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VERNON'S
CRIMINAL STATUTES OF TEXAS 1916
VOLUME 2

Code of Criminal Procedure



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VERNON'S
CRIMINAL STATUTES
OF
TEXAS

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

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

ANNOTATED
WITH HISTORICAL NOTES AND NOTES OF DECISIONS

IN TWO VOLUMES

VOLUME 2

THE CODE OF CRIMINAL PROCEDURE

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(2 CODE CR. PROC. TEX.)

PREFACE

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

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

The defects in the Revised Criminal Statutes are as follows:

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

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

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

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

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

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

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

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

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

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

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

2 CODE CR.PROC.TEX.

(xii)†

THE CODE

OF

CRIMINAL PROCEDURE

TITLE 1

INTRODUCTORY

- | Chap. | | Chap. | |
|-------|---|-------|---|
| 1. | Containing general provisions. | 2. | The general duties of officers charged with the enforcement of criminal laws—Continued. |
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CHAPTER ONE

CONTAINING GENERAL PROVISIONS

- | Art. | | Art. | |
|------|--|------|---|
| 1. | Objects of this code. | 15. | No conviction of treason, except, etc. |
| 2. | Same subject. | 16. | Privilege of senators and representatives. |
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| 4. | Rights of accused persons. | 18. | Change of venue. |
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| 7. | Writ of habeas corpus shall never be suspended. | 21. | No conviction of felony, except by verdict of jury. |
| 8. | Excessive bail, fines, etc., forbidden. | 22. | Defendant may waive any right, except, etc. |
| 9. | No person shall be twice put in jeopardy for same offense. | 23. | Trials shall be public. |
| 10. | Trial by jury shall remain inviolate. | 24. | Defendant shall be confronted by witnesses, except, etc. |
| 11. | Liberty of speech and of the press. | 25. | Construction of this code. |
| 12. | Person shall not be disqualified as a witness for religious opinion or want of religious belief. | 26. | When rules of common law shall govern. |
| 13. | Outlawry and transportation prohibited. | 26a. | Acts by or under military authority exempt from punishment. |
| 14. | Conviction shall not work corruption of blood, etc. | | |

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.]

Cited, *Weaver v. State* (Cr. App.) 150 S. W. 785; *Bullock v. State* (Cr. App.) 165 S. W. 196.

Construction.—*Leeper and Powell v. State*, 29 App. 63, 14 S. W. 398.

Evidence.—In view of subdivision 4 of this article, evidence that defendant, accused of homicide, had committed adultery with the wife of deceased, had given her a condium, that they had been taken together flagrante delicto, whereupon defendant offered witness two bits if he would not tell, and that defendant was the reputed father of one of her children, was admissible as tending to show motive. *Lane v. State* (Cr. App.) 164 S. W. 378. For relevancy of evidence in general, see notes under art. 785.

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.]

Explanatory.—The present Constitution reads as follows: "No citizen of this state shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land." [Const. art. 1, § 19 (Vernon's Sayles' Civ. St. 1914, vol. 1, p. xxv).]

Due course of law.—For an exhaustive interpretation of the term, see *Runge v. Wyatt*, 25 Tex. Supp. 292; *Alford v. State*, 8 App. 545. See, also, *Roper & Gilley v. Lumpkins*, 163 S. W. 110.

Adherence to forms of law. *Krebs v. State*, 3 App. 348.

A defendant is entitled to avail himself of every technical right. *Hatch v. State*, 8 App. 416, 34 Am. Rep. 751.

By "the law of the land" is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. It means that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society. Everything which passes under the form of an enactment is not, therefore, to be considered the law of the land. See the meaning of the term "law of the land" fully discussed. *Huntsman v. State*, 12 App. 619. The legislature can not condemn a particular act as an indictable offense, and then empower the courts in the prosecution of such an offense, to substitute in the indictment and proof, an altogether different act, not prohibited. Nor can it dispense with the essential allegations and proofs, even in offenses mala prohibita. *Hewitt v. State*, 25 Tex. 722; *State v. Wilburn*, Id. 738; *State v. Duke*, 42 Tex. 455; *Williams v. State*, 12 App. 395; *Huntsman v. State*, Id. 619.

This provision has no application to proceedings after trial and conviction. *Loyd v. State*, 19 App. 137.

The Court of Criminal Appeals has power to determine whether the Governor has authority to revoke a conditional pardon merely because he deems it ill-advised and not on account of a breach of the conditions. *Ex parte Rice*, 72 App. 587, 162 S. W. 891.

Contempts.—For rules in contempt proceedings, see *State v. Sparks*, 27 Tex. 627; *Ex parte Ireland*, 38 Tex. 344; *Ex parte Kilgore*, 3 App. 247; *Ex parte Kearby*, 35 App. 531, 34 S. W. 635; s. c., 35 App. 634, 34 S. W. 962.

"Due course of law" requires that when a person is committed for contempt, the proper order must be entered and writ of commitment issued. *Ex parte Kearby & Hawkins*, 35 App. 531, 34 S. W. 635; *Ex parte Kearby*, 35 App. 634, 34 S. W. 962.

A vacation proceeding for contempt is void. *Ex parte Ellis*, 37 App. 539, 40 S. W. 275, 66 Am. St. Rep. 831.

Grand jury.—Grand jury, to be legal must comprise twelve members, no more and no less. Const., art. V, sec. 13; *Lott v. State*, 18 App. 627; *McNeese v. State*, 19 App. 48; *Rainey v. State*, Id. 479; *Harrell v. State*, 22 App. 692, 3 S. W. 479; *Smith v. State*, 19 App. 95; *Williams v. State*, 19 App. 265; *Ex parte Swain*, 19 App. 323; *Ex parte Reynolds*, 35 App. 437, 34 S. W. 120, 60 Am. St. Rep. 54.

The absence or discharge of one member of a properly organized grand jury does not render it illegal. *Drake v. State*, 25 App. 295, 7 S. W. 868; *Trevinio v. State*, 27 App. 372, 11 S. W. 447; *Jackson v. State*, 25 App. 314, 7 S. W. 872.

One convicted on an indictment found by a grand jury consisting of fourteen jurors is convicted contrary to due course of law and may secure his release by habeas corpus proceedings. *Ex parte Reynolds*, 35 App. 437, 34 S. W. 120, 60 Am. St. Rep. 54, overruling *Ex parte Fuller*, 19 App. 241.

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

Indictment.—Bill of Rights, sec. 10.

The act of 1881, known as the "common sense indictment act," in so far as it prescribes forms which do not contain all the elements of the respective offenses,

is contrary to this provision. *Williams v. State*, 12 App. 395; *Young v. State*, 12 App. 614; *Flores v. State*, 13 App. 337; *Brown v. State*, 13 App. 347; *Allen v. State*, 13 App. 28; *Gabrielsky v. State*, 13 App. 428; *Insall v. State*, 14 App. 145.

A legal indictment duly presented by a legal grand jury is an indispensable prerequisite to a prosecution for felony "under the due course of the law of the land." *Lott v. State*, 18 App. 627; *Saragosa v. State*, 40 App. 64, 46 S. W. 250, 48 S. W. 190.

The legislature can not condemn a particular act as an indictable offense, and then empower the courts, in the prosecution of such offense, to substitute in the indictment and proof an altogether different act, not prohibited. Nor can it dispense with the essential allegations and proofs, even in offenses mala prohibita, for the prosecution would not then be "by due course of the law of the land." *Hewitt v. State*, 25 Tex. 722; *State v. Wilburn*, 25 Tex. 738. Neither can it authorize the omission of averments in an indictment negating exceptions in an enacting clause, when such exceptions are essential parts of the description of the offense. *State v. Duke*, 42 Tex. 455.

Petit jury.—It is not competent for the legislature to authorize summary trials before mayors, etc., without a jury, for offenses punishable by fine and imprisonment. *Burns v. LaGrange*, 17 Tex. 415.

Where the record recites that twelve jurors were sworn but names only eleven, the conviction must be reversed. *Huebner v. State*, 3 App. 458.

In misdemeanor cases in a county court or justice's court, the jury must be composed of six men. *Stell v. State*, 14 App. 59; *Marks v. State*, 10 App. 334.

Petit jury, to be legal, must comprise neither more nor less than twelve members. *Lott v. State*, 18 App. 627, and cases cited; *Jester v. State*, 26 App. 369, 9 S. W. 616; *Bullard v. State*, 38 Tex. 504, 19 Am. Rep. 30.

Presence of accused.—See art. 646, post.

Presence of accused in a felony case is essential at every important stage of the trial. For instances, see *Bell v. State*, 32 App. 436, 24 S. W. 418; *Upchurch v. State*, 36 App. 624, 38 S. W. 206, 44 L. R. A. 694; *Mapes v. State*, 13 App. 85; *Granger v. State*, 11 App. 454; *Shipp v. State*, Id. 46; *Benavides v. State*, 31 App. 173, 20 S. W. 369, 37 Am. St. Rep. 799; *Massey v. State*, 31 App. 371, 20 S. W. 758; *Brown v. State*, 38 Tex. 482; *Cordova v. State*, 6 App. 207, citing *Pocket v. State*, 5 App. 552.

Presence of judge.—The court should be present at all times while a case is being tried, and, if it becomes necessary for him to be temporarily absent, he should suspend the proceedings until his return. *Hughes v. State* (Cr. App.) 149 S. W. 173; *White v. State*, 61 App. 498, 135 S. W. 562; *Dunn v. State*, 72 App. 170, 161 S. W. 467.

The temporary absence of the judge from the courtroom during the trial is not ground for reversal unless during his absence something occurs prejudicial to accused. *Hughes v. State* (Cr. App.) 149 S. W. 173; *Maxey v. State* (Cr. App.) 145 S. W. 952.

Trial.—*Paris v. State*, 35 App. 82, 31 S. W. 855; *Rodgers v. State*, 47 App. 195, 82 S. W. 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 arising 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.

Cited, *Essery v. State*, 72 App. 414, 163 S. W. 17; *Galan v. State* (Cr. App.) 177 S. W. 124; *Caldwell v. State*, 137 U. S. 692, affirming s. c. 28 App. 566.

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| 2. Speedy trial. | 12. Limiting time for argument. |
| 3. Public trial. | 13. Confrontation of witnesses. |
| 4. Impartial jury. | 14. — Depositions. |
| 5. Indictment. | 15. — Dying declarations. |
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| 7. Evidence against self. | 17. — Testimony at former trial or |
| 8. — Waiver. | in other proceeding. |
| 9. — Immunity. | 18. Compulsory process. |
| 10. — Persons entitled to claim priv- | |

ilega.

1. In general.—*Aston v. State*, 27 App. 574, 11 S. W. 637.

A party cannot be compelled to go to trial in any case until that case is properly reached on the docket, in the due course of the business of the court. *Thomas v. State*, 36 Tex. 315.

A preliminary proceeding antedating an indictment for a felony is not any part of a "criminal prosecution" within Bill of Rights, § 10, guarantying rights to accused in such prosecutions. *Kempfer v. State*, 63 App. 1, 138 S. W. 1025.

Where there was a large crowd of spectators in court at the trial of defendant, a negro, for homicide, who laughed several times at the prosecutor's references to defendant, but whose conduct was nothing unusual, the failure of the court on request of defendant to effectively rebuke and control the conduct of such crowd was not error. *Millican v. State*, 63 App. 440, 140 S. W. 1136.

Trial of resident citizen of Mexico, in accordance with laws of state held sufficient under the Treaty of Guadalupe Hidalgo (1 Treaties and Conventions, p. 1107), confirmed by Arbitration Convention of March 24, 1908 (Id. p. 1205). *Ex parte Martinez (Cr. App.)* 145 S. W. 959.

2. 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 Tex. 708, 84 Am. Dec. 598. And it applies to all grades of criminal offenses. *Id.*

An accused, who has never demanded, or been refused a trial, can not invoke by habeas corpus, a discharge from imprisonment under this provision. *Hernandez v. State*, 4 App. 425. But if an accused is denied a trial by due course of law, or such a trial is denied him for an unreasonable length of time, he may resort to habeas corpus for relief. *Rutherford v. State*, 16 App. 649.

Where, after the State's application for a continuance had been denied, the state dismissed the prosecution over defendant's objection, and thereafter defendant was again indicted for the same offense, the practice was in effect a denial of the right to a speedy trial, but did not bar the subsequent prosecution. *Venters v. State*, 18 App. 198.

3. Public trial.—See post, art. 23.

By a public trial is not meant that every person who sees fit, shall in all cases be permitted to be present; because there are many cases where, from the character of the charge, and the nature of the evidence by which it is to be supported, the motives to attend the trial on the part of portions of the community would be of the worst character, and where a regard to public morals and public decency would require that at least the young be excluded from hearing and witnessing the evidences of human depravity which the trial must necessarily bring to light. The requirement of a public trial is for the benefit of the accused; that the public may see that he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions; and the requirement is fairly observed if, without partiality or favoritism, a reasonable proportion of the public is suffered to attend, notwithstanding that those persons whose presence could be of no service to the accused, and who would only be drawn thither by a prurient curiosity, are excluded altogether. Publicity does not absolutely forbid all temporary shutting of doors, or render incompetent a witness who can not be heard by the largest audience, or require a court room of dimension adequate to the accommodation of all desirous of attending a notorious trial, or vocal organs in counsel or judge capable of reaching all. See this case, for an instance in which it was held proper, and not in violation of the right of public trial, for the trial court to exclude from the court room a portion of the audience. *Grimmett v. State*, 22 App. 36, 2 S. W. 631, 58 Am. Rep. 630. The trial must be at the courthouse at the county site of the county. *Adams v. State*, 19 App. 1. Where the court room was barely sufficient for the witnesses and two venires of jurymen on a certain occasion, it was proper to exclude mere spectators. *Kugadt v. State*, 33 App. 681, 44 S. W. 989.

4. Impartial jury.—*Steagald v. State*, 22 App. 464, 3 S. W. 771; *Massey v. State*, 31 App. 371, 20 S. W. 758; *Randle v. State*, 34 App. 43, 23 S. W. 953; *Burris v. State*, 37 App. 587, 40 S. W. 284; *Long v. State*, 59 App. 103, 127 S. W. 551, Ann. Cas. 1912A, 1244; *Sorrell v. State (Cr. App.)* 169 S. W. 299.

Where the court house is surrounded by a mob determined to lynch defendant if he is not sentenced to death, he is denied a fair trial by an impartial jury, though the jurors swear they were not influenced thereby. *Massey v. State*, 31 App. 371, 20 S. W. 758.

5. Indictment.—See post, Title 7, ch. 3.

Right to demand nature of charge, and service of indictment. Post, arts. 551-554, and notes; *Johnson v. State*, 36 Tex. 202; *Woodall v. State*, 25 App. 617, 8 S. W. 802; *Abrigo v. State*, 29 App. 143, 15 S. W. 408; *Bonner v. State*, 29 App. 223, 15 S. W. 821; *Harris v. State*, 32 App. 279, 22 S. W. 1037; *Stokes v. State*, 35 App. 279, 33 S. W. 350; *Evans v. State*, 36 App. 32, 35 S. W. 169; *Sims v. State*, 36 App. 154, 36 S. W. 256.

Art. 482, post, permitting substitution for a lost indictment, does not violate the provision of this article that accused shall be held to answer only on indictment by the grand jury. *Schultz v. State*, 15 App. 258, 49 Am. Rep. 194.

Such substitution may be made before the trial. *Withers v. State*, 21 App. 210, 17 S. W. 725.

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 App. 366, 5 S. W. 210.

Where defendant was arrested under a second indictment procured so as to in-

clude another person in the charge, he is entitled to a copy of it. *Stokes v. State*, 35 App. 279, 33 S. W. 350.

A motion to quash an indictment for failure to serve a certified copy held properly denied. *Luster v. State*, 63 App. 541, 141 S. W. 209, Ann. Cas. 1913D, 1089.

Prosecutions for a felony must be upon indictment found by the grand jury, prosecutions for misdemeanors upon an information founded upon a complaint when brought in the county court, but that, in prosecutions in justice court, only a complaint is required, and hence a complaint sworn to before the county attorney, without any information filed, is sufficient therein. *Ex parte Nitsche* (Cr. App.) 170 S. W. 1101.

An indictment is not necessary to the commencement of a criminal prosecution which may be initiated by the filing of a complaint with a justice of the peace charging accused with the commission of a felony, the issuance of a warrant of arrest thereon, and the arrest of accused thereunder by a proper officer. *Baskins v. State* (Cr. App.) 171 S. W. 723.

Under Acts 33d Leg. c. 112, and 1st Called Sess. c. 6, § 8 (Vernon's Sayles' Ann. Civ. St. 1914, art. 5228), a child can be proceeded against as a delinquent without the filing of an indictment against him. *Ex parte Bartee* (Cr. App.) 174 S. W. 1051.

6. — Amendment.—See post, arts. 598, 599, and notes.

7. Evidence against self.—As a means of attacking his credibility, it is legitimate to show by accused on cross-examination that he has been indicted for felonies in other cases. *Doyle v. State*, 59 App. 39, 126 S. W. 1131; *Quintana v. State*, 29 App. 401, 16 S. W. 258, 25 Am. St. Rep. 730; *Jackson v. State*, 33 App. 282, 26 S. W. 194, 622, 47 Am. St. Rep. 30; *Warren v. State*, 33 App. 502, 26 S. W. 1082; *Oliver v. State*, 33 App. 541, 28 S. W. 202; *Bratton v. State*, 34 App. 477, 31 S. W. 379; *McCray v. State*, 38 App. 609, 44 S. W. 170; *Darbyshire v. State*, 36 App. 547, 36 S. W. 173.

Where accused was compelled to make tracks so that they could be compared with the tracks made by the guilty party, evidence of the comparison of the tracks is admissible. *Walker v. State*, 7 App. 245, 32 Am. Rep. 595; *Pitts v. State*, 60 App. 524, 132 S. W. 801; *Hahn v. State* (Cr. App.) 165 S. W. 218.

A witness is protected against giving evidence against himself whether he be before a grand jury or on the trial of a case. *Ex parte Wilson*, 39 App. 630, 47 S. W. 996; *Ex parte Park*, 37 App. 590, 40 S. W. 300, 66 Am. St. Rep. 835.

A joint offender in gaming is not privileged from testifying as to the gaming in which he participated, as he is exempt from punishment should he testify. And it seems a witness is not privileged from answering as to a transaction which, as to him, is barred by the statute of limitations. *Floyd v. State*, 7 Tex. 215.

A witness cannot be compelled to answer a question tending to degrade him, or that may subject him to a civil or criminal suit. But this is a privilege personal to the witness, to be claimed by him or not, as he chooses, and not by counsel for either party. But the court should advise the witness that he is not compelled to answer. If the witness chooses to answer, he is bound to answer everything relating to the transaction. If he declines to answer, no inference of the truth of the fact is permitted to be drawn from that fact. And no answer forced from him after he has claimed protection, if he is entitled to protection, can afterward be given in evidence against him. *Owen v. State*, 7 App. 329; *Floyd v. State*, 7 Tex. 215. And a witness may be asked if he has ever been confined in the penitentiary for crime, and he is not privileged from answering. *Lights v. State*, 21 App. 308, 17 S. W. 428, overruling *State v. Ezell and Ivey*, 41 Tex. 35; see, also, *Perez v. State*, 8 App. 610.

Evidence that after defendant was arrested his overshirt was removed and spots were found on his undershirt is admissible. *Bryant v. State*, 18 App. 107.

A defendant cannot be impeached as a witness by asking if he had previously been convicted of the offense for which he was then on trial. *Richardson v. State*, 33 App. 518, 27 S. W. 139.

Accused cannot be impeached by showing him guilty of or charged with misdemeanors not involving moral turpitude. *Goode v. State*, 32 App. 505, 24 S. W. 102; *Williford v. State*, 36 App. 414, 37 S. W. 761, following *Brittain v. State*, 36 App. 406, 37 S. W. 758.

Where defendant as a witness had exhibited scars on one leg which he claimed were made by a shot fired by deceased, the state can compel him to exhibit those on the other leg to the jury. *Thomas v. State*, 33 App. 607, 28 S. W. 534.

Cross-examination as to unwarned confessions while under arrest. *Morales v. State*, 36 App. 234, 36 S. W. 435, 846 (overruling *Quintana v. State*, 29 App. 401, 16 S. W. 258, 25 Am. St. Rep. 730; *Ferguson v. State*, 31 App. 93, 19 S. W. 901, and *Phillips v. State*, 35 App. 480, 34 S. W. 272). And see *Wright v. State*, 36 App. 427, 37 S. W. 732; *Ware v. State*, 36 App. 597, 38 S. W. 198.

The rule applies to the use of books kept by accused. *Ex parte Wilson*, 39 App. 630, 47 S. W. 996.

A judgment for contempt for failure to produce a bill of sale, when the production of the same would criminate relator, is void. *Ex parte Wilson*, 39 App. 630, 47 S. W. 996.

Cross-examination of defendant as a witness in his own behalf with respect to his proved handwriting, used as a standard of comparison, is proper. *Grooms v. State*, 40 App. 319, 50 S. W. 370.

Defendant was arrested on warrant issued under law of 1903 (concerning selling liquors in violation of law), and brought before the justice who issued the warrant, and while so held was summoned as a witness; held that he was not guilty of contempt in refusing to be sworn but was within his constitutional rights. *Ex parte Sauls*, 46 App. 209, 78 S. W. 1073.

Where witness and his twin brother were both under arrest, charged with an assault on one S., there being only one blow struck, he was not guilty of con-

tempt in refusing to answer questions asked him by the grand jury as to whether he was in the room when S. was assaulted, whether he assaulted S., and also as to where his brother was at the time, though he did not state that his answers would tend to incriminate him. *Ex parte Hughes*, 57 App. 82, 121 S. W. 1118.

A witness sought to be impeached on the ground that he has committed a crime involving moral turpitude cannot be compelled to furnish evidence upon which a criminal prosecution might lie against him. *Pinckard v. State*, 62 App. 602, 138 S. W. 601.

Accused was ordered by a police officer to go with him to the office of a justice in the courthouse, and submit to an examination before a court of inquiry. He was sworn, and, believing himself under arrest, compelled to testify concerning alleged violations of the local option law, and, after the examination, he was handcuffed by the officer and incarcerated. On trial for the same offense investigated, he was placed on the witness stand, and compelled to testify that he had testified falsely before the justice at the court of inquiry, and also to give other testimony with reference to the very offense and transaction concerning which he was convicted over his objection and exception. Held, that such proceeding was a violation of his constitutional guaranty conferred by Bill of Rights, art. 1, § 10, providing that a witness shall not be compelled to testify against himself. *Butler v. State*, 64 App. 482, 142 S. W. 904.

Permitting the state to ask defendant's sister, in the presence of the jury on a prosecution for incest with her, whether she had had intercourse with him, and whether she had a child, was not error, especially in the absence of the interposition of specific grounds of objection, though she, while the jury were withdrawn, had stated she would not answer because her answer might incriminate her. *Harris v. State*, 64 App. 594, 144 S. W. 232.

A witness before the grand jury, who had had lottery tickets for sale, was not, though not claiming his privilege, guilty of contempt in refusing to answer questions as to who paid him for selling the lottery tickets; for P. C. art. 534, provides that any person who shall sell, offer, or keep for sale any lottery tickets, shall be fined, and to answer this question would incriminate the witness. *Ex parte Napoleon (Cr. App.)* 144 S. W. 269.

A witness for the state in a homicide case, asked whether, since the killing of his son by defendant, he had not attempted to shoot defendant, he not having been prosecuted for such offense, might claim his privilege not to answer the question on the ground that it might incriminate him. *Smith v. State (Cr. App.)* 148 S. W. 722.

Where defendant, through her attorney agreed to plead guilty, but afterwards exercised her right not to do so, such agreement was not admissible in evidence. *Dean v. State*, 72 App. 274, 161 S. W. 974.

A person cannot be compelled to testify in a criminal case pending against him, nor give testimony on the trial of another on which a prosecution may or can be founded against him. *Ex parte Muncy*, 72 App. 541, 163 S. W. 29.

In general, a witness may decline to answer any question which tends either directly to incriminate him, or which may indirectly produce such result. *Sovereign Camp Woodmen of the World v. Bailey (Civ. App.)* 163 S. W. 683.

A witness in a civil suit desiring to be relieved from answering a question, on the ground that it will tend to incriminate him, cannot sit silently by and refuse to answer without giving a reason for his silence, but must swear that he believes his answer would incriminate him, it being for the court to determine the question of privilege. *Sovereign Camp Woodmen of the World v. Bailey (Civ. App.)* 163 S. W. 683.

Evidence as to testimony given by accused in another court in which he took the stand and testified voluntarily was not inadmissible, as compelling accused to testify against himself. *Mooney v. State (Cr. App.)* 164 S. W. 828.

In a prosecution for forgery where the forged instrument is in the hands of accused, he cannot be compelled to produce it, or that would be compelling him to give evidence against himself. *Meredith v. State (Cr. App.)* 164 S. W. 1019.

The proceedings were not irregular, where, on a prosecution for receiving from E. stolen cattle, E., called by the state, after testifying that he bought the cattle, claimed his privilege, and was excused from further testifying. *Stanfield v. State (Cr. App.)* 165 S. W. 216.

That a person summoned before the grand jury refused to be sworn to testify because she presumed that she would be questioned about alleged incestuous relations between herself and her father did not excuse her for her refusal to be sworn, but after being sworn, she would be justified in refusing to answer questions relating to the subject. *Ex parte Barnes (Cr. App.)* 166 S. W. 728, 51 L. R. A. (N. S.) 1153.

8. — Waiver.—After defendant has testified in his own behalf the state may recall him for further examination. *Mendez v. State*, 29 App. 608, 16 S. W. 766; *Flowers v. State (Cr. App.)* 152 S. W. 925.

Where accused after his arrest voluntarily took his place among others to be identified by the prosecuting witness, he could not on the trial object to evidence that he was then identified. *Bruce v. State*, 31 App. 590, 21 S. W. 681; *Land v. State*, 34 App. 330, 30 S. W. 788.

Where defendant voluntarily stood up and put on his hat for identification he could not thereafter object that he was compelled to testify against himself. *Gallaher v. State*, 28 App. 247, 12 S. W. 1087.

By taking the stand in his own behalf, defendant waives this right. *Pyland v. State*, 33 App. 382, 26 S. W. 621; *Hargrove v. State*, 33 App. 431, 26 S. W. 993; *Thomas v. State*, 33 App. 607, 28 S. W. 534; *Brown v. State*, 38 App. 597, 44 S. W. 176.

The error in requiring a witness to answer questions which she refused to answer on the ground of self-incrimination is harmless, where the witness, on after-

wards taking the stand, waived her privilege. *Bybee v. State* (Cr. App.) 168 S. W. 526.

A witness relying on the privilege against self-incrimination must assert his privilege at the earliest opportunity, and he cannot answer questions in part and then refuse to answer other questions legitimate to cross-examination. *Ex parte Adams* (Cr. App.) 174 S. W. 1044.

Where a witness appearing before a justice of the peace sitting as a court of inquiry and investigating violations of the local option laws voluntarily and without any objection answered all questions and stated all facts, if any, which would incriminate him, refusal to answer questions which would incriminate others could not be justified on the ground that the answers would incriminate him. *Ex parte Adams* (Cr. App.) 174 S. W. 1044.

9. — **Immunity.**—An agreement as to immunity can be made only as to the particular case on trial and not to other distinct offenses. *Heinzman v. State*, 34 App. 76, 29 S. W. 156, 482.

Court can promise indicted witness that if he will testify for the State his case will be dismissed. If witness accepts, it exempts him from prosecution. *Stanford v. State*, 42 App. 343, 60 S. W. 254.

Proceedings to compel a witness to testify on being granted immunity, must be had in the absence of the jury, until it is determined that immunity will be given. *Hughes v. State*, 62 App. 288, 136 S. W. 1068.

Though the state, if it desired to compel a defendant to testify over her objection, must have agreed in addition to dismissing the indictment against her not to prosecute her, it was sufficient in case the state did not seek her testimony for it to quash the indictment against her to qualify her as a witness for defendant, when, if called, she might claim her privilege against being compelled to disclose incriminating matters. *Streight v. State*, 62 App. 453, 138 S. W. 742.

A witness before the grand jury may, after having been promised immunity in prosecution, be compelled to answer incriminatory questions. *Ex parte Napoleon* (Cr. App.) 144 S. W. 269.

That a person who declined to testify concerning a homicide on the ground that his testimony would incriminate himself, and who was thereupon tendered immunity from prosecution and punishment by the district attorney and district judge, might testify falsely, and thereby become subject to a prosecution for perjury did not entitle him to insist upon his right to refrain from testifying, notwithstanding the tendered immunity. *Ex parte Muncy*, 72 App. 541, 163 S. W. 29.

Unless a witness is offered complete immunity by the prosecuting officers and the offer is approved by the court, the witness cannot be put in contempt of court for refusing to answer the questions of the grand jury as to a criminal offense in which the witness was probably a participant. *Ex parte Higgins*, 71 App. 618, 160 S. W. 696.

To compel a witness to give testimony which might incriminate him, the immunity from prosecution given him must be complete and absolute as to the transaction under investigation. *Ex parte Muncy*, 72 App. 541, 163 S. W. 29.

That immunity does not bar an indictment, but only a conviction, does not justify the refusal of the witness to testify on the ground that his testimony will incriminate himself. *Ex parte Muncy*, 72 App. 541, 163 S. W. 29.

The district attorney, with the knowledge and consent of the district judge, has power to guarantee a witness immunity from prosecution and punishment for any matter about which he may be called to testify in regard to a homicide; and hence, where immunity was tendered by the district judge, a witness could be imprisoned for his refusal to testify. *Ex parte Muncy*, 72 App. 541, 163 S. W. 29.

Where the law of a state absolutely protects one from all punishment for the offense about which he is called to testify, he does not give evidence against himself, and this section has no application. *Ex parte Muncy*, 72 App. 541, 163 S. W. 29.

Where, on the refusal of a witness summoned before the grand jury to be sworn on the ground that she presumed she would be questioned concerning a crime committed by her and another, the district attorney, with the sanction and approval of the district judge, tendered her immunity from prosecution as to any matter about which she might testify, she could be compelled to testify. *Ex parte Barnes* (Cr. App.) 166 S. W. 728, 51 L. R. A. (N. S.) 1155.

10. — **Persons entitled to claim privilege.**—The witness only and not the defendant can avail himself of the right not to answer incriminating questions. *Duncan v. State*, 40 App. 593, 51 S. W. 372.

The privilege of refusing to answer questions on the ground that it would tend to incriminate the witness cannot be put forward for the purpose of concealing facts in the interest of some third person. *Sovereign Camp Woodmen of the World v. Bailey* (Civ. App.) 163 S. W. 683.

11. **Hearing.**—Examining trial, see post, art. 297.

Defendant's rights under this article are not denied by a trial in the absence of his senior counsel, where other counsel, familiar with the case, skilfully conducted his case for him. *Boothe v. State*, 4 App. 202; *Stockholm v. State*, 24 App. 598, 7 S. W. 338; *Webb v. State* (Cr. App.) 40 S. W. 989.

An instruction to disregard the argument of counsel is contrary to defendant's right to be heard by counsel. *Roe v. State*, 25 App. 33, 8 S. W. 463; *Valle v. State*, 9 App. 57, 35 Am. Rep. 719; *Reeves v. State*, 34 App. 483, 31 S. W. 382.

The right to be heard in person and by counsel, given by this section, is limited to the trial court and does not give accused the right to be brought personally before the court at the hearing on appeal. *Tooke v. State*, 23 App. 10, 3 S. W. 782.

Where defendant's sole counsel was sick and unable to represent him at the trial, and he could secure no other counsel, he was denied his right to counsel by the refusal of a continuance. *Daugherty v. State*, 33 App. 173, 26 S. W. 60.

Where it was a regular rule of the court that the time of the session should be

governed by the courthouse clock, and accused's counsel was aware of that fact, but failed to appear at the hour set for the convening of court after recess, the action of the court in permitting witnesses to testify in the absence of accused's counsel was not error. *Brown v. State*, 62 App. 592, 138 S. W. 604.

12. **Limiting time for argument.**—See post, art. 724, and notes.

Limiting the argument to a time too brief for an adequate discussion of the evidence is contrary to this article. *Walker v. State*, 32 App. 175, 22 S. W. 685; *McLean v. State*, 32 App. 521, 24 S. W. 598.

13. **Confrontation of witnesses.**—Bill of Rights, sec. 10; post, art. 24.

Where the defendant was by mistake taken back to jail before the State's last witness was examined and his absence not discovered until the cross-examination was begun, but the witness was not re-examined, the conviction cannot stand. *Bell v. State*, 32 App. 436, 24 S. W. 418.

Where the jury, after having retired, received other evidence against the accused, this court will not stop to inquire as to its effect upon the jury, but will reverse the judgment. *McWilliams v. State*, 32 App. 269, 22 S. W. 970.

Where defendant did not during the trial request the appointment of an interpreter, as authorized by Code Cr. Proc. art. 816, so that he might understand testimony given in English, and all of the evidence given by such witnesses was such that it was improbable that he could have assisted his attorneys by suggestion, consultation, or otherwise had he been able to understand the evidence, the court did not err in refusing to sustain a motion to exclude the evidence given in English, not made until after the testimony was all in, on the ground that so far as such evidence was concerned he had not been confronted by his witnesses. *Zunago v. State*, 63 App. 58, 138 S. W. 713, Ann. Cas. 1913D, 665.

"Confrontation" is the act by which a witness is brought in the presence of accused, so that the latter may object to him, and the former may identify accused and maintain the truth in his presence. *Kemper v. State*, 63 App. 1, 138 S. W. 1025.

14. — **Depositions.**—See post, arts. 817-834.

An accused cannot be compelled to take depositions. *Lane v. State* (Cr. App.) 164 S. W. 378.

15. — **Dying declarations.**—The admission in evidence of dying declarations does not infringe the constitutional right of a person accused of crime to be confronted with the witnesses against him. *Black v. State*, 1 App. 368; *Burrell v. State*, 13 Tex. 713; *Lane v. State*, 59 App. 595, 129 S. W. 353; *Taylor v. State*, 33 App. 552, 43 S. W. 1019.

16. — **Documentary evidence.**—The rule that the accused shall be confronted with the witnesses against him, does not preclude such documentary evidence to establish collateral facts as would be admissible under the rules of common or statutory law. *May v. State*, 15 App. 430; *Rogers v. State*, 11 App. 608; *Patterson v. State*, 17 App. 102.

An objection to an affidavit read in evidence pursuant to an agreement in writing signed by defendant, on the ground that defendant had a right to be confronted by the affiant, was not tenable, as he had the personal power to waive this right. *Allen v. State*, 16 App. 237.

It was error to admit in evidence against defendant telegraphic dispatches purporting to be replies to dispatches sent by defendant. He was entitled to be confronted by the witnesses who it was claimed sent such dispatches. *Chester v. State*, 23 App. 577, 5 S. W. 125.

Written statements of witnesses, not introduced to impeach defendant, but as original evidence, are inadmissible. *Hays v. State* (Cr. App.) 164 S. W. 841.

17. — **Testimony at former trial or in other proceeding.**—Testimony taken at a former trial, or before a legal examining trial, or at an inquest, 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, his removal beyond the jurisdiction of the court, or where he is prevented from attending, admissible against the defendant on final trial. *Dowd v. State*, 52 App. 563, 108 S. W. 389; *Nixon v. State*, 53 App. 325, 109 S. W. 931; *Greenwood v. State*, 35 Tex. 587; *Johnson v. State*, 1 App. 333; *Black v. State*, 1 App. 368; *Sullivan v. State*, 6 App. 319, 32 Am. Rep. 580; *Kerry v. State*, 17 App. 178, 50 Am. Rep. 122; *Steagald v. State*, 22 App. 464, 3 S. W. 771; *Gilbreath v. State*, 26 App. 315, 9 S. W. 618; *Ex parte Meyers*, 33 App. 204, 26 S. W. 196; *Hobbs v. State*, 53 App. 71, 112 S. W. 308; *Porch v. State*, 51 App. 7, 99 S. W. 1122; *Roquemore v. State*, 59 App. 568, 129 S. W. 1120; *Robertson v. State*, 63 App. 216, 142 S. W. 533, Ann. Cas. 1913C, 440; *Smith v. State* (Cr. App.) 148 S. W. 722; *Grant v. State* (Cr. App.) 148 S. W. 760, 42 L. R. A. (N. S.) 423; *Sanchez v. State* (Cr. App.) 153 S. W. 1133. *Contra*, *Cline v. State*, 36 App. 320, 36 S. W. 1099, 37 S. W. 722, 61 Am. St. Rep. 850; *Cox v. State* (Cr. App.) 36 S. W. 435, which expressly overruled the cases above cited which were theretofore decided, but which was in turn overruled by *Porch v. State*, 51 App. 7, 99 S. W. 1122 and *Hobbs v. State*, 53 App. 71, 112 S. W. 308, and *Kemper v. State*, 63 App. 1, 138 S. W. 1025, which reaffirmed *Cline v. State* and overruled the intervening cases but was in turn overruled by *Robertson v. State*, 63 App. 216, 142 S. W. 533, Ann. Cas. 1913C, 440.

Testimony taken on the hearing of a writ of habeas corpus is not admissible against defendant on his final trial. *Childers v. State*, 30 App. 160, 16 S. W. 903, 28 Am. St. Rep. 899.

Evidence taken by a justice of the peace in a court of inquiry held for the purpose of ferreting out violations of law, cannot be used in subsequent trials growing out of such investigations. *Brown v. State*, 55 App. 572, 118 S. W. 142.

Where a witness on the former trial of a homicide case testified to a predicate rendering a declaration of decedent admissible as a dying declaration, the state, on a subsequent trial after the death of the witness, could prove the testimony of

the witness on the former trial, and thus establish a predicate for the admission of the dying declaration. *Roquemore v. State*, 59 App. 568, 129 S. W. 1120.

Admission of testimony of a witness on a former trial of a prosecution for murder was error, where the testimony was material, and there is no showing or admission in the record that the defendant had an opportunity to cross-examine, or that the witness is dead, beyond the jurisdiction, insane, or kept away by the connivance of the defendant. *Betts v. State* (Cr. App.) 144 S. W. 677.

Proof that a witness who had testified at a former trial was without the state, living in another jurisdiction, and that a few days before trial she had written the district attorney that she could not attend because she was quarantined, nursing her only daughter who had an infectious disease, was a sufficient predicate for the introduction of the testimony of the witness taken at the former trial. *Mitchell v. State* (Cr. App.) 144 S. W. 1006.

This provision does not prevent accused from offering the testimony of an absent witness, given at a former trial, at a subsequent trial. *Smith v. State* (Cr. App.) 148 S. W. 722.

Where a witness at a former trial is absent, and his attendance cannot be procured, the stenographic notes of his testimony, proven by a witness present at the former trial, and who heard the absent witness testify, to be substantially his testimony, were admissible. *Smith v. State* (Cr. App.) 148 S. W. 722.

This is a right given to accused, and he alone can question the admissibility of testimony of an absent witness given at a former trial. *Smith v. State* (Cr. App.) 148 S. W. 722.

Before proof of testimony given by witness at a former trial can be made at a subsequent trial, where his attendance cannot be procured, there must be proof that diligence has been used, and that the attendance of the witness cannot be secured. *Smith v. State* (Cr. App.) 148 S. W. 722.

In a prosecution for homicide, where a witness, who testified at a former trial, had died, testimony given on such former trial, that would have been admissible if the witness was living, was admissible. *Sweat v. State* (Cr. App.) 178 S. W. 554.

18. Compulsory process.—The accused has the constitutional right to have his witnesses present at the trial, and it is no answer to an application for a continuance based upon the ground that his witnesses are absent, for the prosecution to admit that the witnesses would swear to the facts as stated in the application. *De Warren v. State*, 29 Tex. 464. It is not within the power of the legislature to deny a defendant the constitutional right of having compulsory process for his witnesses. *Homan v. State*, 23 App. 212, 4 S. W. 575; *Roddy v. State*, 16 App. 502. A subpoena is compulsory process. *Neyland v. State*, 13 App. 536; *Edmondson v. State*, 43 Tex. 230; *Parkerson v. State*, 9 App. 72.

When the witness resides in an unorganized county, the writ should name such county as his residence. *Parkerson v. State*, 9 App. 72.

Attachment. *Roddy v. State*, 16 App. 502.

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.]

See Const. U. S., Amendment 4.

Cited, *Ex parte Rice*, 72 App. 587, 162 S. W. 891.

Arrest.—Arrest under warrant, see post, arts. 263-289; arrest without warrant, see post, arts. 355-376.

"Probable cause" means "a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense with which he is charged." *Landa v. Obert*, 45 Tex. 539.

For a discussion of the preceding article with reference to a seizure of the person, see *Alford v. State*, 8 App. 545. As to arrest without warrant, see *Staples v. State*, 14 App. 136.

Right to arrest without warrant.—See post, arts. 259-264a, and notes.

Search.—Search warrants, see post, arts. 355-383; *Jacobs v. State*, 28 App. 79, 12 S. W. 408; *Sherwood, Ex parte*, 29 App. 334, 15 S. W. 812; *Carter v. State*, 30 App. 551, 17 S. W. 1102, 28 Am. St. Rep. 944; *Miller v. State*, 32 App. 319, 20 S. W. 1103.

A subpoena duces tecum for the production of all telegrams sent from a telegraph office ordering intoxicating liquors without specifying whether the liquors ordered were unlawfully sent for, is unauthorized because too general and because it does not relate to any crime committed nor to any person accused or suspected. *Ex parte Gould*, 60 App. 442, 132 S. W. 364, 31 L. R. A. (N. S.) 835.

Acts 31st Leg. (3d S. S.) c. 15 (P. C., art. 606), making it an offense for any express agent to refuse to permit examination of his books showing entries as to intoxicating liquors shipped into dry territory, does not violate Bill of Rights, § 9. *Hughes v. State* (Cr. App.) 149 S. W. 173.

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 ex-

amination of the evidence in such manner as may be prescribed by law. [Bill of Rights, § 11; O. C. 6.]

Const. U. S., Amendment 8, and State Const., Bill of Rights, sec. 13; post, arts. 7, 8, 306, 342, 315-350, 615, 648, 649, 901-905, 918-924.

Bail pending appeal, see post arts. 901-905 918-924.

Explanatory.—The present constitution (art. 1, § 11; Vernon's Sayles' Civ. St. 1914, vol. 1, p. xxiv) uses the word "when" instead of "where" following the word "offenses."

Former constitutional provisions.—The constitution of the Republic of Texas provided: "All persons shall be bailable by sufficient security, unless for capital crimes, when the proof is evident or presumption strong." Declaration of Rights, section 10. The Constitution of 1845, Bill of Rights, sec. 9, provided: "All prisoners shall be bailable by sufficient sureties unless for capital offenses, when the proof is evident, or the presumption great." The same provision was incorporated in the constitution of 1861, Bill of Rights, section 9. The amended Constitution of 1866, Bill of Rights, section 9, provided, as does the preceding article, that: "All prisoners shall be bailable by sufficient sureties, unless for capital offenses, when the proof is evident." The same language is used in the Constitution of 1869, Bill of Rights, section 9.

Right to, and allowance of, bail.—A capital offense is one for which the highest penalty is death. Pen. Code, art. 56.

The following are capital offenses:

Treason. Pen. Code, art. 93.

Murder of first degree. Pen. Code, art. 1163.

Perjury in a capital case when basis for conviction and execution. Pen. Code, art. 311.

Rape. Pen. Code, art. 1088.

Murder by wilful burning. Pen. Code, art. 1244.

Robbery by use of deadly weapon. Pen. Code, art. 1348. Ex parte Hanson, 27 App. 591, 11 S. W. 641.

This provision of the constitution applies only to prisoners before conviction, and a felon after conviction cannot go at large on bail pending appeal. Ex parte Ezell, 40 Tex. 451, 19 Am. Rep. 32; Ex parte Sewartz, 2 App. 74; Warnock v. State, 6 App. 450.

Capital punishment cannot be inflicted on an offender under seventeen years old, and in all such cases accused is entitled to bail. Ex parte Walker, 28 App. 246, 13 S. W. 861; Walker v. State, 28 App. 503, 13 S. W. 860; Wilcox v. State, 32 App. 284, 22 S. W. 1109; Ex parte Albitz, 29 App. 128, 15 S. W. 173; Ex parte Rankin, 30 App. 71, 20 S. W. 202.

The right of bail does not extend to extradition cases. Ex parte Erwin, 7 App. 288. And see Ex parte Lake, 37 App. 656, 40 S. W. 727, 66 Am. St. Rep. 848.

Defendant indicted for murder and admitted to bail cannot be again placed in custody on a new indictment for the same offense and denied bail. Ex parte Augustine, 33 App. 1, 23 S. W. 689, 47 Am. St. Rep. 17.

A judgment granting bail is final. Ex parte Augustine, 33 App. 1, 23 S. W. 689, 47 Am. St. Rep. 17.

Where indicted party's health is affected by confinement and there is no probability of trial at next term of court on account of absence from State of only witness, bond should be fixed very low until next term of court, and if this is not given and case is not tried, defendant should be released on his own recognizance. Ex parte Tittle, 37 App. 599, 40 S. W. 598.

No order or judgment granting or refusing bail, while applicant is under arrest by complaint only, has any force or effect subsequent to indictment found. Ex parte Kirby, 63 App. 377, 140 S. W. 226.

After a trial for statutory rape on accused's 13 year old daughter, resulting in a "hung jury," where it did not appear that force was used, the court erred in refusing bail, especially as accused might have been prosecuted for incest; the highest penalty for which is 10 years' imprisonment. Jefferson v. State, 71 App. 120, 158 S. W. 520.

Where the Court of Criminal Appeals found that the Governor was without authority to revoke a conditional pardon merely because he deemed it had been improvidently granted, and the state moved for a rehearing, the relator should be admitted to bail during the pendency of that motion. Ex parte Rice, 72 App. 587, 162 S. W. 891.

A finding on hearing on habeas corpus that one accused of murder was entitled to bail is binding on the Court of Criminal Appeals. Ex parte Latham (Cr. App.) 164 S. W. 377.

— **Proof.**—For evidence held sufficient to justify refusal of bail, see Drury v. State, 25 Tex. 45; Moore v. State, 31 Tex. 572; Herrin v. State, 33 Tex. 638; Ex parte Rothschild, 2 App. 560; Ex parte Rucker, 6 App. 81; Ex parte Beacom, 12 App. 318; Ex parte Williams, 18 App. 653; Ex parte Smith, 23 App. 100, 5 S. W. 99; Ex parte Meyers, 33 App. 204, 26 S. W. 196; Ex parte Kuhlman, 62 App. 550, 138 S. W. 400.

"Proof evident" defined. Ex parte Foster, 5 App. 625, 32 Am. Rep. 577; Ex parte Beacom, 12 App. 318; Ex parte Coldiron, 15 App. 464; Ex parte Smith, 23 App. 100, 5 S. W. 99; Ex parte Evers, 29 App. 539, 16 S. W. 343; Ex parte Jones, 31 App. 422, 20 S. W. 983; Thompson v. State, 25 Tex. Supp. 395; Ex parte Cook, 2 App. 388; Thomas v. State, 12 App. 416; Ex parte Boyett, 19 App. 17; Ex parte Wright, 39 App. 193, 45 S. W. 593; Ex parte Wasson, 50 App. 361, 97 S. W. 103; Ex parte Russell, 71 App. 377, 160 S. W. 75.

On application for bail in capital case, the burden of proof to establish the fact that the proof is not evident is not on the relator. Ex parte Newman, 38 App. 166, 41 S. W. 628, 70 Am. St. Rep. 740 (overruling Ex parte Smith, 23 App. 100, 5

S. W. 99, and cases following it). See Ex parte Scoggin, 6 App. 546; Ex parte Randon, 12 App. 145; Ex parte Johnson, 30 App. 279, 17 S. W. 410; Ex parte Jones, 31 App. 422, 20 S. W. 983.

For cases in which it was held that the evidence was insufficient to justify the refusal of bail, see the following: McCoy v. State, 25 Tex. 33, 78 Am. Dec. 520; Zembrod v. State, Id. 519; Thompson v. State, 25 Tex. Supp. 395; Ex parte Cooper, 31 Tex. 185; Ex parte Bramer, 37 Tex. 1; Ex parte Foster, 5 App. 625, 32 Am. Rep. 577; Ex parte Rucker, 6 App. 81; Ex parte Bomar, 9 App. 610; Ex parte Randon, 12 App. 145; Ex parte Gilstrap, 14 App. 240; Ruston v. State, 15 App. 324; Ex parte Coldiron, Id. 464; Ex parte Pace, 16 App. 541; Ex parte Catney, 17 App. 332; Ex parte Matlock, 18 App. 227; Ex parte Williams, Id. 653; Ex parte Boyett, 19 App. 17; Ex parte Schamberger, Id. 572; Ex parte Cochran, 20 App. 242; Ex parte Dickson, Id. 332; Ex parte Terry, Id. 486; Ex parte Wilson, Id. 498; Ex parte Allen, 22 App. 201, 2 S. W. 588; Ex parte Kunde, 22 App. 418, 3 S. W. 332; Ex parte O'Connor, 22 App. 660, 3 S. W. 340; Ex parte England, 23 App. 90, 3 S. W. 714; Ex parte Hay, 23 App. 585, 5 S. W. 98; Ex parte McDowell, 23 App. 679, 5 S. W. 187; Ex parte Pettis, 60 App. 288, 131 S. W. 1081; Ex parte Firmin, 60 App. 368, 131 S. W. 1113; Ex parte Sperger, 62 App. 133, 137 S. W. 351. For statutes and other decisions concerning bail, see post, ch. 8, title 2, Habeas Corpus; ch. 4, title 5, Bail. See, also, Ex parte Duncan, 27 App. 485, 11 S. W. 442; Ex parte Albitz, 29 App. 128, 15 S. W. 173; Ex parte Bates, 29 App. 138, 15 S. W. 406; Ex parte Hope, 29 App. 189, 15 S. W. 602; Ex parte Rankin, 30 App. 71, 20 S. W. 202.

Insanity of accused at time of offense. Zembrod v. State, 25 Tex. 519; Ex parte Miller, 41 Tex. 213; Ex parte Smith, 23 App. 100, 5 S. W. 99.

On appeal from judgment refusing bail, where the evidence is conflicting the court will rarely grant bail. Ex parte Rothschild, 2 App. 560; Drury v. State, 25 Tex. 45; Ex parte Beacom, 12 App. 318.

Accused is not entitled to bail if the evidence is clear and strong, leading a well-guarded and dispassionate judgment to the conclusion that the accused is guilty. Ex parte Smith, 23 App. 100, 5 S. W. 99, expressly overruling the holding of Ex parte Foster, 5 App. 625, 32 Am. Rep. 577, that bail should be denied where the evidence would sustain a capital conviction. Ex parte Evers, 29 App. 539, 16 S. W. 343; Ex parte Jones, 31 App. 422, 20 S. W. 983.

Bail may be refused on circumstantial evidence. Ex parte Rothschild, 2 App. 560; McCoy v. State, 25 Tex. 33, 78 Am. Dec. 520.

Accused is not entitled to bail on the ground that a disagreement of the jury on the trial of the cause shows that the proof is not evident. Webb v. State, 4 App. 167; Ex parte England, 23 App. 90, 3 S. W. 714.

Under act April 3, 1913 (Pen. Code, art. 1140) abolishing the degrees of murder and providing that murder shall be punished by death or imprisonment for life or for any term of years not less than five, all murder cases are not made nonbailable or capital and bail should be granted a person charged with murder unless the proof is evident that, if the law is properly administered, the conviction will be of a capital offense. Ex parte Russell, 71 App. 377, 160 S. W. 75; Ex parte Stephenson, 71 App. 380, 160 S. W. 77.

If the facts fail to show a sedate mind and deliberate, preconceived purpose at the time of killing, accused is entitled to bail, Ex parte Cooper, 31 Tex. 185; or if the evidence is conflicting as to the state of mind, the proof is not evident. Ex parte Miller, 41 Tex. 213. But if the facts show with reasonable certainty a murder with express malice, bail should be refused. Ex parte Drury, 25 Tex. 45.

The fact that deceased, whose wife accused had seduced, had told accused to leave as otherwise one of them must die, whereupon accused waylaid and shot deceased, does not reduce the homicide from first degree murder so as to entitle accused to bail. Ex parte Mosby, 31 Tex. 566, 98 Am. Dec. 547.

In proceedings to admit to bail it is proper to hear witnesses who testified before the grand jury. Ex parte Bramer, 37 Tex. 1.

While the applicant is required to take the initiative and introduce evidence from which the court can determine the issue, the law does not exact that the evidence shall affirmatively exculpate him. The issue is to be determined upon the entire evidence adduced for and against him, and without regard to the prima facie case made by the indictment. He is entitled to bail, unless the evidence as an entirety satisfies the court that the proof of his guilt is evident. Ex parte Randon, 12 App. 145.

The mere fact that there is conflicting evidence does not entitle accused to bail. Ex parte Smith, 23 App. 100, 5 S. W. 99; Ex parte Jones, 31 App. 422, 20 S. W. 983.

To authorize a granting of bail on an application by habeas corpus, where applicant is charged with murder and the fact of the killing is not controverted, it devolves upon applicant to show: (1) That when the intention to kill was formed, his mind was not calm and sedate and in condition to comprehend the nature of the act and its probable consequences. (2) That it was not in such condition when he killed deceased. Ex parte Jones, 31 App. 422, 20 S. W. 983.

On a hearing on habeas corpus for bail after indictment for murder, where it was insisted that applicant was entitled to bail because of proof of threats by deceased against his life, it was held that threats may create fear, but the doctrine can never be tolerated that under the influence of that fear one may, with legal sanction, become an assassin. Ex parte Taylor, 33 App. 531, 28 S. W. 957.

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

When a person is charged with robbery by use of firearms, if the proof is evident, he is not entitled to bail. Ex parte Epps, 35 App. 406, 34 S. W. 113.

A party is not entitled to be released on bail in a murder case when the proof is evident, merely on his own agreement to turn State's evidence, and if the State's attorney should agree for him to have bail, it would be ultra vires. He is relegated to rights under the statutes regardless of the agreement. Ex parte Greenhaw, 41 App. 278, 53 S. W. 1025.

Where officer's return shows that relator is held by virtue of *capias*, under indictment, he is not entitled to discharge or to bail because the State failed to introduce indictment in evidence. *Ex parte Gray*, 41 App. 439, 55 S. W. 176.

Bail is not available to an accused of a capital offense when the proof is evident. *Ex parte King*, 56 App. 68, 118 S. W. 1032; *Ex parte Carbrera*, 53 App. 466, 110 S. W. 898.

Where the evidence is not conclusive as to whether the person indicted for murder killed the decedent, he should be allowed bail. *Ex parte Pettis*, 60 App. 288, 131 S. W. 1081.

Where, on *habeas corpus* by one charged with murder to obtain bail, the state only introduced the indictment, warrant of arrest, and sheriff's return, and relator introduced no evidence, bail should have been granted for want of any proof as to the commission of the offense. *Ex parte Firmin*, 60 App. 368, 131 S. W. 1113.

On *habeas corpus* by one charged with murder to obtain bail, the burden is upon the state to make evident proof of the commission of the offense, in order to have bail denied. *Ex parte Firmin*, 60 App. 368, 131 S. W. 1113.

On *habeas corpus* by one charged with murder in the first degree to obtain bail, the burden is upon the state to show murder in the first degree to prevent the granting of bail. *Ex parte Firmin*, 60 App. 222, 131 S. W. 1116.

Where the proof in a murder case was not evident, the accused was entitled to be admitted to bail. *Ex parte Spencer* (Cr. App.) 138 S. W. 703.

Where relator went to the place of the homicide to make trouble, and there shot deceased while she was endeavoring to get him to leave the premises, not accidentally, as he claimed, but intentionally, he was not entitled to bail. *Ex parte Finney*, 70 App. 284, 156 S. W. 636.

Parties charged with an offense that may be punished capitally are entitled to bail unless the evidence leads a well-guarded and dispassionate judgment to the conclusion that an offense has been committed, that the accused is the guilty agent, and that he will be punished capitally if the law is properly administered. *Ex parte Russell*, 71 App. 377, 160 S. W. 75.

A penitentiary convict, while being taken on the train to a state farm, jumped through the car window and attempted to escape, whereupon the transfer agent, who was assisting in taking the prisoners to the farm in the performance of his duty, shot and killed such convict. No ill will between the agent and the convict appeared, and the killing apparently occurred only by reason of the escape. Held that the agent, who was charged with murder, was entitled to bail, especially in view of Pen. Code art. 1094, § 10, providing that a person imprisoned in the penitentiary or attempting to escape therefrom may be killed by the officer having legal custody of him if his escape can in no other manner be prevented. *Ex parte Russell*, 71 App. 377, 160 S. W. 75.

On an application for bail by a person charged with murder, the trial judge has a reasonable discretion in determining whether the death penalty probably will or should be imposed, and on appeal the presumption will be indulged that his judgment is correct. *Ex parte Stephenson*, 71 App. 380, 160 S. W. 77.

Evidence on an application for bail by one indicted for murder, held sufficient to raise both the issue of manslaughter and self-defense, and not to amount to evident proof of express malice, and therefore to entitle defendant to bail. *Dooley*, *Ex parte* (Cr. App.) 170 S. W. 303.

Where the evidence for the state under a complaint charging murder would support a verdict of murder upon express malice, an offense not bailable, but defendant's evidence raises the issues of self-defense and imperfect self-defense, so as to require their submission to the jury, he was entitled to bail. *Burton*, *Ex parte* (Cr. App.) 170 S. W. 308.

Where the evidence for the state under a complaint charging murder would support a verdict of murder upon express malice, an offense not bailable, but defendant's evidence raises the issues of self-defense and imperfect self-defense, so as to require their submission to the jury, he was entitled to bail. *Burton*, *Ex parte* (Cr. App.) 170 S. W. 308.

Where it appeared with reasonable certainty that accused killed deceased, and that the evidence would raise no question of self-defense or of the lesser degrees of homicide, it was proper to refuse accused admission to bail. *Ex parte Kellett* (Cr. App.) 171 S. W. 711.

Where the evidence raises the issue of negligent homicide of the second degree, the defendant is entitled to bail. *Ex parte Craig* (Cr. App.) 174 S. W. 823.

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.]

See post, arts. 160-224; Const. U. S. art. 1, sec. 9, subd. 2; *Ex parte Angus*, 28 App. 293, 12 S. W. 1099; *Ex parte Rice*, 72 App. 587, 162 S. W. 891; *Ex parte Muncy*, 72 App. 541, 163 S. W. 29.

See *State v. Sparks & Magruder*, 27 Tex. 705, as to Act of Confederate Congress suspending the writ in certain cases.

Explanatory.—The present constitution reads as follows: "The writ of habeas corpus is a writ of right, and shall never be suspended. The legislature shall enact laws to render the remedy speedy and effectual" [Const. art. 1, § 12 (Vernon's *Sayles' Civ. St.* 1914, vol. 1, p. xxiv)].

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 reputa-

tion, shall have remedy by due course of law. [Bill of Rights, § 13; O. C. 8.]

See Const. U. S., Amendment 8.

Excessive bail.—See post, art. 329; *Miller v. State*, 42 Tex. 309; *Miller v. State*, 43 Tex. 579; *Ex parte Catney*, 17 App. 332; *Ex parte Walker*, 3 App. 668; *Ex parte Wilson*, 20 App. 498; *Ex parte Campbell*, 28 App. 376, 13 S. W. 141; *Ex parte Tittle*, 37 App. 597, 40 S. W. 598; *McConnell v. State*, 13 App. 390; *Ruston v. State*, 15 App. 324; *Ex parte Coldiron*, Id. 464; *Ex parte Hutchings*, 11 App. 28; *Ex parte Finn*, 48 App. 606, 90 S. W. 29; *Ex parte Harris*, 49 App. 232, 91 S. W. 794; *Ex parte Goodwin*, 58 App. 288, 125 S. W. 582; *Ex parte Canna* (Cr. App.) 136 S. W. 60; *Ex parte Creed* (Cr. App.) 149 S. W. 192; *Ex parte Mitchell* (Cr. App.) 149 S. W. 194; *Ex parte King* (Cr. App.) 150 S. W. 905; *Ex parte Ross*, 70 App. 493, 157 S. W. 496; *Ex parte Martin*, 71 App. 383, 159 S. W. 1182.

Excessive fines and cruel or unusual punishment.—When the punishment assessed is within the limits prescribed by law, it is not "excessive," and courts can not remedy the grievance, even though of opinion that the discretion of the jury was not judiciously exercised. *Brown v. State*, 16 Tex. 122; *March v. State*, 35 Tex. 115; *Chiles v. State*, 2 App. 36; *Teague v. State*, 4 App. 147; *Davis v. State*, Id. 456; *Johnson v. State*, 5 App. 423; *Drake v. State*, Id. 649; *Williams v. State*, 6 App. 147; *Smith v. State*, 7 App. 414. Ten years' confinement in the penitentiary being within the limits of the penalty prescribed by law for horse theft, such penalty can not be held to be excessive, even though the same jury, upon the same evidence, awarded only five years to a codefendant who pleaded guilty. *Jones v. State*, 14 App. 85. Confinement in the penitentiary for the crime of horse theft is neither an excessive, cruel, or unusual punishment, nor does it become so by reason of article 862, post, providing for successive imprisonment upon different convictions. *Lillard v. State*, 17 App. 114. If a penal statute imposes an unconscionable penalty, it is a matter for redress and correction by the legislature and not the courts. *Wallace v. State*, 33 Tex. 445. And so it is if the law is unwise and bears with undue severity upon any particular class. *Albrecht v. State*, 8 App. 216, 34 Am. Rep. 737.

A sentence imposing a fine of \$40 and ten days' imprisonment on one convicted of keeping and exhibiting a bank for gaming purposes, held not excessive. *Williams v. State*, 6 App. 147.

A verdict fixing the punishment for aggravated assault on a woman at a fine of \$500 and twelve months imprisonment in the county jail held excessive. *Robinson v. State*, 25 App. 111, 7 S. W. 531.

A verdict imposing a fine of \$500 and fifteen months imprisonment on conviction of an aggravated assault by defendant on his stepdaughter held not excessive. *Inglen v. State*, 36 App. 472, 37 S. W. 861.

Thirty years for nocturnal burglary of a private residence is not, under Pen. Code, art. 1312, excessive penalty. *Handy v. State*, 46 App. 406, 80 S. W. 526.

P. C. art. 1450, relating to abandonment, etc., after marriage to avoid a pending prosecution for seduction, and providing a punishment of from two to ten years in the penitentiary does not impose a "cruel or unusual punishment." *Thacker v. State*, 62 App. 294, 136 S. W. 1095.

Where the defendant was one of a party of men who took a woman from her bed at night, blindfolded and stripped her, carried her to a field, and whipped her unmercifully, 90 days in jail and \$50 fine was not an excessive punishment. *Robinson v. State* (Cr. App.) 145 S. W. 345.

This section is not violated by Pen. Code, art. 1259, providing a minimum punishment for wilfully injuring a railroad, because it does not provide a maximum punishment. *Hamilton v. State* (Cr. App.) 153 S. W. 134.

Where accused severely beat his wife, constituting an aggravated assault, a fine of \$500 and two years' imprisonment in the county jail, being less than the maximum penalty fixed by statute for the offense, was not an excessive punishment. *Jobe v. State* (Cr. App.) 173 S. W. 1025.

Courts to be open.—Where threats of mob violence in effect deprive defendant of his rights in the courts, a new trial should be granted. *Massey v. State*, 31 App. 371, 20 S. W. 758.

Legislation in regard to the courts must be so construed as not to violate the provision that every person, for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law. As to courts in newly organized counties, and as to courts for counties not organized. *Runge & Co. v. Wyatt*, 25 Tex. Supp. 291; *O'Shea v. Twohig*, 9 Tex. 336; *Clark v. Goss*, 12 Tex. 395, 62 Am. Dec. 531; *Lumpkin v. Muncey*, 66 Tex. 311, 17 S. W. 732; *Nelson v. State*, 1 App. 41; *Chivarrio v. State*, 15 App. 330; *Barr v. State*, 16 App. 333.

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.

Acquittal in court without jurisdiction, see post, art. 20.

Burglary and offenses committed after entry, see Pen. Code, arts. 1313, 1317, 1318.

Conviction of lower as acquittal of higher offense, see post, art. 782.

Conviction or acquittal in another state or county, see post, arts. 255, 256.

Discharge by examining court, see post, art. 314.

Forgery and passing or possession with intent to pass forged instruments, see Pen. Code, 946.

Higher grade of offense not within jurisdiction, see post, art. 601.

Offenses against state and municipality, see post, art. 965.

Pleas of former acquittal or conviction, see post, art. 572.

Cited, *Etheridge v. State* (Cr. App.) 173 S. W. 1031.

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| 1. In general. | 29. — Bigamy and adultery. |
| 2. Pendency of other prosecution for same offense. | 30. — Fornication and seduction. |
| 3. Pendency of appeal. | 31. — Displaying pistol and carrying or firing same. |
| 4. Insufficient indictment, information or complaint. | 32. — Keeping disorderly house. |
| 5. Quashing or dismissing proceedings. | 33. — Vagrancy and keeping disorderly house. |
| 6. Withdrawn counts or issues. | 34. — Vagrancy and keeping gaming place. |
| 7. Discharge of jury. | 35. — Gaming. |
| 8. Judgment void, set aside, or reversed. | 36. — Forgery. |
| 9. Identity of offenses. | 37. — Passing forged instrument and theft. |
| 10. — Degrees of offenses. | 38. — Attempt to pass forged instrument. |
| 11. — Murder. | 39. — Cursing. |
| 12. — Murder and manslaughter. | 40. — Drunkenness and disturbing peace. |
| 13. — Murder and carrying pistol. | 41. — False swearing and illegal voting. |
| 14. — Assault with intent to murder. | 42. — Burglary. |
| 15. — Assault with intent to murder and murder. | 43. — Burglary and conspiracy to commit. |
| 16. — Assault with intent to murder and threats to kill. | 44. — Theft. |
| 17. — Assault with intent to murder and carrying pistol. | 45. — Theft and receiving stolen property. |
| 18. — Assault. | 46. — Theft and conspiracy to commit. |
| 19. — Assault with intent to rob and murder. | 47. — Theft and driving stock from range. |
| 20. — Robbery. | 48. — Defacing mark and theft. |
| 21. — Robbery and assault with intent to murder. | 49. — Illegal marking of cattle. |
| 22. — Assault with intent to murder and robbery. | 50. — Killing animals. |
| 23. — Affray and aggravated assault. | 51. — Violation of liquor laws. |
| 24. — Rape. | 52. — Perjury. |
| 25. — Attempt to rape and attempt at burglary to commit rape. | 53. — Unlawful practice of medicine. |
| 26. — Rape and incest. | 54. Waiver of defense. |
| 27. — Incest. | 55. Plea. |
| 28. — Adultery. | 56. Burden of proof. |

1. In general.—“Jeopardy” defined. *Powell v. State*, 17 App. 345 (overruling *Moseley v. State*, 33 Tex. 671, and *Taylor v. State*, 35 Tex. 97); *Ex parte Porter*, 16 App. 321; *Parchman v. State*, 2 App. 228, 28 Am. Rep. 435; *Davis v. State*, 37 App. 359, 38 S. W. 616, 39 S. W. 937; *Pizano v. State*, 20 App. 139, 54 Am. Rep. 511; *Vestal v. State*, 3 App. 652; *Pickett v. State*, 43 App. 1, 63 S. W. 325; *Cook v. State*, 43 App. 182, 63 S. W. 872, 96 Am. St. Rep. 854; *Ogle v. State*, 43 App. 219, 63 S. W. 1009, 96 Am. St. Rep. 860; *Johnson v. State* (Cr. App.) 164 S. W. 833.

The constitutional guaranty extends to misdemeanors. *Brink v. State*, 18 App. 344, 51 Am. Rep. 317; *Vestal v. State*, 3 App. 648.

A verdict of not guilty puts an end to the prosecution. *State v. Burris*, 3 Tex. 118.

The doctrine has no application to examining courts. *Ex parte Porter*, 16 App. 321.

The term “former jeopardy” having received a settled judicial construction prior to its use in the constitution of this state, the presumption obtains that the authors of the constitution had that construction in view in using that phrase, and no different meaning of the phrase can be established by legislative enactment. *Powell v. State*, 17 App. 345.

Former jeopardy is a valid defense under the Sunday laws. *Brink v. State*, 18 App. 344, 51 Am. Rep. 317.

Failure of the clerk or justice to enter judgment does not deprive accused of the right to plead former conviction. *Emmons v. State*, 34 App. 118, 29 S. W. 475.

Pen. Code, art. 1618, increasing the punishment for repetition of the same offense, is not unconstitutional as placing a defendant twice in jeopardy for the same offense. *Kinney v. State*, 45 App. 500, 78 S. W. 226, 79 S. W. 570.

Former conviction cannot be asserted on proof that another than the accused had been convicted of the offense charged. *Craig v. State*, 49 App. 295, 92 S. W. 416.

A judgment pleaded in bar must be a final judgment, or a judgment of conviction on which an appeal was pending; otherwise it would be entitled to no consideration. *Lindley v. State*, 57 App. 305, 122 S. W. 873.

P. C. art. 1450, relating to abandonment, etc., after marriage to avoid a pending prosecution for seduction, does not put one twice in jeopardy for the same offense. *Thacker v. State*, 62 App. 294, 136 S. W. 1095.

2. Pendency of other prosecution for same offense.—The pendency of one indictment is a bar to another for the same offense. *Pearce v. State*, 50 App. 507,

98 S. W. 861 (overruling *Bonner v. State*, 29 App. 223, 15 S. W. 821); *Bailey v. State*, 11 App. 140.

In a prosecution for assault, that a prosecution is also pending against the same defendant for an assault on another person, committed at the same time, is no ground for excluding evidence in the pending case; it in no way appearing that accused had been finally tried and either acquitted or convicted in the other prosecution, even if such conviction or acquittal would be any defense in the pending prosecution. *Perkins v. State* (Cr. App.) 144 S. W. 241.

Accused may be prosecuted in the county court for a misdemeanor, though a complaint had been filed against him in a justice court for the same offense, where he had not been tried thereon. *January v. State* (Cr. App.) 146 S. W. 555.

3. Pendency of appeal.—Plea of former conviction cannot be based on a judgment pending on appeal. *Dupree v. State*, 56 App. 387, 120 S. W. 875; *Harvey v. State*, 57 App. 5, 121 S. W. 501, 136 Am. St. Rep. 971.

A contention that accused pending appeal had been again tried could not avail him on appeal from a conviction on the first trial; the plea of former jeopardy not applying in such case. *Bosley v. State* (Cr. App.) 153 S. W. 878.

Where accused pleads a former conviction, from which an appeal is pending, he must move for a continuance of the second prosecution until the appeal is determined, if he would take advantage of his plea. *Phillips v. State* (Cr. App.) 164 S. W. 1004.

Where an appeal is pending from conviction claimed to be former jeopardy in a second prosecution, on appeal from a conviction in the second prosecution, defendant cannot for the first time show the result of the former trial. *Phillips v. State* (Cr. App.) 164 S. W. 1004.

4. Insufficient indictment, information, or complaint.—Jeopardy does not attach where the indictment is invalid. *Longley v. State*, 43 Tex. 490; *Parchman v. State*, 2 App. 228, 28 Am. Rep. 435; *Pickens v. State*, 9 App. 270; *Simco v. State*, 9 App. 338; *Jackson v. State*, 37 App. 128, 38 S. W. 1002; *Grisham v. State*, 19 App. 504; *Branch v. State*, 20 App. 599; *Timon v. State*, 34 App. 363, 30 S. W. 808; *Williams v. State*, 34 App. 433, 30 S. W. 1063; *Shoemaker v. State*, 58 App. 518, 126 S. W. 887; *Morville v. State*, 63 App. 553, 141 S. W. 102; *Whiten v. State*, 71 App. 555, 160 S. W. 462; *McCaskey v. State* (Cr. App.) 174 S. W. 338.

Where the former indictment had been lost and there is no proof that it was valid, the plea of former jeopardy cannot be sustained. *O'Connor v. State*, 28 App. 288, 13 S. W. 14.

A dismissal by the prosecuting attorney after both sides had announced ready or after the jury was sworn, because he then discovered the indictment to be defective, is not former jeopardy. *Jackson v. State*, 37 App. 128, 38 S. W. 1002; *Yerger v. State* (Cr. App.) 41 S. W. 621.

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 App. 458, 34 S. W. 290, and cases cited.

A plea of former conviction under a city ordinance states no defense where the affidavit on which the former conviction was based was insufficient. *Davis v. State*, 37 App. 359, 38 S. W. 616, 39 S. W. 937.

Where, in a prosecution for assault, accused had been previously acquitted because of a variance in the name of the person assaulted, such acquittal did not constitute jeopardy, preventing a subsequent conviction for the same offense. *Reynolds v. State*, 58 App. 273, 124 S. W. 931.

An acquittal will bar any subsequent prosecution for the same offense, if the trial occurs in a court having jurisdiction, whether the indictment is a valid one or not. *Shoemaker v. State*, 58 App. 518, 126 S. W. 887.

5. Quashing or dismissing proceedings.—A dismissal of a prosecution before jeopardy has attached is not a bar to another prosecution for the same offense. *Goode v. State*, 2 App. 520; *Swindel v. State*, 32 Tex. 102; *Longley v. State*, 43 Tex. 490; *Quitow v. State*, 1 App. 47, 28 Am. Rep. 396; *Brill v. State*, 1 App. 152; *Simco v. State*, 9 App. 338; *Ex parte Rogers*, 10 App. 655, 38 Am. Rep. 654; *Ex parte Porter*, 16 App. 321; *Branch v. State*, 20 App. 599; *Elehash v. State*, 35 App. 599, 34 S. W. 928; *Jackson v. State*, 37 App. 128, 38 S. W. 1002; *Yerger v. State* (Cr. App.) 41 S. W. 621; *Shoemaker v. State*, 58 App. 518, 126 S. W. 887; *Morville v. State*, 63 App. 553, 141 S. W. 102; *McCaskey v. State* (Cr. App.) 174 S. W. 338. Quashal of former indictment, as barred by limitations, cannot be set up as plea of former acquittal. *Swancoat v. State*, 4 App. 105.

Where the State's motion for continuance was overruled and the prosecuting attorney thereupon dismissed the case and had the defendant again indicted, the former proceedings did not bar a conviction on the subsequent indictment. *Venters v. State*, 18 App. 198.

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 App. 32, 101 S. W. 233.

On the trial of an indictment containing two counts, one for rape by force and the other rape on a girl under the age of 15, the first count was dismissed for failure of proof. It was then discovered that the indictment was fatally defective because it omitted to state that the prosecutrix was not then and there the wife of accused. The jury were then discharged, the case dismissed and accused was held to wait the action of another grand jury, and was again indicted for rape on a girl under 15 years. Held, that though the dismissal of the count for rape by force would bar a second prosecution, accused was not put in jeopardy by the discharge of the jury and dismissal of the case as to the other count, since jeopardy does not attach to an indictment that is invalid. *Shoemaker v. State*, 58 App. 518, 126 S. W. 887.

A judgment quashing an indictment on motion of accused cannot be pleaded as former jeopardy to a subsequent indictment charging the same offense. *McCaskey v. State* (Cr. App.) 174 S. W. 338.

6. **Withdrawn counts or issues.**—Where, on a trial under an indictment charging murder in one count and in another count a conspiracy to kill decedent, the case was submitted on the count charging murder and a verdict responsive there-to was returned, there was in effect an acquittal of the charge of conspiracy, and on a reversal of the conviction accused can only be tried for murder. *Betts v. State*, 60 App. 631, 133 S. W. 251.

Where defendant had pleaded not guilty to all nine counts of an indictment, but only one count was submitted to the jury, while such action did not amount to an acquittal on the other eight counts, it did constitute former jeopardy as to those counts if the defendant did not consent to their being withdrawn from the jury. *Hewitt v. State* (Cr. App.) 167 S. W. 40.

A bill of exceptions, which shows that the defendant was indicted on two counts, one charging him as an accessory and the other as an accomplice, that at a former trial defendant was convicted on the second count, which conviction was reversed on appeal, whereupon defendant filed a plea of former jeopardy to the first count, which was overruled, presents no reversible error, where he was again convicted as accomplice and no testimony was admitted which was not admissible under the second count. *Millner v. State* (Cr. App.) 169 S. W. 899.

7. **Discharge of jury.**—*Smith v. State*, 22 App. 196, 2 S. W. 542; *Penn v. State*, 26 App. 140, 35 S. W. 973; *Clark v. State*, 28 App. 189, 12 S. W. 729, 19 Am. St. Rep. 817; *Usher v. State*, 42 App. 461, 60 S. W. 555; *Upchurch v. State*, 36 App. 624, 38 S. W. 206, 44 L. R. A. 694; *Wright v. State*, 35 App. 158, 32 S. W. 701; *Hooper v. State* (Cr. App.) 42 S. W. 338; *Shoemaker v. State*, 58 App. 518, 126 S. W. 887; *Johnson v. State* (Cr. App.) 164 S. W. 833.

This constitutional bulwark of liberty does not rest merely within the discretion of a trial judge, but the exercise of his discretion in discharging a jury impaneled in a criminal cause, before verdict, is revisable on appeal. *Powell v. State*, 17 App. 345, overruling *Moseley v. State*, 33 Tex. 671, and *Taylor v. State*, 35 Tex. 97. But such discretion will not be revised on appeal, unless it is made clearly to appear that it has been abused to the prejudice of the accused. *Schindler v. State*, 17 App. 408; *Varnes v. State*, 20 App. 107; *Brady v. State*, 21 App. 659, 1 S. W. 462; see *Pizano v. State*, 20 App. 139, 54 Am. Rep. 511.

Where the jury was discharged on the state's motion for postponement because it had announced ready under a misapprehension that the witnesses were present, there could be no further prosecution. *Pizano v. State*, 20 App. 139, 54 Am. Rep. 511.

The jury failing to agree, the accused consented to their discharge on condition that the case be continued until next term. Held, that jeopardy did not attach. *Arcia v. State*, 28 App. 198, 12 S. W. 599.

The jury failing to agree were discharged in the absence of the accused. Held, that such action was illegal, and jeopardy was a good plea at the second trial. *Rudder v. State*, 29 App. 262, 15 S. W. 717.

But where the only objection counsel for defendant, being tried for misdemeanor, made to the discharge of the jury for failing to agree was that defendant was not present, the discharge of the jury did not bar a subsequent prosecution. *Selman v. State*, 33 App. 631, 28 S. W. 541.

In declaring a mistrial the court must exercise a sound discretion. He cannot do it capriciously. If the facts which he finds and announces in his judgment show a legal necessity for a mistrial, a reviewing court will affirm his judgment; if not, his judgment will be reversed. *Woodward v. State*, 42 App. 188, 58 S. W. 141.

It is error for a court from merely looking at a juror to decide that he is sick, and discharge the jury. He should suspend the trial temporarily and have a physician attend the juror, and if he continues sick have a further examination, and if necessity is apparent, discharge the jury. *Bland v. State*, 42 App. 286, 59 S. W. 1120.

Defendant, who had been before a jury on the same charge, and who agreed that the court should discharge a juror whose child was sick, and to a trial before the remaining five jurors, and who objected to the court's discharge of the jury, was in jeopardy, and on a subsequent trial her plea of former jeopardy should have been sustained. *Schulman v. State* (Cr. App.) 173 S. W. 1195.

8. **Judgment void, set aside, or reversed.**—*Warriner v. State*, 3 App. 104, 30 Am. Rep. 124; *Watson v. State*, 5 App. 271; *Wilson v. State*, 16 Tex. 246.

The award of new trial to defendant bars the plea of former conviction. *Maines v. State*, 37 App. 617, 40 S. W. 490; *Parchman v. State*, 2 App. 228, 28 Am. Rep. 435; *Simco v. State*, 9 App. 338; *Longley v. State*, 43 Tex. 490; *Garza v. State*, 39 App. 358, 46 S. W. 242, 73 Am. St. Rep. 927.

A former conviction which was set aside is not pleadable as former jeopardy. *Lewis v. State*, 1 App. 323; *Dubose v. State*, 13 App. 418; *Robinson v. State*, 23 App. 315, 4 S. W. 904; *Foster v. State*, 25 App. 543, 8 S. W. 664.

Plea of former conviction or acquittal in a city court under an invalid ordinance is not good. *McLain v. State*, 31 App. 558, 21 S. W. 365, and cases cited. *McNeil v. State*, 29 App. 48, 14 S. W. 393. And see *Leach v. State*, 36 App. 248, 36 S. W. 471, and cases cited.

Otherwise, however, when the ordinance is valid. *Davis v. State*, 37 App. 359, 38 S. W. 616, 39 S. W. 937.

Judgment reversed. *Thompson v. State*, 9 App. 649.

Where it cannot be said that the court abused its discretion in discharging a jury for disagreement, it is proper to instruct the jury to find the plea of former jeopardy untrue. *Varnes v. State*, 20 App. 107.

Where there is no evidence to support a plea of former jeopardy, the failure

of the jury to pass on it could not prejudice him. *Robinson v. State*, 23 App. 315, 4 S. W. 904.

Where the plea of former jeopardy showed on its face that the former indictment was fatally defective, it is proper to exclude evidence to support the plea and to refuse to submit it to the jury. *Williams v. State*, 34 App. 433, 30 S. W. 1063.

A previous conviction for driving from the range with a pecuniary fine, which conviction was set aside and a new trial awarded, will not preclude subsequent conviction for felonious theft. *Campbell v. State*, 22 App. 262, 2 S. W. 825, overruling *Sisk's Case*, 9 App. 90.

It is a well settled rule that, "if a defendant moves in arrest of judgment, or applies to a court to vacate a judgment already rendered, for any cause, and his motion prevails, he will be presumed to waive any objection to being put a second time in jeopardy, and so may ordinarily be tried anew." *Sterling v. State*, 25 App. 716, 9 S. W. 45, 8 Am. St. Rep. 452.

Where a defendant, after the reversal of a conviction in the district court, voluntarily appeared in the county court with counsel and waived a jury trial, and was adjudged guilty of a lesser crime on an agreed statement of facts, he cannot, on the case in the district court being called, plead former jeopardy, although the county attorney filed the information in the county court; such being a fraud on the jurisdiction of the district court. *Taff v. State* (Cr. App.) 155 S. W. 214.

One who obtains on habeas corpus his discharge under a judgment and sentence adjudged absolutely void cannot, on a subsequent prosecution for the same offense, rely on the judgment and sentence in support of a plea of former jeopardy, whether he has undergone any part of the punishment imposed or not. *Marshall v. State* (Cr. App.) 166 S. W. 722, L. R. A. 1915A, 526.

A conviction of fornication, rendered in the absence of the county judge, furnishes no basis for a plea of former jeopardy against a prosecution for seduction, arising out of the same acts; it not appearing that the court was in session, or that any one authorized received accused's plea of guilty. *Staples v. State* (Cr. App.) 175 S. W. 1056.

9. **Identity of offenses.**—"Same offense" does not mean the same offense by name, but the same criminal act or omission. *Williams v. State*, 58 App. 193, 125 S. W. 42; *Parchman v. State*, 2 App. 228, 28 Am. Rep. 435; *Hirschfield v. State*, 11 App. 207; *Herera v. State*, 35 App. 607, 34 S. W. 943; *Ex parte Rogers*, 10 App. 655, 38 Am. Rep. 654; *Grisham v. State*, 19 App. 504; *Creech v. State*, 70 App. 229, 158 S. W. 277.

The rule 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. *Hirshfield v. State*, 11 App. 207, and cases cited; *Quitow v. State*, 1 App. 47, 28 Am. Rep. 396; *Simco v. State*, 9 App. 338; *Grisham v. State*, 19 App. 504.

The usual test for determining whether a former conviction or acquittal was of the same offense is whether the same evidence which is necessary to support the second prosecution would have supported the first. *Lowe v. State*, 4 App. 34; *Thomas v. State*, 40 Tex. 36.

It is not essential that the proofs be identical. *Williams v. State*, 58 App. 193, 125 S. W. 42.

The two offenses must, in truth, be the same, though the indictments may differ in immaterial particulars. *Thomas v. State*, 40 Tex. 36.

For application of the rule, see, also, *Hudson v. State*, 9 App. 151, 35 Am. Rep. 732; *Hirshfield v. State*, 11 App. 207; *Willis v. State*, 24 App. 586, 6 S. W. 857; *Wright v. State*, 37 App. 627, 40 S. W. 491; *Epps v. State*, 38 App. 284, 42 S. W. 552; *Morrison v. State*, 38 App. 392, 43 S. W. 113; *Harrington v. State*, 31 App. 577, 21 S. W. 356; *Fleming v. State*, 28 App. 234, 12 S. W. 605.

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 App. 607, 34 S. W. 943.

A plea of former conviction under a city ordinance states no defense, where, under the ordinance, the act constituted a different offense. *Davis v. State*, 37 App. 359, 38 S. W. 616, 39 S. W. 937.

On the doctrine of carving, as applied to special pleas, see *Sadberry v. State*, 39 App. 466, 46 S. W. 639, and cases cited.

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 App. 25, 63 S. W. 571.

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 App. 288, 98 S. W. 839; *Paschal v. State*, 49 App. 111, 90 S. W. 878.

10. — **Degrees of offenses.**—Conviction of lower as acquittal of higher degrees, see post, art. 782.

Higher grade of offense not within jurisdiction, see post, art. 601.

Conviction for the greater offense bars prosecution for the lesser. *Givens v. State*, 6 Tex. 344.

11. — **Murder.**—Former conviction and life sentence for one murder will not bar prosecution for another murder. *Coleman v. State*, 35 App. 404, 33 S. W. 1083.

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 App. 59, 52 S. W. 77, 96 Am. St. Rep. 765.

Where accused was acquitted of murder in the first degree, on express malice, and convicted of murder in the second degree, on implied malice, which conviction was reversed, and thereafter the Legislature changed the law, consolidating

the crimes of murder in the first and second degree, defining the elements of both degrees as constituting one offense, and accused, on a second trial elected to be tried under the old law, the reversal of the conviction for murder in the second degree would not preclude a conviction of murder on implied malice. *Eads v. State* (Cr. App.) 176 S. W. 574.

12. — **Murder and manslaughter.**—Former acquittal of murder will not bar prosecution for manslaughter in the same transaction. *Turner v. State*, 41 App. 329, 54 S. W. 579.

13. — **Murder and carrying pistol.**—As one could not under an indictment for murder be tried for unlawfully carrying a pistol, an acquittal under an indictment for murder will not avail to him, as former jeopardy, when he is subsequently indicted for unlawfully carrying the pistol, with which, and when, he did the killing. *Brown v. State* (Cr. App.) 167 S. W. 1107.

14. — **Assault with intent to murder.**—On a trial for assault with intent to murder, defendant pleaded former jeopardy, in that he had already been tried and convicted for an assault with intent to murder another party, and that his previous conviction grew out of and was a part of the same transaction. Held, that the court properly declined to consider and refused to submit the plea of former jeopardy to the jury, the evidence showing separate and distinct offenses. *Ashton v. State*, 31 App. 482, 21 S. W. 48.

15. — **Assault with intent to murder and murder.**—Conviction under an indictment for assault to murder will not bar prosecution for murder when the injured party subsequently died. *Curtis v. State*, 22 App. 227, 3 S. W. 86, 58 Am. Rep. 635, approving *Johnson's Case*, 19 App. 453, 53 Am. Rep. 385.

Defendant cut prosecutor in an altercation, and was charged with aggravated assault. By arrangement with the county attorney, accused pleaded guilty and a fine was assessed and paid, and the judgment satisfied. He was thereafter indicted for assault to commit murder, and in support of a plea of former jeopardy it was shown that the acts complained of constituted the identical assault for which he had previously pleaded guilty. Held, that the plea was sustained, and that accused was entitled to a discharge. *Corbett v. State*, 63 App. 478, 140 S. W. 342.

16. — **Assault with intent to murder and threats to kill.**—A conviction of assault with intent to murder will not bar a prosecution for threats to kill, though both prosecutions are founded on incidents of the same difficulty. *Lewis v. State*, 1 App. 323.

17. — **Assault with intent to murder and carrying pistol.**—Conviction for unlawfully carrying a pistol will not bar prosecution for assault to murder, though involving the same act. *Thomas v. State*, 40 Tex. 36.

On a trial for carrying a pistol a plea that he had been tried for an assault with intent to murder in which he used the pistol is no bar. The causes of action are not the same. *Ford v. State* (Cr. App.) 56 S. W. 918.

Acquittal of assault to murder cannot be pleaded in bar to carrying pistol on the occasion of the alleged assault. *Woodroe v. State*, 50 App. 212, 96 S. W. 30.

18. — **Assault.**—Where a party fires on four people and wounds them all it is but one offense and a conviction for wounding one is a bar to further prosecution. *Sadberry v. State*, 39 App. 467, 46 S. W. 639.

If a person shoots at one person and strikes another, and is prosecuted for assaulting the person struck, he cannot be afterwards prosecuted for assaulting the one he intended to strike. *Vining v. State* (Cr. App.) 146 S. W. 909.

19. — **Assault with intent to rob and murder.**—Assault to rob one person and the murder of another person in the same transaction are distinct offenses. *Keaton v. State*, 41 App. 621, 57 S. W. 1125; *Taylor v. State*, 41 App. 564, 55 S. W. 963.

20. — **Robbery.**—An acquittal for robbing prosecutor of one 10-cent piece, as charged in the indictment, cannot be pleaded as former jeopardy to a subsequent indictment charging accused with robbing prosecutor of two 5-cent pieces; the two indictments being based on the same act. *McCaskey v. State* (Cr. App.) 174 S. W. 338.

21. — **Robbery and assault with intent to murder.**—Where on trial for assault with intent to murder, it appeared that defendant had been previously convicted of robbery from the same person and by the use of the same violence upon whom and by which the assault was alleged, his plea of former conviction should have been sustained. *Moore v. State*, 33 App. 166, 25 S. W. 1120.

22. — **Assault with intent to murder and robbery.**—A former conviction for assault with intent to murder bars a subsequent prosecution for robbery committed at the same time and by means of the same assault. *Moore v. State*, 33 App. 166, 25 S. W. 1120; *Herera v. State*, 35 App. 607, 34 S. W. 943.

23. — **Affray and aggravated assault.**—A conviction for engaging in an "affray" does not bar a prosecution for "aggravated assault" under a plea of former jeopardy, nor does the doctrine of carving apply. *McCraw v. State* (Cr. App.) 163 S. W. 967; *Decker v. State*, 58 App. 159, 124 S. W. 912.

24. — **Rape.**—In a prosecution for statutory rape, where accused had been acquitted in a former prosecution when the state relied on a different act, evidence in the former trial, tending to show that accused was guilty of the act charged in the second prosecution, was admissible. *Hamilton v. State* (Cr. App.) 168 S. W. 536.

In a prosecution for statutory rape, where accused claimed that his acquittal in a prior prosecution under an indictment for a different act was a bar, it was proper for the state to introduce evidence that the act relied on in the second prosecution was not part of the same transaction as the act for which he was acquitted. *Hamilton v. State* (Cr. App.) 168 S. W. 536.

In a prosecution for statutory rape, where accused, on a previous trial had been

acquitted under an indictment for a different act, and on the present trial he offered no evidence to show that the act upon which the state relied was the same one, his plea of former acquittal was properly denied. *Hamilton v. State* (Cr. App.) 168 S. W. 536.

25. — **Attempt to rape and attempt at burglary to commit rape.**—Acquittal of attempt to commit rape will not bar prosecution for attempt at burglary to commit rape. *Byas v. State*, 41 App. 51, 51 S. W. 923, 96 Am. St. Rep. 762.

26. — **Rape and incest.**—An acquittal for rape will not bar a prosecution for incest with the same person at the same time and place. *Stewart v. State*, 35 App. 174, 32 S. W. 766, 60 Am. St. Rep. 35.

27. — **Incest.**—Where accused in four indictments was charged with incest with B. on four different dates, and on a trial under one indictment B. was asked as to intercourse with accused on the dates covered by the other indictments but on denying such intercourse, no other proof thereof was offered, and no conviction asked for any act except that charged in the indictment on trial, his acquittal did not prevent the trial of the other indictments, or entitle him to release on habeas corpus. *Ex parte Burford*, 70 App. 281, 156 S. W. 686.

28. — **Adultery.**—In *Alonzo v. State*, 15 App. 378, 49 Am. Rep. 207, it is held that in a prosecution for adultery, the acquittal of one of the parties to the offense will not bar a prosecution against the other. The reasoning and doctrine of that decision seem applicable also to the offenses of bigamy.

29. — **Bigamy and adultery.**—Bigamy and adultery are different offenses and are not maintainable by the same evidence; and, therefore, a former acquittal of adultery will not bar a prosecution for adultery. *Swancoat v. State*, 4 App. 105; *Hildreth v. State*, 19 App. 195.

30. — **Fornication and seduction.**—The offense of "seduction" under promise of marriage being based on the first act whereby a virgin is led astray, a conviction of fornication for subsequent acts of intercourse with the prosecutrix is no bar to a prosecution for seduction. *Staples v. State* (Cr. App.) 175 S. W. 1056.

31. — **Displaying pistol and carrying or firing same.**—On a trial for unlawfully carrying a pistol, a plea of former conviction for rudely displaying a pistol is not available. *Nichols v. State*, 37 App. 616, 40 S. W. 502.

A conviction for displaying a pistol and firing the same at and near a church is a defense to a charge for firing the pistol into the church. *Landrum v. State*, 37 App. 666, 40 S. W. 737.

32. — **Keeping disorderly house.**—Keeping a disorderly house is a continuous offense, and a conviction bars further prosecution up to the time of the conviction, unless the indictment or information specifies a time and the proof is confined thereto. *Novy v. State*, 62 App. 492, 138 S. W. 139; *Huffman v. State*, 23 App. 491, 5 S. W. 134; *Fleming v. State*, 28 App. 234, 12 S. W. 605.

An indictment charged the keeping of a disorderly house on May 15, 1883, and was filed May 25, 1883. Defendant pleaded former acquittal before a mayor's court on a complaint charging the same offense to have been committed June 13, 1883. On the trial before the mayor the same proof was adduced as on the trial under the indictment covering the same period of time. Held that the plea should have been sustained. *Handley v. State*, 16 App. 444.

Where an information charging the offense of keeping a disorderly house was intended to charge only one offense as having been committed in two different ways, only one punishment is authorized; but, if each count was intended to and did charge a separate and distinct offense, a conviction might be had under all and punishment assessed for each count. *Sanders v. State*, 70 App. 209, 156 S. W. 927.

33. — **Vagrancy and keeping disorderly house.**—Former acquittal on trial for vagrancy not available as plea in bar of prosecution for keeping a disorderly house. *Wilson v. State*, 16 App. 497.

34. — **Vagrancy and keeping gaming place.**—As the Legislature, by passing the vagrancy act (Pen. Code, art. 634 et seq.), did not intend to repeal Pen. Code, art. 553, making it a felony for a person to keep a place for the purpose of being used as a place to gamble with cards, the vagrancy act (section 1, subd. k), if it does not create a new and distinct offense from that denounced in the Penal Code, is unconstitutional, being in violation of Const. art. 1, § 14, prohibiting double jeopardy. *Parshall v. State*, 62 App. 177, 138 S. W. 759.

35. — **Gaming.**—A conviction for betting with dice is no bar to a prosecution for keeping a gaming table. *Tutt v. State* (Cr. App.) 29 S. W. 268.

Where accused and others shot craps for a couple of hours, during which time there were about 25 bets made by each of the players, and there was no intermission in the playing, and the parties did not separate, each bet was a separate offense, so that a former conviction for betting during the same game would not preclude a second prosecution for betting thereon. *Parks v. State*, 57 App. 569, 123 S. W. 1109.

36. — **Forgery.**—See Pen. Code, art. 946, and notes.

Plea of former acquittal for forgery of a different note is not available. *Inman v. State*, 35 App. 36, 30 S. W. 219.

37. — **Passing forged instrument and theft.**—See Pen. Code, art. 946.

Acquittal on a charge of passing a pay check does not bar a prosecution for theft of the check. *Fulshear v. State*, 59 App. 376, 128 S. W. 134.

38. — **Attempt to pass forged instrument.**—See Pen. Code, art. 946.

Conviction for one of different attempts to pass the same forged instrument will not bar prosecution for the other attempt. *Burks v. State*, 24 App. 326, 6 S. W. 303; *Lewis v. State*, 1 App. 323.

39. — **Cursing.**—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 App. 641, 103 S. W. 882.

40. — **Drunkenness and disturbing peace.**—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 App. 533, 89 S. W. 645.

41. — **False swearing and illegal voting.**—False swearing and illegal voting are distinct offenses, and conviction for one cannot be pleaded against the other. *Arrington v. State*, 48 App. 541, 89 S. W. 643.

42. — **Burglary.**—An acquittal, under an indictment charging that accused broke into a house occupied by T. C. with intent to steal property belonging to him, was no answer to an indictment for breaking the same house, alleged to be in the control of A. C., with intent to steal property belonging to the latter. *Kinney v. State* (Cr. App.) 148 S. W. 783.

The statute makes burglary of a private residence at night a distinct offense from ordinary burglary, hence the fact that accused had been previously indicted and placed on trial under an indictment charging him with ordinary burglary does not preclude a subsequent prosecution for burglary of a private residence at night, the court upon proof of those facts having withdrawn the first case from the jury. *Curtis v. State* (Cr. App.) 176 S. W. 559.

43. — **Burglary and conspiracy to commit.**—Burglary and conspiracy to commit burglary are distinct offenses, and conviction of one will not bar prosecution for the other. *Whitford v. State*, 24 App. 489, 6 S. W. 537, 5 Am. St. Rep. 896.

44. — **Theft.**—Theft of sundry articles at the same time and place, and by the same person, constitutes but a single offense, notwithstanding the articles stolen severally belonged to different persons, and were taken severally from the possession of their respective owners. A former acquittal or conviction for the theft of any of the articles is a defense against a prosecution for the others. *Hudson v. State*, 9 App. 151, 35 Am. Rep. 732; *Wilson v. State*, 45 Tex. 76, 23 Am. Rep. 602; *Addison v. State*, 3 App. 40; *Quitsov v. State*, 1 App. 48, 28 Am. Rep. 396; *Hozier v. State*, 6 App. 542; *Adams v. State*, 16 App. 162; *Wright v. State*, 17 App. 152; *Alexander v. State*, 21 App. 406, 17 S. W. 139, 57 Am. Rep. 617; *Willis v. State*, 24 App. 586, 6 S. W. 857; *Davidson v. State*, 40 App. 288, 49 S. W. 372, 50 S. W. 365; *Stevens v. State* (Cr. App.) 58 S. W. 96.

Where the evidence showed that the theft of cattle belonging to two different owners was the same act, it was held, that a conviction of the theft of the cattle of one of said owners would bar a prosecution for the theft of the cattle of the other owner. But the indictment only charging the theft of the cattle belonging to one of said owners, an acquittal upon said charge would not bar a prosecution for the theft of the cattle belonging to the other owner, notwithstanding the transaction be the same, and the evidence identical. *Wright v. State*, 17 App. 152; *Alexander v. State*, 21 App. 406, 17 S. W. 139, 57 Am. Rep. 617; *Simco v. State*, 9 App. 338. Where the first indictment charged a theft from H. Franks, and the second one charged it from H. Frank, it was held, that the former could not be pleaded in bar of the latter. *Parchman v. State*, 2 App. 228, 28 Am. Rep. 435; *Branch v. State*, 20 App. 599. Where, under an indictment charging the theft of cattle, the defendant was convicted of the offense defined by P. C. art. 1356, but was granted a new trial, it was held, that he might properly be convicted on the second trial of theft as denounced by P. C. art. 1354. *Campbell v. State*, 22 App. 262, 2 S. W. 825, overruling *Sisk v. State*, 9 App. 90.

The proof on the trial showed that the defendants had been separately convicted for the theft of a cow, the property of one W. The animal involved in this prosecution was alleged to be the property of one C., and was found in the possession of the defendants at the same time and place, and under the same circumstances as the W. cow. It showed, also, that when last seen, before being found in the defendants' possession, the W. cow was on her range a mile and a half west of the town of A.; and that the C. cow when last seen before she was found in the possession of the defendants, was on her range several miles southwest from the said town of A. Under this proof the defendants pleaded in bar to this prosecution their former conviction for the theft of W.'s cow, alleging the taking of the two cows to be but one transaction. The jury found against the truth of the special plea. Held, that the finding of the jury was supported by the proof, and was correct. *Willis v. State*, 24 App. 586, 6 S. W. 857. See, also, *Cooper v. State*, 25 App. 530, 8 S. W. 654; *Henkel v. State*, 27 App. 510, 11 S. W. 671; *Rust v. State*, 31 App. 75, 19 S. W. 763.

An acquittal under an indictment for theft which alleges the owner unknown is a bar to a prosecution for the same offense under an indictment alleging the true owner. *Fenton v. State*, 33 App. 633, 28 S. W. 537.

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 App. 285, 49 S. W. 372, 50 S. W. 365.

There is a distinction between former acquittal and former conviction growing out of the same transaction; the principle of carving applies with more force to former conviction than to an acquittal; as, where there are distinct indictments for thefts of cattle from various owners, an acquittal as to one does not bar conviction for theft from another owner, but a conviction will when the thefts are committed at same time and place. *Taylor v. State*, 41 App. 564, 55 S. W. 963.

Indictment may include counts for theft and theft from the person, and conviction under the first count operates as acquittal of the second count. *Hooton v. State*, 53 App. 6, 108 S. W. 651; *Flynn v. State*, 47 App. 26, 83 S. W. 206.

Where accused shot and killed two cows belonging to the same owner as part of one transaction, the state, after securing a conviction for taking one of the

cows, could not claim a conviction for taking the other. *La Flour v. State*, 59 App. 645, 129 S. W. 351.

45. — **Theft and receiving stolen property.**—Where the indictment charges in separate counts theft and receiving stolen property, a conviction for receiving stolen property is in effect an acquittal of larceny. *Davis v. State*, 61 App. 611, 136 S. W. 45.

46. — **Theft and conspiracy to commit.**—Theft and conspiracy to commit theft. *Bailey v. State*, 42 App. 289, 59 S. W. 900, following *Whitford v. State*, 24 App. 489, 6 S. W. 537, 5 Am. St. Rep. 896.

The conspiracy to steal is complete at the time it is entered into, without any reference to subsequent theft, and a conviction of the theft is not a bar to prosecution for the conspiracy. *Bailey v. State*, 42 App. 289, 59 S. W. 901.

47. — **Theft and driving stock from range.**—It is no objection to a plea of former jeopardy interposed in a prosecution under P. C. art. 1356 for driving stock from accustomed range, that the indictment under which the former trial was had charged the theft of the stock, as under said indictment the defendant might have been convicted of this offense. *McElmurray v. State*, 21 App. 691, 2 S. W. 892, but the holding of this case and of *Counts v. State*, 37 Tex. 593; *Campbell v. State*, 42 Tex. 591; *Marshall v. State*, 4 App. 549; *Powell v. State*, 7 App. 467; *Turner v. State*, 7 App. 596; *Foster v. State*, 21 App. 80, 17 S. W. 548; *Smith v. State*, 21 App. 133, 17 S. W. 558, and *Guest v. State*, 24 App. 530, 7 S. W. 242, that an indictment for theft of stock includes a charge of driving from the range, was overruled by *Long v. State*, 39 App. 461, 46 S. W. 821, 73 Am. St. Rep. 921.

48. — **Defacing mark and theft.**—Where one indictment is for defacing mark and another is for theft of same animal, the latter includes the former and trial of latter should have been postponed until jury returned verdict in former, because such verdict would have been a bar to indictment for theft. *Powell v. State*, 42 App. 12, 57 S. W. 95.

49. — **Illegal marking of cattle.**—Where several animals are marked or branded at the same time and place, the transaction is the same, although the animals may belong to different owners, and in such case a conviction for illegally marking or branding one of the animals will bar a prosecution for the same offense with reference to the others. *Adams v. State*, 16 App. 162; *House v. State*, 15 App. 522.

50. — **Killing animals.**—An acquittal of "wilfully and wantonly killing" an animal, is not a bar to "wilfully killing" the same animal "with intent to injure the owner." *Irvin v. State*, 7 App. 78.

Where accused shot and killed two cows belonging to the same owner as part of one transaction, the state, after securing a conviction for taking one of the cows, could not claim a conviction for taking the other. *La Flour v. State*, 59 App. 645, 129 S. W. 351.

51. — **Violation of liquor laws.**—An acquittal for sale of intoxicating liquor made on 24 Feb. is no bar to a prosecution for a sale made on August 10, unless the evidence shows that the two charges refer to the same act. *Fehr v. State*, 36 App. 93, 35 S. W. 381, 650.

A conviction for violation of the local option law will not be disturbed where the evidence does not show a previous conviction for the sale involved in the second prosecution. *Bruce v. State*, 39 App. 26, 44 S. W. 852.

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 App. 154, 90 S. W. 1019.

Conviction under art. 604 of the Pen. 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 App. 523, 102 S. W. 1142.

Where, on a trial for unlawfully selling intoxicating liquor on or about a specified date, the state proved three sales by accused to the same person, and the court authorized a conviction on any sale proved, accused's plea of former conviction on a subsequent trial on another information charging the same sales, and where the evidence was the same, must be sustained, though he committed a separate offense each time he made a sale. *Piper v. State*, 53 App. 550, 110 S. W. 899; *Alexander v. State*, 53 App. 553, 111 S. W. 918; *Fears v. State* (Cr. App.) 178 S. W. 519.

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 App. 565, 110 S. W. 908.

A plea of former acquittal in a prosecution for selling intoxicating liquor, alleging that the offense for which accused was being prosecuted was the same offense as that for which he had been acquitted, but positively averring only that the affidavits and informations in the two causes were identical in every particular, and averring the conclusion that by the former verdict accused had been acquitted of the same charge, is insufficient, since the state, having authority to prosecute for any period of time within the statute of limitations, there could have been many complaints filed against accused for sale to the same man, representing different transactions, and all averring the same date. *Jerue v. State*, 57 App. 213, 123 S. W. 414.

Evidence held to show that the informations in two prosecutions for selling intoxicating liquor, in violation of the local option law were for different and distinct offenses, not growing out of the same transaction. *Jerue v. State*, 57 App. 213, 123 S. W. 414.

On trial for keeping a disorderly house, described as a certain house where liquors were sold without a license, conviction for selling whisky on the same dates could not support a plea of former conviction. *Todd v. State*, 60 App. 199, 131 S. W. 696.

One committing an act which he is enjoined from committing, and which is a violation of a penal law, may be punished for contempt for violating the injunction, and punished for a violation of the criminal law, and the act of 1907, authorizing injunctions restraining the sale of liquor within counties wherein the sale of liquor has been prohibited, is not invalid as imposing an additional punishment for a violation of the local option law. *Ex parte Roper*, 61 App. 68, 134 S. W. 334.

One who has been convicted of selling whisky in violation of the local option law and of an injunction restraining him from selling intoxicating liquors may not, when charged with contempt for violating the injunction, plead his conviction in bar of the contempt proceedings. *Ex parte Looper*, 61 App. 129, 134 S. W. 345, Ann. Cas. 1913B, 32.

On a trial for pursuing the occupation of selling intoxicating liquors in a prohibition county, evidence of sales of liquor, for which accused had already been convicted, was admissible, since the offense of making a single sale and that of pursuing the business of selling are distinct; and hence this did not constitute a second prosecution for the same offense. *Robinson v. State* (Cr. App.) 147 S. W. 245.

A conviction in the county court for illegally selling intoxicants in a dry county would not bar a subsequent prosecution and conviction for unlawfully pursuing the occupation of selling intoxicants in prohibition territory. *Wilson v. State* (Cr. App.) 154 S. W. 571.

A plea of former jeopardy in a prosecution for carrying on the business of selling intoxicating liquor, contrary to law, based upon a former conviction for keeping a disorderly house in which the defendant sold liquor without a license, is bad where the time of the offense charged in the second indictment was different, and the evidence was confined to transactions subsequent to the former conviction. *Creech v. State*, 70 App. 229, 158 S. W. 277.

In a prosecution, under Pen. Code, art. 593, for giving or delivering intoxicating liquors to a minor without the written consent of his parents or guardian, an acquittal on the charge of making a sale to such minor was not sufficient as a plea of former jeopardy, since the offenses were entirely separate and distinct, requiring different proof to convict. *Dickerson v. State*, 72 App. 393, 162 S. W. 871.

A former trial for making particular sales of intoxicants in prohibition territory was not former jeopardy, so as to bar a subsequent prosecution for pursuing the business or occupation of selling intoxicants. *Hightower v. State* (Cr. App.) 165 S. W. 184.

52. — **Perjury.**—Acquittal of an offense is bar to a trial and conviction for perjury committed on the trial of such offense. *Miles v. State* (Cr. App.) 165 S. W. 567; *Murff v. State* (Cr. App.) 172 S. W. 238.

53. — **Unlawful practice of medicine.**—See Pen. Code, art. 756.

54. **Waiver of defense.**—To the defendant's plea of former jeopardy the state interposed a demurrer, but the record fails to show in any manner that either the plea or the demurrer was acted upon by the court. Held, that under our practice, the plea of former jeopardy must be treated as waived. *Johnson v. State*, 26 App. 631, 10 S. W. 235.

55. **Plea.**—Habeas corpus cannot be resorted to to secure the discharge of a prisoner on a plea of former jeopardy. *Darrah v. Westerlage*, 44 Tex. 388; *Ex parte Schwartz*, 2 App. 74; *Griffin v. State*, 5 App. 457; *Ex parte Crofford*, 39 App. 547, 47 S. W. 533.

The plea is not available on habeas corpus. *Pitner v. State*, 44 Tex. 578, and cases cited.

It is not necessary in a plea of former jeopardy, where the plea refers to same case as that in which this is made, to set up the indictment, verdict and judgment in full, as the court must take judicial knowledge of the orders and decrees entered in its own court; especially is this true when the orders and decrees are made in the case then on trial. *Woodward v. State*, 42 App. 188, 58 S. W. 138; *Foster v. State*, 25 App. 543, 8 S. W. 664.

Defense of former jeopardy is not available under plea of not guilty but must be specially pleaded. *Swancoat v. State*, 4 App. 105.

Former jeopardy is a constitutional and not a statutory defense, and although the plea of former jeopardy is not one known to the statutory law of this state, and has no place assigned it in the regular order of pleadings, it is, nevertheless, a plea available to the accused, and may be interposed even after the jury has been impaneled and the plea of not guilty entered. Nor is it essential to the validity of such plea that a record of the proceedings of the former trial was perpetuated by a bill of exceptions. *Pizano v. State*, 20 App. 139, 54 Am. Rep. 511. See, also, as to the right to plead former jeopardy, *Blanford v. State*, 10 App. 627. For pleas of former jeopardy held to be good, see *Powell v. State*, 17 App. 345; *Brink v. State*, 18 App. 344, 51 Am. Rep. 317; *Pizano v. State*, 20 App. 139, 54 Am. Rep. 511; *McElmurray v. State*, 21 App. 691, 2 S. W. 892; *Branch v. State*, 20 App. 599; *Alexander v. State*, 21 App. 406, 17 S. W. 139, 57 Am. Rep. 617.

A plea of former jeopardy based on the dismissal of the former prosecution over defendant's objection should contain the motion to dismiss and the judgment thereon. *Jackson v. State*, 37 App. 128, 38 S. W. 1002.

56. **Burden of proof.**—On the pleas of former jeopardy or former conviction or acquittal, the burden of proof is on the accused. *O'Connor v. State*, 28 App. 288, 13 S. W. 14.

Art. 10. [10] Trial by jury shall remain inviolate.—The right of trial by jury shall remain inviolate. [Bill of Rights, § 15; O. C. 10.]

See post, art. 644 et seq.

See, also, Const. U. S., Amendment 6.

Cited, *Jones v. State* (Cr. App.) 153 S. W. 897; *Ethridge v. State* (Cr. App.) 172 S. W. 786; *Galan v. State* (Cr. App.) 177 S. W. 124.

Explanatory.—In addition to the above, section 15, art. 1, of the present constitution, provides that "The legislature shall pass such laws as may be needed to regulate the same, and to maintain its purity and efficiency." (Vernon's Sayles' Civ. St. 1914, vol. 1, p. xxiv.)

In general.—*English v. State*, 28 App. 500, 13 S. W. 775; *McCampbell v. State*, 37 App. 607, 40 S. W. 496.

The preceding article applies to a trial in a forfeited bail case after judgment nisi has been rendered, and in such case the rules applicable in civil cases apply. In criminal cases, save such as are specially excepted, the only mode of trying an issue of fact is by a jury. *Short v. State*, 16 App. 44.

Art. 608, subd. 6, post, does not, by giving the court discretion to deny a continuance on account of the absence of witnesses, deprive accused of his right to a trial by jury. *Lillard v. State*, 17 App. 114.

The statute providing that the payment of the United States special tax as a seller of intoxicating liquors shall be prima facie evidence that the person paying the tax is engaged in selling such liquors does not infringe the constitutional right to a trial by jury. *Floek v. State*, 34 App. 314, 30 S. W. 794.

Former constitution.—Under the Constitution of 1845 (art. 4, sec. 19) it was not competent for the legislature to authorize summary trials before mayors, etc., without a jury, for offenses involving fine and imprisonment. *Burns v. Lagrange*, 17 Tex. 415; *Smith v. San Antonio*, 17 Tex. 643.

Number of jurors.—See post, arts. 645, 764-766.

Bullard v. State, 38 Tex. 504, 19 Am. Rep. 30; *Lott v. State*, 18 App. 627, and cases cited; *Jester v. State*, 26 App. 369, 9 S. W. 616; *Jones v. State*, 52 App. 303, 106 S. W. 347, 124 Am. St. Rep. 1097.

Misdemeanor cases. *Stell v. State*, 14 App. 59; *Marks v. State*, 10 App. 334.

Proceedings against delinquent children.—The act providing for proceedings against infants as delinquent children, in place of the ordinary common-law criminal procedure, is not unconstitutional as depriving the infants of trial by jury; the proceeding not being criminal in its nature. *Ex parte Bartee* (Cr. App.) 174 S. W. 1051.

Injunction against sale of liquors.—The act of 1907, authorizing injunctions restraining persons from selling intoxicating liquors within any county wherein the sale of intoxicating liquor has been prohibited by law, is not invalid as denying the right of trial by jury, because the matter inquired into in proceedings for contempt for violating an injunction relates merely to a violation of the injunction, and not to a violation of the local option law. *Ex parte Roper*, 61 App. 68, 134 S. W. 334.

Punishment.—This provision does not preclude the Legislature from providing that the jury shall only pass on the question of guilt or innocence and that the punishment shall be assessed by the court. *Ex parte Marshall*, 72 App. 83, 161 S. W. 112.

Waiver.—See post, arts. 22, 582, 982.

Misdemeanors. *Raspberry v. State*, 1 App. 664.

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 Pen. Code, arts. 1151 to 1199 inclusive, and notes.

Explanatory.—The present constitution is identical with the above provision except that it employs the word "responsible" instead of the word "liable" following the word "being." (Vernon's Sayles' Civ. St. 1914, vol. 1, p. xxiv.)

Liberty of speech and of the press.—Extent to which the freedom of the press may be restrained to protect private character from falsehood and slander, and prevent the publication of testimony, libelous in its nature, required by the policy of the law to be kept absolutely secret. *Belo v. Wren*, 63 Tex. 686; *Express Co. v. Copeland*, 64 Tex. 354.

The law defining and punishing libelous publications does not infringe the rights secured by this article. *Morton v. State*, 3 App. 510.

A city ordinance declaring a named newspaper to be a public nuisance and forbidding its sale in the city is contrary to this article and void. *Ex parte Neill*, 32 App. 275, 22 S. W. 923, 40 Am. St. Rep. 776.

The "liberty to speak" or write includes the corresponding right to be silent, and this right is infringed by the provisions of the Blacklisting Law for compelling a corporation to give a discharged employé a statement of the cause of discharge. *St. Louis Southwestern R. Co. of Texas v. Griffin* (Sup.) 171 S. W. 703.

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.

Religious belief.—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 App. 284, 39 S. W. 576.

Oath.—A witness must testify under oath, and counsel for defendant can not waive the sanction of an oath. *Bell v. State*, 2 App. 216, 28 Am. Rep. 429. A witness may be sworn upon the cross, or in any other manner most binding upon his conscience. *Ake v. State*, 6 App. 398, 32 Am. Rep. 586; *Gonzales v. State*, 31 Tex. 495; Const., art. 1, sec. 5. A witness, to be competent, must understand the obligation of an oath. Art. 788, subd. 2.

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.]

See Pen. Code, arts. 61, 62, and notes.

Explanatory.—The present constitution reads as follows: "No conviction shall work corruption of blood, or forfeiture of estate; and the estates of those who destroy their own lives shall descend or vest as in case of natural death." [Const. art. 1, § 21 (Vernon's Sayles' Civ. St. 1914, vol. 1, p. xxv.)]

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.]

Pen. Code, arts. 92-95; post, arts. 803-804.

Explanatory.—The full text of sec. 22 of the Bill of Rights in the present constitution is as follows: "Treason against the state shall consist only in levying war against it, or adhering to its enemies, giving them aid and comfort; and 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." [Vernon's Sayles' Civ. St. 1914, vol. 1, p. xxv.]

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.]

See Pen. 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.

Art. 626, post, authorizing the court to order a change of venue on his own motion is constitutional. *Cox v. State*, 8 App. 254, 34 Am. Rep. 746.

Art. 19. [19] Conservators of the peace; 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.]

Commencement and conclusion of indictments and informations, see post, arts. 451, 478.

Explanatory.—The provision referred to, of the present constitution, reads as follows: "All judges of courts of this state, by virtue of their office, shall 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 authority of the State of Texas, and shall conclude: Against the peace and dignity of the state." [Secs. 11 and 12, art. 5, adopted election August 11, 1891; proclamation September 22, 1891. (Vernon's Sayles' Civ. St. 1914, vol. 1, p. xlii.)]

Writs and process.—*Brown v. State*, 28 App. 65, 11 S. W. 1022, citing *Werbiski v. State*, 20 App. 131.

All writs and process, including those of city or municipal courts, must conform to this article. *Leach v. State*, 36 App. 248, 36 S. W. 471; *Ex parte Fagg*, 38 App. 573, 44 S. W. 294, 40 L. R. A. 212.

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

Art. 20. [20] 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.]

See Const. art. 1, § 14.

Burglary and felony committed after entry, see Pen. Code, 1313, 1317, 1318.

Conviction of lower as acquittal of higher grade of offense, see post, art. 782.

Forgery and passing or possession with intent to pass forged instrument, see Pen. Code, art. 946.

Former jeopardy in general, see ante, art. 9.

Higher grade of offense not within jurisdiction of court, see post, art. 601.

Pleas, see post, arts. 572-574.

Cited, *Marshall v. State* (Cr. App.) 166 S. W. 722, L. R. A. 1915A, 526.

Former law.—Old article 20 was as follows: "By the provisions of the constitution no person shall be exempt from second trial for the same offense who has been convicted upon an illegal indictment or information, and the judgment thereupon arrested; nor where a new trial has been granted to the defendant, nor where a jury has been discharged without rendering a verdict, nor for any cause other than that of a legal conviction."

This article was held unconstitutional in *Powell v. State*, 17 App. 345.

Jurisdiction.—Jeopardy will not attach on a trial before a court having no jurisdiction. *McLain v. State*, 31 App. 558, 21 S. W. 365; *Achterberg v. State*, 8 App. 463; *Allen v. State*, 7 App. 298.

A voluntary appearance before a magistrate and conviction of the lower grade of assault is no bar to a subsequent prosecution for aggravated assault. *Wariner v. State*, 3 App. 104, 30 Am. Rep. 124 (citing *Norton v. State*, 14 Tex. 387, and *Wilson v. State*, 16 Tex. 247); *Watson v. State*, 5 App. 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 App. 558, 21 S. W. 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 App. 321, 42 S. W. 295.

Art. 21. [21] 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.]

Verdicts, see post, art. 763 et seq.

Judgment of not guilty where the trial is by the judge without a jury.—*Willson's Cr. Forms*, 1004.

Art. 22. [22] 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.]

Examination, see post, art. 350.

Cited, *Jones v. State* (Cr. App.) 153 S. W. 897.

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| 1. Authority of attorney in general. | 7. Evidence. |
| 2. Indictment or information. | 8. Presence of accused. |
| 3. Copy of indictment or list of jurors. | 9. Appeal. |
| 4. Right to trial by jury. | 10. Presumption. |
| 5. Objections to jurors or jury. | 11. Former jeopardy. |
| 6. Separation of jury. | |

1. **Authority of attorney in general.**—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 App. 216, 28 Am. Rep. 429; *McDuff v. State*, 4 App. 58.

2. **Indictment or information.**—One prosecuted in county court for a misdemeanor cannot waive the filing of an information. *Ethridge v. State* (Cr. App.) 172 S. W. 786.

One prosecuted for a misdemeanor in the county court cannot waive failure to file an information, that being a jurisdictional matter. *Ethridge v. State* (Cr. App.) 172 S. W. 784.

There can be no material alteration of indictment by agreement between the prosecuting attorney and counsel for the defendant. *Calvin v. State*, 25 Tex. 789.

3. **Copy of indictment or list of jurors.**—The copy of the jury list may be waived. *Swofford v. State*, 3 App. 76; *Houillion v. State*, 3 App. 537.

Attorney cannot waive right to copy of indictment in felony cases. *McDuff v. State*, 4 App. 58.

It is too late after verdict to complain that defendant has not been served with copy of indictment or special venire. *Roberts v. State*, 5 App. 141; *Bonner v. State*, 29 App. 223, 15 S. W. 821.

Where a defendant charged with misdemeanor was compelled to file her written pleadings before the expiration of two days after the service of the information over her protest and demand for the full statutory time, there was no waiver of her right to the time. *Reed v. State*, 31 App. 35, 19 S. W. 678.

4. **Right to trial by jury.**—Post, art. 582.

Before justice, see article 982, post.

In a misdemeanor case defendant may waive a trial by jury or by a legal jury. *Rasberry v. State*, 1 App. 664; *Johnson v. State*, 39 App. 625, 48 S. W. 70; *Ex parte Jones*, 46 App. 433, 80 S. W. 995; *Otto v. State* (Cr. App.) 87 S. W. 698; *Mackey v. State* (Cr. App.) 151 S. W. 802; *Schulman v. State* (Cr. App.) 173 S. W. 1195.

But the record on appeal must show that a legal jury was waived where it shows a jury trial by less than the legal number. *Stell v. State*, 14 App. 59.

A jury trial cannot be waived in a criminal case. *Davis v. State*, 64 App. 8, 141 S. W. 264.

Where defendant in a misdemeanor case waives a jury, the findings of fact by the trial court are as conclusive on the Court of Criminal Appeals as the verdict of a jury. *Salinas v. State* (Cr. App.) 142 S. W. 908.

5. **Objections to jurors or jury.**—Acceptance of jury by defendant is waiver of right of objection to their organization. *McMahon v. State*, 17 App. 321; *Buie v. State*, 1 App. 452; *Caldwell v. State*, 12 App. 302; *Lester v. State*, 2 App. 432; *Ray v. State*, 4 App. 450; *Yanez v. State*, 6 App. 429, 32 Am. Rep. 591; *Castanedo v. State*, 7 App. 582.

Waiver by counsel of the mode of impaneling a jury held binding. *Grant v. State*, 3 App. 1.

After a juror has been sworn and impaneled in a felony case, the court has no authority to excuse or discharge him without the defendant's express personal consent. *Sterling v. State*, 15 App. 249; *Hill v. State*, 10 App. 618.

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 App. 303, 83 S. W. 806.

Where in a murder case after trial had proceeded for a time and one juror was excused and verdict was rendered by eleven jurors, the conviction was illegal. *Jones v. State*, 52 App. 303, 106 S. W. 347, 124 Am. St. Rep. 1097.

Where facts, tending to show that one of the jurors had formed and expressed an opinion prior to the time he was accepted on the jury, were known to defendant's counsel before his acceptance, it was too late to object to such juror on motion for a new trial. *Powers v. State* (Cr. App.) 154 S. W. 1020.

An objection that the officer instructed by the court to summon talesmen was not sworn as required by statute, not made was too late. *James v. State* (Cr. App.) 167 S. W. 727.

6. **Separation of jury.**—A defendant cannot agree to separation of the jury in a felony case, without the jury being in charge of an officer. *Gant v. State*, 55 App. 284, 116 S. W. 803; *Brown v. State*, 38 Tex. 482; *Early v. State*, 1 App. 248, 28 Am. Rep. 409; *Porter v. State*, 1 App. 394; *Grissom v. State*, 4 App. 374; *Defriend v. State*, 22 App. 570, 2 S. W. 641; *English v. State*, 28 App. 500, 12 S. W. 775; *McC Campbell v. State*, 37 App. 607, 40 S. W. 496.

7. **Evidence.**—Attorney cannot agree to accept written statement of an adverse witness in lieu of his personal testimony, nor waive the sanction of an oath. *Bell v. State*, 2 App. 215, 28 Am. Rep. 429.

But such agreement is valid if made by accused. *Allen v. State*, 16 App. 237.

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

Defendant could consent to his counsel's testifying as to statements by him to counsel in the presence of a third person who was not present at trial to testify as to such statements. *Walker v. State*, 19 App. 176.

Defendant may waive the provisions of art. 810, post, relating to use of confessions made while under arrest. *Quintana v. State*, 29 App. 401, 16 S. W. 258, 25 Am. St. Rep. 730.

8. **Presence of accused.**—Only the defendant can waive his right of personal presence at any stage of the trial. *Shipp v. State*, 11 App. 46; *Granger v. State*, Id. 454; *Mapes v. State*, 13 App. 85; *Smith v. State*, 61 App. 328, 135 S. W. 154.

Counsel's waiver of right of defendant to be present on motion for new trial will be presumed to be authorized. *Escareno v. State*, 16 App. 85.

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

9. **Appeal.**—The submission of an appeal on agreement in writing, signed by the counsel of each party, expressly waiving all but certain questions is binding. *Downes v. State*, 22 App. 393, 3 S. W. 242.

10. **Presumption.**—Service of jury list. *Houillion v. State*, 3 App. 537; *Swoford v. State*, 3 App. 76.

When the records fails to show that the challenge to the array was called to the attention of the trial court it will be presumed that it was waived. *Castanedo v. State*, 7 App. 582.

Authority of counsel to waive presence of accused. *Escareno v. State*, 16 App. 85. Irregularities in organization of jury not excepted to. *McMahon v. State*, 17 App. 321.

11. **Former jeopardy.**—See ante, art. 9.

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

See ante, art. 4.

Adams v. State, 19 App. 1; *Grimmett v. State*, 22 App. 36, 2 S. W. 631, 58 Am. Rep. 630; *Kugadt v. State*, 38 App. 681, 44 S. W. 939.

Art. 24. [24] 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 Const. art. 1, § 10; *Vernon's Sayles' Civ. St. 1914*, vol. 1, p. xxiv; ante, art. 4.

As to depositions, see, post, arts. 817-834.

Burrell v. State, 18 Tex. 713; *Rogers v. State*, 11 App. 608; *Evans v. State*, 12 App. 370; *May v. State*, 15 App. 430; *Kerry v. State*, 17 App. 178, 50 Am. Rep. 122; *Taylor v. State*, 38 App. 552, 43 S. W. 1019; *Chester v. State*, 23 App. 577, 5 S. W. 125; *McWilliams v. State*, 32 App. 269, 22 S. W. 970; *Bell v. State*, 32 App. 436, 24 S. W. 418; *Dowd v. State*, 52 App. 563, 108 S. W. 389; *Nixon v. State*, 53 App. 325, 109 S. W. 931; *Hobbs v. State*, 53 App. 71, 112 S. W. 308 (following *Porch v. State*, 51 App. 7, 99 S. W. 1122, which overruled *Cline v. State*, 36 App. 329, 36 S. W. 1099, 37 S. W. 722, 61 Am. St. Rep. 850); *Childers v. State*, 30 App. 160, 16 S. W. 903, 28 Am. St. Rep. 899; *Brown v. State*, 55 App. 572, 118 S. W. 139; *Zunago v. State*, 63 App. 58, 138 S. W. 713, Ann. Cas. 1913D, 665; *Kemper v. State*, 63 App. 1, 138 S. W. 1025; *Robertson v. State*, 63 App. 216, 142 S. W. 533, Ann. Cas. 1913C, 440; *Betts v. State* (Cr. App.) 144 S. W. 677; *Mitchell v. State* (Cr. App.) 144 S. W. 1006; *Smith v. State* (Cr. App.) 148 S. W. 732; *Grant v. State* (Cr. App.) 148 S. W. 760, 42 L. R. A. (N. S.) 428; *Lane v. State* (Cr. App.) 164 S. W. 378; *Hays v. State* (Cr. App.) 164 S. W. 841.

Art. 25. [25] 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.]

Cited, *Slack v. State*, 61 App. 372, 136 S. W. 1073, Ann. Cas. 1913B, 112; *Miles v. State*, 62 App. 530, 138 S. W. 398; *Ex parte Spiller*, 63 App. 93, 138 S. W. 1013; *Jaynes v. State* (Cr. App.) 150 S. W. 441; *Bradberry v. State* (Cr. App.) 152 S. W. 169; *Sanders v. State*, 70 App. 532, 158 S. W. 291; *Essery v. State*, 72 App. 414, 163 S. W. 17; *Galan v. State* (Cr. App.) 177 S. W. 124.

Rules of construction.—See Pen. Code, arts. 3-20, and notes; *Ex parte Nitsche* (Cr. App.) 170 S. W. 1101.

This article construed with *Vernon's Sayles' Civ. St. 1914*, art. 5502, subd. 6, Pen. Code, arts. 9 and 10, abrogate the common-law rule that penal statutes are to be construed strictly, and require the court to construe all penal enactments liberally. *Oliver v. State* (Cr. App.) 144 S. W. 604; *Bradfield v. State* (Cr. App.) 166 S. W. 734.

At common law, highly penal statutes were construed with great strictness. *Estes v. State*, 10 Tex. 300.

This Code lays down its own rules of interpretation, and courts must be governed by those rules, so far as applicable. *Speer v. State*, 2 App. 246. Such construction should be given to the different articles of the Code as accords with its general objects and purpose, and which will give full effect to all its provisions, general as well as special, so that they may stand and operate in harmony, though a special provision may thereby be partially controlled, where otherwise a general one could have no effect. *Cockrum v. State*, 24 Tex. 394. See, also, *Ex parte Porter*, 16 App. 321; *Bautsch v. City of Galveston*, 27 App. 342, 11 S. W. 414; *Childers v. State*, 30 App. 160, 191, 16 S. W. 903, 28 Am. St. Rep. 899.

Ex post facto laws.—See notes to Pen. Code, art. 12.

Constitutional law.—See Pen. Code, art. 4, and notes.

Enactment of statutes.—See notes to Pen. Code, art. 3.

Municipal ordinances.—See notes to Pen. Code, art. 3.

Art. 26. [26] 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.]

Pen. Code, art. 9 and notes.

Rules of evidence, see post, arts. 783, 784.

Cited, *Robbins v. State* (Cr. App.) 166 S. W. 528.

Common-law rules.—The common law, in its application to juries and evidence, is followed except when it has been changed by the Code. *Matthews v. State*, 32 Tex. 117.

Computation of time for serving copy of indictment. *Speer v. State*, 2 App. 246. *Venue. Chivarrio v. State*, 15 App. 330.

The common law rule that an indictment for perjury must allege correctly the day on which the perjury was committed, and that a variance between the time alleged and that proved is fatal, has been changed by statute. *Lucas v. State*, 27 App. 322, 11 S. W. 443.

Discharge of jury in absence of accused. *Rudder v. State*, 29 App. 262, 15 S. W. 717.

Arrest of escaped convict without warrant. *Ex parte Sherwood*, 29 App. 334, 15 S. W. 812.

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*, 26 App. 320, 36 S. W. 1099, 37 S. W. 722, 61 Am. St. Rep. 850; *Loakman v. State*, 32 App. 563, 25 S. W. 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 App. 160, 16 S. W. 903, 28 Am. St. Rep. 899, are overruled by *Hobbs v. State*, 53 App. 71, 112 S. W. 308, following *Porch v. State*, 51 App. 7, 99 S. W. 1122.

New trial. *Hicks v. State* (Cr. App.) 171 S. W. 755.

See, also, *McKenzie v. State*, 32 App. 568, 25 S. W. 426, 40 Am. St. Rep. 795.

Art. 26a. Acts by or under military authority exempt from punishment.—No action or proceeding shall be prosecuted or maintained against a member of the military forces of this state, or officer or person acting under its authority or reviewing its proceedings, on account of the approval or imposition or execution of any sentence, or the imposition or collection of any fine or penalty, or the execution of any warrant, writ, execution, process, or mandate of a military court. [Act 1905, p. 204, ch. 104, § 132.]

Explanatory.—The above provision was omitted from the revised Pen. Code, and as it affects the enforcement of the criminal laws of the state, and in view of the decision in *Berry v. State*, it is inserted in this compilation.

Killing citizen in time of peace.—See notes under art. 5860, *Vernon's Sayles' Civ. St.* 1914.

Since in time of peace a militiaman has only the rights of a peace officer, if in the performance of his duty his life becomes in danger, or it appears to him under all the facts and circumstances in evidence that some person is about to assault him with the intention of killing him, or doing him some bodily injury, he may kill such other in self-defense, but he has no other authority to take human life. *Manley v. State*, 62 App. 392, 137 S. W. 1137.

In a prosecution of a militiaman for killing a citizen while doing guard duty in time of peace, evidence that the state militia was a part of the United States soldiery, and concerning the instructions given to the soldiers as a body, and to defendant individually by his superior officers, was immaterial. *Id.*

That a militiaman doing guard duty in time of peace was directed by his superior officer to keep the people out of a certain inclosure at all hazards did not authorize him to kill a citizen attempting to break into the inclosure after being warned, but only authorized him to use such means as were necessary to perform his order without taking life or committing an assault. *Id.*

In a prosecution of a militiaman for killing a citizen while doing guard duty in a city during a presidential visit at a point where a part of the city street had been closed to travel, accused having had no control over the closing of the street, and having no authority to question his orders with reference thereto, the court should have charged that the inclosure wired off and guarded was not to be taken as a circumstance against accused, nor the fact that he was there as a soldier and had a gun with a bayonet thereon, but that the jury should assume that he was properly at the place in question with the right to carry the gun and bayonet. *Id.*

CHAPTER TWO

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

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1. THE ATTORNEY GENERAL

Article 27. [27] 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. [28] 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. [29] 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. [30] 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.]

Disqualification as judge, see post, art. 617.
McDonough v. State, 19 Tex. 293.

Rule of court.—A rule of court makes it the duty of district and county attorneys to see that the judgments in criminal cases are properly entered by the clerks, and when practicable they should be present when the minutes are read. Rule 119, for district court (142 S. W. xxvi).

Disqualification of judge.—Const. art. 5, § 11, providing that no judge shall sit in any case where he shall have been of counsel, when construed with this article and art. 40, post, does not disqualify one who was district attorney and judge-elect at the time the offense was committed, but who did not appear against the accused, from conducting the trial after his term as judge began. Utzman v. State, 32 App. 426, 24 S. W. 412.

Art. 31. [31] 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. [32] 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.

Convict bonds.—A county attorney has no authority to accept a county convict's bond, and his acceptance does not validate the bond. Ex parte Price, 37 App. 275, 39 S. W. 369.

Mandamus.—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 App. 369, 112 S. W. 1070.

Contempt.—A statement by the county attorney in the presence of the court that, inasmuch as the court had permitted a private citizen to appear and defend in a criminal case, he would decline to represent the state and dissolve his con-

nection with the case did not subject him to be fined for contempt, where the court did not order him to proceed in the case but adjourned court and subsequently appointed another attorney to represent the state. *Ex parte Coffee*, 72 App. 209, 161 S. W. 975.

Art. 33. [33] 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.]

Form of complaint.—Willson's Cr. Forms, 747.

Art. 34. [34] 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.]

See post, arts. 35, 36, 269, 479, 972.

Cited, *Barnes v. State* (Cr. App.) 152 S. W. 1043; *Ex parte Nitsche* (Cr. App.) 170 S. W. 1101.

Authority to take complaint.—Where deputy county attorney has been appointed and all requirements of law complied with, except obtaining approval of commissioners' court, he is a de facto officer and can take affidavits. *Dane v. State*, 36 App. 86, 35 S. W. 661.

Complaint may be made before assistant county attorney, presumption being that he was regularly appointed. *Kelly v. State*, 36 App. 481, 38 S. W. 39; *Moore v. State*, 36 App. 574, 38 S. W. 209; *Copeland v. State*, 36 App. 575, 38 S. W. 210.

A "deputy county attorney" is an "assistant county attorney." *Wilkins v. State*, 33 App. 320, 26 S. W. 409.

A complaint sworn to before the county attorney of one county will not support information filed by county attorney of another county. *Thomas v. State*, 37 App. 142, 38 S. W. 1011.

Affidavit to complaint charging misdemeanor can be taken by county attorney. *Rambo v. State*, 43 App. 271, 64 S. W. 1039.

A city attorney has no authority to administer an oath, except to complaints filed in a corporation court. *Johnson v. State*, 47 App. 580, 85 S. W. 274.

This article does not authorize the county attorney to swear a witness in an investigation under art. 976, post. *Williams v. State*, 50 App. 269, 96 S. W. 47, overruling *Bailey v. State*, 41 App. 158, 53 S. W. 117.

Persons who may make complaint.—*Nixon v. Armstrong*, 38 Tex. 296; *Daniels v. State*, 2 App. 353; *Perez v. State*, 10 App. 327; *Thomas v. State*, 14 App. 70; *Wilson v. State*, 27 App. 47, 10 S. W. 749, 11 Am. St. Rep. 180; *Dodson v. State*, 35 App. 571, 34 S. W. 754; *Jones v. State*, 58 App. 313, 125 S. W. 914.

Requisites of complaint.—Willson's Cr. Forms, 747.

Brown v. State, 11 App. 451; *Arrington v. State*, 13 App. 551; *Pittman v. State*, 14 App. 576; *Bell v. State*, 18 App. 53, 51 Am. Rep. 293; *Jefferson v. State*, 24 App. 535, 7 S. W. 244; *Johnson v. State*, 31 App. 464, 20 S. W. 980; *Ex parte Jackson* (Cr. App.) 96 S. W. 924; *Cardenas v. State*, 58 App. 109, 124 S. W. 953; *Gentry v. State*, 62 App. 497, 137 S. W. 696; *Sandoloski v. State* (Cr. App.) 143 S. W. 151.

— **Time and place of offense.**—*Smith v. State*, 3 App. 549; *Lanham v. State*, 9 App. 232; *Hefner v. State*, 16 App. 573; *Williams v. State*, 17 App. 521; *Huff v. State*, 23 App. 291, 4 S. W. 890, and cases cited; *Jennings v. State*, 30 App. 428, 18 S. W. 90; *Womack v. State*, 31 App. 41, 19 S. W. 605; *Petty v. State*, 60 App. 64, 131 S. W. 215; *Martin v. State*, 72 App. 454, 162 S. W. 1145.

— **Designation and description of accused.**—*Hall v. State*, 32 App. 594, 25 S. W. 292; *Beaumont v. Dallas*, 34 App. 68, 29 S. W. 157; *Gaines v. State*, 46 App. 212, 78 S. W. 1076; *Mistrot v. State*, 72 App. 408, 162 S. W. 833.

— **Signature.**—*Upton v. State*, 33 App. 231, 26 S. W. 197; *Malz v. State*, 36 App. 447, 34 S. W. 267, 37 S. W. 748; *Taylor v. State*, 44 App. 437, 72 S. W. 181; *Lewis v. State*, 50 App. 331, 97 S. W. 481; *Singh v. State* (Cr. App.) 146 S. W. 891.

— **Verification.**—*Morris v. State*, 2 App. 503; *Dishongh v. State*, 4 App. 158; *Lanham v. State*, 9 App. 232; *Robertson v. State*, 25 App. 529, 8 S. W. 659; *Nel- man v. State*, 29 App. 360, 16 S. W. 253; *Jennings v. State*, 30 App. 423, 18 S. W. 90; *Montgomery v. State*, 60 App. 303, 131 S. W. 1087; *Sproles v. State* (Cr. App.) 143 S. W. 622.

Information and belief.—*Green v. State*, 62 App. 50, 136 S. W. 467; *Brown v. State*, 11 App. 451; *Clark v. State*, 23 App. 260, 5 S. W. 115; *Hall v. State*, 32 App. 594, 25 S. W. 292; *Anderson v. State*, 34 App. 96, 29 S. W. 384; *Dodson v. State*, 35 App. 571, 34 S. W. 754; *Fricks v. State*, 58 App. 100, 124 S. W. 922; *Wright v. State*, 63 App. 429, 140 S. W. 1105.

Amendment and correction of complaint.—*Morris v. State*, 2 App. 503; *Patillo v. State*, 3 App. 442; *Dishongh v. State*, 4 App. 158; *Wilson v. State*, 6 App. 154; *Scott v. State*, 9 App. 434; *Huff v. State*, 23 App. 291, 4 S. W. 890; *Neiman v. State*, 29 App. 360, 16 S. W. 253; *Williams v. State*, 34 App. 100, 29 S. W. 472; *Flournoy v. State*, 51 App. 29, 100 S. W. 151; *Sanders v. State*, 52 App. 156, 105 S. W. 803; *Abbey v. State*, 55 App. 232, 115 S. W. 1191; *Montgomery v. State*, 60 App. 303, 131 S. W. 1087; *Cubine v. State* (Cr. App.) 151 S. W. 301; *Graham v. State*, 72 App. 9, 160 S. W. 714; *Murphy v. State* (Cr. App.) 164 S. W. 1.

Art. 35. [35] 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.]

See ante, art. 34, and post, arts. 269, 479, 972.

Cited, *Fleming v. State*, 28 App. 234, 12 S. W. 605; *Barnes v. State* (Cr. App.) 152 S. W. 1043; *Tulley v. State* (Cr. App.) 178 S. W. 364.

Necessity of information.—An information cannot be filed before a complaint is made by a credible person. *Wilson v. State*, 27 App. 47, 10 S. W. 749, 11 Am. St. Rep. 180.

In a prosecution on information, it is not necessary to introduce in evidence the complaint on which it was based. *Galbreath v. State* (Cr. App.) 45 S. W. 10.

Prosecutions in the county court for misdemeanors must be by information, though the offense be one which might be prosecuted to final termination in the justice's court. *Sponberg v. State*, 60 App. 168, 131 S. W. 541.

Prosecutions for a felony must be upon indictment found by the grand jury, prosecutions for misdemeanors upon an information founded upon a complaint when brought in the county court, but that, in prosecutions in justice court, only a complaint was required, and hence a complaint sworn to before the county attorney, without any information filed, was sufficient therein. *Ex parte Nitsche* (Cr. App.) 170 S. W. 1101.

One prosecuted for a misdemeanor in the county court cannot waive failure to file an information, that being a jurisdictional matter. *Ethridge v. State* (Cr. App.) 172 S. W. 784.

An indictment, alleging that accused committed perjury by giving false testimony in the county court on a trial on a complaint charging a violation of the gaming laws, is sufficient for the filing of a complaint in the county court; and arrest thereunder, plea of not guilty, and trial confer jurisdiction on the county court. *Etheridge v. State* (Cr. App.) 175 S. W. 702.

Filing.—A complaint attached to a filed information will be considered filed. *Stinson v. State*, 5 App. 31.

One file mark will do for both complaint and information on the same sheet. *Schott v. State*, 7 App. 616.

A motion to quash information will not lie because complaint was filed Apr. 30, and the information not until the following June 9. *Gentry v. State*, 62 App. 497, 137 S. W. 696.

An information filed Dec. 22, reciting the filing of a complaint on Dec. 20, is insufficient, where the jurat attached to the complaint bore no date and the file mark was the same as that of the information. *Bradberry v. State* (Cr. App.) 152 S. W. 169.

See, also, *Kinley v. State*, 29 App. 532, 16 S. W. 339.

Form of complaint.—See *Willson's Cr. Forms*, 747, 1030.

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

See ante, arts. 34, 35; post, art. 479, and notes.

Art. 37. [37] 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.]

See post, arts. 643, 729, 730.

Cited, *Hughes v. State*, 62 App. 288, 136 S. W. 1068.

In general.—A dismissal against the protest of accused but with the consent of the judge without filing the statement is not available to accused against a second indictment. *Parchman v. State*, 2 App. 228, 28 Am. Rep. 435.

A lieutenant of a subdivision of a military district had no right to order a district judge to dismiss a felony prosecution pending in court. *State v. McLane*, 31 Tex. 260.

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*, 33 Tex. 570.

Where there is a severance, and one defendant is placed on trial, the trial may be suspended to allow the state's attorney to dismiss the prosecution as to the defendant not on trial, for the purpose of using him as a witness. *Johnson v. State*, 33 Tex. 570.

Prosecution being dismissed, there is no legal authority to hold the defendant in custody without complaint or otherwise. *Venters v. State*, 18 App. 198.

Defendant could not complain that the entry of nol. pros. as to co-defendants left them without guaranty of immunity from further prosecution so that he was deprived of the benefit of their untrammelled testimony where such co-defendants were not called as witnesses. *Hobbs v. State*, 53 App. 71, 112 S. W. 308.

Where an indictment was dismissed against the persons other than accused on motion of the district attorney, the motion stating that in the opinion of the district attorney the persons other than accused were accessories to accused in the homicide, it was error to admit the motion in evidence, as it contained the opinion of the district attorney as to the guilt of accused. *Figaroa v. State*, 58 App. 611, 127 S. W. 193.

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

In the absence of a showing that the reasons for dismissal of a former prosecution against accused were filed by the district attorney, and what such reasons were, one other than the prosecuting attorney, who must have received his information from such attorney, since deceased, cannot testify as to why such dismissal had been entered. *Diseren v. State*, 59 App. 149, 127 S. W. 1038.

Where, on a trial for crime, the issue was whether accused or his brother committed the offense, and the testimony on the identity of accused was meager, the action of the district attorney in attempting, in the presence of the jury, to procure the testimony of the brother after the court had refused to grant him immunity, on a conditional agreement offered by the district attorney, was reversible error. *Hughes v. State*, 62 App. 288, 136 S. W. 1068.

An agreement by the county attorney and county judge, with the consent of the district attorney, that accused would not be further prosecuted for unlawfully selling intoxicants if he permitted a conviction in three cases against him, would not be binding upon the state without the approval of the district judge. *Wilson v. State* (Cr. App.) 154 S. W. 571.

The action of the district attorney in stating, in the presence of the jury when calling as a witness one of the defendants on the trial of the codefendant that he would dismiss the case as against the defendant because he was satisfied that he was not guilty, was improper, and the dismissal should have been made by the court without the knowledge of the jury if the court approved the action of the district attorney. *Sasser v. State* (Cr. App.) 166 S. W. 1160.

Where two defendants were indicted for the same offense, the action of the district attorney in stating, in the presence of the jury when calling as a witness one of the defendants on the trial of the codefendant that he would dismiss the case as against the defendant because he was satisfied that he was not guilty, was improper, and the dismissal should have been made by the court without the knowledge of the jury if the court approved the action of the district attorney. *Sasser v. State* (Cr. App.) 166 S. W. 1160.

A district attorney has no power or authority to make an agreement not to prosecute a witness before the grand jury for perjury committed before such body; the agreement being contrary to public policy and void. *Jones v. State* (Cr. App.) 174 S. W. 1071.

Agreement to turn state's evidence.—Compelling testimony on granting immunity, see ante, art. 4.

A plea setting up an agreement whereby defendant was to be granted immunity if he turned state's evidence against a co-defendant, and that he was ready and willing to do so is a good plea in bar. *Camron v. State*, 32 App. 180, 22 S. W. 682, 40 Am. St. Rep. 763 (disapproving the contrary dictum in *Holmes' case*, 20 App. 509); *Hardin v. State*, 12 App. 186; *Bowden v. State*, 1 App. 137; *Nicks v. State*, 40 App. 1, 48 S. W. 186; *Neeley v. State*, 27 App. 324, 11 S. W. 376; *Ex parte Carter*, 62 App. 113, 136 S. W. 778.

Where this article is not complied with the state is not bound by county attorney's agreement to dismiss. *Fleming v. State*, 28 App. 234, 12 S. W. 605; *Kelly v. State*, 36 App. 480, 38 S. W. 39; *Diseren v. State*, 59 App. 149, 127 S. W. 1038.

If a party does not in good faith keep his agreement with the State to testify, he is not entitled to have his case dismissed. *Nicks v. State*, 40 App. 4, 48 S. W. 186; *Goodwin v. State*, 70 App. 600, 158 S. W. 274.

Agreement between State counsel and defendant must be approved by the court before it is binding on the State. *Vincent v. State* (Cr. App.) 55 S. W. 820; *Ex parte Gibson*, 42 App. 653, 62 S. W. 755.

The statutes under which the district attorney and district judge may grant immunity to a witness in respect to matters about which he may testify do not give the courts power to suspend a law of the state. *Ex parte Muncy*, 72 App. 541, 163 S. W. 29; nor violate the constitutional provision conferring upon the Governor the sole power of granting pardons. *Ex parte Muncy*, 72 App. 541, 163 S. W. 29.

A special plea of immunity from prosecution on an agreement to testify for State should be tried by the court and not submitted to the jury. The burden is on defendant to establish same by preponderance of evidence. *Turney v. State*, 40 App. 562, 51 S. W. 243.

The immunity involved in such dismissal pertains only to that particular case and not to any other distinct offense. *Moseley v. State*, 35 App. 211, 32 S. W. 1042, and cases cited.

One indicted for receiving stolen horses can not plead promise of immunity because of information given in regard to stolen horses generally. *Moseley v. State*, 35 App. 210, 32 S. W. 1042.

Where a clerk was jointly indicted with others in several cases for selling lottery tickets, he could refuse to testify after the dismissal of the pending case since that would give him immunity only as to that case. *Ex parte Park*, 37 App. 590, 40 S. W. 300, 66 Am. St. Rep. 835.

The state may dismiss the prosecution for incest against the defendant's paramour who turns state's evidence, and it was not improper for the court to make the suggestion. *Stanford v. State*, 42 App. 343, 60 S. W. 253.

An offer of immunity to a witness, concerning a homicide, from prosecution for the offense of murder, embraced immunity from punishment for any connected offense which his testimony might disclose. *Ex parte Muncy*, 72 App. 541, 163 S. W. 29.

Dismissal of appeal.—A dismissal in the district court of an appeal from a conviction in a recorder's court for non-appearance of the defendant is a dismissal of the action and defendant cannot thereafter be arrested on the recorder's judgment. *Ex parte McNamara*, 33 App. 363, 26 S. W. 506.

Prosecution for lower grade of offense.—Under an indictment for murder in the first degree, the county attorney can dismiss the charge as to murder in the first degree, and try the defendant for murder in the second degree. *Gentry v. State* (Cr. App.) 152 S. W. 635; *Clay v. State*, 70 App. 451, 157 S. W. 164.

Forms on motion to dismiss.—Willson's Cr. Forms, 862-864.

Art. 38 [38] 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.]

In habeas corpus case, see post, art. 199.

Cited, *Ex parte Coffee*, 72 App. 209, 161 S. W. 975.

Appointment.—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 Tex. 701; *State v. Johnson*, 12 Tex. 231.

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 Tex. 474.

The appointment does not extend beyond the term of the court. *State v. Manlove*, 33 Tex. 798.

A city recorder, exercising the powers of a justice of the peace, can appoint a prosecuting attorney only when the district attorney or county attorney is not present, and the appointment must be made in each case, a charter provision authorizing the city attorney to represent the state being unconstitutional. *Harris County v. Stewart*, 91 Tex. 133, 41 S. W. 650.

Where an attorney was appointed to represent the state in a case, and qualified under said appointment, it was held not error of which the defendant could complain, that said attorney, at a subsequent term of the court, prosecuted the case under said appointment, without being reappointed. *Marnoch v. State*, 7 App. 269.

Under this article a county attorney pro tem. may be appointed. *Daniels v. State* (Cr. App.) 77 S. W. 215.

The county judge cannot appoint a county attorney pro tem. in a county in which there was no resident district attorney or county attorney, and an information filed by such is void. *Moore v. State*, 56 App. 300, 119 S. W. 858.

Where all the papers in a prosecution had been filed by the county attorney, but when the case was called he was absent, it was not error for the court to appoint an attorney to prosecute. *Younger v. State* (Cr. App.) 173 S. W. 1039.

Authority and powers.—Attorneys appointed under this article are qualified to draft and present indictments to the grand jury. *State v. Johnson*, 12 Tex. 231; *State v. Gonzales*, 26 Tex. 197.

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

An attorney pro tem. appointed by the court has all the powers and duties of the regular prosecuting attorney. *State v. Lackey*, 35 Tex. 357.

Assistant district attorneys.—See *Vernon's Sayles' Civ. St.* 1914, arts. 342-344, 347.

A judge cannot appoint an assistant district attorney, and if he undertakes to do so the person so appointed is without official character as a prosecutor. *Locklin v. State (Cr. App.)* 75 S. W. 306.

Art. 39. [39] 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. [40] 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 App. 426, 24 S. W. 412.

Art. 40a. County Attorney of Jefferson County.—The County Attorney of Jefferson County shall represent the State in all prosecutions pending in said County Court of Jefferson County at Law, and shall be entitled to the same fees as now prescribed by law for such prosecutions. [Act 1915, p. 52, ch. 29, § 6.]

3. MAGISTRATES

Art. 41. [41] 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.]

Justice of the Peace.—When a justice holds an examining trial, he sits as a magistrate and not as a justice of the peace, and his powers and jurisdiction are those of a magistrate and not those of a justice of the peace. *Brown v. State*, 55 App. 572, 118 S. W. 142; *Hart v. State*, 15 App. 202, 49 Am. Rep. 188.

Judges.—A warrant issued by the county judge need not state that it was issued by him as a "committing magistrate." *Graham v. State*, 29 App. 31, 13 S. W. 1013. A judge holding a hearing on habeas corpus is not sitting as a magistrate. *Childers v. State*, 30 App. 160, 16 S. W. 903, 28 Am. St. Rep. 899.

Art. 42. [42] 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.]

See Pen. Code, arts. 42, 297, 351, 432, 992, 1093 and 1094, and post, art. 61, and title 3, chapters 2, 3 and 4.

Duties and powers.—This article means that the magistrate is authorized and enjoined to use all lawful means to enforce the criminal laws, and that he shall diligently employ and adopt the methods which the law gives to accomplish the result named in the article. *Ex parte Muckenfuss*, 52 App. 467, 107 S. W. 1132.

4. PEACE OFFICERS

Art. 43. [43] 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; Pen. Code, art. 478, and notes.

Who are peace officers.—A private person who undertakes to execute process. Post, arts. 278, 279.

A special constable. Post, art. 146.

Policemen of an incorporated city or town. *Sanner v. State*, 2 App. 458; *Hull v. State*, 50 App. 607, 100 S. W. 405; *Riter v. Neatherly (Civ. App.)* 157 S. W. 439;

Minter v. State, 70 App. 634, 159 S. W. 286; Ex parte Preston, 72 App. 77, 161 S. W. 115.

A de facto town marshal. Rainey v. State, 8 App. 62, 34 Am. Rep. 736.

A deputy sheriff. Clayton v. State, 21 App. 343, 17 S. W. 261.

A de facto officer is one who has the reputation of being the officer, and yet is not a good officer in point of law; in other words, the de facto officer is one who acts under color of a known and valid appointment, but has failed to conform to some precedent requirement, as to take the oath, give a bond, or the like. Weatherford v. State, 31 App. 530, 21 S. W. 251, 37 Am. St. Rep. 828.

A de facto officer, known to be such, has authority to prevent violations of law committed in his presence, and it is his duty to arrest parties guilty of such violations. He has authority, and it is his duty if necessary, to summon others to aid and assist him in arresting the offender. And a party thus summoned to aid and assist the officer in making such arrest is justifiable in doing so, and can not be held to act at his own peril because of the defective or nonrecord of the officer's right or title to his office. Weatherford v. State, 31 App. 530, 21 S. W. 251, 37 Am. St. Rep. 828.

A town marshal. Newburn v. Durham, 10 Civ. App. 655, 32 S. W. 112.

One who has received an appointment to an office, but has not taken the oath nor filed his appointment for record, is a de facto officer. Brown v. State, 42 App. 417, 60 S. W. 549, 96 Am. St. Rep. 806.

County judge. Jones v. State (Cr. App.) 65 S. W. 92.

Who are not.—Deputy marshal of incorporated city or town, unless made so by the charter. Alford v. State, 8 App. 545.

A quondam bailiff of the grand jury. Alford v. State, 8 App. 545.

A private citizen in whose custody a constable had placed one under arrest. Messer v. State, 37 App. 635, 40 S. W. 488.

Art. 44. [44] 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 authorized 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 Pen. Code, arts. 468, 479, and 584, and post, arts. 117-147, 278, 279.

General powers and duties.—Jacobs v. State, 28 App. 79, 12 S. W. 408; Carter v. State, 30 App. 551, 17 S. W. 1102, 28 Am. St. Rep. 944; Kasling v. Morris, 71 Tex. 585, 9 S. W. 739, 10 Am. St. Rep. 797; Minter v. State, 70 App. 634, 159 S. W. 286; Ex parte Preston, 72 App. 77, 161 S. W. 115.

A peace officer arresting under a warrant cannot take bail but must take the prisoner before the magistrate named in the warrant. Short v. State, 16 App. 44.

A recognized de facto officer has authority, and it is his duty to prevent violations of law in his presence. Weatherford v. State, 31 App. 530, 21 S. W. 251, 37 Am. St. Rep. 828.

It is the purpose of the law that peace officers especially shall do everything necessary to prevent, suppress, and punish crime. Ex parte Preston, 72 App. 77, 161 S. W. 115.

Where a company of conspirators organized in Texas to invade Mexico, the sheriff of the county in which the camp was located was justified in investigating the organization, though no complaints had been filed nor warrants of arrest issued. Serrato v. State (Cr. App.) 171 S. W. 1133.

Arrest without warrant.—See post, arts. 259-264; Pen. Code, art. 479; Kasling v. Morris, 71 Tex. 584, 9 S. W. 739, 10 Am. St. Rep. 797; Morris v. Kasling, 79 Tex. 141, 15 S. W. 226, 11 L. R. A. 398; Johnson v. State, 5 App. 43; Hodges v. State, 6 App. 615; Lacy v. State, 7 App. 403; Ross v. State, 10 App. 455, 38 Am. Rep. 643; Staples v. State, 14 App. 136; Weaver v. State, 19 App. 547, 53 Am. Rep. 389; Jacobs v. State, 28 App. 79, 12 S. W. 408; Ex parte Sherwood, 29 App. 334, 15 S. W. 812; Miller v. State, 32 App. 319, 20 S. W. 1103; Earles v. State, 52 App. 140, 106 S. W. 138; Carter v. State, 30 App. 551, 17 S. W. 1102, 28 Am. St. Rep. 944; Newburn v. Durham, 10 Civ. App. 655, 32 S. W. 112; Mundine v. State, 37 App. 5, 38 S. W. 619; Russell v. State, 37 App. 314, 39 S. W. 674; Lynch v. State, 41 App. 510, 57 S. W. 1130; Montgomery v. State, 43 App. 304, 65 S. W. 539, 55 L. R. A. 710; Morawietz v. State, 46 App. 436, 80 S. W. 998; Brown v. King, 41 Civ. App. 588, 93 S. W. 1019; Hull v. State, 50 App. 607, 100 S. W. 405; James v. S. A. & A. P. Ry. Co., 53 Civ. App. 603, 116 S. W. 642; Freeman v. Costley (Civ. App.) 124 S. W. 458; Ricen v. State, 63 App. 89, 138 S. W. 403; Williams v. State, 64 App. 491, 142 S. W. 899; Presley v. Ft. Worth & D. C. Ry. Co. (Civ. App.) 145 S. W. 669; Condron v. State (Cr. App.) 155 S. W. 253; Sanchez v. State, 70 App. 24, 156 S. W. 218; Riter v. Neatherly (Civ. App.) 157 S. W. 439; Missouri, K. & T. Ry. Co. v. Brown (Civ. App.) 158 S. W. 259; Serrato v. State (Cr. App.) 171 S. W. 1133.

Art. 45. [45] 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.]

See Vernon's Sayles' Civ. St. 1914, art. 7135; Pen. Code, art. 351; post, arts. 139-144.

Authority of officer.—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 App. 530, 21 S. W. 251, 37 Am. St. Rep. 828.

One who participates in making an arrest in good faith and merely in response to the command of an officer is not liable in damages therefor, although it may ultimately appear that the officer had no right to make the arrest. *Presley v. Ft. Worth & D. C. Ry. Co.* (Civ. App.) 145 S. W. 669.

Art. 46. [46] 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.]

See Vernon's Sayles' Civ. St. 1914, art. 7135; Pen. Code, art. 351.

Art. 47. [47] 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.]

Pen. Code, arts. 388, 431.

Contempt.—See notes to art. 3, ante.

Proceedings under this article are in the nature of contempt proceedings. *Crow v. State*, 24 Tex. 12.

Art. 47a. Texas Rangers clothed with powers of peace officers.—The officers, non-commissioned officers and privates of this force [Ranger force. See Vernon's Sayles' Civ. St. arts. 6754-6766] shall be clothed with all the powers of peace officers, and shall aid the regular civil authorities in the execution of the laws. They shall have authority to make arrests, and to execute process in criminal cases, and in such cases they shall be governed by law regulating and defining the powers and duties of sheriffs when in discharge of similar duties; except that they shall have the power, and shall be authorized to make arrests and to execute all process in criminal cases in any county in the state. They shall, before entering on the discharge of these duties, take an oath before some authority legally authorized to administer the same, that each of them will faithfully perform his duties in accordance with law. In order to arrest and bring to justice men who have banded together for the purpose of committing robbery, or other felonies, and to prevent the execution of the laws, the officers, non-commissioned officers and privates of said force may accept the services of such citizens as shall volunteer to aid them; but while so engaged such citizens shall not receive pay from the state for such services. [Act 1901, p. 41, § 11.]

Explanatory.—The above article and art. 47b were omitted from the revised Pen. Code. As they relate directly to the administration of the criminal laws, and, in view of the decision in *Berry v. State* (Cr. App.) 156 S. W. 626, they are included in this compilation.

Art. 47b. In case of arrest to convey prisoner to county jail.—When said force, or any member or members thereof, shall arrest any person charged with the commission of a criminal offense, they

shall forthwith convey said person to the county where he or they stand charged with the commission of an offense, and shall deliver him or them to the proper officer, taking his receipt therefor, and all necessary expenses thus incurred will be paid by the state. [Id. sec. 12.]

See note under art. 47a.

5. SHERIFFS

Art. 48. [48] 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.

Entrapment.—An officer is not justified in inducing others to commit crime in order that prosecutions may be instituted against them; his duty being merely to detect and prosecute voluntary criminals. *Scott v. State*, 70 App. 57, 153 S. W. 871.

Art. 49. [49] 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.]

See post, art. 313; *Vernon's Sayles' Civ. St.* 1914, title 74; *Gordon v. State*, 2 App. 154.

Art. 50. [50] 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 aailable 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.]

Escape.—See Pen. Code, arts. 320-351; post, art. 909.

One committed to jail till the fine and costs are paid, must be confined within the jail walls and the sheriff is liable for an escape if he permits the prisoner to go at large. *Luckey v. State*, 14 Tex. 400.

Where one is committed to the custody of the sheriff under a judgment imposing imprisonment in jail, and the sheriff allows the prisoner to go at large under an agreement to serve out his imprisonment as soon as he got well, the sheriff could rearrest the prisoner, and confine him in jail for the term of his sentence, though the time for which he should have been imprisoned had already elapsed; since, the agreement with the sheriff being void, he would be treated for such time as a prisoner at large without authority. *Ex parte Wyatt*, 29 App. 398, 16 S. W. 301.

Art. 51. [51] 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. [52] 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.]

See Pen. Code, arts. 320-351 and notes.

Art. 53. [53] 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.]

See post, art. 313; Vernon's Sayles' Civ. St. 1914, art. 7127; McDade v. Waller County, 3 Willson, Civ. Cas. Ct. App. §§ 110, 111.

Art. 54. [54] 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.]

Appointment.—A deputy sheriff, who was appointed by the sheriff in November, 1906, but was not reappointed upon the re-election of the sheriff in November, 1908, could not lawfully act as deputy sheriff after the expiration of the earlier term of the sheriff. *Trinkle v. State*, 59 App. 257, 127 S. W. 1060.

Authority and powers.—A deputy can make the affidavit provided for in acts 1891, pp. 138, 139, authorizing the sheriff to receive costs for conveying attached witnesses from one county to another. *Shely v. State*, 35 App. 190, 32 S. W. 901.

Summoning jurors. *Forester v. State (Cr. App.)* 163 S. W. 87.

Liability for acts of deputy.—See *Vernon's Sayles' Civ. St. 1914*, art. 7126, and notes.

6. CLERKS OF THE DISTRICT AND COUNTY COURTS

Art. 55. [55] 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 respect 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.]

Pen. Code, arts. 430 and 432.

Art. 56. [56] 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.]

Ante, art. 29.

Art. 57. [57] 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.

CHAPTER THREE

CONTAINING DEFINITIONS

<p>Art. 58. Words and phrases — how understood. 59. Same subject.</p>	<p>Art. 60. Criminal action—how prosecuted. 61. "Officers" includes what. 62. "Examining court" defined.</p>
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Article 58. [58] 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.]

See Pen. Code, arts. 3-31, and notes; *Vernon's Sayles' Civ. St. 1914*, 5502-5504; *Peterson v. State*, 25 App. 70, 7 S. W. 530; *Bautsch v. State*, 27 App. 342, 11 S. W. 414; *Childers v. State*, 30 App. 160, 16 S. W. 903, 28 Am. St. Rep. 899; *Blackburn v. State*, 71 App. 625, 160 S. W. 687; *Currington v. State*, 72 App. 143, 161 S. W. 478; *Hahn v. State (Cr. App.)* 165 S. W. 218; *Baskins v. State (Cr. App.)* 171 S. W. 723.

Art. 59. [59] 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.]

See Pen. Code, arts. 3-31, and notes, and Vernon's Sayles' Civ. St. 1914, arts. 5502-5504.

Art. 60. [60] 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.]

See Pen. Code, art. 26; *Bautsch v. Galveston*, 27 App. 342, 11 S. W. 414; *Kemper v. State*, 63 App. 1, 138 S. W. 1025.

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

See ante, arts. 41-47.

It includes all persons legally authorized to perform public duties. *Sauner v. State*, 2 App. 458.

Art. 62. [62] "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.—When a justice of the peace sits as an examining court he has jurisdiction coextensive with his county. *Hart v. State*, 15 App. 202, 49 Am. Rep. 188.

Evidence.—Admissibility at trial of evidence taken before an examining court and in habeas corpus cases, *Kerry v. State*, 17 App. 178, 50 Am. Rep. 122; *Hobbs v. State*, 53 App. 71, 112 S. W. 308, following *Porch v. State*, 51 App. 7, 99 S. W. 1122, and overruling *Cline v. State*, 36 App. 320, 36 S. W. 1099, 37 S. W. 722, 61 Am. St. Rep. 850, and *Childers v. State*, 30 App. 160, 16 S. W. 903, 28 Am. St. Rep. 899.

TITLE 2

OF THE JURISDICTION OF COURTS IN CRIMINAL ACTIONS

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| <p>Chap.
1. What courts have criminal jurisdiction.
2. Of the court of criminal appeals [and the supreme court.]
3. Of the district courts.</p> | <p>Chap.
3a. Criminal district courts.
Dallas county.
Harris county.
Travis and Williamson counties.
4. Of county courts.
5. Of justices' and other inferior courts.</p> |
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CHAPTER ONE

WHAT COURTS HAVE CRIMINAL JURISDICTION

Article 63. [63] 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.]

Explanatory.—The part of this article enumerating the courts possessing criminal jurisdiction has been superseded by later acts creating special courts. See art. 97a, post, et seq. See, also, Const. art. 5, § 1.

Necessity of jurisdiction.—In order to sustain a conviction, the court must have jurisdiction of the person of accused, of the subject-matter, and also jurisdiction to render the particular judgment. *Emery v. State*, 57 App. 423, 123 S. W. 133, 136 Am. St. Rep. 988.

Concurrent jurisdiction.—Under this article as amended the authorities of one county cannot validly agree to relieve from prosecution one giving testimony before a grand jury concerning an offense for which he has been indicted in another county. *Johnson v. State* (Cr. App.) 148 S. W. 300.

Under this article, jurisdiction attaches in the county in which prosecution is first begun and the defendant is arrested, and hence a record failing to show that the county court had ever obtained jurisdiction of defendant by arrest or otherwise does not sustain a plea of prior jurisdiction, exclusive of that of the district court. *Pittcock v. State* (Cr. App.) 163 S. W. 971.

A defendant in the district court, in order to raise the question of the county court's prior jurisdiction, should do so by plea to the jurisdiction or by setting up the fact that he had been previously charged with the offense in another court having jurisdiction. *Pittcock v. State* (Cr. App.) 163 S. W. 971.

Corporation courts.—See art. 109b, and notes.

Crimes by militiamen.—Where a member of the National Guard, while on duty in time of peace, committed a capital offense by killing a citizen who insisted on passing a military line, the courts of the state had jurisdiction to try the soldier therefor, both under authority conferred by Acts 29th Leg. c. 104, § 103, art. 30 (*Vernon's Sayles' Civ. St.* 1914, art. 5860), and independent thereof; the state courts having first obtained jurisdiction before a military investigation was begun. *Manley v. State*, 62 App. 392, 137 S. W. 1137; *Id.* (Cr. App.) 154 S. W. 1008.

Court of criminal appeals.—The effect of the act of the twenty-second legislature, special session (chapter 16), is to repeal subdivision 1 of article 64, designating the appellate criminal court as the "court of appeals," and to substitute for that designation the "court of criminal appeals." *Cummings v. State*, 31 App. 406, 20 S. W. 706; *Neubauer v. State*, 31 App. 513, 21 S. W. 363.

The Court of Criminal Appeals has only such powers as are conferred on it by the Constitution and statutes. *Ex parte Firmin*, 60 App. 222, 131 S. W. 1116.

Particular courts.—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.

The Act of 24th Leg. c. 11, p. 10, creating the "Texarkana Civil and Criminal Court" was unconstitutional. *Whitener v. W. B. Belknap & Co.*, 89 Tex. 273, 34 S. W. 594.

Cited, *Nelson v. State*, 59 App. 148, 127 S. W. 1020; *Ethridge v. State* (Cr. App.) 172 S. W. 786.

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

Art.	Art.
64. Court to consist of three judges; their qualifications and salaries.	77. Duties of clerks.
65. Election of judges; term of office.	78. Deputy clerks.
66. Classification of judges.	79. Seal of the court.
67. Vacancies, how filled.	80. Court reporter; salary, etc.
68. Appellate jurisdiction described.	81. Reporter to return opinions to the clerk.
69. Power to issue writs.	82. Transferring cases.
70. Power to ascertain matters of fact.	83. Mandate of court; how directed.
71. Presiding judge, how chosen; process, etc.	84. Writ of habeas corpus, when to issue.
72. When judge is disqualified.	85. Supreme court or any one of the justices may issue writ.
73. Terms of court, where held.	86. Appellate jurisdiction prescribed.
74. Appeals returnable.	87. Preceding article construed.
75. Clerks to be appointed.	
76. Oath and bond of clerks.	

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.]

Quorum.—The question of the number of judges necessary to authorize the transaction of business by a court is as a general rule to be determined from the Constitution or statutory provisions creating and regulating courts, and as a general rule a majority of the members of a court is a “quorum” for the transaction of business and the decision of cases. *Long v. State*, 59 App. 103, 127 S. W. 551, Ann. Cas. 1912A, 1244.

In the absence of a quorum, or the number required by law to hold court, a judgment rendered by the remaining judges is a nullity. *Long v. State*, 59 App. 103, 127 S. W. 551, Ann. Cas. 1912A, 1244.

— **Disqualification of judge affecting.**—As a rule, the death or disqualification or absence of a judge does not deprive the remaining judges of authority to hold court and transact its business, provided the remaining number is not reduced below that legally required for the transaction of legal business. *Long v. State*, 59 App. 103, 127 S. W. 551, Ann. Cas. 1912A, 1244.

Under Const. art. 5, § 11, providing that when the Supreme Court, Court of Criminal Appeals, Court of Civil Appeals, or any member of either, shall be disqualified to hear any case, the same shall be certified to the Governor, who shall commission the requisite number of persons for the determination of the case, etc., the disqualification of one of the judges of the Court of Criminal Appeals does not require the appointment of a special judge; but the remaining judges who are qualified, being a quorum, may determine the case. *Long v. State*, 59 App. 103, 127 S. W. 551, Ann. Cas. 1912A, 1244.

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.]

Procedure on appeals.—See post, title 10, arts. 893-962, and notes.

Jurisdiction in general.—Where right of possession of a child is in issue in habeas corpus proceedings the case is a civil and not a criminal case, and the criminal court of appeals has no jurisdiction. *Ex parte Calvin*, 40 App. 24, 48 S. W. 518; *Legate v. Legate*, 87 Tex. 248, 28 S. W. 281; *Telschek v. Fritsch*, 38 App. 43, 40 S. W. 988; *Ex parte Reed*, 34 App. 9, 28 S. W. 689; *Ex parte Berry*, 34 App. 36, 28 S. W. 806.

When the constitution grants jurisdiction, "with such exceptions and under such regulations as the legislature may prescribe," affirmative legislation must be construed as a regulation prohibiting the exercise of powers other than those described. *State v. Daugherty*, 5 Tex. 1.

Proceedings on forfeited bail bonds are criminal in their nature and the court of criminal appeals has jurisdiction of appeals therein. *Gay v. State*, 20 Tex. 504; *Aber v. Warden*, 49 Tex. 377; *Jeter v. State*, 86 Tex. 555, 26 S. W. 49.

Though scire facias proceedings are criminal in their nature so as to give the Court of Criminal Appeals jurisdiction over them, they may be brought to that court by writ of error. *Hart v. State*, 13 App. 555; *Houston v. State*, 13 App. 558.

A record consisting of an agreed statement of certain facts certified to the Court of Criminal Appeals for an opinion on a certain question thereby raised, confers no jurisdiction on that court. *Ex parte Jones*, 34 App. 344, 30 S. W. 806.

The court of criminal appeals, having no appellate jurisdiction save in criminal causes (Const. art. 5, § 5), has no jurisdiction of an appeal from a judgment rendered on a motion by a district attorney, against a sheriff and the sureties on his bond, to require the payment to a certain county of money collected by the sheriff on execution to satisfy a forfeited recognizance, and paid by him to another county. *Russell v. State*, 37 App. 603, 36 S. W. 1070.

The court of criminal appeals has no jurisdiction of an appeal from denial of mandamus to compel a county attorney to institute a prosecution. *Murphy v. Summers*, 54 App. 369, 112 S. W. 1070.

An appeal in a scire facias case allowed to the court of Civil Appeals is insufficient to confer jurisdiction on the Court of Criminal Appeals. *Thomas v. State*, 56 App. 246, 119 S. W. 846.

The Court of Criminal Appeals is a court of final jurisdiction in matters in which it has any jurisdiction, and from its action no appeal will lie. *Ex parte Mussett*, 72 App. 487, 162 S. W. 846.

On an appeal from a judgment forfeiting a bail bond, an appeal bond which recited that notice of appeal was given to the "Supreme Criminal Court of Appeals," and was conditioned for the payment of costs in the "Supreme Criminal Court of the State of Texas," was insufficient to confer jurisdiction upon the Court of Criminal Appeals, and the appeal will be dismissed. *Anderson v. State* (Cr. App.) 166 S. W. 1164.

Vernon's Sayles' Civ. St. 1914, art. 1529, provides that the Supreme Court shall have jurisdiction to issue writs of habeas corpus in all cases where any person is restrained by virtue of any order or commitment of a court or judge, on account of the violation of any order, judgment, or decree theretofore made in any civil cause, and shall have power, pending the hearing of the application, to admit to bail any person to whom the writ may be granted. Held, that where a relator was committed by a notary public for refusal to answer interrogatories pursuant to a commission to perpetuate testimony in a civil case, and a writ of habeas corpus was dismissed by the district judge, and the relator remanded, an appeal from such order lay to the Supreme Court, and not to the Court of Criminal Appeals. *Cummings*, *Ex parte* (Cr. App.) 170 S. W. 153.

Jurisdiction of lower court.—If the lower court had no jurisdiction of the case, the appellate court can acquire none by appeal, and will dismiss appeal. *Lasher v. State*, 30 App. 387, 17 S. W. 1064, 28 Am. St. Rep. 922.

Final judgment.—See notes under art. 853, post.

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 App. 227, 53 S. W. 630.

Necessity of sentence.—See notes under art. 856, post.

Necessity of notice of appeal.—See notes under art. 915, post.

Stare decisis.—The decision of the court of criminal appeals that a city cannot enact a valid ordinance punishing offense punishable under a general law will be followed by the Court of Civil Appeals. *Robinson v. City of Galveston*, 51 Civ. App. 292, 111 S. W. 1076.

Where the court of criminal appeals declared the local option election in certain districts void and the state and county accepted the decision and issued licenses, the decision is conclusive on the civil courts. *State v. Schwarz*, 103 Tex. 119, 124 S. W. 420.

Where an appellate court has held for a number of years to a given construction of a statute, it will follow such construction, and any change must be made by the Legislature. *Morris v. State*, 64 App. 498, 142 S. W. 876.

The Supreme Court will generally follow the decisions of the Court of Criminal Appeals upon questions involving penal laws. *State v. Savage*, 105 Tex. 467, 151 S. W. 530.

While the construction of the civil statutes by the Supreme Court is final and will be followed by the Court of Criminal Appeals, that court, in construing the criminal statutes and enforcing the criminal laws, must follow its own judgment, though contrary to the decisions of the Supreme Court. *Barnes v. State* (Cr. App.) 170 S. W. 548, L. R. A. 1915C, 101.

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.]

Power to issue writ of habeas corpus, see art. 84, post.

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| 1. Habeas corpus—power in general. | 5. — Delinquent children. |
| 2. — Grounds for writ and allowance thereof. | 6. — Contempt proceedings. |
| 3. — Necessity of application to lower court. | 7. — Appeal. |
| 4. — Custody of infants. | 8. Mandamus. |
| | 9. Prohibition. |
| | 10. Certiorari. |

1. Habeas Corpus—Power in general.—The court of criminal appeals has ample authority to issue the writ of habeas corpus in almost any conceivable case. *Ex parte Degener*, 30 App. 566, 17 S. W. 1111; *Ex parte Kearby and Hawkins*, 35 App. 531, 34 S. W. 635; *Ex parte Kearby*, 35 App. 634, 34 S. W. 962.

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

Court of criminal appeals can issue an original writ of habeas corpus but will only do so in extraordinary cases, as where the proceeding is void and an appeal will not be an adequate remedy. *Ex parte Patterson*, 42 App. 256, 58 S. W. 1012, 51 L. R. A. 654. See *Ex parte Japan*, 36 App. 482, 38 S. W. 43.

The court of criminal appeals has jurisdiction to grant writs of habeas corpus when one is held without lawful authority. *Ex parte Gould*, 60 App. 442, 132 S. W. 364, 31 L. R. A. (N. S.) 835.

2. — Grounds for writ and allowance thereof.—See notes under arts. 160-224, post.

3. — Necessity of application to lower court.—When no valid reason is shown for failing to apply to the proper local court the writ will be refused. *Ex parte Lynn*, 19 App. 120; *Ex parte Gregory*, 20 App. 210, 54 Am. Rep. 516.

4. — Custody of infants.—Appellate jurisdiction. See notes under article 68, ante.

The court of criminal appeals has no jurisdiction of a writ of habeas corpus to recover possession of relator's minor child. *Ex parte Reed*, 34 App. 9, 28 S. W. 689; *Ex parte Berry*, 34 App. 36, 28 S. W. 806.

5. — Delinquent children.—Proceedings for the commitment of one charged as a juvenile delinquent, under Acts 33d Leg. c. 112, amending article 1203, are "criminal" in their nature, so that the court of Criminal Appeals had jurisdiction of an application by the alleged delinquent for habeas corpus. *Ex parte McDowell* (Cr. App.) 172 S. W. 213.

6. — Contempt proceedings.—Court of criminal appeals has jurisdiction to issue writs of habeas corpus in contempt proceedings in district court in civil cases. *Ex parte Warfield*, 40 App. 420, 50 S. W. 933, 76 Am. St. Rep. 724.

Under the constitutional provision giving the Court of Criminal Appeals jurisdiction only in criminal cases, it has no jurisdiction of an application for a writ of habeas corpus by a person committed to jail for violating a temporary injunction, in an action brought by the county attorney to enjoin him and other proprietors of theaters and moving picture shows from giving shows therein on Sunday, and charging a fee for admission thereto, though the act sought to be enjoined is a violation of Pen. Code 1911, art. 302, since the action was a civil case, especially in view of *Vernon's Sayles' Civ. St. 1914*, art. 1529, authorizing the Supreme Court, or any justice thereof to issue writs of habeas corpus 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 made in any civil cause. *Ex parte Zuccaro*, 72 App. 214, 162 S. W. 844.

Const. art. 5, §§ 3, 5, as amended in 1891, authorized the Supreme Court to issue writs of habeas corpus, which authority theretofore had been in this court alone, and took away the civil jurisdiction of this court, and *Vernon's Sayles' Civ. St. 1914*, art. 1529, gave the Supreme Court power to issue writs of habeas corpus in all cases where any person is restrained of his liberty by virtue of any process, etc., issued by any court on account of any order or decree in any "civil suit." Relator applied originally to this court for habeas corpus to obtain discharge on final hearing upon an injunction against the opening of a theater or moving picture show on Sunday, after order to show cause why he should not be held in contempt of court for violation of the injunction. Held, that after such amendments it was not contemplated that this court should entertain jurisdiction in any civil matter, that such suit brought in the district court was a "civil suit," and that, in view of the Supreme Court's jurisdiction, which would be more extensive than that of this court and final, the application would be refused. *Ex parte Mussett*, 72 App. 487, 162 S. W. 846.

7. — **Appeal.**—See notes under art. 950.

8. **Mandamus.**—The court of criminal appeals can issue mandamus only to enforce its own jurisdiction, it cannot issue it to compel the district court to try the question of insanity after conviction. *Ex parte Quesada*, 34 App. 116, 29 S. W. 473.

Under Const. art. 5, § 6, giving the Court of Criminal Appeals appellate jurisdiction in all criminal cases, except as otherwise provided, and giving it power to issue writs of habeas corpus and such writs as may be necessary to enforce its own jurisdiction, that court has no power to issue writs of mandamus to compel district judges to do or not to do any particular act with reference to cases appealed to the Court of Criminal Appeals. *Ex parte Firmin*, 60 App. 222, 131 S. W. 1116.

9. **Prohibition.**—It is only in cases in which the court has no jurisdiction, or is exceeding its jurisdiction, that the writ of prohibition will lie, and it will not lie where the inferior court has jurisdiction of the subject-matter and the defendant is duly served with process or voluntarily appears. *State ex rel. Bergeron v. Travis County Court (Cr. App.)* 174 S. W. 365.

Where defendant, prosecuted in the corporation court, did not there contend that the article under which he was prosecuted had been repealed so as to give that court, having jurisdiction, opportunity to rule thereon, and after sentence and appeal to the county court did not make such contention therein, but made it for the first time by petition to the Court of Criminal Appeals for prohibition against the county court, the writ would not issue, defendant not having objected to the jurisdiction of the court at the outset. *State ex rel. Bergeron v. Travis County Court (Cr. App.)* 174 S. W. 365.

10. **Certiorari.**—A writ of certiorari cannot be granted at all in vacation, nor in term time except upon order of the court or by a majority of the members thereof. *Ex parte Martinez (Cr. App.)* 145 S. W. 959.

At common law, in the absence of a right of appeal, defendant on conviction might present to the appellate court a petition pointing out specifically the matters in which he claimed the trial court erred to his prejudice, and where the appellate court saw error or probable injury to accused or that an improper verdict had been rendered, it might grant a writ of certiorari commanding that the entire record be sent up for review; but this method of review was not granted as a matter of right. *Ex parte Martinez (Cr. App.)* 145 S. W. 959.

Under Const. art. 5, § 5, the Court of Criminal Appeals has power only to issue a writ of habeas corpus, and no other writ, in cases where the court has not obtained jurisdiction, and hence where it has no such jurisdiction of the case by reason of a failure to give notice of appeal, it has no power to review a case under the common-law writ of certiorari. *Ex parte Martinez (Cr. App.)* 145 S. W. 959.

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.]

See Const. art. 5, sec. 6.

Practice in general.—See *Vance v. State*, 34 App. 395, 30 S. W. 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 App. 579; *Craddock v. State*, 15 App. 641.

Amount in controversy.—The issue made by the state by its motion for rehearing and certiorari, which alleges that the prosecution was begun in justice's court wherein a conviction was had, and that thereafter the case was appealed to the county court, where accused was again convicted, and his punishment assessed at a fine of \$5, is jurisdictional, and the court has power to ascertain and determine the facts. *May v. State*, 59 App. 141, 127 S. W. 832.

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

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.]

In general.—See *Miller v. State*, 34 App. 392, 30 S. W. 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.]

See art. 69, ante.

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.]

See art. 68, ante.

Jurisdiction in general.—See notes under art. 68, ante.

Amount in controversy.—See notes under art. 87, post.

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.]

See Const., art. 5, sec. 6; post, title 10, Appeals.

Amount of fine.—Where the fine imposed does not exceed \$100, exclusive of costs, on a trial de novo on an appeal taken to the county court from an inferior court such judgment of the county court is final, and no appeal lies therefrom to the court of criminal appeals. *Neubauer v. State*, 31 App. 513, 21 S. W. 363; *Richardson v. State*, 3 App. 69; *Gerald v. State*, 4 App. 308; *Cherry v. State*, Id. 4; *McKinley v. State* (Cr. App.) 32 S. W. 695; *Moore v. State* (Cr. App.) 33 S. W. 1082; *Johnson v. State*, 26 App. 395, 9 S. W. 611; *Tison v. State*, 35 App. 360, 33 S. W. 872 (citing *Nelson v. State*, 33 App. 379, 26 S. W. 623); *Goldman v. State*, 35 App. 436, 34 S. W. 122; *Brady v. State* (Cr. App.) 58 S. W. 1016; *Monroe v. State*, 42 App. 277, 59 S. W. 545; *Cramer v. State* (Cr. App.) 111 S. W. 931; *May v. State*, 59 App. 141, 127 S. W. 832; *Haak v. State*, 60 App. 367, 132 S. W. 357; *Lockett v. State* (Cr. App.) 148 S. W. 305; *Corbett v. State*, 70 App. 73, 156 S. W. 206; *Campbell v. State*, 71 App. 300, 158 S. W. 303; *Swann v. State*, 71 App. 210, 159 S. W. 846; *Thomas v. State*, 71 App. 484, 160 S. W. 380; *Holman v. State* (Cr. App.) 166 S. W. 506; *Allen v. State* (Cr. App.) 167 S. W. 342.

Trial de novo.—Where a criminal prosecution has been appealed from an inferior court to the county court and there dismissed, the appellant may procure a further appeal to the Court of Criminal Appeals in conformity with the law; such cases not being within the statute prohibiting an appeal where the fine assessed in the county court on appeal from an inferior court is less than \$100. *Matula v. State*, 72 App. 189, 161 S. W. 965; *Pevito v. Rodgers*, 52 Tex. 581; *Taylor v. State*, 16 App. 514.

Where accused on appeal to the county court from a conviction in the corporation court is deprived of the right to a trial de novo to which he is entitled, he may enforce such right by a further appeal to the Court of Criminal Appeals. *Matula v. State*, 72 App. 189, 161 S. W. 965.

CHAPTER THREE
OF THE DISTRICT COURTS

<p>Art. 58. Have exclusive jurisdiction of felonies. 59. Shall determine grades of the offense. 60. Misdemeanors involving official misconduct. 61. [Superseded.] 62. Power to issue writs of habeas corpus. 63. Special terms of district court may be held.</p>	<p>Art. 94. How and when special terms may be convened. 95. Grand jury when selected shall discharge its duties as at a regular term. 96. Person indicted by such grand jury may be placed on trial. 97. Not to repeal provision of Revised Civil Statutes.</p>
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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.]

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| <p>1. Explanatory.
2. Jurisdiction in general.
3. Jurisdiction dependent on valid indictment.
4. Felony defined.
5. Indictment charging felony and misdemeanor.
6. Counterfeiting.
7. Extradition.</p> | <p>8. Forgery by nonresidents.
9. Sale of liquors.
10. Theft of automobile.
11. Injunction.
12. Venue.
13. — Change of venue.
14. Transfer of causes.
15. Federal reservations.
16. Losing control of court.</p> |
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1. Explanatory.—The present constitution reads as follows: "The district court shall have original jurisdiction in all criminal cases of the grade of felony." [Const. art. 5, § 8 (Vernon's Sayles' Civ. St. 1914, vol. 1, p. xli).]

2. Jurisdiction in general.—The validity of an appointment as district clerk can not be raised in a criminal cause against a third person, tried in the court of which he is clerk. *Lopez v. State*, 42 Tex. 298.

The district courts of this state alone have jurisdiction to convict of felonies, and their jurisdiction of such cases is dependent upon indictments presented by grand juries. An indictment presented by a body composed of fewer or more than twelve men is not legally presented and does not confer jurisdiction. *Lott v. State*, 18 App. 627.

3. Jurisdiction dependent on valid indictment.—Ante, arts. 3, 4 and notes; post, Tit. 7, c. 3 and notes.

4. Felony defined.—See notes under Pen. Code, arts. 55 and 56.

5. Indictment charging felony and misdemeanor.—Where an indictment filed in the district court charged a felony committed in violation of Pen. Code, art. 233, relating to payment of poll taxes, it is improper to transfer it to the county court, though it also charged a misdemeanor committed in violation of article 229. *Johnson v. State* (Cr. App.) 177 S. W. 490.

6. Counterfeiting.—The district court has jurisdiction of the offense of counterfeiting. *Martin v. State*, 18 App. 224.

7. Extradition.—The courts of the state must take cognizance of the treaties made by the Federal government with other nations, and they cannot try one extradited from a foreign country for an offense other than the one for which he was extradited. *Blanford v. State*, 10 App. 627. And see *Kelly v. State*, 13 App. 158; *Cordway v. State*, 25 App. 405, 8 S. W. 670. Compare with *Underwood v. State*, 38 App. 193, 41 S. W. 618.

8. Forgery by nonresidents.—Title deeds affecting lands in Texas, see Pen. Code, art. 950 and notes.

Where a conspiracy to forge a deed affecting title to lands within the state, was formed within the state and most of the acts in furtherance of the conspiracy were committed there, but the actual forgery was committed in another state, the state courts have jurisdiction of the offense independent of the provisions of Pen. Code, art. 950. *Ex parte Rogers*, 10 App. 655, 38 Am. Rep. 654; *Rogers v. State*, 11 App. 608.

9. Sale of liquors.—A transfer of a prosecution under an indictment returned in the district court for pursuing the occupation of selling intoxicating liquors in local option territory to the county court is properly denied. *Byrd v. State* (Cr. App.) 151 S. W. 1068.

10. Theft of automobile.—The theft of an automobile is a misdemeanor not triable in the district court. *Greenwood v. State* (Cr. App.) 174 S. W. 1049.

11. Injunction.—The district court has jurisdiction to issue an injunction to restrain a druggist, licensed to sell liquor on prescription, from selling liquor in violation of law. *Ex parte Roper*, 61 App. 68, 134 S. W. 334.

12. Venue.—See notes under arts. 234, et seq., post.

13. — Change of venue.—See notes under arts. 626-628, post.

14. Transfer of causes.—See notes under art. 483, post.

15. **Federal reservations.**—The courts of this state have no jurisdiction over offenses committed within limits of property (territory) ceded under the provisions of title 16, of the Revised Statutes, to the United States government for forts, arsenals, etc. And moreover, our courts will take judicial cognizance of the fact of cession of such territory. *Lasher v. State*, 30 App. 387, 17 S. W. 1064, 28 Am. St. Rep. 922.

16. **Losing control of court.**—The bill of exceptions shows that the judge lost control of the trial, constituting reversible error in felony cases, it showing that during the prosecuting attorney's opening address, in which he used fervent and violent language, the judge was in another room, talking, and could not hear what was taking place in the courtroom, and that defendant's counsel, desiring to take an exception, had to go out for the judge, and also reciting that the judge lost control of the trial. *Howard v. State* (Cr. App.) 178 S. W. 506. See, also, *Scott v. State*, 47 App. 568, 85 S. W. 1060, 122 Am. St. Rep. 717; *White v. State*, 61 App. 498, 135 S. W. 562.

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 of offenses included in charge.—See *Harberger v. State*, 4 App. 26, 30 Am. Rep. 157; *Ingle v. State*, 4 App. 91.

This article is constitutional. *Nance v. State*, 21 App. 457, 1 S. W. 448, and cases cited, *Robles v. State*, 38 App. 81, 41 S. W. 620.

It is the averments of the felony alone which confer the jurisdiction. *Robles v. State*, 38 App. 81, 41 S. W. 620.

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*, 38 App. 81, 41 S. W. 620.

The indictment in one count charged burglary, and in another theft of property of the value of four dollars. Defendant was convicted under the latter count; held, the court had no jurisdiction of the offense charged in such count. *Robles v. State*, 38 App. 81, 41 S. W. 620.

— **Retrial of prosecution.**—The Constitution gives the district court exclusive jurisdiction of all criminal cases of the grade of a felony, and this art. and arts. 771, 843, respectively, provide that upon the trial of a felony case, whether the proof develop a felony or misdemeanor, the court shall determine the case as to any offense included in the charge; that, where a prosecution is for an offense consisting of several degrees, the jury may find the defendant guilty of any degree inferior to that charged in the indictment; and that the effect of a new trial is to place the cause in the same position as it was before any trial was had. Held that, where accused was indicted for assault with intent to murder, the reversal on appeal of a conviction of an aggravated assault will not, in view of Code Cr. Proc. 1911, art. 945, providing that, where the Court of Criminal Appeals awards a new trial, the cause shall stand as it would have stood if a new trial had been granted by the court below, deprive the district court of jurisdiction to hear the case upon retrial, though the county court has original jurisdiction of misdemeanors. *Hughes v. State* (Cr. App.) 152 S. W. 912.

Conviction of offense included in charge.—See notes under art. 771, post.

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, § 8.]

Explanatory.—The present constitution reads as follows: "The district court shall have original jurisdiction * * * of all misdemeanors involving official misconduct" [Const. art. 5, § 8 (Vernon's Sayles' Civ. St. 1914, vol. 1, p. xli)].

Official misconduct.—The district court has no jurisdiction to try any indictment for misdemeanor, except one involving "official misconduct." *Cassady v. State*, 4 App. 96. Negligently permitting the escape of a prisoner in the custody of the accused as an officer, is an offense which comes within the definition of official misconduct, and is triable in the district court. *Hatch v. State*, 10 App. 515, overruling *Watson v. State*, 9 App. 212. Intentionally managing a prosecution for vagrancy so as to procure an acquittal, knowing the defendant to be guilty, constitutes official misconduct on the part of a county attorney. But it is not official misconduct for a county attorney to procure the acquittal of one accused of vagrancy, for the purpose of using him as a witness. *Trigg v. State*, 49 Tex. 645. See Vernon's Sayles' Civ. St. 1914, arts. 6028, 6029.

Demanding illegal fees by a county judge is "official misconduct." *Brackenridge v. State*, 27 App. 513, 11 S. W. 630, 4 L. R. A. 360.

"Official misconduct" which gives the district court jurisdiction is a wilful or corrupt failure or neglect to perform an official duty and does not include drunkenness in office. *Craig v. State*, 31 App. 29, 19 S. W. 504.

The failure of the tax assessor of a county to make a report of the fees collected by him, as required by law, is "official misconduct." *Bolton v. State* (Cr. App.) 154 S. W. 1197.

Transfer of causes.—See notes under art. 483, post.

Art. 91. [Superseded. See art. 97a et seq., post.]

Criminal district courts.—Cited, *Nelson v. State*, 59 App. 148, 127 S. W. 1020. The act of 1870 creating the criminal district court for Galveston and Harris counties was constitutional and deprived the district courts of those counties of all criminal jurisdiction. *Stubbs v. State*, 39 Tex. 564; *Long v. State*, 1 App. 709; *March v. State*, 44 Tex. 64.

An appeal lies to the criminal district court in Galveston county from a conviction in a city recorder's court, though the city charter makes no provision for such appeal. *Bautsch v. State*, 27 App. 342, 11 S. W. 414.

The proper designation of the court is not the "criminal district court of Galveston and Harris counties" but when sitting in Galveston county it should be designated as the criminal district court of that county. *Giebei v. State*, 28 App. 151, 12 S. W. 591. And see *Watson v. State*, 5 App. 11.

An indictment for keeping a disorderly house, under Pen. Code, arts. 496, 500, being an offense over which a justice of the peace had jurisdiction, was not a case of which the criminal district court of Galveston and Harris counties had original jurisdiction. *Ex parte Smith* (Cr. App.) 43 S. W. 1000; *Davis v. State*, 32 App. 382, 23 S. W. 892.

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*, 58 App. 209, 127 S. W. 208, 21 Ann. Cas. 405.

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.]

See, post, ch. 8, title 3, as to Habeas Corpus.

Explanatory.—The present constitution, in respect to the writ of habeas corpus, reads as follows: "Said court, and the judges thereof, shall have power to issue writs of habeas corpus, mandamus, injunction, and certiorari, and all writs necessary to enforce their jurisdiction" [Const. art. 5, § 8 (Vernon's Sayles' Civ. St. 1914, vol. 1, p. xli)].

Jurisdiction.—The district court has jurisdiction to issue the writ in a felony case to any officer in any county in the state and can, in chambers, try the case in any county unless prohibited by law. *Ex parte Angus*, 28 App. 293, 12 S. W. 1099.

District judge.—A district judge may grant and hear a writ of habeas corpus though an indictment for the offense is pending in the county court. *Ex parte Strong*, 34 App. 309, 30 S. W. 666.

Custody of children.—The district court may issue the writ on the application of parents to determine the right to custody of their child. *Legate v. Legate*, 87 Tex. 248, 28 S. W. 281.

Grounds for writ and allowance thereof.—See post, articles 160, et seq.

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.]

Validity of act.—This act is a valid exercise of legislative power under Const. art. 5, § 7, which declares that the Legislature shall have power to authorize the holding of special terms of court, or the holding of more than two terms in any county for the dispatch of business. *Ex parte Martinez* (Cr. App.) 145 S. W. 859.

The act of the Legislature authorizing a judge to call a special term of the court is constitutional. *Valdez v. State*, 71 App. 487, 160 S. W. 341.

Special term in general.—A district judge being authorized by law in case of emergency or necessity to at any time call a special term, one may not complain that he is indicted and tried at a special term, to hold which the judge recessed the regular term of the court in another county in the district. *Elliott v. State*, 53 App. 200, 125 S. W. 568.

After the adjournment of the regular January term of the district court which by law might have continued for eight weeks, the district judge made an order that the court convene in special session at the courthouse on a day named, which was within the eight weeks, to resume business under the regular January term for the purpose of disposing of two pending cases. At such term the court made orders changing the venue of such cases designated as having been made at the January term. The defendants in such cases filed pleas to the jurisdiction based on the contention that such term was a special term and took a bill of exceptions restating the objections on the same grounds. Held, that the term was a "special term," and hence the orders changing the venue were not invalid on the ground that the regular term could not be reopened in that manner. *Mayhew v. State* (Cr. App.) 155 S. W. 191.

Such special term was not illegal, nor its orders invalid, because held during the time within which the regular term of the same court might have continued. *Mayhew v. State* (Cr. App.) 155 S. W. 191.

Notice.—Whatever doubt there may have been on this point previous thereto, under *Vernon's Sayles' Civ. St. 1914*, article 1720 of which provides that a district judge may convene a special term of the district court at any time fixed by him, and section 4 of the final title of which provides that all civil statutes of a general nature in force when that revision takes effect and which are not included therein, or thereby expressly continued in force, are thereby repealed, and which nowhere requires previous notice of the time of such special terms or publication thereof, nor continues in force statutes relative to such notice or publication, such notice and publication are not required. *Mayhew v. State* (Cr. App.) 155 S. W. 191.

Validity of orders at special term.—The district judge can make any order at a special term of the district court that he can make at a regular term, and hence orders changing the venue in two cases were not invalid because made at a term called specially for such purpose, and at which no other business was transacted. *Mayhew v. State* (Cr. App.) 155 S. W. 191.

New cases.—The district judge may call a special term for the trial of new cases. *Ex parte Martinez* (Cr. App.) 145 S. W. 959.

Murder case.—The district court, complying with *Vernon's Sayles' Civ. St. 1914*, arts. 1718–1726, has authority to call a special term for the trial of a murder case. *Chant v. State* (Cr. App.) 166 S. W. 513.

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.]

See notes under art. 93, ante.

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.]

Terms of court.—In case of the nonappearance of the judge on the day fixed by law for the opening of the court, and in case no special judge is elected, the law commands the sheriff, or, upon his default, any constable of the county, to open and adjourn the court from day to day for three days, and at noon of the fourth day to adjourn it until its next regular term. After the court has been thus adjourned until the next term, it is not competent for the judge to re-open and hold the term which has lapsed. *Garza v. State*, 12 App. 261. As to terms of the district courts, see *Sayles' Civ. Stat.*, ch. 4, title 28. As to term in newly organized county, see *Ex parte Mato*, 19 App. 112.

The act of April 2, 1889, changing time of holding district court in Karnes county, notwithstanding the emergency clause, was as to the term beginning April 8, 1889, constitutional. *Ex parte Murphy*, 27 App. 493, 11 S. W. 487.

CHAPTER THREE A
CRIMINAL DISTRICT COURTS

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DALLAS COUNTY

Article 97a. Dallas criminal district court created; jurisdiction.
—There is hereby created and established at the city of Dallas a criminal district court, which shall have and exercise all the criminal jurisdiction heretofore vested in and exercised by the district courts of Dallas county. All appeals from the judgments of said court 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. [Acts 1893, p. 118.]

See arts. 97h, 97i, conferring concurrent criminal jurisdiction on criminal district court No. 2 of Dallas county.

Explanatory.—The act, embraced in this article, and arts. 97b–97g, post, was not included in the revised Pen. Code of 1911, except in a meagre manner (arts. 63 and 91). The importance of the permanent special criminal district courts would seem to require that the acts relating to them should appear in the criminal statutes.

Other acts creating special criminal district courts for a limited period have been omitted as temporary. These omitted acts are as follows: Act 1913, ch. 181 creating a special district court for the ninth judicial district, to continue in existence until Dec. 31, 1914; Act 1913, ch. 182 creating a similar court for Grayson County, to expire Dec. 1, 1914; Act 1913, S. S., ch. 25, creating such a court for El Paso County to endure until Dec. 31, 1914; and Acts 1913, S. S., ch. 34 creating a court for the fifth judicial district, which ceased to exist Jan. 1, 1915.

Constitutionality.—The provision of the act creating criminal district court No. 2 for Dallas county (Acts 32d Leg. 1st Called Sess. c. 19), authorizing transfer of causes to such court from court No. 1, is, as required by Const. art. 3, § 35, within the title, “An act to create an additional criminal district court for Dallas county,” and to “prescribe the jurisdiction”; “jurisdiction” meaning the authority of which judicial officers take cognizance of and decide cases, the right to adjudicate concerning the subject-matter in any given case. *Howard v. State* (Cr. App.) 178 S. W. 506.

Authority to define jurisdiction.—The Governor's authorization to the Legislature to create an additional criminal district court for Dallas county authorized it to define the court's jurisdiction. *Howard v. State* (Cr. App.) 178 S. W. 506.

Art. 97b. Dallas county district courts to have no criminal jurisdiction.—The district courts of Dallas county shall not have nor exercise any criminal jurisdiction. [Id.]

Art. 97c. Judge; qualifications, election, etc.—The judge of said criminal district court shall be elected by the qualified voters of Dallas county for a term of four years, and shall hold his office until his successor shall have been elected and qualified. He shall possess the same qualifications as are required of a judge of the district court, and shall receive the same salary as is now, or may hereafter, be paid to the district judges, to be paid in like manner. He shall have and exercise all the powers and duties now or hereafter to be vested in and exercised by district judges in criminal cases. The judge of said court may exchange with any district judge, as provided by law in cases of district judges, and in case of disqualification or absence of the judge, a special judge may be selected, elected, or appointed, as provided by law in cases of district judges. [Id.]

Art. 97d. Seal of the court and its use.—Said court shall have a seal of like design as the seal now provided by law for district courts, except that the words “Criminal District Court of Dallas County” shall be engraved around the margin thereof, which seal shall be used for all the purposes for which the seals of the district courts are required to be used; and certified copies of the orders, proceedings, judgments, and other official acts of said court, under the hand of the clerk and attested by the seal of said court, shall be admissible in evidence in all the courts of this state in like manner as similar certified copies from courts of record are now or may hereafter be admissible. [Id.]

Art. 97dd. Sheriff, clerk and county attorney to serve, etc.—The sheriff, the county attorney, and the clerk of the district court of Dallas county, as heretofore provided for by law, shall be the sheriff, county attorney, and clerk, respectively, of said criminal district court, under the same rules and regulations as are now, or may hereafter be, prescribed by law for the government of sheriffs, county attorneys, and clerks in the district courts of the state; and said sheriff, county attorney, and clerk shall respectively receive such fees as are now or may hereafter be prescribed by law for such officers in the district courts of the state, to be paid in the same manner. [Id.]

Amount of sheriff's fees.—The county is liable to the sheriff for only \$2.00 for each day that he or his deputy may attend upon the criminal district court, though two deputies are necessary and required by the judge. *Ledbetter v. Dallas County*, 51 Civ. App. 140, 111 S. W. 194.

Art. 97e. Terms of the court and grand juries.—Said court shall hold four terms each year for the trial of causes and the disposition of business coming before it, one term beginning the first Monday of January, one term beginning the first Monday of April, one term beginning the first Monday of July, and one term beginning the first Monday of October. A grand jury shall be impaneled in said court for each term thereof; and jury commissioners shall be appointed for drawing jurors for said court, as is now or may hereafter be required by law in district courts, and under like rules and regulations. [Id.]

Art. 97ee. Practice in.—The trials and proceedings in said court shall be conducted according to the laws governing the pleadings, practice, and proceedings in criminal cases in the district courts. [Id.]

Art. 97f. Criminal District Court No. 2 of Dallas County created.—That there is hereby created and established at the city of Dallas a criminal district court to be known as the "Criminal District Court No. 2 of Dallas County," which court shall have and exercise concurrent jurisdiction with the criminal district court of Dallas county, Texas, as now given and exercised by the said criminal district court of Dallas county under the Constitution and laws of the State of Texas. [Act 1911, 1st S. S., p. 106, ch. 19, § 1.]

Art. 97ff. Same; concurrent jurisdiction with criminal district court of Dallas county; transfer of causes.—From and after the time this law shall take effect the criminal district court of Dallas county, and the criminal district court No. 2 of Dallas county shall have and exercise concurrent jurisdiction with each other in all felony causes and in all matters and proceedings of which the said criminal district court of Dallas county now has jurisdiction; and either of the judges of said criminal district court may in their discretion transfer any cause or causes that may at any time be pending in his court to the other criminal district court by an order or orders entered upon the minutes of his court; and where such transfer or transfers are made the clerk of such district court shall enter such cause or causes upon the docket to which such transfer or transfers are made, and, when so entered upon the docket, the judge shall try and dispose of said causes in the same manner as if such causes were originally instituted in said court. [Id., § 2.]

See art. 97nn, post.

When court came into existence.—The court came into existence and had legal authority to acquire jurisdiction, so far as filing papers was concerned, by the 30th day of November, 1911; and hence an order made December 21, 1911, transferring an indictment and papers to that court, conferred jurisdiction, though it could not try the case until the succeeding January term. *Johnson v. State* (Cr. App.) 153 S. W. 849.

Art. 97g. Judge, how elected; term; qualifications; powers and duties; exchange; special judge; etc.—The judge of said criminal district court No. 2 of Dallas county shall be elected by the qualified voters of Dallas county for a term of four years, and shall hold his office until his successor shall have been elected and qualified. He shall possess the same qualifications as are required of the judge of a district court, and shall receive the same salary as is now or may hereafter be paid to the district judges, to be paid in like manner. He shall have and exercise all the powers and duties now or hereafter to be vested in and exercised by district judges of the criminal district court of Dallas county. The judge of said court may exchange with any district judge, as provided by law in cases of district judges, and, in case of disqualification or absence of a judge, a special judge may be selected, elected or appointed as provided by law in cases of district judges; provided, that the Governor, by and with the consent of the Senate, if in session, shall ap-

point a judge of said court, who shall hold the office until the next general election, after the passage of this law, and until his successor shall have been elected and qualified. [Id., § 3.]

Art. 97gg. Seal of court, etc.—Said court shall have a seal of like design as the seal now provided by law for district courts, except that the words "Criminal District Court No. 2 of Dallas County" shall be engraved around the margin thereof, which seal shall be used for all the purposes for which the seals of the district courts are required to be used; and certified copies of the orders, proceedings, judgments and other official acts of said court, under the hand of the clerk and attested by the seal of said court, shall be admissible in evidence in all the courts of this State in like manner as similar certified copies from courts of record are now or may hereafter be admissible. [Id., § 4.]

Art. 97h. Sheriff, county attorney, and clerk of Dallas county to act, etc.; fees.—The sheriff, county attorney and the clerk of the district court of Dallas county, as heretofore provided for by law, shall be the sheriff, county attorney and clerk, respectively, of said criminal district court under the same rules and regulations as are now or may hereafter be prescribed by law for the government of sheriffs, county attorneys and clerks of the district courts of the State; and said sheriff, county attorney and clerk shall respectively receive such fees as are now or may hereafter be prescribed by law for such officers in the district courts of the State to be paid in the same manner. [Id., § 5.]

Art. 97hh. Terms of court; grand jury; drawing jurors; pleading, practice, and procedure.—Said court shall hold four terms each year for the trial of causes and the disposition of business coming before it, one term beginning the first Monday of April, one term beginning the first Monday of July, one term beginning the first Monday of October, and one term beginning the first Monday of January. The grand jury shall be impaneled in said court for each term thereof unless otherwise directed by the judge of said court, and the procedure for drawing jurors for said court shall be the same as is now or may hereafter be required by law in district courts, and under the same rules and regulations. The trials and proceedings in said court shall be conducted according to the laws governing the pleadings, practice and proceedings in criminal cases in the district courts. [Id., § 6.]

Art. 97i. Apportionment.—Dallas county shall constitute the Forty-fourth Judicial District and the Sixty-eighth Judicial District, and Dallas county and Rockwall county shall constitute the Fourteenth Judicial District. The said district courts herein named shall not have nor exercise any criminal jurisdiction in Dallas county, such criminal jurisdiction having been by law exclusively vested in the Criminal District Courts for said county. But all of said three courts shall have and exercise concurrent jurisdiction coextensive with the limits of Dallas county in all civil cases, proceedings and matters of which district courts are given jurisdiction by the Constitution and laws of the State. The said Fourteenth Judicial District Court shall have jurisdiction in Rockwall county, Texas, in all civil and criminal cases which under the Constitution and laws of this State are cognizable by district courts, and in which the jurisdiction is in Rockwall county, Texas; and all appeals in criminal cases shall be to the Court of Criminal Appeals of the State of Texas under the same regulations as are now or may hereafter be provided by the laws for appeals in criminal cases in the district court. [Act 1913, p. 171, ch. 89, § 1.]

Art. 97ii. Concurrent jurisdiction of criminal district courts with county court at law; transfer of causes.—The Criminal District Court and Criminal District Court No. 2 of Dallas County shall have and exercise original concurrent jurisdiction with each other and with the County Court of Dallas County at Law in all matters and proceedings relative to misdemeanor causes of which the County Court of Dallas County at Law now has jurisdiction and either of the judges of said Criminal District Courts and the judge of said County Court of Dallas County at Law may, in his discretion, or upon the motion of the county attorney of Dallas county, transfer by written order or orders, entered upon the minutes of said court, any misdemeanor cause or misdemeanor causes that may at any time be pending in either of said courts to either of the other of said courts, as should, in his discretion, be transferred or as may be prayed for in the motion of the county attorney. [Act 1915, p. 74, ch. 37, § 1.]

Art. 97j. Duty of county clerk on transfer of cause; costs and fees; duty of clerk of district court.—Upon the transfer of any such cause or causes from said County Court of Dallas County at Law to either of said Criminal District Courts it shall be the duty of the county clerk of Dallas County to prepare and forward with the papers in said cause or causes so transferred a bill of the cost then accrued which said cost shall follow said cause or causes, and be taxed in said cause or causes with any other cost that may accrue in said cause or causes in either of said Criminal District Courts to which said cause or causes may be transferred; provided that the county clerk of Dallas County making such a bill of cost shall receive the sum of 50 cents for the preparation and forwarding of said bill of cost, in each cause so transferred, which said sum and cost shall be taxed in said cause and collected as other cost in the manner now provided by law; and the clerk of the District Court of Dallas County shall likewise, upon the transfer of any such cause from either of said Criminal District Courts to the County Court of Dallas County at Law, prepare such bill of cost and forward same as provided therein, and shall receive the same compensation as herein provided for the county clerk of Dallas County in such cases. [Id., § 2.]

Art. 97jj. Misdemeanor dockets for transferred cases.—The clerk of the District Court of Dallas County shall keep for each of said Criminal District Courts a misdemeanor docket and a misdemeanor motion docket in like manner as is now provided for by law for the County Court of Dallas County at Law, and upon any such cause or causes being transferred from the County Court of Dallas County at Law or from one of said Criminal District Courts to the other, said cause or causes shall be docketed as now provided by law for the County Court of Dallas County at Law. [Id., § 3.]

Art. 97jjj. Practice in transferred causes.—In trial of causes transferred to either of the Criminal District Courts of Dallas County from the County Court of Dallas County at Law, the trials, pleadings and practice shall be the same as in trial of other causes over which the Criminal District Courts of Dallas County now have jurisdiction. [Id., § 4.]

Art. 97k. Fees of officers in misdemeanor causes.—The county attorney of Dallas county and all other officers shall receive the same fees in misdemeanor causes in said Criminal District Courts as are now provided by law in the County Court of Dallas County at Law and in all other matters of cost tax in said causes in said Criminal District Courts, the item shall in no event be greater than

that provided by law for such items in the County Court of Dallas County at Law, and all such cost in such causes shall be paid to the officers of the court in which same is accrued. [Id., § 5.]

Art. 97kk. Filing misdemeanor causes in either court.—All misdemeanor causes of which the County Court of Dallas County now has jurisdiction may be filed originally with the clerk of the district [court] of Dallas county, in either the Criminal District Court of Dallas County or the Criminal District Court No. 2 of Dallas County, in the same manner as is now provided by law for the filing of such causes with the county clerk of Dallas county in the County Court of Dallas County at Law. [Id., § 7.]

Art. 97l. Jurisdiction of proceeding on bail bonds and recognizances given in transferred causes.—Said Criminal District Courts shall have jurisdiction on all bail bonds and recognizances taken in proceedings had before such courts; in all causes transferred to said courts from either of them or that may be transferred to said courts from the County Court of Dallas County at Law; and may enter forfeitures thereof; and final judgment and enforce the collection of same by proper process in the manner as provided by law in said bail bond proceedings; and all bail bonds, recognizances or other obligations taken for the appearance of defendants, parties and witnesses, in either the County Court of Dallas County at Law or Criminal District Court of Dallas County, or Criminal District Court No. 2 of Dallas County, shall be binding on all such defendants, parties and witnesses and their sureties for appearance in either of said courts in which said cause may be pending or to which same may be transferred. [Id., § 7a.]

Art. 97ll. Judges of criminal district courts may sit in either court.—From and after the time this law shall take effect the Criminal District Court of Dallas County, Texas, and the Criminal District Court Number Two of Dallas County, Texas, and the respective judges thereof, shall have and exercise concurrent jurisdiction with each other in all felony cases, and in all misdemeanor cases in which said courts have, or may hereafter have, concurrent jurisdiction with the County Court of Dallas County at Law, and in all matters and proceedings of which either of said criminal district courts of Dallas County, Texas, now have jurisdiction; and either of the judges of said criminal district courts may, in his discretion, in the absence of the judge of the other criminal district court from his courtroom, or from the County of Dallas, Texas, try and dispose of any cause or causes that may be pending in such criminal district court as fully as could such absent judge were he personally present and presiding. And either of said judges may receive in open court from the foreman of the grand jury any bill or bills of indictment in the court to which such bill or bills of indictment may be returnable, entering the presentment of such bill or bills of indictment in the minutes of the proceedings of such court, and may hear and receive from any impaneled petit jury any report, information or verdict, and make and cause to be entered any order or orders in reference thereto, or with reference to the continuation of the deliberation of such petit jury or their final discharge, as fully and completely as such absent district judge could do if personally present and presiding over such court; and may make any other order or orders in such courts respecting the causes therein pending or the procedure pertaining thereto, as the regular judge of said criminal district court could make if personally present and presiding. [Act 1915, p. 138, ch. 86, § 1.]

See art. 97h, ante.

HARRIS COUNTY

Art. 97m. Galveston and Harris counties criminal judicial district changed to include only Harris county; criminal district court of Harris county created; original jurisdiction.—That the territorial limits of the Criminal Judicial District composed of the counties of Galveston and Harris is hereby changed so as to hereafter include Harris county alone, and there is hereby created and established in the city of Houston, in the county of Harris, a Criminal District Court, which shall have original and exclusive jurisdiction over all criminal cases, both felony and misdemeanor, in the county of Harris, of which district and county courts under the Constitution and laws of this State, have original and exclusive jurisdiction, and shall be known as “The Criminal District Court of Harris County.” [Act 1911, p. 111, ch. 67, § 1.]

Construction of former act.—The judge of a district court can sit as a judge of the criminal court of Galveston and Harris counties and try cases. Hull v. State, 50 App. 607, 100 S. W. 404.

Art. 97mm. Appellate jurisdiction.—The said court shall have exclusive appellate jurisdiction over all criminal cases tried and determined by justices of the peace, mayors and recorders in said county of Harris, under the same rules and regulations as are provided by law for appeals from justices of the peace, mayors and recorders to the county courts in criminal cases. [Id., § 2.]

Art. 97n. May grant habeas corpus, etc.—The judge of said court hereinafter provided for shall have power to grant writs of habeas corpus, mandamus and all writs necessary to enforce the jurisdiction of his court, under the same rules and regulations which govern district judges. [Id., § 3.]

Art. 97nn. Jurisdiction over bail bonds, etc.—Said court shall have jurisdiction over all bail bonds and recognizances taken in proceedings had before said court, or that may be returned to said court from other courts, and may enter forfeitures thereof, and final judgments, and enforce the collection of the same by proper process in the same manner as is provided by law in district courts. [Id., § 4.]

Art. 97nnn. Jurisdiction over cases transferred.—Said court shall have jurisdiction over all criminal cases heretofore transferred from other courts to the Criminal District Court of Harris County as heretofore established, and over such criminal cases as may hereafter be transferred to the court created by this Act, as fully in all respects as if said cases had originated in said court. [Id., § 5.]

Art. 97o. Seal of court.—The said Criminal District Court of Harris County shall have a seal similar to the seal of the district court, with the words “Criminal District Court of Harris County” engraved thereon, an impression of which seal shall be attached to all writs and other process, except subpoenas issuing from said court, and shall be used in the authentication of all official acts of the clerk of the said court. [Id., § 6.]

Art. 97oo. Rules of practice; pleading and evidence.—The practice in said court shall be conducted according to the laws governing the practice in the district court, and the rules of pleading and evidence in the district court shall govern in so far as the same may be applicable. [Id., § 7.]

Art. 97p. Selection, etc., of juries.—All laws regulating the selection, summoning, and impaneling of grand and petit jurors in the district court shall govern and apply in the criminal district court in so far as the same may be applicable; provided, that the clerk of the district court of Harris county shall assist in drawing the names of

the jurors for said criminal court as is now provided by law. [Id., § 8.]

Art. 97pp. Procedure.—All rules of the criminal procedure governing the district and county courts shall apply to and govern said criminal district court. [Id., § 9.]

Art. 97ppp. Terms of court.—Said court shall hold four terms each year for the trial of causes and the disposition of business coming before it, one term beginning the first Monday in May, one term beginning the first Monday in August, one term beginning on the first Monday in November and one term beginning on the first Monday in February of each year. Each term shall continue until the business is disposed of. [Act 1903, ch. 18; Act 1911, p. 112, ch. 67, § 11.]

Validity of former act.—A governor's proclamation convening a special legislative session provided that it was to enact adequate laws simplifying the procedure in both civil and criminal courts of the state, and amending and changing the existing laws governing "court procedure." Held, that the words "court procedure" should be held to apply generally to all laws governing the operation of courts, including those regulating the times within which sessions of courts may be held, and hence this article changing, extending, and rearranging the terms of the criminal district court for Harris and Galveston counties, was within such proclamation. *Long v. State*, 58 App. 209, 127 S. W. 208, 21 Ann. Cas. 405.

Art. 97q. Extension of term.—Whenever the Criminal District Court of Harris County shall be engaged in the trial of any cause when the time for the expiration of the term of said court as fixed by law shall arrive, the judge presiding shall have the power and may, if he deems it expedient, continue the term of said court until the conclusion of such pending trial; in such case the extension of such term shall be shown on the minutes of the court before they are signed. [Act 1911, p. 112, ch. 67, § 12.]

Art. 97qq. Sheriff of Harris county shall attend, etc.—The sheriff of Harris county and his deputies shall attend upon said court and execute all the process issuing therefrom and perform all duties required by said court or the judge thereof, and shall perform all such services for said court as sheriffs and constables are authorized or required to perform in and for other district courts of this State and he shall receive the same fees for his services as are provided by law for the same services in the district court. [Id., § 13.]

Art. 97r. Same powers as district court.—In all matters over which said criminal district court has jurisdiction, it shall have the same power within said district as is conferred by law upon the district court, and shall be governed by the same rules in the exercise of such power. [Id., § 14.]

Art. 97rr. Appeals and writs of error.—Appeals and writs of error may be prosecuted from the said criminal district court to the court of criminal appeals, in the same manner and form as from district courts in like cases. [Id. sec. 15, superseding article 2228, Rev. Civ. St. 1911.]

Art. 97rrr. Harris county separate criminal judicial district judge, clerk, and district attorney, how elected; duties and powers.—The county of Harris is hereby created a separate criminal judicial district and at the next general election after this Act shall take effect, there shall be elected in and for said district a criminal district judge, a criminal district clerk and a district attorney, each of whom shall have and exercise, respectively, the same duties, powers and authority within said county as are now possessed and exercised by the judge of the criminal district court, the clerk of the criminal district court, and the district attorney for the criminal district composed of Galveston and Harris Counties, and such other duties as are prescribed herein. [Act 1911, p. 113, ch. 67, § 16.]

Art. 97s. Abolished as to Galveston county; transfer of cases; jurisdiction of district and county courts, etc.; compensation of district clerk; special deputy clerks; duty of county attorney, etc.—From and after the taking effect of this Act, the criminal district now composed of Galveston and Harris counties shall cease to exist so far as it embraces Galveston county, and all cases of felony that are then pending on the docket of the Criminal District Court of Galveston County shall be at once transferred to the district courts in said county of the Tenth and Fifty-sixth Judicial Districts, the felony cases on said docket of even numbers shall be transferred to the district court for the Tenth Judicial District and the felony cases on said docket of odd numbers shall be transferred to the district court for the Fifty-sixth Judicial District, and the said district court for the Tenth Judicial District and the said court for the Fifty-sixth Judicial District are hereby vested with concurrent exclusive jurisdiction of all felony cases arising in the county of Galveston, and the judges of said courts are hereby vested with all powers, privileges, and authority given by the Constitution and laws of this State in criminal matters, to the district courts of this State; and the judge of the district court for the Tenth Judicial District and the judge of the district court for the Fifty-sixth Judicial District shall alternately impanel grand juries in said county of Galveston in the same manner provided therefor by the judges of the district courts of this State; and from and after taking effect of this Act, all cases of misdemeanor pending on the docket of the Criminal District Court of Galveston County shall be transferred to the County Court of Galveston County, Texas, unless there be a county court at law of said county, in which event they shall be transferred to the latter court; and said county court and the judge thereof is hereby vested with all the powers, privileges and authority in criminal cases that are conferred by the laws of this State on the county court; and the clerk of the District Court of Galveston County is hereby vested with the powers, duties and authority in criminal matters in cases of felony that are now conferred by law on clerks of the district court in this State, and shall be the custodian of the records in felony cases transferred from said Criminal District Court and hereafter arising in the county of Galveston; and the clerk of the County Court of Galveston County is hereby vested with the powers, duties and authority in criminal matters in cases of misdemeanor as are now conferred by law on the clerks of the county courts of this State, and such clerk shall be the custodian of the papers and records of misdemeanor cases arising in such county after such transfer, and the clerk of the Criminal District Court of Galveston County shall at once make the transfer of cases herein provided and turn over the papers and records of his office to the clerk of the district court and the clerk of the County Court of Galveston County as herein provided. The clerk of the district court shall file and docket the even numbered felony cases in the court of the Tenth Judicial District and the odd numbered felony cases in the court of the Fifty-sixth Judicial District, but any case pending in either of said courts may, in the discretion of the judge thereof, be transferred by one of said district courts to the other, and in case of the disqualification of the judge of either of said courts and in any case, such case on his suggestion of disqualification shall stand transferred to the other of said courts and docketed by the clerk accordingly. All writs and process heretofore, or that may hereafter be issued, up to the time this Act shall take effect, which are made returnable to the Criminal District Court of Galveston and Harris Counties, shall be returnable to the court to which the cause has been or may be transferred

in like manner as if originally made returnable to said court and all writs and process are hereby validated.

The district clerk of Galveston county shall receive the sum of \$600.00 per annum, to be paid by the county of Galveston for ex officio services, and receive the same fees in criminal cases as fixed by law in felony cases, and the county clerk shall receive the sum of \$600.00 per annum for ex officio services and be entitled to such fees as are provided by law in misdemeanor cases.

The county commissioners court shall have authority to pay for the services of a special deputy district or county clerk, or both, if in their judgment such shall be required; such assistant to be appointed by the clerk of the court in which his services are needed. The county attorney and his assistant shall conduct all prosecutions in said district and county courts and county court at law and said county attorneys and the clerks of said court shall receive such fees as are now or may hereafter be provided for by law. [Id., § 17.]

Art. 97ss. Continuation in matters of jurisdiction, records and procedure of former court.—The Criminal District Court of Harris County herein provided for shall, from and after the time when this Act takes effect, be taken and deemed to be, in respect to all matters of jurisdiction, records and procedure a continuation of the Criminal District Court of Galveston and Harris Counties as now organized for Harris county, it being the intention of this Act to reduce the territorial limits of the Criminal Judicial District of Galveston and Harris Counties to Harris county alone. [Id., § 17a.]

Art. 97sss. Judge, how elected; term; qualifications; salary; powers and duties.—The judge of the Criminal District Court of Harris County shall be elected by the qualified voters of said county for a term of four years and shall hold his office until his successor is elected and qualified. He shall possess the same qualifications as are required of the judges of the district court and shall receive the salary and compensation as is now, or may hereafter be provided for district judges of this State, to be paid in the same manner as the salary and compensation of other district judges is paid. Said judge of said criminal district court shall have and exercise all the powers and duties which are now, or hereafter may be by law vested in and exercised by district judges of this State in criminal cases. The judge of said court may exchange with other district judges, as provided by law, and the said judge shall have all the power within said criminal district which is by the Constitution and laws of this State vested in district judges of their respective judicial districts, except that the jurisdiction and authority of said criminal district judge shall be limited to criminal cases, and to the exercise of such powers and the granting of such writs and process as may be necessary or incidental to the exercise of such criminal jurisdiction. [Id., § 18.]

Art. 97t. Criminal district attorney of Harris county; powers and duties.—There shall be elected by the qualified electors of the criminal district of Harris county, Texas, an attorney for said court who shall be styled "The Criminal District Attorney of Harris County," and who shall hold his office for a period of two years and until his successor is elected and qualified. The said criminal district attorney shall possess all of the qualifications and take the oath and give the bond required by the Constitution and laws of this State, of other district attorneys. It shall be the duty of said criminal district attorney, or of his assistants, as hereinafter provided, to be in attendance upon each term of said Criminal District Court of Harris County and to represent the State in all matters pending before said court. And he shall have exclusive control of

all criminal cases wherever pending, or in whatever court in Harris county that now has jurisdiction of criminal cases, as well as any or all courts that may be hereafter created and given jurisdiction of any criminal cases, and he shall collect the fees therefor provided by law. He shall also have control of any and all cases heard on habeas corpus before any civil district court of Harris county, as well as before the criminal court of said county. The criminal district attorney of Harris county shall have and exercise, in addition to the specific powers given and duties imposed upon him by this Act, all such powers, duties and privileges within said criminal district of Harris county as are by law now conferred or which may hereafter be conferred upon district and county attorneys in the various counties and judicial districts of this State. It is further provided that he and his assistants shall have the exclusive right, and it shall be their sole duty to perform the duties provided for in this Act, except in cases of the absence from the county of the criminal district attorney and his assistants, or their inability or refusal to act; and no other person shall have the power to perform the duties provided in this Act, or to represent the State in any case in Harris county, except in case of the absence from Harris county, or the disability or refusal to act, of the criminal district attorney and his assistants. [Id., § 19.]

Art. 97tt. Same; appointment and compensation.—The said criminal district attorney of Harris county shall be commissioned by the Governor and shall receive a salary of five hundred dollars per annum, to be paid by the State, and in addition thereto shall receive the following fees in felony cases, to be paid by the State: For each conviction of felonious homicide, where the defendant does not appeal or dies, or escapes after appeal and before final judgment of the Court of Criminal Appeals, or where, upon appeal, the judgment is affirmed, the sum of forty dollars. For all other convictions in felony cases, where the defendant does not appeal, or dies, or escapes, after appeal, and before final judgment of the Court of Criminal Appeals, or where, upon appeal, the judgment is affirmed, the sum of thirty dollars; provided, that in all convictions of felony, in which punishment is fixed by the verdict and judgment by confinement in the House of Correction and Reformatory, his fee shall be fifteen dollars. For representing the State in each case of habeas corpus where the defendant is charged with a felony, the sum of twenty dollars. For representing the State in examining trials, in felony cases, where indictment is returned, in each case, the sum of five dollars. The criminal district attorney shall also receive such fees in misdemeanor cases, to be paid by the defendant and by the county, as is now provided by law for district and county attorneys, and he shall also receive such compensation for other services rendered by him as is now, or may hereafter be, authorized by law to be paid to other district and county attorneys in this State. [Id., § 20.]

Art. 97ttt. Same; accounting for fees in excess of specified amount.—The criminal district attorney of Harris county shall retain out of the fees earned by him in the Criminal District Court of Harris County the sum of twenty-five hundred dollars per annum, and in addition thereto, one-fourth of the gross excess of all fees in excess of twenty-five hundred dollars per annum, the three-fourths of the excess over and above twenty-five hundred dollars per annum, remaining, to be paid by him into the treasury of Harris county. It is provided that in arriving at the amount collected by him, he shall include the fees arising from all classes of criminal cases of which the Criminal District Court of Harris County has original

and exclusive jurisdiction, whether felony, misdemeanor, habeas corpus hearings, or commission on fines and forfeitures collected in said court, it being the intention of this Act that the criminal district attorney of Harris county shall include all fees of every kind and class earned by him in said criminal district court in arriving at the amount collected by him; it being further provided that at the end of each year he shall make a full and complete report and accounting to the county judge of Harris county of the amount of such fees collected by him. [Id., § 21.]

Art. 97u. Same; assistants and stenographer; duties and compensation of assistants; fees.—The criminal district attorney of Harris County shall appoint two assistant criminal district attorneys, who shall each receive a salary of eighteen hundred dollars per annum, payable monthly. He shall also appoint a stenographer, who shall receive a salary of not more than twelve hundred dollars per annum, payable monthly. In addition to the assistant criminal district attorneys and stenographers, above provided for, the county judge of Harris county may, with the approval of the commissioners' court, appoint as many additional assistants as may be necessary to properly administer the affairs of the office of criminal district attorney and enforce the law, upon the criminal district attorney making application under oath, addressed to the county judge of Harris County, setting out the need therefor, provided the county judge, with the approval of the commissioners' court may discontinue the services of any one or more of the assistant criminal district attorneys provided for in this Act, when in his judgment and the judgment of the commissioners' court, they are not necessary; provided that the additional assistant appointed by the county judge as herein provided for shall receive not more than \$1800.00 per year, payable monthly. The salaries of all assistants shall be paid by Harris County. The assistant criminal district attorneys above provided for, when so appointed, shall take the oath of office and be authorized to represent the State before said criminal district court, and in all other courts in Harris county in which the criminal district attorney of Harris county is authorized by this Act to represent the State, such authority to be exercised under the direction of the said criminal district attorney, and which assistants shall be subject to removal at the will of the said criminal district attorney. Each of said assistant criminal district attorneys shall be authorized to file informations, examine witnesses before the grand jury and generally to perform any duty devolving upon the criminal district attorney of Harris county and to exercise any power conferred by law upon the said criminal district attorney, when by him so authorized. The criminal district attorney of Harris county shall be paid the same fees for services rendered by his assistants as he would be entitled to receive if the services should have been rendered by himself. [Act 1911, ch. 67, § 22, amended; Act 1915, p. 23, ch. 14, § 1.]

Art. 97uu. Clerk, how elected; term; fee; salary; powers and duties; deputies.—The clerk of the Criminal District Court of Harris County shall be elected by the qualified voters of Harris county, and shall hold his office for a term of two years, and until his successor is elected and qualified. Said clerk shall receive such fees as are now or may hereafter be prescribed by law to be paid to the clerk of the district courts of this State, and to be paid and collected in the same manner; and in addition thereto, he shall receive an annual salary of one thousand dollars, to be paid out of the treasury of Harris county monthly. Said clerk shall have the same power and authority, and shall perform the same duties with respect to

said Criminal District Court of Harris County as are by law conferred upon the clerks of other district courts in criminal cases, and shall have authority to appoint one or more deputies as needed, whose salary shall be paid by said clerk. Said deputies shall take the oath of office prescribed by the Constitution of this State, and said deputies are authorized to perform such services as may be authorized by said criminal district clerk, and shall be removable at the will of the clerk. [Act 1911, p. 117, ch. 67, § 23.]

Art. 97v. Judge, attorney and clerk to continue in office until, etc.; clerk to be appointed.—The criminal district judge and the criminal district attorney of the criminal judicial district composed of Galveston and Harris counties, who shall be in office at the time when this Act goes into effect, shall continue in office, respectively, as the judge and the district attorney of the Criminal District Court of Harris County until the next general election, or until their successors shall be elected and qualified.

The clerk of the Criminal District Court of Harris County who shall be in office at the time when this Act goes into effect shall continue in office as clerk of the Criminal District Court of Harris County until January 1, A. D. 1912, and until his successor is appointed and qualified.

The Governor shall, on January 1, 1912, or thereafter, appoint a clerk of the Criminal District Court of Harris County, who shall hold his office from January 1, A. D. 1912, until the next general election, or until his successor is elected and qualified. [Id., § 24.]

TRAVIS AND WILLIAMSON COUNTIES

Art. 97vv. Court created; jurisdiction; appeals.—That there is hereby created and established for the Counties of Travis and Williamson a Criminal District Court, which shall have and exercise all of the criminal jurisdiction now vested in and exercised by the District Court of Travis and Williamson Counties, and said Criminal District Court shall try and determine all causes for divorce between husband and wife and adjudicate property rights in connection therewith in said two counties. All appeals from the judgments of said court shall be to the Court of Criminal Appeals, except appeals in divorce cases, under the same rules and regulations as are now or may hereafter be provided by law for appeals in criminal cases from district courts. [Act 1915, p. 30, ch. 17, § 4.]

Art. 97w. Other courts not to have criminal jurisdiction; pending causes; election of judge; qualifications and salary of judge; special and substitute judges; appointment of first incumbent.—From and after the time when this Act shall take effect the Twenty-sixth District Court of Travis and Williamson Counties, and the Fifty-third District Court of Travis County shall cease to have and exercise any criminal jurisdiction in either of said counties; provided, however, that if there shall be any criminal case upon trial in either the Twenty-sixth or Fifty-third District Courts when this Act shall go into effect, such District Court shall retain jurisdiction of such case until such trial shall be concluded, and until appeal therein shall be perfected, if an appeal shall be made therein; and provided further, that nothing in this Act shall affect the jurisdiction of either the Twenty-sixth or Fifty-third District Courts to pronounce sentence in any criminal case tried in such courts before this Act takes effect, or which shall be on trial when this Act goes into effect. The judge of said Criminal District Court for the Counties of Travis and Williamson shall be elected by the qualified voters of Travis and Williamson Counties for a term of four years, and shall hold his office until his successor shall have been duly elected

and qualified. He shall possess the same qualifications as are required of a judge of the District Court, and shall receive the same salary as is now or may hereafter be paid to district judges, to be paid in like manner. He shall have and exercise all the powers and duties now or hereafter to be vested in and exercised by district judges in criminal cases. The judge of said court may exchange with any district judge, as provided by law in cases of district judges; and in case of disqualification or absence of the judge a special judge may be selected, elected or appointed as provided by law in cases of district judges; provided that the Governor, by and with the consent of the Senate, shall immediately upon this Act taking effect appoint a judge of said court, who shall hold the office until the next general election after the passage of this Act and until his successor shall have been elected and qualified. [Id.]

Art. 97ww. Seal.—Said Criminal District Court shall have a seal in like design as the seal now provided by law for District Courts, except for Travis County the words "Criminal District Court of Travis County, Texas," shall be engraved around the margin thereof; and for Williamson County the words, "Criminal District Court of Williamson County, Texas," shall be engraved around the margin thereof. [Id.]

Art. 97x. Terms.—The terms of said Criminal District Court shall be held each year as follows: in the County of Williamson on the first Monday in January, May and September, and continue in session for four weeks, unless continued longer by the judge thereof by an order duly entered; in Travis County on the first Monday in February, and may continue in session to and including the last Saturday before the first Monday in April; on the first Monday in June, and may continue to and including the first Saturday after the third Monday in July; and on the first Monday in October, and may continue in session to and including the last Saturday before the twenty-fifth of December, unless continued longer by the judge of said court by an order duly entered. [Id.]

Art. 97xx. Procedure.—The trials and proceedings in said Criminal District Court shall be conducted in criminal cases according to the laws governing pleadings, practice and proceedings in criminal cases in the district courts. [Id.]

Art. 97y. Grand and petit jurors.—A grand jury shall be drawn and selected for each term of said court held in Travis County and for each term of said court held in Williamson County in the manner now provided by law, and all grand and petit juries for criminal cases drawn and selected for the Twenty-sixth and Fifty-third District Courts under existing laws at the time this Act takes effect shall be as valid as if no change had been made, and the persons constituting such juries shall be required to appear and serve at the next ensuing term of this court as fixed by this Act, and their acts shall be as valid as if they had served as jurors in the court for which they were originally drawn, and all laws regulating the selection, summoning and impaneling of grand and petit juries in the District Court shall govern said Criminal District Court, and jury commissioners shall be appointed for drawing juries for said court as is now or may hereafter be required by law in district courts, and under like rules and regulations. [Id.]

Art. 97yy. Transfer of causes.—Immediately upon the taking effect of this Act the criminal cases and divorce cases now pending in the Twenty-sixth and Fifty-third District Courts in the respective counties of Travis and Williamson, together with all records and papers relating thereto, shall be transferred to said Criminal

District Court in each respective county, except as otherwise provided in the foregoing paragraph "a" of Section 4 [art. 97w]. [Id.]

Art. 97z. Pending proceedings.—All process and writs heretofore issued or served in criminal cases pending in the Twenty-sixth and Fifty-third District Courts in either Travis or Williamson Counties, returnable to either the Twenty-sixth or Fifty-third District Court, and all process and writs in criminal cases pending in either of said District Courts, heretofore issued or served, returnable to either the Twenty-sixth or Fifty-third District Court, shall be considered returnable to the Criminal District Court herein created, at the time as hereinafter prescribed, and all such process and writs are hereby legalized and validated as if the same had been made returnable to said Criminal District Court of Travis and Williamson Counties hereby created and at the time herein prescribed. And all bail bonds, bonds, and recognizances in criminal cases pending in said Twenty-sixth and Fifty-third District Courts when this Act takes effect, binding any person or persons to appear in either the Twenty-sixth or Fifty-third District Court shall have the effect to require such person or persons to appear at the first term of said Criminal District Court held in Travis County where said bail bond, bond, or recognizance has been given and taken in either the Twenty-sixth or Fifty-third District Court in Travis County; and at the first term of said Criminal District Court held in Williamson County where said bail bond, bond, or recognizance has been given and taken in the Twenty-sixth District Court in Williamson County, after the taking effect of this Act, and there to remain in said court in said respective county, from day to day and from term to term until finally discharged under the same penalties provided by law in such cases, and to the same effect as if the case or matter was still pending in the District Court in which said bail bond, bond, or recognizance was originally given and taken, and all said bail bonds, bonds, and recognizances shall have the same validity and be as valid and binding as if this Act had not been passed. [Id.]

Art. 97zz. Clerk.—The clerk of the District Courts of Travis County as heretofore constituted, and his successors in office, shall be the clerk of the Twenty-sixth and Fifty-third District Courts, and also the clerk of the Criminal District Court in Travis County hereinafter created, and shall perform all the duties pertaining to all of said courts; and the clerk of the District Court of Williamson County, as heretofore constituted, and his successors in office, shall be the clerk of the Twenty-sixth District Court in Williamson County, and also the clerk of the Criminal District Court in Williamson County, Texas, hereinafter created, and shall perform all duties pertaining to both of said courts. [Id., § 3.]

Art. 97zzz. Sheriff and clerk.—The sheriff and clerk of the District Court of Travis County, as now provided for by law, shall be the sheriff and clerk, respectively, of said Criminal District Court in Travis County, and the sheriff and clerk of the District Court of Williamson County, now provided for by law, shall be the sheriff and clerk, respectively, of said Criminal District Court in Williamson County; and the district attorney of the Twenty-sixth and Fifty-third Judicial Districts elected and now acting for said districts, shall be district attorney for said Criminal District Court in both Travis and Williamson Counties, and hold his office until the time for which he has been elected district attorney for the Twenty-sixth and Fifty-third Judicial Districts shall expire; and until his successor is duly elected and qualified; and there shall be elected for two years beginning with the next general election after this Act takes effect, a district attorney for said Criminal District Court,

whose powers and duties shall be the same as other district attorneys; and said clerk, sheriff and district attorney shall, respectively, receive such fees and salary as are now or may hereafter be prescribed by law for such offices in the District Courts of the State of Texas, to be paid in the same manner. [Id., § 4.]

CHAPTER FOUR
OF COUNTY COURTS

Art.	Art.
98. Have exclusive jurisdiction of misdemeanors; except, etc.	104p. Same; vacancy in office of judge; appointment of first incumbent.
99. Power to forfeit bail bonds, etc.	104q. Same; removal of judge.
100. Power to issue writs of habeas corpus.	104r. Same; purpose of act.
101. Appellate jurisdiction.	104s. County court at law of Harris county, Texas created.
101a. Creation of county court of Dallas county, at law.	104ss. Same; effect of change of name of former court.
102. County court of Dallas county at law, jurisdiction of defined.	104sss. Same; jurisdiction.
103. Jurisdiction retained by the county court of Dallas county.	104ssss. Same; clerk; fees.
103a. Terms of county court of Dallas county, at law; practice, etc.	104t. Same; transfer of misdemeanor cases.
103b. Judge to be elected when, etc.; qualifications; term.	104tt. Same; fees of judge.
103c. Bond and oath of judge.	104itt. Same; terms.
103d. Special judge elected or appointed, how.	104u. County court at law No. 2 of Harris county.
104. Power of the county court of Dallas county at law, of the judge thereof.	104uu. Same; jurisdiction.
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104b. Appointment of jury commissioners; selection, etc., of juries.	104uuuu. Same; qualifications of judge; compensation; fees.
104c. Vacancy in office of judge, how filled.	104v. Same; clerk; fees.
104d. Fees and salary of judge.	104vv. Same; seal.
104e. Salary of county judge of Dallas county.	104vvv. Same; sheriff; fees.
104f. County court of Bexar county for criminal cases created.	104vvvv. Same; special judge.
104g. Same; jurisdiction.	104w. Same; power to issue writs.
104h. Same; jurisdiction retained by other courts.	104ww. Same; jurisdiction of county court at law not impaired.
104i. Same; power to issue writs.	104www. Same; terms of court.
104j. Same; terms.	104x. Same; transfer of pending causes.
104k. Same; election of judge; qualifications and tenure.	104xx. Same; transfer of causes.
104l. Same; judge's bond.	104xxx. Same; procedure.
104m. Same; special judge.	104y. Same; return of process in transferred causes.
104n. Same; clerk and sheriff.	104yy. Same; appointment of judge in first instance; election.
104o. Same; jurors.	104yyy. County court of Jefferson county at law created.
	104z. Same; jurisdiction on.
	104zz. Same; jurisdiction of other courts.
	104zzz. Same; clerk; seal; sheriff and deputy.
	105. Appeal, etc., to district court, when.

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.]

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| 1. Explanatory. | 6. Indictment alleging felony and misdemeanor. |
| 2. Jurisdiction in general. | 7. Title to land. |
| 3. Concurrent jurisdiction. | 8. Official misconduct. |
| 4. Conviction of offense within jurisdiction. | 9. Hog theft. |
| 5. Punishment as affecting jurisdiction. | 10. Particular counties. |
| | 11. Transfer of causes. |
1. **Explanatory.**—The present constitution reads as follows: "The county court shall have original jurisdiction of all misdemeanors of which exclusive original

jurisdiction is not given to the justice's court as the same is now or may hereafter be prescribed by law, and when the fine to be imposed shall exceed two hundred dollars. * * * The county court shall not have criminal jurisdiction in any county where there is a criminal district court, unless expressly conferred by law." [Const. art. 5, § 16 (1 Vernon's Sayles' Civ. St. 1914, p. xliii)].

2. **Jurisdiction in general.**—For the commencement of a prosecution in the county court both a complaint and an information are indispensable. *Deon v. State*, 3 App. 435; *Collins v. State*, 5 App. 37; *Hefner v. State*, 16 App. 573.

The constitutional jurisdiction of the county court over crimes can be divested only in conformity to Const. art. 5, § 22. *Chapman v. State*, 16 App. 76.

The act of March 24, 1885, restored to the county courts named therein all the criminal jurisdiction they possessed under the constitution and general laws prior to the act of 1881, which took away such jurisdiction. *Galloway v. State*, 23 App. 398, 5 S. W. 246.

An indictment, alleging that accused committed perjury by giving false testimony in the county court on a trial on a complaint charging a violation of the gaming laws, is sufficient for the filing of a complaint in the county court; and arrest thereunder, plea of not guilty, and trial confer jurisdiction on the county court. *Etheridge v. State* (Cr. App.) 175 S. W. 702.

3. **Concurrent jurisdiction.**—When the jurisdiction is concurrent, the court which first takes jurisdiction acquires control to the exclusion of the other, and is entitled to proceed to judgment. *Burdett v. State*, 9 Tex. 43; *Clepper v. State*, 4 Tex. 242. But since the adoption of art. 572, post, limiting the special pleas which may be filed by the defendant, a plea in abatement that there was a prior indictment, information or complaint pending in another court, is not a good plea. *Schindler v. State*, 15 App. 394; *Williams v. State*, 20 App. 357; *Vaughn v. State*, 32 App. 407, 24 S. W. 26. But when a defendant is convicted in a court of concurrent jurisdiction, such conviction is a bar to a prosecution for the same offense in another court of concurrent jurisdiction, although the latter prosecution had been commenced before the former, and was pending at the time of the conviction. *Kain v. State*, 16 App. 282. The conferring upon an inferior court jurisdiction of a case of which a superior court has jurisdiction, renders their jurisdiction concurrent, but not inconsistent. *Johnson v. Happell*, 4 Tex. 96. Under the charter of the city of Dallas the mayor's court of that city has concurrent jurisdiction with the county court of the offense of keeping a disorderly house. *Handley v. State*, 16 App. 444; *Ex parte Wilson*, 14 App. 592.

County courts have concurrent jurisdiction with justices' courts of misdemeanors cognizable in justices' courts. *Woodward v. State*, 5 App. 296; *Solon v. State*, Id. 301; *Jennings v. State*, Id. 298; *Leatherwood v. State*, 6 App. 244; *Chaplin v. State*, 7 App. 87. But they have no jurisdiction to finally try a felony case. *Davis v. State*, 2 App. 184. But the county judge may sit as an examining court in felony cases, in which case the clerk of the county court may swear the witnesses. *Sullivan v. State*, 6 App. 319, 32 Am. Dec. 580.

The jurisdiction of the county court is concurrent with that of the justices' courts over misdemeanors cognizable in the justices' courts, and the offense of permitting a house to be used for gaming defined by article 572 of the Penal Code comes within this category. *Ballew v. State*, 26 App. 483, 9 S. W. 765.

The legislature cannot delegate to a city authority to make an offense against the city and give the city court jurisdiction over, an act which, under the state law, is a misdemeanor punishable by imprisonment, over which the county court has exclusive jurisdiction. *Ex parte Fagg*, 38 App. 573, 44 S. W. 294, 40 L. R. A. 212.

4. **Conviction of offense within jurisdiction.**—Upon a trial for an aggravated assault in the county court, the defendant may be convicted of a simple assault, and the county court has jurisdiction in such case to adjudge and enforce the conviction. *Crutchfield v. State*, 1 App. 445.

5. **Punishment as affecting jurisdiction.**—County courts have jurisdiction of misdemeanors where a part of the punishment prescribed is imprisonment in the county jail. *Reddick v. State*, 4 App. 32.

6. **Indictment alleging felony and misdemeanor.**—Where an indictment filed in the district court charged a felony committed in violation of Pen. Code, art. 233, relating to payment of poll taxes, it was improper to transfer it to the county court, though it also charged a misdemeanor committed in violation of Pen. Code, article 229. *Johnson v. State* (Cr. App.) 177 S. W. 490.

7. **Title to land.**—In a prosecution for unlawfully pulling down a fence located on property of which another had possession, the fact that defendant claimed to own the land did not cause the question of title to be involved, so as to deprive the county court of jurisdiction. *Johns v. State* (Cr. App.) 174 S. W. 610.

Where an indictment for swindling alleged that defendant acquired certain money from prosecutor by false representations as to defendant's ownership of certain land, and his right to convey the same by deed, when, in fact, he had no title to or right to convey the land, the title to the land was not "involved" in the trial of such case so as to deprive the county court of jurisdiction to try the same within the constitutional provision giving to the district court exclusive jurisdiction to try title to land. *Yoakum v. State* (Cr. App.) 150 S. W. 910.

8. **Official misconduct.**—See notes under art. 89, ante.

9. **Hog theft.**—Where the value of the animals alleged to be stolen is alleged to be less than twenty dollars, the charge is a misdemeanor, and within the jurisdiction of the county court. *Whitsett v. State*, 9 App. 198 (In this case the offense was a felony when the theft was committed, but by law operative before the trial, theft of hogs of less value than \$20 was made a misdemeanor).

County courts have no jurisdiction over theft of hogs worth twenty dollars or more. *Blunt v. State*, 9 App. 234.

10. Particular counties.—Under Const. art. 5, § 22, the legislature can divest a county court of its criminal jurisdiction. *Mora v. State*, 9 App. 406; *Chapman v. State*, 16 App. 76.

Act March 20, 1911 (Acts 32d Leg. c. 93), restoring the civil and criminal jurisdiction of the county court of Castro county, repeals Act April 26, 1893 (Acts 23d Leg. c. 57), which diminished such jurisdiction, and conferred it upon the district court of the county. *Turnbow v. J. E. Bryant Co.* (Civ. App.) 159 S. W. 605.

See list of special acts, following art. 105, post.

11. Transfer of causes.—See notes under art. 483, et seq.

Cited, *Hughes v. State* (Cr. App.) 152 S. W. 912; *Ethridge v. State* (Cr. App.) 172 S. W. 786.

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.]

Jurisdiction of offense.—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 App. 520.

Under this article the county court had jurisdiction of the forfeiture of a bail bond in a criminal case pending therein; such forfeiture proceeding being a mere incident of the criminal case, and Const. art. 5, § 8, which gives the district court jurisdiction of all suits in behalf of the state to recover penalties, forfeitures, and escheats, applying exclusively to civil and not to criminal cases. *Willis v. State* (Cr. App.) 150 S. W. 904.

Forfeiture.—See Title 7, ch. 4, post.

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.]

See post, ch. 8, title 3, Habeas Corpus; ante, art. 92.

Explanatory.—The present constitution reads as follows: "The county court, or judge thereof, shall have power to issue * * * writs of habeas corpus in cases where the offense charged is within the jurisdiction of the county court, or any other court or tribunal inferior to said court" [Const. art. 5, § 16 (1 Vernon's Sayles' Civ. St. 1914, p. xliiv).]

Person charged with capital offense.—A county judge has no power to discharge from custody on habeas corpus, a person charged with a capital felony and committed to the sheriff's custody by the examining court, since that court has no jurisdiction to try felonies. *Letcher v. Crandell*, 18 Civ. App. 62, 44 S. W. 197.

Concurrent jurisdiction.—Where the county court has jurisdiction to issue habeas corpus an application should ordinarily be made to it before being made to the court of criminal appeals, though the latter also has jurisdiction. *Ex parte Lynn*, 19 App. 120; *Ex parte Japan*, 36 App. 482, 38 S. W. 43; *Ex parte Lambert*, 37 App. 435, 36 S. W. 81.

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.]

Explanatory.—The present constitution, in respect to county courts, reads as follows: "They shall have appellate jurisdiction in cases, civil and criminal, of which justices' courts have original jurisdiction." [Const. art. 5, § 16 (1 Vernon's Sayles' Civ. St. 1914, p. xliii).]

See post, title 10, Appeals. This appellate jurisdiction does not exist in the county courts of Galveston and Harris counties. Art. 897, post.

Jurisdiction of trial court.—Where the justice had no jurisdiction to try the case the county court acquires none by appeal, though the case was within its original jurisdiction. *Billingsly v. State*, 3 App. 686; *Uecker v. State*, 4 App. 234.

Art. 101a. Creation of county court of Dallas county, at law.—There is hereby created a court to be held in Dallas county, to be called the "County Court of Dallas County, at Law." [Acts 1907, p. 115, sec. 1.]

Explanatory.—The above article, and articles 103a-103d, 104a-104e, post, were omitted from the revised Penal Code, and are included in this compilation for convenience, and to present a complete exposition of the laws relating to the special county courts.

Art. 102. County court of Dallas county at law, jurisdiction of defined.—The county court of Dallas county at law shall have juris-

diction 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 [103]; and all cases other than probate matters, and such as are provided in article 102 [103], 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 [103], 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.]

Explanatory.—The bracketed numbers were inserted by the compilers to indicate the correct reference according to the original text of the law.

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.]

Constitutionality of former act.—Where there is a criminal district court in a county, and also a county court, the legislature has the power under the constitution to confer by express provision of the law jurisdiction of appeals from the justice court, in the county court. In Dallas county appeals in criminal cases in justices' courts may be taken to the county court. *Kruegel v. State* (Cr. App.) 84 S. W. 1064.

Art. 103a. Terms of county court of Dallas county, at law; practice, etc.—The terms of the county court of Dallas county, at law, and the practice therein, and appeals and writs of error therefrom, shall be as prescribed by laws relating to county courts. The terms of the county court of Dallas county, at law, shall be held as now established for the terms of the county court of Dallas county, until the same may be changed in accordance with the law. [Acts 1907, p. 115, § 4.]

See note under art. 102a.

Art. 103b. Judge to be elected when, etc.; qualifications; term.—There shall be elected in said county, by the qualified voters

thereof, at each general election, a judge of the county court of Dallas county, at law, who shall be well informed in the laws of the state, who shall hold his office for two years, and until his successor shall have duly qualified. [Id. sec. 5.]

Art. 103c. Bond and oath of judge.—The judge of the county court of Dallas county, at law, shall execute a bond and take the oath of office, as required by the law relating to county judges. [Id. sec. 6.]

Art. 103d. Special judge elected or appointed, how.—A special judge of the county court of Dallas county, at law, may be appointed or elected as provided by laws relating to county courts and to the judges thereof. [Id. sec. 7.]

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. [Act 1907, p. 115.]

Delinquent children.—A proceeding wherein petitioner was charged with being a delinquent child in that he stole an automobile is not criminal in its nature, and the county court can take jurisdiction, notwithstanding jurisdiction of criminal causes had been transferred to the county court at law. *Ex parte Bartee* (Cr. App.) 174 S. W. 1051.

Art. 104a. Clerk of; seal; sheriff to attend when, etc.—The county clerk of Dallas county shall be the clerk of the county court of Dallas county, at law. The seal of the said court shall be the same as that provided by law for county courts, except that the seal shall contain the words, "County Court of Dallas County, at Law;" the sheriff of Dallas county shall, in person or by deputy, attend the said court when required by the judge thereof. [Id. sec. 9.]

See note under art. 102a.

Art. 104b. Appointment of jury commissioners; selection, etc., of juries.—The jurisdiction and authority now vested by law in the county court for the appointment of jury commissioners and the selection and service of jurors shall be exercised by the county court of Dallas county, at law. [Id. sec. 10.]

Art. 104c. Vacancy in office of judge, how filled.—Any vacancy in the office of the judge of the county court of Dallas county, at law, may be filled by the commissioners' court of Dallas county until the next general election. [Id. sec. 11.]

Art. 104d. Fees and salary of judge.—The judge of the county court of Dallas county, at law, shall collect the same fees as are now established by law relating to county judges, all of which shall be by him paid monthly into the county treasury; and he shall receive an annual salary of three thousand dollars per annum, payable monthly, to be paid out of the county treasury by the commissioners' court. [Id. sec. 12.]

Art. 104e. Salary of county judge of Dallas county.—The county judge of Dallas county shall hereafter receive from the county treasury, in addition to the fees allowed him by law, such a salary, for the ex officio duties of his office, as may be allowed him by the commissioners' court, not less than twelve hundred dollars per year. [Id. sec. 13.]

Art. 104f. County court of Bexar county for criminal cases created.—That there is hereby created a court to be held in Bexar County, Texas, to be called the “County Court of Bexar County for Criminal Cases.” [Act 1915, p. 78, ch. 39, § 1.]

Art. 104g. Same; jurisdiction.—The County Court of Bexar County for Criminal Cases shall have exclusive jurisdiction of all criminal matters and causes, original and appellate, over which, by the General Laws of the State of Texas, the County Court of said county would have jurisdiction, and the same are hereby transferred to the County Court of Bexar County for Criminal Cases; and all criminal writs and processes heretofore issued by or out of said County Court, be, and the same are hereby made returnable to the County Court of Bexar County for Criminal Cases. [Id., § 2.]

Art. 104h. Same; jurisdiction retained by other courts.—The jurisdiction hereby transferred to the County Court of Bexar County for Criminal Cases shall include all criminal cases and matters, the forfeiture of bonds in criminal cases, all proceedings in relation thereto; but the County Court of Bexar County shall retain, as heretofore, the jurisdiction of all cases of eminent domain; the general jurisdiction of a probate court; it shall probate wills, appoint guardians of minors, idiots, lunatics, persons non compos mentis, and common drunkards, grant letters testamentary and of administration, settle accounts of administrators, executors and guardians; transact all business pertaining 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. The county judge of Bexar county shall be the judge of the County Court of Bexar County, and all ex-officio duties of the county judge shall be exercised by the said judge of the County Court of Bexar County, except in so far as the same shall, by this Act and by Act of the Thirty-second Legislature, General Laws pages 15-17, House Bill No. 111, Chapter 10, be committed to the judge of the County Court of Bexar County for Civil Cases [Vernon’s Sayles’ Civ. St. 1914, Title 36, ch. 4]. The county judge of Bexar County shall retain authority to determine all matters relating to or arising out of or connected with the granting or revoking of liquor licenses, and all matters appertaining thereto, try all applications for liquor licenses and shall approve all liquor bonds as may be provided by law. He shall also retain jurisdiction of the Juvenile Court. [Id., § 3.]

Art. 104i. Same; power to issue writs.—The said County Court of Bexar County for Criminal Cases, and the judge thereof shall have the power to issue writs of injunction, certiorari, supersedeas, mandamus, and all other writs necessary to the enforcement of the jurisdiction of said court; and also power to punish for contempt under such provisions as are or may be provided by the General Laws governing County Courts throughout the State; and to issue writs of habeas corpus in cases within the jurisdiction of said court. [Id., § 4.]

Art. 104j. Same; terms.—The County Court of Bexar County for Criminal Cases shall hold at least four terms for criminal business annually as may be provided by the Commissioners Court of Bexar County under authority of law, and such other terms each year as may be fixed by the Commissioners Court of Bexar County; provided the Commissioners Court having fixed the terms of said court, shall not change the same until the expiration of one year. [Id., § 5.]

Art. 104k. Same; election of judge; qualifications and tenure.—There shall be elected in said county by the qualified voters thereof, at each general election, a judge of the County Court of Bexar County for Criminal Cases, who shall be learned in the laws of the State, who shall hold his office for two years, and until his successor shall have been duly qualified. [Id., § 6.]

Art. 104l. Same; judge's bond.—The judge of the County Court of Bexar County for Criminal Cases shall execute a bond in the sum of five thousand (\$5,000.00) dollars and take the oath of office as required by the law relating to county judges. [Id., § 7.]

Art. 104m. Same; special judge.—Special judge of the County Court of Bexar County for Criminal Cases may be appointed or elected as provided by laws relating to County Courts, and to the judges thereof, and shall receive salary and compensations similar to the judge of the court hereby created, but which shall be prorated and paid to him only for the actual number of days he actually serves. [Id., § 8.]

Art. 104n. Same; clerk and sheriff.—The county clerk of Bexar County shall be the clerk of the County Court of Bexar County for Criminal Cases. The seal of said court shall be the same as that provided for County Courts, except that the seal shall contain the words "County Court of Bexar County for Criminal Cases." The sheriff of Bexar County shall in person or by deputy attend the court when required by the judge thereof. [Id., § 9.]

Art. 104o. Same; jurors.—The jurisdiction and authority now vested by law in the County Court of Bexar County, and the County Court of Bexar County for Civil Cases, for the selection and service of jurors shall be exercised by each of the three courts within their jurisdiction. [Id., § 10.]

Art. 104p. Same; vacancy in office of judge; appointment of first incumbent.—Any vacancy in the office of the judge of the court created by this Act may be filled by the Commissioners Court of Bexar County until the next general election. The Commissioners Court of the county shall, as soon as may be, after this Act shall take effect, appoint a judge of the County Court of Bexar County for Criminal Cases, who shall serve until the next general election, and until his successor shall be duly elected and qualified. [Id., § 11.]

Art. 104q. Same; removal of judge.—The judge of the County Court of Bexar County for Criminal Cases may be removed from office in the same manner and for the same causes as any other county judge may be removed under the laws of this State. [Id., § 13.]

Art. 104r. Same; purpose of act.—The provisions of this law are not intended to in any manner affect the jurisdiction of the County Court of Bexar County for Civil Cases, and this law is intended to create another court somewhat similar to said County Court of Bexar County for Civil Cases, but the court hereby created to have jurisdiction of criminal matters only. [Id., § 14.]

Art. 104s. County court at law of Harris county, Texas, created.—The County Court of Harris County for Civil Cases shall hereafter be known as the County Court at Law of Harris County, Texas, and the seal of said court shall hereafter be the same as that provided by law for county courts, except that the seal shall contain the words: "County Court at Law of Harris County, Texas." [Act 1913, p. 10, ch. 8, § 1.]

Art. 104ss. Same; effect of change of name of former court.—The change in the name of said court shall in no way or manner, other than is provided in this Act, affect the officers or judge of said court, their compensation or tenure of office, and shall, in no way or manner, affect the process of said court already issued. The judge and officers now serving said County Court of Harris County for Civil Cases, shall continue to serve said court under its changed name to the same effect to all things as if the name had not been changed. All process heretofore issued out of said County Court for Civil Cases and all returns thereon shall in all things be treated and considered as if the name of said court had not been changed. [Id., § 2.]

Art. 104sss. Same; jurisdiction.—The said court to be hereafter known as the County Court at Law for Harris County shall have all the jurisdiction heretofore conferred upon it under the name of the County Court of Harris County for Civil Cases, and its judge shall have all the powers heretofore conferred upon the judge of the County Court of Harris County for Civil Cases; and in addition to the said jurisdiction the said County Court at Law of Harris County shall have all of the, and the same jurisdiction over criminal matters that is now vested in the county courts having jurisdiction in civil and criminal cases under the Constitution and laws of Texas, and all appeals from justices, mayors, recorders, or other inferior courts within Harris county, shall hereafter lie to said County Court at Law of Harris County instead of as heretofore, to the Criminal District Court of Harris County, and the judge of said court shall have, in addition to the powers now conferred upon him, the same powers, rights and privileges, as to criminal matters as are now vested in and enjoyed by the judges of county courts having criminal jurisdiction; provided, however, that said court shall have no jurisdiction over any of those matters the jurisdiction over which is now in the county court of Harris county or the judge thereof. [Id., § 3.]

Art. 104ssss. Same; clerk; fees.—The county clerk of Harris county shall have no authority in criminal matters pending in said County Court at Law for Harris County. The clerk of the Criminal District Court of Harris County shall act as the clerk of the said County Court of Law for Harris County in all criminal matters, but only in criminal matters, and he shall sign all papers emanating from said court, including the minutes of said court in criminal matters, whenever its clerk's signature is necessary, as ex officio clerk of said County Court at Law for Harris County, using the seal of said court. The fees of said clerk as to those criminal matters, the jurisdiction over which is hereby vested in said County Court at Law, shall be the same in all respects, including amount, manner of payment and collection, as if the Criminal District Court of Harris County had retained jurisdiction over said matters. [Id., § 4.]

Art. 104t. Same; transfer of misdemeanor cases.—All misdemeanor criminal cases now pending in the Criminal District Court of Harris County, as well as all criminal cases on appeal to the said district court from the various subordinate courts of Harris county shall, immediately upon the taking effect of this Act, be transferred to the County Court at Law of Harris County, and the same are hereby so transferred, and upon said County Court at Law is hereby conferred jurisdiction of such cases. [Id., § 5.]

Art. 104tt. Same; fees of judge.—In addition to the compensation now provided by law, the judge of said County Court at Law of Harris County, shall tax up, receive and collect in each case, the same fees and costs in criminal cases over which said county court

has jurisdiction, as are now provided by the General Laws of the State, for judges of county courts having criminal jurisdiction, such fees to be retained by him as compensation for the additional jurisdiction conferred upon his court. [Id., § 6.]

Art. 104ttt. Same; terms.—Said court shall hold six terms a year, beginning respectively on the first Monday in January, in March, in May, in July, in September, and in November of each year, and each term shall continue until the business is disposed of. [Id., § 7.]

Art. 104u. County court at law No. 2 of Harris County.—There is hereby created a court to be held in Harris County, Texas, to be called the “County Court at Law No. 2 of Harris County, Texas.” [Act 1915, 1st S. S., p. 18, ch. 8, § 1.]

Art. 104uu. Same; jurisdiction.—Said County Court at Law No. 2 of Harris County, Texas, shall have, and it is hereby granted original and appellate jurisdiction, in all matters and causes of a civil and criminal nature, concurrent with and in all things equal to that heretofore conferred upon the County Court at Law of Harris County, Texas. [Id., § 2.]

Art. 104uuu. Same; judge; concurrent jurisdiction with county court at law; proviso.—The judge of said County Court at Law No. 2 of Harris County, Texas, shall have and exercise all the powers and shall be subject to all the limitations and obligations heretofore or hereafter conferred or imposed upon the judge of the County Court at Law of Harris County, Texas. Said County Court at Law No. 2 of Harris County, Texas, shall have concurrent jurisdiction with the County Court at Law of Harris County over criminal matters, and shall have the same jurisdiction over criminal matters, that is now vested in county courts having jurisdiction in civil and criminal cases under the Constitution and laws of Texas. And said County Court at Law No. 2 of Harris County shall have concurrent jurisdiction with the County Court at Law of Harris County in all appeals from justices, mayors, recorders or other inferior courts within Harris County; and the judge of said court shall have the same powers, rights and privileges as to criminal matters as are now vested in and enjoyed by the judges of county courts having criminal jurisdiction; provided, however, that said court shall have no jurisdiction over any of those matters the jurisdiction over which is now vested in the County Court of Harris County, or the judge thereof. [Id., § 3.]

Art. 104uuuu. Same; qualifications of judge; compensation; fees.—The judge of the County Court at Law No. 2 of Harris County, Texas, shall be well informed in the law; he shall have been a duly licensed and practicing member of the bar of this State for not less than two years; he shall be appointed by the Governor of the State of Texas as soon as may be after this Act takes effect; he shall take the oath of office and execute an official bond as now required by the law relating to county judges, and he shall collect the same fees in civil cases as are now provided by law in case of county judges, all of which he shall pay monthly into the county treasury, and in lieu of such fees he shall receive a salary of three thousand dollars per annum to be paid out of the county treasury by the Commissioners Court of Harris County in monthly installments of two hundred and fifty dollars each. In addition to the compensation hereinbefore provided the judge of the County Court at Law No. 2 of Harris County shall tax up, receive and collect in each criminal case the same fees and costs as are now provided by the General Laws of the State for the judges of county courts hav-

ing criminal jurisdiction, such fees to be retained by him as compensation for the exercise of the criminal jurisdiction herein conferred upon his court. [Id., § 4.]

Art. 104v. **Same; clerk; fees.**—The county clerk of Harris County shall be the clerk of said County Court at Law No. 2 of Harris County in civil matters and causes; and shall receive and collect the same fees which he now receives and collects as clerk of the County Court at Law of Harris County, Texas. The clerk of the Criminal District Court of Harris County, Texas, shall be clerk of said County Court at Law No. 2 in all criminal matters and causes, and shall receive and collect such fees as he now receives and collects in criminal matters as clerk of the County Court at Law of Harris County. [Id., § 5.]

Art. 104vv. **Same; seal.**—The seal of the County Court at Law No. 2 of Harris County, Texas, shall be the same as that provided by law for county courts, except that such seal shall contain the words "County Court at Law Number Two of Harris County, Texas," and said seal shall be judicially noticed. [Id., § 6.]

Art. 104vvv. **Same; sheriff; fees.**—The sheriff of Harris County, either in person or by deputy, shall attend said court when required by the judge thereof; and the various sheriffs and constables of this State executing process issued out of said court shall receive the fees now or hereafter fixed by law for executing process issued out of county courts. [Id., § 7.]

Art. 104vvvv. **Same; special judge.**—A special judge of said court may be appointed or elected in the manner and instances now or hereafter provided by the law relating to county courts and the judges thereof. [Id., § 8.]

Art. 104w. **Same; power to issue writs.**—Said court shall have power to issue writs of injunction, mandamus, sequestration, attachment, garnishment, certiorari, supersedeas, habeas corpus in criminal misdemeanor cases, and all writs necessary to the enforcement of its jurisdiction; and, within the limitations placed upon county courts, to punish contempts thereof. Writs of injunction granted in civil cases by the judge of said County Court at Law No. 2 and by the judge of said County Court at Law shall be made returnable to the court in which the petition for injunction shall be filed, as hereinafter provided. [Id., § 9.]

Art. 104ww. **Same; jurisdiction of county court at law not impaired.**—The jurisdiction, civil and criminal, of the County Court at Law of Harris County, Texas, shall not in anywise be impaired or affected by this Act. [Id., § 10.]

Art. 104www. **Same; terms of court.**—The terms of the court hereby created shall begin on the first Monday of the months of June, August, October, December, February and April of each year. The sessions of said court shall be held in such place as may be provided therefor by the Commissioners Court of Harris County. [Id., § 11.]

Art. 104x. **Same; transfer of pending causes.**—As soon as may be, after this Act takes effect, the clerk of the County Court at Law of Harris County, Texas, shall transfer to the docket of the County Court at Law No. 2 of Harris County, Texas, one-half of the civil cases then pending in said County Court at Law. In making such transfer, said Clerk shall first transfer to said County Court at Law No. 2 the case having the smallest file number on the docket of said County Court at Law. The case having the next highest file number shall remain on the docket of said County Court

at Law. The case having the third smallest file number shall be transferred. In like manner said clerk shall go through the docket of said County Court at Law, transferring to the docket of said County Court at Law No. 2 every second civil case thereafter. The clerk shall note such transfer, when made, on the minutes of the County Court at Law of Harris County, Texas. New civil and new criminal cases filed with said clerk after such transfer has been made, irrespective of the court or judge to which the petitions in such civil cases shall be addressed, shall, in like manner, be filed by the said clerk, one civil and one criminal case in said County Court at Law No. 2, and one civil and one criminal case in said County Court at Law. The first new civil case and the first new criminal case, filed with said clerk after such transfer has been made, shall both be filed in said County Court at Law No. 2. [Id., § 12.]

Art. 104xx. Same; transfer of causes.—The judges of said County Court at Law and of said County Court at Law No. 2, in their discretion, either in term time or in vacation, by an order entered upon the minutes of their respective courts, may transfer to the court of the other any case or cases then pending in their respective courts. And when such case or case shall be so transferred the court to which such transfer shall be made shall have the same right and authority to try and finally dispose of the same as the court making such transfer. [Id., § 13.]

Art. 104xxx. Same; procedure.—The practice in said County Court at Law No. 2, and in cases of appeal and writs of error therefrom and thereto, shall be the same as is now, or may hereafter be prescribed for county courts. [Id., § 14.]

Art. 104y. Same; return of process in transferred causes.—All process issued out of the County Court at Law of Harris County, Texas, prior to the time when the clerk thereof shall transfer cases from the docket of said courts, as provided in Section 12 of this Act [art. 104x], in cases transferred as therein provided, shall be returned to and filed in the court hereby created, and shall be equally as valid and binding upon parties to such transferred cases as though such process had been issued out of the County Court at Law No. 2 of Harris County, Texas. Likewise, in cases transferred by the judges of either of said courts, as provided in Section 13 of this Act [art. 104xx], all process extant at the time of such transfer shall be returned to and filed in the court to which such transfer is made, and shall be as valid and binding as though originally issued out of the court to which such transfer may be made. [Id., § 15.]

Art. 104yy. Same; appointment of judge in first instance; election.—As soon as this Act shall take effect the Governor of the State shall appoint a judge of the County Court at Law No. 2 of Harris County, who shall serve until the next general election and until his successor shall be duly elected and qualified. And any vacancy thereafter occurring in the office of the judge of the County Court at Law No. 2 of Harris County, created by this Act, shall be filled by the Commissioners Court of Harris County, the appointee thereof to hold office until the next succeeding general election, and until his successor shall have qualified. There shall be elected by the qualified voters of Harris County at each general election hereafter, a judge of the County Court at Law No. 2 of Harris County, who shall hold his office for two years, and until his successor shall be duly qualified. [Id., § 16.]

Art. 104yyy. County court of Jefferson county at law created.—There is hereby created a court to be held in Beaumont, Jefferson

County, Texas, to be called the County Court of Jefferson County at Law. [Act 1915, p. 51, ch. 29, § 1.]

Art. 104z. Same; jurisdiction.—The County Court of Jefferson County at Law shall have jurisdiction in all matters and cases, 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 hereinafter provided in Section 3 of this Act [art. 104zz], and all cases pending in the County Court of said county other than probate matters such as are provided in Section 3 of this Act, shall be and the same are hereby transferred to the County Court of Jefferson County at Law, and all writs and process, civil and criminal, heretofore issued by or out of said County Court, other than those pertaining to matters which are hereby exempt from this bill that are to remain in the County Court of Jefferson County, shall be and the same are hereby made returnable to the County Court of Jefferson County at Law. The jurisdiction of the County Court of Jefferson County at Law, and to the Judge thereof, shall extend to all matters of eminent domain of which jurisdiction as heretofore vested in the County Court or in the County Judge; but this provision shall not affect the jurisdiction of the Commissioners Court or the County Judge of Jefferson County as the presiding officer of said Commissioners Court as to roads, bridges and public highways, or matters of eminent domain which are now in the jurisdiction of the Commissioners Court or the Judge thereof. [Id., § 2.]

Art. 104zz. Same; jurisdiction of other courts.—The County Court of Jefferson County shall retain, as heretofore, the general jurisdiction of the Probate Court and all jurisdiction conferred by law now over probate matters; and the court herein created shall have no other jurisdiction than that named in this bill, and the County Court of Jefferson County as now and heretofore existing shall have all jurisdiction which it now has, save and except that which is given the County Court of Jefferson County at Law in this bill, but the County Court as now existing shall have no other jurisdiction, civil or criminal. The County Judge of Jefferson County shall be the Judge of the County Court of said county, and all ex-officio duties of the County Judge shall be exercised by said Judge of the County Court of Jefferson County, except in so far as the same shall by this bill be committed to the County Court of Jefferson County at Law. [Id., § 3.]

Art. 104zzz. Same; clerk; seal; sheriff and deputy.—The County Clerk of Jefferson County, Texas, shall be the clerk of the County Court of Jefferson County at Law, and the seal of said court shall be the same as that provided by law for County Courts, except the seal shall contain the words "County Court of Jefferson County at Law," and the Sheriff of Jefferson County shall in person or by deputy attend said court when required by the Judge thereof, and the County Clerk of Jefferson County, Texas, is hereby authorized, if it becomes necessary, in his judgment, to appoint a deputy to specially attend to the matters pertaining to the County Court of Jefferson County at Law, and said deputy shall be allowed a salary of one hundred dollars per month. [Id., § 10.]

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.]

See post, title 10, Appeal.

Transfer of jurisdiction to district court.—See ante, art. 98 and notes.

Transfer of jurisdiction to criminal courts.—See ante, art. 91 and notes.

Cited, *Johnson v. State*, 26 App. 395, 9 S. W. 611.

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

The acts are arranged in chronological order, so that the last act under any county will show the present condition with respect to criminal jurisdiction. The statement that jurisdiction is diminished means that jurisdiction in criminal cases is transferred to the district court. The word "restored" means that the normal criminal jurisdiction is again conferred. When it is said that an act relating to a county is the same as another, it is not intended that they are literally the same in all cases, but only substantially—in purport and effect. When the jurisdiction is diminished, the act is usually drawn on the plan of those under Angelina, Bexar and Chambers counties; when the jurisdiction is restored, it is done by an act similar to that under Atascosa county—the purport of the act seems to be to restore to the court the jurisdiction of a county court under the constitution and general laws.

The legislature has power, by local or general law, to increase, diminish or change the civil and criminal jurisdiction of county courts; and in cases of any such change of jurisdiction the legislature must also conform the jurisdiction of the other courts to such change. Const., art. 5, § 22.

If an act be regarded as an attempt to change the jurisdiction of a county court, it will be held inoperative if it fails to conform the jurisdiction of the other courts to such change. *Erwin v. Blanks*, 60 Tex. 583. The constitutional provision clearly empowers the legislature to take away the jurisdiction of the county court of any particular county, and to confer it upon the district court of such county. The constitutional amendment of 1891 did not restore to county courts the jurisdiction that had been previously taken from them; the provision in question was not changed by the amendment. *Muench v. Oppenheimer*, 86 Tex. 568, 26 S. W. 496.

The following are the usual forms of statement by which the jurisdiction of the other courts is conformed to the change:

Where the jurisdiction is diminished—"The district court of said county shall have and exercise jurisdiction in all matters and causes, civil and criminal, over which by the general laws of the state, the county court of said county would have jurisdiction, except as provided in section _____ of this act." Acts 1897, p. 38, § 2.

Where the jurisdiction is restored—"The district court of _____ county shall no longer have jurisdiction in cases in which the county court of said county by the provisions of this act has exclusive original or appellate jurisdiction." Acts 1897, p. 103, § 6.

In some cases, after defining the jurisdiction of the county court, the only provision is as follows: "All causes now pending in the district court of _____ county of which the county court of said county has jurisdiction under the provisions of this act, and all laws giving jurisdiction to the county court, shall be transferred to the county court of said county." Acts 1889, p. 82 (*Sayles' Civ. St. Supp.* 1894, art. 1172b, § 2); Acts 1893, p. 19 (*Sayles' Civ. St. Supp.* 1894, p. 916); Acts 1893, p. 12 (*Sayles' Civ. St. Supp.* 1894, p. 919).

Angelina—*Jurisdiction diminished*: Act Feb. 9, 1881, p. 3 (*Sayles' Civ. St.* 1889, art. 1172g). See Chambers county.

Restored: Act March 21, 1893, p. 31 (*Sayles' Civ. St. Supp.* 1894, p. 913). Same as provisions under Atascosa county.

Diminished: Act March 30, 1895, p. 47 (*Sayles' Civ. St.* 1897, p. 1923).

Restored: Acts 1901, ch. 83, p. 216 (*Sayles' Civ. St. Supp.* 1904, p. 591).

Armstrong—For special laws relating to this court, see Chapter 3, Title 36, of Vernon's *Sayles' Civ. St.*

Atascosa—*Jurisdiction diminished*: Act March 16, 1883, p. 24 (*Sayles' Civ. St.* 1889, art. 1172o). Same as the provision under Chambers county.

Restored: Act March 24, 1885, p. 47 (*Sayles' Civ. St.* 1889, art. 1172t). Same as act 1897 below.

Diminished: Act May 11, 1893, p. 167 (*Sayles' Civ. St. Supp.* 1894, art. 1172b). See Angelina county.

Restored: Act April 6, 1897, p. 110 (*Sayles' Civ. St.* 1897, p. 1923).

Bailey—For special laws relating to this court, see Chapter 6, Title 36, of Vernon's *Sayles' Civ. St.*

Bandera—*Jurisdiction diminished*: Act Feb. 25, 1881, p. 13 (*Sayles' Civ. St.* 1889, art. 1172h). See Bexar County.

Restored: Act March 25, 1891, p. 75 (*Sayles' Civ. St. Supp.* 1894, art. 1172b, § 17). Same as the provision under Atascosa county.

Diminished: Act April 12, 1895, p. 156. Same as the provision under Angelina county.

Bexar—*Jurisdiction diminished*: Act Feb. 25, 1881, p. 13 (*Sayles' Civ. St.* 1889, art. 1172h; *Sayles' Civ. St.* 1897, p. 1924).

Restored: Acts 1899, pp. 18, 20; Amend. Acts 1899, p. 191 (*Sayles' Civ. St. Supp.* 1904, p. 593).

Special criminal court created. See arts. 104f-104r, ante. See, also, Vernon's *Sayles' Civ. St.* 1914, art. 1811-6 et seq.

Art. 105 JURISDICTION OF COURTS IN CRIMINAL ACTIONS (Title 2)

Blanco—*Jurisdiction diminished*: Act Feb. 9, 1881, p. 3 (Sayles' Civ. St. 1889, art. 1172g). Same as provisions under Chambers county. Act Feb. 25, 1881, p. 13 (Sayles' Civ. St. 1889, art. 1172h). See Bexar county.

Bosque—*Jurisdiction diminished*: Act March 26, 1881, p. 64 (Sayles' Civ. St. 1889, art. 1172k). See Chambers county.

Bowie—*Jurisdiction diminished*: Act July 8, 1879, S. S., p. 21 (Sayles' Civ. St. 1889, art. 1172f). Same as provision under Angelina county.

Restored: Act March 30, 1881, p. 74 (Sayles' Civ. St. 1889, art. 1172l). Same as the provision under Atascosa county, not including § 7.

Brazoria—*Jurisdiction diminished*: Act March 27, 1879, p. 68 (Sayles' Civ. St. 1889, art. 1172c). Amended. Act Feb. 9, 1881, p. 3 (Sayles' Civ. St. 1889, art. 1172g).

Restored: Act March 30, 1881, p. 74 (Sayles' Civ. St. 1889, art. 1172l). Same as provision under Atascosa county, not including § 7.

Brazos—*Jurisdiction diminished*: Act March 26, 1887, p. 55 (Sayles' Civ. St. 1889, art. 1172aa). Criminal and probate jurisdiction.

Brewster—*Jurisdiction diminished*: Act Feb. 21, 1891, p. 12 (Sayles' Civ. St. Supp. 1894, art. 1172b, § 9). Same as the provision under Angelina county.

Restored: Acts 1909, p. 6 (Sayles' Civ. St. Supp. 1910, p. 496).

Brown—*Jurisdiction diminished*: Act March 27, 1879, p. 68 (Sayles' Civ. St. 1889, art. 1172c); Act Feb. 9, 1881, p. 3 (Sayles' Civ. St. 1889, art. 1172g). Same as provisions under Chambers county.

Restored: Act March 30, 1881, p. 74 (Sayles' Civ. St. 1889, art. 1172l). Same as provision under Atascosa county, not including § 7.

Burnet—*Jurisdiction diminished*: Act Feb. 25, 1881, p. 13 (Sayles' Civ. St. 1889, art. 1172h). Same as provision under Bexar county.

Restored: Act March 24, 1885, p. 47 (Sayles' Civ. St. 1889, art. 1172t). Same as the provisions under Atascosa county, not including § 7.

Callahan—*Jurisdiction diminished*: Act July 8, 1879, S. S., p. 21 (Sayles' Civ. St. 1889, art. 1172f). Same as provisions under Angelina county.

Restored: Act March 30, 1881, p. 74 (Sayles' Civ. St. 1889, art. 1172l). Same as the provision under Atascosa county, not including § 7.

Camp—*Jurisdiction diminished*: Act March 27, 1879, p. 68 (Sayles' Civ. St. 1889, art. 1172c). Amended. Act Feb. 9, 1881, p. 3 (Sayles' Civ. St. 1889, art. 1172g). Same as provisions under Chambers county.

Restored: Act March 30, 1881, p. 74 (Sayles' Civ. St. 1889, art. 1172l). Same as provision under Atascosa county, not including § 7.

Diminished: Act March 16, 1883, p. 24 (Sayles' Civ. St. 1889, art. 1172o). Same as the provision under Chambers county.

Restored: Act April 26, 1895, p. 91. Same as the provisions under Atascosa county.

Carson—*Jurisdiction diminished*: Act Feb. 21, 1891, p. 12 (Sayles' Civ. St. Supp. 1894, art. 1172b, § 9). Same as the provision under Angelina county.

Restored: Act March 25, 1891, p. 75 (Sayles' Civ. St. Supp. 1894, art. 1172b, § 17). Same as the provisions under Atascosa county.

Diminished: Acts 1899, p. 260.

Cass—*Jurisdiction diminished*: Act July 8, 1879, S. S., p. 21 (Sayles' Civ. St. 1889, art. 1172f). Same as provisions under Angelina county.

Castro—*Jurisdiction diminished*: Act April 26, 1893, p. 74 (Sayles' Civ. St. Supp. 1894, art. 1172b, § 3). Same as provisions under Angelina county.

Restored: Act 1913, p. 27, ch. 13. See Chapters 5 and 6, Title 36, of Vernon's Sayles' Civ. St.

See Turnbow v. J. E. Bryant Co. (Civ. App.) 159 S. W. 605.

Chambers—*Jurisdiction diminished*: Act March 27, 1879, p. 68 (Sayles' Civ. St. 1889, art. 1172c).

Amendment of act of 1879: Act Feb. 9, 1881, p. 3 (Sayles' Civ. St. 1889, art. 1172g; Sayles' Civ. St. 1897, p. 1926).

Restored: Acts 1905, p. 111 (Sayles' Civ. St. Supp. 1906, p. 567).

Coke—*Jurisdiction diminished*: Act March 25, 1891, p. 73 (Sayles' Civ. St. Supp. 1894, art. 1172b, § 13). See Angelina county.

Restored: Act March 21, 1893, p. 31 (Sayles' Civ. St. Supp. 1894, p. 913). Same as provisions under Atascosa county; also a provision conferring probate jurisdiction. See Delta county.

Restored: Acts 1901, ch. 37, p. 47 (Sayles' Civ. St. Supp. 1904, p. 595).

Coleman—*Jurisdiction diminished*: Act March 27, 1879, p. 68 (Sayles' Civ. St. 1889, art. 1172c). Amended. Act Feb. 9, 1881, p. 3 (Sayles' Civ. St. 1889, art. 1172g). Same as provisions under Chambers county.

Restored: Act March 30, 1881, p. 74 (Sayles' Civ. St. 1889, art. 1172l). Same as provision under Atascosa county, not including § 7.

Comal—*Jurisdiction diminished*: Act March 16, 1883, p. 24 (Sayles' Civ. St. 1889, art. 1172o). Same as the provision under Chambers county.

Comanche—*Jurisdiction diminished*: Act July 8, 1879, S. S., p. 21 (Sayles' Civ. St. 1889, art. 1172f). Same as provisions under Angelina county.

Restored: Act April 9, 1883, p. 55 (Sayles' Civ. St. 1889, art. 1172p). Same as the provision under Atascosa county, not including § 7.

Concho—*Jurisdiction diminished*: Act March 27, 1879, p. 68 (Sayles' Civ. St. 1889, art. 1172c). Amended. Act Feb. 9, 1881, p. 3 (Sayles' Civ. St. 1889, art. 1172g). Same as provisions under Chambers county.

Restored: Act March 31, 1885, p. 103 (Sayles' Civ. St. 1889, art. 1172x). Similar to the provision under Atascosa county.

- Diminished:* Act March 26, 1887, p. 54 (Sayles' Civ. St. 1889, art. 1172z). Same as the provision under Chambers county.
- Restored:* Acts 1909, p. 268 (Sayles' Civ. St. Supp. 1910, p. 498).
- Coryell**—*Jurisdiction diminished:* Act March 27, 1879, p. 68 (Sayles' Civ. St. 1899, art. 1172c). Amended. Act Feb. 9, 1881, p. 3 (Sayles' Civ. St. 1889, art. 1172g). Same as provisions under Chambers county.
- Restored:* Act March 27, 1887, p. 47 (Sayles' Civ. St. 1889, art. 1172y). Same as the provision under Atascosa county, not including § 7; also a provision conferring probate jurisdiction. See Delta county.
- Crockett**—*Jurisdiction diminished:* Act March 27, 1879, p. 68 (Sayles' Civ. St. 1889, art. 1172c). Amended. Act Feb. 9, 1881, p. 3 (Sayles' Civ. St. 1889, art. 1172g). Same as provisions under Chambers county.
- Diminished:* Acts 1909, p. 351 (Sayles' Civ. St. Supp. 1910, p. 495).
- Dallas**—For special laws relating to this court, see arts. 101a–104e, ante.
- Deaf Smith**—For special laws relating to this court, see Chapter 6, Title 36, of Vernon's Sayles' Civ. St.
- Delta**—*Jurisdiction diminished:* Act April 17, 1893, p. 78 (Sayles' Civ. St. Supp. 1894, art. 1172b, § 5). See Angelina county.
- Restored:* Act March 12, 1895, p. 32. Same as the provision under Atascosa county, not including § 7.
- Dimmitt**—*Jurisdiction diminished:* Act Feb. 25, 1881, p. 13 (Sayles' Civ. St. 1889, art. 1172h). See Bexar county.
- Restored:* Act March 24, 1885, p. 47 (Sayles' Civ. St. 1889, art. 1172t). Same as the provisions under Atascosa county.
- Diminished:* Act Feb. 27, 1893, p. 7 (Sayles' Civ. St. Supp. 1894, art. 1172b, § 5a). Same as the provision under Angelina county.
- Restored:* Acts 1905, p. 136 (Sayles' Civ. St. Supp. 1906, p. 569).
- Donley**—*Jurisdiction diminished:* Act March 16, 1883, p. 24 (Sayles' Civ. St. 1889, art. 1172o). Same as the provision under Chambers county.
- Restored:* Act March 21, 1889, p. 48 (Sayles' Civ. St. Supp. 1894, art. 1172b, § 8; Sayles' Civ. St. 1897, p. 1928).
- Duval**—*Jurisdiction diminished:* Act Feb. 25, 1881, p. 13 (Sayles' Civ. St. 1889, art. 1172h). See Bexar county.
- Restored:* Act May 11, 1893, p. 152 (Sayles' Civ. St. Supp. 1894, art. 1172b, § 6). Same as the provisions under Atascosa county.
- Diminished:* Acts 1899, p. 2 (Sayles' Civ. St. Supp. 1904, p. 588).
- Eastland**—*Jurisdiction diminished:* Act July 8, 1879, S. S., p. 21 (Sayles' Civ. St. 1889, art. 1172f). Same as provisions under Angelina county.
- Restored:* Act March 30, 1881, p. 74 (Sayles' Civ. St. 1889, art. 1172l). Same as the provision under Atascosa county, not including § 7.
- Edwards**—*Jurisdiction diminished:* Act Feb. 21, 1891, p. 12 (Sayles' Civ. St. Supp. 1894, art. 1172b, § 9). Same as the provision under Angelina county.
- Restored:* Acts 1903, p. 64 (Sayles' Civ. St. Supp. 1904, p. 596).
- Diminished:* Acts 1909, p. 351 (Sayles' Civ. St. Supp. 1910, p. 495).
- El Paso**—*Jurisdiction diminished:* Act March 27, 1879, p. 68 (Sayles' Civ. St. 1889, art. 1172c). Amended. Act Feb. 9, 1881, p. 3 (Sayles' Civ. St. 1889, art. 1172g). Same as provisions under Chambers county.
- Restored:* Act April 9, 1883, p. 55 (Sayles' Civ. St. 1889, art. 1172p). Same as the provisions under Atascosa county, not including § 7.
- Erath**—*Jurisdiction diminished:* Act July 8, 1879, S. S., p. 21 (Sayles' Civ. St. 1889, art. 1172f). Same as provisions under Angelina county.
- Restored:* Act March 31, 1885, p. 103 (Sayles' Civ. St. 1889, art. 1172x). Substantially the same as the provisions under Atascosa county, not including § 7. The act also confers probate jurisdiction.
- Franklin**—*Jurisdiction diminished:* Act March 27, 1879, p. 68 (Sayles' Civ. St. 1889, art. 1172c). Amended. Act Feb. 9, 1881, p. 3 (Sayles' Civ. St. 1889, art. 1172g). Same as provisions under Chambers county.
- Restored:* Acts 1905, p. 12 (Sayles' Civ. St. Supp. 1906, p. 571).
- Frio**—*Jurisdiction diminished:* Act Feb. 25, 1881, p. 3 (Sayles' Civ. St. 1889, art. 1172h). See Bexar county.
- Restored:* Acts 1907, p. 40 (Sayles' Civ. St. Supp. 1908, p. 463).
- Gillespie**—*Jurisdiction diminished:* Act Feb. 25, 1881, p. 13 (Sayles' Civ. St. 1889, art. 1172h). See Bexar county.
- Gray**—*Jurisdiction diminished:* Acts 1905, p. 3 (Sayles' Civ. St. Supp. 1906, p. 565).
- Restored:* Acts 1907, p. 125 (Sayles' Civ. St. Supp. 1908, p. 464).
- Greer**—*Jurisdiction diminished:* Act March 26, 1887, p. 54 (Sayles' Civ. St. 1889, art. 1172z). Same as the provision under Chambers county.
- Restored:* Act March 21, 1889, p. 48 (Sayles' Civ. St. Supp. 1894, art. 1172b, § 8). See Donley county.
- Gregg**—*Jurisdiction diminished:* Act May 11, 1893, p. 161 (Sayles' Civ. St. Supp. 1894, art. 1172b, § 7). See Angelina county.
- Restored:* Act Feb. 15, 1895, p. 6. Same as the provisions under Atascosa county, with a provision conferring probate jurisdiction. See Delta county.
- Grimes**—*Jurisdiction diminished:* Act March 15, 1881, p. 33 (Sayles' Civ. St. 1889, art. 1172j). See Angelina county.
- Restored:* Act Feb. 10, 1885, p. 11 (Sayles' Civ. St. 1889, art. 1172s). Substantially the same as the provision under Atascosa county, not including § 7.
- Hamilton**—*Jurisdiction diminished:* Act March 27, 1879, p. 68 (Sayles' Civ. St. 1889, art. 1172c). Amended. Act Feb. 9, 1881, p. 3 (Sayles' Civ. St. 1889, art. 1172g). Same as provisions under Chambers county.

Restored: Act March 13, 1893, p. 22 (Sayles' Civ. St. Supp. 1894, p. 917). Same as the provision under Atascosa county, not including § 7; also a provision conferring probate jurisdiction. See Delta county.

Hansford—*Jurisdiction diminished:* Act Feb. 21, 1891, p. 12 (Sayles' Civ. St. Supp. 1894, art. 1172b, § 9). Same as the provision under Angelina county.

Hardin—*Jurisdiction diminished:* Act March 27, 1879, p. 68 (Sayles' Civ. St. 1889, art. 1172c). Amended. Act Feb. 9, 1881, p. 3 (Sayles' Civ. St. 1889, art. 1172g). Same as provisions under Chambers county.

Restored: Act March 20, 1897, p. 28. Same as the provision under Atascosa county.

Harris—For special laws relating to this court, see arts. 104s-104w, ante.

Harrison—For special laws relating to this court, see Chapter 8, Title 36, of Vernon's Sayles' Civ. St.

Hartley—*Jurisdiction diminished:* Act April 26, 1893, p. 74 (Sayles' Civ. St. Supp. 1894, art. 1172b, § 3). Same as provisions under Angelina county.

Restored: Acts 1903, p. 64 (Sayles' Civ. St. Supp. 1904, p. 596).

Hemphill—*Jurisdiction diminished:* Act March 25, 1891, p. 73 (Sayles' Civ. St. Supp. 1894, art. 1172b, § 13). Same as the provision under Angelina county.

Henderson—*Jurisdiction diminished:* Act Feb. 25, 1881, p. 13 (Sayles' Civ. St. 1889, art. 1172h). See Bexar county.

Criminal jurisdiction restored: Act Feb. 3, 1883, p. 14 (Sayles' Civ. St. 1889, art. 1172n). All the criminal jurisdiction which the court had under the constitution and laws prior to the enactment of the preceding law is restored.

Hidalgo—*Jurisdiction diminished:* Act Feb. 25, 1881, p. 13 (Sayles' Civ. St. 1889, art. 1172h). See Bexar county.

Restored: Act April 9, 1883, p. 55 (Sayles' Civ. St. 1889, art. 1172p). Same as the provisions under Atascosa county, not including § 7.

Houston—*Jurisdiction diminished:* Act March 16, 1883, p. 24 (Sayles' Civ. St. 1889, art. 1172o). Same as the provision under Chambers county.

Restored: Act April 13, 1883, p. 84 (Sayles' Civ. St. 1889, art. 1172q). Act of March 16, 1883, repealed, so far as it relates to this county.

Hutchinson—*Jurisdiction diminished:* Acts 1905, p. 8 (Sayles' Civ. St. Supp. 1906, p. 566).

Irion—*Jurisdiction diminished:* Act Feb. 21, 1891, p. 12 (Sayles' Civ. St. Supp. 1894, art. 1172b, § 9). Same as the provision under Angelina county.

Restored: Acts 1907, p. 170 (Sayles' Civ. St. Supp. 1908, p. 465).

Diminished: Act 1915, p. 139, ch. 87; Act 1915, p. 172, ch. 115.

Jasper—*Jurisdiction diminished:* Act March 27, 1879, p. 68 (Sayles' Civ. St. 1889, art. 1172c). Amended. Act Feb. 9, 1881, p. 3 (Sayles' Civ. St. 1889, art. 1172g). Same as provisions under Chambers county.

Restored: Act 1911, p. 12, ch. 7. See Chapter 9, Title 36, of Vernon's Sayles' Civ. St.

Jefferson—*Jurisdiction diminished:* Act March 27, 1879, p. 68 (Sayles' Civ. St. 1889, art. 1172c). Amended. Act Feb. 9, 1881, p. 3; Sayles' Civ. St. 1889, art. 1172g. Same as provisions under Chambers county.

Restored: Act March 26, 1897, p. 81. Same as the provision under Atascosa county; also a provision conferring probate jurisdiction. See Delta county.

County court at law with criminal jurisdiction created. See arts. 104x-104zz, ante.

Karnes—*Jurisdiction diminished:* Act March 15, 1881, p. 33 (Sayles' Civ. St. 1889, art. 1172j). See Angelina county.

Restored: Act March 27, 1887, p. 47 (Sayles' Civ. St. 1889, art. 1172y). Same as provisions under Atascosa county, not including § 7; also a provision conferring probate jurisdiction. See Delta county.

Restored: Acts 1903, p. 20 (Sayles' Civ. St. Supp. 1904, p. 597).

Kendall—*Jurisdiction diminished:* Act Feb. 25, 1881, p. 13 (Sayles' Civ. St. 1889, art. 1172h). See Bexar county.

Restored: Act March 27, 1887, p. 47 (Sayles' Civ. St. 1889, art. 1172y). Same as provisions under Atascosa county, not including § 7; also a provision conferring probate jurisdiction. See Delta county.

Diminished: Act 1911, p. 31, ch. 24. See Chapter 10, Title 36, of Vernon's Sayles' Civ. St.

Restored: Act 1915, Sp. Sess. ch. 27.

Kerr—*Jurisdiction diminished:* Act March 16, 1883, p. 24 (Sayles' Civ. St. 1889, art. 1172o). Same as the provision under Chambers county.

Kimble—*Jurisdiction diminished:* Act Feb. 25, 1881, p. 13 (Sayles' Civ. St. 1889, art. 1172h). See Bexar county.

Restored: Acts 1901, ch. 37, p. 47 (Sayles' Civ. St. Supp. 1904, p. 595).

Diminished: Acts 1903, p. 86 (Sayles' Civ. St. Supp. 1904, p. 588).

King—*Jurisdiction diminished:* Act April 27, 1897, p. 155. Same as the provision under Angelina county.

Restored: Acts 1903, p. 64 (Sayles' Civ. St. Supp. 1904, p. 596).

Lamb—For special laws relating to this court, see Chapter 6, Title 36, of Vernon's Sayles' Civ. St.

Lampasas—*Jurisdiction diminished:* Act Feb. 25, 1881, p. 13 (Sayles' Civ. St. 1889, art. 1172h). See Bexar county.

Restored: Act May 7, 1897, p. 181. Same as the provision under Atascosa county; also a provision conferring probate jurisdiction. See Delta county.

La Salle—*Jurisdiction diminished:* Act Feb. 25, 1881, p. 13 (Sayles' Civ. St. 1889, art. 1172h). See Bexar county.

Restored: Act March 27, 1887, p. 47 (Sayles' Civ. St. 1889, art. 1172y). Same as provisions under Atascosa county, not including § 7.

Diminished: Act March 27, 1889, p. 109 (Sayles' Civ. St. Supp. 1894, art. 1172b, § 10). Same as the provision under Chambers county.

Leon—*Jurisdiction diminished*: Act Feb. 6, 1879, p. 5 (Sayles' Civ. St. 1889, art. 1172b). See Angelina county.

Restored: Act March 24, 1885, p. 47 (Sayles' Civ. St. 1889, art. 1172t). Same as the provision under Atascosa county.

Jurisdiction diminished: Act April 8, 1893, p. 54 (Sayles' Civ. St. Supp. 1894, art. 1172b, § 11). See Angelina county.

Restored: Act April 3, 1897, p. 103. Same as the provisions under Atascosa county, not including § 7; also a provision conferring probate jurisdiction. See Delta county.

Liberty—*Jurisdiction diminished*: Act March 27, 1879, p. 68 (Sayles' Civ. St. 1889, art. 1172c). Amended. Act Feb. 9, 1881, p. 3 (Sayles' Civ. St. 1889, art. 1172g). Same as provisions under Chambers county.

Restored: Act April 15, 1895, p. 55. Same as the provision under Atascosa county, not including § 7; also a provision conferring probate jurisdiction. See Delta county.

Lipscomb—*Jurisdiction diminished*: Act Feb. 21, 1891, p. 12 (Sayles' Civ. St. Supp. 1894, art. 1172b, § 9). Same as the provision under Angelina county.

Restored: Acts 1907, p. 28 (Sayles' Civ. St. Supp. 1908, p. 467).

Live Oak—*Jurisdiction diminished*: Act March 16, 1883, p. 24 (Sayles' Civ. St. 1889, art. 1172o). Same as the provision under Chambers county.

Restored: Act March 27, 1887, p. 47 (Sayles' Civ. St. 1889, art. 1172y). Same as the provision under Atascosa county, not including § 7; also a provision conferring probate jurisdiction. See Delta county.

Llano—*Jurisdiction diminished*: Act March 27, 1879, p. 68 (Sayles' Civ. St. 1889, art. 1172c). Amended. Act Feb. 9, 1881, p. 3 (Sayles' Civ. St. 1889, art. 1172g). Same as provisions under Chambers county.

Restored: Act March 24, 1885, p. 47 (Sayles' Civ. St. 1889, art. 1172t). Same as provisions under Atascosa county. Act March 30, 1885, p. 69 (Sayles' Civ. St. 1889, art. 1172v). Same as the provisions under Atascosa county, not including § 7; also a provision conferring probate jurisdiction. See Delta county.

Lubbock—For special laws relating to this court, see Chapter 6, Title 36, of Vernon's Sayles' Civ. St.

McCulloch—*Jurisdiction diminished*: Act March 27, 1879, p. 68 (Sayles' Civ. St. 1889, art. 1172c). Amended. Act Feb. 9, 1881, p. 3 (Sayles' Civ. St. 1889, art. 1172g). Same as provisions under Chambers county.

Restored: Act April 13, 1891, p. 93 (Sayles' Civ. St. Supp. 1894, art. 1172b, § 12); Act April 3, 1891, p. 132 (Sayles' Civ. St. Supp. 1894, art. 1172b, § 12a). See Atascosa county.

Jurisdiction diminished: Act March 24, 1893, p. 35 (Sayles' Civ. St. Supp. 1894, art. 1172b, § 13). Same as the provision under Angelina county.

Restored: Acts 1901, ch. 82, p. 216 (Sayles' Civ. St. Supp. 1904, p. 600).

McMullen—*Jurisdiction diminished*: Act Feb. 25, 1881, p. 13 (Sayles' Civ. St. 1889, art. 1172h). See Bexar county.

Restored: Act March 13, 1893, p. 19 (Sayles' Civ. St. Supp. 1894, p. 916). Act of 1881 repealed.

Marion—*Jurisdiction diminished*: Act March 27, 1879, p. 68 (Sayles' Civ. St. 1889, art. 1172c). Amended. Act Feb. 9, 1881, p. 3 (Sayles' Civ. St. 1889, art. 1172g). Same as provisions under Chambers county.

Civil jurisdiction restored: Act March 9, 1893, p. 18 (Sayles' Civ. St. Supp. 1894, p. 914). Same as provisions under Atascosa county, but by the title it purports to restore only civil jurisdiction.

Diminished: Act March 11, 1897, p. 38. Same as the provision under Angelina county.

Mason—*Jurisdiction diminished*: Act March 16, 1883, p. 24 (Sayles' Civ. St. 1889, art. 1172o). Same as Chambers county.

Restored: Act March 30, 1885, p. 69 (Sayles' Civ. St. 1889, art. 1172v). See Atascosa county.

Diminished: Act March 26, 1887, p. 54 (Sayles' Civ. St. 1889, art. 1172z). Same as the provision under Chambers county.

Matagorda—*Jurisdiction diminished*: Act March 27, 1879, p. 68 (Sayles' Civ. St. 1889, art. 1172c). Amended. Act Feb. 9, 1881, p. 3 (Sayles' Civ. St. 1889, art. 1172g). Same as provisions under Chambers county.

Restored: Act March 30, 1881, p. 74 (Sayles' Civ. St. 1889, art. 1172l). Same as provisions under Atascosa county, not including § 7.

Diminished: Act March 16, 1883, p. 24 (Sayles' Civ. St. 1889, art. 1172o). Same as the provision under Chambers county.

Restored: Acts 1903, p. 5 (Sayles' Civ. St. Supp. 1904, p. 598).

Medina—*Jurisdiction diminished*: Act Feb. 25, 1881, p. 13 (Sayles' Civ. St. 1889, art. 1172h). See Bexar county.

Restored: Act April 15, 1895, p. 55. Same as provision under Atascosa county, not including § 7; also a provision conferring probate jurisdiction. See Delta county.

Menard—*Jurisdiction diminished*: Act March 25, 1891, p. 73 (Sayles' Civ. St. Supp. 1894, art. 1272b, § 13). See Angelina county.

Restored: Act April 6, 1897, p. 110. See Atascosa county.

Mills—*Jurisdiction diminished*: Act March 27, 1889, p. 109 (Sayles' Civ. St. Supp. 1894, art. 1172b, § 10). Same as the provision under Chambers county.

Restored: Acts 1907, p. 199 (Sayles' Civ. St. Supp. 1908, p. 468).

Montgomery—*Jurisdiction diminished*: Act March 15, 1881, p. 33 (Sayles' Civ. St. 1889, art. 1172j). See Angelina county.

Restored: Act March 24, 1885, p. 47 (Sayles' Civ. St. 1889, art. 1172t). Same as the provisions under Atascosa county, not including § 7.

Morris—*Jurisdiction diminished*: Act March 27, 1879, p. 68 (Sayles' Civ. St. 1889, art. 1172c). Amended. Act Feb. 9, 1881, p. 3 (Sayles' Civ. St. 1889, art. 1172g). Same as provisions under Chambers county.

Restored: Act March 30, 1881, p. 74 (Sayles' Civ. St. 1889, art. 1172l). See Atascosa county.

Diminished: Act Feb. 9, 1883, p. 6 (Sayles' Civ. St. 1889, art. 1172m). Has criminal and probate jurisdiction.

Nacogdoches—*Jurisdiction diminished*: Act March 27, 1879, p. 68 (Sayles' Civ. St. 1889, art. 1172c). Amended. Act Feb. 9, 1881, p. 3 (Sayles' Civ. St. 1889, art. 1172g). Same as provisions under Chambers county.

Restored: Act Feb. 16, 1891, p. 6 (Sayles' Civ. St. Supp. 1894, art. 1172b, § 14). Amended. Act March 10, 1891, p. 24 (Sayles' Civ. St. Supp. 1894, art. 1172b, § 14a). Same as provisions under Atascosa county.

Navarro—*Jurisdiction diminished*: Act July 2, 1879, S. S., p. 7 (Sayles' Civ. St. 1889, art. 1172e). Criminal and probate jurisdiction.

Restored: Act March 12, 1881, p. 28 (Sayles' Civ. St. 1889, art. 1172i). Act of 1879 repealed, and civil and criminal jurisdiction restored.

Newton—*Jurisdiction diminished*: Act March 27, 1879, p. 68 (Sayles' Civ. St. 1889, art. 1172c). Amended. Act Feb. 9, 1881, p. 3 (Sayles' Civ. St. 1889, art. 1172g). Same as provisions under Chambers county.

Restored: Acts 1905, p. 312 (Sayles' Civ. St. Supp. 1906, p. 573).

Nueces—*Jurisdiction diminished*: Act Feb. 25, 1881, p. 13 (Sayles' Civ. St. 1889, art. 1172h). See Bexar county.

Restored: Act March 13, 1893, p. 19 (Sayles' Civ. St. Supp. 1894, p. 916). Act of 1881 repealed.

Ochiltree—*Jurisdiction diminished*: Act Feb. 21, 1891, p. 12 (Sayles' Civ. St. Supp. 1894, art. 1172b, § 9). Same as the provision under Angelina county.

Restored: Acts 1909, p. 115 (Sayles' Civ. St. Supp. 1910, p. 501).

Oldham—*Jurisdiction diminished*: Act Feb. 25, 1881, p. 13 (Sayles' Civ. St. 1889, art. 1172h). See Bexar county.

Restored: Act 1911, p. 123, ch. 70. See chapter 11, title 36, of Vernon's Sayles' Civ. St.

Orange—*Jurisdiction diminished*: Act March 27, 1879, p. 68 (Sayles' Civ. St. 1889, art. 1172c). Amended. Act Feb. 9, 1881, p. 3 (Sayles' Civ. St. 1889, art. 1172g). Same as provisions under Chambers county.

Jurisdiction diminished: Act March 26, 1887, p. 54 (Sayles' Civ. St. 1889, art. 1172z). Same as the provision under Chambers county.

Criminal jurisdiction restored: Act March 31, 1897, p. 92. The ordinary provision conferring criminal jurisdiction. See Atascosa county, §§ 4, 5.

Palo Pinto—*Jurisdiction diminished*: Act July 8, 1879, S. S., p. 21 (Sayles' Civ. St. 1889, art. 1172f). Same as provisions under Angelina county.

Restored: Act March 30, 1881, p. 74 (Sayles' Civ. St. 1889, art. 1172l). Same as the provision under Atascosa county, not including § 7.

Panola—*Jurisdiction diminished*: Act July 8, 1879, S. S., p. 21 (Sayles' Civ. St. 1889, art. 1172f). Same as provisions under Angelina county.

Restored: Act March 27, 1887, p. 47 (Sayles' Civ. St. 1889, art. 1172y). Same as provisions under Atascosa county, not including § 7; also a provision conferring probate jurisdiction. See Delta county.

Parker—*Jurisdiction diminished*: Act Feb. 25, 1881, p. 13 (Sayles' Civ. St. 1889, art. 1172h). See Bexar county.

Restored: Act Feb. 3, 1883, p. 14 (Sayles' Civ. St. 1889, art. 1172n). Act of 1881 repealed, so far as it relates to this county. Civil and criminal jurisdiction restored.

Parmer—For special laws relating to this court, see Chapter 6, Title 36, of Vernon's Sayles' Civ. St.

Pecos—*Jurisdiction diminished*: Act March 27, 1879, p. 68 (Sayles' Civ. St. 1889, art. 1172c). Amended. Act Feb. 9, 1881, p. 3 (Sayles' Civ. St. 1889, art. 1172g). Same as provisions under Chambers county.

Restored: Act April 9, 1883, p. 55 (Sayles' Civ. St. 1889, art. 1172p). Same as the provision under Atascosa county, not including § 7.

Polk—*Jurisdiction diminished*: Act March 27, 1879, p. 68 (Sayles' Civ. St. 1889, art. 1172c). Amended. Act Feb. 9, 1881, p. 3 (Sayles' Civ. St. 1889, art. 1172g). Same as provisions under Chambers county.

Restored: Acts 1903, p. 46 (Sayles' Civ. St. Supp. 1904, p. 601).

Presidio—*Jurisdiction diminished*: Act March 27, 1879, p. 68 (Sayles' Civ. St. 1889, art. 1172c). Amended. Act Feb. 9, 1881, p. 3 (Sayles' Civ. St. 1889, art. 1172g). Same as provisions under Chambers county.

Restored: Act April 9, 1883, p. 55 (Sayles' Civ. St. 1889, art. 1172p). Same as the provisions under Atascosa county, not including § 7.

Randall—For special laws relating to this court, see Chapter 6, Title 36, of Vernon's Sayles' Civ. St.

Red River—*Jurisdiction diminished*: Act July 8, 1879, S. S., p. 21 (Sayles' Civ. St. 1889, art. 1172f). Same as provisions under Angelina county.

Restored: Act Feb. 3, 1883, p. 14 (Sayles' Civ. St. 1889, art. 1172n). The act of 1879 repealed, so far as it relates to this county. Civil and criminal jurisdiction restored.

- Roberts**—*Jurisdiction diminished*: Act Feb. 21, 1891, p. 12 (Sayles' Civ. St. Supp. 1894, art. 1172b, § 9). Same as the provision under Angelina county.
Restored: Acts 1905, p. 111 (Sayles' Civ. St. Supp. 1906, p. 567).
- Sabine**—*Jurisdiction diminished*: Act March 27, 1879, p. 68 (Sayles' Civ. St. 1889, art. 1172c). Amended. Act Feb. 9, 1881, p. 3 (Sayles' Civ. St. 1889, art. 1172g). Same as provisions under Chambers county.
Restored: Acts 1905, p. 146 (Sayles' Civ. St. Supp. 1906, p. 574).
- San Augustine**—*Jurisdiction diminished*: Act March 27, 1879, p. 68 (Sayles' Civ. St. 1889, art. 1172c). Amended. Act Feb. 9, 1881, p. 3 (Sayles' Civ. St. 1889, art. 1172g). Same as provisions under Chambers county.
Restored: Acts 1909, p. 71 (Sayles' Civ. St. Supp. 1910, p. 503).
- San Jacinto**—*Jurisdiction diminished*: Act March 27, 1879, p. 68 (Sayles' Civ. St. 1889, art. 1172c). Amended. Act Feb. 9, 1881, p. 3 (Sayles' Civ. St. 1889, art. 1172g). Same as provisions under Chambers county.
Restored: Acts 1907, p. 56 (Sayles' Civ. St. Supp. 1908, p. 469).
- San Patricio**—*Jurisdiction diminished*: Act March 26, 1881, p. 64 (Sayles' Civ. St. 1889, art. 1172k). Same as Chambers county.
Diminished: Act March 16, 1883, p. 24 (Sayles' Civ. St. 1889, art. 1172o). Same as the provision under Chambers county.
Restored: Act March 13, 1893, p. 19 (Sayles' Civ. St. Supp. 1894, p. 916). Act of 1881 repealed.
Restored: Act April 28, 1893, p. 85 (Sayles' Civ. St. Supp. 1894, art. 1172b, § 15). Same as the provision under Atascosa county; also a provision conferring probate jurisdiction. See Delta county.
- San Saba**—*Jurisdiction diminished*: Act March 27, 1879, p. 68 (Sayles' Civ. St. 1889, art. 1172c). Amended. Act Feb. 9, 1881, p. 3 (Sayles' Civ. St. 1889, art. 1172g). Same as provisions under Chambers county.
Restored: Act April 13, 1897, p. 120. Same as the provision under Atascosa county, not including § 7; also a provision conferring probate jurisdiction. See Delta county.
Restored: Acts 1903, p. 51 (Sayles' Civ. St. Supp. 1904, p. 603).
- Schleicher**—*Jurisdiction diminished*: Act 1915, p. 57, ch. 32.
- Shelby**—*Jurisdiction diminished*: Act March 27, 1879, p. 68 (Sayles' Civ. St. 1889, art. 1172c). Amended. Act Feb. 9, 1881, p. 3 (Sayles' Civ. St. 1889, art. 1172g). Same as provisions under Chambers county.
Restored: Act March 21, 1893, p. 31 (Sayles' Civ. St. Supp. 1894, p. 913). Same as provisions under Atascosa county; also a provision conferring probate jurisdiction. See Delta county.
Diminished: Acts 1899, p. 82 (Sayles' Civ. St. Supp. 1904, p. 589).
Restored: Acts 1909, p. 14 (Sayles' Civ. St. Supp. 1910, p. 505).
- Starr**—*Jurisdiction diminished*: Act Feb. 25, 1881, p. 13 (Sayles' Civ. St. 1889, art. 1172h). See Bexar county.
Restored: Act Feb. 3, 1883, p. 14 (Sayles' Civ. St. 1889, art. 1172n). The act of 1881 repealed so far as it relates to this county. Civil and criminal jurisdiction restored.
- Stephens**—*Jurisdiction diminished*: Act July 8 1879, S. S., p. 21 (Sayles' Civ. St. 1889, art. 1172f). Same as provisions under Angelina county.
Restored: Act March 30, 1881, p. 74 (Sayles' Civ. St. 1889, art. 1172l). Same as the provision under Atascosa county, not including § 7.
- Sterling**—*Jurisdiction diminished*: Act 1915, p. 56, ch. 31; Act 1915, p. 174, ch. 116.
- Stonewall**—*Jurisdiction diminished*: Act April 27, 1897, p. 155. Same as the provision under Angelina county.
Restored: Acts 1901, ch. 7, p. 5 (Sayles' Civ. St. Supp. 1904, p. 604).
 For other special laws relating to this court, see Chapter 12, Title 36, of Vernon's Sayles' Civ. St.
- Sutton**—*Jurisdiction diminished*: Acts 1903, p. 30 (Sayles' Civ. St. Supp. 1904, p. 589).
- Tarrant**—For special laws relating to this court, see Chapter 2, Title 36, of Vernon's Sayles' Civ. St.
- Taylor**—*Jurisdiction diminished*: Act July 8, 1879, S. S., p. 21 (Sayles' Civ. St. 1889, art. 1172f). Same as provisions under Angelina county.
Restored: Act March 30, 1881, p. 74 (Sayles' Civ. St. 1889, art. 1172l). Same as the provisions under Atascosa county, not including § 7.
- Throckmorton**—*Jurisdiction diminished*: Act July 8, 1879, S. S., p. 21 (Sayles' Civ. St. 1889, art. 1172f). Same as provisions under Angelina county.
Restored: Act March 27, 1887, p. 47 (Sayles' Civ. St. 1889, art. 1172y). Same as provisions under Atascosa county, not including § 7; also a provision conferring probate jurisdiction. See Delta county.
- Titus**—*Jurisdiction diminished*: Act March 27, 1879, p. 68 (Sayles' Civ. St. 1889, art. 1172c). Amended. Act Feb. 9, 1881, p. 3 (Sayles' Civ. St. 1889, art. 1172g). Same as provisions under Chambers county.
Restored: Act April 13, 1883, p. 91 (Sayles' Civ. St. 1889, art. 1172r). See Atascosa county, §§ 4, 5.
Restored: Acts 1901, ch. 78, p. 201 (Sayles' Civ. St. Supp. 1904, p. 606).
- Tom Green**—*Jurisdiction diminished*: Act March 27, 1879, p. 68 (Sayles' Civ. St. 1889, art. 1172c). Amended. Act Feb. 9, 1881, p. 3 (Sayles' Civ. St. 1889, art. 1172g). Same as provisions under Chambers county.
Restored: Act April 9, 1883, p. 55 (Sayles' Civ. St. 1889, art. 1172p). Same as the provisions under Atascosa county, not including § 7.
- Travis**—*Civil jurisdiction diminished*: Act April 3, 1889, p. 139 (Sayles' Civ. St. Supp. 1894, art. 1172b, § 16). Criminal and probate jurisdiction.

Art. 105 JURISDICTION OF COURTS IN CRIMINAL ACTIONS (Title 2)

Restored: Act March 25, 1891, p. 75 (Sayles' Civ. St. Supp. 1894, art. 1172b, § 17). Same as the provision under Atascosa county.

Trinity—Jurisdiction diminished: Act March 27, 1879, p. 68 (Sayles' Civ. St. 1889, art. 1172c). Act April 5, 1879, p. 77 (Sayles' Civ. St. 1889, art. 1172d). Amendment of act of March 27, 1879. Act Feb. 9, 1881, p. 3 (Sayles' Civ. St. 1889, art. 1172g). Same as provisions under Chambers county.

Restored: Acts 1905, p. 5 (Sayles' Civ. St. Supp. 1906, p. 578).

Tyler—Jurisdiction diminished: Act July 24, 1879, p. 68 (Sayles' Civ. St. 1889, art. 1172c). Amended. Act Feb. 9, 1881, p. 3 (Sayles' Civ. St. 1889, art. 1172g). Same as provisions under Chambers county.

Restored: Act March 31, 1885, p. 103 (Sayles' Civ. St. 1889, art. 1172x). Similar to the provisions under Atascosa county.

Diminished: Act March 26, 1887, p. 54 (Sayles' Civ. St. 1889, art. 1172z). Same as the provision under Chambers county.

Restored: Act March 8, 1893, p. 12 (Sayles' Civ. St. Supp. 1894, p. 919). Same as provisions under Atascosa county, not including § 7.

Uvalde—Jurisdiction diminished: Act Feb. 25, 1881, p. 13 (Sayles' Civ. St. 1889, art. 1172h). See Bexar county.

Restored: Act Feb. 3, 1883, p. 14 (Sayles' Civ. St. 1889, art. 1172n). The act of 1881 repealed, so far as it relates to this county. Civil and criminal jurisdiction restored.

Webb—Jurisdiction diminished: Act Feb. 11, 1893, p. 5 (Sayles' Civ. St. Supp. 1894, art. 1172b, § 18). Same as the provision under Angelina county.

Wharton—Jurisdiction diminished: Act Feb. 25, 1881, p. 13 (Sayles' Civ. St. 1889, art. 1172h). See Bexar county.

Restored: Act March 13, 1893, p. 22 (Sayles' Civ. St. Supp. 1894, p. 917). Same as the provision under Atascosa county, not including § 7; also a provision conferring probate jurisdiction. See Delta county.

Wheeler—Jurisdiction diminished: Act Feb. 25, 1881, p. 13 (Sayles' Civ. St. 1889, art. 1172h). See Bexar county.

Restored: Act 1911, p. 131, ch. 75. See Chapter 13, Title 36, of Vernon's Sayles' Civ. St.

Wilson—Jurisdiction diminished: Act March 16, 1883, p. 24 (Sayles' Civ. St. 1889, art. 1172o). Same as the provision under Chambers county.

Restored: Act March 16, 1889, p. 41 (Sayles' Civ. St. 1889, art. 1172b, § 19). Same as the provision under Atascosa county, not including § 7; also a provision conferring probate jurisdiction. See Delta county.

Young—Jurisdiction diminished: Act March 16, 1883, p. 24 (Sayles' Civ. St. 1889, art. 1172o). Same as the provision under Chambers county.

Restored: Act March 24, 1885, p. 47 (Sayles' Civ. St. 1889, art. 1172t). Same as the provisions under Atascosa county, not including § 7.

Zapata—Jurisdiction diminished: Act Feb. 25, 1881, p. 13 (Sayles' Civ. St. 1889, art. 1172h). See Bexar county.

Criminal jurisdiction restored: Act March 28, 1885, p. 60 (Sayles' Civ. St. 1889, art. 1172u; Sayles' Civ. St. 1897, p. 1937).

Diminished: Acts 1903, p. 19 (Sayles' Civ. St. Supp. 1904, p. 590).

Restored: Act 1913, p. 84, ch. 42. See Chapter 14, Title 36, of Vernon's Sayles' Civ. St.

CHAPTER FIVE

OF JUSTICES' AND OTHER INFERIOR COURTS

Art.	Art.
106. Original concurrent jurisdiction.	council; term of office, etc.; vacancy; council may make mayor ex officio recorder, when.
107. Power to forfeit bail bonds.	
108. Mayors' and other inferior courts.	
109. May sit at any time to try causes.	109e. Clerk of corporation court elected by council, when; provided; terms; duties.
109a. Corporation court created.	
109b. Jurisdiction.	
109c. Judge or recorder elected or appointed, how; term, mayor ex officio recorder, when.	109f. Seal of corporation court.
109d. Recorder elected or appointed, when and how; discretion in	109g. Until organization of corporation courts municipal court as now established has jurisdiction, but thereafter abolished.

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.]

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| 1. Original concurrent jurisdiction. | 7. Official misconduct. |
| 2. Territorial jurisdiction. | 8. Bawdy and disorderly houses. |
| 3. Punishment as affecting jurisdiction. | 9. Carrying weapons. |
| 4. Decisions under former laws. | 10. Gaming. |
| 5. Increase or diminution of jurisdiction. | 11. Killing animals. |
| 6. Divesting court of jurisdiction. | 12. Transfer of cause. |
| | 13. Procedure. |

1. **Original concurrent jurisdiction.**—The jurisdiction of justices in criminal cases is not exclusive, but concurrent with that of the county court. Art. 98, ante.

After an indictment has been found in the district court a justice has no jurisdiction to try defendant for the same offense since the court first acquiring jurisdiction is entitled to retain it. *Burdett v. State*, 9 Tex. 43. And see *Clepper v. State*, 4 Tex. 242.

The justice has no jurisdiction to try and finally adjudge a case on the voluntary appearance and confession of the defendant. *Wilson v. State*, 16 Tex. 246.

This article did not deprive district courts of their jurisdiction to convict for assault and battery under an indictment charging assault with intent to murder. *Johnson v. State*, 17 Tex. 515.

The term "original concurrent jurisdiction" means that the territorial jurisdiction of the justice of the peace in criminal matters is co-extensive with the limits of the county. *Ex parte Brown*, 43 App. 45, 64 S. W. 250.

Const. art. 5, § 16, provides that the county court shall have appellate jurisdiction in cases, civil and criminal, of which justice courts have original jurisdiction. Const. art. 5, § 22, provides that the Legislature can increase, diminish or change the civil and criminal jurisdiction of county courts. *Vernon's Sayles' Civ. St.* 1914, arts. 903-922, relating to cities and towns, establishes recorders' courts, and article 904 gives such courts jurisdiction over all cases arising under the ordinances of the city, and also concurrent jurisdiction with justices of the peace. *Vernon's Sayles' Civ. St.* 1914, art. 921, declares that appeals from judgments rendered by such corporation courts shall be heard by the county court. Held, under this section that an appeal would not lie from the recorder's court in a case arising under the ordinances of the city, but would only lie in those cases wherein it had jurisdiction concurrently with a justice of the peace, since the statutes establishing the recorder's court did not have the effect of enlarging the jurisdiction of the county court, as originally defined by the Constitution. *Jarvis v. Taylor County* (Civ. App.) 163 S. W. 334.

2. **Territorial jurisdiction.**—A justice has jurisdiction as an examining magistrate over one arrested for a felony committed in another county on a warrant issued by the justice but made returnable before the county judge of the county where the offense was committed. *Arrington v. State*, 13 App. 551.

The ordinary jurisdiction of a justice of the peace is circumscribed by the limits of his own precinct; but when a justice of the peace holds an examining court, to inquire into the commission of an offense, his judicial authority is co-extensive with his county. *Hart v. State*, 15 App. 202, 49 Am. Rep. 188; *Kerry v. State*, 17 App. 178, 50 Am. Rep. 122.

A justice's warrant which is not directed to some officer of his county is void. *Toliver v. State*, 32 App. 444, 24 S. W. 286.

Where a transcript of the record from a justice of the peace, which is sought to be introduced in evidence in a prosecution for bribing a witness before the justice of the peace, shows that the justice was holding court in a precinct other than his own, proof should be made that the facts authorized the holding of court by the justice. *Peacock v. State*, 37 App. 418, 35 S. W. 964.

When a justice of the peace in one precinct holds court in another precinct, before introducing his acts in so holding court, it is necessary to show his authority. *Peacock v. State*, 37 App. 418, 35 S. W. 964.

3. **Punishment as affecting jurisdiction.**—Justices' courts have no jurisdiction to finally determine any criminal action when the punishment prescribed by law may be by a fine exceeding two hundred dollars, or may be imprisoned for any length of time. *Tuttle v. State*, 1 App. 364; *Billingsly v. State*, 3 App. 686; *Uecker v. State*, 4 App. 234; *Jacobs v. State*, 35 App. 410, 34 S. W. 110; *Ex parte McGrew*, 40 Tex. 472; *State v. Newhous*, 41 Tex. 185; *Ex parte Phillips*, 33 App. 126, 25 S. W. 629.

But justice's courts can imprison for nonpayment of fine and costs, or to enforce their authority. *Tuttle v. State*, 1 App. 364.

4. **Decisions under former laws.**—Under *Hart Dig.*, arts. 554, 1712, justices had no jurisdiction where a deadly weapon was used or the assault was aggravated, *Norton v. State*, 14 Tex. 387; nor over sales of liquor without license in 1862, *Ex parte Valasquez*, 26 Tex. 178; nor over aggravated assaults in 1874 (overruling *Owens v. State*, 38 Tex. 555), *Ex parte McGrew*, 40 Tex. 472; *Neil v. State*, 43 Tex. 91.

5. **Increase or diminution of jurisdiction.**—Section 22 of article 5 of the state constitution empowers the legislature by local or general law to increase, diminish, or change the civil and criminal jurisdiction of the county courts, and requires the legislature, in the case of such change, to conform the jurisdiction of the other courts to the same.

Section 16 of the same article of the constitution provides that "in all appeals from justices' courts there shall be a trial de novo in the county court, and when the judgment rendered or fine imposed by the county court does not exceed one hundred dollars, such trial shall be final," etc.

By section 6 of the same article of the constitution it is provided that the court of appeals shall have appellate jurisdiction coextensive with the limits of the state in all criminal cases of whatever grade. This provision is re-enacted by article

86 of the Code of Criminal Procedure, which, however, is controlled by article 87 of the said Code, which expressly declares that article 86 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 or fine in the county court shall not exceed one hundred dollars, exclusive of costs.

Article 165 of the Code of Criminal Procedure provides that "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 cases to the county court."

Under the above constitutional and statutory provisions, the legislature, by act of March 27, 1879, divested the county court of San Augustine county of all jurisdiction in misdemeanor cases, and conferred the same upon the district court of said county. This case originated in the justice's court, where a fine of \$5 was imposed upon the accused. He appealed to the district court, wherein, upon a trial de novo, a fine of \$5 was again assessed against him, and this proceeding is an attempted appeal to this court from the latter judgment. Held, that no appeal to this court lies from said judgment of the district court, and the cause is dismissed for want of jurisdiction by this court. *Johnson v. State*, 26 App. 395, 9 S. W. 611.

6. Divesting court of jurisdiction.—Constitutionality of statutes giving mayors' and recorders' courts either concurrent or exclusive jurisdiction over violations of the Penal Code of which justices have jurisdiction, see post, art. 963 and notes.

7. Official misconduct.—See notes under article 90, ante.

8. Bawdy and disorderly houses.—Justice courts have jurisdiction of the offense as prescribed in P. C. arts. 496-500, relating to bawdy and disorderly houses. *Davis v. State*, 32 App. 382, 23 S. W. 892.

9. Carrying weapons.—Justices of the peace have no jurisdiction of the offense of unlawfully carrying weapons as defined by Penal Code, art. 476, since both fine and imprisonment are imposed. *Tuttle v. State*, 1 App. 364.

As punishment for carrying weapons in church under Penal Code, art. 477, may exceed two hundred dollars, justices of the peace have no jurisdiction. *Anderson v. State*, 18 App. 17.

10. Gaming.—A justice of the peace has no jurisdiction to try a case for exhibiting a gaming bank. *Jacobs v. State*, 35 App. 410, 34 S. W. 110.

11. Killing animals.—A justice of the peace has jurisdiction of offenses committed under Pen. Code, art. 1230, the maximum fine not exceeding two hundred dollars. But he has no jurisdiction of offenses prescribed in article 1231. *Ex parte Phillips*, 33 App. 126, 25 S. W. 629; *Uecker v. State*, 4 App. 234.

12. Transfer of cause.—When an affidavit is filed before a justice of the peace, charging an offense over which he has jurisdiction, it is the justice's duty to try the case, and he cannot transfer it to the county court that an information may be filed there. *Ex parte Holcomb* (Cr. App.) 131 S. W. 604.

An affidavit was filed before a justice of the peace charging defendant with sending a certain anonymous letter, and publishing certain obscene composition. The justice had jurisdiction over the second charge, but not the first. After examination, he bound defendant over to the county court, where defendant was found guilty of the second charge. Held, that this action was proper on the part of the justice, and the county court acquired jurisdiction. *Ex parte Holcomb* (Cr. App.) 131 S. W. 604.

13. Procedure.—See, post, title 11.

Cited, *Ethridge v. State* (Cr. App.) 172 S. W. 786.

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.]

Power in general.—Cited, *Willis v. State* (Cr. App.) 150 S. W. 904.

This power existed in justices of the peace before the enactment of the above articles. *Garner v. Smith*, 40 Tex. 505; see, post, art. 488, et seq.

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.]

See art. 806, *Vernon's Sayles' Civ. St.* 1914.

Constitutionality and repeal.—See notes under art. 963, post.

Procedure.—See art. 964, post, and notes.

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.]

See, post, art. 981.

Art. 109a. Corporation court created.—There is hereby created and established in each of the cities, towns and villages of this state, now or hereafter incorporated, whether by general or special act, a court to be known as the corporation court in such city, town or village, which court shall have jurisdiction and organization herein-after prescribed. [Acts of 1899, p. 40, sec. 1.]

Explanatory.—In *Blessing v. City of Galveston* (1875), 42 Tex. 641, it was held that under the constitution, the legislature had power to create municipal judicial tribunals to enforce the police powers delegated to the municipal body. In 1877, the Supreme Court, in *Ex parte Towles*, 48 Tex. 413, held that the jurisdiction of the various courts named in the constitution was fixed by that document, and the legislature had no power to alter that jurisdiction by the creation of a special tribunal, the powers conferred on which would intrench on the constitutional authority of one of the regularly created courts. The *Towles* decision was followed in 1884 by the decision in *Gibson v. Templeton*, 63 Tex. 555. In *Ex parte Ginnocchio* (1891) 30 App. 584, 18 S. W. 82, the Court of Appeals held that a special statute creating a court with exclusive jurisdiction over violations of the Sunday Laws in the City of Ft. Worth was unconstitutional in so far as it excluded the jurisdiction of justices of the peace over the same subject. In *Leach v. State* (1896) 36 App. 248, 36 S. W. 471, the Court of Criminal Appeals held that the legislature is without power to create a municipal court with jurisdiction concurrent with the constitutional state courts over violations of state laws. The decision in the *Leach* case, supra, was overruled by the Supreme Court in *Harris County v. Stewart* (1897) 91 Tex. 133, 41 S. W. 650, and it was held that, under the power conferred by Const. art. 5, § 1, to "establish such other courts as it (the legislature) may deem necessary" and to "prescribe the jurisdiction and organization thereof," the legislature was authorized to confer on a city recorder's court jurisdiction to try offenses against the general penal laws of the state. In the following year (1898) the Court of Criminal Appeals in *Ex parte Coombs*, 38 App. 648, 44 S. W. 854, adhered to its decision in the *Leach* case, supra, and held that the legislature was without constitutional authority to create a corporation court with jurisdiction exclusive of or concurrent with the regular state courts to try violations of the penal laws. But in 1900 the Court of Criminal Appeals overruled its decisions in the *Leach* and *Coombs* Cases, and in *Ex parte Wilbarger*, 41 App. 514, 55 S. W. 968, held that the act of the 26th Legislature creating the Corporation Court, was not violative of Const. art. 5, § 1, in that it infringed the jurisdiction of the state courts, or of Const. art. 5, § 18, limiting the number of justices in each county, and that such act was not invalid, as conferring both state and municipal jurisdiction on the same court. In *Ex parte Hart*, 41 App. 581, 56 S. W. 341; *Ex parte Freedman*, 47 App. 487, 83 S. W. 1125; *Ex parte Abrams*, 56 App. 465, 120 S. W. 883, 18 Ann. Cas. 45; *Ex parte Hubbard*, 63 App. 516, 140 S. W. 451, the Court of Criminal Appeals followed its decision in the *Wilbarger* case, and in *State ex rel. Bergeron v. Travis County Court*, 174 S. W. 365, it held that articles 963, 964 and 965 of the Code of Criminal Procedure of 1911, were valid enactments. There seems no good reason why the Corporation Court Act should not be incorporated into the Criminal statutes, the jurisdiction of the court being entirely criminal, and the act creating it being a qualification of, or co-ordinate provision with, articles 108, 963-965, Code Cr. Proc. In view of the situation the act is inserted in this compilation as arts. 109a-109g, 920a, 968b-968j, 1177a.

Art. 109b. Jurisdiction.—Said court shall have jurisdiction within the territorial limits of said city, town or village, within which it is established, in all criminal cases arising under the ordinances of the said city, town or village, now in force, or hereafter to be passed, and shall also have jurisdiction concurrently with any justice of the peace in any precinct in which said city, town or village is situated, in all criminal 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 and arising within the territorial limits of such city, town or village. [Id. sec. 2.]

Constitutionality.—See note under art. 109a.

Jurisdiction—Criminal.—City recorder's court held vested with authority to try such offenses against the penal laws of the state as justices of the peace might try. *Harris County v. Stewart*, 91 Tex. 133, 41 S. W. 650.

The city court of the city of Dallas has no jurisdiction to try violations of the Penal Code. *Crowley v. City of Dallas* (Cr. App.) 44 S. W. 865.

Though a provision in a city charter to constitute a corporation court a state court was futile and without effect, it had jurisdiction to punish one on conviction of a municipal offense provided for by city ordinance. *Ex parte Levine* (Cr. App.) 81 S. W. 1206.

This section limits the jurisdiction of corporation courts in criminal cases to those arising within the territorial limits of the city wherein the court exists. An indictment alleging that the offense was committed in the county and does not allege that it was committed in the city is not good. *Moss v. State*, 47 App. 459, 83 S. W. 830, 11 Ann. Cas. 710.

Corporation courts, organized pursuant to Acts 26th Leg. c. 33, have jurisdiction to try all criminal offenses arising under the ordinances of the city. *Ex parte Hubbard*, 63 App. 516, 140 S. W. 451.

— **Revocation of licenses.**—Title 22, Vernon's Sayles' Civ. St. 1914, relates to the incorporation of cities and towns having a population of 1,000 or more; Rev. St. 1895, article 405, authorizes the city council to establish the office of recorder; article 933 provides that where, by ordinance, one is required to obtain a license for any occupation, and has been adjudged guilty of violating any ordinance in relation thereto, the mayor or recorder may suspend or revoke his license; and Acts 26th Leg. c. 33, establishes corporation courts in all incorporated towns and cities. Held, that the city council of a city, coming within such classification, did not have authority to revoke a license authorizing the conduct of the business of installing electrical apparatus. *Wichita Electric Co. v. Hinckley* (Civ. App.) 131 S. W. 1192.

Art. 109c. Judge or recorder elected or appointed, how; term, mayor ex officio recorder, when.—Such court shall be presided over by a judge to be known as the recorder of such court, in such city, town or village, who, in cities, towns or villages incorporated under special charter or charters, shall be elected or appointed in the manner and under the respective provisions of the charter now in force concerning the election or appointment of the magistrate to preside over the municipal court in such city, town or village, and all such provisions are hereby made applicable to the recorder herein provided for; and in cities, towns and villages not incorporated under special charter, such recorder shall be elected by the qualified voters of such city, town or village, in the same manner as the mayor of such city, town or village, and whose term of office shall be the same as such mayor; provided, in such cities, towns and villages not incorporated and acting under special charter, the mayor of such city, town or village shall be ex officio recorder of such court, and shall act as such, unless the city council or board of aldermen of such city, town or village shall, by ordinance, authorize the election of a recorder. [Id. sec. 3.]

Art. 109d. Recorder elected or appointed, when and how; discretion in council; term of office, etc.; vacancy; council may make mayor ex officio recorder, when.—Every two years there shall be elected or appointed in each city, town or village within this state, now or hereafter incorporated, a recorder, who shall preside over the corporation court hereby created, and established, and who shall be elected or appointed as provided in article 905; provided, however, that whenever by the provisions of the charter under which such city, town or village is now incorporated, it is provided that the magistrate now presiding over the municipal court therein is to be elected by the people, then in such case the city council of any such city, town or village may order an election for the recorder, or, in its discretion, may appoint the recorder, who shall hold his office until the next general election for city officers; provided, further, that wherever in any such city, town or village, the office of the presiding magistrate of the municipal court therein shall not have expired when the recorder is elected or appointed therein, the said recorder, first elected or appointed, shall hold his term of office corresponding to the unexpired term of the said magistrate; and every two years thereafter such recorder shall be elected or appointed for a term of two years, and until his successor is elected and qualified. In case of vacancy in the office of recorder or clerk of the court in any city, town or village, such vacancy shall be filled by the council or board of aldermen for the unexpired term only; provided, further, that the board of aldermen may provide by ordinance for the mayor to act as ex officio recorder in all cities and towns not operating under special charter. [Id. sec. 4.]

Art. 109e. Clerk of corporation court elected by council, when; provided; terms; duties.—There shall be a clerk of said corporation court elected by the council or board of aldermen of each such city, town or village, at the same time at which the recorder is elected; but, in such city, town or village, it may be provided by

ordinance that the city secretary shall be ex officio clerk of the said court, and may be authorized to appoint a deputy, who shall have the same powers as the said secretary. The clerk of said court shall hold his office for two years, and until his successor is elected and qualified. In case of an ex officio clerk as aforesaid, he shall hold his office during his term as city secretary. It shall be the duty of said clerk to keep a minute of the proceedings of the said court; to issue all process, and generally to do and perform all of the duties of a clerk of a court as prescribed by law for the clerk of the county court, in so far as the said provisions may be applicable. [Id. sec. 5.]

Art. 109f. Seal of corporation court.—The said corporation court shall have a seal, having engraved thereon a star of five points in the center, and words, "Corporation Court in ———, Texas," the impress of which shall be attached to all proceedings, except subpoenas, issued out of said court, and shall be used to authenticate the official acts of the clerk and of the recorder, where he is authorized or required to use the seal of office. [Id. sec. 7.]

Art. 109g. Until organization of corporation courts municipal court as now established has jurisdiction, but thereafter abolished.—Until the due and legal organization of the said court in any city, town or village, as herein provided for, the municipal court in said city, town or village, as now established, shall continue to exercise its powers and jurisdiction. After the due and legal organization of the said corporation court, the said municipal court and the office of the judge and recorder and clerk thereof shall be abolished, and the said municipal court in each city, town or village shall be entirely superseded by the corporation court and such officers herein created and established, as the same shall be and become duly and legally organized. [Id. sec. 17.]

Texarkana Civil and Criminal Court.—This court was created by Laws 1895, ch. 11 with jurisdiction in criminal cases concurrent with the district court within a restricted territory.

TITLE 3

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

Chap.		Chap.	
1.	Of preventing offenses by the act of a private person.	6.	Of the suppression of obstructions of public highways.
2.	Of preventing offenses by the act of magistrates and other officers.	7.	Of the suppression of offenses affecting reputation.
3.	Proceedings before magistrates for the purpose of preventing offenses.	8.	Of the suppression of offenses against personal liberty.
4.	Of the suppression of riots, unlawful assemblies and other disturbances.	1.	Definition and object of the writ.
5.	Of suppression of offenses injurious to public health.	2.	By whom and when granted.
		3.	Service and return of the writ and proceedings thereon.
		4.	General provisions.

CHAPTER ONE

OF PREVENTING OFFENSES BY THE ACT OF A PRIVATE PERSON

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

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.]

Self-defense.—See Penal Code, arts. 1014, subd. 6, 1105-1109, and notes.

One illegally arrested or detained may, to regain his liberty, repel force by force, but he must not use more force than is necessary. *Miller v. State*, 31 App. 609, 21 S. W. 925, 37 Am. St. Rep. 836; *Stockton v. State*, 25 Tex. 772; *Mundine v. State*, 37 App. 5, 38 S. W. 619. And further this subject, see Pen. Code, tit. 15, ch. 12.

Defense of another.—See Penal Code, arts. 1014, subd. 6, and notes, 1105, subd. 4, and notes, 1107.

Justification for detention of person.—See Pen. Code, art. 1043, and notes.

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, arts. 1014, subd. 4, 1110, and notes.

Arrest without warrant.—See arts. 259-263, post, and notes.

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.]

Degree of force permissible.—See Pen. Code, arts. 1015, 1087-1110, and notes.

Officer's right to overcome resistance.—See Pen. Code, arts. 1014, subd. 5, 1094, subd. 9, and notes.

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.—See notes under Pen. Code, arts. 1014, subd. 6, 1105, 1107-1110.

CHAPTER TWO

OF PREVENTING OFFENSES BY THE ACT OF MAGISTRATES AND OTHER OFFICERS

Art.	Art.
117. Duty of magistrate to prevent.	curity.
118. Same subject.	121. Duty of peace officer to prevent.
119. Same subject.	122. Same subject.
120. May compel offender to give se-	123. Conduct of, etc., how regulated.

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.]

Cited, *Allen v. State* (Cr. App.) 66 S. W. 673.

Magistrates and peace officers defined.—As to who are magistrates, see art. 41, ante. As to who are peace officers, see art. 43, ante.

Duty in case of riot, etc.—See arts. 139-147, post.

Procedure.—See arts. 124-138, post.

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.—Arrest under warrant, post, arts. 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.]

Threats.—See Pen. Code, arts. 1442-1446.

Arrest.—See post, arts. 259-264, 265-267.

Form of warrant.—Willson's Cr. Forms, 1059.

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.]

Procedure.—See post, ch. 3, of this title.

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 defined.—See art. 43, ante, and notes.

Authority and duty of peace officers.—See arts. 44, 45, ante, and 136, post. See, post, ch. 4, of this title, as to duty, etc., in case of riots, etc.

Party summoned does not act at his own peril because of defective or nonrecord of officer's appointment. *Weatherford v. State*, 31 App. 530, 21 S. W. 251, 37 Am. St. Rep. 828.

A peace officer is not a magistrate, and he can only take such measures (under article 121) for the prevention of an execution of a threat against the person of another as the person about to be injured might take himself. *Allen v. State* (Cr. App.) 66 S. W. 673.

This article does not authorize a peace officer to seek out a citizen whom he has understood has made a threat against his life or some one else's life and arrest him. It merely contemplates the prevention of crime and does not contemplate an arrest without warrant, or when he contemplates at some future time consummating the serious threats to take life. *Allen v. State* (Cr. App.) 66 S. W. 674.

— **Homicide in arrests.**—See Pen. Code, art. 1092-1100, 1107, 1130.

If the intent of defendant, he being one of the constable's posse, was only to make an illegal and unwarranted arrest, and in endeavoring to do so he was forced to take the life of the party whom he was seeking to arrest, the offense which he was about to commit being false imprisonment, which under our law is only a misdemeanor, such offense would be considered in estimating the degree of his crime in committing the homicide, and it would be manslaughter, not murder. *Carter v. State*, 30 App. 551, 17 S. W. 1102, 28 Am. St. Rep. 944.

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.]

See art. 121, ante.

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.]

Homicide.—See Penal Code, arts. 1092-1101, 1107, 1130, and notes.

CHAPTER THREE

PROCEEDINGS BEFORE MAGISTRATES FOR THE PURPOSE OF PREVENTING OFFENSES

Art.		Art.	
124.	Magistrate shall issue warrant to prevent, when.	131.	Defendant shall be discharged, when.
125.	Proceedings when accused is brought before magistrate.	132.	May discharge defendant, when.
126.	What shall be a sufficient peace bond.	133.	May require bond of person charged with libel.
127.	Oath required of surety and bond to be filed, etc.	134.	Where defendant has committed a crime.
128.	Amount of bail, how fixed.	135.	Accused shall pay costs, when.
129.	How surety may exonerate himself.	136.	May direct that person or property threatened shall be protected.
130.	Defendant failing or refusing to give bond shall be committed.	137.	Suit on bond.
		138.	Same subject.

Article 124. [114] Magistrate shall issue warrant to prevent, when.—Whenever a magistrate is informed upon oath that an of-

fense 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.]

"Offense" defined.—The word "offense" as used in the clause "or that any person has threatened to commit an offense" has the same meaning and is used in the same sense as the word "offense" appearing in the preceding part of the article, and is limited to offense against person or property. *Ex parte Muckenfuss*, 52 App. 467, 107 S. W. 1132.

Forms of oath and warrant of arrest.—Willson's Cr. Forms, 1058, 1059.

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.]

Form of order requiring bond.—Willson's Cr. Forms, 1060.

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.]

Form of bond.—Willson's Cr. Forms, 1060.

A condition to appear and answer the charge may be inserted in the peace bond. *Lawton v. State*, 5 Tex. 272. This decision, however, was made under a different law from the present one.

For bond held valid, see *Lawton v. State*, 5 Tex. 272.

The bond must be held valid unless it contains some error of substance. *State v. San Miguel*, 4 Civ. App. 182, 23 S. W. 389.

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.]

Oath.—See, as to requisites of sureties' oath, post, art. 327; Willson's Cr. Forms, 1065.

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.]

Rules for fixing amount.—See post, art. 329.

Form of order.—Willson's Cr. Forms, 1060.

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.]

Form of order.—Willson's Cr. Forms, 1067.

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.]

Form of order requiring peace bond.—Willson's Cr. Forms, 1060.

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.]

Form of order.—Willson's Cr. Forms, 1061.

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.]

Libel.—As to offense of libel, see P. C., arts. 21 et seq.; see, also, post, art. 159.

Forms.—Willson's Cr. Forms, 1063, 1064, 1066.

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.]

Form of order.—Willson's Cr. Forms, 1062.

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.]

Collection of costs.—A magistrate can not, under this article, imprison a party to enforce collection of costs adjudged against him. *Landa v. State* (Cr. App.) 45 S. W. 713.

Form of order.—Willson's Cr. Forms, 1060.

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.]

See Willson's Cr. Forms, 1068; see, ante, art. 121.

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 jurisdic-

tion 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.]

Procedure.—As to procedure, see, also, *Lawton v. State*, 5 Tex. 272.

District court has jurisdiction of all suits on such bonds. *State v. San Miguel*, 4 Civ. App. 182, 23 S. W. 389.

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

<p>Art. 139. Officer may require aid of citizens and military, when. 140. Governor may order military to aid in executing process. 141. Conduct of military in suppressing riots. 142. Duty of magistrates and peace officers to suppress, etc.</p>	<p>Art. 143. Officer may call posse comitatus. 144. What means may be adopted to suppress, etc. 145. Unlawful assembly. 146. Suppression of riot, unlawful assembly, etc., at election. 147. Power of special constables in such cases.</p>
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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.]

Officer's authority.—See ante, arts. 45, 46.

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 App. 530, 21 S. W. 251, 37 Am. St. Rep. 828.

Homicide in arrests.—See Pen. Code, arts. 1092-1100, 1107, 1130.

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 App. 551, 17 S. W. 1102, 28 Am. St. Rep. 944.

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.]

See Const., art. 1, sec. 24.

Explanatory.—It would seem that this article, and the following article, at the time they were carried into the revised Code of Criminal Procedure, had been superseded by the militia act of 1905 (*Vernon's Sayles' Civ. St.* 1914, arts. 5776, 5831-5835, 5860).

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.]

See note under art. 140.

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.]

Riot defined.—See Pen. Code, arts. 265, 451–468.

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.]

See ante, articles 122, 123, and 139.

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.]

Unlawful assembly defined.—See Pen. Code, chap. 1, title 9; also, Pen. Code, art. 266.

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.]

Appointment of special constables.—A county commissioner who by article 41, ante, is a magistrate, has the right to appoint in writing special constables to preserve the peace. *Gonzales v. State*, 53 App. 430, 110 S. W. 740.

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.]

Powers of officer.—As to powers and duties of peace officers, see ante, arts. 44, 45, 121, 122 and 123.

A special constable duly appointed has all the powers of a peace officer. *Gonzales v. State*, 53 App. 430, 110 S. W. 740.

CHAPTER FIVE

OF SUPPRESSION OF OFFENSES INJURIOUS TO PUBLIC HEALTH

<p>Art. 148. Court may restrain a person from carrying on a trade, etc., injurious to public health. 149. Proceeding when party refuses to give bond.</p>	<p>Art. 150. Requisites of bond. 151. Suit on bond. 152. Same subject. 153. Unwholesome food, etc., may be seized and destroyed.</p>
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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.]

Offenses defined.—See Pen. Code, art. 694.

Forms.—Willson's Cr. Forms, 1069, 1071, 1073.

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.]

Form of judgment.—Willson's Cr. Forms, 1073.

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.]

Form of bond.—Willson's Cr. Forms, 1074.

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.]

Offenses defined.—See Pen. Code, ch. 2, title 12.

Form of order.—Willson's Cr. Forms, 1075.

CHAPTER SIX

OF THE SUPPRESSION OF OBSTRUCTIONS OF PUBLIC HIGHWAYS

Art.	Art.
154. Public highway shall not be obstructed, except, etc.	157. No defect of form, etc.
155. Order to remove obstructions, etc.	158. When defendant is convicted, obstructions shall be removed at his cost.
156. Suit upon bond of applicant.	

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.]

See, ante, ch. 1, title 13, Pen. Code, art. 812, et seq.

Validity of law.—The second count in the information charges that defendant “did unlawfully and wilfully prevent the free use of said public road, said prevention not being expressly authorized by law.” Held, that the said count charges no offense against the laws of this state. Article 154 of the Code of Criminal Procedure is inoperative, because no penalty has been provided for its violation. *Rankin v. State*, 25 App. 694, 8 S. W. 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.]

Forms.—Willson's Cr. Forms, 1076-1078.

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.]

Existence of highway.—See notes to Pen. Code, art. 812.

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.

Form of order.—Willson's Cr. Forms, 1079.

CHAPTER SEVEN

OF THE SUPPRESSION OF OFFENSES AFFECTING REPUTATION

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.]

Offense defined.—See Penal Code, arts. 1151, et seq., and notes.

Form of order.—Willson's Cr. Forms, 1080.

CHAPTER EIGHT

OF THE SUPPRESSION OF OFFENSES AGAINST PERSONAL LIBERTY

- | Art. | Art. |
|---|--|
| 160. Writ of habeas corpus. | 188. The return shall be under oath if made by a person other than an officer. |
| 1. DEFINITION AND OBJECT OF THE WRIT | 189. The person on whom the writ is served shall obey same, etc. |
| 161. What a writ of habeas corpus is, etc. | 190. How the return shall be made. |
| 162. To whom directed, etc. | 191. The person in custody shall be brought before the judge, etc. |
| 163. Not invalid for want of form. | 192. Custody of prisoner pending examination on habeas corpus. |
| 164. Provisions relating to—how construed. | 193. The court shall allow reasonable time. |
| 2. BY WHOM AND WHEN GRANTED | 194. Illegal custody and refusal to obey writ, how punished. |
| 165. By whom writ may be granted. | 195. Further penalty, etc., for disobeying writ. |
| 166. Before indictment, returnable where. | 196. Applicant for writ may be brought before court. |
| 167. After indictment, returnable where. | 197. Death, etc., of applicant sufficient return to writ. |
| 168. When the applicant is charged with felony. | 198. Proceedings when a prisoner dies. |
| 169. When charged with misdemeanor. | 199. Who shall represent the state in habeas corpus cases. |
| 170. Proceedings under the writ. | 200. Prisoner shall be discharged, when. |
| 171. Time appointed for hearing. | 201. Where party is indicted for capital offense. |
| 172. Who may present petition for relief. | 202. When court has no jurisdiction. |
| 173. The word "applicant" refers to. | 203. Where no indictment has been found, etc. |
| 174. Requisites of petition. | 204. Action of court upon examination. |
| 175. Shall be granted without delay, unless. | 205. If commitment be informal or void. |
| 176. Writ may be issued without application, when. | 206. If there be probable cause to believe an offense has been committed. |
| 177. Judge may issue a warrant of arrest, when. | 207. The court may summon the magistrate who issued the warrant. |
| 178. The person having custody of the prisoner may be arrested, when. | 208. A written issue in case under habeas corpus not necessary. |
| 179. Proceedings under the warrant. | 209. The applicant shall open and conclude the argument. |
| 180. Officer executing warrant may exercise same power, etc. | 210. Costs of the proceeding—how disposed of. |
| 181. The words "confined," "imprisoned," etc., refer to, etc. | 211. If the court be in session, the clerk shall record the proceedings. |
| 182. By "restraint" is meant, etc. | 212. If the proceedings be had before a judge in vacation, etc. |
| 183. The writ of habeas corpus is intended to be applicable, when. | 213. Two preceding articles refer to. |
| 184. Person committed in default of bail is entitled to the writ, when. | 214. Court may grant all reasonable orders, etc. |
| 185. Person afflicted with disease may be moved, when. | 215. Meaning of "return." |
| 3. SERVICE AND RETURN OF THE WRIT AND PROCEEDINGS THEREON | |
| 186. Who may serve writ. | |
| 187. How the writ may be served and returned. | |

Art.	GENERAL PROVISIONS	Art.
216.	Person discharged before indictment not to be again imprisoned, unless.	220. Officer refusing to execute writ, etc., shall be punished, etc.
217.	A person once discharged or admitted to bail may be committed, when.	221. Any one having the custody of another who refuses to obey the writ, etc., shall be punished, how.
218.	A person committed for a capital offense shall not be entitled to the writ, unless, etc.	222. Any jailer, etc., who refuses to furnish copy of process under, etc.
219.	A party may obtain the writ a second time, when.	223. Person shall not be discharged under writ of habeas corpus, when.
		224. This chapter applies to what cases.

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.]

Cited, *Ex parte Lewis* (Cr. App.) 170 S. W. 1098.

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| 1. Nature and scope of remedy in general. | 10. Invalidity or insufficiency of indictment, information, or complaint. |
| 2. Habeas corpus as civil or criminal proceeding. | 11. Former jeopardy. |
| 3. Substitution for other remedy. | 12. Unconstitutionality of laws. |
| 4. Enforcement of right to bail or reduction thereof. | 13. Invalidity of local option elections and laws. |
| 5. Bail in capital cases after continuance. | 14. Invalidity of ordinances. |
| 6. Enforcement of speedy trial. | 15. Testing right to office. |
| 7. Invalidity or irregularity of proceedings in general. | 16. Review of examining trial. |
| 8. Want or excess of jurisdiction. | 17. Commitment for contempt. |
| 9. Void and voidable judgment. | 18. Extradition. |
| | 19. Release of convicts. |
| | 20. Appeal in habeas corpus. |

1. Nature and scope of remedy in general.—The object of the writ is to relieve from illegal restraint, and not to afford redress. *Ex parte Coupland*, 26 Tex. 386; *Ex parte Trader*, 24 App. 393, 6 S. W. 533.

A person arrested on a magistrate's warrant for a felony committed in another county, is not entitled to the writ until an examination is had in the county where the offense is alleged to have been committed. *Robertson v. State*, 36 Tex. 346.

When a county court obtains jurisdiction by appeal, its judgment cannot be revised on habeas corpus. *Ex parte Call*, 2 App. 497; *Ex parte Schwartz*, Id. 74; *Ex parte Boland*, 11 App. 159.

The writ will not be awarded to one detained under a commitment issued by a district court after judgment of conviction for a felony. *Ex parte Pate*, 21 App. 190, 17 S. W. 460.

The writ cannot be used to relieve one from a valid judgment of a court of competent jurisdiction. *Ex parte Branch*, 37 App. 318, 39 S. W. 932.

The application will be dismissed where the relator has been released from custody on a convict bond. *Ex parte Chestnutt*, 39 App. 624, 47 S. W. 649.

A district judge has no authority to award the writ of habeas corpus as long as the case is pending before a magistrate as an examining court. *Ex parte McCorkle*, 29 App. 20, 13 S. W. 991.

Where relator appealed from conviction in mayor's court, but failed to prosecute his appeal, the appeal was dismissed and he was arrested on warrant from the mayor's court. Held, the warrant was void and he was entitled to his release. *Ex parte McNamara*, 33 App. 363, 26 S. W. 506.

An habeas corpus proceeding should not in any way affect the final trial of the relator. *Jones v. State*, 33 App. 493, 26 S. W. 1082, 47 Am. St. Rep. 46.

One who has appealed from a conviction has no right to the writ where all the questions can be decided on his appeal. *Ex parte Barfield* (Cr. App.) 44 S. W. 1095.

When there is a tribunal created by law to pass on any given state of facts, the findings or conclusions of such tribunal cannot be questioned collaterally by habeas corpus. *Ex parte Koen*, 58 App. 279, 125 S. W. 401.

On petition for writ of habeas corpus to the Court of Criminal Appeals in a prosecution for a statutory offense, it may be determined whether the alleged offense was within the statute, since he could not be punished unless his offense was clearly defined by the statute. *Ex parte Roquemore*, 60 App. 282, 131 S. W. 1101, 32 L. R. A. (N. S.) 1186.

One who is properly charged with an offense under a valid statute cannot by habeas corpus avoid a regular trial by showing a defense, but the defense must be proved on the trial, and one properly charged with pursuing an occupation without a license cannot on habeas corpus show a receipt for the license tax. *Ex parte Jennings* (Cr. App.) 172 S. W. 1143.

2. Habeas corpus as civil or criminal proceeding.—A proceeding by habeas corpus when not used to relieve against restraint under a criminal charge cannot be regarded as a civil suit. *McFarland v. Johnson*, 27 Tex. 105.

Habeas corpus to determine a parent's right to custody of a minor child is a civil and not a criminal proceeding, and pertains to the civil courts. *Ex parte Reed*, 34 App. 9, 28 S. W. 689; *Ex parte Berry*, 34 App. 36, 28 S. W. 36; *Legate v. Legate*, 87 Tex. 248, 28 S. W. 281; *Telschek v. Fritsch*, 38 App. 43, 40 S. W. 938.

3. **Substitution for other remedy.**—A writ of habeas corpus cannot serve the office of an appeal, writ of error, certiorari, quo warranto, or supersedeas, nor deal with errors or irregularities which render proceedings voidable merely, but lies to secure a release where the proceedings are absolutely void. Ex parte Martinez (Cr. App.) 145 S. W. 959; Holman v. Mayor, 34 Tex. 668; Perry v. State, 41 Tex. 488; Ex parte Schwartz, 2 App. 74; Ex parte Dickerson, 30 App. 448, 17 S. W. 1076; Ex parte Oliver, 3 App. 345; Ex parte Slaren, Id. 662; Ex parte Mabry, 5 App. 93; Griffin v. State, Id. 457; Ex parte McGill, 6 App. 498; Ex parte Boland, 11 App. 159; Darrah v. Westerlage, 44 Tex. 388; Ex parte McCorkle, 29 App. 20, 13 S. W. 991; Ex parte Branch, 36 App. 384, 37 S. W. 421; Ex parte Beeler, 41 App. 240, 53 S. W. 857; Ex parte Cassens, 57 App. 377, 122 S. W. 888; Ex parte Walsh, 59 App. 409, 129 S. W. 118; Ex parte Cooks, 61 App. 449, 135 S. W. 139; Ex parte Taylor, 63 App. 571, 140 S. W. 774; Ex parte Hendrix, 64 App. 452, 142 S. W. 570.

The legality of the corporate existence of a city and the election and incumbency of its officers, including respondent, restraining relator under a *capias*, may only be attacked in quo warranto, and may not be inquired into by habeas corpus for the release of one from arrest under an ordinance of the city and commitment thereunder. Ex parte Keeling, 54 App. 118, 121 S. W. 605, 130 Am. St. Rep. 884.

Where by law a county judge is authorized to pass on the qualifications of petitioners for ordering an election to determine whether a town shall be incorporated, and he does so pass on their qualifications, and the town is incorporated, in habeas corpus proceedings to secure the release of a resident of the incorporated town from arrest for the violation of an order requiring the resident to work the roads outside the city limits, the qualifications of the petitioners cannot be collaterally attacked, so as to render the incorporation invalid and the arrest legal, since it is only by direct proceedings, such as quo warranto, that the corporation could be attacked. Ex parte Koen, 58 App. 279, 125 S. W. 401.

Where a person, desiring to appeal from a conviction in the corporation or mayor's court, presents a sufficient bond to perfect his appeal, which the mayor refuses to approve, his remedy is by mandamus to force the mayor or other officer to follow the law, and not by habeas corpus to procure his discharge. Ex parte Hunt, 72 App. 124, 161 S. W. 457.

Pending an appeal from a judgment of conviction, the defendant was not entitled to a writ of habeas corpus, as the jurisdiction of the Court of Criminal Appeals had attached, and the questions raised could be heard and determined on the appeal. Ex parte Barnett (Cr. App.) 167 S. W. 845.

Ordinarily the court will not inquire on habeas corpus into facts on which the court sets aside a suspension of sentence during good behavior, but it is otherwise where the right of appeal is denied, and the judgment recites facts showing its action was unauthorized. Ex parte Lawson (Cr. App.) 175 S. W. 698.

4. **Enforcement of right to bail or reduction thereof.**—See post, arts. 184 and 224, and notes. Also arts. 318 and 615, post.

Constitutional right to bail, see art. 6, ante, and notes.

A judgment admitting a person to bail is a final judgment. Ex parte Augustine, 33 App. 1, 23 S. W. 689, 47 Am. St. Rep. 17.

5. **Bail in capital cases after continuance.**—See note to art. 615, post.

6. **Enforcement of speedy trial.**—It can not be invoked to enforce a "speedy public trial." Hernandez v. State, 4 App. 425.

The writ may be availed of when a defendant's constitutional right of trial by due course of law is denied him for an unreasonable length of time. Rutherford v. State, 16 App. 649.

A party cannot be discharged on habeas corpus pending preliminary examination in justice court unless there is shown unreasonable delay by the justice in giving him a trial on preliminary examination. Ex parte Krug (Cr. App.) 60 S. W. 38.

7. **Invalidity or irregularity of proceedings in general.**—The writ may be used to relieve from restraint under any proceeding which is absolutely void. Ex parte Kramer, 19 App. 123; Ex parte Mato, Id. 112; Ex parte McGill, 6 App. 498; Ex parte Kilgore, 3 App. 247; Ex parte Slaren, Id. 662; Ex parte Schwartz, 2 App. 74; Ex parte Grace, 9 App. 381; Ex parte Boland, 11 App. 159; Perry v. State, 41 Tex. 488.

Where relator was arrested on a complaint for a misdemeanor after limitations had run, he was entitled to his discharge on habeas corpus. Ex parte Hoard, 63 App. 519, 140 S. W. 449.

A homicide was committed on July 22d, and relator was accused, and on July 24th the district judge convened a special term in the district court in accordance with all the necessary requirements of Acts 29th Leg. c. 83. Relator was indicted for murder by a duly organized grand jury, served with a copy of the indictment, and his trial set for July 28th, at which time neither the counsel employed for him nor counsel appointed for him by the court questioned the legality of any of the proceedings or reserved any exceptions to the denial of a continuance nor to the impaneling of the jury. He was found guilty of murder in the first degree, sentenced to death, and his motion for new trial was overruled, and his counsel stated in open court that no appeal would be taken. Held that, as the proceedings were in all respects regular, no relief could be granted to accused under his writ of habeas corpus, and that he would be remanded to custody. Ex parte Martinez (Cr. App.) 145 S. W. 959.

8. **Want or excess of jurisdiction.**—The writ may be used to relieve from restraint under a judgment or order of a court rendered without jurisdiction, or a judgment or order which for any reason is a nullity. Ex parte McGrew, 40 Tex. 472; Darrah v. Westerlage, 44 Tex. 388; Holman v. Mayor, 34 Tex. 668; Ex parte Kilgore, 3 App. 247; Martin v. State, 16 App. 265; Ex parte Phillips, 33 App. 126, 25 S. W. 629; Ex parte Ellis, 37 App. 539, 40 S. W. 275, 66 Am. St. Rep. 831; Ex

parte Tinsley, 37 App. 517, 40 S. W. 306, 66 Am. St. Rep. 818; Ex parte Reynolds, 35 App. 437, 34 S. W. 120, 60 Am. St. Rep. 54.

The only ground on which any court, without some special statute authorizing it, will give relief on habeas corpus to a prisoner under conviction and sentence of another court, is the want of jurisdiction in such court over the person or the cause, or some other matter, rendering its proceedings void. Ex parte Degener, 30 App. 566, 17 S. W. 1111. See, also, Ex parte Rosson, 24 App. 226, 5 S. W. 666; Ex parte Angus, 28 App. 293, 12 S. W. 1099; Ex parte Juneman, 28 App. 486, 13 S. W. 783; Ex parte Dickerson, 30 App. 448, 17 S. W. 1076.

Jurisdiction is of two kinds: 1, the power to hear and determine the particular matter; 2, the power to render the particular judgment which was rendered. If either of these two essential elements is lacking, the judgment is fatally defective. Ex parte Degener, 30 App. 566, 17 S. W. 1111.

The writ can be resorted to after judgment only when the judgment is absolutely void for want of jurisdiction in the court. Ex parte Branch, 36 App. 384, 37 S. W. 421.

In habeas corpus to review a conviction in the county court, it appeared that the county commissioners had power to fix the time when the court should sit and the length of the term, and that relator was tried within the time fixed by the commissioners for a specified term; that a special judge, chosen according to law within the time required by statute, opened the term, and no order of adjournment was shown prior to the date of trial. Held, that it sufficiently appeared that the court was in session when relator was tried. Ex parte Cooks, 61 App. 449, 135 S. W. 139.

9. Void and voidable judgments.—See preceding note, also note, ante, as to "Substitution for other remedy" and note, post, as to "Commitment for Contempt."

The writ does not reach such errors or irregularities as would render a judgment voidable only, but only such illegalities as render it void; that is, radical defect; that which is contrary to the principles of law, as distinguished from mere rules of procedure; that which constitutes a complete defect in the proceedings, and not a mere irregularity in the proceedings. If the judgment is void the writ may be resorted to. Ex parte McGill, 6 App. 498; Ex parte Schwartz, 2 App. 75; Holman v. Mayor, 34 Tex. 668; Ex parte Kilgore, 3 App. 247; Ex parte Grace, 9 App. 381; Ex parte Boland, 11 App. 159; Martin v. State, 16 App. 265; Ex parte Juneman, 28 App. 486, 13 S. W. 783; Ex parte Dickerson, 30 App. 448, 17 S. W. 1076; Ex parte Degener, 30 App. 566, 17 S. W. 1111; Ex parte Reynolds, 35 App. 437, 34 S. W. 120, 60 Am. St. Rep. 54; Ex parte Tinsley, 37 App. 517, 40 S. W. 306, 66 Am. St. Rep. 818; Ex parte Ambrose, 32 App. 463, 24 S. W. 291; Ex parte Crawford, 36 App. 180, 36 S. W. 92; Ex parte White, 52 App. 541, 107 S. W. 839; Ex parte Branch, 36 App. 384, 37 S. W. 421; Ex parte Japan, 36 App. 482, 38 S. W. 43; Ex parte Roquemore, 60 App. 282, 131 S. W. 1101, 32 L. R. A. (N. S.) 1186; Ex parte Taylor, 63 App. 571, 140 S. W. 774; Ex parte Cowden (Cr. App.) 168 S. W. 539; Ex parte Lawson (Cr. App.) 175 S. W. 698.

The writ can not be invoked for the purpose of impeaching the validity of a misdemeanor judgment upon the ground that the judgment is void because it fails to order the issuance of execution. Such judgments are not void. Ex parte Dickerson, 30 App. 448, 17 S. W. 1076.

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 App. 12, 29 S. W. 480, 790; Ex parte Juneman, 28 App. 486, 13 S. W. 783.

In a prosecution for selling liquors to a minor, the court having jurisdiction of the subject-matter and of the person of accused, its decision as to whether the local option law superseded the law authorizing the prosecution would be, at most, erroneous, and habeas corpus could not be invoked to review it. Ex parte Cassens, 57 App. 377, 122 S. W. 888.

Where the court has jurisdiction of the subject-matter and person, error in a finding or conclusion of law as to one of the allegations of the information makes the judgment, at most, merely erroneous, so that it is not subject to attack in a collateral proceeding such as on habeas corpus. Ex parte West, 60 App. 485, 132 S. W. 339.

That the county court, in a trial of a misdemeanor case in which the assessment of a jail penalty was compulsory, charged the jury in the absence of the defendant, was not such an irregularity as to render the judgment void, and did not entitle defendant to relief by habeas corpus. Ex parte Taylor, 63 App. 571, 140 S. W. 774.

The county court being a court of general jurisdiction in misdemeanor cases, in which it is compulsory upon the court to assess a jail penalty, its judgment cannot be collaterally attacked by habeas corpus. Ex parte Taylor, 63 App. 571, 140 S. W. 774.

Where the court ordered a child committed for two years as a delinquent, under this article as amended, and subsequently made an order releasing the child, it was entitled to release on habeas corpus; the second order being valid if the first was valid, and the detention being unauthorized if the first order was invalid. Ex parte McDowell (Cr. App.) 172 S. W. 213.

On application for habeas corpus by one who had been committed as a juvenile delinquent, and later ordered released by the same court, the judgments of such court are presumed to be correct. Ex parte McDowell (Cr. App.) 172 S. W. 213.

10. Invalidity or insufficiency of indictment, information, or complaint.—In extradition proceedings, see notes to art. 177, post.

The sufficiency of a complaint can not be determined on application for habeas corpus. Ex parte Beverly, 34 App. 644, 31 S. W. 645; Ex parte Cain, 56 App. 538, 120 S. W. 999; Ex parte Cox, 53 App. 240, 109 S. W. 369; Ex parte Walsh, 59 App. 409, 129 S. W. 118.

The writ is available to one convicted on a void indictment. *Ex parte Reynolds*, 35 App. 437, 34 S. W. 120, 60 Am. St. Rep. 54, and cases cited, and overruling *Fuller's case*, 19 App. 241; *Ex parte Ezell*, 40 Tex. 451, 19 Am. Rep. 32; *Ex parte McGrew*, 40 Tex. 476; *Darrah v. Westerlage*, 44 Tex. 388.

The writ may be used when the indictment under which the applicant is held was presented by an illegal grand jury, and there has been no trial and conviction upon such indictment. *Ex parte Swain*, 19 App. 323.

The writ is not available to test the validity of an indictment, unless the same is void. *Ex parte Wolf*, 55 App. 231, 115 S. W. 1192.

The writ is not available to test the sufficiency of an indictment. *Ex parte Knapp*, 57 App. 411, 123 S. W. 597.

Habeas corpus, though unavailable to test the sufficiency of the complaint, is available to secure the discharge of accused, where the complaint or indictment is void and insufficient to confer jurisdiction, as where it is based on a special law not in force in the territory alleged. *Ex parte Stein*, 61 App. 320, 135 S. W. 136.

Where judgment is rendered in the county court, on appeal from a justice's court assessing a fine at less than \$100, the judgment is conclusive, and cannot be attacked collaterally by habeas corpus before the Court of Criminal Appeals, on the ground that the complaint or information is defective. *Ex parte Hendrix*, 64 App. 452, 142 S. W. 570.

11. **Former jeopardy.**—Former jeopardy, acquittal or conviction can not be availed of by habeas corpus. *Perry v. State*, 41 Tex. 488; *Pitner v. State*, 44 Tex. 578; *Brill v. State*, 1 App. 152; *Griffin v. State*, 5 App. 457; *Ex parte Rogers*, 10 App. 655, 38 Am. Rep. 654; *Ex parte Crofford*, 39 App. 547, 47 S. W. 533. *Contra*, *Moseley v. State*, 33 Tex. 671. And see *Ex parte Porter*, 16 App. 321.

12. **Unconstitutionality of laws.**—The writ is available to test the constitutionality of a law under which the applicant is restrained of his liberty. *Ex parte Mato*, 19 App. 112 (overruling *Parker v. State*, 5 App. 579); *Ex parte Coupland*, 26 Tex. 386; *Ex parte Rodriguez*, 39 Tex. 705; *Milliken v. City Council*, 54 Tex. 388, 38 Am. Rep. 629; *Ex parte Mabry*, 5 App. 93; *Ex parte Bell*, 24 App. 428, 6 S. W. 197; *Ex parte Murphy*, 27 App. 492, 11 S. W. 487; *Ex parte Tipton*, 28 App. 438, 13 S. W. 610, 8 L. R. A. 326; *Ex parte Williams*, 31 App. 262, 20 S. W. 580, 21 L. R. A. 783; *Ex parte Holman*, 36 App. 255, 36 S. W. 441; *Ex parte Brown*, 38 App. 295, 42 S. W. 554, 70 Am. St. Rep. 743; *Ex parte Jones*, 38 App. 482, 43 S. W. 513.

A lunacy proceeding is civil, and not quasi criminal, and hence a person found to be insane is not entitled to a writ of habeas corpus to determine the constitutionality of the statute under which the proceedings were instituted. *Ex parte Singleton*, 72 App. 122, 161 S. W. 123.

13. **Invalidity of local option elections and laws.**—The writ may be used to test the validity of a "local option" election. *Ex parte Kramer*, 19 App. 123; *Ex parte Kennedy*, 23 App. 77, 3 S. W. 114; *Ex parte Lynn*, 19 App. 293; *Ex parte Schilling*, 38 App. 287, 42 S. W. 553; *Ex parte Williams*, 35 App. 75, 31 S. W. 653.

14. **Invalidity of ordinances.**—The writ may be used to test the validity of an ordinance of an incorporated town or city. *Ex parte Gregory*, 20 App. 210, 54 Am. Rep. 516; *Ex parte Gregory*, 1 App. 753; *Ex parte Slaren*, 3 App. 662; *Ex parte Grace*, 9 App. 381; *Ex parte Boland*, 11 App. 159; *Milliken v. City Council*, 54 Tex. 392, 38 Am. Rep. 629; *Ex parte Fagg*, 38 App. 573, 44 S. W. 294, 40 L. R. A. 212; *Ex parte Smith*, 51 App. 466, 102 S. W. 1124; *Ex parte Robinson*, 30 App. 493, 17 S. W. 1057; *Ex parte Ginnochio*, 30 App. 584, 18 S. W. 82.

Where for more than 30 years a city continuously used a certain name as that of the city in all official acts, though occasionally with the added word "Texas," the name was that of the city in fact, and the arrest and detention of one for violating an ordinance adopted by the city under such name was under color of authority, and he could not obtain his discharge on habeas corpus. *Ex parte Keeling*, 54 App. 118, 121 S. W. 605, 130 Am. St. Rep. 884.

15. **Testing right to office.**—The writ is not available to test the right to an office, that is, the writ can not be used to attack a judgment collaterally upon the ground that the judge or justice rendering such judgment was not such officer legally. *Ex parte Call*, 2 App. 497.

16. **Review of examining trial.**—The writ is available to review injustice on an examining trial. *Butler v. State*, 36 App. 483, 38 S. W. 46.

The writ should be granted where a justice of the peace required applicant to give a \$500 bond for making vague and ambiguous threats and to pay costs of the examining trial and sent him to jail in default thereof. *Ex parte Blankenship* (Cr. App.) 57 S. W. 647.

17. **Commitment for contempt.**—Punishment for refusal to obey writ of habeas corpus, see art. 194, post.

The writ may be resorted to in a case of commitment for contempt, but the court can examine only two questions: 1, as to the jurisdiction; 2, as to the form of the commitment. When the jurisdiction is undoubted and the commitment is in form and contains all that the statute requires, the prisoner must be remanded and the writ discharged. *Ex parte Degener*, 30 App. 566, 17 S. W. 1111; *Holman v. Mayor*, 34 Tex. 668; *Yarborough v. State*, 2 Tex. 519; *Ex parte Kilgore*, 3 App. 247; *Ex parte Dickerson*, 30 App. 448, 17 S. W. 1076; *Ex parte Robertson*, 27 App. 628, 11 S. W. 669, 11 Am. St. Rep. 207; *Ex parte Taylor*, 34 App. 591, 31 S. W. 641; *Ex parte Tinsley*, 37 App. 517, 40 S. W. 306, 66 Am. St. Rep. 818; *Ex parte Ellis*, 37 App. 539, 40 S. W. 275, 66 Am. St. Rep. 831; *Ex parte Smith*, 40 App. 181, 49 S. W. 396; *Ex parte Duncan*, 42 App. 661, 62 S. W. 758; *Ex parte Snodgrass*, 43 App. 359, 65 S. W. 1061; *Ex parte Foster*, 44 App. 423, 71 S. W. 593, 60 L. R. A. 631, 100 Am. St. Rep. 866; *Ex parte Ireland*, 38 Tex. 351; *Ex parte West*, 60 App. 485, 132 S. W. 339. And see *Ex parte Kearby*, 55 App. 531, 34 S. W. 635; *Id.*, 35 App. 634, 34 S. W. 962; *Ex parte Warfield*, 40 App. 427, 50 S. W. 933, 76 Am. St.

Rep. 724; *Ex parte Gerrish*, 42 App. 114, 57 S. W. 1123; *Ex parte Roper*, 61 App. 68, 134 S. W. 334; *Ex parte Wolters*, 64 App. 238, 144 S. W. 531.

If the contempt consists in a witness refusing to answer a question in an inferior tribunal, when such tribunal had no jurisdiction of the subject-matter, the judgment is a nullity, and may be thus relieved against on habeas corpus. *Holman v. Mayor*, etc., 34 Tex. 668. See, also, *Ex parte Park*, 37 App. 590, 40 S. W. 300, 66 Am. St. Rep. 835; *Ex parte Kilgore*, 3 App. 247.

The former rule was that a writ of habeas corpus does not lie to revise the action of the lower court in punishing for contempt. *Jordan v. State*, 14 Tex. 436.

If the contempt is committed in the presence of the court, it may summarily punish the offender; but if a person be only prima facie in contempt, judgment nisi should be entered, and scire facias issue, answer to which should be made under oath. In deciding on the answer, the court is not restricted thereto, but may hear evidence aliunde, and remit in whole or in part, and with or without costs, and without a jury. *Crow v. State*, 24 Tex. 12.

For proper procedure in cases of contempt, see, also, *State v. Sparks*, 27 Tex. 627, 705; *Ex parte Ireland*, 38 Tex. 344; *Ex parte Kilgore*, 3 App. 247, and notes to *Vernon's Sayles' Civ. St.* 1914, art. 1708.

Note definitions of and distinctions between civil and criminal contempt of court. *Ex parte Robertson*, 27 App. 628, 11 S. W. 669, 11 Am. St. Rep. 207.

Imprisonment for fine imposed for contempt is not imprisonment for debt. *Ex parte Robertson*, 27 App. 628, 11 S. W. 669, 11 Am. St. Rep. 207; *Dixon v. State*, 2 Tex. 481.

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 Kearby*, 35 App. 531, 34 S. W. 635; *Ex parte Robertson*, 27 App. 628, 11 S. W. 669, 11 Am. St. Rep. 207.

Courts have inherent 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 App. 517, 40 S. W. 306, 66 Am. St. Rep. 818.

The Court of Criminal Appeals will not, on habeas corpus, to secure relief from a punishment assessed for contempt by the district court, review the district court's findings of fact, where such court had jurisdiction, and the act of which the relator was adjudged guilty was contemptuous. *Ex parte Shepherd* (Cr. App.) 153 S. W. 628.

18. **Extradition.**—See notes to art. 177, post.

19. **Release of convicts.**—See arts. 878-882, and 1015, and notes.

A convict must serve his allotted time in jail. *Ex parte Wyatt*, 29 App. 398, 16 S. W. 301.

20. **Appeal in habeas corpus.**—See arts. 950-959, post, and notes.

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.]

See *Willson's Cr. Forms*, 1087.

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.]

See *Willson's Cr. Forms*, 1087.

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 App. 596, 17 S. W. 1111; *Ex parte Trader*, 24 App. 393, 6 S. W. 533; *Ex parte Kearby*, 35 App. 531, 34 S. W. 635; *Id.*, 35 App. 634, 34 S. W. 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.]

Explanatory.—The above provision is obviously antiquated. It has passed through the revisions of 1895 and 1911 in its anachronous state. The index to this code will show the legislation on the subject of the power to issue the writ of habeas corpus enacted before and since the above article was constructed in the ancient day.

Cited, *Childers v. State*, 30 App. 160, 16 S. W. 903, 28 Am. St. Rep. 899.

Hearing and determination.—See notes under article 204, post.

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

The denial of the writ by one judge does not conclude the relator, and he may apply to another. *Ex parte Strong*, 34 App. 309, 30 S. W. 666, citing *Ex parte Ainsworth*, 27 Tex. 731.

Appeal from judgment.—See art. 950, et seq., and notes.

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.]

See Willson's Cr. Forms, 1087.

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 account of which the applicant stands indicted. [O. C. 124.]

See Willson's Cr. Forms, 1087.

Where writ returnable.—Where the venue of the cause has been changed to another district than that in which the indictment was found, in a capital case, the judge of the district in which the cause is pending may hear an application for bail based upon the ground prescribed by art. 615, post. *Ex parte Walker*, 3 App. 668. For case distinguished, see *Ex parte Springfield*, 28 App. 27, 11 S. W. 667, holding statute to be imperative.

After indictment, the writ must be made returnable in the county where the offense is alleged to have been committed. *Ex parte Trader*, 24 App. 393, 6 S. W. 533; *Ex parte Ainsworth*, 27 Tex. 731. And see *Ex parte Springfield*, 28 App. 27, 11 S. W. 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 App. 293, 12 S. W. 1099.

After indictment found the writ of habeas corpus on application for bail is returnable in the county where the offense was committed. This is true even in a case where venue has been changed of the case in which application is made for bail. *Ex parte Graham* (Cr. App.) 64 S. W. 933.

While the writ may be granted by any district judge, the hearing thereunder must be in the county where the indictment was found. *Ex parte Overcash*, 61 App. 67, 134 S. W. 790.

Petitioner having been indicted for murder in Ft. Bend county, the venue was changed to Harris county. He applied to the district judge of Ft. Bend county for a writ of habeas corpus sur bail, but the judge refused to grant the writ because of alleged disqualification, whereupon petitioner applied to the district judge of Fayette county, who granted the writ and made it returnable in Fayette county. Held that, under the rule that a writ of habeas corpus may be granted by any district judge, but must be heard in the county where the indictment was found, the judge granting the writ had no jurisdiction to hear it in Fayette county. *Ex parte Andrus* (Cr. App.) 153 S. W. 621.

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.]

See notes under the following article.

Jurisdiction.—After indictment found for felony, the application for the writ of habeas corpus must, primarily and ordinarily, be made to the judge of the district in which the indictment was found. *Ex parte Ainsworth*, 27 Tex. 731.

This article is merely directory. *Ex parte Angus*, 28 App. 293, 12 S. W. 1099.

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 App. 393, 6 S. W. 533; *Ex parte Springfield*, 28 App. 27, 11 S. W. 677.

The county judge has no power to discharge one charged with a capital felony. *Letcher v. Crandell*, 18 Civ. App. 62, 44 S. W. 197.

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.

Jurisdiction.—See art. 100, ante, and notes.

This and the preceding article, while not mandatory in their language, clearly indicate that, before a person detained upon a charge of misdemeanor can properly resort to the court of appeals for a writ of habeas corpus, he should apply for the writ to the county judge of the county in which the offense was committed, or if there be no county judge in such county, then to the nearest judge or court competent to grant the same. It is not a sufficient excuse for not making application to the local judge, that he is prejudiced against the applicant or his case, and would not administer the law impartially. If the judge refuses the writ, the applicant is not without his remedy. Another judge or court competent to grant it can be applied to. If the judge grants the writ, but upon a hearing thereof refuses to grant the relief to which the applicant may be entitled, he then has his remedy by appeal. *Ex parte Lynn*, 19 App. 120; *Ex parte Gregory*, 20 App. 210, 54 Am. Rep. 516.

This and the preceding article, while not mandatory, clearly indicate that the application for the writ should primarily be made to the local judge or court competent to grant the same, if there be such, and if none such, then to the nearest court or judge competent to grant the same. *Ex parte Lynn*, 19 App. 120.

— **Court of appeals.**—See arts. 69, 84, ante, and notes.

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

See arts. 166 and 167, and notes.

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.]

Cited, *Ex parte Firmin*, 60 App. 368, 131 S. W. 1113.

Requisites of petition.—Willson's Cr. Forms, 1081-1083.

If the application be under article 185, after conviction it must show expressly that any species of confinement will endanger the life of the applicant. *Thomas v. State*, 40 Tex. 6.

If the detention is alleged to be by virtue of a commitment issued by order of a court, a copy must be annexed, and a statement that such copy "can not be obtained without delay" will not be sufficient. *Ex parte Hill*, 43 Tex. 75.

Petition as pleading and not evidence.—The application or petition is a mere pleading, and is not evidence of the facts therein stated. *Ex parte Welburn*, 70 App. 464, 157 S. W. 154; *Ex parte Robertson*, 63 App. 280, 140 S. W. 98; *Ex parte Thomas* (Cr. App.) 145 S. W. 601; *Ex parte Barnes* (Cr. App.) 166 S. W. 728, 51 L. R. A. (N. S.) 1155.

Time for application.—A writ of habeas corpus applied for on the morning of the day on which the case was set for trial held properly denied; no sufficient reason being shown why relator did not sooner apply therefor. *Muldrew v. State* (Cr. App.) 166 S. W. 156.

Application to obtain bail.—See notes to art. 184, post.

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.]

Grant or refusal of writ.—See ante, art. 165, and notes.

Under former laws (Hart. Dig., art. 1576), it seems the writ was not a matter of right, but the judge must have "probable cause to believe" that the applicant was detained without lawful authority. *Jordan v. State*, 14 Tex. 436. But under the law as it now is, the writ is one of right, yet if the petition or documents annexed show that the applicant is entitled to no relief, the writ may and should be refused. But the writ should not be refused, except it clearly appears that the applicant is not entitled to relief. *Ex parte Ainsworth*, 27 Tex. 731.

And generally as to when writ will lie, see *Ex parte Degener*, 30 App. 566, 17 S. W. 1111, and notes to art. 160, ante.

Appeal from judgment.—See art. 950, et seq., 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.]

See Willson's Cr. Forms, 1087.

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.]

See Willson's Cr. Forms, 1088.

Extradition.—See, arts. 1088-1105, post.

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 Tex. 636.

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 Tex. 197.

See in extenso on the essentials of an extradition warrant, *Ex parte Stanley*, 25 App. 372, 8 S. W. 645, 8 Am. St. Rep. 440; *Ex parte Hobbs*, 32 App. 312, 22 S. W. 1035, 40 Am. St. Rep. 782.

Rule where fugitive escapes and returns after having been once arrested, see *Ex parte Hobbs*, 32 App. 312, 22 S. W. 1035, 40 Am. St. Rep. 782.

Where the applicant is arrested under executive warrant upon an interstate requisition for extradition, the validity of the indictment cannot be inquired into on habeas corpus trial. *Ex parte Pearce*, 32 App. 301, 23 S. W. 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 App. 108, 31 S. W. 651.

A fugitive from the justice of a sister state, was illegally brought into Texas by citizens of Mexico. The officers of Texas were not parties to the illegal conduct, but they arrested the fugitive on their attention being called to his presence in the state. Subsequently the Governor of Texas honored a requisition of the Governor of the sister state. Held, that the fugitive was not entitled to his discharge on habeas corpus. *Ex parte Wilson*, 63 App. 281, 140 S. W. 98, 36 L. R. A. (N. S.) 243.

Where extradition papers are regular on their face, and no error in arresting the relator for extradition is alleged in the record, the judgment remanding him to custody after the denial of habeas corpus will be affirmed on appeal. *Ex parte Iles*, 72 App. 530, 162 S. W. 1150.

The court, on habeas corpus by one in custody under a requisition warrant for his arrest as a fugitive from the justice of another state, will not go into the facts of his guilt or innocence of the offense charged by the demanding state. *Ex parte McDaniel* (Cr. App.) 173 S. W. 1018.

An extradition warrant for the arrest of a fugitive from the justice of the demanding state makes a prima facie case on habeas corpus for the discharge of accused, and the burden is on him to show that the warrant was not legally issued. *Ex parte McDaniel* (Cr. App.) 173 S. W. 1018.

An extradition warrant, which recites that the demand was accompanied by a "complaint," instead of by a copy of an affidavit duly certified as authentic by the Governor of the demanding state, is sufficient on habeas corpus. *Ex parte McDaniel* (Cr. App.) 173 S. W. 1018.

An extradition warrant, which recites that accused stands charged by complaint before the proper authorities of the demanding state and that the demand is accompanied by a copy of a complaint sworn to before a justice of the peace, duly certified as authentic by the Governor of the demanding state, presents a prima facie case of the authority of a justice of the peace to act as magistrate, and accused has the burden of showing the contrary to obtain his discharge on habeas corpus. *Ex parte McDaniel* (Cr. App.) 173 S. W. 1018.

Where accused detained under an extradition warrant sought his discharge on habeas corpus and showed that two indictments found in the state were pending against him, the court must order the detention of accused until the indictments are disposed of, with direction for his delivery under the extradition warrant. *Ex parte McDaniel* (Cr. App.) 173 S. W. 1018.

See generally, *Ex parte Erwin*, 7 App. 288; *Ex parte Lake*, 37 App. 656, 40 S. W. 727, 66 Am. St. Rep. 848; *Ex parte White*, 39 App. 497, 46 S. W. 639.

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.]

Cited, *Ex parte Lake*, 37 App. 656, 40 S. W. 727, 66 Am. St. Rep. 848.

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 Tex. 386.

Art. 180. [170] Officer executing warrant may exercise same power, etc.—The same power may be exercised by the officer executing the warrant (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.]

Cited, *Ex parte Snodgrass*, 43 App. 359, 65 S. W. 1061.

Execution of warrants of arrest.—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.]

See *McFarland v. Johnson*, 27 Tex. 105.

Imprisonment, etc.—Imprisonment to enforce punishment by fine means actual imprisonment within the jail. *Luckey v. State*, 14 Tex. 400. See, also, *Ex parte Wyatt*, 29 App. 398, 16 S. W. 301.

One does not serve out the term of his imprisonment by his enlargement on bond pending habeas corpus proceedings. *Ex parte Branch*, 37 App. 318, 39 S. W. 932.

Restraint precluding absolute freedom of action is sufficient. *Ex parte Snodgrass*, 43 App. 359, 65 S. W. 1061; *Ex parte Foster*, 44 App. 423, 71 S. W. 593, 60 L. R. A. 631, 100 Am. St. Rep. 866.

Custody of minor.—See notes to art. 160, ante.

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.]

See *McFarland v. Johnson*, 27 Tex. 105.

Restraint.—Any character or kind of restraint that precludes an absolute and perfect freedom of action on the part of a person authorizes him to make application to court of criminal appeals for release from said restraint. *Ex parte Snodgrass*, 43 App. 359, 65 S. W. 1062; *Ex parte Foster*, 44 App. 423, 71 S. W. 593, 60 L. R. A. 631, 100 Am. St. Rep. 866.

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.]

McFarland v. Johnson, 27 Tex. 105.

Cases in which remedy may be invoked.—See art. 160 and notes; art. 224 and notes.

The right to the writ does not depend upon the legality or illegality of the original caption, but of the present detention. The purpose of the writ is not to punish the respondent, or to afford redress for the illegal detention, but only to relieve from illegal restraint. *Ex parte Coupland*, 26 Tex. 386; *Ex parte Trader*, 24 App. 393, 6 S. W. 533.

As to authority of Court of Appeals to issue writ, and inquire into grounds of detention, see *Ex parte Degener*, 30 App. 566, 17 S. W. 1111; *Ex parte Taylor*, 34 App. 591, 31 S. W. 641; *Ex parte Kearby*, 35 App. 531, 34 S. W. 635; *Id.*, 35 App. 634, 34 S. W. 962, and notes to arts. 69, 84, ante.

For evidence as to popular prejudice against defendant convicted on charge of murder, see *Ex parte Martinez* (Cr. App.) 145 S. W. 959.

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.]

See *Willson's Cr. Forms*, 1083.

Bail.—See notes under art. 160, ante.

Constitutional right to bail, see art. 6, ante, and notes.

Excessive bail, see art. 8, ante.

Rules for fixing amount of bail, see art. 329, post.

Habeas corpus has always been recognized as an appropriate mode of testing a right to bail. It may be used for the purpose of obtaining bail in a capital case,

when the applicant has become entitled to bail under article 615, post. *Ex parte Walker*, 3 App. 668.

Petition.—When the writ is used to obtain a reduction of excessive bail, the petition should be framed with a view to that relief, and complain that the amount of bail which has been required of him is excessive. *Hernandez v. State*, 4 App. 425. And as to excessive bail, see *Ex parte Wilson*, 20 App. 498; *Ex parte Tittle*, 37 App. 597, 40 S. W. 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.]

See *Ex parte Wyatt*, 29 App. 398, 16 S. W. 301.

Forms.—Willson's Cr. Forms, 1084, 1102.

Danger to life or health as cause for removal or bail.—If the application for the writ be after conviction, it must expressly show that any species of confinement will endanger the life of the applicant. *Thomas v. State*, 40 Tex. 6. And see *Ex parte Tittle*, 37 App. 597, 40 S. W. 598.

A party who is in legal custody, and is afflicted with disease rendering his removal necessary, is entitled to the writ, and for this ground he is entitled to the writ, although he has previously resorted to the writ upon other grounds. *Ex parte Wilson*, 20 App. 498.

"Legal custody" referred to in this article does not contemplate release after conviction of a felony; but article 901 controls this matter, and in a felony case when defendant is convicted he must stay in jail until his case is decided by court of criminal appeals. *Ex parte Smith* (Cr. App.) 64 S. W. 1052.

That one confined in jail on a murder charge is suffering from melancholia caused by his confinement, together with the charge against him, is not ground for his release on bail under this article. *Ex parte Johnson*, 60 App. 50, 131 S. W. 316, 31 L. R. A. (N. S.) 916.

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.]

As to persons competent to testify, see post, art. 788.

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.]

Ex parte Firmin, 60 App. 368, 131 S. W. 1113.

Forms of returns.—Willson's Cr. Forms, 1092-1096.

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.]

See Willson's Cr. Forms, 1096.

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.]

Where there is a refusal to obey, see post, arts. 194, 195.

See Willson's Cr. Forms, 1097.

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.]

See Willson's Cr. Forms, 1097.

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.]

See Willson's Cr. Forms, 1097.

Production of body.—Body of applicant must be produced, or good reason shown why it is not. *Ex parte Coupland*, 26 Tex. 386.

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.

See *Ex parte Lake*, 37 App. 656, 40 S. W. 727, 66 Am. St. Rep. 848.
Willson's Cr. Forms, 802.

Jurisdiction and control over prisoner.—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 Tex. 705. The jurisdiction of the court granting the writ cannot be superseded by curing defects in a void judgment or order by entry thereof. *Ex parte Kearby*, 35 App. 531, 34 S. W. 635; *Id.*, 35 App. 634, 34 S. W. 962.

The control of the court over the prisoner ceases when it has made its final order, and the applicant cannot be admitted to bail pending an appeal. *Ex parte Erwin*, 7 App. 288.

Custody pending appeal.—See notes to art. 950, post.

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.]

See Willson's Cr. Forms, 1089, 1103.

See post, art. 222.

Contempt in disobeying writ.—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. In all cases it is the duty of the party to whom the writ is directed to answer it. *State v. Sparks*, 27 Tex. 705. And further on what constitutes contempt in disobeying writ, see *Ex parte Lake*, 37 App. 656, 40 S. W. 727, 66 Am. St. Rep. 848.

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.]

See ante, art. 177; post, art. 222.

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.]

See Willson's Cr. Forms, 1088.

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.]

See Willson's Cr. Forms, 1098.

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.]

See Inquests, post, ch. 1, title, 13.

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.]

See ante, arts. 31, 38, and notes.

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.]

See Willson's Cr. Forms, 1099.

Discharge in extradition cases.—See notes to art. 177, ante.

Procedure.—The return disclosing that a magistrate in assuming to finally try the relator had exceeded his jurisdiction the court will examine witnesses concerning the accusation. Ex parte McGrew, 40 Tex. 472.

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.]

Ex parte Campbell, 28 App. 376, 13 S. W. 141; Childers v. State, 30 App. 160, 16 S. W. 903, 28 Am. St. Rep. 899.

Right to bail.—See notes under article 6, ante.

For rule to determine relator's right to bail, see Ex parte Evers, 29 App. 539, 16 S. W. 343. And see Ex parte Miller, 41 Tex. 213.

— **Burden of proof.**—See notes to art. 6, ante.

Admissibility of testimony on final trial.—See notes to art. 4, ante, and art. 834, post.

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.

Jurisdiction to issue writ.—See arts. 69, 84, 85, 92, 100, 165, ante, and notes.

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 of guilt from indictment.—As a matter of fact, presumption of guilt cannot arise upon an indictment. Ex parte Newman, 38 App. 164, 41 S. W. 628, 70 Am. St. Rep. 740.

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.]

See Willson's Cr. Forms, 1099-1101.

Determination of case.—If the party has been released from custody previous to the service of the writ, its object has been accomplished and the court will make no order on the subject. Ex parte Coupland, 26 Tex. 386.

The questions both of law and fact are for the determination of the judge. McFarland v. Johnson, 27 Tex. 165; Ex parte Campbell, 28 App. 376, 13 S. W. 141.

The return disclosing that a magistrate, in assuming to finally try the relator, had exceeded his jurisdiction, the court will examine witnesses concerning the accusation. *Ex parte McGrew*, 40 Tex. 472.

This statute is mandatory and the court cannot discharge an applicant in habeas corpus proceeding when the facts show that he has been indicted by a legally constituted grand jury. The most that the court can do is to reduce the bail if proper showing is made that it is excessive. *Ex parte Bishop* (Cr. App.) 61 S. W. 308 following *Hernandez v. State*, 4 App. 425; *Parker v. State*, 5 App. 579, as to bail.

Where one is under indictment for an offense under an original application for habeas corpus to the court of criminal appeals, the court will not inquire into the case further than to ascertain and fix the amount of bail. The court will not constitute itself a trial court. *Wright v. State* (Cr. App.) 90 S. W. 24.

The court, on habeas corpus for the discharge of one charged with a violation of the local option law, will not determine the grade of the offense, and will not anticipate that the trial court will act erroneously in assessing punishment on the conviction of accused, or that he will be tried in a forum having no jurisdiction of the offense. *Ex parte McGuire*, 57 App. 38, 123 S. W. 425.

An order of a district judge on habeas corpus, whether with or without evidence, discharging a person held to answer before the grand jury, on the grand jury adjourning without indicting him for lack of time, was of binding force and effect on all the parties concerned. *Ex parte Haubelt*, 57 App. 512, 123 S. W. 607.

The court, on habeas corpus for the discharge of one convicted at a term of court not authorized by law, cannot assume that the indictment against him was returned at a term not authorized by law, and the court will remand him to the custody of the proper officer, for further proceedings in accordance with law. *Hardin v. State*, 57 App. 401, 123 S. W. 613.

Appeal from decision.—See art. 950 post, and notes.

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.]

Defective complaint.—See notes under article 160, ante.

See a case where a prisoner was discharged, because of uncertainty in the description of the offense attempted to be charged against him. *Republic v. Bynum*, Dallam, 376.

Merely that the complaint on which he was arrested was defective, will not entitle a relator to discharge. *Ex parte Beverly*, 34 App. 644, 31 S. W. 645. But compare *Ex parte Rowland*, 35 App. 108, 31 S. W. 651.

Invalidity of extradition complaint or warrant.—See notes to art. 177, ante.

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.]

Ex parte Haubelt, 57 App. 512, 123 S. W. 607.

Evidence to hold prisoner.—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 App. 323; *Ex parte Walck*, 25 App. 168, 7 S. W. 665.

For evidence to hold one on a charge of theft, see *Ex parte Walck*, 25 App. 168, 7 S. W. 665.

Even if the evidence disclosed in the record on a habeas corpus makes it doubtful whether a conviction can be had, yet it may be sufficient to hold the accused for the action of a grand jury. *Ex parte Oakley*, 54 App. 608, 114 S. W. 131.

Under this article, the court may consider evidence which would not be admissible at trial, where the deficiencies in the evidence could be cured and competent evidence of the same facts secured. *Ex parte Lambert* (Cr. App.) 172 S. W. 783.

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.]

See Willson's Cr. Forms, 1090, 1091.

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.—See ante, arts. 6, 201 and notes.

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 App. 164, 41 S. W. 628, 70 Am. St. Rep. 740, overruling on this point Smith v. State, 23 App. 100, 5 S. W. 99. And see Ex parte Arthur (Cr. App.) 47 S. W. 365.

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.]

See Childers v. State, 30 App. 160, 16 S. W. 903, 28 Am. St. Rep. 899; Willson's Cr. Forms, p. 636.

Statement of facts on appeal.—See notes under article 950, post.

The preceding article does not affect at all the mode of making up and authenticating a statement of facts on appeal. The statement of facts must be made up and certified or approved by the judge as in other criminal cases. Ex parte Cole, 14 App. 579; Ex parte Barber, 16 App. 369; Ex parte Barrier, 17 App. 585. Ex parte Malone, 35 App. 297, 31 S. W. 665, 33 S. W. 360. And see also Ex parte Overstreet, 39 App. 468, 46 S. W. 929; Ex parte Williams, 39 App. 524, 47 S. W. 365, 1118; Ex parte Calvin, 40 App. 84, 48 S. W. 518.

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.]

See Willson's Cr. Forms, 1104, p. 636.

Statement of facts.—Evidence received on a trial before a judge in vacation is no part of the proceeding mentioned in this article, and though such proceedings, properly certified by the judge, may contain all the evidence adduced at the hearing, yet such evidence cannot be considered on appeal as a statement of facts, but such statement must be made and authenticated as in other cases, independently of the judge's certificate to the proceedings. Ex parte Malone, 35 App. 297, 31 S. W. 665, 33 S. W. 360. And see Ex parte Barrier, 17 App. 585; Ex parte Wickson (Cr. App.) 47 S. W. 365 and note to preceding article.

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.]

See Willson's Cr. Forms, 1104.

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.]

Diligence.—When an applicant for habeas corpus shows that he is under arrest and dealing with prejudiced sources, the use of strict diligence in procuring testimony should not be required of him. *Ambrose v. State*, 32 App. 468, 24 S. W. 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.]

See *Ex parte Porter*, 16 App. 321.

Rearrest as 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 App. 512, 123 S. W. 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.]

Right to second writ.—An accused, who, prior to indictment, has had a hearing under the writ of habeas corpus, is after indictment entitled to a second writ, and notwithstanding the indictment, and previous hearing upon the first writ, is entitled to bail, if the facts warrant bail. But after indictment found a second writ is not allowable, except in the special cases arising under art. 185, ante, and 219, post; *Wilson v. State*, 20 App. 498.

Where relator was remanded after a hearing upon a writ of habeas corpus sued out before a district court, he should have either appealed from the judgment of the district court, or, upon suing out an original application before the court of criminal appeals, should have informed that court that the writ was a second application, and stated his reason for not appealing from the judgment of the district court, as well as legal ground to sustain the second application. *Ex parte Hubbard*, 63 App. 516, 140 S. W. 451.

A father brought habeas corpus for his minor daughter, held by defendants, on the ground that he was the sole surviving parent, and that she was unlawfully restrained by defendants. Judgment was given against him, and he petitioned for a rehearing and for a new trial and the setting aside of the former judgment.

Held, that the former judgment did not prevent him from urging, in the subsequent proceedings, that he was a Jew; that his child was deprived of Jewish education and worship and of the association of her blood kin and relations; that, if permitted to remain with defendants, she would remain ignorant of the religion of her people; that there was tuberculosis in the family of defendants; and that he feared the child would contract the disease if she remained with defendants; and the judgment in the first proceeding is not *res adjudicata*. *Patton v. Shapiro* (Civ. App.) 154 S. W. 687.

Bail.—When an applicant appeals from a judgment refusing bail, and the judgment is affirmed, he is not entitled to a second writ. *Miller v. State*, 43 Tex. 579.

Though the action of the court is final and conclusive when rendered on appeal under habeas corpus, it will not preclude the district court having jurisdiction from afterwards entertaining a motion to reduce the amount of bail. *Miller v. State*, 43 Tex. 579.

The dismissal of the indictment under which bail was awarded entitles the accused to bail *ipso facto*. *Ex parte Augustine*, 33 App. 1, 23 S. W. 689, 47 Am. St. Rep. 17.

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

No order or judgment granting or refusing bail, while applicant is under arrest by complaint only, has any force or effect subsequent to indictment found. *Ex parte Kirby*, 63 App. 377, 140 S. W. 226.

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.]

Right to second writ.—The dismissal of an appeal from a judgment denying accused's application on an indictment being found for the offense charged did not affect his right to a second writ under this article. *Ex parte Forney*, 45 App. 254, 76 S. W. 440.

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.]

See *Willson's Cr. Forms*, 1086.

Second application.—See notes under articles 185, 217, and 218, ante.

See notes under article 165, ante.

An application for a second writ of habeas corpus under this article must show that since the hearing of the first application important evidence not obtainable then has been obtained, which evidence should be set out, and be substantiated by the affidavit of the witness. The application must also show diligence, and why the testimony was not available on the first hearing, and conform substantially to the requirements of a motion for a new trial. The statute confers the right of obtaining a second writ where important testimony has been obtained, which, though not newly discovered, or which, though known to the applicant, it was not in his power to produce at the former hearing. *Ex parte Foster*, 5 App. 625, 32 Am. Rep. 577; *Ex parte Rosson*, 24 App. 226, 5 S. W. 666.

If an original application is made to the court of appeals, and after the issuance of the writ the cause is abandoned, and the applicant remanded to custody, such judgment is in legal contemplation a judgment upon a hearing, and a subsequent application is a "second application." *Ex parte Hibler*, 43 Tex. 197.

The statute does not apply when there has been an appeal from the first application. *Miller v. State*, 43 Tex. 580.

After indictment, a party is entitled to the writ, although he has before indictment, had the benefit of the writ. *Ex parte Wilson*, 20 App. 498.

As to where writ is returnable, see *Ex parte Springfield*, 28 App. 27, 11 S. W. 677, and notes to art. 167, ante.

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.]

See 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.

Explanatory.—See ante, Penal Code, arts. 872, 888. The offense mentioned in the above article does not appear to have been specifically denounced by the Penal Code.

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.]

See ante, Penal Code, art. 294, and notes.

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.]

Conscript laws of confederate states.—For decisions under the conscript laws of the Confederate States, see *State v. Sparks*, 27 Tex. 705; *Ex parte Blumer*, Id. 734; *Ex parte Mayer*, Id. 715; *Ex parte Coupland*, 26 Tex. 386; *Ex parte Turman*, 26 Tex. 708, 84 Am. Dec. 598.

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.]

Ante, art. 160 and notes. For other decisions pertinent to habeas corpus, see ante, art. 6 and notes.

Habeas corpus as civil or criminal proceeding.—A proceeding by habeas corpus when not used to relieve against restraint under a criminal charge, cannot in the proper sense of the term, be regarded as a civil suit; it should rather, it seems, be held the exercise of a special jurisdiction conferred by the constitution and laws upon either the courts or judges for the prompt relief of the citizen against any improper interference with his personal liberty. *McFarland v. Johnson*, 27 Tex. 105.

Habeas corpus to determine a parent's right to a minor child is a civil and not a criminal proceeding. *Legate v. Legate*, 87 Tex. 248, 28 S. W. 281; *Telschek v. Fritsch*, 38 App. 43, 40 S. W. 983; *Ex parte Reed*, 34 App. 9, 28 S. W. 689; *Ex parte Berry*, 34 App. 36, 28 S. W. 806.

Appeal in habeas corpus.—See post, arts. 950-959, inclusive.

TITLE 4

THE TIME AND PLACE OF COMMENCING AND PROSECUTING CRIMINAL ACTIONS

Chap.	Chap.
1. The time within which criminal actions may be commenced.	2. Of the county within which offenses may be prosecuted.

CHAPTER ONE

THE TIME WITHIN WHICH CRIMINAL ACTIONS MAY BE COMMENCED

Art.	Art.
225. For treason and forgery.	231. Absence from the state not computed.
226. For rape, one year.	232. An indictment is "presented," when.
227. For theft, etc., five years.	233. An information is "presented," when.
228. Other felonies.	
229. Misdemeanors, two years.	
230. Days to be excluded from computation of time.	

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.]

Historical.—The original article read, for "murder or forgery," but was amended as above in revising in 1879.

Statutes of limitations in general.—A conviction will be set aside when the evidence shows, though inadvertently, that the indictment was not found within the time limited for prosecution. *Bingham v. State*, 2 App. 21.

Statutes of limitation are to be construed liberally in favor of accused. *White v. State*, 4 App. 488.

Acts of limitations, being acts affecting the remedy only, are peculiarly within the scope of legislative action and control, and are regulated by no inflexible rules as to the time prescribed within which they are to operate. They may be changed or may be fixed, arbitrarily at any time, so as they are not made to apply to rights already vested. *Moore v. State*, 20 App. 275.

Failure to prove the time of commission of the offense is fatal to a conviction. *Stichtd v. State*, 25 App. 420, 8 S. W. 477, 8 Am. St. Rep. 444.

Retrospective operation.—Statutes of limitation are without retrospective operation. *Martin v. State*, 24 Tex. 61; *State v. Sneed*, 25 Tex. Supp. 66.

Pleading.—Accused need not plead the statute. The state must show the offense within the period. *Bingham v. State*, 2 App. 21; *White v. State*, 4 App. 488; *Shoefercater v. State*, 5 App. 207; *Temple v. State*, 15 App. 304, 49 Am. Rep. 200; *Lucas v. State*, 27 App. 322, 11 S. W. 443.

Instructions.—While it is incumbent on the state to prove an offense not barred by limitation, but when nothing in the evidence raises a doubt whether the prosecution was barred, there is no occasion for instructions to the jury on the subject. *Vincent v. State*, 10 App. 330; *Cohen v. State*, 20 App. 224; *Hoy v. State*, 11 App. 32. But see a state of facts which demand such a charge, and wherein an insufficient charge was given. *Wimberly v. State*, 22 App. 506, 3 S. W. 717.

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.]

Rape.—A prosecution for rape is barred unless the indictment is presented within one year after the commission of the offense. *Anschicks v. State*, 6 App. 524; *Carr v. State*, 36 App. 390, 37 S. W. 426; *Gonzales v. State* (Cr. App.) 62 S. W. 1060. After indictment the cause can be continued indefinitely. *Carr v. State*, 36 App. 391, 37 S. W. 426.

Several acts of intercourse.—Where several acts of intercourse were shown, all of which were barred by limitations except one, alleged in the indictment and relied upon in the trial, a charge that if accused had more than one act of intercourse with prosecutrix, and the first act occurred more than one year before filing the indictment, he should be acquitted, was properly refused. *Eckermann v. State*, 57 App. 287, 123 S. W. 424.

Assault with intent to rape.—An assault with intent to rape is not barred until the lapse of three years after the commission of the offense. *Moore v. State*, 20 App. 275.

Art. 227. [217] For theft, etc., five years.—An indictment for theft punishable as a felony, arson, burglary, robbery and counter-

feiting may be presented within five years, and not afterward. [O. C. 183.]

Theft.—See *Wimberly v. State*, 22 App. 506, 3 S. W. 717; *Wolfe v. State*, 25 App. 698, 9 S. W. 44.

Showing in indictment.—An indictment for burglary, alleging that the offense was committed on April 19, "One Thousand Nine Hundred and ———," and anterior to the presentment of the indictment, which was filed August 30, 1910, shows on its face that the offense was barred by limitations prior to the return of the indictment, and is therefore insufficient. *Bradford v. State*, 62 App. 424, 138 S. W. 119.

Evidence.—Evidence that a crime was committed in "'84", the year 1884 being within the period of limitation, is sufficient proof that the crime was committed within the period. *Wolfe v. State*, 25 App. 698, 9 S. W. 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.]

Historical.—This article was amended in revising by adding to the original article the words "except murder, for which an indictment may be presented at any time."

Murder.—Though an indictment for murder is never barred yet it should show that death occurred within a year and a day after the injury. *Edmonson v. State*, 41 Tex. 496; *Sutton v. State*, Id. 513; *Hardin v. State*, 4 App. 355; *Strickland v. State*, 19 App. 518; *Cudd v. State*, 28 App. 124, 12 S. W. 1010.

Manslaughter.—A prosecution for manslaughter is barred if not presented within three years after the commission of the offense, even though the indictment under which the conviction was had was for murder. *White v. State*, 4 App. 488; *Temple v. State*, 15 App. 304, 49 Am. Rep. 200.

Assault with intent to murder.—Assault with intent to murder is barred by this article, and a conviction cannot be had for such offense under an indictment for murder presented after the limitation period has elapsed. *Moore v. State*, 20 App. 275; *Fulcher v. State*, 33 App. 22, 24 S. W. 292.

Assault with intent to rape.—See notes to article 226, ante.

Embezzlement.—An indictment for embezzlement may not be presented after three years. *Cohen v. State*, 20 App. 224.

Prosecutrix delivered to defendant certain money to be invested on October 15, 1902. On December 5th she let him have \$60 more for the same purpose. He deposited the money in the bank, and thereafter at various times withdrew different sums from the bank and appropriated the same, and on December 17, 1902, attempted to conceal such fact from prosecutrix by forging a note which he represented had been received for a loan of the money. When it was later discovered that the note was a forgery, defendant fled the country, and was later returned and prosecuted; the indictment being returned October 28, 1905, and the embezzlement fixed as of December 13, 1902, when he claimed he had loaned the money to W. on a note and mortgage. Held that, since such concealment was the first manifestation of defendant's attempt to embezzle the funds, the offense was not complete until that time, and it was therefore not barred by limitations. *Hamer v. State*, 60 App. 341, 131 S. W. 813.

Selling intoxicating liquors in prohibition territory.—In a prosecution for pursuing the business of selling intoxicating liquors in prohibition territory, the instructions should have been to convict, if defendant pursued the business at any time prior to the indictment and subsequent to the date of the publication of the order following the prohibition election, where that date was within three years before the filing of the indictment, and the court should instruct the jury to convict defendant if he pursued the business within three years prior to the indictment. *Rhodes v. State* (Cr. App.) 172 S. W. 252.

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 afterward. [O. C. 186.]

Cited *Ethridge v. State* (Cr. App.) 172 S. W. 784.

Misdemeanors in general.—One charged with a misdemeanor may, as a general rule, be convicted for any violation occurring within two years prior to the return of the indictment. *Matthews v. State*, 57 App. 328, 122 S. W. 544. But a complaint for a misdemeanor filed after the period of limitations has expired is without authority of law. *Ex parte Hoard*, 63 App. 519, 140 S. W. 449.

Negligent homicide.—Negligent homicide is barred after the lapse of two years from its commission. *Whitaker v. State*, 12 App. 436.

Adultery.—Adultery is barred in two years. *Mitten v. State*, 24 App. 346, 6 S. W. 196. And 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 App. 366, 35 S. W. 172.

Where defendant's niece by marriage, with whom he was alleged to have committed adultery, testified that the acts of intercourse had been going on for two years prior to a date within the period of limitations, the admission of the evidence was not error as testimony of acts the prosecution for which was barred by the statute, where the court charged that there could be no conviction for acts com-

mitted more than two years prior to the finding of the indictment. *Bodkins v. State* (Cr. App.) 172 S. W. 216.

Sale of intoxicating liquors without license.—Two years is the limitation period for the offense of selling liquors without an occupation license. *Monford v. State*, 35 App. 237, 33 S. W. 351.

Taking up and using estray.—The offense under P. C. art. 1391, of taking up and using an estray is in the nature of theft, and a prosecution for it is not barred until the lapse of two years after the cessation of the unlawful use of the animal. *Davis v. State*, 2 App. 162.

Violations of stock law.—In a prosecution for violating the stock law, it was proper for the court to permit the jury to go back two years prior to the filing of the complaint. *Fisher v. State*, 71 App. 564, 160 S. W. 683.

Penalties recoverable in civil actions.—The “anti-trust” laws of 1899 and 1903 are penal, but cases prosecuted under them for the penalties therein provided are not criminal but civil and this article does not apply to them as to limitations. *Waters-Pierce Oil Co. v. State*, 48 Civ. App. 162, 106 S. W. 926.

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.

In general.—Before the enactment of this article, the day upon which the offense was committed was included in the computation. *State v. Asbury*, 26 Tex. 82.

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.]

Whitaker v. State, 12 App. 436.

Confinement in penitentiary.—Limitation does not apply during the time an indicted defendant is in the penitentiary under conviction for another crime, and the case is continued by reason thereof. *Carr v. State*, 36 App. 390, 37 S. W. 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.]

Serrato v. State (Cr. App.) 171 S. W. 1133.

Requisites of indictment.—See notes to article 451, post.

Record of presentment.—See notes to article 446, post.

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.]

Instructions on question of limitations, see art. 735.

CHAPTER TWO

OF THE COUNTY WITHIN WHICH OFFENSES MAY BE PROSECUTED

<p>Art. 234. For offenses committed wholly or in part without the state.</p> <p>235. Forgery and uttering forged papers.</p> <p>236. Counterfeiting.</p> <p>237. Perjury and false swearing.</p> <p>238. Offenses committed on the boundary of two counties.</p> <p>239. Person dying out of the state of an injury inflicted in the state.</p> <p>240. Person within the state inflicting injury on another out of the state.</p> <p>241. Person without the state inflicting an injury on one within the state.</p> <p>242. An offense committed on a stream, the boundary of this state.</p> <p>243. Person receiving an injury in one county and dying in another, offender, where prosecuted.</p>	<p>Art. 244. An offense committed on a stream, etc., the boundary between two counties, punishable where.</p> <p>245. Property stolen in one county and carried to another.</p> <p>246. Mortgaged property taken from one county and unlawfully disposed of in another, offender prosecuted where.</p> <p>247. Accomplices and accessories.</p> <p>248. Receiving, etc., stolen property.</p> <p>249. Offenses committed out of the state by commissioner of deeds.</p> <p>250. Offenses on vessels within the state.</p> <p>251. Offense of embezzlement.</p> <p>252. False imprisonment, kidnaping and abduction.</p> <p>253. Conspiracy.</p>
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Art.		Art.
254.	Prosecution for rape, commenced and carried on where, takes precedence of other cases.	256. Conviction, etc., in one county bar to prosecution in another.
255.	Conviction or acquittal in another state bar to prosecution in this state.	257. Proof of jurisdiction sufficient to sustain allegation of venue, when.
		258. Offenses not enumerated, prosecuted where.

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.]

Williams v. State, 27 App. 258, 11 S. W. 114.

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.]

Forgery.—See C. C. P. arts. 950, 952.

Prior to the adoption of the Code, forgery could only be prosecuted in the county where the forged instrument was made. *Henderson v. State*, 14 Tex. 503. But under the Code, the offense of forgery may be prosecuted in any county where the instrument was forged, used, or passed, or attempted to be used or passed. *Mason v. State*, 32 App. 95, 22 S. W. 144, 408; *Hocker v. State*, 34 App. 359, 30 S. W. 783, 53 Am. St. Rep. 716; *Thulemeyer v. State*, 34 App. 619, 31 S. W. 659. One passing a forged check in Texas may be prosecuted there for forgery, though the forgery were committed in another state, where the bank on which it was purported to be drawn is situated. *Batte v. State*, 57 App. 125, 122 S. W. 561. But accused, who forged an indorsement to a treasury warrant and cashed it, cannot be prosecuted in the county to which the warrant was forwarded for collection. *Thulemeyer v. State*, 34 App. 619, 31 S. W. 659.

The venue of a prosecution for forgery may be laid in the county wherein accused mailed the forged note to one who discounted it, even though the note was prepared in another county. *Meredith v. State* (Cr. App.) 164 S. W. 1019. But see *Jessup v. State*, 44 App. 83, 68 S. W. 988, holding that the courts of Texas would have no jurisdiction over uttering a forged draft drawn in Texas, but sent by mail and uttered for the first time in Arkansas, since it was still, while in transit, in the possession of the utterer through his innocent agent, the United States mail.

An indictment alleged that accused passed a forged instrument to an individual in the county of the venue with intent to defraud an insurance company having its home office in another county. The instrument was delivered to the individual to deliver to the insurance company as an accommodation to accused. The instrument was delivered to the company at its home office, and the home office was the only office authorized to receive it. Held not to show that the offense was committed in the county. *Bagley v. State*, 63 App. 606, 141 S. W. 107.

The venue of a prosecution for forging a mortgage note, falsely reciting that it was secured by deed of trust on certain described property in H. county, and which, if valid, would give an innocent holder for value the right to enforce an equitable lien against it, is properly laid in H. county. *Pye v. State*, 71 App. 94, 154 S. W. 222.

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.]

See Pen. Code, arts. 954, et seq.

Counterfeiting.—The Texas state courts have jurisdiction of prosecutions for counterfeiting of the coins and currency of the United States. *Martin v. State*, 18 App. 224.

The venue lies in any county wherein the coins were passed. *Stroube v. State*, 40 App. 581, 51 S. W. 357.

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.]

See Pen. Code, arts. 304, et seq., as to perjury and arts. 312 et seq., as to false swearing.

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.]

See article 244, post; *Kugadt v. State*, 38 App. 681, 44 S. W. 989.

Offenses on boundary lines.—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 App. 493; *Cox v. State*, 41 Tex. 1; *Chivarrio v. State*, 15 App. 330; *Mendiola v. State*, 18 App. 462; *Abrigo v. State*, 29 App. 143, 15 S. W. 408; *Hackney v. State* (Cr. App.) 74 S. W. 555; *McElroy v. State*, 53 App. 57, 111 S. W. 948; *Madrid v. State*, 71 App. 420, 161 S. W. 93. Although a river may be the dividing line between the two counties. *Hackney v. State* (Cr. App.) 74 S. W. 555.

This article is controlled by article 245, post. *Cameron v. State*, 9 App. 332.

Though 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 App. 330.

This article, which was adopted prior to the amendment of the Constitution in 1876 by providing for the adoption of prohibition in counties and subdivisions thereof, must be held to apply only to such laws as are in force in counties in which the offense is alleged to have been committed and the prosecution sought to be maintained, so that, as a retail liquor dealer could not sell liquor to a minor in a county which had adopted prohibition, an indictment drawn in a local option county, charging a violation of Pen. Code, art. 622, which denounces such a sale as a misdemeanor, was improper; the proper proceeding being by an action under article 597 for a violation of the local option law. *Talley v. State* (Cr. App.) 147 S. W. 255. And see *Hutchins v. State* (Cr. App.) 40 S. W. 996.

Warrant of arrest.—This article does not authorize a peace officer to execute a warrant of arrest beyond the limits of his own county. *Ledbetter v. State*, 23 App. 247, 5 S. W. 226; *Abrigo v. State*, 29 App. 143, 15 S. W. 408.

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] Persons 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.]

Jurisdiction in general.—In the absence of express treaty to the contrary, the jurisdiction of this state extends to the middle of the stream. *Spears v. State*, 8 App. 467. As to the rules governing when the stream changes its channel, see *Collins v. State*, 3 App. 323, 30 Am. Rep. 142.

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.]

Common law rule.—At common law an offense commenced in one county, but consummated in another, could not be prosecuted in either. *Searcy v. State*, 4 Tex. 450.

Abortion.—Where the means of producing an abortion were applied in one county, but the miscarriage occurred in another, the venue was in the former county. *Moore v. State*, 37 App. 552, 40 S. W. 287.

Murder.—Where an indictment charged commission of murder in a county attached for judicial purposes, to the county wherein the indictment was found, venue was clearly shown. It was also clearly shown where it appeared death occurred in the county where the indictment was found, though the indictment charged commission of the murder in another county in which the fatal blow was struck, as this article provides for prosecution of the offense in either county. *Navarro v. State* (Cr. App.) 43 S. W. 105.

— **Accomplices.**—Where 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, the latter county had jurisdiction to try the accomplice. *Carlisle v. State*, 31 App. 537, 21 S. W. 358.

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 committed 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.]

See articles 238 and 242, ante.

Construction in general.—This article merely regulates the venue where the offense is committed in the river itself. *Hackney v. State* (Cr. App.) 74 S. W. 555.

Change in channel of stream.—See *Collins v. State*, 3 App. 323, 30 Am. Rep. 142.

Street on county line.—Where a county line ran through a town, and defendant, indicted for selling liquors in violation of the local option law of W. county, proved that the building in which he sold it was in B. county, he cannot be convicted, though the street on which he sold it had been regarded for election and taxpaying purposes as in the county of W. *Hutchins v. State* (Cr. App.) 40 S. W. 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.]

Property stolen in one county, etc.—The 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. *Connell v. State*, 2 App. 422; *Cameron v. State*, 9 App. 332; *Roth v. State*, 10 App. 27; *Dixon v. State*, 15 App. 480; *Shubert v. State*, 20 App. 320; *McElmurray v. State*, 21 App. 691, 2 S. W. 892; *Clark v. State*, 23 App. 612, 5 S. W. 178; *West v. State*, 28 App. 1, 11 S. W. 635; *Wampler v. State*, 28 App. 352, 13 S. W. 144; *Abrigo v. State*, 29 App. 143, 15 S. W. 408; *Givins v. State*, 32 App. 457, 24 S. W. 287; *Pearce v. State*, 50 App. 507, 98 S. W. 861; *Park v. State* (Cr. App.) 178 S. W. 516. But this does not mean that one may be indicted in the county in which the property was stolen, and subsequently be indicted for the same offense in the county into which the property was taken. Under such circumstances accused may plead the prior indictment in bar of the other. *Pearce v. State*, 50 App. 507, 98 S. W. 861, overruling the *Schindler's Case*, 15 App. 394. Where one is prosecuted in another than the county of the taking, a complete offense must be made out in the county of the prosecution. 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 App. 27; *Clark v. State*, 23 App. 612, 5 S. W. 178, and cases cited; *West v. State*, 28 App. 1, 11 S. W. 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 App. 577, 21 S. W. 356. This article applies to all species of theft. *Shubert v. State*, 20 App. 320. Except theft from the person, which can only be prosecuted in the county of the original caption. *Roth v. State*, 10 App. 27; *Gage v. State*, 22 App. 123, 2 S. W. 638; *Nichols v. State*, 28 App. 105, 12 S. W. 500. And swindling. *Sims v. State*, 28 App. 447, 13 S. W. 653. And see *Williams v. State*, 27 App. 258, 11 S. W. 114.

The indictment for theft may allege the venue of the offense to be in the county of the prosecution, and such allegation will be sustained by proof that the property was stolen in any other county in the state, and brought by the thief into the county of the prosecution. *Cox v. State*, 41 Tex. 1; *Connell v. State*, 2 App.

422; *Cameron v. State*, 9 App. 332; *Roth v. State*, 10 App. 27; *Dixon v. State*, 15 App. 480. This rule applies to all species of theft. *Shubert v. State*, 20 App. 320; *McElmurray v. State*, 21 App. 691, 2 S. W. 892; *Clark v. State*, 23 App. 612, 5 S. W. 178. Except theft from the person, in which case the prosecution can be maintained only in the county where the property was originally taken. *Gage v. State*, 23 App. 123, 2 S. W. 638.

This article controls article 238, ante. *Cameron v. State*, 9 App. 332.

Where it appeared that accused had put stolen cattle in his pasture in one county, it was immaterial, in prosecution had in that county, whether the cattle were stolen in that county or another. *Dugat v. State* (Cr. App.) 148 S. W. 789.

The venue of the prosecution of a train newsboy for stealing money from a hand bag is in the county where the hand bag is taken with intent to steal its contents, if of value, though the defendant is in another county when he discovers what the hand bag contains and actually appropriates the money. *Lane v. State* (Cr. App.) 152 S. W. 897.

In a prosecution for burglary of a freight car, evidence held sufficient to show that the car was at the place in the county alleged in the indictment at the time of the offense. *McDonald v. State* (Cr. App.) 152 S. W. 1061.

A train porter is triable in the county in which he was found to have in his custody money stolen from a passenger, though he first took the money in another county. *Rogers v. State* (Cr. App.) 153 S. W. 856.

In burglary, conviction must be had in the county in which the house is broken and entered. *Park v. State* (Cr. App.) 178 S. W. 516.

— **Accomplices.**—One cannot be held liable to the charge of being an accomplice in the county where the stolen property was carried, unless it be proved that "he advised, aided, and encouraged" the principal in that county. *West v. State*, 28 App. 1, 11 S. W. 635.

Indictment.—Willson's Cr. Forms, 634.

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.]

See Pen. Code, arts. 86 et seq., and arts. 89 et seq.

Accomplices.—The venue being in that county of this state into which the thief brings the property he stole in another State, 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 App. 473, 11 S. W. 482. And see *West v. State*, 28 App. 1, 11 S. W. 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 be 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.]

Receiving and concealing stolen property.—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 App. 646, 40 S. W. 795. But see *Moseley v. State*, 36 App. 578, 37 S. W. 736, 38 S. W. 197; *Id.*, 35 App. 210, 32 S. W. 1042, 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. See, also, *Bonner v. State*, 32 S. W. 1043.

The word "conceal" does not mean to hide. It means the handling of property so as to mislead the owners in their search for it. If accused brought or assisted in bringing stolen cattle into T. county, and there had them shipped to market under an assumed name, he would be guilty of concealing the property in T. county within this article. Where the indictment charged accused with both receiving and concealing the property, if he received it in F. county and took it to T. county and concealed it there, T. county would have jurisdiction of the prosecution, but if he received it in F. county and brought it into T. county, without there concealing it, that county would not have jurisdiction. *Polk v. State*, 60 App. 150, 131 S. W. 580.

This article gives the court of the county where a theft occurred jurisdiction of the offense of receiving the stolen goods, though accused lived and received and concealed the goods in another county. *Mooney v. State* (Cr. App.) 176 S. W. 52.

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.]

See Pen. Code, art. 352.

Indictment.—Willson's Cr. Forms, 163, 164.

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.]

Gaming on vessel.—In *Jenkins v. State*, 36 Tex. 345, it was held that, on the trial of an indictment for gaming on a steamboat, the venue must be proved as laid, and that an instruction to find accused guilty if they found that the boat, on the trip where the gaming was done, commenced or terminated its voyage in the county where the venue was laid, was error.

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.]

See Pen. Code, arts. 1416 et seq.

As to venue of offense, see *White's Annotated Penal Code*, § 1628.

Embezzlement.—This article authorizes a prosecution for embezzlement in the county where the money is received regardless of the county where it may have been embezzled or where defendant was to account for the same. *Schweir v. State*, 50 App. 119, 94 S. W. 1050; *O'Marrow v. State* (Cr. App.) 147 S. W. 252; *Poteet v. State* (Cr. App.) 153 S. W. 863. The venue may be in the county in which the offender may have taken or received the property or into or through which he may have undertaken to transport it. *Cole v. State*, 16 App. 461; *Reed v. State*, Id. 586; *Cohen v. State*, 20 App. 224; *Brown v. State*, 23 App. 214, 4 S. W. 588; *C. C. P.*, art. 248. The county in which it first appeared defendant had embezzled the money, the owner on first seeing him there after his return demanding the money, and he failing to return it, has jurisdiction of the offense. *Poteet v. State* (Cr. App.) 153 S. W. 863.

"Money" is property within the meaning of this article. *Brown v. State*, 23 App. 214, 4 S. W. 588.

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.]

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.

See article 234, ante.

Conspiracy.—See *Kutch v. State*, 32 App. 184, 22 S. W. 594; *Dawson v. State*, 38 App. 9, 40 S. W. 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.]

Constitutionality.—There is no provision in the constitution prohibiting the legislature from authorizing a prosecution for an offense committed in the state in some county other than the county where the offense was committed. Therefore this article is constitutional. It is not violative of the sixth amendment to the constitution of the United States. Nor do article 3, §§ 45, 56, vesting in the courts the power to change the venue in civil and criminal cases, and prohibiting the legislature from passing any local or special law authorizing such change of venue, prohibit the enactment of this article. *Mischer v. State*, 41 App. 212, 53 S. W. 627, 96 Am. St. Rep. 780; *Dies v. State*, 56 App. 32, 117 S. W. 979; *Eckermann v. State*, 57 App. 287, 123 S. W. 424. It is sufficiently broad to fix the venue, and provide for the trial of a case in such county as may be provided by law, within the requirement of Const. art. 3, § 35. It is complete in itself, and is valid, without reciting or referring to any other act, as required by Const. art. 3, § 36, on revival or amendment of an act. *Brown v. State*, 57 App. 269, 122 S. W. 565.

Residence nearest county seat.—Where the county seat of the county in which the rape is committed is nearer the residence of the district judge of another district than it is to the residence of the judge in whose district the county of the crime is embraced, a county of the former's district has jurisdiction. *Cooksey v. State* (Cr. App.) 58 S. W. 103.

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.]

Former jeopardy.—Generally, see article 9, ante, and article 601, post.

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.]

Former jeopardy.—Generally, see article 9, ante, and article 601, post.

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 App. 644, 89 S. W. 978, 122 Am. St. Rep. 775, approving *Ex parte Moore*, 46 App. 417, 80 S. W. 620, and *Mixon v. State*, 35 App. 458, 34 S. W. 290.

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.]

Allegations of venue in indictment or information.—Article 451 of this Code, subd. 5, post, requires the indictment to show that the place where the offense

was committed is within the jurisdiction of the court in which the indictment is presented. Article 478, subd. 5, post, requires the information to show that the place where the offense is charged to have been committed is within the jurisdiction of the court where the information is filed. Article 455, post, provides that 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. See these articles for cases dealing with the necessity, requisites and sufficiency of allegations of venue in the indictment or information.

Proof of venue.—A plea of not guilty puts in issue the allegation of venue, and the state must prove such allegation, or a conviction will not be warranted. The venue must be proved as alleged. It is not incumbent on defendant to put the venue in issue by special plea, nor to disprove the allegation of venue. *Searcy v. State*, 4 Tex. 450; *Hightower v. State*, 22 Tex. 605; *Tharp v. State*, 28 Tex. 696; *Scott v. State*, 31 Tex. 409; *Vance v. State*, 32 Tex. 396; *Field v. State*, 34 Tex. 39 (overruling *Myers v. State*, 33 Tex. 525); *Shadle v. State*, 34 Tex. 572; *Hill v. State*, 34 Tex. 623; *Jenkins v. State*, 36 Tex. 245; *Burch v. State*, 43 Tex. 376; *Higbee v. State*, 2 App. 407; *Logan v. State*, 2 App. 408; *Huggins v. State*, 2 App. 421; *Jack v. State*, 3 App. 72; *Harrison v. State*, 3 App. 558; *Cady v. State*, 4 App. 238; *Turman v. State*, 4 App. 586; *Yarborough v. State*, 5 App. 125; *Boston v. State*, 5 App. 383, 32 Am. Rep. 575; *Ellison v. State*, 6 App. 248; *Pippin v. State*, 9 App. 269; *White v. State*, 9 App. 390; *Perry v. State*, 9 App. 410; *Cross v. State*, 11 App. 84; *Dreyer v. State*, 11 App. 503; *Bowling v. State*, 13 App. 338; *Williamson v. State*, 13 App. 514; *Sedberry v. State*, 14 App. 233; *Winn v. State*, 15 App. 169; *Briggs v. State*, 20 App. 106; *West v. State*, 21 App. 427, 2 S. W. 810; *Miles v. State*, 23 App. 410, 5 S. W. 250; *Tucker v. State*, 25 App. 653, 8 S. W. 813; *Leggett v. State*, 25 App. 535, 8 S. W. 660; *Shelton v. State*, 27 App. 443, 11 S. W. 457, 11 Am. St. Rep. 200. And the venue must be proved, although the judge and jury may personally know the locus in quo to be within the jurisdiction of the court. *Miles v. State*, 23 App. 410, 5 S. W. 250. It is an issue which must be affirmatively, and not inferentially proved. *Bell v. State*, 1 App. 81; *Moore v. State*, 2 App. 450; *Higbee v. State*, 2 App. 407; *Jack v. State*, 3 App. 72; *Harrison v. State*, 3 App. 559; *Ryan v. State*, 22 App. 699, 3 S. W. 547; *McDevro v. State*, 23 App. 429, 5 S. W. 133. But it need not be proved beyond a reasonable doubt. It is sufficient if, from the evidence, the jury may reasonably conclude that the offense was committed in the county alleged. *McReynolds v. State*, 4 App. 327; *Barrara v. State*, 42 Tex. 266; *Deggs v. State*, 7 App. 359 (explaining *Higbee v. State*, 2 App. 407); *Achterberg v. State*, 8 App. 463; *Hoffman v. State*, 12 App. 406; *McGill v. State*, 25 App. 499, 8 S. W. 661; *Cox v. State*, 28 App. 92, 12 S. W. 493; *Robinson v. State* (Cr. App.) 39 S. W. 678; *Bowman v. State*, 38 App. 14, 40 S. W. 796, 41 S. W. 635; *Steadham v. State*, 40 App. 43, 48 S. W. 177; *Melton v. State*, 71 App. 139, 158 S. W. 550; *Reynolds v. State*, 71 App. 454, 160 S. W. 362; *Belcher v. State*, 71 App. 646, 161 S. W. 459; *Johnson v. State*, 72 App. 387, 162 S. W. 512; *Himmelfarb v. State* (Cr. App.) 174 S. W. 586. See, also, *Hutchins v. State* (Cr. App.) 40 S. W. 996. It may be proved by circumstantial, as well as by direct, evidence. *Nance v. State*, 17 App. 385; *McGill v. State*, 25 App. 499, 8 S. W. 661; *Cox v. State*, 28 App. 92, 12 S. W. 493; *Abrigo v. State*, 29 App. 144, 15 S. W. 408; *McGlasson v. State*, 38 App. 351, 43 S. W. 96; *Kugadt v. State*, 38 App. 681, 44 S. W. 989; *Reynolds v. State*, 71 App. 454, 160 S. W. 362; *Belcher v. State*, 71 App. 646, 161 S. W. 459; *Himmelfarb v. State* (Cr. App.) 174 S. W. 586.

In the following cases the proof was held to sustain the allegations of venue. *Willis v. State*, 10 App. 493; *Wafford v. State*, 44 Tex. 439; *Chivarrio v. State*, 15 App. 330; *Ashlock v. State*, 16 App. 13; *Mendiola v. State*, 18 App. 462; *Tolston v. State* (Cr. App.) 42 S. W. 958; *Parker v. State*, 39 App. 262, 45 S. W. 812; *Matthews v. State*, 57 App. 328, 122 S. W. 544; *Melton v. State*, 71 App. 130, 158 S. W. 550; *Reynolds v. State*, 71 App. 454, 160 S. W. 362; *Brown v. State* (Cr. App.) 170 S. W. 714. In the following cases the proof was held insufficient to sustain the allegations of venue. *Moore v. State*, 2 App. 350; *Stone v. State*, 27 App. 576, 11 S. W. 637; *Stewart v. State*, 31 App. 153, 19 S. W. 908.

General statutes, which recognize the location of a named town, will authorize judicial knowledge of such location. In the absence of such a statute, however, and in the absence of proof, courts will not take cognizance that a named town is in the county of the forum. *Hoffman v. State*, 12 App. 406; *Terrell v. State*, 41 Tex. 463. The boundaries and limits of counties are matters of judicial knowledge. *State v. Jordan*, 12 Tex. 205. But courts do not take notice that particular places are, or are not, in particular counties. *Boston v. State*, 5 App. 383, 32 Am. Rep. 575; *Govitt v. State*, 25 App. 419, 8 S. W. 478. See, also, *Harrison v. State*, 3 App. 558; *Stewart v. State*, 31 App. 153, 19 S. W. 908; *Vivian v. State*, 16 App. 262. Judicial notice will be taken that the city of Galveston is in Galveston county. *Monford v. State*, 35 App. 237, 33 S. W. 351.

General reputation is admissible to prove county boundaries. *Cox v. State*, 41 Tex. 1; *Nelson v. State*, 1 App. 41; *Leggett v. State*, 25 App. 535, 8 S. W. 660; *Tucker v. State*, 25 App. 653, 8 S. W. 813; *Cox v. State*, 28 App. 92, 12 S. W. 493; *Jackson v. State*, 28 App. 143, 12 S. W. 701.

The proof must establish a complete offense in the county where the venue is laid. *Gage v. State*, 22 App. 123, 2 S. W. 638; *West v. State*, 28 App. 1, 11 S. W. 635.

Where the proof of venue is not objected to, and the objection shown by bill of exceptions, the question is not so presented that the court can pass upon it. *Scott v. State* (Cr. App.) 155 S. W. 226.

Instructions as to venue.—The court is not required to charge that the venue must be proved beyond a reasonable doubt. *McReynolds v. State*, 4 App. 327;

Deggs v. State, 7 App. 359; *Achterberg v. State*, 8 App. 463; *Hoffman v. State*, 12 App. 406; *Abrigo v. State*, 29 App. 143, 15 S. W. 408; *McGill v. State*, 25 App. 499, 8 S. W. 661. A charge on circumstantial evidence is inapplicable on the question of venue. *Reynolds v. State*, 71 App. 454, 160 S. W. 362. Where the venue of the cause has been changed, it is not error for the trial judge to inform the jury in his charge of that fact. *Kemp v. State*, 11 App. 175. In a trial for horse theft the court charged the jury that if the horse, prior to the theft, was last seen in the county where the venue was laid, the law presumed that it was stolen in that county. It was held erroneous, because there was no such legal presumption, and the charge was on the weight of the evidence. *Williams v. State*, 11 App. 275. Where the venue of the offense was alleged in the organized county of W., but the proof showed that the offense was committed in the unorganized county of E. attached to W. county for judicial purposes, it was held error to instruct the jury that the venue was proved if they found that the offense was committed in E. county. *Chivarrio v. State*, 15 App. 330. In a prosecution for the theft of cattle, where the question of defendants' possession in the county where the indictment was found was fought out before the jury on the facts, a charge failing to submit such issue was reversible error. *McKnight v. State*, 70 App. 470, 156 S. W. 1188.

In a prosecution for rape, where the evidence showed intercourse in a county other than that alleged in the indictment, and the charge of the court in each paragraph required the jury to believe beyond reasonable doubt that the crime was committed in the county alleged before they could convict the defendant, it was not error to refuse a specific charge that they must find that the act was committed in the county alleged and not in the other county, since the proof of venue is an essential part of the prosecution, and not an affirmative defense. *Melton v. State*, 71 App. 130, 158 S. W. 550.

Raising question of venue.—The question of venue cannot be first raised by a motion for new trial nor by a requested charge. *Johnson v. State*, 72 App. 387, 162 S. W. 512.

Presumptions on appeal.—See article 938, post.

Record on appeal.—The record on appeal must show that the venue of the offense was proved on the trial, or the conviction will be set aside. *Bell v. State*, 1 App. 81; *Higbee v. State*, 2 App. 407; *Huggins v. State*, Id. 421; *Jack v. State*, 3 App. 72; *Boston v. State*, 5 App. 383, 32 Am. Rep. 575; *Pippin v. State*, 9 App. 269; *White v. State*, Id. 390; *Cross v. State*, 11 App. 84; *Dreyer v. State*, Id. 503; *Winn v. State*, 15 App. 169; *Temple v. State*, 15 App. 304, 49 Am. Rep. 200; *Gonzales v. State*, 16 App. 152; *Burton v. State*, Id. 156; *Williams v. State*, 21 App. 256, 17 S. W. 624; *Wells v. State*, 22 App. 18, 2 S. W. 609; *Perry v. State*, 22 App. 19, 2 S. W. 600; *Belcher v. State*, 39 App. 121, 44 S. W. 1160. Where the venue is not proved, the judgment will not be allowed to stand. *Belcher v. State*, 35 App. 168, 32 S. W. 770. The court can not after the expiration of the term, amend the record to show the venue. Id.

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.]

Cited, *Hubbard v. Lord*, 59 Tex. 384.

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| 1. Creation of new county. | 10. Purchasing and receiving cattle without bill of sale. |
| 2. Abortion. | 11. Renting house to be used for gaming. |
| 3. — Accomplice. | 12. Sending threatening letters. |
| 4. Bigamy. | 13. Shipment of intoxicating liquors. |
| 5. Bringing stolen property into state. | 14. Swindling. |
| 6. Conversion. | 15. Theft from the person. |
| 7. Conversion by bailee. | 16. Unlawfully disposing of estray. |
| 8. Driving stock out of county without owner's consent. | |
| 9. Fraudulent disposition of mortgaged property. | |

1. **Creation of new county.**—Where after an indictment was returned a new county was created which included the scene of the crime, the indictment was properly transferred to such new county. *Gomez v. State* (Cr. App.) 170 S. W. 711.

2. **Abortion.**—The venue of the offense of abortion is in the county in which the means were used or taken. *Moore v. State*, 37 App. 552, 40 S. W. 287.

3. **Accomplice.**—Where accused was charged as accomplice to the commission of an abortion on his stepdaughter, resulting from an operation on her in P. county, the venue was properly laid in that county, though all of the acts of encouragement, etc., which constituted accused an accomplice, occurred in another county. *Fondren v. State* (Cr. App.) 169 S. W. 411.

4. **Bigamy.**—The venue of the offense of bigamy is in the county where the marriage occurs. *Brown v. State* (Cr. App.) 27 S. W. 137.

5. **Bringing stolen property into state.**—For bringing stolen property into this state the prosecution should be commenced in the county in which the accused is found. *McKenzie v. State*, 22 App. 568, 25 S. W. 426, 40 Am. St. Rep. 795.

6. **Conversion.**—Where defendant hired hack and harness in El Paso county and sold it in Midland county, venue was properly laid in El Paso county. See *Lopez v. State*, 37 App. 651, 40 S. W. 972; *Steadham v. State*, 40 App. 44, 48 S. W. 177.

7. **Conversion by bailee.**—The venue of the offense of conversion by a bailee is in the county in which the conversion was consummated. *Lopez v. State*, 37 App. 649, 40 S. W. 972. See, also, *Steadham v. State*, 40 App. 43, 48 S. W. 177; *Elton v. State*, 40 App. 342, 50 S. W. 379, 51 S. W. 245; *Cannon v. State*, 38 App. 324, 42 S. W. 981.

8. **Driving stock out of county without owner's consent.**—The venue of the offense under P. C. art. 1407, of driving stock out of county without the owner's consent, is either the county from or into which the animal was driven, and the offense is complete in either, the moment the animal is driven across the line of the coterminous counties. *Rogers v. State*, 9 App. 43, distinguishing *Senterfit's Case*, 41 Tex. 186.

9. **Fraudulent disposition of mortgaged property.**—The venue of the offense of fraudulently disposing of mortgaged property is in the county in which it was fraudulently disposed of. *Robberson v. State*, 3 App. 502. But see *Williams v. State*, 27 App. 258, 11 S. W. 114, holding that the venue for fraudulently removing mortgaged property is in the county where the mortgage was executed and the property situated.

10. **Purchasing and receiving cattle without bill of sale.**—It seems that the offense of driving stock to market without a bill of sale under P. C. art. 1360, must be prosecuted in the county into which the stock is driven, and can not be prosecuted in the county from which the same was driven. *Senterfit v. State*, 41 Tex. 186. But the court must have overlooked the general statute giving counties jurisdiction when the offense is committed within four hundred yards of the boundary. *Rogers v. State*, 9 App. 43.

The venue of the offense of purchasing and receiving cattle without a bill of sale is in the county of the purchase. *Brockman v. State*, 16 App. 54.

11. **Renting house to be used for gaming.**—The venue of the offense of renting a house to be used for gaming is in the county in which the house is situated. *Eylar v. State*, 37 App. 257, 39 S. W. 665.

12. **Sending threatening letters.**—The venue of the offense of sending a threatening letter is in the county from which the letter was sent. *Landa v. State*, 26 App. 580, 10 S. W. 218.

13. **Shipment of intoxicating liquors.**—Accused delivered a trunk containing intoxicating liquor, unlabeled, to a railroad company at D. for shipment to G. in U. county, knowing that it would be necessary for the carrier to transfer the liquor to a connecting carrier at a junction point in U. county; the initial carrier's line not running to destination. Held, that accused thereby made the initial carrier his agent to deliver the liquor to the connecting carrier in U. county, which constituted an offense separate from that committed by the original delivery of the liquor to the initial carrier at D., for which accused could be properly prosecuted in U. county. *Phillips v. State* (Cr. App.) 167 S. W. 353.

14. **Swindling.**—The venue of the offense of swindling is in the county in which the property was acquired. *Sims v. State*, 28 App. 447, 13 S. W. 653, and cases cited.

Where a check on which swindling is based is drawn in one county and is paid in another, the venue is in the latter county. *Dechard v. State* (Cr. App.) 57 S. W. 814.

15. **Theft from the person.**—The venue of the offense of theft from the person is in the county of the taking. *Nichols v. State*, 28 App. 105, 12 S. W. 505, and cases cited.

16. **Unlawfully disposing of estray.**—The venue of the offense of unlawfully disposing of an estray is in the county in which the animal was disposed of. *Tharp v. State*, 28 Tex. 696. But see *Brogden v. State*, 44 Tex. 103.

TITLE 5

OF ARREST, COMMITMENT AND BAIL

Chap.	Chap.
1. Of arrest without warrant.	4. Of bail—Continued.
2. Of arrest under warrant.	2. Recognizance and bail bond.
3. Of the commitment or discharge of the accused.	3. Surrender of the principal by his bail.
4. Of bail.	4. Bail before the examining court.
1. General rules applicable to all cases of bail.	5. Bail by witnesses.

CHAPTER ONE

OF ARREST WITHOUT WARRANT

Art.	Art.
259. Arrest without warrant, when.	264. In such cases must take the offender before the nearest magistrate.
260. Same subject.	
261. Who may authorize.	264a. Arrest of trespassers; may prohibit sale of liquor, etc.
262. When felony has been committed.	
263. In all such cases the officer may adopt the same measures as, etc.	

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.]

See notes under art. 260.

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, 121, 122 and 123, 147.

See Penal Code, art. 479.

Cited *Weaver v. State*, 19 App. 547, 53 Am. Rep. 389; *Presley v. Ft. Worth & D. C. Ry. Co.* (Civ. App.) 145 S. W. 669; *Myers v. Colquitt* (Civ. App.) 173 S. W. 996.

In general.—Our statutes on the subject of arrest without warrant must be construed in subordination to the constitutional guaranty against searches and seizures. Bill of Rights, sec. 9, article 5, ante; *Lacy v. State*, 7 App. 403.

Our statutes, articles 259 to 262 enumerate the only conditions on which a peace officer is authorized to arrest without a warrant. *Mundine v. State*, 37 App. 5, 38 S. W. 619.

By peace officers.—A person unlawfully carrying arms may be arrested by a peace officer without warrant, upon his own knowledge, or upon information of some credible person. Penal Code, art. 479; *Jacobs v. State*, 23 App. 79, 12 S. W. 408; *Hodges v. State*, 6 App. 615; *Miller v. State*, 32 App. 319, 20 S. W. 1103; *Ex parte Sherwood*, 29 App. 334, 15 S. W. 812; *Montgomery v. State*, 43 App. 304, 65 S. W. 539, 55 L. R. A. 710; *Morawietz v. State*, 46 App. 436, 80 S. W. 998; *Brown v. King*, 41 Civ. App. 588, 93 S. W. 1019; *Hull v. State*, 50 App. 607, 100 S. W. 405; *Ricen v. State*, 63 App. 89, 138 S. W. 403; *Condron v. State* (Cr. App.) 155 S. W. 253.

A peace officer is empowered to make an arrest without a warrant where a felony or a breach of the peace is committed in his presence or within his view, or when ordered verbally by a magistrate within whose presence or view such offenses are committed, or in certain cases prescribed by municipal authorities, or when there is no time to procure a warrant, and the offender is about to escape, or in the prevention of offenses as prescribed in chapters 2 and 3 of title 3, ante. *Johnson v. State*, 5 App. 43; *Ross v. State*, 10 App. 455, 38 Am. Rep. 643; *Brown v. State*, 14 App. 136; *Weaver v. State*, 19 App. 547, 53 Am. Rep. 389; *Lynch v. State*, 41 App. 510, 57 S. W. 1130.

It is no part of the duty of a constable to make an arrest without a warrant on a charge of burglary where the offense was not committed in the view of the officer nor legal complaint made. *Kasling v. Morris*, 71 Tex. 584, 9 S. W. 739, 10 Am. St. Rep. 797; *Morris v. Kasling*, 79 Tex. 141, 15 S. W. 226, 11 L. R. A. 398.

The fact that the party arrested or sought to be arrested without warrant may justly have been suspected of felony will not justify a homicide on the part of the officer, unless he bring himself within some of the rules laid down authorizing such arrest without warrant. (*Staples v. State*, 14 App. 136; *Jacobs v. State*, 23 App. 79, 12 S. W. 408; *Ex parte Sherwood*, 29 App. 334, 15 S. W. 812.) *Carter v. State*, 30 App. 551, 17 S. W. 1102, 28 Am. St. Rep. 944.

Warrant is not required for the arrest of an escaped convict. *Ex parte Sherwood*, 29 App. 334, 15 S. W. 812.

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 App. 530, 21 S. W. 251, 37 Am. St. Rep. 828.

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

When parties fire off pistols on a public road at night within two hundred and fifty yards of deputy sheriffs who see the flashes and hear the reports, the officers are authorized to arrest the parties without warrants, and if in attempting to arrest the parties they shoot one who has no pistol and was engaged in the disturbance they are acting officially and the sheriff is liable for damages. *King v. Brown*, 100 Tex. 109, 94 S. W. 329, 330.

One whose peace is disturbed can cause the arrest of the offender by an officer who was not present at time of disturbance and both the officer and the person disturbed are protected by this article when the officer makes the arrest without a warrant. *James v. S. A. & A. P. Ry. Co.*, 53 Civ. App. 603, 116 S. W. 642.

A violation of Pen. Code, art. 1531, making it a misdemeanor to board a train without any lawful business, with intent to obtain a free ride, would not justify the arrest of the offender without a warrant. *Freeman v. Costley* (Civ. App.) 124 S. W. 458.

Facts held to require instructions on the issue as to whether the officers had a warrant of arrest. *Sanchez v. State*, 70 App. 24, 156 S. W. 218.

A white city marshal may enter a negro coach within the corporate limits of the city to investigate a prior disturbance therein, and ascertain whether it is necessary to take steps to prevent its recurrence. *Missouri, K. & T. Ry. Co. of Texas v. Brown* (Civ. App.) 158 S. W. 259.

Where a deputy sheriff was surprised and captured and later killed by a body of men armed and organized in Texas to invade Mexico, it was the duty of the sheriff, on ascertaining such crime, to use all necessary force to pursue and capture the criminals without a warrant. *Serrato v. State* (Cr. App.) 171 S. W. 1133.

By private persons.—A private person cannot arrest another on suspicion that he is a horse thief. *Lacy v. State*, 7 App. 403.

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 App. 545.

Murder in resisting arrest. *Stewart v. State* (Cr. App.) 174 S. W. 1077.

A charge held to have correctly submitted the issue of resisting arrest. *Stewart v. State* (Cr. App.) 174 S. W. 1077.

Presence and view.—*Lacy v. State*, 7 App. 403; *Russell v. State*, 37 App. 314 39 S. W. 674; *Williams v. State*, 64 App. 491, 142 S. W. 899; *Riter v. Neatherly* (Civ. App.) 157 S. W. 439; *S. H. Kress & Co. v. Lawrence* (Civ. App.) 162 S. W. 448.

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.]

See notes under article 259, ante.

See, ante, art. 44.

Municipal authority.—See *Joske v. Irvine* (Civ. App.) 43 S. W. 278; *Id.*, 91 Tex. 574, 44 S. W. 1059; *Minter v. State*, 70 App. 634, 159 S. W. 286.

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 App. 70.

An ordinance authorized 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 App. 434, 77 S. W. 513, 108 Am. St. Rep. 961.

A town or city has the authority under the constitution and laws of this state to authorize the arrest of one found drunk in a public place by an officer without warrant. If there is anything in the ordinances authorizing this inconsistent with any state law, the ordinances would be invalid but in no sense can it be regarded as inconsistent with the laws of the state. *Early v. State*, 50 App. 344, 97 S. W. 85.

Where, in an action for damages for an arrest without a warrant in a town, it conclusively appeared that the arrest was justified, if made under an ordinance passed in accordance with this article, the burden was upon the plaintiff to show that no such ordinance had been passed. *Presley v. Ft. Worth & D. C. Ry. Co.* (Civ. App.) 145 S. W. 669.

The arrest in a town, without a warrant, of one who insisted on riding in a freight car with his shipment, instead of in the caboose, where he belonged, was authorized under this article. *Presley v. Ft. Worth & D. C. Ry. Co.* (Civ. App.) 145 S. W. 669.

A policeman could arrest without a warrant one having a reputation of being a common prostitute, who was found in bed with a man in a reputed house of ill fame. *Haller v. State*, 72 App. 294, 162 S. W. 872.

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.]

See notes under 259, ante.

Ante, art. 44, and notes.

Cited, *Presley v. Ft. Worth & D. C. Ry. Co.* (Civ. App.) 145 S. W. 669.

Duty of officer.—Under this article not only the fact that a felony has been committed, but the identity of the accused, should be disclosed to the officer. *Morris v. Kasling*, 79 Tex. 141, 15 S. W. 226, 11 L. R. A. 398; *Cortez v. State*, 47 App. 10, 83 S. W. 814.

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 App. 415, 35 S. W. 660; *Cortez v. State*, 47 App. 10, 83 S. W. 814.

Town marshal, see *Newburn v. Durham*, 10 Civ. App. 655, 32 S. W. 112.

Before an officer can arrest without a warrant he must get facts which will authorize him to apply for a warrant. *Cortez v. State*, 44 App. 169, 69 S. W. 538.

Bail.—On a voluntary surrender of an offender before indictment the sheriff cannot take his bond, but must carry him before a magistrate. *State v. Miller*, 31 Tex. 564.

Charge to jury.—As to the right to arrest a person for offense committed in presence of one who made arrest, charge held not prejudicial. *Hill v. State*, 35 App. 371, 33 S. W. 1075.

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. 1092-1101.

Cited, *Presley v. F. Worth & D. C. Ry. Co.* (Civ. App.) 145 S. W. 669; *Stewart et al. v. State* (Cr. App.) 174 S. W. 1077.

Territorial limits.—A peace officer can arrest only within the limits of his own county. *Jones v. State*, 26 App. 1, 9 S. W. 53, 8 Am. St. Rep. 454; *Ledbetter v. State*, 23 App. 247, 5 S. W. 226; *Peter v. State*, 23 App. 684, 5 S. W. 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.]

See *Short v. State*, 16 App. 44, and cases cited.

Art. 264a. Arrest of trespassers; may prohibit sale of liquor, etc.—The commanding officer upon any occasion of duty may place in arrest, during the continuance thereof, any person who shall trespass upon the camp ground, parade ground, armory or other place devoted to such duty, or shall in any way or manner interrupt or molest the orderly discharge of duty by those under arms, or shall disturb or prevent the passage of troops going to and returning from any duty. He may prohibit and prevent the sale or use of all spirituous liquors, wine, ale or beer, the holding of huckster or auction sales, and all gambling within the limit of the post, camp ground, place of encampment, parade or drill under his command, or within limits not exceeding one mile therefrom, as he may prescribe. And he may in his discretion abate as common nuisances all such sales. [Act 1905, p. 183, ch. 104, § 73.]

Explanatory.—The above provision was omitted from the revised C. C. P., and is inserted in this compilation in view of the decisions in *Berry v. State* (Cr. App.) 156 S. W. 626; *Stevens v. State*, 70 App. 565, 159 S. W. 505; *Robertson v. State*, 70 App. 307, 159 S. W. 713.

CHAPTER TWO

OF ARREST UNDER WARRANT

Art.	Art.
265. Definition of "warrant of arrest."	279. Cannot be compelled to execute warrant, etc.; has the same right as peace officer.
266. Is sufficient if it have, etc.	280. How warrant is executed.
267. Magistrate may issue warrant of arrest, in what cases.	281. Arrest in one county for felony committed in another.
268. "Complaint" is what.	282. Arrest in one county for misdemeanor committed in another.
269. Requisites of complaint.	283. Proceeding when party arrested for misdemeanor, etc., fails to give bond.
270. Warrant issued by magistrate, etc., extends to every part of the state.	284. Duty of sheriff receiving notice, etc.
271. Warrant issued by other magistrates does not extend, etc., except, etc.	285. Prisoner shall be discharged if not demanded in thirty days.
272. Warrant of arrest may be forwarded by telegraph, etc.	286. A person is said to be arrested, when.
273. Complaint by telegraph and proceedings thereon.	287. An arrest may be made, when.
274. Certified copy of warrant or complaint to be deposited with telegraph manager, etc.	288. What force may be used.
275. Duty of telegraph manager at the office of delivery.	289. In case of felony, may break door.
276. Warrant or complaint must be under official seal, etc.	290. Authority to make arrest must be made known.
277. Telegram to be prepaid, unless, etc.	291. Person escaping, etc., may be retaken without warrant.
278. Warrant may be directed to any suitable person, when.	291a. Members of militia exempt from arrest, when.

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.]

See post, art. 980; Willson's Cr. Forms, 1029, 1031.

Warrant issued by justice of the peace.—A justice of the peace cannot issue a warrant to be executed in another county. A warrant issued by a justice must be directed to some suitable officer of his county. *Toliver v. State*, 32 App. 444, 24 S. W. 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.]

See post, art. 975; Willson's Cr. Forms, 1029, 1031.

Authority of magistrate.—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*, 29 App. 31, 13 S. W. 1013. And see *Pierce v. State*, 17 App. 232.

Designation or description of accused.—See *Newburn v. Durham*, 10 Civ. App. 655, 32 S. W. 112.

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 App. 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*, 8 App. 545.

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 App. 31, 13 S. W. 1013.

Designation or description of offense.—Gaming eo nomine is not an offense, and a warrant of arrest is not legal unless it states an offense. *Fulkerson v. State*, 43 App. 587, 67 S. W. 502.

The warrant of arrest issued by the governor in extradition proceedings must name the offense with which accused is charged in the state to which it is sought to take him. *Ex parte Thomas*, 53 App. 37, 108 S. W. 664.

A warrant for arrest of a party issued by a justice of the peace sitting simply as a magistrate to examine and inquire as to whether the offense had been committed which charged "that the accused was guilty of an offense—of unlawfully whipping a child," was sufficient. *Owen v. State*, 58 App. 261, 125 S. W. 405.

A warrant charging defendant "with the offense of a misdemeanor," instead of stating that he was accused of an offense against the law, naming it, as prescribed by this article and article 975, is insufficient. *Sullivan v. State* (Cr. App.) 148 S. W. 1091.

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.]

See post, arts. 269, 971, et seq. Willson's Cr. Forms, 1029, 1031.

Cited, *Pierce v. State*, 17 App. 232; *Graham v. State*, 29 App. 31, 13 S. W. 1013.

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.]

Authority of prosecuting attorneys, see ante, art. 34, and notes, and post, art. 479 and notes.

Complaints before magistrates, see post, arts. 972 and 973.

Duty to file information on complaint, see art. 35.

Prerequisites to information, see post, art. 479.

Effect of charge of misdemeanor or felony.—When a complaint charges a misdemeanor information shall be presented on it in the county court. When it charges a felony it must be filed with a magistrate, who shall proceed in accordance with the law governing examining courts. *Kinley v. State*, 29 App. 532, 16 S. W. 339.

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.

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.

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

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.]

Habeas corpus to determine sufficiency, see notes under article 160.

Cited, *Bradberry v. State* (Cr. App.) 152 S. W. 169.

Ex parte Sherwood, 29 App. 334, 15 S. W. 812; *Robertson v. State*, 25 App. 529, 8 S. W. 659; *Ex parte Nitsche* (Cr. App.) 170 S. W. 1101.

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| 1. Necessity. | 9. Signature. |
| 2. Persons who may take complaints. | 10. Verification. |
| 3. Persons who may make complaint. | 11. — Information and belief. |
| 4. Form and requisites in general. | 12. Filing. |
| 5. Commencement. | 13. Amendment and correction. |
| 6. Time and place of offense. | 14. Quashing. |
| 7. Designation or description of accused. | 15. Variance between complaint and information. |
| 8. Description of offense. | |

1. Necessity.—Prerequisite to information, see post, art. 479.

Before a warrant based upon a complaint made before a magistrate can legally issue, it must appear that the facts exist which would authorize a verbal arrest, or the facts must present a case in which the magistrate is specially authorized to issue the warrant, or there must be made by some person before a magistrate a complaint charging the commission of an offense, said complaint containing the requisites prescribed in the preceding article. *Pierce v. State*, 17 App. 232.

An officer must make an arrest without warrant when told by a credible person that one is carrying a pistol. *Condron v. State* (Cr. App.) 155 S. W. 253.

2. Persons who may take complaints.—County attorneys. *Rambo v. State*, 43 App. 271, 64 S. W. 1039; *Thomas v. State*, 37 App. 142, 38 S. W. 1011; *Williams v. State*, 50 App. 269, 96 S. W. 47.

Assistant county attorney. *Kelly v. State*, 36 App. 481, 38 S. W. 39; *Moore v. State*, 36 App. 574, 38 S. W. 209; *Copeland v. State*, 36 App. 575, 38 S. W. 210; *Wilkins v. State*, 33 App. 320, 26 S. W. 409.

Justice of the peace. *Lindley v. State*, 57 App. 346, 123 S. W. 141; *Gentry v. State*, 62 App. 497, 137 S. W. 696.

Deputy county attorneys. *Wilkins v. State*, 33 App. 320, 26 S. W. 409; *Dane v. State*, 36 App. 86, 35 S. W. 661.

De facto officers. *Dane v. State*, 36 App. 86, 35 S. W. 661.

City attorneys. *Johnson v. State*, 47 App. 580, 85 S. W. 274.

County judge. *Stepp v. State*, 53 App. 158, 109 S. W. 1095.

3. Persons who may make complaint.—See post, art. 479.

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 App. 47, 10 S. W. 749, 11 Am. St. Rep. 180; *Smith v. State*, 22 App. 196, 2 S. W. 542; *Thomas v. State*, 14 App. 70; *Nixon v. Armstrong*, 38 Tex. 296; *Wooten v. State*, 57 App. 89, 121 S. W. 703; *Jones v. State*, 58 App. 313, 125 S. W. 914.

A county attorney cannot make complaint unless he was the only witness to the offense. *Daniels v. State*, 2 App. 353.

Convicted felon is not competent to make complaint. *Perez v. State*, 10 App. 327.

Husband not competent to make complaint against wife for adultery. *Thomas v. State*, 14 App. 70.

4. Form and requisites in general.—Willson's Cr. Forms, 747, 1030.

Complaint, without reference to form, is sufficient if it substantially complies with the terms of the statute. *Brown v. State*, 11 App. 451; *Arrington v. State*, 13 App. 551; *Pittman v. State*, 14 App. 576; *Bell v. State*, 18 App. 53, 51 Am. Rep. 293.

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

5. Commencement.—Need not commence "in the name and by the authority of the State of Texas." *Johnson v. State*, 31 App. 464, 20 S. W. 989; citing *Jefferson v. State*, 24 App. 535, 7 S. W. 244.

Where a party is prosecuted on a complaint before a justice of the peace for a misdemeanor, it must be "in the name and by the authority of the State of Texas" or else the complaint will be void. *Ex parte Jackson* (Cr. App.) 96 S. W. 924.

6. Time and place of offense.—Complaint must show the offense anterior to its date and correspond with the affidavit. *Huff v. State*, 23 App. 291, 4 S. W. 890, and cases cited; *Womack v. State*, 31 App. 41, 19 S. W. 605; *Lanham's case*, 9 App. 232; *Williams v. State*, 17 App. 521; *Watson v. State* (Cr. App.) 45 S. W. 718; *Jennings v. State*, 30 App. 428, 18 S. W. 90; *Petty v. State*, 60 App. 64, 131 S. W. 215; *Martin v. State*, 72 App. 454, 162 S. W. 1145.

A complaint charging an offense on a certain day, sworn to and filed on the same day, and not stating that the offense was committed anterior to the time of filing was sufficient. *Williams v. State*, 17 App. 521. *Contra*, *Martin v. State*, 72 App. 454, 162 S. W. 1145.

And the date must not be an impossible one. *Hefner v. State*, 16 App. 573; *Jennings v. State*, 30 App. 428, 18 S. W. 90; *Womack v. State*, 31 App. 41, 19 S. W. 605.

The complaint must allege the venue. *Smith v. State*, 3 App. 549, and cases cited.

A complaint sworn to at a date prior to the time the offense is alleged to have occurred is insufficient to support a conviction. *Watson v. State* (Cr. App.) 45 S. W. 718.

7. Designation or description of accused.—See *Wilson v. State*, 6 App. 154.

"George" and "Georg" as given name, are idem sonans, and sufficient. *Hall v. State*, 32 App. 594, 25 S. W. 292.

Naming accused as "Mrs. Beaumont" is not sufficient. *Beaumont v. Dallas*, 34 App. 68, 29 S. W. 157.

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 App. 212, 78 S. W. 1076.

Defendant's name, if unknown should be so stated and, if not known, some reasonable definite description of him should be given. *Mistrot v. State*, 72 App. 408, 162 S. W. 833.

8. Description of offense.—Need not observe the same particularity in setting out the offense as required of indictment or information. *Bell v. State*, 18 App. 53, 51 Am. Rep. 293, and cases cited; *Arrington v. State*, 13 App. 551.

A complaint charging unlawful riding on a train of the "G. H. & S. A. Ry. Co." would not support an information charging that the train was on the track of the Galveston, Harrisburg & San Antonio Railway Company. *Cardenas v. State*, 58 App. 109, 124 S. W. 953.

The complaint does not fail to charge an offense because using "wilful" where the statute uses "knowingly"; the words being synonymous and "wilful" being of more extensive meaning (citing *Words and Phrases*, vol. 3, pp. 7468-7481, 7835, 7836; vol. 5, pp. 3937, 3939). *Ex parte Cowden* (Cr. App.) 168 S. W. 539.

9. 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 App. 231, 26 S. W. 197; *Malz v. State*, 36 App. 447, 34 S. W. 267, 37 S. W. 748; *Singh v. State* (Cr. App.) 146 S. W. 891.

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*, 36 App. 447, 34 S. W. 267, 37 S. W. 748.

Where name to complaint is signed thus: John X. Steele in absence of proof ^{his} mark that complainant was unable to write his name it will be presumed that he signed his name to the complaint. *Taylor v. State*, 44 App. 437, 72 S. W. 181.

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 App. 331, 97 S. W. 481.

Art. 479 does not require a complaint to be signed by affiant. *Lewis v. State*, 50 App. 331, 97 S. W. 481.

10. **Verification.**—Complaint must be authenticated by the jurat of the officer before whom it was made. *Robertson v. State*, 25 App. 529, 8 S. W. 659; *Neiman v. State*, 29 App. 360, 16 S. W. 253; *Jennings v. State*, 30 App. 428, 18 S. W. 90; *Morris v. State*, 2 App. 503; *Dishongh v. State*, 4 App. 158; *Lanham v. State*, 9 App. 232; *Montgomery v. State*, 60 App. 303, 131 S. W. 1087.

The recitals of the jurat, when in conflict with those of the complaint, will control. *Lanham v. State*, 9 App. 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 App. 360, 16 S. W. 253.

11. — **Information and belief.**—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 App. 462, 76 S. W. 437; *Smith v. State*, 45 App. 411, 76 S. W. 436; *Fricks v. State*, 58 App. 100, 124 S. W. 922; *Hall v. State*, 32 App. 594, 25 S. W. 292; *Anderson v. State*, 34 App. 96, 29 S. W. 384; *Dodson v. State*, 35 App. 571, 34 S. W. 754; *Green v. State*, 62 App. 50, 136 S. W. 467; *Wright v. State*, 63 App. 429, 140 S. W. 1105.

Sufficient to charge the commission of the offense on the affiant's "best knowledge and belief." *Anderson v. State*, 34 App. 96, 29 S. W. 384, and cases cited; *Brown v. State*, 11 App. 451; *Clark v. State*, 23 App. 260, 5 S. W. 115.

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

12. **Filing.**—See arts. 35 and 479.

Kinley v. State, 29 App. 532, 16 S. W. 339; *Mitchell v. State*, 46 App. 258, 79 S. W. 26; *Stinson v. State*, 5 App. 31; *Schott v. State*, 7 App. 616; *Gentry v. State*, 62 App. 497, 137 S. W. 696; *Bradberry v. State* (Cr. App.) 152 S. W. 169.

13. **Amendment and correction.**—Jurat cannot be affixed after trial. *Neiman v. State*, 29 App. 360, 16 S. W. 253; *Scott v. State*, 9 App. 434; *Dishongh v. State*, 4 App. 158; *Morris v. State*, 2 App. 503.

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 App. 442.

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

Fraudulent alteration of date. *Huff v. State*, 23 App. 291, 4 S. W. 890, and cases cited.

Complaint as to matter of substance cannot be amended after announcement for trial. *Williams v. State*, 34 App. 100, 29 S. W. 472. Date is matter of substance. *Huff v. State*, 23 App. 291, 4 S. W. 890, and cases cited.

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 App. 29, 100 S. W. 151.

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 App. 156, 105 S. W. 803; *Flournoy v. State*, 51 App. 29, 100 S. W. 151.

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 App. 232, 115 S. W. 1191.

Insertion of name of affiant. *Montgomery v. State*; 60 App. 303, 131 S. W. 1087.

Attaching jurat, without permission of court, after arrest and bail is unauthorized. *Montgomery v. State*, 60 App. 303, 131 S. W. 1087.

The jurat may be amended before trial to show the exact date upon which it was made. *Cubine v. State* (Cr. App.) 151 S. W. 301.

Procedure where complaint is attacked as not officially signed. *Graham v. State*, 72 App. 9, 160 S. W. 714.

14. **Quashing.**—Where a party relies upon matters of fact to quash an information, affidavit or indictment, the verity of the fact, if it exists, must be shown by the attacking party. *Taylor v. State*, 44 App. 437, 72 S. W. 181.

15. **Variance between complaint and information.**—See post, art. 479.

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.]

See post, art. 271.

Extra-territorial warrant.—A sheriff cannot execute process beyond the limits of his county. *Jones v. State*, 26 App. 1, 9 S. W. 53, 8 Am. St. Rep. 454.

Where none of the requisites of this article are observed in issuance of warrant of arrest an officer cannot justify for making an illegal arrest. *Little v. Rich*, 55 Civ. App. 326, 118 S. W. 1077.

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.]

See Willson's Cr. Forms, 1032.

Decisions under former law.—This article, prior to the amendment of 1905, prohibited the execution in another county of a warrant issued by a magistrate, other than a Judge of the Supreme Court, Court of Appeals, district court, or county court, unless indorsed by one of such magistrates, or a magistrate in the county where accused was found.

For decisions under former law, see *Hart v. State*, 15 App. 202, 49 Am. Rep. 188; *Peter v. State*, 23 App. 684, 5 S. W. 228; *Ledbetter v. State*, 23 App. 247, 5 S. W. 226; *Childers v. State*, 30 App. 160, 16 S. W. 903, 28 Am. St. Rep. 899; *Toliver v. State*, 32 App. 444, 24 S. W. 286; *Ex parte Sykes*, 46 App. 51, 79 S. W. 538; *Jones v. State*, 26 App. 1, 9 S. W. 53, 8 Am. St. Rep. 454; *Sneed v. McFathridge*, 43 Civ. App. 592, 97 S. W. 114, 115.

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 Tex. 102, 23 S. W. 645, 22 L. R. A. 87; Willson's Cr. Forms, 1032, 1033.

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.]

For the offense of divulging contents of warrant, etc., see P. C., 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.]

See Willson's Cr. Forms, 1033.

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.]

See Messer, alias Moore, v. State, 37 App. 635, 40 S. W. 488; Willson's Cr. Forms, 1031.

Authority.—A citizen specially appointed under this and art. 979, 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 App. 42, 22 S. W. 25.

Carrying weapons.—When one is acting under appointment made under this article, he has the powers and privileges of a peace officer and has a right to carry his pistol. Jenkins v. State, 47 App. 224, 82 S. W. 1036.

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 App. 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; Willson's Cr. Forms, 1035.

Bail.—A peace officer making an arrest for a felony by virtue of the warrant of a magistrate, has no right to take bail, but must take the accused before the proper magistrate named in the writ. *Short v. State*, 16 App. 44.

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.]

See *Robertson v. State*, 36 Tex. 346; *Arrington v. State*, 13 App. 551; *Willson's Cr. Forms*, 1034.

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.]

See post, arts. 292, 293, 308, 324.

Bail.—One who was arrested for disturbing a religious meeting in a county other than that in which the offense took place was entitled to give proper bond. *Buzan v. State*, 59 App. 213, 128 S. W. 388.

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 App. 361, 23 S. W. 687; *Craig v. State*, 30 App. 619, 18 S. W. 297; *Bennett v. State*, 25 App. 695, 8 S. W. 933; *Nolen v. State*, 8 App. 585; *Id.*, 9 App. 419; *Conoly v. State*, 2 App. 412; *Grosse v. State*, 11 App. 364.

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.]

See *Pen. Code*, arts. 42, 1092, 1100.

He can use violence only in his necessary self-defense. *Skidmore v. State*, 43 Tex. 93; s. c., 2 App. 20; *English v. State*, 34 App. 190, 30 S. W. 233; *Jones v. State*, 26 App. 1, 9 S. W. 53, 8 Am. St. Rep. 454; *Miller v. State*, 32 App. 319, 20 S. W. 1103; *Tiner v. State*, 44 Tex. 128; *Giebel v. State*, 28 App. 153, 12 S. W. 591; *Caldwell v. State*, 41 Tex. 86; *James v. State*, 44 Tex. 314; *Carter v. State*, 30 App. 551, 17 S. W. 1102, 28 Am. St. Rep. 944; *Plasters v. State*, 1 App. 673; *Beaverts v. State*, 4 App. 175, and cases cited; *Giroux v. State*, 40 Tex. 97; *Miller v. State*, 31 App. 609, 21 S. W. 925, 37 Am. St. Rep. 836; *Stewart et al. v. State* (Cr. App.) 174 S. W. 1077.

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.]

Disclosing authority.—See *Plasters v. State*, 1 App. 673; *Stewart et al. v. State* (Cr. App.) 174 S. W. 1077.

The officer should have his warrant in possession when attempting arrest, as the party whose arrest is sought has the right to demand its profert. *Cabell v. Arnold*, 86 Tex. 102, 23 S. W. 645, 22 L. R. A. 87; *Montgomery v. State*, 43 App. 304, 65 S. W. 539, 55 L. R. A. 710.

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 App. 673.

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 App. 161, 29 S. W. 1074, 53 Am. St. Rep. 705.

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.]

Prisoners.—For decision on sheriff's authority to resort to force in preventing escape of prisoner, see *James v. State*, 44 Tex. 314.

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 App. 312, 22 S. W. 1035, 40 Am. St. Rep. 782.

Convicts.—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 Tex. 645.

A convict guard may kill to prevent the escape of a convict, if absolutely the only means to that end. *Washington v. State*, 1 App. 647.

It is not even extenuation of murder that it was committed by an escaped convict resisting re-arrest. *Wallace v. State*, 20 App. 360, and cases cited. See, also, *Waite v. State*, 13 App. 169.

Either an officer or private citizen may arrest an escaped convict without warrant. *Ex parte Sherwood*, 29 T. Cr. R., 334, 15 S. W. 812.

Art. 291a. Members of militia exempt from arrest, when.—No persons belonging to the active militia of this state shall be arrested on any civil process while going on duty to or returning from any place at which he may be required to attend for military duty, except in cases of treason, felony, or breach of the peace. [Act 1905, p. 183, ch. 104, § 70.]

Explanatory.—The above provision was omitted from the revised Code of Criminal Procedure, and is inserted in this compilation in view of the decision in *Berry v. State* (Cr. App.) 156 S. W. 626.

CHAPTER THREE

OF THE COMMITMENT OR DISCHARGE OF THE ACCUSED

Art. 292. Proceeding when brought before a magistrate.	Art. 297. Right of counsel to examine witnesses.
293. When examination postponed for reasonable time; custody and disposition of the accused during that time.	298. Same rules of evidence govern as on final trial.
294. Defendant shall be informed of his right to make statement, etc.	299. Witnesses shall be examined in presence of the accused.
295. Voluntary statement of accused.	300. Testimony shall be reduced to writing, signed and certified.
296. Witnesses may be placed under the rule.	301. Magistrate may issue attachment for witnesses.

Art.	Art.
302. May issue attachment to another county, when.	308. When committed, discharged or admitted to bail.
303. Witness need not be tendered fees, etc.	309. When no safe jail, etc.
304. Attachment shall be executed forthwith.	310. To whom warrant is directed in such case.
305. Manner of postponing examination to procure testimony.	311. Warrant of commitment—its requisites.
306. Capital offenses—who may discharge.	312. When prisoner sent to jail of another county, etc.
307. Proceeding when insufficient bail has been taken.	313. Duty of sheriff in reference to prisoners.
	314. Discharge shall not prevent, etc.

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.]

Examining court.—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 App. 202, 49 Am. Rep. 188; *Kerry v. State*, 17 App. 178, 50 Am. Rep. 122; *Childers v. State*, 30 App. 160, 16 S. W. 903, 28 Am. St. Rep. 899.

A magistrate cannot sit as an examining court or conduct an examining trial until he has the party under arrest and before him. *Brown v. State*, 55 App. 572, 118 S. W. 144.

But he cannot, as an examining court, discharge one accused of a capital felony. *Post*, art. 306.

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 ballable cases. *Post*, art. 350; *Willson's Cr. Forms*, 1051.

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.]

Disposition of statement, see *post*, arts. 347-349.

Testimony of defendant, see *post*, art. 790.

See *Shaw v. State*, 32 App. 155, 22 S. W. 588; *Powell v. State*, 37 Tex. 348; *Brez v. State*, 39 Tex. 95; *Alston v. State*, 41 Tex. 39; *Guy v. State*, 9 App. 161; *Rice v. State*, 22 App. 654, 3 S. W. 791; *Jackson v. State*, 29 App. 458, 16 S. W. 247; *Walker v. State*, 28 App. 112, 12 S. W. 503; *Tabor v. State*, 34 App. 631, 41 S. W. 662, 53 Am. St. Rep. 726; *Kirby v. State*, 23 App. 13, 5 S. W. 165; *Gentry v. State*, 24 App. 80, 5 S. W. 660; *Bailey v. State*, 26 App. 706, 9 S. W. 270; *Salas v. State*, 31 App. 485, 21 S. W. 44.

Repeal of statute.—This and the following article are not repealed by article 790, *post*. The articles authorizing a defendant to make a voluntary statement at an examining trial relate to a different subject than the act which authorizes him to testify in his own behalf. *Aiken v. State* (Cr. App.) 64 S. W. 58.

Admissibility of statement in general.—See *post*, art. 810.

A voluntary statement held admissible though made while under arrest and sworn to by defendant charged with crime. *Salas v. State*, 31 App. 485, 21 S. W. 44.

Informing defendant as to use of statement.—The statute prescribes no form as to cautioning defendant as to his statement and it is sufficient if he is warned that so much of his statement as is inculpatory may be used against him. *Kirby v. State*, 23 App. 13, 5 S. W. 165.

A statement held admissible where it appeared defendant desired to make it and was warned it could be used against him. *Briscoe v. State*, 37 App. 464, 36 S. W. 281.

It does not vitiate a voluntary statement for the magistrate to inform the defendant that it cannot be used for him. The law is that it can be used against him, but not for him. *Aiken v. State* (Cr. App.) 64 S. W. 57, 58.

Admissibility of testimony when accused does not testify.—Accused's testimony before the examining magistrate is admissible against him on his subsequent trial, though he does not then testify. *Pressley v. State*, 64 App. 127, 141 S. W. 215.

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.]

See notes under preceding article. See Willson's Cr. Forms, 1045.

False swearing.—This statute forbids the defendant from swearing to a voluntary statement, and if he does swear to it he cannot be prosecuted for perjury, although he might be prosecuted for false swearing. *Biard v. State*, 54 App. 440, 113 S. W. 275.

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.]

On trial, see post, arts. 719-723, and notes.

Cited, *Hahn v. State* (Cr. App.) 165 S. W. 218.

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.

For rules of evidence, see post, arts. 783-834.

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.]

See Willson's Cr. Forms, 1046.

Disposition of testimony, see post, arts. 347-349.

Depositions before examining courts, see post, arts. 817-834, and notes.

Testimony and certificate.—See *Cline v. State*, 36 App. 320, 36 S. W. 1099, 37 S. W. 722, 61 Am. St. Rep. 850.

This article 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 App. 225.

When a justice of the peace holds an examining court his jurisdiction is co-extensive with the county, and testimony taken thereat is admissible though the court was held outside of his precinct. *Hart v. State*, 15 App. 202, 49 Am. Rep. 188.

The certificate need not state that the testimony was read to or by the witnesses. *Golden v. State*, 22 App. 1, 2 S. W. 531.

The testimony of each witness must be reduced to writing, signed by the wit-

ness, and all of it certified to by the officer taking it. Kirby v. State, 23 App. 13, 5 S. W. 165; O'Connell v. State, 10 App. 567.

Form of certificate, so that it certifies the testimony, is immaterial. McFadden v. State, 28 App. 241, 14 S. W. 128, and cases cited; Timbrook v. State, 18 App. 1; Kerry v. State, 17 App. 179, 50 Am. Rep. 122. See, also, Golden v. State, 22 App. 1, 2 S. W. 531; Clark v. State, 28 App. 189, 12 S. W. 729, 19 Am. St. Rep. 817.

The court can proceed with the examination even though the defendant waives his right of trial. Porch v. State, 51 App. 7, 99 S. W. 1124.

It is the practice to give the substance only and not the details of the evidence. Curry v. State, 72 App. 463, 162 S. W. 851.

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.]

Kirby v. State, 23 App. 13, 5 S. W. 165; Clark v. State, 28 App. 189, 12 S. W. 729, 19 Am. St. Rep. 817; McFadden v. State, 28 App. 241, 14 S. W. 128; Childers v. State, 30 App. 160, 16 S. W. 903, 28 Am. St. Rep. 899.

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.]

Explanatory.—This article and arts. 303 and 304, post seem to be superseded by Act 1897, 1 S. S., p. 58 (arts. 539-545, post).

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.]

See note under art. 302.

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.]

See note under art. 302.

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.]

See Willson's Cr. Forms, 1047.

Proof evident.—See ante, art. 6, and notes.

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.]

See Willson's Cr. Forms, 1055-1057.

Increase of bail.—This article is applicable alone to examining trials and does not apply after indictment found in district court, and where on habeas corpus or otherwise the bail has been fixed under said indictment. *Jenkins v. State* (Cr. App.) 77 S. W. 224.

Increase of bail cannot be directed by the court without the preliminary filing of the affidavit required by this article. *Ex parte Wasson*, 50 App. 361, 97 S. W. 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 post, arts. 341-344; Willson's Cr. Forms, 1047-1049, 1052. See *Kinley v. State*, 29 App. 532, 16 S. W. 339; *Thomas v. State*, 12 App. 416.

Discharge.—A discharge under this statute will constitute such an ending as will be sufficient in a suit for damages for malicious prosecution. *Rogers v. Mullins*, 26 Civ. App. 250, 63 S. W. 898.

Bail.—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 *quære*, can the magistrate bind to the next term, if the court is then in session? *Hays v. State*, 43 App. 268, 64 S. W. 1049.

Rehearing.—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 App. 483, 38 S. W. 46.

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.]

See Willson's Cr. Forms, 1049.

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.]

See Willson's Cr. Forms, 1050.

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.]

See Willson's Cr. Forms, 1050.

Commitment.—The order of the court is itself a mittimus. *Shrader v. State*, 30 Tex. 386.

Bail.—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 Tex. 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 App. 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. 1150, 1151.

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.]

Effect of discharge.—Res adjudicata, jeopardy or secondary proceedings of any kind do not apply to examining courts. *Ex parte Porter*, 16 App. 321; *Butler v. State*, 36 App. 483, 38 S. W. 46.

CHAPTER FOUR

OF BAIL

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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.]

See, ante, art. 6.

Forfeiture of bail, see post, arts. 488-504.

Construction.—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 Tex. 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 App. 279.

Appearance bonds and recognizances are intended to secure the presence and trial of the offender. *Jackson v. State*, 13 Tex. 218.

Personal appearance.—A bail bond requiring a defendant to make his personal appearance before the court is more onerous than this and article 320, post, require. *Williams v. State*, 51 App. 252, 103 S. W. 929.

Effect of taking bail.—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 App. 1, 23 S. W. 689, 47 Am. St. Rep. 17.

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 on appeal.—See art. 320, post.

See *Wright v. State*, 22 App. 670, 3 S. W. 346; *Grier v. State*, 29 Tex. 95.

Defined.—Recognizance is an obligation of record, in which the granting court can make no material alteration without the consent of all the cognizers. *Grant v. State*, 8 App. 432; *Gay v. State*, 20 Tex. 504.

A recognizance is a statutory obligation, and its requisites are prescribed by the statute. In order to constitute it a legal obligation, it must be made in conformity with the law authorizing it to be entered into, at least in a substantial manner. Its very basic principle is that there must be at least one defendant, and there may be sureties, and the further plain provision is that this obligation must show the relation of the parties to the obligation they have undertaken, whether principal or surety. It must be stated who is principal and who are sureties. *Smith v. State*, 35 App. 9, 29 S. W. 158.

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.]

Requisites, see post, art. 321, and notes. See *Willson's Cr. Forms*, 799.

Undertakings to which statute applies.—The requisites prescribed by the Code of Procedure for bail-bonds and recognizances are applicable to all such under-

takings in criminal cases, whether entered into before or after indictment or information. *Foard v. State*, 3 App. 556.

Obligation.—When returned into court a bail bond becomes an obligation of record. *Gragg v. State*, 18 App. 295, citing *Lawton v. State*, 5 Tex. 270; *Costley v. State*, 14 App. 156.

Execution on Sunday.—That it was executed on Sunday will not invalidate a bail bond. *Lindsay v. State*, 39 App. 468, 46 S. W. 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.]

See ante, arts. 160, 280, 308, and post, arts. 336-338, 341, 514, 515, 518, 978, and notes.

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.

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.

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.]

Recognizance on appeal, post, arts. 903, 919. See *Willson's Cr. Forms*, 795, 798.

Nature of liability.—See article 339, and notes.

The liability of sureties is several as well as joint. *Mathena v. State*, 15 App. 460.

A recognizance is a joint and several undertaking, and if good as to the principal, and any one of the sureties, they are not only bound, but liable, though another surety may not be. *Ray v. State*, 16 App. 263.

Form and requisites in general.—It must bind the surety, not alone "his heirs and legal representatives." *Grier v. State*, 29 Tex. 95.

Recognizance must comply with the law. *Nunn v. State*, 40 App. 436, 50 S. W. 713.

Indictment found by an illegal grand jury will not support a recognizance. *Wells v. State*, 21 App. 594, 2 S. W. 806; *Harrell v. State*, 22 App. 692, 3 S. W. 479, and cases cited.

Need not recite that it was entered into in open court. *Pleasants v. State*, 29 App. 214, 15 S. W. 43.

Recognizance must show who is principal and who sureties, see *Smith v. State*, 35 App. 9, 29 S. W. 158.

Not allowable pending motion for new trial. *Thompson v. State*, 35 App. 352, 33 S. W. 871.

Statement of amount.—It must state the sum in which the principal and the sureties also are bound. *Townsend v. State*, 7 App. 74. The sum may be stated in figures, with a dollar mark affixed. *Roberts v. State*, 11 App. 26. It will be presumed that the sum named in the recognizance in which the principal is bound, is the amount of bail fixed by the court, whether such statement is explicitly made in the recognizance or not. *Thrash v. State*, 16 App. 271.

Designation of offense.—Since the amendment of 1899, 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 App. 406, 83 S. W. 1113; *Hannon v. State*, 48 App. 199, 87 S. W. 152; *Davis v. State*, 56 App. 131, 119 S. W. 95,

following *Horton v. State*, 43 App. 600, 68 S. W. 172. And see *Davis v. State*, 47 App. 148, 82 S. W. 512; *Parish v. State*, 47 App. 148, 82 S. W. 517.

A recognizance that describes the offense as embezzlement over \$50, sufficiently shows that defendant is charged with a felony. *Nichols v. State*, 47 App. 406, 83 S. W. 1113.

— **Former law.**—If the offense is specifically defined by the statute, the general name is sufficiently descriptive of it, as murder, theft, rape, robbery, burglary, and the like. *Lowrie v. State*, 43 Tex. 602; *McLaren v. State*, 3 App. 680; *Morris v. State*, 4 App. 554; *Massey v. State*, Id. 580; *O'Bannon v. State*, 9 App. 465; *Robinson v. State*, 11 App. 309; *McGee v. State*, Id. 520; *Arrington v. State*, 13 App. 551; *Kepler v. State*, 14 App. 173; *Jones v. State*, 15 App. 82; *Vivian v. State*, 16 App. 262; *Watkins v. State*, Id. 646; *Thrash v. State*, Id. 271; *Cravey v. State*, 26 App. 84, 9 S. W. 62; *Koritz v. State*, 27 App. 53, 10 S. W. 757; *Brown v. State*, 28 App. 65, 11 S. W. 1022. If the offense is not so defined, then it must be described by stating its essential elements, so that it will appear that a particular offense against the law is charged against the principal. In such case a generic or general term will not be sufficient. *Lowrie v. State*, 43 Tex. 602; *Morris v. State*, 4 App. 554; *Massey v. State*, Id. 580; *O'Bannon v. State*, 9 App. 465; *Kramer v. State*, 18 App. 13.

The following descriptions of the offense have been held insufficient: "Having in his possession stolen goods." *Dalley v. State*, 4 Tex. 417. "Gaming." *State v. Cotton*, 6 Tex. 425. "Playing at a game of cards." *Cotton v. State*, 7 Tex. 547. "Betting money upon a certain game with cards." *McDonough v. State*, 19 Tex. 293. "Stands charged with the crime of making threats." *Sively v. State*, 44 Tex. 274. "Charged with the offense of passing a forged writ of error bond." *Morris v. State*, 4 App. 554. "Passing a forged instrument as true." *Stancel v. State*, 6 App. 460. "Malicious mischief." *McLaren v. State*, 3 App. 680; *Waterman v. State*, 8 App. 671. "Gift enterprise." *Foard v. State*, 3 App. 556. "Carrying a pistol." *Morgan v. State*, 8 App. 672; *Massey v. State*, 4 App. 580. "Skinning a calf or yearling, unmarked or unbranded." *Littlefield v. State*, 1 App. 722. "Unlawfully using an estray horse without complying with the laws regulating estrays." *Davis v. State*, 30 Tex. 352. "Using a stray horse." *Gonzales v. State*, 31 Tex. 205. "Unlawfully taking up and using an estray." *Riviere v. State*, 7 App. 55. "Violation of the estray laws, as set forth in the bill of indictment against him." *Stewart v. State*, 37 Tex. 576; *Etchison v. State*, 8 App. 671. "Larceny of a filly." *Montgomery v. State*, 33 Tex. 179. "Shooting with intent to kill and murder." *Moore v. State*, 34 Tex. 138. "Illegal marking." *Webb v. State*, 32 Tex. 652. "Not publishing quarterly report." *Vanwey v. State*, 44 Tex. 112. "Threats to kill and murder." *Buie v. State*, 1 App. 58. "Permitted monte to be exhibited in a house under his control," or "did unlawfully permit the banking game of monte to be dealt and exhibited in a certain house under his control." *Coney v. State*, 1 App. 62. "Carrying a gun on election day." *Harris v. State*, 1 App. 614. "Destroying a fence." *Wraybourn v. State*, 2 App. 7. "Retailing liquor without license." *Munch v. State*, 3 App. 552. "Disturbing a congregation assembled for religious worship." *Magee v. State*, 7 App. 99. "Cruelty to dumb animals." *Kelley v. State*, 8 App. 671. "Disturbing a congregation." *McKay v. State*, 8 App. 672. "Unlawfully working at his trade on Sunday." *O'Brien v. State*, 8 App. 671. "Violating the bell punch law in failing to register alcoholic drinks." *Moore v. State*, 8 App. 672. "Disposing of mortgaged property." *O'Bannon v. State*, 9 App. 465. "Exhibiting a faro bank." *Kramer v. State*, 18 App. 13. "Wilful burning." *Kepler v. State*, 14 App. 173. "Selling intoxicating liquors." *Ramsey v. State*, 36 App. 392, 37 S. W. 330. "Using abusive language." *Jackson v. State* (Cr. App.) 40 S. W. 287. "Seduction." *Wisdom v. State* (Cr. App.) 86 S. W. 756. "A game played with cards at a public place" is insufficient. *Heath v. State* (Cr. App.) 31 S. W. 659.

The following descriptions have been held sufficient: "Did cut and stab L. H. with intent to kill and murder him." *Turner v. State*, 41 Tex. 549. "Unlawful card playing." *Lowrie v. State*, 43 Tex. 602. "Stealing two bushels of corn the property of one Archibald Cone." *Gay v. State*, 20 Tex. 504. "Assault with intent to kill." *Hodges v. State*, 20 Tex. 493; *Wilson v. State*, 25 Tex. 169; *State v. Hotchkiss*, 30 Tex. 162; *Goldthwaite v. State*, 32 Tex. 599; *Barrera v. State*, Id. 644. "An assault to murder." *Wills v. State*, 4 App. 613. "Murder," without stating the degree. *Thompson v. State*, 31 Tex. 166; *State v. Brown*, 34 Tex. 146. "Wilfully and wantonly killing a certain dog." *Smith v. State*, 36 Tex. 317. "Forgery" or "forgery of a writ of error bond in a civil suit." *Morris v. State*, 4 App. 557; *Douglas v. State*, 26 App. 248, 9 S. W. 733. See, also, *Brown v. State*, 28 App. 65, 11 S. W. 1022; *Cresap v. State*, 28 App. 529, 13 S. W. 992; *La Rose v. State*, 29 App. 215, 15 S. W. 33; *Edwards v. State*, 29 App. 452, 16 S. W. 98. "Assault with intent to rob." *Robinson v. State*, 11 App. 309. "Swindling." *Mathena v. State*, 15 App. 460; *Callaghan v. State*, 57 App. 314, 122 S. W. 879. "Offering to bribe a witness to evade criminal process as a witness." *Hill v. State*, 15 App. 530. "Theft" includes theft of animals, and the kind of animals need not be stated. *Vivian v. State*, 16 App. 262. "Theft of bacon of the value of \$27." *Thrash v. State*, 16 App. 271. "Passing as true a forged instrument in writing, knowing the same to be forged, with intent to injure and defraud." *Camp v. State*, 39 App. 142, 45 S. W. 490.

The offense named or described must be the offense charged in the indictment or information. *McAdams v. State*, 10 App. 317; *Kepler v. State*, 14 App. 173; *Addison v. State*, Id. 568; *Foster v. State*, 27 Tex. 236; *Duke v. State*, 35 Tex. 424; *State v. Gordon*, 41 Tex. 510; *Turner v. State*, Id. 549; *Smalley v. State*, 3 App. 202 (overruling *McCoy v. State*, 37 Tex. 219, and *State v. Angell*, 37 Tex. 357, in so far as said cases hold a contrary doctrine); *Langan v. State*, 27 App. 498, 11 S. W. 521; *Sands v. State*, 30 App. 578, 18 S. W. 86. See, also, *Douglass v. State*, 26 App. 248, 9 S. W. 733; *Brown v. State*, 28 App. 65, 11 S. W. 1022.

A disjunctive statement of the offense, as "selling or giving away whisky on election day," is insufficient. *Hart v. State*, 2 App. 39. A recognizance which recites that the defendant is accused of two or more distinct offenses is bad for duplicity. *Killingsworth v. State*, 7 App. 28; *Hutchinson v. State*, 4 App. 435; *Patton v. State*, 35 Tex. 92.

It must recite the offense. *Fondren v. State* (Cr. App.) 29 S. W. 479.

Recognizance reciting the offense charged in the indictment is sufficient. *Alford v. State*, 37 App. 386, 35 S. W. 657.

The indictment charged playing cards in a room attached to a house for retailing spirituous liquors. The recognizance recited playing cards in a "room" in a certain house; held, defective. *Draughan v. State*, 35 App. 51, 35 S. W. 667.

A recognizance reciting no offense is insufficient. *Swain v. State* (Cr. App.) 38 S. W. 609; *Cannady v. State*, 37 App. 123, 33 S. W. 610, 1004.

Local option is not an offense *eo nomine*. Therefore the statutory elements of the offense must be set out in the recognizance. *Boyett v. State* (Cr. App.) 55 S. W. 495.

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 Tex. 191; *Maxwell v. State*, 38 Id. 171; *Barnes v. State*, 36 Id. 332; *State v. Casey*, 27 Id. 111; *Williamson v. State*, 12 App. 169; *Carroll v. State*, 6 App. 463; *Ray v. State*, 16 App. 268; *Thrash v. State*, Id. 271; *Camp v. State*, 39 App. 142, 45 S. W. 490; *Wright v. State*, 22 App. 670, 3 S. W. 346; *State v. Angell*, 37 Tex. 357; *Ward v. State*, 38 Tex. 302; *State v. Phelps*, 33 Tex. 555; *Littlefield v. State*, 1 App. 723; *Teel v. State*, 3 App. 326; *Crowder v. State*, 7 App. 484; *Wallen v. State*, 18 App. 414; *Smith v. State*, 35 App. 9, 29 S. W. 158; *Hand v. State*, 28 App. 28, 11 S. W. 679; *Thompson v. State*, 35 App. 352, 33 S. W. 871; *Ramsey v. State*, 36 App. 392, 37 S. W. 330.

For statements of the time and place held sufficient, see *Williford v. State*, 17 Tex. 653; *Ray v. State*, 16 App. 268; *Hodges v. State*, 20 Tex. 493; *O'Neal v. State*, 35 Tex. 130; *Moore v. State*, 37 Tex. 133; *Turner v. State*, 14 App. 168; *Fentress v. State*, 16 App. 79; *Camp v. State*, 39 App. 142, 45 S. W. 491.

For insufficient designations of the court, see *State v. Phelps*, 33 Tex. 555; *Crowder v. State*, 7 App. 484; *Smith v. State*, 7 App. 160; *Downs v. State*, 7 App. 483; *Littlefield v. State*, 1 App. 722; *Douglass v. State*, 26 App. 248, 9 S. W. 733; *Brown v. State*, 28 App. 65, 11 S. W. 1022; *Wegner v. State*, 28 App. 419, 13 S. W. 608; *Thompson v. State*, 35 App. 505, 34 S. W. 124, 612; *Ramsey v. State*, 36 App. 392, 37 S. W. 330.

A recognizance, (taken before the adoption of the code,) which requires the defendant to appear at the "next term, then and there to answer the charges exhibited against him, and that he will not depart therefrom, without the leave of the court," is not more onerous than the law requires. *Wilcox v. State*, 24 Tex. 544.

A recognizance is not defective because it binds the party to appear "from day to day" as well as from term to term. *State v. Glavecke*, 33 Tex. 53.

The venue of the offense need not be stated. *Cundiff v. State*, 38 Tex. 641.

In stating the time it is sufficient to state the term of the court, and in stating the place it is sufficient to specify the name of the court and the county. *Teel v. State*, 3 App. 326; *Fentress v. State*, 16 App. 79; *Vivian v. State*, Id. 262. If the time stated be a time when there can be no term of the court legally held, it is a fatal defect. *Burnett v. State*, 18 App. 283; *Thomas v. State*, 12 App. 417; *Brite v. State*, 24 Tex. 219; *Thomas v. State*, 13 App. 496. A recognizance which bound the principal to appear "at the next term of this court" was held insufficient. *Williamson v. State*, 12 App. 169.

For statements of time and place held insufficient, see *Teel v. State*, 3 App. 326; *Barnes v. State*, 36 Tex. 332; *Williamson v. State*, 12 App. 169.

It is not impaired if it omits to stipulate that he shall answer the accusation against him. *Gary v. State*, 11 App. 527; *State v. Becknall*, 41 Tex. 319; *Goldthwaite v. State*, 32 Tex. 599.

Defects, objections, and amendment.—*Carroll v. State*, 6 App. 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. 679.

If a recognizance be defective, its defects cannot be supplied by parol, but only by such intendments as the court can reasonably make by the help of its judicial knowledge of facts. *Brite v. State*, 24 Tex. 219. Being an obligation of record, the court can make no material alteration in it without the consent of all the cognizors. *Grant v. State*, 8 App. 432; *Gragg v. State*, 18 App. 295. But where the recognizance omitted the word "dollars," which appeared in the original entry on the docket, it was held that such defect might be amended upon notice to the cognizors. *Blalack v. State*, 3 App. 376. But the appellate court will not supply by intendment a necessary word, though its omission be obviously a mere clerical oversight. *Carroll v. State*, 6 App. 463.

A failure to specify the offense of which the principal is accused is not cured by reference to the indictment. *Stewart v. State*, 37 Tex. 576.

Before entering a recognizance *nunc pro tunc*, the sureties, who are necessary parties, must be notified and be before the court. *Quarles v. State*, 37 App. 365, 39 S. W. 668; *Quarles v. State*, 40 App. 354, 50 S. W. 457.

A recognizance cannot be amended *nunc pro tunc* as to intrinsic defects without notice to both principal and sureties; and after proper amendment in such case, it can be forfeited only as an original recognizance, and by the same proceeding. *Hand v. State*, 28 App. 28, 11 S. W. 679.

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.

2. That the obligors thereto bind themselves that the defendant will appear before the proper court or magistrate to answer the accusation against him.

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.

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.

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.]

See Willson's Cr. Forms, 798, 799.

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| 1. Execution and delivery. | 7. Time and place of appearance. |
| 2. Blanks. | 8. Designation of offense. |
| 3. Date. | 9. — Former law. |
| 4. Approval and filing. | 10. Onerous conditions. |
| 5. Alteration. | 11. Defects, objections, and amendments. |
| 6. Form and requisites in general. | |

1. **Execution and delivery.**—A bond which does not appear to have been executed by the person indicted, will not support forfeiture. *Lowe v. State*, 15 Tex. 141; *Weaver v. State*, 13 App. 191, and cases cited. And see *Hutchings v. State*, 24 App. 242, 6 S. W. 34. See, also, *Cassady v. State*, 4 App. 96; *Loving v. State*, 9 App. 471.

Must be signed by the principal and sureties. *Tierney v. State*, 31 Tex. 40; *Holt v. State*, 20 App. 271; *Nelson v. State*, 44 App. 595, 73 S. W. 398.

Bond takes effect from delivery and acceptance. *Stafford v. State*, 10 App. 46. And see *Williamson v. State*, 32 App. 213, 22 S. W. 686.

Must be executed or signed by the principal himself, or for him by some one duly authorized by him. *Price v. State*, 12 App. 235.

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 App. 514, citing *Fulshear v. Randon*, 18 Tex. 275, 70 Am. Dec. 281.

A bail bond cannot be delivered as an escrow to the obligee, though it may be delivered as such by the surety to the principal obligor. When delivered to the obligee it is absolute and binding. *Brown v. State*, 18 App. 326.

Unless the contrary is shown, the bond will be presumed to have been executed on the date of its approval. *Mills v. State*, 36 App. 71, 35 S. W. 370.

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 App. 439, 110 S. W. 442.

2. **Blanks.**—Bond binding sureties in dollars, is nugatory as to them. *Townsend v. State*, 7 App. 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 App. 527.

3. **Date.**—The date of the execution and approval of the bond differing, the former controls. *Moseley v. State*, 37 App. 18, 38 S. W. 800; *Williamson v. State*, 32 App. 213, 22 S. W. 686; *Holt v. State*, 20 App. 271; *Washington v. State*, 31 App. 84, 19 S. W. 900; *Brown v. State*, 28 App. 65, 11 S. W. 1022; *Bowen v. State*, 28 App. 103, 12 S. W. 413; *La Rose v. State*, 29 App. 215, 15 S. W. 33; *Faubion v. State*, 21 App. 494, 2 S. W. 830; *Holley v. State*, 70 App. 511, 157 S. W. 937.

A bond should be dated, but the date of the approval thereof by the officer taking it is a sufficient dating. *Carroll v. State*, 6 App. 463; *Ake v. State*, 4 App. 126.

4. **Approval and filing.**—A bond when taken by proper officer, returned into court and filed, is an obligation of record. *Lawton v. State*, 5 Tex. 270; *Goldthwaite v. State*, 32 Tex. 599.

Bond may be filed nunc pro tunc to correspond with the fact of filing. *Slocumb v. State*, 11 Tex. 15.

If taken by the court in session, approval is not necessary. *Arrington v. State*, 13 App. 554.

The statutory provisions respecting the approval of bail bonds are merely directory, and a bail bond is not void by reason of noncompliance therewith. *Dyches v. State*, 24 Tex. 266; *Doughty v. State*, 33 Tex. 1; *Holt v. State*, 20 App. 271; *Taylor v. State*, 16 App. 514. The taking and returning the bond into court is a substantial approval of it, no formal approval being required. *Brown v. State*, 40 Tex. 49; *Evans v. State*, 25 Tex. 80; *Dyches v. State*, 24 Tex. 266. The omission of the clerk to indorse the file mark upon the bond, does not vitiate the bond. It is sufficient if the bond be in court and on file. *Turner v. State*, 41 Tex. 549; *Cundiff v. State*, 38 Tex. 641. It may be filed nunc pro tunc even after judgment nisi has been entered upon it. *Haverty v. State*, 32 Tex. 602; *Slocumb v. State*, 11 Tex. 15.

Bail bond is not affected by the failure of the officer taking it to formally ap-

prove it. See on the subject, *Dyches v. State*, 24 Tex. 266; *Evans v. State*, 25 Tex. 80; *Doughty v. State*, 33 Tex. 1; *Cundiff v. State*, 38 Tex. 641; *Brown v. State*, 40 Tex. 49; *Taylor v. State*, 16 App. 514; *Holt v. State*, 20 App. 271.

Failure of clerk to file returned bond does not affect its validity. *Turner v. State*, 41 Tex. 549; *Eggenberger v. Brandenberger*, 74 Tex. 274, 11 S. W. 1099.

A bail bond duly approved, followed by the release of the prisoner, is not vitiated because it is not filed with the clerk until the day of forfeiture. *Heiman v. State*, 70 App. 480, 158 S. W. 276.

5. **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 App. 213; *Gragg v. State*, 18 App. 295; *Grant v. State*, 8 App. 432; *Wegner v. State*, 28 App. 419, 13 S. W. 608; *Butler v. State*, 31 App. 63, 19 S. W. 676; *Collins v. State*, 16 App. 274; *Davis v. State*, 5 App. 48; *Kiser v. State*, 13 App. 201.

6. **Form and requisites in general.**—Bail bond must conform in every particular to the statute. *Wegner v. State*, 28 App. 419, 13 S. W. 608, and cases cited; *Wallen v. State*, 18 App. 414.

It must be made payable to the state of Texas. *Warren v. State*, 21 Tex. 510; *Lawton v. State*, 5 Tex. 270.

The bond taken by the sheriff after the examining trial should conform to the order of the magistrate. *Barringer v. State*, 27 Tex. 553.

Unless the bond binds the surety as well as "his heirs and legal representatives," it is of no force. *Grier v. State*, 29 Tex. 95.

The law does not require as great particularity in a bail bond which is taken before, as after indictment found. In such case, if the bond shows that the principal stands charged with an offense, and binds him to appear before the proper court, at a proper place and time, and otherwise substantially complies with the statute, it is sufficient. It is only required that it describe in plain language some offense known to the law. *Barrera v. State*, 32 Tex. 644; *Moore v. State*, 37 Tex. 133; *Goldthwaite v. State*, 32 Tex. 599; *State v. Beckmall*, 41 Tex. 319; *Keppler v. State*, 14 App. 173; *Vivian v. State*, 16 App. 262; *Brown v. State*, 28 App. 65, 11 S. W. 1022. When a bail bond is taken by order of a magistrate it must conform to said order as to the amount thereof. *Barringer v. State*, 27 Tex. 553; *Neblett v. State*, 6 App. 316. See, also, *Peters v. State*, 10 App. 303.

Where the bond after naming the principal, required the "above bounden ——" to appear, etc., the omission of the principal's name after the word "bounden" was held not to vitiate the bond. *Gorman v. State*, 38 Tex. 112, 19 Am. Rep. 29.

A bond is not vitiated by the omission of an essential word if the omitted word be clearly indicated by the context. *Roberts v. State*, 11 App. 26.

When the offense of which the principal obligor is accused is named or described in the bond, and it appears therefrom that he is accused of an offense against the laws of this state, it is not necessary that the bond shall disclose the mode of the accusation, that is, whether such accusation is made by indictment, information, etc. *McGee v. State*, 11 App. 520. But when the bond obligated the principal to answer an information filed by a justice of the peace, charging said principal with an aggravated assault and battery, reciting in conclusion that said accusation was preferred in an indictment, it was held void, as it did not show that the principal was legally accused of an offense. *Murphy v. State*, 17 App. 100. All process and proceedings, including a bail bond, based upon a void indictment, are themselves void. *Harrell v. State*, 22 App. 692, 3 S. W. 479.

A bail bond is strictly a statutory bond, and to entitle the state to a forfeiture thereon, it must contain all the requisites prescribed by the statute. The principles of equity as applied to private contracts can not be invoked in the construction of a bail bond. *Wallen v. State*, 18 App. 414; *Turner v. State*, 14 App. 168; *Washington v. State*, 31 App. 84, 19 S. W. 900; *Douglass v. State*, 26 App. 243, 9 S. W. 733; *La Rose v. State*, 29 App. 215, 15 S. W. 33; P. C., art. 950.

An appearance bond must state who is principal and who are sureties. *Smith et al. v. State*, 35 App. 9, 29 S. W. 158.

It was not necessary to recite that the justice before whom the complaint had been filed admitted accused to bail, and that the amount of the bond had been fixed by the justice. *Holley v. State*, 70 App. 511, 157 S. W. 937.

7. **Time and place of appearance.**—*Teel v. State*, 3 App. 326; *Smith v. State*, 7 App. 160; *Crowder v. State*, Id., 484; *Thomas v. State*, 13 App. 496; *Fentress v. State*, 16 App. 79; *Vivian v. State*, Id. 262; *Turner v. State*, 14 Id., 168; *Wallen v. State*, 18 App. 414; *Wegner v. State*, 28 App. 419, 13 S. W. 608.

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. *Williford v. State*, 17 Tex. 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 Tex. 357; *Ward v. State*, 38 Tex. 302; *State v. Phelps*, Id., 555.

It must bind the principal to appear before the proper court, failing which condition, the bond is of no force. *State v. Phelps*, 38 Tex. 555; *Crouch v. State*, 36 Tex. 333; *Littlefield v. State*, 1 App. 722; *Wallen v. State*, 18 App. 414; *Mackey v. State*, 38 App. 24, 40 S. W. 982, and cases cited.

It is void if it names a court not known to law, or an impossible date. *Smith v. State*, 7 App. 160; *Downs v. State*, Id., 483; *Mackey v. State*, 38 App. 24, 40 S. W. 982, and cases cited; *Butler v. State*, 31 App. 64, 19 S. W. 676, and cases cited.

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 App. 350, 116 S. W. 594, citing *Moseley v. State*, 37 App. 18, 38 S. W. 800.

If it binds the recognizer to appear at a term of court not authorized by law, it is void. *Wegner v. State*, 28 App. 419, 13 S. W. 608.

Bail bond stipulating an impossible date or time long passed is a nullity. *Butler v. State*, 31 App. 63, 19 S. W. 676.

A bond requiring defendant to appear at a time there was no court is void. *Moseley v. State*, 37 App. 18, 38 S. W. 800.

Where there are two district courts in a county, if a bail bond does not specify before which court the defendant is to appear, it is not valid. *Granberry v. State*, 55 App. 350, 116 S. W. 594.

A bail bond given for appearance of accused before the district court of a county is insufficient; the county having two district courts, and the particular one not being designated, though the time and place is stated. *Thomas v. State*, 59 App. 159, 127 S. W. 1030.

A bail bond bound the defendant to appear at "the next term of court on the 11th day of September, 1911," and the 11th of September fell during the same term of court in which the bond was issued. Held that, as the bond fixed a definite time for the appearance at a time when the court was legally in session, the specific time fixed will control, and render the bond certain and sufficient in spite of the inconsistent matter therein. *Barrett v. State* (Cr. App.) 151 S. W. 558.

A bail bond entitled "State of Texas, County of H.," stating that the principal was charged "with the offense of a felony," and required to give bail to appear at the "district court of said county," and conditioned on his appearing "before the said district court at its next term, to be begun and holden at the courthouse of said county, in the town of C.," was not invalid as failing to require that the principal make his personal appearance before the district court of H. county, as required by statute, or as failing to state that he was charged with a felony. *Stallings v. State* (Cr. App.) 177 S. W. 132.

8. **Designation of offense.**—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 App. 406, 83 S. W. 1113; *Hannon v. State*, 48 App. 199, 87 S. W. 152; *Davis v. State*, 56 App. 131, 119 S. W. 95 (following *Horton v. State*, 43 App. 600, 68 S. W. 172); *Barrett v. State* (Cr. App.) 151 S. W. 558; *Holley v. State*, 70 App. 511, 157 S. W. 937.

The bond should recite whether the offense named is a felony or misdemeanor. *Callaghan v. State*, 57 App. 314, 122 S. W. 879.

There was no variance between a bond reciting that defendant was charged "with a felony" and a judgment reciting that he was "charged with a felony, to wit, burglary." *Barrett v. State* (Cr. App.) 151 S. W. 558.

Where accused was charged with bigamy, a recital in the bail bond that he was charged with a felony was a sufficient description of the offense. *Holley v. State*, 70 App. 511, 157 S. W. 937.

The statute does not require that the words "felony" or "misdemeanor" shall be used in a bond, but merely permits their use as sufficiently specific, and a bond taken by a United States commissioner sufficiently described the offense where it recited that the principal was charged with the offense of concealing property from his trustee in bankruptcy belonging to creditors, in violation of the Bankruptcy Act of the Revised Statutes of the United States. *United States v. Zarafonitis*, 150 Fed. 97, 80 C. C. A. 51, 10 Ann. Cas. 290.

9. — **Former law.**—A bail bond which recites the offense as "unlawfully selling mortgaged property" is insufficient. *Cravey v. State*, 26 App. 84, 9 S. W. 62.

A bail bond executed after the presentment of an indictment must describe the offense named in the indictment. *Douglass v. State*, 26 App. 248, 9 S. W. 733. The indictment in two separate counts charged forging and the uttering of a forged instrument. The bond set out the essential elements of both offenses. Held, correct. *Id.*

Bail bond recited offense to be "theft of thirty-three sheep." Held sufficient designation of offense. *Lockhart v. State*, 32 App. 149, 22 S. W. 413.

A bond which describes the offense as "carrying on or about the person a dirk" is insufficient for being in the disjunctive. *Walker v. State*, 32 App. 517, 24 S. W. 909 (following *Hart v. State*, 2 App. 39, and *Garza v. State* (Cr. App.) 22 S. W. 139).

A mistake in the date of the indictment will not vitiate the bail. *Blain v. State*, 34 App. 417, 31 S. W. 366.

A bail bond for the appearance of a party charged with offering to bribe a judicial officer should state the intent with which the offer was made. *Hardin et al. v. State*, 36 App. 460, 37 S. W. 735.

A bond for embezzlement which does not state the amount is insufficient because it does not show whether the offense is a felony or a misdemeanor. *Nichols v. State*, 47 App. 406, 83 S. W. 1114.

Where one is convicted on an indictment charging seduction, the recognizance is sufficient under this article if it refers to the offense as felony. *Wisdom v. State* (Cr. App.) 86 S. W. 756.

A bail bond which recites that the principal obligor stands charged "with the offense of unlawfully selling intoxicating liquor without license" is insufficient. *Martin v. State* (Cr. App.) 145 S. W. 916.

A bond reciting that defendant was charged "with the offense of keeping premises for the purpose of being used for gaming" was sufficient. *Hodges v. State* (Cr. App.) 165 S. W. 607.

10. **Onerous conditions.**—See *Williford v. State*, 17 Tex. 653; *Wilcox v. State*, 24 Tex. 544; *Brown v. State*, 28 App. 65, 11 S. W. 1022; *Watson v. State*, 20 App. 382.

An onerous condition not prescribed by the Code cannot be treated as surplusage, and nullifies a bond. *Turner v. State*, 14 App. 168, and case cited; *Watson v. State*, 20 App. 382; *Wegner v. State*, 28 App. 419, 13 S. W. 608; *Townsend v. State*, 7 App. 74.

A condition in a bail bond which is more onerous than is required by the law, vitiates the bond, and such bond will not support a judgment of forfeiture. *Turner v. State*, 14 App. 168; *Johnson v. Erskine*, 9 Tex. 1; *Barringer v. State*, 27 Tex.

553; *Wooters v. Smith*, 56 Tex. 193. A bond which obligates the obligors "jointly and severally" is not more onerous than the law requires. *Fulton v. State*, 14 App. 32; *Mathena v. State*, 15 App. 460. A bail bond which obligates the principal to appear "from day to day and term to term of the court until discharged," is not a condition more onerous than that imposed by law. *Pickett v. State*, 16 App. 648; *Anderson v. State*, 19 App. 299. See one instance of a recognizance more onerous than the law required. *Wright v. State*, 22 App. 670, 3 S. W. 346. A bail bond is not objectionable because it requires the defendant not to depart from the court without leave until discharged. *Thompson v. State*, 34 App. 135, 29 S. W. 789.

None of the articles of this chapter require the personal appearance of the principal, and such a condition in the bond is more onerous than required. *Williams v. State*, 51 App. 252, 103 S. W. 929.

11. Defects, objections, and amendments.—As to intrinsic matter, bail bond cannot be amended nunc pro tunc without notice to both principal and sureties. *Hand v. State*, 28 App. 28, 11 S. W. 679, and cases cited.

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 App. 595, 25 S. W. 286.

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.]

See arts. 648, 649, 899-908, post.

Bail bond or recognizance on appeal.—Under this article and article 330, post, a surety on a bail bond or recognizance on appeal may be released from his liability by surrendering his principal into custody. *Ex parte Cobb* (Cr. App.) 154 S. W. 997, overruling *Talley v. State* (Cr. App.) 69 S. W. 514.

Effect of second arrest of principal.—See notes under article 500, post.

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.]

See arts. 648, 649, post; *Willson's Cr. Forms*, 798.
Cited, *Sanders v. State*, 70 App. 532, 158 S. W. 291.

Duration of obligation.—It binds the obligors for the appearance of the principal from day to day and term to term, until discharged. *Pickett v. State*, 16 App. 648; *Ex parte Guffee*, 8 App. 409.

The obligation of a bail bond subsists until the obligors are discharged from liability thereon, according to law. *Ex parte Guffee*, 8 App. 409; *Wells v. State*, 21 App. 594, 2 S. W. 806.

Joint or several liability.—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 App. 531, 13 S. W. 991; *Kiser v. State*, 13 App. 291; *Mathena v. State*, 15 App. 460; *Thompson v. State*, 34 App. 135, 29 S. W. 789 (overruling *Ishmael v. State*, 41 Tex. 245); *Thomas v. State*, 13 App. 496; *Fulton v. State*, 14 App. 32; *Barringer v. State*, 27 Tex. 553; *Johnson v. State*, 32 App. 353, 22 S. W. 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.]

Married woman as surety.—A 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 App. 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 App. 342, 45 S. W. 1019.

Bonding companies as sureties.—A bail bond executed by a solvent bonding company should be accepted, either in the form of a bond approved by the sheriff, or in open court as a recognizance. *Ex parte Cook*, 62 App. 22, 136 S. W. 67.

Evidence that a bonding company was a going concern and subject to execution in the sum of \$250,000 was sufficient to show that it was solvent, so as to be a proper surety on a bail bond. *Ex parte Cook*, 62 App. 22, 136 S. W. 67.

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.

See Willson's Cr. Forms, 806.

Oath.—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 the oath is discretionary with the approving officer. *Pierce v. State*, 39 App. 343, 45 S. W. 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.

See Willson's Cr. Forms, 806.

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.
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.]

See art. 905, post.

Court to fix bail in felony cases, see post, art. 516.

Excessive bail, see ante, art. 8.

Amount of bail.—The assessment of the amount of bail is a matter within the discretion of the court, judge, magistrate, or officer taking the same, and will not

be revised on appeal, unless it clearly appears that the discretion has been abused and the constitution violated. *McConnell v. State*, 13 App. 390; *Ex parte Goodwin*, 58 App. 288, 125 S. W. 582; *Ex parte King* (Cr. App.) 150 S. W. 905.

No one should be admitted to bail merely on his own recognizance, unless he was unable to give bond, and the confinement would injure his health. *Ex parte Creed* (Cr. App.) 149 S. W. 192.

Where the trial court will hear evidence to determine the amount of bail, it is improper to appeal to the Court of Criminal Appeals for that tribunal to fix the amount of bail in the first instance. *Ex parte Creed* (Cr. App.) 149 S. W. 192.

— **Circumstances to be considered.**—On appeal the record should always show the pecuniary condition of the accused. *Ex parte Hutchings*, 11 App. 28; *Ex parte Coldiron*, 15 Id. 464; *Miller v. State*, 42 Tex. 309; *Ex parte Catney*, 17 App. 332; *Ex parte Walker & Black*, 3 App. 668; *McConnell v. State*, 13 App. 390; *Ruston v. State*, 15 App. 324; *Ex parte Campbell*, 28 App. 376, 13 S. W. 141.

The pecuniary condition of the accused is a matter to be considered. *Ex parte Hutchings*, 11 App. 28; *Ex parte Volz* (Cr. App.) 140 S. W. 226; *Ex parte Creed* (Cr. App.) 149 S. W. 192. See, also, *Ex parte Arthur* (Cr. App.) 47 S. W. 368.

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 App. 376, 13 S. W. 141; *Ex parte Creed* (Cr. App.) 149 S. W. 192.

— **Excessive bail and reduction thereof.**—Excessive bail, see ante, art. 8; *Ex parte Wilson*, 20 App. 498; *Ex parte Tittle*, 37 App. 597, 40 S. W. 598; *Ex parte Harris*, 49 App. 232, 91 S. W. 794; *Ex parte Finn*, 48 App. 606, 90 S. W. 29; *Ex parte Walker*, 3 App. 668; *Ex parte Hutchings*, 11 App. 28; *McConnell v. State*, 13 App. 390; *Ruston v. State*, 15 App. 324; *Ex parte Coldiron*, 15 App. 464; *Ex parte Catney*, 17 App. 332; *Ex parte Campbell*, 28 App. 376, 13 S. W. 141; *Miller v. State*, 43 App. 367, 65 S. W. 998; *Ex parte King* (Cr. App.) 150 S. W. 905.

Prima facie, five hundred dollars would not be excessive in a felony case. *Ex parte Hutchings*, 11 App. 28.

A judgment granting bail is final as to the state and also as to the accused unless he should seek to reduce the amount of bail. *Ex parte Augustine*, 33 App. 1, 23 S. W. 689, 47 Am. St. Rep. 17.

While the judgment of the court below remanding relator till he give a bond will not be disturbed, yet, the evidence of his guilt developed being slight, the amount of bond required will be reduced from \$10,000 to \$1,500. *Ex parte Goodwin*, 58 App. 288, 125 S. W. 582.

Where accused, indicted in two cases for homicide, was not connected with the homicide by any direct or positive evidence, and the circumstances were of weak probative force, the bail, fixed at \$2,500 in each case, was excessive, and must be reduced to \$1,000 in each case. *Ex parte Canna* (Cr. App.) 136 S. W. 60.

Where a person without means was arrested and charged by a complaint with three violations of the prohibition law, the bail should not be fixed for a greater amount than \$500 for each case, even though the offense was punishable by from one to three years in the penitentiary. *Ex parte Creed* (Cr. App.) 149 S. W. 192.

Petitioner had been previously charged with assault with intent to rape, and had given bail for \$1,500. He had also previously been indicted in two other felony cases, and had given a bond for \$750 in each case. He was arrested on complaints for felony for breaches of the prohibitory law. He waived examination, and the committing magistrate fixed his bail in the first at \$1,000 and in each of the other two at \$750. The evidence did not disclose that the \$1,500 bond was still subsisting, but did show that the two other \$750 bonds were in force. Held, that relator was entitled to a reduction of the bail in the three new cases to \$750 in the first and to \$500 each in the other two. *Ex parte Mitchell* (Cr. App.) 149 S. W. 194.

There was no abuse of discretion in fixing bond of accused, charged with assault with intent to kill, to await the grand jury's action, at \$3,000, where his witnesses testified that he had friends, who would probably go on his bond, who were worth over \$100,000; accused having been properly bound over under the evidence. *Ex parte King* (Cr. App.) 150 S. W. 905.

Petitioner, having been charged with robbery by the use of firearms in connection with certain others, denied his guilt and claimed that he was the subject of a conspiracy on the part of others to send him to the penitentiary. One of the cases had been tried, and resulted in a disagreement, and petitioner was admitted to bail in the sum of \$20,000, which he was unable to give. Held, that the bail fixed was excessive, and should be reduced to \$5,000. *Ex parte Ross*, 70 App. 493, 157 S. W. 496.

Where, in a prosecution for murder, defendant was entitled to bail, and bail was fixed at \$7,500, but it appeared that defendant's father was dead, that he had no relations or property from which to secure a bond, but that some of his friends, who were able, had agreed to sign a bond for an amount not greater than \$2,500, the bail would be reduced to that sum. *Ex parte Martin*, 71 App. 333, 159 S. W. 1182.

Where the evidence showed no justification for the homicide, an order fixing the bond of the relator at \$750 was not erroneous as requiring excessive bail, though relator's connection with the evidence was shown only by circumstantial evidence. *Ex parte Campbell* (Cr. App.) 177 S. W. 971.

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 surren-

dering the accused into the custody of the sheriff of the county where he is prosecuted. [O. C. 273.]

Hughes v. State, 28 App. 499, 13 S. W. 777.

Mode of surrender.—There are but two modes in which bail can effect the surrender of their principal: First, by surrendering him into custody of sheriff of county where prosecuted, and, second, by making affidavit of desire to surrender him and thereby obtaining an order for his arrest. *Woodring v. State*, 53 App. 17, 108 S. W. 371; *Kiser v. State*, 13 App. 201; *Roberts v. State*, 4 App. 129.

If a surety desires to surrender his principal he can do so, if the principal will accompany him to the sheriff willingly. If not he must make the affidavit and secure a warrant of arrest. *Adams v. State*, 48 App. 7, 85 S. W. 1079.

Effect of surrender.—Surrender relegates him to the custody of the sheriff under the original *capias*, and a new one is not necessary. *Patillo v. State*, 9 App. 456; *Whitener v. State*, 38 App. 146, 41 S. W. 595.

Surrender of principal before forfeiture is a good defense for the sureties. *Hughes v. State*, 28 App. 499, 13 S. W. 777.

Appeal bond or recognizance.—Under this article and article 322, ante, a surety on a bail bond or recognizance on appeal may be released from his liability by surrendering his principal into custody. *Ex parte Cobb* (Cr. App.) 154 S. W. 997, overruling *Talley v. State*, 44 App. 162, 69 S. W. 514.

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 App. 146, 41 S. W. 595. And see *Roberts v. State*, 4 App. 129.

After a magistrate has heard a case as an examining court and fixed the bail, and the bond has been given in the amount required, on the surrender of the accused by his sureties it is the duty of the sheriff to take a new bond with good sureties in the same amount as was fixed by the magistrate. It is not optional with the sheriff to fix the amount of bond. *Ex parte Wasson*, 50 App. 361, 97 S. W. 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.—Prior to this provision the sheriff did not have such authority. *State v. Wren*, 21 Tex. 379.

This article refers to surrender out of term time, when the sheriff is authorized to take the necessary bail bond. *Whitener v. State*, 38 App. 146, 41 S. W. 595. And see *State v. Russell*, 24 Tex. 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.]

Process.—This article is not restricted in its application to the county of prosecution, but authorizes process to any county in the state. *Whitener v. State*, 38 App. 146, 41 S. W. 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.]

Place of surrender.—This article applies to a surrender in the county of the prosecution. *Whitener v. State*, 38 App. 146, 41 S. W. 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.]

Process.—Under this, and art. 332, the affidavit required by art. 321 can be made when the court is not in session, and the writ, whether called a warrant or *capias*, may issue for the arrest of the principal. *Whitener v. State*, 33 App. 146, 41 S. W. 595.

New bonds.—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 App. 457; *Neblett v. State*, 6 App. 316; *Barringer v. State*, 27 Tex. 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.]

See ante, article 318; post, art. 518; Willson's Cr. Forms, 801, 802.

Authority of officer.—A bail bond taken by a deputy sheriff under the order of an examining court, while said court was in session, and upon which, by order of said court, the accused was released from custody, was held to be valid. *Arrington v. State*, 13 App. 551. A district clerk has no official power to take a bail bond. *Doughty v. State*, 33 Tex. 1. When an examining court, in default of bail, has committed an accused to jail, the sheriff is then authorized to take bail in the sum fixed by the order of the magistrate. *Shrader v. State*, 30 Tex. 386. The sheriff has no authority to take bail of one who, before indictment or accusation, voluntarily surrenders himself. He must take such person before a magistrate. *State v. Miller*, 31 Tex. 564. When the arrest is made under a *capias* for a misdemeanor, the officer making the arrest may take bail, although the court be in session. *Ellis v. State*, 10 App. 324. As to contrary rule under former law, see *Busby v. State*, 13 Tex. 136; *Jackson v. State*, 13 Tex. 218. Where the county court has criminal jurisdiction, indictments for misdemeanor, except for official misconduct, must be transferred to said courts, or to justices' courts, and process thereon must be issued from those courts, and a bail bond taken by authority of a *capias* issued from the district court in such case is without authority of law, and void. *Cassaday v. State*, 4 App. 96. May take and approve bond in vacation or after adjournment of court for the term. *La Rose v. State*, 29 App. 215, 15 S. W. 33. On voluntary surrender of an offender before indictment the sheriff can not take his bond but must carry him before a magistrate. *State v. Miller*, 31 Tex. 564; 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 aailable 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.]

See ante, art. 318; post, arts. 338, 514, 515, 978.

See *Peters v. State*, 10 App. 302; *Kiser v. State*, 13 App. 201; *Arrington v. State*, Id. 554.

Forms.—Willson's Cr. Forms, 801, 1035, 1051.

Authority of officer.—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 App. 201; *Gragg v. State*, 18 App. 295; *La Rose v. State*, 29 App. 215, 15 S. W. 33; *Patillo v. State*, 9 App. 456.

When a sheriff or other peace officer arrests a person under a warrant issued by a magistrate, upon a charge of felony, it is the duty of such sheriff or peace officer to take such person forthwith before the magistrate who issued the warrant, or before the magistrate before whom the warrant is made returnable. No authority is given by law to the sheriff or peace officer in such cases to take bail—that authority is vested in the magistrate. *Short v. State*, 16 App. 44; ante, art. 268; *Kiser v. State*, 13 App. 201; *State v. Miller*, 31 Tex. 564. And he may take bail in a felony case, after indictment found, when he makes the arrest by virtue of a *capias*, and when the court is not in session; but when the court is in session, he can not take bail in a felony case. *Kiser v. State*, 13 App. 201; *Patillo v. State*, 9 App. 456; *Gragg v. State*, 18 App. 295.

The district court being in session, but the proceeding being before an exam-

ining 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 App. 302.

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 App. 551, 554.

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 App. 530.

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 juridical day, it was taken on that day, after final adjournment for the term. *Lindsay v. State*, 39 App. 468, 46 S. W. 1045.

Bail bond is not invalidated because taken on Sunday. *Lindsay v. State*, 39 App. 468, 46 S. W. 1045.

Where a bail bond in a felony case was taken by the sheriff during the term of court, and the record contained no entry of an order of the court fixing the amount of the bail, nor facts showing that it fixed the amount, as required by Acts 30th Leg. c. 71, § 1, but it did not appear that it did not orally fix the amount and instruct the sheriff to take the bail in that amount, and the bond was acted on and accused appeared before the court and was tried, a judgment of forfeiture of the bond would not be set aside on the ground that it was a nullity, because the sheriff acted without authority in taking it. *Wiseman v. State*, 70 App. 477, 156 S. W. 683.

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.]

See ante, arts. 318, 337; post, arts. 515, 518; Willson's Cr. Forms, 801, 1051.

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.]

Joint or several liability.—Judgments upon bail bonds when forfeited should be rendered severally. *Avant et al. v. State*, 33 App. 312, 26 S. W. 411; *Kiser v. State*, 13 App. 201.

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 App. 460, citing *Fulton v. State*, 14 App. 32, and *Rainbolt v. State*, 34 Tex. 286; *Allee v. State*, 28 App. 531, 13 S. W. 991; *Avant v. State*, 33 App. 312, 26 S. W. 411; *Thompson v. State*, 34 App. 135, 29 S. W. 789; *Ray v. State*, 16 App. 268.

Where a recognizance is good as to the principal and one of the sureties, such surety is liable, though another surety may not be. *Ray v. State*, 16 App. 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.]

See ante, arts. 325, 327, 337, 338; Willson's Cr. Forms, 800, 1052.

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.]

See ante, arts. 308, 318; Willson's Cr. Forms, 800, 1052.

Former laws.—Under the old law (Hart. Dig., art. 1706) a bail bond so taken need not recite that defendant had been committed to jail by a justice; the re-

cital that he had been tried by a justice and held to bail was sufficient. *Hodges v. State*, 20 Tex. 493.

Authority of magistrate.—See *Moore v. State*, 37 Tex. 133; *Doughty v. State*, 33 Tex. 1; *Arrington v. State*, 13 App. 551; *Shrader v. State*, 30 Tex. 386; *Thomas v. State*, 12 App. 416; *State v. Russell*, 24 Tex. 505.

After the taking of a bail bond by a magistrate and the adjournment of his court, he has no power to take another. *State v. Russell*, 24 Tex. 505.

Nor has he power to take a bail bond after the adjournment of his court. *Moore v. State*, 37 Tex. 133.

An examining court is authorized to take a bail bond. *Thomas v. State*, 12 App. 416.

This and other statutes seem to contemplate that the committing magistrate, where he holds a party to bail, should require his appearance at the next ensuing term of the district court if no court be then in session or before the district court then in session if one be in session. *Ex parte Hays*, 43 App. 268, 64 S. W. 1049.

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; *Willson's Cr. Forms*, 800.

Art. 343. [331] Reasonable time given to procure bail.—Reasonable time shall be given the accused to procure security. [O. C. 289.]

See *Willson's Cr. Forms*, 800.

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.]

See *Willson's Cr. Forms*, 800.

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.]

See ante, arts. 327, 328; *Arrington v. State*, 13 App. 551; *Id.*, 554; *Willson's Cr. Forms*, 800, 1052.

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.]

See *Willson's Cr. Forms*, 800.

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.]

See ante, art. 300.

Certification of proceedings.—See *Kerry v. State*, 17 App. 179, 50 Am. Rep. 122; *Byrd v. State*, 26 App. 374, 9 S. W. 759.

Bail bond is one of the papers required to be certified. *Kimbrough v. State*, 28 App. 367, 13 S. W. 218.

Examining courts are required to certify all proceedings; and omissions from the record can not be supplied by oral testimony. *Foat v. State*, 28 App. 527, 13 S. W. 867.

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 App. 178, 50 Am. Rep. 122; ante, 288; *Simmons v. State*, 26 App. 514, 10 S. W. 116; *Byrd v. State*, 26 App. 374, 9 S. W. 759; *Kimbrough v. State*, 28 App. 367, 13 S. W. 218.

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.

Examination.—This statute authorizes the examining court to proceed with the examination even if the defendant waives his right of trial. *Porch v. State*, 51 App. 7, 99 S. W. 1124.

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.]

See *Willson's Cr. Forms*, 803, 805, 1053, 1054.

Taking after adjournment.—A bail bond of a witness not executed until after the examining court had adjourned, no order requiring such bond having been entered by the magistrate, was a nullity. *Foat v. State*, 28 App. 527, 13 S. W. 867.

Discharge.—Where C., who was indicted with G. for murder, agreed with the district attorney to testify for the state on the prosecution of G. until G.'s case was finally settled, and upon G.'s first trial a conviction was had, but it was reversed on appeal, and on the second trial G. was again convicted, and appealed, C. is not entitled to discharge or bail pending the appeal, as until the final determination of G.'s case he stands committed under the indictment. *Ex parte Carter*, 62 App. 113, 136 S. W. 778.

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 pecuniary condition, and the nature of the offense, with respect to which he is a witness. [O. C. 298.]

See *Willson's Cr. Forms*, 803, 1053.

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.]

Execution of bond after adjournment of court and without order therefor.—A bond executed four days after the conclusion of the examining court, and after

the court had adjourned and without an order entered requiring it, was held invalid and not to be enforced. *Foat v. State*, 28 App. 527, 13 S. W. 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.

See Willson's Cr. Forms, 1054.

TITLE 6

SEARCH WARRANTS

Chap. 1. General rules. 2. When and how a search warrant may be issued.	Chap. 3. Of the execution of a search warrant. 4. Proceedings on the return of a search warrant.
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CHAPTER ONE

GENERAL RULES

Art. 355. Definition of "search warrant." 356. For what purposes it may be issued. 357. Its object.	Art. 358. Definition of word "stolen." 359. When asked for in reference to property not stolen. 360. These rules applicable to all cases.
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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.]

See Pen. Code, art. 601; Willson's Cr. Forms, 1109, 1110.

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 post, arts. 368, 375.

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.]

Explanatory.—There are special provisions for searches and seizures not embraced in the above enumeration. A complete list of these acts may be obtained by reference to the indices of Vernon's civil and criminal statutes.

For another purpose of a search warrant, see, ante, P. C. art. 601, which authorizes a search warrant for "blind tiger."

Forms.—Willson's Cr. Forms, 1105-1108.

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

Art.	Art.
361. Contents of application for a search warrant.	365. Search warrant may command officer to do what.
362. For warrant to discover and seize.	366. Requisites of a search warrant.
363. For warrant to search suspected place.	367. Requisites of a warrant to search suspected place.
364. Warrant to arrest may issue with the search warrant in certain cases.	

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.]

See Willson's Cr. Forms, 1105.

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.]

See Willson's Cr. Forms, 1106, 1111.

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.]

See Willson's Cr. Forms, 1107, 1108.

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 per-

son 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 being 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.

See Willson's Cr. Forms, 1109, 1110.

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.]

See Willson's Cr. Forms, 1109, 1111.

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

Art.	Art.
368. Warrant shall be executed without delay, etc.	373. Shall seize person accused and property, and take them before magistrate.
369. Three whole days allowed for warrant to run.	374. Officer shall receipt for property.
370. Officer shall give notice of purpose to execute warrant.	375. How return made.
371. Power of officer executing the warrant.	376. All persons have the right to prevent the consequences of theft, etc.
372. When he may enter house by force.	

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.]

See Willson's Cr. Forms, 1114.

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.

See Willson's Cr. Forms, 1111, 1114.

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.]

See ante, P. C., art. 601.

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.]

See Willson's Cr. Forms, 1112, 1113.

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.]

Arrest by officer without warrant.—Where property is openly taken under a claim of right an officer cannot arrest the taker of the property without a warrant either on the theory that a theft was committed in his view, or on the theory that stolen property was found in possession of the taker. *Martin v. State*, 49 App. 526, 95 S. W. 501.

Rights and liabilities of private person.—See *English v. State*, 34 App. 190, 30 S. W. 233.

The owner of stolen property has the right to pursue the thief and recapture his property without a warrant. *Porez v. State*, 29 App. 618, 16 S. W. 750. He also has the right to arrest the thief and take him before a magistrate, or deliver him to a peace officer, but it must be openly done. *Id.* See, also, *Morris v. Kasling*, 79 Tex. 141, 15 S. W. 226, 11 L. R. A. 398.

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. *Porez v. State*, 29 App. 618, 16 S. W. 750, citing *Luera v. State*, 12 App. 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 App. 507.

A homicide, though committed while deceased was committing a theft at night, would not be justified if the killing was done on malice, and not to prevent the theft or consequences thereof. *Laws v. State*, 26 App. 643, 10 S. W. 220.

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. Kasling*, 79 Tex. 141, 15 S. W. 226, 11 L. R. A. 398.

In an action for false imprisonment, it appeared that plaintiff was arrested while carrying away a box of tools. There was no evidence that the tools in the box had been stolen, and certain tools that had been stolen had been recovered and had been in the possession of defendant's agents before the arrest was made, and were retained in defendant's possession and not carried with plaintiff to the magistrate. Held, that there was no evidence to authorize a charge embodying this article. *Southwestern Portland Cement Co. v. Reitzer* (Cr. App.) 135 S. W. 237.

CHAPTER FOUR

PROCEEDINGS ON THE RETURN OF A SEARCH WARRANT

Art.	Art.
377. Disposition of stolen property, etc.	trate schedule of property seized.
378. Officer seizing implements, etc., shall keep same, subject, etc.	382. Proceedings when magistrate is satisfied that warrant was issued upon good ground.
379. Magistrate shall proceed to investigate, etc.	383. Magistrate shall certify record, etc., of proceedings to proper court.
380. Shall discharge defendant, when.	
381. Sheriff, etc., shall furnish magis-	

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.]

See, post, title 11, chap. 2; Willson's Cr. Forms, 1115.

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.]

See, ante, art. 375; Willson's Cr. Forms, 1113.

Explanatory.—Old article 349 of the Code of 1879, following this article, was as follows: "Arms or munitions taken under a warrant in accordance with the provisions of this title shall become forfeited to the state, and shall be so adjudged by the proper court upon the conviction or escape of any person accused of having had possession of or having concealed them." See P. C., art. 62, note.

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

<p>Chap. 1. The organization of the grand jury. 2. Of the duties, privileges and powers of the grand jury. 3. Of indictments and information. 4. Of proceedings preliminary to trial. 1. Of enforcing the attendance of defendant and of forfeiture of bail. 2. Of the capias. 3. Of witnesses and the manner of enforcing their attendance. 4. Service of a copy of the indictment.</p>	<p>Chap. 4. Of proceedings preliminary to trial —Continued. 5. Of arraignment and of proceedings where no arraignment is necessary. 6. Of the pleadings in criminal actions. 7. Of the argument and decision of motions, pleas and exceptions. 8. Of continuance. 9. Disqualification of the judge. 10. Change of venue. 11. Of dismissing prosecutions.</p>
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CHAPTER ONE

THE ORGANIZATION OF THE GRAND JURY

<p>Art. 384. Jury commissioners shall be appointed, and their qualifications. 385. Commissioners shall be notified of appointment, etc. 386. Oath of jury commissioners. 387. Shall be instructed in their duties, furnished with room, stationery, etc. 388. Shall be kept free from intrusion and shall not separate, etc. 389. Shall select grand jurors. 390. Qualifications of grand jurors. 391. Names of grand jurors shall be returned, how. 392. Judge shall deliver list to clerk. 393. And administer oath to clerk, etc. 394. Deputy clerk subsequently appointed shall take same oath. 395. When clerk shall open lists, etc. 396. Mode of summoning grand jurors. 397. Return of officer. 398. Juror may be fined for not attending. 399. Where there has been a failure to select, etc., grand jury, court shall direct grand jury to be summoned. 400. When less than twelve attend, court shall order others summoned. 401. When jurors shall be required to attend forthwith. 402. Sheriff shall be directed by the court not to summon disqualified persons. 403. Court shall test jurors, when.</p>	<p>Art. 404. Shall be interrogated touching qualifications. 405. Mode of testing juror's qualifications. 406. When juror is qualified, shall be accepted. 407. When not qualified shall be excused from serving. 408. Jury shall be impaneled, when, unless, etc. 409. Any person may challenge, when. 410. Definition of "array." 411. Meaning of "impaneled," etc. 412. Causes of challenge to the array. 413. Causes of challenge to a particular juror. 414. Court shall decide challenge summarily. 415. When challenge is sustained, court shall order other jurors summoned, etc. 416. Oath of grand jurors. 417. Court shall instruct grand jury. 418. Bailiffs may be appointed, and the oath they take. 419. Bailiffs' duties. 420. Bailiffs shall take no part in discussions of grand jury, and may be punished for violation of duty. 421. Another foreman shall be appointed, when. 422. Nine members constitute a quorum. 423. May be reassembled after having been discharged for the term.</p>
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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, 1876, p. 79, § 4.]

See *McDonald v. State*, 15 App. 493; *Vernon's Sayles' Civ. St.* 1914, title 75, ch. 2.

Prejudice as disqualifying.—That jury commissioners as well as the jurors to try defendant for a violation of a local option law were Prohibitionists held no ground for reversal of a conviction. *Lively v. State* (Cr. App.) 73 S. W. 1048.

Residents of different portions of county.—There was no error in overruling a motion to quash a venire, because selected by jury commissioners taken from different parts of the county, where there was no proof that the commissioners were not from different portions of the county. *Dailey v. State* (Cr. App.) 55 S. W. 821.

It is no objection to the selection of jury commissioners that they all reside in the county seat of the county, nor is any objection to a special venire, that all the veniremen reside in the county seat of the county. *Williams v. State*, 45 App. 218, 75 S. W. 861.

So the mere fact that all the jury commissioners reside in the city of Houston, which contains two-thirds of the qualified voters of the county does not disqualify them to act as jury commissioners. *Williams v. State*, 45 App. 218, 75 S. W. 860.

Interest in pending suits.—A person is not disqualified to serve as a commissioner on the ground that his father is a party to a suit, or that he is transacting business as a merchant with persons parties to pending suits. *Veramendi v. Hutchins*, 56 Tex. 414.

A motion to quash a venire in a criminal case will not be sustained because one of the jury commissioners was interested as a party in several suits on the jury docket of that term. *Whittle v. State*, 43 Cr. App. 468, 66 S. W. 771.

Jurisdiction to direct commissioners.—In view of this article and article 389, post, and of Const. art. 16, § 19, declaring that the Legislature shall prescribe by law the qualifications of grand and petit jurors; Rev. St. 1895, art. 3145 (*Vernon's Sayles' Civ. St.* 1914, art. 5122, providing that the district court of each county, at each term, shall appoint jury commissioners, and article 3146, *Vernon's Sayles' Civ. St.* 1914, art. 5123, declaring that a person shall not act as jury commissioner more than once in the same year. It was held that, where there were six terms of court a year in a judicial district, the judge at the November, 1911, term had no jurisdiction to direct jury commissioners for that term to draw three grand juries for the succeeding January, March, and May, 1912, terms, and an indictment found by a grand jury so drawn was invalid. *Woolen v. State* (Cr. App.) 150 S. W. 1165.

Review of discretion of court.—The discretion of a trial judge in selecting jury commissioners is not subject to review by an appellate court. *Columbo v. State* (Cr. App.) 145 S. W. 910.

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 jurymen whom you believe to be unfit and not qualified; that you will not make known to any one the name of any jurymen selected by you, and reported to the court; that you will not, directly or indirectly, converse with any one selected by you as a jurymen 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.]

See notes under article 384, ante.

Constitutional and legal jury.—See notes under article 446, post.

A "grand jury" is composed of twelve men, no more and no less. An indictment presented by a body of more than twelve men is a nullity, and all proceedings had under it are void. *O'Bryan v. State*, 27 App. 339, 11 S. W. 443; *Williams v. State*, 19 App. 265; *Rainey v. State*, 19 Tex. App. 479; *Harrell v. State*, 22 App. 692, 3 S. W. 479; *Trevinio v. State*, 27 App. 372, 11 S. W. 447; *Lott v. State*, 18 App. 627; *McNeese v. State*, 19 App. 48; ante, art. 3, and notes; *Ex parte Love*, 49 App. 475, 93 S. W. 551, and cases cited; *Ex parte Reynolds*, 35 App. 437, 34 S. W. 120, 60 Am. St. Rep. 54.

The legal existence of a properly organized grand jury is not affected by the absence of one of its members. *Smith v. State*, 19 App. 95; *Watts v. State*, 22 App. 572, 3 S. W. 769; *Drake v. State*, 25 App. 293, 7 S. W. 868; *Jackson v. State*, 25 App. 314, 7 S. W. 872; *Trevinio v. State*, 27 App. 372, 11 S. W. 447.

The conviction of a person on an indictment found by a grand jury composed of fourteen men, is without due process of law, and the judgment of conviction is absolutely void. *Ex parte Reynolds*, 35 App. 437, 34 S. W. 120, 60 Am. St. Rep. 54.

While twelve is the exact quota of the grand jury, nine of that twelve can return a true bill. *Ex parte Love*, 49 App. 475, 93 S. W. 551; *Watts v. State*, 22 App. 572, 3 S. W. 769; *Drake v. State*, 25 App. 293, 7 S. W. 868.

Selection of jury.—The grand jury is to be selected from the sixteen persons drawn by the jury commissioners. *Smith v. State*, 19 App. 95; *Rainey v. State*, Id., 479.

Summoning additional jurors.—The court may direct the sheriff to summon additional jurors, where one of the twelve drawn by the jury commissioners is disqualified. *Garrett v. State* (Cr. App.) 146 S. W. 930.

Summoning jurors for succeeding terms.—An order of court directing the summoning of grand jurors for the three succeeding terms of court is without authority of law, and a prosecution commenced under an indictment returned by a grand jury summoned for the second term after the order was made must be dismissed. *Mayfield v. State* (Cr. App.) 151 S. W. 303.

Excusing juror.—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 App. 475, 93 S. W. 551.

Race discrimination.—See notes under following article and article 409.

Indictment found by a grand jury against a negro in a county where there are qualified negroes for jury service where negroes are excluded from service on the grand jury is subject to be quashed therefor. *Whitney v. State*, 42 App. 233, 59 S. W. 895; *Smith v. State*, 42 App. 220, 58 S. W. 97.

The fact that the jury commissioners failed to select negroes to serve on the grand jury is no objection to an indictment. *Carter v. State*, 39 App. 345, 46 S. W. 236, 48 S. W. 508.

While the circumstance that for many years no negro had been selected or impaneled as a grand or petit juror might have weight in a close case, it cannot be considered on a motion to quash an indictment for discrimination as to race in the composition of the grand jury, when it is shown that the law has been in every respect complied with. *Pollard v. State*, 58 App. 299, 125 S. W. 390.

Evidence, on a motion to quash an indictment, held not to sustain the ground of discrimination as to race in the composition of the grand jury. *Pollard v. State*, 58 App. 299, 125 S. W. 390.

The Court of Criminal Appeals is bound by the decisions of the United States Supreme Court in determining whether a negro was denied any right on account of race, color, etc., by the manner of selecting the grand jury which indicted him. *Jackson v. State*, 63 App. 351, 139 S. W. 1156. ✓

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.]

Cited, *Woods v. State*, 26 App. 490, 10 S. W. 108; *McCline v. State*, 64 App. 19, 141 S. W. 977.

Exemption from service.—A deputy sheriff is not disqualified. *Trinkle v. State*, 60 App. 187, 131 S. W. 583; *Edgar v. State*, 59 App. 491, 129 S. W. 141.

Exemption from grand jury service of certain officials is a personal privilege to be claimed or waived by them only. *Owens v. State*, 25 App. 552, 8 S. W. 658; *Edgar v. State*, 59 App. 252, 127 S. W. 1053.

Race discrimination.—This article does not discriminate between the races in the selection of a grand jury. *Thomas v. State*, 49 App. 633, 95 S. W. 1072.

Challenge as mode raising objections to qualifications.—See notes to art. 409, post.

Art. 391. [379] Names of grand jurors shall be returned, how.—The names of the persons selected as grand jurors by the commissioners 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.]

Return of petit jurors.—The same rule obtains with reference to the return of petit jurors. *Giebel v. State*, 28 App. 151, 12 S. W. 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.]

See *Willson's Cr. Forms*, 760.

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.]

See Willson's Cr. Forms, 761.

Process.—A defendant can not question the process upon which the grand jury were summoned. *West v. State*, 6 App. 485.

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.]

See Willson's Cr. Forms, 761.

Art. 398. [386] Juror may be fined for not attending.—A jury legally summoned, failing to attend without a reasonable 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.]

See Willson's Cr. Forms, 762, 763.

Explanatory.—The original article read "any number of persons not exceeding twenty."

Summoning additional number.—The court may direct the sheriff to summon additional jurors, where one of the twelve drawn by the jury commissioners is disqualified. *Garrett v. State* (Cr. App.) 146 S. W. 930.

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.]

See Willson's Cr. Forms, 763.

Former and present law as to number.—Constitutional and legal jury, see note under article 389, ante.

Under the constitution and law, as at present existing, a grand jury must be composed of twelve men, no more, and no less. Const., art. 5, sec. 13. *Lott v. State*, 18 App. 627; *McNeese v. State*, 19 App. 48; *Smith v. State*, Id. 95; *Rainey v. State*, Id. 479; *Williams v. State*, Id. 265.

The original article limited the number to not less than fifteen. *Drake v. State*, 25 App. 293, 7 S. W. 868.

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 App. 293, 7 S. W. 868; *Jackson v. State*, 25 App. 314, 7 S. W. 872; *Smith v. State*, 19 App. 95; *Watts v. State*, 22 App. 572, 3 S. W. 769.

Summoning additional jurors.—The court may direct the sheriff to summon additional jurors, where one of the twelve drawn by the jury commissioners is disqualified. *Garrett v. State* (Cr. App.) 146 S. W. 930.

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.

See Willson's Cr. Forms, 762-764.

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.]

See Willson's Cr. Forms, p. 406.

Number constituting legal grand jury.—As to what constitutes a legal grand jury, see notes to arts. 389, 400, ante.

Record 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 App. 395, 30 S. W. 792, citing *Simmons v. Fisher*, 46 Tex. 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.]

See Willson's Cr. Forms, 765.

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 freholder 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.]

See art. 390.

Cited, *Owen v. State*, 25 App. 552, 8 S. W. 658.

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.]

See article 402, ante, and *Drake v. State*, 25 App. 293, 7 S. W. 868.

Jury impaneled on holiday.—See notes to *Vernon's Sayles' Civ. St.* 1914, art. 4606.

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.]

See Willson's Cr. Forms, 766.

Cited, *Leech v. State*, 63 App. 339, 139 S. W. 1147.

Challenge as only method of objecting.—Objections to a grand jury, or to individual grand jurors, can only be made by challenge. *State v. Vahl*, 20 Tex. 779;

Johnson v. State, 33 Tex. 570; Hudson v. State, 40 Tex. 12; Newman v. State, 43 Tex. 525; Reed v. State, 1 App. 1; Thomason v. State, 2 App. 550; Owens v. State, 25 App. 252, 8 S. W. 658; Doss v. State, 28 App. 506, 13 S. W. 788 (overruling Woods' Case, 26 App. 490, 10 S. W. 108); Lacy v. State, 31 App. 78, 19 S. W. 896; Matkins v. State, 33 App. 605, 28 S. W. 536; Edgar v. State, 59 App. 252, 127 S. W. 1053.

Challenge of a particular juror can not be made by plea in abatement after indictment. Doss v. State, 28 App. 506, 13 S. W. 788 (overruling on contrary intimation, Woods' Case, 26 App. 490, 10 S. W. 108). And see, also, Lacy v. State, 31 App. 78, 19 S. W. 896; Anderson v. State, 70 App. 250, 157 S. W. 150.

A challenge to the array is the only mode by which objections are available against the grand jury as a body, and such challenge can be made for no other causes than those specified in article 412, post. Reed v. State, 1 App. 1; Green v. State, Id. 83; Mahl v. State, Id. 127; Smith v. State, Id. 134; Kemp v. State, 11 App. 174; Hart v. State, 15 App. 202, 49 Am. Rep. 188.

Disqualification of grand jurors can not be raised on motion to quash indictment, nor on motion for new trial. Cubine v. State, 44 App. 596, 73 S. W. 396, and cases cited; Matkins v. State, 33 App. 605, 28 S. W. 536.

An objection to the competency of a grand juror is not properly raised by a motion to quash at the trial, especially where no evidence in support of the motion is produced. Sheppard v. State (Cr. App.) 148 S. W. 314.

On a trial, after the overruling of a motion to quash an indictment, a question asked the foreman of the grand jury, who was a witness for the state, for the purpose of showing that he was not a qualified grand juror, was properly excluded. Sheppard v. State (Cr. App.) 148 S. W. 314.

A motion to quash the indictment because the grand jurors' names had been published in a newspaper 40 days before the term of court without any challenge of any when impaneled, held properly denied. Merkel v. State (Cr. App.) 171 S. W. 738.

— **Race discrimination.**—See notes under articles 389 and 390.

When it appears that in the impaneling of the grand jury the rights of colored citizens are discriminated against, this would be a violation of the fourteenth amendment to the constitution of the United States, but in this case not being properly presented the question will not be considered. Carter v. State, 39 App. 345, 46 S. W. 236, 48 S. W. 508 (reversed by Supreme Court of the United States, 177 U. S. 442, 20 Sup. Ct. 687, 44 L. Ed. 839).

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, 42 App. 220, 53 S. W. 97; Lewis v. State, 42 App. 278, 59 S. W. 1116; Kipper v. State, 42 App. 613, 62 S. W. 420.

The burden is on accused, to establish discrimination against his race in the selection of the grand jury. Whitney v. State, 43 App. 197, 63 S. W. 879.

A motion to quash an indictment because accused was a negro, and negroes were improperly excluded from the grand jury, came too late, where accused was in custody when the jury was impaneled. McCline v. State, 64 App. 19, 141 S. W. 977.

Where accused, a negro, was in jail when a grand jury was impaneled which returned an indictment against him, but made no request to challenge the grand jury, nor any objection thereto until the judgment rendered against him on the first trial had been reversed, it was then too late for him to move to quash the indictment because negroes were discriminated against in the selection of the grand jury. Hemphill v. State (Cr. App.) 170 S. W. 154.

Challenge by prisoner in jail.—In order for a party confined in jail to avail himself of the right to challenge the array of the grand jury, he must make a request to be brought from the jail for that purpose. Brown v. State, 32 App. 119, 22 S. W. 596; Webb v. State (Cr. App.) 40 S. W. 989.

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 App. 105, 52 S. W. 73.

But unless he makes the request, he can not be heard to complain. Hart v. State, 15 App. 202, 49 Am. Rep. 188, citing Kemp v. State, 11 App. 174; Innocente v. State, 53 App. 390, 110 S. W. 61.

A prisoner in jail, as well as every other person, should have the opportunity of challenging, but unless such opportunity is requested by a prisoner, he can not be heard to complain. With a view to the prevention of improper prosecutions, the practice of affording prisoners an opportunity to challenge the grand jury is commended. Kemp v. State, 11 App. 174; Reed v. State, 1 App. 1; Smith v. State, Id. 134; Thomason v. State, 2 App. 550; Cordova v. State, 6 App. 207; Hart v. State, 15 App. 202, 49 Am. Rep. 188. Before the adoption of the Code the practice was different. See Tompkins v. Republic, Dallam, 488; State v. Jacobs, 6 Tex. 99; State v. Foster, 9 Tex. 65; Jackson v. State, 11 Tex. 261; Vanhook v. State, 12 Tex. 252; Barker v. State, Id. 273; Stanley v. State, 16 Tex. 557; State v. White, 17 Tex. 242; Martin v. State, 22 Tex. 214.

Where one is in jail who wishes to challenge grand juror he must apply to the judge, and if he has not access to the sheriff he must apply through the jailer. Barkman v. State (Cr. App.) 52 S. W. 69.

One who was in jail when the grand jury by which he was indicted was impaneled cannot attack the indictment at the trial on the ground that a grand juror was disqualified. Welch v. State (Cr. App.) 147 S. W. 572.

Time of making challenge.—It is too late after indictment to question the impanelment of the grand jury or a particular member thereof. Carter v. State, 39

App. 345, 46 S. W. 236, 48 S. W. 508 (reversed by United States Supreme Court, 177 U. S. 442, 20 Sup. Ct. 687, 44 L. Ed. 839); *Smith v. State* (Cr. App.) 56 S. W. 55.

The proper time to challenge the array is before the jurors have been interrogated as to their qualifications. But a challenge to a particular juror may be made after the qualifications of the jurors have been tested. *Reed v. State*, 1 App. 1; *Grant v. State*, 2 App. 164.

The failure of the jury commissioners to sign and certify the list of grand jurors is no ground for complaint after trial. *Barber v. State* (Cr. App.) 46 S. W. 233.

If the right of challenge is not accorded at the time of the jury's organization, it can be raised by him at the time accused is called on to announce ready for trial. *Ex parte Martinez* (Cr. App.) 145 S. W. 959.

A person against whom a preliminary complaint has not been filed may challenge the array of the grand jury after the return of an indictment against him, and when called on to announce for trial. *Garrett v. State* (Cr. App.) 146 S. W. 930.

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.]

See Willson's Cr. Forms, 766.
Cited, *Rainey v. State*, 19 App. 479.

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.]

See Willson's Cr. Forms, 766.

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.]

See Willson's Cr. Forms, 766; *Ante*, art. 409, and notes.
Cited, *Owens v. State*, 25 App. 552, 8 S. W. 658; *Leech v. State*, 63 App. 339, 139 S. W. 1147.

Challenge in writing.—This challenge must be in writing. *Kemp v. State*, 11 App. 174.

Causes for challenge to array.—The array cannot be challenged on any other grounds. *Green v. State*, 1 App. 82; *Kemp v. State*, 11 App. 174; *Hart v. State*, 15 App. 202, 49 Am. Rep. 188; *Woods v. State*, 26 App. 490, 10 S. W. 108.

— **Face discrimination.**—See notes to art. 409, *ante*.

Time for challenge.—See notes to art. 409, *ante*.

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.

Causes for challenge.—Exemption from jury service not disqualification. *Owens v. State*, 25 App. 552, 8 S. W. 658; *Edgar v. State*, 59 App. 252, 127 S. W. 1053; *Trinkle v. State*, 59 App. 257, 127 S. W. 1060; *Edgar v. State*, 59 App. 491, 129 S. W. 141.

An indictment cannot be attacked by motion to quash or plea in abatement because one of the grand jurors was a witness in the case; this not being one of the causes for challenge to a grand juror enumerated. *Welch v. State* (Cr. App.) 147 S. W. 572.

Challenge.—See notes to art. 409, *ante*.

The challenge may be made orally. *Kemp v. State*, 11 App. 174.

Challenge cannot be made by plea in abatement. *Doss v. State*, 28 App. 506, 13 S. W. 788, overruling *Woods' Case*, 26 App. 490, 10 S. W. 108. See, also, *Lacy v. State*, 31 App. 78, 19 S. W. 896.

— **Time for challenge.**—See note to art. 409, *ante*.

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.]

See *ante*, art. 409, and notes.

Cited, *Leech v. State*, 63 App. 339, 139 S. W. 1147.

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.]

See Willson's Cr. Forms, 767, 768.

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.]

See Willson's Cr. Forms, 767.

Quashal of panel.—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 Tex. 9.

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.]

See Willson's Cr. Forms, 769, 770.

Cited, *Drake v. State*, 25 App. 293, 7 S. W. 868.

Record of organization of jury in general.—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 App. 145.

Nunc pro tunc entry of the organization of the grand jury may be made on the minutes. *De Olles v. State*, 20 App. 145, and cases cited.

While it is proper to prove by the minutes of the court that the grand jury was duly and legally impaneled, other evidence of that fact will not be held error unless objected to at the time it is offered. *Foster v. State*, 32 App. 39, 22 S. W. 21; *Waul v. State*, 33 App. 228, 26 S. W. 199.

Oath and record thereof.—Recitals held sufficient to show that the grand jurors were sworn according to law. *Pierce v. State*, 12 Tex. 210; *State v. Loving*, 16 Tex. 558; *Thomason v. State*, 2 App. 550; *Ferguson v. State*, 6 App. 504.

One accused of crime can not question the form of the oath. *West v. State*, 6 App. 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 App. 552, 7 S. W. 249.

Secrecy as to proceedings.—See notes under art. 442, post.

Proceedings before grand jury are secret and exempt from investigation, except as provided for in this and article 570, post.

A violation of this oath is made a misdemeanor by P. C., art. 316.

Courts can not inquire into the evidence, or sufficiency of the evidence, on which the grand jury found the indictment. *Jacobs v. State*, 35 App. 410, 34 S. W. 110 (following *Terry v. State*, 15 App. 66); *Johnson v. State*, 22 App. 206, 2 S. W. 609; *Morrison v. State*, 41 Tex. 516; *Lee v. State* (Cr. App.) 148 S. W. 567, 40 L. R. A. (N. S.) 1132.

Evidence of what transpires in a grand jury room, while the grand jury is in session, is only admissible when, in the judgment of the court, it becomes material to the administration of justice. *Thompson v. State*, 19 App. 593; *Clanton v. State*, 13 App. 139, the latter case overruling *Ruby v. State*, 9 App. 353, in so far as it holds that such evidence is not admissible in any case.

The only contingency that authorizes the State to go into the grand jury room and prove what the witness there testified to is marked out in this article. *Christian v. State*, 40 App. 671, 51 S. W. 903.

Evidence taken before grand jury is admissible solely where the truth or falsity of the witness is in question. *Brown v. State*, 42 App. 176, 53 S. W. 133.

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 App. 561, 67 S. W. 411, following *Wisdom v. State*, 42 App. 579, 61 S. W. 926, which in effect overrules *Gutgesell v. State* (Cr. App.) 43 S. W. 1016.

The members of the grand jury which indicted accused and her codefendant could testify as to what accused testified before the grand jury. *Goodwin v. State*, 70 App. 600, 158 S. W. 274.

— **Impeachment of witnesses.**—Contradictory statements made by a witness when testifying before a grand jury may be proved for the purpose of discrediting him, when, in the judgment of the court, such evidence is material to the due administration of justice. *Clanton v. State*, 13 App. 139 (overruling, upon this point, *Ruby v. State*, 9 App. 353); *Scott v. State*, 23 App. 521, 5 S. W. 142; *Rippey v. State*, 29 App. 37, 14 S. W. 448; *Watts v. State* (Cr. App.) 171 S. W. 202. And see, also, *Sisk v. State*, 28 App. 432, 13 S. W. 647.

State cannot show on cross-examination what witness may have testified to in grand jury room about other matters not inquired about in his examination in chief. *Christian v. State*, 40 App. 671, 51 S. W. 903.

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 App. 339, 39 S. W. 935. And see *Christian v. State*, 40 App. 669, 51 S. W. 903.

In a criminal prosecution, where the state put on grand jurors to show that the testimony of a witness for defendant before them differed from her testimony at the trial, the testimony of one grand juror that he translated her testimony, given in German, for the other jurors, was not objectionable because he was not sworn in the grand jury as a witness to make such translation. *Merkel v. State* (Cr. App.) 171 S. W. 739.

— **Confession before grand jury.**—See notes to art. 810, post.

The confession of a defendant before the grand jury is admissible against him if he has been cautioned. *Grimsinger v. State*, 44 App. 1, 69 S. W. 590.

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.]

See *Willson's Cr. Forms*, 769.

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.]

See *Willson's Cr. Forms*, 771, 772.

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.]

Legal grand jury.—See article 389, ante, and notes thereunder, and also notes under article 409, ante.

A legal grand jury is composed of twelve members. *Ex parte Reynolds*, 35 App. 437, 34 S. W. 120, 60 Am. St. Rep. 54; *Wells v. State*, 21 App. 594, 2 S. W.

806; *Ex parte Swain*, 19 App. 323; *Lott v. State*, 18 App. 627; *McNeese v. State*, 19 App. 48; *Smith v. State*, Id. 95; *Trevinio v. State*, 27 App. 372, 11 S. W. 447; *Harrell v. State*, 22 App. 692, 3 S. W. 479.

The discharge for the term by the legally organized grand jury of one of its members is a nullity. *Watts v. State*, 22 App. 572, 3 S. W. 769. And see *Drake v. State*, 25 App. 293, 7 S. W. 868; *Jackson v. State*, 25 App. 314, 7 S. W. 872.

Quorum.—Quorum of nine, after legal organization, is competent to transact business. *Watts v. State*, 22 App. 572, 3 S. W. 769, citing *Smith v. State*, 19 App. 95. And see *Woods v. State*, 26 App. 490, 10 S. W. 108; *Letch v. State*, 63 App. 339, 139 S. W. 1147.

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.

See *Willson's Cr. Forms*, 782, 783.

Reassembling grand jury.—The practice was the same before the adoption of this article. *Wilson v. State*, 32 Tex. 112; *Newman v. State*, 43 Tex. 525; *Mitchell v. State*, Id. 512; *Drake v. State*, 25 App. 293, 7 S. W. 868; *Trevinio v. State*, 27 App. 372, 11 S. W. 447.

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 App. 242, 49 S. W. 612.

The jurors need not be retested nor resworn. If the reassembled panel is not full, the court can complete the panel according to the rules of law on the subject, or if one of the jurors is disqualified the court can stand him aside and impanel another in his place. *Matthews v. State*, 42 App. 31, 58 S. W. 86, following *Trevinio v. State*, 27 App. 372, 11 S. W. 447.

When the grand jury has been discharged it is discretionary with the district judge to reassemble them during the term. If he does not do so he must require a party who is granted bail during a term of court to appear at the next term of the district court to answer the charge. *Ex parte Glasgow* (Cr. App.) 64 S. W. 1054.

A grand jury properly impaneled and organized adjourned for a week, but on the same day it was reassembled by order of court with 10 members present. Held, that it was a legally constituted grand jury. *Leech v. State*, 63 App. 339, 139 S. W. 1147.

Where, after the grand jury had been discharged for the term, the offense with which defendant was charged was committed, and the court reconvened the grand jury, a grand juror, who had witnessed the offense, was not incompetent as a grand juror, though the state wanted him as a witness, and it was not error to refuse to quash the indictment on that ground. *Vasquez v. State* (Cr. App.) 172 S. W. 225.

CHAPTER TWO

OF THE DUTIES, PRIVILEGES AND POWERS OF THE GRAND JURY

Art.		Art.	
424.	Place to be prepared for grand jury.	436.	Bailiff, etc., shall execute and return process from grand jury, etc.
425.	Deliberations shall be secret.	437.	Evasion of service by witness may be punished by fine.
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427.	Attorney may examine witness, etc.	439.	Oath to witnesses.
428.	Grand jury may send for attorney representing the state, etc.	440.	How witnesses shall be questioned.
429.	Grand jury may seek advice from the court.	441.	When a felony has been committed by unknown person.
430.	Foreman shall preside over grand jury.	442.	After the testimony grand jury shall vote.
431.	Grand jury shall meet and adjourn.	443.	Memorandum shall state what.
432.	Duties of grand jury.	444.	Indictment shall be prepared by attorney and signed, etc., by foreman.
433.	Foreman may issue process for witnesses.	445.	Indictment shall be presented in open court, etc.
434.	Attachment for witnesses in another county may be obtained, how.	446.	Presentment to be entered of record, etc.
435.	Attachment may be obtained in vacation, etc.		

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.]

See Willson's Cr. Forms, 785; P. C., art. 316.

Secrecy as to proceedings.—See notes to art. 416, ante.

Presence of unauthorized persons as ground for quashing indictment.—See notes to art. 570, subd. 2, post.

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.]

Presence of attorney.—The county attorney may be present at all times when the grand jury is not deliberating or voting upon a bill of indictment. *Haywood v. State*, 61 App. 92, 134 S. W. 218. But his presence when the grand jury is discussing or voting is unauthorized, and will vitiate indictment. *Rothschild v. State*, 7 App. 519; *Stuart v. State*, 35 App. 440, 34 S. W. 118. And so will the presence of the assistant county attorney during the grand jury's "investigation and deliberation," though not present at the voting. *Stuart v. State*, 35 App. 440, 34 S. W. 118. The fact that the assistant district attorney was present and examined witnesses in the grand jury room, and consulted with the grand jury regarding the case of accused, is not equivalent to proof that he was present when the grand jury was deliberating upon the indictment against accused. *Moody v. State*, 57 App. 76, 121 S. W. 1117.

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 App. 115, 51 S. W. 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 questions in writing, upon which the court may give them the desired information in writing. [O. C. 276.]

Absence of judge.—That the judge, after organizing the grand jury, left it deliberating on the finding of an indictment, and went to another county, is not ground for quashing the indictment, in the absence of a showing of injury. *Elliott v. State*, 58 App. 200, 125 S. W. 568.

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.]

Cited, *Leech v. State*, 63 App. 339, 139 S. W. 1147.

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.]

Offenses subject to inquiry.—A grand jury is an inquisitorial body pertaining alone to offenses committed within the county or that could be prosecuted in the county and has no power to inquire concerning offenses committed beyond the county's boundaries. *Pigg v. State*, 71 App. 600, 160 S. W. 691.

Agreement not to indict.—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*, 59 App. 39, 126 S. W. 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.]

See Willson's Cr. Forms, 775, 776.

Service on judge as 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. *Ex parte Degener*, 30 App. 566, 17 S. W. 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.]

See Willson's Cr. Forms, 777, 780.

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.]

See Willson's Cr. Forms, 777.

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.

See Willson's Cr. Forms, 880, 881.

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.]

Contempt.—An agent of a telegraph company may be compelled to produce messages before a grand jury. But the court may not punish for contempt for disobeying a subpoena duces tecum unless it is made to appear that the disobedience is as to some matter material to the prosecution of some crime or person charged with crime. *Ex parte Gould*, 60 App. 442, 132 S. W. 364, 31 L. R. A. (N. S.) 835.

One who, when summoned before the grand jury, refuses to be sworn, and who, when brought before the district judge, again refuses to be sworn and answer any question, or to affirm in any way, is guilty of contempt of court, authorizing confinement in jail until she will take the oath required by law, in the absence of any proof that her refusal was on account of any religious or other convictions. *Ex parte Barnes* (Cr. App.) 166 S. W. 728, 51 L. R. A. (N. S.) 1155. See, also, *Ex parte Napoleon* (Cr. App.) 144 S. W. 269.

Self-Incrimination.—See notes under art. 4, ante.

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.]

See Willson's Cr. Forms, 773.

Explanatory.—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. See ante, art. 416, and notes.

Perjury.—See notes to Pen. Code, art. 304, et seq.

One making a false statement before a grand jury, may be convicted of perjury. *Pipes v. State*, 26 App. 318, 9 S. W. 614; *Weaver v. State*, 34 App. 554, 31 S. W. 400; *Buller v. State*, 33 App. 551, 28 S. W. 465; *Butler v. State*, 36 App. 444, 37 S. W. 746; *McMurtry v. State*, 38 App. 521, 43 S. W. 1010; *Barnes v. State* (Cr. App.) 152 S. W. 1043.

— **Indictment.**—See notes to art. 465, post.

The indictment need not state the specific offense which the grand jury was investigating. *Bell v. State* (Cr. App.) 171 S. W. 239. And it is sufficient, though not alleging facts showing the foreman's authority. *Eoff v. State* (Cr. App.) 170 S. W. 707.

Punishment for divulging proceedings.—See Pen. Code, art. 316, and notes.

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.]

Cited, *Bell v. State* (Cr. App.) 171 S. W. 239.

Scope of inquiry.—In an investigation by the grand jury as to a sale of liquor on Sunday the questions should be confined to sales made on Sunday and by persons mentioned in the statute as inhibited from making such sales. *Meeks v. State*, 32 App. 420, 24 S. W. 98. That some one other than those enumerated in the statute (art. 302) sold liquor on Sunday can not constitute a material inquiry. *Id.*

The grand jury must direct its inquiries to the discovery of crime, but cannot inquire into matters not material to the matter under investigation. *Ex parte Gould*, 60 App. 442, 132 S. W. 364, 31 L. R. A. (N. S.) 835.

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.]

See notes under following article.

Voting.—When it appears that the evidence was sufficient to justify the finding of true bills the manner of procedure in voting upon the bills is immaterial. *Jacobs v. State*, 35 App. 410, 34 S. W. 110.

Memorandum.—The statute 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 App. 410, 34 S. W. 110.

Witnesses need not be personally before the grand jury as examining trials are had, testimony taken, reduced to writing, and sworn to and transmitted to the grand jury, which is authorized to return an indictment thereon if found sufficient. *Zweig v. State* (Cr. App.) 171 S. W. 747.

Going behind indictment to inquire into evidence.—See notes under article 416, ante.

There is no law which authorizes the courts to go behind an indictment properly returned into court, and inquire into the evidence, or the sufficiency of the evidence, upon which the grand jury found and presented it. The presumption of law is that the indictment returned was found by the grand jury after all the testimony which was accessible to them had been heard by them. *Terry v. State*, 15 App. 66; *Morrison v. State*, 41 Tex. 516; *Cotton v. State*, 43 Tex. 169; *Hart v. State*, 15 App. 202, 49 Am. Rep. 188; *Johnson v. State*, 22 App. 206, 2 S. W. 609; *Jacobs v. State*, 35 App. 410, 34 S. W. 110; *Dockery v. State*, 35 App. 487, 34 S. W. 281; *Kingsbury v. State*, 37 App. 259, 39 S. W. 365; *Clark v. State* (Cr. App.) 43 S. W. 522; *Lee v. State* (Cr. App.) 148 S. W. 567, 40 L. R. A. (N. S.) 1132. See, also, *Orner v. State* (Cr. App.) 143 S. W. 935.

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.]

See Willson's Cr. Forms, 774.

Memorandum.—When the grand jury docket shows entries containing memorandum of true bills, the name of defendant and nature of the offense, it is a sufficient record. *Jacobs v. State*, 35 App. 410, 34 S. W. 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.]

See Willson's Cr. Forms, 8.

Preparation by attorney pro tem.—The court may appoint a district or county attorney pro tem., who will thereby be authorized to prepare indictments. Ante, art. 38, note.

Signature by foreman.—See notes under articles 451, subd. 9; art. 576, subd. 2. Omission of the foreman's signature will not invalidate indictment. *Robinson v. State*, 24 App. 4, 5 S. W. 509; *Weaver v. State*, 19 App. 547, 53 Am. Rep. 389, and cases cited; *Day v. State*, 61 App. 114, 134 S. W. 215.

Where the foreman signed the indictment, the fact that his signature was not indorsed or signed on the back thereof below the words "A true bill" did not vitiate the indictment. *Brown v. State* (Cr. App.) 170 S. W. 716.

Indorsement of names of witnesses.—That the names of the state's witnesses, as they appeared on the indictment, were not indorsed on the copy served on the accused, is no ground for a postponement of the trial. *Hart v. State*, 15 App. 202, 49 Am. Rep. 188; *Walker v. State*, 19 App. 176. And see *Polk v. State* (Cr. App.) 152 S. W. 907.

The requirement that the witnesses' names shall be indorsed on the indictment is merely directory. *Steele v. State*, 1 Tex. 142; *Walker v. State*, 19 App. 176.

No exception lies because the statute has not been complied with in this respect, nor is it ground for new trial; but upon motion, the court may cause the omission to be supplied. *Skipworth v. State*, 8 App. 135.

Testimony of a witness will not be excluded because his name is not indorsed on the indictment. *Kramer v. State*, 34 App. 84, 29 S. W. 157.

Indorsement of witnesses on indictment may be compelled by motion. *Jacobs v. State*, 35 App. 410, 34 S. W. 110.

Witnesses, whose names are not on the back of indictment, may be introduced by the State. *Fehr v. State*, 36 App. 93, 35 S. W. 381, 650.

A witness may testify for the State though his name is not indorsed on the indictment. *Williams v. State*, 37 App. 147, 38 S. W. 999.

The requirement that the state's attorney shall prepare all indictments, and shall indorse thereon the names of the witnesses upon whose testimony it was found, is directory; and the failure to place the names thereon and furnish the accused with a copy of them is not reversible error. *Luster v. State*, 63 App. 541, 141 S. W. 209, Ann. Cas. 1913D, 1089.

Where defendant filed no motion to be furnished the names of witnesses not indorsed on his copy of the indictment, but waited until the case was called for trial, he thereby waived his right to object that the names had not been furnished him. *Holmes v. State*, 70 App. 214, 156 S. W. 1173.

Where the failure to enter the names of the witnesses on the copy of the indictment served on accused was to avoid trouble, and the omission was ordered by the court without the knowledge or consent of accused or his counsel, the omission did not constitute reversible error. *Holmes v. State*, 70 App. 423, 157 S. W. 487.

Where accused did not move that the names of the witnesses should be indorsed on the indictment, he could not object to the testimony of a witness whose name was not indorsed. *Raleigh v. State* (Cr. App.) 168 S. W. 1050.

Accused, surprised by the testimony of a witness whose name was not indorsed on the indictment, should move to postpone the case. *Raleigh v. State* (Cr. App.) 168 S. W. 1050.

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.]

Presence of accused in county.—An indictment is not void because defendant was not present in the county when indicted. *Ex parte Martinez* (Cr. App.) 145 S. W. 959.

Record.—See notes under the following article.

An objection that nine of the grand jury did not concur in presenting the indictment will not be entertained on appeal dehors the record. *Hasley v. State*, 14 App. 217.

For typographical error, see *Fields v. State* (Cr. App.) 151 S. W. 1051.

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.]

See *Willson's Cr. Forms*, 9.

Filing and record in general.—The fact of the presentment must be noted in the minutes. *Hardy v. State*, 1 App. 556; *Walker v. State*, 7 App. 52. But it is not essential that the entry should state the offense charged. *Hasley v. State*, 14 App. 217; *Bohannon v. State*, Id. 271; *Tyson v. State*, Id. 388; *Spear v. State*, 16 App. 98; *Steele v. State*, 19 App. 425; *DeOlles v. State*, 20 App. 145; *Rowlett v. State*, 23 App. 191, 4 S. W. 582; *Tellison v. State*, 35 App. 388, 33 S. W. 1082; *Malloy v. State*, 35 App. 389, 33 S. W. 1082. The former law required the offense to be noted in the entry. *Denton v. State*, 3 App. 635.

Defendant's name must be omitted from the entry unless he is in custody or under bond. *Bohannon v. State*, 14 App. 271. And see *Haynes v. State* (Cr. App.) 83 S. W. 16.

For entries held sufficient, see *Anderson v. State*, 2 App. 288; *Houillon v. State*, 3 App. 537; *Spear v. State*, 16 App. 98.

In case of variance as to dates between the clerk's file mark on the indictment and the record of its presentation the latter will control. *Kennedy v. State*, 9 App. 399.

To state the file number of a cause is a sufficient description and identification of it. *Lynn v. State*, 28 App. 515, 13 S. W. 867.

Where the record shows that the term of court at which an indictment was found and trial had thereunder began on April 1st and adjourned on June 29th, and that the trial and conviction were had on June 20th, and that, on May 22d the grand jury in open court presented the indictment charging the offense on May 4th, the recital that the indictment was filed April 22d was a typographical or other error, and the indictment as a matter of fact was found and presented to

the court subsequent to the date of the offense alleged therein, as required by this and the preceding article. *Fields v. State* (Cr. App.) 151 S. W. 1051.

Objections and exceptions.—As to exceptions to indictment, see art. 575, 576, post, and notes.

Defects or omissions in the entry as to the presentment can only be availed of when the objection is made in limine. *Alderson v. State*, 2 App. 10; *Coates v. State*, Id. 16; *Houillon v. State*, 3 App. 537; *Hill v. State*, 4 App. 559; *Jinks v. State*, 5 App. 68; *Templeton v. State*, Id. 398; *Johnson v. State*, 7 App. 210; *Bailey v. State*, 11 App. 140; *Rowlett v. State*, 23 App. 191, 4 S. W. 582; *Walker v. State*, 7 App. 52; *Estes v. State*, 33 App. 560, 28 S. W. 469; *Murphey v. State*, 29 App. 507, 16 S. W. 417, and cases cited.

Such defects are not available after verdict. *Douglass v. State*, 8 App. 520.

An objection that the finding and return of an indictment was not entered upon the minutes of the court can not be take advantage of on a motion in arrest, but only by exception in limine to the indictment. *Rather v. State*, 25 App. 623, 9 S. W. 69. Such an objection cannot be made for the first time in the appellate court. *Rowlett v. State*, 23 App. 191, 4 S. W. 582.

That an indictment is not indorsed "filed" by the clerk, will not avail after verdict, if the record shows it was presented in court by the grand jury. *Reynolds v. State*, 11 Tex. 120.

A palpable mistake of the clerk in the date of a file mark is immaterial after verdict. *Terrell v. State*, 41 Tex. 463.

A mistake in the file mark can not be objected to on motion in arrest of judgment. *Terrell v. State*, 41 Tex. 464; *Rippey v. State*, 29 App. 37, 14 S. W. 448.

Where the record of the return of an indictment only showed that, on a specified date, the grand jury appeared in open court and presented the following true bill of indictment, etc., a motion to quash because it did not appear that the indictment was presented by a "quorum of the grand jury" should have been made in the court of original jurisdiction and, being a mere matter of procedure, could not be made in the court to which the venue was changed. *Serrato v. State* (Cr. App.) 171 S. W. 1133.

Amendments.—As to amendment of indictment, see art. 599, and notes.

Omission of the file mark may be supplied after the trial has commenced. *Caldwell v. State*, 5 Tex. 18; *De Olles v. State*, 20 App. 145; *Boren v. State*, 32 App. 637, 25 S. W. 775; *Rippey v. State*, 29 App. 37, 14 S. W. 448; *Skinner v. State*, 64 App. 84, 141 S. W. 231. Compare *Kennedy v. State*, 9 App. 399.

Upon proper showing, even at a subsequent term, the record may be amended so as to show presentment. *Burnett v. State*, 14 Tex. 456, 65 Am. Dec. 131; *Rhodes v. State*, 29 Tex. 188; *Denton v. State*, 3 App. 635; *Townsend v. State*, 5 App. 574; *Cox v. State*, 7 App. 495; *De Olles v. State*, 20 App. 145; *Serrato v. State* (Cr. App.) 171 S. W. 1133. But such amendment can not be made after notice of appeal. *Knight v. State*, 7 App. 206.

It is not error to permit the entry to be amended so as to show that the presentment was made in open court. *Tyson v. State*, 14 App. 388.

Substitution of records.—See notes to art. 482, post.

Where the record of the presentment has been destroyed it can not be supplied by proof that such record was made. It must be substituted in the manner prescribed for the substitution of records. *Strong v. State*, 18 App. 19.

Legality of grand jury.—See notes under article 389, ante.

An indictment presented by a jury composed of more than twelve men is a nullity. *Lott v. State*, 18 App. 627; *McNeese v. State*, 19 App. 48; *Williams v. State*, Id. 265; *Ex parte Swain*, Id. 323; *Rainey v. State*, Id. 479; *Wells v. State*, 21 App. 594, 2 S. W. 806; *Harrell v. State*, 22 App. 692, 3 S. W. 479. See, also, *Trevinio v. State*, 27 App. 372, 11 S. W. 447; *Ex parte Reynolds*, 35 App. 437, 34 S. W. 120, 60 Am. St. Rep. 54, and cases cited.

But legality of an impanelled grand jury is not affected by the absence of one of its members. *Drake v. State*, 25 App. 293, 7 S. W. 868. See, also, *Smith v. State*, 19 App. 95; *Watts v. State*, 22 App. 572, 3 S. W. 769.

And as to correctness of record as to number, see *Vance v. State*, 34 App. 395, 30 S. W. 792.

CHAPTER THREE

OF INDICTMENTS AND INFORMATIONS

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[Decisions as to the requisites and sufficiency of indictments, informations, and complaints as to particular crimes, and as to issues, proof and variance, may be found in the notes under articles of the Penal Code relating thereto. The annotations to this chapter are intended to include decisions of general application or which apply to articles therein relating to particular crimes.]

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.]

See article 4 and notes thereunder. See *Caldwell v. Texas*, 137 U. S. 692, 11 Sup. Ct. 224, 34 L. Ed. 816, dismissing writ of error to review judgment in s. c. 28 App. 566, 14 S. W. 122.

Explanatory.—The present constitution reads as follows: "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 arising in the army or navy, or in the militia, when in actual service in time of war or public danger." [Const. art. 1, § 10 (*Vernon's Sayles' Civ. St. 1914*, vol. 1, p. xxiv).]

Necessity of indictment.—A felony can be prosecuted by indictment only. *Kinley v. State*, 29 App. 532, 16 S. W. 339.

An indictment is not necessary to the commencement of a criminal prosecution which may be initiated by the filing of a complaint with a justice of the peace charging accused with the commission of a felony, the issuance of a warrant of arrest thereon, and the arrest of accused thereunder by a proper officer. *Baskins v. State* (Cr. App.) 171 S. W. 723.

Principals, accessories and accomplices.—See notes under the following article. See notes under P. C. arts. 74, 75, 77, 79, 84, 86.

Art. 448. [436] Misdemeanors presented by indictment, or, etc.—All misdemeanors may be presented by either information or indictment. [O. C. 391.]

Cited, *Etheridge v. State* (Cr. App.) 175 S. W. 702.

Misdemeanors.—A misdemeanor may be prosecuted by information though punishable by imprisonment in the county jail. *Reddick v. State*, 4 App. 32.

Prosecutions in county courts may be commenced by information. *Haines v. State*, 7 App. 30.

One prosecuted for a misdemeanor in the county court cannot waive failure to file an information, that being a jurisdictional matter. *Ethridge v. State* (Cr. App.) 172 S. W. 784.

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, see ante, arts. 106-109, and notes.

See notes to the preceding article and to article 483, post.

Prosecutions in county court for misdemeanors.—Prosecutions in the county court for misdemeanors must be by information. *Sponberg v. State*, 60 App. 168, 131 S. W. 541; *Garza v. State*, 11 App. 410.

One prosecuted in county court for a misdemeanor cannot waive the filing of an information. *Ethridge v. State* (Cr. App.) 172 S. W. 784; *Id.*, 172 S. W. 786. And see *Etheridge v. State* (Cr. App.) 175 S. W. 702.

Presentation of information in vacation.—An information may be presented in vacation. *State v. Corbit*, 42 Tex. 88; *Raspberry v. State*, 1 App. 664.

Essentials of transcript on appeal.—See notes to art. 929, post.

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.]

Cited, *Caldwell v. Texas*, 137 U. S. 692, 11 Sup. Ct. 224, 34 L. Ed. 816.

"Due course of law."—See ante, art. 3, and notes.

Meaning and requisites of indictment in general.—Following statutory words, see notes to art. 474, post. And see, also, specific offenses in Pen. Code.

At the adoption of our constitution, and for a century previously, both in England and America, the preceding article expresses what was understood as constituting an indictment. The meaning of the word "indictment" requires a statement of the essential acts or omissions which constitute the offense with which the party is accused. All that is essential to constitute the offense must be explicitly charged and can not be aided by intendment. A statement of a legal result, a conclusion of law, will not be sufficient. The facts constituting the crime must be set forth, that the conclusion of law may be arrived at from the facts so stated. *Hewitt v. State*, 25 Tex. 722; *State v. Wilburn*, 25 Tex. 738; *State v. Duke*, 42 Tex. 455; *Williams v. State*, 12 App. 395; *Rodriguez v. State*, 12 App. 552; *Brinster v. State*, Id. 612; *Huntsman v. State*, Id. 619; *Insall v. State*, 14 App. 145; *Reed v. State*, Id. 662; *Allen v. State*, 13 App. 28; *Gabrielsky v. State*, Id. 428; *Stringer v. State*, Id. 520 (overruling *Tompkins v. State*, 33 Tex. 228); *Parker v. State*, 9 App. 351; *Pierce v. State*, 17 App. 232; *Van Vickle v. State*, 22 App. 625, 2 S. W. 642; *Cothran v. State*, 36 App. 196, 36 S. W. 273. A printed form, with the blanks properly filled in writing, is a "written statement." *Winn v. State*, 5 App. 621; *Bush v. Republic*, 1 Tex. 455; *State v. Powell*, 28 Tex. 626; *White v. State*, 3 App. 605; *Prophit v. State*, 12 App. 233; *Young v. State*, 12 App. 614; *Flores v. State*, 13 App. 337; *Brown v. State*, 13 App. 347; *Strickland v. State*, 19 App. 518; *Jones v. State*, 25 App. 621, 8 S. W. 801, 8 Am. St. Rep. 449; *Brown v. State*, 26 App. 540, 10 S. W. 112.

When an offense is defined by statute, all of the essential elements of the offense must be alleged. *Rice v. State*, 37 App. 36, 38 S. W. 801; *Gaddy v. State*, 8 App. 127; *Hoskey v. State*, 9 App. 202; *Calcoat v. State*, 37 App. 245, 39 S. W. 364; *Cosgrove v. State*, 37 App. 249, 39 S. W. 367, 66 Am. St. Rep. 802.

Joinder of parties.—Several offenders may sometimes be included in the same indictment, for different offenses of the same kind, the word "separately" being inserted, which would make it several as to each; but if any material inconvenience is apprehended by reason thereof, the court may quash on that ground. *Lewellen v. State*, 18 Tex. 538; *Bennett v. State*, 26 App. 671, 14 S. W. 336.

— **Principals, accomplices, and accessories.**—See notes to Pen. Code, arts. 74, et seq.

— **Conspirators.**—See notes to Pen. Code, art. 1437.

— **Trial of joint defendants.**—See arts. 726-730.

Discharge of defendant where court has no jurisdiction or where facts charged do not constitute offense.—See arts. 731-733, post, and notes.

Legality of grand jury.—See articles 389, 403, 445, and 446, and notes thereunder.

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."

See *Willson's Cr. Forms*, 1.

2. It must appear therefrom that the same was presented in the district court of the county where the grand jury is in session.

3. It must appear to be the act of a grand jury of the proper county.

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.

See *Willson's Cr. Forms*, 4.

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.

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.

See *Willson's Cr. Forms*, 6.

7. The offense must be set forth in plain and intelligible words.

8. The indictment must conclude, "Against the peace and dignity of the state."

See *Willson's Cr. Forms*, 7.

9. It shall be signed officially by the foreman of the grand jury.
[O. C. 395.]

See Willson's Cr. Forms, 1, 4, 6-7a, 815, 817-821.

Cited, Caldwell v. Texas, 137 U. S. 692, 11 Sup. Ct. 224, 34 L. Ed. 816.

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1. **In general.**—An indictment for murder held to be substantially in the form prescribed by law. *Zunago v. State*, 63 App. 58, 138 S. W. 713, Ann. Cas. 1913D, 665.

An indictment, and each count thereof, must be tested by itself as a pleading, and can neither be supported nor defeated as such by the evidence at the trial. *Ritter v. State* (Cr. App.) 176 S. W. 727.

2. **Commencement.**—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" is a defect of substance as well as form. *Jefferson v. State*, 24 App. 535, 7 S. W. 244; *Wood v. State*, 27 App. 538, 11 S. W. 525; *Rowlett v. State*, 23 App. 191, 4 S. W. 582; *State v. Durst*, 7 Tex. 74; *State v. Sims*, 43 Tex. 521; *Holden v. State*, 1 App. 225; *Cox v. State*, 8 App. 254, 34 Am. Rep. 746; *Haun v. State*, 13 App. 383, 44 Am. Rep. 706; *Saine v. State*, 14 App. 144; *Wade v. State*, 52 App. 619, 108 S. W. 677.

The caption need not give the term of the court. *Hudson v. State*, 40 Tex. 12.

The indictment must commence "In the name and by the authority of the State of Texas." These words are indispensable. Const., art. 5, sec. 12. "By and with the authority of the state" was held insufficient. *Saine v. State*, 14 App. 144. A printed card at the head of a blank form of indictment is no part of the indictment, and does not vitiate such indictment. *Winn v. State*, 5 App. 621; *West v. State*, 6 App. 485. See, also, *Owens v. State*, 25 App. 552, 8 S. W. 658. A caption forms no part of and does not vitiate an indictment. *English v. State*, 4 Tex. 125; *Winn v. State*, 5 App. 621; *Jefferson v. State*, 24 App. 535, 7 S. W. 244.

A prosecution in the name of the government, and conducted by the proper law officers, was held to be sufficient to show that it was carried on "in the name and by the authority of the state of Texas." *Drummond v. R.*, 2 Tex. 156. Indictments and informations must commence "in the name and by the authority of the state of Texas." Post, art. 478; *Saine v. State*, 14 App. 144.

The commencement clause applies to every count in the indictment, and does not have to be repeated seriatim. *West v. State*, 27 App. 472, 11 S. W. 482; *Dancey v. State*, 35 App. 615, 34 S. W. 113, 933, and cases cited.

The constitution as published in Revised Statutes of 1895 (art. 5, § 12) showing the requirement as to the beginning of an indictment does not contain the word "the" before "authority," although Sayles' and Axtell's annotated constitutions do, therefore to omit the word "the" in the indictment before authority is proper, and in accord with the constitutional requirement. *Weaver v. State* (Cr. App.) 76 S. W. 564.

Though the Constitution and statutes require every indictment to begin, "In the name and by the authority of the state of Texas," the insertion of the word "of" after the word "name" did not invalidate the indictment. *Moss v. State*, 60 App. 268, 131 S. W. 1088.

3. **Presentation and act of grand jury.**—An indictment which sets out the state and county in the caption, and then recites that "the grand jurors in and for the county and state aforesaid," etc., is sufficient. *English v. State*, 4 Tex. 125. So, also, is the recital, "the grand jurors for the state of Texas, duly sworn, etc., to inquire, etc., of all offenses committed within the county of C.," etc. *Williams v. State*, 30 Tex. 404; *Davis v. State*, 6 App. 133; *Coker v. State*, 7 App. 83; *Scales v. State*, Id. 361. But the following recital was held insufficient: "The grand jurors in and for the County of Freestone and State of Texas, duly elected, etc., in the district court of said Freestone county, Texas, etc., upon their oaths present," etc., because it did not show by direct affirmative allegation that they presented the indictment in the district court of Freestone, or any other county. *Thomas v. State*, 18 App. 213. When the indictment upon its face shows that it was presented by a grand jury duly organized, and that such presentment was made in the proper court, it must be presumed that the presentment was made by a legal grand jury of the proper county, and this presumption must prevail until it is shown that in fact the indictment was not presented by a legal grand jury. *DeOlles v. State*, 20 App. 145. The requirement that the indictment must state the court in which it is presented, relates to form and not substance, and is amendable. *Bosshard v. State*, 25 Tex. Supp. 207. A disregard of the requirement is not available except upon exception to the indictment. It is not an objection which can be entertained on a motion in arrest of judgment. *Niland v. State*, 19 App. 166; *Thomas v. State*, 18 App. 213; *Walker v. State*, 7 App. 52; *Hauck v. State*, 1 App. 357; *Long v. State*, Id. 466; *Mathews v. State*, 44 Tex. 376; *State v. Hilton*, 41 Tex. 565; *Bosshard v. State*, 25 Tex. Supp. 207; *Van Vickie v. State*, 22 App. 625, 2 S. W. 642. But if exception be made to the indictment because of such defect, the exception should be entertained. *Mathews v. State*, 44 Tex. 376; *Thomas v. State*, 18 App. 213. For instances of a sufficient

compliance with requisites 2 and 3, see *Garling v. State*, 2 App. 44; *Harris v. State*, Id. 102; *West v. State*, 6 App. 485; *DeOlles v. State*, 20 App. 145. It is not essential that the indictment should state that the grand jurors were sworn, or that the presentment was made upon their oaths or affirmations. It is sufficient if it appears from the indictment that it was the act of a grand jury of the proper county. *Chevarrio v. State*, 17 App. 390. And that the charge is made by such grand jury. *Van Vickle v. State*, 22 App. 625, 2 S. W. 642. Matters of form in an indictment are amendable before both parties announce ready upon the merits, but not thereafter. Allegations as to the court and term at which the indictment was presented are matters of form. *Osborne v. State*, 23 App. 431, 5 S. W. 251. See *Murphey v. State*, 29 App. 507, 16 S. W. 417.

Indictment held to show that it was presented in a court having jurisdiction. *Hudson v. State*, 40 Tex. 12.

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 App. 110, 22 S. W. 149, and cases cited.

The county having two district courts, it was not necessary that the indictment should have particularized either. *Sargent v. State*, 35 App. 325, 33 S. W. 364; *Phillips v. State*, 35 App. 480, 34 S. W. 272.

On subdivision 3, see, also, *Wright v. State*, 35 App. 367, 33 S. W. 973; *Murphy v. State*, 36 App. 24, 35 S. W. 174; *Nichols v. State*, 30 Tex. 515; *Golden v. State*, 32 Tex. 737.

It is not necessary that it should state that it was presented at the same term the grand jury was organized. *Wright v. State*, 35 App. 367, 33 S. W. 973. Or that the jurors were sworn. *Hart v. State* (Cr. App.) 44 S. W. 1105.

When the first count in an indictment alleges that it was presented in the district court it is not necessary to repeat the allegation in subsequent counts. *Anderson v. State*, 39 App. 34, 44 S. W. 824.

Where there is but one count, the indictment need not, as to each and every minor allegation, allege that "the grand jurors do say." *Campbell v. State*, 43 App. 602, 68 S. W. 513.

An indictment recited that "the grand jurors for the county of Marion, state aforesaid, duly organized as such at the November term, A. D. 1910, of the district court for said county, upon their oaths in said court, present," etc., when in fact the grand jury was organized and returned the indictment at the October term, 1910, begun October 31, 1910, and adjourned on November 26th. Held, that the indictment complied with these two requisites. *Luster v. State*, 63 App. 541, 141 S. W. 209, Ann. Cas. 1913D, 1089.

An indictment alleging that it was found by the grand jury impaneled at the May term, A. D. 191—, instead of the May term, A. D. 1911, is not so defective as to be subject to motion to quash. *Fagnani v. State* (Cr. App.) 146 S. W. 542.

An indictment alleged that the grand jury presenting it was organized at the July term, 1912, and was marked "filed" in the district court July 9th, while the records of the district court showed that it was returned in January, 1913, and was at that term by proper order transferred to the county court. Held, that the statement in the indictment and the file mark might be disregarded as surplusage, and hence, as the defects would have been subject to amendment if raised by motion to quash, a bill of exceptions, reciting an objection to the indictment on the ground that there was nothing to show that it had been found by any legal grand jury or duly transferred to the county court, must be overruled. *Matthews v. State*, 71 App. 374, 160 S. W. 1185.

4. Name of accused.—See article 456, post, and notes thereunder.

The indictment is not invalid because in one place the wrong surname was used. *Smith v. State*, 70 App. 68, 156 S. W. 645. The giving of a wrong name or the failure to give accused's full name is a matter of form only, and, where he was described by his Christian name, nationality, and place of residence, which description was not shown to be untrue, and it appeared that he was the identical person alleged to have committed the offense charged, the judgment will not be reversed. *Cresencio v. State* (Cr. App.) 165 S. W. 936. Christian name being unknown, indictment should so allege, award a fictitious name and reasonably describe the accused. *State v. Vandever*, 21 Tex. 335; *Rothschild v. State*, 7 App. 519; *Pancho v. State*, 25 App. 402, 8 S. W. 476; but contra, see *Wilcox v. State*, 35 App. 631, 34 S. W. 958. 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 App. 631, 34 S. W. 958. And further, as to christian name, see *Wilcox v. State*, 35 App. 631, 34 S. W. 958; *Wilcox v. State*, 31 Tex. 586. And see *Wampler v. State*, 28 App. 352, 13 S. W. 144; *Alsop v. State*, 36 App. 535, 38 S. W. 174; *Mayo v. State*, 7 App. 342; *Spencer v. State*, 34 App. 65, 29 S. W. 159. Initials of the christian name or names are sufficient. *State v. Black*, 31 Tex. 560. And see *State v. Carabin*, 33 Tex. 697. Middle initial letters are immaterial, and may be transposed or omitted, without affecting the validity of the indictment. *State v. Manning*, 14 Tex. 402; *Delphino v. State*, 11 App. 30; *Sullivan v. State*, 6 App. 319, 32 Am. Rep. 580; *Dodd v. State*, 2 App. 58; *Dixon v. State*, Id. 531. It is sufficient to state one of the initials of the Christian name and the surname. *McAfee v. State*, 14 App. 668; *Victor v. State*, 15 App. 90. When a person is known by two or more names it is sufficient to state either name, and proof of the name stated in the indictment is all that is required. *Williams v. State*, 13 App. 285, 46 Am. Rep. 237. If the Christian name is first correctly stated, a mistake in repeating it will not vitiate the indictment. *Musquez v. State*, 41 Tex. 226; *Cotton v. State*, 4 Tex. 260; *Mayo v. State*, 7 App. 342. But see *Kinney v. State*, 21 App. 348, 17 S. W. 423. But omission of the name in one count cannot be supplied by reference to another count. *Powell v. State*, 42 App. 11, 57 S. W. 95. Misspelling the name is immaterial if the name be idem sonans. *Foster v. State*, 1 App. 351; *Williams v. State*, 5 App. 226. When the person is as well known by the name stated in the indictment as

by his true name, the variance between the allegation and the proof will not be material. *Bird v. State*, 16 App. 528; *Rye v. State*, 8 App. 163; *Wells v. State*, 4 App. 20; *Bell v. State*, 25 Tex. 574; *Hart v. State*, 33 Tex. 382; *Cotton v. State*, 4 Tex. 260. When the name of the accused is unknown to the grand jury that fact must be stated, and a reasonably accurate description of him must be given in the indictment. Where the defendant was described as "one Victor, a Mexican, whose other name is to the grand jurors unknown," it was held to be not a compliance with the statute. *Victor v. State*, 15 App. 90, explaining *Harris v. State*, 2 App. 102, and *State v. Vandever*, 21 Tex. 335. And see *Pancho v. State*, 25 App. 402, 8 S. W. 476. Where the indictment described the defendant as "one Ben, whose name other than Ben is to the grand jurors unknown, and who is known and described as negro Ben, and who is a colored man" it was held sufficient. *Negro Ben v. State*, 9 App. 107. If the defendant be not indicted by his true name, he may, upon suggesting that fact and his true name, have the error corrected, but if he does not make such suggestion, it will be taken that his name is truly set forth in the indictment, and he will not thereafter be allowed to deny the same by way of defense. Post, arts. 559-562; *Negro Ben v. State*, 9 App. 107; *Pancho v. State*, 25 App. 402, 8 S. W. 476; *Dugger v. State*, 27 App. 95, 10 S. W. 763; *Milontree v. State*, 30 App. 151, 16 S. W. 764; *Young v. State*, 30 App. 308, 17 S. W. 413; *English v. State*, 30 App. 470, 18 S. W. 94; *Boren v. State*, 32 App. 637, 25 S. W. 775; *Bassett v. State*, 4 App. 41.

Where the information named accused as "one Bird," a mulatto about six feet high, a conviction of "Byrd Johnson," which name was not suggested as his real name, and who was not shown to be the same person as "Bird," was not authorized. *Johnson v. State*, 63 App. 457, 140 S. W. 337. That an information and complaint designated defendant as "one E., commonly known as Slim E.," was not ground for quashing under a motion alleging that no diligence was alleged or used to discover defendant's true name, where the record or evidence did not show that he had another name. *Edmanson v. State*, 64 App. 413, 142 S. W. 887. Where the original indictment had the name wrong, but the copy served on the defendant contained the correction, he could not complain that it was not a true copy. *Ford v. State* (Cr. App.) 54 S. W. 762.

5. — **Suggestion of true name of accused.**—See arts. 559-563, 567, post, and notes.

6. — **Name of injured party.**—See notes to arts. 456, 457, post.

7. **Jurisdiction and venue.**—See article 455, post.

As to proper venue, see arts. 234-258.

The venue of the offense must be alleged. *Searcy v. State*, 4 Tex. 450; *State v. Jordan*, 12 Tex. 205; *State v. Warren*, 14 Tex. 406; *Collins v. State*, 6 App. 647; *Robins v. State*, 9 App. 666; *Jack v. State*, 3 App. 72; *State v. Slack*, 30 Tex. 354; *State v. Johnson*, 32 Tex. 96; *Smith v. State*, 25 App. 454, 8 S. W. 645; *Orr v. State*, 25 App. 453, 8 S. W. 644; *Cox v. State*, 41 Tex. 1; *Cameron v. State*, 9 App. 332; *McElroy v. State*, 53 App. 57, 111 S. W. 948. And see generally, *Harris v. State*, 2 App. 102; *Chivarrio v. State*, 15 App. 330; *Pierce v. State*, 12 Tex. 210; *Smith v. State*, 36 App. 442, 37 S. W. 743; *Eylar v. State*, 37 App. 257, 39 S. W. 665; *Cain v. State*, 13 Tex. 392; *Goldstein v. State*, 36 App. 193, 36 S. W. 278.

It must appear from the indictment that the place where the offense was committed is within the jurisdiction of the court in which it is presented. *Robins v. State*, 9 App. 666; *Lasher v. State*, 30 App. 387, 17 S. W. 1064, 28 Am. St. Rep. 922; *Collins v. State*, 6 App. 647. An omission to lay a venue to the offense is a fatal defect, which may be taken advantage of by motion to quash, or in arrest of judgment. It is a defect of substance which is not amendable. *Robins v. State*, 9 App. 666; *Collins v. State*, 6 App. 647; *Searcy v. State*, 4 Tex. 450; *State v. Warren*, 14 Tex. 406. Venue is sufficiently alleged by naming the county in which the offense was committed. *State v. Odum*, 11 Tex. 12. Without adding "in the State of Texas," etc. *State v. Jordan*, 12 Tex. 205; *Satterwhite v. State*, 6 App. 609.

Exception will reach failure of allegation of venue. *Collins v. State*, 6 App. 647; *Robins v. State*, 9 App. 666; *Orr v. State*, 25 App. 453, 8 S. W. 644.

In alleging locus, indictment may use the word "in" for "at." *Blackwell v. State*, 30 App. 416, 17 S. W. 1061; *Augustine v. State*, 20 Tex. 450. But see *Pederson v. State*, 21 App. 485, 1 S. W. 521. It is sufficient to state the county without identifying the particular locality in the county. *State v. Odum*, 11 Tex. 12; *Corley v. State*, 3 App. 412. And see *Razor v. State*, 57 App. 10, 121 S. W. 512. Where the indictment properly alleges the rental of the house in the county of prosecution but fails to allege that the house rented is in said county it is fatally defective in not showing venue. *Mohan v. State*, 42 App. 410, 60 S. W. 552.

When the indictment alleges that the parties unlawfully met in the county with the intent to aid each other in the commission of an offense, it sufficiently alleges the venue. *Follis v. State*, 37 App. 555, 40 S. W. 277.

If the first count alleges venue, it is good as to all subsequent counts. *Morgan v. State*, 31 App. 1, 18 S. W. 647.

Where the indictment alleges the date of the offense, and the venue, it is sufficient to refer thereafter to the time and place by using the words "then and there." *De Los Santos v. State* (Cr. App.) 146 S. W. 919; *Pierce v. State*, 12 Tex. 210; *Stevens v. State* (Cr. App.) 150 S. W. 944; *Davis v. State* (Cr. App.) 151 S. W. 313; *Jones v. State*, 72 App. 496, 162 S. W. 1142. And see *Baker v. State*, 25 App. 1, 8 S. W. 23, 8 Am. St. Rep. 427. It is not essential to reiterate "then and there." *Harris v. State*, 2 App. 102. The use of "and" instead of "then and there" held sufficient. *Smith v. State*, 36 App. 442, 37 S. W. 743.

8. — **New county.**—See notes to art. 455, post.

9. — **Proof of venue.**—See art. 257, ante, and notes.

10. **Time and limitations.**—See note under article 465, post.

See, ante, ch. 1, title 4. The date of the commission of the offense must be distinctly alleged, and it must be a day certain. *State v. Randle*, 41 Tex. 292; *State v. Slack*, 30 Tex. 354; *State v. Johnson*, 32 Tex. 96; *State v. Eubanks*, 41 Tex. 291; *Furness v. State*, 42 App. 297, 59 S. W. 882, 96 Am. St. Rep. 801; *Coleman v. State* (Cr. App.) 62 S. W. 753; *Mealer v. State* (Cr. App.) 145 S. W. 353. "On or about" a specific date is a sufficient allegation of the time. *State v. McMickle*, 34 Tex. 676; *State v. Elliot*, Id. 148; *State v. Ifill*, 35 Tex. 348; *Johnson v. State*, 1 App. 118; *Keith v. State*, 38 App. 678, 44 S. W. 847; *Davis v. State* (Cr. App.) 151 S. W. 313. And "on or before" the 21st day of July is not fatally defective. *Presley v. State*, 60 App. 102, 131 S. W. 332. Where the name of the month was so written as to read either "February" or "Tebbruary" it was held sufficient. *Witten v. State*, 4 App. 70. The omission of the letters "A. D." before the year is immaterial. *Whorton v. State* (Cr. App.) 152 S. W. 1082. Where the date was alleged as "nineteen hundred and nine seven" instead of ninety-seven it was held defective. *Mundelino v. State* (Cr. App.) 51 S. W. 235. But where the indictment showed plainly that it was intended to charge that the offense was committed in the year "one thousand nine hundred and ten," it was sufficient, though the word "ten" might also be read "teo." *Rogers v. State* (Cr. App.) 153 S. W. 850. Charging the offense to have been committed on February 29, an impossible date, is a fatal defect. *McGinsey v. State*, 60 App. 505, 132 S. W. 773. The time alleged must be a date anterior to the presentment of the indictment. *Williams v. State*, 12 App. 226; *Collins v. State*, 5 App. 37; *Nelson v. State*, 1 App. 556; *Goddard v. State*, 14 App. 566; *Clement v. State*, 22 App. 23, 2 S. W. 379; *Lucas v. State*, 27 App. 322, 11 S. W. 413; *Cudd v. State*, 28 App. 124, 12 S. W. 1010; *Arcia v. State*, 28 App. 198, 12 S. W. 599; *Crass v. State*, 30 App. 480, 17 S. W. 1096; *York v. State*, 3 App. 15; *Blake v. State*, 3 App. 149. And see *Williams v. State*, 17 App. 521; *Womack v. State*, 31 App. 41, 19 S. W. 605. If the time alleged be the same day on which the indictment is presented it must charge that the offense was committed before the indictment was found. *Joel v. State*, 28 Tex. 642; *Williams v. State*, 12 App. 226; *Kennedy v. State*, 22 App. 693, 3 S. W. 480, and cases cited. But an information filed August 31, 1883, which alleged the offense to have been committed "heretofore on the 21st day of August, 1883" was held sufficient, the word "heretofore" showing that the offense was committed anterior to the presentment. *Wilson v. State*, 15 App. 150. If the date of the commission of the offense as alleged, be a date subsequent to the presentment of the indictment, it is a fatal defect, although it be apparent that the error is a clerical one. *Robles v. State*, 5 App. 346; *Goddard v. State*, 14 App. 566; *Donaldson v. State*, 15 App. 25; *Lee v. State*, 22 App. 547, 3 S. W. 89; *Hall v. State* (Cr. App.) 38 S. W. 996. And see *McJunkins v. State*, 37 App. 117, 38 S. W. 994. An indictment alleging that accused, on or about December 1, 1909, made two different sales of intoxicating liquor to a person named, and on or about said date made other sales in violation of the law to persons unknown, and did in such county, during the months of August, September, October, November, and December, 1909, and January, 1910, anterior to the presentment of the indictment, make more than at least two sales, sufficiently alleged that as many as two sales were made within three years from the date of the indictment, without expressly stating that they were made within such time. *Mizell v. State*, 59 App. 226, 128 S. W. 125. Where it is an offense to do an act between two specified dates, it is sufficient to allege any date between said specified dates. *State v. White*, 41 Tex. 64. Charging different dates in different counts does not vitiate conviction and require arrest of judgment. *Shuman v. State*, 34 App. 69, 29 S. W. 160. And see *Hutto v. State*, 7 App. 44. The time alleged must not be so remote as to show that the offense is barred by limitation. *Collins v. State*, 5 App. 37; *Brewer v. State*, Id. 248; *Shoefercater v. State*, Id. 207; *Blake v. State*, 3 App. 149; *O'Connell v. State*, 18 Tex. 343; *State v. Eubanks*, 41 Tex. 291. And see *Mitten v. State*, 24 App. 346, 6 S. W. 196; *Knight v. State*, 64 App. 541, 144 S. W. 967. Where the indictment states the date of the offense and the venue in a certain county it is sufficient to refer thereafter in the indictment to the time and place by using the words "then and there." *De Los Santos v. State* (Cr. App.) 146 S. W. 919. But it is not necessary to reiterate "then and there" to every allegation of time and place. *Harris v. State*, 2 App. 102. And see *Baker v. State*, 25 App. 1, 8 S. W. 23, 8 Am. St. Rep. 427. The use of "and" instead of "then and there" held sufficient. *Smith v. State*, 36 App. 442, 37 S. W. 743. Where an indictment charging misapplication of funds omitted the clause "then and there" after the word "did" but charged "and the said A. B. did" etc., the allegation of time and venue was sufficient. *Butler v. State*, 46 App. 287, 81 S. W. 743. The allegation of the time of the commission of the offense is matter of substance and is not amendable. *Drummond v. State*, 4 App. 150, overruling *State v. Elliot*, 34 Tex. 148. See, also, *Sanders v. State*, 26 Tex. 119; *State v. Davidson*, 36 Tex. 325; *Goddard v. State*, 14 App. 566; *Huff v. State*, 23 App. 291, 4 S. W. 890. An indictment charging the commission of a statutory offense subsequent to the passage of the statute need not contain the allegation that the offense was committed subsequent to the passage of the statute, and the indictment is good on its face. *Byrd v. State* (Cr. App.) 151 S. W. 1068. An indictment presented on October 10, 1914, averring that the offense was committed heretofore on the 30th day of September, 1914, is sufficient. *Collins v. State* (Cr. App.) 178 S. W. 345.

11. — **Proof.**—The time when the offense was committed must be proved, but the date proved need not be the exact date alleged in the indictment. All that is required is, that the time of the commission of the offense be proved, and that the time proved be some date anterior to the presentment of the indictment, and not so remote as to show that a prosecution for the offense was barred by limitation. *Temple v. State*, 15 App. 304, 49 Am. Rep. 200; *Shoefercater v. State*, 5 App. 207; *Brewer v. State*, 5 App. 248; *Stichtd v. State*, 25 App. 420, 8 S. W. 477, 8 Am. St. Rep.

441; *Lucas v. State*, 27 App. 322, 11 S. W. 443; *Cudd v. State*, 28 App. 124, 12 S. W. 1010; *Arcia v. State*, 28 App. 198, 12 S. W. 599, and cases cited; *Abrigo v. State*, 29 App. 143, 15 S. W. 408; *Crass v. State*, 30 App. 480, 17 S. W. 1096; *Stewart v. State*, 31 App. 133, 19 S. W. 908; *Shuman v. State*, 34 App. 69, 29 S. W. 160; *Young v. State* (Cr. App.) 60 S. W. 767; *Moore v. State*, 48 App. 394, 38 S. W. 229; *Brown v. State* (Cr. App.) 148 S. W. 808; *Irby v. State* (Cr. App.) 155 S. W. 543; *Collins v. State* (Cr. App.) 178 S. W. 345. If the proof shows that the offense was committed at a date subsequent to the presentation of the indictment, it is fatal to a conviction. *Kincaid v. State*, 8 App. 465; *McCoy v. State*, 3 App. 399; *Fields v. State*, 43 Tex. 214; *Dovalina v. State*, 14 App. 324; *Clement v. State*, 22 App. 23, 2 S. W. 379.

Under a complaint and information filed June 14, 1912, charging the commission of an offense on June 13th, accused could not be convicted for a violation of the local option law committed June 18, 1912. *Cowan v. State* (Cr. App.) 155 S. W. 214.

Under indictment for robbery on or about December 3d, testimony that it occurred on December 23d was admissible, since the state could prove the offense on any date within the period of limitation. *Perry v. State* (Cr. App.) 155 S. W. 263.

Under an indictment charging the commission of murder on or about March 30th, proof that the crime was committed on March 29th would present no variance. *James v. State*, 72 App. 457, 163 S. W. 61.

One charged with committing an offense on or about a date named may be convicted by proving an offense committed at any time within the period of limitations fixed for the crime charged, unless it is claimed that the time fixed by the evidence was so different from that charged as to be a ground of surprise so as to entitle him to a postponement to procure evidence to meet the charge made by the evidence. *Lingenfelter v. State* (Cr. App.) 163 S. W. 981.

That the indictment charged the commission of the offense on or about March 19th, and the evidence showed that the killing took place on March 29th, presented no material variance. *Herrera v. State* (Cr. App.) 170 S. W. 719.

12. **Statement of offense.**—See notes under article 450, ante, and specific offenses in Pen. Code.

Pursuing language of statute, see notes under article 474, post.

It must be alleged in plain and intelligible words that the accused did the things which constitute the offense. *Moore v. State*, 7 App. 42; *State v. Mesohac*, 30 Tex. 518; *Blair v. State*, 32 Tex. 474; *Johnson v. State*, 1 App. 146; *Greenlee v. State*, 4 App. 345. That "the offense must be set forth in plain and intelligible words" means more than that the defendant must be charged in general terms with the commission of some crime. The indictment must particularize the act or omission complained of, so that its identity can not be mistaken. *Alexander v. State*, 29 Tex. 495. See, also, as to this requisite, *State v. Baggerly*, 21 Tex. 757; *Dawson v. State*, 33 Tex. 491; *Mosely v. State*, 18 App. 311; *Brown v. State*, 26 App. 540, 10 S. W. 112; *Bennett v. State*, 26 App. 671, 14 S. W. 336; *Williams v. State*, 27 App. 258, 11 S. W. 114; *Abrigo v. State*, 29 App. 143, 15 S. W. 408; *Kinley v. State*, 29 App. 532, 16 S. W. 339; *Wofford v. State*, 29 App. 536, 16 S. W. 535; *Bean v. State*, 25 App. 346, 8 S. W. 278; *Lagrone v. State*, 12 App. 426, and cases cited. And see *State v. Shwartz*, 25 Tex. 764; *Sharpe v. State*, 17 App. 511.

Every fact which is a constituent element of the offense must be alleged distinctly and affirmatively and must not be left to be deduced by argument or inference. *Parker v. State*, 9 App. 351; *Hoskey v. State*, *Id.* 202; *Proffit v. State*, 12 App. 233; *Huntsman v. State*, *Id.* 619; *Caldwell v. State*, 14 App. 171; *Pierce v. State*, 17 App. 232; *Long v. State*, 36 Tex. 6; *Gaddy v. State*, 8 App. 127; *Kerry v. State*, 17 App. 179, 50 Am. Rep. 122; *Strickland v. State*, 19 App. 518.

The use of the dollar mark in expressing the value of property is sufficient. *Earl v. State*, 33 App. 570, 28 S. W. 469.

The use of the sign "&" is sufficient, though word "and" is better practice. *Brown v. State*, 16 App. 245. And see *Malton v. State*, 29 App. 527, 16 S. W. 423; *Sawyers v. State*, 39 App. 481, 46 S. W. 814.

13. — **Setting out written instruments.**—As a general rule, whenever an instrument in writing enters into an offense as a part or basis thereof, or when its proper construction is material, the instrument should be set out in *haec verba* in the indictment. *White v. State*, 3 App. 605; *Baker v. State*, 14 App. 332; *Coulson v. State*, 16 App. 189; *Thomas v. State*, 18 App. 213; *Dwyer v. State*, 24 App. 132, 5 S. W. 662; *Tynes v. State*, 17 App. 123.

"In words and figures following, to wit," or "in tenor as follows, to wit," indicate that the writing is set out in *haec verba*, and not merely in substance. *Baker v. State*, 14 App. 332.

An allegation that the writing is "in substance and effect as follows, to wit:" does not imply tenor, but implies merely that the writing is substantially set forth. *Thomas v. State*, 18 App. 213; *Coulson v. State*, 16 App. 189.

It is not necessary that there be *innuendo* averments to explain a matter that is evidently plain. *Rountree v. State* (Cr. App.) 58 S. W. 106.

14. — **Duplicity.**—See notes to article 481, post.

15. — **Spelling, handwriting and grammar.**—See notes to art. 476, post.

16. — **Omission of words.**—See notes to art. 476, post.

17. **Conclusion.**—It is indispensable that the indictment conclude "against the peace and dignity of the state." Const., art. 5, sec. 12. *State v. Durst*, 7 Tex. 74; *State v. Sims*, 43 Tex. 521; *Holden v. State*, 1 App. 225; *Cox v. State*, 8 App. 254, 34 Am. Rep. 746; *Haun v. State*, 13 App. 383, 44 Am. Rep. 706; *Saine v. State*, 14 App. 144; *Thompson v. State*, 15 App. 39, *Id.*, 15 App. 163; *Poss v. State*, 47 App. 486, 33 S. W. 1109; *Wright v. State*, 37 App. 3, 35 S. W. 150, 38 S. W. 811. Every count need not. *West v. State*, 27 App. 472, 11 S. W. 482; *Alexander v. State*, 27 App. 533, 11 S. W. 628; *Stebbins v. State*, 31 App. 294, 20 S. W. 552; *Dancey v.*

State, 35 App. 615, 34 S. W. 113, 938. If the indictment concludes "against the peace and dignity of the state," no words following such conclusion, and which do not form a part of it, will vitiate the indictment. Rowlett v. State, 23 App. 191, 4 S. W. 582. The addition of the word "Texas" after the word "state," in the conclusion, was held not to vitiate the indictment. State v. Pratt, 44 Tex. 93. So the words "a true bill" indorsed on the margin of the indictment did not vitiate it. Thomas v. State, 8 App. 344. So the words "a true bill" following the conclusion, but forming no part of it, were held to not vitiate the indictment. Rowlett v. State, 23 App. 191, 4 S. W. 582. But an omission of the word "the" before the word "state" was held to be a substantial defect and fatal to the sufficiency of the indictment. Thompson v. State, 15 App. 39, Id., 15 App. 168. Mere misspelling of a word, as "aganist" for "against," will not vitiate. Hudson v. State, 10 App. 215.

But an indictment concluding "ainst" the peace and dignity of the State is fatally defective. Bird v. State, 37 App. 408, 35 S. W. 382.

The character "&" may be used for "and." Malton v. State, 29 App. 527, 16 S. W. 423.

18. Signature.—See notes under article 444, ante.

This requisite should be complied with, but a failure to do so will not render the indictment invalid. Post, art. 576; Jones v. State, 10 App. 552; Weaver v. State, 19 App. 547, 53 Am. Rep. 389; Pinson v. State, 23 Tex. 579; Hannah v. State, 1 App. 578; Campbell v. State, 8 App. 84; State v. Flores, 33 Tex. 444; Bassham v. State, 38 Tex. 622; Robinson v. State, 24 App. 4, 5 S. W. 509; State v. Powell, 24 Tex. 135; Witherspoon v. State, 39 App. 65, 44 S. W. 164, 1096; Day v. State, 61 App. 114, 134 S. W. 215.

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.]

See Willson's Cr. Forms, 7a.

See notes under article 453, 465, and 471, post.

Cited and applied in general.—The preceding article is cited and applied in the following cases: State v. Shwartz, 25 Tex. 764; McMahan v. State, 13 App. 220; Costley v. State, 14 App. 156; Reed v. State, Id. 662; Kerry v. State, 17 App. 178, 50 Am. Rep. 122; Black v. State, 18 App. 124; Bosshard v. State, 25 Tex. Supp. 207; Evans v. State, Id. 303; Blair v. State, 32 Tex. 474; Johnson v. State, 1 App. 146; Brown v. State, 26 App. 540, 10 S. W. 112; Hammons v. State, 29 App. 445, 16 S. W. 99; Fitch v. State, 58 App. 366, 127 S. W. 1040; Bell v. State, 62 App. 242, 137 S. W. 670, 36 L. R. A. (N. S.) 98, Ann. Cas. 1913C, 617; Fleming v. State, 62 App. 653, 139 S. W. 598; Caldwell v. Texas, 137 U. S. 692, 11 Sup. Ct. 224, 34 L. Ed. 816.

Proof.—The averments must be as specific as the language of the statute on which the indictment is founded, and the proof must correspond with the averments. Banks v. State, 28 Tex. 644.

When an offense is charged to have been committed in one way, it is error to authorize, over accused's objection, conviction, if the evidence shows that he violated the statutes in some other way not charged. Novy v. State, 62 App. 492, 138 S. W. 139, and cases cited.

Surplusage and redundancy.—See notes under article 476, post.

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.]

See Willson's Cr. Forms, 7a; post, art. 459, et seq.

Cited, Caldwell v. Texas, 137 U. S. 692, 11 Sup. Ct. 224, 34 L. Ed. 816.

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| 1. Certainty in general. | 6. Swindling. |
| 2. Discriptive allegations. | 7. Embezzlement of public money. |
| 3. Offense composed of different constituents. | 8. Perjury. |
| 4. Assault to commit other offense. | 9. Sending anonymous letter. |
| 5. Incest. | 10. Violation of liquor law. |

1. Certainty in general.—The certainty required in an indictment or information is such as will enable the accused to plead the judgment that may be rendered upon it in bar of any prosecution for the same offense. Williams v. State, 1 App. 90, 28 Am. Rep. 399; Johnson v. State, 1 App. 146; Rose v. State, Id. 401; Connell v. State, 2 App. 422; Coleman v. State, Id. 512; Ware v. State, Id. 547; Frasher v. State, 3 App. 263, 30 Am. Rep. 131; Wells v. State, 4 App. 20; Greenlee v. State, Id. 345; Curry v. State, Id. 574; Mayo v. State, 7 App. 342; Mosely v. State, 18 App. 311; Alexander v. State, 29 Tex. 495; Phillips v. State, Id. 226; State v. Hanson, 23 Tex. 232; Hammons v. State, 29 App. 445, 16 S. W. 99; Runnells v. State, 34 App. 431, 30 S. W. 1065; Earl v. State, 33 App. 570, 28 S. W. 469; Martin v. State, 31 App. 27, 19 S. W. 434; Taylor v. State, 29 App. 466, 16 S. W. 302; Rice v. State, 37 App. 36, 38 S. W. 801; McAfee v. State, 38 App. 124, 41 S. W. 627; Bradberry v. State (Cr. App.) 152 S. W. 169; Thompson v. State (Cr. App.) 152 S. W. 893; McDowell v. State (Cr. App.) 155 S. W. 521; Minter v. State, 70 App. 634, 159 S. W. 286; Byrd v. State, 72 App. 242, 162 S. W. 360.

It is well settled that if, eliminating surplusage, the constituents of the offense are so averred as to apprise the defendant of the charge against him, and enable

him to plea the judgment in bar of another prosecution for the same offense, it is good in substance, under our Code. *McConnell v. State*, 22 App. 354, 3 S. W. 699, 58 Am. Rep. 647; *Moore v. State*, 20 App. 275; *Holden v. State*, 18 App. 91; *Mayo v. State*, 7 App. 342; *Burke v. State*, 5 App. 74; *Coleman v. State*, 2 App. 512; *Cudd v. State*, 28 App. 124, 12 S. W. 1010; *Hammons v. State*, 29 App. 445, 16 S. W. 99; *Taylor v. State*, 29 App. 466, 16 S. W. 302; *Lomax v. State*, 38 App. 318, 43 S. W. 92; *Zweig v. State* (Cr. App.) 171 S. W. 747.

Every indictment or information should be drawn with reference to the idea that an innocent man should know the facts charged against him that he may prepare to meet them, and the averments should be direct, positive, and certain, not argumentative or inferential. *State v. Baggerly*, 21 Tex. 757; *Lewellen v. State*, 18 Tex. 538; *State v. Odum*, 11 Tex. 12; *Estes v. State*, 10 Tex. 300; *Bush v. Republic*, 1 Tex. 455; *Moore v. State*, 7 App. 608; *Hunt v. State*, 9 App. 404; *Kerry v. State*, 17 App. 179, 50 Am. Rep. 122; *Pierce v. State*, 17 App. 232; *Peralto v. State*, Id. 578; *Parker v. State*, 9 App. 351; *Proffit v. State*, 12 App. 233; *Thompson v. State*, 16 App. 159; *Brown v. State*, 26 App. 540, 10 S. W. 112.

The rule as to certainty does not require that the offense shall be set out with such minuteness of detail as to entirely supersede proof of identity on another prosecution for the same offense. *Horan v. State*, 24 Tex. 161; *Phillips v. State*, 29 Tex. 226; *Albrecht v. State*, 8 App. 313; *Cochran v. State*, 26 Tex. 678. And see *Hamilton v. State*, 26 App. 206, 9 S. W. 687.

An indictment is sufficiently certain if all the ingredients of the offense be as amply set out as it is necessary to prove them. Facts and incidents which do not constitute a necessary part of the offense need not be stated for the purpose of distinguishing it, but they may be proved by the defendant, so as to fix its identity, and thereby protect himself from a second prosecution. *Horan v. State*, 24 Tex. 161.

The legislature cannot authorize the courts to dispense with essential allegations. *Hewitt v. State*, 25 Tex. 722; *Huntsman v. State*, 12 App. 619.

The common law rule, which requires in indictments "certainty to a certain intent in every particular," does not obtain under our Code. *State v. Miller*, 34 Tex. 535.

It is not material that an indictment does not conform to precedents, if it is otherwise sufficient. *Williams v. State*, 2 App. 271; *Harris v. State*, Id. 102.

An indictment is sufficient as to certainty if it gives the defendant notice as to the particular offense charged against him. *Earl and Garrett v. State*, 33 App. 570, 28 S. W. 469.

2. Descriptive allegations.—Descriptive allegations, although unnecessary to the validity of the indictment, must be proved. *Benson v. State*, 1 App. 6; *Ranjel v. State*, Id. 461; *Warrington v. State*, Id. 168; *Soria v. State*, 2 App. 297; *Courtney v. State*, 3 App. 257; *Meuly v. State*, Id. 382; *Sweat v. State*, 4 App. 617; *McGee v. State*, Id. 625; *Watson v. State*, 5 App. 11; *Hampton v. State*, Id. 463; *Massie v. State*, Id. 81; *Lancaster v. State*, 9 App. 393; *Ex parte Rogers*, 10 App. 655, 38 Am. Rep. 654; *Simpson v. State*, 10 App. 681; *Wallace v. State*, Id. 255; *Gray v. State*, 11 App. 411; *Jones v. State*, 12 App. 424; *Allen v. State*, 8 App. 360; *Cameron v. State*, 9 App. 336; *Davis v. State*, 13 App. 215; *Childers v. State*, 16 App. 524; *Moore v. State*, 20 App. 275; *Withers v. State*, 21 App. 210, 17 S. W. 725; *Loyd v. State*, 22 App. 646, 3 S. W. 670; *Rogers v. State*, 26 App. 404, 9 S. W. 762; *McLaurine v. State*, 28 App. 530, 13 S. W. 992; *Cronin v. State*, 30 App. 278, 17 S. W. 410; *Coffelt v. State*, 27 App. 608, 11 S. W. 639, 11 Am. St. Rep. 205; *Neely v. State*, 32 App. 370, 23 S. W. 798; *Robinson v. State*, 60 App. 592, 132 S. W. 944.

The accused can not complain that the offense is described with unnecessary minuteness. *Lockhart v. State*, 10 Tex. 275.

But matter which is merely useless never vitiate. *State v. Elliott*, 14 Tex. 426; *Smith v. State*, 7 App. 382; *Robinson v. State*, 60 App. 592, 132 S. W. 944.

Under the rule that a descriptive averment must be proved though unnecessary, an averment that the victim of a swindle was a private corporation duly incorporated under the national banking laws must be proved. *Tucker v. State*, 59 App. 291, 128 S. W. 617.

Under article 451, subdivision 4, and article 456, requiring indictments to contain accused's name, or state that it is unknown, and give a reasonably accurate description of him, article 559, providing that, unless accused suggests, when arraigned, that he is not indicted by his true name, it shall be taken as truly set forth, articles 560, 561, and 562, providing for the correction of the indictment upon such a suggestion, and that, if accused refuses to say what his real name is, the cause shall proceed, article 460, making indictments sufficient which charge the offense so as to enable a person of common understanding to know what is meant, give accused notice of the particular offense charged, and enable the court to pronounce the proper judgment, article 476, providing that the proceedings shall not be affected by any defect of form in an indictment which does not prejudice accused's substantial rights, and article 453 as to certainty required in an indictment, the giving of a wrong name or the failure to give accused's full name is a matter of form only, and, where he was described by his Christian name, nationality, and place of residence, which description was not shown to be untrue, and it appeared that he was the identical person alleged to have committed the offense charged, the judgment will not be reversed. *Cresencio v. State* (Cr. App.) 165 S. W. 936.

3. Offense composed of different constituents.—If the offense be composed of different constituents, each constituent being itself an offense, the particular constituents relied on must be specifically and accurately averred. *State v. Williams*, 14 Tex. 98; *State v. Wupperman*, 13 Tex. 33; *Kennedy v. State*, 9 App. 400; *Kerry v. State*, 17 App. 179, 50 Am. Rep. 122; *State v. Meschac*, 30 Tex. 518; *Alexander v. State*, 29 Tex. 495; *Huntsman v. State*, 12 App. 619.

4. Assault to commit other offense.—See Pen. Code, art. 1032, and notes.

In charging an assault with intent to commit some other offense, the same particularity is not required as is required in charging the offense itself. *Browning v. State*, 2 App. 47; *Nash v. State*, 2 App. 362; *Morris v. State*, 13 App. 65; *State v. Wall*, 35 Tex. 484; *State v. Croft*, 15 Tex. 576; *Hammons v. State*, 29 App. 445, 16 S. W. 99; *Waters v. State*, 30 App. 284, 17 S. W. 411; *Wicks et al. v. State*, 28 App. 448, 13 S. W. 748; *Crumes v. State*, 28 App. 516, 13 S. W. 868, 19 Am. St. Rep. 853; *Martin v. State*, 40 Tex. 19; *Long v. State*, 10 App. 186; *State v. Jennings*, 35 Tex. 503; *Hines v. State*, 3 App. 484, and cases cited; *Bittick v. State*, 40 Tex. 117. But see *State v. Williams*, 41 Tex. 98; *Hewitt v. State*, 15 App. 80.

5. Incest.—The use of the word "canally" for "carnally" does not render the indictment bad. *Bailey v. State*, 63 App. 584, 141 S. W. 224.

6. Swindling.—Indictment for swindling held bad for uncertainty. *Hardin v. State*, 25 App. 74, 7 S. W. 534.

Under this article, an indictment alleging that accused fraudulently represented that he owned cattle, and thereby fraudulently induced prosecutor to pay him a specified sum for the cattle, when in truth accused did not own the cattle, and did not have the right to dispose of them, and knew that the representations were false, sufficiently charges swindling as against the objection that it does not allege any sale or delivery of the cattle to prosecutor. *King v. State* (Cr. App.) 146 S. W. 543.

7. Embezzlement of public money.—Indictment held sufficient, notwithstanding the use of the word "secret" instead of "secrete." *Ferrell v. State* (Cr. App.) 153 S. W. 901.

8. Perjury.—An indictment for perjury which alleges that it was a material inquiry before a grand jury whether accused unlawfully delivered to an infant intoxicating liquor, that accused, as a witness before the grand jury, falsely testified that he had not permitted the infant to order intoxicating liquor in accused's name, and that he had not signed his name on express books and received beer consigned to him, and had not delivered the same to the infant, that the grand jury was investigating to ascertain who delivered intoxicating liquors to infants, that accused well knew that he had permitted the infant to order intoxicating liquor in his name, and that he had signed his name on express books, and had received liquor and had delivered the same to the infant, sufficiently charges the offense. *Robertson v. State* (Cr. App.) 150 S. W. 893.

9. Sending anonymous letter.—A complaint and information for sending an anonymous letter reflecting upon a person's integrity, chastity, etc., need not contain the letter. *Bradfield v. State* (Cr. App.) 166 S. W. 734.

10. Violation of liquor law.—Under this article an indictment alleging that accused on or about October 5, 1910, unlawfully pursued the occupation of selling intoxicating liquor, and on a given date made a sale to one man and on a different date a sale to another man, and that during the months of June, July, August, September, October, November, and December, 1910, and January, February, March, and April, 1911, all anterior to the filing of the indictment, made sales to persons to the grand jury unknown, is not defective for not alleging that during all the time accused continued to pursue the business. *Byrd v. State* (Cr. App.) 151 S. W. 1068.

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.]

See *Willson's Cr. Forms*, 7a. See *Smith v. State*, 31 App. 33, 19 S. W. 546; *Jones v. State*, 25 App. 621, 8 S. W. 801, 8 Am. St. Rep. 449; *Martin v. State*, 1 App. 525; *Coleman v. State*, 2 App. 512; *Black v. State*, 18 App. 124; *Crumes v. State*, 28 App. 516, 13 S. W. 868, 19 Am. St. Rep. 853; *Phillips v. State*, 29 Tex. 226; *Hammons v. State*, 29 App. 445, 16 S. W. 99; *State v. Allen*, 30 Tex. 59.

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| 1. Alleging and proving intent in general. | 8. Assault. |
| 2. "Malice aforethought." | 9. Assault to commit other offense. |
| 3. "Fraudulently." | 10. Assault with intent to maim. |
| 4. "Knowingly." | 11. Assault with intent to murder. |
| 5. "Wilfully." | 12. Assault with intent to commit rape. |
| 6. "Wantonly." | 13. Assault with intent to rob. |
| 7. Intent to defraud. | 14. Testimony as to intent. |

1. Alleging and proving Intent In general.—Where, to constitute an act a crime, it is essential that an evil intent should accompany it, the intent must be alleged. *State v. West*, 10 Tex. 553; *State v. Johnston*, 11 Tex. 22; *Cain v. State*, 18 Tex. 387; *Johnson v. State*, 1 App. 146; *Reeves v. State*, 7 App. 276. It is not necessary, however, in charging a common assault, or assault and battery, to allege an intent to injure. P. C. 1008. Nor is an allegation of intent necessary where the act alleged to have been done is in violation of law. *State v. West*, 10 Tex. 553; *State v. Allen*, 30 Tex. 59; *Milstead v. State*, 19 App. 490. But where a particular intent is a material fact in the description of the offense, such particular intent must be specifically alleged. *Morris v. State*, 13 App. 65; *Woolsey v. State*, 14 App. 57; *Marshal v. State*, 31 Tex. 471; *Reeves v. State*, 7 App. 276; *Johnson v. State*, 1 App. 146; *Bartlett v. State*, 21 App. 500, 2 S. W. 829; *Black v. State*, 18 App. 124.

And the intent must be proved beyond a reasonable doubt. *Reagan v. State*, 28 App. 227, 12 S. W. 601, 19 Am. St. Rep. 833. And further burden of proof and reasonable doubt, see notes to art. 785, post.

2. "Malice aforethought."—Statutory terms essential to the definition of the offense, such, for instance, as "malice aforethought," must be used in the indictment. Pen. Code, art. 1140, and notes; *Cravey v. State*, 36 App. 90, 35 S. W. 658, 61 Am. St. Rep. 833, and cases cited.

3. "Fraudulently."—See Pen. Code, art. 1329, and notes; *Muldrew v. State*, 12 App. 617; *Ware v. State*, 19 App. 13; *Spain v. State*, 19 App. 469.

4. "Knowingly."—*State v. West*, 10 Tex. 553; *State v. Stalls*, 37 Tex. 440; *State v. Arnold*, 39 Tex. 74; *Reynolds v. State*, 32 App. 36, 22 S. W. 18; *Hunter v. State*, 18 App. 444, 51 Am. Rep. 319; *Pressler v. State*, 13 App. 95; *Barthelov v. State*, 26 Tex. 175; *Jones v. State*, 32 App. 108, 22 S. W. 149.

5. "Wilfully."—*Barthelov v. State*, 26 Tex. 175; *Wallace v. State*, 30 Tex. 758; *Branch v. State*, 41 Tex. 622; *Uecker v. State*, 4 App. 234; *Woolsey v. State*, 14 App. 57; *Thomas v. State*, 14 App. 200; *Lane v. State*, 16 App. 172; *Brown v. State*, 16 App. 245; *Shubert v. State*, 16 App. 645; *Rose v. State*, 19 App. 470; *Baker v. State*, 21 App. 264, 17 S. W. 144; *Farmer v. State*, 21 App. 423, 2 S. W. 767; *Parsons v. State*, 26 App. 192, 9 S. W. 490; *Sneed v. State*, 28 App. 56, 11 S. W. 834; *Loggins v. State*, 32 App. 358, 24 S. W. 408.

6. "Wantonly."—See *Thomas v. State*, 14 App. 200, citing *Davis v. State*, 12 App. 13; *Branch v. State*, 41 Tex. 622.

7. **Intent to defraud.**—See notes under Pen. Code, arts. 924, 1329.

An indictment for forgery need not state who it was intended to be defrauded. *Westbrook v. State*, 23 App. 401, 5 S. W. 248; *Labbaite v. State*, 6 App. 257; *Holden v. State*, 18 App. 91; *English v. State*, 30 App. 470, 18 S. W. 94; *Johnson v. State*, 35 App. 271, 33 S. W. 231; *Green v. State*, 36 App. 109, 35 S. W. 971; *Howard v. State*, 37 App. 494, 36 S. W. 475, 66 Am. St. Rep. 812; *Allen v. State*, 44 App. 63, 68 S. W. 286, 100 Am. St. Rep. 839; *Crayton v. State*, 47 App. 88, 80 S. W. 839; *Pye v. State*, 71 App. 94, 154 S. W. 222.

Indictment for theft must charge intent to deprive owner of the value of the property. *Peralto v. State*, 17 App. 578. But this and the other elements of theft need not be alleged in an indictment for receiving stolen property. *Brothers v. State*, 22 App. 447, 3 S. W. 737, and cases cited. See, also, notes to Pen. Code, art. 1349.

8. **Assault.**—See notes to Pen. Code, art. 1008.

9. **Assault to commit other offense.**—See notes to art. 453, ante.

10. **Assault with intent to maim.**—See note to Pen. Code, art. 1025.

11. **Assault with intent to murder.**—See notes to Pen. Code, art. 1026.

12. **Assault with intent to commit rape.**—See notes to Pen. Code, art. 1029.

13. **Assault with intent to rob.**—See notes to Pen. Code, art. 1030.

14. **Testimony as to intent.**—See notes under article 783, post.

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.]

See *Willson's Cr. Forms*, 7a; ante, art. 451, subd. 5, and notes; ante, arts. 234-358, and notes; *Harrington v. State*, 31 App. 577, 21 S. W. 356; *Eylar v. State*, 37 App. 257, 39 S. W. 665.

Offense tried in another county but in same district.—An indictment for a crime which is tried in a county other than that in which the offense was committed, but in the same judicial district, as permitted by statute, should charge the commission of the offense in the county where it actually occurred, not in the county where the offender is to be tried. *Gonzales v. State* (Cr. App.) 175 S. W. 706.

Offense in new county before creation thereof.—Where the territory within which the offense was committed has subsequently been created into a new county, the venue should be laid in the old county, although the prosecution is instituted in the new county. *Nelson v. State*, 1 App. 41. And see *Weller v. State*, 16 App. 200; *Hernandez v. State*, 19 App. 408.

Where an offense is committed in an unorganized county, attached to an organized county for judicial purposes, the venue must be laid in the unorganized county, alleging that said county was attached for judicial purposes to the county of the prosecution. *Miles v. State*, 23 App. 410, 5 S. W. 250; *Chivarrio v. State*, 15 App. 330.

Playing at game of cards.—See note to Pen. Code, art. 548.

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.

See notes under P. C. arts. 301, 965, 1349.

See Willson's Cr. Forms, 3-5, 7a; ante, art. 451, note to requisite 4.

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| 1. In general. | 9. Corporation. |
| 2. Abbreviations and derivations of names. | 10. Name of married woman. |
| 3. Suffix "Jr." or "Sr." as part of name. | 11. Assault in general. |
| 4. When known by different names. | 12. Rape. |
| 5. When name is unknown. | 13. Homicide. |
| 6. Names held to be the same or idems sonans. | 14. Theft. |
| 7. Names held not to be the same. | 15. Violation of liquor law. |
| 8. Name of injured person in general. | 16. Forgery. |
| | 17. Pulling down and injuring fence. |
| | 18. When objection as to misnomer can be raised. |

1. **In general.**—The true rule is, if the names can be sounded alike, without doing violence to the power of the letters found in the variant orthography, the variance is immaterial. *Foster v. State*, 1 App. 531; *Goode v. State*, 2 App. 520; *Williams v. State*, 5 App. 226; *Henry v. State*, 7 App. 388; *Walker v. State*, 13 App. 618, 44 Am. Rep. 716, note; *Milontree v. State*, 30 App. 151, 16 S. W. 764, and cases cited. And see, also, *Smith v. State*, 52 App. 344, 106 S. W. 1161, 15 Ann. Cas. 357.

Where the indictment contains a wrong name but it can be regarded as surplusage, the indictment is not bad on this account. *Bolton v. State*, 41 App. 642, 57 S. W. 813.

The giving of a wrong name or the failure to give accused's full name is a matter of form only, and, where he was described by his Christian name, nationality, and place of residence, which description was not shown to be untrue, and it appeared that he was the identical person alleged to have committed the offense charged, the judgment will not be reversed. *Cresencio v. State* (Cr. App.) 165 S. W. 936.

2. **Abbreviations and derivations of names.**—Where two names have the same derivation, or where one is an abbreviation or corruption of the other, but both are commonly used as the same, they will be considered the same. *Goode v. State*, 2 App. 520. See, also, *Alsop v. State*, 36 App. 535, 38 S. W. 174; *Cerda v. State*, 33 App. 458, 26 S. W. 992; *Young v. State*, 30 App. 308, 17 S. W. 413.

3. **Suffix "Jr." or "Sr." as part of name.**—The suffix "Jr." or "Sr." is no part of a man's name. *Peters v. State* (Cr. App.) 154 S. W. 563.

4. **When known by different names.**—Name of injured person in general, see note, post.

If a person is known by two or more names it is sufficient to state either in the indictment. *Bird v. State*, 16 App. 528; *Wilcox v. State*, 35 App. 631, 34 S. W. 958. And see *Lott v. State*, 24 App. 723, 14 S. W. 277; *Taylor v. State*, 27 App. 44, 11 S. W. 35; *Young v. State*, 30 App. 308, 17 S. W. 413; *Carter v. State*, 39 App. 345, 46 S. W. 236, 48 S. W. 508; *Pendy v. State*, 34 App. 643, 31 S. W. 647; *Elehash v. State*, 35 App. 599, 34 S. W. 928; *Polk v. State* (Cr. App.) 148 S. W. 311.

Where a person is known by two or more names it is sufficient to state either in the indictment. Where a wife is sometimes called by her husband's name, she is known by that name and it is not necessary that she be commonly known by that name. *Stokes v. State*, 46 App. 357, 81 S. W. 1213.

5. **When name is unknown.**—Burden of proof, see notes under article 785, post.

If the name be alleged as unknown, it devolves upon the state to prove the fact, and that the grand jury by the use of reasonable diligence could not have ascertained the name. If it could have been ascertained the variance is fatal. *Brewer v. State*, 18 App. 456; *Williamson v. State*, 13 App. 514; *Jorasco v. State*, 6 App. 238; *Cock v. State*, 8 App. 659; *Rothschild v. State*, 7 App. 519; *Presley v. State*, 24 App. 494, 6 S. W. 540; *Atkinson v. State*, 19 App. 462; *Langham v. State*, 26 App. 533, 10 S. W. 113; *Kimbrough v. State*, 28 App. 367, 13 S. W. 218; *Sharp v. State*, 29 App. 211, 15 S. W. 176; *Swink v. State*, 32 App. 530, 24 S. W. 893; *Logan v. State*, 36 App. 1, 34 S. W. 925; *Shoekley v. State*, 38 App. 458, 42 S. W. 972. And see *Smith v. State*, 26 App. 577, 10 S. W. 218; *Alexander v. State*, 27 App. 94, 10 S. W. 764; *Armstrong v. State*, 27 App. 462, 11 S. W. 462; *Puryear v. State*, 28 App. 73, 11 S. W. 929.

When the name of the injured person is unknown, it is sufficient to aver that fact. *State v. Snow*, 41 Tex. 596; *Ranch v. State*, 5 App. 363; *State v. Elmore*, 44 Tex. 102; *Rutherford v. State*, 13 App. 92.

"One Chino, whose other name is to the grand jurors unknown," was held to be sufficient as to the name of the deceased. *De Oles v. State*, 20 App. 145. But "one Victor, a Mexican whose other name is to grand jurors unknown" held insufficient description of accused. *Victor v. State*, 15 App. 90.

Where the surname is set out with the statement that the given name is unknown, a description is not required. *Wilcox v. State*, 35 App. 631, 34 S. W. 958, citing *Negro Ben v. State*, 9 App. 107.

Nor where one is charged as an accomplice to a murder by unknown persons. *Dugger v. State*, 27 App. 95, 10 S. W. 763.

An allegation that accused unlawfully killed the infant child of a person named, the name of which child was unknown to the grand jurors, sufficiently alleged the name of the person killed. *Gossett v. State*, 57 App. 43, 123 S. W. 428. See, also, *Puryear v. State*, 28 App. 73, 11 S. W. 929.

It is sufficient to indict one by his surname with the allegation that his given name is unknown. *Harris v. State*, 2 App. 102.

Information, to be sufficient to charge an offense under the laws of this state, must allege the name of the accused, or must state that his name is unknown, and give a reasonably accurate description of him. Another rule is that in "alleging the name of the defendant, or of any other person necessary to be stated in an indictment or information, it shall be sufficient to state one or more of the initials of the Christian name, and the surname." The information in this case merely impleads "one Pancho," and is insufficient. *Pancho v. State*, 25 App. 402, 8 S. W. 476.

An indictment for homicide must in general, state the name of the injured party, if known, and, if not known, must allege the fact, and give as clear a description of the party injured as the facts before the grand jury will permit. *Johnson v. State*, 60 App. 305, 131 S. W. 1055.

But in a prosecution for violation of the local option law, a complaint which merely charges that accused made sales to an unknown person is not sufficient. *Ex parte Campbell* (Cr. App.) 149 S. W. 193.

An allegation in a homicide case that decedent was a "certain Mexican man" was sufficient, and the fact that the jury in another count called decedent "John," after stating that his name was unknown, was immaterial. *Bradford v. State*, 72 App. 76, 160 S. W. 1135.

6. Names held to be the same or idems sonans.—The following names have been held to be the same: "Knittel" and "Knittel," the mere misplacement of the dot over the letter "i" in the first not being material, the letters composing the name being plainly and distinctly written. *Hennessey v. State*, 23 App. 340, 5 S. W. 215. "Ichman" and "Eichman." *Eichman v. State*, 22 App. 137, 2 S. W. 538. "J. W. Watts" and "J. H. Watts." *Dixon v. State*, 2 App. 530. "Mary Etta" and "Marietta." *Goode v. State*, 2 App. 520. "Whiteman" and "Whitman." *Henry v. State*, 7 App. 383. "Sofia" and "Sofira." *Owen v. State*, 7 App. 329. "Woodlin" and "Woodline" and "Woodlan." *Dawson v. State*, 33 Tex. 491. "Redur" and "Redus." *Hunter v. State*, 8 App. 75. "William" and "Williams." *Williams v. State*, 5 App. 226. "Abraham Barnes" and "A. Barnes." *Ham v. State*, 4 App. 645. "John Smith" and "John A. Smith." *Dodd v. State*, 2 App. 58. "J. H. Smith" and "J. W. Smith." *Dixon v. State*, 2 App. 531. "F. A. Fater" and "F. R. Fater." *Delphino v. State*, 11 App. 30. "Chatam National Bank" and "Chatham National Bank." *Roth v. State*, 10 App. 27. "Wm. Hunt" and "William Hunt." *Roberson v. State*, 15 App. 317. "J. W. Dixon" and "Jack Dixon." *Anderson v. State*, 19 App. 299. "H. Haley" and "H. K. Haley." *McAfee v. State*, 14 App. 668. "Faunterroy" and "Fontleroy." *Wilks v. State*, 27 App. 381, 11 S. W. 415. "George" and "Georg." *Hall v. State*, 32 App. 594, 25 S. W. 292. "Israel" and "Isreal." *Boren v. State*, 32 App. 637, 25 S. W. 775. "Jin White" and "Jm White." *White v. State*, 32 App. 625, 25 S. W. 784. "July" and "Julia." *Dickson v. State*, 34 App. 1, 28 S. W. 815, 30 S. W. 807, 53 Am. St. Rep. 694. "Garzia" and "Garcia." *Rape v. State*, 34 App. 615, 31 S. W. 652. "Helmer" and "Hillmer." *Cline v. State*, 34 App. 415, 31 S. W. 175. "Woodlin," "Woodin," "Woodine," "Woodlow" and "Woodland." *Dawson v. State*, 33 Tex. 491.

"Bob" and "Robert." *Alsop v. State*, 36 App. 535, 38 S. W. 174. "Noberto" and "Norberto." *Salinas v. State*, 39 App. 319, 45 S. W. 900. "Benoni May Scurlack," and "Benani May Scurlack." *Rowan v. State*, 57 App. 625, 124 S. W. 668, 136 Am. St. Rep. 1005. "Darnell" and "Donnell." *Bronson v. State*, 59 App. 17, 127 S. W. 175. "Maple" and "Mable." *Smith v. State*, 63 App. 183, 140 S. W. 1096. "Amer" and "Armor." *Cowser v. State*, 70 App. 265, 157 S. W. 758. Ike "Geton," and Ike "Jetton." *Dennis v. State*, 71 App. 162, 158 S. W. 1008. "Hanik" and "Hanak." *Staha v. State*, 72 App. 386, 162 S. W. 521.

"Hix Nowels" and "Hicks Nowells" are idem sonans. The proof leaving no doubt that the name as spelled in the indictment was the same as that proved on the trial, the court did not err in disregarding the difference in the orthography of the name, and omitting to submit to the jury whether the names were identical. *Spoonemore v. State*, 25 App. 358, 8 S. W. 280. See, also, *Taylor v. State*, 27 App. 44, 11 S. W. 35; *Dugger v. State*, 27 App. 95, 10 S. W. 763; *Puryear v. State*, 28 App. 73, 11 S. W. 929; *Kimbrough v. State*, 28 App. 367, 13 S. W. 218; *Weitzel v. State*, 28 App. 523, 13 S. W. 864, 19 Am. St. Rep. 855; *McLaurine v. State*, 28 App. 530, 13 S. W. 992; *Allee v. State*, 28 App. 531, 13 S. W. 991; *Milontree v. State*, 30 App. 151, 16 S. W. 764; *Young v. State*, 30 App. 308, 17 S. W. 413; *English v. State*, 30 App. 470, 18 S. W. 94; *Rodgers v. State*, 30 App. 523, 17 S. W. 1077.

7. Names held not to be the same.—The following have been held to be not the same names: "Glenn" and "McGlenn." *Martin v. State*, 16 Tex. 240. "Mary Gorman" and "Martha Gorman." *Gorman v. State*, 42 Tex. 221. "Carter Gabriel" and "Gabriel Carter." *Collins v. State*, 43 Tex. 577, overruling *Brown v. State*, 32 Tex. 125. "Abie" and "Avie." *Burgamy v. State*, 4 App. 572. "Lindley" and "Lindsay." *Roberts v. State*, 2 App. 4. "J. F. R." and "N. B. R." *Mayer v. State*, 33 Tex. 340. "E. J. C." and "J. D. C." *Johnson v. State*, 41 Tex. 608. "Coonrod Furnash" and "Conrad Furinash." *Shields v. Hunt*, 45 Tex. 425. "Franz Masoh" and "Frank Mozach." *Schindler v. State*, 17 App. 408. "J. W. Flanagan" and "Major Flanagan." *Perry v. State*, 4 App. 566. "Franks" and "Frank." *Parchman v. State*, 2 App. 223, 28 Am. Rep. 435. "Clements Turner" and "Turner Clements." *Clements v. State*, 21 App. 258, 17 S. W. 156. "Wood" and "Woods." *Neiderluck v. State*, 21 App. 320, 17 S. W. 467. "McDevro" and "McDero." *McDevro v. State*, 23 App. 429, 5 S. W. 133. "Leitz" and "Seitz." *Nance v. State*, 17 App. 355. "M. T. Jacobs" and "Mr. Jacobs." *Stewart v. State*, 31 App. 153, 19 S. W. 908. "John Juniper" and "Frederick Juniper." *Juniper v. State*, 27 App. 478, 11 S. W. 483. "Fraude" and "Freude." *Weitzel v. State*, 28 App. 523, 13 S. W. 864, 19 Am. St. Rep. 855. "Seaffers" and "Seafort." *Milontree v. State*, 30 App. 151, 16 S. W. 764. "M. W. Leonard" and "W. W. Linard." *Campbell v. State*, 35 App. 182, 32 S. W. 899. "Jules E. Schneider" and "Jules E. Schineoder." *Han-*

son v. State, 35 App. 593, 34 S. W. 929. "Andrew Arlow" and "L. B. P. & Co. and Andrew Arlow." Fite v. State, 36 App. 4, 34 S. W. 922.

8. Name of injured person in general.—When name is unknown, see note, ante. The injured party's given name may be stated by initial letters, and a middle letter is immaterial. State v. Black, 31 Tex. 560; Stockton v. State, 25 Tex. 772. Certainty to a common intent, as to the party injured, is all that is required. If he is known by one name as well as another, he may be described by either. Cotton v. State, 4 Tex. 260; Bell v. State, 25 Tex. 574; Hart v. State, 38 Tex. 382; Wells v. State, 4 App. 20; Bird v. State, 16 App. 528; Rye v. State, 8 App. 163; Rutherford v. State, 13 App. 92; Elehash v. State, 35 App. 599, 34 S. W. 928; Johnson v. State, 60 App. 305, 131 S. W. 1085.

The name alleged should be the name which the injured party was known by at the time of the injury. Rutherford v. State, 13 App. 92; Williams v. State, 13 App. 285, 46 Am. Rep. 237. But proof of surname only is insufficient. Stewart v. State, 31 App. 153, 19 S. W. 908.

9. Corporation.—Article 456 refers to individuals and does not embrace corporations. As to corporations and allegations in reference thereto, our code of procedure is silent, and we must look to the common law under direction of article 26 of this Code. An indictment for theft from a corporation must not only describe the corporation by its correct name, but must also allege that it is a corporation, after doing which it should allege that the property was taken from the possession of the party, naming him, who was holding the same for the corporation, without his, the holder's consent. White v. State, 24 App. 231, 5 S. W. 857, 5 Am. St. Rep. 873, disapproving Price v. State, 41 Tex. 215; Stallings v. State, 29 App. 220, 15 S. W. 716; Thurmond v. State, 30 App. 539, 17 S. W. 1098; Smith v. State, 34 App. 265, 30 S. W. 236. And see Griffin v. State, 4 App. 390; Faulk v. State, 38 App. 77, 41 S. W. 616; Carder v. State, 35 App. 105, 31 S. W. 678; Millsaps v. State, 38 App. 570, 43 S. W. 1015.

The indictment need not allege the charter or act of incorporation, or the state or foreign power under whose laws the company was incorporated. Smith v. State, 34 App. 265, 30 S. W. 236.

10. Name of married woman.—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 Tex. 574; Beaumont v. Dallas, 34 App. 68, 29 S. W. 157.

Her surname at the time of the injury is the proper one to allege. Rutherford v. State, 13 App. 92; Cain v. State (Cr. App.) 153 S. W. 147.

Where an indictment alleged that accused forged the name of "Mrs. J. N. Grigg" to a check, and the proof showed that her name was Eliza A. Griggs, but that she married J. N. Griggs, and generally went by the name of Mrs. J. N. Griggs, there was no fatal variance. Shores v. State (Cr. App.) 150 S. W. 776.

11. Assault in general.—When name is unknown, see note, ante.

The name of the injured party must be proved as laid; but if there is a seeming variance, his identity should be passed upon by the jury, under appropriate instructions. In such a case the state is not required to prove that he was as exclusively or as familiarly known by the name alleged as by any other, but only that he was as certainly known by that name to friends and neighbors. Bell v. State, 25 Tex. 574.

The middle initial name of the assaulted party is immaterial, and in case of a mistake therein, it is only necessary that it be shown that the person named in the indictment, and the person assaulted, are identical. Stockton v. State, 25 Tex. 772.

The name of the assaulted party must be proved as alleged. Goode v. State, 2 App. 520; Osborne v. State, 14 App. 225; Hardin v. State, 26 Tex. 113.

The name of the assaulted female must be alleged, or it must be alleged that her name is unknown. To describe her as the wife of some named person is not sufficient. Ranch v. State, 5 App. 363.

There was a fatal variance where the indictment charged assault to murder upon Edward Oscar Williams, while the evidence showed that the assault was upon Oscar Williams. Luttrell v. State (Cr. App.) 143 S. W. 628.

An indictment alleged that defendant did then and there unlawfully commit an aggravated assault and battery in and upon Ed Smith, and did then and there beat, bruise, and wound Ed Smith with some hard instrument, the name of which was to the grand jurors unknown, and did then and there, thereby and therewith, inflict serious bodily injury upon the said Ed Smith, etc. Held, that the indictment was not defective for failure to sufficiently designate the person on whom the offense was committed, in that the word "said" was not contained in the clause alleging that the assault and battery was committed in and upon (said) Ed Smith. Black v. State (Cr. App.) 150 S. W. 774.

12. Rape.—Variance between an indictment for rape on a female under the age of consent, alleging that her name was "Velma Coalson," and the evidence that soon after the date of the alleged offense prosecutrix married a brother-in-law of accused, and that her name then became the name of her husband, was not fatal, where the identity of prosecutrix was proved, and where the evidence showed that her name at the time of the alleged offense was "Velma Coalson." Cain v. State (Cr. App.) 153 S. W. 147.

13. Homicide.—When name is unknown, see note, ante.

Variance between the name of the party killed as stated in the indictment and that proved on the trial is fatal to conviction. Henry v. State, 7 App. 388; Clark v. State, 29 App. 357, 16 S. W. 187; Milontree v. State, 30 App. 151, 16 S. W. 764; Anderson v. State, 60 App. 314, 131 S. W. 1124.

There is no variance if the indictment charges the murder of "Redus," and the proof shows his true name was "Reder," if it further shows he was known

and called by the former name. *Hunter v. State*, 8 App. 75. See, also, *Henry v. State*, 7 App. 388.

Nor if indictment alleges the Christian name of deceased to be Robert, and the proof shows he was commonly called Bob. *Alsop v. State*, 36 App. 535, 38 S. W. 174.

As to allegation of the name of the deceased, see *Williams v. State*, 3 App. 123; *Rothschild v. State*, 7 App. 519; *Cock v. State*, 8 App. 659.

That the name of deceased, as "Smuttery-My-Darling," is an unusual one, is immaterial. *Wade v. State*, 23 App. 308, 4 S. W. 896.

There is not a variance between an indictment giving the name of the murdered person as Rozella Betts, and evidence that her name was Eva Rozella Betts, usually called Eva, but sometimes Rozella. *Betts v. State*, 57 App. 389, 124 S. W. 424.

The variance between an indictment, charging accused with the killing of "Tom Jones," and the evidence, showing that the name of decedent was "Jim Jones," is fatal, requiring a reversal of the conviction, in the absence of evidence that decedent was as well known by the name of "Jim Jones" as "Tom Jones." *Jones v. State*, 62 App. 637, 138 S. W. 703.

14. **Theft.**—See notes under P. C. art. 1329, ante, and art. 457, post.

The name of the owner, or of the possessor of the property, should be alleged correctly, as the allegation must be proved as made. The given name may be stated by its initials. *State v. Black*, 31 Tex. 560; *Collins v. State*, 43 Tex. 577; *Wells v. State*, 4 App. 20; *Perry v. State*, Id. 566; *Brown v. State*, 32 Tex. 125; *Spoonemore v. State*, 25 App. 358, 8 S. W. 280.

Variance as to middle initial to the given name as charged and proved, is immaterial (*Spencer v. State*, 34 App. 65, 29 S. W. 159); but this rule does not extend to the first initial, unless it be shown that defendant was as well known by the named alleged as by his true name. *Willis v. State*, 24 App. 487, 6 S. W. 200; *Young v. State*, 30 App. 308, 17 S. W. 413.

The indictment alleged the name of the owner of the stolen property to be Burris. The proof showed it to be Burrows. The conviction is assailed upon the ground of variance between the ownership as alleged and proved. But held that, as the proof further shows that the owner was commonly known as Burris, the variance is not material. *Taylor v. State*, 27 App. 44, 11 S. W. 35.

Indictment for theft which alleged the name both of accused and the owner as "Mack Brown" held good. *Brown v. State*, 28 App. 379, 13 S. W. 150.

Indictment charging theft of a horse belonging to "J. Aldrete," is supported by proof that the property belonged to "Josianca Aldrete." *Franklin v. State*, 37 App. 312, 39 S. W. 680.

That the evidence showed that the owner's surname was different from that alleged in the information in a prosecution for theft would be a variance. *Johnson v. State*, 58 App. 442, 126 S. W. 597.

A count in an indictment for larceny was not fatally defective because, after mentioning defendant four times by his name, "F. C. Matthers," it referred to him as "the said F. C. Manner"; it appearing that the mistake was merely clerical and could have misled no one. *Skinner v. State* (Cr. App.) 154 S. W. 1007.

Where the indictment charged that the property was stolen from one James, but the proof was that his name was Janes, but that he was commonly known as James, there was no variance. *Gatlin v. State*, 72 App. 516, 163 S. W. 428.

15. **Violation of liquor law.**—See notes to art. 464, post.

When name is unknown, see note, ante. The indictment charged a sale of liquor to "Hall," proof showed a sale to Wall, variance; held, fatal. *Henderson v. State* (Cr. App.) 38 S. W. 618.

An indictment for selling liquors to "Jim W." is not supported by proof of a sale to "Will W." in the absence of evidence that the buyer is also called or known as "Jim W." *Hankins v. State*, 57 App. 152, 122 S. W. 21.

Where an information charged a sale of liquor to Lewis Vandali, and the proof showed a sale to Lewis Vanderlee, and there was no evidence as to the pronunciation of the latter name, or that the person was ever known as Vandali, there was a variance; the names not being idem sonans. *Chaney v. State*, 59 App. 283, 128 S. W. 614.

An indictment for violating the local option law charged a sale to one "Joy Benge," and on cross-examination accused testified that his name was George, but stated that he was called "Joy" by three persons. Held, insufficient to show that he was commonly known as Joy, or was as well known by that name as by his real name, and that the indictment did not therefore properly allege his name as a purchaser of the liquor. *Roberts v. State* (Cr. App.) 144 S. W. 940.

16. **Forgery.**—See notes under art. 924, Pen. Code.

An indictment for forgery setting out a copy of the check forged signed by "Dr. G. A. J.," and alleging that by the name "Dr. G. A. J., defendant meant "G. U. J.," whose name the defendant intended to sign to the instrument and wrote "Dr. G. A. J." instead, sufficiently sets out the name of the person whose act the check purports to be. *Reeseaman v. State*, 59 App. 430, 128 S. W. 1126.

The doctrine of idem sonans has no application to the variance between an indictment charging the forgery of an instrument signed by "Doff G." and the instrument introduced in evidence signed by "Dolph G." *Simmons v. State*, 61 App. 7, 133 S. W. 687.

Where an indictment charged the passing of a forged instrument on Ellis Carter, and the evidence showed that his name was Richard Ellis Carter, but that he went by the name and was called by his friends Ellis Carter, and was generally known in the community by that name, there was no variance. *Shores v. State* (Cr. App.) 150 S. W. 776.

Under an indictment charging the signing of the name "Reen Perrey" to the alleged forged note, without explanatory averments that the name signed was in-

tended for "Rene Perry," the name of the prosecuting witness, the admission by defendant that he had signed the name of the prosecuting witness to the note, and other testimony showing that her name had been signed to the note, was not a variance, where it appeared that the prosecuting witness was frequently known as "Reen," that many people called her "Rennie" and others "Reen"; such names having the same sound and pronunciation as that used in the indictment. *Pye v. State*, 71 App. 94, 154 S. W. 222.

17. Pulling down and injuring fence.—An indictment charging the appellant with pulling down and injuring the fence of W. G. Amos without the consent of W. J. Amos is not bad because of the variance in the initials of the alleged owner. *Thompson v. State*, 64 App. 514, 142 S. W. 908.

18. When objection as to misnomer can be raised.—See arts. 559-563, 567, and notes.

Misnomer is an objection that can not be raised after arraignment and entry of plea of not guilty. *Wilcox v. State*, 31 Tex. 586; *Bassett v. State*, 4 App. 41; *Henry v. State*, 38 App. 306, 42 S. W. 559; *White v. State*, 32 App. 625, 25 S. W. 784.

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.

See notes under P. C. arts. 1329, 1333, 1334, 1348, 1349, 1377.

See Willson's Cr. Forms, 7a.

Allegation in separate counts, see notes under article 481, post.

Cited, *Payne v. State* (Cr. App.) 148 S. W. 694; *Silvas v. State*, 71 App. 213, 159 S. W. 223; *Adams v. State* (Cr. App.) 172 S. W. 219.

In general.—This article applies in all cases in which it is necessary to allege ownership. *Phillips v. State*, 17 App. 169, and cases cited.

The allegation of ownership as well as the name of the owner must be proved as alleged. *Young v. State*, 30 App. 308, 17 S. W. 413.

General and special ownership.—Exclusive possession, care, management and control of property is sufficient proof of ownership. *Dodd v. State*, 10 App. 370; *Emmerson v. State*, 33 App. 89, 25 S. W. 289; *Ledbetter v. State*, 35 App. 195, 32 S. W. 903; *Smith v. State*, 34 App. 124, 29 S. W. 775. And it is better practice, in most instances, to allege the ownership in him who has the actual control, care and management—in short, the possession—of the property. *Shelton v. State*, 52 App. 611, 108 S. W. 679; *Clark v. State*, 58 App. 181, 125 S. W. 12; *Frazier v. State*, 18 App. 434 (overruling *Ersine v. State*, 1 App. 405; *Wilson v. State*, 12 App. 481; *Bowling v. State*, 13 App. 338; *Jackson v. State*, 7 App. 363, and *Williamson v. State*, 13 App. 514). And on the same subject, see, also, *Otero v. State*, 30 App. 450, 17 S. W. 1081, and cases cited; *Wyley v. State*, 34 App. 514, 31 S. W. 393; *Reed v. State*, 34 App. 597, 31 S. W. 404; *Bailey v. State*, 18 App. 426; *House v. State*, 19 App. 227; *Ledbetter v. State*, 35 App. 195, 32 S. W. 903; *Burns v. State*, 35 Tex. 724; *Statum v. State*, 9 App. 273.

Such possession need not be lawful. *Crockett v. State*, 5 App. 526. Thus when stolen property has been sold by the thief, and afterward stolen from the purchaser, the ownership may be alleged to be either in the true owner, or in the purchaser. *King v. State*, 43 Tex. 351; *Moore v. State*, 8 App. 496, citing *Blackburn v. State*, 44 Tex. 457.

Animals on a range are in the possession of the special owner if he has the actual care, control and management, so that ownership may be alleged in him. *Littleton v. State*, 20 App. 168; *Hall v. State*, 22 App. 632, 3 S. W. 338; *Alexander v. State*, 24 App. 126, 5 S. W. 840; *Conner v. State*, 24 App. 245, 6 S. W. 138; *Williams v. State*, 26 App. 131, 9 S. W. 357.

Animals on their accustomed range are in the possession of their owner. *Jones v. State*, 3 App. 498; *Deggs v. State*, 7 App. 359; *Mackey v. State*, 20 App. 603; *Alford v. State*, 31 App. 299, 20 S. W. 553; *McGrew v. State*, 31 App. 336, 20 S. W. 740; *Bennett v. State*, 32 App. 216, 22 S. W. 684; *Cameron v. State*, 44 Tex. 652; *Crockett v. State*, 5 App. 526; *Moore v. State*, 8 App. 496.

One who takes up and legally estrays an animal acquires a special property in it, and ownership may be alleged in him. *Swink v. State*, 32 App. 530, 24 S. W. 893; *Jinks v. State*, 5 App. 68; *Cox v. State*, 43 Tex. 101. And see *Blackburn v. State*, 44 Tex. 457; *Tinney v. State*, 24 App. 112, 5 S. W. 831. This rule does not apply upon a mere partial compliance with the stray laws, and in such case the indictment should allege ownership in an unknown person. *Lowe v. State*, 11 App. 253. But see *Tinney v. State*, 24 App. 112, 5 S. W. 831.

Ownership of a minor's property may be alleged to be in the natural guardian. *Trafton v. State*, 5 App. 480.

It is well settled that ownership may be alleged either in the actual or special owner. *Littleton v. State*, 20 App. 168.

An indictment for theft of jewels given by parent to a child and kept in custody of parent, charged ownership only in the parent; held, sufficient. *Wright v. State*, 35 App. 470, 34 S. W. 273.

The indictment for burglary of a schoolhouse in the night time properly alleged ownership in the janitor, who had charge of the building from 4 p. m. until 8 a. m., though the property taken was school books belonging to the pupils. *Lamater v. State*, 38 App. 249, 42 S. W. 304.

A bare, temporary possession as that of a servant is not sufficient. *Daggett v. State*, 39 App. 5, 44 S. W. 148, 342.

Where a person is in general control of a sheep ranch and had control of the herding, and sheep are stolen from a flock in charge of a hired hand, ownership is properly alleged in the one who has control of the ranch and hired hand. *McMullen v. State* (Cr. App.) 59 S. W. 891.

It is proper to allege ownership in the person from whose possession property is taken. *Bell v. State* (Cr. App.) 71 S. W. 24.

Ownership can be alleged in the temporary possession of property. *Piper v. State*, 56 App. 121, 119 S. W. 869.

In a prosecution for theft of cattle, in which the indictment alleged that the cattle were the property of H., and were taken from his possession without his consent, proof that the cattle were under control of H., who lived in another state, but were in the immediate charge of a hired hand in this state, who looked after them and kept up the fences, etc., was a fatal variance. *Bonner v. State*, 53 App. 195, 125 S. W. 22.

In a prosecution for burglary of a room in a hotel, the ownership, occupancy, and control of the room was properly charged to be in the proprietor, and not in one whose control and possession was that of an employé. *Moore v. State*, 59 App. 361, 128 S. W. 1115.

Pen. Code, art. 1333, declares that it is not necessary to constitute theft, that possession and ownership of the property be in the same person at the time of the taking. Article 1334 provides that "possession" is constituted by exercise of actual control, care, and management of property. Held, that this article 457 of the Code of Criminal Procedure applied to the special owner of property as well as the actual owner thereof, and that the state made out its case when it proved the alleged owner to be a special joint owner with two others, and that, while all three had the care and management of the property, it was unnecessary to prove want of consent of the other joint owners, though to prove it would not be reversible error, nor prejudicial to accused. *Lockett v. State*, 59 App. 531, 129 S. W. 627.

Persons in charge of cattle on a range, looking after them for the owner, were properly stated to be the owners thereof in an indictment for theft. *Taylor v. State*, 62 App. 611, 138 S. W. 615.

Where one person owns the property stolen, and another has the lawful possession and control thereof, the ownership may be alleged in either. *Suggs v. State* (Cr. App.) 143 S. W. 186.

The indictment for receiving stolen property properly alleges its ownership in M., owner and manager of the business, part of the stock of which it was, and not in his employé, who, as yardman, had control of the property in the yard from which it was stolen. *Hogg v. State* (Cr. App.) 146 S. W. 195.

An indictment for swindling may allege ownership in an employé having charge and control of the property fraudulently acquired by accused. *Pilgrim v. State* (Cr. App.) 150 S. W. 1170.

Although the keeper of an automobile garage had the care of a machine which was left there when not in use by the owner, his care or custody of the machine did not constitute ownership for the purpose of the allegation of ownership and taking without consent in a prosecution for theft of a part of a machine. *Staha v. State* (Cr. App.) 151 S. W. 543.

Under the provision that, if one person owns property and another has control thereof, ownership may be alleged in either, where property owned by one person is in the actual control and management of another, it may be alleged to be the property of the latter, and an information charging willful injury to a freight car could allege that it was the car of the B. railroad, without alleging that it was in the custody, etc., of the railroad having control thereof when it was injured. *Hamilton v. State* (Cr. App.) 153 S. W. 134.

Where the owner of cattle placed them in the pasture of one J., who under *Vernon's Sayles' Civ. St.* 1914, § 5664, had a lien thereon for pasturage, J. was the special owner as against the real owner, and an indictment for their theft should have alleged ownership in J. or real ownership in the owner and special ownership in J. *McKnight v. State* 70 App. 470, 156 S. W. 1188.

An indictment for the theft of property in possession of a renter should allege general possession in the owner's agent and special ownership in the renter, or ownership in the agent, or in the renter. *Lewis v. State* (Cr. App.) 164 S. W. 5.

Property levied on by an officer being in his exclusive possession, ownership may be alleged in him in an indictment for robbery. *Bell v. State* (Cr. App.) 177 S. W. 966.

The carrier had such possession that an indictment for burglarizing a car containing potatoes properly alleges ownership of them in it not merely where after arrival at destination the real owner was permitted to show them to prospective purchasers and sold them but after the freight was paid and the bill of lading surrendered and part of the potatoes checked out by its representative; it still being liable as warehouseman for the remainder. *Howard v. State* (Cr. App.) 178 S. W. 506.

Joint or common ownership.—Special joint ownership, see the preceding note.

When 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. *Henry v. State*, 45 Tex.

84; Terry v. State, 15 App. 66; Phillips v. State, 17 App. 169; Samora v. State, 4 App. 508; Calloway v. State, 7 App. 585; Walker v. State, 9 App. 38; Atterberry v. State, 19 App. 401, and cases cited; Clark v. State, 26 App. 486, 9 S. W. 767, and cases cited; Bailey v. State, 20 App. 68; Cohen v. State, *id.*, 224; Aldrich v. State, 29 App. 394, 16 S. W. 251.

Where the indictment alleged the ownership to be in one party, and the proof showed that it belonged to a partnership, held, that there was no variance between allegation and proof, and the court properly charged the jury that the state need not prove want of consent except as to the party in whom ownership was laid Coates v. State, 31 App. 257, 20 S. W. 585.

In case of burglary ownership of community property must be alleged to be in the husband, unless it be a case where the husband may have abandoned the wife, when it may be alleged to be in the wife. Jones v. State, 47 App. 126, 80 S. W. 531, 122 Am. St. Rep. 680.

Where indictment alleges ownership of burglarized property in one person and proof shows the ownership to be in the one alleged and another there is no variance. In such case ownership may be alleged in all or either. Mass v. State (Cr. App.) 81 S. W. 46.

Although one of the joint possessors is the actual owner, both can be treated as possessory, and the possession and ownership can be alleged in either. Duncan v. State, 49 App. 150, 91 S. W. 573.

This article does not relate alone to a technical joint ownership, or joint possession but refers as well to a case where the parties exercise a joint or common possession of the property. Bailey v. State, 50 App. 398, 97 S. W. 696.

An indictment for theft, which alleges a joint ownership and possession of three persons, a copartnership, is not sustained by proof of ownership and possession by two of such persons, and that the third had neither the possession nor a part ownership. Hardeman v. State, 58 App. 51, 124 S. W. 632.

Under this article there was no fatal variance between an allegation that property stolen belonged to J. and proof that it belonged to J. and E., as partners. Davis v. State, 63 App. 453, 140 S. W. 349.

Under the provision that, where property stolen is owned in common or jointly by two or more, the ownership may be alleged in all or either of them, proof that property stolen belonged to a partnership was sufficient to sustain a conviction, though it be alleged to belong to one of the individual members of the firm, and vice versa. Hatfield v. State (Cr. App.) 147 S. W. 236.

Where property is owned in common or jointly by two or more persons, an indictment for burglary may allege ownership to be in either or all of them. Whorton v. State (Cr. App.) 151 S. W. 300.

Where the indictment alleged that the burglarized storehouse was owned and occupied by M. and contained property owned by him, proof that M. and another had possession and control of the burglarized house and property therein did not constitute a variance. Powers v. State, 72 App. 290, 162 S. W. 832.

Under this article ownership was properly alleged in the head of a firm, consisting of himself and his brother, who was in and about the store, and was in possession as one of the joint owners. Lewis v. State, 72 App. 377, 162 S. W. 866.

Separate ownership of married women.—This article applies to a case where the property stolen is the wife's jewelry, and ownership can be alleged to be in the wife or husband, the facts showing it to be the separate property of the wife. Kauffman v. State, 53 App. 209, 109 S. W. 172.

Ownership of married woman's separate property may be alleged to be in her or in her husband. Sinclair v. State, 34 App. 453, 30 S. W. 1070; Hames v. State, 46 App. 562, 81 S. W. 708. But ownership of community property may be alleged to be in her if she has been abandoned. Ware v. State, 2 App. 547; Jones v. State, 47 App. 126, 80 S. W. 531, 122 Am. St. Rep. 680. And there is no variance between an indictment charging theft of the wife's money and proof that the money was community property in her custody. Lane v. State (Cr. App.) 152 S. W. 897.

Where a wife's property is taken, it is proper to allege ownership and possession and want of consent in the husband and not in the wife. McGee v. State (Cr. App.) 46 S. W. 930; Smith v. State, 53 App. 643, 111 S. W. 940. Especially where he had the exclusive management and control. Burt v. State, 7 App. 578. See, also Coombes v. State, 17 App. 258.

Where premises are in fact the separate property of the husband, the ownership should be alleged to be in him. Lucas v. State, 36 App. 397, 37 S. W. 427.

The husband may be convicted of keeping a disorderly house though it is his wife's separate property. Willis v. State, 34 App. 148, 29 S. W. 787.

Estate ownership.—If the property belonged to an estate, it is proper to allege ownership and possession in the person who had the actual and legal control of the same. The son or widow of decedent, having such actual control and management, come within this rule. Dreyer v. State, 11 App. 503; Crockett v. State, 5 App. 526. And see Henry v. State, 45 Tex. 84; McLaurine v. State, 28 App. 530, 13 S. W. 992; Briggs v. State, 20 App. 106.

Where the property belongs to a woman and her children it is sufficient to allege the ownership in the mother alone. Kelley v. State, 44 App. 187, 70 S. W. 20.

Where the property stolen belongs to an estate where the wife had qualified as community survivor, the ownership was properly alleged in her. Pate v. State, 54 App. 491, 113 S. W. 758.

Unknown ownership.—See notes under Pen. Code, article 1329.

An allegation that the owner of the property is to the grand jurors unknown is sufficient. Taylor v. State, 5 App. 1; Culberson v. State, 2 App. 324; State v. Miller, 34 Tex. 535; McGee v. State, 43 Tex. 662; Jorasco v. State, 6 App. 233; Lowe v. State, 11 App. 253; Williamson v. State, 13 App. 514; Mackey v. State, 20 App. 603; Atkinson v. State, 19 App. 462; McVey v. State, 23 App. 659, 5 S. W. 174; McCarty v. State, 36 App. 135, 35 S. W. 994. And in such case the indictment need

not allege that the defendant was not the owner of the property. *Thompson v. State*, 9 App. 301; *Reed v. State*, 32 App. 139, 22 S. W. 403.

An indictment for theft in one count alleged ownership in a certain person, and in another count alleged ownership in a person to the grand jurors unknown; held, sufficient. *McLaughlin v. State* (Cr. App.) 34 S. W. 280.

If the proof shows that the owner's name could have been ascertained by the use of ordinary diligence the variance is fatal. *Swink v. State*, 32 App. 530, 24 S. W. 893; *Langham v. State*, 26 App. 533, 10 S. W. 1113; *Mixon v. State*, 28 App. 347, 13 S. W. 143; *Kimbrough v. State*, 28 App. 367, 13 S. W. 218; *Sharp v. State*, 29 App. 211, 15 S. W. 176; *Yantis v. State* (Cr. App.) 144 S. W. 947.

Where the indictment charges that the owner was unknown, there must be some evidence of such want of knowledge, either by the grand jurors or otherwise, to authorize submission of the question to the jury. *Davis v. State* (Cr. App.) 144 S. W. 938.

The statute comprehends the property of all unknown owners, and the unknown ownership must be proved as any other issue in the case. *Clements v. State*, 43 App. 400, 66 S. W. 302, 303.

Corporation ownership.—See note to art. 456, ante.

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.

See Willson's Cr. Forms, 7a.

In general.—A general description of the stolen property by name, kind, quality, number, and ownership, if known, is sufficient. *Lewis v. State*, 28 App. 140, 12 S. W. 736; *Kimbrough v. State*, 28 App. 367, 13 S. W. 218; *Green v. State*, 28 App. 493, 13 S. W. 784; *Taylor v. State*, 29 App. 466, 16 S. W. 302; *Wofford v. State*, 29 App. 536, 16 S. W. 535; *Otero v. State*, 30 App. 450, 17 S. W. 1081; *Jackson v. State*, 34 App. 90, 29 S. W. 265.

It need not be averred, as at common law, that the stolen property is "goods and chattels." *State v. Odum*, 11 Tex. 12.

A particular description of the property is not necessary—giving it its common name will answer, as a book of a certain value, a title bond, etc. See description of a title bond held to be sufficient. *Dignowitty v. State*, 17 Tex. 521, 67 Am. Dec. 670. See, also, *Green v. State*, 28 App. 493, 13 S. W. 784.

Where the description of stolen property was, "one chest or trunk, containing various articles of clothing, jewelry, etc.," it was held bad for uncertainty, "Trunk" and "chest" are not synonymous, and the articles of clothing, jewelry, etc., should have been more definitely described. *Potter v. State*, 39 Tex. 388.

For a description of miscellaneous articles of stolen clothing held to be sufficient, see *Ware v. State*, 2 App. 547.

The property need not be described as "corporeal personal property." It is sufficient to allege that it is "property." *Sansbury v. State*, 4 App. 99.

The indictment for robbery should describe the property taken, as in theft. See a description held insufficient. *Winston v. State*, 9 App. 143.

An indictment for fraudulent disposition of mortgaged property should describe the property as it is described in the mortgage or other written lien, but it will be sufficient if the description is sufficient to identify the property as that described in the mortgage or other lien. *Glass v. State*, 23 App. 425, 5 S. W. 131. See, also, *Martin v. State*, 28 App. 364, 13 S. W. 151.

"One watch and one pocket-knife," is sufficient description of property stolen. *Grissom v. State*, 40 App. 147, 49 S. W. 93.

An indictment for theft from the person described the property taken as "corporeal personal property, * * * to wit, \$4 in money, two knives, and one ring." Held, that the description was sufficient. *Campbell v. State*, 61 App. 504, 135 S. W. 548.

Where an indictment charged theft from the person and described the property stolen as a pocketbook containing one \$10 bill and two \$5 bills, all of the aggregate value of \$20, good and lawful money of the United States the description is sufficient under C. C. P., article 458 and Pen. Code, arts. 1330, 1337, both of which refer to the crime of theft, and, respectively, provide that the property must have some specific value, and that the term "property" as used in relation to theft includes money, bank bills, and goods of every description as well as agricultural products, and all other personal property, since any theft from the person is a felony and the grade of the offense does not depend upon the amount stolen, and the property alleged to have been stolen was not money, but a pocketbook and its contents, all of which was of the aggregate value of \$20. *Sims v. State*, 64 App. 435, 142 S. W. 572.

An indictment which alleges that accused unlawfully and knowingly entered on a strip of land known as "the Commons," owned by a county named, and under the control of a person named, the mayor of the city named, and removed therefrom earth and sand without consent, is as against a motion to quash insufficient for failing to describe the Commons. *Haworth v. State* (Cr. App.) 168 S. W. 859.

An indictment, charging the theft or embezzlement of a vendor's lien note, which merely described the instrument as one vendor's lien note for the payment of \$8,000 and of the value of \$8,000, is sufficient. *Pye v. State* (Cr. App.) 171 S. W. 741.

An indictment for theft of "one engine lubricator of the value of \$12.00, two oil cups of the value of two dollars, three hard oil cups of the value of three and 50/100 dollars, one fan leather belt of the value of ten dollars, one condenser leather belt of the value of twelve dollars, one distributor leather belt of the value of thirty dollars, two lead mill leather belts of the value of eleven dollars," sufficiently described the property. *Schenk v. State* (Cr. App.) 174 S. W. 357.

An indictment for theft by a bailee, alleging that the money was delivered to accused for the purpose of buying barroom fixtures and whisky, was not defective for failure to allege the kind, character, quality, name, etc., of the fixtures or the quantity of whisky. *Himmelfarb v. State* (Cr. App.) 174 S. W. 586.

Under this article a complaint and information alleging that accused unlawfully took from the possession of prosecutor one suit of clothes of a specified value sufficiently described the property stolen. *Baldwin v. State* (Cr. App.) 175 S. W. 701.

Money.—See article 468, and notes thereunder.

Misspelling the word moneys, see notes under article 476, post.

The term "money" means legal tender metal coins or legal tender currency of the United States. *Menear v. State*, 30 App. 475, 17 S. W. 1082; *Nelson v. State*, 35 App. 205, 32 S. W. 900; *Thompson v. State*, 35 App. 511, 34 S. W. 629.

Indictment for theft of money held bad for uncertainty both as to description and value. *Boyle v. State*, 37 Tex. 359. For sufficient description, see *Kelley v. State*, 34 App. 412, 31 S. W. 174.

Descriptive averments as to money indictment for robbery. *Winston v. State*, 9 App. 143; *Blain v. State*, 34 App. 448, 31 S. W. 368.

When the indictment described the property as "two United States National ten dollar currency bills, of the value, then and there separately, of ten dollars, and of the aggregate value, then and there, of twenty dollars; one of said bills is described more particularly, as follows, to wit, No. 1375, from the Chatam National Bank of New York," etc., the description was held sufficient. *Roth v. State*, 10 App. 27.

For other decisions rendered prior to the enactment of article 458, involving descriptions of money, see *Davison v. State*, 12 App. 214; *Boyle v. State*, 37 Tex. 359; *Martinez v. State*, 41 Tex. 164; *Ridgeway v. State*, Id. 231; *Wells v. State*, 4 App. 20; *Cook v. State*, Id. 265; *Williams v. State*, 5 App. 116; *Statum v. State*, 9 App. 273; *Lavarre v. State*, 1 App. 685.

"Money" is property, and in an indictment for theft a general description of it by name, kind, number of pieces, and ownership will be sufficient. *Davison v. State*, 12 App. 214.

Where the property was described as "one twenty dollar gold piece of the value of twenty dollars, current money of the United States, and one five dollar bill in money of the value of five dollars, and one pocketknife of the value of fifty cents, all being the corporeal personal property of J. W. McKnight," it was held to be sufficient. *Bryant v. State*, 16 App. 144.

An indictment which describes the property as "eight dollars, the same being the corporeal personal property of John Schell" was held bad, because it did not sufficiently describe the property. *Dukes v. State*, 22 App. 192, 2 S. W. 590.

The money was described as one dollar in Mexican money of the value of fifty cents; held, there being no statute upon the subject of foreign money it should be described as property, that is by name, quantity and ownership. (Overruling *Bravo v. State*, 20 App. 177.) *Wade v. State*, 35 App. 170, 22 S. W. 772, 60 Am. St. Rep. 31.

Description of money in indictment for robbery held sufficient. *Kirk v. State*, 35 App. 224, 32 S. W. 1045.

An indictment for robbery which alleges the taking of a certain number of dollars in money sufficiently describes the property taken. *Thompson v. State*, 35 App. 511, 34 S. W. 629; *Colter v. State*, 37 App. 284, 39 S. W. 576.

An indictment for robbery describing the money, as "two dollars in silver coin money of the United States of the value of two dollars and three copper cent pieces each of the value of one cent" is sufficient. *Moore v. State*, 36 App. 88, 35 S. W. 668.

An indictment alleging the value of ten dollar bills to be \$20 each held bad. *Jones v. State*, 39 App. 387, 46 S. W. 250.

The allegation in an indictment for robbery charging accused with having taken two \$20 bills, five \$10 bills, and two \$5 bills, of lawful and current money of the United States of America, sufficiently charged the taking of lawful money of the United States. *Jackson v. State*, 60 App. 273, 131 S. W. 1076.

An information charging the theft of money, describing it as \$10 in money, which passed current as money of the United States of America, of the value of \$10, sufficiently described the money alleged to have been stolen. *Longard y. State*, 60 App. 511, 132 S. W. 766.

In a prosecution for theft, an allegation in the indictment or information that the stolen property was money means lawful money of the United States. *Sims v. State*, 64 App. 435, 142 S. W. 572.

An indictment for robbery alleging that the property taken was silver coin of the value of \$1.50 sufficiently describes it. *Compton v. State* (Cr. App.) 148 S. W. 580.

Where an indictment for the theft of money alleged that the money was 19 \$20 bills, 2 \$5 bills, 1 \$2 bill, and 1 \$1 bill, each of United States paper currency money, and 15 cents in silver coin of the United States, and stated the value of each bill and coin and the total amount, such description was sufficient under this and article 468. *Lane v. State* (Cr. App.) 152 S. W. 897.

An indictment charging embezzlement of "one thousand dollars current of the United States * * * and of the value of \$1,000" is not subject to motion to quash as charging no offense, on the ground of not stating whether it was money or merchandise. *Poteet v. State* (Cr. App.) 153 S. W. 863.

Under Pen. Code, art. 1329, defining "theft" as the fraudulent taking of corporeal personal property belonging to another, etc., art. 1337, providing that "property" as used in relation to the crime of theft includes money, etc., Code Cr. Proc. art. 468, providing that in indictments for theft of any coin or paper, current as money, it shall be sufficient to describe the property in general terms as "money," etc., of or about a certain amount, and this article 458, a complaint and information charging that accused took from the possession of W. certain money of the value exceeding \$1, was not insufficient because of the failure to allege that the stolen money was coins of the United States, or current as money of the United States. *McAdams v. State* (Cr. App.) 172 S. W. 792.

In view of this article and article 468, providing that, in an indictment for theft of money, it is sufficient to describe it as money, an indictment for robbery, which describes the money stolen as \$70 in gold, current money of the United States, and \$160 in bank notes, current money of the United States, is sufficient, though the prosecutor can give a full description of both the gold and the bank notes by stating the denominations thereof. *Terrell v. State* (Cr. App.) 174 S. W. 1088.

Real estate.—Evidence that the land in question was not in certain survey held fatal to conviction though the allegation of the name of the survey was unnecessary. *Evans v. State* (Cr. App.) 40 S. W. 988.

Animals.—Sufficient to describe the stolen animal by the generic term "horse," "ass," "mule" or "cattle." But if the descriptive averments unnecessarily include color, brand or sex, such averments must be proved. *Hill v. State*, 41 Tex. 253; *Coleman v. State*, 21 App. 520, 2 S. W. 859; *Loyd v. State*, 22 App. 646, 3 S. W. 670; *Smythe v. State*, 17 App. 244; *Cameron v. State*, 9 App. 332; *Ranjel v. State*, 1 App. 461; *Allen v. State*, 8 App. 360.

Under the statute as it formerly stood relating to theft of "any horse, gelding, mare, colt, ass, or mule" the proof was required to respond to the averment, and proof of theft of a "mare" did not sustain charge of stealing a "horse." *Banks v. State*, 28 Tex. 644. Also within that statute a "gelding" was not a "horse." *Jordt v. State*, 31 Tex. 571, 98 Am. Dec. 550; *Swindel v. State*, 32 Tex. 102; *Gibbs v. State*, 34 Tex. 134; *Persons v. State*, 3 App. 240; *Valesco v. State*, 9 App. 76. A "filly" was not a "mare." *Lunsford v. State*, 1 App. 448, 28 Am. Rep. 414. A ridgling is a "horse" and not a "gelding." *Brisco v. State*, 4 App. 219, 30 Am. Rep. 162.

The following descriptions of animals have been held sufficient: "Two beeves, the same being cattle." *Hubotter v. State*, 32 Tex. 479. "Certain neat cattle, to wit, one beef." *State v. Garrett*, 34 Tex. 674. "One beef steer." *Short v. State*, 36 Tex. 644; *Robertson v. State*, 1 App. 311. "One beef, then and there being cattle." *Davis v. State*, 40 Tex. 134. "Six head of work oxen." *Musquez v. State*, 41 Tex. 226. "One ox." *Parchman v. State*, 44 Tex. 192. "A bull yearling." *Berryman v. State*, 45 Tex. 1. "Two certain oxen." *Henry v. State*, 45 Tex. 84. "Two work oxen." *Camplin v. State*, 1 App. 108. "One cow." *Johnson v. State*, 1 App. 118. "One beef steer, neat cattle." *Moore v. State*, 2 App. 350. "One certain calf, of the neat cattle kind." *Grant v. State*, 3 App. 1. "One beef cattle." *Duval v. State*, 8 App. 370. "One pieded beef steer." *Robertson v. State*, 1 App. 311. "Four animals of the cattle species." *McIntosh v. State*, 18 App. 284. "One head of neat cattle." *Coward v. State*, 24 App. 590, 7 S. W. 332. "Theft of thirty-three sheep." *Lockart v. State*, 32 App. 149, 22 S. W. 413.

Sufficient to describe the animal as "one cattle," "one hog," etc. Further description will only necessitate unnecessary proof. *State v. Garrett*, 34 Tex. 674; *Smith v. State*, 24 App. 290, 6 S. W. 40.

It is sufficient description of the animals to designate them by their generic name, as a "hog," a "sheep," a "goat." A more particular description is not required and should not be given. *Lunn v. State*, 44 Tex. 85; *Grant v. State*, 2 App. 164.

Where the animal was described as a "white, black and speckled blue yearling" and the evidence showed a "three year old of a white and black speckled color" and "a white and red frosty color" the variance was fatal. *Courtney v. State*, 3 App. 240.

An indictment under P. C. art. 1376, for illegal marking or branding which described the animal as a "colt," was held sufficient. Horse is the generic name of the equine species, cow of the bovine; to name one of the species is sufficient. *Pullen v. State*, 11 App. 89.

An indictment for theft of a horse need not allege that the horse is the "corporeal personal property," etc. *Damron v. State*, 27 S. W. 7.

The indictment should allege the number of cattle stolen. *Matthews v. State*, 39 App. 553, 47 S. W. 647, 48 S. W. 189; *Id.*, 41 App. 98, 51 S. W. 915.

The fact that the statutes of Oklahoma classifies animals of the horse species will not invalidate a Texas indictment describing the animal stolen in Oklahoma and brought into this state, by its generic term. *Beard v. State*, 47 App. 183, 83 S. W. 824.

Description of or setting forth instrument forged.—See notes under art. 924, Penal Code.

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."

See Willson's Cr. Forms, 7a.

Cited, *Caldwell v. Texas*, 137 U. S. 692, 11 Sup. Ct. 224, 34 L. Ed. 816.

Prior law.—This article is only declaratory of the established doctrine at the time of its adoption. *Calvin v. State*, 25 Tex. 789; *Posey v. State*, 32 Tex. 476; *Prim v. State*, *Id.* 157; *Robinson v. State*, 33 Tex. 341; *Jorasco v. State*, 6 App.

238; *Sullivan v. State*, 13 App. 462; *Reed v. State*, 14 App. 662. Prior to the adoption of the Codes, however, the word "feloniously" was essential in every indictment for a felony. *Cain v. State*, 18 Tex. 387.

Theft.—The word "feloniously" need not be used in charging theft, but the word fraudulently is indispensable. *Prim v. State*, 32 Tex. 157; *Calvin v. State*, 25 Tex. 793; *Austin v. State*, 42 Tex. 345; *Conner v. State*, 6 App. 455; *Jorasco v. State*, Id. 238; *Sloan v. State*, 18 App. 225 (overruling *Musquez v. State*, 41 Tex. 226); *Ware v. State*, 19 App. 13; *Spain v. State*, 19 App. 469. And see *Muldrew v. State*, 12 App. 617.

Swindling.—After the adoption of the Code it was held in one case essential in charging the offense of swindling to allege that the offense was "feloniously" committed. *State v. Small*, 31 Tex. 184. But a contrary doctrine was subsequently held in *Robinson v. State*, 33 Tex. 341.

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.]

See notes under articles 465 and 466, post.

See *Willson's Cr. Forms*, 7a; ante, art. 453, and notes.

Cited, *Menasco v. State*, 32 App. 582, 25 S. W. 422; *Earl & Garrett v. State*, 33 App. 570, 28 S. W. 469; *Runnels v. State*, 34 App. 431, 30 S. W. 1065; *Slack v. State*, 61 App. 372, 136 S. W. 1073, Ann. Cas. 1913B, 112; *Payne v. State* (Cr. App.) 148 S. W. 694; *Bradberry v. State* (Cr. App.) 152 S. W. 169; *Thompson v. State* (Cr. App.) 152 S. W. 893; *Caldwell v. Texas*, 137 U. S. 692, 11 Sup. Ct. 224, 34 L. Ed. 816.

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| 1. "Common sense indictment act." | 7. Embezzlement of public money. |
| 2. Notice of offense charged in general. | 8. Forgery. |
| 3. Description of accused. | 9. Incest. |
| 4. Violation of liquor law. | 10. Automobiles exceeding speed limit. |
| 5. Perjury. | 11. Sending anonymous letter. |
| 6. Robbery. | 12. Unlawful practice of medicine. |

1. "Common sense indictment act."—This and following articles down to and including article 476 are commonly known as the "Common Sense Indictment Act," (Act March 26, 1881, 17 Leg. p. 60.) In *Mansfield v. State*, 17 App. 468, it was stated that said act had been repealed. This was a mistake, doubtless owing to the fact that at the time the opinion was rendered there was pending before the legislature a bill to repeal said act, but the bill never became a law and the act has been embodied in the Code of 1895, except form 4, which in *Allen v. State*, 13 App. 28, was held to be unconstitutional; form 13, which was held unconstitutional in *Gabrielsky v. State*, 13 App. 428; and form 21, which in *Williams v. State*, 12 App. 396, was held unconstitutional. On the latter form, see, also, *Brown v. State*, 13 App. 347; *Hodges v. State*, 12 App. 554; *Young v. State*, Id. 614; *Muldrew v. State*, Id. 617; *Insall v. State*, 14 App. 145.

2. Notice of offense charged in general.—The office and purpose of an "indictment" is to notify one of the offense with which he is charged, and the elements thereof, that he may properly prepare his defense, and usually when an offense is charged in the language of the statute, it is sufficient. *Zweig v. State* (Cr. App.) 171 S. W. 747.

3. Description of accused.—Under this article and article 451, subdivision 4, and article 456, requiring indictments to contain accused's name, or state that it is unknown, and give a reasonably accurate description of him, article 559, providing that, unless accused suggests, when arraigned, that he is not indicted by his true name, it shall be taken as truly set forth, articles 560, 561, and 562, providing for the correction of the indictment upon such a suggestion, and that, if accused refuses to say what his real name is, the cause shall proceed, article 453, requiring an indictment to be such as to enable accused to plead the judgment thereon in bar of a subsequent prosecution, and article 476, providing that the proceedings shall not be affected by any defect of form in an indictment which does not prejudice accused's substantial rights, the giving of a wrong name or the failure to give accused's full name is a matter of form only, and, where he was described by his Christian name, nationality, and place of residence, which description was not shown to be untrue, and it appeared that he was the identical person alleged to have committed the offense charged, the judgment will not be reversed. *Crescencio v. State* (Cr. App.) 165 S. W. 936.

4. Violation of liquor law.—Acts 31st Leg. (3d Called Sess.) c. 15 (Pen. Code, art. 606) made it the duty of express companies to enter in a book all shipments of intoxicating liquors to be delivered in prohibition territory, and made it the duty of agents of such companies to open such books at "reasonable" hours for inspection by any officer of the law, or member of the grand jury. Held in view of this article of the Code of Criminal Procedure and of article 461 declaring that, when a statute creating any offense uses special or particular terms, the indict-

ment may use the general term which in common language embraces the special term, and article 474 declaring that words used in a statute to define an offense need not be strictly pursued in the indictment, that an indictment which charged that defendant about 3 o'clock in the afternoon of a certain day, the same being within the office hours of his express company, refused to permit the sheriff to inspect such books was sufficient, though it did not allege that the hour was "reasonable," especially where that ground was not given for the refusal. *Hughes v. State* (Cr. App.) 149 S. W. 173.

5. **Perjury.**—An indictment for perjury which alleges that it was a material inquiry before a grand jury whether accused unlawfully delivered to an infant intoxicating liquor, that accused, as a witness before the grand jury, falsely testified that he had not permitted the infant to order intoxicating liquor in accused's name, and that he had not signed his name on express books and received beer consigned to him, and had not delivered the same to the infant, that the grand jury was investigating to ascertain who delivered intoxicating liquors to infants, that accused well knew that he had permitted the infant to order intoxicating liquor in his name, and that he had signed his name on express books, and had received liquor and had delivered the same to the infant, sufficiently charges the offense under this article 460 and articles 453 and 465. *Robertson v. State* (Cr. App.) 150 S. W. 893.

6. **Robbery.**—Pen. Code, art. 1327, defines robbery as an assault, or violence, or putting in fear of life or bodily injury, by which one fraudulently takes from another any property with intent, etc., and permits capital punishment where a firearm or other deadly weapon is used. An indictment thereunder alleged that accused, "with force and arms" by unlawfully using a firearm, fraudulently took personal property from the owner without his consent and with intent to appropriate the same to his own use. Held, in view of this article of the Code of Criminal Procedure, that "violence" was a general term including all sorts of force, synonymous with physical "force," and used interchangeably in relation to assault; that "violently" meant by or with "force"; that "violent" meant impelled with "force"; and hence that the term "with force and arms" sufficiently alleged that the robbery was effected by "violence" as used in the statute. *Robinson v. State* (Cr. App.) 149 S. W. 186.

7. **Embezzlement of public money.**—Pen. Code, art. 96, punishes any officer who is by law the receiver of the public money, "who shall fraudulently take or misapply, or convert to his own use any part of such public money, or secrete the same with intent to take, misapply, or convert it to his own use." A count of an indictment thereunder alleged that he did "unlawfully and fraudulently 'secret' the same with intent to take, misapply, and convert to his own use." Held that since the two words are substantially equivalent, and convey the same idea, the second count was sufficient, notwithstanding the use of the word "secret" instead of "secrete," in view of this article 460, and the following article 461 of the Code of Criminal Procedure, article 474, post, providing that words defining an offense need not be strictly followed in the indictment if they include the sense of the statutory words, and article 453, ante, only requiring such certainty in the indictment as will enable accused to plead the judgment in bar of another prosecution. *Ferrell v. State* (Cr. App.) 152 S. W. 901.

8. **Forgery.**—Under this article and article 453, ante, providing that the context and subject-matter shall be considered, and that the certainty required in an indictment is such as will enable accused to plead the judgment upon it in bar, and article 476, post, providing that no indictment shall be held insufficient for any defect not prejudicing the substantial rights of accused, an indictment for forgery under Pen. Code, art. 947, which alleges that accused unlawfully and with intent to defraud assisted the forging of a signature to a certain deed purporting to entitle the grantee named therein to certain lands which, if true, would have affected the title and interest in such lands, sufficiently charged that the instrument would have affected the title to lands. *Thompson v. State* (Cr. App.) 152 S. W. 893.

9. **Incest.**—Under this article and article 453, ante, an indictment for incest, which alleges that accused "did * * * unlawfully, canally know, and incestuously have carnal knowledge of," prosecutrix, is not bad; the word "canally" being intended for "carnally." *Bailey v. State*, 63 App. 584, 141 S. W. 224.

10. **Automobiles exceeding speed limit.**—Under this article, providing that an indictment, which gives defendant notice of the particular offense charged is sufficient, a complaint alleging that accused operated an automobile at a greater speed than 18 miles an hour on a public road not a speedway charges a violation of Acts 30th Leg. c. 96, regulating the speed of automobiles on public highways. *Goodwin v. State*, 63 App. 140, 138 S. W. 399.

11. **Sending anonymous letter.**—A complaint and information for sending an anonymous letter reflecting upon a person's integrity, chastity, etc., need not contain the letter, in view of this article and article 453, requiring only such certainty as will enable accused to plead the judgment in bar of another prosecution; and article 474, providing that it is sufficient to use other words conveying the same meaning as the words used in a statute or including the sense of the statutory words. *Bradfield v. State* (Cr. App.) 166 S. W. 734.

12. **Unlawful practice of medicine.**—In view of this and the following article and article 453, providing that the certainty required in the indictment is such as will enable the accused to plead any judgment rendered in bar of any other prosecution for the same offense, and article 474, providing that words used in a statute to define an offense need not be strictly pursued, it was held that an indictment, under Pen. Code, art. 750, declaring that it shall be unlawful for any one to practice medicine upon human beings who has not registered in the district clerk's office of the county in which he resides, his authority for so practicing is sufficient,

which alleged that accused did unlawfully engage in the practice of medicine upon a human being, without having registered in the district clerk's office of the county of his residence, a certificate from some authorized board of medical examiners, or a diploma from some accredited medical college, contrary to the statute made and provided. *Byrd v. State*, 72 App. 242, 162 S. W. 360.

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.]

See Willson's Cr. Forms, 7a.

See notes under the preceding article.

For specific crimes, see notes in Pen. Code relating thereto.

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.]

See Willson's Cr. Forms, 7a.

Gaming in public place.—See notes to Pen. Code, art. 548, et seq.

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.]

See Willson's Cr. Forms, 7a.

Cited, *Caldwell v. Texas*, 137 U. S. 692, 11 Sup. Ct. 224, 34 L. Ed. 816.

Assault with intent to commit other offense.—See notes to Pen. Code, art. 1032, and C. C. P., art. 453.

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.]

See Willson's Cr. Forms, 7a.

See Pen. Code, arts. 589, 593, 597, 598, 600, and notes thereunder.

See *White v. State*, 11 App. 476; *Eppstein v. State*, Id. 480.

Violations of local option law.—See notes to art. 456, ante.

An indictment must allege the name of the person to whom liquor was sold, or that such name was unknown to the grand jury. *Dixon v. State*, 21 App. 517, 1 S. W. 448.

An indictment or information must allege the name of the purchaser. *Drechsel v. State*, 35 App. 580, 34 S. W. 934; *Ex parte Campbell* (Cr. App.) 149 S. W. 193.

An information for violating the local option law, charging that "Reagan Harden did then and there unlawfully sell to Reagan Harden intoxicating liquors," etc., is bad, since a sale, to be in violation of law, must be to some person other than the seller. *Harden v. State*, 62 App. 84, 136 S. W. 768.

Acts 1909 (1st Ex. Sess.) c. 15, § 1 (Pen. Code, art. 589) provides that if any person shall engage in or pursue the occupation or business of selling intoxicating liquors, "except as permitted by law," in any county, justice precinct, city, town, or subdivision of a county in which the sale of intoxicating liquors has been or shall hereafter be prohibited under the laws of the state, he or she shall be punished by confinement in the penitentiary not less than two, nor more than five, years. Held, that article 464 was the proper exercise of legislative power, and the exceptions referred to in Act July 11, 1909, § 1, not being a constituent element of the offense created by such section, it was not essential to the validity of an indictment thereunder that the exceptions referred to should be negated, though the words "except as permitted by law" appear in the body of the act. *Slack v. State*, 61 App. 372, 136 S. W. 1073, Ann. Cas. 1913B, 112.

A person indicted for pursuing the business of selling intoxicating liquors cannot be convicted for making a single sale in violation of another provision of the prohibition law; the statute not authorizing a conviction for a lesser degree of the same offense, or for any other offense than that charged. *Leonard v. State* (Cr. App.) 152 S. W. 632.

An indictment for selling liquor in local option territory that failed to allege that the sale was not permitted by law was not void, and evidence of the commission of the offense was admissible, since it is matter of defense to be shown that the sale was permitted by law; the burden of proof being on defendant to show that he had the legal right to sell intoxicants under the statute. *Mills v. State* (Cr. App.) 178 S. W. 367.

Keeping open on Sunday.—Acts 31st Leg. c. 17, § 15 (Pen. Code, art. 615), provides that all persons having licenses for the sale of intoxicating liquors shall close their places of business from 12 o'clock midnight Saturday until 5 o'clock

a. m. the following Monday of each week; and any person who shall open any place of business for the purpose of traffic, or who shall sell or barter any intoxicating liquors, between the hours mentioned shall be guilty of a misdemeanor. An indictment charged that accused, a licensed retail malt liquor dealer, did keep open his place of business for the purpose of traffic, and did sell intoxicating liquors, between the hours of 12 o'clock midnight Saturday and 5 o'clock a. m. Monday. Held under this article 464 of the Code of Criminal Procedure, that, as the statute in this case makes at least two offenses, one the keeping open on Sunday of a place of business for the purpose of traffic, and the other the actual sale of liquors, the indictment was sufficient; for, both offenses being misdemeanors, both might be charged in a single count—the indictment being defective only in charging a sale of intoxicating liquor. *Warner v. State*, 147 S. W. 265.

Former law.—Before this statute was enacted it was held that an indictment for selling liquor within territory where its sale is specially prohibited need not designate the person to whom sold. *Ryan v. State*, 32 Tex. 280; *State v. Heldt*, 41 Tex. 220.

In a case wherein it was erroneously assumed that the statute was repealed it was also held that it was not necessary to allege the name of the person to whom the liquor was sold. *Mansfield v. State*, 17 App. 468.

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.]

See Willson's Cr. Forms, 7a.

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| 1. Requisites and sufficiency of allegations in general. | 7. Use of the word "voluntarily." |
| 2. Proceedings wherein perjury is assigned in general. | 8. Use of words "deliberately and wilfully." |
| 3. Grand jury proceedings. | 9. Materiality of testimony or statement. |
| 4. Jurisdiction and authority to administer oath. | 10. Knowledge of falsity. |
| 5. Oath. | 11. Negating truth or assigning perjury. |
| 6. Setting forth testimony or statement in writing in general. | 12. Proof and variance. |

1. **Requisites and sufficiency of allegations in general.**—See *Waters v. State*, 30 App. 284, 17 S. W. 411; also, *Brown v. State*, 24 App. 170, 5 S. W. 685.

Indictment held sufficient. *Cox v. State*, 13 App. 479; *Hambright v. State*, 47 App. 518, 84 S. W. 597; See *Addellberger v. State*, 39 S. W. 103; *Jordan v. State*, 47 App. 133, 83 S. W. 821 (overruling *Martinez v. State*, 7 App. 394); *Forenan v. State*, 147 App. 179, 85 S. W. 809; *McDonough v. State*, 47 App. 227, 84 S. W. 594, 122 Am. St. Rep. 684; *Barber v. State*, 64 App. 96, 142 S. W. 577. *Contra*, *Maddox v. State*, 28 App. 533, 13 S. W. 861; *Weaver v. State*, 34 App. 554, 31 S. W. 400; *Crow v. State*, 49 App. 103, 90 S. W. 650; *Fry v. State*, 36 App. 582, 37 S. W. 741, 38 S. W. 168.

An indictment for perjury, predicated on accused's false testimony in the county court on his trial for a violation of Pen. Code, art. 553, punishing any person betting on any banking game wherever played, need not allege that the betting was not at a private residence occupied by a family. *Mares v. State*, 71 App. 303, 158 S. W. 1130.

The indictment need not allege who dealt or exhibited the game. *Mares v. State*, 71 App. 303, 158 S. W. 1130.

But when the perjury is alleged to have been committed on a prosecution under Pen. Code, art. 388, which exempts certain games at a private residence, the indictment should negative the exemption. *Barton v. State*, 50 App. 161, 95 S. W. 110.

An indictment for perjury on a trial for playing cards need not allege the character of the game played where it alleges that it was not played at a private residence. *Curtis v. State*, 46 App. 480, 81 S. W. 29.

An indictment is bad if any of the material facts set forth in the statute is omitted. *State v. Webb*, 41 Tex. 67.

Indictment held good though it did not allege in hæc verba that defendant "committed perjury." *Massie v. State*, 5 App. 81.

The technical formal averments in an indictment for perjury, customary at common law, are not essential under our Code. It is sufficient if the ingredients of the offense, as prescribed by the Code, are set forth in plain and intelligible words. *Brown v. State*, 9 App. 171; *West v. State*, 8 App. 119; *Bradberry v. State*, 7 App. 375; *Watson v. State*, 5 App. 11; *Allen v. State*, 42 Tex. 12.

An indictment which conforms to Willson's Criminal Forms held sufficient to charge the offense of perjury. *Smith v. State*, 27 App. 50, 10 S. W. 751.

In an indictment for perjury the false statement should be set forth as stated by

the witness. If stated disjunctively it should be set forth, but in negating the truth of the statement the negation should be conjunctive. *Fry v. State*, 36 App. 582, 37 S. W. 741, 38 S. W. 168.

Indictment for making false affidavit to statement of witness fees held insufficient if intended to charge defendant with claiming fees to which he was not entitled. *Bridgers v. State*, 44 App. 294, 70 S. W. 767.

Where it is made to appear that it was intended to charge defendant with the offense and where the allegations point him out with due certainty as the party committing the offense, it will not vitiate the indictment if the offense was not distinctly charged against such party in the beginning of the indictment. *Curtley v. State*, 42 App. 227, 59 S. W. 45.

Two or more averments as to false swearing will not necessarily vitiate the indictment.

If what is thought to be contradictory averments are explanatory one of the other, making more fully the description of the matters at issue, this would be no contradiction and would not render the indictment vague or indefinite. *Campbell v. State*, 43 App. 602, 68 S. W. 513.

An indictment for perjury which alleges that it was a material inquiry before a grand jury whether accused unlawfully delivered to an infant intoxicating liquor, that accused, as a witness before the grand jury, falsely testified that he had not permitted the infant to order intoxicating liquor in accused's name, and that he had not signed his name on express books and received beer consigned to him, and had not delivered the same to the infant, that the grand jury was investigating to ascertain who delivered intoxicating liquors to infants, that accused well knew that he had permitted the infant to order intoxicating liquor in his name, and that he had signed his name on express books, and had received liquor and had delivered the same to the infant, sufficiently charges the offense, under this article 464 and articles 453 and 460, prescribing the requisites of indictments generally. *Robertson v. State* (Cr. App.) 150 S. W. 893.

An indictment for false swearing, charging that defendant had a claim against a railroad and had been paid money thereon, and that the false statement as to such claim was deliberately and wilfully made and sworn to, and was deliberately and wilfully false, as defendant knew when he made it, is sufficient. *Urban v. State* (Cr. App.) 178 S. W. 514.

See, also, requisites and precedents, *State v. Lindenburg*, 13 Tex. 27; *State v. Peters*, 42 Tex. 7; *Smith v. State*, 1 App. 620; *Watson v. State*, 5 App. 11.

2. Proceedings wherein perjury is assigned in general.—If the indictment assigns perjury upon a criminal trial, it must show affirmatively the presentment of an indictment or information. *State v. Webb*, 41 Tex. 67.

The indictment must show when and where the proceeding was pending, name of the judge, court, or officer, and whether it was an examining trial or upon indictment. *State v. Oppenheimer*, 41 Tex. 82.

If the indictment shows, by its allegations, that the perjury was committed in a judicial proceeding, describing such proceeding with reasonable certainty, it need only allege in general terms that a certain issue was joined in said proceeding, without specifically alleging what the issue was. *Covey v. State*, 23 App. 388, 5 S. W. 283.

In an indictment for perjury committed on the trial of a civil suit, it is not necessary to allege the kind of civil action. *Garrett v. State*, 37 App. 198, 38 S. W. 1017, 39 S. W. 108.

In alleging the case in which perjury is committed, when it is a criminal case the indictment in full need not be copied; it is enough to briefly describe the case. *Ross v. State*, 40 App. 351, 50 S. W. 336.

An indictment for perjury before a justice of the peace in a proceeding under art. 976 should follow the language of the statute and not merely recite that the justice was sitting as a court of inquiry. *Morris v. State*, 47 App. 420, 83 S. W. 1126.

An indictment for perjury, predicated on accused's false testimony in the county court on his trial for betting at a gaming bank, need not charge that the information in the county court was based on a complaint therein. *Mares v. State*, 71 App. 303, 158 S. W. 1130.

An indictment, charging that accused committed perjury by giving false testimony on his trial in the county court, where he was charged by complaint with a gaming offense, is sufficient, though not averring that he was charged by information or indictment. *Etheridge v. State* (Cr. App.) 173 S. W. 1031.

3. Grand jury proceedings.—See notes under article 439, ante, and notes, post, under this article.

See with reference to proceeding before grand jury. *Rahm v. State*, 30 App. 310, 17 S. W. 416, 28 Am. St. Rep. 911; *Pipes v. State*, 26 App. 318, 9 S. W. 614.

The indictment alleged that it became necessary for the grand jury to know whether the defendant had seen any person bet or wager at a gaming table or bank; held, that the rule that an indictment must not charge an offense in the alternative does not apply. *Fry v. State*, 36 App. 580, 37 S. W. 741, 38 S. W. 168.

An indictment based upon the testimony of a witness before the grand jury in reference to gaming transactions which alleges that the witness was interrogated with reference to gaming transactions in the fall of 1896, is too indefinite. *McMurtry v. State*, 38 App. 521, 43 S. W. 1010.

An indictment based upon testimony given before the grand jury in reference to playing in an outhouse should state the particular outhouse and should state the names of some of the parties inquired about. *Higgins v. State*, 38 App. 539, 43 S. W. 1012.

Indictment for perjury committed before grand jury need not allege that the grand jury "was duly selected, impaneled and sworn," it stating that the grand jury was duly organized. *Flournoy v. State* (Cr. App.) 59 S. W. 903.

In a prosecution for perjury, an indictment charging that the perjury was committed in an investigation before the grand jury to determine whether certain persons unlawfully carried weapons at a certain place was sufficient, as charging that the acts under investigation were in violation of law. *Francis v. State*, 57 App. 555, 123 S. W. 1114.

An indictment under Pen. Code, art. 316, declaring it to be an offense for any witness sworn before a grand jury to afterwards divulge any matter about which he was interrogated, recited that the defendant was interrogated by the grand jury with reference to "unlawful card playing," and charged that he afterwards disclosed what he had testified to before the grand jury. Held, that the indictment was good, whether the matter about which defendant was interrogated related to a direct violation of law or not. *Misso v. State*, 61 App. 241, 135 S. W. 1173.

An indictment for perjury, based on accused giving false testimony before the grand jury, need not allege that he was warned by the grand jury that he was not compelled to inform on himself, and that he could decline to testify against himself. *Robertson v. State* (Cr. App.) 150 S. W. 893.

Where an indictment, seeking to charge accused with perjury in that he testified that he was not asked certain questions before a grand jury, did not allege that accused was a witness or how he got before the grand jury, and if he was a witness that he was ever sworn by the jury before being asked the questions, it was fatally defective. *Pigg v. State*, 71 App. 600, 160 S. W. 691.

An indictment, charging that defendant committed perjury in his testimony before the grand jury, where it was a material inquiry whether any game of cards had been played "at any place other than a private residence occupied by a family in C. county," was not objectionable as showing that the grand jury did not confine its investigation to offenses committed in C. county, but instead attempted to extend it to any and all places outside of such county. *Bell v. State* (Cr. App.) 171 S. W. 239.

4. Jurisdiction and authority to administer oath.—The indictment need not show the commission of the justice, or how his jurisdiction attached; if committed in a trial of forcible entry and detainer a general allegation that he was a justice of the peace, and had jurisdiction, being sufficient. *State v. Peters*, 42 Tex. 7; *Bradberry v. State*, 7 App. 375. See, also, *Stewart v. State*, 6 App. 184.

If perjury was committed before a justice acting as coroner, the indictment should so allege. *Stewart v. State*, 6 App. 184.

In alleging the authority of the officer to administer the oath, it is not necessary to aver the election or qualification of such officer, or to set out his commission. But such authority must be made to appear with certainty, by direct averment. *Stewart v. State*, 6 App. 184; *Bradberry v. State*, 7 App. 374; *St. Clair v. State*, 11 App. 297.

The indictment must directly allege that the court had jurisdiction of the judicial proceeding in which the perjury was committed, or it must allege the facts which clearly show such jurisdiction. Either mode of showing jurisdiction will be sufficient. *Anderson v. State*, 18 App. 17; *Cox v. State*, 13 App. 479; *State v. Webb*, 41 Tex. 67; *State v. Oppenheimer*, Id. 32; *Powers v. State*, 17 App. 428.

See, with reference to "jurisdiction," *Anderson v. State*, 24 App. 705, 7 S. W. 40; *Cordway v. State*, 25 App. 405, 8 S. W. 670.

An indictment for perjury in a judicial proceeding must show that the court had jurisdiction. *Wilson v. State*, 27 App. 47, 10 S. W. 749, 11 Am. St. Rep. 180.

An indictment for perjury before a justice of the peace sufficiently alleges his official capacity by alleging that he was a justice of the peace. *Waters v. State*, 30 App. 284, 17 S. W. 411.

An indictment, alleging that accused committed perjury by giving false testimony in the county court on a trial on a complaint charging a violation of the gaming laws, is sufficient; for the filing of a complaint in the county court, and arrest thereunder, plea of not guilty, and trial, confer jurisdiction on the county court. *Etheridge v. State* (Cr. App.) 175 S. W. 702.

5. Oath.—Proof and variance, see note, post.

Where the statute has prescribed the form of the oath, and the indictment sets out a different oath, the indictment is bad. *State v. Perry*, 42 Tex. 238.

If the oath was alleged to be in writing, a failure to set it out, at least substantially, is fatal; and a general averment that the oath was "legally administered by the clerk," is sufficient only when the circumstances under which the oath was required, and the occasion when made, are shown by averment to be such as to make its falsity perjury. *State v. Umdenstock*, 43 Tex. 554.

It is not necessary that the indictment should set out the oath taken by the defendant in *hæc verba*. It is sufficient to allege that the defendant was "duly sworn," without describing the attendant ceremonies. *Jackson v. State*, 15 App. 579; *Massie v. State*, 5 App. 81; *Beach v. State*, 32 App. 240, 22 S. W. 976. See, also, *State v. Umdenstock*, 43 Tex. 554, which seems to restrict this doctrine.

In an indictment charging a deputy sheriff with making a false affidavit of his expenses in conveying a witness, it is not sufficient to allege that the oath was one required by law. *Shely v. State*, 35 App. 190, 32 S. W. 901.

It is sufficient for an indictment for perjury on the trial of a cause to allege that the witness was sworn and took his corporeal oath before the court to testify and that the judge duly and legally administered the oath according to law. *Lamar v. State*, 49 App. 563, 95 S. W. 509.

6. Setting forth testimony or statement in writing in general.—If the alleged false statement be in writing, it need not be set out in *hæc verba*. It will be sufficient to set it out substantially. Nor is it necessary to set out the whole of what defendant has sworn. Only that portion of the statement which is alleged

to be false should be recited. *Gabrielsky v. State*, 13 App. 428; *State v. Umdenstock*, 43 Tex. 554; *Morris v. State*, 47 App. 420, 83 S. W. 1126.

An indictment for making a false affidavit should set out the words or substance of the affidavit. *Shely v. State*, 35 App. 190, 32 S. W. 901.

An affidavit for making a false affidavit initiating a criminal prosecution was not defective though it did not set out the affidavit or give the number and style of the case. *Simpson v. State*, 46 App. 77, 79 S. W. 530.

In an indictment for perjury, committed in testifying before the grand jury, an allegation that defendant stated, "I have never played a game of cards in the last two years," did not render the indictment defective on the ground that the words quoted were not susceptible of the construction placed on them by the indictment, which was that he meant to state that he had not played any game of cards at any place other than a private residence occupied by a family, within the two years immediately next preceding, in the county where the grand jury was sitting. *Bell v. State* (Cr. App.) 171 S. W. 239.

7. Use of the word "voluntarily."—An indictment for false swearing, alleging that the affidavit was unlawfully, deliberately, corruptly, and wilfully made, is not insufficient, even though not using the word "voluntary"; the other language showing that the affidavit was voluntarily made. *Welch v. State*, 71 App. 17, 157 S. W. 946.

8. Use of words "deliberately and wilfully."—It must be averred positively that the statement was made by the defendant "deliberately and wilfully." *State v. Powell*, 28 Tex. 626; *Juaraqui v. State*, Id. 625; *State v. Webb*, 41 Tex. 67; *State v. Peters*, 42 Tex. 7; *Allen v. State*, Id. 12; *State v. Perry*, Id. 238; *Smith v. State*, 1 App. 620; *Ferguson v. State*, 36 App. 60, 35 S. W. 369.

9. Materiality of testimony or statement.—See P. C., art. 309, and notes.

An indictment for perjury must allege either by direct averment or by such facts as plainly show it, the materiality of the alleged false statement. *Martin v. State*, 33 App. 317, 26 S. W. 400; *Buller v. State*, 33 App. 551, 28 S. W. 465; *Cravey v. State*, 33 App. 557, 28 S. W. 472; *Anderson v. State*, 56 App. 360, 120 S. W. 462; *Jordan v. State*, 47 App. 133, 83 S. W. 821; *Rosebud v. State*, 50 App. 475, 98 S. W. 858.

The pleader in the indictment may set out the facts showing the materiality of the false statement, or he may allege that the false statement was material; either is sufficient. *McAvoy v. State*, 39 App. 684, 47 S. W. 1000; *Sisk v. State*, 28 App. 432, 13 S. W. 647; *Buller v. State*, 33 App. 551, 28 S. W. 465; *Cravey v. State*, 33 App. 557, 28 S. W. 472; *Scott v. State*, 35 App. 11, 29 S. W. 274.

Either by direct averment, or from facts alleged, it must plainly appear that the alleged false statement was material to the issue undergoing investigation when the same was made. *Smith v. State*, 1 App. 620; *Lawrence v. State*, 2 App. 479; *Martinez v. State*, 7 App. 394; *Mattingly v. State*, 8 App. 345; *Donohoe v. State*, 14 App. 638; *Washington v. State*, 22 App. 26, 3 S. W. 228; *Pertain v. State*, Id. 100. This rule applies to each matter embraced in the alleged false statement, upon which an assignment of perjury is desired to be made. *Donohoe v. State*, 14 App. 638; *Martin v. State*, 33 App. 317, 26 S. W. 400; *Buller v. State*, 33 App. 551, 28 S. W. 465; *Craven v. State*, 33 App. 557, 28 S. W. 472; *Johnson v. State*, 34 App. 555, 31 S. W. 397.

See instance of perjury assigned on an immaterial statement. *Martinez v. State*, 7 App. 394; *Mattingly v. State*, 8 App. 345.

Materiality of the perjury assigned must be made to appear upon the face of the indictment. *Brooks v. State*, 29 App. 582, 16 S. W. 542; *Agar v. State*, 29 App. 605, 16 S. W. 761; *Yardley v. State*, 55 App. 486, 117 S. W. 146.

Quere, whether enough of the proceedings ought not be set out to enable the court to judge of the materiality. *Lawrence v. State*, 2 App. 479. The materiality must be apparent, or alleged in general terms; and it is sufficient to aver that the accused was duly sworn. *Massie v. State*, 5 App. 81; *Mattingly v. State*, 8 App. 345.

Where affidavit for continuance is basis of perjury, indictment must set out that part which is considered material and on which assignment for perjury is proposed to be predicated. *Ross v. State*, 40 App. 351, 50 S. W. 336.

If it specifically charges the materiality of the matter assigned for perjury, such allegation, in an indictment for perjury, is sufficient in this respect, notwithstanding it does not literally follow the approved form. (See the statement of the case for the charging part of an indictment for perjury which, substantially conforming to Willson's Criminal Forms, is held sufficient.) *Kitchen v. State*, 26 App. 165, 9 S. W. 461.

Where the execution of an order was a material inquiry an indictment for testifying falsely as to its execution need not allege the materiality of the order. *Rahm v. State*, 30 App. 310, 17 S. W. 416, 28 Am. St. Rep. 911.

An indictment is not defective because it fails to state facts showing the materiality of the evidence. *Adams v. State* (Cr. App.) 29 S. W. 270; *Scott v. State*, 35 App. 11, 29 S. W. 274.

An indictment alleging that defendant on trial for an offense testified that he did not play at a game of dice when in fact he did so play and that this testimony was material to the issue being tried sufficiently alleged its materiality. *Johnson v. State*, 34 App. 555, 31 S. W. 397.

An indictment alleging that it was material whether defendant charged for prescribing and giving drugs and medicine to persons under his treatment was sufficient without naming such persons or stating the particular times and places. *Collins v. State*, 51 App. 347, 101 S. W. 992.

An indictment for perjury at the trial of a third person charged with passing a forged instrument, which alleges that accused testified on the trial that he was with the third person in another county on a designated date, and that the state-

ment was material and was false, is fatally bad, for failing to affirmatively show the materiality of the testimony, by showing that the testimony was in defense of an alibi that the third person was not in the county on the day on which it was alleged he passed the instrument. *Wynne v. State*, 60 App. 660, 133 S. W. 682.

Where an indictment for perjury alleged that accused testified that he had not been asked certain questions before a grand jury but the questions themselves did not show that they were material to any examination that the grand jury had jurisdiction to make, and there was no allegation of facts showing that the questions were material nor that they were falsely answered, the indictment was fatally defective. *Pigg v. State*, 71 App. 600, 160 S. W. 691.

An indictment for perjury, alleging that the false statement was material to the issue on trial, is sufficient without alleging the facts showing the materiality. *Johnson v. State*, 71 App. 428, 160 S. W. 964.

Under Pen. Code, art. 309, providing that the giving of testimony immaterial to the inquiry is not perjury, an indictment, which failed to state that defendant's testimony was material, was fatally defective, though it stated that it became a material inquiry before the grand jury whether he played or saw others play the games which he testified to not playing or having seen played. *Bell v. State* (Cr. App.) 171 S. W. 239.

An indictment charging that it became a material inquiry before the grand jury whether defendant played any game on which money was bet or saw any such game played, and that he testified that he had not played or seen any such game played, and stating in the traverse that he knew that he had played three different games with certain parties named but not shown to have been inquired about before the grand jury, was insufficient for failure to allege that the testimony given by defendant before the grand jury was material to the inquiry. *Scott v. State* (Cr. App.) 171 S. W. 243.

An indictment, alleging that it was a material inquiry on a trial whether T. sold and delivered a pint of whisky to accused, and whether accused paid T. a dollar therefor, that accused was sworn as a witness, and testified that he did not remember whether or not he bought a pint of whisky from T., or whether T. delivered it to him, or whether he paid therefor, or whether T. sold and delivered whisky to him at another time, or whether he paid for that whisky, that such statements were material, whereas in truth and in fact accused did remember whether T. sold and delivered such whisky, and that he paid T. a dollar in each instance therefor, was defective, since while such testimony might become material, and the subject of perjury, under appropriate allegations, and if accused knew of the transaction about which he was testifying and refused to state the facts on the ground that he did not remember, when in fact he did remember, his testimony might be materially false, it was not material, under the allegations contained in the indictment, that accused's memory was treacherous, or that he failed to remember the transactions about which inquiry was made. *Hays v. State* (Cr. App.) 173 S. W. 671.

An indictment for perjury must show the materiality of the false testimony, and, where it averred that, in a prosecution for slander in charging a female with being a whore, accused falsely testified that he had sexual intercourse with her, and that in the slander case truth of the charge was one of the issues, it was sufficient. *Cox v. State* (Cr. App.) 174 S. W. 1067.

In a prosecution for perjury, not only the indictment must allege that defendant's testimony was on a material point, but proof must be made to that effect. *Jones v. State* (Cr. App.) 174 S. W. 1071.

An indictment for false swearing need not charge that the matter or thing alleged as the basis of the false swearing was in any respect material to any matter or fact then under investigation, as it is only requisite that it be a false oath as to a fact past or present. *Urben v. State* (Cr. App.) 178 S. W. 514.

10. **Knowledge of falsity.**—An averment that defendant "well knew" the facts did not exist, instead of negating the oath, is not bad, and it is sufficient to charge a false oath as to one material fact, and to sufficiently assign perjury as to that. *State v. Lindenburg*, 13 Tex. 27.

It must be averred positively that the defendant had knowledge of the falsity of the statement at the time he made it. *State v. Powell*, 28 Tex. 626; *Scott v. State*, 34 App. 41, 28 S. W. 947.

It is not necessary, that the indictment allege that the party making the false statement knew it was false when he made it—overruling *State v. Powell*, 28 Tex. 626, on this point. *Ferguson v. State*, 36 App. 60, 35 S. W. 369.

The indictment must allege that the false statement was deliberately and wilfully made, but it is not necessary that it allege that the person making the statements knew that they were false when he made them. *Ferguson v. State*, 36 App. 60, 35 S. W. 369.

11. **Negating truth or assigning perjury.**—The falsity of the statement should appear by direct averment, and the formal conclusion will not supply the defect. *Jauraqui v. State*, 28 Tex. 625; *Turner v. State*, 30 App. 691, 18 S. W. 792.

It need not, however, negative that the statement was made "through inadvertence, or under agitation, or by mistake." *Brown v. State*, 9 App. 171.

The indictment must specifically negative the truth of each alleged false statement, and this should be done by direct averment. *Gabrielsky v. State*, 13 App. 428; *Rohrer v. State*, Id. 163; *Donohoe v. State*, 14 App. 638; *Jauraqui v. State*, 28 Tex. 625.

Two or more statements may be assigned as perjury in the same count. *Moore v. State*, 32 App. 405, 24 S. W. 95.

When there are two conflicting statements made by a witness it is error to assign perjury on both, the perjury should be assigned upon the one that is false. *Whitaker v. State*, 37 App. 479, 36 S. W. 253.

An indictment which alleges the falsity of material testimony is not defective

because it also alleges the falsity of immaterial testimony. *Dorrs v. State* (Cr. App.) 40 S. W. 311.

The indictment in a prosecution for perjury was fatally defective, where, after alleging that a material inquiry in a former suit was whether J. E. D. called M. D. a liar, and raised his hand to strike her at a certain house, it then failed to allege that defendant falsely testified to those facts as happening at that place. *Lowe v. State*, 59 App. 557, 129 S. W. 842.

Where an indictment for perjury set forth the alleged false testimony, and then charged that such testimony, repeating it, was false and untrue, it sufficiently negated the truth of the testimony. *Barber v. State*, 64 App. 96, 142 S. W. 577.

Where an indictment for perjury, based on the testimony of accused on the examining trial of a third person for disposing of mortgaged property, that the third person owed him two notes, one for \$650 and one for \$80, and that he had a mortgage to secure the \$650 note, did not negative the fact that a mortgage had been given, and did not negative the fact that a third person had disposed of mortgaged property, and did not allege that there was no mortgage to secure the \$80 note, which was genuine, it was insufficient to charge perjury. *Waddle v. State* (Cr. App.) 153 S. W. 882.

The defect in the indictment was not cured by evidence authorizing the inference that accused swore falsely as to the amount of his debt, and as to the amount paid him by the third person. *Waddle v. State* (Cr. App.) 153 S. W. 882.

An indictment charging false swearing, in making an affidavit to procure a marriage license, was defective for alleging that the girl mentioned in the affidavit was not then and there 21 years of age, when the affidavit was averred to have merely stated that she was 18 years of age. *Knight v. State*, 71 App. 56, 153 S. W. 543.

In an indictment for perjury, it is not necessary to traverse and negative all the facts to which accused is alleged to have testified on the trial, but it is only necessary to negative such of his testimony as was alleged to be false. *Johnson v. State*, 71 App. 428, 160 S. W. 964.

While the truth of the alleged false statement must be negated in an indictment for perjury, no particular language is required; it being sufficient if the language used in the indictment specifically negatives the truth of the false statement. *Hart v. State* (Cr. App.) 166 S. W. 152.

The indictment for perjury, committed in a prosecution for theft, alleged that accused did falsely testify that W. was in a certain house from 9 o'clock to 11 o'clock on the night of the theft, and never left the house during that time, which statement was material to the issue, whereas, in truth and in fact, the said W. was between 9 and 11 o'clock p. m. on that day, on or near the corner and intersection of East Fifth street and R. street, and did then and there commit the theft, and further alleged that the statement by accused that W. was in such house from 9 to 11 o'clock on the night of the theft "was false and untrue." Held, that the indictment sufficiently negated the truth of the alleged false statement by accused. *Hart v. State* (Cr. App.) 166 S. W. 152.

An indictment for perjury committed by defendant in testifying falsely before the grand jury, that he had not played any games of cards, was not defective for failure to allege the places and times he had played such games or that he did not know that the players were not in a residence occupied by a family. *Bell v. State* (Cr. App.) 171 S. W. 239.

12. Proof and variance.—If the oath and the manner of administering it be set out, it becomes descriptive and must be proved. *Massie v. State*, 5 App. 81; *West v. State*, 8 App. 119; *Beach v. State*, 32 App. 240, 22 S. W. 976.

Perjury may be assigned on two or more statements in one count, and if the statements are all material, proof that any one of them is false, will support a conviction. *Moore v. State*, 32 App. 405, 24 S. W. 95; *Urben v. State* (Cr. App.) 178 S. W. 514.

Where the time of the commission of the offense is proved by matter of record, as in perjury, a variance is fatal. *O'Connell v. State*, 18 Tex. 343.

If the indictment unnecessarily sets out the oath minutely, it must be proved as alleged, at least substantially. *Massie v. State*, 5 App. 81; *Anderson v. State*, 20 App. 312.

In prosecution for making false affidavit to account, variance as to items of account held fatal. *Rohrer v. State*, 13 App. 163.

It is necessary that every fact which goes to make up any particular assignment of perjury should be proved. Where several assignments are contained in same count it is not enough to disprove part. *Brown v. State*, 40 App. 50, 48 S. W. 169.

Though one of the assignments of perjury was bad, the court did not err in admitting testimony upon the bad assignment. *Foreman v. State*, 47 App. 179, 85 S. W. 809.

The precise day alleged in the indictment need not be proved. *Lucas v. State*, 27 App. 322, 11 S. W. 443.

In an indictment for testifying falsely on a trial for swindling by means of a draft, allegations pertaining to the draft related to a matter of inducement, and any variance was immaterial. *King v. State*, 32 App. 463, 24 S. W. 514.

The matter assigned as perjury must be substantially proved, but the exact words need not be. *Hutcherson v. State*, 33 App. 67, 24 S. W. 908.

Testimony that accused saw a gaming table in a structure attached to a saloon closed in on four sides, but not above, would not sustain a conviction under an indictment for perjury in swearing that he did not see such a table in a certain "house." *Waul v. State*, 33 App. 228, 26 S. W. 199.

Allegations of materiality must be proved. *Garrett v. State*, 37 App. 198, 38 S. W. 1017, 39 S. W. 108.

May charge as many false statements as the pleader may insert, and proof of either will be sufficient. *Campbell v. State*, 43 App. 602, 68 S. W. 513.

Under an indictment charging that defendant testified that S. did not use violent and abusive language, proof that defendant testified that he did not hear such language constituted a fatal variance. *Leverette v. State*, 32 App. 471, 24 S. W. 416.

Where the indictment was not predicated on a general assignment that the testimony was material but alleged how it became material the state was bound to prove the allegations as laid. *Maroney v. State*, 45 App. 524, 78 S. W. 696.

The court is inclined to the view that there was no variance though the false affidavit had a seal and the indictment failed to allege that it contained a seal. *Adams v. State*, 49 App. 361, 91 S. W. 225.

Alleged variance as to name of a person held not presented in such shape in the record that it could be noticed. *Adams v. State*, 49 App. 361, 91 S. W. 225.

In a prosecution for perjury, where numerous matters falsely sworn to were separately charged and negatived, proof of any one of them would warrant a conviction. *Barber v. State*, 64 App. 96, 142 S. W. 577.

Where an indictment for perjury presented separate and distinct allegations of materially false testimony, and distinctly traversed them, the state, to support a conviction, was not compelled to prove the falsity of all the statements charged conjunctively. *Robertson v. State* (Cr. App.) 150 S. W. 893.

Under an indictment for perjury, based on accused giving false testimony before the grand jury, testimony that when accused appeared before the grand jury he was warned that he did not have to testify to anything that would incriminate him, and that if he did testify anything he said could be used against him on the trial of his case, was admissible, though the indictment did not allege that he was so warned. *Robertson v. State* (Cr. App.) 150 S. W. 893.

Where an indictment for perjury averred that accused falsely testified on the trial of her husband that he did not strike her with a stick at a time named, evidence that she did so testify is admissible, but not evidence as to other matters occurring in the trial of the husband. *Smith v. State*, 70 App. 68, 156 S. W. 645.

The indictment for perjury charged that in a certain case the accused testified, "I know Mr. A. when I see him. He shot once with a pistol in the direction of Mr. O., * * * and did not drop his pistol," etc., and further alleged that it was material whether the accused was present at such shooting, and whether A. had a pistol and shot, and that in fact accused was not immediately present at the time, and A. did not have a pistol, and that accused's testimony was wilfully false. Held, that it was not necessary to require the jury to find that the single sentence, "I know Mr. A. when I see him" was false. *Young v. State*, 70 App. 434, 157 S. W. 151.

Although an indictment for perjury charged that a material issue in an action in justice court against accused was whether he was a minor at the time he incurred certain obligations, and that upon that issue accused falsely testified, and the proof showed that upon accused's testimony of his minority plaintiff made a claim of surprise, and the cause was continued, there is no fatal variance, a variance being a disagreement between the allegations and proof in some matter which in point of law is essential, and it being immaterial in this prosecution whether the cause in the justice court proceeded to final judgment or was continued. *Poulter v. State*, 70 App. 197, 157 S. W. 166.

The indictment which alleges that accused falsely testified that he was not present at the house where the gaming occurred at the time charged, and that he did not wager at the game, is good if either statement was false and material. *Mares v. State*, 71 App. 308, 158 S. W. 1130.

Where an indictment for perjury alleged that accused testified that he did not bet at a game played with dice with two persons designated, or any other person, at a certain time and place or at any other time, it was necessary, to sustain a conviction, that the state prove that accused did bet at a game played with dice with the persons designated at the time and place alleged, and a conviction could not be sustained by proof of other facts and circumstances showing that accused may have committed perjury in some other manner or about some other matter. *Portwood v. State*, 71 App. 447, 160 S. W. 345.

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.]

See Willson's Cr. Forms, 7a; Penal Code, arts. 174-193, and notes.

In general.—The indictment should charge that the gift preceded the act. *Hutchinson v. State*, 36 Tex. 293.

It is not essential that indictment should allege the kind or value of the money offered as a bribe. *Leeper v. State*, 29 App. 154, 15 S. W. 411.

Bribery of elector.—An indictment for offering a bribe at a primary election to name a candidate for Congress should allege that the election was held to elect a nominee for representative to the Congress of the United States—there being no such office as "Congress." *Allison v. State*, 45 App. 596, 78 S. W. 1065.

Bribery of witness.—A charge that the defendant, knowing B. to be a witness, offered him \$5, and property to the value of \$10, to secrete himself and be absent from the district court at the April term, 1874, and not be a witness before the grand jury at that term of the court, nor a witness against the defendant in the district court at said term, is wholly insufficient in an indictment. *State v. Hughes*, 43 Tex. 518.

If the offense be offering a bribe to a witness to disobey a subpoena or other legal process, the indictment must allege the issuance of such subpoena or other legal process; but if it be for offering a witness a bribe to avoid a subpoena or other legal process, it need not allege the issuance of a subpoena, or other legal process. *Scoggins v. State*, 18 App. 298; *Brown v. State*, 13 App. 358; *Jackson v. State*, 43 Tex. 421; *State v. Hughes*, Id. 518.

An indictment alleging that, while defendant and M. were under indictments, defendant, to induce M. to disobey a subpoena to appear and testify in the case against defendant, agreed with M. to assist him to pay his fine, stating to him, "I would rather pay your fine than mine," does not sufficiently charge bribery. *Peacock v. State*, 37 App. 418, 35 S. W. 964.

Where the indictment for bribing a witness to avoid process of the court, in a case under consideration by the grand jury, failed to state the character of the process, it was fatally defective. *Harrison v. State* (Cr. App.) 151 S. W. 552.

Bribery of officer.—Surplusage, see notes under article 476, post.

Where, under an indictment charging that accused bribed a policeman to not arrest, report, and file a complaint against him "and any other person or persons" for keeping certain premises for the purpose of gaming, and to not arrest, report, and file a complaint against him "and any other person or persons" for keeping a house as a place where liquor was sold contrary to law, the court treated as surplusage and did not submit to the jury the allegations as to the other persons and as to keeping such place as a gaming place, they could not render the indictment defective. *Minter v. State*, 70 App. 634, 159 S. W. 286.

Under this article and Pen. Code, art. 174, providing that any person who shall bribe any officer with intent to influence his act on any matter which may be brought before him in his official capacity, or to do or omit to do any other act in violation of his duty, shall be punished as therein provided, article 176, providing that all city, county, and state officials are included within article 174, article 189, providing that any person who shall bribe any peace officer to do any other act contrary to his duty as an officer, or to omit to do any duty incumbent upon him as an officer, shall be punished as therein provided, article 193, defining "bribe" as meaning any gift, emolument, money, or thing of value, testimonial, privilege, appointment, or personal advantage, or the promise of either, bestowed or promised for the purpose of influencing an officer or other person in the performance of any public or official duty, or as an inducement to favor the person offering the same or some other person, and article 194, providing that the bribe need not be direct but may be hidden under the semblance of a sale, wager, etc., Code Cr. Proc. art. 460, providing that an indictment is sufficient if it 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 to pronounce the proper judgment, and article 453, providing that 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, an indictment alleging that accused unlawfully and corruptly offered to and did bribe a city policeman, and gave and paid to him as a bribe \$15 with the intent to influence him in violation of his official duty to not arrest, report, and file a complaint against accused for unlawfully, directly or indirectly, keeping and being concerned in keeping a certain house designated as a house for the sale of intoxicating liquor in a locality where local option was not in force, without having obtained a license, substantially followed the statute. *Minter v. State*, 70 App. 634, 159 S. W. 286.

An indictment for bribing a policeman not to arrest, report, and file a complaint against accused was not defective for its alleged failure to charge that accused had committed an offense for which he could bribe an officer not to arrest him; since the crime is committed when the briber has corruptly, illegally, and immorally done all that he could to induce the officer not to do his duty, even though he has not received and never will receive the fruits of his crime. *Minter v. State*, 70 App. 634, 159 S. W. 286.

An indictment for bribing a policeman with intent to induce him, in violation of his official duty, not to arrest, report, and file a complaint against accused, was not defective because of its failure to allege what the police officer's duties were; this being a matter of law. *Minter v. State*, 70 App. 634, 159 S. W. 286.

In order to constitute the crime of bribery, the gift, advantage, or emolument must be bestowed for the purpose of inducing the officer to do a particular act, in violation of his duty, or as an inducement to favor, or in some manner to aid, the person offering the same, or some other person, in a manner forbidden by law, and the gift, advantage, or emolument, must precede the act, and this should be charged in the indictment. *Hutchinson v. State*, 36 Tex. 293.

An indictment for offering to bribe a district or county attorney must allege the cause or charge and proceeding in which it was sought to influence such officer, or give some definite description of it, so that it will appear to be a matter pending in court in which such officer was required or authorized by law to act in his official capacity. *Collins v. State*, 25 Tex. Supp. 202.

Where the indictment charged with offering to bribe a deputy sheriff, it was held sufficient to prove that said deputy sheriff was such de facto, and the offense did not depend upon whether he was such officer de jure. *Florez v. State*, 11 App. 102.

The indictment need not allege that accused offered to bribe the officer to do or omit to do an act in violation of his duty as such officer. The offense is complete when the offer to bribe is made for the purpose and with the intent to influence the officer in his official capacity. *Rath v. State*, 35 App. 142, 33 S. W. 229.

An indictment should allege that the offer to bribe was with the intent to influence the officer in his vote or decision, etc. *Hardin v. State*, 36 App. 460, 37 S. W. 735.

An indictment of a county commissioner held sufficient, though it did not state the specific time when the official act was to be performed by the commissioners' court. *Ruffin v. State*, 36 Tex. Cr. 565, 38 S. W. 169.

An indictment against a county commissioner for accepting a bribe to vote for a public weigher which was thereafter to be chosen by the commissioners' court, need not allege the date when the weigher was to have been chosen. *Ruffin v. State*, 36 App. 565, 38 S. W. 169.

That there was an incumbent of the office to which an appointment was to be made in consideration of the bribe, and that such incumbent was to be removed, need not be alleged. *Ruffin v. State*, 36 App. 565, 38 S. W. 169.

Where it is the duty of the commissioners' court to remove the public weigher before appointing a new weigher, the indictment need not allege that the commissioners' court intended to remove such incumbent. *Ruffin v. State*, 36 App. 565, 38 S. W. 169.

Indictment held to sufficiently allege how defendant county commissioner was to vote and act in the matter in respect to which he was bribed. *Ruffin v. State*, 36 App. 565, 38 S. W. 169.

Indictment held to sufficiently allege the date when the official act of defendant as county commissioner was to be performed. *Ruffin v. State*, 36 App. 565, 38 S. W. 169.

Indictment for attempting to bribe an officer held sufficient. *Moore v. State*, 44 App. 159, 69 S. W. 521.

For forum of indictment of a justice of the peace for accepting a bribe for failure to cause the arrest of one unlawfully carrying a pistol, see *Morawietz v. State*, 46 App. 436, 80 S. W. 997; *Morawitz v. State*, 49 App. 366, 91 S. W. 227.

An indictment alleging that defendant offered to bribe the duly qualified chief of police of a certain city and county, and a peace officer of such city and county, and offered to give as a bribe to the said chief of police, the sum of \$5 with the intent to induce the chief of police to unlawfully permit defendant, who was then and there a prisoner in lawful custody, to escape from such custody, sufficiently charges an attempt to bribe a peace officer. *Lee v. State*, 47 App. 620, 85 S. W. 804.

Where an indictment charged an offer to bribe an assistant county attorney, it was not necessary for it to allege whether he was a state or county officer. *Davis v. State*, 70 App. 524, 158 S. W. 288.

Bribery of attorney.—An indictment for offering to bribe an attorney need not allege the particular acts to be done by him. *Reed v. State*, 43 Tex. 319. But if it be a district attorney, the character or the duty in which he was engaged should be alleged, with averments to show that the offer was to bribe him with respect to his official duties. *Collins v. State*, 25 Tex. Supp. 202.

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.]

See *Willson's Cr. Forms*, 7a; *Penal Code*, arts. 96-109, and notes; post, art. 470. Form 28.

In general.—Indictment held sufficient. *Crump v. State*, 23 App. 615, 5 S. W. 182.

The omission of the words "then and there" after the word "did" in the charging part of the indictment is sufficiently supplied by the words "did unlawfully, willfully and fraudulently, take and misapply," etc. *Butler v. State*, 46 App. 287, 81 S. W. 743.

A count alleging that accused, a county tax collector, did "unlawfully and fraudulently take, misapply, and convert to his own use" taxes collected, is sufficient. *Ferrell v. State* (Cr. App.) 152 S. W. 901.

Repugnancy.—See notes under article 476, post.

Conjunctive allegations.—See notes under article 473, post.

Alleging ownership and conversion.—To properly charge the offense of the misapplication of county or city funds the indictment must allege the ownership of the funds in the county, city, or town; that the funds came into defendant's possession by virtue of his office and that he converted the money fraudulently to his own use. *Crane v. State*, 26 App. 482, 9 S. W. 773; *Steiner v. State*, 33 App. 291, 26 S. W. 214; *Hartnett v. State*, 56 App. 281, 119 S. W. 855, 23 L. R. A. (N. S.) 761, 133 Am. St. Rep. 971.

Embezzlement of city warrant.—An indictment against a city officer for embezzlement of a warrant belonging to the city is defective, where the warrant set out in the indictment was not under seal and did not show upon its face that its issuance was directed by the city council, as required by the charter. *Dickey v. State* (Cr. App.) 144 S. W. 271.

Variance.—See note under *Pen. Code*, art. 1351.

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.]

See notes under article 476, post, as to “spelling.”

See Willson's Cr. Forms, 7a. See article 458 and notes thereunder.

See Jones v. State, 39 App. 387, 46 S. W. 250; Butler v. State, 46 App. 287, 81 S. W. 743; Taylor v. State, 29 App. 466, 16 S. W. 302.

Meaning of “money.”—“Money,” under our statute, has a distinctive meaning, significant of value. Speer v. State, 50 App. 273, 97 S. W. 469.

Theft or robbery.—The character of the coin should be stated. Ridgeway v. State, 41 Tex. 231.

An indictment describing the property as five ten dollar bills of the value of ten dollars each without calling them money is not sufficient. Jackson v. State, 34 App. 90, 29 S. W. 265.

An indictment charging accused with stealing a pocketbook and \$30 in money, “said money being then and there good and lawful money of the United States,” was not sustained by proof of the taking of a \$10 bill and two \$5 bills, without showing that it was paper money of any character issued under authority of the United States. Snelling v. State, 57 App. 416, 123 S. W. 610.

The descriptive averments of an indictment must be proved as they are alleged; and in a prosecution for theft, where the property taken was described in the indictment as current money of the United States of America, it was necessary to prove that it was such, and the testimony of the loser that it consisted of certain coins was insufficient. Rogers v. State, 58 App. 146, 124 S. W. 921.

Where the indictment alleged the larceny of a \$5 gold piece of United States money, the state must not only prove that a \$5 gold piece was stolen, but must show that it was United States money. Maxey v. State, 58 App. 118, 124 S. W. 927.

Where the information charged accused with the theft of \$1, current money of the United States, of the value of \$1, the state must prove that the money taken was current money of the United States; that allegation being descriptive. Johnson v. State, 58 App. 442, 126 S. W. 597.

An indictment for theft of a pay check which describes the check by giving its number, the name of the person drawing it, the person to whom it is payable, and the amount of the check is sufficient, and it is not necessary to set out the check in hæc verba. Fulshear v. State, 59 App. 376, 128 S. W. 134.

An indictment for larceny from the person described the property taken as “corporeal personal property, * * * to wit, \$4 in money, two knives, and one ring.” It held, that the description was sufficient. Campbell v. State, 61 App. 504, 135 S. W. 548.

Where an indictment for the theft of money alleged that the money was 19 \$20 bills, 2 \$5 bills, 1 \$2 bill, and 1 \$1 bill, each of United States paper currency money, and 15 cents in silver coin of the United States, and stated the value of each bill and coin and the total amount, such description was sufficient under this and article 458. Lane v. State (Cr. App.) 152 S. W. 897.

In a prosecution for robbery, it is not necessary that the indictment allege the denomination and kind of money stolen from prosecutor. Bracher v. State, 72 App. 198, 161 S. W. 124.

Under this article and Pen. Code, art. 1329, defining “theft” as the fraudulent taking of corporeal personal property belonging to another, etc., art. 1337, providing that “property” as used in relation to the crime of theft includes money, etc., Code Cr. Proc. art. 458, providing that when it becomes necessary to describe property of any kind in an indictment, a general description thereof by name, kind, quality, number, and ownership, if known, shall be sufficient, a complaint and information charging that accused took from the possession of W. certain money of the value exceeding \$1, was not insufficient because of the failure to allege that the stolen money was coins of the United States, or current as money of the United States. McAdams v. State (Cr. App.) 172 S. W. 792.

Under this article it is sufficient to describe the property in general terms as money, an indictment for theft from the person, which describes the money stolen as “twenty dollars of lawful money of the United States,” sufficiently describes the money. Burrus v. State (Cr. App.) 172 S. W. 981.

In view of this article and article 458, providing that a general description in an indictment of any property by name, kind, quality, number, and ownership is sufficient, an indictment for robbery, which describes the money stolen as \$70 in gold, current money of the United States, and \$160 in bank notes, current money of the United States, is sufficient, though the prosecutor can give a full description of both the gold and the bank notes by stating the denominations thereof. Terrell v. State (Cr. App.) 174 S. W. 1088.

Embezzlement in general.—The indictment need not describe the money, or any part of it, embezzled, State v. Brooks, 42 Tex. 62; but, it seems, it should state with certainty the kind of public moneys. Peacock v. State, 36 Tex. 647.

Misapplication of public funds.—An indictment for misapplication of public funds need not describe the money embezzled, though the better practice is to describe it generally by name, kind and ownership. State v. Brooks, 42 Tex. 62; Lewis v. State, 28 App. 140, 12 S. W. 736.

The phrase “current money of the United States,” as used in an indictment for embezzlement by tax collector, charging conversion to his own use of such money,

includes gold, silver, copper or other coin, bank bills, government notes, or other circulating medium which is current as money; Pen. Code, art. 1419, providing that the term "money," as used in the chapter on embezzlement, shall include, besides coin, bank bills, government notes, or other circulating medium. *Ferrell v. State* (Cr. App.) 152 S. W. 901.

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.]

See *Wilson's Cr. Forms*, 7a.

See notes under article 473, post; Pen. 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." —

See *Wilson's Cr. Forms*, 7a.

The preceding form would seem to be sufficient under decisions rendered without reference to it. See art. 451 and notes.

"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.

See Pen. Code, art. 1141, et seq., and notes.

See *Cudd v. State*, 28 App. 124, 12 S. W. 1010; *Caldwell v. Texas*, 137 U. S. 692, 11 Sup. Ct. 224, 34 L. Ed. 816.

"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.

See Pen. Code, art. 1025, et seq., and notes.

Form 4 held unconstitutional in *Allen v. State*, 13 App. 28. (Omitted.)

"Form No. 5—Simple assault: A B did assault C D."

See, ante, Pen. Code, art. 1008 et seq. and notes.

Need not allege battery, if only assault was committed. *State v. Johnston*, 11 Tex. 22.

Nor that the assault was unlawfully committed. *State v. Lutterloh*, 22 Tex. 211; *State v. Hartman*, 41 Tex. 562.

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 Tex. 113; *Rape v. State*, 34 App. 615, 31 S. W. 652.

Nor "coupled with ability," etc. *Forrest v. State*, 3 App. 232.

Nor the particular acts of violence. *Roberson v. State*, 15 App. 317.

Nor "with intent to injure." *Evans v. State*, 25 Tex. Supp. 304; *Ferguson v. State*, 4 App. 156.

An information held sufficient to support a verdict for simple assault. *Dunn v. State*, 71 App. 89, 158 S. W. 300.

"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."

See ante, art. 466, and notes. Pen. Code, arts. 174-193.

"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.”

See Pen. Code, arts. 548-574, and notes, and 586, and notes.

“Form No. 8—Rape: A B, an adult male, did rape C D, a female.”

See, ante, Pen. Code, art. 1063, and notes.

See indictment under Form No. 8, held fatally defective as embodying none of the elements of rape. *Brinster v. State*, 12 App. 612.

“Form No. 9—Affray: A B and C D did fight together in a public place.”

See Pen. Code, art. 469, and notes.

“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.”

See Pen. Code, art. 490, and notes as to adultery, and *Id.*, art. 494, and notes as to fornication.

“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.”

See Pen. Code, arts. 481 et seq. and notes.

“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.”

See P. C., art. 320 et seq., and notes.

Must charge that the escape was “wilfully” permitted. *Barthelow v. State*, 26 Tex. 175.

Indictment need not show that the arrest was legal, nor that the officer's custody was legal. *State v. Hedrick*, 35 Tex. 485.

Form 13 held unconstitutional in *Gabrielsky v. State*, 13 App. 428. (Omitted.)

“Form No. 14—Keeping disorderly house: A B did keep a disorderly house.”

See Pen. Code, art. 496, et seq., and notes.

An indictment for keeping a bawdyhouse, which substantially follows the form for an indictment laid down in White's Penal Code, § 564, is sufficient. *Farrell v. State*, 64 App. 200, 141 S. W. 535.

“Form No. 15—Lotteries: A B did establish a lottery, or did dispose of certain property by lottery.”

See Pen. Code, art. 533, and notes.

“Form No. 16—Unlawful practice of medicine: A B did practice medicine without authority of law.”

See Pen. Code, art. 750, et seq. and notes, and notes under article 474, post.

“Form No. 17—False imprisonment: A B did wilfully and without lawful authority detain C D against his consent.”

See P. C., art. 1039 et seq. and notes.

Indictment must allege the detention as unlawful. *Redfield v. State*, 24 Tex. 133.

It should allege the mode of detention, as by actual violence, force, threats, etc. *Maner v. State*, 8 App. 361.

“Form No. 18—Kidnaping: A B did falsely imprison C D for the purpose of removing him from the state.”

See Pen. Code, art. 1056 et seq. and notes.

For essential allegations, see *Clark v. State*, 3 Tex. 282; *Mason v. State*, 29 App. 24, 14 S. W. 71.

“Form No. 19—Arson: A B did wilfully burn a certain house, the property of C D.”

See P. C., art. 1200, et seq. and notes.

Form 20 as prescribed by the old Code, declared unconstitutional in *Rodriguez v. State*, 12 App. 552, and is omitted.

Form 21 held unconstitutional in *Williams v. State*, 12 App. 395; *Hodges v. State*, *Id.* 554; *Young v. State*, *Id.* 614; and *Insall v. State*, 14 App. 145, and omitted.

“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."

See P. C., art. 1421, et seq. and notes.

This form was held sufficient in *Arnold v. State*, 11 App. 472. But contra, *Dwyer v. State*, 24 App. 132, 5 S. W. 662; *Hardin v. State*, 25 App. 74, 7 S. W. 534; *Mathena v. State*, 15 App. 473. See, also, *Wills v. State*, 24 App. 400, 6 S. W. 316.

"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."

See Pen. Code, art. 1430, and notes. See, also, *Glass v. State*, 23 App. 425, 5 S. W. 131; *Presley v. State*, 24 App. 494, 6 S. W. 540.

"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."

See Pen. Code, art. 954, et seq.

"Form No. 25—Conspiracy: A B and C D did conspire together to murder E F."

See Pen. Code, art. 1433, et seq., and notes.

"Form No. 26—Robbery: A B did rob C D of twenty dollars in money."

See P. C., art. 1327, and notes. See, also, *Barnes v. State*, 9 App. 128; *Morris v. State*, 13 App. 65; *Menear v. State*, 30 App. 475, 17 S. W. 1082; *Evans v. State*, 34 App. 110, 29 S. W. 266; *Atkinson v. State*, 34 App. 424, 30 S. W. 1064.

"Form No. 27—Forgery: A B did forge a certain false instrument in writing in substance as follows:" [Setting out the forged instrument.]

See Pen. Code, arts. 924, 925, and notes.

"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 Willson's Cr. Forms, 7a.

See, ante, art. 467, and notes.

See Pen. Code, art. 96, and notes.

Information need not, under this article 470, aver that the acts complained of were contrary to the statute. *Burk v. State*, 57 App. 635, 124 S. W. 658.

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.]

See Willson's Cr. Forms, 7a.

See article 452, ante, and notes thereunder.

See *White v. State*, 11 App. 476; *Caldwell v. Texas*, 137 U. S. 692, 11 Sup. Ct. 224, 34 L. Ed. 816.

Necessity of facts or evidence supporting allegations in general.—The evidence should conform to and support the allegations of the indictment. *Knight v. State*, 71 App. 36, 158 S. W. 543; *Malloy v. State*, 58 App. 425, 126 S. W. 598.

Intention of "common sense" indictment act.—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 App. 476. Compare *Mansfield v. State*, 17 App. 468.

Indictment as measured by allegations not by proof.—A pleading is measured by its allegations and not by the proof that may be introduced thereunder, and, in determining whether an indictment discloses a prima facie case, the court will assume that the time of the commission of the act charged is as stated therein. *Mealer v. State* (Cr. App.) 145 S. W. 353.

Proof of time of offense.—See notes to art. 451, subd. 6.

Proof of unnecessary descriptive averments.—See notes to art. 453, ante.

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.]

See Willson's Cr. Forms, 7a; Pen. Code, arts. 1151, 1180, and notes.
Cited, Slack v. State, 61 App. 372, 136 S. W. 1073, Ann. Cas. 1913B, 112.

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.]

See Willson's Cr. Forms, 7a.

In general.—The following decisions conflict with the preceding article, and lay down the following rule: If a statute makes it a crime to do this or that, mentioning several things disjunctively, the indictment may, as a general rule, embrace the whole in a single count; but in doing so it must use the conjunction "and" where "or" is found in the statute, else it will be defective as being uncertain. Hart v. State, 2 App. 40; Tompkins v. State, 4 App. 161; Berliner v. State, 6 App. 181; Copping v. State, 7 App. 61; Slawson v. State, Id. 63; State v. Randle, 41 Tex. 292; Phillips v. State, 29 Tex. 226; Lancaster v. State, 43 Tex. 519; Davis v. State, 23 App. 637, 5 S. W. 147.

It is permissible where the statute may be violated in one of several ways, to charge conjunctively that the party violated the statute by all the means set forth in the law; but it is not permissible to charge it in the alternative. Venturio v. State, 37 App. 653, 40 S. W. 974.

Where the gist of an offense is the failure to do something which it is the defendant's duty to do, and the statute is in the alternative, an indictment or information following the language of the statute is sufficient. Byrd v. State, 72 App. 242, 162 S. W. 360.

Where several offenses are embraced in the same general statutory definition, and are punishable in the same manner, they are not distinct offenses, and may be charged conjunctively in the same count, and a conviction may be had on proving the commission of the offense in any of the ways alleged. Johnson v. State (Cr. App.) 171 S. W. 211.

But see Day v. State, 14 App. 26, and cases cited; Fry v. State, 36 App. 532, 37 S. W. 741, 38 S. W. 168; Willis v. State, 34 App. 148, 29 S. W. 787; Lewellen v. State, 54 App. 640, 114 S. W. 1179, and cases cited.

Description.—An alternative description of property as a "trunk or chest" was held bad. Potter v. State, 39 Tex. 388. And so was "neat cattle or beeves." Costello v. State, 36 Tex. 324.

An alternative designation of an alleged forged instrument as "a school voucher or check" does not vitiate it. Thomas v. State, 18 App. 213.

Forgery.—Indictment for forgery of scholastic census which charges in the alternative that defendant took the census "as census trustee or sub-census trustee" is fatally defective. Munoz v. State, 40 App. 460, 50 S. W. 949.

Where, though an indictment for forgery charges that the offense was "with intent to injure and defraud," a conviction may be had upon a showing that the offense was committed with intent either to injure or defraud. Howard v. State (Cr. App.) 143 S. W. 178.

Misapplication of public money.—Indictments may charge conjunctively in one count the several ways the offense may be committed. Dill v. State, 35 App. 240, 33 S. W. 126, 60 Am. St. Rep. 37; Howell v. State, 29 App. 592, 16 S. W. 533; Willis v. State, 34 App. 148, 29 S. W. 787; Laroe v. State, 30 App. 374, 17 S. W. 934; Comer v. State, 26 App. 509, 10 S. W. 106.

Carrying pistol.—An indictment or information alleging that defendant did unlawfully carry a pistol on or about his person is fatally defective in using the disjunctive "or," instead of the conjunctive "and." Harris v. State, 58 App. 523, 126 S. W. 890; Canterbury v. State (Cr. App.) 44 S. W. 522; Hunter v. State (Cr. App.) 166 S. W. 164.

Violation of liquor law.—Indictment or information for selling or keeping open for traffic on Sunday may charge both modes of violation in the same count. Brown v. State, 38 App. 597, 44 S. W. 176; Hall v. State, 41 App. 423, 55 S. W. 173; Herod v. State, 41 App. 597, 56 S. W. 59.

A complaint for selling liquor without a license was not fatally defective because it alleged that defendant sold "malt liquor or beer." Figueroa v. State, 71 App. 371, 159 S. W. 1188.

An indictment charging conjunctively a violation of the Allison Act, § 4 (art. 606c) making it unlawful, except as otherwise provided, for any person to ship, transport, carry, or deliver intoxicating liquors to any other person in prohibition territory, charges but one offense. Johnson v. State (Cr. App.) 171 S. W. 211.

Unlawfully practicing medicine.—An indictment alleging that accused practicing medicine without a license treated a physical disease in the capacity of a physician or doctor or both is not objectionable because in the disjunctive; the words "physician" and "doctor" being synonymous. Milling v. State (Cr. App.) 150 S. W. 434.

A complaint against a physician for violating the physicians' registration law, alleging that accused did unlawfully treat a disease "or" disorder, to wit, did treat one S., a human being, for tuberculosis and constipation, etc., was not objectionable for uncertainty in the use of the disjunctive, since the designation of the diseases by name sufficiently showed that they were both diseases and disorders. White v. State, 70 App. 285, 157 S. W. 152.

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.]

See notes under 473, ante.

Willson's Cr. Forms, 7a.

Particular crimes. see notes to Pen. Code articles relating thereto.

See Bigham v. State, 31 App. 242, 20 S. W. 577.

Cited, Payne v. State (Cr. App.) 148 S. W. 694.

Following language of statute in general.—It will generally be sufficient if the indictment in describing the offense follows the precise language of the statute, or uses words of equivalent or more comprehensive meaning. *Smith v. R., Dallam, 473; Bush v. R., 1 Tex. 455; Burch v. R., Id. 608; Drummond v. State, 2 Tex. 156; Estes v. State, 10 Tex. 300; State v. West, Id. 553; State v. Ake, 9 Tex. 322; Welsh v. State, 11 Tex. 368; State v. Wupperman, 13 Tex. 33; State v. Warren, 13 Tex. 45; Francis v. State, 21 Tex. 280; Rhodes v. State, 29 Tex. 188; State v. Campbell, Id. 44, 94 Am. Dec. 251; Portwood v. State, Id. 47, 94 Am. Dec. 258; Phillips v. State, Id. 226; Smith v. State, 34 Tex. 612; Mathews v. State, 36 Tex. 675; Fowler v. State, 38 Tex. 559; State v. Thompson, 40 Tex. 515; McFain v. State, 41 Tex. 385; Caldwell v. State, 2 App. 53; White v. State, 3 App. 605; Bigby v. State, 5 App. 101; Brewer v. State, Id. 248; Antle v. State, 6 App. 202; Lagrone v. State, 12 App. 426; Jones v. State, Id. 424; Tynes v. State, 17 App. 123; Kerry v. State, Id. 185, 50 Am. Rep. 123; Lantzner v. State, 19 App. 320; Thompson v. State, 16 App. 74; Shubert v. State, 20 App. 320; Bean v. State, 25 App. 346, 8 S. W. 278; Luckie v. State, 33 App. 562, 28 S. W. 533; Cravey v. State, 36 App. 90, 35 S. W. 658, 61 Am. St. Rep. 833; Bigham v. State, 31 App. 244, 20 S. W. 577; Hughes v. State (Cr. App.) 149 S. W. 173; Robinson v. State (Cr. App.) 149 S. W. 186; Polk v. State (Cr. App.) 154 S. W. 988; Partridge v. State, 71 App. 302, 158 S. W. 549; Byrd v. State, 72 App. 242, 162 S. W. 360; Jones v. State, 72 App. 496, 162 S. W. 1142; Bradfield v. State (Cr. App.) 166 S. W. 734; Arnold v. State (Cr. App.) 168 S. W. 122; Clark v. State (Cr. App.) 174 S. W. 354; Rutherford v. State (Cr. App.) 174 S. W. 1050; Hatch v. State (Cr. App.) 174 S. W. 1062.*

But if the statutory words be words of technical meaning, they can not be substituted by other words, as "malice aforethought" in murder, or "fraudulently" in theft. *Drummond v. State, 2 Tex. 156; McElroy v. State, 14 App. 235; Cravey v. State, 36 App. 90, 35 S. W. 658, 61 Am. St. Rep. 833; Chance v. State, 27 App. 441, 11 S. W. 457.* And where the statute in describing the offense uses a generic term, it will not be enough to employ that term only, but the species must be stated according to the facts in the case. *Burch v. R., 1 Tex. 608; State v. West, 10 Tex. 553; Brewer v. State, 5 App. 248; McAfee v. State, 38 App. 124, 41 S. W. 627.* But if the statute, in defining the offense, sets out the specific acts constituting it, and not by the use of generic terms, the indictment may follow it literally. *McFain v. State, 41 Tex. 385.*

It is always safer, in describing the offense, to use the words of the statute, instead of undertaking to substitute them with other words of equivalent or more comprehensive meaning. *Burch v. R., 1 Tex. 608; Henderson v. State, 14 Tex. 603; Francis v. State, 21 Tex. 280; Barthelow v. State, 26 Tex. 175; State v. Mooreland, 27 Tex. 726; Juaraqui v. State, 28 Tex. 625; State v. Stalls, 37 Tex. 440; Fowler v. State, 38 Tex. 559; Hart v. State, 2 App. 40; White v. State, 3 App. 605; Jones v. State, 12 App. 424.* And see *Goldstein v. State, 36 App. 193, 36 S. W. 278; Cannedy v. State, 58 App. 184, 125 S. W. 31.*

Notwithstanding the general rule is, that in describing the offense in the indictment it is sufficient to follow the language of the statute, there are instances which form exceptions to this general rule, and in which more certainty is required either from the obvious intention of the legislature, or from the application of known principles of law. *State v. West, 10 Tex. 553; State v. Campbell, 29 Tex. 44, 94 Am. Dec. 251; Portwood v. State, 29 Tex. 47, 94 Am. Dec. 258; White v. State, 3 App. 605; Horan v. State, 7 App. 183; Hoskey v. State, 9 App. 202; Kerry v. State, 17 App. 179, 50 Am. Rep. 122; Dixon v. State, 21 App. 517, 1 S. W. 448.* If extrinsic facts be necessary to bring the act within the statute, they must be averred. *Brewer v. State, 5 App. 248; Gray v. State, 7 App. 10; Vaughan v. State, 9 App. 563; Kerry v. State, 17 App. 178, 50 Am. Rep. 122; Longenotti v. State, 22 App. 61, 2 S. W. 620.* And see *State v. Williams, 14 Tex. 98.* But it is sufficient to pursue the words of the statute, if by so doing the act which constitutes the offense is fully, directly, and expressly alleged, without any uncertainty or ambiguity. *Bigby v. State, 5 App. 101; Phillips v. State, 29 Tex. 226; McFain v. State, 41 Tex. 385; Hardin v. State, 25 App. 74, 7 S. W. 534.*

The word "wilful" may be substituted for the statutory word "knowingly." *Ex parte Cowen (Cr. App.) 168 S. W. 539.* "Attempt" for "intent." *Atkinson v. State, 34 App. 424, 30 S. W. 1064; Runnels v. State, 34 App. 431, 30 S. W. 1065.* "Deprive" for "defraud." *Shubert v. State, 20 App. 320.* "Fifty head of cattle" for "drove of cattle." *Caldwell v. State, 2 App. 53.* "The" for "its." *Fowler v. State, 38 Tex. 559.* "Run" for "remove." *Williams v. State, 27 App. 258, 11 S. W. 114.* But "unlawfully" and "knowingly" are not synonymous. *State v. Stalls, 37 Tex. 440; Tynes v. State, 17 App. 123.* "Unlawfully, voluntarily and unjustly" are not equivalent to "wilfully." *Barthelow v. State, 26 Tex. 175.* "Father" or "mother" are not equivalent to "parent." *Lantzner v. State, 19 App. 320.* And "use and benefit" are not equivalent to "the value." *Jones v. State, 12 App. 424.*

Negating exceptions or exemptions.—See particular offenses in Penal Code.

If there be exceptions contained in the same act which creates the offense, the indictment must show, negatively, that the defendant, or the subject of the indictment, does not come within the exception. *Lewis v. State*, 2 App. 26; *Colchell v. State*, 23 App. 584, 5 S. W. 139; *Leatherwood v. State*, 6 App. 244; *McFain v. State*, 41 Tex. 385; *State v. Duke*, 42 Tex. 455; *State v. Clayton*, 43 Tex. 410; *Edwards v. State*, 37 App. 242, 38 S. W. 996, 39 S. W. 368; *McCann v. State*, 40 App. 112, 48 S. W. 512; *Byrd v. State*, 59 App. 513, 129 S. W. 620. When the statute 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 App. 36, 38 S. W. 801, and cases cited; *Williams v. State*, 37 App. 238, 39 S. W. 664; *Williamson v. State*, 41 Cr. App. 461, 55 S. W. 570.

But where the words of the statute defining the offense are so entirely separable from the exception that all the ingredients constituting the offense may be clearly and accurately alleged without any reference to the exception, it is not necessary that the exception should be negated. *McFain v. State*, 41 Tex. 385; *Moseley v. State*, 18 App. 311; *Blasdell v. State*, 5 App. 263; *Owens v. State*, 3 App. 404; *Summerlin v. State*, Id. 444; *Williams v. State*, 37 App. 238, 39 S. W. 664; *Brown v. State*, 9 App. 171; *Williamson v. State*, 41 App. 461, 55 S. W. 570. And see *Lewis v. State*, 7 App. 567; *Zallner v. State*, 15 App. 23; *Antle v. State*, 6 App. 202, and cases cited.

Indictment need not negative the exceptions named in Pen. Code, art. 757. *Antle v. State*, 6 App. 202.

An indictment charging accused with operating an automobile on a public road at a speed greater than 18 miles an hour, must negative the matter in the proviso that the speed limit shall not apply to race courses or speedways, and must allege that accused did not drive his machine on a race course or speedway. *Byrd v. State*, 59 App. 513, 129 S. W. 620.

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.]

See Willson's Cr. Forms, 7a.

Matters of which judicial notice is taken.—See notes under articles 484 and 783, post.

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.]

See Willson's Cr. Forms, 7a; post, arts. 576, 597.

Cited, *Slack v. State*, 61 App. 372, 136 S. W. 1073, Ann. Cas. 1913B, 112; *Bradberry v. State* (Cr. App.) 152 S. W. 169; *Caldwell v. Texas*, 137 U. S. 692, 11 Sup. Ct. 224, 34 L. Ed. 816.

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| 1. Explanatory. | 13. Denial of motion to quash counts not submitted. |
| 2. Effect in general. | 14. Submission of different counts in burglary. |
| 3. Spelling, handwriting and grammar. | 15. Theft. |
| 4. Erasures and interlineations. | 16. Swindling. |
| 5. Typographical error. | 17. Fraudulent disposition of mortgaged property. |
| 6. Name of prosecuting attorney typewritten. | 18. Forgery. |
| 7. Omissions. | 19. Perjury. |
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| 9. Repugnancy. | 21. Charging carrying of pistol and assault. |
| 10. Duplicity. | 22. Sending threatening letter. |
| 11. Giving wrong name or failure to give full name. | 23. Libel. |
| 12. Failure to allege date of local option election. | |

1. Explanatory.—The "Common Sense" indictment Act ends with this article.

2. Effect in general.—Where accused was found guilty under the second count of an indictment, charging an offense, it was not prejudicial error to refuse to quash the first count, which was defective, and under which no evidence was admissible that was not admissible under the second count on the first being quashed. *Smith v. State* (Cr. App.) 176 S. W. 49.

3. Spelling, handwriting, and grammar.—See notes under article 451, ante.

Bad spelling will not vitiate, if the meaning is unmistakable. *State v. Earp*, 41 Tex. 487; *Thomas v. State*, 2 App. 293; *Stinson v. State*, 5 App. 31; *Hudson v. State*, 10 App. 215; *Brumley v. State*, 11 App. 114. See this rule illustrated in the following other cases: *Witten v. State*, 4 App. 70; *Somerville v. State*, 6 App. 433; *Hutto v. State*, 7 App. 44; *State v. Williamson*, 43 Tex. 500; *Hennessy v. State*, 23 App. 340, 5 S. W. 215; *Irvin v. State*, 7 App. 109; *Williams v. State*, 35 App. 391, 33 S. W. 1080; *Rountree v. State* (Cr. App.) 58 S. W. 106. Unless it changes the word intended into another word having a different meaning. *Pye v. State*, 71 App. 94, 154 S. W. 222; *Cheesebourn v. State*, 70 App. 612, 157 S. W. 761.

Appellant was charged by information with disturbance of the "inhabitation" of a public street. Held, that the word inhabitants was obviously intended, and the two words are idem sonans. *Keller v. State*, 25 App. 325, 8 S. W. 275. "Isreal" and "Israel" were held idem sonans. *Boren v. State*, 32 App. 637, 25 S. W. 775. Indictment charged accused with receiving stolen property, to wit: Five "tenty" dollar gold pieces. Held sufficient. *Allen v. State* (Cr. App.) 28 S. W. 474.

It is not fatal to omit the last "t" from the word "intent." *Stinson v. State* (Cr. App.) 173 S. W. 1039. Or the last "t" in "street." *Hart v. State* (Cr. App.) 154 S. W. 553. Or the letter "r" in "carnally." *Bailey v. State*, 63 App. 584, 141 S. W. 224. Or that the word "capable," is misspelled "capapble." *Figuroa v. State*, 71 App. 371, 159 S. W. 1188. Or that the word "woman" is spelled "wom," where it is alleged in other places that prosecutrix was a female. *Qualls v. State*, 71 App. 67, 158 S. W. 539. Or that the word "monet" is used for "money." *Wright v. State*, 70 App. 73, 156 S. W. 624. Or that the word, "respectfully," is used for "respectively." *Compton v. State* (Cr. App.) 148 S. W. 580.

The word "appropriate" may be used for "appropriate." *Hawkins v. State*, 64 App. 480, 142 S. W. 917. But "appriate" and "appropriate" are not idem sonans. *Jones v. State*, 25 App. 621, 8 S. W. 801, 8 Am. St. Rep. 449.

The use of the word "possion" instead of "possession" held a fatal defect. *Evens v. State*, 34 App. 110, 29 S. W. 266. But see *State v. Williamson*, 43 Tex. 500.

Where a word was misspelled, the district judge had no power to authorize the district attorney to add the omitted letter; and, if the omission invalidated the indictment, the addition did not cure the defect. *Stinson v. State* (Cr. App.) 173 S. W. 1039.

Bad handwriting, if legible, will not vitiate. *Irvin v. State*, 7 App. 109; *Hudson v. State*, 10 App. 215; *Dodd v. State*, Id. 370; *State v. Morris*, 43 Tex. 372; *Taylor v. State*, 29 App. 466, 16 S. W. 302; *Cheesebourn v. State*, 70 App. 612, 157 S. W. 761.

Incorrect grammar will not vitiate unless the words employed are so inartisticly arranged as to make the charge uncertain. *State v. Nations*, 31 Tex. 561; *Gay v. State*, 2 App. 127; *Richardson v. State*, Id. 322; *Hudson v. State*, 10 App. 215; *Parsons v. State*, 33 App. 540, 28 S. W. 204; *Stinson v. State*, 5 App. 31; *Taylor v. State*, 29 App. 466, 16 S. W. 302; *Thompson v. State* (Cr. App.) 152 S. W. 893; *Stephens v. State* (Cr. App.) 154 S. W. 996.

4. **Erasures and interlineations.**—Objections to an indictment because of erasures and interlineations can only be reached by exceptions to the form. The court, and not the jury, must decide what are the words of an indictment or other pleading. The burden is upon the defendant to show that the erasures or interlineations were not the act of the grand jury. *Dodd v. State*, 10 App. 370. See, also, *Kahim v. State*, 30 App. 310, 17 S. W. 416, 28 Am. St. Rep. 911; *Perez v. State*, 10 App. 327; *Huff v. State*, 23 App. 291, 4 S. W. 890.

5. **Typographical error.**—Typographical error in an indictment which leaves the meaning clear does not vitiate the indictment. *Whitley v. State* (Cr. App.) 56 S. W. 70.

6. **Name of prosecuting attorney typewritten.**—That the name of the prosecuting attorney was typewritten on the indictment is immaterial. *Miller v. State*, 36 App. 47, 35 S. W. 391.

7. **Omissions.**—See notes under article 467, ante.

An omission of a material word will render the indictment invalid—as the omission of the word "did" in charging the defendant with the commission of the offense. *State v. Hutchinson*, 26 Tex. 111; *State v. Daugherty*, 30 Tex. 360; *Ewing v. State*, 1 App. 362; *Sparks v. State*, 35 Tex. 349; *Edmondson v. State*, 41 Tex. 496; *Moore v. State*, 7 App. 42; *Walker v. State*, 9 App. 177; *Jester v. State*, 26 App. 369, 9 S. W. 616; *Barfield v. State*, 39 App. 342, 45 S. W. 1015. The word "at" is sometimes material. *State v. Huston*, 12 Tex. 245; *State v. Daugherty*, 30 Tex. 360. Also the word "and" in a joint indictment. *State v. Toney*, 13 Tex. 74. The character "&" may be used for the word "and" without vitiating the indictment, but it is better practice to use the word. *Brown v. State*, 16 App. 245. So the word "to" in one instance was held to be essential. *Jones v. State*, 21 App. 349, 17 S. W. 424. The omission of the word "of" presents no error, when, by reading the entire indictment, its intent and meaning is clear. *Stephens v. State* (Cr. App.) 154 S. W. 996. But the omission of the word "of" after the word "possession" in charging theft has been held fatal. *Riley v. State*, 27 App. 606, 11 S. W. 642.

An indictment for burglary alleged the house was "occupied S." instead of occupied by S.; held, fatally defective. *Scroggins v. State*, 36 App. 117, 35 S. W. 968. But the omission of the phrase "then and there" is immaterial. *Smith v. State*, 36 App. 442, 37 S. W. 743. It is not fatal to an indictment for burglary that it is alleged defendant broke and entered the car with intent to take "corporeal property," omitting "personal"; it being in the same count alleged he took from it corporeal personal property, with intent to appropriate it to his own use and deprive the owner of its value. *Howard v. State* (Cr. App.) 178 S. W. 506.

8. **Surplusage or redundancy.**—Unnecessary words do not vitiate. *Sadler v. Republic*, Dallam, 610. And unnecessary averments may be rejected as surplusage. *State v. Moreland*, 27 Tex. 726. Recitals which are not repugnant or contradictory to the body of the indictment, and which do not render unintelligible any of the material, traversable matters constituting the charge may be rejected as surplusage. *State v. Elliott*, 14 Tex. 423. See further, as to surplusage, *Meredith v. State*, 40 Tex. 480; *Warrington v. State*, 1 App. 168; *Gordon v. State*, 2 App. 154; *Burke v. State*, 5 App. 74; *Hampton v. State*, Id. 463; *Mayo v. State*, 7 App. 342; *Smith v. State*, Id. 382; *Rivers v. State*, 10 App. 177; *Osborne v. State*, 24 App. 398, 6 S. W. 536; *McConnell v. State*, 22 App. 354, 3 S. W. 699, 58 Am. Rep. 647; *Gibson v. State*, 17 App. 574; *Taylor v. State*, 29 App. 466, 16 S. W. 302; *Mathews v. State*, 39 App. 553, 47 S. W. 647, 48 S. W. 189, and cases cited; *Lomax v. State*, 38 App. 318, 43 S. W. 92. If one offense be fully charged, and another defectively, the latter may be treated as surplusage. *State v. Coffey*, 41 Tex. 46; *Crow v. State*, 41

Tex. 468; *Henderson v. State*, 2 App. 88; *Holden v. State*, 18 App. 91. As to distinction between variance and surplusage, see *Warrington v. State*, 1 App. 168; *Cudd v. State*, 28 App. 124, 12 S. W. 1010; *Hammons v. State*, 29 App. 445, 16 S. W. 99; *Withers v. State*, 30 App. 384, 17 S. W. 936.

Unnecessary allegations do not vitiate the indictment, but merely devolve on the prosecution the burden of proving them. Redundancy does not render bad an otherwise good indictment. *Rogers v. State*, 26 App. 404, 9 S. W. 762.

Redundant allegations and allegations not necessary to a description of the offense or to constitute the offense, which can be omitted without detriment to the indictment, are to be rejected as surplusage. *Thompson v. State* (Cr. App.) 152 S. W. 893.

Where an indictment filed July 16, 1912, in a prosecution for following the business of selling intoxicating liquor in prohibition territory, averred that while the prohibitory law was in force during the time between November 16, 1911, and the filing of the indictment and before presentment thereof, accused did unlawfully engage in and pursue the occupation of selling intoxicating liquors, and charged specific sales on dates mentioned before filing the indictment, an allegation in the latter part of the indictment charging the offense to have been committed after November 16, 1912, will be disregarded as surplusage; the date being obviously a mistake and the allegation being wholly unnecessary. *Creed v. State* (Cr. App.) 155 S. W. 240.

Unnecessary allegations may be rejected as surplusage, and allegations which are not essential to the offense, and may be omitted without affecting the charge, may be disregarded as surplusage. *Goodwin v. State*, 70 App. 600, 158 S. W. 274.

An indictment charging an offer to bribe an assistant county attorney was not defective because it recited that he was a judicial officer of the state, even conceding that he was not a judicial officer, since this recital was immaterial and could be treated as surplusage; the indictment having alleged the office he held. *Davis v. State*, 70 App. 524, 158 S. W. 288.

A complaint, charging that accused "did on November 10th, and before the making of this complaint, then and there did" assault another is not bad for indefiniteness, for the first "did" may be disregarded as surplusage. *Johnson v. State*, 71 App. 610, 160 S. W. 702.

The indictment clearly charging an offense under the statute both in getting drunk and being found intoxicated in a public place, unnecessary allegations do not invalidate it but are to be treated as surplusage. *Kuykendall v. State*, 72 App. 153, 161 S. W. 130.

Where an indictment, charging the defendant with procuring another to burn his insured house, alleged that the other maliciously set fire to the house, and that the defendant paid the other a certain sum of money in another county, the state need not prove the malice, or the payment of the exact sum, or that the payment was in the named county, which allegations were not necessary to constitute the offense, since the rule that, when a person, place, or thing necessary to be alleged in an indictment is particularly described, it must be proved as described does not apply to allegations, which are mere surplusage. *Arnold v. State* (Cr. App.) 168 S. W. 122.

The validity of a complaint and information, alleging that accused unlawfully pursued the occupation of a pawnbroker without a license, and averring that the taxes due by him to the state for the occupation amounted to \$150, and that the taxes due the county on the occupation amounted to \$75, and that the taxes due the county had been "therefore" duly levied by the commissioners' court of the county, is unaffected by the inadvertent use of the word "therefore" in place of "theretofore," which must be regarded as surplusage. *Schapiro v. State* (Cr. App.) 169 S. W. 683.

Where an indictment for wife abandonment after marriage in order to escape prosecution for seduction alleged that a complaint had been filed in a justice court of M. county, the further words, "precinct No. _____ of" are surplusage. *Baskins v. State* (Cr. App.) 171 S. W. 723.

9. Repugnancy.—See note on "Duplicity" under article 481.

Any repugnancy or uncertainty as to time or place is bad. *Cain v. State*, 18 Tex. 391. The misstatement of a written or printed instrument is immaterial, if the instrument be set out in full. *Luckey v. State*, 26 Tex. 362. But see *Westbrook v. State*, 23 App. 401, 5 S. W. 248 and *Roberts v. State*, 2 App. 4, which hold that in charging forgery it is not essential that the forged instrument should be set out both by its purport and its tenor, but that if it is so set out, any repugnancy between the two allegations will be fatal to the indictment. Repugnancy, in general, consists of two inconsistent allegations in one pleading; and since both cannot be true, and there is no means of ascertaining which is meant, the whole must be as though neither existed, leaving the indictment inadequate. This doctrine applies to counts only; that is to say, no count should contain repugnant matters, but it does not, in the very nature of things, apply to the repugnancy which of necessity must exist in different counts. Counts may be joined containing matter repugnant one to the other. *Boren v. State*, 23 App. 28, 4 S. W. 463. See an instance of repugnancy in *Hardeman v. State*, 16 App. 1, 49 Am. Rep. 821. See, also, *Waters v. State*, 30 App. 284, 17 S. W. 411; *English v. State*, 30 App. 470, 18 S. W. 94; *Shuman v. State*, 34 App. 69, 29 S. W. 160. Where indictment charges in one count the burning of a house belonging to one person and in another the burning of personal property belonging to another it will not support a conviction. *Samuels v. State* (Cr. App.) 29 S. W. 1079.

In charging rape in one count and incest in another, the indictment is neither duplicitous nor repugnant, though predicated on the same transaction. *Owens v. State*, 35 App. 345, 33 S. W. 875; *Wiggins v. State*, 47 App. 538, 84 S. W. 821.

Indictment for misapplication of public money charged defendant as an officer and as clerk and employé of an officer, defendant being the assistant financial agent of penitentiaries. Held, that the allegations are not repugnant. *Busby v. State*, 51 App. 289, 103 S. W. 638.

10. **Duplicity.**—See notes under article 481, post.

11. **Giving wrong name or failure to give full name.**—The giving of a wrong name or the failure to give accused's full name is a matter of form only, and, where he was described by his Christian name, nationality, and place of residence, which description was not shown to be untrue, and it appeared that he was the identical person alleged to have committed the offense charged, the judgment will not be reversed. *Crescencio v. State* (Cr. App.) 165 S. W. 936.

12. **Failure to allege date of local option election.**—Though an information for violating the local option law is required, by this subdivision 2 of article 478, to allege the date of the local option election by which the law was put in force, such allegation being no part of the offense, failure of an information to include it did not render it fatally defective, under article 476, providing that formal defects in indictments shall be disregarded, which is made applicable to informations by article 450. *Meyer v. State* (Cr. App.) 145 S. W. 919.

An objection that an indictment for selling intoxicating liquors in local option territory does not allege the date of the election on prohibition is waived, where made for the first time in the motion for rehearing. *Hart v. State* (Cr. App.) 150 S. W. 188.

13. **Denial of motion to quash counts not submitted.**—Denial of a motion to quash certain counts of an indictment, which the court did not submit to the jury, is harmless. *Massie v. State* (Cr. App.) 163 S. W. 73.

14. **Submission of different counts in burglary.**—Error in submitting a count charging burglary with intent to rape with a count charging burglary with intent to steal was harmless, where accused was convicted under the latter count. *Williams v. State* (Cr. App.) 143 S. W. 634.

15. **Theft.**—In a prosecution for theft of a pay check, an objection on appeal that there was a variance between the instrument offered in evidence and the one set out in the indictment cannot be sustained where the instrument itself was not offered in evidence, and the only evidence in the record tending to show the alleged variance was a statement in the bill of exceptions that the check had been originally written for a larger amount than that alleged in the indictment, and had been afterwards changed, and a statement by counsel in making his objection pointing out the alleged variance; there being no finding of fact as to what was the amount of the check. *Fulshear v. State*, 59 App. 376, 128 S. W. 134.

16. **Swindling.**—See Pen. Code, arts. 1421, et seq., and notes.

17. **Fraudulent disposition of mortgaged property.**—See *Jones v. State*, 35 App. 565, 34 S. W. 631, and cases cited.

18. **Forgery.**—See Pen. Code, arts. 924, et seq., and notes.

Under this article and article 453, providing that the context and subject-matter shall be considered, and that the certainty required in an indictment is such as will enable accused to plead the judgment upon it in bar, and article 460, providing that an indictment charging the commission of an offense in ordinary language so as to enable a person of common understanding to know what is meant, and to enable the court on conviction to pronounce the proper judgment, shall be sufficient, an indictment for forgery under Pen. Code, art. 947, which alleges that accused unlawfully and with intent to defraud assisted the forging of a signature to a certain deed purporting to entitle the grantee named therein to certain lands which, if true, would have affected the title and interest in such lands, sufficiently charged that the instrument would have affected the title to lands. *Thompson v. State* (Cr. App.) 152 S. W. 893.

In a prosecution for forgery, where the second count of the indictment charged the passing of a forged instrument, the impropriety of the court's refusal to sustain a motion to quash was harmless, where that count was not submitted to the jury, and all the evidence introduced was admissible under the first count. *Cheesbrough v. State*, 70 App. 612, 157 S. W. 761.

19. **Perjury.**—See Penal Code, arts. 304, et seq., and notes; *Gabrielsky v. State*, 13 App. 428; *Schoenfeld v. State*, 56 App. 103, 119 S. W. 101, 22 L. R. A. (N. S.) 1216, 133 Am. St. Rep. 956; *Yardley v. State*, 55 App. 486, 117 S. W. 146.

20. **Assault.**—One convicted of simple assault cannot complain because the information, attempting to charge an aggravated assault, is defective because it fails to state the manner in which the instrument charged was used. *Jaehnig v. State*, 57 App. 186, 122 S. W. 267.

21. **Charging carrying of pistol and assault.**—That an indictment charged accused with unlawfully carrying a pistol as well as with assault could not have injured her where she was only convicted of carrying a pistol, and it did not appear that evidence was admitted on the other count. *Tucker v. State* (Cr. App.) 145 S. W. 611.

22. **Sending threatening letter.**—See Pen. Code, art. 1446, and notes; *Cohen v. State*, 37 App. 118, 38 S. W. 1005.

23. **Libel.**—See Pen. Code, arts. 1151 et seq., and notes.

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.]

See note to following article "Requisite 3."

Cited, *Ethridge v. State* (Cr. App.) 172 S. W. 784.

Nature and purpose of information.—The rules applicable to indictments apply to informations in determining their sufficiency. *State v. Elliott*, 41 Tex. 224.

An information is the official act of the state's attorney, and not the act of the person upon whose affidavit it is based; and it must clearly appear on the face of the information that the charge against the accused is preferred by the state's attorney. *Thompson v. State*, 15 App. 39; *Prophit v. State*, 12 App. 233; *Warren v. State*, 17 App. 207; distinguished from *Hunt v. State*, 9 App. 404, and *Allen v. State*, 13 App. 28; *Johnson v. State*, 17 App. 230; *Hilliard v. State*, Id. 210; *State v. Corbit*, 42 Tex. 88. And see, also, *Brown v. State*, 11 App. 451; *Arbutnot v. State*, 38 App. 509, 34 S. W. 269, 43 S. W. 1024, overruling *Thompson v. State*, 15 App. 39. All misdemeanors may be presented by information. *Ante*, art. 448.

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."

See *Willson's Cr. Forms*, 745.

2. That it shall appear to have been presented in a court having jurisdiction of the offense set forth.

See *Willson's Cr. Forms*, 815.

3. That it appear to have been presented by the proper officer.

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.

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.

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.

7. That the offense be set forth in plain and intelligible words.

8. That the information conclude, "Against the peace and dignity of the state."

See *Willson's Cr. Forms*, 746.

9. It shall be signed by the district or county attorney, officially. [O. C. 403.]

See *Willson's Cr. Forms*, 745, 746, 815, 817-821; *post*, art. 576 and notes.

Cited, *Day v. State*, 61 App. 114, 134 S. W. 215; *Bradberry v. State* (Cr. App.) 152 S. W. 169.

Requisite 1.—See *ante*, art. 451, and notes.

See *West v. State*, 27 App. 472, 11 S. W. 482.

An information must commence "in the name and by the authority of the state of Texas." *Saine v. State*, 14 App. 144; *Jefferson v. State*, 24 App. 535, 7 S. W. 244; *Calvert v. State*, 8 App. 538; *Treadaway v. State*, 61 App. 546, 135 S. W. 147.

The first count may be looked to to supply allegations as to commencement in subsequent counts. *Dancey v. State*, 35 App. 615, 34 S. W. 113, 938.

Requisite 2.—See *ante*, art. 451, and notes.

An information must show that it is presented in a court having jurisdiction of the offense charged. *Davis v. State*, 2 App. 184, and cases cited; *Thornberry v. State*, 3 App. 36; *Bowen v. State*, 28 App. 498, 13 S. W. 787, citing *Thomas v. State*, 18 App. 213.

An information may be presented in vacation. *State v. Corbit*, 42 Tex. 88; *Rasberry v. State*, 1 App. 664.

An information filed in county court, charging that accused sold intoxicating liquors on September 29, 1909, which was after Act April 24, 1909 (Acts 31st Leg. [1st Ex. Sess.] c. 35), went into effect, and that the sale was made after an election had been held in the territory, was insufficient in failing to show that the county court had jurisdiction of the offense, for the county court has jurisdiction only of misdemeanors, and, if the election was held after act of April 24, 1909, went into existence, the sale was a felony. *Head v. State*, 64 App. 112, 141 S. W. 536.

Though an information for violating the local option law is required, by subdivision 2, to allege the date of the local option election by which the law was put in force, such allegation being no part of the offense, failure of an information to include it did not render it fatally defective, under article 476, providing that formal defects in indictments shall be disregarded, which is made applicable to informations by article 480. *Meyer v. State* (Cr. App.) 145 S. W. 919.

— **Complaint as prerequisite.**—See notes to art. 479, *post*.

Requisite 3.—See *ante*, article 477 and notes.

An assistant county attorney, though designated a "deputy county attorney," is a "proper" officer. *Wilkins v. State*, 33 App. 320, 26 S. W. 409. And see *Adams v. State*, 47 App. 35, 81 S. W. 963.

An information by a county attorney must allege that he presents to the court that accused has committed the offense charged, and the second count of an information which reads, "and the affiant aforesaid, upon his oath aforesaid, fur-

ther deposes and says that on said above date and at said time and place," is objectionable as merely stating that affiant charged accused with committing an offense, but not presenting that accused committed the offense charged. *Compton v. State*, 71 App. 7, 158 S. W. 515.

An information prepared and presented by an attorney who was not county attorney and who had not previously been appointed to prosecute the case, is not good, and a motion to quash should have been sustained. *Sims v. State*, 72 App. 533, 162 S. W. 1154.

Where the complaint was valid, but the information was invalid because signed by an attorney not appointed to prosecute, on reversal of the case, the county attorney can file another information and proceed with the prosecution. *Sims v. State*, 72 App. 533, 162 S. W. 1154.

Requisite 4.—See ante, article 451, and note.

It must contain the name of the person accused, etc. *Pancho v. State*, 25 App. 402, 8 S. W. 476. The information may designate the defendant by name without following the complaint, which designates him, also, with an alias. *Harrison v. State*, 6 App. 256. If the name of the accused is stated wrong, it may be corrected on his suggestion, but not on that of the prosecuting officer. *Patillo v. State*, 3 App. 442; *Bassett v. State*, 4 App. 41; *Wilson v. State*, 6 App. 154. A variance between the name of the accused as stated in the complaint and that stated in the information, is fatal. *McDevro v. State*, 23 App. 429, 5 S. W. 133. See, also, *Steinberger v. State*, 35 App. 492, 34 S. W. 617.

— **Suggestion of true name, and amendment.**—See arts. 559–563, 567, post, and notes.

Requisite 5.—See ante, article 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 App. 83; *Smith v. State*, 25 App. 454, 8 S. W. 645, and cases cited; *Orr v. State*, 25 App. 453, 8 S. W. 644.

Information is insufficient if it fails to allege the venue of the offense. *Orr v. State*, 25 App. 453, 8 S. W. 644; *Smith v. State*, 25 App. 454, 8 S. W. 645.

An information charging that in a certain town, voting precinct, and county of the state, while a public election was being held on a certain day, defendant then and there unlawfully and wilfully gave to another intoxicating liquor, sufficiently charged, by the use of the words "then and there," that the offense was committed in the town specified. *Walker v. State* (Cr. App.) 151 S. W. 318.

— **Requisites of complaint as to venue.**—See notes to art. 479, post.

Requisite 6.—Ante, art. 451 and notes.

It must allege the time of the commission of the offense, and the time must be a date anterior to the presentment of the information, and not so remote as to show that the offense is barred by limitation. *Blake v. State*, 3 App. 149; *York v. State*, Id. 15; *Swancoat v. State*, 4 App. 105; *Brewer v. State*, 5 App. 248; *State v. Tandy*, 41 Tex. 291; *Williams v. State*, 12 App. 226.

See a sufficient allegation of time. *Wilson v. State*, 15 App. 150.

The complaint can not be resorted to, to supply the allegation of time in the information. *Kennedy v. State*, 22 App. 693, 3 S. W. 480, and cases cited.

An information that "heretofore on the 1st day of April, etc.," and which was filed on April 1st, alleges the date of the offense before the filing of the information. *Scott v. State* (Cr. App.) 56 S. W. 62.

Under an information, filed November 25th, charging that defendant unlawfully carried knuckles on November 23d, evidence that the state's witness took them from him on November 27th would not sustain a conviction, since an information cannot charge an offense to be committed in the future. *Graso v. State* (Cr. App.) 155 S. W. 209.

On motion in arrest it was urged that the information did not charge that the crime was committed before presenting the information. The information, as well as the complaint, sworn to on October 2d, charged the offense to have been committed on September 28th. The information bore no file mark, but it was shown to have been in fact filed on the same day as the complaint. Held, that the court properly ordered the information to be filed nunc pro tunc as of October 2d. *Hall v. State*, 70 App. 240, 156 S. W. 644.

The date laid in an information is immaterial, and the conviction may be had upon evidence showing the commission of the offense charged at any time within the period of limitations and prior to the filing of the information. *Sanders v. State*, 70 App. 209, 156 S. W. 927.

A complaint and information sworn to on July 1, 1913, charging the commission of an offense on July 29, 1913, was fatally defective. *Warner v. State* (Cr. App.) 167 S. W. 1109.

— **Variance between information and complaint.**—See notes to art. 479, post.

Requisite 7.—Ante, art. 451, subd. 7, and notes.

The averments charging the offense must be direct, positive, and certain, and not by way of argument and inference. *Hunt v. State*, 9 App. 404; *Moore v. State*, 7 App. 608; *Thomas v. State*, 12 App. 227; *Proffit v. State*, Id. 233; *Brown v. State*, 11 App. 451; *Woodward v. State*, 33 App. 554, 28 S. W. 204.

The rules with respect to the allegations in indictments and the certainty required, are applicable, also, to informations. Post, art. 480. *State v. Elliott*, 41 Tex. 224; *Calvert v. State*, 8 App. 538; *Rasberry v. State*, 1 App. 664.

The offense must be set forth in plain and intelligible words. *Lasindo v. State*, 2 App. 59; *Swancoat v. State*, 4 App. 105; *Walton v. State*, 12 App. 117.

— **Bad spelling and grammatical errors.**—See notes to art. 476, ante.

Requisite 8.—An information must conclude "against the peace and dignity of the state." *Calvert v. State*, 8 App. 538; *Saine v. State*, 14 App. 144; *Thompson*

v. State, 15 App. 39; Raspberry v. State, 1 App. 664; Wilson v. State, 33 Tex. 548; ante, art. 451, subd. 8 and notes; Wright v. State, 37 App. 3, 35 S. W. 150, 38 S. W. 811; Wood v. State, 27 App. 538, 11 S. W. 525; Treadaway v. State, 61 App. 546, 135 S. W. 147.

In this case information is insufficient because the concluding clause, "against the peace and dignity of the state," is omitted. But the complaint upon which it is founded being sufficient, the prosecution is not dismissed, but is remanded that new information may be preferred. Wood v. State, 27 App. 538, 11 S. W. 525. Further on informations, see Robinson v. State, 25 App. 111, 7 S. W. 531; Jones v. State, 30 App. 426, 17 S. W. 1080.

It is not required that each count should so conclude. Alexander v. State, 27 App. 533, 11 S. W. 628, citing West v. State, 27 App. 472, 11 S. W. 482; Dancy v. State, 35 App. 615, 34 S. W. 113, 938.

— **Process.**—Process issued by a city court must conclude, "against the peace and dignity of the state." Leach v. State, 36 App. 248, 36 S. W. 471, and cases cited.

Requisite 9.—It does not invalidate the information that it is not signed officially by the district or county attorney, if it purports to have been presented by him. But the better practice is that the officer presenting it should sign it officially. Raspberry v. State, 1 App. 664. See, also, Wilkins v. State, 33 App. 320, 26 S. W. 409.

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 App. 426, 17 S. W. 1080, citing Raspberry v. State, 1 App. 664.

The omission of the signature may be cured by amendment. Holcomb v. State, 60 App. 408, 132 S. W. 362.

Variance between information and complaint.—See notes to art. 479, post.

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.]

See Willson's Cr. Forms, 745, 747.

See, also, as to complaints, ante, arts. 34, 35, 36, 268, 269, 273, 274, 275, 276, and notes; post, arts. 972, 973.

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| 1. Presentation in vacation. | 9. Designation or description of accused. |
| 2. Necessity of complaint in general. | 10. Signature. |
| 3. Necessity of information on complaint. | 11. Verification. |
| 4. Variance between complaint and information. | 12. Filing. |
| 5. Authority to make complaint. | 13. Amendment and correction of complaint. |
| 6. Authority to take complaint. | 14. Taking advantage of defects on appeal. |
| 7. Force and requisites of complaint. | |
| 8. Time and place of offense. | |

1. Presentation in vacation.—An information may be presented in vacation. State v. Corbit, 42 Tex. 88; Raspberry v. State, 1 App. 664.

2. Necessity of complaint in general.—Information without a complaint is invalid. Neiman v. State, 29 App. 360, 16 S. W. 253; Kinley v. State, 29 App. 532, 16 S. W. 339; Jennings v. State, 30 App. 428, 18 S. W. 90; Wilson v. State, 27 App. 47, 10 S. W. 749, 11 Am. St. Rep. 189; Domingues v. State, 37 App. 425, 35 S. W. 973; Harden v. State, 62 App. 84, 136 S. W. 768; Spowles v. State (Cr. App.) 143 S. W. 622; Bradberry v. State (Cr. App.) 152 S. W. 169; Compton v. State, 71 App. 7, 158 S. W. 515.

A valid complaint is essential to the sufficiency of an information, and to the jurisdiction of the county court. Thornberry v. State, 3 App. 36; Turner v. State, 3 App. 551. See, also, Wilson v. State, 27 App. 47, 10 S. W. 749, 11 Am. St. Rep. 189; Smith v. State, 27 App. 50, 10 S. W. 751.

Information to be sufficient to charge an offense against the laws of this state must be predicated upon an affidavit or complaint which in substance charges the same offense as that charged in the complaint. Robinson v. State, 25 App. 111, 7 S. W. 531.

A complaint is an indispensable prerequisite to an information for disturbing a congregation. McVea v. State, 35 App. 1, 26 S. W. 834, 28 S. W. 469.

It is the duty of an officer to make an arrest, even without a warrant, where he is told by a credible person that one is carrying a pistol. Condron v. State (Cr. App.) 155 S. W. 253.

3. Necessity of information on complaint.—An information must be founded upon the sworn complaint of a credible person, and the record on appeal must show a complaint, or the conviction will be set aside. Davis v. State, 2 App. 184; Daniels v. State, Id. 353; Thornberry v. State, 3 App. 36; Deon v. State, Id. 435; Turner v. State, Id. 551; Casey v. State, 5 App. 462; Perez v. State, 10 App. 327; Lackey v. State, 14 App. 164; Rose v. State, 19 App. 470; Wadgyr v. State, 21 App. 459, 2 S. W. 768. And the prosecution dismissed. Diltz v. State, 56 App. 127, 119 S. W. 92.

It is not a valid objection to an information that it is founded upon a complaint upon which a previous information had been based, but which previous information had been dismissed. *Goode v. State*, 2 App. 520; *Boyd v. State*, 11 App. 80; *Johnson v. State*, 19 App. 545.

A defective complaint upon which an information has been presented can not be supplied by a new complaint so as to make good the information. A new information should be presented upon the new complaint. *Paschal v. State*, 9 App. 205.

An information as to all material, substantial matters, must be complete within itself, without reference to the complaint upon which it is based. But, on appeal, where the information is bad, but the complaint is good, the conviction will be set aside, but the prosecution will not be dismissed, as another information may be brought upon the complaint in the trial court. *Pittman v. State*, 14 App. 576.

It is wholly unnecessary for an information to state that it is founded upon a complaint in writing under oath, or to make any mention whatever of the complaint. The law requires no more than that such complaint be filed with the information. *Johnson v. State*, 17 App. 230.

Motion to quash bail because there is no information filed on the complaint is untenable. *Coleman v. State*, 32 App. 595, 25 S. W. 286.

The quashal of the information for omitting venue will not vitiate a complaint embracing venue. *Orr v. State*, 25 App. 453, 8 S. W. 644, citing *Johnson v. State*, 19 App. 545; *Lawson v. State*, 13 App. 83.

The 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 App. 32, 35 S. W. 169.

One prosecuted for a misdemeanor in the county court cannot waive failure to file an information, that being a jurisdictional matter. *Ethridge v. State* (Cr. App.) 172 S. W. 784, 786.

An indictment, alleging that accused committed perjury by giving false testimony in the county court on a trial on a complaint charging a violation of the gaming laws, is sufficient for the filing of a complaint in the county court; and arrest thereunder, plea of not guilty, and trial confer jurisdiction on the county court. *Etheridge v. State* (Cr. App.) 175 S. W. 702.

4. Variance between complaint and information.—The material allegations of the information must conform to those of the complaint upon which it is founded, and a want of such conformity will vitiate the information. *Davis v. State*, 2 App. 184; *Daniels v. State*, Id. 353; *Stinson v. State*, 5 App. 31; *Johnson v. State*, 4 App. 594; *Ferguson v. State*, Id. 156; *Hoerr v. State*, Id. 75; *Swink v. State*, 7 App. 73; *Hawthorne v. State*, 6 App. 562; *Williamson v. State*, 5 App. 485; *Collins v. State*, Id. 37; *Calvert v. State*, 8 App. 538; *Cole v. State*, 11 App. 67; *Landrum v. State*, 37 App. 666, 40 S. W. 737; *Chaney v. State*, 59 App. 283, 128 S. W. 614.

A variance between the information and the complaint as to the time of the commission of the offense is fatal. *Hoerr v. State*, 4 App. 75; *Williamson v. State*, 5 App. 485; *Collins v. State*, Id. 37; *Hawthorne v. State*, 6 App. 562; *Swink v. State*, 7 App. 73; *Hefner v. State*, 16 App. 573; *Huff v. State*, 23 App. 291, 4 S. W. 890; *Baumgartner v. State*, 23 App. 335, 5 S. W. 113; *McJunkins v. State*, 37 App. 117, 38 S. W. 994; *Jennings v. State*, 30 App. 428, 18 S. W. 90.

The variance between a complaint, alleging that affiant has good reason to believe, and does believe that accused is guilty of a crime charged, and the information filed by the district attorney, and reciting that it is "founded upon testimony taken in behalf of the state, under oath," does not vitiate the information. *Sandozski v. State* (Cr. App.) 143 S. W. 151.

Where the oath is filed with the information, references in the information to the name of the one signing the complaint may be disregarded as surplusage, and a variance between the two is not fatal. *Germany v. State*, 62 App. 276, 137 S. W. 130, Ann. Cas. 1913C, 477.

Where the complaint charges an assault with "a knife and with a chair," and the information charges that the assault was made with "fists and a chair," the variance is fatal. *Smith v. State*, 57 App. 609, 124 S. W. 665.

A complaint alleged that defendant was concerned in selling intoxicating liquors without a license, while the information charged only a violation of the local option law, without any reference to the law in respect to disorderly houses. Held, that the information was bad for not charging the same offense as that charged by the complaint. *Harden v. State*, 62 App. 84, 136 S. W. 768.

Where the verdict is general, and the affidavit and information contained two counts, that one count in the information is at variance with the affidavit will not be noticed, where the other count is good. *Stuart v. State*, 57 App. 592, 124 S. W. 656.

The particularity requisite in an information is not necessary in the complaint on which it is founded, nor are discrepancies between them of any consequence, provided there is accordance in substance. They should agree as to time and venue, and the names of the defendant and the injured party, and there should be substantial conformity in their allegations descriptive of the offense. *Cole v. State*, 11 App. 67.

Complaint alleged the offense on January 16, 1888; the information January 11, 1888. The variance held immaterial. *Shelton v. State*, 27 App. 443, 11 S. W. 457, 11 Am. St. Rep. 200. The complaint charged John J. and the information Frederick J. Variance held fatal, in effect leaving information without a supporting complaint. *McDevro v. State*, 23 App. 429, 5 S. W. 133; *Juniper v. State*, 27 App. 478, 11 S. W. 483.

Where the information in the beginning alleges that it is made by B, county attorney, but the affidavit on which the information is based is made before C, as county attorney, and the information is signed by C, as county attorney, there is such a variance as to require the information to be quashed. The allegation that

the information is made by B, when the record shows that C is county attorney, cannot be treated as surplusage. *Adams v. State*, 47 App. 35, 81 S. W. 963, 964.

A variance between the complaint and information as to the church shot into by accused held fatal. *Landrum v. State*, 37 App. 666, 40 S. W. 737.

The doctrine of idem sonans has been much enlarged by modern decisions to conform to the rule that a variance, to be material, must be such as would mislead a party to his prejudice, and no injury is shown to the defendant by spelling his name in the complaint "Laun Gentry" and in the information "Lon Gentry." *Gentry v. State*, 62 App. 497, 137 S. W. 696. But "Lewin, Vandali," and "Lewis Vandali," are not being idem sonans. *Chaney v. State*, 59 App. 283, 128 S. W. 614.

The fact that an information names officers to be elected that are not named in the complaint for keeping open a bar on election day is no variance. *Steinberger v. State*, 35 App. 492, 36 S. W. 617. "Daniel H." and "Daniel H. alias Bud H." held no variance. *Harrison v. State*, 6 App. 256.

An information for aggravated assault, which charged that defendant "did strike," is not fatally variant from the affidavit, which charged "did then and there strick." *Stuart v. State*, 57 App. 592, 124 S. W. 656.

Where a complaint charged defendant with an aggravated assault on "on M. W.," and the information charged defendant with an aggravated assault on "one M. W.," the second "on" in the complaint was evidently meant for the word "one," but is surplusage, and there is no variance between the complaint and information. *Gentry v. State*, 62 App. 497, 137 S. W. 696.

5. Authority to make complaint.—Complaint must be made by a credible person, and a credible person is one who is competent to testify and worthy of belief. *Wilson v. State*, 27 App. 47, 10 S. W. 749, 11 Am. St. Rep. 180; *Dodson v. State*, 35 App. 571, 34 S. W. 754; *Thomas v. State*, 14 App. 70; *Nixon v. Armstrong*, 38 Tex. 296; *Jones v. State*, 58 App. 313, 125 S. W. 914.

A county attorney cannot make a complaint unless he was the only witness to the offense. *Daniels v. State*, 2 App. 353.

An unpardoned convict is not competent to make a valid complaint. *Perez v. State*, 10 App. 327.

Husband cannot make complaint against wife for adultery. *Thomas v. State*, 14 App. 70.

6. Authority to take complaint.—County attorneys. *Rambo v. State*, 43 App. 271, 64 S. W. 1039; *Thomas v. State*, 37 App. 142, 38 S. W. 1011; *Williams v. State*, 50 App. 269, 96 S. W. 47.

The affidavit may be taken before a justice of the peace and delivered to the county attorney. *Lindley v. State*, 57 App. 346, 123 S. W. 141; *Gentry v. State*, 62 App. 497, 137 S. W. 696.

De facto officers. *Dane v. State*, 36 App. 86, 35 S. W. 661.

Assistant county attorney. *Kelly v. State*, 36 App. 481, 38 S. W. 39; *Moore v. State*, 36 App. 574, 38 S. W. 209; *Copeland v. State*, 36 App. 575, 38 S. W. 210; *Wilkins v. State*, 33 App. 320, 26 S. W. 409.

Deputy county attorney. *Wilkins v. State*, 33 App. 320, 26 S. W. 409; *Dane v. State*, 36 App. 86, 35 S. W. 661.

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 App. 142, 38 S. W. 1011.

No article of the penal code or code of criminal procedure authorizes city attorneys to administer oaths or affidavits generally. *Johnson v. State*, 47 App. 580, 85 S. W. 274.

A county judge can administer an oath to one swearing to a complaint charging another with an offense. *Stapp v. State*, 53 App. 158, 109 S. W. 1095.

7. Form and requisites of complaint.—The same particularity is not required as in an indictment, and a substantial compliance with the statute will suffice. *Bell v. State*, 18 App. 53, 51 Am. Rep. 293, citing *Arrington v. State*, 13 App. 551; *Pittman v. State*, 14 App. 576; *Brown v. State*, 11 App. 451.

Complaint need not, though the information must, commence, "in the name and by the authority of the state." *Johnson v. State*, 31 App. 464, 20 S. W. 980, citing *Jefferson v. State*, 24 App. 535, 7 S. W. 244.

But a complaint before a justice of the peace must be "in the name and by the authority of the State of Texas." *Ex parte Jackson* (Cr. App.) 96 S. W. 924.

A complaint charging the unlawful riding on a train of the "G., H. & S. A. Ry. Co.," there being no explanation as to the meaning of the letters, did not support an information charging that the train was on the track of the Galveston, Harrisburg & San Antonio Railway Company. *Cardenas v. State*, 58 App. 109, 124 S. W. 953.

In a prosecution for violation of Acts 30th Leg. 1907, pp. 224-228, c. 123, forbidding the practice of medicine without registering and filing for record the certificate required, the complaint and information need not negative the exceptions in the act, where they are not contained in the enacting clause, which defines the offense, since the prosecution is not required to anticipate defenses arising under the act. *Newman v. State*, 58 App. 223, 124 S. W. 956.

Where an affidavit was made by B., and the jurat shows that it was sworn to and subscribed before "W. A. Daniel, Justice of the Peace, Precinct No. —, Fannin County, Texas," and was indorsed and filed: "Affidavit. The State of Texas versus Laun Gentry. Filed the 30th day of April, 1910. W. A. Daniel, Justice of the Peace, Precinct No. 6, Fannin County, Texas"—although the precinct of which magistrate is justice is left blank, it is sufficient, especially when taken in connection with the filing indorsed thereon. *Gentry v. State*, 62 App. 497, 137 S. W. 696.

A criminal complaint or information is not subject to a motion to quash because of surplusage therein. *Figueroa v. State*, 71 App. 371, 159 S. W. 1188.

In a prosecution for wife desertion, where the information alleged that the

county attorney presented to the court that on a certain date, before the filing of such information, the defendant deserted his wife, etc., not referring to the complaint, which alleged that theretofore defendant deserted his wife without justification and refused to provide for her support, and that she was in destitute and necessitous circumstances, such complaint and information sufficiently charged the offense as against general demurrer; it not being necessary that the information should make mention of the complaint. *Herrera v. State* (Cr. App.) 175 S. W. 696.

8. Time and place of offense.—See *Smith v. State*, 25 App. 454, 8 S. W. 645.

Complaint must show an offense anterior to its date. *Huff v. State*, 23 App. 291, 4 S. W. 890, and cases cited; *Lanham v. State*, 9 App. 232; *Williams v. State*, 17 App. 521; *Jennings v. State*, 30 App. 428, 18 S. W. 90; *Womack v. State*, 31 App. 41, 19 S. W. 605; *Petty v. State*, 60 App. 64, 131 S. W. 215; *Cowan v. State* (Cr. App.) 155 S. W. 214; *Martin v. State*, 72 App. 454, 162 S. W. 1145.

But see *Williams v. State*, 17 App. 521, holding that it is sufficient if the information alone conforms to this rule.

The complaint upon which the information is founded must allege the venue of the offense. *Smith v. State*, 3 App. 549, and cases cited; *Strickland v. State*, 7 App. 34.

A complaint stating an impossible date is wholly invalid. *Jennings v. State*, 30 App. 428, 18 S. W. 90, and cases cited; *Hefner v. State*, 16 App. 573.

An affidavit made on a certain day, charging an offense on that date, was defective for not specifically alleging that it was committed before the complaint was made. *Martin v. State*, 72 App. 454, 162 S. W. 1145. *Contra*, *Williams v. State*, 17 App. 521.

When a complaint stated in its caption the proper county and the state, and charged that the defendant did "then and there" commit the offense, it was held sufficient. *Strickland v. State*, 7 App. 34.

An allegation of venue in a complaint will not supply the want of such allegation in an information. *Lawson v. State*, 13 App. 83.

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 App. 291, 4 S. W. 890, and cases cited.

A valid information and complaint filed by B., alleging an offense committed on February 2, 1908, could not aid a defective information and complaint filed by S. alleging an offense committed on February 7, 1908, though both were against the same person. *Treadaway v. State*, 61 App. 546, 135 S. W. 147.

9. Designation or description of accused.—"George" and "Georg" are idem sonans. *Hall v. State*, 32 App. 594, 25 S. W. 292.

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 App. 68, 29 S. W. 157, and cases cited.

Complaint charging "Bill" (or W. H.) Gaines is not objectionable as being in the alternative. *Gaines v. State*, 46 App. 212, 78 S. W. 1076.

Defendant's name, if unknown should be so stated, and, if not known, some reasonable description of him should be given. *Mistrot v. State*, 72 App. 408, 162 S. W. 833.

10. Signature.—Where complaint is signed and sworn to, affiant's name need not appear in the body of the instrument. *Upton v. State*, 33 App. 231, 26 S. W. 197; *Malz v. State*, 36 App. 447, 34 S. W. 267, 37 S. W. 748; *Singh v. State* (Cr. App.) 146 S. W. 891.

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 App. 447, 34 S. W. 267, 37 S. W. 748.

It will be presumed in the absence of proof that a complaint signed: John X
his
mark
Steele was signed by complainant. *Taylor v. State*, 44 App. 437, 72 S. W. 181.

This article does not require that the complaint shall be signed by the affiant. *Lewis v. State*, 50 App. 331, 97 S. W. 481.

Objection that affiant signed by mark comes too late on motion in arrest. *Lewis v. State*, 50 App. 331, 97 S. W. 481.

11. Verification.—On information and belief. *Green v. State*, 62 App. 50, 136 S. W. 467; *Brown v. State*, 11 App. 451; *Clark v. State*, 23 App. 260, 5 S. W. 115; *Anderson v. State*, 34 App. 96, 29 S. W. 384; *Dodson v. State*, 35 App. 571, 34 S. W. 754; *Hall v. State*, 32 App. 594, 25 S. W. 292, and cases cited; *Fricks v. State*, 58 App. 100, 124 S. W. 922; *Wright v. State*, 63 App. 429, 140 S. W. 1105.

Jurat of the officer is essential to sufficiency. *Jennings v. State*, 30 App. 428, 18 S. W. 90, and cases cited; *Morris v. State*, 2 App. 503; *Dishough v. State*, 4 App. 158; *Lanham v. State*, 9 App. 232; *Robertson v. State*, 25 App. 529, 8 S. W. 659; *Neiman v. State*, 29 App. 360, 16 S. W. 253; *Montgomery v. State*, 60 App. 303, 131 S. W. 1087.

Recitals in jurat control those of the complaint. *Lanham v. State*, 9 App. 232.

A complaint without a jurat will not support an information, and after conviction the jurat can not be added or amended. *Scott v. State*, 9 App. 434.

In a jurat signed "Wm. Greer, J. P.," the letters "J. P." can not be inferred to mean "justice of the peace." *Neiman v. State*, 29 App. 360, 16 S. W. 253.

The information was not sufficient, where, when it was filed, the complaint was not sworn to and the affidavit was not made to it. *Sproles v. State* (Cr. App.) 143 S. W. 622.

12. Filing.—An information will not be held invalid because the complaint upon which it is apparently based and which is found among the papers in the case, does not have the file mark indorsed upon it. *State v. Elliott*, 41 Tex. 224.

And where a complaint and information are attached together, a file mark on the information will be considered as relating to both papers. *Stinson v. State*, 5 App. 31.

A complaint attached to a filed information will be considered filed. *Stinson v. State*, 5 App. 31.

If the complaint and information are written on the same sheet of paper, one file mark will answer for both. An objection that the complaint was not "filed" must be taken in limine. *Schott v. State*, 7 App. 616.

One file mark will do for both complaint and information written on the same sheet of paper. *Schott v. State*, 7 App. 616.

An information may be filed at any time before the offense is barred by limitation, although the complaint may have been filed long before the time of presenting the information. *Roberson v. State*, 15 App. 317.

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 App. 532, 16 S. W. 339.

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 App. 595, 25 S. W. 286.

A motion to quash information because there is no file mark on the complaint must be made before the trial, and not in arrest of judgment. *Jessel v. State*, 42 App. 72, 57 S. W. 826.

Where the information and affidavit were fastened and folded together, and filed, as shown by an indorsement on the outside of the bundle made by the folding of the two papers, the information was sufficiently filed. *Wooten v. State*, 57 App. 89, 121 S. W. 703.

Under the provision of this article that an information shall not be presented until oath has been made by some credible person, charging the defendant with an offense, the making of the complaint and the filing of the complaint in the county court is the commencement of a criminal action, and hence a prosecution for the bribery of a witness in a pending cause cannot be defeated because the state fails to show that an information has been filed, where it does show an affidavit and a subpoena, etc. *Smalley v. State*, 59 App. 95, 127 S. W. 225.

A motion to quash an information will not lie because the complaint was filed April 30, 1910, and the information not until June 9, 1910. *Gentry v. State*, 62 App. 497, 137 S. W. 696.

The clerk not having, when the information and complaint were filed, made any indorsement of filing thereon, the court may thereafter permit him to do so as of the date of filing. *Brogdon v. State*, 63 App. 475, 140 S. W. 352.

The delivery of the information and complaint to the clerk is a "filing" in law. *Brogdon v. State*, 63 App. 475, 140 S. W. 352.

The court may permit the clerk to note on the information and complaint the proper file marks; he not having done so when they were filed. *Brogdon v. State*, 63 App. 473, 140 S. W. 353.

Where the objection was in no way raised in the court below, an accused cannot, on appeal, complain that the conviction cannot be sustained because of the want of a file mark on the complaint. *Golden v. State* (Cr. App.) 146 S. W. 910.

One convicted of a misdemeanor cannot complain that the complaint bore no file mark by the clerk; the error being wholly harmless. *Golden v. State* (Cr. App.) 146 S. W. 945.

An information charging accused with the crime of pulling down the fence of another which was filed on December 22d is insufficient though reciting the filing of a complaint on December 20th, where the jurat attached to the complaint bore no date and the file mark was the same as that of the information. *Bradberry v. State* (Cr. App.) 152 S. W. 169.

On motion in arrest it was urged that the information did not charge that the crime was committed before presenting the information. The information, as well as the complaint, sworn to on October 2d, charged the offense to have been committed on September 28th. The information bore no file mark, but it was shown to have been in fact filed on the same day as the complaint. Held, that the court properly ordered the information to be filed nunc pro tunc as of October 2d. *Hall v. State*, 70 App. 240, 156 S. W. 644.

While it would be too late to file the information, after announcement of ready for trial and the parties had gone before the jury, if it had been placed with the papers prior to the calling of the case, and the court's attention had been called thereto, it would be deemed filed as of the date on which it was placed with the clerk. *Landreth v. State* (Cr. App.) 166 S. W. 503.

An objection that the information was not filed by the clerk could not be first raised in the motion for new trial; it being necessary to raise such objection at trial. *Landreth v. State* (Cr. App.) 166 S. W. 503.

13. Amendment and correction of complaint.—See *Williams v. State*, 34 App. 100, 29 S. W. 472; *Morris v. State*, 2 App. 503; *Patillo v. State*, 3 App. 442; *Dis-hough v. State*, 4 App. 158; *Wilson v. State*, 6 App. 154; *Scott v. State*, 9 App. 434; *Huff v. State*, 23 App. 291, 4 S. W. 890; *Neiman v. State*, 29 App. 360, 16 S. W. 253; *Flournoy v. State*, 51 App. 29, 100 S. W. 151; *Sanders v. State*, 52 App. 156, 105 S. W. 803; *Abbey v. State*, 55 App. 232, 115 S. W. 1191; *Cubine v. State* (Cr. App.) 151 S. W. 301.

Under this article it was held, that, while an unauthenticated affidavit could have been corrected, after accused had been arrested and placed under bond, by permission of the court, it was improper for the district attorney to attach his jurat thereto at that time without such permission, and an information based on an affidavit so authenticated was invalid. *Montgomery v. State*, 60 App. 303, 131 S. W. 1087.

If a complaint is attacked as not officially signed by the officer taking it, etc., so as to raise a serious question of its legality on that ground, it is the better and safer practice to file a new, unquestioned complaint, or other papers, as the case may be, to prevent incumbering the record with numerous papers, the validity of which is uncontroverted. *Graham v. State*, 72 App. 9, 160 S. W. 714.

As the preceding article does not require the information to state that it is founded upon a complaint in writing under oath, though this article forbids the county attorney to file an information until a complaint, under oath, has been made, when an information based on a proper complaint duly filed recited that fact, but did not contain the name of the affiant, the insertion of the name of the affiant was not erroneous, though made without the consent of the court, and during trial. *Murphy v. State* (Cr. App.) 164 S. W. 1.

14. **Taking advantage of defects on appeal.**—Where a complaint and information are defective in a material point, advantage may be taken thereof on a motion for rehearing on appeal. *Hatch v. State* (Cr. App.) 174 S. W. 1062.

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.]

See Willson's Cr. Forms, 745; ante, arts. 451 to 460 inclusive and notes.

Rules applicable to informations.—The rules as to indictments apply to informations. *State v. Elliott*, 41 Tex. 224; *Bowen v. State*, 28 App. 498, 13 S. W. 787; *Meyer v. State* (Cr. App.) 145 S. W. 919; *Figueroa v. State*, 71 App. 371, 159 S. W. 1188.

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.

See notes under article 476, ante.

See Willson's Cr. Forms, 2.

General verdict under indictment containing different counts, see notes under article 770.

For other decisions as to the requisites of indictments in particular cases, examine under the heads of the different offenses in the Penal Code.

Cited, *Ferrell v. State* (Cr. App.) 152 S. W. 901.

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| 1. Charging offense in different counts in general. | 28. — Murder. |
| 2. Former law. | 29. — Rape and incest. |
| 3. Different dates in different counts. | 30. — Burglary and theft. |
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| 9. Plural counts in misdemeanor cases. | 36. — Unlawfully practicing medicine. |
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| 12. Adultery. | 39. — Assault. |
| 13. Assault. | 40. — Assault to murder, maiming, and robbery. |
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| 16. Killing animals. | 43. — Rape and assault to rape. |
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| 20. — Misdemeanor and felony. | 47. — Burglary. |
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| 22. — Violation of liquor law. | 49. — Bringing stolen property into state. |
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| 24. — Pandering. | 51: Charge of court submitting counts. |
| 25. — Forgery. | |
| 26. — Assault. | |
| 27. — Assault and robbery. | |

1. **Charging offense in different counts in general.**—An indictment may and should comprise as many counts as are necessary to meet the contingencies of the evidence. *Dill v. State*, 1 App. 278; *Weathersby v. State*, Id. 643; *Waddell v. State*, Id. 720; *Barnwell v. State*, Id. 745; *Irving v. State*, 8 App. 49; *Mathews v. State*, 10 App. 279; *Gonzales v. State*, 12 App. 657; *Boles v. State*, 13 App. 650; *Dovalina v. State*, 14 App. 312; *Bean v. State*, 17 App. 60; *Shubert v. State*, 20 App. 320; *Masterson v. State*, Id. 574; *Green v. State*, 21 App. 64, 17 S. W. 262; *Keeler v. State*, 15 App. 111; *Chester v. State*, 23 App. 577, 5 S. W. 125.

The word "count" is used when, in one finding by the grand jury, the essential

parts of two or more separate indictments, for causes apparently distinct, are combined, the allegations for each being termed count, and the whole an indictment. An indictment in several counts is, therefore, a collection of separate bills against the same defendant, under one caption, and found and indorsed collectively as true by the grand jury. The object is what it appears to be, namely, in fact to charge the defendant with distinct offenses, under the idea that the court may, as often as it will, allow them to be tried together, thus averting from both parties the burden of two or more trials; or, in another class of cases, to vary what is meant to be the one accusation, so as, at the trial, to avoid an acquittal by an unforeseen lack of harmony between allegations and proofs, or a legal doubt as to what form of charge the court will approve. *Boren v. State*, 23 App. 28, 4 S. W. 463.

If several offenses are embraced in the same general definition, and are punishable in the same manner, they are not distinct offenses, and may be charged in the same count of the indictment." Hence, an indictment charging that accused unlawfully played a game of cards at a "tavern and inn, and in a room in and attached to said tavern and inn," is sufficient, and not obnoxious to the objection that it is uncertain and duplicitous. *Comer v. State*, 26 App. 509, 10 S. W. 106.

Quashal of one or more counts does not necessarily affect other counts in an indictment. *West v. State*, 27 App. 472, 11 S. W. 482; *Boren v. State*, 23 App. 28, 4 S. W. 463.

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 App. 24, 14 S. W. 71, and cases cited.

Conviction can be had only on one count. *Crawford v. State*, 31 App. 51, 19 S. W. 766.

An indictment which in one count charges the keeping and exhibiting of a gaming table and bank, is not duplicitous. *Tellison v. State*, 35 App. 388, 33 S. W. 1082.

Same transaction may be set up in different counts although the counts seem to describe different transactions. *Dawson v. State* (Cr. App.) 55 S. W. 49.

An indictment alleging that defendant engaged in the business on a certain date, and on each succeeding day for one year, is fatally defective because it alleges a number of offenses in one count, because each day constituted an offense. *Scales v. State*, 46 App. 296, 81 S. W. 948, 66 L. R. A. 730, 108 Am. St. Rep. 1014.

An indictment may contain several counts charging the same offense as the pleader who prepares it may think necessary to insert, in order to meet any contingency that may arise under the facts. *Johnson v. State*, 52 App. 201, 107 S. W. 53.

It is proper pleading to charge as many counts as necessary growing out of a single transaction to meet any probable phase of the testimony that may be developed upon the trial. *Hawthorn v. State*, 62 App. 114, 136 S. W. 776.

An indictment in the language of the statute, alleging that accused unlawfully established a raffle and disposed by raffle of personal property worth less than \$500, does not charge two distinct offenses, but proof of the establishment of a raffle, or of the disposing of property by such means, proves the offense. *Hickman v. State*, 64 App. 161, 141 S. W. 973.

An indictment for felony may contain separate and distinct counts to meet the proof, but all must relate to the same transaction, while an indictment for misdemeanor may charge separate and distinct offenses if contained in separate and distinct counts. *Golden v. State*, 72 App. 19, 160 S. W. 957.

2. **Former law.**—Before the enactment of the preceding article it was permissible to charge two or more offenses in separate counts of the same indictment. *Boles v. State*, 13 App. 650; *Dill v. State*, 1 App. 278; *Weathersby v. State*, Id. 643; *Waddell v. State*, Id. 720; *Barnwell v. State*, Id. 745; *Dalton v. State*, 4 App. 333.

3. **Different dates in different counts.**—Each day of the keeping of a disorderly house may be charged in different counts as a separate offense. *Hall v. State*, 32 App. 474, 24 S. W. 407.

Different dates in different counts do not vitiate conviction nor require arrest of judgment. *Shuman v. State*, 34 App. 69, 29 S. W. 160.

In a prosecution for knowingly permitting a house controlled by accused to be used as a house of prostitution, the state may allege the offense to have been committed on each of several days in different counts, and sustain a conviction on each count, if the evidence justifies the verdict. *Clyman v. State* (Cr. App.) 165 S. W. 231.

4. **Allegations in count as supplying defects in others.**—Each separate count should charge the defendant as if he had committed a distinct offense, because it is upon the principle of joinder of offenses that the joinder of counts is admitted. Therefore, we must look to the allegations of each count to determine its sufficiency, just as though it was the only count in the indictment; and when thus tested and found sufficient, we need look no farther. But if not sufficient on its face, we may then look to the preceding count or counts, for auxiliary allegations to supply its defects. *Boren v. State*, 23 App. 28, 4 S. W. 463; *Boles v. State*, 13 App. 650.

If the first count alleges venue, it is good as to all subsequent counts. *Morgan v. State*, 31 App. 1, 18 S. W. 647.

Omission of defendant's name in second of two counts cannot be supplied by reference to first count. *Powell v. State*, 42 App. 12, 57 S. W. 95.

5. — **Commencement and conclusion.**—The commencement clause in article 451 applies to every count in the indictment, and does not have to be repeated seriatim. *West v. State*, 27 App. 472, 11 S. W. 482; *Dancey v. State*, 35 App. 615, 34 S. W. 113, 938, and cases cited.

It is not necessary that each count shall conclude with the words, "against the peace and dignity of the state," it being sufficient if the instrument as a whole so concludes. *Alexander v. State*, 27 App. 533, 11 S. W. 628.

6. **Numbering counts.**—Accused cannot complain because some one marked in pencil, on the margin of the indictment, figures in brackets, numbering the several counts. *Webb v. State*, 63 App. 207, 140 S. W. 95.

7. **Distinct offenses in same transaction.**—If the transaction be the same, a count for theft and one for illegally marking and branding may properly be inserted in the same bill though the offenses be not the same. *Armstrong v. State*, 28 App. 526, 13 S. W. 864. See, also, as to counts, *West v. State*, 27 App. 472, 11 S. W. 482; *Mason v. State*, 29 App. 24, 14 S. W. 71; *Weihsen v. State*, 30 App. 623, 18 S. W. 300; *McKenzie v. State*, 32 App. 568, 25 S. W. 426, 40 Am. St. Rep. 795.

May charge adultery in one count and fornication in another. *Garland v. State*, 51 App. 643, 104 S. W. 898; *Cosgrove v. State*, 37 App. 249, 39 S. W. 367, 66 Am. St. Rep. 802.

An indictment containing several counts charging offenses growing out of the same transaction is good as against a motion to quash because of the counts. *Day v. State*, 62 App. 527, 138 S. W. 123.

An indictment charging in one count that defendant did unlawfully injure the fence of a certain person, and in another count that he stole wire from such person, was not invalid as containing counts not arising out of the same transaction. *Skinner v. State* (Cr. App.) 154 S. W. 1007.

The fact that the two counts of an indictment were substantially the same would be no ground to quash it. *Urben v. State* (Cr. App.) 178 S. W. 514.

8. — **Waiver.**—The contention that one count of the indictment undertook to charge two distinct offenses was waived by failure to move to quash before verdict. *Giles v. State* (Cr. App.) 177 S. W. 1167.

9. **Plural counts in misdemeanor cases.**—An indictment may charge distinct misdemeanors in separate counts. *Tucker v. State* (Cr. App.) 145 S. W. 611; *Gould v. State* (Cr. App.) 147 S. W. 247.

Information may contain plural counts charging different misdemeanors. *Alexander v. State*, 27 App. 533, 11 S. W. 628, and cases cited.

An indictment may charge several misdemeanors under one statute in one count. *Warner v. State* (Cr. App.) 147 S. W. 265.

In a statutory misdemeanor case the information may allege the offense to have been committed in all the ways named in the statute, though it may be better to divide the information into separate and distinct counts. *Ray v. State*, 71 App. 268, 158 S. W. 807.

10. **Gaming.**—An indictment charging in one count that accused directly and as agent and employé of another kept and exhibited for gaming a gaming table and bank charges only one offense, as committing the offense directly or as agent of another constitute only different ways in which under the Code the same offense may be committed. *Stevens v. State*, 70 App. 565, 159 S. W. 505.

11. **Disorderly house.**—Different dates, see note, ante.

Where an information charging the offense of keeping a disorderly house was intended to charge only one offense as having been committed in two different ways, only one punishment is authorized: but, if each count was intended to and did charge a separate and distinct offense, a conviction might be had under all and punishment assessed for each count. *Sanders v. State*, 70 App. 209, 156 S. W. 927.

Where an information consisted of two counts, the first charging defendant with keeping a disorderly house in which immoral women were permitted to reside, and the second charging the keeping of a disorderly house in which intoxicating liquors were sold without a license, and the jury found accused guilty, under each count, assessing a separate punishment, the judgment will be sustained; the information, instructions, and verdict showing that accused was found guilty of two distinct offenses and was not receiving double punishment for the same one. *Sanders v. State*, 70 App. 209, 156 S. W. 927.

12. **Adultery.**—Distinct offenses in same transaction, see note, ante.

In a complaint and information for adultery with C., it was proper to charge in one count that accused was married to another person then living, and in another count that C. was so married to another person then living. *Brown v. State* (Cr. App.) 154 S. W. 568.

13. **Assault.**—An indictment for assault may charge different grounds of aggravation in different counts, and in such case, the state will not be compelled to elect. *Waddell v. State*, 1 App. 720.

14. **Burglary.**—Where indictment charges in one count burglary at night, and in another in the daytime, and the evidence shows breaking, the hour of entry is immaterial. *Smith v. State*, 34 App. 123, 29 S. W. 775.

Under art. 481, a count for burglary and a conspiracy to commit burglary may be joined in the same indictment. *Dill v. State*, 35 App. 240, 33 S. W. 126, 60 Am. St. Rep. 37.

15. **Theft.**—Distinct offenses in same transaction, see note, ante.

If the proof upon which the state depends leaves it in doubt whether the offense is theft per se or wilfully driving stock from the range, the indictment should charge both in different counts. *Smith v. State*, 34 Tex. 612.

Theft of several animals belonging to different owners, and taken at the same time, may be prosecuted in one indictment. *Long v. State*, 43 Tex. 467; *Addison v. State*, 3 App. 40; *Taylor v. State*, 25 App. 96, 7 S. W. 861.

An indictment for theft may allege, in one count, ownership and possession in

one person, and in another, ownership in the same person and possession in another holding for him. *Shuman v. State*, 34 App. 69, 29 S. W. 160.

Indictment may include counts for theft and theft from the person, and conviction under the first count operates as acquittal of the second count. *Hooton v. State*, 53 App. 6, 108 S. W. 651; *Flynn v. State*, 47 App. 26, 83 S. W. 206.

Where the indictment charges in separate counts theft and receiving stolen property, a conviction for receiving stolen property is in effect an acquittal of larceny. *Davis v. State*, 61 App. 611, 136 S. W. 45.

16. **Killing animals.**—In all cases of killing animals under P. C. arts. 1231, 1246, the count suggests a count under each article. *Cryer v. State*, 36 App. 621, 37 S. W. 753, 38 S. W. 203.

17. **Duplicity.**—See *Comer v. State*, 26 App. 509, 10 S. W. 106; *Howell v. State*, 29 App. 592, 16 S. W. 533; *Laroe v. State*, 30 App. 374, 17 S. W. 934.

Duplicity in an indictment is the joinder of two or more distinct offenses in one count. If several offenses are embraced in the same general definition and are punishable in the same manner, they are not distinct offenses, and may be charged conjunctively in the same count. *Nicholas v. State*, 23 App. 317, 5 S. W. 239; *Lancaster v. State*, 43 Tex. 520; *State v. Dorsett*, 21 Tex. 656; *State v. Randle*, 41 Tex. 292; *State v. Smith*, 24 Tex. 285; *Weathersby v. State*, 1 App. 643. For instances of duplicity, see *Heineman v. State*, 22 App. 44, 2 S. W. 619; *Hickman v. State*, 22 App. 441, 2 S. W. 640.

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 Tex. 285; *Brown v. State*, 38 App. 537, 44 S. W. 176; *Shuman v. State*, 34 App. 69, 29 S. W. 160; *Oxshier v. State*, 38 App. 499, 43 S. W. 335; *State v. Edmondson*, 43 Tex. 162; *Witherspoon v. State*, 39 App. 65, 44 S. W. 164, 1096.

When offenses are several in their nature, and yet of such a character that one of them, when complete, necessarily implies the other, they may be joined in the same count. *State v. Edmondson*, 43 Tex. 162; *Nicholas v. State*, 23 App. 317, 5 S. W. 239.

Where there are several ways in which an offense may be committed, and they are embraced in the same general definition and are punishable in the same manner, they are not distinct offenses and may be charged conjunctively in the same count. *Willis v. State*, 34 App. 148, 29 S. W. 787; *Stevens v. State*, 70 App. 565, 159 S. W. 505; *Goodwin v. State*, 70 App. 600, 158 S. W. 274.

Duplicity, although not specified as a ground of exception, may be included in articles 451, sec. 7, ante, and 576, sec. 2, post; *State v. Smith*, 24 Tex. 285. But such exception must be made in limine. *Coney v. State*, 2 App. 62; *Berliner v. State*, 6 App. 181.

To render an indictment objectionable on the ground of duplicity, the duplicity must be such as to produce confusion and uncertainty as to the offense intended to be charged. *Beaumont v. State*, 1 App. 533, 28 Am. Rep. 424.

Objection that indictment is duplicitous, too late after verdict. *Rumage v. State* (Cr. App.) 55 S. W. 64.

Two distinct offenses which are different phases of the same transaction, not repugnant to each other and punishable in the same manner, may be charged in the same count. *Prendergast v. State*, 41 App. 358, 57 S. W. 850.

An indictment is not duplicitous that sets out the different ways of committing an offense stated in the statute. If the evidence sustains either, the conviction will not be disturbed. *Young v. State* (Cr. App.) 60 S. W. 767.

The indictment was not duplicitous in not showing that the persons who were alleged to have heard the conversations were the same persons; all of the language being charged as being used at the same time, and in the hearing of W. and the same other persons. *Curl v. State* (Cr. App.) 145 S. W. 602.

18. — **Waiver.**—The defect in an indictment, on the ground that it is duplicitous, was waived, where accused did not, in the trial court, move to quash the indictment on that ground, or raise the question in any other proper manner. *Cabiness v. State* (Cr. App.) 146 S. W. 934.

Duplicity in an indictment is waived by defendant's failure to move to quash the indictment before verdict. *Green v. State* (Cr. App.) 147 S. W. 593.

19. — **Misdemeanors in general.**—Information is not bad for duplicity because it contains several counts charging different misdemeanors. *Alexander v. State*, 27 App. 533, 11 S. W. 628.

20. — **Misdemeanor and felony.**—An indictment charging, in a single count, the commission of a misdemeanor, in violation of Pen. Code, art. 229, making it unlawful to knowingly become the agent of another to obtain a poll tax receipt or give another money to induce him to pay his poll tax, and also the commission of a felony in violation of Pen. Code, article 233, prohibiting the payment or procuring of another to pay poll taxes for a citizen, is duplicitous and should be quashed. *Johnson v. State* (Cr. App.) 177 S. W. 490.

21. — **Unlawful practice of medicine.**—A complaint and information, which charge conjunctively the offenses denounced by Pen. Code, art. 755, punishing the practicing of medicine by one publicly professing to be a physician and surgeon or by one offering to treat any disease by any system, do not charge separate and distinct offenses. *Herrington v. State* (Cr. App.) 166 S. W. 721.

22. — **Violation of liquor law.**—Acts 31st Leg. c. 17, § 15 (Pen. Code, art. 615), provides that all persons having licenses for the sale of intoxicating liquors shall close their places of business from 12 o'clock midnight Saturday until 5 o'clock a. m. the following Monday of each week; and any person who shall open any place of business for the purpose of traffic, or who shall sell or barter any intoxicating liquors, between the hours mentioned shall be guilty of a misdemeanor. An in-

dictment charged that accused, a licensed retail malt liquor dealer, did keep open his place of business for the purpose of traffic, and did sell intoxicating liquors, between the hours of 12 o'clock midnight Saturday and 5 o'clock a. m. Monday. Code Cr. Proc., art. 464, provides that in an indictment for illegal sale of intoxicating liquors it shall be sufficient to charge that defendant sold them contrary to law, naming the person to whom sold. Held that, as the statute in this case makes at least two offenses, one the keeping open on Sunday of a place of business for the purpose of traffic, and the other the actual sale of liquors, the indictment was sufficient; for, both offenses being misdemeanors, both might be charged in a single count—the indictment being defective only in charging a sale of intoxicating liquor. *Warner v. State* (Cr. App.) 147 S. W. 265.

An indictment, charging that the defendant did sell and give, and cause to be sold and given, intoxicating liquors to a minor, without the written consent of his parent or guardian, was not duplicitous; it being permissible to charge conjunctively in the same count in the indictment the commission of an offense in several ways, where the statute embraces the several ways in the same general definition, and makes them punishable in the same manner, and the ways are of such character that each may be a stage of the same offense. *Hogan v. State* (Cr. App.) 147 S. W. 601.

An information alleging that accused sold intoxicating malt, spirituous, and vinous liquors, to wit, one bottle of beer, is not duplicitous in charging the sale of different kinds of intoxicating liquors in the same count as it specifically alleges the kind of liquor sold, and the words "spirituous and vinous" should be disregarded as surplusage. *Loicano v. State*, 72 App. 518, 163 S. W. 64.

23. — **Gaming.**—An indictment charging that accused unlawfully kept and exhibited, for the purpose of gaming, a gaming table and bank, is not duplicitous as charging the keeping and exhibiting of a gaming table for the purpose of gaming, and also the keeping and exhibiting of a bank for the same purpose. *Morris v. State*, 57 App. 163, 121 S. W. 1112.

24. — **Pandering.**—That an indictment for pandering charged that accused committed the offense in more than one of the modes specified in the statute did not render it duplicitous. *Stevens v. State* (Cr. App.) 150 S. W. 944.

25. — **Forgery.**—An indictment which charges in separate counts forgery, and uttering a forged instrument, is not duplicitous. *Chester v. State*, 23 App. 577, 5 S. W. 125; *Barnwell v. State*, 1 App. 745; *Waddell v. State*, *Id.* 720.

Indictment charging in one part that the entire instrument was forged and in another part that appellant knew that the indorsement was forged held not duplicitous. *Strang v. State*, 32 App. 219, 22 S. W. 680.

26. — **Assault.**—An indictment for aggravated assault is not duplicitous because it details certain facts which tend to constitute threats to take life. *Crow v. State*, 41 Tex. 468.

27. — **Assault and robbery.**—An indictment that defendant did make an assault on a person named, and by said assault and by violence and putting in fear of life by the use of firearms did fraudulently take from him certain property, is not bad as charging two offenses in one count. *Goodman v. State* (Cr. App.) 177 S. W. 968.

28. — **Murder.**—An indictment is not bad for duplicity which contains a statement of the facts connected with and forming part of the offense, although such facts are complicated and various. Thus an indictment for murder may in the same count, charge the various means by which the death may have been produced. *Edmondson v. State*, 43 Tex. 230.

A charge for the murder of two persons by the same act is not duplicitous, and may be made in the same count. *Rucker v. State*, 7 App. 549.

29. — **Rape and incest.**—In charging rape in one count and incest in another, the indictment is neither duplicitous nor repugnant, though predicated on the same transaction. *Owens v. State*, 35 App. 345, 33 S. W. 875; *Wiggins v. State*, 47 App. 538, 84 S. W. 821.

30. — **Burglary and theft.**—The offenses of burglary and theft are excepted from the rule of duplicity, and may be joined in the same count. P. C., art. 1303, et seq., and notes; *Williams v. State*, 24 App. 69, 5 S. W. 838.

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 App. 63, 29 S. W. 42, citing *Boren v. State*, 23 App. 28, 4 S. W. 463. And see *Shuman v. State*, 34 App. 69, 29 S. W. 160.

31. — **Fraudulent disposition of mortgaged property.**—It is made a felony to fraudulently dispose of the whole or a part of mortgaged property, but in each instance there must be a fraudulent disposition. Therefore it follows that each fraudulent disposition is a separate offense, and where the pleader undertakes to allege separate offenses, he must do so in separate counts. He cannot allege two distinct offenses in the same count. *Wood v. State*, 47 App. 543, 84 S. W. 1058.

32. — **Accomplices, accessories, and principals.**—An indictment is not duplicitous because charging accused with being an accomplice, an accessory, and a principal, where all the various counts were based on the same transaction. *Collins v. State* (Cr. App.) 178 S. W. 345.

33. **Election.**—When several counts in the same indictment are substantially for the same offense, and are introduced for the purpose of meeting the evidence as it may transpire, the state will not be required to elect on which it will rely. *Green v. State*, 21 App. 64, 17 S. W. 262; *Masterson v. State*, 20 App. 574; *Keeler v. State*, 15 App. 111; *Gonzales v. State*, 5 App. 584; *Dalton v. State*, 4 App. 333; *Dill v. State*, 1 App. 278; *Weathersby v. State*, *Id.* 643; *Waddell v. State*, *Id.* 720; *Barnwell v. State*, *Id.* 745; *Irving v. State*, 8 App. 46. The rule seems to be that the court should interpose by quashing the indictment, or by compelling the state

to elect, where an attempt is made, as manifested by either the indictment or the evidence, to convict the accused of two or more offenses growing out of distinct and separate transactions; but should never interpose in either mode, where the joinder is simply designed and calculated to adapt the pleadings to the different aspects in which the evidence on the trial may present a single transaction. See this case for illustration: *Keeler v. State*, 15 App. 111; and see, also, *Simms v. State*, 10 App. 131; *Fisher v. State*, 33 Tex. 792. If the duty to elect be incumbent on the state, the election should be made when the state has proceeded far enough with its testimony to identify the transaction, and before the defendant offers his evidence. *Dalton v. State*, 4 App. 333; *Lunn v. State*, 44 Tex. 85.

The doctrine of compulsory election by the state between counts explained. *Keeler v. State*, 15 App. 111.

If the evidence tends to support both of two counts the state cannot be compelled to elect. *Armstrong v. State*, 28 App. 526, 13 S. W. 864. Also, *Malton v. State*, 29 App. 527, 16 S. W. 423; *Stebbins v. State*, 31 App. 294, 20 S. W. 552.

It is only when distinct felonies, not of the same character, are charged in different counts of the same indictment that the state may be required to elect upon which count it will claim a conviction. The indictment in this case charged in the first count that the accused burned his own house, the same being insured; and in the second count that he burned a house and thereby endangered the burning of other houses not belonging to him. The two said counts charge the same felony, and there was no occasion for the election by the state of one count to the exclusion of the other upon which to urge a conviction. But the charge of the court to the jury recites that the state voluntarily abandoned and dismissed the second count; notwithstanding which recital it proceeds to instruct the jury upon the law applicable to the second count. Held error; but not such error as would necessitate reversal in the absence of exception, unless it was calculated to injure the rights of the accused. *Baker v. State*, 25 App. 1, 8 S. W. 23, 8 Am. St. Rep. 427.

See *Moore v. State*, 37 App. 552, 40 S. W. 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 App. 240, 33 S. W. 126, 60 Am. St. Rep. 37; *Thompson v. State*, 33 App. 472, 26 S. W. 987; *Welhousen v. State*, 30 App. 623, 18 S. W. 300. But compare *Moore v. State*, 37 App. 552, 40 S. W. 287, with *McKenzie v. State*, 32 App. 568, 25 S. W. 426, 40 Am. St. Rep. 795, and *Masterson v. State*, 20 App. 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.

Where State proved two distinct offenses committed on separate days, it must elect the one for which it claims conviction. *Larned v. State*, 41 App. 509, 55 S. W. 827.

The question whether the State is compelled to elect between counts cannot be raised after verdict. *Matt v. State* (Cr. App.) 58 S. W. 101.

Where two transactions were proved, and each constituted a criminal offense, while the complaint charged but one transaction, accused must require the state to elect. *Wooten v. State*, 57 App. 89, 121 S. W. 703.

Action of the court in submitting only the first count of an indictment cured any error it committed in refusing to sustain a motion to require the state to elect which count would be relied on. *Railey v. State*, 58 App. 1, 121 S. W. 1120, 125 S. W. 576.

The rule that, where an indictment charges in separate counts one or more distinct felonies, and the evidence adduced develops distinct transactions, the state can, at the request of accused, be forced to elect on which count or transaction it will prosecute does not apply where only one transaction or act is charged, and different counts are contained in the indictment drawn to meet the possible phases that the testimony may assume. *Goode v. State*, 57 App. 220, 123 S. W. 597.

The state, in answer to a motion to quash an indictment charging two separate and distinct offenses, has the right to elect on which count it will proceed. *Betts v. State*, 60 App. 621, 133 S. W. 251.

Where an indictment contained several counts charging offenses growing out of the same transaction, the refusal to require the state to elect on which count it would rely for a conviction was proper. *Day v. State*, 62 App. 527, 138 S. W. 123.

Where an indictment charged assault with intent to rape, burglary with intent to rape, and burglary with intent to steal, and the state elected to abandon the first count, because the punishment for that kind of an assault was less than for burglary, it was improper to submit the second. *Williams v. State* (Cr. App.) 143 S. W. 634.

Where an act constitutes different offenses, the state may elect the offense for which the offender will be prosecuted. *January v. State* (Cr. App.) 146 S. W. 555.

Under an information containing a single count if the evidence discloses two or more separate and distinct transactions, any one of which would sustain a conviction, the state must be required to elect, unless the offense charged is a continuous one. *Golden v. State*, 72 App. 19, 160 S. W. 957.

Where the state actually did elect between the several counts in the indictment, the denial of accused's motion to require election was not error. *Collins v. State* (Cr. App.) 178 S. W. 345.

34. — **What constitutes.**—Charge of court submitting but one of plural counts is tantamount to an election by the state on that count. *Moore v. State*, 37 App. 552, 40 S. W. 287; *Smith v. State*, 34 App. 123, 29 S. W. 774; *Dalton v. State*, 4 App. 333; *Thompson v. State* (Cr. App.) 55 S. W. 331; *Mueller v. State* (Cr. App.) 153 S. W. 1142.

35. — **Misdemeanor cases in general.**—The state cannot be required to elect between counts in a misdemeanor case. *Brown v. State*, 38 App. 597, 44 S. W. 176; *Stebbins v. State*, 31 App. 294, 20 S. W. 552, and cases cited; *Thompson v. State*, 32 App. 265, 22 S. W. 979; *Bivens v. State* (Cr. App.) 97 S. W. 87; *Sweeney v. State*, 59 App. 370, 128 S. W. 390; *Tucker v. State* (Cr. App.) 145 S. W. 611; *Gould v. State* (Cr. App.) 147 S. W. 247.

As to election in misdemeanors, see *Street v. State*, 7 App. 5; *Waddell v. State*, 1 App. 720.

In a misdemeanor prosecution, the state may introduce evidence under either count; not being required to elect between the counts. *Woodward v. State*, 58 App. 411, 126 S. W. 271.

Where an indictment charges several misdemeanors under one statute in one count, the state cannot be required to elect upon which charge it will proceed. *Warner v. State* (Cr. App.) 147 S. W. 265.

36. — **Unlawfully practicing medicine.**—Where an indictment for unlawfully practicing medicine charged in one count that defendant practiced medicine, without authority and without a license, by treating certain named persons, and in another count that he publicly professed to be a physician, and offered to treat diseases without first having registered his license, etc., the state was not required to elect on which of the counts it would rely for a conviction under the rule that election between counts cannot be required in misdemeanor cases. *Muel-ler v. State* (Cr. App.) 153 S. W. 1142.

37. — **Carrying pistol.**—All the testimony on a prosecution for carrying a pistol fixing the carrying on the occasion of defendant's going home with C., which was either on March 3d or March 4th, but not on both days, the fact that some of the evidence was that it was on March 3d, and other that it was on March 4th, did not require the state to elect between the two dates; there not being two separate and distinct transactions. *Brogdon v. State*, 63 App. 475, 140 S. W. 352.

38. — **Disorderly house.**—Where an information for knowingly permitting a house to be kept as a house of prostitution contained only one count, while the evidence showed that eight houses owned by accused were occupied by prostitutes who were running houses of prostitution, the state should have been required to elect upon which offense it would seek a conviction. *Golden v. State*, 72 App. 19, 160 S. W. 957.

39. — **Assault.**—Where an indictment for aggravated assault contains two grounds of aggravation in separate counts, it is not error to refuse to require the State to elect upon which ground she relies for a conviction. *Timon v. State*, 34 App. 363, 30 S. W. 808.

Where the facts showed that accused assaulted prosecutor with intent to murder, by lying in wait, or with intent to rob, the state could elect to prosecute him for assault with intent to murder. *Daniels v. State*, 72 App. 286, 162 S. W. 500.

40. — **Assault to murder, maiming, and robbery.**—Where the indictment and evidence would have sustained a conviction of either assault to murder, maiming, or robbery, but the offenses all arose out of one transaction, the state was required to elect the offense for which it would seek a conviction, since, while defendants could be convicted of any one, they could not be convicted of more than one. *Madrid v. State*, 71 App. 420, 161 S. W. 93.

Where an indictment in separate counts charged assault to murder, maiming by cutting off prosecutor's ears, and robbery, defendants were not prejudiced by the fact that the court only submitted the charge of robbery, since the state was entitled to elect and ask a conviction for the most grave offense, included in the indictment, which the evidence would support. *Madrid v. State*, 71 App. 420, 161 S. W. 93.

41. — **Homicide and conspiracy to kill.**—There is no merit in the contention that the court should have required an election between the counts, one of which charged defendant with the homicide, the other that he and another conspired to kill deceased; the issue of homicide alone having been submitted to the jury, and their consideration having been restricted to that count. *Betts v. State*, 57 App. 389, 124 S. W. 424.

An indictment charging in one count that accused and his wife murdered their child, and charging in another count that they conspired together to kill the child, charges two distinct offenses, and the court, on motion, must either quash the indictment or compel the state to elect on which count it will proceed. *Betts v. State*, 60 App. 631, 133 S. W. 251.

42. — **Rape.**—Where indictment contained two counts, first, rape by force and fraud, second, rape of a woman so mentally diseased that she had no will to oppose, the state should not be required to elect upon which count a conviction would be claimed. *Thompson v. State*, 33 App. 472, 26 S. W. 987.

In a prosecution for rape, the state may be required to elect on which of several instances of intercourse it will rely. *Bader v. State*, 57 App. 293, 122 S. W. 555.

Since the question of whether the state will be required to elect upon which count it will rely, when the indictment contains several counts charging different felonies, is for the trial court's discretion, there was no reversible error, in a prosecution for rape, in which the indictment charged intercourse on several distinct occasions, in refusing to require the state to elect until the state's testimony in chief was closed, the district attorney having elected to rely upon a particular count at the close of prosecutrix's examination, in which she testified as to acts of intercourse charged in the several counts, after which the court instructed the jury not to consider any testimony, except that offered to support the count relied upon by the state. *Smith v. State*, 64 App. 454, 142 S. W. 1173.

In a prosecution for rape, where the indictment consisted of two counts, one

charging rape by force and another that she was an imbecile, the state could not be required to elect upon what count it would proceed, so that evidence of the mental condition of the prosecutrix was admissible, even though one count charged that the offense was by force. *Hubbard v. State* (Cr. App.) 147 S. W. 260.

When a father, or other person standing in such relation to a girl under 15, is prosecuted for rape on her, all acts of intercourse are admissible in evidence, but the state must elect upon which act it will seek a conviction. *Ulmer v. State*, 71 App. 579, 160 S. W. 1188.

It was not error to overrule defendant's oral motion to require the state to elect on which act of intercourse it would rely for a conviction of rape, where the court in its instructions expressly limited the jury to the act specified in the indictment as the one of which they must find accused guilty in order to convict. *Cooper v. State*, 72 App. 266, 162 S. W. 364.

Where it appeared that defendant was separately indicted for assaults with intent to rape a girl under 15 years of age, alleged to have been committed on two different dates, and evidence of both offenses was admitted in the trial on the indictment charging the second offense, in connection with a statement that the state relied on the second offense, the defendant could be convicted only for the second offense. *Scott v. State* (Cr. App.) 166 S. W. 729.

The state, at the conclusion of the testimony in a prosecution for rape on a girl under 15 years of age, should be required, on motion of defendant, to elect upon which specific act of intercourse it would rely for a conviction. *Mora v. State* (Cr. App.) 167 S. W. 344.

43. — **Rape and assault to rape.**—Where the state elected to prosecute accused for assault to rape, he was not entitled to a peremptory instruction because the testimony of prosecutrix showed rape instead of assault to rape. *Grimes v. State*, 71 App. 614, 160 S. W. 689.

44. — **Rape and incest.**—Counts for rape and incest, based on the same transaction, could be joined in the indictment, so that the state was not required to elect upon which count it would proceed. *Wadkins v. State*, 58 App. 110, 124 S. W. 959, 137 Am. St. Rep. 922, 21 Ann. Cas. 556.

45. — **Rape and bigamy.**—It is no defense to a prosecution for rape accomplished by a pretended marriage, where the man had a wife living and not divorced, that the marriage would have been a valid, common-law marriage except for his previous marriage, and that therefore the offense was bigamy, since the state, and not the defendant, has the right to elect, where the act of the defendant constitutes more than one offense, upon which charge the defendant shall be prosecuted. *Melton v. State*, 71 App. 130, 158 S. W. 550.

46. — **Seduction.**—In a prosecution for seduction where numerous acts of intercourse were proven, and the court charged the jury that a conviction could be had on the first act alone, the overruling of accused's motion to compel an election was not error. *Knight v. State*, 64 App. 541, 144 S. W. 967.

47. — **Burglary.**—Where an indictment in one count charged a burglary in the daytime, and in another count charged a burglary in the nighttime, it was held error to require the state to elect upon which count defendant should be tried. *Gonzales v. State*, 12 App. 657.

Where an indictment for burglary contained two counts, one charging burglary of a private residence and the other burglary in the ordinary form, and the evidence, which was circumstantial, fairly showed that the burglary was at night, but would have sustained a finding that it was committed in the daytime, the court did not err in refusing to require the state to elect upon which count a verdict would be asked. *Hawthorn v. State*, 62 App. 114, 136 S. W. 776.

There was no error in refusing to require the state to elect, whether it would prosecute on a count for daylight burglary or on one for nighttime burglary. *Fox v. State*, 62 App. 430, 138 S. W. 413.

Where an indictment contained two counts, one charging burglary and the other an attempt to commit burglary, both based on the same transaction, the state could not be required to elect, and the court properly submitted both counts. *Cooper v. State* (Cr. App.) 147 S. W. 273.

48. — **Theft.**—An indictment charged accused with stealing three sheep, and the evidence, which was all circumstantial, tended to show that six sheep were taken. Held, that the district attorney should have been required to elect for which sheep the conviction would be claimed. *Mazureczk v. State*, 59 App. 211, 128 S. W. 136.

Where two indictments were returned against accused for theft of two cows, and, on the trial of one of them alleging ownership in B., the court in terms required the jury to find the ownership in B. in order to convict, and that they could not consider the evidence of the taking of the other cow as proof of the theft in question, the court did not err, in the absence of a request, in failing to require the county attorney to elect as to which cow he would put defendant on trial for stealing. *La Flour v. State*, 59 App. 645, 129 S. W. 351.

49. — **Bringing stolen property into state.**—In a trial of an indictment for bringing stolen goods into the state charging only one transaction by different counts, the state was not required to elect upon which count it would ask for a conviction. *State v. Zweig* (Cr. App.) 171 S. W. 747.

50. — **Accomplices, accessories, and principals.**—Where the several counts of the indictment which were based on the same transaction charged accused as principal, accomplice, or accessory, the state is not compelled to make an election between them. *Collins v. State* (Cr. App.) 178 S. W. 345.

51. **Charge of court submitting counts.**—See notes under article 735, post.

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.]

See Willson's Cr. Forms, 750-752.

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| 1. Constitutionality. | 13. Necessity of substituting papers substantially the same. |
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1. **Constitutionality.**—This article is constitutional. *Withers v. State*, 21 App. 210, 17 S. W. 725. But its constitutionality was questioned in *Schultz v. State*, 15 App. 258, 49 Am. Rep. 194; *Gillespie v. State*, 16 App. 641.

2. **Former law.**—Under a former statute (Hart Dig., art. 454), the fact of loss must have been entered on the minutes and a new indictment be found as originally, or the prosecution might have proceeded under another statute (Hart Dig., art. 2750), by establishing, by clear and conclusive evidence, the exact contents of the lost indictment. *State v. Elliott*, 14 Tex. 423; *State v. Adams*, 17 Tex. 232.

3. **Application as statute of limitation.**—This article applies as a statute of limitation only where a new indictment is found, and not where another indictment is substituted for the one lost, so that, if the prosecution was not barred when the original indictment was returned, a prosecution under an indictment substituted for the one lost will not be barred though substituted at a time when prosecution would be barred on a new indictment. *Brown v. State*, 57 App. 570, 124 S. W. 101.

4. **Mutilation.**—An indictment which has become so mutilated as to become unintelligible, may be substituted. *State v. Ivy*, 33 Tex. 646.

Where an information has been torn, and so mutilated as to render illegible an entire line, it should be substituted. *Perez v. State*, 10 App. 327.

The fraudulent alteration of a date in a complaint is a mutilation, not only of the complaint, but of the information, and the proper practice in such case would be to substitute the complaint and information, as the complaint could not be amended with respect to the date of the commission of the offense. *Huff v. State*, 23 App. 291, 4 S. W. 890.

Under this article the county attorney had no authority to change the date of filing on an information and complaint, and that such change constituted a mutilation, rendering the same nugatory. *Kelly v. State*, 59 App. 14, 127 S. W. 544.

An indictment is sufficient as against a motion to quash, on the ground that it is mutilated, though drawn on two pieces of paper, pasted together, where it is probable that the grand jury took this method of having the bill prepared, instead of writing it in the usual way; there being no attempt to show that some one, other than they, was responsible for its condition. *Jenkins v. State*, 64 App. 86, 141 S. W. 222.

An indictment is sufficient as against an objection that it is mutilated, though it consists of two pieces of paper, pasted together, where one portion contains a printed form of the preliminary allegations, and the other, which is pasted securely thereto, contains the body of the charge in correct terms and in print, where there is no showing that its condition was caused by other than the grand jury presenting it. *Jenkins v. State*, 64 App. 88, 141 S. W. 223.

5. **Original indictment on file as lost or mislaid.**—An indictment or information can only be substituted when it has been lost, mislaid, mutilated, or obliterated. Where the original indictment was on file in the clerk's office of the court of appeals, where it had been sent on appeal for inspection of said court, it was held that it could not be substituted. *Shehane v. State*, 13 App. 533.

6. **Loss of indictment after retransfer of case.**—Where a criminal case, after being transferred, was retransferred to the original district, and the indictment was lost, it might be substituted as any other lost indictment. *Berg v. State*, 64 App. 612, 142 S. W. 884.

7. **Duty of defendant to supply lost indictment.**—The defendant is not charged with the duty of supplying the lost indictment. *Beardall v. State*, 4 App. 631.

8. **How indictment may be supplied.**—*Quære*: 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 App. 258, 49 Am. Rep. 194; *Gillespie v. State*, 16 App. 641.

Where an indictment has been lost or destroyed after trial and conviction, it may be supplied either by the presentment by the grand jury of a second indictment, or by substitution. *Harwood v. State*, 16 App. 416; *Turner v. State*, Id. 318; *Schultz v. State*, 15 App. 258, 49 Am. Rep. 194.

9. **Plea as predicate to substitution.**—This article contemplates plea to the indictment before its loss as a predicate to its substitution. *Schultz v. State*, 15 App. 258, 49 Am. Rep. 194.

10. **Suggestion of loss and proceedings thereon in general.**—The suggestion of loss should be in writing, should set out the facts, and be entered on the minutes of the court; and upon the presentation of the paper prepared as the substitute, accompanied by a written statement of the district or county attorney, that it is substantially the same as that lost, an order of the court should be entered, showing that the substitution was allowed and made. See this case for an insufficient record entry of substitution. *Clampitt v. State*, 3 App. 638; *Graham v. State*, 43 Tex. 550; *State v. Adams*, 17 Tex. 232.

Before one can be tried upon what purports to be a substituted information, a motion must be presented by prosecution alleging the loss of the information and asking permission to substitute same. *Reed v. State*, 42 App. 572, 61 S. W. 925.

11. **Right to contest substitution.**—As the allowance of substitution is a judicial act, the accused has the right to contest it, and cannot be relegated to a motion to quash the substituted papers. *Bowers v. State*, 45 App. 185, 75 S. W. 299.

12. **Substitution pending appeal.**—The indictment or information can not be supplied after an appeal has been perfected, so as to sustain the conviction. *Turner v. State*, 16 App. 318.

Under this and article 916, providing for the substitution of a lost information even after notice of appeal, the trial court may permit the substitution of a lost information, where the trial judge stated that in his opinion he had the information when he wrote the charge, and where the county clerk thought he had the information when he wrote the judgment, and three persons testified that an information had been prepared and filed, and only one witness testified that he had examined the papers on the day of the trial, and that he could not find the information. *James v. State*, 62 App. 610, 138 S. W. 408.

Pending an appeal, lost papers may be substituted, but only when they are lost subsequent to the trial of the case and after the attaching of the jurisdiction of the appellate court. *White v. State*, 72 App. 16, 160 S. W. 703.

Where a criminal case was tried in the county court at the January term on an indictment substituted for the original indictment, which was lost, orders could not be entered at the August term after an appeal had been taken and the jurisdiction of the Court of Criminal Appeals had attached, substituting such indictment. *White v. State*, 72 App. 16, 160 S. W. 703.

13. **Necessity of substituting papers substantially the same.**—In order to substitute at all, the substituted paper must be substantially the same as that which has been lost, mislaid, mutilated, or obliterated. A complaint signed by one party cannot be substituted by one of another party. *Morrison v. State*, 43 App. 437, 66 S. W. 780.

Under this article, where there was no written statement that the substituted indictment was substantially the same as that lost and no written request or pleading of any sort filed, the judgment would be reversed. *White v. State*, 72 App. 16, 160 S. W. 703.

14. **Agreement.**—Agreement of counsel that an indictment is a true substituted indictment is not a substitution. *Carter v. State*, 41 App. 608, 58 S. W. 80.

Where the original indictment was misplaced while in the hands of accused's attorney, who stated that he had a copy which could be used as a substitute, which was done with consent, in the presence of accused, accused could not on appeal complain because he in person made no agreement for substitution. *Harris v. State* (Cr. App.) 167 S. W. 43.

15. **Notice.**—When an indictment is lost, and no new indictment is found there is simply a substitution of the lost paper; the defendant is not entitled to two days' service of substituted indictment. *James v. State*, 52 App. 21, 105 S. W. 180.

The record disclosed that defendant was present and contested the entry of an order allowing the state to substitute an information for the one which had been lost and the bill of exceptions did not recite that defendant was not served with notice of the motion for the entry of order. A motion in arrest of judgment recited that defendant had not been served with process for this order. Held that, in the absence of a bill of exceptions showing that fact, the matter will not be reviewed. *Banks v. State*, 62 App. 552, 138 S. W. 406.

16. **Order of court.**—An order of the court is indispensable to the substitution of a record or filed paper. See *Burrage v. State* (Cr. App.) 44 S. W. 169, in extenso on the rule, and *Strong v. State*, 18 App. 19; *Rogers v. State*, 11 App. 608.

Where the county attorney moved to substitute an information for the original, which was lost, and the motion was granted, the order conferred no authority for the substitution of the complaint as well. *Kelly v. State*, 59 App. 14, 127 S. W. 544.

17. — **Nunc pro tunc.**—Substitution of lost information cannot be made after the trial on a motion to substitute nunc pro tunc. *Reed v. State*, 42 App. 572, 61 S. W. 925, 926.

The action of the trial court in entering a nunc pro tunc order allowing the state to substitute an information for one which has been lost, where the recitals of that order show that the proceedings were regular, that a motion was presented,

and that the court heard evidence, must be presumed to be correct, in the absence of a statement of facts, even though defendant preserved a bill of exception, which merely objected to the order. *Banks v. State*, 62 App. 552, 138 S. W. 406.

18. **Record.**—The record must show: (1) The suggestion of loss, etc. (2) The leave of the court to substitute. (3) That the substitution was in fact made. *Turner v. State*, 7 App. 596; *Beardall v. State*, 4 App. 631; *Magee v. State*, 14 App. 366. And see *Pate v. State*, 21 App. 191, 17 S. W. 461; *Pierce v. State*, 14 App. 365; *Bridges v. State*, 17 App. 579.

Record may be amended by making the substitution entries *nunc pro tunc*. *Turner v. State*, 7 App. 596.

The authenticity of a substitute indictment cannot be rested on presumption, nor on mere inference from a record recital that, the original indictment being lost, the court granted leave to substitute it with a copy inspected by the court. The record must affirmatively verify it as a fact that the substitution was actually made. *Rogers v. State*, 11 App. 608; *Turner v. State*, 7 App. 596; *Strong v. State*, 18 App. 19; *Beardall v. State*, 9 App. 262.

To substitute lost indictment the minutes must show suggestion of loss and leave to substitute, and that substitution has been made. *Carter v. State*, 41 App. 608, 58 S. W. 80.

19. — **Essentials of transcript on appeal.**—See notes to art. 929.

20. **Necessity of showing actual substitution.**—It must be shown that the substitution was actually made. *Turner v. State*, 7 App. 596, and cases cited; *Rogers v. State*, 11 App. 608, and *Strong v. State*, 18 App. 19.

21. **Service of copy of second indictment.**—Where the original indictment has been dismissed for defects and a second indictment has been presented, the defendant is entitled to a copy of such second indictment for at least two entire days before he can be put upon trial. *Lockwood v. State*, 32 App. 137, 22 S. W. 413.

Where defendant announced ready for trial not knowing that a second indictment had been presented, held, such announcement was not a waiver of his right to service of copy of same. *Harris v. State*, 32 App. 279, 22 S. W. 1037.

22. **Lost complaint or information.**—See notes, ante.

The statute only relates to indictments and informations saying nothing about affidavits and complaints but the latter are part of the information, being based thereon. However article 1498, *Sayles' Civ. St.* 1897 (*Vernon's Sayles' Civ. St.* 1914, art. 2157) provides for the substitution of lost records of all kinds, and if other statutory authority to substitute a lost complaint is wanting, it could be found under said provisions. *Bradburn v. State*, 43 App. 309, 65 S. W. 519.

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 App. 437, 66 S. W. 779.

The substitution of a lost complaint or information is a judicial act, and is upon notice; and it is competent for the defendant to contest the substitution of said papers if he sees fit. *Bowers v. State*, 45 App. 185, 75 S. W. 299.

23. **Amendment.**—As to amending an indictment or information, see post, arts. 598, 599, and notes thereto. *Bonner v. State*, 29 App. 223, 15 S. W. 821.

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.]

See *Willson's Cr. Forms*, 750, 753. See notes to article 485.

Authority and jurisdiction.—As to the jurisdiction of the district courts, see, ante, arts. 88, 90. Of county courts, ante, art. 98, and notes.

Where the indictment charges a felony, the case is not transferable from the district court, because it may have been developed by the evidence on a trial that the defendant, if guilty, was guilty of a misdemeanor only. *Ingle v. State*, 4 App. 91; *Cassady v. State*, 4 App. 96.

All indictments must be presented in the district court, and those for misdemeanor, over which said court has no jurisdiction, must be transferred to the proper tribunal for trial. *Davis v. State*, 6 App. 133; *Coker v. State*, 7 App. 83; *Johnson v. State*, 28 App. 562, 13 S. W. 1005.

The district court has no authority to transfer a felony case to the county court, and an order of transfer in such case is a nullity, and does not divest the district court of jurisdiction, and no order to retransfer the case is requisite. *Fossett v. State*, 11 App. 40.

Where the district court is vested with jurisdiction over misdemeanors, and by statute such jurisdiction is divested, and vested in the county court, indictments and informations for misdemeanors then pending in said district court should be transferred to the county court. *Hildreth v. State*, 19 App. 195.

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. *Schwartz v. State*, 38 App. 26, 40 S. W. 976.

A district judge though disqualified to try a case (on account of relationship) is authorized to receive the indictment and transfer the case to the county court

which has jurisdiction. The act of the district judge in transferring a case over which his court has no jurisdiction is merely ministerial. *Oxford v. State*, 49 App. 221, 94 S. W. 464.

Proceedings for transfer in general.—Proceedings held regular and proper in the transfer of an information from the district to the county court. *Hildreth v. State*, 19 App. 195.

Proceedings of transfer of indictment held erroneous, and that plea to jurisdiction should have been sustained. *Mitten v. State*, 24 App. 346, 6 S. W. 196.

Substantial compliance with statute as sufficient.—A substantial compliance with this article is all that is necessary. *Richards v. State*, 63 App. 176, 140 S. W. 459; *Gaston v. State*, 11 App. 143; *Brannon v. State*, 23 App. 428, 5 S. W. 132; *Lynn v. State*, 28 App. 515, 13 S. W. 867, and cases cited.

Order.—See notes under article 485, post.

Jurisdiction of the new court will not attach in default of an order of transfer. *Austin v. State*, 38 App. 8, 40 S. W. 724.

Inasmuch as the county court is not authorized to impanel a grand jury or receive indictments, in order to attach jurisdiction of the county court, there must be an order entered in the district court transferring the indictment to the county court for trial. *Bird v. State*, 49 App. 205, 91 S. W. 791.

The order of transfer is not required to state the name and nature of the offense charged. If the order states the nature of the offense incorrectly this fact does not deprive the proper court of jurisdiction. *Roller v. State*, 43 App. 433, 66 S. W. 777; *Malloy v. State*, 35 App. 389, 33 S. W. 1082, citing *Tellison v. State*, 35 App. 388, 33 S. W. 1082.

Under article 446, ante, it is not necessary to name the defendant on the minutes of the district court. In the order transferring a case from the district to the county court it is sufficient to give the file number without stating either the offense or the name of the defendant. *Haynes v. State* (Cr. App.) 83 S. W. 16.

In the transfer of criminal cases from the district to the county court a general order giving the numbers in the district court and character of offense is sufficient and a particular order is not necessary in each case. *Dittfurth v. State*, 46 App. 424, 80 S. W. 628, and other cases cited; *Forbes v. State*, 35 App. 24, 29 S. W. 784.

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*, 23 App. 562, 13 S. W. 1005.

Where an order was made in the district court transferring to the county court indictments numbered 180 to 193, and the names of the defendants were not given, only the file numbers being entered, such an order does not show that indictment numbered 214 in the county court was one of those transferred from the district court, and hence the county court obtained no jurisdiction. *Hyatt v. State*, 61 App. 421, 135 S. W. 142.

Impeachment of jurisdiction of county court.—When a case has been transferred by the district court to the county court and the latter court has jurisdiction to try the particular case, its jurisdiction cannot in any way be impeached. *Philpott v. State* (Cr. App.) 62 S. W. 921.

Record on appeal.—Where an indictment charges a misdemeanor, the record must show an order transferring the cause from the district to the county court for trial, in order to show the jurisdiction of the county court to sustain a conviction there. *Harris v. State*, 57 App. 84, 121 S. W. 1116.

If being impossible for a county court to obtain an indictment other than by transfer from the district court, the record on appeal from the county court must show the indictment was presented in the district court and transferred to the county court. *Richardson v. State*, 57 App. 285, 122 S. W. 560.

Transfer between district courts in same county.—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 App. 88, 35 S. W. 668.

So there being two district courts in McLennan county under the act creating them, indictments may be transferred from one to the other. *Moore v. State*, 36 App. 88, 35 S. W. 668.

Transfer from county to district court.—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 App. 456, 20 S. W. 985.

Objection to transfer or proceedings.—See notes under article 485, post.

An objection to the proceedings of transfer cannot be made by exception to the indictment. *Coker v. State*, 7 App. 84. Nor by motion in arrest of judgment. *Friedlander v. State*, 7 App. 204; *Bonner v. State*, 38 App. 599, 44 S. W. 172. Nor on motion for new trial. *Abbott v. State*, 42 App. 8, 57 S. W. 97. But may be made by plea to the jurisdiction. *Brumley v. State*, 11 App. 114.

It is too late after mistrial to challenge the validity of the order of transfer. *Thompson v. State*, 2 App. 82.

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.]

See Const. art. 5, § 17; Vernon's Sayles' Civ. St. 1914, vol. 1, p. xlv.

See notes to article 485.

Jurisdiction of justices of the peace.—See article 106, and notes.

Judicial knowledge.—When an indictment is for an offense cognizable by a justice of the peace, and it is made to appear to the district court that the offense was committed in an incorporated town or city, the cause should be transferred to a justice of the peace in said town or city, if there be such officer therein. But the law does not charge a district judge with judicial knowledge that any designated locality is an incorporated town or city, and that there is a justice of the peace therein. If, therefore, those facts were not made to appear to the district judge when he transferred the cause to the county court, the latter court acquires jurisdiction by the order of transfer, and that jurisdiction cannot be impeached in the county court. *Patterson v. State*, 12 App. 222; *Koenig v. State*, 33 App. 367, 26 S. W. 835, 47 Am. St. Rep. 85, 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.]

See Willson's Cr. Forms, 754, 756.

Cited, *Dittfurth v. State*, 46 App. 424, 80 S. W. 628.

Order of transfer.—See notes under article 483, ante.

Under this article, an order transferring an indictment from the district court to the county court, which recited that the district court had no jurisdiction of the offense, which was a misdemeanor, and that the county court had jurisdiction, and that the cases should be transferred "to said county of said county," was sufficient, though it omitted the word "court" after the word "county" in the quoted phrase. *Ellis v. State*, 59 App. 626, 130 S. W. 170.

Cases to which statute refers.—This article has reference only to cases that have been improperly transferred from one court to another in the county where the indictment is preferred; that is from a court not having jurisdiction to one that did. It does not relate to a change of venue from one county to another. *Moore v. State*, 49 App. 499, 96 S. W. 322.

Transcript and certificate.—In executing the order of transfer, the district clerk must accompany each case with a certified copy of all the proceedings taken therein in the district court. Noncompliance with this requirement is available to the defendant by plea to the jurisdiction of the court to which the transfer is made. *Brumley v. State*, 11 App. 114, and cases cited; *Lynn v. State*, 28 App. 515, 13 S. W. 867. The record of the presentment of the indictment should be certified to the court to which the cause is transferred as a part of the proceedings taken in the district court. *Walker v. State*, 7 App. 52.

The certificate must show that the indictment was presented in the district court by the grand jury. *Estes v. State*, 33 App. 560, 28 S. W. 469, and cases cited. But the law does not require that the certificate of transfer shall recite that the indictment was signed, or not signed, by the foreman of the grand jury. *Robinson v. State*, 24 App. 4, 5 S. W. 509; *Baker v. State*, 28 App. 5, 11 S. W. 676. Or describe the offense. *Howard v. State*, 44 App. 39, 68 S. W. 274; *Malloy v. State*, 35 App. 389, 33 S. W. 1082, citing *Tellison v. State*, 35 App. 388, 33 S. W. 1082. Or state when the district court adjourned. *Adams v. State*, 48 App. 7, 85 S. W. 1080.

The certificate is only required to embrace the matter enumerated in this article, and form is of no consequence. *Lynn v. State*, 28 App. 515, 13 S. W. 867, and cases cited; *Adams v. State*, 48 App. 7, 85 S. W. 1080.

For insufficient certificates of transfer, see *Donaldson v. State*, 15 App. 25; *McDonald v. State*, 7 App. 113; *Walker v. State*, Id. 52. Substantial compliance with the statute regulating the transfer of indictments is all that is required in such proceeding. *Brannon v. State*, 23 App. 428, 5 S. W. 132.

See a certificate held to be in substantial compliance with the statute. *Gaston v. State*, 11 App. 143; *Coker v. State*, 7 App. 84.

The certificate must be authenticated by the seal of the district court. *Walker v. State*, 7 App. 52.

— **Curing defects.**—The certificate, when defective, may be amended, or a new certificate may be made by the clerk of the district court, and filed with the papers of the cause in the court to which the cause has been transferred. *McDonald v. State*, 7 App. 113; *Hasley v. State*, 14 App. 217; *Johnson v. State*, 28 App.

562, 13 S. W. 1005, and cases cited; *Hawkins v. State*, 17 App. 593, 50 Am. Rep. 129; *Donaldson v. State*, 15 App. 25; *Austin v. State*, 38 App. 8, 40 S. W. 724.

Attacking defects.—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 App. 8, 40 S. W. 724; *Mitten v. State*, 24 App. 346, 6 S. W. 196, and cases cited. *Brumley v. State*, 11 App. 114; *Donaldson v. State*, 15 App. 25.

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 App. 36, 22 S. W. 18.

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.]

See *Willson's Cr. Forms*, 756.

Issuance of process.—In cases transferable from the district court, no process therein can issue from that court, but the process therein must issue from the court to which the causes are transferred. *Cassaday v. State*, 4 App. 96.

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-transferable 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 they were bound to appear before the court so transferring the same.

See *Willson's Cr. Forms*, 755, 756.

Improper transfer.—The district court having no jurisdiction to transfer a felony case to the County Court, an order making such transfer is a nullity, and an order sending the case back is unnecessary. *Fossett v. State*, 11 App. 40.

CHAPTER FOUR

OF PROCEEDINGS PRELIMINARY TO TRIAL

1. OF ENFORCING THE ATTENDANCE OF DEFENDANT AND FORFEITURE OF BAIL

- Art.
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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.]

See ante, ch. 4, title 5.

Jurisdiction of county court.—See notes under article 99, ante.

When bail bond or recognizance is functus officio.—Where the principal appears at the trial and is fined and placed in jail, the bond has served its purpose and is functus officio. Not so with an appeal bond from a justice to county court. *Johnson v. State*, 32 App. 353, 22 S. W. 406.

When forfeiture may be taken.—A forfeiture declared on a day previous to the day on which the defendant is bound to appear is void. *Crowder v. State*, 7 App. 484.

A forfeiture may be judicially declared at any time after it has occurred, and before the obligation is barred by the statute of limitation. *Hill v. State*, 15 App. 530; *Barrera's Sureties v. State*, 32 Tex. 644.

Bail bond or recognizance may be judicially forfeited at any time after default within the period of limitation. *Brown v. State*, 18 App. 326, citing *Hill v. State*, 15 App. 530. And see *Barrera's Sureties v. State*, 32 Tex. 644.

Bail bond or recognizance is not vitiated by the setting aside of a defective judgment, nisi, and may be forfeited later. *Arderson v. State*, 19 App. 299; *Burris v. State*, 34 App. 551, 31 S. W. 395, and cases cited.

Default and judgment nisi.—See notes under the following article, and also under article 499, post.

The undertaking of the bail is an original undertaking for the appearance of his principal to answer to the indictment; and hence, if he does not have his principal in court according to his undertaking, he forfeits his undertaking, and it becomes a debt of record, and he a principal judgment debtor, as between himself and the state. *Gay v. State*, 20 Tex. 504.

The failure of a defendant to appear in compliance with the condition of a recognizance or bail bond, is a forfeiture, and a judgment nisi is a recorded declaration of the fact. *Taylor v. State*, 21 Tex. 499.

Bail bond was forfeited and judgment nisi rendered at the July term of the court. Scire facias was issued to the sureties on the twentieth day of July, citing them to appear and answer on the third Monday of the same month, which was the eighteenth day already passed. Held, that a default judgment was void. *Bullard v. State*, 32 App. 518, 24 S. W. 898.

Dismissal of scire facias without concurrently setting aside judgment nisi will defeat any subsequent forfeiture. *Burris v. State*, 34 App. 551, 31 S. W. 395, and cases cited.

As this and the following section do not require that the judgment on forfeiture of bail shall recite when accused was to appear, a judgment nisi was not invalid

because it recited that the principal was to make his personal appearance "on the _____ day of _____ 191-," where it also recited that the principal "should well and truly make his personal appearance before said court * * * and there remain from day to day until discharged"; the blank quoted not operating to show that the principal was to appear on an impossible day, but being mere surplusage, and the words last quoted fixing the time of his appearance as of the very date when the bond was given. *Hodges v. State* (Cr. App.) 165 S. W. 607.

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.]

See Willson's Cr. Forms, §07.

See notes under preceding article, and also under article 499, post.

See *Douglass et al. v. State*, 26 App. 248, 9 S. W. 733.

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| 3. Statement of matter of evidence. | 10. Variance between judgment and bond. |
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1. Judgment nisi in general.—A judgment final in the first instance is not authorized. There must first be a judgment nisi, and notification to the sureties. *Waughhop v. State*, 6 Tex. 337.

It is not a valid objection to a judgment nisi, on a bond to answer a charge of murder, that the complaint on which the principal was brought before the magistrate by whom the bond was taken only charged the principal with an assault with intent to murder. *Dyches v. State*, 24 Tex. 266.

Judgment nisi is not valid unless it includes both principal and all sureties, and will not support final forfeiture. *Ellis v. State*, 10 App. 324; *Douglass v. State*, 26 App. 248, 9 S. W. 733.

A judgment nisi omitting any of the statutory requirements will not support a judgment final. *Cheatham v. State*, 13 App. 32, and cases cited; *Hart v. State*, Id., 555; *Watkins v. State*, 16 App. 646, and cases cited; *Galindo v. State*, 15 App. 319.

A judgment nisi is properly rendered against the principal and his sureties severally for the amount of the recognizance or bond. *Kiser v. State*, 13 App. 201; *Stallons v. State* (Cr. App.) 177 S. W. 132; ante, art. 339. But see *Carr v. State*, 9 App. 463; *Sass v. State*, 8 App. 426, and *Ishmael v. State*, 41 Tex. 244, which it would seem have been virtually, though not expressly, overruled by the *Kiser* case, supra, and other cases cited in art. 339, note ante.

A. was held to bail for his appearance before the district court to answer a charge of swindling. He was indicted for theft, and failing to appear his bail bond was forfeited. Held, that the indictment for theft did not authorize the forfeiture of the bail bond for swindling. *Addison v. State*, 14 App. 568.

A judgment nisi which fails to specify the amount of money for which the judgment is rendered, both against the principal and the sureties, though in other respects it comply strictly with the requirements of law, is insufficient and will not support a judgment final. *Galindo v. State*, 15 App. 319.

The judgment nisi must specify the amount of money for which it is rendered, both against the principal and the sureties. *Galindo v. State*, 15 App. 319; *State v. Cox*, 25 Tex. 404.

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 App. 120, and cases cited. *Thompson v. State*, Id. 318, and cases cited; *Ware v. State*, 21 App. 328, 17 S. W. 624; *McIntyre v. State*, 19 App. 443, and cases cited.

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*, 23 App. 531, 13 S. W. 991.

A judgment nisi which does not contain the statutory provisions is void, and can not be made the basis of a final judgment. Thus, it must 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." *Ware v. State*, 21 App. 328, 17 S. W. 624; *McIntyre v. State*, 19 App. 443; *Burnett v. State*, 18 App. 283; *Lindley v. State*, 17 App. 120; *Thompson v. State*, Id. 318; *Pickett v. State*, 16 App. 648; *Watkins v. State*, Id. 646; *Collins v. State*, 12 App. 356; *Thomas v. State*, Id. 416; *Barton v. State*, Id. 613; *Fulton v. State*, 14 App. 32; *McWhorter v. State*, Id. 239; *Addison v. State*, Id. 568; *Hart v. State*, 13 App. 555; *Smith v. State*, Id. 31; *Cheatham v. State*, Id. 32.

The judgment should be rendered severally against the principal and his sureties for the full amount of the obligation. *Thompson v. State*, 34 App. 135, 29 S. W. 789 (overruling *Ishmael v. State*, 41 Tex. 244, *Sass v. State*, 8 App. 426, and *Carr v. State*, 9 App. 463, and following *Kiser v. State*, 13 App. 201); *Mathena v. State*, 15 App. 460.

It should show, however, where the parties were obligated to appear. *Moseley v. State*, 37 App. 18, 38 S. W. 800.

2. Description of bond.—Where a bail bond required the principal to appear in R. county, and was forfeited in A. county, and the judgment nisi described the bond as requiring the principal to appear in A. county, it was held to be a fatal misdescription of the bond. *Cushman v. State*, 38 Tex. 181.

A judgment nisi in a proceeding on a bail bond should so describe the bond as to identify it; and it is better that it should state also the date of the bond, though this is not strictly essential. *Holley v. State*, 70 App. 511, 157 S. W. 937.

3. Statement of matter of evidence.—Under this article and article 491, stating the requisites of the citation to the sureties to show good cause, and not requiring it to state that the bond was approved, as required by statute, and accused released thereon, it is not necessary that the judgment or citation should state such facts; this being a matter of evidence. *Sanders v. State*, 70 App. 532, 158 S. W. 291.

4. Surplusage.—As this and the preceding article do not require that the judgment on forfeiture of bail shall recite when accused was to appear, a judgment nisi was not invalid because it recited that the principal was to make his personal appearance "on the ——— day of ———, 191—," where it also recited that the principal "should well and truly make his personal appearance before said court * * * and there remain from day to day until discharged"; the blank quoted not operating to show that the principal was to appear on an impossible day, but being mere surplusage, and the words last quoted fixing the time of his appearance as of the very date when the bond was given. *Hodges v. State* (Cr. App.) 165 S. W. 607.

Though there was but one surety on a bail bond, the judgment nisi is not invalid in the use of the word "each" with reference to the bondsman, for "each" is singular, and, if superfluous, may be disregarded as surplusage. *General Bonding & Casualty Ins. Co. v. State* (Cr. App.) 165 S. W. 615.

5. Failure to order citations and direct time for return.—The judgment nisi need not order the issuance of citations nor direct when they shall be returnable. Error in these respects is not material and does not affect the validity of the judgment nisi. *Gragg v. State*, 18 App. 295.

6. Alleging date of default.—Under this article it is not fatal error for the judgment nisi to fail to allege the date on which accused failed to appear. *General Bonding & Casualty Ins. Co. v. State* (Cr. App.) 165 S. W. 615.

7. Dismissal as to principal or co-surety.—In proceedings on the forfeiture of a bail bond, the state may dismiss as to the principal, whether with or without cause; it not being contemplated by this and articles 490 and 500, post, that questions arising between the principal and his sureties, or between the sureties themselves, shall be adjudicated in such proceeding. *Hodges v. State* (Cr. App.) 165 S. W. 607.

A bail bond is a several obligation of the principal and the sureties, and where judgment nisi is taken against the principal, and citation is issued for him and the sureties, the case may be dismissed as to the principal and trial had and judgment rendered against the sureties alone. *Hodges v. State* (Cr. App.) 165 S. W. 613.

A dismissal as to the principal on a bail bond is not improper, and will not free the surety, where the principal is a refugee from justice; this conclusion being strengthened by *Vernon's Sayles' Civ. St.* 1914, art. 1204, providing that a surety may be sued without the necessity of previously or at the same time suing the principal, when he resides beyond the limits of the state or cannot be reached by the ordinary process of law. *General Bonding & Casualty Ins. Co. v. State* (Cr. App.) 165 S. W. 615.

A bail bond is a joint and several obligation, and the dismissal as to one bondsman thereby does not prevent judgment being entered against another. *General Bonding & Casualty Ins. Co. v. State* (Cr. App.) 165 S. W. 615.

8. Taking against sureties only.—And the judgment nisi must be entered against the principal as well as the sureties. *Ellis v. State*, 10 App. 324.

Forfeiture against sureties without contemporaneous judgment against the principal is erroneous. *Cox v. State*, 34 App. 94, 29 S. W. 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.

Under this article where the judgment nisi was not taken against the principal in the bond, but only against the sureties, it will not support a final judgment. *Huntley v. State* (Cr. App.) 143 S. W. 1166.

9. Issuance of alias capias.—It is proper to order an alias capias for the principal to issue at the time of rendering judgment nisi. *Post*, art. 508; *Slocumb v. State*, 11 Tex. 15.

10. Variance between judgment and bond.—The judgment nisi should in all material respects conform to the recognizance or bail bond. *Werbiski v. State*, 20 App. 131; *Barringer v. State*, 27 Tex. 553.

Any variance is fatal. *Werbiski v. State*, 20 App. 132, and cases cited.

Where a judgment nisi recites a greater sum than the recognizance or bail bond, such judgment is invalid. *Barringer v. State*, 27 Tex. 553.

There was no variance between a bond reciting that defendant was charged "with a felony" and a judgment that he was "charged with a felony, to-wit, burglary." *Barrett v. State* (Cr. App.) 151 S. W. 558.

"Variance" is a disagreement between the allegation and the proof in some mat-

ter which, in point of law, is essential to the charge or claim; and matter which is merely useless never vitiates. *Hodges v. State* (Cr. App.) 165 S. W. 607.

In view of this and the two following articles authorizing forfeiture of a bail bond, and declaring that the citation in a forfeited case shall state the date of the bond and that it has been declared forfeited, and shall notify the party to appear, etc., there is no variance between a bail bond, correctly stating the date for the appearance of accused, and a judgment nisi, based on the forfeiture of the bond, which gives the date of appearance as "on the _____ day of _____, 191—," since the quoted words state no date, and since the judgment need not state the date of appearance. *Hodges v. State* (Cr. App.) 165 S. W. 613.

And see *Cushman v. State*, 38 Tex. 181; *Addison v. State*, 14 App. 568; *Dyches v. State*, 24 Tex. 266.

11. Effect of annulment.—*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 App. 299.

12. Presumption on appeal.—It has been held that, on appeal, it will be presumed that the judgment nisi was taken in accordance with the statutory requirements, unless it affirmatively appear otherwise. *Thompson v. State*, 31 Tex. 166.

But see subsequent cases which hold that the judgment nisi must show that the forfeiture was taken in accordance with the statutory requirements. *Lindley v. State*, 17 App. 120; *McWhorter v. State*, 14 App. 239; *Collins v. State*, 12 App. 356.

13. Former law.—Before the adoption of the Code a simple entry declaring the recognizance or bond "forfeited" and ordering scire facias to issue was sufficient. *Lawton v. State*, 5 Tex. 272.

The article formerly required that the sureties as well as the principal should be called at the door of the courthouse. See *Odiorne v. State*, 37 Tex. 122, decided under the article before the same was changed.

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.]

See *Willson's Cr. Forms*, 808.

Function of citation or scire facias.—A function of the citation or scire facias is to bring the sureties 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 App. 242, 6 S. W. 34, citing *Branch v. State*, 25 Tex. 423; *Vaughan v. State*, 29 Tex. 273; *Sims v. State*, 41 App. 440, 55 S. W. 179.

The citation in a scire facias proceeding on a bail bond is to give notice to the sureties on the bond before a final judgment can be rendered on the bond and judgment nisi, and also serves as the pleading of the state, based on the judgment nisi. *Holley v. State*, 70 App. 511, 157 S. W. 937.

After the sureties have appeared and answered, a citation issued on forfeiture of a bail bond will be treated solely as a pleading on the bond and judgment nisi. *Hodges v. State* (Cr. App.) 165 S. W. 607.

Jurisdiction to issue scire facias.—Scire facias to forfeit a bail bond can be issued only from the court having possession of the records on which it is founded. *General Bonding & Casualty Ins. Co. v. State* (Cr. App.) 165 S. W. 615.

Citation and judgment nisi during same term.—It is no valid objection to a citation that it was issued during the term of the court at which the judgment nisi was rendered. *Jones v. State*, 15 App. 82.

Issuance of citation and rendition of judgment nisi at the same term of court does not affect action on a bail bond. *Jones v. State*, 15 App. 82.

Necessity of citation for or notice to principal.—See notes under article 492, post.

Citation for the principal need not be issued. *Branch v. State*, 25 Tex. 423; *Vaughan v. State*, 29 Tex. 273; *Hutchings v. State*, 24 App. 242, 6 S. W. 34.

It is not necessary to serve notice on principal of intention to move to amend the recitals of scire facias and judgment nisi. *Sims v. State*, 41 App. 440, 55 S. W. 179, disapproving *Collins v. State*, 16 App. 274.

Dismissal as to principal.—In proceedings on the forfeiture of a bail bond, the state may dismiss as to the principal, whether with or without cause; it not being contemplated by this and the preceding article and article 500, that questions arising between the principal and his sureties, or between the sureties themselves, shall be adjudicated in such proceeding. *Hodges v. State* (Cr. App.) 165 S. W. 607.

Variance between bond and judgment nisi.—See notes under article 489, ante.

In view of this article and the articles preceding and following, there is no variance between a bail bond, correctly stating the date for the appearance of accused, and a judgment nisi, based on the forfeiture of the bond, which gives the date of appearance as "on the _____ day of _____, 191—," since the quoted words state no date, and since the judgment need not state the date of appearance. *Hodges v. State* (Cr. App.) 165 S. W. 613.

Objection to citation.—Where, on forfeiture of a bail bond, the sureties desire to object to insufficiency of the citation, they must in limine file a motion to

quash it and appear solely for that purpose. *Hodges v. State* (Cr. App.) 165 S. W. 607.

Amendment of citation.—See article 499, post, and notes thereunder.

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."
2. It shall be directed to the sheriff or any constable of the county where the surety resides or is to be found.
3. It shall state the name of the principal in such recognizance or bail bond and the names of his sureties.
4. It shall state the date of such recognizance or bail bond, and the offense with which the principal is charged.
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.
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.
7. It shall be signed and attested officially by the court or clerk issuing the same.

See Willson's Cr. Forms, 808.

In general.—See *Cushman v. State*, 38 Tex. 181; *Pearson v. State*, 7 App. 280; *Arrington v. State*, 13 App. 554; *McWhorter v. State*, 14 App. 239; *Goodin v. State*, 14 App. 443; *Hester v. State*, 15 App. 418; *Short v. State*, 16 App. 44; *Thrash v. State*, Id. 271; *Robertson v. State*, 34 App. 131, 29 S. W. 788; *Brown v. State*, 28 App. 277, 12 S. W. 1101. But compare this last case with *State v. Glaevecke*, 33 Tex. 53.

See, also, *State v. Cox*, 25 Tex. 404; *Davidson v. State*, 20 Tex. 649; *Lindley v. State*, 17 App. 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 App. 131.)

Irrelevant and informal matter will not vitiate the citation. *Davidson v. State*, 20 Tex. 649; *State v. Glaevecke*, 33 Tex. 53.

The citation must not vary essentially from the recognizance or bond. *Barringer v. State*, 27 Tex. 553; *Cushman v. State*, 38 Tex. 181; *Smith v. State*, 7 App. 160.

Scire facias is not sufficient if it fails to state such facts as would support a final judgment by default. *Brown v. State*, 43 Tex. 349.

It is not required that the citation to the sureties should show by what authority the bail bond was taken, or that it should appear therefrom that such bond was taken and approved by competent legal authority. The requisites of the citation are prescribed by the preceding article, and a citation containing said requisites is sufficient. A contrary rule was laid down in *Pearson v. State*, 7 App. 280, decided before the enactment of the preceding article, which decision was inadvertently approved in *Lindley v. State*, 17 App. 121. But said decisions in this particular are expressly overruled in *Werbiski v. State*, 20 App. 131, following the decision in *Brown v. State*, 18 App. 326.

The citation may, omit unessential particulars, provided it sets out all the substantial requisites. *Sass v. State*, 8 App. 426; *Cowen v. State*, 3 App. 380; *Brown v. State*, 43 Tex. 349; *State v. Cox*, 25 Tex. 404.

And defects of form are immaterial after a continuance of the cause. *Gragg v. State*, 18 App. 295.

The citation need not show by what authority the bond was taken, or that it was taken or approved by competent authority. *Brown v. State*, 18 App. 326; *Werbiski v. State*, 20 App. 131, overruling *Lindley v. State*, 17 App. 121, on this point.

It is not necessary that the citation recite that the recognizance was entered into in open court. *Pleasants et al. v. State*, 29 App. 214, 15 S. W. 43.

It is not necessary or material in a proceeding to forfeit a bail bond to show that the defendant was arrested. *Trail v. State*, 56 App. 73, 118 S. W. 714.

Under article 489, ante, providing that upon a forfeiture of a bail bond by non-appearance of accused judgment shall be entered that the state recover the amount of the bond, which shall state that it will be made final unless good cause be shown at the next term of court why accused did not appear, and article 491, stating the requisites of the citation to the sureties to show such cause, and not requiring it to state that the bond was approved, as required by statute, and accused released thereon, it is not necessary that the judgment or citation should state such facts; this being a matter of evidence. *Sanders v. State*, 70 App. 532, 158 S. W. 291.

In view of this and the two preceding articles, authorizing the forfeiture of a bail bond, and declaring that the citation in a forfeited case shall state the date of the bond and that it has been declared forfeited, and shall notify the party to appear, etc., there is no variance between a bail bond, correctly stating the date for the appearance of accused, and a judgment nisi, based on the forfeiture of the bond, which gives the date of appearance as "on the _____ day of _____, 191—,"

since the quoted words state no date, and since the judgment need not state the date of appearance. *Hodges v. State* (Cr. App.) 165 S. W. 613.

A citation for the forfeiture of a bail bond is not insufficient, as failing to allege facts constituting a cause of action, because after alleging the giving of the bond, and the transfer of the cause to a named court, it only averred that the principal failed to make his appearance when duly called in "said court." *General Bonding & Casualty Ins. Co. v. State* (Cr. App.) 165 S. W. 615.

Requisite 1. Caption.—The style of the writ should be "The State of Texas." Const. art. 5, sec. 12.

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 App. 65, 11 S. W. 1022, citing *Werbiski v. State*, 20 App. 131. And see *Goodin v. State*, 14 App. 443.

Requisite 2. Direction to sheriff, etc.—A citation may be issued to any county in which the defendant for whom it was issued resides, and it is not required that either the citation or the judgment nisi shall show the place of the defendant's residence. *Dyches v. State*, 24 Tex. 266.

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 Tex. 266.

Where a scire facias was directed to the sheriff or any legal officer of the county, and was returned by one who signed his name as a constable, stating that there is no sheriff or coroner in the county, on which judgment was rendered by default, the service was held sufficient. *Gay v. State*, 20 Tex. 504.

A citation commencing "The state of Texas to the sheriff or any constable, greeting," was held sufficient. *Brown v. State*, 28 App. 65, 11 S. W. 1022.

Requisite 3. Name of principal, etc.—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 Tex. 165. And see *Whitener v. State*, 38 App. 146, 41 S. W. 595.

Where there is an apparent variance between the names of the principal or a surety as used in the recognizance or bond or indictment, and as used in the citation, it must be shown by proper averment in the citation that the variant names designate the same person. Thus, where the bond was signed "W. J. McCulloch," when the information charged "John McCulloch," the citation should have averred that the two names referred to one and the same party. *Hutchings v. State*, 24 App. 242, 6 S. W. 34; *Vidauri v. State*, 22 App. 676, 3 S. W. 347; *McIntyre v. State*, 19 App. 443; *Weaver v. State*, 13 App. 191; *Loving v. State*, 9 App. 471; *Walter v. State*, 6 App. 254; *Cassaday v. State*, 4 App. 96; *Lowe v. State*, 15 Tex. 141.

The object of the citation is to bring the sureties into court to show cause why judgment final should not be entered against them, and it is not essential that it should be issued for, or served upon, the principal. *Hutchings v. State*, 24 App. 242, 6 S. W. 34; ante, art. 490, note.

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 App. 65, 11 S. W. 1022; *Hutchings v. State*, 24 App. 242, 6 S. W. 34, and cases cited.

Scire facias named "M. Larkin;" bond "Mack Larkin;" and bond was "McDuff Larkin." Held, no variance. *Robinson v. State*, 34 App. 131, 29 S. W. 788, cases cited. And see *Wilcox v. State*, 24 Tex. 544.

Variance in the name of the principal. *Whitener v. State*, 38 App. 146, 41 S. W. 595.

Requisite 4. Date and offense charged.—See note as to "Variance" under article 497, post.

See *Dailey v. State*, 4 Tex. 417; *Hodges v. State*, 20 Tex. 493; *Wilson v. State*, 25 Tex. 169; *State v. Hotchkiss*, 30 Tex. 162; *Meredith v. State*, 40 Tex. 480; *Hart v. State*, 2 App. 39; *Walker v. State*, 32 App. 517, 24 S. W. 909; *Avant v. State*, 33 App. 312, 26 S. W. 411.

Moseley v. State, 37 App. 18, 28 S. W. 800; *Bullard v. State*, 32 App. 518, 24 S. W. 898.

It must state the date of the recognizance or bond, and the offense with which the principal is charged, and it must appear to be an offense against the law. *Thompson v. State*, 17 App. 318; *Jones v. State*, 15 App. 82.

And it must be the offense named in the recognizance or bond. *Bailes v. State*, 20 Tex. 498.

Oral testimony is available to show that the apparent variance was due to a clerical error. *Day v. State*, 51 App. 324, 101 S. W. 806.

And see an apparent variance satisfactorily explained. *Pearson v. State*, 51 App. 325, 101 S. W. 802.

It must state the date of the recognizance or bond correctly. *Holt v. State*, 20 App. 271; *Faubion v. State*, 21 App. 494, 2 S. W. 830; *Hedrick v. State*, 3 App. 511; *Garrison v. State*, 21 App. 342, 17 S. W. 351.

The date of a bail bond is the date on which it was executed, and not the date of its approval. *Holt v. State*, 20 App. 271; *Faubion v. State*, 21 App. 494, 2 S. W. 830.

A citation held to sufficiently state date of bond. *Robinson v. State*, 34 App. 131, 29 S. W. 788.

Bail bond dates from its signature and execution, and not from the approval. *Faubion v. State*, 21 App. 494, 2 S. W. 830, citing *Holt v. State*, 20 App. 271.

If the offense be one not eo nomine, then its constituent elements must be stated. *Cresap v. State*, 28 App. 529, 13 S. W. 992; *La Rose v. State*, 29 App. 215, 15 S. W. 33; *Edwards v. State*, 29 App. 452, 16 S. W. 98.

Bond and writ may both state the offense by name if it be an offense eo nomine. *La Rose v. State*, 29 App. 215, 15 S. W. 33; *Brown v. State*, 28 App. 65, 11 S. W. 1022; *Stephens v. State*, 50 App. 531, 98 S. W. 859, 99 S. W. 1122.

Exception that citation fails to allege date of recognizance comes too late after answer to the merits. *Garrison v. State*, 21 App. 342, 17 S. W. 351.

Scire facias recited the bond signed and dated this 23d day of Jan., 1895, the bond offered in evidence was dated _____ day of January, 1895, was approved on the 23d day of January, 1895; held, no variance. *Mills et al. v. State*, 36 App. 71, 35 S. W. 370.

Recognizance described the offense as "passing as true, a forged instrument knowing the same to be forged, with intent to injure and defraud." Held sufficient. *Camp v. State*, 39 App. 142, 45 S. W. 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*, 39 App. 143, 45 S. W. 491.

Recognizance not stating, and the citation stating a date on which the former was entered into is not a variance. *Camp v. State*, 39 App. 143, 45 S. W. 491.

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 App. 531, 98 S. W. 859, 99 S. W. 1122. And see *Cravey v. State*, 26 App. 84, 9 S. W. 62.

The offense "swindling," being one which by statute is made a distinct offense eo nomine, it is enough to state the offense in the scire facias as "swindling," without reciting whether it is a felony or misdemeanor, though under subdivision 3 of article 321, ante, the latter recital would also be necessary in the bond. *Callaghan v. State*, 57 App. 314, 122 S. W. 879.

Where a citation on scire facias on a bail bond did not recite the date of the bond, it was fatally defective. *Holley v. State*, 70 App. 511, 157 S. W. 937.

Under subdivision 3 of article 321, ante, providing that a bail bond shall describe the offense as a felony or as a misdemeanor, according to the charge, where a bond stated that defendant was charged with a felony, a citation to the sureties which, instead of reciting that he was charged and made bond to appear and answer a "felony," stated that he was charged "with the offense of keeping premises for the purpose of being used for gaming," was sufficient, and sufficiently apprised the sureties of the offense charged. *Hodges v. State* (Cr. App.) 165 S. W. 607.

Requisite 5. Forfeiture of bond.—See *Hedrick v. State*, 3 App. 570; *Holt v. State*, 20 App. 272; *Davidson v. State*, 20 Tex. 649; *Kiser v. State*, 13 App. 201; *Thompson v. State*, 34 App. 135, 29 S. W. 789; *Allee v. State*, 28 App. 531, 13 S. W. 991.

Amount of judgment must be stated in judgment nisi and specified in the scire facias. *State v. Cox*, 25 Tex. 404.

A judgment nisi or scire facias stating an amount in excess of the bond should be quashed. *Barringer v. State*, 27 Tex. 553.

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 App. 160; *Frost v. State*, 33 App. 347, 26 S. W. 412, and cases cited; *Downs v. State*, 7 App. 483.

Variance between judgment nisi and scire facias as to time of forfeiture of the bond is fatal. *Brown v. State*, 28 App. 65, 11 S. W. 1022, and cases cited.

Judgment on forfeited bail bond is properly rendered against the defendant severally. *Avant v. State*, 33 App. 312, 26 S. W. 411, and cases cited.

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 App. 350, 116 S. W. 594.

Requisite 6. Notice to appear.—"To show cause why said judgment should not be made final," are the proper words to use in the conclusion of the citation. *Jones v. State*, 15 App. 82.

Where bond was forfeited and a scire facias was issued on the twentieth day of July citing the sureties to appear on the third Monday in July, which was the eighteenth day, held the service was void and a default judgment could not stand. *Bullard v. State*, 32 App. 518, 24 S. W. 898.

Amendment.—See notes under article 499, post.

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.]

See Willson's Cr. Forms, 808.

See notes under article 498, post.

For service and return of citations in civil actions, and decisions relating thereto, see *Vernon's Sayles' Civ. St. 1914*, title 37, c. 6.

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| 1. Service and return in general. | 6. Necessity of return showing service on defendants severally. |
| 2. Necessity of service on principal. | 7. Noting in return time of receiving citation. |
| 3. Time and manner of service as in civil actions. | 8. Return prima facie sufficient. |
| 4. Answer as curing want of service. | 9. Insufficient return and citation. |
| 5. Objection to copy by plea in abatement. | 10. Assignment of error as to service and return. |

1. **Service and return in general.**—Service held sufficient. *Gay v. State*, 20 Tex. 594.

The return of the officer of service of citation may be amended as in civil actions, and a continuance of the cause renders all defects of form immaterial. *Gragg v. State*, 18 App. 295.

Generally on service and return, see *Dyches v. State*, 24 Tex. 266; *Wilson v. State*, 25 Tex. 169; *Evans v. State*, Id., 80; *Winans v. State*, 25 Tex. Supp. 175; *Davis v. State*, 30 Tex. 352; *Gragg v. State*, 18 App. 295; *Bullard v. State*, 32 App. 518, 24 S. W. 898.

2. **Necessity of service on principal.**—Citation need not be served upon the principal. Service upon the sureties is sufficient. *Branch v. State*, 25 Tex. 423; *Vaughan v. State*, 29 Tex. 273; *Hutchings v. State*, 24 App. 242, 6 S. W. 34.

3. **Time and manner of service as in civil actions.**—The sureties are entitled to notice by service of citation for the length of time and in the manner required in a civil action. Each defendant must be served by delivering to him in person a true copy of the citation, and the return of the officer must show the manner of the service, and that it was in compliance with law. Thus, a return as follows: "Executed on July 14, at 3 p. m., 1881, by delivering to Marshall Fulton and R. S. Ross, in person, a true copy of this citation," was held insufficient, because it failed to show that a true copy of the citation was served upon each of the defendants, but on the contrary shows that the defendants were jointly served with one copy. *Fulton v. State*, 14 App. 32; *Vaughan v. State*, 29 Tex. 273; *Covington v. Burleson*, 28 Tex. 370; *King v. Goodson*, 42 Tex. 152; *Middleton v. State*, 11 Tex. 255; *Winans v. State*, 25 Tex. Supp. 175; *Couch v. State*, 57 App. 134, 122 S. W. 24.

4. **Answer as curing want of service.**—An answer cures the want of service. *Steen v. State*, 27 Tex. 86. *Vernon's Sayles' Civ. St.* 1914, art. 1882.

5. **Objection to copy by plea in abatement.**—Objections to the copy of the citation served upon the defendant must be made by plea in abatement. *Wilson v. State*, 25 Tex. 169.

6. **Necessity of return showing service on defendants severally.**—Return must show that service was had upon each of the defendants severally. *Fulton v. State*, 14 App. 32, and cases cited; *Harryman v. State*, 57 App. 204, 122 S. W. 398.

7. **Noting in return time of receiving citation.**—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. *Harbott v. State*, 37 App. 639, 40 S. W. 998, following *Peters v. Crittenden*, 8 Tex. 133.

8. **Return prima facie sufficient.**—The return of service by an officer authorized to make service in certain contingencies is prima facie sufficient, and the authority of such officer can not be questioned for the first time on appeal. *Gay v. State*, 20 Tex. 504.

9. **Insufficient return and citation.**—Under this article a return of service and citation reading, "Came to hand 22d day of August, 1908, and executed on * * * C. 22d day of August, 1908, in B. county," was not sufficient to sustain a default judgment against a surety on a bail bond. *Couch v. State*, 57 App. 134, 122 S. W. 24.

Under this article to support a judgment by default, making final a judgment nisi forfeiting a recognizance bond, the officer's return must show that each of the defendants was served in person with a copy of the writ, giving the date and place of such service, and a return: "Came to hand 22d day of August, 1908, and executed on C. 22d day of August, 1908, in B., Texas. Served on H. September 2, 1908, in B., Texas; S. 4th day of November, 1908, at 2:30 p. m. in B., Texas * * *"—was insufficient. *Harryman v. State*, 57 App. 204, 122 S. W. 398.

10. **Assignment of error as to service and return.**—An assignment of error that no copy of the citation was served upon the surety, brings in question, on appeal, the sufficiency of the return. *Middleton v. State*, 11 Tex. 255.

A service wholly defective will support a default judgment on appeal, if not specially assigned as error. *Evans v. State*, 25 Tex. 80; *Davis v. State*, 30 Tex. 352.

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.

See *Vernon's Sayles' Civ. St.* 1914, arts. 1874, 1878.

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.

See Vernon's Sayles' Civ. St. 1914, art. 1869, et seq.

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.

Judgment final against 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 Tex. 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.

Bail defined.—See ante, art. 315, and notes.

Nature of proceedings and rules governing the same in general.—See Gay v. State, 20 Tex. 504; Blain v. State, 34 App. 417, 31 S. W. 366; Morse v. State, 39 App. 566, 47 S. W. 645, 50 S. W. 342.

The proceeding of forfeiture of bail is a criminal action, but after the rendition of judgment nisi, all the proceedings, unless where otherwise expressly provided, are governed by the same rules as govern in civil causes. Hart v. State, 13 App. 555; Houston v. State, Id. 558-560; Perry v. State, 14 App. 166; Jones v. State, 15 App. 82; Thompson v. State, 17 App. 318; Holt v. State, 20 App. 271; Reddick v. State, 21 App. 267, 17 S. W. 465; Hutchings v. State, 24 App. 242, 6 S. W. 34; State v. Ward, 9 App. 462; State v. Norvell, 53 Tex. 427; Aber v. Warden, 49 Tex. 377. Judgment final upon a judgment nisi, where the proceeding is in the county court, can be rendered only at a civil term of said court. Houston v. State, 13 App. 558, which declares that a contrary doctrine laid down in Cassaday v. State, 4 App. 96; Carter v. State, Id. 165; Wills v. State, Id. 613, is not now the law. See, also, Hart v. State, 13 App. 555; Jones v. State, 15 App. 82. Titus county court, by peculiar legislation, is excepted from the rule above stated. Hutchings v. State, 24 App. 242, 6 S. W. 34.

Scire facias cases are purely criminal, and a civil court has no jurisdiction over such cases. Jeter v. State, 86 Tex. 555, 26 S. W. 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 App. 98, 29 S. W. 472; Cox v. State, 34 App. 94, 29 S. W. 273, and cases cited; Hollenbeck v. State, 40 App. 584, 51 S. W. 373.

Proceedings for forfeiture of a bail bond are, under this article, governed by the rules governing civil actions. Savage v. State (Cr. App.) 148 S. W. 584.

The procedure and practice, governing a suit on a forfeited bail bond are the same as in civil cases. Heiman v. State, 70 App. 480, 158 S. W. 276.

All the proceedings and judgments on the forfeiture of a bail bond constitute a criminal and not a civil case. Hodges v. State (Cr. App.) 165 S. W. 607.

A proceeding to recover on forfeited bail bonds is a criminal action, and not a civil action; this being true, regardless of the amendments to the Code of Criminal Procedure in 1876. General Bonding & Casualty Ins. Co. v. State (Cr. App.) 165 S. W. 615.

Variance.—Under this article and Vernon's Sayles' Civ. St. 1914, art. 1852, defining the requisites of a citation, there is no variance between a bail bond, which states that accused stands charged with a felony and a judgment nisi and citation, which recite that he is by indictment accused of keeping premises for gaming, since the keeper of a gambling house is guilty of a felony, and since the judgment and citation need not state the offense with the definiteness required in bail bonds or indictments. Hodges v. State (Cr. App.) 165 S. W. 613.

Continuance.—Continuance in scire facias proceedings is governed by rules in civil cases. Bailey v. State, 26 App. 341, 9 S. W. 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 App. 91, 25 S. W. 127.

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 Tex. 166.

Suit as against an unserved surety may be dismissed and judgment taken against the principal and other sureties. Pleasants v. State, 29 App. 214, 15 S. W. 43.

New trial, writ of error, or appeal.—See articles 960-962, post, and notes.

See State v. Arrington, 13 App. 611; Blain v. State, 34 App. 417, 31 S. W. 366; Lewis v. State (Cr. App.) 38 S. W. 205; Sparks v. State (Cr. App.) 47 S. W. 976.

The state is not entitled to a new trial in this proceeding, and when it has been granted one, a subsequent forfeiture on the same recognizance or bond is a nullity. *Perry v. State*, 14 App. 166; *Robertson v. State*, Id. 211.

The record on appeal must contain the statement of facts. *Abbott v. State*, 45 App. 514, 78 S. W. 510.

Statement of facts on appeal must contain the judgment nisi. *Abbott v. State*, 45 App. 514, 78 S. W. 510.

Proper notice of appeal is essential to the jurisdiction of the appellate court. *Thomas v. State*, 56 App. 246, 119 S. W. 846.

A party appealing from a judgment of forfeiture must file briefs in the lower court and in the Court of Criminal Appeals as in civil actions; hence an appeal from such judgment must be dismissed where no briefs were filed. *Heiman v. State*, 70 App. 480, 158 S. W. 276; *Thetford v. State* (Cr. App.) 169 S. W. 1153.

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.]

See *Barton v. State*, 24 Tex. 250; *Haverty v. State*, 32 Tex. 602; *Thompson v. State*, 17 App. 318; *Jones v. State*, 15 App. 82.

Answer or plea in general.—If the proceeding be in the county court, the answer must be made at the next civil term of said court: See *Vernon's Sayles' Civ. St.* 1914, arts. 1867, 1934 et seq., as to time of answering. *Odiorne v. State*, 37 Tex. 122.

Plea of misnomer in abatement. *State v. Rhodius*, 37 Tex. 165.

This article refers to the civil and not the criminal term of the county court. *Houston v. State*, 13 App. 558. *Cassaday v. State*, 4 App. 96; *Carter v. State*, Id., 165 and *Wills v. State*, Id., 613, are obsolete. And see *Hutchings v. State*, 24 App. 242, 6 S. W. 34, and cases cited.

Plea of non est factum.—See *Lindsay v. State*, 29 App. 468, 46 S. W. 1045.

Verification of plea or answer.—The answer need not be sworn to. *Odiorne v. State*, 37 Tex. 122; except a plea of non est factum, which must be sworn to. *McWhorter v. State*, 14 App. 239; *Holt v. State*, 20 App. 271. And so, also, must a plea of former judgment nisi pending be under oath. *McWhorter v. State*, 14 App. 239. See *Garrett v. State*, 37 App. 198, 38 S. W. 1017, 39 S. W. 108.

Plea of lis pendens on appeal must be verified by affidavit. *Goodin v. State*, 14 App. 443.

Withdrawal of answer.—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 App. 142, 45 S. W. 490.

Answer as curing want of, or defects in, service of citation.—An answer or appearance cures the want of service, or of defective service, of citation. *Steen v. State*, 27 Tex. 86; *Goode v. State*, 15 Tex. 124.

As to time when answer must be filed.—See *Vernon's Sayles' Civ. St.* 1914, arts. 1867, 1934.

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.

See *Blalack v. State*, 3 App. 376; *Madison v. State*, 17 App. 479; *Ellis v. State*, 10 App. 324.

Setting aside judgment nisi.—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 Tex. 250; *Goode v. State*, 15 Tex. 124.

It was held error to set aside a judgment nisi upon an answer unsworn to, and unsupported by evidence, setting up that the principal was dead at the time the judgment nisi was rendered. *State v. Brown*, 34 Tex. 146.

Effect of dismissal of scire facias.—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 App. 551, 31 S. W. 395.

Amendment or correction.—See, as to amendments, *Sayles' Civ. Stat.*, 1188, 1239 (*Vernon's Sayles' Civ. St.* 1914, arts. 1824, 1879) and notes; *Brown v. State*, 28 App. 65, 11 S. W. 1022.

Quære: Can scire facias be amended and judgment by default taken without notice of amendment? *Davidson v. State*, 20 Tex. 649.

Such notice is not necessary when the sureties are in court contesting the proceedings. *Hutchings v. State*, 24 App. 242, 6 S. W. 34.

Where the judgment nisi is defective, the state, by proper motion, etc., should have the same amended before taking judgment final upon it. *Robertson v. State*, 14 App. 211.

The judgment nisi may be amended even after the expiration of the term at which it was rendered, so as to correct clerical errors or mistakes, or to add an omitted clause necessary to give it effect, when there is anything in the judgment by which to amend. In such case, however, the principal, as well as the sureties, must have notice of the motion to amend. *Collins v. State*, 16 App. 274.

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 App. 274, and cases cited.

Citation may be amended as to defects of form under direction of the court. *Gragg v. State*, 18 App. 295.

A citation may be amended under the same rules governing the amendment of citations and petitions in civil actions. *Hutchings v. State*, 24 App. 242, 6 S. W. 24; *Gragg v. State*, 18 App. 295.

Judgment nisi cannot be amended without notice to principal and sureties. *Hutchings v. State*, 24 App. 242, 6 S. W. 34, citing *Branch v. State*, 25 Tex. 423.

Mere irregular or informal entry of forfeiture and judgment nisi may be amended. *Burris v. State*, 34 App. 551, 31 S. W. 395.

It is not necessary to serve notice on the principal of State's intention to amend judgment nisi and scire facias issued thereon to make them correspond with date of bond. *Sims v. State*, 41 App. 440, 55 S. W. 179.

Where a mistake is made, either in the judgment nisi or in the citation in scire facias on the bail bond, or both, either may be amended by leave of court as pleadings in a civil case, the judgment nisi by the judgment of the court making the necessary corrections, and the citation by proper pleading on behalf of the state, by the district or county attorney, or other person properly representing the state, under authority of the presiding judge, and on proper notice to the sureties. *Holley v. State*, 70 App. 511, 157 S. W. 937.

Where a mistake is made, either in the judgment nisi or in the citation in scire facias on the bail bond, or both, either may be amended by leave of court as pleadings in a civil case, the judgment nisi by the judgment of the court making the necessary corrections, and the citation by proper pleading on behalf of the state, by the district or county attorney, or other person properly representing the state, under authority of the presiding judge, and on proper notice to the sureties. *Holley v. State*, 70 App. 511, 157 S. W. 937.

— **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 App. 28, 11 S. W. 679, and cases cited.

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.

2. The death of the principal before the forfeiture was taken.

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.

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.]

See *Camp v. State*, 39 App. 143, 45 S. W. 491; *Varnell v. State*, 26 App. 65, 9 S. W. 65; *Headley v. State*, 58 Tex. 185, 125 S. W. 27.

Construction with other articles.—Under this article and article 501 providing that when no sufficient cause is shown for accused's failure to appear judgment on the appeal bond shall be made final against him and his sureties; and article 503 providing that if, before final judgment, the principal shall appear or be arrested the court may, in its discretion, remit the amount specified in the bond. Held that, where accused, though without his sureties' fault, purposely left the

county seat and hid, to avoid arrest, until after the term had adjourned, there was no abuse of discretion in rendering judgment against the sureties on his bail bond for the full amount of the bond; no facts being shown which would exonerate them. *Williamson v. State* (Cr. App.) 150 S. W. 892.

In proceedings on the forfeiture of a bail bond, the state may dismiss as to the principal, whether with or without cause; it not being contemplated by this article and articles 489 and 490, ante, that questions arising between the principal and his sureties, or between the sureties themselves, shall be adjudicated in such proceeding. *Hodges v. State* (Cr. App.) 165 S. W. 607.

Cause 1. Invalidity of bond.—Variance in names, see ante, art. 491, subdivision 3, and notes.

And see *Turner v. State*, 14 App. 168; *State v. Gorden*, 41 Tex. 510; *Foster v. State*, 27 Tex. 236; *Keppler v. State*, 14 App. 173; *Addison v. State*, 14 App. 568; *Douglass v. State*, 26 App. 248, 9 S. W. 733; *O'Brien v. State*, 8 App. 671; *Cravey v. State*, 26 App. 84, 9 S. W. 62; *La Rose v. State*, 29 App. 215, 15 S. W. 33; *Lindsay v. State*, 39 App. 468, 46 S. W. 1045; *Ellis v. State*, 10 App. 324; *Collins v. State*, 16 App. 274; *Heath v. State*, 14 App. 213; *Douglass v. State*, 26 App. 248, 9 S. W. 733; *Gay v. State*, 20 Tex. 504; *Thompson v. State*, 31 Tex. 166; *Pleasants v. State*, 29 App. 214, 15 S. W. 43.

Recognizance and bail bond, see ante, title 5, ch. 4. A bail bond, which obligated the principal to appear before the district court of Bexar county instantler, etc., was held sufficient as to time. Instantler means within the next twenty-four hours, or within a reasonable time under the circumstances of the case with reference to which it is used. *Fentress v. State*, 16 App. 79. Bail is not only a joint, but a joint and several undertaking, and if good as to the principal and any one of the sureties, they are not only bound, but are liable, though another surety may not be. And the proceeding may be dismissed as to one surety, and maintained as to another. Even where one surety has not been served, suit may be dismissed as to him, and judgment taken against those served. *Ray v. State*, 16 App. 268; *Goode v. State*, 15 Tex. 124; *Sass v. State*, 8 App. 426. Thus, the suretyship of a married woman invalidates the bail only as to her, not as to the principal and other sureties. *Pickett v. State*, 16 App. 648; ante, art. 324. If the recognizance or bail bond is defective in substance, such defect may be reached by a motion in arrest of judgment. *Sively v. State*, 44 Tex. 274. A recognizance or bail bond, which binds only the sureties to appear, is invalid. *Wright v. State*, 22 App. 670, 3 S. W. 346. Where the indictment and judgment nisi named the principal Atanacio Vidauri, but the return of citation showed that the citation had been executed upon Rafael Vidauri, the judgment final was set aside on appeal, there being no evidence that Atanacio and Rafael Vidauri were the same person. *Vidauri v. State*, 22 App. 676, 3 S. W. 347. A recognizance or bail bond, based upon a void indictment, is itself void. *Harrell v. State*, 22 App. 692, 3 S. W. 479. The validity of a bail bond does not depend upon the approval of the officer taking it. *Holt v. State*, 20 App. 271; *Taylor v. State*, 16 App. 514. A bond was signed "J. W. Dixon," but in the body of the bond the name of the principal was stated to be "Jack Dixon." The indictment charged "Jack Dixon" and the citation was for "Jack Dixon." Held, that the middle initial being immaterial, "J" might stand for "Jack," and there was no variance. *Anderson v. State*, 19 App. 299. But where, in the body of the bond the principal's name was stated to be "Neil McIntyre," and the bond was signed "C. A. McIntyre," it was held that said signature could not be considered to be that of the principal named in the bond. *McIntyre v. State*, 19 App. 443. A bail bond is fatally defective when its conditions require the appearance of the principal at a time when there can legally be no term of the court in which he is required to appear. *Burnett v. State*, 18 App. 283. A bail bond is strictly a statutory bond, and must contain all the requisites prescribed by statute. *Wallen v. State*, 18 App. 414. For other decisions as to requisites of recognizances and bailbonds, see, ante, notes under articles 320 and 321. A bail bond may be filed nunc pro tunc, and judgment final entered thereon, although a capias has been issued for the principal. *Slocumb v. State*, 11 Tex. 15; *Haverty v. State*, 32 Tex. 602. That the bond bears no file mark, is not an objection that will be entertained when presented for the first time on appeal. *State v. Franklin*, 35 Tex. 497; *Turner v. State*, 41 Tex. 549. Evidence aliunde will not be heard to impeach the bond, but if it is substantially defective on its face, exceptions to it may be taken and sustained at any stage of the proceedings. *State v. Angell*, 37 Tex. 357; *Sively v. State*, 44 Tex. 274; *Smalley v. State*, 3 App. 202; *McAdams v. State*, 10 App. 317; *Barringer v. State*, 27 Tex. 553; *Cassaday v. State*, 4 App. 96. It is not a fatal objection to the recognizance or bond that the indictment is lost. *Crouch v. State*, 25 Tex. 755. Nor that the bond was void ab initio because of secession. *Shrader v. State*, 30 Tex. 386.

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 App. 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 App. 439, 110 S. W. 442.

The magistrate's failure to indorse his approval on the bond will not invalidate it. *Dyches v. State*, 24 Tex. 266; *Taylor v. State*, 16 App. 514. And see *Holt v. State*, 20 App. 271; *Faubion v. State*, 21 App. 494, 2 S. W. 830.

Too late to object on appeal that bond shows no file mark. *State v. Franklin*, 35 Tex. 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 Tex. 549.

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 App. 527.

A married woman's signature invalidates the bail bond only as to her and not as to other obligors. *Pickett v. State*, 16 App. 648.

Bail bond can not be an escrow to the obligee, but can be to the principal obligor by a surety. *Brown v. State*, 18 App. 326.

After amendment for intrinsic defects, the forfeiture must be as of the original recognizance and by the same proceeding. *Hand v. State*, 28 App. 28, 11 S. W. 679.

Bail bond is invalid unless it binds the principal as well as the sureties. *Wright v. State*, 22 App. 670, 3 S. W. 346, citing *Barringer v. State*, 27 Tex. 553.

The offense named in the bond must be that of which the accused is charged and no other. *Langan v. State*, 27 App. 498, 11 S. W. 521, and cases cited.

Recognizance cannot be amended nunc pro tunc as to matter of substance without notice to all parties concerned. *Hand v. State*, 28 App. 28, 11 S. W. 679, 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 App. 65, 11 S. W. 1022, and cases cited.

An objectionable condition cannot be treated as surplusage. *Wegner v. State*, 28 App. 419, 13 S. W. 608, and cases cited.

If the bond recites no offense against the state, it will not support scire facias proceedings. *Bowen v. State*, 28 App. 103, 13 S. W. 787, and cases cited.

An impossible date named in the bond invalidates it. *Butler v. State*, 31 App. 63, 19 S. W. 676, and cases cited.

"Violating local option law" is not an offense eo nomine, nor is it such a definition of an offense as would make a bail bond valid. *Woods v. State*, 51 App. 595, 103 S. W. 896.

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 App. 52, 111 S. W. 735, citing *Leal v. State*, 51 App. 425, 102 S. W. 414.

Cause 2. Death of principal.—The death of the principal in an appeal recognizance (post, art. 919), before the time for his appearance in the lower court, will exonerate the obligors, notwithstanding the conviction has been affirmed. *Conner v. State*, 30 Tex. 94. The death of the principal prior to the time of declaring the forfeiture, exonerates his sureties, and where they set up such defense they are entitled to an opportunity to prove it. *Bialack v. State*, 3 App. 376.

Allegation of the death of the principal before forfeiture must be supported by affidavit. *State v. Brown*, 34 Tex. 146.

Death of the principal or his disqualifying sickness, exonerates sureties. *Blacklock v. State*, 3 App. 376; *Price v. State*, 4 App. 73; *Thompson v. State*, 17 App. 318; *Markham v. State*, 33 App. 91, 25 S. W. 127.

Proof in a suit on a forfeited bail bond that one had received a letter from the principal stating that he was sick, but expressing a willingness to come to trial, and that for two years the principal had not been heard from, did not present the issue of his death. *Heiman v. State*, 70 App. 480, 158 S. W. 276.

Cause 3. Sickness, etc., of principal.—Principal's sickness is a good defense to forfeiture. *Reddick v. State*, 21 App. 267, 17 S. W. 465 (citing *Thompson v. State*, 17 App. 318); *Strey v. State* (Cr. App.) 27 S. W. 137.

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 App. 531, 13 S. W. 991; *Cooper v. State*, 5 App. 215, 32 Am. Rep. 571.

Where the defense relied on was that defendant at the time of the forfeiture was confined in the penitentiary, held, that the burden of proof was on the sureties. *Allee v. State*, 28 App. 531, 13 S. W. 991.

Another custody under conviction for another felony, if pleaded, is an answer to scire facias. *Wheeler v. State*, 33 Tex. 173.

Sickness of the principal at the time the forfeiture is had, if established, is a statutory and valid defense. *Thompson v. State*, 17 App. 318; *Price v. State*, 4 App. 73. See facts held sufficient to establish such defense. *Baker v. State*, 21 App. 359, 17 S. W. 256. But a physician's certificate is not competent to establish such defense. *Price v. State*, 4 App. 73.

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 App. 359, 17 S. W. 256.

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 App. 65, 11 S. W. 1022.

The principal is a competent witness as to his sickness when forfeiture is taken. *Reddick v. State*, 21 App. 267, 17 S. W. 465.

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 App. 91, 25 S. W. 127. And see *Brown v. State*, 28 App. 65, 11 S. W. 1022.

The fact that defendant was in attendance in another county under bond when the forfeiture was taken was a sufficient excuse for not being present when his case was called in county where forfeiture was taken. *Woods v. State*, 51 App. 595, 103 S. W. 896.

In scire facias on a bail bond the sureties, claiming exoneration by reason of sickness of the principal or uncontrollable circumstance preventing his appearance

at court, could not take advantage of such defense, unless properly pleaded. *Holley v. State*, 70 App. 511, 157 S. W. 937.

Cause 4. Delay in or failure to prosecute.—It is no sufficient answer by the sureties that the principal did not appear because no indictment had been found against him for the offense named in his bond. *State v. Cocke*, 37 Tex. 155. Where the principal was bound to appear before the county court before indictment or information presented, and at the next term of said court no indictment or information was presented against him, and no cause shown for further holding the principal, it was held that his sureties were discharged from further liability on the bond. *Jones v. State*, 11 App. 412. See, post, art. 642.

Failure to present indictment or file information, 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 Tex. 219; *State v. Cocke*, Id. 155.

Subdivision 4, exonerating defendant and his sureties in case of failure to indict at the first term after his admission to bail where the prosecution has not been continued by order of court, leaves it to the court's discretion to continue by an order entered of record that the prosecution should be and has been continued by its direction, which order ordinarily must specify the case or cases continued, and such a continuance is not made by a general entry to the effect that it is unnecessary to impanel a grand jury. *Headley v. State*, 58 App. 185, 125 S. W. 27.

Other causes.—See arts. 330, et seq., and notes.

See *State v. Warren*, 17 Tex. 283.

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 App. 331, 8 S. W. 277, and cases cited. But see *Hughes v. State*, 28 App. 499, 13 S. W. 777.

The answer should show cause for a failure to move to set aside the judgment nisi at the term at which said judgment was rendered. Such motion should be made at the earliest practicable moment. *Goode v. State*, 15 Tex. 125; *Barton v. State*, 24 Tex. 250. When a former judgment nisi has been set aside at the instance of the defendant, such former judgment is not a bar to a subsequent forfeiture, and is no answer thereto. *Anderson v. State*, 19 App. 299. Where the principal appeared, was put upon his trial, but there was a mistrial, and the court proceeded with the regular call of the docket, and before said call was completed, recalled the case of the defendant, without previous order for its recall, and he being absent, a forfeiture was taken, it was held that such judgment was without authority of law and was void. *Thomas v. State*, 12 App. 416; *Lee v. State*, 25 App. 331, 8 S. W. 277.

The delivery of the principal in court is not a good answer to a citation, without a showing of legal cause for failure to have him in court at the proper time. *Chambless v. State*, 20 Tex. 197; *Barton v. State*, 24 Tex. 250. It is a sufficient answer in a misdemeanor case, punishable by fine only, that the principal appeared by attorney. *Neaves v. State*, 4 App. 1. See, also, *Page v. State*, 9 App. 466. It is a sufficient answer that the sureties had delivered the principal to the sheriff, and that he had thereafter escaped. *State v. Rosseau*, 39 Tex. 614. It is a sufficient answer that at the time the judgment nisi was rendered the principal had been convicted of crime in another county, and was then held in custody under said conviction. *Cooper v. State*, 5 App. 215, 32 Am. Rep. 571; *Wheeler v. State*, 38 Tex. 173. And, where the principal, before the rendition of the judgment nisi has been a second time arrested and has given new bail, the sureties upon the first obligation are released. *Peacock v. State*, 44 Tex. 11; *Lindley v. State*, 17 App. 120; *Roberts v. State*, 22 App. 64, 2 S. W. 622. It is not a sufficient answer that after the forfeiture the principal had been rearrested and had escaped. *Chappell v. State*, 30 Tex. 613. See *Foster v. State*, 38 App. 372, 43 S. W. 80.

No other causes than those specified in this article will exonerate from liability. *Barton v. State*, 24 Tex. 250; *Wheeler v. State*, 38 Tex. 173; *McCoy v. State*, 37 Tex. 219; *Thompson v. State*, 31 Tex. 166; *Martin v. State*, 16 App. 265.

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 App. 46.

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 App. 414.

Former judgment nisi pending on bail bond. *Goodin v. State*, 14 App. 443.

It is well settled that neither the principal nor the sureties will be permitted to question the sufficiency of the indictment or information, in answer to a citation on a judgment nisi. *Jones v. State*, 15 App. 82; *Hester v. State*, Id. 418; *Martin v. State*, 16 App. 265; *Brown v. State*, 6 App. 188; *Smalley v. State*, 3 App. 203; *State v. Ake*, 41 Tex. 166; *State v. Cocke*, 37 Tex. 155; *State v. Rhodius*, Id. 165; *McCoy v. State*, Id. 219; *State v. Angell*, Id. 357. But if in fact there was no indictment or information presented, the judgment nisi would be void. *Brown v. State*, 6 App. 188. And so, if the pretended indictment was presented by an illegal grand jury composed of more or fewer than twelve men, the indictment and all proceedings thereunder would be void. *Harrell v. State*, 22 App. 692, 3 S. W. 479.

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 App. 265, and cases cited.

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 cannot be entered against him or his sureties. *Thompson v. State*, 17 App. 318, citing *Barton v. State*, 24 Tex. 250.

A plea by sureties that the state's attorney, without their knowledge or consent, agreed with their principal, that he need not appear at a preceding term of the court, at which term he did not appear, and no forfeiture was taken at said term, and that thereby they were released, etc., was held to present no legal defense. *Brown v. State*, 18 App. 326. See an answer setting up several matters, none of which constituted a legal defense. *Fentress v. State*, 16 App. 79. When the judgment nisi is upon a recognizance given on appeal, the sureties cannot question the validity of the conviction of the principal. *Martin v. State*, 16 App. 265.

Non est factum is a valid defense, but it must be pleaded under oath, and the plea must deny the execution of the obligation by the person making the defense, or by any one acting under his authority. *Holt v. State*, 20 App. 271; *McWhorter v. State*, 14 App. 239. And so a plea of former judgment nisi pending, if properly pleaded under oath, is a valid defense. *McWhorter v. State*, 14 App. 239. Where the surety signed bail bond blank as to the amount of the penalty, and delivered it to the principal with the understanding that the blank was to be filled with \$500—but the blank was afterward filled with \$1,000—it was held that the surety was liable for the amount of the bond, and that his plea of non est factum was not a valid defense. *Gary v. State*, 11 App. 527. Where a defendant pleads non est factum he must show that he is the party upon whom citation was served. *Rutledge v. State*, 36 Tex. 459; *State v. Rhodius*, 37 Tex. 165.

The sufficiency of the indictment cannot be questioned in a scire facis proceeding. *Langan v. State*, 27 App. 498, 11 S. W. 521; *Wells v. State*, 21 App. 594, 2 S. W. 806, and cases cited; *Harrell v. State*, 22 App. 692, 3 S. W. 479, and cases cited.

Appearance, fine and imprisonment of the principal renders the bond functus officio, and releases the sureties. *Johnson v. State*, 32 App. 353, 22 S. W. 406, and cases cited.

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 App. 131, 29 S. W. 788, and cases cited.

Where the bondsmen of one indicted for crime made no serious effort to secure the rearrest of accused failing to appear, that the officers were diligent did not inure to the benefit of the bondsmen; but, in a suit on the bail bond, final judgment for the full amount of the bond could be rendered against them. *Johnson v. State* (Cr. App.) 150 S. W. 890.

Where a bail bond was executed to guarantee the appearance of accused in the criminal district court of Dallas county, the transfer of the prosecution under Acts Sp. Sess. 32d Leg. c. 19, to the criminal district court No. 2, carried with it the bond, and did not discharge the surety. *General Bonding & Casualty Ins. Co. v. State* (Cr. App.) 165 S. W. 615.

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.]

See *Jones v. State*, 15 App. 82; *Thompson v. State*, 34 App. 135, 29 S. W. 789; *Galindo v. State*, 15 App. 319; *Smith v. State*, 13 App. 31; *Cheatham v. State*, 13 App. 32; *Watkins v. State*, 16 App. 646; *Collins v. State*, 16 App. 274; *Wegner v. State*, 28 App. 419, 13 S. W. 608; *Sass v. State*, 8 App. 426; *Goode v. State*, 15 Tex. 124.

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| 1. Foundation of suit. | 8. When judgment may be rendered. |
| 2. Collection of recognizance on change of venue. | 9. Entry nunc pro tunc. |
| 3. General denial. | 10. Discretion of court. |
| 4. Evidence. | 11. Dismissal as to defendant deceased. |
| 5. Variance. | 12. Principal not served. |
| 6. Trial by jury. | 13. Cognizors not all served. |
| 7. Judgment final in general. | 14. Judgment of justice of the peace. |
| | 15. Writ of error. |

1. **Foundation of suit.**—Citation is both petition and citation, and the recognizance or bail bond and judgment nisi the foundation of the suit. *Cowen v. State*, 3 App. 380, and cases cited; *Goodin v. State*, 14 App. 443, and cases cited.

2. **Collection of recognizance on change of venue.**—When a change of venue is taken the recognizance may be collected in the county to which the change is taken. *Russell v. State* (Civ. App.) 40 S. W. 69.

3. **General denial.**—General denial puts in issue all the material allegations of the petition. *Goodin v. State*, 14 App. 443, and cases cited.

4. **Evidence.**—See *Gragg v. State*, 18 App. 295; *Butler v. State*, 31 App. 63, 19 S. W. 676, and cases cited; *Sims v. State*, 41 App. 440, 55 S. W. 179.

Where a recognizance or bail bond, upon which a recovery is sought, shows upon its face an erasure or alteration in a material matter, it devolves upon the state to satisfactorily explain such erasure or alteration, and show that it was made under such circumstances that the validity of the obligation was not affected there-

by; and until such explanation is made the obligation is not admissible in evidence. *Kiser v. State*, 13 App. 201.

This proceeding is in effect a suit upon the recognizance or bail bond, in which the citation performs the double function of petition and citation. The foundation of the suit is the recognizance or bail bond, and the judgment nisi which is the judicial declaration of the forfeiture of such obligation. The production in evidence of the recognizance or bond, and the judgment nisi, is essential to a recovery, and they must be adduced in evidence on the trial. *Hester v. State*, 15 App. 418; *McWhorter v. State*, 14 App. 239; *Martin v. State*, 16 App. 265.

A general denial puts in issue all the material issuable allegations in the citation, and the burden of proof is upon the state to establish such allegations. *Short v. State*, 16 App. 44; *Goodin v. State*, 14 App. 443; *Houston v. State*, 13 App. 560; *Holt v. State*, 20 App. 271; *Baker v. State*, 21 App. 359, 17 S. W. 256.

A defendant may testify in his own behalf, and in behalf of his codefendants, as in other civil cases. *Reddick v. State*, 21 App. 267, 17 S. W. 465.

Where a bail bond was taken and approved by a justice of the peace and was subsequently forfeited in the district court and judgment nisi rendered thereon and the scire facias issued to the sureties recited that the bond had been entered into before the district court, it was error to admit the bond in evidence over defendant's objection. *Frost v. State*, 33 App. 347, 26 S. W. 412.

In a scire facias on a bail bond the scire facias is admissible in evidence. *Lewis v. State* (Cr. App.) 33 S. W. 570.

When there is no plea putting in issue the execution of a bail bond it is not necessary to prove its execution. *Lindsey v. State*, 39 App. 468, 46 S. W. 1045.

In an action on a forfeited bail bond, it is not necessary to introduce in evidence the indictment, but only the judgment nisi and the bond. *Heiman v. State*, 70 App. 480, 158 S. W. 276.

Where the judgment nisi forfeiting a bail bond did not allege the day on which the principal was required to be present, but left that a blank, there was no variance between it and the bail bond alleging the term at which the principal was to be present, and the surety cannot object to the introduction in evidence of the bond on that ground. *General Bonding & Casualty Ins. Co. v. State* (Cr. App.) 165 S. W. 615.

On scire facias to forfeit a bail bond, where the surety filed a general denial, it put in issue all material allegations in the writ, and the burden is on the state, not only to introduce in evidence the judgment nisi, but the bail bond. *General Bonding & Casualty Ins. Co. v. State* (Cr. App.) 165 S. W. 615.

5. **Variance.**—See *Bailes v. State*, 20 Tex. 498; *Smith v. State*, 7 App. 160; *Brown v. State*, 28 App. 65, 11 S. W. 1022; s. c., 28 App. 297, 12 S. W. 1101; *Avant v. State*, 33 App. 312, 26 S. W. 411; *Frost v. State*, 33 App. 347, 26 S. W. 412; *Mills v. State*, 36 App. 71, 35 S. W. 370; *Whitener v. State*, 38 App. 146, 41 S. W. 595.

The citation performs the double function of a petition and a citation, and in establishing the essential matters therein stated the allegata and the probata must substantially correspond. *Arrington v. State*, 13 App. 554; *Houston v. State*, Id. 558; *State v. Cox*, 25 Tex. 404; *Cowen v. State*, 3 App. 380; *Brown v. State*, 43 Tex. 349; *Busby v. State*, 13 Tex. 136; *McWhorter v. State*, 14 App. 239; *Goodin v. State*, 14 App. 443; *Short v. State*, 16 App. 44.

And the allegata and the probata must substantially correspond. *Arrington v. State*, 13 App. 554; *Werbiski v. State*, 20 App. 131. But to constitute a fatal variance the citation must misdescribe the cause of action in a manner calculated to mislead or surprise the adverse party. *Werbiski v. State*, 20 App. 131.

Where the citation described the undertaking forfeited as a recognizance, and the undertaking which was in fact forfeited was a bail bond, the variance was held to be fatal. *Garrison v. State*, 21 App. 342, 17 S. W. 351.

Where the citation declared upon a forfeited recognizance, and the obligation offered in evidence by the state was a bail bond, the variance was held to be fatal. *Garrison v. State*, 21 App. 342, 17 S. W. 351. Where the citation described the bail bond as dated February 1, 1885, and the true date of said bond was December 13, 1884, the variance was held to be fatal. *Faubion v. State*, 21 App. 494, 2 S. W. 830. So where the citation described the bond as dated April 20, 1883, and the bond admitted in evidence was dated April 17, 1883, the variance was held fatal. *Holt v. State*, 20 App. 271. See, also, *Hedrick v. State*, 3 App. 571.

A bond bearing date other than that alleged in the scire facias cannot be introduced in evidence. *Moseley v. State*, 37 App. 18, 38 S. W. 800.

The scire facias recited the bond dated April 2nd, 1894, the proof showed the bond to have been executed on May 2, 1894; held, fatal variance. *Moseley v. State*, 37 App. 18, 38 S. W. 800.

The scire facias alleged the bond to have been executed April 28. The bond in evidence was executed April 21 and approved April 28; held, the variance was fatal. *Hayden v. State* (Cr. App.) 38 S. W. 801.

In scire facias proceedings, a bail bond offered in evidence, which recites that the principal was charged with burglary by a complaint before a justice, and that on August 11th the justice required him to enter bond for his appearance, and which shows that it was approved by the justice on August 13th, is insufficient to support pleadings reciting the 11th day of August as the date of the execution of the bond calling for the appearance of the principal before the district court to enter a charge of burglary, presented in the district court by complaint. *Huntley v. State* (Cr. App.) 143 S. W. 1166.

6. **Trial by jury.**—Submission of the whole case to the judge without demand for jury is waiver of the right by defendants. *Dyches v. State*, 24 Tex. 266.

Where the defense is a variance between the name of the principal as it appears in the indictment, and in the recognizance or bail bond, it is not error to submit the issue to the jury. *Wilcox v. State*, 24 Tex. 544.

Nor error to refuse a jury when the mooted question was one purely of law. *McCoy v. State*, 37 Tex. 219.

It was held in one case that where the only answer was a general denial, and that there was no indictment against the principal for the offense named in the bond, that the defendants were not entitled to a trial by jury. *McCoy v. State*, 37 Tex. 219. This decision, however, does not seem to accord with subsequent decisions cited above.

The right of trial by jury is the same in this proceeding as in other civil cases, and is governed by the same rules. *Short v. State*, 16 App. 44, citing *Hart v. State*, 13 App. 555. If a jury be not demanded, the court may determine the facts. *Dyches v. State*, 24 Tex. 266.

7. Judgment final in general.—The suit may be discontinued as to either the principal or one or more sureties, and judgment final may then be rendered against the other obligors. *Gay v. State*, 20 Tex. 504; *Thompson v. State*, 31 Tex. 166.

A judgment nisi is properly rendered against the defendants severally for the amount of the recognizance or bond, and a final judgment rendered thereon against the defendants jointly and severally, though a variance from the judgment nisi, and not strictly correct, is immaterial error, and does not vitiate the judgment final. *Kiser v. State*, 13 App. 201.

A judgment is not final, unless the whole matter in controversy is disposed of as to all the parties. Thus, where the case is not disposed of as to one of the sureties, although such surety has not been served with citation, and has not answered, the judgment is not final. *Thompson v. State*, 17 App. 318. See, also, *Cowen v. State*, 3 App. 381; *Walter v. State*, 6 App. 254; *Stephenson v. State*, 9 App. 459; *Brown v. State*, 40 Tex. 49; *Blalock v. State*, 35 Tex. 89; *Ellis v. State*, 10 App. 324; *Wills v. State*, 4 App. 613; *McIntyre v. State*, 19 App. 443; *Cox v. State*, 34 App. 94, 29 S. W. 273, and cases cited.

It is not necessary that the judgment in scire facias on a forfeited bail bond recite the date of the bond or of rendition of the judgment nisi, so that misrecitals thereof are surplusage and immaterial. *Callaghan v. State*, 57 App. 314, 122 S. W. 879.

8. When judgment may be rendered.—It is well settled that in this proceeding in the county court, a trial and judgment final can be legally had only at a term of said court held for civil business. A judgment final rendered at a criminal term of said court would be without authority of law, and a nullity. *Hutchings v. State*, 24 App. 242, 6 S. W. 34; ante, art. 497.

9. Entry nunc pro tunc.—Where a final judgment of forfeiture of a bail bond, conditioned for the defendant's appearance in a criminal case, was rendered in county court, but through some oversight was not entered at that term, the county court properly permitted the judgment to be entered nunc pro tunc at a subsequent date; the parties to the bond not being deprived thereby of any right to move for a new trial or to seek to set aside the judgment. *Willis v. State* (Cr. App.) 150 S. W. 904.

10. Discretion of court.—In view of article 501 and article 500, providing that certain named causes will exonerate defendant and his sureties from liability upon a forfeited bail bond, and article 503 providing that if, before final judgment, the principal shall appear or be arrested the court may, in its discretion, remit the amount specified in the bond, it was held that, where accused, though without his sureties' fault, purposely left the county seat and hid, to avoid arrest, until after the term had adjourned, there was no abuse of discretion in rendering judgment against the sureties on his bail bond for the full amount of the bond; no facts being shown which would exonerate them. *Williamson v. State* (Cr. App.) 150 S. W. 892.

11. Dismissal as to defendant deceased.—Dismissal may be had as to a defendant deceased at the time of forfeiture and judgment nisi. *Ray v. State*, 16 App. 268, and cases cited; *Thompson v. State*, 31 Tex. 166; *Pleasant v. State*, 29 App. 214, 15 S. W. 43.

12. Principal not served.—Judgment may be rendered against all parties without service on principal. *Vaughan v. State*, 29 Tex. 273.

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

14. Judgment of justice of the peace.—Judgment of justice court is not void because it was not entered until nine days after its rendition. *Ex parte Quong Lee*, 34 App. 511, 31 S. W. 391.

15. Writ of error.—Where affidavits show that plaintiffs in error from a judgment on a forfeited bail recognizance filed a petition and bond, and their attorney took the papers to his office to issue citation to the state, but failed to issue it for over a year, though requested by the clerk of the court, the writ of error will be dismissed as abandoned. *Cruz v. State* (Cr. App.) 172 S. W. 235.

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.

See article 498, ante.

Default judgment.—The judgment in such case will be for the full amount of the penalty, and without a jury. *Lawton v. State*, 5 Tex. 272.

Judgment by default must include principal as well as sureties. *Cowen v. State*, 3 App. 380, citing *Blalock v. State*, 35 Tex. 89.

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.]

See *Jackson v. State*, 13 Tex. 218.

Discretion of court.—As to judicial discretion, see *State v. Warren*, 17 Tex. 283; *Chambless v. State*, 20 Tex. 198; *Haverty v. State*, 32 Tex. 602; *Darton v. State*, 24 Tex. 250; *Lee v. State*, 25 App. 331, 8 S. W. 277.

Where, in an action on a bail bond, accused testified that there were two cases against him, that one of them was continued, that he returned to his home intending to return to court, that a day or two later a witness informed him that he had made arrangements with the officers to telephone the witness if the case was reached, and that he would notify accused, and the state proved a determination of accused not to appear at that term of court, a finding for the state and a forfeiture of the bond for the full amount was within the discretion of the trial court, within article 503, and though the facts proved by accused would not justify a judgment of forfeiture for the full amount, the court on appeal would not interfere with the judgment. *Johnson v. State* (Cr. App.) 150 S. W. 890.

In view of this article and articles 500 and 501, ante, it was held that, where accused, though without his sureties' fault, purposely left the county seat and hid, to avoid arrest, until after the term had adjourned, there was no abuse of discretion in rendering judgment against the sureties on his bail bond for the full amount of the bond; no facts being shown which would exonerate them. *Williamson v. State* (Cr. App.) 150 S. W. 892.

Judgment against principal different from that against sureties.—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 App. 252, 103 S. W. 929.

So where a bail bond is for \$500, the court can render judgment against the principal for \$500, and against the sureties for \$100, jointly and severally. *Williams v. State*, 51 App. 252, 103 S. W. 829.

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.]

See ante, art. 497, and notes.

Setting capital cases for trial, see post, art. 659.

In general.—Facts held to require setting aside of judgment nisi and entry of defense. *Jackson v. State*, 13 Tex. 218.

Sureties can not impeach indictment against principal. *Lee v. State*, 25 App. 331, 8 S. W. 277.

Appearance or arrest.—The mere appearance of the principal for trial, without excuse, does not entitle him to a remission of the forfeiture. *State v. Warren*, 17 Tex. 283. This article does not limit the appearance of the principal to a voluntary appearance. His appearance before entry of final judgment, whether voluntary or involuntary, requires the court to set aside the forfeiture, provided good cause be shown why he did not appear in court in accordance with his undertaking. *Baker v. State*, 21 App. 359, 17 S. W. 256.

The arrest or surrender of principal after forfeiture of bail bond will not relieve sureties. But pending final judgment, if principal is apprehended, it is within the power of the court to remit, either in whole or part, the penalty specified in the bond. *Lee v. State*, 25 App. 331, 8 S. W. 277.

New trial.—The state is not entitled to a new trial in this proceeding. *Robertson v. State*, 14 App. 211; *Perry v. State*, Id. 166. The cases cited virtually overrule *Gary v. State*, 11 App. 527, which holds that the state may be granted a new trial.

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.]

See Willson's Cr. Forms, 786.

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.]

See Willson's Cr. Forms, 786.

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.

Transferred cases.—In a misdemeanor case transferred from the district to an inferior court under article 483, ante, the capias must issue from the court to which the cause has been transferred. *Cassaday v. State*, 4 App. 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, [500] in which case the defendant and his sureties shall remain bound under his present recognizance or bail bond.

Alias capias.—See *Brown v. State*, 28 App. 65, 11 S. W. 1022.

Alias capias should issue concurrently with the judgment nisi. *Slocumb v. State*, 11 Tex. 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.

Arrest.—*Gary v. State*, 11 App. 527; *Ex parte Mosby*, 31 Tex. 566, 98 Am. Dec. 547. *Brown v. State*, 28 App. 65, 11 S. W. 1022.

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 App. 527.

New indictment.—This article does not apply when the second arrest is under a second indictment, though based on the same transaction. *Foster v. State*, 38 App. 372, 43 S. W. 80.

Effect of taking new bond.—Where accused pending an appeal secured his release on bail, and after the reversal and remand of the cause and a second conviction the sheriff rearrested him, refused to release him on the first bond, and demanded a new bond, which was given, his sureties on the first bond were released, and the second bond was valid even though the first bond had been a valid obligation conditioned after his second conviction for his appearance. *Sanders v. State*, 70 App. 532, 158 S. W. 291.

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.

See Willson's Cr. Forms, 786, 793.

Art. 513. [501] Capias may issue to several counties.—Capias 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.]

See Willson's Cr. Forms, 790. See ante, arts. 318, 336-338; post, art. 524.

Explanatory.—This article seems to be superseded by Act 1907, p. 148, amending art. 337, ante.

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 Willson's Cr. Forms, 791. See ante, arts. 318, 337, 338, and notes.

Change of venue.—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 App. 129, 44 S. W. 1110.

Art. 516. [504] Court shall fix amount of bail in felony cases, etc.—In all felony cases which areailable, 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.]

See Willson's Cr. Forms, 787.

Presumption that amount was fixed by court.—*Thrash v. State*, 16 App. 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.]

Arrest in other county.—Warrant of arrest can not be executed by a sheriff beyond limits of his county. *Jones v. State*, 26 App. 1, 9 S. W. 53, 8 Am. St. Rep. 454.

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 arts. 318, 336, 337, ante, and art. 978, post.

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.

See Willson's Cr. Forms, 788. See ante, arts. 318, 336, 337, and notes.

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.]

See Willson's Cr. Forms, 789. See ante, arts. 270 and 271, and notes.

Arrest by officer beyond limits of county.—See *Jones v. State*, 26 App. 1, 9 S. W. 53, 8 Am. St. Rep. 454; *Ledbetter v. State*, 23 App. 247, 5 S. W. 226; *Peter v. State*, 23 App. 684, 5 S. W. 228; *Toliver v. State*, 32 App. 444, 24 S. W. 286.

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.]

See Willson's Cr. Forms, 791.

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.]

Bail.—In the cases mentioned in this article, the sheriff of the county of the prosecution is the proper officer to take bail of the prisoner. *Hill v. State*, 15 App. 530.

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.

See Willson's Cr. Forms, 788-790, 792.

Return.—A return of "executed," without showing how executed, does not purport an actual arrest of the party. *Gary v. State*, 11 App. 527.

3. OF WITNESSES AND THE MANNER OF ENFORCING THEIR ATTENDANCE

Art. 525. [513] Definition of "subpœna."—A "subpœna" 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.]

See Willson's Cr. Forms, 780, 865; See ante, art. 4, and notes.

Writ of right.—A defendant may procure a subpœna during the progress of the trial, and its issuance is not a matter of discretion with the judge or clerk, but of right, unless it be shown that the attendance of the witness can not be procured. *Edmondson v. State*, 43 Tex. 230. The right of a defendant to have compulsory

process for witnesses is a constitutional one. *Roddy v. State*, 16 App. 502; *Homan v. State*, 23 App. 212, 4 S. W. 575. And a subpoena is such process. *Neyland v. State*, 13 App. 536.

Unorganized county.—If witness resides in an unorganized county the process should name such county as his residence. *Parkerson v. State*, 9 App. 72.

Subpœna duces tecum.—A subpoena duces tecum should give a reasonably accurate description of the papers wanted, either by date, title, substance, or the subject to which they relate. *Ex parte Gould*, 60 App. 442, 132 S. W. 364, 31 L. R. A. (N. S.) 835.

A subpoena duces tecum for the production of all telegrams sent from a telegraph office ordering intoxicating liquors without specifying whether the liquors ordered were unlawfully sent for, is unauthorized because too general and because it does not relate to any crime committed nor to any person accused or suspected. *Ex parte Gould*, 60 App. 442, 132 S. W. 364, 31 L. R. A. (N. S.) 835.

Process where both parties desire witness.—See *Mixon v. State*, 36 App. 66, 35 S. W. 394; *Byrd v. State*, 39 App. 609, 47 S. W. 721.

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.

See *Willson's Cr. Forms*, 780, 865, 868.

Art. 526a. Application for subpoena.—Hereafter before the clerk of the district court in any county in Texas, or his deputy shall be required or permitted to issue a subpoena in any felony case filed or pending in any district court of which he is clerk or deputy, the attorney representing the defendant or the defendant himself or the district attorney or attorney representing the State shall make his application in writing to the district clerk under oath for said witnesses. Said application shall state the name of the witnesses desired, the location and vocation, if known, and that the testimony of said witnesses is believed to be material to the State or the defense; provided, however, if the defendant be not represented by an attorney, then he, the defendant, would be authorized to make application under oath for his witnesses, as above provided for. [Act 1913, p. 319, ch. 150, § 1.]

See *Willson's Cr. Forms*, 777.

Penalty for violation, see art. 392a, Pen. Code. See, also, arts. 1137a and 1137b.

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.

See *Willson's Cr. Forms*, 780, 869, 870.

Service.—A subpoena cannot be served on a witness by reading it to him over the telephone. *Ex parte Terrell* (Cr. App.) 95 S. W. 537.

Return.—The return should show that the subpoena was read to the witness; and if the subpoena contains the names of several witnesses, it should show distinctly which were served and which not. *Tooney v. State*, 5 App. 163. The preceding article declares the legal requisites of the service and return of a subpoena. As a general rule an officer's return on process of any kind should state that he has performed what the mandatory part of the process required of him. And when the law requires and prescribes any particular forms of proceedings in the service, the return should show that they were specifically complied with, and should set them forth as fully and circumstantially as if they had been expressly required in the mandatory part of the process. *Neyland v. State*, 13 App. 536.

A sheriff's return that he was informed at the witness' last place of employment that the witness had left for another state, is not admissible as a foundation for the admission of the testimony of the witness taken at accused's examining trial, being only hearsay. *Anderson v. State* (Cr. App.) 170 S. W. 142.

Process when both parties desire witness.—See *Mixon v. State*, 36 App. 66, 35 S. W. 394; *Byrd v. State*, 39 App. 609, 47 S. W. 721.

Art. 528. [516] Penalties for refusing to obey a subpoena.—If a witness refuse to obey a subpoena, he may be fined at the discre-

tion 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.]

See Willson's Cr. Forms, 780, 873.

Contempt.—In a contempt proceeding for failing to obey a subpoena, the court cannot in the first instance make his judgment final. He can only enter judgment nisi and then after citation to the party and a hearing on evidence render a final judgment. *Ex parte Terrell* (Cr. App.) 95 S. W. 538.

Appeal will not lie from a judgment fining one for contempt of court in refusing to obey a subpoena. *Pegram v. State*, 72 App. 176, 161 S. W. 458.

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.]

See Willson's Cr. Forms, 780, 871-873.

Materiality.—The court may not punish one for contempt for disobeying a subpoena duces tecum issued by a grand jury unless it is made to appear that the disobedience is as to some matter material to the prosecution of some crime or person charged with crime. *Ex parte Gould*, 60 App. 442, 132 S. W. 364, 31 L. R. A. (N. S.) 835.

Oath.—These requisites are essential, and the unsworn statement of defendant's counsel will not suffice. *McGehee v. State*, 4 App. 94; Willson's Cr. Forms, 871-873.

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.]

See Willson's Cr. Forms, 780, 873; *Walker v. State*, 13 App. 618, 44 Am. Rep. 716, note; *Long v. State*, 17 App. 128; *Hill v. State*, 18 App. 665; *Mixon v. State*, 36 App. 66, 35 S. W. 394; *Harvey v. State*, 35 App. 545, 34 S. W. 623; *Parshall v. State*, 62 App. 177, 138 S. W. 759; *Johnson v. State*, 63 App. 465, 140 S. W. 347.

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.]

See Willson's Cr. Forms, 780, 873, 874.

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.]

See Willson's Cr. Forms, 779, 780.

Art. 533. [521] 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.]

See Willson's Cr. Forms, 780.

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.]

See Willson's Cr. Forms, 780.

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.]

See Willson's Cr. Forms, 780, 879, 880.

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.]

See Willson's Cr. Forms, 776, 780, 865, 873, 876, 877, 879.

Attachment.—Parshall v. State, 62 App. 177, 138 S. W. 759; Johnson v. State, 63 App. 465, 140 S. W. 347.

A witness residing in the county of the prosecution can not be attached until he has disobeyed a subpoena. Colbert v. State, 1 App. 314; Tooney v. State, 5 App. 163. But if nothing appears to the contrary, it will be presumed that the attachment was properly issued. Farrar v. State, 5 App. 489. When a witness who resides in the county of the prosecution has been duly served with, and has disobeyed a subpoena, the party who had him summoned is entitled to have an attachment issued forthwith for such witness. Long v. State, 17 App. 128; Massie v. State, 30 App. 64, 16 S. W. 770.

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.]

See Willson's Cr. Forms, 778, 780, 805, 876, 878, 879.

Personal recognizance.—This article is to be construed in pari materia with articles 543, 544, 547 and 548, and in all cases where the witness is brought before the court and it appears to the satisfaction of the court that the witness is unable to give security for his attendance, it is the duty of the court to take his personal recognizance. Ex parte Sheppard, 43 App. 372, 66 S. W. 305.

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.]

See Willson's Cr. Forms, 778-780.

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.]

See Willson's Cr. Forms, 780, 866, 867.

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.]

See Willson's Cr. Forms, 780.

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.]

See Willson's Cr. Forms, 780.

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.]

See Willson's Cr. Forms, 780.

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 subpoena, 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.]

See Willson's Cr. Forms, 780, 803, 804, 879.

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.]

See Willson's Cr. Forms, 780, 803, 879.

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 disobedience 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.]

See Willson's Cr. Forms, 780, 803, 866, 875, 877, 879.

Contempt.—It was not error to refuse to fine a juror for contempt on his failure to obey a subpoena and attachment to testify on the settlement of a bill of exceptions, where the subpoena was issued for the jury, and the attachment was issued for the juror and not returned. *Johnson v. State*, 59 App. 11, 127 S. W. 559.

Art. 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.

See Willson's Cr. Forms, 780, 879.

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.

See Willson's Cr. Forms, 780, 798, 879; *Hill v. State*, 18 App. 665.

Bond.—A bond to the sheriff to insure the appearance of a witness was defective, where it did not set forth any authority authorizing the sheriff to take it. *Gause v. State*, 60 App. 221, 131 S. W. 605.

Where judgment nisi on a witness' appearance bond was rendered against the surety, its amendment after the term to show that it was a bond that was given instead of a recognizance, and to also correct the Christian name of the principal, was invalid, where notice had not been given the surety; *Rev. St. 1895, arts. 1356, 1357, authorizing such correction only on notice. Gause v. State*, 60 App. 221, 131 S. W. 605.

Process when both parties desire witness.—See *Mixon v. State*, 36 App. 66, 35 S. W. 394; *Byrd v. State*, 39 App. 609, 47 S. W. 721.

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.

See Willson's Cr. Forms, 780, 798; *Ex parte Sheppard*, 43 App. 372, 66 S. W. 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.]

See Willson's Cr. Forms, 780. See 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.]

See Willson's Cr. Forms, 780.

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.]

See Willson's Cr. Forms, 894.

Indorsement of names of witnesses on copy, see notes under article 444, ante.

Time for arraignment, see post, art. 557.

Time for pleading, see post, art. 578.

See *Hart v. State*, 15 App. 202, 49 Am. Rep. 188; *Walker v. State*, 19 App. 176; *Leslie v. State* (Cr. App.) 47 S. W. 367; *Smith v. State*, 52 App. 344, 106 S. W. 1161, 15 Ann. Cas. 357.

Necessity of service.—*Luster v. State*, 63 App. 541, 141 S. W. 209, Ann. Cas. 1913D, 1089.

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 App. 617, 8 S. W. 802; *Johnson v. State*, 36 Tex. 202.

This article requires the court in every case of felony to have the accused, when he is in custody served with a certified copy of the indictment. *Holden v. State*, 44 App. 382, 71 S. W. 600.

Where a party was in jail when he was indicted but was released two days thereafter on bond and continued at large for nine months when the trial took place and in the meantime his attorney had procured a certified copy of the indictment, he was not entitled to have a copy served on him and two days' postponement of the trial. *Keener v. State*, 51 App. 590, 103 S. W. 905.

Writ commanding service.—It is the duty of the clerk to make a copy of the indictment and deliver it to the sheriff, and accompany it with a writ, commanding the sheriff to deliver said copy forthwith to the defendant, if in custody, or when arrested. The importance of the writ is chiefly to furnish record evidence that the copy has been delivered to the defendant. If the copy has been in fact delivered to the defendant, no right of his is prejudiced by neglect of the clerk to issue the writ. *Barrett v. State*, 9 App. 33; *Bonner v. State*, 29 App. 223, 15 S. W. 821. *Luster v. State*, 63 App. 541, 141 S. W. 209, Ann. Cas. 1913D, 1089.

Accused not in custody.—An objection to the copy served is not available to defendant who was not in custody when the indictment was presented. *Johnson v. State*, 4 App. 268.

Second copy.—Where the original indictment and the copy served on accused were identical, accused was not entitled to service of another copy thereof, especially where motion was made in the court to which a change of venue had been allowed. *Goode v. State*, 57 App. 220, 123 S. W. 597.

Sufficiency of copy.—*Luster v. State*, 63 App. 541, 141 S. W. 209, Ann. Cas. 1913D, 1089.

Technical inaccuracies in the copy served will not vitiate the service. *Johnson v. State*, 4 App. 268.

A clerical mistake in transcribing a word from the indictment to the copy served is an immaterial variance. *Johnson v. State*, 4 App. 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 App. 176, and cases cited; *Hart v. State*, 15 App. 202, 49 Am. Rep. 188.

Where the copy served on defendant varies from the original in that it charges the crime to have been committed on a day subsequent to the trial, his objection to going to trial without having had a true copy of the indictment is good. *Lightfoot v. State* (Cr. App.) 77 S. W. 793.

Where defendant filed no motion to be furnished the names of witnesses not indorsed on his copy of the indictment, but waited until the case was called for trial, he thereby waived his right to object that the names had not been furnished him. *Holmes v. State*, 70 App. 214, 156 S. W. 1173.

Presumption.—It will be presumed that defendant was served, where the record on appeal does not show the contrary. *Record v. State*, 36 Tex. 521; *McDuff v. State*, 4 App. 58.

Waiver.—It is too late after verdict to object to the copy or to the failure to serve a copy. *Richardson v. State*, 7 App. 486; *Roberts v. State*, 5 App. 141; *Bonner v. State*, 29 App. 223, 15 S. W. 821.

Waiver must be by defendant himself, and it should be in writing and made part of the record. *McDuff v. State*, 4 App. 58; *Richardson v. State*, 7 App. 486.

Announcement of ready for trial held not a waiver of service of a copy of a second indictment where accused did not know it had been presented. *Harris v. State*, 32 App. 279, 22 S. W. 1037.

After arraignment and plea defendant cannot ask two days' service of a "true certified copy of the indictment" on the ground that there was a variance as to name between indictment and copy served. *White v. State*, 32 App. 625, 25 S. W. 784.

It was not error to refuse a request for copy of indictment when first demanded, when the State announced ready for trial after the first trial had been prosecuted to conviction and new trial granted and defendant had been out on bond and re-arrested. *Scoville v. State* (Cr. App.) 77 S. W. 792.

Defendant's attorney cannot waive the right to have the copy served. *Lightfoot v. State* (Cr. App.) 77 S. W. 793.

Under this and articles 553 and 579, Code Cr. Proc., where a defendant has been at large on bail and his case is called for trial at a term and he then fails to ask for service of copy of indictment and for two days' time in which to prepare for trial, and meets the case at that time by a motion for continuance, he thereby waives service of copy of indictment. *Rice v. State*, 49 App. 569, 94 S. W. 1026.

Second indictment.—When defendant had been served with a copy of an indictment, but it was dismissed and a new indictment for the same offense presented, he was entitled to the service of a copy of the new indictment. *Harris v. State*, 32 App. 279, 22 S. W. 1037.

The rule as to service of a copy holds good as to a second indictment to supply one dismissed for defects, unless waived by accused. *Stokes v. State*, 35 App. 279, 33 S. W. 350, and cases cited; *Lockwood v. State*, 32 App. 137, 22 S. W. 413, and cases cited.

Computation of time.—*Speer v. State*, 2 App. 246.

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.

See Willson's Cr. Forms. 895. See notes under art. 551, ante.

Woodall v. State, 25 App. 617, 8 S. W. 802; *Abrigo v. State*, 29 App. 143, 15 S. W. 408; *Luster v. State*, 63 App. 541, 141 S. W. 209, Ann. Cas. 1913D, 1089.

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.]

See notes under article 551, ante.

Defendant on bail.—A defendant on bail is not entitled to service of copy of the indictment. *Johnson v. State*, 4 App. 268; *Abrigo v. State*, 29 App. 143, 15 S. W. 408, citing *Barrett v. State*, 9 App. 33.

Defendant has the right to have a copy of indictment delivered to him at his request when he is on bail. *Lightfoot v. State* (Cr. App.) 77 S. W. 793.

The execution of a bail bond is not a waiver of service of indictment, nor does the mere fact that defendant executed a bail bond do away with the provisions of the statute. *Brewin v. State*, 48 App. 51, 85 S. W. 1141.

This statute only applies when the party is on bail at the time of presentment of the indictment. *Id.*

See, also, *Kcener v. State*, 51 App. 590, 103 S. W. 905.

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.]

See *Willson's Cr. Forms*, 894.

5. OF ARRAIGNMENT AND OF PROCEEDINGS WHEN 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.]

See *Willson's Cr. Forms*, 897. See *Reed v. State*, 31 App. 36, 19 S. W. 678; *Ex parte Cox*, 12 App. 665.

Cited, *Weatherford v. State* (Cr. App.) 165 S. W. 581.

Necessity of arraignment.—Capital offenses enumerated, see notes under art. 6, ante.

Capital offense is one for which the maximum penalty is death. Pen. Code, art. 56.

If the record on appeal shows neither arraignment nor plea the conviction will be set aside. *Steagald v. State*, 22 App. 464, 3 S. W. 771; *Plasters v. State*, 1 App. 673; *Pringle v. State*, 2 App. 300; *Avara v. State*, 2 App. 419; *Wilson v. State*, 17 App. 525; *Tamplin v. State* (Cr. App.) 32 S. W. 542.

Arraignment and plea are essentials to a valid trial for a capital felony. *Wilson v. State*, 17 App. 525, and cases cited; *Holden v. State*, 1 App. 226; *Early v. State*, 1 App. 249, 28 Am. Rep. 409; *Avara v. State*, 2 App. 419.

Arraignment is not necessary when on a former trial there had been a conviction for a lower grade of homicide than murder in the first degree. *Check v. State*, 4 App. 444.

If the conviction be for felony less than capital, the record on appeal need not show arraignment. *Nolen v. State*, 8 App. 585.

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. *Ex parte Cox*, 12 App. 665. See, also, *Caldwell v. State*, 41 Tex. 86.

When an indictment in one count charges a capital felony, and in another charges a lower crime, defendant can not complain that he was arraigned for the capital felony. *Owens v. State*, 35 App. 345, 33 S. W. 875.

Time for arraignment.—The arraignment should precede the commencement of the trial, but a conviction will not be set aside for arraignment at an improper time. *Smith v. State*, 1 App. 408; *Morris v. State*, 30 App. 95, 16 S. W. 757; *Cordova v. State*, 6 App. 207. And see *Essary v. State*, 53 App. 596, 111 S. W. 927, and cases cited; *Mays v. State*, 50 App. 165, 96 S. W. 329; *West v. State*, 40 App. 148, 49 S. W. 95; *Lister v. State*, 1 App. 740.

The court's omission to have accused arraigned before a change of venue is no ground for a new trial. *Goode v. State*, 57 App. 220, 123 S. W. 597.

Mode and sufficiency.—See *Sims v. State*, 36 App. 154, 36 S. W. 256.

It is only in extreme cases that arraignment of an accused in manacles is permissible. *Rainey v. State*, 20 App. 453.

Objection to such procedure, however, should be interposed at the time. *Vela v. State*, 33 App. 322, 26 S. W. 396.

No objection to the entry on the minutes that it shows action on arraignment contemporaneously with action on motion to change venue. *Bohannon v. State*, 14 App. 271. It is sufficient if recitals show that the indictment was read to defendant before he was required to plead. *Smith v. State*, 21 App. 277, 17 S. W. 471.

It is sufficient if the judgment shows arraignment, without a special order. *West v. State*, 40 App. 149, 49 S. W. 95.

Where defendant's counsel was granted 10 minutes to confer with witnesses, and could not be found at the expiration of 25 minutes, whereupon the court pro-

ceeded to arraign the defendant, who was present, and whose counsel returned during the reading of the indictment and entered a plea of not guilty, the absence of counsel did not render the arraignment erroneous. *Mason v. State* (Cr. App.) 168 S. W. 115.

Presumptions on appeal.—See post, art. 938, and notes.

Rearraignment.—Rearraignment, under the same indictment, is neither required nor prohibited, and, in any event, can not operate as error. *Shaw v. State*, 32 App. 155, 22 S. W. 588. And see *Cheek v. State*, 4 App. 444.

When venue is changed after arraignment it is not necessary that defendant be rearraigned. *Sims v. State*, 36 App. 154, 36 S. W. 256.

It is no objection that defendant was twice arraigned, once before and once after, a change of venue. *Meyers v. State*, 37 App. 208, 39 S. W. 111.

Joint defendants.—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 of recalling the indictment. Held, no error in the proceeding. *Rainey v. State*, 20 App. 455.

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.]

See Willson's Cr. Forms, 397.

See notes under preceding article.

Purpose.—Arraignment is for the purpose of fixing the identity of accused and proof thereof is made by the plea of "not guilty." *Hendrick v. State*, 6 Tex. 341.

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.]

See Willson's Cr. Forms, 897. See arts. 578, 579, post. See *White v. State*, 32 App. 625, 25 S. W. 784.

Time for arraignment or trial.—*McDuff v. State*, 4 App. 58; *Woodall v. State*, 25 App. 617, 8 S. W. 802; *Abrigo v. State*, 29 App. 144, 15 S. W. 408; *Reed v. State*, 31 App. 35, 19 S. W. 678; *Lockwood v. State*, 32 App. 137, 22 S. W. 413; *Sims v. State*, 36 App. 154, 36 S. W. 256; *Essary v. State*, 53 App. 596, 111 S. W. 927, and cases cited; *Johnson v. State*, 36 Tex. 202; *Morris v. State*, 30 App. 95, 16 S. W. 757.

The refusal of the court to grant a continuance in a case set for trial 13 days after a copy of the indictment was served, 12 days after an attorney had been appointed by the court to represent the defendant, and 7 days after another attorney had been employed by the defendant in the case, was not an abuse of the court's discretion, where it is not shown that the defendant was deprived of any testimony of any witnesses, or that he had subsequently ascertained any additional facts that would have been beneficial to him. *Mason v. State* (Cr. App.) 168 S. W. 115.

Waiver.—*McDuff v. State*, 4 App. 58; *Richardson v. State*, 7 App. 486; *Lockwood v. State*, 32 App. 137, 22 S. W. 413.

It was not error to try defendant on Monday after service of the indictment on him on Saturday, where the trial was set for Monday at his request. *Spicer v. State* (Cr. App.) 154 S. W. 548.

Accused, who after the indictment was presented moved to transfer the cause so as to expedite trial, is not, after an announcement of ready for trial, entitled to have the indictment quashed, which was read on arraignment, after the impaneling of the jury, on the ground that the copy served was not an exact copy of the indictment read. Since accused did not move for a continuance, and thus waived the error. *Collins v. State* (Cr. App.) 178 S. W. 345.

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.]

See Willson's Cr. Forms, 896. See *Gutierrez v. State* (Cr. App.) 47 S. W. 372.

Explanatory.—*Vernon's Sayles' Civ. St.* 1914, art. 1773, provides for the appointment by the county judge of an attorney for a party making affidavit of poverty.

Grounds for new trial.—See art. 837 (1), and notes.

Appointment of counsel.—*Eurden v. State*, 70 App. 349, 156 S. W. 1196.

It is only in capital cases that the court is required to appoint counsel. *Pennington v. State*, 13 App. 44; *Brotherton v. State*, 30 App. 369, 17 S. W. 932; *Mass v. State* (Cr. App.) 81 S. W. 46; *Brown v. State*, 52 App. 267, 106 S. W. 368; *Burden v. State*, 70 App. 349, 156 S. W. 1196.

Where the trial court found that accused was intelligent and desired to conduct his own defense, and required the clerk to summon the only witness that he desired, accused cannot complain that he was not given counsel, and that the case was speedily conducted. *Compton v. State* (Cr. App.) 148 S. W. 580.

Time to prepare for trial.—*Compton v. State* (Cr. App.) 148 S. W. 580.

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 App. 369, 17 S. W. 932.

Refusal to grant a continuance in a case set for trial 13 days after a copy of the indictment was served, 12 days after an attorney had been appointed by the court to represent the defendant, and 7 days after another attorney had been employed by the defendant, held not an abuse of discretion. *Mason v. State* (Cr. App.) 168 S. W. 115.

Where appointed counsel was given all the time required by statute to prepare to defend accused, and made no request for further time when the case was called for trial, or during the trial, it was too late, after verdict, to contend that counsel should have been given more time to prepare the case, in the absence of some showing that after the trial counsel had learned of testimony which would have been beneficial, and attached the affidavits of the witnesses, stating the facts to which they would testify. *Harris v. State* (Cr. App.) 169 S. W. 657.

Authority of counsel.—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 App. 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.]

See *Willson's Cr. Forms*, 897, 899.

See *Boren v. State*, 32 App. 637, 25 S. W. 775; *Piland v. State* (Cr. App.) 47 S. W. 1007.

Suggestion of true name.—If a party is not indicted under his true name, he must suggest this on arraignment or it will be too late. *Henry v. State*, 38 App. 313, 42 S. W. 559; *Wilcox v. State*, 31 Tex. 586; *White v. State*, 32 App. 625, 25 S. W. 784; *Carrabin v. State*, 33 Tex. 697; *Kinkead v. State*, 61 App. 651, 135 S. W. 573; *Sugarman v. State* (Cr. App.) 166 S. W. 732.

It is proper to change the name of the defendant at his suggestion. *Sinclair v. State*, 34 App. 453, 30 S. W. 1070; *Peters v. State* (Cr. App.) 154 S. W. 563.

Change of name can only be made in the information, after which the defendant will not be heard to complain of repugnancy. *Wilson v. State*, 6 App. 154.

The disclosure, on the trial, of defendant's Christian name alleged in the indictment to be unknown, will not necessitate inquiry as to whether the said name was unknown, or inaccessible to the grand jury. *Wilcox v. State*, 35 App. 631, 34 S. W. 958.

Error in not requiring accused to be prosecuted under his true name, instead of under that and an alias, cannot be first raised on motion for new trial. *Jones v. State*, 63 App. 394, 141 S. W. 953.

Accused, indicted as J., alias W., held not injured by the court's failure to enter an order directing accused to be prosecuted under the name of J., his true name. *Jones v. State*, 63 App. 394, 141 S. W. 953.

The court, on being informed that accused was not indicted by her right name, having ruled that she would be prosecuted under the name she desired, but her attorney declined to make any motion or request to change the record, she could not thereafter claim error in that she was indicted under the wrong name. *Moreno v. State*, 71 App. 460, 160 S. W. 361.

The giving of a wrong name or the failure to give accused's full name is a matter of form only, and, where he was described by his Christian name, nationality, and place of residence, which description was not shown to be untrue, and it appeared that he was the identical person alleged to have committed the offense charged, the judgment will not be reversed. *Cresencio v. State* (Cr. App.) 165 S. W. 936.

That one commonly known as "Ranols," and indicted as such, was really named "Randall," presented no variance. *Ranols v. State* (Cr. App.) 171 S. W. 1128.

Amendment of indictment, etc.—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 App. 356, and cases cited; *Myatt v. State*, 31 App. 523, 21 S. W. 256; *Sinclair v. State*, 34 App. 453, 30 S. W. 1070; *Morris v. State*, 4 App. 589; *Plumley v. State*, 8 App. 529; *Ben v. State*, 9 App. 107; *Patterson v. State*, 63 App. 297, 140 S. W. 1128; *Woods v. State* (Cr. App.) 150 S. W. 633; *Thompson v. State*, 72 App. 6, 160 S. W. 685; *Cresencio v. State* (Cr. App.) 165 S. W. 936; *Hatcher v. State* (Cr. App.) 170 S. W. 725.

Reswearing jury.—Where the defendant's name was improperly given in the indictment but he corrected it on arraignment it was not error not to reswear the jury. *Clark v. State*, 45 App. 456, 76 S. W. 574.

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.]

See Willson's Cr. Forms, 899. See notes under art. 559, ante.

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.]

See notes under art. 559, ante.

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.]

See notes under art. 559, ante.

Wilcox v. State, 35 App. 631, 34 S. W. 958; Cresencio v. State (Cr. App.) 165 S. W. 936; Sugarman v. State (Cr. App.) 166 S. W. 732.

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.]

See Willson's Cr. Forms, 897.

Time for plea in cases not capital, see post, art. 653.

White v. State, 18 App. 57; McGrew v. State, 31 App. 336, 20 S. W. 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.]

See Willson's Cr. Forms, 897, 898, 900.

Mode of pleading, see post, arts. 584-586.

Entry of plea.—This article is mandatory. Defendant's plea must be entered upon the minutes and if he refuses to plead the plea of not guilty must be entered. Noble v. State, 50 App. 581, 99 S. W. 997; Stacey v. State, 3 App. 121; Parchman v. State, Id. 225; Peeler v. State, Id. 347; Satterwhite v. State, Id. 428; Hunt v. State, 4 App. 53; Thompson v. State, Id. 93; Everett v. State, Id. 159; Id., 4 App. 307; Perry v. State, Id. 566; Morris v. State, Id. 589; Cannon v. State, 5 App. 34; Bush v. State, Id. 64; Gorman v. State, 6 App. 112; Freeman v. State, Id., 462; Ellison v. State, Id. 248; Morehead v. State, 7 App. 126; White v. State, Id. 374; Perez v. State, 8 App. 610; Hunt v. State, 9 App. 570; Gaiocchio v. State, Id. 387; Cole v. State, 11 App. 67; George v. State, Id. 95; Bates v. State, 12 App. 26; Id. 12 App. 139; Popinaux v. State, Id. 140; Warren v. State, 13 App. 348; Huddleston v. State, 14 App. 73; McHenry v. State, Id. 209; Jackson v. State, 16 App. 373; McFarland v. State, 18 App. 313; Pate v. State, 21 App. 191, 17 S. W. 461; Gaither v. State, 21 App. 527, 1 S. W. 456; Jefferson v. State, 24 App. 535, 7 S. W. 244; Smith v. State, 4 App. 628; Knight v. State, 7 App. 206; Melton v. State, 8 App. 619; Bohannon v. State, 14 App. 271; Wilkins v. State, 15 App. 420; Shaw v. State, 17 App. 225; Roe v. State, 19 App. 89; Gordon v. State, 29 App. 410, 16 S. W. 637; Clark v. State, 32 App. 412, 24 S. W. 29; Sims v. State, 49 App. 199, 91 S. W. 580.

And although the case was tried by the judge, a jury being waived, the record must show that the defendant pleaded, or that a plea was entered for him. Roe v. State, 19 App. 89; Melton v. State, 8 App. 619. The proper practice is to enter the plea on the minutes, but in felonies less than capital it may be recited in the judgment. Stacey v. State, 3 App. 121. And even in a capital case it may be recited in an entry of a judgment of the court disposing of an application for a change of venue. Bohannon v. State, 14 App. 271. Although the record may show that the defendant pleaded, or that a plea was entered for him, he may in the trial court, on motion for new trial, contradict such record, and show by proof dehors the record, that in fact no plea was made by, or for him. Smith v. State, 4 App. 626. After an appeal has been perfected, the minutes can not be corrected so as to show that a plea was made by or for the defendant. Knight v. State, 7 App. 206; Gerard v. State, 10 App. 690; Hill v. State, 4 App. 559; McCrew v. State, 31 App. 336, 20 S. W. 740.

Presumptions on appeal.—See post, art. 938.

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.]

See Wilson's Cr. Forms, 900, 956, 975.

See articles 581 and 582, post.

See King v. State (Cr. App.) 46 S. W. 813.

Misdemeanors.—This article does not apply to misdemeanor cases so far as admonition, personal plea, etc., are concerned. *Berliner v. State*, 6 App. 181; *Johnson v. State*, 39 App. 625, 48 S. W. 70; *Scott v. State*, 29 App. 217, 15 S. W. 814.

Requisites of plea.—See *Johnson v. State*, 39 App. 625, 48 S. W. 70; *Giles v. State*, 23 App. 281, 4 S. W. 886, and cases cited; *Coleman v. State*, 35 App. 404, 33 S. W. 1083.

In a felony case a plea of guilty can be made only by the defendant in person, and in open court. It can only be accepted under the three following named conditions, viz.: 1. The defendant must be admonished by the trial court of the consequences of the plea. 2. It must plainly appear that the defendant is sane at the time of making the plea. 3. It must plainly appear that he is uninfluenced by any persuasion or delusive hope of pardon prompting him to make such plea. These prerequisites to the validity of the plea, and the acceptance thereof by the court, are indispensable and must be made manifest of record. They can not be supplied by inference, intendment, or presumption. *Saunders v. State*, 10 App. 336; *Wallace v. State*, Id. 407; *Frosh v. State*, 11 App. 280; *Harris v. State*, 17 App. 559; *Paul v. State*, Id. 583; *Turner v. State*, Id. 587; *Saunders v. State*, 18 App. 372; *Evers v. State*, 32 App. 283, 22 S. W. 1019, and cases cited; *Caruth v. State* (Cr. App.) 177 S. W. 973.

Where the trial court admonished defendant before accepting a plea of guilty, the plea was voluntary, though a layman had advised the defendant to plead guilty, so as to receive the lightest sentence. *Patton v. State*, 62 App. 28, 136 S. W. 42.

A plea of guilty entered in a justice's court by a father for his 17 year old son, when not authorized by the son, is void, and would not authorize the son's imprisonment for nonpayment of the fine imposed. *Ex parte Williamson* (Cr. App.) 177 S. W. 89.

Construction and effect of plea.—See *Crow v. State*, 6 Tex. 334.

A person by pleading guilty to a smaller offense cannot prevent the trial of a greater offense. *Dancey v. State*, 35 App. 615, 34 S. W. 113, 938.

Defendant charged in two counts, first for betting at a gaming table or bank, second for keeping and exhibiting a gaming table or bank, pleaded guilty to the first count; held, that such plea did not bar a prosecution under the second count. *Id.*

Plea of guilty on a trial for murder does not embrace confession to murder of first degree. *Martin v. State*, 36 App. 632, 36 S. W. 587, 38 S. W. 194.

When defendant pleads guilty he cannot attack the verdict on the insufficiency of the evidence. *Doans v. State*, 36 App. 468, 37 S. W. 751.

When an accused pleaded guilty of murder, and his plea was accepted by the court after examination, and evidence was introduced before a jury which conclusively showed that the murder was committed in the perpetration of robbery, the court was not compelled to submit the issue of second degree murder, under Penal Code, article 1142. *Miller v. State*, 58 App. 600, 126 S. W. 864.

Accused, in a prosecution for homicide, though having pleaded guilty, could not be convicted under the plea if the evidence offered to determine his punishment showed that he acted in self-defense. *Harris v. State* (Cr. App.) 172 S. W. 975.

Withdrawal of plea.—Accused, having pleaded guilty, is entitled at any time before the retirement of the jury to withdraw such plea, and put on the state the burden of proving his guilt beyond a reasonable doubt. *Alexander v. State* (Cr. App.) 152 S. W. 436.

Where defendant through her attorney agreed to plead guilty, but afterwards exercised her right not to do so, such agreement was not admissible in evidence. *Dean v. State*, 72 App. 274, 161 S. W. 974.

Sanity of accused.—See Pen. Code, art. 40, and notes.

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 App. 372. And see *Burton v. State*, 33 App. 138, 25 S. W. 782; *Coleman v. State*, 35 App. 404, 33 S. W. 1083.

On the question of sanity, under a plea of guilty in a prosecution for homicide, the burden of proof is on the state to show that accused was sane at the time he committed the offense. *Harris v. State* (Cr. App.) 172 S. W. 975.

Where, notwithstanding a plea of guilty, there was evidence pro and con on the issue whether defendant was insane at the time of the killing, the court erred in instructing the jury that, under the facts, they should find defendant sane. *Harris v. State* (Cr. App.) 172 S. W. 975.

Charge of court.—When defendant was indicted for rape and offered to plead guilty to an assault with intent to rape which the State did not accept, the fact that the court in charging this article omitted the words "by any persuasion" did not injuriously affect the rights of defendant, and was not cause for reversal. *Childress v. State*, 51 App. 455, 103 S. W. 865.

Art. 566. [555] Jury shall be impaneled, when.—Where a defendant in a case of felony persists in pleading guilty, if the punish-

ment 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.]

See Willson's Cr. Forms, 956, 957, 975.

Misdemeanors, see, post, art. 582. See *Crow v. State*, 6 Tex. 334. *Berliner v. State*, 6 App. 181.

In general.—*Patton v. State*, 62 App. 28, 136 S. W. 42.

On trial for murder, there was an agreement between the parties for the defendant to plead guilty to murder in the second degree, but the court refused to accept such plea, and informed defendant that if he pleaded guilty he must plead guilty to murder and leave it to the jury to find the degree. Held correct. *Burton v. State*, 33 App. 138, 25 S. W. 782.

In pleas of guilty, as well as not guilty, the provisions of the statutes should be looked to, and govern the trial of criminal cases. *Woodall v. State*, 58 App. 513, 126 S. W. 591.

Where the evidence conclusively showed that murder was committed in the perpetration of robbery, the court was not compelled to submit the issue of second degree murder, under Penal Code article 1142. *Miller v. State*, 58 App. 600, 126 S. W. 864.

Statute mandatory.—This article is mandatory, and it is fundamental error to disregard it. In so far as it requires evidence to be submitted, it is not intended solely for the benefit of the defendant, but is also intended to protect the interests of the state, by preventing aggravated cases of crime from being covered up by the plea of guilty, so as to allow the criminal to escape with the minimum punishment fixed by law. This provision of the statute should be fully observed and administered, and the proper practice is to have the judgment entry show affirmatively that evidence was adduced upon the plea of guilty. *Harwell v. State*, 19 App. 423; *Paul v. State*, 17 App. 583; *Turner v. State*, Id. 587; *Saunders v. State*, 10 App. 336; *Wallace v. State*, Id. 407; *Frosh v. State*, 11 App. 280; *Scott v. State*, 29 App. 217, 15 S. W. 814; *Johnson v. State*, 39 App. 625, 48 S. W. 70; *Josef v. State*, 33 App. 251, 26 S. W. 213; *Evers v. State*, 32 App. 283, 22 S. W. 1019; *Hopkins v. State* (Cr. App.) 68 S. W. 986; *Sullivan v. State*, 47 App. 615, 85 S. W. 812; *Woodall v. State*, 58 App. 513, 126 S. W. 591.

Evidence.—Sanity of the accused is an issue on plea of guilty which must be shown by the proof. *Burton v. State*, 33 App. 138, 25 S. W. 782.

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 App. 632, 36 S. W. 587, 38 S. W. 194; *Josef v. State*, 33 App. 251, 26 S. W. 213; *Evers v. State*, 32 App. 283, 22 S. W. 1019.

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*, 36 App. 468, 37 S. W. 751.

The word "evidence," as used in this article, means legal evidence, such as would be authorized to go before a jury. *Woodall v. State*, 58 App. 513, 126 S. W. 591.

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.]

See arts. 563, 564, ante, and arts. 581-584, post.
Wardlow v. State, 18 App. 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.
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.]

See *Schindler v. State*, 15 App. 394.

Plea in abatement.—See notes under article 572, post.

Plea to jurisdiction.—See notes under article 572, post.

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 [479].

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.]

See Willson's Cr. Forms, 809, 810. See Johnson v. State, 22 App. 206, 2 S. W. 609; Whitford v. State, 24 App. 489, 6 S. W. 537, 5 Am. St. Rep. 896.

Cited, Haywood v. State, 61 App. 92, 134 S. W. 218; Payne v. State (Cr. App.) 146 S. W. 171; Carter v. State of Texas, 177 U. S. 442, 20 Sup. Ct. 687, 44 L. Ed. 839, reversing 39 App. 345, 46 S. W. 236, 48 S. W. 508.

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| 1. Nature of motion. | 9. Signature. |
| 2. Grounds of motion in general. | 10. Failure to charge offense. |
| 3. Illegal jury. | 11. Presentment, filing, and service of copy. |
| 4. Presence of unauthorized person. | 12. Limitations. |
| 5. Defects in preliminary proceedings. | 13. Want of jurisdiction. |
| 6. Improper or insufficient evidence. | 14. Transferred cases. |
| 7. Race discrimination. | 15. Time for exception or motion. |
| 8. Defects in indictment or information in general. | 16. Waiver. |

1. **Nature of motion.**—Where accused, after arraignment upon the indictment which had just been read, and before pleading, objected to going to trial, and moved the court to quash and set aside because such indictment was not a true original of the certified copy served, the motion was one to quash, and not for a continuance to allow accused to plead. Collins v. State (Cr. App.) 178 S. W. 345.

2. **Grounds of motion in general.**—A motion to quash or set aside an indictment or information is allowable only for the causes specified in this article and articles 575 and 576, post. Goode v. State, 2 App. 520; West v. State, 6 App. 485; Dodd v. State, 10 App. 370; Terry v. State, 15 App. 66; Williams v. State, 20 App. 357; Drake v. State, 25 App. 293, 7 S. W. 868; Jackson v. State, 25 App. 314, 7 S. W. 872; Owens v. State, 25 App. 552, 8 S. W. 658; Woods v. State, 26 App. 490, 10 S. W. 108; Trevinio v. State, 27 App. 372, 11 S. W. 447; Doss v. State, 28 App. 506, 13 S. W. 788; State v. Schwartz, 25 Tex. 764; Lott v. State, 18 Tex. 627; Spearman v. State, 34 App. 279, 30 S. W. 229; Garner v. State, 62 App. 525, 138 S. W. 124.

An indictment or information defective in substance may be taken advantage of on appeal, as well as by exception or in arrest of judgment. State v. Mann, 13 Tex. 61; Anderson v. State, 20 App. 595; Strickland v. State, 19 App. 518.

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 Tex. 226; State v. Schoolfield, 29 Tex. 501.

Independent of the statutory grounds, jeopardy and want of jurisdiction are the only grounds upon which an indictment can be vacated or avoided. Woods v. State, 26 App. 490, 10 S. W. 108; Williams v. State, 20 App. 257.

That the judge, after organizing the grand jury, left it deliberating on the finding of an indictment, and went to another county, is not ground for quashing the indictment, in the absence of a showing of injury. Elliott v. State, 58 App. 200, 125 S. W. 568.

It is no ground for quashing an indictment that, defendant not having been arrested, it was placed on the retired docket to be brought forward on the trial docket when defendant should be arrested. Allen v. State, 62 App. 557, 138 S. W. 593.

3. **Illegal jury.**—That the grand jury was not sworn is not a good exception to indictment. Chevarrio v. State, 17 App. 390. Compare Vanvickie v. State, 22 App. 625, 2 S. W. 642.

But an exception or motion in arrest of judgment, on ground that indictment was found by illegal grand jury, is available. Lott v. State, 18 App. 627; Ex parte Reynolds, 35 App. 437, 34 S. W. 120, 60 Am. St. Rep. 54, and cases cited.

Where an indictment recites upon its face that it was presented in the district court of the proper county and state, by the grand jurors of said county, duly elected, impaneled, sworn and charged as such, it will be presumed that it was presented by a legal grand jury of the proper county, and, to overcome such presumption accused, in his motion to set it aside, must show that, in fact, it was not the act of a legal grand jury of the county. De Olles v. State, 20 App. 145.

Nor state term at which grand jury was organized. Grayson v. State, 35 App. 629, 34 S. W. 961.

Not essential that indictment show date the grand jury was organized. Murphy v. State, 36 App. 24, 35 S. W. 174.

An indictment will not be quashed because the foreman of the grand jury finding it was at the time a deputy sheriff of the county. Trinkle v. State, 60 App. 187, 131 S. W. 583.

Where a challenge to the grand jury was withdrawn when the jury was impaneled, and not renewed until after indictment returned, the juror's alleged incompetency was not ground for motion to quash. Streight v. State, 62 App. 453, 138 S. W. 742.

Where an accused moves to quash the indictment on the ground that the sheriff who summoned one talesman to complete the grand jury which found the in-

dictment was not properly sworn, the motion comes too late, if not made until the end of the trial. *Ybarra v. State* (Cr. App.) 164 S. W. 10.

4. **Presence of unauthorized person.**—See *Sims v. State* (Cr. App.) 45 S. W. 705.

The prosecuting officer is an "unauthorized person" within the meaning of this article. *Rothschild v. State*, 7 App. 519.

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. *Rothschild v. State*, 7 App. 519.

An indictment will be set aside if any one was present when bill was found who is not allowed by law to be present. *Kingsbury v. State*, 37 App. 264, 39 S. W. 365.

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 App. 506, 13 S. W. 788, overruling contrary doctrine in *Woods v. State*, 26 App. 490, 10 S. W. 108.

This clause inhibits the presence of the assistant county attorney during the "investigation and deliberation" of the grand jury. *Stuart v. State*, 35 App. 440, 34 S. W. 118.

The fact that the assistant district attorney was present and examined witnesses in the grand jury room, and consulted with the grand jury regarding the case of accused, is not equivalent to proof that he was present when the grand jury was deliberating upon the indictment against accused. *Moody v. State*, 57 App. 76, 121 S. W. 1117.

The burden is on accused to show the presence of an unauthorized person before the grand jury, when it was deliberating upon the indictment against him or voting upon it. *Moody v. State*, 57 App. 76, 121 S. W. 1117.

If a grand juror was disqualified from sitting where an indictment was returned, the question could have been raised by an objection to the indictment on the ground that a person was present with the grand jury during its deliberations not authorized to be present. *Edgar v. State*, 59 App. 252, 127 S. W. 1053.

The fact that the county attorney, while the grand jury was interrogating witnesses in the grand jury room, had with him in the room a regular bailiff as his stenographer taking down testimony, though he was not present while the grand jury was discussing the finding of a bill or voting, would not invalidate the indictment so as to be a ground for quashing it. *Porter v. State*, 72 App. 71, 160 S. W. 1194.

5. **Defects in preliminary proceedings.**—Information cannot be quashed on the ground that the arrest was made on the complaint before filing of the information. *Evans v. State*, 36 App. 32, 35 S. W. 169.

Cannot be quashed because defendant was not present when grand jury was impaneled. *Barkman v. State* (Cr. App.) 52 S. W. 69.

A motion to dismiss the indictment on the ground that accused was brought into the state from Mexico without a proper warrant of extradition, supported by no proof except his sworn conclusion that the sheriff did not have "legal" and necessary extradition papers, warrant, and authority, is properly denied. *Lawshe v. State*, 57 App. 32, 121 S. W. 865.

Motion to quash information will not lie because the complaint was filed April 30, and the information not until the following June 9th. *Gentry v. State*, 62 App. 497, 137 S. W. 696.

6. **Improper or insufficient evidence.**—The character of testimony or the quantum of proof had before the grand jury cannot be inquired into on motion to quash the indictment. *Edwards v. State* (Cr. App.) 166 S. W. 517; *Kingsbury v. State*, 37 App. 264, 39 S. W. 365; *Jacobs v. State*, 35 App. 410, 34 S. W. 110 (following *Terry v. State*, 15 App. 66); *Dockery v. State*, 35 App. 487, 34 S. W. 281; *Lee v. State* (Cr. App.) 148 S. W. 567, 40 L. R. A. (N. S.) 1132.

7. **Race discrimination.**—See notes arts. 389, 409, ante.

The fact that people of African descent are not drawn by the jury commissioners to serve on the grand jury is not a ground for setting aside an indictment. *Carter v. State*, 39 App. 345, 46 S. W. 236, 48 S. W. 508. But see *Whitney v. State*, 42 App. 283, 59 S. W. 895.

Such objection to the grand jury should be made by challenge to the array. *Carter v. State*, 39 App. 345, 46 S. W. 236, 48 S. W. 508.

On motion to quash on ground of race discrimination, witnesses should be named and tendered to prove facts, else motion will be overruled. *Carter v. State*, 39 App. 356, 357, 46 S. W. 236, 48 S. W. 508.

While the circumstance that for many years no negro had been selected or impaneled as a grand or petit juror might have weight in a close case, it cannot be considered on a motion to quash an indictment for discrimination as to race in the composition of the grand jury, when it is shown that the law has been in every respect complied with. *Pollard v. State*, 58 App. 299, 125 S. W. 390.

Evidence, on a motion to quash an indictment, held not to sustain the ground of discrimination as to race in the composition of the grand jury. *Pollard v. State*, 58 App. 299, 125 S. W. 390.

Motions to quash the indictment because accused was a negro, and negroes were improperly excluded from the grand and the petit juries, were properly overruled, where there was no evidence that he was a negro. *McCline v. State*, 64 App. 19, 141 S. W. 977.

Accused, a negro, who moves to quash the indictment on the ground of discrimination against negroes in the selection of the grand jury, must allege and prove discrimination. *Oliver v. State*, 70 App. 140, 159 S. W. 235.

8. **Defects in indictment or information in general.**—When an indictment or information is substantially defective, a conviction had upon it will be set aside and the prosecution will be dismissed, although such defect was not presented in the trial court. But when the defect in an indictment or information is one of form merely, it will not be considered when presented primarily on appeal, nor

will the prosecution be dismissed because of the same, although presented in the trial court. *Morris v. State*, 13 App. 65; *Woolsey v. State*, 14 App. 57.

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 App. 230, and cases cited. And see *Alderson v. State*, 53 App. 525, 111 S. W. 738; *Arbuthnot v. State*, 38 App. 509, 34 S. W. 269, 43 S. W. 1024.

Presumption obtains in the absence of converse proof that the assistant county attorney possessed all the necessary legal qualifications. *Kelly v. State*, 36 App. 480, 38 S. W. 39.

Objection that indictment for violation of the local option law failed to allege that the law was in operation is matter of form which must be raised by motion to quash and not by motion in arrest. *Dobson v. State* (Cr. App.) 146 S. W. 546.

An indictment charging both burglary and an attempt to commit burglary was not void or subject to quashal because it was indorsed only "indictment for burglary." *Cooper v. State* (Cr. App.) 147 S. W. 273.

A motion to quash an indictment which did not state accused's full name, on the ground that the grand jury, by the exercise of reasonable diligence, could have ascertained his true name, was properly overruled, where it was not sworn to, and was supported by no evidence. *Crescencio v. State* (Cr. App.) 165 S. W. 936.

9. **Signature.**—Want of signature does not invalidate, and is not ground of exception. *Weaver v. State*, 19 App. 565, 53 Am. Rep. 389; *Robinson v. State*, 24 App. 4, 5 S. W. 509; *Jones v. State*, 30 App. 426, 17 S. W. 1080; *Pinson v. State*, 23 Tex. 579; *State v. Powell*, 24 Tex. 135; *Witherspoon v. State*, 39 App. 65, 44 S. W. 164, 1096; *Raspberry v. State*, 1 App. 664; *Keñoë v. State* (Cr. App.) 89 S. W. 270; *Holcomb v. State*, 60 App. 408, 132 S. W. 362; *Day v. State*, 61 App. 114, 134 S. W. 215.

10. **Failure to charge offense.**—Failure to allege matter of which the court has judicial knowledge, will not vitiate indictment. *State v. Mann*, 13 Tex. 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. Shwartz*, 25 Tex. 764. And see *Collins v. State*, 25 Tex. Supp. 202.

An exception that "defendant is not legally charged with any crime in said indictment" is sufficient. *Collins v. State*, 25 Tex. Supp. 202.

11. **Presentment, filing, and service of copy.**—The allegation as to the court in which the indictment is presented is matter of form. *Hauck v. State*, 1 App. 357; *Long v. State*, 1 App. 466; *James v. State*, 44 Tex. 314; *Mathews v. State*, 44 Tex. 376; *Bosshard v. State*, 25 Tex. Supp. 207; *Sharp v. State*, 6 App. 650.

That in his notation in minutes of presentment of indictment clerk misnamed the offense, is not tenable exception. *Rowlett v. State*, 23 App. 191, 4 S. W. 582. And see *Barr v. State*, 16 App. 323.

That the indictment does not show on its face that it was presented in the proper court is good exception on motion to quash. *Murphey v. State*, 29 App. 507, 16 S. W. 417, and cases cited; *Mathews v. State*, 44 Tex. 376.

Clerk's failure to file indictment is not ground for quashal. *Boren v. State*, 32 App. 637, 25 S. W. 775.

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 App. 480, 34 S. W. 272, citing *Sargeant v. State*, 35 App. 325, 33 S. W. 364.

Indictment not invalid because returned on a legal holiday. *Webb v. State* (Cr. App.) 40 S. W. 989.

That the presentment of an indictment against accused had not been entered on the minutes of the court, and that a certified copy had not been served on accused, while a ground for postponing the trial, was no ground for quashing the indictment. *Johnson v. State*, 60 App. 305, 131 S. W. 1085.

The defect in an information bearing no file mark, and not specifically charging that the offense was committed before presentation, cannot be taken advantage of by motion in arrest, but only by motion to quash. *Hall v. State*, 70 App. 240, 156 S. W. 644.

An indictment alleged that the grand jury presenting it was organized at the July term, 1912, and was marked "filed" in the district court July 9th, while the records of the district court showed that it was returned in January, 1913, and was at that term by proper order transferred to the county court. Held, that the statement in the indictment and the file mark might be disregarded as surplusage. *Matthews v. State*, 71 App. 374, 160 S. W. 1185.

12. **Limitations.**—See ante, art. 451, subds. 4 and 6, and notes.

13. **Want of jurisdiction.**—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.

Cases originating in unorganized counties: *Hernandez v. State*, 19 App. 408, and cases cited.

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 App. 457, 1 S. W. 448, and cases cited. But for exception to rule see *Robles v. State*, 38 App. 81, 41 S. W. 620.

Plea to jurisdiction is available to accused independent of statute. *Woods v. State*, 26 App. 490, 10 S. W. 108, citing *Owens v. State*, 25 App. 552, 8 S. W. 658; *Williams v. State*, 20 App. 357.

The sufficiency of the evidence on which the indictment was predicated cannot be challenged by plea to jurisdiction. *Jacobs v. State*, 35 App. 410, 34 S. W. 110, following *Terry v. State*, 15 App. 66.

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. *Marrow v. State*, 37 App. 330, 39 S. W. 944. And see generally, *Harberger v. State*, 4

App. 26, 30 Am. Rep. 157; Ingle v. State, 4 App. 91; Montgomery v. State, Id. 140; Nance v. State, 21 App. 457, 1 S. W. 448; Mitten v. State, 24 App. 346, 6 S. W. 196; Nichols v. State, 28 App. 105, 12 S. W. 500.

When want of jurisdiction does not appear on the face of the indictment or information, the defendant must plead in writing under oath the facts, showing that the court has no jurisdiction. Garner v. State, 62 App. 525, 138 S. W. 124.

14. **Transferred cases.**—See ante, arts. 485, 486, 487 and notes.

The order of transfer under article 483, cannot be questioned by exception to indictment or motion in arrest of judgment. Coker v. State, 7 App. 83; Bonner v. State, 38 App. 599, 44 S. W. 172, citing Friedlander v. State, 7 App. 204.

15. **Time for exception or motion.**—An exception on account of form must be taken before plea made, and before a change of venue is ordered. Ringo v. State, 2 App. 291; Loggins v. State, 8 App. 434; Caldwell v. State, 41 Tex. 86. It may be taken after the state has announced ready for trial. Carr v. State, 19 App. 635, 53 Am. Rep. 395.

Such an exception comes too late in the new tribunal after change of venue. Barr v. State, 16 App. 333, and cases cited.

Exceptions to indictment are not too late if they follow the state's announcement for trial. Carr v. State, 19 App. 635, 53 Am. Rep. 395.

An exception that the indictment does not show that it was presented in the proper court must be in limine; it cannot be made in arrest of judgment. Jones v. State, 32 App. 110, 22 S. W. 149, citing Niland v. State, 19 App. 166; Rather v. State, 25 App. 623, 9 S. W. 69, and cases cited; Rowlett v. State, 23 App. 191, 4 S. W. 582, and cases cited; Murphey v. State, 29 App. 507, 16 S. W. 417.

An objection that an information for selling intoxicating liquors in prohibition territory does not show that the election putting prohibition into effect was held before the passage of the Act of April 24, 1909, c. 35, making such sale a felony, is an objection to the form of the information, and to be available an exception must be taken before announcement for trial and a motion in arrest of judgment filed within two days after judgment, as required by article 848. Hamilton v. State (Cr. App.) 145 S. W. 348.

16. **Waiver.**—Where exceptions are filed but not called to the attention of the court or acted on they will be treated as waived. State v. Thompson, 18 Tex. 528; Myers v. State, 31 Tex. 173.

Art. 571. [560] Motion shall be tried by judge without jury.—An issue 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.]

See 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.

See Willson's Cr. Forms, 822.

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.]

See Willson's Cr. Forms, 822, 823, 825.

Acquittal in court without jurisdiction, see ante, art. 20.

Burglary and felony committed after entry, see Pen. Code, arts. 1313, 1317, 1320.

Conviction of lower as acquittal of higher offense, see post, art. 782.

Conviction or acquittal in other state or county, see arts. 255, 256.

Discharge by examining court, see ante, art. 314.

Forgery and passing or possession with intent to pass forged instruments, see Pen. Code, art. 946.

Former jeopardy in general, see ante, art. 9, and notes.

Higher offense not within jurisdiction of court, see post, art. 601.

Offenses against state and municipality, see post, art. 965.

Practicing medicine without authority, see Pen. Code, art. 756.

Cited, McCline v. State, 64 App. 19, 141 S. W. 977; Payne v. State (Cr. App.) 146 S. W. 171; Ex parte Muncy, 72 App. 541, 163 S. W. 29; Miles v. State (Cr. App.) 165 S. W. 567.

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| 1. Same offense. | 9. Other pleas. |
| 2. Pleas distinguished. | 10. — Plea to jurisdiction. |
| 3. Necessity. | 11. — Plea in abatement. |
| 4. Time for plea. | 12. — Agreement to turn state's evidence. |
| 5. Requisites of plea. | 13. Motion to quash indictment. |
| 6. Amendment of plea. | 14. Habeas corpus. |
| 7. Demurrer, exception, or motion to strike and amendment. | 15. Regularity of former proceeding. |
| 8. Evidence. | |

1. **Same offense.**—Defined, see ante, art. 9, and notes.

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. Simco v. State, 9 App. 338; Arnold v. State, Id. 435; Wright v. State, 17 App. 152; Wilson v. State, 45 Tex. 76, 23 Am. Rep. 602.

2. **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 App. 152, and cases cited. And also *Alexander v. State*, 21 App. 406, 17 S. W. 139, 57 Am. Rep. 617; *Shubert v. State*, 21 App. 551, 2 S. W. 883; *Simco v. State*, 9 App. 338; *Potter v. State*, Id. 55; *Pickens v. State*, Id. 270; *Swancoat v. State*, 4 App. 105; *Hozier v. State*, 6 App. 542; *Williams v. State*, 13 App. 285, 46 Am. Rep. 237; *Wilson v. State*, 16 App. 497; *Nance v. State*, 17 App. 385; *Parchman v. State*, 2 App. 228, 28 Am. Rep. 435; *Bogges v. State*, 43 Tex. 347; *Longley v. State*, Id. 490; *Brothers v. State*, 22 App. 447, 3 S. W. 727; *Arnold v. State*, 9 App. 435.

3. **Necessity.**—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 App. 39, 114 S. W. 828, following *Robinson v. State*, 21 App. 160, 17 S. W. 632; *Vela v. State*, 49 App. 588, 95 S. W. 529; *Samuels v. State*, 25 App. 537, 8 S. W. 656.

The defense of former acquittal is not available under the plea of not guilty, but must be pleaded specially, alleging acquittal by a jury in a court of competent jurisdiction. *Swancoat v. State*, 4 App. 105.

Former conviction is a defense which must be specially pleaded. *Samuels v. State*, 25 App. 537, 8 S. W. 656; *Lindley v. State*, 57 App. 346, 123 S. W. 141. And see, also, *Munch v. State*, 25 App. 30, 7 S. W. 341.

4. **Time for plea.**—See post, art. 578.

A defendant should be allowed reasonable time to prepare and file a special plea. *Coon v. State*, 21 App. 332, 17 S. W. 351.

A plea of former acquittal cannot be considered when interposed after verdict. *Barton v. State* (Cr. App.) 43 S. W. 987.

A plea of former conviction must be made before trial on the merits, and it comes too late after trial. *Lee v. State* (Cr. App.) 148 S. W. 567, 40 L. R. A. (N. S.) 1132.

5. **Requisites of plea.**—*Quitow v. State*, 1 App. 47, 28 Am. Rep. 396; *Parchman v. State*, 2 App. 228, 28 Am. Rep. 435; *Lowe v. State*, 4 App. 34; *Irvin v. State*, 7 App. 78; *Potter v. State*, 9 App. 55; *Pickens v. State*, Id. 270; *Ex parte Rogers*, 10 App. 655, 38 Am. Rep. 654; *Williams v. State*, 13 App. 285, 46 Am. Rep. 237; *Kain v. State*, 16 App. 282; *Hefner v. State*, Id. 573; *Grisham v. State*, 19 App. 504; *Brothers v. State*, 22 App. 447, 3 S. W. 737; *Foster v. State*, 25 App. 543, 8 S. W. 664; *Reddick v. State*, 31 App. 587, 21 S. W. 684; *Hooper v. State*, 30 App. 412, 17 S. W. 1066, 28 Am. St. Rep. 926; *Epps v. State*, 38 App. 284, 42 S. W. 552; *Morgan v. State*, 34 Tex. 677; *Thomas v. State*, 40 Tex. 36; *Bogges v. State*, 43 Tex. 347; *Deaton v. State*, 44 Tex. 446; *Pritchford v. State*, 2 App. 69; *Troy v. State*, 10 App. 319; *Adams v. State*, 16 App. 162; *Washington v. State*, 35 App. 156, 32 S. W. 694; *Munch v. State*, 25 App. 30, 7 S. W. 341; *Denson v. State*, 53 App. 254, 109 S. W. 166, and cases cited; *Creech v. State*, 70 App. 229, 158 S. W. 277; *Whiten v. State*, 71 App. 555, 160 S. W. 462.

6. **Amendment of plea.**—See *Deaton v. State*, 44 Tex. 446; *Grisham v. State*, 19 App. 504.

7. **Demurrer, exception, or motion to strike, and amendment.**—See post, art. 600.

8. **Evidence.**—On plea of former acquittal or conviction, the burden of proof rests on defendant. *Hozier v. State*, 6 App. 501; *Kain v. State*, 16 App. 282; *Willis v. State*, 24 App. 586, 6 S. W. 857; *Fehr v. State*, 36 App. 93, 35 S. W. 381, 650; *Benton v. State*, 52 App. 422, 107 S. W. 837. He must show that the acts which constitute the offense for which the former conviction was had are the very acts constituting the offense for which he is now on trial. *Creech v. State*, 70 App. 229, 158 S. W. 277. He must identify the charge on trial with the offense previously adjudicated. *Alexander v. State*, 53 App. 553, 110 S. W. 919. On trial for keeping a disorderly house, the burden is on defendant to show that acquittal was for the same day for which he is being prosecuted. *Reed v. State* (Cr. App.) 29 S. W. 1085. On plea of former conviction for theft, the burden of proving the plural takings were one and the same transaction rests on the defendant. *Davidson v. State*, 40 App. 288, 49 S. W. 372, 50 S. W. 365. Evidence under defective plea not excepted to. *Adams v. State*, 16 App. 162; *Pickens v. State*, 9 App. 270; *Troy v. State*, 10 App. 319; *Grisham v. State*, 19 App. 504.

A preponderance of evidence is sufficient. *Davidson and Thompson v. State*, 40 App. 288, 49 S. W. 372, 50 S. W. 365; *Kain v. State*, 16 App. 282; *Willis v. State*, 24 App. 586, 6 S. W. 857; *Ake v. State*, 6 App. 398, 32 Am. Rep. 586; *Hozier v. State*, 6 App. 501; *Campbell v. State*, 2 App. 187; *Taylor v. State*, 4 App. 29; *Lowe v. State*, Id. 34; *Hooper v. State*, 30 App. 412, 17 S. W. 1066, 28 Am. St. Rep. 926; *Fehr v. State*, 36 App. 93, 35 S. W. 381, 650; *Morton v. State*, 37 App. 131, 38 S. W. 1019.

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 App. 131, 38 S. W. 1019.

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 App. 422, 107 S. W. 837.

In a prosecution for statutory rape, where accused, on a previous trial had been acquitted under an indictment for a different act, and on the present trial he offered no evidence to show that the act upon which the state relied was the same one, his plea of former acquittal was properly denied. *Hamilton v. State* (Cr. App.) 168 S. W. 536.

9. **Other pleas.**—The pleas of jeopardy and to the jurisdiction of the court are the only special pleas, independent of the statutory pleas of former acquittal or conviction, that can be interposed by defendant. *Alonzo v. State*, 15 App. 378, 49 Am. Rep. 207; *Williams v. State*, 20 App. 357; *Owens v. State*, 25 App. 552, 8 S. W. 658.

10. — **Plea to jurisdiction.**—Priority of jurisdiction, see notes under art. 63, ante. *Cock v. State*, 8 App. 660.

A plea to the jurisdiction, though not provided for by the Code is allowable. *Blandford v. State*, 10 App. 627; *Kelly v. State*, 13 App. 153; *Lott v. State*, 18 App. 627.

A defect in the transfer of an indictment from the district to an inferior court can be availed of only by a plea to the jurisdiction of the court to which the transfer is made. (Art. 487) *Mitten v. State*, 24 App. 346, 6 S. W. 196.

11. — **Plea in abatement.**—See *Dodd v. State*, 10 App. 370; *State v. Rhodius*, 37 Tex. 165.

Plea in abatement, as such, in criminal cases, is not recognized by our Codes. *Woods v. State*, 26 App. 490, 10 S. W. 108, and cases cited; *Hardin v. State*, 4 App. 355; *State v. Oxford*, 30 Tex. 428; *Morrison v. State*, 41 Tex. 516; *Cock v. State*, 8 App. 659; *Schindler v. State*, 15 App. 394; *Owens v. State*, 25 App. 552, 8 S. W. 658; *Williams v. State*, 20 App. 357, and cases cited.

12. — **Agreement to turn state's evidence.**—See ante, art. 37. *Nicks v. State*, 40 App. 1, 48 S. W. 186, and cases cited; *Neeley v. State*, 27 App. 324, 11 S. W. 376; *Fleming v. State*, 28 App. 234, 12 S. W. 605; *Camron v. State*, 32 App. 180, 22 S. W. 682, 40 Am. St. Rep. 763 (disapproving, *Holmes v. State*, 20 App. 509); *Kelly v. State*, 36 App. 480, 38 S. W. 39; *Diseren v. State*, 59 App. 149, 127 S. W. 1038.

13. **Motion to quash indictment.**—See ante, art. 570.

Motion to quash indictment cannot be made to serve the purpose of a plea of former conviction. *Robinson v. State*, 21 App. 160, 17 S. W. 632.

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 App. 345, 46 S. W. 236, 48 S. W. 508, judgment reversed, s. c. 177 U. S. 442, 20 Sup. Ct. 687, 44 L. Ed. 839.

14. **Habeas corpus.**—The question of former acquittal or conviction cannot be raised on habeas corpus. *Brill v. State*, 1 App. 152; *Ex parte Rogers*, 10 App. 655, 38 Am. Rep. 654; *Pitner v. State*, 44 Tex. 578; *Perry v. State*, 41 Tex. 488.

15. **Regularity of former proceeding.**—Where defendant was convicted of manslaughter under a void indictment for murder, murder in the second degree was properly submitted on a subsequent trial under a valid indictment. *Whiten v. State*, 71 App. 553, 160 S. W. 462. But if the first indictment was valid defendant could not be tried for any higher offense than manslaughter. *Id.* And where defendant's conviction of manslaughter was reversed on the ground that the indictment was void, and on trial under a proper indictment defendant was again convicted of manslaughter, which was also reversed, and a doubt existed whether the first indictment was in fact defective, on the new trial no higher grade of homicide than manslaughter will be submitted. *Id.*

Conviction of manslaughter under invalid indictment for murder will bar prosecution for murder. *Mixon v. State*, 35 App. 458, 34 S. W. 290.

Where defendant was acquitted of murder in first degree by virtue of conviction of murder in second degree which was reversed because order changing venue was erroneous, the acquittal of murder in first degree bars further prosecution for that grade of homicide and applicant is entitled to bail. *Ex parte Moore*, 46 App. 417, 80 S. W. 620.

Under this article an acquittal will bar any subsequent prosecution for the same offense, if the trial occurs in a court having jurisdiction, whether the indictment is a valid one or not. *Shoemaker v. State*, 58 App. 518, 126 S. W. 887.

Art. 573. [562] Special plea must be verified.—Every special plea shall be verified by the affidavit of the defendant. [O. C. 485.]

See *Willson's Cr. Forms*, 822-825.

Cited, *Miles v. State* (Cr. App.) 165 S. W. 567.

Verification.—*Swancoat v. State*, 4 App. 105; *Samuels v. State*, 25 App. 537, 8 S. W. 656.

Where an indictment for forgery alleged that a company was a corporation, and the allegation was not denied under oath, there was no error in permitting the secretary and treasurer to testify that the company was a corporation. *White v. State*, 61 App. 498, 135 S. W. 562.

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.]

See *Willson's Cr. Forms*, 811. See post, arts. 590, 770.

Cited, *Essery v. State*, 72 App. 414, 163 S. W. 17.

Trial by jury.—If the plea is not excepted to or motion to strike out interposed, it must go to the jury. *Grisham v. State*, 19 App. 504, and cases cited; *Troy v. State*, 10 App. 319; *Pickens v. State*, 9 App. 270; *Adams v. State*, 16 App. 162.

The defendant is entitled to trial by jury. *Quitow v. State*, 1 App. 49, 28 Am. Rep. 396; *Pritchford v. State*, 2 App. 69. And see *Grisham v. State*, 19 App. 504; *Adams v. State*, 16 App. 162; *Taylor v. State*, 4 App. 29; *Robinson v. State*, 21

App. 160, 17 S. W. 632; Foster v. State, 25 App. 543, 8 S. W. 664; Emmons v. State, 34 App. 118, 29 S. W. 475; Washington v. State, 35 App. 156, 32 S. W. 694.

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 App. 69 and cases cited.

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 App. 29.

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 App. 542.

It devolves upon the courts to determine the legal sufficiency of special pleas, and they should not submit to the jury such as constitute no defense in law. Simco v. State, 9 App. 338.

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 App. 326, 6 S. W. 300; Smith v. State, 18 App. 329, and cases cited.

Former conviction was the defense specially pleaded to this prosecution. Exception to the sufficiency of the special plea was interposed by the state. The trial court ignored the exception and admitted evidence pro and con upon the issue raised by the special plea. Held, that in this state of case the special plea presented an issue for the determination of the jury, and the trial court erred in not submitting that issue to the jury under proper instruction. Munch v. State, 25 App. 30, 7 S. W. 341.

But the plea should not be submitted if there was no evidence to support it. Johnson v. State, 34 App. 115, 29 S. W. 473.

The court should submit the plea of former jeopardy as an issue to the jury. Woodward v. State, 42 App. 188, 58 S. W. 133.

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 App. 575, 85 S. W. 808.

Where there is any view of the evidence under which the plea amounts to a bar, the issue must be submitted. Lindley v. State, 57 App. 305, 122 S. W. 873.

Verdict or finding.—The court should instruct the jury to return a special verdict upon the plea, and the verdict should find whether the plea be true or untrue. Davis v. State, 42 Tex. 494; Deaton v. State, 44 Tex. 446; Brown v. State, 7 App. 619; McCampbell v. State, 9 App. 124, 35 Am. Rep. 726; Pickens v. State, 9 App. 270; White v. State, 9 App. 390; Smith v. State, 13 App. 329; Burks v. State, 24 App. 326, 6 S. W. 300; Wright v. State, 27 App. 447, 11 S. W. 458.

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.

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.

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.]

See Willson's Cr. Forms, 811-815. See notes under art. 570, ante.

Amendment of indictment or information, see post, arts. 597, 598, 599.

Exceptions to defendant's special plea, see post, art. 600.

Requisites of indictment or information, see ante, arts. 451, 478.

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.

2. The want of any other requisite or form prescribed by articles 439 [451] and 466 [478], 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.]

See Willson's Cr. Forms, 7, 816-821. See notes under art. 570, ante.

Requisites of indictment or information, see ante, arts. 451, 478, and notes.

Indictment is subject to exception where the statutory requirements are not complied with. Thomas v. State, 18 App. 213.

Time of taking exceptions.—Exceptions must be duly taken below. *Hauck v. State*, 1 App. 357.

Exceptions to the indictment should be taken below before entry of plea. *Houillon v. State*, 3 App. 537; *Rowlett v. State*, 23 App. 191, 4 S. W. 582. See *Jinks v. State*, 5 App. 68; *Jones v. State*, 10 App. 552.

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.]

Cited, *Payne v. State* (Cr. App.) 146 S. W. 171.

Written motion.—Defendant must plead in writing under oath the facts, showing that the court has no jurisdiction. *Garner v. State*, 62 App. 525, 138 S. W. 124.

Where a motion to quash an indictment was verbal, and it was not argued by the defendant's attorney and the county attorney in open court, and ruled on by the court in open court, no question of its insufficiency is presented for review. *Simpson v. State* (Cr. App.) 151 S. W. 303.

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.]

See ante, arts. 557, 572, and notes.

Cited, *Garner v. State*, 62 App. 525, 138 S. W. 124; *Luster v. State*, 63 App. 541, 141 S. W. 209, Ann. Cas. 1913D, 1089; *Ethridge v. State* (Cr. App.) 172 S. W. 786.

Time allowed.—Accused is entitled to two days within which to prepare and file his pleadings, irrespective of whether such time is necessary; the statute being mandatory. *Stephens v. State* (Cr. App.) 147 S. W. 235; *Woodall v. State*, 25 App. 617, 8 S. W. 802; *Reed v. State*, 31 App. 35, 19 S. W. 678; *Evans v. State*, 36 App. 32, 35 S. W. 169; *Holden v. State*, 44 App. 382, 71 S. W. 600; *Whitesides v. State*, 44 App. 410, 71 S. W. 969; *McFadin v. State*, 44 App. 471, 72 S. W. 172; *Lightfoot v. State* (Cr. App.) 77 S. W. 793; *Templeton v. State* (Cr. App.) 146 S. W. 933; *Partridge v. State* (Cr. App.) 147 S. W. 234; *Graham v. State*, 72 App. 9, 160 S. W. 714.

Defendant, when his case was called, and a jury was selected and sworn, and after his motion to postpone for two days, in which to prepare written pleadings was overruled, declined to plead; whereupon the court entered a plea of not guilty for him, but, before further steps were taken, the court granted such time, and defendant, when so informed, declined to agree to a discharge of the jury, but insisted upon his motion; whereupon the court withdrew the case from the jury, and continued the case for two days. Held, that such facts did not constitute former jeopardy. *Johnson v. State* (Cr. App.) 164 S. W. 833.

Computation of time.—The two days must be computed from the filing of the information. *Evans v. State*, 36 App. 32, 35 S. W. 169.

Waiver.—Filing of pleas under compulsion held not a waiver of the two days provided by this article. *Reed v. State*, 31 App. 35, 19 S. W. 678.

Where one goes to trial, it is too late then to ask for postponement of the case because he has not had two full days after indictment filed in which to prepare for trial. *Counts v. State*, 49 App. 329, 94 S. W. 222.

New trial.—When a motion for new trial is granted, the cause may be again tried at the same term, but the defendant should not be unduly hurried to his prejudice. *Lott v. State*, 41 Tex. 121.

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.]

As to service of copy of indictment, see art. 551, et seq., ante.

Cited, *Luster v. State*, 63 App. 541, 141 S. W. 209, Ann. Cas. 1913D, 1089; *Ethridge v. State* (Cr. App.) 172 S. W. 786.

Service of copy of indictment.—Refusal to postpone the trial for two days after service of indictment, held ground for reversal. *Woodall v. State*, 25 App. 617, 8 S. W. 802.

After verdict it is too late to object for the first time that no copy of the indictment was served on defendant. *Bonner v. State*, 29 App. 223, 15 S. W. 821, and cases cited.

Where the first proceedings became *functus officio* and a second arrest, which was legal and proper, was made, the arrested party was entitled to the statutory service of a copy of the second indictment unless waived by him. *Lockwood v. State*, 32 App. 137, 22 S. W. 413, and cases cited; *Harris v. State*, 32 App. 279, 22 S. W. 1037.

Where no request is made to postpone the case for two days after service of copy of the indictment the right to such postponement is waived. *Callison v. State*, 37 App. 211, 39 S. W. 300.

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.]

See post, art. 630, and notes. *Abrigo v. State*, 29 App. 144, 15 S. W. 408; *Moseley v. State*, 25 App. 517, 8 S. W. 652.

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.

See Willson's Cr. Forms, 975.

See ante, arts. 565, 566, and notes; *Johnson v. State*, 39 App. 625, 48 S. W. 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.

See Willson's Cr. Forms, 1041.

Admonition.—The court may receive a plea of guilty from a defendant charged with a misdemeanor and enter judgment thereon without his being admonished of the consequences and without a showing that it was voluntary. *Johnson v. State*, 39 App. 625, 48 S. W. 70 (distinguishing *Rice's case*, 22 App. 654, 3 S. W. 791); *Berliner v. State*, 6 App. 181; *Scott v. State*, 29 App. 217, 15 S. W. 814.

Presence of accused.—A judgment based upon plea of guilty by constable in misdemeanor case while defendant is in jail and never brought into court is void. Plea of guilty in such case must be made in open court by the accused or his attorney. *Ex parte Jones*, 46 App. 433, 80 S. W. 996.

A conviction of violation of the gambling laws entered upon plea of guilty by defendant's mother, not an attorney at law, unauthorized by him, and made in his absence, was void. *Ex parte Super (Cr. App.)* 175 S. W. 697.

Persuasion and threats.—A conviction entered on a plea of guilty will not be disturbed on appeal, on the theory that accused was overpersuaded to enter the plea, where the evidence is conflicting on that point. *Kirk v. State*, 60 App. 172, 131 S. W. 414.

Where defendant, under arrest and in jail on the charge of carrying a pistol, pleaded guilty thereto upon threats by the deputy sheriff, who had arrested him, that if he did not plead guilty he would be prosecuted both for carrying the pistol and for the theft of it, without understanding the situation, and to avoid the expense of the prosecution for theft, he was entitled to a new trial. *Meeking v. State (Cr. App.)* 148 S. W. 309.

Vacation proceedings.—Where a session of the county court was convened by the sheriff, in the absence of the judge, on the opening day of the term, and the judge appeared the next day, and made an order postponing the regular business to a specified date, except cases where accused persons were unable to give bond and such probate and civil cases as might be tried by agreement at any time, the court was not in vacation, as affecting validity of a plea of guilty. *Kirk v. State*, 60 App. 172, 131 S. W. 414.

Waiver of jury.—Jury trial may be waived. *Raspberry v. State*, 1 App. 664; *Johnson v. State*, 39 App. 625, 48 S. W. 70; *Ex parte Jones*, 46 App. 433, 80 S. W. 995; *Otto v. State (Cr. App.)* 87 S. W. 698; *Mackey v. State (Cr. App.)* 151 S. W. 802; *Schulman v. State (Cr. App.)* 173 S. W. 1195.

Defendant in a misdemeanor case may waive jury trial or consent to trial by a jury of less than six men. *Stell v. State*, 14 App. 59, citing *Marks v. State*, 10 App. 334.

Findings of fact by trial court are as conclusive as the verdict of a jury. *Salinas v. State (Cr. App.)* 142 S. W. 908.

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.]

Constitutionality.—This article is unconstitutional; that is, it is beyond the power of the Legislature to authorize county judges to call indiscriminately special terms at any time to suit themselves in order to take pleas of guilty. *Ex parte Cole*, 51 App. 166, 101 S. W. 249, 250.

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.]

See Willson's Cr. Forms, 838.

See ante, art. 564, and notes.

Time for pleading, see post, art. 653.

Judgment recitals.—A judgment of conviction reciting that a jury had "heard the indictment read by the district attorney and the defendant's plea of not guilty," sufficiently showed that all of the defendants pleaded to the indictment. *Martinez v. State* (Cr. App.) 153 S. W. 886.

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.

See 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.]

See Willson's Cr. Forms, 992.

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.

See Willson's Cr. Forms, 992.

Must be disposed of before venue is changed. Post, art. 630.

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.

Refusal to hear argument.—The matter of hearing arguments on a motion to quash an indictment rests solely within the discretion of the trial court, and where he refuses to hear argument, and errs in refusing to quash the indictment, his ruling is reviewable on appeal. *Hickman v. State*, 64 App. 161, 141 S. W. 973.

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.]

See ante, arts. 572, 574, and notes; post, art. 770.

Submission to jury.—The plea of not guilty and the special plea should be submitted together, with directions to the jury to first consider the special plea; and, if they find that to be true, to proceed no further than to return their verdict upon it. *Wilson v. State*, 45 Tex. 76, 23 Am. Rep. 602; *Davis v. State*, 42 Tex. 494; *Prine v. State*, 41 Tex. 300; *Norton v. State*, 14 Tex. 387; *Pritchford v. State*, 2 App. 69; *Pickens v. State*, 9 App. 270; *White v. State*, id. 390; *Troy v. State*, 10 App. 319; *Adams v. State*, 16 App. 162; *Grisham v. State*, 19 App. 504.

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.]

See Willson's Cr. Forms, 993.

Discharge of accused.—Where, after defendant announced himself ready for trial for aggravated assault the information was quashed at the instance of the county attorney for variance between it and the complaint as to the date of the offense, and a new information was filed instantler, defendant could not, over objection, be tried under the new information without being discharged and re-arrested. *Turner v. State*, 21 App. 198, 18 S. W. 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.]

See Willson's Cr. Forms, 994.

Discharge of accused.—In a capital case, when an indictment is defective, the prosecution will not be dismissed, but it will be ordered that the defendant be committed to await the action of the next grand jury. *Calvin v. State*, 25 Tex. 789.

Where a nolle prosequi is entered to a good indictment in a felony case, and no new proceedings are instituted, defendant cannot be detained in custody. *Venters v. State*, 18 App. 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 limitation before another indictment can be preferred, he shall, in every case, be fully discharged. [O. C. 506.]

See Willson's Cr. Forms, 995.

Limitations.—If a new indictment or information would be barred by limitation, the prosecution will be dismissed, although defect in the indictment or information be one of form merely. *Ante*, art. 583. *Redfield v. State*, 24 Tex. 133.

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.]

See Willson's Cr. Forms, 996, 997. *Venters v. State*, 18 App. 198.

Discharge of accused.—The defendant can not be detained to answer another indictment or information, without an affidavit charging him with an offense. *Crouch v. State*, decided at Galveston, February 11, 1876, unreported.

Where exceptions are sustained because no offense is charged defendant should be discharged by final judgment, but where exceptions are sustained to the form of the indictment the judgment should be only interlocutory. *State v. Thornton*, 32 Tex. 104.

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 un-

der 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.

See Willson's Cr. Forms, 994.

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. 570, 576, and notes.

Cited, *Columbo v. State* (Cr. App.) 145 S. W. 910; *Bradberry v. State* (Cr. App.) 152 S. W. 169; *Matthews v. State*, 71 App. 374, 160 S. W. 1185.

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.

See Willson's Cr. Forms, 748, p. 395.

Name of accused, see ante, arts. 559-562, and notes.

Validity of statutes.—The provisions allowing amendments are not *ex post facto* as to indictments pending. *State v. Manning*, 14 Tex. 402.

Matters of form.—Allegations as to the court and term at which the indictment was presented are matters of form. *Murphey v. State*, 29 App. 507, 16 S. W. 417; *Mathews v. State*, 44 Tex. 376; *Hauck v. State*, 1 App. 357; *Long v. State*, 1 App. 466; *Sharp v. State*, 6 App. 650; *Bosshard v. State*, 25 Tex. Supp. 207; *Osborne v. State*, 23 App. 431, 5 S. W. 251; *Id.*, 24 App. 398, 6 S. W. 536; *Grayson v. State*, 35 App. 629, 34 S. W. 961; *Stiff v. State*, 21 App. 255, 17 S. W. 726; *Murphy v. State*, 36 App. 24, 35 S. W. 174.

Indictments and informations can be amended in matters of form but not in matters of substance. *Hamilton v. State* (Cr. App.) 145 S. W. 348; *Mathews v. State*, 44 Tex. 376; *Golden v. State*, 32 Tex. 737; *James v. State*, 44 Tex. 314; *Long v. State*, 1 App. 466; *Edwards v. State*, 10 App. 25; *Calvin v. State*, 25 Tex. 789; *Brown v. State*, 11 App. 451; *Bates v. State*, 12 App. 26; *Wade v. State*, 52 App. 619, 108 S. W. 677.

It is not error to permit the clerk to change the date of filing the indictment from 1897 to 1891, to make it correspond with the date of its return, as shown by the minutes of the court. *Boren v. State*, 32 App. 637, 25 S. W. 775. See *Ripsey v. State*, 29 App. 37, 14 S. W. 448, and cases cited; *De Olles v. State*, 20 App. 145.

A defect in an information for a sale of intoxicating liquor in violation of the prohibitory law, in not alleging the date when the law was adopted or put in force, is a defect of form. *Parker v. State* (Cr. App.) 150 S. W. 1184; *Jackson v. State*, 70 App. 582, 157 S. W. 1196.

Amendment was properly allowed where the word "court" was omitted where it should have been inserted to show where the prosecution was had. *James v. State*, 44 Tex. 314.

A defect in an indictment in that it did not show that it was presented in the district court of the county where the grand jury was in session, being one of form, was curable by amendment. *Thomas v. State*, 18 App. 213.

Permitting the clerk to amend his signature to the file mark held not error. *DeOlles v. State*, 20 App. 145.

A defect in the information in that it failed, except inferentially, to show in what court it was presented, should, on being pointed out, have been cured by amendment. *Bowen v. State*, 28 App. 498, 13 S. W. 787.

Permitting clerk to supply omission by endorsing file mark on indictment held not error. *Ripsey v. State*, 29 App. 37, 14 S. W. 448.

Permitting clerk to correct a date on file mark held not error. *Boren v. State*, 32 Tex. Cr. 637, 25 S. W. 775.

Docket number. *Stiff v. State*, 21 App. 255, 17 S. W. 726.

An original information, bearing the date "Filed the 9 day of Oct. 19 8," may be amended to show that the date meant was "1908," after trial, and after motion in arrest of judgment, in that the information showed that it was not filed within two years next after the commission of the offense, where the evidence showed that both the affidavit and information were filed at the same time, and on the 9th day of October, 1908. *Burk v. State*, 57 App. 635, 124 S. W. 658.

Omission of the signature to an information. *Holcomb v. State*, 60 App. 408, 132 S. W. 362.

An indictment for keeping a house where intoxicants were sold in quantities of a gallon or less without having obtained a license to "retain" such liquors should be amended to use the word "retail." *Minter v. State* (Cr. App.) 150 S. W. 783.

An indictment for pursuing the business of selling intoxicants in prohibition territory which alleged that the grand jurors in N. county "duly organized as such at the ——— term, A. D. 191—," was properly amended by adding the name of the month and year. *Hightower v. State* (Cr. App.) 165 S. W. 181.

The court may permit an information to be amended by inserting the name of the assistant criminal district attorney and to be signed by him. *Tulley v. State* (Cr. App.) 178 S. W. 364.

Matters of substance.—Allegations of time of commission of offense. *Drummond v. State*, 4 App. 150 (overruling *State v. Elliot*, 34 Tex. 148); *Sanders v. State*, 26 Tex. 119; *Sharp v. State*, 6 App. 650; *Goddard v. State*, 14 App. 566; *Huff v. State*, 23 App. 291, 4 S. W. 890; *Mealer v. State* (Cr. App.) 145 S. W. 353; *Broughton v. State*, 71 App. 617, 160 S. W. 702.

Allegations of venue. *Collins v. State*, 6 App. 647; *Robins v. State*, 9 App. 666; *Smith v. State*, 25 App. 454, 8 S. W. 645; *Orr v. State*, 25 App. 453, 8 S. W. 644, citing *Lawson v. State*, 13 App. 83.

A defect in an indictment in that it did not show that it was presented in the proper court, not being one of substance, should have been cured by amendment. *Walker v. State*, 7 App. 52.

Indictment not charging any offense cannot be amended. *Bates v. State*, 12 App. 26.

The words "against the peace and dignity of the state" cannot be dispensed with in an information. Their omission renders the indictment defective in matters of substance and not amendable. *Saine v. State*, 14 App. 144. Citing *State v. Durst*, 7 Tex. 74; *State v. Sims*, 43 Tex. 521; *Holden v. State*, 1 App. 225; *Cox v. State*, 8 App. 254, 34 Am. Rep. 746.

A defect in an indictment for forgery in that it set out the forged instrument by its substance and effect only, being one of substance, was not curable by amendment. *Thomas v. State*, 18 App. 213.

Where an indictment for violating the local option law places the prosecution under a particular election it cannot be amended by striking out the dates of the publication in the newspaper under such election. *Wade v. State*, 52 App. 619, 108 S. W. 677, and cases cited.

Where an indictment, charging the offense of pursuing the occupation of an itinerant physician without payment of the tax required, used the word "physical" instead of "physician," the court is without authority to substitute "n" for "l." *Rutherford v. State* (Cr. App.) 169 S. W. 1157.

Complaint.—Amendment of information without amending the complaint held not error. *Wilson v. State*, 6 App. 154.

The date of the offense alleged in the complaint being a matter of substance cannot be amended. *Huff v. State*, 23 App. 291, 4 S. W. 890; *Wilson v. State*, 6 App. 154; *Patillo v. State*, 3 App. 442.

Affidavit.—Permitting one other than affiant to amend the affidavit by inserting the true name of defendant, held error. *Patillo v. State*, 3 App. 442.

Record of amendment.—It is essential that the record show affirmatively that the amendment was in fact made, and not show merely an order that the indictment be amended. *Robins v. State*, 9 App. 666, and cases cited; *Cox v. State*, 7 App. 495; *Turner v. State*, 7 App. 596.

Time for amendment.—Matters of form in an indictment or information are amendable before both parties announce themselves ready for trial upon the merits, but not thereafter. Allegations as to the court and term at which the indictment was presented are matters of form, and amendable, subject to the above limitations. Ante, art. 598; *Osborne v. State*, 23 App. 431, 5 S. W. 251; *Williams v. State*, 34 App. 100, 29 S. W. 472; *Murphey v. State*, 29 App. 507, 16 S. W. 417; *Grayson v. State*, 35 App. 629, 34 S. W. 961; *Stiff v. State*, 21 App. 255, 17 S. W. 726; *Wade v. State*, 52 App. 619, 108 S. W. 677.

An amendment as to a matter of form held too late after announcement of ready for trial by both parties. *Williams v. State*, 34 App. 100, 29 S. W. 472.

An indictment may be amended at trial as to an immaterial matter. *Murphy v. State*, 36 App. 24, 35 S. W. 174.

Where the amendment as to form of an information or indictment relates to the term of court at which it is presented, it may be made after the parties have announced ready for trial. *Young v. State*, 55 App. 383, 116 S. W. 1159.

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.

See *Willson's Cr. Forms*, 749, p. 599.

See notes under art. 598, ante.

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.]

See ante, art. 572, and notes. *Venters v. State*, 18 App. 198.

Demurrer, exceptions, and motions to strike.—Where a plea of former acquittal was bad on its face, it was properly stricken out. *Shubert v. State*, 21 App. 551, 2 S. W. 883, approving *Wright v. State*, 17 App. 152; *Alexander v. State*, 21 App. 407, 17 S. W. 139, 57 Am. Rep. 617; *Pickens v. State*, 9 App. 270; *Byas v. State*, 41 App. 51, 51 S. W. 923, 96 Am. St. Rep. 762; *Epps v. State*, 38 App. 284, 42 S. W. 552.

The plea of former acquittal or conviction may be excepted to for insufficiency. *Bogges v. State*, 43 Tex. 347; *Grisham v. State*, 19 App. 504; *Pickens v. State*, 9 App. 270.

Where defendant interposed a plea of former record and judgment which was subject to objection made, but upon which the court did not act, and evidence was introduced under the plea as though no objection had been made, failure to sub-

mit to the jury the question raised by the plea, was error. *Munch v. State*, 25 App. 30, 7 S. W. 341, citing *Grisham v. State*, 19 App. 504.

Judgment on exception. *Rust v. State*, 31 App. 75, 19 S. W. 763.

Sustaining of demurrer to plea of former acquittal held error. *Fenton v. State*, 33 App. 633, 28 S. W. 537.

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.

See *Willson's Cr. Forms*, 822, 823.

Acquittal in court having no jurisdiction, see ante, art. 20.

Burglary and felony committed after entry, see Pen. Code, arts. 1313, 1317, 1318.

Conviction of lower as acquittal of higher offense, see post, art. 752.

Conviction or acquittal in other state or county, see arts. 255, 256.

Discharge by examining court, see ante, art. 314.

Forgery and passing or possession of forged instrument with intent to pass, see Pen. Code, art. 946.

Former jeopardy in general, see ante, art. 9.

Offenses against state and municipality, see post, art. 965.

Pleas, see post, arts. 572-574.

Practicing medicine without authority, see Pen. Code, art. 756.

Prosecution in inferior courts.—A voluntary appearance before a magistrate and plea of guilty of simple assault is no bar to a prosecution in a court of competent jurisdiction for aggravated assault. *Watson v. State*, 5 App. 271; *Wilson v. State*, 16 Tex. 246; *Warriner v. State*, 3 App. 104, 30 Am. Rep. 124; *Norton v. State*, 14 Tex. 387.

A conviction on complaint before a justice of the peace, of the offense of simple assault, is no bar to a prosecution by information based on the same facts for aggravated assault upon a female. *Henkel v. State*, 27 App. 510, 11 S. W. 671, and cases cited. See *Davis v. State*, 39 App. 681, 47 S. W. 978; *Allen v. State*, 7 App. 298.

Though a plea of former conviction of a simple assault founded on a trial before a justice of the peace, is no bar to a subsequent prosecution for aggravated assault based on same act, the plea should be submitted to the jury, and the defendant acquitted if they should find that a simple assault only had been committed. *Funderburk v. State* (Cr. App.) 64 S. W. 1060.

It is no defense to a prosecution for aggravated assault that accused had been prosecuted for simple assault in the mayor's court. *Caudle v. State*, 57 App. 363, 123 S. W. 413.

A conviction by a justice of the peace for engaging in an affray will not bar a prosecution for aggravated assault, even though growing out of the same transaction. *McCraw v. State* (Cr. App.) 163 S. W. 967.

Trial under indictment.—If the former acquittal or conviction was under an indictment or information, and for a minor offense embraced in a transaction which also constituted a higher offense, such acquittal or conviction will bar a subsequent prosecution for the higher grade of offense, although the court in which the former acquittal or conviction was had, did not have jurisdiction of the higher grade of offense, and although an indictment for said higher grade of offense was pending in another court having jurisdiction of it. *Grisham v. State*, 19 App. 504; *Kain v. State*, 16 App. 282; *White v. State*, 9 App. 390; *Achterberg v. State*, 8 App. 463; *Allen v. State*, 7 App. 298; *Thomas v. State*, 40 Tex. 36.

Dismissal or quashal.—Prior prosecution which was dismissed held not a bar. *Brill v. State*, 1 App. 152; *Swindel v. State*, 32 Tex. 102; *Longley v. State*, 43 Tex. 490.

Judgment quashing former indictment held not a bar. *Swancoat v. State*, 4 App. 105.

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.]

See ante, arts. 563, 575.

See notes under article 79, ante.

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.]

Nolle prosequi.—The entry of a nolle prosequi to a good indictment terminates the prosecution and entitles defendant to a discharge. *Venters v. State*, 18 App. 198.

Mistrial.—After mistrial the cause stood as it did before the mistrial, and if defendant had no cause to claim a continuance he should have made his application in the terms of the statute. *Jones v. State*, 3 App. 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.

See *Willson's Cr. Forms*, 837.

Consent.—An agreement between attorneys to constitute a ground for continuance must be in writing as required by the rules or must be consented to by the judge. *Mixon v. State*, 36 App. 66, 35 S. W. 394.

The mere agreement of counsel to continue a case is not of itself sufficient to authorize continuance. *Keaton v. State*, 41 App. 621, 57 S. W. 1126.

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.]

See *Willson's Cr. Forms*, 830, 833.

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| 1. Discretion of court. | 6. Physical and mental condition of accused. |
| 2. Grounds in general. | 7. Want of preparation. |
| 3. Other prosecution pending. | 8. Local prejudice. |
| 4. Absence of compurgators on motion for change of venue. | 9. Absence of counsel. |
| 5. Former conviction. | 10. Codefendants. |
| | 11. — Severance. |

1. Discretion of court.—An application based upon a ground not provided for in the statute, like other applications for continuance, is addressed to the sound discretion of the court, and unless it be shown that such discretion has been abused the action of the court will not be revised. *Townsend v. State*, 41 Tex. 134; *Burrell v. State*, 18 Tex. 713; *Zumwalt v. State*, 5 App. 521; *Jackson v. State*, 4 App. 292; *Daugherty v. State*, 33 App. 173, 26 S. W. 60; *Krebs v. State*, 8 App. 1; *Myers v. State*, 7 App. 640, and cases cited; *Kirby v. State* (Cr. App.) 159 S. W. 455; *Simonds v. State* (Cr. App.) 175 S. W. 1064; *Stacy v. State* (Cr. App.) 177 S. W. 114.

In determining whether the court abused its discretion the whole record must be considered. *Kirby v. State* (Cr. App.) 159 S. W. 455.

2. Grounds in general.—Art. 4606, *Vernon's Sayles' Civ. St.* 1914, prescribing legal holidays does not suspend proceedings of courts on those days; such statute, in so far as it relates to judicial proceedings, being merely permissive. *Pender v. State*, 12 App. 496, citing *Dunlap v. State*, 9 App. 179, 35 Am. Rep. 736.

It is not cause for a continuance that a prosecution against a defendant's witness had been continued by the state, which prosecution rendered said witness incompetent to testify in behalf of defendant. *Moore v. State*, 15 App. 1; *Phelps v. State*, *Id.* 45.

A continuance because the court convened at 8:30 in the morning held properly denied. *Chappell v. State*, 58 App. 401, 126 S. W. 274.

It is in the discretion of the trial court whether he will take a recess until a motion for continuance is prepared, or call the next case on the docket. *Brown v. State*, 72 App. 33, 160 S. W. 374.

Where accused was represented by counsel, the denial of a continuance because he had not been able to get into communication with his father, held harmless. *Clark v. State* (Cr. App.) 174 S. W. 354.

3. Other prosecution pending.—One indicted in the district court for pursuing the business of selling intoxicating liquors in prohibition territory is not entitled to a continuance pending trial in the county court for sales of liquor, for separate and distinct offenses are charged. *Jackson v. State* (Cr. App.) 178 S. W. 521.

4. Absence of compurgators on motion for change of venue.—The defendant is not entitled to a continuance merely for the purpose of finding compurgators to join with him in a motion for change of venue. *Wall v. State*, 18 Tex. 682, 70 Am. Dec. 302. But by reason of surprise may be entitled to a postponement for such purpose. *Blackburn v. State*, 43 Tex. 522.

5. Former conviction.—Where it appeared that defendant had been convicted as an accessory upon the same facts and that he had appealed therefrom, his motion for a postponement until the final disposition of such case, in order that he might plead either former conviction or former acquittal, should have been granted. *Harrison v. State* (Cr. App.) 151 S. W. 552.

Where accused pleads a former conviction, from which an appeal is pending, he must move for a continuance of the second prosecution until the appeal is determined, if he would take advantage of his plea. *Phillips v. State* (Cr. App.) 164 S. W. 1004.

6. Physical and mental condition of accused.—See notes to art. 616, post.

A continuance on the ground of accused's illness held properly denied. *Tilmeyer v. State*, 62 App. 272, 136 S. W. 1060; *Ferales v. State*, 72 App. 176, 161 S. W. 482.

Sickness of the defendant rendering him unable to be present in court at every stage of the trial is cause for continuance or postponement. *Brown v. State*, 33 Tex. 482.

Accused should not be forced to trial when too sick to confer with counsel, in which case the trial should be continued. *Streight v. State*, 62 App. 453, 138 S. W. 742.

It was not an abuse of discretion to refuse a continuance on the ground that counsel have just learned that accused is a monomaniac, counsel having had ample time to learn his condition. *Kirby v. State* (Cr. App.) 150 S. W. 455.

Refusal to continue a case for the illness of accused was not prejudicial where he could and did undergo a trial without any breakdown. *Oliver v. State*, 70 App. 140, 159 S. W. 235.

Where accused is not mentally or physically able to be tried, and can not be of any assistance to his counsel at trial because of his mental condition, and probably can not testify, a continuance should be granted. *Graham v. State*, 72 App. 9, 160 S. W. 714.

7. Want of preparation.—A motion not stating in what particulars accused's attorneys were unable to prepare his defense, held, insufficient to justify a continuance. *Luster v. State*, 63 App. 541, 141 S. W. 209, Ann. Cas. 1913D, 1089.

Where accused did not move for a continuance so as to enable her to prepare for trial, she cannot complain in the motion for new trial that she was not prepared for trial. *Humphries v. State*, 72 App. 535, 163 S. W. 71.

Continuance of a homicide case, after the denial of a writ of habeas corpus because attorneys had not had time to investigate the facts, and because witnesses for the state would not tell attorneys what their testimony would be, held properly denied. *Muldrew v. State* (Cr. App.) 166 S. W. 156.

8. Local prejudice.—That public prejudice exists against defendant is no ground for continuance. *Jones v. State*, 37 App. 433, 35 S. W. 975. And see *Hutcherson v. State*, 62 App. 1, 136 S. W. 53.

An application for a continuance based on alleged "excited condition" of the public mind held too vague. *Baw v. State*, 33 App. 24, 24 S. W. 293.

That a mob attempted to hang defendant is not a ground for continuance. *Miller v. State*, 32 App. 319, 20 S. W. 1103.

Application for a continuance because of threats of mob violence if application for postponement should be made is insufficient, when it does not show who warned nor the extent of the warning. *Hutcherson v. State*, 62 App. 1, 136 S. W. 53.

The refusal of a continuance, sought because the accused was tried at the same term for another crime making it difficult to obtain an impartial jury, if error, is harmless, where no improper juror is forced upon the accused. *Lawson v. State* (Cr. App.) 148 S. W. 587.

9. Absence of counsel.—Absence or disability of counsel for the defense is not good cause for continuance, when it appears that the defendant was faithfully represented on the trial by other counsel, and it does not appear that injury resulted to the defendant because of such absence. *Walker v. State*, 13 App. 618, 44 Am. Rep. 716, note; *Stockholm v. State*, 24 App. 598, 7 S. W. 338; *Boothe v. State*, 4 App. 217; *Mixon v. State*, 36 App. 66, 35 S. W. 394; *Weaver v. State*, 34 App. 282, 30 S. W. 220; *Webb v. State* (Cr. App.) 40 S. W. 989; *Collins v. State* (Cr. App.) 152 S. W. 1047; *Thompson v. State*, 70 App. 610, 157 S. W. 494; *Hamilton v. State* (Cr. App.) 168 S. W. 536; *Simonds v. State* (Cr. App.) 175 S. W. 1064.

A continuance sought because the leading counsel was intoxicated was properly denied where the junior counsel conducted the case with skill and ability. *Webb v. State* (Cr. App.) 40 S. W. 989.

Denial of application for continuance, because defendant's attorney was temporarily out of the state and had made no arrangement for trial, believing that he would return in time to try the case, held not an abuse of discretion. *Davis v. State* (Cr. App.) 154 S. W. 226.

Where accused's attorney, absent when the case was called, appeared before any witness was examined, and the only absent witness appeared before the trial was completed and testified, and accused was not injured by the attorney's absence, he could not complain that he was forced to trial during the absence of his attorney. *Castenara v. State*, 70 App. 436, 156 S. W. 1180.

10. Codefendants.—If a joint application is granted as to one defendant, the continuance must operate as to all, notwithstanding there is a motion for severance. *Krebs v. State*, 3 App. 348; *Thompson v. State*, 9 App. 301.

Testimony of separately indicted defendant whose case had been continued held not ground for continuance. *Moore v. State*, 15 App. 1; *Phelps v. State*, *id.* 45.

Refusal of continuance to await trial of codefendant held not error. *Stouard v. State*, 27 App. 1, 10 S. W. 442.

An application for a continuance to obtain the testimony of a convicted codefendant, was properly overruled. *Magruder v. State*, 35 App. 214, 33 S. W. 233.

Refusal to continue case until after the trial of another defendant in another court held proper. *Price v. State* (Cr. App.) 152 S. W. 640.

11. — Severance.—See notes to arts. 726, 727, ante.

If there has been a severance and conviction of one defendant, the other is not entitled to a continuance to await the result of an appeal. *Slawson v. State*, 7 App. 63; *Myers v. State*, *id.* 640; *Krebs v. State*, 8 App. 1.

A party whose evidence is the object of the severance must be present or in such situation that his case can be first tried with reasonable dispatch; and hence where he has forfeited his bail and is at large, the severance should be denied. *Anderson v. State*, 8 App. 542.

The filing of an affidavit for severance by one of plural defendants will not, without other sufficient cause, operate a continuance to either party. *Stouard v. State*, 27 App. 1, 10 S. W. 442.

The overruling of a motion for continuance is not an announcement of ready for trial on the merits so as to deprive defendant of the right to have another person separately indicted for the same offense first placed on trial, so that he may obtain the latter's testimony in case of acquittal. *Dodson v. State*, 32 App. 529, 24 S. W. 899.

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.]

See *Willson's Cr. Forms*, 826.

Art. 607. [596] 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.]

See *Willson's Cr. Forms*, 827.

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.

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.

3. The facts which are expected to be proved by the witness, and it must appear to the court that they are material.

4. That the witness is not absent by the procurement or consent of the defendant.

5. That the application is not made for delay.

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.]

Cited, *Davis v. State of Texas*, 139 U. S. 651, 11 Sup. Ct. 675, 35 L. Ed. 300.

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| <p style="text-align: center;">Subd. 1</p> <ol style="list-style-type: none"> 1. Name and residence of witness. 2. Subsequent applications. 3. Mode of enforcing attendance of witnesses. <p style="text-align: center;">Subd. 2</p> <ol style="list-style-type: none"> 4. Diligence and excuse for delay in general. 5. Process. 6. — Duplication of process for witnesses. 7. Deposition. <p style="text-align: center;">Subd. 3</p> <ol style="list-style-type: none"> 8. Facts expected to be proved, and their materiality in general. 9. Gaming. 10. Selling liquor. 11. Assault and homicide. 12. — Insanity. 13. — Self-defense. 14. — Threats. 15. Rape. 16. Arson. 17. Burglary. 18. Robbery. 19. Theft. | <ol style="list-style-type: none"> 20. Fraudulent disposition of mortgaged property. 21. Seduction. 22. Cumulative testimony. 23. Corroborating testimony. 24. Character testimony. 25. Impeaching testimony. 26. Alibi. 27. Admissions to prevent continuance. <p style="text-align: center;">Subd. 4</p> <ol style="list-style-type: none"> 28. Cause of absence of witness. <p style="text-align: center;">Subd. 5</p> <ol style="list-style-type: none"> 29. Delay. <p style="text-align: center;">Subd. 6</p> <ol style="list-style-type: none"> 30. Probability of securing attendance of witness. 31. Expectation of securing attendance of witness during term. 32. Discretion of court. 33. Denial of continuance as ground for new trial—In general. 34. — Materiality, truth, and effect of absent testimony. 35. — Presence or accessibility of witnesses during trial. 36. Setting aside continuance. |
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SUBD. 1

1. Name and residence of witness.—Failing to state the residence of the absent witness, or that his residence is unknown, renders the application fatally defective. *Thomas v. State*, 17 App. 437; *Vanwey v. State*, 41 Tex. 639; *Wolf v. State*, 4 App. 332; *Davis v. State* (Cr. App.) 154 S. W. 226; *Anderson v. State*, 8 App. 542.

The statement that one of the witnesses is temporarily absent from the state should be followed by a statement showing at what time he left the county of his reputed residence. *Dove v. State*, 36 App. 105, 35 S. W. 648.

A continuance because of an absent witness is properly refused where the witness is unknown in the county, and where his whereabouts are unknown, and a search of that and surrounding counties fails to show that he has ever been in any of them, and defendant's counsel is the only person professing to be acquainted with him. *Byrd v. State*, 47 S. W. 721, 39 App. 609.

The absent witness must be competent. *Sparkman v. State*, 61 App. 429, 135 S. W. 134.

2. Subsequent applications.—See art. 609, post, and notes.

3. Mode of enforcing attendance of witnesses.—See arts. 525-550, ante, and notes.

SUBD. 2

4. Diligence, and excuse for delay in general.—*Harvey v. State*, 35 App. 545, 34 S. W. 623.

The application must show affirmatively and clearly that due diligence had been used to obtain the testimony of the witness, or it must, in like manner, disclose facts which will excuse the use of such diligence. The diligence used must be fully and distinctly set forth, and it must be apparent therefrom that all the means provided by law were promptly resorted to. It is the duty of the defendant, as soon as he is arrested, to use the means provided by law to obtain the testimony he desires, or he must show good cause for failure to do so, upon applying for a continuance. The burden is upon the party seeking a continuance to show himself entitled to it by definite, exact, and certain averments. He should show such facts as negative a want of legal diligence. A mere general statement that he has used due diligence will not be sufficient, but the acts of diligence must be stated fully and clearly, and where process has been issued and returned, it is better to make the same a part of the application. It is not sufficient to merely state that process was sued out, but it must be shown what was done with it; to whom, and when it was delivered, and when issued to another county, the manner and time of its transmission must be shown, and when process has been returned, the time when it was returned must be shown. *Earrett v. State*, 18 App. 64; *Timbrook v. State*, Id. 1; *Hughes v. State*, Id. 130; *Bond v. State*, 20 App. 421; *Hawkins v. State*, 17 App. 593, 50 Am. Rep. 129; *Long v. State*, 17 App. 128; *Lane v. State*, 16 App. 172; *Childers v. State*, Id. 524; *Lewis v. State*, 15 App. 647; *Buntain v. State*, Id. 515; *O'Neal v. State*, 14 App. 582; *Walker v. State*, 13 App. 618, 41 Am. Rep. 716, note; *Lowe v. State*, 11 App. 253; *Atkins v. State*, 11 App. 8; *Greenwood v. State*, 9 App. 638; *Burton v. State*, Id. 605; *Skipworth v. State*, 8 App. 135; *Cooper v. State*, 7 App. 194; *Murphy v. State*, 6 App. 420; *Henderson v. State*, 5 App. 134; *Robles v. State*, Id. 346; *Fields v. State*, Id. 616; *Johnson v. State*, 4 App. 268; *Donovan v. State*, Id. 372; *Summerlin v. State*, 3 App. 444; *Huebner v. State*, Id. 459; *Bowen v. State*, Id. 618; *Grant v. State*, 2 App. 164; *Murry v. State*, 1 App. 174; *Dill v. State*, Id. 279; *Cantu v. State*, Id. 403; *Buie v. State*, Id. 452; *Townsend v. State*, 41 Tex. 134; *Wall v. State*, 18 Tex. 682, 70 Am. Dec. 302; *Shanks v. State*, 25 Tex. Supp. 326; *Hennessy v. State*, 23 App. 340, 5 S. W. 215; *Maines v. State*, 26 App. 14, 9 S. W. 51; *Stevens v. State*, 27 App. 461, 11 S. W. 459; *Richardson v. State*, 28 App. 216, 12 S. W. 870; *Slade v. State*, 29

App. 381, 16 S. W. 253; *Massie v. State*, 30 App. 64, 16 S. W. 770; *Phipps v. State*, 36 App. 219, 36 S. W. 753; *Thompson v. State*, 33 App. 217, 26 S. W. 198; *McKinney v. State* (Cr. App.) 30 S. W. 786; *Weaver v. State*, 34 App. 282, 30 S. W. 220; *Clapman v. State* (Cr. App.) 30 S. W. 225; *Richards v. State*, 34 App. 277, 30 S. W. 223; *Cullen v. State* (Cr. App.) 30 S. W. 219; *Steel v. State* (Cr. App.) 30 S. W. 1064; *Melver v. State* (Cr. App.) 37 S. W. 745; *Flores v. State* (Cr. App.) 38 S. W. 790; *Shetters v. State* (Cr. App.) 147 S. W. 582; *Gotcher v. State* (Cr. App.) 148 S. W. 574; *Walls v. State* (Cr. App.) 153 S. W. 130; *Fletcher v. State* (Cr. App.) 153 S. W. 1134; *Davis v. State* (Cr. App.) 154 S. W. 226; *Manley v. State* (Cr. App.) 154 S. W. 1008; *Dugat v. State*, 72 App. 39, 160 S. W. 376; *Havard v. State* (Cr. App.) 166 S. W. 507; *Keets v. State* (Cr. App.) 175 S. W. 149; *Stacy v. State* (Cr. App.) 177 S. W. 114.

Burden of proof on the party seeking a continuance. *Long v. State*, 17 App. 128, and cases cited; *Melton v. State*, 63 App. 362, 140 S. W. 230; *Murff v. State* (Cr. App.) 172 S. W. 238.

The law requires of the defendant a strict compliance with its exact requirements upon application for a continuance. What constitutes legal diligence to enforce the attendance of witnesses is explicitly prescribed by the statute, and a defendant, who deviated from its directions, must abide the consequences. *Skipworth v. State*, 8 App. 135.

And further on showing as to diligence, see *Reynolds v. State*, 7 App. 516; *Anderson v. State*, 8 App. 542; *Greenwood v. State*, 9 App. 638; *O'Neal v. State*, 14 App. 582; *Hart v. State*, Id., 657; *Thomas v. State*, 17 App. 437; *Hawkins v. State*, 17 App. 593, 50 Am. Rep. 129; *Timbrook v. State*, 18 App. 1; *McGrath v. State*, 35 App. 413, 34 S. W. 127, 941; *Payton v. State*, 35 App. 508, 34 S. W. 615; *Snodgrass v. State*, 36 App. 207, 36 S. W. 477; *Henry v. State*, 38 App. 306, 42 S. W. 559; *Shanks v. State*, 25 Tex. Supp. 326.

Diligence held sufficient. *Cameron v. State*, 57 App. 316, 122 S. W. 870; *Presley v. State*, 60 App. 102, 131 S. W. 332.

An application made several days before the trial should show that the attendance of the witness could not be had at the trial, or that the proper diligence would have been useless. *Morgan v. State*, 44 Tex. 511.

It is not a good excuse for a failure to use diligence, that the testimony could not have been obtained between the time of the presentment of the indictment and the trial. *Murphy v. State*, 6 App. 420. Nor is confinement in jail and a want of information as to the requirements of the law. *Cox v. State*, 43 Tex. 101. But see *Allphin v. State*, 41 Tex. 79; *Yanez v. State*, 20 Tex. 656, which hold that such excuse may be considered. Nor that the defendant's attorney neglected and abandoned the defense. *Goodman v. State*, 4 App. 349. Nor that a *capias pro fine* had been issued against the witness because of a failure to attend at a previous term; nor that the state had summoned the witness. *Drake v. State*, 5 App. 649; *Handline v. State*, 6 App. 347; *Clark v. State*, 40 App. 129, 49 S. W. 85. But, that the defendant was called upon to announce for trial so soon after the presentment of the indictment that service of process upon an absent witness in a distant county was impracticable, was held to be a sufficient excuse for failure to sue out process for such witness. *Mapes v. State*, 14 App. 129.

Second application for continuance held to show a total want of diligence. *Washington v. State*, 35 App. 154, 32 S. W. 693.

Continuance was properly denied, when the case had been several times continued for witnesses, and the name of such witness had not been included in any former application. *De Alberts v. State*, 34 App. 508, 31 S. W. 391.

In order to show diligence the application should state, when process has been issued at a former term, that the witness had been in attendance during the term at which the application was made. *Harvey v. State*, 35 App. 545, 34 S. W. 623.

Diligence must be shown. *Carr v. State*, 36 App. 390, 37 S. W. 426; *Kirk v. State* (Cr. App.) 37 S. W. 440.

When the bill shows that the witnesses were summoned before court opened, that they were not present on the day of trial; held, such bill does not show diligence. *Henry v. State*, 38 App. 306, 42 S. W. 559.

When defendant has been arrested three days before trial, motion will be overruled if no process has been applied for, even though defendant had no counsel and claimed not to know that evidence was material. *Holmes v. State*, 38 App. 370, 42 S. W. 996.

It is sufficient excuse for want of diligence in obtaining testimony, for absence of which continuance is sought, that the prosecuting witness by false statements to defendant misled him, so that the different testimony given by the prosecuting witness, and but for which the absent testimony would not have been necessary, was a surprise to him. *Richardson v. State*, 57 App. 285, 122 S. W. 560.

An application for a continuance, which alleges that several subpoenas had been issued, and that applicant had learned for the first time, two days before, that the witness lived in Oklahoma, and that applicant had not time to procure depositions, is insufficient for failing to show that due diligence had been used, especially where it was not shown whether it was the first or second continuance and the application had been considered on a motion for new trial. *Smalley v. State*, 59 App. 95, 127 S. W. 225.

Where accused was indicted for murder on January 11, 1907, there was no abuse of discretion in denying a second application for a continuance to procure absent witnesses, made when the case was called for trial on May 5, 1909, in view of the long time which had elapsed since the indictment was filed. *Hunter v. State*, 59 App. 439, 129 S. W. 125.

Accused, failing to avail himself of the offer of the court to issue additional process for an absent witness, and to exhaust all means at its command to procure the witness, may not complain of the denial of his application for a continuance on the ground of the absence of the witness. *Cromwell v. State*, 59 App. 525, 129 S. W. 622.

A motion for a continuance for the absence of a witness was properly denied, where it showed no diligence, and where the witness thereafter testified for the defendant. *Barrego v. State*, 61 App. 625, 136 S. W. 41.

An application, which showed that the witness attended a former term of the court in obedience to a subpoena, but that since he had moved to another county, was fatally defective, for failure to show when the witness moved, and what efforts, if any, plaintiff had made to secure his attendance. *Jones v. State*, 61 App. 656, 136 S. W. 57.

A continuance for absent witnesses will be denied where no subpoena was attached to the application, and the application fails to show when the absent witnesses were subpoenaed. *Clark v. State*, 61 App. 597, 136 S. W. 260.

A continuance for absent witnesses who had left the county is properly denied, for want of due diligence, where the time the witnesses left is not shown, and where any reason why process was not sought for them before they left is not stated. *Toliver v. State*, 63 App. 563, 140 S. W. 776.

Where accused knew for more than five months before his trial that he needed an instrument in the possession of a third person in a sister state, but made no effort to obtain possession thereof, and made no excuse for his failure to do so, a continuance to enable him to procure the instrument was properly denied. *Melton v. State*, 63 App. 573, 140 S. W. 781.

Where the defendant knew of certain testimony before the indictment was returned and had not issued a subpoena, nor included names of witnesses in a motion for a continuance made when the case was first called for trial, a lack of diligence is shown, and a motion for a continuance on the ground that this evidence was newly discovered, made at a time when nearly all the evidence had been introduced, is properly refused. *Schmidt v. State*, 63 App. 491, 140 S. W. 1088.

The trial judge, in allowing the bill of exception to the denial of a motion for a continuance, on the ground of the absence of two witnesses, qualified the bill by stating that one of the witnesses for whom the motion was made was present and testified at the trial, and that defendant, after the motion was overruled, used no diligence to secure the other witness, who was his relative, and whose attendance could have been procured; that one of the witnesses for whose testimony the motion was made testified the reverse of what defendant in his motion for continuance swore he would testify; and the testimony of the other witnesses was not shown to have been material. Held, that any error in overruling the motion for continuance was not prejudicial. *Luster v. State*, 63 App. 541, 141 S. W. 209, Ann. Cas. 1913D, 1089.

An application for a continuance in a criminal prosecution on account of the absence of a witness for the defense, which merely states that a subpoena which the defendant caused to be issued to the county in which the cause was tried was placed in the hands of the sheriff, and returned into court eight days later and four days before the cause was called for trial without a showing of service, or any reason why it was not had, and which also shows that the defendant was informed that the witness was visiting in the adjoining county of another state, and that her home was in the state in a county adjoining that where he was being tried, is insufficient to show diligence, as the defendant had the burden of showing when he learned of the temporary absence of the witness from the state, when she would return, and whether he could have taken her deposition, why the officer made no return upon the subpoena, and that the witness had not returned to her home in ample time to have been secured as a witness by due diligence. *Jones v. State* (Cr. App.) 144 S. W. 252.

An application for a continuance on the ground of the absence of a witness, made by accused, who had obtained three postponements of the trial, one on account of the absence of the witness, is properly denied as a fourth application, where there is a total failure to show diligence. *O'Neal v. State* (Cr. App.) 146 S. W. 938.

Where a companion case was tried while accused was present in court, knowing that absent witnesses were not in attendance, and that his case was next for trial, and he made no effort to secure the attendance of such witnesses although knowing where they lived, there was not such diligence in securing their attendance as would justify a continuance. *Yarborough v. State* (Cr. App.) 147 S. W. 270.

An application for a continuance on the ground of the absence of witnesses must state the facts of diligence to procure the attendance of the witnesses, and a mere affirmation of diligence is insufficient. *Giles v. State* (Cr. App.) 148 S. W. 317.

A continuance on the ground of the absence of witnesses is properly refused, where there is a want of diligence to procure the witnesses for the trial. *Giles v. State* (Cr. App.) 148 S. W. 317.

Where an application for a continuance on the ground of absence of witnesses was made prematurely and under circumstances showing that by the use of ordinary diligence between the date of the application and the trial the witnesses might have been procured, the application was properly denied. *Giles v. State* (Cr. App.) 148 S. W. 317.

Where accused, applying for a continuance on the ground of the absence of a witness, showed that he learned on Sunday, August 6th, that the witness was absent and about 100 miles away, but he applied for no process and did not undertake to communicate with the witness to secure his attendance in any way, and the trial commenced the following day and was not concluded until August 9th, the refusal to grant a continuance was proper for want of due diligence to procure the attendance of the witness. *Giles v. State* (Cr. App.) 148 S. W. 317.

Where accused, by the use of diligence could have located the witness in time to have secured her attendance, or could have obtained her deposition, the continuance was properly denied. *Gaines v. State* (Cr. App.) 150 S. W. 199.

The rule as to diligence is not so strictly enforced on the first application as on subsequent applications, especially where the absent witnesses swear to material facts which would require an acquittal or mitigate the offense. *Valigura v. State* (Cr. App.) 150 S. W. 778.

A motion for a continuance for absence of witnesses is properly overruled for lack of diligence, where it was not shown that accused made any effort to ascertain their whereabouts before issuing the process, or that during the trial he attempted to have them served. *Crutchfield v. State* (Cr. App.) 152 S. W. 1053.

Where accused was arrested for burglary on May 14th, indicted on May 22d, and brought to trial on June 4th, when he moved for a continuance because he had not employed counsel, and because of the absence of two witnesses, whose names he did not know, the application was properly denied for lack of diligence. *Ragland v. State* (Cr. App.) 153 S. W. 1137.

No need to employ a lawyer before securing the witness' attendance. *Johnson v. State*, 70 App. 347, 156 S. W. 1181.

A continuance for the absence of a witness on a third trial is properly denied for lack of diligence, where on the first trial the witness had testified, and on the second trial, resulting in a hung jury, motion for continuance to procure this witness was denied. *Cowser v. State*, 70 App. 265, 157 S. W. 758.

A continuance is properly denied where no diligence is shown, and where witnesses in attendance could testify to the facts as completely as the absent witness. *Oliver v. State*, 70 App. 140, 159 S. W. 235.

Accused is not entitled to continuance on the ground of absence of witnesses where he did not exercise any diligence to procure their attendance; it appearing that one of the absent witnesses was within two blocks of the courthouse, and no attachment was issued against him. *Cole v. State*, 72 App. 282, 162 S. W. 880.

A bill of exceptions to the overruling of accused's motion for a continuance, showing that the case was set for trial a week or more before it was finally tried, that the state was then unable to go to trial because of illness in a witness' family, whereupon the case was reset, that the court then notified the parties that if there was any witness unable to come because of sickness they could take their depositions, that the state offered to cross any interrogatories and waive time and permit them to be taken, that during the trial, lasting three or four days, both parties had opportunity to get such testimony if they wanted it, and that one of the witnesses mentioned in the application did testify, showed no error. *Lane v. State* (Cr. App.) 164 S. W. 378.

Where defendant was indicted February 23d and her case called for trial March 28th, an application for continuance on account of the absence of her husband, which gave no reason why his attendance could not be secured, and which showed no diligence to have been summoned, was properly denied. *Miller v. State* (Cr. App.) 169 S. W. 1164.

Where, though indicted in January, accused did not apply for a subpoena for an absent witness until two days before the May term at which he was tried, and no reason for delay was assigned, accused was not entitled to a continuance to procure the attendance of such witness. *Yelton v. State* (Cr. App.) 170 S. W. 318.

Accused's second application for a continuance because of the absence of a witness, who had been subpoenaed and attended at least one term of court, and who subsequently removed from the state, was properly overruled, where no proper diligence to secure his testimony was shown. *Blalock v. State* (Cr. App.) 176 S. W. 725.

5. Process.—Continuance held properly denied for want of diligence in resorting to process for absent witness. *Stouard v. State*, 27 App. 1, 10 S. W. 442; *McCline v. State*, 25 App. 247, 7 S. W. 667; *Franklin v. State*, 34 App. 286, 30 S. W. 231; *Underwood v. State*, 38 App. 193, 41 S. W. 618; *Benson v. State*, 38 App. 487, 43 S. W. 527; *Gerstenkorn v. State*, 38 App. 621, 44 S. W. 503; *Todd v. State*, 57 App. 15, 121 S. W. 506; *Deadweyer v. State*, 57 App. 63, 121 S. W. 863; *James v. State*, 57 App. 342, 123 S. W. 145; *Boyd v. State*, 57 App. 647, 124 S. W. 651; *Deckard v. State*, 58 App. 34, 124 S. W. 673; *Lewis v. State*, 59 App. 51, 126 S. W. 1137; *Keeton v. State*, 59 App. 316, 128 S. W. 404; *Rreece v. State*, 59 App. 428, 128 S. W. 1124; *Cromwell v. State*, 59 App. 525, 129 S. W. 622; *Roquemore v. State*, 59 App. 568, 129 S. W. 1120; *Coffey v. State*, 60 App. 73, 131 S. W. 216; *Keys v. State*, 60 App. 279, 131 S. W. 1068; *Polk v. State*, 60 App. 462, 132 S. W. 134; *McGee v. State*, 62 App. 358, 137 S. W. 686; *Fox v. State*, 62 App. 430, 138 S. W. 413; *Stephens v. State*, 63 App. 382, 139 S. W. 1141; *Perry v. State*, 63 App. 637, 141 S. W. 209; *Jordan v. State* (Cr. App.) 143 S. W. 623; *Tate v. State* (Cr. App.) 146 S. W. 169; *Crawford v. State* (Cr. App.) 147 S. W. 229; *Irvin v. State* (Cr. App.) 148 S. W. 589; *Waters v. State* (Cr. App.) 148 S. W. 796; *Willcox v. State* (Cr. App.) 150 S. W. 898; *Hogue v. State* (Cr. App.) 151 S. W. 805; *Ward v. State* (Cr. App.) 151 S. W. 1073; *Pace v. State* (Cr. App.) 153 S. W. 132; *Nunez v. State*, 70 App. 481, 156 S. W. 933; *Claussen v. State*, 70 App. 607, 157 S. W. 477; *Beaty v. State*, 72 App. 634, 162 S. W. 877; *Perkins v. State* (Cr. App.) 170 S. W. 737; *Byars v. State* (Cr. App.) 171 S. W. 1132; *Stacy v. State* (Cr. App.) 177 S. W. 114; *Jackson v. State* (Cr. App.) 178 S. W. 521; *Grimes v. State* (Cr. App.) 178 S. W. 523.

Where the witness resides out of the county in which the prosecution is pending, issuance of a subpoena for him is not diligence, because an attachment may and should be issued. And where a witness who has been subpoenaed fails to attend, an attachment should be obtained as soon as his absence is discovered, or would be discovered by proper diligence, which would ordinarily be on the day set apart for the call of the criminal docket. *Hyde v. State*, 16 Tex. 445, 67 Am. Dec. 630; *Walker v. State*, 13 App. 618, 44 Am. Rep. 716, note; *Long v. State*, 17 App. 128; *Hughes v. State*, 18 App. 130; *Blain v. State*, 34 App. 448, 31 S. W. 368; *Harvey v. State*, 35 App. 545, 34 S. W. 623; *Massie v. State*, 30 App. 64, 16 S. W. 770, and cases cited; *Hill v. State*, 36 App. 438, 37 S. W. 736; *Clark v. State*, 38 App. 30, 40 S. W. 992; *Rowland v. State*, 35 Tex. 487; *Parshall v. State*, 62 App. 177, 138 S. W. 759; *Wilson v. State* (Cr. App.) 175 S. W. 1067.

Where an attachment is authorized it must be applied for promptly. *Rowland v. State*, 35 Tex. 487; *Holland v. State*, 38 Tex. 474; *Townsend v. State*, 5 App. 574.

And when not returned or executed other steps must be promptly taken to obtain the testimony or good cause shown for a failure to do so. *Fernandez v. State*, 4 App. 419; *Nash v. State*, 2 App. 362; *White v. State*, 6 App. 476; *Lowe v. State*, 11 App. 253; *Hart v. State*, 14 App. 657; *Barrett v. State*, 18 App. 64; *Hughes v. State*, Id. 130; *Jackson v. State*, 23 App. 183, 5 S. W. 371.

As to failure to sue out process, and when excusable, see *Buie v. State*, 1 App. 452; *Mapes v. State*, 14 App. 129; *Long v. State*, 17 App. 128; *Phillips v. State*, 35 App. 480, 34 S. W. 272; *Dawson v. State*, 38 App. 9, 40 S. W. 731; *Clark v. State*, 38 App. 30, 40 S. W. 992; *Boggs v. State*, 38 App. 82, 41 S. W. 642; *De Warren v. State*, 29 Tex. 464; *Dinkens v. State*, 42 Tex. 250.

When not excusable, see *Coward v. State*, 6 App. 59; *Hutchinson v. State*, Id., 468; *Hailes v. State*, 10 App. 490; *Hill v. State*, 36 App. 438, 37 S. W. 736; *Shanks v. State*, 25 Tex. Supp. 326; *Townsend v. State*, 41 Tex. 134.

Service of a subpoena upon a witness who resides in a different county than that of the prosecution is not diligence. *Chaplin v. State*, 7 App. 87.

Nor is the acceptance of service of a subpoena on the day of the trial by a witness who resides several miles distant from the courthouse. *Gaston v. State*, 11 App. 143.

Where process has been issued it should also be shown whether or not it has been served, and if not served, the diligence used to procure its service, and also that the process was issued by the proper authority. *Williams v. State*, 10 App. 114. And see *Giles v. State* (Cr. App.) 148 S. W. 317.

Either party may avail himself of process issued by the other party but he must be able to show that diligence was used by the other party to get the witness. *Mixon v. State*, 36 App. 66, 35 S. W. 394; *Byrd v. State*, 39 App. 609, 47 S. W. 721.

Failure to have subpoena issued shows lack of diligence. *Ellington v. State*, 63 App. 426, 140 S. W. 1104; *Cole v. State*, 70 App. 459, 156 S. W. 929.

The application must show diligence in applying for process to compel the witness' attendance or facts to excuse the failure. *Lewis v. State* (Cr. App.) 171 S. W. 217; *Collins v. State* (Cr. App.) 34 S. W. 949. See, also, *McGrath v. State*, 35 App. 413, 34 S. W. 127, 941; *Childers v. State*, 37 App. 392, 35 S. W. 654; *Mitchell v. State*, 36 App. 278, 33 S. W. 367, 36 S. W. 456.

That defendant failed to look up a witness, for the absence of whom a continuance was asked, because the state had "issued" a subpoena, would not excuse lack of diligence. *Stacy v. State* (Cr. App.) 177 S. W. 114; *Madison v. State* (Cr. App.) 148 S. W. 1094.

An application should, in a case requiring it, state why the necessary steps were not taken to procure the attendance of the witness prior to the issuance of attachment. *Coward v. State*, 6 App. 59.

It is not sufficient for the applicant to state that he is "informed and believes" that process issued, with a like statement as to what had been done with it. *Labbaite v. State*, 6 App. 257.

When an attachment is authorized the issuance of a subpoena is not diligence. *Chaplin v. State*, 7 App. 87; *De Warren v. State*, 29 Tex. 464.

Process for a witness who resides in an unorganized county should name such county as his residence in order to enable the sheriff to find him. *Parkerson v. State*, 9 App. 72.

It is not diligence to place process for a witness who resides in another county than that of the forum in the hands of the sheriff of the county of the forum. The sheriff of the county in which the witness resides is the proper officer to execute such process. *Hailes v. State*, 10 App. 490; *Skipworth v. State*, 8 App. 135.

An allegation of timely process for procurement of absent witness held not to show diligence where proper disposition of the process was not alleged. *Atkins v. State*, 11 App. 8. See *Payton v. State*, 35 App. 508, 34 S. W. 615; *Snodgrass v. State*, 36 App. 207, 36 S. W. 477; *Dove v. State*, 36 App. 105, 35 S. W. 648; *Sykes v. State*, 53 App. 165, 108 S. W. 1179; *Price v. State*, 53 App. 428, 11 S. W. 654.

Where the disposition made of the process is alleged upon information and belief, the name of the informant should be disclosed. *Pullen v. State*, 11 App. 89.

A witness is in default if he is not in attendance on the day set apart for the call of the criminal docket, or any day of the term subsequent thereto, and before final disposition or continuance of the cause, or, if he is not in attendance at any other particular time named in the writ, or in his bond or recognizance. If the process under which he was summoned be a subpoena, and he disobeys it, the defendant should promptly sue out an attachment. If the witness be under bond or recognizance to appear, such bond or recognizance should be forfeited, and unless these steps are taken, diligence can not be shown. *Hill v. State*, 18 App. 665; *Walker v. State*, 13 App. 618, 44 Am. Rep. 716, note.

Defendant was arrested, charged with murder, in October. In January he filed his application for a continuance in order that blood found upon his clothing might be analyzed. Held, there was a total want of diligence, and the application was properly overruled. *Brown v. State*, 32 App. 119, 22 S. W. 596.

Defendant had two months in which to secure his testimony and had only had subpoenas issued which were returned, "not found." Held the application was properly overruled. *Dean v. State* (Cr. App.) 29 S. W. 477.

Where witnesses appeared at the March term of the court, but failed to appear at the fall term and no process was issued until the next March term, the continuance was properly denied. *Washington v. State*, 35 App. 154, 32 S. W. 693.

Application for continuance for the testimony of defendant's wife who had been in attendance upon the court, but who had taken measles and had been removed to her father's some twelve miles distant; held, the application should have been granted, although no subpoena had been issued for her. *Phillips v. State*, 35 App. 480, 34 S. W. 272.

It is not error to refuse a continuance when defendant relies on process issued at a former term to procure attendance of witnesses. *Brittain v. State* (Cr. App.) 40 S. W. 297.

An application which alleged service of process, but did not show on its face when the process was issued, or from what court, did not show due diligence. *Goode v. State*, 57 App. 229, 123 S. W. 597.

It is error not to continue a prosecution for absence of the only witness of the assault other than the prosecuting witness, and who accused believed would testify that the assault was committed in self-defense; the failure of accused to subpoena the witness being due to his belief that the trial judge had agreed to issue a subpoena, which the judge failed to do. *Simmons v. State*, 58 App. 574, 126 S. W. 1157.

Where accused was arrested on the day the information was filed, and on the next day procured the issuance of a subpoena for an absent witness, such subpoena being mailed to the proper sheriff, accused showed sufficient diligence. *Wilman v. State*, 63 App. 623, 141 S. W. 110.

Denial of a first application for a continuance for the absence of witnesses who would testify to matters material to the defense was erroneous, where accused showed that he had process issued for the witnesses, and that they had been served and were in attendance at the former term of court. *Boydston v. State*, 64 App. 159, 141 S. W. 949.

Where a witness in attendance while the cause was pending on an indictment, thereafter went away, and process, issued as soon as the second arrest on an information occurred, could not be served, there was sufficient diligence. *Roberts v. State* (Cr. App.) 143 S. W. 614.

Where no process was issued for a witness, defendant relying on his promise to attend, but when the case was called he was sick, there was no error in denying a continuance, especially where, before motion for new trial, he had died. *Jordan v. State* (Cr. App.) 143 S. W. 623.

An application for continuance because of an absent witness, accompanied by exhibits showing the issuance of various subpoenas for the witness, was properly refused for lack of diligence, where the exhibits showed that no subpoena was issued to the county wherein it was said the witness resided, or to a county where accused had been informed he was temporarily staying. *Bost v. State*, 64 App. 464, 144 S. W. 589.

Where accused at a former trial did not issue process for witnesses for whose absence he claimed a continuance on the second trial; and, there having been a mistrial, he issued process for the witnesses two or three days after the first jury was discharged, the diligence was insufficient to require the granting of the motion. *Wells v. State* (Cr. App.) 145 S. W. 950.

A showing that accused's attorney in another proceeding issued a subpoena for a witness on account of whose absence a continuance was asked is not a sufficient showing of diligence to entitle accused to continuance. *Vanderberg v. State* (Cr. App.) 148 S. W. 315.

Where a witness for the state, in a criminal prosecution, after the summons moved to another county and the state, when the case was called, had an attachment issued for the witness, accused, who prior to that time had made no application to have this witness subpoenaed in his own behalf, was not diligent, and hence his motion for a continuance on account of absence of such witness was properly overruled. *Collins v. State* (Cr. App.) 148 S. W. 1065.

Where a witness for the state had testified against accused at his examining trial in a justice court, and a witness for accused was also present then, but was not used, and no process was issued for him before announcing ready for trial, accused was not entitled to a continuance because of his absence. *Wesley v. State* (Cr. App.) 150 S. W. 197.

Where a subpoena was returned unserved, a continuance granted, and another process issued to the same county, a second continuance was properly denied for want of diligence to locate the witness. *Weaver v. State* (Cr. App.) 150 S. W. 785.

A continuance on the ground of absent witness was properly denied where process had been issued for him at the preceding term, and a continuance for his absence was then granted, and no additional process had been since applied for. *Clary v. State* (Cr. App.) 150 S. W. 919.

Accused must show that he procured process for his witnesses at once, or at least within a very few days after indictment, requiring them to attend court at the next term. *Hogue v. State* (Cr. App.) 151 S. W. 805.

A second application by accused for a continuance because of the absence of a witness who had removed from the county was insufficient, where it did not show that a subpoena had been issued to the county to which the witness had moved, or some good reason for it not being issued. *Bosley v. State* (Cr. App.) 153 S. W. 878.

Where defendant's subpoenas had been returned a considerable time before the trial, showing that the witnesses had not been found, and no further process issued or was asked for up to the time of the trial, and it appeared that defendant himself did not know where such witnesses resided, his motion for a continuance was properly overruled. *Stephens v. State* (Cr. App.) 154 S. W. 996.

Where the witness for whose absence continuance was asked had moved to another county after he was summoned, and no additional process was issued for him in such county, there was not sufficient diligence to authorize a continuance, in absence of a showing as to why accused had not issued additional process for the witness. *Nesbitt v. State* (Cr. App.) 155 S. W. 203.

Upon second trial an accused is not entitled to a continuance on the ground of the absence of a material witness, where she did not appear at the first trial,

though summoned, and no additional summons was served. *Hamilton v. State* (Cr. App.) 168 S. W. 536.

An application for a continuance for absence of witnesses was properly denied for lack of diligence in attempting to procure their attendance, where the first process issued for the only two witnesses who failed to appear was not served upon them because they were not in the county, and the second was issued on the day of trial, though defendant knew that such witnesses had left the county and resided at certain other places in the state. *Chappell v. State*, 72 App. 191, 161 S. W. 964.

Where no process had been issued for an alleged absent witness, and his residence at the time of the trial was unknown, an application for continuance because of his absence was properly denied for want of diligence. *Brown v. State* (Cr. App.) 169 S. W. 437.

A defendant is not entitled to a continuance of a second trial on the ground of absence of witnesses, who are not shown to have been in attendance at the former trial, where no process had been issued for them since that trial to secure their attendance at the second trial. *Millner v. State* (Cr. App.) 169 S. W. 899.

Where accused was denied subpoena for a witness because the state had already subpoenaed him, whatever diligence the state used would be sufficient for accused. *Wade v. State* (Cr. App.) 172 S. W. 215.

The prosecutrix agreed with accused as to a conversation to which accused testified. A witness to the conversation who was also desired by the state was absent. Held, that the absence of such witness did not, where accused had not filed his application for process for him with the proper officer, entitle accused to a continuance. *Walton v. State* (Cr. App.) 178 S. W. 358.

6. — Duplication of process for witnesses.—See art. 1577, Pen. Code, and notes.

7. **Deposition.**—In a case where the deposition of a witness is authorized to be taken, the application for continuance must show diligence to obtain the testimony by that mode, or good excuse for the want of such diligence. *Bowen v. State*, 3 App. 617; *Adams v. State*, 19 App. 259; *Hennessy v. State*, 23 App. 340, 5 S. W. 215; *Harvey v. State*, 35 App. 545, 34 S. W. 623; *De Alberts v. State*, 34 App. 508, 31 S. W. 391; *Stouard v. State*, 27 App. 1, 10 S. W. 442; *Gregory v. State* (Cr. App.) 39 S. W. 572; *Lyles v. State*, 64 App. 621, 142 S. W. 592; *Slain v. State* (Cr. App.) 145 S. W. 366; *Rhea v. State* (Cr. App.) 148 S. W. 578; *Gaines v. State* (Cr. App.) 150 S. W. 199; *Slaughter v. State* (Cr. App.) 174 S. W. 589. And see *Jones v. State* (Cr. App.) 144 S. W. 252.

Where no effort had been made to take the depositions of nonresident witnesses, nor to procure the attendance of a resident witness who had testified on the first trial until two days before the trial, when his whereabouts could have been easily ascertained three weeks before the trial, there was no sufficient diligence to sustain a second application for a continuance for absence of such witnesses. *Drake v. State* (Cr. App.) 153 S. W. 848.

Where accused knew the location of a witness beyond the court's jurisdiction, his second application for a continuance should have shown that he made some efforts to take her deposition, or obtain her attendance on court. *Bosley v. State* (Cr. App.) 153 S. W. 878.

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8. **Facts expected to be proved, and their materiality in general.**—Materiality must be shown. *Phipps v. State*, 36 App. 219, 36 S. W. 753; *Garrett v. State*, 37 App. 198, 38 S. W. 1017, 39 S. W. 108; *Wiley v. State*, 34 App. 514, 31 S. W. 393; *Williams v. State*, 34 App. 327, 30 S. W. 669; *Tate v. State*, 35 App. 231, 33 S. W. 121; *Mixon v. State*, 36 App. 66, 35 S. W. 394; *Koller v. State*, 36 App. 496, 38 S. W. 44; *Robinson v. State*, 37 App. 195, 39 S. W. 107; *Myers v. State*, 56 App. 222, 118 S. W. 1032; *Yale v. State*, 56 App. 272, 120 S. W. 419; *Williamson v. State*, 36 App. 225, 36 S. W. 444; *McIver v. State* (Cr. App.) 37 S. W. 745; *Chancey v. State*, 58 App. 54, 124 S. W. 426; *Holcomb v. State*, 60 App. 408, 132 S. W. 362; *Boswell v. State* (Cr. App.) 150 S. W. 432; *Cowser v. State*, 70 App. 265, 157 S. W. 758; *Fox v. State*, 71 App. 318, 158 S. W. 1141; *Creed v. State*, 71 App. 509, 160 S. W. 468; *Millner v. State* (Cr. App.) 169 S. W. 899; *Keets v. State* (Cr. App.) 175 S. W. 149.

The application must set out the facts expected to be proved by the absent witness, and in such manner, in connection with other facts when necessary, as to show the relevancy and materiality of the desired testimony. *Huebner v. State*, 3 App. 459; *Fernandez v. State*, 4 App. 419; *Cantu v. State*, 1 App. 402; *Mitchell v. State*, Id. 195; *Wright v. State*, 44 Tex. 645; *Murphy v. State*, 6 App. 420; *Cordova v. State*, Id. 445; *Willison v. State*, 7 App. 400; *Winkfield v. State*, 41 Tex. 149; *Bowman v. State*, 40 Tex. 8; *Martin v. State*, 32 App. 441, 24 S. W. 512; *Damron v. State* (Cr. App.) 27 S. W. 7; *Shirley v. State*, 37 App. 475, 36 S. W. 267; *Pilot v. State*, 38 App. 515, 43 S. W. 112, 1024; *Thomas v. State*, 17 App. 437; *Holland v. State*, 31 App. 345, 20 S. W. 750; *King v. State*, 34 App. 228, 29 S. W. 1086; *Zachary v. State*, 57 App. 179, 122 S. W. 263; *Hinman v. State*, 59 App. 29, 127 S. W. 221; *Hutcherson v. State*, 62 App. 1, 136 S. W. 53; *Davis v. State* (Cr. App.) 154 S. W. 226; *Stephens v. State* (Cr. App.) 154 S. W. 1001; *Tores v. State* (Cr. App.) 166 S. W. 523; *Harris v. State* (Cr. App.) 167 S. W. 43.

It must also appear that the absent testimony is competent and would be admissible on the trial. *Hennessy v. State*, 23 App. 340, 5 S. W. 215; *Allen v. State*, 17 App. 637; *Lewis v. State*, 15 App. 647; *Bowen v. State*, 3 App. 617; *Krebs v. State*, 8 App. 1; *Aiken v. State*, 10 App. 610; *Means v. State*, Id. 16, 38 Am. Rep. 640; *Brooks v. State*, 26 App. 184, 9 S. W. 562; *Browning v. State*, 26 App. 432, 9 S. W. 770; *Clore v. State*, 26 App. 624, 10 S. W. 242; *Bailey v. State*, 26 App. 706, 9 S. W. 270; *King v. State*, 34 App. 228, 29 S. W. 1086; *Mask v. State*, 34 App. 136, 31 S. W. 408; *Linhart v. State*, 33 App. 504, 27 S. W. 260; *Magruder v. State*,

35 App. 214, 33 S. W. 233; Johnson v. State, 31 App. 456, 20 S. W. 985; Patton v. State, 58 App. 231, 125 S. W. 24; Clark v. State, 61 App. 597, 136 S. W. 260; Green v. State, 62 App. 345, 137 S. W. 126; Brown v. State (Cr. App.) 169 S. W. 437; Millner v. State (Cr. App.) 169 S. W. 899.

In first application if the evidence is material and probably true continuance should be granted. McKinney v. State, 41 App. 413, 55 S. W. 338; Carter v. State (Cr. App.) 35 S. W. 378; Presley v. State, 60 App. 102, 131 S. W. 332; Sharp v. State, 61 App. 247, 134 S. W. 333; Harris v. State (Cr. App.) 172 S. W. 1146.

If the absent testimony be consistent with defendant's guilt, it is immaterial. Fernandez v. State, 4 App. 419; Chaplin v. State, 7 App. 87; Frye v. State, Id. 94; Hildreth v. State, 19 App. 195; Browning v. State, 26 App. 432, 9 S. W. 770; Abrigo v. State, 29 App. 143, 15 S. W. 408; Toms v. State (Cr. App.) 40 S. W. 491.

The application must show not only due diligence to procure, but the materiality and probable truth of, the absent testimony. Laurence v. State, 31 App. 601, 21 S. W. 766; Singleton v. State, 57 App. 560, 124 S. W. 92; Fuller v. State (Cr. App.) 154 S. W. 1021.

A general statement that the absent witness will prove the defendant's innocence is insufficient. The facts which it is expected the witness will testify to must be stated definitely. Mere inferences or negations or conclusions or vague indefinite allegations, will not suffice. Grissom v. State, 8 App. 386; Thomas v. State, 17 App. 437; Williams v. State, 10 App. 114; Summerlin v. State, 3 App. 444; Holland v. State, 38 Tex. 474; Brown v. State, 23 Tex. 195; Winkfield v. State, 41 Tex. 149; Mitchell v. State, 1 App. 195; Cockburn v. State, 32 Tex. 359; Snodgrass v. State, 36 App. 207, 36 S. W. 407; Shirley v. State, 37 App. 475, 36 S. W. 267; Garrett v. State, 37 App. 198, 38 S. W. 1017, 39 S. W. 108; Pilot v. State, 38 App. 515, 43 S. W. 112, 1024.

Where there is such direct conflict between the inculpatory facts and those set forth in the application for continuance as to render it improbable that the facts stated in the application are material and probably true, the continuance should be refused, and consequently an application for a new trial, based thereon, should also be refused. McAdams v. State, 24 App. 86, 5 S. W. 826; Riden v. State (App.) 5 S. W. 829; Millions v. State, 34 App. 12, 28 S. W. 685. And see Jackson v. State, 31 App. 552, 21 S. W. 367; Boggs v. State, 38 App. 82, 41 S. W. 642.

When the absent testimony is consistent with the theories of both the state and the defendant it becomes immaterial, as bearing upon the question of continuance, which should be refused. Slade v. State, 29 App. 381, 16 S. W. 253. See, also, Taylor v. State, 27 App. 44, 11 S. W. 35; Peace v. State, 27 App. 83, 10 S. W. 761; Benavides v. State, 31 App. 173, 20 S. W. 369, 37 Am. St. Rep. 799; Scott v. State (Cr. App.) 175 S. W. 1054.

A continuance sought to procure evidence which would change the theory of the defense held properly denied. Bratton v. State, 34 App. 477, 31 S. W. 379. See Bursleson v. State, 33 App. 549, 28 S. W. 198; Brittain v. State (Cr. App.) 40 S. W. 297.

Accused has the burden of showing by his application such a definite statement of facts proposed to be proved as would demonstrate their materiality and the value of such testimony. Patton v. State, 58 App. 231, 125 S. W. 24. And see Spicer v. State (Cr. App.) 154 S. W. 548.

The defendant will not be permitted to select a fact abstractly indifferent in regard to which he finds the witness mistaken, and base his application upon a necessity to disprove such fact, without showing how it has become material. Bruton v. State, 21 Tex. 337.

The facts expected to be proved should be definitely stated in an application for a continuance for absent testimony. Miller v. State, 31 App. 609, 21 S. W. 925, 37 Am. St. Rep. 836.

When it appears from the evidence that the absent witness could not have known anything about the facts which it was alleged that he would testify to; held, that the application was properly overruled. Lindsey v. State, 35 App. 164, 32 S. W. 768.

Where the facts were so remote as to have no particular bearing on the case, the application was properly overruled. Goldsmith v. State, 32 App. 112, 22 S. W. 405.

When the absent witness did not see the difficulty, the application for continuance for his testimony as to what occurred at the place of the difficulty was properly denied. Chalk v. State, 35 App. 116, 32 S. W. 534.

A continuance will not be granted for absent witnesses to prove a conversation when State's evidence shows that he was not present and did not hear the conversation. Barkman v. State, 41 App. 105, 52 S. W. 74.

The absent testimony must not be hearsay. Fulkerson v. State, 57 App. 80, 121 S. W. 1111.

One is not entitled to continuance to secure witnesses to give testimony incriminating themselves. Griffith v. State, 62 App. 642, 138 S. W. 1016.

Testimony of an absent witness, which meets the state's case at its strongest points, and is in direct conflict with it, is material. Davis v. State, 64 App. 8, 141 S. W. 264.

Accused cannot complain of refusal of a continuance asked for absent testimony to combat proof which it was assumed the state would make, where such proof was not offered. Wysong v. State (Cr. App.) 146 S. W. 941.

One charged with being an accomplice held entitled to a continuance on showing that the absent witness would have contradicted the principal on a material fact. Baggett v. State (Cr. App.) 151 S. W. 560.

It is not error to refuse a continuance for the absence of witnesses to testify concerning undisputed matters. McDowell v. State (Cr. App.) 155 S. W. 521.

Denial of a continuance to procure the testimony of the mother of the second wife of accused, prosecuted for bigamy, held error. Sparlin v. State (Cr. App.) 170 S. W. 307.

Where accused's own testimony contradicted the evidence sought to be elicited from an absent witness, he cannot complain that a continuance was denied. *Yelton v. State* (Cr. App.) 170 S. W. 318.

In a prosecution for murder, wherein defendant asked a continuance to secure the attendance of his wife, stepson, his two brothers-in-law, his brother, and other nonresident witnesses to prove that he drank to excess in the near past, was subject to spells of dependency, was of a melancholy and brooding disposition, and at such times did not comprehend the full measure of his acts, and was a paranoiac, though not insane, and wherein the testimony of witnesses, who had known defendant at his work for several years preceding the homicide, was to the effect that he was sane, and he had not been closely associated with the witnesses he wished for six years, the continuance was properly denied. *Myers v. State* (Cr. App.) 177 S. W. 1167.

Accused, who sought a continuance on the ground of absent witnesses, for whom no process had been issued, relied solely on a certificate of a physician that one witness was unable to appear and a statement by the other witness' husband to that effect. On the motion for new trial he offered no affidavit showing what the testimony of the witness would be. Held that, under the circumstances, the court was warranted in concluding the witnesses would not testify as alleged and denying the continuance. *Grimes v. State* (Cr. App.) 178 S. W. 523.

A motion for a continuance on account of the absence of witnesses is properly denied, where other persons present, who could have testified to the fact accused desired to elicit from the absent witnesses, were not called. *Grimes v. State* (Cr. App.) 178 S. W. 523.

And see *Henry v. State*, 38 App. 306, 42 S. W. 559; *McCulloch v. State*, 35 App. 268, 33 S. W. 230.

9. **Gaming.**—Absent testimony held not of sufficient materiality to entitle accused to a continuance in a prosecution for keeping a gambling room. *Boswell v. State* (Cr. App.) 150 S. W. 432.

One charged with gaming held entitled to a continuance to procure the testimony of absent witnesses, who would have testified that accused did not bet at the game. *Knowles v. State* (Cr. App.) 150 S. W. 777.

10. **Selling liquor.**—There was no error in refusing accused a continuance on account of an absent witness in a prosecution for violation of the local option law, where the state relied for conviction on sales of liquor when such witness was not present. *Matthews v. State*, 57 App. 337, 123 S. W. 127.

Continuance on the ground of absence of a witness in a prosecution for carrying on the occupation of selling intoxicating liquor in local option territory held properly denied. *Clark v. State*, 61 App. 597, 136 S. W. 260.

Where the state negated the idea that accused kept the liquor for sale in a gin, the denial of a continuance on the ground of the absence of witnesses who would prove that accused did not keep liquor in the gin was not erroneous. *Crawford v. State* (Cr. App.) 147 S. W. 229.

Continuance because of the absence of witnesses on a trial for selling intoxicating liquor in prohibition territory, held improperly denied. *Barnes v. State* (Cr. App.) 168 S. W. 858.

11. **Assault and homicide.**—Absence of a witness who would testify in support of accused's theory held ground for continuance. *Medford v. State* (Cr. App.) 174 S. W. 607; *Wade v. State* (Cr. App.) 172 S. W. 215.

The mere fact that the injured party had said that the defendant had been guilty of theft is immaterial in a prosecution for aggravated assault. *Boone v. State*, 31 Tex. 557.

And so may testimony to prove that certain blood stains were not made by human blood. *Landers v. State*, 35 Tex. 359.

And the identity of money found upon the deceased may be material. *White v. State*, 36 Tex. 347.

In a capital prosecution the age of the defendant may be material. *Sheffield v. State*, 43 Tex. 378.

On charge of an assault with intent to murder, alleged to have been committed with a razor, defendant applied for a continuance for witness, by whom he expected to prove that he did not have any razor at the time he made the assault. Held, the continuance should have been granted. *Porter v. State* (Cr. App.) 32 S. W. 692.

A statement that an absent witness would testify that "a short time" after the assault she saw the prosecuting witness and discovered no signs of bruises, is too indefinite. *Patton v. State*, 58 App. 231, 125 S. W. 24.

An application for a continuance for absence of a witness, whose testimony would show that defendant the night before the murder left his pistol home, is properly refused, since, there being direct evidence that he fired the fatal shot, such evidence did not go to show that he did not have a pistol at the time of the killing. *Robinson v. State*, 58 App. 550, 126 S. W. 276.

The refusal of a continuance on the ground of the absence of a witness who would testify only to matters occurring in a controversy between accused and a third person prior to the assault held not reversible error. *Porter v. State*, 60 App. 588, 132 S. W. 935.

It was no ground for a continuance that the assaulted party had other enemies in the community, where she testified that several persons were present with the defendant at the time of the assault. *Robinson v. State* (Cr. App.) 145 S. W. 345.

The denial of a continuance because of an absent witness, who would testify to deceased's unfaithfulness to accused held not error. *Stanton v. State* (Cr. App.) 151 S. W. 808.

It was not grounds for a continuance in a murder case that an absent witness would testify that a third party, charged with the same offense, asked defendant's

wife not to turn against him, and stated to her there was no case against him unless she did so. *Bosley v. State* (Cr. App.) 153 S. W. 878.

The denial of a continuance and a new trial because of the absence of an eye witness was not reversible error, where such witness' testimony at the examining trial was introduced in evidence by accused, and did not tend to show self-defense, but at most only tended to reduce the killing to manslaughter, and the jury found accused guilty of manslaughter. *Hiles v. State* (Cr. App.) 163 S. W. 717.

12. — **Insanity.**—The refusal of a continuance to secure a witness to prove insanity held error. *Roberts v. State* (Cr. App.) 150 S. W. 627; *Barlow v. State*, 61 App. 64, 133 S. W. 1050. *Contra*, *Hogue v. State* (Cr. App.) 146 S. W. 905.

13. — **Self-defense.**—Absent testimony as to threats, see *Ellis v. State*, 30 App. 601, 18 S. W. 139; *Allen v. State*, 17 App. 637; *Brown v. State*, 23 Tex. 195; *Norris v. State*, 32 App. 472, 22 S. W. 592; *Riley v. State*, 9 App. 354; *Dow v. State*, 31 App. 278, 20 S. W. 583; *Miller v. State*, 31 App. 609, 21 S. W. 925, 37 Am. St. Rep. 836; *Dow v. State*, 31 App. 278, 20 S. W. 583; *Johnson v. State*, 31 App. 456, 20 S. W. 985; *Cameron v. State*, 57 App. 316, 122 S. W. 870; *Singleton v. State*, 57 App. 560, 124 S. W. 92; *Wells v. State* (Cr. App.) 145 S. W. 950; *Burton v. State* (Cr. App.) 148 S. W. 805.

Where on trial for murder, defendant applied for continuance for a witness who would corroborate defendant's testimony as to deceased's motions which led defendant to act in self-defense, held, the continuance should have been granted. *Phipps v. State*, 34 App. 660, 31 S. W. 397.

Accused is entitled to a continuance to procure witness to testify that he acted in self-defense. *Rucker v. State* (Cr. App.) 40 S. W. 991.

Continuance should be granted to obtain the evidence of a witness who the appellant swears will testify that deceased made an assault upon defendant with a knife, although two of defendant's witnesses testified as to the homicide and did not say there was an assault. *Fant v. State* (Cr. App.) 57 S. W. 819.

14. — **Threats.**—Mere threats by deceased are immaterial in a prosecution for murder. *Carter v. State*, 8 App. 372; *Halbert v. State*, 31 Tex. 357; *Goodson v. State*, 32 Tex. 121; *Brooks v. State*, 24 App. 274, 5 S. W. 852.

An application for a continuance for a witness to prove threats against defendant is wholly indefinite and insufficient. *Miller v. State*, 32 App. 319, 20 S. W. 1103.

15. **Rape.**—Application for a witness, who would swear that he was in the "vicinity" of the spot where the alleged offense was committed and that he heard no outcry, held, properly overruled as too indefinite. *Russell v. State*, 33 App. 424, 26 S. W. 990.

Absent testimony in a rape case held to be of sufficient materiality to entitle accused to a continuance. *Smith v. State*, 64 App. 454, 142 S. W. 1173.

There was no abuse of discretion in denying a first application for a continuance in a rape case to procure witnesses to show that prosecutrix's reputation for chastity was bad before the alleged offense, where the physical facts and the evidence conclusively showed that prosecutrix did not consent. *Sharp v. State*, 71 App. 633, 160 S. W. 369.

16. **Arson.**—Defendant's application for continuance stated that his wife who was in bed sick, had, a short time before the fire, taken an invoice of the goods stored in the house and that she would testify that the stock amounted to twenty-five hundred dollars, and that he was insured only in the sum of one thousand dollars; held, the continuance should have been granted. *Dawson v. State*, 33 App. 9, 40 S. W. 731.

17. **Burglary.**—Application for continuance set up that defendant expected to prove by the absent witness that he had repaired a rifle gun for defendant a few days before the burglary was committed, but the testimony showed that the gun attempted to be used in the burglary was a shot-gun; held, the application was properly overruled. *Pilot v. State*, 38 App. 515, 43 S. W. 112, 1024.

Absent testimony in a burglary case, held immaterial, and it was error to refuse the continuance. *Elkins v. State*, 57 App. 247, 122 S. W. 393.

Absent testimony in a burglary case held immaterial. *Hart v. State*, 61 App. 509, 134 S. W. 1178.

For absent testimony presenting no defense in a burglary case, see *Spicer v. State* (Cr. App.) 154 S. W. 548.

18. **Robbery.**—Evidence of absent witnesses that the prosecuting witnesses were engaged in a game of cards with defendant charged with robbery held material and relevant. *Keys v. State*, 60 App. 279, 131 S. W. 1068.

19. **Theft.**—Absent testimony in a prosecution for theft held to be of sufficient materiality to entitle accused to a continuance. *Presley v. State*, 60 App. 102, 131 S. W. 332; *Davis v. State* (Cr. App.) 144 S. W. 938; *La Fell v. State* (Cr. App.) 153 S. W. 884; *Silvas v. State*, 71 App. 213, 159 S. W. 223.

Absent testimony for the defense on a trial for theft held immaterial. *Gotcher v. State* (Cr. App.) 148 S. W. 574; *Williams v. State*, 34 App. 327, 30 S. W. 669.

The application stated that defendant expected to prove by the absent witness that he had purchased the horse for a valuable consideration. Held, too indefinite. *Emmerson v. State*, 33 App. 89, 25 S. W. 289.

On trial for theft of a steer, where the defense was that the taking by defendant was under claim of right, and the application for continuance was for the testimony of several witnesses, by whom the defendant expected to prove that he owned and controlled animals in the brand found upon the stolen animal, and by one witness that he thought the animal belonged to defendant, and had notified him to come and get it. *Walker v. State*, 32 App. 175, 22 S. W. 685.

A continuance was properly refused where defendant prosecuted for a theft wanted a witness to prove that he (witness) had cattle on the same range, and

when there was no showing that witnesses had a brand, and the brand found on the cattle in controversy was similar. *Bigham v. State*, 36 App. 453, 37 S. W. 753.

20. **Fraudulent disposition of mortgaged property.**—Where defendant charged with selling mortgaged property, testified that he told the purchaser the property was mortgaged, a continuance should have been granted for a witness who heard the conversation between defendant and purchaser. *Massey v. State* (Cr. App.) 40 S. W. 726.

21. **Seduction.**—Application for a continuance of a trial for seduction on the ground of the absence of a witness who would testify that, at some time prior to the alleged offense, he had had intercourse with prosecutrix, was properly refused because of the failure to specify the time and place of the act. *Hinman v. State*, 59 App. 29, 127 S. W. 221.

Denial of a continuance, in a prosecution for seduction, because of the absence of two witnesses by whom defendant expected to prove that each "had hugged and kissed" prosecutrix more than two years prior to the commission of the offense, was not an abuse of discretion. *Bush v. State*, 71 App. 14, 157 S. W. 944.

Continuance of a trial for seduction because of the absence of a witness alleged to have had sexual intercourse with the prosecutrix before the offense, held improperly denied though the state introduced evidence that the witness would not so testify. *Creacy v. State* (Cr. App.) 166 S. W. 162.

22. **Cumulative testimony.**—The rule that a continuance will not be granted for the production of cumulative evidence does not apply to the first application for continuance, but only to a subsequent application. *Robinson v. State*, 71 App. 561, 160 S. W. 456; *Irvine v. State*, 20 App. 12; *Wilson v. State*, 18 App. 577; *Hughes v. State*, *Id.* 130; *Ninnon v. State*, 17 App. 650; *Pinecord v. State*, 13 App. 468; *McAdams v. State*, 24 App. 86, 5 S. W. 826; *Hyden v. State*, 31 App. 401, 20 S. W. 764; *Adams v. State*, 19 App. 1; *Harvey v. State*, 35 App. 545, 34 S. W. 623; *Riley v. State*, 58 App. 176, 125 S. W. 582; *Wilman v. State*, 63 App. 623, 141 S. W. 110; *Wells v. State* (Cr. App.) 145 S. W. 950; *Loggins v. State* (Cr. App.) 149 S. W. 170; *Wade v. State* (Cr. App.) 172 S. W. 215; *Sharp v. State*, 71 App. 633, 160 S. W. 369; *Poulter v. State*, 72 App. 140, 161 S. W. 475.

But see *Graves v. State*, 9 App. 559, and compare *Gilcrease v. State*, 33 App. 619, 28 S. W. 531; *Johnson v. State*, 55 App. 134, 114 S. W. 1178.

An accused is not entitled to a continuance on the ground of the absence of a witness whose testimony would only have been cumulative. *Hamilton v. State* (Cr. App.) 168 S. W. 536; *Brittain v. State* (Cr. App.) 40 S. W. 297; *Francis v. State*, 57 App. 555, 123 S. W. 1114; *Polk v. State*, 60 App. 462, 132 S. W. 134; *White v. State*, 60 App. 559, 132 S. W. 790; *Florence v. State*, 61 App. 238, 134 S. W. 689; *Dozier v. State*, 62 App. 258, 137 S. W. 679; *O'Neal v. State* (Cr. App.) 146 S. W. 938; *Crawford v. State* (Cr. App.) 147 S. W. 229; *Dowd v. State* (Cr. App.) 148 S. W. 304; *Boswell v. State* (Cr. App.) 150 S. W. 432; *Oliver v. State*, 70 App. 146, 159 S. W. 235; *Millner v. State* (Cr. App.) 169 S. W. 899.

The overruling of an application for a continuance in a criminal case, on the ground of the absence of witnesses, was not erroneous, where some of the witnesses appeared at the trial and testified or could have testified to the facts sought to be proved by all of the absent witnesses. *Lahue v. State*, 51 App. 159, 101 S. W. 1008; *Dobbs v. State*, 54 App. 579, 113 S. W. 921.

Where the issue upon which the testimony is desired is insanity, it is no objection to its materiality that it is cumulative. *Webb v. State*, 5 App. 596. Nor where the testimony for the state conflicts with that for the defendant. *Bozier v. State*, 5 App. 220.

Accused is not entitled to a continuance to take the deposition of nonresident witnesses who testified in the former trial, when their testimony is admissible, and it is not alleged that he expects to prove additional facts by them. *Ricen v. State*, 63 App. 89, 138 S. W. 403.

23. **Corroborating testimony.**—Where defendant's witnesses were attacked and testimony of absent witnesses tended to corroborate them continuance should have been granted. *Fossett v. State*, 41 App. 400, 55 S. W. 498.

A continuance should have been granted to secure the testimony of defendant's wife to prove that, just before the homicide, his daughter, as she testified, informed his wife of misconduct of deceased toward her, and that his wife informed him, and that his mind was excited. *Hays v. State* (Cr. App.) 164 S. W. 841.

Where accused testified practically alone as to self-defense, it was error to refuse a continuance to procure corroborative testimony. *Taylor v. State* (Cr. App.) 164 S. W. 844.

24. **Character testimony.**—Absence of character witnesses is no ground upon which to base an application for a continuance. *Yarborough v. State* (Cr. App.) 147 S. W. 270; *Miller v. State*, 32 App. 319, 20 S. W. 1103; *Wright v. State*, 37 App. 627, 40 S. W. 491; *Parks v. State*, 35 App. 378, 33 S. W. 872; *Benson v. State*, 38 App. 487, 43 S. W. 527; *Bronson v. State*, 59 App. 17, 127 S. W. 175; *Robinson v. State* (Cr. App.) 145 S. W. 345; *Hogue v. State* (Cr. App.) 146 S. W. 905; *Simmons v. State* (Cr. App.) 155 S. W. 229; *Millner v. State* (Cr. App.) 169 S. W. 899. But see *Murphy v. State*, 41 App. 120, 51 S. W. 941.

25. **Impeaching testimony.**—A continuance will not be granted to obtain impeaching testimony. *Fifer v. State*, 64 App. 203, 141 S. W. 989; *Garrett v. State*, 37 App. 198, 33 S. W. 1017, 39 S. W. 108; *Rodgers v. State*, 36 App. 563, 38 S. W. 184; *Butts v. State*, 35 App. 364, 33 S. W. 866; *Franklin v. State*, 34 App. 203, 29 S. W. 1088; *Wade v. State* (Cr. App.) 54 S. W. 582; *Mumphreys v. State*, 57 App. 19, 121 S. W. 504; *Gee v. State*, 57 App. 151, 122 S. W. 23; *Patton v. State*, 58 App. 231, 125 S. W. 24; *Gipson v. State*, 58 App. 403, 126 S. W. 267; *Wynne v. State*, 59 App. 126, 127 S. W. 213; *Bussey v. State*, 59 App. 260, 127 S. W. 1035; *Trinkle v. State*, 59 App. 257, 127 S. W. 1060; *Vela v. State*, 62 App. 361, 137 S. W.

129; *Dozier v. State*, 62 App. 253, 137 S. W. 679; *Stephens v. State*, 63 App. 332, 139 S. W. 1141; *Melton v. State*, 63 App. 362, 140 S. W. 230; *Melton v. State*, 63 App. 573, 140 S. W. 781; *Wade v. State* (Cr. App.) 144 S. W. 246; *Robinson v. State* (Cr. App.) 145 S. W. 345; *Vanderberg v. State* (Cr. App.) 148 S. W. 315; *King v. State* (Cr. App.) 148 S. W. 324; *Lawson v. State* (Cr. App.) 148 S. W. 587; *Loggins v. State* (Cr. App.) 149 S. W. 170; *Fletcher v. State* (Cr. App.) 153 S. W. 1134; *Pierce v. State* (Cr. App.) 154 S. W. 559; *Caples v. State* (Cr. App.) 155 S. W. 267; *Cole v. State*, 70 App. 459, 156 S. W. 929; *Claussen v. State*, 70 App. 607, 157 S. W. 477; *Giles v. State*, 70 App. 550, 157 S. W. 943; *Brown v. State*, 72 App. 23, 160 S. W. 374; *Dukes v. State* (Cr. App.) 163 S. W. 96; *Raleigh v. State* (Cr. App.) 168 S. W. 1050; *McCuen v. State* (Cr. App.) 170 S. W. 738.

On trial for seduction, where the application was for witnesses by whom the defendant expected to prove that they had had carnal intercourse with the prosecutrix, and her own testimony tended to show her unchaste, a new trial should have been granted. *Kelly v. State*, 33 App. 31, 24 S. W. 295.

When the application was for a witness by whom defendants expected to prove statements impeaching the state's witness and it appears that on trial defendant did not ask the state's witness about the statements, held, that he could not be heard to complain that his application was overruled. *Jameson v. State*, 32 App. 385, 21 S. W. 508.

Proposed testimony, which was the same as that of the witness sought to be impeached, was not impeaching testimony so as to authorize a continuance in a criminal case to procure it for that purpose. *Chancey v. State*, 58 App. 54, 124 S. W. 426.

It was error to deny a first application for continuance for the absence of two witnesses for accused, duly subpoenaed, whose testimony, while impeaching in character, would have also tended to corroborate defendant's version of the difficulty. *Rushing v. State*, 62 App. 309, 137 S. W. 372.

A continuance should not be granted for the absence of a witness who would testify to acts of sexual intercourse with the prosecutrix in a rape case. *Wragg v. State* (Cr. App.) 145 S. W. 342.

For statement of rule as to impeaching and cumulative testimony, see *Loggins v. State* (Cr. App.) 149 S. W. 170.

26. *Alibi*.—A continuance to procure an absent witness to prove an alibi was properly refused, where accused, when testifying, did not state that he was with such witness at the time of the offense. *Tate v. State* (Cr. App.) 146 S. W. 169. And where the absent witness could not have testified as to the whereabouts of the defendant as claimed. *Hart v. State* (Cr. App.) 150 S. W. 188. And where the defendant could have reached the place of the crime after he was seen by the witness in time to have committed it. *Allen v. State*, 62 App. 501, 137 S. W. 1133. And where the application failed to show how far accused was from the place of the crime. *Bussey v. State*, 59 App. 260, 127 S. W. 1035. And where the evidence showed accused's guilt. *Hart v. State*, 61 App. 509, 134 S. W. 1178.

It is error to refuse continuance to obtain evidence to alibi where diligence is used and it is not shown that the evidence could not be procured. *Murphy v. State*, 41 App. 120, 51 S. W. 941; *Gilder v. State*, 61 App. 16, 133 S. W. 883; *Davis v. State*, 64 App. 8, 141 S. W. 264; *McMillan v. State* (Cr. App.) 146 S. W. 1190.

Alibi can be relied upon to disprove or surround with doubt not only the main but any criminative fact relied upon for conviction. *Taylor v. State*, 27 App. 44, 11 S. W. 35; *Gallaher v. State*, 28 App. 248, 12 S. W. 1087. In the first of these cases, to meet the single inculpatory fact against him the defendant asked for a continuance to secure the presence of an absent witness to prove an alibi. In view of the proof on the trial, and the refusal of a continuance, a new trial should have been awarded. *Id.* And see on the same subject, *Watson v. State*, 28 App. 34, 12 S. W. 404; *Quintana v. State*, 29 App. 401, 16 S. W. 258, 25 Am. St. Rep. 730; *Bennett v. State*, 30 App. 341, 17 S. W. 545. Note a case in which continuance was properly refused. *Jones v. State*, 31 App. 177, 20 S. W. 354.

An application for a continuance because of the absence of witnesses by whom accused expected to prove that he was in another place "at the time the offense with which he was there charged was committed" held properly denied as too general. *Stephens v. State* (Cr. App.) 154 S. W. 1001.

And further as to alibi, see *Dove v. State*, 36 App. 105, 35 S. W. 648; *Long v. State*, 39 App. 461, 46 S. W. 821, 73 Am. St. Rep. 954; *Underwood v. State*, 38 App. 193, 41 S. W. 618; *Blake v. State*, 38 App. 377, 43 S. W. 107.

27. *Admissions to prevent continuance*.—An admission that a witness, on account of whose absence a continuance is asked, would swear, if present, as stated in the application, will not defeat the application; it could only have that effect when the facts stated in the application are admitted to be true. *Skaro v. State*, 43 Tex. 88; *DeWarren v. State*, 29 Tex. 464; *Hyde v. State*, 16 Tex. 445, 67 Am. Dec. 630; *Francis v. State* (Cr. App.) 55 S. W. 489; *Roberts v. State* (Cr. App.) 143 S. W. 614; *Burford v. State* (Cr. App.) 151 S. W. 538.

After such an admission the state cannot controvert the facts which would have been testified to. *Roberts v. State* (Cr. App.) 143 S. W. 614; *Davis v. State* (Cr. App.) 152 S. W. 1094.

As to admissions to defeat continuance, see *Graves v. State*, 9 App. 559; *Harvey v. State*, 35 App. 545, 34 S. W. 623; *Phipps v. State*, 36 App. 216, 36 S. W. 753.

The rule that an admission that an absent witness would testify to the facts stated in the application will not defeat a continuance, applies only when the defendant is legally entitled to a continuance. *Hackett v. State*, 13 App. 406; *McGrew v. State*, 31 App. 336, 20 S. W. 740.

It is no answer to an application for a continuance that the defendant declined to go with the court and jury to the place where his witness was sick, which place was outside of the courthouse, and there hear the testimony of such witness. *Adams v. State*, 19 App. 1.

When defendant's application for continuance is admitted by the state to be true and the facts are admitted as evidence to the jury he cannot complain that his application was refused. *Gardner v. State* (Cr. App.) 59 S. W. 1115.

The state cannot introduce the testimony of the absent witness taken on a former trial without first admitting the truth of the facts stated in the application for continuance. *McMillan v. State* (Cr. App.) 143 S. W. 1174.

The refusal to grant a continuance for the absence of a witness who would testify to things already admitted by the state was not error. *Face v. State* (Cr. App.) 153 S. W. 132.

Where the state, to avoid a continuance on the ground of the absence of witnesses for accused, admitted the truth of every fact set forth in the application for a continuance, and the court charged that the jury were bound to take such facts as true and they could not consider any evidence in contradiction thereof, accused could not complain. *Truett v. State* (Cr. App.) 168 S. W. 523.

It was not error to deny a continuance, where defendant's counsel was permitted to make a statement to the jury as to what he claimed an absent witness would testify, and the prosecuting attorney admitted its truth, and defendant's attorney then expressed himself as satisfied. *Sutton v. State* (Cr. App.) 172 S. W. 791.

Where, on a trial for homicide, the testimony of one of the two physicians who examined deceased's body was not materially different from that which the other physician would have given had he been present, and the state offered to admit that the absent physician would testify as claimed and that such testimony was true, the denial of a continuance was not error. *Brown v. State* (Cr. App.) 174 S. W. 360.

SUBD. 4

28. Cause of absence of witness.—All applications for a continuance on account of the absence of a witness, must state that the witness is not absent by the defendant's procurement or with his consent. *Pullen v. State*, 11 App. 89; *Cocker v. State*, 31 Tex. 498; *White v. State*, 9 App. 41; *Bowers v. State* (Cr. App.) 71 S. W. 284; *Gaines v. State*, 63 App. 73, 138 S. W. 387; *Perry v. State*, 63 App. 637, 141 S. W. 200; *Sandolowski v. State* (Cr. App.) 143 S. W. 151; *Tate v. State* (Cr. App.) 146 S. W. 169; *Pace v. State* (Cr. App.) 153 S. W. 132. And see *Gaines v. State* (Cr. App.) 150 S. W. 199; *Swilley v. State* (Cr. App.) 171 S. W. 734.

On motion for new trial because of refusal of continuance for absent witnesses, it is proper for the state to show that they were either fictitious persons, or absent by the procurement and consent of defendant. *Sargent v. State*, 35 App. 325, 33 S. W. 364.

Where it was suggested before the court in a murder trial that an absent witness had been kept away by deceased's friends, and a witness was sent for to prove this, but he was not brought into court until after overruling motion for continuance, the matter should have been thoroughly sifted by the court. *Logan v. State*, 39 App. 573, 47 S. W. 645.

An application for a continuance must state the residence of the witness, and, when it states that a witness is temporarily absent, it should state how long he has been so absent, and when he left the county of his residence. *Stacy v. State* (Cr. App.) 177 S. W. 114.

SUBD. 5

29. Delay.—The application must state that the continuance is not made for delay. *Peck v. State*, 5 App. 611; *Zumwalt v. State*, Id. 521; *White v. State*, 9 App. 41; *Wynne v. State*, 59 App. 126, 127 S. W. 213; *Johnson v. State*, 59 App. 425, 128 S. W. 1123; *Perry v. State*, 63 App. 637, 141 S. W. 209.

SUBD. 6

See Willson's Cr. Forms, 328.

30. Probability of securing attendance of witness.—See notes to art. 609, subd. 2, post.

If the improbability of ever securing the witness appears the continuance should be refused. *Sinclair v. State*, 34 App. 453, 30 S. W. 1070.

A continuance will not be granted to procure the testimony of a fugitive from justice, whose whereabouts is unknown. *Deckard v. State*, 58 App. 34, 124 S. W. 673.

The denial of an application for a continuance is not ground for reversal where there is no showing that the attendance of an alleged absent witness could be secured at another trial. *Roquemore v. State*, 59 App. 568, 129 S. W. 1120.

Where the probability of securing the attendance of the witness is remote, a continuance is properly denied. *Smith v. State* (Cr. App.) 148 S. W. 722.

It is not error to refuse a continuance sought because of the absence of defendant's fugitive partner in the crime. *Ortiz v. State* (Cr. App.) 151 S. W. 1059.

31. Expectation of securing attendance of witness during term.—Even though sufficient in other respects, an application for a continuance is properly refused if it fails to allege that there is no reasonable expectation of securing the testimony of the absent witness during the term of the court by a postponement of the trial to a future day thereof. *Strickland v. State*, 13 App. 364; *Beatey v. State*, 16 App. 421; *Thomas v. State*, 17 App. 437; *Timbrook v. State*, 18 App. 1; *Perry v. State*, 63 App. 637, 141 S. W. 209.

Denial of a continuance for the absence of a witness residing in a sister state. Held erroneous. *Mason v. State*, 57 App. 319, 122 S. W. 871.

Application held to show that the presence of witness could not be procured at the term. *Sweeney v. State*, 59 App. 370, 128 S. W. 390.

32. Discretion of court.—This subdivision vests the courts' with discretionary power to grant or refuse a first or any subsequent application for continuance, although the application may comply strictly with the statute. *Howard v. State*, 8 App. 53; *Dunlap v. State*, 9 App. 179, 35 Am. Rep. 736; *Woodard v. State*, 9 App. 412; *Early v. State*, Id. 476; *Williams v. State*, 10 App. 114; *Williams v. State*, Id. 528; *Aiken v. State*, Id. 610; *Wooldridge v. State*, 13 App. 443, 44 Am. Rep.

708; *Abrigo v. State*, 29 App. 143, 15 S. W. 408; *McAdams v. State*, 24 App. 86, 5 S. W. 826; *Bronson v. State*, 59 App. 17, 127 S. W. 175; *Goode v. State*, 57 App. 220, 123 S. W. 597; *Deckard v. State*, 58 App. 34, 124 S. W. 673; *Patton v. State*, 58 App. 221, 125 S. W. 24; *Gipson v. State*, 58 App. 403, 126 S. W. 267; *Bost v. State*, 64 App. 464, 144 S. W. 589; *Fletcher v. State* (Cr. App.) 153 S. W. 1134; *McCuen v. State* (Cr. App.) 170 S. W. 738; *Murff v. State* (Cr. App.) 172 S. W. 238.

The exercise of the court's discretion is not reviewable in absence of abuse of discretion or an arbitrary exercise thereof. *Hunter v. State*, 59 App. 439, 129 S. W. 125; *Lane v. State*, 59 App. 595, 129 S. W. 353; *Johnson v. State*, 61 App. 104, 134 S. W. 225. And see *Trinkle v. State*, 59 App. 257, 127 S. W. 1060; *Giles v. State* (Cr. App.) 148 S. W. 317.

Even before the revision of the Code it was discretionary with the court to grant or refuse a subsequent application for continuance. *Myers v. State*, 7 App. 640; *Johnson v. State*, Id. 297; *Krebs v. State*, 8 App. 1.

The provision which confers upon the courts discretionary power to grant or refuse a continuance, is not violative of the constitution. *Lillard v. State*, 17 App. 114.

The discretion thus conferred is not an arbitrary but a sound one. *Irvine v. State*, 20 App. 12; *Harris v. State*, 18 App. 287; *McAdams v. State*, 24 App. 86, 5 S. W. 826; *Sharp v. State*, 71 App. 633, 160 S. W. 369. Prior to the enactment of this subdivision, the discretionary power conferred by it did not exist when the application was a first one, and complied with the statute, but in such case the continuance was a matter of right. *Howard v. State*, 8 App. 53; *Dinkens v. State*, 42 Tex. 250; *Shackelford v. State*, 43 Tex. 138; *Jenkins v. State*, 30 Tex. 444; *Austin v. State*, 42 Tex. 345; *Peeler v. State*, 2 App. 455; *Swofford v. State*, 3 App. 77; *Sansbury v. State*, 4 App. 99; *Stephenson v. State*, 5 App. 79; *Tooney v. State*, Id. 163; *Farrar v. State*, Id. 489.

33. Denial of continuance as ground for new trial—In general.—Where testimony of a defendant is absent from any cause he should make application for a postponement or continuance of the trial, and make the refusal of such application a ground for new trial. *Cotton v. State*, 4 Tex. 260; *Higginbotham v. State*, 3 App. 447; *Walker v. State*, 7 App. 245, 32 Am. Rep. 595; *Hartless v. State*, 32 Tex. 88; *Jackson v. State*, 18 App. 585; *Burton v. State*, 9 App. 605.

When defendant's case was called he asked for process for a witness, which was issued, and defendant was returned to jail to await its execution. Subsequently on the same day he announced to the court that he was ready for and demanded a trial. Held that he was not entitled to a new trial on account of the absent witness. *Carrelo v. State*, 32 App. 91, 22 S. W. 147.

A new trial will not be granted on account of the absence of a witness when no continuance was sought on such ground. *Crawford v. State* (Cr. App.) 29 S. W. 42; *McGibbon v. State* (Cr. App.) 29 S. W. 775.

The appellate court will not revise the action of the trial court in refusing a new trial on this ground, unless an abuse of legal discretion clearly appears. *Bronson v. State*, 59 App. 17, 127 S. W. 175.

A new trial for refusal of continuance is properly denied, where the absent testimony is merely cumulative, and no effort made to secure either the presence of the witnesses or their affidavits in support of the motion. *Polk v. State*, 60 App. 462, 132 S. W. 134.

The denial of the continuance and refusal to grant a new trial on the ground of the absence of the witness on account of sickness held not an abuse of discretion. *Crawford v. State* (Cr. App.) 147 S. W. 229.

Where neither the motion for a continuance, which admittedly did not conform to the statutory requirements, nor the motion for a new trial, stated what the defendant expected to prove by the witnesses which he might desire to use, and it did appear that those witnesses knew nothing of the immediate transaction, the action of the court in overruling the motion will not be reviewed. *Valdez v. State*, 71 App. 487, 160 S. W. 341.

An unwarranted refusal of a continuance is ground for new trial. *Wade v. State* (Cr. App.) 172 S. W. 215.

Where accused could not have obtained a continuance on the ground of the absence of a witness testifying to facts proved by other witnesses, a new trial on the ground of newly discovered testimony of the witness was properly denied. *Edwards v. State* (Cr. App.) 172 S. W. 227.

34. — Materiality, truth, and effect of absent testimony.—When the facts as stated in the application for continuance are considered in connection with the evidence adduced on the trial, and do not appear to be material, or do not appear to be probably true, a new trial because of the refusal of the continuance should not be granted. *Cunningham v. State*, 20 App. 162; *Collins v. State*, 24 App. 141, 5 S. W. 848; *Melton v. State*, 24 App. 47, 5 S. W. 652; *Parker v. State*, 24 App. 61, 5 S. W. 653; *Henning v. State*, 24 App. 315, 6 S. W. 137; *Hennessy v. State*, 23 App. 340, 5 S. W. 215; *Rice v. State*, 22 App. 654, 3 S. W. 791; *Harvey v. State*, 21 App. 178, 17 S. W. 158; *Murray v. State*, 21 App. 466, 1 S. W. 522; *Doss v. State*, 21 App. 505, 2 S. W. 814, 57 Am. Rep. 618; *Ruby v. State*, 9 App. 353; *McGriff v. State* (Cr. App.) 38 S. W. 789; *Brookin v. State*, 26 App. 121, 9 S. W. 735; *Browning v. State*, 26 App. 432, 9 S. W. 770; *Tweedle v. State*, 29 App. 586, 16 S. W. 544; *Testard v. State*, 26 App. 260, 9 S. W. 888; *McKinney v. State*, 31 App. 583, 21 S. W. 683; *Cockerell v. State*, 32 App. 585, 25 S. W. 421; *Wilkins v. State*, 35 App. 525, 34 S. W. 627; *Green v. State*, 36 App. 109, 35 S. W. 971; *Kirk v. State* (Cr. App.) 37 S. W. 440; *Koller v. State*, 36 App. 496, 38 S. W. 44; *Rodgers v. State*, 36 App. 563, 38 S. W. 184; *Carver v. State*, 36 App. 552, 38 S. W. 183; *Boggs v. State*, 38 App. 82, 41 S. W. 642; *Kugadt v. State*, 38 App. 681, 44 S. W. 989; *Garza v. State*, 39 App. 358, 46 S. W. 242, 73 Am. St. Rep. 927; *Wilson v. State* (Cr. App.) 55 S. W. 490; *Singleton v. State*, 57 App. 560, 124 S. W. 92; *Wigfall v. State*, 57 App. 639, 124 S. W. 649; *Mays v. State*, 58 App. 651, 127 S. W. 546; *Lane v. State*, 59 App. 595, 129 S. W. 353; *Kuykendall v. State*, 60 App.

254, 131 S. W. 1099; Spain v. State, 61 App. 63, 133 S. W. 1055; Day v. State, 62 App. 448, 138 S. W. 130; Parshall v. State, 62 App. 177, 138 S. W. 759; Melton v. State, 63 App. 362, 140 S. W. 230; Melton v. State, 63 App. 573, 140 S. W. 781; Schmidt v. State, 63 App. 491, 140 S. W. 1088; Luster v. State, 63 App. 541, 141 S. W. 209, Ann. Cas. 1913D, 1089; Sanford v. State, 64 App. 607, 143 S. W. 1172; Shetters v. State (Cr. App.) 147 S. W. 582; King v. State (Cr. App.) 148 S. W. 324; Bird v. State (Cr. App.) 148 S. W. 738; Kinney v. State (Cr. App.) 148 S. W. 783; Baxter v. State (Cr. App.) 150 S. W. 912; Bosley v. State (Cr. App.) 153 S. W. 878; Pierce v. State (Cr. App.) 154 S. W. 559; McKelvey v. State (Cr. App.) 155 S. W. 932; Stoner v. State, 72 App. 482, 162 S. W. 836; Jones v. State (Cr. App.) 174 S. W. 1071; Stacy v. State (Cr. App.) 177 S. W. 114.

That a continuance was refused because of a want of diligence, does not absolve the trial court on a motion for a new trial from the duty of considering the materiality and probable truth of the testimony expected from the absent witness in connection with the evidence adduced on the trial. Though an application for a continuance fails to comply with the requirements of the statute, if, in view of the evidence adduced on the trial, the absent testimony appears to be material and probably true, the trial court should award a new trial. Jackson v. State, 23 App. 183, 5 S. W. 371; Covey v. State, 23 App. 388, 5 S. W. 283; Mayfield v. State, 23 App. 645, 5 S. W. 161; Shultz v. State, 20 App. 315; Stanley v. State, 16 App. 393; Beatey v. State, Id. 421; Tyler v. State, 13 App. 205; Price v. State, 22 App. 110, 2 S. W. 622; Lawson v. State, 21 App. 172, 17 S. W. 427; Sims v. State, 21 App. 649, 1 S. W. 465; Hyden v. State, 31 App. 401, 20 S. W. 764; Kelly v. State, 33 App. 31, 24 S. W. 295; McCline v. State, 25 App. 247, 7 S. W. 667; Taylor v. State, 27 App. 44, 11 S. W. 35; Cordway v. State, 25 App. 405, 8 S. W. 670; Testard v. State, 26 App. 260, 9 S. W. 888; Browning v. State, 26 App. 432, 9 S. W. 770; High v. State, 26 App. 545, 10 S. W. 238, 8 Am. St. Rep. 488; Vines v. State, 31 App. 31, 19 S. W. 545; Simmons v. State, 26 App. 514, 10 S. W. 116; Peace v. State, 27 App. 83, 10 S. W. 761; Black v. State, 27 App. 495, 11 S. W. 485; Richardson v. State, 28 App. 216, 12 S. W. 870; Abrigo v. State, 29 App. 143, 15 S. W. 408; Weathersby v. State, 29 App. 278, 15 S. W. 823; Frizzell v. State, 30 App. 42, 16 S. W. 751; Pruitt v. State, 30 App. 156, 16 S. W. 773; Fisher v. State, 30 App. 502, 18 S. W. 90; Ellis v. State, 30 App. 601, 18 S. W. 139; Ferguson v. State, 31 App. 93, 19 S. W. 901; Harrington v. State, 31 App. 577, 21 S. W. 356; Gilcrease v. State, 33 App. 619, 28 S. W. 531; Edmonson v. State (Cr. App.) 36 S. W. 270; Keys v. State, 60 App. 279, 131 S. W. 1068; Valigura v. State (Cr. App.) 150 S. W. 778.

Even if the absent testimony set out in an application for continuance be both admissible and probably true, it will not, if immaterial, require the award of a new trial because of the refusal of the continuance. Peace v. State, 27 App. 83, 10 S. W. 761.

To have that effect it would have to be shown further that such absent testimony would induce a different result. Covey v. State, 23 App. 388, 5 S. W. 283; Fowler v. State, 25 App. 27, 7 S. W. 340; Peterson v. State, 25 App. 70, 7 S. W. 530; Cordway v. State, 25 App. 405, 8 S. W. 670; Browning v. State, 26 App. 432, 9 S. W. 770; Boyett v. State, 26 App. 689, 9 S. W. 275; Self v. State, 28 App. 398, 13 S. W. 602; Hammond v. State, 28 App. 413, 13 S. W. 605; Frizzell v. State, 30 App. 42, 16 S. W. 751. See, also, Thompson v. State, 25 App. 161, 7 S. W. 589; McCline v. State, 25 App. 247, 7 S. W. 667; Eads v. State, 26 App. 69, 9 S. W. 68; Brooks v. State, 26 App. 87, 9 S. W. 355; Brookin v. State, 26 App. 121, 9 S. W. 735; Noland v. State, 26 App. 173, 9 S. W. 358; Testard v. State, 26 App. 260, 9 S. W. 888; Simmons v. State, 26 App. 514, 10 S. W. 116; Clore v. State, 26 App. 624, 10 S. W. 242; Bailey v. State, 26 App. 706, 9 S. W. 270; Black v. State, 27 App. 495, 11 S. W. 485; Richardson v. State, 28 App. 216, 12 S. W. 870; Hammond v. State, 28 App. 413, 13 S. W. 605; Leeper and Powell v. State, 29 App. 63, 14 S. W. 398; Weathersby v. State, 29 App. 278, 15 S. W. 823; Duncan v. State, 30 App. 1, 16 S. W. 753; Ulrich v. State, 30 App. 62, 16 S. W. 769; Pruitt v. State, 30 App. 156, 16 S. W. 773; Gonzalez v. State, 30 App. 203, 16 S. W. 978; Young v. State, 30 App. 308, 17 S. W. 413; Brotherton v. State, 30 App. 369, 17 S. W. 932; Clark v. State, 30 App. 377, 17 S. W. 933; Withers v. State, 30 App. 383, 17 S. W. 936; Vines v. State, 31 App. 31, 19 S. W. 545; Knowles v. State, 31 App. 383, 20 S. W. 829; Wolfforth v. State, 31 App. 387, 20 S. W. 741; Hyden v. State, 31 App. 401, 20 S. W. 764; Attaway v. State, 31 App. 475, 20 S. W. 925; Land v. State, 34 App. 330, 30 S. W. 788; Sweeney v. State, 59 App. 370, 128 S. W. 390; Lane v. State, 59 App. 595, 129 S. W. 353; Shetters v. State (Cr. App.) 147 S. W. 582; Gaines v. State (Cr. App.) 150 S. W. 199; Meadows v. State (Cr. App.) 154 S. W. 546.

A continuance is properly refused where it is improbable that the absent witness would testify as claimed or that their testimony would not probably be true. Bost v. State, 64 App. 464, 144 S. W. 589; Johnson v. State (Cr. App.) 35 S. W. 387; Pilgrim v. State, 59 App. 231, 128 S. W. 128; Giles v. State (Cr. App.) 148 S. W. 317; Ragland v. State (Cr. App.) 153 S. W. 1137; Brown v. State, 72 App. 33, 160 S. W. 374; Dugat v. State, 72 App. 39, 160 S. W. 376; Conatser v. State (Cr. App.) 170 S. W. 314.

When the trial court is called upon to reconsider, upon a motion for a new trial, the refusal of a continuance, the truth, materiality, and sufficiency of the application for continuance are to be considered in connection with the evidence adduced on the trial, and are not to be considered as already predetermined by the refusal of the continuance anterior to the trial, nor to be disposed of by an arbitrary, as distinguished from a sound discretion. Harris v. State, 18 App. 287; Irvine v. State, 20 App. 12; see, also, Aiken v. State, 10 App. 610; Williams v. State, Id. 523; Woodlridge v. State, 13 App. 443, 44 Am. Rep. 708; Hughes v. State, 18 App. 130; Word v. State, 12 App. 174; Ratliff v. State, Id. 330; Casinova v. State, Id. 554; Laubach v. State, Id. 583; Pinckord v. State, 13 App. 463; Miles

v. State, 14 App. 436; Garcia v. State, 15 App. 120; Cooper v. State, 16 App. 341; Smythe v. State, 17 App. 244; Parker v. State, 18 App. 72; Miller v. State, 18 App. 232; Wilson v. State, Id. 576; Turner v. State, 20 App. 56; Frazier v. State, 22 App. 120, 2 S. W. 637; Bronson v. State, 59 App. 17, 127 S. W. 175; Dowd v. State (Cr. App.) 148 S. W. 304.

Denial of a continuance was not erroneous, where, after the trial and before the ruling on the motion for new trial, the witness appeared and made affidavit denying that he would testify favorably to accused. Hinman v. State, 59 App. 29, 127 S. W. 221; Wilkins v. State, 35 App. 525, 34 S. W. 627; Singleton v. State, 57 App. 560, 124 S. W. 92.

Where the facts in the record positively contradict the proposed testimony, the overruling of the application was not error. Waul v. State, 33 App. 228, 26 S. W. 199. See, also, Reynolds v. State, 33 App. 143, 25 S. W. 736, 47 Am. St. Rep. 25; Foreman v. State, 33 App. 272, 26 S. W. 212; Baw v. State, 33 App. 24, 24 S. W. 293; Cave v. State, 33 App. 335, 26 S. W. 503; Russell v. State, 33 App. 424, 26 S. W. 990; Neel v. State, 33 App. 408, 26 S. W. 726; Cerda v. State, 33 App. 458, 26 S. W. 992; Linhart v. State, 33 App. 504, 27 S. W. 260; Cockerell v. State, 32 App. 585, 25 S. W. 421; Burlison v. State, 33 App. 549, 28 S. W. 198; Millirons v. State, 34 App. 12, 28 S. W. 635; Campbell v. State (Cr. App.) 28 S. W. 808; Van Dusen v. State, 34 App. 456, 30 S. W. 1073; Teague v. State (Cr. App.) 31 S. W. 401; Shaw v. State, 32 App. 155, 22 S. W. 588.

If the facts set out in the application for a continuance do not appear to be relevant and material and probably true, when considered in connection with the evidence adduced on the trial, the action of the trial court in refusing a new trial, will not be revised on appeal. Rice v. State, 22 App. 654, 3 S. W. 791; Harvey v. State, 21 App. 178, 17 S. W. 158; Doss v. State, 21 App. 505, 2 S. W. 314, 57 Am. Rep. 618; Cunningham v. State, 26 App. 162; Weaver v. State, 19 App. 547, 53 Am. Rep. 389; Bluman v. State, 33 App. 43, 21 S. W. 1027, 26 S. W. 75.

Though a continuance was properly refused by the trial court, yet upon motion for a new trial, if the evidence adduced at the trial denotes that the absent testimony was material and probably true, the trial court should grant a new trial, and the action of the trial court in this matter will be revised on appeal if it appears that the defendant may have sustained injury in consequence of the continuance, and if it be reasonably probable that the absent testimony would induce a verdict more favorable to him. Covey v. State, 23 App. 388, 5 S. W. 233; Schultz v. State, 20 App. 315; Tyler v. State, 13 App. 205.

Where defendant asked for a continuance on account of absent witnesses, by whom he expected to prove that they had had carnal intercourse with prosecutrix, and the evidence tended to show that she was unchaste, a new trial should have been granted. Kelly v. State, 33 App. 31, 24 S. W. 295.

The rule which should govern the trial court in passing, first, upon an application for continuance, and subsequently upon a motion for a new trial is, if there is such a conflict between the culpatory facts and those set forth in the application as to render it improbable that the facts stated in the application are material and probably true, the continuance should be refused, and also a new trial based upon such refusal should be denied. There must, however, not only be such a conflict, but the inculpatory facts should be so strong and convincing as to render the truth of the facts set forth in the application improbable. McAdams v. State, 24 App. 86, 5 S. W. 826; Hollis v. State, 9 App. 643.

The ruling of the trial court refusing a continuance will not be revised, unless in addition to its other requisites the application shows the relevancy and materiality of the absent testimony. Brooks v. State, 24 App. 274, 5 S. W. 852; Hennessy v. State, 23 App. 340, 5 S. W. 215.

The appellate court will not revise the action of the trial court in refusing a new trial because of its previous refusal of a continuance, unless it be made to appear, not merely that the accused might probably have been prejudiced by such ruling, but that it is reasonably probable that had the absent testimony been before the jury, a verdict more favorable to the defendant would have resulted. See the opinion for the substance of absent testimony set forth in the application for continuance and held as to one witness to be immaterial, and as to the other not probably true; wherefore the trial court did not err in refusing a new trial. Browning v. State, 26 App. 432, 9 S. W. 770.

When defendant moved for a continuance for witnesses to prove communicated threats, and the evidence presented two theories, one of premeditated murder and one of self-defense, a new trial should have been granted. Gilcrease v. State, 33 App. 619, 28 S. W. 531.

When it is apparent to the Court of Appeals that the facts set out in defendant's application for continuance are not probably true, and that the witness mentioned therein is a fictitious person, the alleged error of the lower court in overruling such application will not be considered. Benson v. State, 38 App. 487, 43 S. W. 527.

Although the trial judge holds in ruling on motion for new trial after conviction, that the evidence of the absent witness is not probably true, yet if the appellate court in reviewing the evidence is of the opinion that the evidence is probably true, the case will be reversed. Perez v. State, 48 App. 225, 87 S. W. 351.

On the hearing the affidavit or statement of the absent witness as to the truth of the allegations in the application for a continuance respecting the testimony he would give may be considered. Davis v. State, 64 App. 8, 141 S. W. 264.

A motion for a new trial on the ground that a continuance was improperly refused should have been granted, where it was supported by the affidavit of the absent witnesses that they would testify to accused's whereabouts when the crime was committed, making it impossible, if their testimony were true, that he could have committed it. McMillan v. State (Cr. App.) 146 S. W. 1190.

One charged with receiving deposits while insolvent, held entitled to have absent testimony as to his solvency submitted to the jury, regardless of the fact that it appeared from other evidence that it probably would not have changed the result. *Brown v. State*, 71 App. 353, 162 S. W. 339.

A judgment refusing a continuance for absence of a witness will not be reversed unless it is probable that, if the absent testimony had been before the jury, a verdict more favorable to defendant would have resulted. *Stacy v. State* (Cr. App.) 177 S. W. 114.

35. — **Presence or accessibility of witnesses during trial.**—Refusal of continuance for absence of witnesses cannot be complained of, they having arrived before conclusion of the trial. *Burnett v. State* (Cr. App.) 165 S. W. 581; *Hackett v. State*, 13 App. 406; *Brown v. State*, 23 App. 214, 4 S. W. 588; *Mitchell v. State*, 36 App. 278, 33 S. W. 337, 36 S. W. 456; *Brown v. State* (Cr. App.) 169 S. W. 437.

If substantially the same testimony as that which is absent was adduced on the trial, the defendant can not be heard to complain of the refusal of the continuance. *Walker v. State*, 13 App. 618, 44 Am. Rep. 716, note; *Tucker v. State*, 23 App. 512, 5 S. W. 180; *McAdams v. State*, 24 App. 86, 5 S. W. 826; *Allison v. State*, 14 App. 402; *Beatey v. State*, 16 App. 421; *Fulkerson v. State*, 57 App. 80, 121 S. W. 1111; *Jordan v. State* (Cr. App.) 143 S. W. 623.

A continuance for absent witnesses is properly refused, when some of the witnesses to the same fact are in attendance, and are not called to testify in the case. *Halliburton v. State*, 34 App. 410, 31 S. W. 297; *Craft v. State* (Cr. App.) 31 S. W. 367; *Blain v. State*, 34 App. 448, 31 S. W. 368; *Bratton v. State*, 34 App. 477, 31 S. W. 379; *Johnson v. State*, 31 App. 456, 20 S. W. 985; *Wade v. State* (Cr. App.) 144 S. W. 246.

Nor can he complain if it was within his power to supply the absent testimony on the trial, and he failed to do so. *Woodriddle v. State*, 13 App. 443, 44 Am. Rep. 708; *Nolan v. State*, 14 App. 474, 46 Am. Rep. 247.

In view of the fact that all of the witnesses, save one, named in the application for continuance were either present or accessible at the time of trial, and either testified or could have been called to testify, and that the trial court offered to postpone the trial until the arrival of the absent witness, which offer was declined by the defense, the ruling of the trial court refusing the continuance was correct. *May v. State*, 25 App. 114, 7 S. W. 588. See, also, *Fowler v. State*, 25 App. 27, 7 S. W. 340; *Peterson v. State*, 25 App. 70, 7 S. W. 530; *McCline v. State*, 25 App. 247, 7 S. W. 667; *Stouard v. State*, 27 App. 1, 10 S. W. 442; *Weathersby v. State*, 29 App. 278, 15 S. W. 823.

Several witnesses on the trial could have testified to facts set out in the defendant's application for continuance, but were not called upon to do so. Moreover, the alleged facts fail of materiality. Under these circumstances the motion for a new trial, based upon the refusal of continuance, was properly overruled. *Jackson v. State*, 31 App. 552, 21 S. W. 367; *Richardson v. State*, 28 App. 216, 12 S. W. 870; *White v. State*, 28 App. 71, 12 S. W. 406.

When one of two witnesses to a fact is in attendance during a part of the trial and defendant refuses to put him on the stand, he is not entitled to a continuance for the testimony of such witnesses. *Piles v. State* (Cr. App.) 32 S. W. 529.

Viewed from the standpoint of a motion for new trial for refusal of a continuance for absence of two witnesses, there was no error, where one of the witnesses was brought into court and testified at the trial, and it was agreed that the testimony of the other could be used, with the admission that it was to be taken as true, and her testimony was used and conceded to be true. *Wheeler v. State*, 61 App. 527, 136 S. W. 68.

Where accused has another witness present to prove the fact which he claims he can prove by the absent witness, the denial of a continuance is not erroneous. *Crawford v. State* (Cr. App.) 147 S. W. 229.

Where a continuance applied for on the ground of absent witnesses was refused, and the records showed that some of these witnesses were present at the trial and not called, but failed to show whether all of them were present, the reviewing court could not say that the refusal of the continuance was error. *Clardy v. State* (Cr. App.) 147 S. W. 568.

It is not error at the close of the evidence to allow the state to show the presence of the witnesses in court in order to preclude a new trial or reversal for denial of a continuance. *Kelly v. State* (Cr. App.) 151 S. W. 304.

The denial of a fourth application for a continuance for absence of witnesses was not error, where two of the witnesses appeared and testified during the trial, and the testimony of a third was reproduced. *Manley v. State* (Cr. App.) 154 S. W. 1008.

Denial of a motion for a continuance for absence of a witness is not ground for a new trial, where the witness attended the trial and testified. *Sinclair v. State* (Cr. App.) 168 S. W. 530.

36. **Setting aside continuance.**—A conditional continuance may be set aside as soon as the contingency transpires. *Callahan v. State*, 30 Tex. 488.

The court may, but only for good reason, set aside a continuance without consent of defendant. *Brown v. State*, 3 App. 294. And see *Callahan v. State*, 30 Tex. 488.

An order of continuance may be set aside by the court granting it, but this power should be exercised only in rare and exceptional cases. *Brown v. State*, 3 App. 295. See, also, *Hamilton v. State*, 40 App. 464, 51 S. W. 217.

Where an order granting a continuance was set aside, and another application made for another witness, the latter application should be considered a first one. *Brown v. State*, 3 App. 295.

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.

Procurement of testimony from other source.—A second or subsequent application must show that the absent testimony cannot be procured from any other source. *Fulkerson v. State*, 57 App. 80, 121 S. W. 1111; *Attaway v. State*, 31 App. 475, 20 S. W. 925; *Land v. State*, 34 App. 330, 30 S. W. 788; *McCulloch v. State*, 35 App. 268, 33 S. W. 230; *Henderson v. State*, 5 App. 134; *Pinckord v. State*, 13 App. 468; *Myers v. State* (Cr. App.) 62 S. W. 750; *Goode v. State*, 57 App. 220, 123 S. W. 597; *Gipson v. State*, 58 App. 403, 126 S. W. 267; *Bacon v. State*, 61 App. 206, 134 S. W. 691; *Wallis v. State* (Cr. App.) 153 S. W. 130; *Bosley v. State* (Cr. App.) 153 S. W. 878. And see *Edwards v. State* (Cr. App.) 172 S. W. 227.

The statute applies to an application made after a continuance by consent. *McKinney v. State*, 8 App. 626; *Goode v. State*, 57 App. 220, 123 S. W. 597; *Cromwell v. State*, 59 App. 525, 129 S. W. 622.

A first application need not aver that the desired testimony cannot be procured from any other source. *Pinckord v. State*, 13 App. 468; *Parker v. State*, 18 App. 72.

A second application on account of absence of a witness must show that the facts cannot be proved by any other witness. *Land v. State*, 34 App. 330, 30 S. W. 788. And see *Gipson v. State*, 58 App. 403, 126 S. W. 267.

Cumulative testimony.—See notes to art. 608, subd. 3, ante.

A second continuance will not be granted on account of the absence of mere cumulative testimony. *Bosley v. State* (Cr. App.) 153 S. W. 878; *Attaway v. State*, 31 App. 475, 20 S. W. 925; *Harvey v. State*, 35 App. 545, 34 S. W. 623; *Gilcrease v. State*, 33 App. 619, 28 S. W. 531; *Johnson v. State*, 55 App. 134, 114 S. W. 1178; *Bonnors v. State* (Cr. App.) 35 S. W. 650; *Goode v. State*, 57 App. 220, 123 S. W. 597; *Petty v. State*, 59 App. 586, 129 S. W. 615; *Bacon v. State*, 61 App. 206, 134 S. W. 690; *Allen v. State*, 64 App. 225, 141 S. W. 983; *Sandoloski v. State* (Cr. App.) 143 S. W. 151; *Maxe v. State* (Cr. App.) 145 S. W. 952; *Pace v. State* (Cr. App.) 153 S. W. 132; *Manley v. State* (Cr. App.) 154 S. W. 1008; *Rogers v. State*, 71 App. 149, 159 S. W. 40; *Whitfill v. State* (Cr. App.) 169 S. W. 681.

2. That the defendant has reasonable expectation of procuring the same at the next term of the court. [O. C. 516.]

See *Willson's Cr. Forms*, §29.

Expectation of procuring testimony at next term.—A subsequent application must show that the defendant has reasonable expectation of producing the absent testimony at the next term of the court. *Smith v. State*, 22 App. 316, 3 S. W. 684; *Henderson v. State*, 5 App. 134; *Myers v. State* (Cr. App.) 62 S. W. 750; *Goode v. State*, 57 App. 220, 123 S. W. 597; *Bacon v. State*, 61 App. 206, 134 S. W. 691; *Millner v. State* (Cr. App.) 169 S. W. 899; *Sims v. State* (Cr. App.) 45 S. W. 705.

Where a continuance has been entered by consent, another application thereafter is a second or subsequent application, and should conform to the requirements of second applications. *Goode v. State*, 57 App. 220, 123 S. W. 597; *McKinney v. State*, 8 App. 626; *Cromwell v. State*, 59 App. 525, 129 S. W. 622.

General requirements.—Nothing is to be presumed in aid of a subsequent application. It must show that the applicant has been guilty of no laches or neglect. *Henderson v. State*, 5 App. 134; *Peck v. State*, Id. 611; *Handline v. State*, 6 App. 347; *Swofford v. State*, 3 App. 77; *Goode v. State*, 57 App. 220, 123 S. W. 597; *Deckard v. State*, 58 App. 34, 124 S. W. 673.

A second application must conform strictly to the statute; nothing being presumed in its favor. *Henderson v. State*, 5 App. 134; *Barrett v. State*, 9 App. 33. As to strictness necessary in a subsequent application, see *Barrett v. State*, 9 App. 33.

An application made after a postponement for some days, held a second application. *Griffith v. State*, 62 App. 642, 138 S. W. 1016.

An application for a continuance reciting that it is defendant's first application for continuance "for want of the testimony of absent witnesses," shows that he had applied for a continuance on other grounds. *Salinas v. State* (Cr. App.) 142 S. W. 908.

— **Diligence.**—A second application is properly denied, where there is no sufficient showing of diligence. *Johnson v. State*, 59 App. 425, 128 S. W. 1123; *Laurence v. State*, 31 App. 601, 21 S. W. 766; *Handline v. State*, 6 App. 347; *Woodward v. State*, 58 App. 412, 126 S. W. 271; *Kinney v. State* (Cr. App.) 144 S. W. 257; *Woods v. State* (Cr. App.) 150 S. W. 633.

Application held properly denied for lack of diligence. *King v. State* (Cr. App.) 148 S. W. 324; *Washington v. State*, 35 App. 154, 32 S. W. 693; *Dill v. State*, 1 App. 278; *Henderson v. State*, 22 Tex. 593; *Hyde v. State*, 16 Tex. 445, 67 Am. Dec. 630; *Beaver v. State*, 63 App. 581, 142 S. W. 11.

It cannot avail defendant as diligence, as regards his right to a second continuance for absence of a witness, that a person was served with process issued by the state for such witness, if he was not such witness. And that defendant caused a subpoena to issue is not a showing of diligence. *Swilley v. State* (Cr. App.) 171 S. W. 734.

Showing as to diligence held sufficient. *Preston v. State*, 4 App. 186.

When the defendant had the opportunity of having the absent witness put under recognizance, and failed to do so, sufficient diligence is not shown on a sub-

sequent application. *Parkerson v. State*, 9 App. 72; *Martin v. State*, Id. 293; *Gonzalez v. State*, 30 App. 203, 16 S. W. 978; *McGee v. State*, 31 App. 71, 19 S. W. 764.

The rule as to diligence is much more strict on a third application than it is on a first application. *Beaver v. State*, 63 App. 581, 142 S. W. 11.

Discretion of court.—See notes to art. 608, subd. 6, ante.

Denial of continuance as ground for new trial.—See notes to art. 608, subd. 6, ante.

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.]

See Willson's Cr. Forms, 828.

Application.—It should show whether it is the first or a subsequent application. *Washington v. State*, 35 App. 156, 22 S. W. 694. And see *Chancey v. State*, 58 App. 54, 124 S. W. 426; *Rodgers v. State*, 36 App. 563, 38 S. W. 184; *McCulloch v. State*, 35 App. 268, 33 S. W. 230; *Halliburton v. State*, 34 App. 410, 31 S. W. 297; *Sims v. State* (Cr. App.) 45 S. W. 765.

It must be complete within itself, no presumptions being entertained to support it. *Massie v. State*, 30 App. 64, 16 S. W. 770; *Thomas v. State*, 17 App. 437, and cases cited; *Cantu v. State*, 1 App. 402.

As to jurat, see *Morris v. State*, 2 App. 502; *Dishough v. State*, 4 App. 158.

The application must state all the requisites of the statute, and must be sworn to. *Anderson v. State*, 8 App. 542.

An application which recites that accused is "informed" that the absent witness is suffering from an injury rendering him physically unable to attend court, not supported by the affidavit of the witness or a certificate of any physician, is properly denied. *Treadway v. State* (Cr. App.) 144 S. W. 655.

If based on information and belief, it should state and verify the source of information. *Byars v. State* (Cr. App.) 171 S. W. 1132.

The allegations of a motion for continuance that defendant had just learned that J., indicted for the same offense, had turned state's evidence, and that J. had, under another name, unknown to defendant, been convicted of a felony, in a county also unknown to defendant, and had never had his citizenship restored, are too vague and indefinite. *Howard v. State* (Cr. App.) 178 S. W. 506.

Amendment of application.—The policy of the law is against permitting the amendment of affidavits. *Sydnor v. Chambers*, *Dallam*, 601.

A defendant made application for a continuance which was refused, because it did not show proper diligence. After a jury was impaneled to try the cause, defendant's counsel who had been employed after the continuance had been refused, discovered that diligence had in fact been used, and he thereupon made another application for continuance. It was held that to have granted the second application would have been a proper exercise of judicial discretion. *Skaro v. State*, 43 Tex. 88.

When an amendment is allowed, the defendant must swear to the amended statement. *Patillo v. State*, 3 App. 442.

It is discretionary with the trial judge to permit an application for a continuance or postponement to be amended. *McKinney v. State*, 8 App. 626.

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.

See Willson's Cr. Forms, 831, 832, 937.

Denial.—See notes to art. 613, post.

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.

See Willson's Cr. Forms, 831, 833.

Denial of grounds of application, and trial of issue.—It is only upon such controverted allegations as affect the question of diligence, or that the testimony cannot be obtained, that evidence will be heard. *Howard v. State*, 8 App. 53; *Rucker v. State*, 7 App. 549; *Murry v. State*, 1 App. 174. *Dixon v. State*, 2 App. 530. But see *Henry v. State*, 38 App. 306, 42 S. W. 559; *Steel v. State*, 55 App. 551, 117 S. W. 851.

A failure to controvert the application does not preclude the state from controverting it as to diligence on a motion made by the defendant for a new trial. *Walker v. State*, 13 App. 618, 44 Am. Rep. 716, note; *Richardson v. State*, 28 App.

216, 12 S. W. 870; Jackson v. State, 23 App. 183, 5 S. W. 371, and cases cited; Jetton v. State, 17 App. 311.

Before the adoption of the two preceding articles the application might be controverted as to diligence, or the probability of obtaining the testimony, but not as to the materiality of the testimony. The Code prescribes the same practice. Hyde v. State, 16 Tex. 445, 67 Am. Dec. 630; Murry v. State, 1 App. 174; Dixon v. State, 2 App. 539; Rucker v. State, 7 App. 549.

Want of diligence cannot be proved by the unsworn statement of the sheriff. Merritt v. State, 2 App. 177. Nor by statements of the defendant made while he was in jail, based upon rumor. Vickery v. State, 7 App. 401.

A continuance held properly denied where the state filed affidavits of the witnesses named in the application contradicting the matters proposed to be proved by them. Wilkins v. State, 35 App. 525, 34 S. W. 627.

The defendant's application for a continuance based on the absence of a witness, was refused before the organization of the jury. The cause proceeding to trial, the court permitted two state's witnesses to testify that they had made diligent inquiry for the alleged absent witness, but that they could find no person who had ever known, seen, or heard of such person. Held, that such evidence was irregular, but, in the absence of a showing that the jurors were apprised of the application for continuance, or that such evidence was in any wise calculated to prejudice the accused, its admission was not reversible error. Testard v. State, 26 App. 260, 9 S. W. 888.

It is improper for the judge to base his decision on information obtained from private sources, as this is not legitimate evidence. Richardson v. State, 28 App. 216, 12 S. W. 870.

The materiality and truth of absent testimony cannot be inquired into on the hearing of the application, but such inquiry may be made on the motion for a new trial. Attaway v. State, 31 App. 475, 20 S. W. 525.

The state cannot contest that the witness would testify as stated in the application. Lane v. State (Cr. App.) 28 S. W. 202.

After defendant's application for a continuance was overruled the State, over defendant's objection, was allowed to prove by the absent witness's father that such witness was an unpardoned ex-convict, held, error and highly prejudicial to defendant. Mask v. State, 34 App. 136, 31 S. W. 408.

Bills of exceptions.—See notes to art. 845, post.

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.

Argument.—Argument is within the discretionary control of the trial judge. Parkerson v. State, 9 App. 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.]

See Willson's Cr. Forms, 836.

Bail.—On habeas corpus for bail, see Ex parte Walker, 3 App. 668. See, also, notes to art. 160, et seq., as to habeas corpus.

An order refusing to reduce bail is not a final order from which an appeal will lie. Ex parte Wright, 40 App. 135, 49 S. W. 104.

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.]

See Willson's Cr. Forms, 830, 834, p. 457.

Grounds for new trial.—See notes under art. 837(2), post.

Surprise.—A party surprised at the testimony of a witness must ask for a continuance. The matter is not available on a motion for new trial. Bryant v. State, 35 App. 394, 33 S. W. 978, 36 S. W. 79; Caldwell v. State, 28 App. 566, 14 S. W. 122; Graves v. State (Cr. App.) 144 S. W. 961; McGowen v. State (Cr. App.) 164 S. W. 999; Raleigh v. State (Cr. App.) 168 S. W. 1050.

After going into trial a party is not entitled to a continuance unless he shows that by some unexpected occurrence since the trial began, which no reasonable diligence could have anticipated, he was so taken by surprise as that he can not

have a fair trial. *Stanley v. State*, 16 App. 392; *Salinas v. State* (Cr. App.) 142 S. W. 908.

The primary remedy against a surprise by reason of the self-contradictory testimony of a witness is by seeking a continuance, or a postponement of the trial to a future day of the term. *Cunningham v. State*, 20 App. 162; *Cresswell v. State*, 14 App. 1; *Childs v. State*, 10 App. 183; *Webb v. State*, 9 App. 490; *Walker v. State*, 7 App. 245, 32 Am. Rep. 595; *Higginbotham v. State*, 3 App. 447. See, also, *Yanez v. State*, 20 Tex. 656; *Mayfield v. State*, 44 Tex. 59.

The denial of a postponement to procure testimony to impeach state's witnesses held not error, no diligence being shown. *Mancha v. State*, 57 App. 332, 123 S. W. 129; *Miller v. State*, 72 App. 151, 161 S. W. 128.

The preceding article seems to have been the law before the adoption of the Codes. *Cotton v. State*, 4 Tex. 260.

Defendant was charged with rape and was preparing an application for change of venue, the one day's service of a copy of the special venire not having expired. The state dismissed the charge of rape, and immediately the defendant was put upon his trial for assault with intent to rape, a motion to postpone to allow him time to complete his motion for a change of venue having been overruled. Held that a postponement should have been granted. *Blackburn v. State*, 43 Tex. 522.

If deception be practiced upon the defendant in relation to the attendance of a state's witness, it may constitute surprise. *March v. State*, 44 Tex. 64.

The unexpected attendance of a state's witness, no deception having been used upon defendant, does not constitute surprise. *Townsend v. State*, 5 App. 574.

Where the defendant was taken by surprise by material testimony of a new witness who had not been produced by the prosecution at either of two judicial investigations of the case previously had, it was held that this was good cause for a postponement of the cause to enable the defendant to obtain the testimony of a witness for whom he had sued out process, by which he expected to show the falsity of the testimony of the new witness. A reasonable delay of an hour or two in the progress of a trial involving the life of a defendant, or his liberty for life, is trivial when taken in comparison with the graver issues at stake. Dispatch is to be commended in judicial proceedings, but never at the sacrifice of a full and fair investigation, by which the defense and the prosecution alike are afforded all reasonable means and opportunity for adducing all evidence on their respective sides which may tend to illustrate the very truth of the issue before the court. *Hodde v. State*, 8 App. 382.

The mere fact that an application for continuance has been overruled does not prevent another application during the progress of the trial, on account of surprise. *McKinney v. State*, 8 App. 626.

The unauthorized departure of a material witness in the course of the trial and before his examination is such surprise as will be good cause for a continuance or postponement. *Eldredge v. State*, 12 App. 208; *Cotton v. State*, 4 Tex. 260; *Hodde v. State*, 8 App. 382.

As to continuance on ground of surprise, because a witness testified to material facts which he did not testify to on the examining trial and because of illness of subpoenaed witness, see *Evans v. State*, 13 App. 225; *Shulze v. State*, 28 App. 316, 12 S. W. 1084.

Where the defendant was surprised by the failure of his witness to produce an account-book which he had been summoned to bring with him, it was held that a postponement should have been granted. *Lutton v. State*, 14 App. 518.

The fact that a witness testifies to something different from what defendant supposed he would is not ground of surprise. *White v. State*, 40 App. 366.

An application to continue or postpone on account of surprise is addressed to the sound discretion of the court, but if the court improperly refuses it, and the trial develops that because of such refusal the defendant has probably been injured in his rights, a new trial should be granted. *Roach v. State*, 21 App. 249, 17 S. W. 464; *Eldredge v. State*, 12 App. 208; *Childs v. State*, 10 App. 183; *McDow v. State*, Id. 98; *Hodde v. State*, 8 App. 383.

A defendant who is misled or surprised by the state's testimony should ask for a postponement or continuance. *Robbins v. State*, 33 App. 573, 28 S. W. 473; *Garner v. State*, 34 App. 356, 30 S. W. 782.

The principal State's witness was charged by separate indictment, as a principal in the robbery charged against defendant, but on the stand denied having anything to do with the robbery. Defendant was entitled to prove by other witnesses that said witness was a principal or an accomplice, and having moved for a continuance, to obtain such testimony, which motion was overruled, the court erred in not granting him a new trial. *Dawson v. State*, 34 App. 263, 30 S. W. 224.

A continuance asked on the fifth day of the trial for the testimony of one who had already been convicted on the same charge was properly denied. *Magruder v. State*, 35 App. 214, 33 S. W. 233.

The cross-examination of a state's witness showing he was a 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 App. 606, 38 S. W. 48, distinguishing *White v. State*, 33 App. 177, 26 S. W. 72.

The granting of an oral motion to suppress depositions, held ground for continuance. *Blake v. State*, 38 App. 377, 43 S. W. 107.

The state's witness having testified to buying whisky from accused in the presence of two others, accused was entitled to a continuance to procure the two witnesses to contradict the state's witness. *Rankin v. State*, 57 App. 132, 122 S. W. 25.

Where defendant knew that a witness had testified and would testify that defendant had sold to the witness intoxicating liquor, and this was known to state's counsel, defendant was not entitled to a continuance on the ground of surprise at such testimony, though there had been a mistrial in which the witness had not been introduced by the state, and though he had not been subpoenaed as a witness in the present case. *Sweeney v. State*, 59 App. 370, 123 S. W. 390.

The county attorney is under no obligation to disclose the state of his evidence, nor is the defendant entitled to rely thereon. *Salinas v. State* (Cr. App.) 142 S. W. 908.

Where the state introduced evidence of and relied on acts prior in time to those alleged, accused, who proceeded with the trial without objection, cannot urge on appeal that he was surprised, in the absence of any request to be allowed to withdraw his announcement of ready and to move to continue. *Knight v. State*, 64 App. 541, 144 S. W. 967.

Where the state, before defendant announced ready for trial, gave him the names of all the witnesses used at the trial, his request for a postponement to prepare his defense because the state's attorney had not indorsed the names of all the witnesses on the indictment was properly denied. *Polk v. State* (Cr. App.) 152 S. W. 907.

Refusal of a postponement, on the ground of surprise that evidence of acts before a certain date was admitted, held not an abuse of discretion. *Shanklin v. State* (Cr. App.) 152 S. W. 1063.

Where the absent testimony could have been used only to contradict testimony, and it appeared that there was no conflict between the testimony and what the absent witness would have testified, the court did not err in refusing a postponement. *Cooper v. State*, 72 App. 266, 162 S. W. 364.

Refusal to postpone case to give defendant's counsel time to consult witnesses from Saturday noon until Monday morning because of the expense of the witnesses in attendance, held not erroneous, where the court granted each request for time to confer with witnesses. *Mason v. State* (Cr. App.) 168 S. W. 115.

Accused held not entitled to withdraw his announcement of ready for trial and to a continuance because a juror objected to the cross-examination of the state's witness. *Fondren v. State* (Cr. App.) 169 S. W. 411.

Physical condition of accused or witness.—See notes to art. 605, ante.

If a defendant, after the commencement of the trial, is taken too ill to remain in court, the cause should be postponed or continued. *Brown v. State*, 38 Tex. 482.

When during the trial a material witness becomes so intoxicated as to render him incapable of testifying, it is good ground for a postponement of the cause. *McDow v. State*, 10 App. 98.

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*, 19 App. 1.

Granting a continuance because defendant is drunk is in the discretion of the court. *Branch v. State*, 35 App. 304, 33 S. W. 356.

The granting of a continuance because the witness is drunk is in the discretion of the court. *Branch v. State*, 35 App. 304, 33 S. W. 356.

If defendant is drunk when his case is called a continuance should be sought at the time. *Inglin v. State*, 36 App. 472, 37 S. W. 861.

Discharge of jury.—It is not contemplated by the preceding article that, in case of a postponement of the trial, after the jury has been impaneled, the court has the right to discharge the jury; nor would the court have such right even in the case of a continuance for the term, except upon a clear showing of necessity. *Pizano v. State*, 20 App. 139, 54 Am. Rep. 511.

Re-examination of witness.—See a case in which it was held that error was not committed in refusing to delay a case to procure a witness whom the defendant desired to recall for the purpose of having him repeat his statement. *Moore v. State*, 7 App. 14.

Postponement on account of absence of jurors.—See notes to art. 606, post.

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; Act June 10, 1876, p. 19, § 6; Act Aug. 17, 1876, p. 164, § 24.]

See *Willson's Cr. Forms*, 757, 758, 853, 854, 856.

For decisions in civil cases, see *Vernon's Sayles' Civ. St.* 1914, arts. 1516, 1584, 1675, 1736, 2290.

Explanatory.—The present constitution reads as follows: "No judge shall sit in any case wherein he may be interested, or where either of the parties may be connected with him, either by affinity or consanguinity, within such a degree as may be prescribed by law, or when he shall have been counsel in the case." [Const. art. 5, § 11 (*Vernon's Sayles' Civ. St.* 1914, vol. 1, p. xlii).]

In general.—A justice cannot try a case in which he is the party injured. *Ex parte Ambrose*, 32 App. 468, 24 S. W. 291.

Prejudice not based on the property interest is not a legal disqualification. *Johnson v. State*, 31 App. 456, 20 S. W. 985.

A remark of the trial judge held not to disqualify him. *Bismarck v. State*, 45 App. 54, 73 S. W. 965.

Relationship.—Relationship is to be computed by the common law rule. *Tyler Tax R. R. Co. & Douglass v. Overton*, 1 White & W. Civ. Cas. Ct. App. §§ 533, 534, 535, 536; *Reed v. State*, 11 App. 587; *January v. State*, 36 App. 488, 38 S. W. 179; *Ex parte Tinsley*, 37 App. 517, 40 S. W. 360, 66 Am. St. Rep. 818.

R. and S. were jointly indicted for murder. S. was not arrested. The judge was related to S. within the third degree of consanguinity, and for this reason excused himself from trying R., and the governor appointed a special judge to try him. R. pleaded to the jurisdiction of the special judge to try him. Held, that the plea should have been sustained,—that the judge was not disqualified to try R., and could not because of his relationship to S., who had not been arrested, excuse himself. But if R. and S. had been upon trial jointly, the judge would have been disqualified. *Reed v. State*, 11 App. 587.

A judge is disqualified to try a case whose grandfather was the brother of the defendant's grandmother. *Gresham v. State*, 43 App. 466, 66 S. W. 845.

Interest.—The interest which disqualifies a judge does not signify every bias, prejudice, or partiality which he may entertain with reference to the case, and which may be included in the broadest sense of the word "interest," as contradistinguished from its use as indicating a pecuniary or personal right or privilege in some way dependent upon the result of the case. The tests are pecuniary interest, relationship, or whether he has been counsel in the case. *Taylor v. Williams*, 26 Tex. 583; *McFaddin v. Preston*, 54 Tex. 403; *Dicks v. Austin College*, 1 App. C. C. § 1068; *Clack v. Taylor County*, 3 Willson, Civ. Cas. Ct. App. § 201; *Wilks v. State*, 27 App. 381, 11 S. W. 415; *Johnson v. State*, 29 App. 526, 16 S. W. 418.

That the property stolen belonged to the district judge, is not a ground of disqualification to try the party accused of the theft. *Davis v. State*, 44 Tex. 523. And see *Tabor v. State*, 34 App. 631, 31 S. W. 662, 53 Am. St. Rep. 726.

Nor is a county judge disqualified by reason of fees allowed him by law in criminal cases. *Bennett v. State*, 4 App. 72. Nor is a county judge disqualified from trying a case where the defendant is charged with being a defaulting road hand. *Ex parte Call*, 2 App. 497.

The fact that the title to a schoolhouse was vested in the county judge in his official capacity, for the use of the county, does not disqualify him from presiding over a trial for defacing the said schoolhouse. *Clark v. State*, 23 App. 260, 5 S. W. 115.

Counsel.—The disqualification exists, if the judge has, before becoming such judge, been consulted, and has given his advice in regard to the case, although he charged no fee for such consultation and advice. *Railroad v. Ryan*, 44 Tex. 426.

That the district judge was district attorney when the crime was committed did not disqualify him where he had nothing to do with the prosecution of the case. *Utzman v. State*, 32 App. 426, 24 S. W. 412.

That the same questions of law and fact arise in two cases does not disqualify the judge from sitting in one because he has previously prosecuted the other. *Koenig v. State*, 33 App. 367, 26 S. W. 835, 47 Am. St. Rep. 35.

Where judge who tried defendant for murder had acted as counsel for defendant, he was disqualified to act. *Graham v. State*, 43 App. 110, 63 S. W. 558.

A judge is not disqualified because he had proposed to assist the prosecution as counsel for a certain fee, which was never arranged or agreed to be paid. *Baines v. State*, 43 App. 490, 66 S. W. 847.

Judge held not disqualified to try murder case by having acted as assistant district attorney in presenting case against accomplice to grand jury. *Locklin v. State* (Cr. App.) 75 S. W. 305.

The fact that a judicial officer takes the affidavit of a party, charging another with the commission of an offense, does not make him counsel in the case, so as to disqualify him for trying it. *Stapp v. State*, 53 App. 153, 109 S. W. 1093.

An attorney, who had advised accused to plead guilty upon a prior indictment for the same offense, held disqualified to sit as special judge in his trial under a second indictment. *Durham v. State*, 58 App. 143, 124 S. W. 932.

That the trial judge had theretofore been of counsel in other prosecutions against accused for violating the local option law would not disqualify him as special judge to sit in a prosecution for violating the local option law. *Trinkle v. State*, 59 App. 257, 127 S. W. 1060.

A county judge is not disqualified from acting in a criminal case, because he is attorney for plaintiff in a civil action against accused in the district court. *McIndoo v. State* (Cr. App.) 147 S. W. 235.

See, also, *Thompson v. State*, 9 App. 649; *Bateman v. State* (Cr. App.) 44 S. W. 290.

Consent of parties.—Consent of parties cannot remove a judge's incapacity or restore his competency to try a case. *Gresham v. State*, 43 App. 466, 66 S. W. 845; *Summerlin v. State* (Cr. App.) 153 S. W. 890; *Abrams v. State*, 31 App. 449, 20 S. W. 987; *Slaven v. Wheeler*, 58 Tex. 23.

Effect of disqualification.—When a judge is disqualified a judgment rendered by him is a nullity. *January v. State*, 36 App. 488, 38 S. W. 179; *Ex parte Ambrose*, 32 App. 468, 24 S. W. 291; *Graham v. State*, 43 App. 110, 63 S. W. 558; *Woody v. State* (Cr. App.) 69 S. W. 155.

Disqualification does not prevent him from receiving an indictment from the grand jury, or from making incidental orders, such as an order changing the venue, or entering an order appointing a special judge. *Cock v. State*, 8 App. 659.

The judgment of a court appointing a receiver for a corporation is not void because the judge is related to some of the stockholders in the corporation. *Ex parte Tinsley*, 37 App. 517, 40 S. W. 306, 66 Am. St. Rep. 818.

That a member of the bar selected as a special judge by the attorneys in a civil case was hearing that cause does not deprive the regular district judge, who was disqualified to sit in the civil case, from proceeding with a criminal trial. *Hamilton v. State* (Cr. App.) 168 S. W. 536.

Plea and trial of issue.—*Abrams v. State*, 31 App. 449, 20 S. W. 987.

An issue, as to the disqualification of a judge, should be tried and determined by him. His evidence should be given under oath, and the facts in evidence on

the issue should be incorporated in the record on appeal. *Slaven v. Wheeler*, 58 Tex. 23; *Johnson v. State*, 31 App. 456, 20 S. W. 985.

Evidence held insufficient to show disqualification of county judge. *Benson v. State*, 39 App. 56, 44 S. W. 167, 1091.

Upon the suggestion of the disqualification of the judge in that he has been of counsel against defendant, it is not proper for the court to pass upon such matter without allowing defendant to introduce evidence in the matter, although the facts are within the court's personal knowledge. *Benson v. State*, 39 App. 56, 45 S. W. 167, 1091.

A verified plea in limine alleging that a judge of a different district is threatening to try the case, though the regular judge is not disqualified, and though the judge from the other district has not been appointed by the Governor to hold court, and though the lawyers practicing at the bar have not elected him to hold court, and though accused has not agreed to try the case before him, does not prove itself; but there must be evidence to sustain it, especially where the record contradicts the plea. *Hart v. State*, 61 App. 509, 134 S. W. 1178.

Plea alleging that a special judge is disqualified to try a case held required to be proved by evidence. *Hart v. State*, 61 App. 509, 134 S. W. 1178.

Art. 618. [607] Proceedings when judge of district court is disqualified.—Whenever any case or cases, civil or criminal, are pending in which the district judge is disqualified from trying the same, no change of venue shall be made necessary thereby; but the judge presiding shall immediately certify that fact to the Governor, whereupon the Governor shall designate some district judge in an adjoining district to exchange and try such case or cases, and the Governor shall notify both of said judges of such order; and it shall be the duty of said judges to exchange districts for the purpose of disposing of such case or cases, and, in case of sickness or other reasons rendering it impossible to exchange, then the parties or their counsels shall have the right to select or agree upon an attorney of the court for the trial thereof; and, in the event the district judges shall be prevented from exchanging districts and the parties and their counsels shall fail to select or agree upon an attorney of the court for the trial thereof, which fact shall be certified to the Governor by the district judge or the special judge, whereupon the Governor shall appoint a person legally qualified to act as judge in the trial of the case. [Act Aug. 15, 1876, p. 141; Act 1879, p. 1; Act 1897, S. S., p. 39, ch. 12; Act 1915, p. 86, ch. 45, amending art. 1676, Rev. St. 1911.]

See Willson's Cr. Forms, 852, 853.

Explanatory.—Arts. 618 and 619, revised C. C. P., 1911, appeared as arts. 570 and 571 of the Code of 1879 and as arts. 607 and 608 of the Code of 1895, and in each case are ascribed to Act Aug. 15, 1876, p. 141. The act of 1876 was amended by Act 1879, p. 1 (see note to art. 1092, Rev. Civ. St. 1879). The amendatory act was thereafter carried into Rev. Civ. St. 1895, as arts. 1069 and 1070, but the old provision was left in the criminal statutes as above stated. In 1897 (Act 1897, S. S. p. 39, ch. 12) arts. 1069 and 1070, Rev. Civ. St. 1895, were amended, and such amendment was carried into Rev. Civ. St. 1911, as arts. 1676 and 1677, but the old provision of 1876 was still carried in the revised C. C. P. of 1911. The legislature in 1915, amended art. 1676, Rev. Civ. St. 1911, so as to make it read as above. In view of the fact that the various amendatory acts referred to clearly supersede these obsolete provisions of the C. C. P., the old provisions (arts. 618 and 619) are eliminated, and the new provision inserted as art. 618.

Cited, *Savage v. Umphres* (Civ. App.) 131 S. W. 291.

Validity and construction in general.—This article does not transcend the constitutional provision in providing that such agreement may be made by the Attorneys of the parties and the attorney representing the State may make such agreement with the defendant or his attorney. *Davis v. State*, 44 Tex. 523; *Early v. State*, 9 App. 476, overruling *Murray v. State*, 34 Tex. 331.

This and article 1677, Rev. Civ. St. 1911 (same article in *Vernon's Sayles'* as amended by the twenty-fifth legislature in no wise conflict with article 1678, Rev. St. 1911 (same article in *Vernon's Sayles'* Civ. St. 1914). *Greer v. State* (Cr. App.) 65 S. W. 1077.

This article does not conflict with article 5, section 11, of the constitution and must be complied with when the district judge is disqualified by reason of being a party to a suit pending in his court. *Kruegel v. Nash* (Civ. App.) 72 S. W. 601, 602; *Oates v. State*, 56 App. 571, 121 S. W. 370; *Alley v. Mayfield* (Civ. App.) 131 S. W. 295.

That a suit filed in the district court of the one district was tried there by the judge of another district held of no consequence. *Rabb v. Texas Loan & Investment Co.* (Civ. App.) 96 S. W. 77.

If the provision of this article that "in case of sickness or other reasons rendering it impossible to exchange, then the parties or their counsel shall have the right to select or agree on an attorney of the court for the trial thereof," should be

held invalid as violating Const. art. 5, § 11, guaranteeing to litigants the right to appoint a proper person to try a cause on the disqualification of the resident judge. Its invalidity would not invalidate the balance of the section in so far as it provided for an exchange of judges under such circumstances. *Oates v. State*, 56 App. 571, 121 S. W. 370.

Under this article, articles 3050 and 5728, Rev. St. 1911 (same articles in Vernon's Sayles' Civ. St. 1914) and Const. art. 5, § 11, which declares that district judges may hold courts for each other when expedient, a district judge of a district not embracing the county in which the contested election was held, sitting in exchange with the judge of that district, could try the case; jurisdiction being conferred on the district court and not its judge. *Savage v. Umphres* (Civ. App.) 131 S. W. 291.

Where the mode of selecting a special judge is prescribed by law, and the causes for such selection are indicated, other modes and other causes are thereby excluded. *Summerlin v. State* (Civ. App.) 153 S. W. 890.

Under the mandatory provisions of the constitution and the statutes, the selection of a special judge by agreement was authorized only when the regular judge was disqualified, and where there was no such disqualification his selection and his judgment was a nullity. *Summerlin v. State* (Civ. App.) 153 S. W. 890.

Disqualification of special judge.—See notes under art. 617, ante.

Exchange of judge.—Under Const. art. 5, § 11, providing that district judges may exchange or hold court for each other when they deem it expedient, and shall do so when required by law, the judge of another district may sit at the request of the regular judge, though the latter is not disqualified or at the time holding court for the former or another judge. *Johnson v. State*, 61 App. 104, 134 S. W. 225.

Under Vernon's Sayles' Civ. St. 1914, art. 1715, providing that any judge of the district court may hold court for any other district judge, the regular presiding judge of a district may vacate the bench, and the judge of another district may hold court for him. *Hart v. State*, 61 App. 509, 134 S. W. 1178.

Notwithstanding this article, the local bar, under article 1678, Revised Civ. St. 1911, providing that whenever the judge of the court shall be absent or unable or unwilling to hold court the practicing lawyers of such court may elect a special judge, may select a special judge where the Governor fails to designate a district judge to try the case in which the regular district judge was disqualified. *Webb v. Reynolds* (Civ. App.) 160 S. W. 152.

This article does not render it erroneous for a district judge who was disqualified to call in on his initiative a judge of an adjoining circuit to try the case; Const. art. 5, § 11, providing that district judges may exchange districts or hold courts for each other when they deem it expedient, and article 1715 of the Revised Civil Statutes containing a similar provision. *Connellee v. Blanton* (Civ. App.) 163 S. W. 104.

See, also, *Wyers v. State*, 21 App. 448, 2 S. W. 816; *Gilleland v. State*, 44 Tex. 356.

Transfer of cause.—The statute does not make the disqualification of a judge the ground for transferring a cause pending in his court to another. *Johnson v. Johnson* (Civ. App.) 89 S. W. 1102.

Certification of disqualification.—There being no law authorizing an appeal from a refusal of a district judge to certify to the governor his disqualification, the appellate court had no jurisdiction to revise his ruling, and had no power to enforce, by writ of mandamus or otherwise, the performance of such duty. *Grigsby v. Bowles*, 79 Tex. 138, 15 S. W. 30.

Party trying the case before special judge without objection held estopped to assert that he was not agreed on. *Davis v. Bingham* (Civ. App.) 46 S. W. 840.

Where the disqualified judge and the judge who tried the case deemed it expedient for the latter to try the case, it was not necessary for the case to be certified to the Governor, nor for him to designate a judge to try the case. *Miller v. State* (Cr. App.) 91 S. W. 583.

— **On second trial.**—Where a judge is disqualified a special judge can be selected to try the case. When a case has been tried before a special judge, and is reversed on appeal and the special judge has moved out of the county and refuses to return and try the case, the regular judge can certify his disqualification to the governor, and he can order the regular judge and the judge of an adjoining district to exchange districts, and the latter can try the case. *Sovereign Camp W. of W. v. Boehme*, 44 Civ. App. 159, 97 S. W. 848.

Selection by agreement.—In a suit by publication, the judge being disqualified, the plaintiff selected a special judge, who proceeded to render judgment by default. The selection by the plaintiff not being an appointment by the parties, there was no jurisdiction, and the judgment rendered in the cause was void. *Mitchell v. Adams*, 1 Posey, Unrep. Cas. 117.

The State is not bound by an oral agreement with defendant or his attorney for a special judge. *Thompson v. State*, 9 App. 649; *Smith v. State*, 24 App. 290, 6 S. W. 40.

It is not required that the agreement should be in writing, but the proper practice is to reduce it to writing, sign and file it with the papers in the cause. *Thompson v. State*, 9 App. 649; *Davis v. State*, 44 Tex. 523; *Early v. State*, 9 App. 476, overruling upon this point, *Murray v. State*, 34 Tex. 331.

A judge cannot be selected by one party in the absence of the other, and his acts are void. *Latimer v. Logwood* (Civ. App.) 27 S. W. 960.

Act June 19, 1897 (Acts 25th Leg. Sp. Sess. p. 39, c. 12), repealing Rev. St. 1895, arts. 1069, 1070, which gave the Governor authority to appoint a judge pro tem. from among the bar of the district on the disqualification of the resident judge, and denying the authority to the Governor to make such appointment, but providing that in such case the resident judge shall exchange with the judge of

another district if possible, was not in violation of Const. art. 5, § 11, guaranteeing to litigants, in case a judge is disqualified, the right by consent to appoint a proper person to try the cause. *Oates v. State*, 56 App. 571, 121 S. W. 370.

Const. art. 5, § 11, declares that, when a judge of the district court is disqualified, the parties may by consent appoint a proper person to try the cause, or, on their failing to do so, a competent person may be appointed to try the same in the county where it is pending in such manner as may be prescribed by law, and the district judges may exchange districts or hold court for each other when they deem it expedient and shall do so when required by law, and that the disqualification of judges of inferior tribunals shall be remedied and vacancies filled as may be prescribed by law. Held, that the right given to parties to agree on a special judge was the only part of such provision that was absolute and self-executing, and hence the provision did not deprive the Legislature of power to restrict such right to the selection of a judge pro tem. by agreement to instances where, by reason of sickness or other exigency, it was impossible for judges to exchange districts on the disqualification of the resident judge. *Oates v. State*, 56 App. 571, 121 S. W. 370.

Where under this statute a special judge was agreed upon by all of the parties except two, and it was not shown that they were parties to the agreement, and they did not appear, the special judge was without lawful authority to determine the issues affecting their rights. *Bomar v. Morris* (Civ. App.) 176 S. W. 663.

Under Const. art. 5, § 11, and *Vernon's Sayles' Civ. St.* 1914, art. 1675, and this article and articles 617 and 619, the selection of a special judge by agreement was authorized only when the regular judge was disqualified. *Summerlin v. State* (Cr. App.) 153 S. W. 890.

Parties who consent to the appointment of a special judge are not thereby estopped from denying his jurisdiction. *Summerlin v. State* (Cr. App.) 153 S. W. 890.

Acts of improperly selected judge.—A member of the bar selected by the governor to try a cause without authority held not a judge de facto. *Oates v. State*, 56 App. 571, 121 S. W. 370.

Where, on the disqualification of a resident judge to try accused for murder, the Governor without authority appointed a member of the bar to try the cause as judge pro tem., before whom defendant was tried and convicted and sentenced to be hung, such conviction was void as a deprivation of life without due process of law, in violation of Const. U. S. Amend. 14. *Oates v. State*, 56 App. 571, 121 S. W. 370.

Art. 618a. Record to be made where special judge is agreed on or appointed.—Whenever a special judge is agreed upon by the parties for the trial of any particular cause, as above provided, the clerk shall enter in the minutes of the court, as a part of the proceedings in such cause, a record showing:

1. That the judge of the court was disqualified to try the cause; and
2. That such special judge (naming him) was, by consent, agreed upon by the parties to try the cause; and
3. That the oath prescribed by law has been duly administered to such special judge. [Acts 1876, p. 141; Act 1897, 1st S. S., p. 39, ch. 12, § 1.]

Explanatory.—The above provision was omitted from the revised C. C. P. 1911, and, in view of the decisions in *Berry v. State* (Cr. App.) 156 S. W. 626; *Stevens v. State*, 70 App. 565, 159 S. W. 505, is inserted in this compilation. See note under art. 618, ante.

Sufficiency of record.—The record should show how a special judge trying a cause became such; but if the record is silent, a party who, without objection, has participated in the trial of his cause before such judge, cannot, for the first time on appeal raise the objection that his authority did not appear. *Shultz v. Lempert*, 55 Tex. 273; *Brinkley v. Harkins*, 48 Tex. 225; *Hess v. Dean*, 66 Tex. 663, 2 S. W. 727.

It is sufficient if a record of the appointment as special judge be made before the proceedings in the case are ended in the district court. *Harris v. Musgrave*, 72 Tex. 18, 9 S. W. 90.

A recital in a judgment of an appointment of special judge held sufficient. *Temple Compress Co. v. De More* (Civ. App.) 42 S. W. 778.

Oath of office.—The administration of the oath is waived by the parties engaging in the trial of a case to a judgment. *Ford v. First Nat. Bank of Cameron* (Civ. App.) 34 S. W. 684. And see *Schultze v. McLeary*, 73 Tex. 92, 11 S. W. 924; *Railway Co. v. Rowland*, 3 Civ. App. 158, 22 S. W. 134; *Coles v. Thompson*, 7 Civ. App. 666, 27 S. W. 46; *Hall v. Jankofsky*, 9 Civ. App. 504, 29 S. W. 515; *Campbell v. McFadden*, 9 Civ. App. 379, 31 S. W. 436.

Under this article and C. C. P. 1911, art. 620 (art. 620, post) a special judge must take the oath of office in order to justify his sitting in a case and trying it. *Summerlin v. State* (Cr. App.) 153 S. W. 890.

Competency and authority of special judge.—That a special district judge appointed to try a cause is a member of the legislature is no objection to his competency as a judge. *Roundtree v. Gilroy*, 57 Tex. 176.

A decree of divorce is not invalidated because rendered by a special district judge who, at the time the trial began, was the county judge of the county. Even if he be such an officer as is forbidden under the constitution to hold another of-

office, the acceptance and discharge of the duties of another office would operate an abandonment of the office to which he had formerly qualified. *Alsop v. Jordan*, 69 Tex. 300, 6 S. W. 831, 5 Am. St. Rep. 53.

A special district judge, qualified under appointment, has authority to hear and determine not only the suit pending in which the appointment was made, but also any litigation between the same parties growing out of that suit; e. g. he can hear an injunction suit and application after the term for a new trial in the case. *Harris v. Musgrave*, 72 Tex. 18, 9 S. W. 90.

It is too late, after the trial of the case before a special judge, to raise the question of his disqualification. Such trial is in itself an agreement to submit the case to him. *T. C. Ry. Co. v. Rowland*, 3 Civ. App. 158, 22 S. W. 134.

The regularity of the appointment of a special judge cannot be questioned in a collateral proceeding. *Hall v. Jankofsky*, 9 Civ. App. 504, 29 S. W. 515.

Art. 619. [608] [Superseded. See art. 618 and note thereunder.]

See Willson's Cr. Forms, 854.

Art. 620. [609] Special judge shall take oath of office.—The attorney agreed upon or appointed, as provided in the two preceding articles, [618, 619] 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.

See Willson's Cr. Forms, 853-855.

Mode of selection of special judge.—Three modes only are prescribed by statute for the election, selection, or appointment of a special judge, viz.: 1. If the regular judge fails to appear at the appointed time and place for holding his court, an election of a special judge for the term shall be held. 2. If the regular judge is, from any cause, disqualified to try a case, the parties thereto, by agreement, may select a special judge. 3. If the parties fail to agree, the district judge shall certify the fact to the governor, who shall appoint a special judge to try the case. In either event, it is required that the special judge, before entering upon the discharge of his duties as such, take the oath of office required by the constitution. The manner of the selection or appointment of the special judge, together with the reasons therefor, 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 in the cause, and the same must appear in the transcript on appeal. *Smith v. State*, 24 App. 290, 6 S. W. 40, distinguished from *Early v. State*, 9 App. 476. See, also, *Perry v. State*, 14 App. 166; *Wilson v. State*, Id. 205; *Harris v. State*, Id. 676; *Snow v. State*, 11 App. 99; *McMurry v. State*, 9 App. 207; *Weatherford v. State* (Cr. App.) 28 S. W. 814.

The fact that a special judge in a prosecution was elected by the bar as authorized by *Vernon's Sayles' Civ. St.* 1914, art. 1678, the district judge being unwilling to preside is not ground for sustaining a plea objecting to his presiding. *Brazell v. State*, 33 App. 333, 26 S. W. 723.

Oath.—Under the express provisions of *Vernon's Sayles' Civ. St.* 1914, art. 1677, and this article, a special judge must take the oath of office in order to justify his sitting in a case and trying it. *Summerlin v. State* (Cr. App.) 153 S. W. 890.

See, also, *Weatherford v. State* (Cr. App.) 28 S. W. 814.

Powers of special judge.—See *State v. Womack*, 17 Tex. 237; *Gill v. State*, 36 App. 589; *Edwards v. James*, 13 Tex. 52.

In a case tried before a special judge, in which an appeal is taken, and a statement of facts is desired, he must approve such statement. In such case the regular judge cannot authenticate the statement of facts. *Myers v. State*, 9 App. 157.

He may enter a judgment nunc pro tunc at a subsequent term in a case tried by him. *Pennington v. State*, 13 App. 44.

A special judge has all the power and authority of the regular judge with reference to the case or cases which he is selected or appointed to try. *Powers v. State*, 23 App. 42, 5 S. W. 153.

The fact that a special judge who rendered judgment on a forfeited bail bond failed to sign such judgment during the term at which it was granted, does not invalidate the judgment. *Lockhardt v. State*, 32 App. 149, 22 S. W. 413.

The action of the district judge, called in to try a criminal case because of the disqualification of the presiding judge, in ordering a special venire and having the venire drawn and issuing the writ, and setting the case for a certain day, while the presiding judge is trying a civil action in the same court building, is legal. *Oliver v. State*, 70 App. 140, 159 S. W. 235.

Exercise of powers by regular judge after appointment of special judge.—*Gill v. State*, 36 App. 589, 38 S. W. 190.

Record.—Cited, *Gill v. State*, 36 App. 589, 38 S. W. 190.

If a special judge sits the record must show the authority of his selection and how selected and that the proper oath was administered to him as special judge. *Reed v. State*, 55 App. 137, 114 S. W. 834; *McMurray v. State*, 9 App. 207; *Perry v. State*, 14 App. 166; *Wilson v. State*, 14 App. 205; *Harris v. State*, 14 App. 676;

Smith v. State, 24 App. 290, 6 S. W. 40; Blanchett v. State, 29 App. 46, 14 S. W. 392; Weatherford v. State (Cr. App.) 28 S. W. 814.

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.]

See Willson's Cr. Forms, 757.

Decisions under former law.—When a cause is transferred from the county to the district court, under the old article (573), the jurisdiction of the latter court attaches as amply as if it was original and exclusive, and said court has no authority to transfer it back to the county court, although a new county judge, not disqualified from trying it, has succeeded the disqualified judge. Such a transfer will not invest the county court with jurisdiction. If the district judge be disqualified also to try the case, a special judge of said court must be selected or appointed to try it. Snow v. State, 11 App. 99. A special judge of the county court may be elected when the regular judge fails to appear at the time appointed for holding the court, or when, during the term, he is absent or unable or unwilling to hold his court. Sayles' Civ. Stats., arts. 1130, 1131; Byars v. Crisp, 2 Willson, Civ. Cas. Ct. App. § 707. But there is no authority of law for the selection of a special judge of the county court by agreement of the parties. Whittington v. Butler, 2 Willson, Civ. Cas. Ct. App. § 730.

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.

See Willson's Cr. Forms, 758, 856.

See art. 617, ante.

Transfer of case to county court.—This article does not authorize transfer to the county court of a prosecution which is within the jurisdiction of a justice of the peace. Gill v. State, 45 App. 256, 76 S. W. 575.

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.

See Willson's Cr. Forms, 757-759, 856.

Explanatory.—The words "two preceding articles" should read "preceding article." The reference was copied into the revisions of 1895 and 1911 without consideration of the fact that art. 573 of the revision of 1879 (art. 621 of revision of 1911) was amended by Act 1893, p. 83, by substituting appointment of a substitute county judge by the parties or by the governor in place of the old provision for a transfer of the case to the district court. The amendment rendered art. 625 inapplicable to the county court, and confined its operation to justices of the peace.

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. 3, § 45.]

See Willson's Cr. Forms, 838.

See post, arts. 637, 638, 639, 640. See, also, art. 18, ante, and notes. And *Snow v. State*, 11 App. 99; *Reed v. State*, 11 App. 587; *Thurmond v. State*, 27 App. 347, 11 S. W. 451; *Long v. State*, 32 App. 140, 22 S. W. 409; *Kutch v. State*, 32 App. 184, 22 S. W. 594; *Harboit v. State*, 39 App. 129, 44 S. W. 1110.

Constitutionality.—This act is constitutional. *Ex parte Cox*, 12 App. 665; *Cox v. State*, 8 App. 254, 34 Am. Rep. 746.

Power and duty of court in general.—A district judge may, upon his own motion, change the venue in a criminal case to any other county in his own or in an adjoining district, when he becomes satisfied that a trial alike fair and impartial to the accused and the state cannot, for any cause, be had in the county where the cause is pending. *Brown v. State*, 6 App. 286.

This action of the court in changing the venue upon its own motion will not be revised on appeal, unless it be shown that the defendant has been materially prejudiced thereby. *Rothschild v. State*, 7 App. 519; *Bohannon v. State*, 14 App. 271; *Woodson v. State*, 24 App. 153, 6 S. W. 184. See *Walker v. State*, 42 Tex. 360.

And when a district judge is satisfied that from any cause a fair and impartial trial of a felony case can not be had in the county of the prosecution, he should exercise the power conferred upon him by the preceding article and change the venue. *Webb v. State*, 9 App. 490.

The discretion conferred upon district judges by the preceding article is not restricted by article 631, post, and whether such discretionary authority is a dangerous power, is not a question for judicial determination. No instance of its abuse has yet been made manifest. *Bohannon v. State*, 14 App. 271.

Venue should be changed where a fair trial cannot be had. *Massey v. State*, 31 App. 371; *Frizzell v. State*, 30 App. 42, 16 S. W. 751; *Lacy v. State*, 30 App. 119, 16 S. W. 761.

See a case in which the judge should have ordered a change of venue upon his own motion. *Steagald v. State*, 22 App. 464, 3 S. W. 771.

A change of venue in a homicide case may be ordered where the county of the venue is small and two trials of the case have already been had in it. *Campbell v. State*, 35 App. 160, 32 S. W. 774. And see *Webb v. State*, 9 App. 490.

The court can set aside continuance and change the venue of a rape case of his own motion. *Griffey v. State* (Cr. App.) 56 S. W. 52.

Where the application for a change of venue and change occurred in cause No. 4424, but pending the motion another for same offense was returned and numbered 4470, it was error to change the venue of the latter case when the defendant had not been arrested nor arraigned under the last indictment. *Lankster v. State*, 42 App. 360, 59 S. W. 888.

Where the testimony introduced by a person accused of homicide on a proceeding on the court's own motion to change the venue only showed that in the opinion of the witnesses a jury to try the case could be procured without changing the venue, while it appeared that deceased and accused's families were prominent people in that county; that the killing excited a great deal of interest and much more than usual; that the families of the parties were influential; that newspapers all over the county had more or less to say about the killing; that two trials had been had, and difficulty experienced in securing a jury; that a great many people from the different portions of the county attended both trials; and that a great deal of interest was taken all over the county—the court did not abuse its discretion in making the change on its own motion. *Mayhew v. State* (Cr. App.) 155 S. W. 191.

Under this article the district judge is vested with a discretion which, although it is a judicial and not a personal discretion, will not be interfered with unless abused. *Mayhew v. State* (Cr. App.) 155 S. W. 191. See *Treadway v. State* (Cr. App.) 144 S. W. 655.

Misdemeanor cases.—The codes of this state do not authorize change of venue in misdemeanor cases. *Halsell v. State*, 29 App. 22, 18 S. W. 418; *Henderson v. State* (Cr. App.) 39 S. W. 116; *Fox v. State*, 53 App. 150, 109 S. W. 371. And further see *Thurmond v. State*, 27 App. 347, 11 S. W. 451; *McCoy v. State*, 27 App. 415, 11 S. W. 454; *Frizzell v. State*, 30 App. 42, 16 S. W. 751; *Johnson v. State*, 31 App. 456, 20 S. W. 985.

County to which venue may be changed.—In changing the venue of his own motion, the district judge is authorized to transfer the case to any county in his own or in an adjoining district. *Boyett v. State*, 26 App. 689, 9 S. W. 275.

Under this article the discretionary right to order a change is vested in the trial court, and the Court of Criminal Appeals, while it has the authority to direct a change of venue, cannot specify the county to which the change should be had. *Coffman v. State* (Cr. App.) 165 S. W. 939.

Under this article where an indictment found before the creation of a new county, including the scene of the crime, was transferred to such new county,

the trial judge was authorized, when the district court of such new county convened to change the venue to another county, if in his opinion the facts connected with the offense had gained such wide notoriety that a fair and impartial trial could not be had. *Gomez v. State* (Cr. App.) 170 S. W. 711.

Second change of venue.—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*, 30 App. 42, 16 S. W. 751; citing *Thurmond v. State*, 27 App. 347, 11 S. W. 451.

When the offense was committed in an unorganized county and before the organization of such county, jurisdiction in another county had attached. Defendant cannot claim change of venue as a matter of right, to the county where the offense was committed after its organization. *Woodring v. State*, 33 App. 26, 24 S. W. 293.

Retransfer of case to original county.—Where a court of one district, upon its own motion, transferred a criminal case to a second district, and by agreement of the parties the venue was changed back to the original court, the court of the second district was divested of all jurisdiction, and the original court was re-invested with jurisdiction, and could compel the clerk of the court of the second district to return the papers and documents in the case. *Berg v. State*, 64 App. 612, 142 S. W. 884.

A criminal case was transferred from one district to another, and was later, by consent of all the parties, transferred back to the original court. The defendant then objected to the jurisdiction of the original court, and parol testimony of the order showing the retransfer was offered and admitted without objection. Held that, while the transcript might be the best evidence, parol evidence having been admitted without objection, the court properly overruled defendant's plea to the jurisdiction; it appearing that he had consented to the order of retransfer, and had executed a new bond in the original court. *Berg v. State*, 64 App. 612, 142 S. W. 884.

Order for change of venue.—Art. 623, and notes. The requirement in the preceding article that the judge shall state in his order changing the venue the grounds therefor, is complied with in an order stating the grounds to be, "influences from terrorism prevailing among the good people of the county" where the case is pending. *Cox v. State*, 8 App. 254, 34 Am. Rep. 746. See *Gregory v. State* (Cr. App.) 37 S. W. 752.

Order must show grounds. *Bowden v. State*, 12 App. 246; *Frizzell v. State*, 30 App. 42, 16 S. W. 751; *Campbell v. State*, 35 Cr. R. 160, 32 S. W. 774.

The order, embracing the reasons upon which the court predicated his authority to change the venue should be embraced in the transcript. Without this order in the transcript the appellate court cannot say that the judge abused his discretion. *Borden v. State*, 42 App. 648, 62 S. W. 1065.

It is only necessary for the judge to assign reasons for changing the venue; he need not assign reasons for ignoring counties of the district nearest the court house of the county in which the homicide occurred. *Ricks v. State*, 48 App. 264, 87 S. W. 1037.

An order changing the venue in a criminal case after a reversal on a former appeal was not invalid because made at a special term, the order for the convening of which was made before the mandate reached the district court, where it appeared from the time elapsing after the issuance of the mandate, from the order changing the venue itself, and from the qualification of the bill of exceptions thereto that the mandate had reached that court before the order changing the venue was made. *Mayhew v. State* (Cr. App.) 155 S. W. 191.

Objection or exception to order.—See art. 634, and notes.

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 jeopardized 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.]

See *Willson's Cr. Forms*, 840, 841.

See *Webb v. State*, 9 App. 490; *Massey v. State*, 31 App. 371, 20 S. W. 753; *Stegald v. State*, 22 App. 464, 3 S. W. 771; *Fox v. State*, 53 App. 153, 109 S. W. 370.

Discretion of court.—A change of venue in behalf of the State is within the discretion of the court. *Gregory v. State* (Cr. App.) 37 S. W. 752.

Art. 628. [615] Change of venue; when granted on application of defendant.—A change of venue may be granted on the writ-

ten 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.]

See Willson's Cr. Forms, 843-846.

See Daugherty v. State, 7 App. 480; Brown v. State, 33 App. 147, 25 S. W. 789; Cravey v. State, 23 App. 677, 5 S. W. 162; Davis v. State, 19 App. 201; Mitchell v. State, 43 Tex. 512; Blackburn v. State, Id., 522; Wall v. State, 18 Tex. 683, 70 Am. Dec. 302.

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| 1. Requisites of application in general. | 6. Agreement affecting right to change. |
| 2. Affidavits and other testimony in support of application. | 7. Misdemeanor cases. |
| 3. Grounds in general. | 8. Change as to one of several defendants. |
| 4. Local prejudice. | 9. Second change of venue. |
| 5. Dangerous combination against accused. | 10. Hearing and determination. |
| | 11. Review of discretion of trial court. |

1. **Requisites of application in general.**—If the statute is not fully complied with, the application is fatally defective. Mitchell v. State, 43 Tex. 512; O'Neal v. State, 14 App. 582; Macklin v. State, 53 App. 197, 109 S. W. 145; Gibson v. State, 53 App. 349, 110 S. W. 41.

A change cannot be granted upon a different ground than that set out in the application. Dupree v. State, 2 App. 613.

2. **Affidavits and other testimony in support of application.**—The requirement that the application shall be supported by the affidavits of at least two credible persons, residents of the county of the prosecution, is not met by the affidavit of the defendant and one other person. O'Neal v. State, 14 App. 582; Macklin v. State, 53 App. 197, 109 S. W. 145; Gibson v. State, 53 App. 349, 110 S. W. 41.

When there is a full investigation of the facts as to whether defendant could obtain a fair and impartial trial, he cannot be heard to complain that he was not allowed to file additional affidavits. Long v. State, 32 App. 140, 22 S. W. 409. When the testimony as to prejudice is meager and witnesses testify that defendant can get a fair and impartial trial, change is properly refused. Blain v. State, 34 App. 448, 31 S. W. 368.

On the hearing of the motion by the court, the orders of the courts in other cases granting the defendant change of venue on account of prejudice are admissible in evidence. Blain v. State, 34 App. 448, 31 S. W. 368.

In view of this article the words "means of knowledge" in article 633 should not be given a restricted meaning, and the counter affidavits filed by the state were sufficient to raise an issue on both grounds of the motion. Lemons v. State, 59 App. 299, 128 S. W. 416.

Under this article the overruling of verbal and written motions for such change, unsupported by any affidavits, was proper. Williams v. State (Cr. App.) 144 S. W. 622.

An affidavit for change of venue, which was sworn to by accused attorney, could not be considered. Luttrell v. State, 70 App. 183, 157 S. W. 157.

An application for change of venue, drawn in accordance with the Code provisions, and to which no controverting affidavit was filed, on objection that it was sworn to before one of defendant's attorneys, should have been permitted to be sworn to before the clerk. Simonds v. State (Cr. App.) 175 S. W. 1064.

3. **Grounds in general.**—Where both the grounds mentioned in the preceding article are set up in the application, the defendant is entitled to a change of venue if he establishes either. Carr v. State, 19 App. 635, 53 Am. Rep. 395.

The prejudice of the trial judge is not alone sufficient to require change of venue. Gaines v. State, 38 App. 202, 42 S. W. 385; Johnson v. State, 31 App. 456, 20 S. W. 985.

4. **Local prejudice.**—As to review of decision, see art. 634, post.

Change of venue was applied for upon the ground that the accused could not secure a fair trial by an impartial jury, because of the prejudice prevailing against him throughout the county. The proof shows that whatever prejudice existed against the accused was confined to a single section of the county, and it is made to appear that none of the jurors who tried the case resided in that section of the county. Held, that the refusal of the trial court to change the venue was not error. Johnson v. State, 26 App. 399, 9 S. W. 762. See, also, Barnett v. State (Cr. App.) 176 S. W. 580.

A motion for change of venue for prejudice held properly denied under the evidence. Ferguson v. State, 61 App. 152, 136 S. W. 465; Hutcherson v. State, 62 App. 1, 136 S. W. 53; Hemphill v. State (Cr. App.) 170 S. W. 154.

Evidence held to show that the denial of a change of venue for prejudice of the inhabitants of the county constituted an abuse of discretion. Streight v. State, 62 App. 453, 138 S. W. 742; Coffman v. State, 62 App. 88, 136 S. W. 779; Sorrell v. State (Cr. App.) 169 S. W. 299.

When evidence clearly shows prejudice, general in the county, no matter whether it is against the defendant or his case, venue should be changed. *Meyers v. State*, 39 App. 500, 46 S. W. 817; *Coffman v. State*, 62 App. 88, 136 S. W. 779.

Prejudice and prejudgment mean the same thing, and if there has been such prejudgment that defendant cannot get a fair and impartial trial, venue should be changed. *Gallaher v. State*, 40 App. 296, 50 S. W. 388.

This article refers to a "prejudice" which may exist either as against defendant himself or by reason of a prejudgment of his cause. *Randle v. State*, 34 App. 43, 28 S. W. 953.

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 cannot 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. *Randle v. State*, 34 App. 43, 28 S. W. 953.

Where the evidence showed such a strong prejudice that it was unlikely that a fair and impartial jury could be obtained, the court should grant change of venue. *Barnes v. State*, 42 App. 297, 59 S. W. 883, 96 Am. St. Rep. 801.

On an application for change of venue for prejudice of the inhabitants, the question is whether the court may know, considering the mode provided for the selection of jurors, that a jury will be obtained that will not be influenced by the passions of the hour or public sentiment, who have not prejudged the case, and would not consider matters outside the evidence. *Streight v. State*, 62 App. 453, 138 S. W. 742.

Under Code Cr. Proc. art. 692, § 13, providing that although a juror may have received an impression or formed an opinion from reading newspaper accounts of the homicide, communications, reports, or mere rumor, yet if he, on oath, states that such impression or opinion will not influence his action or disable him from rendering a fair and impartial verdict, he shall not be disqualified as a juror, a defendant, seeking a change of venue on such ground, must not only show that such publications, etc., were made, but that, by reason thereof, there was created in the public mind so great a prejudice as would prevent a fair and impartial trial in the county. *Myers v. State* (Cr. App.) 177 S. W. 1167.

5. **Dangerous combination against accused.**—It devolves upon accused to clearly establish the 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 App. 119, 16 S. W. 761. See *Miller v. State*, 31 App. 609, 21 S. W. 925, 37 Am. St. Rep. 836.

Conduct and threats of a mob may be ground for change of venue. *Miller v. State*, 32 App. 320, 20 S. W. 1103; *Steagald v. State*, 22 App. 464, 3 S. W. 771. See *Massey v. State*, 31 App. 371, 20 S. W. 758.

That the sheriff, apprehensive of mob violence and called for troops, which troops were present at the trial, held not to require change of venue. *Harrison v. State* (Cr. App.) 43 S. W. 1002.

In a prosecution for murder, evidence on a motion for change of venue, on the ground of the existence of a combination of influential persons, whereby a fair trial would be prevented, held to show that such combination did not exist. *Barnett v. State* (Cr. App.) 176 S. W. 580.

In a prosecution for murder, evidence that the county officers had promptly arrested defendant, that the grand jury had reconvened, and that the cause was set for hearing five days after service of a copy of the indictment, did not show a "combination of influential persons," within the meaning of the statute, entitling a defendant to a change of venue on that ground. *Myers v. State* (Cr. App.) 177 S. W. 1167.

6. **Agreement affecting right to change.**—An agreement at one term that the court may continue the case if the defendant would not move for change of venue at next term does not bind defendant. *Luttrell v. State*, 40 App. 651, 51 S. W. 930.

7. **Misdemeanor cases.**—See notes under arts. 18 and 626, ante.

8. **Change as to one of several defendants.**—Change as to one of several jointly indicted is change as to all. *Cock v. State*, 8 App. 659. But see *Krebs v. State*, 8 App. 1.

9. **Second change of venue.**—Only one change of venue is allowable at the instance of a defendant. *Webb v. State*, 9 App. 490; *Rothschild v. State*, 7 App. 519.

10. **Hearing and determination.**—Defendant's presence is not necessary. *Rothschild v. State*, 7 App. 519.

11. **Review of discretion of trial court.**—See arts. 634, 938, and notes.

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.]

See Willson's Cr. Forms, 842, 846.

See art. 628, and notes.

Construction and operation in general.—See *Sims v. State*, 36 App. 154, 36 S. W. 256.

Affidavit.—When the record shows that the court had the sheriff sworn and he testified that no jury could probably be had in the county, this is not tantamount to a written affidavit, as required by this article. But under article 613 the court can of its own motion change the venue, and unless some prejudice to defendant is shown, the court's discretion in changing the venue will not be revised. *Gray v. State*, 43 App. 300, 65 S. W. 375.

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.]

See Willson's Cr. Forms, 838, 843.

Time for filing application.—Though filed after the state has announced, the application is in time if filed before the accused has announced. *Carr v. State*, 19 T. Cr. R., 635, 53 Am. Rep. 395.

Court can set aside continuance and change the venue, try the case or make other disposition of it. *Hamilton v. State*, 40 App. 467, 51 S. W. 217.

A defendant, who had not announced ready for trial, and whose motion for a continuance on the ground of the absence of his principal counsel, who was most familiar with the facts, witnesses, etc., had been overruled, was not thereby deprived of the right to thereafter file his application for a change of venue. *Simonds v. State* (Cr. App.) 175 S. W. 1064.

Time for hearing and determination of application.—It is not necessary to summon a special venire before a change of venue can be granted. *Sims v. State*, 36 App. 154, 36 S. W. 256.

Disposition of other motions and pleas.—This article evidently contemplates that all questions relating to the form of the indictment, and other incidental questions, must be raised and disposed of before a change of venue, and that nothing should remain thereafter but the trial of the general issue. *Caldwell v. State*, 41 Tex. 86; *Loggins v. State*, 8 App. 434; *Ex parte Cox*, 12 App. 665. See *Barr v. State*, 16 App. 333.

This article requires that all matters which do not affect the substance of the charge must be disposed of before the defendant applies for change of venue. *Vance v. State*, 34 App. 395, 30 S. W. 792, and cases cited; *Goode v. State*, 57 App. 220, 123 S. W. 597.

Where the original indictment and the copy served on accused were identical, accused was not entitled to service of another copy thereof, especially where motion was made in the court to which a change of venue had been allowed; this article contemplating that all questions relating to the form of indictments, and those not relating to the substance of the charge which defendant may desire to make, must be heard by him before he applies for a change of venue. *Goode v. State*, 57 App. 220, 123 S. W. 597.

The provision of this article that a plea of not guilty shall be entered before change of venue is ordered, is directory only. *McGregor v. State*, 71 App. 604, 160 S. W. 711. And see *Carr v. State*, 19 App. 365, 53 Am. Rep. 395.

In view of art. 232, providing that an indictment is considered as presented when it has been duly acted on by the grand jury and received by the court, and Supreme Court Rule 110 (142 S. W. xxv) declaring that the record must show that the indictment was presented in open court by a quorum of the grand jury, and this article, where the record of the return of an indictment only showed that, on a specified date, the grand jury appeared in open court and presented the following true bill of indictment, etc., a motion to quash because it did not appear that the indictment was presented by a "quorum of the grand jury" should have been made in the court of original jurisdiction and, being a mere matter of procedure, could not be made in the court to which the venue was changed. *Serrato v. State* (Cr. App.) 171 S. W. 1133.

Under this article a motion to quash an indictment for an irregularity in the grand jury came too late after change of venue. *Vasquez v. State* (Cr. App.) 172 S. W. 225.

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.]

See Willson's Cr. Forms, 838, 850.

See *Cox v. State*, 8 App. 254, 34 Am. Rep. 746; *Brown v. State*, 6 App. 286; *Preston v. State*, 4 App. 186; *Mondragon v. State*, 33 Tex. 480; *Rothschild v. State*, 7 App. 519; *Harrison v. State*, 3 App. 558.

Necessity of transferring case to nearest county.—Case may be sent to other than nearest county. *Woodson v. State*, 24 App. 153, 6 S. W. 184; *Bohannon v. State*, 14 App. 271. And see *McCoy v. State*, 27 App. 415, 11 S. W. 454.

As this article requiring criminal causes upon change of venue to be removed

to some adjoining county, was enacted before the construction of railroads, and as the right of accused is not to direct the county in which the change shall be had, but only to a fair trial the trial court may, under article 626, direct the change to be made to a county the courthouse of which, though not nearest to that of the county wherein the prosecution is pending, is most easily accessible therefrom; the statutory provision being for the convenience of witnesses in the days before railroads. *Coffman v. State* (Cr. App.) 165 S. W. 939.

Judicial notice.—The Court of Criminal Appeals will take judicial notice that, at the time of the enactment of this article, requiring a change of venue in a criminal case to be made to the next adjoining county the courthouse of which was nearest that of the county in which venue was laid, there were no railroads in the county affording access from one county seat to another. *Coffman v. State* (Cr. App.) 165 S. W. 939.

Change from county to which case is sent on court's own motion.—*Frizzell v. State*, 30 App. 42, 16 S. W. 751; *Thurmond v. State*, 27 App. 347, 11 S. W. 451.

Not applicable to change by court on its own motion.—It is only in cases where in the application for change of venue is made by the state or the defendant that the case must be sent to the nearest county. The rule does not apply to changes made by the judges of their own motion. *Frizzell v. State*, 30 App. 42, 16 S. W. 751.

Co-defendants.—Where persons were jointly indicted and a severance was ordered after which a change of venue was applied for, it was not error to change the venue as to different defendants to different counties. *Wilson v. State*, 70 App. 3, 155 S. W. 242.

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.]

See Willson's Cr. Forms, 838.

Ante, art. 631, and notes. And see *Preston v. State*, 4 App. 186; *Brown v. State*, 6 App. 286; *Cox v. State*, 8 App. 254, 34 Am. Rep. 746; *Bohannon v. State*, 14 App. 271; *Rothschild v. State*, 7 App. 519; *Harrison v. State*, 3 App. 559; *McCoy v. State*, 27 App. 415, 11 S. W. 454.

Art. 632a. Change of venue in certain cases.—Any officer or member of the military forces of this state, who is indicted or sued for any injury to persons or property done while performing, or endeavoring to perform, any duty required of him by this law, shall have the right, and it is hereby made the duty of the court in which such indictment or suit is pending, upon the application of the person so indicted or sued, to remove the venue of such cause to some court of competent jurisdiction in another county not subject to the same or some other disqualification; provided, such application is supported by the affidavit of two credible persons to the effect that they have good reason to believe that the defendant can not have a fair and impartial trial before such court. [Act 1905, p. 204, ch. 104, § 133.]

Explanatory.—The above provision was omitted from the revised C. C. P. of 1911, and, in view of the decisions in *Berry v. State* (Cr. App.) 156 S. W. 626 and *Stevens v. State*, 70 App. 565, 159 S. W. 505, is inserted in this compilation.

Knowledge of affiants.—Under this article, where a member of the national guard indicted for murder committed while doing guard duty applied for a change of venue, and filed an affidavit supported by necessary compurgators, and the county attorney elected not to attack the credibility of the latter but only their means of knowledge, it was the duty of the court to grant the change; the statute not contemplating a trial of the question whether accused could or could not get a fair trial in the county. *Manley v. State*, 62 App. 392, 137 S. W. 1137.

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.

See Willson's Cr. Forms, 847-849.

See *Crow v. State*, 4 App. 374; *Scott v. State*, 23 App. 521, 5 S. W. 142; *Cravey v. State*, 23 App. 677, 5 S. W. 162; *Blain v. State*, 34 App. 448, 31 S. W. 368; *Rowland v. State*, 35 Tex. 487.

Cited, *Mooney v. State* (Cr. App.) 176 S. W. 52.

Necessity and mode of controverting testimony.—See *Smith v. State*, 21 App. 277, 17 S. W. 471, and cases cited; *Rowland v. State*, 35 Tex. 487; *Harrison v. State* (Cr. App.) 43 S. W. 1002.

The court may examine the compurgators touching their means of knowledge with regard to the facts. *Buie v. State*, 1 App. 452; *Dixon v. State*, 2 App. 531; *Dupree v. State*, Id. 613.

And may take the sworn statements of citizens as to the existence of the alleged local prejudice. *Labbaite v. State*, 6 App. 257; *Crow v. State*, 41 Tex. 463; *Winkfield v. State*, Id. 149; *Grissom v. State*, 4 App. 374; *McCarty v. State*, Id. 461; *Pierson v. State*, 21 App. 14, 17 S. W. 468.

If the defendant's application for a change of venue complies with the requirements of the statute, and is not properly controverted when it comes on to be heard, no triable issue is raised, and he is entitled to the change of venue as a matter of right. *Davis v. State*, 19 App. 201. *Simonds v. State* (Cr. App.) 175 S. W. 1064.

The court may receive counter affidavits or resort to any legitimate method or proof. *Cotton v. State*, 32 Tex. 614.

Change of venue was sought by the defendant in this case upon the ground that the prejudice against him in the county of the forum was so great that he could not obtain a fair and impartial trial. The affidavits of his compurgators were traversed by counter affidavits on behalf of the state. A large number of witnesses testified pro and con as to the credibility and means of knowledge of the defendant's compurgators, and, over the objection of the defendant—who contended that the investigation should be confined solely to the credibility and means of knowledge of his compurgators—the trial court permitted the contesting witnesses to testify directly as to the existence or nonexistence of the prejudice alleged in the affidavits supporting the application for the change of venue. Held, that the proceeding was correct, and the objection was properly overruled. *Meuly v. State*, 26 App. 274, 9 S. W. 563, 8 Am. St. Rep. 477; *Byrd v. State*, 26 App. 374, 9 S. W. 759; *Halsell v. State*, 29 App. 22, 18 S. W. 418; *Blackwell v. State*, 29 App. 194, 15 S. W. 597; *Lacy v. State*, 30 App. 119, 16 S. W. 761; *Nalley v. State*, 30 App. 456, 17 S. W. 1084; *Johnson v. State*, 26 App. 399, 9 S. W. 762.

Form and sufficiency of controverting affidavits.—See *Pierson v. State*, 21 App. 14, 17 S. W. 468; *Smith v. State*, 21 App. 277, 17 S. W. 471; *Cotton v. State*, 32 Tex. 614; *Logan v. State*, 39 App. 573, 47 S. W. 645; *Buford v. State*, 43 Tex. 415.

Mere negative controverting affidavits held not to overcome direct supporting affidavits. *Walker v. State*, 42 Tex. 360.

The credibility of the compurgators, or their means of knowledge, may be controverted by the affidavit of a credible person, and such attacking affidavit may be made by the district attorney. *Dunn v. State*, 7 App. 600.

The controverting affidavit on the part of the state must directly impeach the credibility of the compurgators, or show that their means of knowledge are not sufficient to support and justify the statements contained in their affidavits. A triable issue on the application is raised only when the state has filed a contesting affidavit in compliance with the preceding article. *Davis v. State*, 19 App. 201.

Where both the grounds mentioned in art. 628, ante, are alleged in the application, and the controverting affidavit assails but one of them, the change of venue should be awarded upon the other. *Carr v. State*, 19 App. 635, 53 Am. Rep. 395.

For a controverting affidavit held to be sufficient, see *Hunnicut v. State*, 20 App. 632.

The district attorney is not required to make or sign affidavits controverting motion for change of venue. *Baw v. State*, 33 App. 24, 24 S. W. 293.

Accused moved for a change of venue on both grounds mentioned in art. 628, and the state filed an affidavit that the accused's affiants did not have sufficient acquaintance and knowledge of the people throughout the county, and had not sufficient information to justify their statement that prejudice existed against accused, and were wholly unacquainted with the feeling and sentiment in the county upon the case. Held, that the words "means of knowledge" in this article should not be given a restricted meaning, and the counter affidavits filed by the state were sufficient to raise an issue on both grounds of the motion. *Lemons v. State*, 59 App. 299, 128 S. W. 416.

A controverting affidavit averred that the compurgators had not sufficient knowledge and acquaintance with the people throughout the county to justify their statements made in their affidavits; that the county was large, and contained numerous qualified jurors who knew nothing of the case; that the scene of the homicide was in a remote part of the county; and that no great excitement had been created thereby outside of the immediate community. Held, that the controverting affidavit attacked the means of knowledge of the defendant and his compurgators, and properly raised an issue requiring the introduction of evidence. *Barnett v. State* (Cr. App.) 176 S. W. 580.

Additional affidavits.—Permitting state to file a second installment of controverting affidavits held not error. *Baw v. State*, 33 App. 24, 24 S. W. 293. Striking out additional supporting affidavits filed by defendant held not error. *Long v. State*, 32 App. 140, 22 S. W. 409.

Burden of proof.—When an application is properly contested the burden of proof upon the issue thus raised is upon the applicant. *Davis v. State*, 19 App. 201; *Pierson v. State*, 21 App. 14, 17 S. W. 468; *Lacy v. State*, 30 App. 119, 16 S. W. 761.

Credibility of witnesses.—In determining as to the credibility of the compurgators the court may inquire into their motives, intent, and feelings, relationship to the party and the like, and their opportunities and means of knowledge. A person may be a truthful man, and still not a credible witness in matters involving information, feeling, prejudice and the like. *Dunn v. State*, 7 App. 600; *Hemming v. State*, 24 App. 315, 6 S. W. 137. See *Winkfield v. State*, 41 Tex. 148; *Smith v. State*, 31 App. 14, 19 S. W. 252.

Whether a witness on such inquiry has formed an opinion as to the guilt or innocence of the defendant is not material. *Myers v. State*, 7 App. 640.

The credibility of the controverting affiant is an issue for the determination of

the trial judge. His credibility can not be impugned merely upon the grounds that he was the physician of the injured party, or that he is a witness in the case for the prosecution. *Smith v. State*, 21 App. 277, 17 S. W. 471.

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.

See *Ellison v. State*, 12 App. 557.

Review on appeal in general.—The action of the trial court, changing or refusing to change the venue of a cause, will not be revised on appeal, unless it is made clearly to appear that such action was an abuse of the discretion confided to the trial judge, and was prejudicial to the defendant. *Cox v. State*, 8 App. 254, 34 Am. Rep. 746; *Myers v. State*, 8 App. 321; *Grissom v. State*, Id. 386; *Clampitt v. State*, 9 App. 27; *O'Neal v. State*, 14 App. 582; *Martin v. State*, 21 App. 1, 17 S. W. 430; *Johnson v. State*, 4 App. 268; *Labbaite v. State*, 6 App. 257; *Long v. State*, Id. 613; *Daugherty v. State*, 7 App. 480; *Noland v. State*, 3 App. 598; *Grissom v. State*, 4 App. 374; *McCarty v. State*, 4 App. 461; *Cotton v. State*, 32 Tex. 614; *Bohannon v. State*, 14 App. 271; *Gaines v. State*, 38 App. 202, 42 S. W. 335, and cases cited; *McGee v. State*, 14 App. 366; *Baw v. State*, 33 App. 24, 24 S. W. 293; *Lacy v. State*, 30 App. 119, 16 S. W. 761; *Gaines v. State* (Cr. App.) 37 S. W. 331; *Harris v. State* (Cr. App.) 148 S. W. 1074; *Stoner v. State*, 72 App. 482, 162 S. W. 836; *Mooney v. State* (Cr. App.) 176 S. W. 52; *Barnett v. State* (Cr. App.) 176 S. W. 580.

The rule in civil cases that objections to a change of venue not made in the court below will not be considered on appeal, has been extended and applies in criminal cases, and in the absence of such objection duly taken and saved, the order changing the venue can not be attacked in the tribunal to which the venue has been changed by plea to the jurisdiction or otherwise. *Harrison v. State*, 3 App. 558; *Preston v. State*, 4 App. 186; *Brown v. State*, 6 App. 236; *Rothschild v. State*, 7 App. 519; *Krebs v. State*, 8 App. 1; *Ex parte Cox*, 12 App. 665.

Presumption that order for change was made before adjournment of the term will be indulged; it not being necessary that the order should contain the caption showing the term at which it was made. *Fitzpatrick v. State*, 37 App. 20, 38 S. W. 806.

In absence of a clear showing sustaining a motion for change of venue on the ground of prejudice and of the evidence in the record upon which the trial court acted in denying the motion, it must be assumed on appeal that its action was proper. *Joy v. State*, 57 App. 93, 123 S. W. 584.

An accused cannot claim that a change of venue was unauthorized, where, though present, he did not object thereto. *Kemper v. State*, 63 App. 1, 138 S. W. 1025.

Refusal of the court changing on its own motion the place of trial of a criminal case from one county to another county in the district of the presiding judge to retransfer the case to the original county is not reviewable where there was no motion or affidavit for the retransfer, but merely a verbal suggestion of accused's counsel. *Treadway v. State* (Cr. App.) 144 S. W. 655.

An order on the court's own motion as authorized by article 626, changing the venue from one county to another within the district of the judge of the court, is not reviewable on appeal in the absence of any exception or objection thereto; the order reciting that accused and his counsel were personally present at the time it was made. *Treadway v. State* (Cr. App.) 144 S. W. 655.

In a prosecution for murder, where defendant applied for a change of venue on the statutory ground of such prejudice against him in the county that he could not obtain a fair trial, and showed the publication of the remarks and conduct of the same trial judge when the jury acquitted another charged with killing the predecessor of the railroad terminal superintendent, whom defendant had killed, but did not ask the publishers as to the state of public feeling against him, and called no witnesses residing outside of the city of Ft. Worth as to the state of feeling existing among the 10,000 qualified jurors in the county outside of the city, there was no abuse of the trial court's discretion in denying the application. *Myers v. State* (Cr. App.) 177 S. W. 1167.

Bill of exceptions.—See *Harbolt v. State*, 39 App. 129, 44 S. W. 1110.

The action of the court with reference to a change of venue will not be revised on appeal, unless the facts are brought up by bill of exceptions perfected at the term whereat the order was made. *Bowden v. State*, 12 App. 246; *Jackson v. State*, 30 App. 664, 18 S. W. 643; *Kutch v. State*, 32 App. 184, 22 S. W. 594; *Adams v. State*, 35 App. 235, 33 S. W. 354; *Underwood v. State*, 38 App. 193, 41 S. W. 618; *Wright v. State*, 40 App. 448, 50 S. W. 940; *Blackwell v. State*, 29 App. 194, 15 S. W. 597; *King v. State* (Cr. App.) 64 S. W. 246; *Gibson v. State*, 53 App. 349, 110 S. W. 41, and cases cited; *Goode v. State*, 57 App. 220, 123 S. W. 597; *Smith v. State*, 31 App. 14, 19 S. W. 252; *Jackson v. State*, 63 App. 351, 139 S. W. 1156; *Treadway v. State* (Cr. App.) 144 S. W. 655; *Vines v. State* (Cr. App.) 148 S. W. 727.

Where exceptions to the refusal of an application made by defendant for change of venue were reserved, and thereafter the defendant applied for and obtained a continuance of the cause to the next term of the court, such exception will not be considered on appeal. *Ellison v. State*, 12 App. 557. See, further, as to necessity

and requisites of bill of exceptions in such case, *Pruitt v. State*, 20 App. 129; *Preston v. State*, 4 App. 186; post, art. 744.

The bill of exceptions should contain the evidence adduced, otherwise the case will not be reversed. *Underwood v. State*, 38 App. 193, 41 S. W. 618.

The exception must have been taken and reserved in the court by which the change is ordered. *Gibson v. State*, 53 App. 349, 110 S. W. 41.

— **In what court taken.**—Exception must be taken and reserved in the court by which the change was ordered. *Harrison v. State*, 3 App. 558; *Preston v. State*, 4 App. 186; *Brown v. State*, 6 App. 286; *Rothschild v. State*, 7 App. 519; *Krebs v. State*, 8 App. 1; *Bowden v. State*, 12 App. 246; *Ex parte Cox*, 12 App. 665; *Blackwell v. State*, 29 App. 194, 15 S. W. 597; *Lacy v. State*, 30 App. 119, 16 S. W. 761; *Jackson v. State*, 30 App. 664, 18 S. W. 643; *Miller v. State*, 31 App. 609, 21 S. W. 925, 37 Am. St. Rep. 836; *Gibson v. State*, 53 App. 349, 110 S. W. 41.

— **Time for approval and filing.**—The bill of exceptions complaining of the denial of a change of venue must be filed during term time, or the ruling is not reviewable. *Mitchell v. State*, 71 App. 241, 158 S. W. 815; *McMahan v. State*, 61 App. 489, 135 S. W. 558; *Creed v. State* (Cr. App.) 155 S. W. 240; *Luttrell v. State*, 70 App. 183, 157 S. W. 157; *Mooney v. State* (Cr. App.) 164 S. W. 828; *Wyres v. State* (Cr. App.) 166 S. W. 1150.

The act of 1903 [arts. 844a, post] allowing bills of exception to be filed 20 days after adjournment of term does not relate to or affect this article regulating bills of exception on the action of the court on a motion for change of venue. *Wallace v. State*, 46 App. 341, 81 S. W. 967; *Lax v. State*, 46 App. 628, 79 S. W. 579; *Canon v. State*, 59 App. 398, 128 S. W. 141; *Sharp v. State*, 71 App. 633, 160 S. W. 369.

A bill of exception to court's action on motion to change venue must be filed during the term, though twenty days has been allowed after adjournment of term in which to file bills of exception and statement of facts, and the act of 1905 [arts. 844a-846, post] relating to stenographer's report of evidence does not affect the statute. *Bink v. State*, 50 App. 445, 98 S. W. 864, 865.

Denial of a change of venue cannot be reviewed, where the testimony taken in support of the motion was not filed and approved during the term. *King v. State*, 57 App. 363, 123 S. W. 135.

The provision that an order granting or refusing a change of venue shall not be revised unless the facts on which it is based are presented in a bill of exceptions filed at the term of court at which the order is made, applies to all matters, not arising on the trial, and hence where bills presenting such matters are not filed at the term at which the proceedings occur, they cannot be reviewed. *Hemp-hill v. State* (Cr. App.) 170 S. W. 154.

— **Conclusiveness and effect of bill.**—See notes under art. 744.

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.]

See Willson's Cr. Forms, 851.

Payment of fees.—The clerk of the district court is entitled to have his fees paid for making transcript and certified copies of papers as soon as he performs the work. *Escavaille v. Stephens*, 102 Tex. 514, 119 S. W. 842.

Requisites of transcript.—It is not necessary that the transcript contain a caption or that the clerk's certificate state the number of pages. Nor does it require a caption as part of the transcript. *Wolfforth v. State*, 31 App. 387, 20 S. W. 741.

The transcript need not contain the order impaneling the grand jury. *Vance v. State*, 34 App. 395, 30 S. W. 792.

It is not required to transmit a certified copy of the indictment; it being sufficient to transmit the original indictment. *Goode v. State*, 57 App. 220, 123 S. W. 597.

Supplying deficiencies in transcript.—Under this article the court to which a cause has been sent on a change of venue may require the clerk of the court where the prosecution is commenced to place his seal nunc pro tunc on the certificate to the orders embraced in the transcript on a change of venue. *Biggerstaff v. State*, 59 App. 575, 129 S. W. 840.

The better practice requires the court to which a case has been transferred on a change of venue to issue an order in certiorari compelling the clerk of the court transferring the case to complete the record by attaching his seal to the certificate or to permit the state's counsel to withdraw the record for such purpose. *Biggerstaff v. State*, 59 App. 575, 129 S. W. 840.

The court to which a cause is sent on change of venue may issue any order necessary to compel the clerk of the court from which the case was sent to supply any deficiencies in the transcript which may be necessary to a full understanding of the previous proceedings. *Brown v. State*, 6 App. 286; *Wolfforth v. State*, 31 App. 387, 20 S. W. 741. If the transcript fails to show the order of transfer, such defect can not be supplied by parol proof, unless it be shown that a copy of such order can not be obtained. *Valentine v. State*, 6 App. 439; *Byrd v. State*, 26 App. 374, 9 S. W. 759.

Proof of transfer on trial of cause.—Where, after change of venue, counsel for the state asked the court if it was necessary in order to show jurisdiction that

they should offer the transcript, and the court stated that it was not, but that it would take judicial notice of that, and the transcript was not exhibited or read to the jury, and no reference made as to who procured the transfer, and it did not appear that the jury had any information from which they could have concluded that accused sought the change of venue, accused was not prejudiced. *Goode v. State*, 57 App. 220, 123 S. W. 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 Willson's Cr. Forms, 851.

See *Byrd v. State*, 26 App. 374, 9 S. W. 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.]

See Willson's Cr. Forms, 838.

Necessity of recognizance.—Order to change venue had no operation until defendant was recognized to appear before the new court. *State v. Butler*, 38 Tex. 560.

Under this article and arts. 638-640 an accused who was not in custody in R. county, but on bond, should have been required to recognize in that county when the venue was ordered changed to W. county, in order to give the court in W. county jurisdiction, even though accused had appeared in W. county at a prior term of court; such appearance not waiving his failure to recognize in R. county. *Harris v. State*, 71 App. 463, 160 S. W. 447.

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.

See Willson's Cr. Forms, 838.

See *Harbolt v. State*, 39 App. 129, 44 S. W. 1110; *Harris v. State*, 71 App. 463, 160 S. W. 447.

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 Willson's Cr. Forms, 839.

See *Harbolt v. State*, 39 App. 129, 44 S. W. 1110; *Harris v. State*, 71 App. 463, 160 S. W. 447.

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.]

See *Ex parte Springfield*, 28 App. 27, 11 S. W. 677; *Harris v. State*, 71 App. 463, 160 S. W. 447.

Bail.—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 App. 668.

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.

Showing of diligence.—Diligence does not require issuance of new process. *Means v. State*, 10 App. 16, 38 Am. Rep. 640.

11. OF DISMISSING 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.]

See Willson's Cr. Forms, 857-861.

See *Allee v. State*, 28 App. 531, 13 S. W. 991.

Construction and operation in general.—If no bill is found, the defendant is entitled to a discharge, even though the only reason why a bill was not presented was because of the absence of the state's attorney and the inability of the court to find some one to act pro tem. *Bennett v. State*, 27 Tex. 701; *Ex parte Porter*, 16 App. 321. When the prosecution is dismissed it is a termination of that prosecution, and there is no legal authority to detain the accused in custody when no new proceedings have been instituted against him by complaint or otherwise. *Venters v. State*, 18 App. 198. It seems that a dismissal may be set aside at any time during the term, and certainly so, if done with the consent of the defendant. *Farry v. State*, 21 Tex. 746.

To entitle defendant to a discharge, a grand jury must have met and been discharged without indicting. *Ex parte Oakley*, 54 App. 608, 114 S. W. 131.

That the state continued the case twice is no ground for the discharge of accused, where the time covered by both continuances did not cover over two months from the time of the arrest. *Ex parte Young* (Cr. App.) 176 S. W. 50.

Former jeopardy.—See notes under art. 9, ante.

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.]

See Willson's Cr. Forms, 862-864.

See ante, art. 37, and notes; post, arts. 729, 730.

See, also, *Parchman v. State*, 2 App. 228, 28 Am. Rep. 435; *State v. McLane*, 31 Tex. 260; *Kelly v. State*, 36 App. 480, 38 S. W. 39; *Fleming v. State*, 28 App. 234, 12 S. W. 695; *Venters v. State*, 18 App. 198; *Ex parte McNamara*, 33 App. 363, 26 S. W. 506.

Compelling testimony on granting immunity, see ante, art. 4, and notes.

TITLE 8

OF TRIAL AND ITS INCIDENTS

<p>Chap.</p> <ol style="list-style-type: none"> 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. <ol style="list-style-type: none"> 1. General rules. 	<p>Chap.</p> <ol style="list-style-type: none"> 7. Of evidence in criminal actions—Continued. <ol style="list-style-type: none"> 2. Of persons who may testify. 3. Evidence as to particular offenses. 4. Of dying declarations and of confessions of the defendant. 5. Miscellaneous provisions. 8. Of the depositions of witnesses and testimony taken before examining courts and juries of inquest.
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CHAPTER ONE

OF THE MODE OF TRIAL

<p>Art.</p> <ol style="list-style-type: none"> 644. Jury the only mode of trial, except upon issues of fact, etc. 645. Jury shall consist of what number. 645a. Same; criminal district court of Harris county. 646. Defendant must be personally present, etc., when. 647. In other misdemeanors defendant may appear by counsel, when. 648. Defendant on bail in felony case placed in custody before trial, etc. 	<p>Art.</p> <ol style="list-style-type: none"> 649. Surety still bound in case of mistrial. 650. Criminal docket shall be kept. 651. District court, on first day, shall fix day for taking up criminal docket. 652. County court shall hold a term for criminal business. 653. Defendant required to plead when case is called for trial. 654. Meaning of term "called for 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.]

Trial by jury.—See *Short v. State*, 16 App. 44; Const., art. 1, sec. 15; ante, arts. 10, 21 and 28, and notes.

Waiver of trial by jury.—In misdemeanors involving a pecuniary fine as a penalty, the case may be tried on an agreed state of facts, as in civil causes, *State v. Jones*, 18 Tex. 874, and a jury may be waived in the county court. *Rasberry v. State*, 1 App. 664.

The state cannot waive a jury, but the defendant may waive a trial by jury. *Schulman v. State* (Cr. App.) 173 S. W. 1195.

Trial by court.—On trial by the court without a jury, the court is not authorized to file conclusions of fact and law, as in a civil action. *Morris v. State* (Cr. App.) 163 S. W. 709.

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.

In general.—Const., art. 5, secs. 13 and 17; arts. 10, 21 and 22, and notes.

See *Muely v. State*, 31 App. 155, 18 S. W. 411, 19 S. W. 915; *Essery v. State*, 72 App. 414, 163 S. W. 17; *Ethridge v. State* (Cr. App.) 172 S. W. 786.

In the district court.—*Jester v. State*, 26 App. 369, 9 S. W. 616, and cases cited.

Where the record merely states that the court impaneled the following jury, naming eleven, or states that twelve men came but names only eleven, it cannot be presumed that there were twelve jurors impaneled. *Rich v. State*, 1 App. 206; *Huebner v. State*, 3 App. 458, but see *Gerard v. State*, 10 App. 690.

But the record need not name the jurors, though it is better to do so if there is objection to any of them. *Morton v. State*, 3 App. 510.

In the county court.—Number of jurors in county court. Post, art. 766.

Where the record on appeal recites that a jury of lawful men came, but names only the one who signed the verdict as foreman, it cannot be presumed that five others were impaneled and sworn. *Marks v. State*, 10 App. 334.

A defendant can agree to be tried before less than six jurors. *Stell v. State*, 14 App. 59; *Schulman v. State* (Cr. App.) 173 S. W. 1195.

Art. 645a. Same; criminal district court of Harris county.—Said Criminal District Court of Harris County [ante, arts. 97m-97v] shall try all misdemeanor cases coming before it with six jurors instead of twelve jurors, unless a jury be waived by the defendant. [Act 1911, p. 112, ch. 67, § 10.]

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.]

When the above article was carried into the revision of 1911 it had been superseded by Act 1907, p. 31, ch. 19, § 1. The revisers of 1911 overlooked the fact of supersession and incorporated the above section of the act of 1907 into the new code as art. 899 (see same article in this compilation). The new provision is the existing law of the state, in view of such decisions as *Berry v. State* (Cr. App.) 156 S. W. 626 and *Stevens v. State*, 70 App. 565, 159 S. W. 505. Its text is as follows:

In all prosecutions for felonies, the defendant must be personally present at the trial, and he must likewise be present in all cases of indictment 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, ch. 19, § 1, superseding art. 633, revised C. C. P. 1895.]

In general.—The defendant must not only be within the walls of the courthouse, but in the very room in which the case is conducted. *Brown v. State*, 38 Tex. 482.

It is error to take any step during the trial, no matter how trivial in the absence of the defendant, and such error renders the proceedings void. *Gibson v. State*, 3 App. 439; *Conn v. State*, 11 App. 390; *Mapes v. State*, 13 App. 85; *Rudder v. State*, 29 App. 262, 15 S. W. 717.

When defendant steps out of the court room during the impaneling of the jury and reading of the indictment without the knowledge of the court, the defendant can waive his presence for the time, or, if he did not wish to waive, he should have presented the matter to the court at the time. *O'Toole v. State*, 40 App. 580, 51 S. W. 244.

Restraint of defendant.—In a prosecution for murder, where the sheriff on one occasion did not take the handcuffs off the accused until the jury were taking their seats, but it did not appear that the jury saw him take the handcuffs off accused, such custody or restraint of accused was not reversible error. *Guerrero v. State* (Cr. App.) 171 S. W. 731.

Where accused, as member of a company illegally organized in Texas to invade Mexico, was on trial for the killing of a deputy sheriff as an incident to the conspiracy to prevent discovery, and the other conspirators were only captured after having fired at the sheriff and another deputy and also attempting to resist the posse and a company of United States soldiers, defendant was not prejudiced because certain of the alleged co-conspirators were brought into the court room during the trial of accused manacled. *Martinez v. State* (Cr. App.) 171 S. W. 1153.

Presence of counsel.—The presence of counsel for accused is not essential in any case. *Berkley v. State*, 4 App. 122; *Beaumont v. State*, 1 App. 533, 28 Am. Rep. 424; *Summers v. State*, 5 App. 365, 32 Am. Rep. 573; *Richardson v. State*, 7 App. 486.

Presence during particular proceedings.—Necessity of defendant's presence when sentence is pronounced. Post, arts. 855, 866, and notes.

Accused has the right to be present in court in a felony case, when his motion for a new trial is heard, and, if the record on appeal shows affirmatively that his motion for a new trial was heard and determined in his absence, and that he subsequently objected thereto in the court below, the conviction will be set aside and the cause remanded for a new trial. *Gibson v. State*, 3 App. 437; *Berkley v. State*, 4 App. 122; *Krautz v. State*, Id. 534; *Garcia v. State*, 5 App. 337.

In a capital case the defendant need not be present at the drawing of the special venire. *Pocket v. State*, 5 App. 552; *Cordova v. State*, 6 App. 207. Nor when his motion for a change of venue is heard and determined. *Rothschild v. State*, 7 App. 519.

Where the court received a written communication from the jury, the contents of which he did not divulge to the defendant, and orally refused to answer the communication, stating that it was not proper for him to do so, the proceeding was erroneous, since it is an evasion of the defendant's right to be present, to conduct proceedings secretly. *Conn v. State*, 11 App. 390.

Where the trial court, altered its charge, while defendant was not present, the conviction must be reversed whether the alteration was material or immaterial. *Granger v. State*, 11 App. 454.

The defendant is entitled to be present when the judgment is entered against him, and when the sentence is pronounced, and when a motion to enter judgment

nunc pro tunc is heard and determined. *Mapes v. State*, 13 App. 85; *Gordon v. State*, *Id.* 136.

It is not necessary that the defendant be present while the clerk performs the ministerial act of entering up the judgment. *Powers v. State*, 23 App. 42, 5 S. W. 153.

While the defendant is entitled to be present when the jury is selected, he cannot complain where he left the courtroom, and one juror was examined and peremptorily challenged by the state before defendant's absence was discovered. *Powers v. State*, 23 App. 42, 5 S. W. 153.

The court is not authorized to discharge the jury in defendant's absence. *Rudder v. State*, 29 App. 262, 15 S. W. 717.

The court cannot in the absence of the defendant discharge a juror because of sickness in his family. *Upchurch v. State*, 36 App. 624, 38 S. W. 206, 44 L. R. A. 694.

But where the court set aside its order overruling the motion for new trial entered in defendant's absence, and set the motion for rehearing the error was cured. *Gonzales v. State*, 38 App. 62, 41 S. W. 605.

The defendant must be present when the verdict is rendered in a felony case, but he need not be present in a misdemeanor case. *Wyatt v. State*, 49 App. 193, 94 S. W. 219.

The principal in an appeal bond is not bound, on scire facias, to make personal appearance, but may appear by counsel. *Williams v. State*, 51 App. 252, 103 S. W. 929.

A special venire can be ordered, the veniremen drawn and the writ issued, and a criminal case set for trial without the presence of accused or his attorney. *Oliver v. State*, 70 App. 140, 159 S. W. 235.

The rule that defendant in a trial for felony must be present during any and all proceedings of the actual trial did not require that he should be present when the court continued the term in order to finish the trial, as it was authorized to do by Rev. St. 1911, art. 1726. *Bullock v. State* (Cr. App.) 165 S. W. 196.

Effect of absence.—On a trial for murder, after the cross-examination of the state's last witness had begun, it was discovered that the accused was absent, having been taken to the jail by the sheriff through mistake, before the witness was placed on the stand. Further proceedings were suspended and the evidence withdrawn from the jury; but inasmuch as the witness had testified to important facts, a new trial should have been granted. *Bell v. State*, 32 App. 436, 24 S. W. 418.

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 App. 220, 106 S. W. 337.

Where accused, in a prosecution for rape, after the examination of a witness against him, absented himself from the court, and was not present thereafter during the trial, nor while a witness claimed to have testified falsely was giving his evidence, the court, by the absence of accused, lost jurisdiction to continue the trial, and hence the evidence of such witness, though false, did not constitute perjury. *Emery v. State*, 57 App. 423, 123 S. W. 133, 136 Am. St. Rep. 988.

Where accused during a recess of court retired to a room to await the resuming of the trial, expecting to be advised when the court would be ready to proceed, and while he was absent the state introduced material evidence, a new trial must be granted. *Foreman v. State*, 60 App. 576, 132 S. W. 937.

In a prosecution for a felony, where accused had been admitted to bail, his absence from the courtroom while his counsel was presenting his case to the jury will not work a mistrial; the court not having knowledge of his absence, and it being the accused's voluntary act. *Whitehead v. State* (Cr. App.) 147 S. W. 583.

Presenting the objection.—On appeal, to constitute material error, the record must show affirmatively the absence of the defendant, and that the attention of the trial court was called to the fact. *Sweat v. State*, 4 App. 617; *Cordova v. State*, 6 App. 207.

Waiver of right.—When the record shows that defendant's presence on hearing of his motion for a new trial was waived by his counsel, it will be presumed that such waiver was authorized by the defendant. *Escareno v. State*, 16 App. 85; *Bracken v. State*, 29 App. 362, 16 S. W. 192; *Muely v. State*, 31 App. 155, 18 S. W. 411, 19 S. W. 915.

Where a jury came into court during their deliberation and asked that certain evidence be read to them and this was done in the absence of defendant who was out on bond, it was reversible error, even though his counsel stated that he waived his presence. Though the counsel said that he would take no "advantage" or "notice" of the absence, the error was assigned making it necessary for the court to rule upon it. *Hill v. State*, 54 App. 646, 114 S. W. 118, 119.

Where the defendant (in a felony prosecution) was at his boarding house two blocks from the court when notified that the jury had agreed and started at once to the courthouse but arrived just after the verdict was received and the jury discharged, he was not voluntarily absent and case reversed because defendant not present when verdict was received. *Derden v. State*, 56 App. 396, 120 S. W. 486, 487, 133 Am. St. Rep. 986.

After the court's charge in criminal slander was prepared in the judge's chamber and read over to accused's attorney, accused's husband, who was also an attorney, stated to the judge and to accused's attorney and the state's attorney that accused was not feeling well and would not return to court and hear the charge read, unless she had to, when the state's attorney said it was entirely with the accused's husband and her whether she returned. An hour or so afterward the judge, believing all parties were present, began reading the charge to the jury,

and had only read the first part of the charge and the plea of not guilty, when accused and her attorney came into the courtroom. Accused and her attorney were in front of the courthouse when the judge and the crowd went upstairs to reconvene court and read the charge, and his attention was not called to accused's absence until the motion for new trial. Held, that any irregularity in reading a part in accused's absence was not reversible. *Curl v. State* (Cr. App.) 145 S. W. 602.

Misdemeanors.—Where the prosecution is for a misdemeanor punishable by fine and imprisonment, the waiver of defendant's presence at the trial is in violation of law, but where the punishment assessed is a pecuniary fine only, the judgment is not void because of the defendant's absence from the trial. *Cain v. State*, 15 App. 41.

The presence of accused at a misdemeanor trial is not indispensable at every stage of the proceedings. *Selman v. State*, 33 App. 631, 28 S. W. 541.

The statute inhibits any part of the trial in the absence of the defendant in a misdemeanor case where imprisonment is part of the punishment. *Washington v. State*, 52 App. 323, 106 S. W. 361.

Under this and article 634 a bail bond requiring defendant charged with a misdemeanor to make his personal appearance before the court is more onerous than the law requires. *Williams v. State*, 51 App. 252, 103 S. W. 930.

Where defendant in a misdemeanor case voluntarily withdraws himself from the court room for a few minutes while his counsel is addressing the jury, the harm if any is of his own making, and the case will not be reversed on this account. *Killman v. State*, 53 App. 570, 112 S. W. 95, 96.

Defendant in a misdemeanor case, in which it was compulsory for a court to assess a jail penalty, had a right to be present at all stages of the trial. *Ex parte Taylor*, 63 App. 571, 140 S. W. 774.

That the county court, in a trial of a misdemeanor case in which the assessment of a jail penalty was compulsory, charged the jury in the absence of the defendant, was not such an irregularity as to render the judgment void, and did not entitle defendant to relief by habeas corpus. *Ex parte Taylor*, 63 App. 571, 140 S. W. 774.

In view of Pen. Code 1911, art. 1341, and of this article a bail bond in the sum of \$100, conditioned for the defendant's appearance for trial on the charge of the theft of a pair of shoes worth \$4, was not excessive. *Willis v. State* (Cr. App.) 150 S. W. 904.

Where, on conviction of a misdemeanor, no jail penalty was assessed, it was not material that defendant's motion for rehearing was heard in his absence. *Davis v. State*, 70 App. 563, 158 S. W. 283.

In a prosecution for a misdemeanor, where the defendant's counsel stated, when the case was called for trial, that the defendant was too sick to appear and objected to proceeding with the trial in his absence, the court could not try the case in the defendant's absence. *Love v. State*, 71 App. 259, 158 S. W. 532.

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.]

In general.—See ante, art. 646.

If the defendant appears by counsel, the latter need not bring into court the money to pay fine and costs. *Neaves v. State*, 4 App. 1. Where the defendant having been convicted in a justice's court appealed to the county court, and executed an appeal bond, it was held that he had the right to appear in the county court by counsel even without the consent of the attorney representing the state. *Page v. State*, 9 App. 466. Where a defendant is tried in his absence under the provision of the preceding article, he must be under bond to waive the right of appeal, or he must appear at the proper time and enter into recognizance, if he desires the benefit of an appeal. His counsel can not enter in such recognizance for him. *Ferrill v. State*, 29 Tex. 489; *Chaney v. State*, 23 Tex. 24.

Principal in appeal bond may appear by counsel. *Williams v. State*, 51 App. 252, 103 S. W. 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.]

When the above article was carried into the revision of 1911 it had been superseded by Act 1907, p. 31, ch. 19, § 2. The revisers of 1911 overlooked the fact of supercession and incorporated the above section of the act of 1907 into the new code as art. 900 (same article in this compilation). The superseding provision is the existing law of the state in view of the decisions in *Berry v. State* (Cr. App.) 156 S. W. 626; *Stevens v. State*, 70 App. 565, 159 S. W. 505, and other decisions. The text of the new provision is as follows:

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. [Act 1907, p. 31, ch. 19, § 2, superseding art. 635 revised C. C. P. 1895.]

In general.—The sureties are not discharged until the defendant has appeared before the proper court and entered his plea. This may be, and under the statute should be, before the jury is impaneled. There is no interregnum between his bail and his trial. That is his final plea, unless he has been surrendered by his sureties to the sheriff. *Fossett v. State*, 43 App. 117, 67 S. W. 323, 324.

Where one is on bail in a felony case he should not be remanded to jail during the trial but should be permitted to be at large until a verdict of guilty is returned. *Spencer v. State*, 52 App. 289, 106 S. W. 386; *Choice v. State*, 52 App. 285, 106 S. W. 388.

Where a prisoner made a second application for a writ of habeas corpus to obtain bail prior to her trial, it was error to refuse a hearing prior to the trial and to set the application for hearing on the same day the case was set for trial, and to refuse to hear the application except in connection with the trial of the case, on the ground that the court, having heard the first writ, "knew that the evidence offered on the second hearing would be practically the same." *Streight v. State*, 62 App. 453, 138 S. W. 742.

The sheriff may not take accused into custody until after a verdict of guilty has been rendered, and accused will then be taken into custody and his sureties discharged until a new trial is awarded, when he is entitled to his discharge under the bond. *Wiseman v. State*, 70 App. 477, 156 S. W. 683.

Misdemeanors.—The statute permitting persons accused of crime to remain at liberty on bail during the trial does not apply to misdemeanors. *Ex parte Caldwell*, 58 App. 239, 125 S. W. 25.

A person convicted of a misdemeanor is not entitled to liberty on his bail for appearance at trial pending his motion for a new trial. *Ex parte Caldwell*, 58 App. 239, 125 S. W. 25.

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.]

Explanatory.—The above provision is not necessarily inconsistent with the act of 1907 superseding art. 648, though the new act may carry the necessary inference that the liability of the sureties continues in case of a mistrial, since in such case there is no verdict of guilty.

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.]

In general.—It is proper to call a capital case for trial on the return day of the special venire, whether it has then been reached on the docket or not. *Mitchell v. State*, 43 Tex. 512.

This article is controlled in a capital case by 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 App. 202, 42 S. W. 385.

The order in which cases on the docket are called is largely a matter for the trial court's discretion, and its action is not reversible error unless accused is injured thereby. *Goodwin v. State* (Cr. App.) 143 S. W. 939.

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.]

In general.—See Const., art. 5, sec. 17; also, Amendment to Const., Acts, 1883, pp. 134, 135; *Wilson v. State*, 15 App. 150; *Thomas v. State*, 14 App. 200.

A plea of guilty may be received and the cause disposed of in vacation, in the county court. Ante, art. 583.

One convicted at a term of the county court fixed by the commissioners' court, as authorized by Const. art. 5, § 29, cannot complain of the failure of the county court to hold a term every month for criminal business, as required by section 17. *Matthews v. State*, 57 App. 328, 122 S. W. 544.

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.]

In general.—See ante, arts. 563–586, and notes; *Muely v. State*, 31 App. 155, 18 S. W. 411, 19 S. W. 915; *McGrew v. State*, 31 App. 336, 20 S. W. 740.

Where the plea was not entered until after the evidence was all in and the arguments begun, the conviction cannot stand, though there was no prejudice to defendant. *Cole v. State*, 11 App. 67.

The court cannot enter a plea of not guilty for defendant unless the latter refuses to plead when opportunity to do so is given. *Shaw v. State*, 17 App. 225.

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 App. 336, 20 S. W. 740.

It is necessary under the statute that the plea be entered where a party is placed on trial in a criminal case. *Sims v. State*, 49 App. 199, 91 S. W. 580.

Record of plea.—Where defendant's motions for new trial and in arrest, charged that he was not offered the opportunity to plead and asked that the judgment entry reciting a plea be corrected, which motions were supported by uncontradicted affidavits of defendant and bystanders, the motions should have been sustained. *Shaw v. State*, 17 App. 225.

The uncorroborated affidavit of the defendant could not avail against a judgment recital that defendant pleaded not guilty. *Gordon v. State*, 29 App. 410, 16 S. W. 337.

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.]

In general.—See note to art. 651, ante.

This article and article 653 are directory and not mandatory. *McGrew v. State*, 31 App. 336, 20 S. W. 740.

Withdrawal of announcement of ready.—The fact of surprise alone is not a ground for the postponement of the case or withdrawal of announcement of ready. *Morrison v. State*, 40 App. 489, 51 S. W. 358.

Order of cases.—A case can not be called out of its order and defendant forced to trial in advance of a number of cases preceding his on the docket. *Thomas v. State*, 36 Tex. 315.

But the court has some discretion as to the order of its business and where cases are tried out of their regular order, to secure the attendance of jurors or witnesses or to try jail cases first, the convictions will not be reversed unless the defendant was thereby prejudiced. *Nichols v. State*, 3 App. 546; *Jones v. State*, 8 App. 648; *Wright v. State*, 10 App. 476.

Where a case is postponed to procure additional talesmen, the next case can be tried in the meantime. *Jones v. State*, 8 App. 648; *Shehane v. State*, 13 App. 533.

In mere matters of procedure and the order of calling cases, an alleged erroneous ruling will not be reversed in any event, unless injury or injustice is clearly shown. *Todd v. State*, 57 App. 26, 121 S. W. 506.

Where cases of a higher number appeared on the trial docket preceding others of a lower number in regular order, the fact that they were called in the order in which they appeared, and that accused was forced to try an indictment for illegal sale of liquor prior to an indictment for running a disorderly house, of a lower number, was not error. *Todd v. State*, 57 App. 15, 121 S. W. 506.

Where a large number of cases were on the docket for trial on the day accused's case was tried, and, reading from the top to the bottom of the column in which the setting appeared, the causes were in the order, "12,084, 12,083, 12,082," and were called in that order by the court, except that cause No. 12,082 was not tried, accused was not entitled to object that he was forced to trial of case No. 12,084 before the trial of No. 12,082. *Todd v. State*, 57 App. 26, 121 S. W. 506.

Where a case was set for trial over the objection of the defendant on the same day as seventeen other cases, and tried three days later after various dispositions had been made of the other cases, and no motion for continuance was filed by the defendant, there was no abuse of discretion in proceeding with the trial, even though there were a number of days later in the term when it could have been tried, it appearing that special venire cases were originally set for those dates and then continued. *Creech v. State*, 70 App. 229, 158 S. W. 277.

CHAPTER TWO

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

Art.		Art.
655.	Definition of a "special venire."	664a. Officer wilfully or negligently failing to perform duty, penalty.
656.	State may obtain order for special venire, etc.	665. Penalty for putting in or taking from wheel or violating any provisions of this law.
657.	Defendant may obtain special venire, when.	666. In case no jurors, or not a sufficient number have been selected, etc.
658.	Order of court shall state what, and writ shall issue accordingly.	667. Same subject.
659.	Capital case may be set for particular day.	668. Service of writ.
660.	Manner of selecting special venire.	669. Return of writ.
661.	Same.	670. Sheriff shall be instructed by court as to summoning jurors.
661a.	Special venire how summoned.	671. Defendant served with copy of list, etc.
662.	Not to amend or repeal Title 7, Chapter 1.	672. One day's service of copy before trial.
663.	Repeals article 661, as to counties with cities of 20,000.	
664.	Certain officers to select jurors.	

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.]

See Willson's Cr. Forms, 901, 904.

In general.—As to the order and writ, see post, art. 658, and notes.

Amended by act March 14, 1887, p. 20, omitting maximum number of sixty.

The statutes relating to special venire in capital cases are, for the most part, directory, and must be liberally construed. *Harrelson v. State*, 60 App. 534, 132 S. W. 783; *Murray v. State*, 21 App. 466, 1 S. W. 522; *Roberts v. State*, 30 App. 291, 17 S. W. 450, and cases cited.

The court cannot excuse special venire men in the absence of the defendant. *Clay v. State*, 40 App. 604, 51 S. W. 370.

The order for special venire may be made at the term preceding the trial. *Roberts v. State*, 30 App. 291, 11 S. W. 450.

These articles intend to provide the character of venire from which a jury in a capital case is to be selected and the obligation is cast upon the State in the first instance to ask for this special venire. If the State has not acted, and the court has not taken the steps to provide for this special tribunal, it is the defendant's right to object to being tried by any other than a special venire at any time prior to his agreement to be tried by the regular jury. He can, however, waive his right to be tried by a special venire. *Farrar v. State*, 44 App. 236, 70 S. W. 210.

Capital case.—When a charge of murder in the first degree has been reduced by the county attorney dismissing as to that degree and going to trial on a lesser degree, the defendant is not entitled to have a special venire drawn. *Gentry v. State* (Cr. App.) 152 S. W. 635; *Clay v. State*, 70 App. 451, 157 S. W. 164.

Where the defendant is prosecuted for murder in the first, but is convicted of murder in the second degree, and is awarded a new trial, he is not entitled to a special venire. *Cheek v. State*, 4 App. 444.

Murder by a person whom the prosecuting attorney admits is under 17 years of age is not a capital case, and does not entitle accused to a special venire. *Ex parte Walker*, 28 App. 246, 13 S. W. 861; *Walker v. State*, 28 App. 503, 13 S. W. 860.

Where an indictment contained two counts charging robbery and one charging theft from the person, and the county attorney dismissed the counts charging robbery after defendant requested a special venire, it was not error for the court to refuse to summon a special venire. *Miller v. State* (Cr. App.) 169 S. W. 1164.

Number of veniremen.—The writ of special venire must include not fewer than thirty-six persons to be summoned. *Harrison v. State*, 3 App. 558; *Wasson v. State*, 3 App. 474; *Hall v. State*, 28 App. 146, 12 S. W. 739; *Taylor v. State*, 14 App. 340.

It was not an abuse of discretion to refuse accused's request for a venire of 100 instead of 50 men on the ground that, as a codefendant had just been tried, doubtlessly the facts shown on that trial had been extensively circulated in the county, especially since in selecting the jury accused procured 11 jurors out of the panel summoned. *Campbell v. State*, 63 App. 595, 141 S. W. 232, Ann. Cas. 1913D, 853.

Number served or appearing.—The fact that not all of the persons named in the venire were summoned, even if the number summoned be less than thirty-six, does not invalidate the venire. *Hall v. State*, 28 App. 146, 12 S. W. 739; *Taylor v. State*, 14 App. 340.

The fact that one of the named veniremen was dead and another was outside the state is not a sufficient ground for quashing the venire. *Smith v. State*, 21 App. 277, 17 S. W. 471.

On call of special venire, one of the number was found to be absent. Defendant asked for a postponement until the absent juror could be brought in, which was refused, but an attachment was issued for said juror. Upon his appearance, he was peremptorily challenged by defendant. Held, that defendant could not be heard to complain. *Shaw v. State*, 32 App. 155, 22 S. W. 588.

It is not ground for quashing a special venire that only 42 of 100 persons were in attendance, the others being disqualified or excused by the parties where there was no unfairness, the jury was completed out of the first 56 talesmen summoned by order of the court, and defendant had three challenges remaining when the jury was completed. *Martin v. State*, 38 App. 462, 43 S. W. 352.

Though the absence of a large number of the special venire would have been ground for quashing the venire, yet defendant having declined and refused to move to quash it, but elected not to do so, even on suggestion of the court, there was a waiver, so that he cannot complain of the court's refusal to delay trial in order to obtain the presence of such veniremen under attachment; especially where all his challenges to talesmen were sustained, and no objectionable juror was imposed on him. *Chandler v. State*, 60 App. 329, 131 S. W. 598.

Where the veniremen not served with summons were either out of the county or not found, and, of the 45 served, only 4 of those not appearing were unexcused and unaccounted for, leaving 23 present, and no attachments were asked for the absent jurors, a motion to quash the venire was properly overruled. *Williams v. State*, 60 App. 453, 132 S. W. 345.

Where the court ordered a special venire of 200 men, but when the case was called only 67 responded, of whom all were excused by the court, or by consent, except 40, the action of the court in refusing a complete venire out of which to select the jury and in requiring the defendant to proceed with the qualification and selection of the jury, and in summoning talesmen after that part of the venire present was exhausted, was not error, in the absence of a motion to quash the venire, or of showing that defendant suffered any injury. *Johnson v. State*, 63 App. 50, 138 S. W. 1021.

A motion to quash a special venire in a homicide case because only 80 men were drawn and 54 of them summoned, and only 10 of those summoned answered, and some of those summoned were properly excused, was properly denied; accused in no way seeking any attachment for any of the veniremen not attending. *Oliver v. State*, 70 App. 140, 159 S. W. 235.

When the objection that a number of jurors were not summoned was presented to the court, it made an investigation, in which accused's counsel participated, and it was found that those not summoned were not in the county, and that those summoned and not in attendance had served longer than required by law for the term, and the court told them they could leave their excuse for nonattendance with the sheriff, and it would send for them if necessary, and such excuses were submitted to accused's counsel, and the court offered to have the jurors summoned and brought in, but accused's counsel acquiesced in their nonattendance, and did not ask for an attachment, and accused procured a satisfactory jury without exhausting his challenges. Held, that there was no error in not requiring the venire to be quashed. *Ward v. State*, 70 App. 393, 159 S. W. 272.

The fact that but 13 of the original 36 veniremen answered to their names was no ground for quashing the venire. *Keets v. State* (Cr. App.) 175 S. W. 149.

Names of veniremen.—A special venire will not be quashed on account of discrepancies between the names of some of the persons drawn, and the names written in the list served on the defendant, when such persons did not serve on the trial jury, and the defendant did not exhaust his challenges. *Bowen v. State*, 3 App. 617.

Where defendant does not exhaust his peremptory challenges, and no objectionable juror is chosen, it is not reversible error to overrule a motion to quash a special venire on the grounds that the officer changed two of the names in the writ, and then served it as changed. *Williams v. State*, 29 App. 89, 14 S. W. 338.

"Rowland" and "Roland" are idem sonans. *Deckard v. State*, 57 App. 359, 123 S. W. 417.

W. C. "Brackeen" was drawn on the venire, and served as foreman of the jury, and signed the verdict by that name, but signed it so that it looked like "Breechen." Accused's counsel had known the juror for years, and accepted him as a juror, and saw him hand the verdict to the court, and heard it read with his name as foreman without objection. Held, that accused could not have been prejudiced by any apparent misspelling of the juror's name. *Jones v. State*, 63 App. 394, 141 S. W. 953.

Second venire.—Until a special venire has been exhausted or discharged with defendant's consent, it is error for the court to order the issuance and execution of another venire. *Sharpe v. State*, 17 App. 486; *Bates v. State*, 19 Tex. 123; *Hall v. State*, 28 App. 146, 12 S. W. 739.

The law does not authorize the selection of two special venires at the same time. *Foster v. State*, 38 App. 525, 43 S. W. 1009.

Objections to irregularities with reference to the special venire cannot be made for the first time in the motion for new trial. *Perry v. State* (Cr. App.) 45 S. W. 566.

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.

See Willson's Cr. Forms, 901.

In general.—See *Taylor v. State*, 14 App. 340; *Hall v. State*, 28 App. 146, 12 S. W. 739.

As to what is a capital case, see notes to art. 655, ante.

The trial court may, at the request of the state 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 App. 291, 17 S. W. 450.

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 App. 236, 70 S. W. 210.

The 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 v. State*, 44 App. 236, 70 S. W. 210.

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.

See Willson's Cr. Forms, 902.

In general.—As to what is a capital case, see notes to art. 655, ante.

Depriving accused of his right to select his trial jury from the original special venire held error. *Hall v. State*, 28 App. 146, 12 S. W. 739.

Failure to demand special venire.—A party prosecuted for robbery by use of firearms is entitled to a special venire even if it would cause a continuance to grant him one, and to one day's service of a copy of such venire, and it is no answer or excuse that the defendant did not call for such venire. *Burries v. State*, 36 App. 13, 35 S. W. 164.

As to defendant's failure to demand special venire, see *Farrar v. State*, 44 App. 236, 70 S. W. 210.

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.

See Willson's Cr. Forms, 903.

Order.—See *White v. State*, 16 Tex. 206.

The order must be for not less than thirty-six persons. *Harrison v. State*, 3 App. 558; *Wasson v. State*, Id. 474; *Taylor v. State*, 14 App. 346. On appeal the record must show the order for a special venire, or the conviction will not be affirmed, although no objection in limine was made to the organization of the jury. It will not be presumed or inferred that such order was made and entered. *Steagald v. State*, 22 App. 464, 3 S. W. 771. Overruled, *Williams v. State*, 29 App. 89, 14 S. W. 388; *Hall v. State*, 28 App. 146, 12 S. W. 739.

Where no objection was taken in the trial court that the record did not show an order for a special venire, it will be presumed on appeal that such order as the law prescribes was made and entered, or that it was waived. *Williams v. State*, 29 App. 89, 14 S. W. 388, overruling *Steagald v. State*, 22 App. 464, 3 S. W. 771.

Where a capital case was continued for the term order a special venire returnable at the next term. *Roberts v. State*, 30 App. 291, 17 S. W. 450.

Writ.—See *White v. State*, 16 Tex. 206.

It is 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 App. 617.

An objection that the seal impressed on the writ omitted the word "of" before the name of the county, is hypercritical. *Cordova v. State*, 6 App. 208.

A special venire writ which showed the style and number of the case, though in its preliminary recitals it omitted the name of the court or county in which the case was pending, but distinctly stated in the mandatory part that the persons named were to be summoned to be and appear before the district court of Williamson county, Texas, at the courthouse, thereof, in Georgetown town, on a day specified, was held to be sufficient, and not obnoxious to the objection that it did not show in what case it was issued, nor in what cause the said proceedings were pending. *Murray v. State*, 21 App. 466, 1 S. W. 522.

A writ of special venire facias, which was executed and returned by the sheriff, will not be quashed because it was improperly directed to the "sheriff or any constable," instead of the sheriff alone. *Suit v. State*, 30 App. 319, 17 S. W. 458; *Jackson v. State*, 30 App. 664, 18 S. W. 643.

A special venire issued in a capital case which names the case by style and number and the court in which it is pending, and which gives the date to which the same is returnable, is sufficient, and it need not state that the case is a capital one or state the nature of the offense. *Harrelson v. State*, 60 App. 534, 132 S. W. 783.

Where a special venire in a capital case was actually issued on August 10th, and was made returnable on September 1st, following, and the jurors appeared on September 3d under authority and by direction of the writ, the fact that the certificate of the clerk at the bottom of the venire bore the date of September 10th did not render the writ invalid. *Harrelson v. State*, 60 App. 534, 132 S. W. 783.

Amendment of writ or minutes.—As to amendment of sheriff's return, see notes to art. 669, post.

The special venire writ may be amended as to impossible dates. *Suit v. State*, 30 App. 319, 17 S. W. 458. See, also, *Hall v. State*, 28 App. 146, 12 S. W. 739; *Roberts v. State*, 30 App. 291, 17 S. W. 450; *Brotherton v. State*, 30 App. 369, 17 S. W. 932.

Where the order for a venire in a murder case was not entered in the minutes by the clerk, it was proper, after the return of the venire, to make the minutes conform to the order. *English v. State*, 34 App. 190, 30 S. W. 233.

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.

See Willson's Cr. Forms, 903.

In general.—Ante, art. 651, and notes.

A capital case may be taken up on the day fixed, though it is thereby called out of its order on the docket. *Mitchell v. State*, 43 Tex. 512.

Where a capital case is continued for the term the court may, before the expiration of that term, set it for trial on a certain day of the succeeding term. *Roberts v. State*, 30 App. 291, 17 S. W. 450.

Under this article the case may be set for trial on a day preceding the day fixed for taking up the criminal docket under the provisions of art. 651, ante. *Gaines v. State*, 38 App. 202, 42 S. W. 385.

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.]

See Willson's Cr. Forms, 901, 904.

In general.—The drawing of a special venire is a proceeding preliminary to trial, and it is not essential that the defendant or his counsel should be present thereat. *Cordova v. State*, 6 App. 207; *Pocket v. State*, 5 App. 552. Nor is it essential that the clerk in person should draw the names from the box. And the box used may be an ordinary cigar box with any kind of a lid. *Pocket v. State*, 5 App. 552. A special venire shall be selected from the names of those persons selected by the jury commissioners to do service for the term. *Weaver v. State*, 19 App. 547, 53 Am. Rep. 389; *Roberts v. State*, 30 App. 291, 17 S. W. 450; *Brotherton v. State*, 30 App. 369, 17 S. W. 932; *Jones v. State*, 31 App. 177, 20 S. W. 354.

The statute does not require the names of talesmen to be placed in the box and drawn by lot and placed on the list in the order drawn. *Locklin v. State* (Cr. App.) 75 S. W. 307.

A defendant has a right, in a capital case, to demand special venire drawn in accordance with the statutes on the subject. To deny him such right is error. *Oates v. State*, 48 App. 131, 86 S. W. 770, 771.

It is the policy of the law that jurors be drawn by commissioners, and not selected by the sheriff or any officer. *Knight v. State* (Cr. App.) 147 S. W. 268.

It was not a fatal objection to the venire that in the county where it was drawn, there were many qualified jurors whose names were not in the wheel, where it was not shown that they were known to the officers, or contended that the omission of their names was intentional or hurtful to the defendant. *Vasquez v. State* (Cr. App.) 172 S. W. 225.

Constitutionality.—See *Giebel v. State*, 28 App. 151, 12 S. W. 591.

This article, when construed in connection with post, art. 664, is constitutional as a general law applicable to certain counties in Texas, and is not obnoxious on the ground that it is a special law or that it is class legislation. *Logan v. State*, 54 App. 74, 111 S. W. 1028; *Brown v. State*, 54 App. 121, 112 S. W. 80; *Smith v. State*, 54 App. 238, 113 S. W. 289; *Brown v. State*, 55 App. 9, 114 S. W. 820; *Halsford v. State*, 56 App. 118, 120 S. W. 193; *Oates v. State*, 56 App. 571, 121 S. W. 370; *Rasor v. State*, 57 App. 10, 121 S. W. 512; *Snowberger v. State*, 58 App. 530, 126 S. W. 878; *Lee v. State* (Cr. App.) 148 S. W. 706.

Discrimination.—Evidence, on a motion in a criminal case to quash the special venire, held not to sustain the ground of discrimination as to race in the composition of the jury. *Pollard v. State*, 58 App. 299, 125 S. W. 390.

The fact that for many years no negro had been selected as a juror cannot be considered on a motion to quash a special venire in a criminal case because of race discrimination when it is shown that the law was in every respect complied with. *Pollard v. State*, 58 App. 299, 125 S. W. 390.

A motion to quash a panel of special veniremen summoned to try a negro, on the ground that the negro race had been discriminated against, was unsustainable, where the only testimony was that of a jury commissioner that no intentional discrimination against the negro race was made in the selection of jurors for the particular term of court, but that the members selected good men whom they personally knew to act as jurors. *Hemphill v. State* (Cr. App.) 170 S. W. 154.

An objection that defendant, a negro, was discriminated against, in violation of Const. Amends. U. S. 14, 15, in that the jury commission did not draw a negro on the petit jury, came too late when first made after conviction. *Watts v. State* (Cr. App.) 171 S. W. 202.

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.]

See Willson's Cr. Forms, 901, 904.

See art. 663, post.

In general.—Where the writ commanded the sheriff to summon the sixty individuals named therein, it sufficiently shows that they had been previously selected, and it will be presumed in the absence of a showing to the contrary that they were selected in the manner required by law. *Smith v. State*, 21 App. 277, 17 S. W. 471.

Where the court orders a special venire of 90 men, and the clerk issues a writ for only 60, defendant's motion to quash the venire should be granted. *Hunter v. State*, 34 App. 599, 31 S. W. 674.

This act does not conflict with the previous law in regard to petit jurors drawn for service during the ensuing term. The only change in this respect is that it requires the jury commissioners to draw what is termed in this act of the Twenty-ninth Legislature a special venire list. This is an additional list of names to serve on special venires exclusively, and these cannot be called into service until the jurors summoned for regular service have been exhausted under the terms of the act, either by serving one week in the district court as petit jurors, and once on the special venire, or twice on special venires. When this has been done the clerk shall then resort to special venire jurors and the list selected specially for that purpose. In other words, the purpose of the act is to require the exhaustion of the petit jurors before resorting to those specially drawn for special venire service and for the further purpose of using those jurors so specially drawn as talesmen. *Moore v. State*, 49 App. 629, 95 S. W. 516.

This article provides for a special venire list to be drawn by the jury commissioners out of which talesmen are to be drawn when the special venire authorized by the old law has been exhausted. *Gabler v. State*, 49 App. 623, 95 S. W. 523.

This amended article provides a further list of names from which special venires are to be drawn after the jurors for the term have been drawn once on any special venire, the purpose of the act being to equalize jury service among the citizens amenable thereto. *Mays v. State*, 50 App. 165, 96 S. W. 331.

Drawing the venire.—See ante, art. 660, and notes.

Where one hundred names had been drawn from the list of two hundred and fifty-two jurors constituting the jury for the term prior to the time defendant's special venire was drawn it was proper to draw his venire from the remaining one hundred and fifty-two names without replacing the one hundred names in the box. *Saye v. State*, 50 App. 569, 99 S. W. 553.

Additional talesmen.—This act is inapplicable to the selection of talesmen and does not prevent the court from directing the sheriff under art. 667, to summon talesmen according to his own selection. *Mays v. State*, 50 App. 165, 96 S. W. 329; *Wallace v. State* (Cr. App.) 97 S. W. 1051. But see *Keith v. State*, 50 App. 63, 94 S. W. 1045.

The Act 1905 amended Title 8, chapter 2, by adding this article (647a), but this article does not repeal article 666 authorizing the court to order sheriff to summon enough jurors to make up the venire. *Gibson v. State*, 53 App. 349, 110 S. W. 47, 48.

Art. 661a. Special venire, how summoned.—Whenever district court shall have convened, and a day shall have been set for the trial of the different capital cases which call for a special venire, the men whose names may have been drawn to answer summons to the venire facias in the different capital cases shall be immediately notified by the sheriff to be in attendance on the court on the day and week for which they were respectively drawn to serve as veniremen for said day and week; and such notice shall be given at least one day prior to the time when such duty is to be performed, exclusive of the day of service. [Acts 1905, p. 17, amending Rev. St. 1895 by adding art. 3175a thereto.]

Explanatory.—The above provision was omitted from the revised Code of Procedure of 1911. Though it had its being by way of amendment of Rev. Civ. St. 1895, by adding thereto, art. 3175a, it seems to relate solely to criminal matter, and it is inserted in this compilation, in view of the decisions in *Berry v. State* (Cr. App.) 156 S. W. 626.

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.]

Constitutionality.—See notes to art. 660, ante.

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.]

Constitutionality.—See notes to art. 660, ante.

Application.—A county which has two cities aggregating a population of 20,000 comes within this article. *Logan v. State*, 54 App. 74, 111 S. W. 1023.

The provision of the Code requiring that a venire should be drawn from a wheel applies only to counties containing a city of more than 20,000 population. *Asbeck v. State*, 70 App. 225, 156 S. W. 925.

Art. 664. Certain officers to select jurors.—That between the 1st and 15th days of August of each year, in all counties in this State having therein a city or cities containing a population aggregating twenty thousand (20,000) or more people, as shown by the United States census of date next preceding such action, the tax collector of such county or one of his deputies, together with the tax assessor of such county or one of his deputies, together with the sheriff of such county or one of his deputies, together with the county clerk of such county or one of his deputies, shall meet at the court house of such county and shall select from the list of qualified jurors of such county as shown by the tax lists in the tax assessor's office for the current year, the jurors for service in the district and county courts of such county for the ensuing year in the manner hereinafter provided. [Act 1907, ch. 139, § 10; Act 1911, p. 150, ch. 82, § 1, superseding part of art. 664, revised C. C. P. 1911.]

Explanatory.—The words "hereinafter provided" have reference to arts. 5152-5158, *Vernon's Sayles' Civ. St.* 1914, and to arts. 664a and 665, post.

Art. 664a. Officer wilfully or negligently failing to perform duty, penalty.—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. [Act 1907, ch. 139, § 10.]

Explanatory.—This article constituted the second sentence of art. 664, C. C. P. as revised in 1911. The first sentence was amended by Laws 1911, ch. 82, and as amended appears above as art. 664.

Constitutionality.—See notes to art. 660, ante.

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.]

Constitutionality.—See notes to art. 660, ante.

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.

See Willson's Cr. Forms, 908.

In general.—A special venire shall be selected from the names of those persons who have been selected by the jury commissioners to do service during the term, and until those names are exhausted the court is not authorized to send to the body of the county for a special venire or for talesmen to complete the panel. *Sharpe v. State*, 17 App. 486. When there has been a failure by jury commissioners to select persons for jury service, the court may order the requisite number to be summoned from the body of the county. In the absence of a contrary showing, the presumption obtains that the jurors had been selected in the manner required by law, and an objection that one of the veniremen named in the list was dead, and that another was beyond the jurisdiction of the court, does not invalidate the venire. *Smith v. State*, 21 App. 277, 17 S. W. 471.

Where there were only thirty-six jurors drawn for the term, a special venire in a robbery case including these thirty-six and other jurors is authorized by this article. *Delaney v. State*, 48 App. 594, 90 S. W. 643.

This article was not repealed by the Act of 1905 adding article 647a to Code of Criminal Procedure. *Gibson v. State*, 53 App. 349, 110 S. W. 47, 48.

Where there was no wilful violation of the statute requiring the jury commission to draw a jury panel, there was no error in forcing one to be tried before a jury summoned by the sheriff under the direction of the court. *McKnight v. State*, 57 App. 594, 124 S. W. 423.

Where only 17 of the jury drawn by jury commissioners were in attendance, the others having been excused, and the panel was filled with talesmen by the sheriff by order of the court, there was no error. *Gentry v. State* (Cr. App.) 152 S. W. 635.

Oath of sheriff.—See post, art. 670, and notes.

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.

See Willson's Cr. Forms, 908.

In general.—See, also, notes to art. 666, ante.

Prior to the enactment of this article it was held that when the special venire was exhausted before the jury was completed the regular jurors for the week should be resorted to before the sheriff was ordered to summon talesmen. *Roberts v. State*, 5 App. 141. This rule was followed after the article was adopted in *Weaver v. State*, 19 App. 547, 53 Am. Rep. 389, and *Cahn v. State*, 27 App. 709, 11 S. W. 723, and that practice was approved, though the failure to observe it was held

harmless in *Williams v. State*, 29 App. 89, 14 S. W. 388. But the *Weaver and Cahn* cases were expressly overruled in *Weathersby v. State*, 29 App. 278, 15 S. W. 823, which held that under this article the court was not bound to call the jurors for the week before ordering the sheriff to summon talesmen. This rule has been followed in *Brotherton v. State*, 30 App. 369, 17 S. W. 932; *Thompson v. State*, 33 App. 217, 26 S. W. 198; and *Deon v. State*, 37 App. 506, 40 S. W. 266.

Where the sheriff, of his own motion, summoned additional talesmen in place of the veniremen he could not serve, the venire need not be quashed, but the jury may be selected from the jurors on the venire and from those thereafter summoned by the sheriff on order of the court, though some of them were the same persons as were erroneously summoned by him. *Harris v. State*, 6 App. 97; *Adams v. State*, 35 App. 285, 33 S. W. 354.

There is no conflict between article 661 and this article which refers to selection and summoning of talesmen. Both stand and the manner of selecting talesmen remains unchanged. *Mays v. State*, 50 App. 165, 96 S. W. 332.

After the special venire in a homicide case was exhausted, the jury was properly completed from jurors summoned by the sheriff. *Williams v. State*, 60 App. 453, 132 S. W. 345.

The statute providing for special venires and the organization of a jury is directory only, so that, where a special venire has been exhausted the court may properly order the summons of sufficient talesmen out of which to complete the jury. *Bullock v. State* (Cr. App.) 165 S. W. 196.

Order.—It is not error for the court verbally to order the sheriff to summon additional jurors. *Roberts v. State*, 5 App. 141; *Harris v. State*, 6 App. 97.

Necessity.—Accused having requested the court to issue process for absent jurors, the clerk was directed to issue an attachment, which was placed in the hands of the sheriff, who within two hours reported back to the court that the absent jurors could not be found in the city, and that they lived in the country at a distance ranging from 8 to 20 miles. The sheriff had previously returned that eight of the jurors could not be found in the county. Held, that the sheriff's diligence was insufficient to justify the court in ordering talesmen. *Razor v. State*, 57 App. 10, 121 S. W. 512.

Prejudicial error.—A special venire having been exhausted, talesmen to complete the panel were summoned from the city in which the trial was being had. Defendant moved to quash this second venire upon the ground of local prejudice, and to have jurors summoned from the country. Held, that the motion was properly overruled. *Grissom v. State*, 4 App. 374.

Where there was nothing to show that any prejudice existed against defendant in the minds of talesmen improperly summoned, and it also appeared that he received the minimum punishment for an offense clearly proved, a conviction would not be reversed because of the court's error in ordering talesmen on an insufficient showing. *Razor v. State*, 57 App. 10, 121 S. W. 512.

Objection to being required to be tried before a "picked-up" jury comes too late when first made after verdict. *Ellington v. State*, 63 App. 427, 140 S. W. 1101.

Oath of sheriff.—See post, art. 670, and notes.

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.

See Willson's Cr. Forms, 905.

In general.—Under a previous statute the service of the writ might also be made by leaving a written notice at the juror's place of residence, with a member of his family over sixteen years old. *Cordova v. State*, 6 App. 207. And such is the law now with respect to service upon regular jurors. *Sayles' Civ. Stat. art. 3066.*

A special venire summoned by means of postal cards is no summons at all in law. *Clay v. State*, 40 App. 603, 51 S. W. 370.

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.

See Willson's Cr. Forms, 905.

In general.—It is the duty of the trial judge to see that the law is substantially observed and to enforce it with such strictness as to certainly accomplish its purpose, which is to secure an impartial jury for the trial of the cause. But a slight disregard of the provisions of the statute will not be sufficient per se to warrant the setting aside of a conviction. *Charles v. State*, 13 App. 658.

Amendment.—A return may be amended under direction of the court. *Powers v. State*, 23 App. 42, 5 S. W. 153; *Rodriguez v. State*, 23 App. 503, 5 S. W. 255; *Murray v. State*, 21 App. 466, 1 S. W. 522; *Sterling v. State*, 15 App. 249; *Washington v. State*, 8 App. 377; *Livar v. State*, 26 App. 116, 9 S. W. 552; *Hall v. State*, 28 App. 146, 12 S. W. 739; *Williams v. State*, 29 App. 89, 14 S. W. 388; *Scott v. State*, 29 App. 217, 15 S. W. 814; *Franklin v. State*, 34 App. 625, 31 S. W. 643.

Number served.—It is no valid objection to a special venire, or return thereon, that all the persons named in the writ were not summoned, or that a less number than thirty-six were summoned. *Hall v. State*, 28 App. 146, 12 S. W. 739; *Taylor v. State*, 14 App. 340; *Charles v. State*, 13 App. 658; *Harris v. State*, 6 App. 97; *Rodriguez v. State*, 23 App. 503, 5 S. W. 255; *Martin v. State*, 38 App. 462, 43 S. W. 352.

Diligence.—A return which named certain of the veniremen, and stated that they were not served because they could not be found in the county, though diligent search had been made for them by the sheriff and his deputies, said veniremen being absent from the county, and that others of the veniremen were not served because they could not be found after diligent search made for them at their residences and places of business, and at other places at which they were likely to be found, was held to be sufficient. *Lewis v. State*, 15 App. 647; *Suit v. State*, 30 App. 319, 17 S. W. 458; *Jackson v. State*, 30 App. 664, 18 S. W. 643; *Charles v. State*, 13 App. 658.

In the absence of a showing to the contrary, the presumption of diligence obtains in favor of an officer charged with the execution of legal process. In this case the sheriff returned two of the jurors named in the special venire as "not found." The defendant's bill of exceptions to the action of the court holding the return sufficient failed to disclose the diligence used by the sheriff to execute the process, and hence the presumption must obtain in favor of the officer. *Livar v. State*, 26 App. 115, 9 S. W. 552.

Where return showed that some of the jurors who were not served were absent from the county and others lived in remote parts of the county so far away that they could not be reached and the return made in the time allowed, held the diligence was sufficient. *Parker v. State*, 33 App. 111, 21 S. W. 604, 25 S. W. 967.

The mere absence of veniremen, without any showing of a want of diligence to secure their attendance, is not ground for quashing the venire. *Haywood v. State*, 61 App. 92, 134 S. W. 218.

Under a motion to quash a venire "because out of 100 names herein drawn only 17 of said special venire are present in court," evidence going to show that the officer's diligence in summoning the venire was not sufficient is not admissible. *Haywood v. State*, 61 App. 92, 134 S. W. 218.

Attachment for jurors.—Where the return inadvertently showed as summoned a juror who was not in fact summoned, it was error to proceed to select the jury from the others present, the court should have issued process for the juror or discharged the venire and ordered a new one. *Osborne v. State*, 23 App. 432, 5 S. W. 251.

It is not required that every person drawn on the venire be summoned, but only that the sheriff exercise reasonable diligence to summon the jurors. Accused is not entitled to process for jurors not summoned. *Rodriguez v. State*, 23 App. 503, 5 S. W. 255.

If the defendant desires to confute the excuse of the juror as shown by the return of the officer he must procure process for his production. *Livar v. State*, 26 App. 115, 9 S. W. 552.

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.]

See Willson's Cr. Forms, 908.

In general.—See ante, arts. 666, 667, and notes.

Instructions to the sheriff were not required prior to the enactment of this article. *Dill v. State*, 1 App. 278.

The court can amend its minutes showing that the sheriff and his deputies were properly sworn so as to show in addition that they were properly instructed. *Rodriguez v. State*, 32 App. 259, 22 S. W. 978.

Oath of sheriff.—The oath prescribed by art. 5170, *Vernon's Sayles' Civ. St.* 1914, should be administered to the sheriff and his deputies before summoning talesmen. *Hicks v. State*, 5 App. 488; *Wyers v. State*, 22 App. 258, 2 S. W. 722; *Habel v. State*, 28 App. 588, 13 S. W. 1001.

But the failure to administer the oath must appear affirmatively in the record, by bill of exceptions or otherwise, a mere statement to that effect in the bill of exceptions not being sufficient. *Samschen v. State*, 8 App. 45.

Where the oath has been administered once during the term it is not necessary that it be administered again, at defendant's request, upon the issuance of a venire for talesmen. *Habel v. State*, 28 App. 588, 13 S. W. 1001; *Shaw v. State*, 32 App. 155, 22 S. W. 588; *Adams v. State*, 35 App. 285, 33 S. W. 354.

It is not error to allow the minutes of the court to be corrected so as to show that the deputy sheriffs who were sworn to summon jurors were properly sworn and instructed by the court. *Rodriguez v. State*, 32 App. 259, 22 S. W. 978.

The failure of the court to administer to officers summoning jurors not selected

by jury commissioners the oath required by art. 5170, Vernon's Sayles' Civ. St. 1914, is error. *Sewall v. State* (Cr. App.) 148 S. W. 569.

It is not necessary for the court to swear the sheriff in ordering him to summon the special venire drawn as talesman; his oath of office being sufficient. *Fowler v. State*, 71 App. 1, 158 S. W. 1117.

Where the sheriff and all his deputies were sworn by the presiding judge at the beginning of court, the fact that the judge, called in to try the case, ordered a special venire and administered the oath to only two of the deputies was not prejudicial in the absence of evidence that the officers violated their duty in summoning talesmen, especially where no objectionable juror was forced on accused, and he did not exhaust his peremptory challenges. *Oliver v. State*, 70 App. 140, 159 S. W. 235.

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.]

See Willson's Cr. Forms, 903, 906, 907.

In general.—See post, art. 672, and notes.

Requisites of copy.—The clerk's certificate to the copy served, as well as the sheriff's return, may be amended. *Washington v. State*, 8 App. 377; *Sterling v. State*, 15 App. 249.

Under Rev. St. 1911, art. 2180 (Vernon's Sayles' Civ. St. 1914, art. 2180), requiring all writs to be attested with the seal of the court, and this and the following articles must bear the seal of the court, and file mark affixed thereto, and the court may not after motion to quash the venire on the ground that the writ did not bear the seal of court, permit the seal to be affixed to the writ and make it relate back to the time of its issuance, but it must postpone the case and direct the service of a copy of the venire properly attested. *Ollora v. State*, 60 App. 217, 131 S. W. 570.

The service of a true copy of the venire on defendant held a substantial compliance with the statute, though the certificate was not attached thereto till after the service and was then not under seal. *Luster v. State*, 63 App. 541, 141 S. W. 209, Ann. Cas. 1913D, 1089.

Amendment of writ.—On September 4th the court set a homicide case for trial on September 14th, and on the same day ordered a venire of 50 men drawn, making the writ returnable on September 11th, and on that date the sheriff filed the writ without making return, and on the 12th the district attorney filed a motion asking permission to make the return on the writ and for an order requiring him to do so, which motion was granted, and the return was made and accused served with a copy thereof on the 12th. Held, that no error was shown. *Swanney v. State* (Cr. App.) 146 S. W. 548.

Review.—The sufficiency of the writ commanding the sheriff to deliver to accused a certified copy of the venire, may be reviewed on appeal, though there is no statement of facts in the record. *Ollora v. State*, 60 App. 217, 131 S. W. 570.

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.]

See Willson's Cr. Forms, 903, 906.

In general.—The object of this article is to enable accused better to exercise his right of challenge. *Bates v. State*, 19 Tex. 123.

The defendant is entitled to a copy of the names of the persons summoned, not drawn. Service of the names drawn is not a compliance with the preceding article. *Harrison v. State*, 3 App. 558; *Foster v. State*, 38 App. 625, 43 S. W. 1009.

This statute is mandatory. *Robles v. State*, 5 App. 346; *Kellum v. State*, 33 App. 82, 24 S. W. 897, and cases cited; *Jones v. State*, 33 App. 617, 28 S. W. 464.

This article requires no more than that the names of all the jurors summoned under the special venire shall be served upon the defendant more than one day before the case is called for trial. It is immaterial that such copy contains other names which have been erased. *Murray v. State*, 21 App. 466, 1 S. W. 522.

Where the name of one of the special veniremen was inadvertently omitted from the list served on defendant, and he was stood aside on defendant's objection, but thereafter summoned by the sheriff after the special venire was exhausted and

challenged by the state for inability to read and write English, there was no error. *Campbell v. State*, 30 App. 645, 18 S. W. 409.

Under Rev. St. 1911, art. 2180 (Vernon's Sayles' Civ. St. 1914, art. 2180), requiring all writs to be attested with the seal of the court, and art. 653, and this article must bear the seal of the court, and file mark affixed thereto, and the court may not after motion to quash the venire on the ground that the writ did not bear the seal of court, permit the seal to be affixed to the writ and make it relate back to the time of its issuance, but it must postpone the case and direct the service of a copy of the venire properly attested. *Ollora v. State*, 60 App. 217, 131 S. W. 570.

The service of a true copy of the names of the jurors summoned held sufficient compliance with the statute, though no certificate was attached thereto until after service, and then was not under the seal of the court. *Luster v. State*, 63 App. 541, 141 S. W. 209, Ann. Cas. 1913D, 1089.

Where, to prevent jury tampering, the court had some years before established a rule that in criminal cases the names of the jurors drawn by the jury commissioners should not be given out until the week for which they were to serve, accused cannot complain that the court denied his motion to postpone the trial for 10 days to enable him to examine the list of jurors, where his counsel did not request additional time to investigate the jurors, and he had sufficient time to do so before exercising his right to challenge. *McGaughy v. State* (Cr. App.) 169 S. W. 287.

Time of service.—See *Robles v. State*, 5 App. 346.

"One day's service" means an entire day, excluding the day of service and return. *Speer v. State*, 2 App. 246.

Service of the special venire on Saturday, the trial being on the following Monday, is in accordance with a statute allowing defendant one entire day's service of the venire before the trial. *Adams v. State*, 35 App. 285, 33 S. W. 354.

Personal service.—The fact that defendant could not read and that list was served on his counsel is not sufficient. *Jones v. State*, 33 App. 617, 28 S. W. 464.

Waiver.—Service of such copy may be waived, and will be held to have been waived, unless asserted in limine. *Houllillon v. State*, 3 App. 537; *Roberts v. State*, 5 App. 141.

Where defendant claimed his right to one day's service of a copy of the special venire, it was error to try him with the regular jurors though neither he nor the State asked for a special venire. *Burries v. State*, 36 App. 13, 35 S. W. 164.

Variance in names.—Mere discrepancies in some of the names, as they appear in the original and copy, is not material, if it appears that none of them served in the trial of the case. *Bowen v. State*, 3 App. 617.

Effect of variance or omission.—If the name of a juror varies in the copy from the original, on objection he should be set aside; and if nothing appears to the contrary it will be presumed he was. *Swofford v. State*, 3 App. 76; *Thompson v. State*, 19 App. 593.

When a venireman has been misnamed in the copy of the special venire served on the defendant, it is the proper practice to stand him aside. *Swofford and Marks-bury v. State*, 3 App. 77; *Bowen v. State*, 3 App. 617; *Thompson v. State*, 19 App. 594; *Lindson v. State*, 28 App. 323, 13 S. W. 388; *Mitchell v. State*, 36 App. 278, 33 S. W. 367, 36 S. W. 456. See, also, *Roberts v. State*, 30 App. 291, 17 S. W. 450.

Defendant, indicted for murder, who was in jail, was served with two copies of a venire, one containing 60, and the other 52, different names. Defendant moved to quash the special venire for said cause, which was denied. Held error for which the cause would be remanded for a new trial. *Foster v. State*, 38 App. 525, 43 S. W. 1009.

The omission to serve on accused in a capital case one day before the trial a copy of the names of 6 jurors in a special venire of 125 names drawn, followed by the court permitting the sheriff to amend his return, but without subsequently serving the venire on accused, necessitated the quashing of the venire, on motion of accused. *Thomas v. State*, 63 App. 98, 138 S. W. 1018.

Where the name of a juror is omitted from the list served on the defendant, it is not necessary to quash the panel, but the juror should be excused so that the defendant will not be required to pass upon him. *Melton v. State*, 71 App. 130, 158 S. W. 550.

Jurors not appearing.—If certain names on the copy have not in fact been summoned, the defendant is entitled to have process for such persons, and it is error in such case to proceed with the formation of the jury, but the proceeding should be suspended until said persons are brought in, or a new venire should be summoned, and the organization of the jury accomplished de novo. *Osborne v. State*, 23 App. 431, 5 S. W. 251. But the defendant may waive the right to have the said persons present, and when he declines proffered process to bring them in, it will be held that he has waived such right. *Jackson v. State*, 4 App. 292.

Talesmen.—The defendant is not entitled to service of a list of talesmen summoned. *Johnson v. State*, 4 App. 268; *Drake v. State*, 5 App. 649; *Harris v. State*, 6 App. 97; *Gardenhire v. State*, Id. 147; *Sharp v. State*, Id. 650; *Richardson v. State*, 7 App. 486; *Dow v. State*, 31 App. 278, 20 S. W. 583; *Brotherton v. State*, 30 App. 369, 17 S. W. 932.

CHAPTER THREE

OF THE FORMATION OF THE JURY IN CAPITAL CASES

Art.	Art.
673. Names of jurors to be called, etc.	688. When held to be qualified, etc.
674. Shall be sworn to answer questions.	689. Two kinds of challenges.
675. Excuses heard and determined by court.	690. A peremptory challenge.
676. Persons summoned as jurors may claim exemption, how and when.	691. Number of challenges in capital cases.
677. May be excused by consent of parties.	692. Challenge for cause.
678. Challenge to the array.	693. Evidence may be heard, etc.
679. State may challenge array, when.	694. Certain questions not permissible.
680. Defendant may challenge array, when.	695. No juror shall be impaneled, when.
681. Two preceding articles do not apply when, etc.	696. Jurors summoned shall be called in order.
682. Challenge must be in writing.	697. Judge shall decide qualifications of jurors.
683. Judge shall decide without delay.	698. Oath to be administered to each juror.
684. Proceedings when such challenge is sustained.	699. Court may adjourn persons summoned, etc., but jurors, when sworn, should not separate, unless, etc.
685. Defendant entitled to copy of list summoned, as in first instance.	700. Persons not selected as jurors shall be discharged.
686. Court shall proceed to try qualifications of persons summoned.	701. Persons summoned on special venire, challenged or excused, paid, when.
687. Mode of testing qualifications.	

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.]

See Willson's Cr. Forms. 909, 910.

In general.—See post, art. 696. See, also, *Livar v. State*, 26 App. 115, 9 S. W. 552; *Habel v. State*, 28 App. 538, 13 S. W. 1001; *Brotherton v. State*, 30 App. 369, 17 S. W. 932; *Jackson v. State*, 30 App. 664, 18 S. W. 643.

The statutes regulating the formation of the jury in capital cases are directory and not mandatory, and where substantial compliance has been observed, no irregularity or failure on the part of the court to observe a literal compliance will constitute reversible error, unless injury to the defendant is shown. *Murray v. State*, 21 App. 466, 1 S. W. 522; *Hudson v. State*, 28 App. 323, 13 S. W. 388; *Roberts v. State*, 30 App. 291, 17 S. W. 450; *Jackson v. State*, 30 App. 664, 18 S. W. 643; *Barnett v. State* (Cr. App.) 176 S. W. 580.

Error in improperly excusing jurors who were summoned but not present was cured where the state peremptorily challenged such jurors. *Bizzell v. State*, 72 App. 442, 162 S. W. 861.

Where, in forming a jury in a prosecution for murder, several veniremen were out as jurors on another case when their names were reached, it was not error to pass them and call others; it appearing that they were examined next day. And it was not error to decline to postpone the case until the attendance of absent veniremen could be procured, where they were later called and examined, at which time appellant had a number of peremptory challenges left. *Barnett v. State* (Cr. App.) 176 S. W. 580.

Attachment.—An attachment can not issue for a person not summoned. *Thompson v. State*, 19 App. 593. When the defendant fails to ask for an attachment for an absent venireman he waives his right thereto and can not be heard to complain. *Kennedy v. State*, 19 App. 618; *Thompson v. State*, Id. 593; *Sinclair v. State*, 35 App. 130, 32 S. W. 531; *Hudson v. State*, 28 App. 323, 13 S. W. 388; *Jackson v. State*, 30 App. 664, 18 S. W. 643.

Where only 33 of the 50 jurors summoned on the special venire were in attendance, it was error to proceed to the selection of a jury from those present without first issuing an attachment for the absentees. *Cahn v. State*, 27 App. 709, 11 S. W. 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.”

See Willson's Cr. Forms, 912.

In general.—See *Bizzell v. State*, 72 App. 442, 162 S. W. 861.

The preceding article is directory merely. *Murray v. State*, 21 App. 466, 1 S. W. 522; *Jackson v. State*, 30 App. 664, 18 S. W. 643. Any number of the special venire may be sworn together to answer questions touching their qualifications; but the jurors should be examined separately. *Wasson v. State*, 3 App. 474; *Taylor v. State*, Id. 170; *Hardin v. State*, 4 App. 355.

The trial court cannot, under Bill of Rights, § 5, 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. *Riddles v. State* (Cr. App.) 46 S. W. 1058.

Evidence on motion for a new trial held to sustain the court's finding that a certain juror was sworn and examined on his voir dire. *Williams v. State*, 63 App. 507, 140 S. W. 447.

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.

In general.—See *Horbach v. State*, 43 Tex. 243; *Jackson v. State*, 30 App. 664, 18 S. W. 643; *Stephens v. State*, 31 App. 365, 20 S. W. 826; *Upchurch v. State*, 36 App. 624, 38 S. W. 206, 44 L. R. A. 634.

For good cause shown, over which it has no control, such as sickness, etc., the court may discharge a person summoned on special venire; but if a portion of the venire are engaged on another case, and are called in and accepted by both parties, the court can not on its own motion discharge them. *Bates v. State*, 19 Tex. 122.

Ordinarily, it is not competent for the court to excuse a juror summoned upon a special venire, until he has appeared at the trial, and has been sworn to answer questions touching his service and qualifications, even though he may be exempt from jury service and the court apprised of the fact. His excuse, if any he has, must be claimed and established under oath. *Robles v. State*, 5 App. 346; *Foster v. State*, 8 App. 254; *Hill v. State*, 10 App. 618; *Thuston v. State*, 18 App. 26; *Livar v. State*, 26 App. 115, 9 S. W. 552. But to this, as to every other general rule, there must, as there ought to be, exceptions where the rule should fail for the want of reason in its enforcement. Thus, a postmaster may be unable to leave his office without endangering the public service, just as one who is sick may be absolutely unable, from physical ailment, to appear and present in person his excuse. In either of such cases he might send his excuse by another, and the court could hear and determine it in his absence. If the defendant is dissatisfied or desires to disprove the fact or ground of excuse, he should apply for an attachment to have the juror brought forthwith into the court. *Kennedy v. State*, 19 App. 618; *Thompson v. State*, 19 App. 593. If, upon the call of the venire, it satisfactorily appears that a venireman whose name is called is absent on account of sickness, or other unavoidable cause over which he has no control, the court is authorized to excuse him. But when the court exercises this authority without the consent of parties, or over the objection of the defendant, it should be only upon the most satisfactory evidence of unavoidable necessity, and even then an attachment is available to test the bona fides of the excuse. *Thompson v. State*, 19 App. 593. If a juror is improperly excused, objections should be made at once. *Bejarano v. State*, 6 App. 265. The court has no authority to excuse a juror after he has been impaneled. *Ellison v. State*, 12 App. 557; *Hill v. State*, 10 App. 618.

This article and art. 677 are directory merely. *Murray v. State*, 21 App. 466, 1 S. W. 522.

In this case the return of the sheriff described the juror as “decrepit,” and “over age.” Upon this return the court excused the juror, and the defendant objected, but did not sue out process for the production of the juror in court. Held, that the action of the court was not error. *Livar v. State*, 26 App. 115, 9 S. W. 552.

The court may excuse a juror, though he does not make his excuse known on the call for excuses, but only when called for the purpose of being passed on by the parties; this article not being mandatory with reference to the time of granting excuses. *Goodall v. State* (Cr. App.) 47 S. W. 359.

It being shown on the call of the venire that one of the jurors was out of the county, so that he could not be brought into court, it was a case of absence from unavoidable cause, for which the court could excuse his attendance. *Cameron v. State* (Cr. App.) 153 S. W. 867.

Prejudice.—It was not prejudicial error for the court to excuse seven jurors who did not appear in person to claim their exemptions, where the state thereafter peremptorily challenged them. *Bizzell v. State*, 72 App. 442, 162 S. W. 861.

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 be-

fore 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.]

In general.—See *Bizzell v. State*, 72 App. 442, 162 S. W. 861.

Objections which go to the fitness of the juror may be urged by the party to be affected by the verdict, but matters of exemption or privilege can only be claimed by the juror himself. *Breeding v. State*, 11 Tex. 257.

An exemption by special law (before the present constitution) was not affected by subsequent legislation. *Ex parte House*, 36 Tex. 83.

Constitutionality.—Acts 30th Leg. 1907, p. 269, c. 139, of which this section was a part is valid. *Oates v. State*, 56 App. 571, 121 S. W. 370.

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.

In general.—See *Bizzell v. State*, 72 App. 442, 162 S. W. 861.

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.

See *Willson's Cr. Forms*, 913.

In general.—Challenge to array of grand jurors, see ante, art. 409, and notes.

No challenge to the array of jurors selected by jury commissioners can be entertained. *Post*, art. 681; *Woodard v. State*, 9 App. 412; *O'Bryan v. State*, 12 App. 118; *Williams v. State*, 24 App. 32, 5 S. W. 658; *Carter v. State*, 39 App. 345, 46 S. W. 236, 48 S. W. 508.

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.]

See *Willson's Cr. Forms*, 913.

In general.—This and article 680 suggest that a challenge to the array can only be made when prejudice is shown. *Whittle v. State*, 43 App. 468, 66 S. W. 772.

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.]

See *Willson's Cr. Forms*, 914, 915.

Cited, *Jones v. State* (Cr. App.) 153 S. W. 897.

Grounds.—A challenge to the array is allowed only upon the grounds specified in the statute. *Williams v. State*, 44 Tex. 34; *Swofford v. State*, 3 App. 76; *Woodard v. State*, 9 App. 412; *Harris v. State*, 6 App. 97; *Tuttle v. State*, Id. 556; *Coker v. State*, 7 App. 83; *Castanedo v. State*, Id. 582; *Bean v. State*, 17 App. 60; *Anderson v. State*, 34 App. 96, 29 S. W. 384; *Ross v. State*, 56 App. 275, 118 S. W. 1034.

Under a former law (*Hart. Dig.*, art. 1667) it was not a valid objection to a jury panel that their names were not on the list required to be made out by the county court. *Sayle v. State*, 8 Tex. 120.

It is not ground for challenge to the array of jurors that they had heard and tried a case against another party charged with an offense of the same character. *C. C. P. arts.* 680, 681. *Bowman v. State*, 41 Tex. 417; *Anderson v. State*, 34 App. 96, 29 S. W. 384.

Where the defendant is a negro, it is not a ground for challenge to the array that it is composed of white men exclusively. *Williams v. State*, 44 Tex. 34; *Carter v. State*, 39 App. 345, 46 S. W. 236, 48 S. W. 508. Nor is it a ground for such challenge that a large number of the venire are incompetent to serve as jurors. *Mitchell v. State*, 43 Tex. 512. Nor that the sheriff had summoned persons not drawn on the special venire. *Harris v. State*, 6 App. 97. Nor that the officer who summoned the jury was prejudiced against the defendant. *Tuttle v. State*, 6 App. 556. Nor that the jury commissioners had failed to certify the jury list. *Coker v. State*, 7 App. 83.

A challenge to the array can not be entertained to jurors selected by jury commissioners. *Post*, art. 681. Nor is it a good ground to quash a special venire, or of challenge to the array, that the jury commissioners selected jurors solely from persons known to be not defendant's equals, but his superiors, and unjustly discriminated against persons of his race and kind by refusing to select them as jurors. *Cavitt v. State*, 15 App. 190.

It is not a ground for challenge to the array that the writ for the special venire was improperly directed to "the sheriff or any constable" if it was in fact executed by the sheriff. *Jackson v. State*, 30 App. 664, 18 S. W. 643.

The defendant moved to quash the venire because the court had ordered a venire of ninety men; the clerk had issued the writ for only sixty. Held the motion was well taken and should have been sustained. *Hunter v. State*, 34 App. 599, 31 S. W. 674.

A challenge to the array, where the sheriff, after the panel for the week had been quashed because the sheriff had not been sworn, summoned some of the jurors who had been on the panel that was quashed, can only be made by stating under oath that the sheriff acted corruptly, and with a view to cause accused to be convicted. *Arnold v. State*, 38 App. 1, 40 S. W. 734.

An array of jurors cannot be challenged on the ground that it had been summoned by the sheriff under order of the judge, though a jury had been selected for that term of court by the jury commissioners. *Sanchez v. State*, 39 App. 389, 46 S. W. 249.

Where the county judge has intentionally failed to select jury commissioners to select jurors for the term, the motion to quash a venire selected by the sheriff should be granted, although this is not one of the causes for challenging the array given by this article and article 716. *White v. State*, 45 App. 597, 78 S. W. 1067.

A jury panel can only be quashed where the officer has acted corruptly in summoning the jurors. *Ross v. State*, 56 App. 275, 118 S. W. 1035.

It was not error to refuse to set aside the jury in a prosecution for violating the local option law, because many of the jurors were members of a local option league, whose object was to enforce the laws, and some of them had voted for local option, while others had voted against it; the officers not having acted fraudulently in selecting the jury. *Deadweyler v. State*, 57 App. 63, 121 S. W. 863.

A motion to quash the array of jurors should be sustained, where they were not chosen by commissioners as the law directs, but selected and summoned by the sheriff. *Irvin v. State*, 57 App. 331, 123 S. W. 127.

It was not error to refuse a motion to quash a special venire because the officer made return for one person when he should have served and made return on another, where the record showed that the person served was not selected as a juror in the cause. *Deckard v. State*, 57 App. 359, 123 S. W. 417.

Where after the jury, in a trial for violation of the local option law, were sworn, an adjournment was taken, and a heated campaign speech of an hour and a half in favor of prohibition was there delivered, the jury being present, a motion to set aside the jury should have been sustained. *Rigsby v. State*, 64 App. 504, 142 S. W. 901, 38 L. R. A. (N. S.) 1116.

The array cannot be challenged by one charged with assault on the sheriff with intent to kill where there was no showing that the sheriff or his deputies acted corruptly in summoning jurors. *Forester v. State* (Cr. App.) 163 S. W. 87.

The jury list having been drawn from the wheel, as prescribed by the statute, slight subsequent irregularities, as failure to properly fill out or certify the blanks would not vitiate the jury panel absent a showing that some injury might or could be done defendant thereby. *Howard v. State* (Cr. App.) 178 S. W. 506.

Review and waiver.—The overruling a challenge to the array is not revisable on appeal, unless excepted to at the trial and a proper bill of exception is reserved. *Castanedo v. State*, 7 App. 582. A failure to challenge the array at the proper time, and accepting the jury as summoned, is a waiver of defendant's right to such challenge. *Buie v. State*, 1 App. 453.

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.

See Willson's Cr. Forms, 913.

In general.—See, ante, art. 678.

Cited, *Jones v. State* (Cr. App.) 153 S. W. 897.

A challenge to the array cannot be made to a jury selected by the jury commissioners. *Whittle v. State*, 43 App. 468, 66 S. W. 772; *Carter v. State*, 39 App. 345, 46 S. W. 236, 48 S. W. 508; *Arnold v. State*, 38 App. 1, 40 S. W. 734; *O'Bryan v. State*, 12 App. 118; *Williams v. State*, 24 App. 32, 5 S. W. 658; *Woodard v. State*, 9 App. 412; *Ross v. State*, 56 App. 275, 118 S. W. 1034.

A special venire selected by commissioners to serve at the May term need not be quashed because erroneously returned by the commissioners as jurors for the April term. *Giebel v. State*, 28 App. 151, 12 S. W. 591.

A challenge on the ground that the array, selected by jury commissioners, was so constituted as to be prejudicial against an accused person was properly overruled, his proper remedy being by motion for a change of venue. *Columbo v. State* (Cr. App.) 145 S. W. 910.

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.

See Willson's Cr. Forms, 913, 915.

In general.—Ante, art. 680, and notes.

The challenge to the array, which must be in writing, must precede challenge to the poll. *Cooley v. State*, 38 Tex. 636.

A challenge to the array must be made in the manner prescribed by this article. *Woodard v. State*, 9 App. 412.

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.

See *Willson's Cr. Forms*, 916, 917.

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 account of which officer's misconduct the challenge has been sustained, shall not summon any other jurors in the case.

See *Willson's Cr. Forms*, 917.

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.

See *Willson's Cr. Forms*, 917.

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.

In general.—See *Bizzell v. State*, 72 App. 442, 162 S. W. 861.

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?

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.]

In general.—See notes to art. 692 (1), (2).

Cited, *Jones v. State* (Cr. App.) 153 S. W. 897.

If a juror answers that he is a freeholder, his affidavit to a contrary effect will not be entertained on a motion for a new trial. *Brennan v. State*, 33 Tex. 266. A juror who tried the case, qualified himself on his voir dire by declaring himself a freeholder in the state. It transpired after the trial he was neither a freeholder in the state nor a householder in the county. Applying for a new trial, the defendant and his counsel made affidavit that they did not know of the disqualification of the juror until after the return of the verdict. Held, that the new trial should have been awarded notwithstanding defendant and his counsel had intimately known the juror for years. *Boren v. State*, 23 App. 28, 4 S. W. 463; *Brackenridge v. State*, 27 App. 513, 11 S. W. 630, 4 L. R. A. 360. When a juror has qualified himself on voir dire the defendant is not required to presume him guilty of perjury and extend the investigation. *Armendares v. State*, 10 App. 44; *Henrie v. State*, 41 Tex. 573. But in *Leeper & Powell v. State*, 29 App. 63, 14 S. W. 398, it was held that a new trial could not be granted for the disqualification of a juror unless injury to the defendant was shown, overruling *Boren v. State*, *Brackenridge v. State* and *Armendares v. State*, supra, insofar as they held to the contrary. This case was followed in *Williamson v. State*, 36 App. 225, 36 S. W. 444; *Mays v. State*, 36 App. 437, 37 S. W. 721.

These provisions as to qualification of juries are in accordance with the constitution. *Long v. State*, 1 App. 709.

While it is better practice for the court merely to ask the statutory questions before impaneling a jury, the making of additional remarks is not error, unless shown to have been prejudicial. *Edwards v. State*, 61 App. 307, 135 S. W. 540.

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.

In general.—See *Bizzell v. State*, 72 App. 442, 162 S. W. 861.

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.]

See *Cooley v. State*, 38 Tex. 636; *Seals v. State*, 35 App. 138, 32 S. W. 545.

Cited, *Bizzell v. State*, 72 App. 442, 162 S. W. 861.

Number of challenges.—See, post, arts. 691, 709, 710.

Accepted juror.—Defendant cannot peremptorily challenge an accepted juror. *McMillan v. State*, 7 App. 142.

Juror challenged for cause.—Error in overruling a challenge for cause will not be reviewed unless the defendant exhausted his peremptory challenges and thereafter an objectionable juror was forced upon him. *Burrell v. State*, 18 Tex. 713; *Johnson v. State*, 27 Tex. 758; *Bowman v. State*, 41 Tex. 417; *Bejarano v. State*, 6 App. 265; *Tuttle v. State*, 6 App. 556; *Sharp v. State*, 6 App. 650; *Krebs v. State*, 8 App. 1; *Tooney v. State*, 8 App. 452; *Holt v. State*, 9 App. 571; *Steagald v. State*, 22 App. 464, 3 S. W. 771; *Powers v. State*, 23 App. 42, 5 S. W. 153; *Bolding v. State*, 23 App. 172, 4 S. W. 579; *Hudson v. State*, 28 App. 323, 13 S. W. 388; *Roberts v. State*, 30 App. 291, 17 S. W. 450; *Williams v. State*, 30 App. 354, 17 S. W. 408; *White v. State*, 30 App. 652, 18 S. W. 462; *Wilson v. State*, 32 App. 22, 22 S. W. 39; *Long v. State*, 59 App. 103, 127 S. W. 551, Ann. Cas. 1912A, 1244; *Lawson v. State* (Cr. App.) 148 S. W. 587; *Grant v. State* (Cr. App.) 148 S. W. 760, 42 L. R. A. (N. S.) 428; *Harris v. State* (Cr. App.) 148 S. W. 1074; *Oates v. State* (Cr. App.) 149 S. W. 1194; *Walker v. State* (Cr. App.) 151 S. W. 822; *Byrd v. State* (Cr. App.) 151 S. W. 1068; *Thompson v. State*, 72 App. 659, 163 S. W. 973; *Gomez v. State* (Cr. App.) 170 S. W. 711.

Even if defendant exhausted his peremptory challenges, using one of them on a juror who should have been discharged on defendant's challenge for cause was sustained, the conviction will not be reversed unless an objectionable juror was forced on him after his challenges were exhausted. *Hollis v. State*, 8 App. 620; *Loggins v. State*, 12 App. 65.

Where, after defendant had exhausted all his challenges, a juror then left on the jury but not yet impaneled nor sworn, was excused by the court for sickness, and another called in his place, there was no error. *Heskeu v. State*, 17 App. 161.

After his peremptory challenges have been exhausted, defendant can still challenge jurors subsequently called for cause, but not otherwise. *Thompson v. State*, 19 App. 593; *Kennedy v. State*, 19 App. 618.

Where accused exhausted his peremptory challenges, using two on jurors who were disqualified, and thereafter was compelled to accept a juror who had a fixed opinion which it would take evidence to remove but who stated he would try defendant according to the law and the evidence, accused was entitled to a new trial even though his challenge for cause to the last juror was properly overruled. *Maines v. State*, 35 App. 110, 31 S. W. 667.

Error in overruling a challenge to a disqualified juror for cause is prejudicial, though he was challenged peremptorily, where, after accused had exhausted his peremptory challenges, there remained on the jury three jurors who had stated that they had formed an opinion as to accused's guilt. *Keaton v. State*, 40 App. 139, 49 S. W. 90.

Although the court may err in holding a juror qualified who is not, yet if accused is tendered a fair and impartial jury he cannot complain although he is deprived of a challenge by the improper action of the court. *Keaton v. State*, 41 App. 621, 57 S. W. 1127.

When a challenge for cause was overruled, accused should have excused the juror peremptorily, if he had any peremptory challenges left. *Chapman v. State* (Cr. App.) 147 S. W. 580.

An exception to the court's action on defendant's challenge of jurors for cause would not be considered on his appeal from a conviction, where the challenged jurors did not serve on the jury, and it was not shown that any objectionable juror was forced on defendant by reason of his being required to peremptorily challenge. *James v. State* (Cr. App.) 167 S. W. 727.

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.]

In general.—Cited, *Bizzell v. State*, 72 App. 442, 162 S. W. 861.

Where a challenge to a juror for cause is improperly overruled, and the defendant challenges him peremptorily, the error is cured by allowing the defendant an extra peremptory challenge. *Blackwell v. State*, 29 App. 194, 15 S. W. 597.

It is not error to refuse to permit a defendant in a criminal case to challenge a juror peremptorily after he has exhausted his 20 peremptory challenges. *Pier-son v. State*, 21 App. 14, 17 S. W. 468; *McKinney v. State*, 31 App. 583, 21 S. W. 683; *Thompson v. State*, 19 App. 592; *Kennedy v. State*, 19 App. 618.

That accused was misled by the clerk as to the number of peremptory challenges, and was thereby compelled to accept an objectionable juror is not ground for reversal since he or his attorney must keep account of the number of challenges. *Miller v. State*, 36 App. 47, 35 S. W. 391.

Second degree murder.—If the defendant is convicted of murder in the second degree, and a new trial is awarded him, he is restricted to ten challenges. *Cheek v. State*, 4 App. 444; *Hudson v. State*, 28 App. 323, 13 S. W. 388; *Blackwell v. State*, 29 App. 195, 15 S. W. 597; *McKinney v. State*, 31 App. 583, 21 S. W. 683.

Effect of amendment.—One is entitled only to the number of challenges allowed at the time of trial, not to the number allowed at the time he committed the crime. *Edmonson v. State* (Cr. App.) 44 S. W. 154.

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.

2. That he is neither a householder in the county nor a freeholder in the state.

3. That he has been convicted of theft or any felony.

4. That he is under indictment or other legal accusation for theft or any felony.

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.

6. That he is a witness in the case.

7. That he served on the grand jury which found the indictment.

8. That he served on a petit jury in a former trial of the same case.

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.

11. That the juror has conscientious scruples in regard to the infliction of the punishment of death for crime.

12. That he has a bias or prejudice in favor of or against the defendant.

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.

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.]

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| | Subd. 1 | | Subd. 12 |
| 1. | In general. | 23. | In general. |
| 2. | Poll-tax. | 24. | Race prejudice. |
| 3. | Objection. | 25. | Previous conviction. |
| | Subd. 2 | 26. | Witnesses. |
| 4. | In general. | 27. | Prejudice against offense. |
| | Subd. 3 | 28. | Prejudice against defense of alibi. |
| 5. | In general. | 29. | Prejudice against or in favor of counsel. |
| 6. | Pardon. | | Subd. 13 |
| | Subd. 4 | 30. | Former law. |
| 7. | In general. | 31. | Opinions of jurors in general. |
| | Subd. 5 | 32. | Examination. |
| 8. | In general. | 33. | Basis of opinion. |
| 9. | Deafness. | 34. | — Conversation with witness. |
| | Subd. 6 | 35. | — Evidence at former trial. |
| 10. | In general. | 36. | — Evidence in another case. |
| 11. | Character witness. | 37. | — Newspaper reports. |
| | Subd. 7 | 38. | — Hearsay and rumor. |
| 12. | In general. | 39. | Opinion in another case. |
| | Subd. 8 | 40. | Fixity of opinion. |
| 13. | In general. | 41. | False answer by juror. |
| 14. | Juror challenged at former trial. | | Subd. 14 |
| 15. | Trial of co-defendant. | 42. | In general. |
| 16. | Trial of similar case. | | Decisions in General |
| | Subd. 9 | 43. | In general. |
| 17. | In general. | 44. | Objections not covered by statute. |
| | Subd. 10 | 45. | — Previous service as juror. |
| 18. | In general. | 46. | — Misnomer. |
| 19. | Diligence. | 47. | — Discrimination against race. |
| | Subd. 11 | 48. | — Deputy sheriff. |
| 20. | In general. | 49. | — Opinion as to insanity as defense. |
| 21. | Circumstantial evidence. | 50. | Examination of jurors. |
| 22. | Discretion in challenging. | 51. | Time to raise objection. |
| | | 52. | Sufficiency of objection. |
| | | 53. | New trial. |
| | | 54. | Bill of exceptions. |

SUBD. 1

1. **In general.**—Every male person who has attained the age of twenty-one years, shall be a citizen of the United States, and who shall have resided in this state one year next preceding an election, and the last six months in the district or county in which he offers to vote; and every male person, who has attained the age of twenty-one years, who, at any time before an election, shall have declared his intention to become a citizen of the United States in accordance with the federal naturalization laws, and shall have resided in the state one year next preceding such election, and the last six months in the county in which he offers to vote, and who has paid his poll tax, shall be deemed a qualified voter. But the following named are not qualified voters: 1. Persons under twenty-one years of age. 2. Idiots and lunatics. 3. All paupers supported by any county. 4. All persons convicted of any felony, subject to such exceptions as the legislature may make. 5. All soldiers, marines, and seamen employed in the service of the army or navy of the United States. Const., art. 6, secs. 1, 2; Vernon's Sayles' Civ. St. 1914, arts. 2938, 2939. The residence of a married man, if not separated from his wife, shall be where his wife resides. If a married man be separated from his wife, he shall be considered, as to residence, a single man. The residence of a single man shall be where he usually sleeps. Vernon's Sayles' Civ. St. 1914, art. 2941. A citizen householder and voter of an unorganized county is a competent juror to serve on juries impaneled in the organized county to which the unorganized county of his residence is attached for judicial purposes. Groom v. State, 23 App. 82, 3 S. W. 668.

"Citizen" is a person, native or naturalized, who has the privilege of voting for public officers, and who is qualified to fill an elective office. Abrigo v. State, 29 App. 143, 15 S. W. 408.

The fact that a juror was a naturalized German-American citizen, who might not understand the meaning of some words of the English language, although he appeared to understand the questions asked on his examination, did not disqualify him from jury service. Myers v. State (Cr. App.) 177 S. W. 1167.

2. **Poll-tax.**—The fact that a juror is disqualified because not a resident or citizen is not a ground for new trial unless it be shown that defendant was not lacking in diligence in ascertaining that fact and that injury resulted to him. Roseborough v. State, 43 Tex. 570; O'Mealy v. State, 1 App. 180.

Disqualification of a juror for non-age is not a ground for new trial unless it is

made to appear defendant was not wanting in diligence and that injury resulted to him by reason thereof. *Trueblood v. State*, 1 App. 650.

It is error to overrule a challenge to a juror who has not paid his poll tax for the preceding year. *Carter v. State*, 45 App. 430, 76 S. W. 438.

Failure to pay a poll tax is not an absolute disqualification of a juror, but is a ground for challenge; article 695, stating that no one subject to the grounds of challenge in subds. 3, 4 and 5 of article 692 shall be impaneled as a juror. *Poole v. State*, 45 App. 348, 76 S. W. 567.

3. **Objection.**—It is not alone sufficient to award new trial that one of the jurors was not a qualified voter, that fact being unknown to defendant until after verdict. *Sutton v. State*, 31 App. 297, 20 S. W. 564.

SUED. 2

4. **In general.**—The Constitution of 1869 (art. 12, sec. 45) repealed the qualification of "householder or frecholder." *Maloy v. State*, 33 Tex. 599; and made all qualified voters competent jurors. *Wilson v. State*, 35 Tex. 365. But by the jury act of 1876 the qualification can not be dispensed with, *Lester v. State*, 2 App. 432; though intimated that the jury law of 1876 repealed former laws specifying causes for challenge (P. D., art. 3041). *Brill v. State*, 1 App. 572.

A single man renting land and living upon it with a younger brother and occupying the house for all purposes of a home, and taking his meals elsewhere, was held to be a householder. *Lester v. State*, 2 App. 432. So a person who rents a room and boards is a householder. *Robles v. State*, 5 App. 346. And so may a married man who lives with his father be a householder. *Bejarano v. State*, 6 App. 265.

"Householder" is a person, whether married or single, who occupies a house and is the head or master of the family occupying the house with him. He is not a householder who merely occupies a room or house. *Lane v. State*, 29 App. 310, 15 S. W. 827. Other decisions hereunder: *Brackenridge v. State*, 27 App. 513, 11 S. W. 630, 4 L. R. A. 360; *Leeper & Powell v. State*, 29 App. 64, 14 S. W. 398; *Abrigo v. State*, 29 App. 143, 15 S. W. 408; *Hunter v. State*, 30 App. 314, 17 S. W. 414; *Munson v. State*, 34 App. 498, 31 S. W. 387.

A juror who occupies a room in his father's house, with the latter's permission, and a clerk, whose employer furnishes him a room at his house, where he eats and sleeps, are not householders. *Maines v. State*, 35 App. 109, 31 S. W. 667.

A single man who rents a room in one house and eats at another is not a householder. *McArthur v. State*, 41 App. 635, 57 S. W. 848.

A single man, living with his parents though paying board or renting a room from the occupant of a house, is not a "householder" so as to be a qualified juror. *Gomez v. State* (Cr. App.) 170 S. W. 711.

SUBD. 3

5. **In general.**—See Const., art. 6, sec. 1, subd. 4. And see post, art. 1051.

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 App. 359, 107 S. W. 832.

6. **Pardon.**—Under Const. art. 4, relative to the pardoning power, the governor may pardon a person convicted of theft, though he has served his full term, and such absolute pardon after he has served out his term removes his disability as a juror. *Easterwood v. State*, 34 App. 400, 31 S. W. 294.

Where a juror had been convicted of a felony in a foreign state, but had been restored to citizenship by the grant of a full pardon, he was not disqualified under *Vernon's Sayles' Ann. Civ. St.* 1914, art. 5115, subd. 6, providing that no person who has been convicted of a felony shall be a qualified juror in Texas. *Wickizer v. Williams* (Civ. App.) 173 S. W. 288.

SUBD. 4

7. **In general.**—See post, art. 695.

Under art. 694, post, this ground must be sustained by proof aliunde the voir dire examination of the proposed juror to be available to either party. *Sewell v. State*, 15 App. 56.

SUBD. 5

8. **In general.**—See post, art. 695; *Hart v. State*, 15 App. 202, 49 Am. Rep. 188.

Mental defect includes not only imbecility but also such gross ignorance as practically disqualifies any person from performing his duties as a juror, and one who did not understand the obligation of an oath and could not be made to understand it was properly excluded from the jury. *Caldwell v. State*, 41 Tex. 86.

9. **Deafness.**—It was proper to excuse a venireman who, by reason of defective hearing, was unable to understand the proceedings in court. *Mitchell v. State*, 36 App. 278, 33 S. W. 367, 36 S. W. 456.

On a criminal trial a juror stated that his hearing was not good, and that unless favorably situated he could not hear the testimony. He seemed to understand questions by the court, and stated that he could hear if placed near the witnesses, and the court informed counsel that if selected he would be placed in a favored position. Accused's counsel challenged him peremptorily, and, having exhausted his peremptory challenges, claimed that R., an objectionable juror, was forced upon him. Held, that there was no error in overruling the objection to such juror, especially where it was not shown why R. was objectionable, and it was not even claimed that he was disqualified. *Calan v. State* (Cr. App.) 177 S. W. 124.

A juror, whose hearing in one ear was defective, but who heard the questions asked him on examination without apparent difficulty, was properly accepted on

the jury, where the court stated that he would place him so that he could hear everything. *Myers v. State* (Cr. App.) 177 S. W. 1167.

SUBD. 6

10. **In general.**—Jurors whose names are endorsed on the indictment as witnesses for the state are incompetent, though they belong to the regular panel for the week and state that they know nothing about the case. *West v. State*, 8 App. 119.

A juror in a criminal case was accepted without being questioned by either side as to his qualifications. The state subsequently asked him if he was qualified, and, receiving affirmative answers, again accepted him, and defendant peremptorily challenged. Held no error prejudicial to defendant. *Seals v. State*, 35 App. 138, 32 S. W. 545.

11. **Character witness.**—That persons had been subpoenaed as witnesses, one by the state and one by defendant, did not disqualify them as jurors, where they were summoned as character witnesses, and had been summoned in similar cases as character witnesses, but had not been called to testify. *Edgar v. State*, 58 App. 491, 129 S. W. 141.

SUBD. 7

12. **In general.**—The fact that a juror had sat on the grand jury who returned the indictment does not necessarily disqualify him, but is a statutory ground for challenge. If defendant fails to ask the jurors if any of them served on the grand jury who presented the bill he cannot afterwards complain that one of them did so serve. *Franklin v. State*, 2 App. 8; *Self v. State*, 39 App. 455, 47 S. W. 26.

A juror who was on the grand jury which presented a bill charging the defendant with an offense is not disqualified from trying a similar offense against the same defendant. *Johnson v. State*, 34 App. 115, 29 S. W. 473.

That a juror was also a member of the grand jury which returned the indictment, though not actually present when the bill was examined and returned, did not disqualify him as a juror, but was only a ground for challenge. *Bryan v. State*, 63 App. 200, 139 S. W. 981.

Where accused moved for a new trial on the ground that the foreman of the jury had been a member of the grand jury that presented the indictment, but that ground was not verified, it could not be reviewed. *Johnson v. State* (Cr. App.) 143 S. W. 626.

SUBD. 8

13. **In general.**—Any person who has sat as a petit juror in a former trial of the same case, involving the same questions of fact, may be challenged for cause. *Jacobs v. State*, 9 App. 278; *Willis v. State*, Id. 297; *Dunn v. State*, 7 App. 600.

14. **Juror challenged at former trial.**—The fact that a juror was peremptorily challenged at a former trial does not disqualify him. *Wilson v. State*, 3 App. 63; *Easterwood v. State*, 34 App. 400, 31 S. W. 294; *Nalley v. State*, 28 App. 387, 13 S. W. 670.

15. **Trial of co-defendant.**—Jurors are disqualified to try a person, having tried a case involving the same transactions against a co-defendant, though they state that they have not formed an opinion as to his guilt or innocence, and can try the case impartially. *Sessions v. State*, 37 App. 58, 38 S. W. 605.

16. **Trial of similar case.**—On a trial for gaming it is error to impanel, over defendant's objections, a jury that had tried a companion case involving the same facts. *Obenchain v. State*, 35 App. 490, 34 S. W. 278.

On a trial for selling liquor, where the jurors on voir dire state that they heard a witness for the prosecution testify in a case against the same defendant on the day before the trial he had sold him liquor, and defendant is charged with a sale to such witness, the jurors are incompetent. *Gilmore v. State*, 37 App. 81, 38 S. W. 787.

The fact that jurors on a trial for sale of liquor in June, 1895, had tried defendant in a case for selling liquors in March, 1895, is no ground for challenge where the jurors state that they have no bias against the accused. *Arnold v. State*, 38 App. 1, 40 S. W. 734.

In a prosecution for the unlawful sale of intoxicating liquors, where the principal matter of defense was an attack on the credibility of the prosecuting witness, it was error to compel defendant to select a jury from a panel including six jurors who had previously sat in a similar case, in which almost the sole defensive matter was the credibility of the same prosecuting witness. *Edgar v. State*, 59 App. 488, 129 S. W. 140.

A part of the jury which accused was compelled to accept, sat in the trials of two others for similar offenses, and the only witnesses against accused herein were witnesses in the other cases. Each of the jurors who had served in the other cases stated that they had no opinion as to accused's guilt and would try him fairly, but accused was not permitted to ask them whether they had formed an opinion as to the veracity of the witnesses testifying in the other trial. Held, that it was error to compel accused to accept such jurors. *Hardgraves v. State*, 61 App. 422, 135 S. W. 144.

Where a prosecution for violating the local option law rested upon practically the same testimony of the same witness as in other cases in which defendant had been convicted, defendant was entitled to have the jury set aside, and to another jury. *Smith v. State*, 61 App. 328, 135 S. W. 154.

Where accused had at the same term been convicted of a similar offense, there is no error where there were only 12 jurors on the regular panel, 6 of whom tried accused in the first case, and the court excused them and retained only 1 juror who had heard the evidence in the first prosecution, upon his statement that he

had no opinion as to the guilt or innocence of accused in the second. *Byrd v. State*, 72 App. 265, 162 S. W. 363.

SUBD. 9

17. *In general.*—The sustaining of the state's challenge to a juror because his sister had married accused's brother was not erroneous. *Holmes v. State*, 70 App. 423, 157 S. W. 487.

SUBD. 10

18. *In general.*—That a juror is related to the prosecutor is not cause for challenge by the state, but is for the defendant. *Black v. State*, 9 App. 328. A private prosecutor is one who prefers an accusation against a party whom he suspects to be guilty of an offense against the law, and such person can not be allowed to try the case as a juror, if challenged for this cause by the defendant, nor can a person who is related to the private prosecutor within the third degree of consanguinity or affinity. Subscribers to a fund for the employment of counsel to prosecute a defendant are not private prosecutors. *Heacock v. State*, 13 App. 97; *McInturf v. State*, 20 App. 335; *McGee v. State*, 37 App. 668, 40 S. W. 967; *Moore v. State*, 36 App. 574, 38 S. W. 209. Defendant was on trial for the theft of A.'s horse. He challenged certain jurors because they were related within the prohibited degree to the owners of other horses with the theft of which at the same time and place the defendant was charged by other indictments. Held, that it was error to overrule the challenge. *Wright v. State*, 12 App. 163. Second cousins are related to each other within the third degree, and where one of the trial jurors was the husband of the second cousin of the alleged injured party, and on a motion for a new trial it was made to appear that upon his voir dire such juror stated that he was not related to the alleged injured party, and that he was accepted as a juror by the defendant under the belief that his statement was true, it was held that a new trial should have been granted. *Page v. State*, 22 App. 551, 3 S. W. 745; *Powers v. State*, 27 App. 700, 11 S. W. 646.

19. *Diligence.*—It is not good ground for new trial on ground of relationship of juror to injured party, if the defendant failed to examine juror as to relationship before he took him. *Templeton v. State* (Cr. App.) 57 S. W. 832.

SUBD. 11

20. *In general.*—"Conscientious scruples" was cause for challenge prior to the enactment of the Code. *White v. State*, 16 Tex. 206; *Burrell v. State*, 18 Tex. 713.

This is a cause for challenge notwithstanding the law permits the jury to assess the punishment at imprisonment for life. *Caldwell v. State*, 41 Tex. 86; *Thompson v. State*, 19 App. 593; *Kennedy v. State*, Id. 618; *Gonzales v. State*, 31 App. 508, 21 S. W. 253.

A juror, on his voir dire examination, stated that he had conscientious scruples as to inflicting the death penalty except in extreme murder cases and the court excused such juror; held, no error. *Sawyer v. State*, 39 App. 557, 47 S. W. 650.

In a prosecution for murder, a juror who stated that if a cold-blooded murder was shown, authorizing the infliction of the death penalty, he would not agree thereto, and a juror who stated that he had conscientious scruples against the infliction of the death penalty, and that he did not believe his conscience would let him give that penalty in any case, were properly excused. *Myers v. State* (Cr. App.) 177 S. W. 1167.

21. *Circumstantial evidence.*—This is a cause for challenge, though such scruples be limited to cases of circumstantial evidence. *Shafer v. State*, 7 App. 239; *Clanton v. State*, 13 App. 139; *Little v. State*, 39 App. 654, 47 S. W. 984; *Grant v. State* (Cr. App.) 148 S. W. 760, 42 L. R. A. (N. S.) 428; *Borders v. State*, 72 App. 135, 161 S. W. 483.

The acceptance of a juror whose scruples against capital punishment extend only to cases depending on circumstantial evidence is not error, where the conviction was on direct evidence. *Nairn v. State* (Cr. App.) 45 S. W. 703.

22. *Discretion in challenging.*—The action of the district attorney in testing the jurors on their voir dire in asking, under the statute, if they had conscientious scruples as to the infliction of the death penalty, in some cases challenging therefor and in others not, was a matter wholly within his discretion. *Merkel v. State* (Cr. App.) 171 S. W. 738.

SUBD. 12

23. *In general.*—Where a juror voluntarily introduced himself to the prosecuting witness and stated that he was acquainted with the case and would do all he could for witness, defendant is entitled to a new trial though he did not examine the juror on his voir dire. *Hanks v. State*, 21 Tex. 526.

Where a juror had previously stated that accused had killed a poor, innocent soldier and ought to have his neck broke, but stated on voir dire that he had no prejudice, defendant was entitled to a new trial. *Henrie v. State*, 41 Tex. 573.

A statement by a juror before the trial that he would not like to be in defendant's shoes does not show prejudice. And where there was an affidavit that the same juror had stated that defendant was going to the penitentiary "or words to that effect," it will be presumed that the juror qualified himself on his voir dire and the decision of the trial judge accepting his statement will not be reversed, especially where defendant's counsel had procured a third affidavit as to the juror from one who subsequently repudiated it as incorrect. *Nash v. State*, 2 App. 362.

Where a juror stated on his voir dire that he had no prejudice against defendant, but remarked to two other jurors before the jury was fully impaneled that he was a bad juror for defendant, which remark was unknown to defendant or his counsel till after the trial, defendant is entitled to a new trial, though he did not exhaust his peremptory challenges. *Long v. State*, 10 App. 186.

Where a juror had stated to others before the trial that if he were on the jury

he would inflict on him the highest penalty allowed by the law, but on his voir dire denied any prejudice, he was disqualified and defendant on first learning of the statements after the trial, was entitled to a new trial. *Sewell v. State*, 15 App. 56.

Where a proposed juror, on the day before the trial, expressed to the defendant the hope or belief that he would be acquitted, it was held that the challenge for cause made by the state was properly allowed. *Mason v. State*, 15 App. 534.

The word "bias" means a leaning of the mind; propensity toward an object; not leaving the mind indifferent; inclination; prepossession; bent. See facts held to show bias in favor of defendant. *Pierson v. State*, 18 App. 524. Bias or prejudice in favor of or against the alleged injured party does not constitute cause for challenge. *Jones v. State*, 8 App. 648.

The state is as much entitled to an unbiased, unprejudiced jury as the defendant. *Pierson v. State*, 18 App. 524; *McGill v. State*, 25 App. 499, 8 S. W. 661; *Giebel v. State*, 28 App. 151, 12 S. W. 591; *Withers v. State*, 30 App. 383, 17 S. W. 936.

On motion for new trial one of the grounds was that one of the jurors had said before he sat on the jury that "defendant ought to have his d—d neck broke," which imputed statement the juror denied. It was further shown that he knew nothing about the parties or the facts in the case. Held, the motion was properly overruled. *Mayes v. State*, 33 App. 33, 24 S. W. 421.

A new trial will be granted on the ground of bias and prejudice on the part of a juror, where defendant and his attorneys swear that such bias was unknown to them before the trial, and affidavits that such juror had said before the trial "that defendant was guilty of the crime charged, and ought to be punished," and that it was a "bad case against the defendant," are not controverted. *Graham v. State*, 28 App. 582, 13 S. W. 1010.

A juror was shown, after convicting for murder, to have stated that he had seen too much of the difficulty at the time it occurred, and knew too much of the case, to render any other verdict; that he should have been a witness instead of a juror; and that a certain defense offered at the trial was, as he knew of his own personal knowledge, without merit. A counter affidavit was to the effect that he had no prejudice against defendant, that he had tried the case on the law and the evidence, and that he had not been controlled by anything he had heard or seen prior to the trial. His first statements, however, were admitted, or, at least, not denied. Held, that a new trial should have been granted. *Washburn v. State*, 31 App. 352, 20 S. W. 715.

It was shown by affidavits that a juror had stated that defendant "ought to be hung" and "ought to be burned." This was controverted by the state, and the juror, in his affidavit, denounced the imputed statement as maliciously false. Held, that a new trial on such ground was properly refused. *Washburn v. State*, 31 App. 352, 20 S. W. 715, distinguished. *Shaw v. State*, 32 App. 155, 22 S. W. 588.

On motion for a new trial it was shown by the testimony of two witnesses that defendant and one of the jurors had had a difficulty after which they heard the juror abuse defendant and state that defendant had a case in court and if he could get on the jury he would send defendant to the penitentiary. A new trial should have been granted. *Reed v. State*, 32 App. 25, 22 S. W. 22.

"Prejudice," as used in this subdivision, refers only to the person of the accused, and means hatred, ill will, dislike, antipathy, etc. *Randle v. State*, 34 App. 43, 28 S. W. 953.

Where a juror, after retiring to consider the verdict, stated that he knew something about the case, and that he thought they had the right man, it is not ground for reversal, without evidence that such knowledge created in his mind such a prejudice against defendant that he could not give him a fair trial. *Ray v. State*, 35 App. 354, 33 S. W. 869.

A certain juror, on his voir dire, stated that he had formed an opinion, and that he might have expressed an opinion as to the guilt or innocence of defendants but that he would not be induced by it. Defendants did not ask him at the time anything further as to the matter, and did not challenge him. Held, that defendants were not entitled to a new trial on showing that such juror, before being called, had stated that defendants were guilty. *Aud v. State*, 36 App. 76, 35 S. W. 671, disapproving *Hanks v. State*, 21 Tex. 527.

Two jurors who stated in the jury room that defendant had killed another and was caught cheating at cards, and that his brother had also killed a man, and they were not liable to have any accidental shooting, showed a prejudice against defendant which rendered them unfit to serve as jurors. *Mitchell v. State*, 36 App. 278, 33 S. W. 367, 36 S. W. 456.

A statement in an affidavit that a juror stated to affiant before the trial that, if selected, he would "give defendant what belonged to him," and that affiant understood that the juror meant that he would convict defendant, is not sufficient ground for a new trial, where the juror makes an affidavit that he was without bias, and that what he said was that he would try defendant according to law, and give him what belonged to him. *Driver v. State*, 37 App. 160, 38 S. W. 1020.

Accused's counsel is not on voir dire examination entitled to ask a juror whether he had any aversion to the defense that a man is not connected with the crime either by illegal act or omission, and that he is not a principal, accomplice, or accessory; for the burden of proof is on the state and not accused, and no juror could have a prejudice against the failure of the state to show guilt. *Collins v. State* (Cr. App.) 178 S. W. 345.

As each juror is required to take an oath he will be governed by the law given him in the charge of the court, it is improper to question him as to whether he would follow the court's charge. *Collins v. State* (Cr. App.) 178 S. W. 345.

24. Race prejudice.—If a colored defendant objects to a trial by white jurors, he must do so by challenge for cause upon the ground of "bias or prejudice." *Williams v. State*, 44 Tex. 34. On the trial of a white man for the murder of a negro, it was held proper to permit the state's counsel to ask the jurors the follow-

ing question: "If they could return the same kind of a verdict against a white man for killing a negro that they would against a white man for killing another white man upon the same evidence?" *Lester v. State*, 2 App. 432. But it is not allowable to ask a proposed juror whether he has the "same neighborly regard" for a negro that he has for a white man. *Cavitt v. State*, 15 App. 190.

In the trial of a negro for murdering a white man, the question was asked a juror on the voir dire, "Under the same facts and circumstances, could and would you render the same verdict in a case where a negro killed a white man for insulting his (the negro's) wife, as in a case where a white man killed a negro for insulting his (the white man's) wife?" Held proper, as tending to show whether or not the juror was prejudiced against defendant, he having killed deceased, it was claimed by defendant, under the peculiar circumstances disclosed by the question. *Fendrick v. State*, 39 App. 147, 45 S. W. 589.

A juror, who has a prejudice against the negro race socially, but not civilly or legally, is not incompetent to sit as a juror on the trial of a negro. *Bass v. State*, 59 App. 186, 127 S. W. 1020.

Jurors who testified on their voir dire examination in the prosecution of one negro for killing another that they could give accused as fair and impartial a trial for killing another negro as they could a white man for killing a white man under the same circumstances, but could not give a negro who had killed a white man as fair a trial as they could a white man, were not objectionable. *Williams v. State*, 60 App. 453, 132 S. W. 345.

25. Previous conviction.—Where six jurors who had previously convicted accused on a similar charge of violating the local option law were again drawn to try him for an alleged unlawful sale of liquor to another person, and testified that though previously they had convicted accused, they had formed no opinion as to the present case, and would render an impartial verdict based on the evidence, the court did not err in denying a challenge for bias. *Edgar v. State*, 59 App. 252, 127 S. W. 1053.

26. Witnesses.—A juror, who states that he is a warm personal friend of one of the state's principal witnesses, and who states that he does not know accused or his principal witnesses, and who declares that he can give accused a fair and impartial trial, is not disqualified. *Giles v. State* (Cr. App.) 148 S. W. 317.

27. Prejudice against offense.—A statement by the district attorney in examining jurors before empanelment, that the law made it a felony for one to engage in the occupation of selling intoxicants in local option counties, followed by a question whether the jury believed that was a good and wholesome law and ought to be enforced as any other law, to which they answered, "Yes," was not reversible error on the ground that it tended to prejudice the facts. *Wilson v. State* (Cr. App.) 154 S. W. 571.

Where jurors stated on their voir dire that they had not formed any conclusion as to defendant's guilt or innocence, but that they had a prejudice against the crime with which accused was charged, they were not disqualified. *Cooper v. State*, 72 App. 266, 162 S. W. 364.

In a prosecution for statutory rape, it is not improper for the prosecutor to question jurors as to whether they have any prejudice against the statutory rape statute. *Hamilton v. State* (Cr. App.) 168 S. W. 536.

Jurors can only be examined as to whether they have a prejudice or bias against accused, and not whether they have a prejudice against particular heinous offenses. *Collins v. State* (Cr. App.) 178 S. W. 345.

28. Prejudice against defense of alibi.—Where on a voir dire examination accused asked a juror if he had any prejudice against the defense of alibi, and the juror replied in the negative, stating that he did not understand the terms, counsel is not entitled to explain it to him. *Collins v. State* (Cr. App.) 178 S. W. 345.

29. Prejudice against or in favor of counsel.—Where it did not appear there was any relationship between the jurors and counsel for the state, which would make them biased against accused, questions as to whether the jurors would favor the state because of the reputation of the state's counsel to the prejudice of the accused who was represented by counsel who had not lived in the locality for so long a time, and did not enjoy so much confidence, were properly excluded. *Collins v. State* (Cr. App.) 178 S. W. 345.

SUBD. 13

Cited, *Byrd v. State* (Cr. App.) 151 S. W. 1068; *Myers v. State* (Cr. App.) 177 S. W. 1167.

30. Former law.—This subdivision was amended by Act of 1876, p. 83, and again amended by Act March 31, 1885, p. 90. The subdivision prior to said amendment, was as follows:

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 be first asked whether, in his opinion, the conclusion so established will influence his verdict. If he answer in the affirmative, he shall be discharged; if he answer in the negative, he shall be further examined by the court, or under its direction, as to how his conclusion was formed, and the extent to which it will affect his action* and if the court is not satisfied that he is impartial, the juror shall be discharged.

(*) Down to here it is the same as the new law.

31. Opinions of jurors in general.—Jurors are disqualified to try a person, having tried a case involving the same transactions against a co-defendant, though they state that they have not formed an opinion as to his guilt or innocence, and can try the case impartially. *Sessions v. State*, 37 App. 53, 38 S. W. 605; *Gilmore v. State*, 37 App. 81, 38 S. W. 787.

The better practice is to discharge a juror whose impartiality is questionable. *Black v. State*, 42 Tex. 377; *Rothschild v. State*, 7 App. 519; *Dreyer v. State*, 11 App. 631.

Light impressions, which may readily yield to the testimony and leave the mind open to its fair consideration, constitute no objection; but impressions which are apparently of such a nature as will close the mind to opposing testimony, and combat its force, constitute a valid objection. The investigation is addressed exclusively to the present condition of the juror's mind; and the mode by which he has reached a conclusion, whether upon evidence or hearsay, is wholly immaterial, except as it may tend to illustrate the strength or weakness of the conclusion; and that the juror may say such conclusion will not affect his verdict, is not of potent significance. If the juror formed an opinion, at the time he first heard of the murder, that the accused was the perpetrator, which opinion had remained unchanged for two years, up to the time of trial; had heard the case talked about a great deal, and believed what he had heard; and had frequently expressed the opinion that the accused was guilty, and would take his seat upon the jury prepared to act upon such opinion, in case he heard nothing to change it, he ought to be excluded for incompetency. And where the competency of the juror is doubtful, he should be excluded. *Rothschild v. State*, 7 App. 519; *Livar v. State*, 26 App. 115, 9 S. W. 552; *Suit v. State*, 30 App. 319, 17 S. W. 458.

An opinion previously entertained, of a temporary nature, does not disqualify, if it is not shown to exist at the time of trial. *Grissom v. State*, 8 App. 386. Even when the juror had heard the evidence on a former trial of the case. *Shields v. State*, 8 App. 427. But he is not a competent juror, who, at the time of impaneling the jury, entertains such an opinion respecting the guilt or innocence of the accused as will influence his verdict. *Tooney v. State*, 8 App. 452.

A juror who states that he heard the evidence on the trial of persons who were indicted with defendant, and that he had formed an opinion as to the guilt of such persons, but had formed no opinion as to the guilt or innocence of defendant, and could give defendant a fair trial, is competent. *Pierson v. State*, 21 App. 14, 17 S. W. 468.

Where, at the examination of jurors in a criminal cause, it appears that there had not been formed in their minds any such conclusion as to the guilt or innocence of defendant as disqualified them from sitting as jurors, the overruling of defendant's challenge to such jurors was proper. *McKinney v. State*, 31 App. 583, 21 S. W. 683.

In a case in which defendant was accused of shooting at his wife's brother, K., with intent to murder him, it appeared that more than a year after the assault, and two days before the trial, while the court was in session, defendant shot and killed K. on the courthouse square; that the jurors were in the courthouse, and were soon at the scene of the shooting, and heard the remarks of the district judge, and heard the matter discussed then and afterwards by the people. On their voir dire they stated that they could give defendant a fair and impartial trial according to the testimony, and the law as given them by the court, and that they had no opinion on the case and no prejudice. Held, that the jurors were not disqualified. *Gaines v. State* (Cr. App.) 37 S. W. 331.

Jurors who have formed and expressed an opinion prior to their acceptance on the jury to the effect that accused is guilty are disqualified jurors. *Slack v. State* (Cr. App.) 149 S. W. 107.

A juror who had read papers containing a report of the homicide, but who stated that he had no opinion as to the defendant's guilt or innocence, and another juror who had read nothing of the homicide, and knew nothing about it, except from some slight discussion, and had no formed opinion, and who would consider any bias shown by a witness for defendant in weighing his testimony, were competent. *Myers v. State* (Cr. App.) 177 S. W. 1167.

32. Examination.—A party who accepts a juror after learning that he has formed an opinion, without pressing the inquiry further, cannot afterwards complain, though the juror was not fair and impartial. *Kirk v. State* (Cr. App.) 37 S. W. 440; *Aud v. State*, 36 App. 76, 35 S. W. 671.

When the juror answers that the conclusion formed in his mind as to the guilt or innocence of the defendant will influence his verdict, he shall be discharged, and no further examination of such juror is legitimate. If, however, he answer that his conclusion will not influence his verdict, he shall be further examined as to how such conclusion was formed and the extent to which it may influence his verdict. This further examination is to satisfy the court of the juror's impartiality, and if the court is not so satisfied the juror should be discharged, whether challenged or not. No formula or general rule controls this further examination, but it should be restricted to the imputed disqualification; and the juror, unless contumacious, should not be subjected to the treatment of a refractory witness. *Stagner v. State*, 9 App. 440.

When a proposed juror answers that there is established in his mind a conclusion as to the guilt or innocence of the accused that will influence his verdict, he is disqualified as a juror in the case, and should be discharged without further examination. It is only when he answers the qualifying question in the negative that any further examination is required. *Spear v. State*, 16 App. 98; *Rockhold v. State*, Id. 577; *Shannon v. State*, 34 App. 5, 28 S. W. 540; *Arnold v. State*, 38 App. 5, 40 S. W. 735.

It is not error in a murder case to refuse to permit defendant to ask the jurors whether, from hearsay or otherwise, they have an opinion as to the guilt or innocence of a person indicted with defendant, but not yet tried, though the theory of the state is that such person was the instigator of the conspiracy to murder deceased, and defendant was in his employ, and in his company, immediately preceding the homicide. *Peddy v. State*, 31 App. 547, 21 S. W. 542.

It was error, in a trial for murder, not to allow defendant to ask a juror, before trial, if he believed him guilty and that he ought to be hung, when another

juror had answered such questions in the affirmative. *Randle v. State*, 34 App. 43, 28 S. W. 953.

Upon application for a new trial on the ground that one of the jurors had expressed an opinion relative to the accusation against defendant, counsel's affidavit must show proper diligence in questioning such juror before he was sworn. *Armstrong v. State*, 34 App. 248, 30 S. W. 235.

Where juror admits on voir dire that he has formed an opinion, defendant must press the investigation else he will be estopped from complaining of juror's disqualification. But if the juror answers that he has no opinion and it is discovered afterwards that he has, defendant is not put on notice and does not have to press investigation, and if it develops that he has a fixed opinion, new trial should be granted. *Hughes v. State* (Cr. App.) 60 S. W. 565.

In a prosecution for betting at a pool table, where it does not appear that defendant attempted, before accepting a juror, to find if he was biased or prejudiced, or had expressed any opinion, the court on appeal cannot consider whether or not the juror had formed an opinion before the trial. *Tinker v. State*, 58 App. 321, 125 S. W. 890.

33. **Basis of opinion.**—See *Shaw v. State*, 27 Tex. 750.

34. — **Conversation with witness.**—Where a juror has formed an opinion from talking with witnesses, he is disqualified. *Wilkerson v. State* (Cr. App.) 57 S. W. 961; *Trotter v. State*, 37 App. 468, 36 S. W. 278.

One who has formed an opinion of the guilt of accused, but states that he can try the case uninfluenced by his opinion, is not incompetent as a juror because he has talked with a witness; it not appearing that he got his opinion from talking with the witness. *Wade v. State*, 35 App. 170, 32 S. W. 772, 60 Am. St. Rep. 31.

35. — **Evidence at former trial.**—A juror is not disqualified by the mere fact that he has heard the evidence adduced on a former trial of the cause. To disqualify him there must be a conclusion established in his mind as to the guilt or innocence of the accused which will influence his verdict. *Parchman v. State*, 2 App. 228, 28 Am. Rep. 435; *Thompson v. State*, 19 App. 593. See, also, *Kennedy v. State*, Id. 618.

Whenever the opinion of the juror has been formed upon the evidence given at a former trial, or has been so deliberately entertained that it has become a fixed belief of the prisoner's guilt, it would be wrong to receive him. *Grissom v. State*, 4 App. 374.

A juror who had heard a portion of the evidence at the examining trial, but who did not have any opinion as to defendant's guilt is not incompetent. *Shields v. State*, 8 App. 427.

A proposed juror stated that he had heard all of the evidence in the preliminary examination of the case before a magistrate, but that he had neither formed nor expressed an opinion which would influence him in finding a verdict. Held, error to sustain the challenge of the state to such juror. *Wade v. State*, 12 App. 358.

A proposed juror stated on his voir dire that he heard the evidence in part on a habeas corpus trial, and at that time formed an opinion as to the guilt or innocence of the defendant, but that the opinion so formed would not now influence his verdict, but that he could render an impartial verdict according to the law and the evidence. Held, competent. *Johnson v. State*, 21 App. 368, 17 S. W. 252.

36. — **Evidence in another case.**—Where opinion of juror is formed from hearing the facts testified to by a witness in another case from the one in which he sits, he is incompetent. *Drye v. State*, 40 App. 127, 49 S. W. 83; *Black v. State*, 42 Tex. 377; *Goble v. State*, 42 App. 501, 60 S. W. 968.

In the trial of a defendant charged as an accomplice, he may test the qualifications of a juror by inquiring whether he had formed an opinion as to the guilt or innocence of the party alleged to be the principal offender; and the juror's disqualifying opinion with respect to the principal constitutes cause for challenge on the trial of the accomplice. *Arnold v. State*, 9 App. 435.

The mere fact that a proposed juror heard the trial of a codefendant of the accused for the same murder, and approved the verdict of conviction, does not disqualify him as a juror. *Pierson v. State*, 21 App. 14, 17 S. W. 468.

A juror who had been told by his brother, who served as juror in a previous trial of the same indictment, that accused was guilty, is not disqualified where he stated that his brother's opinion would not influence him. *Harris v. State* (Cr. App.) 148 S. W. 1074.

37. — **Newspaper reports.**—If a juror, some time before the trial, had read in the newspapers a statement of the evidence, and had then formed an opinion, which opinion he remembered, but not the evidence, and thought the opinion then formed would not influence his verdict; but if the testimony on the trial corresponded with the testimony he had read, his conclusion would be the same, and would require other evidence to change it, he is a competent juror. *Grissom v. State*, 4 App. 374; *Rothschild v. State*, 7 App. 519; *McKinney v. State*, 31 App. 583, 21 S. W. 683; *Ashton v. State*, 31 App. 479, 21 S. W. 47; *Groszehmigem v. State*, 57 App. 241, 121 S. W. 1113; *Maxey v. State* (Cr. App.) 145 S. W. 952; *Wyres v. State* (Cr. App.) 166 S. W. 1150.

Where jurors testified that though they had an opinion concerning defendant's guilt formed from newspaper accounts of the occurrence, which in the absence of evidence would influence their action, they were nevertheless able to set aside such opinions and render a verdict entirely on the evidence, the court did not err in overruling a challenge for bias. *Myers v. State*, 71 App. 594, 160 S. W. 679.

A juror who knew nothing of the homicide, except what he had read in one newspaper, and who had never heard any remarks about the case, or expressed any opinion about it, and whose impression would not influence him, was competent. *Myers v. State* (Cr. App.) 177 S. W. 1167.

38. — **Hearsay and rumor.**—Jurors testifying that they can give a fair trial are competent though they have formed an opinion based on hearsay or rumor. *Adams v. State*, 35 App. 285, 33 S. W. 354; *Suit v. State*, 30 App. 319, 17 S. W. 453; *Trotter v. State*, 37 App. 469, 36 S. W. 278; *Deon v. State*, 37 App. 506, 40 S. W. 266; *Hamlin v. State*, 39 App. 579, 47 S. W. 656; *Post v. State*, 10 App. 579; *Reed v. State*, 32 App. 25, 22 S. W. 22; *Morris v. State*, 30 App. 95, 16 S. W. 757; *Kennedy v. State*, 19 App. 618; *Sawyer v. State*, 39 App. 557, 47 S. W. 650; *Wilkerson v. State* (Cr. App.) 57 S. W. 960.

The decisions draw a distinction between the formation of an opinion from mere hearsay and one derived from original sources, holding in the former case that the court can rightfully exercise its discretion. *Keaton v. State*, 40 App. 145, 49 S. W. 90.

A juror on his voir dire stated he had heard a person in whom he had confidence make a statement of the case, based, not upon his own knowledge, but upon hearsay, and thereupon he, the juror, had formed a conclusion provided the statement was true, but had formed no conclusion as to whether or not it was true. Held, not a disqualifying conclusion. *Bolding v. State*, 23 App. 172, 4 S. W. 579. A juror stated on his voir dire that he had formed an opinion in the case, that it would take evidence to remove; that his opinion was based upon hearsay; that he did not value hearsay evidence much; that he could render an impartial verdict upon the law as given by the court, and the testimony of the witnesses. Held, competent. *Steagald v. State*, 22 App. 464, 3 S. W. 771.

A juror who had heard people talking about the homicide since being summoned on the venire, and on several occasions while attending court, was properly excused. *Myers v. State* (Cr. App.) 177 S. W. 1167.

39. **Opinion in another case.**—The conclusion in a juror's mind, to disqualify him, must involve the defendant on trial—not a codefendant or a co-conspirator. *Peddy v. State*, 31 App. 547, 21 S. W. 542.

On trial for violating the local opinion law by illegally giving a prescription, jurors are not disqualified because they believe that defendant has violated the law, when they have no opinion in regard to the particular case. *West v. State*, 35 App. 48, 30 S. W. 1069.

Where accused was charged with illegally selling intoxicating liquors, it was not error to deny his motion to discharge the regular jury of the week on the ground that it had already tried and convicted two other defendants for the same character of offense and on the testimony of two witnesses who would be the only witnesses against accused, it appearing that the other defendants had been convicted of running entirely different places, and there being no showing that either of the jurors who sat in the trial of accused were a part of the jury that tried either of the other cases. *Ausbrook v. State*, 70 App. 289, 156 S. W. 1177.

And see *Arnold v. State*, 38 App. 1, 40 S. W. 734; *Segars v. State*, 35 App. 45, 31 S. W. 370.

40. **Fixity of opinion.**—A juror who stated that he had formed an opinion from general talk about the case, that that opinion had remained with him until the time of the trial two years later, and had been frequently expressed by him and that it would go into the jury box with him unless he heard something to change it, is not qualified though he stated that he would lay it aside and go by the evidence. *Rothschild v. State*, 7 App. 519.

Where a juror stated that he had formed an opinion which it would require evidence to remove, but had never heard witnesses, or any one who pretended to know the facts, detail them; that such opinion was not fixed and definite, and he had no present conviction, but could render a verdict entirely free from any previous opinion, he was held competent. *Post v. State*, 10 App. 579.

A juror stated that from what he had heard he had formed an impression respecting the guilt or innocence of the defendant, but that he had not heard the evidence, nor talked with any of the witnesses about the case; that if the evidence should prove what he had heard, then he had an opinion, but that he did not know whether what he had heard was true, and had formed no conclusion that it was true. Held, that he was a competent juror. *Ellison v. State*, 12 App. 557.

A juror stated that when he first heard of the homicide he said the defendant ought to have killed the deceased, but denied that he had formed or entertained any opinion about the case. Held, that he was a competent juror. *Lewis v. State*, 15 App. 647. A juror stated that, although he had heard about the homicide, there was not established in his mind, from hearsay or otherwise, any conclusion as to the guilt or innocence of the accused, such as would influence his verdict. Held, competent. *Sharpe v. State*, 17 App. 486.

The opinions of certain jurors held so fixed as to render them incompetent. *Ward v. State*, 19 App. 664.

On his voir dire a juror stated that, with respect to the guilt or innocence of the defendant, he had not formed nor expressed an opinion that would disqualify him to try the case; that he had formed an opinion it would require evidence to remove, but he thought he could render a verdict according to the evidence. On further examination he stated that he "had not formed such opinion as would influence his verdict, and that he would be entirely governed by the law and evidence in court." Held, that the juror was qualified. *Livar v. State*, 26 App. 115, 9 S. W. 552.

When the proposed juror states that he has formed a conclusion, the important question is, was the opinion so entertained as to become a fixed belief. *Miller v. State*, 32 App. 319, 20 S. W. 1103. See, also, *May v. State*, 33 App. 74, 24 S. W. 910.

Allowing a juror to sit in a murder trial, where he stated on his examination that he had expressed an opinion in a jocular way, but that he could give defendant a fair trial, is not error, where he was not challenged for cause or otherwise, and defendant's challenges for cause were not then or afterwards exhausted. *Kugadt v. State*, 38 App. 681, 44 S. W. 989.

Where a juror qualifies on his examination, and states that he has no opinion in the case and knows nothing of the facts, and it subsequently appears that he had expressed an opinion that the defendant should be hung, and where, during the deliberations of the jury, he states matters only in evidence at a former trial of the defendant, which he attended, and states that any one who has done as defendant has done should be hung, a verdict of manslaughter, fixing the highest sentence permitted by law, will be set aside, especially where it appears that this high penalty would not have been given by the jury but for the misconduct and preconceived opinion of the juror. *Knight v. State* (Cr. App.) 147 S. W. 268.

At the commencement of the trial of accused for perjury, his counsel asked the jurors whether they heard comments of the court, before the case was called for trial, with reference to perjury while sentencing another person convicted of a different crime. A number of the jurors, having answered in the affirmative, also stated, in answer to a question of the district attorney, that the court's remarks would have no effect on them in giving defendant a fair trial. The court overruled defendant's objection to the jurors, and he was required, after exhausting his peremptory challenges, to accept three of them as members of the jury. Held that, no prejudice having been shown, such facts were insufficient to constitute reversible error. *Craig v. State* (Cr. App.) 151 S. W. 804.

A juror in a trial for bigamy, who, before the trial, had said that in such case he would convict the defendant, was incompetent by reason of his fixed and expressed opinion of defendant's guilt. *Harris v. State*, 72 App. 117, 161 S. W. 125.

Notwithstanding an opinion, one is a qualified juror; he stating his opinion was formed from hearsay, and not from discussion with any witness, and that he could and would entirely disregard it, and try the case as fairly and impartially as if he had heard nothing about it. *Harvard v. State* (Cr. App.) 166 S. W. 507.

Where a juror testified that he had formed and then had an opinion as to the guilt or innocence of accused, but could lay such opinion aside and go into the box and render a fair and impartial verdict based on the testimony, without regard to what he had previously heard or the opinion he then had, he was competent, since the disqualifying conclusion must involve the guilt or innocence of accused to the extent that it would influence the verdict. *Phillips v. State* (Cr. App.) 167 S. W. 353.

A juror, who testified that, from what he had heard and read about the homicide, he had a fixed opinion which it would take pretty strong evidence to remove, was properly excused on challenge. *Myers v. State* (Cr. App.) 177 S. W. 1167.

41. **False answer by juror.**—A juror on his voir dire disclaimed bias or prejudice, or any conclusion as to the guilt or innocence of the defendant, but on motion for a new trial it was shown by the affidavit of two of the jurors that before the jury was fully impaneled, he said to them that "he was a poor juror for the defendant." Held, that for this ground the new trial should have been granted. *Long v. State*, 10 App. 186.

When a juror has fully qualified himself on his voir dire, and it afterward appears that at the time he was impaneled he had a positive and fixed opinion that the defendant was guilty, a new trial should have been granted. *McWilliams v. State*, 32 App. 269, 22 S. W. 970.

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42. **In general.**—This subdivision disqualifies from jury service a person who, though able to read, is unable to write. *Rainey v. State*, 20 App. 473. The requirement of ability to write is not satisfied by the ability of a proposed juror to write his name and nothing more. The requirement contemplates that he shall be able to express his ideas in writing. *Johnson v. State*, 21 App. 368, 17 S. W. 252. The ability to read and write has reference to the English language, and ability to read and write a foreign language does not satisfy the requirement. *Wright v. State*, 12 App. 163. This inability to read and write the English language is a ground for challenge, unless it be made to appear that the requisite number of jurors who can read and write that language cannot be found in the county of the forum, and a trial court is not authorized to dispense by general order with this test of the qualification of jurors. *Garcia v. State*, 12 App. 335; see, also, *Nolen v. State*, 9 App. 419.

DECISIONS RELATING TO SUBJECT IN GENERAL

43. **In general.**—See *Powers v. State*, 27 App. 700, 11 S. W. 646; *Nalley v. State*, 28 App. 387, 13 S. W. 670; *Leeper & Powell v. State*, 29 App. 63, 14 S. W. 398; *Hughes v. State* (Cr. App.) 152 S. W. 912; *Cloud v. State* (Cr. App.) 153 S. W. 892; *Jones v. State* (Cr. App.) 153 S. W. 897.

Chapter 1, of title 75, of the Revised Statutes, unless otherwise provided, relates to the qualification and exemption of jurors as well in criminal as in civil trials. *Dunn v. State*, 7 App. 600.

44. **Objections not covered by statute.**—Inability to speak and understand the English language is a good cause for challenge. *Etheridge v. State*, 8 App. 133; *McCampbell v. State*, 9 App. 124, 35 Am. Rep. 726; *Lyles v. State*, 41 Tex. 172, 19 Am. Rep. 38. See *Yanez v. State*, 6 App. 429, 32 Am. Rep. 591.

That a proposed juror is exempt from jury service is not a cause for challenge. *Kennedy v. State*, 19 App. 618.

The defendant in this case was a wife and mother. A juror on his voir dire declared that such fact would influence his verdict. He was held incompetent. *Withers v. State*, 30 App. 383, 17 S. W. 936.

Where the jury panel was quashed on motion of defendant, and the sheriff, as required by art. 715, post, summoned another jury, the fact that some of the jurors summoned had been summoned as jurors on the panel quashed by the court did not render them incompetent. *Arnold v. State*, 38 App. 1, 40 S. W. 734.

It is no ground for challenge to a juror that defendant's counsel had been involved in litigation against him. *Goodall v. State* (Cr. App.) 47 S. W. 359.

Where accused challenged a juror, as did also the state, and he did not serve, though qualified, and the bill of exceptions did not show that any objectionable juror served, there was no error. *Cole v. State*, 72 App. 282, 162 S. W. 880.

A conviction will not be reversed on account of remarks by the trial judge addressed to the panel of jurors for the week cautioning them against laxity, where accused was tried by only four members of the panel, and, though he had not exhausted his peremptory challenges, he accepted them. *McGaughey v. State* (Cr. App.) 169 S. W. 287.

A juror who, in answer to the question whether, after hearing the evidence and being of the opinion that defendant should be acquitted, the fact that the other 11 jurors were for conviction would or might cause him to change his opinion and lead him to an agreement, answered, "I don't know; I cannot say; I am afraid and believe it might," was not subject to challenge for cause. *Orange v. State* (Cr. App.) 173 S. W. 297.

45. — **Previous service as juror.**—Under the jury law of 1876 the provisions relating to juries were the same for both criminal and civil cases, and under those provisions, one who had served as juror for six days during the preceding six months in the district court or during the preceding three months in the county court, was incompetent. *Welsh v. State*, 3 App. 414; *Garcia v. State*, 5 App. 337; *Tuttle v. State*, 6 App. 556; *Myers v. State*, 7 App. 640.

After the revision of the codes in 1879, by which separate provisions were made as to jurors in civil and criminal cases it was held in *Dunn v. State*, that the provision disqualifying for former service still applied in criminal cases though not contained in the Code of Criminal Procedure. *Dunn v. State*, 7 App. 600, and for some time cases were decided on that ruling. *Thompson v. State*, 19 App. 613; *Monk v. State*, 27 App. 450, 11 S. W. 460. But in *Hunter v. State*, 30 App. 314, 17 S. W. 414, it was held that previous service as a juror did not disqualify for service in a criminal case, overruling *Dunn v. State*, 7 App. 600, and this case was approved and followed in *Benton v. State*, 52 App. 360, 107 S. W. 838.

46. — **Misnomer.**—That a juror whose real name was "Andres" was summoned under the name of "Andrews" did not require the court to sustain a challenge to him, where he was identified as the one who was selected by the jury commissioners and summoned as such juror, and who attended; the names being idem sonans. *Valigura v. State* (Cr. App.) 153 S. W. 856.

It was not error for the court to overrule accused's challenge to a juror because his name was misspelled, made after the jury was impaneled, the complaint read, and part of the testimony adduced; since the objection should have been made when the list was furnished. *Tipton v. State* (Cr. App.) 168 S. W. 97.

47. — **Discrimination against race.**—Negroes cannot be intentionally excluded from service on juries where a negro is on trial. *Whitney v. State*, 42 App. 283, 59 S. W. 896.

Where Federal question is raised on ground of intentionally excluding negroes from jury service, it is the duty of the court to probe the matter to determine whether or not the fourteenth amendment has been violated in the formation of the jury. *Whitney v. State*, 42 App. 283, 59 S. W. 896.

48. — **Deputy sheriff.**—That a juror was a deputy sheriff did not disqualify him from serving. *Mingo v. State*, 61 App. 14, 133 S. W. 882.

A constable who had been deputy sheriff and had acted as balliff during the term at which accused was tried, and had waited on the court and had charge of the jury in a felony case at the same term, was not competent as a juror in accused's case. *Chapman v. State* (Cr. App.) 147 S. W. 580.

49. — **Opinion as to insanity as defense.**—In a murder trial accused's counsel, in stating the case to the jury on their voir dire examination, stated that insanity was in issue, and asked them if they recognized the mental condition known as insanity, and, upon receiving an affirmative answer, asked them if they would acquit if they believed that accused was insane when the offense was committed, and upon receiving an affirmative answer asked if they would give accused the benefit of any reasonable doubt on the question of insanity, whereupon the court instructed that the jury need not answer the last question because the doctrine of reasonable doubt did not apply to the issue of insanity, but that he would charge that if the jury believed from a preponderance of the evidence that accused was insane when the offense was committed they should acquit. Held, that the court's action was proper. *Jones v. State*, 60 App. 139, 131 S. W. 572.

A juror was disqualified to sit in a murder case in which the sole defense was insanity, who stated on his voir dire that he would require overwhelming proof of insanity before acquitting on that ground. *Jones v. State*, 60 App. 139, 131 S. W. 572.

A juror who testifies that he recognizes the defense of insanity and will not punish one for an offense committed while insane, and who further states, in answer to leading questions, that he will require accused to prove the defense beyond reasonable doubt, but who states on further inquiry that he will be governed by the charge, and that if the law does not require accused to prove the defense beyond a reasonable doubt he will not require it, is not disqualified. *Maxey v. State* (Cr. App.) 145 S. W. 952.

50. **Examination of jurors.**—The court can illustrate meaning of circumstantial evidence to venire men, when they have stated that they were opposed to conviction on circumstantial evidence. *Morrison v. State*, 40 App. 490, 51 S. W. 358.

The court can interrogate the jurors as to their qualification. *King v. State* (Cr. App.) 64 S. W. 245, 246.

On a trial for rape, where a juror has testified that he served as juror in a criminal assault case, it is not error to exclude a question as to the verdict in that case; it having no tendency to prove bias. *Wragg v. State* (Cr. App.) 145 S. W. 342.

Neither side may test jurors by showing that they would or would not give credence to the testimony of any witness for either side. *Ellis v. State* (Cr. App.) 154 S. W. 1010.

It was not error for the court to refuse to permit defendant in a prosecution for violating the prohibitory law to examine jurors on their voir dire as to whether they would give the same weight and credence to the testimony of a witness employed in the sheriff's department as they would if he were not in such employment, as tending to commit the juror on the question of credibility before the witness had testified. *Ellis v. State* (Cr. App.) 154 S. W. 1010.

Where it appeared that private prosecutors employed an assistant in the prosecution, and the court informed defendant that he could ask each member of the jury, he had had contributed to the prosecution, there was no error in refusing to defer the selection of a jury until defendant had been furnished with the names of all persons contributing to the prosecution. *Holmes v. State*, 70 App. 214, 156 S. W. 1173.

Where accused, contrary to the requirements of Acts 33d Leg. c. 7, failed to file his application for a suspended sentence until after trial began, and four jurors had been selected, the court properly sustained the state's objection to questions propounded by him to the remaining eight jurors on their examination as to whether they had any prejudice against the suspended sentence law. *Williamson v. State*, 72 App. 618, 163 S. W. 435.

In a prosecution for statutory rape, it was not error to exclude, on the preliminary examination of the jurors, questions whether they would as readily believe the testimony of a woman who was not virtuous as one who was virtuous, where the court charged that the jury must find accused guilty beyond a reasonable doubt, regardless of the character of the witness. *Hamilton v. State* (Cr. App.) 168 S. W. 536.

While counsel should not be permitted to fritter away the time of the court in asking useless questions of the jurors, accused's counsel was entitled to a list of the jurors and to ask each juror separately any question tending to show whether he had formed an opinion or had any bias or prejudice and should not have been required to address his questions to the jury as a whole. *Barnes v. State* (Cr. App.) 168 S. W. 858.

In a prosecution for rape, where defendant at the trial was 23 years of age, refusal of a hypothetical question to jurors on their voir dire, as to whether they would have any bias against a 35 year old man having sexual intercourse with a 16 or 17 year old girl, was not reversible error. *Merkel v. State* (Cr. App.) 171 S. W. 738.

Where the court, in examining a juror who had said that he would not convict upon circumstantial evidence, stated two illustrations to which accused objected, but the juror was excused and the illustrations were not such as could have influenced the jurors selected in passing on the guilt or innocence of accused, there was no error. *Brown v. State* (Cr. App.) 174 S. W. 360.

51. Time to raise objection.—When it is discovered after the jury has been impaneled while the evidence is being admitted that a juror is disqualified, the jury should be discharged and another impaneled. *Hughes v. State* (Cr. App.) 60 S. W. 565.

An objection that negroes were excluded from the jury comes too late after verdict. It should have been in motion to quash or plea in abatement. *Garnett v. State* (Cr. App.) 60 S. W. 765.

Where a challenge to any member of the petit jury exists in favor of defendant on trial for murder, and he is not accorded the right at the time of its organization, it can be raised by him at the time he is called on to announce ready for trial. *Ex parte Martinez* (Cr. App.) 145 S. W. 959.

52. Sufficiency of objection.—That a juror is "objectionable" is not a sufficient challenge for cause. *Sutton v. State*, 31 App. 297, 20 S. W. 564; *Aistrop v. State*, 31 App. 467, 20 S. W. 989; *Wyres v. State* (Cr. App.) 166 S. W. 1150.

Merely that an objectionable juror sat upon the trial—the defendant having exhausted his peremptory challenges—is not an exception sufficient to raise the question of the juror's status on appeal. *Hudson v. State*, 28 App. 323, 13 S. W. 388; *Ripsey v. State*, 29 App. 37, 14 S. W. 448.

53. New trial.—Under art. 837, post, specifying the only grounds on which a new trial can be granted, the fact that one of the jurors was disqualified does not entitle accused to a new trial unless it is shown to have injured him. *Leeper v. State*, 29 App. 63, 14 S. W. 398, overruling *Lester v. State*, 2 App. 433; *Armendares v. State*, 10 App. 44; *Boren v. State*, 23 App. 28, 4 S. W. 463; *Brackenridge v. State*, 27 App. 513, 11 S. W. 630, 4 L. R. A. 360.

This ruling has been followed in *Lane v. State*, 29 App. 310, 15 S. W. 827; *Williamson v. State*, 36 App. 225, 36 S. W. 444.

When disqualification of juror is raised for first time after a verdict, it must be shown that injury resulted from juror serving. *Martinez v. State* (Cr. App.) 67 S. W. 839. See, also, notes under art. 837.

54. Bill of exceptions.—See art. 744, and notes.

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.]

In general.—See *Shaw v. State*, 27 Tex. 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.]

In general.—See *Sewell v. State*, 15 App. 56.

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.

In general.—See notes to article 692.

Only such jurors as are mentioned in subdivisions 3, 4, and 5, of art. 692, are ipso facto incompetent. All other grounds of challenge may be waived, and the court can not deprive the parties of the right of waiver. *Greer v. State*, 14 App. 179; see, also, *Sewell v. State*, 15 App. 56; *Wood & Carson v. State*, 28 App. 61, 12 S. W. 405.

One who has been convicted of theft or a felony and has not had his citizenship restored by a pardon is disqualified as a juror. *Rice v. State*, 52 App. 359, 107 S. W. 833.

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.]

Absence of jurors.—When the names of the special venire were being called for the purpose of selecting the jury, five of the parties, whose names appeared upon the list, failed to appear, and the court refused to have them brought into the jury box to be passed upon as their names were called in the order in which they stood on the list furnished the defendant, though the defendant requested it. Said five persons were out as jurors in another felony case. The court ordered talesmen summoned, the venire having been exhausted without calling in the five absent persons aforesaid. Held, error. The impaneling of the jury should have been postponed until said five persons had been discharged from the other jury. *Thuston v. State*, 18 App. 26.

When the name of one C. was reached on the list, the sheriff informed the court that C. had not been summoned. Over objection of the defendant the court proceeded to complete the panel out of the remaining veniremen. Held, that this action of the court was without authority of law, and in derogation of valuable rights of the defendant. The court should have suspended the proceedings until C. was brought in, or a new venire should have been ordered, and a jury organized de novo. *Osborne v. State*, 23 App. 431, 5 S. W. 251.

Of the venire of sixty but fifty were summoned, and of the fifty but thirty-three responded at the trial. Defendant moved that before he be required to proceed in the selection of his jury he be awarded process to compel the attendance of the seventeen absentees summoned, or for a postponement until their attendance could be had. The motion was overruled. The thirty-three were then tested and four jurors secured. Defendant again moved for compulsory process for the seventeen absentees. The motion was overruled and talesmen ordered. Defendant then moved that before resorting to talesmen he be tendered the regular panel of jurors drawn for the week by the commissioners, which motion was likewise overruled. Held, that in each of these rulings the trial court erred. *Cahn v. State*, 27 App. 709, 11 S. W. 723. See, also, *Hudson v. State*, 28 App. 323, 13 S. W. 388; *Habel v. State*, 28 App. 588, 13 S. W. 1001; *Jackson v. State*, 30 App. 664, 18 S. W. 643.

Where the absent talesmen appeared before the jury was completed, or the additional jurors ordered, and were then examined and properly excused by the court, there was no error. *Sinclair v. State*, 35 App. 130, 32 S. W. 531; *Sawyer v. State*, 39 App. 557, 47 S. W. 650.

Delay.—Where attachment has been issued for veniremen, it is largely within the discretion of the trial court to determine whether it will unreasonably delay the case to wait for them before ordering talesmen to be summoned. *Hudson v. State*, 28 App. 323, 13 S. W. 388.

Where, on request attachments were issued for absent jurors, it was not error to refuse a postponement until the veniremen were brought in. *Deon v. State*, 37 App. 506, 40 S. W. 266; *Shaw v. State*, 32 App. 155, 22 S. W. 588; *Stephens v. State*, 31 App. 365, 20 S. W. 826; *Jones v. State*, 31 App. 177, 20 S. W. 354; *Mitchell v. State*, 36 App. 278, 33 S. W. 367, 36 S. W. 456; *Sawyer v. State*, 39 App. 557, 47 S. W. 650; *Jackson v. State*, 30 App. 664, 18 S. W. 643; *Habel v. State*, 28 App. 588, 13 S. W. 1001.

The jurors summoned upon the special venire shall be called in the order in which they appear on the list furnished the defendant; and a person who has been summoned but is not present, may upon his appearance before the jury is completed be tested as to his qualifications, and impaneled unless challenged. But no case shall be unreasonably delayed on account of absent juror. *Greer v. State* (Cr. App.) 65 S. W. 1076.

Where some of the petit jurymen who had been summoned in a homicide case were not present, and attachment for them was issued on which they were brought into court, the refusal of defendant's motion to postpone the case until they should be brought in was not erroneous. *Giesecke v. State*, 64 App. 531, 142 S. W. 1179.

On a bill of exceptions claiming that the court should have given defendant time to prepare a motion for a continuance because only 15 of the 60 veniremen drawn were in attendance, and that he could not get a fair jury from the streets, there was no showing that defendant did not get a fair trial out of the 15 regular jurors, and it appeared that the remaining 45 were excused by the court or not found after diligent search for them by the sheriff. Held, that the denial of time to prepare such motion was not error. *Claussen v. State*, 70 App. 607, 157 S. W. 477.

In a trial where seven of the venire were absent, the court on information that they were absent might proceed with the call of the venire if a waiting for the absentees would result in unnecessary delay. *Bizzell v. State*, 72 App. 442, 162 S. W. 861.

Exercise of challenges.—The names of the persons summoned as jurors shall be called in the order in which they appear on the list furnished the defendant. They must be called one at a time, seriatim, and be tested and passed upon, first by the state and then by the defendant. *Taylor v. State*, 3 App. 170; *Wasson v. State*, Id. 474; *Garza v. State*, Id. 286; *Robles v. State*, 5 App. 346; *Drake v. State*, Id. 649; *Clark v. State*, 8 App. 350; *Horbach v. State*, 43 Tex. 242; *Mitchell v. State*, Id., 512; *Foster v. State*, 38 App. 525, 43 S. W. 1009.

If the defendant desires to examine the proposed juror as to his qualifications, it is not objectionable practice to require him to make such examination before requiring the state to pass upon the juror. *Hardin v. State*, 4 App. 355; *Grissom v. State*, Id. 374; *Ray v. State*, Id. 450.

The defendant can not require a list of jurors challenged by the state before exercising his own right. *Phillips v. State*, 6 App. 44.

Each juror shall be tried and passed upon separately. *Caldwell v. State*, 12 App. 302.

Withdrawal of acceptance.—Neither party can peremptorily challenge a juror after he has been called and examined and accepted as a juror, whether the jury is full or not. *Horbach v. State*, 43 Tex. 242; *Drake v. State*, 5 App. 649.

The state can withdraw its acceptance of a juror and peremptorily challenge him where it discovered after accepting him that he had expressed a design to get on the jury to convict defendant and impose the death sentence on him. *Mitchell v. State*, 43 Tex. 512.

A party cannot challenge a juror after accepting him without showing, in the application for leave to challenge, that it is for some cause not discoverable on the examination of the juror. *Baker v. State*, 3 App. 525, overruling *Hubotter v. State*, 32 Tex. 479 and *Cooley v. State*, 38 Tex. 636.

Where the court on defendant's motion and with the consent of the prosecuting attorney excluded a juror after the jury was sworn because it was then learned he had expressed a determination to hang accused, the court could select another juror and proceed with the case. *Evans v. State*, 6 App. 513.

Veniremen engaged on other case.—Where twelve of the special veniremen were on the jury and considering their verdict in another case, it was error for the court, after they had been called and accepted by the parties to discharge them for cause, and order the sheriff to summon additional jurors. *Bates v. State*, 19 Tex. 123.

Where five of the original veniremen were on the jury in another felony case, the trial should have been postponed until that jury was discharged, even though defendant made no request for such postponement. *Thuston v. State*, 18 App. 26.

In *Hudson v. State*, 28 App. 323, 13 S. W. 388, it was held following *Cahn v. State*, 27 App. 709, 11 S. W. 723, that where the court directed the call of the regular jury for the week while some of the special venire were out on another case, but those jurors appeared and were examined before the sheriff was ordered to summon additional jurors, there was no error. But the holding of *Cahn v. State* that the regular jurors should be called was overruled by *Weathersby v. State*, 29 App. 278, 15 S. W. 823.

The refusal of the court to have two of the venire, then absent as jurymen in another case, called in and qualified, or to have the trial postponed until that case was decided, is not reversible error where it is shown that before the jury was made up such two jurymen were discharged from the case they were considering, and were placed on the panel, and that one was challenged by the state and the other by defendant. *Stephens v. State*, 31 App. 365, 20 S. W. 826.

Exclusion of veniremen from courtroom.—An application to exclude veniremen from the courtroom during the selection of a jury should be granted where it is claimed that their presence would prevent defendant from asking proper questions for fear of prejudicing the jury. *Streight v. State*, 62 App. 453, 138 S. W. 742.

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.]

In general.—See *Rippey v. State*, 29 App. 37, 14 S. W. 448.

Where the district attorney asked the panel of jurors if they were biased in favor of or against accused, whereupon two of them answered that they were prejudiced, accused could not have been prejudiced by the court's action in asking such jurors if they were prejudiced against accused, it appearing that the court did not understand the question asked by the district attorney, and that such jurors did not serve in the case. *Conatser v. State* (Cr. App.) 170 S. W. 314.

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.]

See Willson's Cr. Forms, 918.

In general.—Cited, *Jones v. State* (Cr. App.) 153 S. W. 897.

The oath prescribed by the preceding article should be administered to each juror separately as he is selected, but an objection that this requirement was not observed comes too late when made for the first time in a motion for a new trial. *Caldwell v. State*, 12 App. 302; *Ellison v. State*, Id. 557.

The court has no authority to excuse a juror after the oath has been administered to him as a juror. *Ellison v. State*, 12 App. 557; *Hill v. State*, 10 App. 618; *Sterling v. State*, 15 App. 249; *Heskew v. State*, 17 App. 161. Nor can a peremptory challenge to a juror be entertained after he has been sworn. *Drake v. State*, 5 App. 649; *McMillan v. State*, 7 App. 142. But, it seems, the court has discretion to entertain a challenge for cause after the juror has been impaneled. *Drake v. State*, 5 App. 649; *Baker v. State*, 3 App. 525; *Horbach v. State*, 43 Tex. 242; *Mitchell v. State*, Id. 512; *Evans v. State*, 6 App. 513.

An attorney at law, who was a deputy district clerk, administered the oath to the jury. Held, that he was competent to administer the oath, it not appearing that he was an attorney in the case. *Thompson v. State*, 19 App. 593; *Ripsey v. State*, 29 App. 37, 14 S. W. 448.

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. *Ripsey v. State*, 29 App. 37, 14 S. W. 448.

As each juror is required to take an oath he will be governed by the law given him in the charge of the court, it is improper to question him as to whether he would follow the court's charge. *Collins v. State* (Cr. App.) 178 S. W. 345.

Record.—As to the necessity and sufficiency of a record showing that the oath was administered, see post, arts. 929, 938.

Decisions prior to Code of 1879.—*Leer v. State*, 2 App. 495; *Chambliss v. State*, Id. 396; *Clampitt v. State*, 3 App. 639; *Tickle v. State*, 6 App. 623; *Preston v. State*, 8 App. 30; *Holland v. State*, 14 App. 182.

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.]

In general.—See, post, arts. 745 and 837, and notes thereto, as to separation of jury.

If more than twelve jurors are inadvertently impaneled, and the extra jurors can be identified, they may be discharged and the cause proceed, provided they have not yet retired to consider their verdict, but if more than the legal number are permitted to deliberate on the verdict, a new trial must be granted. *Bullard v. State*, 38 Tex. 504, 19 Am. Rep. 30.

Where a juror stricken by the defendant remained in the box during the taking of the testimony, when his presence was discovered and he was ordered to retire, which he did before the jurors had any opportunity to converse together, a conviction need not be reversed. *Lyons v. State*, 9 App. 636.

It is reversible error to permit jurors who have been selected and sworn in a murder case to separate and go to their homes, without being in charge of an officer, even if the defendant consents thereto. He cannot by his waiver do that which the statute prohibits. *Gant v. State*, 55 App. 284, 116 S. W. 803.

Accepted jurors in a felony case less than capital may separate when they have not been sworn to try the case. *Jones v. State* (Cr. App.) 153 S. W. 897.

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.]

Constitutionality.—Acts 30th Leg. 1907, p. 269, c. 139. Oates v. State, 56 App. 571, 121 S. W. 370.

CHAPTER FOUR

OF THE FORMATION OF THE JURY IN CASES LESS THAN CAPITAL

Art.		Art.	
702.	Duty of clerk when parties have announced ready for trial.	709.	Challenges in non-capital felonies.
703.	Same subject.	710.	In misdemeanors.
704.	When court shall direct other jurors to be summoned.	711.	Manner of peremptory challenge.
705.	Challenge for cause to be made, when.	712.	Lists shall be returned to clerk, when.
706.	When number is reduced, etc., by challenge, others to be drawn, etc.	713.	When jury is left incomplete, court shall direct, etc.
707.	Causes for challenge same as in capital cases, except, etc.	714.	Oath to be administered to jurors.
708.	Peremptory challenge to be made, when.	715.	When there are no regular jurors court shall order jurors to be summoned.
		716.	Array may be challenged as in capital cases.

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.]

In general.—It is an improper practice, for the clerk to prepare the lists before the parties have announced ready for trial, but such irregularity to be availed of must be promptly excepted to. *McMahon v. State*, 17 App. 321.

Where the court ordered the summoning of talesmen to complete a jury, it should have sustained defendant's motion to instruct the clerk to place all the names on separate slips of paper as near the same size and appearance as might be, place them in a receptacle, and shuffle them, after which each slip should be drawn by the clerk, and the name placed on the jury list in the order in which they were drawn. *Ellis v. State* (Cr. App.) 154 S. W. 1010.

Prejudice.—That the court failed to pursue the method of drawing talesmen prescribed by this article and arts. 703, 713, was not ground for reversal of a conviction, where it was not shown that any objectionable juror or one who was not fair and impartial was forced on accused thereby. *Ellis v. State* (Cr. App.) 154 S. W. 1010.

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.]

In general.—See notes to article 702.

Neither the sheriff nor his deputy is authorized to draw names of jurors from the box and make lists of same for counsel for State and defendant. This must be done by the clerk. *Brogden v. State*, 47 App. 121, 80 S. W. 378.

Appellant has a right to be present when the jury is drawn and the right to see that the list is drawn by the proper person and in accordance with law. The drawing of a list from a box to try any case that may be called up, before a case is called for trial, is reversible error. *Adams v. State*, 50 App. 586, 99 S. W. 1015.

Number.—See *Davis v. State*, 9 App. 634. More than twenty-four names can not be drawn from the box. *Burfey v. State*, 3 App. 519; *Jones v. State*, Id. 575.

Where defendant was furnished with a jury list of 30 names, the fact that 3 were stricken off was harmless, since he was entitled to but 24 from which to choose. *Bratt v. State*, 38 App. 121, 41 S. W. 624.

Where a regular panel of jurors was tested on their voir dire, only 22 qualified,

and the court ordered 25 talesmen to be brought in to complete the list of 24 names from which the parties should select a jury, and 13 of the talesmen qualified, it was not error to refuse to have the names of the 22 jurors of the regular panel, and all of the talesmen who had qualified, placed in the box and drawn therefrom in the regular way, until the panel of 24 was completed, and to grant the request only in so far as securing the names of 2 additional jurors from the list of talesmen, was concerned. *Railey v. State*, 58 App. 1, 121 S. W. 1120, 125 S. W. 576.

Where the court ordered the summoning of talesmen to complete a jury, it should have sustained defendant's motion to instruct the clerk to place all the names on separate slips of paper as near the same size and appearance as might be, place them in a receptacle, and shuffle them, after which each slip should be drawn by the clerk, and the name placed on the jury list in the order in which they were drawn. *Ellis v. State* (Cr. App.) 154 S. W. 1010.

The overruling of defendant's demand for a full panel of 32 names, before passing on the list which contained 27 names, was not error. *James v. State* (Cr. App.) 167 S. W. 727.

There is no law that requires the judge when a jury is to be impaneled in a felony case, not capital, to summon other jurors, when there are more than 12 to select from in the panel. *Reed v. State* (Cr. App.) 168 S. W. 541.

Waiver of objection.—That the names of 26 jurors were drawn instead of 24, as required by statute, cannot be taken advantage of by a general objection to the manner of organizing the jury. The objection should be taken specifically. *Jones v. State*, 37 Cr. App. 433, 35 S. W. 975.

Where accused tried at one term accepted, without objection, the jury selected at the prior term, he could not after trial complain of the time of the selection of the jury. *Kinch v. State*, 70 App. 419, 156 S. W. 649.

Prejudice.—That the court failed to pursue the method of drawing talesmen prescribed by this article and arts. 702, 713, was not ground for reversal of a conviction, where it was not shown that any objectionable juror or one who was not fair and impartial was forced on accused thereby. *Ellis v. State* (Cr. App.) 154 S. W. 1010.

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.

In general.—See *Davis v. State*, 9 App. 634. Regular jurors should be made available if practicable, without resorting to talesmen. *West v. State*, 7 App. 150.

Error cannot be predicated of the fact that the names of less than 24 jurors were placed in the box when a jury was to be selected to try defendant; a number of the regular list of jurors being out, trying a case, at the time, and the names of the 16 regular jurors in attendance on the court when defendant's case was called being placed in the box, and, after 7 jurors were obtained therefrom, talesmen being summoned, from whom the remainder of the jury were secured. *Code Cr. Proc.* 1895, arts. 703-706. *Thurmond v. State*, 37 Cr. App. 422, 35 S. W. 965.

A panel is properly filled with talesmen, where all the regular jury except seven are trying another case and have been out considering it for a long time. *Leslie v. State* (Cr. App.) 47 S. W. 367.

If there were only six names in the box and they were placed upon the list this would be a sufficient compliance with the statute, and when these are exhausted the court can order six talesmen. *Hackleman v. State* (Cr. App.) 91 S. W. 592.

Where regular juries were drawn as provided by the wheel jury law for alternate weeks, and a felony case, not being reached on a week on which a jury had been ordered, was reset for the next week, there being no regular jury, the court could order the sheriff to procure talesmen to serve as jurors during that week. *Martin v. State*, 57 App. 595, 124 S. W. 681.

The court is not required to summon more than 24 regularly drawn jurors until after the challenges reduce the number to less than 12. *Reynolds v. State*, 71 App. 454, 160 S. W. 362.

Absence of regular jurors.—In the absence of any request for attachment of an absent juror or any suggestion of prejudice to defendant, there is no error in completing a jury with talesmen, where, after failure of some jurors to appear and others were excused, only 22 of the jurors summoned were present, of whom only 5 were accepted. *Gonzales v. State*, 58 App. 257, 125 S. W. 395.

There was no error in overruling defendant's motion to require that all the regular jurors drawn for the week be brought into court by process before talesmen were summoned; it appearing that there were eight regular jurors in the box, and, in addition, that no injury was suffered from the court's action. *Sweeney v. State*, 59 App. 370, 128 S. W. 390.

Disqualification of sheriff.—In a prosecution for pursuing the business of selling intoxicating liquors in local option territory, the judge when the case was called for trial stated to the sheriff that considering that he had just been elected after a heated campaign in which he had been accused of failing to enforce the local option law and with standing in with accused, he ought not to select the talesmen, and thereupon swore a person not an officer authorized to summon jurors to select talesmen, who brought in extreme prohibitionists, although in the opinion of the court fair and impartial men, which fact was unknown to the defendant until

after he had exhausted his peremptory challenges, and the jury had been selected. Held that, as the sheriff was not disqualified to summon jurors, the action of the court in appointing an unauthorized person to summon the jurors was reversible error. *Todd v. State* (Cr. App.) 155 S. W. 220.

In a prosecution for aggravated assault, where the accused was a deputy sheriff and the sheriff was also implicated, the court properly directed the constable of the precinct to summon the talesmen, and delivered the jury into the custody of the deputy constable. *Stoner v. State* (Cr. App.) 162 S. W. 336.

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.

In general.—Ante, art. 692 and notes; post, art. 707.

Cited, *Sweeney v. State*, 59 App. 370, 128 S. W. 390; *Reynolds v. State*, 71 App. 454, 160 S. W. 362.

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.

In general.—See *Thurmond v. State*, 37 App. 422, 35 S. W. 965.

Defendant may be required to pass upon those in the panel before filling it with talesmen. *Speiden v. State*, 3 App. 156, 30 Am. Rep. 126; *West v. State*, 7 App. 150.

A constitutional jury for the trial of causes in the district court consists of twelve persons. *Jester v. State*, 26 App. 369, 9 S. W. 616.

Where there were only seven jurors present and in the box in the county court, it was not error to require the defendant to proceed with the selection of a jury without furnishing a full panel of twelve jurors. *Logan v. State*, 55 App. 180, 115 S. W. 1193.

There was no error in overruling defendant's motion to require that all the regular jurors drawn for the week be brought into court by process before talesmen were summoned; it appearing that there were eight regular jurors in the box, and, in addition, that no injury was suffered from the court's action. *Sweeney v. State*, 59 App. 370, 128 S. W. 390.

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.

In general.—After the jury had been sworn in a criminal case, defendant discovered in the box a juror whom he had previously challenged, and thereupon asked the court to stand him aside. Held, that defendant showed want of diligence in making the discovery and where it was not shown that the juror so challenged was prejudiced against defendant, the refusal to exclude him was not reversible error. *Munson v. State*, 34 App. 498, 31 S. W. 387.

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 de-

fendant 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.]

In general.—Defendant is not entitled to a list of those challenged peremptorily by the state, before passing upon the jury. *Phillips v. State*, 6 App. 44. And he may consent himself, or by counsel, to impaneling the jury in some mode other than that prescribed by law. *Grant v. State*, 3 App. 1.

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.]

In general.—A juror already accepted can not be challenged peremptorily by the party accepting him. *McMillan v. State*, 7 App. 142.

Challenges for cause to jurors will not be reviewed on appeal where it does not appear that appellant exhausted his peremptory challenges, and thereafter was forced to accept a juror subject to disqualification or challenge for cause. *Duke v. State*, 61 App. 441, 134 S. W. 705.

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.

In general.—See ante, art. 706, and notes.

Where the court ordered the summoning of talesmen to complete a jury, it should have sustained defendant's motion to instruct the clerk to place all the names on separate slips of paper as near the same size and appearance as might be, place them in a receptacle, and shuffle them, after which each slip should be drawn by the clerk, and the name placed on the jury list in the order in which they were drawn. *Ellis v. State* (Cr. App.) 154 S. W. 1010.

That the court failed to pursue the method of drawing talesmen prescribed by arts. 702, 703, and this article, was not ground for reversal of a conviction, where it was not shown that any objectionable juror or one who was not fair and impartial was forced on accused thereby. *Ellis v. State* (Cr. App.) 154 S. W. 1010.

The court is not required to summon more than 24 regularly drawn jurors until after the challenges reduce the number to less than 12. *Reynolds v. State*, 71 App. 454, 160 S. W. 362.

Record.—As to the necessity and sufficiency of showing by the record that the oath was administered, see post, arts. 929, 938, and notes.

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.]

See Willson's Cr. Forms, 919

In general.—See, ante, art. 698, and notes. The oath is to be administered to the jury en masse, and not to each juror separately as in capital cases. *Ellison v. State*, 12 App. 557; *Rippey v. State*, 29 App. 37, 14 S. W. 448. The jury must be sworn as prescribed in the preceding article. *Stephens v. State*, 33 App. 101, 26 S. W. 728.

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.

In general.—See ante, arts. 666, 667, and notes.

Elkins v. State, 1 App. 539, and *Shackleford v. State*, 2 App. 385, were decided prior to the adoption of the Revised Code, and are not now applicable in so far as they require the appointment of jury commissioners. *Williams v. State*, 24 App. 32, 5 S. W. 658.

Where a case is called for trial after the regular jury for the week has been discharged, it is proper to order the sheriff to summon a jury to try such case. *Wyatt v. State*, 38 App. 256, 42 S. W. 598.

When a jury has not been drawn for the term, it is competent for the court to order the sheriff to summon a jury for the week. *Thomson v. State* (Cr. App.) 44 S. W. 837.

It is not error, after certain jurors summoned for the week have disqualified themselves, to require defendant in a criminal case to select a jury from those remaining. *Thomson v. State* (Cr. App.) 44 S. W. 837.

When there was no jury for the week and the judge on the first day of the term, appointed three men as jury commissioners and they selected 24 jurors for the second week, and the jury was chosen from these, held, that while the proper practice would have been for the court to order the sheriff to summon the jurors, yet as no injury to defendant was shown by the means and manner of selecting the jury, there was not such error committed by the court as to require a reversal of the case. *Lenert v. State* (Cr. App.) 63 S. W. 564.

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 App. 490, 110 S. W. 920, 22 L. R. A. (N. S.) 706.

The action of the court in appointing jury commissioners to draw the jury for the trial of a criminal prosecution at the term of court then in session was not error. *Schuh v. State*, 58 App. 165, 124 S. W. 908.

Under this article and *Vernon's Sayles' Civ. St. 1914*, art. 5127, providing that the court, whenever it may deem it necessary, shall appoint jury commissioners, where they have not been appointed in time to select the jurymen, and that these jury commissioners may draw for the term of court then in session, as well as the terms following, the action of the court in appointing jury commissioners to draw the jury for the trial of a criminal prosecution at the term of court then in session was not error. *Schuh v. State*, 58 App. 165, 124 S. W. 908.

Where all the criminal cases on the docket, including the prosecution against accused, were set for the first three days of the week beginning Monday, for which a regular jury had been selected, and the case against accused had been postponed at his request until Friday, the court, having inadvertently discharged the jury before that day, properly directed the sheriff to summon a jury to try his case. *Kosmoroski v. State*, 59 App. 296, 127 S. W. 1056.

Where defendant and his counsel agreed in open court that a jury might be summoned by the sheriff, accused could not object on appeal that the jury was not regularly drawn by a jury commissioner. *Britton v. State*, 61 App. 30, 133 S. W. 885.

The jury commission appointed at one term of court selected jurors for six weeks of the following term. At the expiration of that time, there still being a number of cases on the docket, the trial judge appointed a new commission to draw jurors for four weeks longer. Held that, although he might have reassembled the old commission, if that were possible, or have directed the sheriff to summon jurors as provided by this article, the action taken by him was proper under *Vernon's Sayles' Civ. St. 1914*, art. 5127, providing that if from any cause jury commissioners are not appointed, or fail to select jurors as required, the court shall proceed to supply a sufficient number of jurors, and for that purpose may appoint commissioners when it may be deemed necessary. *Columbo v. State* (Cr. App.) 145 S. W. 910.

Where, owing to the death of the clerk of the court at a former term, no jury commissioners were appointed, and at the next term the panel of jurors was drawn by the sheriff, the panel cannot be quashed. *Cox v. State*, 71 App. 236, 158 S. W. 560.

It was not error to refuse defendant a continuance after a mistrial because there were no qualified regular jurors. *Branch v. State* (Cr. App.) 165 S. W. 605.

The court, excusing jurors for the week because they had heard the evidence in the trial of one indicted for the same offense, and were disqualified to try defendant, properly ordered a jury summoned by the sheriff. *Bruce v. State* (Cr. App.) 173 S. W. 301.

Constitutionality.—"Due course of law" does not entitle accused to a trial by a jury selected by jury commissioners, and one selected from talesmen summoned by the sheriff is legal. *Sanchez v. State*, 39 App. 389, 46 S. W. 249.

Cause of failure to select jury.—Where the county judge intentionally refuses to appoint jury commissioners to select jurors for the term, a substantial right is denied to a person who is tried by a jury selected by the sheriff, and a motion to quash the panel should have been sustained. *White v. State*, 45 App. 597, 78 S. W. 1067.

When through inadvertence or oversight, the jury commissioners have not selected a jury for the ensuing term the court would be authorized under this article to have the sheriff to summon jurors for the disposition of cases pending in court. When the statute for the appointment of jury commissioners has been

deliberately disregarded, it will be ground for reversal. *Hurt v. State*, 51 App. 338, 101 S. W. 807.

Jurors selected.—Where the jury panel was quashed on motion of defendant, and the sheriff, as required by this article, summoned another jury, the fact that some of the jurors summoned had been summoned as jurors on the panel quashed by the court did not render them incompetent. *Arnold v. State*, 38 App. 1, 40 S. W. 734.

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.

See ante, arts. 678-684, and notes.

CHAPTER FIVE OF THE TRIAL BEFORE THE JURY

<p>Art. 717. Order of proceeding in trial. 718. Testimony allowed at any time before, etc., if, etc. 719. Witnesses placed under rule. 720. Witnesses under rule kept separate, or, etc. 721. A part of witnesses may be placed under rule. 722. When under rule shall be attended by an officer. 723. Shall be instructed by the court, etc. 724. Order of argument, how regulated. 725. In prosecutions for felony, two addresses on each side. 726. Defendant's right to sever on trial. 727. Same subject. 728. Defendants may agree upon the order in which they will be tried, etc. 729. May dismiss as to one who may be witness. 730. Where there is no evidence against a defendant jointly prosecuted. 731. Where it appears the court has no jurisdiction. 732. In such case the court may commit, when. 733. Defendant shall be discharged in all cases, when. 734. The jury are judges of the facts. 735. Charge of court to jury. 736. Charge shall not discuss the facts, etc. 737. Either party may ask written instructions. 737a. Correction of charge after objections thereto; no further charge after argument begins, except, etc.; review. 738. Charges shall be certified by judge.</p>	<p>Art. 739. No charge in misdemeanor, except, etc. 740. No verbal charge in any case, except, etc. 741. Judge shall read to jury only such charges as he gives. 742. Jury may take charge with them in their retirement, etc. 743. Judgment not to be reversed unless error prejudicial, etc. 744. Bill of exceptions. 745. Jury in felony case shall not separate until, unless, etc. 746. In misdemeanor case, court may permit jury to separate. 747. Sheriff shall provide jury with, etc. 748. No person shall be with jury or permitted to converse with them, except, etc. 749. Punishment for violation of preceding article. 750. Officer shall attend jury. 751. Jury shall take papers in the case. 752. Foreman appointed. 753. Jury may communicate with court. 754. Jury may ask further instructions. 755. Jury may have witness re-examined, when. 756. Defendant shall be present, when. 757. If a juror become sick after retirement. 758. In misdemeanor case in district court. 759. Disagreement of jury. 760. Final adjournment of court discharges jury. 761. When jury has been discharged without a verdict cause may be again tried, etc. 762. Court may proceed with other business.</p>
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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.
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.
4. The testimony on the part of the state shall be introduced.

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.

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.]

<p style="text-align: center;">Subd. 1</p> <p>1. In general.</p> <p>2. Cure of omission.</p> <p>3. Judgment entry.</p> <p style="text-align: center;">Subd. 3</p> <p>4. In general.</p> <p style="text-align: center;">Subd. 4</p> <p>5. In general.</p> <p>6. Order of evidence.</p> <p>7. Eyewitnesses.</p> <p style="text-align: center;">Subd. 5</p> <p>8. In general.</p> <p style="text-align: center;">Subd. 6</p> <p>9. Number of witnesses.</p> <p>10. Time for consultation.</p>	<p style="text-align: center;">Subd. 7</p> <p>11. In general.</p> <p>12. Admissible rebuttal.</p> <p style="text-align: center;">Conduct of Trial in General</p> <p>13. In general.</p> <p>14. Argument to court.</p> <p>15. Improper evidence subsequently withdrawn.</p> <p>16. Reasons for ruling.</p> <p>17. Conduct of judge.</p> <p>18. Misconduct of prosecuting attorney.</p> <p>19. ——— Improper questions.</p> <p>20. ——— Prejudice.</p> <p>21. Restraint of accused.</p> <p>22. Restrictions on defendant's counsel.</p> <p>23. Consultation with adverse witness.</p>
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SUBD. 1

1. **In general.**—The failure to read the indictment or information to the jury is an omission from which it must be apprehended that injury resulted to the defendant, and is reversible error, where it is made to appear affirmatively in the record on appeal. *Wilkins v. State*, 15 App. 420.

The provision of this article requiring the indictment or information to be read to the jury is mandatory and a failure to so do is cause for reversal. *Essary v. State*, 53 App. 596, 111 S. W. 929.

2. **Cure of omission.**—Where on a tardy reading of the indictment the state offers to reintroduce the evidence and defendant objects because it is already before the jury the reintroduction is waived and the omission cured. *Barbee v. State*, 32 App. 170, 22 S. W. 402.

Where State and defendant have both closed their evidence, and it is discovered that the indictment had not been read to jury and no plea entered, it is not error to permit these to be done and the evidence reintroduced. *Hearne v. State* (Cr. App.) 53 S. W. 1009.

3. **Judgment entry.**—It is not required that the reading of the indictment be recited in the judgment but the proper practice is to make the judgment entry immediately preceding the plea set forth the fact of reading though it may be authenticated by the charge of the court. *White v. State*, 18 Tex. App. 57.

SUBD. 3

4. **In general.**—This subdivision is merely directory, and its disregard is not cause for reversal unless there be cause to apprehend such disregard resulted injuriously to the rights of the defendant. In the conduct of trials, however, the directions prescribed by the statute should be strictly followed, and especially when those directions are insisted upon by the defendant. The legislative will should be observed and rigidly adhered to by the courts in matters of practice, as well as in all other respects. *Holsey v. State*, 24 App. 35, 5 S. W. 523. See, also, *Nalley v. State*, 28 App. 387, 13 S. W. 670; *Hendricks v. State*, 28 App. 416, 13 S. W. 672; *Malton v. State*, 29 App. 527, 16 S. W. 423; *Morris v. State*, 30 App. 95, 16 S. W. 757; *McGrew v. State*, 31 App. 336, 20 S. W. 740.

Where other attorneys in addition to the district attorney were employed to prosecute, it was not error to permit one of the attorneys for the state to make a preliminary statement of what the state expected to prove, as the state had a right, under the statute, to make such statement. *Himmelfarb v. State* (Cr. App.) 174 S. W. 586.

SUBD. 4

5. **In general.**—In determining the propriety of recalling a witness who has testified on the trial, the trial court is vested with a wide discretion, and such discretion can not be defeated or controlled by any agreement entered into by counsel in the case. *Pierson v. State*, 18 App. 524.

The state may anticipate defensive testimony upon a material issue, and may support its theory thereupon by its evidence in chief as well as by evidence in rebuttal. *Gibson v. State*, 23 App. 414, 5 S. W. 314.

The state cannot be required to produce every witness present at the trial. *Wilford v. State*, 36 App. 414, 37 S. W. 761.

The county attorney may put any witness on the stand he sees fit, and he need not call the prosecutor as a witness. *Evans v. State*, 57 App. 174, 122 S. W. 392.

The county attorney may, to explain why the prosecutor is not called as a witness, prove by a qualified witness that prosecutor is insane. *Evans v. State*, 57 App. 174, 122 S. W. 392.

6. **Order of evidence.**—The law does not prescribe the order in which testimony shall be introduced. The practice is to admit competent evidence at any convenient

stage of the trial; and to admit evidence which may not appear to be material or relevant upon the assurance of counsel that it will be followed by other evidence rendering it competent; but the better practice is, when practicable, to determine the competency of evidence when it is offered. *Heard v. State*, 9 App. 1; *Davis v. State*, Id. 363.

Where a witness testified to a certain statement, and on cross-examination was asked as to whether she had not made a contradictory statement to a person named, and she denied making it, and on redirect examination it was proven that she had testified to the same facts at another time as those then testified to by her, the supporting testimony was admissible in evidence, though introduced before the impeaching witness had been placed on the stand. *Bosley v. State* (Cr. App.) 153 S. W. 878.

In a prosecution for aggravated assault, the admission of testimony that the prosecuting witness said in the absence of accused that he was sure of the parties, given after a predicate had been laid for the impeachment of the prosecuting witness, but before the impeaching testimony, was merely premature, and was rendered proper by the subsequent introduction of the impeaching evidence. *Caples v. State* (Cr. App.) 155 S. W. 267.

Reception of evidence out of its proper order is a matter within the discretion of the trial court, the exercise of which will not be reviewed unless abused. *Sorrell v. State* (Cr. App.) 169 S. W. 299.

It is not an abuse of the court's discretion, as to the order in which the witnesses are introduced, to permit the prosecution to rest before the testimony of an absent witness was heard and to permit the witness to testify on his appearance after the defense had begun its evidence. *Clark v. State* (Cr. App.) 169 S. W. 895.

Where, upon the record as a whole, evidence was admissible, the order of its introduction was immaterial. *McCue v. State* (Cr. App.) 170 S. W. 280.

7. Eyewitnesses.—The state is not required to introduce every eyewitness to the transaction. *Gilson v. State*, 23 App. 414, 5 S. W. 314; *Mayes v. State*, 33 App. 33, 24 S. W. 421; *Reynolds v. State*, 33 App. 143, 25 S. W. 786, 47 Am. St. Rep. 25; *Kidwell v. State*, 35 App. 264, 33 S. W. 342; *Trotter v. State*, 37 App. 468, 36 S. W. 278; *Darter v. State*, 39 App. 40, 44 S. W. 850; *Robinson v. State* (Cr. App.) 57 S. W. 812; *Davis v. State*, 57 App. 545, 124 S. W. 104. And it was not held in *Hunnicut v. State*, 20 App. 632 or *Phillips v. State*, 22 App. 139, 2 S. W. 601, that such was the rule. *Wheelis v. State*, 23 App. 238.

Where defendant's direct evidence is in conflict with opinion testimony offered by the state, eyewitness being accessible, should be called to testify by the state. *Thompson v. State*, 30 App. 325, 17 S. W. 448.

SUBD. 5

8. In general.—It is not error for the court to refuse to require counsel for the state to make a statement to the jury of what he expects to prove, before he begins the introduction of evidence. *Poole v. State*, 45 App. 348, 76 S. W. 567.

It is not error to refuse to permit defendant's attorney to make a statement to the jury after the plea of guilty and before the testimony of the State has been offered. The statute provides when the statement may be made. *Owen v. State*, 52 App. 65, 105 S. W. 513.

It is error to refuse permission to make the statement when application therefor is made at an apt time. *House v. State* (Cr. App.) 171 S. W. 206.

The fact that defendant had put two character witnesses on the stand before offering to make such statement does not defeat his right to make the statement. *House v. State* (Cr. App.) 171 S. W. 206.

SUBD. 6

9. Number of witnesses.—On a trial for homicide, where accused who had provoked the difficulty introduced 10 or 12 witnesses to testify that deceased was a violent and dangerous man who would carry his threats into execution, and the prosecuting attorney stated that he would not contest this question, it was within the discretion of the court to refuse to permit any more witnesses to testify on this point. *Carver v. State* (Cr. App.) 148 S. W. 746.

10. Time for consultation.—Refusing to allow defendant's counsel five minutes in which to consult with witnesses and each other at the close of the state's case is not ground for reversal where counsel for the state had just previously been given 10 minutes in which to consult on their statement that they had only one more witness whose testimony would be short, and defendant's first witness was not present, and 17 minutes were allowed to bring her in. *Davis v. State*, 57 App. 545, 124 S. W. 104.

SUBD. 7

11. In general.—Original testimony may be introduced which directly rebuts defendant's theory and testimony as to an alibi. *Pilot v. State*, 38 App. 515, 43 S. W. 112, 1024.

Whether in rebuttal or not, evidence essential to the due administration of justice is admissible. *Upton v. State*, 33 App. 231, 26 S. W. 197.

12. Admissible rebuttal.—Where, in a prosecution for assault with intent to rape, alleged to have been committed by defendant on his stepdaughter, her mother testified as a witness for defendant that prosecutrix had never told her anything about it, it was permissible for prosecutrix to testify in rebuttal that she told her mother the first time she saw her after leaving the house about the occurrence in the presence of another woman. *Grimes v. State*, 64 App. 64, 141 S. W. 261.

In a trial for aggravated assault, prosecutrix's testimony that accused placed his hands on her body was not rendered inadmissible because introduced in rebut-

tal, after accused denied that he had done so. *Grantland v. State* (Cr. App.) 146 S. W. 196.

In a trial for murder, permitting a witness for the state, after defendant had testified, to reiterate in rebuttal a part of his testimony on a material point, was not such gross abuse of the trial court's discretion as to require a reversal. *Lee v. State* (Cr. App.) 148 S. W. 706.

In a prosecution for arson, where the state introduced evidence of several burnings, accused may introduce rebutting testimony as to all. *Ward v. State*, 71 App. 310, 158 S. W. 1126.

Evidence of a quarrel between deceased and accused as to their partnership books held admissible in rebuttal of accused's evidence that decedent was the one who objected to the manner in which the books were kept, and first raised objection thereto. *Corbitt v. State*, 72 App. 396, 163 S. W. 436.

Where accused, on cross-examination of a state's witness, sought to show intense hostility by decedent toward him, and various acts of unkindness, the state was properly permitted to show that deceased had no ill will toward defendant, and that the alleged acts of hostility never occurred. *Lamb v. State* (Cr. App.) 169 S. W. 1158.

On a trial for false swearing in connection with the obtaining of a license, where accused filed a plea for a suspended sentence and testified as to his reasons for not delivering a license which he had previously obtained for the same parties, it was not error to permit the state to show that such license was not delivered for a different reason. *Onstott v. State* (Cr. App.) 170 S. W. 301.

CONDUCT OF TRIAL IN GENERAL

13. **In general.**—The aunt of the youthful prosecutrix was allowed to sit near the latter while testifying, but neither spoke to nor prompted her. Not error. *Rodgers v. State*, 30 App. 510, 17 S. W. 1077.

Recalling a witness to restate his evidence is not error. *Hays v. State*, 36 App. 146, 35 S. W. 983.

That on a trial for murder of a school teacher, the public schools adjourned and teachers and scholars attended a part of the trial, will not reverse a conviction on the ground that the combined events were by concert of action to influence the jury. *Long v. State*, 59 App. 103, 127 S. W. 551, Ann. Cas. 1912A, 1244.

When accused applied for a continuance to procure an absent witness, the court stated that it would communicate with the sheriff of the county where such witness lived to see if attendance could be procured. Thereupon accused's son-in-law communicated with the witness by phone, and, returning to the courtroom, stated to his wife, as claimed by the state, that a continuance would be granted because he had instructed the witness not to attend. This statement the state's attorney claimed to have overheard and examined accused's son-in-law in relation thereto before the motion for continuance was overruled. The court casually and without show of feeling requested him to remain in court until he was discharged, and he came and went in the courthouse throughout the trial; no one knowing until after the verdict was rendered that the court intended to punish him for contempt for interfering with witnesses. Every juror swore positively that the examination of accused's son-in-law did not influence his verdict. Held, that the court's action in requesting accused's son-in-law to remain in court was not erroneous on the ground that it prevented accused from having an impartial trial by prejudicing the jury to believe that his son-in-law was trying to obstruct justice by interfering with witnesses. *Lane v. State*, 59 App. 595, 129 S. W. 353.

Where accused relied on insulting language by decedent concerning a female relative who had given birth to a child, and the female had charged that accused was the father of the child, and the court at the request of accused directed the female not to bring the child into the courtroom when she was called as a witness, and the order was obeyed, but later she was recalled, when she came in with the child, the action of the court in permitting her to testify while having the child with her was not reversible error; no reference being made to the child during her testimony, nor by the attorneys during the argument. *Redman v. State* (Cr. App.) 149 S. W. 670.

In a criminal prosecution, where accused's counsel was questioning one of the state's witnesses as to what the sheriff and county attorney told him to say, it is highly improper for the sheriff to interfere in the cross-examination and tell accused's counsel to sit down and keep his place, and the trial judge should suppress such conduct vigorously. *Cober v. State*, 72 App. 374, 162 S. W. 869.

A stipulation, entered into between accused's counsel and the prosecutor as to preliminary matters of proof, which were also matters of record, cannot, where accused, who was present, acquiesced in the stipulation, be questioned after verdict. *Eoff v. State* (Cr. App.) 170 S. W. 707.

In a prosecution of four jointly indicted and tried for offering to bribe a witness, the fact that, at the close of the testimony, the court did not deem the evidence sufficient to authorize the conviction of one of the defendants, and withdrew a statement made by such defendant and admitted in evidence, did not show that the district attorney was guilty of improper conduct, where there was no evidence that he acted in bad faith, and where he appeared to act in an earnest effort to produce evidence to convict all four defendants. *Savage v. State* (Cr. App.) 170 S. W. 730.

Where, in a prosecution for killing deceased by shooting through a window, the shot striking deceased in the back while sitting at the table near the window, it was sought to introduce by the wife his *res gestæ* statement that it was accused who shot him, questions asked by the court in the presence of the jury, to determine the admissibility of the evidence as to whether room was lighted, the position of accused, and the time of the statement, were not leading, or calculated to impress the jury that the court thought deceased saw the assailant. *Shamblin v. State* (Cr. App.) 171 S. W. 718.

14. **Argument to court.**—In a criminal case, where a defendant fails to request that the jury be retired, he cannot complain that authorities upon which the state relied were read to the court in the presence of the jury. *Germany v. State*, 62 App. 276, 137 S. W. 130, Ann. Cas. 1913C, 477; *Singh v. State (Cr. App.)* 146 S. W. 891.

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 App. 402; *White v. State*, 10 App. 381; *Bogen v. State*, 30 App. 467, 17 S. W. 1087. And see *Crook v. State*, 27 App. 198, 11 S. W. 444.

It is not error for State's counsel to read to the court in presence of jury a decision in reference to instructing the jury as to law concerning defendant's failure to testify. *Burks v. State (Cr. App.)* 55 S. W. 825.

It is not proper to retire the jury while argument is being made to the court on the law of the case. *Patterson v. State (Cr. App.)* 60 S. W. 560.

Defendant having objected to testimony which was admissible, it was not error to permit the district attorney to state his reasons why he thought the testimony admissible. *Robinson v. State*, 63 App. 212, 139 S. W. 978.

The refusal of the trial court to permit counsel for defendant to read, in the presence and hearing of the jury, the opinion of the court in a certain case, when it appears from the statements of the court qualifying the exceptions that the court was familiar with the case sought to be read, was proper. *Millican v. State (Cr. App.)* 140 S. W. 1136.

Where evidence is properly admissible, a discussion in the presence of the jury about admitting it is not error. *Lee v. State (Cr. App.)* 148 S. W. 706.

15. **Improper evidence subsequently withdrawn.**—It is improper practice to permit incompetent and injurious evidence to go before the jury, and after it had been discussed to exclude or withdraw it on the court's own motion or at the suggestion of the prosecuting officer. *Hill v. State (Cr. App.)* 161 S. W. 118.

16. **Reasons for ruling.**—It was proper for the trial court to overrule an objection to offered evidence, without assigning reasons for its action, where it had assigned reasons for a similar ruling before, but accused cannot complain that the court stated its reasons, where accused's counsel requested such reasons. *Ward v. State*, 70 App. 393, 159 S. W. 272.

17. **Conduct of judge.**—It is error for court to remark in hearing of the jury that evidence offered (which was highly material) was immaterial. *Zysman v. State*, 42 App. 432, 60 S. W. 670.

Where counsel for accused sought by certain remarks to get excluded evidence before the jury, it was proper for the court to state, in the jury's presence, that counsel's statement was improper, and he must not again make such statements. *Drake v. State (Cr. App.)* 151 S. W. 315.

It was not error to punish defendant's counsel, in the jury's absence, on account of his repeatedly refusing to abide by the court's ruling excluding certain questions. *Shaffer v. State (Cr. App.)* 151 S. W. 1061.

If the court deems it necessary to criticize the conduct of counsel with respect to its rulings, it is better practice to first have the jury retire and then firmly and plainly inform counsel of the penalty for wilful disobedience of the court's rulings. *Ward v. State*, 70 App. 393, 159 S. W. 272.

18. **Misconduct of prosecuting attorney.**—Statement made to other attorney in the presence of the jury has same effect as if made to the jury. *Howard v. State (Cr. App.)* 33 S. W. 225.

Where, in a prosecution for homicide, the state's counsel asked a witness if deceased was not lying in a perfect position of rest, and an objection was sustained, it was improper for counsel in the hearing of the jury to then state that the witness had so testified on a former hearing. *Streight v. State*, 62 App. 453, 133 S. W. 742.

In a homicide case, it was error to refuse to withdraw the remark by the prosecuting attorney in the hearing of the jury, "And this is the favor he gets in return," upon a witness having testified that decedent was friendly to him, and giving material testimony in accused's behalf. *Kemper v. State*, 63 App. 1, 138 S. W. 1025.

After accused had laid a foundation for impeaching H., a state's witness, the prosecuting attorney questioned him relative to similar statements before the grand jury, to which objection was sustained. The prosecuting attorney then stated in the presence of the jury that a member of the grand jury had been summoned as a witness to corroborate H., but in view of the court's ruling would be excused. Held, that this statement, although improper, was not prejudicial to accused, especially where H. was afterwards impeached, thus rendering the testimony of the member of the grand jury competent in corroboration. *Carver v. State (Cr. App.)* 148 S. W. 746.

A remark of counsel for the state to a witness that the witness was an extraordinary man was not reversible error. *Williams v. State (Cr. App.)* 143 S. W. 763.

Side remarks of the state's attorney in a burglary case did not constitute error where the court instructed the jury to disregard them. *Shaffer v. State (Cr. App.)* 151 S. W. 1061.

At the end of a hypothetical question the county attorney stated that as far as the state was concerned it did not desire to do accused anything but justice. Accused objected to the statement as gratuitous, whereupon the county attorney said: "I will withdraw it then. We want to give him all the hell we can." The court at once instructed the jury not to consider the statement, and did so again in his instructions, and the attorney apologized to the court and jury for having used the expressions. Held, that the error was cured. *Harris v. State (Cr. App.)* 169 S. W. 657.

19. — **Improper questions.**—It is reprehensible to permit State's counsel to refresh witness's memory by reading his evidence before the grand jury to him on the stand in the presence of the petit jury. *Spangler v. State*, 41 App. 424, 55 S. W. 329.

Where, in a prosecution for perjury in a suit on certain notes alleged to have been executed by M., he was not a witness, and his conduct or reputation was neither in issue nor material, repeated efforts by the district attorney to show that M. was a scoundrel, that he had been hanged in Oklahoma, and had a bad reputation, after the court had directed the attorney not to continue such line of examination, was prejudicial error. *Downing v. State*, 61 App. 519, 136 S. W. 471.

In a prosecution for cattle theft, where the district attorney, in questioning a witness who was a relative of defendant, in answer to the witness' remark, "I have a right," said, "Of course, if you want to save your uncle, you have a right to," and the court sustained an objection thereto, and instructed the jury not to consider such remark, defendant was not prejudiced. *Roberts v. State*, 64 App. 135, 141 S. W. 235.

It was improper for a county attorney to repeat an improper question after the court had ruled that it was incompetent. *Grimes v. State*, 64 App. 64, 141 S. W. 261.

In a trial for assault to murder, it was improper for the district attorney to ask accused's witness as to accused's character as a law-abiding citizen, where accused had not put his character in evidence. *Hinton v. State* (Cr. App.) 144 S. W. 617.

It was improper for the prosecuting attorney to ask a witness on cross-examination if he did not know that he was telling nothing but lies. *Cooper v. State* (Cr. App.) 147 S. W. 273.

It was highly improper for the county attorney to ask a witness on cross-examination, "Don't you know you lied when you said he told you that?" if never being proper for counsel to call a witness a liar. *Shed v. State* (Cr. App.) 153 S. W. 125.

Where on a trial for manslaughter the state's attorney had no reason to believe that he could establish a conspiracy to kill between accused and his witnesses, it was improper to ask the witnesses concerning such a conspiracy. *Clements v. State* (Cr. App.) 153 S. W. 1137.

The trial court has the power to restrain the prosecutor from asking improper questions merely for the purpose of getting before the jury incompetent evidence prejudicial to the accused and should severely punish prosecutor's attempt to do so. *Vick v. State*, 71 App. 50, 159 S. W. 50.

When the trial court rules that evidence is not admissible, counsel should respect such ruling, and not urge its admission. *Ward v. State*, 70 App. 393, 159 S. W. 272.

In a prosecution for alleged assault on defendant's stepdaughter, with intent to rape, the mother having testified for accused that her other daughters had left home and were cold and indifferent to her, it was not prejudicial misconduct for the prosecuting attorney to ask her the reason why they had left home, creating an inference that accused had assaulted them also, where the court promptly sustained an objection to the question, did not permit the witness to answer, and instructed the prosecuting attorney not to ask the question again. *Grimes v. State*, 71 App. 614, 160 S. W. 689.

In a prosecution in a prohibition county, the action of the prosecutor in asking each of defendant's witnesses if they had not been drinking that day, and if they had not drunk with defendant, and, though they denied it, failing to follow it up by affirmative testimony, was improper as an effort to prejudice the jury against defendant and some of his material witnesses. *Hodges v. State* (Cr. App.) 166 S. W. 512.

The counsel for the state should never by his questions suggest an answer to a friendly witness. *Carter v. State* (Cr. App.) 170 S. W. 739.

A bill of exceptions complaining that during the trial the district attorney said, while a witness was testifying, that accused was a pet of the officers of the county, that accused objected to the remarks, when the district attorney replied that he "never said that he was the officers' pet," but said "he might be this officer's pet," qualified so as to show that the remarks were made during a colloquy between the district attorney and accused's counsel, and that the court directed the jury not to consider the remarks, and reprimanded the district attorney and accused's counsel, presents no error. *McHenry v. State* (Cr. App.) 173 S. W. 1020.

20. — **Prejudice.**—Defendant cannot complain where State's counsel has asked an improper question which was not allowed to be answered, and the court instructed the jury not to consider the question. *Patterson v. State* (Cr. App.) 56 S. W. 59.

In a trial for murder, where the district attorney, after having been told that certain pictures were not admissible, offered them in evidence, but the jury were not permitted to see them, his conduct was harmless. *Lee v. State* (Cr. App.) 148 S. W. 706.

Where a witness was testifying to facts which would tend to reduce the offense to manslaughter when he was asked by the county attorney whether he did not know he lied when he made a certain statement, and accused was convicted of manslaughter and given the lowest penalty, the impropriety of such statement by the county attorney was not reversible error. *Shed v. State* (Cr. App.) 153 S. W. 125.

Where a question was promptly withdrawn, when objection was made, and the court instructed the jury not to consider it for any purpose, there was no error. *Flores v. State*, 72 App. 232, 162 S. W. 883.

The improper repetition of a question to which objection had been sustained in a different form is not prejudicial, where the question was not such as to tend in the least to show that the defendant had any connection with the crime. *Millner v. State* (Cr. App.) 169 S. W. 899.

That the county attorney persisted in asking questions that had been ruled out, while improper, was not ground for reversal in the absence of a showing of prejudice. *Williams v. State* (Cr. App.) 170 S. W. 708.

21. **Restraint of accused.**—The fact that defendant was arrested in another case pending against him during the time he was on trial was not ground for reversal. *Numez v. State*, 70 App. 481, 156 S. W. 933.

In a prosecution for murder, where the sheriff on one occasion did not take the handcuffs off the accused until the jury were taking their seats, but it did not appear that the jury saw him take the handcuffs off accused, such custody or restraint of accused was not reversible error. *Guerrero v. State* (Cr. App.) 171 S. W. 731.

Where accused, as member of a company illegally organized in Texas to invade Mexico, was on trial for the killing of a deputy sheriff as an incident to the conspiracy to prevent discovery, and the other conspirators were only captured after having fired at the sheriff and another deputy and also attempting to resist the posse and a company of United States soldiers, defendant was not prejudiced because certain of the alleged co-conspirators were brought into the court room during the trial of accused manacled. *Martinez v. State* (Cr. App.) 171 S. W. 1153.

22. **Restrictions on defendant's counsel.**—Where the cross-examination of a state's witness proceeded on the theory that the district attorney and a justice of the peace had been guilty of improper conduct on an ex parte examination of witnesses, and the court permitted many questions without eliciting proof of any improper conduct, and informed accused's counsel that, if there was improper conduct, he would be given the widest opportunity to show it, and many more questions were asked on cross-examination, the remark of the court made on objection to questions on cross-examination that, if counsel knew of any improper conduct, he could prove it, but he should not take the time of the court fishing around, was not erroneous. *McKelvey v. State* (Cr. App.) 155 S. W. 932.

A bill of exceptions complaining of the action of the court in refusing to permit defendant's attorney to state reasons for objection to testimony and upon his insisting, ordering him to sit down and thereafter ordering the sheriff to set him down, presents no error, where the bill shows that the same objections had been made to the testimony of other witnesses for reasons then stated, and the court qualified the bill by adding that the counsel gave him considerable trouble and would not stop talking when commanded to do so. *Mason v. State* (Cr. App.) 163 S. W. 115.

23. **Consultation with adverse witness.**—The court has no power to compel a person who has turned State's evidence to talk with the attorney of an accomplice who is on trial. *Wilkerson v. State* (Cr. App.) 57 S. W. 953.

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.]

In general.—The court in its sound discretion can permit admission of evidence any time before argument closes and such discretion will be reversed only when abused. *Toler v. State*, 41 App. 659, 56 S. W. 917; *Nolen v. State*, 14 App. 474, 46 Am. Rep. 247; *Donahoe v. State*, 12 App. 297; *Cook v. State*, 11 App. 19; *George v. State*, Id. 95; *Bostick v. State*, Id. 126; *Grosse v. State*, Id. 364; *Hewitt v. State*, 10 App. 501; *Moore v. State*, 7 App. 14; *Goins v. State*, 41 Tex. 334; *Bittick v. State*, 40 Tex. 117; *Kemp v. State*, 38 Tex. 110; *Harris v. State*, 44 Tex. 146; *Jones v. State*, 3 App. 150; *Lister v. State*, Id. 17; *Reardon v. State*, 4 App. 602; *Phillips v. State*, 6 App. 44; *Noftinger v. State*, 7 App. 301; *Walling v. State*, Id. 625; *Timbrook v. State*, 18 Tex. App. 1; *Farris v. State*, 26 App. 105, 9 S. W. 487; *Nalley v. State*, 28 App. 387, 13 S. W. 670; *Hendricks v. State*, 28 App. 416, 13 S. W. 672; *Malton v. State*, 29 App. 527, 16 S. W. 423; *Laurence v. State*, 31 App. 601, 21 S. W. 766; *Gonzales v. State*, 32 App. 611, 25 S. W. 781; *Testard v. State*, 26 App. 260, 9 S. W. 888; *Browder v. State*, 30 App. 614, 18 S. W. 197; *Kimbrough v. State*, 28 App. 367, 13 S. W. 218; *Thompson v. State*, 30 App. 325, 17 S. W. 448; *Wright v. State*, 37 App. 146, 38 S. W. 1004; *Hamilton v. State* (Cr. App.) 58 S. W. 95; *Spates v. State*, 62 App. 532, 138 S. W. 393; *Bailey v. State*, 63 App. 534, 141 S. W. 224; *Cole v. State*, 70 App. 459, 156 S. W. 929; *Raleigh v. State* (Cr. App.) 168 S. W. 1050.

This article embodies the practice followed before its adoption. *Nutt v. State*, 19 Tex. 340; *Laurence v. State*, 31 App. 601, 21 S. W. 766.

Where it transpired during the argument that a witness who had testified had not been sworn, it was held not error to allow such witness to be recalled, sworn, and re-examined. *Thomas v. State*, 1 App. 289.

It is not error to refuse to allow a witness to testify after argument begins when the nature of the testimony is not stated to the court. *Richards v. State*, 34 App. 277, 30 S. W. 229.

1. The admission of testimony after the argument has begun and before it has closed is within the sound discretion of the court, and his action will not be revised unless it clearly appears that such discretion has been abused. 2. This statute is an exception to the general rule and this exception marks the limit of the power of the court in this respect. 3. The language of the statute conveys the idea that evidence shall not be introduced after the close of the argument in as strong terms as if the legislature had said so in direct language. *Williams v. State*, 35 App. 183, 32 S. W. 893.

The refusal of defendant's application to introduce evidence after demurring to the state's evidence under a misapprehension of the testimony of a witness, held error. *White v. State* (Cr. App.) 150 S. W. 609.

It was within the discretion of the court to permit the reading of the minutes of the commissioners court showing the local option law to be in force when the defendant after the opening argument for the state requested a directed verdict because the minutes, though in evidence had not been read to the jury. *Howard v. State*, 72 App. 624, 163 S. W. 429.

Refusal of continuance for absence of witnesses cannot be complained of, they having arrived before conclusion of the trial, if not before conclusion of the testimony. *Burnett v. State* (Cr. App.) 165 S. W. 581.

In a prosecution for murder, it is proper for the state to reintroduce defendant for further cross-examination. *Barnett v. State* (Cr. App.) 176 S. W. 580.

Exclusion of evidence.—The court has discretion to exclude proffered evidence after the evidence is closed, and it is only on the abuse of such discretion that the court's exclusion of the same will be revised. *Dement v. State*, 39 App. 271, 45 S. W. 917.

Time for receiving evidence.—Testimony can be introduced at any time before the conclusion of the argument. *Pool v. State*, 51 App. 596, 103 S. W. 892; *Patterson v. State* (Cr. App.) 60 S. W. 559; *Fluewellian v. State*, 59 App. 334, 128 S. W. 621.

But no testimony is allowable after argument is begun, unless essential to justice. *Thomas v. State*, 1 App. 289.

The court did not err in refusing to permit defendant to testify after the evidence in the case was closed and the argument begun. *Warren v. State*, 31 App. 573, 21 S. W. 680.

If the court permits evidence to be introduced after the argument has closed, the case will be reversed. *Williams v. State*, 35 App. 183, 32 S. W. 893.

It is not error to permit the recall of a witness after argument has begun. *Dodson v. State*, 35 App. 571, 34 S. W. 754.

Evidence cannot be introduced after close of argument, whether argument is made alone to court or to court and jury. *Lockett v. State* (Cr. App.) 55 S. W. 336.

Whether evidence shall be admitted while the district attorney is making his closing address is within the discretion of the court. *Welch v. State* (Cr. App.) 147 S. W. 572.

The time of introduction of evidence is a matter largely within the discretion of the trial court. *Johnson v. State* (Cr. App.) 149 S. W. 165.

It is not error to allow the prosecution to recall a witness, although the counsel for defendant had closed his argument and the state had made its opening argument and the leading counsel for defendant had left town, where it is not shown that the remaining counsel were not fully capable of cross-examining the witness. *Webb v. State* (Cr. App.) 154 S. W. 1013.

It is within the discretion of the trial court to admit evidence offered by the state after accused has introduced his testimony, instead of requiring that it be offered by the state at the time it puts in its first evidence. *Corbitt v. State*, 72 App. 396, 163 S. W. 436.

In a rape case, it was not error to permit the state's counsel after the state had made its opening argument, and while defendant's counsel was speaking, to recall the prosecuting witness to prove that she was not the wife of accused. *Greenwood v. State* (Cr. App.) 168 S. W. 100.

After the case has been submitted to the jury, evidence to show authority for the holding of court in a hotel during the building of a new courthouse was improperly received. *Reed v. State* (Cr. App.) 174 S. W. 1065.

Evidence admissible.—The indictment alleged defendant's name to be Daniels. The evidence showed his name to be Daniel. The State was properly allowed to prove that defendant was commonly called Daniels, although such evidence was not introduced until after the State had rested her case. *Pendy v. State*, 34 App. 643, 31 S. W. 647.

On a trial for perjury after the evidence was closed, defendant demurred to the evidence because it was not shown that the oath was administered by an authorized officer; held, no error to recall the officer and prove that he was a notary public. *Powell v. State*, 36 App. 377, 37 S. W. 322.

The exclusion of testimony by defendant's father and brother who had been present during the trial to supply gaps in an alibi testified to by a witness who did not reach the courthouse until after the state's opening argument, held not error. *Williams v. State*, 59 App. 347, 128 S. W. 1120.

The court, in refusing to reopen the case near the close of the argument of the state's attorney for the admission of the testimony of a physician who had already testified and been cross-examined, held not an abuse of its discretion. *Bailey v. State*, 63 App. 584, 141 S. W. 224.

Where a witness testified to the distances between the point where the homicide occurred and certain houses, it was not error to permit him, at his own request, to again take the stand the next day and correct his former testimony by accurately stating such distances as determined by him from having stepped them off in the interval. *Mims v. State* (Cr. App.) 153 S. W. 321.

It was not an abuse of discretion in a murder trial to permit the state, after the defense closed, to admit testimony that immediately after the shooting witness examined the ground over which decedent traveled to the point where he fell, looked for the pistol, and did not find any, though he also helped a physician undress decedent, as tending to show that decedent had no pistol. *Decker v. State* (Cr. App.) 154 S. W. 566.

Where the state rested without introducing the orders of the commissioners' court putting local option in force in the county, it was proper for the court to call attention of the state's attorney to the omission privately and to allow him to subsequently introduce the record of proceedings. *Anderson v. State*, 70 App. 250, 157 S. W. 150.

Where, in a prosecution for cattle theft, accused had put in evidence that he had told the sheriff when arrested he had never seen that particular brand on any cattle until he bought those in question from a certain person in October, 1912, the state could show, after accused had closed his evidence, that witnesses saw accused with cattle having the same brand freshly branded, in April, 1912. *Reynolds v. State*, 71 App. 454, 160 S. W. 362.

Where, in a prosecution for perjury committed in a divorce suit by the plaintiff therein, in his testimony that his wife was afflicted with a natural and incurable impotency, accused failed to move for the appointment of a commission of physicians to make an examination until after he had closed his evidence, such motion, being then too late, was properly denied. *Edwards v. State*, 71 App. 417, 160 S. W. 709, 49 L. R. A. (N. S.) 563.

— **Rebuttal.**—Cited, *Mancha v. State*, 57 App. 332, 123 S. W. 129; *Giles v. State* (Cr. App.) 148 S. W. 317; *Galan v. State* (Cr. App.) 177 S. W. 124.

Material testimony may be admitted in rebuttal, even though properly admissible in chief. *Graham v. State*, 57 App. 104, 123 S. W. 691; *Raleigh v. State* (Cr. App.) 168 S. W. 1050; *De Lerosa v. State* (Cr. App.) 170 S. W. 312.

The common law rule with regard to the examination of witnesses is entirely abrogated by this article. *Morris v. State*, 30 App. 95, 16 S. W. 757, and cases cited.

The court may recall the defendant after he has testified in his own behalf for the purpose of impeaching him. *Chapman v. State* (Cr. App.) 30 S. W. 225.

The court, after defendant has closed his case, may permit the State to introduce evidence not strictly in rebuttal. *Thompson v. State*, 35 App. 511, 34 S. W. 629.

Admitting evidence, though on rebuttal, on prosecution for seduction, that prosecutrix used ergot on defendant's prescription, was not error. *Beeson v. State*, 60 App. 39, 130 S. W. 1006.

Where a person charged with unlawfully selling intoxicating liquors has testified that he never sold intoxicating liquors to any one, it is within the discretion of the trial court to permit evidence in rebuttal of sales not shown by the state's direct evidence. *Dickson v. State* (Cr. App.) 146 S. W. 914.

This article abolished the common-law rule as to matters in rebuttal, and hence it was not error for the court to permit the state in rebuttal to introduce eyewitnesses of the crime and to permit them to testify as to the homicide generally. *Montgomery v. State* (Cr. App.) 151 S. W. 813.

The state has a right to recall a defendant, who took the stand in his own behalf, for further examination, as against the objection that he cannot be compelled to testify against himself. *Flowers v. State* (Cr. App.) 152 S. W. 925.

Where defendant sought to impeach a witness for the state, evidence to support him was properly admitted in rebuttal. *Pierce v. State* (Cr. App.) 154 S. W. 559.

In a prosecution for selling liquor in prohibition territory, where accused denied the sale, it was not an abuse of discretion for the court to allow one of the persons claimed to have been present to testify in rebuttal that he saw accused sell and deliver the liquor. *De Lerosa v. State* (Cr. App.) 170 S. W. 312.

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.]

In general.—*Boyett v. State*, 26 App. 689, 9 S. W. 275; *Trotter v. State*, 37 App. 468, 36 S. W. 278; *Heath v. State*, 7 App. 464.

After the enforcement of the rule has been requested, the proper practice is not to relax it without the consent of the parties before the conclusion of the testimony in the case, but to enforce it, notwithstanding the particular witness may have been examined. The discretion of the judge is not an arbitrary one. *Heath v. State*, 7 App. 464.

Where defendant had invoked the rule, the exclusion of testimony by his father and brother who had been present during the trial to supply gaps in an alibi testified to by another witness after the state's opening argument, held not error. *Williams v. State*, 59 App. 347, 128 S. W. 1120.

One who, before his severance, was jointly charged with accused with murder was properly allowed to remain in the courtroom during the trial; he not being competent as a witness for accused, and not having been summoned for the state. *Ryan v. State*, 64 App. 628, 142 S. W. 878.

The defendant is not limited to any particular time for making his demand that witnesses be placed under the rule but may do so at any time while evidence is being taken. *Clary v. State* (Cr. App.) 150 S. W. 319.

Where relatives of accused were present at the trial and heard the testimony of a witness for the state after the rule had been invoked, but the state's attorney at the time did not know that they knew anything about the case, but after adjournment of the first half day of trial had them sworn and placed under the rule, the trial court in permitting them to testify, did not abuse his discretion, so as to afford ground for reversal. *Cooper v. State*, 72 App. 250, 161 S. W. 1094.

In a trial for homicide, where the district attorney on his first appearance in the case stated that he desired one J., a witness summoned by defendant, to advise him about facts in the case, and would not use him as a witness for the state, and that if defendant desired to use him he might do so without objection, and where defendant said he did not expect to put J. on the stand, the court's action

in discharging him from the rule and allowing him to remain in court during the trial was not an abuse of its discretion. *Lane v. State* (Cr. App.) 164 S. W. 378.

The placing of witnesses under the rule being in the sound discretion of the trial court, it will, until the contrary is shown, be presumed that such discretion was correctly exercised. *Hahn v. State* (Cr. App.) 165 S. W. 218.

That the court placed the witnesses under the rule in charge of an officer who would testify for the state, did not render the testimony of the witnesses inadmissible. *Cole v. State* (Cr. App.) 165 S. W. 929.

Exemptions from rule.—Ordinarily, expert witnesses, witnesses who are attorneys in the case, and those called to testify to a witness's reputation for truth and veracity, are exempt from the rule. *Johnson v. State*, 10 App. 571; *Powell v. State*, 13 App. 244; *Spear v. State*, 16 App. 98; *Leache v. State*, 22 App. 279, 3 S. W. 539, 58 Am. St. Rep. 638; *Roach v. State*, 41 Tex. 261.

A deputy sheriff is an officer of the court and should not be placed under the rule. *Bonnors v. State* (Cr. App.) 35 S. W. 669; *Williams and Gordon v. State*, 37 App. 147, 38 S. W. 999.

The rule to sequester witnesses can not be invoked against attorneys in the case. *Boatmeyer v. State*, 31 App. 473, 20 S. W. 1102.

The clerk of court may testify though not included in the rule. *Johnican v. State* (Cr. App.) 48 S. W. 181.

The court may permit the sheriff to remain in the courtroom and exclude him from the rule excluding the witnesses, and may permit him to testify. *Siars v. State*, 63 App. 567, 140 S. W. 777.

Where the sheriff was a witness, the refusal of the court to place him under the rule with the other witnesses was not an abuse of discretion, where accused made no showing of prejudice, and the court qualified the bill of exceptions by a statement that, knowing the high character of the witness, he was of the opinion that no harm was done to accused. *Hahn v. State* (Cr. App.) 165 S. W. 218.

Discretion as to placing under rule.—It is discretionary with the court to permit one who has remained in the court room during the trial to testify. *Miller v. State*, 36 App. 47, 35 S. W. 391; *Powell v. State*, 36 App. 377, 37 S. W. 322; *Cook v. State*, 30 App. 607, 18 S. W. 412; *Blackwell v. State*, 29 App. 194, 15 S. W. 597; *Baldwin v. State*, 39 App. 245, 45 S. W. 714; *Rummel v. State*, 22 App. 558, 3 S. W. 763; *Thomas v. State*, 33 App. 607, 28 S. W. 534; *Woods v. State* (Cr. App.) 151 S. W. 296.

On any trial, at the request of either party, the witnesses may be placed under the rule, and those summoned for the prosecution may be kept separate from those summoned for the defense, if the court sees proper to so direct; and they may be placed in the custody of an officer or be allowed to go at large, under a like discretion. The trial judge is invested with a wide discretion in all matters relating to this procedure, and such discretion will not be revised on appeal unless it has been abused, but the right to have witnesses placed under the rule is a right given by law, and it should not be denied or substantially abridged at the arbitrary discretion of the judge. *McMillan v. State*, 7 App. 142; *Walling v. State*, Id. 625; *Shields v. State*, 8 App. 427; *Estep v. State*, 9 App. 366; *Avery v. State*, 10 App. 199; *Johnson v. State*, Id. 571; *Hoy v. State*, 11 App. 32; *Cross v. State*, Id. 84; *Powell v. State*, 13 App. 244; *Walker v. State*, 17 App. 16; *Kennedy v. State*, 19 App. 618; *Bond v. State*, 20 App. 421; *Goigs v. State*, 41 Tex. 334; *Sherwood v. State*, 42 Tex. 498; *Brown v. State* (Cr. App.) 59 S. W. 1119.

The putting of witnesses under the rule is a matter for the trial court's discretion. *Ryan v. State*, 64 App. 628, 142 S. W. 878.

The discretion granted the court by this article is not an arbitrary discretion. *Clary v. State* (Cr. App.) 150 S. W. 919.

In the absence of anything showing an abuse of discretion, the refusal of the trial court to put some of the prosecuting witnesses under the rule will not be held erroneous. *Smith v. State*, 70 App. 68, 156 S. W. 645.

The trial court has a wide discretion under the statute in putting witness under the rule; and, where the state's counsel stated that the brother of deceased, summoned by defendant as a witness, was familiar with the facts, and would be of material aid to the state in presenting the case, it cannot be said that the trial court abused its discretion in not putting such witness under the rule. *Ward v. State* (Cr. App.) 159 S. W. 272.

In view of article 58 and Pen. Code 1911, arts. 10, 58, providing that words and phrases are to be taken in their usual acceptation, the placing of witnesses under the rule rests in the discretion of the trial court; the word "may" in this article being used in contradistinction to "shall" in art. 296, ante. *Hahn v. State* (Cr. App.) 165 S. W. 218.

While only officers of the court necessary to the transaction of its business have a right to be excused from the rule, the court has a wide discretion, and may excuse officers such as county detectives. *Collins v. State* (Cr. App.) 178 S. W. 345.

Prejudice.—Failure to place under the rule two parties summoned as witnesses for the state was not error where neither was used as a witness. *De Los Santos v. State* (Cr. App.) 146 S. W. 919.

Refusal to place witnesses under the rule was harmless error, where each witness testified only to independent facts, and they in no way supported each other. *Clary v. State* (Cr. App.) 150 S. W. 919.

Testimony of witness violating the rule, or not under it.—It is in the discretion of the court to permit a witness to testify who has not been placed under the rule. *King v. State*, 34 App. 228, 29 S. W. 1086; *Turner v. State* (Cr. App.) 32 S. W. 700; *Piles v. State* (Cr. App.) 32 S. W. 529; *Sherwood v. State*, 42 Tex. 498; *Ham v. State*, 4 App. 645; *Cordova v. State*, 6 App. 207; *Allen v. State*, 62 App. 501, 137 S. W. 1133; *Welch v. State* (Cr. App.) 147 S. W. 572.

It is within the discretion of the court to permit a witness who had been un-

der the rule, and who had been discharged, and had been at large, to be recalled to explain his testimony. *Goins v. State*, 41 Tex. 334. But on appeal the refusal of the trial court to permit such witness to be recalled will not be revised, unless it be shown that the fact sought to be proved was not known to the party calling him at the previous examination, or why such fact was not then elicited. *Roach v. State*, 41 Tex. 261.

A violation of the rule held to require the exclusion of the testimony of two witnesses for the state. *Welhousen v. State*, 30 App. 623, 18 S. W. 300.

Excluding a material witness because not placed under rule, held, error. *Ashwood v. State*, 37 App. 555, 40 S. W. 273.

It is error not to allow a witness to testify as to a material fact because the rule having been invoked witness had heard part of testimony of one witness, no intention of infraction of rule being shown. *Caviness v. State*, 42 App. 420, 60 S. W. 555.

Where a witness, although not sworn as a witness at the beginning of the trial and placed under the rule at that time with the other witnesses, was not present in court when accused testified, it was not improper to permit him to testify to statements by accused. *Welch v. State* (Cr. App.) 147 S. W. 572.

Punishment for violation of the rule.—Violation of the rule by witnesses or the officer having them in charge, may be punished as contempt. *Cross v. State*, 11 App. 84; *Blackwell v. State*, 29 App. 195, 15 S. W. 597; *Cook v. State*, 30 App. 607, 18 S. W. 412; *Welhousen v. State*, 30 App. 624, 18 S. W. 300.

A witness failing to leave the room when the witnesses are put under the rule may be punished for contempt of court. *Bishop v. State* (Cr. App.) 35 S. W. 170.

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.]

In general.—Cited, *Hahn v. State* (Cr. App.) 165 S. W. 218.

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 App. 142; *Welhousen v. State*, 30 App. 623, 18 S. W. 300.

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.

In general.—Cited, *Hahn v. State* (Cr. App.) 165 S. W. 218.

Certain witnesses were excused from the rule by consent of parties. When they were called to testify, objection was made by defendant that he had consented to excuse them from the rule only on condition that they remain out of the court room. This condition was not heard by the court, nor admitted by the state. Held, that it was not apparent that the court had erred in permitting the witnesses to testify. *Davis v. State*, 6 App. 196.

Where counsel for defendant exempts a witness from the rule, he cannot afterwards object that the witness was not under the rule. *Galan v. State* (Cr. App.) 150 S. W. 1171.

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

Cited, *Hahn v. State* (Cr. App.) 165 S. W. 218.

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.

Conference with counsel.—Cited, *Hahn v. State* (Cr. App.) 165 S. W. 218.

Though the rule segregating witnesses was invoked, it was not error to permit the district attorney to take the state's witnesses into his office and have them relate to him, in the presence of each other, what their testimony would be, to

enable him to arrange the order of introducing the testimony. *Jordan v. State*, 62 App. 380, 137 S. W. 133; *Girtman v. State* (Cr. App.) 164 S. W. 1008.

A witness should not be called from the stand and conferred with by counsel. *Williams v. State*, 35 Tex. 355; *Davis v. State*, 6 App. 196.

The rule is provided simply to prevent the testimony of one witness from influencing another, and not to prevent counsel from conferring with the witnesses, with consent of the court. *Jones v. State*, 3 App. 150; *McMillan v. State*, 7 App. 142.

But attorneys should not be allowed unlimited license to converse with the witnesses, but an officer should be present at such conferences. *Brown v. State*, 3 App. 294.

A witness can not be contradicted by the testimony of an attorney who conferred with him while under the rule. *Brown v. State*, 3 App. 294; *Blackwell v. State*, 29 App. 195, 15 S. W. 597; *Cook v. State*, 30 App. 607, 18 S. W. 412; *Welshousen v. State*, 30 App. 624, 18 S. W. 300.

The trial judge is authorized to prescribe the conditions under which a conference with a witness under the rule may be had. *Holt v. State*, 9 App. 571.

It is within the discretion of the court to permit the state's counsel to confer with a witness who is under the rule, and such action of the court will not be revised, except where an abuse of such discretion is apparent. *Dubose v. State*, 13 App. 418; *Davis v. State*, 6 App. 196. The practice of permitting counsel to confer with witnesses under the rule is condemned, but will not be cause for reversal, unless it be manifest that the court has abused the discretion confided to it. *Kennedy v. State*, 19 App. 618.

Where an attorney talks with witnesses placed under the rule it is proper for the court to reprimand him even in the presence of the jury. *Magee v. State* (Cr. App.) 43 S. W. 98.

It was not error for the trial court, after the jury had been impaneled and the witnesses sworn and put under the rule, to permit the county attorney to confer for a minute with the only witness for the prosecution before putting him on the stand. *Ross v. State*, 71 App. 493, 159 S. W. 1063.

The action of the court in placing the witnesses under the rule in charge of an officer, who will be a witness for the state, and in permitting the district attorney to interview the witnesses one by one in the presence of the officer, is within the discretion of the trial court, and will not be disturbed unless abused. *Cole v. State* (Cr. App.) 165 S. W. 929.

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.]

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1. **Limiting time.**—On trial for theft, where more than twelve witnesses testified, and the evidence is circumstantial, it was held reversible error for the court to limit the argument to forty-five minutes. *Walker v. State*, 32 App. 175, 22 S. W. 685.

The court erred in limiting the argument of counsel to fifteen minutes on each side. *Huntly v. State* (Cr. App.) 34 S. W. 923.

An order limiting defendant's counsel to five minutes more in which to close; held, not prejudicial. *Scott v. State* (Cr. App.) 36 S. W. 276.

The court may limit the time of argument. *Bailey v. State*, 37 App. 579, 40 S. W. 281.

The time which will be allowed for argument is a matter for the trial judge's discretion, and his ruling thereon will not be reviewed in the absence of abuse of such discretion. *Bailey v. State*, 37 App. 579, 40 S. W. 281; *Jenkins v. State*, 60 App. 236, 131 S. W. 542; *King v. State* (Cr. App.) 148 S. W. 324; *Holmes v. State* (Cr. App.) 150 S. W. 926.

Where the taking of evidence in a homicide case was closed on Friday night, about two days having been consumed in obtaining the evidence, and three counsel represented the state and five represented accused, a ruling limiting the time for argument to three hours on each side, in order to permit the jury to consider

the case on Saturday, was not reversible error; such matters being left largely to the trial court's discretion, subject to the right of the parties to fully present the issues. *Bradley v. State*, 60 App. 398, 132 S. W. 484.

Where, after closing of the evidence, counsel for both sides, being asked by the court as to the amount of time desired for argument, announced that each side would take a certain time, there was no error in allowing the district attorney, after the county attorney had made the opening argument, to use the remainder of the state's time in argument, though the defendant's counsel, at the close of the opening argument, announced that he did not wish to make an argument. *Leggett v. State*, 62 App. 99, 136 S. W. 784.

Defendant on trial for a statutory offense used all of his time in arguing the law, and the court refused to hear him further on the law, but offered additional time to argue to the jury, which right he expressly waived, and the court then overruled his objection to the closing argument to the jury by the county attorney. Held, that the action of the court showed no injury to defendant, and was not reviewable. *Hughes v. State* (Cr. App.) 149 S. W. 173.

The limiting of arguments by a court, pressed for time in the trial of cases, to one hour on each side, is within the discretion of the court, and where the bill of exceptions does not show an injury to defendant, is not reversible error. *Creech v. State*, 70 App. 229, 158 S. W. 277.

2. **Number of arguments.**—Permitting the state to make a second argument after making the opening argument held not error where defendant refused to make any argument. *Vines v. State*, 31 App. 31, 19 S. W. 545.

3. **Control by court.**—In regard to the latitude allowable to the argument of counsel the trial judge is vested with a large discretion, which will only be revised when obviously abused. *Bingham v. State*, 6 App. 169; *Hudson v. State*, 6 App. 565, 32 Am. Rep. 593; *Foster v. State*, 8 App. 248; *Cross v. State*, 11 App. 84; *Vines v. State*, 31 App. 31, 19 S. W. 545; *Walker v. State*, 32 App. 175, 22 S. W. 685; *Tooke v. State*, 23 App. 12, 3 S. W. 782; *Hall v. State*, 58 App. 512, 126 S. W. 573.

The trial judge is expressly empowered to regulate the order of argument, but the state's counsel is entitled to the concluding address. In his opening argument the state's counsel should fairly develop his case and give the law he relies on; and the trial court should see that he does so. But counsel for the defendant must anticipate the line of argument to which the evidence suggests the state's counsel may resort in his conclusion. *Cross v. State*, 11 App. 84. If the state's counsel should fail to fairly develop his case until in his concluding argument, the trial judge, in his discretion, would be authorized to allow the defendant's counsel to again address the jury, and then to allow the state's counsel to close the argument. *Morales v. State*, 1 App. 494, 28 Am. Rep. 419; *Cross v. State*, 11 App. 84; *Smith v. State*, 27 App. 50, 10 S. W. 751; *Miller v. State*, 27 App. 63, 10 S. W. 445.

The rules for the government of argument in the district court, should be strictly enforced. *Laubach v. State*, 12 App. 583.

When counsel after being reprimanded by the court persists in making improper arguments the court should impose upon him such fine as will restrain such conduct. *Lancaster v. State*, 36 App. 16, 35 S. W. 165.

Court should not restrict argument more than is necessary. Court's action restricting will not be reviewed unless abused. *Whitley v. State* (Cr. App.) 56 S. W. 70.

Where the court had determined not to submit the issue of self-defense, it was not improper to inform counsel for accused, arguing in support of the defense of self-defense, that the issue would not be submitted. *Burton v. State* (Cr. App.) 148 S. W. 805.

4. **Right to argue.**—An accused is entitled to the benefit of argument by his counsel upon any and all of the facts placed before the jury. *Zimmer v. State*, 64 App. 114, 141 S. W. 781.

Under Const. art. 1, § 10, providing that accused shall have the right of being heard by himself or counsel, accused has an absolute right to be so heard unless he waives it, so that it was reversible error to refuse the request of accused's counsel to be heard in argument on the law and facts, made immediately after the evidence was in, and to render judgment of conviction without argument. *Anselin v. State*, 72 App. 17, 160 S. W. 713.

Where the defendant in good faith desired to argue the matter after the court had withdrawn part of its charge delivered before the argument and substituted a different charge, the denial of a reasonable time for such argument deprived defendant of a valuable right, and was prejudicial. *Nowlin v. State* (Cr. App.) 175 S. W. 1070.

5. **Scope of argument.**—Zeal in behalf of their client, or desire for success, should never induce counsel to permit themselves to endeavor to obtain a verdict by arguments based upon any other than the facts in the case, and the conclusions legitimately deducible from the law applicable to them. *Thompson v. State*, 43 Tex. 268; *Hatch v. State*, 8 App. 416, 34 Am. Rep. 751.

The statement by the state's counsel in his closing argument that good men had contributed to the employment of counsel to prosecute the defendant, and that he could have proved certain facts with regard to which the court excluded evidence, had not the defendant objected, was held to be an abuse of the privilege of argument, which not only called for the condemnation of the trial judge, but which was such error as required a reversal of the conviction. *Clark v. State*, 23 App. 260, 5 S. W. 115.

A statement by the county attorney in his opening argument that he felt it proper to warn the jury not to discuss anything except the evidence while retired, as courts sometimes had to set aside verdicts because juries discussed improper

matters in the jury room, was not improper, but rather commendable. *Moray v. State* (Cr. App.) 145 S. W. 592.

Counsel may legitimately discuss everything connected with the case, whether of law or fact; and, while the court should charge the law to the jury, and may instruct that the jury shall receive the law from the court, it should not instruct that the jury should not consider the argument of counsel as to the law of the case. *Chapman v. State* (Cr. App.) 147 S. W. 580.

6. Stating proceedings.—Statements to the jury, by the county attorney, in a prosecution for unlawfully selling intoxicants, that accused, who applied for a continuance to procure witnesses, did not want his witnesses, but merely wanted a continuance, were not reversible error; the testimony of the witness who was sought to be impeached clearly showing guilt, if believed. *Trinkle v. State*, 59 App. 257, 127 S. W. 1060.

The wife of accused having been improperly required to produce a deed of trust that the state might introduce the same in evidence against her husband, the district attorney, as shown by the bill of exceptions, stated that the attorney for accused "gave the deed of trust" to the wife, and "she was brought into court and made to dig it up." The court qualified the bill by saying that the language used was, "We had a time getting possession of this deed of trust. They had it and would not give it up till the court got after them and made them dig it up." Held, that such remarks, whether made in accordance with the version of the attorneys or of the court, were highly improper. *Downing v. State*, 61 App. 519, 136 S. W. 471.

It was not prejudicial error for the prosecuting attorney, in his opening argument, to state that he abandoned a count charging assault with intent to rape, because the penalty was not as grave as that prescribed for burglary, upon which the state elected to rely. *Williams v. State* (Cr. App.) 143 S. W. 634.

Where, in a prosecution for violating the local option law, defendant claimed that he obtained the whisky from C. as prosecutor's agent, a statement, made by the prosecuting attorney in argument, that the fate of C. rested on the jury's verdict, and, if they found "this negro [defendant] not guilty, the attorney would have C. in jail just as soon as the verdict was returned, was improper, but was cured by an instruction directing the jury not to consider it. *McElwee v. State* (Cr. App.) 165 S. W. 927.

7. Illustrations.—Illustration by use of weapon in evidence. *Little v. State*, 39 App. 654, 47 S. W. 984.

Where, in a homicide case, the defense was that deceased killed herself, it was not reversible error for the prosecuting attorney, in his argument, to hand the pistol to a juror and ask him if it were possible for deceased to have shot herself in the place where she was shot, although such practice should not be indulged in. *Borders v. State*, 72 App. 135, 161 S. W. 483.

Where counsel for accused in his argument dwelt on the fact that accused had a good reputation for peace, and therefore would not have committed the killing charged, the argument of the state's counsel, in reply, that he had known of a minister who had always borne an enviable reputation commit a heinous murder after he was 60 years old, was proper within the rule that circumstances of other cases, actual or hypothetical, may be used in illustrating argument, provided counsel does not present to the jury prejudicial facts not in evidence. *Edwards v. State* (Cr. App.) 172 S. W. 227.

In a prosecution for murder, where state's counsel was arguing the question that the mode and use of a weapon must always be considered in passing on whether it is a deadly weapon, and whether death was intended, and stated that, if a pistol were thrown at a man, and not fired, it would not necessarily be a deadly weapon, the argument was legitimate. *Bolden v. State* (Cr. App.) 178 S. W. 533.

8. Arguing law to jury.—It was not improper for the prosecuting attorney in his argument to state that there are two kinds of burglary, burglary with intent to kill and with intent to commit theft, and to state the proof required to establish each, though the prosecution was for burglary to commit theft. *Cooper v. State* (Cr. App.) 147 S. W. 273.

It is a matter for the court's discretion whether the authorities on the legal questions raised shall be presented to the court in the jury's presence or absence, the exercise of which discretion will not be reviewed unless abused to accused's prejudice. *Holmes v. State* (Cr. App.) 150 S. W. 926.

Whether the state's counsel shall be permitted to read cases and discuss law to the trial court is within the court's sound discretion. *Davis v. State* (Cr. App.) 151 S. W. 313.

9. — Reading from books.—The extent to which counsel may read from books, as part of his argument to the jury, is a matter confided largely to the discretion of the trial judge, and his action will not be revised on appeal unless that discretion has been clearly abused to the prejudice of the defendant. *Smith v. State*, 21 App. 277, 17 S. W. 471; *Collins v. State*, 20 App. 399; *Lott v. State*, 18 App. 627; *Cross v. State*, 11 App. 84; *Foster v. State*, 8 App. 248; *Harrison v. State*, Id. 183; *Dempsey v. State*, 3 App. 430, 30 Am. Rep. 148; *Hines v. State*, 3 App. 483; *Hudson v. State*, 6 App. 565, 22 Am. Rep. 533; *Wade v. DeWitt*, 20 Tex. 393; *Forbes v. State*, 35 App. 24, 29 S. W. 784; *Jacobs v. State*, 37 App. 428, 35 S. W. 978. See an instance in which it was held that this discretion was abused by the trial judge. *Lott v. State*, 18 App. 627; *Laroe v. State*, 30 App. 374, 17 S. W. 934. See, also, *Roe v. State*, 25 App. 33, 8 S. W. 463; *Teiman v. State*, 28 App. 144, 12 S. W. 742; *Boyan v. State*, 39 App. 467, 17 S. W. 1087.

It is in the discretion of the court to permit authorities to be read to the jury. *Phipps v. State*, 36 App. 216, 36 S. W. 753.

It is not error for court to refuse to allow counsel for defendant to read to jury

facts in other insanity cases and opinions of judges in such cases. *Cannon v. State*, 41 App. 467, 56 S. W. 360.

In a prosecution of a militiaman for killing a citizen while doing guard duty during a visit of the President of the United States within a city at the call of the mayor, held, that reading a civil case asserting that a highway is primarily for travelers was improper in the light of evidence also erroneously admitted questioning the validity of the mayor's call for the militia at the time in question and his right to close the street. *Manley v. State*, 62 App. 392, 137 S. W. 1137.

Upon the trial of defendant for aggravated assault, the court's refusal to allow his attorney to read and discuss the opinion of the Court of Criminal Appeals in another case, where defendant had appealed from a conviction for an assault growing out of the same transaction, was within its proper discretion. *Perkins v. State* (Cr. App.) 144 S. W. 241.

10. **Matters outside of issues.**—C. and T. were jointly indicted for theft. They severed and C. was on trial. Counsel for the state in argument said, "They have severed and C. is put on trial, and you are told he is only a hired hand. They hope thus to clear this man and then he is to swear his confederate clear. I tell you this is the trick. Good men in this county, and the best men in Gonzales county, desire the conviction of this man and his partner." Held, that such remarks were improper, and that it was the duty of the court to have promptly suppressed them, and to have informed the jury that they should not be influenced by the wishes of good or bad men, but that they should try the defendant by the law and the evidence. *Conn v. State*, 11 App. 390.

An attorney appointed by the court to assist the prosecuting attorney, stated in his argument that he appeared, not as hired counsel, but upon the suggestion of the court, the state's attorney being worn out. Held, that such remarks were calculated to impress the jury with the belief that the trial judge believed the defendant guilty and desired his conviction; and it was the duty of the court to stop the counsel and instruct the jury that such was not the purpose of the appointment. *Brunet v. State*, 12 App. 521.

For the district attorney to reply to the argument of the improbability of defendant having passed a check knowing it was forged, because of his having remained in the neighborhood a week or more thereafter, with the statement that only two days before a person was convicted of altering an order, though he had remained in the community within half a mile of the man whose order was altered, which fact would not be proper evidence, was reversible error. *Rodrigues v. State*, 58 App. 275, 125 S. W. 403.

A statement by the state's attorney in argument that accused was old, but that this was not the first time an aged defendant had been in the court, as one whose hair was gray with age had been convicted within the year, was not a legitimate answer to accused's defense of old age and insanity and was improper. *Lane v. State*, 59 App. 595, 129 S. W. 353.

It is improper to permit the state's attorney to argue that there was a conspiracy to kill decedent, where accused was not shown to have been involved in one. *Clements v. State*, 61 App. 161, 134 S. W. 728.

In a prosecution for violating the local option law, where the state's evidence showed only the single sale for which accused was being prosecuted, statements in the county attorney's argument that accused was making his living by violating the local option law, and that the jury should stand by the county attorney in its enforcement, are highly improper. *Harwell v. State*, 71 App. 473, 160 S. W. 378.

A witness for the state having been excused, on claim of privilege, it was improper for counsel for the prosecution to state, in his argument to the jury, that if he had testified the state could have thrown more light on the case. *Stanfield v. State* (Cr. App.) 165 S. W. 216.

Where the guilt of accused, charged with receiving stolen cattle with knowledge that they were stolen, was clearly established, the improper statement of the prosecuting attorney that the story of thievery, of which accused was the head, rivaled the stories of Robin Hood, that accused was the captain of cow thieves, and the head of an underground system from a pasture in one county down through another county, terminating in accused's pasture, where the cattle were found, and that cattle stealing must be broken up, was not ground for reversal. *Mooney v. State* (Cr. App.) 176 S. W. 52.

Where the district attorney in the presence of the jury stated that he was willing for the jury to take with them a map drawn by a state's witness, and admitted to be incorrect, and which had not been admitted in evidence, an objection to such statement by accused, as prejudicial, and calculated to cause the jury to believe that he did not want them to have the map because it might bear witness or give evidence against him, is not ground for reversal, where the jury was not permitted to take the map, the district attorney's offer not having been accepted by either the court or accused, especially as the court, in qualifying the bill, expressly disapproved accused's contention as to the effect of the remark on the jury. *Galan v. State* (Cr. App.) 177 S. W. 124.

In a prosecution for murder, where there was evidence as to the character of the wound made by defendant's knife, its depth, and that it penetrated the chest cavity, the state's counsel was authorized to argue as to the probable length of the blade of defendant's knife, despite defendant's contradictory testimony. *Bolden v. State* (Cr. App.) 178 S. W. 533.

11. **Facts not in evidence.**—See *Laubach v. State*, 12 App. 583; *Nalley v. State*, 28 App. 387, 13 S. W. 670; *Fuller v. State*, 30 App. 559, 17 S. W. 1108.

Prosecuting officers should confine their remarks to the evidence in the case. *Kirksey v. State*, 61 App. 298, 135 S. W. 124; *Pace v. State*, 58 App. 90, 124 S. W. 949; *Knight v. State* (Cr. App.) 147 S. W. 268; *Dunn v. State*, 72 App. 170, 161 S. W. 467.

Prosecuting counsel should not be permitted to assert, in argument to the jury, that if an absent witness had been introduced he would have testified to certain facts, when adverse counsel had not invited such assertion. *Greene v. State*, 17 App. 395.

It is error for counsel in argument to state his personal knowledge of facts, and especially when such facts are not in evidence. He must keep within the record, confining his discussion to facts in proof. *Tillery v. State*, 24 App. 251, 5 S. W. 842, 5 Am. St. Rep. 882; *Orman v. State*, 24 App. 495, 6 S. W. 544.

A statement that defendant had bribed a witness to stay away, when unsupported by testimony, is cause for reversal. *Butler v. State* (Cr. App.) 27 S. W. 128.

Statements by the prosecuting attorney as to what he told the prosecutrix to do, and what she did, explanatory and supplementary to her testimony should not have been allowed by the court. *Bice v. State*, 37 App. 38, 38 S. W. 803.

Where, on a trial for homicide, accused sought to show that H. had committed the offense, and, though evidence that H. had admitted shortly after the homicide that he had killed decedent was excluded on objection by the state, the state, while cross-examining H. as a witness, brought out a denial of the making of such statement, and then introduced witnesses who testified that H. did make the statement, the argument of the district attorney, that H. did not proclaim that he had killed decedent until he got on the witness stand after accused was indicted, was improper. *Hardin v. State*, 57 App. 401, 123 S. W. 613.

For the county attorney in his argument to state that to his knowledge defendant was a bootlegger, that he induced a witness for the state to leave the state, that he never did a decent thing, there being no evidence of these things, and no evidence attacking his character, was, in the absence of correction by the court, reversible error. *Harwell v. State*, 61 App. 233, 134 S. W. 701.

Where six years had elapsed since a homicide, and one witness had died during that period, and former trials of accused had been had, the argument of the district attorney that six years had elapsed since the homicide, that "accused was in the court room a free man and walked the streets of the city a free man," and that witnesses who had testified in the case in the early stages had died, but that the records did not disclose the result of the former trials, but that they "were failures," was not ground for reversal, though the facts as expressed by the quoted words did not appear by the record. *Hickey v. State*, 62 App. 568, 138 S. W. 1051.

Where there was no evidence to show in a burglary case that accused was "a big double-fisted nigger" or as to the amount of work he could do, it was improper for the county attorney to remark in his argument: "The idea of this double-fisted nigger, that can do more work than any man on this jury, laying around cooking for \$15 a week." *Majors v. State*, 63 App. 488, 140 S. W. 1095.

In a prosecution for keeping a disorderly house in which liquors were sold and kept for sale without a license, an argument of the county attorney that the fact that defendant permitted certain named persons, who were a crowd of booze drinkers, to hang around his place showed that he was keeping liquor for sale was improper, where there was no evidence in the record to sustain the characterization of such persons. *Williams v. State* (Cr. App.) 148 S. W. 306.

In a prosecution for wilfully breaking the windows of a schoolhouse, held, that the county attorney's argument constituted prejudicial error as stating facts not sustained by evidence. *Liner v. State*, 70 App. 75, 156 S. W. 211.

Where the assistant prosecutor enumerated the witnesses who had testified, and asked the county attorney if any one else testified for defendant, his remark that there was no one else, if true, was not a remark out of the record. *Link v. State* (Cr. App.) 164 S. W. 987.

It was improper for counsel for the prosecution, in his argument to the jury, to tell them that a witness, excused on his claiming his privilege in their absence, was indicted for the same offense; this fact not being in evidence. *Stanfield v. State* (Cr. App.) 165 S. W. 216.

The action of the district attorney in stating to the jury that since the trial he had learned that the defendant was a bad hombre, that he had committed a crime in Mexico and had to leave the country, and that they would like to get hold of him, was reversible error, where there was no evidence as to such matters in the record. *Gusman v. State*, 72 App. 258, 171 S. W. 770.

12. — **Excluded evidence.**—In view of the facts that the character of the defendant was not put in issue by the evidence, and that the trial court rejected evidence to the effect that the defendant was once arrested for robbery, it was a palpable abuse of the privilege of argument on the part of counsel for the state to discuss the one and advert to the other. *Stephens v. State*, 20 App. 255.

It is improper for counsel in argument to state what the evidence would have been, had the court permitted the introduction of certain testimony, or to say that "you had as well burn up the law books and tear down the courthouses and let them all go free," if a certain rule of law be followed. *Johnson v. State*, 63 App. 50, 138 S. W. 1021.

Prosecuting attorneys should keep within the record in their arguments, and should not comment in argument upon objections made by accused to the introduction of remarks made by him to the officers when arrested; they being in fact incompetent. *Beaver v. State*, 63 App. 531, 142 S. W. 11.

In a prosecution for murder, where a statement in a dying declaration, that deceased had gone to defendant's house or premises to collect a bill was excluded, the county attorney's statement to the jury: "He shot an unarmed man; shot him in the back, because he went there to collect a bill. He ordered me out, and before I got out he shot me—" was reversible error. *Johnson v. State* (Cr. App.) 148 S. W. 328.

It is not proper for counsel, upon the exclusion of evidence offered, to state in the jury's hearing what the witness' evidence would have been had he been permitted to testify. *Ward v. State*, 70 App. 393, 159 S. W. 272.

In a prosecution for bigamy, where the court excluded letters claimed to have been written by defendant to the alleged former wife, who had delivered them to the district attorney, a statement by the district attorney to the jury that if he had been allowed to introduce them in evidence he would have shown defendant's guilt was prejudicial. *Harris v. State*, 72 App. 117, 161 S. W. 125.

In a prosecution for statutory rape, where the state improperly attempted to show that one of accused's attorneys, before he was engaged, had a conversation with the father of the prosecutrix, argument by the prosecutor that accused sent his attorney to see the prosecutrix's father, and that this showed a consciousness of guilt, was highly improper and prejudicial. *Bradley v. State*, 72 App. 287, 162 S. W. 515.

13. — **Incorrect statement.**—It was improper for the district attorney in his argument to say that a witness testified to the same facts at the examining trial as on the final trial, where, as shown by the record, there was a difference in the testimony given on the two trials, since attorneys, in making statements of fact, should keep within the record. *Sylvas v. State* (Cr. App.) 159 S. W. 906.

Argument by the prosecutor that accused had sent a witness to attempt to stop the prosecution was highly improper where the witness testified that he was acting on his own behalf. *Bradley v. State*, 72 App. 287, 162 S. W. 515.

14. — **Character of witness.**—That a witness testifying for accused had been convicted of a felony and had been pardoned by the Governor could properly be referred to in the argument of the prosecuting attorney. *Harris v. State* (Cr. App.) 167 S. W. 43.

15. — **Action by court.**—Where the county attorney in his argument dwells on facts the evidence to prove which has been withdrawn from the jury, the court should reprimand him and charge the jury to disregard the argument. *Hart v. State*, 57 App. 21, 121 S. W. 598.

The trial court in criminal cases has authority to and should prohibit improper argument by the district attorney not based on the evidence. *Brailaforv v. State*, 71 App. 113, 158 S. W. 541.

16. **Comment on evidence.**—The argument should be restricted to a discussion of the facts in the case, and the conclusions legitimately deducible from the law applicable to them. *Thompson v. State*, 43 Tex. 268.

Counsel for defendant can not read in argument a statement of facts used on a former appeal of the case, and the opinion of the appellate court, in order to demonstrate the insufficiency of the evidence adduced on the trial. *Dempsey v. State*, 3 App. 429, 30 Am. Rep. 148.

In a trial for theft of hogs, prosecuting counsel asserted in his argument that "The defendant and Moore, with whom he is charged as principal, stole the hogs and divided them." Held, that the statement was warranted by the evidence, and was within the rules governing arguments. *Reynolds v. State*, 17 App. 413.

Where a fact is in evidence, it is a proper subject for comment in argument. *Leonard v. State*, 20 App. 442; *Ashlock v. State*, 16 App. 13; *House v. State*, 9 App. 567; *Williams v. State*, 24 App. 32, 5 S. W. 658; *Bennett v. State*, 24 App. 73, 5 S. W. 527, 5 Am. St. Rep. 875; *Cordway v. State*, 25 App. 405, 8 S. W. 670; *McGill v. State*, 25 App. 499, 8 S. W. 661; *Cooksie v. State*, 26 App. 72, 9 S. W. 58; *Weatherford v. State*, 31 App. 530, 21 S. W. 251, 37 Am. St. Rep. 828; *Laurence v. State*, 31 App. 601, 21 S. W. 766.

The issue on trial was whether the acids conveyed by defendant into the jail were useful to aid prisoners to escape. The district attorney in his argument suggested "that it was a common practice to throw vitriol into the eyes of persons and blind them." Held, that, though reprehensible, it is not reversible error. *Watson v. State*, 32 App. 80, 22 S. W. 46.

Where testimony that accused had been threatening the witness was before the jury, in answer to a question why the witness waited so long before filing the complaint, the county attorney could comment on it in his argument. *Jones v. State*, 58 App. 313, 125 S. W. 914.

In a homicide case the state's attorney asked in argument who in the case was such a man as would be liable to kill a man, and stated that accused testified that he was at deadly enmity with his neighbor and with his father-in-law, and that bad feeling sprung up between him and decedent some time after the latter moved near accused, and that the evidence showed that he attempted to draw a gun on decedent, after which he asked whether the jury believed from such facts that accused was one who would waylay and assassinate a man. Held, that the remarks were not unreasonable nor unfair. *Hunter v. State*, 59 App. 439, 129 S. W. 125.

It was proper for the district attorney to comment on what accused did not do at the time of the killing, as well as on what he did do, together with the affection of the deceased father for his daughter, and his dependence on her, etc., though not with reference to particular instances not shown by the record. *Burnam v. State*, 61 App. 616, 135 S. W. 1175.

Under the evidence held not error, in a rape trial, for the prosecuting attorney to say in his argument, "It seems that the defendant, in order to bring about the ruin and destruction of this child, called in the assistance of his paramour, after he had failed in his purpose to do the same thing by himself on a former occasion." *Hutcherson v. State*, 62 App. 1, 136 S. W. 53.

Where there was evidence that the alley near the window at which an entrance was attempted was white and chalky in places, and that defendant was bareheaded when at the window, and that when arrested he had white dust on his hat, it was not improper for the prosecuting attorney to argue that the defendant had left his hat in the alley and had there got the white chalky dust on it; such argument being merely a deduction from the testimony. *Cooper v. State* (Cr. App.) 147 S. W. 273.

Where the state introduced in evidence the clothes worn by accused at the time of the killing of decedent, and they were bloody, and the state claimed that the

blood was that of decedent, and accused refused to put on the clothes during the trial, though requested so to do by the state's attorney, the argument of the state's attorney, commenting on the refusal of accused to put on the clothes, was not improper. *Washington v. State* (Cr. App.) 147 S. W. 276.

Where, in a prosecution for homicide, it was shown that defendant had sold his wife and children and his interest in their residence to decedent for \$5.20, that she and decedent had thereafter lived together, and that she had subsequently secured a divorce from him, after which defendant killed decedent and sought to reduce the homicide to manslaughter in connection with decedent's relation to his former wife and because of his conduct toward her and defendant on the night of the homicide, defendant was not prejudiced by an attack made by the prosecuting attorney on his character with reference to his conduct as a husband and father, etc., nor by the court's refusal to charge the jury that they should disregard the argument with reference to the wife having secured a divorce on some statutory ground, as there was no evidence as to such ground, nor with reference to which of such grounds the divorce was granted. *Clayton v. State* (Cr. App.) 149 S. W. 119.

Argument of the prosecuting attorney in a criminal case is not improper where based on legitimate deductions from the testimony. *Wrba v. State*, 70 App. 211, 156 S. W. 1164.

Where, after a difficulty between accused and deceased had terminated and deceased was fleeing, accused pursued and felled him with an ax, and a third person carried deceased to a house to give him aid and ordered accused away, after which, while deceased was being carried to his home, accused approached and without provocation again struck deceased with an ax, killing him, a statement by the county attorney in argument, that if deceased and accused engaged in mutual combat and the combat was abandoned by deceased it would be in law the same as if deceased had never engaged in the difficulty with accused at all, was not error. *Harris v. State* (Cr. App.) 169 S. W. 657.

Where the evidence showed that defendant had begun to have intercourse with his wife's niece when she was only 14 years old, but that the county attorney did not learn of it until more than one year after she became 15, argument by the county attorney that defendant could and would have been prosecuted for rape if his crime had been detected before the statute of limitations had run was a comment on the evidence, and not error, especially where no special charge in regard thereto was requested. *Bodkins v. State* (Cr. App.) 172 S. W. 216.

On the trial of a person for testifying falsely before the grand jury that he had carnal intercourse with a girl claimed to have been seduced by another man, where there was evidence that defendant had visited at the home of the girl's father, the statement of the district attorney in his argument that defendant voluntarily appeared before the grand jury after visiting the girl's family and tried to ruin her was not improper. *Sutton v. State* (Cr. App.) 172 S. W. 791.

17. — **Deductions.**—Prosecuting counsel has the right to deduce from the facts legitimately in evidence, a motive on the part of the accused to commit the crime for which he is on trial, and to urge it upon the jury. *McInturf v. State*, 20 App. 335.

An argument by the prosecuting attorney, consisting of deductions drawn from the evidence in the case, is not improper. *Fifer v. State*, 64 App. 203, 141 S. W. 989.

Where accused filed a statutory request that, if he be found guilty, and his punishment assessed at not more than five years, the sentence should be suspended, the prosecutor could not argue that the filing of the request showed a consciousness of guilt. *Bradley v. State*, 72 App. 287, 162 S. W. 515.

While on a criminal trial evidence of an indictment against accused for another offense was admissible to affect his credibility as a witness, it was highly improper for the county attorney, in his argument, to state that it was a strong circumstance to show guilt. *Whitfill v. State* (Cr. App.) 169 S. W. 681.

18. — **Witnesses.**—In a prosecution of a negro for carrying a pistol, where three witnesses impeached the veracity of complaining witness and his wife, who testified, and one witness testified that accused's reputation was very good, and that he was one of the best negroes on the creek, and accused testified that he did not carry the pistol, argument of the county attorney that the jury should not turn accused loose because certain white men wanted him turned loose, that in nine-tenths of the cases defended in the county the juries were only asked to turn the defendants loose because some white man wanted them turned loose, and as long as they parade white men before the juries for that purpose counsel was going to tell the juries about it, was not ground for reversal, especially where there was no special charge requested to disregard the argument. *Jones v. State*, 58 App. 313, 125 S. W. 914.

Statements made by the district attorney in argument to the jury in a liquor prosecution, that they knew that the prosecuting witness would not have told that he got whisky from defendant unless he had to, and that defendant's witness S. had no regard for the law of the state, was not an improper comment on the testimony. *Wright v. State*, 63 App. 429, 140 S. W. 1105.

Held, in view of the facts, that the prosecution had the right to argue that a negro who was a witness for the state, was the son of defendant's witness, a white man. *Millican v. State*, 63 App. 440, 140 S. W. 1136.

The argument of the district attorney, consisting of a comment on the evidence of a witness, and asserting that the witness perjured himself, is not improper. *Owens v. State*, 63 App. 633, 141 S. W. 530.

Where prosecutrix was the only witness for the state in a trial for aggravated assault, it was not improper for the state's attorney to tell the jury that, to acquit, the jury must believe that prosecutrix committed perjury. *Grantland v. State* (Cr. App.) 146 S. W. 196.

Where the credibility of a witness is to be passed on by the jury, the prosecuting attorney may discuss his testimony and argue to the jury that it was false. *Hysaw v. State* (Cr. App.) 155 S. W. 941.

19. Challenge to call witness.—Defendant having denied making a statement to C. as claimed by the state, C. was not placed on the stand, and defendant's counsel, having called attention to the fact that he was not made a witness, insisted that defendant's denial of the statement must be true. Held, that it was error to permit a district attorney, in reply, to state that C. was present, and that he had no doubt counsel for defendant was fully advised as to what his testimony would be, and that he would give defendant 15 minutes in which to place C. on the stand, and, if he did not testify in line with the questions asked defendant when he was on the stand, the attorney would join in a request for acquittal. *Rushing v. State*, 62 App. 309, 137 S. W. 372.

It is improper for the prosecuting attorney in his closing argument to challenge accused's counsel to bring the state's witness upon the stand to develop evidence which both parties had an opportunity to develop. *Kemper v. State*, 63 App. 1, 138 S. W. 1025.

20. Opinion as to guilt.—Counsel should not in argument express his opinion as to the guilt or the innocence of the defendant. *Kennedy v. State*, 19 App. 618; *Young v. State*, *id.* 536; *Pierson v. State*, 18 App. 524; *Brazell v. State*, 53 App. 333, 26 S. W. 723; *Thomas v. State*, 33 App. 607, 28 S. W. 534; *Habel v. State*, 28 App. 588, 13 S. W. 1001; *Davis v. State* (Cr. App.) 44 S. W. 1100.

A statement by the district attorney that defendant is guilty and everybody who has heard the testimony knows it, is not reversible error. *Henry v. State* (Cr. App.) 30 S. W. 802.

The district attorney's statement in his closing argument that if he did not believe accused was guilty he would not prosecute him, though improper, was not ground for reversal. *Hinton v. State* (Cr. App.) 144 S. W. 617.

In a trial for murder, after a remark of the district attorney had been withdrawn from the jury, his statement, that never in any case would he submit to the jury a case where the evidence did not justify a conviction, was unobjectionable. *Lee v. State* (Cr. App.) 148 S. W. 706.

21. Conviction on former trial.—See notes under art. 843, post.

22. Failure of defendant to testify or to produce witnesses.—See art. 790, post, and notes.

23. Other offenses by accused.—In a prosecution for unlawfully carrying a pistol, a statement by the prosecutor that the reason that accused's attorney had objected to a question asked accused as to whether he had been previously indicted in the county for a like offense was that he did not want the jury to have the facts, and that it was not the first time accused had been indicted in the county for carrying a pistol, was improper argument. *Waterhouse v. State*, 57 App. 590, 124 S. W. 633.

24. Appeal to sympathy or prejudice.—Public opinion, being subordinate to the law, should have nothing whatever to do with trials in courts of justice, and should not be invoked in appeals to the jury. *Kennedy v. State*, 19 App. 618; *Grosse v. State*, 11 App. 364; *Conn v. State*, 11 App. 390, which compare with *Aud v. State*, 36 App. 76, 35 S. W. 671; *Clark v. State*, 23 App. 260, 5 S. W. 115.

Appeals to partisan feeling or to race prejudice are reprehensible, and should be promptly suppressed. *Lester v. State*, 2 App. 432.

In prosecuting for rape, and other high crimes which arouse public indignation, and fire the minds of a community with a desire for vengeance against the guilty party, the court and counsel should especially be scrupulously cautious to accord to the defendant a fair and impartial trial, as free as possible from excitement or prejudice. There should be no claptrap or sharp practice made use of by counsel for the state. No improper means should be resorted to to prejudice the minds of the jury against the defendant in the remotest degree. No testimony should be offered on the part of the prosecution that is known by the prosecution to be not relevant and legal. No remarks should be made by counsel for the state which are not fully warranted by the evidence. Matters not in evidence should not even be alluded to in argument, when such matters might possibly prejudice the defendant. *Bryson v. State*, 20 App. 566; *Gazley v. State*, 17 App. 267; *Weatherford v. State*, 31 App. 530, 21 S. W. 251, 37 Am. St. Rep. 828.

Inflammatory appeals to the passions of the jury are unwarranted and reprehensible. *Exon v. State*, 33 App. 461, 26 S. W. 1088.

The district attorney, in his argument to the jury, should keep himself within the record, and not so conduct himself as to subject himself to the criticism that he is seeking to arouse the passions of the jury by unfair methods. *Ross v. State*, 61 App. 12, 133 S. W. 688.

In a prosecution for assault with intent to murder, where the defense was insanity, a statement in argument of the prosecuting attorney that, if accused had been put on trial in the probate court on a complaint of insanity, his counsel would have been there as stoutly defending him against the charge, and asserting his sanity there as stoutly as he was asserting his insanity, at the trial, was not ground for reversal; it containing no appeal to any matter that would ordinarily affect the jury, and not being inflammatory or embracing a statement of facts touching the case or accused's guilt. *Turner v. State*, 61 App. 97, 133 S. W. 1052.

On a trial for seduction, it was improper for the prosecuting attorney to seek to arouse the passions and prejudice of the jury by reference to matters outside the record, and to make an impassioned reference to the jurors' "loved ones at home" and their "little flaxen haired girl, or the little girl with the black hair and the blue eyes," for the purpose of arousing the animosity of the jury against the character of offense charged. *Cooper v. State*, 72 App. 645, 163 S. W. 424.

Where prosecutrix and her family were only in moderate circumstances, and

labored for a living, while the father of accused was well to do, and the witnesses testifying for accused were ministers, wives of ministers, and other people of equal standing, the argument of the prosecuting attorney that, where a family had plenty of money, that fact would enable accused to gather around him influential friends, as had been done in this case, and that it had been stated that money could beat any case, was prejudicial. *Sorell v. State* (Cr. App.) 167 S. W. 356.

The district attorney in his argument should not appeal to passion and prejudice, but should always confine his remarks to the evidence and legitimate deductions therefrom. *Carter v. State* (Cr. App.) 170 S. W. 739.

25. — **Enforcement of law.**—There being nothing indicating injury, a conviction will not be reversed because of the district attorney stating that he was endeavoring to enforce the laws, and calling on the jury to help him. *Beeson v. State*, 60 App. 39, 130 S. W. 1006.

In a prosecution for homicide, a remark of the county attorney in argument that "it is time that murders were stopped in Dallas county" was improper. *Wells v. State* (Cr. App.) 145 S. W. 950.

In a prosecution for assault with intent to murder, the district attorney in his argument to the jury stated that human life was too cheap in C. county, that there were too many men going around the country with human blood dripping from their fingers, and that the way to stop murder was to convict men who were guilty of attempt to murder. The attorney proceeded by asking the reason why defendant shot prosecutor, and stated that it might have been because he was that type and character of a man that was walking around the country with a loaded pistol in his grip looking for some good citizen like prosecutor to kill, that the reason why he asked certain questions concerning the jurors' qualifications in their examination on voir dire was because he had tried the case in another county in which there was no defense, but the jury found defendant not guilty, that he considered the verdict an outrage and that he intended to remind every man accepted by him on the jury of his oath and obligations to return a verdict according to law and the evidence in cases of that character. Held, that the remarks were improper. *Daniels v. State*, 71 App. 662, 160 S. W. 707.

26. — **Effect of acquittal.**—On a trial for murder the district attorney in his argument said: "Now, gentlemen, if you acquit this defendant you set free the foul murderer of an innocent young girl and the law can never lay its hands on him again; but if you should convict him and in doing so should by mistake convict an innocent man, then he has his right of appeal and the court of appeals will reverse the case and give the defendant a new trial and no injury will be done." Held highly improper. *Crow v. State*, 33 App. 264, 26 S. W. 209; *Brazell v. State*, 33 App. 333, 26 S. W. 723.

In a murder prosecution, in which the evidence indicated that accused and his brother were connected with the fight in which the killing occurred, and the brother had wounds on his head, the district attorney stated in argument that the defense insisted that accused did not cut decedent, but if the jury acquitted him, and his brother were indicted for the crime, they would say that he did not do it, and would have accused then swear that he committed the crime; that the jury knew accused committed the crime, and if he was not convicted now, he never would be; that the jury knew the history of the county, that it ran red with the blood of murders committed in it; and somebody should be punished for this crime. Held, that it was legitimate argument to urge accused's conviction, and, under the facts, to state what would happen if he was acquitted, but the remarks about the history of the county and the crimes committed therein were improper. *Graham v. State*, 57 App. 104, 123 S. W. 691.

The argument of the prosecuting attorney, on a trial for violating the local option law, that if the jury did not convict on the facts they could as well wipe out the local option statute, tear down the courthouse and turn bootleggers loose in the county, and that the jury should give accused the severest penalty, and teach him that bootleggers like him could not go around the county peddling out liquor, was improper, necessitating a new trial; the argument affecting the result. *Burrell v. State*, 62 App. 635, 138 S. W. 707.

In a prosecution for assault with intent to rape, argument of the state's attorney that, "if you don't convict the defendant in this case, there is no use for the grand jury of your county to hereafter indict any man for the detestable crime of assault with intent to rape, committed in your county," in the absence of any special charge by defendant, and where the court instructed the jury not to consider such remark, was not reversible error. *Collins v. State* (Cr. App.) 148 S. W. 1065.

A statement by the district attorney that, if the jury did not convict accused for this offense, "you will see that you will have to try him for a higher offense in the near future; the way to stop this is to send the defendant to the penitentiary"—was improper and calculated to prejudice accused. *Brailford v. State*, 71 App. 113, 158 S. W. 541.

A statement by the prosecutor in his argument that to turn the defendant loose would invite crime for all other criminals is legitimate. *Henderson v. State* (Cr. App.) 172 S. W. 793.

27. — **Reference to mob violence.**—On trial for rape the prosecuting attorney said: "The friends of the prosecutrix have not in their anger taken the law in their own hands and lynched or applied the torch to defendant; therefore the life of this demon should pay the penalty." Held, error. *Thompson v. State*, 33 App. 472, 26 S. W. 987.

In a prosecution for rape, a remark by the district attorney that there should be speedy trials and prompt convictions or mob law would result, while improper, does not require a reversal of the conviction. *Valdez v. State*, 71 App. 487, 160 S. W. 341.

On the trial of a negro for rape, the remarks of the district attorney, that the people had often taken the law in their own hands and mobbed persons committing such crime, that if the jury turned accused loose the people could not be blamed for taking the law in their own hands, and that it would be much worse than convicting an innocent man to turn him loose and then in a week or two for him to attack "one of your wives, sisters, or daughters," were improper and required a reversal. *Hemphill v. State*, 72 App. 638, 165 S. W. 462, 51 L. R. A. (N. S.) 914.

28. **Applause of argument.**—*Cartwright v. State*, 16 App. 473, 49 Am. Rep. 826; *Weatherby v. State*, 29 App. 278, 15 S. W. 823; *Parker v. State*, 33 App. 111, 21 S. W. 604, 25 S. W. 967; *Hamilton v. State*, 36 App. 372, 37 S. W. 431.

29. **Abusive language.**—See *Morris v. State*, 39 App. 371, 46 S. W. 253; *McConnell v. State*, 22 App. 354, 3 S. W. 699, 58 Am. Rep. 647; *Parks v. State*, 35 App. 378, 33 S. W. 872.

The district attorney should not in any case be allowed to call the defendant a "Hyena" or use toward him other such scurrilous remarks. *Kugadt v. State*, 38 App. 681, 44 S. W. 989; *Callihan v. State* (Cr. App.) 150 S. W. 617.

Vituperation, vilification and abuse in argument, held error. *Crawford v. State*, 15 App. 501; *Sterling v. State*, Id. 249; *Hunnicut v. State*, 18 App. 500, 51 Am. Rep. 330; *Ricks v. State*, 19 App. 308.

See an instance of the use of abusive remarks, held to be sufficient error to cause a reversal of the judgment. *Stone v. State*, 22 App. 185, 2 S. W. 585.

Argument of counsel as to character of defendant. *Turner v. State*, 39 App. 322, 45 S. W. 1020. And see *Stephens v. State*, 20 App. 255; *Coyle v. State*, 31 App. 604, 21 S. W. 765; *Pollard v. State*, 33 App. 197, 26 S. W. 70.

Denunciatory remarks of counsel towards defendant should not be permitted. *Patterson v. State* (Cr. App.) 60 S. W. 560.

A remark to the jury by the county attorney that the defendant never did a decent act in his life was improper and erroneous. *Paris v. State*, 62 App. 354, 137 S. W. 698.

Where the evidence for defendant in a prosecution for assault with intent to commit rape was that prosecutrix spoke to him shortly after the alleged assault, which was denied by the state's witnesses, the prosecuting attorney had the right to argue the question of fact from the state's standpoint, and his reference to the defendant as a libertine and a rapist, in view of general evidence against defendant, was not reversible error. *Conger v. State*, 63 App. 312, 140 S. W. 1112.

In a prosecution for theft, a statement by the district attorney in argument that defendant admitted he was a married man, and that he was charged with seducing a little girl, and that a man who would commit that character of crime would commit theft, was erroneous and improper, in view of the presumption of innocence attaching to every person charged with crime. *Thompson v. State* (Cr. App.) 150 S. W. 181.

A prosecuting officer under no circumstances should resort to vituperative and abusive language in arguing a case to the jury. *Bishop v. State*, 72 App. 1, 160 S. W. 705.

While a prosecuting attorney ought never to use epithets, yet it was not error for him, in his argument in a homicide case, to point his finger at accused and call him a "cold-blooded brute" and "an animal," as the record showed the murder to have been very brutal, and there was no requested charge on the point. *Borders v. State*, 72 App. 135, 161 S. W. 483.

Accused having been charged as an accomplice to the murder of deceased on the theory that he desired deceased's wife, the prosecuting attorney in his argument pointed his finger at accused and called him "a scoundrel and villain and everything else," and also referred to the presence of deceased's wife as brazen effrontery in that she had attended the trial, and defendant had not used her as a witness, and had not shown where her children were. He also said that he wished he could tell the jury the remarks of the principal who did the killing, that it was a pity for the state he could not tell the words that were said at the time the principal and deceased's wife met after the killing, and that it was a good thing for defendant that he could not. Held, that such statements were improper and prejudicial. *Millner v. State*, 72 App. 45, 162 S. W. 348.

In a prosecution for murder, the argument of state's counsel referring to defendant as a culprit was not improper. *Bolden v. State* (Cr. App.) 178 S. W. 533.

30. **Request for death penalty.**—On trial for murder in perpetration of robbery, held, not error for the district attorney to say in his argument: "The defendant murdered deceased while he was asleep in bed, and after brutally killing him with an ax robbed him of his money, his clothes, his horse, and his buggy; he should suffer the death penalty for his crime." *Thomas alias Whitehead v. State*, 33 App. 607, 28 S. W. 534.

While the state's attorney must stay within the record in his argument, and not use inflammatory language, he may insist upon the death penalty being imposed where the evidence justifies it. *Jackson v. State*, 63 App. 351, 139 S. W. 1156.

Where the prosecuting attorney in a trial for murder appealed to the jury to assess the death penalty and reminded them that laws were enforced for the protection of society, that the safety of human life was vouchsafed only by prompt infliction of severe punishment upon those guilty of crime, and that the object of the law prescribing the death penalty was not punishment or revenge, but example, there was no error in refusing to grant a new trial after conviction and assessment of the death penalty, because of the prosecuting attorney's language. *Calderon v. State*, 63 App. 639, 141 S. W. 251.

31. **Retaliatory remarks.**—If counsel for the defendant provokes improper remarks to be made by counsel for the state, the defendant will not be heard to complain of such remarks. *Baker v. State*, 4 App. 223; *Williams v. State*, 24 App. 33, 5 S. W. 658; *House v. State*, 19 App. 227; *Pierson v. State*, 18 App. 525; *Pierson v. State*, 21 App. 14, 17 S. W. 468; *Smith v. State*, 21 App. 277, 17 S. W. 471; *McGill*

v. State, 25 App. 499, 8 S. W. 661; Cooksie v. State, 26 App. 72, 9 S. W. 58; Miller v. State, 27 App. 63, 10 S. W. 445; Walker v. State, 28 App. 503, 13 S. W. 860; Lewis v. State, 29 App. 202, 15 S. W. 642, 25 Am. St. Rep. 720; Weathersby v. State, 29 App. 278, 15 S. W. 823; Frizzell v. State, 30 App. 42, 16 S. W. 751; Gonzalez v. State, 30 App. 203, 16 S. W. 978; Rahm v. State, 30 App. 310, 17 S. W. 416, 28 Am. St. Rep. 911; Cook v. State, 30 App. 607, 18 S. W. 412; Wolfforth v. State, 31 App. 387, 20 S. W. 741; McKinney v. State, 31 App. 533, 21 S. W. 683; Ray v. State, 35 App. 354, 33 S. W. 869; Leggett v. State (Cr. App.) 65 S. W. 517.

When remarks, though outside of the record, are only in reply to irrelevant remarks made by defendant's counsel, the case will not be reversed. Sinclair v. State, 35 App. 130, 32 S. W. 531; Washington v. State, 35 App. 154, 32 S. W. 693; Campbell v. State, 35 App. 160, 32 S. W. 774; Campbell v. State, 62 App. 561, 138 S. W. 607; McHenry v. State (Cr. App.) 173 S. W. 1020.

When an advocate grossly abuses his privilege to the manifest injury to the defendant, it is the duty of the court to stop him instantly. But a defendant, whose own outrageous conduct provoked such impropriety, is not entitled to complain of it. Eanes v. State, 10 App. 421.

Accused's counsel, in his argument, after stating that children are usually truthful, stated that the Savior had said, "Suffer little children to come unto me, for of such is the kingdom of Heaven." In reply, state's counsel used this language: "The Gentleman who uttered the expression, 'Suffer little children to come unto me for of such is the kingdom of Heaven,' lived nearly 2,000 years ago, and did not know of the juvenile laws and courts of Texas, and of the small boys who have been juveniled under that law." Held, that the state's counsel's retort did not constitute error. Railey v. State, 58 App. 1, 121 S. W. 1120, 125 S. W. 576.

That defendant's counsel commented on an erroneous and illegal statement made by the state's counsel would not cure the latter's error; a previous opinion of the Court of Criminal Appeals in the same case having suggested that the matter referred to by the state's counsel should not be commented on. Harville v. State, 57 App. 486, 123 S. W. 1109.

In a robbery case, accused's counsel called a prosecuting witness abusive names, and stated that he was in no shape, having taken at least two glasses of beer, to know what really happened, and that he was not entitled to consideration. Subsequently accused's attorney objected that the prosecuting attorney was calling accused a vile wretch, and the prosecuting attorney declared that he was quoting from accused's counsel's statement that the prosecuting witness was entitled to no more credit "than this vile wretch here," referring to accused. Accused's counsel denied using such term, claiming he had spoken of accused as a poor unfortunate wretch. Held that, it appearing that the prosecuting attorney was answering the argument of accused's counsel, the matter was not ground for reversal. Martin v. State, 57 App. 595, 124 S. W. 681.

Expatiation by the district attorney on the same proposition of law announced by accused's counsel was not error. Edwards v. State, 58 App. 342, 125 S. W. 894.

Where counsel for accused commented on a previous acquittal of accused, notwithstanding the court warned him that the remarks were improper, and counsel for accused then stated that the county attorney could have as wide a range in his argument as he desired, the remarks of the county attorney that the jury that acquitted accused were ashamed of the verdict, and that he had spoken to some of the jurors who voluntarily told him they were ashamed of it, were called for by defendant's counsel, and did not justify a reversal. Fluewellian v. State, 59 App. 334, 128 S. W. 621.

Where counsel for accused, in his argument to the jury, commented on the failure of the state to impeach accused, the argument of the county attorney, in reply, that accused knew that the state could not put accused's reputation in issue, but that the state was willing to make an issue of his character, and that no one knew it better than accused himself and his counsel, was not ground for reversal. Roberts v. State, 60 App. 111, 131 S. W. 321.

Accused's counsel having argued that accused's testimony must be taken at full value because his character and his reputation had not been impeached, it was not reversible error for the county attorney to state that accused alone could put his character in issue, and that how did counsel know but the state had witnesses to show that accused had been "picking up little things around the country," if character should have been put in issue, etc. Hilcher v. State, 60 App. 180, 131 S. W. 592.

Where, on a trial for theft, counsel for accused had commented on the failure of the state to connect accused with certain cotton sold by him, an argument of the county attorney, calling attention of the jury to the fact that his inability and failure to do so was due to objections by the attorney for accused, was not ground for reversal. Wright v. State, 60 App. 335, 131 S. W. 1070.

Argument of the prosecuting attorney in his closing address in answer to argument made by counsel for the defense is proper. Kemper v. State, 63 App. 1, 138 S. W. 1025.

The counsel for one accused of murder having said in his argument that the testimony of a certain witness would have shown that decedent was armed when killed, it was not improper for the prosecuting attorney in his closing argument to invite accused to call that witness, and ask her where decedent's pistol was when he was killed. Kemper v. State, 63 App. 1, 138 S. W. 1025.

Statement in the district attorney's argument to the jury why he did not testify was not improper, where it was made in response to defendant's counsel's argument asking the jury why the district attorney did not testify. Moore v. State (Cr. App.) 144 S. W. 598.

Where defendant's attorney argued at length concerning the history of defendant's family, defendant could not object that the prosecuting officer, in reply, stated that he had known the defendant and two other members of his family ever since the officer had been in town, and that that was the reason they did not

attempt to prove that defendant had a good character, because they dared not do it. *Lubbock v. State* (Cr. App.) 147 S. W. 258.

Where counsel for accused stated in the presence of the jury that he would have offered a witness if he had not known of the conviction of the witness, made after the court had sustained an objection to the state introducing the witness, the remark of the district attorney that the witness would contradict a witness for accused, though improper, was occasioned by the improper remarks of accused's counsel, and accused could not complain. *Burton v. State* (Cr. App.) 148 S. W. 805.

In a prosecution for assault with intent to rape, the argument of the state's attorney that if a witness subpoenaed in the case, but then dead, was alive and in court, he believed that he would say that defendant stated "that there were two cocks out there in that buggy, and I am going to have one of them before morning," explained by the court to the effect that it was in reply to remarks of defendant's counsel, was not error. *Collins v. State* (Cr. App.) 148 S. W. 1065.

Remarks of the county attorney, being but a legitimate reply to argument of defendant's counsel on an issue he injected into the case, are not ground for complaint, even had there been no instruction to disregard them; much less where they were withdrawn, and an instruction to disregard them given. *Maxwell v. State* (Cr. App.) 153 S. W. 324.

Where, in a larceny case, defendant's attorneys in their argument stated that defendant had a good reputation, the state's counsel was justified in referring to the fact that he could not attack such reputation unless defendant first made it an issue. *Manley v. State* (Cr. App.) 153 S. W. 1138.

A bill of exceptions to remarks of a prosecuting attorney, qualified by the judge's statement, "Refused because in answer to argument of defendant's counsel," presents no error. *Holmes v. State*, 70 App. 214, 156 S. W. 1173.

Improper argument of prosecuting attorney is not reversible error, where it was in reply to and admitted because of remarks by defendant's counsel. *Ulmer v. State*, 71 App. 579, 160 S. W. 1188.

In a prosecution for rape on a girl under 15 years of age, where it appeared that defendant, from the time of his arrest, knew that the state would show by her that she was under 15 years, and his own counsel in argument lamented the fact that the state had not brought neighbors to testify to her age, the remark of the prosecuting attorney, "Oh, you slick one, why didn't you go and bring some good people from that neighborhood up there that would say that she was 15 years old, or that she was not born on the 2d day of January, 1901?" was not reversible error. *Graham v. State* (Cr. App.) 163 S. W. 726.

The statement of counsel for accused in his argument to the jury that the fact that the father of accused was rich should not be considered against accused did not justify the argument of the prosecuting attorney that, where a family had plenty of money, accused would be enabled to gather around him influential friends, and that money could beat any case, but that the jury should pass on the question of the guilt of accused as though he was the humblest citizen. *Sorell v. State* (Cr. App.) 167 S. W. 356.

On a trial for homicide, where accused placed his general reputation in issue by a plea for suspension of sentence and evidence in support thereof, accused was asked without objection if he had not killed a man in Louisiana, to which he replied that he had not. In his argument accused's counsel charged the county attorney with acting unfairly in asking such question, called upon him to explain why he asked it, and stated that, if the state wanted to show that accused had been convicted in Louisiana, it knew it ought to do so by a certified copy of the judgment of conviction. The county attorney in reply stated that he asked the question because he had information which he considered reliable, that accused was a fugitive from justice from Louisiana, and that he thought if he asked accused he would speak the truth about it. Held, that this remark of the county attorney was not error. *Dickson v. State* (Cr. App.) 168 S. W. 862.

On a trial for homicide, accused's counsel, in his argument referring to accused's flight following the homicide, said there was nothing for him to flee from, as the indictment showed that he had not been indicted until shortly before the trial, nearly seven years after the killing. The county attorney having referred to this argument, accused's counsel interrupted, stating that he knew what was coming and objected to any statement as to a previous indictment because there was no evidence of such indictment. The county attorney then stated that he intended to make no such statement, but that there was no evidence that a previous indictment was not found. Held, that the court's refusal to admonish the county attorney that he could not refer at all to the argument of accused's counsel about the indictment was not error, since, when counsel for defendant by their argument go out of the record and make comments or call upon the state's counsel for an explanation, they cannot complain of matters thus brought out. *Dickson v. State* (Cr. App.) 168 S. W. 862.

Where on a trial for keeping a bawdyhouse an inmate of accused's house laughed at a remark of accused's counsel in his argument, the prosecuting officer's incidental reference to the fact that she laughed at such remark was not sufficient cause for a reversal. *Farris v. State* (Cr. App.) 170 S. W. 310.

Where, in a prosecution for homicide alleged to have been committed in furtherance of a conspiracy to organize in Texas an armed band to invade Mexico, defendants' attorneys devoted their argument almost exclusively to historical sketches of conditions of the Mexican people and other revolutions, referring to the condition of the Mexican people and their struggle for liberty, comparing defendants to other revolutionists for liberty, and defended the Mexicans in their present struggle against their President, whom he dubbed a tyrant, argument of the district attorney in reply that defendant was a member of the faction in Mex-

ico, the principles of which were murder, rapine, and plunder, etc., was proper. *Gonzales v. State* (Cr. App.) 171 S. W. 1149.

The statement of the district attorney that the law was made for negroes as well as the white people, called out by language of defendant's counsel, was not improper. *McHenry v. State* (Cr. App.) 173 S. W. 1020.

32. **Action by court.**—A case will not be reversed on account of improper remarks by the district attorney, when the jury is instructed to disregard them, unless it is shown that the jury was prejudiced by such remarks. *Schroeder v. State* (Cr. App.) 36 S. W. 94; *Trotter v. State*, 37 App. 468, 36 S. W. 278; *Carver v. State*, 36 App. 552, 38 S. W. 183; *Gent v. State*, 57 App. 414, 123 S. W. 594; *La Grone v. State*, 61 App. 170, 135 S. W. 121; *Welch v. State* (Cr. App.) 147 S. W. 572; *Byrd v. State* (Cr. App.) 151 S. W. 1068; *Fuller v. State* (Cr. App.) 154 S. W. 1021; *McGregor v. State*, 71 App. 604, 160 S. W. 711; *Brown v. State* (Cr. App.) 170 S. W. 714.

It is the duty of the court to check all assaults on the character, motives, or conduct of counsel, and to enforce decorum of argument by fine and imprisonment, if necessary. *Shackelford v. State*, 43 Tex. 138. On a trial for murder, the audience applauded the opening address of counsel for the state. Counsel for defendant were permitted to comment upon the occurrence. In reply counsel for the state, alluding to the demonstration made by the audience, said: "It was a spontaneous outburst of approval by the audience of this cause, after they had heard it truthfully represented by the state." Held, the court should have taken prompt and decisive action on the occasion, and should have endeavored by its condemnation of the proceeding, and its admonition to the jury, to prevent any prejudice to the defendant by such reprehensible conduct, and the remarks of counsel for the state alluding to the conduct of the audience should have been reproved by the court. *Cartwright v. State*, 16 App. 473, 49 Am. Rep. 826.

An improper remark of the district attorney, in argument, that defendant would be lucky even if he got the limit, because, had prosecutrix's parents been of a different nationality, he would have been killed, was not ground for reversal; the court, on objection, having ordered counsel to confine himself to the facts, and having instructed the jury not to consider the remarks in arriving at a verdict. *Groszohmigem v. State*, 57 App. 241, 121 S. W. 1113.

Error in argument of a district attorney, who stated, "Let us now get rid of slop that is always injected in a criminal trial by the defendant," was cured where, after objection by accused, the court charged the jury not to consider the argument, and at the conclusion thereof, at accused's request, gave a special charge to the same effect. *Railey v. State*, 58 App. 1, 121 S. W. 1120, 125 S. W. 576.

Error in the argument of state's counsel that accused had interposed technical objections which prevented the state from proving certain facts was cured where, after objection by accused thereto, the court instructed the jury not to consider the argument, and at the conclusion thereof gave a special charge again instructing them to the same effect. *Railey v. State*, 58 App. 1, 121 S. W. 1120, 125 S. W. 576.

The misconduct of the prosecuting attorney in stating to the jury that accused, who had objected to evidence, did not want the truth brought out, and that there was no better proof of his guilt than his objection to the evidence, was obviated by the charge of the court that the evidence was not admissible, and that accused could object to its introduction without being criticised therefor, and that the remarks of the prosecuting attorney should not be considered. *Craft v. State*, 57 App. 257, 122 S. W. 547.

The statement by the court, upon accused's objection to remarks by the state's attorney, requesting counsel to keep in the record and not discuss accused's character, must have been understood by the jury as sustaining accused's objection to the remarks to the extent that they should not infer from the remarks of counsel anything with reference to accused's character. *Hunter v. State*, 59 App. 439, 129 S. W. 125.

In a prosecution for assault, with intent to kill, where the county attorney in his argument stated that the court would charge on aggravated and simple assault, because there was a squint of testimony to raise such questions, and the court would be compelled to give the charge whether or not any other reasonable man would believe a word of such defenses, was not prejudicial, where the court gave a special charge instructing the jury not to consider such argument of the county attorney. *Barrego v. State*, 61 App. 625, 136 S. W. 41.

It was not error for counsel for the state in his argument to state that accused was "a black negro, the exact image of Jack Johnson," and that accused thought "he could fool this jury into turning him loose, on the ground that he was protecting his mulatto stepdaughter, who came on the stand and tried to talk like a yankee," where all the parties interested were negroes, and the jury were instructed to disregard the argument. *Jordan v. State*, 62 App. 380, 137 S. W. 133.

As the court may limit the argument of counsel to the evidence, and must so conduct the case as to keep from the jury all matters not in evidence, it may instruct the jury not to consider outside matters inadvertently or intentionally brought to their attention by counsel in argument. *Campbell v. State*, 62 App. 561, 138 S. W. 607.

In his closing argument the county attorney, in urging the jury to convict appellant, told the jury that it would be better for them to present in person an application for pardon to the Governor than to ignore the law, and that the jurors were a part of the government, charged with the enforcement of the law, and that there is a governor and a board of pardons who have their duties to perform. The court at once orally instructed the jury to disregard this argument, no request was made for further charge on the matter, and on a motion for new trial all the jurors testified that they were not affected by it. Held, that no error was committed. *Parshall v. State*, 62 App. 177, 138 S. W. 759.

The improper argument of prosecuting attorneys in stating facts in another

case and stating that juries were being criticized for not performing their duties held cured by the action of the parties and the court at the time. *Leech v. State*, 63 App. 339, 139 S. W. 1147.

In a trial for burglary, where defendant's motion for continuance on the ground of absent witnesses had been overruled, the prosecuting attorney in his closing argument said "Davis had some testimony that he could have gotten, and that was Ernest Davis, because he testified that he met Ernest Davis as he went home," and upon objection the court instructed the jury orally to disregard the remark, but declined to give defendant's special charge relating to such remark. Held, in view of the statute requiring that a charge be given in writing, that the remark was prejudicial. *Davis v. State*, 64 App. 8, 141 S. W. 264.

It was not reversible error to refuse to instruct that counsel for the state should not apply epithets to accused, and should not have called him a brute or a fiendish criminal, and that the jury should not consider such argument where the trial judge did not hear the argument, having been engaged in preparing instructions, and where the prosecuting attorney denied having made the remarks attributed to him. *McCline v. State*, 64 App. 19, 141 S. W. 977.

Where accused had falsely uttered a receipt to defeat an action upon a note, held by a widow, the district attorney stated in his closing argument that they had tried to discredit and besmirch a widow in order to protect a high-handed criminal. The trial court orally admonished the jury not to consider the remark, and defendant requested no written charge withdrawing the remark from the jury. Held, that the error, if any, would not be considered by the appellate court. *Barber v. State*, 64 App. 89, 142 S. W. 582.

In a trial for murder, the district attorney said that he hoped that his right hand would shiver at his side before he would ever ask a jury to convict a man when the evidence did not show his guilt, never, never, and that he dismissed whenever he had no evidence to convict a case. Held that, considered with the court's verbal instruction that the jury could not consider such remark, it was not error. *Lee v. State* (Cr. App.) 148 S. W. 706.

Where defendant's attorney in his argument to the jury told them the substance of a conversation which the court had not allowed the defendant to introduce because it was hearsay, the court did not commit error by merely admonishing him to stay within the record. *Yates v. State* (Cr. App.) 152 S. W. 1064.

A statement by the county attorney in his argument in a prosecution for carrying on the business of unlawfully selling intoxicating liquor that the defendant had been violating the liquor laws for seven years, which remark the court instructed the jury not to consider, because it was not based on the evidence, is not such misconduct as to require a reversal. *Creech v. State*, 70 App. 229, 158 S. W. 277.

In a prosecution of defendant for killing his divorced wife, there was some evidence that two years prior to the homicide he had assaulted her with a hatchet. The record did not show whether the hatchet was introduced in evidence, but the assistant county attorney in argument produced a hatchet, placed it on the table in front of him in presence of the jury, with a pistol with which deceased had been killed by defendant, and stated that defendant had used the hatchet on deceased and had chopped her in the head with it about two years before. On objection the court stopped him and instructed the jury not to consider such remark for any purpose. Held that, in view of such admonition, the statement was not of sufficient gravity to justify a reversal. *Stanton v. State*, 70 App. 519, 158 S. W. 994.

Where the jury were charged to disregard it, a reference by the district attorney in argument to marks of guilt on accused's face is harmless. *Forward v. State* (Cr. App.) 166 S. W. 725.

Where the court directed the jury to disregard remarks by the prosecutor that one of accused's witnesses who had testified to a previous difficulty with deceased had been indicted with crime, the remarks do not constitute reversible error, although the matter thus brought before the jury had been excluded when offered in evidence. *Johnson v. State* (Cr. App.) 167 S. W. 733.

In a prosecution for larceny of turkeys, where, on objection by the defendant to the argument of the prosecuting attorney, the court told the jury that it was improper for the county attorney to refer to the defendant as "Turkey Tom" and as a "Gobbler," and they should not consider it, and instructed the attorney to use only the defendant's true name, the conviction will be affirmed. *Scott v. State* (Cr. App.) 175 S. W. 1054.

Accused was being tried for homicide several miles from the jail where he was confined, and this fact was known to the court and all the officers and jurors serving on the case. The court, in adjourning until the following morning, stated in the presence of the jury that the sheriff might take accused "home, where he belonged." Accused claimed that this remark was calculated to make the jury believe that the court thought accused should be in jail, but the court, in qualifying the bill of exceptions, did not approve this claim. Held, that the remark did not constitute reversible error. *Galan v. State* (Cr. App.) 177 S. W. 124.

For the court, when defendant offered in evidence pending indictments for felonies against a state's witness, to say to the jury, "You will not consider the byplay of defendant's lawyer," and, on objection, to say, "You will not consider the remarks made by the court, but, if you can think of a more appropriate name for it, do so," is improper. *Crowder v. State* (Cr. App.) 177 S. W. 501.

33. — **Erroneous instruction.**—It is error to charge the jury to not consider the arguments in the case. Legitimate argument is proper for the consideration of the jury. *Laubach v. State*, 12 App. 583.

34. **Prejudice.**—However reprehensible, as a question of practice, may be a ruling of the court in a dispute over privilege of counsel in argument, if such ruling inures to the benefit of the defendant, he can not be heard to complain. *White v. State*, 10 App. 381.

Counsel for the state, when commenting upon the evidence in his closing address, was interrupted by the defendant in person with the statement that if he had the absent witnesses he could show different. Said counsel, in reply to defendant's remark, stated to the jury that the brother of the absent witnesses told him that said witnesses, if present, would testify against the defendant. Held, that such statement was unwarranted by the law or the facts of the case, and was the assertion of a fact not in evidence, and was prejudicial to the defendant. *Laubach v. State*, 12 App. 583.

When counsel transcend the limits of legitimate argument to the jury, it is the right of opposing counsel to object, and to invoke the intervention of the court; but, though no objection be interposed, the purity of public justice demands that the court should suppress such abuses of the privilege of counsel. *Crawford v. State*, 15 App. 501.

A conviction will not be set aside because of alleged improper remarks made by counsel for the state in argument, unless it appear: (1) That the remarks were improper, and (2) that they were of a material character, and such as, under the circumstances, were calculated to injuriously affect the defendant's rights. *House v. State*, 19 App. 227; *Pierson v. State*, 18 App. 524; *Bass v. State*, 16 App. 62; *Sutton v. State*, Id. 490; *Langford v. State*, 17 App. 445; *Young v. State*, 19 App. 536; *McConnell v. State*, 22 App. 354, 3 S. W. 699, 58 Am. Rep. 647; *Hardy v. State*, 31 App. 289, 20 S. W. 561.

Objectionable remarks of the prosecuting attorney, if promptly withdrawn by the court with instructions to the jury to disregard and not consider them, will not constitute error where no injury is shown to have resulted. *King v. State*, 32 App. 463, 24 S. W. 514; *Boscow v. State*, 33 App. 390, 26 S. W. 625.

Accused, in a trial for rape, was not shown to be injured by a remark of the district attorney in argument, "You have there that wretched wretch," there being no statement of facts showing in what connection the remark was made and whether it was justified or not. *Hall v. State*, 58 App. 512, 126 S. W. 573.

In the prosecution of a negro for carrying weapons, remarks of counsel that negroes as a race are about all alike, they are unreliable, and that whenever they got into trouble, if you would let them sleep over it, and get together, that you could not do anything with them, are not of sufficient importance to require a reversal, especially in the absence of requested instructions in regard to the matter. *Johnson v. State*, 59 App. 11, 127 S. W. 559.

After the sustaining of an objection to the course of a district attorney, he remarked to defendant's counsel and in discussing the matter before the court, "If you people want to shroud this in darkness and refuse to turn on the light, I can't help it, but I only want to disclose the whole transaction to the jury, and have all the light thereon that can be had." Held, that the remarks were not of such a prejudicial character as to authorize reversal of a conviction. *Boswell v. State*, 59 App. 161, 127 S. W. 820.

The court on appeal will not interfere unless there has been such a gross violation of the right of legitimate argument as is calculated to impair accused's rights. *Hickey v. State*, 62 App. 568, 138 S. W. 1051.

In a prosecution for statutory rape, the district attorney, in his argument, stated that counsel for defendant had tried to discredit the prosecuting witnesses because of the poverty of their family, and had said that they were not worthy of belief because of their poverty and conditions of life, and it was also shown that in the deliberation of the jury it was mentioned that the prosecutrix was a poor girl while defendant was a man of prominence and wealth, although there was testimony that this did not influence the jury. Held that, considered with the unsatisfactory evidence in the case, the argument was ground for reversal. *Logan v. State* (Cr. App.) 148 S. W. 713.

Where, though witnesses were present at the time it was alleged that defendant killed his wife by cutting her in the neck, none saw how or by whom the wound was inflicted, the remark by counsel that "the court will have to charge you that this is a case of circumstantial evidence, but as a matter of fact it is not," standing alone, could not have been harmful to defendant. *Davis v. State* (Cr. App.) 154 S. W. 550.

Where defendant was accused of killing his wife by cutting her in the neck, as they were walking with others along a road, argument by prosecuting counsel that defendant's counsel were claiming there was no motive shown, and in saying, "How do you know but that as defendant and his wife were walking along she accused him of being too intimate with some other woman, and you have a right to presume that she did," was not of such a harmful nature as to require reversal. *Davis v. State* (Cr. App.) 154 S. W. 550.

In absence of a request for instructions on the right of the state's attorney to comment on the evidence of a witness who testified that she had been coerced in the making of certain statements as to accused's guilt, the comments of the state's attorney on her credibility would not present reversible error, especially where her testimony was favorable to the state rather than to accused. *Thompson v. State*, 72 App. 659, 163 S. W. 973.

On a trial for keeping a disorderly house, a remark of the prosecuting attorney directing the attention of the jury to the diamonds worn by accused and asking if they knew that every glitter therefrom denoted a lost soul was not reversible error, where accused testified, it did not appear that she did not wear diamonds, and it was not shown how this could injuriously affect her in the trial of the case. *Hearne v. State* (Cr. App.) 165 S. W. 596.

Where certain argument of the county attorney was not improper in itself, but, on objection being made, the court instructed the jury not to consider it for any purpose, and no injury could or did occur to accused by reason thereof, it was not available for error. *Fondren v. State* (Cr. App.) 169 S. W. 411.

Where there was abundant other evidence to show that deceased had in his possession a considerable sum of money, the act of the prosecutor in stating to

the jury that memoranda found with the body of deceased showed that he was hard-working and had money in his possession was harmless. *McCue v. State* (Cr. App.) 170 S. W. 280.

Where appellant's bills objecting to misconduct of a county attorney in argument did not show the occasion for the argument, nor anything in connection therewith as a statement of facts approved by the judge to show the surrounding circumstances, the jury having assessed the lowest penalty, the argument, though improper, would not be held prejudicial. *Williams v. State* (Cr. App.) 170 S. W. 708.

For a prosecuting attorney to say of a witness who had testified at the examining trial, but not at the trial itself, that he did not believe his testimony, and that he wanted the witness at the trial, is improper but not prejudicial, where the testimony of the witness went before the jury. *Echols v. State* (Cr. App.) 170 S. W. 786.

In a prosecution for homicide, the language of the district attorney in his closing argument, to the effect that the state had proved the main facts of the case as to the actual killing, and that he had other witnesses by whom he could have proved the same facts if necessary, was harmless, where there was no controversy that defendant killed deceased, he having so testified, and where defendant asked no written instructions as to such remarks. *Hicks v. State* (Cr. App.) 171 S. W. 755.

Argument of the prosecuting attorney held not prejudicial under the rule that, to justify a reversal because of remarks of the prosecuting counsel, it must appear that they were improper, of a material character, and such as under the circumstances were calculated to injuriously affect accused's rights. *Himmelfarb v. State* (Cr. App.) 174 S. W. 586.

In a prosecution for murder, where accused did not put in issue his reputation for peace and quiet, argument by the state that, had accused dared to place his reputation for peace and quiet in issue, it could have been shown that it was bad, was prejudicial. *Marshall v. State* (Cr. App.) 175 S. W. 154.

The court on appeal will not reverse a conviction because of improper argument of the prosecuting attorney, unless it very clearly appears that the rights of accused were prejudiced thereby. *Mooney v. State* (Cr. App.) 176 S. W. 52.

On a trial for forgery and passing a forged instrument, by introducing it in evidence in the justice court, a remark of the district attorney that accused committed perjury in the justice court was not ground for reversal, where upon objection he withdrew the remark and stated to the jury that he meant forgery. *Bunker v. State* (Cr. App.) 177 S. W. 108.

35. — **Cure by verdict.**—In a murder case, where there was no issue of self-defense, and the evidence showed that accused shot and killed decedent, the comment of the county attorney on evidence that accused had kept a negro house of ill fame and a gambling house, which evidence had been excluded as incompetent, was not ground for reversal, where the jury gave accused the minimum punishment for manslaughter. *Hart v. State*, 57 App. 21, 121 S. W. 508.

Where a robust son assaulted his old and decrepit father, and the evidence showed that accused's mother was in sympathy with accused on the trial, the argument of the prosecuting attorney that he did not want the jury to punish accused by a pecuniary fine, and that that would not be a punishment to him, as his mother would pay the fine, was not error; the punishment assessed not being excessive, in view of the facts. *Davis v. State*, 58 App. 461, 126 S. W. 863.

Remarks of the prosecutor in a trial of a negro for murder urging a death sentence were harmless where the jury assessed only a life sentence. *Millican v. State*, 63 App. 440, 140 S. W. 1136.

A remark of the prosecuting attorney in a trial for murder, "that they ought to hang the defendant. If they did not do so, and sent him to the penitentiary, the Governor, on some flimsy pretext, would pardon him, and he would assassinate some other citizens of the state"—while improper, was not reversible error, where the jury did not inflict the death penalty. *Roberts v. State* (Cr. App.) 150 S. W. 627.

Improper remarks of the state's attorneys do not constitute reversible error where no instruction to disregard was requested, especially where the jury fixed the lowest penalty and it does not appear in what connection such remarks were made. *Love v. State* (Cr. App.) 150 S. W. 920.

36. — **Restricting defendant's argument.**—In a homicide case, where accused's counsel were improperly refused the right to comment upon the pipe with which deceased was armed at the time of the homicide, the court proceeding upon the theory that it had not been identified in evidence, the error was reversible in view of the argument by the counsel for the state that the pipe was slipped into the courtroom to bolster up defendant's story. *Zimmer v. State*, 64 App. 114, 141 S. W. 781.

37. **Necessity of objections or exceptions.**—See post, art. 744.

38. **Necessity of request for charge.**—Improper argument by the prosecuting attorney not inherently prejudicial cannot be reviewed on appeal unless defendant requested an instruction that the argument be disregarded. *Young v. State*, 19 App. 536; *Kennedy v. State*, 19 App. 618; *Garello v. State*, 31 App. 56, 20 S. W. 179; *Maxwell v. State*, 31 App. 119, 19 S. W. 914; *Wilson v. State*, 32 App. 22, 22 S. W. 39; *Locklin v. State*, 75 S. W. 308; *Norris v. State*, 32 App. 172, 22 S. W. 592; *Mathews v. State*, 32 App. 355, 23 S. W. 690; *Davis v. State*, 32 App. 377, 23 S. W. 794; *Jones v. State*, 33 App. 7, 23 S. W. 793; *Boscow v. State*, 33 App. 390, 26 S. W. 625; *Morris v. State*, 35 App. 313, 33 S. W. 539; *Othold v. State* (Cr. App.) 33 S. W. 1084; *Ray v. State*, 35 App. 354, 33 S. W. 869; *Love v. State*, 35 App. 27, 29 S. W. 790; *Barber v. State*, 35 App. 70, 31 S. W. 649; *Chalk v. State*, 35 App. 116, 32 S. W. 534; *Trotter v. State*, 37 App. 468, 36 S. W. 278; *Epson v. State* (Cr. App.) 36 S. W. 584; *Gallihar v. State* (Cr. App.) 37 S. W. 329; *Jackson v. State* (Cr. App.) Id. 430; *Wright v. State*, 37 App. 146, 38 S. W. 1004; *Garrett v. State*, 37 App. 198, 38 S. W.

1017, 39 S. W. 108; *Gilmore v. State*, 37 App. 178, 39 S. W. 105; *Leggett v. State* (Cr. App.) 65 S. W. 517; *Gaines v. State* (Cr. App.) 77 S. W. 11; *Pollard v. State*, 58 App. 299, 125 S. W. 390; *Woodward v. State*, 58 App. 412, 126 S. W. 271; *Felder v. State*, 59 App. 144, 127 S. W. 1055; *Turner v. State*, 61 App. 97, 133 S. W. 1052; *Diaz v. State*, 62 App. 317, 137 S. W. 377; *Campbell v. State*, 62 App. 561, 138 S. W. 607; *Hickey v. State*, 62 App. 568, 138 S. W. 1051; *Melton v. State*, 63 App. 362, 140 S. W. 230; *Majors v. State*, 63 App. 488, 140 S. W. 1095; *Millican v. State*, 63 App. 440, 140 S. W. 1136; *Jones v. State*, 63 App. 394, 141 S. W. 953; *Williams v. State* (Cr. App.) 144 S. W. 622; *Wragg v. State* (Cr. App.) 145 S. W. 342; *Wells v. State* (Cr. App.) 145 S. W. 950; *January v. State* (Cr. App.) 146 S. W. 555; *Singh v. State* (Cr. App.) 146 S. W. 891; *Cooper v. State* (Cr. App.) 147 S. W. 273; *Williams v. State* (Cr. App.) 147 S. W. 571; *Warren v. State* (Cr. App.) 149 S. W. 130; *Overstreet v. State* (Cr. App.) 150 S. W. 899; *Kelly v. State* (Cr. App.) 151 S. W. 304; *Wagoner v. State* (Cr. App.) 151 S. W. 313; *Bogue v. State* (Cr. App.) 155 S. W. 943; *Goodwin v. State*, 70 App. 600, 158 S. W. 274; *Stewart v. State*, 71 App. 237, 158 S. W. 996; *Figueroa v. State*, 71 App. 371, 159 S. W. 1188; *Mooney v. State* (Cr. App.) 176 S. W. 52.

In a prosecution for assault with intent to rape defendant's stepdaughter, the county attorney, after unsuccessfully attempting to show other assaults on prosecutrix's sisters, in his closing argument stated to the jury that they left home because they were compelled to slave for defendant and because he tried to debauch them. He characterized defendant as a "brute," and, on this being objected to, reiterated that defendant was a "brute of the vilest kind," that he did not dare put his character in issue, because the state had a dozen witnesses to show how other girls were treated and how they had to slave for defendant and were never allowed to go to school. Held, that such argument constituted misconduct sufficient to require a reversal on proper bills of exception being reserved, though no special charges in regard thereto were requested. *Grimes v. State*, 64 App. 64, 141 S. W. 261.

In the absence of a requested charge on improper remarks of the district attorney in his argument to the jury, the court on appeal will not review the remarks, unless they were flagrant abusive or improper. *Owens v. State*, 63 App. 633, 141 S. W. 530.

That the district attorney argued to the jury that the letter of deceased to defendant's sister-in-law was not genuine but was fixed up by defendant, as to which letter defendant alone testified, though his sister-in-law was in court, was not reversible error; no special charge in regard thereto having been requested by defendant. *Strickland v. State*, 71 App. 582, 161 S. W. 110.

In the absence of any request for a special charge, error cannot be predicated on a statement of the district attorney to the jury, the court, in approving the bill of exceptions, stating that, when objection was made, the district attorney corrected the statement, and the court instructed the jury not to consider it. *Miller v. State*, 72 App. 151, 161 S. W. 128.

Accused, objecting to the argument of the prosecuting attorney, should, in addition to the making of an oral request for a charge directing the jury to disregard the argument, present a special charge on the subject, though, where the argument is very harmful, the error may be presented when only the oral request has been made. *Sorell v. State* (Cr. App.) 167 S. W. 356.

In a prosecution for driving cattle across a quarantine line without having them dipped or inspected as required, argument of counsel that a small fine would not be any punishment to accused with his big farms is not reversible error, where no charge instructing the jury to disregard such remarks was requested and the evidence showed that accused was the owner of more than one farm. *Smith v. State* (Cr. App.) 168 S. W. 522.

Where at the time the county attorney stated to the jury in his argument that an indictment against accused for another offense was a strong circumstance to show guilt, accused's counsel approached the judge and asked that an exception be reserved, but on being told by the judge, who had not heard the remark, to make his objection openly in court, declined to do so, and asked no special charge, he could not complain of such argument, especially where the court did charge that, if the jury believed that accused was under indictment for another offense, they could consider that only for the purpose of aiding in determining the credibility of accused as a witness, and must consider it for no other purpose. *Whitfill v. State* (Cr. App.) 169 S. W. 681.

Accused cannot object on appeal to alleged misconduct of the district attorney in argument where no exception was reserved thereto at the time, or application made to the court to correct the error either by instruction or by granting accused a venire de novo, and this though the misconduct was such that it could not be cured by instruction. *Johnson v. State* (Cr. App.) 171 S. W. 1128.

Though it was improper for the district attorney, in presenting the case, to say that the filing by defendant of a plea for suspended sentence in case of conviction was a baby act, and equivalent to an admission of guilt, and that the suspended sentence law did not apply to old men, was improper; yet, it not being such error that an instruction would not have cured it, it cannot be complained of, in the absence of exception thereto, and request for, and refusal of, an instruction to disregard it. *Thompson v. State* (Cr. App.) 178 S. W. 1192.

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.]

Number of arguments.—This article cannot be construed to entitle a defendant's one counsel to two speeches. *Morales v. State*, 1 App. 499, 28 Am. Rep. 419.

Where the defendant's counsel declined to address the jury, the permission of

two arguments in behalf of the state was not error; the matter being in the discretion of the trial court. *Walker v. State*, 64 App. 70, 141 S. W. 243.

Limitation of time.—This article does not limit the time which shall be occupied by counsel in the argument of the case, regulation of which is within the discretion of the presiding judge. *Jenkins v. State*, 60 App. 236, 131 S. W. 542.

Where the issues are few and not complicated and the testimony short, limiting each side to 45 minutes for argument is not an abuse of discretion. *Howard v. State* (Cr. App.) 178 S. W. 506.

Argument of counsel in general.—See notes under art. 724, ante.

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.]

See Willson's Cr. Forms, 920.

Former law.—This article and what is now article 728, before being amended by Act of March 16, 1874, p. 28, and Act of Feb. 12, 1883, p. 9, were as follows:

Where two or more defendants are jointly prosecuted, they may sever in the trial at the request of either, and if the defendant upon whose application the severance is allowed shall file his affidavit in writing, stating that a severance is requested for the purpose of obtaining the evidence of one or more of the persons jointly indicted with him; that such evidence is material to his defense; and that he verily believes that there is no evidence against the person or persons whose evidence is desired, such person or persons shall be first tried.

Where a severance is claimed, but no affidavit is filed as provided in the preceding article, the attorney representing the state shall be entitled to elect which defendant shall be first tried.

For decisions made under said former provisions, see the following: *Allison v. State*, 14 App. 402; *Myers v. State*, 7 App. 640; *Rucker v. State*, Id. 549; *Slawson v. State*, Id. 63; *Reed v. State*, 11 App. 509, 40 Am. Rep. 795; *Conn v. State*, Id. 390; *Anderson v. State*, 8 App. 542; *Berry v. State*, 4 App. 492; *Boothe v. State*, Id. 202; *Krebs v. State*, 3 App. 348; *Bybee v. State*, 36 Tex. 366.

Right to severance.—Severance of defendants jointly prosecuted is now a matter of right. *Wiley v. State*, 22 App. 408, 3 S. W. 570; *Teiman v. State*, 28 App. 144, 12 S. W. 742; *King v. State*, 35 App. 472, 34 S. W. 282; *Conn v. State*, 11 App. 390; *Shaw v. State*, 39 App. 161, 45 S. W. 597; *Sanchez v. State*, 70 App. 24, 156 S. W. 218. 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 App. 263, 30 S. W. 224.

Defendant and a third person were jointly indicted for the murder of G. They were also jointly indicted for the murder of E. The two killings grew out of the same transaction. Held that on proper application, defendant before being tried for the murder of G. was entitled to have the third person tried for the murder of E. though the third person had been tried for and acquitted of the murder of G. *Terry v. State*, 45 App. 264, 76 S. W. 929.

Opposition to severance.—A defendant will not be heard in opposition to severance asked by his co-defendant. *Berry v. State*, 4 App. 492.

Severance resulting in continuance.—Appeal of the party first tried will not operate continuance for the co-defendant pending action of the appellate court. *Krebs v. State*, 8 App. 1, and cases cited.

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 App. 542.

One of plural defendants is not entitled to a continuance in order that his co-defendant may be tried first and that he may have the benefit of her testimony in case she is acquitted. *Stouard v. State*, 27 App. 1, 10 S. W. 442; *Williams v. State*, 27 App. 466, 11 S. W. 481.

Defendant is not entitled to a severance on first trial when the severance would necessarily work a continuance of the case. *Thompson v. State*, 35 App. 511, 34 S. W. 629.

Defendant's motion for a continuance until his fugitive partner in the homicide, who had been jointly indicted with him, should be apprehended and placed on trial or until they could have an opportunity to agree upon a severance of the case was properly refused. *Ortiz v. State* (Cr. App.) 151 S. W. 1056.

The right to a severance is mandatory, but, where the court granted a severance, it was under no obligation to wait an unreasonable time for the jury to return a verdict in the cases first tried before proceeding to the trial of the others. *Bruce v. State* (Cr. App.) 173 S. W. 301.

Continuance to avoid severance.—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 App. 348.

The state can not defeat defendant's right of severance by a continuance. *Forcey v. State*, 29 App. 408, 16 S. W. 261; *Davis v. State*, 33 App. 344, 26 S. W. 410.

Accessories.—Since under Pen. Code, art. 90, the principal must be tried before his accessory, a motion of the principal that the person charged as accessory be first put on trial is properly overruled. *Williams v. State*, 27 App. 466, 11 S. W. 481.

The refusal to grant defendant a trial separate from that of parties charged as accessories was proper. *Sewall v. State* (Cr. App.) 148 S. W. 569.

Application.—When application for severance is filed, two alternatives are open—grant the request or dismiss the prosecution, so defendant can secure the testimony. But there must not be coupled with the dismissal a contract not under any circumstances to reindict the person whose case is dismissed. *Brown v. State*, 42 App. 176, 58 S. W. 133.

Motion to sever is properly overruled where it is not made to obtain evidence of co-defendant. *Bailey v. State*, 42 App. 289, 59 S. W. 900.

Severance is granted for the trial. Upon subsequent trials the parties have the right to change the order of trial if they think it is to their interest, and the doctrine of *res adjudicata* does not apply. *Brooks v. State*, 42 App. 347, 60 S. W. 53.

When one defendant makes application for severance, and to have his codefendant tried first, the court's action in dismissing the codefendant on motion of the district attorney, and not requiring him to be first tried, is error, as it deprived the affiant of the right guaranteed by the statute to have the party tried, that he might not be deprived of his testimony. *Manor v. State*, 45 App. 370, 77 S. W. 786.

An application by one of two joint defendants for a severance, not made until after the jury had been impaneled and sworn and the indictment had been read to them, was too late. *Hooper v. State*, 72 App. 82, 160 S. W. 1187.

Instruction.—Cited, *Price v. State* (Cr. App.) 152 S. W. 640.

That the charge of the court recited the case as against joint defendants is immaterial where the court stated in the first paragraph of the charge that a severance had been granted. *Lowe v. State*, 11 App. 253.

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 defendants 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.]

See Willson's Cr. Forms, 920, 920a.

Joint defendants.—See ante, art. 726, and notes.

Order of trial.—See art. 728, post, and notes.

Right to severance.—See *Price v. State* (Cr. App.) 40 S. W. 596.

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 App. 529, 24 S. W. 899.

Defendant desiring the testimony of a person under indictment should move to have such person tried first. *Perry v. State* (Cr. App.) 34 S. W. 618.

All the provisions of the code of procedure must be construed together and articles 37 and 729 must be construed with this article. *Brown v. State*, 42 App. 176, 58 S. W. 132.

Where accused insists that a witness has been indicted for the same offense to prevent him from testifying, he must proceed in the manner prescribed by this article to obtain the testimony of the witness. *Day v. State*, 62 App. 527, 138 S. W. 123.

An affidavit that a joint defendant moving for a separate trial believes there is not sufficient evidence against his codefendant to secure his conviction is only necessary to authorize such defendant to move for a separate trial when he desires the evidence of the other defendant, and that he be first tried. *Ryan v. State*, 64 App. 628, 142 S. W. 878.

Where accused, when he announced ready for trial for theft, knew that another was charged in another county with participation in the same theft, so that he could not be a witness for accused under art. 791, post, providing that persons charged as principals or accessories, whether in the same or different indictments, cannot be witnesses for one another, and it was not claimed that accused was surprised by any state's evidence, accused cannot complain that the court, upon excluding the other person charged as a witness for accused, refused to permit accused to withdraw his announcement of ready for trial, so that he might move to have the other person tried first, pursuant to this article. *Burton v. State* (Cr. App.) 146 S. W. 186.

Where two defendants, separately indicted as accomplices to the commission of the same crime, each filed affidavits asking that the other be first tried, it was in the court's discretion to direct which one should be tried first. *Millner v. State* (Cr. App.) 169 S. W. 899.

Same transaction.—In reply to motion to sever, state can set up and show the real facts, and if it appears that the transactions are not the same, the motion should be overruled. *Grooms v. State*, 40 App. 328, 50 S. W. 370.

If by using the term "transaction" means the same offense then the accessory would not come within its purview, because the accessory is not connected with the crime, but with the offender, severance will not apply to an accessory. *Ray v. State*, 43 App. 234, 64 S. W. 1057.

Where two persons are indicted separately for perjury for making practically the same false statements, there can be no severance as provided by this article so as to entitle one to have the other tried first in order in case of acquittal to get the benefit of his testimony. *Anderson v. State*, 56 App. 360, 120 S. W. 466.

Affidavit.—That affiant “verily believes there is no evidence against the co-defendant,” is held sufficient in *Reed v. State*, 11 App. 509, 40 Am. Rep. 795.

Affidavit for severance based upon “belief” that the testimony of the co-defendant is material is insufficient. *Shaw v. State*, 39 App. 161, 45 S. W. 597.

The essential element of this affidavit is that the testimony of the party who is sought to be tried first is material to the defense of affiant. If this be not the case then the application for severance is not good. *Rocha v. State*, 43 App. 169, 63 S. W. 1019.

A motion for a separate trial of two defendants charged with the same offense, made to enable the testimony of one of them to be used in the trial of the other, which was not sworn to by either defendant, and which did not state that the desired testimony was material, was not sufficient. *Wilson v. State*, 71 App. 330, 158 S. W. 1114.

Continuance.—Where by reason of a change of venue, it would cause a continuance to try the co-defendant first, the application therefor was properly denied. *Locklin v. State* (Cr. App.) 75 S. W. 305.

There was no error in overruling a request that another defendant, whose indictment was pending in a different court, be first placed on trial, on the ground that his testimony was material to the defense. *Polk v. State* (Cr. App.) 152 S. W. 907.

Dismissal of co-defendant.—See art. 729, post.

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 App. 71, 112 S. W. 308, overruling on the point, *Puryear's case*, 50 App. 454, 98 S. W. 258. (The effect of this decision is to overrule on the same point *Wolf's case*, 46 App. 231, 79 S. W. 520, and *Follis' case*, 46 App. 203, 78 S. W. 1069, followed in *Puryear's case*; and revive the decision in *Brown's case*, 42 App. 176, 58 S. W. 131, specifically overruled in *Puryear's case*.)

Any error in overruling a motion for a severance as to two persons claimed to be accessories to accused could not have prejudiced him, where the cases were dismissed against both of such persons, and one of them testified for accused, and the other was available. *Black v. State* (Cr. App.) 143 S. W. 932.

Accessories.—This article applies to defendants separately indicted, some as principals and others as accomplices or accessories. *King v. State*, 35 App. 472, 34 S. W. 282, which compare with *Williams v. State*, 27 App. 466, 11 S. W. 481.

Accused and two others were indicted separately, the latter as accessories, and, when the case was called, they agreed that accused should be tried last, whereupon accused moved for a “severance” as to the accessories, which motion was overruled and the cases against the accessories dismissed. Held, that the procedure was not erroneous. *Black v. State* (Cr. App.) 143 S. W. 932.

Pen. Code 1911, art. 90, expressly requiring that where a principal is arrested he shall be tried before the accessory, is special and controls the general provisions of this article, and hence one indicted as an accessory cannot be first tried. *Zweig v. State* (Cr. App.) 171 S. W. 747.

Prejudice.—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 App. 472, 34 S. W. 282; *Anderson v. State*, 56 App. 360, 120 S. W. 462.

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.

See *Willson's Cr. Forms*, 920.

See ante, art. 726, and notes.

In general.—Defendants jointly indicted and prosecuted are entitled as a matter of right, not only to sever, but by agreement to fix and indicate the order in which they will be tried. *Teiman v. State*, 28 App. 144, 12 S. W. 742.

Where defendants can not agree, it is the duty of the court to direct the order of their trial. *Chumley v. State*, 32 App. 255, 26 S. W. 408; *Parker v. State*, 33 App. 111, 21 S. W. 604, 25 S. W. 967.

Where a severance is requested by one of several jointly indicted, and no affidavit is filed, stating that affiant believes there is not sufficient evidence against his codefendant to secure a conviction, it is a matter for the court's discretion which defendant shall be first tried. *Ryan v. State*, 64 App. 628, 142 S. W. 878.

Accessories.—Where accused was indicted as accomplice and accessory to a murder, and deceased's wife was also indicted by the same grand jury as an accomplice, and both moved for separate trials, but could not agree which should be tried first, the court did not err in directing that accused be first tried. *Millner v. State*, 72 App. 45, 162 S. W. 348.

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.]

See ante, arts. 4, 37, 643, and notes.

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.]

Instruction.—Cited, *Ex parte Muncy*, 72 App. 541, 163 S. W. 29.

If, upon a joint trial, there be no evidence tending to implicate one of the defendants, the court should require the jury to pass upon his case before the other defendant opens his defense. In such case the jury should be instructed to consider the case as to the defendants as wholly disconnected, and to return a general verdict as to the defendant whose case is thus submitted to them. *Lyles v. State*, 41 Tex. 172, 19 Am. Rep. 38; *Bybee v. State*, 36 Tex. 366; *Jones v. State*, 13 Tex. 168, 62 Am. Dec. 550.

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.]

See 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.]

See 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.]

In general.—See post, art. 786, and notes.

See *Taylor v. State*, 3 App. 387; *Johnson v. State*, 5 App. 423; *Allison v. State*, 14 App. 402; *Walker v. State*, 14 App. 609; *Jackson v. State*, 22 App. 442, 3 S. W. 111; *Barbee v. State*, 23 App. 199, 4 S. W. 584; *Carr v. State*, 24 App. 562, 7 S. W. 328, 5 Am. St. Rep. 905; *Weatherford v. State*, 31 App. 530, 21 S. W. 251, 37 Am. St. Rep. 828; *Williams v. State*, 33 App. 128, 25 S. W. 629, 28 S. W. 958, 47 Am. St. Rep. 21; *Collins v. State*, 39 App. 441, 46 S. W. 933; *Davis v. State*, 139 U. S. 651, 11 Sup. Ct. 675, 35 L. Ed. 300.

It is the province of the court to determine as matter of law, what games are within the inhibition of the statute. *Stearnes v. State*, 21 Tex. 692.

Unless the general charge embodies the substance of this article, it would be error to refuse a correct requested charge, including also the reasonable doubt. *Lensing v. State* (Cr. App.) 45 S. W. 572.

Under this article and arts. 738, 740, 741, requiring the jury to receive the law from the court, providing that the general charge and the charges given or refused at the request of either party shall be certified by the judge and filed, and that when charges are asked the judge shall read to the jury only such as he gives, etc., the action of the county attorney in writing in certain words in the charge on

the jury coming into court for information was ground for reversal, where after the additions had been made the charge was not read to the jury, but was handed to it. *Christensen v. State*, 59 App. 278, 128 S. W. 616.

It is the duty of the court to inform the jury as to the law applicable to a given state of facts, but for the jury to determine the facts, and whether testimony is for or against a defendant, they being the judges of the credibility of witnesses and the weight of evidence. *Newton v. State*, 62 App. 622, 138 S. W. 708.

While the jurors in a criminal case are the exclusive judges of the credibility of the witnesses and the weight of the testimony, they are bound by the trial court's instructions on the law. *Witty v. State* (Cr. App.) 171 S. W. 229.

Questions of law and fact.—In perjury, the materiality of the matter assigned as perjury is determinable by the court, and should not be submitted to the jury. *Davidson v. State*, 22 App. 372, 3 S. W. 602; *Jackson v. State*, 15 App. 579; *Donohoe v. State*, 14 App. 638; *Spearman v. State* (Cr. App.) 152 S. W. 915, 44 L. R. A. (N. S.) 243.

In a prosecution for unlawfully carrying a pistol, whether the accused was traveling was a question for the jury. *Campbell v. State*, 58 App. 349, 125 S. W. 893, 21 Ann. Cas. 447; *Williams v. State* (Cr. App.) 169 S. W. 1154.

Where defendant carried a pistol to a picnic in a wagon, and while at the picnic took the pistol from the wagon to a point distant about 100 yards, to where certain persons were standing, and after holding it for a time handed it to his friend, he was not entitled to an acquittal of unlawfully carrying a weapon about his person as matter of law. *Pickett v. State*, 57 App. 350, 123 S. W. 131.

Where a statute declared that insulting language applicable to a female relative constituted adequate cause for an assault, the court, in a prosecution for assault alleged to have resulted from insulting remarks by prosecutor concerning defendant's wife, should determine as a matter of law whether they were insulting, and, if so found, should have charged that the use of the words constituted adequate cause. *Morrison v. State*, 61 App. 223, 135 S. W. 551.

It was error, in a prosecution for assault to murder, in which it appeared that the assaulted party was beaten considerably in the face, to leave it to the jury to determine what was adequate cause, and whether the pain caused by the assault produced such passion as would reduce it to manslaughter, had the killing occurred, or, in the absence of death, to aggravated assault, when the statute expressly provides that an assault causing pain or bloodshed will be adequate cause. *Luttrell v. State* (Cr. App.) 143 S. W. 628.

Evidence that a private detective did not himself suggest the commission of burglary, but, when it was suggested to him, he seemingly assented thereto, and that during the commission of the crime he stood outside the building, and thereafter received a part of the stolen money, which he promptly turned over to the police, warrants submitting to the jury the question whether the detective was an accomplice, instead of instructing, as a matter of law, that he was an accomplice. *Hyde v. State* (Cr. App.) 165 S. W. 195.

— **Admissibility of evidence.**—It is the province of the court, and not the jury, to determine the competency of evidence, and the jury are not the judges of the law in any case, but must receive the law from the court, and must find the facts alone from the evidence, under the instructions received from the court. *Fore v. State*, 5 App. 251; *Johnson v. State*, Id. 423; *Taylor v. State*, 3 App. 387; *Nels v. State*, 2 Tex. 280; *Wharton v. State*, 45 Tex. 2; *Walker v. State*, 37 Tex. 366; *Carter v. State*, 37 Tex. 362; *Newton v. State*, 62 App. 622, 138 S. W. 708.

The competency of an expert witness to prove handwriting by comparison is a question for the court. *Heacock v. State*, 13 App. 97.

It is proper to submit to the jury the question as to whether a proper predicate has been proved for the admission of dying declarations. *Foster v. State* (Cr. App.) 56 S. W. 58.

— **Admissibility of confession.**—Whether a confession is admissible is a question of law for the court; it being only when the voluntary character of the confession is contested or the making thereof denied that the court is required to submit such issue to the jury. *Belcher v. State*, 71 App. 646, 161 S. W. 459; *Cain v. State*, 18 Tex. 387; *Speer v. State*, 4 App. 474; *Nolen v. State*, 8 App. 585; *Carter v. State*, 37 Tex. 362; *Hauck v. State*, 1 App. 357; *Rains v. State*, 33 App. 294, 26 S. W. 398; *Blocker v. State*, 61 App. 413, 135 S. W. 130; *Campbell v. State*, 63 App. 595, 141 S. W. 232, Ann. Cas. 1913D, 858; *Drake v. State* (Cr. App.) 151 S. W. 315. See, also, *Overstreet v. State* (Cr. App.) 150 S. W. 899.

Review.—See post, art. 939, and notes.

This article and art. 786, prohibit the Court of Criminal Appeals from passing on the credibility of witnesses and the weight of their testimony on appeal from a conviction. *Smith v. State* (Cr. App.) 146 S. W. 896.

Art. 735. [715] Charge of court to the jury.—In all felony cases the judge shall, before the argument begins, 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 the evidence nor shall he sum up the testimony. Before said charge is read to the jury, the defendant or his counsel shall have a reasonable time to examine the same and he shall present his objections thereto in writing, distinctly specifying each ground of

objection. [O. C. 594; Act 1913, p. 278, ch. 138, § 1, amending art. 735, revised C. C. P.]

See Willson's Cr. Forms, 921, 923, 930, 941.

Cited, *Powdrill v. State* (Cr. App.) 155 S. W. 231; *Dennis v. State*, 71 App. 162, 158 S. W. 1008; *Davis v. State*, 139 U. S. 651, 11 Sup. Ct. 675, 35 L. Ed. 300.

I. Necessity, nature, requisites and sufficiency of charge

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I. NECESSITY, NATURE, REQUISITES, AND SUFFICIENCY OF CHARGE

1. **Law applicable to case in general.**—The charge must set forth distinctly the law applicable to the case. By the expressions "the law applicable to the case," and "the law of the case," are meant the law applicable to the case as made by the proofs—the law applicable to the pleadings and the evidence. The charge must conform to, and be limited by, the allegations in the indictment, and also by the evidence. It is the duty of the court to charge the jury fully and affirmatively upon every phase of the case made by the evidence, and every legitimate inference therefrom, however feeble and inconclusive it may be, and whether such evidence is produced by the state or the defense, and whether it be unimpeached or contradicted. Accused is entitled to a distinct and affirmative, and not merely an implied or negative, charge as to any special defenses he may have. A charge inapplicable to the evidence, or presenting a defense or an issue not made by the evidence, should not be given. And so a charge which is abstract, and not applicable to the evidence, is properly refused. *Jones v. State*, 13 Tex. 168, 62 Am. Dec. 550; *O'Connell v. State*, 18 Tex. 363; *Burrell v. State*, 18 Tex. 713; *Daniels v. State*, 24 Tex. 389; *Holtzclaw v. State*, 26 Tex. 682; *Johnson v. State*, 27 Tex. 758; *Seal v. State*, 28 Tex. 491; *Maria v. State*, 28 Tex. 698; *Warren v. State*, 29 Tex. 369; *Adams v. State*, 34 Tex. 526; *Gillmore v. State*, 36 Tex. 334; *Bergstrom v. State*, 36 Tex. 336; *Hudson v. State*, 40 Tex. 12; *Haynes v. State*, 40 Tex. 52; *Marshall v. State*, 40 Tex. 200; *Pefferling v. State*, 40 Tex. 486; *Sutton v. State*, 41 Tex. 513; *Parrar v. State*, 42 Tex. 265; *Farrar v. State*, 42 Tex. 275; *Lopez v. State*, 42 Tex. 298; *Stanfield v. State*, 43 Tex. 167; *Bishop v. State*, 43 Tex. 390; *Gibbs v. State*, 1 App. 12; *Dorsey v. State*, 1 App. 33; *Rogers v. State*, 1 App. 187; *Rogers v. State*, 1 App. 187; *Holden v. State*, 1 App. 235; *Lindsay v. State*, 1 App. 327; *Priemuth v. State*, 1 App. 481; *Miles v. State*, 1 App. 510; *Bronson v. State*, 2 App. 46; *Merritt v. State*, 2 App. 177; *West v. State*, 2 App. 209; *Pugh v. State*, 2 App. 539; *Davis v. State*, 2 App. 588; *Kouns v. State*, 3 App. 13; *Lister v. State*, 3 App. 17; *Noland v. State*, 3 App. 598; *Sims v. State*, 4 App. 144; *Teague v. State*, 4 App. 147; *Curry v. State*, 4 App. 574; *Reardon v. State*, 4 App. 602; *Tooney v. State*, 5 App. 163; *Shultz v. State*, 5 App. 390; *Robinson v. State*, 5 App. 519; *Drake v. State*, 5 App. 649; *Brown v. State*, 6 App. 286; *Hutto v. State*, 7 App. 44; *Hemanus v. State*, 7 App. 372; *Smith v. State*, 7 App. 414; *Richardson v. State*, 7 App. 486; *Francis v. State*, 7 App. 501; *Riojas v. State*, 8 App. 49; *Smith v. State*, 8 App. 141; *Foster v. State*, 8 App. 248; *Reynolds v. State*, 8 App. 412; *Berry v. State*, 8 App. 515; *Kendall v. State*, 8 App. 569; *Whaley v. State*, 9 App. 305; *Reed v. State*, 9 App. 317; *Henry v. State*, 9 App. 358; *Greta v. State*, 9 App. 429; *Sims v. State*, 9 App. 586; *Richardson v. State*, 9 App. 612; *Davis v. State*, 10 App. 31; *Scott v. State*, 10 App. 112; *Elliston v. State*, 10 App. 361; *Eanes v. State*, 10 App. 421; *Ross v. State*, 10 App. 455, 38 Am. Rep. 643; *Williams v. State*, 10 App. 528; *McGrew v. State*, 10 App. 539; *Jernigan v. State*, 10 App. 546; *Knox v. State*, 11 App. 148; *Ainsworth v. State*, 11 App. 339; *Conn v. State*, 11 App. 390; *Bennett v. State*, 12 App. 15; *Snowden v. State*, 12 App. 105, 41 Am. Rep. 667; *Powell v. State*, 12 App. 238; *Taylor v. State*, 13 App. 184; *Hardin v. State*, 13 App. 192; *Evans v. State*, 13 App. 225; *Williams v. State*, 13 App. 285, 46 Am. Rep. 237; *Johnson v. State*, 13 App. 378; *Hackett v. State*, 13 App. 406; *Odle v. State*, 13 App. 612; *Behrens v. State*, 14 App. 121; *Lee v. State*, 14 App. 266; *Benevides v. State*, 14 App. 378; *Reynolds v. State*, 14 App. 427; *Boddy v. State*, 14 App. 528; *Jackson v. State*, 15 App. 84; *Smith v. State*, 15 App. 139; *Rutherford v. State*, 15 App. 236; *Stewart v. State*, 15 App. 598; *Ashlock v. State*, 16 App. 13; *Gartman v. State*, 16 App. 215; *White v. State*, 18 App. 57; *Burkhard v. State*, 18 App. 599; *Niland v. State*, 19 App. 166; *Irvine v. State*, 20 App. 12; *Bell v. State*, 21 App. 270, 17 S. W. 155; *Leggett v. State*, 21 App. 382, 17 S. W. 159; *Paulin v. State*, 21 App. 436, 1 S. W. 453; *Coleman v. State*, 21 App. 520, 2 S. W. 859; *Pierce v. State*, 21 App. 540, 1 S. W. 463; *Burney v. State*, 21 App. 565, 1 S. W. 458; *Bramlette v.*

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W. 43; Woodall v. State, 58 App. 513, 126 S. W. 591; Tilmyer v. State, 58 App. 562, 126 S. W. 870, 137 Am. St. Rep. 982; Cox v. State, 58 App. 545, 126 S. W. 886; Mays v. State, 58 App. 651, 127 S. W. 546; Diseren v. State, 59 App. 149, 127 S. W. 1038; Johnson v. State, 59 App. 263, 128 S. W. 614; Moore v. State, 59 App. 361, 128 S. W. 1115; Petty v. State, 59 App. 586, 129 S. W. 615; Phinney v. State, 59 App. 480, 129 S. W. 628; Trinkle v. State, 60 App. 187, 131 S. W. 583; Powell v. State, 60 App. 201, 131 S. W. 590; Dulin v. State, 60 App. 376, 131 S. W. 1105; Pickrell v. State, 60 App. 572, 132 S. W. 938; Shrewder v. State, 62 App. 403, 136 S. W. 461, 1200; Dozier v. State, 62 App. 258, 137 S. W. 679; Powdrill v. State, 62 App. 442, 138 S. W. 114; Perkins v. State, 62 App. 508, 138 S. W. 133; Taylor v. State, 62 App. 611, 138 S. W. 615; Alexander v. State, 63 App. 102, 138 S. W. 721; Walker v. State, 63 App. 499, 140 S. W. 455; Davis v. State, 63 App. 484, 141 S. W. 93; Zimmer v. State, 64 App. 114, 141 S. W. 781; Porterfield v. State, 64 App. 179, 141 S. W. 968; Baum-

garner v. State, 64 App. 165, 142 S. W. 4; Sanford v. State, 64 App. 607, 143 S. W. 1172; Clay v. State (Cr. App.) 144 S. W. 280; Weaver v. State (Cr. App.) 146 S. W. 927; Green v. State (Cr. App.) 147 S. W. 593; Simms v. State (Cr. App.) 148 S. W. 786; Pettis v. State (Cr. App.) 150 S. W. 790; Davis v. State (Cr. App.) 151 S. W. 313; Walker v. State (Cr. App.) 151 S. W. 318; Brooks v. State (Cr. App.) 151 S. W. 549; Polk v. State (Cr. App.) 152 S. W. 907; Andrada v. State (Cr. App.) 152 S. W. 910; Crutchfield v. State (Cr. App.) 152 S. W. 1053; Jones v. State (Cr. App.) 153 S. W. 310; Hamilton v. State (Cr. App.) 153 S. W. 331; Scott v. State (Cr. App.) 153 S. W. 871; Hall v. State (Cr. App.) 153 S. W. 902; Stewart v. State (Cr. App.) 153 S. W. 1151; Powers v. State (Cr. App.) 154 S. W. 1020; Green v. State, 70 App. 256, 156 S. W. 682; Holmes v. State, 70 App. 214, 156 S. W. 1173; Reagan v. State, 70 App. 498, 157 S. W. 483; Templeton v. State, 71 App. 307, 158 S. W. 302; Hollins v. State, 71 App. 84, 158 S. W. 514; Knight v. State, 71 App. 36, 158 S. W. 543; Melton v. State, 71 App. 130, 158 S. W. 550; Cowart v. State, 71 App. 116, 158 S. W. 809; Jackson v. State, 71 App. 297, 158 S. W. 813; Ward v. State, 71 App. 310, 158 S. W. 1126; Haynes v. State, 71 App. 31, 159 S. W. 1059; Palmer v. State, 71 App. 335, 160 S. W. 349; Robinson v. State, 71 App. 561, 160 S. W. 456; Ulmer v. State, 71 App. 579, 160 S. W. 1188; Christian v. State, 71 App. 566, 161 S. W. 101; Key v. State, 71 App. 642, 161 S. W. 121; Elmore v. State, 72 App. 226, 162 S. W. 517; Brice v. State, 72 App. 219, 162 S. W. 574; Edwards v. State (Cr. App.) 166 S. W. 517; Wyres v. State (Cr. App.) 166 S. W. 1150; Caples v. State (Cr. App.) 167 S. W. 730; Warner v. State (Cr. App.) 167 S. W. 1103; Raleigh v. State (Cr. App.) 168 S. W. 1059; Burrus v. State (Cr. App.) 172 S. W. 981; Hart v. State (Cr. App.) 175 S. W. 436; Howard v. State (Cr. App.) 178 S. W. 506; Cline v. State (Cr. App.) 178 S. W. 520.

In support of the presumption of innocence, every theory of the crime which the evidence suggests should be charged upon accused's request. Martin v. State, 57 App. 264, 122 S. W. 558.

A request having basis in the evidence, and also predicated on matters not raised, is, where the matters are commingled, properly refused. Grimes v. State (Cr. App.) 178 S. W. 523.

2. General considerations in giving charge.—Defendants being indicted for violating one phase of a law, the charge of the court should confine the jury to that phase, and in submitting others error is committed. Whitcomb v. State, 30 App. 269, 17 S. W. 258. The charge is controlled absolutely by the evidence adduced on the trial. Whether or not it tends sufficiently to the establishment of a defense, or a mitigation of the offense, as to reasonably demand a charge, are questions primarily committed to the sound discretion of the trial judge. If its force is deemed very weak, trivial, light, and its application remote, the court should not charge upon it. If, however, it is so pertinent and forcible that it might in reason be expected to influence the jury in reaching a verdict, the court should so charge as to furnish them with the appropriate rule of law with reference to it. Bishop v. State, 43 Tex. 390; Elam v. State, 16 App. 34. It is measurable by the evidence and need not transcend the legitimate deductions therefrom, and it is not incumbent on the judge to give in charge the law applicable to a deduction which the jury could not reasonably draw from the evidence. Williams v. State, 11 App. 63; Lum v. State, Id. 483; Smith v. State, 15 App. 139; Pugh v. State, 2 App. 539. In charging the jury the judge should instruct hypothetically upon whatever state of facts there is evidence tending to prove. It is error for him to submit to the jury a fact or state of facts of which there is no evidence, or to give an instruction with reference to a state of facts of which there is no evidence. In order to justify instructions, predicated upon a supposed state of facts, it is not necessary that the judge should be entirely satisfied of such facts. If there is evidence from which the jury may infer such facts to be true, it is the duty of the judge to declare the law thereon; and it is not error for him to do so even where the evidence is very slight. Reynolds v. State, 14 App. 427. It would be error to charge upon a hypothetical state of case not presented by the evidence. Taylor v. State, 17 App. 46.

Proper instructions can not be withheld because of the unreasonableness and inconsistency of the testimony on which they are based. Hayes v. State (Cr. App.) 39 S. W. 106.

The court need not single out each of the different facts tending to connect accused with the crime, and charge on each separately. Pink v. State, 40 App. 23, 48 S. W. 171.

Where there are two theories in a case, one favorable and the other unfavorable, and the unfavorable theory is given, the favorable theory should also be given. Walker v. State, 63 App. 499, 140 S. W. 455.

In determining whether an issue favorable to accused shall be submitted, the court must take the testimony of accused as true, and, where it raises an issue, it must submit the evidence to the jury. Fifer v. State, 64 App. 203, 141 S. W. 989.

That accused testifies to facts contrary to those established by the other evidence does not require that the issues so made be submitted upon the theory that accused's evidence is true. Scott v. State, 70 App. 57, 153 S. W. 871.

3. Determination of questions of law.—In a prosecution for following the business of selling intoxicating liquors in prohibition territory, the trial judge may charge the jury, as a matter of law, that beer is an intoxicant. Misher v. State (Cr. App.) 152 S. W. 1049. So, also, as to whisky. Hambright v. State, 60 App. 253, 131 S. W. 1123.

Evidence tended to show that previous to the homicide the accused repeatedly declared his intention to kill the deceased, and that, on the evening of, but before, the killing, he went to the house of the deceased and told deceased's family to tell him that he and George Nixon, Aaron Nixon, and Bill Evans were coming to his house that night to kill him; that about dark on that night the defendant and the said Nixons and the said Evans met at a certain house where they prepared arms and ammunition, and whence they went in the direction of the house of the

deceased; that, just before the killing, George Nixon called the deceased from his house to the fence, and, while they were talking at the said fence, the defendant and said Evans and one Buie, each having a gun, passed and stopped at a point forty yards distant, to which point the defendant called the deceased, and that when the deceased started for that point one or the other of the said parties fired upon and killed the deceased. Buie, testifying for the defense, admitted that he and the defendant passed the house of the deceased on the night of the homicide, and saw several negroes there, but denied that he or defendant stopped at or near the said house and witnessed the killing, or that they spoke to the deceased or any person then at his house. He testified further that he and defendant went to Wagoner's house, six miles distant, without stopping; that he did not hear the fatal shot fired, and was not informed of the homicide until the next morning. Held, that the evidence clearly raised the issue of conspiracy, and of the complicity of the defendant as a principal offender, and authorized the charge of the court on that issue, which, conforming to the rules above stated, was correct. *Phillips v. State*, 26 App. 228, 9 S. W. 557, 8 Am. St. Rep. 471.

The court may, before giving his instructions proper, state to the jury the nature of the charge against defendant, and state that "in determining defendant's guilt or innocence of said charge, I give you the following instructions as the law applicable to the case, and by which you must be governed." *Wolforth v. State*, 31 App. 387, 20 S. W. 741.

On a trial for manslaughter, a charge that defendant had, at a former trial been acquitted of murder, and could not again be tried for said offense, is sufficient to protect defendant's rights in connection with such former acquittal. *Abrams v. State* (Cr. App.) 40 S. W. 798.

Where an election resulting in prohibition, not contested within the time specified, becomes effective as a matter of law, the court, after proof by the introduction of the proper orders, etc., can charge, as a matter of law, that prohibition is in force. *Robinson v. State* (Cr. App.) 154 S. W. 997.

An instruction that the jury are the exclusive judges of the facts and the credibility of the witnesses, but that the law must be received from the court, and that they are bound thereby, sufficiently charges that the jury must receive the law from the court in its instructions. *Jefferson v. State*, 71 App. 120, 158 S. W. 520.

4. **Application of law to facts.**—The court may, in its charge, call attention to the facts, or a particular fact, if it be controverted, to direct the jury to the rules of law that must govern in arriving at the truth; if it be uncontroverted, to apply the law to it. All that is required of the judge is that he should neither decide on the facts nor attempt to influence the jury in their decision on the facts. *Jones v. State*, 13 Tex. 168, 62 Am. Dec. 550; *Cocker v. State*, 31 Tex. 498; *Barker v. State*, 36 Tex. 201; *Marshall v. State*, 40 Tex. 200; *Darnell v. State*, 43 Tex. 147; *Douglass v. State*, 8 App. 520; *Carroll v. State* (Cr. App.) 81 S. W. 294. The court should, in its instruction, furnish the jury with the appropriate rules of law as to all the issues or defenses raised by the evidence. *Mitchell v. State* (Cr. App.) 144 S. W. 1006.

5. **Duties of jury.**—A charge, which instructs or advises the jury as to the proper process of reasoning on the facts, is erroneous. *Brown v. State*, 23 Tex. 195.

The action of the court in telling the jury to "pass on the case as soon as you can, as you are on the special venire in the case that will come up next," afterwards explained by saying, "I mean I want you to commence on your deliberations as soon after you get your dinner as you can," is not ground for reversal, unless it appears to have unduly influenced the jury. *Wilson v. State* (Cr. App.) 28 S. W. 200.

An instruction that the jury in deliberating on the case should not refer to any matter or issue not in evidence, nor separate from each other, nor talk with any one not of the jury, and that violation of the injunction would be punished severely by the court, is not improper as a threat calculated to mislead and prejudice the jury. *Villereal v. State* (Cr. App.) 61 S. W. 715.

In an address to the regular jury panel for the week, the trial judge told them that a verdict was the agreed consensus of opinion of each and all 12 men; that it was a mistake for a juror to think that because the rest did not think exactly as he that there was no chance to agree, but they ought to discuss the matter and get each other's viewpoint, as it was always possible to agree, etc.; that a hung jury was a detriment to the state and to the defendant, etc. Held, that the remarks did not have a tendency to coerce jurors to reach a verdict in any improper manner, and hence was not injurious to a defendant whose case was tried during the week. *Reed v. State* (Cr. App.) 168 S. W. 541.

A charge that the jury should disregard what they had heard of the case, or knew of the character of any of the witnesses, and confine themselves to the evidence alone on the trial, not informing fellow jurors of their knowledge, is not erroneous. *Ross v. State* (Cr. App.) 170 S. W. 305.

6. — **Fixing punishment.**—An instruction that, if the jury have a reasonable doubt of defendant's guilt, they must acquit, and not resolve the doubt by a mitigation of the punishment, is error, as tending to influence the jury to inflict the death penalty, rather than milder punishment. *Johnson v. State*, 27 App. 163, 11 S. W. 106.

Where the punishment for an offense has been changed from time to time, it is erroneous for the court to charge the jury as to what statute they are to assess the punishment under, as it is within their province to determine the time when the crime was committed, and assess the punishment under the statute in existence at that time. *Martin v. State*, 24 Tex. 61.

7. Definition of offense.—The charge should give the statutory definition of the offense for which the defendant is on trial, or failing to do this, should explain the nature and ingredients of such offense. *Hilliard v. State*, 37 Tex. 358; *Smith v. State*, 1 App. 517; *Cady v. State*, 4 App. 238; *Gose v. State*, 6 App. 121; *Lindley v. State*, 8 App. 445; *Johnson v. State*, 13 App. 378; *Blocker v. State*, 27 App. 16, 10 S. W. 459; *Briscoe v. State*, 27 App. 193, 11 S. W. 113; *Bailey v. State* (Cr. App.) 39 S. W. 669. See, also, *Hargrave v. State* (Cr. App.) 30 S. W. 444; *Simons v. State* (Cr. App.) 34 S. W. 619. A reference to the indictment for a specification of the offense, or some of its descriptive ingredients, is not objectionable. *Tincher v. State*, 19 Tex. 156. But the charge need not be in language of statute. It is sufficient to state the constituent elements of the crime. *Adkins v. State*, 41 App. 577, 56 S. W. 64. See, also, *Davis v. State*, 10 App. 31. Where the court in its instructions properly applied to the facts articles of the Penal Code and Code of Criminal Procedure without quoting any of the articles, the refusal of special charges in the language of the Codes is not erroneous. *Gentry v. State*, 61 App. 619, 136 S. W. 50. The charge may be defective, though in the language of the statute, if it fails to apply the law to the facts. *Francis v. State*, 7 App. 501.

Defendant cannot complain of the court's quoting in its charge a clause of a statute; it, in so doing, having merely followed what he requested in a special charge. *Gould v. State* (Cr. App.) 147 S. W. 247. See, also, *Ringo v. State*, 2 App. 291; *Coker v. State*, 71 App. 504, 160 S. W. 366.

In a misdemeanor case, where no charge is requested by either party, the court may instruct the jury by simply reading from the Code the necessary provisions in regard to the crime. *Hobbs v. State*, 7 App. 117.

The court may in its instructions state what the charge preferred in the indictment is, and may then charge the jury that they must believe every essential fact necessary to show guilt before they can convict, and need not tell the jury what the statute is and lay down general principles of law. *Ritter v. State* (Cr. App.) 176 S. W. 727.

8. Offenses or counts thereof alleged.—When an indictment contains more than one count, the charge should submit the law pertinently as applicable to each count upon which the trial is had. *Pollard v. State*, 33 App. 197, 26 S. W. 70; *Callison v. State*, 37 App. 211, 39 S. W. 300. Where the indictment charges two offenses, and there is evidence to support both, the jury should be instructed as to the law covering both offenses. *Struckman v. State*, 7 App. 551. Where there is no evidence supporting one or more counts of the indictment the court need not submit such counts to the jury. *Parks v. State*, 29 App. 597, 16 S. W. 532. And where one of the counts is bad a charge thereon is error. *McMurtry v. State*, 38 App. 521, 43 S. W. 1010. If a nolle prosequi has been entered upon one or two counts charging different grades of an offense, it is error to give an instruction upon the grade of offense charged in such count. *Serio v. State*, 22 App. 633, 3 S. W. 784. Where only one count of an indictment is submitted to the jury, requested instructions that if the jury should believe defendant guilty of a violation of the law, but be unable to ascertain on which charge of the indictment he was guilty, they should find him not guilty, is properly refused. *Manovitch v. State*, 50 App. 260, 96 S. W. 1. Where one species of aggravated assault is alleged, it is error to charge in relation to another species not alleged. *Stanfield v. State*, 43 Tex. 167; *Coney v. State*, 43 Tex. 414; *Kouns v. State*, 3 App. 13; *Ferguson v. State*, 4 App. 156; *McGee v. State*, 5 App. 492; *Anderson v. State*, 16 App. 132. Where one species of burglary is alleged, it is error to charge as to another not alleged. *Mace v. State*, 9 App. 110; *Sullivan v. State*, 13 App. 462; *Weeks v. State*, 13 App. 466; *Buntain v. State*, 15 App. 485; *Bravo v. State*, 20 App. 188. Or to charge as to a species about which there is no evidence. *Neiderluck v. State*, 23 App. 38, 3 S. W. 573. See, also, *Jones v. State*, 22 App. 680, 3 S. W. 478; *Melton v. State*, 24 App. 287, 6 S. W. 303; *Fernandez v. State*, 25 App. 538, 8 S. W. 667; *Bradford v. State*, 25 App. 723, 9 S. W. 46; *McLin v. State*, 29 App. 171, 15 S. W. 600; *Surrell v. State*, 29 App. 321, 15 S. W. 816; *Otero v. State*, 30 App. 450, 17 S. W. 1081. Where one species of rape is alleged, it is error to charge as to another species not alleged. *Cooper v. State*, 22 App. 419, 3 S. W. 334; *Serio v. State*, 22 App. 633, 3 S. W. 784. See, also, *Taylor v. State*, 24 App. 299, 6 S. W. 42. Where, on a prosecution for rape the indictment contained a count charging rape on a girl under 15 years of age, and one charging rape by force, threats, and fraud, and only the first count was submitted, a charge with reference to the second count is properly refused. *Ricks v. State*, 48 App. 229, 87 S. W. 345. Where the offense charged was conveying into a jail articles useful to aid prisoners in escaping, it is error to instruct as to the law against aiding a prisoner to escape from an officer. *Mason v. State*, 7 App. 623. 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. *Parks v. State*, 29 App. 597, 16 S. W. 532; *Moore v. State*, 37 App. 552, 40 S. W. 287.

Accused was charged in an indictment with cursing and swearing at a public place, and, further, that he cursed and abused a certain person under circumstances reasonably calculated to provoke a breach of the peace. After the evidence had been introduced, the county attorney elected to prosecute on the first count only. Held, error to instruct as to both counts, and authorize a conviction under either one of such counts. *Austin v. State*, 57 App. 623, 124 S. W. 636.

Where the information charged intimidation by threatening words and acts of violence, and by the firing of guns, a charge as to the use of threatening words is not open to the objection that the information charged that the offense was committed by the firing of guns alone. *Oliver v. State*, 58 App. 50, 124 S. W. 637.

Where, in a prosecution for theft, the court refused to submit the question of swindling to the jury, a request to charge that, if the false pretense was a promise to do something in the future, it would not constitute swindling, is properly refused. *Hawkins v. State*, 53 App. 407, 126 S. W. 268, 137 Am. St. Rep. 970.

On a trial under an indictment charging that accused owned and kept a house as a house of prostitution, instruction to find her guilty if she owned, kept, was concerned in keeping, or knowingly permitted such house to be kept as a house of prostitution, is erroneous, as it authorized a conviction on matters not set up in the indictment. *Dowman v. State* (Cr. App.) 164 S. W. 846.

9. **Definition or explanation of terms.**—For charges defining certain words or terms see the following cases:—"Accomplice." *Crass v. State*, 31 App. 312, 20 S. W. 579. "Adequate cause." *Beckham v. State* (Cr. App.) 69 S. W. 534. "Anger." *Robinson v. State* (Cr. App.) 63 S. W. 869. "Carnal knowledge" and "carnally know." *Drake v. State* (Cr. App.) 151 S. W. 315. "Consignee." *Pope v. State*, 71 App. 261, 158 S. W. 527. "Cool, sedate, and deliberate." *Beard v. State*, 41 App. 173, 53 S. W. 348; *Dyrley v. State* (Cr. App.) 63 S. W. 631. "Corroborated." *Moore v. State* (Cr. App.) 144 S. W. 598. "Corroboration." *Still v. State* (Cr. App.) 50 S. W. 355; *Harris v. State*, 64 App. 594, 144 S. W. 232. "Credible." *Chavarria v. State* (Cr. App.) 63 S. W. 312. "Credibility." *Barber v. State*, 64 App. 96, 142 S. W. 577. "Deadly weapon." *Tollett v. State* (Cr. App.) 55 S. W. 335. "Deliberately." *Mahon v. State*, 46 App. 234, 79 S. W. 28; *Holt v. State*, 48 App. 559, 89 S. W. 838. "Engaging in or pursuing the occupation or business of selling intoxicating liquors." *Hightower v. State* (Cr. App.) 165 S. W. 184. "Entry." *Jones v. State*, 60 App. 426, 132 S. W. 476. "Family." *Goode v. State*, 16 App. 411. "House." *Allen v. State*, 62 App. 501, 137 S. W. 1133. "Implied malice." *Connell v. State*, 46 App. 259, 81 S. W. 746. "Malice" or "Malice aforethought." *Moore v. State* (Cr. App.) 50 S. W. 355; *Bean v. State* (Cr. App.) 51 S. W. 946; *Hamp v. State* (Cr. App.) 60 S. W. 45; *Hatcher v. State*, 43 App. 237, 65 S. W. 97. "Mitigate, excuse, or justify the act." *Swain v. State*, 48 App. 98, 86 S. W. 335. "Nighttime." *Jackson v. State* (Cr. App.) 38 S. W. 990. "Prostitution." *Tores v. State* (Cr. App.) 63 S. W. 880. "Provoking difficulty." *Vance v. State*, 45 App. 434, 77 S. W. 813. "Public road." *Jolly v. State*, 19 App. 76. "Res gestae." *Kalsky v. State*, 37 App. 247, 39 S. W. 362. "Robbery." *Ransom v. State* (Cr. App.) 70 S. W. 960. "Sale." *Ellis v. State*, 59 App. 630, 130 S. W. 171; *Moreno v. State*, 64 App. 660, 143 S. W. 156, Ann. Cas. 1914C, 863. "Serious bodily injury." *De Los Santos v. State* (Cr. App.) 31 S. W. 395. "Wantonly." *Roberts v. State* (Cr. App.) 143 S. W. 614. "Wilful," "wilfully," and "wilfulness." *Rose v. State*, 19 App. 470; *Sparks v. State*, 23 App. 447, 5 S. W. 135; *Wheeler v. State*, 23 App. 598, 5 S. W. 160; *Pinney v. State*, 29 App. 184, 15 S. W. 175; *Garza v. State* (Cr. App.) 47 S. W. 983; *Holt v. State*, 48 App. 559, 89 S. W. 838; *Roberts v. State* (Cr. App.) 143 S. W. 614; *Carney v. State* (Cr. App.) 175 S. W. 155.

It is not error, in a prosecution for violating a statute, to refuse to define a word used in the statute, when such word is used in its ordinary sense, and it is easily comprehended by every one. *Humphreys v. State*, 34 App. 434, 30 S. W. 1066. In a prosecution for a violation of a statute it is not error to refuse an instruction defining a word used in the statute, when such word is used in its ordinary sense, and is easily comprehended by every one. *Humphreys v. State*, 34 App. 434, 30 S. W. 1066.

10. **Matters not in dispute.**—It is not error to omit to submit an issue on a matter as to which the evidence is undisputed. *Bailey v. State* (Cr. App.) 155 S. W. 536. Where it is admitted that defendant obtained the property alleged to have been stolen with the consent of the owner, an instruction which authorizes the jury to convict if defendant obtained it without the consent of the owner, is erroneous. *Sanders v. State*, 38 App. 343, 42 S. W. 983. Where, in a prosecution for swindling by obtaining clothing in exchange for a worthless check, there was no dispute that the check was delivered to prosecutor's clerk, it is not error to refuse to charge that the state was bound to prove that the check was delivered by defendant to the person alleged in the indictment. *Glover v. State*, 57 App. 208, 122 S. W. 396. Where the unequivocal evidence tended to show that the death was occasioned by arsenic, it is not error for the court to refuse to submit the issue whether deceased met his death from other poison. *Bailey v. State* (Cr. App.) 144 S. W. 996. In a trial for unlawfully disposing of a mortgaged chattel, it is not error to omit to submit an issue whether there was a completed trade between the parties where it was undisputed that accused bought the property from the mortgagee, and agreed to give a mortgage thereon, which he did. *Loggins v. State* (Cr. App.) 149 S. W. 170. Where, on a trial for burglary, the evidence showed that prosecutors were in the sole possession and control of the house burglarized, and no question was raised as to the actual ownership thereof, the refusal to direct an acquittal, unless the jury found who actually owned the house, is proper. *Smith v. State*, 61 App. 225, 135 S. W. 533. Where the evidence showed that accused had the exclusive possession of the bay horse, alleged to have been stolen, when he swapped it for a sorrel, a charge that unless the jury believed that accused was in the exclusive possession of the horse claimed to have been stolen, and further find that he stole it, they should acquit, is properly refused. *Johnson v. State*, 57 App. 603, 124 S. W. 664.

Where, in a prosecution for the sale of intoxicating liquor in local option territory, there is no evidence raising the issue that the article sold, which was beer, was not intoxicating, but the case was tried on the theory that it was intoxicating and prohibited, there was no error in refusing an instruction based on the theory that the beer sold was not an intoxicating liquor, as under Acts 1st Called Sess. 31st Leg. c. 17, defining "intoxicating liquors" as including fermented liquor, the courts will take judicial knowledge that beer is an intoxicating liquor. *Moreno v. State*, 64 App. 660, 143 S. W. 156, Ann. Cas. 1914C, 863.

11. **Matters of common knowledge.**—As to matters of common knowledge, of which jurors are supposed to possess competent knowledge, the court is not required to instruct. *Flournoy v. State*, 16 Tex. 31.

12. Presumptions, burden of proof, and reasonable doubt.—See Willson's Cr. Forms, 935, 936.

See notes to Pen. Code, art. 51, and C. C. P. art. 785, post.

Where it does not appear that it was an insistence before the jury that the indictment should be regarded by them as evidence of guilt, it is not error to refuse a charge that the indictment is no evidence of guilt. *Crane v. State*, 57 App. 476, 123 S. W. 422.

Presumptions of law that are against accused should not ordinarily be given in the charge, but, where applicable, presumptions of law favorable to accused should be given. *Snowberger v. State*, 58 App. 539, 126 S. W. 878.

13. Elements and incidents of offenses and defenses in general.—See notes to Penal Code articles dealing with specific offenses.

Where an information charged an assault by striking with the hands, the instructions should have been confined to the means alleged, and not have permitted a conviction for an assault with a stick, knife, or anything else capable of inflicting injury. *Maloney v. State*, 57 App. 435, 125 S. W. 36.

Where, on a trial for unlawfully selling intoxicating liquors, the only issue was whether accused made the sale to prosecutor for himself or another owning the property, or whether he acted as agent for the prosecutor, and as such bought the liquor for prosecutor, it is immaterial that the instructions did not define a sale. *Roberts v. State*, 59 App. 47, 126 S. W. 1129.

An instruction, in a prosecution for aggravated assault, that, if such assault was mutual, then the defendant would be guilty as charged, without submitting the other questions of fact as to what constitutes an assault, is reversible error. *Clark v. State*, 63 App. 579, 140 S. W. 779.

Where the evidence showed that accused sold casks of liquor already in local option territory, and delivered the same to the buyer, the question involving the taking of orders by accused and shipping liquor from other points is not involved as to such casks. *Sandolowski v. State* (Cr. App.) 143 S. W. 151.

Where, in a prosecution for forgery, the defendant set up authority from his father to sign the check in question, an instruction that if the jury believed or had a reasonable doubt as to the existence of such authority, or if they believed that the father did not authorize the defendant to sign his name to the check, but that the defendant believed that he had such authority, they should acquit the defendant, fully and aptly presents the defense. *Howard v. State* (Cr. App.) 143 S. W. 178.

Where accused claimed, in a prosecution for unlawfully carrying a pistol, that the city marshal wanted accused to assist him in keeping order on the night before the alleged unlawful carrying, and gave him a pistol for that purpose, and told him to leave it with T. the following morning, and that he did not see T. then, but left it with another, from whom the marshal subsequently obtained it, a charge that the authority of one deputized by an officer to execute process to carry a pistol terminates when the purpose of his appointment is accomplished, and that if the city marshal, who was a peace officer, summoned accused to aid him on the occasion on which defendant is claimed to have carried the pistol, or if the jury have a reasonable doubt thereof, they should acquit, does not adequately present accused's theory. *Spowles v. State* (Cr. App.) 143 S. W. 622.

Where, on a trial for seduction, prosecutrix fixed the time of the promise of marriage and accompanying act of intercourse as April, 1908, and accused proved prior misconduct of prosecutrix and her general reputation for want of chastity prior to the time fixed by her, the refusal to charge that if prosecutrix was unchaste at the time fixed by her accused must be acquitted is reversible error. *Humphrey v. State* (Cr. App.) 143 S. W. 641.

Charges must be given on every issue favorable to the defendant from which the jury might infer absence of guilt or give him the benefit of doubt, especially in those cases where the intent forms an element of the offense; defendant being entitled to charges submitting all circumstances tending to mitigate the offense or in extenuation. *Grant v. State* (Cr. App.) 143 S. W. 929.

Where, on a trial for the murder of a child by arsenic poisoning, the evidence showed that arsenic was found in cheap candy, and that the child had eaten candy just before she was taken sick, and that she had been sick more or less for some time, as evidenced by vomiting and complaints, and the theory of the state was that accused placed arsenic in coffee given to the child, the refusal to charge the theory of the defense of the possibility of the poison having been received accidentally is reversible error. *Orner v. State* (Cr. App.) 143 S. W. 925.

In a prosecution for homicide, a charge that if arsenic was placed in the coffee which deceased drank on the day of his death, and if Mrs. B., or any other person than accused, mixed and mingled the arsenic with the coffee, then accused should be acquitted, is not where there was no other Mrs. B. mentioned in the record, erroneous as failing to identify her as the wife of accused. *Bailey v. State* (Cr. App.) 144 S. W. 996.

In a prosecution for keeping a disorderly house where spirituous liquors were kept and sold without a license, where defendant testified that the beer found at his place belonged to his son, and was kept there for his individual use, and that he had never made a sale of liquor to any one, and where no liquor was shown to have been at defendant's place on any other occasion, and no sale to any one was shown, a refusal of an instruction submitting defendant's defensive theory that the keeping of beer for his own use, or for the use of his stepson, was not a violation of law and that on a reasonable doubt as to whether such liquor was kept for sale defendant should be acquitted, is reversible error. *Williams v. State* (Cr. App.) 148 S. W. 306.

Where accused, charged with carrying a pistol, testified that he came to Texas about four years before, and went to live with his uncle, and made a crop there every year until 1911, that during 1911 he went to another place and did some work,

but frequently visited the home of his uncle, and considered that his home, and that he was at his uncle's home at the time he carried the pistol, refusal to charge on the issue as to whether his home was at the home of his uncle is reversible error. *McCollum v. State* (Cr. App.) 150 S. W. 430.

Where, on a trial for keeping a gambling room, the testimony of the prosecution showed that accused was running a gambling house, and that card playing took place constantly, a requested charge that it was no offense for accused to have occasional games among his friends in his room is properly refused, as presenting an issue not raised by the evidence. *Boswell v. State* (Cr. App.) 150 S. W. 432.

In a criminal prosecution for being the owner, lessee, or tenant of a disorderly house, where there was proof for the defense that the owner of the premises had rented them to other parties, and no attempt was made to show any connection between defendant and the owner or lessee of the building, a requested charge that defendant could not be convicted unless defendant was either the owner, a lessee, or a tenant of such house, should have been given. *Mitchell v. State* (Cr. App.) 150 S. W. 890.

Where, in a prosecution for engaging in the business of selling intoxicants in a dry county, accused claimed that he collected the money from the parties for whom he ordered, before the liquor was ordered, which the state controverted, an instruction that, if accused ordered liquor for the accommodation of others and collected the money from them before the order was made, he would not be guilty, is not objectionable for requiring the jury to believe that he collected the money from such others before the order was made. And such instruction is not objectionable on the ground that accused would not be guilty whether he ordered the liquor as an accommodation or not, but presented accused's contention under the evidence. *Wilson v. State* (Cr. App.) 154 S. W. 571.

Where, in a prosecution for hog theft, defendant denied that he had anything to do with prosecutor's hogs, claimed that he was absent on the day of the taking, buying hogs in another direction, and that the hog meat found in his smokehouse was the product of the hogs so purchased, it is error for the court to omit to charge on the defensive matter so presented. *Matthews v. State* (Cr. App.) 155 S. W. 228.

In a prosecution for disturbing a congregation assembled for religious worship, where the information did not allege that the parties who committed the offense were riding on horses, or that they were riding at all, and most of the witnesses testified that they were riding horses, accused cannot predicate his conviction upon whether or not he was riding a horse or a mule; and a charge that if the parties, or either of them, were riding mules, accused should be acquitted, is properly refused. *Laird v. State* (Cr. App.) 155 S. W. 260.

Where accused assaulted decedent several times during the night of the killing, and at one time threw a water pitcher at her, and decedent's body was badly bruised, though no one was present when she was slain, the court properly submittted to the jury the issue whether accused killed her by beating and bruising her with an unknown weapon. *Lucas v. State* (Cr. App.) 155 S. W. 527.

In a prosecution for pursuing the business or occupation of selling intoxicants in prohibition territory, the court charged the statute that any person who pursues the occupation of selling intoxicants in prohibition territory shall be punished, and that, to constitute the pursuing of the business of selling intoxicants, the state must prove that accused made at least two sales, and further instructed that the jury could not convict because accused permitted certain persons to leave intoxicants upon her premises, but must believe, beyond a reasonable doubt, that she actually made sales of intoxicants in pursuit of the business of selling intoxicants, and that she was engaged in the business of selling intoxicants, and, if the jury did not find both facts established beyond a reasonable doubt, they should acquit, though they believed that one of the elements was proven. Held, that the instruction was not objectionable upon the ground that it permitted a conviction on proof of two separate and distinct sales. *Hightower v. State* (Cr. App.) 165 S. W. 184.

On a trial for stealing a horse and buggy, accused's defense that he was not a party to the original theft is fairly submitted by an instruction that if N. left accused and went off and himself hired or took the property without the knowledge or consent of the owner, and if accused was not present, or if the jury had a reasonable doubt as to whether this was true, to find accused not guilty. *Moran v. State* (Cr. App.) 166 S. W. 161.

Where in a prosecution for wife murder, defendant claimed that another than himself killed deceased, but there was no evidence raising such issue except the testimony, declarations, and statements of accused, and the court properly and sufficiently charged, as to such statements and declarations that the burden was on the state to establish beyond a reasonable doubt that they were false, the court did not err in omitting to otherwise present defendant's claim that another killed deceased as an affirmative defense. *Brown v. State* (Cr. App.) 169 S. W. 437.

Where, in a prosecution for homicide, the state did not rely on a conspiracy to specifically kill decedent, but claimed that decedent was killed, as an act incidental to the furtherance of a conspiracy to illegally organize in Texas a company to invade Mexico, the court properly refused to charge on conspiracy to kill decedent. And the court did not err in omitting to define conspiracy. *Serrato v. State* (Cr. App.) 171 S. W. 1133.

A reliance on a plea of not guilty, and the fact that the state does not prove guilt beyond a reasonable doubt, does not call for any other or different affirmative charges than those on the presumption of innocence and reasonable doubt. It is only where the evidence presents an affirmative defense that an affirmative charge to acquit, if the facts are consistent with defendant's innocence, is called for. *Orange v. State* (Cr. App.) 173 S. W. 297.

14. **Time and place of offense.**—Where the evidence raises the issue, an instruction that defendant cannot be convicted where it appears that the alleged of-

fense did not occur in the county charged in the information should have been given. *Stripling v. State*, 47 App. 117, 80 S. W. 376. Where there was no issue on the question of venue, a charge that, if the jury believed from the evidence that defendant committed the offense as charged, they should find him guilty, is a sufficient charge on that subject. *Meyer v. State* (Cr. App.) 49 S. W. 600. It is not error in a prosecution for a misdemeanor to charge that, if the jury believed beyond a reasonable doubt that defendant committed the offense within two years before the filing of the indictment, they could convict. *Willingham v. State*, 62 App. 55, 136 S. W. 470. In a prosecution for kidnapping, where the jurisdiction of the offense was in issue, and where there was no proof that the channel of the Rio Grande had suddenly changed, there is no error in refusing defendant's requested charge assuming that the river had suddenly changed its course into a new channel. *Nunez v. State*, 70 App. 481, 156 S. W. 933. In a prosecution for an unlawful sale of intoxicants, where the state's witnesses fixed the day of the sale as the first or second Saturday in March, it is proper for the court to refuse a special charge narrowing the issue down to whether the sale was made on Saturday, March 7th. *De Lerosa v. State* (Cr. App.) 170 S. W. 312.

Where the indictment charging a violation of the local option law was returned on December 11, 1908, and the state was not required to elect on which transaction a conviction would be sought, an instruction that if, at any time during 1908, and before December 11, accused sold intoxicating liquors, they should render a verdict of guilty, is not objectionable, in that it did not correctly state the law as to the time within which accused might or might not be convicted. *Matthews v. State*, 57 App. 328, 122 S. W. 544.

In a prosecution for robbery, upon an indictment found January 12, 1911, charging the offense to have been committed on or about May 1, 1910, and in which all of the testimony was as to a transaction on or about the first Sunday in May, 1910, a charge that if defendant on or about the 1st day of May, 1910, etc., is not objectionable for failing to charge that the jury must find offense to have been committed before the filing of the indictment. *Green v. State* (Cr. App.) 147 S. W. 593.

In a prosecution for forgery of a mortgage note, an instruction that, if defendant signed and executed the note in J. county, he should be acquitted, although the signing and execution of the note was a forgery, that the burden of proof was on the state, that the defendant was presumed to be innocent, and, if there was a reasonable doubt of defendant's guilt, he should be acquitted, fairly submitted the issue whether it was executed in H. county. *Pye v. State*, 71 App. 94, 154 S. W. 222.

In a prosecution for the theft of two mules by a bailee, an instruction that defendant was guilty, if he obtained possession of the mules in B. county and did "then and there" fraudulently convert same, sufficiently informed the jury that, to warrant conviction, the conversion must have taken place in B. county. *Pech v. State* (Cr. App.) 154 S. W. 998.

Where an indictment found in W. county charged that cattle were stolen and were received and concealed by accused in W. county, an instruction that, if accused in C. county received and concealed such cattle, knowing that they had been stolen in W. county, to find him guilty is erroneous, as it authorized a conviction upon a state of facts which would not have been provable. *Mooney v. State* (Cr. App.) 164 S. W. 828.

15. Intent or motive.—See Willson's Cr. Forms, 921-924, 933, 934.

Where the state's evidence does not raise the issue of fraudulent intent, and accused denies any connection with the crime, a charge on fraudulent intent is not required. *Taylor v. State*, 38 App. 241, 42 S. W. 385; *Chesson v. State* (Cr. App.) 42 S. W. 293. In a prosecution for injuring a fence, it is proper to refuse to charge that, "if defendant broke the fence unintentionally, he would not be guilty," there being no evidence to authorize such a charge. *Jessel v. State*, 42 App. 72, 57 S. W. 826. A charge directing a conviction if defendant took property in question is fatally defective in omitting fraudulent intent as a constituent element of the offense. *Wilson v. State*, 59 App. 623, 129 S. W. 836. In a prosecution for forgery in the signing of the name of another to a note as surety, where accused claimed that he signed such person's name relying upon the fact of their long-standing friendship, and thinking that it would make no difference with such person, and it appeared that accused in fact had no authority to sign such name, and that he fled the country, being captured in another state and brought back for trial, failure to charge that, if he did not intend to defraud the person whose name he signed, he should be acquitted, is not error. *Carlton v. State*, 60 App. 584, 132 S. W. 775. Where an indictment charged that accused mingled poison with coffee with the intent to injure and kill two persons named, the court could submit the question of the intent of accused to injure and kill one of such persons. *Terry v. State*, 62 App. 73, 136 S. W. 485. In a trial for aggravated assault claimed to have been committed by accused forcing a door in a house to which prosecuting witness fled, it is error to refuse to submit an issue of accident and mistake where accused had testified he thought the persons in the house were his sisters. *Atkinson v. State*, 62 App. 419, 138 S. W. 125. Where there was evidence tending to show that one prosecuted for an aggravated assault in driving over a young girl was intoxicated and that he was either racing with another or his horse was running away when the alleged assault took place, an instruction that if the defendant was not actuated by a criminal intent, he is not guilty, should have been given, the question of intent being presented by the evidence. *Perkins v. State*, 62 App. 508, 138 S. W. 133. In a trial for forging a check of a fictitious firm, purported to be drawn for services rendered by accused, it is not error to refuse to submit a question of a claim of deposit for collection. *Feeny v. State*, 62 App. 585, 138 S. W. 135. In a prosecution for disturbing a congregation assembled for religious worship, where the evidence clearly indicated that accused, if he threw a jug into the church, knew that persons were assembled there to hear preaching, a charge that if the church was not lighted, and no services were going on, and there was nothing to put accused on

notice that they were holding religious services, then he was not guilty, is properly refused, being without support in the evidence. *Laird v. State* (Cr. App.) 155 S. W. 260. Where witnesses in a prosecution for keeping a disorderly house testified to acts tending to show defendant's knowledge of the character and conduct of the inmates of the house, but defendant testified positively that she did not know that any of the inmates were prostitutes or had been guilty of improper conduct, the knowledge of defendant was in issue, and the refusal of a requested instruction that unless they found that appellant had knowledge that the women in the house were prostitutes and plying their vocation they would acquit her is error. *Hitchings v. State* (Cr. App.) 143 S. W. 1164. Where there was no evidence tending to show consent by the prosecutor to taking of property by accused, a charge on such theory is properly refused. *Stokes v. State* (Cr. App.) 70 S. W. 95. See, also, *Simmacher v. State* (Cr. App.) 43 S. W. 512. Where there was no testimony raising the issue that defendant in a prosecution for conversion might have thought he had authority or permission of the owner to sell the cow in question, the court did not err in refusing a requested charge thereon. *Barrow v. State*, 71 App. 549, 160 S. W. 458. A charge, that the law of bigamy should not extend to any person whose wife shall have been continually remaining out of the state, or shall have voluntarily withdrawn from the husband and remained absent for five years, the person marrying again not knowing his wife to be living within that time, so that, should the jury find that accused's former wife had voluntarily abandoned him and remained continually absent for five years before his second marriage, they should acquit, is properly refused, in view of evidence by accused that before his second marriage his son told him that his first wife was living, and asked him to see about it before remarrying. *Jones v. State* (Cr. App.) 165 S. W. 144.

Generally the guilt of one aiding a homicide is measured by the intent of the one actually committing the offense, and it is only when the evidence suggests a different condition of mind or motive that the court need present the theory that accused is to be tried according to the intent with which he may have participated. *Condron v. State*, 62 App. 485, 138 S. W. 594.

Where accused, in a prosecution for maintaining a place where gaming was conducted, testified that any gaming conducted therein was without his knowledge and consent, and that he did not know that the game played there when the sheriff arrested several persons was being conducted until he was afterwards told thereof, it is reversible error not to charge on request that, to convict, the gaming must have been carried on with accused's knowledge and consent. *Goodwin v. State* (Cr. App.) 143 S. W. 939.

Where it was shown, on a prosecution for assault on rape, that defendant approached the house in which prosecutrix and her mother were, and which was within speaking distance of neighboring houses, and came on the gallery, and when asked who he was told his name, and was given something to eat on condition that he go away, that he returned and tried to raise a window, and, without any threat, caught prosecutrix by the wrist and upon her screaming voluntarily let go and went away, the refusal of a requested instruction that, to constitute an assault with intent to rape, the assault must be made with the specific intent to have intercourse with prosecutrix without her consent, and that if defendant assaulted the prosecutrix, intending to have intercourse with her, provided she would consent, and not intending to have intercourse without her consent, or by force, he would not be guilty of the offense charged, is error. *Taff v. State* (Cr. App.) 143 S. W. 1156.

Where the evidence, in a prosecution for disturbing a congregation assembled for religious worship, showed that the people were assembled in the church for worship, that accused saw them there, and that some one threw a jug through the window, an instruction that the jury should acquit if they should believe that accused threw the jug not knowing the people were assembled for worship, is properly refused. *Haynes v. State*, 71 App. 31, 159 S. W. 1059.

16. **Cause of death.**—It is error to submit, as a predicate for conviction on a prosecution for murder of defendant's child, that he whipped her with a belt; the evidence being that he had not whipped her therewith for two months, and all the evidence excluding the idea that her death was caused thereby. *Betts v. State*, 57 App. 389, 124 S. W. 424.

17. **Nature of weapon used.**—See notes to Pen. Code, arts. 1106, 1147, 1150.

18. **Force used.**—Where the evidence does not raise the issue of excessive force in a prosecution for aggravated assault, it is error to charge thereon. *Corley v. State* (Cr. App.) 155 S. W. 227.

19. **Limitations.**—Unless the issue of limitation is raised by the evidence, it is unnecessary that the charge should instruct in relation thereto. *Vincent v. State*, 10 App. 331; *Hoy v. State*, 11 App. 32; *Cohen v. State*, 20 App. 224; *Moore v. State*, 20 App. 275; *Wimberley v. State*, 22 App. 506, 3 S. W. 717; *Blocker v. State*, 27 App. 16, 10 S. W. 439; *Green v. State*, 27 App. 244, 11 S. W. 114; *Kelley v. State*, 27 App. 562, 11 S. W. 627; *Floyd v. State*, 29 App. 349, 16 S. W. 188; *Richardson v. State*, 47 App. 592, 85 S. W. 282; *Thorp v. State*, 59 App. 517, 129 S. W. 607, 29 L. R. A. (N. S.) 421.

An instruction in a prosecution for pursuing the business of selling intoxicating liquors in local option territory September 12, 1912, that if defendant about that time and subsequent to the 1st day of August, 1909, unlawfully pursued such business, he should be found guilty, is erroneous because authorizing a conviction for an offense that might have been committed more than three years prior to the time the indictment was presented in court. *Todd v. State* (Cr. App.) 155 S. W. 220.

20. **Insanity or intoxication.**—See Willson's Cr. Forms, 929-932.

See, also, notes to Penal Code, §§ 39, 41.

Where accused was shown to have been intoxicated at the time of an assault, an instruction on the law of drunkenness is proper. *Upchurch v. State* (Cr.

App.) 39 S. W. 371. Where the evidence raises the question, the court should instruct on the effect of temporary insanity from the use of intoxicants, and the instruction should be given irrespective of the strength or weakness of the testimony. *Edwards v. State* (Cr. App.) 54 S. W. 589; *Hierhalzer v. State*, 47 App. 199, 83 S. W. 836; *Miller v. State*, 52 App. 72, 105 S. W. 502; *Lawrence v. State* (Cr. App.) 143 S. W. 636; *Lawrence v. State*, 70 App. 506, 157 S. W. 480. But see *Wright v. State*, 37 App. 627, 40 S. W. 491; *Lucas v. State* (Cr. App.) 155 S. W. 527. See, also, *Holloway v. State*, 45 App. 303, 77 S. W. 14. But where the evidence does not make the issue the instruction need not be given. *Kelly v. State* (Cr. App.) 149 S. W. 110. Though there was some evidence tending to show that defendant was intoxicated at the time he committed the offense, but the question of temporary insanity was not raised, such testimony does not require a charge by the court. *Vallereal v. State* (Cr. App.) 20 S. W. 557. Where accused did not claim that he was insane from the recent voluntary use of liquor, and the evidence showed that he knew what he was doing, the refusal to charge thereon is not erroneous, though accused was intoxicated at the time of the offense, since mere intoxication from recent use of intoxicating liquors does not of itself excuse crime nor mitigate the degree thereof, but temporary insanity, produced by the use of liquor, is evidence which may be used in all cases in mitigation of the penalty and in murder to determine the degree. *Lucas v. State* (Cr. App.) 155 S. W. 527. Where the evidence plainly shows the commission of a homicide by persons engaged in a robbery, and in possession of their full mental powers, a charge as to the law of homicide by intoxicated persons is properly refused. *Lieber v. State*, 29 App. 63, 14 S. W. 398. In a prosecution for forgery, evidence that defendant was very drunk at about the time he passed the forged check does not justify a charge on temporary insanity produced by the recent use of ardent spirits, there being no evidence of his condition when he signed the check. *Howard v. State*, 37 App. 494, 36 S. W. 475, 66 Am. St. Rep. 812. Where, on a prosecution for theft, there was no evidence that accused at the time of the theft was so intoxicated as to be unable to form a criminal intent, the mere fact that it appeared that he might have been drinking, does not require an instruction that if accused was too drunk to form a fraudulent intent he should be acquitted. *Berry v. State*, 46 App. 420, 80 S. W. 630. Where the evidence did not show any use of liquors before or at the time of a crime, but only afterward, an instruction as to temporary insanity produced by the recent use of intoxicants is erroneous. *Morse v. State* (Cr. App.) 152 S. W. 927. On an issue as to whether one accused of crime was at the time a subject of delirium tremens, it is the duty of the court to give a charge directly applicable to that defense. *Erwin v. State*, 10 App. 700. Where there was no proof that accused was insane from the long continued use of alcohol, affecting him with delirium tremens, the court need not instruct on such phase of the case. *Stokes v. State* (Cr. App.) 70 S. W. 95.

Where insanity is raised by the proof as an issue, a charge thereon must be given. *Thomas v. State*, 40 Tex. 60; *Warren v. State*, 9 App. 619, 35 Am. Rep. 745; *Erwin v. State*, 10 App. 700; *Smith v. State*, 19 App. 95; *Hierhalzer v. State*, 47 App. 199, 83 S. W. 836; *Miller v. State*, 52 App. 72, 105 S. W. 502; *Berry v. State*, 58 App. 291, 125 S. W. 580. The state has a right, equal to that of defendant, to have the issue submitted. *Witty v. State* (Cr. App.) 171 S. W. 229. Charging the jury with reference to insanity is error, insanity not being raised by the evidence, though there is some evidence that accused was weak minded. *Griffith v. State*, 47 App. 64, 78 S. W. 347. And see *Powell v. State*, 37 Tex. 348. On a trial for murder, evidence of conduct of accused towards his wife, which might be readily accounted for as the result of rage and excitement produced by knowledge of his wife's infidelity and by the free use of intoxicants, does not call for a charge on insanity. *McConnell v. State*, 22 App. 354, 3 S. W. 699, 58 Am. Rep. 662. It is not error to refuse to submit an issue of insanity in a homicide case, where there was no evidence of insanity at the time of the killing. *Cook v. State*, 71 App. 532, 160 S. W. 465. Where the evidence showed that if accused was insane at all he was insane continuously from childhood to the time of the trial, it is not error to omit to submit an issue of accused's insanity at the time of the trial, as distinguished from insanity at the time of the offense. *Lester v. State* (Cr. App.) 154 S. W. 554.

Where one indicted for theft introduces evidence tending to support the defense of Kleptomania, the charge should specifically treat thereof, and not stop with submitting merely the usual test of ability to distinguish between right and wrong. *Looney v. State*, 10 Tex. App. 520, 38 Am. Rep. 646.

21. Agency.—In a prosecution for selling intoxicating liquor in local option territory, it is improper to refuse a charge on the question of agency, where that issue is raised by the evidence. *Lewis v. State* (Cr. App.) 163 S. W. 705. See, also, *Taylor v. State* (Cr. App.) 75 S. W. 536; *Carter v. State* (Cr. App.) 89 S. W. 835; *Moreno v. State*, 64 App. 660, 143 S. W. 156, Ann. Cas. 1914C, 863; *Scott v. State*, 70 App. 57, 153 S. W. 871; *Cowley v. State*, 72 App. 173, 161 S. W. 471; *Shepherd v. State* (Cr. App.) 174 S. W. 609.

22. Alibi.—See *Willson's Cr. Forms*, 925, 926.

Where the defense of alibi is made and supported by evidence a charge on alibi should be given. *Deggs v. State*, 7 App. 359; *McGrew v. State*, 10 App. 539; *Long v. State*, 11 App. 381; *Granger v. State*, 11 App. 454; *Powell v. State*, 13 App. 244; *McAffee v. State*, 17 App. 131; *Ninnon v. State*, 17 App. 650; *Hunnicut v. State*, 18 App. 498, 51 Am. Rep. 330; *Bennett v. State* (Cr. App.) 15 S. W. 405; *Ayres v. State*, 21 App. 399, 17 S. W. 253; *Jones v. State*, 30 App. 345, 17 S. W. 544; *Conway v. State*, 33 App. 327, 26 S. W. 401; *Polanka v. State*, 33 App. 634, 28 S. W. 541; *Anderson v. State*, 34 App. 546, 31 S. W. 673, 53 Am. St. Rep. 722; *Title v. State*, 35 App. 96, 31 S. W. 677; *Smith v. State* (Cr. App.) 50 S. W. 362, denying rehearing (Cr. App.) 49 S. W. 583; *Wilson v. State*, 41 App. 115, 51 S. W. 916; *Joy v. State*, 41 App. 46, 51 S. W. 935; *Rountree v. State* (Cr. App.) 55 S. W.

827; *Padron v. State*, 41 App. 548, 55 S. W. 827; *Arismendis v. State* (Cr. App.) 60 S. W. 47; *Tijerina v. State*, 45 App. 182, 74 S. W. 913; *Mass v. State*, 59 App. 390, 128 S. W. 394; *Pendley v. State*, 71 App. 281, 158 S. W. 811. Where the state introduced in evidence the testimony of accused on a former trial to the effect that he was not present when the offense was committed, and that he had nothing to do with it, and that he was at a different place some distance away, a requested instruction on the subject of alibi ought to be given. *Davis v. State* (Cr. App.) 152 S. W. 1094. And the charge should be given although the evidence in support of the defense is not direct. *Sapp v. State* (Cr. App.) 77 S. W. 456. But where the evidence does not raise the issue of alibi, or where it is not contended that defendant was not present at the time the offense was committed, or the evidence shows that he was present, a charge on alibi is unnecessary. *Johnson v. State* (Cr. App.) 58 S. W. 105; *Cain v. State*, 42 App. 210, 59 S. W. 275; *Benavides v. State* (Cr. App.) 61 S. W. 125; *Delaney v. State*, 48 App. 594, 90 S. W. 642. And see *Glover v. State* (Cr. App.) 46 S. W. 824; *Jackson v. State* (Cr. App.) 67 S. W. 497. And the charge should not be given where defendant does not contend that he was not present, but only that he did not commit the offense. *Herbert v. State*, 49 App. 72, 90 S. W. 653; *Hardin v. State*, 57 App. 401, 123 S. W. 613; *Jones v. State*, 64 App. 510, 143 S. W. 621. And where accused admitted that he was in a position where he could have committed the offense charged, the charge is properly refused. *Caples v. State* (Cr. App.) 155 S. W. 367. It is not necessary to instruct as to the alibi of an alleged accomplice. *Jenkins v. State*, 45 App. 173, 75 S. W. 312. See, also, *Hamlin v. State*, 39 App. 579, 47 S. W. 656.

The evidence showing that defendant had not been with deceased for an hour or two before her death, and certain of the evidence being that her death was caused by strangulation, the requested charge that, if deceased died under such circumstances, the jury should acquit, should have been given, though one that, if the jury failed to find defendant was present at the time of the child's death, they should acquit, was given. *Betts v. State*, 57 App. 389, 124 S. W. 424.

In a prosecution for offering to bribe a witness, a contention that the submission to the jury of the issue of defendant's alibi was error, since an alibi assumed that an offense had been committed, and that there could not be an alibi in any case where the corpus delicti could not be established without establishing the defendant's guilt, is unsustainable. *Maples v. State*, 60 App. 169, 131 S. W. 567.

In the following cases the evidence was held to raise the issue of alibi so as to require an instruction thereon on request therefor. *Schaper v. State*, 57 App. 201, 122 S. W. 257 (unlawfully carrying pistol); *Hart v. State* (Cr. App.) 150 S. W. 188 (sale of liquor in prohibition territory).

In the following cases the evidence was held not to raise the issue of alibi so as to require an instruction thereon. *Conway v. State*, 33 App. 327, 26 S. W. 401 (burglary); *Williams v. State*, 59 App. 347, 128 S. W. 1120 (seduction); *Robinson v. State*, 62 App. 645, 138 S. W. 704 (robbery); *Brogdon v. State*, 63 App. 475, 140 S. W. 352 (carrying pistol); *Hernandez v. State*, 64 App. 73, 141 S. W. 268 (sale of liquor in prohibition territory); *Myers v. State* (Cr. App.) 144 S. W. 1134 (burglary); *Mitchell v. State*, 71 App. 185, 159 S. W. 1073 (sale of liquor in prohibition territory); *Brown v. State*, 72 App. 33, 160 S. W. 374 (sale of intoxicants).

23. — **Sufficiency.**—The defense of alibi is sufficiently embodied in the general charge, which includes charges in presumption of innocence and reasonable doubt, and the failure to give a special charge on alibi is not reversible error, unless such charge is requested and refused. *Gibbs v. State*, 1 App. 12; *Davis v. State*, 14 App. 645; *McAfee v. State*, 17 App. 131; *Clark v. State*, 18 App. 467; *Ayres v. State*, 21 App. 399, 17 S. W. 253; *Rider v. State*, 26 App. 334, 9 S. W. 688; *Quintana v. State*, 29 App. 401, 16 S. W. 258, 25 Am. St. Rep. 730; *Oxford v. State*, 32 App. 272, 22 S. W. 971; *Loggins v. State*, 32 App. 364, 24 S. W. 512; *Marshall v. State*, 37 App. 450, 36 S. W. 86; *Pink v. State*, 40 App. 23, 48 S. W. 171; *Crane v. State*, 57 App. 476, 123 S. W. 422; *Jones v. State*, 64 App. 510, 143 S. W. 621; *Myers v. State* (Cr. App.) 144 S. W. 1134; *Payne v. State* (Cr. App.) 148 S. W. 694; *Brown v. State*, 72 App. 33, 160 S. W. 374; *Womack v. State* (Cr. App.) 170 S. W. 139, overruling *Wilcher v. State*, 47 App. 301, 83 S. W. 384; *Bird v. State*, 48 App. 188, 87 S. W. 146; *Allen v. State*, 45 App. 468, 76 S. W. 458.

An instruction that alibi is a special plea, independent of a plea of not guilty, is proper. *Young v. State* (Cr. App.) 79 S. W. 34.

Where circumstantial evidence alone was relied on to show that accused killed decedent, and accused proved an alibi, and showed that a third person committed the offense, the failure to charge affirmatively that if another committed the offense, or if there was reasonable doubt thereof, the jury should acquit, is erroneous, though the court charged on reasonable doubt, alibi, and circumstantial evidence. *Wheeler v. State*, 56 App. 547, 121 S. W. 166.

In the following cases the charges on alibi were held to be correct and sufficient. *Boothe v. State*, 4 App. 202; *Reardon v. State*, 4 App. 602; *Walker v. State*, 6 App. 576; *Means v. State*, 10 App. 16, 38 Am. Rep. 640; *Thornton v. State*, 20 App. 519; *Galleher v. State*, 28 App. 247, 12 S. W. 1087; *Caldwell v. State*, 28 App. 566, 14 S. W. 122; *Ford v. State*, 40 App. 280, 59 S. W. 951; *Stevens v. State*, 42 App. 154, 59 S. W. 545; *Winfield v. State*, 44 App. 475, 72 S. W. 182; *Benavides v. State* (Cr. App.) 61 S. W. 125; *O'Hara v. State*, 57 App. 577, 124 S. W. 95; *Mass v. State*, 59 App. 390, 128 S. W. 394; *Cooper v. State* (Cr. App.) 147 S. W. 273; *Ellis v. State* (Cr. App.) 154 S. W. 1010; *Madrid v. State*, 71 App. 420, 161 S. W. 93.

In the following cases the charges on alibi were held incorrect or insufficient. *Walker v. State*, 37 Tex. 367; *Walker v. State*, 42 Tex. 361; *Humphries v. State*, 18 App. 302; *Crook v. State*, 27 App. 198, 11 S. W. 444; *Jones v. State*, 30 App. 345, 17 S. W. 544; *Bennett v. State*, 30 App. 341, 17 S. W. 545; *Thompson v. State*, 42 App. 140, 59 S. W. 805.

24. **Character.**—Though the defendant may prove his good character, it is not necessary that the charge should instruct upon that issue. And it is error to in-

struct in regard to it, when there is no evidence raising the issue. *Hardin v. State*, 4 App. 355; *Gose v. State*, 6 App. 121; *Heard v. State*, 9 App. 1; *Pharr v. State*, 9 App. 129.

24½. **Possession of stolen property and explanation thereof.**—A charge on the explanation of the possession of recently stolen property is properly refused, where no explanation of accused's possession of the stolen property was offered at any time. *Grande v. State*, 37 App. 51, 38 S. W. 613; *Carson v. State*, 48 App. 157, 86 S. W. 1011; *Spencer v. State*, 61 App. 60, 133 S. W. 1049; *Holland v. State*, 61 App. 201, 134 S. W. 693; *Kinkead v. State*, 61 App. 651, 135 S. W. 573; *Frazier v. State*, 62 App. 640, 138 S. W. 620; *Myers v. State* (Cr. App.) 144 S. W. 1134; *McGee v. State* (Cr. App.) 155 S. W. 246; *Stanfield v. State* (Cr. App.) 165 S. W. 216. But where accused offers an explanation of his possession the instruction should be given. *White v. State*, 60 App. 519, 132 S. W. 772; *Coleburn v. State*, 61 App. 26, 133 S. W. 882; *McKnight v. State*, 70 App. 470, 150 S. W. 1188. Where no explanation of possession of the stolen property was given by accused until he went upon the witness stand, a charge on such explanation is not required. *Diseren v. State*, 59 App. 149, 127 S. W. 1038. And see *Dobbs v. State*, 57 App. 55, 121 S. W. 859; *Jones v. State*, 60 App. 426, 132 S. W. 476. 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 App. 599, 24 S. W. 642; *Pollard v. State*, 33 App. 197, 26 S. W. 70. Testimony of accused that he purchased stolen articles, and of the prosecuting witness that he had left them in his house when he went away, and when he returned found them in possession of accused, who claimed to have purchased them, strongly suggested an issue as to the purchase thereof in good faith, so that it is error not to submit it to the jury by an instruction requested by accused. *Wilson v. State*, 59 App. 623, 129 S. W. 836. In a prosecution for the burglary of shoes from a box car, a charge to the jury that, if they should believe that the accused's explanation of their possession of the goods when first accosted was reasonable and probably true, then accused should be acquitted, was properly refused in view of the evidence by an officer that, when he saw accused with the sacks on their backs, he inquired as to what they contained, and they replied "papers," and that he then looked into them and found shoes, and, on inquiring as to where they obtained them, they replied "at the smelter," which evidence was not controverted by accused on the stand; it thereby appearing that accused had offered no explanation of their acts. *Vargas v. State*, 60 App. 196, 131 S. W. 594. In a prosecution for cattle theft, where accused claimed that the heifer in question had been purchased by his daughter from a certain person, a charge that, if the heifer had been purchased from such person, the jury should acquit, and should acquit if they had any reasonable doubts of such fact, is sufficient, and it was not necessary to charge as to the explanation of accused when first accosted, and that if his explanation of his possession of the property was reasonable and probably true, they should acquit, unless the state disproved it; the issue being clearly presented by the charge given, and the other charge tending rather to confuse the jury than to throw light upon the transaction. *Hinsley v. State*, 60 App. 565, 132 S. W. 779. In a trial for cattle theft, an instruction that, if accused bought the cow from the third person, he should be acquitted no matter what the other evidence showed, or if the jury had reasonable doubt as to whether accused so purchased, is not erroneous as limiting the defense to a purchase from the third person, where the court instructed that if, on the whole case, the jury had reasonable doubt as to accused's guilt, he should be acquitted. *Taylor v. State*, 62 App. 611, 138 S. W. 615. Where, on a trial for larceny, the state relied on circumstantial evidence, and accused admitted having had possession of the stolen property, and explained that it had been given him, a charge that, if the property had been given to accused, he was entitled to an acquittal, and if the jury had a reasonable doubt they should acquit him, sufficiently submitted the issue. *Lewis v. State*, 64 App. 490, 142 S. W. 875. Where, on a trial for larceny, accused testified that he did not steal the property, but received it from a third person who had stolen it, a charge that, if accused received the property from the third person, he must be acquitted, sufficiently submitted his theory, and it is not error to refuse a charge that, if accused gave a reasonable account of his possession of the stolen property, the state must prove it false; otherwise, he must be acquitted. *Bowen v. State* (Cr. App.) 143 S. W. 187. In a prosecution for theft of a horse, where accused explained his possession of it by stating that he had traded for it, and got it from a man whose name he did not know or remember, a charge that, if the jury believed that defendant traded for the horse or had a reasonable doubt as to whether or not he traded for it, they should acquit him is sufficient, and it was not necessary to charge specially in regard to explanation of possession of recently stolen property. *Stephens v. State* (Cr. App.) 154 S. W. 996.

In a prosecution for burglary, where the court charges as to possession of recently stolen property, it must charge that possession, to be evidence of guilt, must be recent, personal, and exclusive. *Leonard v. State*, 57 App. 254, 123 S. W. 549.

In a prosecution for burglary, where defendant, explaining his possession of the goods, said that he had purchased them, an instruction that such possession must be consistent with his innocence is erroneous, since he could have been innocent of burglary had he bought the goods knowing them to have been stolen. *Gusemano v. State* (Cr. App.) 155 S. W. 217.

25. **Rules of evidence in general.**—The jury in a felony case should always be instructed that they are the exclusive judges of the facts proved, and of the weight to be given to the testimony. *Barbee v. State*, 23 App. 199, 4 S. W. 584. See, also, *Jackson v. State*, 22 App. 442, 3 S. W. 111. A conviction will be reversed for a failure to instruct that it can only be had on the testimony of two witnesses,

or of one witness supported by evidence, when the facts justify such instruction. *Gartman v. State*, 16 App. 215.

Remarks by the trial judge to the regular jury panel for the week, telling them in effect that they must forget the standing of the parties, their names, and who they are, but they must try the case according to the evidence and the law, could not be construed to mean that the jury was not to consider evidence as to a defendant's general reputation as a peaceable and law-abiding man, etc. *Reed v. State* (Cr. App.) 168 S. W. 541.

26. **Acts and declarations of conspirators and co-defendants.**—Where testimony as to statements made by an alleged co-conspirator has been admitted the court should instruct the jury that, unless they find that the conspiracy did exist independent of the statements of such alleged co-conspirator, then they should disregard the testimony entirely. *Luttrell v. State*, 31 App. 493, 21 S. W. 248; *Parr v. State*, 36 App. 493, 38 S. W. 180; *Brooks v. State* (Cr. App.) 56 S. W. 924; *Casner v. State*, 42 App. 118, 57 S. W. 821; *Segrest v. State* (Cr. App.) 57 S. W. 845; *Graham v. State* (Cr. App.) 61 S. W. 714; *Renner v. State*, 43 App. 347, 65 S. W. 1102; *Steed v. State*, 43 App. 567, 67 S. W. 328; *Kees v. State*, 44 App. 543, 72 S. W. 855; *Chapman v. State*, 45 App. 479, 76 S. W. 477; *Wallace v. State*, 46 App. 341, 81 S. W. 966; *Nelson v. State*, 48 Tex. Cr. R. 274, 87 S. W. 143; *Cooper v. State*, 48 App. 608, 89 S. W. 816; *Delaney v. State*, 48 Tex. Cr. R. 594, 90 S. W. 642; *Wesley v. State*, 60 App. 299, 131 S. W. 1107; *Wilson v. State*, 70 App. 3, 155 S. W. 242.

Where accused and his father were charged with assault with intent to murder, and both participated in the difficulty with prosecutor, and the state did not prove any agreement between them to assault prosecutor, and accused's testimony excluded the idea of such agreement, a charge authorizing a conviction on the theory that accused and his father agreed to assault prosecutor is erroneous, as authorizing a conviction on facts not proved. *Day v. State*, 62 App. 413, 138 S. W. 127.

Where defendant admitted that, when the first altercation between himself and deceased occurred, deceased's father, instead of being in a conspiracy to kill defendant, or do him any harm, caused deceased to leave, and thereafter had a pleasant conversation with defendant, the evidence did not raise an issue of conspiracy to injure defendant, so as to require an instruction on that subject. *Tyler v. State* (Cr. App.) 148 S. W. 1086.

Where, in a prosecution for assault to kill, it appeared that defendant and two others conspired to give the prosecutor a whipping, but that they went unarmed, and were joined by another who shot prosecutor without defendant's knowledge or consent, and not in furtherance of any design to which defendant was a party, defendant was entitled to an instruction that if defendant conspired only to assault prosecutor, and he was shot by another without defendant's connivance or consent, defendant would be guilty of no greater offense than that within the original contemplation of the parties. *Wilson v. State*, 70 App. 3, 155 S. W. 242.

Where accused accompanied his sister at night to the home of decedent to take, by force or stealth, the sister's daughter, who had eloped with and married decedent's son, and accused shot decedent while attempting to enter the home, and he claimed that the killing was accidental, the court, in submitting the issue of negligent homicide, properly charged on conspiracy by defining a conspiracy, and stating that each party to a conspiracy was responsible for any offense committed in furtherance of the common purpose. *Chant v. State* (Cr. App.) 166 S. W. 513.

Where accused, tried for murder on the theory that it was committed by his co-conspirators in pursuance of a common design, testified that the co-conspirators acted independently in killing decedent, and that the killing was not incidental to the common design, failure to submit accused's theory is reversible error. *Vasquez v. State* (Cr. App.) 171 S. W. 1160.

27. **Accomplices and testimony thereof.**—See Willson's Cr. Forms, 928.

See, also, notes to Pen. Code, art. 79, and C. C. P. art. 801, post.

Where the state introduces evidence of accomplices, the court should charge that a conviction cannot be had on the uncorroborated testimony of accomplices. *Thomas v. State*, 43 Tex. 658; *Roach v. State*, 4 App. 46; *Miller v. State*, 4 App. 251; *Stone v. State*, 22 App. 185, 2 S. W. 585; *Boyd v. State*, 24 App. 570, 6 S. W. 853, 5 Am. St. Rep. 908; *Wicks v. State*, 28 App. 448, 13 S. W. 748; *Owens v. State* (Cr. App.) 20 S. W. 558; *Brown v. State* (Cr. App.) 20 S. W. 924; *Kelley v. State* (Cr. App.) 31 S. W. 174; *Stewart v. State*, 35 App. 174, 32 S. W. 766, 60 Am. St. Rep. 35; *Ballew v. State* (Cr. App.) 34 S. W. 616; *Coburn v. State*, 36 App. 257, 36 S. W. 442; *Guyer v. State*, 37 App. 489, 36 S. W. 450; *Parr v. State*, 36 App. 493, 38 S. W. 180; *Martin v. State*, 36 App. 632, 36 S. W. 587, 38 S. W. 194; *Brann v. State* (Cr. App.) 39 S. W. 940; *Robinson v. State*, 35 App. 54, 43 S. W. 526, 60 Am. St. Rep. 20; *Clark v. State*, 39 App. 179, 45 S. W. 576, 73 Am. St. Rep. 918; *Smith v. State* (Cr. App.) 45 S. W. 707; *Humphries v. State*, 40 App. 59, 48 S. W. 184; *Collins v. State* (Cr. App.) 51 S. W. 216; *Wilson v. State*, 41 App. 115, 51 S. W. 916; *Brooks v. State* (Cr. App.) 56 S. W. 924; *White v. State* (Cr. App.) 62 S. W. 749; *Brace v. State*, 43 App. 48, 62 S. W. 1067; *Thomas v. State*, 45 App. 81, 73 S. W. 1045; *Sheppard v. State*, 63 App. 569, 140 S. W. 1090; *Castillo v. State* (Cr. App.) 172 S. W. 788. Where the evidence is conflicting as to whether or not a witness is an accomplice, the court properly submits the question to the jury in the charge. *White v. State*, 30 App. 653, 18 S. W. 462. See, also, *Clark v. State*, 30 App. 402, 17 S. W. 942. When there is evidence implicating a state's witness whose testimony is materially prejudicial to accused as an accomplice, the trial court, whether requested or not, must charge the law relating to such proof. *Barrera v. State*, 42 Tex. 260; *Thomas v. State*, 43 Tex. 658; *Kelly v. State*, 1 App. 628; *Carroll v. State*, 3 App. 117; *Hoyle v. State*, 4 App. 239; *Butler v. State*, 7 App. 635; *Sitterlee v. State*, 13 App. 587; *Burke v. State*, 15 App. 156;

Winn v. State, 15 App. 169; Dunn v. State, 15 App. 569; Howell v. State, 16 App. 93; Tisdale v. State, 17 App. 444; Mercer v. State, 17 App. 452; Fuller v. State, 19 App. 389; Coffelt v. State, 19 App. 436; Anderson v. State, 20 App. 312; Stone v. State, 22 App. 185, 2 S. W. 585; Boren v. State, 23 App. 28, 4 S. W. 463; Shulze v. State, 28 App. 316, 12 S. W. 1084; Conde v. State, 33 App. 10, 24 S. W. 415; Smith v. State, 37 App. 488, 36 S. W. 586; Anderson v. State, 39 App. 83, 45 S. W. 15; Clark v. State, 39 App. 179, 43 S. W. 576, 73 Am. St. Rep. 918; Bell v. State, 39 App. 677, 47 S. W. 1010; Johnson v. State, 58 App. 244, 125 S. W. 16; Polk v. State, 60 App. 150, 131 S. W. 580. But where there is no testimony tending to implicate witnesses for the state in the commission of the offense, the charge need not be given. Dubose v. State, 13 App. 418; Kerrigan v. State, 21 App. 487, 2 S. W. 756; May v. State, 22 App. 595, 3 S. W. 781; Pitner v. State, 23 App. 366; 5 S. W. 210; Trent v. State, 31 App. 251, 29 S. W. 547; Wilson v. State (Cr. App.) 24 S. W. 619; Robbins v. State, 33 App. 573, 28 S. W. 473; Matkins v. State, 33 App. 605, 28 S. W. 536; Pace v. State (Cr. App.) 31 S. W. 173; Stanley v. State (Cr. App.) 74 S. W. 320; La Grone v. State, 61 App. 170, 135 S. W. 121; Williams v. State (Cr. App.) 144 S. W. 622; Tate v. State (Cr. App.) 151 S. W. 825; Holmes v. State, 70 App. 214, 156 S. W. 1173; Creech v. State, 70 App. 229, 158 S. W. 277; Coker v. State, 71 App. 504, 160 S. W. 366. Where the counts in the indictment charging accused as an accomplice and accessory were withdrawn, the court properly declined to define accomplice and accessory. Collins v. State (Cr. App.) 178 S. W. 345. While the court could charge that another was accused's accomplice, where that fact was conceded, or the evidence clearly showed it, it was error to so charge, where it was doubtful whether the alleged accomplice participated in committing the offense. Snelling v. State (Cr. App.) 123 S. W. 610. While in some cases it may be proper for the court to assume that a particular witness is an accomplice, and so instruct the jury, ordinarily the better and safer practice is to submit the question to the jury, taking care to instruct clearly and fully as to what will constitute an accomplice. Zollicoffer v. State, 16 App. 312. See, also, Williams v. State, 33 App. 128, 25 S. W. 629, 28 S. W. 938, 47 Am. St. Rep. 21; Preston v. State, 40 App. 72, 48 S. W. 581; Vails v. State, 59 App. 340, 128 S. W. 1117. Unless the evidence shows without doubt that the witness is an accomplice, the court must submit that question to the jury. Jones v. State, 63 App. 394, 141 S. W. 953. Whether a witness was an accomplice is a question of fact for the jury, where his testimony does not clearly show, but merely indicates, that he might have been an accomplice. Franklin v. State, 63 App. 438, 140 S. W. 1091. To require or warrant an instruction on accomplice testimony, there must be some evidence of a witness' complicity in the crime for which defendant is being tried. Mere knowledge on the part of a witness that defendant committed the crime does not call for such instruction. Smith v. State, 28 App. 309, 12 S. W. 1104. Where, in a prosecution for pursuing the business of selling intoxicating liquor in local option territory, a witness testified that he was under indictment for making one of the identical sales for which the defendant was being prosecuted, a charge on accomplice testimony should be submitted. Thomas v. State (Cr. App.) 147 S. W. 262. A charge on accomplice testimony and necessary corroboration is not authorized, where an accomplice was not a witness and did not testify on the trial. Gracy v. State, 57 App. 68, 121 S. W. 705. Where an accomplice refuses to testify the instruction need not be given. Waggoner v. State, 35 App. 199, 32 S. W. 896; Wyres v. State (Cr. App.) 166 S. W. 1159. See, also, Lawrence v. State, 35 App. 114, 32 S. W. 530. The court need not affirmatively charge that a witness is an accomplice. Dill v. State (Cr. App.) 28 S. W. 950. Where the court instructs that a certain witness, who is the only one claimed to be an accomplice, is such, a failure to charge what constitutes an accomplice is not error. Still v. State (Cr. App.) 50 S. W. 355; Winfield v. State, 44 App. 475, 72 S. W. 182. It is not error to refuse a charge on accomplice testimony where the accomplice testified to no fact which connected defendant with the crime or assisted the state to make out its case. Matkins v. State, 33 App. 605, 28 S. W. 536; Moseley v. State, 36 App. 578, 37 S. W. 736, 38 S. W. 197. Evidence that a witness for the state had been indicted for the offense for which defendant was tried, but that the indictment had been dismissed, without any evidence that it had been dismissed for the purpose of securing his testimony, or that he was acting in any way with defendant in the commission of the offense, does not require the court to instruct the jury on the law relating to the testimony of an accomplice. Castillo v. State (Cr. App.) 172 S. W. 788. In a trial for being an accomplice to theft of a horse, it is not necessary to charge on the necessity for corroboration of his accomplice in another theft. Bailey v. State (Cr. App.) 155 S. W. 536. On trial for abortion when the injured female testifies the court is not necessarily required to instruct on the law of accomplice. Willingham v. State, 33 App. 98, 25 S. W. 424. When testimony has been introduced to corroborate a confessed accomplice the court should instruct the jury that the corroborative evidence must tend to connect defendant with the crime. Conway v. State, 33 App. 327, 26 S. W. 401. Where an accomplice is a witness for defendant, the court should not charge on the necessity of corroboration. Josef v. State, 34 App. 446, 30 S. W. 1067. The charge on accomplice testimony should include all witnesses connected with the transaction, and if there is a doubt as to whether a witness is so connected the issue should be submitted to the jury. Powell v. State, 42 App. 12, 57 S. W. 95.

In the following cases it was held that the instruction on accomplice testimony should have been given. Kelly v. State, 1 App. 628; Watson v. State, 9 App. 237; Sitterlee v. State, 13 App. 587; Coffelt v. State, 19 App. 436; Boren v. State, 23 App. 28, 4 S. W. 463; Hamilton v. State, 26 App. 206, 9 S. W. 687; Hines v. State, 27 App. 104, 10 S. W. 448; Shulze v. State, 28 App. 316, 12 S. W. 1084; Kelley v. State, 34 App. 412, 31 S. W. 174; Truelove v. State, 44 App. 386, 71 S. W. 601; Sapp v. State (Cr. App.) 77 S. W. 456; Clifton v. State, 46 App. 18, 79 S. W. 824, 108 Am. St. Rep. 983; Goldstein v. State (Cr. App.) 166 S. W. 149.

In the following cases it was held that the instruction on accomplice testimony was unnecessary. *Smith v. State*, 8 App. 39; *O'Connor v. State*, 28 App. 288, 13 S. W. 14; *Mason v. State*, 29 App. 24, 14 S. W. 71; *Lawrence v. State*, 35 App. 114, 32 S. W. 530; *Smith v. State*, 36 App. 442, 37 S. W. 743; *Prendergast v. State*, 41 App. 358, 57 S. W. 850; *Carroll v. State* (Cr. App.) 62 S. W. 1061; *Galloway v. State*, 44 App. 230, 70 S. W. 211; *Sanchez v. State*, 48 App. 591, 90 S. W. 641, 122 Am. St. Rep. 772; *Jenkins v. State*, 49 App. 457, 93 S. W. 726, 122 Am. St. Rep. 812; *Waters v. State* (Cr. App.) 148 S. W. 796.

28. **Admissions and confessions.**—Where two theories are presented by the evidence, one of which renders defendant's confession admissible, the other inadmissible, it is error to refuse to instruct the jury to disregard the confession if they believe the theory which renders it inadmissible. *Raines v. State*, 33 App. 294, 26 S. W. 368; *Sparks v. State*, 34 App. 86, 29 S. W. 264. See, also, *Zwicker v. State*, 27 App. 539, 11 S. W. 633. Where there is evidence that a confession was not made voluntarily the court should instruct the jury to disregard it, if they believe that it was not voluntary. *Cain v. State*, 18 Tex. 387; *Paris v. State*, 35 App. 82, 31 S. W. 855; *Sullivan v. State*, 40 App. 633, 51 S. W. 375; *Bailey v. State*, 42 App. 289, 59 S. W. 900; *Johnson v. State*, 48 App. 423, 88 S. W. 223. But where a proper predicate has been laid, and there is no evidence impeaching the predicate, the charge need not be given. *Williams v. State*, 37 App. 147, 38 S. W. 999. And where there is no evidence as to whether or not the confession was voluntarily made the charge should not be given. *Pinckard v. State*, 62 App. 602, 138 S. W. 601; *Ex parte Martinez* (Cr. App.) 145 S. W. 959. When a witness testifying to an alibi for accused, and not indicted himself, is attempted to be impeached by putting in evidence a confession of his participation in the crime, it is not necessary to charge that the confession should not be considered if obtained by duress, though that would be necessary if the confession were accused's. *Wingate v. State* (Cr. App.) 152 S. W. 1078.

Where there are no statements in a confession tending to show innocence, an instruction that such statements are presumed to be true, etc., is properly refused. *McDonald v. State* (Cr. App.) 152 S. W. 1061; *Loan v. State* (Cr. App.) 153 S. W. 305, 43 L. R. A. (N. S.) 844; *Anderson v. State*, 71 App. 27, 159 S. W. 847. Where the state relies for conviction only upon a confession which contains exculpatory matters, the court should charge that the state must prove such matters to be false in order to authorize a conviction based upon the confession, but need not so charge where the state does not rely solely upon the confession. *Cook v. State*, 71 App. 532, 160 S. W. 465; *Belcher v. State*, 71 App. 646, 161 S. W. 459. Where the evidence consists almost entirely of confessions of accused, which contain statements in his favor not proved to be false, it is error to refuse to instruct that the state is bound by such statements, unless they are shown by the evidence to be untrue. *Jones v. State*, 29 App. 20, 13 S. W. 990, 25 Am. St. Rep. 715. See further as to necessity of instructions as to binding effect on state of statements in confessions. *Pace v. State* (Cr. App.) 20 S. W. 762; *Trevenio v. State*, 48 App. 207, 87 S. W. 1162; *Millner v. State*, 72 App. 45, 162 S. W. 348; *Brown v. State* (Cr. App.) 174 S. W. 360.

Where there is abundant testimony outside an alleged confession, the jury need not be charged that they can not convict on confessions alone. *Willard v. State*, 27 App. 386, 11 S. W. 453, 11 Am. St. Rep. 197; *Slade v. State*, 29 App. 381, 16 S. W. 253; *Franks v. State* (Cr. App.) 45 S. W. 1013; *Tidwell v. State*, 40 App. 38, 47 S. W. 460 (rehearing denied 48 S. W. 184); *Bailey v. State*, 42 App. 289, 59 S. W. 900; *Nelson v. State* (Cr. App.) 65 S. W. 95; *Murphy v. State*, 43 App. 515, 67 S. W. 108; *Ellington v. State*, 48 App. 160, 87 S. W. 153; *Griffin v. State*, 49 App. 440, 93 S. W. 732.

The court, in admitting the confession, should charge the jury fully as to their duty to consider or reject it, and in this connection should charge on the issue of defendant's sanity and its effect as to their consideration of the confession. *Berry v. State*, 58 App. 291, 125 S. W. 580. An instruction that "no person can be convicted upon his own confession unless it is corroborated by other evidence, and whether there is such evidence is for the jury," is sufficient, in the absence of a request for special instructions. *Attaway v. State*, 35 App. 403, 34 S. W. 112. A charge that where the state puts a confession in evidence, the whole of it is to be taken together, and the state bound by it, unless it is shown to be untrue in whole or in part, is in proper form. *McKinney v. State*, 48 App. 402, 88 S. W. 1012. Where the jury have been instructed not to consider a confession unless they believed that it was freely and voluntarily made, the failure to add to an instruction not to consider the confession if they believed that it was induced by duress, threats, or coercion, the words "or other improper influence," is not error. *Anderson v. State* (Cr. App.) 54 S. W. 581. An instruction that unless the statements were made voluntarily, and not induced by threats or promises, the jury could not consider them in the case, is sufficient though the word freely was not used in the charge. *Cross v. State* (Cr. App.) 101 S. W. 213, 214. Where the state introduced evidence of accused's statements immediately after the killing and of others three or four hours later, a charge that declarations, made just after the killing, should be considered together, and that the state was bound thereby, is not improper as allowing the jury to consider together the statements made just after the death with those made a few hours later, which were not *res gestæ*. *Coffman v. State* (Cr. App.) 165 S. W. 939.

An instruction that a confession should be considered in evidence if the defendant therein had made statements that were otherwise found to be true is improper, where the evidence shows no fact connected with the crime that was discovered in consequence of the confession. *Gentry v. State*, 24 App. 80, 5 S. W. 660. And see *Warren v. State*, 29 Tex. 369; *Ewing v. State*, 29 App. 434, 16 S. W. 185.

In the following cases the charges on confessions were held proper and suffi-

cient. *Martin v. State* (Cr. App.) 41 S. W. 620; *Cavaness v. State*, 45 App. 209, 74 S. W. 908; *Goode v. State*, 57 App. 220, 123 S. W. 597.

It is proper not to charge on the law of confessions when there is no proof that a confession was made. *Fox v. State*, 87 S. W. 157; *Johnson v. State*, 57 App. 603, 124 S. W. 664.

It is error to instruct the jury that a material allegation of the indictment is admitted by counsel for the defendant. No such admissions by a defendant's counsel are evidence against him, and are not a proper matter for the consideration of the jury. *Clayton v. State*, 4 App. 515.

Accused is not entitled to a charge on the competency of a confession elicited by himself on cross-examination of the state's witnesses, without objection by the state. *Luna v. State* (Cr. App.) 47 S. W. 656.

The fact that accused contravenes the confession made by him, does not require an instruction that if he did not admit the taking, the confession should be disregarded. *Whitehead v. State*, 49 App. 123, 90 S. W. 876.

A requested instruction on the effect of a confession of the accused is properly refused where the confession was not taken at the time and place mentioned therein. *Williams v. State* (Cr. App.) 144 S. W. 622.

The statement of defendant that he was not at the place of the crime at the time of its commission, introduced with evidence of its falsity, being entirely exculpatory, does not call for a charge on admission or confessions. *Whorton v. State* (Cr. App.) 152 S. W. 1082.

Where the admissibility of testimony depends on defendant having made a certain statement, as to which the evidence is conflicting, the jury should be instructed that, unless they find he did make it, they should not consider such testimony. *Kaufman v. State* (Cr. App.) 165 S. W. 193.

Where a written statement as to the crime made by one of accused's witnesses was not introduced in evidence, although the witness was impeached by proof of the falsity of his testimony that he did not sign it, the court need not charge that the jury should not consider the statement. *Collins v. State* (Cr. App.) 178 S. W. 345.

In a prosecution for homicide, where the state introduced in evidence statements made by accused at the time he was arrested, accused, though the record would amply support a finding that his exculpatory statement was false, is entitled to have the jury charged that, unless the state show the falsity of such statement, he should be acquitted. *Cline v. State* (Cr. App.) 178 S. W. 520.

29. Purpose and effect of evidence.—Evidence of flight after a preliminary examination having been admitted, it is not necessary to charge with reference to the purpose in admitting it. *Clark v. State* (Cr. App.) 36 S. W. 273.

30. — Limiting evidence admitted for specific purpose in general.—Where evidence admissible for one purpose only has been admitted for that specific purpose, the jury should be instructed that they can not consider it for any other purpose. *Branch v. State*, 15 App. 96; *May v. State*, 15 App. 430; *Kelley v. State*, 18 App. 262; *Davidson v. State*, 22 App. 372, 3 S. W. 662; *Washington v. State*, 23 App. 336, 5 S. W. 119; *Maines v. State*, 23 App. 568, 5 S. W. 123; *Rogers v. State*, 26 App. 404, 9 S. W. 762; *Puryear v. State*, 28 App. 73, 11 S. W. 929; *Foster v. State*, 32 App. 39, 22 S. W. 21; *Dawson v. State*, 32 App. 535, 25 S. W. 21, 49 Am. St. Rep. 791; *Bluman v. State*, 33 App. 43, 21 S. W. 1027, 26 S. W. 75; *Sexton v. State*, 33 App. 416, 26 S. W. 833; *Wilson v. State*, 37 App. 373, 35 S. W. 390, 38 S. W. 624, 39 S. W. 373; *Neal v. State* (Cr. App.) 53 S. W. 856; *La Flour v. State*, 59 App. 645, 129 S. W. 351; *Powdrill v. State* (Cr. App.) 155 S. W. 231.

Failure of the court to limit the effect of testimony not admitted for any particular purpose is not error. *Neal v. State* (Cr. App.) 53 S. W. 856.

The testimony of expert witnesses need not be limited. *Turner v. State*, 48 App. 585, 89 S. W. 975.

Where, in a prosecution for homicide, a witness testified that after the killing accused dragged the body of deceased away from the place of the homicide, it is not necessary for the court in its instructions to limit the effect of such testimony. *Canon v. State*, 59 App. 398, 128 S. W. 141.

Whether there was a conflict in the evidence on the issue as to whether accused had attempted to induce a witness to give false testimony, the court should control in its charge the purpose for which evidence was admitted, to show that accused had tried to induce the giving of false testimony. *Day v. State*, 62 App. 448, 138 S. W. 130.

A requested charge, in a prosecution for habitually associating with prostitutes, that the jury should only consider such testimony as bore upon accused's status at the time the complaint was filed, is properly refused as inapplicable, where the evidence established but one status during the time to which the testimony related, which was that charged in the information. *Lingenfelter v. State* (Cr. App.) 163 S. W. 981.

In a trial for homicide, the district clerk of the county in which accused was tried produced a record which stated: "This is a case wherein Albert Bazanno is the defendant. It is found on page 53 of Book G, which reads as follows: 'State of Texas v. Albert Bazanno. Orange County. July 1st, 1905,' etc. For copy of said record, see exhibit attached hereto, marked 'A.' and made a part of this record on page ———." In addition there was some reference to the fact that accused had been in an asylum for the insane and had been discharged. Held not such evidence of a judgment of insanity rendered against the accused as to require the court to charge the jury with respect to the effect of the judgment. *Bozanno v. State*, 60 App. 507, 132 S. W. 777.

Where, in a trial for shooting at an officer, it developed on cross-examination by defendant that on a prior occasion the officer shot his horse from under him,

the court did not err in failing to limit the effect of such testimony. *Boyd v. State* (Cr. App.) 150 S. W. 612.

Where evidence is admissible, a requested instruction excluding the jury from considering it for any purpose as against defendant is properly refused. *Qualls v. State* (Cr. App.) 165 S. W. 202.

While the evidence of the first offense of rape on a girl under 15 should not have been stricken, in a prosecution in which the state elected to rely on a second offense, the court should have instructed the jury that the defendant was not on trial for the offense committed on the former date. *Scott v. State* (Cr. App.) 166 S. W. 729.

Where, in a prosecution for assault with intent to rape, it appeared that prosecutrix left the state in company with two men, and the state claimed that this was done to prevent her testifying against accused, and that she was arrested by officers and returned to Texas, but defendant denied all knowledge of her flight from the state, the court should have charged, at his request, that, if such flight was not done at defendant's suggestion, solicitation, or connivance, it should not be considered against him for any purpose. Where, shortly after the alleged offense, accused left the state with a view to attending school elsewhere at his mother's request or command, and there was evidence that at this time he had no knowledge that an indictment had been returned against him or that process had issued, the court should have charged, at his request, that, if he had no such knowledge when he left the state, the fact of his leaving could not be considered against him at all. *Caples v. State* (Cr. App.) 167 S. W. 730.

Where evidence tending to show a motive or intent for the commission of the crime is given, a refusal to limit it to that purpose is not error. *Weaver v. State*, 46 App. 607, 81 S. W. 39. *Contra*, *Mallory v. State*, 37 App. 482, 36 S. W. 751, 66 Am. St. Rep. 808. *And* see *Martin v. State*, 41 App. 242, 53 S. W. 849; *Harrelson v. State*, 60 App. 534, 132 S. W. 783; *Millican v. State*, 63 App. 440, 140 S. W. 1136; *Howard v. State* (Cr. App.) 143 S. W. 178; *Mitchell v. State* (Cr. App.) 144 S. W. 1006; *Brook v. State* (Cr. App.) 151 S. W. 801; *Gradington v. State* (Cr. App.) 155 S. W. 210; *Wilson v. State*, 70 App. 3, 155 S. W. 242; *Burnaman v. State*, 70 App. 361, 159 S. W. 244, 46 L. R. A. (N. S.) 1001. Limiting effect of evidence to show identity of stolen property, see *Sapp v. State* (Cr. App.) 77 S. W. 456. Limiting effect of evidence to show ownership of stolen property, see *Black v. State*, 38 App. 58, 41 S. W. 606. Limiting evidence of identity of person, see *Mahon v. State*, 46 App. 234, 79 S. W. 28. Limiting evidence to show interest or bias of witness, see *Duffy v. State* (Cr. App.) 66 S. W. 844; *Millican v. State*, 63 App. 440, 140 S. W. 1136; *Wilson v. State*, 71 App. 330, 158 S. W. 1114. Limiting evidence to show that a witness was a detective and not an accomplice, see *Clay v. State*, 40 App. 556, 51 S. W. 212. Limiting evidence of records of trial in which perjury was committed, see *Estill v. State*, 38 App. 255, 42 S. W. 305; *Ross v. State*, 40 App. 349, 50 S. W. 336; *Mares v. State*, 71 App. 303, 158 S. W. 1130. Limiting testimony of absent witness admitted to be true, see *Durham v. State*, 45 App. 475, 76 S. W. 563.

31. — **Limiting effect of impeaching evidence.**—Where evidence is introduced for impeachment only, and is otherwise incompetent, and is calculated to injure unless limited to such purpose, the court should so limit it. *Branch v. State*, 15 App. 96; *Tucker v. State*, 23 App. 512, 5 S. W. 180; *Barron v. State*, 23 App. 462, 5 S. W. 237; *Williams v. State*, 25 App. 76, 7 S. W. 661; *Drake v. State*, 25 App. 293, 7 S. W. 868; *Wolfe v. State*, 25 App. 698, 9 S. W. 44; *Mahoney v. State*, 33 App. 388, 26 S. W. 622; *Exon v. State*, 33 App. 461, 26 S. W. 1088; *Engers v. State* (Cr. App.) 26 S. W. 987; *Shackelford v. State* (Cr. App.) 27 S. W. 8; *Coker v. State*, 35 App. 57, 31 S. W. 655; *Paris v. State*, 35 App. 82, 31 S. W. 855; *Phillips v. State*, 35 App. 480, 34 S. W. 272; *Wilson v. State*, 37 App. 373, 35 S. W. 390, 38 S. W. 624, 39 S. W. 373; *Golin v. State*, 37 App. 90, 38 S. W. 794; *Joy v. State*, 41 App. 46, 51 S. W. 933; *Winfrey v. State*, 41 App. 538, 56 S. W. 921; *Blanco v. State* (Cr. App.) 57 S. W. 829; *Herd v. State*, 43 App. 575, 67 S. W. 495; *Terry v. State* (Cr. App.) 72 S. W. 382; *Webb v. State*, 47 App. 305, 83 S. W. 394; *Franklin v. State* (Cr. App.) 88 S. W. 357; *Dusek v. State*, 48 App. 519, 89 S. W. 271; *Brundige v. State*, 49 App. 596, 95 S. W. 527; *Goss v. State*, 57 App. 557, 124 S. W. 107; *Rowan v. State*, 57 App. 625, 124 S. W. 668, 136 Am. St. Rep. 1005; *Henderson v. State*, 58 App. 581, 126 S. W. 1133; *Florence v. State*, 61 App. 238, 134 S. W. 689; *Hickey v. State*, 62 App. 568, 138 S. W. 1051; *Moore v. State* (Cr. App.) 144 S. W. 598; *Edmondson v. State* (Cr. App.) 150 S. W. 917; *De Leon v. State* (Cr. App.) 155 S. W. 247; *Caples v. State* (Cr. App.) 167 S. W. 730. But see *Thurmond v. State*, 27 App. 347, 11 S. W. 451; *Harrrell v. State*, 39 App. 204, 45 S. W. 581. Where, however, testimony could have been considered for no other purpose than to impeach a witness, for which it was introduced, it is not error for the court to fail to limit it to such purpose. *Givens v. State*, 35 App. 563, 34 S. W. 626; *Wilson v. State*, 37 App. 373, 35 S. W. 390, 38 S. W. 624, 39 S. W. 373; *Magee v. State* (Cr. App.) 43 S. W. 512; *Winfrey v. State*, 41 App. 538, 56 S. W. 921; *Blanco v. State* (Cr. App.) 57 S. W. 829; *Harris v. State* (Cr. App.) 57 S. W. 833; *Carroll v. State* (Cr. App.) 58 S. W. 340; *Ogle v. State* (Cr. App.) 58 S. W. 1004; *Gann v. State* (Cr. App.) 59 S. W. 896; *Robinson v. State* (Cr. App.) 63 S. W. 869; *Newman v. State* (Cr. App.) 70 S. W. 951; *Oates v. State*, 48 App. 131, 86 S. W. 769; *Harris v. State*, 49 App. 338, 94 S. W. 227; *Rice v. State*, 49 App. 569, 94 S. W. 1024; *Moore v. State* (Cr. App.) 144 S. W. 598; *Treadway v. State* (Cr. App.) 144 S. W. 655; *Cain v. State* (Cr. App.) 153 S. W. 147; *Ross v. State*, 71 App. 493, 159 S. W. 1063; *Flores v. State*, 72 App. 232, 162 S. W. 883; *Law v. State* (Cr. App.) 163 S. W. 90; *Roberts v. State* (Cr. App.) 163 S. W. 100; *Watts v. State* (Cr. App.) 171 S. W. 202. And where testimony is admissible both as direct and impeaching testimony, it is not necessary to limit it to the purpose of impeachment alone. *Ferguson v. State*, 31 App. 93, 19 S. W. 901; *Nelson v. State* (Cr. App.) 65 S. W. 95; *Weaver v. State*, 46 App. 607, 81 S. W. 39; *Nelson v. State* (Cr. App.) 81 S. W. 713; *Armstead v. State*, 48 App. 304, 87 S. W. 824; *Elliott v. State*, 58 App. 200, 125 S. W.

568; *Mass v. State*, 59 App. 390, 128 S. W. 394; *Jenkins v. State*, 59 App. 475, 128 S. W. 1113; *Whitehead v. State*, 61 App. 558, 137 S. W. 356.

Where evidence that a witness had made prior statements out of court different from his testimony in court is admitted, not for the purpose of establishing the verity of the previous statements, but to discredit the witness' testimony in court, a failure to instruct as to the purpose for which it was admitted is error. *Henderson v. State*, 1 App. 432; *Rogers v. State*, 26 App. 404, 9 S. W. 762; *Foster v. State*, 28 App. 45, 11 S. W. 832; *Thompson v. State*, 29 App. 208, 15 S. W. 206; *Dickey v. State* (Cr. App.) 27 S. W. 140; *Gatlin v. State*, 40 App. 116, 49 S. W. 87; *Winfrey v. State*, 41 App. 538, 56 S. W. 919; *Guinn v. State* (Cr. App.) 65 S. W. 376; *Sapp v. State* (Cr. App.) 77 S. W. 456; *Dusek v. State*, 48 App. 519, 89 S. W. 271; *Keith v. State*, 50 App. 63, 94 S. W. 1044; *Phillips v. State*, 50 App. 127, 94 S. W. 1051; *Benjamin v. State*, 57 App. 291, 122 S. W. 542; *Jones v. State* (Cr. App.) 154 S. W. 1018; *Liner v. State*, 70 App. 75, 156 S. W. 211; *Smith v. State*, 71 App. 661, 160 S. W. 1184; *Hiles v. State* (Cr. App.) 163 S. W. 717. But see *Harris v. State* (Cr. App.) 150 S. W. 796. And this rule applies to evidence of statements made before a grand jury. *Finley v. State* (Cr. App.) 47 S. W. 1015; *McGill v. State*, 60 App. 614, 132 S. W. 941; *Kearse v. State* (Cr. App.) 151 S. W. 827. But see *Cain v. State* (Cr. App.) 153 S. W. 147. Where evidence of prior statements or former testimony of a witness is introduced for the sole purpose of showing the falsity of his testimony given in the trial of a cause, a charge that such evidence is admitted, not for the purpose of proving what the witness swears to at the trial is untrue, but to show his unworthiness of belief, is bad. *Howard v. State*, 25 App. 686, 8 S. W. 929; *Cline v. State*, 33 App. 482, 27 S. W. 128; *Winn v. State*, 34 App. 37, 28 S. W. 807; *Treadway v. State* (Cr. App.) 144 S. W. 655. Where the state in cross-examining several witnesses asked them if they had not testified directly on a former trial, but did not follow up the evidence by offering any testimony to impeach them, the court is not required to charge that such testimony could only be considered as bearing on the credibility of witnesses. *Pugh v. State* (Cr. App.) 151 S. W. 546. Where there is no material difference in the statements of defendant's witness and the state's witness, whose testimony was introduced to contradict the evidence of defendant's witness, an instruction limiting such contradictory evidence is unnecessary. *Massingill v. State* (Cr. App.) 63 S. W. 315. Where accused, testifying in her own behalf, is cross-examined as to facts affecting her credibility, failure to limit the purpose for which the evidence was received is not error. *Brittain v. State*, 47 App. 597, 85 S. W. 278. Where the court fails to limit the impeaching testimony of certain state's witnesses, having limited such testimony as to other such witnesses, such failure is error. *Borden v. State*, 42 App. 648, 62 S. W. 1064. Where the mother of accused was a material witness for him, and she was not connected with assaults committed on decedent by accused's brother and a friend, an instruction, that the evidence that accused's brother and the friend had been convicted of simple assaults on decedent was admitted to enable the jury to pass on the credibility of accused's brother and friend and the mother as witnesses, is erroneous. *Hardin v. State*, 57 App. 401, 123 S. W. 613. In a prosecution for homicide growing out of the alleged undue intimacy of deceased with defendant's wife, where the testimony only raised a suspicion as to defendant's alleged intimacy with the wife of another, it is error for the court in limiting impeaching testimony to assume that defendant was guilty in such matter. *Ballard v. State*, 71 App. 587, 160 S. W. 716.

In a prosecution for homicide, where some of the state's witnesses gave testimony, in a habeas corpus proceeding by accused, different from that at trial, a charge that the jury might consider the contradiction, which did not specifically name the witnesses, is not improper for that reason. *Coffman v. State* (Cr. App.) 165 S. W. 939.

The court need not give special instructions relative to the impeachment of one witness by another, when such witnesses merely contradicted each other in their original testimony as to certain facts. *Kipper v. State*, 45 App. 377, 77 S. W. 611.

A statement by the judge made on the admission of impeaching evidence limiting its scope is not equivalent to an instruction to that effect, and the failure to give such instruction is ground for reversal. *Thompson v. State*, 29 App. 208, 15 S. W. 206.

Where evidence is introduced to impeach a witness, a charge that impeaching evidence is to be considered for the sole purpose of enabling the jury to judge of the weight to be given the testimony of the witness impeached, and failing to state that it is to be considered in determining the witness' credibility, is erroneous. *Dean v. State* (Cr. App.) 77 S. W. 803; *Elkins v. State*, 48 App. 205, 87 S. W. 149; *Pratt v. State*, 50 App. 227, 96 S. W. 8; *Coffman v. State*, 62 App. 88, 136 S. W. 779. Where there was testimony impeaching witnesses for accused by proof of contradictory statements, instructions that the testimony of the impeaching witnesses could only be considered to affect the credibility of the witnesses impeached, that the testimony of contradictory statements could be considered only to affect the credibility of the witnesses and for no other purpose, etc., properly charges that the jury must determine whether the impeaching statements were made and if made to consider them only as impeaching the witnesses. *Pratt v. State*, 59 App. 635, 129 S. W. 364. And see *Gentry v. State* (Cr. App.) 152 S. W. 635.

Where the court, in limiting the application of testimony to the impeachment of witnesses, charged that such evidence was admitted, "not for the purpose of affecting the guilt or innocence of the defendant, but only admitted for the purpose of affecting the credibility of the witnesses," such instruction is properly worded. *Bolden v. State* (Cr. App.) 178 S. W. 533.

Charge on limitation of impeaching testimony held sufficient. *Trotter v. State*, 37 App. 468, 36 S. W. 278; *Connell v. State*, 45 App. 142, 75 S. W. 512; *Tardy v. State*, 46 App. 214, 78 S. W. 1076; *Ellington v. State*, 48 App. 160, 87 S. W. 153; *Marek v. State*, 49 App. 428, 94 S. W. 469.

Charge on limitation of impeaching testimony held insufficient. *Crockett v. State*, 40 App. 173, 49 S. W. 392; *Bennett v. State* (Cr. App.) 75 S. W. 314.

32. — **Limiting effect of evidence competent only as against one of several defendants.**—In a trial of two joint defendants, if a confession or declaration of one of them is admitted, the jury must be instructed to consider it only as against him. *Collins v. State*, 24 App. 141, 5 S. W. 848; *Perigo v. State*, 25 App. 533, 8 S. W. 660; *Short v. State* (Cr. App.) 29 S. W. 1072. See also as to threats made by one of two joint defendants, *Barron v. State*, 23 App. 462, 5 S. W. 237. When acts and declarations of a principal tending to criminate an accomplice are admitted in evidence, the court should instruct that the evidence can only be considered in reference to the guilt of the principal. *Armstrong v. State*, 33 App. 417, 26 S. W. 829. Evidence admissible to show the guilt of a principal, introduced in the trial of an accomplice or accessory, should be limited to that purpose. *Woods v. State* (Cr. App.) 60 S. W. 241; *Thomas v. State*, 43 App. 20, 62 S. W. 919, 96 Am. St. Rep. 834. Where, on a trial of two defendants, the testimony of one of them given at their former trial was received in evidence without objection, it is proper to charge that such testimony could not be considered for any purpose as to the codefendant. *Jones v. State*, 64 App. 510, 143 S. W. 621.

33. — **Limiting proof of other offense.**—Where evidence is introduced tending to show an independent offense by defendant, or a conviction of another offense, it is error for the court to neglect to charge the jury as to the legitimate effect of the evidence of such independent offense. *Long v. State*, 11 App. 381; *Tyler v. State*, 13 App. 205; *McCall v. State*, 14 App. 353; *Alexander v. State*, 21 App. 406, 17 S. W. 139, 57 Am. Rep. 617; *Harwell v. State*, 22 App. 251, 2 S. W. 606; *Taylor v. State*, 22 App. 529, 3 S. W. 753, 58 Am. Rep. 656; *Davis v. State*, 23 App. 210, 4 S. W. 590; *Wheeler v. State*, 23 App. 598, 5 S. W. 160; *Mayfield v. State*, 23 App. 645, 5 S. W. 161; *Cravey v. State*, 23 App. 677, 5 S. W. 162; *Littlefield v. State*, 24 App. 167, 5 S. W. 650; *Burks v. State*, 24 App. 326, 6 S. W. 300; *Id.*, 24 App. 332, 6 S. W. 303; *Reno v. State*, 25 App. 102, 7 S. W. 532; *Gentry v. State*, 25 App. 614, 8 S. W. 925; *Barnes v. State*, 28 App. 29, 11 S. W. 679; *Hanley v. State*, 28 App. 375, 13 S. W. 142; *Barton v. State*, 28 App. 483, 13 S. W. 783; *Williamson v. State*, 30 App. 330, 17 S. W. 722; *Sexton v. State*, 33 App. 416, 26 S. W. 833; *Warren v. State*, 33 App. 502, 26 S. W. 1082; *Oliver v. State*, 33 App. 541, 28 S. W. 202; *Mask v. State*, 34 App. 136, 31 S. W. 408; *West v. State* (Cr. App.) 33 S. W. 227; *Hutton v. State* (Cr. App.) 33 S. W. 969; *Boutwell v. State* (Cr. App.) 35 S. W. 376; *Wilson v. State*, 37 App. 373, 35 S. W. 390, 38 S. W. 624, 39 S. W. 373; *Martin v. State*, 36 App. 125, 35 S. W. 976; *Thornley v. State*, 36 App. 118, 35 S. W. 981, 61 Am. St. Rep. 836 (reversing 36 App. 118, 34 S. W. 264, 61 Am. St. Rep. 836); *Scott v. State* (Cr. App.) 36 S. W. 276; *Franklin v. State*, 38 App. 346, 43 S. W. 85; *Cox v. State* (Cr. App.) 44 S. W. 157; *Holt v. State*, 39 App. 282, 45 S. W. 1016, 46 S. W. 829; *Bennett v. State*, 43 App. 241, 64 S. W. 254; *Scott v. State* (Cr. App.) 68 S. W. 680; *Camarillo v. State* (Cr. App.) 68 S. W. 795; *Grant v. State*, 44 App. 311, 70 S. W. 954; *Peterson v. State* (Cr. App.) 70 S. W. 978; *Wilson v. State* (Cr. App.) 76 S. W. 434; *Terry v. State*, 45 App. 264, 76 S. W. 928; *Scoville v. State* (Cr. App.) 77 S. W. 792; *Robbins v. State*, 47 App. 312, 83 S. W. 690, 122 Am. St. Rep. 694; *McKinney v. State* (Cr. App.) 95 S. W. 504; *Harvey v. State*, 57 App. 5, 121 S. W. 501, 136 Am. St. Rep. 971; *Goolsby v. State*, 59 App. 528, 129 S. W. 624; *Clay v. State* (Cr. App.) 144 S. W. 280; *Betts v. State* (Cr. App.) 144 S. W. 677; *Gradington v. State* (Cr. App.) 155 S. W. 210. It is only when proof of another offense is such that the jury might use it improperly to convict for that collateral offense, instead of the offense charged, or make some other unwarranted use of that testimony to the prejudice of the defendant, that it is necessary for the court to charge limiting the purpose for which such evidence is admissible. *Carroll v. State* (Cr. App.) 58 S. W. 340; *Bailey v. State* (Cr. App.) 155 S. W. 536. And see *Hudson v. State*, 28 App. 323, 13 S. W. 388; *Purcell v. State*, 29 App. 1, 13 S. W. 993; *Leeper v. State*, 29 App. 63, 14 S. W. 398; *Moseley v. State*, 36 App. 578, 37 S. W. 736, 38 S. W. 197; *Pilot v. State*, 38 App. 515, 43 S. W. 112, 1024; *Hamblin v. State*, 41 App. 135, 50 S. W. 1019, 51 S. W. 1111; *Brown v. State*, 48 App. 158, 87 S. W. 159; *Franklin v. State* (Cr. App.) 88 S. W. 357; *Rice v. State*, 49 App. 569, 94 S. W. 1024; *Gilbert v. State*, 57 App. 85, 121 S. W. 1126. And where accused is not connected with the evidence of the commission of such other offense the charge is unnecessary. *Brown v. State*, 41 App. 232, 53 S. W. 866. The rule that when a defendant takes the stand as a witness, and the state proves other indictments against him, a failure to charge as to the object of such evidence is reversible error, does not apply to proof of former indictments of a witness who is not a defendant. *Matkins v. State*, 33 App. 605, 23 S. W. 536. And see *Ledbetter v. State*, 35 App. 195, 32 S. W. 903.

Where, in a prosecution for passing a forged check or draft, the court properly and fully limited the use of evidence of the finding of two other forged checks in defendant's possession when arrested, and told the jury that if they believed from the evidence beyond a reasonable doubt that such other checks were forgeries, and were found in defendant's possession, and that he knew them to be forgeries, then they could consider such testimony only to aid them, if it did, in passing on the identity of defendant, his system and methods, if any, and his intent, if any, as to the passing of the check for which he was on trial, there was no error in omitting to charge on testimony of a witness that defendant stated to him when arrested that he had won the forged checks which were found on his person. *Dugat v. State*, 72 App. 39, 160 S. W. 376.

Instructing the jury to regard the evidence of other crimes for no purpose whatever than that of affecting defendant's credibility properly limits it. *Roberts v. State*, 44 App. 267, 70 S. W. 423.

Instructions held to sufficiently limit the evidence. *Dunn v. State*, 43 App. 25, 63 S. W. 571; *Gradington v. State* (Cr. App.) 155 S. W. 210.

Instructions held not to sufficiently limit the evidence. *Lopez v. State*, 28 App. 343, 13 S. W. 219; *Goolsby v. State*, 59 App. 528, 129 S. W. 624.

34. **Determination of sufficiency of evidence in general.**—It is the duty of the trial judge to measure his charge by the evidence adduced, and give instructions to the jury as to every legitimate deduction to be drawn from the evidence; but when he has done this the law's demands are satisfied. *Smith v. State*, 15 App. 139.

A requested instruction that the state is required to prove its case by positive evidence is properly refused. *Dodd v. State* (Cr. App.) 82 S. W. 510.

Where, in a prosecution for an attempt to bribe an officer, evidence of an alleged other attempt to bribe a prospective juror was offered to prove intent, it is error for the court to omit the charge that, before the jury should consider such evidence, they must find the same to be true, and to constitute an offense. *Carden v. State*, 62 App. 545, 138 S. W. 598. In a prosecution for incest, an instruction that accused could not be found guilty upon the testimony of prosecutrix unless the jury believed her testimony was true and that it "showed, or tended to show," that accused is guilty as charged is erroneous, for the jury should be required to find that the evidence of the prosecutrix was true and showed the guilt of accused. *Blalack v. State*, 72 App. 375, 162 S. W. 865.

Where, on a trial for seduction, prosecutrix fixed the time of the promise of marriage and accompanying act of intercourse as in April, 1908, and the evidence showed that in the early part of 1909 accused married another woman, and that while in another town he wrote letters to prosecutrix containing expressions of endearment, and telling her that when he obtained a divorce from his wife he would marry her, and that on his return he renewed the illicit relations with prosecutrix, a charge that a conviction could not be based on a promise of marriage made by a married man to a single woman, and that, unless the letters and the evidence of acts of intercourse and of promise by accused to the prosecutrix after his marriage explained the relation of the parties at the time of the first act, they should not be considered, is erroneous for failing to specifically state how such facts could explain the relations of the parties. *Humphrey v. State* (Cr. App.) 143 S. W. 641.

In a trial for wife murder, a neighbor who had been with the wife previous to her death testified that she had stated on Saturday that medicine could do her no good; that she was all kicked to pieces. Later a physician testified that the wife must have begun to be delirious or irrational on Thursday or Friday. The court gave defendant's counsel his charge, and a number of special charges were prepared covering every one of the exceptions or objections to the general charge, but none on the question whether testimony of the neighbor should be considered by the jury. Held that, although it would have been proper for the court to have instructed that such testimony should not be considered unless the jury found that the deceased was rational when she made the declaration, nevertheless, the neighbor being very positive that deceased was sane and conscious of approaching death, and the doctor not having been present and not being very positive as to the exact time when deceased became irrational, in the absence of any objection or special charge of defendants, the failure of the court to instruct on the point was not reversible error. *Paschal v. State* (Cr. App.) 174 S. W. 1057.

35. **Excluding evidence from consideration.**—A charge excluding from the jury the very fact in issue is erroneous. *Sinclair v. State*, 45 App. 487, 77 S. W. 621.

Requested charges requiring the court to single out certain evidence and by a process of reasoning eliminate it from the jury's consideration were properly refused. *Lemons v. State*, 59 App. 299, 128 S. W. 416.

Where testimony is erroneously admitted the court should direct the jury to disregard it. *Stevens v. State* (Cr. App.) 49 S. W. 105; *Wilson v. State*, 41 App. 115, 51 S. W. 916; *Hollins v. State* (Cr. App.) 69 S. W. 594; *Bradley v. State*, 60 App. 398, 132 S. W. 484; *Orner v. State* (Cr. App.) 143 S. W. 935. But it is not good practice to allow the admission of improper testimony and then instruct the jury to disregard it. The better practice would be to have the jury retired, let the witness give the whole of the testimony, and then direct what shall be admissible. *Owen v. State*, 58 App. 261, 125 S. W. 405.

Where testimony is admitted on a predicate of issuable facts, the court should submit it to the jury, with an instruction that, if they believe the predicate, they may consider the testimony based upon it, while, if they fail to believe it, they shall disregard such testimony. *Carbough v. State*, 49 App. 452, 93 S. W. 738. Where the court charges the jury to disregard certain evidence it should sufficiently indicate the evidence to be disregarded. *Hall v. State*, 43 App. 479, 66 S. W. 733. Defendant in a criminal prosecution may request the court to withdraw evidence from the jury, even after the evidence has been argued. *Cox v. State*, 63 App. 494, 140 S. W. 445.

In a prosecution for violating the local option law, the error in requiring defendant to testify that he had previously been convicted of violating the local option law is not cured by an instruction, given at the request of the state, after the argument was over and the charge given, withdrawing this evidence from the consideration of the jury, as the state had already received the full benefit of the testimony and the argument. *Haney v. State*, 57 App. 158, 122 S. W. 34.

In a prosecution for theft of horses shipped by accused, it is not error to refuse a charge excluding all testimony as to the contents of the bill of lading, including the name of shipper, "sought to be introduced in evidence." *Crane v. State*, 57 App. 476, 123 S. W. 422.

In a murder trial, it is proper to refuse to instruct that, if one of the first three shots fired by accused was fatal, the firing of subsequent shots was immaterial in determining accused's guilt. *Decker v. State* (Cr. App.) 154 S. W. 566.

Where no objection was made to questions asked by the county attorney during the trial, the court did not err in refusing a special charge that the jury should not consider the questions as any evidence of defendant's guilt. *Swafford v. State* (Cr. App.) 171 S. W. 225.

36. Circumstantial evidence.—See Willson's Cr. Forms, 927.

It is only where the evidence is wholly circumstantial that a charge on circumstantial evidence is required. *Tooney v. State*, 8 App. 452; *Hardin v. State*, 8 App. 653; *Eckert v. State*, 9 App. 105; *Dubose v. State*, 13 App. 418; *Wooldridge v. State*, 13 App. 443, 44 Am. Rep. 708; *Hart v. State*, 15 App. 202, 49 Am. Rep. 188; *Buntain v. State*, 15 App. 515; *Wheeler v. State*, 15 App. 607; *Sharpe v. State*, 17 App. 486; *Hunnicut v. State*, 18 App. 498, 51 Am. Rep. 330; *House v. State*, 19 App. 227; *Mackey v. State*, 20 App. 603; *Jack v. State*, 20 App. 656; *Smith v. State*, 21 App. 277, 17 S. W. 471; *Ledbetter v. State*, 21 App. 344, 17 S. W. 427; *Ayres v. State*, 21 App. 399, 17 S. W. 253; *McCandless v. State*, 21 App. 411, 2 S. W. 811; *Jones v. State*, 23 App. 501, 5 S. W. 138; *Heard v. State*, 24 App. 103, 5 S. W. 846; *Crowell v. State*, 24 App. 404, 6 S. W. 318; *Carr v. State*, 24 App. 562, 7 S. W. 328, 5 Am. St. Rep. 905; *Clore v. State*, 26 App. 624, 10 S. W. 242; *Taylor v. State*, 27 App. 463, 11 S. W. 462; *Puryear v. State*, 28 App. 73, 11 S. W. 929; *Smith v. State*, 28 App. 309, 12 S. W. 1104; *Robertson v. State*, 33 App. 366, 26 S. W. 508; *Leftwich v. State*, 34 App. 489, 31 S. W. 385; *Rodgers v. State*, 36 App. 564, 38 S. W. 184; *Hedrick v. State*, 40 App. 536, 51 S. W. 252; *Gann v. State* (Cr. App.) 59 S. W. 896; *Goode v. State*, 56 App. 418, 120 S. W. 199; *Williams v. State*, 58 App. 82, 124 S. W. 954; *Boswell v. State*, 59 App. 161, 127 S. W. 820; *Jones v. State*, 59 App. 559, 129 S. W. 1118; *Ferrell v. State* (Cr. App.) 152 S. W. 901; *Pullen v. State*, 70 App. 156, 156 S. W. 935; *Nobles v. State*, 71 App. 121, 158 S. W. 1133; *Womack v. State* (Cr. App.) 170 S. W. 139; *Cook v. State* (Cr. App.) 171 S. W. 227; *Guerrero v. State* (Cr. App.) 171 S. W. 731; *Jones v. State* (Cr. App.) 174 S. W. 1071. Where there is direct and positive evidence of the commission of a crime the charge need not be given. *Hunter v. State*, 30 App. 314, 17 S. W. 414; *Polk v. State*, 35 App. 495, 34 S. W. 633; *Rodgers v. State*, 36 App. 563, 38 S. W. 184; *Upchurch v. State* (Cr. App.) 39 S. W. 371; *Colter v. State*, 37 App. 284, 39 S. W. 576; *Taylor v. State* (Cr. App.) 42 S. W. 285; *Brown v. State* (Cr. App.) 43 S. W. 986; *Williams v. State* (Cr. App.) 45 S. W. 494; *Glover v. State* (Cr. App.) 46 S. W. 824; *Wolf v. State* (Cr. App.) 53 S. W. 108; *Red v. State* (Cr. App.) 53 S. W. 618; *Nite v. State*, 41 App. 340, 54 S. W. 763; *Leftwich v. State* (Cr. App.) 55 S. W. 571; *Thomas v. State*, 43 App. 20, 62 S. W. 919, 96 Am. St. Rep. 834; *Dunn v. State*, 43 App. 25, 63 S. W. 571; *Camarillo v. State* (Cr. App.) 68 S. W. 795; *Usher v. State*, 47 App. 98, 81 S. W. 712; *Aladin v. State*, 48 App. 1, 86 S. W. 327, 122 Am. St. Rep. 730; *Ricks v. State*, 48 App. 229, 87 S. W. 345; *Yancy v. State*, 48 App. 166, 87 S. W. 693; *Lewallen v. State*, 48 App. 283, 87 S. W. 1159; *Smith v. State* (Cr. App.) 90 S. W. 638; *Chappell v. State*, 58 App. 401, 126 S. W. 274; *Sellers v. State*, 61 App. 140, 134 S. W. 348; *Wilson v. State*, 61 App. 628, 136 S. W. 447; *Brogdon v. State*, 63 App. 475, 140 S. W. 352; *Brogdon v. State*, 63 App. 473, 140 S. W. 353; *Footo v. State* (Cr. App.) 144 S. W. 275; *Mitchell v. State* (Cr. App.) 144 S. W. 1006; *Wesley v. State* (Cr. App.) 150 S. W. 197; *Clary v. State* (Cr. App.) 150 S. W. 919; *Perry v. State* (Cr. App.) 155 S. W. 263; *Nobles v. State*, 71 App. 121, 158 S. W. 1133; *Hendricks v. State*, 72 App. 75, 160 S. W. 1190; *Johnson v. State*, 72 App. 387, 162 S. W. 512; *Jones v. State* (Cr. App.) 174 S. W. 1071; *Scott v. State* (Cr. App.) 175 S. W. 1054; *Egbert v. State* (Cr. App.) 176 S. W. 560. And this is so even though there may be much circumstantial evidence in the case. *Mitchell v. State* (Cr. App.) 144 S. W. 1006; *Ferrell v. State* (Cr. App.) 152 S. W. 901. But see *Rountree v. State* (Cr. App.) 58 S. W. 106, holding that where the evidence was largely circumstantial it was proper to give a charge on circumstantial evidence. And see *Powdrill v. State* (Cr. App.) 155 S. W. 231. And where the facts proven are in such close relation to the main fact as to make them equivalent to direct testimony the charge on circumstantial evidence is unnecessary. *Surrell v. State*, 29 App. 321, 15 S. W. 816; *Baldwin v. State*, 31 App. 589, 21 S. W. 679; *Bennett v. State*, 32 App. 216, 22 S. W. 684; *Thompson v. State*, 33 App. 217, 26 S. W. 198; *Trijo v. State*, 45 App. 127, 74 S. W. 546; *Laird v. State* (Cr. App.) 155 S. W. 260; *Forward v. State* (Cr. App.) 166 S. W. 725; *Egbert v. State* (Cr. App.) 176 S. W. 560. But where the evidence is wholly circumstantial the charge must be given, and a failure to give it is prejudicial error. *Burrell v. State*, 18 Tex. 713; *Cave v. State*, 41 Tex. 182; *Harrison v. State*, 6 App. 42; *Hunt v. State*, 7 App. 212; *Smith v. State*, 7 App. 382; *Struckman v. State*, 7 App. 581; *Ward v. State*, 10 App. 293; *Ray v. State*, 13 App. 51; *Wyers v. State*, 13 App. 57; *Harris v. State*, 13 App. 309; *Thomas v. State*, 13 App. 493; *Flores v. State*, 13 App. 665; *Montgomery v. State*, 13 App. 669; *Cook v. State*, 14 App. 96; *Lee v. State*, 14 App. 266; *Dovalina v. State*, 14 App. 312; *Faulkner v. State*, 15 App. 115; *Garcia v. State*, 15 App. 120; *Howell v. State*, 16 App. 93; *Allen v. State*, 16 App. 237; *Kenneda v. State*, 16 App. 258; *Cooper v. State*, 16 App. 341; *Conner v. State*, 17 App. 1; *Schindler v. State*, 17 App. 408; *Mathews v. State*, 17 App. 472; *Vaughn v. State*, 17 App. 562; *Dupree v. State*, 17 App. 591; *Murphy v. State*, 17 App. 645; *White v. State*, 18 App. 57; *Black v. State*, 18 App. 124; *Wright v. State*, 18 App. 358; *Sullivan v. State*, 18 App. 623; *Counts v. State*, 19 App. 450; *Riley v. State*, 20 App. 100; *Ramirez v. State*, 20 App. 133; *Jackson v. State*, 20 App. 190; *Norwood v. State*, 20 App. 306; *Parker v. State*, 20 App. 451; *Jack v. State*, 20 App. 656; *Crowell v. State*, 24 App. 404, 6 S. W. 318; *Fuller v. State*, 24 App. 596, 7 S. W. 330; *Guajardo v. State*, 24 App. 603, 7 S. W. 331; *Willard v. State*, 26 App. 126, 9 S. W. 358; *Crowley v. State*, 26 App. 578, 10 S. W. 217; *Taylor v. State*, 27 App. 463, 11 S. W. 462; *Puryear v. State*, 28 App. 73, 11 S. W. 929; *Scott v. State* (Cr. App.) 12 S. W. 504; *Robertson v. State*, 33 App. 366, 26 S. W. 508; *Polanka v. State*, 33 App. 634, 28 S. W. 541; *Leftwich v. State*, 34 App. 489, 31 S. W. 385; *McCament v. State* (Cr. App.) 37 S. W. 437; *Lopez v. State* (Cr. App.) 40 S. W. 595; *Nichols v. State*, 39 App. 80, 44 S. W. 1091; *Pace v. State*, 41 App. 203, 53 S. W. 689 (reversing judgment in 41 App. 203, 51 S. W. 953, on rehearing); *Pace v. State* (Cr. App.) 53 S. W. 690; *Davis v. State* (Cr. App.) 54 S. W. 584; *Arismendis v. State*, 41 App. 374, 54 S. W. 599; *Arismendis v. State*, 41 App. 378, 54 S. W. 601; *Hanks v. State* (Cr. App.) 56 S. W. 922; *Laster v. State*, 49 App. 532, 94 S. W. 233; *Goode v. State*, 56 App. 418, 120 S. W. 199;

Bonner v. State, 58 App. 195, 125 S. W. 22; *Broadnax v. State* (Cr. App.) 150 S. W. 1168; *Law v. State*, 71 App. 179, 160 S. W. 98; *Harris v. State*, 72 App. 117, 161 S. W. 125. Especially where accused has requested the charge. *Bonner v. State*, 53 App. 195, 125 S. W. 22. And where one fact is proved from which another fact is to be inferred, the charge must be given. *Gentry v. State*, 41 App. 497, 56 S. W. 68.

A charge on circumstantial evidence should be given in a larceny case which depends on circumstantial evidence as to the original taking. *Stewart v. State* (Cr. App.) 77 S. W. 791. Where, in a prosecution for the theft of two hogs, accused's defense was that he took up a number of hogs that had been getting in his cornfield, and that all got out but two, which he subsequently concluded to kill and appropriate, and the state's case depended mainly on circumstantial evidence, a charge thereon should be given. *Veasly v. State* (Cr. App.) 85 S. W. 274. Where, on a trial for the larceny of money, the evidence showed that the prosecutor had the money in a drawer in an office, which was locked, that accused asked for the key to the office to procure clothing therein, that prosecutor gave him a bunch of keys containing the key to the office and to the drawer, that accused left on the next train after going into the office, that prosecutor on going into the office missed the money, a ragged \$5 bill, that he wired the conductor of the train on which the accused was riding, and that the conductor secured a ragged \$5 bill from accused, identified by prosecutor, a charge on circumstantial evidence is warranted. *Suggs v. State* (Cr. App.) 143 S. W. 186. Where accused was indicted in three counts, the first for larceny, and the third for receiving stolen property, the second count being quashed, and the evidence to support the other two being circumstantial, and the court charged on circumstantial evidence as to the first count, and then instructed that, if the jury found defendant not guilty on the first count, they might consider the third, and thereupon defined the offense of concealing and receiving stolen property, but gave no charge on circumstantial evidence as affecting that offense, such failure was erroneous as equivalent to an assumption by the court that there was direct evidence of guilt of the offense of receiving. *Rupe v. State*, 57 App. 588, 124 S. W. 655.

Where the evidence in a prosecution for violating the local option law showed that a person went into accused's place of business and asked for "cheese," that accused took the money and went into another room, and that upon his return the other party went into that room and found a bottle of whisky wrapped in paper, a charge concerning circumstantial evidence is justified. *Columbo v. State* (Cr. App.) 145 S. W. 910. Where there was no positive testimony of a sale of liquor in violation of the prohibition law, and there was positive testimony of a gift, and the state sought to overcome it by circumstantial evidence, the court must, on the request of the accused, submit the issues of sale or gift, and charge on circumstantial evidence. *Ely v. State*, 71 App. 211, 158 S. W. 806.

Where all the evidence in relation to the breaking and entering is circumstantial, a charge on circumstantial evidence should be given, and the fact that accused had pleaded guilty of theft of property stolen during the burglary, which plea is introduced in evidence, does not dispense with the necessity of the charge on circumstantial evidence. *Beason v. State*, 43 App. 442, 67 S. W. 96, 69 L. R. A. 193.

On a trial for robbery, where the prosecuting witness identified accused as the thief, a requested instruction to disregard the court's remark, in the presence of the jury, that he could not charge on circumstantial evidence, because there was an eyewitness, should have been given; the remark being improper and calculated to impress the jury that the testimony of the prosecuting witness was true and his identification sufficient to justify a conviction. *McMillan v. State* (Cr. App.) 146 S. W. 1190.

Where, in a prosecution for forgery in raising the amount of a check, the prosecuting witness testified that the check called for \$8.25 when he signed and delivered it, and that when it came back to his hands, after having been cashed, it called for \$18.25, accused is entitled to a charge on circumstantial evidence, his connection with the alteration being merely circumstantial. *Dysart v. State*, 46 App. 52, 79 S. W. 534.

Where it appeared in a prosecution for murder that there had been no difficulty between defendant and deceased, that deceased approached a crowd, and that defendant in a general fight struck twice at deceased, but it was not shown who the others in the fight were or what kind of an instrument made the wound, or how the fighting came about, a failure to submit a charge on circumstantial evidence is error. *Huddleston v. State*, 70 App. 260, 156 S. W. 1168.

Where an issue whether defendant advised or agreed to the commission of an offense is raised, and this is shown by circumstantial evidence alone, it is proper for the court to charge on circumstantial evidence on that particular issue. *Burnam v. State*, 61 App. 616, 135 S. W. 1175; And see *Maxwell v. State* (Cr. App.) 149 S. W. 171; *Blackshear v. State* (Cr. App.) 154 S. W. 564.

Where, in a larceny case, accused relies on a claim of ownership, a charge on circumstantial evidence need not be given. *Smith v. State*, 62 App. 124, 136 S. W. 481. Where, in a prosecution for theft of a deed, a witness testified that he saw accused pick up a paper at the place where the deed was placed and take it with him, and the evidence showed that the deed stolen was filed for record, and that accused executed another deed for the same land, a requested charge on circumstantial evidence is properly refused. *Roberts v. State*, 61 App. 434, 135 S. W. 144. Testimony, in a trial for theft of an estray horse, that accused bought the horse off the range, and took a bill of sale of it, and that he took the horse up and claimed and disposed of it as his own, does not present a case of circumstantial evidence, requiring a charge thereon. *Baxter v. State* (Cr. App.) 43 S. W. 87. Where, in a prosecution for larceny of diamond rings, the only conflict in the testimony was whether defendant was authorized by the prosecuting witness to pawn them as he did, a charge on circumstantial evidence need not be given. *Creale v. State*, 71 App. 9, 158 S. W. 268. On a trial for theft, testimony that, while the

prosecuting witness was in bed, accused took his pocketbook from his pants, which were lying by the bed, justifies the refusal of an instruction on circumstantial evidence. *Thompson v. State* (Cr. App.) 167 S. W. 345.

In a prosecution for homicide, where dying declarations of deceased, as well as the testimony of eyewitnesses, showed that accused committed the crime, there is no cause for a charge on circumstantial evidence. *Cruse v. State* (Cr. App.) 77 S. W. 818. Where the act of the killing by third persons and of accused conspiring with them was shown by positive testimony, and a witness testified to accused's presence at the time of the killing, the refusal to charge on circumstantial evidence is proper. *Bass v. State*, 59 App. 186, 127 S. W. 1020. Where the evidence for the state and for accused all showed that accused fired the fatal shot, an instruction on circumstantial evidence is unnecessary, even though it was the theory of the state that accused, in seeking the difficulty, had conspired with another. *Coulter v. State*, 72 App. 602, 162 S. W. 885. Where all were together pursuant to a common unlawful design, all were guilty, regardless of who fired the fatal shot; and hence an instruction on circumstantial evidence is not warranted. *Davis v. State* (Cr. App.) 172 S. W. 978.

In a prosecution for disturbing a religious congregation where numbers of witnesses testified that they saw accused within a few feet of a window, riding by, and just at that time a jug was thrown in, a charge on circumstantial evidence is unnecessary. *Laird v. State* (Cr. App.) 155 S. W. 260.

37. — **Misdemeanor cases.**—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 App. 320, 33 S. W. 358; *Martin v. State*, 32 App. 441, 24 S. W. 512.

38. — **Admissions and confessions by accused.**—A charge on circumstantial evidence is not required where accused has made admissions or confessions which show that he committed or connect him with the crime charged. *Johnson v. State*, 28 App. 17, 11 S. W. 667; *Smith v. State*, 28 App. 309, 12 S. W. 1104; *Wampler v. State*, 28 App. 352, 13 S. W. 144; *Self v. State*, 28 App. 398, 13 S. W. 602; *Mathews v. State*, 39 App. 555, 47 S. W. 647, 48 S. W. 189; *White v. State*, 32 App. 625, 25 S. W. 784; *Ellis v. State*, 33 App. 86, 24 S. W. 894; *Holmes v. State* (Cr. App.) 42 S. W. 979; *Paul v. State* (Cr. App.) 45 S. W. 725; *Doucette v. State* (Cr. App.) 45 S. W. 800; *Franks v. State* (Cr. App.) 45 S. W. 1013; *Mathews v. State*, 39 App. 553, 47 S. W. 647, 48 S. W. 189; *White v. State*, 40 App. 366, 50 S. W. 705; *Hedrick v. State*, 40 App. 532, 51 S. W. 252; *Mathews v. State*, 41 App. 98, 51 S. W. 915; *Ricks v. State*, 41 App. 676, 56 S. W. 928; *Jackson v. State* (Cr. App.) 62 S. W. 914; *Carmona v. State* (Cr. App.) 65 S. W. 928; *Roberts v. State*, 44 App. 267, 70 S. W. 423; *Landreth v. State*, 44 App. 239, 70 S. W. 758; *Usher v. State*, 47 App. 93, 81 S. W. 309; *Whitehead v. State*, 49 App. 123, 90 S. W. 876; *Keith v. State*, 50 App. 63, 94 S. W. 1044; *Welch v. State*, 50 App. 28, 95 S. W. 1035; *Burk v. State*, 50 App. 155, 95 S. W. 1064; *Taylor v. State*, 62 App. 611, 138 S. W. 615; *Hargrove v. State*, 63 App. 143, 140 S. W. 234; *Ellington v. State*, 63 App. 420, 140 S. W. 1102; *Wright v. State*, 63 App. 664, 141 S. W. 228; *Gowans v. State* (Cr. App.) 145 S. W. 614; *Willcox v. State* (Cr. App.) 150 S. W. 898; *Whorton v. State* (Cr. App.) 151 S. W. 300; *Meadows v. State* (Cr. App.) 154 S. W. 546; *Anderson v. State*, 71 App. 27, 159 S. W. 847; *Strickland v. State*, 71 App. 582, 161 S. W. 110; *Thompson v. State* (Cr. App.) 163 S. W. 973; *Cook v. State* (Cr. App.) 171 S. W. 227; *Guerrero v. State* (Cr. App.) 171 S. W. 731; *Vandever v. State* (Cr. App.) 173 S. W. 1197. See, however, *Hays v. State* (Cr. App.) 173 S. W. 671, holding that where, on the trial of accused for testifying falsely that he did not remember whether he purchased whisky from a certain person, where there was nothing to show that he did remember, and nothing to show that such person ever sold him any whisky, except accused's own statement before a justice of the peace prior to such person's trial that he purchased whisky from him, the court should have charged on circumstantial evidence, as accused's statement before the justice was but a circumstance if admissible at all.

That accused, charged with burglarizing an old house, in which corn was stored, the doors of which were held closed by rocks, sticks, etc., and the windows gone, pleaded guilty to the theft of the corn, is not sufficient to make the charge of burglary a case of positive evidence, as the corn may have been stolen and no burglary committed. *Beason v. State* (Cr. App.) 63 S. W. 633.

39. — **Evidence of eyewitnesses.**—Where facts attendant upon the commission of a crime have been testified to by an eyewitness the charge need not be given. *Jones v. State*, 31 App. 177, 20 S. W. 354; *Campbell v. State* (Cr. App.) 38 S. W. 171; *Jones v. State* (Cr. App.) 77 S. W. 802; *Gowans v. State* (Cr. App.) 145 S. W. 614; *Willcox v. State* (Cr. App.) 150 S. W. 898; *Sylvas v. State* (Cr. App.) 150 S. W. 906; *Ballard v. State*, 71 App. 168, 160 S. W. 92; *Law v. State*, 71 App. 179, 160 S. W. 98.

Where a witness testified that he saw a shot fired and decedent fall, and that accused fired the shot, and other witnesses showed that decedent was shot in the back, and that accused was in the rear of him, while the only other person who fired shots on the occasion of the killing was in front of decedent, there was direct testimony that accused fired the fatal shot, and an instruction on circumstantial evidence is not required. *Egbert v. State* (Cr. App.) 176 S. W. 560.

40. — **Testimony of accomplices.**—Where the evidence against accused is positive, although it is that of an accomplice, a charge on circumstantial evidence is not necessary. *Kidwell v. State*, 35 App. 264, 33 S. W. 342; *Rios v. State*, 39 App. 675, 47 S. W. 987; *Harris v. State*, 40 App. 8, 48 S. W. 502; *Tune v. State*, 49 App. 445, 94 S. W. 231; *Martinez v. State*, 61 App. 29, 133 S. W. 881; *Johnson v. State*, 72 App. 387, 162 S. W. 512.

41. — **Venue.**—The court is not required to charge on wholly circumstantial evidence as to venue. *Steadham v. State*, 40 App. 43, 48 S. W. 177; *Pye v. State* (Cr. App.) 154 S. W. 222.

42. — **Intent.**—A charge on circumstantial evidence is not necessary where only the intent with which the crime is committed is proved by circumstances, the main fact or facts being proved by positive evidence. *Russell v. State*, 38 App. 566, 44 S. W. 159; *Houston v. State* (Cr. App.) 47 S. W. 468; *Alexander v. State*, 49 App. 407, 49 S. W. 229, 50 S. W. 716; *Hanks v. State* (Cr. App.) 56 S. W. 922; *Nixon v. State* (Cr. App.) 93 S. W. 555; *Williams v. State*, 58 App. 82, 124 S. W. 954; *Burton v. State* (Cr. App.) 146 S. W. 186; *Egbert v. State* (Cr. App.) 176 S. W. 560.

43. — **Identity of accused.**—When there is direct evidence showing that accused is the person who committed the crime the charge on circumstantial evidence is not required. *Givens v. State*, 35 App. 563, 34 S. W. 626; *Jenkins v. State*, 49 App. 457, 93 S. W. 726, 122 Am. St. Rep. 812; *Vela v. State*, 62 App. 361, 137 S. W. 120; *Williams v. State* (Cr. App.) 143 S. W. 634; *Robinson v. State* (Cr. App.) 145 S. W. 345; *Moray v. State* (Cr. App.) 145 S. W. 927; *Cooper v. State* (Cr. App.) 147 S. W. 273; *Serow v. State* (Cr. App.) 154 S. W. 557; *Gradington v. State* (Cr. App.) 155 S. W. 210; *Pullen v. State*, 70 App. 156, 156 S. W. 935; *Haynes v. State*, 71 App. 31, 159 S. W. 1059; *Barrow v. State*, 71 App. 549, 160 S. W. 458; *Herrera v. State* (Cr. App.) 170 S. W. 719; *Terrell v. State* (Cr. App.) 174 S. W. 1089. Want of exact certainty in the identification of accused as the thief, witness testifying that he had not seen him since the theft, five years before, but that he believed him to be the same man, does not call for a charge on circumstantial evidence. *Monk v. State* (Cr. App.) 44 S. W. 1101. Statements of deceased immediately after the occurrence and in contemplation of death, positively identifying defendant as the guilty party, whether regarded as dying declarations or *res gestæ*, render a charge on circumstantial evidence unnecessary. *Hernandez v. State*, 47 App. 20, 81 S. W. 1210.

44. — **Possession of property and explanation thereof.**—Where there is no direct evidence of the taking, in a prosecution for theft, and possession of the property alleged to have been taken is relied on as proof of the offense, an instruction on circumstantial evidence should be given. *Taylor v. State*, 27 App. 463, 11 S. W. 462; *Lee v. State*, 27 App. 475, 11 S. W. 483; *Hyden v. State*, 31 App. 401, 20 S. W. 764; *Robertson v. State*, 33 App. 366, 26 S. W. 508; *Hodge v. State*, 41 App. 229, 53 S. W. 862; *Wallace v. State* (Cr. App.) 66 S. W. 1102; *Cortez v. State* (Cr. App.) 74 S. W. 907; *Armstead v. State*, 48 App. 304, 87 S. W. 824. Other illustrations of when charge is necessary, see *York v. State*, 42 App. 528, 61 S. W. 128; *Davis v. State*, 45 App. 132, 74 S. W. 544; *Guerrero v. State*, 46 App. 445, 80 S. W. 1001. When charge is not necessary, see *Williams v. State* (Cr. App.) 44 S. W. 1103; *Reed v. State* (Cr. App.) 46 S. W. 931; *Ballard v. State*, 71 App. 168, 160 S. W. 93; *Law v. State*, 71 App. 179, 160 S. W. 98. But where the property is found in accused's possession and he confesses that he stole it the charge on circumstantial evidence is unnecessary. *Wright v. State*, 63 App. 664, 141 S. W. 228.

45. — **Sufficiency of charge.**—There is no prescribed formula for a charge on circumstantial evidence, the charge being sufficient if the ideas conveyed are correct, and are so expressed as to be comprehended by the jury. *Brown v. State*, 23 Tex. 195; *Rye v. State*, 8 App. 153; *Simms v. State*, 8 App. 230; *Loggins v. State*, 8 App. 434; *Hubby v. State*, 8 App. 597; *Hardin v. State*, 8 App. 653; *Taylor v. State*, 9 App. 100; *Chitister v. State*, 33 App. 635, 28 S. W. 683; *Coffman v. State* (Cr. App.) 165 S. W. 939. It is not erroneous merely because it does not follow approved forms. *Galloway v. State*, 44 App. 230, 70 S. W. 211. But the trial court should not change charges which have been approved by the appellate court. *Melver v. State* (Cr. App.) 60 S. W. 50. It need not state that the case was one in which the state relied on the circumstantial evidence for a conviction. *Pennington v. State* (Cr. App.) 48 S. W. 507; *Henderson v. State*, 50 App. 266, 96 S. W. 37; *Flagg v. State* (Cr. App.) 153 S. W. 852. Nor that the state relied wholly on circumstantial evidence to corroborate a witness who testified that accused did the killing in his presence. *Hargrove v. State*, 63 App. 143, 140 S. W. 234. It should be so framed as to guard the jury from basing their findings upon mere surmises. *Myers v. State*, 6 App. 1. Where the case against accused depends on a number of circumstances the court need not instruct as to any particular circumstance, but a general charge on circumstantial evidence is enough. *Smotherman v. State*, 47 App. 309, 83 S. W. 838. A charge on circumstantial evidence is sufficient if it contains the test of exclusion; that is, that the evidence is sufficient only when it excludes every other reasonable hypothesis save that of guilt. *Smith v. State* (Cr. App.) 33 S. W. 339; *Powers v. State* (Cr. App.) 152 S. W. 909. The subject of circumstantial evidence is sufficiently presented by a charge that, to warrant a conviction on circumstantial evidence, each fact necessary to establish the guilt of accused must be proved by competent evidence beyond a reasonable doubt, and the facts and circumstances proved should not only be consistent with the guilt of the accused, but inconsistent with any other reasonable hypothesis or conclusion than that of his guilt, and producing in the minds of the jurors a reasonable and moral certainty that the accused committed the offense. *Reeseaman v. State*, 59 App. 430, 128 S. W. 1126. For other cases holding that charges on circumstantial evidence similar to the one above stated were sufficient, see *Gallaher v. State*, 28 App. 247, 12 S. W. 1087; *Good v. State*, 30 App. 276, 17 S. W. 409; *Loggins v. State*, 32 App. 364, 24 S. W. 512; *Hamlin v. State*, 39 App. 579, 47 S. W. 656; *Bennett v. State*, 39 App. 639, 48 S. W. 61; *Areola v. State*, 40 App. 51, 48 S. W. 195; *Galloway v. State*, 44 App. 230, 70 S. W. 211; *Mass v. State*, 59 App. 390, 128 S. W. 394; *Wheeler v. State*, 61 App. 527, 136 S. W. 68; *Harris v. State* (Cr. App.) 148 S. W. 1074; *McGee v. State* (Cr. App.) 155 S. W. 246; *Coffman v. State* (Cr. App.) 165 S. W. 939. In a case where the evidence is circumstantial, and there is no question that the offense was committed, a charge that the facts proved must be consistent with each other and with the guilt of the accused, and, taken together, must be of a conclusive nature, producing a reasonable and moral certainty that defendant, and 'no other person committed the

offense charged," is sufficient. *Crow v. State*, 37 App. 295, 39 S. W. 574. See, also, *Henderson v. State*, 14 Tex. 503; *Crutchfield v. State*, 7 App. 65; *Irvin v. State*, 7 App. 109; *Smith v. State*, 8 App. 141; *Bouldin v. State*, 8 App. 332; *Hubby v. State*, 8 App. 597; *Harrison v. State*, 9 App. 407; *Early v. State*, 9 App. 476; *Campbell v. State*, 10 App. 560; *Post v. State*, 10 App. 579; *Bryant v. State*, 16 App. 144; *Ninnon v. State*, 17 App. 650; *Johnson v. State*, 18 App. 385; *Hill v. State*, 37 App. 415, 35 S. W. 660; *Baldez v. State*, 37 App. 413, 35 S. W. 661. And a charge that it is not sufficient that the circumstances coincided with, accounted for, and therefore rendered probable, the guilt of defendant, but they must exclude to a moral certainty every other reasonable hypothesis, is not prejudicial. *Gonzales v. State* (Cr. App.) 57 S. W. 667. See, also, *McCoy v. State* (Cr. App.) 73 S. W. 1057; *Gaines v. State* (Cr. App.) 77 S. W. 10; *Henderson v. State*, 50 App. 266, 96 S. W. 37; *Moseley v. State*, 59 App. 90, 127 S. W. 178; *Brown v. State* (Cr. App.) 169 S. W. 437. A charge that the crime may be established by circumstances, if they are sufficient to establish beyond a reasonable doubt that accused committed the crime charged is insufficient. *Davis v. State* (Cr. App.) 54 S. W. 583. See, also, *Bookser v. State*, 26 App. 593, 10 S. W. 219. A charge that to justify a conviction upon circumstantial evidence alone the facts relied upon must be absolutely incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt, is erroneous, since it furnishes no aid to the jury in determining what weight should be given to such testimony, and on what hypothesis they should convict. *Williamson v. State*, 30 App. 330, 17 S. W. 722. A charge, as to circumstantial evidence, that the jury must believe accused committed the offense, is not erroneous because the words "and no other person" are omitted. *Ramirez v. State*, 43 App. 455, 66 S. W. 1101. See, also, *Bennett v. State*, 39 App. 639, 48 S. W. 61; *Boersh v. State* (Cr. App.) 62 S. W. 1060; *Bell v. State* (Cr. App.) 71 S. W. 24; *Bosley v. State* (Cr. App.) 153 S. W. 878. Where accused is charged with having acted with two others in taking certain cattle, the fact that the court used the term "others," instead of specifically naming the others is immaterial. *Reid v. State* (Cr. App.) 57 S. W. 662.

It is not permissible to single out facts and charge upon them in cases of circumstantial evidence. *Beard v. State*, 57 App. 323, 123 S. W. 147; *Moore v. State*, 59 App. 361, 128 S. W. 1115.

46. **Credibility of witnesses.**—A charge that the jury are the "exclusive judges of the facts of the case and the weight of the testimony" sufficiently instructs them that they are the exclusive judges of the credibility of the witnesses. *Allison v. State*, 14 App. 402. A charge to the jury that they are "the exclusive judges of the credibility, of the weight of the evidence, and all the facts proved," is not erroneous, as not informing the jury that they were the judges of the "credibility of the witnesses." *Binyon v. State* (Cr. App.) 56 S. W. 339. An instruction that, if the jury cannot reconcile conflicting testimony, they must decide which of said testimony is entitled to the greater weight and credibility, and, in so determining, consider the intelligence, interest, and apparent bias or prejudice of any of the witnesses, as well as their manner of testifying, is correct. *Adam v. State* (Cr. App.) 20 S. W. 548; *Lancaster v. State*, 36 App. 16, 35 S. W. 165. It is proper to instruct the jury that the credibility of the witnesses is exclusively with them, and to refuse to instruct that if the jury found that a witness has sworn falsely then such witness is not a credible witness, and they would not be authorized to convict upon the testimony of such witness alone. *Slayton v. State*, 50 App. 62, 94 S. W. 901. See, also, *Rideus v. State*, 41 Tex. 199; *Morgan v. State*, 44 Tex. 511; *Brown v. State*, 2 App. 115; *Mason v. State*, 2 App. 192; *Allison v. State*, 14 App. 402. But it is error to instruct the jury that they must discard from their consideration any part or the whole of the testimony of any witness that they may regard as improbable or untrue, and find their verdict on such evidence as they may regard as true and worthy of credit. *Bishop v. State*, 43 Tex. 390; *Kelly v. State*, 1 App. 628; *Chester v. State*, Id. 702; *Butler v. State*, 3 App. 48; *Leverett v. State*, Id. 213; *Johnson v. State*, 9 App. 558; *Litman v. State*, Id. 461. An instruction is erroneous which allows the jury arbitrarily to believe or disbelieve any witness or set of witnesses; the jury should be left free to weigh the evidence. *Jackson v. State*, 7 App. 363; *Williams v. State*, 10 App. 8; *Wilbanks v. State*, Id. 642; *Johnson v. State*, 9 App. 558.

It is not error to omit entirely a charge to the effect that the jury are the judges of the credibility of witnesses and the weight to be given their testimony, unless there is a suspicion as to the credibility of the weight of the testimony. *Whitehead v. State*, 49 App. 123, 90 S. W. 876. But see *Lensing v. State* (Cr. App.) 45 S. W. 572. It is only when a witness has been improperly impeached as to his truth and veracity that it is proper for the court to instruct the jury with reference thereto. *Rider v. State*, 26 App. 334, 9 S. W. 688. It is proper to refuse to charge that the jury may consider the fact that the state's witnesses "were paid and hired to catch the defendant," though such witnesses testified that they had been employed by the sheriff as detectives. *Copeland v. State*, 36 App. 575, 38 S. W. 210. It is not error to refuse to charge that the evidence that prosecutrix told witness she would be well paid if she would swear that she saw defendant strike prosecutrix can be considered only as going to the credibility of such witness. *Druse v. State* (Cr. App.) 38 S. W. 803. A request to charge that, if the prosecuting witness had been impeached on a material issue in the case, the jury could not consider his testimony for any purpose is properly refused. *Brown v. State*, 72 App. 23, 160 S. W. 374.

Where, in a prosecution for rape, defendant claimed that prosecutrix was afflicted with nymphomania, a court charge that if she was laboring under a disease of the mind so as to be incapable of receiving a sound mental impression of the transaction, regarding which she testified, or if she had capacity to receive such mental impression as would render it impossible for her to retain and im-

part such an impression correctly, or was laboring under such defect of reason as would render it impossible for her to understand the obligation of an oath, then she was incompetent to testify, but that if defendant had not so established, by preponderance of the testimony, that she was laboring under such disease, etc., then the jury could consider her testimony, the jury being the exclusive judge of the weight of her testimony, is correct. *Jenkins v. State*, 60 App. 236, 131 S. W. 542.

47. Failure of accused to testify.—It is not error to instruct the jury not to consider, as a circumstance against defendant, his failure to testify. *Fulcher v. State*, 28 App. 465, 13 S. W. 750; *Guinn v. State*, 39 App. 257, 45 S. W. 694; *Unsell v. State* (Cr. App.) 45 S. W. 902; *Parker v. State*, 40 App. 119, 49 S. W. 80; *Pearl v. State*, 43 App. 189, 63 S. W. 1013; *Grant v. State*, 44 App. 311, 70 S. W. 954; *Louder v. State*, 46 App. 121, 79 S. W. 552; *McCoy v. State* (Cr. App.) 81 S. W. 43; *Matthews v. State*, 57 App. 328, 122 S. W. 544. Nor is it error to fail to so instruct. *Morrison v. State*, 40 App. 473, 51 S. W. 358; *Prewett v. State*, 41 App. 262, 53 S. W. 879; *Torey v. State*, 41 App. 543, 56 S. W. 60.

It is not error to give only a portion of article 790 in the charge. *Leslie v. State* (Cr. App.) 49 S. W. 73; *Anderson v. State*, 53 App. 341, 110 S. W. 58. The court should tell the jury not to consider or discuss defendant's failure to testify. *Fine v. State*, 45 App. 290, 77 S. W. 806. A charge in the language of the statute that the failure of accused to testify shall not be taken as a circumstance against him, and that the jury must not allude to, comment on, or discuss it on their retirement, is not erroneous. *Guinn v. State*, 39 App. 257, 45 S. W. 694; *Mason v. State* (Cr. App.) 81 S. W. 718; *Dougherty v. State*, 59 App. 464, 128 S. W. 398; *Kinhead v. State*, 61 App. 651, 135 S. W. 573; *Willingham v. State*, 62 App. 55, 136 S. W. 470. An instruction that the law allows a defendant to testify in his own behalf, but a failure to do so is not even a circumstance against him, and no presumption of guilt can be indulged in by the jury on account of such failure on his part, and the jury will not mention, discuss, or even refer to the fact that defendant failed to testify, was proper. *O'Hara v. State*, 57 App. 577, 124 S. W. 95; *Singleton v. State*, 57 App. 560, 124 S. W. 92. It is not improper for the trial judge to state, on impaneling a jury for the week, that an accused person may testify, but failure to do so is not even a circumstance of guilt against him; that whether he shall testify is in his attorney's discretion; that a lawyer might have good reason, consistent with innocence of his client, for not placing him on the stand; and that, if the jury should be chosen in a criminal case where accused did not testify, they must not only not consider such failure, but could not even mention it, in their deliberations. *Newton v. State* (Cr. App.) 143 S. W. 638.

48. Failure to call witness or produce evidence.—Where the state introduced only circumstantial evidence of defendant's guilt, eyewitnesses to the commission of the crime, being present in court, but unfriendly to the State, a charge that the State was required to introduce the best evidence obtainable, and that, if it was probable that there were eyewitnesses by whom the State could have proven the act of killing, it was the duty of the state to produce such evidence, and that, if it did not do so, defendant could not be convicted on circumstantial evidence, is properly refused. *McCandless v. State*, 42 App. 655, 62 S. W. 745.

49. Co-defendants.—Where two defendants are jointly tried, the charge should instruct that the jury may acquit one and convict the other. *Hampton v. State*, 45 Tex. 154. And see *Halmes v. State*, 9 App. 313; *Hays v. State*, 30 App. 472, 17 S. W. 1063; *Ragsdale v. State*, 61 App. 145, 134 S. W. 234; *Sellers v. State*, 61 App. 140, 134 S. W. 348.

50. Commission of other offenses.—An answer by defendant, to a question asking whether he had ever been charged with subornation of perjury, that he did not know what that meant, but that some negroes trumped up a charge against him, about which nothing was ever done, was not such an admission of a criminal charge as to authorize the court to assume in its instructions that there was testimony before the jury as to defendant having been charged with some other crime. *Stull v. State*, 47 App. 547, 84 S. W. 1059.

In a prosecution for unlawfully altering the brand of a hog, where there was no evidence that the brand of any other hogs of the prosecutor had been altered by defendant, it is error, in instructing the jury, to refer to the re-marking of other hogs. *Cox v. State*, 58 App. 545, 126 S. W. 886.

A charge, on a trial for the theft of a skirt from a store, as to other thefts of goods found at the home of a third person with whom accused spent a part of his time is erroneous, in the absence of evidence connecting accused with such thefts. *Morgan v. State*, 62 App. 120, 136 S. W. 1065.

51. Principals and accessories.—See, also, notes to Pen. Code, art. 74.

Charge on principals held called for or warranted by the evidence. *Newton v. State* (Cr. App.) 143 S. W. 638; *Clay v. State* (Cr. App.) 146 S. W. 166; *Davis v. State* (Cr. App.) 148 S. W. 302; *Johnson v. State* (Cr. App.) 149 S. W. 165; *Oates v. State* (Cr. App.) 149 S. W. 1194; *Walker v. State* (Cr. App.) 151 S. W. 822; *Wilson v. State* (Cr. App.) 154 S. W. 1015; *Pendley v. State*, 71 App. 281, 158 S. W. 811; *Harris v. State*, 71 App. 463, 160 S. W. 447.

Where the evidence does not raise the question of principal and accessory a charge thereon is not warranted. *Adcock v. State*, 41 App. 288, 53 S. W. 845; *Arimendis v. State*, 41 App. 374, 54 S. W. 599; *Steed v. State*, 43 App. 567, 67 S. W. 328; *Bird v. State*, 48 App. 188, 87 S. W. 146; *Armstead v. State*, 48 App. 304, 87 S. W. 824; *Black v. State* (Cr. App.) 145 S. W. 944. See, also, *Phillips v. State*, 26 App. 228, 9 S. W. 557, 8 Am. St. Rep. 471. Where the court charged that, before the jury could convict defendant they must find beyond a reasonable doubt that she was a principal, a failure to charge that, if she were an accomplice or an accessory, they must acquit her, is without prejudice, where the evidence shows that,

if guilty at all, she was guilty as a principal. *Harris v. State*, 37 App. 441, 36 S. W. 88.

Charge on law of principals held correct. *McDonald v. State*, 34 App. 556, 35 S. W. 286; *Chancey v. State*, 58 App. 54, 124 S. W. 426; *Christian v. State*, 71 App. 566, 161 S. W. 101; *Castillo v. State* (Cr. App.) 172 S. W. 788.

Charge on principals held required. *Jones v. State*, 57 App. 144, 122 S. W. 31; *Condron v. State*, 62 App. 485, 138 S. W. 594; *Roman v. State*, 64 App. 515, 142 S. W. 912.

Charge on principals held incorrect. *Maloney v. State*, 57 App. 435, 125 S. W. 36; *Jenkins v. State* (Cr. App.) 155 S. W. 208; *Silvas v. State*, 71 App. 213, 159 S. W. 223.

Charge on principals held not required. *La Fell v. State* (Cr. App.) 153 S. W. 884.

If, upon trial, the evidence as to knowledge on the part of one who is merely present is unsatisfactory, he is entitled to have the jury instructed that if they do not believe he was privy to the offense (i. e., privately knowing), they should acquit. *Burrell v. State*, 18 Tex. 713.

It is error for the court to charge the law of principals in regard to keeping watch when there is no evidence that any of the parties to the crime were keeping watch. *Burgess v. State*, 33 App. 9, 24 S. W. 286.

In a homicide case, it is unnecessary for the court, under the evidence, to instruct as to who were principals, having already charged that "an accomplice is one who is connected with the crime, either before, at the time, or after the commission of the offense." *Foster v. State* (Cr. App.) 150 S. W. 936.

Where the evidence showed that two persons participated in the offense, a charge on the law of principals is applicable. *Coggins v. State* (Cr. App.) 151 S. W. 311.

Where the court charges on the theory that accused was a principal, the converse of the proposition that if another committed the offense, and defendant neither aided nor encouraged him and was not present, he would not be a principal, should also be given. *La Fell v. State* (Cr. App.) 153 S. W. 884.

Where the theory of the state was that defendant was a principal in the theft of diamonds, and it proved that he had the diamonds in his possession which he claimed to have bought, the state must show that he was a principal, and he could not be convicted, even if he bought them knowing them to have been stolen, and the court should so instruct. *Jones v. State* (Cr. App.) 154 S. W. 1018.

Where, in a prosecution of two defendants for murder, the court charged with reference to both parties as principals, it should have also charged that they could not convict defendant T., if he did not act as principal; the evidence raising the issue that he was an innocent bystander. *Jenkins v. State* (Cr. App.) 155 S. W. 208.

In a prosecution for the theft of cattle, where it was in issue whether defendants were so connected with the original taking as to be principals, the jury should have been appropriately instructed thereon. *McKnight v. State*, 70 App. 470, 156 S. W. 1188.

52. Grade or degree of offense.—See Willson's Cr. Forms, 936.

It is not indispensable that the court should charge as to the different degrees of the offense charged, unless, in its judgment, the evidence to be passed upon by the jury renders such charge necessary in order that the jury may understand the application of the facts to the law governing the different degrees of the offense. If, after hearing the evidence, the court is in doubt, then the law as to the less offense should be charged. Where the evidence tends to establish an offense of lower grade than that charged, the difference between the different degrees should be explained to the jury by instructions. But where the evidence tends to prove only the greater offense an instruction on a lower offense need not be given. *Daniels v. State*, 24 Tex. 389; *Myers v. State*, 33 Tex. 525; *Hudson v. State*, 40 Tex. 12; *Jones v. State*, 40 Tex. 188; *Marshall v. State*, 40 Tex. 200; *Pefferling v. State*, 40 Tex. 486; *Holden v. State*, 1 App. 225; *Holden v. State*, 1 App. 225; *Washington v. State*, 1 App. 647; *Boyett v. State*, 2 App. 93; *Halbert v. State*, 3 App. 656; *Sims v. State*, 4 App. 144; *Grissom v. State*, 4 App. 374; *Roberts v. State*, 5 App. 141; *Gatlin v. State*, 5 App. 531; *Winn v. State*, 5 App. 621; *Collins v. State*, 6 App. 72; *Berry v. State*, 8 App. 515; *Hubby v. State*, 8 App. 597; *McPhail v. State*, 10 App. 128; *Eanes v. State*, 10 App. 421; *Hill v. State*, 11 App. 456; *Evans v. State*, 13 App. 225; *Neyland v. State*, 13 App. 536; *Taylor v. State*, 14 App. 340; *Benevides v. State*, 14 App. 378; *Darnell v. State*, 15 App. 70; *Smith v. State*, 15 App. 139; *Gomez v. State*, 15 App. 327; *Anderson v. State*, 15 App. 447; *Granger v. State*, 24 App. 45, 5 S. W. 648; *Heard v. State*, 24 App. 103, 5 S. W. 846; *Brooks v. State*, 24 App. 274, 5 S. W. 852; *Henning v. State*, 24 App. 315, 6 S. W. 137; *Thumm v. State*, 24 App. 667, 7 S. W. 236; *Chamberlain v. State*, 25 App. 398, 8 S. W. 474; *Croell v. State*, 25 App. 755, 9 S. W. 68; *Blocker v. State*, 27 App. 16, 10 S. W. 439; *Habell v. State*, 28 App. 588, 13 S. W. 1001; *Massey v. State*, 29 App. 159, 15 S. W. 601; *Surrell v. State*, 29 App. 321, 15 S. W. 816; *McSpatton v. State*, 30 App. 616, 18 S. W. 298; *Cockerell v. State*, 32 App. 585, 25 S. W. 421; *Hodge v. State* (Cr. App.) 26 S. W. 69; *Steiner v. State*, 33 App. 291, 26 S. W. 214; *Folks v. State* (Cr. App.) 58 S. W. 98. Unless the evidence demands it, it is not proper to give in charge all the provisions of the Code relating to an offense in all its degrees, without reference to the facts proved. *Lopez v. State*, 42 Tex. 299. Where an information is insufficient to charge the offense intended, though it sufficiently charges a lesser, included offense, a charge which permits a conviction of the higher offense is error, where the record leaves it uncertain of which offense the jury found defendant guilty. *Lomax v. State*, 38 App. 318, 43 S. W. 92. It is not reversible error to charge on lower degree of offense than that raised by the evidence. *Robinson v. State* (Cr. App.) 57 S. W. 812. It is not improper, where on a former trial the defendant has been acquitted of a higher grade of the offense of which he is charg-

ed, for the court to so inform the jury, and to instruct them that they should not consider such high grade of offense. *Pharr v. State*, 10 App. 485. But the jury should not be informed that on a former trial the defendant was convicted of any grade of the offense. *West v. State*, 7 App. 150. Where the testimony of prosecutrix showed that accused was guilty of an assault with intent to rape, and accused relied on alibi, the refusal to charge on the lesser degree of the offense is not erroneous. *Fowler v. State* (Cr. App.) 148 S. W. 576. The conduct and testimony of accused require the presentation of his theory, that if he put the child where it was found without any intent to kill it, but to prevent the exposure of his sister-in-law's shame and his connection with its paternity, he must be found guilty of a lesser degree of assault or acquitted. *Martin v. State*, 57 App. 264, 122 S. W. 558. In determining whether the evidence requires the submission of issues as to lesser grades of homicide than that for which accused is being tried, all doubts must be resolved in favor of accused and not against him. *Menefee v. State* (Cr. App.) 149 S. W. 138.

Where, in a prosecution for assault on defendant's stepdaughter, the evidence showed that if accused assaulted her at all it was with intent to rape, a request to charge that, if accused penetrated the rectum of prosecutrix, the jury should acquit, is properly refused. *Grimes v. State*, 71 App. 614, 160 S. W. 689.

53. — **Felony or misdemeanor.**—In a prosecution for receiving and concealing stolen goods, it was error, in instructing that, if accused received the goods, he would be guilty of a felony, to omit to submit an issue whether the offense was a misdemeanor, where, though the evidence for the state showed that the goods were valued at more than \$50, there was evidence for accused tending to show that they were of less value. *Williams v. State* (Cr. App.) 153 S. W. 1136. In a prosecution for horse theft, where there was no evidence to indicate that the appropriation of the horse was but temporary, an instruction that if defendant only intended to use the horse temporarily, and did not intend permanent appropriation, he would only be guilty of misdemeanor, and the jury should acquit, is properly refused. *Hartley v. State* (Cr. App.) 71 S. W. 603. In a prosecution for theft, evidence examined and held not to show misdemeanor theft, and hence to justify the court in refusing to charge on that subject. *Sanford v. State*, 64 App. 607, 143 S. W. 1172.

54. — **Degrees of homicide in general.**—A charge is defective which fails to instruct the jury as to the law of each grade of homicide presented by the evidence. *Lindsay v. State*, 36 Tex. 337; *Lawrence v. State*, 10 App. 495; *Green v. State*, 12 App. 445; *Ellison v. State*, 12 App. 557; *Benevides v. State*, 14 App. 378; *Jones v. State*, 29 App. 338, 15 S. W. 403; *Jones v. State*, 33 App. 492, 26 S. W. 1082, 47 Am. St. Rep. 46; *Moore v. State*, 40 App. 439, 50 S. W. 942; *Joy v. State*, 57 App. 93, 123 S. W. 584; *Wood v. State* (Cr. App.) 150 S. W. 780. But where there is no evidence of any other grade of offense than that of murder in the first degree, it is proper to refuse instructions as to any lower grade of homicide. *Hudson v. State*, 40 Tex. 12; *Holden v. State*, 1 App. 225; *Washington v. State*, 1 App. 647; *Gilly v. State*, 15 App. 287; *Rhodes v. State*, 17 App. 579; *Trumble v. State*, 25 App. 631, 8 S. W. 814; *Smith v. State*, 40 App. 391, 50 S. W. 938.

55. — **Degrees of murder.**—Where there is no evidence to support an allegation of murder in the first degree, an instruction on that subject should not be given. *Barnes v. State*, 57 App. 449, 125 S. W. 39.

In a prosecution for murder in the second degree, it is not error to charge on murder in the first degree in giving a complete exposition of the elements of murder in the second degree. *Godwin v. State*, 39 App. 404, 46 S. W. 226; *White v. State*, 44 App. 346, 72 S. W. 173, 63 L. R. A. 660.

Where accused has been acquitted of murder in the first degree by a verdict of guilty of murder in the second degree or manslaughter, and he is granted a new trial, it is error, on the second trial to instruct on murder in the first degree, since accused is not on trial for that crime. *Baker v. State*, 4 App. 223; *Parker v. State*, 22 App. 105, 3 S. W. 100; *Smith v. State*, 22 App. 316, 3 S. W. 684. In a prosecution for murder in the second degree, where the accused had been acquitted of murder in the first degree, the giving of a charge upon murder in the first degree, is not error, where the court stated that it was given so that the jury could better understand the essentials of murder in the second degree. *Berg v. State*, 64 App. 612, 142 S. W. 884.

It is the duty of the court to submit the issue of murder in the second degree in all cases where there is any evidence tending to present that issue. *Nalley v. State*, 28 App. 387, 13 S. W. 670; *Utzman v. State*, 32 App. 426, 24 S. W. 412; *Burt v. State*, 38 App. 397, 40 S. W. 1000, 43 S. W. 344, 39 L. R. A. 305, 330; *Fendrick v. State*, 39 App. 147, 45 S. W. 589; *Guerrero v. State*, 39 App. 662, 47 S. W. 655; *Augustine v. State*, 41 App. 59, 52 S. W. 77, 96 Am. St. Rep. 765; *Robinson v. State* (Cr. App.) 63 S. W. 869; *Hernandez v. State*, 47 App. 20, 81 S. W. 1219; *Manning v. State*, 48 App. 55, 85 S. W. 1149. But where the evidence wholly fails to raise an issue of a less degree of murder than the first, a charge on second-degree murder need not be given. *O'Connell v. State*, 18 Tex. 343; *Jones v. State*, 40 Tex. 188; *Taylor v. State*, 13 App. 184; *Smith v. State*, 15 App. 139; *May v. State*, 22 App. 595, 3 S. W. 781; *Caldwell v. State*, 28 App. 566, 14 S. W. 122; *Williams v. State*, 30 App. 354, 17 S. W. 408; *White v. State*, 30 App. 652, 18 S. W. 462; *Ringo v. State* (Cr. App.) 26 S. W. 73; *Henry v. State* (Cr. App.) 30 S. W. 802; *Howard v. State* (Cr. App.) 33 S. W. 225; *Swan v. State*, 39 App. 531, 47 S. W. 362; *Wilkerson v. State* (Cr. App.) 57 S. W. 956; *Kipper v. State*, 45 App. 377, 77 S. W. 611; *Jenkins v. State*, 49 App. 457, 93 S. W. 726, 122 Am. St. Rep. 812; *Tune v. State*, 49 App. 445, 94 S. W. 231; *Wynne v. State*, 59 App. 126, 127 S. W. 213. See, also, *Worthan v. State* (Cr. App.) 65 S. W. 526. Where the evidence tends to show that the killing was done with express malice, a charge on murder in the second degree is properly refused. *Leslie v. State* (Cr. App.) 49 S. W. 73. Where the evidence shows that the offense is either murder in the first or a kill-

ing in self-defense, an instruction on murder in the second degree is not required. *Henning v. State*, 24 App. 315, 6 S. W. 137. Where the evidence for the state shows a murder by lying in wait, and the evidence for the defense a justifiable homicide, an instruction on murder in the second degree is unnecessary. *Green v. State*, 27 App. 244, 11 S. W. 114. Where the evidence indicated that accused killed deceased in the perpetration of a robbery, or, if the motive was not robbery, that it was a plain case of cold-blooded and unprovoked murder, the court did not err in omitting to charge the law on murder in the second degree. *King v. State*, 57 App. 363, 123 S. W. 135. See, also, *Parker v. State*, 40 App. 119, 49 S. W. 80; *Turner v. State*, 48 App. 585, 89 S. W. 975. Where deceased, after having retired for the night, was awakened by some one hallooing at the gate, and on arising was informed that he was wanted at the long-distance phone about a mile and a half from his residence, and he prepared to go, and as he went into the yard was fired on and killed, defendant admitted the killing, but testified that he was forced to do so by H., who was with him, because of certain prosecutions which deceased had instituted, or was about to institute, against H. and accused. A charge on murder in the second degree is not required. *Cain v. State*, 63 App. 87, 138 S. W. 405. Where accused is on trial for manslaughter, it is error to instruct the jury in regard to the crime of murder in the first and second degrees, especially if they are told if they find accused guilty of murder in the first or second degree to return a verdict for manslaughter. *Parker v. State*, 22 App. 105, 3 S. W. 100. Where decedent insulted the wife of accused, and the insult was the only cause that led accused to kill decedent, the court properly submitted the issue of murder in the second degree, for, if accused's mind was not aroused, he could be convicted of murder in the second degree. *Davis v. State*, 70 App. 37, 155 S. W. 546.

Though the evidence is circumstantial, a charge on murder in the second degree is not necessary, where the evidence discloses express malice, or a cool, calm deliberate design to kill. *Morgan v. State*, 41 App. 102, 51 S. W. 902; *Beard v. State*, 41 App. 173, 53 S. W. 348; *Pearl v. State*, 43 App. 189, 63 S. W. 1013; *Johnson v. State*, 49 App. 314, 94 S. W. 224. But where such circumstantial evidence does not clearly show murder in the first degree the charge on murder in the second degree should be given. *Bennett v. State*, 39 App. 639, 48 S. W. 61. And see *Trijo v. State*, 45 App. 127, 74 S. W. 546.

To instruct as to murder in the second degree, where the testimony shows a case of first degree, is not error. *Johnson v. State* (Cr. App.) 45 S. W. 901.

Where, after a plea of guilty to murder the evidence excludes murder in the second degree a charge on murder in the second degree need not be given. *Murray v. State*, 46 App. 400, 78 S. W. 927.

In the following cases it was held that instructions on murder in the first degree were authorized by the evidence. *Greer v. State* (Cr. App.) 45 S. W. 12; *Glaze v. State* (Cr. App.) 45 S. W. 903; *Ricks v. State*, 48 App. 264, 87 S. W. 1036; *King v. State*, 57 App. 363, 123 S. W. 135.

In the following cases it was held that instructions on murder in the first degree were improper as not being within the issues made by the evidence. *Guerrero v. State*, 39 App. 662, 47 S. W. 655; *Honeycutt v. State*, 42 App. 129, 57 S. W. 806, 96 Am. St. Rep. 797; *Kipper v. State*, 42 App. 613, 62 S. W. 420.

56. — **Manslaughter.**—If there is any evidence which may bring the crime within the grade of manslaughter, a charge thereon should be given. *Maria v. State*, 28 Tex. 698; *Johnson v. State*, 43 Tex. 612; *Williams v. State*, 7 App. 396; *McLaughlin v. State*, 10 App. 340; *Lawrence v. State*, 10 App. 495; *Reynolds v. State*, 14 App. 427; *Moore v. State*, 15 App. 1; *Rutherford v. State*, 16 App. 649; *Liskoski v. State*, 23 App. 165, 3 S. W. 696; *Moore v. State*, 26 App. 322, 9 S. W. 610; *Adams v. State* (Cr. App.) 19 S. W. 907; *Riptoe v. State* (Cr. App.) 42 S. W. 381; *Connell v. State*, 46 App. 259, 81 S. W. 746; *Smith v. State*, 57 App. 585, 124 S. W. 679; *Barnes v. State*, 57 App. 449, 125 S. W. 39; *McMillan v. State*, 58 App. 525, 126 S. W. 875; *Casey v. State*, 59 App. 429, 123 S. W. 1125. But where there is no evidence of manslaughter the charge thereon need not be given. *Escareno v. State*, 16 App. 85; *Homberg v. State*, 12 App. 1; *Jones v. State*, 22 App. 324, 3 S. W. 230; *Coyle v. State*, 31 App. 604, 21 S. W. 765; *Brown v. State*, 32 App. 119, 22 S. W. 596; *Vela v. State*, 33 App. 322, 26 S. W. 396; *Hart v. State* (Cr. App.) 44 S. W. 1105; *Little v. State*, 39 App. 654, 47 S. W. 984; *Johnson v. State* (Cr. App.) 53 S. W. 105; *Prewett v. State*, 41 App. 262, 53 S. W. 879; *Squires v. State* (Cr. App.) 54 S. W. 770; *Villereal v. State* (Cr. App.) 61 S. W. 715; *Coffman v. State* (Cr. App.) 165 S. W. 939. And it is improper to instruct upon manslaughter, where the testimony tending to raise the issue is so slight that no sensible juror would consider it. *Wilson v. State*, 60 App. 1, 129 S. W. 613; *Irving v. State*, 70 App. 222, 156 S. W. 641. But if the trial court has a reasonable doubt as to the necessity of a charge on manslaughter, he should resolve such doubt in favor of accused and charge thereon. *Stewart v. State*, 71 App. 237, 158 S. W. 996; *Christian v. State*, 71 App. 566, 161 S. W. 101. If an issue is raised it is the court's duty to instruct thereon, and if all the testimony suggests that manslaughter is in the case a charge thereon is required, though accused testifies that he killed in self-defense or accidentally. *Green v. State*, 58 App. 428, 126 S. W. 860. It is not error to give a charge defining manslaughter, even though the question of manslaughter is not involved under the testimony. *Godwin v. State*, 39 App. 404, 46 S. W. 226.

It is not necessary to charge on voluntary manslaughter, where the evidence shows a voluntary homicide without adequate cause. *Boyet v. State*, 2 App. 93; *Hill v. State*, 11 App. 456; *Lum v. State*, 11 App. 483; *Anderson v. State*, 15 App. 447; *Blackwell v. State*, 29 App. 194, 15 S. W. 597; *Ford v. State*, 40 App. 280, 50 S. W. 350; *Hatcher v. State*, 43 App. 237, 65 S. W. 97; *Thomas v. State*, 49 App. 633, 95 S. W. 1069; *Alexander v. State*, 63 App. 102, 138 S. W. 721; *Garrett v. State* (Cr. App.) 155 S. W. 251; *Burton v. State* (Cr. App.) 178 S. W. 334. But where

an overt act, in connection with other circumstances, is sufficient to excite in the mind of a person of ordinary temper sudden passion, rendering him incapable of cool reflection, adequate cause is produced sufficient to raise the issue of manslaughter, so as to require a charge thereon. *Roquemore v. State*, 59 App. 568, 129 S. W. 1120.

Where, under the evidence, accused is guilty of murder, or of no offense, a charge on manslaughter is unnecessary. *Neyland v. State*, 13 App. 536; *Coffey v. State*, 13 App. 580; *Esher v. State*, 13 App. 607; *Flournoy v. State* (Cr. App.) 42 S. W. 984; *Little v. State*, 39 App. 654, 47 S. W. 984; *Darlington v. State*, 40 App. 333, 50 S. W. 375; *Hedrick v. State*, 40 App. 532, 51 S. W. 252; *Cannon v. State*, 41 App. 467, 56 S. W. 351; *Hays v. State* (Cr. App.) 57 S. W. 835; *Randell v. State* (Cr. App.) 64 S. W. 255. Where the evidence shows that the offense is either murder in the first degree or a killing in self-defense, an instruction on manslaughter is not required. *Henning v. State*, 24 App. 315, 6 S. W. 137; *Reddick v. State* (Cr. App.) 47 S. W. 993; *Solomon v. State* (Cr. App.) 65 S. W. 915; *Greer v. State* (Cr. App.) 65 S. W. 1075; *Flynn v. State*, 43 App. 407, 66 S. W. 551; *Davis v. State*, 47 App. 445, 83 S. W. 1112; *Lentz v. State*, 48 App. 2, 85 S. W. 1068; *Powdrill v. State* (Cr. App.) 155 S. W. 231. And see *Spangler v. State*, 42 App. 233, 61 S. W. 314; *Jennings v. State*, 60 App. 421, 132 S. W. 473. Where the evidence shows murder unless the homicide was justifiable, an instruction on manslaughter is unnecessary. *Myers v. State*, 33 Tex. 525; *Evans v. State*, 13 App. 225; *Green v. State*, 27 App. 244, 11 S. W. 114; *Self v. State*, 28 App. 398, 13 S. W. 602; *Angus v. State*, 29 App. 52, 14 S. W. 443; *Maxwell v. State*, 31 App. 119, 19 S. W. 914; *Franklin v. State*, 34 App. 625, 31 S. W. 643; *McGrath v. State*, 35 App. 413, 34 S. W. 127, 941.

Where the evidence in defendant's trial for the murder of his son showed that the homicide was due to express malice and was not committed as the result of sudden passion, a charge on manslaughter is not called for. *Powdrill v. State* (Cr. App.) 155 S. W. 231. A charge on manslaughter on the theory of assault and battery by deceased, causing pain or bloodshed, is erroneous, where there was no evidence that deceased struck plaintiff or caused him any pain or bloodshed. *Blocker v. State*, 61 App. 413, 135 S. W. 130. Where, in a prosecution for homicide, the evidence conclusively showed that defendant waylaid deceased as the result of a long-standing grudge, it is not error to refuse to submit the issue of manslaughter to the jury. *Canon v. State*, 59 App. 398, 128 S. W. 141.

Defendant having married deceased's youngest daughter against his will, deceased threatened to take defendant's life and to separate him from his wife. Deceased carried a gun wherever he went, and, having come to town fully armed where defendant was at work, defendant, on being informed that deceased had come to kill him, left his work, secured a gun, and shot deceased, who was coming towards him with a gun in his hands. Held, that such facts did not call for a charge on manslaughter. *Jennings v. State*, 60 App. 421, 132 S. W. 473.

Where accused, shooting decedent and a third person at the same time, testified on cross-examination that he could not see what the third person was doing at the time, and there was no evidence of any act done by the third person, a charge on provocation, reducing the homicide to manslaughter, is not objectionable for omitting references to acts of the third person. *Alexander v. State*, 63 App. 102, 138 S. W. 721.

Where there was no evidence of antecedent menaces, quarrels, or threats or anything else tending to reduce the shooting to manslaughter, the denial of an instruction submitting that issue was proper. *Beckham v. State* (Cr. App.) 176 S. W. 564.

In every case where it becomes a question whether or not there was an intention to kill, suggested by the character of the weapon not being deadly the court should submit the issue of manslaughter. *Johnson v. State*, 42 App. 377, 60 S. W. 48; *Danforth v. State*, 44 App. 105, 69 S. W. 159.

In view of the statute making an assault causing pain "adequate cause," the court in a case where defendant's testimony shows such adequate cause should instruct that an assault causing pain would in law be adequate cause, and that, if this cause produced such a degree of anger, rage, or resentment as to render the mind incapable of cool reflection, the offense would be of no higher grade than manslaughter, and it is reversible error not to do so. *Rodriguez v. State*, 70 App. 77, 155 S. W. 530.

Where accused and his sister went at night, armed, to the home of the decedent, with the intent to take by force or stealth a daughter of the sister, who had eloped with and married a son of decedent, and during the difficulty accused shot decedent, and accused insisted that the killing was accidental, the issue of manslaughter is not raised, but the question was whether accused was guilty of murder in either degree, or of negligent or accidental homicide. *Chant v. State* (Cr. App.) 166 S. W. 513.

In the following cases the evidence was held to raise the issue of manslaughter, so as to require a charge thereon or make such a charge proper. *Johnson v. State*, 22 App. 206, 2 S. W. 609; *Ross v. State*, 23 App. 689, 5 S. W. 184; *Bonner v. State*, 29 App. 223, 15 S. W. 821; *Carter v. State*, 30 App. 551, 17 S. W. 1102, 28 Am. St. Rep. 944; *Brande v. State* (Cr. App.) 45 S. W. 17; *Guerrero v. State*, 39 App. 662, 47 S. W. 655; *Reddick v. State* (Cr. App.) 47 S. W. 993; *Franklin v. State* (Cr. App.) 48 S. W. 178; *Birdwell v. State* (Cr. App.) 48 S. W. 583; *Alexander v. State*, 40 App. 395, 49 S. W. 229, 50 S. W. 716; *Williams v. State*, 40 App. 565, 51 S. W. 224; *Taylor v. State*, 41 App. 148, 51 S. W. 1106; *Lynch v. State*, 41 App. 510, 57 S. W. 1130; *Folks v. State* (Cr. App.) 58 S. W. 98; *Schauer v. State* (Cr. App.) 60 S. W. 249; *Runnels v. State*, 42 App. 555, 61 S. W. 479; *Norris v. State*, 42 App. 559, 61 S. W. 493; *Mooney v. State* (Cr. App.) 65 S. W. 926; *Hooper v. State*, 44 App. 125, 69 S. W. 149, 100 Am. St. Rep. 845; *Beckham v. State* (Cr. App.) 69 S. W. 534; *Aldredge v. State* (Cr. App.) 72 S. W. 843; *Armstrong v. State*, 41 App. 413, 88 S. W. 215; *Gardner v. State*, 44 App. 572, 73 S. W. 13; *Pollard v. State*, 45 App. 121, 73 S. W. 953; *Cole v. State*, 45 App. 225, 75 S. W. 527; *McComas v. State* (Cr. App.) 75 S. W. 533; *Vann v. State*, 45 App. 434, 77 S. W. 813, 108 Am.

St. Rep. 961; Nicks v. State, 46 App. 241, 79 S. W. 35; Riley v. State (Cr. App.) 81 S. W. 711; Goodman v. State, 47 App. 388, 83 S. W. 196; Harrison v. State, 47 App. 393, 83 S. W. 699; Gray v. State, 47 App. 375, 83 S. W. 705; Hjeronymous v. State, 47 App. 366, 83 S. W. 708; Melton v. State, 47 App. 451, 83 S. W. 822; Venters v. State, 47 App. 280, 83 S. W. 832; Thomas v. State, 48 App. 67, 85 S. W. 1154; Stacy v. State, 48 App. 95, 86 S. W. 327; Swain v. State, 48 App. 98, 86 S. W. 335; Whitten v. State, 48 App. 140, 86 S. W. 1134; Lundy v. State, 48 App. 217, 87 S. W. 352; Martinez v. State, 48 App. 532, 89 S. W. 642; Lara v. State, 48 App. 568, 89 S. W. 840; Harris v. State, 48 App. 627, 89 S. W. 1064; Lewis v. State, 48 App. 614, 89 S. W. 1073; Arnwine v. State, 49 App. 5, 90 S. W. 39, 41; Keith v. State, 50 App. 63, 94 S. W. 1044; Fuller v. State (Cr. App.) 95 S. W. 1029; Newcomb v. State, 49 App. 550, 95 S. W. 1048; Smith v. State, 57 App. 585, 124 S. W. 679; Roquemore v. State, 59 App. 568, 129 S. W. 1120; Anderson v. State, 60 App. 314, 131 S. W. 1124; Jackson v. State, 63 App. 351, 139 S. W. 1156; Blackshear v. State (Cr. App.) 154 S. W. 564.

In the following cases the evidence was held not to raise the issue of manslaughter so as to require a charge thereon. McDade v. State, 27 App. 641, 11 S. W. 672, 11 Am. St. Rep. 216; Floyd v. State, 29 App. 349, 16 S. W. 188; Jackson v. State, 30 App. 664, 18 S. W. 643; Mealer v. State, 32 App. 102, 22 S. W. 142; Farris v. State (Cr. App.) 33 S. W. 969; Mitchell v. State, 38 App. 170, 41 S. W. 816; Navarro v. State (Cr. App.) 43 S. W. 105; Dancy v. State, 46 S. W. 247; Meyers v. State, 39 App. 500, 46 S. W. 817; Riddles v. State (Cr. App.) 46 S. W. 1058; Fuller v. State (Cr. App.) 48 S. W. 183; Lee v. State, 44 App. 460, 72 S. W. 195; Pollard v. State, 45 App. 121, 73 S. W. 953; Brown v. State (Cr. App.) 78 S. W. 507; Smith v. State, 45 App. 552, 78 S. W. 694; Chism v. State (Cr. App.) 78 S. W. 949; Hjeronymus v. State, 46 App. 157, 79 S. W. 313; Dean v. State, 47 App. 243, 83 S. W. 816; Charba v. State, 48 App. 316, 87 S. W. 829; Ricks v. State, 48 App. 264, 87 S. W. 1036; Lucas v. State, 49 App. 135, 90 S. W. 880.

57. — **Accidental shooting.**—In a prosecution for assault with intent to kill, where accused contended that the prosecuting witnesses attacked him in pursuance of a murderous conspiracy, and the prosecuting witnesses claimed that accused wantonly attacked them, a charge submitting the question of accidental shooting is erroneous, not being supported by the evidence. Black v. State (Cr. App.) 145 S. W. 944. See, also, Powell v. State (Cr. App.) 70 S. W. 218.

58. — **Negligent homicide.**—Where the testimony puts in issue the question of negligent homicide the court should charge thereon. Joy v. State, 57 App. 93, 123 S. W. 584. And see McConnell v. State, 22 App. 354, 3 S. W. 699, 58 Am. Rep. 647; Morton v. State (Cr. App.) 71 S. W. 281. But it is not error not to so charge, where the evidence does not suggest that degree. Blalock v. State, 40 App. 154, 49 S. W. 100; Alvarez v. State (Cr. App.) 58 S. W. 1013; Williams v. State, 45 App. 218, 75 S. W. 859; Friday v. State (Cr. App.) 79 S. W. 815; Scott v. State, 47 App. 568, 85 S. W. 1060, 122 Am. St. Rep. 717; Wilson v. State, 60 App. 1, 129 S. W. 613; Blackshear v. State (Cr. App.) 154 S. W. 564. In a prosecution for homicide, where all the evidence introduced by the state excluded everything but a deliberate killing, and where the defendant gave evidence tending to show an accidental killing, a charge defining negligent homicide is error. Hodge v. State, 60 App. 157, 131 S. W. 577.

Evidence that deceased had a knife in her hand, and that in the scuffle between her and defendant over a purse, which she had taken from him, the knife accidentally fatally cut her, does not raise an issue of negligent homicide, but merely of accidental killing. Davis v. State (Cr. App.) 143 S. W. 1161.

59. — **Assault with intent to kill.**—Where, on a prosecution for assault with intent to murder, there was evidence tending to show a lesser degree of such crime, and defendant entered a plea of guilty, it is the duty of the court to instruct on the lesser degree. Jackson v. State, 48 App. 373, 88 S. W. 239.

Where accused, on a trial for assault with intent to murder, was convicted of aggravated assault and the court properly charged on aggravated assault, instructions on assault with intent to kill were immaterial. Hughes v. State, 62 App. 288, 136 S. W. 1068.

Evidence showing that an assault was committed with a knife, and that the wounds, which were described, were severe, and aimed at vital parts, causing prosecutor to be confined for three weeks, justifies an instruction on assault with intent to murder without further proof as to the kind and character of the knife. Thomas v. State, 44 App. 344, 72 S. W. 178. Where a man stabbed a woman and cut her throat in two places, but her injuries did not necessitate her going to bed, and she lived for five days and was able to do business, and finally died because of the bursting of a blood clot on the brain, an instruction upon the point of assault with intent to kill must be given. Ex parte Pettis, 60 App. 288, 131 S. W. 1081.

Where the killing is perpetrated in the furtherance of a conspiracy to release certain persons from jail an instruction on assault with intent to murder is not justified. Kipper v. State, 45 App. 377, 77 S. W. 611.

In the following cases the evidence was held to make an instruction on assault with intent to murder proper. Loyd v. State, 46 App. 533, 81 S. W. 293; Bruster v. State, 50 App. 147, 95 S. W. 1066.

60. — **Aggravated assault.**—Where the evidence does not justify a conviction for assault with intent to kill, an instruction as to aggravated assault should be given. King v. State (Cr. App.) 28 S. W. 947.

Where the evidence shows that the assault was one with intent to murder a charge on aggravated assault is unnecessary. Barbee v. State, 34 App. 129, 29 S. W. 776.

The fact that one uses greater violence or force than is necessary in repelling an attack does not relieve the court from charging the issue of aggravated as-

sault, when otherwise presented by the evidence. *Palmer v. State*, 47 App. 268, 83 S. W. 202.

If the evidence makes a case either of assault to murder or shows that accused is guilty of no offense, it is not error not to charge on aggravated assault. *Moore v. State*, 31 App. 234, 20 S. W. 563; *Bouldin v. State* (Cr. App.) 74 S. W. 907; *Thomas v. State* (Cr. App.) 154 S. W. 994. Nor where the evidence makes a case of assault with intent to murder, or of self-defense. *Phillips v. State* (Cr. App.) 36 S. W. 86; *Barnes v. State*, 39 App. 184, 45 S. W. 495; *Duval v. State* (Cr. App.) 70 S. W. 543; *Turner v. State* (Cr. App.) 72 S. W. 187; *Wormley v. State* (Cr. App.) 143 S. W. 615; *Thomas v. State* (Cr. App.) 154 S. W. 994. Nor where the evidence makes a clear case of murder, and not of manslaughter. *Harris v. State* (Cr. App.) 47 S. W. 643. Nor where the evidence shows that the killing was at least manslaughter, if not in self-defense. *Estep v. State* (Cr. App.) 70 S. W. 966.

Where accused killed deceased with a knife, and there was no evidence that it was not a deadly weapon, an instruction on aggravated assault is not required. *Martinez v. State* (Cr. App.) 56 S. W. 58. And where the evidence shows that accused cut prosecuting witness' throat with a razor, the charge need not be given. *Ford v. State* (Cr. App.) 56 S. W. 338.

In the following cases it was held that the issue of aggravated assault was presented, requiring a charge thereon. *Moore v. State*, 33 App. 351, 26 S. W. 404; *Smith v. State*, 36 App. 569, 38 S. W. 167; *Honeywell v. State*, 40 App. 199, 49 S. W. 586; *Mooney v. State* (Cr. App.) 65 S. W. 926; *Lee v. State*, 44 App. 460, 72 S. W. 155; *Cubine v. State*, 44 App. 596, 73 S. W. 396; *Newsome v. State* (Cr. App.) 75 S. W. 296; *Evans v. State* (Cr. App.) 76 S. W. 467; *Carlisle v. State* (Cr. App.) 77 S. W. 213; *Spiller v. State* (Cr. App.) 77 S. W. 809; *Loyd v. State*, 46 App. 533, 81 S. W. 293; *Cooper v. State*, 48 App. 36, 85 S. W. 1059; *Pastrana v. State*, 48 App. 224, 87 S. W. 347; *Armstrong v. State* 48 App. 413, 88 S. W. 215; *Jackson v. State*, 48 App. 373, 88 S. W. 229; *Wilson v. State*, 49 App. 50, 90 S. W. 312; *Coleman v. State*, 49 App. 82, 90 S. W. 499; *Lucas v. State*, 49 App. 135, 90 S. W. 880; *Ashley v. State*, 58 App. 420, 126 S. W. 589; *Betts v. State*, 60 App. 631, 133 S. W. 251; *Grant v. State* (Cr. App.) 143 S. W. 929; *Blackshear v. State* (Cr. App.) 154 S. W. 564; *Thomas v. State* (Cr. App.) 154 S. W. 994; *Green v. State* (Cr. App.) 154 S. W. 1003; *Wilson v. State* (Cr. App.) 154 S. W. 1015; *Dawson v. State*, 70 App. 8, 155 S. W. 266; *Bolden v. State* (Cr. App.) 166 S. W. 503.

In the following cases it was held that the issue of aggravated assault was not raised, and that a charge thereon was not necessary. *Reyes v. State*, 48 App. 346, 88 S. W. 245; *Moody v. State* (Cr. App.) 59 S. W. 894; *Duffy v. State* (Cr. App.) 66 S. W. 844; *Manger v. State* (Cr. App.) 69 S. W. 145; *Wilson v. State*, 45 App. 61, 73 S. W. 964; *Morris v. State* (Cr. App.) 76 S. W. 472; *Palmer v. State*, 48 App. 553, 89 S. W. 836; *Windham v. State*, 59 App. 366, 128 S. W. 1130; *Thomas v. State*, 60 App. 84, 131 S. W. 314; *Burr v. State*, 64 App. 495, 142 S. W. 919; *Smith v. State* (Cr. App.) 143 S. W. 643; *Crutchfield v. State* (Cr. App.) 152 S. W. 1053; *Fuller v. State* (Cr. App.) 154 S. W. 1021; *Hooper v. State*, 72 App. 82, 160 S. W. 1187.

61. — Simple assault.—Where, in a prosecution for assault to murder, defendant's testimony would only make him guilty of a simple assault, the court should have affirmatively submitted to the jury the question of simple assault. *King v. State*, 61 App. 190, 134 S. W. 687. See, also, *Calliham v. State* (Cr. App.) 150 S. W. 617. On a trial for assault with intent to murder, where there was evidence that defendant discharged a weapon merely to frighten prosecutor, a charge on simple assault should be given. *Bean v. State* (Cr. App.) 49 S. W. 394; *Pastrana v. State*, 48 App. 224, 87 S. W. 347; *Ivory v. State*, 48 App. 279, 87 S. W. 699. Where the evidence did not raise simple assault, but showed accused to be guilty of an assault with intent to murder, the refusal of a charge on simple assault is proper. *Carter v. State* (Cr. App.) 165 S. W. 200. Where accused, charged with biting off an ear, was convicted on sufficient evidence of aggravated assault, failure to submit the issue of simple assault is not prejudicial error. *Pool v. State*, 59 App. 482, 129 S. W. 1135.

In the following cases the evidence was held to raise the issue of simple assault, requiring an instruction thereon. *Catling v. State* (Cr. App.) 72 S. W. 853; *Reyes v. State*, 48 App. 346, 88 S. W. 245.

In the following cases the evidence was held not to raise the issue of simple assault so as to require an instruction thereon. *Henry v. State* (Cr. App.) 50 S. W. 399; *Henry v. State* (Cr. App.) 54 S. W. 592; *Bedford v. State*, 44 App. 97, 69 S. W. 158; *Caples v. State* (Cr. App.) 155 S. W. 267.

62. — Assault and battery.—Under the statute making assault and battery adequate cause to reduce a homicide from murder to manslaughter, it is not necessary to define "assault and battery" in a charge on manslaughter. *Bearden v. State*, 44 App. 578, 73 S. W. 17.

Under an information charging only assault, the case should not be submitted to the jury as assault and battery. *Shuffield v. State*, 62 App. 556, 138 S. W. 402.

63. — Embezzlement.—Where the employment and all the transactions were continuous, and the proof raised no issue of an embezzlement of less than \$50, it was sufficient to charge the jury that the accused could be convicted of felony if the sum embezzled was in excess of \$50, without also charging that before the jury could convict the proof must show an embezzlement at "one time" of a sum exceeding \$50. *Lawshe v. State*, 57 App. 32, 121 S. W. 865.

Where accused charged with embezzlement appropriated to his own use at least \$115 of the money of prosecutor, the refusal to charge on embezzlement of a sum less than \$50 is not erroneous. *Irby v. State* (Cr. App.) 155 S. W. 543.

64. — Burglary or theft.—Though defendant, in a prosecution for receiving stolen property, testified to receiving property on his prior trial for burglary, where-in he was acquitted, and his testimony in the burglary case with other evidence

was sufficient to convict, it was reversible error to refuse an instruction in his favor based on the testimony of a witness for the state who testified, as he also did in the burglary case, to facts showing defendant guilty of theft only. *Allen v. State* (Cr. App.) 175 S. W. 700.

65. *Self defense.*—See notes to Pen. Code, art. 1107.

Where the evidence raises the issue of self defense a charge thereon should be given. But the charge should be confined to the issue as made by the evidence and not go beyond it. *Wasson v. State*, 3 App. 474; *Edwards v. State*, 5 App. 593; *Guffee v. State*, 8 App. 187; *Foster v. State*, 8 App. 248; *Kemp v. State*, 11 App. 174; *Bennett v. State*, 12 App. 15; *North v. State*, 12 App. 111; *Luera v. State*, 12 App. 257; *Pogue v. State*, 12 App. 283; *King v. State*, 13 App. 277; *Jackson v. State*, 15 App. 84; *Sterling v. State*, 15 App. 249; *Short v. State*, 15 App. 370; *Bell v. State*, 17 App. 538; *Ashworth v. State*, 19 App. 182; *Pierce v. State*, 21 App. 540, 1 S. W. 463; *Wheelis v. State*, 23 App. 238, 5 S. W. 221; *Johnson v. State*, 26 App. 631, 10 S. W. 235; *Johnson v. State*, 27 App. 163, 11 S. W. 106; *Brazzil v. State*, 28 App. 584, 13 S. W. 1006; *Reagan v. State* (Cr. App.) 13 S. W. 1009; *Gonzalez v. State*, 30 App. 203, 16 S. W. 978; *Lee v. State*, 21 App. 241, 17 S. W. 425; *Thuston v. State*, 21 App. 245, 17 S. W. 474; *Carter v. State*, 30 App. 551, 17 S. W. 1102, 28 Am. St. Rep. 944; *Woodring v. State*, 33 App. 26, 24 S. W. 293; *Mitchell v. State*, 38 App. 170, 41 S. W. 816; *Hutchinson v. State* (Cr. App.) 42 S. W. 992; *Smith v. State*, 57 App. 585, 124 S. W. 679; *Barnes v. State*, 57 App. 449, 125 S. W. 39; *McMillan v. State*, 58 App. 525, 126 S. W. 875; *Ballard v. State*, 62 App. 435, 138 S. W. 120; *Cook v. State*, 71 App. 532, 160 S. W. 465. Where, however, the evidence does not raise the issue the charge should not be given. *Wallace v. State*, 20 App. 360; *Smith v. State*, 22 App. 316, 3 S. W. 684; *Cook v. State*, 22 App. 511, 3 S. W. 749; *Wright v. State*, 40 App. 447, 50 S. W. 940; *Castlin v. State* (Cr. App.) 57 S. W. 827; *Hays v. State* (Cr. App.) 57 S. W. 835; *Howard v. State* (Cr. App.) 58 S. W. 77; *Furlough v. State* (Cr. App.) 65 S. W. 1069; *Burton v. State* (Cr. App.) 148 S. W. 805; *Rembert v. State* (Cr. App.) 148 S. W. 1097; *Cloud v. State* (Cr. App.) 153 S. W. 892; *Irving v. State*, 70 App. 222, 156 S. W. 641; *Coffman v. State* (Cr. App.) 165 S. W. 939; *Ricen v. State*, 63 App. 89, 138 S. W. 403. Nor where the issue is raised so slightly as not to justify the jury to rest a verdict thereon. *Burton v. State* (Cr. App.) 148 S. W. 805. And where the evidence is of such a nature as to preclude the idea that accused acted in self-defense the charge on self-defense should not be given. On this proposition, see the following cases. *Escajeda v. State* (Cr. App.) 21 S. W. 361; *Childs v. State* (Cr. App.) 22 S. W. 1039; *Nairn v. State* (Cr. App.) 45 S. W. 703; *Godwin v. State*, 39 App. 404, 46 S. W. 226; *Burks v. State*, 40 App. 167, 49 S. W. 389; *Courtney v. State* (Cr. App.) 57 S. W. 654; *Garnett v. State* (Cr. App.) 60 S. W. 765; *Monroe v. State*, 47 App. 59, 81 S. W. 726; *Sanders v. State* (Cr. App.) 83 S. W. 712; *Lentz v. State*, 48 App. 2, 85 S. W. 1063; *Garza v. State*, 48 App. 382, 88 S. W. 231; *Spencer v. State*, 48 App. 580, 90 S. W. 638; *Maroney v. State* (Cr. App.) 95 S. W. 108; *Hill v. State* (Cr. App.) 168 S. W. 864. Nor need the charge be given where the homicide was committed in the perpetration of some other offense, such as burglary, etc. *Hedrick v. State*, 40 App. 532, 51 S. W. 252. But if the trial court has a reasonable doubt as to the necessity of a charge on self defense, he should resolve such doubt in favor of accused and charge thereon. *Christian v. State*, 71 App. 566, 161 S. W. 101.

Whenever the court by his charge proposes to deprive a defendant of his right of self-defense he must be enabled to lay his hand on the facts which justify him in doing so, and unless he can do so he should not give a charge of this character. *McCandless v. State*, 42 App. 58, 57 S. W. 675.

A charge fully submitting self-defense under the evidence is not erroneous, although the law could have been more pertinently applied to the evidence, where no amplified charge was requested. *Weich v. State* (Cr. App.) 147 S. W. 572.

The charge on self-defense should not be mixed with other matters. *Jones v. State* (Cr. App.) 153 S. W. 310.

Where there were no eyewitnesses to a homicide, and accused did not testify, but the state proved that immediately following the homicide he voluntarily sought the city marshal and made a statement concerning the matter, claiming to have acted in self-defense, accused was entitled to an instruction that there could be no conviction, unless the state disproved such statement. *De Leon v. State* (Cr. App.) 155 S. W. 247.

Accused is entitled to an instruction on self-defense though such defense is supported solely by his own testimony. *Bedford v. State*, 36 App. 477, 38 S. W. 210.

A charge on mutual combat is a limitation on the right of self-defense, and should not be given where there is no evidence authorizing it. *Schauer v. State* (Cr. App.) 60 S. W. 252; *Reese v. State*, 49 App. 242, 91 S. W. 583. When it is given, however, the converse should be given. *Christian v. State*, 46 App. 47, 79 S. W. 562. When the evidence shows that defendant was forced into the fight, and acted in self-defense, it is error to charge mutual combat. *Maines v. State*, 35 App. 109, 31 S. W. 667. A charge that if the parties willingly rushed at each other to fight, and "in pursuance of such agreement" defendant fired the shot, then the law of self-defense does not apply, is erroneous, as tending to impress the jury that the facts stated constituted an agreement to fight, or that the court believed there was such an agreement. *Gardner v. State*, 57 App. 471, 125 S. W. 13. In the following cases the evidence was held to raise the issue of mutual combat so as to require or warrant instructions thereon. *Koller v. State*, 36 App. 496, 38 S. W. 44; *Miller v. State* (Cr. App.) 38 S. W. 791; *Walters v. State* (Cr. App.) 40 S. W. 794; *Burns v. State* (Cr. App.) 150 S. W. 794. In the following cases the evidence was held not to warrant instructions on mutual combat, or to make instructions given inapplicable. *Rosborough v. State*, 21 App. 672, 1 S. W. 459; *Burns v. State*, 58 App. 463, 125 S. W. 901; *Newton v. State*, 58 App. 316, 125 S. W. 908.

An instruction that accused was not deprived of his right of self defense be-

cause he had previously threatened the life of deceased, is erroneous, in the absence of evidence that accused had ever made any such threats. *Lankster v. State*, 41 App. 603, 56 S. W. 65.

Where accused's sole defense was that he neither committed the offense nor attempted to do so, failure to charge on self defense is not error. *Hooper v. State*, 29 App. 614, 16 S. W. 655; *Kidwell v. State*, 35 App. 264, 33 S. W. 348.

That the court, after fully instructing on self-defense, in undertaking to instruct with reference to issues made by the state's evidence, which, if sustained by the proof, would or might deny him the benefit of his plea of self-defense, such as mutual combat, defendant's provoking the difficulty, and deceased's abandonment of the difficulty, instructed requiring these facts to be found true beyond a reasonable doubt, in order to abridge his right of self-defense, does not shift the burden of proof to defendant. *Bordeaux v. State*, 58 App. 61, 124 S. W. 640.

Where accused, on returning from a hunting expedition armed with a gun, met decedent on a railroad right of way and there engaged in an altercation with decedent and shot him, the court did not err in omitting to charge that, when accused saw decedent on the railroad right of way, he had the right under the law to arm himself and go and demand an explanation of decedent's prior threats, etc. *Shaw v. State*, 72 App. 114, 161 S. W. 963.

Where the evidence was that deceased was standing on a sidewalk in a city and defendant approached and fired one shot, the contention of the state being that defendant walked up to deceased and shot him, and that of defendant being that, as he approached, deceased ran his hand in his pocket, it is error to instruct upon the cessation of the right of self-defense. *Kirklain v. State* (Cr. App.) 164 S. W. 1016.

In the following cases the evidence was held, either to raise the issue of self defense, so as to require instructions thereon, or to make instructions thereon proper and applicable thereto. *Lister v. State*, 3 App. 17; *Wasson v. State*, 3 App. 474; *Cartwright v. State*, 16 App. 473, 49 Am. Rep. 826; *Tillery v. State*, 24 App. 251, 5 S. W. 842, 5 Am. St. Rep. 882; *Williams v. State* (Cr. App.) 23 S. W. 793; *Glover v. State*, 33 App. 224, 26 S. W. 204; *Garner v. State*, 34 App. 356, 30 S. W. 732; *Chalk v. State*, 35 App. 116, 32 S. W. 534; *Adams v. State*, 35 App. 285, 33 S. W. 354; *Price v. State*, 36 App. 403, 37 S. W. 743; *Bedford v. State*, 36 App. 477, 38 S. W. 210; *Rucker v. State* (Cr. App.) 40 S. W. 991; *Roller v. State* (Cr. App.) 44 S. W. 496; *Freeman v. State*, 40 App. 545, 46 S. W. 641, 51 S. W. 230; *Bryant v. State* (Cr. App.) 47 S. W. 373; *Hardin v. State*, 40 App. 208, 49 S. W. 607; *Chapman v. State*, 42 App. 135, 57 S. W. 965; *Lynch v. State*, 41 App. 510, 57 S. W. 1130; *Wesley v. State* (Cr. App.) 65 S. W. 904; *Bartay v. State* (Cr. App.) 67 S. W. 416; *Morgan v. State*, 43 App. 543, 67 S. W. 420; *Orta v. State*, 44 App. 393, 71 S. W. 755; *Newsome v. State* (Cr. App.) 75 S. W. 296; *Poole v. State*, 45 App. 348, 76 S. W. 565; *Drake v. State*, 45 App. 273, 77 S. W. 7; *Hjeronymus v. State*, 46 App. 157, 79 S. W. 313; *Beard v. State*, 47 App. 50, 80 S. W. 33, 122 Am. St. Rep. 672; *Arthur v. State*, 46 App. 477, 80 S. W. 1017; *McVey v. State* (Cr. App.) 81 S. W. 740; *Goodman v. State*, 47 App. 388, 83 S. W. 196; *Gray v. State*, 47 App. 375, 83 S. W. 705; *Brittain v. State*, 47 App. 597, 85 S. W. 278; *Cooper v. State*, 48 App. 36, 85 S. W. 1059; *Nelson v. State*, 48 App. 274, 87 S. W. 143; *Carr v. State*, 48 App. 287, 87 S. W. 346; *Simpson v. State*, 48 App. 328, 87 S. W. 826; *Armstrong v. State*, 48 App. 413, 88 S. W. 215; *Roberts v. State*, 48 App. 378, 88 S. W. 221; *Coleman v. State*, 48 App. 343, 88 S. W. 238; *Coleman v. State*, 49 App. 82, 90 S. W. 499; *Fuller v. State* (Cr. App.) 95 S. W. 1039; *Griffin v. State*, 57 App. 280, 122 S. W. 553; *Hardin v. State*, 57 App. 401, 123 S. W. 613; *Smith v. State*, 57 App. 585, 124 S. W. 679; *Newman v. State*, 58 App. 443, 126 S. W. 578, 21 Ann. Cas. 718; *Roquemore v. State*, 59 App. 568, 129 S. W. 1120; *Scott v. State*, 60 App. 318, 131 S. W. 1072; *Blocker v. State*, 61 App. 413, 135 S. W. 130; *Pace v. State*, 61 App. 435, 135 S. W. 379; *Alexander v. State*, 63 App. 102, 138 S. W. 721; *Jackson v. State*, 63 App. 351, 139 S. W. 1156; *Anderson v. State*, 63 App. 525, 140 S. W. 457; *Luttrell v. State* (Cr. App.) 143 S. W. 628; *Jackson v. State* (Cr. App.) 147 S. W. 589; *Lee v. State* (Cr. App.) 148 S. W. 706; *Holmes v. State* (Cr. App.) 150 S. W. 926; *Wilson v. State* (Cr. App.) 154 S. W. 1015; *Rodriguez v. State*, 70 App. 77, 155 S. W. 530; *Wilson v. State*, 70 App. 355, 156 S. W. 1185; *Bonds v. State*, 71 App. 408, 160 S. W. 100; *Cook v. State*, 71 App. 532, 160 S. W. 465; *Belcher v. State*, 71 App. 646, 161 S. W. 459; *Davis v. State*, 73 App. 49, 163 S. W. 442; *Millner v. State* (Cr. App.) 169 S. W. 899; *Edwards v. State* (Cr. App.) 172 S. W. 227.

In the following cases charges on self-defense were held either not called for by the evidence, or inapplicable to the issues as made by the evidence. *Lynch v. State*, 24 App. 350, 6 S. W. 190, 5 Am. St. Rep. 888; *Alexander v. State*, 25 App. 260, 7 S. W. 867, 8 Am. St. Rep. 438; *Bean v. State*, 25 App. 346, 8 S. W. 278; *Boyd v. State*, 28 App. 137, 12 S. W. 737; *Brazzil v. State*, 28 App. 584, 13 S. W. 1006; *Cline v. State* (Cr. App.) 28 S. W. 684; *Ruttidge v. State* (Cr. App.) 33 S. W. 347; *Adams v. State*, 35 App. 285, 33 S. W. 354; *Graham v. State* (Cr. App.) 33 S. W. 537; *Myers v. State* (Cr. App.) 33 S. W. 865; *Castro v. State* (Cr. App.) 40 S. W. 985; *Mitchell v. State*, 38 App. 170, 41 S. W. 816; *Hutchinson v. State* (Cr. App.) 42 S. W. 992; *Glaze v. State* (Cr. App.) 45 S. W. 903; *McGlothlin v. State* (Cr. App.) 53 S. W. 869; *Manis v. State*, 41 App. 614, 53 S. W. 81; *Hall v. State*, 43 App. 257, 64 S. W. 248; *Danforth v. State*, 44 App. 105, 69 S. W. 159; *Bearden v. State*, 44 App. 578, 73 S. W. 17; *Willis v. State* (Cr. App.) 74 S. W. 543; *Lewis v. State* (Cr. App.) 75 S. W. 788; *Garner v. State*, 45 App. 308, 77 S. W. 797; *Nix v. State*, 45 App. 504, 78 S. W. 227; *Dent v. State*, 46 App. 166, 79 S. W. 525; *Keith v. State*, 50 App. 63, 94 S. W. 1044; *Long v. State*, 59 App. 103, 127 S. W. 551, Ann. Cas. 1912A, 1244; *Johnson v. State*, 59 App. 475, 128 S. W. 1113; *Harrelson v. State*, 60 App. 534, 132 S. W. 783; *Ballard v. State*, 62 App. 435, 138 S. W. 120; *Zunago v. State*, 63 App. 58, 138 S. W. 713, Ann. Cas. 1913D, 665; *Smith v. State* (Cr. App.) 148 S. W. 722; *Edwards v. State* (Cr. App.) 151 S. W. 294; *Carey v. State* (Cr. App.) 167 S. W. 366; *Crossett v. State* (Cr. App.) 168 S. W. 548; *Bankston v. State* (Cr. App.) 175 S. W. 1068.

66. — **Provoking difficulty.**—Where the evidence calls for it, the rules relating to the provoking of the contest by the defendant should be fully and clearly explained in the charge in so far as they may be applicable to the evidence. See the following: *Gilleland v. State*, 44 Tex. 356; *Reed v. State*, 11 App. 509, 40 Am. Rep. 795; *Green v. State*, 12 App. 445; *King v. State*, 13 App. 277; *Cartwright v. State*, 14 App. 486; *Smith v. State*, 15 App. 338; *Logan v. State*, 17 App. 50; *Jones v. State*, Id. 602; *Arto v. State*, 19 App. 126; *Lilly v. State*, 20 App. 1; *Thuston v. State*, 21 App. 245, 17 S. W. 474; *Roach v. State*, 21 App. 249, 17 S. W. 464; *White v. State*, 23 App. 154, 3 S. W. 710. Where the evidence shows, or tends to show, a case of perfect self-defense, unattended by any circumstances which would indicate that accused provoked the difficulty, accused is entitled to a charge on self defense containing no restrictions as to the law on provoking the difficulty. *Cline v. State* (Cr. App.) 28 S. W. 681; *Bow v. State*, 34 App. 481, 31 S. W. 170; *Williford v. State*, 38 App. 393, 42 S. W. 972; *Vance v. State*, 45 App. 434, 77 S. W. 813; *Sprinkle v. State*, 49 App. 224, 91 S. W. 787; *Leito v. State*, 49 App. 309, 92 S. W. 418; *Culp v. State*, 58 App. 74, 124 S. W. 946; *McMillan v. State*, 58 App. 525, 126 S. W. 875; *Irving v. State* (Cr. App.) 150 S. W. 611; *Shelton v. State* (Cr. App.) 150 S. W. 940; *Robbins v. State*, 70 App. 52, 155 S. W. 936; *Finch v. State*, 71 App. 325, 158 S. W. 510; *Strickland v. State*, 71 App. 582, 161 S. W. 110. When the evidence is such as is calculated to raise a question as to the character of the intent with which the difficulty was provoked by the accused, it becomes the duty of the trial court to instruct the jury fully as to the distinction between perfect and imperfect self-defense. *Meuly v. State*, 26 App. 274, 9 S. W. 563, 8 Am. St. Rep. 477. The court is only authorized to charge on provoking the difficulty, where the evidence shows that accused before or at the time of the difficulty did some act or used some language with the intent and calculated to provoke a difficulty, and that he was assaulted by decedent, and that he then killed decedent. *McMahon v. State*, 46 App. 540, 81 S. W. 206; *Renow v. State*, 49 App. 281, 92 S. W. 801.

Where a charge on the law of provoking the difficulty is given, and is justified by the evidence, accused is entitled to the converse of the charge, if his evidence shows or tends to show that he did not provoke the difficulty. Where the court charged on the issue of provoking the difficulty as a limitation upon self-defense, but accused's evidence showed that decedent was the aggressor, the court should also have charged that the fact that decedent provoked the difficulty and followed it up would not be a limitation upon the right of self-defense. *Ware v. State* (Cr. App.) 152 S. W. 1074; *Ponder v. State* (Cr. App.) 155 S. W. 244.

Where the evidence was that accused and deceased agreed to meet unarmed, a charge that accused had the right to bear arms should not be given. Where the charge on self-defense was not limited, a charge on the right of accused to take arms with him to the place of the affray is unnecessary. *Finch v. State*, 71 App. 325, 158 S. W. 510.

In a homicide case, the court charged that a perfect right of self-defense exists only where accused acted from necessity, and was not himself in the wrong, and where his conduct was not intended or reasonably calculated to produce the necessity which required his action, and that if he was in the wrong, or was violating the law, and because of his own wrong, and with intent to bring on the difficulty, he was thereby placed in a position where it became necessary for him to defend himself from attack, the law limits his right of self-defense according to the degree of his own wrong, and if accused sought decedent, armed with a deadly weapon, with intent to kill him or inflict serious bodily harm upon him, and by acts done or words used with intent to provoke a difficulty with decedent, and reasonably calculated to provoke decedent to attack him, and decedent did attack him or made a demonstration reasonably indicating to accused, viewed from his point of view, that he was in danger of death or serious bodily harm, accused could not justify the killing on the ground of self-defense, and, if he killed decedent under such circumstances, he would be guilty of first or second degree murder. Held, that the charge did not cast the burden upon accused of proving that he did not intend to provoke the difficulty. *Keeton v. State*, 59 App. 316, 128 S. W. 404.

In the following cases it was held that the evidence raised the issue of provoking the difficulty so as to require or justify a charge thereon, or that the charges given were applicable to the evidence. *Meuly v. State*, 26 App. 274, 9 S. W. 563, 8 Am. St. Rep. 477; *Williams v. State*, 30 App. 429, 17 S. W. 1071; *Maxwell v. State*, 31 App. 119, 19 S. W. 914; *Carter v. State*, 37 App. 403, 35 S. W. 378; *Longacre v. State* (Cr. App.) 41 S. W. 629; *Godwin v. State*, 38 App. 466, 43 S. W. 336; *Chism v. State* (Cr. App.) 78 S. W. 949; *Bateson v. State*, 46 App. 34, 80 S. W. 88; *Sanders v. State* (Cr. App.) 83 S. W. 712; *Tardy v. State*, 47 App. 444, 33 S. W. 1128; *Stacy v. State*, 48 App. 95, 86 S. W. 327; *Best v. State*, 58 App. 327, 125 S. W. 909; *Sorrell v. State* (Cr. App.) 169 S. W. 299.

In the following cases charges on provoking the difficulty were held, either not called for by the evidence, or inapplicable to the evidence. *Cheek v. State*, 4 App. 444; *Bonner v. State*, 29 App. 223, 15 S. W. 821; *Morgan v. State*, 34 App. 222, 29 S. W. 1092; *Walters v. State*, 37 App. 388, 35 S. W. 652; *Winters v. State*, 37 App. 582, 40 S. W. 303; *Winters v. State* (Cr. App.) 51 S. W. 1110; *Wrage v. State*, 41 App. 369, 54 S. W. 602; *Francis v. State* (Cr. App.) 55 S. W. 488; *McCandless v. State*, 42 App. 58, 57 S. W. 672; *Grayson v. State* (Cr. App.) 57 S. W. 808; *Borden v. State*, 42 App. 648, 62 S. W. 1064; *Cook v. State*, 43 App. 182, 63 S. W. 872, 96 Am. St. Rep. 854; *Munden v. State* (Cr. App.) 64 S. W. 239; *Poer v. State* (Cr. App.) 67 S. W. 500; *Williams v. State*, 44 App. 115, 69 S. W. 415; *Teel v. State* (Cr. App.) 69 S. W. 531; *Pollard v. State*, 45 App. 121, 73 S. W. 953; *Drake v. State*, 45 App. 273, 77 S. W. 7; *Dent v. State*, 46 App. 166, 79 S. W. 525; *Beard v. State*, 47 App. 50, 81 S. W. 33, 122 Am. St. Rep. 672; *Wilson v. State*, 46 App. 523, 81 S. W. 34; *Goodman v. State*, 47 App. 388, 83 S. W. 196; *Carr v. State*, 48 App. 287, 87 S. W. 346;

Craiger v. State, 48 App. 500, 88 S. W. 208; Roberts v. State, 48 App. 378, 88 S. W. 221; Crow v. State, 48 App. 419, 88 S. W. 814; Lucas v. State, 49 App. 135, 90 S. W. 880; Reese v. State, 49 App. 242, 91 S. W. 583; Sprinkle v. State, 49 App. 224, 91 S. W. 787; Renow v. State, 49 App. 281, 92 S. W. 801; Edwards v. State, 60 App. 323, 131 S. W. 1078; Thomas v. State, 71 App. 387, 160 S. W. 71; Humphrey v. State, 73 App. 433, 165 S. W. 589.

67. — **Threats.**—Where the evidence raises the question of threats by decedent against accused a charge on threats should be given. *Gaines v. State* (Cr. App.) 53 S. W. 623; *Herrington v. State* (Cr. App.) 63 S. W. 562; *Fielding v. State*, 48 App. 334, 87 S. W. 1044; *Lara v. State*, 48 App. 568, 89 S. W. 840; *Thomson v. State*, 49 App. 384, 93 S. W. 111; *Carden v. State*, 59 App. 501, 129 S. W. 362; *Reinhardt v. State*, 60 App. 662, 133 S. W. 265; *Jackson v. State*, 63 App. 351, 139 S. W. 1156; *Lyons v. State*, 71 App. 189, 159 S. W. 1070; *Masters v. State*, 71 App. 608, 160 S. W. 693; *Rutherford v. State*, 73 App. 132, 164 S. W. 383. And the charge should be given affirmatively, and favorably to accused, rather than in the negative form. *Gaines v. State* (Cr. App.) 53 S. W. 623; *Watson v. State*, 50 App. 171, 95 S. W. 115; *Pratt v. State*, 50 App. 227, 96 S. W. 8; *Mitchell v. State*, 50 App. 180, 96 S. W. 43. But where there is no evidence of such threats the charge should not be given. *Chalk v. State*, 35 App. 116, 32 S. W. 534; *Norris v. State*, 42 App. 559, 61 S. W. 493; *Leito v. State*, 49 App. 309, 92 S. W. 418; *Eads v. State* (Cr. App.) 143 S. W. 1163; *Jackson v. State*, 71 App. 297, 158 S. W. 813; *Perales v. State*, 72 App. 176, 161 S. W. 482; *Coulter v. State*, 72 App. 602, 162 S. W. 885. And where there was no evidence of threats by decedent which were communicated to accused, an instruction regarding uncommunicated threats is uncalled for. *Salmon v. State* (Cr. App.) 154 S. W. 1023. An instruction on uncommunicated threats is not called for, when the evidence shows that all the threats communicated to accused were actually made. *Salmon v. State* (Cr. App.) 154 S. W. 1023. Evidence of uncommunicated threats, introduced only to assist the jury on the issue as to who commenced the difficulty, does not require an instruction on self defense. *Asken v. State*, 47 App. 362, 83 S. W. 706. Where the evidence shows that threats by decedent toward accused were communicated to accused, he was entitled to a charge on threats from his viewpoint, whether they were actually made or not. *Andrus v. State*, 73 App. 329, 165 S. W. 189. An instruction on accused's right to seek decedent respecting threats made by decedent was improper, where the evidence showed that decedent sought accused. *Duke v. State*, 61 App. 19, 133 S. W. 432. A charge that the language used by decedent, in connection with his acts, should be considered on the question of self defense, is unnecessary, where the only evidence of language used was that decedent said some time prior to any hostile act or demonstration that he could whip defendant. *Driver v. State* (Cr. App.) 65 S. W. 528. Where there was evidence of threats by decedent, a charge, in the terms of the statute, on the subject of threats, and in addition requiring the jury to view the conduct of decedent "from defendant's stand point," sufficiently required the jury to consider the threats in view of all the facts and circumstances in evidence from defendant's standpoint. *Newman v. State* (Cr. App.) 70 S. W. 951. Where there was no testimony of any words spoken by decedent with reference to which accused could have acted, a charge that one in a homicide case may prove threats of decedent, but that the same cannot be considered as a justification unless decedent by some act manifested an immediate intention to execute the threats, and that, if accused on account of the threats and conduct of decedent apprehended that decedent might make an assault on him, accused could defend himself and procure a gun for that purpose and place it where he could get it and use it in case of an assault on him by decedent, etc., sufficiently submitted the issue of threats. *Pratt v. State*, 59 App. 635, 129 S. W. 364. In a prosecution for homicide, an instruction on the law of threats is not objectionable for failure to include serious bodily injury, as well as the taking of defendant's life, where the only threats testified to were directed exclusively to killing defendant by "shooting it out with him." *Barnes v. State*, 61 App. 37, 133 S. W. 887.

68. — **Character, etc., of deceased.**—Where there is no evidence as to deceased's character and disposition or of accused's knowledge thereof, or of the relative strength of the parties, a charge as to such matters is uncalled for. *Andrews v. State* (Cr. App.) 76 S. W. 918; *Hickey v. State*, 45 App. 297, 76 S. W. 920; *Hickey v. State*, 62 App. 568, 138 S. W. 1051; *Clay v. State* (Cr. App.) 144 S. W. 280; *Jackson v. State*, 71 App. 297, 158 S. W. 813; *Lyons v. State*, 71 App. 189, 159 S. W. 1070; *Ballard v. State*, 71 App. 587, 160 S. W. 716. And see *Alexander v. State*, 63 App. 102, 138 S. W. 721; *Sanchez v. State* (Cr. App.) 149 S. W. 124; *Robbins v. State*, 70 App. 52, 155 S. W. 936. But where there is evidence of deceased's strength or dangerous character, a charge on the relative strength and disposition of the parties is proper. *Bearden v. State*, 46 App. 144, 79 S. W. 37; *Munos v. State*, 58 App. 147, 124 S. W. 941.

69. — **Attack, and danger of injury or bodily harm, or apprehension thereof.**—Where the evidence tends to show that defendant was in apparent danger because of the conduct of decedent, it is the duty of the court to charge that if defendant believed that decedent was about to make an attack on him, he would have the right of self-defense. *Terry v. State*, 45 App. 264, 76 S. W. 928. Where the question is one not of real, but of apparent, danger, the court should instruct on apparent danger. *White v. State*, 23 App. 154, 3 S. W. 710; *Allen v. State*, 24 App. 216, 6 S. W. 187; *Chism v. State* (Cr. App.) 78 S. W. 949; *Duke v. State*, 61 App. 19, 133 S. W. 432; *Carden v. State*, 62 App. 607, 138 S. W. 396; *Holmes v. State* (Cr. App.) 155 S. W. 205; *Andrus v. State*, 73 App. 329, 165 S. W. 189. But where the evidence shows the danger to be actual, not apparent, a charge on apparent danger should not be given. *Bowman v. State* (Cr. App.) 20 S. W. 558; *Cavil v. State* (Cr. App.) 25 S. W. 628; *Stacey v. State* (Cr. App.) 33 S. W. 348;

Tilmyer v. State, 58 App. 562, 126 S. W. 870, 137 Am. St. Rep. 982; Payton v. State, 60 App. 475, 132 S. W. 127; Lee v. State (Cr. App.) 148 S. W. 706.

In charging on self-defense, and in that connection, on threats made by deceased against accused, the criterion of apparent danger is as the situation is viewed from the standpoint of accused, and not as to the belief of danger by the jury. Adams v. State, 47 App. 347, 84 S. W. 231; Brownlee v. State, 48 App. 408, 87 S. W. 1153.

Right of accused to carry weapon on belief of trouble with decedent, see Nix v. State, 45 App. 594, 78 S. W. 227.

In the following cases the evidence was held, either to raise the issue of actual or apparent danger, etc., so as to require instructions thereon, or to make the instructions thereon proper and applicable thereto. Humphries v. State, 25 App. 126, 7 S. W. 663; Bean v. State, 25 App. 347, 8 S. W. 278; Giebel v. State, 28 App. 151, 12 S. W. 591; Reed v. State (Cr. App.) 20 S. W. 709; Bush v. State, 40 App. 539, 51 S. W. 238; Bruce v. State, 41 App. 27, 51 S. W. 954; Swanger v. State (Cr. App.) 58 S. W. 72; Curtis v. State (Cr. App.) 59 S. W. 263; Spangler v. State, 42 App. 233, 61 S. W. 314; Grubb v. State, 43 App. 72, 63 S. W. 314; Aiken v. State (Cr. App.) 64 S. W. 57; Teel v. State (Cr. App.) 69 S. W. 531; Jones v. State, 44 App. 405, 71 S. W. 962; Teel v. State (Cr. App.) 73 S. W. 11; Crockett v. State, 45 App. 276, 77 S. W. 4; Tardy v. State, 46 App. 214, 78 S. W. 1076; Bearden v. State, 46 App. 144, 79 S. W. 37; Logan v. State, 46 App. 573, 81 S. W. 721; Hayman v. State, 47 App. 263, 83 S. W. 204; Coleman v. State, 48 App. 343, 88 S. W. 238; Willis v. State, 49 App. 139, 90 S. W. 1100; Thomas v. State, 49 App. 633, 95 S. W. 1069; Pinson v. State, 50 App. 234, 96 S. W. 23; Smith v. State, 57 App. 455, 123 S. W. 698; Munos v. State, 58 App. 147, 124 S. W. 941; Ward v. State, 59 App. 62, 126 S. W. 1145; Hudson v. State, 59 App. 650, 129 S. W. 1125, Ann. Cas. 1912A, 1324; Barnes v. State, 61 App. 37, 133 S. W. 887; Best v. State, 61 App. 551, 135 S. W. 581; Carden v. State, 62 App. 607, 138 S. W. 396; Owens v. State, 63 App. 633, 141 S. W. 530; Giesecke v. State, 64 App. 531, 142 S. W. 1179; Sanchez v. State (Cr. App.) 149 S. W. 124; Fox v. State, 71 App. 318, 158 S. W. 1141; Crossett v. State (Cr. App.) 168 S. W. 548.

In the following cases charges on actual or apparent danger, etc., were held not to be required by the evidence, or to be inapplicable to the evidence. Orman v. State, 22 App. 604, 3 S. W. 468, 58 Am. Rep. 662; Patillo v. State, 22 App. 586, 3 S. W. 766; Orman v. State, 24 App. 495, 6 S. W. 544; Foster v. State, 28 App. 45, 11 S. W. 832; Gonzales v. State, 28 App. 130, 12 S. W. 733; Hudson v. State, 28 App. 323, 13 S. W. 388; Moore v. State, 31 App. 234, 20 S. W. 563; Sutton v. State, 31 App. 297, 20 S. W. 564; Riptoe v. State (Cr. App.) 42 S. W. 381; Renfro v. State, 42 App. 393, 56 S. W. 1013; McCandless v. State, 42 App. 58, 57 S. W. 672; Stell v. State (Cr. App.) 58 S. W. 75; Matthews v. State, 42 App. 31, 58 S. W. 86; Moody v. State (Cr. App.) 59 S. W. 894; Seeley v. State, 43 App. 66, 63 S. W. 309; Anderson v. State, 43 App. 275, 65 S. W. 523; Hampton v. State (Cr. App.) 65 S. W. 526; Allen v. State (Cr. App.) 66 S. W. 671; Crawford v. State (Cr. App.) 70 S. W. 548; Andrews v. State (Cr. App.) 76 S. W. 918; Crenshaw v. State, 48 App. 77, 85 S. W. 1147; Crow v. State, 48 App. 419, 88 S. W. 814; Watsen v. State, 50 App. 171, 95 S. W. 115; Goodwin v. State, 58 App. 496, 126 S. W. 582; Duke v. State, 61 App. 19, 133 S. W. 432; Johnson v. State, 63 App. 50, 138 S. W. 1021; Holmes v. State (Cr. App.) 155 S. W. 205.

70. — **Force used.**—On the question of instructions as to force used as applicable to, or called for by, the evidence, see Spangler v. State, 42 App. 233, 61 S. W. 314; Scott v. State, 46 App. 305, 81 S. W. 950; Thurman v. State (Cr. App.) 86 S. W. 1014; Newcomb v. State, 49 App. 550, 95 S. W. 1048; Munos v. State, 58 App. 147, 124 S. W. 941; Aycock v. State, 61 App. 9, 133 S. W. 683; Mayhew v. State (Cr. App.) 144 S. W. 229, 39 L. R. A. (N. S.) 671; Castro v. State (Cr. App.) 146 S. W. 553; Ward v. State, 70 App. 393, 159 S. W. 272; Lyons v. State, 71 App. 189, 159 S. W. 1070.

71. — **Abandonment of difficulty or use of means to avoid injury.**—Where there is evidence that accused has, in good faith, abandoned the original difficulty, he is entitled to an instruction on the law of abandoning the difficulty. Jackson v. State, 28 App. 108, 12 S. W. 501. A homicide case presents the issue of abandoning the difficulty though deceased abandoned it at the instance of a third person. Chambers v. State (Cr. App.) 86 S. W. 752.

Where the difficulty was shown to be a continuous fight from its inception to its close, a charge on abandonment of the difficulty is called for. Wilson v. State, 46 App. 523, 81 S. W. 34; Coker v. State, 59 App. 241, 128 S. W. 137.

In the following cases charges on abandoning the difficulty were held called for by the evidence, or applicable to the evidence. Burns v. State, 53 App. 463, 125 S. W. 901; Edwards v. State (Cr. App.) 151 S. W. 294; Ware v. State (Cr. App.) 152 S. W. 1074.

In the following cases charges on abandoning the difficulty held unnecessary or improper as not called for by the evidence. Highsmith v. State, 41 App. 32, 50 S. W. 723, 51 S. W. 919; Guerrero v. State, 41 App. 161, 53 S. W. 119; Connell v. State, 45 App. 142, 75 S. W. 512; Crenshaw v. State, 48 App. 77, 85 S. W. 1147; Renow v. State, 49 App. 281, 92 S. W. 801; Duke v. State, 61 App. 19, 133 S. W. 432.

72. — **Retreat.**—Whenever the question of justifiable homicide is raised by the evidence, the court should instruct the jury on the law of retreat, but the doctrine of retreat is not applicable to cases of imperfect right of self-defense. Carter v. State, 30 App. 551, 17 S. W. 1102, 28 Am. St. Rep. 944.

In charging on the right of one whose life is being threatened to kill in self-defense, the jury should be told that the assailed party is not bound to retreat, when the facts make the instruction of importance. Bell v. State, 17 App. 538; May v. State, 23 App. 146, 4 S. W. 591. An instruction that accused is not bound

to retreat to avoid the necessity of killing his assailant should be made applicable to all phases of the law of self defense, and it is improper to restrict it to the law of threats. *Gonzales v. State*, 28 App. 130, 12 S. W. 733.

In the following cases it was held that the evidence was sufficient to require an instruction on retreat, or that the instructions thereon were applicable to the evidence. *Hooper v. State*, 44 App. 125, 69 S. W. 149, 100 Am. St. Rep. 845; *Connell v. State*, 45 App. 142, 75 S. W. 512; *Giesecke v. State*, 64 App. 531, 142 S. W. 1179.

In the following cases it was held that the charges on retreat were not required by the evidence, or were inapplicable to the evidence. *May v. State*, 23 App. 146, 4 S. W. 591; *Moody v. State* (Cr. App.) 59 S. W. 894; *Hughes v. State*, 47 App. 216, 82 S. W. 1037.

73. Defense of another.—See notes to Pen. Code, art. 1107.

Where the evidence shows a killing in defense of another the court should present this phase of the case distinctly in the charge to the jury. *Ashworth v. State*, 19 App. 182; *Monsen v. State* (Cr. App.) 63 S. W. 649; *Trevino v. State*, 72 App. 91, 161 S. W. 108. If the trial court has a reasonable doubt as to the necessity of a charge on defense of another, he should resolve such doubt in favor of accused and charge thereon. *Christian v. State*, 71 App. 566, 161 S. W. 101. Defendant is not entitled to an instruction that, if the person whom he shot, or those with him, made an unlawful attack on defendant's daughter, he should be acquitted, where the evidence is that any such assault was unknown to him, and after he shot. *Singleton v. State* (Cr. App.) 167 S. W. 46. And see further. *Kendall v. State*, 8 App. 569; *Butler v. State*, 33 App. 232, 26 S. W. 201; *Stanton v. State* (Cr. App.) 29 S. W. 476; *Martin v. State*, 42 App. 144, 58 S. W. 112; *Chambers v. State*, 46 App. 61, 79 S. W. 572; *Garza v. State*, 48 App. 382, 88 S. W. 231; *Mayhew v. State* (Cr. App.) 144 S. W. 229, 39 L. R. A. (N. S.) 671; *Williams v. State* (Cr. App.) 148 S. W. 763.

74. Punishment.—The jury should be distinctly instructed as to the punishment which may be imposed by their verdict. And if the charge incorrectly instructs as to the penalty of the offense, it is fundamental error for which the conviction will be set aside, although the error be not excepted to, and although it may be an error inuring to the benefit of the defendant. *Buford v. State*, 44 Tex. 525; *Searcy v. State*, 1 App. 440; *Allen v. State*, 1 App. 514; *Garnet v. State*, Id. 605, 28 Am. Rep. 425; *Robinson v. State*, 2 App. 390; *Hamilton v. State*, Id. 494; *Collins v. State*, 5 App. 38; *Jones v. State*, 7 App. 338; *Allen v. State*, Id. 298; *Veal v. State*, 8 App. 474; *Spears v. State*, Id. 467; *Rodriguez v. State*, Id. 129; *Bouldin v. State*, Id. 624; *Wilson v. State*, 14 App. 524; *Turner v. State*, 17 App. 587; *Howard v. State*, 18 App. 348; *Gardenhire v. State*, Id. 565; *Cohen v. State*, 11 App. 337; *Bostic v. State*, 22 App. 136, 2 S. W. 538; *Wright v. State*, 23 App. 313, 5 S. W. 117; *Myers v. State*, 9 App. 157; *Key v. State*, 12 App. 506; *Williams v. State*, 25 App. 76, 7 S. W. 661; *Jenkins v. State*, 28 App. 86, 12 S. W. 411; *Graham v. State*, 29 App. 31, 13 S. W. 1013; *Farmer v. State* (Cr. App.) 28 S. W. 197; *Hargrove v. State* (Cr. App.) 30 S. W. 801. But see *O'Docherty v. State* (Cr. App.) 57 S. W. 657. Where an alternative penalty is attached to the offense, the jury should be instructed in relation thereto. *Cesure v. State*, 1 App. 19; *Lewis v. State*, 1 App. 323; *Ringo v. State*, 2 App. 291.

That the court in defining the offense charged told the jury what the penalty was and in submitting the issues also instructed them as to the penalty to be assessed, is not erroneous as making the punishment too prominent. *Ulloa v. State*, 73 App. 41, 163 S. W. 732.

Where several offenses are embraced in the same indictment, they must be treated as distinct offenses by the court in instructing the jury upon the penalty attached to each by law. *Maul v. State*, 25 Tex. 166. And see *Stewart v. State* (Cr. App.) 31 S. W. 407.

The court cannot charge with reference to the disposition or working of convicts. *Leverett v. State*, 40 App. 197, 49 S. W. 588.

In a rape trial, it is not error to refuse to instruct that the object of punishment is to suppress crime and reform the offender, and that punishment with another object is unauthorized. *Hutcherson v. State*, 62 App. 1, 136 S. W. 53.

Where accused fails to file his application for a suspended sentence until after trial began, and four jurors had been selected, the court need not submit to the jury the suspended sentence law. *Williamson v. State*, 72 App. 618, 163 S. W. 435. Unless there is evidence that accused is of good character, and has not been before convicted of a felony, a charge on the suspended sentence law is properly refused. *Walker v. State*, 73 App. 99, 164 S. W. 3.

In a misdemeanor case, it is improper for the court to charge the jury that the county attorney has waived a jail sentence. *Love v. State*, 71 App. 259, 158 S. W. 532.

Instructions as to punishment of youthful offenders, see *Washington v. State*, 28 App. 411, 13 S. W. 606; *Duncan v. State*, 29 App. 141, 15 S. W. 407; *Sanchez v. State*, 31 App. 484, 21 S. W. 364; *Rocha v. State*, 38 App. 69, 41 S. W. 611; *Windham v. State* (Cr. App.) 150 S. W. 613.

Instructions as to punishment held proper and correct. *Champ v. State*, 32 App. 87, 22 S. W. 678; *Stewart v. State* (Cr. App.) 31 S. W. 407; *Boggs v. State*, 38 App. 82, 41 S. W. 642; *Ellott v. State*, 58 App. 200, 125 S. W. 568.

Instructions as to punishment held improper and incorrect. *Longenotti v. State*, 22 App. 61, 2 S. W. 620; *Irvin v. State*, 25 App. 588, 8 S. W. 681; *Jenkins v. State*, 28 App. 86, 12 S. W. 411; *Blackwell v. State*, 30 App. 416, 17 S. W. 1061; *Moody v. State*, 30 App. 422, 18 S. W. 94; *Hargrove v. State*, 33 App. 165, 25 S. W. 967; *Prinzel v. State*, 35 App. 274, 33 S. W. 350; *Petteway v. State*, 36 App. 97, 35 S. W. 646.

75. Manner of arriving at verdict.—The court may tell the jury that they should not arrive at their verdict by lot. *Driver v. State*, 37 App. 160, 38 S. W.

1020; *Lankster v. State* (Cr. App.) 72 S. W. 388; *McKelvey v. State* (Cr. App.) 155 S. W. 932.

The court's remark, after finishing his charge to the jury at 5:30 p. m., that he would wait for the verdict but a short time before adjourning court, without anything to show that the jury were thereby influenced to arrive at a verdict within about 15 minutes adverse to defendant, without due consideration, does not alone justify a reversal. *Walderen v. State* (Cr. App.) 174 S. W. 348.

76. Form of verdict.—It is not essential, though proper, that the charge should instruct the jury in the forms of verdicts which may be rendered in the case; but when such an instruction is given it should embrace every verdict which might be rendered in the case. *Williams v. State*, 24 App. 637, 7 S. W. 333; *Crook v. State*, 27 App. 198, 11 S. W. 444. And see *Beard v. State*, 41 App. 173, 53 S. W. 348.

Oral instructions as to form of verdict, see notes to article 773, ante.

76½. Influence of arguments of counsel.—It is error to instruct, that the jury are not to consider any argument of the attorneys regarding the law of the case, as it is the duty of the court, if an attorney presents a fallacious proposition of law, to correct him. *Reeves v. State*, 34 App. 483, 31 S. W. 382. See further, *Roe v. State*, 25 App. 33, 8 S. W. 463; *Simpson v. State*, 45 App. 320, 77 S. W. 819. Where evidence has been improperly admitted showing that accused has been convicted of another offense, and the state's attorney, in his argument, states that accused has been convicted of such offense, it is error to refuse to instruct the jury to disregard such remarks. *Goldstein v. State* (Cr. App.) 35 S. W. 289.

Though, upon the trial of a prosecution for murder, counsel for the defendant stated that the defendant had produced a knife used in the fight in which the killing occurred, and challenged the state to produce the poker which was shown to have been used by the deceased, argument by the state's counsel intimating that the defendant was suppressing evidence in not allowing the testimony of a witness in a former trial to be given to the jury was not germane thereto, and a charge taking the effect of such improper argument from the jury is erroneously refused. *McMillan v. State* (Cr. App.) 143 S. W. 1174.

77. Time for giving instructions.—The instruction of the court to the jury, after they had returned a verdict of guilty of murder in the second degree, to find whether the killing was done in pursuance of a formed design, is a novel practice and not to be commended. *Patterson v. State* (Cr. App.) 60 S. W. 562.

It is not improper for the court to read to the jury his charge with reference to defendant not testifying on his trial for crime, after he had read his instructions, but before the jury had retired. *Mason v. State* (Cr. App.) 81 S. W. 718.

78. Written instructions.—See notes to art. 740, post.

79. Form and language in general.—The preliminary statement constitutes no part of the charge of the court proper. *Wolfforth v. State*, 31 App. 387, 20 S. W. 741.

No general charge applicable to any particular offense can be devised. *Atkinson v. State*, 20 Tex. 522. Substantial accuracy only is required. *Alexander v. State*, 12 Tex. 540; *Ashlock v. State*, 16 App. 13. A proper charge should suppose a state of facts shown to exist, and deduce the legal conclusions applicable to such facts. *O'Connell v. State*, 13 Tex. 343. It should not extend, beyond a plain statement of the law of the case, into philosophic dissertations upon the nature of evidence, the proper process of reasoning upon the facts, or the precautionary considerations to be borne in mind in coming to a proper conclusion. *Brown v. State*, 23 Tex. 195; *Harrison v. State*, 8 App. 183; *Hodde v. State*, id. 383; *Walker v. State*, 13 App. 618, 44 Am. Rep. 716, note; *Sisk v. State*, 9 App. 246. It should not attempt novel expositions of the law, in cases in which the principles have been fully settled. *Hunt v. State*, 7 App. 212. The better practice is to remind the jury in the charge that their findings must be predicated alone upon the evidence adduced on the trial. *Miles v. State*, 14 App. 436. The instructions should be a pertinent application of the law to the facts, and not merely a general definition of law. *Gardner v. State*, 40 App. 19, 22, 48 S. W. 170; *Smith v. State* (Cr. App.) 148 S. W. 699. It is not error to underscore certain words and portions of the charge. *Jackson v. State*, 28 App. 108, 12 S. W. 501. It is not necessary for the court, in charging in a criminal case, to give all the law of the case in a single paragraph. *Pinson v. State* (Cr. App.) 151 S. W. 556. Paragraphs of a charge should be complete, and those relating to the same subject should be so arranged in the charge and connected, that they can be readily understood by the jury as bearing upon the same subject, and to be considered together with reference to such subject. *Tillery v. State*, 24 App. 251, 5 S. W. 842, 5 Am. St. Rep. 882; *Smith v. State*, 19 App. 95; *Nolen v. State*, 8 App. 585; *Blair v. State*, 26 App. 387, 9 S. W. 890; *Bonner v. State*, 29 App. 223, 15 S. W. 821; *Williams v. State*, 30 App. 429, 17 S. W. 1071; *Bayne v. State*, 29 App. 132, 15 S. W. 404; *Wolfforth v. State*, 31 App. 387, 20 S. W. 741. Where in a connected and intelligent manner the issues are submitted in succeeding paragraphs, properly limited, and constituting all together an intelligent and fair submission of the issues, this is sufficient. *Hudson v. State*, 59 App. 650, 129 S. W. 1125, Ann. Cas. 1912A, 1324. The charge in a homicide case cannot and should not all be given in a single paragraph. *Christian v. State*, 71 App. 566, 161 S. W. 101; *Hicks v. State* (Cr. App.) 171 S. W. 755.

The charge should always contain the instruction that if the jury do not believe the defendant guilty, they should acquit him. *Steagald v. State*, 22 App. 464, 3 S. W. 771.

There is no error shown from the fact that the court erased a portion of his charge before he read it to the jury. *Lawrence v. State*, 35 App. 114, 32 S. W. 530.

An instruction should be addressed to the jury as a body, and not to the jurors individually. *Glover v. State* (Cr. App.) 76 S. W. 465.

Where the precise terms of the statute are once used, and thereafter there is a slight departure from the literal words of the statute, the obvious equivalent being

used, no reversible error is committed. *Ward v. State*, 59 App. 62, 126 S. W. 1145.

A charge to the jury that, if they find certain facts to be true, they shall find defendant guilty, "otherwise you will," is erroneous, as it leaves the jury no alternative but to convict. *Sanders v. State*, 17 App. 222. An instruction that if the jury have a reasonable doubt "as to whether the witness," naming him, "killed the said H., you should acquit him," instead of instructing to acquit "defendant," is error. *Giles v. State*, 44 App. 435, 71 S. W. 961.

A charge that the jury ought to consider the circumstances of the case from the standpoint of defendant, etc., is not bad because of the use of the word "ought" instead of must. *Jackson v. State*, 32 App. 192, 22 S. W. 831. An objection to a charge because it nowhere mentions, except in the style of the case, the name of defendant, and does not inform the jury who is meant by defendant, is without merit. *Jasper v. State* (Cr. App.) 61 S. W. 392. A charge which merely instructs the jury to convict defendant if they find him guilty as charged in the indictment is not erroneous. *Pena v. State* (Cr. App.) 63 S. W. 311. The use of the words "per se" in an instruction is not objectionable on the ground that such words are Latin. *Schwartz v. State*, 47 App. 213, 83 S. W. 195, 11 Ann. Cas. 620. Where it was shown that an offense occurred prior to the presentment of the indictment, an instruction using the language "at or about the time charged in the indictment," is not erroneous. *Green v. State* (Cr. App.) 86 S. W. 332. An instruction that evidence of contradictory statements might be considered to aid in determining the weight to be given the testimony of a witness, and his credibility or otherwise, is not bad because of the use of the word "otherwise." *Marek v. State*, 49 App. 428, 94 S. W. 469. Putting the words "on motion of the defendant" in the paragraph of a charge does not make the instruction objectionable in form. *Lott v. State* (Cr. App.) 146 S. W. 544. A contention, that an instruction that, under the hypothesized facts, the jury "may" find accused guilty of manslaughter, is erroneous for using the quoted word instead of "must," was hypercritical. *Wilson v. State*, 71 App. 399, 160 S. W. 83.

Where, on a trial for rape of a female under the age of 15 years, the prosecutrix was referred to by a witness of accused and by accused's counsel as "the little girl," accused could not complain of a charge referring to her as "the little girl." *Wofford v. State*, 60 App. 624, 132 S. W. 929.

It is not essential that the charge submitting the question of murder in the first degree should state in any way accused's defenses, such as self-defense, though it might be best in some cases; it not being possible to charge all of the law in a single paragraph. *Jackson v. State*, 63 App. 351, 139 S. W. 1156.

Where an indictment charges a statutory offense conjunctively, an instruction correctly submits the question in the case in the disjunctive form. *Cabiness v. State* (Cr. App.) 146 S. W. 934.

After the trial judge had been out about an hour preparing his charge, he found on his return that some of the jury had become impatient at the delay, and in explanation thereof stated to the jury that it might seem that he had taken rather a long time to prepare the charge, but that when it was considered that the court's charges were prepared with the view of being criticised by lawyers, and sometimes passed on by the higher courts, and that the court has to examine the special charges, perhaps the time taken was not so long as it might appear. Held, that the remarks were not reversible error in the absence of a showing that the jury had been affected thereby. *Wilson v. State* (Cr. App.) 154 S. W. 571.

On a trial for homicide, the refusal of an instruction that the jury should not consider any fact or circumstance not in evidence is not error where it did not appear that they did consider or discuss any fact or circumstance not admitted in evidence. *Brown v. State* (Cr. App.) 174 S. W. 360.

80. — **Inadvertent errors or omissions.**—The omission from a charge of a word which an intelligent mind will supply, to make the sentence complete, is not cause for a reversal, but the omission from a charge of a word which changes the meaning of the sentence, and which gives to it a meaning highly injurious to accused, is erroneous. *Goolsby v. State*, 59 App. 528, 129 S. W. 624. And see *Hill v. State*, 11 App. 456; *Arrington v. State* (Cr. App.) 20 S. W. 927; *Toler v. State*, 41 App. 659, 56 S. W. 917; *Jackson v. State* (Cr. App.) 80 S. W. 83.

Where the court in its charge speaks of "express malice," intending to say "implied malice," there is material error. *Pickett v. State*, 12 App. 86.

A reference in a charge to defendant as "Mance," instead of "Manch," does not make the charge error. *Callicoatte v. State* (Cr. App.) 22 S. W. 1041. So, also, as to a charge miscalling the name of a co-defendant, not on trial, in its introductory part. *Crutchfield v. State*, 7 App. 65. So, also, as to a charge referring to the name of the owner of stolen property. *Spencer v. State*, 34 App. 65, 29 S. W. 159. So, also, as to a charge misstating the year of the offense. *McCoy v. State*, 7 App. 379. The use of the word "collater," instead of "collateral," held not to vitiate a charge. *Hutcherson v. State* (Cr. App.) 35 S. W. 376. It is hypercritical to object to a charge because of the use of the singular, instead of the plural, in that part thereof dealing with reasonable doubt. *Moncla v. State* (Cr. App.) 70 S. W. 548. It is not fatal error that a charge, in a prosecution for a violation of the local option law, to mix the names of defendant and the person to whom the liquor was sold. *Butler v. State*, 49 App. 234, 91 S. W. 794. An objection to a charge that punishment would be assessed "at" death, instead of "by" death, is hypercritical. *Hill v. State* (Cr. App.) 77 S. W. 808. That a charge to the person assaulted, who was a woman, as "him" for "her," is not ground for complaint. *Magruder v. State*, 47 App. 465, 84 S. W. 587. That a charge, in referring to the amount of the fine, omits the dollar mark, does not make it misleading. *Clement v. State* (Cr. App.) 86 S. W. 1016; *Porter v. State* (Cr. App.) 86 S. W. 1018.

81. **Repetition.**—An instruction should not be given undue prominence by repetition. *Long v. State*, 1 App. 710; *Irvine v. State*, 20 App. 12; *Reid v. State* (Cr. App.) 57 S. W. 662; *Lee v. State*, 44 App. 460, 72 S. W. 195; *Plemons v. State*, 44 App. 555, 72 S. W. 854. The above stated rule applies to matters of defense. Cau-

thern v. State (Cr. App.) 65 S. W. 96; Benson v. State (Cr. App.) 69 S. W. 165; Hancock v. State, 47 App. 3, 83 S. W. 696. And also to charges as reasonable doubt and the degree of proof required. See McGaffey v. State, 4 Tex. 156; Webb v. State, 9 App. 490; King v. State, 9 App. 515; Stewart v. State (Cr. App.) 26 S. W. 203; Sanches v. State (Cr. App.) 55 S. W. 44; Edens v. State, 41 App. 522, 55 S. W. 815; Ford v. State (Cr. App.) 56 S. W. 338; Ramirez v. State, 43 App. 455, 66 S. W. 1101; Johnson v. State (Cr. App.) 67 S. W. 412; Price v. State, 44 App. 304, 70 S. W. 966; Comegys v. State, 62 App. 231, 137 S. W. 349; Hammons v. State (Cr. App.) 177 S. W. 493.

An instruction that the injury intended may be a sense of shame, following an instruction that the intent is presumed where an injury is caused by violence to the person, is not an undue repetition. Rogers v. State, 40 App. 355, 50 S. W. 338.

82. Argumentative instructions.—The charge should not be argumentative, but such a charge is not necessarily bad, where not calculated to arouse the sympathies or excite the passions of the jury. Brown v. State, 23 Tex. 195; Cesure v. State, 1 App. 19; Stuckey v. State, 7 App. 174. An argumentative charge on the weight of the evidence is erroneous. Head v. State (Cr. App.) 175 S. W. 1062. Charges held not argumentative. Clark v. State, 61 App. 597, 136 S. W. 260; Knight v. State, 64 App. 541, 144 S. W. 967.

83. Confused or misleading instructions.—Where an instruction in a homicide is incorrect, but is in favor of the defendant, but, when taken in connection with other instructions, tends to mislead the jury, it is ground for reversal. Patterson v. State (Cr. App.) 60 S. W. 557.

A charge, on a trial for violating the local option law, that the law was in full force, is not objectionable as misleading. Ellis v. State, 59 App. 626, 130 S. W. 170.

Where defendant, on prosecution for aggravated assault, pleads a former conviction of fighting in a public place, an instruction that, unless the jury believe that the offense charged in the case before them is the same offense charged in the former case, the plea of former conviction cannot avail, is misleading. Lawson v. State (Cr. App.) 32 S. W. 895.

An instruction on a trial for assault with intent to murder that accused, after being informed that prosecutor had insulted a female relative, did not have the right to arm himself for the purpose of seeking and killing prosecutor, etc., is misleading as failing to state the offense accused was guilty of because he shot prosecutor without killing him. Cheatham v. State, 57 App. 442, 125 S. W. 565.

In a prosecution for homicide in which a witness testified that accused and decedent had fought in a room, and decedent held accused around the waist and appellant had his head under her arm, the court, in his charge on self-defense, stated that if the jury believed that some one other than accused stabbed decedent, or had a reasonable doubt thereon, they should acquit. Held, that the instruction was not misleading for being placed at the end of the charge on self-defense; nor did it give undue emphasis to the theory of self-defense, of which there was evidence, though accused claimed that another killed deceased. Banks v. State (Cr. App.) 150 S. W. 184.

Where, in the trial of one for giving intoxicating liquor to another in a certain town and precinct while an election was being held, an instruction that the jury should convict if they believed beyond a reasonable doubt that defendant committed the offense charged at the time stated could not have been misleading, because it did not require the jury to find that the acts took place in the town and precinct charged in the information. Walker v. State (Cr. App.) 151 S. W. 318.

An instruction on a trial for theft of property worth over \$50 that theft of property under the value of \$50 is punishable by imprisonment in the county jail and by fine, or imprisonment without fine, and, if the jury believe that accused is guilty and have a reasonable doubt as to whether the value of the property taken is less than \$50, the verdict must be guilty of theft of property under the value of \$50, when read in connection with a charge that, before the jury can convict accused of a felony, the state must show beyond a reasonable doubt that \$50 worth or more of property was taken at the same time, is not misleading. Wilson v. State, 70 App. 631, 158 S. W. 516.

In the following cases the instructions on self-defense were held to be confused and misleading. Nowlen v. State, 33 App. 141, 25 S. W. 774; Thornton v. State (Cr. App.) 65 S. W. 1105; Aldredge v. State (Cr. App.) 72 S. W. 843; Andrews v. State (Cr. App.) 76 S. W. 918; Dodson v. State, 45 App. 571, 78 S. W. 940; Bear-den v. State, 46 App. 144, 79 S. W. 37; Scott v. State, 46 App. 85, 79 S. W. 543; Burnam v. State (Cr. App.) 148 S. W. 757.

In the following cases the instructions on self-defense were held not to be confused or misleading. Yancy v. State, 48 App. 166, 87 S. W. 693; Brown v. State, 50 App. 79, 95 S. W. 126; Groszehmigem v. State, 57 App. 241, 121 S. W. 1113; Cheatham v. State, 57 App. 442, 125 S. W. 565; Giesecke v. State, 64 App. 531, 142 S. W. 1179.

84. Inconsistent or contradictory instructions.—The instructions should not be inconsistent or contradictory. See generally on this point, Johnson v. State, 21 App. 368, 17 S. W. 252; Green v. State, 32 App. 298, 22 S. W. 1094; Criner v. State, 41 App. 290, 53 S. W. 873; Henry v. State (Cr. App.) 54 S. W. 592; Bennett v. State (Cr. App.) 75 S. W. 314; Farris v. State, 64 App. 524, 144 S. W. 249; McElwee v. State, 73 App. 445, 165 S. W. 927.

85. Requests for instructions.—See notes to § 737, post.

86. Waiver of right to charge.—An accused can not be considered to have waived his right to a full and correct charge upon an issue raised by the evidence, because his requested charge was not as full as the law requires, nor is the trial court for such reason, relieved of its duty to give a full and correct charge. Bell v. State, 17 App. 538.

87. Examination of charge by counsel and objections thereto.—So much of this article as requires the filing of objections to the charge on submission to counsel

and before it is read to the jury, which went into effect on July 1, 1913, applies to all prosecutions thereafter, though the offense was committed prior thereto. *James v. State*, 72 App. 457, 163 S. W. 61; *Wright v. State*, 73 App. 178, 163 S. W. 976; *Ybarra v. State*, 73 App. 70, 164 S. W. 10; *Manning v. State*, 73 App. 72, 164 S. W. 11.

While in misdemeanor cases the court need not charge the jury, yet, if he does so, the charge should be submitted to counsel for inspection. *Goode v. State* (Cr. App.) 171 S. W. 714.

At the close of the testimony it is the court's duty to grant accused's application for examination of the court's proposed charge, in order that he may urge exceptions thereto before it is read to the jury. *Harris v. State* (Cr. App.) 172 S. W. 975.

88. Lost charge.—When a charge has been lost or destroyed it should be supplied in the trial court in the same manner as any other lost or destroyed record may be supplied. *Lunsford v. State*, 1 App. 448, 28 Am. Rep. 414.

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

89. Weight of evidence in general.—Under this article the charge should be entirely free from intimating any opinion as to the weight of the evidence. The evidence must not be summed up. The measure of the law is not followed by mere abstinence of the judge from any positive expression as to the weight of the evidence, but he should avoid even the appearance of any intimation as to the facts. *Ross v. State*, 29 Tex. 499; *Bishop v. State*, 43 Tex. 390; *Parrish v. State*, 45 Tex. 52; *Gibbs v. State*, 1 App. 13; *Foster v. State*, 1 App. 363; *Massey v. State*, 1 App. 564; *Hannah v. State*, 1 App. 579; *Johnson v. State*, 1 App. 609; *Chapman v. State*, 1 App. 728; *Alderson v. State*, 2 App. 10; *Grant v. State*, 2 App. 164; *Merritt v. State*, 2 App. 177; *Butler v. State*, 3 App. 48; *Leverett v. State*, 3 App. 214; *Brown v. State*, 3 App. 295; *Rice v. State*, 3 App. 451; *Fisher v. State*, 4 App. 181; *Stephenson v. State*, 4 App. 591; *Stuckey v. State*, 7 App. 174; *Pharr v. State*, 7 App. 472; *Kiojas v. State*, 8 App. 49; *Hodde v. State*, 8 App. 382; *Renfro v. State*, 9 App. 229; *Litman v. State*, 9 App. 461; *Stephens v. State*, 10 App. 120; *McWhorter v. State*, 11 App. 584; *Maddox v. State*, 12 App. 429; *Stockholm v. State*, 24 App. 598, 7 S. W. 338; *Hughes v. State*, 32 App. 379, 23 S. W. 891; *Kirk v. State*, 35 App. 224, 32 S. W. 1045. The court should keep within the restrictions indicated by this article, should not advise the jury how to reason on the facts, or, by a dissertation, however shaped, instruct them on the weight and effect of evidence. *Johnson v. State*, 1 App. 609. A charge which is, in effect, a philosophic disquisition upon the force and nature of a particular species of evidence, amounts to an invasion of the province of the jury, and is error. *Walker v. State*, 13 App. 618, 44 Am. Rep. 716, note; *Harrison v. State*, 8 App. 183; *Bouldin v. State*, Id. 332; *Hodde v. State*, Id. 382; *Walker v. State*, 42 Tex. 361; *Alonzo v. State*, 15 App. 378, 49 Am. Rep. 207. A charge on the weight of evidence favorable to accused is no more authorized than one favorable to the state. *Patterson v. State*, 63 App. 297, 140 S. W. 1128; *Burns v. State* (Cr. App.) 145 S. W. 356; *Carver v. State* (Cr. App.) 148 S. W. 746; *Minter v. State*, 70 App. 634, 159 S. W. 286. Hence, in a rape trial, instructions that, if accused had carnal intercourse with prosecutrix, her consent would be presumed until the state proved beyond reasonable doubt that she used all means to prevent it, and that prosecutrix's testimony that she did not consent would be no criterion, though some force was used, and that if she did not put forth every effort to resist, etc., accused should be acquitted, are properly refused. *Patterson v. State*, 63 App. 297, 140 S. W. 1128.

A sentence in the paragraph of a charge is not objectionable as upon the weight of evidence when the paragraph taken as a whole is not open to such objection. *Cooper v. State* (Cr. App.) 147 S. W. 273.

In a prosecution for fornication, a charge that testimony of eyewitnesses to the act is unnecessary, but that it is sufficient if the testimony or evidence would lead the jury to believe accused committed the act, is on the weight of the evidence. *Ledbetter v. State*, 21 App. 344, 17 S. W. 427. A charge that if defendant left a stable and went to a restaurant to get supper, and stopped at saloons, drinking, he would not be a person traveling, within the statute, and would be guilty if he carried a pistol on his person, and it devolves on him to excuse or justify the act, is on the weight of the evidence. *Ratigan v. State*, 33 App. 301, 26 S. W. 407. A charge that where an instrument is shown to be a forgery, and in the possession of some one other than the person whose act it purports to be, such possession standing alone, is sufficient to warrant a conviction for the execution of the instrument, is on the weight of evidence. *Millsaps v. State*, 38 App. 570, 43 S. W. 1015. Where, on a trial for theft of cattle, defendant introduced a bill of sale, an instruction that, if the jury believed that the bill of sale was made by defendant as a sham to cover up the crime, they should consider the same with all the other facts in arriving at their verdict, is on the weight of evidence. *Arismendis v. State*, 41 App. 374, 54 S. W. 599. In a prosecution for violating the local option law, a charge that, in determining whether defendant acted as agent in making the sale, the jury would consider all testimony tending to show the business relation existing between defendant and the alleged principal, and testimony as to the number of orders accepted and sent by defendant to such principal, except the one in the case, is on the weight of evidence. *Sinclair v. State*, 45 App. 487, 77 S. W. 621. In a prosecution for theft of cotton in the open boll by a lessee from his lessor, a charge that, in determining whether the cotton was the exclusive property of the lessor, the jury should consider how much cotton the lessor had received on his rental contract previous to the alleged theft and how much defendant had received, and if all the cotton the lessor had received, together with the cotton picked up to that time, was less in value than the cotton defendant had received, including a bale used to pay defendant's store account, then the jury should find that the cotton was the exclusive property of the lessor, otherwise not, is a charge

on the weight of evidence; and as the ownership of the cotton was an issue in the case, not being dependent alone on how equitably the cotton theretofore raised had been divided, the charge grouping the facts and instructing the jury to determine the question by calculation is erroneous. *Gipson v. State*, 57 App. 290, 122 S. W. 557. In a prosecution for unlawfully altering the brand of a hog, an instruction that "if defendant made an explanation of the marking of the hog that was reasonable and consistent with his innocence when first accosted about the hog, and that the same was probably true, the jury should acquit, unless they find that the explanation was untrue," is on the weight of the evidence. *Cox v. State*, 58 App. 545, 126 S. W. 886. Instructions on a trial for homicide that the evidence showed beyond controversy that deceased was a violent and dangerous man, and was such a man as might reasonably be expected to execute threats made by him, and that the jury should regard these facts as established, are properly denied, being charges on the weight of evidence. *Carver v. State* (Cr. App.) 148 S. W. 746. In a prosecution for seduction under promise of marriage, a charge that the fact that the prosecuting witness had frequently had sexual intercourse with appellant after the first act, and her allowance of embraces, etc., from one to whom she had formerly been engaged, while she was between 13 and 15 years old, would show that she was unchaste, would have invaded the province of the jury as being a charge on the weight of the evidence. *Blackburn v. State*, 71 App. 625, 160 S. W. 687. An instruction, in a prosecution for slander in imputing unchastity to a female, that the statement of a small number of persons as to reputation is insufficient to make a general reputation, especially if the small number testifying are influenced by the same persons, or move in the same circles, is erroneous as on the weight of the testimony. *McDonald v. State*, 73 App. 125, 164 S. W. 831. An instruction informing the jury as to the law in case they found certain facts beyond a reasonable doubt is on the weight of the evidence. *Bedford v. State* (Cr. App.) 170 S. W. 727.

A charge that, if the jury believed from the evidence beyond a reasonable doubt the allegations of the indictment, they would find accused guilty, is not objectionable as on the weight of the testimony. *Melton v. State*, 63 App. 573, 140 S. W. 781. A charge that: "If you believe W. knew when defendant put his hand in W.'s pocket, and took W.'s pocketbook in his hand, you will acquit him. If defendant had the pocketbook in his hand before W. knew it, W.'s subsequent discovery of the fact would make no difference, and defendant would nevertheless be guilty; but unless you should find that defendant did have the pocketbook in his hand before W. knew it, you should acquit" him,—is not a charge on the evidence. *Files v. State*, 36 App. 206, 36 S. W. 93. Where there was evidence that defendant was seen going through the pockets of a drunken man in a saloon, that he pulled his hand out of the pockets, that he had certain coins in his hand, etc., a charge "that it is only necessary that the property stolen should have gone into the possession of the person taking it, and need not be carried away, in order to complete the offense," is not on the weight of evidence. *Newman v. State* (Cr. App.) 64 S. W. 258. A charge that the characteristics of a gaming table are, first, that it is a game, second that it has a keeper, dealer, or exhibitor, third, that it must be exhibited for the purpose of obtaining betters, and that each act of betting makes the keeper guilty of an offense, though the table is one licensed by law, and that the legal meaning of the term "bet," is the mutual agreement and tender of a gift of something valuable, which is to belong to one of the contending parties, according to the result of a trial of chance or skill, or both combined, is not on the weight of evidence. *Mayo v. State* (Cr. App.) 82 S. W. 515. A charge that, if the jury believed that the state introduced a witness who testified substantially that accused had told him that there was not a man with decedent's name that had nerve enough to stand up before him with a knife, pistol, or anything else, etc., merely submitted to the jury whether such testimony had been introduced, and whether they should credit it as well as the weight they should give it, and is not a charge that the witness as a matter of fact had testified substantially to such effect and on the weight of the testimony. *Day v. State*, 61 App. 114, 134 S. W. 215. In a trial for embezzlement, an instruction that, if the jury found from the evidence, beyond a reasonable doubt, that the defendant and the prosecuting witness agreed that the defendant was to run the store for the prosecuting witness, and receive for his services 20 per cent. of the net profits, the defendant was an agent and employé, and not a partner, is not upon the weight of testimony. *O'Marrow v. State* (Cr. App.) 147 S. W. 252. An instruction on a trial for horse theft that if accused had delivered the horses to prosecutor as a pledge for a debt, and if accused fraudulently took from the possession of prosecutor the horses without his consent, and with the intent to deprive him of their value, he was guilty, is not objectionable as on the weight of the evidence. *Haley v. State*, 70 App. 39, 156 S. W. 637. An instruction that venue must be proved affirmatively, but need not be proved positively beyond a reasonable doubt, but may be proved by circumstantial evidence and that it is only necessary that from all the facts the jury may reasonably conclude the offense was committed in the county alleged, and if from all facts the jury cannot reasonably conclude that the offense was committed in S. county, they should acquit, is not upon the weight of the evidence. *Reynolds v. State*, 71 App. 454, 160 S. W. 362. Where certain testimony was given in the absence of the jury in order to determine its admissibility, and the court having ruled that it was, the jury were returned, and during the examination the court suggested to the district attorney that, in order to connect it, "You might ask him the questions I did while the jury was out," such suggestion is not objectionable as on the weight of the evidence. *Belcher v. State*, 71 App. 616, 161 S. W. 459. On a trial for rape, an instruction that there was evidence that the prosecuting witness stated on the night of the crime, when accused was carried before her, that he was not the guilty person, and evidence that the following day she stated that he was such person, and that this latter statement must not be considered as evidence tending to show accused's guilt, but might be considered for what the jury thought

it worth in determining the weight to be given the testimony of the prosecuting witness on that point, objected to as on the weight of the evidence, is not erroneous. *Hemphill v. State*, 72 App. 638, 165 S. W. 462, 51 L. R. A. (N. S.) 914. An instruction that if defendant did unlawfully and falsely assume and pretend to be a deputy sheriff of F. county, and then and there take on himself to act as such officer, and as such did try to arrest and did demand the arrest of M., and, while pretending to be such deputy sheriff, did demand that M. submit to arrest by him while falsely pretending to be such a deputy sheriff, and that in truth he was not a deputy sheriff, and was not authorized to make such arrest, and knew that he was not a deputy sheriff, then the jury should find him guilty, etc., is not on the weight of the evidence. *Brown v. State* (Cr. App.) 170 S. W. 714. In a prosecution for statutory rape, where accused, on a previous trial, had been acquitted under an indictment based on a different act, a charge that the jury could not consider evidence of this act against accused, as he had been acquitted thereof, if on the weight of the evidence, is not prejudicial to accused. *Hamilton v. State* (Cr. App.) 168 S. W. 536.

In a prosecution for theft from the person, an instruction that if the jury found from the evidence beyond a reasonable doubt, that accused was guilty of an attempt to commit theft from the person—that is, that in the county and state named in the indictment, on or about the date named, before the presentment of the indictment, accused did attempt to unlawfully, fraudulently, and privately take from the person of the one named corporeal, personal property without the knowledge of such owner, and with an intent to deprive him of its value and appropriate it to his own use—then the jury could find accused guilty of an attempt to commit theft from the person, is not on the weight of the evidence. *Bell v. State*, 70 App. 466, 156 S. W. 1194.

90. **Remarks and conduct of court in general.**—Where, preceding defendant's trial for murder, wherein self-defense was alleged, the court on several occasions, delivered a lecture to the petit jurors, in the absence of defendant, in which he severely criticised the law of self-defense and the doctrine of reasonable doubt, both of which he held up to ridicule and contempt, such action is violative of this article. *Chapman v. State*, 42 App. 135, 57 S. W. 966; *Murphy v. State* (Cr. App.) 57 S. W. 967.

91. **Comments on facts or evidence in general.**—An instruction that the jury could not consider a certain matter as corroborating defendant's confession is properly refused as commenting on the testimony, which may not be done against the state any more than against defendant. *Harris v. State*, 64 App. 594, 144 S. W. 232.

An instruction in a prosecution for criminal assault upon a young girl that, where an injury is actually caused by violence to the person injured, the intent to injure is presumed, is not a comment upon the evidence. *Miller v. State* (Cr. App.) 150 S. W. 635. In a prosecution for burglary, where the state introduced evidence of defendant's explanation of the possession of the stolen property, a charge authorizing acquittal if the property was purchased as defendant stated, or if the jury had a reasonable doubt as to his so purchasing it, is not a comment on the evidence. *Coggins v. State* (Cr. App.) 151 S. W. 311.

Where, in a prosecution for hog theft, a witness testified that he had followed the tracks of the hogs alleged to have been stolen, and his verdict did not altogether harmonize with that of other witnesses with reference to the tracks, he having testified that he drank egg-nog the morning he followed the tracks, it is error for the court, on witness being asked how much he drank, to interpose an objection *sua sponte* that it was immaterial how much he drank, that he might have been drunk, and could have hunted the hogs whether he was competent or not. *Matthews v. State* (Cr. App.) 155 S. W. 228.

92. **Statements and review of evidence.**—The court may state to the jury that there is or is not evidence of a particular fact, when the record shows such statement to be true, since whether or not there is any evidence at all as to a fact in issue is a question for the court. *Burrell v. State*, 18 Tex. 713. And it is not error for the court to charge on the identical evidence given at the trial. *Wright v. State*, 41 Tex. 246; *Stephenson v. State*, 4 App. 591. Subject however to the restriction that the court must not comment on the weight of the evidence, or assume facts as proved, or impress the jury with its opinions thereon. *Stephenson v. State*, 4 App. 591. The court can not instruct the jury that any evidence before them is sufficient to convict of the crime charged. *Lunsford v. State*, 9 App. 217. But the court may call the jury's attention to the fact that there is other evidence in the case tending to corroborate an accomplice, leaving the jury to give the evidence such weight as it sees fit. *Barker v. State*, 36 Tex. 201.

In a prosecution for robbery an instruction detailing merely the facts charged in the indictment, and stating that such matters must be proved beyond a reasonable doubt to justify a conviction, is not error. *Young v. State* (Cr. App.) 79 S. W. 34.

93. **Opinion or belief as to facts.**—A 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. *Gibbs v. State*, 1 App. 13; *Hannah v. State*, 1 App. 579; *Grant v. State*, 2 App. 164; *Merritt v. State*, 2 App. 177; *Butler v. State*, 3 App. 48; *Brown v. State*, 3 App. 295; *Rice v. State*, 3 App. 451; *Stephenson v. State*, 4 App. 591; *Stuckey v. State*, 7 App. 174; *Pharr v. State*, 7 App. 472; *Hodde v. State*, 8 App. 382; *Renfro v. State*, 9 App. 229; *Stephens v. State*, 10 App. 120; *Dobbs v. State*, 51 App. 113, 100 S. W. 948; *Simmons v. State*, 55 App. 441, 117 S. W. 141. It is error to frequently repeat a principle of law involved so as to create an impression on the jurors' minds as to the court's opinion of the facts to which the principle is applicable. *Perrin v. State*, 45 App. 560, 78 S. W. 930.

The charge should always contain the instruction that if the jury do not believe the defendant guilty they should acquit him. The omission of such instruction has a tendency to impress the jury with the belief that, in the opinion of the court,

the defendant is not entitled to an acquittal. *Steagald v. State*, 22 App. 464, 3 S. W. 771.

A charge admonishing the jury against assessing the punishment by lot should be prefaced by the clause, "if you find defendant guilty." *Hart v. State*, 47 App. 156, 82 S. W. 652.

A charge that "an alibi is a species of defense often set up in criminal cases, and one which seems to figure in this case," is erroneous, because calculated to impress upon the jury, that the court regarded the defense as a pretense. *Walker v. State*, 37 Tex. 367. Where the state introduced an application for continuance, as evidence against defendant, an instruction by the court that the jury might "believe such of the allegations therein as incriminated defendant, and reject the others," is erroneous, as an expression of the court's opinion on the evidence. *Renfro v. State*, 9 App. 229. On a prosecution for murder, an instruction that the court admitted evidence of the conversations and acts of four other persons as tending to show a conspiracy to murder decedent is erroneous, as indicating the belief of the court that the evidence proved a conspiracy. *Nelson v. State*, 43 App. 553, 67 S. W. 320. Where defendants were accused of wilfully placing an obstruction on a railroad track, a charge that "the meaning of the term 'wilfully' is that the obstruction was, by defendants, placed upon said railroad track with an evil intent," is erroneous, because apt to lead the jury to believe that the court thought defendants did place the obstruction on the track. *Stanfield v. State*, 43 App. 10, 62 S. W. 917. The action of the court during the examination of a witness for accused in leaving the bench and walking to the witness, and asking her a question, and remarking after the answer by the witness, "That is all I want to know," and going back to the bench, is violative of the statute as indicating to the jury its belief about the testimony of the witness. *Deary v. State*, 62 App. 352, 137 S. W. 699. An instruction that if the person whom accused assaulted attacked accused, and if it reasonably appeared to accused that he was in danger of losing his life, or of suffering serious bodily harm from the "supposed attack," he should be acquitted, is erroneous, as indicating that the trial court regarded accused's evidence that he was attacked as being untrue or doubtful. *Hinton v. State* (Cr. App.) 144 S. W. 617.

In a prosecution for indecent exposure, where evidence was admitted of complaints of other similar acts by accused, a charge that the evidence of such other acts should not be considered as substantive testimony of guilt, but only as bearing on accused's intent, is not erroneous, on the ground that the word "substantive," as used, was calculated to mislead the jury to believe that the court believed that the evidence was sufficient to authorize a conviction without such evidence. *Harvey v. State*, 57 App. 5, 121 S. W. 501, 136 Am. St. Rep. 971. A charge stating the general duty of jurors and as to what the law required that they should do, and embracing a statement that the law required the court to give instructions and the jury to observe them, and that to be guilty of disobedience or violation of such instructions might cause a reversal of the case, does not, as to the statement concerning disobedience of the instructions, involve the expression of an opinion by the court that accused was guilty. *Ward v. State*, 59 App. 62, 126 S. W. 1145. An instruction defining seduction as the leading of an unmarried female under 25 years of age away from the path of virtue, etc., is not erroneous as leading the jury to think that the court believed the female to be virtuous. *Browning v. State*, 64 App. 148, 142 S. W. 1.

94. **Inferences from evidence.**—On a trial for an unlawful marriage, an instruction that, when a person was shown to have been living at a certain time, his continued existence for seven years thereafter is to be presumed, is an invasion of the province of the jury. *Hull v. State*, 7 App. 593. In a trial for horse theft an instruction that if the horses, prior to the theft, were last seen in the county where the venue was laid, the law presumed they were stolen there, is on the weight of the evidence. *Williams v. State*, 11 App. 275. An instruction that the jury may presume an agency in a sale of liquor from the circumstances shown is on the weight of evidence. *Brann v. State* (Cr. App.) 39 S. W. 940. Where, in a prosecution for rape, other acts of intercourse are proven, it is error to instruct the jury that there is evidence to show that defendant raped prosecutrix at various other times. *Owens v. State*, 39 App. 391, 46 S. W. 240. Where the evidence showed that prosecutrix was brought to the office of the county attorney on two different days, and that she disclosed the facts on the second day, whereupon the county attorney reported them to the county attorney of another county, and there was also evidence that after the latter county attorney received the message prosecutrix and her mother were summoned before the grand jury, which evidence was introduced by the state to disprove the theory of the defense that the prosecution had been concerted in malice, it is error to instruct that prosecutrix finally disclosed the name of defendant, such instruction being equivalent to saying that she did so reluctantly, and hence was the more to be believed by the jury. *Denton v. State*, 46 App. 193, 79 S. W. 560.

95. — **Intent.**—A charge, in a prosecution for aggravated assault, that, where an injury is actually caused by violence to the person or to the feelings of a person, the intent to injure is presumed, and it rests with the person inflicting the injury to show the accident or innocent intention, and that the injury intended may be either bodily pain, constraint, a sense of shame, or other disagreeable emotions of the mind, is not on the weight of evidence. *Stripling v. State*, 47 App. 117, 80 S. W. 376.

96. — **Possession of stolen property and explanation thereof.**—A charge authorizing a conviction on unexplained recent possession of property alleged to have been stolen is on the weight of the evidence. *Stewart v. State* (Cr. App.) 77 S. W. 791. See, also, *Martinez v. State*, 41 Tex. 164; *McIver v. State* (Cr. App.) 60 S. W. 50; *Gilford v. State*, 48 App. 312, 87 S. W. 698. So, also, is a charge that possession of stolen property is not, of itself, sufficient to authorize a conviction.

May v. State (Cr. App.) 51 S. W. 242. So, also, is a charge that if the property was stolen, and recently thereafter was found in defendant's possession, and he gave a reasonable explanation thereof, the jury could not convict unless satisfied of the falsity of his explanation. Hopperwood v. State, 39 App. 15, 44 S. W. 841. So, also, is a charge that the possession must have been recent, unexplained, personal, and exclusive. Neblett v. State (Cr. App.) 85 S. W. 17; Carson v. State, 48 App. 157, 86 S. W. 1011. So, also, is a charge that if part of the property stolen was found and identified, the theft of the rest might be inferred from that fact, if all was stolen at the same time and place. White v. State, 17 App. 188. See further as to charges on possession of stolen property, Massey v. State, 1 App. 563; Merritt v. State, 2 App. 177; Arispe v. State, 26 App. 581, 10 S. W. 111; Poliard v. State, 33 App. 197, 26 S. W. 70; Wheeler v. State, 34 App. 350, 30 S. W. 913; McCarty v. State, 36 App. 135, 35 S. W. 994; Hayes v. State, 36 App. 116, 35 S. W. 983; Grande, Jr. v. State, 37 App. 51, 38 S. W. 613; Berry v. State, 37 App. 44, 38 S. W. 812; Trail v. State (Cr. App.) 57 S. W. 92; Ballow v. State (Cr. App.) 69 S. W. 513; McCulloh v. State (Cr. App.) 71 S. W. 278; Dyer v. State (Cr. App.) 77 S. W. 456; Hart v. State, 47 App. 156, 82 S. W. 652; Lee v. State, 57 App. 177, 122 S. W. 389; Harris v. State, 71 App. 463, 160 S. W. 447.

97. — **Flight.**—An instruction that "the flight of a person suspected of crime is a circumstance to be weighed by the jury as tending to prove a consciousness of guilt * * * not as a part of the doing of the act itself, but as indicative of a guilty mind," and that at most it is but a circumstance tending to establish a consciousness of guilt in the person fleeing, is on the weight of the evidence. Cleavinger v. State, 43 App. 273, 65 S. W. 89. See, also, Seeley v. State, 43 App. 66, 63 S. W. 309.

98. **Assumption as to facts.**—An instruction assuming the existence of facts not proven is erroneous. White v. State, 13 Tex. 133; Hardin v. State, 13 App. 192; Brewer v. State (Cr. App.) 27 S. W. 139. It is improper to assume that any fact has been proved against accused, however strong the evidence may be. White v. State, 13 Tex. 133; Bergstrom v. State, 36 Tex. 335; Pippin v. State, 36 Tex. 696; Long v. State, 1 App. 466; Brown v. State, 3 App. 294; Baker v. State, 6 App. 344; Webb v. State, 8 App. 115; Eabb v. State, 8 App. 173; Kellogg v. State, 58 App. 84, 124 S. W. 958. But it is not error to use the form, "if it be proved so and so, then you will find," etc. McGaffey v. State, 4 Tex. 156.

A witness having denied a certain conversation with the wife of accused, an instruction that the jury should disregard the conversation, save for the purpose of affecting the credibility of the witness, is erroneous, as assuming the fact of such conversation. Spirey v. State, 45 App. 496, 77 S. W. 444.

A statement in a charge that it was alleged in the indictment that a certain person was a servant of another is not tantamount to telling the jury such was the fact. Burk v. State, 50 App. 185, 95 S. W. 1064.

In a prosecution for being an accomplice in a murder by agreeing to make horse tracks around decedent's house to divert suspicion from decedent's wife and another, alleged to have been principals, a charge that there was no direct evidence that accused agreed to make tracks to and from the house, evidence thereof being circumstantial, and that the jury would not be warranted in believing that accused made the tracks, unless the circumstances necessary to establish the fact were proved beyond reasonable doubt, and found consistent with the claim that he had agreed to make the tracks, and consistent with each other, and inconsistent with any other reasonable conclusion, and established beyond reasonable doubt that he so agreed, and if they had any reasonable doubt that he made the agreement to induce the commission of the offense and divert suspicion from decedent's wife and the other, they could not consider the tracks proved against accused, nor conclude that he agreed to make them, is on the weight of evidence, since it singles out and assumes as a fact the agreement to make tracks, and that no witness testified directly to that fact, and instructed as to circumstantial evidence as to that fact alone. Beard v. State, 57 App. 323, 123 S. W. 147.

In a prosecution for horse theft, an instruction that if accused's statement when first questioned was unreasonable and contradictory, and did not account for his possession in a manner consistent with his innocence, the jury should find him guilty, is not fatally defective in the use of the words "and contradictory," though such words should be omitted as tending to mislead the jury to assume that the court was of the opinion that the statements of accused were contradictory and incriminating. Presley v. State, 60 App. 102, 131 S. W. 332.

99. — **Admitted or uncontroverted facts.**—It is not error for the trial court to assume in its instruction a fact which is undisputed in evidence. Fahey v. State, 27 App. 146, 11 S. W. 108, 11 Am. St. Rep. 182; Strang v. State, 32 App. 219, 22 S. W. 680; Holliday v. State, 35 App. 133, 32 S. W. 538; Ragazine v. State, 47 App. 46, 84 S. W. 832; Dugat v. State (Cr. App.) 148 S. W. 789; Holmes v. State (Cr. App.) 150 S. W. 926; Crain v. State (Cr. App.) 153 S. W. 155. Where deceased, an officer, was killed by defendant in attempting to rescue a prisoner, there being no question as to the legality of the arrest, the court is authorized in assuming that the arrest was legal. Sierra v. State, 37 App. 430, 35 S. W. 982. In a prosecution for robbery the court must not assume that prosecutor's ownership and want of consent to the taking of the property, and the commission of the crime itself, have been established unless there can be no controversy on those questions under the evidence. Bradshaw v. State, 44 App. 222, 70 S. W. 215. In a prosecution for violating the local option law it is not error to charge that the law was in force in the territory where the offense is charged, there being no conflict as to the validity of the election. Williams v. State, 37 App. 238, 39 S. W. 664. See, also, Cantwell v. State, 47 App. 521, 85 S. W. 18; Roberson v. State (Cr. App.) 91 S. W. 578; Ellis v. State, 59 App. 630, 130 S. W. 171; Moreno v. State, 64 App. 660, 143 S. W. 156, Ann. Cas. 1914C, 863. On a prosecution for theft it is proper to

assume in an instruction that accused took the property, where the only defense was that he took it for the purpose of taking care of it for the prosecutor. *Tanner v. State* (Cr. App.) 44 S. W. 489. Where, in a prosecution for robbery, it was admitted that accused and another took the money from witness, and the only dispute was whether witness gave it to defendant in payment for clothing, or whether it was forcibly taken from him, an instruction that if the jury believed that prosecuting witness had stolen clothing from accused, such fact would not justify accused in assaulting witness and taking the money from him, but that such act would be robbery justifying a conviction, is proper. *Beard v. State*, 44 App. 402, 71 S. W. 960. A criticism of an instruction on self-defense, in that it "required the jury to believe the threats were made," is without merit, where it was not disputed that such threats were made. *Kelly v. State* (Cr. App.) 151 S. W. 304.

100. — **Facts established by testimony.**—The rule which forbids the judge to charge the jury upon the weight of evidence does not preclude him from assuming as true, by the language used in his charge, a fact clearly established, and as to which there is no conflict in the evidence. *Wintz v. Morrison*, 17 Tex. 373, 67 Am. Dec. 658; *Denham v. Trinity County Lumber Co.*, 73 Tex. 73, 11 S. W. 151; *O'Connell v. State*, 18 Tex. 343; *Mueley v. State*, 31 App. 155, 18 S. W. 411, 19 S. W. 915. Where the value of stolen property is proven beyond doubt, it is not error to assume the value as proven. *Nelson v. State*, 35 App. 205, 32 S. W. 900. Where the testimony is unequivocal that a witness is an accomplice, a charge that he is such and that a conviction can not be had on his testimony unless corroborated is not improper. *Torres v. State* (Cr. App.) 55 S. W. 828. See, also, *Winfield v. State*, 44 App. 475, 72 S. W. 182; *Espinoza v. State*, 73 App. 237, 165 S. W. 208. Where the evidence clearly shows that two persons acted together in passing forged checks, one keeping watch while his confederate is passing, or attempting to pass, such checks, accused is not prejudiced by an assumption that he is a principal offender. *Mason v. State*, 32 App. 95, 22 S. W. 144, 408. In a prosecution for following the business of selling intoxicating liquors in prohibition territory, where the orders of the commissioner's court had been introduced in evidence showing local option to be in force in the county in which the venue was laid, the court may assume that fact in its charge. *Creed v. State* (Cr. App.) 155 S. W. 240. Where two shots were fired at deceased, and an examination of his body showed that one bullet passed through his heart and would cause instant death, it was not error to assume that the last shot was the one which caused the death. *Morgan v. State*, 43 App. 543, 67 S. W. 420.

101. — **Purpose and effect of evidence.**—Where, on a trial for murder, accused introduces in evidence a contract between the state and two persons charged as his accomplices, stating the testimony they would give, for the purpose of impeaching one of them, who had testified for the state, it is error to assume in the charge that accused offered the contract as original evidence against himself. *Faulkner v. State*, 43 App. 311, 65 S. W. 1093.

102. — **Confessions or admissions.**—A charge that the state had introduced testimony to prove the confession of accused, made before the grand jury, and other confessions of accused, and that, although accused's confessions showed the commission of the offense, the jury should find accused not guilty unless the state had corroborated the confessions by other evidence, assumes that the statement made before the grand jury, as well as the other statements, were confessions of guilt. *Barnes v. State*, 46 App. 513, 81 S. W. 735. On a trial for complicity in a murder, an instruction that admissions, made by the principal in accused's absence, have been admitted solely on the issue of the principal's guilt, and can not be considered for any other purpose, does not assume as true the controverted fact of the making of such admissions. *Wilkerson v. State* (Cr. App.) 57 S. W. 956.

103. — **Truth or weight of evidence.**—An instruction that a certain witness is an accomplice, according to his own testimony, is erroneous, as it assumes that his testimony is true. So, also, is an instruction not to find accused guilty on the testimony of a certain witness unless his testimony has been corroborated, where the witness testified that he was an accomplice, for the same reason. *Bell v. State*, 39 App. 677, 47 S. W. 1010. See, also, *Jones v. State*, 44 App. 557, 72 S. W. 845; *Hart v. State*, 47 App. 156, 82 S. W. 652; *Washington v. State*, 47 App. 131, 82 S. W. 653; *Garias v. State*, 48 App. 449, 88 S. W. 345; *Barton v. State*, 49 App. 121, 90 S. W. 877; *Dixon v. State* (Cr. App.) 90 S. W. 878; *James v. State*, 72 App. 155, 161 S. W. 472. But an instruction, in a prosecution for incest, that if the jury believed certain facts, prosecutrix was an accomplice, and that her testimony would not be sufficient to warrant a conviction unless the jury believed the same to be true, and unless she was corroborated by other testimony, does not assume the truth of the testimony of prosecutrix. *Gillespie v. State*, 49 App. 530, 93 S. W. 556. In a prosecution for assault with intent to rape, it is error for the court, in referring in its charge to testimony of defendant's witnesses to assume that such witnesses contradicted each other, and also to assume a contradiction between two witnesses, where none existed. *Dina v. State*, 46 App. 402, 78 S. W. 229. When accused was indicted for selling intoxicating liquor to a minor, a charge that knowledge on the part of accused that the person to whom he sold the liquor was a minor was an essential element of the offense, and must be proved, but that such knowledge might be shown by circumstantial evidence, is not objectionable as an assumption that the facts adduced were sufficient without positive evidence of accused's knowledge. *Aston v. State* (Cr. App.) 61 S. W. 307.

104. — **Issues and theories of case.**—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 App. 387, 20 S. W. 741, citing *McGrew v. State*, 31 App. 336, 20 S. W. 740. A charge that if the jury believed that after accused justifiably fired the first shot,

deceased ran and accused pursued and killed him, though not believing himself in danger, defendant was guilty, does not assume that deceased fled. *Coleman v. State*, 48 App. 343, 88 S. W. 238. In a prosecution for rape, an instruction that if at the time prosecutrix was "under the age of 15 years and was not the wife of defendant, you will find the defendant guilty of rape as charged," does not assume that prosecutrix was under the age of 15 years, or that she and the defendant were not married. *Haywood v. State*, 61 App. 92, 134 S. W. 218. And a charge that if, at any time within one year before a certain date, accused had carnal knowledge of prosecutrix, she not being his wife, etc., is not on the weight of evidence, as assuming that prosecutrix was a female and under the age of 15 years. *Eckermann v. State*, 57 App. 287, 123 S. W. 424. In a prosecution for assault to kill, a charge assuming as a fact that defendants, or one of them, were in the wrong from the beginning, and had assaulted the prosecuting witness with unlawful intent, when such conduct on the part of defendants was a disputed issue, is erroneous. *Young v. State* (Cr. App.) 151 S. W. 1046. Where, in a prosecution for aggravated assault and battery arising out of the alleged poisoning of accused's chickens, the issue was sharply raised that prosecuting witness and not accused was the attacking party, an instruction that the jury might consider testimony as to poison being deposited on accused's premises for no other purpose than in mitigation of punishment, in the event that accused was found guilty, assumes that accused was the aggressor because of the poisoning of the chickens, thereby eliminating the issue of self-defense. *Parish v. State* (Cr. App.) 153 S. W. 327.

105. — **Insanity.**—An instruction that mere weakness of mind is no defense to crime, provided accused has sufficient reason to know the quality of the act charged against him, and knew the difference between the right and wrong thereof, does not assume that accused was weak-minded. *Cox v. State*, 60 App. 471, 132 S. W. 125.

106. — **Intent.**—In a prosecution for forgery a charge that if defendant made the instrument in writing which was alleged to have been forged, and signed a certain name thereto, and when he did so intended to sign another name, and did so without authority from such person, to find defendant guilty, does not assume that defendant signed the instrument, and that when he did so he believed that he was signing such name. *Reeseman v. State*, 59 App. 430, 128 S. W. 1126. In a prosecution for the theft of a steer, where it was shown that the animal owned by prosecutor and the one owned by defendant's father-in-law were very much alike and defendant claimed that he had taken the one owned by his father-in-law with his consent, a charge that if defendant took the animal in such a manner as to constitute theft, and that the consent of his father-in-law was used as a pretext, and that he took it with the fraudulent intent to deprive the owner of its value, and appropriate it to his own use, the consent of the father-in-law did not justify defendant, is erroneous as an assumption of fact by the court. *Hazlett v. State* (Cr. App.) 96 S. W. 36.

107. — **Time and place of offense.**—Where prosecutrix and a witness are uncertain as to the date of the offense, and only fix it by reference to other circumstances, the date of which is disputed, it is error to instruct that they testified to a particular date. *Owens v. State*, 39 App. 391, 46 S. W. 249. In a prosecution for practicing medicine without a license, where the evidence was conflicting as to what county defendant was a resident of, it is error for the court, on the request of the jury for a statement as to what constituted a resident of a county, to charge that the uncontradicted testimony in the case showed him to be a resident of B. county. *Kellogg v. State*, 58 App. 84, 124 S. W. 958.

108. — **Facts connected with crime charged in general.**—Where there is no evidence to prove facts essential to accused's conviction it is error for the court to assume in its instructions the existence of such evidence or to assume that such facts were proven. *Bergstrom v. State*, 36 Tex. 336. In the absence of evidence in regard to possession of recently stolen property, a charge thereon is erroneous as assuming a fact. *Leonard v. State*, 57 App. 254, 122 S. W. 549. Where stolen property was found about 30 days after the theft, in the possession of defendant's father, defendant not being present, nor shown to have been in the possession thereof at all, an instruction that the jury should convict, if such property was recently after its theft found in defendant's possession, under circumstances requiring of him an explanation of his possession, which he failed to make, and that his possession thereof was personal, and unexplained, is erroneous as assuming a fact which occurred a month subsequent to the alleged theft. *Spillman v. State*, 38 App. 607, 44 S. W. 149. An instruction that if defendant and a third person connived together to make a sale to the witness for the purpose of evading the law, the transaction was a sale, is erroneous for assuming the fact of connivance, not shown by the evidence. *Randall v. State*, 49 App. 261, 90 S. W. 1012. Where defendant's father approached and struck deceased, who, a few moments before, had had trouble with another son, and deceased shot him whereupon defendant killed deceased, an instruction that the jury should convict defendant of murder in the second degree if they found that his father attacked deceased, and during the attack defendant, suddenly and without deliberation forming a design to kill deceased, immediately did so, and they should further find that at the time of the killing deceased had done nothing that caused defendant to believe that he intended to kill or seriously hurt defendant's father, is improper, since it assumes that the attack made by defendant's father on deceased was unlawful, and that defendant knew it was unlawful. *Johnson v. State* (Cr. App.) 59 S. W. 269. On a trial for pandering, an instruction, in response to an inquiry by the jury, that if accused, knowing the purpose for which it was to be used, secured a place for a woman in a house of prostitution the offense would be complete, and it was proper for the jury to consider her request to go there as meaning the same in law as

consent to go there, is on the weight of the evidence, as it virtually told the jury that she made a request, and that accused obtained a room on such request. *Jones v. State*, 72 App. 496, 162 S. W. 1142. A charge stating that "where an injury is actually caused by violence," etc., following the words of the statute, is not an assumption that injury has been proved in the case. *Stripping v. State*, 47 App. 117, 80 S. W. 377. A charge that if when defendant made the alleged false statement under oath he believed the facts therein stated to be true, he would not be guilty, does not tell the jury that the statement was false. *Wilson v. State*, 49 App. 496, 93 S. W. 547. In a prosecution for the fraudulent conversion of property, an instruction that if the jury believed that defendant was in the possession of the property of another by virtue of a contract of hiring, and unlawfully converted the property to his own use, he was guilty, etc., does not assume that there was a contract of hiring. *Lewallen v. State*, 48 App. 283, 87 S. W. 1159. In a prosecution of a man for incest in marrying his half-niece, where the indictment charges and the evidence shows that his wife is the only daughter of his half-sister, an instruction that if the jury believe defendant's wife is the daughter of a half-sister of defendant, he should be convicted, does not assume that the mother of defendant's wife is his half-sister. *Simon v. State*, 31 App. 186, 20 S. W. 399, 716, 37 Am. St. Rep. 802. An instruction that two sales of whisky would not of itself constitute the offense of pursuing the occupation of selling intoxicating liquors, but that before any one could be convicted who was engaged in such occupation, the state must prove at least two sales, does not assume that accused was engaged in such business. *Pierce v. State* (Cr. App.) 154 S. W. 559. The charge in bigamy, that if the jury find and believe from the evidence that on a certain date defendant married G., and then and there had a former wife, Y., then living, and that said former marriage had been lawfully solemnized, does not assume as a fact the former marriage, leaving to the jury only the question of it having been lawfully solemnized. *Edwards v. State*, 73 App. 380, 166 S. W. 517.

109. — **Character of article used in committing offense.**—Where, in a prosecution for aggravated assault, it was shown that accused fired at prosecutor with a double-barreled shotgun, and there was no question but that the assault was made with a gun, and that in the manner of its use it was a deadly weapon, the court could properly assume such fact, and charge that an assault becomes aggravated when committed with a gun; the same being a deadly weapon. *Kosmoroski v. State*, 59 App. 296, 127 S. W. 1056. An instruction that the means by which a homicide is committed should be considered in determining accused's intent, and, if the instrument be one not likely to produce death, it is not presumed that death was designed, unless such intention appears from the manner of its use, is on the weight of the evidence when considered with reference to accused, where he shot decedent with a pistol, and the evidence raised the issue of apparent danger, but did not show that decedent drew any weapon. *Andrus v. State*, 73 App. 329, 165 S. W. 189. An instruction that if accused killed deceased with a razor, and that said razor was a deadly weapon, to find defendant guilty, does not tell the jury that the razor was a deadly weapon. *Spears v. State*, 41 App. 527, 56 S. W. 347. Where the character of an assault made upon defendant's wife, as shown by the injuries inflicted on her, was such that the jury, in a prosecution of the husband for her murder, was authorized to find that he used a deadly weapon, instructions were properly given that, if the jury found beyond a reasonable doubt the defendant with his hands or feet, or any instrument or object, or in any manner unlawfully killed the woman, and further believed from the evidence beyond a reasonable doubt that the instrument or object used, if any, by the defendant, was a deadly weapon, defendant was guilty of murder; such charge not being on the weight of the evidence. *Paschal v. State* (Cr. App.) 174 S. W. 1057.

110. — **Commission of offense.**—A charge that "the jury are instructed to have due regard to a broken and violated law, and the probability of inflicting an unjust punishment upon an innocent party," is prejudicial, in assuming that the law has been violated. *Bradford v. State*, 25 App. 723, 9 S. W. 46. Where, on a trial for theft of a horse, defendant's counsel insisted that, as it was shown that defendant had executed a bill of sale to the horse, the sale could be proved only by the bill of sale, it is error to charge that "the sale of a stolen horse by a thief is not required to be evidenced by a bill of sale in order to his being criminally prosecuted for the theft of the horse," since such charge assumed that the horse was stolen, and that defendant was the thief. *White v. State*, 21 App. 339, 17 S. W. 727. Where, in a prosecution for keeping a disorderly house, the court, over defendant's objection, read the article of the Penal Code relating to keeping a disorderly house, and the punishment therefor, and then verbally instructed them that, if they believed beyond a reasonable doubt that defendant owned, rented, or leased "that house," they should find defendant guilty, the charge is on the weight of the evidence. *Harkey v. State*, 33 App. 160, 25 S. W. 291, 47 Am. St. Rep. 19. An instruction that, if deceased was killed, certain witnesses were accomplices in the crime, assumes that the killing was a crime, that such crime was committed. *Barton v. State*, 49 App. 121, 90 S. W. 877. A charge on circumstantial evidence concluding "and produces in your minds a reasonable and moral certainty that accused was present at the time of the commission of the offense, and did commit the offense charged against him," assumes that the offense was committed. *Beaver v. State* (Cr. App.) 86 S. W. 1020. In a murder trial, an instruction that, if accused did not engage in any shooting between decedent and his deputy on the one hand, and codefendant, on the other, nor participate in the codefendant's act as a principal offender, until after being fired upon by decedent or his deputy, and then procured a weapon and fired or attempted to fire at either or both decedent and his deputy he was not guilty is erroneous, as a charge upon the weight of the evidence. *Condon v. State*, 62 App. 485, 138 S. W. 594. An instruction on a trial for seduction that, if prosecutrix had carnal intercourse

with some other person before she had intercourse with accused, he must be acquitted, is erroneous, as charging that accused had had intercourse with prosecutrix. *McLaurin v. State* (Cr. App.) 146 S. W. 557. In a prosecution for making a false entry in an account book, a charge that if the jury found that accused was a bookkeeper, and as such with intent to defraud wilfully and knowingly made a false entry, he should be found guilty, is erroneous in assuming that the entry was false. *Pope v. State* (Cr. App.) 170 S. W. 150.

An instruction that the facts proved should not only be consistent with the guilt of accused, but inconsistent with any other reasonable hypothesis, and producing in the jurors' minds a reasonable and moral certainty that accused and no other person committed the offense charged, does not assume that the offense had been committed. *Rice v. State*, 49 App. 569, 94 S. W. 1024. An instruction that if the jury should find that defendants, or either of them, was not present when the crime was alleged to have been committed, "if you find one was committed, or you should have a reasonable doubt thereof," they should find such defendant not present not guilty, does not assume that the crime was committed. *Parks v. State* (Cr. App.) 79 S. W. 537. On a trial for conveying instruments into a jail to facilitate the escape of a prisoner accused of felony, an instruction that certain indictments and capiases, put in evidence by the state, were sufficient to establish an allegation of the indictment that a person named, described in said indictments and capiases, was confined on an accusation of felony is not on the weight of evidence, but a proper explanation of the legal effect of the records of the court. *Broxton v. State*, 9 App. 97. Where the court instructs that defendant's principal, who turned state's evidence, is an accomplice, and hence defendant cannot be convicted on his testimony alone, such instruction is not erroneous as assuming as a fact that the principal committed the crime, there being no evidence contradicting the principal's confession of his part in the crime, and defendant's plea of not guilty not operating as a denial of the principal's guilt, but only of his own part in the transaction. *Wilkerson v. State* (Cr. App.) 57 S. W. 956. In a prosecution for a violation of a prohibition law, where accused set up an alibi and the court in its charge pointedly required the jury to believe beyond a reasonable doubt that accused did on or about the date charged unlawfully sell intoxicating liquors to the person named, and also charged that the burden was on the state to show beyond a reasonable doubt that such sale was made, a charge on the defense of alibi, though assuming that an unlawful sale of liquor had been made, is not erroneous as on the weight of the evidence. *Fagnani v. State* (Cr. App.) 146 S. W. 542. In a murder trial, an instruction that accused pleaded an alibi, that, if the jury had reasonable doubt as to his presence at the time and place of the offense, he should be acquitted, and that he should be acquitted if there was reasonable doubt as to whether decedent's death resulted from accident is not improper as assuming that an offense had been committed. *Crowell v. State* (Cr. App.) 148 S. W. 570. An instruction in a prosecution for an assault with intent to commit rape that, "should you find defendant guilty, so say, and of what offense, assessing the proper punishment therefor," is not erroneous, as assuming that an offense had been committed. *Conger v. State*, 63 App. 312, 140 S. W. 1112. In a prosecution for homicide, a charge that if the jury believed beyond a reasonable doubt that arsenic was mixed in the coffee which deceased drank on the day of his death, and that if no person other than the accused placed the arsenic in the coffee, etc., does not assume that arsenic was placed in the coffee. *Bailey v. State* (Cr. App.) 144 S. W. 996.

In a prosecution for theft, a charge that if the property had been stolen, and recently thereafter defendant was found in possession of it, and his explanation is reasonable, and probably true, and accounts for his possession in a manner consistent with his innocence, the jury should consider the explanation as true, and acquit the defendant, but that if the explanation was unreasonable, and did not account for defendant's possession in a manner consistent with his innocence, or if it was reasonable, and probably true, and did account for defendant's possession, but the state has shown the falsity thereof, the jury should take the possession of the defendant, together with his explanation, in connection with all the other facts and circumstances, if any, in evidence, and, if they believe the defendant guilty beyond a reasonable doubt, they should so find, otherwise they should acquit the defendant, is not on the weight of evidence, in assuming that the property delivered by defendant to the injured party was stolen. *Bacon v. State*, 61 App. 206, 134 S. W. 690.

111. — **Guilt of accused.**—The trial judge in a murder trial should not assume in his charge that a codefendant was guilty of the offense charged, though convinced thereof by the evidence. *Condron v. State*, 62 App. 485, 138 S. W. 594. An instruction that a state witness, who had pleaded guilty was "an accomplice with defendant," is erroneous, as withdrawing the question of defendant's guilt from the jury. *Spears v. State*, 24 Tex. App. 537, 7 S. W. 245. An instruction to the jury that, "if they believe from the evidence that the defendant did assault the said B. with a knife, under circumstances not amounting to an intent to murder as hereinbefore explained, they will, if they so believe from the evidence, find the defendant guilty of an aggravated assault," assumes the defendant to be guilty of one or other of the offenses named, and invades the province of the jury by instructing them to find the defendant guilty, at any rate, of the lesser grade of offense. *Warren v. State*, 23 App. 383, 3 S. W. 240. In a prosecution for aggravated assault a charge that if defendant "an adult male * * * did commit an assault, as that term has been defined," on prosecutrix, "then you will find defendant guilty of an aggravated assault, is bad as assuming that defendant was an adult male, and committed the assault. *Holliday v. State*, 35 App. 133, 32 S. W. 538. Where, on a prosecution for murder, a doubt arises from the evidence as to whether accused is guilty as a principal, accused's guilt must not be assumed, and so charged, but the charge should be framed in accordance with the

doubt. *Renner v. State*, 43 App. 347, 65 S. W. 1102. On the trial of an indictment for failing to report cattle slaughtered for market, an instruction that, if accused and another were partners in butchering beeves for market, then the jury should inquire if they failed to exhibit the hide and make report with bill of sale, and if they had so failed, then accused should be found guilty, assumes that accused killed the animal. *Bergstrom v. State*, 36 Tex. 336.

The quoted words, "that is, with the defendant's guilt," in the statement in a charge, "These necessary facts must be consistent with each other and with the main facts sought to be established, that is, with the defendant's guilt, and, when taken together, must be of a conclusive nature leading on the whole," etc., do not make the charge one on the weight of evidence; it not being thereby assumed or charged that defendant is guilty. *Gordon v. State*, 62 App. 638, 138 S. W. 705. An instruction that "in case you have a reasonable doubt as to defendant's guilt, you will acquit him, and say, by your verdict, 'Not guilty,'" does not assume the guilt of defendant. *Williams v. State* (Cr. App.) 55 S. W. 500. A charge that, "in this case, the state's witness C. is an accomplice to the offense charged" is not tantamount to telling the jury that defendant was guilty of the offense, or that C. was an accomplice with defendant, and is not objectionable, there being no question as to the fact of C.'s connection with the affair. *Hudson v. State* (Cr. App.) 36 S. W. 452. Where the testimony shows that a witness was an accomplice, the fact that the court informed the jury that the witness was to be regarded as an accomplice, and hence needed corroboration, is not erroneous, as being equivalent to telling the jury that accused was guilty, since the witness could be an accomplice regardless of accused's participation in the crime. *Hatcher v. State*, 43 App. 237, 65 S. W. 97. After charging on murder in the first degree, the court instructed the jury that, if they have a reasonable doubt of such murder being of the first degree, they should acquit defendant of this degree of murder, "and then further consider the next degree of murder, and if from the evidence you believe beyond a reasonable doubt that such murder, if any, was committed with 'implied malice' as that kind of malice is explained to you in this charge, you will find him guilty of murder in the second degree." The charge is not objectionable as assuming that defendant committed the murder in question, or that, if defendant did not commit murder in the first degree, he was guilty of murder in the second degree, or as instructing the jury that, if any murder was ever committed by any person, the defendant was guilty of same. *Mass v. State*, 59 App. 390, 128 S. W. 394. In a trial for cattle theft, an instruction that if the cattle were fraudulently taken, and accused and another acted together in taking the cattle, if they were taken, etc., is not upon the weight of the evidence. *Ellington v. State*, 63 App. 427, 140 S. W. 1101. In a prosecution for seduction an instruction, which, among other things, tells the jury that a woman can be seduced but once, "and you can not convict the defendant for seduction in this case by reason of intercourse with her" subsequent to their first act of copulation, if any there was, is not objectionable as assuming that defendant seduced prosecutrix. *Knight v. State*, 64 App. 541, 144 S. W. 967. An instruction that "if you believe beyond a reasonable doubt that the defendant in a sudden transport of passion aroused by an adequate cause, either alone, or acting with W., under such circumstances as to constitute him a principal, killed deceased, you will find him guilty of manslaughter, and if you believe W. killed deceased, and have a reasonable doubt as to whether defendant acted as a principal, you cannot hold him responsible for W.'s acts," is not objectionable as assuming that defendant acted either alone or as a principal in the commission of a homicide. *Cukierski v. State* (Cr. App.) 153 S. W. 313. An instruction, in presenting the issue of murder in the first and second degrees and manslaughter, that if accused killed deceased by any means, he should be found guilty, does not assume that deceased was dead and that accused killed him. *Williams v. State* (Cr. App.) 65 S. W. 1059. A charge that if the jury believed accused mingled a noxious potion with water, with intent to kill his wife, and if the noxious potion was strychnine, and that after so mingling said strychnine with water, he, with intent to kill, caused her to drink the water with which the noxious potion had been mingled, then they should find him guilty, does not assume that accused mingled strychnine with water. *Ellington v. State*, 48 App. 160, 87 S. W. 153. An instruction that, if accused made the assault charged and his codefendant was present, etc., the codefendant was guilty, does not assume that accused made an assault. *Sellers v. State*, 61 App. 140, 134 S. W. 348. On a trial for the larceny of a cow, an instruction that if the jury believed that accused stole the cow, and that it was the property of prosecutor, and that accused fraudulently took the cow, if he did take it, with intent to deprive the owner of the value thereof, etc., accused was guilty, does not assume that the cow was taken by accused. *Richards v. State*, 59 App. 203, 127 S. W. 823. A charge on the defense of insanity, which states under what circumstances the jury should acquit accused, if they found he did commit the act of burglary does not assume the guilt of accused. *Smith v. State*, 61 App. 225, 135 S. W. 533. In a prosecution for assault with intent to kill, an instruction that if accused cut prosecuting witness, and if a minute or two before at a blacksmith shop witness had made one or more assaults upon the accused, which caused pain or bloodshed, such facts were sufficient in law to reduce the offense, if any, from assault with intent to murder to aggravated assault, and if the jury believed that accused's mind was thereby rendered incapable of cool reflection, and that it was not sufficient time from the encounter at the blacksmith shop until the cutting for his mind to cool, etc., defendant would only be guilty of aggravated assault, does not charge as a matter of law that accused was guilty of assault with intent to kill. *Luttrell v. State*, 70 App. 183, 157 S. W. 157. Where in a prosecution for arson, an instruction that, to convict, the jury must find beyond a reasonable doubt that accused attempted to burn the house charged, and further instructed that alibi was a defense, and the jury should find for defendant if the evidence raised a

reasonable doubt as to his presence at the place of the offense when it was committed, and that insanity was also a defense, and that the insanity must have existed at the very time of the commission of the offense and that if they believed that accused was, at the time of the commission of the offense, as charged, insane, the jury should acquit, and if at the time of the commission of the offense, if any, accused did not know right from wrong as it related to that particular act, the jury should acquit is not erroneous, as assuming that accused committed, or participated in the commission of, the offense of arson, or in assuming any other fact. *Glaser v. State*, 60 App. 379, 131 S. W. 1997.

112. — **Commission of other or related offenses.**—In a prosecution for receiving stolen property, an instruction assuming contemporaneous thefts is erroneous. *Brewer v. State* (Cr. App.) 27 S. W. 139. A charge on a trial for theft that if the jury find that defendant and one H., "when they were guilty of acting together in the commission of the offense so as to make them principals. * * * fraudulently took from the possession of H. two cattle," they would be guilty, is erroneous, where it is an issue in the case as to whether defendant had acted with H. at all. *Milligan v. State* (Cr. App.) 22 S. W. 414. A charge assuming that defendant had previously burglariously entered the house is on the weight of the evidence. *Glenn v. State* (Cr. App.) 76 S. W. 757. An instruction that the contemporaneous taking and recovery of any other animal or animals adduced in the evidence was not admitted to show the guilt or innocence of accused, but solely to show criminal intent, if any, is erroneous for telling the jury that other animals had been stolen. *Glover v. State* (Cr. App.) 76 S. W. 465. Where, on a prosecution for theft of a horse and a mule the evidence introduced with reference to a mare said to have been taken at the same time as the mule showed that the same belonged to accused, and there was no testimony showing accused had possession of any stolen property other than the mule, an instruction that the state had introduced evidence tending to prove the theft of other property than that alleged in the indictment to have been stolen, to wit, a mare, and that the jury could consider such testimony, is erroneous as assuming that accused had possession of stolen property other than the mule. *Homer v. State* (Cr. App.) 65 S. W. 371. An assumption in the charge, on a trial for the sale of liquor in violation of the local option law of there being evidence that accused was charged with other sales, when there was no such evidence is error. *Arnold v. State* (Cr. App.) 83 S. W. 205. An instruction that evidence that accused had influenced a witness to leave the state should be considered only for a certain purpose, is objectionable as assuming that he so influenced the witness. *Rice v. State*, 49 App. 569, 94 S. W. 1024.

113. — **Failure to prove defense.**—An instruction that the failure or inability of defendant to show his innocence does not lend any additional probative force to the incriminative facts, if any, shown by the state, or raise any presumption of guilt against defendant, is error, as conveying the impression that, in the opinion of the court, defendant had failed to show his innocence. *Johnson v. State*, 27 Tex. App. 163, 11 S. W. 106. On a trial for murder, a charge that: "If, therefore, the jury are satisfied beyond a reasonable doubt, from the testimony adduced, that the means used by the defendant were likely to kill or do great bodily harm, the jury will return their verdict for murder in the first degree," the defense relying on an alibi, indicates the opinion of the judge as plainly, and much more injuriously, than if it had been directly expressed, and is error. *Walker v. State*, 42 Tex. 360.

114. — **Truth of evidence.**—A charge is erroneous which assumes the truth of the inculpatory evidence adduced by the state. *Webb v. State*, 8 Tex. App. 115.

115. — **Grade or degree of offense.**—When the defendant is on trial for an offense of degrees, the charge should not assume or intimate that the defendant is guilty of any particular degree instructed upon. *Haynes v. State*, 2 App. 84; *Williams v. State*, Id. 271.

116. **Comments on conduct or character of accused.**—A charge as to the consideration the jury should accord to evidence of accused's general good character in that aspect which is impugned by the accusation, is on the weight of the evidence. *Lockhart v. State*, 3 Tex. App. 567.

A charge that mere silence of accused at the time of being arrested should not be considered as a circumstance against him, would be on the weight of the evidence. *Clark v. State* (Cr. App.) 59 S. W. 887.

117. **Reference to evidence as tending to prove.**—Generally it has been held that a charge which states that evidence has been introduced tending to prove the commission of a crime, or facts connected therewith, is erroneous as being on the weight of the evidence. *Santee v. State* (Cr. App.) 37 S. W. 456; *Reese v. State*, 44 App. 34, 68 S. W. 283; *Reese v. State* (Cr. App.) 70 S. W. 424; *Hollar v. State* (Cr. App.) 73 S. W. 961; *Cortez v. State* (Cr. App.) 74 S. W. 907; *Cavaness v. State*, 45 App. 209, 74 S. W. 908.

118. **Directing verdict or declaring law if jury believe the evidence.**—A charge that the jury, if believing the testimony of named witnesses, should either convict or acquit, is on the weight of the testimony. *Green v. State*, 60 App. 530, 132 S. W. 806. An instruction that, if the jury believe from the evidence the defendant confessed, to a person named, he was guilty, the jury may find him guilty as charged, is on the weight of evidence. *Long v. State*, 1 Tex. App. 466. Where on the trial of an indictment for a misdemeanor, presented six years after the commission of an offense, it appears that, shortly after its commission, the accused left the state, an instruction that, if the jury believed that accused was guilty, they should acquit him as the offense was barred by limitation, is on the weight of the evidence. *Whitaker v. State*, 12 Tex. App. 436.

In a prosecution for burglary, an instruction that if the jury, bearing in mind a definition given, believed from the evidence that defendant with another, on or

about a certain date, forcibly entered a house with intent to commit the crime of theft, he would be guilty, is not on the weight of the evidence. *Lewis v. State*, 72 App. 377, 162 S. W. 866.

119. **Directing verdict, or declaring law, if certain facts are found.**—A charge which submits the facts to the jury, and informs them that, if these facts are true, the defendant would be guilty, is proper, where the facts stated constitute the crime. *Crook v. State*, 39 App. 252, 45 S. W. 720; *Still v. State* (Cr. App.) 50 S. W. 355.

An instruction, in a prosecution for the larceny of a horse by the bailee thereof, that if "the jury believe that defendant borrowed the horse, and was to return it, and did not do so, but took it to another town, and it was taken from him, such will be a fraudulent appropriation, and you will find defendant guilty," is on the weight of the testimony. *Jaimes v. State*, 32 App. 473, 24 S. W. 297. Where there is testimony that accused prevented the prosecuting witness from shooting at him, by elevating her arm, and the pistol was fired in the air, a charge on self-defense that if the jury believed that the prosecuting witness assaulted accused by "shooting at him" with a pistol, and accused then shot, etc., they should acquit him, is erroneous as on the weight of the evidence. *Hall v. State*, 42 App. 444, 60 S. W. 769. Where deceased's death was caused by setting on fire gasoline and turpentine which had been poured on his clothing, a charge that if the jury were satisfied that turpentine was poured on deceased, and accused knew of it, and that he procured part of the turpentine, and that deceased was set on fire, and that at the time or just before the match was lighted defendant, with a deliberate design, poured turpentine on deceased, and was present with the others, leaning over the body, when the match was ignited, and that accused reasonably knew death might result, he would be guilty as a principal, is on the weight of the evidence. *Renner v. State*, 43 App. 347, 65 S. W. 1102.

The character of deceased being shown by the evidence to be known by defendant, a charge to acquit if the jury believed that defendant killed deceased, and at such time deceased made an attack on him, which, from its character and the relative strength of the parties, and "defendant's knowledge of the character and disposition of deceased," caused him to have reasonable expectation or fear of death, is not on the weight of evidence. *Messer v. State*, 43 App. 97, 63 S. W. 643. In a prosecution for assault to commit rape, an instruction that if defendant put his hand on Mrs. R., threw her down, and pulled up her dress, without her consent, the jury should convict, is not on the weight of evidence. *Valles v. State* (Cr. App.) 71 S. W. 598. An instruction on a prosecution for the sale of intoxicating liquors that if the jury believed that defendant, on or about a specified date, or at any time within two years of a specified date, sold intoxicating liquors, they should find him guilty, is not on the weight of the evidence. *Williams v. State*, 45 App. 477, 77 S. W. 215. In a prosecution for aggravated assault, an instruction that if the jury found from the evidence that defendant was engaged in the doing of an unlawful act towards the prosecuting witness and the witness did only that which was necessary to protect himself, then defendant could not justify on the ground of self defense, is not on the weight of evidence, as telling the jury that defendant was engaged in unlawful acts toward the prosecuting witness. *Pace v. State* (Cr. App.) 79 S. W. 531. Where, in a prosecution for disclosing the secrets of the grand jury, the court, after defining the offense in the language of Pen. Code 1895, art. 213, charged that, if the jury believed from the evidence that defendant disclosed to S. the matter about which he had been interrogated while before the jury, without reiterating the particular matter testified about, they should find him guilty, such charge is not on the weight of the testimony. *Higdon v. State*, 46 App. 198, 79 S. W. 546. An instruction that if the jury were satisfied from the evidence, beyond a reasonable doubt, that defendant, within three years prior to the filing of the indictment in W. county, state of Texas, with a deadly weapon or instrument, reasonably calculated or likely to produce death or serious bodily injury from the manner in which it was used, and with malice aforethought, had assaulted G. with intent then and there to kill and murder her, defendant was guilty of assault with intent to murder, is not on the weight of the testimony. *Lozano v. State* (Cr. App.) 81 S. W. 37. An instruction that if the jury believe from the evidence beyond a reasonable doubt that the defendant did, as charged in the indictment, with express malice aforethought, with his fist, it being an instrument well calculated and likely to produce death, by the manner in which it was used, with a sedate and deliberate mind and formal design to kill, unlawfully strike with his fist the infant child, and thereby kill said infant child, they will find him guilty of murder in the first degree, is not on the weight of the evidence. *Tune v. State*, 49 App. 445, 94 S. W. 231. On a prosecution for robbery, an instruction that if defendant took one or more of the bills, which prosecutor testified had been taken from him, under circumstances that would constitute robbery, defendant should be found guilty, is on the weight of the evidence. *Chancey v. State*, 50 App. 85, 96 S. W. 12.

120. **Conflicting evidence.**—The court must not in the charge undertake to decide conflicts of evidence. That is the exclusive province of the jury. *Wasson v. State*, 3 App. 474. An instruction, in a criminal case, that, if there was a conflict in the evidence, the jury should reconcile it, if it could be done, or, if the evidence could not be reconciled, then the jury, after considering all the facts before them, should give credit to such witness, or set of witnesses, as appeared to them most worthy of belief, is erroneous, because it allows the jury arbitrarily to believe or disbelieve a witness, or set of witnesses. *Jackson v. State*, 7 App. 363. And see *Means v. State*, 10 App. 16, 38 Am. Rep. 640. Where prosecutor and his brother had accused defendant of sending a scurrilous valentine, which mentioned their sisters' names in an offensive manner, and, in the quarrel ensuing, the prosecutor was wounded and his brother killed,—the evidence being conflicting as to defendant's connection with the valentine,—an instruction that the valentine could

not be considered by the jury against defendant, unless they found beyond reasonable doubt that he was connected with its production, was erroneous, since it is on the weight of evidence, and authorized the jury to take the valentine as a criminative fact against defendant. *Kelley v. State*, 43 App. 40, 62 S. W. 915. An instruction to the effect that, if the evidence could not be reconciled, the jury should decide who of the witnesses were entitled to the greater credibility, is not upon the weight of the evidence. *Rideus v. State*, 41 Tex. 199.

121. **Confining jury to consideration of part of evidence.**—On a prosecution for homicide, where the facts that deceased had followed defendant and had whistled at his horse were but two of the facts which led up to the main facts of the trouble, a charge on self-defense that specially mentioned those facts as not justifying defendant in taking the life of deceased is erroneous. *Craiger v. State*, 48 App. 500, 88 S. W. 208.

Where, after charging on manslaughter, a court charged that the jury were to determine the state of mind of the defendant when he killed the deceased (if he did so), and, in that connection, threats (if any) made by the deceased regarding the defendant, the reputation of the deceased (if such it was) as a violent and dangerous man, the defendant's personal knowledge (if such he had) that the deceased was a violent and dangerous man, the relative strength of deceased and the defendant, and all other facts in the case that might shed any light upon such state of mind, is not on the weight of the evidence. *Clark v. State*, 45 App. 456, 76 S. W. 573.

121½. **Affirmative and negative testimony.**—Where, on a trial for unlawfully carrying a pistol, two witnesses testified that they saw on the defendant what they "took to be the handle of a pistol," and two testified that their opportunities were as good as any one's, and that they saw nothing of the kind, an instruction that, with equal opportunities, the testimony of an affirmative witness was preferable to that of one who failed to observe the fact, is erroneous. *Haskew v. State*, 7 Tex. App. 107.

122. **Purpose and effect of evidence.**—An instruction, on a trial for murder, that certain testimony was to be given such weight as, upon a consideration of the entire testimony, the jury might deem the same entitled to, in determining whether or not defendant had a motive for the killing, and for no other purpose whatever, and under no circumstances should the testimony be considered as affecting defendant's right of self-defense, is a charge on the weight of the evidence, where the testimony referred to was a part of the *res gestæ*. *Terry v. State*, 45 App. 264, 76 S. W. 928. An instruction in a prosecution for cattle theft that a certain brand was only admitted in evidence as proving ownership of the cow claimed to be the mother of the stolen calf, and that the brands on the calf placed on the calf by the owner after its recovery can only be considered, in connection with all the other evidence, for the purpose of identifying the calf, is a charge on the weight of the evidence. *Wallace v. State* (Cr. App.) 66 S. W. 1102. In a prosecution for violating the local option law, an instruction that all advertisements and cards of defendant published in a newspaper, the occupation license issued to defendant, together with the tax collector's record of the occupation tax paid by the defendant in L. county, introduced in evidence, could be considered by the jury for no other purpose than to show whether the defendant at the time of the sale was engaged or interested in the sale of intoxicating liquors in L. county, is a charge on the weight of evidence. *Brown v. State* (Cr. App.) 76 S. W. 475.

A charge in a prosecution for perjury as to why the pleadings and judgment in the action in which the perjury was charged to have been committed were introduced, and the purpose for which they could be considered, is not a charge upon the weight of the evidence. *Spearman v. State* (Cr. App.) 152 S. W. 915, 44 L. R. A. (N. S.) 243. In a prosecution for receiving or concealing stolen goods, an instruction that the confession of the original thief, and the verdict and judgment and sentence of conviction against him, were not original evidence against accused and could not be considered for that purpose but only to show that the thief was guilty of stealing the property described in the indictment, and that the jury could not convict accused unless they believed beyond a reasonable doubt that the thief fraudulently took the property from the owners without their consent with intent to deprive them of its value and appropriate it to his own use, and that accused knew that the property had been stolen and received and concealed it, is not on the weight of evidence. *Meek v. State*, 71 App. 433, 160 S. W. 698.

In a prosecution for offering to bribe a witness, where evidence as to defendant's tampering with a witness after his indictment was admissible on the issue of his guilt, it was not proper for the court to limit the evidence by its charge, since that would have been a charge on the weight of the evidence. *Savage v. State* (Cr. App.) 170 S. W. 730.

123. — **Impeaching evidence.**—In a prosecution for murder, an instruction that impeaching testimony was admitted solely for the purpose of aiding the jury in passing on the credibility of the witnesses, and in determining the weight to be attached to their evidence, is not a charge on the weight of the testimony. *Messer v. State*, 43 App. 97, 63 S. W. 643; *Kipper v. State*, 45 App. 377, 77 S. W. 611. But see *Bail v. State* (Cr. App.) 36 S. W. 448, holding that an instruction that singles out the corroborative evidence received to impeach a witness, and tells the jury, in effect, that it should go to the witness' credibility, is on the weight of the evidence; *McCleary v. State*, 57 App. 139, 122 S. W. 26, holding that an instruction declaring that there was evidence before the jury "tending" to impeach witness, which could be considered, if at all, for impeachment purposes only, is erroneous, as on the weight of evidence; *Stull v. State*, 47 App. 547, 84 S. W. 1059, holding that a charge that certain evidence was admitted "only for the purpose of going to the credibility of the defendant as a witness" is upon the weight of the evidence; *Holloway v. State*, 45 App. 303, 77 S. W. 14, holding that an instruction in a prosecution for homicide that the evidence relative to defendant having served

in the penitentiary, which evidence was brought out on the cross-examination of defendant's witnesses to prove his good character, could only be considered as affecting his reputation as a good citizen, and for no other purpose whatever, is on the weight of the evidence. A charge that if the jury believed that the state introduced at former trials of the case "the following testimony of accused, taken by the stenographer substantially as follows" (setting it out by question and answer), etc., did not invade the province of the jury by charging on the weight of testimony; it being necessary in limiting impeaching testimony to state the substance or purport thereof. *Day v. State*, 61 App. 114, 134 S. W. 215. Where the defense to impeach the prosecutrix had offered evidence as to contradictory statements made by her as to the number of times the defendant had intercourse with her, and for the purpose of corroborating the state was allowed to prove by the prosecutrix statements she had made to the county attorney on that subject, a charge reciting those facts and charging the jury that this evidence should not be considered unless believed to corroborate her other testimony, and only for purposes of corroboration, is not erroneous as upon the weight of the evidence or misleading to the jury. *Whitehead v. State*, 61 App. 558, 137 S. W. 356. Where contradictory statements by the prosecuting witness were proved by accused for purposes of impeachment, and the state was then permitted to corroborate such witness by proof of statements similar to her testimony, the failure to charge as to the effect of this supporting testimony was not error, as such a charge would have been on the weight of the evidence. *Gradington v. State* (Cr. App.) 155 S. W. 210.

124. — Evidence of other acts or offenses.—Instructions that evidence of defendant having been convicted of another crime is only admissible for impeaching purposes, and cannot be considered for any other purposes, is not on the weight of the evidence. *Ledbetter v. State*, 35 App. 195, 32 S. W. 903; *Bruno v. State* (Cr. App.) 58 S. W. 85; *Jasper v. State* (Cr. App.) 61 S. W. 392; *Melton v. State*, 63 App. 362, 140 S. W. 230; *Overstreet v. State* (Cr. App.) 150 S. W. 899. *Contra*, see *Counts v. State*, 48 App. 629, 89 S. W. 972. And see *Mickey v. State*, 49 App. 255, 91 S. W. 587.

Where, in a prosecution for the theft of horses, evidence was admitted of the contemporaneous theft of other horses than those described in the indictment, an instruction that the jury should only consider such evidence to establish the identity of the transaction or as developing the *res gestæ* of the alleged offense, and to aid in proving guilt by circumstances connected with the offense is not upon the weight of the testimony. *Byrd v. State*, 49 App. 279, 93 S. W. 114. And see *Stephens v. State* (Cr. App.) 154 S. W. 1001. And where the testimony shows that the theft of a saddle was contemporaneous with the theft of a horse, a charge that the jury could use the testimony concerning the theft of the saddle only in judging of the intent of the accused as to the theft of the horse is not on the weight of evidence. *Hammock v. State*, 49 App. 471, 93 S. W. 549. But, where, on a trial for embezzlement, the state introduced evidence tending to prove the embezzlement of other money belonging to the prosecuting witness, and defendant claimed that he borrowed the money, an instruction that the state had introduced evidence tending to prove the embezzlement of other money belonging to the prosecuting witness, which evidence could only be considered on the question of intent, is on the weight of the evidence. *Leach v. State*, 46 App. 507, 81 S. W. 733.

In a prosecution for murder, in which it appeared that defendant's wife was killed while defendant and another were engaged in a shooting affray, a charge that evidence tending to show that defendant shot at the other person engaged in the affray could not be considered as any evidence of the guilt of the defendant, but that if the jury believed defendant killed deceased they might consider such evidence as showing the condition of defendant's mind at the time he fired and the intent with which he did so, is on the weight of the testimony. *Bennett v. State* (Cr. App.) 75 S. W. 314. In a prosecution for violating the local option law, an instruction that evidence that intoxicating liquor other than that involved was found on premises controlled by accused, and was claimed by him, could not be considered, except to show intent to commit the particular offense, is erroneous as being on the weight of the evidence. *Stewart v. State* (Cr. App.) 153 S. W. 1150.

An instruction, on a trial for rape on a female under the age of consent, which limits the finding of the jury to the act of intercourse alleged to have occurred at a specified place, and stated that the jury could not consider any other acts between the parties, is not on the weight of the testimony. *Cain v. State* (Cr. App.) 153 S. W. 147.

125. Weight of particular parts of testimony.—It is not proper for the court to single out particular facts or specific parts of the testimony and charge thereon. To do so would be instructing on the weight of the evidence. *Cooper v. State*, 23 Tex. 331; *Johnson v. State*, 1 App. 609; *Walker v. State*, 13 App. 618, 44 Am. Rep. 716, note; *McCall v. State*, 14 App. 353; *White v. State*, 17 App. 188; *Howard v. State*, 18 App. 348; *Gonzales v. State*, 32 App. 611, 25 S. W. 781; *Ratigan v. State*, 33 App. 301, 26 S. W. 407; *Varnarsdale v. State*, 35 App. 587, 34 S. W. 931; *Wilson v. State* (Cr. App.) 36 S. W. 587; *Copeland v. State*, 36 App. 575, 38 S. W. 210; *Carter v. State*, 39 App. 345, 46 S. W. 236, 48 S. W. 508; *Gatlin v. State*, 40 App. 116, 49 S. W. 37; *Smith v. State* (Cr. App.) 49 S. W. 583; *Preston v. State*, 41 App. 300, 53 S. W. 127, 881; *Gardner v. State* (Cr. App.) 59 S. W. 1114; *Miles v. State*, 65 S. W. 912; *Harris v. State*, 65 S. W. 921; *Tardy v. State*, 46 App. 214, 78 S. W. 1076; *Rice v. State*, 49 App. 569, 94 S. W. 1024; *Fuller v. State*, 50 App. 14, 95 S. W. 541; *Wadkins v. State*, 58 App. 110, 124 S. W. 959, 137 Am. St. Rep. 922, 21 Ann. Cas. 556; *Canon v. State*, 59 App. 398, 128 S. W. 141; *Lockett v. State*, 59 App. 531, 129 S. W. 627; *Harrelson v. State*, 60 App. 534, 132 S. W. 783; *Blocker v. State*, 61 App. 413, 135 S. W. 130; *Allen v. State*, 64 App. 225, 141 S. W. 983; *Barber v. State*, 64 App. 96, 142 S. W. 577; *Carlisle v. State*, 64 App. 535, 142 S. W. 1178; *Wragg v. State* (Cr. App.) 145 S. W. 342; *Warren v. State* (Cr. App.) 149 S. W. 130; *Tucker v. State* (Cr. App.) 150 S. W. 190; *Mims v. State* (Cr. App.) 153 S. W. 321; *Stewart v. State* (Cr. App.) 153 S. W. 1150;

Neal v. State, 70 App. 584, 157 S. W. 1192; Minter v. State, 70 App. 634, 159 S. W. 286; Ballard v. State, 71 App. 587, 160 S. W. 716; Smith v. State (Cr. App.) 164 S. W. 825; Cunningham v. State (Cr. App.) 166 S. W. 519; De Rossett v. State (Cr. App.) 168 S. W. 531; Collins v. State (Cr. App.) 178 S. W. 345. The charge should not give undue prominence to any fact, theory, or proposition of law. Moore v. State, 59 App. 361, 128 S. W. 1115; Roquemore v. State, 59 App. 568, 129 S. W. 1120. A charge may be erroneous by giving undue influence to collateral facts or by laying too much stress on comparatively immaterial considerations so as to divert the jury from the main issue. Long v. State, 1 App. 709. Where the trial court in a prosecution for larceny makes various repetitions of the law in regard to principals so as to have impressed the jury that defendant in his judgment was connected with the taking, there is prejudicial error. Newton v. State, 62 App. 622, 138 S. W. 708. If certain portions of the testimony makes an issue for the jury, it is sufficient to tell them to acquit if they believe such issue, or if they have reasonable doubt as to whether it is true or not. Lockett v. State, 59 App. 531, 129 S. W. 627. It is error to instruct the jury to convict if they believe certain inculpatory evidence to be true, ignoring other evidence of an exculpatory or extenuating nature. Howard v. State, 18 App. 348; McFarlin v. State, 41 Tex. 23. In a murder case, a charge to the jury to find accused guilty if they believed from the evidence that deceased was killed under the circumstances detailed by a designated witness, is a charge on the weight of evidence. Rice v. State, 3 App. 451. While, in a theft prosecution, the fact that accused forfeited his bail bond and his flight, as well as his explanation of such facts, were admissible in evidence, the court should not refer to either the incriminating or explanatory evidence in its charge. Brown v. State, 57 App. 570, 124 S. W. 101. In a prosecution for theft, a charge that the jury would not consider defendant's guilt because he had not returned the money alleged to have been taken, nor consider whether he had promised to repay the same, singles out a particular fact and eliminates it from the jury's consideration. Hawkins v. State, 58 App. 407, 126 S. W. 268, 137 Am. St. Rep. 970. Where accused contended that the prosecution was the result of a conspiracy, it is improper for the court to single out that testimony and charge that if the prosecution was the result of conspiracy, and the jury had reasonable doubt of accused's guilt, they should acquit. Walton v. State (Cr. App.) 178 S. W. 358.

126. Documentary evidence.—It is within the province of the court to construe the legal effect and meaning of documents and other written instruments, and a charge on such legal effect and meaning would not be on the weight of the evidence. See Jones v. State, 5 App. 130; Braxton v. State, 9 App. 97; Smith v. State, 24 App. 1, 5 S. W. 510; Scott v. State, 35 App. 11, 29 S. W. 274; Floeck v. State, 34 App. 314, 30 S. W. 794; Overly v. State, 34 App. 500, 31 S. W. 377; Monford v. State, 35 App. 237, 33 S. W. 351; Wright v. State, 37 App. 3, 35 S. W. 150, 38 S. W. 811; Darbyshire v. State, 36 App. 547, 38 S. W. 173.

127. Circumstantial evidence.—An instruction, in effect announcing to the jury that they need not be alarmed at the idea of finding one guilty on circumstantial evidence, because it was not only legal and competent but frequently more convincing than positive testimony, even though the facts constituting the chain were testified to by witnesses of doubtful credibility, and that they were as likely to make a mistake and convict an innocent man on positive testimony as on circumstantial, is on the weight of the evidence. Harrison v. State, 8 App. 183; Harrison v. State, 9 App. 407. A charge that "circumstantial evidence, when fully and clearly made out, is sufficient to sustain a conviction for crime; but the circumstances must not be of a vague, indefinite, shadowy character, and the facts constituting the chain must be clearly defined. * * * In cases depending upon circumstantial evidence, the mind seeks to explore every possible source from which any light, however feeble, may be derived; and it is peculiarly proper that the jury should have before them every fact and circumstance, however slight, * * *" is on the weight of the evidence. McCleskey v. State (Cr. App.) 13 S. W. 997.

In a prosecution for an illegal sale of liquor, an instruction that certain circumstances purporting to be applicable to the facts in the case are not a violation of the local option law, is on the weight of the evidence. Bennett v. State, 40 App. 445, 50 S. W. 946.

A charge that when the evidence "is wholly circumstantial, as in the case here," the absence of all evidence of a motive affords of itself, a strong presumption of innocence, and that the failure of the evidence to show any other criminal agent than accused is not a circumstance that may be considered by the jury in determining guilt is on the weight of the evidence. Williams v. State, 60 App. 453, 132 S. W. 345.

A charge, on a trial for larceny, that possession of recently stolen property may be proved by circumstantial evidence under the rules governing circumstantial evidence, is not on the weight of the evidence. Suggs v. State (Cr. App.) 143 S. W. 186. An instruction that the truth or falsity of the statements or declarations of accused might be shown by circumstantial evidence, and that it was not necessary for the state to disprove them by positive testimony, is not on the weight of the evidence. Brown v. State (Cr. App.) 169 S. W. 437. An instruction that if the jury believed from the evidence that prosecutor did not see accused at the time of commission of the offense, as testified to by prosecutor, or if the jury had a reasonable doubt thereof, the state must rely on circumstantial evidence to convict, is not a charge on the weight of the evidence. Terrell v. State (Cr. App.) 174 S. W. 1088.

128. Reasonable doubt.—A charge that the jury must find enumerated facts beyond a reasonable doubt before they may convict accused is not on the weight of the testimony. Williams v. State (Cr. App.) 55 S. W. 500; Chenault v. State,

46 App. 351, 81 S. W. 971; *Tune v. State*, 49 App. 445, 94 S. W. 231; *Curry v. State*, 50 App. 158, 94 S. W. 1058; *Hill v. State* (Cr. App.) 168 S. W. 864.

129. **Accomplices and testimony thereof.**—A charge, in a prosecution for larceny, that another was an accomplice if any offense was committed, and the jury could not find accused guilty upon the accomplice's testimony unless they believed it to be true and that it showed accused guilty as charged, and could not convict even then unless they believed that there was evidence outside of the accomplice's tending to connect accused with the offense charged, and believed beyond a reasonable doubt from all the evidence that accused was guilty, is not upon the weight of the evidence. *Brown v. State*, 57 App. 570, 124 S. W. 101.

An instruction that a witness was an accomplice is proper where sustained by the evidence, and is not a charge on the weight of the evidence. *Sheppard v. State*, 63 App. 569, 140 S. W. 1090.

130. **Credibility of witnesses.**—An instruction which infringes on the right of the jury to determine the credibility of the witnesses must not be given. *Ross v. State*, 29 Tex. 499; *Searcy v. State*, 1 App. 440; *Pharr v. State*, 7 App. 472; *Riojas v. State*, 8 App. 49; *Kirk v. State*, 35 App. 224, 32 S. W. 1045. A charge which directs the jury arbitrarily to reject or credit certain testimony is improper. *Bishop v. State*, 43 Tex. 390; *Litman v. State*, 9 App. 461; *Johnson v. State*, 9 App. 558; *Wilbanks v. State*, 10 App. 642. So, also, is a charge which suggests that the court has a doubt as to the veracity of a witness. *Gibbs v. State* (Cr. App.) 20 S. W. 919. And a charge that certain testimony is false is bad. *Bonner v. State* (Cr. App.) 32 S. W. 1043. Where the state, in a prosecution for homicide, introduced threats by defendant to kill deceased, an instruction that if such threats were made with no intention of taking the life of deceased, or were made in a jocular manner, they should not be considered in reaching a verdict, invades the province of the jury as the judge of the credibility of witnesses. *Brock v. State* (Cr. App.) 151 S. W. 801. However correct may be the proposition that the evidence of a pardoned convict is entitled to but little credit, an instruction to the jury to discredit or receive it with suspicion, would be erroneous. *Thornton v. State*, 20 App. 519.

An instruction to the jury to the effect that they are the judges of the credence due to an impeaching witness, as well as the others, and should believe such of the witnesses as they thought most entitled to credit, is good. *Williams v. State*, 10 App. 8. Where the jury have been instructed that they are the exclusive judges of the evidence, its weight, and of the credibility of the witnesses, and additional instruction that what witnesses and how much of their testimony they would believe is left entirely to their minds and consciences, while unnecessary, is not error. *Collins v. State*, 39 App. 441, 46 S. W. 933.

A charge that, unless the jury believed the evidence of one of accused's witnesses was wholly false, they should acquit, is properly refused as on the weight of the evidence. *Collins v. State* (Cr. App.) 178 S. W. 345.

131. — **Co-defendants.**—Where one, who was jointly indicted with defendant, has been allowed to testify for the state, an instruction to give his evidence such credit as the jury believe it entitled to, and that the presumption is that all the witnesses testified correctly, is not erroneous. *Morgan v. State*, 44 Tex. 511.

132. — **Interest or bias.**—A charge that in determining the truth of the testimony the jury are to consider the intelligence, interest, and apparent bias or prejudice of the witnesses is on the weight of the testimony. *Harrell v. State*, 37 App. 612, 40 S. W. 799; *Williams v. State* (Cr. App.) 40 S. W. 801; *Isham v. State* (Cr. App.) 41 S. W. 622; *Penny v. State* (Cr. App.) 42 S. W. 297; *Daggett v. State*, 39 App. 5, 44 S. W. 148, 842, overruling *Brown v. State*, 2 App. 115; *Adam v. State* (Cr. App.) 20 S. W. 548; *Cockerell v. State*, 32 App. 585, 25 S. W. 421; *McGrath v. State*, 35 App. 413, 34 S. W. 127, 941.

133. **Credibility of accused.**—A charge which intimates an opinion on the credibility of statements made by accused is erroneous. *Ross v. State*, 29 Tex. 499. Where accused has testified, an instruction that, in determining the credibility of the witnesses, the jury may consider their interest in the case, is on the weight of the testimony. *Cockerell v. State*, 32 App. 585, 25 S. W. 421; *Harrell v. State*, 37 App. 612, 40 S. W. 799; *Penny v. State* (Cr. App.) 42 S. W. 297; *Oliver v. State* (Cr. App.) 42 S. W. 554; *Shields v. State*, 39 App. 13, 44 S. W. 844. But see *McGrath v. State*, 35 App. 413, 34 S. W. 127, 941. And a charge that the jury are the sole judges of the credibility of accused's testimony, and that they should judge and weigh it as they would that of other witnesses, coupled with a statement that the jury should consider accused's interest, is also erroneous. *Muely v. State*, 31 App. 155, 19 S. W. 915, reversing 18 S. W. 411. So, also, is a charge that the jury in weighing accused's evidence should treat him as any other witness, judging his appearance, demeanor, etc. *Clark v. State* (Cr. App.) 59 S. W. 887. Where accused's testimony has not been attacked, nor his credibility been assailed, but evidence was admitted of his intoxication, a charge that evidence of his having been intoxicated might weaken his testimony and affect his credibility as a witness, is on the weight of testimony. *Tally v. State*, 48 App. 474, 88 S. W. 339. In a prosecution for the theft of hogs, where accused has testified that he never claimed any interest in the hogs, that he had stated to the prosecutor that they were not his, and that he had merely assisted a relative in driving them, believing that the relative owned them, an instruction authorizing the jury to acquit, if they had a reasonable doubt on the question whether the hogs were the property of prosecutor, or of accused or his relative, is erroneous as conveying the idea that the court believed accused's testimony was false. *Johnson v. State*, 49 App. 106, 90 S. W. 633. A charge which says that the jury may consider the fact that a hired detective and the defendant are witnesses in arriving at their verdict, and

to test their credibility, is a charge upon the weight of evidence. *Ross v. State*, 53 App. 293, 109 S. W. 152.

134. Corroboration of witness.—A charge that, while prosecutrix in a rape case need not be corroborated, still the jury should carefully consider her testimony, is on the weight of evidence. *Knowles v. State*, 44 App. 322, 72 S. W. 398. And so is a charge that prosecutrix is a competent witness, but her credibility is for the jury to determine; that, if her testimony is unsupported by other evidence, her credit would thereby be weakened; that, when a conviction might be had on her uncorroborated statement, special scrutiny of the facts is demanded; and that, in the absence of corroborating circumstances, the jury should acquit. *Gonzales v. State*, 32 App. 611, 25 S. W. 781. In a prosecution for theft, where the court gave defendant's requested instructions on accomplice testimony, and further instructed that, if the jury found that there was any evidence, "either in the tracks or otherwise," that they thought corroborated a certain witness, who was an accomplice, they might convict, such instruction is on the weight of evidence. *Dickenson v. State* (Cr. App.) 63 S. W. 328. On a trial for seduction, where there was no evidence except the testimony of prosecutrix to show that letters purporting to have been written by accused came from him, an instruction as to corroboration is erroneous as on the weight of the evidence. *James v. State*, 72 App. 155, 161 S. W. 472. It is error, in a prosecution for killing a newborn infant, to charge that if the jury believed that the child's neck was broken, as alleged in the indictment, that would not be sufficient to corroborate the evidence of the child's mother, as the fact of corroboration should have been left for the jury's determination. *Jones v. State*, 63 App. 394, 141 S. W. 953. An instruction in a prosecution for incest, that, if the female voluntarily, and with the same intent as defendant, participated in the alleged commission of the offense, she would be an accomplice, and her testimony would not be sufficient to warrant a conviction unless she be corroborated by other credible testimony tending to connect defendant with the commission of the alleged offense, is not on the weight of evidence. *Schoenfeldt v. State*, 30 App. 695, 18 S. W. 640. But, where, coupled with such an instruction, the court also charges that if the evidence shows that she was the victim of force or undue influence, so that she did not act voluntarily, then she is not an accomplice, and a conviction may stand on her uncorroborated evidence, such a charge, though a correct proposition of law, is on the weight of the evidence. *Tipton v. State*, 30 App. 530, 17 S. W. 1097.

135. Failure of accused to testify.—After the jury have retired, answers in the affirmative by the court to their inquiries whether an opportunity was afforded defendant, personally or otherwise, to rebut the contents of a letter from him to another, are erroneous, as on the weight of evidence, and tantamount to referring to defendant's failure to testify, although the court, in its original instructions, charged the jury not to discuss defendant's failure to testify, etc. *Parker v. State*, 43 App. 526, 67 S. W. 121.

136. Character evidence.—To instruct as to the consideration the jury should give evidence of good character would be on the weight of the evidence. *Lockhart v. State*, 3 App. 567.

137. Character of witness.—Where a witness testified that the reputation of the prosecutrix for chastity was good, but on cross-examination he said he had never heard her reputation questioned, and the court, in refusing a request to exclude the testimony remarked, "there is no higher evidence of good character of a person than the fact that it is never discussed," such remark was improper, as on the weight of evidence. *McCullar v. State*, 36 App. 213, 36 S. W. 585, 61 Am. St. Rep. 847.

138. Confessions, admissions and declarations.—The court should not instruct as to the weight to be given to a confession. *Harris v. State*, 1 App. 74.

A charge that a confession is of the most weighty nature in law comments on the weight of the evidence. *Morrison v. State*, 41 Tex. 516; *Harris v. State*, 1 App. 74; *Ledbetter v. State*, 21 App. 344, 17 S. W. 427.

Where a party accused of burglary made an extrajudicial confession, and on trial the court charged that the jury should find from the evidence whether accused confessed after being properly warned, and, if they so found, convict defendant, such charge is on the weight of the evidence. *Veigh v. State*, 43 App. 17, 62 S. W. 757. A charge that, if confessions were so contradictory in themselves that they could not be reconciled, they might be disregarded is on the weight of evidence, since the fact that they were contradictory would not affect their admissibility, but would only go to their weight as evidence. *Goode v. State*, 57 App. 220, 123 S. W. 597. A charge that, if the jury found confessions were not voluntary, they should acquit, unless they believed from the other evidence that the defendant's guilt had been established beyond a reasonable doubt, is not on the weight of evidence. *Morris v. State*, 39 App. 371, 46 S. W. 253. A charge that "the confession of defendant may be used in evidence against him if it appears that the same was freely made without compulsion or persuasion, * * * the court charges you to wholly disregard the alleged confession of defendant, unless you believe from the evidence that the same, if any, was freely and voluntarily made, if you believe from the evidence that the confession, if any, was made on compulsion or promise on the part of the officer or officers in question you will wholly disregard the alleged confession, the only way in which you can consider the confession, if any, in evidence, is for you to believe from the evidence that the same, if any, was freely and voluntarily made," is not subject to the objection that it is on the weight of the evidence. *Griffin v. State*, 49 App. 440, 93 S. W. 732.

An instruction that admissions of defendant against himself are to be taken as true is on the weight of the evidence. *Grant v. State*, 2 App. 164.

On the trial of a perjury case, an instruction to the jury to convict on the state's case as made by a letter in evidence, in which defendant admitted his guilt, and

the evidence of a certain witness, unless it is overcome by other evidence, is on the weight of evidence. *Hughes v. State*, 32 App. 379, 23 S. W. 891. A charge that the jury might consider, "as evidence against" a defendant, any statement made by him, is a charge on the weight of the testimony, where the only statement shown to have been made was neither a confession of guilt nor an unequivocal admission of any criminative fact, but might but for such charge have been considered by the jury in connection with the other facts and circumstances as favorable to the defendant. *Martin v. State*, 38 App. 285, 43 S. W. 91. An instruction in a criminal case that the whole of admissions made by defendant, which are introduced by the state, are to be taken together, and the state is bound by them unless they are shown to be false, and that such admissions are to be taken into consideration as evidence in connection with all the other facts and evidence, is a charge on the weight of the evidence, and erroneous. *Wallace v. State* (Cr. App.) 66 S. W. 1102. Defendant on a trial for larceny of sugar is not entitled to a charge that the jury could not consider against him his statements as to how he got the sugar he had in his possession, unless they believed it was the sugar taken from prosecutor; that being on the weight of evidence. *Smotherman v. State*, 47 App. 309, 83 S. W. 838. A charge that the state having introduced in evidence the testimony of accused given before the grand jury is bound by all of it, and that the whole of such statement must be taken together, unless shown to be untrue, is not on the weight of the evidence. *Bailey v. State* (Cr. App.) 144 S. W. 996.

139. **Dying declarations.**—A charge that dying declarations are "worthy of the same credit as other evidence" is a charge upon the weight of evidence. *Walker v. State*, 42 Tex. 360.

140. **Principals and accessories.**—A charge that the jury are to judge whether defendant, if present at the killing, acted as principal, "from the surrounding circumstances in proof, such as companionship of the parties and the conduct of defendant at, before, and after the commission of the offense," is not on the weight of the evidence. *Watson v. State*, 28 App. 34, 12 S. W. 404.

A requested charge that the mere presence of a person at the committing of an offense, or his mere knowledge that an offense is about to be committed, will not make him a principal, nor will his failure to give alarm or supposed concealment of the offense and the offenders make him such, but, to constitute one a principal with others in the commission of a crime, there must be a combination of both acts and intent, and he must act together with the others in the commission of the offense, knowing their unlawful intent, and that, unless the jury believe beyond a reasonable doubt that accused was present when decedent was killed, and knew both of the act of the killing and of the intent of the person who committed the act, and did some overt act in connection with such person, and had a guilty knowledge and conspired with the person doing the killing before the act was done, the mere presence at decedent's house on the night of the killing, and the mere fact that she may have falsified and may have concealed those who killed decedent, will not render her a principal, is on the weight of the evidence. *Goode v. State*, 57 App. 220, 123 S. W. 597.

Defendant, having been acquitted of burglary from a railroad car from which lard had been thrown onto the right of way, was then indicted for theft; the evidence showing that he was apprehended while in the act of loading a part of the lard into a wagon on the night that it was taken from the car. He requested the court to charge that, if another person threw the lard from the car, then the fact that defendant took the same from the right of way would not constitute theft, which the court gave with the addition, unless the jury believed that defendant either by himself or in connection with another took possession of the property with the intent at the time of defrauding the owner, and appropriating the same to his own use. Held that, though the charge as requested was not the law of the case, the amendment was in effect a peremptory instruction to find defendant guilty, and was erroneous. *Roman v. State*, 64 App. 515, 142 S. W. 912.

141. **Elements of offense.**—In a prosecution for pursuing the occupation of selling intoxicating liquor in local option territory, a charge which sets out the elements of the offense as defined by the statute, naming the persons to whom the sales were alleged to have been made, is not on the weight of the testimony. *Clark v. State*, 61 App. 597, 136 S. W. 269; *Dickson v. State* (Cr. App.) 146 S. W. 914; *Misher v. State* (Cr. App.) 152 S. W. 1049; *Wilson v. State* (Cr. App.) 154 S. W. 571.

In a prosecution for burglary, a charge that, if the owner of the house sent defendant to the house to get the goods which were stolen, and defendant afterward stole the goods, she was not guilty, is not on the weight of the evidence. *Monceveis v. State* (Cr. App.) 70 S. W. 94. Where, on a trial for burglary, the prosecutor positively testified that accused was inside the house, and that he could not have entered without opening a door, and accused denied entering the house and testified that he only went on its steps, a charge that a burglary is committed by entering a house by force with intent to commit theft, and that the entry must be made with actual force, but that the slightest force is sufficient to constitute a breaking, such as the opening of a door that is shut, is not objectionable as on the weight of the testimony. *Snodgrass v. State* (Cr. App.) 148 S. W. 1095.

On the trial of an indictment for obstructing a public road which had been changed by the commissioners' court, an instruction that if the line of travel, after the change, was adopted by the public, and a plainly beaten roadway was established by the traveling public, which was recognized by the overseers, then that such public roadway was the public road, is erroneous, as it is on the weight of the evidence; it being a material question, made by the evidence, whether the

obstruction built by defendant was across the public road as changed. *Hall v. State*, 13 App. 269.

In a prosecution for disturbance of the peace wherein it is the province of the jury to decide whether the words used were calculated to disturb a charge of the court which invades this province of the jury is erroneous, and upon the weight of evidence. *McCardless v. State*, 21 App. 411, 2 S. W. 811.

142. **Conspiracy.**—Though the evidence raised the question of whether accused was the victim of conspiracy, a charge on such evidence would be on the weight of the testimony. *Collins v. State* (Cr. App.) 178 S. W. 345.

143. **Intent or malice.**—A charge which tells the jury they can look to appellant's mind at the time of the homicide and before and after that time to arrive at his intent is not an actual charge upon the evidence. *Howard v. State* (Cr. App.) 58 S. W. 78.

A charge that, if the jury found certain facts or circumstances from the evidence to exist, it would be express malice, is not on the weight of the evidence. *Cameron v. State* (Cr. App.) 153 S. W. 867. An instruction that express malice might be established by proof of the cool deportment and bearing of the party when the killing was done, immediately preceding and subsequent thereto, his apparent freedom from passion or excitement, the absence of any known cause to disturb his mind or cause his passion, is not a charge on the weight of the testimony. *Howard v. State* (Cr. App.) 58 S. W. 77. An instruction that, if the jury believe from the evidence that a previous difficulty occurred between deceased and defendant anterior to the fatal encounter, it will not be presumed that the killing was upon the antecedent malice, and it devolves upon the state to prove that defendant acted upon such antecedent malice, and not upon fresh provocation at the time of the killing, is on the effect and weight of the evidence. *Drake v. State*, 29 App. 265, 15 S. W. 725. A charge that implied malice is what the law infers from or imputes to certain acts, however suddenly done, as when the fact of an unlawful killing is established, and the facts do not establish express malice beyond a reasonable doubt, nor tend to mitigate, excuse, or justify the act, then the law implies malice and the murder is in the second degree, is not upon the weight of the evidence. *Carson v. State*, 57 App. 394, 123 S. W. 590, 136 Am. St. Rep. 981. An instruction that "if a homicide be established, and the instrument used was reasonably calculated to produce that result, the law presumes that such was the design; if, however, the instrument used was not likely to produce death, it is not to be presumed that death was designed, unless from the manner in which it was used such intention evidently appears"—is on the weight of evidence, and in effect tells the jury to presume that defendant intended to kill deceased when he struck the blow. *Thomas v. State*, 57 App. 452, 125 S. W. 35. Where the state, in a prosecution for homicide, introduced threats by defendant to kill deceased, an instruction that if such threats were made with no intention of taking the life of deceased, or were made in a jocular manner, they should not be considered in reaching the verdict, is on the weight of the evidence. *Brock v. State* (Cr. App.) 151 S. W. 801. An instruction, in a murder case, that the means used by defendant in the commission of the offense, if believed to have been committed, should be taken into consideration, and, if they were not such as would be reasonably calculated to cause the death of the deceased by the way in which they were used, that no intent to kill should be presumed from their use, is not objectionable as being upon the weight of evidence. *Ford v. State*, 64 App. 14, 142 S. W. 6.

A charge that the jury are the judges whether or not a purchase of the alleged stolen property was in fact a bona fide purchase, or whether or not it was a device and sham, is not calculated to influence the jury to believe the purchase was a sham. *Bowers v. State* (Cr. App.) 71 S. W. 284.

An instruction, on a prosecution for violating the local option law, where defendant claimed that the sale was made for sacramental purposes, that, if defendant made the sale in good faith, he could not be convicted, though he entered into no extended investigation of the purpose of the purchaser, and though the purchaser was a stranger to defendant, is on the weight of the testimony. *White v. State*, 45 App. 602, 79 S. W. 523.

144. **Evidence to prove conspiracy.**—A charge stating that the acts and declarations of witnesses were admitted on the ground that they were conspirators with the defendant, and that the admission only meant that sufficient evidence of the conspiracy was offered to permit the case to go to the jury to determine from all the evidence whether there was such a conspiracy, is on the weight of evidence. *Hudson v. State*, 43 App. 420, 66 S. W. 668; *Moore v. State*, 44 App. 45, 68 S. W. 279.

A charge as to the testimony of a witness in a prosecution for the theft of cotton, relating to declarations of defendant's brother as to ownership of some cotton, not made in the presence of the defendant, and not showing any conspiracy to which defendant was a party, that if defendant's brother and others formed a common purpose to steal the cotton, and the defendant entered into such purpose, then the acts and declarations of the conspirators in pursuance of a common design, and prior to the theft, could be used by the jury "against" the defendant, is on the weight of the evidence. *Newton v. State*, 62 App. 622, 138 S. W. 708. In a prosecution for homicide, an instruction that the fact that S. was indicted in the federal court, and that deceased was a witness in that case, and the testimony as to said case and as to the acts, conduct, or declaration of S., or of any other person except accused, could not be considered by the jury except to assist them in arriving at a possible motive of the person or persons who killed deceased, in connection with a charge that the acts of third parties could not be used as a basis of conspiracy between the parties to take the life of deceased is on the weight of the evidence. *Figaroa v. State*, 58 App. 611, 127 S. W. 193.

In a prosecution for assault committed in pursuance of a conspiracy, a charge authorizing the jury to consider acts and declarations of a co-conspirator "against defendant," if such acts and declarations were in furtherance of the common purpose and during the pendency of the conspiracy, if such conspiracy existed, is not a charge on the weight of the testimony on the subject of conspiracy. *Flannigan v. State* (Cr. App.) 53 S. W. 113, denying rehearing (Cr. App.) 51 S. W. 1116. An instruction that, before the jury could consider certain acts and declarations of defendant's companions who were present at the killing as against defendant, the jury must first believe beyond a reasonable doubt that such acts were done and declarations made during and in pursuance of a conspiracy between defendant and his companions to take the life of decedent or her husband, is not objectionable as a charge on the weight of the evidence, nor as intimating that a conspiracy existed. *Deneaner v. State*, 58 App. 624, 127 S. W. 201.

145. **Properties of liquor.**—A charge that alcohol is an intoxicant is not on the weight of evidence. *Sebastian v. State*, 44 App. 508, 72 S. W. 849; *Mayo v. State*, 62 App. 110, 136 S. W. 790. Where the issue was whether beer sold by accused in prohibition territory would produce intoxication, an instruction that beer is a fermented liquor, and that all fermented liquors are intoxicating, is erroneous for failing to leave the issue to the jury. *Jones v. State*, 70 App. 343, 156 S. W. 1191.

146. **Ownership of property.**—A charge in a prosecution for the theft of a hog that, if neither of the hogs found in the pen of defendant belonged to the owner alleged in the indictment, the defendant would not be guilty, and that, if there was a reasonable doubt whether the hogs in defendant's pen were the property of such owner, defendant was not guilty, taken as a whole, is not objectionable as being upon the weight of the evidence. *Holloway v. State*, 63 App. 503, 140 S. W. 453.

147. **Degree of crime.**—Where the charge of the court makes the circumstances of the case necessarily convict defendant of assault with intent to murder, and the facts in the case, as shown by the court in other portions of the charge, justify the jury in finding defendant guilty of aggravated assault, the first instruction is error. *Brown v. State* (Cr. App.) 53 S. W. 639. Where, in a prosecution for murder, defendant did not avow the killing and claim accident, but disavowed all knowledge of the homicide, stating that he believed deceased was shot by some one else accidentally with a stray bullet, and there was no testimony tending to show that defendant may have shot deceased accidentally, a charge on negligent homicide is properly refused, since it would be a suggestion on the part of the court that he might have done so accidentally, and thus be a charge on the evidence. *Morton v. State*, 43 App. 533, 67 S. W. 115.

Where, on a trial for assault with intent to rape, defendant's attorney stated, in argument, that the court would charge an aggravated assault, which would indicate that it thought defendant guilty of no greater offense, a reply by the court that the charge would be given only indicated that there was evidence to support a conviction of aggravated assault, is not on the weight of the evidence. *Hill v. State* (Cr. App.) 34 S. W. 750. A charge that where an unlawful killing is established, the condition of the mind of the party killing, at the time, just before, and just after the killing, is an important consideration in determining the grade of the homicide, is not on the weight of evidence. *Alexander v. State*, 40 App. 395, 49 S. W. 229, 50 S. W. 716. A charge that if the jury believed that accused was guilty of an assault, or an assault and battery, but had a reasonable doubt whether it was an aggravated assault or assault and battery, they should acquit of aggravated assault and battery and convict only of simple assault, or simple assault and battery is not on the weight of the evidence. *Jenkins v. State*, 60 App. 465, 132 S. W. 133. An instruction that the law does not further define murder in the second degree than that if the killing be shown to be unlawful, and there is nothing in the evidence on the one hand showing express malice, and on the other hand nothing that will reduce the killing below the grade of murder, then the law implies malice, and the homicide is murder in the second degree, is not upon the weight to be given the testimony. *Hendricks v. State* (Cr. App.) 154 S. W. 1005. An instruction, that where one person intentionally kills another it depends on the circumstances whether the act is justifiable, or, if not justifiable, the degree of guilt, forming a part of the charge defining murder and not a part submitting the issues to the jury, is not on the weight of the evidence. *Edwards v. State* (Cr. App.) 172 S. W. 277.

148. **Defenses in general.**—On a trial for the theft of a gelding belonging to C., a charge to the jury that, "if C. did not give defendant authority in person, or authorize any one for him to deliver the gelding to defendant, and he testifies that he did not give such consent, this would affirmatively show want of consent, if you believe him" is an improper comment on the evidence, and error. *Smith v. State*, 43 Tex. 103.

In a prosecution for forgery, an instruction that the payment of other unauthorized checks by the father of defendant would not be a defense to the present action, if the jury believed that the present check was unauthorized, is not improper as a charge on the weight of the evidence. *Howard v. State* (Cr. App.) 143 S. W. 178.

149. **Alibi.**—An instruction that alibi is a perfectly legitimate defense is an improper comment on the weight of testimony. *Payne v. State* (Cr. App.) 148 S. W. 694. And see *Johnson v. State*, 1 App. 609. Where an alibi is relied upon, it is not improper for the court in its charge, to state that fact. Such a charge is not upon the weight of evidence. *Powell v. State*, 13 App. 244. A charge which assumes that no evidence of alibi can avail the defendant, unless it produces conviction upon the minds of the jury that defendant was not present at the commission of the offense, but was elsewhere, is erroneous. *Walker v. State*, 42 Tex. 361. And see *Walker v. State*, 37 Tex. 366.

150. **Defense of insanity.**—Where the defense was insanity, and it appeared that defendant was a young man of very weak mind, a charge to the jury "that the question for your determination is not whether defendant is a man of weak or strong mind," etc., is on the weight of evidence. *Angel v. State*, 45 App. 135, 74 S. W. 553. A charge on the defense of insanity, which states under what circumstances the jury should acquit accused, if they found he did commit the act of burglary, is not on the weight of the evidence. *Smith v. State*, 61 App. 225, 133 S. W. 533. In a trial for horse theft, an instruction that if accused took the horse, but at the time was laboring under a disease of the mind to such an extent that he did not know right from wrong, and did not know that the taking of the horse, if he did take it, was wrong, he should be acquitted, is not objectionable on the weight of the evidence. *Lester v. State* (Cr. App.) 154 S. W. 554.

151. **Self defense.**—An expression by the court in an instruction on self-defense that "the doctrine of self-defense is a defensive and not an offensive right, and is limited to prevention and necessity," is on the weight of the evidence. *Coker v. State*, 59 App. 241, 128 S. W. 137. A charge that if defendant was struck by W., and cut and stabbed him with a knife to protect himself from such assault, then the cutting would be justified as in self-defense, unless defendant had deprived himself of the right of self-defense by having provoked the difficulty with W., with the apparent intention of killing W. or doing him some bodily harm, and that if W. and defendant met on the sidewalk, and W. asked defendant not to approach nearer him, indicating to defendant that he (W.) was apprehensive that defendant would assault him with a knife, and defendant, notwithstanding such request of W. persisted in coming nearer under circumstances reasonably calculated to induce the apprehension that defendant designed and was prepared to cut W. with a knife, etc., defendant would be responsible for the altercation and was guilty of having provoked the same, is on the weight of the evidence. *Sprinkle v. State*, 49 App. 224, 91 S. W. 787. In a prosecution for murder, that part of a charge on self-defense to the effect that if the weapon used by said parties (deceased and his brother), or either of them, and the manner of its use, was such as was reasonably calculated to produce death or serious bodily injury, then the law presumes that they intended to kill or inflict serious bodily injury upon defendant, is not on the weight of evidence. *Gay v. State*, 58 App. 472, 125 S. W. 896.

A charge that if decedent before the killing had threatened to take accused's life or do him serious bodily injury, and such threats had been communicated to accused, and if decedent, by some act at the time of the killing, caused accused to believe that decedent was about to execute his threat, and, acting upon such belief, accused killed him, the jury should acquit without regard to whether decedent was a dangerous man, or whether the threats were made seriously if accused believed them to have been seriously made, or whether decedent was intending to execute them, if accused believed it from some act of decedent, is objectionable as trenching closely on the weight of the evidence. *Bradley v. State*, 60 App. 398, 132 S. W. 484.

152. **Instructions in response to request.**—Defendant cannot complain of an instruction, which he requested, in relation to the conclusion to be drawn from a given state of facts in the case, on the ground that it is on the weight of evidence. *Needham v. State*, 19 Tex. 332.

III. CONSTRUCTION AND OPERATION OF CHARGE

153. **Construction of instructions given.**—A charge and the language thereof must be given a reasonable and not a strained construction, and the jury must be considered to be such reasonably intelligent and capable men as to put such reasonable construction on the charge. *Christian v. State*, 71 App. 566, 161 S. W. 101; *Graham v. State* (Cr. App.) 163 S. W. 726; *Coffman v. State* (Cr. App.) 165 S. W. 939. The language of a charge must be interpreted with reference to the evidence which elicited it. *Peck v. State*, 9 App. 70.

On a trial for murder, the statement by the court, preliminary to the charge, that defendant stands charged by the indictment with the offense of murder in the first degree, but is now on trial for murder in the second degree only, is not objectionable as a charge on murder in the first degree, but is a mere statement of the fact of the indictment. *Worthan v. State* (Cr. App.) 65 S. W. 526.

In a prosecution for theft, an instruction that, if the jury have a reasonable doubt as to whether defendant is the identical person who sold the animals to a witness, they should acquit, is not objectionable as permitting the jury to arrive at a belief that defendant was such identical person from sources other than the evidence. *Ellison v. State* (Cr. App.) 72 S. W. 188.

Where, in a prosecution for killing her child, it appeared that it was killed either by defendant or W., and the court properly charged the law as to the killing of the child by either, an instruction, "do the facts and circumstances of the case at the time of the killing and before and after that time, having connection with or relation to it, furnish satisfactory evidence of a sedate and deliberate mind on the part of the person killing at the time he or she does act," is not objectionable, as authorizing the jury to infer that defendant might be responsible for the acts of W. *Becknell v. State*, 47 App. 240, 82 S. W. 1039.

An instruction that, if defendant seduced prosecutrix, he could not escape by proving her subsequent misconduct, is proper; it not being open for the jury to infer therefrom that her subsequent behavior was not to be considered in testing her credibility. *Beeson v. State*, 60 App. 39, 130 S. W. 1006.

The court having charged that if the jury found beyond a reasonable doubt that defendant was guilty of some grade of assault, but had reasonable doubt whether he was guilty of an assault with intent to murder or an aggravated assault and battery, they should convict him of no higher offense than aggravated assault and battery, or if they had a reasonable doubt whether he was guilty of an

aggravated assault and battery or simple assault and battery, they should only convict of simple assault and battery, and if they had a reasonable doubt as to his guilt, they should acquit, as he was presumed to be innocent until his guilt was established by legal evidence, a further instruction, that if the jury believed from the evidence, beyond a reasonable doubt, that defendant with malice aforethought did unlawfully and intentionally cut prosecutor with a deadly weapon, and that defendant had a specific intent to kill prosecutor, then if the jury found that defendant was not guilty of aggravated assault and battery, or simple assault and battery, under the instructions given, they should find defendant guilty of an assault with intent to murder, is not objectionable as requiring the jury to find the defendant guilty of some offense. *Waters v. State* (Cr. App.) 148 S. W. 796.

154. **Construction and effect of charge as a whole.**—The charge must be considered as a whole, and if, when so considered, it is a full, clear, and correct presentation of the law applicable thereto, it is not material that isolated paragraphs or sentences might be misleading or improper. *Jordan v. State*, 10 Tex. 479; *Johnson v. State*, 27 Tex. 758; *Ross v. State*, 29 Tex. 499; *Browning v. State*, 1 App. 96; *Thrasher v. State*, 3 App. 281; *Street v. State*, 7 App. 5; *Gatlin v. State*, 5 App. 531; *Hardin v. State*, 8 App. 653; *Boothe v. State*, 4 App. 202; *Hudson v. State*, 10 App. 215; *Brownlee v. State*, 13 App. 255; *Elam v. State*, 16 App. 34; *Logan v. State*, 17 App. 50; *Lewis v. State*, 18 App. 401; *Hildreth v. State*, 19 App. 195; *Davis v. State*, 19 App. 201; *Hart v. State*, 21 App. 163, 17 S. W. 421; *Smith v. State*, 21 App. 277, 17 S. W. 471; *Smith v. State*, 22 App. 316, 3 S. W. 684; *Hodges v. State*, 22 App. 415, 3 S. W. 739; *Stegald v. State*, 22 App. 464, 3 S. W. 771; *Heard v. State*, 24 App. 103, 5 S. W. 846; *McCleavland v. State*, 24 App. 202, 5 S. W. 664; *McDaniel v. State*, 32 App. 16, 21 S. W. 684, 23 S. W. 989; *Champ v. State*, 32 App. 87, 22 S. W. 678; *Green v. State*, 32 App. 298, 22 S. W. 1094; *Sowell v. State*, 32 App. 482, 24 S. W. 504; *Neel v. State*, 33 App. 408, 26 S. W. 726; *Luckie v. State*, 33 App. 562, 28 S. W. 533; *Harrell v. State*, 39 App. 204, 45 S. W. 581; *Meyer v. State* (Cr. App.) 49 S. W. 600; *Jackson v. State* (Cr. App.) 51 S. W. 389; *Morgan v. State*, 41 App. 102, 51 S. W. 902; *Sanches v. State* (Cr. App.) 55 S. W. 45; *Williams v. State* (Cr. App.) 55 S. W. 500; *Spears v. State*, 41 App. 527, 56 S. W. 347; *Carter v. State*, 59 App. 73, 127 S. W. 215; *Keeton v. State*, 59 App. 316, 128 S. W. 404; *Eggleston v. State*, 59 App. 542, 128 S. W. 1105; *Hudson v. State*, 59 App. 650, 129 S. W. 1125, Ann. Cas. 1912A, 1324; *Burnam v. State*, 61 App. 616, 135 S. W. 1175; *Johnson v. State*, 61 App. 635, 136 S. W. 259; *Anthony v. State*, 62 App. 138, 136 S. W. 1097; *Whitehead v. State*, 61 App. 558, 137 S. W. 356; *Alexander v. State*, 63 App. 102, 138 S. W. 721; *Leech v. State*, 63 App. 339, 139 S. W. 1147; *Jackson v. State*, 63 App. 351, 139 S. W. 1156; *Ellington v. State*, 63 App. 427, 140 S. W. 1101; *Conger v. State*, 63 App. 312, 140 S. W. 1112; *Treadway v. State* (Cr. App.) 144 S. W. 655; *Burns v. State* (Cr. App.) 145 S. W. 356; *Baker v. State* (Cr. App.) 145 S. W. 607; *Payne v. State* (Cr. App.) 148 S. W. 694; *Williams v. State* (Cr. App.) 148 S. W. 763; *Summers v. State* (Cr. App.) 148 S. W. 774; *Redman v. State* (Cr. App.) 149 S. W. 670; *Crutchfield v. State* (Cr. App.) 152 S. W. 1053; *Wilson v. State* (Cr. App.) 154 S. W. 571; *Hendricks v. State* (Cr. App.) 154 S. W. 1005; *Luttrell v. State*, 70 App. 183, 157 S. W. 157; *Melton v. State*, 71 App. 130, 158 S. W. 550; *Mitchell v. State*, 71 App. 241, 158 S. W. 815; *Rogers v. State*, 71 App. 149, 159 S. W. 40; *Reynolds v. State*, 71 App. 454, 160 S. W. 362; *Brown v. State*, 72 App. 33, 160 S. W. 374; *Bussey v. State*, 71 App. 612, 160 S. W. 697; *Christian v. State*, 71 App. 566, 161 S. W. 101; *Roberts v. State* (Cr. App.) 168 S. W. 100; *Graham v. State*, 73 App. 28, 163 S. W. 726; *Campbell v. State*, 73 App. 198, 164 S. W. 850; *Hightower v. State*, 73 App. 258, 165 S. W. 184; *Coffman v. State*, 73 App. 295, 165 S. W. 939; *Roberts v. State* (Cr. App.) 168 S. W. 100; *Witty v. State* (Cr. App.) 171 S. W. 229; *Hicks v. State* (Cr. App.) 171 S. W. 755; *Terrell v. State* (Cr. App.) 174 S. W. 1083; *Cooper v. State* (Cr. App.) 177 S. W. 975. Regard must be had to the connection and interdependence of its several parts. *Harrison v. State*, 8 App. 183; *Graham v. State*, 73 App. 28, 163 S. W. 726. It is not proper to consider objections to a single paragraph, word, or sentence. *Crutchfield v. State* (Cr. App.) 152 S. W. 1053. So, where a paragraph of a charge appears confusing and misleading and other paragraphs appear to conflict, but the charge as a whole correctly states the law and harmonizes the conflict, no error is shown. *Williams v. State* (Cr. App.) 148 S. W. 763. Hence it is not necessary in a paragraph of an instruction to define "adequate cause" if it was defined later in the charge. *Hendricks v. State* (Cr. App.) 154 S. W. 1005. And it is not necessary to instruct that the jury must affirmatively find certain matters before convicting, where in a separate paragraph the jury were instructed that accused would not be guilty under such circumstances. *Link v. State*, 73 App. 82, 164 S. W. 987.

Where a previous portion of the instructions correctly defined malice as applicable to both degrees of murder, an instruction that if defendant with a deadly weapon shot and killed deceased, and such shooting was not under the immediate influence of sudden passion produced by an adequate cause, and was not in self-defense of an unlawful attack, he is guilty of murder in the second degree, is not objectionable as failing to require the existence of malice. *Davis v. State*, 57 App. 545, 124 S. W. 104. A charge that, to constitute theft, the taking must be wrongful, so that, if the property came into the possession of accused by lawful means, the subsequent appropriation of it would not be theft, but if the taking, though originally lawful, was obtained by false pretext, or with intent to deprive the owner thereof, and the property is so appropriated, the offense of theft is complete, is not prejudicial, because not explaining the meaning of possession, where the court subsequently charged that the jury must believe that at the time of obtaining possession of the property alleged to have been stolen, if he did obtain possession thereof, etc., and the making of a statement to the owner's wife, if any were made, accused had formed the intent to appropriate the property to his

own use, and that the statement, if any, made to the wife of the owner, was a false pretense to obtain possession of the property. *James v. State*, 57 App. 342, 123 S. W. 145. As to whether the charge on self-defense presented the view that the circumstances must be viewed from defendant's standpoint, the whole paragraph on the subject must be considered. *La Grone v. State*, 61 App. 170, 135 S. W. 121. An instruction that, where a fire is communicated to a house by means of setting fire to some combustible material which was close enough to communicate therewith, etc., is not objectionable as intimating that the burning might be sufficient, though not wilfully done, where the whole charge taken together presented this question, and defined arson as the wilful burning of a building. *Wigfall v. State*, 57 App. 639, 124 S. W. 649. Where the charge as a whole, when applying the law to the facts, presents fully what it takes to constitute murder in the first degree, the omission of the word "express" before the word "malice," in the definition of murder in the first degree, is not error. *Johnson v. State*, 63 App. 50, 138 S. W. 1021. Where, in a prosecution for uttering a false affidavit, the court charged on the question of insanity, informing them that, if accused was of unsound mind and not cognizant of the facts stated in the affidavit, it could not have been wilfully, deliberately, and corruptly made, the giving of another charge informing them that the affidavit was sufficient if its falsity was legally proved to warrant a conviction was not prejudicial error. *Welch v. State*, 71 App. 17, 157 S. W. 946. A charge in a murder case that, to warrant a conviction of murder in the first degree, the jury must be satisfied by the evidence beyond a reasonable doubt that the defendant, before the act, deliberately formed the design with a calm and sedate mind to kill deceased, that he selected and used the weapon or instrument reasonably sufficient to accomplish the death by the mode and manner of its use, and that the killing was unlawful, but the act must not result from a mere sudden, rash, and immediate design, springing from an inconsiderate impulse, passion, or excitement construed as a whole, is not prejudicial to defendant. *Leech v. State*, 63 App. 339, 139 S. W. 1147. Read as a whole, the charge on manslaughter, in a case in which the only attempt of defendant was to reduce the offense to manslaughter, based on the testimony of his wife that deceased raped her, and that she told defendant thereof, held to fairly and fully present that issue. *Cameron v. State* (Cr. App.) 153 S. W. 867. Where, in a prosecution for arson, defended on the ground of insanity, the charge of the court defined arson, defined a building, and the meaning of the term "wilful," charged that, if defendant wilfully burned the gin, he would be guilty as charged, that no acts done by an insane person were punishable as a crime, and on the presumption of innocence and burden of proof, the charge, taken as a whole, was not objectionable as authorizing a conviction, though the defendant was insane, and did not know that he was doing an unlawful act. *Rogers v. State*, 71 App. 149, 159 S. W. 40. An instruction that, if the jury found that accused unlawfully carried a pistol about his person as alleged, they should find him guilty is not erroneous for not adding, "Unless they found him not guilty under some other paragraph of the charge," where the succeeding paragraph charged he would not be guilty if the pistol was out of repair, etc. An instruction that, while it was not an offense to carry a pistol to have it repaired, accused was not entitled to rely on that defense if he stopped over on his way to the repair shop and engaged in business or pleasure is not erroneous, because the court did not instruct in connection therewith that carrying the pistol would not be an offense if it could not be fired, having already so instructed in another paragraph. *Rasberry v. State*, 72 App. 13, 160 S. W. 682. On a trial for embezzlement, after the court had charged that defendant's agency, whereby he was charged with the duty of receiving the property in question, the receipt of the property, its receipt by virtue of his agency, and the fraudulent conversion or misapplication of the property by him, were requisite to the offense of embezzlement, it further charged that, if accused was the agent of J., and came into possession of money, the property of J., as agent or attorney in fact, and if he did "fraudulently embezzle, misapply, or convert to his own use without the consent of the said J." and if each of the four essential requisites previously set forth had been established beyond a reasonable doubt, to find him guilty of embezzlement. Held that, taking the charge in its entirety, the failure of the instruction last mentioned to state that accused must fraudulently embezzle, misapply, and convert to his own use the property in question could not have misled the jury. *Thompson v. State*, 72 App. 24, 160 S. W. 704. Where the defendant claimed justifiable homicide on the ground that deceased was attempting to rob him, and also on the ground of self-defense, a charge, one paragraph of which seemed to require the jury to believe both grounds of justification existed before they could acquit, is not erroneous, where the charge, considered as a whole, was not susceptible of that construction. *Swilley v. State*, 73 App. 619, 166 S. W. 733. Instructions defining murder in the second degree, and its elements, were not erroneous because they ignored the issue of insanity, where such issue was fully and correctly presented in other instructions. *Witty v. State* (Cr. App.) 171 S. W. 229.

An instruction on homicide, requiring provocation of accused to have arisen at the time of the homicide, is not reversible error, where other instructions extended his right to act on provocation, previously given. *Jordan v. State*, 62 App. 380, 137 S. W. 133.

An instruction, in a prosecution for pursuing the business of selling intoxicating liquors, that if accused on or about five dates mentioned, "or on either of said days or dates," unlawfully engaged in the business of selling intoxicating liquors, and if he also on those dates sold liquors to persons named, or made any two of such sales, to find him guilty as charged, did not authorize a conviction for a single sale, although the quoted portion might better have been omitted, since when read as a whole it required the jury to find that he engaged in the business and made at least two sales. *Pierce v. State* (Cr. App.) 154 S. W. 559.

155. Correction of instructions, and error in instructions cured by other instructions given.—A charge may be corrected before it is read. *Boothe v. State*, 4 App. 202; *Baker v. State*, 7 App. 612. But after the charge has been read and filed it constitutes part of the record in the cause, and its alteration or amendment then, without the consent of the defendant, is such error as will necessitate a reversal of the conviction. *Granger v. State*, 11 App. 454.

It is not error to correct a charge on suggestion made after it has been read to the jury and before its delivery to them. *Bailey v. State* (Cr. App.) 38 S. W. 992.

When a trial judge believes that instructions given are wrong, he can recall the jury to give proper ones. *Lott v. State*, 60 App. 162, 131 S. W. 553.

Under this article it is proper for the court to submit his charge to the attorneys, and, after they had filed exceptions thereto, to make such changes as he thinks advisable. *Link v. State*, 73 App. 82, 164 S. W. 987.

Generally error in one portion of a charge may be cured by another portion. *Hodges v. State*, 22 App. 415, 3 S. W. 739. And see *Woodson v. State*, 24 App. 153, 6 S. W. 184.

An omission to charge on circumstantial evidence is not cured by the ordinary charge on reasonable doubt. *Hunt v. State*, 7 App. 212; *Wallace v. State*, 7 App. 570; *Struckman v. State*, 7 App. 531.

An instruction on self-defense contained the expression "expectation or fear of death or serious bodily injury." After being so written, the "r" in "or" was over-written by "f" in pencil so as to make the phrase read "expectation of fear." The court explained that the change was made without his knowledge or consent, and that the clause was read to the jury as originally written. Held, that an objection to the instructions because of the change was hypercritical and unsustainable. *Barnes v. State*, 61 App. 37, 133 S. W. 887.

Instructions held cured by other instructions. *Tucker v. State* (Cr. App.) 43 S. W. 106; *Poteet v. State* (Cr. App.) 43 S. W. 339; *Monticue v. State*, 40 App. 523, 51 S. W. 236; *Lane v. State*, 41 App. 558, 55 S. W. 831; *Hill v. State* (Cr. App.) 77 S. W. 808; *Monroe v. State*, 47 App. 59, 81 S. W. 726; *Bell v. State*, 48 App. 256, 87 S. W. 1160; *Brewin v. State*, 49 App. 296, 92 S. W. 420; *Perry v. State*, 61 App. 2, 133 S. W. 635; *Fagnani v. State* (Cr. App.) 146 S. W. 542.

Instructions held not cured by other instructions. *Arcia v. State*, 28 App. 198, 12 S. W. 599; *Johnson v. State*, 29 App. 150, 15 S. W. 647; *Simmons v. State*, 31 App. 227, 20 S. W. 573; *Armstrong v. State* (Cr. App.) 50 S. W. 346; *Parker v. State*, 43 App. 526, 67 S. W. 121; *White v. State* (Cr. App.) 68 S. W. 639; *Posey v. State*, 46 App. 190, 78 S. W. 689; *Scott v. State*, 46 App. 85, 79 S. W. 543; *Choran v. State*, 49 App. 301, 92 S. W. 422.

156. Withdrawal of instructions.—Where an instruction on declarations of accused as to recent possession of stolen property is withdrawn, because there was no evidence to support it, and a proper instruction was given previous thereto, such withdrawal is not error. *Shackelford v. State* (Cr. App.) 53 S. W. 834.

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.]

See Willson's Cr. Forms, 927, 928.

In general.—See arts. 787, 842, post.

Cited, *Terrell v. State* (Cr. App.) 174 S. W. 1088; *Davis v. State of Texas*, 139 U. S. 651, 11 Sup. Ct. 675, 35 L. Ed. 300.

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 App. 19. And see in illustration *Stuckey v. State*, 7 App. 174; *Brown v. State*, 23 Tex. 195; *Bryant v. State*, 35 Tex. 394, 33 S. W. 978, 36 S. W. 79.

Repetition of certain facts and issues to the point of imparting to them undue prominence is improper in the charge. *Bonner v. State*, 29 App. 223, 15 S. W. 821; *Irvine v. State*, 20 App. 12. And in illustration, see *Bryant v. State*, 16 App. 144; *Russell v. State*, 37 App. 314, 39 S. W. 674; *Tillery v. State*, 24 App. 251, 5 S. W. 842, 5 Am. St. Rep. 882.

On a trial for bribing a policeman not to arrest, report, and file a complaint against accused for keeping a place for the unlawful sale of intoxicating liquor, and to not come in on him unawares, but to let him know in advance, so he could have parties in his place scatter and get out, and so that things would apparently be all right when the officer arrived, where there was evidence that in this connection accused also said, "I expect you to do your duty," it was not error to refuse to charge that the jury must take this to mean literally what it apparently expressed; since this would have been on the weight of the evidence. *Minter v. State*, 70 App. 634, 159 S. W. 286.

Remarks by the trial judge to the panel of jurors drawn for the week during which accused was tried, but made before the jurors for the several cases had been selected, urging them not to treat offenders with laxity, are not instructions, within this article. *McGaughey v. State* (Cr. App.) 169 S. W. 287.

Weight of evidence.—See ante, art. 735, and notes.

Art. 737. [717] Either party may ask written instructions.—Before the court reads his charge to the jury, counsel on both sides shall have a reasonable time to present written instructions and ask that they be given to the jury. The court shall 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; Act 1913, p. 278, ch. 138, § 2, amending art. 737 revised C. C. P.]

See Willson's Cr. Forms, 942; *Davis v. State of Texas*, 139 U. S. 651, 11 Sup. Ct. 675, 35 L. Ed. 300.

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| 9. — Request unnecessary. | 19. Repetition of special requests already given. |
| 10. Sufficiency of erroneous request to call for correct charge. | 20. Argument of counsel. |

1. In general.—If requested instructions are "given" or "refused" they must be authenticated by the judge's signature; and where nothing indicates that they were refused, it will be presumed, on appeal, that they were given. *Carr v. State*, 5 App. 153; *Johnson v. State*, 7 App. 210; *Seal v. State*, 28 Tex. 491; *Jeffries v. State*, 9 App. 598.

If a requested instruction be given, it should be signed by the judge, filed and read to the jury. If refused it should be certified as refused and filed, and the jury should not be allowed to take a refused charge with them in their retirement. *Irvine v. State*, 18 App. 51; *Hildreth v. State*, 19 App. 195. It is no reason for refusing a special instruction that it was not filed before it was presented. *Lawrence v. State*, 11 App. 306.

Instructions requested at a previous trial must be again requested on second trial, else they will be considered as waived on second trial, and will form no part of the record of the last trial. *Bracken v. State*, 29 App. 362, 16 S. W. 192.

Where a special charge was not marked "Refused" or "Given," the appellate court will presume that it was given. *Hambright v. State*, 60 App. 253, 131 S. W. 1123.

Where evidence was admitted without objection, and no motion was made to strike it out, a requested special charge that the jury be instructed not to consider such evidence, which assigned no reasons as to why the evidence was not admissible, was insufficient to present the question of the admissibility of such evidence for review; for the appellate court cannot search the record to judge whether it was properly admitted. *Berg v. State*, 64 App. 612, 142 S. W. 884.

Under this article and arts. 735, 743 the court in misdemeanor cases will not consider complaints of the charge given and the refusal of special charges unless a bill of exceptions is taken at the time, giving in the bill the specific reasons why the court erred in giving the charge complained of, or in refusing the requested charge. *Giles v. State* (Cr. App.) 148 S. W. 317.

That the trial court led accused to believe that a requested charge would be given which the court failed to give, and accused argued before the jury that that was the law, while the prosecution insisted it was not, was not ground for reversal, where the instruction was one that there was no error in refusing. *Haynes v. State*, 71 App. 31, 159 S. W. 1059.

While the statute requiring the charge to be submitted to the attorneys, and requiring the attorneys to make their objections thereto before the charge is read to the jury, does not require special charges to be asked, the requesting of special charges is the better practice and to be commended. *Goldstein v. State*, 73 App. 558, 166 S. W. 149.

2. Application of amendatory act.—This section as amended applies to trials subsequent to the taking effect of that chapter for offenses committed prior to its taking effect. *Wright v. State*, 73 App. 178, 163 S. W. 976; *Ybarra v. State*, 73 App. 70, 164 S. W. 10.

Where on a trial for an offense committed prior to the taking effect of the amendatory chapter the trial court submitted the charge to accused's counsel for criticism and objection, and allowed him a reasonable time to examine it, and he failed to object thereto or to suggest amendments, objections to the charge could not be made in the motion for a new trial, though the trial judge at the opening of the trial announced that accused would be tried under the law and procedure in force at the time of the commission of the offense, unless accused filed a written request that he be tried under the law and procedure in force at the time of the trial. *Wright v. State*, 73 App. 178, 163 S. W. 976.

3. Necessity for request.—Necessity of request for charge to present on appeal the failure of the court to charge as to an issue, see notes to art. 743, post.

Necessity of request for written charge to present on appeal objections to argument, see notes to art. 724, ante.

The whole of a charge must be taken into consideration in determining complaints against any part thereof, and, if the charge as a whole is substantially correct and no special charges have been requested, it will be held sufficient. *Conger v. State*, 63 App. 312, 140 S. W. 1112; *Gentry v. State*, 61 App. 619, 136 S. W. 50.

While charge may be inaccurate, yet in misdemeanor cases appellate court cannot reverse unless there is special exception and special charge asked covering defect. *Abbott v. State*, 42 App. 8, 57 S. W. 98.

Where, in a prosecution for assault to murder, the court instructed as to the doctrine of reasonable doubt, as between the different degrees of assault, and upon the whole case, in absence of requested charges, it was not bound to instruct on reasonable doubt in the part of the charge defining aggravated assault. *McDaniel v. State*, 63 App. 359, 139 S. W. 1154.

As a general rule it is necessary that an appellant ask written instructions in respect to the remarks and comment of opposing counsel, if he desires such instructions. *Davis v. State*, 64 App. 8, 141 S. W. 264.

Where the court instructed that the burden was upon the state to establish guilt by legal evidence beyond a reasonable doubt, that accused was presumed innocent until his guilt was so established, and if the jury had a reasonable doubt as to his guilt they should acquit, failure to instruct on reasonable doubt as to each issue submitted was not reversible error in the absence of a request for such instruction. *Hamilton v. State*, 64 App. 175, 141 S. W. 966.

Where defendant in a homicide case requested and secured instructions that the burden was on the state to prove defendant's sanity at the time of the killing, and that he then knew the character of his act and its consequences and had sufficient will power to refrain therefrom, and that if he entertained the insane delusion that deceased had an immediate design on his life, or the life of his mother or brother, and acted thereon, he should be acquitted, the failure of the court to charge on manslaughter, without request, was not error. *Witty v. State* (Cr. App.) 171 S. W. 229.

Under the act of April 5, 1913 (Acts 33d Leg. c. 138), accused cannot complain of an omission in the charges given where she requested no charges. *Gray v. State* (Cr. App.) 178 S. W. 337.

4. — **Definitions.**—In a prosecution for fighting in a public place, the court charged that the law defines a public place as any place at which people are assembled for the purpose of business, amusement, recreation, or other lawful purposes; that a private residence cannot be a public place, unless it is made public by being open to the public; that a place may be public at one time and private at another; that if the jury find that the house at which accused was charged with fighting was a public place, and that accused fought there with other persons, they should find him guilty. Held, that the instruction sufficiently presented the proposition that if people were assembled at a house by special invitation, and the public generally not invited, the place was not a public one, in the absence of a request for a more specific charge. *Austin v. State*, 57 App. 623, 124 S. W. 639.

Where accused requested no special charge, the trial court did not err in failing to define the words, "prima facie evidence," used in its charge. *Fagnani v. State* (Cr. App.) 146 S. W. 542.

In a trial for burglary of a dwelling, it was not reversible error to omit the word "actually" in instructing that the jury must find that the house was occupied by the owner, in the absence of a request for a special instruction. *Payne v. State* (Cr. App.) 148 S. W. 694.

Failure of the court to define a credible witness was not error, where no objection was made to the court's charge at the trial, and no special instruction on the subject was requested. *Miles v. State*, 73 App. 493, 165 S. W. 567.

5. — **Defenses.**—Failure of the court to charge on alibi did not present error where there was no exception taken or charge thereon requested. *Williams v. State* (Cr. App.) 147 S. W. 571; *Hernandez v. State*, 64 App. 73, 141 S. W. 268.

Where the evidence raises the issue the court should charge on temporary insanity from the recent use of intoxicating liquors whether requested to do so or not, although he may have given in charge to the jury the doctrine of insanity generally. *Hierhalzer v. State*, 47 App. 199, 83 S. W. 837.

In the absence of a requested charge presenting the law of provoking difficulty, the court, in a homicide case, need not charge on that subject. *Harrelson v. State*, 60 App. 534, 132 S. W. 783.

In a criminal prosecution, where the court charged on the doctrine of reasonable doubt, the failure to charge on the question of alibi, though there was evidence tending to prove accused's alibi, is not error, in the absence of a special request or exception reserved at the time of the giving of the charge. *Harris v. State* (Cr. App.) 148 S. W. 1074.

Even if the trial court might have properly submitted an issue as to accused's insanity at the time of the trial apart from an issue as to insanity when the offense was committed, it was not reversible error to omit to do so, where accused did not request such submission, and no statutory affidavit was filed asking that the issue be specially tried. *Lester v. State* (Cr. App.) 154 S. W. 554.

When, at the time of the killing, deceased had in his hand a deadly weapon, failure to specifically instruct as to the presumption of his intent to use it, if he was attempting to use it, is reversible error, when a special charge was requested thereon; but, in the absence of such request, the record will be examined as to whether injury could have resulted from failure to so charge. *Holmes v. State* (Cr. App.) 155 S. W. 205.

6. — **Admissibility and effect of evidence.**—A charge on the effect of a confession held sufficient, in the absence of a request for a more specific application of the law. *Williams v. State* (Cr. App.) 144 S. W. 622.

In a prosecution for burglary, where evidence of explanations made by defendant as to his possession of the alleged stolen property was not objected to when offered, and not made the subject of a motion to strike, a charge on the issue of whether defendant was under arrest at the time he made the explanation was unnecessary; no special charge having been requested. *Coggins v. State* (Cr. App.) 151 S. W. 311.

Failure to instruct on the failure of accused to testify was not error, where no request was made for such instruction. *Bosley v. State* (Cr. App.) 153 S. W. 878.

Where the trial court admitted a map or plat, but thereafter withdrew it from

the jury, and orally instructed them not to consider it, his failure in the written charge to again so instruct the jury was not error, in the absence of any request for such instruction. *Hines v. State*, 73 App. 17, 163 S. W. 717.

Failure to instruct that if the jury did not find defendant's wife was acting with, aiding, and abetting him, they should not consider her acts or declarations, cannot be complained of, no such instruction having been requested, but defendant having relied solely on his objection that the testimony was inadmissible. *Thompson v. State* (Cr. App.) 178 S. W. 1192.

7. — Limiting evidence to purpose.—Where the general charge fails to limit the general effect of testimony going to establish motive only, exceptions should be taken or special charges asked curing the omission, and especially so when it can not be readily seen how the defendant could have been injured by the omission. *Sullivan v. State*, 31 App. 486, 20 S. W. 927, 37 Am. St. Rep. 826.

Where, in a prosecution for homicide, defendant introduced evidence of other assaults made by him on other persons, and the attending circumstances as bearing on the plea of insanity, it was not error for the court, in the absence of a request, to omit to limit the purpose and effect of such evidence. *Montgomery v. State* (Cr. App.) 151 S. W. 813.

In a prosecution for unlawfully tearing down a fence, failure to instruct that certain evidence was admissible only to refute plaintiff's contention that he acted under a belief that, as owner of the land, he had a right to tear down the fence, was not error, in the absence of a request for such instruction. *Johns v. State*, (Cr. App.) 174 S. W. 610.

8. — Fuller instructions.—An objection that an instruction on the defense of alibi failed to recite defendant's testimony as to his whereabouts at the time of the homicide is not available on appeal, where defendant failed to request a more particular instruction. *Mass v. State*, 59 App. 390, 128 S. W. 394.

In a prosecution for pursuing the business of selling intoxicants in a local option county, the court instructed that the state must prove that accused unlawfully engaged in and followed the occupation and business of selling intoxicants, and that he had made at least as many as two or more sales of intoxicants in the county prior to the date of the indictment, and that by the term "occupation and business" was meant vocation; calling; trade; the business which one engages in to procure a living, or obtain wealth. Held, that the charge was not prejudicial error, in the absence of a request for a fuller charge on the subject. *Dozier v. State*, 62 App. 258, 137 S. W. 679.

Where the charge has submitted the law applicable to the case, as required by art. 735, a defendant who desires a more specific presentation of any issue should request special instructions thereon, otherwise the court will not reverse unless the charge was calculated to injure the right of the defendant within art. 743. *Dowling v. State*, 63 App. 366, 140 S. W. 224.

In a prosecution for theft, the court charged that the jury should not consider any testimony with reference to any thefts committed by defendant other than the one alleged in the information. Held, that evidence as to such other thefts having been introduced by defendant on cross-examination of the state's witnesses, if defendant desired a more explicit charge with reference thereto, it was defendant's duty to request a special charge; and, not having done so, he could not object that the charge given was insufficient. *Gowans v. State*, 64 App. 401, 145 S. W. 614.

When the court properly submits a question to the jury in general terms, without exception and a request for a special charge submitting it more fully, there is no reversible error in not giving such a special charge. *Tyler v. State* (Cr. App.) 150 S. W. 782.

In a prosecution for incest, committed with accused's daughter, in which the court charged that the jury, if they believed from the evidence that the daughter consented to such intercourse, should acquit, because there was no evidence to corroborate her testimony if she was an accomplice, there was no error in failing to charge that, in determining whether the daughter consented to the intercourse with her father, they should take into consideration all the facts and circumstances connected with the case, accused not having requested that specific charge. *Tyler v. State* (Cr. App.) 150 S. W. 782.

That a charge on circumstantial evidence was not full enough cannot be assigned as error by accused where he did not request a fuller charge. *Ferrell v. State* (Cr. App.) 152 S. W. 901.

Where the court clearly required the jury to believe that to convict of either first or second degree murder they must find beyond a reasonable doubt that defendant did not kill deceased in self-defense, but with express malice aforethought, it was incumbent upon defendant, if he desired any further charge on the subject to request it. *Powdrill v. State* (Cr. App.) 155 S. W. 231.

Where instructions defining terms were correct, it was the duty of accused, if he desired more full and ample definitions, to request that they be given before the return of the verdict. *Brown v. State*, 71 App. 353, 162 S. W. 339.

Where the court did not submit the offenses of manslaughter or aggravated assault as fully as accused desired, it was his duty to request further instructions. *Girtman v. State*, 73 App. 158, 164 S. W. 1008.

An instruction that a credible witness was one who, being competent to give testimony, is worthy of belief was sufficient, in the absence of a requested charge further defining the words "credible witness." *Hart v. State*, 73 App. 362, 166 S. W. 152.

9. — Request unnecessary.—Where an accomplice testified for the state, it is error not to instruct as to such testimony, though no special charge was requested. *Castillo v. State* (Cr. App.) 172 S. W. 788.

10. Sufficiency of erroneous request to call for correct charge.—A requested charge in a criminal case which, though not technically correct in form, suggests

a correct proposition of law to which accused is entitled, requires the giving of a correct charge on that point. *Stanley v. State*, 62 App. 306, 137 S. W. 703; *White v. State*, 10 App. 381; *Powers v. State* (Cr. App.) 152 S. W. 909.

Testimony for the state in a criminal case was sufficient to sustain a conviction under an indictment for theft and for fraudulently receiving stolen property. Defendant testified that he bought the property from or through another, and supported his evidence by another's testimony and by testimony as to his good reputation. The charge defined theft substantially in the terms of the statute, and submitted the offense of theft as such, as well as that of fraudulently receiving and concealing stolen property, and the issue of its voluntary return. Defendant requested a special instruction that, when a person takes property under a claim of title, he cannot be convicted of theft, and if the jury believed he took the property under a claim of title they must acquit. Held, that while the requested charge was not strictly accurate, nor its language wholly applicable to the case, it was sufficient to call the court's attention to its failure to submit the defense at all, and should, at least in substance, have been given. *Eubanks v. State*, 57 App. 153, 122 S. W. 35.

A charge that corroborative evidence tending to connect the accused with the offense will justify his conviction of adultery on the testimony of his paramour being erroneous, it was error to refuse a requested charge that the corroborative evidence must show the commission of the offense, as well as defendant's connection with it, and that they must believe the testimony of the accomplice to be true; the requested charge, though not technically accurate, being sufficient to call the court's attention to the matter. *Moore v. State*, 58 App. 183, 125 S. W. 34.

That defendant's requests for special charges on the issues presented by his evidence are not in every particular correct does not authorize the court to refuse instructions on such issues. *Davis v. State*, 63 App. 484, 141 S. W. 93.

Where the court had not specially charged that the jury must find that the ownership of the property stolen was in a person named in the indictment as special owner, and defendant's exception to the charge stated "that, under the indictment, the jury should be instructed that they must believe that such person was entitled to the exclusive management and control of said property," and then presented a special charge on the issue, though incorrect, he had sufficiently called the court's attention to the fact that he was complaining that the issue of ownership was a contested one and had not affirmatively been presented. *Schenk v. State* (Cr. App.) 174 S. W. 357.

11. **Time for request.**—No charge to be given after argument begins with certain exceptions. Post, art. 737a.

A requested instruction must be called to the court's attention before he reads his charge to the jury. *Watts v. State* (Cr. App.) 171 S. W. 202; *Burrus v. State* (Cr. App.) 172 S. W. 981.

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 App. 443, 111 S. W. 1042.

An instruction curing an omission in the charge should be given, though not requested until the jury was ready to retire. *Campbell v. State*, 63 App. 595, 141 S. W. 232, Ann. Cas. 1913D, 858.

Where evidence was admitted without objection by accused, and no motion to strike it out was made, a special charge instructing the jury to disregard it came too late to be reviewed on appeal. *Berg v. State*, 64 App. 612, 142 S. W. 354.

A request for a charge not made until after the court had read his charge to the jury came too late, and there was no error in refusing it. *James v. State* (Cr. App.) 167 S. W. 727.

Under Acts 33d Leg. c. 138, amending Code Cr. Proc. 1911, arts. 735, 737, 743, and adding article 737a, an objection to a charge on self-defense and to the refusal to give specially requested charges, not made until motion for new trial was filed, was insufficient, and assignments of error thereto could not be considered by the Court of Criminal Appeals. *Crossett v. State* (Cr. App.) 168 S. W. 548.

Code Cr. Proc. 1911, arts. 735, 737, 743, as amended, and article 737a, as added, by Act April 5, 1913 (Acts 33d Leg. c. 138), provide that in felony cases before the charge is read accused shall have a reasonable time to examine it; that he shall present his objections in writing; that counsel on both sides shall have a reasonable time to present written instructions; that the judge, after receiving such objections and special charges, may make such changes in his main charge as he may deem proper; that accused shall have the opportunity to present objections thereto; and that objections to the charge and to the refusal or modification of special charges shall be made at the time of the trial. Held, that the refusal of instructions not presented until after the court had given his main charge could not be reviewed. *Galan v. State* (Cr. App.) 177 S. W. 124.

12. **Correct requested charges.**—Requested instructions, when correct in principle and applicable to the case, and when not embraced in the general charge, should be given. See the following cases for instances in which it was held error to refuse requested instructions: *Black v. State*, 1 App. 369; *Ross v. State*, 9 App. 275; *Dreyer v. State*, 11 App. 503; *Gabrielsky v. State*, 13 App. 428; *Evans v. State*, 15 App. 31; *Stanley v. State*, 16 App. 392; *Payne v. State*, 17 App. 40; *Johnson v. State*, 19 App. 545; *Clayton v. State*, 21 App. 343, 17 S. W. 261; *Gamel v. State*, 21 App. 357, 17 S. W. 158; *Leggett v. State*, 21 App. 382, 17 S. W. 159; *Farmer v. State*, 21 App. 423, 2 S. W. 767; *Wyers v. State*, 21 App. 448, 2 S. W. 816; *McGee v. State*, 21 App. 670, 2 S. W. 890; *Tucker v. State*, 21 App. 699, 2 S. W. 893; *Shultz v. State*, 22 App. 16, 2 S. W. 599; *Smith v. State*, 22 App. 196, 2 S. W. 542; *Harwell v. State*, 22 App. 251, 2 S. W. 606; *Williams v. State*, 22 App. 332, 3 S. W. 226; *Willey v. State*, 22 App. 408, 3 S. W. 570; *White v. State*,

23 App. 156, 3 S. W. 710; *Wheeler v. State*, 23 App. 238, 5 S. W. 224; *Mosley v. State*, 23 App. 409, 4 S. W. 907; *Barron v. State*, 23 App. 462, 5 S. W. 237; *Guest v. State*, 24 App. 235, 5 S. W. 840; *Willis v. State*, 24 App. 584, 6 S. W. 556; *Id.*, 24 App. 587, 6 S. W. 857.

Error to refuse charge on issue raised by evidence and insufficiently covered in general charge. *Porter v. State*, 48 App. 301, 88 S. W. 859.

It was error to refuse requested charges that the gist of the offense of theft was the original taking of the property, and unless the jury were satisfied from the evidence, beyond a reasonable doubt, that accused took the hog in question, if the hog was taken, or had some connection therewith, he would not be guilty, and any subsequent connection by him with the property would not constitute theft, as they met the omission in the charge given. *McClure v. State*, 59 App. 287, 128 S. W. 386.

In a prosecution for violating the local option law by selling whisky, it was reversible error to refuse a requested charge on accused's theory that if the alleged purchaser gave accused \$1 to purchase whisky for him in another county, and he purchased it and delivered it to such person, he should be acquitted, as well as a charge on the effect of testimony to the effect that the money paid accused was for bananas, and not whisky. *Spain v. State*, 59 App. 538, 128 S. W. 904.

The court having charged on provoking a difficulty, as limiting the right of self-defense and as bearing on the question of manslaughter, and defendant's evidence, at least, having excluded the idea of provoking a difficulty, and shown that a former difficulty between him and deceased was abandoned, the court should have given his requested instruction as to the law in such case. *Edwards v. State*, 60 App. 323, 131 S. W. 1078.

13. Erroneous requests.—If the requested instruction be upon the weight of the evidence, or unwarranted by the evidence, or otherwise incorrect or improper, it should be refused. *Payne v. State*, 21 App. 184, 17 S. W. 463; *Chester v. State*, 1 App. 702; *Priesmuth v. State*, *Id.* 480; *McMahon v. State*, *Id.* 102; *Robertson v. State*, *Id.* 312; *Bejarano v. State*, 6 App. 265; *Hatch v. State*, *Id.* 384; *Mayfield v. State*, 44 Tex. 59; *Ramey v. State*, 14 Tex. 409; *Needham v. State*, 19 Tex. 332; *Irvin v. State*, 7 App. 199; *Brown v. State*, 9 App. 81; *Taylor v. State*, 14 App. 340; *Allison v. State*, *Id.* 402; *Clark v. State*, 23 App. 260, 5 S. W. 115; *Sparks v. State*, 23 App. 447, 5 S. W. 135; *McVey v. State*, 23 App. 659, 5 S. W. 174; *Alexander v. State*, 24 App. 126, 5 S. W. 840; *Anderson v. State*, 24 App. 705, 7 S. W. 40; *Aguierre v. State*, 31 App. 519, 21 S. W. 256.

If in the mind of the trial judge it be doubtful whether or not a requested instruction should be given, and such instruction be abstractly correct, the doubt should be resolved in favor of the defendant, and such instruction, if asked by the defendant, should be given. *Henderson v. State*, 5 App. 134; *Summers v. State*, 5 App. 365, 32 Am. Rep. 573; *Pocket v. State*, *Id.* 552.

Where the evidence suggests a defense, the court may refuse to give accused a special charge which does not correctly state the law. *Herrington v. State*, 73 App. 359, 166 S. W. 721.

14. — Applicability to evidence.—The court is not required, because requested, to charge every correct abstract proposition of law. *Duncan v. State*, 30 App. 1, 16 S. W. 753. See, also, *Smith v. State*, 27 App. 50, 10 S. W. 751; *Bracken v. State*, 29 App. 362, 16 S. W. 192.

Where the county attorney produced a book, and opened it, and pointed to the book when asking questions of accused, testifying in his own behalf, but the book was not offered in evidence, nor shown to the jury, the refusal to charge that the jury should not consider the book in evidence was not erroneous. *Ellis v. State*, 59 App. 630, 130 S. W. 171.

The evidence in a homicide case showed that accused was ignorant and illiterate, and in his youth had attacks like epilepsy, and he testified that he had some kind of a spell on the day of the killing, but did not claim that he was laboring under any mental infirmity, or did not understand everything then said or done; and he testified in detail to a long conversation between himself and deceased, and attempted to justify the killing as in self-defense, and the other evidence did not tend to raise the question of insanity. Held, that the court did not err in refusing to charge on the defense of insanity. *Coffey v. State*, 60 App. 73, 131 S. W. 216.

Where a state's witness testified that he bought whisky of accused and paid him for it, and accused denied that he had ever made a sale or delivery of whisky to the witness or that he had ever seen him before, and the court charged that if the jury found that accused made a sale to the witness they should convict, the refusal to give a charge defining a sale in law was not erroneous; the question as to what constituted a sale not being in issue. *Trinkle v. State*, 60 App. 187, 131 S. W. 583.

It is not error to refuse a request to charge on an issue not raised by the evidence. *Ellis v. State* (Cr. App.) 154 S. W. 1010.

Where the record showed no reason or necessity for special instructions, and the instructions given substantially and fully covered everything necessary or proper on the subject, error in refusing such instructions was not shown. *Mayhew v. State* (Cr. App.) 155 S. W. 191.

Defendant was not entitled to have given his requested charge that, if it reasonably appeared to him that deceased or P. was about to shoot him, he was justified in slaying deceased; his own testimony showing that he feared no assault from P., but only one from deceased, and that he was in no danger from P., or at least thought he was not. *Holmes v. State* (Cr. App.) 155 S. W. 205.

The case being one, partly at least, depending on circumstantial evidence, refusal to defendant, on a trial for pursuing the business of selling intoxicating liquors in prohibition territory, of an instruction to acquit unless the jury found that

he kept in his possession intoxicating liquors for sale, was not error. *Robertson v. State* (Cr. App.) 178 S. W. 1191.

15. — **Singling out evidence.**—Where the court charged that the jury were the judges of the credibility of the witnesses and that if they had a reasonable doubt of the guilt of accused they should acquit, a requested charge that if accused successfully impeached the testimony of the state's witnesses the jury should acquit, or if the evidence on the question of impeachment raised a reasonable doubt as to accused's guilt he must be acquitted, was properly refused because singling out one issue of the case. *Trinkle v. State*, 60 App. 187, 131 S. W. 583.

Where the court in its charge on manslaughter did not limit the provocation to the time of the killing, but directed the jury to consider all the facts in evidence in determining whether accused's mind was moved by that degree of anger, rage, sudden resentment, or terror, as to render it incapable of cool reflection, it was not error to refuse to specially charge that the jury should consider the threats made by decedent against accused, and thus select out of a large number of circumstances detailed in evidence a particular circumstance. *Giles v. State*, 60 App. 436, 132 S. W. 359.

Where there was other evidence connecting accused with the offense, besides the comparison of the tracks made by him and his confederate and by the horse they drove, the refusal of a special charge that evidence of footprints is not sufficient to support a conviction was proper because singling out a particular circumstance in the evidence. *Hahn v. State*, 73 App. 409, 165 S. W. 218.

A requested charge that the jury should not find that there was a promise of marriage on the testimony of prosecutrix alone, but under the law her evidence as to the promise of marriage under which she claims she has been seduced must be corroborated (i. e., confirmed by direct and positive testimony, or by circumstances of such character as to convince the jury beyond a reasonable doubt that her testimony in that respect is true), was properly refused as singling out a particular fact and attempting to charge thereon. *Gillespie v. State*, 73 App. 555, 166 S. W. 135.

16. — **Weight of evidence.**—In a prosecution for the burglary of a box car, a charge that the evidence tending to connect defendant with another and previous burglary of a car could only be considered on the issue of whether defendant's explanation of his possession of stolen goods was true, and that defendant could not be convicted of the breaking of any other car than that charged, was erroneous, as being a charge on the weight of the evidence. *Nowlin v. State* (Cr. App.) 175 S. W. 1070.

17. **Modification of requests.**—The court is not bound to modify an erroneous instruction, but may refuse it. *Perkins v. State* (Cr. App.) 144 S. W. 241; *Mealer v. State* (Cr. App.) 145 S. W. 353.

It is the duty of the court to give charges asked, with or without modification, or to refuse them. When they are modified, the modification must be in writing. *McMahon v. State*, 1 App. 102; *Jones v. State*, 22 App. 680, 3 S. W. 478; *Sparks v. State*, 23 App. 447, 5 S. W. 135.

A requested instruction should be presented in the very language desired. *Heilbron v. State*, 2 App. 537.

The trial court is not bound to modify or qualify an illegal or erroneously requested instruction. *Lawrence v. State*, 20 App. 536; *Bradford v. State*, 25 App. 723, 9 S. W. 46; *Smith v. State*, 27 App. 50, 10 S. W. 751; *Surrell v. State*, 29 App. 321, 15 S. W. 816; *Bracken v. State*, 29 App. 362, 16 S. W. 192; *Muely v. State*, 31 App. 155, 18 S. W. 411, 19 S. W. 915.

It was not available error to add to the defendant's requested instruction to not consider the testimony of a certain witness for any purpose the words, "save as to impeachment if it does so impeach," where the defendant accepted the instruction with this qualification. *Tucker v. State* (Cr. App.) 150 S. W. 191.

18. **Repetition of charge.**—Requested instructions, substantially given in or covered by the general charge, or special instructions, need not be given. *Teague v. State*, 4 App. 147; *Pocket v. State*, 5 App. 552; *Holmes v. State*, 20 App. 509; *Bond v. State*, Id. 427; *Collins v. State*, Id. 399; *Moore v. State*, Id. 233; *Hawkins v. State*, 17 App. 593, 50 Am. Rep. 129; *Johnson v. State*, Id. 565; *Reynolds v. State*, Id. 413; *Conner v. State*, Id. 1; *Sewell v. State*, 15 App. 56; *Allison v. State*, 14 App. 402; *Bohannon v. State*, Id. 271; *Brownlee v. State*, 13 App. 255; *Early v. State*, 9 App. 476; *Brown v. State*, Id. 81; *Heard v. State*, Id. 1; *Hunter v. State*, 8 App. 75; *Cordova v. State*, 6 App. 445; *Phillips v. State*, Id. 44; *Proffit v. State*, 5 App. 51; *Henderson v. State*, Id. 134; *Robinson v. State*, 15 Tex. 311; *Shultz v. State*, 13 Tex. 401; *Henderson v. State*, 12 Tex. 525; *Day v. State*, 21 App. 213, 17 S. W. 262; *Smith v. State*, 21 App. 277, 17 S. W. 471; *Bradberry v. State*, 21 App. 273, 2 S. W. 592; *Rummel v. State*, 22 App. 558, 3 S. W. 763; *Pless v. State*, 23 App. 73, 3 S. W. 576; *McVey v. State*, 23 App. 659, 5 S. W. 174; *Carr v. State*, 24 App. 562, 7 S. W. 328, 5 Am. St. Rep. 905; *Benavides v. State*, 31 App. 173, 20 S. W. 369, 37 Am. St. Rep. 799; *Stephens v. State*, 31 App. 365, 20 S. W. 826; *Harper v. State* (Cr. App.) 40 S. W. 272; *Bailey v. State*, 37 App. 579, 40 S. W. 281; *Taylor v. State* (Cr. App.) 42 S. W. 285; *Chambers v. State* (Cr. App.) 44 S. W. 495; *Darter v. State*, 39 App. 40, 44 S. W. 850; *Burrage v. State* (Cr. App.) 44 S. W. 1104; *Long v. State* (Cr. App.) 46 S. W. 640; *Jones v. State* (Cr. App.) 46 S. W. 933; *Campbell v. State*, 43 App. 602, 68 S. W. 513; *Razor v. State*, 57 App. 10, 121 S. W. 512; *Brent v. State*, 57 App. 411, 123 S. W. 593; *Graham v. State*, 57 App. 104, 123 S. W. 691; *York v. State*, 57 App. 484, 123 S. W. 1112; *Washington v. State*, 58 App. 345, 125 S. W. 917; *McNary v. State*, 58 App. 619, 127 S. W. 180; *Keeton v. State*, 59 App. 316, 128 S. W. 404; *Thorp v. State*, 59 App. 517, 129 S. W. 607, 29 L. R. A. (N. S.) 421; *Trinkle v. State*, 60 App. 187, 131 S. W. 583; *Chandler v. State*, 60 App. 329, 131 S. W. 598; *Gillree v. State*, 60 App. 301, 131 S. W. 1071; *Dulin v. State*, 60 App. 376, 131 S. W. 1105; *Williams v. State*, 60 App. 453, 132 S. W. 345; *Frazier v. State*, 61 App. 647, 135 S. W. 533; *Liles v.*

State, 62 App. 32, 135 S. W. 1177; Carter v. State, 61 App. 609, 136 S. W. 47; Clark v. State, 61 App. 597, 136 S. W. 260; McCullough v. State, 62 App. 126, 136 S. W. 1055; Vela v. State, 62 App. 361, 137 S. W. 120; Whitehead v. State, 61 App. 558, 137 S. W. 356; Diaz v. State, 62 App. 317, 137 S. W. 377; Wilson v. State, 63 App. 81, 138 S. W. 409; Fox v. State, 62 App. 413, 138 S. W. 413; Parshall v. State, 62 App. 177, 138 S. W. 759; Hickey v. State, 62 App. 568, 138 S. W. 1051; Bryan v. State, 63 App. 200, 139 S. W. 981; Ellington v. State, 63 App. 424, 140 S. W. 1100; Patterson v. State, 63 App. 297, 140 S. W. 1128; Grimes v. State, 64 App. 64, 141 S. W. 261; Browning v. State, 64 App. 148, 142 S. W. 1; Baumgarner v. State, 64 App. 165, 142 S. W. 4; Lyles v. State, 64 App. 621, 142 S. W. 592; Davis v. State (Cr. App.) 143 S. W. 1161; Moore v. State (Cr. App.) 144 S. W. 598; Oliver v. State (Cr. App.) 144 S. W. 604; Knight v. State (Cr. App.) 144 S. W. 967; Baker v. State (Cr. App.) 145 S. W. 607; Hogue v. State (Cr. App.) 146 S. W. 905; McIndoo v. State (Cr. App.) 147 S. W. 235; Yarborough v. State (Cr. App.) 147 S. W. 270; Bird v. State (Cr. App.) 148 S. W. 738; Burnam v. State (Cr. App.) 148 S. W. 757; Williams v. State (Cr. App.) 148 S. W. 763; Kinney v. State (Cr. App.) 148 S. W. 783; Warren v. State (Cr. App.) 149 S. W. 130; Cyphers v. State (Cr. App.) 150 S. W. 187; Overstreet v. State (Cr. App.) 150 S. W. 899; Stevens v. State (Cr. App.) 150 S. W. 944; Whorton v. State (Cr. App.) 151 S. W. 300; Pugh v. State (Cr. App.) 151 S. W. 546; Washington v. State (Cr. App.) 151 S. W. 818; King v. State (Cr. App.) 152 S. W. 629; Fenoglio v. State (Cr. App.) 152 S. W. 909; Spearman v. State (Cr. App.) 152 S. W. 915, 44 L. R. A. (N. S.) 243; Cain v. State (Cr. App.) 153 S. W. 147; Stewart v. State (Cr. App.) 153 S. W. 1151; Pyle v. State, 71 App. 94, 154 S. W. 222; Nickerson v. State (Cr. App.) 154 S. W. 992; Broadnax v. State (Cr. App.) 154 S. W. 1196; Simmons v. State (Cr. App.) 155 S. W. 229; Perry v. State (Cr. App.) 155 S. W. 263; McDowell v. State (Cr. App.) 155 S. W. 521; Irving v. State, 70 App. 222, 156 S. W. 641; Holmes v. State, 70 App. 214, 156 S. W. 1173; Bush v. State, 71 App. 14, 157 S. W. 945; Melton v. State, 71 App. 130, 158 S. W. 550; Vick v. State, 71 App. 50, 159 S. W. 50; Veach v. State, 71 App. 181, 159 S. W. 1069; Stubbs v. State, 71 App. 390, 160 S. W. 87; Thomason v. State, 71 App. 439, 160 S. W. 359; Vine v. State, 71 App. 490, 160 S. W. 382; Raspberry v. State, 72 App. 13, 160 S. W. 682; Cole v. State, 72 App. 282, 162 S. W. 880; Bowen v. State, 72 App. 404, 162 S. W. 1146; Graham v. State, 73 App. 28, 163 S. W. 726; Pittcock v. State, 63 App. 1, 163 S. W. 971; Campbell v. State, 73 App. 198, 164 S. W. 850; Phillips v. State, 73 App. 317, 164 S. W. 1004; Gorrell v. State, 73 App. 232, 164 S. W. 1012; Gant v. State, 73 App. 279, 165 S. W. 142; Waddle v. State, 73 App. 501, 165 S. W. 591; Gillespie v. State, 73 App. 585, 166 S. W. 135; Brown v. State, 73 App. 571, 166 S. W. 508; Herrington v. State, 73 App. 359, 166 S. W. 721; Truett v. State (Cr. App.) 168 S. W. 523; Lamb v. State (Cr. App.) 168 S. W. 534; Crosssett v. State (Cr. App.) 168 S. W. 548; Hill v. State (Cr. App.) 168 S. W. 864; Raleigh v. State (Cr. App.) 168 S. W. 1050; Sorrell v. State (Cr. App.) 169 S. W. 299; Fondren v. State (Cr. App.) 169 S. W. 411; Brown v. State (Cr. App.) 169 S. W. 437; Millner v. State (Cr. App.) 169 S. W. 899; Reece v. State (Cr. App.) 170 S. W. 317; Speer v. State (Cr. App.) 171 S. W. 201; Cook v. State (Cr. App.) 171 S. W. 227; Zweig v. State (Cr. App.) 171 S. W. 747; Longmire v. State (Cr. App.) 171 S. W. 1165; Henderson v. State (Cr. App.) 172 S. W. 793; Latham v. State (Cr. App.) 172 S. W. 797; Burrus v. State (Cr. App.) 172 S. W. 981; Windham v. State (Cr. App.) 173 S. W. 661; Paschal v. State (Cr. App.) 174 S. W. 1057; Staples v. State (Cr. App.) 175 S. W. 1056; Egbert v. State (Cr. App.) 176 S. W. 560; Bunker v. State (Cr. App.) 177 S. W. 108; Cooper v. State (Cr. App.) 177 S. W. 975; Collins v. State (Cr. App.) 178 S. W. 345; Howard v. State (Cr. App.) 178 S. W. 506; Grimes v. State (Cr. App.) 178 S. W. 522.

Specific illustration of requested charges refused because covered by other charges given, see Brooks v. State, 26 App. 184, 9 S. W. 562; Hunter v. State, 34 App. 599, 31 S. W. 674; Brown v. State, 57 App. 570, 124 S. W. 101; Keeton v. State, 59 App. 316, 128 S. W. 404; Hunter v. State, 59 App. 439, 129 S. W. 125; Lockett v. State, 59 App. 531, 129 S. W. 627; Vargas v. State, 60 App. 196, 131 S. W. 594; Bradley v. State, 60 App. 398, 132 S. W. 484; Hawthorn v. State, 62 App. 114, 136 S. W. 776; Allen v. State, 62 App. 501, 137 S. W. 1133; McDaniel v. State, 63 App. 359, 139 S. W. 1154; Millican v. State, 63 App. 440, 140 S. W. 1136; Moray v. State (Cr. App.) 145 S. W. 592; Cooper v. State (Cr. App.) 147 S. W. 273; Grant v. State (Cr. App.) 148 S. W. 760, 42 L. R. A. (N. S.) 428; Duckett v. State (Cr. App.) 150 S. W. 1177; Yates v. State (Cr. App.) 152 S. W. 1064; Alsop v. State (Cr. App.) 153 S. W. 624; Manley v. State (Cr. App.) 153 S. W. 1138; Stewart v. State (Cr. App.) 153 S. W. 1151; Webb v. State (Cr. App.) 154 S. W. 1013; Laird v. State (Cr. App.) 155 S. W. 260; Cole v. State, 70 App. 459, 156 S. W. 929; Fox v. State, 71 App. 318, 158 S. W. 1141; Reynolds v. State, 71 App. 454, 160 S. W. 362; Ulmer v. State, 71 App. 579, 160 S. W. 1188; Currington v. State, 72 App. 143, 161 S. W. 478; Cooper v. State, 72 App. 250, 161 S. W. 1094; Campbell v. State, 73 App. 198, 164 S. W. 850; Link v. State, 73 App. 82, 164 S. W. 987; McGowen v. State, 73 App. 112, 164 S. W. 999; Qualls v. State, 73 App. 212, 165 S. W. 202; Koger v. State, 73 App. 448, 165 S. W. 577; Bragg v. State, 73 App. 340, 166 S. W. 162; Cunningham v. State, 73 App. 565, 166 S. W. 519; Clark v. State (Cr. App.) 169 S. W. 895; Harper v. State (Cr. App.) 170 S. W. 721; Merkel v. State (Cr. App.) 171 S. W. 738; Hill v. State (Cr. App.) 173 S. W. 1022; Brown v. State (Cr. App.) 174 S. W. 360; Johns v. State (Cr. App.) 174 S. W. 610; Cooper v. State (Cr. App.) 177 S. W. 975. For cases holding that requested charges were not covered by other charges, and should, therefore, have been given, see McAlister v. State, 59 App. 237, 128 S. W. 123; Mazureczk v. State, 59 App. 211, 128 S. W. 136.

It is the better practice to give every instruction asked by the defendant, unless it is manifestly not the law of the case, no matter if it has already been given in the main charge. Banks v. State, 7 App. 591.

While the burden of proof rests on the state, and never shifts, it is not error to refuse to so charge; the charges on reasonable doubt and presumption of inno-

cence being sufficient to prevent the jury from erring in the matter. *Beeson v. State*, 60 App. 39, 130 S. W. 1006.

Where, in a prosecution for assault to murder, accused requested a special charge, on the rule that, if the jury had any doubt as to whether the assault was aggravated or simple, they should give accused the benefit thereof, the court should have given a proper charge on the subject, where the evidence required it, though the requested charge might not have been properly worded. *King v. State*, 61 App. 190, 134 S. W. 687.

Where the main charge covered accused's right to defend himself in a more favorable light than his requested instructions, such instructions were properly refused. *McDaniel v. State*, 63 App. 359, 139 S. W. 1154.

Where accused, relying on an alibi, presented no requested instructions on the subject, he could not complain of the charge that, if the jury did not believe that accused was present at the time and place of the commission of the offense, and that he was at some other or different place, or if there was a reasonable doubt on the question, accused must be acquitted, and that accused was presumed to be innocent until his guilt was proved beyond a reasonable doubt. *Fowler v. State* (Cr. App.) 148 S. W. 576.

19. **Repetition of special requests already given.**—Where the court charged for accused that among other evidence relied on by the state was evidence to show accused in possession of alleged stolen property, and that if the jury believed that accused found such property, or came into possession of it in any other way than by the alleged burglary of the house, he should be acquitted, it was not error to refuse an additional request to charge that if accused found the property, or came into possession of it in any other way than by the alleged burglary, it would be no evidence of his guilt, and that if the jury had a reasonable doubt that such property was actually stolen, or that accused found it, and it thereby came into his possession, they should disregard his possession thereof, as being no evidence of guilt; it being sufficiently covered by the former charge given. *Mays v. State*, 58 App. 651, 127 S. W. 546.

Where, in a prosecution for the theft of seed cotton, the court properly instructed on reasonable doubt, and, at defendant's request, specifically instructed the jury to acquit if they believed some one else, and not defendant, stole the cotton, or had a reasonable doubt thereof, it was not error to refuse defendant's requested instructions that the jury should acquit if they believed that the defendant loaded his wagon, and went to bed and stayed in his room, and did not go and steal the cotton, and that he was at home at the time the cotton was stolen. *Tucker v. State* (Cr. App.) 150 S. W. 190.

20. **Argument of counsel.**—See ante, art. 724, and notes.

Art. 737a. Correction of charge after objections thereto; no further charge after argument begins, except, etc.; review.—After the judge shall have received the objections to his main charge, together with any special charges offered he may make such changes in his main charge as he may deem proper, and the defendant or his counsel shall have the opportunity to present their objections thereto and in the same manner as is provided in Article 735, and thereupon the judge shall read his charge to the jury as finally written, together with any special charges given. After the argument begins no further charge shall be given to the jury unless required by the improper argument of counsel or the request of the jury, or unless the judge shall in his discretion, permit the introduction of other testimony, and in the event of such further charge the defendant or his counsel shall have the right to present objections in the same manner as is prescribed in Article 735. Provided that the failure of the court to give the defendant or his counsel a reasonable time to examine the charge and specify the ground of objection shall be subject to review either in the trial court or in the Appellate Court. [Act 1913, p. 278, ch. 138, § 3, amending Tit. 8, ch. 5, C. C. P. by adding art. 737a.]

In general.—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 App. 282, 45 S. W. 1016, 46 S. W. 829.

Although the homicide for which accused was tried was committed before the act of 1913 became effective, such changes in procedure must be followed where the trial was not had until after the statute went into effect. *Ybarra v. State*, 73 App. 70, 164 S. W. 10.

Under Acts 33d Leg. c. 138, amending this article and arts. 735, 737, ante and 743, post, an objection to a charge on self-defense and to the refusal to give specially requested charges, not made until motion for new trial was filed, was insufficient, and assignments of error thereto could not be considered by the Court of Criminal Appeals. *Crossett v. State* (Cr. App.) 168 S. W. 548.

Under this article, and in view of its purpose, the court, if convinced that an erroneous charge against accused has been given, may withdraw and correct it before the verdict. *Nowlin v. State* (Cr. App.) 175 S. W. 1070.

Code Cr. Proc. 1911, art. 735, as amended by Acts 33d Leg. c. 138, makes it the duty of the judge, before reading his charge to the jury, to submit it to the defendant, who shall have a reasonable time to present his objections thereto. Article 737a provides that failure to give defendant a reasonable time to do this gives him the right to make his objections for the first time in a motion for new trial and requires a review thereof. In a prosecution for horse theft, the trial judge failed to submit the charge to accused and to submit to the jury the issue as to whether the accused owned the horse, and proper complaint was made in the motion for a new trial. Held, reversible error. *Abrigo v. State* (Cr. App.) 178 S. W. 518.

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.]

See *Davis v. State of Texas*, 139 U. S. 651, 11 Sup. Ct. 675, 35 L. Ed. 300.

Authentication in general.—The general charge and special instructions given or refused at the request of either party, must be certified by the judge. The official signature of the judge is all the certificate or authentication required. *Jefries v. State*, 9 App. 598; *Roberts v. State*, 5 App. 141; *Carr v. State*, Id. 153; *Henderson v. State*, Id. 134; *Williams v. State*, 18 App. 409; *Hildreth v. State*, 19 App. 195; *McLain v. State*, 30 App. 482, 17 S. W. 1032, 28 Am. St. Rep. 934.

When the court's charge is not signed by the judge exception thereto can be taken in motion for new trial as well as by bill of exception. *Jones v. State*, 48 App. 32, 85 S. W. 1076.

This article in requiring a judge to sign a charge to the jury is mandatory. *Alberson v. State*, 54 App. 8, 111 S. W. 413.

Under article 743, post, failure of the court to certify his charge, as required by this article, was harmless, where it resulted from mere inadvertence, and where the charge in the record was the only charge given to the jury, or upon which they acted. *Shetters v. State* (Cr. App.) 147 S. W. 582.

Filing and authentication thereof.—That the charge bears the file mark in another case is not material. *Austin v. State*, 42 Tex. 355.

On appeal the file mark should appear in the body of the record, and not in the margin merely. *Smith v. State*, 1 App. 408.

The main charge, as well as all requested charges given or refused, must be filed by the clerk of the trial court, and the filing must be authenticated by the official signature of the clerk. The proper practice is to require the clerk to place his file mark on the charge as soon as it is read, and before it is delivered to the jury. In a felony case, on appeal, the conviction will be set aside, unless the transcript contains a charge duly authenticated by the signature of the judge and the file mark of the clerk. *Haynie v. State*, 3 App. 223; *Parchman v. State*, Id. 225; *Krebs v. State*, Id. 348; *Richards v. State*, Id. 423; *Clampitt v. State*, Id. 638; *Thompson v. State*, 4 App. 44; *Hunt v. State*, Id. 53; *Long v. State*, Id. 81; *Doyle v. State*, Id. 253; *Richarte v. State*, 5 App. 359; *Hill v. State*, 4 App. 559; *Williams v. State*, 18 App. 409.

The file marking may be entered nunc pro tunc, even at a subsequent term, but not after an appeal has been taken, and it is immaterial that the order to file nunc pro tunc is made by the successor in office of the judge before whom the trial was had. *Nettles v. State*, 4 App. 337; *Hill v. State*, Id. 559.

But where the record showed that the charge was authenticated by the official signature of the judge, and had been filed by the clerk, but not filed until one day after the trial, it was held that the objection that it had not been filed at the proper time could not be entertained when presented for the first time on appeal. *Lowe v. State*, 11 App. 253.

Record.—It was held in one case that where the judgment recited that the jury received the charge of the court, the mere absence from the record of the charge would not be cause for reversal, but it would be presumed that the clerk, in making up the transcript, had omitted the charge. *Tullis v. State*, 41 Tex. 598. This decision does not appear to be in harmony with more recent decisions cited above.

Alteration of charge.—Under arts. 734, 740, 741, and this article, the action of the county attorney in writing in certain words in the charge on the jury coming into court for information was ground for reversal, where after the additions had been made the charge was not read to the jury, but was handed to it. *Christensen v. State*, 59 App. 278, 128 S. W. 616.

Agreement of counsel.—An agreement of counsel, in the transcript, as to what the charge was, will not be considered on appeal. *Lockett v. State*, 40 Tex. 4. Nor will a paper purporting to be the charge, but which is not signed by the judge or otherwise authenticated. *Wheelock v. State*, 15 Tex. 253; *Smith v. State*, 1 App. 408; *Lindsay v. State*, Id. 584; *West v. State*, 2 App. 209; *Hubbard v. State*, Id. 506.

Requested charges.—Special instructions, whether given or refused, must be authenticated by the signature of the trial judge to be reviewable on appeal. *Porter v. State*, 60 App. 588, 132 S. W. 935; *Britton v. State*, 61 App. 30, 133 S. W. 885; *Baker v. State* (Cr. App.) 145 S. W. 607.

Where requested charges are not copied in the transcript, the refusal thereof cannot be reviewed on appeal. *Cruz v. State* (Cr. App.) 148 S. W. 564.

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.]

See *Davis v. State of Texas*, 139 U. S. 651, 11 Sup. Ct. 675, 35 L. Ed. 300.

Necessity of written charge.—See post, art. 740, and notes.

Necessity of requests.—The court is not required to give instructions in a misdemeanor case unless requested to do so. *Luttrall v. State*, 64 App. 411, 142 S. W. 588; *Waechter v. State*, 34 App. 297, 30 S. W. 444, 800; *Bush v. State* (Cr. App.) 70 S. W. 550; *Stubbs v. State*, 71 App. 390, 160 S. W. 87; *Robey v. State*, 73 App. 9, 163 S. W. 713; *Goode v. State* (Cr. App.) 171 S. W. 714.

It is error to refuse an appropriate instruction when properly requested. *Ross v. State*, 9 App. 275. And when charges are requested they must be given with or without modification, or must be refused. *Melton v. State*, 12 App. 488.

Requested charges in misdemeanor cases, unlike those in felony cases, must state pointedly the law applicable to the case. *Brent v. State*, 57 App. 411, 123 S. W. 593.

Where the instructions submitted the issues in a misdemeanor case in substantial fairness, accused, desiring more accurate charges, must ask special charges. *Hamilton v. State*, 58 App. 173, 127 S. W. 212.

In a prosecution for a misdemeanor, failure of the court to submit an issue as specifically as possible is not reversible error, in the absence of a request for a more specific presentation. *Diggs v. State*, 64 App. 122, 141 S. W. 100.

The court, on a prosecution for sale of liquor, there being evidence of three separate sales, one of a bottle of whisky, and two of single drinks, was not required to correct, and as corrected give, a requested charge to acquit if defendant did not accept money for the bottle of whisky. *Carver v. State* (Cr. App.) 150 S. W. 914.

While the court need not charge the jury in a misdemeanor case unless requested to do so, if he does give an erroneous charge, it will require a reversal, if it is excepted to and a correct charge requested. *Buckley v. State*, 70 App. 550, 157 S. W. 765.

On a trial for keeping a disorderly house, where one paragraph of a requested instruction was improper, the court was under no obligation to modify it by striking out such paragraph, and giving the other, even if the other paragraph was proper. *Cunningham v. State*, 73 App. 565, 166 S. W. 519.

On a trial for playing cards and going into and remaining in a place where cards were being played, the court was not bound to charge that an admission by one of the defendants subsequent to the offense could not be considered in passing on the guilt of the other defendants, where no such charge was requested. *Sloan v. State* (Cr. App.) 170 S. W. 156.

In a misdemeanor case, where the court charged the jury as to the purpose for which evidence could be considered, accused, if desirous of more explicit instructions, should request them. *Noodleman v. State* (Cr. App.) 170 S. W. 710.

Necessity of written request.—The court may refuse to give requested instructions where they are not presented in writing. *Murray v. State*, 38 App. 677, 44 S. W. 830.

Necessity of request to raise question on appeal.—Before a defendant charged with a misdemeanor can complain on appeal of the giving or failure to give instructions, he must have presented a written request for special charges in the trial court. *Kosmoroski v. State*, 59 App. 296, 127 S. W. 1056; *Gruensendorf v. State* (Cr. App.) 56 S. W. 625; *Elliott v. State*, 59 App. 1, 127 S. W. 547; *Ellis v. State*, 59 App. 626, 130 S. W. 170; *Ellis v. State*, 59 App. 630, 130 S. W. 171; *Bradley v. State* (Cr. App.) 136 S. W. 446; *Webb v. State*, 63 App. 207, 140 S. W. 95; *Wagoner v. State*, 63 App. 180, 140 S. W. 339; *Brogdon v. State*, 63 App. 475, 140 S. W. 352; *Drummond v. State*, 71 App. 260, 158 S. W. 549; *Scott v. State* (Cr. App.) 175 S. W. 1054.

A misdemeanor case will not be reversed for failure of the trial court to charge all the law applicable, in the absence of requests for special instructions covering the point and bills of exception to the refusal to give such special instructions. *Robbins v. State*, 60 App. 523, 132 S. W. 770.

Under this article, a conviction will not be reversed for failure to properly charge the law on the point in controversy. *Willingham v. State*, 62 App. 55, 136 S. W. 470.

In a prosecution for assault, accused objected to the charge that the use of any dangerous weapon in an angry or threatening manner, with intent to alarm another and under circumstances to effect that object was an assault, on the ground that this charge was not applicable to the evidence. He also objected to that charge upon the ground that the court should have charged the jury that the conduct above detailed amounted to no more than a simple assault, but in neither case did he request special charges. Held, that under this article and art. 747, the objections to this charge presented no reversible error. *Noland v. State*, 63 App. 275, 140 S. W. 100.

The court in misdemeanor cases will not consider complaints of the charge given and the refusal of special charges unless a bill of exceptions is taken at the time, giving in the bill the specific reasons why the court erred in giving the charge complained of, or in refusing the requested charge. *Giles v. State* (Cr. App.) 148 S. W. 317.

Under arts. 737, 743, and this article the giving and refusal of instructions cannot be considered, unless bills of exceptions are taken at the time in which the specific reasons why the court erred are given. *Brown v. State*, 73 App. 571, 166 S. W. 508.

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.

Cited, *Davis v. State of Texas*, 139 U. S. 651, 11 Sup. Ct. 675, 35 L. Ed. 300.

Written charges.—In felony cases the charge must be in writing. In misdemeanor cases the charge must also be in writing, unless the parties consent to a verbal charge. The statutory provision is mandatory. *Clark v. State*, 31 Tex. 574; *Gibbs v. State*, 1 App. 12; *Smith v. State*, 1 App. 408; *West v. State*, 2 App. 209; *Killman v. State*, 2 App. 222, 28 Am. Rep. 432; *Chamberlain v. State*, 2 App. 451; *Goode v. State*, 2 App. 520; *Jordan v. State*, 5 App. 422; *Trippett v. State*, 5 App. 595; *Williams v. State*, 5 App. 615; *Hobbs v. State*, 7 App. 117; *Howard v. State*, 8 App. 612; *Henry v. State*, 9 App. 358; *Melton v. State*, 12 App. 488; *Williams v. State*, 18 App. 409; *Harkey v. State*, 33 App. 100, 25 S. W. 291, 47 Am. St. Rep. 19; *Rumage v. State* (Cr. App.) 55 S. W. 64; *Winfrey v. State*, 41 App. 538, 56 S. W. 919; *Edwards v. State* (Cr. App.) 69 S. W. 144; *Garrison v. State*, 54 App. 600, 114 S. W. 128. And see *Carr v. State*, 5 App. 153; *Kelley v. State* (Cr. App.) 31 S. W. 390; *Bennett v. State*, 40 App. 445, 50 S. W. 746; *Hill v. State*, 43 App. 533, 67 S. W. 506; *Vick v. State* (Cr. App.) 69 S. W. 156; *Greer v. State*, 62 App. 81, 136 S. W. 451. If the record shows no written charge, it will be presumed, in the absence of anything to the contrary, that no charge was given, or that a verbal charge was given by consent of the parties. *Carr v. State*, 5 App. 153. And see *Newton v. State*, 3 App. 245.

An admonition to the jury to pay particular attention to the charge need not be in writing. *Sargent v. State* (Cr. App.) 33 S. W. 364. A bare statement to the jury of the penalty authorized by statute is not a charge so as to make it necessary to put it in writing. *Bush v. State* (Cr. App.) 70 S. W. 550. After giving a charge in writing it is not error to verbally instruct the jury to disregard certain testimony. *Winfield v. State* (Cr. App.) 54 S. W. 584. Remarks or an address by the trial judge to the regular jury panel for the week, made when administering the oath to them and for the purpose of aiding them in the discharge of their duties, are not required to be in writing. *Reed v. State* (Cr. App.) 168 S. W. 541. Requested instructions must be in writing. *Mooney v. State* (Cr. App.) 176 S. W. 52.

The court may charge in writing though not requested. *Hunt v. State*, 9 App. 404.

Reading law to the jury is a verbal and not a written charge, and is reversible error if excepted to at the time. *Wilson v. State*, 15 App. 150; *Carr v. State*, 41 Tex. 543. But in *Hobbs v. State*, 7 App. 117, it was held that the judge may read from the statutes such portions thereof as are necessary to inform the jury of the nature, definition, and punishment of the offense. It will be seen that this last cited decision is in conflict with the two decisions before cited. It, in effect, overrules *Carr v. State*, supra, and is itself, in effect, overruled by *Wilson v. State*, supra.

Where the general charge has been signed and additional charges are given to supply omissions in the former, these also must be signed. *Logan v. State*, 40 App. 88, 48 S. W. 575.

Under this article and arts. 734, 738, 741, the action of the county attorney in writing in certain words in the charge on the jury coming into court for information was ground for reversal, where after the additions had been made the charge was not read to the jury, but was handed to it. *Christensen v. State*, 59 App. 278, 128 S. W. 616.

The court should read the charge to the jury in the precise words in which it is written in a criminal case, as well as in a civil case, though the only statute so requiring, Rev. Civ. St. 1911, art. 1971, refers to civil actions. *Coley v. State* (Cr. App.) 150 S. W. 739.

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.]

Cited, *Davis v. State of Texas*, 139 U. S. 651, 11 Sup. Ct. 675, 35 L. Ed. 300.

In general.—*Irvine v. State*, 18 App. 51; *Bracken v. State*, 29 App. 362, 16 S. W. 192.

Under this article and arts. 734, 738, 740, the action of the county attorney in writing in certain words in the charge on the jury coming into court for information was ground for reversal, where after the additions had been made the charge was not read to the jury, but was handed to it. *Christensen v. State*, 59 App. 278, 128 S. W. 616.

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.]

In general.—See *Irvine v. State*, 18 App. 51; *Davis v. State of Texas*, 139 U. S. 651, 11 Sup. Ct. 675, 35 L. Ed. 300.

That the jury inadvertently failed to take one of accused's special charges, which had been approved and read to them, to the jury room when they retired was not reversible error. *Thomason v. State*, 71 App. 439, 160 S. W. 359.

Art. 743. [723] Judgment not to be reversed unless error prejudicial, etc.—Whenever it appears by the record in any criminal action upon appeal of the defendant that any of the requirements of the nine preceding articles [arts. 735–742] 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, or unless it appears from the record that the defendant has not had a fair and impartial trial, and all objections to the charge, and on account of refusal or modification of special charges shall be made at the time of the trial. [O. C. 602; Act 1897, p. 17; Act 1913, p. 278, ch. 138, § 4, amending art. 743, revised C. C. P.]

See Willson's Cr. Forms, 940–942.

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1. Explanatory.—Code Cr. Proc. 1895, art. 723, read as follows: "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 be reversed; provided, the error is excepted to at the time of the trial."

It was amended by Act of 1897, p. 17, to read as follows: "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."

I. IN GENERAL

Cited, *Fitzsimmons v. State*, 62 App. 440, 138 S. W. 110; *Perkins v. State* (Cr. App.) 144 S. W. 241; *Johnson v. State* (Cr. App.) 150 S. W. 623; *Silvas v. State*, 71 App. 213, 159 S. W. 223; *James v. State*, 72 App. 457, 163 S. W. 61; *Muldrew v. State*, 73 App. 463, 166 S. W. 156; *Johnson v. State* (Cr. App.) 171 S. W. 1128; *Galan v. State* (Cr. App.) 177 S. W. 124; *Davis v. State of Texas*, 139 U. S. 651, 11 Sup. Ct. 675, 35 L. Ed. 300.

2. **Validity.**—The wisdom of this statute is of no concern to the courts. *Chance v. State*, 63 App. 602, 141 S. W. 113.

This article as amended by Acts 33d Leg. c. 138, is valid and binding on the Court of Criminal Appeals, since the Constitution gives the right of appeal only under such conditions and restrictions as may be provided by law. *Wright v. State*, 73 App. 178, 163 S. W. 976.

3. **Subsequent trial for offenses before amendment.**—This section as so amended applies to trials subsequent to the taking effect of the amendment for offenses committed prior to its taking effect, since they relate to mere matters of procedure which are governed by the law in force at the time of the trial. *Wright v. State*, 73 App. 178, 163 S. W. 976.

Although the homicide for which accused was tried was committed before the act of 1913 became effective, the changes in procedure must be followed where the trial was not had until after the statute went into effect. *Ybarra v. State*, 73 App. 70, 164 S. W. 10.

II. HARMLESS ERROR

4. **Decisions under former statute.**—If the error be not excepted to at the proper time, the next point at which it should be objected to is in a motion for a new trial. But, when the objection is presented for the first time in a motion for a new trial, it is subject to another and a very different rule than when it is presented by proper bill of exception, which rule is, that if under all the circumstances as exhibited in the record the error was "calculated to injure the rights of the defendant," the conviction will be set aside; otherwise, the error will be deemed immaterial, and the conviction will not be disturbed because of it. If the objection be still further delayed, and for the first time presented on appeal, the conviction will not be disturbed because of the error, unless it be an error of a fundamental nature; that is, if the error be a material misdirection of the law applicable to the case, or be a failure to give in charge the law required by the evidence in the case, and such affirmative error, or such error of omission, is calculated, under all the circumstances of the case, to injure the rights of the defendant, the conviction will be set aside. *Bishop v. State*, 43 Tex. 309; *Tuller v. State*, 8 App. 501; *Mace v. State*, 9 App. 110; *Vincent v. State*, Id. 303; *Whaley v. State*, Id. 305; *Henry v. State*, Id. 358; *Scott v. State*, 10 App. 112; *Erwin v. State*, Id. 700; *Williams v. State*, Id. 8; *St. Clair v. State*, 11 App. 297; *Holmes v. State*, Id. 223; *Gardner v. State*, Id. 265; *Hill v. State*, Id. 379; *McWhorter v. State*, Id. 584; *Powell v. State*, 12 App. 238; *Randle v. State*, Id. 250; *Maddox v. State*, Id. 429; *Gonzales v. State*, Id. 657; *Ray v. State*, 13 App. 51; *Wyers v. State*, Id. 57; *Caruthers v. State*, Id. 339; *Thomas v. State*, Id. 493; *Flores v. State*, Id. 665; *Montgomery v. State*, Id. 669; *McNair v. State*, 14 App. 78; *Cook v. State*, Id. 96; *Davis v. State*, Id. 645; *Moore v. State*, 15 App. 1; *Smith v. State*, Id. 133; *Burke v. State*, Id. 156; *Gilly v. State*, Id. 287; *Mason v. State*, Id. 534; *Elam v. State*, 16 App. 34; *Lillard v. State*, 17 App. 114; *Fonville v. State*, Id. 363; *Greene v. State*, Id. 395; *Langford v. State*, Id. 445; *Lewis v. State*, 18 App. 401; *Miller v. State*, Id. 34; *White v. State*, Id. 57; *Black v. State*, Id. 124; *Nairn v. State*, Id. 260; *Wilson v. State*, 18 App. 270, 51 Am. Rep. 309; *Howard v. State*, 18 App. 348; *Mendiola v. State*, Id. 462; *Clark v. State*, Id. 467; *Gardenhire v. State*, Id. 565; *Smith v. State*, 19 App. 95; *Arto v. State*, Id. 126; *Hildreth v. State*, Id. 195; *White v. State*, Id. 343; *Counts v. State*, Id. 450; *Riley v. State*, 20 App. 100; *Ramirez v. State*, Id. 133; *Cunningham v. State*, Id. 162; *Jackson v. State*, Id. 190; *Collins v. State*, Id. 197; *Shubert v. State*, Id. 320; *Crist v. State*, 21 App. 361, 17 S. W. 260; *Ayres v. State*, 21 App. 399, 17 S. W. 253; *Pierce v. State*, 21 App. 540, 1 S. W. 463; *Washington v. State*, 22 App. 26, 3 S. W. 228; *Parker v. State*, 22 App. 105, 3 S. W. 100; *Bostic v. State*, 22 App. 136, 2 S. W. 538; *Curtis v. State*, 22 App. 227, 3 S. W. 86, 58 Am. Rep. 635; *Davidson v. State*, 22 App. 372, 3 S. W. 662; *Williams v. State*, 22 App. 497, 4 S. W. 64; *Taylor v. State*, 22 App. 529, 3 S. W. 753, 58 Am. Rep. 656; *Leache v. State*, 22 App. 279, 3 S. W. 539, 58 Am. Rep. 638; *Smith v. State*, 22 App. 316, 3 S. W. 684; *Washington v. State*, 23 App. 336, 5 S. W. 119; *Maines v. State*, 23 App. 568, 5 S. W. 125; *Liskowski v. State*, 23 App. 165, 3 S. W. 696; *Roberts v. State*, 23 App. 170, 4 S. W. 879; *Steber v. State*, 23 App. 176, 4 S. W. 880; *Bond v. State*, 23 App. 180, 4 S. W. 580; *Davis v. State*, 23 App. 210, 4 S. W. 590; *Cravey v. State*, 23 App. 677, 5 S. W. 162; *White v. State*, 23 App. 154, 3 S. W. 710; *Pitner v. State*, 23 App. 366, 5 S. W. 210; *Tucker v. State*, 23 App. 512, 5 S. W. 180; *Williams v. State*, 24 App. 17, 5 S. W. 655; *Tillery v. State*, 24 App. 251, 5 S. W. 842, 5 Am. St. Rep. 882; *Burks v. State*, 24 App. 332, 6 S. W. 303; *Crowell v. State*, 24 App. 404, 6 S. W. 318; *McDaniel v. State*, 24 App. 552, 7 S. W. 249; *Willis v. State*, 24 App. 584, 6 S. W. 856; *Fuller v. State*, 24 App. 596, 7 S. W. 330; *Guajardo v. State*, 24 App. 603, 7 S. W. 331.

If the error, however immaterial it may be, is promptly excepted to, and presented by a proper bill of exception on appeal, the statute is mandatory that the conviction shall be set aside, without inquiry as to the effect of such error upon the jury. *Marshall v. State*, 40 Tex. 200; *Bishop v. State*, 43 Tex. 390; *Heath v. State*, 7 App. 465; *Spears v. State*, 8 App. 467; *Fury v. State*, 8 App. 471; *Harrison v. State*, 8 App. 183; *Bouldin v. State*, 8 App. 332; *Tuller v. State*, 8 App. 501; *Johnson v. State*, 1 App. 609; *Mace v. State*, 9 App. 110; *Vincent v. State*, 9 App. 303; *Whaley v. State*, 9 App. 305; *McGrew v. State*, 10 App. 539; *Buntain v. State*, 15 App. 485; *Goode v. State*, 16 App. 411; *White v. State*, 17 App. 188; *Niland v. State*, 19 App. 166; *Bravo v. State*, 20 App. 188; *Clanton v. State*, 20 App. 615; *Paulin v. State*, 21 App. 436, 1 S. W. 453; *McCandless v. State*, 21 App. 411, 2 S. W. 811; *Leache v. State*, 22 App. 279, 3 S. W. 539, 58 Am. Rep. 638; *McConnell v. State*, 24 App. 354, 3 S. W. 699, 58 Am. Rep. 647; *Jackson v. State*, 22 App. 442, 3 S. W. 111; *Jones v. State*, 22 App. 680, 3 S. W. 478; *Levine v. State*, 22 App. 683, 3 S. W. 660; *Gentry v. State*, 24 App. 80, 5 S. W. 660; *Behrens v. State*, 14 App. 121.

An erroneous charge, though it inures to the benefit of defendant, if it be opportunely excepted to, constitutes reversible error. *Cunningham v. State*, 27 App. 479, 11 S. W. 485; *White v. State*, 28 App. 71, 12 S. W. 406; *Jenkins v. State*, 28 App. 86, 12 S. W. 411; *Habel v. State*, 28 App. 588, 13 S. W. 1001; *Leeper v. State*, 29 App. 154, 15 S. W. 411; *Massey v. State*, 29 App. 159, 15 S. W. 601; *Surrell v. State*, 29 App. 321, 15 S. W. 816; *Warren v. State*, 31 App. 573, 21 S. W. 680.

See, also, *Roe v. State*, 25 App. 33, 8 S. W. 463; *Wimbish v. State*, 25 App. 90, 7 S. W. 533; *Cordway v. State*, 25 App. 405, 8 S. W. 670; *Rushing v. State*, 25 App. 607, 8 S. W. 807; *Wolfe v. State*, 25 App. 706, 9 S. W. 44; *Comer v. State*, 26 App. 509, 10 S. W. 106; *Davidson v. State*, 27 App. 262, 11 S. W. 371; *Barton v. State*, 28 App. 483, 13 S. W. 783; *Davis v. State*, 28 App. 542, 13 S. W. 994; *Garner v. State*, 28 App. 561, 13 S. W. 1004; *Habel v. State*, 28 App. 588, 13 S. W. 1001; *Leeper v. State*, 29 App. 154, 15 S. W. 411; *Massey v. State*, 29 App. 159, 15 S. W. 601; *Surrell v. State*, 29 App. 321, 15 S. W. 816; *Bracken v. State*, 29 App. 362, 16 S. W. 192; *Taylor v. State*, 29 App. 479, 16 S. W. 302.

(A) Instructions Given

5. In general.—*Hofheintz v. State*, 45 App. 117, 74 S. W. 311; *Stullivan v. State*, 47 App. 615, 85 S. W. 811; *Bonura v. State* (Cr. App.) 98 S. W. 268; *Bice v. State*, 55 App. 529, 117 S. W. 166; *Underwood v. State*, 55 App. 601, 117 S. W. 809; *Tilmeyer v. State*, 62 App. 272, 136 S. W. 1060; *Leech v. State*, 63 App. 339, 139 S. W. 1147; *Powdrill v. State* (Cr. App.) 155 S. W. 231; *McGaughey v. State* (Cr. App.) 169 S. W. 287.

Because a charge given was not required will not necessarily require the reversal of a conviction. It may be harmless or even inure to the benefit of accused. *Surrell v. State*, 29 App. 321, 15 S. W. 816. But see *McSpatton v. State*, 30 App. 616, 18 S. W. 298.

The court will not reverse for error in a charge, where, considering the charge as a whole, accused could not have been injured thereby. *Coffey v. State*, 60 App. 73, 131 S. W. 216.

Where an instruction on aggravated assault submitted what occurred at the time and just before the shooting, and after instructing on adequate cause and cooling time the court further instructed that whether such adequate cause existed for such sudden passion, if any there was, was for the jury to determine, from a consideration of all the facts and circumstances in evidence in the case, it left the jury to determine whether the prior occurrence constituted adequate cause, so that the rights of the defendant were not injured. *Mosley v. State*, 61 App. 294, 135 S. W. 148.

Where the court, on the trial of accused for the theft of a mule, correctly charged the law applicable to the facts, showing a theft of two mules at the same time and place, the act of the court in charging, on the jury asking for further instructions, that the state could demand a conviction for the theft of one mule, as charged in the indictment, was not prejudicial to accused. *Miller v. State*, 62 App. 507, 138 S. W. 113.

An instruction at the end of the charge on manslaughter, that if accused was at a different place than where the killing occurred he should be acquitted, was not harmful error, on the ground that it commingled a charge on alibi with a charge on manslaughter, since the subjects were not commingled, and a special charge on alibi was not required, in the absence of a request. *Banks v. State* (Cr. App.) 150 S. W. 184.

It was not shown that the court erred in giving a charge which tended to emphasize another portion of the charge, where it did not appear how this could have injured accused, and it was not in fact urged that it did injure him, especially where the evidence was not in the record, and did not accompany the record. *Clifton v. State*, 70 App. 346, 156 S. W. 1179.

Any error in refusing requested charges by accused, or in particular expressions in the charges given, was harmless, where the charges given were substantially correct upon every issue. *Hunter v. State*, 73 App. 459, 166 S. W. 164.

6. Burden of showing prejudice.—In the absence of a statement of facts, the appellate court cannot determine that an erroneous instruction was prejudicial to the rights of accused. *Burton v. State*, 62 App. 648, 138 S. W. 1019.

7. Errors in form.—Since under art. 773, post, the court could have orally called the jury's attention to the informality of a verdict brought in, and instructed them orally as to the correct form, or had it changed with their consent, it was not reversible error to orally instruct as to the form of their verdict in the first instance. *Ragsdale v. State*, 61 App. 145, 134 S. W. 234.

The trial court in charging used a paper containing the instructions given on the former trial, erasing with ink the part of those instructions held error by the appellate court, and submitting the original paper to the jury. Held, that the jury could not have been harmfully misled thereby, since if they deciphered the erroneous part, under the erasure, they must have known that the trial court held that it was not the law. *Tilmeyer v. State*, 62 App. 272, 136 S. W. 1060.

Where, in a prosecution for homicide, there was no evidence of self-defense, the fact that the court struck out with a pen a part of an instruction with reference to the law of self-defense, and permitted the same to go to the jury with the part so stricken, was not prejudicial to accused. *Zunago v. State*, 63 App. 58, 138 S. W. 713, Ann. Cas. 1913D, 665.

The failure of the court to certify his charge, as required by art. 738 ante, was harmless, where it resulted from mere inadvertence, and where the charge in the record was the only charge given to the jury, or upon which they acted. *Shettlers v. State* (Cr. App.) 147 S. W. 582.

In a prosecution for unlawfully disposing of mortgaged property, instructions submitting the question whether accused had disposed of the mortgaged property, as originally drawn, used the words "without the consent of the said C. and W.,"

the owners of the mortgage and debt, and were so read to the jury; but immediately afterwards, before the jury took the charge and retired, the court interlined the quoted words so as to make them read "without the consent of either the said C. or W." and did not again read the instructions to the jury. Accused was present when the interlineation was made, and made no objection until the motion for new trial, and admits that the jury actually read over the charge as changed after their retirement and before verdict. Held, that no injury could have resulted to accused by the court's failure to again read over the charge to the jury after changing it. *Coley v. State* (Cr. App.) 150 S. W. 789.

8. Invited error.—Accused cannot complain of a charge given at his request. *Law v. State*, 73 App. 5, 163 S. W. 90; *Wilson v. State*, 57 App. 336, 123 S. W. 140; *Jones v. State*, 63 App. 394, 141 S. W. 953; *Browning v. State*, 64 App. 148, 142 S. W. 1; *Stewart v. State* (Cr. App.) 153 S. W. 1151; *McKelvey v. State* (Cr. App.) 155 S. W. 932; *Meek v. State*, 71 App. 433, 160 S. W. 698; *Suesberry v. State*, 72 App. 439, 162 S. W. 849.

Accused cannot ask a reversal on appeal in a misdemeanor case because of the charge on self-defense, where the charge requested by him on that theory was given. *Reynolds v. State*, 63 App. 270, 139 S. W. 977.

The trial court having instructed at accused's request that the second count in the indictment was withdrawn, accused cannot complain on appeal of any error in failing to instruct on it. *Ellington v. State*, 63 App. 424, 140 S. W. 1100.

Where accused, in a prosecution for murder, requested a charge on the right of self-defense, he could not complain of the giving of a charge conveying the same thought in practically the same words to the jury. *Renn v. State*, 64 App. 639, 143 S. W. 167.

Accused, having requested the court to charge that, even though the jury believed the evidence that decedent's son stated that decedent did not speak after the son appeared, they could consider such evidence only for impeachment, and not as any evidence that decedent did not in fact speak after she was injured, was estopped to object that the court's instruction that if the jury believed that the son told B. that his mother did speak, they could consider B.'s testimony to that effect in support of the son, on the ground that it was on the weight of the evidence. *Brown v. State* (Cr. App.) 169 S. W. 437.

Where accused himself requested a charge on alibi, he cannot complain that the court charged on that question; the error, if any, having been invited. *De Lerosa v. State* (Cr. App.) 170 S. W. 312.

9. Clerical errors.—Verbal inaccuracies in a charge, where it correctly and fairly presents the law as a whole, are not ground for reversal. *McCue v. State* (Cr. App.) 170 S. W. 280; *Coleman v. State* (Cr. App.) 150 S. W. 1177.

If there was error in the court substituting the name of a wrong party as to contradictory statements, yet it was not injurious to rights of defendant and therefore not cause for reversal. *Jackson v. State* (Cr. App.) 103 S. W. 928.

In a rape case, where the offense was alleged to have been committed on or about March 24, 1909, a charge that if accused, as charged, on or about the 23d day of March, 1909, as alleged, had carnal knowledge, etc., was not reversible error, where there was no question of limitation. *Munger v. State*, 57 App. 334, 122 S. W. 874.

At a trial for assault with intent to murder, where no one except the defendant and the person injured, who was a witness, were present at the assault, an instruction on the presumption arising from the use of a deadly weapon, which referred to the injured party as "the deceased," while erroneous, is harmless, in view of the evidence. *Hartfield v. State*, 61 App. 515, 134 S. W. 1180.

Where an indictment for forgery charged that the offense was committed April 15, 1909, and mentioned no other date, and all the testimony and the alleged forged instrument showed that April 15, 1909, was the date of the offense, the error in an instruction, stating that the offense was committed on or about April 15, 1910, was not prejudicial, and the court must, as required by this article, disregard it. *White v. State*, 61 App. 498, 135 S. W. 562.

In a prosecution for theft, error in the caption of the court's charge in stating that the case was tried in a county other than that where it was actually tried, and in failing to state the offense the defendant was accused of, or when or where it was committed, or that defendant pleaded not guilty, was not prejudicial, as the jury must have known where the trial was held and with what crime accused was charged and that he had pleaded not guilty. *Franklin v. State*, 63 App. 438, 140 S. W. 1091.

Where the indictment in a prosecution for murder charged that the offense was committed by striking deceased with a piece of board, a charge, which in submitting the cause to the jury used the word "board" in every place therein but one, where the words were "piece of wood," the words were practically synonymous, and could not have misled the jury. *Johnson v. State*, 64 App. 399, 142 S. W. 589.

An instruction that, before the jury could "not" convict accused, they must find facts which would, in law, establish accused's guilt, was not reversible error; the presence of the word "not" being obviously a clerical error. *McWhirter v. State* (Cr. App.) 146 S. W. 189.

The evident mistake of the court in charging, on a prosecution for assault to murder, to find defendant not guilty if he, or B., or both, did the shooting, whereas elsewhere, all through the charge, it had instructed, if he did the shooting with malice aforethought, he would be guilty, was harmless; the state's theory being that defendant did the shooting, it being clear that, if he did, it was to kill, and defendant's case and evidence being that he did not fire at all, and had nothing to do with it. *Giles v. State* (Cr. App.) 150 S. W. 907.

The use twice in instructions in a homicide case of the word "defendant" when "deceased" was intended to be used was a mere clerical error, and not reversible,

where the whole instruction showed that it was not misleading. *Bonds v. State*, 71 App. 408, 160 S. W. 100.

Where a charge on self-defense, relating to the manifest intention of the deceased to execute threats previously made, through inadvertence used the word "excuse" instead of "execute," but it appeared that the word was read "execute" by all the attorneys and by the judge, the error was not prejudicial. *Carey v. State* (Cr. App.) 167 S. W. 366.

10. **Inapplicability to issue.**—On a trial for theft the court through mistake instructed the jury that defendant was charged with robbery, but in subsequent paragraphs correctly charged the law in regard to theft. Held that the error was harmless. *Oxford v. State*, 32 App. 272, 22 S. W. 971.

Under an indictment charging embezzlement of money in accused's possession "borrowed" for counting, an instruction, authorizing conviction if the money was held under a contract of borrowing "or other bailment," is not reversible error, in the absence of a statement of facts showing prejudice to accused. *Shrewder v. State*, 62 App. 403, 136 S. W. 461, 1200.

Where a portion of a charge complained of, though not in the language of the indictment in the statement to the jury of what the law in the case was, substantially quoted the article of the statute under which the prosecution was had, the defendant was not injured by the charge and cannot complain. *Baumgarner v. State*, 64 App. 165, 142 S. W. 4.

Where the undisputed evidence showed that decedent was killed by blows on his head with a stone, as charged in the indictment, in which was another count, charging the killing while accused was unlawfully engaged in committing a robbery, an instruction, reciting the charging part of the two counts, without limiting the jury to either, was not prejudicial to accused. *Washington v. State* (Cr. App.) 147 S. W. 276.

Where the information, charging the practicing of medicine by accused without a license, did not allege a specified time of the commission of the offense, but embraced the whole period on and prior to a designated date within the period of limitation, and the evidence, without contradiction, showed that accused practiced medicine on and before the designated date, a charge, authorizing a conviction on a transaction occurring prior to the designated date, was not prejudicial to accused, on the ground that each day of practice was a separate offense, since a conviction barred any offenses committed in the county within the period of limitation on and prior to the designated date. *Stiles v. State* (Cr. App.) 148 S. W. 326.

In a prosecution for carrying a pistol, where the court properly stated the law as to unlawfully carrying a pistol, an instruction that, if accused did unlawfully "have" on or about his person a pistol as charged, he should be found guilty, did not prejudice accused, because of the use of the word "have," instead of "carry." *McCrary v. State* (Cr. App.) 151 S. W. 812.

The words "religious purposes" are so analogous to "religious worship" that in a prosecution for disturbing a congregation assembled for religious worship a charge using the term "religious purposes" is an immaterial variance. *Laird v. State* (Cr. App.) 155 S. W. 260.

11. **Omission of elements of offense.**—When the defendant had no claim to the money which he took from the prosecutor, and the evidence shows that he took it with a fraudulent intent, the omission of the word "fraudulent" in the definition of the offense contained in the charge was not calculated to injure defendant and court will not reverse on account of such omission. *Murphy v. State* (Cr. App.) 67 S. W. 109.

In the charge of murder of second degree the court omitted to state that the killing must be unlawful, and that it must be done on malice aforethought, and while under this article it might be doubtful whether the case ought to be reversed for these omissions yet the necessary ingredients of murder in the second degree should be given when that issue is submitted to the jury, applying the law to the facts. *McDowell v. State*, 55 App. 596, 117 S. W. 832.

In a prosecution for murder, where the only defense was that some one else did the killing, and it appeared that deceased had received his death wound by being struck in the head with a gun barrel, a charge on murder in the second degree, which did not make an unlawful killing a condition precedent to conviction, is not reversible error for the killing could not have been justified. *Crutchfield v. State* (Cr. App.) 152 S. W. 1053.

Where, on a trial for rape on a female under the age of consent, prosecutrix testified that accused had intercourse with her, and physicians examining her declared that she had been penetrated, an instruction that it was necessary that the evidence showed penetration, but beyond that the jury need not go, though erroneous, was not ground for reversal; the indictment not alleging that the offense was accomplished by force, threats, or fraud. *Kinch v. State*, 70 App. 419, 156 S. W. 649.

12. **Reasonable doubt.**—Where the court, in a trial for theft, charged generally regarding the presumption of innocence and reasonable doubt, there was no error requiring a reversal, though a particular clause of the charge did not include the law of reasonable doubt. *Williams v. State*, 62 App. 322, 137 S. W. 687.

In a prosecution for rape, the court charged that if the defendant did not have sexual intercourse with the prosecuting witness, as charged in the indictment, or if there was a reasonable doubt as to whether he did or did not, defendant was not guilty, and also that the burden of proof is upon the state throughout the entire case, and the defendant is presumed to be innocent until his guilt is established by legal and competent evidence beyond a reasonable doubt. Held, that the giving of the instructions was not reversible error. *Lott v. State* (Cr. App.) 146 S. W. 544.

The court instructed that a reasonable doubt was an actual doubt that the jury was conscious of, after going over in their minds the entire case, giving consideration to all the testimony and every particular of it, and if the jury felt uncertain and not fully convinced that accused was guilty, and believed that they are acting in a reasonable manner, and that a reasonable man in any matter of like importance would hesitate to act because of such a doubt, as they are conscious of having, then that was a reasonable doubt of which accused was entitled to have the benefit. Held that, while it was the better practice not to define "reasonable doubt," the instruction attempting to define it could not have injured accused. *Holmes v. State* (Cr. App.) 150 S. W. 926.

13. Singling out evidence.—Submission, in prosecution for perjury, of materiality of testimony held not prejudicial. *Montgomery v. State* (Cr. App.) 40 S. W. 805.

A charge in a prosecution for an assault with intent to commit rape that if defendant embraced prosecutrix with her consent, or if there was a reasonable doubt as to whether he embraced her with her consent, such acts upon his part with her consent would not constitute an assault herein defined, while objectionable as imposing upon defendant the burden of proving certain conduct toward the witness with her consent giving undue prominence to such consent, is harmless. *Conger v. State*, 63 App. 312, 140 S. W. 1112.

14. Weight of evidence.—A charge even if on the weight of the evidence is not ground of reversal unless the error was calculated to injure the rights of defendant. *Bollen v. State*, 48 App. 70, 86 S. W. 1026.

That an instruction was upon the weight of the evidence would not be reversible error, where the facts recited therein were proved beyond a reasonable doubt, both by accused and all of the other witnesses. *Crain v. State* (Cr. App.) 153 S. W. 155.

The giving of a charge calling the evidence to the attention of the jury and informing them they might consider it in passing on the credit of the witness was prejudicial. *Reed v. State* (Cr. App.) 174 S. W. 1065.

15. Inapplicability to evidence—Instruction not supported by evidence.—A charge on circumstantial evidence could not have injured accused, even if the case was not one of circumstantial evidence. *Platinburg v. State*, 57 App. 375, 123 S. W. 421.

Where the testimony of prosecutrix on a trial for seduction, testifying unequivocally to the promise of marriage, to accused's act, and to her consent thereto by reason of the promise of marriage and her devotion to accused, was corroborated by proof that accused called on prosecutrix at her home, accompanied her frequently to different gatherings, and by letters written by accused to prosecutrix in which he spoke of his love for her and of their coming marriage, the error in a charge that prosecutrix was an accomplice, and that the jury could not convict on her testimony unless they believed that her testimony was true, and that it tended to show guilt, and that there was other testimony tending to connect accused with the commission of the offense, arising from the fact that it required a less degree of proof than the law contemplates, was not prejudicial to accused. *Thorp v. State*, 59 App. 517, 129 S. W. 607, 29 L. R. A. (N. S.) 421.

The error in submitting the issue of manslaughter, while the evidence only shows accused's guilt of murder in the second degree or self-defense relied on by him, is not prejudicial to accused convicted of manslaughter. *Stewart v. State*, 71 App. 237, 158 S. W. 996.

In a prosecution for false imprisonment, while it was improper for the court in giving the statutory definition of the offense to quote another article of the statute defining threats in connection with the offense, where there was no evidence of any threats, the error was harmless, where the case was submitted solely on the false imprisonment alleged and proved. *Matthews v. State*, 71 App. 374, 160 S. W. 1185.

Where, in a prosecution for theft, it was not in issue that the defendant had taken the property in payment of a debt to him, an instruction placing the burden of proof of such an issue on the defendant was not ground for a reversal. *Schenk v. State* (Cr. App.) 174 S. W. 357.

16. — Instructions as to offense not established by evidence.—In a prosecution for murder, the court charged that even though the jury believed that the killing, if any, took place under circumstances showing no deliberation, yet if accused provoked the difficulty with the apparent intention of killing or doing serious bodily injury to deceased, the offense was not within the definition of manslaughter. This part of the charge was given in connection with the definition of manslaughter, and was preceded by a paragraph defining adequate cause, and was followed by one applying the law to the facts of the case, in which the court directed the jury that if the killing was done in a sudden transport of passion aroused by adequate cause, and not in self-defense, it would be manslaughter. Held that, although the place occupied by the charge as to manslaughter in the instructions was wrong, and there was no provoking the difficulty in the case, the error was harmless, in view of the fact that there was no manslaughter in the case. *Eggleston v. State*, 59 App. 542, 128 S. W. 1105.

Any error in submitting an issue of provocation of the difficulty in a murder case was harmless, even if the evidence did not raise the issue, where a full and complete charge on self-defense was given, and it appeared that, after becoming angry at decedent, accused went to different places, where he procured a gun and ammunition, and returned to where he killed decedent. *Kinney v. State* (Cr. App.) 144 S. W. 257.

In a prosecution for murder, where the evidence showed either murder in the second degree, as found by the jury, or perfect self-defense, errors in the charge as to manslaughter were not prejudicial. *Burns v. State* (Cr. App.) 145 S. W. 356.

Where the evidence showed that about half an hour before accused shot decedent the latter had ordered accused out of a restaurant, and had struck accused on the head with a pistol, whereupon accused left the restaurant, obtained a gun and shells, and returned and shot decedent, an instruction on manslaughter, that the past conduct of decedent, his threats and bearing, should be considered in considering the condition of accused's mind at the time of the killing, was not prejudicial error, being beneficial to accused. *Maxey v. State* (Cr. App.) 145 S. W. 952.

A charge on a trial for practicing medicine without a license, which embodied Pen. Code, art. 750, to the effect that, if the affidavit of authority to practice prescribed thereby was wilfully false, it would subject the applicant to punishment for false swearing, was not prejudicial to accused, where no evidence was submitted on such an issue. *Milling v. State* (Cr. App.) 150 S. W. 434.

Even if the evidence, which showed that decedent, who was a deputy, hid behind a gate post and stepped out and presented a gun at accused and others as they were carrying away stolen property, did not raise the issues of manslaughter, self-defense, or defense of another, any error in submitting such issues was not prejudicial to accused, though his only defense was alibi. *Christian v. State*, 71 App. 566, 161 S. W. 101.

Where the facts did not justify the submission of aggravated assault, defendant's complaint of the court's charge on that offense, even if correct, would not present reversible error. *Girtman v. State*, 73 App. 158, 164 S. W. 1008.

In a prosecution for homicide, where there was no issue of manslaughter in the case, errors in instructions on manslaughter are harmless. *Johnson v. State* (Cr. App.) 167 S. W. 733.

17. — **Assumption of facts.**—In a prosecution for pandering, defendant was not prejudiced by the court's assumption in its charge that the house to which defendant took prosecutrix was a house of prostitution, and in omitting to define "prostitute" and "prostitution"; the meaning of both being too well known to need defining. *Stevens v. State* (Cr. App.) 150 S. W. 944.

Even though an instruction in a prosecution for the killing of an officer was erroneous as assuming that the defendant was carrying a pistol at a certain time, it was harmless where the officer had a warrant for his arrest charging him with carrying a pistol at that time. *Condron v. State* (Cr. App.) 155 S. W. 253.

Where accused admitted that he intentionally struck the blows which killed decedent under circumstances showing an intention to kill, and relied on self-defense and on facts reducing the killing to manslaughter, and there was no issue of accidental homicide or any issue rendering the homicide other than an intentional one, the error, if any, in a charge that where one person intentionally kills another it depends on the circumstances whether the act is justifiable, or, if not justifiable, the degree of guilt, was not prejudicial. *Edwards v. State* (Cr. App.) 172 S. W. 227.

18. — **Disregarding evidence.**—Where decedent, accompanied by a third person, fired a shot before accused shot decedent, but the third person did not do anything at which any one could take offense, the failure, in submitting the issue of self-defense, to include the acts of the third person, was not prejudicial to accused; the court submitting every theory of self-defense as applied to the conduct of decedent. *Pifer v. State*, 64 App. 203, 141 S. W. 989.

It was not reversible error for the court to charge that any assault causing pain or bloodshed would be adequate cause to reduce a homicide to manslaughter, and that if deceased or his brother assaulted accused with their fists or a stick, and this created anger, rage, etc., accused would be guilty only of manslaughter, instead of summarizing all the testimony relating to the alleged assault. *Welch v. State* (Cr. App.) 147 S. W. 572.

19. **Errors harmless under the evidence.**—See a charge in a prosecution for swindling devolving the burden of proof upon the defendant, held to be harmless and immaterial error in view of the facts in the case. *Sherwood v. State*, 42 Tex. 498.

On a trial for murder, where there was testimony admitted as to the acts and declarations of several supposed conspirators, and it was objected to the charge of the court that it permitted the jury to consider threats and declarations of all, while the evidence may not have shown all to be conspirators, held, that if the objection complained of be conceded, still, inasmuch as the charge was not excepted to, and no probable injury to defendant made to appear, all the parties having been shown to be co-conspirators, defendant can not be heard to complain. *Luttrell v. State*, 31 App. 493, 21 S. W. 248.

An incorrect definition of principals could not prejudice defendant when he was present and acting in the theft. *Robinson v. State*, 37 App. 195, 39 S. W. 107.

Where accused was at least guilty of aggravated assault, if guilty at all, it was not prejudicial error to omit to submit to the jury the different statutory grounds of aggravation. *Wimberley v. State*, 60 App. 65, 130 S. W. 1002.

Where, on a trial for murder, accused testified that the injuries inflicted on him by decedent with a club caused both pain and bloodshed, the error in a charge on manslaughter that an assault and battery, causing pain and bloodshed, was adequate cause was not reversible. *Anthony v. State*, 62 App. 138, 136 S. W. 1097.

In a prosecution for the sale of intoxicating liquor in local option territory, an erroneous instruction as to the date when the local option law went into effect is harmless, where the testimony tended to show a sale by defendant after the actual date on which the law went into effect. *Green v. State*, 62 App. 345, 137 S. W. 126.

Defendant purchased mules on credit, giving a deed of trust for the price on land which he claimed was unincumbered. The land was subject to vendor's lien notes. Before the time of defendant's trial for swindling, he deeded the land to his vendor in payment of those notes. The land upon which he gave a second deed of trust was only part of the land subject to the vendor's lien. Held, that an in-

struction that, if the land not subject to the second deed of trust was of cash market value, sufficient to pay off the vendor's lien notes on the whole, then the verdict should be for the defendant was harmless error. *Brown v. State*, 62 App. 592. 138 S. W. 604.

Though an instruction on the subject of confessions might have been made more specific, it will not be ground for reversal, where the facts in evidence outside of the confession were sufficient to support the verdict. *Williams v. State* (Cr. App.) 144 S. W. 622.

Where the evidence in a prosecution for obstructing a railroad track showed that ties had been placed on the track, and defendant's evidence showed that rocks also had been placed there, an instruction submitting obstructions by ties or rocks was not reversible error. *Clay v. State* (Cr. App.) 146 S. W. 166.

Where accused was cross-examined in order to show that the persons communicating to him threats alleged to have been made by deceased were unworthy of belief, and that accused knew such fact, and no testimony on this point was elicited from any other witness, an instruction requiring the jury to find that accused "honestly" believed the information given him regarding such threats in order to justify the homicide, if error, was harmless. *Williams v. State* (Cr. App.) 148 S. W. 763.

An instruction in a trial for homicide limited the law of threats to those actually communicated to defendant before the homicide, but there was no pertinent or forcible evidence that any of the threats made by deceased were not communicated to defendant, and whether communicated or not they were considered by the jury. Held, in view of the Code provision, that the exclusion of uncommunicated threats was not prejudicial. *Summers v. State* (Cr. App.) 148 S. W. 774.

Error, if any, in an instruction as to principals in not requiring both parties to have been present, was not reversible, where the undisputed evidence showed beyond doubt that they were both present. *Johnson v. State* (Cr. App.) 149 S. W. 165.

In a prosecution for homicide, the defense was that accused was told, about an hour before the killing, that decedent had said that he had accused's daughter, who had disappeared from home, where accused would never see her again, and that decedent had said to accused's informant, "Tell that damn, gray-headed old daddy of yours [referring to accused] that if he wants to know anything from me to come and see me;" and accused testified that about an hour afterward, when decedent was passing his home, he said to decedent that he understood that decedent had his little girl where he would never see her again, and that decedent must tell him where she was, and that decedent replied, "What in hell are you going to do about it?" Held that, since according to accused's testimony he was informed of decedent's insulting conduct toward his daughter very shortly before the difficulty, a part of the instruction on manslaughter, that "the provocation must arise at the time, to cause the passion," could not have harmed accused. *Jaynes v. State* (Cr. App.) 150 S. W. 441.

Where, in a prosecution for unlawfully disposing of mortgaged property, all of the evidence by both accused and the state showed that accused gave a mortgage as alleged, and that it was unsatisfied at the time of his disposition of the property, any error in a charge because it did not confine the jury to the evidence in the case, but permitted them to believe from any source, that the mortgage lien was unsatisfied at the time of the sale, could not have harmed accused. *Coley v. State* (Cr. App.) 150 S. W. 789.

If there was any error in instructions, as to the testimony of an accomplice which did not specifically require the jury to find such testimony to be true, it was harmless, where accused's own testimony, in connection with that shown to have been voluntarily given by him before the grand jury and which he did not contradict, showed that the testimony of the accomplice was true. *Bailey v. State* (Cr. App.) 150 S. W. 915.

In an instruction on the abandonment of the difficulty, the use of the words "in good faith abandoned," etc., was improper, in that the jury might infer that the defendant intended at some future time to renew the difficulty, but it is harmless error in a case where there is no evidence from which such an inference could be drawn. *Kelly v. State* (Cr. App.) 151 S. W. 304.

Where accused, on trial for carrying a pistol, did not have any authority from the sheriff to carry it, and the evidence of threats only showed threats generally, long before the date of the offense, and the court charged that if accused, on the occasion, had reasonable ground for fearing an unlawful attack, and the danger was so threatening as not to admit of the arrest of the person about to make the attack, he should be acquitted, and that the law permits one to carry a pistol when his life is threatened, and he believes honestly that the threats will be executed, any error in a charge, that if accused, when he carried the pistol, had not been called on by any officer to assist in suppressing an unlawful assembly he should be convicted, was not prejudicial, since, in view of the evidence and the other instructions, no other verdict than that of guilty could properly be rendered. *Carpenter v. State* (Cr. App.) 151 S. W. 539.

Where, in a trial for the theft of property of the value of more than \$50, the uncontroverted evidence showed that the money stolen exceeded that amount, an instruction to convict defendant if he took property of the value of \$50 or more, if erroneous, was harmless. *Lane v. State* (Cr. App.) 152 S. W. 897.

In a prosecution for murder, where accused had killed deceased by striking him on the head with a gun barrel, the error in a charge on murder in the second degree, which told the jury that if the weapon was one capable of producing death "or serious bodily injury," etc., accused should be found guilty, is not reversible, it appearing there was no justification for the killing. *Crutchfield v. State* (Cr. App.) 152 S. W. 1053.

Where all of the evidence in a prosecution for unlawfully killing a deer went to its killing on or about August 1, 1909, 1910, or 1911, error in a charge that if accused within two years next before May 13, 1912, killed a wild deer, the jury should

convict, on the ground that two years from that date would embrace the open season of from November 1, 1910, to January 1, 1911, and from November 1, 1911, to January 1, 1912, was not reversible. *Baker v. State* (Cr. App.) 153 S. W. 631.

On a trial for engaging in the business of selling intoxicating liquors, accused could not complain because the charge would have authorized the conviction of a druggist selling on prescription, where there was no evidence that he was a druggist or had a license to sell on prescription. *Pierce v. State* (Cr. App.) 154 S. W. 559.

An instruction authorizing the conviction of defendant as principal if he acted with others in the commission of the offense, though not personally present constitutes reversible error where the defense was an alibi, where the evidence for the prosecution was circumstantial, or where there was any evidence that defendant was guilty only as an accomplice, even though it would not be reversible error if the evidence was uncontradicted that the defendant was present at the commission of the offense. *Silvas v. State*, 71 App. 213, 159 S. W. 223.

In a prosecution for burglarizing a store, the court instructed that if accused, either alone, or acting with another so as to constitute him a principal, unlawfully burglarized the store with intent to steal, the jury should find him guilty. Held, that the instruction was not prejudicial, even if erroneous, merely because there was no evidence that accused kept watch at the store, the evidence being that his accomplice did so, and because there was no evidence that accused burglarized the store alone. *Pinkerton v. State*, 71 App. 195, 160 S. W. 87.

Where the killing was in the morning, on the first meeting of defendant with deceased after the night when defendant was claimed to have been informed of the using of insulting language to his wife by deceased, there was no harm in the use of the word "sudden" in the charge that by "adequate cause" is meant such as would commonly produce a degree of anger, sudden resentment, or terror in a person of ordinary temper sufficient to render the mind incapable of cool reflection; and that if defendant, on his first meeting with deceased after being informed of such insulting words, killed because of said words and their influence on his mind, he could not be found guilty of any higher degree of offense than manslaughter. *Davis v. State*, 73 App. 49, 163 S. W. 442.

In a prosecution for pursuing the business of selling intoxicants in prohibition territory, the court refused a requested charge not to consider as a sale a transaction between accused and J., if he requested accused to order whisky for him, and paid her for it from money due him, and accused ordered the whisky for him acting as his agent, but instructed, instead, that, if J. requested accused to order whisky for him, and she did so and acted as his agent in doing so, such transaction would not be a sale, unless J. paid accused for the whisky after it arrived or at delivery. Held, that the refusal of the requested charge and the giving of the charge was not reversible error; the evidence, in fact, showing a sale by accused to J. *Hightower v. State*, 73 App. 258, 165 S. W. 184.

Error in a charge which required the jury to believe that the threats which were communicated to the defendant were actually made by the deceased, and that they were threats to take the life of defendant and to do him serious bodily injury, was harmless, where the evidence was uncontradicted that the deceased did threaten the defendant with death and also with serious bodily injury. *Carey v. State* (Cr. App.) 167 S. W. 366.

Where an alleged statement made by deceased after she had been injured did not even tend to show whether or not defendant inflicted the injuries, and did not throw any light on who struck the fatal blows, an instruction with reference to impeaching testimony, on the question whether deceased spoke after her injury or not, though objectionable as on the weight of the evidence, was not prejudicial. *Brown v. State* (Cr. App.) 169 S. W. 437.

20. **Error favorable to accused.**—Accused cannot complain of an instruction which is more favorable to him than he is entitled. *Coker v. State*, 71 App. 504, 160 S. W. 366; *McCleaveland v. State*, 24 App. 202, 5 S. W. 664; *Kitchen v. State*, 26 App. 169, 9 S. W. 461; *Green v. State*, 32 App. 298, 22 S. W. 1094 (overruling to that extent: *Surrel's Case*, 29 App. 321, 15 S. W. 816; *White's Case*, 28 App. 71, 12 S. W. 406; *Jenkin's Case*, 28 App. 86, 12 S. W. 411, and *Habel's Case*, 28 App. 588, 13 S. W. 1001); *Wilkins v. State*, 35 App. 525, 34 S. W. 627; *Gonzales v. State*, 35 App. 339, 33 S. W. 363, 60 Am. St. Rep. 51; *Scruggs v. State*, 35 App. 622, 34 S. W. 951; *Carlisle v. State*, 37 App. 108, 38 S. W. 991; *Briscoe v. State*, 37 App. 464, 36 S. W. 281; *Joy v. State*, 57 App. 93, 123 S. W. 584; *Schuh v. State*, 58 App. 165, 124 S. W. 908; *Kosmoroski v. State*, 59 App. 296, 127 S. W. 1056; *Fator v. State*, 59 App. 251, 128 S. W. 901; *La Grone v. State*, 61 App. 170, 135 S. W. 121; *Hopkins v. State*, 61 App. 590, 135 S. W. 553; *Fox v. State*, 62 App. 430, 138 S. W. 413; *Parker v. State*, 63 App. 464, 140 S. W. 337; *Ellington v. State*, 63 App. 420, 140 S. W. 1102; *Ford v. State*, 64 App. 14, 142 S. W. 6; *Lott v. State* (Cr. App.) 146 S. W. 544; *Kearse v. State* (Cr. App.) 151 S. W. 827; *Drake v. State* (Cr. App.) 153 S. W. 848; *Powdrill v. State* (Cr. App.) 155 S. W. 231; *Brown v. State* (Cr. App.) 169 S. W. 437; *Terrell v. State* (Cr. App.) 174 S. W. 1088; *Barnett v. State* (Cr. App.) 176 S. W. 580.

As the courts have no right to assess punishment not provided for by law, the error in submitting a case under statutes not applicable to the offense is fundamental and may be first raised on motion for rehearing on appeal. *Dillard v. State* (Cr. App.) 177 S. W. 99.

21. — **Unnecessary instructions.**—Where the state's evidence showed an unlawful killing of decedent by accused, and there was no eyewitness to the killing save accused, who testified to facts establishing a complete defense, and there was no evidence that accused killed decedent under the immediate influence of sudden passion arising from an adequate or without an adequate cause, a charge that, if decedent in a sudden transport of passion aroused without adequate cause shot decedent, accused was guilty of murder in the second degree, was objection-

able as narrowing the state's case down to the state of mind of a sudden transport of passion aroused without adequate cause, and the error therein was in favor of accused. *Hickey v. State*, 62 App. 568, 138 S. W. 1051.

Where the evidence in a prosecution for an assault with intent to commit rape shows that defendant was either guilty of such assault or that he was not guilty of any offense, an instruction that, if defendant assaulted the prosecuting witness without the specific intent of having carnal knowledge, or if there was a reasonable doubt as to such specific intent, he was not guilty of assault with intent to commit rape, but might be found guilty of an aggravated assault and battery, and that if the assault was with such intent, but without intent to have carnal knowledge of the prosecutrix by force, he was guilty only of aggravated assault and battery, an offense which was not defined in the instruction, is, in connection with the whole charge, more favorable to defendant than he was entitled to. *Conger v. State*, 63 App. 312, 140 S. W. 1112.

In a trial for embezzlement, an instruction that the defendant and the prosecuting witness were partners, if they agreed to engage in business, each to furnish certain goods and money necessary to run the business, and each to share in the profits, was harmless, being more favorable to the defendant than he was entitled to, where there was no evidence that he had complied with certain conditions of the agreement necessary to complete the formation of the partnership. *O'Marrow v. State* (Cr. App.) 147 S. W. 252.

A judgment of conviction should not ordinarily be reversed for unnecessary instructions in favor of accused. *Christian v. State*, 71 App. 566, 161 S. W. 101.

22. — **Additional burden on state.**—An erroneous charge, which imposes a greater burden on the state than is necessary, is not ground for reversal of a conviction. *Evans v. State* (Cr. App.) 148 S. W. 573; *Neuvar v. State*, 72 App. 410, 163 S. W. 58.

Error in a prosecution for killing an infant for predicated an instruction upon a killing "in a passion aroused without adequate cause," when there was no evidence of passion, was not prejudicial to accused, so as to be reversible, especially where he received the lowest penalty for second-degree murder, since, if the quoted words had any effect at all, they placed a greater burden on the state than they should have done. *Jones v. State*, 63 App. 394, 141 S. W. 953.

Error in charging that defendant could be convicted if he sold intoxicating liquor "for the purpose" of evading the prohibitory law merely placed an additional burden on the state, and could not have harmed accused. *Nobles v. State*, 71 App. 121, 158 S. W. 1133.

Accused, in a prosecution for robbery, was not prejudiced by an instruction that the robbery must have been wilfully committed, since such requirement only imposed an additional burden of proof on the state. *Madrid v. State*, 71 App. 420, 161 S. W. 93.

23. — **Submission of lesser offense.**—Where the evidence showed the offense, if any, to be murder in the first degree, the submission of the issue of murder in the second degree was not prejudicial to accused. *Coffman v. State*, 73 App. 295, 165 S. W. 939; *Hardy v. State*, 31 App. 289, 20 S. W. 561; *Wolforth v. State*, 31 App. 387, 20 S. W. 741; *Morgan v. State*, 31 App. 1, 18 S. W. 647; *Hamilton v. State*, 64 App. 175, 141 S. W. 966.

Where, in a prosecution for murder, the evidence of the state shows that the killing was without excuse, and the evidence of the accused shows self-defense, the issue as to manslaughter is not involved, and therefore an error of the court in its charge on manslaughter could not avail accused, as, in submitting the issue, the court erred in favor of accused. *Eggleston v. State*, 59 App. 542, 128 S. W. 1105.

Accused cannot complain on appeal that she was convicted of a lower grade of assault than that for which she could have been convicted under a proper instruction. *Jenkins v. State*, 60 App. 465, 132 S. W. 133.

On appeal from a conviction of simple assault on an information charging aggravated assault, under Pen. Code, art. 601, § 3, accused cannot complain of an instruction permitting a verdict of guilty of simple assault, on the ground that the evidence clearly showed an aggravated assault; any error being in favor of the accused. *Garrett v. State*, 61 App. 514, 135 S. W. 532.

In a trial for disturbing religious worship, error in failing to submit a count charging disturbance of the peace was harmless to accused. *Webb v. State*, 63 App. 207, 140 S. W. 95.

Where the facts in a trial for murder would sustain a verdict of murder in the first degree, and the court, by making its definition of implied malice prominent, aided counsel for accused in getting the offense reduced to murder in the second degree, with almost the minimum penalty, accused could not complain. *Roberts v. State* (Cr. App.) 150 S. W. 627.

On a trial for aggravated assault, the submission of simple assault was favorable to accused, even though the evidence did not raise that issue. *Dunn v. State*, 71 App. 89, 158 S. W. 300.

The submission of manslaughter, when that was not in the case, was favorable to the accused, so that he cannot complain thereof on appeal. *Wilson v. State*, 71 App. 399, 160 S. W. 83.

The giving of an instruction on manslaughter which quoted Pen. Code 1911, art. 1129, subd. 1, providing that provocation must arise at the time of the commission of the offense, and that the passion must not be the result of a former provocation, was not prejudicial, though it was not authorized by the evidence, where the court also stated that in determining whether adequate cause existed at the time of the killing the jury may consider all of the facts and circumstances in evidence occurring both at the time and prior to the time of the killing. *Thompson v. State* (Cr. App.) 177 S. W. 503.

Where the testimony of defendant in a murder case showed no prior difficulty between him and deceased other than what occurred at the immediate killing, error in giving, without evidence to authorize it, an instruction on manslaughter, which quoted Pen. Code 1911, art. 1129, subd. 1, providing that provocation must arise at the time of the commission of the offense, and that the passion must not be the result of a former provocation, was harmless. *Thompson v. State* (Cr. App.) 177 S. W. 503.

24. — **Submission of defense.**—Where, on a trial for assault with intent to murder, the state's evidence showed that accused shot at prosecutor, and the evidence of the defense showed that accused fired no shots, but that he and his companion were shot from behind, a charge on self-defense, though not raised by the evidence, was not prejudicial to accused. *Recen v. State*, 58 App. 457, 126 S. W. 577.

In a prosecution for pursuing the business of selling intoxicating liquors, an instruction that the state must prove two sales to persons as alleged in the indictment, within two years preceding the filing of the indictment, instead of within three years, as provided by the statute, was error favorable to accused. *Pierce v. State* (Cr. App.) 154 S. W. 559.

Error, in a prosecution for robbery with arms in charging that if accused retook the money under an honest belief it was his property, the jury should acquit, when accused had lost the money at cards and voluntarily given it to the winner, whom he afterward robbed, was favorable to the accused, so that he cannot complain thereof. *Coker v. State*, 71 App. 504, 160 S. W. 366.

Where on the evidence self-defense was not in the case, a charge thereon was clearly in defendant's favor, and he could not complain of it. *Hicks v. State* (Cr. App.) 171 S. W. 755.

25. — **Weight of evidence.**—A defendant, in a prosecution for forgery, cannot complain that an instruction submitting his defense was on the weight of the evidence, where, so far as it was so, it was in his favor. *Howard v. State* (Cr. App.) 143 S. W. 178.

A charge that correctly stated the law as to the defense of insanity, and concluded, "You are further instructed that the fact that the defendant's mind was simply weak or impaired and that he was not insane as above defined would be no defense," would not constitute reversible error because of the fact that the latter part of the charge was on the weight of the evidence, since the error was in favor of, and not against, the defendant. *Woods v. State* (Cr. App.) 150 S. W. 633.

If an instruction that two sales of whisky would not of itself constitute the offense of engaging in the occupation of selling intoxicating liquors was on the weight of the testimony, it was error favorable to accused of which he could not complain. *Pierce v. State* (Cr. App.) 154 S. W. 559.

26. — **Limiting evidence to purpose.**—If there was any error in an instruction, that a previous statement by prosecutrix consistent with her testimony could only be considered in determining the weight to be given her testimony, it was in accused's favor. *Hemphill v. State*, 72 App. 638, 165 S. W. 462, 51 L. R. A. (N. S.) 914.

27. — **Testimony of accomplice.**—Any error in charging that certain state's witnesses were accomplices of accused was favorable to him, since, if they were not, their testimony would not as a matter of law have to be corroborated to sustain a conviction. *Joy v. State*, 57 App. 93, 123 S. W. 584.

Where on a trial for bribery accused mistakenly insisted that the state's witnesses were accomplices and induced the court to submit that question to the jury, he could not complain of such submission whether they were corroborated or not, as it did no injury to him but was rather in his favor. *Minter v. State*, 70 App. 634, 159 S. W. 286.

Where witnesses for the state were not accomplices, accused could not complain of the court's charge that one of them was an accomplice, and of the submission of the question whether the other was an accomplice. *Hearne v. State*, 73 App. 390, 165 S. W. 596.

Error in submitting to the jury the question whether a witness for the state was an accomplice was favorable and not prejudicial to the accused. *Arnold v. State* (Cr. App.) 168 S. W. 122.

28. — **Punishment.**—Error in a charge omitting to state that the punishment might be imprisonment for life, as expressly stated by Pen. Code 1911, art. 1069, was in defendant's favor and not ground for reversal, especially where the verdict fixed the punishment at 10 years within the period fixed as the lowest punishment. *Graham v. State*, 73 App. 28, 163 S. W. 726.

In the prosecution of an accomplice for swindling, defendant could not complain of the trial court's failure to authorize a higher penalty, since such, if error, was clearly in defendant's favor. *Bragg v. State*, 73 App. 340, 166 S. W. 162.

29. **Effect of verdict.**—Conviction being had on but one of two counts, an incorrect charge on the other count is immaterial error. *Rosson v. State*, 37 App. 87, 38 S. W. 788; *Tigerina v. State*, 35 App. 302, 33 S. W. 353.

One convicted of murder cannot complain of instructions as to manslaughter. *Wheatly v. State* (Cr. App.) 39 S. W. 672. And see *Maxwell v. State*, 31 App. 119, 19 S. W. 914.

Where the first count of an indictment charged defendant with making a forged instrument purporting to be the act of J., and in a second count with knowingly passing the instrument with intent to defraud, and in a third with making the instrument purporting to be the act of J., a fictitious person, and defendant was convicted on the second count, he was not prejudiced by the court's refusal to charge that, before he could be convicted of forging the name of a fictitious per-

son, the jury must believe from the evidence that no such person existed, and was not in A. on the date defendant claimed the check was drawn, and that the jury could not presume that such person did not exist. *Boswell v. State*, 59 App. 161, 127 S. W. 820.

Where accused, who shot and killed deceased 15 or 20 minutes after a personal encounter between them, was only convicted of manslaughter, an instruction that, if there was not sufficient cooling time, the homicide would be reduced from murder to manslaughter, was not materially prejudicial. *Cox v. State*, 60 App. 471, 132 S. W. 125.

Where accused, relying on self-defense, was found guilty of manslaughter, the error in an instruction on manslaughter that an assault and battery by decedent, causing pain and bloodshed, was adequate cause to reduce the killing to manslaughter was immaterial. *Anthony v. State*, 62 App. 138, 136 S. W. 1097.

A count of an indictment charging a daytime burglary did not allege that it was a private residence, but simply charged a burglarious entry of a house belonging to G. with intent to commit theft. A count charging a nighttime burglary alleged that it was a private residence occupied by G. and his family. Pen. Code 1895, art. 839, provides that he is guilty of burglary, who, with intent to commit a felony or theft by breaking, enters a house in the daytime. A charge authorized a conviction on proof of an entry and remaining concealed therein, which state of facts was not pleaded in the indictment. The conviction was under the count for daytime burglary. Held, that the error in the charge cannot be complained of by the defendant, since it could not have induced the jury to return a verdict of guilty. *Fox v. State*, 62 App. 430, 138 S. W. 413.

Where the state's case showed a lying in wait and a killing on premeditated malice, and the court correctly charged on murder in the first degree a conviction of murder in the first degree would not be reversed for errors in other instructions. *Alexander v. State*, 63 App. 102, 138 S. W. 721.

Where an indictment charges theft in two counts and accused is convicted under the second count, an alleged error in charging the jury relative to the first count will not be considered on appeal. *Sanford v. State*, 64 App. 607, 143 S. W. 1172.

Where the second count of an indictment charged accused with an attempt to rob, and the third count alleged an attempt to rob by using and exhibiting a firearm, the jury having found defendant guilty as charged in the second count, he was not prejudiced by an instruction permitting a conviction if he unlawfully made an assault on prosecuting witness and "did then and there exhibit a firearm, to wit, a gun," to such witness, etc. *Evans v. State* (Cr. App.) 148 S. W. 573.

In a trial for murder, where the charge on manslaughter was that approved on a former appeal, with the addition that an assault and battery, a blow inflicted by deceased causing pain to defendant, was adequate cause for manslaughter, the additional instruction was without injury where defendant was convicted only of manslaughter. *Lee v. State* (Cr. App.) 148 S. W. 706.

Where the court submitted the issue of manslaughter, and the jury convicted defendant of that offense only, error, if any, in failing to submit that issue, in conformity with the evidence, was harmless. *Alexander v. State* (Cr. App.) 151 S. W. 807.

Where one was convicted of manslaughter, and to do so it was necessary to find that he was a principal with one W., an instruction on assault to murder, which was only to be considered if he was not found to be a principal, could not have prejudiced the defendant. *Cukierski v. State* (Cr. App.) 153 S. W. 313.

On a trial for pursuing the business of selling intoxicating liquors, an instruction that if the jury acquitted him of that offense they might find him guilty of making a sale of intoxicating liquors was harmless, where accused was convicted of engaging in the business of selling. *Pierce v. State* (Cr. App.) 154 S. W. 559.

30. — Conviction of lesser offense.—Where a defendant was only convicted of manslaughter, he could not be prejudiced by instructions relating to murder. *Cukierski v. State* (Cr. App.) 153 S. W. 313; *Blake v. State*, 3 App. 581; *Gonzales v. State*, 35 App. 33, 29 S. W. 1091, 30 S. W. 224; *Johnson v. State*, 61 App. 635, 136 S. W. 259; *Ballard v. State*, 62 App. 435, 138 S. W. 120; *Hampton v. State*, 63 App. 100, 138 S. W. 1019; *Banks v. State* (Cr. App.) 150 S. W. 184; *Condron v. State* (Cr. App.) 155 S. W. 253; *Matthews v. State*, 72 App. 654, 163 S. W. 723; *Lopez v. State*, 73 App. 624, 166 S. W. 154; *Henson v. State* (Cr. App.) 168 S. W. 89; *Ross v. State* (Cr. App.) 170 S. W. 305.

Where a defendant was convicted of murder in the second degree, error in instructions as to murder in the first degree was harmless. *Reagan v. State*, 70 App. 498, 157 S. W. 483; *Joy v. State*, 57 App. 93, 123 S. W. 584; *Pollard v. State*, 58 App. 299, 125 S. W. 390; *Dougherty v. State*, 59 App. 464, 128 S. W. 398; *Jordan v. State*, 62 App. 380, 137 S. W. 133; *Allen v. State*, 64 App. 225, 141 S. W. 983; *Kinney v. State* (Cr. App.) 144 S. W. 257; *Roberts v. State* (Cr. App.) 150 S. W. 627; *Hendricks v. State* (Cr. App.) 154 S. W. 1005; *Chant v. State*, 73 App. 345, 166 S. W. 513; *Francis v. State* (Cr. App.) 170 S. W. 779.

Any error in instructions on assault with intent to kill was harmless where accused was only convicted of aggravated assault. *Black v. State* (Cr. App.) 143 S. W. 932; *Lacoume v. State* (Cr. App.) 143 S. W. 626; *Harris v. State*, 72 App. 491, 162 S. W. 1150.

Where accused was convicted of aggravated assault only, instructions with reference to manslaughter and higher degrees of homicide cannot be reviewed on appeal. *Foster v. State* (Cr. App.) 148 S. W. 583; *Boyd v. State* (Cr. App.) 150 S. W. 612; *Earnest v. State* (Cr. App.) 152 S. W. 638.

One convicted of simple assault cannot complain because the court misdirected the jury as to the law on aggravated assault. *Jaehng v. State*, 57 App. 186, 122 S. W. 267.

In a prosecution for assault to kill, instructions drawing a distinction between assault to kill and aggravated assault present no error after conviction of aggravated assault only. *Hogue v. State* (Cr. App.) 146 S. W. 905.

Though the evidence did not raise the issue of murder, the submission of that question was harmless, where accused was only convicted of negligent homicide. *Windham v. State* (Cr. App.) 173 S. W. 661.

31. — **Punishment.**—A case will not be reversed because the judge's charge misstated the punishment, where the jury impose the lowest punishment under the law. *Ramirez v. State*, 43 App. 455, 66 S. W. 1101; *Brown v. State*, 62 App. 592, 138 S. W. 604; *Green v. State* (Cr. App.) 147 S. W. 593.

The court charged the old law as to punishment, which was by fine and imprisonment, whereas under the amended law the imprisonment feature is eliminated from the punishment. As the jury inflicted only a fine, the defendant's rights were not prejudiced by the charge. *Clark v. State* (Cr. App.) 78 S. W. 1079.

In a prosecution for homicide, an instruction on the issue of manslaughter, erroneous in that it required the jury to believe both that decedent used insulting language about defendant's mother and also assaulted defendant with a knife, will be considered harmless, where defendant was only convicted of manslaughter, and was given the lowest penalty. *Munos v. State*, 58 App. 147, 124 S. W. 941.

One given the minimum punishment for manslaughter may not complain of errors in the charge submitting murder in the first and second degrees. *Wells v. State*, 63 App. 618, 141 S. W. 96.

Where the indictment contained counts of forgery and passing a forged instrument, the submission of the issue of forgery to the jury is not erroneous, where the court also submitted the passing of the forged instrument, there being evidence to support both charges, and the jury in assessing the penalty fixed the lowest that could be fixed for either count. *Howard v. State* (Cr. App.) 143 S. W. 178.

Error, if any, in submitting a count for burglarizing a private residence, was harmless, where defendant was convicted upon a different count, and given the lowest penalty thereunder. *Parker v. State* (Cr. App.) 149 S. W. 108.

Where the jury convicted for murder in the second degree and assessed the punishment at 20 years' imprisonment the failure of the court in charging on manslaughter to submit as adequate cause insults shown by the evidence was reversible error. *Washington v. State* (Cr. App.) 151 S. W. 818.

A definition of manslaughter, though inaccurate, is not harmful, unless it conflicts with a charge on self-defense, where the defendant was given the lowest penalty for manslaughter. *Condron v. State* (Cr. App.) 155 S. W. 253.

The failure of the judge to give a charge that temporary insanity produced by intoxicants may be considered in mitigation of the penalty is harmless where the lowest penalty is fixed by the jury. *Drysdale v. State*, 70 App. 273, 156 S. W. 685.

One convicted of murder and sentenced to 99 years' imprisonment cannot complain that the court erroneously charged that, if defendant was convicted of murder in the first degree, he might be imprisoned any number of years not less than five where the instructions also specifically charged the law as to murder in the second degree. *Castillo v. State* (Cr. App.) 172 S. W. 788.

32. **Inconsistent instructions.**—If instructions to acquit one accused of unlawfully carrying a pistol if he had reason to fear an attack or if the pistol was so broken as to be useless were inconsistent, the error was harmless, in the absence of any evidence that accused was in danger of an attack. *Farris v. State*, 64 App. 524, 144 S. W. 249.

33. **Defining terms.**—Where the indictment for aggravated assault alleged that the assault was made with a knife, alleged to be a deadly weapon, and that by means thereof there was inflicted serious bodily injury on prosecutor, and that the assault was committed on him while in the discharge of his duties as an officer, and the court submitted all of the issues, and the verdict was general, the failure to give a charge defining a serious bodily injury was reversible error, though the requested charge thereon was not technically correct. *Porter v. State*, 60 App. 588, 132 S. W. 935.

In a prosecution under Pen. Code, art. 559, making it a felony to keep a room as a place in which to gamble with cards, the refusal of requested charges that "kept for the purpose of gambling" means the chief purpose, and that the accused must have been personally interested in keeping, or have been the proprietor of the room in question, if error, was harmless. *Parshall v. State*, 62 App. 177, 138 S. W. 759.

Where, in a prosecution for violating the local option law, it was proved that defendant had a United States liquor license, and the court instructed that this was prima facie evidence that he was selling liquor in violation of law, it was not error, of which defendant could take advantage, for the first time on a motion for a new trial, that the court failed to define "prima facie evidence." *Walker v. State* (Cr. App.) 145 S. W. 904.

It was not reversible error in a prosecution for seduction under promise of marriage, where there was evidence of the seduction and of the promise of marriage, to define the offense strictly in accordance with the statute without specifically defining it. *Blackburn v. State*, 71 App. 625, 160 S. W. 687.

In a prosecution for perjury, where there was no evidence that the testimony claimed as perjured was so given by mistake, inadvertence, or agitation, the failure of the court in his charge to define "wilfully" and "deliberately" was not reversible error, it appearing that accused was given the lowest penalty. *Johnson v. State*, 71 App. 428, 160 S. W. 964.

34. **Reasonable doubt as to particular issue.**—Where, in a prosecution for aggravated assault, a charge, not excepted to at the time as given, is erroneous, as placing the burden of showing self-defense on defendant, the refusal of a request

to charge that, if the jury had reasonable doubt as to whether the prosecutrix fired on defendant before he struck her, then he was entitled to such reasonable doubt, is prejudicial error. *Stuart v. State*, 57 App. 592, 124 S. W. 656.

It was not prejudicial error to omit to instruct that, if the jury had reasonable doubt whether accused was guilty of manslaughter, they must acquit him, where the court directed acquittal if the jury had reasonable doubt as to accused's guilt. *Wysong v. State* (Cr. App.) 146 S. W. 941.

In a prosecution under Pen. Code, art. 1022, subd. 9, for aggravated assault, where both simple and aggravated assault were submitted, a failure to instruct upon the reasonable doubt in favor of defendant as between the two degrees, while of itself not error, was reversible error, where, had it been given, error in failing to give defendant's request that, if the difficulty arose from provocation arising at the time, he would not be guilty of aggravated assault would have been cured. *Hodges v. State*, 73 App. 378, 166 S. W. 512.

Where, in a prosecution for homicide, the court charged on the presumption of innocence and reasonable doubt, accused was not prejudiced by the court's refusal to charge that, if there was a reasonable doubt arising on the facts between the issue of manslaughter and self-defense, accused was entitled to the benefit thereof. *Clay v. State* (Cr. App.) 170 S. W. 743.

35. Uncontested issues.—In a prosecution for carrying a pistol, where accused's reputation as a peaceable citizen was admitted, it was not reversible error to refuse an instruction that his reputation was admitted. *Hines v. State*, 57 App. 216, 123 S. W. 411.

The failure to submit questions to the jury was not prejudicial to accused, where the evidence on the issues was not contested. *Robertson v. State* (Cr. App.) 150 S. W. 893.

Where, in a prosecution for theft of a piano as bailee, the evidence was that it had cost \$275, and was worth from \$200 to \$250 when converted, the court's inadvertent failure to charge that the jury must believe that it was worth more than \$50 in order to convict accused was not reversible error. *Height v. State* (Cr. App.) 150 S. W. 908.

36. Trivial evidence.—The evidence to present the issue of manslaughter must be so pertinent and forcible that it may be reasonably supposed that the jury will be influenced thereby in arriving at a verdict, and, unless the evidence is of such weight, it is not error to refuse to charge on manslaughter. *Treadway v. State* (Cr. App.) 144 S. W. 655.

Where the evidence of the state clearly showed that the confession of accused was voluntarily made and understood, and accused's testimony to the contrary was weak, the error, in refusing to charge that if the confession was not voluntarily made, or without a full understanding of the nature of it, it must be disregarded was not prejudicial. *Lopez v. State*, 73 App. 624, 166 S. W. 154.

37. — Defenses.—In a prosecution for hog theft, the court charged that if defendant was present with another, and they or either of them, acting with a common purpose into which defendant entered, undertook to steal a hog, then defendant would be a principal, and that defendant's mere bodily presence without participating in the intent would not make him guilty as the principal, nor would his subsequent receipt of some of the stolen meat make him guilty of theft, but that it must be shown that he participated in the original taking. Held, that the court's failure to affirmatively charge on alibi was not ground for reversal. *Phillips v. State*, 57 App. 160, 121 S. W. 1110.

Where the only evidence of alibi was an alleged statement of accused that he told another that he was down the road about a mile and a half or two miles from the place of the killing, and near another's house, on the night of the killing, and the other testimony showed conclusively that accused was not at such house, but was at the place of the killing when it occurred, and the court gave instructions applying the law of circumstantial evidence to every possible combination of facts, any error in not charging on alibi was not reversible. *Williams v. State*, 60 App. 453, 132 S. W. 345.

In a prosecution for seduction, the refusal of a charge presenting the issue of consent because of lust is harmless error, where the evidence tending to establish the defense is weak and trivial. *Knight v. State*, 64 App. 541, 144 S. W. 967.

The failure to instruct upon matters of defense raised by evidence so trivial that it cannot be supposed to have been considered by the jury is no ground for reversal. *Mitchell v. State* (Cr. App.) 144 S. W. 1006.

In a prosecution for burglary, where the state introduced evidence of defendant's explanation of his possession of the property alleged to have been stolen, and the falsity thereof, the failure to charge that defendant should be acquitted if the property was purchased as he stated, or if the jury had a reasonable doubt as to that fact, was harmless, where the entire evidence amply showed defendant's guilt. *Coggins v. State* (Cr. App.) 151 S. W. 311.

38. Included offenses.—The case will not be reversed because the court did not charge upon another theory (of manslaughter) than that charged upon where the failure to so charge was not prejudicial. *Cornelius v. State*, 64 App. 173, 112 S. W. 1056.

Where, in a prosecution for assault with intent to murder, accused was convicted of that offense, he was not prejudiced by the court's omission to submit the offense of simple assault, on the theory that, if it was committed simply to alarm prosecutrix, it could not be more than simple assault, since, being an assault, it could not be a lesser grade than aggravated assault, if unlawful. *Lofton v. State*, 59 App. 270, 128 S. W. 384.

In a prosecution for robbery, the court's failure to submit the issues of simple and aggravated assault was not prejudicial to defendant, where the court instructed the jury to acquit if defendant did not take the ring, which he was charged to

have taken, from off the person of another, though the evidence would have sustained a conviction for assault. *Clemmons v. State*, 72 App. 276, 161 S. W. 973.

39. **Circumstantial evidence.**—Where, in the trial of one for knowingly permitting gambling on premises under his control, all the evidence was positive except that upon the question of knowledge by the accused, and the court instructed that the accused was not guilty if he rented a room in the building to be used as a barber shop and it was used for gaming purposes without his knowledge, error, if any, in failing to instruct upon circumstantial evidence was harmless. *De Los Santos v. State* (Cr. App.) 146 S. W. 919.

Error in not charging on circumstantial evidence was not reversible where under the evidence an honest jury could not have acquitted. *Dennis v. State*, 71 App. 162, 158 S. W. 1008.

Where the court in its instructions affirmatively presented every defensive theory of accused and charged that the jury must find accused guilty beyond a reasonable doubt, the failure to charge on circumstantial evidence, though the evidence called for such a charge, was not reversible error. *Ballard v. State*, 71 App. 168, 160 S. W. 92.

The error, if any, in failing to charge on circumstantial evidence, in view of the facts, was not reversible, where the court charged the jury that if they believed the animal alleged to have been stolen was the property of accused, or had a reasonable doubt of that fact, they should acquit him. *Law v. State*, 71 App. 179, 160 S. W. 98.

40. **Limiting evidence to particular purpose.**—Though the court should instruct the jury as to the purpose of evidence of the contemporaneous theft of other property, the omission to so charge is not fundamental or material error in the absence of exception or requested instructions, unless the defendant's rights may have been prejudiced thereby. *Gentry v. State*, 25 App. 614, 8 S. W. 925.

Where a witness was properly permitted on re-examination, after cross-examination to show bias, to explain that a former action taken by him against defendant was due to certain criminal charges against defendant, and not to ill will, the court's failure to limit the effect of such testimony was harmless, where the testimony could not have had any probative force in showing defendant's guilt of the charge on which he was being tried, and the jury could not have been misled into convicting defendant for the other offenses. *Manley v. State* (Cr. App.) 153 S. W. 1138.

The failure of the court to limit the consideration of testimony, admitted to show the bias of witnesses for the defendant, to that purpose, where the testimony could not have been used for any other purpose, does not require reversal. *Ross v. State*, 71 App. 493, 159 S. W. 1063.

41. **Effect of verdict.**—Where accused was acquitted of an assault, the failure to direct the kind of verdict as to assault in case the jury found that accused acted in self-defense was not erroneous. *Day v. State*, 62 App. 527, 138 S. W. 123.

Where the court correctly submitted murder in the first and second degrees, and the jury found accused guilty of murder in the first degree, a failure to submit a less degree of homicide was not prejudicial. *Fifer v. State*, 64 App. 203, 141 S. W. 989.

Any insufficiency in the instructions on manslaughter was not reversible error, where accused was only found guilty of manslaughter, and the lowest authorized penalty imposed. *Shed v. State* (Cr. App.) 153 S. W. 125.

Where accused was found guilty only of manslaughter, the failure to charge that an assault and battery would be adequate to reduce the homicide to manslaughter did not present error. *Flores v. State*, 72 App. 232, 162 S. W. 883.

42. **Error favorable to accused.**—Where defendant, in a criminal prosecution for seduction under promise of marriage, introduced evidence to impeach the prosecuting witness, he could not complain that the court did not limit it, but permitted it to be considered for any and all purposes, since, if error, it was error in his favor. *Murphy v. State* (Cr. App.) 143 S. W. 616.

In a prosecution for pursuing the occupation of selling intoxicants in a prohibition territory contrary to Pen. Code 1911, art. 589, failure to define the meaning of "engaging in or pursuing the occupation or business" of selling intoxicants would be favorable to accused, so that he could not complain thereof; since, without definition, the jury would naturally understand that the term meant the pursuit of the business as a vocation to procure a living or obtain wealth. *Hightower v. State*, 73 App. 258, 165 S. W. 184.

43. **Cure by other instructions.**—Where the court in its general charge misdirected the jury as to alibi, but gave a special charge at the request of the defendant which embodied correctly the law upon that issue, the defendant could not complain of the misdirection in the general charge. *White v. State*, 19 App. 343.

Failure, in prosecution for false swearing, to define "deliberately" and "willfully," is without prejudice when supplied by special instructions. *Woodson v. State*, 24 App. 153, 6 S. W. 184; *Mahon v. State*, 46 App. 234, 9 S. W. 28.

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 App. 272, 22 S. W. 971.

Where, in a prosecution for aggravated assault, the court, in applying the law to the facts, correctly stated that the minimum penalty was a fine of \$25, any error in an instruction that the penalty was a fine not less than \$20 or more than \$1,000, or imprisonment, or both, was cured. *Woodland v. State*, 57 App. 352, 123 S. W. 141.

Where, in a prosecution for assault on defendant's wife by striking her, the court charged that if defendant struck R. with his hands and fists as alleged, and defendant was an adult male, while R. was a female, then he would be guilty of

aggravated assault, he was not prejudiced by the court's error in a general definition of what constitutes assault. *Reynolds v. State*, 58 App. 273, 124 S. W. 931.

In a homicide case, accused testified that he and decedent had a quarrel over an account, and decedent got very angry and caught accused around the neck and said he was going to cut him, and, while they were scuffling, some one shot, and that accused did not know who shot, and did not know his brother was going to shoot if he did shoot. The court charged that if accused's brother, or some one else than accused, on an independent impulse of their own, shot decedent, the jury should acquit, and also charged that if some other than accused fired the fatal shot, or the jury had a reasonable doubt whether accused or some other did it, the jury should acquit. Held, that the charges given were more favorable to accused than one as to the right of a third party to intervene to protect the life or limb of one assailed, so that the failure to give the latter charge was not reversible error in view of the charges given. *Spencer v. State*, 59 App. 217, 123 S. W. 118.

Any error in the general part of the charge on the right of self-defense was not injurious to accused, in view of the correct concrete application of the principles of law relating to provoking a difficulty. *Keeton v. State*, 59 App. 316, 128 S. W. 404.

The error, if any, in a charge that a conviction may be had on circumstantial as well as direct evidence, on the ground that it is on the weight of the evidence, does not require a reversal, where the charge is followed, and in direct connection therewith, by the statement that, to justify a conviction on circumstantial evidence, each fact necessary to establish guilt must be proved beyond a reasonable doubt, and that all the facts must be considered with each other and lead on the whole to a conclusion of guilt. *Roberts v. State*, 60 App. 20, 129 S. W. 611.

The quoted phrase, in a charge that every one is permitted to defend himself against unlawful attacks, and may use all the necessary force reasonably sufficient, all force apparently reasonably necessary to prevent death or serious bodily harm, but "no more than the circumstances reasonably indicate to be necessary," was not so erroneous, in limiting the perfect right of self-defense, as to require a reversal of a conviction for second degree murder, where, following such charge, the court gave a correct charge, applying the law of self-defense to the facts in issue. *Moss v. State*, 60 App. 268, 131 S. W. 1088.

An instruction in a prosecution for assault with intent to rape that the jury must determine whether defendant was guilty of an assault with intent to rape, aggravated assault, and battery, or not guilty, applying the facts in evidence to the law as given, while improper as requiring the jury to determine whether defendant was not guilty, is harmless where the jury are instructed that defendant is presumed to be innocent until his guilt is established by legal evidence, and that in case of a reasonable doubt they should acquit him. *Conger v. State*, 63 App. 312, 140 S. W. 1112.

Though a portion of a charge in a criminal cause did not state the offense in the language of the indictment, in the statement of the law of the case to the jury, but in submitting the cause to the jury for their finding, the court used the language of the indictment, the defendant was not injured by the charge. *Baumgarner v. State*, 64 App. 165, 142 S. W. 4.

Where the court charged that the state must show that accused was in possession of the stolen property, and that on the failure of the state to so show beyond a reasonable doubt accused must be acquitted, and that if accused's explanation of his possession was reasonable he must be acquitted, a charge that possession of recently stolen property could be proved by circumstantial evidence was not prejudicial. *Suggs v. State* (Cr. App.) 143 S. W. 186.

Accused cannot complain of a sentence defining self-defense at the close of the charge on murder in the first degree, where an independent instruction on self-defense was correct. *Kinney v. State* (Cr. App.) 144 S. W. 257.

In a trial for homicide, the court charged that every person may defend himself against unlawful attack reasonably threatening injury to his person, and may use all necessary and reasonable force to defend himself, but no more than the circumstances reasonably indicate to be necessary, and by other charges correctly submitted the case on the evidence for a finding as to self-defense without in any way qualifying it. Held, in view of the Code provision, that any error in another instruction limiting the defendant's right of self-defense, and impressing the jury with the belief that the court thought defendant had used greater force than was necessary, was not prejudicial. *Summers v. State* (Cr. App.) 148 S. W. 774.

An instruction as to principals, erroneous as excluding the question of defendant's presence, was not cured by a charge upon alibi. *Menefee v. State* (Cr. App.) 149 S. W. 138.

Where the requested instructions of defendant on a trial for murder were given, and presented every phase of self-defense raised by the evidence, they cured any slight error on the court's own charge on self-defense. *Penton v. State* (Cr. App.) 149 S. W. 190.

A charge given in a prosecution for incest with accused's daughter, authorizing a conviction if the jury believed beyond a reasonable doubt that accused had intercourse with his daughter as charged, knowing at the time that she was his daughter, but that, if they believed from the evidence that the daughter consented to the intercourse, they should acquit, was more favorable to accused than a requested charge that, in determining whether or not the daughter consented to the sexual intercourse with her father, they should take into consideration all of the facts and circumstances connected with the case. *Tyler v. State* (Cr. App.) 150 S. W. 782.

An instruction that the fact that accused took hold of, kissed, or placed his hands on, prosecutrix would not make him guilty of assault with intent to rape, but that, before they could convict, the jury must believe beyond a reasonable

doubt that he took hold of, kissed, or placed his hands on, her in such manner as to constitute an assault, "and at the very time intended instantly and without suspension of action and without waiting to ascertain whether or not she would consent to then and there place herself in such attitude that the final act of carnal intercourse could be performed upon her, whether the purpose was to put her in such attitude by his force alone or by her free co-operation and consent," while apparently omitting something necessary to make a complete sentence, held not to have harmed accused, in view of other instructions. *Love v. State* (Cr. App.) 150 S. W. 920.

Although a paragraph in a charge, standing alone, was calculated to make the jury believe that the court thought there was no reasonable doubt of guilt, where it was followed immediately by two other paragraphs which undoubtedly gave the defendant the benefit of any doubt, there was no error. *Condron v. State* (Cr. App.) 155 S. W. 253.

Error in an instruction defining manslaughter, in a prosecution for assault with intent to kill, inadvertently quoting literally the statutory language, in which an assault and battery "by the deceased," causing pain or bloodshed, was made an adequate cause, was harmless where the court also charged that if prosecuting witness had assaulted the accused, causing pain or bloodshed, and thereby rendered his mind incapable of cool reflection, etc., he would only be guilty of aggravated assault. *Luttrell v. State*, 70 App. 183, 157 S. W. 157.

Although a charge by the court was too general, it was cured by the giving of special specific charges requested by defendant. *Harris v. State*, 72 App. 491, 162 S. W. 1150.

In view of this article and the fact that defendant did not object or ask any charge, a charge in a trial for homicide that all testimony as to the relations of defendant with deceased's wife was only to aid on the issue of defendant's motive, if erroneous, did not authorize or require a reversal, where the court gave a full, complete, and unobjectionable charge properly submitting every question raised. *Lane v. State*, 73 App. 266, 164 S. W. 378.

Where accused's defense was alibi, the error in a charge on principals, which did not require the jury to find that accused was personally present at the killing, must be disregarded, where other paragraphs of the charge directed acquittal in case of a reasonable doubt as to whether accused was present at the killing. *McCue v. State* (Cr. App.) 170 S. W. 280.

Where the court charged on alibi, and that the burden of proof was on the state, that accused was presumed to be innocent until his guilt was established beyond a reasonable doubt, and that the jury were the exclusive judges of the facts proved, of the credibility of the witnesses, and of the weight to be given to their testimony, any error in a charge that if the jury believed that prosecutor did not see accused commit the offense, as testified to by him, the state must rely on circumstantial evidence to convict, construed as a charge on the weight of the evidence, was not reversible. *Terrell v. State* (Cr. App.) 174 S. W. 1088.

(B) Failure or Refusal to Give Instructions

44. In general.—Necessity of request for charge, ante, art. 737, and notes.

Omissions in one part of the charge become immaterial if they are supplied in other portions in such manner as to clearly instruct the jury upon the issue involved and protect the rights of the accused against prejudice. *Smith v. State*, 22 App. 316, 3 S. W. 684; *Hodges v. State*, 22 App. 415, 3 S. W. 739; *Steagald v. State*, 22 App. 464, 3 S. W. 771; *Hart v. State*, 21 App. 163, 17 S. W. 421.

Under this article the refusal to instruct on feigned resistance (in a rape case) is not ground for reversal. *Leach v. State* (Cr. App.) 77 S. W. 220.

In a prosecution for aggravated assault, where the court charged that any unlawful violence to the person of another, with intent to injure him, whatever the means or degree of violence, was an assault and battery, any error in refusing a special charge that, before you can find defendant guilty of an assault, you must find beyond a reasonable doubt that at the time he used or offered to use violence it was his intention to injure such person, was harmless; the issue being sufficiently submitted. *Stone v. State*, 57 App. 321, 123 S. W. 582.

Where, on a trial for burglary with intent to steal, the evidence showed an entry and the larceny of a harness, and that accused offered to sell a harness, and explained that his father had given it to him to sell, and that at the time of his explanation he was not suspected of the crime, and that the harness belonged to prosecutor, and the father of accused as a witness for him testified that he had not owned a harness and had not given any harness to his son to sell, the failure to charge on explanation of recently stolen property was not prejudicial to accused, since a charge on the subject would have been injurious to him, because making prominent the testimony of his father. *Jones v. State*, 60 App. 426, 132 S. W. 476.

Where, under the evidence, accused could not have been prejudiced by the court's failure to charge on possession of recently stolen property, such failure was not ground for reversal. *Frazier v. State*, 62 App. 640, 138 S. W. 620.

Where the charge has submitted the law applicable to the case, as required by art. 735 ante, a defendant who desires a more specific presentation of any issue should request special instructions thereon, otherwise the court will not reverse unless the charge was calculated to injure the right of the defendant. *Dowling v. State*, 63 App. 366, 140 S. W. 224.

A failure to give the presumption of innocence and reasonable doubt statute to the jury is not reversible error, unless the court was requested to give it and refused. *Conger v. State*, 63 App. 312, 140 S. W. 1112.

The failure of the court to present issues presented by defendant's evidence is not reversible error, in absence of a request for special charges. *Davis v. State*, 63 App. 484, 141 S. W. 93.

A conviction will not be reversed because of technical omissions or misstatements in the instructions, especially where accused requested no charge on the subject. *Jones v. State*, 63 App. 394, 141 S. W. 353.

Where the charge required the jury to believe beyond a reasonable doubt that accused killed deceased, and the jury were also charged on alibi, the refusal of the court to charge that if another killed deceased they should acquit was no ground for reversal. *Mitchell v. State* (Cr. App.) 144 S. W. 1006.

A failure to supplement a requested charge in a prosecution for an illegal sale of liquor by the addition of matters *sua sponte* which would make it properly state the law will not reverse. *Mealer v. State* (Cr. App.) 145 S. W. 353.

Any error in omitting to instruct on the necessity for corroboration of a particular accomplice was harmless, where no objection was made to an omission to give the instruction as to another accomplice. *Bailey v. State* (Cr. App.) 155 S. W. 536.

In a criminal prosecution, accused was not prejudiced by the court's refusal to charge that the burden of proof was on the state throughout the trial and never shifted to defendant. *Gonzales v. State* (Cr. App.) 171 S. W. 1149.

Where the court gave all of accused's requested charges except the one to acquit and another embraced in the main charge, accused could not complain of the charge for failing to state the law applicable to the facts. *Calyon v. State* (Cr. App.) 174 S. W. 591.

III. OBJECTIONS AND EXCEPTIONS

(A) *Decisions Prior to Act of 1897*

45. **Necessity of exception.**—An error or omission in the charge, not excepted to will not be reviewed on appeal unless fundamental or calculated to prejudice accused. *Shubert v. State*, 20 App. 320; *Wimbish v. State*, 25 App. 90, 7 S. W. 533; *Bailey v. State*, 26 App. 706, 9 S. W. 270; *Williams v. State*, 29 App. 167, 15 S. W. 285; *Moore v. State* (Cr. App.) 28 S. W. 686; *Patterson v. State* (Cr. App.) 29 S. W. 272; *Shaw v. State* (Cr. App.) 33 S. W. 1083.

In the absence of a statement of facts or a bill of exception, there is nothing to be considered on appeal but the sufficiency of the indictment, and the correctness of the charge of the court when viewed with reference to the indictment. If the charge under any state of proof would be correct under the indictment, it will be presumed that there was evidence warranting it. It is only when the charge is not warranted by the indictment, or by any state of facts that could have been proved, that it will be revised in the absence of a statement of facts or bill of exception. *Nairn v. State*, 18 App. 260; *White v. State*, 9 App. 41; *Early v. State*, 9 App. 476; *Brown v. State*, 16 App. 197; *Henderson v. State*, 20 App. 304; *Banks v. State*, 24 App. 559, 7 S. W. 327.

The court's charge on reasonable doubt, alibi and circumstantial evidence, where it was not excepted to and no special instructions were asked, held sufficient. *Marshall v. State*, 37 App. 450, 36 S. W. 86.

46. **Time for exception.**—Bills of exception relating to the charge of the court may be taken at any time before the trial is concluded, and the trial is not concluded until the verdict is returned into court and received. It is not required that the defendant shall specifically except to the charge as given, or to the action of the court refusing a requested instruction, at the very time that the one is given, or the other refused, but such exception may be made after the jury has retired from the box. All that is required is that general exception be taken at the time, with a request for time to prepare a bill containing the specific objections, and a preparation and presentment of such bill to the judge before the verdict is returned, in order that the court may have the opportunity to correct its charge, if it so desires. *Phillips v. State*, 19 App. 158; *McCall v. State*, 14 App. 353.

To perpetuate an exception to a charge of the court the defendant must give notice of exception at the time the charge is delivered, but he need not specify the ground of exception until the jury has retired. He must do so, however, before the return of verdict; otherwise this court will revise only fundamental error. *Martin v. State*, 25 App. 557, 8 S. W. 682; *Smith v. State*, 27 App. 50, 10 S. W. 751; *Bogan v. State*, 30 App. 466, 17 S. W. 1087; *Phillips v. State*, 19 App. 158; *McCall v. State*, 14 App. 353, discussed and distinguished. *Garello v. State*, 31 App. 56, 20 S. W. 179.

47. — **Motion for new trial.**—If a verbal charge be given over the objection of the defendant, it will not be ground for reversal, unless it be excepted to at the time, and the error be presented by bill of exception. It is too late to complain of the error in a motion for a new trial. *Vanwey v. State*, 41 Tex. 639; *Franklin v. State*, 2 App. 8; *Goode v. State*, Id. 520; *Lawrence v. State*, 7 App. 192.

The striking out of a paragraph in a charge by the court after having read it to the jury must be excepted to and bill reserved. It cannot be taken advantage of for the first time by motion for a new trial. *Anglely v. State*, 35 App. 427, 34 S. W. 116.

48. **Sufficiency of exception.**—Exception to the charge of the court, to be considered, must point out the objection. *Thompson v. State*, 32 App. 265, 22 S. W. 979.

49. **Misdemeanors.**—In misdemeanors, as a general rule, an error in the charge will not be revised unless it is excepted to at the trial, and presented by proper bill of exception, and, furthermore, if the defendant desires further instructions, he must present them in writing, and if they be refused, he must promptly except to such refusal, and present this action of the court by proper bill of exception, or the matter will not be considered on appeal. *O'Connell v. State*, 18 Tex. 343; *Jackson v. State*, 25 Tex. Supp. 229; *Mooring v. State*, 42 Tex. 85; *Browning v. State*,

1 App. 96; Foster v. State, 1 App. 363; Porter v. State, 1 App. 477; Goode v. State, 2 App. 520; Campbell v. State, 2 App. 187; Franklin v. State, 2 App. 8; Campbell v. State, 3 App. 33; Forrest v. State, 3 App. 232; Work v. State, 3 App. 233; Brown v. State, 3 App. 401; Richards v. State, 3 App. 423; Hobbs v. State, 7 App. 117; Winn v. State, 11 App. 304; Loyd v. State, 19 App. 321; Sparks v. State, 23 App. 447, 5 S. W. 135; Comer v. State, 26 App. 509, 10 S. W. 166.

But if the error in the charge be a fundamental one, the conviction will be set aside, although such error was not excepted to. Loyd v. State, 19 App. 321; Haynes v. State, 2 App. 84; Allen v. State, 7 App. 298; Veal v. State, 8 App. 474; Marks v. State, 10 App. 334.

(B) *Decisions under Act of 1897*

50. **Necessity of objection or exception.**—Errors in the charge, or in the failure or refusal to charge, unless fundamental, cannot be considered on appeal, where no exception was taken thereto at the trial or in the motion for new trial. Kilpatrick v. State, 39 App. 10, 44 S. W. 830; Darter v. State, 39 App. 40, 44 S. W. 850; Dudley v. State, 40 App. 37, 48 S. W. 179; Pena v. State, 38 App. 333, 42 S. W. 991; Johnson v. State, 42 App. 87, 58 S. W. 61, 51 L. R. A. 272; Monson v. State, 45 App. 426, 76 S. W. 571; Reyes v. State, 51 App. 420, 102 S. W. 423; Gantt v. State (Cr. App.) 105 S. W. 800; Sue v. State, 52 App. 122, 105 S. W. 809; Wilson v. State, 52 App. 173, 105 S. W. 1026; Jones v. State, 53 App. 131, 110 S. W. 741, 126 Am. St. Rep. 776; Keye v. State, 53 App. 320, 111 S. W. 400; Grant v. State, 59 App. 123, 127 S. W. 173; Flemister v. State (Cr. App.) 116 S. W. 56; Tate v. State, 55 App. 397, 116 S. W. 606; Jones v. State, 55 App. 207, 116 S. W. 1147; Gracy v. State, 57 App. 68, 121 S. W. 705; Flournoy v. State, 57 App. 88, 122 S. W. 26; Eckermann v. State, 57 App. 287, 123 S. W. 424; Thurston v. State, 58 App. 308, 125 S. W. 31; Joseph v. State, 59 App. 82, 127 S. W. 171; Hinman v. State, 59 App. 29, 127 S. W. 221; Coy v. State, 59 App. 379, 128 S. W. 414; Wright v. State, 60 App. 385, 131 S. W. 1070; Turner v. State, 61 App. 97, 133 S. W. 1052; Vela v. State, 62 App. 361, 137 S. W. 120; Burton v. State, 62 App. 648, 138 S. W. 1019; Villa v. State, 63 App. 537, 141 S. W. 104; Chance v. State, 63 App. 602, 141 S. W. 113; Nelson v. State, 64 App. 489, 142 S. W. 918; Murphy v. State (Cr. App.) 143 S. W. 616; Kinney v. State (Cr. App.) 144 S. W. 257; Knight v. State, 64 App. 541, 144 S. W. 967; Hart v. State (Cr. App.) 150 S. W. 188; Wren v. State (Cr. App.) 150 S. W. 440; Coleman v. State (Cr. App.) 150 S. W. 1177; Carpenter v. State (Cr. App.) 153 S. W. 883; Wilson v. State, 71 App. 330, 158 S. W. 1114; Jones v. State (Cr. App.) 163 S. W. 75.

A bill of exceptions filed after term time and complaining of a charge presents nothing for review where a qualification by the trial judge shows that accused made only a general exception at trial and did not assign the errors complained of in his motion for new trial. Knight v. State, 64 App. 541, 144 S. W. 967.

Where no exception is taken to the failure of the trial court to charge, an assignment of error therein after the adjournment of the term cannot be considered. Gotcher v. State (Cr. App.) 148 S. W. 574.

51. — **Particular issues.**—Omission to charge article 1106, Penal Code, must be raised by bill of exception or on motion for new trial. Pratt v. State, 59 App. 167, 127 S. W. 827. See, also, Alexander v. State, 63 App. 102, 138 S. W. 721.

A conviction will not be reversed for mere failure to charge on alibi unless a special charge submitting this issue is requested or an exception saved to the court's failure to give such charge at the time. Johnson v. State, 56 App. 540, 120 S. W. 1002; Jones v. State, 53 App. 131, 110 S. W. 745, 126 Am. St. Rep. 776.

If there is no exception to the charge of the court, nor motion for a new trial, the Court of Appeals will not reverse the case because the issue of aggravated assault was not submitted. Pena v. State, 38 App. 333, 42 S. W. 991.

If the judge fails to give a charge in writing applicable to the facts of the case as required by one of the eight preceding articles this fact must be excepted to at the time of the trial or on motion for a new trial else the court of criminal appeals cannot review it. Barnett v. State, 42 App. 302, 62 S. W. 768.

It is too late to complain in the appellate court, of the failure of the charge to restrict the effect of the testimony admitted over his objection. Exceptions should have been saved to the ruling, or it should have been complained of in motion for new trial. Young v. State (Cr. App.) 66 S. W. 567.

An objection that the court failed to charge on manslaughter comes too late when made for first time in appellate court. Rambo v. State (Cr. App.) 69 S. W. 165.

It is too late to raise for the first time in the appellate court the question that the defendant's shot did not necessarily result in the death of the deceased, but that it may have been and probably was caused by the negligence of the physician in treating the deceased after the wound was inflicted. White v. State, 44 App. 346, 72 S. W. 174, 63 L. R. A. 660.

It is too late to raise the objection in appellate court for first time that the trial court did not apply the law to the issue of ownership. This should have been taken advantage of by bill of exception or in motion for new trial. Windom v. State, 44 App. 514, 72 S. W. 194.

In a prosecution for assault with intent to murder, an objection that the court did not charge aggravated assault and battery cannot be raised for the first time in the appellate court, although the facts required that such charge should have been given. As the question was not raised in court below by bill of exception nor in motion for new trial, it cannot be revised by appellate court. Cubin v. State, 45 App. 108, 74 S. W. 40.

Unless the point is saved by bill of exception or raised in motion for new trial, that court erred in failing to charge the law of aggravated assault in a prosecution for assault with intent to kill, it cannot be raised in the appellate court. Cubine v. State, 45 App. 108, 74 S. W. 40.

The punishment for perjury committed in a civil suit was formerly by confinement in the penitentiary not less than 5 nor more than 10 years. In 1897 it was changed to not less than 2 nor more than 10 years. In 1904 a defendant was convicted in a case of this character of perjury, on the trial of which the court charged the punishment to be not less than 5 nor more than 10 years' confinement in the penitentiary. The majority of the court hold that because objection to the court's error is not presented by bill of exceptions, nor reserved in motion for new trial, he cannot avail himself of the court's error for the first time in the appellate court. The jury assessed the punishment at seven years in the penitentiary. *Manning v. State*, 46 App. 326, 81 S. W. 960, 3 Ann. Cas. 867.

Where there is no exception to the charge on the ground that it is on the weight of the evidence, it is waived under the terms of this article. *Martin v. State*, 47 App. 29, 83 S. W. 392.

In order for an appellant to avail himself of the failure of the court to submit the issue of "cooling time" in a murder case, he must reserve an exception to such failure in the trial court. The question cannot be raised for the first time in the appellate court. *Ham v. State* (Cr. App.) 98 S. W. 878.

Under the decisions construing this article it would seem there are no fundamental errors on appeal except those reserved by bill of exceptions or in the motion for a new trial. *White v. State*, 52 App. 193, 106 S. W. 1168.

Misdirecting the jury in respect to the punishment is not available, unless excepted to at the time or challenged in the motion for new trial. *Robbins v. State*, 57 App. 8, 121 S. W. 504.

A conviction will not be reversed for the failure to limit the scope of impeaching evidence, in the absence of an exception to such failure and a request for such limitation. *Goss v. State*, 57 App. 557, 124 S. W. 107.

Code Cr. Proc. 1895, art. 723, providing that where, on appeal by defendant in a criminal action, any of the requirements of the preceding articles have been disregarded, the judgment shall not be reversed unless the error shall have been excepted to at the time, did not require an exception at the trial in order to entitle accused to review an erroneous instruction authorizing a conviction of an offense with which he is not charged. *Grant v. State*, 59 App. 123, 127 S. W. 173.

The failure of the court in its charge to apply the law to the facts will not justify a reversal of the conviction where there is no bill of exceptions taken at the time excepting to the charge on that ground. *May v. State*, 59 App. 141, 127 S. W. 832.

The refusal of an instruction as to alleged improper argument by the prosecuting attorney in a criminal prosecution will not be reviewed when the matter is not preserved by bill of exceptions. *Green v. State*, 62 App. 345, 137 S. W. 126.

In the absence of any request, and in the absence of any exception to the charge as given, a conviction will not be reversed because of the failure to charge on accused's theory. *Treadwell v. State*, 64 App. 83, 141 S. W. 219.

A charge in a criminal prosecution cannot be complained of on appeal, where it was neither complained of at the time nor a special charge requested correcting it. *Baumgarner v. State*, 64 App. 165, 142 S. W. 4.

The Court of Criminal Appeals will not revise alleged error in the refusal of instructions, unless the action of the lower court is excepted to by defendant at the time and additional instructions asked and a bill of exceptions saved to their refusal. *Hughes v. State* (Cr. App.) 149 S. W. 173.

The failure of the court, on a trial for assault to murder, to submit the issues of self-defense and alibi cannot be raised for the first time on appeal. *Martinez v. State* (Cr. App.) 153 S. W. 886.

The refusal of a requested instruction relative to the argument of the prosecuting attorney could not be considered on appeal when not raised and preserved by a bill of exceptions. *Williamson v. State*, 72 App. 618, 163 S. W. 435.

52. Bills of exception and statements of facts.—See Willson's Cr. Forms, 939-942.

Where the record on a criminal appeal does not contain a statement of facts or bill of exceptions, the refusal to give requested instructions cannot be reviewed. *Nelson v. State*, 59 App. 148, 127 S. W. 1020; *Williams v. State* (Cr. App.) 81 S. W. 36; *Olive v. State* (Cr. App.) 127 S. W. 550; *Sullivan v. State*, 62 App. 410, 137 S. W. 700; *Featherstone v. State* (Cr. App.) 151 S. W. 1055; *Stout v. State* (Cr. App.) 152 S. W. 927.

The denial of a motion for a new trial, on the grounds that the court erred in submitting murder in the first degree could not be reviewed, in the absence of bills of exception and statements of fact. *Ramos v. State*, 71 App. 484, 160 S. W. 380.

The court's refusal to give a requested charge on self-defense would not be reviewed, where it was nowhere copied in the record or bill. *McGregor v. State*, 71 App. 604, 160 S. W. 711.

53. Motion for new trial.—Error in the charge as a ground for new trial, see post, art. 835, subd. 2, and notes.

An exception to instructions is sufficiently presented if complained of in the motion for a new trial. *Serop v. State* (Cr. App.) 154 S. W. 557; *Palmer v. State*, 47 App. 268, 83 S. W. 203; *Mitchell v. State* (Cr. App.) 144 S. W. 1006; *Hogue v. State* (Cr. App.) 146 S. W. 905; *Holmes v. State*, 70 App. 214, 156 S. W. 1173.

This statute authorized reversals on appeal for errors in the charge where they are excepted to either at the time the charge is given or on motion for new trial. *Garza v. State*, 38 App. 317, 42 S. W. 563.

When requested instructions are refused, and the action of the court is objected to in a motion for a new trial, it will be considered on appeal. *Livingston v. State*, 38 App. 535, 43 S. W. 1008.

Where there are no bills of exception in the record nor errors claimed in admitting or rejecting testimony nor special charges asked, but the charge is as-

sailed in the motion for new trial and every paragraph thereof is criticised, the court on appeal cannot reverse the case for immaterial error. *Alexander v. State*, 63 App. 102, 138 S. W. 721.

Under Code Cr. Proc. 1895, art. 723, as amended by Acts 25th Leg. c. 21, which prohibits reversal of a conviction for error in the charge, unless it was excepted to during the trial, or was complained of in the motion for new trial, objections raised by an amended motion for new trial, filed with permission of the trial court, are reviewable. *Kinney v. State* (Cr. App.) 144 S. W. 257.

Where matters of exception are presented in a motion for a new trial, exceptions to the charge, though not approved by the trial judge, are considered as grounds of the motion. *Lewis v. State*, 72 App. 377, 162 S. W. 866.

54. — **Necessity for motion.**—Errors in a charge, not assigned in the motion for a new trial, will not be considered on appeal. *Ryan v. State*, 64 App. 628, 142 S. W. 878; *Boone v. State* (Cr. App.) 60 S. W. 759; *Benevidas v. State*, 57 App. 170, 121 S. W. 1107; *Rowan v. State*, 57 App. 625, 124 S. W. 668, 136 Am. St. Rep. 1005; *Daniels v. State*, 58 App. 569, 126 S. W. 1153; *Stewart v. State* (Cr. App.) 153 S. W. 1151.

Where no complaint was made in the motion for new trial of the court's failure to charge self-defense, it is too late to complain of such failure on appeal. *Keye v. State*, 53 App. 320, 111 S. W. 401.

Where there has been no motion for new trial, no defects, or omissions or errors of commission in the charge can be considered. *Raines v. State*, 56 App. 94, 119 S. W. 94.

In a prosecution for assault with intent to murder, where accused was prosecuted as a principal, though he did not do the act, and the court fully charged as to the defense, and no errors in the charge were pointed out in the motion for new trial, any error in charging the law as to principals will be considered harmless. *Johns v. State*, 63 App. 416, 140 S. W. 1093.

Where the failure of the court to charge on circumstantial evidence was not called to its attention by the motion for new trial, the error cannot be reviewed on appeal. *Romero v. State*, 72 App. 105, 160 S. W. 1193.

55. **Necessity of requests.**—Failure to charge on alibi is not ordinarily reversible error unless excepted to or unless a requested charge thereon was refused. This article does not change the rule as to charges on the law of alibi as fixed by the decisions before its passage, and does not institute a more rigorous or technical rule than existed aforesaid. *Wright v. State*, 56 App. 353, 120 S. W. 461; *Phillips v. State*, 57 App. 160, 121 S. W. 1110; *Schaper v. State*, 57 App. 201, 122 S. W. 257, citing *Jones v. State*, 53 App. 131, 110 S. W. 741, 126 Am. St. Rep. 776, which overrules *Allen v. State*, 45 App. 468, *6 S. W. 458; *Wilcher v. State*, 47 App. 301, 83 S. W. 384, and *Bird v. State*, 48 App. 188, 87 S. W. 146.

Where appellant requested no special charges on any of the points in the instructions to which he objects, the court may decline to consider such objections. *Conger v. State*, 63 App. 312, 140 S. W. 1112.

Defendant, complaining of the charges given as not stating the circumstances under which the defendant should be acquitted, should have requested additional charges; and, not having done so, his criticism presented no reversible error. *Rogers v. State*, 71 App. 149, 159 S. W. 40.

See, also, art. 737, and notes.

56. **Necessity of statement of facts.**—In the absence of a statement of facts and bills of exceptions, a charge submitting the offense stated in the information will be presumed on appeal to have charged the law applicable to the evidence. *Focke v. State* (Cr. App.) 144 S. W. 267; *Jenkins v. State*, 59 App. 475, 128 S. W. 1113; *Morris v. State*, 63 App. 375, 140 S. W. 775; *Collins v. State* (Cr. App.) 148 S. W. 1071.

When there is no statement of facts in the record the appellate court cannot determine whether or not the appellant was injured by the court's charge, even conceding it to be erroneous. *Ruiz v. State*, 48 App. 470, 88 S. W. 808; *Thomas v. State* (Cr. App.) 148 S. W. 1088.

Matters presented in an omnibus bill of exceptions, complaining of the refusal of a continuance and of portions of the charge and of rulings on evidence, cannot be considered, in the absence of a statement of facts. *Leto v. State* (Cr. App.) 143 S. W. 184.

An exception to the charge, not setting up any such error as will authorize a conviction on proof not justified by the indictment, cannot be considered, in the absence of a statement of facts. *Hogan v. State* (Cr. App.) 143 S. W. 184.

Where the record on appeal does not contain the testimony or bills of exceptions, the question whether an issue was material, and that accused was entitled to have the jury pass on certain testimony, will not be considered. *Giles v. State* (Cr. App.) 151 S. W. 1043.

See, also, art. 844, and notes.

57. **Sufficiency of objection.**—An objection that the court erred in his charge or some designated paragraph, which gives no reason or merely states that the charge is not the law, or is inapplicable to the evidence or the issues or is on the weight of the evidence, is too general to be considered on appeal. *Thompson v. State* (Cr. App.) 124 S. W. 659; *Pollard v. State*, 58 App. 299, 125 S. W. 390; *Davis v. State*, 58 App. 461, 126 S. W. 863; *Joseph v. State*, 59 App. 82, 127 S. W. 171; *Vargas v. State*, 60 App. 196, 131 S. W. 594; *Leech v. State*, 63 App. 339, 139 S. W. 1147; *Browning v. State*, 64 App. 148, 142 S. W. 1; *Ford v. State*, 64 App. 14, 142 S. W. 6; *Black v. State* (Cr. App.) 143 S. W. 932; *Moore v. State* (Cr. App.) 144 S. W. 598; *Wells v. State* (Cr. App.) 145 S. W. 950; *McWhirter v. State* (Cr. App.) 146 S. W. 189; *Wooldridge v. State* (Cr. App.) 146 S. W. 550; *Williams v. State* (Cr. App.) 150 S. W. 185; *Holmes v. State* (Cr. App.) 150 S. W. 926; *Walker v. State* (Cr. App.) 151 S. W. 822; *Ward v. State* (Cr. App.) 151 S. W. 1073; *Jones v. State* (Cr. App.) 153 S. W. 897; *Bryant v. State* (Cr. App.) 153 S. W. 1156; *McDowell v.*

State (Cr. App.) 155 S. W. 521; Lucas v. State (Cr. App.) 155 S. W. 527; Meek v. State, 71 App. 433, 160 S. W. 698; Johnson v. State, 71 App. 428, 160 S. W. 964; Matthews v. State, 71 App. 374, 160 S. W. 1185; Dickerson v. State, 72 App. 393, 162 S. W. 871; Boyd v. State, 72 App. 521, 163 S. W. 67; Garham v. State, 73 App. 28, 163 S. W. 726.

General objections to instructions which do not point out any error therein will not be considered on appeal. Vela v. State, 62 App. 361, 137 S. W. 120; Williams v. State, 22 App. 497, 4 S. W. 64; Smith v. State, 22 App. 316, 3 S. W. 684; Hennessy v. State, 23 App. 340, 5 S. W. 215; Peace v. State, 27 App. 83, 10 S. W. 761; Bolding v. State, 23 App. 172, 4 S. W. 579; May v. State, 25 App. 114, 7 S. W. 588; Burke v. State, 25 App. 172, 7 S. W. 873; Cordway v. State, 25 App. 405, 8 S. W. 670; Howard v. State, 25 App. 602, 8 S. W. 806; Cooksie v. State, 26 App. 72, 9 S. W. 58; Livar v. State, 26 App. 115, 9 S. W. 552; Briscoe v. State, 27 App. 193, 11 S. W. 113; Jacobs v. State, 28 App. 79, 12 S. W. 408; Jackson v. State, 28 App. 143, 12 S. W. 701; Huffman v. State, 28 App. 174, 12 S. W. 588; Walker v. State, 28 App. 503, 13 S. W. 860; Graham v. State, 28 App. 582, 13 S. W. 1010; Leeper v. State, 29 App. 64, 14 S. W. 398; Farrar v. State, 29 App. 250, 15 S. W. 719; Quintana v. State, 29 App. 401, 16 S. W. 258, 25 Am. St. Rep. 730; Tweedle v. State, 29 App. 586, 16 S. W. 544; Hooper v. State, 29 App. 616, 16 S. W. 655; Rahm v. State, 30 App. 310, 17 S. W. 416, 28 Am. St. Rep. 911; Suit v. State, 30 App. 320, 17 S. W. 458; Hurley v. State, 30 App. 333, 17 S. W. 455, 28 Am. St. Rep. 916; Sims v. State, 30 App. 605, 18 S. W. 410; Browder v. State, 30 App. 614, 18 S. W. 197; Vines v. State, 31 App. 31, 19 S. W. 545; Rust v. State, 31 App. 75, 19 S. W. 763; Wilkerson v. State, 31 App. 86, 19 S. W. 903; Maxwell v. State, 31 App. 119, 19 S. W. 914; Glasgow v. State, 50 App. 635, 100 S. W. 936; Jones v. State, 59 App. 559, 129 S. W. 1118; Tabor v. State, 61 App. 425, 135 S. W. 142; Beauchamp v. State, 63 App. 263, 140 S. W. 104; Adams v. State, 64 App. 61, 141 S. W. 527; Barker v. State, 64 App. 106, 141 S. W. 529; Berg v. State, 64 App. 612, 142 S. W. 884; Byrd v. State (Cr. App.) 151 S. W. 1068.

A bill of exceptions merely complaining of the refusal of a requested instruction set out, without any reason why it should have been given, is too general. Harris v. State, 64 App. 594, 144 S. W. 232; Gould v. State (Cr. App.) 146 S. W. 172; Coffman v. State, 73 App. 295, 165 S. W. 939.

Objections to instructions, or failure to give special charges requested, if taken for the first time in the motion for a new trial, are in the nature of exceptions, and must be equally specific. Ryan v. State, 64 App. 628, 142 S. W. 878; Berg v. State, 64 App. 612, 142 S. W. 884.

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. Gonzalez v. State, 30 App. 203, 16 S. W. 978; Garello v. State, 31 App. 56, 20 S. W. 179; Bogan v. State, 30 App. 466, 17 S. W. 1087.

A complaint as to a charge on the law of self-defense excepted to, "because same was too restrictive, and not general and liberal enough towards the defendant on the law of self-defense, but limited the rights therein," was too general to be subject to review. Pollard v. State, 58 App. 299, 125 S. W. 390.

A motion for a new trial was presented on the ground that the court failed to give an instruction defining manslaughter, and applying the rules of law with reference thereto to the facts, and telling the jury that defendant would be guilty of aggravated assault if, had she killed said prosecutor under those circumstances, she would only be guilty of manslaughter, in that the testimony in the case clearly raised the issue of manslaughter and aggravated assault. Held, that such statement was a sufficient criticism of the instruction to call the court's attention to his failure to submit the issue of aggravated assault. Furgerson v. State, 58 App. 431, 126 S. W. 594.

Where a charge on the law of provoking the difficulty was excepted to, without pointing out any error therein, and the bill of exceptions merely quoted a part of the charge, and added that accused objected thereto and tendered his bill of exceptions to said charge on account of said error, the complaint was sufficient to raise the question, on appeal, whether the court was justified in charging at all on the law of provoking the difficulty. Coffey v. State, 60 App. 73, 131 S. W. 216.

An exception to a charge, submitting the issue of second-degree murder as being confusing, misleading, unintelligible, and not such a clear presentation of the law as accused was entitled to under the laws, and because a part thereof was so carelessly worded as to leave the jury in doubt as to its meaning, was a general exception not sufficiently pointing out any error complained of to authorize its consideration on appeal. Tilmeyer v. State, 62 App. 272, 136 S. W. 1060.

An assignment of error and a motion for a new trial for failure to give the special requested charge, on the ground that it was not covered by the charge of the court, will not be reviewed, as the motion should specifically point out the objection. Ryan v. State, 64 App. 628, 142 S. W. 878.

Defendant, in exceptions to the whole of the charge, gave as the only reason for objection that the charge was "vague, uncertain, indefinite, and multifarious, and did not give the true law of the case, and was prejudicial to defendant in his trial, and calculated to and did mislead the minds of the jury as to the true law of the case." Held, that the objections were too general. Perkins v. State (Cr. App.) 144 S. W. 241.

Exceptions to the refusal to give requested instructions where the bill of exceptions gives no reasons why they should have been given, and where the motion for new trial quotes the several bills as to the refusal to give such instructions, but states no reason why they should have been given, will not be reviewed. Perkins v. State (Cr. App.) 144 S. W. 241.

The bill of exceptions to the refusal of charges merely recited that "defendant offered to the court special charges Nos. 1, 2, 3, * * * and 9, and asked that the same be allowed and read to the jury, but the court refused the same, to

which action * * * defendant then and there excepted" and now tenders her bill of exceptions. Held, that the bill did not show sufficiently definite requests to authorize the appellate court to review error in refusing them. *Curly v. State* (Cr. App.) 145 S. W. 602.

Where defendant in a homicide case, in which the defense was that he took deceased for a robber, claims that his requested charge that it was not necessary that deceased was attempting to rob defendant, but the jury should consider whether defendant was acting on a reasonable apprehension of danger, should have been given because of the district attorney arguing to the jury that it was necessary that they find that deceased was engaged in attempting to rob defendant, the bill of exceptions should so explain what was done and said, the surrounding circumstances, and the state of the proof, as to show that there was error. *Stephens v. State* (Cr. App.) 145 S. W. 907.

Bills of exception to the effect that the evidence called for a charge on justifiable homicide when committed to prevent a felony, and as to the law applicable to communicated threats, presented nothing for review, when they did not set forth the evidence upon which such exceptions were based. *Galan v. State* (Cr. App.) 150 S. W. 1171.

A bill of exception reciting that defendant excepted to the charge because it failed to instruct upon all the law applicable to the case, in that the evidence called for a charge upon dying declarations, and the sanity of deceased when he made such declaration; because there was testimony that a man with a gunshot wound in his stomach would rarely be in his sane mind five to seven hours afterwards, presents no matter for review where it does not attempt to show that the declarant was in such wounded condition, nor show that it had been several hours from the time of the shot to the making of his declaration or that the declaration was in any way affected by the declarant's condition. *Galan v. State* (Cr. App.) 150 S. W. 1171.

Complaints of instructions, on the ground that the court erred in refusing charges mentioned by number are too general to be considered on appeal. *Walls v. State* (Cr. App.) 153 S. W. 130.

In a prosecution for disturbing a religious assemblage, an objection that the information alleged that the congregation had assembled for religious worship, while the charge used the words "religious purposes," is not definite enough to require review. *Laird v. State* (Cr. App.) 155 S. W. 260.

A bill of exceptions complaining of the "refusal to charge Pen. Code 1911, art. 41, relating to intoxication as a defense, as the evidence raised the issue," is too general to be considered on appeal. *Lucas v. State* (Cr. App.) 155 S. W. 527.

In a prosecution for cattle theft, where the evidence was purely circumstantial and the defense was an alibi, an objection to a charge defining principals on the ground that there was no evidence that any person other than the defendant killed the cow, and no evidence showing that the defendant was present at the time, or if not present, was keeping watch or aiding in the killing, was sufficient to point out that the charge erroneously authorized a conviction as principal upon a state of facts which would make him guilty only as an accomplice. *Silvas v. State*, 71 App. 213, 159 S. W. 223.

Defendant filed a bill of exceptions reciting, "Be it remembered," etc., after which was incorporated a complete copy of the entire charge, followed by a recital that defendant excepted to the charge because it was on the weight of the evidence; that it was variant from the information, misstated the stock law (Pen. Code 1911, art. 1241) under which he was prosecuted; and that it permitted the jury to go back two years before the filing of the complaint. It then alleged that defendant requested the court to give the following charges, and purported to copy literally four special charges, and closed with the statement, "Which charges the court then and there refused to give and to which defendant in open court excepted." Held, that the bill was too general to permit a review of any of the proceedings attempted to be excepted to. *Fisher v. State*, 71 App. 564, 160 S. W. 683.

An objection that an instruction is ambiguous, conflicting, and misleading to the jury and prejudicial to the accused is too general to be considered on appeal. *Meek v. State*, 71 App. 433, 160 S. W. 698.

Where the record contained several requests by defendant, none of which were numbered, defendant's bill, merely complaining of the court's refusal to give his request, without otherwise identifying it, was too general. *Boyd v. State*, 72 App. 521, 163 S. W. 67.

An objection that a charge "was not a correct statement of the law in reference to the matter dealt with" was too general to be considered. *Reed v. State* (Cr. App.) 168 S. W. 541.

A bill of exceptions stating that accused presented certain special charges which the court refused to give, to which ruling he then and there excepted, did not raise the question with respect to such refusal in such a way that it could be reviewed. *Galan v. State* (Cr. App.) 177 S. W. 124.

A bill of exceptions complaining of the refusal of a request must show when it was presented to the court for his action, and that the court ruled thereon. *Grimes v. State* (Cr. App.) 178 S. W. 523.

58. Misdemeanors.—In a misdemeanor case, accused must except to the instructions at the time, and must ask additional instructions, and must save a bill of exceptions to the charge or refusal to charge, specifically pointing out the error, or the instructions will not be reviewed on appeal unless radically wrong. *Bradley v. State* (Cr. App.) 136 S. W. 446; *Durham v. State*, 57 App. 279, 122 S. W. 553; *Thompson v. State*, 59 App. 498, 124 S. W. 659; *Stennett v. State*, 59 App. 262, 128 S. W. 616; *Ellis v. State*, 59 App. 626, 130 S. W. 170; *Ellis v. State*, 59 App. 630, 130 S. W. 171; *Hilcher v. State*, 60 App. 180, 131 S. W. 592; *Brunk v. State*, 60 App. 263, 131 S. W. 1125; *Day v. State*, 62 App. 527, 138 S. W. 123; *Rey-*

nolds v. State, 63 App. 270, 139 S. W. 977; Fields v. State, 63 App. 283, 139 S. W. 978; Wagoner v. State, 63 App. 180, 140 S. W. 339; Staten v. State, 63 App. 592, 141 S. W. 525; Barker v. State, 64 App. 106, 141 S. W. 529; Hickman v. State, 64 App. 161, 141 S. W. 973; Baumgarner v. State, 64 App. 165, 142 S. W. 4; Luttrall v. State, 64 App. 411, 142 S. W. 588; Gould v. State (Cr. App.) 146 S. W. 172; Gamble v. State (Cr. App.) 146 S. W. 551; Cabiness v. State (Cr. App.) 146 S. W. 934; Golden v. State (Cr. App.) 146 S. W. 945; McIndoo v. State (Cr. App.) 147 S. W. 235; Yarborough v. State (Cr. App.) 147 S. W. 270; Hogan v. State (Cr. App.) 147 S. W. 601; Kidwell v. State (Cr. App.) 148 S. W. 395; Giles v. State (Cr. App.) 148 S. W. 317; Garlington v. State (Cr. App.) 148 S. W. 583; Ward v. State (Cr. App.) 151 S. W. 1073; Shanklin v. State (Cr. App.) 152 S. W. 1063; Johnson v. State, 70 App. 294, 156 S. W. 1164; Dunn v. State, 71 App. 89, 158 S. W. 300; Fisher v. State, 71 App. 564, 160 S. W. 683; Dean v. State, 72 App. 274, 161 S. W. 974; Yates v. State, 72 App. 279, 162 S. W. 499; Forester v. State, 72 App. 293, 162 S. W. 507; Boyd v. State, 72 App. 452, 162 S. W. 850; Brown v. State, 73 App. 571, 166 S. W. 508.

This article merely extends the time of exception to the charge of the court, but in no way cures the failure of defendant in misdemeanors to tender special charges to the court at the time of the trial. The old line of authorities on the question of charge in misdemeanor cases still applies. Woods v. State (Cr. App.) 75 S. W. 33; Licett v. State (Cr. App.) 79 S. W. 33; Gowans v. State (Cr. App.) 145 S. W. 614.

If one is indicted for a felony and is convicted of a misdemeanor an exception that the charge omits an instruction on alibi, when the evidence raises the question, is sufficient under this article without requesting the court to charge on the subject. But if the prosecution is for a misdemeanor and conviction is for misdemeanor then the exception is not sufficient unless a request is made for such charge. Wilcher v. State, 47 App. 301, 83 S. W. 355.

In a prosecution for betting at a pool table, defendant cannot complain of a charge which he admits states the law correctly in the abstract, but claims it is not applicable to the case, where he failed to request specific instructions, since, this being a misdemeanor case, the court will not reverse for omissions in a charge, though complained of in a motion for new trial, unless specially excepted to and charges asked; but where the charge is erroneous, and excepted to, it is ground for reversal. Tinker v. State, 58 App. 321, 125 S. W. 890.

Where the court gave a verbal charge in a prosecution, and there was no exception nor any special charges requested, the Supreme Court will presume that the charge covered every necessary phase of the case. Sullivan v. State, 61 App. 657, 136 S. W. 456.

Ordinarily in a misdemeanor case a defective instruction is not reversible error, where no special charge is requested; but where the instruction is affirmatively wrong, and an exception is properly taken and shown by proper bill of exception and preserved by motion for new trial, it is prejudicial error. Novy v. State, 62 App. 492, 138 S. W. 139.

On appeal in misdemeanor cases, objections to failure to instruct on reasonable doubt and presumption of innocence will not be reviewed, unless accused excepted to the charge, and requested special charges on the points. Webb v. State, 63 App. 207, 140 S. W. 95.

In a prosecution for assault, accused objected to the charge that the use of any dangerous weapon in an angry or threatening manner, with intent to alarm another and under circumstances to effect that object was an assault, on the ground that this charge was not applicable to the evidence. He also objected to that charge upon the ground that the court should have charged the jury that the conduct above detailed amounted to no more than a simple assault, but in neither case did he request special charges. Held, that under art. 739, ante, and this article, the objections to this charge presented no reversible error. Noland v. State, 63 App. 275, 140 S. W. 100.

The charge in a misdemeanor case cannot be reviewed for failure to charge on alibi, unless a special charge is requested, and the failure to give it is excepted to and preserved by bill of exceptions. Brogdon v. State, 63 App. 475, 140 S. W. 352.

The giving, in a misdemeanor case, of a charge which is on the weight of testimony, is not reversible error, in the absence of exception thereto at the time, or request for a special charge on the subject. Hughes v. State (Cr. App.) 145 S. W. 918.

In a misdemeanor case, especially where accused requested no special charges to cure any of the alleged errors, a bill of exceptions, stating that accused excepted to the court's charge on the ground that the same was not the law, that the court set out and read a purported letter, and for that reason charged the jury on conspiracy giving a wrong charge, and failed to charge on defendant's not being able to read and write or his other defenses, is too general to be reviewed. Golden v. State (Cr. App.) 146 S. W. 945.

In the absence of a bill of exceptions to a charge in a prosecution for unlawfully killing a wild deer because the period of two years within which the court charged that a conviction could be had if the killing occurred within that time included several months of the open season, and failure to request a written charge correcting the error, it cannot be reviewed. Baker v. State (Cr. App.) 153 S. W. 631.

The Court of Criminal Appeals will not review objections to instructions when first made in that court, so that where, in a prosecution for selling intoxicants in dry territory, the objection below to a charge that if accused ordered liquor as an accommodation for others, and collected the money from them before the order was made, he would not be guilty, was that he would not be guilty whether he ordered it as an accommodation or not, an objection will not be considered on rehearing that the charge was erroneous as requiring the jury to believe that he collected the money from the parties before the order was made. Wilson v. State (Cr. App.) 154 S. W. 571.

59. — **Motion for new trial.**—Exceptions must be reserved to instructions given in a misdemeanor case at the time they are given, and a special charge covering the matter requested and an exception taken to the refusal to give the request, in order to have the instructions reviewed; it being too late to first except to instructions in the motion for new trial. *Miller v. State* (Cr. App.) 150 S. W. 635; *Franklin v. State*, 59 App. 523, 129 S. W. 369; *Milam v. State* (Cr. App.) 146 S. W. 185; *Collins v. State* (Cr. App.) 152 S. W. 1047; *Schneider v. State*, 70 App. 517, 156 S. W. 944; *Fisher v. State*, 71 App. 564, 160 S. W. 683.

Where the objection to a clerical error in the instructions in a misdemeanor case was first raised by motion for a new trial and there was no exception to the instructions when given, or during the trial, and the bill of exceptions filed 20 days after the adjournment of the court was solely to the court's overruling the motion for new trial on that ground, the error was not reviewable. *Giles v. State*, 70 App. 550, 157 S. W. 943.

60. — **Statement of facts.**—In the absence of a statement of facts and bill of exceptions, it will be presumed that the court charged all the law applicable to the evidence. *Harris v. State* (Cr. App.) 162 S. W. 1147.

(C) *Decisions under Act of 1913*

61. **Applicability of act.**—See ante, art. 735, and notes.

Where on a trial for an offense committed prior to the taking effect of such amendatory chapter the trial court submitted the charge to accused's counsel for criticism and objection, and allowed him a reasonable time to examine it, and he failed to object thereto or to suggest amendments, objections to the charge could not be made in the motion for a new trial, though the trial judge at the opening of the trial announced that accused would be tried under the law and procedure in force at the time of the commission of the offense, unless accused filed a written request that he be tried under the law and procedure in force at the time of the trial. *Wright v. State*, 73 App. 178, 163 S. W. 976.

Under this article, the failure to object or to raise an objection, in the motion for new trial, to an instruction in a homicide case, based on the theory that accused would be punished if convicted under the law as it existed at the time of the commission of the offense, would be treated as an election to be tried under the old law, though, in absence of election, he was entitled, under Pen. Code 1911, art. 17, to be punished under the new law, as it ameliorated the punishment. *Echols v. State* (Cr. App.) 170 S. W. 786.

62. **Objections and exceptions.**—Errors in the instructions cannot be reviewed, unless excepted to at the time of the trial. *Wright v. State*, 73 App. 178, 163 S. W. 976; *Davis v. State*, 73 App. 49, 163 S. W. 442; *Seats v. State* (Cr. App.) 170 S. W. 793; *Mooney v. State* (Cr. App.) 176 S. W. 52; *Gray v. State* (Cr. App.) 178 S. W. 337.

Accused claimed that the forged note was written in L. county, and from there mailed to the prosecuting witness, while the prosecuting witness testified that it was mailed to him from M. county, in which county venue was laid. Accused requested charges on the theory that the mailing of the note from M. county was not sufficient to give that county venue if the note was written in L. county. The only exceptions to the charge on venue, which was that the state must prove that the offense was committed in M. county, were to the overruling of accused's requests. Held, that in the absence of appropriate objections accused could not, on appeal, contend that the charge was insufficient to present the issue raised by his testimony and that of the prosecuting witness. *Meredith v. State*, 73 App. 147, 164 S. W. 1019.

An exception that the court erred in failing to submit the law of manslaughter is too general to call for review of the question whether the evidence raised the issue of manslaughter. *Chant v. State*, 73 App. 345, 166 S. W. 514.

Neither a paper objecting to the court's charge and filed in the record and containing the style and number of the cause, but not signed by any one or showing that it was presented to the trial court, nor special charges, which were copied in the record, followed by the word "refused," with the trial judge's signature, were sufficient to present for review the correctness of the charge. *Womack v. State* (Cr. App.) 170 S. W. 139.

The fact that objections to the charge were made before it was read to the jury may be preserved by a bill of exceptions approved by the trial judge. *Ross v. State* (Cr. App.) 170 S. W. 305.

In a misdemeanor case, the only proper way by which the Court of Criminal Appeals can consider an objection to the court's charge is by bill of exceptions thereto, taken at the time of the trial. *Williams v. State* (Cr. App.) 170 S. W. 708.

Where no exceptions were taken to the charge before it was read to the jury and there is no statement of facts, it must be presumed that the judge fully presented all the issues made by the evidence. *Gomez v. State* (Cr. App.) 170 S. W. 711.

Exceptions to a charge in a criminal case should show that they were taken before the charge was read to the jury. *Denton v. State* (Cr. App.) 172 S. W. 796.

Accused, not having raised that particular objection, cannot complain that the instructions on self-defense did not inform the jury what would be the grade of the offense, if, after inflicting a mortal wound in self-defense, accused pursued deceased and inflicted other wounds, hastening death. *Maddox v. State* (Cr. App.) 173 S. W. 1026.

63. — **Requests.**—Defendant's requested charges, not shown to have been presented to the court or acted upon by it before the charge and argument, could not be considered on appeal. *Jones v. State* (Cr. App.) 167 S. W. 1110; *Lopez v. State*, 73 App. 624, 166 S. W. 154; *Woodard v. State* (Cr. App.) 170 S. W. 309; *Perrett v. State* (Cr. App.) 170 S. W. 316; *Clay v. State* (Cr. App.) 170 S. W. 743.

Where neither the motion for new trial nor the bills of exception give any reasons why charges requested by accused, and refused, were requested, or show how they were applicable to any state of facts, error in refusing the requests cannot be considered. *Bain v. State*, 73 App. 528, 166 S. W. 505; *Hill v. State* (Cr. App.) 173 S. W. 1022.

Where no objection was made to the charge either on the ground of omission or commission, error in the refusal of special charges requested by defendant would not be considered. *Jones v. State* (Cr. App.) 167 S. W. 1110; *Womack v. State* (Cr. App.) 170 S. W. 139.

In a felony case, it is not necessary to preserve a refused instruction by a bill of exception, where the record shows its presentation and request in ample time, and hence, where the record did so show, the insufficiency of the bill of exceptions was immaterial. *Goldstein v. State*, 73 App. 558, 166 S. W. 149.

Where no objection was made when the charge was submitted to accused's counsel before argument, a request to charge on circumstantial evidence, made during the closing argument for the state, comes too late. *Forward v. State*, 73 App. 561, 166 S. W. 725.

Where the record contains no bills of exception or statement of facts, refusal of requested charges and denial of motion for new trial will not be reviewed. *Mendoza v. State* (Cr. App.) 173 S. W. 301.

64. **Time for objection.**—Objections to instructions cannot be reviewed on appeal, unless they have been presented to the trial court before the charge is read to the jury and that fact is shown by the record. *Bedford v. State* (Cr. App.) 170 S. W. 727; *Hawkins v. State* (Cr. App.) 168 S. W. 93; *Wynne v. State* (Cr. App.) 170 S. W. 149; *Gutierrez v. State* (Cr. App.) 170 S. W. 717; *Gonzales v. State* (Cr. App.) 171 S. W. 1149; *Bodkins v. State* (Cr. App.) 172 S. W. 216; *Carmicle v. State* (Cr. App.) 172 S. W. 238; *Bowden v. State* (Cr. App.) 174 S. W. 339; *Glasper v. State* (Cr. App.) 174 S. W. 585; *Dillard v. State* (Cr. App.) 177 S. W. 99.

Objections to a charge must be filed before verdict is rendered, and the charge cannot be objected to thereafter, unless drawn so as to prevent accused from having a fair trial. *Clay v. State*, 73 App. 78, 164 S. W. 1; *Williamson v. State* (Cr. App.) 167 S. W. 360.

An objection to instructions cannot be raised for the first time on motion for rehearing. *Burge v. State*, 73 App. 505, 167 S. W. 63; *Roberts v. State* (Cr. App.) 168 S. W. 100.

Defendant, who did not specifically object to the charge of the court before it was read to the jury, could not complain of the charge, either in the motion for a new trial or in a bill of exceptions filed after the term time, except under the conditions named in this act. *James v. State*, 72 App. 457, 163 S. W. 61.

Under Acts 33d Leg. c. 138, the refusal of requested charges will not be considered on appeal, where no objection was filed to the court's charge when it was presented to counsel for inspection. *Speer v. State* (Cr. App.) 171 S. W. 201.

65. — **Motion for new trial.**—Where the accused fails to reserve any exception to the charge as given or the failure to submit a particular issue and presents a special charge on same, an objection presented in respect thereto in a motion for new trial is too late. *Johns v. State* (Cr. App.) 174 S. W. 610; *James v. State*, 72 App. 457, 163 S. W. 61; *Simmons v. State*, 73 App. 288, 164 S. W. 843; *Fate v. State*, 73 App. 278, 164 S. W. 1018; *Gant v. State*, 73 App. 279, 165 S. W. 142; *Edwards v. State*, 73 App. 380, 166 S. W. 517; *Mora v. State* (Cr. App.) 167 S. W. 344; *Bell v. State* (Cr. App.) 169 S. W. 1150; *Barnett v. State* (Cr. App.) 170 S. W. 143; *Lewis v. State* (Cr. App.) 171 S. W. 217; *Hicks v. State* (Cr. App.) 171 S. W. 755; *Martinez v. State* (Cr. App.) 171 S. W. 1153; *Staples v. State* (Cr. App.) 175 S. W. 1056.

An objection to a charge on self-defense and to the refusal to give specially requested charges, not made until motion for new trial was filed, was insufficient, and assignments of error thereto could not be considered by the Court of Criminal Appeals. *Crossett v. State* (Cr. App.) 168 S. W. 548.

Objections to the charge, which are first made after verdict in the amended motion for new trial, cannot be considered on appeal in a criminal case. *Taylor v. State* (Cr. App.) 169 S. W. 672.

66. **Sufficiency of objection.**—Objections to a charge on the ground that the court failed to apply the law to the facts and no where charge on an affirmative defense, and only authorizing an acquittal in the expression "otherwise you will find defendant not guilty" are too general and will not be considered. *Calyon v. State* (Cr. App.) 174 S. W. 591.

67. **Misdemeanors.**—In misdemeanor cases, the only way the appellate court is authorized to consider complaints of the charge of the court and the refusal of requests is by bill of exceptions, taken at the trial, giving the specific reasons why the court erred. *Branch v. State*, 73 App. 471, 165 S. W. 605; *Davis v. State* (Cr. App.) 167 S. W. 1108, L. R. A. 1915A, 572; *King v. State* (Cr. App.) 169 S. W. 675.

In a misdemeanor case, where the court charged the jury but did not submit the charge to counsel, errors assigned by counsel when he did see the charge will be considered on appeal, but a mere assignment of error complaining of the court's failure to submit the charge before it was given cannot be considered where no error therein was pointed out. *Goode v. State* (Cr. App.) 171 S. W. 714.

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.]

See Willson's Cr. Forms, 937-941.

See Vernon's Sayles' Civ. St. 1914, arts. 2058, 2067, and notes; also Rules for District Court, 53-60, 142 S. W. xxi.

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| 1. Rulings which may be made subject of bill of exceptions. | 26. — Putting witnesses under the rule. |
| 2. Necessity of bill of exceptions. | 27. — Misconduct of court. |
| 3. — Appointment of counsel. | 28. — Misconduct of prosecuting attorney. |
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| 25. — Denial of continuance or postponement. | |

1. Rulings which may be made subject of bill of exceptions.—A bill of exceptions to the overruling of accused's motion for new trial will not answer in lieu of bills of exception to proceedings had upon trial, to which an exception should have been reserved during the trial. *Simmons v. State*, 73 App. 288, 164 S. W. 843; *Lerman v. State* (Cr. App.) 40 S. W. 286; *Milo v. State*, 59 App. 196, 127 S. W. 1025; *Golden v. State* (Cr. App.) 146 S. W. 945; *Compton v. State* (Cr. App.) 148 S. W. 580; *Wingate v. State* (Cr. App.) 152 S. W. 1078; *Walker v. State*, 73 App. 99, 164 S. W. 3.

A defendant has the right to demand of the court a bill of exceptions incorporating what he proposed to prove by his excluded witnesses. *Browder v. State*, 30 App. 614, 18 S. W. 197. Other decisions: *Tomlin v. State*, 25 App. 676, 8 S. W. 931; *Livar v. State*, 26 App. 115, 9 S. W. 552; *Frisby v. State*, 26 App. 180, 9 S. W. 463; *Benavides v. State*, 31 App. 173, 20 S. W. 369, 37 Am. St. Rep. 799.

Accused, not satisfied with the bill of exceptions as qualified by the court, may take a bill to the acts of the court. *Johnson v. State*, 61 App. 635, 136 S. W. 259.

A bill of exceptions, complaining of the refusal of the trial court to order a knife introduced in evidence to be sent up as an exhibit, does not present a ground for reversal of the judgment; the remedy being to ask for an order from the Court of Criminal Appeals. *Reagan v. State*, 70 App. 498, 157 S. W. 483.

That the bill of exceptions embraces the motion for new trial does not add anything to the motion, or give accused any additional grounds for review. *Stubbs v. State*, 71 App. 390, 160 S. W. 87.

2. Necessity of bill of exceptions.—See art. 2058, Vernon's Sayles' Civ. St. 1914, and notes.

The matters presented as grounds for a new trial in a criminal case could not be reviewed or revised, where the record contained neither a statement of facts nor a bill of exceptions. *Hooper v. State* (Cr. App.) 156 S. W. 221; *Plew v. State* (Cr. App.) 35 S. W. 366; *Royal v. State* (Cr. App.) 39 S. W. 666; *Humphrey v. State* (Cr. App.) 40 S. W. 489; *Daniels v. State* (Cr. App.) 125 S. W. 398; *Robinson v. State*, 58 App. 550, 126 S. W. 276; *Rivers v. State* (Cr. App.) 128 S. W. 902; *Patton v. State*, 62 App. 28, 136 S. W. 42; *Butler v. State* (Cr. App.) 136 S. W. 769; *Ricen v. State*, 63 App. 89, 138 S. W. 403; *Brown v. State*, 62 App. 592, 138 S. W. 604; *Hampton v. State*, 63 App. 100, 138 S. W. 1019; *Millican v. State* (Cr. App.) 140 S. W. 1136; *Douglas v. State* (Cr. App.) 141 S. W. 952; *Johnson v. State*, 64 App. 399, 142 S. W. 589; *Martinez v. State* (Cr. App.) 145 S. W. 621; *Coleman v. State* (Cr. App.) 150 S. W. 1177; *Lodge v. State* (Cr. App.) 151 S. W. 812; *Gaston v. State* (Cr. App.) 151 S. W. 1048; *Corbin v. State* (Cr. App.) 151 S. W. 1051; *Ely v. State* (Cr. App.) 152 S. W. 631; *Brewer v. State* (Cr. App.) 153 S. W. 622; *Cloud v. State* (Cr. App.) 153 S. W. 892; *Jaynes v. State* (Cr. App.) 156 S. W. 221; *Schneider v. State*, 70 App. 517, 156 S. W. 944; *Washington v. State* (Cr. App.) 156 S. W. 1172; *Simon v. State* (Cr. App.) 158 S. W. 285; *Adams v. State* (Cr. App.) 158 S.

W. 303; Jackson v. State (Cr. App.) 159 S. W. 846; Austin v. State (Cr. App.) 163 S. W. 80; Parker v. State (Cr. App.) 163 S. W. 81; McGowen v. State, 73 App. 112, 164 S. W. 999; Davis v. State (Cr. App.) 170 S. W. 725; McCaulay v. State (Cr. App.) 170 S. W. 793; Howard v. State (Cr. App.) 174 S. W. 607; Brown v. State (Cr. App.) 174 S. W. 824; McDevitt v. State (Cr. App.) 177 S. W. 1175.

Where, on appeal, the record contains neither bill of exceptions nor statement of facts, the judgment will be affirmed. English v. State (Cr. App.) 122 S. W. 389; O'Hara v. State, 57 App. 577, 124 S. W. 95; Beasley v. State (Cr. App.) 125 S. W. 565; Wilson v. State (Cr. App.) 126 S. W. 570; Rutherford v. State, 59 App. 2, 127 S. W. 551; Mann v. State (Cr. App.) 128 S. W. 118; Vaughn v. State, 59 App. 423, 128 S. W. 1134; Howard v. State (Cr. App.) 128 S. W. 901; King v. State, 59 App. 511, 129 S. W. 626; Burk v. State (Cr. App.) 134 S. W. 705; Addelman v. State (Cr. App.) 143 S. W. 183; Thomas v. State (Cr. App.) 152 S. W. 927; Lee v. State (Cr. App.) 153 S. W. 326; Miller v. State (Cr. App.) 154 S. W. 548; Wilson v. State (Cr. App.) 157 S. W. 153; Vasquez v. State (Cr. App.) 174 S. W. 341; Clark v. State (Cr. App.) 177 S. W. 970.

Where there is no bill of exceptions nor statement of facts, nor any questions raised in the motion for new trial that can be considered without a statement, the judgment will be affirmed. Clay v. State (Cr. App.) 152 S. W. 637; Angley v. State, 35 App. 427, 34 S. W. 116; Saldano v. State (Cr. App.) 38 S. W. 771; Parker v. State (Cr. App.) 135 S. W. 130; Hamil v. State (Cr. App.) 145 S. W. 914; Sersion v. State (Cr. App.) 151 S. W. 541; McKinney v. State (Cr. App.) 153 S. W. 855; Young v. State (Cr. App.) 154 S. W. 548; Redo v. State (Cr. App.) 160 S. W. 71; Shockley v. State, 71 App. 475, 160 S. W. 452; Gowan v. State, 73 App. 222, 164 S. W. 6; Everett v. State (Cr. App.) 170 S. W. 1100; Price v. State (Cr. App.) 170 S. W. 1101.

Where no error appears in a record containing no statement of facts or bill of exceptions, the judgment will be affirmed. Meyer v. State (Cr. App.) 122 S. W. 22; Davis v. State (Cr. App.) 122 S. W. 22; Kemper v. State (Cr. App.) 125 S. W. 398; Keen v. State (Cr. App.) 128 S. W. 901; Clark v. State (Cr. App.) 128 S. W. 902; Gonzales v. State, 61 App. 503, 135 S. W. 381; Campbell v. State, 61 App. 504, 135 S. W. 548; Harris v. State, 62 App. 235, 137 S. W. 373.

Where the record contains no bill of exceptions and no statement of facts, and where the indictment or information charges the offense of which defendant was convicted, there is nothing presented for review. Horton v. State (Cr. App.) 170 S. W. 785; Walters v. State (Cr. App.) 122 S. W. 26; Teague v. State (Cr. App.) 128 S. W. 901; Ikard v. State (Cr. App.) 135 S. W. 547; Whittaker v. State (Cr. App.) 147 S. W. 599; Thomas v. State (Cr. App.) 148 S. W. 1088; Follis v. State (Cr. App.) 150 S. W. 779.

On appeal on a record without a motion for a new trial, or any bill of exceptions or statement of facts, all the court can do is to look to the sufficiency of the indictment, and, where that is valid, affirm the judgment. Brannan v. State (Cr. App.) 175 S. W. 697; Morris v. State (Cr. App.) 37 S. W. 430; McElroy v. State (Cr. App.) 172 S. W. 1144; Hale v. State (Cr. App.) 175 S. W. 696.

Grounds of complaint in a motion for new trial in a misdemeanor case cannot be considered, unless bills of exceptions are reserved to the rulings of the trial court. Goodwin v. State, 63 App. 140, 138 S. W. 399; Lewis v. State, 33 App. 618, 28 S. W. 465; Nickerson v. State (Cr. App.) 154 S. W. 992.

Any ruling or action of the court which is not manifest of record, or which can not be fully understood and intelligibly passed upon, without a statement of the facts bearing upon it, must, in order to be revised, be presented by a proper bill of exception setting forth fully and clearly such facts. Escareno v. State, 16 App. 85; Callahan v. State, 30 Tex. 488.

Where, on appeal from a conviction, the record contains neither a bill of exceptions nor a statement of facts, and the motion for a new trial is not sent up in the record, and the transcript contains only the judgment overruling the motion for a new trial, a notice of appeal, and an order granting time in which to prepare a bill, the judgment will be affirmed. English v. State (Cr. App.) 122 S. W. 389.

In the absence of bill of exceptions and statement of facts, the only ground for new trial being that the verdict was contrary to the law and evidence, the indictment for robbery with a deadly weapon being regular, two counts thereof having been submitted to the jury by appropriate and correct charge, the jury having found him guilty and assessed his punishment at 40 years in the penitentiary, and the judgment being regular, there must be an affirmance. Marue v. State (Cr. App.) 134 S. W. 727.

Where no bill of exceptions is taken, and where the record does not show that the matter alleged as error occurred or was excepted to at the time, it cannot be considered. Mosley v. State, 61 App. 294, 135 S. W. 148.

Errors not assigned in bills of exceptions or the motion for a new trial are not reviewable. Ellington v. State, 63 App. 424, 140 S. W. 1100.

Matters not raised by a bill of exceptions or motion for new trial cannot be considered on appeal. Bailey v. State (Cr. App.) 144 S. W. 996.

Grounds assigned in a motion for new trial, which do not relate to matters reserved in a bill of exceptions, cannot be reviewed on appeal unless they relate to erroneous instructions. Columbo v. State (Cr. App.) 145 S. W. 910.

A fact, merely recited in a motion for new trial, but not verified by bill of exceptions, and with nothing in the record to indicate its truth, cannot be considered on appeal. Hughes v. State (Cr. App.) 145 S. W. 918.

The facts must be presented by bill of exceptions that there may be review of the denial of new trial, asked on the ground that the special judge who presided at the trial was not legally qualified or elected. Jaramillo v. State (Cr. App.) 147 S. W. 600.

An appeal from a conviction must be affirmed, where there is no motion for new trial, no statement of facts, and no bill of exceptions, and where the indictment charges an offense, and the trial court submitted that offense. *Sanders v. State* (Cr. App.) 148 S. W. 566.

In the absence of a motion for new trial, bill of exceptions, or statement of facts, in the record a judgment of conviction will be affirmed; the court having submitted the offense charged in the indictment. *Parrish v. State* (Cr. App.) 150 S. W. 453.

The Court of Criminal Appeals cannot consider questions raised by assignments of error, but is restricted by the statute to questions raised by bills of exceptions or in the motion for new trial. *Skinner v. State* (Cr. App.) 151 S. W. 1007.

On appeal in a criminal case, where the indictment, charge, judgment, and sentence were in proper form, there were no questions open for consideration, in the absence of a bill of exceptions or statement of facts. *Hooper v. State* (Cr. App.) 156 S. W. 221.

Where no bills of exceptions were reserved to the introduction of testimony, and the charge submitted the offense charged in the indictment, the judgment would be affirmed, in the absence of a statement of facts. *Oakery v. State* (Cr. App.) 158 S. W. 285.

Where a writ of certiorari was granted to perfect the record in a criminal appeal, and to supply lost papers, and defendant had ample opportunity to supply the lost papers, but made no effort to do so, an affirmance of the conviction will be granted on motion of the state, in the absence of a statement of facts and bill of exceptions. *Rupard v. State*, 71 App. 256, 158 S. W. 285.

On appeal in a criminal case, where the indictment was in proper form and the charge submitted the offense alleged in the indictment, the denial of a motion for a new trial could not be reviewed where the record contained no bill of exceptions nor statement of facts. *Sullivan v. State*, 71 App. 92, 158 S. W. 302.

Where the record does not show the evidence or any reserved exceptions to the court's rulings, assignments of error that the verdict was contrary to law and evidence and in excluding and admitting evidence and in giving and omitting to give instructions cannot be considered. *Gonzales v. State*, 71 App. 83, 158 S. W. 303.

Where accused's motion for a new trial presented certain questions by merely reciting the questions, and then stating in the ground of the motion that they would be more particularly shown by his bill of exceptions, giving the number thereof, while as to many of the grounds there was no such bill in the record, they could not be reviewed. *Thomason v. State*, 71 App. 439, 160 S. W. 359.

Absent a statement of facts and bills of exceptions, grounds in the motion for new trial, complaining of the rejection of evidence, of the failure of the court to charge, and based on newly discovered evidence, cannot be reviewed. *Leach v. State*, 72 App. 273, 161 S. W. 977.

Objections not affirmatively mentioned in the bill of exceptions are deemed to have been waived. *Best v. State*, 72 App. 201, 164 S. W. 996.

Where the record of the election of a special judge was regular, the overruling of a plea in abatement of the indictment on the ground that lawyers not practicing in the court participated in the election of the special judge, who was a nonresident of the district, not supported by any evidence, cannot be considered on appeal. *Tores v. State* (Cr. App.) 166 S. W. 523.

Rulings on motions and pleas cannot be reviewed where accused reserved no exception to them. *Tores v. State* (Cr. App.) 166 S. W. 523.

Where no exceptions were reserved to the introduction of testimony, and no objections were made to the court's charge, or any special charges requested, the only question reviewable on appeal is the sufficiency of the evidence. *Jarrot v. State* (Cr. App.) 168 S. W. 95.

Without a statement of facts or bill of exceptions, and where there is no motion for a new trial in the record, nothing is raised that can be reviewed. *Davis v. State* (Cr. App.) 174 S. W. 824.

Absent bill of exceptions, in a misdemeanor case, only the question of the evidence sustaining the conviction can be considered. *Stinson v. State* (Cr. App.) 177 S. W. 970.

3. — **Appointment of counsel.**—A ruling of a trial court denying accused the particular counsel he desired to have appointed for his defense is not reviewable in the absence of a bill of exceptions. *Krummel v. State* (Cr. App.) 147 S. W. 871.

4. — **Denial of change of venue.**—See art. 634, and notes.

5. — **Denial of continuance.**—See Willson's Cr. Forms, 937.

Where no bill of exceptions was reserved to the court's action in overruling a motion for a continuance, the ruling cannot be reviewed. *Williams v. State* (Cr. App.) 148 S. W. 763; *Cocker v. State*, 31 Tex. 498; *Cotton v. State*, 32 Tex. 614; *Bowman v. State*, 40 Tex. 8; *Jones v. State*, Id. 188; *Davis v. State*, Id. 478; *Meredith v. State*, Id. 480; *Townsend v. State*, 41 Tex. 134; *Anderson v. State*, 42 Tex. 389; *Nelson v. State*, 1 App. 41; *Brooks v. State*, 2 App. 1; *Grant v. State*, 3 App. 1; *Allen v. State*, 4 App. 581; *Blankenship v. State*, 5 App. 218; *Harris v. State*, 6 App. 97; *Dill v. State*, Id. 113; *Tuttle v. State*, Id. 556; *Reynolds v. State*, 7 App. 516; *Plumley v. State*, 8 App. 529; *Hollis v. State*, 9 App. 643; *Delphino v. State*, 11 App. 30; *Gaston v. State*, Id. 143; *Taylor v. State*, 12 App. 489; *Cone v. State*, 13 App. 483; *Esher v. State*, Id. 607; *Bohannon v. State*, 14 App. 271; *Taylor v. State*, Id. 340; *Prator v. State*, 15 App. 363; *Spear v. State*, 16 App. 98; *Makinson v. State*, Id. 133; *Lucas v. State*, 19 App. 79; *Young v. State*, Id. 536; *James v. State*, 21 App. 353, 17 S. W. 422; *Scott v. State*, 23 App. 521, 5 S. W. 142; *Williams v. State*, 24 App. 32, 5 S. W. 658; *Mathews v. State*, 32 App. 355, 23 S. W. 690; *Wimbish v. State*, 25 App. 90, 7 S. W. 533; *Fields v. State*, 31 App. 42, 19 S. W. 604; *Bell v. State*, 31 App. 276, 20 S. W. 549; *Holland v. State*, 31

App. 345, 20 S. W. 750; Attaway v. State, 31 App. 475, 20 S. W. 925; Pickens v. State, 31 App. 554, 21 S. W. 362; Hyden v. State, 31 App. 401, 20 S. W. 764; Browning v. State, 26 App. 432, 9 S. W. 770; Powers v. State, 27 App. 700, 11 S. W. 646; Wampler v. State, 28 App. 352, 13 S. W. 144; Frizzell v. State, 30 App. 42, 16 S. W. 751; Pruitt v. State, 30 App. 156, 16 S. W. 773; Otero v. State, 30 App. 450, 17 S. W. 1081; Sims v. State, 30 App. 605, 18 S. W. 410; Freeman v. State, 33 App. 568, 23 S. W. 471; Smith v. State, 33 App. 569, 28 S. W. 471; Blackshire v. State, 33 App. 160, 25 S. W. 771; Rodgers v. State (Cr. App.) 28 S. W. 948; Luckie v. State, 33 App. 562, 28 S. W. 523; Sutton v. State (Cr. App.) 28 S. W. 537; Sullivan v. State (Cr. App.) 28 S. W. 539; Hobbs v. State (Cr. App.) 28 S. W. 814; Knotts v. State (Cr. App.) 32 S. W. 532; Vines v. State, 31 App. 31, 19 S. W. 545; Wilson v. State, 32 App. 22, 22 S. W. 39; Adams v. State (Cr. App.) 40 S. W. 590; Trevino v. State, 38 App. 64, 41 S. W. 608; Davis v. State, 57 App. 637, 124 S. W. 634; Ellis v. State, 58 App. 289, 125 S. W. 575; Robinson v. State, 58 App. 550, 126 S. W. 276; Lemons v. State, 59 App. 299, 128 S. W. 416; Payne v. State, 60 App. 322, 131 S. W. 1101; Rivers v. State (Cr. App.) 132 S. W. 771; Wells v. State (Cr. App.) 134 S. W. 702; Talbot v. State, 58 App. 324, 125 S. W. 906; Dugat v. State (Cr. App.) 148 S. W. 789; Jennings v. State (Cr. App.) 148 S. W. 313; Hartfield v. State, 61 App. 513, 134 S. W. 1180; Sullivan v. State, 62 App. 410, 137 S. W. 700; Gaines v. State, 63 App. 73, 138 S. W. 387; Wilson v. State, 63 App. 81, 133 S. W. 409; Fields v. State, 63 App. 283, 139 S. W. 978; Teel v. State, 63 App. 460, 140 S. W. 340; Williams v. State, 63 App. 515, 140 S. W. 440; Espy v. State, 63 App. 625, 140 S. W. 1088; Walker v. State, 64 App. 70, 141 S. W. 243; Browning v. State, 64 App. 148, 142 S. W. 1; Berg v. State, 64 App. 612, 142 S. W. 884; Moore v. State (Cr. App.) 144 S. W. 598; Hinton v. State (Cr. App.) 144 S. W. 617; Milam v. State (Cr. App.) 146 S. W. 185; Teague v. State (Cr. App.) 148 S. W. 1063; Tyler v. State (Cr. App.) 148 S. W. 1086; Clanton v. State (Cr. App.) 148 S. W. 1095; Jobe v. State, 72 App. 163, 161 S. W. 966; Davis v. State (Cr. App.) 150 S. W. 777; Washington v. State (Cr. App.) 151 S. W. 818; Ortiz v. State (Cr. App.) 151 S. W. 1059; Flowers v. State (Cr. App.) 152 S. W. 925; Edwards v. State (Cr. App.) 152 S. W. 926; Kelly v. State (Cr. App.) 154 S. W. 1195; Singleton v. State (Cr. App.) 155 S. W. 212; Creed v. State (Cr. App.) 155 S. W. 240; Dawson v. State, 70 App. 8, 155 S. W. 266; Irby v. State (Cr. App.) 155 S. W. 543; Northcutt v. State, 70 App. 577, 158 S. W. 1004; Fowler v. State, 71 App. 1, 158 S. W. 1117; Ward v. State, 70 App. 393, 159 S. W. 272; Gorrell v. State, 73 App. 232, 164 S. W. 1012; Smith v. State, 73 App. 521, 165 S. W. 574; Swilley v. State, 73 App. 619, 166 S. W. 733; Smith v. State (Cr. App.) 167 S. W. 843; Womack v. State (Cr. App.) 170 S. W. 139; Ortiz v. State (Cr. App.) 173 S. W. 300.

Error in overruling defendant's motion for a continuance will not be reviewed, where neither the application nor a bill of exceptions reserved to the ruling is in the record. Woods v. State (Cr. App.) 157 S. W. 765; Ward v. State, 59 App. 62, 126 S. W. 1145; Moreno v. State, 64 App. 660, 143 S. W. 156, Ann. Cas. 1914C, 863; Wormley v. State (Cr. App.) 143 S. W. 615; Brown v. State (Cr. App.) 144 S. W. 265; Rippetoe v. State (Cr. App.) 148 S. W. 811.

Where accused stated in his motion for new trial that he was not prepared for trial, not having been able to procure material evidence, because he had no attorney to attend to his case, and that his motion for a continuance when the case was called was overruled, but there was no bill of exception reserved to such matters, and nothing in the record verifying such statement, except such mention in the motion for new trial, the questions raised would not be reviewed. Franks v. State, 57 App. 131, 122 S. W. 21.

Refusal of a continuance is not reviewable, in the absence of a statement of facts and bills of exceptions. Dehunt v. State (Cr. App.) 138 S. W. 1013

6. — Proof of venue.—See art. 938, post.

To take advantage, on appeal, of insufficient proof of venue, there must have been a contest over it in the trial court and the matter preserved by bill of exceptions, except where the issue is fought out on the trial as to whether the offense was in the county where the venue was laid, when it will be noticed without bill of exceptions. Munger v. State, 57 App. 384, 122 S. W. 874.

7. — Rulings and objections respecting jurors.—See art. 938, post.

Grounds for new trial, in that the court erred in overruling challenges to certain jurors, could not be reviewed, where not presented by bills of exceptions showing the questions propounded and the answers of the jurors. Vines v. State (Cr. App.) 148 S. W. 727; Campbell v. State, 73 App. 198, 164 S. W. 850.

If the sheriff was not sworn, a bill of exceptions must show it. Samschen v. State, 8 App. 45.

Irregularities in the organization of a trial jury should not be tolerated, but, if permitted by the trial court, the error, to be revised on appeal, must be promptly excepted to at the very time, and it is too late to object thereto for the first time on motion for new trial. If not objected to at the proper time, and a jury is selected without objection, the defendant will not be heard to complain afterward, but will be held to have waived all such objections. McMahon v. State, 17 App. 321; Davis v. State, 19 App. 201; Caldwell v. State, 12 App. 302.

An objection that the jury was not sworn cannot be reviewed in the absence of a bill of exceptions. Miller v. State (Cr. App.) 91 S. W. 583.

Where a venire ordered to try accused appeared from the record to have been properly summoned, alleged errors in the formation of the jury, not presented by bill of exceptions, will not be reviewed. Johnson v. State, 60 App. 305, 131 S. W. 1085.

Objection that a juror was insane cannot be considered when not presented by bill of exceptions and when the record does not show the facts in relation thereto. Springer v. State, 63 App. 266, 140 S. W. 99.

In the absence of a bill of exceptions requiring accused to go to trial before a

“picked-up” jury, it will be presumed that he made no objection at the time. *Ellington v. State*, 63 App. 427, 140 S. W. 1101.

Where the record does not contain a bill of exceptions, and the evidence on the matter of discrimination in the county against the negro race in selecting jurors, alleged by accused, a negro, as a ground for quashing the indictment and denied by the state, is not preserved in the record, the question is not reviewable on appeal. *Wells v. State*, 63 App. 618, 141 S. W. 96.

In the absence of a bill of exceptions, questions involving the organization of the grand jury are not reviewable on appeal. *Smith v. State* (Cr. App.) 143 S. W. 643.

Questions raised in a motion for a new trial concerning the absence of negroes on the jury panel, failure to serve accused with a copy of the special venire, etc., cannot be reviewed, where they are not presented by a bill of exceptions, and where there is no evidence in the record with reference thereto. *Vines v. State* (Cr. App.) 148 S. W. 727.

On an appeal from a criminal prosecution, that the defendant was required to exhaust peremptory challenges on jurors whom the court held to be qualified, but whom the defendant did not think qualified, or that the defendant should have been granted additional peremptory challenges, were unavailable for review in the absence of bills of exceptions. *Teague v. State* (Cr. App.) 148 S. W. 1063.

On appeal from a criminal prosecution, the court will not review the overruling of a motion to quash the jury venire, where there was no bill of exceptions thereto in the record, even though the duly acknowledged motions to quash were shown. *Teague v. State* (Cr. App.) 148 S. W. 1063.

The action of the trial court in organizing the jury cannot be reviewed, where not verified by bill of exceptions. *Rodriguez v. State* (Cr. App.) 150 S. W. 1167.

That the court required accused in a homicide case to go to trial without a special venire could not be reviewed, in the absence of a bill of exceptions. *Pinson v. State* (Cr. App.) 151 S. W. 556.

Where no bill of exceptions is reserved verifying the fact that a juror sat on a former trial of the case, and the record contains no evidence showing such fact, error in overruling the motion for new trial on that ground cannot be reviewed. *Reeves v. State* (Cr. App.) 153 S. W. 127.

Errors in the formation of the jury, or in the selection of any juror, cannot be reviewed on appeal, in the absence of a bill of exceptions. *Martinez v. State* (Cr. App.) 153 S. W. 886.

Assignments of error to the selection of a special venire cannot be considered, where no bills of exception were reserved. *Asbeck v. State*, 70 App. 225, 156 S. W. 925.

In the absence of a statement of facts and bills of exception, the denial of a motion for new trial, requested on the ground that the grand jury was not organized according to law, cannot be reviewed, it appearing that the lower court heard the evidence on that issue. *Fowler v. State*, 71 App. 1, 158 S. W. 1117.

In the absence of a bill of exceptions reserved thereto, the Court of Criminal Appeals cannot review the trial court's action in overruling a motion to quash the venire. *Sharp v. State*, 71 App. 633, 160 S. W. 369.

In the absence of an exception reserved to the formation and organization of the jury, an objection that it was composed wholly of “talesmen” is not ground for reversal. *Bracher v. State*, 72 App. 198, 161 S. W. 124.

Where the trial judge, on a motion for a new trial on the ground that one of the jurors could not read or write, decided that he could read and write, and the evidence adduced on the hearing of the motion was not brought up on appeal by a proper bill of exceptions, the overruling of the motion would not be reviewed. *Berry v. State*, 73 App. 203, 163 S. W. 964.

The overruling of a plea in abatement of the indictment on the ground of discrimination in the organization of the grand jury, and the overruling of a motion to quash a special venire on the ground of discrimination in the selection of jurors to prevent a fair trial, cannot be reviewed on appeal, unless exceptions are reserved and the evidence on the hearing included in the bills of exception. *Tores v. State* (Cr. App.) 166 S. W. 523.

8. — Rulings relating to time and mode of trial and to arraignment and plea.—See art. 938, post.

It is not essential to the validity of a plea of former jeopardy, that a record of the proceedings on the former trial has been perpetuated by a bill of exceptions. *Pizano v. State*, 20 App. 139, 54 Am. Rep. 511; *Briscoe v. State*, 27 App. 193, 11 S. W. 113.

Where the record in a misdemeanor case shows on its face that no plea to the information was entered, advantage of this can be taken in appellate court in absence of bill of exceptions, when the question was raised in motion for new trial. *Thompson v. State*, 46 App. 412, 80 S. W. 623. And see *Noble v. State*, 50 App. 581, 99 S. W. 997, and *Mays v. State*, 51 App. 32, 101 S. W. 233.

In absence of a bill of exceptions, the appellate court cannot consider error in compelling accused to go to trial, and not allowing him a certain time to prepare for trial. *Elliott v. State*, 59 App. 1, 127 S. W. 547.

Defendant's complaint, on motion for new trial, that he was “forced to trial without his witness and without his attorney” cannot be considered on appeal, in the absence of a bill of exceptions. *Johnson v. State* (Cr. App.) 150 S. W. 1175.

Refusal of the court to permit accused to withdraw his plea of guilty, and plead not guilty before the retirement of the jury, cannot be reviewed on appeal, where there was no bill of exceptions and the objection was not raised. *Alexander v. State* (Cr. App.) 152 S. W. 436.

In a prosecution of an accessory, it is too late, in the motion for new trial, to complain that the principal was not first tried, in the absence of any motion or

bill of exceptions calling therefor, or any showing that the principal was under arrest or could be tried. *Harrison v. State* (Cr. App.) 153 S. W. 139.

Where a ground of a motion for new trial, that accused was induced by his father to plead guilty upon representations made to him and his father by the county attorney that he would receive the lightest punishment, was not preserved in a bill of exceptions, and the record did not sustain such contention, the judgment of conviction will be affirmed. *Price v. State* (Cr. App.) 154 S. W. 545.

Where accused pleaded not guilty in the court to which the venue was changed instead of that in which the indictment was returned, as required by art. 630, but no bill of exceptions was taken to the omission nor the question raised in the trial court other than by an amended motion for new trial, the court did not err in denying the motion. *McGregor v. State*, 71 App. 604, 160 S. W. 711.

The striking of a plea of former jeopardy could not be reviewed, where no bill of exceptions was reserved thereto. *Jones v. State*, 72 App. 496, 162 S. W. 1142.

Where a bill of exceptions was not reserved to the action of the trial court in calling the case out of its regular order, its action is not reviewable. *Cyrus v. State* (Cr. App.) 169 S. W. 679.

9. — **Rulings respecting indictment, information, or complaint.**—Where the record on appeal contains no statement of facts and no bill of exceptions, a question of variance between the allegations of the indictment and the proof touching the name of the person whose house was alleged to have been burglarized cannot be noticed. *Isaacs v. State*, 58 App. 256, 125 S. W. 397.

In absence of a bill of exceptions, objections that the minutes did not show when the indictment was received and ordered filed, that the copy of the indictment served on accused was not a true copy, and that accused's counsel was misled by the state's attorney, and induced to believe that the indictment would be dismissed and a new indictment filed, cannot be considered on appeal. *Lemons v. State*, 59 App. 299, 128 S. W. 416.

In the absence of a bill of exceptions showing the facts, the action of the trial court in permitting a name in an information to be changed to correspond with the name of the one making the complaint cannot be reviewed. *Germany v. State*, 62 App. 276, 137 S. W. 130, Ann. Cas. 1913C, 477.

In the absence of a bill of exceptions, the action of the trial court in overruling accused's motion to compel the state in a prosecution for seduction to elect upon which act it would rely cannot be reviewed. *Knight v. State*, 64 App. 541, 144 S. W. 967.

Error in overruling a motion in arrest because the indictment charged two separate misdemeanors each of which counts were submitted in separate charges cannot be reviewed without a bill of exceptions to the ruling on the motion verifying the facts claimed in the motion by showing that the court, in fact, charged on both counts. *Tucker v. State* (Cr. App.) 145 S. W. 611.

Objection that a complaint, charging accused with the misdemeanor with which he was convicted, bore no file mark by the clerk, cannot be considered, where not presented on appeal by a bill of exceptions showing the facts. *Golden v. State* (Cr. App.) 146 S. W. 945.

In the absence of a bill of exceptions, the appellate court cannot review the question as to service on accused of a copy of the indictment. *Harris v. State* (Cr. App.) 148 S. W. 1074.

Where the information contained in the record was properly signed by the county attorney, and the fact that it was not so signed was not authenticated by a bill of exceptions, error cannot be predicated on the overruling of a motion in arrest of judgment on the ground that the information was not signed by the prosecuting attorney. *Baker v. State* (Cr. App.) 153 S. W. 631.

A defendant can take advantage of the failure of an information to charge an offense, even though his bill of exceptions on that point is refused by the trial court. *Rupard v. State*, 71 App. 256, 158 S. W. 285.

10. — **Conduct of trial in general.**—Objections to the court's action in retiring the jury during counsel's discussion of the law after the conclusion of the evidence are not available on appeal, where the matter is not preserved by bill of exceptions. *Lawshe v. State*, 57 App. 32, 121 S. W. 865.

Where it was not shown by bill of exceptions that accused was brought before the jury at divers and different times during the trial manacled and handcuffed, and led into the courtroom by a chain attached to the handcuffs, and held by the sheriff or one of his deputies, the denial of a new trial on the ground that such act was prejudicial to him would not be reviewed; it being presumed that, in the absence of the bill, it either did not occur at all, or, if so, only in such a way as was necessary and proper under the circumstances, though in general a prisoner should not be carried into or out of court in the presence of the jury manacled, handcuffed, or chained. *Zunago v. State*, 63 App. 58, 138 S. W. 713, Ann. Cas. 1913D, 665.

The action of the trial judge in permitting the jury to separate during the noon hour, without instructions, cannot be reviewed on appeal, where no bill of exceptions was reserved. *McIndoo v. State* (Cr. App.) 147 S. W. 235.

Alleged error in permitting defendant's wife to sit in court in front of and facing her daughter, the prosecuting witness, while testifying, could not be reviewed, in the absence of bills of exception reserved at the time. *Jennings v. State* (Cr. App.) 148 S. W. 313.

Where not presented by a bill of exceptions, the appellate court cannot review the error of the trial court in rushing through the case without giving accused, who was too poor to employ counsel, an opportunity to present any defense. *Compton v. State* (Cr. App.) 148 S. W. 580.

Alleged improper conduct of a witness for the state while testifying in a criminal prosecution cannot be reviewed, in the absence of a bill of exceptions showing his acts. *Marlow v. State* (Cr. App.) 150 S. W. 610.

A ground of motion for new trial, complaining that part of the jury was not sworn, cannot be considered on appeal, where the facts are not verified by bill of exceptions or otherwise. *Stewart v. State* (Cr. App.) 153 S. W. 1151.

An objection that an interpreter was not sworn according to law could only be raised by a bill of exception. *Moreno v. State*, 71 App. 460, 160 S. W. 361.

The refusal of the trial court to appoint a commission of physicians to make a physical examination will not be reviewed on appeal in a criminal case in the absence of a bill of exceptions thereto. *Edwards v. State*, 71 App. 417, 160 S. W. 709, 49 L. R. A. (N. S.) 563.

Where there was no bill of exceptions reserved to the misconduct of spectators during the trial, and nothing to verify the allegation thereof in the motion for new trial, which was not sworn to, the matter could not be reviewed. *Buckingham v. State*, 73 App. 101, 164 S. W. 5.

Merely swearing a state's witness in the absence of defendant, being first complained of in the motion for new trial, presents no error. *Singleton v. State* (Cr. App.) 167 S. W. 46.

11. — **Putting witnesses under rule.**—Where accused did not object to a witness' testimony on the ground that he was wrongfully excused from the rule and no bill of exceptions showing injury was reserved, the alleged error cannot be reviewed. *Collins v. State* (Cr. App.) 178 S. W. 345.

12. — **Misconduct of prosecuting attorney.**—Alleged objectionable and injurious remarks of the district attorney could not be reviewed where they were not verified in any manner or perpetuated by bills of exception. *Shornweber v. State*, 70 App. 389, 156 S. W. 222; *Royal v. State* (Cr. App.) 39 S. W. 666; *Cleveland v. State*, 57 App. 356, 123 S. W. 142; *Powell v. State*, 60 App. 201, 131 S. W. 590; *Rivers v. State* (Cr. App.) 132 S. W. 771; *Dixon v. State*, 62 App. 53, 136 S. W. 462; *Dixon v. State*, 62 App. 75, 136 S. W. 463; *Boyce v. State*, 62 App. 374, 137 S. W. 116; *Zunago v. State*, 63 App. 58, 138 S. W. 713, Ann. Cas. 1913D, 665; *Newton v. State* (Cr. App.) 143 S. W. 638; *Moore v. State* (Cr. App.) 144 S. W. 598; *Williams v. State* (Cr. App.) 148 S. W. 763; *Kirby v. State* (Cr. App.) 150 S. W. 455; *Bogue v. State* (Cr. App.) 155 S. W. 943; *Holmes v. State*, 70 App. 214, 156 S. W. 1173; *Luttrell v. State*, 70 App. 183, 157 S. W. 157; *Vick v. State*, 71 App. 50, 159 S. W. 50; *Heidelberg v. State*, 71 App. 393, 159 S. W. 1187; *Grimes v. State*, 71 App. 614, 160 S. W. 689; *Strickland v. State*, 71 App. 582, 161 S. W. 110; *Jobe v. State*, 72 App. 163, 161 S. W. 966; *Lee v. State*, 72 App. 237, 162 S. W. 843; *Harris v. State*, 72 App. 491, 162 S. W. 1150; *Simmons v. State*, 73 App. 288, 164 S. W. 843; *Willis v. State* (Cr. App.) 167 S. W. 352; *Brown v. State* (Cr. App.) 169 S. W. 437; *Noodleman v. State* (Cr. App.) 170 S. W. 710; *Taylor v. State* (Cr. App.) 177 S. W. 82.

Where improper remarks have been made by the prosecuting officer in argument to the jury, there is no ground for reversal, unless defendant objects, takes a bill of exceptions, and asks a special charge in writing to disregard the remarks, and the charge is refused. *Leech v. State*, 63 App. 339, 139 S. W. 1147; *Johnson v. State*, 64 App. 399, 142 S. W. 589; *McWhirter v. State* (Cr. App.) 146 S. W. 189; *Wren v. State* (Cr. App.) 150 S. W. 440.

Objections to the allusion by the prosecuting attorney that defendant did not testify should be reserved by bill of exceptions. *Anderson v. State*, 39 App. 34, 44 S. W. 824.

In absence of bills of exception allowed and approved by the trial judge, the Court of Criminal Appeals cannot consider alleged improper remarks of counsel or error in admitting evidence. *Greer v. State*, 62 App. 81, 136 S. W. 451.

Argument of the prosecuting attorney cannot be reviewed, in the absence of a bill of exceptions or some showing that the language was used by him. *Boyce v. State*, 62 App. 374, 137 S. W. 116.

In the absence of a bill of exceptions, an objection to the action of the county attorney in consulting with some of the witnesses will not be reviewed. *Carney v. State*, 63 App. 370, 140 S. W. 440.

Alleged improper argument of counsel cannot be considered on a criminal appeal, in absence of a bill of exceptions, where the motion for a new trial does not state the language used, and a special charge was not requested to correct it. *Ryan v. State*, 64 App. 628, 142 S. W. 878.

A denial of a motion for a new trial for improper remarks of the district attorney cannot be reviewed on appeal, where there are no bills of exception, and the evidence and remarks referred to do not appear in the record. *Henry v. State* (Cr. App.) 146 S. W. 879.

Improper language alleged to have been used by the district attorney cannot be reviewed, where it is sought to be taken advantage of by an exception to the refusal of a special charge, but without a bill of exceptions verifying the fact that the objectionable language was used and showing that an exception was reserved. *Kinney v. State* (Cr. App.) 148 S. W. 783.

Alleged improper remarks of a district attorney cannot be considered by a court on appeal from a conviction for murder, where they are not verified by a bill of exceptions, and the motion for a new trial does not state what the remarks were that were objected to. *Teague v. State* (Cr. App.) 148 S. W. 1063.

That remarks were made by the prosecuting attorney, and excepted to, should for appeal be shown by bill of exception; allegation of the fact in the motion for new trial not verifying it. *Jones v. State* (Cr. App.) 177 S. W. 971.

13. — **Misconduct of court.**—In the absence of a bill of exceptions reserved to the remarks of the trial court complained of, the court on appeal cannot presume that the remarks were made. *Melton v. State*, 63 App. 573, 140 S. W. 781.

A court on appeal will not review the act of the lower court in lecturing a witness when the question is not presented by a bill of exceptions. *Howard v. State* (Cr. App.) 143 S. W. 178.

Objection, on motion for new trial, that the trial judge erred in reading the charge by unduly emphasizing one word and not another is not reviewable, where

the facts relating to the emphasis are not shown by bill of exceptions. *Newton v. State* (Cr. App.) 143 S. W. 638.

A mere allegation in the motion for new trial not supported by a bill in the record that the court reprimanded counsel for the accused is insufficient to preserve such matter for review. *Williams v. State* (Cr. App.) 144 S. W. 622.

Remarks by the court stated in the motion for new trial cannot be reviewed where no bill of exceptions was reserved. *Clary v. State* (Cr. App.) 150 S. W. 919.

In the absence of a bill of exceptions showing that the court gave its "regular and customary lecture to the jury," or, if he did, what he said at the time, any error in giving such a "lecture" cannot be considered on appeal. *Holmes v. State* (Cr. App.) 150 S. W. 926.

14. — **Misconduct of jury.**—Misconduct of jurors in their deliberations cannot be relied on by accused on appeal, unless shown by bill of exceptions. *Patterson v. State*, 63 App. 297, 140 S. W. 1128; *Flores v. State* (Cr. App.) 129 S. W. 838.

That a jury in a criminal case received testimony and evidence and wrong information as to the evidence in the case from one of their members cannot be reviewed, in the absence of bill of exceptions evidencing all the facts. *Brandt v. State*, 57 App. 157, 122 S. W. 23.

A ground of assignment for misconduct of the jury, not verified by any bill of exceptions, and in respect to which no facts appear in the record, is not reviewable on appeal. *Bozanno v. State*, 60 App. 507, 132 S. W. 777.

Irregularity on the part of the jury in arriving at their verdict will not be considered on appeal when not presented by a bill of exception. *Garner v. State*, 62 App. 55, 138 S. W. 124.

In the absence of a bill of exceptions showing that the jury read newspapers, it cannot be presumed on appeal that they did so, and that the reading was prejudicial to accused. *Berg v. State*, 64 App. 612, 142 S. W. 884.

Where, in a homicide case, a ground of a motion for a new trial, complaining that the jury was allowed to separate during its deliberation, was not supported by affidavit, and there was no bill of exceptions reserved, the appellate court could not consider the objection. *Gant v. State*, 73 App. 279, 165 S. W. 142.

15. — **Rulings on evidence.**—See Willson's Cr. Forms, 938.

Ordinarily no ruling or action of the trial court in relation to questions of evidence will be considered and revised on appeal, unless presented by proper bill of exception, and unless objection to such ruling or action was promptly interposed. If primarily made after verdict such objections are not usually available. *Daffin v. State*, 11 App. 76; *Waite v. State*, 13 App. 169; *Williams v. State*, 19 App. 276; *Etheridge v. State*, 8 App. 133; *Cavitt v. State*, 15 App. 190; *Thomas v. State*, 17 App. 437; *Masterson v. State*, 20 App. 574; *Rountree v. State*, 10 App. 110; *Holbert v. State*, 9 App. 219, 35 Am. Rep. 738; *Pippin v. State*, 9 App. 269; *Roe v. State*, 25 App. 33, 8 S. W. 463; *Wright v. State*, 36 App. 35, 35 S. W. 287; *Lega v. State*, 36 App. 38, 34 S. W. 926, 35 S. W. 381; *Cummings v. State*, 36 App. 256, 36 S. W. 442; *Rector v. State* (Cr. App.) 38 S. W. 776; *Terry v. State*, 39 App. 628, 47 S. W. 654; *Galloway v. State*, 42 App. 380, 57 S. W. 658; *Jackson v. State*, 57 App. 341, 123 S. W. 142; *Ross v. State*, 57 App. 372, 123 S. W. 420; *Crane v. State*, 57 App. 476, 123 S. W. 422; *Eckermann v. State*, 57 App. 287, 123 S. W. 424; *Talbot v. State*, 58 App. 324, 125 S. W. 906; *Greer v. State*, 62 App. 81, 136 S. W. 451; *Henry v. State* (Cr. App.) 146 S. W. 879; *Chandler v. State* (Cr. App.) 152 S. W. 1041; *Johnson v. State* (Cr. App.) 153 S. W. 849; *Campbell v. State*, 73 App. 198, 161 S. W. 850; *Chancoy v. State*, 58 App. 54, 124 S. W. 426; *Ellis v. State*, 57 App. 601, 124 S. W. 667; *Flores v. State* (Cr. App.) 129 S. W. 838; *Foster v. State* (Cr. App.) 148 S. W. 583; *Eanes v. State* (Cr. App.) 131 S. W. 1090; *Dulin v. State*, 60 App. 376, 131 S. W. 1105; *Rivers v. State* (Cr. App.) 132 S. W. 771; *La Grone v. State*, 61 App. 170, 135 S. W. 121; *Carter v. State*, 61 App. 609, 136 S. W. 47; *Burton v. State*, 62 App. 648, 138 S. W. 1019; *Robinson v. State*, 63 App. 373, 140 S. W. 228; *Johnson v. State*, 63 App. 465, 140 S. W. 347; *Jame v. State*, 63 App. 559, 140 S. W. 1086; *Sheppard v. State*, 63 App. 569, 140 S. W. 1090; *Ellington v. State*, 63 App. 424, 140 S. W. 1100; *Ellington v. State*, 63 App. 427, 140 S. W. 1101; *Ellington v. State*, 63 App. 420, 140 S. W. 1102; *Ellington v. State*, 63 App. 426, 140 S. W. 1104; *Morville v. State*, 63 App. 551, 141 S. W. 98; *Jenkins v. State*, 64 App. 85, 141 S. W. 224; *Baumgarner v. State*, 64 App. 165, 142 S. W. 4; *Oldham v. State*, 63 App. 527, 142 S. W. 13; *Jones v. State*, 64 App. 510, 143 S. W. 621; *McGinsey v. State* (Cr. App.) 144 S. W. 268; *Bost v. State*, 64 App. 464, 144 S. W. 589; *Yantis v. State* (Cr. App.) 144 S. W. 947; *Patton v. State* (Cr. App.) 145 S. W. 1189; *Hogue v. State* (Cr. App.) 146 S. W. 905; *McIndoo v. State* (Cr. App.) 147 S. W. 235; *Simpson v. State* (Cr. App.) 148 S. W. 312; *Cruz v. State* (Cr. App.) 148 S. W. 564; *Wren v. State* (Cr. App.) 150 S. W. 440; *Robison v. State* (Cr. App.) 150 S. W. 912; *Cleveland v. State*, 57 App. 356, 123 S. W. 142; *Creed v. State* (Cr. App.) 155 S. W. 240; *Coggins v. State* (Cr. App.) 151 S. W. 311; *Alexander v. State* (Cr. App.) 151 S. W. 807; *Ortiz v. State* (Cr. App.) 151 S. W. 1059; *Simpson v. State* (Cr. App.) 154 S. W. 999; *Peters v. State* (Cr. App.) 155 S. W. 212; *Thomas v. State* (Cr. App.) 148 S. W. 1088; *Clanton v. State* (Cr. App.) 148 S. W. 1095; *Vick v. State*, 71 App. 50, 159 S. W. 50; *Jobe v. State*, 72 App. 163, 161 S. W. 966; *Harris v. State*, 72 App. 491, 162 S. W. 1150; *Davis v. State* (Cr. App.) 167 S. W. 1108, L. R. A. 1915A, 572; *Smith v. State*, 70 App. 62, 156 S. W. 214; *Smith v. State*, 70 App. 68, 156 S. W. 645; *Baker v. State* (Cr. App.) 157 S. W. 478; *Fowler v. State*, 71 App. 1, 158 S. W. 1117; *Veach v. State*, 71 App. 181, 159 S. W. 1069; *Mayes v. State*, 72 App. 381, 162 S. W. 520; *Smith v. State*, 72 App. 206, 162 S. W. 835; *Jones v. State* (Cr. App.) 163 S. W. 75; *Williamson v. State*, 72 App. 618, 163 S. W. 435; *Powell v. State*, 73 App. 146, 164 S. W. 852; *Hewitt v. State* (Cr. App.) 167 S. W. 40; *Conatser v. State* (Cr. App.) 170 S. W. 314; *Gutierrez v. State* (Cr. App.) 170 S. W. 717.

The denial of a motion for a new trial because of the admission of alleged erroneous evidence could not be reviewed, where the record contained no bills of exception verifying such matters, and there was nothing in the record to show that evidence was admitted, other than as stated in the motion. *Clifton v. State*, 70 App. 346, 156 S. W. 1179; *Hart v. State*, 61 App. 509, 134 S. W. 1178; *Slatter v. State*, 61 App. 243, 136 S. W. 770; *Mayo v. State*, 62 App. 110, 136 S. W. 790; *Moore v. State* (Cr. App.) 138 S. W. 111; *Allen v. State*, 62 App. 557, 138 S. W. 593; *Allen v. State*, 64 App. 225, 141 S. W. 983; *Browning v. State*, 64 App. 148, 142 S. W. 1; *Lyles v. State*, 64 App. 621, 142 S. W. 592; *Edmanson v. State*, 64 App. 413, 142 S. W. 887; *Drake v. State* (Cr. App.) 143 S. W. 1157; *Williams v. State* (Cr. App.) 144 S. W. 622; *Griego v. State* (Cr. App.) 145 S. W. 613; *Trezevant v. State* (Cr. App.) 145 S. W. 1191; *Jaramillo v. State* (Cr. App.) 147 S. W. 600; *Dugat v. State* (Cr. App.) 148 S. W. 789; *Rippetoe v. State* (Cr. App.) 148 S. W. 811; *Teague v. State* (Cr. App.) 148 S. W. 1063; *Johnson v. State* (Cr. App.) 150 S. W. 1175; *Stone v. State* (Cr. App.) 151 S. W. 811; *Pace v. State* (Cr. App.) 153 S. W. 132; *Wisnoski v. State* (Cr. App.) 153 S. W. 316; *Brown v. State* (Cr. App.) 154 S. W. 568; *McDowell v. State* (Cr. App.) 155 S. W. 521; *Wilson v. State*, 70 App. 631, 158 S. W. 516; *Melton v. State*, 71 App. 130, 158 S. W. 550; *Sharp v. State*, 71 App. 633, 160 S. W. 369; *Humphries v. State*, 71 App. 551, 160 S. W. 458; *Strickland v. State*, 71 App. 582, 161 S. W. 110; *Kuykendall v. State*, 72 App. 153, 161 S. W. 130; *Brown v. State* (Cr. App.) 161 S. W. 339; *Yates v. State*, 72 App. 279, 162 S. W. 499; *Humphries v. State*, 72 App. 535, 163 S. W. 71; *Law v. State*, 73 App. 5, 163 S. W. 90; *Lord v. State*, 73 App. 109, 164 S. W. 1021; *James v. State* (Cr. App.) 167 S. W. 727; *Reece v. State* (Cr. App.) 170 S. W. 317.

In the absence of a bill of exceptions or statement of facts, the court on appeal cannot review the rulings on the evidence. *Tate v. State* (Cr. App.) 136 S. W. 65; *Parker v. State* (Cr. App.) 165 S. W. 462.

Error in not permitting accused to ask certain questions on cross-examination cannot be considered on appeal, in absence of a bill of exceptions. *Clark v. State*, 58 App. 181, 125 S. W. 12.

Where no objection was made, upon a trial for burglary, to the admission of circumstantial evidence to prove a want of consent of the owner of the property stolen, and no bill of exceptions was reserved, the objection cannot be raised on appeal. *Brown v. State*, 58 App. 336, 125 S. W. 915.

Where it is urged as a ground for new trial that the trial court erred in excluding evidence that the defendant in a prosecution for aggravated assault had been convicted and paid his fine before a justice of the peace, and this ground is not presented by a bill of exceptions, it will not be considered on appeal. *Pollock v. State*, 60 App. 265, 131 S. W. 1094.

Grounds of a motion for new trial complaining of the admission of testimony will not be considered on appeal, where the testimony is not presented by bill of exceptions and is not even given in the motion for new trial. *Franklin v. State*, 63 App. 438, 140 S. W. 1091.

On appeal from a conviction in a prosecution for violating the local option law, the question whether the court erred in permitting the minutes of the commissioners' court to be introduced in evidence will not be considered where no bill of exceptions appears in the record. *Moreno v. State*, 64 App. 660, 143 S. W. 156, Ann. Cas. 1914C, 863.

An appellate court could not review alleged error in permitting the state to interrogate defendant as to the particulars of an alleged assault committed on another, where the record contained no bill of exceptions preserving error thereon. *Lacoume v. State* (Cr. App.) 143 S. W. 626.

Rulings admitting testimony are not reviewable where no exceptions thereto appear in the record, especially where it is not stated what was testified to, or what part of the testimony was excepted to. *Moore v. State* (Cr. App.) 144 S. W. 598.

The admission on a trial for homicide of accused's testimony on a habeas corpus proceeding cannot be reviewed on appeal, where no bill of exceptions thereto was reserved. *Welch v. State* (Cr. App.) 147 S. W. 572.

Denial of a motion to strike out all the testimony adduced down to the close of the state's case could not be reviewed, in the absence of a bill of exceptions reserved thereto. *Pugh v. State* (Cr. App.) 151 S. W. 546.

Unless defendants, in a misdemeanor case, take a bill of exceptions to the admission of evidence, and so preserve the point, the question of its admissibility cannot be held reversible error on appeal. *Mackey et al. v. State* (Cr. App.) 151 S. W. 802.

Where the record does not contain the evidence, or any bills of exception, the exclusion of evidence cannot be reviewed. *Featherstone v. State* (Cr. App.) 151 S. W. 1055.

No bill of exceptions being reserved thereto, and it not being verified in any way, the matter of permitting certain cross-examination cannot be reviewed. *Cameron v. State* (Cr. App.) 153 S. W. 867.

Where prosecutrix was tested as to her competency, and the court decided that she was competent, and her testimony went before the jury, accused, reserving no exception, could not complain of the ruling. *Kinch v. State*, 70 App. 419, 156 S. W. 649.

There was no error in admitting a subpoena in evidence, where the only exception reserved was to the remarks of counsel, and not to the admission of the evidence. *Mooney v. State*, 73 App. 121, 164 S. W. 828.

Where motion for new trial complaining of error in the admission of evidence of statements by accused did not disclose what the statements were, and there was no bill of exceptions showing that the testimony was objected to when offered, the ruling was not reviewable. *Johnson v. State* (Cr. App.) 174 S. W. 1047.

16. — **Verdict contrary to law and evidence.**—On appeal from a conviction, objection that the verdict is contrary to the law and the evidence is not reviewable, where the evidence is not presented by statement of facts or bill of exceptions. *Young v. State* (Cr. App.) 153 S. W. 1133; *Stuart v. State*, 35 App. 440, 34 S. W. 121; *Powell v. State* (Cr. App.) 125 S. W. 574; *Wallace v. State* (Cr. App.) 129 S. W. 139; *Maggio v. State* (Cr. App.) 141 S. W. 220; *Williams v. State* (Cr. App.) 150 S. W. 1163; *Chandler v. State* (Cr. App.) 152 S. W. 1041; *Brown v. State* (Cr. App.) 158 S. W. 812; *Fitzhugh v. State* (Cr. App.) 160 S. W. 710.

Where the record does not contain the evidence, its sufficiency to support a conviction cannot be reviewed. *Featherstone v. State* (Cr. App.) 151 S. W. 1055; *Gerron v. State* (Cr. App.) 151 S. W. 1048; *Johnson v. State* (Cr. App.) 153 S. W. 849; *Lane v. State* (Cr. App.) 156 S. W. 204; *Ramos v. State*, 71 App. 484, 160 S. W. 389.

Where, on appeal in a criminal prosecution, there is no statement of facts or bill of exceptions, and the ground for a motion for new trial is the refusal to strike out the evidence of a witness because he was an ex-convict, and there is no verification in the record of that statement, the objection and the ground of such motion that the evidence is insufficient will not be considered. *Williams v. State* (Cr. App.) 135 S. W. 127.

Where, in a misdemeanor case, there was some evidence of a fact essential to a conviction, and there was no requested charge that the evidence was insufficient, the question of the insufficiency of the evidence, not presented by a bill of exceptions in any form, is not reviewable on appeal. *Goodwin v. State*, 63 App. 140, 138 S. W. 399.

A conviction, though based on conflicting evidence, must be affirmed, where there were no bills of exception and there was no complaint of the charges given, and no charges were requested. *Mitchell v. State*, 71 App. 254, 158 S. W. 812.

17. — **Error relating to instructions.**—See art. 743, and notes. See, also, art. 938.

18. — **Findings of court.**—In the absence of a bill of exceptions bringing the evidence into the record, a finding of fact of the trial court cannot be reviewed. *Smith v. State* (Cr. App.) 167 S. W. 843.

19. — **Evidence heard and proceedings had on motion for new trial.**—A motion for new trial on the ground of newly discovered evidence will not be reviewed on appeal, where the evidence is not presented by a bill of exceptions or otherwise. *Franklin v. State*, 63 App. 438, 140 S. W. 1091; *Madrid v. State*, 71 App. 420, 161 S. W. 93.

Where matters of fact are involved in the ruling upon a motion for new trial, they must be properly presented in the record by bill of exceptions or statement of facts, or they can not be considered on appeal. *Jordan v. State*, 10 Tex. 479; *Short v. State*, 36 Tex. 644; *Sharp v. State*, 6 App. 650.

It is not necessary to take a bill of exceptions to the overruling of a motion for a new trial. *Doans v. State*, 36 App. 468, 37 S. W. 751.

Where the failure to grant a motion for a new trial for absence of a witness then in the penitentiary is not presented by a bill of exception, and it is not shown that such convict was offered as a witness, or that a motion was made for continuance until he could be obtained, error cannot be predicated upon such refusal. *Wilson v. State*, 61 App. 628, 136 S. W. 447.

Where no bill of exceptions and statement of facts or evidence was in the record, a question which arose between the attorneys, on motion for a new trial, as to an agreement on a plea of guilty, and which was settled by the trial court, could not be reviewed. *Muckleroy v. State* (Cr. App.) 146 S. W. 199.

Accused's motion for new trial on the ground that his attorneys were not sufficiently informed as to the testimony of his own witnesses, because of the late time at which they were appointed, preventing him from securing a fair trial, cannot be considered on appeal, where it was not verified by a bill of exceptions, or otherwise than by accused's statement under oath. *Flowers v. State* (Cr. App.) 147 S. W. 1162.

Where evidence adduced on a motion for a new trial is not in the record, the conclusion of the judge thereon in approving the bill of exceptions must be accepted. *Jefferson v. State* (Cr. App.) 152 S. W. 908.

One convicted of a crime cannot take advantage of an alleged error in overruling a motion to quash the indictment based upon defects in the selecting and swearing of the grand and petit juries shown by extrinsic evidence, where the order overruling the motion appears, but not the motion itself, and there is no statement of facts or bill of exceptions. *Anderson v. State*, 70 App. 594, 157 S. W. 1197.

Where the order denying a motion for a new trial for misconduct of the jury recited that the court heard the motion and "the evidence adduced thereon," error in denying the motion cannot be reviewed in the absence of a bill of exceptions containing the evidence heard by the trial court. *Sharp v. State*, 71 App. 633, 160 S. W. 369.

Supreme Court rule 53 for the district and county courts provides that there shall be no bill of exceptions as to matters which at common law constitute the record proper, as the citation, pleadings, and motions for new trial, etc., and rule 55 provides that rulings upon applications for continuance and other incidental motions, and upon evidence and other proceedings not embraced in the two preceding rules, must be presented in a bill of exceptions to become a part of the record. Held, that evidence introduced on a motion for new trial must be preserved by bill of exceptions to enable the Court of Criminal Appeals to review a ruling denying the motion. *Sharp v. State*, 71 App. 633, 160 S. W. 369.

20. **Substitutes for bill of exceptions.**—When matters of fact are involved in a ruling of the court complained of, they must be authenticated by proper bill of exception, and merely setting them out as grounds for new trial, or assigning

them as errors, will not suffice. *Marshall v. State*, 5 App. 273; *McDaniel v. State*, Id. 475; *Hicks v. State*, Id. 488; *Samschen v. State*, 8 App. 45; *Lee v. State*, 61 App. 607, 135 S. W. 1174; *Cooper v. State* (Cr. App.) 147 S. W. 273; *Bragg v. State*, 73 App. 340, 166 S. W. 162.

An attorney's "protest" not signed by the judge will not answer as a bill of exceptions. *Caldwell v. State*, 2 App. 53; *Wakefield v. State*, 3 App. 39; *Davis v. State*, 40 Tex. 478.

A recitation in the judgment that accused excepted to the action of the court in refusing to quash a special venire is not sufficient to take the place of a bill of exception thereto. *Caldwell v. State*, 2 App. 53; *Wakefield v. State*, 3 App. 39; *Davis v. State*, 40 Tex. 478; *Asbeck v. State*, 70 App. 225, 156 S. W. 925.

Exceptions to evidence admitted over the defendant's objection may be embraced in a statement of facts in connection with the evidence objected to; but exceptions to evidence excluded can not be embraced in a statement of facts, but must be presented by bill of exception. *Cooper v. State*, 7 App. 194; *Green v. State*, 12 App. 51; *McWhorter v. State*, 13 App. 523; *Branch v. State*, 15 App. 96.

A recital in the judgment that a continuance was refused, and that the defendant excepted, will not supply the place of a specific bill of exceptions. *Gaston v. State*, 11 App. 143; *Hollis v. State*, 9 App. 643; *Prator v. State*, 15 App. 363.

Statements relative to the action of the court in regard to the charge given could not be considered when contained only in the motion for new trial and not embodied in a proper bill of exceptions. *Angley v. State*, 35 App. 427, 34 S. W. 116.

Statements in the motion for new trial relative to the charge, or failure to instruct, cannot be regarded as bills of exceptions. *Martin v. State*, 38 App. 462, 43 S. W. 352.

The action of the court in respect to an application for continuance must be evidenced by a bill of exceptions, that it may be reviewed. The presence in the record of an order, taken from the minutes of the court, reciting that the application was overruled, and defendant excepted is not enough. *Wesley v. State*, 60 App. 299, 131 S. W. 1107.

Under this article errors assigned in the brief on exceptions to the testimony not preserved by bills of exceptions cannot be considered. *Taylor v. State*, 62 App. 611, 138 S. W. 615.

The court on appeal in a criminal prosecution will not consider matter claimed as error, where not presented by a bill of exceptions, though sworn to in a motion for new trial. *Howard v. State* (Cr. App.) 143 S. W. 178.

Since a sworn motion for a new trial is merely a pleading, if it is desired that exhibits attached to the motion be considered as evidence they should be introduced as such, and the fact that no other evidence was introduced should be shown by the bill of exceptions in order to have error in overruling the motion reviewed. *Sharp v. State*, 71 App. 633, 160 S. W. 369.

Matters stated in an affidavit attached to the motion for new trial, not being verified by bill of exceptions or statement of facts, cannot be considered on appeal. *Terry v. State*, 73 App. 79, 164 S. W. 2.

A matter simply alleged in the motion for new trial, but not verified by affidavit, bill of exceptions, or statement of facts, cannot be considered on appeal. *Lamont v. State*, 73 App. 77, 164 S. W. 3.

21. Form, requisites, and sufficiency of bill.—See art. 2050, *Vernon's Sayles' Civ. St.* 1914, and notes thereunder.

The allegations of a bill of exceptions should be so explicit that the matters may be comprehended without recourse to inferences, and so as to enable the appellate court to fully understand all the facts on which the rulings depend, and must set out the proceedings below sufficiently to enable the court to know that an error has been committed, and be so full that in and of itself it will disclose all that is necessary to manifest the alleged error, and must state enough of the evidence or facts proven to render intelligible the rulings involved, and it cannot be aided either by a statement in reply to a motion for a new trial or by the statement of facts, nor will the appellate court supply omissions or aid the bill by inferences or presumptions. *Best v. State* (Cr. App.) 164 S. W. 997; *Eldridge v. State*, 12 App. 208; *Davis v. State*, 14 App. 645; *Walker v. State*, 9 App. 200; *White v. State*, Id. 41; *Yanez v. State*, 6 App. 429, 32 Am. Rep. 591; *Wright v. State*, 10 App. 476; *Ballinger v. State*, 11 App. 323; *Pierson v. State*, 18 App. 524; *Smith v. State*, 19 App. 95; *Cooper v. State*, 22 App. 419, 3 S. W. 334; *Buchanan v. State*, 24 App. 195, 5 S. W. 847; *Woodson v. State*, 24 App. 153, 6 S. W. 184; *Henning v. State*, 24 App. 315, 6 S. W. 137; *Gilleland v. State*, 24 App. 524, 7 S. W. 241; *Buntain v. State*, 15 App. 515; *Thompson v. State*, 32 App. 265, 22 S. W. 979; *Yungman v. State*, 35 App. 80, 31 S. W. 663; *Lawrence v. State*, 35 App. 114, 32 S. W. 530; *Adams v. State*, 35 App. 285, 33 S. W. 354; *Parks v. State*, 35 App. 378, 33 S. W. 872; *Bryant v. State*, 35 App. 394, 33 S. W. 978, 36 S. W. 79; *Wagner v. State*, 35 App. 255, 33 S. W. 124; *Attaway v. State*, 35 App. 403, 34 S. W. 112; *Simons v. State* (Cr. App.) 34 S. W. 619; *Ball v. State*, Id. 753; *Logan v. State*, 36 App. 1, 34 S. W. 925; *Lega v. State*, 36 App. 38, 34 S. W. 926, 35 S. W. 381; *McGrath v. State*, 35 App. 413, 34 S. W. 127, 941; *Payton v. State*, 35 App. 508, 34 S. W. 615; *Wilkins v. State*, 35 App. 525, 34 S. W. 627; *Jones v. State*, 35 App. 565, 34 S. W. 631; *Levine v. State*, 35 App. 647, 34 S. W. 969; *Hurley v. State*, 36 App. 73, 35 S. W. 371; *Wright v. State*, 36 App. 35, 35 S. W. 287; *Miller v. State*, 36 App. 47, 35 S. W. 391; *Boutwell v. State* (Cr. App.) 35 S. W. 376; *Harris v. State*, 37 App. 441, 36 S. W. 88; *Kirkpatrick v. State*, 57 App. 17, 121 S. W. 511; *Douglas v. State*, 58 App. 122, 124 S. W. 933, 137 Am. St. Rep. 930; *Hunter v. State*, 59 App. 439, 129 S. W. 125; *Green v. State*, 60 App. 530, 132 S. W. 806; *Spencer v. State*, 61 App. 60, 133 S. W. 1049; *Thompson v. State*, 61 App. 250, 134 S. W. 350; *Ridge v. State*, 61 App. 214, 134 S. W. 732; *Conger v. State*, 63 App. 312, 140 S. W. 1112; *Patterson v. State*, 63 App. 297, 140 S. W. 1128; *Jordan v. State*, 64 App.

187, 141 S. W. 786; *Fifer v. State*, 64 App. 203, 141 S. W. 989; *Jones v. State* (Cr. App.) 144 S. W. 252; *Moore v. State* (Cr. App.) 144 S. W. 598; *Oliver v. State* (Cr. App.) 144 S. W. 605; *Baker v. State* (Cr. App.) 145 S. W. 607; *Milam v. State* (Cr. App.) 146 S. W. 185; *Golden v. State* (Cr. App.) 146 S. W. 945; *Harris v. State* (Cr. App.) 148 S. W. 1074; *Parker v. State* (Cr. App.) 149 S. W. 108; *Ortiz v. State* (Cr. App.) 151 S. W. 1056; *Elmore v. State*, 72 App. 226, 162 S. W. 517; *Galan v. State* (Cr. App.) 177 S. W. 124.

A bill of exceptions failing to state the grounds for the exception urged will not be considered on appeal because too indefinite. *Day v. State*, 62 App. 527, 138 S. W. 123; *Edmanson v. State*, 64 App. 413, 142 S. W. 887.

Bills of exception which relate to the competency of evidence, or to rulings of the trial court upon applications for continuance, will not be considered on appeal without a statement of such facts as are necessary to elucidate the exceptions. *Livar v. State*, 26 App. 115, 9 S. W. 532.

When there are a number of bills of exception but no statement of facts the errors complained of will not be reviewed. *Mayes v. State* (Cr. App.) 38 S. W. 613.

In absence of statement of facts bill of exceptions should have contained all the evidence. *Robinson v. State*, 37 App. 195, 39 S. W. 107.

When the bill of exceptions to the overruling of defendant's motion to require the State to disclose the names of private prosecutors, does not show what effect such disclosure would have on the case, it will be presumed that the motion was properly overruled. *Bratt v. State*, 38 App. 121, 41 S. W. 622.

If the grounds alleged in the bill of exceptions, as objections, are true, it should be shown in the bill itself. *Munoz v. State* (Cr. App.) 60 S. W. 760.

In the absence of a statement of facts, the bill of exceptions must show on its face that it contains all of the evidence as to the matter complained of. *Brown v. State*, 57 App. 269, 122 S. W. 565.

A bill of exceptions, grouping all the matters complained of on the trial, is improper, and will not be reviewed. *Cabral v. State*, 57 App. 304, 122 S. W. 872.

Where a bill of exceptions, setting forth accused's objection to a 7 year old boy as a witness because he did not understand the nature of an oath, merely stated that the objection was overruled and the boy allowed to testify, without giving any of the proceedings had in regard to testing his competency, it cannot be aided by going to the statement of facts or other parts of the record. *Munger v. State*, 57 App. 384, 122 S. W. 874.

A bill of exceptions touching a matter separately reserved, and not contained in the statement of facts, must be tested solely by reference to its contents. *Green v. State*, 60 App. 530, 132 S. W. 806.

Though bills of exceptions are not full and explicit enough to be reviewable on appeal, yet where defendant was convicted on circumstantial evidence, and sentenced for life, the court will look into the bills of exceptions and assignments of defendant. *Ridge v. State*, 61 App. 214, 134 S. W. 732.

A bill of exceptions stating the matters sought to be reviewed as objections and not as facts is insufficient. *Whitehead v. State*, 61 App. 558, 137 S. W. 356.

Under rules of the Court of Criminal Appeals, a bill of exception cannot be supplemented by reference to other parts of the record. *Banks v. State*, 62 App. 552, 138 S. W. 406.

The Court of Criminal Appeals cannot look to other parts of a record in aid of a bill of exceptions which accused has accepted and filed, and he is bound by qualifications therein. *Campbell v. State*, 63 App. 595, 141 S. W. 232, Ann. Cas. 1913D, 858.

A bill of exceptions which does not set out any of the testimony, but only refers to other parts of the record, is too incomplete to be considered on appeal. *Knight v. State*, 64 App. 541, 144 S. W. 967.

A bill of exceptions, which, without stating grounds of objection, recites merely that defendant excepted to the verdict when it was returned into court, the verdict merely finding defendant guilty and assessing his punishment, presents nothing for review, other than the sufficiency of the evidence. *Smith v. State* (Cr. App.) 145 S. W. 918.

A bill of exceptions, in the absence of a statement of facts, must show on its face that it contains all the evidence in the trial as to the matter complained of, or there is nothing to review. *Williams v. State* (Cr. App.) 150 S. W. 185.

A bill of exceptions complaining of the insufficiency of the evidence to sustain the verdict cannot be considered, where the evidence is not in the record. *Williams v. State* (Cr. App.) 150 S. W. 185.

The Supreme Court will not consider bills of exceptions not prepared in accordance with the rules, and which do not set out the proceedings below sufficiently to show whether there is error, nor within themselves disclose all that is necessary to manifest error. *Harrison v. State* (Cr. App.) 153 S. W. 139.

Where a bill of exceptions, complaining of the court's refusal to require the state's counsel to let defendant's counsel have a paper to which he referred while examining a witness, did not disclose what the paper was, nothing was presented for review. *Flores v. State*, 72 App. 232, 162 S. W. 833.

On appeal the legal presumption is that the court ruled correctly, and to have the refusal of a severance reviewed, the bill must state matters as to arrest, trial, and continuance which would show error in the ruling. *Zweig v. State* (Cr. App.) 171 S. W. 747.

Inferences will not be indulged to supply omissions in a bill of exceptions, nor will the court on appeal supply omissions, nor aid the bill by inferences or presumptions. *Galan v. State* (Cr. App.) 177 S. W. 124.

Objections not affirmatively mentioned in a bill of exceptions are deemed to have been waived. *Galan v. State* (Cr. App.) 177 S. W. 124.

22. — **Excuses for defects.**—It is no excuse for the insufficiency of bills of exceptions to show that they were prepared by one not an attorney, owing to the illness of accused's counsel. *Harris v. State* (Cr. App.) 148 S. W. 1074.

23. — **Rulings relating to indictment or information.**—The record disclosed that defendant was present and contested the entry of an order allowing the state to substitute an information for the one which had been lost and the bill of exceptions did not recite that defendant was not served with notice of the motion for the entry of order. A motion in arrest of judgment recited that defendant had not been served with process for this order. Held that, in the absence of a bill of exceptions showing that fact, the matter will not be reviewed. *Banks v. State*, 62 App. 552, 138 S. W. 406.

A bill of exceptions, which shows that accused announced that he was not ready to go to trial, because he had not been served for at least one full day with a properly certified copy of the indictment, and that the court ordered him to trial, to which he excepted, does not show as a fact that he had not been properly served with the indictment, and the court on appeal must assume that the trial court found, as a matter of fact, that accused had been properly served, in view of the fact that the indictment was returned and filed November 6th, and the case was not called for trial until November 14th following. *Washington v. State* (Cr. App.) 147 S. W. 276.

Where the court, in approving the bill of exceptions complaining of the denial of a motion to require the state to indorse on the indictment the names of all its witnesses, stated that the indictment contained the indorsement of witnesses who were all of the main witnesses, the bill presented no error. *Byrd v. State* (Cr. App.) 151 S. W. 1068.

While an order permitting an amendment to the information should be entered of record and copied in the transcript, a showing in the bill of exceptions that permission was granted by the court to make such amendment is sufficient evidence of that fact. *Tulley v. State* (Cr. App.) 178 S. W. 364.

24. — **Rulings respecting jurors.**—To entitle defendant to a reversal because of the false answer of a juror on his voir dire the bill of exceptions must show the examination of the juror. *Shaw v. State*, 27 Tex. 750.

Where the bill of exceptions fails to show that jurors challenged by defendant sat on the jury that tried him, or that he had exhausted his peremptory challenges, and an objectionable juror was forced upon him, the overruling of such challenges is not cause for reversal. *Kramer v. State*, 34 App. 84, 29 S. W. 158.

A bill of exceptions to the court refusing to sustain challenges to jurors for cause must show that the juror sat on the trial and that defendant's peremptory challenges were exhausted. *Segars v. State*, 35 App. 45, 31 S. W. 370.

A bill of exceptions to the action of the court in refusing to excuse a juror who had talked with a witness in the case, should show what witness such juror talked with and what such witness testified to, in order to ascertain whether or not such witness was material. *Wade v. State*, 35 App. 170, 32 S. W. 772, 60 Am. St. Rep. 31.

A bill of exceptions to disqualified jurors must show that such jurors sat in the case and show the facts disqualifying them. *Jones v. State*, 37 App. 433, 35 S. W. 975; *Jordan v. State*, 37 App. 224, 33 S. W. 780, 39 S. W. 111.

A bill of exceptions reserved to the qualification of a juror who on voir dire examination states that he has formed an opinion as to the guilt or innocence of defendant, should state the answer of the juror or the facts or information upon which he based his opinion, or the reason why the judge held the juror qualified. *Sawyer v. State*, 39 App. 557, 47 S. W. 650.

Bill of exception complaining of disqualified juror should show that party's challenges were exhausted. *Taylor v. State* (Cr. App.) 56 S. W. 753.

A bill of exceptions to the rulings of the court on questions to jurors touching their qualifications cannot be considered on appeal, where the record fails to show that the jurors questioned sat during the trial of the case, or that accused was required to exhaust peremptory challenges upon them. *Canon v. State*, 59 App. 398, 128 S. W. 141.

Where the bill of exceptions as qualified and approved, and accepted by appellant, showed that no objection was taken to a juror on his voir dire, and that no showing was made which would disqualify him, a conviction will not be reversed because of recitals in the bill before it was qualified, which would disqualify such juror. *Williams v. State*, 60 App. 453, 132 S. W. 345.

A bill of exceptions to the exclusion of certain questions in the examination of veniremen, which does not recite what the expected answers were, will not be considered on appeal. *Caton v. State* (Cr. App.) 147 S. W. 590.

Where it did not appear that the jury or any one of them were not competent, fair, and impartial, the refusal of the court to permit counsel for accused to ask certain questions of the jury was not error; the expected answers not being incorporated in the bill. *Stevens v. State* (Cr. App.) 150 S. W. 944.

A bill of exception recited that on voir dire 36 or more men were examined for jury service, and challenges for cause were made and sustained until only 24 men remained, and the court thereupon directed the challenge to be made from the list of 24 men, to which defendant objected and requested a full panel, which objection is overruled, and that on the challenges the state struck 6 men and the defendant 8, and the first 12 remaining were impaneled to serve as the jury, to all of which defendant then and there excepted. Held, that the bill of exceptions did not authorize review of the alleged error. *Luttrell v. State*, 70 App. 183, 157 S. W. 157.

A bill of exceptions complaining of the overruling of accused's challenge to a juror presents no error, where it was not shown that this juror served, or any other objectionable juror served. *Poulter v. State*, 70 App. 197, 157 S. W. 166.

A bill of exceptions, showing that defendant objected to the court excusing jurors and instructing the sheriff to summon others, but not showing that the

court acted improperly in excusing the jurors, presents no error. *Miller v. State* (Cr. App.) 169 S. W. 1164.

Where the bill of exceptions did not show what the answers of the jurymen would have been, accused cannot complain that the court excluded questions as to whether they were members of the Masonic order and whether the fact that the prosecuting witness was also a member influenced them in reaching their verdict. *Yelton v. State* (Cr. App.) 170 S. W. 318.

That jurors had read a newspaper account of the case, made a ground of motion for new trial, should, for purpose of appeal, be verified by bill of exception. *Jones v. State* (Cr. App.) 177 S. W. 971.

The denial of a motion for new trial, sought on account of the misconduct of the jury, cannot be reviewed, where the affidavits were not included in the bill of exceptions. *Grimes v. State* (Cr. App.) 178 S. W. 523.

25. — **Denial of continuance or postponement.**—In the absence of the application for continuance on the ground of the absence of witnesses, the bill of exceptions stating that accused issued a subpoena for the witnesses, without showing that he complied with the law other than the statement that he had issued process, and without alleging that the witnesses were not absent by the procurement or consent of accused, or that the application was not made for delay, is too indefinite to require consideration on appeal. *Clark v. State*, 57 App. 649, 124 S. W. 622.

Where defendant's bill of exceptions shows a motion for a continuance to secure a witness, but does not disclose what the defendant desired to prove by the witness, the bill of exceptions presents no ground of review. *Davis v. State*, 60 App. 620, 132 S. W. 932.

A motion by accused for a continuance to procure witnesses was properly overruled where the bill of exceptions showed no diligence to procure the witnesses, stated no reason for their absence, failed to show their residence, and merely stated that accused applied to the clerk for subpoenas which were issued, but had not been returned for want of time. *Black v. State* (Cr. App.) 143 S. W. 932.

Where the bill of exceptions to the refusal of a continuance stated that an absent witness would testify as to defendant's whereabouts on a specific day, while the indictment fixed the date of the offense as on or about that day, and the statute authorized a conviction if the offense was committed on any date within one year prior to the filing of the indictment, the reviewing court could not say that it was error to refuse the continuance; it being presumed, since the bill of exceptions did not affirmatively show the materiality of the testimony of the witness, that the ruling of the trial court was correct. *Clardy v. State* (Cr. App.) 147 S. W. 568.

A bill of exceptions did not show any error which stated that 30 or 40 minutes after accused's announcement as ready for trial he moved to postpone, claiming that he had not been served with a true copy of the indictment, and that the motion was overruled because the copy served was sufficient to apprise accused of the nature of the accusation, and that accused accepted said copy and summoned his witnesses and appeared and asked for a postponement because of absent witnesses but afterwards stated that his witnesses were all present and he was ready, whereupon the motion to postpone was overruled as coming too late. *Dennis v. State*, 71 App. 162, 158 S. W. 1008.

Denial of a continuance is not reviewable on appeal where the application therefor is not copied in the bill of exceptions in the record complaining of the denial. *Betts v. State*, 71 App. 204, 159 S. W. 1069.

A ground for new trial, consisting of an exception to the court's refusal to suspend the trial until an absent witness could be brought into court, could not be reviewed, where no facts were stated in connection therewith, and there was no bill of exceptions verifying the matter in the record. *Clay v. State* (Cr. App.) 170 S. W. 743.

A bill of exceptions merely stating that appellant's motion for a continuance was overruled and that he was forced to trial, in the absence of a material witness, not copying the motion or stating what his witness would testify, or the diligence used to procure him, or the reason why he had not been served, presented no question on appeal. *Keets v. State* (Cr. App.) 175 S. W. 149.

26. — **Putting witnesses under the rule.**—Where the court qualified defendant's bill complaining that some of the state's witnesses were in sight and hearing of the witness testifying, although the rule had been invoked by stating that the witnesses were out of sight and hearing of the witness on the stand, error was not presented. *Shaffer v. State* (Cr. App.) 151 S. W. 1061.

A bill of exceptions complaining of the refusal of the trial court to put some of the prosecuting witnesses under the rule presents no error, where it does not show what such witnesses testified to. *Smith v. State*, 70 App. 63, 156 S. W. 645.

27. — **Misconduct of court.**—A bill of exceptions to the remark of the court should show what remark was made and what the evidence was about which the remark was made. *Chalk v. State*, 35 App. 116, 32 S. W. 534.

Where error is predicated on an alleged improper examination of a witness by the court, the bill of exceptions must show what testimony was elicited by him. *Harris v. State*, 37 App. 441, 36 S. W. 88.

A bill of exceptions, complaining of a remark of the court that a witness for accused and a woman had run away together, made to the clerk in overruling an application for a continuance, is without merit, in the absence of an affidavit that the remark was heard by the jury and affected their verdict. *Gipson v. State*, 58 App. 403, 126 S. W. 267.

A bill of exceptions to a remark of the trial judge is insufficient, where it merely states that an objection was made, without showing the ground thereof. *Newton v. State* (Cr. App.) 143 S. W. 638.

A bill of exceptions, complaining of a remark of the trial judge on an application for a continuance that he also wanted the absent witness present in order to pred-

icate an indictment for perjury on the motion for the continuance, did not show error, where it appeared that no jury had been impaneled, and it was not shown that any juror who served heard the remark, or was objected to on that ground. *Pierce v. State* (Cr. App.) 154 S. W. 559.

A bill of exceptions alleging that improper remarks were made by the court in the presence of the jury, qualified by the court, stating that the remarks were not made in the hearing of the jury, shows no error prejudicial to defendant. *Creale v. State*, 71 App. 9, 158 S. W. 268.

Where a bill of exceptions, complaining of a remark of the court that testimony was proper to impeach a witness of accused, was qualified by the court's explanation, disclosing that accused objected to the testimony on the ground of irrelevancy, and insisted on knowing the rule under which the evidence could be admitted, the bill as modified presented no error. *Tores v. State* (Cr. App.) 166 S. W. 523.

The bill of exceptions shows that the judge lost control of the trial, constituting reversible error in felony cases, it showing that during the prosecuting attorney's opening address, in which he used fervent and violent language, the judge was in another room, talking, and could not hear what was taking place in the courtroom, and that defendant's counsel, desiring to take an exception, had to go out for the judge, and also reciting that the judge lost control of the trial. *Howard v. State* (Cr. App.) 178 S. W. 506.

28. — **Misconduct of prosecuting attorney.**—Where a bill of exceptions alleging error in a remark of the district attorney in his closing argument did not show the attitude of the case in such a way as to indicate whether the language complained of could have injuriously affected accused, and no written charge was requested that the remarks be not considered, it did not show error. *Ellis v. State* (Cr. App.) 154 S. W. 1010; *Clayton v. State* (Cr. App.) 149 S. W. 119; *Ward v. State* (Cr. App.) 151 S. W. 1073; *Walls v. State* (Cr. App.) 153 S. W. 130; *Stewart v. State*, 71 App. 237, 158 S. W. 996; *Hearne v. State*, 73 App. 390, 165 S. W. 596; *Hunter v. State*, 73 App. 459, 166 S. W. 164.

A bill of exceptions, complaining of the action of the county attorney in reading statements while examining a witness and in asking the witness whether the statements were true, will not be considered, where it fails to show what the statements were, and the circumstances under which the statements were made. *Ligon v. State*, 59 App. 274, 128 S. W. 620.

The bill of exceptions in a homicide case stated that the court was writing its charge and did not hear an alleged improper remark by the state's attorney in argument, if made by him, and that accused's counsel never requested to have the statement withdrawn and first called the court's attention to it in the motion for new trial. Held, that the bill of exceptions did not certify that the alleged improper statement was made. *Lane v. State*, 59 App. 595, 129 S. W. 353.

In absence of a certificate in a bill of exceptions showing that an alleged improper argument was in fact made by the state's attorney, the Court of Criminal Appeals cannot reverse for such argument. *Lane v. State*, 59 App. 595, 129 S. W. 353.

Where the court sustained objections to improper questions asked accused on cross-examination, and the questions were not answered, and at the request of accused's counsel the court admonished the district attorney not to ask such questions again, and he complied, the conduct of the district attorney was not ground for reversal, and to justify a reversal the bill of exceptions must show that there were answers to the questions and that the answers were injurious to accused. *Huggins v. State*, 60 App. 214, 131 S. W. 596.

A ground of objection to remarks of the assistant county attorney in his argument to the jury, as to the beating of deceased by defendant, the Saturday night before the murder, does not present any reason for reversal where the ground of objection is not verified as a fact and is insufficient to be treated as a statement of fact, and the judge immediately instructed the jury not to consider the remarks. *Alexander v. State*, 61 App. 31, 133 S. W. 436.

An objection in the bill of exceptions to opening remarks of the assistant county attorney in his argument to the jury, alleged to be without evidence on which to base them, as to the act of defendant in beating decedent the Saturday night before the murder, cannot be treated as a statement of the fact, and the statement of the court that "the above is approved with the understanding that the judge immediately instructed the jury not to consider the above remarks" does not verify the ground of objection as a fact. *Alexander v. State*, 61 App. 31, 133 S. W. 436.

Improper arguments by the county attorney cannot be relied on on appeal, where there was no bill of exceptions showing that such language was used by him, the only bill of exceptions showing requested instructions that the jury should ignore certain alleged remarks. *Holland v. State*, 61 App. 201, 134 S. W. 693.

A bill of exceptions complaining of improper argument as not being within the record is insufficient, where it fails to show the testimony introduced at trial, even though reference be made to the statement of facts without showing what the statement shows on the subject. *Whitehead v. State*, 61 App. 558, 137 S. W. 356.

A bill of exceptions, complaining that the argument of the county attorney on the defendant's contention that there was a conspiracy against him, was improper, but failing to show within itself the facts of the case and the testimony of the witnesses, or that the defendant had requested in writing that the court charge the jury to disregard these statements, is insufficient. *Whitehead v. State*, 61 App. 558, 137 S. W. 356.

Bills of exceptions based on improper argument of counsel should show a sufficient statement of the evidence, and the argument used so that the court can tell therefrom whether the argument was of such a character as to require a reversal. *Conger v. State*, 63 App. 312, 140 S. W. 1112.

A bill of exceptions to parts of the closing argument of the state's attorney, showing objections to different parts, some not ruled on and some sustained, and here and there in brackets simply the word "exception," and no request for any charge to disregard any parts of the speech, is insufficient to show error. *Harris v. State*, 64 App. 594, 144 S. W. 232.

On appeal from a conviction, the court will not review objections to remarks of the county attorney, where the bill of exceptions does not show just what occurred, or any error, and the record does not show that appellant requested any instruction to disregard the remarks complained of. *Gamble v. State* (Cr. App.) 146 S. W. 551.

Where bills of exceptions complaining of the remarks of the county attorney in his argument did not explain the circumstances under which the remarks were made or show what the record contained so that the court could determine whether they were improper, and showed that the court, at the request of accused, specially charged the jury not to consider the remarks, the record did not show that the remarks were grounds for reversal. *O'Neal v. State* (Cr. App.) 146 S. W. 938.

Where a bill of exceptions stated that the prosecuting attorney asked a witness if he did not know he was lying but did not show the connection in which the question was asked or that the witness testified to any material fact, it failed to show that the remark was harmful to the defendant. *Cooper v. State* (Cr. App.) 147 S. W. 273.

A bill of exceptions showing that the only thing that occurred in the absence of the judge was a disagreement as to whether the state's attorney's argument was within the record, without showing whether defendant had testified as the state's attorney stated or not, was defective. *Hughes v. State* (Cr. App.) 149 S. W. 173.

A bill of exceptions, reciting that the state permitted a witness to testify that a brother of defendant had quit his wife for a certain other woman, to which defendant had excepted on the ground of its irrelevancy and tendency to prejudice the jury, and that if admissible at all it was only for the purpose of impeaching the named woman; and a bill reciting that counsel for the state in closing said that such woman was the paramour of defendant's brother—were insufficient. *King v. State* (Cr. App.) 152 S. W. 629.

The bill of exceptions to remarks of the prosecuting attorney in argument, showing that the court sustained defendant's objections thereto and orally told the jury not to consider them, and not showing the surrounding circumstances, does not show prejudicial error. *Collins v. State* (Cr. App.) 152 S. W. 1047.

The refusal of a requested charge, alleging certain remarks to have been made by the prosecuting attorney, cannot be reviewed in the absence of bills of exceptions verifying the fact that such language was used; the charge alone not doing so. *Law v. State*, 73 App. 5, 163 S. W. 90.

Where there was no exception showing that the state's counsel made remarks in regard to which special charges were asked, the fact that such remarks were made was not verified so as to bring the matter before the court for review. *Tores v. State* (Cr. App.) 166 S. W. 523.

Where the court, in approving a bill of exceptions to alleged misconduct of the private prosecutor in argument in stating that because another jury had failed to do their duty by only giving accused 10 years in the pen was no reason why the present jury should render such a verdict, stated that the argument was in reply to argument of accused's counsel, without stating what such argument was, a bystander's bill, reciting the language used by the private prosecutor, but making no reference to the court's modification, or stating what argument had been used by accused's counsel, was unavailable. *Eads v. State* (Cr. App.) 170 S. W. 145.

A bill of exceptions recited that the district attorney in the presence of the jury stated that he was willing for the jury to take with them a map drawn by a state's witness and admitted to be incorrect, and which had not been admitted in evidence; that accused objected to the statement of the district attorney as prejudicial and calculated to cause the jury to believe that he did not want them to have the map because it might bear witness or give evidence against him. Held, that the bill was insufficient to properly present the matter for review. *Galan v. State* (Cr. App.) 177 S. W. 124.

29. — Rulings on evidence.—See Willson's Cr. Forms, 938, 939.

A bill of exception to the exclusion of evidence must set forth the evidence offered and the objections made thereto, and such facts as may be necessary to disclose its relevancy, materiality and competency, or the questions sought to be presented by it will not be considered. Inferences will not be indulged to supply the omission of essential statements in a bill of exceptions. *Buchanan v. State*, 24 App. 195, 5 S. W. 847; *Walker v. State*, 19 App. 176; *Counts v. State*, 19 App. 450; *Sutton v. State*, 16 App. 490; *Luttrell v. State*, 14 App. 147; *Walker v. State*, 9 App. 200; *Livar v. State*, 26 App. 115, 9 S. W. 552; *May v. State*, 25 App. 114, 7 S. W. 588; *Henning v. State*, 24 App. 315, 6 S. W. 137; *Guajardo v. State*, 24 App. 603, 7 S. W. 331; *Jacobs v. State*, 28 App. 79, 12 S. W. 408; *Jackson v. State*, 28 App. 143, 12 S. W. 701; *Walker v. State*, 28 App. 503, 13 S. W. 860; *Graham v. State*, 28 App. 582, 13 S. W. 1010; *Leeper v. State*, 29 App. 64, 14 S. W. 398; *Quintana v. State*, 29 App. 401, 16 S. W. 258, 25 Am. St. Rep. 730; *Tweedle v. State*, 29 App. 586, 16 S. W. 544; *Hooper v. State*, 29 App. 616, 16 S. W. 655; *Pruitt v. State*, 30 App. 156, 16 S. W. 773; *Rahm v. State*, 30 App. 310, 17 S. W. 416, 28 Am. St. Rep. 911; *Brotherton v. State*, 30 App. 369, 17 S. W. 932; *Sims v. State*, 30 App. 605, 18 S. W. 410; *Shoenfeldt v. State*, 30 App. 695, 18 S. W. 640; *Wilkerson v. State*, 31 App. 86, 19 S. W. 903; *Walker v. State*, 33 App. 359, 26 S. W. 507; *Turner v. State*, 33 App. 103, 25 S. W. 635; *Gonzales v. State*, 32 App. 611, 25 S. W. 781; *White v. State*, 32 App. 625, 25 S. W. 784; *Childers v. State*, 37 App. 392, 35 S. W. 654; *Mallory*

v. State, 37 App. 482, 36 S. W. 751, 66 Am. St. Rep. 808; *Matthews v. State* (Cr. App.) 38 S. W. 790; *Bailey v. State*, 37 App. 579, 40 S. W. 281; *Gass v. State* (Cr. App.) 56 S. W. 74; *Ford v. State* (Cr. App.) 56 S. W. 338; *Spears v. State*, 41 App. 527, 56 S. W. 348; *Wesley v. State*, 57 App. 277, 122 S. W. 550; *Matthews v. State*, 57 App. 337, 123 S. W. 127; *Deckard v. State*, 57 App. 359, 123 S. W. 417; *Eckermann v. State*, 57 App. 287, 123 S. W. 424; *Chancey v. State*, 58 App. 54, 124 S. W. 426; *Pollard v. State*, 58 App. 299, 125 S. W. 390; *Gay v. State*, 58 App. 472, 125 S. W. 896; *Woodward v. State*, 58 App. 412, 126 S. W. 271; *Boykin v. State*, 59 App. 267, 128 S. W. 382; *Edgar v. State*, 59 App. 491, 129 S. W. 141; *Coffey v. State*, 60 App. 713, 131 S. W. 216; *Trinkle v. State*, 60 App. 187, 131 S. W. 583; *Dulin v. State*, 60 App. 376, 131 S. W. 1105; *Porter v. State*, 60 App. 588, 132 S. W. 935; *Leggett v. State*, 62 App. 99, 136 S. W. 784; *Whitehead v. State*, 61 App. 553, 137 S. W. 356; *Smith v. State*, 63 App. 183, 140 S. W. 1096; *Perry v. State*, 63 App. 637, 141 S. W. 209; *Earle v. State*, 64 App. 537, 142 S. W. 1181; *Foote v. State* (Cr. App.) 144 S. W. 275; *Ward v. State* (Cr. App.) 146 S. W. 931; *Sheppard v. State* (Cr. App.) 148 S. W. 314; *Clark v. State* (Cr. App.) 148 S. W. 801; *Collins v. State* (Cr. App.) 148 S. W. 1065; *Harris v. State* (Cr. App.) 148 S. W. 1074; *Kelly v. State* (Cr. App.) 149 S. W. 110; *Bigliben v. State* (Cr. App.) 151 S. W. 1044; *Shaffer v. State* (Cr. App.) 151 S. W. 1061; *Fletcher v. State* (Cr. App.) 153 S. W. 1134; *Luttrell v. State*, 70 App. 183, 157 S. W. 157; *Oliver v. State*, 70 App. 140, 159 S. W. 235; *Stevens v. State*, 70 App. 565, 159 S. W. 505; *Wilson v. State*, 71 App. 426, 160 S. W. 967; *Girtman v. State*, 73 App. 158, 164 S. W. 1008; *Harris v. State* (Cr. App.) 167 S. W. 43; *Echols v. State* (Cr. App.) 170 S. W. 786; *Edwards v. State* (Cr. App.) 172 S. W. 227; *Vandever v. State* (Cr. App.) 173 S. W. 1197; *Grimes v. State* (Cr. App.) 178 S. W. 523.

A bill of exceptions, complaining of the admission of certain testimony, cannot be considered, where it does not show what the testimony was or that it was admitted. *Parker v. State*, 63 App. 464, 140 S. W. 537; *Simms v. State*, 32 App. 277, 22 S. W. 876; *Burge v. State*, 32 App. 359, 23 S. W. 692; *Hutcherson v. State* (Cr. App.) 35 S. W. 875; *McIver v. State*, 37 S. W. 745; *Chapman v. State*, 37 App. 167, 39 S. W. 113; *Fletcher v. State*, 37 App. 193, 39 S. W. 116; *Bryson v. State* (Cr. App.) 39 S. W. 365; *Deckard v. State*, 57 App. 359, 123 S. W. 417; *Joy v. State*, 57 App. 93, 123 S. W. 584; *Wilson v. State*, 58 App. 596, 127 S. W. 548; *Hernandez v. State*, 60 App. 30, 129 S. W. 1109; *Chance v. State*, 63 App. 602, 141 S. W. 113; *Roberts v. State*, 64 App. 135, 141 S. W. 235; *Ryan v. State*, 64 App. 628, 142 S. W. 878; *Moore v. State* (Cr. App.) 144 S. W. 588; *Williams v. State* (Cr. App.) 144 S. W. 612; *Pettis v. State* (Cr. App.) 150 S. W. 790; *Stevens v. State* (Cr. App.) 150 S. W. 944; *Black v. State* (Cr. App.) 151 S. W. 1053; *Shaffer v. State* (Cr. App.) 151 S. W. 1061; *Johnson v. State* (Cr. App.) 153 S. W. 875; *Martinez v. State* (Cr. App.) 153 S. W. 886; *Ellis v. State* (Cr. App.) 154 S. W. 1010; *Coker v. State*, 71 App. 504, 160 S. W. 366; *Gant v. State* (Cr. App.) 165 S. W. 142.

A bill of exceptions to the admission of evidence, which fails to state facts from which the court of appeals can determine whether the question objected to was improper or injurious, is insufficient. *Clayton v. State* (Cr. App.) 149 S. W. 119; *Floyd v. State* (Cr. App.) 35 S. W. 969; *Maynard v. State* (Cr. App.) 39 S. W. 667; *Todd v. State*, 57 App. 15, 121 S. W. 506; *Milo v. State*, 59 App. 196, 127 S. W. 1025; *James v. State*, 63 App. 75, 138 S. W. 612; *Lacy v. State*, 63 App. 189, 140 S. W. 461; *Jones v. State*, 63 App. 394, 141 S. W. 953; *Ryan v. State*, 64 App. 628, 142 S. W. 878; *Moore v. State* (Cr. App.) 144 S. W. 598; *Trimble v. State* (Cr. App.) 145 S. W. 929; *Ortiz v. State* (Cr. App.) 151 S. W. 1056; *Hughes v. State* (Cr. App.) 152 S. W. 912; *Hart v. State* (Cr. App.) 154 S. W. 553; *Holmes v. State*, 70 App. 423, 157 S. W. 487; *Pinkerton v. State*, 71 App. 195, 160 S. W. 87; *Best v. State*, 72 App. 201, 164 S. W. 997; *Lopez v. State*, 73 App. 624, 166 S. W. 154; *Willis v. State* (Cr. App.) 167 S. W. 352; *Womack v. State* (Cr. App.) 170 S. W. 139; *Prata v. State* (Cr. App.) 172 S. W. 974.

A bill of exceptions to the admission of evidence, which does not show the ground of objection stated or that an objection was duly made, presents no question for review. *Bowen v. State*, 72 App. 404, 162 S. W. 1146; *Gilleland v. State*, 24 App. 524, 7 S. W. 241; *Davis v. State*, 14 App. 645; *Walker v. State*, 9 App. 200; *Ballinger v. State*, 11 App. 323; *Gaitan v. State*, Id. 544; *Wright v. State*, 10 App. 476; *Conner v. State*, 17 App. 1; *Logan v. State*, Id. 50; *Bryant v. State*, 18 App. 107; *Lewis v. State*, 15 App. 647; *Hughes v. State*, 27 App. 127, 11 S. W. 34; *Miller v. State*, 36 App. 47, 35 S. W. 391; *Fletcher v. State*, 37 App. 193, 39 S. W. 116; *Yawn v. State*, 37 App. 205, 38 S. W. 785, 39 S. W. 105; *Kalsky v. State*, 37 App. 247, 39 S. W. 362; *Pitner v. State*, 37 App. 268, 39 S. W. 662; *Barry v. State*, 37 App. 302, 39 S. W. 692; *Wade v. State*, 37 App. 401, 35 S. W. 663; *Bailey v. State*, 37 App. 579, 40 S. W. 231; *McGlasson v. State*, 38 App. 351, 43 S. W. 93; *Rodes v. State*, 38 App. 328, 42 S. W. 990; *Witherspoon v. State*, 39 App. 65, 44 S. W. 164, 1096; *Lindsay v. State*, 39 App. 468, 46 S. W. 1045; *Harrell v. State*, 39 App. 204, 45 S. W. 581; *Fluwellian v. State*, 59 App. 334, 128 S. W. 621; *Hunter v. State*, 59 App. 439, 129 S. W. 125; *Ross v. State*, 61 App. 12, 133 S. W. 688; *Adams v. State*, 64 App. 61, 141 S. W. 527; *Newton v. State* (Cr. App.) 143 S. W. 638; *Ward v. State* (Cr. App.) 146 S. W. 931; *Cooper v. State* (Cr. App.) 148 S. W. 1093.

Where, in a criminal prosecution, a bill of exceptions merely sets out the evidence and states that the same was immaterial, it is too general to require its consideration on appeal. *Jones v. State* (Cr. App.) 144 S. W. 252; *Barfield v. State*, 41 App. 19, 51 S. W. 908; *Fifer v. State*, 64 App. 203, 141 S. W. 989.

The bill must show not only that the confession was offered, but that it was admitted, and it must set out the confession as introduced. *Stroube v. State*, 40 App. 583, 51 S. W. 357.

A bill of exceptions to the admission of evidence must show that the evidence was admitted and that it was, at the time, objected to by defendant. *Holder v. State*, 35 App. 19, 29 S. W. 793.

A bill of exceptions to the opinion of a witness should show that the witness was not an expert. *Isaacs v. State*, 36 App. 505, 38 S. W. 40.

Bill of exceptions for error in questioning defendant should show his answer. *Kalsky v. State*, 37 App. 247, 39 S. W. 362.

A bill of exceptions which shows that defendant was taken to a saloon, shown a watch and asked if he had let a third party have the watch, and stated that he had not, the bill in no way attempts to connect the watch with the one taken from the burglarized house; held, too indefinite to demand consideration. *Moore v. State*, 39 App. 266, 45 S. W. 809.

A bill of exceptions to confessions made while under arrest must set out the confessions and statements made. *Dement v. State*, 39 App. 271, 45 S. W. 917.

The term "incompetent and irrelevant" is without meaning, when used alone in bill of exceptions objecting to evidence, and such a bill will not be considered. *Pangburn v. State* (Cr. App.) 56 S. W. 72.

Where the bill of exceptions, complaining of the court's action in permitting the state to prove accused's testimony on the examining trial over accused's objection that he was under arrest at the time and was not warned, did not show whether the testimony was taken in the examining trial, or whether it was a statement made by accused after due warning, it would be presumed that the court ruled correctly, and that it was the sworn testimony of accused that was offered in evidence and hence admissible, though accused was under arrest and no warning was given. *Kirkpatrick v. State*, 57 App. 17, 121 S. W. 511.

Bills of exception setting out objections to testimony of accused's wife on cross-examination as not limited to a cross-examination of her direct testimony, but stating nothing to show that it was not so limited, cannot be considered. *Ferguson v. State*, 57 App. 205, 122 S. W. 551.

In a burglary prosecution, accused's bill of exceptions recited that the state offered a confession in evidence, to which accused objected, on the ground that the confession was not true in fact; that accused was not warned as provided by statute, but was compelled by force and violence to sign it, which confession was admitted in evidence. Held, that the exception to the admission of the confession was not sufficiently specific; not setting out the confession, and the grounds of objection not being verified as facts. *Malley v. State*, 58 App. 425, 123 S. W. 598.

A bill of exceptions, reciting that exceptions were taken to the exhibition of a hat to the jury on the ground that it had not been introduced in evidence, but not stating as a fact that the hat had not been introduced in evidence, with no certification to the truth of the exceptions taken, nor to the grounds of the exception, is insufficient. *Green v. State*, 58 App. 428, 126 S. W. 860.

Two cases were brought against accused for violation of the liquor laws, and both were submitted to the court. In the first case accused was found not guilty, and in the second case, was found guilty, and he urged on appeal that the court considered the evidence introduced in the first case in arriving at his conclusion in the second case, but the court in approving the bill of exceptions stated that he considered only the evidence introduced in the second case in deciding it. Held, that error was not shown. *McAdams v. State*, 59 App. 86, 126 S. W. 1156.

Where, in a prosecution for assault on a city marshal who had arrested accused's father, the bill of exceptions to the admission of evidence as to the facts and circumstances of the arrest stated as a ground of objection that accused was not present at the arrest, but it is not stated as a fact in the bill that accused was absent at the time of the arrest, the ground of the exception to the evidence cannot be considered. *Marsden v. State*, 59 App. 36, 126 S. W. 1160.

The bill of exceptions taken to leading questions should affirmatively show that the leading questions did not fall under any of the exceptions to the general rule excluding leading questions, and should exclude the idea that, under the peculiar circumstances, the court was justified in permitting leading questions. *Carter v. State*, 59 App. 73, 127 S. W. 215.

A bill of exceptions to the state's introduction of evidence to support the reputation for truth of a state's witness, on the theory that it was incompetent for the state to support its witness by evidence of general reputation, was insufficient, in the absence of a showing that the credibility of the witness had not been attacked. *Edgar v. State*, 59 App. 252, 127 S. W. 1053.

The assignment of error was in permitting a question whether witness stated to another that he left home because his father, accused, wanted to get him in difficulty, and in permitting such other to testify that witness made such statement; but the bill of exceptions did not go to the admissibility of such other's testimony. Held, that the assignment of error was broader than the bill of exceptions, and hence could not be considered. *Hunter v. State*, 59 App. 439, 129 S. W. 125.

In a prosecution for homicide, an objection to the testimony of a witness as to the act of accused in dragging the body of deceased after the shooting cannot be considered on appeal, where the testimony of such witness is not stated in the bill of exceptions, and the bill does not undertake to show what the witness testified to in regard to the dragging of the body. *Canon v. State*, 59 App. 398, 128 S. W. 141.

In a prosecution for homicide, a bill of exceptions recited that the state propounded to a witness the question "How did the defendant appear to look to you?" and that to this question appellant objected, and asked that the witness be required to tell what the defendant did and describe the expressions of his face, and any other thing that the defendant did, and let the jury say how that appeared. The ruling of the court on this bill was as follows: "Allowed and ordered filed, with the remark that the purpose of this evidence was to show that the defendant was excited, and such fact was elicited by the question. There was no other way to show it unless the question had been put in a leading shape, or nearly so." Held,

that the bill of exceptions was not sufficient to show that accused was prejudiced by the ruling of the court. *Canon v. State*, 59 App. 398, 128 S. W. 141.

The bill of exceptions recited that a certain statement, testified to as having been made by accused, was made some weeks before the homicide for which accused was tried, that accused was under arrest for carrying a pistol at the time, and was in justice court, and the pistol-carrying charge had been disposed of by his pleading guilty to a disturbance of the peace. Held, that the bill of exceptions showed that accused had been discharged from the pistol-carrying charge when the statement testified to was made. *Lana v. State*, 59 App. 595, 129 S. W. 353.

Memoranda headed "Defendant's Bills of Exceptions," subheaded "S. of F. p. 7 (Witness G.)," containing disconnected questions and answers, and showing objections to testimony, rulings thereon, and exceptions by such recitals, as, "Counsel for deft.: We object; question is leading. Objection overruled. Deft. exerts," are insufficient, and present nothing for review. *Ronquillo v. State*, 60 App. 27, 129 S. W. 838.

A ground of objection to the admission of evidence which amounts to the statement of a fact as the ground, and which is not verified by the bill of exceptions, cannot be considered. *Hernandez v. State*, 60 App. 30, 129 S. W. 1109.

A mere statement, as a ground of objection to proof of a conversation of a witness with a third person that accused was absent, is not equivalent to a finding that accused was not present, and a bill of exceptions complaining of the evidence must show as a fact that accused was not present. *Jones v. State*, 59 App. 559, 129 S. W. 1118.

A bill of exceptions, complaining of questions put to accused by the county attorney, which does not point out any error, and which fails to show accused's answers, if any, cannot be considered on appeal. *Ellis v. State*, 59 App. 630, 130 S. W. 171.

An exception to a question put to prosecutrix is not shown to have been well taken; it being impossible to say from the bill whether she had or had not already testified as she did in answer to such question. *Beeson v. State*, 60 App. 39, 130 S. W. 1006.

A witness was asked, in a homicide case, whether he knew of any accident that happened to accused, in which he got a lick on his head, and answered, "Well, I did not see the lick." There was no answer to the question. The bill of exceptions did not show what the answer would have been, or what other information the witness had regarding the matter. Held, that the bill of exceptions did not show the purported error, was incomplete, and would not be considered. *Coffey v. State*, 60 App. 73, 131 S. W. 216.

On a trial for homicide, the wife of accused, having been asked on cross-examination if she did not hear her husband curse accused, and having replied that he did not utter the words attributed to him, was asked on redirect examination whether her husband ever cursed, to which question accused objected unless he be permitted to contradict the anticipated answer. Held, that overruling the objection was not shown to be error, on a bill of exceptions not showing what the specific objection was, or that accused offered evidence that witness had heard her husband swear. *Bradley v. State*, 60 App. 398, 132 S. W. 484.

On appeal from a conviction of cattle theft, a bill of exceptions complaining of the admission of evidence of a witness that accused told him that he, accused, had killed the yearling, on the ground that his testimony was a confession while under arrest and in custody, and was not in compliance with the statute, was insufficient, where it did not show that at the time the statement was made, accused was under arrest and in custody, especially where qualified by the court with the statement that accused was not under arrest at the time. *Hinsley v. State*, 60 App. 565, 132 S. W. 779.

Where, on a trial for murder, no objection was interposed to the evidence that decedent left home about 6 o'clock in the morning of the day of the killing, and that when he left he went to perform specified work and carried a hammer with him, an objection to evidence relating to the time of his expected return on the ground that it was immaterial did not present an objection to the evidence reviewable on appeal. *Harrelson v. State*, 60 App. 534, 132 S. W. 783.

A bill of exceptions complaining of the admission of evidence on a trial for perjury committed by accused while testifying for a defendant in a civil action in justice's court, which recites that the justice testified that he was a justice and was familiar with the records in his court, that same were kept by him and in his possession but that he did not have the dockets with him, and that the court permitted the justice to testify as to the contents of certain records in a civil suit that had been pending in his court notwithstanding the objection of accused that the records were the best evidence, and which is approved with the explanation that the justice testified that there was such a civil action on his docket, that it was tried by him without a jury, and that accused appeared as a witness for defendant, and that the justice rendered judgment for defendant because of the testimony of accused, does not show within itself that any error was committed because it does not state what records were admitted in evidence, and because it does not negative the fact that matters essential to show jurisdiction of the justice were not in fact admitted. *Green v. State*, 60 App. 530, 132 S. W. 806.

The grounds of objection to the admission of evidence stated at the time of the making of the objection thereto should be incorporated in the bill of exceptions complaining of the admission of the evidence, and a mere statement, "to which ruling of the court in admitting the testimony defendant objects," is insufficient. *Ross v. State*, 61 App. 12, 133 S. W. 688.

A bill of exceptions to admission in evidence of a bullet removed from decedent's body insufficiently raises an objection that it did not appear that accused used a pistol shooting that kind of bullets, where the bill does not show that the evidence did not show he had such a pistol or was not the only person who shot. *Butler v. State*, 61 App. 133, 134 S. W. 230.

In a prosecution for keeping a disorderly house, a bill of exceptions to exclusion of testimony that witness had watched the house frequently, and had seen no one enter or leave and nothing improper, is insufficient to show error, where the time to which the testimony relates is not shown. *Thompson v. State*, 61 App. 250, 134 S. W. 350.

Admission of testimony of another offense was not reversible error where the bills of exceptions do not contain sufficient other testimony to show error, and it might have been admissible to prove motive. *Barrego v. State*, 61 App. 625, 136 S. W. 41.

Where the bill of exceptions does not state what the conversations were which are claimed to be hearsay, the question cannot be reviewed. *Wilson v. State*, 61 App. 628, 136 S. W. 447.

A bill of exceptions to the admission of evidence on cross-examination, which may have been legitimate for certain purposes, is unavailing, when so indefinite that it cannot be said therefrom whether admission of the evidence was erroneous, and how it was injurious. *Leggett v. State*, 62 App. 99, 136 S. W. 784.

Where a bill of exceptions fails to show the contents of an opinion and briefs read to the trial court in a criminal case, they cannot be held to be improper. *Germany v. State*, 62 App. 276, 137 S. W. 130, Ann. Cas. 1913C, 477.

A bill of exception complaining of the exclusion of evidence that several persons who signed accused's bail bond were jurors in a former trial of the same case, which was offered as corroborative evidence of the accused's good reputation, is insufficient when it does not show that the persons signing were jurors, or that accused's reputation had been attacked. *Whitehead v. State*, 61 App. 558, 137 S. W. 356.

A bill of exception complaining that the trial court refused to allow the defense to contradict the testimony of the prosecutrix that the defendant was the only person who ever had intercourse with her by proving that she had said that another had had intercourse with her cannot be considered, where it failed to show that she had testified that the defendant was the only person with whom she had ever had intercourse. *Whitehead v. State*, 61 App. 558, 137 S. W. 356.

Where certain evidence objected to was admitted on the promise of the county attorney to connect accused with it, and in qualifying the bill of exceptions the court stated that the testimony was connected not only with the statement made by accused, but by the testimony of another witness, it would be presumed on appeal that the court's modification stated the fact and that the testimony was connected, though the bill of exceptions did not show how the same had been made. *Henzen v. State*, 62 App. 336, 137 S. W. 1141.

An objection to testimony as being irrelevant and prejudicial is too general to be considered. *Wilson v. State*, 63 App. 81, 138 S. W. 409.

There being exceptions to the rule that, where the sale for which defendant is being tried has been made out positively and clearly, evidence of other sales is not admissible, the bill of exceptions to admission of evidence of other sales should exclude the circumstances under which it might be admissible. *James v. State*, 63 App. 75, 138 S. W. 612.

A bill of exceptions reciting that defendant made objection to any and all evidence introduced by the state of other sales than that for which he was being tried is insufficient for not showing by proper averments other and different sales were improperly admitted. *James v. State*, 63 App. 75, 138 S. W. 612.

The bill of exceptions reciting that defendant objected to the ruling sustaining an objection to his question to a witness, because the question, if truthfully answered, would have brought a certain answer, is insufficient because not setting out what the answer would have been. *James v. State*, 63 App. 75, 138 S. W. 612.

A bill of exceptions merely showing that on a prosecution for sale of liquor on a certain day of a certain month the state introduced evidence of a sale in that month, to which defendant objected because of no specific date being fixed, is insufficient, as not only generally may a date other than that specified be proved, if prior to presentment of the indictment, and within limitations, but subsequent evidence may have fixed the date of the sale testified to as that on which the state relied. *James v. State*, 63 App. 75, 138 S. W. 612.

Where a bill of exceptions to the admission of evidence of a minor, objected to on the ground that the witness did not know the pains and penalties of perjury, failed to show the testimony given by the witness, but merely recited that he was allowed to testify as to all the circumstances surrounding the killing, it was insufficient to authorize a review of the question on appeal. *Zunago v. State*, 63 App. 58, 138 S. W. 713, Ann. Cas. 1913D, 665.

Where the bill of exceptions complaining of the admission of testimony to impeach a witness for accused does not set forth the testimony of the witness, nor show that a proper predicate was not laid for the impeachment, nor that accused was not present at the time the witness made the statement proved by the impeaching witness, the bill does not show error in the admission of the testimony. *Hickey v. State*, 62 App. 568, 138 S. W. 1051.

Bills of exception to the admission of evidence are insufficient, where they fail to show the testimony in the case. *Webb v. State*, 63 App. 207, 140 S. W. 95.

A bill of exceptions on appeal from a conviction for a breach of the peace, which shows the admission of evidence to a certain effect and then sets out a statement from the witness' testimony, is insufficient, in that it does not inform the court as to what the other testimony was, so as to show whether or not the statement was admissible, and presents nothing for review. *Robertson v. State*, 63 App. 268, 140 S. W. 105.

To obtain review, a bill of exceptions, complaining of the erroneous admission of a confession, must contain the confession. *Johns v. State*, 63 App. 416, 140 S. W. 1093.

Where, in a prosecution for rape, defendant objected to the testimony of a certain physician as to the examination of the prosecutrix, because the examination

was too remote, a bill of exceptions, which failed to state when the examination was had, did not show error. *Smith v. State*, 63 App. 183, 140 S. W. 1096.

A bill of exceptions to the exclusion of a witness' opinion as to prosecutrix's age was insufficient, where it did not state the proof on the subject, so as to show whether or not, under any contingency, the witness' best judgment could have been given. *Smith v. State*, 63 App. 183, 140 S. W. 1096.

In a prosecution for rape, a bill of exceptions to the exclusion of the contents of a letter offered on the issue of prosecutrix's age held insufficient. *Smith v. State*, 63 App. 183, 140 S. W. 1096.

Bills of exceptions to the overruling of objections to questions asked defendant's witnesses on cross-examination are insufficient, where they fail to show what the proof in the case was so as to enable the appellate court to determine the question of admissibility. *Wright v. State*, 63 App. 429, 140 S. W. 1105.

Bills of exceptions to the exclusion of questions asking a witness whether he had not been convicted of certain misdemeanors, not involving moral turpitude, were insufficient, where they did not state that the witness would have sworn to such convictions, but, on the contrary, indicated that he might deny the same. *Wright v. State*, 63 App. 429, 140 S. W. 1105.

A bill of exceptions on appeal from a conviction for an assault with intent to commit rape, which recites that the prosecutrix testified as to whom she talked with first after the occurrence, that defendant's counsel, upon an objection, was permitted to ask questions of the witness as to that point, and that, after asking such questions, defendant objected to any proof of any complaint made by witness on the ground that it was not voluntarily made, but was in answer to questions asked by her friends, and was no part of the *res geste*, without a definite showing as to the voluntary character of the complaint, is not sufficient to require or authorize a review of the objection. *Conger v. State*, 63 App. 312, 140 S. W. 1112.

A bill of exceptions on appeal from a conviction for assault with intent to commit rape to the testimony of a witness that, when the prosecutrix made complaint to her and another, she was crying, is not sufficient to require consideration. *Conger v. State*, 63 App. 312, 140 S. W. 1112.

Bills of exceptions on appeal from a conviction for assault with intent to rape, which merely show the testimony of the prosecutrix, without showing that the witness was permitted to give the details of the assault or what she told the persons to whom she made complaint, and which, on objection to the testimony of the person to whom the complaint was made, do not set out the evidence of the witness, are insufficient. *Conger v. State*, 63 App. 312, 140 S. W. 1112.

A bill of exceptions on appeal from a conviction for assault with intent to commit rape which sets out testimony of the state as to the condition of the mind and appearance of the prosecuting witness when she went, after the ride, to her own home, without stating that defendant's counsel attempted to have her testify that she had been pleasant and agreeable to defendant after returning from the ride, does not sufficiently state the evidence to authorize consideration on appeal. *Conger v. State*, 63 App. 312, 140 S. W. 1112.

In a prosecution for rape, a bill of exceptions to the exclusion of testimony concerning a conversation between witness and prosecutrix to show the lewd character of the latter is insufficient, where it fails to show when the conversation occurred, or the circumstances thereof, and the conversation itself is not purported to be given. *Patterson v. State*, 63 App. 297, 140 S. W. 1128.

Where testimony introduced might be admissible for a certain purpose, a bill of exceptions which fails to negative the fact that it was admissible for that purpose, is incomplete and cannot be considered. *Chance v. State*, 63 App. 602, 141 S. W. 113.

A bill of exceptions must be complete in itself, and a court will not look to other parts of the record in order to determine whether testimony is admissible, so that, where testimony is introduced which would not be improper if followed by certain other testimony, a bill of exceptions, which fails to show whether the state's attorney followed up the matter, is incomplete, and the court will not review the exception thereto. *Chance v. State*, 63 App. 602, 141 S. W. 113.

In a prosecution for the theft of a yearling, a bill of exceptions, complaining that a witness was not permitted to testify that accused had told him that the yearling was the property of his principal, is defective, and presents no matter for review, where it fails to state that the yearling mentioned was the one which defendant is accused of stealing. *Roberts v. State*, 64 App. 135, 141 S. W. 235.

A bill of exceptions, complaining of the allowance of a question asked a witness as to whether he could state from the report of a gun and the position he occupied between decedent and accused the direction decedent fired the gun, is insufficient, where the court may infer that the witness was looking directly at decedent or any other state of facts which would enable the witness to testify positively from personal knowledge. *Fifer v. State*, 64 App. 203, 141 S. W. 989.

A bill of exceptions, complaining of the admission in evidence of papers in a civil suit which does not set out the papers or their substance, but which merely recites that they are irrelevant and calculated to prejudice the jury, is insufficient. *Fifer v. State*, 64 App. 203, 141 S. W. 989.

In a prosecution for forgery, a bill of exceptions to the admission of testimony, which merely set out the question and answer and noted the objection thereto, with the reason for the objection as presented in the trial court, was insufficient. *Howard v. State (Cr. App.)* 143 S. W. 178.

A bill of exceptions to the action of the court in a prosecution for forgery in refusing to allow a witness to answer as to whether he believed accused intended to defraud him, giving as a reason for the propriety of the answer which would have been elicited that the indictment charged "that the forgery was done to injure and defraud the defendant" (meaning the witness) is insufficient, where the indictment merely charged that the forgery was intended to "injure and defraud." *Howard v. State (Cr. App.)* 143 S. W. 178.

In a prosecution for forgery, a bill of exceptions to the introduction of checks in evidence, which merely observes that the defendant objected to their admission because they were not connected with and threw no light on the transaction, because the state's witness did not remember whether at the time the checks purported to have been given by his son he had forbade him to use his name, and because they were inadmissible as prejudicial to the rights of the defendant, is wholly insufficient to present any matter attempted to be raised. *Howard v. State* (Cr. App.) 143 S. W. 178.

A bill of exceptions to the introduction in evidence of "all of the filed papers in said cause, such as indictments, subpoenas, bonds, attachment," etc., on the ground that they were immaterial, but not containing a copy of any of the papers, does not show reversible error. *Black v. State* (Cr. App.) 143 S. W. 932.

The bill of exceptions in a prosecution for assault to kill recited error in permitting accused to be asked whether he and his wife were at the time living together as husband and wife, and whether he had not cursed, abused, and ran her from home, because such evidence was immaterial and irrelevant, and that it was error to permit the state to inquire into a matter between husband and wife in which the person assaulted was not interested, and because it appeared that, if accused and his wife were separated, they had separated long before accused's trouble with the person assaulted. Held that, in absence of a further showing in the bill as to the facts, it could not be said that the trial court erred in admitting the evidence; it being presumed that there was no error unless the bill shows it. *Black v. State* (Cr. App.) 143 S. W. 932.

A bill of exceptions which is not full and explicit so that matters attempted to be presented may be comprehended without recourse to inference, and does not show the state of the evidence so as to show whether the evidence objected to was admissible, is insufficient, as it cannot be aided by the statement of facts. *Harris v. State*, 64 App. 594, 144 S. W. 232.

A bill of exceptions in a murder case, which states merely that a witness for the state was asked if accused, her son, had not given her a beating of which she informed deceased, and the answer thereto, with the objection that it was immaterial, without showing any other evidence in the case, was insufficient to present the question raised by the objection. *Jones v. State* (Cr. App.) 144 S. W. 252.

Where, in a prosecution for murder, a bill of exceptions to the admission of testimony of the sister-in-law of the deceased and mother of the defendant, in answer to a question whether she had told the deceased of a beating which the defendant had given her, merely shows the question, the objection made to it and the answer, without any showing of the other evidence of the witness or others, and without any attempt to show how the testimony was prejudicial to the defendant, is insufficient to enable the court to determine whether the admission of the testimony was prejudicial. *Jones v. State* (Cr. App.) 144 S. W. 252.

A bill of exceptions on appeal from a criminal prosecution, which merely sets out a question and answer, with an objection that the question was leading, is insufficient to present the matter for review. *Jones v. State* (Cr. App.) 144 S. W. 252.

A bill of exceptions, complaining of the admission of testimony on cross-examination because involving a matter not brought out on the direct examination, which does not show the testimony on the direct examination, does not present reversible error. *Brown v. State* (Cr. App.) 144 S. W. 265.

A bill of exceptions to testimony of a grand juror showing certain testimony before the grand jury, but not who testified before the grand jury, is insufficient. *Moore v. State* (Cr. App.) 144 S. W. 598.

A bill of exceptions, on an appeal from a conviction for permitting a theatrical performance to be given on Sunday, which merely stated that a witness for the state, in describing a missionary scene shown at the performance, said, "And it was quite a nice little play," was not sufficient in its specification of error to the admission of evidence to require consideration. *Oliver v. State* (Cr. App.) 144 S. W. 605.

Where a bill of exceptions to the admission of certain evidence did not show in what connection it was introduced, but only that it was objected to on the ground that it was irrelevant and inadmissible because it indicated the commission of a misdemeanor by parties in no way connected with the offense and in a county where the court had no jurisdiction, etc., it was too indefinite to be considered, since the grounds of objection could not be considered as a statement of facts. *Graves v. State* (Cr. App.) 144 S. W. 961.

In a prosecution for the theft of cattle, a bill of exceptions, reciting that the state offered in evidence a brand of one M., recorded in the brand book of the county, whereupon defendant objected to its admission, because, when recorded, the law required the county clerk to designate the part of the animal on which it should be placed, and the record did not indicate where the animal should be branded, and that the record further disclosed that five brands were recorded at that time, when the law allowed a recordation of only one, and that the objections were overruled, to which action accused excepted, is fatally defective, not furnishing the court with all matters sufficient to pass on the question involved. *Baker v. State* (Cr. App.) 145 S. W. 607.

Where a judgment of conviction of the defendant of a similar offense was final on its face, and he objected to its admission in evidence upon the ground that there was no showing that it had not been appealed from or that a new trial had not been granted, it was incumbent on him to show by the bill of exceptions that there had been an appeal taken or a new trial granted in such former prosecution. *Gould v. State* (Cr. App.) 146 S. W. 172.

A bill of exceptions, complaining that accused's wife was cross-examined on matters not brought out by him on her direct examination, presents no question for review, where it does not show what was the wife's direct testimony. *Golden v. State* (Cr. App.) 146 S. W. 945.

In a prosecution for theft, one of the bills of exceptions showed that, while the prosecuting witness was being examined, he was asked whether he and his son were partners, or whether the goods stolen belonged to the witness individually, that defendant objected, on the ground that it called for the conclusion of a witness and was highly prejudicial to defendant's rights, and that the witness answered that the goods belonged to him individually, and not to him and his son. Another bill stated that the son was asked whether he and his father were partners, and whether it was not a fact that the witness had no interest in the stock from which the goods were taken, but that they belonged to the father individually, which was objected to for the same reasons as above; that the court overruled the objections. Held, that such bills were not sufficient to render intelligible the ruling excepted to. *Hatfield v. State* (Cr. App.) 147 S. W. 236.

In a prosecution for rape, where the indictment charged that it was by force, and also that the prosecutrix was an imbecile, a bill of exceptions to the admission of testimony as to the mental condition of the prosecutrix, after the prosecutrix had testified that she was forcibly ravished, and another as to her competency to testify, was insufficient to present any matter for review. *Hubbard v. State* (Cr. App.) 147 S. W. 260.

A bill of exceptions, which shows that, while the state was making out its case, it introduced witnesses to contradict the voluntary statement by accused on his examining trial, does not show error in the admission of such testimony, where it does not give the voluntary statement nor the testimony to contradict it. *Washington v. State* (Cr. App.) 147 S. W. 276.

A bill of exceptions, reciting that a shirt which deceased was wearing when killed was exhibited to the jury and offered in evidence, is insufficient to raise for review the admissibility of the shirt, where the bill does not recite that it was actually received in evidence. *Welch v. State* (Cr. App.) 147 S. W. 572.

A bill of exceptions on appeal from a conviction for robbery with firearms, which complains that the negative answers of the state's witness to the questions, "You did not give him the money willingly, did you?" and "He did not have your consent to take the money did he?" were inadmissible because leading, and which shows timely objection to such questions, is insufficient to show any error. *Green v. State* (Cr. App.) 147 S. W. 593.

A bill of exceptions on appeal from a conviction for robbery with firearms showed that a witness for the state was permitted to testify over defendant's objection that on the night of the alleged robbery he had a conversation with his brother, the person alleged to have been robbed, and that his brother had then told him that defendant had taken the money from him by threatening him with a pistol, which the trial judge, on approval, qualified by stating that defendant had called a witness who testified that on the night of the alleged robbery the state's witness told him that his brother had told him that he had been robbed by defendant in a game of cards, and wanted him to go and make defendant give the money back to his brother. Held, that the bill was insufficient. *Green v. State* (Cr. App.) 147 S. W. 593.

A bill of exceptions, on appeal from a conviction for the theft of cattle, showed an objection to evidence of a deputy sheriff that in ascertaining defendant's whereabouts he made search and inquiry and sent instructions to other police officers. Held, that as presented the bill showed no reversible error, since the court could not tell therefrom whether the evidence was admissible or not, or its effect on the case. *Gotcher v. State* (Cr. App.) 148 S. W. 574.

Where a bill of exceptions does not show whether the evidence complained of was permitted to go to the jury, it does not present error. *Williams v. State* (Cr. App.) 148 S. W. 763.

In a prosecution for cattle theft, a bill of exceptions, complaining of the admission of a brand on the ground that it was not the brand of the prosecuting witness, must be overruled, where the court approved the bill with qualifications and referred to the statement of facts for the evidence, wherein it appeared that the prosecuting witness had inherited the brand as the only heir of his father. *Dugat v. State* (Cr. App.) 148 S. W. 789.

A bill of exceptions to the overruling of an objection to a question is insufficient where it does not state the answer given. *Clark v. State* (Cr. App.) 148 S. W. 801.

In a prosecution for homicide, bills of exception to a refusal to strike out testimony that, after the first search of accused's trunk, a truss and an undershirt with blood on it were found, the searches taking place after accused was in prison, are insufficient to present any matter for review, not showing how the finding of those articles connected accused with the offense. *Harris v. State* (Cr. App.) 148 S. W. 1074.

In a prosecution for murder, a bill of exceptions to the admission of testimony, merely showing that over accused's objection the state asked a witness whether, when he was in a certain person's office, he did not state that deceased was about the same size as that person, presents nothing for review, not showing that the testimony was material. *Harris v. State* (Cr. App.) 148 S. W. 1074.

A statement in a bill of exception to the allowance of a question of the objection made that no proper predicate had been laid is not sufficient to show that it was the fact that no predicate had been laid. *Douglass v. State* (Cr. App.) 148 S. W. 1089.

A bill of exceptions complaining of the admission of the testimony of a witness on the trial of an accomplice to a forgery of checks that she remembered the circumstances of the checks being passed by a young woman, and the young woman's presence in a store before the passing of the checks, that a young man came into the store and talked to her, but that witness could not identify the man on the ground that the testimony did not identify accused as the man who talked with the woman in the store, and it was irrelevant as evidence against accused, and that the testimony could not be received to corroborate the woman forging the

checks, was insufficient to require the appellate court to review the ruling. *Warren v. State* (Cr. App.) 149 S. W. 130.

In a prosecution for sales of intoxicating liquor on Sunday, a bill of exceptions complaining of the admission of testimony by a witness that he got a pint of whiskey for a sick man, taken by itself, shows no error. *Woods v. State* (Cr. App.) 151 S. W. 296.

In a prosecution for violating the liquor laws, a bill of exceptions reserved to the reading of an entry in a stub book kept by the officer issuing licenses for the sale of intoxicating liquor shows no error, where it does not show that the stub book or its contents were introduced in evidence. *Woods v. State* (Cr. App.) 151 S. W. 296.

On appeal from a conviction for making sales of intoxicating liquor on Sunday, bills of exception reciting that defendant excepted to a question whether the witness issued defendant a liquor license on the ground that the license would be the best evidence, but that the question was answered in the affirmative and to testimony that he issued a license to one J. F. W., although the evidence had not shown J. F. W. and accused to be the same person, are insufficient to require a review. *Woods v. State* (Cr. App.) 151 S. W. 296.

On appeal from a conviction for unlawfully carrying a pistol, a bill of exceptions stated that a witness for the state testified that he saw a pistol in accused's pocket and told him he had better behave himself or he would get into trouble. Appellant denied this, and objected to the testimony, on the ground that it was immaterial, irrelevant, and calculated to prejudice the jury against him, since he was not being prosecuted for misbehaving himself or disturbing the peace, but had pleaded guilty to that offense. The court qualified the bill by stating that accused had denied such statement, and that it was admitted as a part of the res geste. Held, that the bill was so meager in stating the status of the case as not to show any reversible error. *McCrary v. State* (Cr. App.) 151 S. W. 812.

A bill of exceptions stating that certain testimony was "leading, too general, and prejudicial," which failed to show in what connection the evidence was offered, is too vague to present a question for review. *Black v. State* (Cr. App.) 151 S. W. 1053.

A bill of exceptions after conviction for perjury in having falsely testified in his wife's action for divorce that he had not had intercourse with her before their marriage, showing that the former wife had testified for the state, and explained why she gave false answers in her deposition filed by defendant in his original suit against her for divorce, and objecting thereto for irrelevancy and on the ground of a confidential communication between husband and wife, was insufficient to require consideration of such objections. *Spearman v. State* (Cr. App.) 152 S. W. 915, 44 L. R. A. (N. S.) 243.

A bill of exceptions in a prosecution for perjury for having testified in his wife's action to set aside a divorce obtained by him and for a divorce that he had not had intercourse with her before their marriage, stating that the wife testified that, while in another state after the decree in his divorce action, defendant met her, and told her that the court had granted him the divorce, and that, if it was valid, he would remarry her, and objecting thereto on the ground that the evidence was immaterial and irrelevant, that his divorce was set aside for fraud, and that any such conversation was privileged as a communication between husband and wife was insufficient to require consideration of such objections. *Spearman v. State* (Cr. App.) 152 S. W. 915, 44 L. R. A. (N. S.) 243.

A bill of exceptions which does not point out any specific part of documentary evidence as objectionable, and which does not present the question of its admission, so that the court can know its bearing in the case, is insufficient. *Spearman v. State* (Cr. App.) 152 S. W. 915, 44 L. R. A. (N. S.) 243.

Bills of exception merely stating that, on the trial of defendant for carrying a pistol, witnesses were allowed, over his objection, he excepting to the ruling, to testify that they saw him with a pistol before a certain day, some of them three or four months before that day, present no question for review; they stating no grounds of objection and giving no reason why the testimony was not admissible. *Shanklin v. State* (Cr. App.) 152 S. W. 1063.

A bill of exceptions to the admission of evidence in a prosecution for assault with intent to rob, which merely showed by quoting the questions that witness was asked whether the assaulted person identified the three men who held him up and answered that he did, and further stated, in answer to questions, that he identified accused as the person who pointed the gun at him, was insufficient to show error, not showing who the witness was, or the circumstances of the identification, etc. *Wingate v. State* (Cr. App.) 152 S. W. 1078.

Where a bill of exceptions was reserved for allowing the introduction of a letter written by defendant, but no grounds of objection are stated, and part of the contents are admissible as showing an attempt to get a witness to leave the country, no error appears. *Rhodes v. State* (Cr. App.) 153 S. W. 128.

A bill of exceptions complaining of the refusal of the court to permit defendant, on trial for seduction, to prove that witnesses had heard that third persons had accused prosecutrix of improper relations with others than defendant, as qualified by the court's showing that the witnesses in fact, testified the reverse, did not show error; the court indicating to defendant that he could prove the character of prosecutrix by general reputation or by specific acts. *Walls v. State* (Cr. App.) 153 S. W. 130.

Bills of exception to the effect that the state was permitted to prove by certain witnesses that defendant's wife, who had testified in his favor at the trial, had made a written statement at the inquest to the effect that deceased was unarmed, which contradicted her testimony at the trial, were too general to require consideration. *Perry v. State* (Cr. App.) 153 S. W. 138.

Bills of exceptions complaining of the admission of evidence of tracks found at

the scene of the homicide will not be reviewed, where they stated the objections merely as such, and were not approved as a statement of the facts on which the objection was based, and did not state sufficient facts surrounding the matter to show error. *Mims v. State* (Cr. App.) 153 S. W. 321.

A bill of exception complaining of a question, on a trial for adultery, as to how long accused and the woman lived together, on the ground that it was leading, and of the answer that they lived together three months, on the ground that it was a conclusion, which did not give the status of the case, the other testimony, or anything except the question and answer, was insufficient. *Brown v. State* (Cr. App.) 154 S. W. 568.

On a prosecution for homicide claimed to have been committed in defense of accused's son, a bill of exceptions reciting that the state was permitted to prove that a witness was present at the time of the difficulty between accused and deceased, and that he saw accused's son secreting a dirk knife or hollow ground razor, which was objected to and an exception taken, was insufficient to require the court to pass upon the admissibility of the evidence on appeal. *Mayhew v. State* (Cr. App.) 155 S. W. 191.

Where evidence on a trial for homicide that accused's son in whose defense he claimed the homicide was committed was seen to secrete a knife was objected to only "unless it could be shown that defendant was present," and the qualification of the bill of exceptions thereto stated that it occurred within a few seconds after the killing, and that the testimony showed that accused was then standing only a few feet away, and that he and his son walked away together, no error was shown. *Mayhew v. State* (Cr. App.) 155 S. W. 191.

Where the connection of a question asked on accused's cross-examination, with his other evidence, was not shown by a bill of exceptions to a ruling permitting the question, the bill was incomplete. *Nesbitt v. State* (Cr. App.) 155 S. W. 203.

A bill of exceptions to the admission of evidence which does not set out the questions asked or answers cannot be reviewed. *Nesbitt v. State* (Cr. App.) 155 S. W. 203.

On appeal from a conviction of burglary, committed by shooting into a house with intent to injure a woman who had previously lived with and been "kept" by accused, a bill of exceptions, stating that a question asked the prosecuting witness as to why accused wanted her to live with him, and whether he wanted her to sleep with him, was leading, failed to show that a leading question was not permissible. *Gradington v. State* (Cr. App.) 155 S. W. 210.

Where the trial court would not permit appellant to introduce a judgment and record, he should copy them in his bill of exceptions, to their exclusion. *Perry v. State* (Cr. App.) 155 S. W. 263.

Bills of exception to the exclusion of a question to a witness whom accused's counsel were evidently trying to discredit, which did not show any of the surrounding circumstances, and to the admission of alleged opinion evidence which also failed to show any of the surrounding circumstances, are insufficient to require review. *Christie v. State* (Cr. App.) 155 S. W. 541.

A bill of exceptions to the refusal to exclude a question whether the witness had made a certain statement cannot be considered, where it also shows that the witness said he could not remember anything about that. *Davis v. State*, 70 App. 37, 155 S. W. 546.

A bill of exceptions on appeal from a conviction for horse theft, which showed that while prosecutor was testifying and was being cross-examined he was asked whether it was not a fact that accused had brought a civil action for the possession of the alleged stolen property before the finding of the indictment, that the court sustained an objection to the question, and that, if the witness had testified he would have shown that the civil action was still pending, was insufficient to require the court on appeal to review the ruling. *Haley v. State*, 70 App. 30, 156 S. W. 637.

In a prosecution for homicide with a pistol, a bill of exceptions, reciting that while the witness was upon the stand, after it had developed that he had not seen the body of deceased until the day after the homicide, and there had been no evidence introduced that the condition of the wounds was then the same as immediately subsequent to the shooting, he was permitted to testify over accused's objection as to the manner in which the balls entered and left the body of deceased, and that an opinion based on such condition was immaterial and prejudicial, sufficiently presents for review the question of the competency of such evidence. *Roberts v. State*, 70 App. 297, 156 S. W. 651.

A bill of exception for prosecution with an assault to kill, recited that prosecuting witness testified to a settlement for cotton purchased, and that witness mentioned to accused that he owed him for picking cotton and "it made him mad," and that defendant objected to the quoted evidence on the ground that it was a conclusion, and excepted to the overruling of objection. Held not sufficient to authorize a view of any error in admitting the evidence. *Luttrell v. State*, 70 App. 183, 157 S. W. 157.

A bill of exceptions reciting that one of accused's witnesses was asked on cross-examination if he had not been indicted for murder, and when, presents no error when taken by itself, not showing that such evidence was not admissible for impeachment, and it appearing from the record that the witness in question was one of accused's attorneys, and that he stated he did not object to going into the details of the whole transaction. *Poulter v. State*, 70 App. 197, 157 S. W. 166.

A bill of exceptions reciting that in a prosecution for perjury based on false testimony by accused that he was an infant, a witness for the state testified that in a certain year he was thrown in company with accused, and that his residence was in the jail in Wise county, presents no error, where it showed that the court charged the jury to disregard testimony that accused was in the jail with the

witness, and the witness was only allowed to testify as to the length of his acquaintance with accused. *Poulter v. State*, 70 App. 197, 157 S. W. 166.

In a prosecution for forging a money order, a bill of exception reserved to the introduction of a money order, which was objected to on the ground that the verbiage did not correspond with that charged in the indictment, is insufficient, for the bill should have referred to the variance and specified wherein it existed. *Cheesebourn v. State*, 70 App. 612, 157 S. W. 761.

A bill of exceptions to the admission of testimony and to leading questions must contain sufficient matter to show that the testimony was improper and that the alleged leading questions did not fall within any of the exceptions. *Rodriguez v. State*, 71 App. 108, 158 S. W. 537.

A bill assigning error in the admission of testimony over the objection of the accused, in that the transaction inquired about occurred in the absence of the accused, is incomplete, since the objection does not amount to a statement of the fact that the accused was not present. *Wilson v. State*, 71 App. 330, 153 S. W. 1114.

Where the fact of accused's former conviction of crime was brought out before the jury, a bill of exceptions to the action of the court in allowing the prosecutor to ask the questions eliciting the evidence shows no error where it appeared that the court ordered the evidence stricken and disregarded by the jury and qualified the bill of exceptions by a statement that on motion for new trial the jurors said they disregarded the evidence, for, where illegal evidence has been admitted and then withdrawn by the court, no reversible error is committed unless some injury is shown. *Vick v. State*, 71 App. 50, 159 S. W. 50.

A mere statement in a bill of exceptions that the admission of incompetent evidence, which was subsequently stricken, was prejudicial is not sufficient to show that fact, but the manner of the harm should be shown. *Vick v. State*, 71 App. 50, 159 S. W. 50.

A bill of exceptions complaining of the refusal to permit accused on cross-examination of a witness to ask if he had ever committed robbery and of his confinement to inquiries regarding thefts and burglaries, because the inquiry was proper, tended to impeach the witness and, because accused expected to prove that the witness had committed robberies and had been indicted therefor, was insufficient. *Kaufman v. State*, 70 App. 438, 159 S. W. 58.

Bills of exception reciting that witnesses for the state over accused's objection were permitted to testify to certain facts, to which accused objected on certain grounds and then and there excepted, were insufficient to require or authorize the court to consider them. *Kaufman v. State*, 70 App. 438, 159 S. W. 58.

A bill of exceptions to the admission of evidence, reciting the questions and answers of respective witnesses, extending through five pages of typewritten matter, and followed by numerous objections, was insufficient to require review on appeal. *Dugat v. State*, 72 App. 39, 160 S. W. 376.

The incompetency of a witness to testify could not be reviewed, where no evidence as to his incompetency accompanied the record. *Ramos v. State*, 71 App. 484, 160 S. W. 380.

In the absence of bill of exceptions or statement of facts showing that a certain witness testified, and what her evidence was, the Court of Criminal Appeals cannot determine whether there was any prejudicial error in the examination of such witness or the admission of her evidence. *Daly v. State*, 72 App. 531, 163 S. W. 1152.

Where, in a rape prosecution, the evidence of the girl, the prosecuting witness, constituted 48 typewritten pages, and defendant in one bill objected to a whole mass of the testimony, without pointing out any specific error, the bill presented no error; a part of the evidence being admissible. *Boyd v. State*, 72 App. 521, 163 S. W. 67.

To show prejudice from exclusion of defendant's question on cross-examination of a state witness, to show his animosity to defendant, whether certain facts were not true, the bill of exceptions should state that he would have testified that such were the facts, or that, if he did not so testify, proof would be offered that they were. *Davis v. State*, 73 App. 49, 163 S. W. 442.

The bill of exceptions does not show prejudice in the sustaining of objection to the question asked, on cross-examination, of one who had testified to deceased's good reputation, if it was not common, current report that deceased was keeping two certain women; it not stating witness would have testified such was the report, but stating that defendant expected or hoped so to show. *Davis v. State*, 73 App. 49, 163 S. W. 442.

In a homicide case a bill of exceptions, complaining of the admission of evidence of threats by accused not directed against any particular person, was insufficient to require consideration, where it did not state the facts surrounding the testimony, nor show why or in what way it was inadmissible. *Hiles v. State*, 73 App. 17, 163 S. W. 717.

A bill of exceptions to the admission of a statement of facts in a former trial of accused containing his former testimony, which bill did not show that it was not agreed by the parties that the said admitted testimony had not been agreed to as the testimony of accused on the former trial, nor show that no witnesses were introduced who testified that the accused had given such testimony on the previous trial, and did not by any means exclude the idea that the testimony was not proven in some of the methods prescribed by law to render it admissible, was insufficient to show error. *Best v. State* (Cr. App.) 164 S. W. 996.

A bill of exceptions is too general for consideration if it includes a number of statements, some of which are clearly admissible. *Link v. State*, 73 App. 82, 164 S. W. 987.

A bill of exceptions should be clear and pointed, giving the testimony admitted, the objection made, and point out the error in the ruling. *Link v. State*, 73 App. 82, 164 S. W. 987.

A bill of exceptions stated that the "state introduced in evidence part of a statement of facts of a former trial as agreed on and signed by the attorneys for the state and for the defendant and certified as correct by the official stenographer, now absent and living in another state, and approved by the court; that said statement was not signed by defendant; and that it purported to be his testimony on the trial, as follows [stating the testimony]; that this testimony was offered and admitted after the state had asked defendant if he did not testify at such former trial as above set out, and he stated that he had not so testified; that defendant objected to said statement and testimony for the following reasons: 'It is hearsay, it is contained in the statement of facts agreed by the attorneys,' etc., which objections were overruled by the court, to which ruling the defendant excepted, and tenders his bill of exceptions to be signed and approved and filed as part of the record." Held, that the bill was insufficient. *Best v. State* (Cr. App.) 164 S. W. 997.

In a prosecution for murder, a bill of exceptions that the court erred in admitting testimony tending to show that there was "bad feeling between the Gants [defendant's people] and Howards [deceased's people]" was too indefinite for review. *Gant v. State*, 73 App. 279, 165 S. W. 142.

In a prosecution for vagrancy, bills of exceptions that the court erred in excluding testimony that at the time of the offense charged, accused had \$40 in his possession, and that for several months prior thereto he had bought groceries from a certain merchant, and paid cash therefor, were insufficient and too meager to be considered on appeal. *Branch v. State*, 73 App. 471, 165 S. W. 605.

On a trial for keeping a disorderly house, the admission of evidence that an officer stated to a witness that there was something crooked there, referring to accused's place, was not ground for reversal, where the bill of exceptions did not state facts from which it could be intelligently determined whether or not it was admissible. *Cunningham v. State*, 73 App. 565, 166 S. W. 519.

A bill of exceptions, complaining of the testimony of a witness testifying without questions being propounded to him, must disclose the testimony given, and especially the part deemed objectionable, or the ruling cannot be reviewed. *Tores v. State* (Cr. App.) 166 S. W. 523.

Where a bill of exceptions in a criminal case complaining of the admission of evidence of a witness' good reputation for truth and veracity, as qualified by the trial judge, showed that a witness was cross-examined as to the making of contradictory statements, but did not show whether such contradictory statements were proved, it did not show that the admission of such evidence was erroneous. *Thompson v. State* (Cr. App.) 167 S. W. 345.

Where defendant was charged with procuring another to burn his insured house, bills of exceptions complaining of the admission in evidence of the insurance company's policy and its assignment to defendant, over objections that it had not been shown that the insurer had authority to issue the policy or that it was properly executed by an authorized agent, which bills did not contain a statement of the facts which rendered the instruments inadmissible, are not sufficient; the statement of objections made not being a statement of facts. *Arnold v. State* (Cr. App.) 168 S. W. 122.

In a homicide case, a bill of exceptions complaining of testimony by the wife of deceased that the reason she remained in the home of M. was because he willed it to her, on the ground that the testimony was a conclusion of the witness presents no error, where the court, in approving the bill, explained it by adding that accused's contention was that deceased and his wife were trespassers in M.'s home, and to rebut this the witness was permitted to testify that she remained there under a claim of right. *McGaughey v. State* (Cr. App.) 169 S. W. 287.

A bill of exceptions to the exclusion of offered evidence, alleging that accused "expected" to prove certain facts, instead of that he could and would have proven by the witness the facts stated, was insufficient. *Brown v. State* (Cr. App.) 169 S. W. 437.

In a prosecution for the unlawful sale of intoxicating liquors, a bill of exceptions, showing that the prosecuting witness was allowed, over objection, to state how long after it was after he had purchased the liquor that he told the prosecuting attorney about it, when qualified by the court to show that the defendant's contention was that the prosecuting witness was so intoxicated that he could have had no recollection of the transaction, shows no error. *Clark v. State* (Cr. App.) 169 S. W. 895.

A bill of exceptions complaining of the refusal to permit the defendant to answer a question as to what was done at a certain time, which does not state the answer which would have been made, but states that it was sought to prove that defendant and the wife of deceased, who were indicted as accomplices, had made no attempt at that time to induce the principal to commit the crime, shows no error, where defendant did testify fully as to that fact. *Millner v. State* (Cr. App.) 169 S. W. 899.

A bill of exceptions in a murder case alleged that the widow of deceased was called by the state and asked if, before defendant killed deceased, during her husband's entire lifetime, she ever heard him make any threat against defendant, and answered that she had not, to which defendant objected as an attempt to prove deceased's character, because it related to a purported statement by deceased long prior to the killing, and because defendant did not rely on threats as a provocation. The court overruled the objection, and defendant then and there excepted and tendered his bill, which was approved, signed, and ordered filed. Held, that the bill was too meager and insufficient to require review. *Lamb v. State* (Cr. App.) 169 S. W. 1158.

A bill of exceptions, which states that for purposes of impeachment a witness testified that he had frequently arrested the defendant on various charges, but

which does not negative the fact that the charges were for felonies or cases involving moral turpitude, shows no error. *Miller v. State* (Cr. App.) 169 S. W. 1164.

A bill of exceptions, complaining of the admission of evidence that when deceased's wife came home and found him shot she asked him how he felt, and that he replied that he felt very bad and then embraced and kissed her until she was taken away, which bill was allowed by the court with a statement that it contained only a part of the evidence which was admitted as a predicate for the declarations made by deceased to his wife, is too meager for consideration. *Francis v. State* (Cr. App.) 170 S. W. 779.

A bill of exceptions to evidence is too general for consideration, where it includes a number of statements, some of which are clearly admissible, and there is nothing in the objection pointing out specifically the supposed objectionable parts of the evidence. *Zweig v. State* (Cr. App.) 171 S. W. 747.

On appeal from a conviction, where the bill of exceptions to the admission of testimony over objection failed to set out such testimony, but contained a statement by the court below that such testimony at defendant's request was withdrawn from the jury, who were instructed not to consider it, the bill presented no error; it being impossible to determine whether or not the testimony was such that its withdrawal would not cure error in admitting it unless it was set out in the bill. *Wilson v. State* (Cr. App.) 175 S. W. 1067.

An objection that testimony was irrelevant and immaterial without further specification is no objection, if the testimony was admissible under any theory of the case. *Eads v. State* (Cr. App.) 176 S. W. 574.

Bills of exceptions complaining of the admission of accused's statement on the examining trial given through an interpreter because it did not correctly represent what accused stated did not show that the action of the court was erroneous, where neither the statement nor the substance thereof was copied into the bills. *Galan v. State* (Cr. App.) 177 S. W. 124.

A bill of exceptions to the admission of evidence simply stating the grounds of objection, but not stating as matters of fact the matters upon which the objections are predicated, is incomplete and insufficient. *Galan v. State* (Cr. App.) 177 S. W. 124.

A bill of exceptions reciting that the prosecuting witness was allowed to testify that she had heard that accused, who was charged with performing an abortion on the witness, had performed such operation before, was too meager to warrant a review where nothing else appears. *Gray v. State* (Cr. App.) 178 S. W. 337.

A bill of exceptions, in a seduction case, to the exclusion of questions to the prosecutrix as to when the first act of intercourse occurred, shows no error, where there was no offer that she would have testified it occurred before the marriage promise. *Grimes v. State* (Cr. App.) 178 S. W. 523.

30. — **Rulings relating to instructions.**—See notes under art. 743.

31. — **Misconduct of jury.**—Where the bills of exception do not present the evidence thereof, objections in a motion for new trial that the jury discussed the failure of accused to testify cannot be reviewed. *Knight v. State*, 64 App. 541, 144 S. W. 967.

32. **Allowance of time to prepare bill of exceptions.**—See art. 2058, *Vernon's Sayles' Civ. St.*, 1914.

Reasonable requests for time to prepare a bill of exceptions should always be granted, and the refusal of such request is error, but is not reversible error, unless it be made to appear that injury probably resulted to the defendant from such refusal. *Rosborough v. State*, 21 App. 672, 1 S. W. 459; *Smith v. State*, 19 App. 95; *Kennedy v. State*, Id. 618; *Brown v. State*, 13 App. 59; *Sager v. State*, 11 App. 110; *Knox v. State*, Id. 148; *Powers v. State*, 23 App. 42, 5 S. W. 153.

While counsel for accused is entitled to a proper opportunity in open court to make any objection he desires to the argument of the state's attorney and to reserve his bill of exceptions, it was not error to refuse to permit such objections to be so made as to interrupt counsel's argument and to permit the assigning of reasons, so that the jury would understand the objections. *Edwards v. State*, 61 App. 307, 135 S. W. 540.

Where accused reserved no bills of exception to the charge, but the court, after the jury retired, stated that it would supply any omission or correct any error pointed out by accused, and accused did not specify exceptions, the court on appeal will not consider exceptions to the charge, in the absence of fundamental error therein. *Alexander v. State*, 63 App. 102, 138 S. W. 721.

Though the statute makes it proper for the court when an objection is made and a bill of exceptions is taken to stop the trial a sufficient length of time to then and there prepare, sign, and approve the bill, the refusal to suspend the trial for that purpose is not reversible error, where the party complaining is subsequently given his bill in full. *Kearse v. State* (Cr. App.) 151 S. W. 827.

33. **Approval and signature of judge.**—See *Willson's Cr. Forms*, 944.

See arts. 2063-2066, *Vernon's Sayles' Civ. St.* 1914, and notes. See, also, art. 933, post.

A bill of exceptions without the approval of the trial judge, verified by his signature, cannot be considered on appeal. *Nomez v. State*, 70 App. 481, 156 S. W. 933; *McCullar v. State*, 36 App. 213, 36 S. W. 585, 61 Am. St. Rep. 847; *Moss v. State*, 39 App. 3, 43 S. W. 983, 44 S. W. 832; *Todd v. State*, 57 App. 15, 121 S. W. 506; *Boswell v. State*, 59 App. 161, 127 S. W. 820; *King v. State*, 59 App. 511, 129 S. W. 626; *Payne v. State*, 60 App. 322, 131 S. W. 1101; *Young v. State*, 61 App. 440, 134 S. W. 736; *Ikard v. State* (Cr. App.) 135 S. W. 547; *Boydston v. State*, 64 App. 159, 141 S. W. 949; *Footo v. State* (Cr. App.) 144 S. W. 275; *Ward v. State* (Cr. App.) 146 S. W. 931; *Ashmore v. State* (Cr. App.) 150 S. W. 196; *Stewart v. State* (Cr. App.) 153 S. W. 1150; *Stephens v. State* (Cr. App.) 154 S. W. 1001; *Rasberry v. State*, 72 App. 13, 160 S. W. 682; *Graham v. State*, 73 App. 28, 163 S. W. 726; *Staples v. State* (Cr. App.) 175 S. W. 1056.

Where the trial judge certifies that he refused to prepare or sign a bill of exceptions to the admission of evidence, on the ground that there was no objection or exception by appellant, and there was no attempt to controvert this statement of the judge, and it was permitted to go in the record and come before the court on appeal, the court will not review the matter presented by the bill of exception. *Marsden v. State*, 59 App. 36, 126 S. W. 1160; *Crane v. State*, 57 App. 476, 123 S. W. 422; *Britton v. State*, 61 App. 30, 133 S. W. 885; *Vines v. State* (Cr. App.) 148 S. W. 727; *Kaufman v. State*, 70 App. 438, 159 S. W. 58.

Where the court refused bills of exception, and accused made no attempt to prove them, they cannot be considered on appeal. *McHenry v. State* (Cr. App.) 173 S. W. 1020; *York v. State*, 57 App. 484, 123 S. W. 1112; *Galan v. State* (Cr. App.) 150 S. W. 1171; *Simpson v. State* (Cr. App.) 154 S. W. 999; *Daly v. State*, 72 App. 531, 162 S. W. 1152.

An unauthenticated bill of exception amounts to nothing, and will not be considered. *Hill v. State*, 10 App. 673. A bill of exceptions must be authenticated in one of two ways: 1. By the official signature of the judge who tried the case. 2. By bystanders in the manner provided by the statute. For the rules governing bills of exception in civil cases, and which are in the main applicable in criminal cases, see *Vernon's Sayles' Civ. Stat.*, arts. 2058, 2067 and notes; rules for District Court, 53-60, 2 App. 665; see, also, *McDow v. State*, 10 App. 98; *Owens v. State*, 4 App. 153.

Defendant's counsel were refused permission to ask certain questions, and the court refused to allow the bill of exceptions to state what answers counsel expected to elicit; held, it will be presumed that the answers would have been favorable to the defense. *Barnes v. State*, 37 App. 320, 38 S. W. 684.

The bill of exceptions should be submitted to the adverse party or his counsel and if found correct then signed by the judge and filed by the clerk during the term. If bill is not satisfactory to appellant as corrected he can have one signed by bystanders and filed during the term. *Culver v. State*, 42 App. 645, 62 S. W. 923.

The trial court should uniformly follow the letter and spirit of this and articles 2058, 2063-2066, *Vernon's Sayles' Civ. St.* in regard to bills of exception, in order to secure a fair and impartial trial under the laws and constitution of this State. *Owens v. State*, 43 App. 249, 63 S. W. 638.

Where the record on appeal from a conviction of murder contained a bill of exceptions showing a refusal to admit certain testimony for the defense, and the trial court denied the bill, stating that the statement of facts would show the admission of such testimony, the bill presents no ground of review. *Davis v. State*, 60 App. 620, 132 S. W. 932.

A bill of exceptions must be authenticated by the signature of the trial judge, and a mere recital in the motion for new trial that accused had objected to evidence cannot be considered on appeal. *Nelson v. State*, 64 App. 489, 142 S. W. 918.

Where, in a criminal prosecution, the court refused to approve a bill of exceptions containing a requested instruction, on the ground that it did not remember that any such charge was asked and refused, the appellate court will accept the statement of the trial court as to the matter. *Howard v. State* (Cr. App.) 143 S. W. 178.

Grounds of a motion for new trial are not verified by merely reserving exceptions to the action of the court in overruling the motion, and, unless otherwise verified, cannot be considered on appeal. *Sanford v. State*, 64 App. 607, 143 S. W. 1172.

Refusal to instruct the jury to disregard remarks, charged to have been made by the district attorney, is not reviewable where the trial court refused a bill of exceptions relating to the matter, and no bystanders' bill was preserved. *Kinney v. State* (Cr. App.) 144 S. W. 257.

A bill of exceptions in the record marked "refused" by the trial court, cannot be considered on appeal; a bystander's bill being proper in such case. *Kinney v. State* (Cr. App.) 144 S. W. 257.

A paper, purporting to be a bill of exceptions, containing objections to the charge, which does not show on its fact that those objections were made at the time the charge was given, or that the paper was proved by the trial judge as a bill of exceptions, cannot be considered. *Golden v. State* (Cr. App.) 146 S. W. 945.

A bill of exceptions which the court refused to sign with the statement that no such ruling was made by the court cannot be reviewed. *Clark v. State* (Cr. App.) 148 S. W. 801.

Where defendant, under permission to substitute lost papers, seeks to substitute bills of exceptions, the originals of which the trial court finds were not presented to nor approved by him, the Court of Criminal Appeals cannot consider the disallowed bills. *Rupard v. State*, 71 App. 256, 158 S. W. 285.

Under the statute, only the judge who tried a criminal case could approve a bill of exceptions and statement of facts, and his successor could not do so. *Porter v. State*, 72 App. 71, 160 S. W. 1194.

Bills of exception in a criminal case should be presented to the judge who tried the case for his approval, or proven by bystanders, and bills approved by another district judge are not properly verified. *Miller v. State* (Cr. App.) 169 S. W. 1164.

Where the court declined to sign a bill of exceptions to remarks of the prosecuting attorney, accused must resort to the other means of establishing the facts provided by statute if the remarks are to be considered on appeal. *Bolden v. State* (Cr. App.) 178 S. W. 533.

34. — **Mode and sufficiency of approval.**—If the judge certifies that the bill was not "allowed," but orders it made part of the record, it will be considered on appeal as sufficiently authenticated by his signature. *Bell v. State*, 2 App. 215, 28 Am. Rep. 429.

On signing a bill of exception, the judge may, in his discretion, very properly explain the rulings excepted to. *Bejarano v. State*, 6 App. 265; *Hardy v. State*, 31 App. 289, 20 S. W. 561.

A trial judge should refuse to sign a bill of exceptions which, in his opinion, does not truthfully recite proceedings. He should not sign a bill, and by way of explanation contradict its recitals. *Tyson v. State*, 14 App. 388.

Where there are several bills of exceptions, and the judge on a separate sheet of paper refers to the bills, explains some of them and approves all of them; held, such approval is sufficient. *Fitzpatrick v. State*, 37 App. 20, 38 S. W. 806.

Bills of exceptions must be officially approved and authenticated by the trial judge in order to be considered on appeal, and where they merely contained initials which were the same as the trial judge's initials they cannot be considered. *Fator v. State*, 59 App. 251, 128 S. W. 901.

A bill of exceptions alleging that the court overruled objections to the testimony of a witness as to statements by decedent that he did not approach accused at the time of the shooting, on the ground that the testimony was hearsay, and not *res gestæ*, followed by a certificate of the court stenographer giving the testimony by questions and answers, but not made a part of the bill, or approved or passed on by the judge, is insufficient. *Sanders v. State*, 63 App. 258, 140 S. W. 103.

35. — **Qualification or correction by court.**—See Willson's Cr. Forms, 943.

Where one accepts a bill of exceptions as qualified by the court in approving it, he is bound thereby. *Wyres v. State* (Cr. App.) 166 S. W. 1150; *Goss v. State*, 57 App. 557, 124 S. W. 107; *Douglas v. State*, 58 App. 122, 124 S. W. 933, 137 Am. St. Rep. 930; *Gay v. State*, 58 App. 472, 125 S. W. 896; *Woodward v. State*, 58 App. 412, 126 S. W. 271; *Marsden v. State*, 59 App. 36, 126 S. W. 1169; *Keeton v. State*, 59 App. 316, 128 S. W. 404; *Lemons v. State*, 59 App. 299, 128 S. W. 416; *Hinsley v. State*, 60 App. 565, 132 S. W. 779; *Pitts v. State*, 60 App. 524, 132 S. W. 801; *Green v. State*, 60 App. 530, 132 S. W. 806; *Wofford v. State*, 60 App. 624, 132 S. W. 929; *Spain v. State*, 61 App. 63, 133 S. W. 1055; *La Grone v. State*, 61 App. 170, 135 S. W. 121; *Smith v. State*, 61 App. 225, 135 S. W. 533; *Edwards v. State*, 61 App. 307, 135 S. W. 540; *Johnson v. State*, 61 App. 635, 136 S. W. 259; *Slatter v. State*, 61 App. 243, 136 S. W. 770; *Mayo v. State*, 62 App. 110, 136 S. W. 790; *Tilmeyer v. State*, 62 App. 272, 136 S. W. 1060; *Allen v. State*, 62 App. 557, 138 S. W. 593; *Sparks v. State*, 64 App. 610, 142 S. W. 1183; *Moore v. State* (Cr. App.) 144 S. W. 598; *Hinton v. State* (Cr. App.) 144 S. W. 617; *Knigh't v. State*, 64 App. 541, 144 S. W. 967; *Wragg v. State* (Cr. App.) 145 S. W. 342; *Hickman v. State* (Cr. App.) 145 S. W. 914; *Gould v. State* (Cr. App.) 146 S. W. 172; *Dickson v. State* (Cr. App.) 146 S. W. 914; *Lubbock v. State* (Cr. App.) 147 S. W. 258; *Cooper v. State* (Cr. App.) 147 S. W. 273; *Clardy v. State* (Cr. App.) 147 S. W. 568; *Cyphers v. State* (Cr. App.) 150 S. W. 187; *Gaines v. State* (Cr. App.) 150 S. W. 199; *Stevens v. State* (Cr. App.) 150 S. W. 944; *Coggins v. State* (Cr. App.) 151 S. W. 311; *Pace v. State* (Cr. App.) 153 S. W. 132; *Mayhew v. State* (Cr. App.) 155 S. W. 191; *Perry v. State* (Cr. App.) 155 S. W. 263; *Haley v. State*, 70 App. 30, 156 S. W. 637; *Creech v. State*, 70 App. 229, 158 S. W. 277; *Stanton v. State*, 70 App. 519, 158 S. W. 994; *Boyd v. State*, 72 App. 521, 163 S. W. 67; *Hiles v. State*, 73 App. 17, 163 S. W. 717; *General Bonding & Casualty Ins. Co. v. State*, 73 App. 649, 165 S. W. 615; *Gillespie v. State*, 73 App. 585, 166 S. W. 135; *Tores v. State* (Cr. App.) 166 S. W. 523; *Martoni v. State* (Cr. App.) 167 S. W. 349; *Mason v. State* (Cr. App.) 168 S. W. 115; *Bruce v. State* (Cr. App.) 173 S. W. 301; *McHenry v. State* (Cr. App.) 173 S. W. 1020; *Slaughter v. State* (Cr. App.) 174 S. W. 580; *Terrell v. State* (Cr. App.) 174 S. W. 1088; *Galan v. State* (Cr. App.) 177 S. W. 124; *Collins v. State* (Cr. App.) 178 S. W. 345.

If counsel are not satisfied with the approval of a bill of exceptions as explained by the court, they must follow their statutory remedy; viz., get their bill signed by bystanders. *Illil v. State*, 37 App. 415, 35 S. W. 660; *Briscoe v. State*, 37 App. 464, 36 S. W. 281.

The court can allow, change, or strike out a bill of exceptions during the term, although filed and approved, if upon proper showing it appears to be untrue or erroneous. *Cain v. State*, 42 App. 210, 59 S. W. 275.

Where an application for continuance states that it is the first application, but the judge, in approving the bill of exceptions to its refusal, states that it is the second application, the appellant, by accepting the bill of exceptions as allowed, is bound thereby. *Bacon v. State*, 61 App. 206, 134 S. W. 690.

On appeal from a conviction, accused is bound by a qualification in a bill of exceptions to refusal of an instruction submitting an issue as to the voluntary character of a confession, stating that there was nothing in the proof to indicate that accused did not fully understand everything in the confession, and that the proof showed that it was freely and voluntarily made. *Campbell v. State*, 63 App. 595, 141 S. W. 232, Ann. Cas. 1913D, 858.

Where a bill of exceptions to the admission of evidence in a criminal prosecution was qualified by the judge, who stated that the statements of the prosecuting witness were made so close after the transaction as to be part of the *res gestæ*, there was no error shown, for a party accepting a bill of exceptions as qualified by the court is bound by such qualification. *Wade v. State* (Cr. App.) 144 S. W. 246.

If a bill of exceptions is incorrect, it should be refused, and not approved, subject to contradictory explanations of the judge indorsed thereon. *Hinton v. State* (Cr. App.) 144 S. W. 617.

Where the trial court improperly qualifies a bill of exceptions in approving it, the appellant's remedy is by reserving an exception thereto. *Perry v. State* (Cr. App.) 155 S. W. 263.

The trial judge could not qualify bills of exception by stating facts *dehors* the record; it being necessary that he testify to such facts like any other witness. *Graham v. State*, 72 App. 9, 160 S. W. 714.

Where the judge approves a bill of exceptions with a qualification, accused refusing to accept the qualification can only prove the facts as claimed by him by a bystander's bill, properly sworn to as prescribed by statute. *Mooney v. State* (Cr. App.) 176 S. W. 52.

36. — **Preparation of bill by judge.**—See art. 2066, Vernon's Sayles' Civ. St. 1914, and notes.

The same strictness is required of the court in stating the grounds on which evidence apparently erroneous was admitted as is required of defendant in stating objections to the admission of evidence. *Ball v. State* (Cr. App.) 36 S. W. 448.

Where accused's bill of exceptions tendered as authorized by this article was rejected by the court, and the court as authorized by Vernon's Sayles' Civ. St. 1914, art. 2066, prepared a bill of exceptions which was defective, but accused, because of lapse of time since the trial, could not prove a bill by bystanders, the bill prepared by the court cannot be rejected on appeal. *Hickey v. State*, 62 App. 568, 138 S. W. 1051.

Where the judge refused to sign defendant's bill of exceptions because not full and correct, and prepared his own bills, and defendant did not have his bills proved by bystanders, they could not be considered. *Kelly v. State* (Cr. App.) 151 S. W. 304.

Under this article and art. 2058 et seq., Vernon's Sayles' Civ. St. 1914, providing that, on the judge finding a proposed bill incorrect, he may prepare a bill of exceptions presenting the ruling of the court, and providing for bills by bystanders, the court may prepare a bill of exceptions where the bill presented is erroneous, and, where the bill as prepared by the judge is not questioned, the court on appeal is bound thereby. *Kearse v. State* (Cr. App.) 151 S. W. 827.

37. — **Bill of exceptions included in statement of facts.**—To warrant consideration of a bill of exceptions which is incorporated in the statement of facts, the judge's approval of the statement must certify that the bill of exceptions reserved therein was approved. *Waller v. State* (Cr. App.) 145 S. W. 921.

38. — **Conclusiveness and effect of approved bill.**—The judge's authentication of a bill does not establish the validity of its grounds of exception, but merely certifies its presentation to him and his disposition of it. *Hennessey v. State*, 23 App. 340, 5 S. W. 215; *Smith v. State*, 4 App. 626; *McKinney v. State*, 41 App. 434, 55 S. W. 341; *Munoz v. State* (Cr. App.) 60 S. W. 760; *Douglas v. State*, 53 App. 122, 124 S. W. 933, 137 Am. St. Rep. 930; *Woodward v. State*, 58 App. 411, 126 S. W. 271; *Hunter v. State*, 59 App. 439, 129 S. W. 125; *Day v. State*, 61 App. 114, 134 S. W. 215; *Duke v. State*, 61 App. 441, 134 S. W. 705; *Ferguson v. State*, 61 App. 152, 136 S. W. 465; *James v. State*, 63 App. 75, 138 S. W. 612; *Hickey v. State*, 62 App. 568, 138 S. W. 1051; *Conger v. State*, 63 App. 312, 140 S. W. 1112; *Baker v. State* (Cr. App.) 145 S. W. 607; *Jacobs v. State* (Cr. App.) 146 S. W. 558; *Ward v. State* (Cr. App.) 146 S. W. 931; *Colden v. State* (Cr. App.) 146 S. W. 945; *Irvin v. State* (Cr. App.) 148 S. W. 589; *Harris v. State* (Cr. App.) 148 S. W. 1074; *Holmes v. State*, 70 App. 423, 157 S. W. 487; *Best v. State* (Cr. App.) 164 S. W. 996; *Roberts v. State* (Cr. App.) 168 S. W. 100; *Galan v. State* (Cr. App.) 177 S. W. 124.

When a bill of exception contradicts the record as to a specific fact, the bill will be held to control and to state the fact truly. *Gaines v. Salmon*, 16 Tex. 311; *Smith v. State*, 4 App. 626; *Harris v. State*, 1 App. 74.

Affidavits will not suffice to authenticate the recitals in a bill of exception which are qualified or disputed by the trial judge in his note of explanation thereto. If the court refuses a full and fair bill of exception, the defendant is authorized to resort to bystanders. *Lindley v. State*, 11 App. 233.

The appellate court will not supply omissions in bill of exception. *Attaway v. State*, 31 App. 475, 20 S. W. 925.

When the motion sets up the bias or prejudice of the judge, his explanation appended to the bill of exceptions will not prevail as against the affidavits appended to the application. *Gaines v. State*, 38 App. 202, 42 S. W. 335.

The court is not required to consult the statement of facts to verify the judge's statement attached to the bill of exceptions. *Burt v. Stae*, 38 App. 397, 40 S. W. 1000, 43 S. W. 344, 39 L. R. A. 305, 330.

Where there is an issue between the explanation of a bill of exceptions by the court and the matters recited and proved up by bystanders, which is in doubt, the recitals in the statement of facts may be looked to. *Zachary v. State*, 57 App. 179, 122 S. W. 263.

In a rape case, a bill of exceptions, complaining of the refusal to permit a witness to answer a question relating to the reputation of prosecutrix for chastity prior to her alleged connection with accused, stated that the witness would have answered that he knew her general reputation in that respect, and that it was bad. The court approved the bill to where it undertook to set out what would have been the witness' answer, and gave an explanation that it changed its ruling, and notified accused's attorneys during the trial, offering to permit evidence of prosecutrix's reputation, and calling special attention to the former witness, that that witness was afterwards on the stand, but was asked no further question on the subject. The bill as proved up by bystanders included the court's explanation, recited the question asked, that objection was made, the answer of the witness, purpose of the testimony, and that "we, the undersigned, * * * hereby attest that we are fully informed, and understand the contents of the foregoing bill of exceptions, * * * and that the said bill of exceptions, which the judge * * * refused to sign, is correct. * * *" Held that, as the bill as proved up did not in terms deny the statement of the court, it should be accepted. *Zachary v. State*, 57 App. 179, 122 S. W. 263.

Appellant's objection in the bill of exceptions to the testimony of certain witnesses, because "defendant had already been convicted on the testimony" of such witnesses, "and no new trial had been granted," will not be taken by the Court of Criminal Appeals to establish the fact of such conviction. *Hardgraves v. State*, 61 App. 325, 135 S. W. 132.

Where an exception in a prosecution for the illegal sale of intoxicants was reserved to a question as to whether witness issued a retail license to one J. F. W. on the ground that he and defendant were not shown to be the same person, the

court's approval of the bill of exceptions, reciting the objection, is not a certificate of the fact on which the objection was based, but merely of the exception. *Woods v. State* (Cr. App.) 151 S. W. 296.

The bill of exceptions reciting that the jury did not see, examine, or use for any purpose the signature of witness, which he wrote on a slip of paper, when testifying that he did not write his name on the back of the forged check, the contrary cannot be presumed. *Whorton v. State* (Cr. App.) 152 S. W. 1082.

This court must take the record as it finds it, and, if appellant's bill of exceptions may be contradicted at all, it should be done in the lower court and within the time prescribed by law, and it cannot be done in this court. *Bizzell v. State*, 72 App. 442, 162 S. W. 861.

In a prosecution for perjury before a grand jury investigating illegal sales of liquor, where a witness gave no such testimony as was claimed in defendant's motion to strike it out, the court, in approving the bill of exceptions to his overruling of the motion to strike out such testimony, by merely approving the bill, did not thereby certify the contents of the witness' alleged testimony so that it had to be taken as stated on appeal. *Jones v. State* (Cr. App.) 174 S. W. 1071.

A bill of exceptions controls even the statement of facts. *Galan v. State* (Cr. App.) 177 S. W. 124.

A bill of exceptions cannot be impeached by affidavit of the trial judge, it not being contended it is not a correct copy of the original or was obtained by fraud, but merely that the judge read only the first part of it. *Howard v. State* (Cr. App.) 178 S. W. 506.

39. Proof by by-standers.—See Willson's Cr. Forms, 945.

See art. 2067, Vernon's Sayles' Civ. St. 1914, and notes. See, also, art. 938, post.

A paper purporting to be a bill of exception signed by bystanders will not be recognized and considered as part of the record, unless it has the statutory requisites of a bill so signed. The recital that "the judge having refused to sign this, it is signed by the undersigned bystanders," with three names subscribed thereto, does not authenticate it. *Knight v. State*, 7 App. 206; *Sayles' Civ. Stat. art. 1369; Houston v. Jones*, 4 Tex. 170; *Hardie v. Campbell*, 63 Tex. 292.

A party objecting to any ruling of the trial court should except to the same at the time, and, if he asks it, time should be given him in which to embody his exception in a written bill. Refusal to grant such time, if prejudicial to the party, would be reversible error. But to bring before this court the refusal of the trial court to grant time for the preparation of the bill, exception to such action should be promptly taken, and if the court refuses the bill the party should appeal to the bystanders. Note that in this case this rule was not observed. *George v. State*, 25 App. 229, 8 S. W. 25. See, also, *Briscoe v. State*, 27 App. 193, 11 S. W. 113; *Browder v. State*, 30 App. 614, 18 S. W. 197; *Baldwin v. State*, 31 App. 289, 21 S. W. 679.

A bill of exceptions signed by bystanders will not be considered unless it be shown by some testimony other than the mere statement of the bystanders that the judge refused to sign and approve the bill. *Landrum v. State*, 37 App. 666, 40 S. W. 737.

Affidavit of defendant showing why bill of exceptions by bystanders was not taken cannot be considered. *Gallardo v. State* (Cr. App.) 40 S. W. 972.

Bill of exception signed by only two bystanders is not sufficient. *Osborne v. State* (Cr. App.) 56 S. W. 54.

Bill of exceptions signed by bystanders, where it is not shown otherwise than by statement of the bystanders that the trial judge declined or refused to sign the bill as to the matter. *Johnson v. State* (Cr. App.) 59 S. W. 900.

Vernon's Sayles' Civ. St. 1914, art. 2066, requires the trial judge, when he disagrees with the bill of exceptions presented by counsel, to return it with his refusal indorsed thereon and make it such a bill as he deems correct. Article 2067 permits the party presenting the bill, if dissatisfied with that filed by the judge to have the bill presented filed as a part of the record, upon presenting the signatures of three reputable bystanders as to its correctness. Held, that a bill of exceptions presented and refused must be attested by bystanders to be entitled to consideration on appeal, and if not so attested that signed by the judge will be taken as correct. *Washington v. State*, 58 App. 345, 125 S. W. 917.

Where accused is not satisfied with the bill of exceptions as qualified by the court, he should attack it by bystanders. *Long v. State*, 59 App. 103, 127 S. W. 551.

Defendant's counsel prepared bills of exceptions in time, presented them to the county attorney, who, after being importuned several times to examine and pass on them, refused to do so, whereupon defendant's counsel presented them to the court, and endeavored to get it to act on them. The court refused to suggest any errors in the bills, except that one of them did not state the proceedings in the exact order in which they occurred, whereupon defendant's attorney corrected the bill, after which the court refused to allow the bills, but simply marked them "refused," and refused to prepare other bills correctly setting forth the exceptions. There were also affidavits indicating that the court's refusal to sign the bills was captious. Held, that defendant under such circumstances was not required to resort to bystanders' bills, but that the Court of Appeals would consider the bills as though signed and allowed. *Butler v. State*, 64 App. 482, 142 S. W. 904.

A bill of exceptions, proved up by bystanders after its disallowance by the court in accordance with the statute, filed within the time allowed by law, and not contested in the trial court, could not be attacked on a motion for a rehearing in the Court of Criminal Appeals by affidavits. *Hemphill v. State* (Cr. App.) 165 S. W. 462, 51 L. R. A. (N. S.) 914.

A bill of exceptions in a criminal case to the prosecuting attorney's argument, disallowed by the court on the ground that he could not recall such argument, but bearing an approval by citizens of the state, attesting that they were fully informed and understood its contents, that they were present when the matters related in the bill occurred and were fully cognizant thereof, and that the bill was correct and truly presented the facts as they transpired, which was properly sworn

to, was in compliance with the statute, and, not having been contested as authorized by statute, would be taken as true. *Hemphill v. State* (Cr. App.) 165 S. W. 462, 51 L. R. A. (N. S.) 914.

When not contested by affidavits, as authorized by statute, a bystander's bill, prepared under Vernon's Sayles' Civ. St. 1914, art. 2067, imports absolute verity, and cannot be questioned otherwise. *Marshall v. State* (Cr. App.) 175 S. W. 154.

Where the judge refused to act on bills of exception until his vacation ended, thereby postponing action until the expiration of the statutory time, accused could prove his bills by bystanders. *Demarco v. State* (Cr. App.) 178 S. W. 1024.

40. Time for preparation and filing.—See arts. 844a and 845, post, and notes.

41. Filing of bill of exceptions.—A bill of exceptions, not filed below, cannot be considered on appeal from a criminal conviction. *Cyphers v. State* (Cr. App.) 150 S. W. 187; *Ikard v. State* (Cr. App.) 135 S. W. 547; *Guill v. State* (Cr. App.) 146 S. W. 198; *Richards v. State*, 63 App. 176, 140 S. W. 459; *Russell v. State* (Cr. App.) 168 S. W. 95.

Bills of exception bearing no file marks, and not showing that they were ever filed with the clerk of the court, nor when they were delivered to the clerk, if at all, and not showing when they were presented to and approved by the judge, will not be considered. *Roberts v. State* (Cr. App.) 150 S. W. 627.

42. Incorporation of bill into record.—See art. 938, post.

Where bills of exceptions are not in the record, the court cannot consider anything based thereon. *Allen v. State*, 62 App. 501, 137 S. W. 1133; *Campbell v. State*, 62 App. 561, 138 S. W. 607; *Burton v. State* (Cr. App.) 146 S. W. 186; *Sheppard v. State* (Cr. App.) 148 S. W. 314; *Vines v. State* (Cr. App.) 148 S. W. 727; *Gerron v. State* (Cr. App.) 151 S. W. 1048.

While a bill of exceptions may be included in a statement of facts, it must clearly show the matter sought to be presented and its connection. *Cox v. State*, 60 App. 471, 132 S. W. 125.

Grounds of motion for a new trial based on bills of exceptions not appearing in the record cannot be considered on appeal. *Dickson v. State* (Cr. App.) 146 S. W. 914.

43. Necessity of objection, exception, or other presentation in trial court in general.—Objections or exceptions to particular proceedings, see notes under articles of the code dealing with the particular subjects.

An exception to error of the court in discussing the evidence must be saved at the time, otherwise, on appeal, the conviction will not be reversed because of it, unless it be apparent that the defendant was injured by it. *Copeney v. State*, 10 App. 473. See, also, *Mayo v. State*, 7 App. 342; *Davis v. State*, 14 App. 645; *Crook v. State*, 27 App. 198, 11 S. W. 444; *Young v. State*, 31 App. 24, 19 S. W. 431.

Accused cannot complain on appeal of the admission of evidence not objected to in the trial court. *Wynne v. State*, 59 App. 126, 127 S. W. 213; *Howard v. State*, 37 App. 494, 36 S. W. 475, 66 Am. St. Rep. 812; *Lucas v. State*, 62 App. 316, 137 S. W. 354; *Brock v. State* (Cr. App.) 151 S. W. 801; *Ward v. State*, 70 App. 393, 159 S. W. 272; *Coulter v. State*, 71 App. 514, 160 S. W. 80; *Floyd v. State*, 72 App. 247, 161 S. W. 974; *Boyd v. State*, 72 App. 452, 162 S. W. 850; *Corbitt v. State*, 72 App. 396, 163 S. W. 436; *Rhodes v. State* (Cr. App.) 172 S. W. 252.

Where the remarks of the trial court in the presence of the jury were not at the time complained of, and no opportunity was given the court to withdraw the same, accused could not, on appeal, complain thereof. *Coy v. State*, 59 App. 379, 123 S. W. 414; *Jones v. State*, 33 App. 7, 23 S. W. 793; *Florence v. State*, 61 App. 238, 134 S. W. 689; *Edwards v. State*, 61 App. 307, 135 S. W. 540; *Mitchell v. State* (Cr. App.) 144 S. W. 1006; *Hickman v. State* (Cr. App.) 145 S. W. 915; *Valdez v. State*, 71 App. 487, 160 S. W. 341; *Himmelfarb v. State* (Cr. App.) 174 S. W. 586.

Objectionable remarks made by counsel should be objected to at the time. *Wilson v. State*, 32 App. 22, 22 S. W. 39; *Locklin v. State* (Cr. App.) 75 S. W. 308; *Mason v. State*, 15 App. 534; *Jackson v. State*, 18 App. 586; *Barber v. State*, 35 App. 70, 31 S. W. 649; *Stewart v. State* (Cr. App.) 40 S. W. 499; *Jones v. State*, 64 App. 510, 143 S. W. 621; *Wagoner v. State* (Cr. App.) 151 S. W. 313.

A judgment in a criminal case cannot be reversed on grounds presented for the first time on appeal, unless the error is fundamental. *Martinez v. State* (Cr. App.) 153 S. W. 886; *Shanklin v. State* (Cr. App.) 152 S. W. 1063; *Cheesebourn v. State*, 70 App. 612, 157 S. W. 761.

Alleged improper remarks of the prosecuting attorney will not be reviewed, where they are not shown by bill of exceptions and it does not appear that a special charge was requested with reference thereto. *Hooper v. State*, 72 App. 82, 160 S. W. 1187; *Warren v. State* (Cr. App.) 149 S. W. 130.

In misdemeanors, nothing will be revised on appeal not excepted to below, *Goode v. State*, 2 App. 520; *Campbell v. State*, 3 App. 33; unless the error is fundamental. *Veal v. State*, 8 App. 474.

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 App. 112, 22 S. W. 405.

It cannot be objected, on appeal, that a witness between 10 and 11 years old did not show that she understood the nature of an oath, where no exception was taken to the ruling of the trial court that the witness was competent. *Nichols v. State*, 32 App. 391, 23 S. W. 680.

In order to have the question of the competency of the witness revised on appeal exceptions must be taken at the time the witness is offered. *Nichols v. State*, 32 App. 391, 24 S. W. 680.

A prejudicial statement made by a witness is no ground for reversal when no objection was made at the time. *Penn v. State*, 36 App. 140, 35 S. W. 973.

Answers of a witness not objected to at the time, and when there is no motion to have them stricken out, will not be considered on appeal. *Howard v. State*, 37 App. 494, 36 S. W. 475, 66 Am. St. Rep. 812.

If a party is surprised by evidence he should ask for postponement so as to get evidence to meet it. It is too late after verdict to complain. *Turner v. State* (Cr. App.) 55 S. W. 54.

If an important witness becomes too ill to testify defendant should ask a postponement, and if he continues ill after a reasonable postponement the defendant should ask for a withdrawal of the case from the jury and a continuance. It is too late after verdict to raise this question. *Munoz v. State* (Cr. App.) 60 S. W. 760.

An assignment of error that the offense was a graded one and the grade depended on the value of the property alleged to have been injured, and no value was proved, cannot be considered where the matter was not called to the attention of the court by exception or in motion for new trial, but is raised for first time in defendants' brief. *Williams v. State*, 53 App. 396, 110 S. W. 64.

Objections to formation of the jury cannot be raised for the first time on appeal, especially where the record does not disclose the matters complained of. *Sellers v. State*, 61 App. 140, 134 S. W. 348.

Where the defense while cross-examining the prosecutrix, and trying to show that her baby did not resemble the defendant, did not object to having the baby brought in before the jury, the defense cannot claim it as error on appeal, where the court offered to have the baby removed if the defense requested. *Whitehead v. State*, 61 App. 558, 137 S. W. 356.

Grounds of motion based on exceptions not in the record cannot be considered on appeal. *Allen v. State*, 62 App. 501, 137 S. W. 1133.

Objection first raised by motion for rehearing on appeal is too late, unless it presents fundamental error. *Kinney v. State* (Cr. App.) 144 S. W. 257.

Where accused did not at the time except to the act of the court in questioning witnesses, he cannot complain on appeal. *Mitchell v. State* (Cr. App.) 144 S. W. 1006.

In a prosecution for robbery, accused cannot complain that evidence showing that he robbed two companions at the same time was admitted, where there was no motion to compel the state to elect, and no complaint of the evidence was made until after judgment. *Compton v. State* (Cr. App.) 148 S. W. 580.

Defendant, prosecuted for sale of liquor, not having objected to evidence of three sales on the same day, or moved to require the state to elect between the sales, could not by motion for new trial object that the verdict did not specify the sale for which he was convicted; the judgment being a bar to prosecution for any of the sales. *Carver v. State* (Cr. App.) 150 S. W. 914.

Where the court, on being advised that a juror who had been selected and sworn had formed and expressed an opinion, ordered the other six jurors accepted and sworn into an adjoining room in charge of an officer, and the juror was examined, and thereafter the court stated he would sustain a peremptory challenge, but no challenge was interposed, accused could not complain because the juror sat in the case. *McKelvey v. State* (Cr. App.) 155 S. W. 932.

In a prosecution for perjury, charged to have been committed in a civil suit in a justice's court, the admission of the testimony of the justice, as to what the issues joined before him were, is not ground for reversal, where no objection was made below, even though the plea filed in the justice's court would have been the best evidence. *Johnson v. State*, 71 App. 428, 160 S. W. 964.

A motion to exclude evidence to which defendant did not object when offered was unsustainable. *Cooper v. State*, 72 App. 266, 162 S. W. 364.

An objection that the sheriff was not sworn before he summoned one talesman, and that such talesman completed the jury and sat in the case, could not be made for the first time on motion for new trial. *Howard v. State*, 72 App. 624, 163 S. W. 429.

The court on appeal and accused are bound by objections made in the trial court at the time of trial, and any additional objections cannot be considered. *Terrell v. State* (Cr. App.) 174 S. W. 1089.

Evidence which might have been admissible, had other evidence been offered, will not be excluded on a ground not raised in the court below. *Eads v. State* (Cr. App.) 176 S. W. 574.

44. **Objections to indictment or information.**—See art. 476, and notes.

45. **Objections relating to instructions.**—See art. 743, and notes.

46. **Objection or exception to preserve grounds for new trial.**—Where there was no exception to the admission of testimony, the question cannot be raised on motion for a new trial. *Batte v. State*, 57 App. 125, 122 S. W. 561; *Vernon v. State*, 72 App. 287, 162 S. W. 499; *Suesberry v. State*, 72 App. 439, 162 S. W. 849.

An acceptance of the jury by the defendant is a waiver by him of the right to question its organization, on motion for new trial or in arrest of judgment, or upon appeal. *Buie v. State*, 1 App. 452; *Yanez v. State*, 6 App. 429, 32 Am. Rep. 591.

The objection, however, that a juror is not a householder, can not avail on motion for new trial, unless a showing is made of a want of knowledge and rebuttal of laches. An unmarried man may be a householder. *Brill v. State*, 1 App. 572.

Improper argument of counsel to be available must be objected to at the time it is made. It will not be considered when objected to for the first time on motion for new trial. *Harvey v. State*, 35 App. 545, 34 S. W. 623.

A juror on his voir dire examination stated that he had formed and expressed an opinion as to the guilt of defendant, but he would not be influenced by such opinion. Defendant did not further question or challenge such juror, but on motion for new trial set up the disqualification of such juror; held, that he should have challenged such juror at the time the jury was being impaneled. *Moore v. State*, 36 App. 88, 35 S. W. 668.

When surprised at the testimony of a witness the defendant should ask to withdraw his announcement of ready for trial, and postpone or continue the case.

He cannot successfully claim surprise for the first time on motion for new trial. *Bryant v. State*, 35 App. 394, 33 S. W. 978, 36 S. W. 79.

An objection that a hypothetical question did not contain all the evidence favorable to defendant will not be considered. Defendant's remedy is to propose a proper question. *Shirley v. State*, 37 App. 475, 36 S. W. 267.

A ruling not excepted to at the time cannot be made a basis for a new trial. *Allen v. State*, 36 App. 436, 37 S. W. 738.

Defendant was arraigned for trial and went to trial without objection the same day he was indicted; held, no ground for a new trial. *Butler v. State* (Cr. App.) 88 S. W. 787.

In a prosecution for homicide, exception to the action of the sheriff in bringing accused into the courtroom, in the presence of the jury at the opening of the trial, with his hands manacled cannot be taken for the first time on the motion for a new trial. *Canon v. State*, 59 App. 398, 128 S. W. 141.

An objection for the first time on a motion for new trial that two of the witnesses were not sworn is too late. *Barnes v. State*, 61 App. 37, 133 S. W. 887.

Variance between the name of the foreman of the jury, as drawn and served and as signed to the verdict, cannot first be raised on motion for new trial. *Jones v. State*, 63 App. 394, 141 S. W. 953.

Where accused, knowing of the bias of a juror, fails to challenge him, he cannot raise that objection on motion for a new trial. *Bailey v. State* (Cr. App.) 144 S. W. 996.

Though the jurors in a criminal prosecution were professional jurors, an objection thereto should be by motion to quash the panel, where known to the accused's counsel; and, in the absence thereof, the constitution of the jury could not be relied on as ground for new trial. *Hart v. State* (Cr. App.) 150 S. W. 188.

It is too late to raise for the first time on a motion for a new trial an objection that a juror was not a resident of the county. *Jefferson v. State* (Cr. App.) 152 S. W. 908.

Where there was no objection at trial to evidence by accused's wife on cross-examination, to the effect that she did not inquire after decedent's condition, or attend his funeral, though he was her son-in-law, objections to such evidence could not first be taken in motion for new trial. *Ward v. State*, 70 App. 393, 159 S. W. 272.

In a prosecution for forgery, a contention that accused was under 16 years of age at the time of the commission of the alleged offense and was less than 17 when the indictment was found against him must be made on trial, and cannot be raised for the first time on the motion of new trial. *Bowen v. State*, 72 App. 404, 162 S. W. 1146.

Where counsel for defendant announced ready for trial and made no request for additional time or any representation that he had not had time to prepare for the trial, such suggestion came too late after verdict, where it was not contended that appellant or his counsel was in any way surprised by the state's testimony. *Spikes v. State* (Cr. App.) 174 S. W. 614.

47. Sufficiency of objection or exception.—In a criminal prosecution, where a large part of the testimony objected to is admissible, a general objection is insufficient, and a special objection is necessary. *Johnson v. State* (Cr. App.) 167 S. W. 733; *Gaines v. State* (Cr. App.) 37 S. W. 331; *Harrison v. State* (Cr. App.) 153 S. W. 139; *Brown v. State*, 71 App. 353, 162 S. W. 339; *Francis v. State* (Cr. App.) 170 S. W. 779.

An objection that evidence is immaterial is too general and indefinite, and will not be considered on appeal. *Hickey v. State*, 62 App. 568, 138 S. W. 1051; *Stapp v. State* (Cr. App.) 144 S. W. 941.

A general objection to evidence of the seizure of liquor in defendant's possession prior to an alleged sale in violation of the local option law is insufficient as an objection on the ground that such possession by defendant was not reasonably contemporaneous with the alleged sale. *Goss v. State*, 57 App. 557, 124 S. W. 107.

Any error in permitting a question to accused, a middle-aged man, in a prosecution for murder, as to whether complaint was not filed against him in another county for killing a negro, the answer to which was that such a complaint was filed against him when he was 19 years old, was not of itself reversible error; the only objection to such question being that it was immaterial, and no objection being made because of the remoteness of the time when the complaint was filed. *Hunter v. State*, 59 App. 439, 129 S. W. 125.

Where the only objection to the admission of evidence in a murder case, admitted to show decedent's possible intent, that decedent for some weeks before the killing had taken with him some of his younger children wherever he went, which he had not done theretofore, was that it was immaterial, irrelevant, and prejudicial, accused cannot urge on appeal that the evidence was not admissible on the ground that decedent's intentions, unknown to accused, were not admissible to affect accused. *Hunter v. State*, 59 App. 439, 129 S. W. 125.

Objections to remarks made by the trial judge when the jury was impaneled for the week were insufficiently preserved, though objection was then made, where accused's trial was not called until four days later, and the objection was not then renewed. *Newton v. State* (Cr. App.) 143 S. W. 638.

Objections that questions, put by the state's attorney to a witness as to his sympathy for accused, were improper are insufficient to present the question of impropriety. *Bailey v. State* (Cr. App.) 144 S. W. 996.

It is not error to overrule objections to the argument of the county attorney, where no specific objections thereto are made. *Crawford v. State* (Cr. App.) 147 S. W. 229; *Bolden v. State* (Cr. App.) 178 S. W. 533.

Where no grounds of objection to evidence were stated, defendant's counsel merely stating in some instances, "Objected to," and in others that the testimony

"was irrelevant and immaterial," the admission thereof could not be reviewed on appeal. *Simms v. State* (Cr. App.) 148 S. W. 786.

The trial court in ruling on evidence need only pass on the objections made. *Irby v. State* (Cr. App.) 155 S. W. 543.

Accused cannot complain of the exclusion of a question to a witness, where there was no offer of proof showing what the reply of the witness would have been. *Bybee v. State* (Cr. App.) 168 S. W. 526.

An objection to evidence a part of which was admissible was properly overruled; since objection must be directed specifically to the inadmissible part in such case. *Ghent v. State* (Cr. App.) 176 S. W. 566.

Overruling objection to the whole of certain evidence, part of which is admissible, is not error. *Aven v. State* (Cr. App.) 177 S. W. 82.

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.]

In general.—Separation of the jury in a felony case is not allowable even by consent of the parties, unless the jurors are in charge of an officer. *Porter v. State*, 1 App. 394.

The law which forbids the separation of the jury should be carefully observed and enforced by the court and officers. *Marnoch v. State*, 7 App. 269.

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 App. 607, 40 S. W. 496 (overruling *Kelly v. State*, 28 App. 120, 12 S. W. 505); *Brown v. State*, 38 Tex. 482; *English v. State*, 28 App. 500, 13 S. W. 775.

Consent of defendant.—See ante, art. 22, and notes.

The defendant may waive the right to have the jury kept together, but he must do so in person, and not by his counsel. *Sterling v. State*, 15 App. 249; *Kelly v. State*, 28 App. 120, 12 S. W. 505; *Brown v. State*, 38 Tex. 482.

While the appellate court does not believe that it is necessary to get the consent of the attorney for the defendant for a part of the jury to retire for a few minutes in charge of an officer to answer a call of nature while the others remain in the court room, yet the better practice is to obtain such consent. *Johns v. State*, 47 App. 161, 83 S. W. 199.

Where a juror left his seat and started to leave the courtroom, and was recalled by the court and told that if he wanted anything the sheriff would wait on him, but that the jury could not separate, and the sheriff remarked that they must all remain together, according to San Antonio rules, which remark the jury were instructed not to consider, the sheriff's remark, though improper, was not reversible error. *Galan v. State* (Cr. App.) 150 S. W. 1171.

What constitutes separation.—That during a 10 minutes' recess the officer in charge of the jury took the jury to the toilet room 25 steps from the jury box, and that six or eight minutes thereafter it was discovered that one juror had stayed in the box, and the officer then took him in with the rest, and no one spoke to the juror during such period, would not constitute a separation within the statute. *Robinson v. State*, 58 App. 550, 126 S. W. 276.

During the trial of a murder case, a horse belonging to one of the jurors got out of a pasture where it was being kept, and passed along the street dragging a rope. A juror left the jury, caught the horse 25 or 30 steps away, and an attorney in the case took the horse from the juror. Nothing was said by the juror to the attorney, or by the attorney to the juror, or by anybody else to the juror, in regard to the case. Held, that such separation was not material. *Earnes v. State*, 61 App. 37, 133 S. W. 887.

There was no error in permitting jurors, accepted and sworn, to separate in the courtroom, where each juror was constantly within the hearing and sight of the officer and in the immediate view of the court, and where it was not shown that they had any talk with others, or that anybody spoke to them. *Galan v. State* (Cr. App.) 150 S. W. 1171.

Where the jury in a criminal prosecution, after retiring to consider their verdict, informed the court that they wished to have a portion of the testimony reproduced, and the court ordered them to be brought into open court, and after they returned to the courtroom the sheriff discovered that only 11 jurors were present, and within five minutes the sheriff was sent to the jury room after the other juror, and the other juror was found in the jury room, and no one was with either him or the other 11 but the sheriff, and no one spoke to any of them, there was no error in the alleged separation. *Webb v. State* (Cr. App.) 154 S. W. 1013.

Where, in a prosecution for homicide, 2 jurymen were allowed to go to a drug store for a drink at a soda fountain while the others remained outside, and 10 of the jury went into the courtroom and took their seats while the other 2 remained outside in a toilet, and the jury were taken to the wagon yard, and those who had horses were permitted to go and get feed for them while the other jurors remained out of the stable and in the yard, there was a violation of this article. *Eads v. State* (Cr. App.) 170 S. W. 145.

Where the jury room was upstairs over the district court room, and the stairway leading to it was seven or eight feet from the door of the courtroom, and when the jury came down the stairs and started to take their seats it was discovered that one was not present, though he was seen coming down the stairs,

and his tardiness was only from half a minute to a minute and a half, and it was impossible for him to have met any one, there was not a "separation" of the jury. *Guerrero v. State* (Cr. App.) 171 S. W. 731.

The court having adjourned for 10 minutes, the jury in charge of the sheriff and a deputy were conducted to the hall of the courthouse, and, after all other persons had been removed, those who desired were permitted to go to a water cooler and toilet. One of the jurors remained in the toilet alone, while the others were in the hall, and, without any one noticing his absence, the officer returned the rest of the jury to the jury box some 37 feet from the hall. The juror's absence having been discovered, the officer immediately required the remainder of the jury to return with him to the hall, and, as they got near the hall door, the absent juror, in company with the judge, entered the courtroom from the hall door, whereupon the jury took their seats. The absent juror testified that no one was with him in the toilet, or in the hall when he was coming out, at which time he saw the judge and asked him where "his crowd" was, and that no one spoke to him, or he to any one else. Held, that such absence did not constitute a separation of the jury sufficient to vitiate the trial. *Latham v. State* (Cr. App.) 172 S. W. 797.

Instructions of court.—In a trial for murder, where defendant's bill of exceptions showed that each of the jurors selected had testified that he knew the result of a former trial, and knew that the trial court had set aside the judgment, but had stated that such knowledge would not influence his verdict, and had been accepted, the remark of the court at adjournment that they must not separate, and that, if they did so, "it would force him to grant a new trial," was under the circumstances of the case improper. *Johnson v. State* (Cr. App.) 149 S. W. 165.

Prejudice in general.—That a juror unattended left the jury room and conveyed some bedclothes to the floor above to the person from whom they were borrowed and took a drink of whisky at another room held not error it not being shown that probable injustice was done. *Stewart v. State*, 31 App. 153, 19 S. W. 908.

Where the jury accidentally separated for a few minutes without the slightest probability of being influenced thereby there was no error. *Champ v. State*, 32 App. 87, 22 S. W. 678.

Separation of the jury by permission of the court over defendant's objection will necessitate reversal of a conviction without reference to the question of injury to defendant. But to reverse because the jury separated without the consent of the court, it must appear that the separating juror conversed with other persons about the case, or committed other misconduct to the prejudice of the accused. It is complained in this case that a juror, with consent of counsel on both sides, was permitted by the court to visit his sick wife in charge of an officer; but it appears that he did not converse with her or any one about the case. Held, that the objection is without merit. *Boyett v. State*, 26 App. 691, 9 S. W. 275.

Upon the return of the verdict the jury was discharged, but almost immediately, and before all the jurors had left the box, the verdict was found to be informal, and the jury was replaced in the box and the verdict amended. Held, that no injury resulted to the defendant from this proceeding, and he has no cause to complain. *Boyett v. State*, 26 App. 689, 9 S. W. 275.

Accused pleaded guilty of manslaughter, but asked that sentence be suspended. The jury assessed his punishment at two years' imprisonment, and recommended that sentence be not suspended. Before the verdict was rendered court was suspended, owing to a fire nearby, and the sheriff took the jurors into an adjoining room, but after five or ten minutes discovered that two of them were still in the courtroom. There were others in the courtroom at the time, but it did not appear that the jurors spoke to any one, or that any one spoke to them, and the door between the courtroom and the room where the sheriff was was open. Held, it being manifest that no undue influence was exercised on the jury as to the punishment, they having given accused the lowest penalty affixed to the crime of which he pleaded guilty, the separation of the jury could not have prejudiced him, although they declined to recommend a suspension of sentence. *Sephes v. State* (Cr. App.) 148 S. W. 586.

To make the separation of the jurors, in a criminal case less than capital, reversible error, accused must show that they have been tampered with while apart so as to prevent an impartial trial. *Jones v. State* (Cr. App.) 153 S. W. 897.

Separation before being sworn.—The statute forbidding the separation of the jury applies to jurors who have been segregated and impaneled in the case, and does not require jurors to be locked up after they have been examined as a whole, and no challenges have been made, and they have not been selected or sworn. *Martin v. State*, 57 App. 595, 124 S. W. 681.

The impropriety of permitting jurors who had been accepted, but not sworn, to separate and use the telephone, was not reversible, where they were not objected to as jurors, and no impropriety was shown to have been committed by them while separated. *Myers v. State* (Cr. App.) 144 S. W. 1134.

Accepted jurors in a felony case less than capital may separate when they have not been sworn to try the case. *Jones v. State* (Cr. App.) 153 S. W. 897, overruling *Wilcock v. State*, 64 App. 1, 141 S. W. 88.

— **Capital case.**—In a capital case the jurors who have been accepted by both parties, but not sworn, should be kept together in charge of an officer. *Grissom v. State*, 4 App. 374.

The fact that one or two accepted jurors, pending the completion of the jury, remained in the court room when the others were taken to an adjoining room even though it be shown that the separated jurors conversed with outside persons while so separated, will not necessarily require the reversal of a capital conviction. *Bailey v. State*, 26 App. 706, 9 S. W. 270.

To make the separation of jurors, accepted but not sworn in a capital case, reversible error, it must appear that it affected the fairness of the trial. *Jones v. State* (Cr. App.) 153 S. W. 897.

Ground for new trial.—A mere separation of the jury is not cause for a new trial, even in a capital case. Such separation may be explained, and unless it be shown that probable injustice to the defendant was occasioned thereby, it will not be good ground for setting aside the conviction. *Jones v. State*, 13 Tex. 168, 62 Am. Dec. 550; *Jack v. State*, 26 Tex. 1; *Nelson v. State*, 32 Tex. 71; *Wakefield v. State*, 41 Tex. 556; *Jenkins v. State*, Id. 128; *Soria v. State*, 2 App. 297; *Davis v. State*, 3 App. 91; *Cox v. State*, 7 App. 1; *West v. State*, Id. 150; *Russell v. State*, 11 App. 288; *Ogle v. State*, 16 App. 361; but see *Walker v. State*, 37 Tex. 366.

A general dispersion of the jury, though unavoidable, will vitiate the verdict. *Early v. State*, 1 App. 248, 28 Am. Rep. 409.

For instances of separation held sufficient to vitiate a verdict, see *Wright v. State*, 17 App. 152; *Wilson v. State*, 18 App. 576; *Warren v. State*, 9 App. 619, 35 Am. Rep. 745; *Walker v. State*, 37 Tex. 367; *Defriend v. State*, 22 App. 570, 2 S. W. 641.

A short temporary separation of the jury, when no injury is shown, is no ground for a new trial. *Taylor v. State*, 38 App. 552, 43 S. W. 1019.

Affidavits of jurors are insufficient to do away with the effect of a separation when the opportunity to be tampered with or influenced is clearly shown. *Robinson v. State*, 30 App. 460, 17 S. W. 1082, and authorities cited.

Separation of the jury during trial; held, sufficient ground for new trial. *Burris v. State*, 37 App. 587, 40 S. W. 284.

While part of the jury were in a saloon, others were out in the back yard, and while eleven of the jury were eating breakfast, one went out to a closet with one of the witnesses in the case unaccompanied by the officer; held, such separation was a violation of the law and a new trial should have been granted. *Darter v. State*, 39 App. 40, 44 S. W. 850.

The officer in charge of the jury should not allow the jury to go into a saloon while deliberating upon their verdict. No emergency would justify such act. *Id.*

Where, during the trial of a homicide case, a juror became sick at night, and a physician was called to prescribe for him in the presence of an officer, and, with the consent of accused's counsel, he was placed on a cot in the court room while the other jurors were in the jury room, and, while he was lying on the cot, relatives saw him in the presence of the officer staying with him, there was no such separation of the jury as to authorize the setting aside of conviction, in the absence of anything improper occurring. *Chant v. State*, 73 App. 345, 166 S. W. 513.

In a felony case a juror, after the evidence was all in and argument begun, and while they were in charge of an officer going to supper, slipped off and went three or four blocks and got his horse and took him to a livery stable. He was gone between 15 and 30 minutes, and admitted talking to two people. The only evidence heard on the motion for new trial was the testimony of the juror, the state contenting itself with showing that the juror was favorable to defendant. Held, that defendant should have been granted a new trial because of such separation, since, under the statute, when a separation was shown, the burden was upon the state to show that nothing improper took place during the separation, and should have called the two witnesses to whom the juror admitted to have talked. *Somers v. State*, 73 App. 549, 166 S. W. 1156.

The court having adjourned for 10 minutes, the jury in charge of the sheriff and a deputy were conducted to the hall of the courthouse, and, after all other persons had been removed, those who desired were permitted to go to a water cooler and toilet. One of the jurors remained in the toilet alone, while the others were in the hall, and without any one noticing his absence, the officer returned the rest of the jury to the jury box some 37 feet from the hall. The juror's absence having been discovered, the officer immediately required the remainder of the jury to return with him to the hall, and, as they got near the hall door, the absent juror, in company with the judge, entered the courtroom from the hall door, whereupon the jury took their seats. The absent juror testified that no one was with him in the toilet, or in the hall when he was coming out, at which time he saw the judge and asked him where "his crowd" was, and that no one spoke to him, or he to any one else. Held, that such absence did not constitute a separation of the jury sufficient to vitiate the trial. *Latham v. State* (Cr. App.) 172 S. W. 797.

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.

In general.—It was not error to permit the jury to separate after the completion of the case, but before the return of a verdict, where the jury was properly instructed and were guilty of no improper conduct. *Farris v. State* (Cr. App.) 170 S. W. 310.

Reconvening jury.—This article does not authorize the court to reconvene a jury after it has been finally discharged, in order to remedy an informality in a verdict rendered by it, or to return another verdict. *Ellis v. State*, 27 App. 190, 11 S. W. 111. See, also, *Testard v. State*, 26 App. 260, 9 S. W. 888; *Rider v. State*, 26 App. 334, 9 S. W. 688; *Cannon v. State*, 3 Tex. 31.

Instructions.—Cited, *Cannon v. State*, 3 Tex. 31; *Jones v. State* (Cr. App.) 153 S. W. 897.

Where the court, when the jury was first organized, and at the first recess, fully instructed them not to discuss the case until it was finally submitted to them, there was no error in his failure to give a similar instruction at each subsequent recess. *Millner v. State*, 72 App. 45, 162 S. W. 348.

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.]

In general.—*Warren v. State*, 9 App. 619, 35 Am. Rep. 745; *Wright v. State*, 17 App. 152.

Use of intoxicating liquor as ground for new trial.—See post, art. 837 (7), and notes.

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.]

In general.—A conversation with other persons by a juror, with permission of the court, over the objection of the defendant, is reversible error per se, without reference to the question of probable injury to the defendant. *Defriend v. State*, 22 App. 570, 2 S. W. 641.

That a juror on separation of the jury conversed with outside persons does not necessarily require a reversal of the conviction. *Bailey v. State*, 26 App. 706, 9 S. W. 270.

Jurors should not be permitted to converse with other persons over telephones, out of the presence of the court and without permission of the court and when such conduct does occur it is obligatory on the State to show beyond any question that the jurors were not tampered with. *Early v. State*, 51 App. 382, 103 S. W. 873, 874, 123 Am. St. Rep. 889.

Jurors, in a trial for statutory rape, while deliberating on the case, were permitted to talk over a telephone to their families and others. Held that, considered with the unsatisfactory evidence in the case, it was ground for reversal. *Logan v. State* (Cr. App.) 148 S. W. 713.

Ground for new trial.—See post, art. 837 (7), and notes thereto.

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.

Cited, *Martin v. State*, 9 App. 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.]

In general.—The presence of a bailiff with the jury, while they are deliberating, will not vitiate the verdict, unless it appear that the fairness of the trial was affected thereby. *Martin v. State*, 9 App. 293; *Slaughter v. State*, 24 Tex. 410; *Dansby v. State*, 34 Tex. 392; see, also, *Hunnicut v. State*, 18 App. 499, 51 Am. Rep. 330.

Interest of officer.—That the prosecuting witness guarded the jury is not ground for reversal, in the absence of showing that the verdict was affected thereby; but the practice is not a good one. *Speer v. State*, 57 App. 297, 123 S. W. 415.

That the sheriff, who was a material witness for the state, was in charge of the jury during the trial was not ground for reversal, in the absence of a showing of some act of his which influenced or tended to influence the jury in their verdict. *Galan v. State* (Cr. App.) 150 S. W. 1171.

The fact that a deputy sheriff was a witness in a case did not disqualify him from performing his official duty in guarding the jury. *Holmes v. State*, 70 App. 214, 156 S. W. 1173.

Ground for new trial.—See post, 837, and notes.

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.]

Law books.—While the court does not hold it to be error, yet they do not wish to be understood as commending the practice of allowing a jury to take law books with them upon retiring. *Camp v. State* (Cr. App.) 57 S. W. 97.

Indictment.—That the jury did not take with them the indictment is immaterial. *Schultz v. State*, 15 App. 258, 49 Am. Rep. 194.

At a former trial defendant was found guilty of murder in the second degree, the verdict was written on the indictment, the clerk obliterated the verdict by putting ink over it and the court allowed the jury to take the indictment out with them; held, no error. *Harvey v. State*, 35 App. 545, 34 S. W. 623. See also *Lancaster v. State*, 36 App. 16, 35 S. W. 165.

Evidence.—The jury may take with them papers used by the witnesses for comparing handwriting. *Ferguson v. State*, 61 App. 152, 136 S. W. 465; *Webb v. State* (Cr. App.) 154 S. W. 1013.

It is not error to allow the jury to use a magnifying glass in inspecting documentary evidence. *Hatch v. State*, 6 App. 384.

The jury is entitled to take with them all evidence in the case. *Heard v. State*, 9 App. 1.

Deceased's coat which had been put in evidence may be taken into the jury room. *Chalk v. State*, 35 App. 116, 32 S. W. 534.

In a prosecution for burglary, by shooting into a house with intent to injure a person therein, where the state's theory was that accused fired on account of indignities offered his wife, and accused claimed that when he reached the window, the injured person attempted to shoot him with a pistol or gun, and that he fired for self-preservation, evidence that one of the jurors who had been on the building when it was constructed, and had some personal knowledge of its location, drew a diagram, which the jury substituted for two diagrams introduced in evidence, of the interior of the room in which the injured person was when the shot was fired was not ground for reversal. *Railey v. State*, 58 App. 1, 121 S. W. 1120, 125 S. W. 576.

A refusal to permit the jury to take papers received in evidence is not error, in the absence of a request by the jury that they be permitted to take them. *Wragg v. State* (Cr. App.) 145 S. W. 342.

A letter introduced in evidence was properly turned over to the jury at their request on their retiring to deliberate on a verdict. *Warren v. State* (Cr. App.) 149 S. W. 130.

In a prosecution for selling intoxicating liquors in prohibition territory, the jury can take certified copies of the orders putting prohibition in force in the territory which had been in evidence with them on retirement. *Howard v. State*, 72 App. 624, 163 S. W. 429.

The refusal to permit the jury to take letters offered by defendant bearing on the issues was not reversible error. *Hicks v. State* (Cr. App.) 171 S. W. 755.

Charges.—See ante, art. 742, and notes.

Cited, *Essery v. State*, 72 App. 414, 163 S. W. 17.

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.]

In general.—Where after retirement and in the absence of defendant, the jury returned into court and asked to be relieved of further consideration of the case, which the court refused, stating that he had to leave the next morning, there was no such violation of this article as to require reversal. *Washington v. State*, 56 App. 195, 119 S. W. 689, following *Wilkerson v. State*, 49 App. 170, 91 S. W. 228.

In a prosecution for violation of the prohibition law, where a witness testified that he asked the defendant to procure whisky for him, and defendant said he would, and thereafter some one handed a bottle of whisky to the witness through a window, but that witness saw only his hand, and did not know who it was, and the jury propounded to the court, in writing, the question whether a man would have to sell and deliver intoxicating liquors in person to be a violation of the law, it was the duty of the court, under this article and art. 754, to answer the question of the jury. *Beck v. State*, 63 App. 615, 141 S. W. 111.

Under this article and articles 754, 755, 756, the court may not, in the absence of accused, withdraw from the jury, asking for the testimony of designated witnesses received without objection, the consideration of the testimony directly bearing on the issues. *Cowart v. State* (Cr. App.) 145 S. W. 341.

Who may act as spokesman.—Communication to the court through a juror other than the foreman is a mere irregularity not invalidating the proceedings. *Willis v. State*, 24 App. 586, 6 S. W. 857.

Presence of defendant.—See post, art. 756, and notes.

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.]

In general.—See *Wilson v. State*, 37 App. 156, 38 S. W. 1613.

If the jury desire further instructions, they should be brought into court in a body, and, after notice to the defendant or his counsel, and in case of felony, in the presence of the defendant, should be instructed only upon the points requested by them. The instructions should be in direct response to the questions asked, and must not invade the province of the jury. *Taylor v. State*, 42 Tex. 504; *Newman v. State*, 43 Tex. 525; *Wharton v. State*, 45 Tex. 2; *Chamberlain v. State*, 2 App. 451; *Garza v. State*, 3 App. 287; *Hannah v. State*, 7 App. 610; *Post v. State*, 10 App. 598; *Shipp v. State*, 11 App. 46; *Granger v. State*, *Id.* 454; *McDonald v. State*, 15 App. 493; *Mapes v. State*, 13 App. 85.

When the jury request further instructions, and the subject-matter thereof be proper, the court has no option but to give them. If the subject-matter be improper, the court should so inform the jury. All instructions or responses so given by the court to the jury must be in writing. *Conn v. State*, 11 App. 390.

An additional instruction as to punishment held sufficiently responsive to the inquiry of the jury. *Boggs v. State*, 38 App. 82, 41 S. W. 642.

That the court, after charging orally without objection, gives, at the request of the jury after it had retired, and also at the request of the prosecuting attorney and over objection of defendant, a proper written charge is not ground for reversing a conviction. *Jenkins v. State*, 60 App. 465, 132 S. W. 133.

In a prosecution for violation of the prohibition law, where a witness testified that he asked the defendant to procure whisky for him, and defendant said he would, and thereafter some one handed a bottle of whisky to the witness through a window, but that witness saw only his hand, and did not know who it was, and the jury propounded to the court, in writing, the question whether a man would have to sell and deliver intoxicating liquors in person to be a violation of the law, it was the duty of the court to answer the question of the jury. *Beck v. State*, 63 App. 615, 141 S. W. 111.

Where the jury after retiring returned for additional instructions, and were given them in writing, that the additional charge, though signed by the judge, had no file mark thereon until the correct file marks were placed thereon before an appeal was perfected, was not reversible error. *Lyles v. State*, 64 App. 621, 142 S. W. 592.

Where the jury asked if it made any difference whether the confession was made before a justice of the peace or the county attorney, the instruction was properly limited to the question and one, requested by defendant, as to the necessity of a confession being freely and voluntarily made was properly refused. *Harris v. State*, 64 App. 594, 144 S. W. 232.

In a prosecution for unlawfully carrying a pistol, where the evidence indicated that, the accused's child having been injured by an older boy, accused took his pistol and went out into the street, it was not error for the court, in response to an inquiry of the jury, after their retirement, whether, under those circumstances, accused had a right to "get his gun and go down there," to state that he did not have that right. *Farris v. State*, 64 App. 524, 144 S. W. 249.

The court may not, in the absence of accused, withdraw from the jury, asking for the testimony of designated witnesses received without objection, the consideration of the testimony directly bearing on the issues. *Cowart v. State* (Cr. App.) 145 S. W. 341.

Where the jury returned, after being charged and asked if it was necessary that the accessory know that the principal seduced the prosecutrix, and the court told them that the defendant must know that fact, adding that the issue was one for the determination of the jury, who might consider all the circumstances, there was no reversible error, in spite of this article which is not construed to mean that the court cannot, at any other time before verdict, correctly charge the jury on any matter, though necessary or proper, or that he should make the answer as short as possible. *Harrison v. State* (Cr. App.) 153 S. W. 139.

In a prosecution for theft from the person, the jury, after retirement, asked the judge whether they could render verdict finding accused guilty of attempt at theft, in answer to which the court charged that if the jury found from the evidence, beyond a reasonable doubt, that accused was guilty of an attempt to commit theft from the person—that is, that in the county and state named in the indictment, on or about the date named, before the presentment of the indictment, accused did attempt to unlawfully, fraudulently, and privately take from the person of the one named corporeal, personal property, without the knowledge of such owner, and with an intent to deprive him of its value and appropriate it to his own use—then the jury could find accused guilty of an attempt to commit theft from the person. Held, that the charge given in answer to the jury's question was proper. *Bell v. State*, 70 App. 466, 156 S. W. 1194.

Where the jury, after retiring in an adultery case, returned, and propounded a question to the court, it was not error for the court to give no additional in-

structions, but to tell the jury to look to the charge as given. *Edwards v. State*, 71 App. 417, 160 S. W. 709, 49 L. R. A. (N. S.) 563.

Necessity of defendant's presence.—See post, art. 756, and notes.

Additional instructions without request.—After the jury has retired, the court cannot, of its own motion, withdraw an instruction given at the request of the defendant, and give additional instructions. *Goss v. State*, 40 Tex. 529; *Garza v. State*, 3 App. 286.

The court cannot give additional instructions at the instance of the state, the jury not having requested such instructions. *Myers v. State*, 8 App. 321.

The court may now give additional charges, of its own motion. *Benavides v. State*, 31 App. 173, 20 S. W. 369, 37 Am. St. Rep. 799; *Gardner v. State*, 56 App. 594, 120 S. W. 895; *Miller v. State*, 62 App. 507, 138 S. W. 113.

When the court has given an erroneous charge as to the punishment, he may correct it before verdict found. *Flores v. State*, 41 App. 166, 53 S. W. 347.

Construction of charge.—Cited, *Rudder v. State*, 29 App. 262, 15 S. W. 717.

When such additional instructions are given, they are to be considered in connection with the charge already given. *Swift v. State*, 8 App. 614.

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.]

In general.—The witness must not be re-examined upon the point, and the following rules must be observed: 1. The jury should indicate the particular statement about which they disagree. 2. The witness should be directed to repeat his testimony upon the particular point, and no other. 3. The court may instruct the witness to repeat his testimony upon the point in the very language employed on the original examination, as nearly as he can. *Campbell v. State*, 42 Tex. 591.

Mere difference of counsel as to the evidence of a witness does not necessitate his recall, and its advisability is left to the discretion of the judge, subject to revision only for abuse. Proper practice in such case is for the judge to inform the jury that if they shall disagree as to the testimony in question, the witness will be recalled at their instance. *Láster v. State*, 3 App. 17.

Where pending the summoning of witness recalled the jury rendered their verdict the presumption is that the jury did not desire to have their testimony reiterated. *Colter v. State*, 37 App. 284, 39 S. W. 576.

This right of recall is limited to the request of the jury, and the court cannot be held to error because it refused recall on request of attorneys. *Wilson v. State*, 37 App. 373, 35 S. W. 390, 38 S. W. 624, 39 S. W. 373.

It was not reversible error to permit a witness to answer questions asked by the foreman of the jury after they had retired, where he testified to no new or additional fact, but testified precisely or substantially as previously testified by him. *Galan v. State* (Cr. App.) 177 S. W. 124.

Necessity of defendant's presence.—See art. 756, and notes.

Recalling on courts' own motion.—See post, art. 756, and notes.

Depositions.—Depositions may be reread when the jury disagree as to their contents. *Clark v. State*, 28 App. 189, 12 S. W. 729, 19 Am. St. Rep. 817.

Different or additional evidence.—If the witness changes his statement to the prejudice of the defendant, it is material error. *Tarver v. State*, 43 Tex. 564; *Edmondson v. State*, 7 App. 116.

— **Presumption.**—When a witness is recalled to restate his testimony in the absence of a showing what the evidence first given was, and what given on recall was, it will be held that the witness restated his evidence correctly. *Killman v. State*, 53 App. 570, 112 S. W. 96.

— **Ground for new trial.**—See art. 837 (6), and notes.

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.]

In general.—If instructions given at the instance of a defendant are lost, the judge cannot repeat them orally to the jury, even in a misdemeanor case, in the absence of the defendant. *Chamberlain v. State*, 2 App. 451; *Caston v. State*, 31 App. 304, 20 S. W. 585.

The defendant must be present in a felony case when a witness repeats his statement to the jury. *Barton v. State*, 9 App. 261. Defendant's counsel cannot waive the defendant's right to be present on such occasion. *Shipp v. State*, 11 App. 46.

See *Granger v. State*, 11 App. 454; *Mapes v. State*, 13 App. 85.

If the defendant in a murder trial is not present when a witness is recalled to restate his evidence the case will be reversed. *Burton v. State*, 46 App. 493, 81 S. W. 742.

The court may not, in the absence of accused, withdraw from the jury, asking for the testimony of designated witnesses received without objection, the con-

sideration of the testimony directly bearing on the issues. *Cowart v. State* (Cr. App.) 145 S. W. 341.

It is improper for the court to communicate with the jury, in the absence of accused. *Booth v. State* (Cr. App.) 145 S. W. 923.

It was not error for the court, at the jury's instance to have read to them a portion of the testimony of a witness, in the absence of defendant's counsel, who was sent for, but could not be found. *Wesley v. State* (Cr. App.) 150 S. W. 197.

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.]

See Willson's Cr. Forms, 976.

Validity of article.—This article is not in conflict with constitution, art. 1, sec. 14, declaring that no person shall be twice put in jeopardy of life or liberty for the same offense. *Woodward v. State*, 42 App. 188, 58 S. W. 135.

Illness of child.—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*, 42 App. 188, 58 S. W. 135.

Necessity of judicial finding.—A judicial finding of sickness is necessary before the jury is discharged. *Upchurch v. State*, 36 App. 624, 38 S. W. 206, 44 L. R. A. 694.

Effect of discharge.—Cited, *Heskew v. State*, 17 App. 161.

The juror can not be excused and his place supplied, but the entire jury must be discharged, and another jury impaneled. *Ellison v. State*, 12 App. 557; *Hill v. State*, 10 App. 618. The defendant may, however, waive the rights thus secured to him, but must do so in person. A waiver by his counsel will not bind him. *Sterling v. State*, 15 App. 249; ante, art. 22, and notes; *Arcia v. State*, 28 App. 198, 12 S. W. 599.

Art. 758. [738] In misdemeanor 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.]

Verdict by nine jurors in misdemeanor case.—See, post, art. 765.

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.]

See Willson's Cr. Forms, 977.

In general.—After a felony case has been submitted the jury can not be discharged, unless there is no probability of their agreement, unless for one of the causes specified in article 757, ante, or unless it be with the consent of the defendant, or by the final adjournment of the court. See, upon this subject, *Schindler v. State*, 17 App. 408; *Varnes v. State*, 20 App. 107; *Pizano v. State*, 20 App. 139, 54 Am. Rep. 511; *Brady v. State*, 21 App. 659, 1 S. W. 462; *Ellison v. State*, 12 App. 557; *Hill v. State*, 10 App. 618; *Early v. State*, 1 App. 248, 28 Am. Rep. 409; *Clark v. State*, 28 App. 189, 12 S. W. 729, 19 Am. St. Rep. 817; *Arcia v. State*, 28 App. 199, 12 S. W. 599; *O'Connor v. State*, 28 App. 288, 13 S. W. 14; *Rudder v. State*, 29 App. 262, 15 S. W. 717; *Dow v. State*, 31 App. 278, 20 S. W. 583. *Penn v. State*, 36 App. 140, 35 S. W. 973.

The judicial discretion vested by this article is not measured by "reasonable time." *Powell v. State*, 17 App. 345.

Length of time of deliberation.—Where, on a trial for pandering lasting only from 9 a. m. to 4 p. m. the jury were kept together until 6 p. m. the following day, and then reported that they could not agree, the court did not abuse its discretion by discharging them without accused's consent. *Jones v. State*, 72 App. 496, 162 S. W. 1142.

Under the statute, the length of time required by the jury to consider its verdict before it is discharged is for the court's discretion, and no abuse of discretion is shown, where the jury were held from 4:30 p. m. on May 21st until 10:30 a. m. on May 23d, when they found a verdict. *Matthews v. State*, 72 App. 654, 163 S. W. 723.

Recital in judgment.—The judgment discharging the jury is not valid unless it finds and recites that the jury have been kept together such a length of time that it is not probable they will agree. *Wright v. State*, 35 App. 158, 32 S. W. 701.

Coercion of verdict.—After the jury had withdrawn, they sent a message to the court to the effect that there was "no hope of reaching a verdict," and that they wanted to be discharged, to which the court responded, in the absence of accused and his counsel, "Tell the jury as long as there is life, there is hope, and this court lasts four weeks longer." Held, that the court's remark was not of itself reversible error. *Booth v. State* (Cr. App.) 145 S. W. 923.

The remarks of the court to the jury, after they had retired and deliberated

for about 24 hours, and reported that they could not agree and asking for a discharge, that the case had to be settled by some 12 men, that the court did not know of any 12 men who could do the work better than the jury, that the jury could settle the case and ought to do so, that the court would hold session until the business was disposed of, and that the jury should retire and consider a verdict, were not objectionable as coercing a verdict. *Rippetoe v. State* (Cr. App.) 148 S. W. 811.

Jeopardy.—Ante, art. 9, and notes.

A discharge of the jury under this article in defendant's absence and over the objection of his counsel, is a bar to another prosecution. *Rudder v. State*, 29 App. 262, 15 S. W. 717.

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.]

See generally, *Dow v. State*, 31 App. 278, 20 S. W. 583; *Ex parte Juneman*, 28 App. 486, 13 S. W. 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.]

In general.—After a mistrial, the case stands as if there had been none; and if the defendant is not ready for another trial, he must apply for a continuance. *Jones v. State*, 3 App. 575; *Garrett v. State*, 37 App. 198, 38 S. W. 1017, 39 S. W. 108. It is beyond the legal authority of the court to discharge the jury in the absence of the defendant and such discharge bars further prosecution. *Rudder v. State*, 29 App. 262, 15 S. W. 717.

Under this article and art. 715, ante, it was not error to refuse defendant a continuance after a mistrial because there were no qualified regular jurors. *Branch v. State*, 73 App. 471, 165 S. W. 605.

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.]

In general.—*Miller v. State*, 32 App. 266, 22 S. W. 880.

Subject to statutory restrictions, the order and regulation of business in the trial courts is under their discretionary control, and not revisable on appeal when no prejudice to the defendant is shown. It was held not error to proceed with a trial for theft during the postponement of a trial for rape for one day in order to complete a jury. *Shehane v. State*, 13 App. 533. See, also, *Jones v. State*, 8 App. 648.

During an intermission in a criminal trial, it was not error for the court to permit a special judge in another case to take an oath and enter an order in such case. *Bunker v. State* (Cr. App.) 177 S. W. 108.

CHAPTER SIX OF THE VERDICT

Art.	Art.
763. Definition of "verdict."	774. Where jury refuse to have verdict corrected.
764. In felony case.	775. In case of plural defendants.
765. When nine jurors may render verdict, etc.	776. Same subject.
766. Six jurors in county court.	777. In case of acquittal.
767. When jury have agreed, etc.	778. Judgment entered immediately.
768. Polling the jury.	779. Where verdict of guilty in felony.
769. Defendant must be present, when.	780. Acquittal for insanity.
770. Verdict must be general.	781. Verdict on plea of guilty by person insane.
771. In offenses of different degrees.	782. Conviction of lower, acquittal of higher offense.
772. Offenses consisting of degrees.	
773. Informal verdict may be corrected.	

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.

See *Willson's Cr. Forms*, 947.

Cited, *Robertson v. State*, 63 App. 216, 142 S. W. 533, *Ann. Cas.* 1913C, 440; *Esery v. State*, 72 App. 414, 163 S. W. 17.

Nature and requisites of verdict.—A verdict must be sufficient in itself, and its defects can not be aided and cured by inference from other parts of the record, except that the charge of the court may be looked to, to identify the offense as found by the jury. *Slaughter v. State*, 24 Tex. 410; *Marshall v. State*, 4 App. 549; *Hutto v. State*, 7 App. 44; *Henderson v. State*, 5 App. 134; *Chester v. State*, 1 App. 703; *Vincent v. State*, 10 App. 330.

It must be responsive to the charge of the court and sufficiently certain to identify the transaction with that alleged in the indictment, and to bar another prosecution. *Senterfit v. State*, 41 Tex. 186; *Lindsay v. State*, 1 App. 327; *Vincent v. State*, 10 App. 330.

It must speak the truth between the state and the defendant, as to the offense charged in the indictment. *Buster v. State*, 42 Tex. 315.

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 App. 443, 44 Am. Rep. 708; *Buster v. State*, 42 Tex. 315.

Verdicts are to have a reasonable intendment and to be given a reasonable construction. They are not to be avoided unless from necessity originating in doubt of their import, or immateriality of the issue found, or of their manifest tendency to work injustice, or their failure to contain that which some express provision of the statute requires they should contain. *Walker v. State*, 13 App. 618, 44 Am. Rep. 716, note; *McMillan v. State*, 7 App. 100; *Bland v. State*, 4 App. 15; *Williams v. State*, 5 App. 226; *Partain v. State*, 22 App. 100, 2 S. W. 854.

A verdict is certain, when the intention of the jury in connection with the pleadings and charge is understood. *McGee v. State*, 37 App. 670, 40 S. W. 967.

When a verdict is so defective and uncertain that the court can not know for what offense to pass judgment, it should not be received, or, having been received, should be set aside. *Guest v. State*, 24 App. 530, 7 S. W. 242; *Shelton v. State*, 27 App. 443, 11 S. W. 457, 11 Am. St. Rep. 200.

In a prosecution for false swearing, the district attorney wrote out a verdict and handed it to a juror, who signed it as foreman, and as thus signed it was read by the clerk. The jury did not retire or deliberate as to their verdict, nor did the member who signed the verdict speak to any other member in regard to signing it. That member had not been elected foreman, nor was there any consultation among the jurymen as to the matter, though the judge, after the verdict was handed to the clerk, asked the jury if they agreed to it, and they nodded their heads. Held, that the verdict was erroneous. *Woodall v. State*, 58 App. 513, 126 S. W. 591.

A verdict is sufficient where a judgment properly rendered on it will bar another prosecution for the same offense. *Roberts v. State* (Cr. App.) 168 S. W. 100.

— **Form of verdict.**—Technical objections to the want of form in wording will be disregarded. *Lindsay v. State*, 1 App. 327. And so will technical and unsubstantial objections. *Reynolds v. State*, 17 App. 413.

And so where several defendants are on trial, under the same plea, and the finding of the jury is the same as to all of them, it will be sufficient to refer to them as "the defendants." If, however, they should find a verdict as to one, or more, differing from the verdict as to another, or others on trial, it would be necessary to name in the verdict each defendant to whom a finding applies, so as to render certain the finding of the jury as to each defendant. *Williams v. State*, 5 App. 226. See, also, *Plumley v. State*, 8 App. 529, for a sufficient identification of the defendant by the record.

The verdict must be in writing, but it is not imperative that it be written upon the indictment, nor that the jury shall have the indictment with them in their deliberations. *Schultz v. State*, 15 App. 258, 49 Am. Rep. 194.

When there is but one defendant on trial, the verdict need not designate him by name. It is sufficient to refer to him as "the defendant." *George v. State*, 17 App. 515; *Williams v. State*, 5 App. 226.

Verdict written with lead pencil is good. *Ellis v. State*, 30 App. 601, 18 S. W. 139. Need not be dated. *Hardy v. State*, 37 App. 55, 38 S. W. 615.

The foreman wrote out the verdict on the court's charge, and signed it, and, as the jury were about to leave the jury room a juror asked if the verdict should not be written on the indictment, when the foreman unfolded the indictment, and discovered that there was a verdict written thereon, and stated that there must be a mistake, and they must have the wrong indictment, and they called the sheriff's attention to the indictment, which was returned to the jury room without any verdict on it, and the jury believed that they had gotten the right indictment instead of the one on which the verdict had been written, whereupon the foreman wrote the same verdict of guilty on the indictment which he had written on the charge. Held, that accused was not injured by the proceedings in writing out the verdict. *Myers v. State* (Cr. App.) 144 S. W. 1134.

That the verdict in a larceny case read, "We, the jurors, find," instead of, "We, the jury, find," did not render it insufficient. *Skinner v. State* (Cr. App.) 154 S. W. 1007.

A verdict, in a prosecution for burglary, reading, "We, the jury, find the defendant guilty of burglary as charged, and assess his punishment at two years in the penitentiary," was not insufficient as omitting the word "confinement." *Brown v. State* (Cr. App.) 177 S. W. 1161.

— **Mistakes of grammar and spelling.**—Incorrect orthography or ungrammatical language will not vitiate a verdict, when the meaning of the words and language used is not uncertain. *Wooldridge v. State*, 13 App. 443, 44 Am. Rep. 708; *Walker v. State*, 13 App. 618, 44 Am. Rep. 716, note; *Reynolds v. State*, 17 App. 413; *Hoy v. State*, 11 App. 32; *Taylor v. State*, 5 App. 569; *Krebs v. State*, 3 App. 348; *Koontz v. State*, 41 Tex. 570; *Partain v. State*, 22 App. 100, 2 S. W. 854; *Thompson v. State* (Cr. App.) 152 S. W. 893.

The rule of *idem sonans* obtains in the construction of verdicts, which is, that

if words may be sounded alike without doing violence to the power of the letters found in the variant orthography, then the words are idem sonans, and the variance is immaterial. *Walker v. State*, 13 App. 618, 44 Am. Rep. 716, note; *Woodridge v. State*, 13 App. 443, 44 Am. Rep. 708; *Henry v. State*, 7 App. 388.

Verdict will not be disturbed on account of bad writing or spelling. *Cockerell v. State*, 32 App. 585, 25 S. W. 421.

Responsiveness to issues.—The verdict must respond to the indictment under P. C. art. 1360, for driving stock to market without bill of sale. *Senterfit v. State*, 41 Tex. 186.

A verdict, convicting defendant of an attempt to rape, rendered upon the sole issue of an assault with intent to commit rape, is not responsive to the issues. *Wylvias v. State*, 64 App. 236, 142 S. W. 585.

Number of jurors concurring.—Verdict of conviction by four jurors agreed to by the parties is a nullity. *Archer v. State*, 51 App. 46, 100 S. W. 769.

Different counts.—Indictment contained a good and a bad count and the court submitted both to the jury. Held, that the verdict, because uncertain upon which count it was rendered, cannot stand. *Peacock v. State*, 37 App. 418, 35 S. W. 964.

Where there are two counts, verdict should show upon which count it is based. *Shell v. State* (Cr. App.) 38 S. W. 207.

Surplusage.—A verdict, in a prosecution for unlawfully carrying a pistol, is not erroneous, because it finds that accused should pay the costs, as these would be assessed against him, regardless of the verdict. *McIndoo v. State* (Cr. App.) 147 S. W. 235.

Clerical mistake.—When the verdict as set forth in the judgment was insufficient, it was held, on appeal, that it was manifest that the insufficiency was the result of a clerical mistake, the verdict as actually rendered being elsewhere set forth in the record, and being sufficient. *McInturf v. State*, 20 App. 335. But see *Long v. State*, 1 App. 709.

Impeachment of verdict.—A verdict can be neither explained nor impeached by the affidavit, deposition, or other sworn statement of a juror. *Weatherford v. State*, 31 App. 530, 21 S. W. 251, 37 Am. St. Rep. 828.

Jurors will not be allowed to impeach their verdict by alleging that different members of the jury misunderstood the testimony of a witness. *Ulmer v. State*, 71 App. 579, 160 S. W. 1188.

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.

See *Willson's Cr. Forms*, 947.

Cited, *Essery v. State*, 72 App. 414, 163 S. W. 17.

Number of jurors rendering verdict.—A jury of more than twelve persons is an illegal one and can not render a legal verdict. *Bullard v. State*, 38 Tex. 504, 19 Am. Rep. 80.

Under a former law nine jurors could render a verdict in a felony case, under certain circumstances. *Ray v. State*, 4 App. 450; *Gindrat v. State*, 3 App. 573. But such is not now the law. *Ellison v. State*, 12 App. 557.

Necessity of signing.—Prior to the enactment of the preceding article, the verdict need not have been signed by the foreman, though that was held to be the better practice. *Morton v. State*, 3 App. 510; *Williams v. State*, 5 App. 615. See, also, Const., art. 5, sec. 13; ante, art. 4.

The verdict in a felony case must be signed by the foreman; such signature not necessary in a misdemeanor verdict. *Barton v. State* (Cr. App.) 44 S. W. 1093.

The verdict of the jury does not have to be signed by the foreman or any others of the jury, even in a felony case. *Mackey et al. v. State* (Cr. App.) 151 S. W. 802.

Sufficiency of signature.—The foreman having signed the verdict, it was not vitiated because he did not write "foreman" in full, but an abbreviation. *Howard v. State* (Cr. App.) 178 S. W. 506.

Presumptions as to signing.—A judgment as shown by the record on appeal recited that the jury was composed of 12 men, whose names were given, but the verdict signed by the foreman was by a name not corresponding to any of those recited as in the panel. This discrepancy, however, was not adverted to or noticed in the motion for a new trial, and was not questioned or raised by bill of exceptions, affidavit, or otherwise. Held that, in absence of proof, it should be held that accused was tried by a jury of 12 required by Const. art. 5, § 13, and Code Cr. Proc. 1911, art. 645; the foreman's name being presumed to be improperly stated in copying the verdict. *Petty v. State*, 59 App. 586, 129 S. W. 615.

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.]

See, ante, art. 758; Const., art. 5, sec. 13.

Ray v. State, 4 App. 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.

See Const., art. 5, sec. 17; ante, arts. 4, 645.

Cited, *Ethridge v. State* (Cr. App.) 172 S. W. 786.

Consent to trial by less than six.—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 App. 59.

Where defendants, on trial for a misdemeanor, agreed to try the case before a jury of five, which was done without objection pending the trial, an objection by themselves, after conviction, that they were tried by a jury of five men only, was too late. *Mackey et al. v. State* (Cr. App.) 151 S. W. 802.

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.]

Time for receiving verdict.—A verdict may be received on Sunday. *Shearman v. State*, 1 App. 215, 28 Am. Rep. 402; *McKinney v. State*, 8 App. 626; *Walker v. State*, 13 App. 618, 44 Am. Rep. 716, note; *Powers v. State*, 23 App. 42, 5 S. W. 153; *Huffman v. State*, 28 App. 174, 12 S. W. 588; *Brown v. State*, 32 App. 119, 22 S. W. 596, and cases cited.

During recess of the court for dinner a verdict was returned to the judge, who received it without formally reopening court. Held, that the court was open for all purposes connected with the case before the jury, and a formal reopening of the court for the purpose of receiving the verdict was not necessary. *Templeton v. State*, 5 App. 398.

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 App. 486, 13 S. W. 783.

Entry of verdict.—An entry that the verdict was returned into court by the "grand jury duly impaneled to try said cause" was held not vitiated by the word "grand." *Stewart v. State*, 4 App. 519.

It is not essential that the verdict should be "filed," but only that it be entered upon the minutes. *Williams v. State*, 7 App. 163; *Huffman v. State*, 28 App. 175, 12 S. W. 588; *Ex parte Juneman*, 28 App. 486, 13 S. W. 783.

Length of deliberations.—A verdict rendered by the jury after being out not exceeding 10 minutes will not be set aside as the result of passion or prejudice on the sole ground of the shortness of the time of deliberation; counsel having made lengthy arguments. *Williams v. State* (Cr. App.) 150 S. W. 185.

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.]

See *Willson's Cr. Forms*, 971, 972.

Manner of polling.—In polling a jury, it is not intended that the jurors shall be interrogated further than to ask each of them the direct question: "Is that your verdict?" If he answers in the affirmative, his answer is conclusive, and further inquiry is not permissible. *Bean v. State*, 17 App. 60.

Dissent by juror—What constitutes.—A verdict is good although a juror may hesitate or explain when it is delivered, provided he does not retract. See instances: *Henderson v. State*, 12 Tex. 525; *Jack v. State*, 26 Tex. 1.

Application of statute.—Neither this nor the succeeding article was modified by the act of the thirtieth legislature, page 31 (arts. 646, 648, 901-908, C. C. P.). *Derden v. State*, 56 App. 396, 120 S. W. 485, 133 Am. St. Rep. 986.

Entry of verdict.—See art. 767.

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.]

See article 646.

See ante, art. 767; *Rudder v. State*, 29 App. 262, 15 S. W. 717.

Presence of defendant and counsel.—In a felony case the defendant must be present when the verdict is received, but the presence of his counsel is not essen-

tial. *Beaumont v. State*, 1 App. 533, 28 Am. Rep. 424; *Summers v. State*, 5 App. 365, 32 Am. Rep. 573; *Richardson v. State*, 7 App. 486; *Mapes v. State*, 13 App. 85. The presence of the defendant is not essential, however, at the time the clerk performs the ministerial act of entering the judgment. *Powers v. State*, 23 App. 42, 5 S. W. 153. In a misdemeanor case his presence is not essential. *Gage v. State*, 9 App. 259; *Mapes v. State*, 13 App. 85.

The defendant must be present, though his attorney need not be. *Huffman v. State*, 28 App. 174, 12 S. W. 588; *Brown v. State*, 32 App. 119, 22 S. W. 596, and cases cited.

Other statutes.—This article was not modified by Acts 30th Leg., p. 31 (arts. 646, 648, 901-908, C. C. P.); *Derden v. State*, 56 App. 396, 120 S. W. 485, 133 Am. St. Rep. 986.

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.]

See Willson's Cr. Forms, 946, 954, 957.

Cited, *Essery v. State*, 72 App. 414, 163 S. W. 17.

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| 1, 2. Forgery. | 11. ——— Conformity to pleading and proof. |
| 3. Requisites and sufficiency in general. | 12. ——— Different counts. |
| 4. ——— Verdicts held sufficient. | 13. ——— Mistakes in spelling. |
| 5. ——— Verdicts held insufficient. | 14. Special pleas. |
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| 8. ——— Sufficiency in general. | 17. ——— Place of imprisonment. |
| 9. ——— Specifying offense. | 18. ——— Excessiveness of punishment. |
| 10. ——— "Guilty as charged." | 19. ——— Mistakes in spelling. |
| | 20. Correction of verdict. |

1, 2. **Forgery.**—See notes under Pen. Code, arts. 924, 946.

3. **Requisites and sufficiency in general.**—In construing a verdict the object is to get at the meaning of the jury. *Chester v. State*, 1 App. 703. And a verdict is sufficient when it appears that the jury have clearly expressed an intention to find the defendant guilty of the crime charged in the indictment, and to assess his punishment within the terms of the law. *Williams v. State*, 5 App. 226; *Hutto v. State*, 7 App. 44; *McMillan v. State*, 7 App. 100; *McCoy v. State*, 7 App. 379.

The court, in determining whether a verdict is sufficient, must seek to arrive at the meaning of the jury and give to it a reasonable intendment, and where the jury has expressed an intention to find accused guilty as charged in the indictment, and to assess his punishment in terms of law, the verdict is sufficient as against technical objections. *Roberts v. State* (Cr. App.) 168 S. W. 100.

4. ——— **Verdicts held sufficient.**—The verdict in a local option case used the word "indictment" instead of "information" and omitted the word "fine" before the amount assessed as a fine; held, sufficient. *McGee v. State*, 37 App. 668, 40 S. W. 967.

A verdict finding accused guilty, and imposing a "fine of \$50 and 40 days in jail," shows that accused was fined \$50 and that his imprisonment should be 40 days in jail. *Ellis v. State*, 59 App. 630, 130 S. W. 171.

A verdict, reciting that the jury found defendant guilty as charged in the indictment and assessed his punishment at a fine of \$25 and 20 days in jail, was not fatally defective, because accused was tried on a complaint and information, instead of an indictment, and because the word "confinement" was omitted in connection with the "20 days in jail." *Craig v. State*, 62 App. 299, 137 S. W. 667.

A verdict, "We the jury find the defendant guilty of murder in the first degree and assess his punishment at death," signed by the foreman, was not void for uncertainty. *Zunago v. State*, 63 App. 58, 138 S. W. 713, Ann. Cas. 1913D, 665.

A verdict in criminal slander, "We, the jury, find the defendant, C., guilty according to the law and evidence of the case, and affix the fine to the lowest limit, which is \$100," is sufficient. *Curl v. State* (Cr. App.) 145 S. W. 602.

In a prosecution for robbery, a verdict that, "We, the jury, find accused guilty and assess the penalty at five years in the penitentiary," is sufficient. *Compton v. State* (Cr. App.) 148 S. W. 580.

A verdict that we, the jury, find the defendant guilty as charged in the indictment and assess his punishment at two years in the penitentiary, is neither unintelligible nor vague. *Dugat v. State* (Cr. App.) 148 S. W. 789.

A verdict, in a prosecution for selling liquor without a license, "We, the jury, find the defendant guilty as charged, and assess his fine at \$300 and 30 days in jail," was sufficient. *Figueroa v. State*, 71 App. 371, 159 S. W. 1188.

5. ——— **Verdicts held insufficient.**—Where the offense charged was robbery, a verdict: "We, the jury, find the defendant guilty of agreeing to the commission of the offense, and is liable as a principal offender, and assess the punishment at seven years in the state penitentiary," was held insufficient. *Ring v. State*, 42 Tex. 282.

On trial for aggravated assault, the verdict was, "We, the jury, find the defendant guilty and assess his punishment at a fine of \$10." Held, insufficient. *Hays v. State*, 33 App. 546, 28 S. W. 203.

On trial for murder the jury returned a verdict finding defendant guilty, and assessing his punishment at death, but did not state the degree; held, while this is such an irregularity as requires a reversal of the case, it does not amount to an acquittal of murder in the first degree. *Garza v. State*, 39 App. 358, 46 S. W. 242, 73 Am. St. Rep. 927.

6. — **Mistakes of grammar or spelling.**—A verdict reading, "We the juror find the defendant guilty, and sess his punishment deth," is intelligible. *Krebs v. State*, 3 App. 348.

Verdicts are to have a reasonable intendment, and to receive a reasonable construction, and are not to be avoided, unless from necessity, originating in doubt of their import, or immateriality of the issue found, or their manifest tendency to work injustice, or their failure to contain that which some express provision of the statute requires they shall contain. Incorrect orthography, or ungrammatical language will not vitiate a verdict. *Walker v. State*, 13 App. 618, 44 Am. Rep. 716, note; *Woodriddle v. State*, 13 App. 443, 44 Am. Rep. 701; *Bland v. State*, 4 App. 15; *Reynolds v. State*, 17 App. 413; *Williams v. State*, 5 App. 226; *Curry v. State*, 7 App. 91; *McMillan v. State*, Id. 100.

The following verdict was held sufficient: "We, the jury, find defend gitty and assess his punishmez at 90 days imp. county jale." *Hallis v. State* (Cr. App.) 34 S. W. 922.

In a prosecution for misdemeanor, a verdict, "We, the juror, find the defendant guilty and ses his pently at 60 days in jail & \$25.00 fine," is not reversible error, as its meaning is clear. *Willingham v. State*, 62 App. 55, 136 S. W. 470.

A verdict "that the jury find the defendant 'guidy' and 'assess' his punishment," etc., was not vitiated by the misspelled words. *Alsop v. State* (Cr. App.) 153 S. W. 624.

On a trial for aggravated assault, a verdict, "We * * * find the defendant guilty of aggravate assault & assess his punishment in the county jail one month and fine him one hundred dollars (\$100.00)," is sufficient. *Yates v. State*, 72 App. 279, 162 S. W. 499.

A verdict, "We the jury find the Defenda— Guilty of Man Slaughter and Assess his punishment at two years in the State Penitentiary," signed by a juror, followed by the word, "Fourman," is sufficient as against a motion in arrest. *Lopez v. State*, 73 App. 624, 166 S. W. 154.

7. **Finding of guilt—General or special verdict.**—Verdict must be general, finding defendant either guilty or not guilty. It must be general as contradistinguishing from special. *Slaughter v. State*, 24 Tex. 410.

8. — **Sufficiency in general.**—A verdict must declare that the jury find the defendant guilty. An omission of the word "find" vitiates the verdict, and such omission can not be supplied in the judgment. *Shaw v. State*, 2 App. 487.

The form of the verdict, in the event of conviction, as prescribed by the charge in this case, was as follows: "We, the jury, find the defendant, Mack Crook, guilty as an accomplice to murder of the first degree in the killing and murdering of James H. Black, as charged in the indictment," etc. Held correct. *Crook v. State*, 27 App. 198, 11 S. W. 444.

A verdict: "We find the defendant guilty" etc., omitting the words "the jury," held, sufficient. *Beabout v. State*, 37 App. 515, 40 S. W. 405.

Also a verdict: "We the jury find the defendant guilty as in the indictment," leaving out the word "charged" was held sufficient. *Styles v. State*, 37 App. 599, 40 S. W. 498.

A verdict which finds defendant guilty as charged in the complaint, when he was charged by information based on a complaint is sufficient. *Jackson v. State*, 37 App. 612, 40 S. W. 498.

Verdict, "We, the jury, find defendant guilty as in the indictment," held, sufficient. *Styles v. State*, 37 App. 599, 40 S. W. 498.

The information charged that on or about February 17th accused unlawfully, etc., carried a pistol. The verdict was, "We, the jury, find the defendant guilty as charged in the information." Held, that the verdict found accused guilty of unlawfully carrying a pistol on or about February 17th. *Greer v. State*, 62 App. 81, 136 S. W. 451.

In a prosecution for theft, a verdict that "we, the jury, find defendant guilty and assess his punishment at two years confinement in the penitentiary," is not open to objection that defendant was not found guilty as charged. *Franklin v. State*, 63 App. 438, 140 S. W. 1091.

In a prosecution for following the business of selling intoxicating liquors in prohibition territory, where the indictment charged the offense with particularity, a verdict of guilty as charged in the indictment, signed by the foreman, together with the judgment and sentence thereon, are sufficient. *Monroe v. State*, 70 App. 245, 157 S. W. 154.

9. — **Specifying offense.**—A verdict finding the defendant "guilty of the crime" was held sufficient in a case of horse theft. *Lindsay v. State*, 1 App. 327. Guilty of "burglary and theft" was held unintelligible and bad. *Haney v. State*, 2 App. 504.

But a verdict: "We, the jury, find the defendant guilty of felony, and assess the penalty at two years in the state penitentiary," did not determine that defendant was guilty of the theft of property of the value of twenty dollars or over, that being the offense with which he was charged. *Miles v. State*, 3 App. 59. So a verdict: "We, the jury, find the defendant guilty of a misdemeanor in driving from the county of Lampasas one cow brute, and assess his fine at \$18," was held insufficient. *Senterfit v. State*, 41 Tex. 187. So a verdict: "We, the jury, find the

defendant guilty of a misdemeanor, and assess his punishment at one hundred dollars," was held wholly insufficient. *Howell v. State*, 10 App. 298. So on an indictment for the theft of two hogs, a verdict finding the defendant guilty "of theft of property of the sum of twelve dollars," was held insufficient. *Collins v. State*, 6 App. 647; *Moore v. State* (Cr. App.) 33 S. W. 971.

Indictment being for theft, but the charge submitting only driving from the range, a general verdict will be good for that offense. *Marshall v. State*, 4 App. 549. And see *Foster v. State*, 21 App. 80, 17 S. W. 548.

But under an indictment for theft of a horse, the offense of driving the animal from its accustomed range was also submitted to the jury, and they returned a general verdict of guilty, assessing the punishment at two years' confinement in the penitentiary. Held, that the verdict was sufficient to support a judgment for the last named offense. *Foster v. State*, 21 App. 80, 17 S. W. 548. So, where the indictment charged theft of cattle, but the charge of the court submitted to the jury only the offense of driving the animals from their range, and the jury returned a general verdict of guilty, assessing the punishment at a fine of one dollar, the verdict was held sufficient. *Marshall v. State*, 4 App. 549. So, where an information charged an aggravated assault, and a general verdict of guilty was returned, assessing the punishment at a fine of \$100, the verdict was held sufficient, inasmuch as that was the offense charged, and no minor offense was submitted by the court to the jury. *Franks v. State*, 4 App. 431. See, in this connection, *Dreyer v. State*, 11 App. 631.

A verdict of guilty will be construed as meaning guilty of the offense charged. *Steinberger v. State*, 35 App. 492, 34 S. W. 617.

Where the court submitted the issues of guilt of disfiguring the person of another, punishable by imprisonment in the penitentiary, and of aggravated assault, punishable by fine, a verdict of guilty without designating the crime, but fixing the punishment at a term in the penitentiary was sufficiently definite to show the purpose of the jury to find accused guilty of disfiguring. *Lee v. State* (Cr. App.) 148 S. W. 567, 40 L. R. A. (N. S.) 1132.

A verdict on a trial for murder, "We, the jury, find the defendant guilty and assess his punishment at twenty years in the penitentiary," rendered under instructions submitting murder and manslaughter, is sufficient to sustain a judgment adjudging accused guilty of murder. *Roberts v. State* (Cr. App.) 168 S. W. 100.

10. — "Guilty as charged."—A verdict which finds the defendant "guilty as charged in the indictment" is sufficient without naming the offense, and is the proper form for a verdict of guilty, except in murder, or when the intention is to find for a lower degree. *Henderson v. State*, 5 App. 134; *Nettles v. State*, Id. 386; *Jones v. State*, 58 App. 535, 117 S. W. 127.

But where the indictment charged theft of property of the value of twenty dollars, a verdict that finds the defendant "guilty as charged in the indictment" is a sufficient finding that he is guilty of theft of property of the value of \$20. *Cohea v. State*, 11 App. 153. See, also, *Lawrence v. State*, 20 App. 536.

On trial for rape the court in his charge submitted rape, also assault with intent to rape. The jury brought in the following verdict: "We, the jury, find the defendant guilty as charged in the indictment," and they assessed his punishment at fifty years confinement in the penitentiary; held, this verdict found defendant guilty of rape and the court properly treated it so. *McGee v. State*, 39 App. 190, 46 S. W. 709.

The indictment charged accused with the theft of a watch of the value of \$135 and also \$31 in money. The court submitted two phases of theft—first, theft of property over \$50; second, that under \$50. The following verdict was returned: "We, the jury, find the defendant guilty as charged in the indictment and assess his punishment at 4 years' confinement in the penitentiary." Held, that the verdict showed that the defendant had been convicted of a felony. *Burton v. State*, 62 App. 648, 138 S. W. 1019.

Where accused was charged only with aggravated assault, a verdict that "we, the jury, find accused guilty as charged," was sufficient. *Noland v. State*, 63 App. 275, 140 S. W. 100.

An objection to a verdict, "we find the defendant guilty as charged in the indictment of murder in the first degree," on the ground that it is uncertain in that the indictment embraces all the degrees of homicide, is hypercritical. *Wisnoski v. State* (Cr. App.) 153 S. W. 316.

Where an accused is charged with aggravated assault, but the court limits the jury to a consideration of simple assault, a verdict of "guilty of assault as charged in the information" is sufficiently definite. *Carpenter v. State* (Cr. App.) 153 S. W. 883.

In a prosecution for robbery, where the indictment charged that it was committed by the exhibition of deadly weapons, a verdict finding accused guilty as charged in the indictment, and assessing his punishment at the lowest term of imprisonment prescribed, is sufficient because there are no degrees of robbery, however committed. *Dosh v. State*, 72 App. 239, 161 S. W. 979.

A verdict, in a prosecution for an aggravated assault, reciting that the jury find the defendant guilty as charged in the indictment is sufficient to show a conviction for aggravated assault, and of no other offense. *McCraw v. State* (Cr. App.) 163 S. W. 967.

In a prosecution for aggravated assault on a female, a verdict finding defendant guilty as charged and assessing his punishment at a fine of \$25, which was the lowest penalty for aggravated assault and the highest for simple assault, was not defective, as indefinite concerning the offense of which accused was convicted, since any assault on prosecutrix would be an aggravated one by virtue of the statute. *Carmicle v. State* (Cr. App.) 172 S. W. 238.

11. — Conformity to pleading and proof.—Under an indictment charging an assault with intent to murder, a verdict of guilty of assault with "attempt" to murder was held sufficient. *Hart v. State*, 38 Tex. 382.

"Guilty of aggravated assault and battery" was held good, although the indictment did not charge a "battery," and none was proved. *Bittick v. State*, 40 Tex. 117.

The indictment charged the theft of a "horse (a stallion)," the verdict found the defendant guilty of the theft of a "horse (a gelding)," as charged in the indictment." Held, that the verdict was not responsive to, and did not support the indictment. *Persons v. State*, 3 App. 210.

And where the indictment charged theft of a horse, and the verdict was a general one of "guilty of theft as charged in the indictment," assessing the punishment at two years' confinement in the penitentiary, it was held that the conviction was for the offense defined in art. 1356, and that the verdict was sufficient. *Foster v. State*, 21 App. 80, 17 S. W. 548.

12. — **Different counts.**—A general verdict may be applied to whichever of plural counts in the indictment is supported by the proof. *Spoonemore v. State*, 25 App. 358, 8 S. W. 280; *Alexander v. State*, 31 App. 359, 20 S. W. 756; *Carr v. State*, 36 App. 3, 34 S. W. 949 (distinguishing *Parks v. State*, 29 App. 597, 16 S. W. 532); *Isaacs v. State*, 36 App. 505, 38 S. W. 40; *Fry v. State*, 36 App. 582, 37 S. W. 741, 38 S. W. 168, and cases cited; *Fry v. State*, 36 App. 584, 37 S. W. 741, 38 S. W. 168; *Rosson v. State*, 37 App. 87, 38 S. W. 788; *Looman v. State*, 37 App. 279, 39 S. W. 571; *Pitner v. State*, 37 App. 268, 39 S. W. 662; *McMurtry v. State*, 38 App. 521, 43 S. W. 1010, and cases cited; *Lovejoy v. State*, 40 App. 89, 48 S. W. 520, and cases cited; *Mohan v. State*, 42 App. 410, 60 S. W. 553; *Bivins v. State* (Cr. App.) 97 S. W. 87.

A general verdict of guilty responds sufficiently to an indictment which contains two counts, even if one of the counts be bad, inasmuch as the verdict will be applied to the good count. *Boren v. State*, 23 App. 28, 4 S. W. 463; *Pitner v. State*, 37 App. 268, 39 S. W. 662; *Southern v. State*, 34 App. 144, 29 S. W. 780, 53 Am. St. Rep. 702; *Ferrell v. State* (Cr. App.) 152 S. W. 901; *Noodleman v. State* (Cr. App.) 170 S. W. 710.

Counts are independent of each other, and the first or any other may be quashed without affecting the remainder; and a general verdict applies to those which are good, and on appeal the presumption is that the conviction was upon the good count. *King v. State*, 10 Tex. 281; *State v. Rutherford*, 13 Tex. 24; *State v. Yarborough*, 19 Tex. 161; *Henderson v. State*, 2 App. 88; *Boren v. State*, 23 App. 28, 4 S. W. 463.

Where there are two counts with different penalties and the defendant pleads guilty to first, the court can submit both to the jury and jury can convict on second. *Dancey v. State*, 35 App. 616, 34 S. W. 113, 938.

Where there are two counts and both are submitted, and the charge states the penalty incorrectly as to one, but gives the correct minimum of each, which is the same, and the jury assess the minimum, the court can apply a general verdict to either count. *Lovejoy v. State*, 40 App. 99, 48 S. W. 520.

When there are counts with different penalties, judgment ascertaining punishment is application of general verdict to the count which the penalty sustains. *Jordan v. State*, 40 App. 190, 49 S. W. 371.

Where an indictment charged burglary and theft in a single count, and the charge of the court was confined to the issue of burglary, a general verdict of guilty was held to authorize a judgment for burglary. *Turner v. State*, 22 App. 42, 2 S. W. 619.

It is a general rule that a general verdict of guilty responds sufficiently to an indictment which contains two counts, even if one of the counts be bad, inasmuch as the verdict will be applied to the good one. But exceptions to this rule are when the counts charge a felony which includes other offenses which are misdemeanors, and all the offenses covered by the indictment are submitted to the jury in the charge of the court. In such case a general verdict of guilty, applicable to either of the offenses, being uncertain, would not support a judgment. *Hickman v. State*, 22 App. 441, 2 S. W. 640; *Guest v. State*, 24 App. 530, 7 S. W. 242; *English v. State*, 29 App. 174, 15 S. W. 649.

A double conviction—that is for both offenses—cannot be had under an indictment charging forgery and uttering a forged instrument, in different counts. *Crawford v. State*, 31 App. 51, 19 S. W. 766, and cases cited.

When there are several assignments of perjury and proof to sustain any good assignment, a general verdict will be sustained. *Beach v. State*, 32 App. 240, 22 S. W. 976; *Moore v. State*, 32 App. 405, 24 S. W. 95.

When an indictment in separate counts charges distinct offenses the proper practice is to retire the jury and let them apply the verdict to one of the counts. *Southern v. State*, 34 App. 144, 29 S. W. 780, 53 Am. St. Rep. 702.

If the defendant requests it the jury should be required to pass upon each count separately. *Id.*

When an indictment in one count charges defendant as principal and in another as an accomplice, a general verdict is insufficient. *Isaacs v. State*, 36 App. 505, 38 S. W. 40.

On an indictment for theft and receiving stolen goods the application of a general verdict of guilty to one count; held, no error. *Rosson v. State*, 37 App. 87, 38 S. W. 788.

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*, 38 App. 521, 43 S. W. 1010.

Where there is a fatally defective count in an information, and the case is submitted on all counts, a general verdict of conviction cannot stand. *Smith v. State*, 57 App. 609, 124 S. W. 665.

Where, on the trial of an indictment in two counts, one for forgery, and one for uttering the instrument as forged, the jury were instructed to disregard the first count and base their verdict on the second count, and the verdict rendered was

"guilty as charged in the indictment," the verdict would apply only to the second count. *Chappell v. State*, 58 App. 401, 126 S. W. 274.

Where one of the counts submitted attempted to charge a violation of the rules and regulations of the live stock sanitary commission, while the others charged violations of Pen. Code 1911, art. 1283, relative to permitting cattle affected with contagious and infectious diseases to run at large, or with other animals not so affected, and the verdict found accused guilty of "breaking the laws of the live stock sanitary commission," the verdict could not, for the purpose of upholding a conviction, be applied to the counts charging a violation of article 1283, since, while a verdict general in its terms may be applied to any count submitted, a verdict which makes a specific finding as to the count under which accused is found guilty cannot be so applied. *Rhea v. State*, 70 App. 258, 156 S. W. 643.

On a trial under an information charging, in two counts, that accused played cards at a place other than a private residence occupied by a family, and that he knowingly went into and remained at a place where cards were being played, where the evidence was sufficient to support a conviction under the second count, a general verdict of guilty should be applied to that count. *Sloan v. State* (Cr. App.) 170 S. W. 156.

13. — Mistakes in spelling.—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 App. 403, 37 S. W. 743; *Roberts v. State*, 33 App. 83, 24 S. W. 895; *Lawrence v. State*, 20 App. 536; *Foster v. State*, 21 App. 80, 17 S. W. 548; *Jacobs v. State*, 28 App. 80, 12 S. W. 408; *Beabout v. State*, 37 App. 515, 40 S. W. 405; *McGee v. State*, 39 App. 190, 45 S. W. 709; *Inglen v. State*, 36 App. 472, 37 S. W. 861; *Day v. State*, 62 App. 527, 138 S. W. 123; *Johnson v. State*, 71 App. 428, 160 S. W. 964; *Tores v. State* (Cr. App.) 166 S. W. 523.

A judgment of conviction can be based only upon a verdict of guilty. To find the defendant "guilty" is not sufficient. *Wilson v. State*, 12 App. 481; *Taylor v. State*, 5 App. 569. Nor is it permissible to explain by evidence that the jury intended to find the defendant guilty, and that the word "guilty" was intended for the word "guilty." *Harwell v. State*, 22 App. 251, 2 S. W. 606. But omitting to cross the letter "t" in the word "guilty" does not vitiate the verdict. *Pertain v. State*, 22 App. 100, 2 S. W. 854; *Walker v. State*, 13 App. 618, 44 Am. Rep. 716, note. And to find the defendant "gilty" is sufficient. *Koontz v. State*, 41 Tex. 570. So to find him "guilty" is sufficient. *Curry v. State*, 7 App. 91.

A verdict which read, "Wee the jurors finde the defendant gilty and of mrder in the first degree," etc., was held sufficient. *Walker v. State*, 13 App. 618, 44 Am. Rep. 716, note.

Verdict is not vitiated by bad spelling. "We, the josury, find the defendant gilty," suffices in this case. *Shelton v. State*, 27 App. 443, 11 S. W. 457, 11 Am. St. Rep. 200; *Barnes v. State* (Cr. App.) 32 S. W. 896.

14. Special pleas.—See art. 574.

Where the defendant has pleaded former conviction or acquittal, as well as not guilty, and such plea under the evidence has been submitted to the jury, as well as the plea of not guilty, the verdict must expressly find whether the special plea is true or untrue, and if it fails to do so, the conviction, on appeal, will be set aside. *Davis v. State*, 42 Tex. 494; *Deaton v. State*, 44 Tex. 446; *Taylor v. State*, 4 App. 29; *Brown v. State*, 7 App. 619; *McCampbell v. State*, 9 App. 124, 35 Am. Rep. 726; *Pickens v. State*, Id. 270; *White v. State*, Id. 390; *Smith v. State*, 18 App. 329; *Burks v. State*, 24 App. 326, 6 S. W. 300; ante, art. 572. In a misdemeanor case, where a jury has been waived, and the cause has been submitted to the judge, an express finding on the special plea is not required. *Taylor v. State*, 4 App. 29; *Munch v. State*, 25 App. 30, 7 S. W. 341; *Wright v. State*, 27 App. 447, 11 S. W. 458; *English v. State*, 29 App. 174, 15 S. W. 649.

Where the evidence did not show that the judgment of conviction pleaded in bar was final, or whether an appeal had been taken therein, or a motion for new trial therein granted, the court properly refused to submit the issue of former conviction, notwithstanding this article. *Lindley v. State*, 57 App. 305, 122 S. W. 873.

15. Assessment of punishment—Province of jury.—If verdict finds accused guilty of any offense within the different degrees embraced in the indictment, it must assess the punishment, except where it is absolutely fixed by statute. *Buster v. State*, 42 Tex. 315.

By the adoption of the Revised Penal Code the penalty for murder has been changed from death absolutely, to the alternative of death or confinement for life in the penitentiary, and the jury must not only find by their verdict that the defendant is guilty of murder in the first degree, but they must assess the punishment at either death or confinement in the penitentiary for life. A general verdict of guilty of murder in the first degree without assessing the punishment, will be insufficient to support a judgment. *Doran v. State*, 7 App. 385; *Woodbridge v. State*, 13 App. 443, 44 Am. Rep. 708. When under the law the punishment was death absolutely, a general verdict of guilty of the capital offense, without assessing the punishment, was sufficient. *Murray v. State*, 1 App. 418; *Boothe v. State*, 4 App. 202; *Perry v. State*, 44 Tex. 473.

Where there was evidence justifying a conviction of murder in the first degree, whether the death penalty should be assessed was for the jury. *Zunago v. State*, 63 App. 58, 138 S. W. 713, Ann. Cas. 1913D, 665.

The indeterminate sentence law passed at the regular session of the 33d Legislature (Acts 33d Leg. c. 132) having been declared unconstitutional, accused, charged with murder alleged to have been committed October 1, 1901, for which he was placed on trial in July, 1913, was entitled as of right to have his punishment assessed by the jury. *Johnson v. State*, 72 App. 178, 161 S. W. 1098.

Where the jury in a misdemeanor case returned a verdict finding accused guilty and recommending a suspension of sentence, without assessing the punishment,

the court properly refused to receive the verdict, and directed the jury to assess the punishment; as a suspension of sentence in a misdemeanor case is not authorized by law. *Smith v. State*, 72 App. 206, 162 S. W. 835.

In a criminal case, whether tried before or after the enactment of the indeterminate sentence law of August 18, 1913 (Acts 33d Leg. [1st Called Sess.] c. 5), the court must require the jury to assess the penalty. *Williamson v. State*, 72 App. 618, 163 S. W. 435.

The first indeterminate sentence law having been declared invalid, the court properly required the jury to assess the punishment in a prosecution for assault to murder. *Simmons v. State*, 73 App. 288, 164 S. W. 843.

In a prosecution for procuring an abortion, it was proper to submit to the jury the question of the punishment to be assessed upon conviction. *Link v. State*, 73 App. 82, 164 S. W. 987.

16. — **Sufficiency in general.**—A verdict which assessed the punishment at "ten years in the penitentiary," was held good, the word "confinement" being unnecessary. *Jones v. State*, 7 App. 103; *Lindsay v. State*, 1 App. 327; *Taylor v. State*, 14 App. 340; *Carroll v. State*, 24 App. 313, 6 S. W. 42; *Gage v. State*, 9 App. 259; *Reynolds v. State*, 17 App. 413.

Where the verdict assessed the punishment at "twelve months" imprisonment, the law fixing it at "one year," the verdict was sustained. *Mitchell v. State*, 2 App. 404.

Verdict of imprisonment "at hard labor in the state prison" is good. *Moore v. State*, 7 App. 14; *Wilson v. State*, 12 App. 431; *Harris v. State*, 8 App. 90.

When the punishment prescribed by the law is fine and imprisonment in the county jail, or such imprisonment without fine, a verdict assessing a fine, without imprisonment, also, is insufficient. *Fowler v. State*, 9 App. 149; *Johnson v. State*, 18 App. 7; *Sager v. State*, 11 App. 110.

Verdict assessed punishment at a fine of \$30¹⁰⁰/₁₀₀₋₀₀ and fifteen days in jail; held, it plainly appeared that the jury intended to assess a fine of \$30 and was sufficient. *Kelly v. State*, 36 App. 480, 38 S. W. 43.

Where the word "dollars" or the dollar mark is omitted, the verdict will not be set aside, as the sense is clear. *O'Docharty v. State* (Cr. App.) 57 S. W. 657.

A verdict finding accused guilty of murder in the second degree; and assessing his "punishment twenty years' confinement in the penitentiary," is sufficient, though the word "at" is omitted between "punishment" and "twenty." *Garrett v. State* (Cr. App.) 155 S. W. 251.

17. — **Place of imprisonment.**—"State prison" is equivalent to "state penitentiary." *Moore v. State*, 7 App. 14; *Harris v. State*, 8 App. 90; *McCoy v. State*, 7 App. 379.

"Confinement in the penitentiary," or it seems "in the penitentiary," means "imprisonment at hard labor in the state penitentiary." *Williams v. State*, 5 App. 226; *Jones v. State*, 7 App. 103.

The verdict must state the place of confinement of a minor under the age of sixteen years, but it is not necessary that it state the finding of the jury as to the age of defendant. *Cole v. State*, 32 App. 423, 24 S. W. 510.

A verdict assessing punishment at two years in the "Reform School" cannot be upheld. It should have stated the house of correction and reformatory. *Evans v. State*, 35 App. 485, 34 S. W. 285.

A verdict sentencing one convicted of a felony to the "reform school" is void. *Evans v. State*, 35 App. 485, 34 S. W. 285.

Where accused was charged with cattle theft as a felony, a verdict finding him guilty as charged in the indictment, and assessing his punishment at "two years' imprisonment," was not defective for failure to fix the place of punishment, since there could be no other place therefor than the penitentiary. *Willcox v. State* (Cr. App.) 150 S. W. 898.

18. — **Excessiveness of punishment.**—A verdict can not be held excessive if the punishment assessed is within the statutory limits, unless in a clear case of the abuse of the discretion which the law has confided to juries. *Teague v. State*, 4 App. 147; *Davis v. State*, Id. 456; *Johnson v. State*, 5 App. 423; *Drake v. State*, Id. 649; *Jones v. State*, 14 App. 85; *Chiles v. State*, 2 App. 37; *Davis v. State*, 15 App. 594; *Fate v. State*, 73 App. 278, 164 S. W. 1018.

19. — **Mistakes in spelling.**—When a verdict assessed a "find" against the defendant, it was held sufficient, the context showing that the word "find" was intended for the word "fine." *Bland v. State*, 4 App. 15.

A verdict assessing the punishment at confinement in the state "penty" was held bad. *Keeller v. State*, 4 App. 527. But confinement in the state "prisin" was held good. *McCoy v. State*, 7 App. 379.

A verdict assessing the punishment at "2 years in the state penitenilrey," was held sufficient. *Hoy v. State*, 11 App. 32. So was a verdict assessing the punishment at five years "confindenment in the penitentiary." *McMillan v. State*, 7 App. 100.

On trial for theft the verdict was, "We, the jury, find the defendant guilty and assess his punishment at conprisonment in the state penitentiary for a term of two years." Held, the verdict was good and sufficient without the words "at conprisonment," and they might be rejected as surplusage. *Roberts v. State*, 33 App. 83, 24 S. W. 895.

In assessing the fine, the jury used "dolls" instead of dollars. Held, sufficient. *Short v. State* (Cr. App.) 29 S. W. 1072.

That the jury used the word "apess" instead of "assess" does not render the verdict void. *Hamilton v. State* (Cr. App.) 34 S. W. 280.

Objection to the verdict was that it used the word "jears" instead of "years," it appearing that the word might be called either. The verdict was held sufficient. *Jones v. State*, 35 App. 565, 34 S. W. 631.

A verdict, "We the jury find the defendant guilty and assess his punishment at ten years in the state penitentiary," was sufficient, notwithstanding the misspelling, to sustain a judgment. *Smith v. State*, 63 App. 183, 140 S. W. 1096.

A verdict was returned, finding accused guilty of manslaughter and assessing his punishment at three years in the penitentiary. By direction of the court it was amended to find him not guilty of murder in the second degree, guilty of manslaughter, and to assess his punishment by confinement in the penitentiary for three years, and in the amended verdict the word "three" was misspelled "three." No objection to the verdict was made at the time, and judgment was entered thereon, fixing the penalty at three years' confinement in the penitentiary. Held, that the court did not err in refusing to grant a new trial on account of the misspelling the word "three"; accused not having been injured thereby. *Burns v. State* (Cr. App.) 150 S. W. 794.

20. Correction of verdict.—See art. 773, and notes.

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.]

See Willson's Cr. Forms, 936, 948-950.

See Pen. Code, art. 1142, and notes.

Cited, *Essery v. State*, 72 App. 414, 163 S. W. 17.

Offenses for which conviction may be had.—Party charged with robbery cannot be convicted of an aggravated assault if the indictment does not contain averments which would make it good for aggravated assault, but he can be convicted of a simple assault, if the elements of such assault are stated. *Foreman v. State* (Cr. App.) 57 S. W. 845.

One indicted for an assault with intent to rape, and for an attempt to have carnal knowledge of a female without her consent, and with burglary at night-time, with intent to have carnal knowledge of the female without her consent, may be convicted of aggravated assault. *Ward v. State* (Cr. App.) 151 S. W. 1073.

Under this article and art. 772, subd. 13, under an indictment charging theft privately from the person, the jury could convict of the offense of attempt to commit theft from the person, if the evidence authorized such conviction. *Bell v. State*, 70 App. 466, 156 S. W. 1194.

Specifying grade or degree of offense.—In illustration, see *Slaughter v. State*, 24 Tex. 410 (explained in *Buster v. State*, 42 Tex. 315); *Bowen v. State*, 28 App. 498, 13 S. W. 787; *Hays v. State*, 33 App. 546, 28 S. W. 203; *Styles v. State*, 37 App. 599, 40 S. W. 498.

In murder cases, the verdict of conviction must find the degree. *McCloud v. State*, 37 App. 237, 39 S. W. 104, following *Buster v. State*, 42 Tex. 315.

Where the charge only submits one degree of a crime, the verdict need not designate the degree. If it says guilty as charged it is sufficient. *Millard v. State* (Cr. App.) 59 S. W. 273.

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 App. 347, 60 S. W. 53.

The jury, on a prosecution for assault, must find the grade of the offense, whether aggravated or simple assault; and a verdict merely finding accused guilty, and assessing his punishment at a fine, is insufficient. *Evans v. State*, 57 App. 174, 122 S. W. 392.

A verdict of guilty should specify the grade of the offense of which it was intended to convict accused. *Scott v. State*, 60 App. 318, 131 S. W. 1072.

Sufficiency of verdict.—When an indictment charges an offense, which includes other offenses, and all the offenses covered by the indictment are submitted to the jury by the charge of the court, a general verdict of guilty, assessing a punishment applicable to either of the offenses, is uncertain and will not support a judgment. Thus, where the indictment charged theft of cattle, and also driving cattle from their accustomed range, and both offenses were submitted to the jury, a general verdict of "guilty as charged in the indictment," assessing a punishment applicable to either offense, was held insufficient, and did not authorize the judgment for theft of cattle. *Guest v. State*, 24 App. 530, 7 S. W. 242. See, also, in this connection, *Miller v. State*, 16 App. 417. And on the same subject, see *Taylor v. State*, 25 App. 96, 7 S. W. 861; *Spoonemore v. State*, 25 App. 358, 8 S. W. 280; *Woods v. State*, 26 App. 490, 10 S. W. 108; *Lopez v. State*, 28 App. 343, 13 S. W. 219.

In all felony cases which include degrees, except murder cases, a general verdict of guilty, affixing a punishment corresponding with the offense charged in the indictment, will support a judgment of conviction for that offense. *Nettles v. State*, 5 App. 386; *Henderson v. State*, Id. 134. See further under heads of the different offenses including degrees. *Foster v. State*, 25 App. 543, 8 S. W. 664.

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*, 39 App. 190, 45 S. W. 709, following *Nettles v. State*, 5 App. 386, and overruling on the point *Guest v. State*, 24 App. 530, 7 S. W. 242.

Where the issues of both aggravated and simple assault were submitted and the

verdict is a fine of \$25, it is too uncertain as to the offense of which defendant is found guilty to base a judgment thereon. *Moody v. State*, 52 App. 232, 105 S. W. 1127, 1128.

Under Pen. Code 1895, art. 712 (Pen. Code 1911, art. 1142), requiring the jury, finding one guilty of murder, to find whether it is murder in the first or second degree, a verdict, finding accused, indicted for murder, guilty as charged in the indictment, is fatally defective. *Orner v. State* (Cr. App.) 143 S. W. 935.

Conviction of included offense—New trial—Jurisdiction.—In view of articles 89, 843 and 945 where accused was indicted for assault with intent to murder, the reversal on appeal of a conviction of an aggravated assault will not deprive the district court of jurisdiction to hear the case upon retrial, though the county court has original jurisdiction of misdemeanors. *Hughes v. State* (Cr. App.) 152 S. W. 912.

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.]

Explanatory.—Degrees in murder have been abolished. See arts. 1140, 1141, Pen. Code.

Cited, *Key v. State*, 71 App. 642, 161 S. W. 121; *Essery v. State*, 163 App. 414, 163 S. W. 17.

Selling intoxicating liquors.—The offense of pursuing the business or occupation of selling intoxicating liquors and the offense of making a single sale are separate and distinct, and are not degrees of the same offense. *Pierce v. State* (Cr. App.) 154 S. W. 559.

Subdivision 2.—In view of article 771 and 837, one indicted for an assault with intent to rape, and for an attempt to have carnal knowledge of a female without her consent, and with burglary at nighttime, with intent to have carnal knowledge of the female without her consent, may be convicted of aggravated assault. *Ward v. State* (Cr. App.) 151 S. W. 1073.

One charged with an aggravated assault may be convicted of a simple assault if the facts justify such finding. *Yelton v. State* (Cr. App.) 170 S. W. 318.

Subdivision 3.—Maiming includes disfiguring, wounding, aggravated assault and battery, and simple assault and battery. *Pool v. State*, 59 App. 482, 129 S. W. 1135.

Subdivision 6.—It has been held that under an ordinary indictment for theft a conviction may be had of the offense defined in P. C. art. 1356, post, of "wilfully taking into possession and driving, etc., live stock," etc. *Foster v. State*, 21 App. 80, 17 S. W. 548; *Turner v. State*, 7 App. 596; *Powell v. State*, Id. 467; *Marshall v. State*, 4 App. 549; *Campbell v. State*, 22 App. 262, 2 S. W. 825; *Counts v. State*, 37 Tex. 593; *Bawcom v. State*, 41 Tex. 189; *Guest v. State*, 24 App. 530, 7 S. W. 242; *Smith v. State*, 21 App. 134, 17 S. W. 558.

Under an indictment for theft in the usual form a conviction may be had for theft committed by means of false pretenses, as defined in P. C. art. 1332. *Smith v. State*, 35 Tex. 738; *Maddox v. State*, 41 Tex. 205; *Quitow v. State*, 1 App. 65; *Davison v. State*, 12 App. 214; *Dow v. State*, Id. 343; *Reed v. State*, 8 App. 40, 34 Am. Rep. 732; *Spinks v. State*, Id. 125; *Jones v. State*, Id. 648; *Hudson v. State*, 10 App. 215; *White v. State*, 11 Tex. 769; *Morrison v. State*, 17 App. 34, 50 Am. Rep. 120; *Atterberry v. State*, 19 App. 401; *Hernandez v. State*, 20 App. 151; *Porter v. State*, 23 App. 295, 4 S. W. 889. It was formerly held otherwise. *Marshall v. State*, 31 Tex. 471.

It has been held that under an ordinary indictment for theft, a conviction may be had for swindling. *Davison v. State*, 12 App. 214. But see *Huntsman v. State*, 12 App. 619.

So far only as it includes embezzlement, this subdivision is unconstitutional and void. *Huntsman v. State*, 12 App. 619, overruling *Whitworth v. State*, 11 App. 414. ("Embezzlement," following the word "swindling," originally stricken out.)

Under an indictment for theft of an animal a conviction cannot be maintained for unlawfully, without the consent of the owner, killing the animal. *Beavers v. State*, 14 App. 541. Nor for a violation of the estray laws. *Hart v. State*, 14 App. 657.

A conviction for knowingly receiving stolen property, cannot be had under an indictment for theft. *Brown v. State*, 15 App. 581 (overruling *Parchman v. State*, 2 App. 228, 28 Am. Rep. 435); *McCampbell v. State*, 9 App. 124, 35 Am. Rep. 726; *Vincent v. State*, 10 App. 330; *Dreyer v. State*, 11 App. 631. See, also, *Chandler v. State*, 15 App. 587; *Gaither v. State*, 21 App. 527, 1 S. W. 456; *Counts v. State*, 37 Tex. 593; *Gray v. State*, 24 App. 611, 7 S. W. 339; *Fernandez v. State*, 25 App. 538, 8 S. W. 667; *Wheeler v. State*, 34 App. 350, 30 S. W. 913.

"Theft from the person" is a distinct offense from general theft, and under an ordinary indictment for theft, a conviction cannot be had for theft from the person. *Gage v. State*, 22 App. 123, 2 S. W. 638; *Harris v. State*, 17 App. 132; *Kerry v. State*, 17 App. 178, 50 Am. Rep. 122. A conviction for the offense of embezzlement cannot be had under an indictment for theft. *Huntsman v. State*, 12 App. 619; *Lott v. State*, 24 App. 723, 14 S. W. 277, overruling *Whitworth v. State*, 11 App. 414. The decision in *Whitworth v. State*, supra, was based upon article 772, subd. 6 of the Code of Criminal Procedure, which article was adopted in the revision of the Codes, but was held unconstitutional in *Huntsman v. State*, supra. Prior to the enactment of said article it had been held that a conviction for embezzlement could not be had under an indictment for theft. *Simco v. State*, 8 App. 406; s. c., 9 App. 338.

Conviction for the offense under article 1348 cannot be sustained under an indictment charging theft in general terms—and vice versa. *Torres v. State*, 33 App. 125, 25 S. W. 128; *Williams v. State*, 30 App. 153, 16 S. W. 760.

It is error to charge that defendant can be convicted of driving stock from accustomed range, under an indictment for theft. *Chambers v. State* (Cr. App.) 59 S. W. 261.

The offenses of theft, of being an accomplice to the theft, and of receiving and concealing the stolen property, are entirely separate and distinct, and under an indictment charging one of such offenses, a party cannot be convicted of either of the others. *Kaufman v. State*, 70 App. 438, 159 S. W. 58.

Proof that plaintiff, acting as agent for the defendant in the purchase of a mule, drew upon the defendant for a sum in excess of that paid for the mule, and converted the excess to his own use, is sufficient to justify a statement by defendant that plaintiff was a thief. *Burkhiser v. Lyons* (Civ. App.) 167 S. W. 244.

Subdivision 8.—It has been held that a former acquittal of bigamy can constitute no bar against a charge of adultery. *Swancoat v. State*, 4 App. 105. This decision was rendered, however, before the adoption of the Revised Codes, and whether or not, in view of this subdivision, it would be adhered to, remains to be determined.

Subdivision 12.—An indictment for robbery will not support a conviction for an assault with intent to murder. *Munson v. State*, 21 App. 329, 17 S. W. 251.

Subdivision 13.—In view of article 771, under an indictment charging theft privately from the person, the jury could convict of the offense of attempt to commit theft from the person, if the evidence authorized such conviction. *Bell v. State*, 70 App. 466, 156 S. W. 1194.

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.]

See *Willson's Cr. Forms*, 970.

Power to correct verdict.—It is not only within the power, but it is the duty, of the trial judge, to reject an informal or insufficient verdict, call the attention of the jury to the informality or insufficiency, and either have the same corrected with their consent, or send them out again to consider of their verdict. *Taylor v. State*, 14 App. 340; *Jones v. State*, 7 App. 103; *Alston v. State*, 41 Tex. 39; *Walker v. State*, 13 App. 618, 44 Am. Rep. 716, note; *Guest v. State*, 24 App. 530, 7 S. W. 242; *Robinson v. State*, 23 App. 315, 4 S. W. 904; *Gage v. State*, 9 App. 259; *May v. State*, 6 App. 191; *Rocha v. State*, 38 App. 69, 41 S. W. 611; *Jones v. State*, 54 App. 507, 113 S. W. 761; *Murphree v. State*, 55 App. 316, 115 S. W. 1190.

The judge can cause the verdict to be corrected so as to show the specific finding of the jury. *Black v. State* (Cr. App.) 68 S. W. 683.

Matters which may be corrected.—Verdict of murder assessing penalty at 99 years in the penitentiary, being not only informal but contrary to the charge of the court, and not such a finding as the court could receive, it was not only proper but the duty of the court to reject the verdict, call the attention of the jury to the charge and send them out again to consider of their verdict. *Taylor v. State*, 14 App. 340.

Two parties being jointly on trial for burglary, and the jury having returned a verdict finding both guilty, and affixing the punishment at confinement in the reformatory, they were informed that appellant could not be sent to the reformatory; whereupon they considered their verdict and assessed the punishment of both defendants to commitment in the penitentiary. Held, a new trial having been

awarded the other defendant, there is no ground for complaint. *Jones v. State*, 31 App. 252, 20 S. W. 578. See, also, *Sterling v. State*, 25 App. 716, 9 S. W. 45, 8 Am. St. Rep. 452; *Cunningham v. State*, 26 App. 83, 9 S. W. 62; *Medis v. State*, 27 App. 194, 11 S. W. 112, 11 Am. St. Rep. 192; *Whitcome v. State*, 30 App. 269, 17 S. W. 255; *Caesar v. State*, 30 App. 274, 17 S. W. 258.

On trial for theft when there were two counts in the indictment, the verdict was, "We, the jury, find the defendant guilty," etc. The court, in the presence of the jury, and with their consent, inserted after the word "guilty," "of theft of property of the value of twenty dollars." Held, no error. *Southern v. State*, 34 App. 144, 29 S. W. 780, 53 Am. St. Rep. 762.

An incorrect date may be corrected by direction of the court. *Hardy v. State*, 37 App. 55, 38 S. W. 615.

The court may, on the jury finding accused guilty on all the counts of an indictment and assessing a fine for each, refuse to accept the verdict and direct the jury to retire and designate under which count a verdict of guilty is based if accused is found guilty, and accused may not complain of the action of the court where the jury returned a verdict finding him guilty of one offense and assessing his punishment in a sum less than the sum assessed on all the counts. *Day v. State*, 62 App. 527, 138 S. W. 123.

A change, in the form of a verdict, finding accused guilty of murder in the first degree, and fixing his "sentence" at life imprisonment, so as to omit from the verdict the name of accused and insert the word "punishment" in place of the word "sentence," made by the court before the verdict was filed, and in the presence of the jury, was not erroneous; the jury assenting to the change. *Fifer v. State*, 64 App. 203, 141 S. W. 989.

The court properly has the jury correct a verdict assessing a greater penalty than allowed by law, and with consent of the jurors, properly inserts the words, "and assesses his penalty at." *Gould v. State* (Cr. App.) 147 S. W. 247.

Effect of correction.—Where the verdict convicting defendant of murder in the second degree, as first returned, misspelled the words "jury," "guilty," "imprisonment," and "penitentiary," but the court before their final discharge corrected the verdict in those particulars, and such corrections, on submission to the jury, were agreed to by them, the verdict is proper in form. *Catron v. State*, 63 App. 377, 140 S. W. 227.

Reconvening jury.—Where the court in a prosecution for felony has accepted the verdict and discharged the jury, it is without authority to reconvene the jury and permit them to amend their verdict, and such amended verdict is a nullity. *Essery v. State*, 72 App. 414, 163 S. W. 17; *Coleman v. State* (Cr. App.) 170 S. W. 150.

Anticipating informalities in instructions.—Since the court could have orally called the jury's attention to the informality of a verdict brought in, and instructed them orally as to the correct form, or had it changed with their consent, it was not reversible error to orally instruct as to the form of their verdict in the first instance, though it may have been better to have instructed thereon in writing. *Ragsdale v. State*, 61 App. 145, 134 S. W. 234; *Noland v. State*, 63 App. 275, 140 S. W. 100.

Sufficiency of verdict.—The verdict must be sufficient in itself, and its defects cannot be aided and cured by inference from other parts of the record, *Slaughter v. State*, 24 Tex. 410; though the charge may be looked to to identify the offense as found by the jury. *Marshall v. State*, 4 App. 549; *Hutto v. State*, 7 App. 44.

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.]

See Willson's Cr. Forms, 970.

See, ante, article 773.

See *Robinson v. State*, 23 App. 315, 4 S. W. 904; *Alston v. State*, 41 Tex. 39.

Power of court.—If an improper verdict is returned the court can direct the jury to retire and find properly. *Jones v. State*, 54 App. 507, 113 S. W. 762.

The court may, on the jury finding accused guilty on all the counts of an indictment and assessing a fine for each, refuse to accept the verdict and direct the jury to retire and designate under which count a verdict of guilty is based if accused is found guilty, and accused may not complain of the action of the court where the jury returned a verdict finding him guilty of one offense and assessing his punishment in a sum less than the sum assessed on all the counts. *Day v. State*, 62 App. 527, 138 S. W. 123.

The court properly has the jury correct a verdict assessing a greater penalty than allowed by law, and, with consent of the jurors, properly inserts the words, "and assesses his penalty at." *Gould v. State* (Cr. App.) 147 S. W. 247.

When verdict operates as acquittal.—An informal or illegal verdict will not operate as an acquittal, unless plainly so intended. *Robinson v. State*, 23 App. 315, 4 S. W. 904; *Alston v. State*, 41 Tex. 39; *Ellis v. State*, 27 App. 190, 11 S. W. 111.

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.]

See Willson's Cr. Forms, 951, 952.

See *Flynn v. State*, 8 App. 398; *Sterling v. State*, 25 App. 716, 9 S. W. 45, 8 Am. St. Rep. 452; *Medis v. State*, 27 App. 194, 11 S. W. 112, 11 Am. St. Rep. 192; *Whitcomb v. State*, 30 App. 269, 17 S. W. 258; *Caesar v. State*, 30 App. 274, 17 S. W. 258; *Hays v. State*, 30 App. 472, 17 S. W. 1063.

Operation of article.—In *Alonzo v. State*, 15 App. 378, 49 Am. Rep. 207, it is held that in a prosecution for adultery, the acquittal of one of the parties to the offense will not bar a prosecution against the other. The reason and doctrine of that decision seems applicable also to the offenses of bigamy and miscegenation.

No exception is made in any case to the operation of the preceding article. *Alonzo v. State*, 15 App. 378, 49 Am. Rep. 207. See, also, *Flynn v. State*, 8 App. 398; *Allen v. State*, 34 Tex. 230; *Williams v. State*, 5 App. 226; *Burrell v. State*, 18 Tex. 713; Willson's Cr. Forms, 951, 952.

Where an indictment charged that three persons named did unlawfully and willfully make an assault on prosecutor, etc., all were not entitled to an acquittal unless the evidence showed that they jointly committed the offense, but one or more could be convicted according to the proof of guilt. *Madrid v. State*, 71 App. 420, 161 S. W. 93.

Form of verdict.—A verdict finding defendants guilty jointly, is good. *Davidson and Thompson v. State*, 40 App. 289, 49 S. W. 372, 50 S. W. 295.

Assessment of punishment.—Verdict in joint prosecutions must assess penalties separately. *Hays v. State*, 30 App. 472, 17 S. W. 1063, and cases cited; *Mootry v. State*, 35 App. 450, 33 S. W. 877, 34 S. W. 126; *Polk v. State*, 35 App. 495, 34 S. W. 633; *Williams v. State*, 5 App. 226; *Flynn v. State*, 8 App. 398, overruling *Bennett v. State*, 30 Tex. 521, and citing *Allen v. State*, 34 Tex. 230.

Upon the trial of joint offenders, if the same results in conviction, the verdict must assess separate penalties and the judgment must conform to such verdict. The verdict in this case reads as follows: "We, the jury, find the defendants guilty as charged, and assess the fine at \$100;" to which verdict the judgment conforms. Held, that the verdict assesses a joint penalty, and that the judgment is not legal. *Cunningham v. State*, 26 App. 83, 9 S. W. 62.

On a trial of two defendants jointly for murder the verdict was: "We the jury find the defendants Mat Mootry and Albert Rolley guilty of murder in the first degree and assess their punishment at death;" held sufficient. *Mootry et al. v. State*, 35 App. 450, 33 S. W. 877, 34 S. W. 126. See, also, *Polk et al. v. State*, 35 App. 495, 34 S. W. 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 App. 241, 42 S. W. 384.

Instructions.—In a prosecution of four jointly indicted and tried for offering to bribe a witness, an instruction that, where several defendants are tried together, the jury may convict such of them as they may believe from the evidence, beyond reasonable doubt, to be guilty, and acquit the others, in view of a verdict acquitting part of the defendants and convicting one, was not misleading as requiring the jury, on finding one guilty, to find all guilty. *Savage v. State* (Cr. App.) 170 S. W. 730.

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.]

See Willson's Cr. Forms, 953.

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.]

See Willson's Cr. Forms, 962, 968, 998.

Art. 778. [758] Judgment entered immediately.—In every case of acquittal or conviction, the proper judgment shall be entered immediately. [O. C. 634.]

Necessity of defendant's presence.—A judgment of conviction can not, in a felony case be entered in the absence of the defendant, but may be in a misdemeanor case. *Mapes v. State*, 13 App. 85. But the presence of the defendant is not essential when the clerk performs the ministerial act of entering the judgment in the minutes. *Powers v. State*, 23 App. 42, 5 S. W. 153.

Entry of judgment.—Judgment on a verdict can not be entered on Sunday. *Shearman v. State*, 1 App. 215, 28 Am. Rep. 402.

It is made the duty of district and county attorneys to see that the judgments in criminal cases are properly entered by the clerk, and, when practicable, they

should be present when the minutes are read. Rule 119 for District Courts (142 S. W. xxvi).

The judgment should be rendered and entered upon the minutes as soon as practicable after the verdict has been received, except that it can not be entered on Sunday, though a verdict may be received on Sunday. *McKinney v. State*, 8 App. 626.

An informal entry will not invalidate a judgment entered during the term, especially when the judge approved the minutes. *Hurley v. State*, 35 App. 282, 33 S. W. 354.

The failure of the judge to sign the minutes of the court does not invalidate the judgment. *Hurley v. State*, 35 App. 282, 33 S. W. 354.

— **Necessity.**—When a party has been adjudged guilty of contempt of court, he cannot be legally imprisoned until the judgment has been entered up and a writ of commitment issued. *Ex parte Kearby*, 35 App. 531, 34 S. W. 635.

Correction of judgment.—The trial court cannot conform the judgment to the verdict after an appeal has been taken. *Robison v. State* (Cr. App.) 150 S. W. 912.

Entry nunc pro tunc.—See note to article 859.

See *Estes v. State*, 38 App. 506, 43 S. W. 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.]

Insanity as defense.—See Pen. Code, art. 39, and notes.

Insanity after conviction.—See Title 12, chap. 1.

Instructions.—The preceding article is merely directory, and though, in a proper case, the jury should be instructed in accordance therewith, the omission to do so, if without apparent injury to the defendant, will not be material error. *Massengale v. State*, 24 App. 181, 6 S. W. 35. See, also, *Frizzell v. State*, 30 App. 42, 16 S. W. 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.]

See Willson's Cr. Forms, 929, 955, 957, 958, 978, 979.

See 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.]

See Willson's Cr. Forms, 958.

Acquittal in court having no jurisdiction, see ante, art. 20.

Burglary and felony committed after entry, see Pen. Code, arts. 1313, 1317, 1318.

Conviction or acquittal in other state or county, see arts. 255, 256.

Discharge by examining court, see ante, art. 314.

Former jeopardy in general, see ante, art. 9.

Higher grade of offense not within jurisdiction, see ante, art. 601.

Irregularity in former proceeding, see ante, art. 572.

Offenses against state and municipality, see post, art. 965.

Plaus of former acquittal or conviction, see ante, article 572.

Practicing medicine without authority, see Pen. Code, art. 756.

Conviction of lower as acquittal of higher offense.—A conviction of murder in the second degree operates as an acquittal of murder in the first degree and a conviction of manslaughter operates as an acquittal of murder in both degrees. *Jones v. State*, 13 Tex. 168, 62 Am. Dec. 550; *Baker v. State*, 4 App. 223; *Parker v. State*, 22 App. 105, 3 S. W. 100; *Fuller v. State*, 30 App. 559, 17 S. W. 1108; *Grisham v. State*, 19 App. 504; *Coleman v. State*, 43 App. 289, 65 S. W. 90; *Ex parte Moore*, 46 App. 417, 80 S. W. 620; *Smith v. State* (Cr. App.) 147 S. W. 240; *Lee v. State* (Cr. App.) 148 S. W. 706; *Johnson v. State* (Cr. App.) 149 S. W. 165.

One may be convicted of a lesser offense on evidence showing a greater offense of which he has previously been acquitted. *Gray v. State*, 61 App. 454, 135 S. W. 1179; *Fuller v. State*, 30 App. 559, 17 S. W. 1108; *Harvey v. State*, 35 App. 545, 34 S. W. 623; *Cornelius v. State*, 54 App. 173, 112 S. W. 1054. See, also, *Conde v. State*, 35 App. 98, 34 S. W. 286, 60 Am. St. Rep. 22.

Conviction of simple assault is an acquittal of aggravated assault. *Foster v. State*, 25 App. 543, 8 S. W. 664; *Robinson v. State*, 21 App. 160, 17 S. W. 632; *Tribble v. State*, 2 App. 424.

Accused, having been acquitted of murder and convicted of manslaughter, cannot, on reversal of such conviction, be tried for any higher degree of offense than manslaughter. *Blackshear v. State* (Cr. App.) 154 S. W. 564; *Flynn v. State*, 43 App. 407, 66 S. W. 551.

A conviction of unlawfully carrying a pistol under an indictment for assault with intent to murder is void and will not bar a prosecution for assault with intent to murder. *Thomas v. State*, 40 Tex. 36.

Conviction or acquittal for a minor offense will generally not bar a greater, but if, on the trial of the greater offense, there can be a conviction for the lesser, former conviction or acquittal of the lesser will bar the greater. *Tribble v. State*, 2 App. 424; *Thomas v. State*, 40 Tex. 36.

An acquittal or conviction of an assault with intent to murder, or of an aggravated assault and battery, will not bar a prosecution for culpable homicide, if such acquittal or conviction was had before the death of the injured party. *Johnson v. State*, 19 App. 463, 53 Am. Rep. 385; *Curtis v. State*, 22 App. 227, 3 S. W. 86, 58 Am. Rep. 635.

Where on an indictment for theft of cattle under P. C. art. 1353 conviction was had under article 1356, and a new trial granted the defendant, it was held that on another trial he might be convicted of the theft as charged in the indictment. *Campbell v. State*, 22 App. 262, 2 S. W. 825, overruling *Sisk v. State*, 9 App. 90.

Conviction of manslaughter, under an invalid indictment for murder, is a bar to subsequent prosecution for murder. *Mixon v. State*, 35 App. 458, 34 S. W. 290.

Where on a trial for murder, the jury returned a verdict finding defendant guilty and assessing his punishment at death, without stating the degree, this was not an acquittal of murder in the first degree. *Garza v. State*, 39 App. 358, 46 S. W. 242, 73 Am. St. Rep. 927.

On the reversal of a conviction of negligent homicide under indictment for murder accused could not again be convicted of negligent homicide if the evidence showed a greater offense. *Flynn v. State*, 43 App. 407, 66 S. W. 551.

In a manslaughter trial, accused having been previously acquitted of murder, an instruction on self-defense held not erroneous as submitting an issue of malice, of which accused was previously acquitted. *Gray v. State*, 61 App. 454, 135 S. W. 1179.

If an indictment for murder under which a person was convicted of manslaughter was void, on a trial under a valid indictment murder in the second degree was properly submitted. *Whiten v. State*, 71 App. 555, 160 S. W. 462.

A person tried under an indictment for murder and convicted of manslaughter could not be tried under a new indictment for any higher offense than manslaughter if the first indictment was valid. *Whiten v. State*, 71 App. 555, 160 S. W. 462.

Where, under an indictment for murder, a conviction for manslaughter was reversed on the ground that the indictment was returned by an illegally drawn grand jury, and on a trial under a proper indictment accused was again convicted of manslaughter, which conviction was also reversed, and a doubt existed as to whether the first indictment was in fact defective, on the new trial, no higher grade of homicide than manslaughter will be submitted. *Whiten v. State*, 71 App. 555, 160 S. W. 462.

Where a conviction for aggravated assault under an indictment for assault to murder is reversed, assault to murder should not be submitted on the new trial. *Lara v. State*, 72 App. 100, 161 S. W. 99.

Where, in a prosecution for assault to rape, defendant was convicted of aggravated assault, such conviction operated as an acquittal of higher included offenses. *Caples v. State* (Cr. App.) 167 S. W. 730.

CHAPTER SEVEN

OF EVIDENCE IN CRIMINAL ACTIONS

Art.	1. GENERAL RULES	Art.	
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784.	Rules of the statute law govern.	793.	All other persons competent witnesses.
785.	Presumption of innocence and reasonable doubt.	794.	Husband and wife as witnesses.
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790.	Defendant may testify.	800.	Clerk to administer oath.
791.	Principals, accomplices and accessories.	801.	Testimony of accomplice.

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| <p>Art.
802. In trials for forgery, etc., person injured competent witness.</p> <p>3. EVIDENCE AS TO PARTICULAR OFFENSES</p> <p>803. Two witnesses in treason.
804. What evidence not admitted in treason.
805. In cases where two witnesses are required, etc.
806. Perjury and false swearing.
807. Proof of intent to defraud in forgery.</p> <p>4. OF DYING DECLARATIONS AND OF CONFESSIONS OF THE DEFENDANT</p> <p>808. Dying declarations evidence, when.</p> | <p>Art.
809. Confession of defendant.
810. When confession shall not be used.</p> <p>5. MISCELLANEOUS PROVISIONS</p> <p>811. When part of an act, declaration, etc., is given in evidence, the whole may be required.
812. Written part of an instrument shall control, etc.
813. When subscribing witness denies execution of instrument, etc.
814. Evidence of handwriting by comparison.
815. Party may attack testimony of his own witness, etc.
816. Interpreter shall be sworn to interpret, when.</p> |
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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.]

See Pen. Code, arts. 9, 34, 35, 40, ante; arts. 1 (4), 26; and Vernon's Sayles' Civ. St. 1914, art. 3687, and notes.

See *Roe v. State*, 25 App. 33, 8 S. W. 463.

Cited, *Robbins v. State*, 73 App. 367, 166 S. W. 528.

For other decisions relating to evidence not found in the notes to this chapter, see under heads of the several offenses, and under other appropriate heads.

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 135. — Questions of law.
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 169. — Sufficiency of preliminary proof.
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 171. — Sufficiency of objection.
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1. Unlawfully carrying arms.—See notes under P. C. art. 475.

2. Illustrative cases.—For criminal decisions, citing and illustrating the preceding article, see *Myers v. State*, 3 App. 8; *Morrill v. State*, 5 App. 447; *Jackson*

v. State, 8 App. 60; Johnson v. State, 9 App. 249; Stewart v. State, Id. 321; May v. State, 15 App. 430; Womack v. State, 16 App. 178; Allison v. State, 14 App. 402; Fernandez v. State, 25 App. 538, 8 S. W. 667.

3. **Application of common law rules.**—Common law rules of procedure, see art. 26, ante, and notes.

The code changes the common law rules of evidence only in so far as they conflict with its provisions. It does not repeal such rules by implication. Tilley v. State, 21 Tex. 200.

The common law rule with regard to the examination of witnesses is practically and entirely abrogated in effect by C. C. P. art. 718, which expressly declares that the court shall allow testimony to be introduced at any time before the argument of the case is concluded, if it appears that it is necessary to a true administration of justice. Morris v. State, 30 App. 95, 16 S. W. 757.

The common law as to procedure rules of construction and questions of evidence is not in force in this state with reference to the enforcement of criminal laws except when our legislative body has failed to provide rules with reference to those questions. Loakman v. State, 32 App. 563, 25 S. W. 22; Cline v. State, 36 App. 320, 36 S. W. 1099, 37 S. W. 722, 61 Am. St. Rep. 850.

In the absence of a statutory provision on the subject, the rules of the common law, when ascertained, are as binding as if written in the Code or statutes. Bluemann v. State, 33 App. 60, 21 S. W. 1027, 26 S. W. 75.

Proof of ownership of cattle by proof of the brand is a matter settled by the statutes with which the common law has nothing to do. McKenzie v. State, 32 App. 568, 25 S. W. 426, 40 Am. St. Rep. 795.

4. **Judicial notice—In general.**—See article 475; Vernon's Sayles' Civ. St. 1914, art. 3687.

In an early case it was held that the offense of betting at "rondo" had been so frequently brought under discussion and adjudication before the courts, that judicial cognizance would be taken that it was a "gaming table" within the meaning of the statute. State v. Mann, 13 Tex. 61.

In proper cases a court will assume knowledge of natural laws, such as are ordinarily admitted by experience, or demonstrated by science. But this rule will not authorize the assumption that a boy sixteen years of age presented the physical appearances of a person under the age of twenty-one years. Hunter v. State, 18 App. 444, 51 Am. Rep. 319.

Our courts take judicial knowledge of the cession of property to the United States government for forts, arsenals, etc. Lasher v. State, 30 App. 387, 17 S. W. 1064, 28 Am. St. Rep. 922. See, also, Thompson v. State, 25 App. 161, 7 S. W. 589; McGill v. State, 25 App. 499, 8 S. W. 661.

Judicial knowledge is taken by the courts of this state that, as fixed by the act of congress, ten cents in silver is a dime, legal tender coin of the United States, of the value of ten cents. Menear v. State, 30 App. 475, 17 S. W. 1082.

Courts take judicial notice that "brass knuckles" may be composed of metal other than brass. Louis v. State, 36 App. 52, 35 S. W. 377, 61 Am. St. Rep. 832.

Judicial notice will be taken of the contraction, derivation and corruption of the names of persons. Alsop v. State, 36 App. 535, 38 S. W. 174.

The Court of Criminal Appeals judicially knows that "Alex." is a contraction of the name "Alexander." Patterson v. State, 63 App. 297, 140 S. W. 1128.

The court will take judicial notice of the value of United States money. Sims v. State, 64 App. 435, 142 S. W. 572.

Judicial notice is taken that text-books in the Texas public schools impress the idea that alcoholic stimulants are injurious to health and morals. Ex parte Townsend, 64 App. 350, 144 S. W. 628, Ann. Cas. 1914C, 814.

5. — **Matters of common knowledge.**—Judicial knowledge can be acquired by facts learned through former litigation, and courts properly take judicial notice of facts forming part of the common knowledge of every person of ordinary understanding and intelligence, and of such things as are generally known in their respective jurisdictions, and courts will extend the scope of judicial knowledge to keep pace with the advance of art, science, and general knowledge, when the facts are of such an age and duration as to have become a part of the common knowledge of well-informed persons. Moreno v. State, 64 App. 660, 143 S. W. 156, Ann. Cas. 1914C, 863.

Under the rule that courts may take judicial notice of facts which form part of the common knowledge of persons of ordinary understanding, judicial notice may be taken of the nature and habits of a hog, and of the results incident to his keeping and confinement within the populous portion of a city. Ex parte Botts (Cr. App.) 154 S. W. 221, 44 L. R. A. (N. S.) 629.

The Court of Criminal Appeals knows as a matter of common knowledge that the fire limits of a city include thickly settled and business parts of the city. Ex parte Bradshaw, 70 App. 166, 159 S. W. 259.

6. — **Geographical facts.**—The boundaries of counties as municipal subdivisions of the state is a matter of judicial knowledge. State v. Jordan, 12 Tex. 205; McGill v. State, 25 App. 499, 8 S. W. 661; Coffman v. State, 73 App. 295, 165 S. W. 939.

Courts take notice of the territorial extent of the jurisdiction and sovereignty exercised de facto by their own government and the local divisions of their country and the relative positions of such local divisions but not of their precise boundaries, further than they may be disclosed in public statutes. Boston v. State, 5 App. 383, 32 Am. Rep. 575.

General statutes, which recognize the location of a place, will authorize judicial knowledge of such location. In the absence of such a statute, and in the absence of evidence, a court can not judicially know that a named place is in a particular county. Hoffman v. State, 12 App. 406; Terrell v. State, 41 Tex. 463; Boston v.

State, 5 App. 333, 32 Am. Rep. 575. See, also, *State v. Lee*, 15 Tex. 252; *Bell v. State*, 1 App. 81.

Courts of this state judicially know that the Indian Territory is beyond the jurisdiction of this state. *Conner v. State*, 23 App. 378, 5 S. W. 189. And that the "Muscoogie Nation" is the same as the "Creek Nation." *Cowell v. State*, 16 App. 57.

The courts of this state take judicial notice of the boundaries and limits of counties, and of their relation or contiguity to each other. See the opinion in extenso for proof held sufficient to support an allegation of venue. *McGill v. State*, 25 App. 499, 8 S. W. 661.

While the court would take judicial notice that L. was the county seat of a county, it could not take judicial notice that a particular store was in L. *Stewart v. State*, 31 App. 153, 19 S. W. 908.

The Court of Criminal Appeals will take judicial notice that the city of Galveston is in Galveston county, Tex., so that the venue of a crime was sufficiently established in that county, where it was shown to have been committed in the city of Galveston. *Gossett v. State*, 57 App. 43, 123 S. W. 428.

The Court of Criminal Appeals judicially knows the geography of the country, and that Panola county lies north of and adjoining Shelby county. *Bussey v. State*, 59 App. 260, 127 S. W. 1035.

The Court of Criminal Appeals judicially knows where the respective counties of the state are situated and where and how they are situated with reference to one another, and the location of the county seats and railroads with reference thereto. *Giles v. State* (Cr. App.) 148 S. W. 317.

The court judicially knows that Red river is on the northern boundary of the state. *Smith v. State* (Cr. App.) 148 S. W. 722.

The Court of Criminal Appeals takes judicial notice that in 1877 Nueces county was much larger than the ordinary Texas county. *Sandaval v. State*, 72 App. 368, 162 S. W. 1148.

The Court of Criminal Appeals will take judicial notice that, at the time of the enactment of article 631, there were no railroads in the country affording access from one county seat to another. *Coffmann v. State*, 73 App. 295, 165 S. W. 939.

7. — Municipal corporations.—Judicial knowledge of municipal corporations is not chargeable to the courts of this state, inasmuch as the law enables cities and towns of two hundred inhabitants to incorporate, and such incorporations are not by public act. *Temple v. State*, 15 App. 304, 49 Am. Rep. 200. And a court or judge is not charged with judicial knowledge that any designated locality is in an incorporated city or town. *Patterson v. State*, 12 App. 222.

Courts cannot judicially know that towns, even where they are county seats, are incorporated towns. *Bluitt v. State*, 56 App. 525, 121 S. W. 168.

8. — Laws and ordinances.—A person cannot be convicted for violation of the county option law, in the absence of proof that such law was adopted in the county where the prosecution is pending subsequently to the passage of the statute, since judicial notice of the existence of such law will not be taken. *Pointer v. State*, 60 App. 355, 132 S. W. 136; *Woodward v. State*, 58 App. 411, 126 S. W. 270; *Pierce v. State* (Cr. App.) 154 S. W. 559.

The Court of Criminal Appeals does not judicially know that prohibition is in force in any given locality in the state, nor can any of the lower courts have such judicial knowledge. *Robinson v. State* (Cr. App.) 154 S. W. 997; *Dorman v. State*, 64 App. 104, 141 S. W. 526; *Kinnebrew v. State* (Cr. App.) 150 S. W. 775.

A state court will not take judicial notice of city ordinances, and, on appeal from a conviction in a city court, the ordinance must be introduced in evidence. *Karchmer v. State*, 61 App. 221, 134 S. W. 700; *Wilson v. State*, 16 App. 497; *Hailes v. State*, 9 App. 170.

A joint resolution of the legislature is a public statute of which the court is bound to take judicial notice. *State v. Delesdenier*, 7 Tex. 76.

That municipal corporations are authorized by law to hold elections for city attorney and other officers, was held to be within judicial cognizance. *Gallagher v. State*, 10 App. 469.

Charters and ordinances of municipal corporations must be proved, as courts do not take judicial notice thereof. *Temple v. State*, 15 App. 304, 49 Am. Rep. 200.

As to whether an act is robbery in a foreign country, State or Territory, can only be shown by introducing the law of such foreign country, State or Territory, in evidence. *Smith v. State*, 37 App. 342, 39 S. W. 933.

The court knows judicially that a girl just over 12 years of age could not marry in Texas; 14 years being the youngest age at which a marriage could occur. *Munger v. State*, 57 App. 384, 122 S. W. 874.

The court knows judicially that in Texas a marriage between a white man and negro woman could not be had. *Munger v. State*, 57 App. 384, 122 S. W. 874.

Where it appears that prohibition was adopted in a county at an election held June 5, 1910, the court will take judicial notice that another election could not have been held, and the law repealed prior to alleged violations between March and September, 1911. *Leonard v. State* (Cr. App.) 152 S. W. 632.

The court cannot take judicial notice that prohibition is in force in any county or subdivision thereof, and the personal knowledge of the presiding judge on a trial for selling liquor in prohibition territory is not judicial knowledge. *Jackson v. State*, 70 App. 582, 157 S. W. 1196.

9. — Organization and terms of courts and judicial proceedings.—A court will take judicial notice of the record, pleadings, and proceedings in a case before it, and it is unnecessary, therefore, to introduce the same in evidence. *Robinson v. State*, 21 App. 160, 17 S. W. 632; *Harris v. State*, 21 App. 478, 2 S. W. 830; *Foster v. State*, 25 App. 543, 8 S. W. 664.

The courts will take judicial notice of the time of the commencement of a term of a district court as fixed by a general and public statute. *Hudson v. State*, 40 Tex. 12.

Judicial cognizance will be taken of the courts of the state, and of the counties in which they are held, and of the judges thereof. *Watson v. State*, 5 App. 11; *Long v. State*, 1 App. 709.

A court will take judicial cognizance of the statutory terms of district and county courts, but not of terms of the county court fixed otherwise than by an act of the legislature. *Conner v. State*, 6 App. 455; *Wills v. State*, 4 App. 613.

Judicial notice will be taken of the fact of there being two district courts in a county. *Thomas v. State*, 59 App. 159, 127 S. W. 1030.

The Court of Criminal Appeals will take judicial notice that in a large part of Texas the district courts convene only twice a year, and that in many of the counties they remain in session for periods of time ranging from one to four or five weeks. *Ex parte Looper*, 61 App. 129, 134 S. W. 345, Ann. Cas. 1913B, 32.

The Court of Civil Appeals properly took judicial notice of its prior decision determining that a local option election in a county where a liquor dealer's bond was given was invalid. *State v. Savage (Tex.)* 151 S. W. 531.

The Court of Criminal Appeals would take judicial notice of the date when a former appeal in the same case was decided and the cause reversed, the date when the mandate was issued, that no motion for rehearing was made, and that two days was ample time for the mandate to reach the district court of Eastland county. *Mayhew v. State (Cr. App.)* 155 S. W. 191.

The Court of Criminal Appeals takes judicial notice of the terms of the district court of a county. *Knowlton v. State (Cr. App.)* 169 S. W. 674.

10. — **Public officers.**—The court takes judicial notice of the names and signatures of its own officers, and where the officer's signature is followed by the word "Clerk" it will be presumed on appeal that he was clerk of the court in which the case was tried. *Cardenas v. State*, 58 App. 109, 124 S. W. 953.

The Court of Criminal Appeals will take judicial notice of the date of the incumbency and resignation of a certain judge, and also of the date on which his successor was appointed and took the oath of office. *Porter v. State*, 72 App. 71, 160 S. W. 1194.

11. — **Intoxicating beverages.**—The court will take judicial knowledge that beer is intoxicating. *Stewart v. State (Cr. App.)* 172 S. W. 979; *Todd v. State (Cr. App.)* 155 S. W. 220; *Figuroa v. State*, 71 App. 371, 159 S. W. 1188.

Courts do not judicially know that beer is an intoxicating liquor. *Dallas Brewery v. Holmes Bros.*, 51 Civ. App. 514, 112 S. W. 124.

Where, in a prosecution for the sale of intoxicating liquor in local option territory, there is no evidence raising the issue that the article sold, which was beer, was not intoxicating, but the case was tried on the theory that it was intoxicating and prohibited, there was no error in refusing an instruction based on the theory that the beer sold was not an intoxicating liquor, as under *Vernon's Sayles' Civ. St. 1914*, art. 7465, defining "intoxicating liquors" as including fermented liquor, the courts will take judicial knowledge that beer is an intoxicating liquor. *Moreno v. State*, 64 App. 660, 143 S. W. 156, Ann. Cas. 1914C, 863.

In a prosecution for violation of the local option law, taking judicial notice that beer is an intoxicating liquor is not indulging a presumption against accused, who was proved to have sold beer, without any evidence being introduced that beer is an intoxicating liquor. *Moreno v. State*, 64 App. 660, 143 S. W. 156, Ann. Cas. 1914C, 863.

The court will take judicial notice that beer is intoxicating, where there is no issue raising the question whether it is intoxicating. *Jones v. State*, 70 App. 343, 156 S. W. 1191.

12. — **Effect of judicial notice.**—When judicial knowledge of a fact can be indulged, such fact need not be alleged or proved. *State v. Mann*, 13 Tex. 61.

13. **Presumptions.**—See *Vernon's Sayles' Civ. St. 1914*, art. 3687.

As to presumption of "innocence," see P. C., arts. 11, 51, 52 and notes; C. C. P. art. 785. As to presumption of "intent," see P. C. arts. 51, 52. In "rape" by fraud, P. C., art. 1066. In "homicide," P. C., arts. 1147, 1150. In "murder," P. C., art. 1140. In "assault," P. C., art. 1009. Of "chastity" of a slandered female, P. C., art. 1181. Of "sanity," P. C., art. 40.

A presumption of guilt arises from fabrication of evidence, or attempts to escape or evade justice, when accused of an offense. *Benavides v. State*, 31 Tex. 579; *Sheffield v. State*, 43 Tex. 378.

The law presumes, ordinarily, in favor of the regularity of all the proceedings in a case. *Meredith v. State*, 40 Tex. 480; *Escareno v. State*, 16 App. 85.

In theft, the fact that the defendant disposed of different recently stolen articles at the same time, warrants the presumption that they came to his possession at the same time. *Jack v. State*, 20 App. 656.

It presumes that an officer has performed his duty properly, but this presumption does not extend to a person not an officer. *James v. State*, 21 App. 353, 17 S. W. 422.

Where the placing of liquor in a room was depended on as a circumstance to prove that accused charged with perjury in testifying that liquor was not placed in his house knew that the testimony was false, the evidence must show that accused had control of and was in charge of the room, under the rule that the court cannot base one presumption on another presumption. *Trinkle v. State*, 71 App. 64, 158 S. W. 544.

The law presumes the chastity of every woman, and especially would this be true of a young girl of 17. *Blackburn v. State*, 71 App. 625, 160 S. W. 687.

Where the time had elapsed in which to contest a prohibition election, the court is required to conclusively presume that all steps taken were legal, and will not

pass on the questions as to whether or not the orders were sufficient. *Rhodes v. State* (Cr. App.) 172 S. W. 252.

14. **Relevancy of evidence—In general.**—"Relevancy" as applied to evidence means that which conduces to prove a pertinent hypothesis, a pertinent hypothesis being one which, if sustained, will logically influence the issue, so that it is relevant to put in evidence any circumstance which tends to make a proposition at issue either more or less probable, and whatever is a condition either of the existence or nonexistence of a relevant hypothesis may be shown; but no circumstance is relevant which does not make more or less probable the proposition at issue. *Belcher v. State*, 71 App. 646, 161 S. W. 459; *Lane v. State*, 73 App. 266, 164 S. W. 378.

The general rule is, that the evidence must correspond to the allegations, and be confined to the issue; otherwise it is irrelevant, immaterial, and inadmissible. This rule excludes all evidence of collateral facts. An exception to this general rule exists in a case where the knowledge, motive, or intent of a party is a material fact in issue, in which case evidence of collateral facts may be admissible. *Wilburn v. State*, 41 Tex. 237; *Cesure v. State*, 1 App. 19; *Persons v. State*, 3 App. 241; *Fore v. State*, 5 App. 251; *Francis v. State*, 7 App. 501; *Rye v. State*, 8 App. 153; *Heard v. State*, 9 App. 1; *Green v. State*, 12 App. 51.

When it becomes necessary to prove motive, intent, or knowledge on the part of the defendant, greater latitude is allowed in the introduction of evidence than is allowed with respect to other issues. *Francis v. State*, 7 App. 501; *Fore v. State*, 5 App. 257; *Heard v. State*, 9 App. 1; *Cameron v. State*, *Id.* 332.

Proof that an examining court had denied the defendant bail is irrelevant. *Richardson v. State*, 9 App. 612.

Where one theory of the defense in a murder trial was, that a state's witness had committed the murder, it was held competent for the state to introduce any evidence that would tend to refute it; and that it was not error to permit the state to prove the intimate personal and business relations existing between the deceased and said witness at the time of the homicide. *Walker v. State*, 17 App. 16.

And in a prosecution for perjury alleged to have been committed before an examining court, the complaint upon which the examination was based was held to be relevant and competent evidence for the state, to prove that the alleged false statements were made in a judicial proceeding, etc., but not evidence to be considered in determining the main issue. *Higgenbotham v. State*, 24 App. 505, 6 S. W. 201. See, also, *Partain v. State*, 22 App. 100, 2 S. W. 854; *Gabrielsky v. State*, 13 App. 428; *St. Clair v. State*, 11 App. 237.

Any evidence that goes to explain, illustrate or prove motive for which crime has been committed is admissible even though the fact proved was created after the crime was committed. *Morrison v. State*, 40 App. 492, 51 S. W. 358.

It is improper to prove that character of defendant's wife for chastity is bad when such evidence has nothing to do with the case. *Williams v. State*, 40 App. 503, 51 S. W. 220.

As tending to show who brought on the difficulty State can show that defendant and his brother who were acting together, were together drinking, carousing and manifesting a turbulent and lawless disposition. *Clay v. State*, 40 App. 604, 51 S. W. 370.

In the trial of a husband for the murder of his wife, it is relevant for the state as tending to show motive, that the wife was unfaithful to him, provided it be further shown that at the time of the homicide he had knowledge of her infidelity; but without proof of such knowledge on his part, evidence of her infidelity is irrelevant and inadmissible. *Phillips v. State*, 22 App. 139, 2 S. W. 601.

In a murder trial, it was held competent for the state to prove that the homicide occurred in a house of prostitution, and that the defendant was the keeper of the house. *Gibson v. State*, 23 App. 414, 5 S. W. 314.

It was held error for the state to introduce in evidence an order changing the venue in the cause. Jurisdiction is a question addressed to the court alone, and is not a subject for the consideration of the jury. The said order did not relate to any relevant fact in issue. *Shamburger v. State*, 24 App. 433, 6 S. W. 540.

For other instances of relevant evidence, see under heads of the different offenses; *McGill v. State*, 25 App. 499, 8 S. W. 661; *Howard v. State*, 25 App. 686, 8 S. W. 929; *Leeper & Powell v. State*, 29 App. 73, 14 S. W. 398; *Blackwell v. State*, 29 App. 195, 15 S. W. 597; *Chumley v. State*, 28 App. 89, 12 S. W. 491; *Hudson v. State*, 28 App. 323, 13 S. W. 388; *Crumes v. State*, 28 App. 516, 13 S. W. 868, 19 Am. St. Rep. 853; *Wicks v. State*, 28 App. 450, 13 S. W. 748; *McLain v. State*, 30 App. 482, 17 S. W. 1092, 28 Am. St. Rep. 954; *Cook v. State*, 30 App. 608, 18 S. W. 412.

For decisions respecting evidence of collateral facts, see *Musgrave v. State*, 28 App. 57, 11 S. W. 927; *Graves v. State*, 28 App. 354, 13 S. W. 149; *Martin v. State*, 28 App. 364, 13 S. W. 151; *Kimbrough v. State*, 28 App. 367, 13 S. W. 218; *Hanley v. State*, 28 App. 375, 13 S. W. 142; *Barton v. State*, 28 App. 483, 13 S. W. 783; *Abrigo v. State*, 29 App. 145, 15 S. W. 408; *Blackwell v. State*, 29 App. 195, 15 S. W. 597; *Taylor v. State*, 29 App. 455, 16 S. W. 302; *Morris v. State*, 30 App. 95, 16 S. W. 757; *Williams v. State*, 24 App. 412, 6 S. W. 318; *Reno v. State*, 25 App. 102, 7 S. W. 532; *Gentry v. State*, 25 App. 614, 8 S. W. 925; *Tomlin v. State*, 25 App. 676, 8 S. W. 931; *Brooks v. State*, 26 App. 184, 9 S. W. 562; *Byrd v. State*, 26 App. 374, 9 S. W. 759; *Breedlove v. State*, 26 App. 445, 9 S. W. 768; *Williams v. State*, 30 App. 153, 16 S. W. 760; *Good v. State*, 30 App. 276, 17 S. W. 409; *Thompson v. State*, 30 App. 325, 17 S. W. 448; *Welhousen v. State*, 30 App. 623, 18 S. W. 300.

When the state's theory is that a certain person participated in a crime which is denied by the defendant, evidence of the acts of such person showing that he was present is admissible. *Martin v. State* (Cr. App.) 30 S. W. 222.

That the person making the complaint, but who was not a witness, had said

that he would get even with defendant, was admissible. *Simmons v. State* (Cr. App.) 37 S. W. 324.

On trial for murder, evidence that the neighborhood in which the parties lived was "a lawless and tough place," is inadmissible, unless it was a case of circumstantial evidence, and it was admitted for the purpose of showing that the murder might have been committed by some person other than the defendant. *Goin v. State*, 37 App. 90, 38 S. W. 794.

That incriminating articles, alleged to be the property of decedent, were found in accused's possession on a second, and not on a first, search of his belongings goes to the weight, and not to the admissibility, of the evidence. *Harris v. State*, 62 App. 235, 137 S. W. 373.

In a trial for murder, where the age of the accused was in issue, but where there was no question but that two of the witnesses for him were his parents, the marriage certificate of such parents was inadmissible, since it would not tend to corroborate the testimony of accused or of his parents. *Ex parte Martinez* (Cr. App.) 145 S. W. 959.

Either party to a criminal case may introduce any pertinent evidence tending to prove an issue or lessen the adverse effect of any proper deduction made by evidence introduced against him. *Sweeney v. State* (Cr. App.) 146 S. W. 883.

In a prosecution for burglary, the owner of the house in which the burglary was alleged to have been committed was properly permitted to testify that a scantling which made a screen door fit closely was pried loose on the day of the entry, and that the latch with which the door was fastened could have been lifted with a pen-knife, though he did not notice the condition of the door when he first returned home, as the lapse of time would go to the weight of his testimony rather than to its admissibility. *Overstreet v. State* (Cr. App.) 150 S. W. 899.

Defendant's testimony that he had been in jail several months before trial and had but a few days to engage counsel was properly excluded. *Shaffer v. State* (Cr. App.) 151 S. W. 1061.

In a prosecution of a tax collector for appropriating money collected to his own use, the state could show that he gave various sums to certain women about the time he was charged with having embezzled the state's money, and to whom he gave it. *Ferrell v. State* (Cr. App.) 152 S. W. 901.

In a prosecution for offering to bribe a policeman not to arrest a woman and man found together in bed in accused's house, evidence of the general reputation of the woman was admissible. *Haller v. State*, 72 App. 294, 162 S. W. 872.

Evidence that accused's house was reputed to be a house of ill fame was admissible in evidence as tending to show why accused would offer to pay money to the policeman. *Haller v. State*, 72 App. 294, 162 S. W. 872.

Evidence that accused offered to pay money to first one, and a few minutes thereafter to another, policeman, in the presence of both, was admissible. *Haller v. State*, 72 App. 294, 162 S. W. 872.

Under *Vernon's Sayles' Civ. St.* 1914, art. 7238, incorporated towns, become subject to the stock law, if it is adopted, and hence, in a prosecution for violating the stock law, evidence of ordinances of an incorporated town included in the subdivision is admissible. *Neuvar v. State*, 72 App. 410, 163 S. W. 58.

It was not error, in a prosecution for libel, to permit proof of the meaning of the word "renegade," used in the libelous article, as the court could have legally defined the word in its charge. *Samper v. State*, 73 App. 375, 166 S. W. 511.

Memoranda found near the body and in the clothes are not admissible to show that deceased had in his possession a considerable sum of money. *McCue v. State* (Cr. App.) 170 S. W. 280.

Where, on a trial for theft from the person, accused showed that he did not take prosecutor's money with the intention of appropriating it, but merely pulled it out of prosecutor's shirt front to show to him that he had not lost it, evidence that accused and prosecutor were Odd Fellows was admissible. *Burrus v. State* (Cr. App.) 172 S. W. 981.

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

In a prosecution for the murder of his father-in-law, it was the contention of the state that accused lay in wait for deceased as he went to lodge meeting, and killed him, while accused contended that their meeting was accidental, and that he killed in self-defense. Accused objected to evidence that deceased belonged to a lodge, which met the evening of the killing, on the ground that it was immaterial and would tend to prejudice any juror who was a member of that lodge. It did not appear that any juror was a member of the lodge, nor was the objection that the fact of the lodge meeting was unknown to accused made. Held, that, under the circumstances, the evidence was properly received. *Eads v. State* (Cr. App.) 176 S. W. 574.

Where, until accused took the stand and admitted the killing, there was no positive evidence that he had slain deceased, it was not error to permit the sheriff, who arrested accused after discovering the body, to testify to finding a pistol and cartridges secreted in a loft. *Eads v. State* (Cr. App.) 176 S. W. 574.

Where, on a trial for passing a forged check, accused questioned the accuracy of the loose-leaf ledger system of bookkeeping employed by the bank upon which the check was drawn, it was permissible to show by the bank's officers that it was a correct system and in general use. *Bunker v. State* (Cr. App.) 177 S. W. 108.

In a prosecution for rape on a 13 year old girl, testimony that defendant had told a witness that he had had intercourse with a child of 11, and that it was surprising how young a girl a man could have intercourse with, was inadmissible, but would not have been had prosecutrix been of the age mentioned, or defendant had used language indicating that he referred to her. *Haggart v. State* (Cr. App.) 178 S. W. 328.

Where the identity of accused was a sharply contested issue, one of the prosecuting witnesses may testify that he recognized accused's voice, and that accused, who had been their chauffeur, addressed him as "son," which was the name habitually employed by other members of his family. *Collins v. State* (Cr. App.) 178 S. W. 345.

For other instances of irrelevant evidence, see under heads of the different offenses.

15. — Facts in issue.—Under a separate indictment for murder, or assault with intent to murder, it is competent for the state to prove that another committed the murder or assault, and that the defendant was present, aiding and abetting such other persons in the commission of the offense, although it is not so alleged in the indictment. *Davis v. State*, 3 App. 91; *Gladden v. State*, 2 App. 508; *Williams v. State*, 42 Tex. 392; *Mills v. State*, 13 App. 487.

On prosecution for false swearing to procure a marriage license, defendant objected to proof by the state that the father and mother objected to the marriage of their minor daughter because such evidence was not authorized by the indictment; held, the evidence was admissible to controvert the alleged false affidavit to the effect that there were no legal objections to said marriage, and which affidavit was traversed by the indictment. *Harkreader v. State*, 35 App. 243, 33 S. W. 117, 60 Am. St. Rep. 40.

It is admissible to prove the age of a female under an indictment charging defendant, an adult male, with an assault upon such female, although the age of the female is not alleged in the indictment. *Hill v. State*, 37 App. 279, 38 S. W. 987, 39 S. W. 666, 66 Am. St. Rep. 803.

In a robbery prosecution, the subpoenas and attachment for a witness, to procure whom accused applied for a continuance, which was denied, as well as testimony that such witness was present at a former term of court, was not admissible in evidence; accused's diligence to procure the attendance of the witness not being material on trial before the jury. *Chancey v. State*, 58 App. 54, 124 S. W. 426.

In a prosecution for betting on a card game, a question to a witness as to why M. was not present as a witness was excluded, the answer to which would have been that he was not in court because of the anticipated confinement of his wife. An application for continuance was made because of M.'s absence, stating such grounds. Held, that the question was properly excluded; the answer only bearing on the application for continuance, with which the jury was not concerned. *Melton v. State*, 58 App. 86, 124 S. W. 910.

Under an indictment for perjury, based on accused giving false testimony before the grand jury, testimony that when accused appeared before the grand jury he was warned that he did not have to testify to anything that would incriminate him, and that if he did testify anything he said could be used against him on the trial of his case, was admissible, though the indictment did not allege that he was so warned. *Robertson v. State* (Cr. App.) 150 S. W. 833.

Where defendant, in a prosecution for murder, shot deceased while attempting to recover mules that had strayed into deceased's inclosed field, and which he was seeking to impound, it was proper for the state to prove that the stock law (*Vernon's Sayles' Civ. St.* 1914, art. 7248 et seq.), prohibiting mules and other stock from running at large, had been adopted and was in force in the county wherein the homicide occurred. *Barnett v. State* (Cr. App.) 176 S. W. 580.

In a prosecution for murder, evidence of the acts and conduct of the grand jury in their investigation of the crime is inadmissible, where it was not in issue, under a count in the indictment averring that the killing occurred by some means to it unknown, to show that the grand jury could, by diligence, have ascertained the means by which the killing occurred. *Satterwhite v. State* (Cr. App.) 177 S. W. 959.

Voice is a competent means of identification, and a witness who recognized accused's voice over the telephone may testify as to his remarks. *Collins v. State* (Cr. App.) 178 S. W. 345.

16. — Time and place of criminal act.—In a trial for murder, the evidence showed that the deceased was found dead behind a gambling house. It was held competent for the state to identify the deceased by the apparel and appearance of the body, and by the description and contents of a valise found a short distance from the body. *Tooney v. State*, 8 App. 452.

The sheriff cannot testify as to the identification of defendant nor the circumstances under which it was made. *Reddick v. State*, 35 App. 463, 34 S. W. 274, 60 Am. St. Rep. 56.

Testimony of an officer that he arrested defendant from the description given him is inadmissible to identify defendant. *Mallory v. State*, 37 App. 482, 36 S. W. 751, 66 Am. St. Rep. 808.

A witness may state that he measured tracks on the ground, and may state the character of such tracks, and describe the peculiarity of shoes worn by accused. *Boyman v. State*, 59 App. 23, 126 S. W. 1142.

On a trial for burglary, it was proper to permit witnesses who identified accused as the burglar to testify that within 48 hours after the burglary they saw and recognized him and caused his arrest, especially where in the meantime his appearance had been in some measure changed by a change of clothes and by having his hair cut. *Weaver v. State* (Cr. App.) 150 S. W. 785.

In a prosecution for pandering, alleged to have been committed in B. county, evidence that the house of J., to which defendant took his wife, was situated in B. county, Tex., was admissible to prove the venue. *Stevens v. State* (Cr. App.) 150 S. W. 944.

In a prosecution for adultery, where the state necessarily depended somewhat upon circumstantial evidence, evidence tending to show that persons seen by witness under circumstances indicating the offense were the defendants was admissible as a circumstance bearing upon the identity of the parties. *Mackey et al v. State* (Cr. App.) 151 S. W. 802.

In a prosecution for the theft of belting from a cotton gin, men who had repaired the belt may testify as to their identification of it by the way it had been mended. *McGee v. State* (Cr. App.) 155 S. W. 246.

In a prosecution for kidnapping, where the place of jurisdiction of the offense was in issue, testimony of a witness, who was at the place eight days thereafter, detailing facts tending to show that the place of the offense was in fact in this state, was admissible, especially where it was not suggested that conditions had changed during that time. *Nunez v. State*, 70 App. 481, 156 S. W. 933.

A witness, who testified to seeing accused and a third person together at a named place, could, to fix the time, state that he saw them the night before he learned of the crime charged. *Castenara v. State*, 70 App. 436, 156 S. W. 1180.

In a prosecution for assault with intent to murder, it was not improper to permit a telephone operator to testify that she knew the voice of accused over the telephone, and heard her on the night of the assault and previous thereto, talking over the telephone. *Forrester v. State*, 73 App. 61, 163 S. W. 87.

17. — Evidence creating prejudice against accused.—In a prosecution for willfully turning out cattle and refusing to keep them up, evidence that a yearling belonging to accused crawled through a partnership fence into an adjoining lot several miles from the place in question did not tend to establish the charge, but was calculated to prejudice accused before the jury, and objections thereto should have been sustained. *Phinney v. State*, 59 App. 480, 129 S. W. 628.

On a trial for murder, the admission of evidence that accused prior to the murder, and not connected therewith, consorted with negro prostitutes on a fishing excursion, and drank whisky while so doing, was reversible error, as placing accused in a disadvantageous light before the jury. *Roquemore v. State*, 59 App. 568, 129 S. W. 1120.

Where the state showed statements by accused to prosecutrix as to his owning property, evidence that his claim of ownership was untrue was inadmissible because merely prejudicing the jury against him. *Wilkerson v. State*, 60 App. 388, 131 S. W. 1108, Ann. Cas. 1912C, 126.

In a prosecution for arson, there was admitted in evidence a letter written by accused, while in jail, to B., stating that he had been wanting to see him very badly, and requesting him to come to the jail and see accused. B., under the state's theory, was the receiver of property taken from accused's home the day before it was burned; and it was claimed that he said that he thought there was something wrong. Held that, by reason of the prejudicial inferences which might be drawn from the letter, it was error to admit it in evidence. *Brown v. State* (Cr. App.) 150 S. W. 436.

In a prosecution for assault to murder, it is error to admit in evidence two applications for a continuance made by defendant, where defendant on the stand admitted that he had applied for continuances and stated why he had done so, and there was nothing in the applications which contradicted his testimony. *Wilson v. State* (Cr. App.) 154 S. W. 1015.

18. — Circumstantial evidence.—In theft it is not permissible to prove the owner's want of consent to the taking of the property by circumstantial evidence, unless the positive and direct testimony of the owner cannot be produced, and its nonproduction is satisfactorily accounted for. *Porter v. State*, 1 App. 394; *Erskine v. State*, Id. 405; *Jackson v. State*, 7 App. 363; *Lanham v. State*, Id. 137; *Stewart v. State*, 9 App. 321; *Bowling v. State*, 13 App. 338; *Smith v. State*, Id. 507.

But where it is shown that the direct testimony of the owner cannot be produced, and that the failure to produce it is not attributable to any want of diligence, or to any fault on the part of the prosecution, then it is perfectly competent and proper to resort to circumstantial evidence. *Wilson v. State*, 45 Tex. 76, 23 Am. Rep. 602; *McMahon v. State*, 1 App. 102; *Welsh v. State*, 3 App. 422; *Foster v. State*, 4 App. 246; *Trafton v. State*, 5 App. 480; *Rains v. State*, 7 App. 588; *Jackson v. State*, Id. 363; *Clayton v. State*, 15 App. 348; *Spruill v. State*, 10 App. 695; *Wilson v. State*, 12 App. 481; *Williamson v. State*, 13 App. 514.

In cases depending upon circumstantial evidence, the mind seeks to explore every possible source from which any light, however feeble, may be derived, and it is peculiarly proper that the jury should have before them every fact and circumstance, however slight, which may aid them in reaching a satisfactory conclusion. Greater latitude in the presentation of evidence must necessarily be allowed in cases of circumstantial than those of direct evidence. *Cooper v. State*, 19 Tex. 449; *Landers v. State*, 35 Tex. 359; *Ballew v. State*, 36 Tex. 98; *Barnes v. State*, 41 Tex. 342; *Noftsinger v. State*, 7 App. 301; *Preston v. State*, 8 App. 30; *Howard v. State*, 8 App. 53; *Bouldin v. State*, Id. 332; *Washington v. State*, Id. 377; *Somerville v. State*, 6 App. 433.

It is the right of a defendant to have every relevant circumstance, from which a conclusion can be drawn favorable to his innocence, placed before the jury. *Pridgen v. State*, 31 Tex. 420; *Myers v. State*, 24 App. 334, 6 S. W. 194; *Bowers v. State*, 24 App. 542, 7 S. W. 247, 5 Am. St. Rep. 901.

Facts so remotely pertinent as to have no possible weight, or which are incapable of generating any reasonable presumption or inference respecting the guilt or innocence of the defendant, should be rejected. *Bowen v. State*, 3 App. 617; *Boothe v. State*, 4 App. 202; *Shultz v. State*, 5 App. 390; *Walker v. State*, 6 App. 576; *Sharp v. State*, Id. 650; *Cooper v. State*, 7 App. 194.

It is not necessary that evidence should bear directly upon the issue; it is admissible if it tends to prove the issue or constitutes a link in the chain of proof, although it might not justify a verdict in accordance with it. *Marshall v. State*, 5 App. 273; *Francis v. State*, 7 App. 501; *Guajardo v. State*, 24 App. 603, 7 S. W. 331; *Irby v. State*, 25 App. 203, 7 S. W. 705; *Monk v. State*, 27 App. 450, 11 S. W. 460; *Taylor v. State*, 27 App. 463, 11 S. W. 462; *Leeper v. State*, 29 App. 63, 14 S. W. 398; *Blackwell v. State*, 29 App. 195, 15 S. W. 597; *Crass v. State*, 30 App. 480, 17 S. W. 1096; *Felsenthal v. State*, 30 App. 675, 18 S. W. 644.

When the inculpatory evidence is circumstantial, any fact, however unimportant

in itself, which tends in the least degree to establish the guilt or innocence of the accused, is competent evidence. In such cases, therefore, incidents may be legitimate evidence, which would be deemed irrelevant in a case dependent on direct and positive testimony. In such cases no definite line of demarkation between proximate and remote facts can be drawn. The only criterion of competency is whether the facts proposed to be proved tend to cast any light, however feeble, upon the subject of the inquiry. *Preston v. State*, 8 App. 30; *Washington v. State*, Id. 377; *Bouldin v. State*, Id. 332; *Howard v. State*, Id. 53; *Simms v. State*, 10 App. 131; *Langford v. State*, 17 App. 445.

Relevancy is defined to be that which conduces to the proof of a pertinent hypothesis—a pertinent hypothesis being one which, if sustained, would logically influence the issue. Hence, it is relevant to put in evidence any circumstance which tends to make the proposition at issue more or less probable. Whatever is a condition, either of the existence, or of the nonexistence, of a relevant hypothesis, may be shown. But no circumstance is relevant which does not make more or less probable the proposition at issue. *McGuire v. State*, 10 App. 125; *Grimmett v. State*, 22 App. 36, 2 S. W. 631, 58 Am. Rep. 630.

Circumstances relied on to establish the principal fact at issue, or such as are necessary to the conclusion sought, must be actually proved, or no inference or presumption can be legitimately based thereon. *Jernigan v. State*, 10 App. 546.

However remote from the main issue in point of time, place, or other circumstances a fact may be, if relevant, and tending to explain the main issue, the safer practice is to admit evidence thereof, leaving the question of its weight to the jury. *Russell v. State*, 11 App. 288.

All the circumstances of the transaction may be submitted to the jury, provided they afford any fair presumption or inference as to the matter in issue. *McMahon v. State*, 16 App. 357.

When direct and positive proof is attainable, circumstantial evidence cannot be resorted to. *Miller v. State*, 18 App. 34; *Dixon v. State*, 15 App. 480; *Clayton v. State*, Id. 348; *Porter v. State*, 1 App. 394; *Gabrielsky v. State*, 13 App. 428; *Scott v. State*, 19 App. 325; *Williams v. State*, Id. 276.

For other decisions relating to circumstantial evidence, see under heads of different offenses and subjects. *Rippey v. State*, 29 App. 37, 14 S. W. 448; *Blackwell v. State*, 29 App. 195, 15 S. W. 597; *Good v. State*, 30 App. 276, 17 S. W. 409; *Everett v. State*, 30 App. 682, 18 S. W. 674.

When the owner of stolen property has died since the taking, the want of consent may be shown by his acts and declarations. *Brown v. State* (Cr. App.) 28 S. W. 536.

Where the state relies on circumstantial evidence, the court may admit testimony of isolated circumstances forming links in the chain sought to be established. *Davis v. State*, 61 App. 611, 136 S. W. 45.

In a prosecution for crime, any fact can be established by circumstantial evidence as completely as by positive evidence. *Melton v. State*, 71 App. 130, 158 S. W. 550.

Where the state relies upon circumstantial evidence to connect defendant with a crime, defendant may prove, by the same character of testimony, that others committed it, and that he did not. *Satterwhite v. State* (Cr. App.) 177 S. W. 953.

19. — **Alibi.**—Where the defense of alibi was that accused spent the entire day and night of the killing in his father's home, testimony that a witness heard accused on the night of the crime while he was in another room of an immoral resort was admissible. *McCue v. State* (Cr. App.) 170 S. W. 280.

Testimony that accused was seen drinking with deceased on the evening of the murder was also admissible. *McCue v. State* (Cr. App.) 170 S. W. 280.

Testimony that a witness saw accused down town on the afternoon of the murder and saw him later that evening is also admissible. *McCue v. State* (Cr. App.) 170 S. W. 280.

Also testimony that a witness saw him on the afternoon of the killing in a saloon drinking with another person. *McCue v. State* (Cr. App.) 170 S. W. 280.

Testimony that the companion of a former witness saw two men drinking as detailed by such witness, though he did not know and could not recognize accused, as the other witness had, is admissible in corroboration. *McCue v. State* (Cr. App.) 170 S. W. 280.

Where an accomplice claimed to have met accused in an immoral resort, testimony that on the night of the killing the accomplice and accused visited the resort, where they removed their blood-stained clothing and spent the rest of the night smoking hop, was admissible. *McCue v. State* (Cr. App.) 170 S. W. 280.

Testimony that, some days after, he was arrested when leaving such resort, was admissible. *McCue v. State* (Cr. App.) 170 S. W. 280.

An alibi is available not merely to meet the main issue in the case but any criminative fact relied upon by the state. *Taylor v. State*, 27 App. 44, 11 S. W. 35; *Gallaher v. State*, 28 App. 248, 12 S. W. 1087.

20. — **Incriminating others.**—In a case of circumstantial evidence the bare fact that some other person may have had a motive to commit the crime is not enough, but proximity and opportunity must also be shown. *Ogden v. State* (Cr. App.) 58 S. W. 1020; *Thompson v. State*, 35 App. 523, 34 S. W. 629.

Investigation with reference to other parties than the defendant is not permissible, unless the inculpatory facts as to such parties are such as are proximately connected with the transaction for which the defendant is on trial. In other words, to show remote acts or threats of a third party, is not admissible, unless other facts are in proof which proximately and pertinently connect such third party with the crime charged against the defendant. See this case for evidence held to be admissible under this rule, and as overruling the decisions in the cases of *Bowen v. State*, 3 App. 617; *Boothe v. State*, 4 App. 203; *Walker v. State*, 6 App. 576; *Holt v. State*, 9 App. 571, in so far as they conflict with the rule announced.

Kunde v. State, 22 App. 65, 3 S. W. 325, see, also, upon this point, *McInturf v. State*, 20 App. 335; *Hart v. State*, 15 App. 202, 49 Am. Rep. 188; *Dubose v. State*, 10 App. 230; *Means v. State*, 10 App. 16, 38 Am. Rep. 640; *Aiken v. State*, 10 App. 610.

In a prosecution for keeping a disorderly house, the defense being that B., and not the defendant, was the proprietor of the house, certain promissory notes, and a mortgage on the furniture, etc., in the house, executed by said B., were held to be relevant, tending to show that B., and not the defendant, kept the house. *Stone v. State*, 22 App. 185, 2 S. W. 585.

Evidence showing ill will of a person, not a witness, towards the accused, and which raises merely a bare suspicion that such person took the money embezzled, is properly rejected as immaterial. *Lawshe v. State*, 57 App. 32, 121 S. W. 865.

In a prosecution for rape, circumstances of lewdness, familiarity, etc., indicating that prosecutrix might have been guilty of intercourse with others than accused, was admissible to rebut her testimony that she had never had intercourse with any other person than accused and to account for her general condition, the condition of her vagina, and the destruction of her hymen, as testified to by physicians, and to prove that others than accused had in fact had intercourse with her. *Bader v. State*, 57 App. 293, 122 S. W. 555.

Where, on a trial for homicide, accused sought to show that a third person had committed the offense, proof that the third person had been indicted and tried in justice's court for simple assault on decedent was inadmissible. *Hardin v. State*, 57 App. 401, 123 S. W. 613.

One on trial for crime may prove the confession of another in a position to have committed the crime. *Gilder v. State*, 61 App. 16, 133 S. W. 883.

In a prosecution for seduction under a promise of marriage, evidence that other persons than defendant had had carnal intercourse with the prosecuting witness is admissible. *Murphy v. State* (Cr. App.) 143 S. W. 616.

Where the state, on a trial for theft from the person, showed that accused committed the offense, while he showed that a third person, committed it, the reputation of the third person for honesty was in issue, and the state could prove his general reputation. *Hall v. State* (Cr. App.) 153 S. W. 902.

In a prosecution for an aggravated assault, consisting in the whipping of the prosecuting witness, testimony for the defense that a few months before other persons were heard to threaten to whip the prosecuting witness because he did not support his family is inadmissible, where they were not identified and shown to have been in a position where they could have committed the assault. *Caples v. State* (Cr. App.) 155 S. W. 267.

In a prosecution for arson, where the state relied on circumstantial evidence, testimony that the injured party had had a difficulty with another who bore him ill will and could have burned his house is admissible; it appearing that such person might have fired the premises instead of accused. *Ward v. State*, 71 App. 310, 158 S. W. 1126.

In a prosecution for arson, where the state relied solely on circumstantial evidence and the fact that accused had a grudge against the injured parties, accused is entitled to show that other persons in the neighborhood had threatened to burn out the injured party's premises because he drove them off of his land; it appearing that such persons were in a position to have committed the offense. *Ward v. State*, 71 App. 310, 158 S. W. 1126.

In a prosecution for aggravated assault, that another person struck the person alleged to have been assaulted by defendant was immaterial, unless it was expected to show an acting together in the assault. *Hodges v. State*, 73 App. 378, 166 S. W. 512.

In a prosecution for theft of oil cups, lubricator, belts, etc., from a cotton gin, defendant was not entitled to show theft of furnace grates from the gin by other persons. *Schenk v. State* (Cr. App.) 174 S. W. 357.

In a prosecution for murder, where the evidence as to defendant's guilt was entirely circumstantial, it was not error to exclude testimony that unidentified burglars had been operating in the neighborhood, such evidence having no tendency to show who committed the crime. *Satterwhite v. State* (Cr. App.) 177 S. W. 959.

21. **Transactions to which accused is not a party.**—To affect one accused of murder, transactions between decedent and third persons in his absence must in some way be brought home to him. *Kincaid v. State* (Cr. App.) 145 S. W. 597.

22. — **Evidence held inadmissible.**—It was held error to permit a state's witness to testify that, after he had testified against the defendant on an examining trial, he fled the county because serious threats had been made against him, it not being shown that defendant made the threats, or that he was in any way responsible for them. *Maines v. State*, 23 App. 568, 5 S. W. 123.

A state's witness testified that, at the instance of the agent of the alleged owners of the stolen animals, he went to the city of Memphis, and there found certain cattle in the brand of the alleged owners, and without having otherwise identified the animals, he further testified, over objection by the defense, that he sold the said animals under a power of attorney from the alleged owner, and delivered the proceeds of the sale to the agent for the alleged owners. Held, that the proof was *res inter alios acta*, and irrelevant, and, tending to prove the issue of ownership, its admission was material error. *Byrd v. State*, 26 App. 374, 9 S. W. 759.

The state was allowed to prove by the sheriff that he had a conversation with one of three defendants and immediately wired a deputy to arrest another one. Held irrelevant. *Rix v. State*, 33 App. 353, 26 S. W. 505. Evidence that defendant's brother was in jail is inadmissible. *Chapman v. State* (Cr. App.) 30 S. W. 225.

The fact that a third person bought shot is not admissible if not being shown that defendant knew of the purchase or used the shot. *Patterson v. State* (Cr. App.) 60 S. W. 559.

Where, in a prosecution for assault with intent to murder, defendant's theory was that the relations of his wife had taken all the property he had and caused a separation between them, evidence that prosecutrix's uncle, after the assault, obtained from defendant a check for \$348.05, was *res inter alios acta*, and not admissible as tending to show a conspiracy. *Groszehmigem v. State*, 57 App. 241, 121 S. W. 1113.

In a criminal prosecution, evidence as to why another person was not also indicted for the offense was irrelevant. *Zachary v. State*, 57 App. 179, 122 S. W. 263.

In a burglary case, evidence that a search warrant had been sued out, either by the prosecuting witness or by a third person, was inadmissible. *Elkins v. State*, 57 App. 247, 122 S. W. 393.

In a burglary case, evidence of acts of third persons as to carrying property from the burglarized house and secreting it, not brought home to accused, was inadmissible. *Elkins v. State*, 57 App. 247, 122 S. W. 393.

In a prosecution for killing the son of S. in a difficulty concerning defendant's right to remove a barn from certain premises occupied by S., evidence that S. had conferred with an attorney as to his right to hold possession of the barn was inadmissible against defendant. *Smith v. State*, 57 App. 455, 123 S. W. 698.

In a prosecution for aggravated assault, testimony that almost immediately after the quarrel began, but after the alleged assault, defendant's brother shot the father of the prosecuting witness was inadmissible; there being no evidence of a conspiracy between defendant and his brother as to the quarrel, and such act of shooting being that of a mere bystander. *Majors v. State*, 58 App. 39, 124 S. W. 663.

In a prosecution for homicide, the state was not entitled to show the failure of a codefendant previously tried to produce certain testimony at his trial, to which accused was not a party and over which he had no control. *Deneaner v. State*, 58 App. 624, 127 S. W. 201.

In a prosecution for burglary, evidence that a witness, who testified that he and defendant committed the burglary, had in his possession articles stolen two days before, was wholly irrelevant when not made for the purposes of impeachment. *Pitts v. State*, 60 App. 524, 132 S. W. 801.

In a prosecution for homicide, evidence warranting an inference that a state's witness had been induced to leave the state by defendant's brother and certain others was inadmissible, in the absence of some proof that accused was connected therewith. *Barnes v. State*, 61 App. 37, 133 S. W. 887.

Testimony that the son of accused and a witness ran away to avoid going before the grand jury, and that the son furnished the money therefor, is inadmissible against accused in the absence of a showing that he furnished his son the money or aided or induced the witness to avoid going before the grand jury. *Day v. State*, 62 App. 448, 138 S. W. 130.

On the trial of a mother for murder of her child by poison, evidence that the last time the child was at the home of a third person, playing with children, she began to cry was inadmissible, in the absence of anything connecting accused, not present, with the crying. *Orner v. State* (Cr. App.) 143 S. W. 935.

While, in a prosecution for murder of a child by whipping it, a witness may testify as to all of what she saw or heard in regard to the acts charged, she may not testify as to her own action upon hearing the whipping of the child. *Betts v. State* (Cr. App.) 144 S. W. 677.

Where in a burglary prosecution no purported confession was offered, evidence that the arresting officer had at other times mistreated other prisoners in an attempt to extort a confession was inadmissible. *Moray v. State* (Cr. App.) 145 S. W. 927.

In a homicide case, the body of deceased having been placed on the railroad track and run over by a train, there was no error in refusing to permit the defendant to prove that the county attorney had brought suit against the railroad company for damages for the death of deceased. *Foster v. State* (Cr. App.) 150 S. W. 936.

In a prosecution for pandering, evidence as to the place where prosecutrix was placed by another after the prosecution of accused had been begun was inadmissible. *Stevens v. State* (Cr. App.) 150 S. W. 944.

Testimony of accused's witness in an incest case, that she had stopped visiting at accused's home because she believed a third party and accused's wife were criminally intimate, was properly excluded, where neither the wife nor the third party were used as witnesses, especially where other witnesses were permitted to state all facts showing such criminal intimacy. *Drake v. State* (Cr. App.) 151 S. W. 315.

Where, in a prosecution for burglary, defendant denied that he had committed it, but claimed he had purchased the stolen property from G., while the state claimed defendant and G. acted together in committing the burglary, evidence that G. had previously committed other burglaries in the same town, with which defendant had nothing to do, was inadmissible. *Walker v. State* (Cr. App.) 151 S. W. 822.

On a trial for burglary, testimony that, after the witness obtained possession of certain cigars, he sent for R., who identified them as the cigars stolen, this not occurring in accused's presence, was inadmissible, although R. had testified that they were the cigars stolen. *Bradshaw v. State* (Cr. App.) 155 S. W. 218.

On a trial for aggravated assault, the testimony of the prosecuting witness, that before leaving a hotel just prior to the difficulty he placed a pistol in his pocket on account of information received from the clerk of the hotel that accused was there to see him, was improperly admitted, since accused was not

chargeable with what occurred between third parties not in his presence, and such testimony was calculated to convey to the jury the idea that accused was there for the purpose of provoking a difficulty, and that the prosecuting witness armed himself to defend himself against an anticipated attack. *Ponder v. State* (Cr. App.) 155 S. W. 244.

On a trial for homicide the testimony of deceased's father that deceased expected to marry accused's sister on the day following the homicide, that he and deceased were going for the license on that day, but that he knew nothing about the matter, except what deceased had told him, was incompetent, in the absence of any evidence that accused knew of the relations between his sister and deceased, or that he was objecting to the marriage. *De Leon v. State* (Cr. App.) 155 S. W. 247.

In a prosecution for homicide, evidence that there had been a good deal of gambling among negroes and Mexicans in the vicinity in which accused lived some time prior to the killing was irrelevant and improperly admitted. *Roberts v. State*, 70 App. 297, 156 S. W. 651.

Where, in a perjury case, defendant's father was not a witness, it was error to admit evidence showing that he had left another county under suspicious circumstances. *Poulter v. State*, 72 App. 140, 161 S. W. 475.

In a prosecution for perjury, it was prejudicial error to admit evidence that defendant's father, several years before, had stolen a log chain; the father not being a witness. *Poulter v. State*, 72 App. 140, 161 S. W. 475.

An accused is responsible for his own acts and those done under his authority; but the fact that one who was subsequently engaged as his attorney conferred with the father of the prosecutrix is not admissible as evidence of an admission tending to show a consciousness of guilt. *Bradley v. State*, 72 App. 287, 162 S. W. 515.

23. — Evidence held admissible.—In a prosecution for pursuing the occupation of a liquor dealer without paying the occupation tax, it was held to be relevant and competent for the state to prove that the son of the defendant, in the discharge of the defendant's business, sold liquors, as such testimony tended to establish that the defendant was engaged in such occupation. *Wade v. State*, 22 App. 629, 3 S. W. 786.

Where, on a trial for violating the local option law, prosecutor testified that he got whisky by, or from, or through accused, that accused told him that he would get whisky from C., that accused, in company with another, went to C.'s house, and that after they had returned from the house the whisky was delivered to prosecutor, the court properly permitted the state to show that C. had recently purchased whisky, which he had either drunk or given away, but none of which he had sold. *Wesley v. State*, 57 App. 277, 122 S. W. 550.

Where the state showed that accused and third persons had conspired to rob, and that in the attempted robbery the homicide was committed, and that accused had visited the residence of the person to be robbed and had gone to signal the third persons who were a short distance away, the testimony of a witness, who saw accused go about a hundred yards from the place, that she heard somebody talking, was admissible to connect accused with the third persons, who almost immediately after the hearing of the talking appeared at the place of the killing. *Bass v. State*, 59 App. 186, 127 S. W. 1020.

In a prosecution for keeping a bawdy house, the character of the occupancy being part of the crime, it is admissible to prove the character of the occupancy and the conduct of the parties occupying the house, as well as their conversations; and in such a prosecution it was proper to admit testimony of a witness that he went to the place in question with another person late at night, and that there was a boy at the foot of the steps, who asked witness and the other person if they wanted some girls, and if they did to go upstairs, saying that there were some girls up there. *Robbins v. State*, 60 App. 523, 132 S. W. 770.

Where deceased's wife had described the slayer the evening of the killing, a witness' testimony that he received that description and began to track a man who fitted that description is admissible, particularly where the credibility of the wife is impeached by proof of inconsistent statements. *Mitchell v. State* (Cr. App.) 144 S. W. 1006.

In a prosecution for passing a forged check, evidence that the bank on which the check was drawn refused payment was admissible on the issue of forgery. *Wesley v. State* (Cr. App.) 150 S. W. 197.

In a prosecution for forgery in which the forgery relied on consisted of the raising of a voucher check, a bank cashier was properly permitted to testify that the voucher, as altered, had been paid by the bank, and also that the bank had paid a number of such checks to the accused in person, though he was not able to state positively that the accused presented the identical check. *Horn v. State* (Cr. App.) 150 S. W. 948.

The testimony of prosecutrix in a rape case that she was prevented by force by defendant's partner in the crime from making complaint until the night of the following day was properly admitted; it being always permissible in rape cases to prove that complaint was made at the first opportunity. *Ortiz v. State* (Cr. App.) 151 S. W. 1059.

In a prosecution of an accessory charged with giving a witness a certain amount of money to get out of the country, testimony by bankers that another accessory had applied to them for that amount and procured it at the time was admissible. *Harrison v. State* (Cr. App.) 153 S. W. 139.

In a prosecution of L. W. for stealing a yearling, testimony of W. W. that, after the date alleged in the indictment, he bought a yearling about the same size and color of the yearling alleged to have been stolen, was admissible, where the state sought to show that the yearling bought by the witness was the one de-

defendant claimed to have raised and the one that he wanted the prosecuting witness to look at. *Webb v. State* (Cr. App.) 154 S. W. 1013.

Where, in a prosecution of defendants for murdering their father by shooting him, there was evidence of animosity between decedent and T., who had married decedent's daughter, evidence that on the day prior to the killing, T., in company with defendants, purchased certain explosive shells of the same character as those used to kill decedent, was admissible. *Jones et al. v. State*, 72 App. 504, 163 S. W. 81.

24. — Indictment, acquittal or conviction of third persons.—When one of several defendants, charged with the offense of conspiracy, has been tried and acquitted, the record of such acquittal is competent evidence in behalf of another of such defendants subsequently tried. *Paul v. State*, 12 App. 346.

Accused and S. were indicted for murder, but the indictment against S. was dismissed by the state on the ground that there was not sufficient evidence to convict S. under the indictment, but that if he could be convicted of any offense, it would be that of accessory. Held, that evidence that a witness had been told that S. was being prosecuted in the federal court for another offense, and that deceased was a witness against him, and the indictment of S. in the federal court and a subpoena for deceased as a witness in the case were improperly admitted, as it failed to connect accused in any way with any of the matters testified to, and it was inadmissible to show conspiracy between accused and S., in the absence of any evidence connecting accused with S. in the killing. *Figaroa v. State*, 58 App. 611, 127 S. W. 193.

On a trial of statutory rape, evidence that a third person charged with having raped prosecutrix had been acquitted was inadmissible. *Kearse v. State* (Cr. App.) 151 S. W. 827.

On a trial for assault to murder, evidence that other parties had been indicted for their participation in the difficulty in which the alleged assault occurred, and such indictments themselves, were improperly admitted. *Lara v. State*, 72 App. 100, 161 S. W. 99.

On a trial for assault to murder, it was error to admit evidence that other parties indicted for their participation in the same difficulty had forfeited their bonds, fled, and were refugees from justice, where accused had not attempted to flee, and was not shown to be responsible for the acts of such other parties subsequent to the difficulty. *Lara v. State*, 72 App. 100, 161 S. W. 99.

On a trial for assault to murder, evidence that another party had been convicted of murdering a person who came to the prosecuting witness's rescue in the difficulty in which the alleged assault occurred, was improperly admitted. *Lara v. State*, 72 App. 100, 161 S. W. 99.

25. — Persons connected with prosecution.—Unless defendant expects to prove a connection between the jurors and the committee it is immaterial who composed a committee employing private counsel to prosecute. *Moore v. State*, 36 App. 574, 38 S. W. 209.

Evidence as to the fee paid attorneys who assisted in the prosecution was properly excluded. *Shaffer v. State* (Cr. App.) 151 S. W. 1061.

In a prosecution of an optician for practicing without a license, the court properly refused to permit accused to show that a third party, who was not a witness, had employed an attorney to assist in the prosecution of the case. *Tipton v. State* (Cr. App.) 168 S. W. 97.

26. Conduct of accused subsequent to offense.—Indications of a consciousness of guilt by a person accused or suspected of crime, or of one who in consequence of such indications, is accused or suspected of crime, may be proved as evidence against him. No limit to the number of such indications can be assigned, nor can their nature or character be theoretically defined. However numerous or minute they may be, they are admissible, if they tend to elucidate the transaction in question. *Hart v. State*, 15 App. 202, 49 Am. Rep. 188. See, also, *Williams v. State*, Id. 104; *Tooney v. State*, 8 App. 452.

Acts and conduct of defendant before arrest are admissible against him. *Holt v. State*, 39 App. 299, 45 S. W. 1016, 46 S. W. 829.

What was said and done by defendant a short time after the killing was admissible against him, not only as *res gestæ*, but was admissible for the reason that they were the acts and declarations of defendant in the nature of a confession. *McGee v. State*, 31 App. 71, 19 S. W. 764.

State cannot show that defendant did not testify at a former trial. *Dorrs v. State* (Cr. App.) 40 S. W. 311.

Evidence that on the night of the difficulty accused and his companion came to witness' house, some eight or ten miles from where they resided, and stayed all night, though they were both married men, was admissible to show conduct inconsistent with innocence; their explanation being a desire to reach a justice of the peace, before whom accused pleaded guilty to a lesser offense than that with which he was subsequently charged. *Decker v. State*, 58 App. 159, 124 S. W. 912.

The coming and going of an accused after the commission of an offense are proper matters to be shown, except where the state thereby seeks to prove a different offense. *Williams v. State* (Cr. App.) 144 S. W. 622.

In a trial for burglary, followed by defendant's attempt to cut his throat, the court properly permitted the chief of police to testify about defendant's condition and about his writing of statements concerning the offense upon scrap paper soon after his arrest. *Shaffer v. State* (Cr. App.) 151 S. W. 1061.

On a trial for horse stealing, where there was evidence that the sheriff followed accused from the place where the horses were stolen to another state, where he was found in possession of such horses, and accused claimed that he had purchased them from a third person, evidence that he voluntarily returned to this state should have been admitted. *La Fell v. State* (Cr. App.) 153 S. W. 884.

The acts and conduct of one when arrested are admissible against him. *Serop v. State* (Cr. App.) 154 S. W. 557.

27. — **Flight or resisting arrest.**—It is always permissible to show flight and search for accused. *Gotcher v. State* (Cr. App.) 148 S. W. 574; *Benavides v. State*, 31 Tex. 579; *Sheffield v. State*, 43 Tex. 378; *Blake v. State*, 3 App. 581; *Hardin v. State*, 4 App. 355; *Gose v. State*, 6 App. 121; *Alken v. State*, 10 App. 610; *Mathews v. State*, 9 App. 138; *Arnold v. State*, Id. 435; *Williams v. State*, 22 App. 497, 4 S. W. 64; *Buchanan v. State*, 52 S. W. 770; *Perry v. State* (Cr. App.) 155 S. W. 263.

Where defendant had been previously indicted for the same offense in another county under a defective indictment, and had there forfeited his bail, the indictment and the order forfeiting the bond are admissible to show flight. *Arnold v. State* (Cr. App.) 168 S. W. 122; *Gilleland v. State*, 24 App. 524, 7 S. W. 241.

When there has been no attempt to show flight, evidence that defendant did not run away is admissible. *Harvey v. State*, 35 App. 545, 34 S. W. 623.

The flight of defendant is good evidence against him and any act of his in connection with it is admissible. *Patterson v. State* (Cr. App.) 60 S. W. 559.

In a prosecution for rape, it was not error to allow proof to be made that a constable, after the prosecution was instituted, had sought to find accused and could not do so, on the ground that it was not shown that the officer had any process for the accused, and his search for him was without authority of law, since it was permissible to prove by any one who knew that accused had fled from the scene of the offense and from his home. *Gent v. State*, 57 App. 414, 123 S. W. 594.

In a prosecution in K. county for rape, evidence that accused was found in G. county, and that he had changed his name and denied ever living in K. county, was admissible to show flight, change of name, and a denial that he had ever lived in the county where the crime was committed. *Gent v. State*, 57 App. 414, 123 S. W. 594.

In a prosecution for rape, the complaint filed against accused, the *capias*, and the bail bond were admissible to show that there was a prosecution, flight, and accused's forfeiture of his bond. *Gent v. State*, 57 App. 414, 123 S. W. 594.

In a prosecution for theft, accused's forfeiture of his bail bond and subsequent flight were admissible in evidence against him, and his explanation that his flight was upon the advice of his counsel for certain reasons was admissible in his favor. *Brown v. State*, 57 App. 570, 124 S. W. 101.

If accused has not sought to escape arrest for the crime for which he is tried, no good or useful purpose is served by showing that he sought to escape arrest for other crimes; and while evidence of flight is admissible as some evidence of guilt, and as amounting in effect to a quasi admission of it, flight to escape arrest for another and different offense ought not to be considered as evidence of guilt of an offense as to which there was no flight. *Damron v. State*, 58 App. 255, 125 S. W. 396.

Evidence is admissible in a homicide case of accused's flight and escape after arrest, being a circumstance against him. *Hunter v. State*, 59 App. 439, 129 S. W. 125.

In a prosecution for making a criminal assault on a young girl, in which the state's evidence tended to show that accused had left the state to avoid arrest, and had returned and was in hiding in his father's house when arrested, the officer who arrested him testified that, when he went to the house, accused's mother said, "Don't go in there, you will scare him to death, he is heavily armed, and he will die before he will give up," and that witness heard a voice from the room which sounded like that of accused, saying, "Ma, I will die before I will give up." Held, that the evidence of the officer of the attempt to evade arrest was admissible as tending to show guilt. *Miller v. State* (Cr. App.) 150 S. W. 635.

Where accused fled after the commission of the alleged crime, it was not error to permit the sheriff to testify that he searched for him, advertised, and offered rewards, and finally found him in jail in another part of the state. *Love v. State* (Cr. App.) 150 S. W. 920.

Where, after a homicide committed in 1906, accused fled from the city and was not located until in December, 1913, it was not error to permit the chief of police to detail the search he made to find accused and that he could not be found in the city. *Dickson v. State* (Cr. App.) 168 S. W. 862.

While evidence of flight is ordinarily admissible as indicative of guilt, yet a judgment nisi in an *ex parte* proceeding against accused for the forfeiture of his bail bond because of his failure to appear for trial, not being a final adjudication of any fact, was inadmissible. *Sorrell v. State* (Cr. App.) 169 S. W. 299.

Where, in a prosecution for homicide, there was no evidence indicating that defendant's purpose in going to Louisiana while on bail was with intent not to return in time for trial, evidence that when he returned he apologized to one of his bondsmen for not telling him in advance about his intended trip, and that he did not blame him for refusing to become a bondsman a second time, was inadmissible. *Sorrell v. State* (Cr. App.) 169 S. W. 299.

Evidence that accused fled the country, and that the officers had mailed out circulars in their efforts to apprehend him, but he was not arrested for three years, was admissible. *Grimes v. State* (Cr. App.) 178 S. W. 523.

28. — **Attempt or opportunity to escape.**—It is simply permissible to prove that defendant attempted to escape, but the circumstances, character and extent of an assault committed on a jailer in an attempt to escape cannot be shown in a trial of murder. *Spriggins v. State*, 42 App. 341, 60 S. W. 55.

The state may show that accused attempted to escape, as evidence of guilt. *Wilkerson v. State*, 60 App. 388, 131 S. W. 1108, Ann. Cas. 1912C, 126.

Where, in a prosecution for murder, the case depended in part on circumstantial evidence, an escape from prison after the arrest of the accused was proper to be shown. *Williams v. State* (Cr. App.) 144 S. W. 622.

Where, in a prosecution for homicide, the state did not attempt to show flight by accused nor that he attempted to escape, the court properly excluded evidence that he had an opportunity to escape with others from the jail, but that he did not do so, but informed the officers, offered to show his character. *Millner v. State*, 72 App. 45, 162 S. W. 348.

29. — **Suppression or fabrication of evidence.**—Fabrication of evidence by the defendant, together with the circumstances attending may be proved in all cases and considered by the jury. *Benavides v. State*, 31 Tex. 579; *Sheffield v. State*, 43 Tex. 378; *Williams v. State*, 22 App. 497, 4 S. W. 64.

Suppression of, or failure to produce, evidence may sometimes be indicative of guilt. *Mercer v. State*, 17 App. 452.

30. — **Suborning or interfering with witnesses.**—Where it is shown that an assault was made by defendant upon a witness because such witness was going to testify against him in a criminal prosecution, such assault becomes a relevant fact and is admissible as evidence against defendant. *Inman v. State*, 35 App. 36, 30 S. W. 219; *Love v. State*, 35 App. 27, 29 S. W. 790.

Where a witness testified that he had never heard prosecutor make any threat against accused, the witness should be permitted to testify that accused tried to induce him to state that prosecutor had made threats. *Day v. State*, 62 App. 448, 128 S. W. 130.

31. **Matters explanatory of facts in evidence or inferences therefrom.**—A defendant may introduce rebutting proof in explanation of his flight, etc. *Arnold v. State*, 9 App. 435.

In a murder trial, the defendant proposed to prove, in explanation of his recent purchase of a pistol, and of his possession of it on the day of the homicide, that it was then the custom and habit of the people of that county to carry pistols. Held, that such testimony was irrelevant. *Creswell v. State*, 14 App. 1.

Where a defendant on an examining trial had pleaded guilty, and his said plea was introduced in evidence against him on his final trial, it was held competent for the state to also introduce the complaint to which the plea of guilty referred in order to identify the offense therein charged with the offense for which the defendant was then being tried. *Rice v. State*, 22 App. 654, 3 S. W. 791.

In a prosecution for maiming, where the injured party was a fellow-prisoner in jail with the defendant, it was held relevant and competent testimony on the issue of intent to prove that the prisoners had a code of laws adopted by themselves, which prescribed penalties for certain offenses, and that it was in the effort to enforce one of these laws upon the injured party that the maiming of him resulted. *Bowers v. State*, 24 App. 542, 7 S. W. 247, 5 Am. St. Rep. 901.

A witness has the right to explain any conduct or previous statement made by him tending to create a distrust of his integrity or truth. *Bruce v. State*, 31 App. 590, 21 S. W. 681.

Exclusion of evidence offered by defendant tending to repel inculpatory inferences deducible from entries in a book kept by him held error. *Bluman v. State*, 33 App. 43, 21 S. W. 1027, 26 S. W. 75.

Where the state proved flight of defendant, he had a right to prove that he had been informed that there had been a mob organized to arrest and hang him. *Lewallen v. State*, 33 App. 412, 26 S. W. 832.

When defendant was arrested he had a key which fitted the lock of the door to the house in which the homicide was committed. Held that defendant should have been allowed to explain when and how he came in possession of the key. *Radford v. State*, 33 App. 520, 27 S. W. 143.

Evidence that witness failed to identify defendant for fear of personal safety is inadmissible. *Thompson v. State*, 35 App. 511, 34 S. W. 629.

On trial for theft defendant proved an alibi; fixing the dates by entries in certain books; held, competent for the State to have the books brought in and the entries identified by the witness, and then to prove by expert testimony that there had been erasures and interlineations made in such entries. *Collins v. State*, 39 App. 441, 36 S. W. 933.

When defendant brings out testimony as to a record of a former trial, the State may introduce testimony explaining the record. *Fitzpatrick v. State*, 37 App. 20, 38 S. W. 806.

Refusal to allow witness for the defense to explain impeaching testimony; held, reversible error. *Tippett v. State*, 37 App. 186, 39 S. W. 120.

Defendant introduced in evidence a petition filed by plaintiff for the recovery of money, the court properly refused to permit the prosecuting witness to testify in regard to the allegations in such petition. *Sanders v. State*, 38 App. 343, 42 S. W. 983.

Where a person for any reason has failed to explain his silence when the circumstances would suggest a candid statement, he may give his reason for such silence, where the transaction is the subject of judicial inquiry; and where a prosecuting witness in a prosecution for aggravated assault had not told accused's wife who the assailant was, witness could explain on direct examination that she had not informed the wife because she and accused had been good to her and had treated her as their own child. *Ferguson v. State*, 57 App. 205, 122 S. W. 551.

In a murder prosecution, there was evidence that accused's brother participated in the fight in which decedent was cut, and accused's theory was that, if he used a knife in the fight, it was in his brother's defense, and he introduced evidence that his brother had two wounds on his head, on the theory that they might have been made by decedent. Held, that a witness could testify that he struck accused's brother on the head with a piece of iron in the fight, and that he helped to undress decedent after he was cut, and found no weapons on him, as tending to rebut accused's theories. *Graham v. State*, 57 App. 104, 123 S. W. 691.

Where, in a homicide case, accused had proved by a state's witness that he told

others that he knew nothing of the killing, the state could, on redirect examination, ask him why he told such others that he did not see the killing, the answer to which was that he did so because he was instructed by the grand jury not to tell what his testimony would be. *Spencer v. State*, 59 App. 217, 128 S. W. 118.

Where an attorney indicted for embezzlement of money alleged to have been received from his client to be loaned executed a receipt to her for \$60 "on loan account," parol evidence was admissible to explain that the words "loan account" meant that the money was left with him to be loaned. *Hamer v. State*, 60 App. 341, 131 S. W. 813.

In a prosecution for burglary, where it was shown that about a mile from the place of the burglary there was discovered a place where parties had eaten a lunch, and there was found a bottle marked Jersey Cream Whisky, a tin can marked Van Camp's Pork and Beans, and a number of cigarette stumps, testimony of the sheriff as to defendant's habits while in jail, as to whether he ate Van Camp's Pork and Beans, drank Jersey Cream Whisky, and smoked cigarettes, was admissible. *Bowen v. State*, 60 App. 595, 133 S. W. 256.

Where, in a prosecution for homicide, the state offered evidence that defendant had furnished money to G. to purchase a horse of S. and induce him to leave the state, and that defendant's brother and G. carried S. to a train, and that he did leave the state, defendant was entitled to show by G.'s father that G. gave his son the money with which to purchase the horse. *Barnes v. State*, 61 App. 37, 133 S. W. 887.

Admission of testimony in a homicide case, over the general objection that witness' investigation was not legal and was prejudicial to defendant's rights, that witness had made an investigation to see if he could find gun shells similar to the one found at the place of the homicide, and in doing so had gone to several hardware stores, and failed to find any similar shells, was not error; as not only it cannot be said that it was inadmissible for any purpose, but it was admissible, in the absence of special reason, in connection with evidence that the shells were of a peculiar make, and were peculiarly loaded, and that like shells were found in defendant's room. *Wheeler v. State*, 61 App. 527, 136 S. W. 68.

Where one, accused of assault with intent to maim, claimed that she acted to repel an attempt to rape her, the state could show numerous previous acts of intercourse between the parties, and that the victim went to the place of the offense at accused's invitation. *Cole v. State*, 62 App. 270, 138 S. W. 109.

To explain why accused happened to be at the place where the homicide occurred, he was entitled to show that a few minutes before the homicide he left witness' office, stating that he was going to a certain place, the way to which led by the place of the homicide. *Kemper v. State*, 63 App. 1, 138 S. W. 1025.

Where a statement of deceased that accused was a hypocrite, and was glad his wife was dead, was in evidence, the exclusion of testimony tending to rebut this statement was error. *Maclin v. State* (Cr. App.) 144 S. W. 951.

In a prosecution for cattle theft, after a number of state's witnesses had testified that they never heard accused charged of stealing a thing before he was shown to have sold a certain cow known as the H. yearling to the butcher, accused offered to show by one of such witnesses on cross-examination that he had heard that, when the yearling was turned loose, it went to accused's cow and sucked it, and that it was generally conceded that the H. animal belonged to accused, and not H., and also offered to show, in connection with the evidence as to accused's reputation, that, when the H. animal was branded by accused, a number of persons were present, and saw him brand it. Held, that the evidence offered was admissible to explain the evidence as to accused's reputation in connection with the H. animal, making it error to exclude it. *Booth v. State* (Cr. App.) 145 S. W. 923.

Where accused on a trial for rape on a girl under 15 years of age contended that the different members of the family of prosecutrix were about the premises at the time of the alleged offense, so that they would have known what was being done, the court properly permitted the state to prove the membership of the family of prosecutrix, and to show their whereabouts at the time of the alleged offense, and that the members of the family were not in sight or hearing at such time, and to show that the mother of prosecutrix was dead. *Kearse v. State* (Cr. App.) 151 S. W. 827.

Where accused was charged with slandering his wife in charging her with misconduct with S., and accused sought to use the flight of S. as an incriminating circumstance, the court properly permitted him to testify to a statement made to him by the wife as furnishing a reason for his flight consistent with their innocence. *Elder v. State* (Cr. App.) 151 S. W. 1052.

Where accused testified that he had stated that certain others stole the money, he was properly asked the time when the money was stolen by the others and the amount, and could explain why he could not give that information. *Ferrell v. State* (Cr. App.) 152 S. W. 901.

Where the state in a prosecution for homicide showed that, on a prior trial, it had introduced an eyewitness who was then absent, to raise an inference that the testimony of such witness was favorable to the state, the defendant in rebuttal was entitled to introduce the testimony previously given by the witness in order to prove that the testimony had not such effect. *Green v. State* (Cr. App.) 154 S. W. 1003.

In a prosecution for uxoricide, where accused introduced testimony that at the time of the killing he was in great distress and shedding tears, testimony that his grief was feigned is admissible. *Beaupre v. State*, 70 App. 19, 156 S. W. 625.

Where the defense brings out the fact that the prosecuting witness in a larceny case delayed having defendant arrested and declined to file a complaint, the state could show that she did so through fear of threats of bodily harm. *Creale v. State*, 71 App. 9, 158 S. W. 268.

In a prosecution for abandonment after seduction and marriage, where defend-

ant's uncle had testified that the wife told him she was going back to send the defendant to the penitentiary, it was proper for the state to show that the statement was occasioned by the uncle's telling her that her husband was not coming back. *Qualls v. State*, 71 App. 67, 158 S. W. 539.

Where, in a prosecution for assault to rape, a witness for the state testified on cross-examination that he had not promptly reported the offense to the officers after he saw its commission, and had not himself interfered, he was properly allowed to explain on redirect the reason for his failure to do so. *Hooper v. State*, 72 App. 82, 160 S. W. 1187.

Where, in a prosecution for seduction under promise of marriage, defendant swore that he received a letter from prosecutrix, while he was absent in Colorado, soliciting him to return because she suspected she was pregnant, and on his return that she told him the reason why she wrote the letter, she was entitled to testify as to the reason why she desired him to return. *Gillespie v. State*, 73 App. 585, 166 S. W. 135.

32. Character or reputation of accused.—It is not permissible for the state to give in evidence the bad character of the defendant, unless he has initiated the inquiry by introducing evidence of his good character. *Hartless v. State*, 32 Tex. 88; *Williams v. State*, 40 App. 504, 51 S. W. 220.

A defendant may prove his general good character in all cases, whether the evidence against him be direct or circumstantial, doubtful or certain, whenever guilty knowledge or criminal intention is of the essence of the offense. *Coffee v. State*, 1 App. 548; *Lee v. State*, 2 App. 338; *Lockhart v. State*, 3 App. 567; *Jones v. State*, 10 App. 552; *Johnson v. State*, 17 App. 565; *House v. State*, 42 App. 125, 57 S. W. 826.

When evidence of character is admissible it should be restricted to the trait of character in issue; or, as otherwise expressed, the evidence should have some analogy and reference to the nature of the charge, it being obviously irrelevant and absurd to inquire into the party's loyalty on a charge of theft, or to inquire into his character for truth on a charge of murder, or into his character for honesty on a charge of treason. *Jones v. State*, 10 App. 552; *Lockhart v. State*, 3 App. 567; *Johnson v. State*, 17 App. 565; *Coffelt v. State*, 19 App. 436; *Leader v. State*, 4 App. 162; *Plasters v. State*, 1 App. 673.

Where intent is an essential element of the offense it is competent to prove the general reputation of accused. *Short v. State*, 25 App. 379, 8 S. W. 281.

An inquiry as to character must be limited to the general reputation of the person impugned in the community of his residence, or where he is best known, and the witness must speak from his knowledge of that general reputation, and not from his own individual opinion. *Holsey v. State*, 24 App. 35, 5 S. W. 523; *Brownlee v. State*, 13 App. 255; *Marshall v. State*, 5 App. 273; *Roach v. State*, 41 Tex. 261; *Boon v. Weathered's Adm'r*, 23 Tex. 675.

Testimony as to the character of a defendant's associates is irrelevant and inadmissible. *Holsey v. State*, 24 App. 35, 5 S. W. 523.

In a trial for rape the accused may prove his character as a "peaceable," "law abiding" man. *Lincecum v. State*, 29 App. 328, 15 S. W. 818, 25 Am. St. Rep. 727. Other decisions under this section: *Walker v. State*, 25 App. 448, 8 S. W. 644; *Gentry v. State*, 25 App. 614, 8 S. W. 925; *Irvine v. State*, 26 App. 37, 9 S. W. 55; *Drake v. State*, 29 App. 266, 15 S. W. 725; *Jackson v. State*, 29 App. 459, 16 S. W. 247; *Thompson v. State*, 30 App. 325, 17 S. W. 448; *Williams v. State*, 30 App. 430, 17 S. W. 1071; *Browder v. State*, 30 App. 614, 18 S. W. 197; *Campbell v. State*, 30 App. 648, 18 S. W. 409; *Felsenthal v. State*, 30 App. 675, 18 S. W. 644; *Young v. State*, 31 App. 24, 19 S. W. 431.

In a prosecution for keeping a disorderly house, evidence of the common reputation of the character of the defendant as a prostitute, or a person devoid of chastity, is not admissible. *Gamel v. State*, 21 App. 357, 17 S. W. 158.

Evidence as to defendant's character in another state may be introduced when he has been in the state only two years. *Thomas v. State*, 33 App. 607, 28 S. W. 534.

The court is inclined to hold that where proof of actual character is relevant (that is, tends to solve some issue in the case) it ought to be admitted. *Spangler v. State*, 41 App. 424, 55 S. W. 328.

An answer to a question which tends to put in issue the reputation of defendant as a law abiding citizen when he himself has not put it in issue should be excluded. *Bell v. State* (Cr. App.) 56 S. W. 913.

Where accused's general reputation for chastity and virtue is put in issue, matters occurring five or six years before are not inadmissible on the ground of remoteness. *Newell v. State* (Cr. App.) 145 S. W. 939.

In a prosecution for seduction under promise of marriage, defendant was not limited to proof of his character for morality and chastity, but was entitled to prove that his general reputation as a peaceable law-abiding citizen was good. *Bishop v. State*, 72 App. 1, 160 S. W. 705.

Where defendant prayed a suspension of sentence and introduced evidence of his general reputation, there was no error in permitting the state to inquire into his habits and mode of life. *Turner v. State*, 72 App. 649, 163 S. W. 705.

Defendant not testifying, the state may not introduce evidence of his bad character, irrelevant to the issue of guilt of the crime charged. *Kaufman v. State*, 73 App. 454, 165 S. W. 193.

In a prosecution for assault with intent to kill, where defendant had lived in the county for seven years, and where the state did not attack his general reputation for truth and veracity, evidence as to such reputation was properly excluded. *Jones v. State* (Cr. App.) 167 S. W. 1110.

Where one is on trial in a criminal case, his character prior to the commission of the offense may be inquired into, but not the character he may have acquired

after the commission thereof or what is said about his character after such time. *Caruth v. State* (Cr. App.) 177 S. W. 973.

33. — **Evidence of particular acts.**—Evidence that a defendant, who was on trial for theft of a horse, was at the time of the theft, a county convict, and as such hired to the owner of the horse, was held irrelevant. *Persons v. State*, 3 App. 240.

Evidence that defendant was a "capper and roper-in" for a gambling house near which deceased's body was found held not inadmissible. *Tooney v. State*, 8 App. 452.

It was held error for the state to prove that for four or five years prior to the trial the defendant had been confined in the penitentiary for felony. *Guajardo v. State*, 24 App. 603, 7 S. W. 331.

That defendant held a position of trust at a fair salary is inadmissible to prove reputation. *Howard v. State*, 37 App. 494, 36 S. W. 475, 66 Am. St. Rep. 812.

On trial for robbery, proof that some months prior to the commission of the offense defendant worked for wages, is irrelevant. *Colter v. State*, 37 App. 284, 39 S. W. 576.

Character of defendant for peace and quietude cannot be put in issue by the State by proving an isolated difficulty with third party or generally. *Dimry v. State*, 41 App. 272, 53 S. W. 853.

Where defendant's character for peace is put in issue, State can prove a former difficulty in which he was engaged. *Young v. State*, 41 App. 442, 55 S. W. 333.

The fact that defendant was a fugitive from justice at time of homicide is admissible against him. *Patterson v. State* (Cr. App.) 60 S. W. 559.

Evidence that jurors who sat in a former trial of the same case had signed the defendant's bail bond is inadmissible to show good character and reputation. *Whitehead v. State*, 61 App. 558, 137 S. W. 356.

Evidence was not admissible in a homicide action that accused was "a good worker"; that not being an issue. *Ward v. State* (Cr. App.) 146 S. W. 931.

In a trial for the murder of a woman whom he had outraged, testimony of a young woman as to having seen defendant on the day of the homicide, that she did not notice him much that day, but that he always generally looked at her real hard, and once watched her until she got to the corner, qualified by the court's statement that it was introduced without objection and that the objectionable part was at once excluded, presented no error. *Durfee v. State*, 73 App. 165, 165 S. W. 180.

In a prosecution of a woman for arson, evidence was not admissible that witness, who roomed at accused's house at the time of the fire, saw accused and a man together in the house, and knew that they roomed together. *McClary v. State*, 73 App. 430, 165 S. W. 572.

On a trial for keeping a disorderly house, evidence that some time before the date of the alleged offense accused had beer in an ice box in such house, and that parties were drinking beer there, was admissible. *Cunningham v. State*, 73 App. 565, 166 S. W. 519.

In a prosecution for homicide, the fact that evidence of accused's visits to saloons and the lowest of dives might necessarily have a prejudicial effect does not render such testimony inadmissible, where it was vitally connected with the evidence to show accused's guilt. *McCue v. State* (Cr. App.) 170 S. W. 280.

In a prosecution for homicide, evidence that accused sold whisky some time before the killing, not being relevant thereto, is improperly received. *Davis v. State* (Cr. App.) 172 S. W. 978.

In a prosecution for murder, evidence that six or seven years before the killing, at a time when accused did not know deceased, accused became intoxicated at a picnic and had to be restrained, is inadmissible. *Marshall v. State* (Cr. App.) 175 S. W. 154.

34. **Materiality or competency of evidence.**—A defendant charged with aggravated assault, by striking a boy with a switch, may testify to the object and purpose of such striking to show his motives and intent. *Berry v. State*, 30 App. 423, 17 S. W. 1080.

On trial for assault with intent to rape, defendant's evidence that he intended to have sexual intercourse with prosecutrix with her consent, and not by force, should have been allowed. *Lewallen v. State*, 33 App. 412, 26 S. W. 832.

On trial for murder it is admissible to prove blood spots found on clothing in defendant's house. *Thomas alias Whitehead v. State*, 33 App. 607, 28 S. W. 534.

On trial for manslaughter the opinion of the court of appeals on an appeal from a former conviction is inadmissible. *Abrams v. State* (Cr. App.) 40 S. W. 798.

The district attorney was permitted over the objection of the defendant to read article 912 C. C. P. in evidence for the purpose of showing that the escape of a man convicted of a felony pending the appeal tends to affirm his sentence. This was improper. It is the law of the land, but it is not evidence in the case. *Lucas v. State*, 50 App. 219, 95 S. W. 1056.

A question asked a witness as to where a pistol belonging to another was kept before such other came to a certain place to pick cotton was not inadmissible as being irrelevant and immaterial, and failing to show that the witness knew that the other owned any pistol, or had in his possession other pistols than the one witness had formerly seen, since the objection did not go to the admissibility of the testimony, but merely to the weight thereof. *Deckard v. State*, 57 App. 359, 123 S. W. 417.

Where, on a trial for passing a forged check, accused claimed that he went by a designated name, and that he had met a person by that name at a designated town and had formed a partnership with him, and that he got the check from his partner in settlement of their partnership, evidence that one who had lived in the designated town did not know any man there by the designated name was admissible. *Fluewellian v. State*, 59 App. 334, 128 S. W. 621.

In a prosecution for homicide, where the issue is self-defense, it is error to permit a person living with deceased to testify that he never heard deceased make any threats against accused. *Maclin v. State* (Cr. App.) 144 S. W. 951.

Evidence is admissible, in a prosecution for unlawfully carrying a weapon, that a person who was shown to have been with prosecuting witness and others, who testified to accused's commission of the unlawful act, was out of the state at the time of the trial and might not return, though accused did not attack the state's good faith in not producing all the evidence available. *Sweeney v. State* (Cr. App.) 146 S. W. 883.

Where the first count in an indictment had been quashed because of a defect therein, it was not error to refuse to permit accused to require the assistant county attorney to testify that he knew the first count was bad. *Wesley v. State* (Cr. App.) 150 S. W. 197.

In a prosecution for assault with intent to murder, the fact that the assaulted party was dead, and that another spectator was out of the state, may be shown before the jury to explain why their evidence at the examining trial was read. *Hughes v. State* (Cr. App.) 152 S. W. 912.

An envelope found on defendant, on which were written the names with which a check was signed and indorsed, is admissible on trial for forgery of the check. *Whorton v. State* (Cr. App.) 152 S. W. 1082.

Defendant in homicide could not introduce his bail bond to appear and answer the indictment, it being material to no issue. *White v. State* (Cr. App.) 177 S. W. 93.

35. — Remoteness.—In a prosecution for assault with intent to rape, it was held competent for the state to prove the condition of an undergarment of the alleged injured female on the first evening and the second morning after the alleged outrage upon her person. *Grimmett v. State*, 22 App. 36, 2 S. W. 631, 58 Am. Rep. 630.

In a prosecution for rape, it was held competent for the state to show by a medical expert that five weeks after the alleged rape he examined the alleged injured female, and to state the result of such examination. While such evidence was remote in point of time, it tended to throw light upon the transaction, and in a prosecution for this offense no testimony should be rejected which, in the remotest degree, will tend to aid the jury in reaching the truth. *Pless v. State*, 23 App. 73, 3 S. W. 576.

In a prosecution for forgery, there was no error in excluding evidence of certain transactions of the prosecuting witness in different matters 12 years prior to the transactions complained of, especially where the testimony could not have been of any benefit to defendant. *Wheeler v. State*, 62 App. 370, 137 S. W. 124.

Evidence of the details of a difficulty between accused and prosecutor a year or more prior to the alleged assault was properly excluded. *Williams v. State* (Cr. App.) 150 S. W. 185.

Threats by defendant against deceased, though made two or three years prior to the killing, relating to the same difficulty, were admissible, although a partial reconciliation had occurred in the meantime. *Powdrill v. State* (Cr. App.) 155 S. W. 231.

Evidence as to condition of locus on second day after occurrence held not too remote. *Sharp v. State*, 71 App. 633, 160 S. W. 369.

In a rape prosecution, evidence of physicians who examined the sexual organ of the girl was properly admitted on the issue of penetration, the length of time intervening between the act and the examination not affecting the admissibility of the evidence, but its weight. *Boyd v. State*, 72 App. 521, 163 S. W. 67.

36. — Experiments.—On an issue as to whether certain words could have been heard by a witness testifying thereto evidence of an experiment to determine the question is admissible. *Wilson v. State* (Cr. App.) 36 S. W. 587.

Evidence of experiments showing that the crime could not have been committed by defendant within the time claimed; held, admissible. *Clark v. State*, 38 App. 30, 40 S. W. 992.

Experiment made on the scene of killing can be proved if it was made under circumstances similar to original transaction, although not made under exactly similar conditions as attended the original transaction. The want of exact similarity would not exclude but would go to the weight of the testimony. *Schauer v. State* (Cr. App.) 60 S. W. 251.

In a prosecution for homicide, defendant introduced evidence to show that the deceased was killed by an accidental discharge of defendant's pistol falling on the floor. The state then put the pistol in evidence and exhibited it to the jury with the explanation that the hammer rested upon a "safety notch" and could not be discharged by a blow, or by a fall upon the floor. The defendant then offered testimony of an experiment with the pistol by fastening it to a secure place and striking the hammer while on the safety notch a slight blow, and that the blow caused its discharge. This was excluded on the ground that the experiment was not made by striking the floor, as appellant claimed the shot to have been fired. Held, that the testimony as to the experiment made with the pistol was improperly excluded. *Hodge v. State*, 60 App. 157, 131 S. W. 577.

Testimony concerning experiments is not admissible in a murder trial, where they are based on speculative and hypothetical theories, and are not shown to have been based upon facts connected with the homicide. *Harris v. State*, 62 App. 235, 137 S. W. 373.

In a prosecution for uxoricide, where accused claimed that his wife had committed suicide, evidence of experiments showing that she could not have killed herself, as claimed, was admissible. *Coffman v. State*, 73 App. 295, 165 S. W. 939.

Where a physician testified that at the time he made an experiment to see if he could make an indentation in the wall of the room where deceased was killed by striking across a bed with an iron bar with which defendant claimed deceased

had been killed, and in the same manner, the bed had not been moved and a deputy sheriff, who testified with reference to a similar experiment, stated that before he made it accused placed the witness in the exact position which he claimed the person who killed deceased was in when he struck the blow, the evidence of the experiments was not rendered inadmissible because of defendant's testimony that when the physician arrived he changed the position of the bed. *Brown v. State* (Cr. App.) 169 S. W. 437.

37. — **Admissibility by reason of admission of other evidence.**—See a case in which the state having introduced hearsay testimony, it was held that the defendant should have been permitted to rebut it with the same character of testimony. *Ellison v. State*, 12 App. 558.

A fact apparently irrelevant may be made relevant and admissible by other facts with which it is connected by the proof. See this case for an example. *Campbell v. State*, 15 App. 506.

An unrecorded brand on an animal can only be used as any other flesh mark in connection with other testimony to identify the animal. It is no proof of ownership, and the flesh mark can be proved by parol as any other flesh mark. *Welch v. State*, 42 App. 338, 60 S. W. 46.

It is error to admit evidence to contradict hearsay testimony, and that raises an immaterial issue. *Boatright v. State*, 42 App. 442, 60 S. W. 761.

The introduction of improper testimony whether with or without objection by the accused, does not authorize the state to introduce, over accused's objection, improper testimony of the same nature. *Zimmer v. State*, 64 App. 114, 141 S. W. 781.

Examination by the defense in a prosecution for an aggravated assault as to matters which were not relevant to the assault, but which the state had been allowed improperly to develop, would not excuse the improper admission, where the examination was merely to meet the testimony of the state, to which the accused had objected, where the defense also asked for the exclusion of the testimony and for a charge taking its effect from the jury. *Larue v. State* (Cr. App.) 146 S. W. 194.

In a trial for aggravated assault, prosecutrix was properly permitted to testify that she told her mother of the affair, but not to detail the conversation, when she arrived home, where accused's counsel first asked her whom she told. *Grantland v. State* (Cr. App.) 146 S. W. 196.

A party cannot complain that evidence brought out on direct examination was hearsay when he brought out the same evidence on cross-examination. *Lott v. State* (Cr. App.) 146 S. W. 544.

On a trial for assault with intent to rape, where prosecutrix testified without objection that she told her sister about it at the time and afterwards told her mother, it was not error to permit the mother to testify that prosecutrix complained to her three days after the alleged assault. *Love v. State* (Cr. App.) 150 S. W. 920.

Upon defendant's trial for aggravated assault, where he was permitted to testify that he had no intent to injure complaining witness, there was no error in refusing to permit the other party engaged in the assault to testify that he did not intend to injure. *Robey v. State*, 73 App. 9, 163 S. W. 713.

Where, in a prosecution of accused as an accomplice to abortion, defendant, who was prosecutrix's stepfather, claimed, and as a part of his defense sought to prove, that the whole prosecution was a "frame-up" by the husband of prosecutrix's sister, and showed that he had made threats against defendant, and was very unfriendly toward him, denying that he ever had had intercourse with prosecutrix at any time, and testifying that her testimony that he was the author of her ruin was a pure fabrication, and that he knew nothing of the intention to have an abortion performed until after it was performed, the court properly permitted the state to show in rebuttal that, before prosecutrix's sister and her husband disclosed the fact to the officers they communicated with prosecutrix's grandfather and grandmother, and were advised by them to disclose the fact, and also that before such disclosure the prosecuting officers had obtained from prosecutrix a statement of the facts on which they acted before she had come under the influence of her sister and brother-in-law. *Fondren v. State* (Cr. App.) 169 S. W. 411.

38. — **View.**—It is error to permit the jury to inspect the scene of the crime in a prosecution for assault with intent to murder. *Riggins v. State*, 42 App. 472, 60 S. W. 877.

In a prosecution for rape, the court properly refused to send the jury, at defendant's request, to inspect the ground where the offense was alleged to have occurred. *Fate v. State*, 73 App. 278, 164 S. W. 1018.

In a prosecution for the theft of goats, the brand on which, it was claimed, had been changed, a view of the goats by the jury was not permissible, nor could they be introduced in evidence. *Simonds v. State* (Cr. App.) 175 S. W. 1064.

39. **Res gestæ—Admissibility of declarations in general.**—See *Wilkerson v. State*, 31 App. 86, 19 S. W. 903; *Castillo v. State*, 31 App. 145, 19 S. W. 892, 37 Am. St. Rep. 794; *Moore v. State*, 31 App. 234, 20 S. W. 563; *Miller v. State*, 31 App. 609, 21 S. W. 925, 37 Am. St. Rep. 836.

In order to constitute declarations a part of the *res gestæ*, it is not necessary that they were precisely coincident in point of time with the principal fact. If they sprang out of the principal fact, tend to explain it, were voluntary and spontaneous, and made at a time so near it as to preclude the idea of deliberate design, they may be regarded as contemporaneous, and are admissible in evidence. *Boothe v. State*, 4 App. 202; *Foster v. State*, 8 App. 248; *Neyland v. State*, 13 App. 536; *Ford v. State*, 40 App. 284, 50 S. W. 350; *McKinney alias Jackson v. State*, 40 App. 374, 50 S. W. 708; *Freeman v. State*, 40 App. 550, 46 S. W. 641, 51 S. W. 230; *Ward v. State*, 70 App. 393, 159 S. W. 272.

Exclamations and remarks of those engaged in the difficulty, made at the time, are part of the *res gestæ* and are admissible. *Shumate v. State*, 38 App. 266, 42 S. W. 600; *Colquitt v. State*, 34 Tex. 550.

Circumstances constituting *res gestæ* may always be shown to the jury, along with the principal facts, and their admissibility is determined by the judge, according to the degree of their relation to the principal facts, and in the exercise of his sound discretion—it being extremely difficult, if not impossible, to bring this class of cases within the limits of a more particular description. Declarations made at the time of the transaction and expressive of its character, motive, or object, are regarded as verbal acts indicating a present purpose and intention, and are, therefore, admitted in proof, like any other material fact. When the ascertainment of the motive with which an act is done becomes material, on the trial of the actor, to determine his guilt or innocence, his declarations made at the time the act is done, and expressive of its character and object, are regarded as verbal acts indicating a present purpose and intention, and are admissible as evidence. See an application of the doctrine above stated in a case of theft. *Williams v. State*, 4 App. 5. See, also, *Gillian v. State*, 3 App. 132, a case of jail breaking; *Ward v. State*, 41 Tex. 611, a case of theft. *Taylor v. State*, 7 App. 659; and P. C. art. 1348; for other decisions in theft cases involving the doctrine of *res gestæ* evidence. *Irby v. State*, 25 App. 293, 7 S. W. 795; *Testard v. State*, 26 App. 260, 9 S. W. 888; *McGee v. State*, 31 App. 71, 19 S. W. 764.

A declaration explanatory of an act is admissible as *res gestæ*, if it was made spontaneously at the time of the act, and before deliberation or time to fabricate the statement. *Foster v. State*, 8 App. 248.

What is said and done just before the killing in a disturbance out of which the killing grew is a part of the *res gestæ*. *Hardin v. State*, 40 App. 217, 49 S. W. 607.

The fact that a witness on account of tender age is incompetent to testify does not prevent her statements made at time of transaction from being admissible as a part of the *res gestæ*. *Croomes v. State*, 40 App. 675, 51 S. W. 924, 53 S. W. 882.

As to declarations, the test is, were the declarations the facts talking through the party, or the party's talk about the fact? *Bradberry v. State*, 22 App. 273, 2 S. W. 592; *Hobbs v. State*, 16 App. 517.

Res gestæ are events speaking for themselves through the instinctive words and acts of participants when relating the events. There are no limits of time within which the *res gestæ* can be arbitrarily confined. They may not be coincident as to time if they are generated by an excited feeling which extends without break or let down from the moment of the event they illustrate. In other words, they must stand in immediate causal relation to the act, and become part either of the action immediately producing it, or of action which it immediately produces. Incidents which are thus immediately and unconsciously associated with an act, whether such incidents are doings or declarations, become in this way evidence of the character of the act. Continuousness cannot always be measured by time. Instinctiveness is the requisite, and when this obtains the acts or declarations are *res gestæ*. *Powers v. State*, 23 App. 42, 5 S. W. 153.

Whatever is said by any party to the transaction is a part of the transaction and is admissible in evidence as *res gestæ*. *Weathersby v. State*, 29 App. 278, 15 S. W. 823; *Powers v. State*, 23 App. 42, 5 S. W. 153; *Thompson v. State*, 19 App. 593; *Kennedy v. State*, 19 App. 618. And further on the subject, see *Irby v. State*, 25 App. 293, 7 S. W. 795; *Testard v. State*, 26 App. 260, 9 S. W. 888; *Lewis v. State*, 28 App. 140, 12 S. W. 736; *Giebel v. State*, 28 App. 151, 12 S. W. 591; *McFadden v. State*, 28 App. 241, 14 S. W. 128; *Fulcher v. State*, 28 App. 465, 13 S. W. 750; *Lewis v. State*, 29 App. 291, 15 S. W. 642, 25 Am. St. Rep. 720; *Craig v. State*, 30 App. 619, 18 S. W. 297.

Conversations held in the presence of defendant prior to the commission of the homicide are admissible. *Wright v. State*, 36 App. 427, 37 S. W. 732.

40. — **Accompanying and surrounding circumstances.**—The use of a weapon different from and in addition to that charged in the indictment is *res gestæ*. *Richards v. State*, 3 App. 423.

What occurred during the quarrel is *res gestæ* on a trial for homicide. *Chalk v. State*, 35 App. 116, 32 S. W. 534.

Where the offense alleged is the cutting a ditch upon real property, it is competent for state to prove that defendant began digging the ditch three or four days prior to the date alleged in the complaint. This was part of the *res gestæ* of the offense—being same ditch—and not another and distinct offense. *Adams v. State*, 47 App. 35, 81 S. W. 964.

On a trial for carrying a pistol, evidence as to the particulars of the shooting and as to who fired the first shot is admissible as *res gestæ*, and as showing defendant's intention in carrying the weapon. *Hutchinson v. State*, 58 App. 228, 125 S. W. 19.

Evidence that defendant was discovered in the retail establishment of one person, without any authority to enter the same, and the fact that a wholesale establishment of another in an adjoining room, separated only by a partition, afforded evidence that he had been in that room, was a part of the *res gestæ* and admissible in a prosecution for burglary of the wholesale store. *Doyle v. State*, 59 App. 39, 126 S. W. 1131.

In a burglary case, evidence of a witness that she had a trunk in the burglarized house on the day the clothing alleged to have been stolen was taken from the house, that when she left in the morning the trunk was locked, and, when she returned in the evening, the lock had been broken off the trunk, was admissible as part of the *res gestæ*, and as a circumstance to show that somebody had been in the house. *Kubacak v. State*, 59 App. 165, 127 S. W. 836.

Where the disturbance in which the killing occurred arose out of the difficulty between accused and a third person, evidence of such difficulty was admissible. *Johnson v. State*, 61 App. 635, 136 S. W. 259.

In a prosecution against a town marshal for disturbing the peace by loud lan-

guage, evidence was not restricted to the language used; but evidence as to the surrounding circumstances is admissible as part of the *res gestæ*. *Hart v. State* (Cr. App.) 154 S. W. 553.

Evidence, in a prosecution for rape, of the attending circumstances held properly admitted as a part of the *res gestæ* of one particular act. *Boyd v. State*, 72 App. 521, 163 S. W. 67.

In a prosecution of a father for the rape of his daughter, the daughter was properly permitted to testify that the acts were without her consent; it being admitted as a part of the *res gestæ*. *Boyd v. State*, 72 App. 521, 163 S. W. 67.

Where, on a trial for keeping a house of assignation, two men testified that they met two girls on the street and arranged to meet them at accused's house for sexual intercourse, the girls suggesting accused's house, and telling them to see accused, engage rooms, and tell her they were for "Mary" and "Ethel," that they went direct to accused's house, delivered such message, and engaged rooms, and were joined in a few minutes by the girls, their testimony as to the conversation on the street and the testimony of a police officer as to seeing the men and women together on the street and watching them was admissible. *Hearne v. State*, 73 App. 390, 165 S. W. 596.

Accused, while attending a dance, stepped out on the gallery and urinated, and was seen by one of the ladies present, whose husband complained to him of his conduct. While subsequently dancing with deceased's sister, he attempted to take liberties which she resented, refusing to continue dancing with him. He asked one or two other ladies to dance, and cursed them for their refusal, whereupon a dispute and scuffle ensued, in which deceased jerked accused out of the door, whereupon accused knocked deceased off a porch and then shot him. Held that, on a trial for homicide, testimony as to what occurred on the gallery and in connection with that matter and as to what occurred while accused was dancing with deceased's sister was admissible, as it was a part of the transaction, and all of his misconduct was the cause of the others attempting to put him out of the room, and of the consequent killing. *Muldrew v. State*, 73 App. 463, 166 S. W. 156.

In a prosecution for homicide, evidence as to what was said and done by defendant and deceased from the time they first came in view of each other at the time of the killing, that defendant when leaving the scene immediately thereafter had six-shooters in each hand, and when the constable attempted to arrest him resisted arrest and shot the constable, was admissible as *res gestæ*. *Lamb v. State* (Cr. App.) 169 S. W. 1158.

On a trial for homicide, a witness was properly permitted to detail the events leading up to the tragedy; this being *res gestæ* of the transaction. *Gomez v. State* (Cr. App.) 170 S. W. 711.

41. — **Subsequent condition of injured person.**—Evidence that two days after the alleged occurrence, when witness saw prosecutrix, she noticed that her lips were blue, could see places on her neck, bruised spots on her throat, and a bruised place on her lip, was admissible as *res gestæ*. *Grimes v. State*, 64 App. 64, 141 S. W. 261.

On a trial for homicide, a physician's testimony that, when he saw accused after the homicide, he seemed to be very much distressed, was properly excluded, where he testified that it was 20 or 25 minutes after he received the call to attend deceased before he saw accused, and the evidence did not show how much time elapsed between the homicide, and the time he received the call. *Mayhew v. State* (Cr. App.) 155 S. W. 191.

In a prosecution for assault with intent to murder, evidence by a physician, who reached the prosecuting witness some ten minutes after the assault, to the effect that the witness was conscious when he reached him, but was pale from the loss of blood, is admissible. *Forrester v. State*, 73 App. 61, 163 S. W. 87.

42. — **Acts and statements of accused prior to offense.**—Statements made by the defendant prior to the killing as to his purpose in going to the place where the homicide occurred are no part of the *res gestæ*. *Powell v. State*, 5 App. 234.

Acts, declarations and statements of defendant before the homicide are not admissible. *Harrell v. State*, 39 App. 222, 45 S. W. 581.

Declarations of defendant made immediately before the killing took place, held, admissible as a part of the *res gestæ*. *Koller v. State*, 36 App. 496, 38 S. W. 44.

Declaration of defendant just before the transaction admissible to show motive and intent. *Ex parte Kennedy* (Cr. App.) 57 S. W. 648.

A statement by accused, just prior to his entering a schoolhouse and disturbing religious worship, in answer to a warning by witness that, if the meeting was disturbed, somebody would report accused and his companions, "By God, you would not do it," was admissible as *res gestæ*. *Boyd v. State*, 57 App. 250, 122 S. W. 393.

43. — **Acts and statements while committing offense.**—Evidence as to oral statements by defendant at the time a false affidavit was made, corresponding to the statements in the affidavit, was admissible as part of the *res gestæ* over the objection that it was secondary evidence. *Simpson v. State*, 46 App. 77, 79 S. W. 530.

Evidence of obscene language, used by defendant to a lady when he had a pistol drawn on her, being part of the transaction, is admissible as *res gestæ* on a prosecution for carrying a pistol. *Brogdon v. State*, 63 App. 473, 140 S. W. 353.

That declarations made by accused when he was surprised in a burglarized building were in answer to questions would not prevent their admission as *res gestæ*. *Hickman v. State* (Cr. App.) 145 S. W. 915.

In a trial for burglary with intent to commit rape, persons who went to the house to prevent the execution of such intent, after being informed that accused had broken into the house, were properly permitted to testify what accused did when they came to the house; his acts and declarations constituting part of the *res gestæ*. *Alsop v. State* (Cr. App.) 153 S. W. 624.

44. — Acts and statements of accused subsequent to offense.—What a person does immediately after an assault, and in direct connection with it is often more satisfactory in showing the state of mind which prompted the assault than that which immediately precedes it. *Weaver v. State*, 24 Tex. 387.

The reasons given by defendant why he delayed in shooting are incompetent. *Meredith v. State*, 40 Tex. 480. See, also, *Johnson v. State*, 1 App. 130.

Where there was no eyewitness to the homicide, the defendant offered to prove by witnesses who reached the place of the homicide five or ten minutes after it had occurred, the statement made by him to them in relation to such homicide. Held, that his statement so made was *res gestæ* and admissible. *Brunet v. State*, 12 App. 521.

It was proper to permit the state to prove that a few minutes after the deceased was shot, the defendant and another man were seen at the house of deceased's father, and also to prove the language and conduct of defendant at that time and place. This testimony related to matters which transpired immediately after the homicide, and were closely connected with it, and were part of the *res gestæ*. *Cartwright v. State*, 16 App. 473, 49 Am. Rep. 826.

Declarations made by the defendant ten or fifteen minutes after he had committed the homicide, and after he had gone a distance of four or five hundred yards from the place of the homicide, were held to be not a part of the *res gestæ* and not admissible for the defendant. *Stephens v. State*, 20 App. 255.

And see a case of habeas corpus for bail where the declarations of the relator, made immediately subsequent to the homicide, were held *res gestæ*. *Ex parte Albitz*, 29 App. 128, 15 S. W. 173.

What was said and done by defendant a short time after the killing was admissible against him as *res gestæ*. *McGee v. State*, 31 App. 71, 19 S. W. 764.

When probably as much as an hour had elapsed after the killing, defendant had loaded his wagon and driven some three-quarters of a mile, his declarations would not be a part of the *res gestæ* and would not be admissible in his own behalf. *Chalk v. State*, 35 App. 116, 32 S. W. 534.

Declarations made by deceased at the place and within fifteen minutes after the shooting are a part of the *res gestæ*, and are admissible in evidence. *Lindsey v. State*, 35 App. 164, 32 S. W. 768.

Statements made by defendant, half an hour after the alleged assault, are inadmissible as part of the *res gestæ*. *McCullough v. State*, 35 App. 268, 33 S. W. 230; *Kinnard v. State*, 35 App. 276, 33 S. W. 234, 60 Am. St. Rep. 47.

Acts of defendant immediately after killing are admissible as *res gestæ*, and as illustrative of transaction from appellant's standpoint. *Nelson v. State* (Cr. App.) 58 S. W. 108.

Evidence of a fight between accused and the only witness for the state while on the way to the trial for violating the prohibition law was not admissible as part of the *res gestæ* of the sale. *Haney v. State*, 57 App. 158, 122 S. W. 34.

In a prosecution for aggravated assault, for aggravated assault with a deadly weapon, and for resisting an officer, testimony by the officer that, while he was taking accused to jail, the latter cursed and abused and threatened to kill him, was admissible as *res gestæ*; and it was not rendered inadmissible by the officer's testimony in connection therewith of a statement by accused, after he was released and came back, that he intended to kill him. *Woodward v. State*, 58 App. 411, 126 S. W. 271.

In a trial for burglary, a statement made by appellant, shortly after he was shot down by a prosecuting witness at the door of the latter's chicken house, that he and his companions had gone into the chicken house, breaking off the lock, that when interrupted they had caught a number of chickens, that accused had followed that business for some time, that when interrupted he started to escape, etc., was admissible as a *res gestæ* statement. *Bronson v. State*, 59 App. 17, 127 S. W. 175.

Evidence of statements made by defendant and his companions within 15 minutes after the shooting of deceased at a point about a half mile distant, was properly excluded when offered as *res gestæ*; there having been sufficient time intervening during which defendant and his companions could have concocted a defense. *Deneaner v. State*, 58 App. 624, 127 S. W. 201.

Evidence by accused's father as to what accused told him about the killing when he saw him some time thereafter was not admissible not being *res gestæ*. *Jackson v. State*, 63 App. 351, 139 S. W. 1156.

Where defendant after the killing walked to his home, put up his gun, told his father of the killing, and then walked a mile to the home of a justice of the peace, and gave himself up, evidence as to what he then told the justice as to the killing was properly excluded as not being part of the *res gestæ*. *Blue v. State* (Cr. App.) 148 S. W. 730.

Where accused shot and killed his wife, and then left the scene of the killing, but immediately returned and then started to find an officer to surrender to him, and he found an officer between a half and three-quarters of a mile from the scene of the killing, and he was immediately turned over to the jailer, and he then said that he wanted the jailer and the sheriff to go to the scene of the killing to see whether his wife was dead, and, if she was, they should come back and tell him and he would be satisfied and the mob could come in the morning, was admissible as a part of the *res gestæ*, in the absence of anything to show that accused's mind had become cool and calculating when making the declaration. *Rainer v. State* (Cr. App.) 148 S. W. 735.

In a homicide case, testimony that defendant came to witness' house on the night of the crime, and told him to tell "S. not to give him out for the next ten years, because ten years was not too long for him, and that he walked all the way from V. with his knife in his hand to give her the dose that Shorty got, but Shorty stepped in his way," was admissible to show his state of mind; S. having been the mistress of accused, and the killing having been in her presence, and was close enough to the time of the crime to be part of the *res gestæ*. *Gentry v. State* (Cr. App.) 152 S. W. 635.

Where witnesses, who were walking along the road with defendant and his wife at the time he was alleged to have killed her, testified that she put her arms around him and drew him away from the remainder of the crowd, and shortly after was seen to sink to the ground, further testimony that defendant walked back to her, and told her to get up, and kicked her, was admissible as *res gestæ*. *Davis v. State* (Cr. App.) 154 S. W. 550.

Where the state claimed that accused walked into the room where decedent and third persons were, and immediately shot decedent, while appellant claimed that decedent attacked him and grabbed him, and that during the struggle accused got out his gun and shot decedent, the testimony of an eyewitness that accused made no reply to a question put to him by the witness immediately after the shooting as to why he shot decedent was admissible to throw light on the transaction. *McKelvey v. State* (Cr. App.) 155 S. W. 932.

Statements made by accused to his son immediately after having killed deceased were admissible on behalf of the state. *Smith v. State*, 70 App. 62, 156 S. W. 214.

In a prosecution for homicide, evidence of statements made by accused 10 or 15 minutes after the killing, upon his return home, whence he had ridden rapidly after shooting deceased, is admissible as part of the *res gestæ*. *Garcia v. State*, 70 App. 485, 156 S. W. 939.

Where a few minutes after a fight and while a wound received in such fight was bleeding, and the party was laboring under the excitement incident to the fight, one of the parties made a statement to a physician as to the difficulty and how it occurred, such statement should have been admitted on such party's trial for aggravated assault. *Russell v. State*, 71 App. 86, 158 S. W. 546.

A statement by accused long after he had left the scene of the homicide was not *res gestæ*, but a self-serving declaration, and properly excluded. *Wright v. State*, 73 App. 178, 163 S. W. 976.

Where accused left the place where he killed decedent, and later in the night went to the home of a third person and called a justice of the peace over the phone, his statements made to the third person and to the justice were inadmissible as self-serving declarations, and were not a part of the *res gestæ*. *Chant v. State*, 73 App. 345, 166 S. W. 513.

On a trial of accused for the murder of his son-in-law, the conduct of decedent's wife immediately after accused had stabbed decedent, and accused's statements in response to exclamations by the wife, were admissible as part of the *res gestæ*. *Roberts v. State* (Cr. App.) 168 S. W. 100.

Where, from the time accused gave the alarm and called a number of people stating that he thought deceased was dead, the minds of those present were directed to ascertaining the mode of death and to finding the weapon with which the killing was done, and accused participated until his arrest in the search for the weapon, which was continued in his presence, evidence that he was nervous while the others were searching the room in which the weapon was found, and that, after it was found and was being taken away with other pistols also found in the same room, he turned pale and flushed up and appeared nervous, was properly admitted as *res gestæ*, though it related to his conduct while under arrest, as time is not the only determining factor as to *res gestæ*; and if all the facts and circumstances show the matters to be so connected as to be part and parcel of the transaction, acts and conduct springing out of and forming a part of it are admissible as a part of the transaction. *Brown v. State* (Cr. App.) 174 S. W. 360.

45. — **Other offenses part of same transaction.**—See *Blackwell v. State*, 29 App. 195, 15 S. W. 597.

As part of the *res gestæ*, it is competent to prove that other persons than the deceased, for whose murder the defendant is on trial, were killed in the same onslaught. *Krebs v. State*, 3 App. 348; *Crews v. State*, 34 App. 533, 31 S. W. 373; *Lee v. State*, 72 App. 237, 162 S. W. 843.

In a robbery trial, it was proper to show that another person was robbed at the same time and place as prosecuting witness. *Serop v. State* (Cr. App.) 154 S. W. 557; *Compton v. State* (Cr. App.) 148 S. W. 580.

And it is also competent to prove as *res gestæ* an additional assault committed by the defendant at the time of the one charged. *Weaver v. State*, 24 Tex. 387.

Where the prosecutrix, in testifying, was permitted, over the defendant's objection, to narrate the circumstances of an assault made by the defendant upon her father-in-law when the latter came to her rescue during her struggle with the defendant, it was held that the testimony was admissible; that it was *res gestæ* and relevant. *Thompson v. State*, 11 App. 51.

Upon the question of intent, and to develop the *res gestæ*, etc., the state was properly permitted to show the contemporaneous receiving by defendant of other stolen property than that charged in the indictment. *Morgan v. State*, 31 App. 1, 18 S. W. 647.

It is competent for the state to prove the simultaneous theft of other property than that alleged, if such proof conduces to establish identity in developing the *res gestæ*, or to prove the guilt of the accused by circumstances connected with the theft, or to show the intent with which the accused acted with respect to the property alleged in the indictment. *Williams v. State*, 24 App. 412, 6 S. W. 318; *Stokely v. State*, 24 App. 509, 6 S. W. 538; *Reno v. State*, 25 App. 102, 7 S. W. 532; *Gentry v. State*, 25 App. 614, 8 S. W. 925; *Hanley v. State*, 28 App. 375, 13 S. W. 142; *Moore v. State*, 28 App. 377, 13 S. W. 152; *Barton v. State*, 28 App. 483, 13 S. W. 783; *Blackwell v. State*, 29 App. 195, 15 S. W. 597; *Morris v. State*, 30 App. 95, 16 S. W. 757; *Welhousen v. State*, 30 App. 623, 18 S. W. 300; *Nixon v. State*, 31 App. 205, 20 S. W. 364; *Kelley v. State*, 31 App. 211, 20 S. W. 365.

See a case of murder where the proof showed that several assaults committed at the same place, almost simultaneously in point of time, and for the same manifest purpose, were so closely connected with, related to, and illustrative of each other as to make each *res gestæ* of the other. *Leeper v. State*, 29 App. 63, 14 S. W. 398.

On trial for robbery of one woman, it was held admissible to prove that, at the

same time and place, defendant raped another woman who had no money. *Harris v. State*, 32 App. 279, 22 S. W. 1037.

That the prosecuting witness was robbed during the assault is admissible as part of the *res gestæ*. *Richards v. State*, 34 App. 277, 30 S. W. 229.

Where deceased and his wife were found in a barn, deceased mortally wounded and his wife dead, the killing of the wife is a part of the *res gestæ*. *Crews v. State*, 34 App. 533, 31 S. W. 373.

On trial for burglary evidence of theft and arson committed at the same time is admissible. *Mixon v. State* (Cr. App.) 31 S. W. 408.

Evidence showing that other property was taken at the same time and place is admissible in a prosecution for burglary. *Hayes v. State*, 36 App. 146, 35 S. W. 983.

On trial for murder of one Mrs. C., evidence of the killing of her husband and son at the same time and place was admitted; held, that this was part of the *res gestæ*, and being limited by the court to its legitimate purpose, was properly admitted. *Martin v. State*, 38 App. 462, 43 S. W. 352.

Evidence of possession of other stolen animals belonging to other parties stolen about the same time is admissible as a part of *res gestæ*. *Thompson v. State*, 42 App. 140, 57 S. W. 806.

An indictment for conversion as bailee of a horse, it was admissible to prove as *res gestæ* that he took a saddle at the same time. *Clark v. State* (Cr. App.) 59 S. W. 888.

The fact that an extraneous crime is not exactly contemporaneous does not make it inadmissible. *Brown v. State* (Cr. App.) 59 S. W. 1119.

That crimes are contemporaneous is not sufficient to authorize their admission. They must also illustrate and show intent with which defendant acted in the commission of the offense for which he is being tried. *Hunt v. State* (Cr. App.) 60 S. W. 965.

In a prosecution for carrying a pistol, in which the evidence showed that another made threats against accused, who, when he heard of them, armed himself, and went down town, and shot such other, after a quarrel, evidence of the character of the wounds inflicted, while not necessary, was a part of the *res gestæ* of carrying the pistol. *Hines v. State*, 57 App. 216, 123 S. W. 411.

Where, on a trial for assault to murder, the evidence showed that accused, on hearing the return to his premises of prosecutor and other boys, after he had learned that they had been on the premises shortly before playing a prank on him, fired a shot to alarm them, and shot prosecutor, evidence that on their first appearance he had shot twice, and had killed one of the boys, was admissible as a part of the transaction. *Trimble v. State*, 57 App. 439, 125 S. W. 40.

Evidence of another theft on the same day was not admissible as part of the *res gestæ*; the two offenses being separate. *Nunn v. State*, 60 App. 86, 131 S. W. 320.

Where, on a trial for aggravated assault on an officer, the evidence showed that a few minutes before the assault there had been a difficulty between accused and a third person, and when prosecutor after the difficulty accosted accused she had a large knife open in her hand and used profane and threatening language, and that prosecutor in endeavoring to arrest her and prevent injury to himself was assaulted by her, the exclusion of evidence relating wholly to the difficulty with the third person and to the conduct of prosecutor after the assault on him was not erroneous. *Porter v. State*, 60 App. 588, 132 S. W. 935.

In a prosecution for violating the local option law by selling liquor to D., a witness who testified that accused had sold to D. could testify that accused at the same time sold liquor to him, and D. also could testify to the same sale to the other witness; such evidence being admissible as *res gestæ*, and to establish accused's identity. *Hardgraves v. State*, 61 App. 325, 135 S. W. 132.

On a trial for assaulting with a pistol, with intent to murder, a man who was paying attentions to a woman to whom accused was attached, evidence that in the fight, immediately after the shooting, accused struck the woman with his fist and attempted to strike her with a chair was admissible as a part of the *res gestæ*, and as throwing light on his state of mind and intention. *Irving v. State*, 70 App. 222, 156 S. W. 641.

Where an officer claimed that he was called to a saloon and notified of pending trouble, and that some one had a knife; that he discovered the knife on accused's person and demanded it; that accused refused to surrender it, and a difficulty arose, in which he was cut on the hand before he obtained the knife; that he then arrested four persons and started off with them, when some one called to him to watch out, and he was then assaulted from the rear, and that a person who came to his rescue was killed—he was properly permitted to testify on accused's trial for assault to murder as to the details of both difficulties, the participants therein, the wounds inflicted on him, and that such person who came to his rescue was killed. *Lara v. State*, 72 App. 100, 161 S. W. 99.

In a prosecution for the procuring of a woman to have sexual intercourse with another man, evidence that during the intercourse she robbed the man, and gave part of the money to accused, is admissible as part of the *res gestæ*. *Bybee v. State* (Cr. App.) 168 S. W. 526.

On a trial for assault on a constable, with intent to kill, growing out of an attempt to arrest accused for killing a third person a few minutes before, evidence that he shot and killed such third person was properly admitted. *Lamb v. State* (Cr. App.) 168 S. W. 534.

In a prosecution for receiving one stolen pool ball, testimony that the accused at about the same time received other balls from the same person is admissible as part of the *res gestæ* and to show intent. *Henderson v. State* (Cr. App.) 172 S. W. 793.

In a prosecution for carrying liquor into prohibition territory and delivering it there to a person named, evidence that other persons had given defendant money to get liquor for them, which liquor was delivered at the same time as was that for the person named in the indictment, was properly admitted as part of the *res gestæ* and as showing system. *Perryman v. State* (Cr. App.) 173 S. W. 1195.

46. — **Declarations of injured person in general.**—Declarations of assaulted party held admissible as *res gestæ*. *Black v. State*, 8 App. 329; *Graves v. State*, 58 App. 42, 124 S. W. 676.

Declarations of injured female *res gestæ*, when. *Castillo v. State*, 31 App. 145, 19 S. W. 892, 37 Am. St. Rep. 794.

47. — **Declarations of injured person before and at time of offense.**—Preparatory to, and just before the assassination of the deceased, he was taken by a party of men in the nighttime out of his father's house, but was allowed to return under surveillance to put on his boots, when, being asked by his mother who the men were, he, with exhibitions of terror, told her in a whisper who three of them were, two of the three being defendants on trial. Held, that this statement of the deceased to his mother was *res gestæ* and admissible in evidence against the defendants. *Cox et al. v. State*, 8 App. 255, 34 Am. Rep. 746.

While sitting in a church, the deceased looked out at a window, and remarked to a companion, that the defendant was outside and fixing to kill him, the deceased, and the deceased immediately stepped to the door, where he was fired upon and instantly killed. Held, that the said statement of the deceased and his said conduct were *res gestæ* and admissible evidence against the defendant. *Means v. State*, 10 App. 16, 38 Am. Rep. 640.

Declarations made by an assaulted party, which were spontaneous, voluntary and almost contemporaneous with the assault, are admissible. *Waechter v. State*, 34 App. 297, 30 S. W. 444, 800.

Evidence that immediately before the killing deceased started to a blacksmith shop, and stated that he was going there to draw water, is admissible as a part of the *res gestæ*. *Merritt v. State*, 39 App. 70, 45 S. W. 21.

The fact that deceased was a convict does not make his declarations at time of shooting inadmissible as a part of the *res gestæ*. *Neely v. State* (Cr. App.) 56 S. W. 626.

Where the defense, in a prosecution for murder, was that the accused shot deceased at a time when he thought deceased was about to carry out threats previously made against accused, evidence of the statements of deceased to a witness for the state that he would get witness an application for a lodge membership, made just before he started toward a stairway and the shooting began, is admissible, as part of the *res gestæ*, to show the scene of the shooting just as it occurred. *Renn v. State*, 64 App. 639, 143 S. W. 167.

Where witnesses heard an injured person exclaim, "Don't kill me!" at once went to him, and saw several persons going away, what he then said was admissible as *res gestæ* on a trial for assault to murder. *Martinez v. State* (Cr. App.) 153 S. W. 886.

Where decedent on the same night, and but a few minutes prior to the fatal difficulty in which he was killed, went to D. and requested that he interfere in a difficulty then going on, and told him that defendant and certain others were planning to kill decedent, evidence of decedent's statement to D. was admissible as *res gestæ*. *Girtman v. State*, 73 App. 158, 164 S. W. 1008.

Where accused claimed that she shot deceased in self-defense, and testified that just prior to the killing he shifted his knife from his right hand to his left and threw his right hand down to his belt, as though to draw a pistol, evidence of a bystander, who saw deceased throw his hand to his belt, as testified by accused, that deceased's acts and conduct created an impression in the witness' mind that deceased was attempting to draw a pistol, was admissible as *res gestæ*. *Latham v. State* (Cr. App.) 172 S. W. 797.

48. — **Acts and statements of injured person after the offense.**—Evidence held admissible.—The acts, remarks, and conduct of an injured person immediately after the attack were admissible as *res gestæ*. *Simpson v. State* (Cr. App.) 154 S. W. 999; *Bejarano v. State*, 6 App. 265; *McInturf v. State*, 20 App. 335; *Waechter v. State*, 34 App. 297, 30 S. W. 444, 800; *Duke v. State*, 35 App. 283, 33 S. W. 349; *Gant v. State*, 73 App. 279, 165 S. W. 142.

Declarations made by deceased a few minutes after he was shot are *res gestæ*. *Lindsey v. State*, 35 App. 164, 32 S. W. 768; *Graham v. State*, 57 App. 104, 123 S. W. 691; *Ryan v. State*, 64 App. 628, 142 S. W. 878; *Fuller v. State* (Cr. App.) 154 S. W. 1021; *Lopez v. State*, 73 App. 624, 166 S. W. 154.

The declarations of the party assaulted, after the difficulty, are incompetent. *Meredith v. State*, 40 Tex. 480.

In a trial for murder by poisoning, a witness in behalf of the state testified that the day before deceased died witness found him prostrated and helpless behind a saloon and gambling house with which the defendant was connected, and that the deceased then said that he was not drunk, but had been drugged and dragged to that place. Held, that this statement of the deceased was *res gestæ*. *Tooney v. State*, 8 App. 452.

A statement made by the deceased twenty minutes after he was wounded respecting the cause and circumstances of the wound, the said statement being so intimately connected with the wounding as to negative the idea of manufacturing testimony, was held to be admissible against the defendant. *Stagner v. State*, 9 App. 440.

A witness testified that from a distance of one hundred and fifty yards, he saw the deceased when he was shot, and that he went immediately to him, and inquired how he shot himself and deceased replied: "I did not do it. I was shot from up yonder," indicating, by a motion, the place from which he was shot.

Held, that both the statement and motion of the deceased were *res gestæ* and admissible evidence against the defendant. *Warren v. State*, 9 App. 619, 35 Am. Rep. 745.

Witnesses for the state testified that they heard the fatal shot and the outcry of the deceased, and ran immediately a distance of about one hundred yards to where deceased was lying wounded, and asked him who shot him, and that in reply he stated that the defendant shot him. His statement was held admissible as *res gestæ*. *Washington v. State*, 19 App. 521, 53 Am. Rep. 387.

A statement made by deceased an hour after the difficulty sixty or seventy yards from the scene of the killing, after his mind had been diverted by other matters not connected with the difficulty about which he had talked, is *res gestæ*. *Freeman v. State*, 49 App. 556, 46 S. W. 641, 51 S. W. 230.

See the statement of the case for statements made to his father by the deceased as soon as he could talk, and within twenty minutes after he received the fatal shot, and which, being clearly *res gestæ*, were properly admitted in evidence for the state. *Irby v. State*, 25 App. 203, 7 S. W. 705.

On trial for aggravated assault upon a woman, her declaration ten minutes afterward as to hurts, bruises, and wounds, is part of the *res gestæ* and is admissible in evidence. *Pilcher v. State*, 32 App. 557, 25 S. W. 24.

In a trial for assault with intent to rape, the name of the assaulting party may be proven by the statements of the prosecutrix when such statements are a part of the *res gestæ*. *Sentell v. State*, 34 App. 260, 30 S. W. 226.

A statement, written by deceased after he was wounded, as to circumstances connected with the shooting, is admissible as part of the *res gestæ* on a showing that deceased wrote the statement directly after he was shot; but that portion of the statement in which he expresses an opinion that he was shot by one of a family named is inadmissible. *Figaroa v. State*, 58 App. 611, 127 S. W. 193.

Where accused, returning home at night, secured a gun from under the bed of his son, and shot his sleeping wife, who immediately awoke and ran a few feet out on a gallery, where she fell, the statement of the wife then immediately made in the presence of accused that he had killed her, and the statement of the son immediately following, made in the presence of accused, that he had killed her, were admissible as a part of the *res gestæ*. *Wynne v. State*, 59 App. 126, 127 S. W. 213.

In a rape case, testimony of a witness who lived about 150 feet from prosecutrix's residence, where she was assaulted, that he heard a disturbance there, and saw a man around the house some 15 minutes before, and, when he heard some one scream in her house, he ran to the back door, and prosecutrix told him a minute or two after the disturbance that some one had insulted her, and, when asked who, said she did not know his name, but knew it was the same man who came to sell her a lot, was admissible as *res gestæ*; what prosecutrix says immediately after the rape and what is said in reply thereto always being admissible. *Lemons v. State*, 59 App. 299, 128 S. W. 416.

On a trial for assault with intent to rape, the testimony of third persons, as to complaints made by prosecutrix immediately after she had escaped from accused and had run to another part of the grounds where the offense was committed, was admissible as a part of the *res gestæ*. *Rogers v. State* (Cr. App.) 143 S. W. 631.

In a murder trial, witnesses were properly permitted to testify that immediately after the shooting a bystander said "You d——d s—— of a b——, what are you doing?" and that a few minutes later decedent asked one of the witnesses to "stop the blood," and stated that he was bleeding to death, and that accused had told him he was going to kill him, but that he thought accused would wait until decedent got outside and "take a punch at him"; the testimony being admissible as part of the *res gestæ*. *Kinney v. State* (Cr. App.) 144 S. W. 257.

Declarations by deceased as to the cause of the injuries from which he subsequently died, made to a physician within half an hour after the injuries were inflicted, and while he was still suffering and bleeding from his wounds, are admissible as a part of the *res gestæ*. *Carver v. State* (Cr. App.) 148 S. W. 746.

Where deceased in a minute or a minute and a half after shots were fired came into a restaurant about 40 feet from the place of the shooting, and told a witness that defendant had shot him, such statement was admissible as a part of the *res gestæ*, and it was immaterial that it was made in answer to question propounded. *Johnson v. State* (Cr. App.) 149 S. W. 165.

On a trial for assaulting a girl eight years old while on her way to school with intent to rape, evidence that when she reached school she was excited was admissible as a part of the *res gestæ*. *Duckett v. State* (Cr. App.) 150 S. W. 1177.

Also evidence of what she told her teacher about the matter at recess. *Duckett v. State* (Cr. App.) 150 S. W. 1177.

Where accused, after being informed by his wife that decedent had insulted her, sought decedent and shot and killed him, the testimony of a witness that decedent, after he had been shot and carried into a room, confessed to accused's wife, who came into the room, that he had insulted her was admissible as *res gestæ* and to corroborate the wife's testimony to decedent's insults. *Davis v. State*, 70 App. 37, 155 S. W. 546.

Evidence that the party assaulted was assisted from the scene of the difficulty held admissible as *res gestæ*. *Luttrell v. State*, 70 App. 183, 157 S. W. 157.

A declaration by a person shot, made not more than two minutes after the shooting, and while he was excited and seeking to get away, to the effect that he had been robbed and shot, is admissible as a part of the *res gestæ*. *Wilson v. State*, 70 App. 627, 158 S. W. 512.

It appeared that after decedent was cut he rode directly home and called his wife, and she testified that he was very bloody, and his entrails were bulging

through his shirt, and he acted as if in great pain, and stated that accused had asked him if he claimed that accused still owed him, and, upon stating that he did, that accused cut him twice, and also testified that decedent said he was dying, and another witness testified that when decedent's wife called him, witness caught decedent as he was falling off the horse, and that decedent repeated the statement about accused asking about the debt and cutting. These statements were only 10 or 15 minutes after the wounding. Held, that the evidence was admissible as *res gestæ*. *Ward v. State*, 70 App. 393, 159 S. W. 272.

Where a nine year old girl, who had been raped, met her mother near the scene, and not more than 10 or 15 minutes thereafter, while still laboring under the excitement incident to the commission of the offense, and immediately related the occurrence to her mother, her statements so made were admissible as part of the *res gestæ*. *Valdez v. State*, 71 App. 487, 160 S. W. 341.

Evidence by the woman at whose house prosecutrix boarded that prosecutrix was nervous and was not able to stand up when she arrived home on the night of the alleged rape was admissible as *res gestæ*, in connection with her other testimony that prosecutrix called witness as soon as she got home, at which time she stated, "That ornery dog has ruined me," and that prosecutrix' hair was entangled and her face and body bruised, and she was in a generally dilapidated condition. *Sharp v. State*, 71 App. 633, 160 S. W. 369.

A witness who was half a mile from the place of the shooting, but who immediately ran there upon hearing it, when decedent, who was lying on the ground and suffering intensely, voluntarily told him the circumstances of the shooting and described the assailants, could testify as *res gestæ* as to what decedent told him about the shooting. *Christian v. State*, 71 App. 566, 161 S. W. 101.

A witness testified that after the cutting he assisted in carrying decedent to a drug store across the street, and that decedent asked that his clothes be unfastened, and it was then found that his intestines were protruding through the cut in his stomach, and the decedent remarked, "That fellow took my life for nothing." Held, that the evidence was admissible as *res gestæ*. *Corbitt v. State*, 72 App. 396, 163 S. W. 436.

Evidence by the owner of a drug store, just outside of which the cutting occurred, that decedent immediately after the cutting went into the drug store and stated to witness that accused had cut him, but that he did not know what for, and by another who heard such statements to the druggist, was admissible as *res gestæ*; decedent's statement having been made about two minutes after the cutting. *Matthews v. State*, 72 App. 654, 163 S. W. 723.

Where the defendant killed his wife and another at the same time, declarations by the wife, just after the shooting and prior to her death, which were part of the *res gestæ*, were admissible, in a prosecution for the killing of the other, notwithstanding they were uttered by the defendant's wife. *Robbins v. State*, 73 App. 367, 166 S. W. 528.

Statements made by deceased and by another person a few minutes after the shooting, and evidently amounting to the event speaking, were properly admitted as *res gestæ* of the transaction. *Gomez v. State* (Cr. App.) 170 S. W. 711.

Where deceased stated shortly after the shooting that he desired to see his children, that he had been shot, and that defendant shot him, the first part of the statement relating to his children was inadmissible in a prosecution for the homicide, but the rest was properly admitted as part of the *res gestæ*. *Francis v. State* (Cr. App.) 170 S. W. 779.

In a prosecution for theft from the person, a witness' testimony that immediately after the alleged theft the injured person came to his place, which was about 200 yards from the scene of the theft, and requested the witness to give him something with which to defend himself, as the persons who had robbed him were then trying to kill him, was properly admitted as part of the *res gestæ*, where it appeared that the statement was made while the injured person was excited from being robbed and chased. *Watts v. State* (Cr. App.) 171 S. W. 202.

In a prosecution for murder committed by shooting at deceased through a window, while he was sitting in a lighted room near the window, his statement that accused was the assailant, made within two minutes after being shot, was admissible as *res gestæ*, where there was evidence that he had his face toward the window immediately after he was shot, and deceased's statement to a witness, a very few minutes after the shooting, that accused did it, in answer to a question from witness, is also admissible as *res gestæ*. *Shamblin v. State* (Cr. App.) 171 S. W. 718.

A statement of the prosecuting witness, who went direct from the place of the assault to an ice plant about a block away and told the foreman that he had been knocked down and stabbed, showing a wound on which there was fresh blood, and his request that the foreman go with him to the police station, were admissible as part of the *res gestæ*. *Bruce v. State* (Cr. App.) 173 S. W. 301.

49. — Evidence held inadmissible.—Declarations of the deceased, made an hour or two subsequent to the affray, and after he had gone in search of medical attention, were held to be mere hearsay and not admissible. *Green v. State*, 8 App. 71.

In a prosecution for incest, the statement of the prosecutrix to her father, soon after giving birth to a child, that accused was its father, is inadmissible as part of the *res gestæ*. *Poyner v. State*, 40 App. 640, 51 S. W. 376.

Where accused woke up a female nurse by kissing her, and some time after accused's departure the nurse, in response to repeated inquiries of another who noticed her tears and disconsolate attitude, finally stated accused's offense, such statement was not admissible in a prosecution for aggravated assault, as it was not spontaneous, and was not part of the *res gestæ*. *Porterfield v. State*, 64 App. 179, 141 S. W. 968.

50. — **Acts and statements of third persons.**—The remarks or observations of a crowd present at the commission of an offense are not *res gestæ*, but hearsay and inadmissible. *Holt v. State*, 9 App. 571.

Immediately before deceased was shot, he ordered his daughter, who was defendant's wife, to leave the room. She answered: "No, pa; if I do John will shoot you,"—the John referred to being the defendant, her husband. Held, that this testimony was *res gestæ*. *Jeffries v. State*, 9 App. 598.

Immediately before the shooting defendant's wife called to him to get his pistol, and when he did so, and returned to the place where his wife and the deceased were disputing, she several times ordered the defendant to shoot, which he presently did, inflicting the fatal wound. Held, that this testimony was *res gestæ*, and admissible against the defendant. *Cook v. State*, 22 App. 511, 3 S. W. 749.

Where the state was permitted to prove by a witness that when he arrived at the place of the homicide, some member of the crowd there congregated, pointed to the defendant, whom the witness had just met a short distance from the place of the homicide, and said: "There is the man who did the shooting." Held, that such remark was not a part of the *res gestæ*, and that the trial court erred in admitting it in evidence over the defendant's objection. To entitle the state to introduce in evidence the declaration of a bystander, not connected with the transaction, it must be clearly shown that the defendant heard such declaration, and heard it under circumstances calling for a response from him. But cases may, and do, arise where the declarations of a mere bystander would be admissible for the defendant. To illustrate: A. and B. are engaged in a combat. C., a bystander, cries out: "B. is trying to cut A. with a knife." In the further progress of the combat B. is injured by A. The exclamation of C., the bystander, is admissible as tending to show A.'s intent in injuring B.; to show that A. was actuated by the apprehension of danger caused by such exclamation. *Felder v. State*, 23 App. 477, 5 S. W. 145, 59 Am. Rep. 777.

Evidence that a minister spoke to one disturbing religious worship is admissible. *McAdoo v. State*, 35 App. 603, 35 S. W. 960, 60 Am. St. Rep. 61.

Remarks of a third party as to defendant's condition on the night of the alleged theft, are not *res gestæ* and are not admissible. *Wright v. State*, 37 App. 627, 40 S. W. 401.

Statements made by bystanders at time of killing as to defendant's sanity are not admissible. *Carlisle v. State* (Cr. App.) 56 S. W. 366.

Remarks by bystanders such as "Little Jack Kennedy shot him and there he goes" at time and place of homicide are not *res gestæ* but hearsay. *Ex parte Kennedy* (Cr. App.) 57 S. W. 648.

Where, on a trial for homicide, a witness testified that accused stabbed decedent, that after the stabbing accused went off to one side, and that a third person then came and stood by the body of decedent and asked who killed him, it was proper to permit the state to show that the witness replied that accused killed decedent. *Hardin v. State*, 57 App. 401, 123 S. W. 613.

Where, on a trial for homicide, a witness testified: That he saw no part of the difficulty, but saw decedent lying on the ground dying; that he saw a person standing off some distance, who he thought was accused; that third persons were holding such person; but that he was trying to get loose, and said, "Turn me loose, I will kill the ——" —it was proper to permit the witness to state that he said to such person that he had already killed decedent, and that he would not be permitted to do anything further. *Hardin v. State*, 57 App. 401, 123 S. W. 613.

In a prosecution for aggravated assault with a deadly weapon and for resisting an officer while making an arrest, testimony by the officer assaulted that a bartender in accused's saloon where the arrest was made caught hold of witness, who told the bartender he would shoot if he did not let go, was admissible as part of the *res gestæ* of the assault by accused. *Woodward v. State*, 58 App. 412, 126 S. W. 271.

In a homicide case, testimony whether witness who left the room about the time the killing occurred did not remark just after leaving that accused had killed decedent was admissible as *res gestæ*. *Keeton v. State*, 59 App. 316, 128 S. W. 404.

In a prosecution for homicide, accused testified that he killed deceased while the latter was attempting to stab him. When the officers arrived there were two persons near the body of deceased, and they called the attention of the officers to the fact that a knife was lying near the body. The first person who saw the body after the killing testified that there was no knife near the body, and that there were jugs lying near the body. Held, that evidence that the two persons who were with the body when the officers arrived on approaching the body had ordered all the people away from the body into the house, and that they had moved one of the jugs lying near the body was admissible in evidence as part of the *res gestæ*. *Eggleston v. State*, 59 App. 542, 128 S. W. 1105.

Evidence that, after defendant had struck deceased, a bystander commanded witness not to throw a rock "in here," but to throw it down, was not admissible as *res gestæ*. *Baum v. State*, 60 App. 638, 133 S. W. 271.

On a trial for murder, evidence that a witness who reached the deceased a few moments after the killing, but after defendant had fled, heard some unknown person say, "If you had let me had the pistol, I could have gotten him," was properly excluded. *Penton v. State* (Cr. App.) 149 S. W. 190.

Exclamations by the wife and child of decedent, made while accused was shooting decedent, begging accused not to shoot him, are admissible as a part of the *res gestæ*. *Redman v. State* (Cr. App.) 149 S. W. 670.

In a murder trial, the state was properly permitted to show that, when accused raised the knife as if to strike decedent, a bystander called to decedent to run, that accused would kill her. *Pettis v. State* (Cr. App.) 150 S. W. 790.

On a trial for a homicide, for which accused and his brother were jointly indicted, but separately tried, evidence that as the brother left the scene of the crime at full speed he waived his gun and holloed was admissible as part of the *res gestæ*. *Burns v. State* (Cr. App.) 150 S. W. 794.

In a trial for burglary with intent to commit rape, a deputy sheriff who apprehended accused in the commission of the offense was properly permitted to testify, as part of the *res gestæ*, that when he arrived at the house he knew accused was there and told the women in the house to step out, that he might have to shoot; the remark having been made just before witness confronted accused. *Alsup v. State* (Cr. App.) 153 S. W. 624.

Where defendant killed the husband of his stepdaughter, evidence of a witness that at the time of the shooting she heard defendant's stepdaughter say that she told defendant "not to do that," was admissible as *res gestæ*, being an exclamation coincident with the firing of the shots by a party concerning whom the trouble arose. *Smith v. State*, 70 App. 62, 156 S. W. 214.

A statement by a person not present at the time of a homicide made shortly thereafter is not a part of the *res gestæ* and is properly excluded as hearsay. *Oliver v. State*, 70 App. 140, 159 S. W. 235.

Where defendant was charged with maliciously taking down a gate, it was prejudicial error not to allow witnesses to testify as to what was said by the boys doing the act to show that there was no intent to injure the property; it being *res gestæ*. *Meador v. State*, 72 App. 527, 162 S. W. 1155.

In a suit on a benefit certificate issued by a fraternal beneficiary association, the by-laws of which provided that the certificate should be void if the insured should die in consequence of a violation of any law, it appeared that insured was killed while engaged in a brawl. Held, that evidence of declarations made immediately after the killing by one of the men who was present that the killing was in self-defense was admissible as part of the *res gestæ*. *Sovereign Camp Woodmen of the World v. Bailey* (Civ. App.) 163 S. W. 683.

In the trial of one charged as accomplice to murder, declarations of the principal which are part of the *res gestæ* of the killing are admissible. *Millner v. State* (Cr. App.) 169 S. W. 899.

In a prosecution for violation of an ordinance of the city of Ft. Worth making it unlawful for any white person and any negro to have sexual intercourse, each act to constitute a separate offense, punishable by fine not to exceed \$200, evidence that, as soon as admission was gained to the room where defendant and the white man were locked in, both of them undressed, and the bed ruffled up, the white man said to the officer that he had not had intercourse with defendant, was admissible as part of the *res gestæ*. *Strauss v. State* (Cr. App.) 173 S. W. 663.

Where accused passed a forged instrument by offering it in evidence in the justice court, and the district court obtained possession thereof by a subpoena duces tecum, that court did not err, on a trial for passing such instrument, in refusing to instruct its officers to return the instrument to accused, as legal possession had been obtained of it, and the court had a right to hold it until the case was disposed of. *Bunker v. State* (Cr. App.) 177 S. W. 108.

In a prosecution for selling liquor in local option territory, where a witness was allowed to testify that he did not know who got a bottle of whisky purchased, after stating that his father and two others were present, the witness not being allowed to testify to any statement not made in the presence and hearing of defendant and not constituting a part of the *res gestæ* of the transaction, connected with money being furnished and whisky being delivered as its result, the evidence was admissible. *Mills v. State* (Cr. App.) 178 S. W. 367.

51. Evidence of other offenses—In general.—Independent and disconnected crimes cannot ordinarily be proven against an accused on his trial for another different and distinct crime. *Currington v. State*, 72 App. 143, 161 S. W. 478; *Goldstine v. State* (Cr. App.) 35 S. W. 289; *Ware v. State*, 36 App. 597, 38 S. W. 193; *Barnett v. State*, 50 App. 538, 99 S. W. 556; *Bowman v. State*, 70 App. 22, 155 S. W. 939.

The primary rule of evidence which requires that the proof shall correspond with the allegations, and be confined to the point in issue, excludes all evidence of collateral facts, or those which are incapable of affording any reasonable presumption or inference as to the principal fact or matter in issue. Under this rule, it was held error to permit the state, over objection, to prove that, prior to the commission of the arson, for which the defendant was on trial, he was charged with the commission of another and distinct offense, and was a fugitive from justice. *Chumley v. State*, 20 App. 547.

Another distinct offense committed "about the time" is not an offense committed at the time, and when it does not show system is inadmissible. *James v. State*, 40 App. 195, 49 S. W. 401.

It is not permissible for the state to prove a former trial and conviction of the defendant for the same offense. *Clark v. State*, 23 App. 260, 5 S. W. 115.

Evidence that the defendant had been confined in the penitentiary for felony, was held irrelevant and inadmissible. *Guajardo v. State*, 24 App. 603, 7 S. W. 331.

On trial for robbery of a woman it is competent for the state to prove that at the same time and place defendant ravished another woman who had no money, and used his pistol in both instances. *Harris v. State*, 32 App. 279, 22 S. W. 1037.

Evidence of defendant's former conviction must be limited to his credibility. *Hutton v. State* (Cr. App.) 33 S. W. 969.

On trial for keeping and exhibiting a gaming table evidence that defendant had been engaged in other acts of gaming should not be admitted. *Ah Kee v. State* (Cr. App.) 34 S. W. 269.

Showing that defendant at other times had carried weapons; held, not error. *Creswell v. State*, 37 App. 335, 39 S. W. 372, 935.

State cannot prove that defendant was fined some time before the killing for

disturbance with deceased, it not being for purpose of showing malice or antecedent grudges. *Woodward v. State*, 42 App. 188, 58 S. W. 143.

Where defendant is tried for bringing eight dead hogs into the county of prosecution it is error to prove that two weeks after date of crime he brought ten dead hogs into said county. The two transactions were not contemporaneous. *Grant v. State*, 42 App. 273, 58 S. W. 1027.

Where two offenses have been committed about the same time and accused is being tried for one, the commission of the other is not admissible unless it either shows system or the offenses are contemporaneous and show the intent with which accused acted in commission of offense for which he is being tried. *McIver v. State* (Cr. App.) 60 S. W. 50.

Independent crimes cannot be introduced where no connection is shown between the independent crime and the offense with which defendant is being tried unless some system is shown—such as in arson or burglary. In most instances independent crimes are never admissible, since they do not illustrate the act with which defendant is being tried, nor do they throw any light on his intent and motive. *Spriggins v. State*, 42 App. 341, 60 S. W. 54.

Extraneous crimes committed two and one-half months before commission of crime for which defendant is being tried are not contemporaneous. *Denton v. State*, 42 App. 427, 60 S. W. 672.

It is error to prove that next day after the crime when defendant was arrested he was carrying a pistol, as this was a distinct offense and in no way connected with and not illustrative of the crime for which defendant was being tried. *Riggins v. State*, 42 App. 472, 60 S. W. 878.

In a prosecution for unlawfully carrying a pistol, evidence that accused had been previously indicted in the county for a like offense was inadmissible. *Waterhouse v. State*, 57 App. 590, 124 S. W. 633.

In a prosecution for offering to bribe a witness, where defendant did not take the stand, the admission in evidence of his having been convicted of arson would have been reversible error. *Maples v. State*, 60 App. 169, 131 S. W. 567.

In a prosecution for practicing medicine without authority in violation of Pen. Code, art. 750, evidence that defendant treated persons other than the person named in the information was admissible. *Germany v. State*, 62 App. 276, 137 S. W. 130, Ann. Cas. 1913C, 477.

Where a witness for the state testified that accused had attempted to induce him to give false testimony, testimony of the witness that he made a complaint against accused therefor, and as to the result of the trial thereon, was immaterial. *Day v. State*, 62 App. 448, 138 S. W. 130.

In a prosecution for pandering, witnesses were properly permitted to testify that defendant first sought to obtain a room at B.'s, and, failing in this, obtained a room at J.'s both of which were houses of prostitution, that he subsequently carried his wife to each of those places, and the statements made by him on those occasions. *Stevens v. State* (Cr. App.) 150 S. W. 944.

In a prosecution of a bank president for receiving deposits on a certain Monday with knowledge of the bank's insolvency, evidence that on Saturday before such Monday, other persons had made deposits, was not admissible, especially where accused was not in personal charge of the bank. *Brown v. State* (Cr. App.) 151 S. W. 561.

In a prosecution for receiving a stolen dress, evidence of the theft of a diamond ring subsequent to the theft of the dress, by the same parties who stole the dress, was improperly admitted, where the court in no way limited its application. *Forrester v. State* (Cr. App.) 152 S. W. 1041.

The details of an operation of abortion and the suffering at the time and after are not admissible in evidence in a prosecution for seduction, nor for being an accessory to that crime. *Harrison v. State* (Cr. App.) 153 S. W. 139.

Where defendant was on trial for perjury, evidence of other offenses committed by him in other counties, under different circumstances, and for which he had never been indicted, was inadmissible. *Poulter v. State*, 72 App. 140, 161 S. W. 475.

On a trial for keeping a disorderly house, evidence that accused had pleaded guilty to a charge of vagrancy was not admissible unless the section of the vagrancy statute under which she was prosecuted was first shown. *Bowman v. State*, 73 App. 194, 164 S. W. 846.

On a trial for carrying a pistol, evidence as to an altercation between accused, after he had given bail for his appearance and left the jail, and a person who followed him to get him to return to attend to some minor matter, should have been excluded, and its admission is ground for reversal, where the jury, in addition to a fine, assessed the punishment at imprisonment in the county jail for 60 days. *Ransom v. State*, 73 App. 442, 165 S. W. 932.

When extraneous crimes are *res gestae* of an offense on trial, or tend to show the intent with which accused acted, and such intent is an issue, or tend to connect him with the offense charged, they are admissible. *Serrato v. State* (Cr. App.) 171 S. W. 1133.

In a prosecution for rape on a child under 15, her evidence of an act of intercourse prior to that charged, although committed more than a year before the institution of the prosecution, so that prosecution for it would have been barred by limitation, was admissible as evidence showing the relations of the parties, bearing on the probability of the commission of the act charged, under the rule that evidence of one crime is admissible to prove another, when they are so related that the inference follows. *Haggart v. State* (Cr. App.) 178 S. W. 328

Where accused is shown to have committed an act forbidden by law, and makes defense that, if she did the facts alleged, she did so innocently or by mistake, proof of other similar offenses is admissible to rebut the defense. *Gray v. State* (Cr. App.) 178 S. W. 337.

52. — In prosecutions for homicide.—Propriety of allowing defendant to be asked about another murder with which he had been charged. *Butler v. State* (Cr. App.) 27 S. W. 128.

Where defendant is being tried for murder, evidence of an assault upon the jailer by the defendant cannot be shown. *Spriggins v. State*, 42 App. 341, 60 S. W. 55.

Accused on the day of the murder was told by deceased that the latter had taken up hogs belonging to accused because they were injuring his crops, and both went to the house of deceased and subsequently accused went to the house of deceased's landlord, and from there returned to the house of deceased, where the murder was committed. Held, that evidence that, while at the landlord's house, accused cursed and abused some of the people he met there, and assaulted one of them, was not admissible, as evidence of extraneous crimes is inadmissible unless the same will develop the *res gestæ*, intent, system, or identity of the parties. *Pace v. State*, 58 App. 90, 124 S. W. 949.

On a trial for murder, evidence that decedent was a fugitive from the justice of a sister state, charged with a felony and that on his coming to Texas he changed his name was inadmissible. *Roquemore v. State*, 59 App. 568, 129 S. W. 1120.

The state, on a trial of the murder of his child, may show that the parent had pleaded guilty to a charge of aggravated assault on the child. *Betts v. State*, 60 App. 631, 133 S. W. 251.

A bill of exceptions which shows that the court would have sustained an objection to a question asked accused as to whether he had ever killed a person before, unless the proof showed that the killing was recent, and that if counsel for accused desired to urge the objection the question and the partial answer made before the objection would be excluded, and no further reference or question was ever made thereto by any one, does not show error in the admission of evidence. *Johnson v. State*, 61 App. 635, 136 S. W. 259.

While it was permissible, on a prosecution for mixing poison with a drink with intent to kill M., to introduce defendant's statement that on the day it was claimed the poison was mixed with the drink she was at M.'s house for the purpose of getting certain articles, this showing her opportunity to do the mixing, the fact of an officer having subsequently gone to defendant's house to search for such articles and to arrest her for stealing them is an extraneous matter not admissible. *Miller v. State* (Cr. App.) 144 S. W. 239.

Evidence that another who died may have drunk thereof cannot be considered on the question of defendant having put poison in milk with intent to kill M. *Miller v. State* (Cr. App.) 144 S. W. 239.

Where defendant killed his wife and another, evidence, in a prosecution for the killing of the other, that defendant had previously assaulted and seriously injured his wife, and had been indicted therefor in another county, was admissible to support the state's contention that defendant killed his wife to prevent her from testifying in the other prosecution. *Robbins v. State*, 73 App. 367, 166 S. W. 528.

In a prosecution for homicide, it was improper for the court to permit the state to ask witnesses for accused on cross-examination whether they had not associated with accused, drunk with him, and branded cattle with him, for the purpose of raising an inference that accused was also a cattle thief. *Eads v. State* (Cr. App.) 170 S. W. 145.

53. — In prosecutions for forgery.—See a state of facts in a trial for forgery in which it was held that certain postoffice receipts which the evidence tended to show had been fraudulently made or altered by defendant, were competent evidence against the defendant as tending to show his intent. *Hennessy v. State*, 23 App. 340, 5 S. W. 215.

On trial for forgery, evidence that defendant had been engaged with others in stealing stock is irrelevant and inadmissible. *Lettz v. State* (Cr. App.) 21 S. W. 371, distinguished. *Burge v. State*, 32 App. 359, 23 S. W. 692.

On a trial for passing a forged instrument it is admissible to show that defendant passed other forged instruments. *Mallory v. State*, 37 App. 482, 36 S. W. 751, 66 Am. St. Rep. 808; *Howard v. State*, 37 App. 494, 36 S. W. 475, 66 Am. St. Rep. 812; *McGlasson v. State*, 37 App. 620, 40 S. W. 503, 66 Am. St. Rep. 842.

State can prove that another forgery is pending against defendant. *Colter v. State*, 41 App. 78, 51 S. W. 945.

In a prosecution of a railroad station agent for forging a labor receipt, other transactions, indicating an embezzlement by the agent, rather than forgery, were inadmissible. *Pelton v. State*, 60 App. 412, 132 S. W. 480, Ann. Cas. 1912C, 86.

Evidence that the accused had presented other forged checks for payment to the bank which paid the check alleged to be a forgery was improper, where such payments were not shown to have been contemporaneous with the transaction relied on. *Horn v. State* (Cr. App.) 150 S. W. 943.

In a prosecution for passing a forged check or draft, evidence of the officers who arrested accused that at the time of his arrest they found other forged drafts or checks on his person and in his baggage, and as to the character of the ink with which such checks were written, was admissible. *Dugat v. State*, 72 App. 39, 160 S. W. 376.

54. — In prosecutions for embezzlement or theft.—Evidence is sometimes admissible to show incidentally other acts of embezzlement. *Leonard v. State*, 7 App. 417.

In a prosecution for theft of sheep, it was held competent for the state to prove by the owner of the sheep, that in the same flock in which he found his stolen sheep he saw other sheep with marks and brands recently altered, as had been the marks and brands upon his said stolen sheep, into the mark and brand of the defendant, said flock having been recently sold by defendant as his property. Said testimony was admissible as a link in the chain of circumstances relied on by the

state to connect the defendant with the theft of the sheep described in the indictment. *Hester v. State*, 15 App. 567.

In a prosecution for the theft of a horse, committed in B. county, on January 19, 1887, it was held error to permit the state to prove that the defendant was seen in another county on the night of January 31, 1887, at a place where, on said last named date, another horse, different from that named in the indictment, was stolen. *Carter v. State*, 23 App. 508, 5 S. W. 128.

As tending to establish identity in developing the *res gestæ*, or to prove guilt by circumstances connected with the theft, or to show the intent of the accused with respect to the property described in the indictment, it is competent for the state to prove the theft by defendant of other property at the same time and place of the theft in question, but it is not competent to prove a distinct theft committed by the defendant at another time and place. See the statement of the case for evidence of distinct thefts held to have been erroneously admitted. *Williams v. State*, 24 App. 412, 6 S. W. 318.

On trial for theft of a yearling it was held inadmissible to prove the theft of two calves by someone living at defendant's place. *Schwen v. State*, 37 App. 368, 35 S. W. 172.

On trial for theft of a bank bill it is competent to show that prosecutor had about the same time, and under similar circumstances, lost several other bills. *Hurley v. State*, 36 App. 73, 35 S. W. 371.

In a prosecution for theft evidence of similar thefts at other times; held, inadmissible. *Buck v. State* (Cr. App.) 38 S. W. 772.

Evidence of other thefts, not showing systematic crime nor showing defendant's connection therewith, is not admissible. *Unsell v. State*, 39 App. 330, 45 S. W. 1022.

State cannot prove burglary committed by defendant fifty miles away in prosecution for theft of horse at a different time and place. *McIver v. State* (Cr. App.) 60 S. W. 50.

Where, in a prosecution for theft, the evidence was unequivocal as to the breaking and entering of the house in question and the theft therein, evidence as to another burglary, alleged to have been committed on the same night, serving no purpose either of identification, system, or developing the *res gestæ*, was inadmissible. *Clark v. State*, 59 App. 246, 128 S. W. 131, 29 L. R. A. (N. S.) 323.

Where, on the trial of a porter in a store for the theft of a skirt, the state proved that accused had a skirt in his possession in the store, but did not prove that he had been in possession of other goods, evidence of goods found in the house of a third person with whom accused spent a part of his time was inadmissible. *Morgan v. State*, 62 App. 120, 136 S. W. 1065.

Where a city secretary was indicted for misapplying a warrant belonging to the city, and it appeared that the warrant was deposited by him to the credit of the wrong fund of the city for the purpose of covering up a shortage in that fund, it was error to admit evidence of prior misappropriations from the fund in which the shortage appeared. *Dickey v. State* (Cr. App.) 144 S. W. 271.

In a prosecution for embezzling the proceeds of a check given accused to deposit for another, it was error to admit evidence that accused had committed a crime in dealing with others. *Nesbitt v. State* (Cr. App.) 144 S. W. 944.

55. — **Violations of liquor laws.**—In a prosecution for sale of intoxicating liquor in violation of the local option law, evidence of previous indictments and of a conviction of defendant for selling is inadmissible. *Kirksey v. State*, 61 App. 298, 135 S. W. 124; *Tyrrell v. State* (Cr. App.) 38 S. W. 1011; *Haney v. State*, 57 App. 158, 122 S. W. 34; *Shepherd v. State* (Cr. App.) 174 S. W. 609.

On prosecution for selling liquor to a minor evidence that defendant had sold liquor to other minors is inadmissible. *Freedman v. State*, 37 App. 115, 38 S. W. 993.

In prosecutions for the sale of intoxicating liquors, proof of other and different sales is improper. *Spain v. State*, 61 App. 63, 133 S. W. 1055.

Where, on a trial for violating the local option law, the question of system of accused was not in issue, and the evidence on the issue of a sale of whisky by accused to prosecutor was conflicting, evidence of the delivery of whisky to accused three months before the alleged sale was inadmissible, because disconnected with the charge. *Gaines v. State*, 63 App. 73, 138 S. W. 387.

Where the person who had purchased liquor from accused in local option territory testified that accused told him that he was shipping similar liquor to other persons named, and that he could procure liquor from such persons, it was not error to permit the witness to testify that accused had shipped similar liquor to others in the town. *Sandoloski v. State* (Cr. App.) 143 S. W. 151.

In a prosecution for sale of intoxicants on Sunday, it is not error to ask a witness whether he saw the side door of accused's saloon open on a stated Sunday. *Woods v. State* (Cr. App.) 151 S. W. 296.

Where accused denied making a sale of beer to prosecutor in violation of the local option law, the admission of evidence of another sale by accused to prosecutor and of the fact that two or three days after the alleged sale of beer the officer arresting accused found whisky and beer and empty beer bottles, from some of which beer had been recently emptied, was not erroneous. *Mitchell v. State*, 71 App. 185, 159 S. W. 1073.

Where accused, in a prosecution for selling intoxicants in prohibition territory, admitted that he received the money from prosecuting witness, and delivered the whisky to him, but claimed that he was acting as agent in so doing, evidence by prosecuting witness that he had purchased whisky from accused on another occasion was admissible on the issue of agency. *Ross v. State*, 72 App. 611, 163 S. W. 433.

56. — **In prosecutions for burglary.**—On trial for burglary it is error to permit evidence of other extraneous crimes not connected with the burglary in ques-

tion. *Ware v. State*, 36 App. 597, 38 S. W. 198; *Overstreet v. State* (Cr. App.) 150 S. W. 630; *Bowman v. State*, 70 App. 22, 155 S. W. 939.

It was held error to permit the owner of the house to testify that his house had been broken open and robbed previously, and that he believed the defendant and his wife were the guilty parties. *Wilburn v. State*, 41 Tex. 237.

Evidence of another burglary committed at the same time and in close proximity to one for which defendant is being tried is admissible, without identifying property as having been stolen from second house. *Gass v. State* (Cr. App.) 56 S. W. 74.

In a prosecution for burglary it was error to permit the state to prove another burglary by defendant on the same night, and immediately before the commission of the alleged burglary for which he was on trial. *Hill v. State*, 44 App. 603, 73 S. W. 9.

On a prosecution for burglary, it was error to admit evidence that defendant, when arrested and taken before a justice, and before he was warned, was discovered trying to get rid of a pin and watch, and to show that they were the fruit of former crimes. *Johnson v. State*, 50 App. 116, 96 S. W. 45.

In a prosecution for burglarizing the house of C., evidence of an alleged confession by accused, in which he admitted obtaining certain articles from the store of another on the same night, was inadmissible as substantive evidence. *Barnett v. State*, 50 App. 538, 99 S. W. 556.

Motions of a district attorney to dismiss indictments are addressed to the discretion of the court, with which the jury has nothing to do, and hence in a burglary case, evidence of other indictments against the accused for assault with intent to murder, growing out of the same transaction, and that they had been dismissed, was improperly admitted. *Railey v. State*, 58 App. 1, 121 S. W. 1120, 125 S. W. 576.

In a prosecution for the burglary of a store, a witness for the state testified that he was an employé of the same telephone company as defendant, and that he saw the defendant coming out of the workroom, in which was located a wire screen partition between it and the store, with a large grip which could hold several suits of clothes, and that it looked as if it was full, and, on his inquiring what he had in it, defendant replied, "Old clothes to have washed." Held, that it was error to admit such testimony, when it related to an occurrence some two weeks after the date of the crime charged, and its admission was but a proof of other and extraneous crimes. *Johnson v. State*, 57 App. 438, 123 S. W. 1105.

In a prosecution for burglary by shooting into a dwelling house at night on September 28th with intent to murder, it was error to admit testimony as to trouble which accused had at another's house on December 25th following. *Windham v. State*, 59 App. 366, 128 S. W. 1130.

In a prosecution for burglary by shooting into a dwelling house in the nighttime on September 28th with intent to murder, the court permitted the occupant of the house to testify: That on the night of December 25, 1906, he heard accused make threats against him. That accused and his father had been at another place and got into trouble there, and they stopped at witness' gate, and accused said: "Where is old C.? The God damn son of a bitch, let him show up to-night!" And then said, "I am going to shoot that light out," but his father told him not to, and that he was in trouble enough already. That, when accused made such statements, witness spoke to him. Another witness was permitted to testify in support of the above testimony. Held, that the testimony was erroneous as being concerning another offense distinct from that alleged. *Windham v. State*, 59 App. 366, 128 S. W. 1130.

57. — In prosecutions for rape and Incest.—In a statutory rape case, it was not error to admit evidence of other acts of intercourse by defendant with prosecutrix where the instructions limited the jury to the consideration of one specific act on a certain date. *Williamson v. State*, 72 App. 618, 163 S. W. 435; *Smith v. State*, 64 App. 454, 142 S. W. 1173; *Cain v. State* (Cr. App.) 153 S. W. 147.

Where the state has elected to rely upon one act of incestuous intercourse, evidence of subsequent acts are inadmissible, and likewise acts leading up to the intercourse. *Gross v. State*, 61 App. 176, 135 S. W. 373, 33 L. R. A. (N. S.) 477; *Cowser v. State*, 70 App. 265, 157 S. W. 758.

On trial for rape, evidence of other assaults made by defendant on prosecutrix is admissible. *Hanks v. State* (Cr. App.) 38 S. W. 173.

Where, in a prosecution for incest, the state elected to rely for a conviction on a separate act definitely proved and as to which the prosecutrix was corroborated, it was error to permit the state to introduce proof of other acts of intercourse between prosecutrix and accused before or after the act in question. *Pridmore v. State*, 59 App. 563, 129 S. W. 1113, 29 L. R. A. (N. S.) 858.

In a prosecution for statutory rape, where the defense claimed the father of the prosecutrix was the guilty party, evidence that four years before he raped another daughter is not admissible to show the father guilty. *Whitehead v. State*, 61 App. 558, 137 S. W. 356.

In a prosecution of defendant for rape of his daughter, evidence of other sexual acts between the parties, that accused was the father of prosecutrix's child, that he slept with her and had many times been seen in bed with her by others was admissible. *Cooper v. State*, 72 App. 266, 162 S. W. 364.

In a prosecution for rape, evidence of an act of intercourse prior to that charged, tending to show the relations of the parties and the probability of the commission of the offense, could be considered only as bearing on the probability of the commission of the act charged, since a conviction could be had only for such act. *Haggart v. State* (Cr. App.) 178 S. W. 328.

58. — In prosecutions for assault.—In a prosecution for assault with intent to kill, evidence that defendant on the morning of the offense had threatened to kill other persons was inadmissible. *Owen v. State*, 58 App. 261, 125 S. W. 405.

In a prosecution for assault of a person assisting an officer in attempting to

arrest defendant, evidence that defendant had whipped a little boy a day or so before was improperly admitted. *Owen v. State*, 58 App. 261, 125 S. W. 405.

Also testimony that defendant had been indicted therefor. *Owen v. State*, 58 App. 261, 125 S. W. 405.

Where accused, charged with assault with intent to murder, put his character for peace and quiet in evidence, proof that about 5 years before, when 13 or 14 years of age, accused had cut his female teacher with a knife, and had pleaded guilty to aggravated assault, was admissible on the issue of his being a quiet and peaceable man. *Goolsby v. State*, 59 App. 528, 129 S. W. 624.

Where one tried for felonious assault pleaded self-defense and previous threats by complaining witness, it was error to permit the state to show that accused pleaded guilty to carrying a pistol at the time. *Comegys v. State*, 62 App. 231, 137 S. W. 349.

Where, on a trial for assault to murder, a witness stated that he had not heard prosecutor make any threat against accused, and that accused had tried to induce him to testify to the contrary, the testimony of a third person that she had seen accused waving a knife over the head of witness was inadmissible. *Day v. State*, 62 App. 448, 138 S. W. 130.

In a prosecution for assault alleged to have occurred shortly after the person assaulted called the defendant into his store and asked defendant to pay a debt, where the testimony was conflicting as to who commenced the difficulty, and the person assaulted testified that he was not excited or mad when he called defendant into the store, testimony that about 30 minutes preceding the difficulty the person assaulted had committed an assault on a drummer, and that within 15 minutes preceding such assault he had committed another assault on another drummer, was admissible. *Jackson v. State*, 62 App. 541, 138 S. W. 411.

In a prosecution for assault with intent to murder, it was improper for the court to permit the state to introduce a subpoena which had been issued for another, whom, it was claimed, defendant had assaulted at another and different time, and to state that such person could not be produced, because she was sick in bed, and to state that defendant was then under arrest for committing such other assault. *Lacoume v. State* (Cr. App.) 143 S. W. 626.

59. — Evidence relevant to offense and also showing another offense.—It is no objection to a conviction for embezzlement, that the evidence also proves that in committing the embezzlement the defendant also committed theft of the property. *Golden v. State*, 22 App. 1, 2 S. W. 531.

Where, in a trial for assault to murder, it appeared that the injured person's brother lost a hat, and, being informed that accused's brother had it, the injured person went to him to recover it, when the difficulty arose, testimony that the morning after the difficulty witness found a hat identified as the one taken near the place of the difficulty was not objectionable as tending to connect accused with theft of the hat, a different offense than that for which he was being tried, where there was nothing in the record to show that he was accused of theft. *Wilson v. State*, 63 App. 81, 138 S. W. 409.

Where, after defendant had been acquitted of burglary, he was indicted for theft, committed in the same transaction, any evidence which tended to show that he was guilty of the theft was admissible, though it also showed that he was guilty of the burglary notwithstanding the acquittal. *Roman v. State*, 64 App. 515, 142 S. W. 912.

Where, on a trial for burglary, the prosecutor testified that accused, when caught in the house burglarized, stated that he had just walked 30 miles, and was tired and hungry, and wanted something to eat, the testimony of witnesses that accused was in a store in the town in the forenoon of the day of the burglary in the afternoon, and that the witnesses fixed the date by stating that the store was burglarized that night, was admissible to prove the falsity of accused's statements and to fix the time of his presence in the store, and, where the court so limited the testimony, accused could not complain on the ground that the testimony proved that he was guilty of burglarizing the store. *Snodgrass v. State* (Cr. App.) 148 S. W. 1095.

In a prosecution for robbery by threats with a pistol, evidence that a certain witness had been convicted of carrying a pistol shortly after the date of the alleged robbery, offered to impeach him and to connect him with the offense charged against accused, was inadmissible for any purpose; accused having testified that he got the pistol used by him from such witness. *Coker v. State*, 71 App. 504, 160 S. W. 366.

In a prosecution for procuring a female to leave the state for the purpose of prostitution, the fact that evidence that defendant obtained money from her father to enable him to search for her, though he already knew where she was, also tended to show that the defendant was guilty of swindling does not affect its admissibility. *Hewitt v. State* (Cr. App.) 167 S. W. 40.

Any competent evidence which tends to defeat the defense urged is admissible, though it tends to show accused's commission of another offense, and especially is this true where accused's intent is an element of the crime, and the evidence offered tends to show that his intent was criminal. *Bedford v. State* (Cr. App.) 170 S. W. 727.

Where, in a prosecution for homicide alleged to have been committed in pursuance of a conspiracy to organize in Texas an armed force to invade Mexico, accused voluntarily became a witness in his own behalf, evidence obtained from him in developing the homicide case was not objectionable because it also showed a conspiracy to violate the neutrality laws of the United States. *Serrato v. State* (Cr. App.) 171 S. W. 1133.

60. — Other offenses to prove identity.—Evidence of a theft from another person on the same day was not admissible on the question of identity. *Nunn v. State*, 60 App. 86, 131 S. W. 320.

61. — Acts showing knowledge.—For the purpose of establishing the defendant's knowledge of the vicious character of a forged paper he is charged with

uttering, it is competent for the state to show his contemporaneous connection with other papers of like vicious character. *Heard v. State*, 9 App. 1.

Where the defendant was charged with receiving a yearling, knowing that the same was stolen, it was held competent for the state to prove that at the same time he received said yearling, he also received, in connection with another person, and from the same thief, two other cattle, and that in connection with said other person, he sold the three cattle at the same time to a third person. Said testimony was admissible as tending to show defendant's knowledge and intent with respect to the animal named in the indictment. *Harwell v. State*, 22 App. 251, 2 S. W. 606.

Where, on a trial for aggravated assault on an officer, the information alleged that accused knew at the time that the prosecutor was an officer and had been so informed at the time, evidence that a few months before the assault prosecutor had arrested accused was admissible to show whether accused knew, or had reason to know, that prosecutor was an officer at the time of the assault. *Ligon v. State*, 59 App. 274, 128 S. W. 620.

In a prosecution for passing a forged check or draft, evidence of the passing, or attempted passing, by accused of other forged checks or drafts at about the same time is admissible as showing guilty knowledge, etc. *Dugat v. State*, 72 App. 39, 160 S. W. 376.

On the trial of the owner of a house for knowingly permitting it to be kept as a house of prostitution where prostitutes were permitted to resort or reside for the purpose of plying their vocation, evidence that a number of other houses owned by accused were occupied by women who were running houses of prostitution, that the occupants of the house in question and the other houses had been arrested charged with being prostitutes, and that accused went on their bonds was competent to show accused's knowledge of the character of the occupants and their vocation. *Golden v. State*, 72 App. 19, 160 S. W. 957.

62. — Acts showing intent, malice, or motive.—It may be shown for the purpose of proving a criminal intent, that the accused had, about the time of the uttering charged, uttered or attempted to utter, other forged instruments of the same description, or that he had such others, or instruments for manufacturing them, in his possession. *Ham v. State*, 4 App. 645; *Francis v. State*, 7 App. 501; *Heard v. State*, 9 App. 1; *Burks v. State*, 24 App. 326, 332, 6 S. W. 300, 303; *Thornley v. State*, 36 App. 118, 34 S. W. 264, 35 S. W. 981, 61 Am. St. Rep. 836.

Other swindles perpetrated by the defendant, about the same time and in the same manner as the one for which he is on trial, are admissible to establish the identity and the fraudulent intent of the defendant. *Davison v. State*, 12 App. 214; *Hutcherson v. State* (Cr. App.) 35 S. W. 375.

On trial for embezzlement evidence of similar offenses committed by defendant is admissible to show intent. *Gallardo v. State* (Cr. App.) 40 S. W. 974; *Lawshe v. State*, 57 App. 32, 121 S. W. 865.

A back link in the chain of transfer may also be proved a forgery, but the court should caution the jury that it is only to show intent. *Francis v. State*, 7 App. 501.

Where defendant confessed to having forged the instrument, and at the same time confessed having embezzled other funds, the latter confession was admissible to show intent. *Strang v. State*, 32 App. 219, 22 S. W. 680.

Evidence of other sales of liquors is not admissible to show intent. *Dane v. State*, 36 App. 84, 35 S. W. 661.

On trial for slander it is competent to prove, as showing the animus of defendant, that subsequent to the slander as alleged he used the same or similar language to other parties in regard to the prosecutrix. *Whitehead v. State*, 39 App. 89, 45 S. W. 10.

If party is charged with theft it is permissible to prove contemporaneous theft committed by him to show intent in committing theft for which he is being tried; otherwise it is never admissible except when state relies upon system. *Denton v. State*, 42 App. 427, 60 S. W. 672.

In a prosecution for uxoricide, in which defendant claimed that the killing was accidental, testimony by a justice that accused was prosecuted in his court for fighting his wife, and that he had paid fines for fighting her and assaulting her with a pistol, was admissible to prove motive and intent in killing her. *Wilson v. State*, 60 App. 1, 129 S. W. 613.

In a prosecution for theft of five goats claimed by accused to have been taken under a mistake of fact, there was no error in admitting testimony of a witness whose goats were claimed to have been stolen and who bought the five in question, as to having seen accused in possession of nine other goats, this being proper in view of the mark of the witness thereon to show, as affecting the good faith or truthfulness of the claim of accused, possession of other goats belonging to the witness which had likewise been marked and branded by accused. *Petty v. State*, 59 App. 586, 129 S. W. 615.

In connection with testimony tending to show that defendant's motive in killing deceased was to protect himself against testimony of deceased in cases in which defendant, and in some of which deceased, was charged with theft, the indictments in those cases are admissible. *Chandler v. State*, 60 App. 329, 131 S. W. 598.

In order that other collateral forgeries may be considered by the jury in proving defendant's fraudulent intent with reference to the forgery in question, they must believe from the evidence beyond a reasonable doubt that such other transactions were in fact forgeries; a scintilla of evidence indicating such fact not being sufficient. *Pelton v. State*, 60 App. 412, 132 S. W. 480, Ann. Cas. 1912C, 86.

In a prosecution of a railroad station agent for forging a receipt for money alleged to have been paid for services rendered at his station on behalf of the railroad company, other receipts relating to precisely similar transactions, and also claimed to have been forged, and to have been executed about the same time as the forgery in question, were admissible to show defendant's intent. *Pelton v. State*, 60 App. 412, 132 S. W. 480, Ann. Cas. 1912C, 86.

Where, in a prosecution for an attempt to bribe an officer by saying to him that,

if he would summon certain persons as jurymen, defendant "would make it all right—he would not lose anything," it was essential to establish defendant's intent in using such words, evidence that defendant approached others in the same manner was admissible. *Carden v. State*, 62 App. 545, 138 S. W. 598.

In a prosecution for the theft of certain mules, by means of falsely representing to prosecutor that defendant desired to hire him to haul certain furniture with the mules, evidence that accused had previously stolen other animals in substantially the same manner was admissible to show system and intent. *Melton v. State*, 63 App. 362, 140 S. W. 230.

One accused of stealing cattle having claimed to have taken them under a claim of ownership, the state could show that, several days before the taking, he and his brother took other cattle from the owners without their consent. *Ellington v. State*, 63 App. 420, 140 S. W. 1102.

In a prosecution for forgery of a check, other checks were properly admitted in evidence to show intent, where they were shown to have been made within a few days of the check charged to have been forged and their effect was properly limited by the court's charge. *Howard v. State* (Cr. App.) 143 S. W. 178.

In a prosecution for homicide claimed to have been committed by putting arsenic in coffee, evidence that persons other than deceased had been rendered ill by drinking the coffee should be considered only in passing upon the intention of accused. *Bailey v. State* (Cr. App.) 144 S. W. 996.

Upon a trial as principal in a murder, the details of extraneous crimes or supposed extraneous or collateral offenses are not admissible even to show motive. *Menefee v. State* (Cr. App.) 149 S. W. 138.

While details of another crime are generally not admissible in a criminal prosecution, where in a prosecution for burglary the accused contended that he entered the house in question with an innocent intent, and after entering he conceived the idea of theft and stole the property, evidence of the entry of another house on the same day was admissible on the question of intent. *Overstreet v. State* (Cr. App.) 150 S. W. 899.

On a trial for burglary, committed by shooting into a house with intent to injure a woman who had previously lived with and been "kept" by accused, but who had left him, evidence of prior assaults on such woman by accused was admissible to show motive. *Gradington v. State* (Cr. App.) 155 S. W. 210.

In a trial for being an accomplice in the larceny of a horse, evidence that accused assisted the same principal in selling another stolen horse, and received part of the proceeds, was admissible to show his motive and intent in assisting in the sale of the particular horse. *Bailey v. State* (Cr. App.) 155 S. W. 536.

In a prosecution for the theft of cattle, evidence that, when defendants were making up a herd to drive for shipment, they saw strange cattle and turned them from one part of the pasture into another so as to prevent their mingling with the herd was inadmissible upon the theory that defendant, the son of the owner of the herd, had stolen them, in the absence of anything showing contemporaneous and fraudulent acts in connection with those cattle. *McKnight v. State*, 70 App. 470, 156 S. W. 1188.

In a prosecution for swindling in executing a deed of trust as security for a loan by prosecuting witness on land which accused had already conveyed to P., evidence that, after P.'s deed had been delivered and recorded, he told accused that he had learned that the title was bad, and demanded back his money, whereupon accused agreed to give him another lot in lieu thereof, which he never did, was not objectionable, as showing another offense, but was admissible as bearing on accused's intent. *Bedford v. State* (Cr. App.) 170 S. W. 727.

In a prosecution for homicide in the furtherance of a conspiracy to illegally organize in Texas an armed company to invade Mexico, evidence that accused, a member of the company, secured arms when he went to the camp, carried them all the time while he was in the company, and was armed when arrested, was admissible as showing that, while in the United States, the company was prepared to resist all those who might interfere with their purpose, together with the nature of the resistance that would be offered. *Gonzales v. State* (Cr. App.) 171 S. W. 1146.

Where, in a prosecution for unlawfully pulling down a fence, defendant contended that he acted under a belief that he owned the land, evidence that he not only tore down the fence around the land claimed by him but also around another tract was properly admitted; testimony of extraneous crimes being admissible to show intent. *Johns v. State* (Cr. App.) 174 S. W. 610.

In a prosecution for robbery, where accused's identity was a sharply contested issue, it appeared that accused had been a chauffeur in the employ of the father of the complaining witness, and that the wife of such witness had become enamored of accused. Accused and his companions, after robbing one of their victims, placed him in a swing on a porch, and then lay in wait for the complaining witness, who was murderously assaulted. Held that, as it appeared that mere robbery was not the only motive of the wrongdoers towards the complaining witness, it was proper to allow the witness' wife, who testified in accused's favor, to be cross-examined as to whether accused did not tempt her to put powders in her husband's coffee. *Collins v. State* (Cr. App.) 178 S. W. 345.

63. — Acts of series showing system or habit.—In a prosecution under Pen. Code, art. 589, for unlawfully engaging in the business of selling intoxicants in prohibition territory, evidence of other sales than those alleged in the indictment is admissible to show that accused was engaged in the occupation of selling intoxicants. *Wilson v. State* (Cr. App.) 154 S. W. 571; *Watkins v. State* (Cr. App.) 58 S. W. 109; *Stephens v. State*, 63 App. 382, 139 S. W. 1141; *Clay v. State* (Cr. App.) 144 S. W. 280; *Byrd v. State* (Cr. App.) 151 S. W. 1068; *Misher v. State* (Cr. App.) 152 S. W. 1049; *Brown v. State*, 72 App. 33, 160 S. W. 374; *Cole v. State*, 72 App. 282, 162 S. W. 880.

Where independent criminal acts are connected as part of a systematic plan, evidence of any of them is legitimate to show guilty knowledge, and the time when

the collateral inculpatory acts occurred is immaterial, provided they are close enough together to indicate that they are a part of a system. *Mason v. State*, 31 App. 306, 20 S. W. 564; *Hendricks v. State*, 26 App. 176, 9 S. W. 555, 557, 8 Am. St. Rep. 463; *King v. State*, 27 App. 567, 11 S. W. 525, 11 Am. St. Rep. 203; *English v. State*, 30 App. 470, 18 S. W. 94; *Fielder v. State*, 40 App. 188, 49 S. W. 376; *Hennesy v. State*, 23 App. 340, 5 S. W. 215; *Nixon v. State*, 31 App. 205, 20 S. W. 364; *Dawson v. State*, 32 App. 535, 25 S. W. 21, 40 Am. St. Rep. 791.

Prosecutor testified that he gave defendant money and directed him to procure whisky, and that defendant brought prosecutor whisky, on which proof the state claimed defendant guilty of violating the local option law. Held, that evidence that on a later occasion defendant asked witness if he was going to order whisky, stating that he intended to order some himself, whereupon witness told him he wanted to go in on the order, gave defendant 70 cents, and that thereafter witness and defendant divided a quart of whisky, did not in itself show a violation of the local option law, and was therefore inadmissible to illustrate the transaction under investigation, as showing defendant's system or habit. *Vannort v. State*, 57 App. 615, 124 S. W. 654.

In a prosecution for the theft of articles belonging to a certain person, evidence of defendants having stolen other articles from another person on the same day was inadmissible to prove system, where the thefts were not committed in a peculiar manner. *Nunn v. State*, 60 App. 86, 131 S. W. 320.

In a prosecution for a violation of the local option law, where the evidence showed that the prosecuting witness went into accused's place of business and asked for "cheese," that accused took the money and went into another room, and that, when he returned the witness went into such other room and picked up a bottle of whisky wrapped in tissue paper, evidence of similar transactions between witness and accused was admissible for the purpose of showing a system. *Columbo v. State* (Cr. App.) 145 S. W. 910.

In a trial for swindling by leading the defrauded persons to believe that accused had discovered minerals in a shaft which accused "salted," the jury were properly permitted to consider similar transactions between accused and the defrauded persons concerning another shaft which he sunk, and in which he falsely represented that minerals had been found, to establish the identity in developing the res gestæ of the particular offense, and as tending to circumstantially show his guilt. *Trimble v. State* (Cr. App.) 145 S. W. 929.

In a prosecution for unlawfully keeping a house in which intoxicating liquors were sold and kept without a license, evidence as to sales of liquor made by defendant at the place in question, at times other than those stated in the information, is admissible. *Milam v. State* (Cr. App.) 146 S. W. 185.

On a trial of a person accused of pursuing the business or occupation of selling intoxicating liquors, evidence of a sale about three years before the trial is competent as showing the character of the business in which he was engaged where there was evidence tending to show that such business had been continuous from that time. *Dickson v. State* (Cr. App.) 146 S. W. 914.

Where a number of specific sales are alleged in an indictment for carrying on the business of selling liquor contrary to law, evidence of other sales is admissible. *Creech v. State*, 70 App. 229, 158 S. W. 277.

While ordinarily, in a prosecution for violating the prohibitory law, evidence of other sales is not admissible, yet where the evidence as to the making of the sale is conflicting, testimony that accused made sales to other persons is admissible solely on the ground that it tends to show that he made the sale in question. *Nobles v. State*, 71 App. 121, 158 S. W. 1133.

On a trial for receiving and concealing stolen goods, the testimony of the thief, from whom it was claimed accused received the goods, that for four years he had a contract with accused and his father and brother by which he and his associates were to steal goods and accused and his father and brother were to buy them from him, and his testimony as to the details of transactions committed in consummation of such agreement, was properly admitted to establish a system of like crimes committed by accused, where the witness testified that the particular goods involved were stolen pursuant to an agreement between him and accused, and the court properly charged as to the purpose for which such evidence could be considered, and that accused could not be convicted for other offenses and required corroboration of the witness' testimony. *Kaufman v. State*, 70 App. 438, 159 S. W. 58.

In a prosecution for pursuing the business of selling intoxicating liquors in prohibition territory, evidence of other sales should be confined to the time subsequent to the publication of the order made by the judge after the prohibition election, where such time is within three years prior to the indictment. *Rhodes v. State* (Cr. App.) 172 S. W. 252.

In a prosecution for the burglary of a box car, where defendant claimed that certain clothing found at his house had been bought by him from a certain named person, evidence that such clothing had been taken by defendant and another on another and previous breaking of a car was admissible to rebut the defense, though evidence of other independent crimes is ordinarily inadmissible. *Nowlin v. State* (Cr. App.) 175 S. W. 1070.

64. — **Continuing offenses.**—Under a charge of keeping a disorderly house during a stated period, evidence is admissible to show its maintenance on any particular day or days within that time, to fix the character of the house and of the keeper, though one conviction only can be had. *Novy v. State*, 62 App. 492, 138 S. W. 139.

In a prosecution for pursuing the occupation of peddling patent and other medicines without a license, evidence of individual sales was admissible as tending to prove that he was so engaged. *Shed v. State*, 70 App. 10, 155 S. W. 524.

In a prosecution for pursuing the business of selling intoxicants in prohibition

territory, evidence was admissible that accused was the person from whom a witness bought whisky. *Hightower v. State*, 73 App. 258, 165 S. W. 184.

65. Best and secondary evidence.—*Vernon's Sayles' Civ. Stat.* 1914, art. 3687.

It is an established rule that the best existing evidence within the reach of the prosecution must be produced, or its absence satisfactorily accounted for, before a resort to secondary or inferior evidence will be sanctioned. *Porter v. State*, 1 App. 394; *Butler v. State*, 3 App. 48; *Scott v. State*, Id. 103; *Barnell v. State*, 5 App. 113; *Somerville v. State*, 6 App. 433; *Smith v. State*, 10 App. 420; *Powell v. State*, 11 App. 401; *Hunter v. State*, 13 App. 16; *Baldwin v. State*, 15 App. 275; *Wyers v. State*, 13 App. 57; *Smith v. State*, Id. 507; *White v. State*, 14 App. 449; *Woodson v. State*, 24 App. 153, 6 S. W. 184; *Scott v. State*, 19 App. 325.

The rule requiring the production of the best evidence attainable, does not demand the greatest amount of proof procurable, but only excludes such evidence as implies that better evidence exists, and is withheld or not accounted for. This rule has been adopted for the prevention of fraud, and to secure a pure administration of justice. *Porter v. State*, 1 App. 394; *Rodriguez v. State*, 5 App. 256.

In a prosecution for assault, if others besides the assaulted person witnessed the transaction, their testimony is primary, and is competent without producing the testimony of the assaulted party or accounting for its nonproduction. *Eckert v. State*, 9 App. 105.

The written law of another state cannot be proved by parol in Texas. *Patterson v. State*, 17 App. 102.

Circumstantial evidence to prove an issuable fact, cannot be resorted to when it appears that primary evidence of such fact existed, and its nonproduction is not accounted for. *Williams v. State*, 19 App. 276; *Scott v. State*, Id. 325; *Miller v. State*, 18 App. 34; *Baldwin v. State*, 15 App. 275; *Dixon v. State*, Id. 480; *Clayton v. State*, Id. 348; *Hunter v. State*, 13 App. 16; *Wyers v. State*, Id. 57; *Gabriel-sky v. State*, Id. 428; *Stewart v. State*, 9 App. 321; *Porter v. State*, 1 App. 394.

An unrecorded brand on an animal can only be used as any other flesh mark in connection with other testimony to identify the animal. It is no proof of ownership, and the flesh mark can be proved by parol as any other flesh mark. *Welch v. State*, 42 App. 338, 60 S. W. 46.

Where, in a prosecution for embezzlement, it was claimed that defendant had executed or forged a note to deceive his client, and that the note had been lost, it was no objection that its contents were sought to be proved by a copy of a copy of the note; there being no degrees of secondary evidence. *Hamer v. State*, 60 App. 341, 131 S. W. 813.

Where there is written evidence of a fact in issue, the writing, whether required by law or not is, as a general rule, the best evidence. *Green v. State*, 60 App. 530, 132 S. W. 806.

As a person knows as a fact whether he has placed money in a bank, he may on a prosecution for swindling, over objection that the books of the bank are the best evidence, testify that he had money in a bank on which he gave checks to defendant. *Robinson v. State*, 63 App. 212, 139 S. W. 978.

Evidence as to identity of cost marks and stock numbers on clothing in store and clothing claimed to have been stolen therefrom was not objectionable as secondary evidence. *Williams v. State*, 63 App. 507, 140 S. W. 447.

Where, in a prosecution for assault to murder, the shooting was claimed to have taken place in October, 1910, while the trial did not occur until March, 1912, evidence that the clothing worn by prosecutor, when shot, was not powder-burned, was admissible on an issue as to how close he was to defendant when shot; it not being necessary to produce the clothes as the best evidence. *Simms v. State* (Cr. App.) 148 S. W. 786.

In a trial for burglary of a railroad car, testimony by a local agent of the railroad company that the car was in his custody was not objectionable as not being the best evidence, even if the company had written rules bearing on the custody of cars. *Kelly v. State* (Cr. App.) 149 S. W. 110.

A marriage may be proved by the evidence of one who testified that she knew the parties, was present at their marriage, and knew that they were married. *Stevens v. State* (Cr. App.) 150 S. W. 944.

There are no degrees of superiority in secondary evidence. *Harris v. State*, 71 App. 463, 160 S. W. 447.

Where accused, at the time she killed deceased, was registered under an assumed name at a hotel, and, after the killing, the name under which she had registered was erased, the fact that she consented to the admission of secondary evidence to prove the fact that she so registered did not deprive the state of the right to introduce the register to prove the fact, though there was no evidence connecting her with the erasure. *Latham v. State* (Cr. App.) 172 S. W. 797.

66. — Judicial proceedings and records.—Witnesses may testify as to testimony given by accused on a former trial; the prosecuting attorney's testimony not being inadmissible on the theory that the official stenographer's record was the best evidence. *Patterson v. State*, 63 App. 297, 140 S. W. 1128; *Harris v. State*, 71 App. 463, 160 S. W. 447.

In a prosecution for resisting the execution of process, the process, the execution of which is alleged to have been resisted, is the best evidence of its existence, etc., and should be produced or its absence accounted for. *Porter v. State*, 1 App. 394; *Scott v. State*, 3 App. 103.

The best evidence that a change of venue was duly ordered in a case, is the order of judgment of the court, and until it be shown that such primary evidence cannot be produced, parol evidence cannot be resorted to. *Valentine v. State*, 6 App. 439.

When it is proposed to contradict the testimony of a witness by his testimony taken before an examining court, if his testimony on a former trial was reduced

to writing, the writing must be produced, or its nonproduction accounted for, before oral testimony will be allowed as to it. *Hunter v. State*, 8 App. 75.

In proving a conviction for felony, in order to disqualify a witness, the best evidence is the judgment of conviction, and proof that the records of the court, in which the conviction is claimed to have been had, had been partially searched without finding the judgment, and that those records are voluminous, will not authorize resort to secondary evidence to prove the conviction. *Perez v. State*, 10 App. 327. See, also, notes under art. 788.

The pendency of litigation between parties in a justice's court, may be proved by the justice of the peace, without producing or accounting for the nonproduction of his records. *Kennedy v. State*, 19 App. 618. Or by a constable who served process in the litigation. *Thompson v. State*, 19 App. 593.

The best evidence of the contents of a court record is a certified copy of such record under the hand and seal of the clerk and it is error to permit parol evidence thereof. *Stewart v. State*, 35 App. 174, 32 S. W. 766, 60 Am. St. Rep. 35.

Defendant's statement made on examining trial may be shown by parol. *Stevens v. State* (Cr. App.) 38 S. W. 167.

A question to a witness as to how many times he had been indicted was not objectionable on the ground that the bills of indictment were the best evidence of that fact. *Keeton v. State*, 59 App. 316, 128 S. W. 404.

In a prosecution for perjury committed in a civil case, it was proper to allow the official stenographer to read in evidence a transcript of his original stenographic notes of the testimony of accused, where it was shown that he was experienced and capable, and that the original notes had been lost. *Barber v. State*, 64 App. 96, 142 S. W. 577.

The testimony of accused in another court could be proved by any person who heard it; it not being necessary to produce the stenographer's report. *Mooney v. State*, 73 App. 121, 164 S. W. 838.

That a person charged with keeping a disorderly house had pleaded guilty to a charge of vagrancy should have been proved by the court papers and dockets. *Bowman v. State*, 73 App. 194, 164 S. W. 846.

The record in the case is the best evidence of an acquittal; but, since there was no record where the grand jury failed to indict, oral testimony was admissible to prove that fact. *Ghent v. State* (Cr. App.) 176 S. W. 566.

67. — **Official records.**—If a locality has been incorporated by special legislative enactment, the primary evidence of the fact is the original charter or incorporative act, or an authenticated copy thereof. But when it is shown that such primary evidence is lost, or cannot be had, secondary evidence is competent. If the corporation was created under the general incorporation statute (Vernon's Sayles' Civ. St. 1914, title 22, c. 14) a certified copy of the entry of that fact, upon the record of the commissioner's court, would be primary evidence. *Temple v. State*, 15 App. 304, 49 Am. Rep. 200.

The best evidence is the charter of pardon. The next best evidence of it is a certified copy or exemplification of it, from the office of the secretary of state, and parol evidence can not be used to prove it, in the absence of a showing satisfactorily accounting for the nonproduction of both the original and such copy. *Hunnicut v. State*, 18 App. 498, 51 Am. Rep. 330. See, also, notes under art. 788.

On an issue of the age of prosecutrix in a prosecution for rape, a witness for the state was allowed, over objections, to testify as to the contents of a school census report which he claimed was made in 1897 or 1898, the original of which was in the hands of the prosecuting attorney, and had been left in another county. The state contended that she was born in 1894, and the defendants asserted the year 1892, and if born in 1894 a census report of 1897 or 1898, would not have included her as a school child. Held, that the admission of the secondary evidence of the report was error under the circumstances. *Shoemaker v. State*, 58 App. 518, 126 S. W. 887.

In prosecution for keeping a disorderly house, the county clerk could testify from the stubs of receipts issued for liquor licenses, which were his only records of licenses issued, that he issued no license to accused, over an objection that his books were the best evidence of that fact. *Wilson v. State*, 61 App. 628, 136 S. W. 447.

In a prosecution for the sale of intoxicating liquor in a certain justice precinct, the record of the precinct introduced by the state did not disclose what surveys were within the bounds of the precinct. Held, that oral evidence that the place where the liquor was sold was within the limits of the precinct was admissible, although the boundaries of a justice precinct are matters of record, and the record is the best evidence thereof. *Moreno v. State*, 64 App. 660, 143 S. W. 156, Ann. Cas. 1914C, 863.

On a trial for receiving and concealing stolen cattle, a witness was properly permitted to testify as to the ownership of certain cattle, though the brand on such cattle was recorded, where he did not testify that he knew the cattle by the brand, but independent of the brand. *Mooney v. State*, 73 App. 121, 164 S. W. 838.

68. — **Corporate and other unofficial records.**—In a prosecution for burglary of a freight car, entries made by clerks at the time of examining for missing packages is admissible as original evidence. *Dawson v. State*, 32 App. 535, 25 S. W. 21, 40 Am. St. Rep. 791.

A witness, over defendant's objection, was allowed to testify to the contents of the books of a certain railroad company in East St. Louis, Ill., showing that certain cattle alleged to have been stolen had been shipped over said road; held, there is no rule of law or principle of evidence under which such testimony is admissible. *Wade v. State*, 37 App. 401, 35 S. W. 663.

In a prosecution under Pen. Code, art. 589, making it a felony to pursue the occupation of selling intoxicating liquor in local option territory, testimony by an

express agent as to express shipments of intoxicating liquors to the accused, being from his personal knowledge and not from receipts or records in his office, was admissible, not being secondary evidence. *Clark v. State*, 61 App. 597, 136 S. W. 260.

In a prosecution for gaming, the fact that defendant was president of a club that had control of the gaming place could be shown by oral testimony. *Polk v. State* (Cr. App.) 152 S. W. 907.

In a prosecution for bringing stolen property into the state testimony of one of the company alleged to have been the original owner that it was a corporation was admissible as a fact that the witness personally knew. *Zweig v. State* (Cr. App.) 171 S. W. 747.

69. — **Family records.**—Where, in a prosecution for rape, prosecutrix's mother testified as to prosecutrix's age, evidence of a Bible entry of the date of prosecutrix's birth made by the mother was inadmissible as secondary. *Rowan v. State*, 57 App. 625, 124 S. W. 668, 136 Am. St. Rep. 1005.

Where the father of prosecutrix testified in a prosecution for rape as to her age, an entry of the date of her birth made by him in an ordinary ledger is inadmissible as secondary evidence. *Haywood v. State*, 61 App. 92, 134 S. W. 218.

70. — **Conveyances, contracts and other instruments.**—An exception to the general rule is that the official character of an alleged public officer need not be proved by the commission or other written evidence of the officer's right to act as such except on an issue directly between the officer and the public. Such official character may be proved ordinarily by parol testimony. *Woodson v. State*, 24 App. 153, 6 S. W. 184; *Shely v. State*, 35 App. 190, 32 S. W. 901.

In a prosecution for arson, where the theory of the prosecution was that accused burned a building to enable the owner to obtain the insurance thereon, parol evidence that the building was insured is inadmissible, where it is not shown that the insurance policies themselves could not by diligence have been obtained. *Moore v. State* (Cr. App.) 146 S. W. 183; *Brown v. State* (Cr. App.) 150 S. W. 436.

Where the contest was whether or not an alleged stolen animal corresponded with a description in a bill of sale, the witnesses agreeing as to the description in the bill of sale, it was held that the production of the bill of sale, as primary evidence, was not essential. *Hailes v. State*, 10 App. 490.

In a theft case an agreement in writing, signed by state's counsel and the defendant, and an attesting witness, that an attached affidavit of the owner of the alleged stolen property proving his want of consent to the taking of the property, might be read in evidence on the trial, was presented by the state, and said affidavit was thereunder offered and admitted in evidence, the defendant objecting thereto on the ground that it was not proved that he executed the agreement. Held, that the objection should have been sustained, as it devolved upon the state, before reading in evidence the said affidavit, to prove the execution by the defendant of said agreement by the attesting witness if accessible, and if not, by secondary evidence. *Allen v. State*, 16 App. 237.

In proving the execution of a written instrument, if there be a subscribing witness thereto, the testimony of such witness is primary, and must be produced, or its nonproduction satisfactorily accounted for, before the execution of the instrument can be proved by secondary evidence. *Morrow v. State*, 22 App. 239, 2 S. W. 624; *Sample v. Irwin*, 45 Tex. 567; *White v. Holliday*, 20 Tex. 679; *Craddock v. Merrill*, 2 Tex. 494. When the subscribing witness denies, or does not recollect, the execution of the instrument, its execution may be proved by other evidence. Art. 813.

When an original written instrument can be produced, secondary evidence of its contents is inadmissible. *Huff v. State*, 23 App. 291, 4 S. W. 890; *Chester v. State*, 23 App. 577, 5 S. W. 125; *Miller v. State*, 18 App. 34; *Wyers v. State*, 13 App. 57; *Sager v. State*, 11 App. 110.

On a trial for burglary of freight cars, waybills made out by the clerks in their special departments and sent with the cars were held to be admissible as original evidence. *Dawson v. State*, 32 App. 535, 25 S. W. 21, 40 Am. St. Rep. 791.

In prosecution for theft of a cow a sale by the original owner of cattle bearing the brand of the cow may be proved by parole. *Ledbetter v. State*, 35 App. 195, 32 S. W. 903.

Certified copies of papers executed by defendant are inadmissible when defendant had not been notified to produce the originals. *Golin v. State*, 37 App. 90, 38 S. W. 794.

It is error to permit witness to testify from memorandum which he had made of contents of bill of lading of contents of burglarized car. The bill of lading itself is best evidence. *Johnson v. State*, 42 App. 440, 60 S. W. 667.

Without showing that invoices of goods received were lost or inaccessible, it was error in a burglary case to permit witnesses to refer thereto to show, in connection with tickets of sales, the loss of goods claimed to have been stolen. *Johnson v. State*, 57 App. 488, 123 S. W. 1105.

In a prosecution for keeping a disorderly house and permitting to be kept a disorderly house in which liquors were sold without a license, testimony that witness had seen an internal revenue license in the possession of defendant's partner, who told witness that it was a license and was issued to defendant and himself, was inadmissible, being secondary evidence. *Campbell v. State*, 59 App. 496, 129 S. W. 139.

Testimony that witness went to the place alleged to have been kept as a disorderly house and asked a boy there if they had an internal revenue license, and the boy brought him one, was properly excluded as secondary evidence; the license itself not being produced in evidence. *Campbell v. State*, 59 App. 496, 129 S. W. 139.

In a prosecution for forgery of a check, a question whether witness authorized defendant to sign his name to the check was not objectionable on the ground that

the check was the best evidence, since the production of the check would not have shown on its face that the witness did not sign it, and therefore could not have been the best evidence of that fact. *Douglass v. State* (Cr. App.) 148 S. W. 1089.

Whether or not a license to sell intoxicants had been issued to accused is a fact which may be proved otherwise than by the exhibition of the license, this being particularly true in view of Pen. Code, art. 629, requiring the posting of licenses in some prominent place in the building in which the sale of intoxicants is carried on. *Woods v. State* (Cr. App.) 151 S. W. 296.

A witness can testify that he saw a revenue license posted in any given place, and it cannot be objected to as not being the best evidence. *Johnson v. State* (Cr. App.) 153 S. W. 875.

In a prosecution for arson, it was proper to permit the prosecution to prove by oral evidence that the state owned the barn which was burned, without requiring the production of the deed. *Anderson v. State*, 71 App. 27, 159 S. W. 847.

The best evidence that the house burned was insured is the policy, and, it not appearing that it could not be produced, testimony that it was insured is objectionable as secondary. *Crowder v. State* (Cr. App.) 177 S. W. 501.

71. — **Books of account.**—Evidence of entries in books is not admissible until it has been shown that the books have been lost or destroyed or cannot be procured. *Jacobs v. State*, 42 App. 353, 59 S. W. 1113.

In a prosecution for forgery of a receipt of cotton seed, delivered to a gin, testimony of the person whose name was signed to the receipt, and another witness from the gin, that no receipt was issued by them or any one else on the day on which the alleged instrument was shown to have been issued, is not inadmissible because the books of the gin were the best evidence, since such testimony did not embrace any fact that would be shown by the books. *Chappell v. State*, 58 App. 401, 126 S. W. 274.

A witness may not be permitted to testify what his books show without a personal knowledge of the transaction. *Davis v. State*, 61 App. 611, 136 S. W. 45.

Where the state, on a trial for the larceny from a gin of a bale of cotton, sought to identify the bale by the ginner's weight of the bale, the books of the ginner, properly kept, and not the tickets delivered by him to the owner, were the best evidence. *Davis v. State* (Cr. App.) 152 S. W. 1094.

72. — **Letters and telegrams.**—In the absence of proof of the loss or destruction of a letter, its contents cannot be proved by a witness who had read the letter. *Campbell v. State*, 62 App. 561, 138 S. W. 607; *Adams v. State*, 34 App. 470, 31 S. W. 372; *Harris v. State*, 72 App. 117, 161 S. W. 125.

Before contents of letter can be admitted, letter must be produced or defendant notified to produce it. *James v. State*, 40 App. 195, 49 S. W. 401; *Johnson v. State*, 27 App. 163, 11 S. W. 106.

In the case of a telegram sent, the original message sent, or the transcript delivered by the company to the receiver, are the best evidence of the contents thereof. *Conner v. State*, 23 App. 378, 5 S. W. 189; *Chester v. State*, 23 App. 577, 5 S. W. 125.

Where a wife testifies, in a prosecution for abandonment, that a letter was stolen from her, it should be shown that the letter is either in her husband's possession or beyond the jurisdiction of the court, and then she may testify as to its contents. *Qualls v. State*, 71 App. 67, 158 S. W. 539.

In a prosecution for assault, where defendant, a postmaster, claimed to have had a telegram from the Postmaster General to relieve the complaining witness, the court, if defendant had such telegram, should have required its production and introduction in evidence, instead of admitting defendant's oral testimony to the fact and as to its contents. *Robey v. State*, 73 App. 9, 163 S. W. 713.

73. — **Admissibility of secondary evidence.**—In order to authorize secondary evidence of a lost written instrument, it must be shown that the instrument once existed, and that a bona fide and diligent search has been made for it in the place where it should most likely be found, if the nature of the case admits of such proof. What degree of diligence in the search for the lost instrument must be shown, depends upon the peculiar circumstances of the particular case; but, as a general rule, the party is required to show that he has, in good faith, exhausted, in a reasonable degree, all the sources of information and means of discovery, which the nature of the case would naturally suggest, and which were accessible. *Haun v. State*, 13 App. 383, 44 Am. Rep. 706. If the proof establishes a reasonable presumption of the loss of the instrument, it is sufficient to admit secondary evidence of it. *Cheatham v. Riddle*, 8 Tex. 162.

Secondary evidence of records may be received to establish their existence and contents, when the primary evidence has been lost or destroyed, under the same rules governing in the case of other writings. The statute providing for the substitution of lost records and papers is merely cumulative, and does not abolish or affect other modes of establishing the same. *McMillan v. State*, 18 App. 375; *Stallworth v. State*, Id. 378.

Photographic copies of the original writings are admissible in evidence when the original is in the possession of defendant and upon notice to produce them he has refused to do so. *Grooms v. State*, 40 App. 329, 50 S. W. 370.

Where a document is in the possession or power of the adverse party, secondary evidence can not be introduced of its contents, unless the adverse party, or his attorney, has been given regular notice to produce the original. There are three instances in which such notice is not required: (1) Where the document to be proved and that to be produced are duplicate originals. (2) Where the document to be produced is itself a notice. (3) Where, from the nature of the action, the defendant has notice that he is charged with the possession of the document. Notice to produce is not required where the document belongs to a third party, and the defendant has fraudulently obtained possession of it. An allegation in an indictment for forgery, that the alleged forged order was in the possession of the

defendant, or was lost or destroyed, and that a copy of the same could not be had, etc., being made for another purpose, was held to be not a notice to produce the order. *Rollins v. State*, 21 App. 148, 17 S. W. 466.

On trial for fraudulently obtaining a check, a copy of the check is admissible after proof that the original is lost. *Williams v. State*, 34 App. 523, 31 S. W. 405. The fact that a written offer to bribe had been introduced in evidence does not preclude the State from proving subsequent parole offers. *Rath v. State*, 35 App. 142, 33 S. W. 229.

A note and mortgage were court papers in custody of the district clerk, and were by him turned over to defendant's counsel for inspection, but they were never returned to the clerk. The district attorney testified that he had asked defendant's attorneys for such papers, and that they each said they did not know where the papers were; held, that secondary evidence of their contents was admissible. *Garrett v. State*, 37 App. 198, 38 S. W. 1017, 39 S. W. 108.

Where a conveyance by accused was admissible in evidence, and the deed had been traced to his possession, the state, upon accused's failure to produce the deed in evidence after notice, could show the conveyance by other evidence. *Skidmore v. State*, 57 App. 497, 123 S. W. 1129, 26 L. R. A. (N. S.) 466.

A witness at defendant's trial for burglary testified that defendant spoke English at a habeas corpus proceeding. Held, that as the state could not, in the first instance, use the testimony of defendant himself to show that fact, the evidence was admissible. *Kelly v. State*, 61 App. 663, 136 S. W. 58.

Where the note to which signatures were forged was destroyed and only parts thereof containing the signatures were preserved, parole testimony of the contents of the note, with a blank note as the form of the note to which the signatures were forged, was admissible. *Slatter v. State*, 61 App. 243, 136 S. W. 770.

In a prosecution for swindling, where defendant's title to lands was in issue, and the state served notice upon defendant to produce his title papers, the record copies of these title papers are admissible in evidence. *Brown v. State*, 62 App. 592, 138 S. W. 604.

While the defendant could not be required to produce papers in evidence, yet where he had in his possession papers material to the prosecution, and, after being served with the proper subpoena duces tecum, failed to produce the same, secondary evidence of their contents was admissible. *Gould v. State* (Cr. App.) 146 S. W. 172.

Where, in a prosecution for attempting to pass a forged check, the assistant county attorney testified that when he drew the indictment he carefully compared the check copied therein with the original, which was then in his possession, and that it was afterwards lost and could not be found after diligent search, parole evidence of its contents was admissible. *Wesley v. State* (Cr. App.) 150 S. W. 197.

In a prosecution for wife murder, secondary evidence of a note, which the evidence indicated to have been written by accused at the time of the homicide, addressed to his sister, and stating that he was going to kill his wife and himself, which note was destroyed by the husband of the sister after being read by himself and another to keep his wife from getting possession of it, was admissible. *Asbeck v. State*, 70 App. 225, 156 S. W. 925.

In prosecution for aggravated assault, where the fact of complaining witness' resignation from a post office position was in issue, and he himself testified, without objection, that he had sent his resignation to Washington at a certain date, a carbon copy of such resignation was admissible. *Robey v. State*, 73 App. 9, 163 S. W. 713.

Where the forged note was in possession of accused, who admitted that it was correctly set out in the indictment, oral proof of its contents is properly received, where accused, who was given time to get the note, which he said was at his home when the state served notice upon him to produce it, or that secondary evidence would be introduced, testified that he was unable to find the note, and did not request additional time for search. *Meredith v. State*, 73 App. 147, 164 S. W. 1019.

Where the alleged forged instrument and other papers material on a trial for passing a forged instrument had disappeared after being placed on the judge's desk, on the trial in a former prosecution, it was not error, in connection with evidence of their loss and the search made therefor, to admit evidence that accused had been tried in such other case. *Bunker v. State* (Cr. App.) 177 S. W. 108.

On a trial for passing a forged instrument, where accused objected to secondary evidence of the contents of the forged instrument and other material papers which had been lost, it became incumbent upon the state to show their location when last seen, the search, made therefor, and the loss thereof, and when this was shown, secondary evidence of their contents became admissible. *Bunker v. State* (Cr. App.) 177 S. W. 108.

When a written instrument is shown to be in the possession of a defendant and he declines to produce it upon notice, secondary evidence of its contents is admissible. *Bunker v. State* (Cr. App.) 177 S. W. 108.

74. — **Confessions.**—Where the evidence shows the loss of a confession and that it can not be found on a diligent search, oral proof of its contents is admissible. *Roberts v. State* (Cr. App.) 150 S. W. 627.

75. **Demonstrative evidence.**—In a prosecution for arson, against the defendant jointly indicted with one Lovelace, it was shown that Lovelace had shot an officer who was attempting to arrest him upon said charge, and the officer thereupon shot and killed Lovelace. It was held error to permit the state to introduce in evidence the blood-stained warrant for the arrest of Lovelace, which the officer had when the shooting occurred. *Chumley v. State*, 20 App. 547.

The party assaulted may be allowed to show to the jury his side where accused struck him and from which portions of the broken rib had been extracted. *Parish v. State*, 32 App. 583, 25 S. W. 420.

In a prosecution for assault with intent to murder, it was error to allow the assaulted party to exhibit his scars to the jury, where his wounds had been operated

upon and so changed and enlarged that the scars could throw no light upon the issue in the case as to the manner in which they were inflicted. *Graves v. State*, 58 App. 42, 124 S. W. 676.

In a prosecution for homicide, articles of clothing and a flour sack, shown by the evidence to belong to accused, and shells from a gun shown to correspond in size to the gunshot wounds on deceased's body, and to shells purchased by accused, which articles were found near the place of the homicide, were admissible in evidence. *Canon v. State*, 59 App. 398, 128 S. W. 141.

In a statutory rape case, where there was no objection to the prosecutrix having her baby with her on the stand, it was proper for the jurors to consider the resemblance between the baby and the defendant. *Vaughn v. State*, 62 App. 24, 136 S. W. 476.

In a trial for cattle theft, it was not error to receive testimony that witness who examined the brand on the cow made a memorandum of the mark and brand on it, nor to receive in evidence the memorandum, where the testimony conformed to the memorandum and accused cross-examined. *Taylor v. State*, 62 App. 611, 138 S. W. 615.

Where an undated letter written by a daughter of accused to decedent, her husband, was properly received in evidence, the envelope in which the letter was sent was admissible to show the date of the letter, and that it was addressed to decedent's brother, though intended for and delivered to decedent, and though there were blood stains thereon. *Roberts v. State* (Cr. App.) 168 S. W. 100.

In a prosecution for murder, evidence that the dial of a watch found on the body of the deceased, and which had stopped, indicated a certain time was admissible. *Satterwhite v. State* (Cr. App.) 177 S. W. 959.

76. — **Matters explanatory of offense.**—Where there is a conflict in the testimony, in a prosecution for homicide as to the position of the deceased when a shot was fired, the clothing worn by him was properly admitted in evidence to show which theory was correct. *Reagan v. State*, 70 App. 498, 157 S. W. 483; *King v. State*, 13 App. 277; *Hart v. State*, 15 App. 202, 49 Am. Rep. 188; *Johnson v. State* (Cr. App.) 167 S. W. 733.

Where hair was found upon a gun defendant should have been allowed to exhibit it to the jury. *House v. State*, 42 App. 125, 57 S. W. 825.

Where on a trial for homicide accused undertook to show that a third person fired the shot that struck a witness, and the evidence of the direction of the shot was not clear, the introduction in evidence of the clothing worn by the witness at the time was relevant. *Milo v. State*, 59 App. 196, 127 S. W. 1025.

Where the evidence in a prosecution for a homicide committed with an ax was wholly circumstantial, overalls worn by accused at the time of the homicide which had blood spots on them, and marks as if some one had tried to rub the blood off, were admissible in evidence to connect accused with the killing. *Williams v. State*, 60 App. 453, 132 S. W. 345.

The bloody and bullet-pierced clothing worn by deceased should not be admitted in evidence, where it could not serve to throw light on any question; the facts being clearly shown independent thereof. *Williams v. State*, 61 App. 356, 136 S. W. 771.

In a homicide case in which the issue was self-defense, and the state claimed that accused fired the first shot with his rifle, the clothing which decedent wore when he was shot, the bloody parts of which were cut away, leaving only that part through which the shots passed, were admitted in evidence to discredit accused's testimony as to the position of decedent's gun when he was shot, and to show that accused shot first. Accused claimed that decedent shot first, shooting from his right shoulder. Held, that the evidence was admissible for the purpose offered. *Jackson v. State*, 63 App. 351, 139 S. W. 1156.

In a trial for assault with intent to murder, bloody clothing worn by accused at the time of the difficulty was properly admitted in evidence to corroborate the state's testimony as to the number of times accused struck, as against objection that there was no controversy as to the number of wounds inflicted, nor the direction that any of them had taken, and that the evidence tended to prejudice the jury against accused. *York v. State*, 64 App. 153, 142 S. W. 8.

Where, in a prosecution for assault with intent to murder, the nature of the wounds and their location was not disputed, the clothing worn by complainant at the time of the assault was inadmissible solely to show the amount of blood lost and the condition of the clothing after the assault. *Lacoume v. State* (Cr. App.) 143 S. W. 626.

Where accused claimed that deceased when killed was standing up with a stick in his hand, and the state claimed that accused was pulling him by the wrist, and there was evidence that after the killing deceased's shirt sleeve was pulled down over his hand, if the shirt would aid the jury in determining the attitude of the parties or the location of the wound it was admissible in evidence. *Welch v. State* (Cr. App.) 147 S. W. 572.

Where, on a trial for assault with intent to murder, the evidence was conflicting on the questions of whether accused had fired both barrels of his gun at prosecutor, and as to the number of punctures seen after the shooting on the person of prosecutor, and as to whether the prosecutor was sitting at the time he was shot, the action of the court in admitting in evidence the clothing worn by prosecutor at the time of the shooting, but since washed and free from blood, to show the number of shot holes in the clothing, and in permitting the prosecutor to exhibit to the jury the part of his body where the shots struck him, the shot holes having healed, was not erroneous. *Anderson v. State* (Cr. App.) 148 S. W. 802.

In a prosecution for homicide, where it appeared that the first search of accused's trunk showed that there were undershirts in it, an undershirt with human blood on it, found at a search after accused's imprisonment, was admissible in evidence. *Harris v. State* (Cr. App.) 148 S. W. 1074.

The garments worn by decedent at the time of the homicide are admissible in evidence if they illustrate any issue. *Peters v. State* (Cr. App.) 155 S. W. 212.

It was error, in a prosecution for aggravated assault, to permit the injured person's bloody coat to be admitted in evidence; the fact of the cutting and the location of the wound not being disputed. *Corley v. State* (Cr. App.) 155 S. W. 227.

Though the blood had been washed from decedent's clothes, where they were otherwise in the condition in which they were removed from him, and accused questioned the nature and length of the wounds, the clothing was admissible in evidence, and the state could also show that the cut in the top and under shirts corresponded. *Ward v. State*, 70 App. 393, 159 S. W. 272.

In a rape prosecution, prosecutrix's shoe with a portion of the heel off, a piece of the heel found at the place of the alleged rape, prosecutrix's bent hat pin, and accused's tie pin also found there, as well as prosecutrix's torn waist and other clothes, were all properly admitted in evidence on the question of force. *Sharp v. State*, 71 App. 633, 160 S. W. 369.

In a prosecution for killing a woman whom he had outraged, where the evidence was wholly circumstantial, the clothing worn by deceased when killed, with the cuts therein into which a knife, which defendant admitted was his, was found to fit, was admissible as an aid to the jury in determining whether or not her wounds were made with such knife. *Durfee v. State*, 73 App. 165, 165 S. W. 180.

Where, on a trial for homicide, accused testified that deceased made a threatening gesture and sprang towards him, while it was the state's claim that accused shot deceased when deceased's back was turned towards him, the point of entrance of the shot was an issue in the case, and deceased's clothing was admissible in evidence to shed light on this issue. *Carter v. State* (Cr. App.) 170 S. W. 739.

Where deceased was killed in furtherance of a conspiracy to form in Texas an armed force to invade Mexico in order to prevent discovery of the conspiracy, accused, on trial for the homicide, was not prejudiced by the introduction of a hat worn by deceased at the time of the killing, a rope with which his hands were tied behind him, and a belt with which a load was fastened on him after he had been captured by the conspirators and while he was forced to pack material for them until he was killed. *Martinez v. State* (Cr. App.) 171 S. W. 1153.

A door panel upon which blood prints were discovered, which was sawed out and preserved, and which was identified at the trial, was properly admitted in a trial for homicide. *Brown v. State* (Cr. App.) 174 S. W. 360.

77. — **Articles used in committing offense.**—A bullet was sufficiently identified to make it admissible in evidence against accused, where the constable producing it testified that he obtained it from the undertaker and the undertaker identified it as one which he removed from decedent's body and delivered to the constable. *Butler v. State*, 61 App. 133, 134 S. W. 230.

On a trial for assault to murder it appeared that accused shot at an officer who attempted to arrest him, that there was a pistol in the wagon in which he was riding, and that cartridges which fitted the pistol were found on his person, and that the bullets had been split and something put in them. Held that it was proper to exhibit such cartridges to the jury. *Ricen v. State*, 63 App. 89, 138 S. W. 403.

Where accused shot decedent through the head with a 44-caliber bullet, a battered bullet found at the place of the killing long afterwards, and evidence that it weighed only 154 grains, while a 44-caliber bullet weighed 207 grains, were inadmissible, in the absence of evidence that a bullet in passing through a person's head would lose that much in weight. *Hickey v. State*, 62 App. 568, 138 S. W. 1051.

In a murder trial, it was not error to admit in evidence a pistol found in decedent's barn, where accused admitted that he gave the pistol to a certain person at the barn, and it was sufficiently identified as the pistol used by accused. *Sanchez v. State* (Cr. App.) 149 S. W. 124.

There was no error in admitting in evidence a bullet found on the ground where the killing occurred, where the position of deceased at the time he was shot was a contested issue, on which the finding of the bullet would have a strong bearing, and the bullet was shown to be of a size that fitted defendant's pistol, and was in a pool of blood that must have come from deceased. *Kelly v. State* (Cr. App.) 151 S. W. 304.

Where one of the self-confessed robbers who claimed accused was not with them testified that accused's pistol was used, a pistol discovered under accused's pillow and identified as the one used was properly received in evidence. *Collins v. State* (Cr. App.) 178 S. W. 345.

In a prosecution for robbery, where one of the men was struck with a bar of iron, found in a nearby yard, and duly preserved, the bar was properly received in evidence, having been identified as an ice pick made by accused. *Collins v. State* (Cr. App.) 178 S. W. 345.

78. — **Articles subject of offense.**—In a trial for theft of a buggy axle, buggy spring, ax, and ax handle, where accused claimed that the articles in his possession did not conform to the description given by a witness, and the state had exhibited part of the property to the jury, accused was entitled to have the witness bring the axle and springs into court for comparison by the jury with those described. *Wilson v. State*, 58 App. 104, 124 S. W. 943.

Where accused was shown to be the man who executed an alleged forged check signed by him, to which he signed an assumed name, the check was properly admitted in evidence. *Carter v. State*, 61 App. 609, 136 S. W. 47.

In a prosecution for uttering a forged note, the fact that an indorsement of a third person was placed on the back thereof long after the making and passing of the note did not affect its admissibility in evidence. *Jordan v. State* (Cr. App.) 143 S. W. 623.

Evidence in a larceny case that a sack of money was taken from the defendant at the time of his arrest, and that such property tallied with that stolen, was properly admitted together with the sack and money. *Coleman v. State* (Cr. App.) 150 S. W. 1177.

79. — **Writings admitted for comparison.**—Where one accused of theft, claiming that he bought the property from another, showed a bill of sale purporting to be signed by such other person whose whereabouts were unknown, a road petition bearing the known signature of such other person was properly admitted to show that the signature on the bill of sale was not genuine. *Taylor v. State*, 62 App. 611, 138 S. W. 615.

In a prosecution for forgery of a check, a bond admitted to have been signed by accused was admissible on the issue of forgery of the check. *Frye v. State* (Cr. App.) 146 S. W. 199.

Letters which one, stating that she knows defendant's handwriting, testifies were written by him to her are admissible as standards of comparison with the writing in the check charged to have been forged by him. *Whorton v. State* (Cr. App.) 152 S. W. 1082.

80. **Admissions by accused.**—A statement made by a witness on trial of one charged with homicide may be used as original evidence on the trial of the witness for the same offense. *Harris v. State*, 37 App. 441, 36 S. W. 88.

Statements made by one co-defendant in the presence and hearing of the other are admissible and binding upon both. *Lamater v. State*, 38 App. 249, 42 S. W. 304.

Statement of defendant to different parties before the commission of the offense of burglary that he was engaged in stealing and taking property to another place and disposing of it, is admissible. *Touchston v. State* (Cr. App.) 53 S. W. 855.

In a prosecution for permitting to be kept on premises owned by defendant a disorderly house, testimony that appellant paid taxes on certain fixtures contained in the building in which the business was charged to have been conducted was admissible. *Sweeney v. State*, 59 App. 370, 128 S. W. 390.

On a trial for rape by means of a sham marriage, a letter written by accused while he and prosecutrix were living together as husband and wife, wherein he admitted their marriage, was admissible as an admission by accused that he and prosecutrix were married, and as consistent with the existence of the marriage state. *Wilkerson v. State*, 60 App. 38, 131 S. W. 1108, Ann. Cas. 1912C, 126.

In a prosecution for practicing as a physician without a license in violation of Pen. Code, art. 756, evidence that defendant made representations to the father of the prosecuting witness and to others that he could cure certain diseases, and had cured them, was admissible. *Germany v. State*, 62 App. 276, 137 S. W. 130, Ann. Cas. 1913C, 477.

Accused's admission that he is a married man and has a living wife is admissible against him in a prosecution for bigamy. *Bryan v. State*, 63 App. 200, 139 S. W. 981.

In a prosecution for perjury committed by accused, who was defendant in a civil action, his verified answer in that action was admissible, for a party's pleadings are always evidence against him. *Barber v. State*, 64 App. 96, 142 S. W. 577.

In a trial for murder, where the age of the accused was in issue, testimony of accused as to his age, voluntarily given in a previous case, was admissible as original testimony. *Ex parte Martinez* (Cr. App.) 145 S. W. 959.

It is not error to receive in evidence accused's motion for a continuance on the ground of the absence of witnesses who would testify to facts therein alleged as against the objection that the motion is irrelevant and immaterial to any issue in the case. *Crawford v. State* (Cr. App.) 147 S. W. 229.

On a trial for adultery, accused's statement to a witness that the woman was married and her husband living was competent. *Brown v. State* (Cr. App.) 154 S. W. 568.

In a prosecution for theft of the proceeds of another's check, evidence was not admissible that, some time after accused had cashed the check and appropriated the money, the prosecuting witness was in accused's office, and accused was trying to sell him a life policy, and that witness replied that he did not have the money, and accused offered to let him have the policy on what he owed him. *Nesbitt v. State* (Cr. App.) 155 S. W. 203.

In a prosecution for pursuing the business of selling intoxicating liquor in local option territory, the admission in evidence of an agreement between the county attorney in another case against defendant for violation of the local option law that the case should be continued, and that defendant would not engage in selling liquors in the county while local option was in force there, that the sheriff could at any time examine his place of business, and that the finding of intoxicating liquors thereon should be held to be a plea of guilty, that a conviction thereafter should be held to be a plea of guilty, and that while defendant kept the agreement that cause should be suspended, was prejudicial error, since it had no bearing upon the case on trial. *Todd v. State* (Cr. App.) 155 S. W. 220.

In a prosecution for theft, where accused was arrested after the stolen goods had been found in his house, evidence that his hands then were greasy, as if from the belting, and that he washed them, was not inadmissible because he was under arrest when he did so. *McGee v. State* (Cr. App.) 155 S. W. 246.

Where, on a trial for embezzlement of a check or the money thereof, the evidence showed that a check was delivered to accused for use in payment of a balance due the state on land, and that he deposited the check and received the money thereon, a letter written by accused prior to the finding of the indictment, reciting that a receipt from the land office would be found inclosed, while no receipt was inclosed, was admissible. *Irby v. State* (Cr. App.) 155 S. W. 543.

In a prosecution for homicide testimony that the witness had a talk with defendant after the killing about a note upon which the witness was defendant's surety, and that the defendant told the witness that he had made settlement with his father, the payee, who had promised him that if he would kill deceased he would give accused the note and pay all the costs in the case, is all admissible;

the entire conversation being necessary to explain the reason accused gave for killing deceased. *Bogue v. State* (Cr. App.) 155 S. W. 943.

In a prosecution for perjury based on false testimony by accused that he was an infant when he incurred the liability sued on, evidence of conversations between accused and the road overseers, in which accused admitted that he had reached his majority before the time such debt was incurred, is admissible. *Poulter v. State*, 70 App. 197, 157 S. W. 166.

Where a witness in a homicide case testified that defendant stated to him, in response to an inquiry as to where he got the blood on his shirt, that he had killed deceased, and that the witness then gave him another shirt, which he put on at the house, the testimony of M., who was present at the house but had not heard such statement, that defendant stated, in response to her inquiry concerning the blood, that he had something to tell her, but he would not tell her because she was of bad repute, was properly admitted. *Womack v. State* (Cr. App.) 170 S. W. 139.

Where a number of persons, charged with playing cards and with going into and remaining in a place where cards were being played, were tried together, an admission of one of the defendants, subsequent to the commission of the offense and in the absence of the other defendants, was properly admitted, as it was admissible against him. *Sloan v. State* (Cr. App.) 170 S. W. 156.

Defendant's statement, shortly after the shooting, made to one who asked why he had killed the girl, that "in Mexico they are killing lots of them—why can't I kill one?" was an admission that he killed the girl, and admissible to prove that fact. *Guerrero v. State* (Cr. App.) 171 S. W. 731.

On a trial for testifying falsely before the grand jury, an agreement between defendant's attorney and the district attorney, made in defendant's presence and acquiesced in by him, that a witness who desired to go home would testify that defendant was sworn before the grand jury by the foreman, was properly admitted in evidence, especially where it was proven by other testimony that defendant was sworn and testified before the grand jury. *Sutton v. State* (Cr. App.) 172 S. W. 791.

In a prosecution for permitting a disorderly house to be kept on defendant's premises, evidence that defendant had admitted that he was the owner of the building was admissible, since title to the property was not being adjudicated. *Davidson v. State* (Cr. App.) 173 S. W. 1037.

81. — Acquiescence or silence.—Silence of a person under arrest is not a confession of the truth of statements made in his presence. *Gardner v. State* (Cr. App.) 34 S. W. 945.

Defendant's friend told him he was very wrong, and he made no reply; held, admissible. *Kelly v. State*, 37 App. 641, 40 S. W. 803.

Before declarations of third parties made in presence of defendant are admissible it must be shown that he heard them and that he understood himself to be accused and the circumstances must be such as to require from him a response. *Ex parte Kennedy* (Cr. App.) 57 S. W. 648.

In a prosecution for keeping a disorderly house, evidence that certain persons called upon accused, and notified her to stop running a disorderly house, or permitting women to resort there for purposes of prostitution, was admissible as implying, in substance, a direct charge against accused of violation of law, without denial on her part. *Finn v. State*, 60 App. 521, 132 S. W. 805.

Accused's silence when charged with an offense is sometimes admissible in evidence, so that in a prosecution for keeping a bawdyhouse, testimony of an officer was admissible that he notified accused that she was keeping a disorderly house and must vacate; it not appearing that accused made any reply to the charge. *Gordon v. State*, 60 App. 570, 133 S. W. 255.

Statement of defendant's boy, heard and not replied to by defendant, made to an officer who had come to defendant's place to search for whisky, "If you will let him off this time, I will see he does not sell any more whisky. Mamma and I both have tried to get him not to do that"—is admissible on a prosecution for illegal sale. *Carver v. State* (Cr. App.) 150 S. W. 914.

In prosecution for the burglary of a box car, testimony of officers who searched defendant's house that they found in his trunk two shirts identified as those stolen, that he denied that they were his, and claimed that they had been bought by his brother-in-law, that his sister in his presence denied that, and stated that defendant had brought them there, and that defendant made no reply to her statement, was admissible. *Nowlin v. State* (Cr. App.) 175 S. W. 1070.

82. — Negotiations for compromise.—The defense proposed to prove that the defendant, at his first meeting, with the owner of the property after the alleged theft, proposed to pay him for the same. It was also proposed to prove the conversation which then ensued between the defendant and the owner, which conversation is not set out in the bill of exceptions. Held, that the said proof was properly excluded as being no part of the *res gestæ* nor relevant to any issue in the case and as not coming within the rule which qualifies as evidence a defendant's explanation of his possession of stolen property. *Brooks v. State*, 26 App. 184, 9 S. W. 562. Also, see *Cortez v. State*, 24 App. 511, 6 S. W. 546; *Guest v. State*, 24 App. 530, 7 S. W. 242; *Boyd v. State*, 24 App. 570, 6 S. W. 853, 5 Am. St. Rep. 908; *Lopez v. State*, 28 App. 243, 13 S. W. 219; *Bayne v. State*, 29 App. 132, 15 S. W. 404; *Williamson v. State*, 30 App. 330, 17 S. W. 722; *Andrews v. State*, 25 App. 339, 8 S. W. 328; *Matlock v. State*, 25 App. 654, 8 S. W. 818, 8 Am. St. Rep. 451.

In a prosecution for selling intoxicating liquor without a license, evidence that accused visited the prosecutor, and asked how much the fine would be, and requested him to make the offense "Sunday selling," so that the penalty would be lighter, is not inadmissible as an attempt to compromise the case. *Loicano v. State*, 72 App. 518, 163 S. W. 64.

83. — **Effect of admission.**—Accused on trial for rape of a girl under 15 years of age may admit that prosecutrix was not 15 years of age at the time of the alleged offense, and be bound by such admission. *Kearse v. State* (Cr. App.) 151 S. W. 827.

84. **Declarations in general.**—What one says when he starts on a journey—his purpose and object—is generally admissible. *Young v. State*, 37 App. 458, 36 S. W. 272.

Acts and declarations of a party immediately before death as to mental or physical condition are admissible when pertinent to the issue and it is immaterial that they refer to past events and conditions. *Morrison v. State*, 40 App. 491, 51 S. W. 358.

There is no rule which authorizes proof to be made of what a party may have said about threats communicated to him. *Harrell v. State*, 39 App. 204, 45 S. W. 581.

85. **Declarations by accused.**—It was held competent for the state to prove declarations made by the defendant on the same night, but before the burglary was committed, and also to prove certain interviews on the day after the burglary between defendant and the person in whose possession certain property burglariously taken from the house was found on the day after the burglary. *Langford v. State*, 17 App. 445.

In a prosecution for perjury, statements and declarations made by the defendant as a witness before the grand jury, contradictory to his evidence upon which the perjury was assigned, were held to be relevant and admissible. *Littlefield v. State*, 24 App. 167, 5 S. W. 650.

Declarations made by accused long prior to a homicide held not competent as evidence. *Ex parte Albitz*, 29 App. 128, 15 S. W. 173.

The state was permitted to prove that on the afternoon before the homicide defendant who was then drunk told witness that he had a good pistol and was going to use it. Held irrelevant. *Richardson v. State*, 32 App. 524, 24 S. W. 894.

What defendant said in regard to the property after the theft is inadmissible. *Blount v. State* (Cr. App.) 28 S. W. 950.

Where, on a trial for murder, the evidence showed that, when the body of decedent was examined, no pistol was found on him except one in his coat pocket located away from his bosom, evidence that accused, relying on self-defense, shortly after the homicide stated to third persons that he killed decedent, and at the time he shot him decedent was putting his hand in his shirt bosom, was admissible as original testimony, though it incidentally contradicted accused's testimony. *Harrelson v. State*, 60 App. 534, 132 S. W. 733.

There being, up to the time defendant took the stand, no positive proof that he killed deceased, the state, which was endeavoring to make a case against him by circumstantial evidence, was entitled to introduce a conversation between defendant and his employer on the morning after the killing, immediately after which defendant, though he had promised to work that day, fled the country, in which the employer said that he had been told that defendant was squabbling with some of the boys on the road the day before, and told defendant he must not squabble with the other men, and defendant answered that he had not had any trouble. *La Grone v. State*, 61 App. 170, 135 S. W. 121.

Any statement of a defendant relative to the offense for which he is being tried is admissible. *Germany v. State*, 62 App. 276, 137 S. W. 130, Ann. Cas. 1913C, 477.

The state's theory being that defendant killed decedent because he was desirous of marrying decedent's wife, and wanted to get decedent out of the way, testimony as to what defendant said when he heard the court had refused a divorce to decedent's wife was admissible, though both defendant and the person to whom the remark was addressed denied that he had used the language. *Drake v. State* (Cr. App.) 143 S. W. 1157.

In a prosecution for theft as bailee of certain mules which accused desired to purchase, there was evidence tending to show that accused represented to two others that the owner would retain a mortgage on the mules, but desired additional security, and that the others signed a note as sureties upon such representation, but afterwards learned that the owner had not reserved a lien; that the sureties requested accused to secure them by a mortgage on the mules, which accused refused to do, and the sureties claimed that the next day they agreed to take the mules and pay the note. Held that, while evidence was admissible as to representations by accused that the original owner would take a mortgage on the mules if the sureties would sign the note as such, other misrepresentations by accused as to a farm, etc., were inadmissible. *Thompson v. State* (Cr. App.) 150 S. W. 181.

In a prosecution for unlawfully disposing of mortgaged property, evidence that accused told the person to whom he sold the mortgaged property, a mare, at the time he purchased it, that "there was not a dollar against her," was admissible. *Coley v. State* (Cr. App.) 150 S. W. 739.

In a prosecution for seduction, evidence by the prosecutrix that certain letters were written by defendant to her rendered them admissible. *Bishop v. State* (Cr. App.) 151 S. W. 821.

Where the state claimed that defendant killed decedent, that he might marry decedent's wife, evidence of what defendant said when he heard the court had refused decedent's wife a divorce was admissible. *Drake v. State* (Cr. App.) 153 S. W. 848.

In a prosecution for robbery, testimony for the state that on the night of the alleged robbery defendant asked witness to come and go with them, given in detailing a conversation with defendant in regard to the robbery, was admissible. *Perry v. State* (Cr. App.) 155 S. W. 263.

An objection to the admission in evidence of letters written by accused or by a third person prior to the filing of an indictment for embezzlement on the ground

that the letters were written after the date alleged in the indictment as the date of the offense was properly overruled. *Irby v. State* (Cr. App.) 155 S. W. 543.

In a prosecution for homicide, where there was a question as to whether or not deceased was a trespasser on accused's premises, testimony that the witness heard accused authorize deceased to pick cotton on his premises is admissible. *Bogue v. State* (Cr. App.) 155 S. W. 943.

Where defendant was accused of falsely testifying on the trial of her husband that he did not strike her at a given time, evidence as to declarations by accused upon being examined by a physician, and of her statements to the county judge, tending to show that she was beaten, is admissible to show that she falsely testified. *Smith v. State*, 70 App. 68, 156 S. W. 645.

Where two witnesses testified that they passed decedent's home on the morning of the day on which the killing was alleged to have occurred, and saw defendant and decedent, and heard loud talking and swearing between them, and one of the witnesses testified that he heard defendant say to decedent, "I guess, by G—, you are about the last G— man that had it," and recognized his voice, the evidence was admissible, though the other witness was not familiar with defendant's voice, and could not testify that he was the one who made the statement testified to. *Belcher v. State*, 71 App. 646, 161 S. W. 459.

In a prosecution for the theft of cattle, a conversation between witness, his wife, and defendant in regard to the projected theft of the animal was admissible. *Elmore v. State*, 72 App. 226, 162 S. W. 517.

Acts and declarations of accused prior to the event which tend to show his mental status are admissible in a prosecution for an offense of which intent is a material element. *Brown v. State* (Cr. App.) 169 S. W. 437.

86. — **Self-serving declarations.**—The acts and declarations of the defendant are not admissible evidence in his behalf, unless they form a part of the *res gestæ*, or are a part of a confession introduced in evidence against him, or come within the rule that when a part of an act or declaration has been given in evidence, the whole is admissible. *Pharr v. State*, 10 App. 485; *Allen v. State*, 17 App. 637; *Jones v. State*, 22 App. 324, 3 S. W. 230; *Bradberry v. State*, 22 App. 273, 2 S. W. 592; *Webb v. State*, 8 App. 115; *Robinson v. State*, 3 App. 256; *Harmon v. State*, Id. 52; *Davis v. State*, Id. 92; *Ray v. State*, 4 App. 450; *Powell v. State*, 5 App. 234; *McCulloch v. State*, 35 App. 268, 33 S. W. 230; *Hughes v. State* (Cr. App.) 149 S. W. 173.

Defendant's declarations to witnesses who saw cuts on his neck and through his coat that they were inflicted during the rencounter with the assaulted party, and before the assault was committed by defendant in the same rencounter were self-serving declarations and not *res gestæ*. *Good v. State*, 18 App. 39.

A statement made by defendant shortly after the homicide that he was as "innocent as a babe unborn;" held, properly excluded. *Lancaster v. State*, 36 App. 16, 35 S. W. 165.

What defendant said a few weeks before the homicide, about getting away from deceased, is inadmissible; it is a self-serving declaration. *Red v. State*, 39 App. 414, 46 S. W. 408.

In a murder case, where it appeared that the difficulty arose over decedent's undue intimacy with accused's sister, testimony of a witness that accused, a few hours before the homicide, came to him and wanted him to have decedent arrested for intimacy with accused's sister and for threats to kill accused, was properly excluded as a self-serving declaration of accused. *Hart v. State*, 57 App. 21, 121 S. W. 508.

In a prosecution for theft of a mower accused, claiming that he bought it from others, and paid part down, and subsequently paid the remaining 25 cents, could show that he paid the money for the mower, and evidence that he stated at the time what he paid the 25 cents for, was admissible. *White v. State*, 57 App. 196, 122 S. W. 391.

In a prosecution for murder, testimony of a witness as to statements made to him by the defendant a day or two before the killing that deceased had threatened his life, and that he intended to move away, are inadmissible, as self-serving. *Hardeman v. State*, 61 App. 111, 133 S. W. 1056.

In a prosecution for a homicide occurring about 10 o'clock at night, evidence that accused, when informed of decedent's death about 10 hours afterwards at the place where he was staying a mile and a half from the place of the killing, said that he was sorry that decedent was dead, and that he, accused, did not intend to kill him, was not *res gestæ*, but hearsay and self-serving, and was properly excluded. *Cornwell v. State*, 61 App. 122, 134 S. W. 221, Ann. Cas. 1913B, 71.

In a prosecution for violating the prohibitory law by selling liquor to S., evidence that after all the parties had separated defendant asked witness to go back and overtake the purchasers and make them give back his whisky was not admissible as *res gestæ*, but was an inadmissible self-serving declaration. *Wright v. State*, 63 App. 429, 140 S. W. 1105.

Where it appeared that accused killed decedent with a shotgun, testimony by him as to what he said to different persons, before any trouble with decedent, about going hunting was inadmissible; he having been permitted to show his preparations to go hunting. *Kinney v. State* (Cr. App.) 144 S. W. 257.

Accused, who relies on insanity produced by epilepsy, may not show that four years before he entered into a contract of employment, and that the contract stated that he was subject to epileptic fits, and that if he was injured by reason of having a fit he would not hold his employer liable, because the contract is but a self-serving declaration that he was subject to epileptic fits. *Maxey v. State* (Cr. App.) 145 S. W. 952.

In a trial for burglarizing a railroad car, it was not error to exclude testimony for accused that after he was arrested he asked why he was in custody, and, on

being told that it was for stealing a sack of flour, he asked, "What in the ——— would I want with a sack of flour?" *Kelly v. State* (Cr. App.) 149 S. W. 110.

Where, in a prosecution for homicide, two persons were indicted as principals, the conversation or conduct of either of them on the morning after the commission of the crime was inadmissible on behalf of either, where they were of a self-serving character. *Maxwell v. State* (Cr. App.) 149 S. W. 171.

In support of the contention of defendant, charged with selling liquor to H., that he did not sell it to him, but that H. grabbed it and ran, throwing down some money, the fact that defendant gave the money to a third person to return to H. may not be shown; this having been not before, but after, he was charged with making the sale. *Carver v. State* (Cr. App.) 150 S. W. 914.

Evidence that accused when arrested denied assaulting prosecutrix, and said he had not seen her that morning when the alleged assault occurred, was properly excluded, being purely self-serving. *Duckett v. State* (Cr. App.) 150 S. W. 1177.

In a trial for burglary accompanied by assault and followed by an attempt on the part of defendant to commit suicide, evidence that defendant told his foster mother the day after the crime was committed that he did not know how the wound on his throat was inflicted and that it was not self-inflicted, being hearsay and self-serving, was properly excluded. *Shaffer v. State* (Cr. App.) 151 S. W. 1061.

In a trial for burglary accompanied by an assault upon a young woman, evidence that defendant told his foster mother of his engagement to the young woman soon after it occurred and some months before the offense, was properly excluded, being hearsay. *Shaffer v. State* (Cr. App.) 151 S. W. 1061.

Where accused did not testify, declarations made to third persons could not be proved because self-serving. *Byrd v. State* (Cr. App.) 151 S. W. 1068.

In a prosecution for killing a wild deer out of season claimed by the state to have been done in 1910 or 1911, within the period of limitations, evidence that accused had told another that some time in the summer of 1909 he had killed a deer at the place charged was properly excluded as hearsay, and self-serving. *Baker v. State* (Cr. App.) 153 S. W. 631.

In a homicide case, self-serving statements made by defendant six months before the killing were inadmissible. *Salmon v. State* (Cr. App.) 154 S. W. 1023.

Accused on trial for horse theft may not show that long after the commission of the alleged offense he brought a civil action for the recovery of the alleged stolen property. *Haley v. State*, 70 App. 30, 156 S. W. 637.

Statement of defendant, a short time before the killing, to a third person that he had been told deceased had charged defendant and his sister-in-law with improper conduct is a self-serving declaration. *Strickland v. State*, 71 App. 582, 161 S. W. 110.

In a prosecution for wife murder, declarations to third persons by accused prior to the killing, not a part of the *res gestæ*, that he rescued his wife from drowning, and that he would not permit her to drive a certain horse because it would kill her, and that she had become angry thereat, were self-serving and inadmissible. *Brown v. State* (Cr. App.) 169 S. W. 437.

Declarations by accused several hours after the alleged offense are inadmissible in his behalf as self-serving. *Cyrus v. State* (Cr. App.) 169 S. W. 679.

87. — **Explanatory declarations.**—Statements by defendant of his reason for running away are inadmissible. *Golin v. State*, 37 App. 90, 38 S. W. 794.

In a prosecution for swindling by obtaining goods by means of a worthless check, evidence of defendant's mother that after his arrest she saw him in jail, and he then stated to her that it was his intention and belief, at the time he signed the check, that it was drawn on a different bank, and that he had money therein to pay the check, was inadmissible, as self-serving. *Glover v. State*, 57 App. 208, 122 S. W. 396.

Where, in a prosecution for horse theft, the state, as a circumstance tending to prove the theft, introduced evidence showing that defendant sold the horse at less than its real market value, it was error to refuse to permit defendant to show by the purchaser that, at the time of the sale, he gave as his reason for selling that he was out of feed and wanted to buy feed for his other stock. *Sims v. State*, 72 App. 621, 163 S. W. 79.

Defendant's declarations to third persons of why he was going to move off deceased's place, made subsequent to the time witness testified he said deceased accused him of whipping his wife and made threats against deceased on account thereof, are self-serving, and so inadmissible. *Davis v. State*, 73 App. 49, 163 S. W. 442.

88. **Declarations by person injured.**—Declarations of the deceased on leaving home, as to where he was going, are verbal acts, and admissible for the state. *West v. State*, 2 App. 460.

Declarations of the deceased, unless *res gestæ*, dying declarations, or made in the presence of the defendant, are not admissible evidence against the defendant. *Green v. State*, 8 App. 71; *Campbell v. State*, Id. 84; *Hammel v. State*, 14 App. 326; *Gonzales v. State*, 16 App. 152; *Robinson v. State*, Id. 347.

When an article is proved to have been in possession of deceased, anything he may have said in regard to it is admissible. It is a verbal act, as to title and possession, and when made long anterior to alleged homicide indicates absence of fabrication. *Gay v. State*, 40 App. 242, 259, 49 S. W. 612.

The statements of the injured female, made an hour after the alleged assault and at a different place from where the assault occurred, are inadmissible. *Caudle v. State*, 34 App. 26, 28 S. W. 810.

Statements of prosecutrix made soon after the alleged assault was committed are admissible to corroborate her testimony. *Duke v. State*, 35 App. 283, 33 S. W. 349.

Ex parte statement of deceased before the transaction, not brought home to defendant, is inadmissible. It is not criminative evidence on part of defendant. *Young v. State*, 41 App. 442, 55 S. W. 333.

The testimony having placed defendant where he could and probably did hear a conversation between deceased and witness, in which deceased told of defendant having cursed and threatened him, the statement was admissible; the question whether defendant heard it being for the jury. *La Grone v. State*, 61 App. 170, 135 S. W. 121.

In a prosecution for murder, statements of the deceased made a week or ten days before the killing that the point of difference between himself and others was getting warm, that certain persons were getting raw, naming the accused, and there was likely to be trouble over the matter, were communicated to the defendant, were admissible as a threat, and bearing directly upon the question of self-defense. *McMillan v. State* (Cr. App.) 143 S. W. 1174.

Where a defendant, prosecuted for assaulting his wife, had applied for a continuance to take her deposition, she having left the state, but failed to get it, the court did not err in refusing to admit affidavits and other papers claimed to be signed by her attempting to exonerate him. *Yates v. State* (Cr. App.) 152 S. W. 1064.

Where accused, after being informed by his wife that decedent had insulted her, sought decedent and shot and killed him on first meeting him, the testimony of witnesses that decedent, before the shooting, had related how he had cursed accused's wife was admissible to show the probable truth of the communication by the wife of the fact of the insults to accused and to corroborate the testimony of the wife that decedent had cursed her. *Davis v. State*, 70 App. 37, 155 S. W. 546.

On a trial for homicide committed in a fight, evidence that deceased, after receiving the fatal injuries, and while being taken to a doctor, asked where "the son of a bitch" (meaning accused) was, was properly excluded, since it would have shed no light on the actions of either party during the difficulty. *Dawson v. State*, 72 App. 68, 161 S. W. 469.

Declarations by defendant's wife that he had made threats against her on various occasions, and testimony that she had called upon a deputy sheriff for protection against him, were admissible, in a prosecution for the killing of another at the same time as defendant killed his wife, provided such statements were made in defendant's hearing or brought to his knowledge before the killing. *Robbins v. State*, 73 App. 367, 166 S. W. 528.

89. Declarations of third persons.—When the evidence fails to establish the defendant's connection with the matter it is improper and inadmissible to adduce in evidence against him the prejudicial acts and declarations of third persons, though such acts and declarations were offered in the interest of or in behalf of the accused. *Favors v. State*, 20 App. 158; *Barbee v. State*, 23 App. 199, 4 S. W. 534; *Maines v. State*, 23 App. 568, 5 S. W. 123; *Taylor v. State*, 27 App. 463, 11 S. W. 462; *Nalley v. State*, 28 App. 387, 13 S. W. 670; *Tillery v. State*, 24 App. 251, 5 S. W. 842, 5 Am. St. Rep. 882; *Clark v. State*, 28 App. 189, 12 S. W. 729, 19 Am. St. Rep. 817; *McFadden v. State*, 28 App. 241, 14 S. W. 128; *Menges v. State*, 25 App. 710, 9 S. W. 49. But contra the principles enunciated in the above cases, see *Brumley v. State*, 21 App. 222, 17 S. W. 140, 57 Am. Rep. 612; *Johnson v. State*, 22 App. 206, 2 S. W. 609; *Ball v. State*, 29 App. 107, 14 S. W. 1012; *Fuller v. State*, 30 App. 560, 17 S. W. 1108. In this case the declarations of the third party were held to have been properly excluded as hearsay. *Evers v. State*, 31 App. 318, 20 S. W. 744, 18 L. R. A. 421, 37 Am. St. Rep. 811.

On a trial for killing an officer who was attempting to unlawfully arrest defendant, evidence of statements by a third person to the officer regarding the desperate character of defendant was inadmissible. *Miers v. State*, 34 App. 161, 29 S. W. 1074, 53 Am. St. Rep. 705.

Statements made by a codefendant as to defendant's connection with the crime is inadmissible against the State. *Thompson v. State*, 35 App. 511, 34 S. W. 629.

Declarations of a witness after the killing charged are inadmissible, except for impeachment. *Abram v. State*, 36 App. 44, 35 S. W. 389.

What defendant's wife said is inadmissible. *Wheelock v. State* (Cr. App.) 33 S. W. 182.

There being no evidence of a conspiracy between defendant and deceased's wife, mother-in-law, and sister-in-law, it is not competent to prove that on the morning after the killing, the latter three were talking and laughing as though nothing had happened. *Barry v. State*, 37 App. 302, 39 S. W. 692.

Nor was it competent to show that the mother-in-law on the day after the killing tried to make witness remember the acts and conduct of deceased toward defendant's wife. *Barry v. State*, 37 App. 302, 39 S. W. 692.

Where one is employed to gather cattle, on a charge of theft from another party, declarations of employer at the time of employment in reference to gathering cattle are admissible, but not those made afterwards, whether employer is dead or alive at time of trial. *Johnson v. State* (Cr. App.) 55 S. W. 576.

In a prosecution for homicide evidence of advice given by a witness to F., who did the killing, a day or two prior to the homicide, with reference to his rights in respect to a trespass on certain crops by hogs, was too remote and inadmissible. *Deneaner v. State*, 58 App. 624, 127 S. W. 201.

In a prosecution for assault with intent to rape, where the evidence showed that accused and others stopped the buggy in which prosecutrix and her escort were going home at night from a party, and committed the assault, evidence was admitted of declarations, in the absence of accused, by a girl whom prosecutrix and her escort passed on the road before reaching the place of the assault, who said to them, "Watch out, those boys have gone ahead," referring to accused and his companions, and another being by prosecutrix to her escort as to what their con-

duct should be if they met accused and the others, and by the escort to the effect that if accused and the others had gone down the road they had gone to get whisky. Held that, in view of the fact that accused and his companions were met shortly after such statements were made where the escort anticipated they would be, the testimony was admissible. *Ross v. State*, 60 App. 547, 132 S. W. 793.

The admission of the testimony was not dependent on the existence of a conspiracy between accused and the witness. *Ross v. State*, 60 App. 547, 132 S. W. 793.

Where, in a prosecution for rape on a female under 15, defendant pleaded limitations, and there was a direct issue as to the time when he had his last act of intercourse with prosecutrix, she testifying that she had not had intercourse with other men than her husband and defendant, evidence that she had made statements to others that she had had intercourse with other men mentioned, at the time contended for by defendant, was admissible as bearing on the question of limitations. *Foreman v. State*, 61 App. 56, 134 S. W. 229.

In a prosecution for homicide, evidence that one now dead confessed to committing the homicide is admissible for the defendant. *Pace v. State*, 61 App. 436, 135 S. W. 379.

In a homicide case it was immaterial whether witness told another after the homicide that there were several men who were ready to kill decedent, in the absence of a showing that accused was one of the men referred to by the witness. *Kemper v. State*, 63 App. 1, 138 S. W. 1025.

Evidence that prosecutrix pointed out to her father and the sheriff the place where she claimed accused assaulted her was competent. *Duckett v. State* (Cr. App.) 150 S. W. 1177.

While it was proper, in a prosecution for the theft of money, to admit evidence as to where the money was found, and by whom found and returned it was improper to permit a witness to state that a third person had proposed to him that the money would be returned under named conditions, where defendant was not shown to be in any way connected with such proposal. *Manley v. State* (Cr. App.) 153 S. W. 1138.

In a prosecution for abandonment after seduction and marriage it was not proper to show that defendant's uncle had told the wife that she was too good for the defendant. *Qualls v. State*, 71 App. 67, 158 S. W. 539.

Testimony on a prosecution for receiving stolen cattle, of one having charge of a pasture, that he was instructed by the owner of it to keep defendant out of it, is improper. *Stanfield v. State*, 73 App. 290, 165 S. W. 216.

Where decedent was killed as an incident to a conspiracy to illegally organize an armed force in Texas to invade Mexico, in accordance with a certain political party, and accused testified that he was a subscriber to a newspaper, and that one of the principal things which induced him to join the company was articles in the paper, and that the principles announced in the paper were those of the party to which he belonged and joined the company to carry out, a translated copy of the paper was admissible as showing the purpose for which the conspiracy was organized and for which the defendant joined it. *Gonzales v. State* (Cr. App.) 171 S. W. 1149.

90. — **Declarations in accused's absence.**—Conversations, statements, and acts of third persons, had, made, and performed in the absence of the defendant, are ordinarily not admissible in evidence against him or in his behalf. *Chumley v. State*, 20 App. 547; *Fuller v. State*, 19 App. 380; *Segura v. State*, 16 App. 221; *Robinson v. State*, Id. 347; *Gonzales v. State*, Id. 152; *Anderson v. State*, 14 App. 49; *Hammel v. State*, Id. 326; *Campbell v. State*, 8 App. 84; *Green v. State*, Id. 71; *Washington v. State*, 17 App. 197; *Aiken v. State*, 10 App. 610; *Cohea v. State*, 11 App. 153; *Tyler v. State*, Id. 388; *Hester v. State*, 15 App. 587; *Burke v. State*, Id. 156; *White v. State*, 18 App. 57; *Snow v. State*, 6 App. 284; *McCracken v. State*, Id. 507; *Grant v. State*, 3 App. 1; *Speiden v. State*, Id. 156, 30 Am. Rep. 126; *Sneed v. State*, 4 App. 514; *Morrill v. State*, 5 App. 447; *Spencer v. State*, 31 Tex. 64; *Davis v. State*, 37 Tex. 227; *Secrest v. State* (Cr. App.) 40 S. W. 988.

On a trial for testifying falsely before the grand jury regarding a theft by J., J.'s confession of the theft was admissible though made in defendant's absence. *Martin v. State*, 33 App. 317, 26 S. W. 400.

Declaration of paramour in adultery jointly indicted with defendant not made in his presence, not admissible against him. *Whicker v. State* (Cr. App.) 55 S. W. 48.

In a burglary prosecution, testimony that goods found in accused's residence by the sheriff, after the burglary, were brought to witness, and he identified them as the goods stolen, was admissible, and not objectionable as a declaration of the witness made while accused was not present. *Platinburg v. State*, 57 App. 375, 123 S. W. 421.

On a trial for an illegal sale of whisky through go-betweens, acts and declarations in furtherance of the sale, though made in the absence of the accused and without his express authority, are admissible when it appears that he is so connected with the transaction as to show knowledge, intent, and purpose of making the sale and his necessary cognizance of the events happening in his absence. *Lindley v. State*, 57 App. 480, 123 S. W. 1107.

In a prosecution for gaming, a question to accused's witness whether another did not ask certain persons in witness' presence and accused's absence, on the day before the offense was alleged to have been committed, where their poker players were, and the persons questioned stated they did not know, was not admissible; the answer not binding accused. *Melton v. State*, 58 App. 86, 124 S. W. 910.

On a trial for violating the local option law, testimony of the state's witness that he told the truth when the officers caught him with the whisky, and also told the truth when in a certain office, etc., was inadmissible; defendant not be-

ing present when the statements were made. *Kirksey v. State*, 58 App. 138, 125 S. W. 15.

Declarations made by the third person, in the absence of accused, after the offense, that he and accused were partners in business, were inadmissible. *Holt v. State*, 57 App. 432, 125 S. W. 43.

In a prosecution for keeping a disorderly house in which liquors were sold without license, testimony that defendant's partner stated that a document was an internal revenue license and that it had been issued to defendant and himself could not bind the defendant in his absence. *Campbell v. State*, 59 App. 496, 129 S. W. 139.

No conspiracy being shown, it was improper to receive evidence of declarations, before the killing, by accused's brother and sister and another in his absence, tending to show intent to kill decedent; or declarations by the sister in accused's absence, and on hearing a pistol fired that accused had killed decedent. *Clements v. State*, 61 App. 161, 134 S. W. 723.

In a prosecution against a father for incest with his daughter, evidence of what his wife's brother, in a conversation with the wife in the defendant's absence, said about her leaving defendant, is not admissible, being conversations of third parties in the absence of defendant. *Gross v. State*, 61 App. 176, 135 S. W. 373, 33 L. R. A. (N. S.) 477.

On a trial for theft, opinions of witnesses, expressed on finding goods in the home of a third person in the absence of accused, were not binding on him. *Morgan v. State*, 62 App. 120, 136 S. W. 1065.

In a prosecution for homicide, it was incompetent to permit a witness to testify that N. stated to her in defendant's absence the night of the killing that she (N.) did not see how accused could have killed her husband; that he had always been good to her. *Streight v. State*, 62 App. 453, 138 S. W. 742.

Declarations of a third person in the absence of accused which tend to establish a preconceived plan of accused to kill decedent are inadmissible. *Hickey v. State*, 62 App. 568, 138 S. W. 1051.

A conversation between deceased's brother and defendant's brother some hour and a half prior to the homicide, in defendant's absence, and not shown to have been brought to defendant's attention, was inadmissible against him. *Wallace v. State* (Cr. App.) 145 S. W. 925.

On a trial for the robbery of a watch, it was competent for a police officer to testify that a third person, who had the watch in his possession, called it to the officer's attention, that he went to the police station, examined the records, and then took possession of the watch, which proved to be the one stolen, although this did not take place in accused's presence. *McMillan v. State* (Cr. App.) 146 S. W. 1190.

In a trial for receiving stolen goods, testimony of an accomplice of the thief, but not of the defendant, that the thief told her in defendant's absence that the stolen goods were sent to defendant, was improperly admitted. *Forrester v. State* (Cr. App.) 152 S. W. 1041.

It was error in a larceny case to permit a witness to testify to a conversation, in defendant's absence, between witness and other members of a lodge as to expelling defendant from the lodge. *Manley v. State* (Cr. App.) 153 S. W. 1138.

Statements made by a state's witnesses to the county attorney at an ex parte hearing at which accused was not present are inadmissible to prove the offense charged. *Liner v. State*, 70 App. 75, 156 S. W. 211.

In a prosecution of a negro for unlawfully carrying a pistol, evidence of a state's witness that he heard accused's brother say in accused's absence that he was going to take a gun away from C., a white man, who was deputy sheriff, was incompetent; there being no claim of any conspiracy or acting together between accused and his brother. *Gibbs v. State*, 70 App. 278, 156 S. W. 687.

In a prosecution for stealing chickens, where the testimony showed that the defendant had been seen taking a basket to his wife, a witness for the state in chief cannot testify that defendant's wife wanted to leave the basket with the witness, stating that she was afraid somebody would get the basket and find the chickens in it, where the defendant was not present when such statement was made. *Seymour v. State*, 71 App. 76, 158 S. W. 304.

91. — **Declarations to or by officer.**—An officer may testify that he summoned the assaulted party to assist him in making the arrest, but he should not state the details of the conversation as to the character of the man he was going to arrest. *Owen v. State*, 58 App. 261, 126 S. W. 405.

In a prosecution for burglary, where the state relied on flight as an evidence of guilt, the sheriff could testify to his attempts to locate accused, but could not testify that another, who reported the crime, told him to look out for accused. *Handy v. State* (Cr. App.) 173 S. W. 299.

92. — **Declarations inculcating accused.**—In a prosecution for selling intoxicating liquors, it is not competent for the state to prove declarations of the prosecuting witness to connect accused with the sale. *McAdams v. State*, 59 App. 86, 126 S. W. 1156.

Evidence of declarations of prosecutrix, while living with accused apparently as his wife, that she and accused were married, and evidence of letters written by her during that time stating that she and accused were married, and evidence of her declarations to the same effect when accused was arrested and it was first brought to her attention that the marriage was a nullity, was admissible on a trial for rape by means of a sham marriage. *Wilkerson v. State*, 60 App. 388, 131 S. W. 1103, Ann. Cas. 1912C, 126.

Where the state sought to show that accused and his brother and a third person committed the crime charged pursuant to a conspiracy, a statement of accused's father that accused desired to see his brother and the third person on important business, was inadmissible against accused, unless accused sent the mes-

sage by his father to his brother and the third person, and where accused and the father denied the sending of such message, the testimony of the accomplice that the father delivered such message was inadmissible against accused. *Carlisle v. State*, 64 App. 535, 142 S. W. 1178.

In a murder trial, the state was properly permitted to show that before the killing accused's companion attempted to borrow a weapon, stating that he had a friend who wanted to kill another, where the circumstances indicated that accused knew his companion was making the request, and was close enough to hear what he said, though accused testified he did not hear the conversation. *Kinney v. State (Cr. App.)* 144 S. W. 257.

93. — **Declarations to accused.**—When a defendant's witness had testified to threats made by deceased against defendant, it was not error to refuse to permit her to state that in communicating such threats to defendant she had also told defendant that deceased was a bad man and had killed some men. *Harrell v. State*, 39 App. 204, 45 S. W. 581.

Where, on a trial for aggravated assault, the evidence showed that a third person was one of the parties to the assault, and participated in it, and pleaded guilty to simple assault, a statement by the third person, in the presence of accused, that his paying a fine would not be sufficient, was admissible. *Boykin v. State*, 59 App. 267, 128 S. W. 382.

In a homicide case, it was not error to exclude testimony that a witness told B. to tell accused that he had heard decedent threatened to kill accused, and for accused to be careful to "keep his eyes on" decedent, and not to do anything until forced to do so; it not appearing that B. was dead or beyond the jurisdiction of the court, or that he denied having communicated such threat to accused. *Kemper v. State*, 63 App. 1, 138 S. W. 1025.

Testimony of a witness that just after the shooting a third person, who was shown by the testimony to be near accused and deceased, asked accused what he meant, was properly admitted, but, it appearing that accused made no reply, the jury should have been instructed to disregard it, unless they believed beyond a reasonable doubt that accused heard the question or exclamation. *Rhea v. State (Cr. App.)* 148 S. W. 578.

In a prosecution for obstructing a street, where it appeared that, on defendant's request, the commissioners' court permitted him to close certain lands which he said were on the east side of a depot, a letter to defendant from the county judge, to the effect that the request had been granted as to the lots east of the depot, where the obstruction was placed, was admissible on the issue of willfulness. *Carney v. State (Cr. App.)* 175 S. W. 155.

94. — **Corroborative or impeaching statements.**—In a murder trial, a state's witness, who was shown to be an active participant in the transaction which resulted in the homicide, having testified to material facts, it was held competent for the defendant to prove that two hours before the homicide said witness said that she directed the deceased to kill defendant if he came on the premises. *Tow v. State*, 22 App. 175, 2 S. W. 582.

Where the defendant claimed that he did not intend not to live with his wife until after his father informed him that she had stated she was going to send him to the penitentiary, it was proper for the father to testify that he so informed his son. *Qualls v. State*, 71 App. 67, 158 S. W. 539.

A state's witness testified in a homicide case that he saw decedent's knife a few minutes after the killing, lying on the ground closed, but accused's witnesses testified that it was open when picked up. The state's witness was asked on cross-examination if he did not tell accused's son that accused thought witness had it in for him, but he hadn't, and could not say whether the knife was open or shut, the making of which statement the witness denied, whereupon accused asked him if accused's son did not say certain things to him, which evidence was excluded; the court explaining, however, that witness could be asked anything with respect to what was claimed he said to accused's son. Held, that since it did not appear that the latter's statements would make witness' alleged statements clear, there was no error in excluding the evidence offered. *Ward v. State*, 70 App. 393, 159 S. W. 272.

Where a witness for the state testified that, after he had seen defendant and deceased's wife in flagrante delicto, he told a certain named person something like a week or two weeks afterwards, and the state offered no other witnesses to bolster up his testimony, the admission of his testimony was not error, although the state could not bolster up its witness by offering other witnesses to show that he had told them soon after the occurrence the same fact to which he was then testifying. *Lane v. State*, 73 App. 266, 164 S. W. 378.

Where accused claimed that he and his brother met the prosecutors by chance, and that the fight was not of his seeking, evidence that accused's brother, when he left the place he had been during the evening, stated that he was going to his father's to stay the balance of the night, it then being about 1 o'clock, is admissible, even though accused had met the prosecutors earlier in the evening, when they were carrying some young ladies home and had threatened them, using offensive language and had stated that he would get his brother and attack them later that night. *Carter v. State*, 73 App. 334, 165 S. W. 200.

95. — **Letters.**—Where, in a prosecution for homicide, defendant testified in her own behalf that deceased had accused her of infidelity, and that her alleged misconduct was the cause of the killing, and it was also shown that she had attempted to regain possession of certain letters written to a man since deceased, certain letters alleged to have been written by her to others were admissible, though she denied authorship thereof. *Streight v. State*, 62 App. 453, 138 S. W. 742.

A letter by a father who lived in a foreign state to his son who resided in the domestic state, informing him of the death of the prosecuting witness, another

son, who resided with the father, is inadmissible to prove such death. *Hughes v. State* (Cr. App.) 152 S. W. 912.

In a trial for homicide growing out of the illegal relations of defendant with deceased's wife, a letter written by him to her tending to show an intimacy between them was admissible on the issue of motive. *Lane v. State*, 73 App. 266, 164 S. W. 378.

96. — **Declarations in accused's presence.**—A statement made to a defendant, or in his hearing, and which he hears and understands, and which is made under circumstances which reasonably require of him a reply, is not hearsay, and may be given in evidence. *Bond v. State*, 20 App. 421; *Felder v. State*, 23 App. 477, 5 S. W. 145, 59 Am. Rep. 777.

In a trial for murder, the state was permitted, over objection of the defendant, to prove that some member of a crowd congregated at the place of the homicide, just after the shooting, pointed to the defendant, who was walking away from the place, and said: "There is the man who did the shooting." It was not shown that the defendant heard this remark, or understood that it related to him. Held, that this evidence was hearsay and inadmissible. To entitle the state to introduce in evidence the declaration of a bystander, it must be clearly shown that the defendant understood himself to be accused of the criminal act committed; and, further, the circumstances must have been such as to require of him a response. *Felder v. State*, 23 App. 477, 5 S. W. 145, 59 Am. Rep. 777.

In a prosecution for swindling by means of a worthless check, evidence that, after defendant's arrest, his mother told him that she had neglected to put his money in a different bank from that on which the check was drawn, and that defendant thereupon cried, was inadmissible. *Glover v. State*, 57 App. 208, 122 S. W. 396.

In a homicide case, it was error to receive testimony that on hearing a gun fired, and on going around a house to the place where the parties were, witness said to accused, "Why did you do that? Don't shoot again!" *Kemper v. State*, 63 App. 1, 138 S. W. 1025.

On a trial for burglary, the confession of a third person made in accused's presence while accused and the third person were both under arrest was incompetent. *Bradshaw v. State* (Cr. App.) 155 S. W. 218.

On a trial for stealing a horse and buggy, where it appeared that accused and another traveled together in the buggy, were together when it was sold, that accused, at the time of the sale, stated that it was not stolen, and that they then went together to the place where they were arrested, while in possession of the stolen horse, and that while in jail they together talked to the owner, the statement of the other in accused's presence, and acquiesced in by him by silence at least, as to where the buggy would be found was admissible against accused. *Moran v. State*, 73 App. 525, 166 S. W. 161.

97. **Hearsay in general.**—See *Long v. State*, 13 App. 211; *Chumley v. State*, 20 App. 547; *Barbee v. State*, 23 App. 199, 4 S. W. 584; *Maines v. State*, 23 App. 568, 5 S. W. 123; *Massie v. State*, 27 App. 617, 11 S. W. 638; *Nuckolls v. State*, 27 App. 690, 11 S. W. 646; *Nalley v. State*, 28 App. 387, 13 S. W. 670; *Sauls v. State*, 30 App. 496, 17 S. W. 1066; *Campbell v. State*, 30 App. 648, 18 S. W. 409; *Sanders v. State*, 31 App. 525, 21 S. W. 258; *Parker v. State*, 25 App. 743, 9 S. W. 42; *Bookser v. State*, 26 App. 593, 10 S. W. 219.

For other decisions as to "Hearsay," see *Vernon's Sayles' Civ. St.* 1914, art. 3687. To the general rule excluding hearsay evidence there are exceptions, as in the case of dying declarations, art. 808; confessions, arts. 809, 810.

Mere hearsay is not only not the best, it is not even secondary, evidence; it is no evidence. It is not admissible, although no better evidence is to be obtained. *Belverman v. State*, 16 Tex. 130; *Reeves v. State*, 7 App. 276; *Holt v. State*, 9 App. 572; *Felder v. State*, 23 App. 477, 5 S. W. 145, 59 Am. Rep. 777.

The general rule is that all reports or statements, verbal or written, made by a person not produced as a witness, are inadmissible in evidence. The principle of this rule is, that such evidence requires credit to be given to the statements of a person who is not subjected to the ordinary tests enjoined by the law for ascertaining the correctness and completeness of his testimony—namely, that oral testimony should be delivered in the presence of the court, or a magistrate, under the moral and legal sanctions of an oath, and where the moral and intellectual character, the motives and deportment of the witness can be examined, and his capacity and opportunities for observation, and his memory can be tested by cross-examination. Such evidence, moreover, as to oral declarations, is very liable to be fallacious, and its value is, therefore, greatly lessened by the probability that the declaration was imperfectly heard, or was misunderstood, or is not accurately remembered, or has been perverted. It is also to be observed, that the persons communicating such evidence are not exposed to the danger of a prosecution for perjury to the extent that other witnesses are exposed. *Harris v. State*, 1 App. 74.

Evidence that certain shoes of the accused would have made such tracks as the owner of the burglarized premises had described to the witness was hearsay. *Bluitt v. State*, 12 App. 39, 41 Am. Rep. 666.

In a prosecution for an assault with intent to rape, a state's witness was allowed to testify, over defendant's objection, that after the commission of the offense, certain persons came to witness and made overtures for a compromise of the complaint against the defendant, inquiring how much money it would take to settle it, etc. There was no proof that these overtures were made by the authority or with the knowledge of the defendant, and he was not present when they were made. Held, that this evidence was purely hearsay and inadmissible. *Barbee v. State*, 23 App. 199, 4 S. W. 584. For similar instances of hearsay evidence, see *Favors v. State*, 20 App. 155; *Washington v. State*, 17 App. 197; *Tyler v. State*, 11

App. 388; *Langford v. State*, 9 App. 283; *Maines v. State*, 23 App. 568, 5 S. W. 123; *Estes v. State*, 23 App. 600, 5 S. W. 176; *Montgomery v. State*, 23 App. 650, 5 S. W. 165.

See *Estes v. State*, 23 App. 600, 5 S. W. 176, for evidence held to be hearsay, and improperly admitted against the defendant prosecuted for receiving stolen property.

Testimony as to what others told witness that deceased had said would be hearsay. *Howe v. State* (Cr. App.) 177 S. W. 497.

Hearsay evidence, as to the identification of stolen property, is inadmissible. *Howard v. State*, 35 App. 136, 32 S. W. 554.

When one is being tried for murder, the testimony of one given on his trial for the same murder, reproduced by one who heard it, is inadmissible, and is not harmless because defendant's testimony is somewhat similar. *Taylor v. State*, 41 App. 564, 55 S. W. 961, 965.

On a trial for murder testimony that an ax with which the killing was claimed to have been done and which was brought to the witness by another party as soon as he found it, had negro hair, blood and brains on it, was not objectionable as hearsay. *Williams v. State*, 60 App. 453, 132 S. W. 345.

In a prosecution for theft of a package of overalls, testimony by an express agent as to what the records of his office showed, regarding the package, without proof of who made the records, or that they were correctly made, was hearsay and inadmissible. *McConico v. State*, 61 App. 48, 133 S. W. 1047.

In a prosecution for keeping a room in a hotel as a place in which to gamble, a witness on his direct examination testified that accused was proprietor, and on cross-examination testified that he had never lived at the hotel; had never had a room there, but had eaten there; that he knew that accused was proprietor, because he looked after the interests of the hotel; that he had seen him around there, acting as if he was the proprietor; that he had a wife and children there; and that sometimes his boys were on watch at night. The witness finally admitted that he did not know whether accused was actually proprietor, and said that his testimony was a conclusion. Held, that this testimony was not hearsay. *Parshall v. State*, 62 App. 177, 138 S. W. 759.

The statement by the witness that his testimony was a conclusion and that he did not know, as a matter of fact, whether accused was the actual proprietor was an objection which went to the weight of his testimony, and not to its competency. *Parshall v. State*, 62 App. 177, 138 S. W. 759.

On a trial for selling intoxicating liquors in prohibition territory, after J. had testified that he purchased liquor from accused, accused, to show that the liquor was ordered by J., and not by defendant, gave evidence to show a shipment of liquor by express to J. The brother of accused had testified that he and accused were partners in the whisky ordering business, and that liquor which he ordered was divided with accused. The state, by cross-examination of the brother and by recalling J., sought to prove that the shipment to J. was really ordered by the brother, though in J.'s name, to which accused objected as hearsay and prejudicial, irrelevant, and not in support of the issues. Held, that the objection was properly overruled. *Dickson v. State* (Cr. App.) 146 S. W. 914.

In a trial for burglary of a railroad car, testimony by a local agent of the railroad company that the car was in his custody was not objectionable as being hearsay, even if the company had written rules bearing on the custody of cars. *Kelly v. State* (Cr. App.) 149 S. W. 110.

In a prosecution for passing a forged check, a witness testified that accused purchased a pair of shoes from one of his salesmen and offered the check in payment, when the salesman took accused back to witness and explained the check to him; whereupon accused indorsed the check to witness. Held, that such evidence was based on the witness' own knowledge, and was not objectionable as hearsay. *Wesley v. State* (Cr. App.) 150 S. W. 197.

Defendant's testimony as to what the newspapers had published regarding the crime was properly excluded where he stated that all his information was hearsay. *Shaffer v. State* (Cr. App.) 151 S. W. 1061.

In a prosecution for theft, evidence that, in the house pointed out as being accused's, the officers, who entered under their search warrant, found the stolen belt- ing is not inadmissible because the house was pointed out as accused's, where his household furniture and wardrobe were in it at the time of the arrest, and he had been living there up to within three days of the theft. *McGee v. State* (Cr. App.) 155 S. W. 246.

Where on a trial for perjury, predicated on accused's false testimony through an interpreter, the interpreter testified that he correctly interpreted what accused testified to, the testimony of a juror as to what the interpreter interpreted to the jury was not objectionable as hearsay. *Mares v. State*, 71 App. 303, 158 S. W. 1130.

In a prosecution for receiving or concealing stolen goods, which were shown to include certain pipes, evidence that witness found two pipes buried in the ground, which were part of the stolen property, and delivered them to the owners, was admissible over an objection, shown by bill of exceptions only, that it was not shown that accused was connected with the hiding of the pipes or knew of their being stolen at the time, so that the evidence was hearsay and immaterial. *Meek v. State*, 71 App. 433, 160 S. W. 698.

A statement of facts in a former trial of the case containing the testimony of the accused was not hearsay. *Best v. State*, 72 App. 201, 164 S. W. 997.

Hearsay evidence in regard to the arrest of a third person as the man who killed deceased was properly excluded, where the witness who identified defendant as the person who fired the fatal shot testified that she had at one time caused the arrest of such third person. *Herrera v. State* (Cr. App.) 170 S. W. 719.

In a prosecution for murder, evidence that defendant's wife, on the morning

after the homicide, pointed out to certain witnesses on the ground the location of the parties, from which measurements and plans were made, held admissible. *Barnett v. State* (Cr. App.) 176 S. W. 580.

On a trial for homicide, accused claimed that deceased attacked him with a knife, and that he struck deceased in self-defense. The state offered evidence that this claim was a fabrication hatched out in the office of accused's attorneys on the morning of the trial. Held, that evidence that it was a matter of common talk and rumor in the neighborhood where the difficulty occurred that a knife was found the next morning at the place where it occurred was properly excluded as hearsay. *Blalock v. State* (Cr. App.) 176 S. W. 725.

98. — **Evidence as to fact of making declaration.**—A person who was present when others were negotiating a trade between themselves, and who heard them make the trade, is a competent witness to testify about the trade, and his testimony is original and not hearsay. *Hester v. State*, 15 App. 567.

In a prosecution for pursuing the business of selling intoxicating liquors, where there was evidence of the receipt, by accused, of express shipments of intoxicating liquors, the testimony of accused's father that a doctor, in his presence, advised accused to use intoxicating liquors on his broken leg for the purpose of causing it to heal, was properly excluded as hearsay, especially where it did not appear that any of such shipments were so used. *Leonard v. State* (Cr. App.) 152 S. W. 632.

Where accused showed that he called at the sheriff's house and that the sheriff's wife informed him that the sheriff was absent, and also showed by the wife that many people came to the house calling for the sheriff, the testimony of the wife that she afterwards told the sheriff that people were calling for him, was properly excluded as hearsay. *Oliver v. State*, 70 App. 140, 159 S. W. 235.

On an issue as to the insolvency of a private banker at the time he received certain deposits, evidence of a certain transaction between him and the state bank commissioner in which defendant was required to substitute certain assets of another bank owned by him was not objectionable as hearsay. *Brown v. State*, 71 App. 353, 162 S. W. 339.

99. — **Statements of witnesses or persons available as witnesses.**—In a theft case it was held hearsay and inadmissible for a witness to testify that a few moments after the alleged theft, he told the owner of the property stolen that he had seen two suspicious looking negroes in the vicinity, one of whom witness recognized as the defendant. *Jackson v. State*, 20 App. 190.

On a trial for rape by means of a sham marriage, evidence of a declaration by prosecutrix, made in the absence of accused, while she was no longer under the impression that she was his wife, as to the fact that she and accused had been married on a passenger train, was inadmissible as hearsay. *Wilkerson v. State*, 60 App. 388, 131 S. W. 1108, Ann. Cas. 1912C, 126.

A question asked accused as to what a constable told him that the prosecuting witness said was properly excluded as hearsay, especially where the constable, although a witness for accused, was not asked regarding such matter. *Sheppard v. State* (Cr. App.) 148 S. W. 314.

Where no attempt was made to impeach a witness, a question calling for a statement, alleged to have been made by the witness, relative to accused, out of court and overheard by another, was inadmissible as hearsay. *King v. State* (Cr. App.) 148 S. W. 324.

In a prosecution for murder, where it appeared that S. tried on a vest, which was found in accused's trunk after the killing, and which a witness claimed belonged to deceased, the witness, who was identifying the vest, might properly be asked if he did not when in S.'s office say that deceased was about the same size as S. *Harris v. State* (Cr. App.) 148 S. W. 1074.

Where prosecutrix left her home, after the alleged assault by accused, and went to a relative, a half mile away, the details of the complaints made by prosecutrix to the relative were inadmissible, in the absence of a showing that the complaints were a part of the res gesta. *Calliham v. State* (Cr. App.) 150 S. W. 617.

On a trial for violating the liquor laws, the testimony of the chief of police that two policemen brought him some whisky, which he produced and exhibited, should have been excluded as hearsay, especially where such policemen had not then testified, and, of course, had not been impeached. *Broadnax v. State* (Cr. App.) 150 S. W. 1163.

What witness told another would be hearsay, and was properly excluded. *Ward v. State*, 70 App. 393, 159 S. W. 272.

Evidence to show that a witness who though present in court, was not used, had identified a person other than defendant as the person who committed the homicide, was properly excluded. *Herrera v. State* (Cr. App.) 170 S. W. 719.

Accused, desiring the testimony of what third persons told a witness, should call the third persons as witnesses. *McHenry v. State* (Cr. App.) 173 S. W. 1020.

100. — **Statements of persons deceased or not available as witnesses.**—That deceased informed witness that a woman in his office was defendant's wife; held, hearsay. *Jones v. State*, 38 App. 87, 40 S. W. 807, 41 S. W. 638, 70 Am. St. Rep. 719.

Testimony that deceased told witness that his life had been threatened; held, hearsay. *Murphy v. State* (Cr. App.) 40 S. W. 978.

That a person was in Europe did not justify evidence of his statements to another witness not made in accused's presence. *Bradshaw v. State* (Cr. App.) 155 S. W. 218.

101. — **Oral statements in general.**—In a prosecution for assault and battery, testimony of witnesses as to statements made to them relative to the assault, by the person alleged to have been assaulted, being hearsay, should have been excluded. *Howard v. State* (Cr. App.) 174 S. W. 615; *Gonzales v. State*, 16 App. 152.

The statements of a detective acting with the defendant as a sham conspirator in the commission of the burglary, as to what another detective acting in the same capacity had told him, are hearsay, and inadmissible against the defendant. *Speiden v. State*, 3 App. 156, 30 Am. Rep. 126.

In a trial for assault with intent to murder, the defendant proposed to prove that an officer, a short time before the assault, directed one of the assaulted parties to take the other home, because such other party was intoxicated. Held, hearsay, and properly rejected. *Hobbs v. State*, 16 App. 517.

A medical witness, having expressed his opinion as to the cause of the death of the deceased, on a trial for murder, was permitted, over the objection of the defendant, to testify that other physicians in attendance at a post mortem examination of the deceased, concurred in his opinion as to the cause of death. Held, that this evidence was clearly hearsay, and inadmissible. *Morgan v. State*, 16 App. 593.

The defense offered to prove by the witness N. the statement made to him by one D. to the effect that the gun with which it was claimed by the state the killing was done was found by D. at a certain place, which proof, upon objection by the state, was excluded as hearsay. Held, that the ruling was correct. *Crook v. State*, 27 App. 198, 11 S. W. 444.

Testimony that the witness had been informed of certain facts is hearsay, and inadmissible. *Short v. State* (Cr. App.) 29 S. W. 1072; *Taylor v. State*, 62 App. 611, 138 S. W. 615. Testimony of defendant as to what a certain person told him while he was in jail, is inadmissible. *Chapman v. State* (Cr. App.) 30 S. W. 225.

A statement made by a person that he heard shots in a certain direction are inadmissible. *Harvey v. State*, 35 App. 545, 34 S. W. 623.

Testimony that witness heard others say that defendant had threatened the life of another is hearsay. *Woods v. State* (Cr. App.) 36 S. W. 96.

Statements made by defendant on his way home after the killing were properly excluded as hearsay. *Johnson v. State* (Cr. App.) 35 S. W. 387.

Statements by a third person in absence of defendant, concerning an admission, are inadmissible. *Gill v. State*, 36 App. 589, 38 S. W. 190.

In a murder case, where it appeared that the homicide was the result of illicit relations existing between decedent and accused's sister, testimony of accused's mother that she had had the girl examined by a doctor, who had told her that the girl showed signs of having had intercourse with some man, was properly excluded as hearsay. *Hart v. State* (Cr. App.) 121 S. W. 508.

Where, on a trial for crime, the issue was whether accused or his brother committed the offense, and the testimony as to the identity of accused was meager, the action of the district attorney in asking a witness questions, for the purpose of bringing before the jury statements by accused's father, made in the absence of accused, that he believed that accused was the guilty party, was erroneous. *Hughes v. State*, 62 App. 288, 136 S. W. 1068.

Statements of a third person, not a witness in the case, made in the absence of accused and prosecutrix, cannot be proved by the state or accused. *Campbell v. State*, 62 App. 561, 138 S. W. 607.

One accused of murder was not entitled to show that a little girl had shown his witness a knife, stating that she found it under a bridge, where accused claimed decedent was standing when shot; the conversation having occurred a month after the shooting, and the witness not having been present when the knife was found. *Oldham v. State*, 63 App. 527, 142 S. W. 13.

In a prosecution for seduction under promise of marriage, evidence of witnesses that a third person, who was not a witness, had stated that he had had intercourse with the prosecuting witness, was hearsay and inadmissible. *Murphy v. State* (Cr. App.) 143 S. W. 616.

Evidence as to what witnesses had heard others say about the deceased having trouble with a person other than the accused was properly rejected as hearsay; evidence as to what the witnesses knew of the matter and what they had heard deceased say being proper. *Williams v. State*, 144 S. W. 622.

In a murder trial, testimony that a third person told witness the day after the killing that he had delivered a pistol to decedent just before the homicide, and testimony as to other statements by the third person, was properly excluded as being hearsay. *Kinney v. State* (Cr. App.) 144 S. W. 257.

Where defendant, in a trial for murder, testified that he was knocked down by deceased and lost his watch and had been informed that a certain person had picked it up and brought it to the police station, and the chief of police testified that such person had brought accused's watch to him and delivered it, evidence as to what the finder said to the chief of police at the time he delivered the watch was hearsay and not admissible. *Lee v. State* (Cr. App.) 148 S. W. 706.

Evidence on the part of defendant that his witness heard some child state after the killing when defendant was not present that another person shot at defendant was inadmissible for any purpose. *Blue v. State* (Cr. App.) 148 S. W. 730.

Where accused, relying on insulting language by decedent toward a female relative to the effect that she was pregnant by accused, sought to show that a third person was the father of the child of the female, the testimony of a witness that in a conversation with decedent's wife on the evening before the killing the wife stated that the female had obtained medicine from her to bring on her monthly periods, and had asked where the third person was, was inadmissible as hearsay to support the theory that the third person was the father of the child. *Redman v. State* (Cr. App.) 149 S. W. 670.

In a homicide case, it was not error to refuse to permit defendant to testify that C. had told him that he had seen two cattle in S.'s brand, and not the brand of deceased, in a certain pasture; it appearing that deceased had sold cattle to the man who placed the cattle in the pasture, the testimony being hearsay. *Kelly v. State* (Cr. App.) 151 S. W. 304.

In an incest case the court properly excluded testimony as to what police and detectives told the prosecutrix and her mother when the complaint was made. *Drake v. State* (Cr. App.) 151 S. W. 315.

Where a clerk of the store alleged to have been burglarized, on discovering the burglary, showed the owner as soon as he arrived how the door had been unfastened and an entry effected, the owner was entitled to illustrate with a stick the condition of the bar with which the door had been fastened, and the door, but was not entitled to state what was told him by his clerk. *Walker v. State* (Cr. App.) 151 S. W. 822.

Where accused was charged with slandering his wife, and several young men testified to facts damaging to the wife's reputation for chastity, though denying any ill will toward her, evidence that a boy whose name was unknown to the witness had told witness that the boys around T. where the parties resided had it in for the wife, because she would not permit them to hang around the telephone office, was hearsay, and inadmissible. *Elder v. State* (Cr. App.) 151 S. W. 1052.

Where it appeared in a murder trial that decedent had previously inflicted a fatal wound on accused's son by striking him with a stick of wood, testimony that C. told witness that he had gotten the stick that decedent killed the son with, that decedent told him to get it and hide it, that decedent might have it in court, and that he did hide it, was properly excluded as being hearsay. *Decker v. State* (Cr. App.) 154 S. W. 566.

Evidence that another told witness that he had given authority to sign a certain name to a check claimed to have been forged was not admissible in a prosecution for forgery, being hearsay. *Davis v. State*, 70 App. 253, 156 S. W. 1171.

Where, in a prosecution for seduction under promise of marriage, it was shown that on one occasion O. was seen in prosecutrix's company by certain others, evidence that on the next day he requested those who saw him never to say anything about having seen him with prosecutrix the night before was hearsay and inadmissible. *Gillespie v. State*, 73 App. 585, 166 S. W. 135.

In a prosecution for homicide, dying declarations of the deceased, to the effect that defendant's wife had appealed to deceased for protection early in the evening, and that defendant had threatened to kill her, were hearsay evidence of statements by the defendant's wife, and were inadmissible, although his statements as to how the shooting occurred and what was done and said by the parties at that time were admissible both as *res gestæ* and as dying declarations. *Robbins v. State*, 73 App. 367, 166 S. W. 528.

Testimony of witnesses as to what a third person, notifying them of the difficulty between accused and decedent, reported, was inadmissible as hearsay. *Edwards v. State* (Cr. App.) 172 S. W. 227.

102. — Oral statements incriminating accused.—In a prosecution for selling liquor on Sunday, testimony by the officer who took the liquor from T., who purchased it, that he asked him where he got it, and he took him to the back end of a saloon, and told him that that was where he got it, was objectionable as hearsay, where not made in the presence of defendant. *Long v. State*, 58 App. 28, 124 S. W. 640.

But testimony of the officer identifying the place shown him by the witness was not objectionable as hearsay. *Long v. State*, 58 App. 28, 124 S. W. 640.

On a trial for violating the local option law, testimony of the marshal that he caught the state's witness with some whisky, and that the witness stated that he got it from accused, etc., was inadmissible. *Kirksey v. State*, 58 App. 188, 125 S. W. 15.

A statement made to a witness by a third party that if any one got into trouble about the prosecutrix it would be defendant was hearsay and inadmissible in a rape case in the absence of proof of conspiracy or collusion between such witness and the prosecutrix to prosecute the defendant. *Clardy v. State* (Cr. App.) 147 S. W. 568.

Declarations of accused's infant children, made on coming alone to the home of witness, that their parents had declared before the children left home that they were going to kill decedent, were inadmissible as hearsay, though when the children came to the home of witness they appeared to be excited. *Williams v. State* (Cr. App.) 166 S. W. 1170.

In a prosecution for keeping a disorderly house, testimony of a policeman that a certain woman stated to him, in defendant's absence, that defendant knew that she and the man who registered with her were not husband and wife, being hearsay, was improperly admitted. *Nichols v. State* (Cr. App.) 170 S. W. 304.

On a trial for receiving stolen goods, stolen from a house which was burglarized, the state may show that, on information received, officers found a toy in the trunk of the wife of accused, and prove that the toy was one taken from the house burglarized on the night of the burglary; but the state may not, to aid the testimony on that issue, prove that a third person had told the officers that they would find the toy, nor give in evidence the search they made of accused's dwelling to find the toy, where the officers made the search without informing any one that they were in search of the toy. *Barker v. State* (Cr. App.) 175 S. W. 151.

103. — Identification of property stolen.—In a theft case, it was held error to permit the state to prove that the alleged owner of the property, after said property had been found, identified and claimed the same, the defendant not being present at the time. *Anderson v. State*, 14 App. 49.

Evidence that the alleged owner of stolen property pointed out, claimed and took possession of the same when defendant was not present, is hearsay, and not admissible to establish ownership. *Clay v. State*, 40 App. 560, 51 S. W. 212.

In a burglary case, evidence of the identification of goods in accused's possession by third persons as belonging to them was inadmissible. *Elkins v. State*, 57 App. 247, 122 S. W. 393.

104. — **Conversations.**—Evidence of discussion among employees where defendant worked as to his sanity; held, inadmissible. *Hurst v. State* (Cr. App.) 40 S. W. 264.

In a trial upon an indictment as principal in a murder, evidence as to a telephone conversation by which the wife of the one who actually did the killing arranged to have a third person come to the house in her husband's absence was inadmissible as hearsay. *Menefee v. State* (Cr. App.) 149 S. W. 138.

In a trial for burglary accompanied by an assault and followed by an attempt on the part of defendant to kill himself with a razor, evidence as to conversations between defendant's foster mother and the officers relative to their finding blood and a blood-stained handkerchief was properly excluded. *Shaffer v. State* (Cr. App.) 151 S. W. 1061.

One charged with having assaulted his wife, who left him and went out of the state, although asked on cross-examination if he did not go after her and have a conversation with her, having so testified on direct examination, was properly not permitted to detail to the jury the conversation he had with her. *Yates v. State* (Cr. App.) 152 S. W. 1064.

In a prosecution for horse theft, the court properly refused to permit witnesses to testify as to conversations they had had with the person from whom defendant claimed to have gotten the horse, since, not occurring in the presence of defendant, it was hearsay. *Sims v. State*, 72 App. 621, 163 S. W. 79.

105. — **Written statements.**—Where a witness testified that after accused's arrest, and while the matter of his marriage with prosecutrix was being discussed, the prosecutrix admitted that she and accused had not been married, a letter written by prosecutrix to the witness, while accused was in jail, admitting her statement to the witness that she and accused had not been married, and stating that she was afraid to say in the presence of accused that they were married, and that she had stated that she and accused were married, and that she thought that they were, was inadmissible as hearsay. *Wilkerson v. State*, 60 App. 388, 131 S. W. 1108, Ann. Cas. 1912C, 126.

Where the state sought to show that a check, relied on by accused in support of his defense, had been altered, a letter by a bank to another bank, which had cashed the check, was inadmissible against accused; he having no connection with the letter. *Davis v. State* (Cr. App.) 152 S. W. 1094.

An unsworn statement of a person who was not independently shown to have ever been connected with an underwriters' association, made to a third person in a letter, that the association did not have a certain capital, was not admissible in evidence. *Tripp v. State*, 72 App. 97, 160 S. W. 1191.

In a prosecution for assault with intent to kill, letters and certificates from parties at another place bearing upon defendant's peaceable and law-abiding reputation, etc., were hearsay and inadmissible. *Jones v. State* (Cr. App.) 167 S. W. 1110.

A letter written by one claiming to be a wife of accused is not admissible to show that he was guilty of the offense of bigamy. *Ex parte Lambert* (Cr. App.) 172 S. W. 783.

106. **Evidence founded on hearsay.**—It is improper to admit a newspaper account of the commission of the offense. *Millirons v. State*, 34 App. 12, 28 S. W. 685.

A witness whose knowledge is based on letters written by third persons is not competent to testify. *Scruggs v. State*, 35 App. 622, 34 S. W. 951.

In a prosecution for disturbing religious worship, one who testified that he did not know accused, but that he was the man he saw at the church window on the night of the disturbance, could testify that he was told accused's name by others. *Buzan v. State*, 59 App. 213, 128 S. W. 388.

In a prosecution for embezzlement, an auditor's report, showing the amounts embezzled, is hearsay and inadmissible, where the information contained in the report was obtained in part from different books, in part from oral statements of different persons, and in part from other sources. *Dickey v. State* (Cr. App.) 144 S. W. 271.

The testimony of a witness having no personal recollection of the facts, but relying on the books of a bank, kept by a third person and not proved to be correct, and on a letter with which accused had nothing to do, is inadmissible as hearsay. *Davis v. State* (Cr. App.) 152 S. W. 1094.

The testimony of a witness having no independent recollection of the fact testified to, but relying wholly on memoranda made by him of private writings, not the best evidence of the facts recited therein, is hearsay. *Davis v. State* (Cr. App.) 152 S. W. 1094.

Testimony merely of what witnesses had heard as to the mental condition of defendant's father is hearsay. *Brice v. State*, 72 App. 219, 162 S. W. 874.

107. — **Matters provable by reputation.**—In a prosecution for keeping a disorderly house, the character of the house, and of its occupants also, may be proved by general reputation. *Pen. Code*, art. 496.

County boundaries may be proved by general reputation. *Cox v. State*, 41 Tex. 1; *Nelson v. State*, 1 App. 42. Except in trials for bigamy, incest, and adultery, marriage may be proved as at common law, that is, by general reputation, cohabitation, declarations, and the like. *Jackson v. State*, 8 App. 60.

Its witness having testified to a confession of defendant, the state introduced evidence to sustain the character of its witness for truth and veracity. The sustaining witnesses testified that for several years prior to his removal (about eighteen months before), they lived in the same neighborhood with him and knew his reputation. Held sufficient as predicate. *Thurmond v. State*, 27 App. 347, 11 S. W. 451.

General reputation is admissible to prove character when that is an issue. *Landa v. Obert*, 5 Civ. App. 620, 25 S. W. 342.

On trial of a white woman for intermarrying with a negro, evidence that her first husband was a white man was admissible, to show that she was recognized as a white woman. *Bell v. State*, 33 App. 163, 25 S. W. 769.

On trial for libel, for charging the injured party with dishonesty, the general reputation of such person for honesty and fair dealing is admissible, but rumor and conversation in regard to specific acts are not admissible either to show want of malice or to mitigate the punishment. *Baldwin v. State*, 39 App. 245, 45 S. W. 714.

The term "pedigree" includes the facts of birth, marriage, and death and the times when such events happened. *Rowan v. State*, 57 App. 625, 124 S. W. 668, 136 Am. St. Rep. 1005.

Testimony that defendant was reputed to be in control of a private residence is hearsay. *Dunn v. State*, 72 App. 170, 161 S. W. 467.

103. — Evidence as to age.—While, where prosecutrix's mother and father are dead or beyond the court's jurisdiction, and her age is in issue, hearsay evidence as to her age was admissible, if based on statements of her near relatives or persons in a position to know thereof, it was error to admit evidence that prosecutrix's general reputation was that she was only 13 years of age, where her parents had testified in the case to her age, though they testified differently. *Cowden v. State* (Cr. App.) 150 S. W. 779; *Tate v. State* (Cr. App.) 150 S. W. 781.

It is not hearsay for a child to testify as to her age, where she received her knowledge from her mother. *Vaughn v. State*, 62 App. 24, 136 S. W. 476.

In a rape prosecution the girl was properly permitted to testify as to her age, though she did say on cross-examination that she was 14, because her mother had told her so; its weight being for the jury. *Boyd v. State*, 72 App. 521, 163 S. W. 67.

109. Acts and declarations of conspirators in general.—In the case of conspirators, when a conspiracy has been shown, any fact or circumstance which tends to establish the guilt of one of them, is relevant and competent evidence against the others. *Pierson v. State*, 18 App. 524; *Mixon v. State*, 36 App. 66, 35 S. W. 394.

The acts of all are admissible in a general indictment against all. *Cruit v. State*, 41 Tex. 476; or on separate indictments, *Corn v. State*, 41 Tex. 301.

Where defendant and M. acted together and were the parties who did the killing, it was immaterial which had or kept the gun, or in whose possession it was found and a gun found hidden between the mattresses of M.'s bed, was admissible against defendant. *Rodriguez v. State*, 32 App. 259, 22 S. W. 678.

When the alleged conspiracy has been established, declarations of a co-conspirator made before the commission of the offense are admissible. *Cline v. State*, 34 App. 347, 30 S. W. 801; *Atkinson v. State*, 34 App. 424, 30 S. W. 1064.

Statements and declarations of co-conspirators are admissible when evidence tending to prove a conspiracy has been introduced. *Small v. State* (Cr. App.) 40 S. W. 790.

The evidence showed a conspiracy between defendant and one W. The state was allowed to prove that prior to the alleged theft the witness had a conversation with W., who stated that said cattle belonged to defendant, but defendant did not wish it known as he had some judgments against him; held, such conversation not being in the furtherance of the common design is not admissible. *Dungan v. State*, 39 App. 115, 45 S. W. 19.

Where a conspiracy has been formed, the acts and declarations of a conspirator are admissible against his co-conspirators until the object of the conspiracy has been accomplished. *Milo v. State*, 59 App. 196, 127 S. W. 1025.

In a prosecution for burglary, testimony that an alleged accomplice of defendant introduced defendant to witness was admissible. *Bowen v. State*, 60 App. 595, 133 S. W. 256.

In a prosecution of an accessory to the crime of seduction, it was proper to admit evidence of acts and statements by the principal as to bringing about the periods of the prosecutrix; all evidence admissible against the principal being admissible against the accessory, it being necessary to prove the guilt of the principal. *Harrison v. State* (Cr. App.) 153 S. W. 139.

In a prosecution for assault to murder, where the state's theory of the case was that four persons were acting together in a conspiracy to take the life of the person assaulted, there was no error in admitting statements made by the conspirators, or their acts, during the afternoon which preceded the evening of the assault, as the acts and declarations of co-conspirators, prior to the consummation of the completed act, are admissible to show the conspiracy and the animus behind the acts. *Wilson v. State* (Cr. App.) 154 S. W. 1015.

109½. Who are accomplices.—See art. 79, Penal Code, and notes.

110. Furtherance or execution of common purpose.—If two or more act together, with unlawful intent, in the perpetration of a crime, they are co-conspirators and principal offenders by reason of their common design and co-operation, and whether they be indicted and tried jointly or separately, the antecedent acts or declarations of each, pending and in pursuance of the common design, and tending to throw light upon its execution or upon the motive or intent of its perpetrators, are competent evidence against each and all of them. *Cox et al. v. State*, 8 App. 254, 34 Am. Rep. 746; *Avery v. State*, 10 App. 199; *Cruit v. State*, 41 Tex. 476; *Blum v. State*, 20 App. 578, 54 Am. Rep. 530. See, also, *Williams v. State*, 24 App. 17, 5 S. W. 655; *Clark v. State*, 28 App. 189, 12 S. W. 729, 19 Am. St. Rep. 817; *Cook v. State*, 22 App. 511, 3 S. W. 749; *Tillery v. State*, 24 App. 251, 5 S. W. 842, 5 Am. St. Rep. 882; *Cortez v. State*, 24 App. 511, 6 S. W. 546.

The acts and declarations of co-conspirators, made in furtherance of the common design, and while the conspiracy continues, are evidence against each other. *Phillips v. State*, 6 App. 364; *Cox v. State*, 8 App. 254, 34 Am. Rep. 746; *Loggins v. State*, 8 App. 434; *Avery v. State*, 10 App. 199; *Post v. State*, Id. 598; *Loggins v. State*, 12 App. 65; *Pierson v. State*, 18 App. 524; *Kennedy v. State*, 19 App. 618; *Smith v. State*, 21 App. 96, 17 S. W. 560; *Smith v. State*, 21 App. 107, 17 S. W. 552; *Thompson v. State*, 35 App. 511, 34 S. W. 629; *Cline v. State*, 34 App. 347, 30 S. W. 801; *Vasquez v. State* (Cr. App.) 171 S. W. 1160.

On a prosecution for larceny, the evidence for the state showed that F. rented a room over a store, and that the room was occupied by himself and defendant,

that during their occupancy a hole was cut through the floor whereby access was obtained to the store and goods taken therefrom. While the owner of the store was testifying he was asked if he saw any one else that evening in the store, and stated that the other man was F., who came in and asked to be shown some gloves. The evening referred to was the evening before the theft. Held, that the evidence was admissible. *Hernandez v. State*, 60 App. 30, 129 S. W. 1109.

Testimony of the one who leased the room as to the statements of F., when taking the room, to the effect that he was going to bring a "partner" with him was admissible. *Hernandez v. State*, 60 App. 30, 129 S. W. 1109.

Though the indictment does not allege a conspiracy, yet if the evidence shows that, though widely separated, the defendant and another, not under indictment, concerted and co-operated in the transaction, the acts of the other in pursuance of the common design are evidence against the defendant. *Heard v. State*, 9 App. 1.

Where a conspiracy has been shown, not only the acts and declarations of a co-conspirator in furtherance of a common design may be proved against the defendant, but also the financial condition of the co-conspirator, in connection with his possession of the effects of the deceased, prior to the consummation of the conspiracy. *Post v. State*, 10 App. 598.

Until the full object and purpose for which the parties combined is finally completed, the acts and declarations of each are admissible against the others. *O'Neal v. State*, 14 App. 582. See, also, *Smith v. State*, 21 App. 107, 17 S. W. 552; *McFadden v. State*, 28 App. 241, 14 S. W. 128; *Gentry v. State*, 24 App. 478, 6 S. W. 321; *Bowers v. State*, 24 App. 542, 7 S. W. 247, 5 Am. St. Rep. 901; *Menges v. State*, 25 App. 710, 9 S. W. 49; *Phillips v. State*, 26 App. 228, 9 S. W. 557, 8 Am. St. Rep. 471; *Weathersby v. State*, 29 App. 278, 15 S. W. 823; *Lyons v. State*, 30 App. 642, 18 S. W. 416; *Blain v. State*, 30 App. 702, 18 S. W. 862; *Mason v. State*, 31 App. 306, 20 S. W. 564.

In a murder trial, it was held correct to permit the state to prove that eleven days before the murder, the codefendants of the defendant were seen in the town in which the murder was committed. In connection with other proof, this testimony tended to show preparation and complicity on the part of all the defendants. *George v. State*, 17 App. 513.

On trial for murder, where defendant and two others had acted together, it was held admissible to prove threats and preparation of one of the others, it also being shown that defendant knew of such threats and preparation and took part in the killing. *Cline v. State*, 33 App. 482, 27 S. W. 128.

Conspiracy being established, the acts and declarations of each conspirator, pending the enterprise, are admissible in evidence. *Williams v. State*, 24 App. 17, 5 S. W. 655; *Rix v. State*, 33 App. 353, 26 S. W. 505.

Declarations of alleged conspirators in the absence of defendant, and not in furtherance of the common design, are inadmissible. *Schwen v. State*, 37 App. 368, 35 S. W. 172; *Caudill v. State* (Cr. App.) 35 S. W. 373.

To render the statements and declarations of one co-conspirator admissible against another it is essential that the conspiracy was then pending its object not having been consummated and such act or declaration must be in furtherance of the common design. *Dungan v. State*, 39 App. 115, 45 S. W. 19.

Where the facts, in a prosecution for robbery occurring at the time of an assault, show a conspiracy to beat prosecutor, hired to ferret out places where liquor was unlawfully sold, prosecutor may testify what his business was, and that he met one of the conspirators at the barber shop, where the assault took place, by appointment. *Phillips v. State*, 73 App. 317, 164 S. W. 1004.

111. — **Absence of defendant.**—When a conspiracy is shown (which is usually inductively from circumstances), then the acts and declarations of one conspirator in furtherance of the common design, as long as the conspiracy continues, are admissible against his associates, though made in the absence of the latter. The least degree of concert or collusion between the parties to an illegal transaction makes the act of one the act of all. *Hannon v. State*, 5 App. 549; *Phillips v. State*, 6 App. 364; *Taylor v. State*, 3 App. 170; *O'Neal v. State*, 14 App. 582; *Smith v. State*, 21 App. 96, 17 S. W. 560; *Smith v. State*, 21 App. 107, 17 S. W. 552; *Cox v. State*, 8 App. 254; *Kennedy v. State*, 19 App. 618; *Pierson v. State*, 18 App. 524; *Phelps v. State*, 15 App. 45; *Serrato v. State* (Cr. App.) 171 S. W. 1133.

Where, in a prosecution for assault to kill, the state claimed a conspiracy between defendant and three others to kill deceased, evidence of all facts and circumstances in furtherance of the design by each of the parties was admissible, though all of them may not have been present at the time the assault occurred. *Wilson v. State*, 70 App. 3, 155 S. W. 242.

Where the facts in a prosecution for kidnapping showed a conspiracy, the acts, words, and conduct of each and all of the conspirators in furtherance of the common design, until the termination of the conspiracy, were admissible, whether defendant was actually present or not. *Nunez v. State*, 70 App. 481, 156 S. W. 933.

Where accused, charged with rape, informed a third person that accused's son was acting for him, using money given him by accused, and that the third person would obtain instructions from the son, the acts of the son, done under the directions of accused, were admissible against him, though the acts were not in the presence of accused. *Burge v. State* (Cr. App.) 167 S. W. 63.

Declarations of a co-conspirator during accused's absence, in furtherance of a conspiracy that accused should burn the co-conspirator's house for the insurance, were admissible under an instruction that they could only be considered if the conspiracy was proven beyond a reasonable doubt. *Walker v. State* (Cr. App.) 167 S. W. 339.

In a prosecution for bringing stolen property into the state, the statements and acts of all the conspirators during the pendency of, and in furtherance of, the common design to convert the goods to their use, such as its diversion, etc., were

admissible against another, though said and done in his absence. *Zweig v. State* (Cr. App.) 171 S. W. 747.

112. — Acts and declarations during actual commission of crime.—Declarations made during the commission of an assault in pursuance of a conspiracy are admissible. *Rape v. State*, 34 App. 615, 31 S. W. 652.

Where, in a prosecution for aggravated assault on a police officer, there was evidence that defendant and two others were acting together when committing the assault, and that one of them, approaching complainant, removed his pistol from his holster and struck him over the head with it, it was not error to permit the state to exhibit the pistol to the jury, though defendant had not been personally connected therewith. *Lacoume v. State* (Cr. App.) 143 S. W. 626.

Where the testimony of the prosecuting witness tended to show that a person accused of rape and C. were acting together to compel her to have sexual intercourse with accused, it was not error to permit her to testify to the acts and conduct of C. as well as the acts and conduct of accused. *Wragg v. State* (Cr. App.) 145 S. W. 342.

Where, in a prosecution for assault with intent to murder, the evidence indicated that both defendant and B. were present and were engaged in the assault, it was not error to admit in evidence statements made by B. at the time of the assault as against accused. *Waters v. State* (Cr. App.) 148 S. W. 796.

Where it was the theory of the state that accused and his father conspired to kill deceased owing to a difficulty between deceased and the father, evidence of the acts of the father during the shooting was admissible. *Coulter v. State*, 72 App. 602, 162 S. W. 885.

113. — Acts and declarations prior to conspiracy or defendant's joinder therein.—One conspirator's declaration of his individual intention to commit a crime, not made in furtherance of a design concerted with others, is not evidence against one who subsequently engaged in the conspiracy and co-operated in its execution. *Cox v. State*, 8 App. 254, 34 Am. Rep. 746.

When conspiracy has been proved, and conspirators are together, the declarations of one made prior to the conspiracy are admissible against the other. *Casner v. State*, 42 App. 118, 57 S. W. 825.

Acts and declarations of principals in regard to the deceased, occurring before the homicide and before the conspiracy was entered into, are admissible against those who subsequently entered the conspiracy and also against those who made them. *Cain v. State*, 42 App. 210, 59 S. W. 276.

If two or more parties form a conspiracy to do a certain act, and a third party enters the conspiracy after its formation, the acts and declarations of the co-conspirators made before the said party comes into the conspiracy, are admissible against such party when he adopts the conspiracy, common design and purpose of all. *Stevens v. State*, 42 App. 154, 59 S. W. 548.

114. — Subsequent to crime but before fulfillment of purpose.—Where decedent was killed by a company of men illegally organized in Texas to invade Mexico, merely as an incident of the purpose of the organization, in order to prevent decedent from informing concerning them, and the conspiracy did not end until the company were arrested and incarcerated, evidence as to what was said and done by the conspirators, or any of them, after decedent's death and prior to their arrest was admissible. *Serrato v. State* (Cr. App.) 171 S. W. 1133; *Martinez v. State* (Cr. App.) 171 S. W. 1153.

It was shown that the goods taken from the burglarized house were still in the joint possession of defendant and his co-defendant, and that they were preparing to take them out of the State; held, the conspiracy was not at an end and the confessions, acts and statements of one were admissible against the other. *Franks v. State*, 36 App. 149, 35 S. W. 977.

A conspiracy to set fire to a building, with the ultimate purpose of obtaining the insurance on a building of one of the conspirators adjoining it, did not terminate with the burning of the building, so as to render inadmissible a letter by one of the conspirators to the other, received the day after the fire, on the ground that the object of the conspiracy had then been accomplished. *Gracy v. State*, 57 App. 68, 121 S. W. 705.

Since, where a crime is committed pursuant to a conspiracy, the conspiracy continues until the proceeds of the crime have been divided or the design is accomplished, any evidence as to the concerted action of the conspirators up to the time the purpose of the conspiracy has been accomplished is admissible. *Snelling v. State*, 57 App. 416, 123 S. W. 610.

Where a conspiracy has for its purpose not only the commission of a crime, but also a division of the profits which were to result therefrom, the declarations by one conspirator made after the crime, and before the subsequent arrangements as to the division of the benefits were completed, were competent as against his co-conspirators. *Eggleston v. State*, 59 App. 542, 128 S. W. 1105.

Where it is a part of a conspiracy to murder that, after the killing, a co-conspirator should return to the body and place a knife there, to show that the killing was in self-defense, his act would be in the nature of concealing the crime, and evidence of such act would be admissible in evidence as part of the *res gestæ* in a prosecution for murder, and if for any reason, as for escape or concealment, the common purpose of the conspirators continues, declarations in furtherance thereof are admissible, although the crime which was the object of the conspiracy has been consummated. *Eggleston v. State*, 59 App. 542, 128 S. W. 1105.

The evidence showing an acting together by M. and defendant, shortly after a burglary, in attempting to dispose of a harness taken in the burglary, their possession of which was not satisfactorily explained, a declaration of M., then made, before disposition of the harness, that defendant had a harness he wanted to sell, was admissible, on a prosecution for the burglary, as a declaration of a co-con-

spirator prior to termination of the conspiracy. *Dowling v. State* (Cr. App.) 145 S. W. 606.

The rule that evidence of acts and declarations of a conspirator in furtherance of the common design is admissible against another conspirator pending the conspiracy and until its final termination includes anything that is within the contemplation of the conspiracy, such as dividing the spoils, or any matter that may be subsequent to, but included in, the scope of the agreement. *Serrato v. State* (Cr. App.) 171 S. W. 1133.

115. **Acts and declarations after accomplishment of object.**—In general the acts and declarations of a confederate of the defendant are not evidence against the defendant, if they were made after the consummation of the unlawful enterprise; but such acts or declarations are evidence against the defendant if he was present and acquiesced in them, even after the lapse of some time from the consummation of the offense, and even before he had been charged or prosecuted for complicity in the offense. *Holden v. State*, 18 App. 91; *Long v. State*, 13 App. 211; *Ricks v. State*, 19 App. 308; *Armstead v. State*, 22 App. 51, 2 S. W. 627; *Smith v. State*, 21 App. 107, 17 S. W. 552; *Davis v. State*, 9 App. 363; *Avery v. State*, 10 App. 199; *Wiley v. State*, 22 App. 408, 3 S. W. 570; *Williams v. State*, 24 App. 17, 5 S. W. 655; *Cortez v. State*, 24 App. 511, 6 S. W. 546; *Tillery v. State*, 24 App. 251, 5 S. W. 842, 5 Am. St. Rep. 882.

Declarations of a co-conspirator after the consummation of the conspiracy are inadmissible. *Price v. State* (Cr. App.) 40 S. W. 596; *Phillips v. State*, 6 App. 364.

The declaration of a conspirator, made soon after the accomplishment of the object of the conspiracy, is not admissible against the other though present, as forming a part of the *res gestæ*. It is admissible against the one making it. *Williams v. State*, 40 App. 569, 51 S. W. 224.

Evidence offered to show conspiracy held incompetent because, even if tending to show conspiracy, it related to matters transpiring subsequent to the completion of the conspiracy. *Jump v. State*, 27 App. 459, 11 S. W. 461. And on this subject: *Menges v. State*, 25 App. 710, 9 S. W. 49; *Brookser v. State*, 26 App. 593, 10 S. W. 219; *Kegans v. State*, 27 App. 703, 11 S. W. 644; *Clark v. State*, 28 App. 189, 12 S. W. 729, 19 Am. St. Rep. 817; *Lyons v. State*, 30 App. 642, 18 S. W. 416; *Blain v. State*, 30 App. 702, 18 S. W. 862. See, also, *Graves v. State*, 28 App. 354, 13 S. W. 149; *Nalley v. State*, 28 App. 387, 13 S. W. 670; *Williams v. State*, 30 App. 153, 16 S. W. 760.

Declarations made after the object of the conspiracy had been accomplished as to further acts of defendants are not admissible. *Mixon v. State* (Cr. App.) 31 S. W. 408. Neither are declarations made in the presence of defendant while he is asleep. *Id.*

On trial for murder, where the state's theory was that defendant assisted another person in committing the homicide, evidence of the flight of such other person is admissible. *McIntyre v. State* (Cr. App.) 33 S. W. 347.

On trial of two persons for murder, evidence that after the homicide was committed one of them had possession of property that had belonged to deceased, is inadmissible as against the other. *Conde v. State*, 35 App. 98, 34 S. W. 286, 60 Am. St. Rep. 22.

The finding of a pistol belonging to defendant's brother, by information given by the owner after the conspiracy between defendant and his brother was at an end, would be inadmissible. *Murphy v. State*, 36 App. 24, 35 S. W. 174.

It is not competent to prove that on the morning after the killing, the mother-in-law, sister-in-law, and wife of the deceased, were talking and laughing as though nothing had happened. If a conspiracy had existed between them and defendant, it was then at an end. *Barry v. State*, 37 App. 302, 39 S. W. 692.

Statements made by the principal before his arrest going to incriminate him are clearly admissible against an accomplice. *Wilkerson v. State* (Cr. App.) 57 S. W. 961.

A conspirator to set fire to a building, with the object of obtaining the insurance on a building of his own adjoining it, wrote a letter to his co-conspirator before the fire, but not received until the day after, in regard to the conspiracy between them. Held, that the letter was not within the rule against the admission against a conspirator of acts or declarations of his co-conspirator, in his absence, after the accomplishment of the object of the conspiracy. *Gracy v. State*, 57 App. 68, 121 S. W. 705.

Where the evidence showed that any conspiracy to steal money had ended and the spoils had been divided when a conversation occurred in which a claimed conspirator offered accused money, there was no connection between the money offered accused there and that stolen, so that the testimony of such conversation was not admissible. *Snelling v. State*, 57 App. 416, 123 S. W. 610.

Accused and another were arrested for burglary, and were warned generally that anything they might say could be used against them, and the other person in the presence of accused acknowledged that he had the stolen goods, and accused remained silent. Held, that the confession and acts of the codefendant were not admissible in evidence against accused, as they were the acts and declarations of an alleged co-conspirator after completion of the offense, and made under circumstances which could not be used against the silent conspirator, and the evidence was also inadmissible because his silence after being warned that any statement that he might make could be used against him precluded the admission of anything that was said in his presence. *Couch v. State*, 58 App. 505, 126 S. W. 866.

Acts and declarations of a conspirator after the commission of a crime were admissible against his co-conspirators, where they are so connected with the crime as to be part of the *res gestæ*. *Eggleston v. State*, 59 App. 542, 128 S. W. 1105.

In a prosecution for burglary, evidence of possession by one of the co-conspir-

ators of the fruit of the crime is admissible against defendant. *Bowen v. State*, 60 App. 595, 133 S. W. 256.

In a prosecution for burglary, evidence of the finding of a bank book at the home occupied by defendant and two co-conspirators with defendant, showing a deposit of \$800 by one of the conspirators in a certain bank, was admissible. *Bowen v. State*, 60 App. 595, 133 S. W. 256.

Where accused and his father were charged with assault to murder, and both participated in the difficulty with prosecutor, evidence that the father, in the absence of accused, had, subsequent to the difficulty, sought to induce a witness to give false testimony was inadmissible. *Day v. State*, 62 App. 413, 138 S. W. 127.

Where, on a trial of two defendants, the testimony of one of them given at their former trial was received in evidence without objection, the court properly charged that such testimony could not be considered for any purpose as to the codefendant. *Jones v. State*, 64 App. 510, 143 S. W. 621.

In a prosecution for burglary, evidence of a conversation by an officer with B., who was jointly charged with accused, on the next day after their arrest, and while both were in custody, in which B. stated, in accused's absence, where some silk handkerchiefs could be found, and that they were found in that place, was not admissible as against accused; any conspiracy between him and B. to commit the crime having been terminated, and the conversation having been in accused's absence. *Overstreet v. State* (Cr. App.) 150 S. W. 630.

In a prosecution charging one T., with others, as a principal in offering to bribe a witness, where none of the defendants requested a severance and were jointly tried, T.'s voluntary statement, made before the grand jury, reduced to writing and signed by him, was admissible as against him alone. *Savage v. State* (Cr. App.) 170 S. W. 730.

In a prosecution for homicide committed as incidental to an illegal conspiracy to organize in Texas an armed band to invade Mexico, a manifesto in the Mexican language, purported to have been written by a Junta in California, intended to incite Mexicans to rebellion, found in the possession of one of the conspirators, who separated from the others a short time prior to their arrest, but who was first arrested, was admissible against accused to show the illegal character of the conspiracy. *Martinez v. State* (Cr. App.) 171 S. W. 1153.

Where it was the theory of the state that deceased had been killed pursuant to a conspiracy, evidence of the acts of accused's co-conspirators after he was arrested was admissible to show the reason for the conspiracy and why accused and the others had joined. *Cline v. State* (Cr. App.) 178 S. W. 520.

116. Admissibility in defendant's behalf.—See notes under art. 791.

117. Preliminary proof of conspiracy.—The sufficiency of the preliminary proof as a predicate for the imputed acts or declarations, is primarily determinable by the judge; but if its sufficiency is a question in the case, it should be submitted to the jury with instructions to disregard such acts and declarations, in case they are not satisfied from the evidence, independent of such acts and declarations of the defendant's complicity in the crime charged. *Loggins v. State*, 8 App. 434; *Crook v. State*, 27 App. 198, 11 S. W. 444.

Conspiracy can not be proved by the declarations of a co-conspirator made after the consummation of the offense, and in the absence of the defendant. *Cohea v. State*, 11 App. 153; *Crook v. State*, 27 App. 198, 11 S. W. 444.

See facts stated in the opinion, upon which it was held that a prima facie case of conspiracy was established, and hence there was no error in admitting in evidence, against the defendant, the acts and declarations of his co-conspirators, and especially so where the court submitted the question of conspiracy vel non to be found by the jury, and further instructed them that if they found a conspiracy was not established, they were not to consider these acts and declarations as evidence against the defendant. *Luttrell v. State*, 31 App. 493, 21 S. W. 248.

The statements of a party received as that of a co-conspirator with defendant, which were made in defendant's absence and not brought to his attention until given at the trial, are not admissible to prove the conspiracy. *Newton v. State*, 62 App. 622, 138 S. W. 708.

In connection with other circumstantial evidence of a conspiracy between defendant and his brother, evidence that the brother, when asked, a few days before the homicide, what was the trouble between defendant and deceased, said: "It ain't going to leak out from us; it may leak out after a while, but it will never come from us"—was admissible. *Cameron v. State* (Cr. App.) 153 S. W. 867.

Though all the testimony for defendant is to the contrary, yet, if the testimony as a whole raises the issue that defendant and his wife were acting together in making the assault, then her acts and declarations during the time of the preparation for the act and while it was being consummated are admissible. *Thompson v. State* (Cr. App.) 178 S. W. 1192.

A conspiracy may be shown by circumstances. *Thompson v. State* (Cr. App.) 178 S. W. 1192.

While a conspiracy cannot be shown by declarations of a co-conspirator alone, they may be considered thereon in connection with other evidence. *Thompson v. State* (Cr. App.) 178 S. W. 1192.

Evidence, on a prosecution for assault to murder, held sufficient to authorize a finding that defendant and his wife were acting together, rendering her acts and declarations admissible on the issue of whether he fired. *Thompson v. State* (Cr. App.) 178 S. W. 1192.

118. — Necessity.—To render the acts and declarations of a supposed confederate admissible against a defendant, proof must be adduced of the defendant's complicity at the time such acts were done or declarations made by his alleged confederate. *Loggins v. State*, 8 App. 434.

The acts and declarations of the principal may be proved to establish his guilt,

but if there be no proof aliunde of conspiracy between the defendant and the principal, the jury should be instructed not to consider such evidence as proof of any other issue than the guilt of the principal. *Arnold v. State*, 9 App. 435.

Declarations of an accomplice made pending the offense, in the absence of proof of conspiracy, were not admissible. *Martin v. State*, 25 App. 557, 8 S. W. 682.

The state's witness, Holman, testified, on the trial of the accused as an accomplice to murder, to the acts, declarations, and statements of one Harris, and a conversation between him, the witness, the said Harris, and the alleged principal, to all of which the accused objected upon the ground that he was not present at any of the times testified about, and that it had not been shown that a conspiracy to commit murder existed between him and the said parties. Held, that this proof in this case was clearly hearsay, and was inadmissible, except upon the predicate of the existence of such a conspiracy. *Crook v. State*, 27 App. 198, 11 S. W. 444.

Outside of the acts and declarations, there must be proof of the conspiracy itself. *Blain v. State*, 33 App. 236, 26 S. W. 63.

To render the statements and declarations of one co-conspirator admissible against another it is essential that a conspiracy be shown. *Dungan v. State*, 35 App. 115, 45 S. W. 19.

Testimony that freshly branded cattle were found in a co-defendant's pasture, no conspiracy having been shown, is inadmissible. *Guinn v. State*, 39 App. 257, 45 S. W. 694.

When no conspiracy has been proven, acts and declarations of other persons charged with the commission of the offense are inadmissible against defendant. *Rhodes v. State*, 39 App. 332, 45 S. W. 1009.

In a prosecution of two persons for burglary, in the absence of evidence of cooperation between them, evidence that goods taken from the building burglarized were found in the possession of either defendant is not admissible against the other. *Love v. State*, 58 App. 270, 124 S. W. 932.

119. — **Order of proof.**—The old rule that a conspiracy must first be established before acts and declarations of individual conspirators are admissible against each other is no longer the law. (*Following Smith v. State*, 21 App. 120, 17 S. W. 552.) *Harris v. State*, 31 App. 411, 20 S. W. 916.

The acts and declarations of a co-conspirator may be introduced in evidence before the conspiracy has been established, provided it be subsequently established by other evidence in the case. *Luttrell v. State*, 31 App. 493, 21 S. W. 248.

Proof of a plot or combination must precede proof of declarations made by either of the conspirators, though the acts and declarations of separate parties in planning or executing the scheme may be shown in evidence of the common design. *Serrato v. State* (Cr. App.) 171 S. W. 1133.

Where a conspiracy is shown, it is immaterial that this is not done until after introduction of acts and declarations of a co-conspirator. *Thompson v. State* (Cr. App.) 178 S. W. 1192.

120. **Documentary evidence in general.**—For other decisions as to documentary evidence, see *Vernon's Sayles' Civ. St.* 1914, arts. 3687, 3694, 3699.

Documentary evidence is admissible in criminal cases under the rules of the common law, to establish collateral facts, and this practice is not in contravention of the constitutional right of the defendant to be confronted with the witnesses against him. *Rogers v. State*, 11 App. 608; *May v. State*, 15 App. 430.

A notary's certificate of protest, whether given in this or another state, is competent evidence of the facts therein recited, but of nothing more. *May v. State*, 15 App. 430; *May v. State*, 17 App. 213.

An affidavit previously made by defendant against a witness may be introduced to fix a date. *Perry v. State* (Cr. App.) 34 S. W. 618.

In a prosecution for swindling by obtaining goods with a worthless check, the check was admissible, though it did not show whether the bank on which it was drawn was a corporation or a joint-stock company, or where it was situated, and though the indictment did not allege that the bank was engaged in the banking business in the city and county of its location. *Glover v. State*, 57 App. 208, 122 S. W. 396.

The license and return showing accused's marriage to his second wife was admissible in evidence in a bigamy case. *Bryan v. State*, 63 App. 200, 139 S. W. 981.

Where accused, in a civil action on a note, falsely testified that the plaintiff executed and gave to him a receipt showing payment, the receipt, whether a valid instrument or not, was admissible in a prosecution for perjury, for it was material whether the receipt was executed as testified by accused. *Barber v. State*, 64 App. 96, 142 S. W. 577.

In a prosecution of a tax collector for embezzling, accused's reports to the state comptroller were properly admitted in evidence, even though some of them were signed only by his deputies. *Ferrell v. State* (Cr. App.) 152 S. W. 901.

121. — **Official records.**—Penal Code, art. 606, makes the entries on packages of intoxicating liquors shipped by express and in the books and papers of the express companies thereby required quasi public records and admissible in evidence in a prosecution for pursuing the occupation of selling intoxicating liquors in prohibition territory on proof that they were the records kept by the express company and identifying them, though they were not proved by the officer or agent of the express company making the entries; it also appearing that accused had signed such records as a receipt for the packages referred to therein. *Stephens v. State*, 63 App. 382, 139 S. W. 1141; *Atkinson v. State* (Cr. App.) 149 S. W. 114.

The record of a brand is not admissible as evidence of ownership in a trial for cattle theft unless the same has been recorded; and the record is not sufficient unless it designates the part of the animal upon which it is to be placed. But the statute controlling the subject can not be construed to mean that the record

shall designate the particular right or left side, shoulder, flank, or hip, as the case may be, of the animal upon which the brand is to be placed. It was sufficient in this case that the record of the brand showed that it was to be placed on the "hip, thigh, and flank." *Thompson v. State*, 25 App. 161, 7 S. W. 589.

On a trial for giving away liquor on election day the minutes of the commissioner's court showing the order for the election is admissible in evidence. *Borches v. State*, 33 App. 96, 25 S. W. 423.

An ordinance of a city or town may be proved by introducing in evidence a book purporting to be the ordinances of such city or town signed by the mayor of such city or town and attested by the secretary thereof. *Stark v. State*, 38 App. 233, 42 S. W. 379.

The fact that the assessment as made on a regular assessment blank was not signed and sworn to by the party making the assessment does not render it inadmissible if the officer identifies it as the original assessment made by the party. *Hamilton v. State* (Cr. App.) 60 S. W. 40.

In a trial for keeping a disorderly house where intoxicating liquors were sold, the county attorney's testimony, and an examined copy of the internal revenue collector's records as proven by his testimony, were properly admitted. *Novy v. State*, 62 App. 492, 138 S. W. 139.

In a prosecution for a violation of the local option law, the records of the commissioners' court were properly introduced in evidence to prove that prohibition was in force in the county, though such records were not transcribed by the judge nor the commissioners, as they became originals when transcribed by the clerk and signed and approved by the judge and commissioners. *Hart v. State* (Cr. App.) 150 S. W. 188.

In a prosecution for unlawfully engaging in the business of selling intoxicants in dry territory, the books of an express company showing the shipments of liquors to accused were admissible in evidence, having been properly identified, and the entries being shown to have been correctly made, and accused's receipt for items therein being shown. *Wilson v. State* (Cr. App.) 154 S. W. 571.

In a prosecution for pursuing the occupation of selling patent and other medicines without a license, orders of the county court levying an occupation tax covering the period during which defendant pursued that occupation were admissible. *Shed v. State*, 70 App. 10, 155 S. W. 524.

In a prosecution for selling intoxicating liquors in prohibition territory, the putting in force the prohibition within the territory may be proved either by the minute book, where the orders are entered in the minutes of the commissioners' court, or by properly certified copies thereof. *Howard v. State*, 72 App. 624, 163 S. W. 429.

122. — **Judicial proceedings and records.**—A transcript of the proceedings in justice court properly certified is admissible on habeas corpus trial. *Ex parte Ambrose*, 32 App. 468, 24 S. W. 291.

On trial for murder a petition for injunction, filed by defendant against deceased and others, and the order and writ were held competent to show animus of the parties. *Turner v. State*, 33 App. 103, 25 S. W. 635.

In a prosecution for homicide, the subpoena issued for deceased as a witness in a prosecution of defendant for cattle theft and the indictment of defendant in such prosecution were admissible on the question of motive. *Canon v. State*, 59 App. 398, 128 S. W. 141.

In a trial for killing a sheriff who attempted to arrest accused, the warrant for such arrest was properly admitted in evidence, regardless of any defects therein. *Condron v. State*, 62 App. 485, 138 S. W. 594.

In a trial for perjury in an action by defendant's former wife to vacate a divorce obtained by him, and for a divorce, the wife's petition therein, the answer thereto, and the decree obtained by defendant in his action were admissible to show the issues in the wife's action. *Spearman v. State* (Cr. App.) 152 S. W. 915, 44 L. R. A. (N. S.) 243.

In a prosecution for a perjury consisting of defendant's testimony in a prior prosecution against him for assault on J., it was proper for the state to introduce the indictment against defendant in such prosecution. *Miles v. State*, 73 App. 493, 165 S. W. 567.

In a prosecution for perjury for giving false testimony against prosecutor upon an examining trial, the complaint was admissible, as a matter of inducement, and the warrant of arrest, with the return thereon, to show that the examining court had jurisdiction over the prosecutor. *Waddle v. State*, 73 App. 501, 165 S. W. 591.

123. — **Private writings and publications.**—On an issue of insanity medical books are not admissible in evidence, and experts should not be allowed to testify to statements made therein. *Burt v. State*, 38 App. 397, 40 S. W. 1000, 43 S. W. 344, 39 L. R. A. 305, 330.

In the trial of appellant for arson, it was in proof that he had procured insurance on his stock to a much larger amount than its value when burned, and a state's witness testified that he was hired by the appellant to burn the house, and did set it on fire, and that the appellant, previous to the fire, told him that he intended to swindle the insurance company, and that he was fixing his books for that purpose, and had them nearly ready. Over defendant's objections the state was permitted to produce an account-book, and to prove that it was a book used by defendant in his business, and that certain entries therein were in his handwriting, and was then allowed to prove by an expert bookkeeper the meaning of the entries, which were mercantile and ambiguous. The objections were that neither the purpose nor the date of the entries was proved, and that the entries themselves were irrelevant. Held, that in view of the other evidence there was no error in overruling the objections and admitting the entries. *Bluman v. State*, 33 App. 43, 21 S. W. 1027, 26 S. W. 75.

In a trial for keeping a disorderly house, where intoxicants were unlawfully sold, freight bills and receipts were admissible to show receipt of intoxicants by him. *Novy v. State*, 62 App. 492, 138 S. W. 139.

Where the information alleged that a certain company was the proprietor of a place of public amusement, a theater, and that the defendant was the agent and employé of such company, and as such agent and employé did open, and permit to be opened, such place of public amusement on Sunday, tickets and programs of the theater for certain dates, including the Sunday in question, were admissible to prove the allegations of ownership and agency. *Gould v. State* (Cr. App.) 146 S. W. 172.

Medical books were not admissible in evidence in a homicide case to show that catgut was not a proper thread used for sewing up wounds. *Ward v. State*, 70 App. 393, 159 S. W. 272.

Where, on a trial for bigamy, the proprietor of a hotel identified accused as the person who stopped at her hotel, and also identified accused's first wife as the woman who was there with accused, and testified that accused informed her that the woman was his wife, a leaf out of the register of the hotel, showing that accused had registered there with his wife, was admissible. *Harris v. State* (Cr. App.) 167 S. W. 43.

Where accused went to a hotel in the place where decedent resided, and having registered under an assumed name, and been assigned a room, was on the lookout for decedent until she met and shot him, and thereafter the name under which she registered was erased, the register was admissible in evidence, as against an objection that it was calculated to prejudice accused's rights, and to show that she was not connected with the erasure. *Latham v. State* (Cr. App.) 172 S. W. 797.

124. — **Maps and photographs.**—A map or plat of a town in which the homicide occurred made by the county surveyor and testified by him to be correct is competent evidence. *Rodriquez v. State*, 32 App. 259, 22 S. W. 978.

In a trial for murder, it was not error to admit in evidence photographs taken at the scene of the homicide the morning thereafter, showing the position of the body, the buggy in which it was found, and the environments. *Sanchez v. State* (Cr. App.) 149 S. W. 124.

Where, in a prosecution for cattle theft, the state proved before introducing in evidence a map showing the pasture of the alleged owner, together with the gates, etc., that it was approximately correct, the map was properly admitted in evidence and used by witnesses; it not being necessary to show that it was absolutely correct. *Reynolds v. State*, 71 App. 454, 160 S. W. 362.

Where a civil engineer drew a map or plat which was shown to be substantially correct, it was properly admissible to show the situation of the place of the homicide, though not drawn to a scale, as against an objection that it was misleading. *Bullock v. State* (Cr. App.) 165 S. W. 196.

A county map, made by the land office, is properly received in evidence, though it had been torn in half and put together again. *Tores v. State* (Cr. App.) 166 S. W. 523.

125. — **Authentication and proof.**—See as to "Foreign laws," notes to *Vernon's Sayles' Civ. St.* 1914, arts. 3692, 3693.

A certified copy of a record of a mark and brand is competent evidence without producing the record. *Wilson v. State*, 3 App. 206. See, also, *Myers v. State*, 24 App. 334, 6 S. W. 194; *Crowell v. State*, 24 App. 404, 6 S. W. 318.

For the manner of proving the laws of an Indian nation, see *Cowell v. State*, 16 App. 57.

Revised Statutes 1911, art. 4304 (same article in *Vernon's Sayles' Civ. St.* 1914) requires the secretary of state to keep a fair register of all the official acts of the governor, which is tantamount to requiring that he shall keep a record of all official acts of the governor, and certified copies from such registry are admissible evidence. *Hunnicut v. State*, 18 App. 498, 51 Am. Rep. 319.

Records are proved by their production in court, or by exemplified or certified copies thereof. *Elsner v. State*, 22 App. 687, 3 S. W. 474.

Merely showing that one received a letter through the mail without showing who signed it or was authorized to sign does not make the letter admissible. *Templeton v. State* (Cr. App.) 57 S. W. 831.

In the trial of one for a violation of the Sunday law by keeping a theater open as agent for an amusement company, the articles of incorporation of the amusement company together with an application for a permit for the company to do business in the state, and a copy of the permit, all properly certified to by the Secretary of State, were admissible in evidence. *Gould v. State* (Cr. App.) 146 S. W. 172.

Where an entry of date of birth is made in a family Bible at or about the time of birth, and this fact is proven, the entry is admissible to prove the date of birth, but when the father is living and in attendance in court, and the entry is shown to be in his handwriting, he must be called to testify that the entry was made contemporaneous with the event. *Figliben v. State* (Cr. App.) 151 S. W. 1044.

In a prosecution for forging an express order, the express agent may testify as to entries made by his assistant where they were kept under his direction and instruction. *Cheesebourn v. State*, 70 App. 612, 157 S. W. 761.

Where a witness testified that a marriage license offered in evidence on a trial for bigamy was the original license issued by the clerk, and that the witness was deputy clerk, and knew the signature on the license to be genuine, the license under the seal of the clerk was properly received in evidence, though not filed with the papers in the case. *Harris v. State* (Cr. App.) 167 S. W. 43.

In a prosecution for selling liquor, the sheet showing the paying of an internal revenue liquor tax by defendant was not admissible, unless properly proven by an examined copy or otherwise. *Rhodes v. State* (Cr. App.) 172 S. W. 252.

126. — **Compelling production.**—On trial for keeping a "Blind Tiger," where defendant's counsel had obtained possession of defendant's revenue license which had been brought into court as evidence, the court had the power, and correctly caused counsel to return such license into court. *Segars v. State*, 35 App. 45, 31 S. W. 370.

127. — **Exclusion of parol evidence.**—In a trial for keeping a disorderly house, evidence held admissible to show the meaning of abbreviations, such as "Brls. liquor," "cs. liquor," "Cs. whisky," etc., in freight bills and receipts covering consignments to accused. *Novy v. State*, 62 App. 492, 138 S. W. 139.

128. **Opinion evidence in general.**—For decisions as to proof of "Handwriting" by experts, see art. 814.

Opinions of witnesses are not, as a general rule, admissible in evidence; but witnesses must be confined to a statement of facts, and it is the province of the jury to decide from the facts detailed in evidence the conclusion which should be deduced therefrom. Where the jury are as competent as any other persons to deduce the proper conclusions from a given state of facts, the opinions even of experts are not admissible in evidence as to the conclusion or inference to be drawn from them. *Cooper v. State*, 23 Tex. 331; *Campbell v. State*, 10 App. 560; *Lumbkin v. State*, 12 App. 341; *Koblenschlag v. State*, 23 App. 264, 4 S. W. 888.

The father of the defendant who has testified to an alibi, can not be compelled to give his opinion as to the guilt of the defendant. *Dever v. State*, 37 App. 396, 30 S. W. 1071.

A witness may not testify as to his opinion about matters of which he has no actual knowledge. *Morgan v. State*, 62 App. 120, 136 S. W. 1065.

Opinions as to who, under given facts, had possession of potatoes are inadmissible; this being a question of law. *Howard v. State* (Cr. App.) 178 S. W. 506.

129. **Facts or conclusions.**—Witness' opinion from experiments made on the scene is admissible as being short hand rendering of the facts, that is, as if the facts themselves were speaking. *Martin v. State*, 40 App. 660, 51 S. W. 912.

In a prosecution for burglary by shooting into a house with intent to injure a person therein, prosecuting witness testified that just prior to the offense, he had had an altercation with accused's wife, in which she was the aggressor, which she denied on the stand. A witness for the state on cross-examination testified that he witnessed the occurrence, and that he did not see a certain witness of accused present, a boy eight years old, who had testified that he was present and had heard prosecuting witness call accused's wife certain insulting names and had seen him slap her, etc. Held, that it was not error to exclude a question whether, if the boy said he was there, witness would dispute it, as it called for the witness' opinion. *Railey v. State*, 58 App. 1, 121 S. W. 1120, 125 S. W. 576.

Where a witness had testified that she heard the cries of a woman or girl and also the sound of a man's voice which seemed to be located in a flat of bushes across the road from her house, that she had heard accused's voice a number of times and had heard the man's voice distinctly, she could testify that she recognized the man's voice at the time as the voice of accused, but that she might have been mistaken as to the identity; such testimony not being an opinion but a statement of a fact giving the grounds upon which she alleged her knowledge. *Liles v. State*, 62 App. 32, 135 S. W. 1177.

In a prosecution for disturbing the peace, complainant was not entitled to testify that the conduct of accused in fact disturbed her. *Snodgrass v. State*, 61 App. 654, 136 S. W. 57.

A witness on his direct examination testified that accused was proprietor of a hotel and on cross-examination testified that he had never lived at the hotel; had never had a room there, but had eaten there; that he knew that accused was proprietor, because he looked after the interests of the hotel; that he had seen him around there, acting as if he was the proprietor; that he had a wife and children there; and that sometimes his boys were on watch at night. The witness finally admitted that he did not know whether accused was actually proprietor, and said that his testimony was a conclusion. Held that this was not opinion evidence. *Parshall v. State*, 62 App. 177, 138 S. W. 759.

Under Pen. Code, art. 606, requiring every shipper of intoxicating liquors to a point within prohibition territory to place on the package the names of the consignor and consignee, and the words "intoxicating liquors," evidence in a prosecution for pursuing the occupation of selling liquors in prohibition territory by a driver of an express wagon that he hauled for accused packages marked intoxicating liquors from the express office to the place where accused did business was not objectionable as opinion evidence because the witness had no personal knowledge of the contents of the packages. *Stephens v. State*, 63 App. 382, 139 S. W. 1141.

In a prosecution for burglary, the wife of the person named in the indictment as the owner of the house entered was asked whether or not she had ever given the defendant permission to come into the house whenever he wanted to. Held, that the question was not objectionable as calling for a conclusion of the witness. *McKinney v. State*, 63 App. 470, 140 S. W. 344.

In a trial for murder, defendant asked a witness for the state, "If you had then thought that he (defendant) intended to shoot you, you would not have stayed there and waited for anything further," to which the witness answered, "No, sir." Held, that the exclusion of the testimony was not erroneous, since it was not admissible to prove what the witness would have done under other circumstances. *Lyles v. State*, 64 App. 621, 142 S. W. 592.

A question to a witness whether a certain theater was a place of public amusement does not call for the opinion of the witness, but for a fact. *Oliver v. State* (Cr. App.) 144 S. W. 604.

In a prosecution for seduction, testimony by the prosecutrix that she was engaged to marry accused is to a fact and not objectionable as an opinion. *Knight v. State*, 64 App. 541, 144 S. W. 967.

Where a witness testified that deceased, when shot, was facing accused, a question as to how the shot could have gone as it did if he was facing accused was not objectionable as calling for a conclusion. *Williams v. State* (Cr. App.) 148 S. W. 763.

In a trial for burglary of a railroad car, testimony by a local agent of the railroad company that the car was in his custody was not objectionable as constituting a conclusion, even if the company had written rules bearing on the custody of cars. *Kelly v. State* (Cr. App.) 149 S. W. 110.

Where a witness testified that a scantling which made a screen door fit closely was pried loose and that the door latch could have been lifted with a penknife his testimony, "that he figured" whoever entered the house could have probably gotten in that way, was a matter of opinion and should have been excluded upon proper objection. *Overstreet v. State* (Cr. App.) 150 S. W. 899.

In a homicide case, an answer to a question, "Did it appear to you that some one had been riding on the train and had fallen on the track in between the trucks?" would be but the deduction of the witness, and was properly excluded. *Foster v. State* (Cr. App.) 150 S. W. 936.

In a prosecution for incest with a stepdaughter, that a third person told accused that another might be the father of the child is inadmissible. *Vickers v. State* (Cr. App.) 154 S. W. 578.

Testimony that a wound in the back of deceased could not have been made with the knife found near, in connection with the act of the witness in taking the knife and finding it so broad that it could not enter the wound, was a statement of a fact, and not an expression of an opinion. *Espinoza v. State* (Cr. App.) 165 S. W. 208.

Where all witnesses agreed that deceased called accused a "damn liar," and accused claimed that much worse epithets were used, the exclusion of a question to a young lady present at the killing as to whether deceased's language was profane was not error; for persons differ as to what is profanity. *Johnson v. State* (Cr. App.) 167 S. W. 733.

In a prosecution for allowing a disorderly house to be kept on defendant's premises, testimony of one who had watched the house as to what he heard from outside a room in the house held not objectionable as opinion evidence, but admissible as testimony of the facts within the witness' knowledge. *Davidson v. State* (Cr. App.) 173 S. W. 1037.

In a prosecution for murder, evidence that a trailway ran close to the spot where the body of the deceased was found, that there were not obstructions between such spot and the trailway, and that a person of ordinary height, passing along such trailway, could easily have seen the dead body if it had been there, was not inadmissible, as calling for an opinion. *Satterwhite v. State* (Cr. App.) 177 S. W. 959.

130. — **Evidence as to intent, belief, or knowledge.**—When a witness was present at an affray, and seized the arm of the assaulted party, it was held competent for the defendant to ask him why he seized the arm of such party. *Thomas v. State*, 40 Tex. 36.

The injured party may testify that he surrendered the property because he believed he would be shot if he did not. *Dill v. State*, 6 App. 113.

The court properly rejected as opinion evidence the declaration of the wife of the defendant that she knew her husband was going to kill deceased. *Skaggs v. State*, 31 App. 563, 21 S. W. 257. See, also, *Douglass v. State*, 26 App. 109, 9 S. W. 489, 8 Am. St. Rep. 459; *Lucas v. State*, 27 App. 322, 11 S. W. 443; *Cudd v. State*, 28 App. 124, 12 S. W. 1010; *O'Conner v. State*, 28 App. 288, 13 S. W. 14; *Floyd v. State*, 29 App. 349, 16 S. W. 188; *Wood v. State*, 28 App. 14, 11 S. W. 678; *Watson v. State*, 28 App. 34, 12 S. W. 404; *Clark v. State*, 28 App. 189, 12 S. W. 729, 19 Am. St. Rep. 817; *Arcia v. State*, 28 App. 198, 12 S. W. 599; *Thompson v. State*, 30 App. 325, 17 S. W. 448.

The fact that defendant had talked with witness the evening before the homicide and that witness believed there would be trouble and left to keep from seeing it is inadmissible, it being merely opinion evidence. *Wilson v. State*, 37 App. 64, 38 S. W. 610.

In a prosecution for rape, evidence of prosecutrix's mother that she discovered nothing while defendant boarded at her house that aroused her suspicions of intimacy between prosecutrix and accused except that after accused left the house witness found two letters addressed to the prosecutrix in defendant's handwriting which aroused her suspicions, which letters were not introduced in evidence, was objectionable as a conclusion of the witness. *Rowan v. State*, 57 App. 625, 124 S. W. 668, 136 Am. St. Rep. 1005.

Testimony that witness and her husband were the only persons who knew that there was money in the house alleged to have been burglarized is objectionable as a conclusion of the witness. *Winkler v. State*, 58 App. 564, 126 S. W. 1134.

In a rape prosecution, a question to a witness as to whether, when he talked with the officers about the case with the knowledge he had thereof, he did not believe the guilty party to be other than accused, and on what he based his opinion, was properly excluded as calling for opinion evidence. *Lemons v. State*, 59 App. 299, 128 S. W. 416.

A statement of a witness that accused had determined to kill decedent is inadmissible, as a conclusion of the witness. *Burnam v. State*, 61 App. 51, 133 S. W. 1045.

In a prosecution for forgery, a question whether a witness believed that the defendant intended to defraud him when he drew certain checks was properly refused as calling for an opinion. *Howard v. State* (Cr. App.) 143 S. W. 178.

Where a witness for accused testified to threats by decedent against accused, questions on his cross-examination as to whether he had not stated on the day he was subpoenaed that he did not know anything about the case, and as to whether on the day of the killing and after hearing of it he had not stated that he was surprised, as he thought the difficulty between decedent and accused was dropped, were not objectionable as calling for opinions, but were proper as impeaching questions calling for a statement of fact. *Treadway v. State* (Cr. App.) 144 S. W. 655.

A witness testified that he saw accused at deceased's house; that he was crying, and said his wife had just died; that deceased told him accused was a hypocrite, and was glad his wife was dead. Held, that a further question as to whether the witness knew why accused was waiting at deceased's house was improperly excluded on the objection that it called for an opinion of the witness, where the witness would have answered that he was informed that accused was waiting for a train to go to L., where his wife was dead. *Maclin v. State* (Cr. App.) 144 S. W. 951.

Where, in a murder trial, accused's wife's brother testified to facts tending to show that accused, in talking to him of infidelity of some women, referred to accused's wife, it was not error to refuse to permit witness to state that he inferred that appellant was talking about his wife. *Kirby v. State* (Cr. App.) 150 S. W. 455.

In a prosecution for assault to murder, it was not error to refuse to allow the prosecuting witness to answer a question whether she had not told a certain person just after the assault that she did not believe defendant aimed to hurt her, since it would be but a conclusion. *Rhodes v. State* (Cr. App.) 153 S. W. 128.

In a prosecution for assault to kill, a statement by the prosecuting witness that she did not believe that defendant intended to hurt her was a mere opinion of the witness, and not admissible. *Rhodes v. State* (Cr. App.) 153 S. W. 128.

It was error to permit a witness to testify that he thought his license as a saloon keeper was forfeited by the authorities for the assigned reason that he was keeping a disorderly house, where it was not attempted to be shown that he, in fact, was keeping a disorderly house, or that the license was forfeited for that reason, since his testimony was merely an expression of opinion. *Russell v. State*, 71 App. 86, 158 S. W. 546.

Where an electrical engineer showed that he possessed sufficient information to give an opinion, and also testified that he had taught the persons later charged with arson that the effect of cutting the electric light wire would be to put out the lights, it was not error to allow him to testify that those charged with the crime would know the effect of cutting the wires. *Anderson v. State*, 71 App. 27, 159 S. W. 847.

On a trial for adultery and fornication with W., testimony that a witness talked with W. on the street, and that a few days later accused shook his finger at him and said, "Don't do that any more," without further explanation, was admissible; but the witness' further testimony that he suspected accused referred to his talk with W. should have been excluded. *Koger v. State* (Cr. App.) 165 S. W. 577.

131. — **Nature, condition, relation and identity of things.**—Witnesses may give their opinion as to whether the stick shown was the stick with which the offense was committed. *Thompson v. State*, 35 App. 352, 33 S. W. 871.

Non-expert may testify to relative position of bullet wounds. *Balls v. State* (Cr. App.) 40 S. W. 801.

Where the defense was self-defense, and accused claimed that decedent was reaching to his right hip pocket for a gun when accused fired, a witness who was present at the inquest, where the clothing was stripped from decedent's body, and who placed the right hand of decedent upon his right hip, could testify that the wound in the body was when the right hand was so placed, in a direct line with the wounds in the right forearm, and a straight line entering the wound in the arm where the bullet entered, and passing through the wound in the arm, would have struck and entered the wound in the body though the witness was unable to testify to the precise location of the wounds in the arm or in the body; such testimony not being a mere opinion of the witness, but the statement of fact vital to the defense. *Carson v. State*, 57 App. 394, 123 S. W. 590, 136 Am. St. Rep. 981.

In a prosecution for unlawfully carrying a pistol, testimony by a witness that defendant had a pistol, that he believed it to be a pistol, that it looked like a pistol, that he might be mistaken, but to the best of his knowledge and belief it was a pistol, that he knew a pistol when he saw one, and that he would give his oath that it was absolutely a pistol, was not objectionable as being opinion testimony. *Holt v. State*, 58 App. 295, 125 S. W. 573.

Testimony that an attempt had been made to wipe the blood from the ax with which the killing was done was not opinion testimony, but merely a shorthand statement of facts, and was admissible. *Williams v. State*, 60 App. 453, 132 S. W. 345.

Witnesses, who testified that they had a thorough knowledge of the kind of hair they called "negro hair," could testify that the hair found on the ax with which decedent, a negro, was supposed to have been killed was negro hair. *Williams v. State*, 60 App. 453, 132 S. W. 345, Ann. Cas. 1912C, 126.

Evidence in a prosecution for theft of clothing, identifying the pants, returned to the store by the sheriff, by comparing the cost marks and stock numbers on the pants with those on the coats, and to the effect that the pants matched the coats, was not objectionable as opinion evidence. *Williams v. State*, 63 App. 507, 140 S. W. 447.

In a prosecution for homicide, where deceased had been shot through a window, a witness may state that deceased could have been shot from a certain designated point where it is a mere shorthand rendition of the facts detailed by the witness, and not a statement of an opinion. *Christie v. State* (Cr. App.) 155 S. W. 541.

The testimony of a witness, who had measured tracks and the shoes of accused that they were of the same length, was a statement of fact and admissible to connect accused with the crime charged. *Wilson v. State*, 70 App. 340, 156 S. W. 204.

In a prosecution for burglary and the larceny of oats, a question asked the own-

er of the stolen property how the oats in the bin of defendant's father compared with his own does not call for a conclusion, and is proper whether the defendant was present at the time the owner made the examination of the oats or not. *Wilson v. State*, 71 App. 330, 158 S. W. 1114.

It is not an expression of opinion, for one who had examined and observed, to state that potatoes he saw in a car and at another place were the same potatoes and in the same kind of dirty sacks, and that the sacks were sewed with the same character of twine, and branded the same. *Howard v. State* (Cr. App.) 178 S. W. 506.

132. — **Evidence as to tracks and stains.**—It has been held competent for a witness to state his opinion, that certain blood spots appeared to him to have been made with a hand. *Richardson v. State*, 7 App. 486.

Evidence that certain shoes of the accused would have made such tracks as the owner of the burglarized premises had described to the witness, was not only hearsay, but the opinion of the witness, and inadmissible. *Bluitt v. State*, 12 App. 39, 41 Am. Rep. 666.

In a trial for murder, a state's witness having described the peculiarity of a certain track seen by him at the place of the homicide, it was held competent for him also to testify, that at the examining trial of defendant and others charged with the murder, he saw on the foot of one of the defendant's alleged accomplices, a boot which would have made such a track as he had described. Such testimony tended to throw light upon the transaction. *Thompson v. State*, 19 App. 593.

A witness may properly give his opinion that foot tracks of men and horses correspond with others. For other decisions hereunder, see *Steagald v. State*, 24 App. 207, 5 S. W. 853; *Irvine v. State*, 26 App. 37, 9 S. W. 55; *Fulcher v. State*, 28 App. 465, 13 S. W. 750; *Graham v. State*, 28 App. 582, 13 S. W. 1010; *Drake v. State*, 29 App. 266, 15 S. W. 725; *Jackson v. State*, 29 App. 459, 16 S. W. 247; *Hunter v. State*, 30 App. 314, 17 S. W. 414; *Thompson v. State*, 19 App. 594; *Clark v. State*, 28 App. 189, 12 S. W. 729, 19 Am. St. Rep. 817; *Crumes v. State*, 28 App. 516, 13 S. W. 868, 19 Am. St. Rep. 853; *Riphey v. State*, 29 App. 37, 14 S. W. 448; *McLain v. State*, 30 App. 482, 17 S. W. 1092, 28 Am. St. Rep. 934; *Cook v. State*, 30 App. 608, 18 S. W. 412.

In a prosecution for assault to rape, testimony of a party, who went to the place of the alleged assault the next morning, that he saw where the parties had sat down or wallowed on the ground, was objectionable, being a conclusion of the witness, and not a statement of fact. *Liles v. State*, 58 App. 310, 125 S. W. 921.

Testimony that witness did not know how long the tracks around the house in which the killing occurred were in inches, that it was a pretty good sized shoe and was longer than the ordinary, larger than a No. 8 shoe, was not objectionable as being witness' opinion; being more in the nature of a shorthand rendition of facts. *Williams v. State*, 60 App. 453, 132 S. W. 345.

In a prosecution for assault with intent to rape, testimony of a witness who had stated that the night before he had seen a man and woman or girl ride by the house on a black mule and had followed up the tracks the next morning, and that he had seen where the mule had stopped at a certain place in a mesquite flat, because it was tramped down and he could see the mule's tracks, that he saw the tracks of a girl or small woman and a man's tracks at such place, and that there was a place on the ground where the grass had been mashed down over a space of two or three feet, was not inadmissible as opinion evidence, but was admissible as a mere recitation of facts. *Liles v. State*, 62 App. 32, 135 S. W. 1177.

Where a prosecution for a theft of United States notes was sought to be sustained by circumstantial evidence, and it was shown that defendant had cut his hand the night the property was stolen, evidence that, when the money was recovered, it bore spots which a witness thought was blood, and which were not on the bills before they were stolen, was admissible as based on common knowledge and not mere opinion. *Diaz v. State*, 62 App. 317, 137 S. W. 377.

A witness was properly permitted to testify whether tracks he discovered were made by the heel of a boot which he made for accused, where witness testified in detail as to why he knew the tracks were so made. *Newton v. State* (Cr. App.) 143 S. W. 638.

In a murder trial, witnesses were properly permitted to testify that they trailed the tracks of two men from a point near where the homicide was committed to another point, that they could tell the difference between tracks made by a person walking and one running, in that the tracks of the latter are farther apart, and the toe of the shoe cuts deeper, etc.; the witnesses having stated that they had experience in trailing men, and knew the facts testified to by observation and experience. *Grant v. State* (Cr. App.) 148 S. W. 760, 42 L. R. A. (N. S.) 428.

Testimony of one, after testifying in what direction, as shown by tracks, deceased's horse was traveling when near a tree, that this would put the left side of a man, riding, towards the tree was not objectionable as an opinion; it being a fact within his knowledge. *Strickland v. State*, 71 App. 582, 161 S. W. 110.

Persons not experts were properly permitted to testify that on the next day and for a few days after the killing they went to the home of deceased, and found blood at various places on the ground, the side of the house, and floor thereof. *Belcher v. State*, 71 App. 646, 161 S. W. 459.

In a prosecution for the theft of cattle, where there was evidence that defendant was riding a certain horse, that he, with others, buried the fore quarters and returned with the hind quarters, that the hide was buried after the brand was cut out and had been found with the brand cut out, and that the owner of the animal said he would take it to be the hide of the animal he lost, testimony that witness knew defendant's horse and the kind of tracks he made and had traced the tracks, which corresponded to the route traveled, was admissible not as an opinion and conclusion but as a statement of fact. *Elmore v. State*, 72 App. 226, 162 S. W. 517.

On a trial for homicide in which it appeared that deceased's body was found in a hall, and that the pistol with which he was killed was found in an adjoining

room, the testimony of a witness that he discovered blood prints or finger or thumb prints on the casing of the door leading to such room, that the blood was fresh on the door when he made the discovery the day deceased was killed or the following morning, that accused had a defective thumb, that it looked to have been mashed, was as broad again at the end as it should be, and ran to a point on the right-hand side, and that the blood print on the board showed that the point of the thumb was extra large and a defective thumb on the right-hand side like he described it, was properly admitted, as the witness did not express his opinion, but testified to facts as witnessed by him. *Brown v. State* (Cr. App.) 174 S. W. 360.

133. — **Evidence as to manner, appearance and conduct.**—A witness' opinion that a woman "looks like a white woman" is not admissible. *Moore v. State*, 7 App. 608.

In a prosecution for seduction the mother should not be allowed to testify that from his attentions to her daughter she regarded defendant as her future son-in-law. *Snodgrass v. State* (Cr. App.) 31 S. W. 366.

Statement by a witness that immediately after the homicide a certain person who was with defendant was watching witness, is not the expression of an opinion. *Trotter v. State*, 37 App. 468, 36 S. W. 278.

On trial for an assault with intent to rape, it was not error to allow the prosecutrix to testify that she saw the negro who assaulted her before she got even with him and that he was stooping down by the fence like he was at work on it. *Oxshier v. State*, 38 App. 499, 43 S. W. 335.

Witness should not be permitted to state that from the way deceased talked she seemed to be uneasy or to give his opinion that from the pale and haggard looks of defendant he was troubled some way or another. *Spangler v. State*, 41 App. 424, 55 S. W. 327.

The testimony of a witness that she had seen nothing in the conduct of a female, while staying at the house of the witness, indicating that she was not a virtuous woman, was objectionable, as the conclusion of the witness based on facts not stated. *Richmond v. State*, 58 App. 435, 126 S. W. 596, 137 Am. St. Rep. 973.

In a prosecution for homicide, a witness may testify that accused appeared excited. *Canon v. State*, 59 App. 398, 128 S. W. 141.

State could ask as to prosecutrix's demeanor after the offense as to being calm, excited, or otherwise, and witness could state that prosecutrix was a little excited and trembling and began to cry while talking. *Holland v. State*, 60 App. 117, 131 S. W. 563.

It was proper to permit a witness to testify that at the time defendant was exhibiting to witness certain weapons he seemed to be very quiet, and that he was sober; the testimony not being a conclusion. *Duke v. State*, 61 App. 441, 134 S. W. 705.

Where the state claimed that accused killed his son within 20 or 30 minutes after the son had joined his mother in making affidavits against accused for violating an injunction in a divorce suit brought by the mother, evidence of witnesses who observed accused just before the killing that he spoke in an angry manner and looked mad, that his voice trembled, and his face was red and flushed, that he was much excited and seemed to be in a hurry, was admissible. *Powdrill v. State*, 62 App. 442, 138 S. W. 114.

In a murder trial, testimony that decedent had "his hands in his front pockets all the time" was not inadmissible as a statement of witness' conclusion, because he was not looking at decedent all the time; such circumstance affecting the weight and not the admissibility of the testimony. *Lacy v. State*, 63 App. 189, 140 S. W. 461.

A witness may state how a person appeared, though it is to some extent an opinion. *Rogers v. State* (Cr. App.) 143 S. W. 631.

Accused's question to a witness whether he could testify that accused was sober enough on a particular occasion to comprehend what was going on was properly excluded on objection that it called for an opinion, though it was offered to show that accused was so drunk on the particular occasion that he could not know what occurred, where the witness was permitted to testify fully in regard to accused's drinking, and stated that he did not know whether accused was drunk or not. *Moore v. State* (Cr. App.) 144 S. W. 598.

Testimony, on a trial for adultery, that accused and a woman "lived together" was not objectionable as a conclusion, especially where the witness had stated the facts showing that they lived together. *Brown v. State* (Cr. App.) 154 S. W. 568.

134. — **Evidence as to meaning of words and acts.**—It is error to allow witness to state what he understood language of defendant to mean. This is a conclusion which the jury can draw from the language itself. *Martin v. State*, 42 App. 144, 58 S. W. 112.

In a trial for assault with intent to murder, testimony of prosecutor that he understood from accused's manner in a prior difficulty between them that accused meant, in warning prosecutor not to say anything against him, that if he did a personal encounter would result, was inadmissible, being the opinion or inference of the witness. *Dowell v. State*, 58 App. 482, 126 S. W. 871.

Evidence that witness could not exactly understand the language defendant used when he first shot at deceased, but understood him to say something like, "I have got you," that witness could not say the exact language, but understood it that way, was not objectionable for indefiniteness. *Barnes v. State*, 61 App. 37, 133 S. W. 887.

A witness should not be permitted to testify to his understanding from what another told him. *Taylor v. State*, 62 App. 611, 138 S. W. 615.

In a homicide case, evidence by a witness that he "understood" another person, who, with the witness, was chased off of premises claimed by deceased to mean the pistol had by the deceased at his house when he said "it was the ugliest, meanest old thing I ever saw," was a mere opinion of the witness and inadmissible. *Salmon v. State* (Cr. App.) 154 S. W. 1023.

In a homicide case, the court did not err in refusing to permit a witness to tes-

tify that he understood deceased to be speaking of the defendant, when he made some vague remarks that there was some one on a certain committee who was not a gentleman; it being a mere opinion. *Salmon v. State* (Cr. App.) 154 S. W. 1023.

The sustaining of an objection to a question whether deceased, at the time he arose from his chair just before he was shot, was commanding or demanding accused to sit down was proper, where the court informed counsel that they could question the witness as to what deceased said. *Johnson v. State* (Cr. App.) 167 S. W. 733.

135. — Questions of law.—Witness will not be permitted to state that he had investigated a charge of felony made by one party against another, and found it to be without evidence to support it. Such statement is a mere conclusion of the witness. *Tillery v. State*, 24 App. 251, 5 S. W. 842, 5 Am. St. Rep. 882.

Where, in a prosecution for robbery, the sheriff who made the arrest testified that the person, alleged to have been robbed, charged accused to his face of getting his money, a question to witness whether he did not know that it was material whether accused denied the accusation was properly excluded, as calling for witnesses' opinion on a question of law. *Chancey v. State*, 58 App. 54, 124 S. W. 426.

In a prosecution for rape on a female alleged to have been under the age of consent, defendant's statement to a witness after he had obtained a new trial from his first conviction that he was "really guilty," but was out on bond, having gotten a new trial, and "would beat it the next time," was not objectionable as the witnesses' conclusion but was admissible as an admission. *Rowan v. State*, 57 App. 625, 124 S. W. 668, 136 Am. St. Rep. 1005.

In prosecution for theft, a question, asked of the prosecuting witness, as to whether he and his son were partners in the mercantile business from which the goods were taken, or whether the goods belonged to the witness individually, was not objectionable as calling for the conclusion of the witness. *Hatfield v. State* (Cr. App.) 147 S. W. 236.

136. Admissibility of opinions of non-experts.—An exception to the general rule excluding the opinions of witnesses obtains where the sanity of a party is in issue. In such case the opinions of witnesses, even though not experts, are admissible. See the decisions upon this subject collated in P. C., art. 40 and notes.

Where the value of property is an issue, the opinions of witnesses acquainted with the property, or with like property, are admissible evidence. *Saddler v. State*, 20 App. 135; *Martinez v. State*, 16 App. 122.

In a prosecution for adultery it was held, that the opinion of witnesses that a certain woman was the wife of the defendant, was not competent evidence. *Webb v. State*, 24 App. 164, 5 S. W. 651.

The exception also obtains where, in case of nonage, the discretion of the defendant is an issue. *Carr v. State*, 24 App. 562, 7 S. W. 328, 5 Am. St. Rep. 905.

In a prosecution for the theft of belting from a gin, a witness, who is an experienced gin man, may testify to the value of the belting when new and its value at the time of the theft. *McGee v. State* (Cr. App.) 155 S. W. 246.

Where it was claimed that accused falsely testified as to his age, testimony by witnesses as to their opinion of the age of accused is admissible when based on their acquaintance with him, and his size, weight, and appearance. *Poulter v. State*, 70 App. 197, 157 S. W. 166.

On a trial for gambling, the testimony of a witness that he was certain accused and others were gambling, that they acted like it, or at least that that was his opinion, but that he did not see any hand played by accused nor any money bet, should have been excluded; since, while the witness could state what was done by the parties, he could not give his opinion or conclusion from their acts. *Chism v. State*, 71 App. 389, 159 S. W. 1185.

137. — Province of jury.—In a prosecution for using loud and vociferous, obscene, vulgar, and indecent language, cursing, etc., near a private house, the prosecuting witness, over defendant's objection, was asked by the state if the imputed language was used in a manner calculated to disturb his family, and he answered in the affirmative. Held error. The witness could have testified to the words used, the manner of their use, the tone of voice, etc., leaving it to the jury, whose province it was, to decide whether or not they were calculated to disturb the inhabitants of the house. *Lumbkin v. State*, 12 App. 341.

It is competent, on a trial for selling intoxicating liquor to a minor, for a witness to testify to the physical marks of age of the alleged minor, but it is not competent for the witness to express his opinion as to how such physical marks of age would impress others. Whether or not the accused knew the purchaser of the liquor to be a minor was a question for the jury to solve. *Walker v. State*, 25 App. 448, 8 S. W. 644.

On a trial for keeping a disorderly house, witness cannot give an opinion as to how long it would take to overcome a house's reputation as being disorderly, that being a question for the jury to determine. *Thompson v. State*, 61 App. 250, 134 S. W. 350.

138. — Impressions from collective facts.—Another exception to the general rule is, where the facts from which the opinion proceeds as an effect are of a character that they can not be so detailed and presented to the minds of a jury as to impart to them the knowledge which the witness actually possesses; whenever a condition of things is such that it can not be reproduced and made palpable in the concrete to the jury, or when language is not adequate to such realization, then the witness may describe it by its effects upon his mind, even though such effect be opinion. *Powers v. State*, 23 App. 42, 5 S. W. 153; *Richardson v. State*, 7 App. 486; *Hardin v. State*, 8 App. 653; *Allen v. State*, Id. 67; *Dill v. State*, 6 App. 113; *Cooper v. State*, 23 Tex. 331.

It is competent for a witness, in detailing the facts of a transaction, to state the impressions they made upon his mind at the time they occurred, unless such impressions be purely conjectural or too remote. See the opinion for the "im-

pressions" of a witness admitted as evidence held under the above rule to be purely conjectural; wherefore the trial court erred in refusing to exclude them. *Irvine v. State*, 26 App. 37, 9 S. W. 55.

It is not error to refuse to allow witness to state his impressions from acts of deceased at time of the homicide. *Robinson v. State* (Cr. App.) 57 S. W. 812.

Where, in a prosecution for homicide, a witness was asked the position of the door of the house in which deceased was standing when he was shot, and answered that he could not give a definite answer, but could only judge from the range of the ball and from the way it hit the door, his answer was properly excluded as an opinion deduced from physical facts which could have been detailed to the jury. *Barnes v. State*, 61 App. 37, 133 S. W. 887.

139. — **Identity of persons and things.**—On a trial for murder a witness testified that in his judgment and belief the defendant was one of the parties who came to his house on the night before the homicide to borrow a pistol; held, admissible, the fact that the witness was not certain as to the identity of the defendant goes only to the weight of the testimony and not to its admissibility. *Tate v. State*, 35 App. 231, 33 S. W. 121.

In a prosecution for disturbing religious worship, a witness could testify that in his opinion it was accused's face at the church window, and that in his opinion the noise came from that window; the witness not knowing accused, but having testified that the prisoner was the same person he saw at the window. *Buzan v. State*, 59 App. 213, 128 S. W. 388.

In a prosecution for burglary of a bank, testimony of witnesses as to seeing three men on the railroad track north of the town where the burglary occurred approaching the town on the evening before, and as to their resemblance to the three persons accused of the burglary, one of whom was the defendant, was admissible. *Bowen v. State*, 60 App. 595, 133 S. W. 256.

In a prosecution for taking up and using a horse without consent of the owner, evidence that a witness saw two parties in a buggy, and that from their appearance, size, form, etc., it was his impression that one of them was the defendant, held admissible. *Sparkman v. State*, 61 App. 429, 135 S. W. 134.

Nonexpert opinions may be given as to the identity of persons and objects. *Harris v. State*, 62 App. 235, 137 S. W. 373.

A witness having fully described a vest worn by decedent could testify that according to his "best judgment" it was the same one in evidence. *Harris v. State*, 62 App. 235, 137 S. W. 373.

A witness who was asked in a theft prosecution whether any one stayed at her house the night before the theft could testify whether the grip carried by one of the parties looked like the grip showed to witness which belonged to accused. *Williams v. State*, 63 App. 507, 140 S. W. 447.

In a prosecution for theft of cotton, a person who observed and measured tracks leading from the wagon in which the stolen cotton was found, and who observed tracks made by the defendant while such person was on his horse, and defendant was walking in front of him after his arrest a week after the first observation, cannot testify that in his opinion the tracks were similar, where there is no showing of any peculiarity in the tracks made, or that the witness measured the last tracks made. *Ballenger v. State*, 63 App. 657, 141 S. W. 91.

In a prosecution for robbery, the opinion of the street car operator who was robbed that defendant was one of the men committing the robbery, the one who covered him with a pistol while the other got his money, was admissible; such opinion evidence being always admissible upon questions of identity. *Perry v. State* (Cr. App.) 155 S. W. 263.

140. — **Time.**—A witness can not testify as an expert as to the length of time it would take to gather a certain number of cattle within a given range. He must state the facts, leaving the jury to determine the question of time. *Tyler v. State*, 11 App. 388.

On a trial for burglary, where a witness testified that accused was at his hotel at a given time, and the distance from the hotel to the residence of the prosecuting witness had been shown, it was not error to refuse to permit such witness to state whether accused could have gone from the hotel to such residence and been at the residence at the time the prosecuting witness said the entry was made; this question calling for a mere opinion of the witness. *Weaver v. State* (Cr. App.) 150 S. W. 785.

A witness, who stated the distance from her home to the store burglarized and the time elapsing after accused had left her at her home until shots were fired, could not give her opinion as to whether accused could have reached the store after leaving her, but that question was for the jury. *Brown v. State* (Cr. App.) 169 S. W. 897.

141. — **Cause and effect.**—It is not permissible to ask a witness his opinion as to the danger likely to follow the use of a weapon in a particular mode. *Thomson v. State*, 40 Tex. 36.

When a claimed result becomes so remote that conclusion and deduction are necessary to connect it with a cause, a non-expert witness can only state physical facts, leaving the conclusions to be drawn by a jury. See this case for an illustration of this rule: *Navarro v. State*, 24 App. 378, 6 S. W. 542.

A refusal to permit a witness in a criminal cause to testify as to what would be the probable effect on a negro or person of the lower classes of threatening, coaxing, intimidating, or cursing to induce or impel the making of a confession was proper where such witness was not shown to have expert knowledge not possessed by an ordinary jurymen. *Williams v. State* (Cr. App.) 144 S. W. 622.

In a prosecution for accomplice to arson, a question calling for the opinion of a

witness as to the origin of the fire when he first looked out and saw it was properly excluded as calling for a conclusion. *Thomason v. State*, 71 App. 439, 160 S. W. 359.

142. — **Facts forming basis of opinion.**—Sheriff cannot testify in regard to sanity of defendant without first stating the facts upon which his opinion is based. *Hurst v. State* (Cr. App.) 40 S. W. 264.

A witness can state facts within his knowledge and then give his opinion as to sanity or insanity based on such facts though he is not an expert, but he cannot give his opinion on a hypothetical question unless he is an expert. *Canon v. State*, 41 App. 467, 56 S. W. 351.

It is error to admit opinion of witness that a college is not an accredited one basing such opinion on a book purporting to contain a list of accredited medical colleges. *Aldenhoven v. State*, 42 App. 6, 56 S. W. 914.

A witness who shows that he knows nothing about the situation cannot give his opinion in response to a hypothetical question not founded on the testimony in the case. *Jones v. State* (Cr. App.) 174 S. W. 1071.

143. **Subjects of expert testimony.**—An exception to the general rule excluding the opinions of witnesses is, that on questions of science, or skill, or trade, persons of skill in those particular departments are allowed to give their opinions in evidence. *Vernon's Sayles' Civ. St.* 1914, art. 3687.

Expert opinion evidence is not admissible to prove the relative positions and situations of parties involved in a homicide or assault to murder. *Cooper v. State*, 23 Tex. 331; *Thompson v. State*, 30 App. 325, 17 S. W. 448; *Williams v. State*, 30 App. 430, 17 S. W. 1071.

The opinion of a witness not an expert, is not competent to prove the sex of a skeleton. In such case a person skilled in anatomy should be called in to examine the skeleton and testify as to the sex of it. *Wilson v. State*, 41 Tex. 321.

An expert's opinion must be limited to a matter of science, skill, trade, or the like, and is not allowable on the merits of the case, or on matters about which the jury are as competent to form a conclusion as he is. *Hunt v. State*, 9 App. 166; *Cooper v. State*, 23 Tex. 331.

A witness, who is shown to be experienced in the use and handling of fire-arms, may give his opinion, after having made an examination of a fire-arm, that it had been recently discharged. *Meyers v. State*, 14 App. 35.

It is impossible for a witness to be an expert at saving goods from a burning house, and his opinion as to whether goods might have been saved is inadmissible. *Bluman v. State*, 33 App. 43, 21 S. W. 1027, 26 S. W. 75.

A witness cannot testify from the way deceased was accustomed to handle his pistol in firing and from the character of the wound, its appearance and cause as an expert and give his opinion as to who fired first. *Hardin v. State*, 40 App. 208, 49 S. W. 607.

There was no error in permitting a witness who qualified himself as a pharmacist to testify as to the contents of bottles of acids and to satisfy himself by a practical test of their contents. *Watson v. State*, 32 App. 80, 22 S. W. 46.

An expert bookkeeper was properly permitted to testify as to the meaning of entries in defendant's books, the entries being mercantile and ambiguous. *Bluman v. State*, 33 App. 43, 21 S. W. 1027, 26 S. W. 75.

A man familiar with the stock business can qualify, and as an expert give his opinion as to whether a hide was taken from a slaughtered animal or one that had died a natural death. *Clay v. State*, 41 App. 653, 56 S. W. 630.

An expert may testify as to how a bullet entered a person's arm, though he may not state in what relative positions the parties stood at the time of the shooting. *Roquemore v. State*, 59 App. 568, 129 S. W. 1129.

On a criminal prosecution, it was proper to sustain an objection to a question to an expert on mental diseases as to whether accused was a fit subject for excessive punishment, as the death penalty, or long continued confinement. *Duke v. State*, 61 App. 441, 134 S. W. 705.

Where, accused testified on a former trial, and went into the details in regard to the homicide and attendant circumstances, it was proper in a hypothetical question to an expert on mental diseases to ask him whether a man who testified to the details several months afterwards could have been so under the influence of liquor as to be temporarily insane and irresponsible. *Duke v. State*, 61 App. 441, 134 S. W. 705.

Where there was no eyewitness to the killing of deceased, except accused, and he testified to facts indicating that the killing was in self-defense, and it was material to that issue to determine whether the first shot entered under the arm of deceased, it was improper to permit a physician to testify to an opinion that the first shot was the one that entered under the arm, and that the wound on the arm was not inflicted by the same shot. *Powdrill v. State*, 62 App. 442, 138 S. W. 114.

A physician was properly allowed to testify in a homicide case that he arrived at the scene of the killing shortly thereafter, and that neither the attitude of the body nor the clothing indicated a struggle; the case being one of circumstantial evidence. *Ward v. State* (Cr. App.) 146 S. W. 931.

Where an undertaker was shown to be familiar with pistol shot wounds and gave reasons for his statements, the court properly permitted him to testify that, from an examination of decedent's body, he was of the opinion that the bullet entered in the back or left side of deceased's body, ranging to the front, and came out in front. *Vines v. State* (Cr. App.) 148 S. W. 727.

The question whether an ordinary article of apparel has been washed is not a subject for expert testimony. *Harris v. State* (Cr. App.) 148 S. W. 1074.

In a homicide case, where defendant contended that deceased had cut him immediately before the shooting, an answer by a qualified witness to the question,

"If a man so cut should get up and walk 15 feet and turn around, would the presence of blood have appeared on his face?" was admissible. *Kelly v. State* (Cr. App.) 151 S. W. 304.

Defendant being accused of killing his wife by stabbing her in the neck, a question to an expert as to his conclusion as to whether the wound was inflicted purposely by defendant, or accidentally in a scuffle, was properly excluded, as not on a subject of expert testimony. *Davis v. State* (Cr. App.) 154 S. W. 550.

In a prosecution for homicide with a pistol, opinion evidence by an expert as to where the balls entered and left the body of deceased is inadmissible, where it is shown that the expert did not view the body until a day after the killing during which time cotton had been stuffed into the wounds thus enlarging them. *Roberts v. State*, 70 App. 297, 156 S. W. 651.

Where physicians were qualified and testified to an examination of a wound in defendant's arm and described the wound and its condition, their testimony as to the length of time it had been inflicted when examined was admissible. *Pullen v. State*, 70 App. 156, 156 S. W. 935.

A witness, who had been engaged in stock business for many years, who had before seen brands that had been burned, might testify that he had examined brands on goats, as to the condition in which he found the brands, and that an old brand had the appearance of being burned over, and that the brand appeared to be fresh. *Simonds v. State* (Cr. App.) 175 S. W. 1064.

144. — **Cause and effect.**—The opinions of medical men or surgeons, who are shown to be experts, are admissible as to the cause of death, the nature and consequence of wounds, the causes and effects of disease, the character of instrument with which a wound was inflicted, and the character of a particular weapon, as to whether or not it is deadly or dangerous. *Waite v. State*, 13 App. 169; *Banks v. State*, Id. 182; *Lovelady v. State*, 14 App. 545; *Shelton v. State*, 34 Tex. 662.

One who has handled firearms and is familiar with them can testify as an expert as to effect of firing a pistol at a certain distance. *Head v. State*, 40 App. 268, 50 S. W. 352.

But not as to the manner in which an injury was inflicted. *Steagald v. State*, 24 App. 207, 5 S. W. 853.

An expert offered by the defense stated that he had heard the state's expert witness testify. The court asked witness upon a hypothetical case covering all the evidence what he thought caused the death of deceased; held, no error. *Hamlin v. State*, 39 App. 579, 47 S. W. 656.

It is error to admit opinion of witness as to instrument used in making an assault who had no other qualification as an expert than that he had been an overseer. *Taylor v. State*, 41 App. 148, 51 S. W. 1107.

Where, on a trial of a parent for the murder of his child, the theory of the state was that accused had whipped decedent in such a manner that it caused the bursting of blood vessels in the brain, causing death, the court properly permitted a physician to give his opinion that the whipping weakened the vitality and lowered the resisting powers of decedent, and thereby rendered her more liable to sustain a bursting of a blood vessel in the brain. *Betts v. State*, 60 App. 631, 133 S. W. 251.

A physician, examining the body of a decedent and testifying in detail to the condition thereof, may give his opinion that certain instruments are such as would produce death, and that certain wounds were inflicted by such instruments. *Betts v. State*, 60 App. 631, 133 S. W. 251.

In a prosecution for homicide, witnesses licensed to practice medicine were competent to testify that a man shot in a part of the head where deceased was shot would not have any voluntary movement, as the bullet would produce instant paralysis of the entire physical system. *Streight v. State*, 62 App. 453, 138 S. W. 742.

In a prosecution for assault with intent to murder, the court properly permitted a practicing physician to testify as an expert, in answer to a hypothetical question, as to the effect of a blow on the head with a given instrument, with which it was shown the assault was made. *Lacoume v. State* (Cr. App.) 143 S. W. 626.

Testimony of a physician of long standing, who examined the wounds of a deceased person on the morning he was found dead, as to what character of instrument was used to inflict the wounds, was properly admitted in a prosecution for murder. *Williams v. State* (Cr. App.) 144 S. W. 622.

In the trial of an indictment for wilfully obstructing a railroad track, a railroad engineer of experience and knowledge may testify as an expert as to whether the obstructions placed on the track were calculated to wreck a train running at the usual rate of speed. *Clay v. State* (Cr. App.) 146 S. W. 166.

A physician, who has been practicing for a number of years, may give his testimony as an expert as to the nature of a blow which crushed deceased's skull. *Harris v. State* (Cr. App.) 148 S. W. 1074.

It was proper to permit a physician who made a post mortem examination of decedent to testify that the wounds on deceased's head could have been made with a 45-caliber pistol used as a club; the state having introduced in evidence such a pistol, which was shown and admitted to belong to defendant and to have been used by him on the night of the killing. *Girtman v. State* (Cr. App.) 164 S. W. 1008.

Witnesses who had tried to ascertain which was the fatal wound, by probing and examining the wounds, only one of which entered a vital part, after detailing the facts of such examination to the jury, might give their opinions as to which wound caused death. *Espinoza v. State* (Cr. App.) 165 S. W. 208.

Under such conditions, they might also give their opinions as to the kind of instrument used in making the wounds. *Espinoza v. State* (Cr. App.) 165 S. W. 208.

Where medical experts examined the wounds of the prosecuting witness, they

are entitled to testify that, from their experience and observation as physicians, the weapon used was calculated to produce death or serious bodily injury, though they did not see the weapon. *Nesbitt v. State* (Cr. App.) 171 S. W. 1126.

145. Competency of experts.—An expert witness is one who is selected by the court, or by a party in a cause, on account of his knowledge or skill, to examine, estimate, and ascertain things, and make report of his opinion. To entitle a witness to be examined as an expert in a specific topic he must, in the opinion of the court, have special practical acquaintance with the immediate line of inquiry. *Heacock v. State*, 13 App. 97.

In this case the prosecutrix, not having qualified as an expert, was erroneously permitted to testify as such a witness. *Navarro v. State*, 24 App. 378, 6 S. W. 542.

One who has had experience in handling firearms and in killing hogs and cattle, and who has made frequent observations as to the appearance of bullet wounds of entry and exit, and from such experience can tell which is the wound of entry and which the wound of exit, and he testifies that the wound where the bullet enters is smaller than where it comes out, and that on entering the bullet pushes the flesh inward, and where it comes out it pushes the flesh with its ragged parts outward, is competent to testify which one of the bullet wounds on the body of decedent was the place of entry. *Welch v. State*, 57 App. 111, 122 S. W. 880.

Where certain witnesses testified that they were experienced stockmen and had followed the business for many years, and had had such experience as would enable them to testify as to brands on horses and cattle, and the defacing thereof, they were competent to testify to a brand on a horse defendant was charged with having stolen, as it was originally and as to its alleged alteration. *Gatlin v. State*, 72 App. 516, 163 S. W. 428.

A doctor, who had practiced medicine for 27 years, had performed major and minor operations in surgery, and when attending medical school had studied surgery and physiology, was competent to testify as an expert witness regarding the effect of a bullet wound in the breast which penetrated the heart. *Brown v. State* (Cr. App.) 174 S. W. 360.

146. Examination of experts.—In the examination of an expert as to his opinion upon a hypothetical state of facts, it is improper practice to allow hypothetical questions having no foundation in the evidence adduced; yet it is not essential that counsel shall state to such witness the facts as they have been proved. He may assume the facts in accordance with his theory of them. *Lovelady v. State*, 14 App. 545; *Webb v. State*, 9 App. 490; *Leache v. State*, 22 App. 279, 3 S. W. 539, 58 Am. Rep. 638.

An expert may be asked by either party as to the reasons on which his opinion is based; or he may, with leave of the court, give such explanation on his own account. Beyond this he can not go, though he may be examined in details to test his credibility and judgment. *Leache v. State*, 22 App. 279, 3 S. W. 539, 58 Am. Rep. 638.

Court can supervise a hypothetical question so as to see that all the facts are embraced. *Williams v. State* (Cr. App.) 53 S. W. 861.

Either side may put a hypothetical question based upon the facts of the case—that is, such facts as are proved and the party putting the question deems proper to collate in the hypothetical question—and, if the opposite side is not satisfied with the question as put, it may amplify the question or put it under the facts deemed proper. *Duke v. State*, 61 App. 441, 134 S. W. 705.

Where, in an incest case, a doctor testified, on cross-examination by accused, that the hymen would have been injured by penetration beyond a certain depth, it was not improper for the state to adduce, on redirect examination, that there were cases of women being impregnated without destroying the hymen. *Drake v. State* (Cr. App.) 151 S. W. 315.

147. — Facts forming basis of opinion.—An expert's opinion must not be based upon extrajudicial information, but must be founded either upon the evidence or the expert's personal knowledge of the facts, or else be postulated upon a hypothetical state of facts. *Hunt v. State*, 9 App. 166; *Cooper v. State*, 23 Tex. 331.

Medical experts can state opinion on all of the evidence if they have heard it all or upon hypothetical statement in conformity with all the evidence. If they have not heard the evidence each side can have its opinion upon any hypothesis reasonably consistent with the evidence. If meagerly presented on one side it may be fully stated by the other. *Morrison v. State*, 40 App. 473, 51 S. W. 358.

An expert should not be allowed to testify as to his opinion based on part of the testimony of one witness and on a newspaper account. *Williams v. State*, 37 App. 348, 39 S. W. 687.

In a prosecution for homicide, the state claimed that, when the shot was fired by which deceased was killed, the powder burned his eyebrows. Defendant introduced a firearm expert who testified to making certain experiments and tests on dummies lying in the same position that accused was supposed to have lain at the time he was killed, having eyebrows made of human hair, using a pistol of the same size and cartridges of the same make. Held that, the witness having qualified as an expert, it was error to refuse to permit him to testify that, according to the experiments under similar circumstances, it would be impossible at any range for the powder to burn off the eyebrow. *Streight v. State*, 62 App. 453, 138 S. W. 742.

In a prosecution for homicide committed by placing poison in coffee, it was permissible for an expert to testify as to his analysis of the contents of the coffee-pot where a witness, present at the attempted murder, poured part of the contents in a bottle, sealed it, and delivered the bottle and the pot to the attending physician, who delivered them to the expert. *Bailey v. State* (Cr. App.) 144 S. W. 996.

148. **Compelling expert to testify.**—An expert, like any other witness, may be compelled to testify as such. *Summers v. State*, 5 App. 365, 32 Am. Rep. 573.

149. **Evidence on former trial or hearing.**—Testimony of defendant on a former trial or hearing, see notes under art. 790.

Testimony of a witness before the grand jury cannot be used on the trial of the case. *Seals v. State* (Cr. App.) 38 S. W. 1006; *Hightower v. State*, 70 App. 48, 155 S. W. 533.

Testimony taken before a court or judge on hearing of a writ of habeas corpus, although reduced to writing and properly authenticated, is not admissible evidence against defendant on final trial. *Childers v. State*, 30 App. 160, 16 S. W. 903, 28 Am. St. Rep. 899.

Where accused, who was indebted upon a note, falsely uttered what purported to be a receipt for the amount of the note, and in an action upon the note testified that it was such a receipt, evidence of his testimony, given in the civil action, was admissible in a prosecution for forgery. *Barber v. State*, 64 App. 89, 142 S. W. 582.

On an issue of insanity in a murder trial, it was error to exclude on accused's offer testimony as to accused's sanity, given in a prior inquisition in the county court; the witness having since died. *Witty v. State* (Cr. App.) 153 S. W. 1146.

Former testimony of an absent witness in general cannot be shown at a subsequent trial in the absence of proof that the witness was either dead, out of the state, or that his presence was prevented by defendant, except to rebut an inference that his testimony was favorable to the state, on the state proving that it had tendered him on the prior trial. *Green v. State* (Cr. App.) 154 S. W. 1003.

Under a plea of insanity, a certified copy of the evidence adduced on an insanity trial upon which accused was adjudged insane could not be received, in the absence of any showing that the witnesses were dead, beyond the jurisdiction of the court, or that for any reason their attendance could not be secured. *Cooper v. State*, 71 App. 489, 160 S. W. 382.

Where a witness for accused, whose evidence was material and who had testified at the former trial, was unable to be present at the second trial because of paralysis, his testimony at the former trial could be reproduced by the evidence of a witness who had then heard it. *Harris v. State*, 71 App. 463, 160 S. W. 447.

That the testimony of accused in a former trial of the case was contained in a statement of facts in that case would not make it inadmissible. *Best v. State*, 72 App. 201, 164 S. W. 997.

In a prosecution for homicide, where a witness was asked if he recognized a man he saw turn and walk off, and replied that he could not tell, but that it ran in his mind that it was defendant, such testimony was inadmissible. *Sweat v. State* (Cr. App.) 178 S. W. 554.

150. — **Preliminary proof.**—To justify proof of the testimony of a witness testifying on a former trial, a proper predicate must be laid by showing that the witness is out of the state at the time of the subsequent trial. *Hardin v. State*, 57 App. 401, 123 S. W. 613.

Showing that a witness has permanently removed from the state is sufficient predicate for admission of his testimony at a former trial. *Whorton v. State* (Cr. App.) 152 S. W. 1082.

Testimony by a witness that M. was living in Louisiana and not in Texas, and that he received a letter from him the day before from some place in Louisiana, was a sufficient predicate to authorize the reproduction of his testimony given on a former trial. *Pace v. State* (Cr. App.) 153 S. W. 132.

Testimony of two witnesses that H. lived in Arkansas and is now there and does not reside any more in Texas is a sufficient predicate to authorize the reproduction of his testimony on a former trial. *Pace v. State* (Cr. App.) 153 S. W. 132.

It is sufficient predicate for admission of testimony of a witness, given on a former trial, that his father testifies he is in a foreign country, and that he has a letter from him stating that he is employed there. *Sanchez v. State* (Cr. App.) 153 S. W. 1133.

151. — **Method of proof.**—A court reporter was properly permitted to testify from a copy of notes taken by him at a former trial of the case, where he stated that the notes were a correct transcription of the evidence, though he had no independent recollection thereof. *Smith v. State*, 60 App. 293, 131 S. W. 1081; *Pace v. State* (Cr. App.) 153 S. W. 132.

The state, on the second trial, may not introduce the stenographic report of the testimony of a witness on the former trial by merely showing his absence at the second trial, but must first show the correctness of the testimony as taken by the stenographer. *Franklin v. State*, 62 App. 433, 138 S. W. 112; *Harris v. State*, 71 App. 463, 160 S. W. 447.

Where proof of the oral testimony of a witness at a former trial is admissible, a witness who heard the testimony should be introduced to prove it, and it cannot be established by an agreed statement of facts made at the former trial. *Hardin v. State*, 57 App. 401, 123 S. W. 613.

It is sufficient proof of the testimony of a witness on a former trial, now incapacitated, that the witness herein be able to testify substantially to the material part of the evidence of such other witness on the former trial without giving his words verbatim. *Harris v. State*, 71 App. 463, 160 S. W. 447.

A bill of exceptions to the admission of a statement of facts in a former trial of accused containing his former testimony, which bill did not show that it was not agreed by the parties that the said admitted testimony had not been agreed to as the testimony of accused on the former trial, nor show that no witnesses were introduced who testified that the accused had given such testimony on the previous trial, and did not by any means exclude the idea that the testimony was

not proven in some of the methods prescribed by law to render it admissible, was insufficient to show error. *Best v. State*, 72 App. 201, 164 S. W. 996.

A statement of facts in a former trial of the case containing the former testimony of accused was not inadmissible as against the objection that it was not the testimony of a witness who had heard the defendant so testify, or the objection that it was condensed in the statement of facts, or the objection that it was not in the form of question and answer as the stenographer made it, or that it was not signed by the defendant. *Best v. State*, 72 App. 201, 164 S. W. 997.

The testimony of accused in another court may be proved by one hearing the testimony. *Mooney v. State* (Cr. App.) 176 S. W. 52.

152. Weight and sufficiency of evidence.—The sufficiency or effect of evidence is a question for the jury ordinarily, and a verdict will not be set aside for the reason that the evidence is insufficient, unless it is clearly so. See art. 786, and notes.

Affirmative is more reliable than negative evidence, and should have more weight. *Winkfield v. State*, 41 Tex. 148; *Walker v. State*, 42 Tex. 360; *Willis v. Lewis*, 28 Tex. 185; *Coles v. Perry*, 7 Tex. 109; *Cunningham v. State*, 5 Tex. 440; *McReynolds v. State*, 4 App. 327.

Positive recognition of defendant's voice, by a witness who was familiar with it, may suffice to identify the defendant as the culprit. *Davis v. State*, 15 App. 594.

Defendant, agent of the injured company, admitted that he had lost the money at a game of poker; held, sufficient to show a taking without consent of the company. *Smith v. State*, 34 App. 265, 30 S. W. 236.

Where the prosecuting witness positively identified defendant, and there were many facts and circumstances shown by other witnesses strongly corroborating her, defendant was not entitled to an acquittal on the ground that the evidence did not identify him as the party committing the offense. *Keetz v. State* (Cr. App.) 175 S. W. 149.

153. — Circumstantial evidence.—For decisions relating to the charge of the court in cases of circumstantial evidence, see art. 735.

To support a conviction on circumstantial evidence, each fact necessary to establish guilt must be proven, and the facts and circumstances must not only be consistent with guilt but inconsistent with any other reasonable hypothesis. *Yarborough v. State* (Cr. App.) 151 S. W. 545; *Brown v. State* (Cr. App.) 150 S. W. 436; *Rios v. State* (Cr. App.) 153 S. W. 308.

Circumstantial evidence, when fully and conclusively made out, is sufficient to sustain a conviction for crime, but the circumstances must not be of a vague, indefinite, shadowy character, and the facts constituting the chain must be clearly defined and fully proved. The more there may be of them, and the longer the chain connecting them, the stronger and more confident will be the conclusion. *Shultz v. State*, 13 Tex. 401; *Noftinger v. State*, 7 App. 301; *Washington v. State*, 8 App. 377.

To warrant a conviction on circumstantial evidence, each fact necessary to the conclusion sought to be established must be proven by competent evidence, beyond a reasonable doubt, and all the facts necessary to such conclusion must be consistent with each other, and with the main fact sought to be proved, and the circumstances, taken together, must be of a conclusive nature, leading on the whole to a satisfactory conclusion, and producing in effect a reasonable and moral certainty that the accused, and no other person, committed the offense charged. The mere union of a limited number of independent circumstances, each of an imperfect and inconclusive character, will not justify a conviction. They must be such as to generate and justify full belief according to the standard rule of certainty. It is not sufficient that they coincide with, and render probable the guilt of the accused, but they must exclude every other reasonable hypothesis. No other conclusion but that of the guilt of the accused must fairly and reasonably grow out of the evidence, but the facts must be absolutely incompatible with innocence, and incapable of explanation upon any other reasonable hypothesis than that of guilt. A legal test of the sufficiency of circumstantial evidence is, is it sufficient to satisfy the mind and conscience of a common man, and so convince him that he would venture to act upon the conviction produced by it, in matters of the highest importance and concern to his own interest. *Henderson v. State*, 14 Tex. 503; *Powers v. State*, 16 Tex. 546; *Burrell v. State*, 18 Tex. 713; *Perkins v. State*, 32 Tex. 109; *Law v. State*, 33 Tex. 37; *Elizabeth v. State*, 27 Tex. 329; *White v. State*, 36 Tex. 347; *Cave v. State*, 41 Tex. 182; *Earnes v. State*, Id. 342; *Roseborough v. State*, 43 Tex. 570; *Black v. State*, 1 App. 368; *Hampton v. State*, Id. 652; *Rodriguez v. State*, 5 App. 256; *Bonats v. State*, 29 Tex. 183; *Pogue v. State*, 12 App. 283; *Pharr v. State*, 10 App. 485; *Hunt v. State*, 7 App. 212; *Lovelady v. State*, 14 App. 545; *Scott v. State*, 19 App. 325.

Circumstantial evidence may be, and often is, as strong and conclusive as direct and positive evidence. *Law v. State*, 33 Tex. 37.

Rules as to the weight to be attached to circumstantial evidence are intended merely as directions to aid the mind in arriving at a correct conclusion. They are not rules of law, to be obeyed, but of reason, to be considered. Our statute has established as a test for the sufficiency of the proof, that the concurrent minds of the jury should be satisfied of the guilt of the defendant, beyond a reasonable doubt. *Brown v. State*, 23 Tex. 195.

Though necessary in every criminal case that the corpus delicti be proved, yet the proof may be made by circumstantial evidence, and the legal test of its sufficiency is whether it satisfies the understanding and conscience of the jury, beyond a reasonable doubt. But circumstances indicative of guilt, no matter how strong, avail nothing without proof of the corpus delicti. *Brown v. State*, 1 App. 154; *Henderson v. State*, 14 Tex. 503. See, also, Pen. Code, art. 1034.

Another practical test of the sufficiency of evidence is its ability to satisfy the

understanding and conscience of the jury, and to produce in their minds a moral certainty of the defendant's guilt, beyond a reasonable doubt. Moral certainty is that degree of certainty which is supported by a reasonable probability, founded on the experience of the ordinary course of things, and, consequently, must be reasonable in itself. It is not requisite that circumstantial evidence, to warrant conviction, must demonstrate the guilt of the accused beyond a possibility of his innocence. If, beyond a reasonable doubt, it convinces the understanding, and satisfies the reason and judgment of those who must act upon it, the degree of certainty required by the law is attained. *Taylor v. State*, 9 App. 100; *Jackson v. State*, Id. 114; *Pharr v. State*, 10 App. 485; *Law v. State*, 33 Tex. 37.

A confession of guilt partakes of the nature of positive rather than circumstantial evidence, and has uniformly been so regarded in the decisions in this state. *Eckert v. State*, 9 App. 105; *Dubose v. State*, 13 App. 419; *Jack v. State*, 20 App. 656.

An inculpatory or exculpatory statement is only a circumstance to be weighed with other facts. *Russell v. State*, 33 App. 424, 26 S. W. 990.

The fact that certain footprints corresponded with defendant's shoes, which were half soled, had several prominent tacks, and were run down at the heel, is not as circumstantial evidence sufficient within the rule to exclude every other reasonable hypothesis than that the tracks were made by the shoes of accused, who was seen within a day of the crime a few miles from the town where it was committed. *Warren v. State*, 52 App. 218, 106 S. W. 132, Id. (Cr. App.) 106 S. W. 133.

Any fact necessary to be established in a case can be proved as well by circumstantial as by direct testimony. *Yantis v. State* (Cr. App.) 144 S. W. 947.

A connected chain of circumstantial evidence is entitled to the same weight as positive evidence. *Bailey v. State* (Cr. App.) 144 S. W. 996.

Where the circumstantial evidence relied on to justify a conviction is sufficient to exclude any reasonable hypothesis, except that of guilt, a conviction is warranted. *Griego v. State* (Cr. App.) 145 S. W. 612.

On a trial for unlawfully giving intoxicating liquor to a minor, the defendant's knowledge of the minority may be proved by circumstantial evidence. *Hogan v. State* (Cr. App.) 147 S. W. 601.

Suspicious circumstances alone are not sufficient upon which to base a conviction. *Yarbrough v. State* (Cr. App.) 151 S. W. 545.

154. — Uncontroverted evidence.—The force of testimony is increased by a failure to rebut it, where, from the nature of the circumstances, its falsity can be easily shown; and counsel have a right to comment on such nonproduction. *Mercer v. State*, 17 App. 452; *Thompson v. Shannon*, 9 Tex. 536; *Needham v. State*, 19 Tex. 332. But a mere failure to produce exculpatory evidence within the power of the defendant easily to produce, does not always lend additional probative force to inculpatory evidence. *Strong v. State*, 18 App. 19. But if the inculpatory fact be questioned, or its criminative import be controverted, and the defendant has it in his power, but fails to disprove it if false, or to explain it if true, his failure to do so tends to establish its truth or criminative import. *Davis v. State*, 15 App. 594; *Mercer v. State*, 17 App. 452.

155. — Conclusiveness of evidence on party introducing it.—In order to avoid a postponement of a trial, it was agreed that the defendant might read in evidence the testimony of an absent witness as set forth in defendant's application for a continuance. Held, that such agreement did not preclude the state from introducing the absent witness to testify in person on the trial. *Hackett v. State*, 13 App. 406.

Where the state on a trial for larceny proved declarations of accused, explaining his recent possession of stolen property, it was bound by the declarations unless it disproved them, and accused need not furnish any other proof of his innocence. *Daniel v. State*, 60 App. 515, 132 S. W. 773.

Where the state in a prosecution for homicide puts in evidence the declarations of defendant, which were exculpatory and set up self-defense, it is bound by them, unless they are proven to be false, so as to entitle defendant to an acquittal. *Giesecke v. State*, 64 App. 531, 142 S. W. 1179.

The state, introducing in evidence an exculpatory statement of accused as a principal, must, to convict accused as principal, show the falsity of the statement. *Baggett v. State* (Cr. App.) 144 S. W. 1136.

Where the state, on a trial for larceny, introduced the testimony of accused on a former trial to the effect that the property belonged to a third person, and that accused sold it for him, the state, to obtain a conviction, must show that the testimony was false. *Davis v. State* (Cr. App.) 152 S. W. 1094.

Exculpatory or reasonable explanation showing innocence must be shown false, and it may be viewed or weighed in the light of all the facts and its falsity so determined. *McKnight v. State*, 70 App. 470, 156 S. W. 1188.

Where, in a prosecution for abortion, the state offered a part of defendant's statement introduced before the grand jury, in which she stated that prosecutrix came to her house with R.; that defendant pushed her finger up in prosecutrix, and pushed up her womb; that R. stayed on the porch while she did that; that she did not know R., and had never seen the girl before; that she pushed her womb up as far as she could, but gave her no medicine—such testimony was not exculpatory so as to require the state to disprove the same, that the jury might not be required to accept it as true. *Shaw v. State*, 73 App. 337, 165 S. W. 930.

156. — Sufficiency of evidence of accomplice.—See notes under Pen. Code, art. 79.

157. Reception of evidence in general.—Order of proof, see arts. 717, 718, ante, and notes.

Privilege of witness as to self-incriminating questions, see art. 4.

The party introducing a witness can not assail his credibility in any manner unless such witness has testified to some fact injurious to such party. Art. 815.

Illegal testimony should not be admitted, and when admitted inadvertently or erroneously, should be excluded, and the jury instructed to not consider it. *Myers v. State*, 6 App. 1; *Moore v. State*, 7 App. 14; *Clark v. State*, 23 App. 260, 5 S. W. 115; *Gose v. State*, 6 App. 121.

It is not error to refuse to grant time to the defense to take down in writing the testimony of the witnesses while they are being examined. *Lewis v. State*, 15 App. 647.

When a witness after being admonished by the court, persists in injecting into his testimony statements which he has been informed are not legal evidence, he should be punished by fine, and, if necessary, by imprisonment. *Harrison v. State*, 16 App. 325.

It was held not to be error to permit a witness to retire from the stand and the court room into a room by himself, so that he could examine certain papers for the purpose of identifying and explaining them in his testimony. *Kunde v. State*, 22 App. 65, 3 S. W. 325.

On exclusion of evidence once admitted. *Miller v. State*, 31 App. 609, 21 S. W. 925, 37 Am. St. Rep. 836.

Where a witness was asked a question as to whether another witness owned a pistol, the question was not objectionable, as depriving defendant of the privilege of proving by the witness himself that he did not own a pistol, since it would not disqualify him to testify, and, even if it did disqualify him, that would not render inadmissible testimony of other witnesses who were qualified. *Deckard v. State*, 57 App. 359, 123 S. W. 417.

In a homicide case, the trial court having decided that evidence objected to by the state concerning a statement made by decedent was inadmissible, it was improper to subsequently permit the evidence to go to the jury on withdrawal of the state's objection. *Kemper v. State*, 63 App. 1, 138 S. W. 1025.

Accused was charged with assault and battery, and T., the person claimed to have been assaulted, was also charged with the same offense committed at the same time against accused. On accused's trial T. was offered as a witness, but excluded upon a showing that he had been convicted of a felony and not pardoned, and after all of the evidence was introduced, accused requested the court to decide his case, a jury having been waived, which the court refused to do, stating that it would reserve its decision until the evidence was heard in the case against T., when T. would be permitted to testify for himself. T. testified in his own case, and was acquitted, whereupon the court asked the jury if they considered accused guilty, and received an affirmative answer, when the court found a verdict against accused in his own case. Held, that the court's action in deciding accused's case on testimony introduced in T.'s case was erroneous, requiring a reversal. *Cagel v. State*, 71 App. 406, 160 S. W. 73.

A witness for the state did not or would not remember that he had told the county attorney that immediately before the shooting by accused deceased told accused "not to shoot her," but testified that he said "not to hurt her," whereupon the county attorney held before him and examined him from a statement made by him shortly after the shooting that deceased had said to accused, "Don't shoot me." The witness, when recalled the following day testified that deceased had said, "Don't shoot me." Held, that there was no error in permitting such examination by the county attorney. *Cooper v. State*, 72 App. 250, 161 S. W. 1094.

Where certain letters offered in evidence were relevant and material, it was no objection to their introduction that they were read to the jury before the file mark of the clerk was placed on them. *Millner v. State*, 72 App. 45, 162 S. W. 348.

158. Examination, credibility, impeachment and corroboration of witnesses.—See notes under art. 3687, *Vernon's Sayles' Civ. St.* 1914.

159. Compelling calling of witnesses.—The state, ordinarily, is not required to introduce every eyewitness to the transaction. *Gibson v. State*, 23 App. 414, 5 S. W. 314; *Wheelis v. State*, Id. 238, 5 S. W. 224; *Phillips v. State*, 22 App. 139, 2 S. W. 601; *Hunnicut v. State*, 20 App. 626; *Trotter v. State*, 37 App. 468, 36 S. W. 278.

In some cases it may be proper to grant defendant's motion to compel the state to place the raped child on the stand. *Bozeman v. State*, 34 App. 503, 31 S. W. 389.

It has never been the rule in this State to require the State to place upon the stand all of the eye-witnesses to a transaction. The prosecuting officer may produce such witnesses and only such as he thinks best. *Kidwell v. State*, 35 App. 264, 33 S. W. 342.

The state cannot be forced to introduce any particular witness in the proof of its case at least where he is a co-conspirator of accused in a murder case, though he were an eyewitness. *Goode v. State*, 57 App. 220, 123 S. W. 597.

Where defendant relied on certain eyewitnesses to prove that he acted in self-defense in killing deceased, the state was not required to introduce and vouch for such testimony, but it was proper for the court to call the witnesses, and tender them both to the state and to defendant. *Pugh v. State* (Cr. App.) 151 S. W. 546.

The state is not compelled to introduce all of its testimony, nor to call all the eyewitnesses to the killing in its case in chief. *Bullock v. State*, 73 App. 419, 165 S. W. 196.

160. Consultation between counsel and witnesses.—A witness should not be called from the stand and conferred with by counsel. *Williams v. State*, 35 Tex. 355.

It is proper for a party to inquire privately of a witness, before he is called to testify, what his testimony will be, but if the witness refuses to divulge his testimony, the court cannot compel him to do so. *Withers v. State*, 23 App. 396, 5 S. W. 121; *Yanez v. State*, 20 Tex. 656.

Where the state did not call two of decedent's children in support of its case in chief, whereupon the court granted permission to defendant's counsel to consult with them, they having refused to inform defendant's counsel what they would testify to, the court did not err in refusing to compel them to do so. *Bullock v. State*, 73 App. 419, 105 S. W. 196.

161. Offer of proof.—No testimony should be offered by the prosecution that is not relevant and legal. *Gazley v. State*, 17 App. 267.

Testimony apparently inadmissible is properly rejected when counsel does not state for what purpose it is introduced. *Pearson v. State* (Cr. App.) 33 S. W. 224.

Where the court was not informed as to what a witness would testify to in response to a question objected to, there was no error in sustaining the objection. *Welch v. State*, 57 App. 111, 122 S. W. 880.

The mere fact that testimony in a homicide case is in a sense impeaching testimony, or that it is offered by counsel for the prosecution as impeaching in its character, does not affect its admissibility as original testimony, where in fact and in law it is admissible in the first instance. *Harrelson v. State*, 60 App. 534, 132 S. W. 783.

Evidence of the indictment of another for the larceny with which defendant was charged was properly excluded when not admissible on the grounds stated by defendant for offering it. *Coleman v. State* (Cr. App.) 150 S. W. 1177.

Where defendant tried to introduce the entire testimony of a witness at the examining trial, but there was no predicate laid for its introduction, and, if offered to contradict the witness, the attorney did not state what part was offered for that purpose, although the court requested that any part to be impeached be pointed out, there was no error in refusing its exclusion. *Rhodes v. State* (Cr. App.) 153 S. W. 123.

162. Limiting effect of evidence.—The rule is well settled that a witness may be discredited by proving that on a former occasion he made statements inconsistent with his statements on the trial. The purpose of such contradictory evidence is not, as charged by the court in this case, merely to test the general credibility of the witness, but to attack the truth of his statement on the particular trial, and the jury have the right to consider it for that purpose. See the opinion for a charge on the subject held erroneous. *Howard v. State*, 25 App. 686, 8 S. W. 929.

In a prosecution as an accomplice in a murder, it being claimed that decedent's wife and another were principals, where the first alleged connection of accused with the killing occurred on the day thereof, evidence of trouble between decedent and two persons on the night before was not evidence against accused, and, being only competent as tending to show decedent's wife a principal, the court should limit its effect. *Beard v. State*, 57 App. 323, 123 S. W. 147.

Evidence that in the trouble between defendant and his wife, in which, accidentally or intentionally, she was killed with a knife, defendant kicked her immediately after she fell, or was seen on the ground, was part of the transaction itself, and not extraneous, so that it was not necessary that the court should limit the evidence thereof. *Davis v. State* (Cr. App.) 143 S. W. 1161.

The proof of accused's motive and intent in committing the crime is part of the main issue and is not an extraneous matter, and testimony in relation thereto should not be limited. *Mitchell v. State* (Cr. App.) 144 S. W. 1006.

Where defendant claimed that the killing followed a difficulty he had had with a woman in which he had slapped her face, it was not error for the court to omit to limit testimony introduced by accused to show that a week or 10 days before the difficulty in question he had had a previous similar difficulty, under the rule that it is not necessary to limit testimony where it can only be used by the jury for the purpose for which it was introduced and when the jury cannot be misled thereby on the main case. *Smith v. State* (Cr. App.) 147 S. W. 240.

Where, in a trial for shooting at an officer, it developed on cross-examination by defendant that on a prior occasion the officer shot his horse from under him, the court did not err in failing to limit the effect of such testimony, or to instruct that the officer had no legal right to shoot on the former occasion; the question of his right to shoot on such occasion being one of fact for the jury to consider in deciding the issue of self-defense in the present case, taking into consideration all the circumstances in evidence. *Boyd v. State* (Cr. App.) 150 S. W. 612.

In a prosecution for the theft of a cow, where the direct testimony as to ownership was sufficient to establish it, and evidence of an unrecorded brand was admitted without objection, the court need not in a special charge restrict the scope of such evidence to proof of identity. *Powers v. State* (Cr. App.) 152 S. W. 909.

Where testimony could not be legitimately or rationally used for any other purpose, it is not error to refuse to limit it to that purpose. *Ellis v. State* (Cr. App.) 154 S. W. 1010.

In a prosecution for the unlawful sale of a mortgaged chattel, where evidence was introduced tending to show that the mortgagee had given the defendant an order on the county clerk for the mortgage, which the mortgagee denied, it was error to charge the jury that the evidence could only be considered on the question of the defendant's intention, since it was also competent as affecting the credibility of the mortgagee, and as tending to show his consent to the sale. *Cowart v. State*, 71 App. 116, 158 S. W. 809.

On a trial for cattle theft, where evidence as to an unrecorded cattle brand was admissible to establish identity, but not to prove ownership, but the court gave no instruction restricting the jury's consideration thereof, it was error to refuse an instruction that such evidence should not be considered on the question of ownership. *Turner v. State*, 71 App. 477, 160 S. W. 357.

In a prosecution charging one T., with others, as a principal in offering to bribe a witness, where none of the defendants requested a severance and were jointly tried, T.'s voluntary statement, made before the grand jury, reduced to

writing and signed by him, was admissible as against him alone. *Savage v. State* (Cr. App.) 170 S. W. 730.

163. — **Impeaching evidence.**—Limiting evidence to impeach accused, see notes under art. 790.

A witness introduced by the state having testified to facts tending to support the defense, the state, over the objection of the defendant, introduced evidence to impeach its said witness. Held, that the omission of the trial court to charge the jury that such impeaching testimony could only be considered as affecting the credibility of the witness was error. *Williams v. State*, 25 App. 76, 7 S. W. 661.

Testimony introduced to impeach the evidence of a witness can be considered for that purpose only. *Floyd v. State*, 29 App. 349, 16 S. W. 188.

Where accused objected to the introduction of certain evidence offered for impeachment, and, after its admission, only requested an instruction that the evidence did not impeach the witness, and that the jury could not consider it for that or any other purpose, he could not object that the court failed to limit the evidence to impeachment only. *Ellis v. State* (Cr. App.) 154 S. W. 1010.

Where evidence that defendant's brother, who gave material testimony in his favor on the issue of self-defense, had previously sought to induce another witness to give similar testimony could only be considered to discredit the brother's testimony, for which purpose it was offered, it was not error for the court to omit to limit its effect to such purpose. *Burnaman v. State*, 70 App. 361, 159 S. W. 244, 46 L. R. A. (N. S.) 1001.

164. — **Evidence of other offenses.**—Where proof of an attempt to pass the forged instrument to a different person than the party named in the indictment, was admitted as tending to establish the fraudulent intent the failure of the charge to limit and circumscribe the purpose and object of such evidence was fundamental error. *Burks v. State*, 24 App. 326, 6 S. W. 300; *Id.*, 24 App. 332, 6 S. W. 303.

When the state proves the contemporaneous theft of other property, it is the duty of the court to instruct the jury as to the purpose of such evidence. *Gentry v. State*, 25 App. 614, 8 S. W. 925.

Where there is evidence of theft contemporaneous with the burglary charged, the evidence of such theft must be limited to its legitimate purpose. *West v. State* (Cr. App.) 33 S. W. 227.

Where evidence of defendant's possession of other forged instruments is admitted to show intent, the court in its instruction to the jury should limit such evidence to its legitimate purpose. *Thornley v. State*, 36 App. 118, 34 S. W. 264, 35 S. W. 981, 61 Am. St. Rep. 836.

Evidence of another crime should not be admitted unless limited properly to its special purpose. *Martin v. State*, 36 App. 125, 35 S. W. 976.

In a prosecution for slander of a female, evidence of similar utterances at different places is admissible only to show the motive and intent of the accused, and it was error where such evidence was admitted for the court to refuse instructions limiting that evidence to its proper scope. *Adams v. State*, 62 App. 426, 138 S. W. 117.

165. **Cumulative evidence.**—When it is shown that a witness contributed money toward the prosecution of defendant there is no error in excluding his further testimony as to what occurred in the grand jury room relative to raising a subscription to prosecute accused. *Wright v. State*, 36 App. 427, 37 S. W. 732.

It is not error to exclude record evidence of the fact that defendant had been tried for insanity and found to be insane, when the fact was proved otherwise and there was no dispute as to the fact. *Lamb v. State* (Cr. App.) 56 S. W. 52.

Where, in a prosecution for homicide, defendant's evidence that deceased had been indicted for making an aggravated assault and had been convicted of simple assault on a one-armed, decrepit person, was not denied, the court properly refused to permit other testimony as to the same transaction. *Edwards v. State*, 61 App. 307, 135 S. W. 540.

The court did not err in refusing to permit accused to prove that a witness had been convicted of an offense some 15 years before the trial, where the defendant was permitted to show that the witness had been in the penitentiary, and the state admitted that his reputation for veracity was bad, since such evidence would only be admissible as affecting his credibility. *Foster v. State* (Cr. App.) 150 S. W. 936.

Where, in a prosecution for rape, prosecutrix admitted having made contradictory statements as to the author of her condition, and swore repeatedly before the grand jury that it was another than defendant, he was not entitled to introduce additional evidence of such contradictory statements by other witnesses. *Cooper v. State*, 72 App. 266, 162 S. W. 364.

On a trial for assault with intent to murder, it was immaterial to show how many times prosecutor had paid fines for fighting, where the court admitted evidence as to all fights he had engaged in. *Willis v. State* (Cr. App.) 167 S. W. 352.

166. **Number of witnesses.**—In a prosecution for homicide, the court should not limit the number of witnesses to the good character of accused, unless the state admits that his reputation in the respects inquired about was good, or unless carried to an extreme. *Manley v. State*, 62 App. 392, 137 S. W. 1137.

Where some dozen witnesses testified to accused's reputation, and the state admitted that his reputation as a law-abiding citizen was good, it was not error to refuse to permit other witnesses to testify to the same fact. *Drake v. State* (Cr. App.) 151 S. W. 315.

167. **Admission of evidence dependent on preliminary proof.**—It is not necessary that the relevancy of evidence should appear at the time it is offered, it being the usual course to receive, at any proper and convenient stage of the trial, in the discretion of the judge, any evidence which the counsel offering it states

will be rendered relevant and material by other evidence which he undertakes to produce. But counsel for the state should never make such a statement and introduce irrelevant evidence, unless he is morally certain that he can, by other evidence, render it relevant and material. And when irrelevant evidence has thus been introduced, and there is a failure to show its relevancy and materiality by other evidence, it is the duty of the court, of its own motion, to exclude such irrelevant evidence, and to instruct the jury to disregard it. *Marshall v. State*, 5 App. 273; *Phillips v. State*, 19 App. 158; *Smith v. State*, 21 App. 133, 17 S. W. 553; *Pierson v. State*, 18 App. 524.

Before contents of letters written to defendant can be shown it must be proved that he received the letters where mailing is not proof of this. *James v. State*, 40 App. 190, 49 S. W. 401.

Without having shown the statement to be authorized by the accused, the state proposed to prove by the sheriff the statement of the accused's brother to him, that the accused intended to plead guilty when brought to trial, and the defense objected that the testimony was hearsay. Thereupon the county attorney stated that he would legalize the said testimony by subsequent evidence, but, when interrogated by the court, he declined to disclose the facts to be subsequently proved. Notwithstanding this action of the county attorney, the trial court admitted the evidence, and the defendant reserved exception. Held, that the trial court erred primarily in admitting the incompetent testimony upon the equivocal statement of the county attorney, and again by its subsequent failure to withdraw it from the jury. *Rushing v. State*, 25 App. 607, 8 S. W. 807.

In a prosecution for rape, evidence that defendant told the witness that M. had frequently been seen at prosecutrix's house, and had told defendant that he (M.) was sleeping with prosecutrix, and referred to her as his wife, that accused requested witness to go to prosecutrix's father and explain to him the statements of M., and that he did so, was inadmissible, in the absence of any evidence that such disclosures had been brought to the knowledge of prosecutrix, or that they procured or induced the prosecution, notwithstanding other evidence that M. was a repeated visitor and companion of prosecutrix, and that the offered testimony indicated motive of the prosecutrix and her parents for the prosecution. *Bader v. State*, 57 App. 293, 122 S. W. 555.

As the state should not be called on to establish a negative as a predicate for the introduction of testimony, the state may prove by a witness the position of the body of decedent, without first showing that it had not been disturbed. *Welch v. State*, 57 App. 111, 122 S. W. 880.

In a prosecution for burglary, one of the accomplices fled to H., and while there was incarcerated on suspicion of having stolen certain jewelry in a different transaction. The district attorney asked him who furnished the money for him and his companion to go to H., and he testified that his companion bought his ticket, and after they arrived at H. the companion received a letter from the place where the burglary was alleged to have been committed, with \$10 in it, and that witness did not know who sent the letter. Held, that the evidence was inadmissible, in the absence of any attempt to show that accused was in any manner connected with the sending of the money, etc. *Maibaum v. State*, 59 App. 386, 123 S. W. 378.

In a prosecution for theft of a package of overalls, a waybill, showing that the package had been received at the depot, was inadmissible, where it was not shown that the waybill was correctly made out by the person issuing it. *McConico v. State*, 61 App. 48, 133 S. W. 1047.

In a trial for assault on murder, where it appeared that, before going to the place of the difficulty, accused exhibited a razor, and stated that if any one bothered him at the place where he was going he would use it, testimony that the next morning witness found a razor near the place of the difficulty was not inadmissible on the theory of insufficient identification of the razor; it having been identified by another witness as one like the razor exhibited by accused. *Wilson v. State*, 63 App. 81, 138 S. W. 409.

In a trial for cattle theft, where it appeared that accused sold the cow to F., it was not error to permit F. to testify that he showed the cow to W., where the testimony was followed by testimony of W. and other witnesses rendering the particular testimony material. *Taylor v. State*, 62 App. 611, 138 S. W. 615.

A certified copy of a marriage license of accused's previous marriage, together with the minister's certificate of performing the ceremony which had been filed in the office of the county clerk, several months after the marriage, was admissible in evidence, though it was not shown that defendant was the same person named in the marriage certificate; the latter fact merely going to the weight of the evidence. *Bryan v. State*, 63 App. 200, 139 S. W. 981.

Evidence that, two years before the difficulty between defendant and his wife, in which she was killed, he slapped her on two or three occasions, not being followed up by evidence of later difficulties of the same nature between them, was too remote, and should, on motion, have been excluded, though not objected to when introduced. *Davis v. State* (Cr. App.) 143 S. W. 1161.

Where there was no evidence, in a prosecution for horse theft, that the horses were taken with the consent of the owner, evidence as to whether the owner had mortgaged the horses, asked for the purpose of showing that he had mortgaged them, and that they were taken by accused with his connivance and consent, to defraud the mortgagee, was not admissible. *Burton v. State* (Cr. App.) 146 S. W. 186.

In a trial for violating the local option law, it was improper to admit in evidence the record book of an express company purporting to show the signature of defendant receiving for a consignment of liquor, where there was no evidence that defendant wrote his name in the book, and no attempt to connect him with the entries made therein. *Stevens v. State* (Cr. App.) 150 S. W. 942.

In a prosecution for illegal sales of intoxicating liquors, it is proper to allow witness to testify that accused was engaged in the saloon business, even if it had not been shown that the retail license introduced in evidence was issued to accused. *Woods v. State* (Cr. App.) 151 S. W. 296.

In a prosecution for burglary of a clothing store, evidence of the manager of the store concerning the suit case and clothing claimed to have been stolen was not objectionable, on the ground that the goods produced and exhibited were not sufficiently identified as those stolen; the objection going to the weight, and not to the admissibility, of the evidence. *Walker v. State* (Cr. App.) 151 S. W. 822.

168. — **Admissibility of preliminary proof.**—As preliminary to introducing the evidence of a witness who had testified on a former trial, the state could show that such witness was then outside of the state, and that it was not certain that he would return; the fact that the state did not afterwards introduce such evidence being immaterial, especially where accused did not move to exclude the evidence as to the witnesses being absent from the state from the jury, on the ground that his evidence was not introduced. *Sweeney v. State* (Cr. App.) 146 S. W. 883.

169. — **Sufficiency of preliminary proof.**—Where it was shown that the body of decedent, when seen by a witness, had been practically undisturbed, it was not error to permit the witness to prove the position of the body. *Welch v. State*, 57 App. 111, 122 S. W. 880.

Another witness testified that, as soon as he found the ax with which the killing was claimed to have been done, he took it in the condition in which he found it to a crowd, where K. was, and the latter testified that the ax was bloody and had negro hair, blood and brains on it, which was substantially the testimony of the other witness. Held, that the ax was sufficiently identified to warrant the admission of K.'s evidence. *Williams v. State*, 60 App. 453, 132 S. W. 345.

The genuineness of letters claimed to have been written by N. to defendant is not established so as to make their contents admissible against defendant by the mere statement of witness that they were signed by N. *Miller v. State* (Cr. App.) 144 S. W. 239.

Where, in a prosecution for abortion, prosecutrix did not identify defendant as the woman to whom she was carried, but did testify that R. carried her to a woman named Kate or Kit Shaw, which was the name of defendant, who admitted that R. brought prosecutrix to see her, that was sufficient identification to justify the admission of prosecutrix's testimony. *Shaw v. State*, 73 App. 337, 165 S. W. 930.

170. **Objections to evidence.**—Review on appeal dependent on objection in lower court, see notes under art. 744, ante.

When parol evidence is offered, and it is objected to because there is written evidence of the fact sought to be proved, it devolves upon the objector to produce the writing, or show that it once existed. *Allen v. State*, 8 App. 67.

171. — **Sufficiency of objection.**—Where part of the testimony of an absent witness was admissible, an objection to the whole is properly overruled, it being necessary to point out the improper parts. *Hughes v. State* (Cr. App.) 152 S. W. 912; *Overstreet v. State* (Cr. App.) 150 S. W. 899.

It is not error to permit proof of the reputation of witnesses at the time of the trial as against an objection going only to the weight of the evidence. *Sharp v. State*, 61 App. 247, 134 S. W. 333.

172. — **Effect of failure to object.**—Though the record is the best evidence that a witness has been convicted of crime, if other evidence is admitted without objection there is no error. *Moore v. State*, 39 App. 266, 45 S. W. 809.

Admission of testimony was not error, where it went in without objection and was excluded as soon as accused requested exclusion. *Kirby v. State* (Cr. App.) 150 S. W. 455.

173. — **Motions to strike out.**—But if the illegal evidence has been elicited by the defendant, it will not be excluded. *Speights v. State*, 1 App. 551; *Moore v. State*, 6 App. 563.

When improper evidence has, through inadvertence or otherwise, been admitted, even when not objected to, it is a proper practice to exclude it from the jury, and to instruct the jury that it must not be considered by them. It is error in such cases to overrule a motion made by the defendant to exclude. *Branch v. State*, 15 App. 96; *Thomas v. State*, 17 App. 437; *Phillips v. State*, 22 App. 139, 2 S. W. 601; *Gose v. State*, 6 App. 121; *Marshall v. State*, 5 App. 273; *Rountree v. State*, 10 App. 110.

On a trial for rape committed by a negro unknown to the prosecutrix, the state having proved that on the morning after defendant was arrested and placed in jail, he, together with six or eight other negroes, were stripped of their hats and coats and formed in a line in the jail, when the prosecutrix was brought in and at once identified defendant, and that these negroes were then rearranged with hats and coats on, and again defendant was identified by the prosecutrix and her sister, and defendant afterwards moved the court to exclude this testimony upon the ground that it was compelling defendant to testify against himself. Held, that the motion came too late, the defendant having made no objection at the time the evidence was admitted; and even if his motion was not too late, it did not appear that he made the slightest objection to taking his place in line for inspection, nor that he did not willingly take his place and risk his chance of identification. See the question discussed in extenso in the opinion and numerous authorities reviewed. *Bruce v. State*, 31 App. 590, 21 S. W. 681.

Where the record showed that after evidence had been admitted without objection, the court held that it was inadmissible and instructed the jury to disregard it, the request of accused moving to strike the question and answer from the

record and to instruct the jury not to consider the same was sufficiently complied with. *Wofford v. State*, 60 App. 624, 132 S. W. 929.

Where defendant, on cross-examination of a state's witness in a prosecution for violating the local option law, obtained an answer that complainant came to witness' house for a dollar, saying that he was to get whisky from defendant, the court properly refused to strike out such answer on defendant's verbal request after the testimony was all in. *Wren v. State* (Cr. App.) 150 S. W. 440.

174. **Waiver or cure of error in admitting or excluding evidence.**—Error in admitting evidence which is material and calculated to influence the jury is not cured by a charge that the jury should not consider the testimony. *Darnell v. State*, 53 App. 585, 126 S. W. 1122; *McCandless v. State*, 42 App. 58, 57 S. W. 672.

On a trial for murder, where the wife of the accused had stated in her testimony that she knew her husband was going to kill the deceased, held, that the statement was opinion evidence, and incompetent for any purpose, but the error was cured by the court's withdrawal of the statement from the consideration of the jury. *Skaggs v. State*, 31 App. 563, 21 S. W. 257.

As a rule the withdrawal of the illegal evidence from the jury cures the error, but there are exceptions. *Dimry v. State*, 41 App. 272, 53 S. W. 854.

In a murder case, where objection was sustained to a question asked a state's witness on cross-examination, but the court subsequently recalled the witness, and told accused's counsel that they could ask the question, a refusal to do so waived the error. *Goode v. State*, 57 App. 220, 123 S. W. 597.

Where, after an objection to a question, defendant's counsel said: "All right; go ahead; we don't care"—and when the witness was requested to repeat the answer again said, "Go ahead, and relate it again," and the witness did so, and no motion was afterwards made to exclude the testimony, the objection was waived. *Burnaman v. State*, 70 App. 361, 159 S. W. 244, 46 L. R. A. (N. S.) 1001.

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.]

See Willson's Cr. Forms, 892, 893.

Proof of records and recorded instruments.—An original marriage license, with the return thereon showing the marriage, having been filed and recorded in the county clerk's office, according to law, is admissible on a prosecution for bigamy; it having been filed with the papers in the case, and a copy thereof served on defendant at the previous term. *Edwards v. State* (Cr. App.) 166 S. W. 517.

— **Necessity of filing and notice.**—Deeds, bills of sale, and other instruments in writing, which are required or permitted by law to be recorded, may be read in evidence without proof of their execution, if they have been filed among the papers in the cause, and notice of such filing given to the adverse party at least three days before the trial of the cause. But without such filing and notice, their execution must be proved, as in the case of other written instruments, before they can be read in evidence. *Johnson v. State*, 9 App. 249; *Graves v. State*, 28 App. 354, 13 S. W. 149; *Allison v. State*, 14 App. 402; *Morrow v. State*, 22 App. 239, 2 S. W. 624; *Timbrook v. State*, 18 App. 1; *Vernon's Sayles' Civ. St.* 1914, art. 3700, and notes. Records of marks and brands are not within the contemplation of art. 3700, and do not require to be filed, etc. *Ninnon v. State*, 17 App. 650.

The rule as to filing and notice of instruments does not apply to official certificates of records of another state. *Patterson v. State*, 17 App. 102.

A bill of sale cannot be introduced without proof of execution unless filed among the papers in the cause at least three days before commencement of the trial, and notice of filing given the opposite party or his attorney. *Morrow v. State*, 22 App. 239, 2 S. W. 624. See further as to bills of sale, notes on "Evidence" under P. C. art. 1329.

The rule requiring three days filing and notice only obtains where the party offering the instrument is not prepared to and does not prove its execution aliunde and not where this can be and is proved by subscribing witnesses or a party who saw the instrument executed. *Williams v. State*, 30 App. 153, 16 S. W. 760.

The rule that before a recorded instrument can be offered in evidence it must have been filed with the papers in the case three days before the trial does not apply in prosecution for forgery. *Caston v. State*, 31 App. 304, 20 S. W. 585.

An unprobated will could be used in evidence upon proof of its execution without filing it, and giving the opposite party notice, and the statute provides that a certified copy shall be admitted in evidence in like manner as the original. *Golin v. State*, 37 App. 90, 38 S. W. 794.

In view of *Vernon's Sayles' Civ. St.* 1914, art. 3700, the deed records of a county, showing a lease of a building to an amusement company whose employé is on trial for permitting a theatrical performance in the building to be given on Sunday, is inadmissible, where a copy was not filed before the trial and notice given. *Gould v. State*, 61 App. 195, 134 S. W. 695.

For a copy of a decree of divorce from accused's first wife to be admissible in a prosecution for bigamy to show that he did not exercise due care to ascertain if his second wife had procured a divorce before marrying a third time, it was unnecessary to file it and give three days' notice of the filing. *Coy v. State* (Cr. App.) 171 S. W. 221.

The original records showing that local option is in force in a county are admissible, without having given notice, against accused, charged with pursuing the business of selling intoxicating liquors. *Jones v. State* (Cr. App.) 174 S. W. 349.

Proof of foreign laws.—A book which purported to be the Code of Laws of the Muscogee Nation, and which purported to be published by authority of said nation, and was certified to be a true copy of the laws of said nation by the principal chief, under the great seal of said nation, was held to be admissible in evidence. The local governments of the Indian nations come within the meaning of "foreign governments," as used in art. 3692 of Vernon's Sayles' Civ. St. 1914. Every nation is "foreign" to all others. And the several states of the American union as "foreign" to each other with respect to their statutes. *Covell v. State*, 16 App. 57.

Articles 3692 and 3693, of Vernon's Sayles' Civ. St. 1914, apply in criminal as well as civil cases. Under these articles, laws of another state, when offered as evidence, are not subservient to, or within the purview of, the rules which apply to proof of private documents. The written law of another state can not be proved by parol. The imprint of a book of statutes of another state suffices prima facie to authenticate and render it admissible in evidence. When a statute of another state is proved under article 3693 of the Revised Statutes, and only a portion of the provisions of a particular statute are embraced in the certificate of the secretary of state, the failure to embrace the entire statute will not invalidate the certificate, but, in the absence of proof to the contrary, it will be presumed that the portions omitted are immaterial. *Patterson v. State*, 17 App. 102; *Cummins v. State*, 12 App. 121.

A reprint of a book purporting to be the "Penal Code of the State of Coahuila, Republic of Mexico, and published by authority of said state;" is admissible in a criminal prosecution to prove the law of such state under Vernon's Sayles' Civ. St. 1914, art. 3692. *Fernandez v. State*, 25 App. 538, 8 S. W. 667.

Copies of records.—Article 3694, Vernon's Sayles' Civ. St. 1914, is cumulative and not restrictive in effect, therefore does not affect the rule or right with regard to the admissibility of the originals as evidence. *Rainey v. State*, 20 App. 455.

Under Vernon's Sayles' Civ. St. 1914, art. 3706 a certified copy of an unproved will was admissible and it would appear that it could be proved up as an examined copy by the subscribing witnesses. *Golin v. State*, 37 App. 90, 38 S. W. 794.

Proof of marks and brands.—Prior to such amendment, marks and brands which would otherwise be intrinsically evidence of ownership, were admissible in the courts of this state, to prove ownership, only when they had been duly recorded. This rule applied to equine as well as other stock named in the statute. *Thompson v. State*, 26 App. 466, 9 S. W. 760.

Under Rev. St. 1911, art. 7160, as amended by Acts 33d Leg. c. 69 (Vernon's Sayles' Civ. St. 1914, art. 7160) in a criminal case evidence as to unrecorded brands is admissible to prove ownership as well as identity. *Turner v. State*, 71 App. 477, 160 S. W. 357. See, also, notes on "Evidence" under P. C. art. 1329.

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.]

See Willson's Cr. Forms, 935, 936.

See Pen. Code, art. 11, and notes.

Presumption of innocence and reasonable doubt: *Shamburger v. State*, 24 App. 433, 6 S. W. 540; *McDade v. State*, 27 App. 641, 11 S. W. 672, 11 Am. St. Rep. 216; *Ellis v. State*, 29 App. 413, 16 S. W. 256; *Frizzell v. State*, 30 App. 42, 16 S. W. 751.

For other authorities hereunder, see *Zwicker v. State*, 27 App. 539, 11 S. W. 633; *Moore v. State*, 28 App. 377, 13 S. W. 152; *Powell v. State*, 28 App. 393, 13 S. W. 599; *Johnson v. State*, 29 App. 151, 15 S. W. 647.

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| 1. Presumption as to intent. | 15. — Necessity of instructions in general. |
| 2. Presumption from use of weapon. | 16. — Sufficiency of instructions in general. |
| 3. Sufficiency of evidence in general. | 17. — Following language of statute. |
| 4. Presumption of innocence. | 18. — Shifting burden of proof. |
| 5. — Presumption distinguished from reasonable doubt. | 19. — Sufficiency of application of law to whole case. |
| 6. — Overcoming presumption. | 20. — Instructions as to different degrees. |
| 7. — Operation and effect of presumption. | 21. Burden of proof. |
| 8. — Insanity. | 22. — Non-age. |
| 9. — Necessity of instructions. | 23. — When on defendant. |
| 10. — Sufficiency of instructions. | 24. — Insanity. |
| 11. Reasonable doubt in general. | 25. — Instructions. |
| 12. — Particular offenses. | |
| 13. — Grade of offense. | |
| 14. — Venue. | |

1. Presumption as to intent.—See Pen. Code, art. 51.

2. Presumption from use of weapon.—See Pen. Code, arts. 1106, 1147.

3. Sufficiency of evidence in general.—See notes to art. 783, ante.

4. Presumption of innocence.—The law indulges no supposition, but as a fact, presumes the defendant innocent until his guilt is established by legal evidence. *Reid v. State*, 9 App. 472.

As a rule the presumption of innocence applies only in the case for which the defendant is on trial. *Hargrove v. State*, 33 App. 431, 26 S. W. 993.

In a prosecution for theft, a statement by the district attorney in argument that defendant admitted he was a married man, and that he was charged with seducing a little girl, and that a man who would commit that character of crime would

commit theft, was erroneous and improper, in view of the presumption of innocence attaching to every person charged with crime. *Thompson v. State*, 150 S. W. 181.

In a prosecution for attempting to procure a woman to enter a house of ill fame there was a presumption of innocence in defendant's favor. *Currington v. State*, 72 App. 143, 161 S. W. 478.

In a prosecution for wife murder, there is no additional presumption of innocence because of the relationship. *Brown v. State*, 169 S. W. 437.

5. — **Presumption distinguished from reasonable doubt.**—The rule imposing the burden of proof on the party advancing a proposition is a very different thing from the presumption of innocence. A defendant has the presumption of innocence with him through the whole case. The advantage that he derives, however, from the fact that the burden is on the prosecution to make out the points it advances is only temporary. As soon as this is done to such an effect as to sustain a verdict of guilty, then, should the proof close at that point, the case goes to the jury free from any presumptions arising from the prior imposition of this burden. In other words, the rule requiring the actor to take on him the burden of proof is one merely of practice, adopted for the proper development of the case, and ceases to operate when the evidence is in. The rule requiring guilt to be made out beyond reasonable doubt is a fundamental sanction of the law—applicable to all stages of a trial. The first rule concerns the order, the second the weight of testimony. *Jones v. State*, 13 App. 1; *Ake v. State*, 6 App. 398, 32 Am. Rep. 586.

6. — **Overcoming presumption.**—An accused is presumed innocent until proven guilty beyond a reasonable doubt. *Knight v. State*, 64 App. 541, 144 S. W. 967; *Gazley v. State*, 17 App. 267; *Black v. State*, 18 App. 124; *Grant v. State*, 42 App. 275, 58 S. W. 1025; *Daniel v. State*, 60 App. 515, 132 S. W. 773; *Conger v. State*, 63 App. 312, 140 S. W. 1112.

The jury are not required to believe the defendant innocent, but they must acquit him upon any reasonable doubt of his guilt, even without actually believing him innocent. The law presuming him to be innocent, the state must by legal evidence satisfy the minds of the jury, beyond reasonable doubt, that he is guilty. *Munden v. State* 37 Tex. 353; *McMillan v. State*, 7 App. 142; *Myers v. State*, Id. 640; *Smith v. State*, 9 App. 150; *Robertson v. State*, Id. 209; *Blocker v. State*, Id. 279; *Wallace v. State*, Id. 299; *La Norris v. State*, 13 App. 33, 44 Am. Rep. 699.

This presumption of innocence is with the accused throughout the whole case, from its commencement to its final determination. Its effect is to place the burden of proving the guilt of the accused upon the prosecution. The fact of guilt having been established to the exclusion of any reasonable doubt, the prosecution has made out its case, and this case will overcome the presumption of innocence, and produce the conviction of the accused; but the presumption of innocence never ceases to exist until the conviction is finally determined. *Jones v. State*, 13 App. 1; *Templeton v. State*, 5 App. 398; *Brinkoeter v. State*, 14 App. 67; *Gazley v. State*, 17 App. 267; *Robertson v. State*, 10 App. 602; *Moore v. State*, 20 App. 233; *Strong v. State*, 18 App. 19; *Fury v. State*, 8 App. 471; *Ake v. State*, 6 App. 398, 32 Am. Rep. 586; *Johnson v. State*, 27 App. 163, 11 S. W. 106; *Zwicker v. State*, 27 App. 539, 11 S. W. 633; *McDade v. State*, 27 App. 641, 11 S. W. 672, 11 Am. St. Rep. 216; *Gallaher v. State*, 28 App. 247, 12 S. W. 1089; *Lewis v. State*, 29 App. 105, 14 S. W. 1008; *Johnson v. State*, 29 App. 150, 15 S. W. 647; *Slade v. State*, 29 App. 381, 16 S. W. 253; *Thompson v. State*, 30 App. 325, 17 S. W. 448; *Black v. State*, 1 App. 368.

The presumption of innocence must be overcome before a conviction can be had. *Perry v. State*, 44 Tex. 473.

In a prosecution for fraudulently inducing the complaining witness to sign a note with accused by falsely representing that accused had a contract to teach school, evidence held insufficient to overcome the legal presumption of innocence, and to sustain a conviction. *Thurman v. State*, 59 App. 285, 128 S. W. 404.

Where circumstantial evidence is relied upon, the presumption of innocence must be excluded; that is, the facts must exclude every other conclusion or hypothesis except that of guilt to warrant a conviction. *Williams v. State*, 70 App. 275, 156 S. W. 938.

The burden of proof is on the state, and the defendant is presumed to be innocent until his guilt is established by legal evidence beyond a reasonable doubt. *Witty v. State* (Cr. App.) 171 S. W. 229.

7. — **Operation and effect of presumption.**—The presumption of innocence must be overcome by the evidence, and in doubtful cases is sufficient to turn the scale in favor of the defendant. *Hampton v. State*, 1 App. 652; *Perry v. State*, 44 Tex. 473; *Hull v. State*, 7 App. 593; *Shelton v. State*, 12 App. 513.

The presumption of innocence counterbalances the presumption of continued life, in a prosecution for bigamy. *Hull v. State*, 7 App. 593.

Where the evidence is insufficient to rebut the presumption of innocence, the verdict will be set aside on appeal. *Walker v. State*, 14 App. 630.

The presumption of innocence is stronger than any presumption of guilt arising merely from the means used to accomplish the guilty purpose. *Black v. State*, 18 App. 124.

The presumption of innocence is not a substantial right of defendant, equal to a witness in his behalf. *Brown v. State* (Cr. App.) 170 S. W. 716.

8. — **Insanity.**—Where the state shows beyond a reasonable doubt that accused committed crime, and he relies on mental irresponsibility, he has the burden of showing that fact, notwithstanding the presumption of innocence. *Douglas v. State*, 73 App. 385, 165 S. W. 933.

The rule that if accused was, at any time prior to the commission of the offense, insane, the law presumed that the condition existed at the time of the offense, unless the state established beyond a reasonable doubt that at that time he was of

sound mind, applies only where, prior to the offense, accused had been legally adjudged insane, or it had been admitted or conclusively proved, on a trial had prior to the offense that he was insane, and in other cases accused has the burden to show, his mental incapacity to commit the crime at the time of its commission. *Douglas v. State*, 73 App. 385, 165 S. W. 933.

9. — **Necessity of instructions.**—The court should instruct on reasonable doubt and the presumption of innocence. *Priesmuth v. State*, 1 App. 480; *Hampton v. State*, 1 App. 652; *Treadway v. State*, 1 App. 668; *Stapp v. State*, 1 App. 734; *Mace v. State*, 6 App. 470; *Alonzo v. State*, 15 App. 378, 49 Am. Rep. 207; *Lensing v. State* (Cr. App.) 45 S. W. 572.

In all cases of felony the court should give in charge to the jury the presumption of innocence in connection with the rule as to reasonable doubt. *Thomas v. State*, 40 Tex. 45; *Carr v. State*, 41 Tex. 545; *Stapp v. State*, 1 App. 734; *Black v. State*, Id. 368; *Lindsay v. State*, Id. 327; *Priesmuth v. State*, Id. 480; *Treadway v. State*, Id. 668; *Coffee v. State*, 5 App. 545; *McMullen v. State*, Id. 577; *Hampton v. State*, 1 App. 652; *Hutto v. State*, 7 App. 44.

The mere omission to charge the presumption of innocence is not such error of itself as will cause a conviction to be set aside. *Hutto v. State*, 7 App. 44; *Frye v. State*, Id. 94; *Wilkins v. State*, 15 App. 420. But if such charge be requested and refused, this would be error for which the judgment would be reversed. *Hampton v. State*, 1 App. 652; *Coffee v. State*, 5 App. 545; *McMullen v. State*, Id. 577; *Mace v. State*, 6 App. 470; *Wilkins v. State*, 15 App. 420. And so it would be, if such omission were excepted to at the time of the trial, and presented by bill of exception. *Leache v. State*, 22 App. 279, 3 S. W. 539, 58 Am. Rep. 638; *Jackson v. State*, 22 App. 442, 3 S. W. 111; *Clanton v. State*, 20 App. 615; *Niland v. State*, 19 App. 166; *Buntam v. State*, 15 App. 485; *White v. State*, 17 App. 188; *Paulin v. State*, 21 App. 436, 1 S. W. 453.

The court did not err in refusing a special charge as to the presumption of innocence and reasonable doubt where these principles of law were fully embodied in the charge given, it being unnecessary to repeat them in another form. *Hurley v. State*, 35 App. 282, 33 S. W. 354.

The refusal of a requested instruction as to the presumption of innocence, is not error where this is covered by the main charge. *Thompson v. State*, 37 App. 227, 38 S. W. 785, 39 S. W. 298.

On appeal in misdemeanor cases, objections to failure to instruct on reasonable doubt and presumption of innocence will not be reviewed, unless accused excepted to the charge, and requested special charges on the points. *Webb v. State*, 63 App. 207, 140 S. W. 95.

10. — **Sufficiency of instructions.**—The charge should be substantially in the language of the statute. The following is the proper form of such charge: "The defendant is presumed to be innocent until his guilt is established by legal evidence; and if from the evidence before you, you have a reasonable doubt as to the defendant's guilt, you will acquit him." The charge should follow the language of the statute without any attempt at amplification or explanation. *Massey v. State*, 1 App. 563; *Chapman v. State*, 3 App. 67; *Ham v. State*, 4 App. 645; *Bland v. State*, 4 App. 15; *Fury v. State*, 8 App. 471; *Cohea v. State*, 9 App. 173; *McPhail v. State*, Id. 164; *Walker v. State*, 13 App. 618, 44 Am. Rep. 716, note; *Wilson v. State*, 27 App. 577, 11 S. W. 638; *Gallaher v. State*, 28 App. 247, 12 S. W. 1087; *Lewis v. State*, 29 App. 105, 14 S. W. 1008; *Johnson v. State*, 29 App. 150, 15 S. W. 647; *Slade v. State*, 29 App. 381, 16 S. W. 253; *Pitts v. State*, 29 App. 374, 16 S. W. 189; *Robertson v. State*, 10 App. 602.

On a murder trial the court instructed that defendant was presumed to be innocent till his guilt was established by competent evidence beyond a reasonable doubt, and if the jury had a reasonable doubt arising from the evidence they should acquit. Held not objectionable, as requiring affirmative evidence of innocence, or as contravening the rule that a reasonable doubt may arise from want of evidence as well as from evidence adduced. *Zwicker v. State*, 27 App. 539, 11 S. W. 633; *Tomlinson v. State* (Cr. App.) 43 S. W. 332.

A charge that "defendant is presumed to be innocent until his guilt is established by the evidence beyond a reasonable doubt" is not erroneous because the word "legal," as used in the statute, is omitted before the word "evidence." *Williams v. State*, 34 S. W. 943, 35 App. 606; *McDade v. State*, 27 App. 641, 11 S. W. 672, 11 Am. St. Rep. 216.

An instruction that defendant is presumed innocent until his guilt is established by competent evidence and that after his guilt is established by such evidence the presumption no longer exists, is erroneous. *Stapp v. State*, 1 App. 734.

On a trial for wilfully obstructing a public road, an instruction that the wilful intent was presumed and that it devolved upon defendant to show his innocent intent destroyed the presumption of innocence, and was erroneous. *Brinkoeter v. State*, 14 App. 67; *Drinkoeter v. State*, 16 App. 72.

The court instructed the jury that "the defendant is presumed to be innocent until his guilt is proved beyond a reasonable doubt; and if, upon the whole evidence, you have a reasonable doubt of his guilt, you must acquit him, and not resolve the doubt by a mitigation of the punishment." This charge is objectionable in that the concluding clause may have induced the jury to inflict the greatest penalty instead of the milder one provided by the statute. *Johnson v. State*, 27 App. 163, 11 S. W. 106.

For a discussion of the principle controlling the charge of court on the presumption of innocence, see *Johnson v. State*, 27 App. 163, 11 S. W. 106; *Crook v. State*, 27 App. 198, 11 S. W. 444; *Neeley v. State*, 27 App. 327, 11 S. W. 376; *Zwicker v. State*, 27 App. 539, 11 S. W. 633; *McDade v. State*, 27 App. 641, 11 S. W. 672, 11 Am. St. Rep. 216; *Gallaher v. State*, 28 App. 247, 12 S. W. 1087; *Lewis v. State*, 29 App. 105, 14 S. W. 1008; *Johnson v. State*, 29 App. 150, 15 S. W. 647; *Hurley v. State*, 30 App. 335, 17 S. W. 455, 28 Am. St. Rep. 916.

A charge that defendant is presumed to be innocent till his guilt is established by legal evidence, and that in case the jury have a reasonable doubt as to guilt they must acquit, correctly instructs as to the presumption of innocence and reasonable doubt. *Flournoy v. State*, 57 App. 88, 122 S. W. 26.

A statement of the statutory doctrine of reasonable doubt in the court's charge, that in all criminal cases the burden of proof was on the state, that defendant was presumed innocent until his guilt was established by legal evidence beyond a reasonable doubt, and that in case the jury had a reasonable doubt as to defendant's guilt they should acquit, was sufficient. *King v. State*, 57 App. 363, 123 S. W. 135.

Though the allegation that the shotgun used by defendant was a deadly weapon was not questioned, an instruction that the "instrument or means by which a homicide was committed are to be taken into consideration in judging the intent" of defendant is not subject to the objections of giving undue prominence to the presumption arising from the character of the weapon and the manner of the killing, or that it makes a presumption of criminal intent neutralize the presumption of innocence. *Smith v. State*, 57 App. 585, 124 S. W. 679.

It was not reversible error to charge, in a prosecution for burglary in the district court of an accused under 16 years of age, that the defendant in this case, "as in all criminal cases," is presumed to be innocent until his guilt is established by evidence beyond a reasonable doubt. *Ragsdale v. State*, 61 App. 145, 134 S. W. 234.

An instruction that in all criminal cases accused is presumed to be innocent until his guilt is established by competent evidence beyond a reasonable doubt, and that the burden of proving guilt is on the prosecution throughout the trial, and does not shift to the accused, and in case the jury has a reasonable doubt of accused's guilt they shall acquit, sufficiently presented accused's denial of guilt. *Northcutt v. State*, 70 App. 577, 158 S. W. 1004.

11. Reasonable doubt in general.—The reasonable doubt extends to the whole case and every material part of it, especially including the complicity of the defendant. *Perry v. State*, 44 Tex. 473; *Bray v. State*, Id. 132; *Walker v. State*, 42 Tex. 360; *Kay v. State*, 40 Tex. 29; *Munden v. State*, 37 Tex. 353; *Dorsey v. State*, 34 Tex. 631; *Campbell v. State*, 1 App. 108; *Parchman v. State*, 2 App. 228, 28 Am. Rep. 435; *Lee v. State*, 2 App. 338; *Merritt v. State*, 2 App. 177; *Gillian v. State*, 3 App. 132; *Boothe v. State*, 4 App. 202; *Gonzales v. State*, 5 App. 584; *Ake v. State*, 6 App. 398, 32 Am. Rep. 586; *McMillan v. State*, 7 App. 142; *Benevides v. State*, 14 App. 378; *Jones v. State*, 70 App. 343, 156 S. W. 1191.

It is not necessary that the insanity of the defendant be established beyond a reasonable doubt. *Williams v. State*, 37 App. 348, 39 S. W. 687; *Burt v. State*, 38 App. 397, 40 S. W. 1000, 43 S. W. 344, 39 L. R. A. 305, 330.

A mere probability or strong suspicion of guilt will not warrant a conviction. The law demands that the evidence must be sufficient to satisfy the minds of the jurors, beyond a reasonable doubt, of the guilt of the defendant. *Pilkinton v. State*, 19 Tex. 214; *Conner v. State*, 34 Tex. 659; *Tollett v. State*, 44 Tex. 95; *Grant v. State*, 3 App. 1; *Barnell v. State*, 5 App. 113; *Hodde v. State*, 8 App. 383.

Neither a preponderance of evidence, nor any preponderant weight of evidence, warrants conviction, unless it satisfies the minds of jurors of the defendant's guilt to the exclusion of every reasonable doubt. *Billard v. State*, 30 Tex. 367, 94 Am. Dec. 317; *Conner v. State*, 34 Tex. 659; *Griffith v. State*, 9 App. 372; *Jones v. State*, 7 App. 457; *Barnell v. State*, 5 App. 113.

An instruction that a reasonable doubt was not a mere fanciful or imaginary one but grew out of the testimony or the want of it and left the mind in that condition that after a full investigation of the facts detailed in the evidence the jury could not say they had an abiding conviction that defendant was guilty, was not erroneous. *Cave v. State*, 41 Tex. 182.

A reasonable doubt may arise in the minds of the jurors from evidence tending to prove an alibi before they have arrived at a moral certainty as to the truth of the alibi. *Walker v. State*, 42 Tex. 360.

But the doubt, to be a reasonable one, must not be merely speculative, imaginary, possible, or conjectural; it must be a real doubt. *Gibbs v. State*, 1 App. 12; *Brown v. State*, Id. 154; *Pilkinton v. State*, 19 Tex. 214; *Billard v. State*, 30 Tex. 367, 94 Am. Dec. 317; *Ham v. State*, 4 App. 645.

Reasonable doubt is that state of the case which, after full consideration of all the evidence, leaves the jury without an abiding conviction, to a moral certainty, of the truth of the accusation. *Chapman v. State*, 3 App. 67; *Billard v. State*, 30 Tex. 367, 94 Am. Dec. 317.

If the evidence leaves the mind involved in reasonable doubt as to his guilt, that doubt inures to his benefit, and he is entitled to be acquitted. *Robertson v. State*, 10 App. 602.

Doubt of a fact upon which another fact depends necessarily involves doubt of the latter fact. *Poston v. State*, 12 App. 408.

The rule as to reasonable doubt applies alone to criminative facts, and not to exculpatory facts, and the charge of the court should so restrict it. Exculpatory facts, to warrant acquittal, need not be established beyond a reasonable doubt. *Dyson v. State*, 13 App. 402; *Rockhold v. State*, 16 App. 577; *Morgan v. State*, 16 App. 593.

An alibi need not be established beyond a reasonable doubt. If the evidence adduced whether in behalf of the state or of defendant raises a reasonable doubt as to defendant's presence at the time and place of the commission of the offense, defendant is entitled to an acquittal. *Gallaher v. State*, 28 App. 247, 12 S. W. 1087.

A reasonable doubt of guilt, independent of exculpatory proof, entitles the accused to an acquittal. *Johnson v. State*, 27 App. 163, 11 S. W. 106.

A reasonable doubt may arise from a want of sufficient criminative facts to establish guilt. *Zwicker v. State*, 27 App. 539, 11 S. W. 633.

On a trial for slander, even though defendant has the burden of proving the truth of the alleged statement, he is not required to prove it beyond a reasonable doubt. *Manning v. State*, 37 App. 180, 39 S. W. 118.

Where a dazed and irresponsible condition of mind, relied on as excusing a homicide, was produced by a blow inflicted on defendant by decedent immediately prior to the killing, the burden of proof is not on defendant to establish his mental condition, as claimed, by a preponderance of the evidence, but it is sufficient for acquittal if the evidence raises a reasonable doubt thereof; the blow and its consequences being a part of the *res geste*. *Dent v. State*, 46 App. 166, 79 S. W. 525.

It is not every doubt of the sufficiency of the facts that will justify an acquittal; but the doubt must be a reasonable one. *Liogn v. State*, 59 App. 274, 128 S. W. 620.

Defendant is entitled to the benefit of a reasonable doubt, and, where it exists, to an acquittal. *Hollis v. State* (Cr. App.) 153 S. W. 853.

The jury must find facts constituting an offense beyond a reasonable doubt before they may convict. *Hill v. State* (Cr. App.) 168 S. W. 864.

12. — **Particular offenses.**—See this case for evidence held insufficient to support a conviction for theft, because it does not overcome the presumption of innocence nor exclude the reasonable doubt. *Reveal v. State*, 27 App. 57, 10 S. W. 759.

The doctrine of reasonable doubt applies to every one charged with crime, and if the jury have a reasonable doubt of any grade of homicide, the defendant is entitled to an acquittal. *Redman v. State*, 52 App. 591, 108 S. W. 367.

In a prosecution for carrying a pistol, the burden was upon the state to prove the crime beyond a reasonable doubt, but not upon accused to prove his defense beyond a reasonable doubt; and a charge that if the jury believed beyond a reasonable doubt that accused was handed his pistol in a restaurant, and immediately proceeded to take it to his home by the most direct route practicable, he should be acquitted, was erroneous. *Humphries v. State*, 58 App. 30, 124 S. W. 635.

In a prosecution for burglary with intent to steal, the defendant cannot be convicted where there is a reasonable doubt that he entered the house, as charged, for the purpose of committing the crime of theft, or as to whether he had the consent to enter the house of the owner named in the indictment, or of his wife. *McKinney v. State*, 63 App. 470, 140 S. W. 344.

In a prosecution for assault with intent to murder, the burden of proving that accused was a principal is upon the state, which must establish that fact beyond a reasonable doubt. *Black v. State* (Cr. App.) 145 S. W. 944.

In a prosecution for bigamy, where accused's defense was that he had been informed and believed that his first wife was dead, he is entitled to the benefit of reasonable doubt on his defense. *Sparlin v. State* (Cr. App.) 170 S. W. 307.

13. — **Grade of offense.**—In a proper case, the rule of reasonable doubt applies to the degrees in murder. *Guagando v. State*, 41 Tex. 626; *Murray v. State*, 1 App. 417; *Blake v. State*, 3 App. 581; *White v. State*, 23 App. 154, 3 S. W. 710; P. C., art. 1140.

If there is a reasonable doubt as to the degree of the offense, it must be solved by the jury and not by the court. *Conner v. State*, 23 App. 378, 5 S. W. 189.

14. — **Venue.**—The venue of an offense need not be proved beyond a reasonable doubt. *Himmelfarb v. State* (Cr. App.) 174 S. W. 586; *Barrara v. State*, 42 Tex. 260; *McReynolds v. State*, 4 App. 327; *Deggs v. State*, 7 App. 359; *Achterberg v. State*, 8 App. 463; *Hoffman v. State*, 12 App. 406; *McGill v. State*, 25 App. 499, 8 S. W. 661; *Cox v. State*, 28 App. 92, 12 S. W. 493; *Abrido v. State*, 29 App. 143, 15 S. W. 408; *Belcher v. State*, 71 App. 646, 161 S. W. 459.

15. — **Necessity of instructions in general.**—The rule as to reasonable doubt must be charged in every felony case, whether asked or not. *Hutto v. State*, 7 App. 44; *Goode v. State*, 2 App. 520; *Lindsay v. State*, 1 App. 327; *Black v. State*, Id. 368; *Priesmuth v. State*, Id. 480; *Mace v. State*, 6 App. 470; *Thomas v. State*, 40 Tex. 36.

In misdemeanors it is not error to omit an instruction as to reasonable doubt, unless the defendant requests it to be given. *May v. State*, 6 App. 191; *Treadway v. State*, 1 App. 668; *Goode v. State*, 2 App. 520.

Failure to give proper charge on reasonable doubt is fundamental error. *Logan v. State*, 40 App. 85, 48 S. W. 575.

16. — **Sufficiency of instructions in general.**—See *McCay v. State*, 32 App. 233, 22 S. W. 974; *Loggins v. State*, 32 App. 364, 24 S. W. 512; *Crockett v. State*, 40 App. 173, 49 S. W. 392.

"If the jury have a reasonable doubt arising from the facts," etc., is an erroneous charge, as the doubt may arise from a want of facts. *Massey v. State*, 1 App. 563.

An instruction, that "if the jury had any reasonable doubt of the guilt of the defendant, such as naturally and fairly presented itself from the evidence which the jury believed," etc., was held erroneous. The reasonable doubt is not limited to, nor is it necessary that it should arise from, the evidence which the jury believes. *Holmes v. State*, 9 App. 313.

An instruction, that "the defendant is entitled to all reasonable doubts" could not be complained of by the defendant, but is improper, because it opens up a field for speculation and doubt outside the facts of the case. *Reid v. State*, 9 App. 472.

The following charge was held erroneous: "If you can reasonably account for or explain the facts and circumstances in evidence before you in this case, in any way consistently with defendant's innocence, without resorting to unreasonable facts and theories, then you should do so and acquit. But if you can not account for nor explain the facts and circumstances detailed before you in this case upon any reasonable ground consistently with defendant's innocence, then, if you can not do this, you should convict." *Robertson v. State*, 10 App. 602.

To instruct that the jury should acquit if they have a reasonable doubt as to the "guilt or innocence" of the defendant is error; but such error as usually would inure to the benefit of the defendant, and of which he could not ordinarily be heard to complain. *Patterson v. State*, 12 App. 223; *McNair v. State*, 14 App. 78; *Holland v. State*, Id. 182; *Thomas v. State*, Id. 200; *Hackett v. State*, 13 App. 406.

If there be a reasonable doubt as to guilt of the principal the accessory cannot be held guilty. It is therefore the duty of the court to charge the law of reasonable doubt as to the guilt of the principal as well as to that of the accessory. *Poston v. State*, 12 App. 408.

An instruction that certain evidence might be considered as any other circumstance to establish the guilt or innocence of defendant, was erroneous. The question is not whether defendant is innocent, but whether he is guilty, and the jury may find him not guilty though they do not believe him to be innocent, where the proof of guilt fails to convince them beyond a reasonable doubt. *Smith v. State*, 13 App. 507.

Where the court charged on reasonable doubt as between the degrees of murder and between murder in the second degree and manslaughter and instructed that there should be an acquittal if there was a reasonable doubt of defendant's guilt, this was sufficient without charging on reasonable doubt as between manslaughter and self defense. *Cockerell v. State*, 32 App. 585, 25 S. W. 421.

On a trial for perjury an instruction that the jury should acquit if they had a reasonable doubt whether the alleged false statement was true or false, was not prejudicial to defendant. *Kitchen v. State*, 26 App. 165, 9 S. W. 461.

On the question of reasonable doubt the court charged as follows: "It is not sufficient to secure a conviction for the state to make out a prima facie case, but the guilt of the defendant must be shown beyond a reasonable doubt; and the failure or inability of the defendant to show his innocence does not lend any additional probative force to the incriminative facts, if any, shown by the state, or raise any presumption of guilt against the defendant." This charge, though abstractly correct, was calculated to lead the jury to believe that in the opinion of the court the defense had failed to show innocence. *Johnson v. State*, 27 App. 163, 11 S. W. 106.

Upon the defense of alibi, as applied to the alleged principal, the charge of the court required the jury to believe that the alleged principal was not present at the time and place of the killing. Held error, because the effect of such charge was to eliminate from the defense of alibi the doctrine of reasonable doubt. *Crook v. State*, 27 App. 198, 11 S. W. 444.

An instruction that "if you believe from the testimony beyond a reasonable doubt that the defendant did not take the property fraudulently, but under an honest claim of right, he would not be guilty of theft, and you should acquit him," held error, as applying the reasonable doubt to the evidence instead of the guilt of the accused. *Lewis v. State*, 29 App. 105, 14 S. W. 1008.

In a prosecution for the theft of a horse, it was error to instruct the jury: "If the facts and circumstances in evidence, taken together, leave you with reasonable doubt as to the guilt of defendant, you will return a verdict of guilty; otherwise not guilty." *Clark v. State*, 30 App. 402, 17 S. W. 942.

The court charged the jury, "if you believe the defendant innocent you will acquit him," but in another part of the charge he had instructed upon presumption of innocence, and told the jury "in case you have a reasonable doubt as to defendant's guilt you will acquit him." Held that the charge taken as a whole is sufficient. *Nowlen v. State*, 33 App. 141, 25 S. W. 774.

The defense was that defendant had bought the pistol found on his person from one S. The court instructed the jury that if they had a reasonable doubt as to whether defendant bought said pistol from S., or got it from any other person than E. J. (the alleged owner), you will acquit defendant; held, sufficient. *Hays v. State*, 36 App. 533, 38 S. W. 171.

In a prosecution for mule theft, defendant having claimed that he traded a pair of horses for the mules, an instruction that if the jury found from the evidence that defendant traded for the mules, or had a reasonable doubt as to whether he did or not, they should acquit him, sufficiently charged the doctrine of reasonable doubt, in accordance with the facts as defendant claimed them to be. *Cleveland v. State*, 57 App. 356, 123 S. W. 142.

Though it is a legal maxim that every one is presumed to intend whatever would be the reasonable or probable result of his act and the means used by him, it is never permissible to so instruct the jury, as defendant is entitled to reasonable doubt on every phase of the case. *Thomas v. State*, 57 App. 452, 125 S. W. 35.

Where the court properly charged on circumstantial evidence, and every other phase of the case including the issue of alibi, a charge that, if the jury did not find beyond a reasonable doubt that accused, and not his son, killed decedent, they should acquit him, was not erroneous. *Wynne v. State*, 59 App. 126, 127 S. W. 213.

Where the issue was whether accused or another struck prosecutor, and the court charged that to justify a conviction the jury must find that accused struck prosecutor, the refusal to charge that before the jury could convict they must believe that defendant and no other struck prosecutor, and if they had a doubt they should acquit, was not reversible error. *Ligon v. State*, 59 App. 274, 128 S. W. 620.

An instruction in a prosecution for homicide as to self-defense is not erroneous for failure to couple with it a statement of the doctrine of reasonable doubt, where the charge contains a statement of such doctrine and of the presumption of innocence, and after defining the different degrees and applying reasonable doubt to them, the jury were then told that, if they had a reasonable doubt on the guilt of defendant, they should acquit. *Eggleston v. State*, 59 App. 542, 128 S. W. 1105.

A written charge that accused is presumed to be innocent until his guilt is established, by evidence, "beyond a reasonable _____. This reasonable doubt extends to every phase of the case; and if you have a reasonable _____ of the guilt of the defendant, you will give him the benefit of such doubt and acquit him," is not prej-

udicially erroneous for omitting the word "doubt," after the word "reasonable," because the jury will supply the word and make the sentence complete. *Cromwell v. State*, 59 App. 525, 129 S. W. 622.

Accused's right to the benefit of reasonable doubt throughout the case, including the issue whether he wounded a witness to free himself or with intent to murder, was sufficiently covered by instructions that if the jury believed beyond reasonable doubt that the assault was unlawful, but had reasonable doubt as to whether it was with intent to murder or was an aggravated assault, accused was entitled to the benefit thereof, and that one accused is presumed to be innocent until his guilt is shown beyond reasonable doubt. *Perry v. State*, 61 App. 2, 133 S. W. 685.

An instruction that if the jury were satisfied beyond a reasonable doubt that accused was guilty of murder, but had a reasonable doubt whether it was committed under express or implied malice, they must give accused the benefit of such doubt and not find him guilty of a higher grade than murder in the second degree, if he was guilty of any offense, was not objectionable as not giving accused the benefit of a reasonable doubt as to his guilt. *Mingo v. State*, 61 App. 14, 133 S. W. 882.

Under Act April 15, 1909 (Acts 31st Leg. c. 15), making it a felony to pursue the occupation of selling intoxicating liquor in local option territory, the word "occupation" does not necessarily mean principal business, but may mean a business carried on by the defendant as a side line, and hence a charge, in a prosecution under that law, that in order to constitute and engage in or pursue the occupation of selling intoxicating liquor it is necessary for the state to prove beyond a reasonable doubt that the defendant unlawfully followed that business, places a greater burden on the state than the law requires, and was not prejudicial to defendant. *Clark v. State*, 61 App. 597, 136 S. W. 260.

A charge that if the jury believe beyond a reasonable doubt that accused is guilty of some degree of murder, but have a reasonable doubt as to whether the killing was committed on express or implied malice, they must give accused the benefit of the doubt and find him guilty of no higher offense than murder in the second degree, followed by a charge that if accused is guilty of some grade of culpable homicide, but there is a reasonable doubt whether the offense is murder in the second degree or manslaughter, the jury must give accused the benefit of the doubt and cannot find him guilty of a higher degree of offense than manslaughter, and followed by a charge on reasonable doubt and presumption of innocence as applicable to the whole case, is not objectionable for failing to state that, if the jury have a reasonable doubt that the killing was not committed on express or implied malice, accused cannot be convicted of murder in the second degree. *Alexander v. State*, 63 App. 102, 138 S. W. 721.

On a trial for the theft of a hog, a charge that, if neither of the hogs found in the pen of defendant belonged to the person named as owner in the indictment, the defendant would not be guilty, and that, if there was a reasonable doubt whether the hogs in defendant's pen were the property of such owner, defendant should be found not guilty, considered as a whole, sufficiently informs the jury that, if they had reasonable doubts of the ownership alleged, they should acquit defendant. *Holloway v. State*, 63 App. 503, 140 S. W. 453.

Where there was evidence that one of three different persons, other than defendant, killed deceased, it was error to charge that if one of such other persons killed deceased the jury should acquit defendant, without further instructing that they should also acquit, unless they found, beyond a reasonable doubt, that defendant was the person who in fact did the killing. *Wallace v. State* (Cr. App.) 145 S. W. 925.

Where, in a trial for unlawfully giving intoxicating liquor to a minor, the court, after properly charging upon reasonable doubt and the burden of proof, stated that, in order to convict, the state must prove that the defendant knew that the person to whom he gave the liquor was a minor, and then stated that the jury must believe the alleged facts, beyond a reasonable doubt, before finding the defendant guilty, it sufficiently covered the subject-matter; and other instructions upon the same matter were properly refused. *Hogan v. State* (Cr. App.) 147 S. W. 601.

In a homicide case, the court instructed that, if the jury "find from the evidence that some one else other than defendant fired the shot that inflicted the wound in the right breast or right side of deceased," they should acquit, and further instructed in the next paragraph that, if there is "from the evidence reasonable doubt in your minds as to whether the defendant fired the shot that inflicted the wound" in decedent's right breast, or whether the shot was fired by some other than accused, "you will resolve the doubt in favor of defendant," and that accused was presumed to be innocent until his guilt was established by legal evidence beyond a reasonable doubt, and, if the jury have a reasonable doubt as to accused's guilt, they should acquit. Held that, in view of the rest of the instructions, the part quoted in the first paragraph was not objectionable as not giving to accused the benefit of a reasonable doubt as to his being the person who fired the fatal shot. *Holmes v. State* (Cr. App.) 150 S. W. 926.

In a prosecution for assault with intent to murder, accused requested a charge that in a criminal case the law contemplates the concurrence of twelve minds in the conclusion of guilt, and that each individual juror must be satisfied beyond a reasonable doubt of guilt before he can consent to a verdict of guilty, and each juror should feel the responsibility resting upon him, and realize that his mind should be convinced beyond a reasonable doubt of accused's guilt before he can convict, so that if any individual member of the jury, after having considered all the evidence, should entertain such reasonable doubt of guilt, it is his duty not to surrender his own convictions simply because the balance of the jury entertains different convictions. The court charged, pursuant to the statute, that the burden of proof was upon the state, and, in case the jury had a reasonable doubt as to defendant's guilt, they should acquit. Held, that the requested charge was properly refused; it being improper in any case. *Thomas v. State* (Cr. App.) 154 S. W. 994.

It was not error to instruct that if the jury had reasonable doubt as to whether

accused procured a woman to come into the state for the purpose of prostitution, or as to accused's guilt, he should be acquitted, and that in all criminal cases accused was presumed to be innocent until his guilt was established by legal and competent evidence beyond a reasonable doubt, that the burden of proof was on the state throughout the trial and never shifted to accused, etc. *McDowell v. State* (Cr. App.) 155 S. W. 521.

An instruction that prosecutrix, on a trial for seduction, is an accomplice and that accused cannot be convicted on her testimony alone unless there is other evidence tending to connect accused with the offense, is not erroneous for failing to charge on reasonable doubt covered by an instruction following. *Cole v. State*, 70 App. 459, 156 S. W. 929.

A charge which requires the jury to affirmatively believe beyond a reasonable doubt all the facts necessary to show accused's guilt before they can find him guilty, and which gives a complete charge on reasonable doubt, telling the jury that the accused is presumed to be innocent until his guilt is established by legal evidence beyond a reasonable doubt, and that, if the jury has a reasonable doubt as to guilt, they must acquit him, sufficiently charges on reasonable doubt. *Mitchell v. State*, 71 App. 241, 158 S. W. 815.

In a prosecution for rape on a girl under 15 years of age, a charge that if the jury found beyond a reasonable doubt that defendant criminally assaulted her with or without her consent, she being under the age of 15 years, and not his wife, they should assess his punishment at imprisonment for not less than five years, unless defendant should be found not guilty, but if they did not find defendant's commission of the offense, or found that prosecutrix was 15 years old or more, or had a reasonable doubt that she was under that age, then they should acquit, followed by proper charges on the burden of proof, the presumption of innocence and the defense of insanity, taken as a whole, clearly required the jury to believe, beyond a reasonable doubt, all of the essential elements of the offense before they could convict. *Graham v. State*, 73 App. 28, 163 S. W. 726.

In a prosecution for pandering, the court affirmatively charged that the jury must believe beyond a reasonable doubt that accused caused the procured female to become an inmate of a house of ill fame, with other requisites of the offense, before they could convict, and also charged that, if the jury believed that the house where the accused procured a room for the female was not a house of ill fame, they must acquit. Held, that an exception that the general charge nowhere affirmatively charged that the jury must find beyond a reasonable doubt that the house where he procured a room was a house of ill fame was not sustained. *Smith v. State*, 73 App. 129, 164 S. W. 825.

Where the court charged on reasonable doubt and the presumption of innocence, a charge submitting an issue was not objectionable for omitting any reference to reasonable doubt. *Hill v. State* (Cr. App.) 168 S. W. 864.

The court at defendant's request having charged, concerning defendant's statements as to how deceased was injured, that the burden of proof was on the state to establish beyond a reasonable doubt the falsity of such statements, and that proof of the falsity of the statements, if any, in immaterial matters was not sufficient, but that the state must prove the falsity of every statement, if any, made by defendant which in the mind of the jury raised a reasonable doubt of his guilt, defendant could not successfully contend that the court had not otherwise charged with sufficient definiteness that all exculpatory statements which raised a reasonable doubt of accused's guilt must be proven to be false. *Brown v. State* (Cr. App.) 169 S. W. 437.

In a prosecution for homicide, in which accused relied on self-defense, the court charged: "Now, if you believe from the evidence, beyond a reasonable doubt, that the defendant with a deadly weapon in a sudden passion arising from an adequate cause, and not in defense of herself against an unlawful attack producing a reasonable expectation or fear of death or serious bodily injury, with intent to kill deceased, etc., you will find the defendant guilty and assess her punishment," etc. The court also charged that in all criminal cases the burden of proof was on the state, and accused was presumed innocent until her guilt was established by legal evidence beyond a reasonable doubt, and, in case the jury had a reasonable doubt of accused's guilt, they should acquit. Held, that such charge constituted a sufficient charge on reasonable doubt arising on the issue between manslaughter and self-defense. *Clay v. State* (Cr. App.) 170 S. W. 743.

Where the court gave the customary charge on presumption of innocence and reasonable doubt, and in a separate paragraph affirmatively presented accused's defense, the charge was not objectionable because the part submitting the issue to the jury for a finding did not charge the converse of the proposition that if the jury did not believe that the elements of the offense had been proven as required, they should acquit. *Serrato v. State* (Cr. App.) 171 S. W. 1133.

The instructions need not define the term "reasonable doubt." *Marshall v. State* (Cr. App.) 175 S. W. 154.

17. — **Following language of statute.**—As to reasonable doubt should be charged in the language of the statute, without any attempt at amplification or explanation. *Schultz v. State*, 20 App. 315; *Fury v. State*, 8 App. 471; *Holmes v. State*, 9 App. 313; *Bland v. State*, 4 App. 15; *Ham v. State*, Id. 645; *Chapman v. State*, 3 App. 67; *Massey v. State*, 1 App. 563; *Bramlette v. State*, 21 App. 611, 2 S. W. 765, 57 Am. Rep. 622; *Abram v. State*, 36 App. 44, 35 S. W. 389; *Walker v. State*, 13 App. 618, 44 Am. Rep. 716, note; *Zwicker v. State*, 27 App. 539, 11 S. W. 633; *Johnson v. State*, 27 App. 163, 11 S. W. 106; *Holmes v. State* (Cr. App.) 150 S. W. 926.

Our statute has established as a test for the sufficiency of the proof that the concurrent minds of the jury should be satisfied of the guilt of the defendant, beyond a reasonable doubt, and the charge to the jury should be confined to this statutory test. *Brown v. State*, 23 Tex. 195.

The language of this long-standing provision was advisedly selected to express

the precise meaning of the lawmaker. Its entire context should be preserved, and attempts to paraphrase or supplement it in the charge to the jury, tend to beget perplexity and breed error. *Fury v. State*, 8 App. 471; *McPhail v. State*, 9 App. 164; *Cohea v. State*, Id. 173.

Nothing further than a charge, in accordance with this article need be given on the subject of reasonable doubt. *Sanchez v. State* (Cr. App.) 153 S. W. 1133.

A requested charge that the law contemplates the concurrence of 12 minds before a conviction can be had, that each individual juror must be satisfied beyond a reasonable doubt of defendant's guilt before he can consent to a verdict of guilty, that each juror should feel the responsibility resting on him and realize that his own mind must be convinced beyond a reasonable doubt of defendant's guilt before he can consent to a verdict of guilt, so that if any individual juror, after having considered all the evidence and consulted with his fellow jurors, should entertain a reasonable doubt of defendant's guilt, it was his duty not to surrender his convictions merely because the balance of the jury entertain different convictions, was properly refused; it being sufficient that the court's charge on reasonable doubt was in substantial conformity to the statute. *Hysaw v. State* (Cr. App.) 155 S. W. 941.

18. — **Shifting burden of proof.**—An instruction which in effect conditions an acquittal upon the belief of the jury that the defendant is innocent, instead of on the sufficiency of the evidence to establish his guilt beyond a reasonable doubt, is erroneous. *Smith v. State*, 9 App. 150; *Robertson v. State*, Id. 209; *Blocker v. State*, Id. 279; *Wallace v. State*, Id. 299; *Crook v. State*, 27 App. 198, 11 S. W. 444; *Moore v. State*, 28 App. 377, 13 S. W. 152; *Wagner v. State*, 17 App. 554; *Brinkoeter v. State*, 14 App. 67.

The defense claimed that the deceased fired the fatal shot and killed herself. Upon that issue the court charged: "If, from the evidence, you believe that Anna Smith took her own life, and that the fatal shot which deprived her of life was not fired by the defendant, but by her own hand, or by any other means than the act of the defendant, then he is not guilty, and you should so find." Held, that the charge was erroneous because it imposed upon the accused the burden of proving his innocence. The instruction should have been to the effect that if, from all the evidence, the jury entertained a reasonable doubt whether the defendant killed the deceased, or whether the deceased killed herself, they should acquit him. *Shamburger v. State*, 24 App. 433, 6 S. W. 540.

An instruction directing an acquittal if the jury believed certain exculpatory facts, was erroneous as it required the jury to find defendant's innocence while the true rule is that they must presume innocence until his guilt is established beyond a reasonable doubt. *Johnson v. State*, 29 App. 150, 15 S. W. 647; *Johnson v. State*, 30 App. 419, 17 S. W. 1070, 28 Am. St. Rep. 930.

An instruction that payment of the federal tax was prima facie evidence that the person paying it was engaged in selling liquor, was not erroneous where the court also charged on the presumption of innocence and reasonable doubt and left the jury to determine from all the evidence whether defendant was guilty. *Floek v. State*, 34 App. 314, 30 S. W. 794.

An instruction that the doubt must be reasonable and based upon sound judgment and fairly deducible from the evidence considered as a whole and that the mere possibility that defendant might be innocent would not warrant an acquittal on the ground of reasonable doubt, was calculated to impress the jury with the belief that the testimony must indicate a reasonable doubt affirmatively, when the true principle is that the criminative facts must exclude it. *Abram v. State*, 36 App. 44, 35 S. W. 389.

Where indictment charged that defendant was agent of bailor, it was error to instruct the jury that if they believed beyond a reasonable doubt that he was the agent of the person to whom he was to deliver the property, to acquit, because this was a shifting of the burden of reasonable doubt. *Crain v. State* (Cr. App.) 56 S. W. 912.

In a prosecution for murder, the court, after defining negligent homicide in the second degree, charged that if the jury believed from the evidence beyond reasonable doubt that defendant struck deceased with a stick or a club with no apparent intention of killing him, if he did so, he was not acting in self-defense. Held not erroneous, as requiring him to prove beyond a reasonable doubt no apparent intention to kill, the gravamen of negligent homicide, which would not be in the case if there was an intention to kill. *Talbot v. State*, 58 App. 324, 125 S. W. 906.

An instruction that, if the jury found, beyond a reasonable doubt, that while a congregation was assembled for religious worship accused willfully disturbed the congregation by loud talking, etc., he was guilty was not erroneous, as placing the burden on him to establish his innocence. *Webb v. State*, 63 App. 207, 140 S. W. 95.

An instruction that if defendant did not assault the prosecutrix, or if there was a reasonable doubt as to whether he assaulted her, he must be acquitted, is not objectionable as imposing upon defendant the burden of proving that he did not commit the assault charged. *Conger v. State*, 63 App. 312, 140 S. W. 1112.

An instruction that if the jury believed accused shot deceased, but further believed that deceased had used insulting words or conduct concerning accused's wife, thereby creating in his mind such a degree of rage, anger, etc., as to render him incapable of cool reflection, he would not be guilty of any higher offense than manslaughter, did not place the burden on accused to prove the use of insulting words by deceased, when read, as it should be, in connection with a further charge that, if the jury had a reasonable doubt whether the offense of which accused was guilty was murder in the second degree or manslaughter, they should find him guilty only of manslaughter. *Welch v. State* (Cr. App.) 147 S. W. 572.

In a prosecution for following the business of selling intoxicating liquors in local option territory, an instruction that if defendant did not engage in the occupation, or if he did not make as many as two sales, or if there is reasonable doubt as to either of these, or of the defendant's guilt, he should be acquitted, is erroneous,

placing too great a burden on the defendant; the state being bound to show him guilty beyond a reasonable doubt. *Sain v. State* (Cr. App.) 148 S. W. 566.

Where the court gave a full instruction on self-defense as applicable to the facts, and charged that the burden was on the state to establish the defendant's guilt by legal evidence beyond a reasonable doubt, applying the doctrine of reasonable doubt to each grade of the offense, an instruction correctly defining manslaughter, and charging that if the jury believed beyond a reasonable doubt that the killing took place under such circumstances, and not in defendant's lawful self-defense, they should convict him of manslaughter, was not objectionable as shifting the burden to defendant to show that the killing was in self-defense. *Overcash v. State* (Cr. App.) 148 S. W. 701.

Where defendant contended that C. killed the deceased, an instruction that, "if you believe from the evidence or have a reasonable doubt that C. killed deceased, then you will find defendant not guilty," was a proper submission of the issue, and did not shift the burden to the defendant to show that C. did the killing. *Pace v. State* (Cr. App.) 153 S. W. 132.

Where the court in charging on manslaughter charged that, if the jury find "beyond a reasonable doubt that defendant had adequate cause," etc., you will find him guilty of manslaughter, but in the next paragraph charged that if they believed beyond a reasonable doubt that defendant was guilty of homicide, but have a reasonable doubt as to whether it was murder or manslaughter, they should only find him guilty of manslaughter, the instruction was not erroneous, as not giving him the benefit of the doubt. *Hendricks v. State* (Cr. App.) 154 S. W. 1005.

A charge on murder in the second degree that, if the jury believed beyond a reasonable doubt that accused, in a sudden passion, without adequate cause, and not in defense of himself or under circumstances which would reduce it to manslaughter, killed deceased, to find him guilty of murder in the second degree, etc., is not improper, as requiring accused to prove beyond a reasonable doubt that he acted in self-defense. *Johnson v. State* (Cr. App.) 167 S. W. 733.

A charge that, if the jury had any reasonable doubt as to the guilt of accused of murder in the first or second degree or of negligent homicide, they must acquit him, and if the evidence raised a reasonable doubt, accused was entitled to an acquittal, was not objectionable as shifting the burden of proof on accused. *Hill v. State* (Cr. App.) 168 S. W. 864.

Where accused, charged with carrying a pistol, claimed that he borrowed the pistol as he was leaving town after having a difficulty with a third person, and that while en route to his wagon to go home he met the third person and the difficulty was resumed, a charge that before the jury could give accused the benefit of his defensive matter they must find beyond a reasonable doubt that he had a legal right to carry the pistol was erroneous, for the reasonable doubt was in his favor as he could borrow the pistol and carry it home, and if after borrowing it he was en route to his wagon to go home, the mere fact that he had a difficulty did not affect his right. *Davis v. State* (Cr. App.) 175 S. W. 1073.

19. — **Sufficiency of application of law to whole case.**—The doctrine of reasonable doubt given in charge with reference to the whole case, that is, with reference to the general issue of guilty or not guilty, is ordinarily sufficient, without applying it to each and every fact in proof. And it is not required that it shall be charged with regard to an affirmative independent defense. *McCall v. State*, 14 App. 353; *Barr v. State*, 10 App. 507; *Ashlock v. State*, 16 App. 13; *Webb v. State*, 9 App. 490; *King v. State*, Id. 515; *McCullough v. State*, 23 App. 620, 5 S. W. 175; *McCay v. State*, 32 App. 233, 22 S. W. 974; *Cockerell v. State*, 32 App. 555, 25 S. W. 421; *Loggins v. State*, 32 App. 364, 24 S. W. 512; *Edwards v. State*, 58 App. 342, 125 S. W. 894.

The doctrine of reasonable doubt need not be appended to each paragraph of the charge if the charge as a whole properly instructs the jury on that issue. *Condron v. State* (Cr. App.) 155 S. W. 253; *James v. State* (Cr. App.) 167 S. W. 727.

Where the court charges the doctrine of reasonable doubt generally, making it applicable to the whole case, an objection that it was not applied in the instructions on threats and self-defense is untenable. *Powell v. State*, 28 App. 393, 13 S. W. 599.

A general charge as to reasonable doubt is ordinarily sufficient. *Carson v. State*, 34 App. 342, 30 S. W. 799.

In a prosecution for rape, where the court applied the doctrine of reasonable doubt to the case as a whole, an instruction charging that, if accused ravished the prosecutrix without her consent, then he should be convicted, was not erroneous in submitting the question of reasonable doubt. *Wade v. State* (Cr. App.) 144 S. W. 246.

Where the court applied the doctrine of reasonable doubt to the whole case and gave an approved charge on circumstantial evidence, it was not necessary to apply the law of reasonable doubt to each fact in the chain of circumstances. *Mason v. State* (Cr. App.) 168 S. W. 115.

20. — **Instructions as to different degrees.**—The rule of reasonable doubt should be charged as between the different degrees of homicide. *Murray v. State*, 1 App. 417; *Eanes v. State*, 10 App. 422; *McCall v. State*, 14 App. 353.

In a prosecution for an offense of degrees, when the evidence requires it, the rule of reasonable doubt should be charged with respect to the degrees. *McCall v. State*, 14 App. 353. But it is not always essential in such cases that such instruction should be given. *Hodges v. State*, 6 App. 615.

Where court charges all degrees and reasonable doubt, it is not necessary to charge reasonable doubt between the degrees—once given is enough. *Little v. State*, 39 App. 662, 47 S. W. 984; *Matthews v. State*, 42 App. 31, 58 S. W. 88; *Edens v. State*, 41 App. 522, 55 S. W. 816.

An instruction that, in order to warrant a verdict of murder in the second degree, the jury must believe from the evidence, beyond a reasonable doubt, that defendant committed the homicide with implied malice, etc., sufficiently applies the

doctrine of reasonable doubt as between murder in the second degree and manslaughter, in the absence of a request for a special instruction. *Powell v. State*, 28 App. 393, 13 S. W. 599.

On a prosecution for murder, an instruction to find defendant guilty of murder in the second degree if the jury have a reasonable doubt as to the degree, and of manslaughter if they have a reasonable doubt as to whether he is guilty of murder in the second degree, on implied malice, or of manslaughter, was proper. *Tate v. State*, 33 S. W. 121, 35 App. 231.

The court instructed the jury that if they had a reasonable doubt as to defendant's guilt they would acquit him; held, this instruction extended to each degree of the offense and is sufficient. *Little v. State*, 39 App. 654, 47 S. W. 984.

It was proper to instruct that if the jury believed, beyond reasonable doubt, that accused was guilty of murder, but had reasonable doubt whether it was upon express or implied malice, he should be given the benefit of the doubt, and be found guilty of no higher offense than murder in the second degree. *Kinney v. State* (Cr. App.) 144 S. W. 257.

While it is better to charge on reasonable doubt as between different degrees of homicide, it is sufficient if the court charges on reasonable doubt as to the whole case, where no charge was requested as to reasonable doubt between the different degrees. *Simpson v. State* (Cr. App.) 154 S. W. 999.

In a prosecution for rape, a charge submitting that offense and requiring the jury to believe the facts constituting it beyond a reasonable doubt before they could convict, and that, in case an acquittal of that offense, the question whether defendant was guilty of an assault with intent to rape should be considered, and requiring a finding of facts constituting that offense beyond a reasonable doubt, and submitting the law of aggravated assault as applicable to the evidence with the application of the rule of reasonable doubt to that offense, together with the usual charge on presumption of innocence and reasonable doubt, in view of a conviction of the offense without mitigating circumstances, was not objectionable in not applying the rule of reasonable doubt to each specific offense mentioned in the charge. *Turner v. State*, 72 App. 649, 163 S. W. 705.

21. **Burden of proof.**—The proposition that the burden of proof never shifts from the state to defendant but rests upon the state throughout, is elementary and has but few and rare exceptions. *Phillips v. State*, 26 App. 228, 9 S. W. 557, 8 Am. St. Rep. 471; *Black v. State*, 1 App. 368; *Slade v. State*, 29 App. 381, 16 S. W. 253; *Ake v. State*, 6 App. 398, 32 Am. Rep. 586; *Jones v. State*, 13 App. 1; *Horn v. State*, 30 App. 541, 17 S. W. 1094.

The burden of proof is not on the defendant in a criminal case in the sense in which it is understood to rest on the defendant in a civil suit. Where accused pleads not guilty, the burden is on the state to overcome the legal presumption of innocence and the question of his guilt is to be determined from the whole evidence without inquiring whether it was introduced by him or the state. *Perry v. State*, 44 Tex. 473; *Luera v. State*, 12 App. 257.

The principle that the burden never shifts (*Shafer v. State*, 7 App. 239) relates to the establishment of the corpus delicti and the complicity.

The presumption of innocence and the presumption of the continuance of life neutralize each other, and in a prosecution for bigamy though the first wife is shown to have been living within seven years, the burden of proof does not shift but rests on the state to establish beyond a reasonable doubt that she was living at the time of the second marriage. *Hull v. State*, 7 App. 593.

Before there can be a conviction for any degree of homicide the State must show that deceased was killed, and that such killing was unlawful. *Hunter v. State*, 34 App. 599, 31 S. W. 674.

In a prosecution for violation of the local option law, taking judicial notice that beer is an intoxicating liquor is not indulging a presumption against accused, who was proved to have sold beer, without any evidence being introduced that beer is an intoxicating liquor. *Moreno v. State*, 64 App. 660, 143 S. W. 156.

In a prosecution for homicide, the burden is on the state to show that a threat by accused was directed against the deceased. *Maclin v. State* (Cr. App.) 144 S. W. 951.

In a prosecution under Pen. Code, art. 506a, for attempting to procure a woman to enter a house of ill fame, the burden of proof was on the state. *Currington v. State*, 72 App. 143, 161 S. W. 478.

In a trial for homicide growing out of defendant's remark, provoking a renewal of a difficulty, defendant did not have the burden of showing that he went on a peaceful mission, such burden, as all other issues in a criminal case, being upon the state. *Mason v. State*, 72 App. 501, 163 S. W. 66.

On the question of sanity, under a plea of guilty in a prosecution for homicide, the burden of proof is on the state to show that accused was sane at the time he committed the offense. *Harris v. State* (Cr. App.) 172 S. W. 975.

22. — **Non-age.**—See notes under Pen. Code, arts. 34, 35.

23. — **When on defendant.**—See Pen. Code, art. 52.

24. — **Insanity.**—See Pen. Code, art. 40, and notes.

25. — **Instructions.**—The general charge should include an instruction that, if the jury do not believe the defendant guilty, they should acquit, and this is especially true when the evidence is conflicting, or does not clearly establish the guilt of defendant. *Lindsay v. State*, 1 App. 327; *Spears v. State*, 2 App. 244; *Steagald v. State*, 22 App. 464, 3 S. W. 771; *Pierce v. State* (Cr. App.) 22 S. W. 587. But where the evidence clearly establishes guilt the instruction is unnecessary. *Rideus v. State*, 41 Tex. 199.

It is error to refuse to instruct the jury to the effect that "the burden of proof never shifts from the state to the defendant, but is upon the state throughout to first establish every constituent element of the offense." *Horn v. State*, 30 App.

541, 17 S. W. 1094; *Phillips v. State*, 26 App. 229, 9 S. W. 557, 8 Am. St. Rep. 471; *Conner v. State*, 24 App. 245, 6 S. W. 138; *Guajardo v. State*, 24 App. 603, 7 S. W. 331; *Mask v. State*, 34 App. 136, 31 S. W. 408.

It is error to refuse a charge that the burden of proof is always upon the state in a capital case. *Black v. State*, 1 App. 368; or even in cases of theft. *Chapman v. State*, 1 App. 728.

A charge which directs the jury to acquit, if they can reasonably conclude from the evidence that the defendant is innocent, is erroneous. The jury need never conclude, reasonably or otherwise, that the defendant is innocent, but only that the evidence fails to establish his guilt. *McMillan v. State*, 7 App. 142; *Myers v. State*, Id. 649; *Smith v. State*, 9 App. 150; *Robertson v. State*, Id. 209; *Blocker v. State*, Id. 279; *Wallace v. State*, Id. 299.

Where the charge is in the ordinary and technical terms and applies the doctrine of presumption of innocence and reasonable doubt, the court need not go further and charge that the burden of proof never shifts. *Lewis v. State* (Cr. App.) 59 S. W. 887.

A charge "that defendant is presumed to be innocent until his guilt is established by legal evidence beyond a reasonable doubt, and, if the jury have a reasonable doubt of his guilt, they should acquit him," sufficiently charges that the burden of proof is on the state. *Huggins v. State*, 42 App. 364, 60 S. W. 52.

In a prosecution for aggravated assault, a charge that if defendant assaulted prosecutrix, but at the time of so doing she had made an attack on him which caused a reasonable expectation or fear of death or bodily injury, and that, acting under such fear, he assaulted her, then he should be acquitted, is erroneous, as placing the burden of proof on defendant to establish his defense. *Stuart v. State*, 57 App. 592, 124 S. W. 656.

In a trial for assault with intent to murder, an instruction that, if from the acts or words of prosecutor there was created in the mind of accused a reasonable apprehension that she was in danger of losing her life or of suffering serious bodily harm, she had the right to defend herself from such danger, viewed from her standpoint, etc., and that if accused committed the assault as a means of defense, believing that she was in danger of losing her life, etc., she should be acquitted, coupled with a charge that an accused is presumed to be innocent until his guilt is established beyond a reasonable doubt, was not erroneous, as shifting the burden of proof and requiring accused to establish affirmatively the facts constituting her defense. *Edwards v. State*, 58 App. 342, 125 S. W. 894.

In a prosecution for theft, where the state introduced exculpatory statements of accused, which were proven to be untrue and which accused denied making, a charge that the state had put such statements in evidence, and was bound thereby, unless they were disproved, was properly refused. *Roberts v. State*, 64 App. 135, 141 S. W. 235.

In a murder trial, an instruction that if accused in sudden passion, as explained in the charge, and not in self-defense, aroused by adequate cause, unlawfully shot decedent, he should be convicted of manslaughter, was not erroneous as shifting the burden of proof. *Oldham v. State*, 63 App. 527, 142 S. W. 13.

Where accused, on trial for murder by arsenic poisoning, showed that decedent might have been poisoned accidentally by eating food containing poison, the refusal to charge that the burden was on the state to show the guilt of accused was erroneous. *Orner v. State* (Cr. App.) 143 S. W. 935.

Defendant's requested instruction that the burden of proof is always on the state, and never shifts to defendant, should be given on a prosecution for mixing poison with a drink with intent to kill, it being a very close question, at least, under the evidence, whether defendant had anything to do with the matter. *Miller v. State* (Cr. App.) 144 S. W. 239.

An instruction that if deceased had attacked or was about to attack accused, etc., in addition to the charge on presumption of innocence and reasonable doubt, immediately followed by a charge that in all criminal cases the burden of proof is on the state, was not objectionable as shifting the burden on defendant. *Lee v. State* (Cr. App.) 148 S. W. 706.

In a prosecution for the theft of cattle, an instruction that, if they were stolen as charged and found in the possession of defendants shortly thereafter, such possession and its explanation, if any, would be proper for the consideration of the jury on the guilt or innocence of the defendants under all the circumstances was objectionable, since it is the guilt and not the innocence that is to be determined under such circumstances. *McKnight v. State*, 70 App. 470, 156 S. W. 1188.

In a prosecution for making a false entry in an account book, a charge that if the alleged false entry was made by accused, but was correct and was a proper entry, and not made with intent to defraud, he should be acquitted, is not erroneous in placing upon accused the burden of proving his defense. *Pope v. State* (Cr. App.) 170 S. W. 150.

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.]

See arts. 734, ante, 842, post.

See, ante, art. 735, as to charge of the court upon the evidence.

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| 1. Comparative weight of positive and negative evidence. | 12. Weighing evidence. |
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1. **Comparative weight of positive and negative evidence.**—See notes to art. 783, ante.

2. **Jury as judges of the facts in general.**—The jury are the judges of the issues of fact. *Davis v. State*, 64 App. 8, 141 S. W. 264; *Roberts v. State*, 57 App. 199, 122 S. W. 388.

If a question arise as to the name of the assaulted party, the charge should submit it to the jury. *Bell v. State*, 25 Tex. 574.

The jury are not bound to give equal credit to the whole of a confession, but it is for them to decide how much of it under all the circumstances of the case they will believe. *Riley v. State*, 4 App. 538.

Question in prosecution for robbery as to whether the money was obtained by assault and violence or by putting witness in fear of bodily injury was properly submitted to the jury. *Thompson v. State* (Cr. App.) 26 S. W. 1081.

Where an accused, who pleaded not guilty, was properly tried by jury, it was improper for the court to instruct a verdict of guilty, even though the evidence warranted such finding. *Manning v. State* (Cr. App.) 145 S. W. 938.

3. **Weight of evidence and credibility of witnesses.**—The jury are the judges of the credibility of witnesses and the weight to be given their testimony. *Snodgrass v. State* (Cr. App.) 150 S. W. 162, 41 L. R. A. (N. S.) 1144; *Edgar v. State*, 59 App. 491, 129 S. W. 141; *Nash v. State*, 61 App. 259, 134 S. W. 709; *Mitchell v. State* (Cr. App.) 144 S. W. 1006; *Crowell v. State* (Cr. App.) 148 S. W. 570; *Cooper v. State* (Cr. App.) 177 S. W. 975.

The jury are the exclusive judges of the facts proved and of the credibility of the witnesses and the weight to be given to the testimony. *Newton v. State*, 58 App. 316, 125 S. W. 908; *Coffman v. State*, 62 App. 88, 136 S. W. 779; *Hernandez v. State*, 64 App. 73, 141 S. W. 268; *Hightower v. State* (Cr. App.) 143 S. W. 1168; *Grimes v. State* (Cr. App.) 178 S. W. 523.

The trial court and the jury are the exclusive judges of the testimony, and the weight to be given thereto, and the credibility of the witnesses. *Trimble v. State* (Cr. App.) 145 S. W. 929; *Johnson v. State*, 64 App. 399, 142 S. W. 589.

Where the evidence, if not conflicting, at least tended to establish different and opposite conclusions, it was for the jury to find their verdict upon the evidence which in their judgment was entitled to credit. *Williams v. State*, 41 Tex. 209.

The jury are the judges of the credibility of witnesses and the weight to be given their testimony, and, where the state's evidence is sufficient to prove a case, they have a right to believe the witnesses on either side. *Johnson v. State* (Cr. App.) 150 S. W. 903.

The credibility of witnesses is for the jury, and an issue which has any evidence in its support may not be withdrawn from the jury. *Hamilton v. State* (Cr. App.) 153 S. W. 331.

The jury is the exclusive judge of the credibility of the witnesses and the weight to be given to their testimony, and may properly discuss their testimony in the jury room. *Claussen v. State*, 70 App. 607, 157 S. W. 477.

It is the peculiar province of the jury to determine the credibility of the witnesses and the weight to be given to their testimony, and hence an instruction that the jury could not "weigh" the testimony was improper. *Barrow v. State*, 71 App. 549, 160 S. W. 458.

4. ——— **Weight of evidence.**—The weight of the evidence is for the jury. *Wadkins v. State*, 58 App. 110, 124 S. W. 959, 137 Am. St. Rep. 922, 21 Ann. Cas. 556; *Nels v. State*, 2 Tex. 280; *Hughes v. State*, 62 App. 283, 136 S. W. 1068; *Davis v. State*, 64 App. 8, 141 S. W. 264; *Lott v. State* (Cr. App.) 146 S. W. 544; *Collins v. State* (Cr. App.) 148 S. W. 1065; *Collins v. State* (Cr. App.) 178 S. W. 345.

The proposition that "the witnesses being equal in credibility the greater number must prevail," is unsound. The jury may give credence to one witness against the positive testimony of two or more other witnesses. A mere numerical preponderance is unimportant. *Jones v. State*, 13 Tex. 163, 62 Am. Dec. 550; *Cox v. State*, 32 Tex. 610; *Parrish v. State*, 45 Tex. 51; *Brown v. State*, 1 App. 154; *Blake v. State*, 3 App. 581; *Simpson v. State*, Id. 425. But in cases involving the issue of the sanity of the defendant, the jury would be warranted in giving more credit to the opinion of the many than the few. *Webb v. State*, 5 App. 596.

The jury are the exclusive judges of the facts proved, and of the weight to be given to the testimony, except where the law has otherwise provided. *Jones v. State*, 5 App. 86.

The weight to be given to the opinions of witnesses as to whether defendant had sufficient discretion to understand the nature and illegality of his acts, was a matter for the jury to consider and determine. *Carr v. State*, 24 App. 562, 7 S. W. 328, 5 Am. St. Rep. 905.

In a prosecution for robbery, where an accomplice testified positively as to defendant's participation, and was sufficiently corroborated to support a conviction,

the court properly refused to instruct an acquittal. *Perry v. State* (Cr. App.) 155 S. W. 263.

5. — **Credibility of witnesses.**—The jury are the judges of the credibility of the witnesses. *Davis v. State*, 64 App. 8, 141 S. W. 264; *Borches v. State*, 33 App. 96, 25 S. W. 423; *Roberts v. State*, 57 App. 199, 122 S. W. 388; *Jones v. State*, 58 App. 313, 125 S. W. 914; *Trinkle v. State*, 59 App. 257, 127 S. W. 1060; *Barber v. State*, 64 App. 96, 142 S. W. 577; *Melton v. State*, 71 App. 130, 158 S. W. 550; *McCue v. State* (Cr. App.) 170 S. W. 280.

The jury must, if possible, reconcile all conflicts of evidence, and if they can not, they may credit such testimony as, in their opinion, is most entitled to belief. They are not bound to believe the testimony of a witness merely because he is uncontradicted, nor to disbelieve it because he has been impeached. It is their province to determine what testimony shall be believed and what shall be disregarded. *Brown v. State*, 2 App. 139; *Riley v. State*, 4 App. 538; *Taylor v. State*, 5 App. 1; *Jones v. State*, Id. 86; *Brady v. State*, Id. 343; *Satterwhite v. State*, 6 App. 609; *Coward v. State*, Id. 59; *Cordova v. State*, Id. 445; *Cooper v. State*, 7 App. 194; *Seal v. State*, 28 Tex. 491; *Addison v. State*, 3 App. 40; *Johnson v. State*, 5 App. 423.

It is for the jury and not for the court to judge as to the credence to be given dying declarations, and it was error to charge that when such declarations were admissible they were the highest testimony known and must receive full faith and credit. *Walker v. State*, 37 Tex. 366.

It is unquestionably the privilege of the jury to give such credence to the witnesses as they see fit and they are not required and cannot be coerced by the court to regard testimony as true which they believe to be false or give credence to a witness who they are firmly convinced is not entitled to credence. *Wharton v. State*, 45 Tex. 2.

The weight of the testimony of prosecutrix, based on the grounds that it is unreasonable in certain particulars, and because of contradictions of her testimony by other witnesses, is for the jury. *Bailey v. State*, 63 App. 584, 141 S. W. 224.

Though the main witness for the state on a trial for perjury may have been contradicted, the court may not, as a matter of law, charge that he is an incredible witness, but must leave that question to the jury. *Robertson v. State* (Cr. App.) 150 S. W. 893.

In a prosecution for burglary, the credibility of defendant and of the officers testifying against him held for the jury. *Nowlin v. State* (Cr. App.) 175 S. W. 1070.

6. — **Uncontroverted evidence.**—The jury is not at liberty to arbitrarily disregard uncontradicted, unimpeached, probable testimony. While it is the province of the jury to judge of the credibility of testimony, they must exercise judgment, and not will merely, in doing so. *Satterwhite v. State*, 6 App. 609; *Jones v. State*, 5 App. 86; *Fisher v. State*, 4 App. 181; *Chester v. State*, 1 App. 702; *Conner v. State*, 34 Tex. 659.

7. — **Conflicting evidence.**—Contradictions in the evidence are for the consideration of the jury in the trial court. *Jones v. State*, 63 App. 394, 141 S. W. 963; *Coley v. State* (Cr. App.) 150 S. W. 789.

In a prosecution for violating the local option law, where the evidence was conflicting, questions of fact were for the jury. *Lee v. State*, 61 App. 607, 135 S. W. 1174.

In a prosecution for murder, where there was conflicting evidence as to whether a witness handed defendant a pistol with which to shoot deceased, the court could not charge that such witness was an accomplice; the question being for the jury. *Foster v. State* (Cr. App.) 150 S. W. 936.

In a prosecution for burglary, where the state relied on circumstantial evidence and the presumption arising from accused's possession of recently stolen property, his bare explanation that he had purchased the property from a peddler is not sufficient to authorize a peremptory instruction for acquittal, but the case should be submitted to the jury. *Johnson v. State*, 70 App. 631, 158 S. W. 284.

On a trial for keeping a disorderly house, where the evidence of the witnesses for the state, if believed, justified a verdict of guilty, though the testimony for accused would support a different finding, this contested issue of fact was properly submitted to the jury. *Smith v. State*, 72 App. 206, 162 S. W. 835.

Where five witnesses, in a prosecution for unlawfully carrying a pistol, swore that accused had the pistol, while accused and three other witnesses swore that he did not, the question was properly submitted to the jury, and their verdict will not be disturbed, especially in view of the charge on reasonable doubt given at accused's request. *Ulloa v. State*, 73 App. 41, 163 S. W. 732.

In a prosecution for homicide, where the evidence on alibi was conflicting, the question was for the jury. *McCue v. State* (Cr. App.) 170 S. W. 280.

Where, notwithstanding a plea of guilty, there was evidence pro and con on the issue whether defendant was insane at the time of the killing, the court erred in instructing the jury that, under the facts, they should find defendant sane. *Harris v. State* (Cr. App.) 172 S. W. 975.

8. — **Inferences.**—Though it is the province of the jury to find the facts, they may not deduce from a given or admitted state of facts the more unfavorable deduction unless the favorable deduction is excluded as unreasonable. *Cromeans v. State*, 59 App. 611, 129 S. W. 1129.

9. — **Presumptions.**—Presumptions of fact are always for the consideration of the jury, and the court must not instruct that they are evidence of guilt. *Sheffield v. State*, 43 Tex. 378.

10. **Judge sitting as jury.**—When a jury is waived, as it may be in a misdemeanor trial, the court takes the place of a jury, and must determine the facts as well as the law of the case. *Briggs v. State*, 6 App. 144.

11. **Directing verdict.**—Refusal of the court to direct, on request, a verdict of acquittal, is not reversible error, though the evidence fails to make out a case, or shows affirmatively that accused is not guilty. *Wilkerson v. State*, 60 App. 388, 131 S. W. 1108, Ann. Cas. 1912C, 126.

12. **Weighing evidence.**—While the jury may not consider any particular fact known by them unless they testify to it at the trial, they may judge the weight of the evidence by their own general knowledge, as ordinary men, of the subject of the inquiry. *Melton v. State*, 71 App. 130, 158 S. W. 550.

13. **Instructions.**—It is preferable to give the charge in the language of the statute, ordinarily omitting the exceptions. It was error to go further and lay down rules enabling the jury to cull the testimony against defendant and find a verdict upon it, and arbitrarily reject the evidence produced on behalf of defendant. *Wilbanks v. State*, 10 App. 642.

Evidence held to demand an instruction that the jury were the exclusive judges of the facts proved, and of the weight to be given to the testimony. *Jackson v. State*, 22 App. 442, 3 S. W. 111.

A jury in a felony case should always be instructed that they are the exclusive judges of the facts proved, and of the weight to be given to the testimony. *Barbee v. State*, 23 App. 199, 4 S. W. 584.

The jury must be instructed that they are the judges of the facts. *Weatherford v. State*, 31 App. 530, 21 S. W. 251, 37 Am. St. Rep. 828.

It is error to refuse to charge that the jury is the exclusive judge of the credibility of witnesses, of the weight to be given their testimony, and of what is a reasonable doubt, when such charge is specially requested. *Lensing v. State* (Cr. App.) 45 S. W. 572.

Where the jury were instructed that they were the exclusive judges of the evidence, of its weight, and of the credibility of the witnesses, an additional charge that what witnesses and how much of their testimony they would believe was left entirely to their minds and consciences, though unnecessary, was not error, as being on the weight of the evidence. *Collins v. State*, 46 S. W. 933, 39 App. 441.

Defendant in a criminal prosecution is entitled to a charge that the jury are the exclusive judges of the facts proven and weight to be given to the testimony. *Taylor v. State*, 50 App. 560, 100 S. W. 393.

14. **Setting aside verdict.**—Where there is no testimony to support the verdict; or, where the evidence is insufficient to rebut the presumption of innocence; or, where the verdict is contrary to the evidence, it will be set aside, though it is with reluctance that the court will disturb a verdict when there is any evidence to sustain it. Where, however, the verdict is manifestly wrong, and it is clear that injustice has been done the defendant, it will be set aside, though there is sufficient evidence to support it. *Walker v. State*, 14 App. 609; *March v. State*, 3 App. 335; *Lockhart v. State*, Id. 567; *Blake v. State*, Id. 581; *King v. State*, 4 App. 256; *Jones v. State*, Id. 436; *Templeton v. State*, 5 App. 398; *Gamble v. State*, Id. 421; *Johnson v. State*, Id. 423; *Barnell v. State*, Id. 113; *Tollett v. State*, 44 Tex. 95; *Jones v. State*, 7 App. 457. See, also, the following other decisions: *Addison v. State*, 3 App. 40; *Baltzeager v. State*, 4 App. 532; *Reardon v. State*, Id. 602; *Ridout v. State*, 6 App. 249.

15. **Review of questions of fact.**—The jury are the exclusive judges of the facts proved, and of the weight of the testimony, and the court on appeal from a verdict attacked on the ground of the insufficiency of the testimony to sustain it may only determine whether there is sufficient evidence, if believed, to sustain it. *Kearse v. State* (Cr. App.) 151 S. W. 827; *Whitehead v. State*, 61 App. 558, 137 S. W. 356; *Calderon v. State*, 63 App. 639, 141 S. W. 251; *Trimble v. State* (Cr. App.) 145 S. W. 929; *Harris v. State* (Cr. App.) 148 S. W. 1074; *Cain v. State* (Cr. App.) 153 S. W. 147; *Vick v. State*, 71 App. 50, 159 S. W. 50; *Robertson v. State*, 70 App. 307, 159 S. W. 713; *Calyon v. State* (Cr. App.) 174 S. W. 591.

On appeal from a judgment of conviction, the court, in passing upon the sufficiency of the evidence, will consider only the inculpatory evidence, to ascertain whether, as a matter of law, it is sufficient, though the testimony for accused, if true, justifies an acquittal. *Hearne v. State*, 73 App. 390, 165 S. W. 596; *Shamblin v. State* (Cr. App.) 171 S. W. 718.

With the facts, an appellate court has but little concern except to see that the case went to the jury on proper and legal evidence and under proper instructions and that there is a sufficient amount of legal evidence to support the verdict. *Addison v. State*, 3 App. 40.

A verdict and judgment will not be disturbed on the facts unless clearly and manifestly wrong. *Lockhart v. State*, 3 App. 567.

A conviction will be set aside on appeal when it appears that it was not had upon evidence sufficient to support it. *Jones v. State*, 5 App. 86.

If the guilt of the defendant is not made to appear to a reasonable certainty, it is the duty of the court of criminal appeals to reverse the judgment. *Mitchell v. State*, 33 App. 575, 28 S. W. 475.

When the State's evidence is certain and that of defendant is uncertain the verdict will not be set aside. *Lomax v. State* (Cr. App.) 40 S. W. 999.

While the trial court should not hesitate in a proper case to set aside the verdict of the jury, though it is for them to determine the facts, the court on appeal is justified in setting aside the verdict only where it is without any evidence to support it. *Welch v. State*, 57 App. 111, 122 S. W. 880.

Where the record discloses a total absence of testimony to support the verdict, the court on appeal will set it aside. *Vails v. State*, 59 App. 340, 128 S. W. 1117.

The appellate court has power to inquire if there is any testimony, or that it is so slight as not to authorize a finding therein against the great preponderance of the testimony. *Murphy v. State* (Cr. App.) 143 S. W. 616.

Where no error is pointed out in a motion for a new trial, a conviction will not be disturbed for want of sufficient evidence, unless there is a total lack of evidence, or it is so improbable that no unbiased person would be justified in arriving at the conclusion that defendant was guilty of the offense charged. *Wooldridge v. State* (Cr. App.) 146 S. W. 550.

An objection that the evidence is insufficient to sustain a conviction presents for review on appeal only the question whether there is any evidence in the record which will justify the verdict. *Lawless v. State*, 72 App. 366, 162 S. W. 890.

The court, in passing on the question whether an issue is raised by the testimony of accused, must view the testimony in as favorable light to him as possible. *McCampbell v. State* (Cr. App.) 174 S. W. 345.

16. Conclusiveness of verdict—Verdict supported by evidence.—A verdict, supported by evidence which, if believed, shows the guilt of accused, will not be disturbed on appeal. *Thurston v. State*, 58 App. 308, 125 S. W. 31; *Speer v. State*, 57 App. 297, 123 S. W. 415; *Coleman v. State*, 58 App. 451, 126 S. W. 573; *Long v. State*, 59 App. 103, 127 S. W. 551, Ann. Cas. 1912A, 1244; *Smith v. State*, 60 App. 81, 131 S. W. 313; *Trinkle v. State*, 60 App. 187, 131 S. W. 583; *Porter v. State*, 60 App. 588, 132 S. W. 935; *Martinez v. State*, 61 App. 29, 133 S. W. 881; *De Los Santos v. State* (Cr. App.) 146 S. W. 919; *Veherana v. State*, 72 App. 4, 160 S. W. 711.

Where, though the evidence is conflicting, there was ample testimony, if believed, to support the verdict, a conviction will not be disturbed on appeal. *Woodward v. State*, 58 App. 412, 126 S. W. 271; *Gonzales v. State*, 32 App. 611, 25 S. W. 781; *Cooper v. State*, 72 App. 645, 163 S. W. 424.

Where the evidence for the state, if believed by the jury, is sufficient, a conviction will not be disturbed, unless no unbiased jury could have arrived at such a verdict. *Wragg v. State* (Cr. App.) 145 S. W. 342; *Hogan v. State* (Cr. App.) 147 S. W. 871.

Where, in a prosecution for disturbing religious worship, there was some evidence justifying a finding of guilty, the judgment of conviction will be affirmed. *Buckley v. State*, 57 App. 284, 122 S. W. 546.

Where the question whether accused intended to sell whisky or not was for the jury, and the issue was fairly presented, the verdict will not be disturbed on appeal. *McNary v. State*, 58 App. 619, 127 S. W. 180.

Where, though the testimony is unsatisfactory, yet, if true, would with the facts support the verdict, it will not be disturbed. *Black v. State* (Cr. App.) 151 S. W. 1053.

Where the state's evidence, if believed, is sufficient to support the verdict, it is conclusive on appeal, though contradicted and impeached by the testimony of accused. *Walls v. State* (Cr. App.) 153 S. W. 130.

A verdict of conviction for selling in violation of the prohibition law will not be disturbed because of conflict in the evidence, where there was evidence of the purchase of the whisky from accused. *Clay v. State*, 73 App. 78, 164 S. W. 1.

When the punishment inflicted by the jury is within that prescribed by the Legislature, and the evidence is sufficient to support a conviction, it will not be disturbed on appeal. *Bell v. State* (Cr. App.) 169 S. W. 1150.

17. — Weight of evidence and credibility of witnesses.—The weight of evidence and credibility of the witnesses, in a criminal case, is for the jury and not for the appellate court. *Watts v. State* (Cr. App.) 171 S. W. 202; *Cox v. State*, 32 Tex. 610; *Gamble v. State*, 5 App. 421; *Cravey v. State*, 33 App. 557, 28 S. W. 472; *Stewart v. State*, 34 App. 214, 29 S. W. 1080; *Wilson v. State*, 61 App. 628, 136 S. W. 447; *Christian v. State*, 71 App. 566, 161 S. W. 101.

The jury is the exclusive judge of the credibility of witnesses and the weight of the testimony, and unless the testimony, considered in its most favorable light for the state, will not justify the verdict, the court on appeal will not disturb it. *Sanders v. State*, 63 App. 258, 140 S. W. 103; *Roberts v. State*, 60 App. 20, 129 S. W. 611; *Oates v. State* (Cr. App.) 149 S. W. 1194.

It is the province of the jury to weigh the evidence, and unless it appears that their finding is against the evidence it will not be disturbed on appeal. *Shaw v. State*, 27 Tex. 750; *Baltzeager v. State*, 4 App. 532; *March v. State*, 3 App. 335.

An appellate court will not undertake to control the action of the district court unless there has been something more than a mere preponderance in the number of witnesses who testify to facts inconsistent with guilt. *Blake v. State*, 3 App. 581.

The district judge and the jury are in a better position to decide properly the weight and degree of credit to be attached to the testimony of the witnesses than the appellate court can be by an inspection of the record. *Reardon v. State*, 4 App. 602.

The errors of juries must be most palpable and apparent to justify an appellate court in reversing a judgment because they have given credence to one set of witnesses and disbelieved others. *Cox v. State*, 32 Tex. 610.

Being the judges of the credibility of the witnesses and the weight which should be given to their testimony, the decision of the jury as to which of the theories advanced by defendant and the state is in fact true, is conclusive on appeal. *Crow v. State*, 33 App. 264, 26 S. W. 209.

A conviction will not be disturbed on appeal, though the court may believe that the preponderance as to defendant's alibi was in his favor. *Willingham v. State*, 62 App. 55, 136 S. W. 470.

The jury in the trial court are the judges of the credibility of witnesses and the weight to be given their testimony; and a conviction will not be disturbed on appeal, unless there is comparatively no evidence, or the great preponderance of the evidence is in favor of accused. *Roberts v. State*, 64 App. 135, 141 S. W. 235.

Where there are two theories, one favorable and the other unfavorable to accused, and the unfavorable theory shows a violation of the law, the court on ap-

peal will not disturb a conviction, as the credibility of witnesses is for the jury. *Jordan v. State* (Cr. App.) 146 S. W. 881.

Code Cr. Proc. 1911, arts. 734, 786, prohibit the Court of Criminal Appeals from passing on the credibility of witnesses and the weight of their testimony on appeal from a conviction. *Smith v. State* (Cr. App.) 146 S. W. 896.

The jury being the judges of the credibility of witnesses, where accused's testimony is directly contradicted by that of two other witnesses, a finding of the jury will not be disturbed on appeal. *McIndoo v. State* (Cr. App.) 147 S. W. 235.

Where there was evidence, which if believed, was sufficient to support a conviction of assault to murder, and the court submitted the defense of absolute justification, a conviction would not be reversed as against the evidence, though it appeared to the appellate court that the evidence predominated in favor of the defendant. *Simms v. State* (Cr. App.) 148 S. W. 786.

The jury are the exclusive judges of the credibility of the witnesses and the weight of their testimony, and the court on appeal will consider only whether the evidence is sufficient as a matter of law if believed to sustain a conviction. *Hogue v. State* (Cr. App.) 151 S. W. 805.

Where defendant gives more than one explanation, the conflict in such statements may be considered by the jury in determining whether they are reasonable and probably true; and, under such circumstances, its verdict will not be reversed on appeal. *Stephens v. State* (Cr. App.) 154 S. W. 996.

A verdict depending on the question of veracity between two witnesses cannot be reviewed. *Womack v. State*. 70 App. 494, 157 S. W. 495.

In a prosecution for unlawfully carrying a pistol, where defendant claimed that he was taking it to be repaired and showed that the gun was in part defective, a conviction cannot be disturbed on appeal, where the jury were charged that defendant had the right to carry the pistol to the shop for repairs and, when repaired, to take it home; the jury by its verdict having disregarded defendant's testimony. *Decker v. State*, 72 App. 88, 160 S. W. 1192.

On a trial before the court without a jury on the charge of unlawfully carrying a pistol, the court seeing the witnesses and their manner of testifying is the judge of their credibility, and this court has no power to say that he shall believe or disbelieve the testimony of defendant and his witnesses, even though there was no direct contradicting testimony on the part of the state. *Vincent v. State*, 72 App. 193, 162 S. W. 840.

The credibility of the witnesses is for the jury, and the appellate court cannot, where the state's testimony was not unreasonable, reverse a conviction on the ground that the testimony on which it was based was not worthy of the belief. *Hart v. State* (Cr. App.) 175 S. W. 436.

18. — **Conflicting evidence.**—A conviction on conflicting evidence cannot be disturbed on appeal. *Loicano v. State*, 72 App. 518, 163 S. W. 64; *Taylor v. State*, 17 App. 46; *Jack v. State*, 20 App. 656; *Doss v. State*, 21 App. 505, 2 S. W. 814, 57 Am. Rep. 618; *Stout v. State*, 22 App. 339, 3 S. W. 231; *Brown v. State*, 24 App. 170, 5 S. W. 685; *Carr v. State*, 24 App. 562, 7 S. W. 328, 5 Am. St. Rep. 905; *Dougllass v. State*, 8 App. 520; *Bright v. State*, 10 App. 68; *Jones v. State*, 12 App. 156; *Lane v. State*, 19 App. 54; *Walker v. State*, 14 App. 609; *Brown v. State*, 8 App. 48; *Slaughter v. State*, 7 App. 123; *Givens v. State*, 6 Tex. 344; *Bachelor v. State*, 10 Tex. 258; *Jordan v. State*, Id. 479; *Higginbotham v. State*, 23 Tex. 574; *Seal v. State*, 28 Tex. 491; *Thompson v. State*, 36 Tex. 326; *Phillips v. State*, 26 App. 228, 9 S. W. 557, 8 Am. St. Rep. 471; *Cole v. State*, 32 App. 423, 24 S. W. 510; *Martin v. State*, 32 App. 441, 24 S. W. 512; *Polk v. State*, 35 App. 495, 34 S. W. 633; *Turner v. State*, 37 App. 451, 36 S. W. 87; *Tamplin v. State*, 58 App. 406, 126 S. W. 264; *Cooper v. State*, 58 App. 598, 126 S. W. 862; *Carter v. State*, 59 App. 73, 127 S. W. 215; *Johnson v. State*, 59 App. 11, 127 S. W. 559; *Dulin v. State*, 60 App. 376, 131 S. W. 1105; *Garrett v. State*, 61 App. 254, 134 S. W. 696; *Goldstein v. State*, 61 App. 662, 136 S. W. 60; *Jordan v. State*, 64 App. 187, 141 S. W. 786; *Rogers v. State* (Cr. App.) 153 S. W. 850; *Giles v. State*, 70 App. 550, 157 S. W. 943; *Wilson v. State*, 70 App. 627, 158 S. W. 512; *Jefferson v. State*, 71 App. 120, 158 S. W. 520; *Stubbs v. State*, 71 App. 390, 160 S. W. 87; *Hicks v. State* (Cr. App.) 170 S. W. 279; *Harriss v. State* (Cr. App.) 174 S. W. 354.

A verdict on conflicting evidence, and sustained by evidence, if believed, will not be disturbed on appeal. *Hollins v. State*, 71 App. 84, 158 S. W. 514; *Thompson v. State*, 25 App. 161, 7 S. W. 589; *Wright v. State*, 35 App. 367, 33 S. W. 973; *Miller v. State*, 35 App. 209, 33 S. W. 227; *Hickey v. State*, 62 App. 568, 138 S. W. 1051; *Jordan v. State* (Cr. App.) 146 S. W. 881; *Crawford v. State* (Cr. App.) 147 S. W. 229; *Snodgrass v. State* (Cr. App.) 150 S. W. 162, 41 L. R. A. (N. S.) 1144; *Hart v. State* (Cr. App.) 150 S. W. 188; *Valigura v. State* (Cr. App.) 153 S. W. 856; *Chappell v. State*, 72 App. 191, 161 S. W. 964; *Smith v. State*, 73 App. 521, 165 S. W. 574; *Walker v. State* (Cr. App.) 167 S. W. 339.

A verdict of guilty, on conflicting evidence, is conclusive on appeal, and the Court of Criminal Appeals can only determine whether accused was tried according to law. *Chancey v. State*, 58 App. 54, 124 S. W. 426; *Millican v. State*, 63 App. 440, 140 S. W. 1136.

A verdict of the jury on conflicting evidence will not be disturbed on appeal; the question of the veracity of witnesses and the weight to be given their testimony being for the jury. *Curry v. State*, 72 App. 463, 162 S. W. 851; *Newell v. State* (Cr. App.) 145 S. W. 939.

The verdict settles all conflicts in the evidence. *Luckie v. State*, 33 App. 562, 28 S. W. 533; *Matkins v. State*, 33 App. 605, 28 S. W. 536; *Duke v. State*, 35 App. 283, 33 S. W. 349; *Spencer v. State*, 34 App. 65, 29 S. W. 159.

When the evidence is conflicting and about evenly balanced the Court of Appeals will not disturb the verdict and judgment. *Turner v. State*, 37 App. 451, 36 S. W. 87.

In a prosecution for unlawfully carrying a pistol, where the evidence of the state was sufficient to convict, while the evidence for the defendant, if true, constituted a good defense, a verdict of guilty cannot be set aside on appeal. *Ander-son v. State*, 61 App. 5, 133 S. W. 689.

Where the state's witnesses, if believed, established a case against accused, who, corroborated by witnesses, denied the charge, the jury and the trial court must determine the facts, and the court, on appeal, will not reverse a conviction. *Sparks v. State*, 64 App. 610, 142 S. W. 1183.

Where accused's explanation of her possession of the pistol she was accused of unlawfully carrying was contradicted by the evidence offered by the state, which, if true, was sufficient to support a conviction, the verdict will not be disturbed on appeal. *Stallworth v. State* (Cr. App.) 147 S. W. 238.

If the evidence conflicts so that a conviction or acquittal would be sustained if the jury believed the evidence, the appellate court cannot disturb a verdict of conviction. *Brown v. State* (Cr. App.) 148 S. W. 808.

A conviction of theft cannot be disturbed because of defendant's testimony that he took the property with the owner's consent, this being merely in conflict with evidence justifying the court's finding. *Brown v. State* (Cr. App.) 150 S. W. 906.

Though the evidence for defendant would have sustained an acquittal, where the evidence was conflicting, the appellate court cannot disturb their verdict. *Foster v. State* (Cr. App.) 150 S. W. 936.

Where, on a trial for homicide, the evidence for the state showed a cold-blooded killing, and accused's connection therewith was shown by the testimony of an accomplice, which was corroborated, the verdict could not be disturbed, though accused's testimony tended somewhat persuasively to show that the killing was by a third person. *Jones v. State* (Cr. App.) 163 S. W. 75.

In a prosecution for aggravated assault, where the testimony was conflicting as to whether the accused struck the party assaulted with a rock, the question was one of fact, and, having been fairly and fully submitted to the jury, the verdict will not be disturbed. *McCraw v. State*, 73 App. 45, 163 S. W. 967.

Where the state's case presented ample evidence to sustain a conviction of manslaughter, and accused's case presented the issue of self-defense, the jury's verdict, convicting accused of manslaughter, was conclusive on the facts. *Clay v. State* (Cr. App.) 170 S. W. 743.

19. — **Successive verdicts.**—A verdict supported by evidence, and in accordance with the verdict of the jury on a former trial, will not be disturbed on appeal. *Smith v. State*, 61 App. 225, 135 S. W. 533.

20. — **Findings of trial judge.**—Where a prosecution for disturbing religious worship was tried without a jury, the findings of the trial court on an issue of fact will not be disturbed on appeal. *Buzan v. State*, 59 App. 213, 123 S. W. 388; *Hooper v. State*, 62 App. 105, 136 S. W. 790.

The findings of the trial court on a motion for new trial on the ground of the misconduct of the jury will not be disturbed on appeal, where there is evidence to sustain them, notwithstanding contradictory evidence. *Kemper v. State*, 57 App. 355, 123 S. W. 131.

Where a jury is waived, and accused is tried by the judge, it being the judge's duty to determine the credibility of the witnesses and the weight to be given to their testimony, a conviction will not be set aside on appeal, if there is sufficient testimony to authorize a conviction. *Kirby v. State*, 61 App. 1, 133 S. W. 682.

Where defendant in a misdemeanor case waives a jury, the findings of fact by the trial court are as conclusive on the Court of Criminal Appeals as the verdict of a jury. *Salinas v. State* (Cr. App.) 142 S. W. 908.

A finding by the trial judge on conflicting evidence as to alleged representations made by accused's former attorney inducing a plea of guilty was conclusive on appeal. *Payne v. State* (Cr. App.) 146 S. W. 171.

A finding by the trial court, sitting without a jury, made upon conflicting evidence, is conclusive on appeal, and accused cannot have it set aside, upon the theory that where the testimony is false the conviction should be reversed, merely because he denied the testimony of the prosecuting witness. *Nagle v. State*, 71 App. 255, 158 S. W. 530.

21. — **Approval of verdict by trial court.**—A conviction sustained by evidence and approved by the trial court will not be disturbed on appeal. *Washington v. State* (Cr. App.) 147 S. W. 276; *Ridout v. State*, 6 App. 249; *Hooper v. State*, 30 App. 413, 17 S. W. 1066, 28 Am. St. Rep. 926; *White v. State*, 34 App. 153, 29 S. W. 1094; *Brandt v. State*, 57 App. 157, 122 S. W. 23; *Dougherty v. State*, 59 App. 464, 123 S. W. 388; *Kirksey v. State*, 61 App. 641, 135 S. W. 577; *Ross v. State*, 71 App. 493, 159 S. W. 1063.

Where the jury gave credence to the two witnesses for the state in preference to the nine witnesses for defendant, whose testimony, if true, established an alibi, and the trial court refused to set aside the verdict, the appellate court could not interfere. *Parrish v. State*, 45 Tex. 51.

A verdict which has received the approval of the trial court will not be interfered with in the absence of abuse of discretion. *O'Hara v. State*, 57 App. 577, 124 S. W. 95.

Where there is evidence in the record to sustain the verdict, the appellate court will not, merely because of impeaching testimony, set aside the action of the trial court, affirming a verdict assessing defendant's guilt. *Pratt v. State*, 59 App. 167, 127 S. W. 827.

A conviction for rape, supported by the testimony of prosecutrix and corroborating circumstances, and approved by the trial judge, will not be disturbed on appeal merely because of contradictory evidence. *Martin v. State*, 73 App. 546, 165 S. W. 579.

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 decide 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.

See art. 736, ante, 842, post.

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

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| 1. Remarks of judge in general. | 7. Proceedings against witness or counsel. |
| 2. Examination of witnesses by judge. | 8. Prejudice from remarks. |
| 3. Comments on evidence. | 9. Necessity of exceptions. |
| 4. ——— Remarks in absence of jury. | 10. Cure of error. |
| 5. Expression of opinion as to accused's guilt. | 11. Bill of exceptions. |
| 6. Remarks reflecting on accused or his counsel. | 12. Necessity of objections to evidence. |

1. **Remarks of judge in general.**—No intimation of the opinion of the court of the truth or falsity of any part of the evidence should be communicated to the jury. *Pharr v. State*, 7 App. 472; *Johnson v. State*, 9 App. 558.

See an instance in which it was held that the judge violated the preceding article to the prejudice of the defendant. *Moncallo v. State*, 12 App. 171.

It is error for the trial judge to violate the preceding article, but not material error unless it be made to appear that it operated to the prejudice of the defendant. *Rodriguez v. State*, 23 App. 503, 5 S. W. 255. In view of this statute, judges, in ruling upon the admissibility of evidence, should severely abstain from anything beyond a simple announcement of the ruling. The court, in a trial of a case before it, is presumed to be, and should be, an impartial arbiter as to the legal rights of the parties, and if competent evidence is submitted to the jury, it is their exclusive province to consider that evidence, without any expression of opinion by the court as to whether it is of much or of little value. *Wilson v. State*, 17 App. 525.

On the jury stating, after being out 19 hours, that they had not disagreed as to the law, the court remarked: "It seems strange you would fail to agree, when there is so little conflict in the evidence. If it was a long, complicated case, with conflicting testimony, the court could readily see a cause for failure to agree." And they retired, and found a verdict of guilty. Held prejudicial error. *Kelly v. State*, 33 App. 31, 24 S. W. 295.

It is not improper for the judge to ask the jury in its room whether or not it would soon reach a verdict. *Priest v. State* (Cr. App.) 34 S. W. 611.

On trial for aggravated assault upon a female it is error for the court to remark that he is not sure but that the assault is one with intent to rape. *Price v. State*, 35 App. 501, 34 S. W. 622.

Remarks of the court in overruling objection to evidence of character; held, error. *McCullar v. State*, 36 App. 213, 36 S. W. 585, 61 Am. St. Rep. 847.

On cross-examination, defendant was asked whether he had ever been convicted and sent to the penitentiary. The court sustained an objection to the question, with the remark that the district attorney might go into the matter, but would do so at his peril. Held, that defendant was not prejudiced by the question, or the court's remark. *Clemmons v. State*, 39 App. 279, 45 S. W. 911, 73 Am. St. Rep. 923.

A statement by the court in the jury's presence, while accused's motion for a continuance was being considered, that a witness named therein had been indicted, is not objectionable, where it was made in response to an inquiry of accused. *Gregory v. State* (Cr. App.) 48 S. W. 577, denying rehearing *id.* (Cr. App.) 43 S. W. 1017.

The action of the court in cross-examining accused with reference to evidence first properly rejected and subsequently admitted and then withdrawn, in such a manner as to discredit him before the jury, by indicating that it did not believe him, was in violation of this article. *McMahan v. State*, 61 App. 489, 135 S. W. 558.

Where the court remarked, on sustaining an objection to evidence, that it was the "rankest kind of hearsay testimony," there was no error. *Yates v. State* (Cr. App.) 152 S. W. 1064.

Where accused's counsel was permitted to cross-examine the witness as rigidly as he desired, the court's remark, when he desired to call the prosecutrix, that the state had closed, was not erroneous as forcing accused to introduce the prosecutrix as his own witness. *Grimes v. State* (Cr. App.) 178 S. W. 523.

Where the court overruled an objection to a question directing prosecutrix to answer it if she could, and the prosecutrix stated she did not know how, the action of the court was not erroneous as suggesting the answer, where it did not appear that the prosecutrix could have answered such question. *Grimes v. State* (Cr. App.) 178 S. W. 523.

2. **Examination of witnesses by judge.**—Examination of witnesses in general, see notes to *Vernon's Sayles' Civ. St.* 1914, art. 3637.

It was not error for the court to ask a witness who was testifying relative to dying declarations as to the condition of mind of deceased at the time he made the declarations, the court believing it possible that deceased's mentality was impaired by his sinking condition. *Chalk v. State*, 35 App. 116, 32 S. W. 534.

A prior question by the state on the same subject was objected to by defendant

on the ground that it was leading, whereupon the judge prepared the proper questions in writing, went from his seat, and handed the questions to the interpreter, and told him to ask the questions as written. Held, that such conduct of the judge was not prejudicial to defendant. *Malcek v. State*, 33 App. 14, 24 S. W. 417.

The trial judge should refrain from the examination of witnesses, though such examination is not cause for reversal, unless prejudicial to the appellant. *Drake v. State* (Cr. App.) 143 S. W. 1157.

It is not error for the court to interrogate witnesses when it is not claimed that by his conduct he influenced the jury. *Stapp v. State* (Cr. App.) 144 S. W. 941.

Except when necessary to enable the trial judge to make an intelligent ruling he should not, when evidence is being detailed before the jury, propound questions to witnesses. *Mitchell v. State* (Cr. App.) 144 S. W. 1006.

On a trial for rape, where the prosecuting witness was a young, inexperienced girl, it was not reversible error for the trial judge to examine her for the purpose of making clear certain features of her testimony, where his questions and conduct did not indicate to the jury his opinion of the merits of the case. *Wragg v. State* (Cr. App.) 145 S. W. 342.

3. Comments on evidence.—In passing upon the admission or rejection of testimony the court should refrain from expressing any opinion as to its weight or effect. *McGee v. State*, 37 App. 668, 40 S. W. 967; *Kemper v. State*, 63 App. 1, 138 S. W. 1025.

In discussing the admissibility of evidence in the presence of the jury, the court remarked to counsel: "Has it not already been sufficiently shown that a conspiracy existed to admit the evidence?" Held, a violation of this article. *Crook v. State*, 27 App. 198, 11 S. W. 444.

Evidence of defendant's skill in shooting should have gone to the jury without comment as to its weight, where he was charged with shooting with intent to kill, but did not hit, and claimed that he was shooting to alarm merely. *Moore v. State*, 33 App. 306, 26 S. W. 403.

Upon the question of the materiality of the evidence offered by the State it is objectionable for the court to remark that he deems such evidence highly material. *Kirk v. State*, 35 App. 224, 32 S. W. 1045.

The court in the presence of the jury remarked, there is no higher evidence of a good reputation than the fact that such reputation has never been discussed; held, improper as being on the weight of the evidence. *McCullar v. State*, 36 App. 213, 36 S. W. 585, 61 Am. St. Rep. 847.

Where one prosecuted for illegal sales desires, on the theory that the state's witnesses are mistaken as to the place they got the liquor, to introduce evidence as to the furnishings of two saloons near there, it is error for the court to remark that one of them was not then running; as, if he is to testify, he should be first sworn. *Benson v. State* (Cr. App.) 44 S. W. 163.

A remark by the court, in ruling upon an objection to a question, that he did not think it was material, but would permit it, was improper, as a comment by the judge on the effect of the evidence. *Melton v. State*, 58 App. 86, 124 S. W. 910.

In a prosecution for theft, where defendant produced a witness who testified that defendant was paid money a day or two before the alleged offense, which he had won at cards, and the prosecuting attorney asked the witness if it was not a fact that gamblers sometimes have money, and sometimes do not, it was error for the court to remark, in overruling defendant's objections to this question, that it was the most material question that had been asked by the state. *Blacker v. State*, 58 App. 216, 125 S. W. 409.

Where the witnesses were under the rule, and one of them testified to a fact, and another witness contradicted him, the remark of the court in the presence of the jury that the former witness had testified to the fact and that that settled it was in violation of this article. *Newton v. State*, 58 App. 316, 125 S. W. 908.

The remarks of the court on overruling objections to questions to a witness on redirect examination, that accused had refused to cross-examine the witness after bringing out a part of the facts, was not objectionable as a comment on the weight of the evidence, or as giving his view of the testimony in violation of the statute. *Milo v. State*, 59 App. 196, 127 S. W. 1025.

Remarks by the court, in excluding a question on cross-examination of a state's witness as to whether he knew what the usual price of a half pint of whisky was at the time he bought from accused, that he did not consider that the price paid for the whisky, or what it was worth, was material to the case one way or the other, were improper as a direct comment on the weight of the testimony. *Walling v. State*, 59 App. 279, 128 S. W. 624.

A remark by the trial judge upon objection to testimony in a homicide case that hair found on the fatal ax was negro hair, "I do not know whether it takes an expert to tell about hair," was not a comment on the evidence. *Williams v. State*, 60 App. 453, 132 S. W. 345.

The remarks of the trial judge in response to a motion to strike out the evidence of prosecutrix that she, under 15 years of age, had not had intercourse with any one but accused on trial for rape, that the evidence might not be admissible under the law, but that it ought to be, and that the evidence was in, and that accused could produce his authorities and the court would strike it out if the law required it, were only a comment on the admissibility of the evidence and not an expression of opinion of the guilt or innocence of accused. *Wofford v. State*, 60 App. 624, 132 S. W. 929.

The case being one of circumstantial evidence, the remark of the court, during the trial and while the question whether the law of circumstantial evidence should be charged was being discussed, that he did not know whether or not he would so charge was erroneous, as tending to make the jury believe he thought the facts sufficiently cogent to preclude the idea of charging on circumstantial evidence. *Davis v. State* (Cr. App.) 143 S. W. 1161.

Where, in a prosecution for murder of a child by whipping it, the testimony relied on by the state was that of witnesses who heard but did not see the whipping, a remark by the court "that a person could tell a thing as well by hearing * * * as seeing it," while true, was improper as tending to express an opinion on the weight of testimony. *Betts v. State* (Cr. App.) 144 S. W. 677.

After a witness had testified that a third person made a confession while he and accused were both under arrest, and that accused interrupted, and asked him what he was getting from the police department for the information, the court, in the presence and hearing of the jury, gave an opinion which he ordered incorporated in the record reciting the offer of such evidence, and holding that by his remark accused joined in the confession, and that the testimony would be admitted. Held, that the delivery of this opinion to the jury or in its presence and hearing was improper. *Bradshaw v. State* (Cr. App.) 155 S. W. 218.

Where it is sought to compel a prosecutrix, in a prosecution for abandonment after seduction and marriage, to give the names of her former fiancés, a remark of the court in admitting the evidence that he did not think it was serious, and the jury could weigh it for what it was worth, was not a comment on the evidence. *Qualls v. State*, 73 App. 212, 165 S. W. 202.

A witness, in a prosecution for keeping a gaming house, testified, on questions by the court that he had spent much of his time on the premises, but had seen no gambling, whereupon the court ordered his arrest until a perjury indictment could be filed against him. He was immediately taken by the sheriff, led from the witness stand in the presence of the jury, and carried to jail. Defendant had pleaded not guilty to the gambling charge and had also moved for a suspended sentence. The statutes provide that the jury are the exclusive judges of the facts and the credibility and weight of the evidence and that the court shall rule without expressing his conclusion or belief as to the testimony. Held, that the court's action in arresting the witness constituted an expression on the weight of his testimony in open court. *Caruth v. State* (Cr. App.) 177 S. W. 973.

In a prosecution for seduction, where the date of the intercourse was in controversy, a remark by the trial judge, in sustaining the state's objection to cross-examination of the prosecutrix, that the question asked had been asked the previous day, was not erroneous as a comment on the weight of the testimony; it appearing that the question in fact had been asked the preceding day. *Grimes v. State* (Cr. App.) 178 S. W. 523.

4. — **Remarks in absence of jury.**—Pending the discussion and decision of the admissibility of testimony, the jury should have been retired from the courtroom. *Crook v. State*, 27 App. 198, 11 S. W. 444; *Watts v. State*, 18 App. 381.

A remark by the court, in the absence of the jury, that he did not see the bearing of certain offered proof on the case, was not error; the evidence excluded being immaterial. *Irvin v. State* (Cr. App.) 148 S. W. 589.

5. **Expression of opinion as to accused's guilt.**—A statement by the trial judge, addressed to the attorneys, but within the hearing of the jury, that he believed that defendant was guilty under his own statement, and would like defendant's attorney to find some law governing the matter, is a violation of the statute prohibiting the court from making remarks as to the effect of the evidence, or stating his conclusion as to defendant's guilt or innocence. *Dean v. State*, 58 App. 98, 124 S. W. 924.

6. **Remarks reflecting on accused or his counsel.**—When accused in answer to a question stated that he had no recollection of the matter; held, error for the court to state that he refused to answer. *Manning v. State*, 37 App. 159, 39 S. W. 118.

Where appellant's attorney procured squirrel hair and horse hair and exhibited it to the jury it was error for the court to reflect upon the attorney for the manner of obtaining the hairs. *House v. State*, 42 App. 125, 57 S. W. 825.

Where, in a prosecution for perjury, a witness for the state appeared reluctant to testify, it was error for the court to state in the jury's presence that the witness appeared to be evading the truth and to threaten to punish the witness, and to state to defendant's counsel that, while he would give them any exception they wanted, he was "not going to have the witness interfered with." *Scott v. State*, 72 App. 26, 160 S. W. 960.

In a prosecution for assault with intent to murder, where accused's brother was tendered as a witness, although he had participated in the affray and was also under indictment, the action of the court in reprimanding accused's counsel and complimenting such counsel upon his knowledge of criminal law and long experience in practice thereof, when sustaining the objection to the brother's competency, was not improper; the statute expressly declaring the brother to be incompetent. *Carter v. State*, 73 App. 334, 165 S. W. 200.

If the court feels called upon to reprimand counsel, he should first send the jury from the room, and then use such measures as will compel respect for his ruling. *Echols v. State* (Cr. App.) 170 S. W. 786.

7. **Proceedings against witness or counsel.**—Accused cannot complain of any prejudice resulting from his counsel being fined by the trial judge, in the presence of the jury, for disregarding instructions that, in cross-examining an accomplice, he must not inquire as to any offenses committed by the accomplice, not constituting a felony or involving moral turpitude. *Grant v. State* (Cr. App.) 148 S. W. 769, 42 L. R. A. (N. S.) 428.

That a court fined a witness who was wilfully evading answering questions, and sent him to jail until he should answer them did not indicate the opinion of the judge as to defendant's guilt and was not injurious. *Loan v. State* (Cr. App.) 153 S. W. 306, 43 L. R. A. (N. S.) 844.

Whenever it becomes necessary to punish a recalcitrant witness, the court should retire the jury before doing so, in order that they may not be affected injuriously against accused. *Scott v. State*, 72 App. 26, 160 S. W. 960.

8. **Prejudice from remarks.**—The court's remark in response to an objection to leading questions by defendant's counsel, "let him go on; I have cautioned him several times. I reckon the jury have sense enough to know whether the witness is telling the truth or not," was not prejudicial, it not being a reflection on the veracity of the witness. *House v. State*, 19 App. 227.

While it was error for the court to remark before the jury that it "would admit evidence of defendant's good character, though it did not see its relevancy," it was not reversible since defendant had confessed the commission of the act charged. *Young v. State*, 31 App. 24, 19 S. W. 431.

While a witness was testifying as to the value of different articles alleged to have been stolen, the court remarked that much time was being consumed on very indefinite proof. Held that, though the court is prohibited from commenting on the weight of testimony, the remark did not warrant a reversal, in the absence of evidence that any injury was done defendant. *Stayton v. State*, 32 App. 33, 22 S. W. 38.

A remark by the court that a State's witness had been guessing at the length of a stick, could not be prejudicial to the defendant. *Thompson v. State*, 35 App. 352, 33 S. W. 871.

Remarks of the court on the admission of incompetent testimony; held, not prejudicial. *Huntly v. State* (Cr. App.) 34 S. W. 948.

Remark of the judge that the witness had already answered the question; held, not prejudicial. *Bonners v. State* (Cr. App.) 35 S. W. 669.

For the court, in overruling an objection to evidence, to remark that "it is not very material, but it may go to the jury," is harmless error, where the testimony was in fact immaterial. *McGee v. State*, 37 App. 668, 40 S. W. 967.

Questions asked witnesses by the court held not prejudicial. *Harrell v. State*, 39 App. 204, 45 S. W. 581.

Remarks of the court as to nature and weight of evidence will not be ground for reversal where the character of the testimony and its materiality to the case is not shown and it is not made to appear that probable injury was done by the remarks. *Newman v. State* (Cr. App.) 64 S. W. 259.

During the taking of evidence as to the character of accused, the question was asked as to his membership in a church, and, on objection being sustained, his counsel stated that such membership was no reflection on him, to which the court in a spirit of levity replied that it might be a reflection on the church. On objection, the court promptly withdrew the remark, and specially charged the jury not to consider it. Held, that defendant was not prejudiced thereby. *Pilgrim v. State*, 59 App. 231, 128 S. W. 128.

While, it is improper for the court to comment upon testimony, where, in a criminal prosecution, upon cross-examination of a witness by the accused, a question arose as to the responsiveness of the answer of the witness, and the court, during a colloquy of counsel, remarked that he thought the witness was doing the best he could, the remark was not calculated to injure the accused; and where the court immediately instructed the jury not to consider the remark it will not be ground for reversal. *Renn v. State*, 64 App. 639, 143 S. W. 167.

In a murder trial, it was not reversible error for the trial judge to tell an accomplice, who testified for the state, that his testimony must be voluntary and might be used against him, where the court instructed, at accused's request, that, where the state makes an agreement with an accomplice, as it did with witness, whereby he "turns state's evidence," the state is bound by the agreement, if the accomplice carries out his part of it by testifying to the truth. *Grant v. State* (Cr. App.) 148 S. W. 760, 42 L. R. A. (N. S.) 428.

Remarks of the court not shown to have influenced the jury do not present error. *Williams v. State* (Cr. App.) 148 S. W. 763.

Remarks of the court to counsel in discussing his rulings not bearing on the weight of evidence, nor indicating his opinion of the merits of the case, could not have prejudiced accused. *Williams v. State* (Cr. App.) 148 S. W. 763.

Where on a trial for assault to murder, a physician testified to the nature of the bullet wound received by prosecutor, and accused sought to question the witness as to the force of a bullet, the remark of the court on sustaining an objection that it did not appear that the witness was an expert on the force of bullets, and it would make no difference whether the bullet hit prosecutor or not if the pistol used was a weapon that was reasonably calculated to produce death, was not prejudicial to accused. *Wilson v. State*, 70 App. 627, 158 S. W. 512.

Where defendant was cross-examining a witness, the court's remark, "Let him answer the question propounded before you butt in on him," qualified by the court's statement that counsel in his enthusiasm had several times interrupted the witness before he had finished his answer, was not prejudicial as tending to influence the jury on the issue of defendant's guilt. *Link v. State*, 73 App. 82, 164 S. W. 987.

Where defendant, to lay a foundation for the introduction of the testimony of a witness at the examining trial, showed that the witness left the jurisdiction of the court because he did not wish to be bothered with the trial, etc., a statement of the court, "Gentlemen, it appears to me that the witness has skipped out for the purpose of keeping away from the court," though improper, is not prejudicial to defendant. *Echols v. State* (Cr. App.) 170 S. W. 786.

9. **Necessity of exceptions.**—See notes under art. 744.

10. **Cure of error.**—Where the court, in a prosecution for perjury, by his remarks in the jury's presence concerning two witnesses and also by punishment of the one who proved recalcitrant, clearly indicated to the jury that he believed the witnesses were evading the truth or testifying falsely, the matter was not cured by his subsequent instructions that the jury should not consider such matters. *Scott v. State*, 72 App. 26, 160 S. W. 960.

11. Bill of exceptions.—See art. 744, and notes.

12. Necessity of objections to evidence.—See notes to arts. 783, 938.

Under this article the judge may simply decide upon the objections made to the evidence, and a failure to assert an objection is tantamount to a waiver of the objection. *Mayo v. State*, 7 App. 342; *Davis v. State*, 14 App. 645; *Fruitt v. State*, 30 App. 156, 16 S. W. 773; *Bryant v. State*, 18 App. 107.

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.

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.

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.]

In general

1. Disqualification in general.
2. Knowledge of witness or means of knowledge.
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6. Incompetency of insane person in general.
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10. Competency of children in general.
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16. Incompetency in general.
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18. Nature of offense for which convicted.
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IN GENERAL

1. **Disqualification in general.**—Seducer held not a competent witness against the female in prosecution for fornication. *Spencer v. State*, 31 Tex. 64.

Negroes are competent witnesses. *Ex parte Warren*, 31 Tex. 143. See post, art. 801.

An attorney who has interviewed witness while under the rule, can not be used to prove contradictory statements made by the witness to him in such interview. *Brown v. State*, 3 App. 294.

A statute which enlarges the class of persons who may be competent to testify as witnesses is not *ex post facto* in its relation to offenses previously committed, since it only relates to modes of procedure in which no individual has a vested right, and which the state, on grounds of public policy, may regulate at pleasure. *Mrous v. State*, 31 App. 597, 21 S. W. 764, 37 Am. St. Rep. 834.

The fact that a witness is drunk does not render his testimony inadmissible. It goes only to the weight of the same. *Meyers v. State*, 37 App. 208, 39 S. W. 111.

It was not error to permit a witness to testify to the marriage of defendant, over the objection that he was drunk at the time. *Stevens v. State* (Cr. App.) 150 S. W. 944.

See *Logan v. U. S.*, 144 U. S. 263, 12 Sup. Ct. 617, 36 L. Ed. 429.

2. **Knowledge of witness or means of knowledge.**—When a witness knows nothing of his own knowledge, of the matter inquired about, his testimony should be excluded. *Harris v. State*, 37 App. 441, 36 S. W. 88; *Woods v. State*, 37 App. 459, 36 S. W. 96.

Where a witness testified that on the night prior to the homicide accused was drinking heavily and on the point of having delirium tremens, but on cross-examination admitted that he did not know what delirium tremens was, it was proper

to exclude his statement as to the delirium tremens. *Duke v. State*, 61 App. 441, 134 S. W. 705.

It was not error to allow the mother of the prosecutrix in a statutory rape case to testify that her daughter was under the age of consent, where she did not know the year in which the daughter was born, but stated that she had kept track of the daughter's age by adding a year each birthday, and that the date of her birth was in a record kept at home. *Vaughn v. State*, 62 App. 24, 136 S. W. 476.

Where, in a prosecution of a wife for killing her husband, there was evidence that deceased had made threats to murder her and the children through a period of years, and that nearly every day he cursed and abused her, and had drawn a revolver on her several times, and threatened to cut her throat, evidence in rebuttal that deceased's reputation was that of a peaceable, law-abiding citizen was admissible, but witnesses, who only knew deceased in a business way, should not have been permitted to testify that they had never heard deceased curse his wife or any member of his family. *Streight v. State*, 62 App. 453, 138 S. W. 742.

In a prosecution for keeping a room in a hotel as a place in which to gamble, a witness testified that accused was proprietor, and on cross-examination testified that he had never lived at the hotel, or had a room there, but had eaten there; that he knew that accused was proprietor, because he looked after the interests of the hotel; that he had seen him around there, acting as if he was the proprietor; that he had a wife and children there; and that sometimes his boys were on watch at night. The witness finally admitted that he did not know whether accused was actually proprietor, and said that his testimony was a conclusion. Held, that the testimony of the witness does not show that he had no personal knowledge, or that it was not proper testimony to go before the jury; for he said that accused looked after the interests of the hotel. *Parshall v. State*, 62 App. 177, 138 S. W. 759.

In a prosecution of a tax collector for fraudulently converting public money, one of accused's deputy collectors could testify that he had seen accused take money from the taxes collected for his personal use, if he knew that he did so. *Ferrell v. State* (Cr. App.) 152 S. W. 901.

Where, on a trial for homicide, it was the contention of the state that accused shot deceased through a closed door and that the bullet passed through her body, the testimony of a witness, who examined the premises the next morning, that he found a bullet hole in the door and a bullet in the wall opposite the door, was properly admitted; these being physical facts which could be testified to by any witness who saw them, and the next morning not being too remote in time. *Dickson v. State* (Cr. App.) 168 S. W. 862.

3. — Identification from hearing voice.—A witness, identifying accused as the person with whom a conversation over the telephone occurred, may properly testify to such conversation. *White v. State*, 61 App. 498, 135 S. W. 562.

Where a telephone operator made a connection, and recognized the voices of accused and N. talking over the phone, the conversation being material, the operator was competent to testify thereto. *Streight v. State*, 62 App. 453, 138 S. W. 742.

A witness, who had been well acquainted for a number of years with two persons, and who testified that she recognized their voices and heard what they said in a certain conversation, although she did not see them, could testify as to such conversation; the fact that she did not identify them by sight only going to the weight of her testimony. *Reynolds v. State*, 63 App. 270, 139 S. W. 977.

4. Determination of competency.—Whether a witness is competent, so as to justify the introduction of his testimony given on a former trial, depends on his status at the time the testimony is offered, and not at the time it was given. *Goldstein v. State* (Cr. App.) 171 S. W. 709.

5. Review of competency on appeal.—See notes under art. 744.

SUBD. 1

6. Incompetency of insane person in general.—A conviction can not stand when based exclusively upon the testimony of a witness who is incapable of exercising a faculty necessary to a knowledge of the matter about which he has testified. *Williams v. State*, 44 Tex. 34. See, also, *Ake v. State*, 6 App. 398, 32 Am. Rep. 586; *Williams v. State*, 12 App. 127.

An insane woman cannot testify as to rape alleged to have been committed on her. *Lopez v. State*, 30 App. 487, 17 S. W. 1058, 28 Am. St. Rep. 935.

In an indictment for rape which charges that the woman was so mentally diseased at the time as to have no will to oppose the act, the prosecutrix is not a competent witness to prove the corpus delicti of the offense charged; as the allegation apprehends her insanity at the time charged as to the particular act. *Lee v. State*, 43 App. 285, 64 S. W. 1048.

7. — Who not disqualified.—A person who can relate connectedly what happened to him while under the influence of some drug administered to him in a glass of beer was not insane at the time of the happening within the meaning of this article. *Pones v. State*, 43 App. 201, 63 S. W. 1021.

A witness, who, though he had been adjudged insane, had been out of the insane asylum more than six years, and who satisfied the court that he had recovered and was in every way competent to testify intelligently, was competent, though the judgment establishing his lunacy was not shown to have been vacated. *Singleton v. State*, 57 App. 560, 124 S. W. 92.

8. Burden of showing disqualification.—Where there is nothing to show that a witness is insane when he is called to testify nor that he was insane when the event happened about which he is called to testify, the burden is on the party objecting on the ground of insanity to prove the same. *Batterton v. State*, 52 App. 381, 107 S. W. 827.

9. **Charge of court.**—Where a witness for the state on whose testimony a conviction rested was claimed to be insane, an instruction that, if the jury found the witness insane, their verdict should be for the defendant, and that the degree of insanity required to render a person incompetent to testify was such a defect of reason as to render the person incapable of receiving a sound mental impression of the transaction regarding which he was called on to testify, or if he had capacity to receive such impression, then such defect of mind as would render it impossible for him to impart such impression, or such defect of reason as would render it impossible for him to know and understand the nature and obligation of an oath, properly submitted the capacity of the witness. *Batterton v. State*, 62 App. 381, 107 S. W. 826.

SUBD. 2

10. **Competency of children in general.**—See *Oxsheer v. State*, 38 App. 499, 43 S. W. 335; *Wolforth v. State*, 31 App. 387, 20 S. W. 741; *Nichols v. State*, 32 App. 391, 23 S. W. 681.

Children or other persons, not possessed of sufficient intelligence to relate transactions about which they are interrogated, or who do not understand the obligation of an oath, are incompetent to testify. *Ake v. State*, 6 App. 393, 32 Am. Rep. 586; *Holst v. State*, 23 App. 1, 3 S. W. 757, 59 Am. Rep. 770; *Williams v. State*, 12 App. 127.

A girl nine years old, whose examination disclosed an utter want of anything like a knowledge of the nature or character and consequences of the oath she had taken, held incompetent. *Williams v. State*, 12 App. 127.

A witness may not know the criminality of an act on account of tender years, and yet be capable of testifying in court. *Grayson v. State*, 40 App. 574, 51 S. W. 246.

Prosecuting witness held incompetent to testify because even though intelligent enough to relate the transaction, she was not sufficiently intelligent to understand the obligation of an oath. *Holst v. State*, 23 App. 1, 3 S. W. 757, 59 Am. Rep. 770.

Objections to witnesses because of their youth, without objecting that they do not understand the obligation of an oath, are no objections. *Hawkins v. State*, 27 App. 273, 11 S. W. 409.

Where a boy 10 years of age is offered as a witness, and upon preliminary examination as to competency he appears to have an idea of future rewards and punishments, it should also be shown that he knows the pains and penalties of perjury. *Murphy v. State*, 36 App. 24, 35 S. W. 174.

A conviction based in whole or in part upon the testimony of a witness under nine years of age cannot be sustained, on the ground that such a witness cannot be punished for perjury. *Freasier v. State* (Cr. App.) 84 S. W. 361.

A negro girl 14 years old is not incompetent to testify because she says that she does not understand the obligation of an oath, if by other answers, bearing and apparent intelligence she shows that she understands the nature and quality of truth as it differs from falsehood. *Anderson v. State*, 53 App. 341, 110 S. W. 57.

A four year old child, apparently utterly unable to realize the meaning of an oath, is not a "competent witness." *Mays v. State*, 58 App. 651, 127 S. W. 546.

A child over 14 years old is presumptively competent to testify. *Douglas v. State*, 73 App. 385, 165 S. W. 933.

11. **Witnesses held competent.**—Where a witness testified that he was only seven years old, that if he swore and lied the bad man would get him, that he meant the devil, and that he would go to the penitentiary, there was no error in permitting his testimony to go to the jury. *Mason v. State*, 2 App. 192.

An objection to a boy's testimony, "because of ignorance," is properly overruled, when such testimony is as clear and intelligent as that of most witnesses of mature years and ordinary education, and is strongly corroborated. *Hawkins v. State*, 27 App. 273, 11 S. W. 409.

It is not an abuse of discretion for a trial judge to permit a boy 12 years old to testify in a criminal cause, when it appears that the boy, on his voir dire, stated that "it was wrong to tell a lie, and that, if he told a lie, he would be punished." *Parker v. State*, 33 App. 111, 21 S. W. 604, 25 S. W. 967.

A boy thirteen years old understanding the difference between truth and falsehood and comprehending the idea of future reward and punishment, is a competent witness. *Partin v. State* (Cr. App.) 30 S. W. 1067.

A deaf witness, whose reading of the oath after it is reduced to writing is substantially correct, and shows that he understands its meaning, is competent. *Kirk v. State* (Cr. App.) 37 S. W. 440.

Though a witness has had little religious training, and though his ideas of a future state of rewards and punishments are rather crude, if he understands that the oath or affirmation binds his conscience to speak the whole truth and nothing but the truth regarding the matter under investigation, that it is wrong to lie, and that for a violation of this duty the law imposes punishment as for perjury, he is a competent witness. *Colter v. State*, 37 App. 284, 39 S. W. 576.

Where a 7 year old boy testified that he knew that he would be punished if he testified falsely, and that to hold up his hand and swear meant that he would be punished if he did not tell the truth, he was a competent witness, though he testified that he did not know the nature of an oath, or what it meant to swear. *Munger v. State*, 57 App. 384, 122 S. W. 874.

Where a Mexican boy stated that he was nine years old, that when he was required to hold up his hand it meant to tell the truth, and that it was wrong to tell a story, the court did not err in receiving his testimony, though he did not know what penalty would be inflicted for telling lies, or what became of boys that did not tell the truth, and though he had never gone to school, and was unable to read or write. *Zunago v. State*, 63 App. 58, 138 S. W. 713, Ann. Cas. 1913D, 665.

A child of six years of age may testify if he understands the obligation of an oath and can relate the transaction. *Finch v. State*, 71 App. 325, 158 S. W. 510.

Where the girl whom the defendant was charged with raping was only nine

years old, but gave a clear, concise recital of the event, and was fully informed that she would be punished if she swore falsely, she was a competent witness. Valdez v. State, 71 App. 487, 160 S. W. 341.

Notwithstanding the provision of Const. art. 1, § 5, that oath and affirmations shall be taken subject to the pains and penalties of perjury, an infant of under 7 years of age is competent to testify in a capital felony, even though under Pen. Code, arts. 34, 35, she is not subject to the punishment of death prescribed by art. 311, for perjury in a capital case, where the death penalty is not inflicted upon the accused. Smith v. State, 73 App. 273, 164 S. W. 838.

A child under six years of age, who had sufficient capacity to remember ordinary occurrences, and understood that it was wrong to testify falsely under oath, and that she would not only be punished hereafter, but would be sent to the penitentiary for perjury, is competent to testify. Smith v. State, 73 App. 273, 164 S. W. 838.

A girl 10 years old, who shows that she has sufficient intellect to give her testimony, and who knows that she will be imprisoned for testifying falsely, is competent to testify. Cole v. State, 73 App. 457, 165 S. W. 929.

A child eight years old, who shows on her voir dire examination that she can relate the transactions as to which she will be interrogated as a witness, and understands the nature of an oath and that she will be punished if she does not tell the truth, is properly permitted to testify. Douglas v. State, 73 App. 385, 165 S. W. 933.

In a prosecution for assault with intent to rape, the trial court's allowance of the testimony of prosecutrix, a girl six years old, who stated that she knew what was meant when she took the oath, that "it means to take an oath to God to tell the truth," that if she told a falsehood she would be punished, and who detailed the transaction very intelligently, was not an abuse of discretion. Brown v. State (Cr. App.) 176 S. W. 50.

12. Effect of disqualification.—Where a child is incompetent as a witness, its statements made to others in relation to the matter involved cannot be used in evidence. Smith v. State, 41 Tex. 352; Holst v. State, 23 App. 1, 3 S. W. 757, 59 Am. Rep. 770.

13. Determination of competency.—In a criminal prosecution, the determination of the competency of children to testify is a matter left largely to the discretion of the trial court, who can judge from the demeanor and manner of the witness on the stand, and his determination will not be disturbed on appeal unless an abuse is shown. Finch v. State, 71 App. 325, 158 S. W. 510; Williams v. State, 12 App. 127; Taylor v. State, 22 App. 529, 3 S. W. 753, 58 Am. Rep. 656; Holst v. State, 23 App. 1, 3 S. W. 757, 59 Am. Rep. 770; Hawkins v. State, 27 App. 273, 11 S. W. 409; Parker v. State, 33 App. 111, 21 S. W. 604, 25 S. W. 967; Douglas v. State, 73 App. 385, 165 S. W. 933.

There is no precise age under which a child is deemed incompetent to testify, but when under fourteen years of age competency is determinable by an examination, and the action of the court thereon will not be revised in the absence of a showing that its discretion was abused. Johnson v. State, 1 App. 609; Brown v. State, 2 App. 115; Mason v. State, Id. 192; Brown v. State, 6 App. 286; Ake v. State, 6 App. 398, 32 Am. Rep. 586; Burk v. State, 8 App. 336; Davidson v. State, 39 Tex. 129; Williams v. State, 12 App. 127.

A state's witness having disqualified herself upon her voir dire with regard to her knowledge of the nature and obligation of an oath, the state was permitted to take her to a private office and instruct her thereupon. She was thereupon returned into court, and, replying that she then understood the test, was held competent as a witness. Held, that the proceeding was erroneous. Taylor v. State, 22 App. 529, 3 S. W. 753, 58 Am. Rep. 656.

Instructing child as to the obligation of an oath, see Holst v. State, 23 App. 1, 3 S. W. 757, 59 Am. Rep. 770; Hawkins v. State, 27 App. 273, 11 S. W. 409.

Whether a boy nine years old should be admitted to testify is within the sound discretion of the trial court. Streight v. State, 62 App. 453, 138 S. W. 742.

The competency of a child as a witness is a question for the court, and a requested charge on that issue was properly refused. Valdez v. State, 71 App. 487, 160 S. W. 341.

14. Necessity of objection or exception.—See notes under art. 744.

15. Sufficiency of evidence.—See notes to art. 783, ante. •

SUBD. 3

16. Incompetency in general.—Competency of person indicted jointly or separately for the same offense, see Pen. Code, art. 91; C. C. P. art. 791. See, also, art. 797.

A person convicted of felony, unless such conviction has been legally set aside or he has been granted a legal pardon, is disqualified to testify as a witness in judicial proceedings. Arcia v. State, 26 App. 193, 9 S. W. 685; Watts v. State (Cr. App.) 148 S. W. 310.

A defendant who has been convicted of a felony is not incompetent to testify as a witness in his own behalf. Williams v. State, 28 App. 301, 12 S. W. 1103; Shannon v. State, 28 App. 474, 13 S. W. 599; Quintana v. State, 29 App. 401, 16 S. W. 259, 25 Am. St. Rep. 730; Nicks v. State, 40 App. 1, 48 S. W. 186.

One convicted of the same libel and under a convict bond for the payment of the fine imposed, is not a competent witness for defendant. Baldwin v. State, 39 App. 245, 45 S. W. 714.

A witness who was serving a term in the penitentiary for participation in the same offense for which defendant was on trial was incompetent to testify that he (the witness) was the guilty person, and that accused took no part in the burglary in question. Bradford v. State, 62 App. 424, 138 S. W. 118.

It is immaterial when the witness was convicted, since he remains incompetent to testify until pardoned. Price v. State (Cr. App.) 147 S. W. 243.

One jointly indicted with accused and first tried and convicted of the felony charged is not a competent witness for accused. *Castenara v. State*, 70 App. 436, 156 S. W. 1180.

17. — **Effect of incompetency.**—Liability of convict to prosecution for perjury, see notes under Pen. Code, art. 304.

No fact stated by or derived from a convict can, so long as his disability exists, be detailed as testimony by another, or used as evidence for any purpose against another. *Long v. State*, 10 App. 186.

An application for a continuance to obtain the testimony of a convicted co-defendant, was properly overruled. *Magruder v. State*, 35 App. 214, 33 S. W. 233.

That accused was a county convict and had been hired out on bond would not render inadmissible any statements he might make. *Andrews v. State*, 64 App. 2, 141 S. W. 220, 42 L. R. A. (N. S.) 747.

Where one jointly indicted with accused was first tried and convicted of the felony charged, statements made by him to third persons about the crime were inadmissible in behalf of accused. *Castenara v. State*, 70 App. 436, 156 S. W. 1180.

18. **Nature of offense for which convicted.**—A felony is an offense which is punishable with death or imprisonment in the penitentiary either absolutely or as an alternative. Pen. Code, art. 55, and notes.

It is only a conviction of felony that disqualifies as a witness. *Welsh v. State*, 3 App. 114; *Pitner v. State*, 23 App. 366, 5 S. W. 210.

A conviction for driving stock from its accustomed range with intent to defraud the owner is a conviction for felony, though the punishment assessed is a fine. *Woods v. State*, 26 App. 490, 10 S. W. 108 (*Hurt, J.*, dissenting).

A person indicted with another, or separately, for the same offense in a misdemeanor case, can after his conviction be used by the state as a witness against his co-defendant even though he has not satisfied the judgment of conviction. *Burdett v. State*, 51 App. 345, 101 S. W. 989.

A witness is not disqualified by reason of having been convicted under U. S. Statutes of illicit retail liquor dealing, a crime punishable by confinement in the penitentiary for more than a year, because it has been held that this is not a felony. *Cabrera v. State*, 56 App. 141, 118 S. W. 1059.

Evidence that a witness who had testified against accused in a prior trial was, at the time of the subsequent trial, incarcerated in a penitentiary in a foreign state, without proof of the offense of which he had been convicted, nor whether such offense was a felony, was insufficient to show that the witness was disqualified so as to prevent the introduction of his testimony given at the former trial. *Goldstein v. State* (Cr. App.) 171 S. W. 709.

19. **What constitutes conviction.**—"Convict" defined. Penal Code, art. 27.

Convicted felon is not disqualified as a witness until sentence has been passed upon him and he has accepted the sentence, no matter for what reason he may not have been sentenced. If he has been sentenced he is not disqualified until judgment against him has been affirmed. *Flournoy v. State* (Cr. App.) 59 S. W. 903; *Arcia v. State*, 26 App. 193, 9 S. W. 685; *Jones v. State*, 32 App. 135, 22 S. W. 404; *Robinson v. State*, 36 App. 104, 35 S. W. 651; *Foster v. State*, 39 App. 399, 46 S. W. 231; *Underwood v. State*, 38 App. 193, 41 S. W. 618; *Stanley v. State*, 39 App. 482, 46 S. W. 645.

A person convicted of a felony but not sentenced is a competent witness. *Hurley v. State*, 35 App. 282, 33 S. W. 354; *Woods v. State*, 26 App. 490, 10 S. W. 108; *Evans v. State*, 35 App. 455, 34 S. W. 285; *Wright v. State* (Cr. App.) 45 S. W. 723.

Under Pen. Code, arts. 865b, 865e, one whose sentence had been suspended was not incompetent as a witness as being a convicted criminal. *Espinoza v. State*, 73 App. 237, 165 S. W. 208; *Simonds v. State* (Cr. App.) 175 S. W. 1064.

Where the punishment assessed for driving stock from its accustomed range as a fine sentence was not essential to complete the conviction and disqualify the person convicted as a witness. *Woods v. State*, 26 App. 490, 10 S. W. 108.

Conviction of felony does not render a witness incompetent before sentence, where the time for applying for a new trial has not expired. *Luna v. State* (Cr. App.) 47 S. W. 656.

It is not enough to show disqualification of a witness on account of conviction for a felony, to produce a judgment, entered as of course upon rendition of verdict of guilty. It is necessary to produce the record showing not only the entry of the judgment but that sentence has been recorded. *G., C. & S. F. Ry. Co. v. Johnson*, 98 Tex. 76, 81 S. W. 5.

Where a party seeks to disqualify a witness on the ground that he had been convicted of crime, he must show a valid judgment and sentence. *Deckard v. State*, 57 App. 359, 123 S. W. 417.

Though a person has pleaded guilty to a charge of crime, and his punishment has been assessed by the jury, he is not disqualified as a witness until sentenced. *Sheppard v. State*, 63 App. 569, 140 S. W. 1090.

A person convicted of a felony who has appealed and after affirmance has moved for a rehearing, which motion is still pending, is not an incompetent witness especially in view of Pen. Code 1911, art. 27, defining "convict." *Bowles v. State* (Cr. App.) 150 S. W. 626.

20. **Necessity of conviction.**—Competency of one indicted for the same offense prior to conviction, see art. 791, and Pen. Code, art. 91.

A witness may not be impeached by showing merely that he has been indicted for a felony or for some misdemeanor involving moral turpitude, but the impeaching party must go further and show conviction. *Wright v. State*, 63 App. 429, 140 S. W. 1105.

Accused on trial for perjury, based on false testimony before the grand jury that he had not delivered intoxicating liquor to an infant, may not show that the infant testifying for the state had made one sale of intoxicating liquor, without at-

tempting to show that he had been indicted or convicted of a felony for unlawfully selling liquor. *Robertson v. State* (Cr. App.) 150 S. W. 893.

Witnesses are competent to testify on the trial of an offense, though they are indicted for a separate and distinct offense, and it is not necessary to postpone the trial until the witnesses have been tried or to hear evidence to determine whether they are guilty of the offense charged. *McKelvey v. State* (Cr. App.) 155 S. W. 932.

21. Conviction in another state.—The words “any other jurisdiction,” as used in the statute, do not limit the conviction to the tribunals of the United States exercising their jurisdiction in Texas, but a conviction of a felony is available to disqualify a witness, although such conviction was not had within the territorial limits of this state, but in such case it must be shown that the offense of which the witness was convicted was a felony by the laws of the state in which it was had, which fact may be proved by the laws of such state, and it must also appear from the judgment of conviction, or be otherwise shown, that it is a valid judgment under the laws of the state in which it was rendered. *Pitner v. State*, 23 App. 366, 5 S. W. 210; *Goldstein v. State* (Cr. App.) 171 S. W. 709.

22. Impeaching witness by proof of conviction.—Impeaching defendant, see notes to art. 790.

For the purpose of discrediting him, a witness may be asked if he had not been in the penitentiary, and was not sent there from a certain county. *Ivey v. State*, 41 Tex. 35, overruled. *Lights v. State*, 21 App. 308, 17 S. W. 428; *Woodson v. State*, 24 App. 153, 6 S. W. 184.

A witness was asked by defendant in a criminal case if he had not been in the penitentiary for a felony. The state objected before answer, on the ground that the witness could only be disqualified by the record of his conviction. The court then stated that the witness might answer, but his answer would only be allowed to go to his credit, and not to his qualification. Held not error. *McNeal v. State* (Cr. App.) 43 S. W. 792.

Convictions which do not involve moral turpitude, or are below the grade of felony, are inadmissible to affect credibility of a witness. *Hightower v. State*, 60 App. 109, 131 S. W. 324.

Evidence that accused had served a term in the penitentiary was admissible to impeach him as a witness; the time of sentence and service not being too remote. *Simpson v. State* (Cr. App.) 154 S. W. 999.

The state may impeach one of accused's witnesses by showing on cross-examination, that she had been convicted of the offense of running a disorderly house; the offense being one involving moral turpitude. *Bogue v. State* (Cr. App.) 155 S. W. 943.

In a prosecution for aggravated assault upon a woman, evidence of the fact that accused had been convicted of an assault with intent to rape some 23 years before is too remote to affect his credibility. *McGill v. State*, 71 App. 443, 160 S. W. 353.

In a prosecution for robbery by threats with a pistol, evidence that a certain witness had been convicted of carrying a pistol shortly after the date of the alleged robbery, offered to impeach him and to connect him with the offense charged against accused, was inadmissible for any purpose; accused having testified that he got the pistol used by him from such witness. *Coker v. State*, 71 App. 504, 160 S. W. 366.

23. Restoration of competency by pardon.—See *Gaskins v. State* (Cr. App.) 38 S. W. 470.

Competency, by reason of pardon, may be shown, although the witness is dead, where it is desired to use his testimony taken before an examining court. *Schell v. State*, 2 App. 30.

It is only in cases of conviction for perjury or false swearing, that a pardon must specifically restore the competency of the convict to testify. In all other cases a full pardon effectuates the restoration of competency. *Rivers v. State*, 10 App. 177.

A pardon of one sentenced to the penitentiary for two years and who voluntarily went to the penitentiary before his appeal was decided, to take effect two years from the time he commenced service in the penitentiary, was a full pardon and not a mere remission of the punishment. *Rivers v. State*, 10 App. 177.

It is within the power of the governor to restore the competency of a witness laboring under the disqualification of a felony conviction, even after such person has suffered the penalty assessed against him, and a full pardon in such case fully restores his competency as a witness. *Hunnicut v. State*, 18 App. 498, 51 Am. Rep. 330.

A pardon, in order to have the effect of restoring competency as a witness, must be a full pardon. A partial or conditional pardon will not have such effect. A pardon is full when it fully and unconditionally absolves the party from all the legal consequences of his crime and conviction, direct and collateral. See this case for a full discussion of the subject: *Carr v. State*, 19 App. 635, 53 Am. Rep. 395; *Dudley v. State*, 24 App. 163, 5 S. W. 649.

A full pardon renders the party competent to testify to facts which have come to his knowledge after his conviction, and before his pardon, as well as to any other facts within his knowledge. *Thornton v. State*, 20 App. 519.

A pardon is valid, in the absence of fraud, though it states the date of a conviction incorrectly, if it was intended to cover, and does cover, the particular offense. *Martin v. State*, 21 App. 1, 17 S. W. 430; *Hunnicut v. State*, 18 App. 498, 51 Am. Rep. 330.

The delivery and acceptance of a pardon are complete when the grantor has parted with his entire control or dominion over the instrument, with the intention that it shall pass to the grantee, and the latter assents to it, either in person or by his agent. A pardon once delivered and accepted can not be revoked, but if obtained by fraud, practiced upon the governor, it is void. *Rosson v. State*, 23 App.

287, 4 S. W. 897; *Ex parte Rosson*, 24 App. 226, 5 S. W. 666; *Hunnicut v. State*, 18 App. 498, 51 Am. Rep. 330.

A full pardon absolves the party from all legal consequences of his crime. It blots out the offense and gives him a new credit and capacity. *Bennett v. State*, 24 App. 73, 5 S. W. 527, 5 Am. St. Rep. 875.

A pardon granted "subject to the revocation by the governor of Texas whenever it shall be deemed by said governor that he has violated any of the criminal laws of the state" will not restore the holder to competency as a witness. *McGee v. State*, 29 App. 596, 16 S. W. 422.

That a previous conditional or partial pardon was granted to and accepted by the party, does not affect the validity of a full pardon subsequently granted to and accepted by him. *Martin v. State*, 21 App. 1, 17 S. W. 430.

Pardon and restoration of citizenship after conviction of a felony removes incompetency as a witness, and the conviction goes only to the witness' credibility. *Wormley v. State* (Cr. App.) 143 S. W. 615.

An ex-convict who was pardoned by the Governor for the purpose of testifying in the particular case, was a competent witness. *Flowers v. State* (Cr. App.) 147 S. W. 1162.

24. — **Credibility of pardoned convict.**—Instructions, see notes to art. 735 as to instructions on the weight of the evidence.

It is not essential, in order to warrant a conviction upon the testimony of a convicted felon whose competency to testify has been restored, that such testimony should be corroborated. *Thornton v. State*, 20 App. 519.

Though the pardon of one convicted of felony will in general restore his competency as a witness, the conviction may still be used to affect his credit. *Bennett v. State*, 24 App. 73, 5 S. W. 527, 5 Am. St. Rep. 875; *Dudley v. State*, 24 App. 163, 5 S. W. 649.

25. **Proof of disqualification.**—A judgment convicting a witness of a felony is the best evidence to prove his disqualification to testify, and not the admission of the witness himself. *King v. State*, 57 App. 363, 123 S. W. 135; *Bratton v. State*, 34 App. 477, 31 S. W. 379; *Baldwin v. State*, 39 App. 245, 45 S. W. 714; *Carden v. State*, 62 App. 545, 138 S. W. 598; *Harris v. State* (Cr. App.) 143 S. W. 1071.

The disqualification of being a convicted felon must be shown by the judgment of conviction. It can not be shown by parol testimony over the objection of the defendant. *Cooper v. State*, 7 App. 194; *Perez v. State*, 8 App. 610; *Perez v. State*, 10 App. 327.

Where defendant, on presentation by the state of a witness, is permitted without objection to elicit from him, for the purpose of showing his incompetency, that he had been convicted of a crime, and had not been pardoned, he should be held incompetent, the right to have his conviction shown by the records thereof being waived by the state. *Simkins, J.*, dissenting. *White v. State*, 33 App. 177, 26 S. W. 72.

When the competency of a witness on account of previous conviction for crime is in issue his incompetency can not be proved by the witness himself. *White v. State*, 33 App. 177, 26 S. W. 72.

When a witness has testified and afterwards the court admits parol testimony that such witness has been convicted of a crime, but admits it only for the purpose of discrediting the witness and does not exclude the evidence theretofore given by the witness there is no error. *Batson v. State*, 36 App. 606, 38 S. W. 48.

Where, on examination on voir dire, a witness states, without objection, that he is an unpardoned convict for felony, the party calling out such testimony cannot thereafter complain that such is not the best evidence; and, if no objection be made to the competency of the witness, that right is waived. *Moore v. State*, 39 App. 266, 45 S. W. 809.

It is not necessary to prove by the record that a witness has been convicted of a felony. He can be compelled to testify as to that. *Keaton v. State*, 41 App. 621, 57 S. W. 1128.

Where it appeared that a witness had not been arrested within the last 30 years, it was not error to sustain an objection to a question as to whether the witness had ever served a term on the poor farm. *Deckard v. State*, 57 App. 359, 123 S. W. 417.

Where defendant's attorney, in support of a motion for a new trial, alleged that he had failed to get a certified copy of the conviction of a witness against accused from a foreign state, because he had been informed by defendant's former attorney, that, pursuant to a conversation with the judge, the state would raise no question that the witness was not an unpardoned federal convict, and it appeared that at the time the witness was permitted to testify, over objection, all parties knew that he was an unpardoned convict, defendant was entitled to a new trial, though defendant's attorney misunderstood the effect of the conversation between defendant's former attorney and the court. *Carden v. State*, 62 App. 545, 138 S. W. 598.

Where the state, after a witness called by it had testified, in response to questions propounded by defendant, that he had been convicted of a felony, did not demand the record of conviction, or raise any question as to the existence of better evidence, such matters were waived; and the oral proof was sufficient for the purpose. *Price v. State* (Cr. App.) 147 S. W. 243.

Upon proper objection, the state may prevent a witness from testifying orally as to his conviction, and may require the defendant to produce the proper judgment of conviction and sentence. *Watts v. State* (Cr. App.) 148 S. W. 310.

In order to make a witness incompetent on the ground that she had been convicted of a felony, and not pardoned, such facts should have been shown by the court records; but it could be shown by other evidence than such records, if it was merely sought to be shown for impeachment purposes. *Daly v. State*, 72 App. 631, 162 S. W. 1152.

Oral proof that a witness has been convicted of a felony and not pardoned, so as to make him incompetent, is competent to prove that fact, in the absence of timely objection, requiring that it be proved by the judgment of conviction. *Matthews v. State*, 72 App. 654, 163 S. W. 723.

Any error in excluding a witness from testifying on the ground that he had been convicted of a felony, and not pardoned, when that fact was not proven by the judgment, was not ground for reversal, where it is admitted that the witness was, in fact, incompetent on that ground, since on a new trial the witness would still be incompetent, and his conviction could be shown by the judgment of conviction. *Matthews v. State*, 72 App. 654, 163 S. W. 723.

The best evidence of the conviction in a foreign state of one offered as a witness is a copy of the indictment and final judgment of conviction, properly certified to, together with a copy of the laws of that state showing that the acts constitute a felony under the laws of that state. *Goldstein v. State* (Cr. App.) 171 S. W. 709.

26. **Proof of pardon.**—When a pardon is relied on to prove a restoration of competency, the pardon itself should be produced, or its nonproduction should be satisfactorily accounted for, in which case it may be proved by the next best evidence, which would be a certified copy thereof, or an exemplification from the record or register of the secretary of state. *Hunnicut v. State*, 18 App. 498, 51 Am. Rep. 330; *Cooper v. State*, 7 App. 195; *Schell v. State*, 2 App. 30.

The court may hear proof, and even the statement of the party himself, to show that the pardon was intended to, and does cover, the particular offense of which he was convicted, notwithstanding discrepancies in the description of the conviction as recited in the pardon. *Hunnicut v. State*, 20 App. 632; *Hunnicut v. State*, 18 App. 498, 51 Am. Rep. 330; *Martin v. State*, 21 App. 1, 17 S. W. 430.

Where the court admits testimony of a witness that he has been convicted of a felony solely on the question of his credibility, and the witness also states orally at the time that he has been pardoned, it is not error to permit the witness to testify. *Perry v. State* (Cr. App.) 155 S. W. 263.

COMPETENCY OF WITNESSES IN GENERAL

See notes under art. 3687, *Vernon's Sayles' Civ. St.* 1914.

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.]

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| 1. Evidence in seduction cases in general. | 7. Necessity of corroboration. |
| 2. Continuances. | 8. Extent of corroboration required. |
| 3. Competency of seduced female. | 9. Admissibility of corroborative evidence. |
| 4. — Objections to competency. | 10. Sufficiency of corroboration. |
| 5. Testimony of prosecutrix—Admissibility. | 11. Instructions as to corroboration. |
| 6. Impeachment of prosecutrix. | 12. Review on appeal. |

1. **Evidence in seduction cases in general.**—See notes to Pen. Code, art. 1448.

2. **Continuances.**—See notes to arts. 605, 608, ante.

3. **Competency of seduced female.**—The seduced female is incompetent to testify against the defendant. *Cole v. State*, 40 Tex. 147. (This decision was made before the enactment of article 789.)

On a trial for seduction, where the offense was shown to have been committed before the passage of the act of 1891, permitting the seduced female to testify, held, that the court properly permitted the prosecutrix to testify, and that to do so would not be to make the said act *ex post facto* as to said offense. *Mrous v. State*, 31 App. 597, 21 S. W. 764, 37 Am. St. Rep. 834.

4. — **Objections to competency.**—Before the enactment of the preceding article it was held that the objection to the competency of the seduced female must be raised when she was placed on the stand. *Cole v. State*, 40 Tex. 147.

5. **Testimony of prosecutrix—Admissibility.**—Where the prosecuting witness has testified to the first act of intercourse, her testimony as to other acts of intercourse is admissible. *Murphy v. State* (Cr. App.) 143 S. W. 616; *Thacker v. State*, 62 App. 294, 136 S. W. 1095; *Bishop v. State* (Cr. App.) 144 S. W. 278.

It is competent to ask prosecutrix whether she would have yielded to the sexual embrace of defendant if he had not promised to marry her, also to prove by her that he is the father of her child. *Snodgrass v. State*, 36 App. 207, 36 S. W. 477; *Hinman v. State*, 59 App. 29, 127 S. W. 221.

Where prosecutrix testified that a child was born to her March 7, 1907, that the first act of intercourse with accused occurred in April or May, 1906, and that she had never had intercourse with any other man, it was proper to permit her to testify that she and accused had other acts of intercourse after the alleged seduction in explanation of her testimony of the birth of a child. *Hinman v. State*, 59 App. 29, 127 N. W. 221.

The state was properly permitted to ask prosecutrix why she submitted to intercourse. *Browning v. State*, 64 App. 148, 142 S. W. 1.

Prosecutrix may testify that a child was born to her on a specified date. *Bishop v. State* (Cr. App.) 144 S. W. 278.

Prosecutrix, having fully detailed the extent of her association with defendant, was properly permitted to testify that she had associated with defendant "like young people generally do." *Bishop v. State* (Cr. App.) 144 S. W. 278.

The prosecutrix may testify that her pregnancy was caused by accused. *Knight v. State*, 64 App. 541, 144 S. W. 967.

A question to the prosecutrix, as to whether she would have yielded to defendant had it not been on account of his promise to marry her, was not objectionable as leading and suggesting the answer desired by the prosecuting officer. *Black v. State*, 71 App. 621, 160 S. W. 720.

6. Impeachment of prosecutrix.—Mere reports and rumors in the neighborhood as to the character and conduct of prosecutrix are inadmissible in evidence unless such reports and rumors go to make up the prosecutrix's general reputation for chastity. A witness may if he knows state her general reputation; any act or statement of the prosecutrix tending to show a want of chastity is also admissible, but it must be testified to by the witness who saw the act or heard the statement. *Parks v. State*, 35 App. 378, 33 S. W. 872.

In a prosecution for seduction, where prosecutrix testifies that she has never had intercourse with any man except defendant, testimony of other men that they had had intercourse with her is admissible to impeach her. *Davis v. State*, 36 App. 548, 38 S. W. 174.

Where accused seduced prosecutrix by virtue of a promise of marriage, and she subsequently was guilty of improper acts with others, the fact of her subsequent misconduct may be considered on the question of her credibility as a witness. *Walls v. State* (Cr. App.) 153 S. W. 130.

Where accused's witnesses were allowed to testify that the reputation of the prosecutrix for virtue was bad, they cannot give specific facts showing the reputation to be deserved. *Hart v. State* (Cr. App.) 175 S. W. 436.

7. Necessity of corroboration.—The testimony of the injured female is alone insufficient to support a conviction. It must be corroborated. *Wright v. State*, 31 App. 354, 20 S. W. 756, 37 Am. St. Rep. 822; *McCullar v. State*, 36 App. 213, 36 S. W. 585, 61 Am. St. Rep. 847.

There must be some fact, independent of the testimony of the prosecutrix, tending to connect accused with the offense, to justify a conviction. *James v. State*, 72 App. 155, 161 S. W. 472.

The prosecutrix is an accomplice, and her testimony must be corroborated by evidence tending to connect accused with the commission of the offense, to support a conviction. *Hayes v. State*, 72 App. 249, 162 S. W. 870.

8. Extent of corroboration required.—The testimony of the prosecutrix need not be corroborated in each of the necessary elements of the offense; but the corroborative evidence is sufficient if it tends to connect accused with the commission of the offense. *Curry v. State* (Cr. App.) 151 S. W. 319; *Williams v. State*, 59 App. 347, 128 S. W. 1120; *Gillespie v. State*, 73 App. 585, 166 S. W. 135; *De Rossett v. State* (Cr. App.) 168 S. W. 531; *Slaughter v. State* (Cr. App.) 174 S. W. 580.

Under this article and art. 801, a prosecutrix is sufficiently corroborated when there are any facts that tend to show that accused committed the offense, and it is error to attempt to lay down a rule as to what particular issues of the case shall be corroborated; the word "tending," meaning to be directed as to any end, object, or purpose. *Nash v. State*, 61 App. 259, 134 S. W. 709.

The corroborative evidence need not be direct and positive independent of the testimony of the prosecuting witness, but proof of such facts and circumstances as tend to support her testimony, and which satisfy the jury that she is worthy of credit as to the facts essential to constitute the offense and which tend to connect the defendant with the commission of the offense, fulfills the requirements of this article, and it is not necessary that the prosecuting witness be corroborated both as to the act of intercourse and the promise of marriage. *Murphy v. State* (Cr. App.) 143 S. W. 616.

An instruction that the corroboration of prosecutrix's testimony must extend to and include the promise of marriage, if any, and the act of intercourse, and that her testimony connecting defendant with the commission of the offense must not only be corroborated but the jury must believe beyond a reasonable doubt that it is true, that her testimony is true, and that she has been corroborated by other evidence "connecting" defendant with the offense charged, was not prejudicial to defendant, but was too onerous to the state. *Bush v. State*, 71 App. 14, 157 S. W. 944.

It is not necessary that the prosecuting witness be corroborated both as to the act of intercourse and the promise of marriage, although the fact that defendant had married her after prosecution against him had been begun for seduction, and to secure a dismissal of that case, would be a circumstance tending strongly to corroborate on both issues; it being a virtual admission of those facts. *James v. State* (Cr. App.) 167 S. W. 727.

9. Admissibility of corroborative evidence.—Declarations that prosecutrix made to her mother are not competent to corroborate her testimony on the trial. *Snodgrass v. State* (Cr. App.) 31 S. W. 366.

It is not error for a prosecutrix to testify that she had borne a child; this being proper corroboration of the fact of intercourse with some man. *Stapp v. State* (Cr. App.) 144 S. W. 941.

Where the prosecuting witness had testified that accused gave her an engagement ring and it had been shown that he had purchased a ring at a store, testimony of a witness who worked there that he delivered to the prosecuting witness a package which was about an inch square and resembled a ring box was admissible. *Knight v. State*, 64 App. 541, 144 S. W. 967.

Circumstantial evidence of very slight probative value is admissible, owing to the nature of the crime, so that evidence of statements by accused wherein he

boasted of his conquests are admissible as circumstances corroborative of the prosecutrix, particularly in view of his later statement to the witness that he had gotten prosecutrix with child. *Knight v. State*, 64 App. 541, 144 S. W. 957.

10. Sufficiency of corroboration.—Corroborative evidence in proof of seduction need not be direct and positive, or such evidence as is sufficient to convict independent of that of the prosecutrix, but simply such circumstances as tend to support her testimony, and to satisfy the jury she is worthy of credit. *Wright v. State*, 31 App. 254, 20 S. W. 756, 37 Am. St. Rep. 822; *Capshaw v. State*, 73 App. 609, 166 S. W. 737.

Evidence held to sufficiently corroborate the testimony of prosecutrix to support a conviction. *Nash v. State*, 61 App. 259, 134 S. W. 709; *Beeson v. State*, 60 App. 39, 130 S. W. 1606; *Bost v. State*, 64 App. 464, 144 S. W. 589; *Stapp v. State* (Cr. App.) 144 S. W. 941; *Haves v. State*, 72 App. 249, 162 S. W. 870; *De Rossett v. State* (Cr. App.) 168 S. W. 531.

See opinion for facts stated held to sufficiently corroborate the prosecutrix in her statements as to defendant's promise to marry her. *Anderson v. State*, 39 App. 83, 45 S. W. 15.

While the prosecutrix is an accomplice and must be corroborated before her evidence will justify conviction, she may be corroborated by merely circumstantial evidence. *Bost v. State*, 64 App. 464, 144 S. W. 589.

Letters purporting to have been signed by accused did not corroborate the testimony of prosecutrix, where there was no testimony except hers to show that they came from accused. *James v. State*, 72 App. 155, 161 S. W. 472.

In a prosecution for seduction under promise of marriage, evidence of defendant's conduct toward her both prior and subsequent to the alleged seduction held sufficient to corroborate her testimony, that she yielded to him solely because she loved him, and he loved her, and had promised to marry her. *Gillespie v. State*, 73 App. 585, 166 S. W. 135.

11. Instructions as to corroboration.—Instructions in seduction cases in general, see notes to Pen. Code, art. 1448.

In a prosecution for seduction, the court instructed that the prosecutrix is an accomplice of defendant, and no conviction can be had on her testimony, unless corroborated by evidence sufficient to satisfy the jury of the truth of the evidence of prosecutrix. Held, that the instruction is erroneous, as not requiring the jury also to find the testimony of prosecutrix to be true. *Lemmons v. State*, 53 App. 269, 125 S. W. 400; *Vantreese v. State*, 59 App. 281, 128 S. W. 383.

The court should charge clearly and explicitly that there must be testimony outside of that of the alleged accomplice, tending to show that defendant induced the prosecutrix to have carnal intercourse with him by reason of his promise to marry her, and that by reason of such promise, she was induced to yield her virtue to him. *McCullar v. State*, 36 App. 213, 36 S. W. 585, 61 Am. St. Rep. 847.

An instruction that the prosecuting witness was an accomplice, and that defendant could not be convicted solely upon her evidence, unless the jury believed it to be true and that it showed the defendant to be guilty of the offense, and that even then defendant could not be convicted unless the jury believed there was other testimony tending to connect the defendant with the offense charged, is good. *Murphy v. State* (Cr. App.) 143 S. W. 616.

An instruction that corroborative evidence need not be direct and positive, independent of prosecutrix's testimony, but may consist of such facts and circumstances as tend to support her testimony, and which satisfy the jury that she is worthy of credit to the facts essential to constitute the offense of seduction, as previously defined, etc., was erroneous for failure to require that such corroborating evidence be such as tended to connect defendant with the offense charged. *Bishop v. State* (Cr. App.) 144 S. W. 278.

A charge that the prosecutrix is an accomplice, that accused cannot be convicted upon her uncorroborated testimony, that the corroboration must not only prove the offense but connect accused with its commission, taken in connection with a special charge requested by accused which instructed the jury that the prosecutrix was an accomplice and that her subsequent acts cannot be considered as corroborative of her testimony, is correct. *Knight v. State*, 64 App. 541, 144 S. W. 967.

Where there was no evidence except the testimony of prosecutrix to show that letters purporting to have been written by accused came from him, an instruction held erroneous, as permitting the jury to judge for themselves whether they would consider the letters as corroborative, and allowing them to consider the letters, though not identified by other evidence than that of prosecutrix, in connection with other evidence, in determining the sufficiency of the corroboration. *James v. State*, 72 App. 155, 161 S. W. 472.

An instruction that no conviction could be had upon the testimony of the female alleged to have been seduced, unless corroborated by other evidence tending to connect accused with the offense charged, that the corroborative evidence need not be direct and positive, independent of the prosecutrix, that such facts and circumstances as tended to support her testimony, and which satisfied the jury that she was worthy of credit as to the facts essential to constitute the offense, were sufficient, and that it was for the jury to say from all the facts and circumstances in evidence whether she had been sufficiently corroborated, was erroneous, and the court should have charged that the jury must find that her testimony was true, and also find that there was evidence, independent of her testimony, tending to connect accused with the commission of the offense. *James v. State*, 72 App. 155, 161 S. W. 472.

On a trial for seduction, there was no evidence, except the prosecutrix's testimony, to show that letters in evidence came from accused. Held, that instructions given were erroneous, and one requested improperly refused, because the jury should have been pointedly told that the letters could not be used as corroboration.

rative evidence unless there was evidence, independent of that of prosecutrix, tending to show that accused wrote them, and that she could not be corroborated by her own statements regarding them. *James v. State*, 72 App. 155, 161 S. W. 472.

Instruction as to corroboration held to properly state the law and not to lead jury to believe that burden was not on the state to corroborate prosecutrix. *Gillespie v. State*, 73 App. 585, 166 S. W. 135.

Where there was much circumstantial evidence tending to show the promise of marriage, the refusal of an instruction which charged that an unsigned letter, which the prosecutrix alone testified was written her by the accused, would not constitute corroboration was properly refused because disregarding all the circumstantial evidence. *De Rossett v. State* (Cr. App.) 168 S. W. 531.

12. **Review on appeal.**—If the evidence of corroboration is insufficient in law, the appellate court should so hold reversing and remanding the conviction. *Curry v. State*, 72 App. 463, 162 S. W. 851.

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.]

Cited, *Ethridge v. State* (Cr. App.) 172 S. W. 786.

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| 1. Statement in examining court. | 23. — Rebutting impeaching evidence. |
| 2. Competency of defendant. | 24. — Limiting impeaching evidence. |
| 3. Severance. | 25. — Bill of exceptions. |
| 3½. Explanation of failure to testify. | 26. Contradicting defendant. |
| 4. Effect of testifying. | 27. Corroboration. |
| 5. — Credibility of defendant. | 28. — Proving reputation for veracity. |
| 6. Self incrimination. | 29. Reference by counsel to accused's failure to testify. |
| 7. Use of evidence on subsequent trial. | 30. — Reference to failure to deny or contradict testimony. |
| 8. Examination of defendant. | 31. — Reference to lack of proof. |
| 9. — Direct examination. | 32. — Reference to failure to call witnesses or produce evidence. |
| 10. — Cross-examination. | 33. — Wife of accused. |
| 11. — Harmless error. | 34. — Character witnesses. |
| 12. Impeachment of defendant. | 35. — Reference to failure to deny charge. |
| 13. — Character of reputation. | 36. — Reference to failure to testify on former trial or hearing. |
| 14. — Reputation for veracity. | 37. — Cure of error. |
| 15. — Accusation or conviction of crime in general. | 38. — Review on appeal. |
| 16. — Accusation of particular offenses. | 39. Instructions. |
| 17. — Conviction of particular offenses. | 40. Reference by jury to failure to testify. |
| 18. — Contradictory statements. | |
| 19. — Confessions. | |
| 20. — Laying predicate. | |
| 21. — Examination of impeaching witnesses. | |
| 22. — Harmless error. | |

1. **Statement in examining court.**—See ante, arts. 294, 295.

This statute does not repeal articles 294 and 295. They relate to different subjects. *Aiken v. State* (Cr. App.) 64 S. W. 58.

2. **Competency of defendant.**—Relevancy of defendant's testimony, see notes to C. C. P., art. 783, and under particular offenses.

A defendant charged with assault may testify as to his motives and intentions. *Berry v. State*, 30 App. 423, 17 S. W. 1080; *Lewallen v. State*, 33 App. 412, 26 S. W. 832; *Koller v. State*, 36 App. 496, 38 S. W. 44.

The defendant in a scire facias proceeding is a competent witness in his own and in behalf of his codefendants. *Reddick v. State*, 21 App. 267, 11 S. W. 465.

The fact that the statute now permits a defendant to testify in his own behalf does not render admissible his declarations that are not a part of the res gestae. *Gonzales v. State*, 28 App. 130, 12 S. W. 733.

A convict, or an unpardoned ex-convict, can testify in his own behalf. *Williams v. State*, 28 App. 301, 12 S. W. 1103; *Shannon v. State*, 28 App. 474, 13 S. W. 599; *Jackson v. State*, 33 App. 281, 26 S. W. 194, 622, 47 Am. St. Rep. 39; *Nicks v. State*, 40 App. 5, 48 S. W. 186. And see *Quintana v. State*, 29 App. 401, 16 S. W. 258, 25 Am. St. Rep. 730.

Defendant's testimony that he thought his appointment for the purpose of arresting a certain person authorized him to carry a pistol was properly excluded, such person having been arrested and his case disposed of prior to the date of the carrying of the pistol. *O'Neal v. State*, 32 App. 42, 22 S. W. 25.

3. **Severance.**—The provision that where a severance is had the privilege of testifying extends only to the prisoner on trial, in no manner changes art. 791. *Jenkins v. State*, 30 App. 379, 17 S. W. 938.

3½. **Explanation of failure to testify.**—That accused has been ill with pneumonia would not affect his mind, and that he was still weak therefrom would not pre-

vent him from telling what he knew, and his mother's testimony as to his physical condition, owing to his illness, as explaining why he did not take the stand, was properly excluded. *Joseph v. State*, 59 App. 82, 127 S. W. 171.

4. Effect of testifying.—If a defendant testifies in a case he occupies the same position as any other witness. *Hutchins v. State*, 33 App. 298, 26 S. W. 399; *McFadden v. State*, 28 App. 241, 14 S. W. 128; *Quintana v. State*, 29 App. 401, 16 S. W. 258, 25 Am. St. Rep. 730; *White v. State*, 30 App. 652, 18 S. W. 462; *Bell v. State*, 31 App. 276, 20 S. W. 549.

Defendant's testimony in his own behalf is subject to the same tests as that of other witnesses. He is subject to be examined, cross-examined and impeached in precisely the same mode as other witnesses. *Huffman v. State*, 28 App. 174, 12 S. W. 588; *Hargrove v. State*, 32 App. 431, 26 S. W. 993.

When a defendant takes the stand as a witness he places himself in the same position as any other witness and may be contradicted or sustained in the same manner and upon the same character of proof. *Ware v. State*, 36 App. 597, 38 S. W. 198; *Morales v. State*, 36 App. 234, 36 S. W. 435, 846.

A defendant in a criminal case, who has taken the stand on his own behalf, is presumed to have done so after having advised with his counsel, and with full knowledge that he can become such witness, and that on doing so he is to be treated as any other witness, and also that his testimony so given can be used against him at any subsequent trial of such case. *Collins v. State*, 39 App. 441, 46 S. W. 933.

5. — Credibility of defendant.—In a prosecution for burglary, the credibility of defendant and of the officers testifying against him held for the jury. *Nowlin v. State* (Cr. App.) 175 S. W. 1070.

6. Self-incrimination.—See art. 4, and notes.

When defendant goes on the stand as a witness he is held to waive his constitutional privilege and can be cross-examined on any branch of the case, although he may not have been examined on such branch in chief. *Grooms v. State*, 40 App. 319, 50 S. W. 370; *Fyland v. State*, 33 App. 382, 26 S. W. 621.

Requiring a witness for the defense in a criminal case to answer on cross-examination that he had failed to testify when he was tried for the same offense does not compel a defendant to testify in his own behalf. *Holt v. State*, 39 App. 282, 45 S. W. 1016, 46 S. W. 829.

The state has a right to recall a defendant, who took the stand in his own behalf, for further examination, as against the objection that he cannot be compelled to testify against himself. *Flowers v. State* (Cr. App.) 152 S. W. 925.

Under Bill of Rights, § 10, providing that in all criminal prosecutions the accused shall not be compelled to give evidence against himself, a person cannot be compelled to testify in a criminal case pending against him, nor give testimony on the trial of another on which a prosecution may or can be founded against him. *Ex parte Muncy*, 72 App. 541, 163 S. W. 29.

Where the law of a state absolutely protects one from all punishment for the offense about which he is called to testify, he does not give evidence against himself, and Bill of Rights, § 10, providing that the accused in a criminal prosecution shall not be compelled to give evidence against himself, has no application. *Ex parte Muncy*, 72 App. 541, 163 S. W. 29.

Evidence as to testimony given by accused in another court in which he took the stand and testified voluntarily was not inadmissible, as compelling accused to testify against himself. *Mooney v. State*, 73 App. 121, 164 S. W. 828.

In a prosecution for forgery where the forged instrument is in the hands of accused, he cannot be compelled to produce it, for that would be compelling him to give evidence against himself. *Meredith v. State*, 73 App. 147, 164 S. W. 1019.

7. Use of evidence on subsequent trial.—When defendant has testified in his own behalf his evidence can be used against him on subsequent trial. *Preston v. State*, 41 App. 300, 53 S. W. 128, 831; *Robertson v. State*, 63 App. 216, 142 S. W. 533, Ann. Cas. 1913C, 440.

If accused takes the stand on the examining trial as a witness and is sworn, his testimony may be reproduced against him in any subsequent trial, whether he was warned or not, but where he makes a statement, as required by the statute, the state, before introducing such testimony, must show a warning. *Kirkpatrick v. State*, 57 App. 17, 121 S. W. 511.

The testimony of accused on his former trial is admissible in evidence on his subsequent trial, though he does not testify at such trial. *Jones v. State*, 64 App. 510, 143 S. W. 621.

In a prosecution with intent to kill, the state could prove accused's evidence on a former trial, which disputed his evidence at the present trial on a material point. *Luttrell v. State*, 70 App. 183, 157 S. W. 157.

A statement of facts in a former trial of the case containing the former testimony of accused was not inadmissible as against the objection that it was not the testimony of a witness who had heard the defendant so testify, or the objection that it was condensed in the statement of facts, or the objection that it was not in the form of question and answer as the stenographer made it, or that it was not signed by the defendant. *Best v. State*, 72 App. 201, 164 S. W. 996.

A bill of exceptions to the admission of a statement of facts in a former trial of accused containing his former testimony, which bill did not show that it was not agreed by the parties that the said admitted testimony had not been agreed to as the testimony of accused on the former trial, nor show that no witnesses were introduced who testified that the accused had given such testimony on the previous trial, and did not by any means exclude the idea that the testimony was not proven in some of the methods prescribed by law to render it admissible, was insufficient to show error. *Best v. State*, 72 App. 201, 164 S. W. 996.

That the testimony of accused in a former trial of the case was contained in a

statement of facts in that case would not make it inadmissible. *Best v. State*, 72 App. 201, 164 S. W. 997.

A statement of facts in a former trial of the case containing the testimony of the accused was not hearsay. *Best v. State*, 72 App. 201, 164 S. W. 997.

8. Examination of defendant.—After defendant testifies in his own behalf he is a witness for all purposes and after he has left the stand can be recalled by the State and questioned. *Hamilton v. State* (Cr. App.) 60 S. W. 40; *Mendez v. State*, 29 App. 608, 16 S. W. 766.

Defendant stated that he was shot in the left leg and exhibited it to the jury; held, that the state had the right to compel him to exhibit his right leg for the purpose of contradicting him. *Thomas v. State*, 33 App. 607, 28 S. W. 534.

It is not error to recall defendant to ask him if he had made certain statements in his testimony. *Lafferty v. State* (Cr. App.) 35 S. W. 374.

It was not error for the court, while defendant was being examined as a witness in his own behalf, to permit the district attorney and sheriff or deputy sheriff to hold a consultation in the presence of the jury. *Girtman v. State*, 73 App. 158, 164 S. W. 1008.

9. — Direct examination.—On a trial for homicide, a question asked accused by his counsel as to what he meant if he stated to the first people he met that he had to do what he did in defense of his family was properly excluded, where accused positively and emphatically denied making such statement and had not withdrawn his denial. *Hiles v. State*, 73 App. 17, 163 S. W. 717.

10. — Cross-examination.—Defendant as a witness may be compelled to answer any question, however irrelevant or disgraceful to himself, except where the answer might expose him to a criminal charge. *Crockett v. State*, 40 App. 178, 49 S. W. 392.

On indictment for murder, a defendant, having testified on his own behalf, may be compelled to admit that he killed another man in the same conflict, such killing being part of the *res gestæ*. *Hargrove v. State*, 33 App. 431, 26 S. W. 993.

On a prosecution for disturbing a religious meeting, testimony elicited from defendant on cross-examination, that he was drinking at the time of the disturbance, is admissible to show his mental condition, and as affecting the weight of his testimony. *Lewis v. State*, 33 App. 618, 28 S. W. 465.

When defendant takes the stand he becomes a witness for all purposes. The state is not confined in its cross-examination to matters elicited in chief. *Brown v. State*, 38 App. 597, 44 S. W. 176.

After defendant charged with keeping a disorderly house has made himself a witness in his own behalf, State can prove by him that he bought the house at a certain date. *Hamilton v. State* (Cr. App.) 60 S. W. 40.

In a prosecution for manslaughter, it was error to allow the district attorney to elicit from accused on cross-examination that certain eyewitnesses were not present in court, that all of them were present and testified for the state in a former trial, and that he did not know where they were and had not tried to get their depositions, since accused was not chargeable with the absence of state witnesses. *Askew v. State*, 59 App. 152, 127 S. W. 1037.

Where accused on a trial for passing a forged check testified that he had assumed a name for business purposes, evidence on cross-examination that he had gone by another name on a certain night, and that he had registered at a hotel under that name with a prostitute, because he did not desire to register under his correct name, as it might affect his business, was proper. *Fluewellian v. State*, 59 App. 334, 128 S. W. 621.

Where accused testifies in his own behalf, he subjects himself to cross-examination on all the facts relevant and material to the case, and cannot refuse to testify to any facts which would be competent evidence, if proved by other witnesses. *Edwards v. State*, 61 App. 307, 135 S. W. 540.

Where accused claimed that he killed deceased in self-defense, the state was properly permitted to cross-examine him as a witness in his own behalf, and show that prior to his surrender and trial he had never told any one that he acted in self-defense, and that, opportunity offering, he had not even told his brother. *Edwards v. State*, 61 App. 307, 135 S. W. 540.

In a homicide case, it was improper to permit the state to ask accused on cross-examination what a deceased witness testified to at a habeas corpus trial, and if accused did not wait until after that witness' death to deny the statement made by the witness. *Kemper v. State*, 63 App. 1, 138 S. W. 1025.

Though the witnesses for the state on a prosecution for carrying a pistol stated that defendant went home with C., on March 3d, and on that occasion displayed the pistol, defendant, who testified that on that night he did not go home with C., but went with another and did not then have a pistol, may on cross-examination be asked if on March 4th he did not go home with C. and then have a pistol. *Brogdon v. State*, 63 App. 475, 140 S. W. 352.

On cross-examination of person accused of burglary, it was not error to permit a question as to whether he knew of any reason why the prosecuting witness would have had him arrested, unless because he entered his house. *Weaver v. State* (Cr. App.) 150 S. W. 785.

Where a person accused of burglary testified that he went to the house of the chief of police selling a medicine, was asked by the chief if he had a license to sell it, and, upon answering that he did not know he had to have a license, was told to come to the chief's office, it was not error to permit cross-examination as to whether he knew he was selling a preparation manufactured by himself under the name of another preparation without a license, and whether he did not know that another person manufactured a preparation under that name, since, having testified that he did not know he had to have a license, it was permissible for the state to show that he did know he should have had a license. *Weaver v. State* (Cr. App.) 150 S. W. 785.

Where the state claimed that defendant had slandered his wife to manufacture evidence to obtain a divorce, that he might marry M., the court properly permitted the state to cross-examine defendant with reference to his attentions to M. *Elder v. State* (Cr. App.) 151 S. W. 1052.

Where defendant testified that he could not remember after 10 o'clock on the night of the offense, the court properly permitted him to be cross-examined as to whether his lack of remembrance was due to a blow received prior to that hour. *Shaffer v. State* (Cr. App.) 151 S. W. 1061.

In a prosecution for selling a half pint of alcohol in a prohibition county, the question on cross-examination of accused as to whether he kept intoxicating liquors in his drug store, to which answer was made that he kept alcohol, was proper. *Wirba v. State*, 70 App. 211, 156 S. W. 1164.

In a prosecution for rape, where defendant went into the matter as to whether prosecutrix had accused him, cross-examination as to that fact was proper. *Ulmer v. State*, 71 App. 579, 160 S. W. 1188.

The court should not have permitted the district attorney to ask defendant, in a prosecution for seduction, if he had not left another county because indicted for rape on a certain girl, when the attorney at the time was aware that no such indictment had ever been presented, or arrest made. *Capshaw v. State*, 73 App. 609, 166 S. W. 737.

Where accused testified that his former wife wrote him that she had procured a divorce, that relying upon this he contracted a subsequent marriage, but that the letter which he showed to his subsequent wife had been lost, accused may be cross-examined as to the contents of the letter to enable the state to show that he was mistaken as to the statements therein contained. *Coy v. State* (Cr. App.) 171 S. W. 211.

Where accused became a witness voluntarily in his own behalf, he was subject to cross-examination as any other witness. *Serrato v. State* (Cr. App.) 171 S. W. 1133.

Where one accused of adultery with his wife's niece admitted that she had been living in his home, but denied having intercourse with her, and introduced testimony reflecting on her good name, he can be asked on cross-examination whether he knew of any reason why she would falsely testify against him. *Bodkins v. State* (Cr. App.) 172 S. W. 216.

Where, in a prosecution for theft of property from a cotton gin owned by a company, defendant testified that he owned stock in the company, the state might, on cross-examination, ask him when he purchased the stock and what he paid for it, to ascertain if his claim was made in good faith. *Schenk v. State* (Cr. App.) 174 S. W. 357.

In a prosecution for burglary, where the defendant pleaded guilty and filed a plea asking that sentence be suspended, taking the stand to testify that he had never been convicted of a felony, the action of the court in permitting the state to cross-examine defendant about the burglary was proper, since where a defendant in a criminal prosecution voluntarily takes the stand he may be questioned about any matter legitimately connected with that under inquiry, as well as about matters he testified to on direct examination. *Brown v. State* (Cr. App.) 177 S. W. 1161.

11. — **Harmless error.**—Where the court sustained objections to improper questions asked accused on cross-examination, and the questions were not answered, and at the request of accused's counsel the court admonished the district attorney not to ask such questions again, and he complied, the conduct of the district attorney was not ground for reversal, and to justify a reversal the bill of exceptions must show that there were answers to the questions and that the answers were injurious to accused. *Huggins v. State*, 60 App. 214, 131 S. W. 596.

Where the district attorney did not attempt to prove that accused was guilty of other offenses to affect his credibility, though the court ruled that such testimony was admissible, and did not attempt to prove that accused had made a statement to a justice, but accepted accused's testimony that he had not made the statement, the rulings on the evidence presented no error. *Siars v. State*, 63 App. 567, 140 S. W. 777.

Though the fact, which the state attempted to elicit by a question to defendant, was inadmissible against him, allowing the question, which in and of itself was not of a harmful nature, was not prejudicial; he having answered against the existence of the fact. *Wyres v. State* (Cr. App.) 166 S. W. 1150.

In a prosecution for the unlawful sale of intoxicating liquor, the questioning of defendant as to whether he did not, shortly before the alleged sale, get off a train with liquor and get into a closed carriage and drive away rapidly was not reversible error, where objection to the question was sustained. *Clark v. State* (Cr. App.) 169 S. W. 895.

In a prosecution of one accused as accomplice to murder, a question by the district attorney, asked the defendant on cross-examination, if he had not debauched the dead man's wife, to which question the defendant's objection was sustained, was not error, where the defendant had admitted illicit intercourse with the woman. *Millner v. State* (Cr. App.) 169 S. W. 899.

Where, in a prosecution for cattle theft, one jointly indicted turned state's evidence, and the case was dismissed against him, and defendant proved that such codefendant's reputation was bad, he was not prejudiced by a question on cross-examination as to why, under such circumstances, he associated with the codefendant, to which he answered that the latter wanted to buy beef, and that he would as soon sell to him as any one. *Swafford v. State* (Cr. App.) 171 S. W. 225.

12. **Impeachment of defendant.**—Impeachment of witnesses generally, see notes to *Vernon's Sayles' Civ. St. 1914*, art. 3687.

Use of confession for purpose of impeachment, see notes to art. 810.

Where accused testifies in his own behalf, he assumes the character of a witness and may be contradicted, discredited, and impeached like any other witness,

except that a statement made while under arrest cannot be introduced to impeach him. *Burton v. State* (Cr. App.) 148 S. W. 805; *Bell v. State*, 31 App. 276, 20 S. W. 549; *Gonzales v. State*, 31 App. 508, 21 S. W. 253.

On the trial of a man for the murder of his wife, it is not error to permit the state, on cross-examination, to ask defendant, as a witness, if his wife did not bring a suit against him for divorce on the ground of adultery with the woman who stayed at his house. *Melick v. State*, 33 App. 14, 24 S. W. 417.

Defendant cannot be asked, for the purpose of impeaching him as a witness, if he was not convicted of the offense for which he is on trial at a former trial. *Richardson v. State*, 33 App. 518, 27 S. W. 129.

It is not competent to prove or to attempt to prove by defendant why his wife left him. *Williford v. State*, 36 App. 414, 37 S. W. 761.

Where accused, on trial for an assault with intent to rape, testified in his own behalf, it was error to show extraneous matters having no tendency to affect his credibility as a witness, but only to create a prejudice against him as being an immoral man. *Campbell v. State*, 62 App. 561, 138 S. W. 607.

13. — **Character or reputation.**—The inquiry as to character must be limited to the general reputation of the person in the community of his residence or where he is best known, and the witness must speak from his knowledge of this general character and not from his own individual opinion. *Brownlee v. State*, 13 App. 255.

When defendant has voluntarily put his character in issue, the prosecution may introduce evidence in rebuttal as to his general reputation, but not as to particular acts. Such evidence should be confined to defendant's character, and not that of his associates. *Holsey v. State*, 24 App. 35, 5 S. W. 523.

It was not prejudicial error for the attorney general, in addressing the jury on a trial for murder, to refer to the fact that defendant had not put in issue his own character. *Coyle v. State*, 31 App. 604, 21 S. W. 765.

Where defendant, who had been in the state but two years, put his character in evidence, a witness who up to three years before had known him in another state may testify that he knew his general reputation there, and that it was not good. *Thomas v. State*, 33 App. 607, 28 S. W. 534.

On trial for burglary, the fact that defendant slept with lewd women does not tend to impeach his veracity and is not admissible. The question of chastity has no bearing on defendant's veracity. *Hudson v. State*, 41 App. 453, 55 S. W. 492, 96 Am. St. Rep. 789.

It is inadmissible to prove on cross-examination of defendant why his wives left him, it being shown that he had been married three times and that two of his wives had quit him. *Jenkins v. State* (Cr. App.) 57 S. W. 810.

In a prosecution for unlawfully carrying a pistol wherein it was claimed by defendant and the city marshal that the marshal went to defendant and informed him there was a show coming to town and that he wanted him to get his pistol and go to meet the train, to protect the town from thugs, and that thereupon he procured a pistol, walked to the back door of a saloon, and fired it off, evidence that he and the marshal got drunk and went on the streets, and whooped and hallooed, knocked one or two men down, and made considerable noise, was admissible to impeach and contradict him. *Schuh v. State*, 58 App. 165, 124 S. W. 908.

On trial of accused for whipping his wife, the court erred in requiring him to answer how many times he had been married, and how many living wives he had, etc.; his conduct toward such other women not being in issue. *Treadaway v. State*, 61 App. 546, 135 S. W. 147.

A question to accused, after he had put his character as a law-abiding citizen in evidence, "You broke a couple of S.'s ribs, didn't you?" referring to another difficulty he had had, answered in the negative, was improper. *Ward v. State*, 70 App. 393, 159 S. W. 272.

In a prosecution for larceny from the person, the fact that defendant was a prostitute can always be drawn out upon her cross-examination. *Wilson v. State*, 71 App. 426, 160 S. W. 967.

In a prosecution for homicide, where defendant had denied having had an altercation with a road overseer, even though the state might show that defendant had previously been convicted for such altercation, it was error to permit all the details of that transaction to be presented to the jury. *House v. State* (Cr. App.) 171 S. W. 208.

14. — **Reputation for veracity.**—When a witness testifies to defendant's reputation for veracity he may further testify that defendant is unworthy of belief. *Ware v. State*, 36 App. 597, 38 S. W. 198.

When defendant testifies as a witness, his general reputation for truth and veracity at time of trial can be shown. *Renfro v. State*, 42 App. 393, 56 S. W. 1018.

15. — **Accusation or conviction of crime in general.**—See *Carroll v. State*, 32 App. 431, 24 S. W. 100, 40 Am. St. Rep. 756; *McCray v. State*, 38 App. 609, 44 S. W. 170.

Evidence of other offenses in general, see art. 783, ante.

Where accused testified in his own behalf, evidence that he had been indicted for several offenses was admissible as bearing on his credibility. *Dedford v. State* (Cr. App.) 170 S. W. 727; *Warren v. State*, 33 App. 502, 26 S. W. 1082; *Rutherford v. State* (Cr. App.) 34 S. W. 271; *Chance v. State*, 63 App. 602, 141 S. W. 113.

An accused, who testifies in his own behalf, can be forced to testify that he has previously been convicted and served a term in the penitentiary, unless such conviction is so remote as to be inadmissible. *Keets v. State* (Cr. App.) 175 S. W. 149; *Darbyshire v. State*, 36 App. 547, 38 S. W. 173; *Campbell v. State*, 62 App. 561, 138 S. W. 607.

Offenses showing moral turpitude which defendant has committed can be proved to discredit him. *Ross v. State*, 40 App. 352, 50 S. W. 336; *White v. State*, 61 App. 498, 135 S. W. 562.

It is not competent to prove by defendant as going to his credit that he has been convicted of such misdemeanors as do not impute moral turpitude. *Goode v. State*, 32 App. 505, 24 S. W. 102; *Williford v. State*, 36 App. 414, 37 S. W. 761; *Brittain v. State*, 36 App. 406, 37 S. W. 758; *Fitzpatrick v. State*, 37 App. 20, 38 S. W. 806.

A defendant who makes himself a witness may, like any other witness, on cross-examination have his credibility attacked by questions as to whether he had not been previously arrested for crimes. *Jackson v. State*, 33 App. 281, 26 S. W. 194, 622, 47 Am. St. Rep. 30.

A defendant who testifies in his own behalf may be asked, for the purpose of attacking his credibility, if he has been accused of other crimes. *Oliver v. State*, 33 App. 541, 28 S. W. 202.

For the purpose of impeaching defendant he may be asked on cross-examination whether he had been convicted of a felony, and it is not necessary to introduce the record of the conviction. *Bratton v. State*, 34 App. 477, 31 S. W. 379.

The defendant, while on the stand in a prosecution for the unlawful sale of intoxicating liquors, was asked how many times he had been indicted in that county, and how many fines he had paid, and the question and answer were limited by the court to felonies, and the jury was directed not to consider any answer to any other grade of offense. Held that, as limited by the court, the question and answer were properly allowed as impeaching evidence. *Green v. State*, 62 App. 345, 137 S. W. 126.

While it is permissible to show on cross-examination of accused that he has been charged in another case with a felony or an offense involving moral turpitude, it is improper to ask him concerning facts tending to show that he was in fact guilty of the other offense. *Moore v. State* (Cr. App.) 144 S. W. 598.

Though when a former crime is admitted, the circumstances attendant upon it cannot be gone into, yet when a defendant himself brings it into a case and seeks to arouse sympathy for himself by showing that he was led into crime as a mere boy by older persons, then the state may show the real facts, and, if on cross-examination of such defendant it develops that defendant committed another crime, which the state's attorney immediately asked the court to instruct the jury not to consider, there is no error. *Kelly v. State* (Cr. App.) 151 S. W. 304.

Where accused testifies he is subject to examination as any other witness, and can be compelled to testify to previous indictments or convictions for felony, if not too remote. *Turner v. State*, 71 App. 477, 160 S. W. 357.

It was error to compel accused as a witness in his own behalf to testify that he had been convicted on a prior trial of the same case though he invoked the benefit of the suspended sentence law. *Sorrell v. State* (Cr. App.) 169 S. W. 299.

Where accused took the stand and he made evasive answers to questions as to whether there were not other indictments pending against him, the indictments are admissible though only on the question of his credibility. *Collins v. State* (Cr. App.) 178 S. W. 345.

16. — **Accusation of particular offenses.**—That a defendant is under other indictments for assault and battery or for carrying weapons, cannot be shown to impeach his testimony as a witness, the offenses charged being misdemeanors not involving moral turpitude, and not legitimately affecting his credibility. *Brittain v. State*, 36 App. 406, 37 S. W. 758.

On prosecution for an assault with intent to commit rape, evidence that defendant had been indicted and acquitted of a similar offense is admissible, going to his credit as a witness. *Clark v. State*, 38 App. 30, 40 S. W. 992.

On trial for unlawfully carrying a pistol, when defendant becomes a witness in his own behalf, it is not admissible for the state to ask him if he has not been charged with like offenses a number of times. The fact that a man has carried a pistol cannot affect his credibility as a witness. *Bain v. State*, 38 App. 635, 44 S. W. 518.

The state may prove by a defendant who takes the stand on his own behalf that he is then under indictment for perjury. *Bruce v. State*, 39 App. 26, 44 S. W. 852.

In a prosecution for manslaughter, where accused, on cross-examination, in answer to a question as to his reason for firing a second shot into a saloon after shooting decedent, stated that his purpose was to keep any one from coming out and shooting him down, and that he did not shoot at one C., son of decedent, it was competent to ask him if he had been indicted for assault with intent to murder C., to show his motive for the statement and to affect his credibility. *Davis v. State*, 57 App. 165, 121 S. W. 1108.

As a means of attacking his credibility, it is legitimate to show by accused on cross-examination that he has been indicted for felonies in other cases. *Doyle v. State*, 59 App. 39, 125 S. W. 1131.

Evidence that accused, on trial for burglary, had theretofore been indicted for burglary, was admissible to affect his credibility. *Diseren v. State*, 59 App. 149, 127 S. W. 1038.

On cross-examination of accused, it was error to permit questions as to previous arrests for intoxication and for fighting, for the purpose of impeachment. *Powell v. State*, 60 App. 201, 131 S. W. 590.

It is error to require accused, on trial for murder, to show on his cross-examination that 14 years before he had been charged with an assault with intent to murder. *Thomas v. State*, 63 App. 98, 138 S. W. 1018.

In a homicide case, it was improper to ask accused on cross-examination if he had not been indicted for illegally taking money from negroes. *Kemper v. State*, 63 App. 1, 138 S. W. 1025.

In a prosecution for assault to murder, it was proper for the court to permit the state to examine defendant concerning his prior arrest for theft from the person of another; such offense being a felony. *Lacoume v. State* (Cr. App.) 143 S. W. 626.

The state on a trial for pursuing the occupation of selling intoxicating liquors in prohibition territory may show on the cross-examination of accused that he has been indicted for selling intoxicating liquors in counties where the making of a single sale is a felony to affect his credibility as a witness. *Clay v. State* (Cr. App.) 144 S. W. 280.

In a prosecution for hog theft, the state could show by accused that he had been indicted for cattle theft and for illegally marking a cow, the court having charged that the evidence was admissible solely for impeaching accused's credibility as a witness, and could not be considered as substantive evidence to prove guilt. *Brown v. State* (Cr. App.) 148 S. W. 808.

The fact that an indictment was pending against accused for seduction was admissible as affecting his credibility in a prosecution for theft, but it was error to permit a question "Are you not under arrest, charged with seducing B.'s little girl?" since only the fact of the pending charge of seduction could be shown, and not that the girl was "little," or whose daughter she was. *Thompson v. State* (Cr. App.) 150 S. W. 181.

The defendant having testified, the state could properly show that he had been arrested on a charge of burglary. *Black v. State* (Cr. App.) 151 S. W. 1053.

In a prosecution for selling intoxicants in violation of the local option law, evidence that other indictments for felony in violating the local option law were pending against accused in certain counties was admissible to affect accused's credibility as a witness. *Ross v. State*, 72 App. 611, 163 S. W. 433.

Where accused testified in his own behalf, the court properly permitted the district attorney to ask him on cross-examination if he were not then under indictment for assault with intent to murder. *Girtman v. State*, 73 App. 158, 164 S. W. 1008.

Where accused, charged with selling whisky in a prohibition county, testified in his own behalf, the state could attack his general reputation and show that he had been indicted for various offenses, including sales of intoxicating liquors in prohibition territory, and that indictments therefor were pending against him, to affect his credibility. *Martoni v. State* (Cr. App.) 167 S. W. 349.

On a trial for assault to murder, where accused testified in his own behalf, evidence that he had been twice indicted for murder was admissible to affect his credit as a witness. *Lamb v. State* (Cr. App.) 168 S. W. 534.

In a prosecution for theft of goats, where defendant took the stand for himself, it was permissible to show that there was another indictment for felony pending against him, as affecting his credit as a witness. *Simonds v. State* (Cr. App.) 175 S. W. 1064.

17. — **Conviction of particular offenses.**—Where defendant, on trial for embezzlement, had not put his character in issue, it was error for the trial court to permit a judgment of conviction against defendant for burglary to be introduced and read in evidence in order to overcome defendant's application for a continuance on the ground of the absence of a witness by whom it was expected to prove the good character of defendant. *Felsenthal v. State*, 30 App. 675, 18 S. W. 644.

In a prosecution for selling liquors on Sunday the prosecuting attorney may ask defendant on his cross-examination as a witness how many times he had been convicted for violating the liquor and Sunday laws. *Levine v. State*, 35 App. 647, 34 S. W. 969.

Evidence of a prior conviction of horse theft is competent to affect the credibility of defendant on trial for horse theft. *Ray v. State* (Cr. App.) 43 S. W. 77.

It was competent, as affecting his credit as a witness on his own behalf in a trial for an assault, to prove by defendant, on cross-examination, that he had therefore been sent to the reformatory for the offense of sodomy. *McCray v. State*, 38 App. 609, 44 S. W. 170.

In a prosecution for theft, evidence that accused had been sent to the penitentiary 24 or 25 years before for robbery was not admissible, being too remote; but evidence that he had pleaded guilty to the crime of theft 4 or 5 years before was admissible. *White v. State*, 57 App. 196, 122 S. W. 391.

The offense of swindling involves moral turpitude, and accused, testifying in his own behalf, may, on cross-examination, be required to show that he has been convicted thereof. *White v. State*, 61 App. 498, 135 S. W. 562.

On a trial for cattle theft, where it appeared that accused explained his possession of the stolen cattle by stating that he purchased them and had a bill of sale and a check showing payment, and the bill of sale was in evidence, accused's conviction for a felony and imprisonment for 18 months 18 years prior to the trial was too remote to justify proof thereof on his cross-examination. *Turner v. State*, 71 App. 477, 160 S. W. 357.

In a trial for homicide committed August 15, 1912, as the outcome of defendant's illegal conduct with deceased's wife begun some 18 months prior thereto and continued to the homicide, the admission of defendant's testimony on cross-examination that he was convicted of an assault with intent to murder on August 12, 1903, for which he served a penitentiary term of two years, leaving about August, 1905, was proper for purposes of impeachment only. *Lane v. State*, 73 App. 266, 164 S. W. 378.

On a trial for keeping a disorderly house, a statement by accused in the grand jury room, while the grand jury was investigating the case, that she had paid two fines for being "vag," was not admissible to impeach her testimony. *Bowman v. State*, 73 App. 194, 164 S. W. 846.

Where a conviction of accused of forgery had been set aside, the indictment quashed, and the case dismissed, evidence of such conviction was not admissible to affect the credibility of accused as a witness in his own behalf. *Bedford v. State* (Cr. App.) 170 S. W. 727.

18. — **Contradictory statements.**—See *Ferguson v. State*, 31 App. 93, 19 S. W. 901.

On a trial for murder committed in an attempt to rob a train, where defendant has testified that the conspiracy to rob was formed in a certain part of the country,

and not in the penitentiary, the state may impeach him by proving his declarations that it was formed while he and his co-conspirators were confined in the penitentiary. *May v. State*, 33 App. 74, 24 S. W. 910.

A defendant testifying in his own behalf stands as other witnesses and may be impeached by the same methods. Contradictory statements made by defendant while under arrest, though he had not been warned, were admissible to impeach him. *Cerda v. State*, 33 App. 458, 26 S. W. 992.

An accused, who does not admit on his examination that he made certain contradictory statements as to a material matter, may be impeached by the person to whom they were made. *Gonzales v. State*, 35 App. 33, 29 S. W. 1091, 30 S. W. 224.

In the examination of certain persons charged with robbery, and before his arrest as an accomplice therein, defendant willingly testified, without claiming his privilege to refuse to give evidence which might criminate him. Held, that such testimony was admissible against defendant on his own trial. *Armstrong v. State*, 34 App. 248, 30 S. W. 235.

Where statements of defendant are sought to be admitted in evidence against him, it is proper to show the question asked defendant as explanatory of his answer. *Harvey v. State*, 35 App. 545, 34 S. W. 623.

Statements by defendant while in jail are admissible in evidence to discredit his testimony. *Thompson v. State*, 35 App. 511, 34 S. W. 629.

Where, in a criminal prosecution, the accused testified in his own behalf, his evidence, given in habeas corpus proceedings, was properly admitted for purposes of impeachment. *Tenn v. State*, 64 App. 639, 143 S. W. 167.

After one accused of crime had testified in his own behalf, testimony of one who heard a conversation between the defendant and another, before the defendant was charged with the crime is admissible to impeach the defendant's testimony, even though the third person made notes of the conversation which were not signed by the defendant. *Anderson v. State*, 71 App. 27, 159 S. W. 847.

19. — Confessions.—See notes under art. 810.

The state cannot examine a defendant when a witness in his own behalf as to a confession made by him while in jail without being warned, for the purpose of laying a predicate for his impeachment, and then show by witnesses that he made the confession. *Morales v. State*, 36 App. 234, 36 S. W. 435, 846; *Quintana v. State*, 29 App. 401, 16 S. W. 258, 25 Am. St. Rep. 730; and *Ferguson v. State*, 31 App. 93, 19 S. W. 901; distinguished. *Phillips v. State*, 35 App. 480, 34 S. W. 272, overruled.

20. — Laying predicate.—After defendant has testified and left the stand the state can recall him to the stand to lay a predicate for his impeachment. *Clay v. State*, 40 App. 604, 51 S. W. 370.

21. — Examination of impeaching witnesses.—A witness called to testify to a conversation denied by accused should be examined in the language of the predicate laid for accused's impeachment; the witness being improperly permitted to state the conversation between himself and accused. *Kemper v. State*, 63 App. 1, 138 S. W. 1025.

22. — Harmless error.—Permitting accused, as a witness, to be asked if he had not, during a certain period, run a house of ill fame at a certain place, and came to another place to get women to take there for immoral purposes, was not reversible error, in view of accused's answer in the negative. *Hart v. State*, 57 App. 21, 121 S. W. 508.

Where the evidence showed that accused shot decedent, under circumstances eliminating self-defense, the admission of testimony of accused, in answer to a question whether his house had not been raided by officers as a gambling house and he arrested, and whether he had not pleaded guilty, that his house was not raided, but that he was arrested for shooting craps, and pleaded guilty, was not reversible error, where the court withdrew the evidence from the jury and instructed them not to consider it, and the jury found accused guilty only of manslaughter, with the minimum punishment. *Hart v. State*, 57 App. 21, 121 S. W. 508.

Even if admission of testimony on accused's cross-examination of his indictment for another offense was error, it was harmless, where the jury gave accused the minimum punishment. *Davis v. State*, 57 App. 165, 121 S. W. 1108.

It was prejudicial error to admit evidence to contradict accused on a collateral and immaterial matter, where there was a sharp conflict in the testimony on the main issue. *Holland v. State*, 60 App. 117, 131 S. W. 563.

The admission of a question whether accused had ever been indicted was not error, where he answered that he did not know, as no papers had ever been served on him. *Williams v. State* (Cr. App.) 148 S. W. 763.

On defendant's cross-examination he was asked if he had not been convicted of a felony and sentenced to the penitentiary within 8 or 10 years, to which he answered in the negative. He was then asked, "How long has it been?" Held, that the asking of such question to which an objection was promptly sustained was not prejudicial. *Clayton v. State* (Cr. App.) 149 S. W. 119.

Error in compelling defendant to testify as a witness in his own behalf that he had been convicted on a prior trial of the same case was not rendered harmless because he had accepted jurors after they had testified on their voir dire that they had heard of the former conviction, nor because accused had filed certain pleas before the jury was impeached in which such prior conviction appeared. *Sorrell v. State* (Cr. App.) 169 S. W. 299.

Where a conviction of accused of forgery had been set aside, the indictment quashed, and the case dismissed, and in a prosecution for another offense evidence of such conviction was erroneously admitted to impeach him, the error was harmless; the court having permitted him to testify that the conviction had been set aside and the case dismissed. *Bedford v. State* (Cr. App.) 170 S. W. 727.

23. — **Rebutting impeaching evidence.**—Testimony of accused that former prosecutions had been dismissed was admissible to rebut the assumption arising from evidence of former indictments. *Diseren v. State*, 59 App. 149, 127 S. W. 1038.

Where one accused of a crime testified on cross-examination that he had been indicted several times before for embezzlement, he should be permitted to testify on redirect examination, without going into details, that the indictments had all been dismissed, and that he was not guilty of the charges, especially where the statute provides that the defendant has a right to explain any act or circumstances introduced against him. *Cowart v. State*, 71 App. 116, 158 S. W. 809.

24. — **Limiting impeaching evidence.**—Where proof that accused had been indicted for an offense was admitted solely to affect his credibility as a witness, the court must limit the purpose for which the proof was admitted. *Clay v. State* (Cr. App.) 144 S. W. 280; *Thomas v. State*, 63 App. 98, 138 S. W. 1018.

When the confession of defendant is offered for the purpose of impeaching him the court should instruct the jury to consider such confession only for that purpose. *Phillips v. State*, 35 App. 480, 34 S. W. 272.

Where accused, on a trial for murder, denied while testifying in his behalf that he had made threats to kill decedent and statements indicating a deadly animosity towards decedent, evidence of accused's threat to kill and of his statements implying animosity was admissible as original testimony, and the court was not required to limit the testimony to impeach accused. *Harrelson v. State*, 60 App. 534, 132 S. W. 783.

It is not necessary to limit evidence of extraneous crimes to affect accused's credibility as a witness, unless the evidence of the extraneous crimes might be used by the jury against accused. *Harrelson v. State*, 60 App. 534, 132 S. W. 783.

Defendant testified to an alleged conversation with deceased before she stabbed him, during which she claimed he started toward her with a knife. She also testified that, soon after the killing, the constable and sheriff arrested her, and while they were putting her in jail she told them that deceased had cut her in two or three places on the back and had threatened to kill her. The sheriff, in rebuttal, testified that she said nothing about deceased having cut her on the back when they put her in jail, and that he did see a bruised place on one of her eyes, but did not see any sign of any cut on her, and the constable testified that he saw no bruises or marks on her at all. Held, that such evidence in rebuttal was not limited to impeachment, but was original testimony, and that the court did not err in refusing to limit the jury's consideration thereof to defendant's impeachment. *Young v. State*, 61 App. 303, 135 S. W. 127.

It was error not to limit evidence that accused had been indicted and acquitted of another homicide to its effect by way of impeachment. *Stanley v. State*, 62 App. 306, 137 S. W. 703.

If impeaching evidence is admitted to affect accused's credibility as a witness, the jury must be instructed that it was admitted for that purpose, so that it was error to merely charge in a rape case that evidence of other offenses by accused was admitted for the "impeachment of defendant as a witness, and for no other purpose," without stating whether the evidence was for impeaching accused's credibility, or character as a man of chastity, honesty, etc. *Edmondson v. State* (Cr. App.) 159 S. W. 917.

In a prosecution for the unlawful sale of a mortgaged chattel, where it was shown by the state, upon cross-examination of the defendant, that he had been indicted several times for embezzlement and the unlawful sale of mortgaged property, the evidence was not admissible as original evidence; and, when introduced for the purpose of impeachment, it was error for the court to refuse to limit the effect of the testimony to that purpose, upon proper request by the defendant. *Cowart v. State*, 71 App. 116, 158 S. W. 809.

25. — **Bill of exceptions.**—See art. 744, and notes.

26. **Contradicting defendant.**—Where defendant was charged with having a pistol when he committed the offense, and denied ever having carried a pistol, it is competent to prove that he had a pistol after the robbery. *Williams v. State*, 34 App. 523, 31 S. W. 405.

It was prejudicial error to admit evidence to contradict accused on a collateral and immaterial matter, where there was a sharp conflict in the testimony on the main issue. *Holland v. State*, 60 App. 117, 131 S. W. 563.

Where accused testified that he had not been drinking on the night of the killing, the state could show that 30 minutes after the killing his breath smelt strongly of whisky, as a circumstance affecting the accuracy of his testimony detailing the circumstances surrounding the killing. *Payton v. State*, 60 App. 475, 132 S. W. 127.

Where accused, testifying in his own behalf, was cross-examined to affect his credibility on a matter about which he had not been indicted, and the questions did not indicate facts justifying an indictment, his answers could not be contradicted. *Campbell v. State*, 62 App. 561, 138 S. W. 607.

In a prosecution for theft of a beef, testimony of a person who saw the property alleged to have been stolen in the pen of the defendant and told another person about it on a certain day, and of such other person that the first witness did so tell him, is admissible to show the time the beef was in the pen, and thereby disprove testimony of defendant to the effect that on the day before the witness saw the beef he purchased it from a traveler in another county. *Chance v. State*, 63 App. 602, 141 S. W. 113.

In a prosecution for homicide, for which accused and another were originally jointly indicted, evidence by the codefendant's brother that the codefendant and accused were together on the day of the shooting, and that accused knew that the codefendant and decedent were likely to have trouble, and that witness asked him to go with his brother to the hotel to keep him out of trouble, was admissible to show that accused knew of the existence of trouble between decedent and the codefendant, as well as to impeach accused's statement that he did not know of such trouble. *Ryan v. State*, 64 App. 628, 142 S. W. 878.

A person accused of crime who becomes a witness can have his credibility tested on cross-examination the same as any other witness, and the state may show by his cross-examination, if it can, that statements on direct examination were not true. *Weaver v. State* (Cr. App.) 150 S. W. 785.

In a prosecution for assault with intent to kill in which accused claimed that his arm had been so injured a few days before the difficulty that he could not use it, evidence that he had used an ax the day before the trouble, to break open a salt barrel, and carried part of the salt home on his shoulder, was admissible to impeach accused as a witness. *Luttrell v. State*, 70 App. 183, 157 S. W. 157.

Where, in a prosecution of a father for the rape of his daughter, the daughter testified that it occurred about 8 o'clock in the evening, while her mother was at a neighbor's, and defendant testified that his wife was not away from home that evening, testimony of the neighbor was admissible to rebut defendant's testimony. *Boyd v. State*, 72 App. 521, 163 S. W. 67.

Where, in a prosecution of a father for the rape of his daughter, the daughter testified that it occurred about 10 o'clock one morning, and defendant testified that on that morning he left home at 9 o'clock to go to a neighbor's to help kill a hog, testimony of the neighbor was admissible in rebuttal of defendant's testimony. *Boyd v. State*, 72 App. 521, 163 S. W. 67.

27. Corroboration.—Defendant should be allowed to corroborate his own evidence to collateral facts. *Milrahey v. State*, 33 App. 577, 26 S. W. 537.

Where the state showed contradictory statements by accused for the purpose of impeaching him, defendant was entitled to show statements by him shortly after the transaction under investigation consistent with his testimony. *Campbell v. State*, 35 App. 160, 32 S. W. 775.

A person charged with theft of property which he sold and claimed to have authority from the owner to sell, should be allowed to introduce, as tending to corroborate his statement, testimony that the owner had procured and tried to procure the services of other persons to sell such property. *Kimball v. State*, 37 App. 230, 39 S. W. 297, 66 Am. St. Rep. 799.

Where defendant's explanation is attacked and made to appear to be a recent fabrication he can show that he made the same statement at a time when there was no motive to fabricate. *Ballow v. State*, 42 App. 263, 58 S. W. 1024.

Where, in a prosecution for homicide, the state had accused testify that she had not told the neighbors of deceased's improper conduct as claimed by her, she was entitled to prove as supporting testimony that she had told a cousin with whom she was raised, and her attorney, and had acted on his advice in remaining with her husband. *Streight v. State*, 62 App. 453, 138 S. W. 742.

Defendant prosecuted for sale of a bottle of whisky, which he claimed he had not sold but was taken, could not, after testifying that the bottle belonged to him and D., and had been ordered for their own use, in the absence of any effort to impeach him by proof of contradictory statements or otherwise, corroborate his testimony by testimony of D. that he reported to D. that some one had taken their bottle of whisky, and run off with it. *Carver v. State* (Cr. App.) 150 S. W. 914.

Where accused took the stand and contradicted the prosecutrix, he cannot, his reputation for veracity not having been attacked, show that he told other witnesses of statements by prosecutrix which tended to corroborate his own testimony. *Hart v. State* (Cr. App.) 175 S. W. 436.

28. — Proving reputation for veracity.—Where accused was permitted to prove his general reputation as a peaceable and law-abiding citizen, and no effort was made to impeach his testimony, the fact that defendant's evidence and that of the state's witness conflicted furnished no ground to base an offer of evidence of defendant's general reputation for veracity. *Allen v. State*, 64 App. 225, 141 S. W. 983; *Wisnoski v. State* (Cr. App.) 153 S. W. 316.

In a prosecution, that there is a conflict between defendant's testimony and that of witnesses for the state does not entitle defendant to introduce evidence of his reputation for veracity. *McGrath v. State*, 35 App. 413, 34 S. W. 127, 941.

Though one accused of murder testifies in his own behalf, he is not entitled to show a good reputation for truth and veracity, if the state has not attempted to impeach him. *Lacy v. State*, 63 App. 189, 140 S. W. 461.

It was proper to exclude testimony for accused as to his reputation for truth and veracity where the state had not sought to impeach him, though two witnesses testified that accused made certain statements to them and in their presence at the time of the homicide, which statements defendant denied he made. *Pettis v. State* (Cr. App.) 150 S. W. 790.

29. Reference by counsel to accused's failure to testify.—Improper argument in general, see notes to arts. 724, 725, ante.

Prosecuting counsel is specially inhibited from alluding to, or commenting on, in argument, the failure of defendant to testify in his own behalf, and violation of this inhibition constitutes reversible error. *Johnson v. State*, 31 App. 464, 20 S. W. 980; *Hunt v. State*, 28 App. 149, 12 S. W. 737, 19 Am. St. Rep. 815; *McFadden v. State*, 28 App. 241, 14 S. W. 128; *Fulcher v. State*, 28 App. 465, 13 S. W. 750; *Reed v. State*, 29 App. 449, 16 S. W. 99; *Jordon v. State*, 29 App. 595, 16 S. W. 543; *Mendez v. State*, 29 App. 608, 16 S. W. 766; *Jenkins v. State*, 30 App. 379, 17 S. W. 938; *Lopez v. State*, 30 App. 487, 17 S. W. 1058, 28 Am. St. Rep. 935; *White v. State*, 30 App. 652, 18 S. W. 462; *Quintana v. State*, 29 App. 401, 16 S. W. 258, 25 Am. St. Rep. 730; *McCandless v. State*, 42 App. 655, 62 S. W. 747; *Sanchez v. State* (Cr. App.) 69 S. W. 514.

The district attorney in his argument said: "I now to defendant's face challenge him to explain his possession. He sits there silent; silence speaks louder than words and the defendant is silent." Held, a more palpable violation of the statute prohibiting allusion to defendant's failure to testify can not well be imagined. *Alvilla v. State*, 32 App. 136, 22 S. W. 406.

The prohibition against comments on defendant's failure to testify does not ap-

ply where defendant submits himself as a witness, but fails to testify as to certain inculpatory facts. *McFadden v. State*, 28 App. 241, 14 S. W. 128.

The prosecuting attorney read to the jury art. 1009, Pen. Code, viz.: When an injury is caused by violence to the person the intent to injure is presumed; and it rests with the person inflicting the injury to show the accident or innocent intention; held, this could not be construed as an attack on the defendant's failure to testify. *Jacobs v. State*, 37 App. 428, 35 S. W. 378.

Where defendant introduces the fact for the consideration of the jury that he has failed to testify he cannot complain because the State's counsel comments upon the same, nor that the jury in considering and passing upon his rights discusses the same in all its phases. *Wade v. State*, 43 App. 207, 63 S. W. 878, 879.

A remark by the state's attorney that, if accused would take the stand, the state would prove certain facts by him, whether strictly erroneous or not, is unnecessary and likely to result in reversible error. *Skidmore v. State*, 57 App. 497, 123 S. W. 1129, 26 L. R. A. (N. S.) 466.

The statement of the assistant county attorney, in the presence of the jury, that he could not prove a fact because accused did not testify, made in interpreting the argument of counsel for accused, is reversible error as alluding to accused's failure to testify. *Morgan v. State*, 62 App. 120, 136 S. W. 1065.

A prosecuting attorney's statement to the jury that, although accused had offered no testimony under his defense, the attorney did not intend to refer to his failure to testify was erroneous, as making such reference. *Wilcock v. State*, 64 App. 1, 141 S. W. 88.

State's counsel may comment upon the fact that a witness subpoenaed by accused and in court did not testify. *Black v. State* (Cr. App.) 143 S. W. 932.

A statement by the district attorney that she (meaning the wife of the deceased) knows better than any other person except accused that he was the man who killed her husband is not, taken alone, a reference to the failure of accused to testify. *Mitchell v. State* (Cr. App.) 144 S. W. 1006.

Where, in a prosecution for violating the liquor law, evidence of various trips made by defendant to a railway station, where he got whisky, was introduced to show his system, a statement by the district attorney in argument that he was anxious to know what kind of an explanation defendant's lawyers were going to make of those trips, that he could not imagine what explanation they would attempt to make, and if they make any explanation "they will be going some," was not objectionable as a reference to defendant's failure to testify. *Walker v. State* (Cr. App.) 145 S. W. 904.

A statement of the state's counsel in objecting to certain evidence as hearsay, that, if defendant's counsel desired to prove such fact, they should place defendant on the stand, was harmless. *Dosley v. State* (Cr. App.) 153 S. W. 878.

That the argument of defendant's counsel authorized the state's counsel to refer to the fact that he could not attack defendant's reputation until defendant had first raised the issue did not justify the state's attorney, in the same connection, in referring to defendant's failure to testify. *Manley v. State* (Cr. App.) 153 S. W. 1138.

In a prosecution for burglary, where it appeared that a watchman had fired three times at the alleged burglar, and that defendant when arrested had been shot through the arm, and defendant did not explain how he received the wound, although he contended that it would have been impossible for the watchman to have shot him, the district attorney's language, to the effect that if defendant was not wounded in the store the jury might like to know where he was wounded, was no more than an indirect reference to defendant's failure to testify, and not reversible error. *Pullen v. State*, 70 App. 156, 156 S. W. 935.

Where accused, on a trial for selling intoxicating liquor in prohibition territory, did not testify, the statement of the state's attorney in his argument to the jury that the jury might as well expect accused to testify that he sold intoxicating liquor as to expect a state's witness to so testify was an improper reference to accused's failure to testify. *Jones v. State*, 70 App. 343, 156 S. W. 1191.

Where, in a prosecution for horse theft, the district attorney refused to permit a witness to state a conversation with accused, saying, "M. is here and can tell it himself, that would be hearsay," defendant having failed to testify, such statement did not constitute such a reference to his failure to do so as would warrant a reversal; the court having charged that the jury should not consider or allude to defendant's failure to testify. *Gatlin v. State*, 72 App. 516, 163 S. W. 428.

In a criminal case the remark of the assistant prosecutor, enumerating the witnesses for the prosecution and those for defendant, who had not himself testified, and his inquiry of the county attorney as to whether there was any one else who testified for the defendant, eliciting the response that there was no one else, was not such an indirect reference to defendant's failure to testify as to direct the jury to such fact, within the rule that if the remarks relate to some circumstance or statement about which the defendant alone could be expected to testify, and the language is such as to call the jury's attention to the fact that he alone could dispute the matter, and that he had not done so, there would be an indirect reference to his failure to testify, but that if that was not the legitimate and necessary construction of the language used, it would not be held such a reference. *Link v. State*, 73 App. 82, 164 S. W. 987.

A slight indirect allusion to the failure of defendant to testify does not constitute reversible error. *Vickers v. State* (Cr. App.) 169 S. W. 669.

In a prosecution for slander, where accused did not take the stand in his own behalf, argument of counsel referring to accused's failure to place on the stand his particular friend, who was present when the alleged slander was uttered and was also present at trial, is not objectionable as a reference to accused's failure to testify himself, though it was stated in the last of the argument that it was not denied accused uttered the slander. *Ethridge v. State* (Cr. App.) 169 S. W. 1152.

30. — **Reference to failure to deny or contradict testimony.**—State's attorney may comment upon a failure to contradict a witness. *Kelly v. State*, 37 App. 641, 40 S. W. 803.

Where state's witnesses testified to an admission by accused when no one else was present, the statement of the prosecuting attorney in his argument to the jury that no one had denied the testimony was a reference to the failure of accused to testify. *Flores v. State*, 60 App. 25, 129 S. W. 1111.

The statement of the county attorney that accused had put no witness on the stand to deny the testimony of a witness for the state, made after the court had told him that his argument that accused was the only man that could deny certain testimony of a witness for the state, and had not done so, was improper, was an allusion to the failure of accused to testify, and was ground for reversal. *Deary v. State*, 62 App. 352, 137 S. W. 699.

In a prosecution for playing craps, when there were present only defendant, state's witness, and another, who was not permitted to testify, argument by the prosecuting attorney that defendant was asking acquittal because his friends had sworn to the bad reputation of the state's witness, and that, "in the face of the fact that no living man has taken the stand to deny that the defendant is guilty, they are going to ask you to acquit him," was objectionable, for commenting on accused's failure to testify. *Williams v. State* (Cr. App.) 146 S. W. 168.

Argument of prosecuting attorney in an incest prosecution, that they say that the prosecuting witness has not been corroborated, but they dare not put a witness on the stand to contradict her testimony, is error, as commenting on failure of accused to testify. *Vickers v. State* (Cr. App.) 154 S. W. 578.

In a criminal prosecution, where accused did not take the stand, it is reversible error for the county attorney, in summing up the evidence, to state how the various witnesses testified that accused committed the crime, and that accused did not deny it. *Coher v. State*, 72 App. 374, 162 S. W. 869.

A statement by the prosecuting attorney in argument that a witness had identified accused as the one who roomed with his wife at the home of the mother of the witness, and that the witness had not been impeached nor contradicted, was not objectionable, as a direct or indirect reference to the failure of accused to testify. *Harris v. State* (Cr. App.) 167 S. W. 43.

In a prosecution for misdemeanor, the county attorney's statement in argument that no witness had impeached the prosecuting witness, and that his testimony was uncontradicted by any witness or circumstance in this case, was not improper as being a direct or an indirect allusion to the failure of the defendant to testify. *Wilson v. State* (Cr. App.) 175 S. W. 1067.

Statement of a prosecuting attorney that complaining witness "has testified to all these facts, which have not been denied," is not a reference to the failure of accused to testify. *Taylor v. State* (Cr. App.) 177 S. W. 82.

31. — **Reference to lack of proof.**—The statement to jury by counsel for State that defendant has introduced no evidence, is not an allusion to failure of defendant to testify. *Henry v. State* (Cr. App.) 54 S. W. 594.

In a prosecution for violating the local option law, accused and two others were all who had any knowledge as to the transaction. The other two became witnesses for the state and testified to drinking liquor from a bottle which one of them had purchased from accused, who did not testify. The county attorney, in his closing argument, stated "with the town full of witnesses, the defendant produced no witnesses to show that he did not sell the whisky to G.," and, after exception, stated: "I wish the defendant would produce some witnesses to show that it was not whisky or brandy." Held, that such statements could not but refer to defendant's failure to testify, and were therefore error. *Shaw v. State*, 57 App. 474, 123 S. W. 691.

In a prosecution for forgery, the remark of the district attorney, "Where is the proof in this case that any one had any interest in this transaction except the man who had the instrument in his possession" (referring to defendant), was not objectionable as a comment on defendant's failure to testify. *Reeseaman v. State*, 59 App. 430, 128 S. W. 1126.

A statement by the prosecuting attorney that accused had offered no evidence save some letters and the testimony of his mother is a statement of fact and not a comment on accused's failure to testify. *Knight v. State*, 64 App. 541, 144 S. W. 967.

A remark by the prosecuting attorney in his argument, where the defendant did not testify, that the burden of proof was on defendant, and he must come in and show his reasons, etc., and he knew better than any one else whether he sold beer, etc., is prejudicial, and violative of the statute. *Minter v. State* (Cr. App.) 150 S. W. 783.

Defendant's attorney having argued that there was no evidence that defendant intended to kill deceased, the district attorney in his address in reply stated that the jury could only judge of defendant's intent from his acts, and then asked on whose testimony defendant's attorney based his statement, stating that certain witnesses specified did not so testify, and that defendant did not put certain other witnesses named on the stand to so testify, and then stated that there was no evidence that the gun that killed deceased was accidentally discharged, and that defendant did not intend to kill him. Held, that such argument was not erroneous as a reference to defendant's failure to testify in his own behalf. *Henson v. State* (Cr. App.) 168 S. W. 89.

Where accused did not testify in his own behalf, but introduced testimony tending to show that between two certain hours on the evening of the homicide he was not at the place where it was committed, comment by the state's attorney that the testimony did not show where accused was prior to those two hours was not erroneous as a comment on defendant's failure to testify. *Mason v. State* (Cr. App.) 168 S. W. 115.

On a trial for playing cards at a place other than a private residence occupied by a family, where C. testified that he gave defendants permission to go to his residence in his absence for the purpose of playing dominoes, the statement of the state's counsel in argument that the testimony of C. was all the testimony defendants had brought to contradict the state, that the defendants in latching the door and placing a quilt over the window were not perpetrating a joke on the officers, and that they brought no evidence that it was a joke, was not such a direct or indirect reference to defendant's failure to testify as necessitated a reversal. *Sloan v. State* (Cr. App.) 179 S. W. 156.

32. — Reference to failure to call witnesses or produce evidence.—See *Ray v. State*, 35 App. 354, 33 S. W. 869.

The district attorney may comment on accused's failure to produce material witnesses. *Sweeney v. State* (Cr. App.) 146 S. W. 883; *Ward v. State* (Cr. App.) 151 S. W. 1073.

On trial for incest, the female accomplice refused to testify. The district attorney commented upon the fact as being a circumstance tending to show defendant's guilt; held, improper and the court should so have instructed the jury. *Waggoner v. State*, 35 App. 199, 32 S. W. 896.

It is error to permit counsel to refer to the fact that the defendant did not use a witness that he had present on a former trial. *Gann v. State* (Cr. App.) 59 S. W. 897, 898.

The mere absence of witnesses for the state from a trial should not be used in argument against an accused person, unless he was instrumental in some way in keeping them away. *Askew v. State*, 59 App. 152, 127 S. W. 1037.

In a prosecution for homicide, in which accused relied on self-defense, he testified that when he killed deceased the latter was cutting him with a knife, that he cut open the sleeve of his shirt, that the arm of the shirt showed where he had cut, that there was blood on the shirt, that he had this shirt, and it was then in the possession of his wife, but the shirt was not introduced in testimony. Held, that the state's counsel was justified in commenting on the failure of accused to introduce the shirt in evidence, and on the fact that accused's wife had the shirt in her possession and refused to produce it. *Eggleston v. State*, 59 App. 542, 128 S. W. 1105.

In a prosecution for forgery, where the attorney for defendant argued that there was no evidence that the defendant could write, a reference of the district attorney to the failure to put defendant's mother, who was present in court, and his school teacher, on the stand to prove that he could not write, was not objectionable as a reference to defendant's failure to testify. *Reeseaman v. State*, 59 App. 430, 128 S. W. 1126.

In a prosecution for seduction, where it appeared that prosecutrix had written accused three letters, one of which he introduced in evidence, counsel for the state were justified in commenting upon accused's failure to introduce the other letters, and insisting that they were unfavorable to him, for, where a defendant is on trial for a crime, the absence of any testimony wilfully withheld by him forms a predicate for any legitimate deduction, especially where testimony relating to the letters was elicited on cross-examination of the prosecutrix, who hesitated to identify the letter introduced claiming it was part of two different letters. *Bost v. State*, 64 App. 589, 144 S. W. 589.

On a trial for receiving stolen goods, where the state did not claim that accused personally received them, but only that he directed that they should be placed in his barn, it was proper to permit the county attorney in his argument to refer to accused's failure to call as witnesses several relatives of his who were present when the goods were placed in the barn and when they were found and taken therefrom by the officers. *Kaufman v. State*, 70 App. 438, 159 S. W. 58.

33. — Wife of accused.—Where the defendant's wife must have known important facts favorable to the defendant, if such facts had existed, and it was within the power of the defendant to introduce her as a witness, but he failed to do so, it was held not beyond the limit of proper argument for the prosecuting counsel to refer to and comment upon these facts, it being not within the power of the state to introduce her as a witness against him. *Mercer v. State*, 17 App. 452.

In a prosecution of accused as a participant in a homicide committed by another, it was proper for the district attorney to comment on the fact that while the wife of the person committing the homicide was in the courtroom, and had not been sworn as one of the witnesses, accused could have called her as a witness, but the state could not. *Burnam v. State*, 61 App. 616, 135 S. W. 1175.

Where, though a bill of exceptions shows that an accused, in a prosecution for murder, and his wife were not living together at the time of the trial, it does not show, either that she would not have testified truthfully, or that she would not testify at all, upon being sought as a witness by the accused, or that she was living with persons unfriendly to him, there is nothing shown which would render improper the refusal of an instruction, directing the jury not to consider remarks of counsel for the state, commenting on the failure of the accused to put his wife on the stand. *Renn v. State*, 64 App. 639, 143 S. W. 167.

Where a defendant was granted a continuance to take the deposition of his wife, whom he was charged with assaulting and who had left him, the court did not err in permitting the prosecuting attorney to comment on his failure to take such deposition. *Yates v. State* (Cr. App.) 152 S. W. 1064.

In a prosecution for rape of a daughter a remark of the prosecuting officer, that: "The mother did not testify; the law seals her lips—he is her husband. I could have proven what she told her, but it is inadmissible evidence, and the law would not permit me"—was improper. *Ulmer v. State*, 71 App. 579, 160 S. W. 1188.

In a prosecution for procuring a woman for another man to have sexual inter-

course with, where it appeared that the woman changed her clothing in the room of accused's wife before she was brought to the other man, it is not improper for the prosecutor to refer to the fact that accused failed to introduce his wife; she being competent for him, and incompetent for the state. *Bybee v. State* (Cr. App.) 168 S. W. 526.

34. — Character witnesses.—The prosecuting attorney in his argument remarked: "Any man not a stranger in the county would have his neighbors prove his character. Tom Pollard has lived in Dallas county for more than twenty years; he was raised in Dallas county, yet he has brought no witness to speak in behalf of his character." Held improper and prejudicial. *Pollard v. State*, 33 App. 197, 26 S. W. 70.

35. — Reference to failure to deny charge.—On a trial for libel, defendant having testified in the case, the district attorney said defendant knew that his name appeared in this paper as business manager and if he did not write or circulate this libel why did he not come out in his paper and disavow his connection with so scurrilous an attack; held, not improper. *Noble v. State*, 38 App. 368, 43 S. W. 80.

The district attorney, in his argument, could comment on the fact that accused when charged with the crime when arrested did not deny it. *Adams v. State*, 64 App. 501, 142 S. W. 918.

In a prosecution for murder a district attorney's remarks as to what defendant said when the father of the murdered girl asked him why he had said to her that if she would not run away with him he would kill her and if she told what defendant said he would kill her, that defendant did not deny it, as he would if it had not been true, and that the jury knew he would have denied it, but instead he said they would go to law, were not objectionable as a reference to defendant's failure to testify. *Guerrero v. State* (Cr. App.) 171 S. W. 731.

36. — Reference to failure to testify on former trial or hearing.—Reference to conviction on former trial, see post, art. 843, and notes.

The inhibition is not limited or restricted to the pending trial but includes the failure of defendant to testify at a former trial. *Richardson v. State*, 33 App. 518, 27 S. W. 139; *Wilson v. State*, 54 App. 505, 113 S. W. 529; *Hare v. State*, 56 App. 6, 118 S. W. 545, 133 Am. St. Rep. 950.

It was error to permit the state, for the purpose of discrediting, as being of recent fabrication, a defense brought out for the first time on the second trial on defendant's examination, to show that defendant did not testify at the former trial. *Dorrs v. State* (Cr. App.) 40 S. W. 311.

Where accused, relying on self-defense, testified that decedent cut him across the breast with a knife, cutting through his two top shirts and an undershirt and grazing the skin, and a witness for him merely testified that she had noticed his shirt on the night of the murder, and noticed a place torn in the shoulder of it, questions asked accused on cross-examination as to what persons he had exhibited his clothing, and as to whether at the examining trial his clothing was in the same condition as immediately after the killing, and whether he had ever produced the clothing, or offered it in evidence, were proper, and not open to objection that they alluded to the failure of accused to testify or make any statement at the examining trial. *Welch v. State*, 57 App. 111, 122 S. W. 880.

It is improper for the district attorney to state in argument that accused failed to testify in the examining trial, and that the record showed that he had never denied the killing until the present trial, when he admitted it. *Eads v. State* (Cr. App.) 147 S. W. 592.

It was improper for the district attorney to ask accused whether he had testified at a hearing on habeas corpus; since he had the right to testify or not at such hearing, as he saw proper, and his failure so to do was not a circumstance against him. *Swilley v. State*, 73 App. 619, 166 S. W. 733.

In the third trial of a prosecution for incest, where the accused, who did not testify at either of the former trials, was asked whether he had ever before had an opportunity to give a reason for certain things concerning which he had testified, and an objection to the question was sustained by the court without the ground being made known to the jury, there was not such a reference to the failure of defendant to testify at the previous trials as to require a reversal, especially where the court charged the jury not to consider anything they might know about the former trials. *Vickers v. State* (Cr. App.) 169 S. W. 669.

Where the prosecuting attorney was permitted to ask defendant whether he had been informed at his preliminary examination that he could make a statement if he desired to do so, but was not permitted to ask whether he did make such statement, and the court, at defendant's request, instructed the jury that defendant's failure to make a statement at that time must not be considered by them, the fact of the failure to make such statement was brought before the jury by the defendant, and he cannot assign error thereon. *Millner v. State* (Cr. App.) 169 S. W. 899.

37. — Cure of error.—When the district attorney in his argument alludes to defendant's failure to testify, the case will be reversed, although the court may instruct the jury to disregard such allusion. *Hunt v. State*, 28 App. 149, 12 S. W. 737, 19 Am. St. Rep. 815 (reaffirmed *Wilkins v. State*, 33 App. 320, 26 S. W. 409); *Brazell v. State*, 33 App. 333, 26 S. W. 723; *Hankins v. State*, 39 App. 261, 45 S. W. 807.

It is reversible error for the prosecuting attorney to ask defendant whether he testified in a former trial, though the court withdrew the matter and instructed the jury not to consider the same. *Brown v. State*, 57 App. 269, 122 S. W. 565.

38. — Review on appeal.—Necessity of statement of facts, see art. 844, and notes.

Argument commenting on the failure of accused to take the stand cannot be reviewed on appeal in the absence from the record of any request for a special charge instructing the jury not to consider such statement. *Knight v. State*, 64 App. 541, 144 S. W. 967.

39. **Instructions.**—See notes to article 735, ante.

40. **Reference by jury to failure to testify.**—Where jury discuss in retirement failure of defendant to testify, case will be reversed. *Rogers v. State*, 55 S. W. 817; *Thorpe v. State*, 40 App. 349, 50 S. W. 383; *Tate v. State*, 33 App. 261, 42 S. W. 595; *Wilson, alias Garner v. State*, 39 App. 365, 46 S. W. 251.

Where, on reference by a juror to the fact that defendant had not testified, another juror stated that they could not consider this matter for any purpose, and it was not considered, and the trial court concluded that no injury was shown, defendant having received the lowest penalty, such reference by the juror was not ground for reversal. *Probest v. State*, 60 App. 608, 133 S. W. 263; *Powers v. State* (Cr. App.) 154 S. W. 1020; *Espinoza v. State* (Cr. App.) 165 S. W. 298.

The mere fact of comment, and nothing more by some of the jurors on accused's failure to take the stand, will not necessitate a new trial. *Coffman v. State* (Cr. App.) 165 S. W. 939; *Howard v. State*, 174 S. W. 607. But see *Huddleston v. State*, 70 App. 260, 156 S. W. 1168.

The failure of accused to take the stand as a witness should not be considered against him or alluded to by the jury in their deliberations. *Witty v. State* (Cr. App.) 171 S. W. 229; *Portwood v. State*, 71 App. 447, 160 S. W. 345.

The fact that on a trial for murder, after the evidence had gone to the jury, two jurors read a newspaper which contained an accurate synopsis of the evidence, and also correctly stated that "defendant was not placed on the stand," is not ground for a new trial. *Williams v. State*, 33 App. 128, 25 S. W. 629, 28 S. W. 958, 47 Am. St. Rep. 21.

The fact that a conviction of one charged with the larceny of a cow was brought about by the argument of a minority of the jury that accused, if innocent, could have shown where he got the cow, amounted to an improper reference to the failure of accused to testify, requiring the setting aside of the verdict. *Richards v. State*, 59 App. 203, 127 S. W. 823.

A juror's remark, after the jury had retired, that he wondered why accused was not on the stand, to which another juror stated that it was not necessary, and they did not have to unless they wanted to, and usually did not, or language to that effect, was such a comment upon accused's failure to testify as to require a reversal of the judgment of conviction. *Walling v. State*, 59 App. 279, 128 S. W. 624.

A conviction cannot be impeached for the declaration of a juror, after verdict and after the jury had dispersed, that if defendant had testified in his own behalf, and stated that his family were hungry, and that he killed the cow in question to get something to eat, he would have acquitted him. *La Flour v. State*, 59 App. 645, 129 S. W. 351.

Evidence as to making and effect of remark in jury room as to defendant's failure to testify held not to show a matter of importance enough to require a new trial. *Rhodes v. State* (Cr. App.) 153 S. W. 128.

That the foreman of the jury upon retiring stated to the others that they could not consider the fact that accused did not testify does not, where there was no discussion of the matter, constitute misconduct authorizing a new trial, being a mere reiteration of the charge of the court. *Veach v. State*, 71 App. 181, 159 S. W. 1069.

Evidence in support of a motion for a new trial that, during the consideration of the case, one of the jurors wondered why defendant did not testify, that some one else remarked "that wasn't admissible," and some one else said, "Yes; we can't talk about that," while other jurors heard no such remarks at any time, did not constitute ground for reversal. *Cooper v. State*, 72 App. 266, 162 S. W. 364.

Where, on a trial for pandering, accused's failure to testify was referred to by the jurors in their deliberations on more than one occasion, one of them remarked that if he had gone on the stand and testified and shown that he ever worked they would not convict, and another stated that if he had anything good in his past record his attorney was too good a lawyer not to have shown that fact, a new trial should be granted. *Jones v. State*, 72 App. 496, 162 S. W. 1142.

A discussion by the jurors during their deliberations of the fact that defendant had offered no evidence is proper, and not a comment on the failure of the defendant to testify in his own behalf. *Henderson v. State* (Cr. App.) 172 S. W. 793.

Where the evidence in a prosecution for assault with intent to murder was conflicting as to whether accused or the prosecutor was the aggressor, a conviction cannot stand, where the jury discussed and considered accused's failure to take the stand and explain why he was armed. *Clark v. State* (Cr. App.) 177 S. W. 84.

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.]

See Pen. Code, arts. 89-91; C. C. Pr., arts. 788, subd. 3, 801, and notes.

See *Helm v. State*, 20 App. 41; *Blain v. State*, 24 App. 626, 7 S. W. 239; *Scroggin v. State*, 30 App. 92, 16 S. W. 651; *Jenkins v. State*, 30 App. 379, 17 S. W. 938. Cited, *Shrewder v. State*, 62 App. 403, 136 S. W. 461, 1200.

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| 1. Acts and declarations of conspirators. | 8. — Identity of offense. |
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1. Acts and declarations of conspirators.—See notes under art. 783.

2. Effect of other statutes.—This article is in no manner changed by art. 790, which provides that where two or more are jointly indicted, and a severance is had, the privilege of testifying extends only to the prisoner on trial. *Jenkins v. State*, 30 App. 379, 17 S. W. 938.

3. Incompetency in general.—A person charged, either in the same or another indictment, with participation in the offense on trial, is not competent to testify in behalf of accused. *Anderson v. State*, 27 App. 177, 11 S. W. 33, 3 L. R. A. 644, 11 Am. St. Rep. 189; *Duncan v. State*, 40 App. 593, 51 S. W. 372; *Rutter v. State*, 4 App. 57; *Boothe v. State*, 4 App. 202; *Helm v. State*, 20 App. 41; *Barnes v. State*, 28 App. 29, 11 S. W. 679; *Carrico v. State*, 26 App. 618, 38 S. W. 37; *Freeman v. State*, 33 App. 568, 28 S. W. 471; *Rangel v. State*, 22 App. 642, 3 S. W. 788; *Day v. State*, 62 App. 527, 138 S. W. 123; *Ryan v. State*, 64 App. 628, 142 S. W. 878; *Christian v. State*, 71 App. 566, 161 S. W. 101.

The codefendant is not competent as a supporting witness on a motion for new trial, unless no evidence was developed against him. *Delaney v. State*, 41 Tex. 601; nor is he a competent witness for the defense, unless he has been tried and acquitted. *Warfield v. State*, 35 Tex. 736; or has been fined and paid it. *Ellege v. State*, 24 Tex. 78; *Tilley v. State*, 21 Tex. 200; *Jordan v. State*, 29 App. 595, 16 S. W. 543; *Baldwin v. State*, 39 App. 245, 45 S. W. 714.

The defense cannot use an accomplice as a witness pending indictment. *Myers v. State*, 3 App. 8; unless the prosecution has been dismissed. *Morrill v. State*, 5 App. 447.

An indicted adulterer is not a competent witness for the paramour. *Morrill v. State*, 5 App. 447; *Rutter v. State*, 4 App. 57.

Where it appears that an indictment against a defendant's witness has been obtained, not in good faith, but for the purpose of depriving the defendant of the testimony of such witness, the disqualification provided by the preceding article does not obtain, and such witness will be held competent. See the case cited below for an illustration of this rule, and for the further holding that where the depositions of a witness were taken at a time when he was competent to testify, they cannot be rejected when offered by the defendant because of a disqualification of the witness produced by the act of the prosecution. *Doughty v. State*, 18 App. 179, 51 Am. Rep. 303.

If the proposed witness stands indicted for any character of complicity in the commission of the offense for which the defendant is on trial, he is an incompetent witness for the defendant. *Clark v. State*, 18 App. 467.

Defendant offered as a witness one A., who had been separately indicted for the same theft, and convicted of driving stock from its accustomed range, and his penalty affixed at a pecuniary fine. The state objected to the witness upon the ground that he was a convicted felon, and that he had not paid the fine assessed against him as penalty. Held that, though separately indicted, the proposed witness was indicted as a principal to the same offense, and unless he had been acquitted was not competent to testify in behalf of the defendant. *Woods v. State*, 26 App. 490, 10 S. W. 108.

When State uses accomplice as a witness, defendant has the right to cross-examine him then or to recall him for purpose of cross-examination without restriction. *Duffy v. State*, 41 App. 391, 55 S. W. 177.

A witness who was charged by information with having committed the same offense at the same time and place, is incompetent to testify in behalf of the defendant. *Robertson v. State*, 63 App. 268, 140 S. W. 105.

Under this article, one convicted for permitting a theatrical performance to be given on Sunday, and who had not paid his fine, but whose appeal was pending, was incompetent to testify in a prosecution of another employé for the same offense, on the same day, and at the same theater. *Oliver v. State* (Cr. App.) 144 S. W. 604.

Accused, charged with assault with intent to murder, cannot introduce his brother as a witness in his behalf, where the brother was an active participant in the same affray out of which grew the prosecution, and was himself under indictment. *Carter v. State*, 73 App. 334, 165 S. W. 200.

In a trial of one charged as an accomplice for murder, where the codefendant, also indicted as accomplice, was not called to testify, a statement by the district attorney in the hearing of the jury that the codefendant was not a competent witness could not prejudice the defendant. *Millner v. State* (Cr. App.) 169 S. W. 899.

A person charged, in a separate indictment, with the same felony as defendant, and convicted thereof, was incompetent to testify on defendant's behalf, though sentence had been suspended. *Watts v. State* (Cr. App.) 171 S. W. 202.

4. — What witnesses excluded.—The rule of exclusion extends, in a case of theft, to a "receiver" of the stolen property. *Crutchfield v. State*, 7 App. 65.

On a trial for theft the defendant offered his mother as a witness in his behalf. The state objected to her testifying, because an indictment was pending against her charging her with receiving and concealing the property alleged to

have been stolen. The objection was sustained. Held error. The witness was neither charged as a principal nor as an accomplice in the theft, and because of her relationship to the defendant, she could not be an accessory, and she was therefore a competent witness in his behalf. *Gray v. State*, 24 App. 611, 7 S. W. 339. But see *Crutchfield v. State*, 7 App. 65.

No one can be an accessory after the fact, such as disqualifies him as a witness, unless he comes within the letter and spirit of Pen. Code, art. 86; that is, he must give some aid and assistance to the principal before he can be guilty. The evidence going to disqualify a witness must be sufficient to convict him as accessory before such witness would be an accessory. *Chenault v. State*, 46 App. 351, 81 S. W. 972.

The provision of the statute against pandering that the female for whom a room in a house of prostitution is alleged to have been procured may testify for or against accused shows an intention not to bring such witnesses within the rule governing accomplices' testimony, since, under the law, an accomplice cannot testify for a codefendant, and hence the court properly refused to charge that such female and the proprietor of the house of prostitution were accomplices. *Jones v. State*, 72 App. 496, 152 S. W. 1142.

5. — **Competency after acquittal or dismissal.**—If the indictment against the witness has been dismissed, or if the witness has been tried and acquitted, he is a competent witness for the defendant as well as for the state. *Rich v. State*, 1 App. 207; *Morrill v. State*, 5 App. 447; *Blain v. State*, 24 App. 626, 7 S. W. 239; *Brooks v. State*, 26 App. 87, 9 S. W. 355; *Scroggin v. State*, 30 App. 92, 16 S. W. 651; *Jenkins v. State*, 30 App. 379, 17 S. W. 938.

New trial to obtain testimony of acquitted codefendant, see *Huebner v. State*, 3 App. 458; *Williams v. State*, 4 App. 5; *Brown v. State*, 6 App. 286; *Rucker v. State*, 7 App. 549; *Helms v. State*, 20 App. 41; *Jones v. State*, 23 App. 501, 5 S. W. 133; *Gibbs v. State*, 30 App. 581, 18 S. W. 88; *Carrico v. State*, 36 App. 618, 38 S. W. 37.

6. — **Competency after conviction and payment of fine.**—See art. 797.

7. — **Necessity of indictment to disqualify.**—A person who, although a participant and a principal in the offense for which the accused is on trial, if he has never been charged with the offense by indictment or information, a competent witness for the accused. *Brooks v. State*, 26 App. 87, 9 S. W. 355; *Scroggin v. State*, 30 App. 92, 16 S. W. 651; *Campbell v. State*, 30 App. 646, 18 S. W. 409.

A person charged jointly with accused with an assault, who had been arrested and bound over to await the action of the grand jury, but had not been indicted, could testify in behalf of accused, although it was anticipated that the grand jury which had adjourned would be recalled during the same term. *Ponder v. State* (Cr. App.) 155 S. W. 244.

8. — **Identity of offense.**—A witness to be incompetent to testify in behalf of a defendant upon the ground that he was under indictment for the same offense must appear to have been indicted for participation in the very same criminal act for which the defendant is being tried. It will not suffice to disqualify him that he is indicted for a similar offense. *Day v. State*, 27 App. 143, 11 S. W. 36; *Thomas v. State* (Cr. App.) 146 S. W. 878.

Because two parties are charged separately with the same statutory offense, this will not render them incompetent as witnesses unless the offenses were part of the same transaction. *Secker v. State*, 28 App. 479, 13 S. W. 774; *Barnes v. State*, 28 App. 29, 11 S. W. 679.

A person is not disqualified to testify as a witness for defendant, on trial for unlawfully carrying knuckles made of metal, by his being under charge for similar offense. *Coleman v. State*, 58 App. 451, 126 S. W. 573.

Where, in a prosecution for playing craps, the state's witness testified that, while he and defendant were playing, B. came in, borrowed money from defendant, and then played with witness in a game in which the defendant did not engage, it was error to refuse to permit B. to testify for defendant, on the ground that he was an accomplice. *Williams v. State* (Cr. App.) 146 S. W. 168.

9. — **Declarations of codefendant.**—Unless part of the *res gestæ*, or part of an act or declaration put in evidence by the state, the acts and declarations of a co-conspirator are not admissible as evidence when offered by the defendant. *Wright v. State*, 10 App. 476; *Blain v. State*, 24 App. 626, 7 S. W. 239.

Since persons jointly charged with murder were not competent witnesses for each other, evidence by the sheriff as to what accused's codefendant had told him as to the way the killing occurred, and as to accused's conduct, was properly excluded, being indirect testimony by the codefendant. *Ryan v. State*, 64 App. 628, 142 S. W. 878.

The statement of one indicted for the same offense made while in jail under indictment, that he alone had anything to do with the crime, is inadmissible for defendant. *Wyres v. State* (Cr. App.) 166 S. W. 1150.

In the trial of one charged as accomplice to murder, where it appeared that the principal came to accused the morning after the homicide, and was taken by defendant to his hiding place, and the defendant was allowed to testify that at that time he did not know that the deceased had been killed, it was not error to exclude testimony as to what the principal said to the defendant on that occasion. *Millner v. State* (Cr. App.) 169 S. W. 899.

In the trial of one charged as accomplice to murder, declarations made by the principal are not admissible on behalf of the defendant, since the principal himself is not permitted to testify on behalf of such accomplice. *Millner v. State* (Cr. App.) 169 S. W. 899. See, also, notes under art. 783.

Under the provision of the Criminal Code that one charged jointly with the commission of an offense is not a competent witness, the brother of defendant, jointly indicted for the homicide, who had been convicted, but sentence suspended,

is not competent to testify on behalf of defendant. *Sunday v. State* (Cr. App.) 177 S. W. 97.

10. **Proof of incompetency.**—In a murder case it was held competent for the state to introduce in evidence, in order to sustain objections to a proffered witness, an indictment charging such witness as a principal in the commission of the same murder for which the defendant was on trial; and that such indictment, in the absence of a contrary showing, identified the murder therein charged as the same for which the defendant was on trial, and the court had judicial knowledge that the proposed witness had not been tried upon said indictment. It was also further held, that it was competent for the state to show, aliunde such indictment, the witness' participation in the murder, and thus establish his incompetency to testify in behalf of the defendant. *Moore v. State*, 15 App. 1.

It is not permissible for the state to introduce in evidence an indictment against a witness, charging a different offense than that for which the defendant is on trial. *Clark v. State*, 18 App. 467.

The defense in this case offered a witness by whom to prove an alibi. The witness was rejected, upon the state's motion, upon the ground that he was charged by a separate indictment with the same offense. The onus of establishing incompetency by showing that the indictment against the witness covered the same criminal act for which the defendant was on trial rested on the state; and, the state failing to establish that fact in this case, the presumption obtained in favor of the competency of the witness, and the ruling of the court was error. *Day v. State*, 27 App. 143, 11 S. W. 36.

A mere statement by the county attorney that a witness was incompetent because he was under indictment charged with the same offense as accused would not authorize the rejection of the witness without requiring proof of that fact. *Thomas v. State* (Cr. App.) 146 S. W. 878.

11. **Competency as witnesses for the state.**—A witness indicted for the same offense with defendant may testify for the State pending prosecution against the witness. *Duncan v. State*, 40 App. 593, 51 S. W. 372; *Myers v. State*, 3 App. 8; *Underwood v. State*, 38 App. 193, 41 S. W. 618; *Freeman v. State*, 33 App. 568, 28 S. W. 471; *Bolton v. State* (Cr. App.) 43 S. W. 984; *Stanfield v. State*, 73 App. 290, 165 S. W. 216.

In cases of severance, the prosecution, upon the trial of one, may call up that of another and enter a dismissal, and then make him a witness. *Johnson v. State*, 33 Tex. 570.

A co-conspirator may, as a witness, testify to the conspiracy against the defendant, and to all matters material to the issue. *Cohoa v. State*, 11 App. 153.

The disqualification prescribed by the preceding article does not apply to witnesses produced in behalf of the state, but only to those who are produced in behalf of the defendant. In so far as the prosecution is concerned, the rule at common law, with regard to the admissibility of such evidence, has not been changed by said article. *Rangel v. State*, 22 App. 642, 3 S. W. 788; *Meyers v. State*, 3 App. 8; *Myers v. State*, 8 App. 321; *Rutter v. State*, 4 App. 57; *Morgan v. State*, 44 Tex. 511.

A person indicted with another, or separately, for the same offense in a misdemeanor case, can after his conviction be used by the State as a witness against his co-defendant even though he has not satisfied the judgment of conviction. *Burdett v. State*, 51 App. 345, 101 S. W. 989.

An accomplice is a competent witness for the state. *McGinsey v. State* (Cr. App.) 144 S. W. 268.

Sustaining the claim of privilege of one indicted for the same offense as defendant, when called as a witness for the state, was not error; nor prejudicial to defendant, who claimed such witness was alone guilty. *Wyres v. State* (Cr. App.) 166 S. W. 1150.

12. — **Competency of testimony.**—A witness who had testified in a prosecution for burglarizing a store that he and accused hid knives taken therefrom at a certain place the day after the burglary was properly allowed to testify that just after he was before the grand jury he went to such place, and that the knives were gone. *Pinkerton v. State*, 71 App. 195, 160 S. W. 87.

13. — **Impeachment of accomplice.**—The defendant may prove by the witness that he was indicted for the same offense for which the defendant was on trial, but that the prosecution had been dismissed upon condition that he would testify as a witness for the state. *Hinds v. State*, 11 App. 238.

The defendant may show that a witness for the state is under indictment, or is suspected of the same offense, in order to show that he is interested. *Clark v. State*, 18 App. 467.

It is not competent to prove that an accomplice's general reputation for honesty is bad. *Coffelt v. State*, 19 App. 436. But the defendant may impeach an accomplice witness in the usual manner. *Turney v. State*, 9 App. 192.

It is error to refuse to permit introduction of letter to defendant of particeps criminis in prosecution for fornication for the purpose of contradicting her. *Boatright v. State*, 42 App. 442, 60 S. W. 761.

14. **Sufficiency of testimony of accomplice.**—See, post, art. 801.

15. **Removal of incompetency.**—See art. 727.

Where accused, when he announced ready for trial for theft, knew that another was charged in another county with participation in the same theft, so that he could not be a witness for accused, and it was not claimed that accused was surprised by any state's evidence, accused cannot complain that the court, upon excluding the other person charged as a witness for accused, refused to permit accused to withdraw his announcement of ready for trial, so that he might move to have the other person tried first, pursuant to article 727. *Burton v. State* (Cr. App.) 146 S. W. 186.

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.]

See *Hunnicut v. State*, 18 App. 498, 51 Am. Rep. 330; *Schell v. State*, 2 App. 30.

Examination by judge.—On a trial for rape, where the prosecuting witness was a young, inexperienced girl, it was not reversible error for the trial judge to examine her for the purpose of making clear certain features of her testimony, where his questions and conduct did not indicate to the jury his opinion of the merits of the case. *Wragg v. State* (Cr. App.) 145 S. W. 342.

See, also, notes to art. 787, ante.

Evidence as to competency.—Where the witnesses for the state, on a trial for homicide, were some distance from the shooting, and accused contended that they could not see the difficulty between him and deceased, testimony that from the point where such witnesses placed themselves they were in plain view of the point where the difficulty occurred was properly admitted. *Bankston v. State* (Cr. App.) 175 S. W. 1068.

Art. 793. [773] All other persons competent witnesses.—All other persons, except those enumerated in articles 798 [788] and 805 [795], 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.]

See notes under art. 788.

Privileged communications.—It is a settled rule of the law, founded upon public policy, that communications made by a client to his attorney, in the course of their relations as such, and with respect to the business about which the attorney had been employed by the client, shall not be disclosed. This rule has been most rigidly, and with great unanimity, adhered to by the courts, and the tendency has been to contract rather than relax it. *Sutton v. State*, 16 App. 490.

An attorney is not only not allowed to disclose any communications made to him by his client during the existence of that relationship, but is also disqualified to testify to any other fact which may have come to his knowledge by reason of such relationship from any source whatever. *Hernandez v. State*, 18 App. 134, 51 Am. Rep. 295. But to render the communications inadmissible they must have been made to the attorney, counsel, or solicitor acting for the time being in the character of legal adviser. The privilege does not extend to information received in the character of friend, and not as counsel; nor to a law student in the office of the attorney; nor to third persons present at a conference between the attorney and client. *Walker v. State*, 19 App. 176; *Rahm v. State*, 30 App. 310, 17 S. W. 416, 28 Am. St. Rep. 911; *Everett v. State*, 30 App. 682, 18 S. W. 674; *Russell v. State*, 38 App. 590, 44 S. W. 159.

Privileged communications are subject to two rules: 1. To be privileged they must pass between the attorney and his client in professional confidence, and in the legitimate course of the professional employment of the former. 2. If the communications were made before the commission of the offense, and for the purpose of being guided or helped in its commission, they are not privileged, and this second rule is not affected by the fact that the attorney was wholly without blame. *Orman v. State*, 22 App. 604, 3 S. W. 468, 58 Am. Rep. 662; *Orman v. State*, 24 App. 495, 6 S. W. 544.

The state desiring a deed of trust to introduce in evidence called the attorney for accused, and, over his objection and claim of privilege that his knowledge concerning the deed was secured through his relationship as attorney for accused, and under a threat of commitment for contempt for refusing to testify, compelled him to state that the deed was in the possession of the wife of accused. Held, that the court erred. *Downing v. State*, 61 App. 519, 136 S. W. 471.

Where defendant's attorney got possession of certain forged notes from others than defendant, and under circumstances excluding the idea that defendant was in any way connected with the attorney's possession, or had knowledge that the attorney had obtained them, the attorney's professional relation with defendant did not render his evidence as to obtaining the notes privileged. *Jordan v. State* (Cr. App.) 143 S. W. 623.

A witness consulted by the defendant as an attorney, and who advised the defendant, understanding that the relation of attorney and client existed as to the matter, cannot be questioned about matters as to which he advised defendant, since they are exempt as confidential communications. *Menefee v. State* (Cr. App.) 149 S. W. 138.

Statements by accused, while carrying on a general conversation in the presence of his attorney and a third person, made to both, are not privileged communications to the attorney. *Johnson v. State* (Cr. App.) 174 S. W. 1047.

— **Waiver of privilege.**—See *Walker v. State*, 19 App. 176.

— **Communications to physician.**—Declarations made by a defendant to, or in the hearing of, his attendant physician, are not privileged communications. *Steagald v. State*, 22 App. 464, 3 S. W. 771.

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.]

Privileged communications—in general.—One spouse can not be used to impeach the testimony of the other, by proving contradictory statements, as this would be allowing testimony of communications made while the marriage relation subsisted between them. *Roach v. State*, 41 Tex. 261.

Defendant's spouse testifying for defendant cannot be cross-examined relative to privileged communications. *Owen v. State*, 7 App. 329.

On a prosecution for murder the defense was that accused had been laboring under an insane delusion that his wife had been intimate with deceased. The wife testified that after the arrest her husband told her that he wanted her to testify that deceased had made indecent proposals to her and that it would go hard with him if she did not. Held, that this testimony should have been excluded. *Spivey v. State*, 45 App. 496, 77 S. W. 445.

A statement by accused to a husband made on the latter's request as to the cause of the trouble between accused and the husband's wife, that accused had heard that the wife had had intercourse with other men, was privileged as a confidential communication. *McDonald v. State*, 73 App. 125, 164 S. W. 831.

In a prosecution for murder, defendant's wife testifying to the identity of a knife found near deceased's body, and as to a threat made by deceased, may be cross-examined in reference thereto. *Stacy v. State* (Cr. App.) 177 S. W. 114.

— **Competency of testimony after termination of relation.**—The testimony of a divorced wife to a threat made by her former husband against one with whose murder he is charged, in the course of a conversation with the witness prior to the divorce, is inadmissible. *Davis v. State*, 45 App. 292, 77 S. W. 451.

A wife will not be permitted to testify as to threats made by her deceased husband in her presence alone against the defendant. *Gant v. State*, 55 App. 284, 116 S. W. 804.

A confession by a husband to his wife that he killed a man is absolutely privileged and cannot be used, even though he be dead. *Pace v. State*, 61 App. 436, 135 S. W. 379.

Confidential communications of a wife to her husband cannot, after their divorce, be testified to by him for the state on a prosecution of her. *Miller v. State* (Cr. App.) 144 S. W. 239.

— **Communications in presence of third persons.**—An exclamation of the husband immediately on firing the shot that killed deceased made in the presence of both his wife and her mother: "I told you I would do it," is not a confidential communication between husband and wife, but a part of the *res gestæ* and the wife can testify against the husband concerning same, she having since the homicide obtained a divorce from the husband. The exclamation was the transaction voicing itself in the presence of the wife and another. *Cole v. State*, 48 App. 429, 88 S. W. 343, 344.

A wife divorced at the time of trial is not inhibited from detailing a conversation between herself, her husband (the defendant), and her father (the deceased). It was not a conversation between the husband and wife as inhibited by this article. *Cole v. State*, 51 App. 89, 101 S. W. 218.

Communications or statements between husband and wife in the presence of others are not confidential and therefore are not privileged. *Richards v. State*, 55 App. 278, 116 S. W. 587.

Threats against defendant made by deceased husband to his wife in the presence of others are not privileged. *Gant v. State*, 55 App. 284, 116 S. W. 804.

On a trial for bigamy, evidence of declarations and communications between the alleged husband and wife in conversation before a third person, showing intimacy between the parties, is admissible. *Bryan v. State*, 63 App. 200, 139 S. W. 981.

In a prosecution for crime committed with defendant's stepdaughter, defendant's confession in the presence of his wife and daughter is not a "confidential communication." *Cowser v. State*, 70 App. 265, 157 S. W. 758.

— **Competency of testimony of third persons.**—A letter by a husband to his wife is a privileged communication, and the privilege having attached cannot be defeated by allowing one who has read the letter to testify as to its contents. *Gross v. State*, 61 App. 176, 135 S. W. 373, 33 L. R. A. (N. S.) 477.

A letter of defendant, on trial for bigamy, to his alleged former wife, which she had delivered to her father to be used as evidence against the defendant, is inadmissible as being a privileged communication. *Walker v. State*, 64 App. 70, 141 S. W. 243.

In a prosecution for bigamy, where the mother of the first alleged wife can identify the handwriting of defendant and, without the connivance of such wife, saw letters to her from him, she might identify them as his, but she could not so

testify as to letters which the wife had received and had sent to the district attorney, who was in possession of them. *Harris v. State*, 72 App. 117, 161 S. W. 125.

— **Legitimacy of children.**—On a trial for incest, where the defendant was being prosecuted for marriage with the daughter of his half-sister by the same father, defendant proposed to prove the declarations of his deceased mother and his deceased father that he (defendant) was not the son of his supposed father; that there was no blood relationship existing between himself and his supposed half-sister; and the further declaration of his deceased mother, that "if defendant got into trouble by his marriage, she would protect him." Held, that the evidence was inadmissible, there being no evidence of non-access between the supposed parents, nor that they were not living together, nor of impotency on the part of the putative father when defendant was conceived in his mother's womb. *Simon v. State*, 31 App. 186, 20 S. W. 399, 716, 37 Am. St. Rep. 802.

It is a well established rule, and supported on the highest considerations of public policy, that the lips of parents are sealed as to any testimony which would assail the legitimacy of their children born in wedlock. *Id.*

Declarations of defendant's deceased mother that he was illegitimate, though born in wedlock, made to him about the time of his marriage, were inadmissible to prove good faith on his part in entering into the marriage. The general rule as to the admissibility of declarations of deceased persons as to relationship, birth, and marriage, and establishing pedigree, is not applicable, because if the mother were living she could not testify as a witness to the facts proposed. *Id.*

Competency of wife's testimony in general.—See notes under art. 795.

Where, in a prosecution against a husband for perjury, it appeared that a deed of trust which the state desired to introduce in evidence was in the possession of the wife, it was error under this and the following article to compel the wife's appearance by subpoena duces tecum, and to require her to produce the deed to be used in evidence against her husband over his objection, on penalty of incarceration for contempt in case of her refusal. *Downing v. State*, 61 App. 519, 136 S. W. 471.

Under arts. 794 and 795, a wife, in a prosecution against the husband for incest with the wife's daughter by a former husband, may not testify, though since divorced, that she was pregnant at the time of the offense, to show the likelihood that accused committed the offense. *Vickers v. State* (Cr. App.) 154 S. W. 578.

Under arts. 794, 795, a wife who testifies for her husband on his trial for crime is subject to cross-examination like any other witness, except that new incriminating evidence cannot be brought out against the husband, but she can be impeached in the same way and to the same extent as any other witness. *Taylor v. State* (Cr. App.) 167 S. W. 56.

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.]

See Pen. Code, art. 506c, and notes thereunder.

See, also, note to article 794.

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| 1. Witness for defendant. | 7. — Consent or failure to object. |
| 2. — Cross-examination. | 8. Reference to failure of wife to testify. |
| 3. — Impeachment and contradiction. | 9. — Offenses by defendant against spouse. |
| 4. Incompetency as witness for state. | 10. Evidence of acts and declarations of spouse. |
| 5. — Co-defendants. | |
| 6. — Existence and severance of marriage relation. | |

1. Witness for defendant.—Husband and wife are competent witnesses for each other. *Alonzo v. State*, 15 App. 378, 49 Am. Rep. 207; *Dumas v. State*, 14 App. 464, 46 Am. Rep. 241; *Johnson v. State*, 27 App. 135, 11 S. W. 34.

When a spouse is a competent witness in the case, he or she may be compelled to testify therein as any other witness. *Alonzo v. State*, 15 App. 378, 49 Am. Rep. 207; *Dumas v. State*, 14 App. 464, 46 Am. Rep. 241; *Bramlette v. State*, 21 App. 611, 2 S. W. 765, 57 Am. Rep. 622.

On trial for conspiracy to commit arson, the object being to get insurance money on articles of personal property stored in a house, defendant is entitled to the testimony of his wife who stored the articles and made an inventory of them, and when she is sick and can not attend court he is entitled to a continuance for her testimony. *Dawson v. State*, 38 App. 9, 40 S. W. 731.

It was not error to refuse to permit defendant, in a prosecution for rape, to call his wife to testify in his behalf, after both sides had rested and the state admitted all that defendant stated that he desired to prove by her. *Boyd v. State*, 72 App. 521, 163 S. W. 67.

2. — Cross-examination.—The spouse of a defendant when a witness is subject to cross-examination, but the cross-examination must be confined to matters about which the witness has testified on the examination in chief. *Gaines v. State*, 38 App. 202, 42 S. W. 385; *Creamer v. State*, 34 Tex. 173; *Greenwood v. State*, 35 Tex. 587; *Owen v. State*, 7 App. 329; *Washington v. State*, 17 App. 197; *Johnson v. State*, 28 App. 17, 11 S. W. 667; *Hoover v. State*, 35 App. 342, 33 S. W. 337; *Hamilton v. State*, 36 App. 372, 37 S. W. 431; *Jones v. State*, 38 App. 87, 40 S. W. 807, 41 S. W. 638, 70 Am. St. Rep. 719; *Merritt v. State*, 39 App. 70, 45 S. W. 21; *Hull v. State* (Cr. App.) 47 S. W. 472; *Stewart v. State*, 52 App. 273, 106 S. W. 687; *Hobbs v. State*, 53 App. 71, 112 S. W. 314; *Pinckard v. State*, 62 App. 602, 138 S. W. 601;

Johnson v. State, 63 App. 50, 138 S. W. 1021; Johnson v. State, 72 App. 387, 162 S. W. 512; Taylor v. State (Cr. App.) 167 S. W. 56; Roberts v. State (Cr. App.) 168 S. W. 100.

The usual questions may be asked on the cross-examination of an accused's wife as to all matters pertinent to her direct examination as in all other cases. Swanney v. State (Cr. App.) 146 S. W. 548; Brown v. State, 61 App. 334, 136 S. W. 265; Ward v. State, 70 App. 393, 159 S. W. 272.

Where, in a murder trial, accused's wife testified on an issue of his insanity that he had falsely accused her of infidelity, it was not error to permit her to be asked on cross-examination if accused was "mad and mean" on such occasions. Kirby v. State (Cr. App.) 150 S. W. 455.

Where accused's wife was attempting to show that the killing was a sudden affair, without any pre-existing unfriendly feeling between accused and his family and decedent, the state could show, on her cross-examination, that she did not inquire as to decedent's condition after he was cut, or attend his funeral, though he was her son-in-law. Ward v. State, 70 App. 393, 159 S. W. 272.

Where a defendant introduces the wife of another defendant, who testifies to facts material to the defense, she may be cross-examined as to the matters testified to by her on direct examination, and subjected to the usual test of cross-examination as to all matters pertaining to her examination. Link v. State, 73 App. 82, 164 S. W. 987.

3. — Impeachment and contradiction.—A spouse called as a witness can be impeached in the same way and to the same extent as any other witness. Taylor v. State (Cr. App.) 167 S. W. 56; Shelton v. State, 34 Tex. 662; Hampton v. State, 45 Tex. 154; Magruder v. State, 35 App. 214, 33 S. W. 233; Roberts v. State (Cr. App.) 168 S. W. 100.

The wife may be cross-examined for the purpose of testing the truth of her testimony for the defense. Shelton v. State, 34 Tex. 662.

The prosecution may examine the wife as to her testimony on a former trial or examination of the same case. Hampton v. State, 45 Tex. 154.

In a prosecution for aggravated assault the wife of a state's witness is a competent witness for defendant. Clubb v. State, 14 App. 192; distinguishing Roach v. State, 41 Tex. 261.

Accused having called his wife to testify that he did not leave home the night of the robbery, the state could ask her on cross-examination if she did not testify at the examining trial that she did not know whether accused left home that night with a gun. Brown v. State, 61 App. 334, 136 S. W. 265.

Where, in a prosecution for murder of accused's wife's father, accused's wife testified for him that she told accused for the first time on the morning of the killing that decedent, her father, was the father of her child, the state could ask her on cross-examination whether she had not told accused that fact before the day of the killing, and told others that she told accused thereof a month before the killing. Swanney v. State (Cr. App.) 146 S. W. 548.

Where accused's wife testifies to witnessing the shooting, and is asked on cross-examination if about the time thereof she was not telephoning the other party to the telephone conversation may testify in rebuttal concerning it, since the testimony of the defendant's wife is subject to the same attack as that of any other witness. Reagan v. State, 70 App. 498, 157 S. W. 483.

Where the wife of the defendant testified to witnessing the shooting, it was proper to ask her on cross-examination if, about the time of the shooting she was not telephoning to a certain woman, since that tends to show the falsity of her testimony on direct examination. Reagan v. State, 70 App. 498, 157 S. W. 483.

In such case the wife may be impeached by proof of contradictory statements as to material matters testified to by her on her direct examination. Link v. State, 73 App. 82, 164 S. W. 987.

Where accused, on his preliminary examination, testified that he killed decedent solely because decedent called him a vile name immediately before the killing, and on the trial his wife testified that decedent had, on the night before the killing, insulted her, and that she had told accused of it that night, the state, on her cross-examination for purposes of impeachment, could show that decedent had previously insulted her, and that she had not told accused of it, and could ask her whether she had told a third person that she did not know why accused killed decedent. Taylor v. State (Cr. App.) 167 S. W. 56.

Where the state, for the purposes of impeaching the wife of accused, who testified that decedent had, on the night before the killing, insulted her, and that she had immediately told accused of it, asked her whether she had not told a third person immediately after the killing that she did not know why accused killed decedent, and she replied that she did not think that she used those words, the testimony of the third person that she informed him immediately after the killing that she did not know why accused killed decedent was admissible. Taylor v. State (Cr. App.) 167 S. W. 56.

The bias of a witness is admissible, and the extent thereof can be shown, and, if denied by the witness, the same can be proved by others, and this rule applies though the witness is the wife of accused. Roberts v. State (Cr. App.) 168 S. W. 100.

4. Incompetency as witness for state.—The husband and wife are incompetent to testify against each other or against a joint offender with either, and a dismissal of the prosecution as to the husband or wife on trial, after such illegal testimony has been admitted, will not cure the error. Dill v. State, 1 App. 278; Dungan v. State, 39 App. 115, 45 S. W. 19.

The husband or wife is not competent to testify for the state, unless the prosecution be for an offense committed by the one against the other. Johnson v. State, 27 App. 135, 11 S. W. 34; Johnson v. State (Cr. App.) 148 S. W. 328.

A husband can not testify as to the loss of the marriage bond in a prosecution against the wife. *Republic of Texas v. Mumford, Dallam, 374.*

When one spouse is not disqualified from testifying by reason of the marital relation, neither is the other. *Daffin v. State, 11 App. 76.*

The husband or wife of a party prosecuted for adultery is not competent to even make a complaint charging against him or her with said offense. *Thomas v. State, 14 App. 70; Compton v. State, 13 App. 271, 44 Am. Rep. 703.*

It is permissible to contradict the testimony of one spouse by that of the other, even though the effect be to discredit the one contradicted. *Clubb v. State, 14 App. 192.*

The spouse of the defendant's paramour is a competent witness against him in a prosecution for adultery. *Alonzo v. State, 15 App. 378, 49 Am. Rep. 207; Morrill v. State, 5 App. 447.*

The wife is incompetent to testify against her husband for aggravated assault upon her daughter, defendant's stepdaughter. *Johnson v. State, 27 App. 135, 11 S. W. 34.*

Where a witness for defendant was asked on cross-examination whether she knew the result of the trial of her husband and she answered that she did, and objection was sustained to the further question as to what the result of such trial was, no error or prejudice to defendant's rights was committed. *Williams v. State, 30 App. 354, 17 S. W. 408.*

Testimony of the wife that she knew her husband was going to kill deceased, was opinion evidence and incompetent. *Skaggs v. State, 31 App. 563, 21 S. W. 257.*

Proof by the wife of deceased, in a prosecution for murder, that her husband had a policy of insurance on his life for her benefit was inadmissible, there being no evidence of conspiracy by her and defendant to take the life of deceased, nor any evidence that she was instrumental in instigating, promoting or causing the death of her husband. *Barry v. State, 37 App. 303, 39 S. W. 692.*

Where, in a prosecution against a husband for perjury, it appeared that a deed of trust which the state desired to introduce in evidence was in the possession of the wife, it was error under this and the preceding article, to compel the wife's appearance by subpoena duces tecum, and to require her to produce the deed to be used in evidence against her husband over his objection, on penalty of incarceration for contempt in case of her refusal. *Downing v. State, 61 App. 519, 136 S. W. 471.*

A wife, by whose testimony her husband is sought to be impeached as a witness, cannot be compelled to testify that her husband has been guilty of a criminal offense, involving moral turpitude. *Pinckard v. State, 62 App. 602, 138 S. W. 601.*

Testimony of defendant's wife, given before the grand jury under process and without defendant's knowledge, not competent against defendant as original testimony, cannot be used against him indirectly as testimony tending to impeach the wife by a contradiction between her testimony before the grand jury and at the trial. *Johnson v. State (Cr. App.) 148 S. W. 328.*

In a prosecution for perjury committed in a divorce suit by the plaintiff therein, by his testimony that his wife was afflicted with a natural and incurable impotency, it was not error to admit evidence of an examination of the wife's person over an objection that this would permit the wife to testify against her husband. *Edwards v. State, 71 App. 417, 160 S. W. 709, 49 L. R. A. (N. S.) 563.*

5. — **Co-defendants.**—A spouse is not a competent witness against a co-defendant of the other spouse. *Dill v. State, 1 App. 278; Daffin v. State, 11 App. 76; Dungan v. State, 39 App. 115, 45 S. W. 19.*

But if either spouse becomes a competent witness the other is also competent. *Daffin v. State, 11 App. 76; Dill v. State, 1 App. 278; Bluman v. State, 33 App. 43, 21 S. W. 1027, 26 S. W. 75.*

On trial of an accomplice, the principal offender had gone on the stand and fully confessed his guilt. Held that it was not error to permit the wife of the principal to testify as a witness in the case against the accomplice. *Bluman v. State, 33 App. 43, 21 S. W. 1027, 26 S. W. 75.*

The wife is competent to testify against her husband's codefendant where the prosecuting officer has agreed to dismiss as to her husband, especially where her testimony was exculpatory of the husband. *Rios v. State, 39 App. 675, 47 S. W. 987.*

6. — **Existence and severance of marriage relation.**—The husband cannot be examined as to statements made by his wife for the purpose of impeaching her testimony, regardless of the time the relation commenced. *Roach v. State, 41 Tex. 261.*

The disqualification of husband and wife as witnesses against each other extends only to those who are lawfully married, and does not extend to those who are living together unlawfully, although they may recognize each other as husband and wife. *Mann v. State, 44 Tex. 642.*

In a prosecution for murder, the prosecution could prove by the divorced wife that defendant had not charged her with improper relations with deceased, claimed to have been the cause of the hostility. *Giebel v. State, 28 App. 151, 12 S. W. 591.*

Divorced parties occupy same relation towards each other that they did before marriage, as witnesses. *White v. State, 40 App. 371, 50 S. W. 705.*

The incompetency of a spouse as a witness for the state is not affected by a mere separation without a legal severance of the marriage relation. *Johnson v. State, 27 App. 135, 11 S. W. 34.*

Evidence, in a prosecution for bigamy, held to show prima facie that accused was previously married to another, so as to make the evidence of his second wife admissible. *Bryan v. State, 63 App. 200, 139 S. W. 981.*

Where the evidence in a bigamy case showed prima facie a previous marriage by accused, evidence of the second woman he attempted to marry was admissible to the effect that she married accused on a certain date, together with her identification of her signature to the marriage certificate, he representing himself as an

unmarried man, and that they lived together until she left him, and that accused confessed to her that he was married and had children when he married her, and told her the maiden name of his first wife. *Bryan v. State*, 63 App. 200, 139 S. W. 981.

Under arts. 794 and 795, a wife, in a prosecution against the husband for incest with the wife's daughter by a former husband, may not testify, though since divorced, that she was pregnant at the time of the offense, to show the likelihood that accused committed the offense. *Vickers v. State* (Cr. App.) 154 S. W. 578.

7. — **Consent or failure to object.**—The wife cannot testify against her husband, even with his consent, except in a case where he is charged with some offense against her person. *Brock v. State*, 44 App. 335, 71 S. W. 21, 60 L. R. A. 465, 100 Am. St. Rep. 859.

The testimony of the husband or wife against the other is not admissible and its admission is reversible error whether excepted to or not; nor can one testify against the other, even if that other consented to the admission of the testimony. (See *Brock v. State*, 44 App. 335, 71 S. W. 20, 60 L. R. A. 465, 100 Am. St. Rep. 859.) *Davis v. State*, 45 App. 222, 77 S. W. 452.

Though no exception is reserved, the testimony of the wife, either directly or through hearsay, cannot be used by the state as a predicate for the conviction of the husband in cases which do not involve any act of violence towards the person of the wife. *Woodall v. State*, 58 App. 513, 126 S. W. 591.

A wife cannot be used as a witness against her husband, even though no objection is urged at the time. *Johnson v. State* (Cr. App.) 148 S. W. 328.

Disqualification of a wife to testify against her husband in a criminal case other than for an offense committed against her, cannot be waived by the husband. *Eads v. State* (Cr. App.) 170 S. W. 145.

8. **Reference to failure to wife to testify.**—Accused applied for a continuance because of the absence of his wife as a witness, and at the close of his testimony, while he was on the stand, he stated that his wife had at all times desired to live with him, and was asked: "Q. If you had her here herself, would you prove it by her? A. I think I could. Q. Well, * * * she is now in attendance, and I now tender to you your wife to use as a witness." And accused objected to such statement. Held, that argument and allusion could be made to an accused's failure to use his wife as a witness for him, so that the showing that his wife was present was not error. *Coffey v. State*, 60 App. 73, 131 S. W. 216.

Though accused had asked a continuance to obtain his wife's testimony, it was improper for the district attorney to place her on the stand and offer her as a witness for accused; her presence being subject to proof in other ways. *Holland v. State*, 60 App. 117, 131 S. W. 563.

In a prosecution of accused as a participant in a homicide committed by another, it was proper for the district attorney to comment on the fact that while the wife of the person committing the homicide was in the courtroom, and had not been sworn as one of the witnesses, accused could have called her as a witness, but the state could not. *Burnam v. State*, 61 App. 616, 135 S. W. 1175.

Where, though a bill of exceptions shows that an accused, in a prosecution for murder, and his wife were not living together at the time of the trial, it does not show, either that she would not have testified truthfully, or that she would not testify at all, upon being sought as a witness by the accused, or that she was living with persons unfriendly to him, there is nothing shown which would render improper the refusal of an instruction, directing the jury not to consider remarks of counsel for the state, commenting on the failure of the accused to put his wife on the stand. *Renn v. State*, 64 App. 639, 143 S. W. 167.

Where, in a prosecution of accused as an accomplice to abortion, accused introduced his wife as a witness and asked her no questions concerning the operation alleged to have produced the abortion, it was not improper, on cross-examination, for the county attorney to say to her, "They have not questioned you anything about this operation, and for that reason we cannot do it"; the court on objection having instructed the jury not to consider the remark. *Fondren v. State* (Cr. App.) 169 S. W. 411.

Where, in a prosecution for homicide, accused testified to threats alleged to have been made by deceased against him and communicated by accused's wife, but did not call the wife to testify, such omission was a proper subject of argument by the state's attorney as bearing on the effect of such evidence. *Eads v. State* (Cr. App.) 170 S. W. 145.

It was error for the state's attorney, on cross-examining accused, to ask him if he did not know that his wife could not testify unless he waived his objection to her testimony, and on objection to state that the authorities held that a wife could testify unless accused objected, and that the state could tender the wife as a witness, and if he objected, her mouth was closed, and, having forced accused to object by placing the wife on the stand, to argue to the jury that accused had closed the mouth of his wife by refusing to waive objections to her testimony. *Eads v. State* (Cr. App.) 170 S. W. 145.

Where accused's wife, who was present at a homicide and in attendance on court at the trial, was not called by accused as a witness, it was permissible for the district attorney in his argument to refer to accused's failure to call her, as the state could not introduce her. *Gomez v. State* (Cr. App.) 170 S. W. 711.

9. — **Offenses by defendant against spouse.**—Bigamy, adultery and kindred offenses are not "offenses against each other," wherein spouses are competent witnesses against each other. *Johnson v. State*, 27 App. 135, 11 S. W. 34; *Republic of Texas v. Mumford*, *Dallam*, 374; *Boyd v. State*, 33 App. 470, 26 S. W. 1680.

One spouse is not a competent witness against the other in a prosecution against either for adultery, for incest, or for fornication, these not being offenses committed by one against the other. *Compton v. State*, 13 App. 271, 44 Am. Rep. 703 (overruling upon this point *Morrill v. State*, 5 App. 447, and *Roland v. State*, 9 App. 277,

35 Am. Rep. 743). See, also, *Thomas v. State*, 14 App. 70; *Sargent v. State*, 61 App. 34, 133 S. W. 885.

One spouse cannot testify against the other in a prosecution for the theft of his or her property. *Overton v. State*, 43 Tex. 616. But one may testify against the other in a prosecution for an assault by one upon the other. *Matthews v. State*, 32 Tex. 117; *Owen v. State*, 7 App. 329; *Navarro v. State*, 24 App. 378, 6 S. W. 542.

The wife is an incompetent witness against her husband who is prosecuted for slander against her. *Baxter v. State*, 34 App. 516, 31 S. W. 394, 53 Am. St. Rep. 720.

Where the husband is charged with assault on murder his wife, the wife is a competent witness for the state. *Bramlette v. State*, 21 App. 611, 2 S. W. 765, 57 Am. Rep. 622.

The wife is a competent witness for the state in a prosecution against her husband for abortion upon her produced by his violence. *Navarro v. State*, 24 App. 378, 6 S. W. 542.

In a prosecution for assault with intent to murder defendant's wife, the wife held properly allowed to testify to previous assaults and separations. *Hall v. State*, 31 App. 565, 21 S. W. 368.

Wife of one joint defendant in adultery is not a competent witness. *McLean et al. v. State*, 32 App. 521, 24 S. W. 898.

Spouses are competent witnesses against each other when the prosecution involves acts of personal violence by one against the other. *Baxter v. State*, 34 App. 516, 31 S. W. 394, 53 Am. St. Rep. 720, and cases cited.

Abortion upon and with consent of one who subsequently became defendant's wife is not "personal violence" against defendant's "wife." *Miller v. State*, 37 App. 575, 40 S. W. 313.

10. Evidence of acts and declarations of spouse.—Acts and declarations of the wife made in the absence of her husband, are hearsay and inadmissible against him. *Hamilton v. State*, 36 App. 372, 37 S. W. 431.

The declarations of one spouse are evidence against another when they are part of the *res gestæ* of the offense, or when the parties are co-conspirators in the offense, under the same rules governing other conspirators. *Cook v. State*, 22 App. 511, 3 S. W. 749.

Dying declarations of a daughter to her mother that her father had caused her death in attempting to procure an abortion could be proved by the mother who was divorced subsequent to the making of such declarations. *Ex parte Fatheree*, 34 App. 594, 31 S. W. 403.

Where one uses what purports to be a declaration of the wife in order to obtain from defendant an incriminating statement, such declaration and the answer of the defendant thereto are inadmissible in evidence. *Stiles v. State*, 44 App. 143, 68 S. W. 994.

Where a husband is on trial for killing his wife, the offense is one committed against her, such as is contemplated by this article, and her declarations are admissible against him as *res gestæ* and dying declarations. *Rice v. State*, 54 App. 149, 112 S. W. 307.

In a prosecution for false swearing, testimony by a grand juror, detailing statements made before the grand jury by defendant's wife and her father, to the effect that the wife was under 18 years of age, was inadmissible. *Woodall v. State*, 58 App. 513, 126 S. W. 591.

Evidence that after an altercation with deceased and before the shooting, accused had a conversation in his wife's presence, and that when he shot deceased she was where she could see the shooting, offered to show a preconceived killing did not require her to give testimony against her husband contrary to the statute, where she was not called as a witness. *Williams v. State* (Cr. App.) 148 S. W. 763.

In a prosecution of a husband for practicing medicine without a license, evidence that defendant treated witness, and that in his presence he paid defendant's wife money therefor, and that she accepted it after witness had offered the money to defendant directly and he had declined to take it, was not objectionable as compelling the wife indirectly to testify against her husband. *Mueller v. State* (Cr. App.) 153 S. W. 1142.

Where the defendant killed his wife and another at the same time, declarations by the wife, just after the shooting and prior to her death, which were part of the *res gestæ*, were admissible, in a prosecution for the killing of the other, notwithstanding they were uttered by the defendant's wife. *Robbins v. State*, 73 App. 367, 166 S. W. 528.

On a trial for keeping a disorderly house, the acts and statements of accused's husband, proved by the testimony of other witnesses, were not inadmissible, on the ground that to admit them permitted or compelled the husband to testify against the wife. *Farris v. State* (Cr. App.) 170 S. W. 310.

Admission against defendant of the acts and declarations of his wife as a co-conspirator is not compelling her to testify against her husband, in contravention of the statute. *Thompson v. State* (Cr. App.) 178 S. W. 1192.

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.]

See Const., art. 1, sec. 5.
See, also, ante, arts. 12, 788, subd. 2.

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.

See *Aldrich v. State*, 29 App. 395, 16 S. W. 251.

Competency in general.—A co-defendant is competent when the judgment against him was a fine and the same has been paid. *Tilley v. State*, 21 Tex. 200; *Ellege v. State*, 24 Tex. 78.

In misdemeanor, a defendant who has been convicted and has satisfied the punishment imposed, is a competent witness for his co-defendant. *Jordan v. State*, 29 App. 595, 16 S. W. 543. And see *Baldwin v. State*, 39 App. 245, 45 S. W. 714.

Competency for state.—A person indicted with another, or separately, for the same offense in a misdemeanor case, can after his conviction be used by the state as a witness against his co-defendant even though he has not satisfied the judgment of conviction. *Burdett v. State*, 51 App. 345, 101 S. W. 989.

Incompetency before conviction.—See art. 791; Pen. Code, art. 91.

Incompetency of one convicted of felony.—See art. 788, subd. 3.

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.]

Postponement of trial—Oath.—The judge may decline to testify, and postpone the case for trial before some other judge; but, if he testifies, he must do so under oath as other witnesses. *Valentine v. State*, 6 App. 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.]

See Willson's Cr. Forms, 928.

See ante, art. 791, and notes; Pen. Code, arts. 74 to 91, inclusive, and notes.

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1. Who are accomplices.—See Pen. Code, arts. 74-91, and notes.

Abortion, see Pen. Code, art. 1072.

The word "accomplice" is used in the preceding article in a different sense from its technical meaning defined in article 79, of the Penal Code. As used in the preceding article, it includes principals and accessories, and persons who are *particeps criminis*. It means a person who, either as a principal, accomplice, or accessory, is connected with the crime by unlawful act or omission on his part, transpiring either before, at the time of, or after the commission of the offense, and whether or not he was present and participated in the crime. *Phillips v. State*, 17 App. 169; *Harrison v. State*, Id. 442; *House v. State*, 16 App. 25; *Zollicoffer v. State*, Id. 312; *Hornsberger v. State*, 19 App. 335; *Anderson v. State*, 20 App. 312; *Roach v. State*, 4 App. 46; *Jones v. State*, 3 App. 575; *Davis v. State*, 2 App. 588; *Irvin v. State*, 1 App. 301; *Kelly v. State*, Id. 628; *Barrara v. State*, 42 Tex. 260; *Williams v. State*, Id. 392; *Boyd v. State*, 24 App. 570, 6 S. W. 853, 5 Am. St. Rep. 908; *Hines v. State*, 27 App. 104, 10 S. W. 448; *Crook v. State*, 27 App. 198,

11 S. W. 444; *Thurmond v. State*, 27 App. 347, 11 S. W. 451; *Puryear v. State*, 28 App. 73, 11 S. W. 929; *Jenkins v. State*, 28 App. 86, 12 S. W. 411; *Shulze v. State*, 28 App. 316, 12 S. W. 1034; *Scroggin v. State*, 30 App. 92, 16 S. W. 651; *Rogers v. State*, 30 App. 462, 17 S. W. 548; *McGrew v. State*, 31 App. 336, 20 S. W. 740; *Ham v. State*, 4 App. 645; *Brown v. State*, 6 App. 286; *Freeman v. State*, 11 App. 92, 40 Am. Rep. 787; *Dubose v. State*, 13 App. 418; *Smith v. State*, 13 App. 507; *Timbrook v. State*, 18 App. 1; *Ortis v. State*, 18 App. 282; *May v. State*, 22 App. 595, 3 S. W. 781; *Conde v. State*, 33 App. 10, 24 S. W. 415; *Huffman v. State*, 57 App. 399, 123 S. W. 596; *Pace v. State*, 58 App. 90, 124 S. W. 949; *Johnson v. State*, 58 App. 244, 125 S. W. 16; *Jones v. State*, 59 App. 559, 129 S. W. 1118; *Goldstein v. State*, 73 App. 558, 166 S. W. 149; *Newton v. State*, 62 App. 622, 138 S. W. 708.

A co-conspirator is an accomplice and his evidence alone will not support a conviction. *Sessions v. State*, 37 App. 62, 38 S. W. 623; *Cohea v. State*, 11 App. 153.

Where a defendant was on trial for conveying tools into a jail to aid the escape of a prisoner therein confined, another prisoner who also escaped by using the same tools, was held not to be an accomplice with respect to the offense for which the defendant was on trial. *Peeler v. State*, 3 App. 533.

Complicity with the defendant in other crimes than that for which he is on trial, does not render a witness an accomplice with respect to that crime. *Ham v. State*, 4 App. 645.

In a prosecution for the theft of a watch, the evidence showed that the stolen watch when found was in possession of a state's witness; but the defendant asserted claim to it, and charged that said witness had stolen it from him. It was held that while the witness may have stolen the watch from the defendant, that did not make him an accomplice in the original theft of it. *Smith v. State*, 8 App. 39.

Where the witness, knowing of the unlawful intent of the defendant to commit the offense, furnished him transportation to the place where the offense was committed, it was held that such witness was an accomplice. *Phillips v. State*, 17 App. 169.

A joint offender in betting or gaming is not an accomplice. P. C., art. 574; *Wright v. State*, 23 App. 313, 5 S. W. 117.

A person charged with a similar offense is not an accomplice. *Day v. State*, 27 App. 143, 11 S. W. 36.

A witness learning that defendant had had intercourse with prosecutrix concealed himself and saw them in the act of intercourse, then with defendant's consent he compelled prosecutrix to allow him to have intercourse with her by threatening to divulge what he had seen; held, he was not an accomplice in the seduction of the prosecutrix. *Anderson v. State*, 39 App. 83, 45 S. W. 15.

The sister of a defaulting witness, as a witness on the trial of the defendant, testified that money furnished her by defendant for the purpose, she gave the witness to leave the country, and it was shown that at no time and place did defendant personally offer to bribe the witness. Held, that the sister was an accomplice, and the court should have charged the law of accomplice testimony. *Humphries v. State*, 40 App. 59, 48 S. W. 184.

A justice of the peace and a constable were not accomplices to the crime of false swearing committed by swearing before the justice to obtain a marriage license, though they knew the affidavit was false, and their testimony did not require a charge on accomplice testimony. *Wilson v. State*, 49 App. 496, 93 S. W. 547.

A witness, testifying that he saw accused and a third person coming out of a field as if they were driving something, that they went out in the bed of a creek where a gun was fired, that when witness came in view of accused and the third person they picked up a hog and threw it in the creek, that the hog belonged to the witness, was not an accomplice with accused and the third person in the larceny of the hog, so that the refusal to charge on the subject of accomplice was proper. *Fields v. State*, 57 App. 613, 124 S. W. 652.

In a prosecution for homicide, a witness who pulled his pistol at the time of the shooting, and handed it to the defendant, would be either a principal or an accomplice, so as to require his testimony to be corroborated. *Foster v. State* (Cr. App.) 150 S. W. 936.

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

A witness testifying that on the morning after the burglary he walked to accused's stable and talked to him and an accomplice, and advised them to look out because of tracks around the depot building, and that the accomplice immediately changed his shoes and gave the witness whisky out of a bottle, is not an accomplice. *Holmes v. State*, 70 App. 423, 157 S. W. 487.

As regards necessity of corroboration, one was an accomplice to any burglary, from which defendant obtained whisky, he having after the transaction got from defendant, and drunk some of the whisky, knowing beforehand that the "raid," as he termed it, was to be made, and understanding that the whisky came from it. *Jobe v. State*, 72 App. 163, 161 S. W. 966.

The term "accomplice" signifies a guilty associate in crime, and is strictly defined as one who is associated with others in the commission of a crime; the test being whether the alleged accomplice could be indicted and punished for the crime for which the accused is being tried. *Liegeois v. State*, 73 App. 142, 164 S. W. 382.

Where defendant was charged with procuring another to burn his building, a brother of the one who set the fire, who was a material witness for the prosecution, and whose only connection with the prosecution was that after his brother's arrest he aided in procuring an attorney and induced defendant to pay the attor-

ney's fees and part of the amount he agreed to pay for starting the fire, was not an accomplice whose testimony must be corroborated to sustain a conviction. *Arnold v. State* (Cr. App.) 168 S. W. 122.

A witness, who testified that, after accused struck deceased with an iron bar, he himself stabbed him, was an accomplice. *McCue v. State* (Cr. App.) 170 S. W. 280.

2. — **Knowledge and concealment of crime.**—A witness loaned his gun to the defendant, the defendant declaring at the time that he intended to kill one M. After the defendant started off with the gun, the witness pursued him and tried unsuccessfully to recover the gun. After the defendant had killed M., the witness went to a house where defendant had stopped and advised him to leave. Held, that the witness was an accomplice. *Barnes v. State*, 36 Tex. 639.

In a trial for theft of money a witness for the state, who was a daughter of the defendant, had falsely denied any knowledge of the stolen money. Held, that this did not make her an accomplice. *Rhodes v. State*, 11 App. 563.

If a witness implicates himself as a particeps criminis, he is an accomplice, notwithstanding he claims that he was coerced. Thus, where two witnesses fabricated and testified to a false state of facts for the purpose of concealing the guilt of a party of murder, it was held that they were accomplices, although they claimed that they had been told and induced to so testify by the murderer, and did so through fear of him. *Blakely v. State*, 24 App. 616, 7 S. W. 233, 5 Am. St. Rep. 912. See, also, *Dodson v. State*, 24 App. 514, 6 S. W. 548; *Mercer v. State*, 17 App. 452; *Freeman v. State*, 11 App. 92, 40 Am. Rep. 787; *Davis v. State*, 2 App. 588.

Where a witness leaves the state to keep from testifying, he is not an accomplice. *Chitister v. State*, 33 App. 635, 28 S. W. 683.

Evidence that D. came up with accused and another on the evening of the homicide, but some time before it was committed, and, after they had all drunk whisky, accused, referring to the place where the homicide was committed, remarked, "There is where I will do the work to-night," to which D. replied, "Uh, huh," and left and at the time of the killing was conclusively shown to have been at a point in the country where it would have been impossible for him to have taken any part in the murder or to have done any act in furtherance of the crime, was insufficient to make him an accomplice, under the rule that concealment of knowledge that a crime is to be committed will not make the concealing party an accomplice or accessory before the fact. *Spates v. State*, 62 App. 532, 138 S. W. 393.

A witness testifying for the state, on a trial for burglary of a depot building and the stealing of beer and whisky therein, to the finding on his premises of whisky after the burglary and putting the whisky into his barn, but not reporting the facts to the officers, is not an accomplice. *Holmes v. State*, 70 App. 423, 157 S. W. 487.

Where parties, after committing a homicide, went to the home of a woman from whom they had rented rooms, and while there told her the facts concerning the killing, it not appearing that she was paid the room rent with the money stolen from deceased, she was not an accomplice, though she concealed her knowledge of the killing for some time. *Jones v. State* (Cr. App.) 163 S. W. 75.

Accused, deceased, and two other persons, who were present when accused struck deceased a blow from which he subsequently died, agreed to say nothing about the matter, so that the officers would not learn of it. At the time none of them knew or believed that deceased was fatally injured. Held, that one of such persons was not an "accomplice," and, on the trial of accused for homicide, corroboration of his testimony was not required. *Blalock v. State* (Cr. App.) 176 S. W. 725.

3. — **Agreements not to prosecute or testify.**—A witness who agrees with the defendant not to prosecute if he will pay for the stolen property, is an accomplice. *Gatlin v. State*, 40 App. 117, 49 S. W. 87.

Where the owner of the goods taken promises the defendant that if he will return the goods he will let him go, but if not he will prosecute him, he is an accomplice in law, and a charge on his evidence as that of an accomplice is required. *Campbell v. State*, 42 App. 27, 57 S. W. 289.

Where witness agrees that if defendant will pay a debt which he owes him that he will not testify against him, and it does not appear that defendant accepted the offer, the witness is not an accomplice so as to require his testimony to be corroborated. *Robertson v. State*, 46 App. 441, 80 S. W. 1000.

A witness is not an accomplice merely because he received from accused a specified sum to procure prosecutrix to write a letter asking for the dismissal of the prosecution for rape, or merely because he obtained a part of the amount so paid. *Burge v. State*, 73 App. 505, 167 S. W. 63.

4. — **Detectives and informers.**—Where one receives money from an officer to bring about violations of the law, and in accordance with the agreement he brings about such violations, he is an "accomplice," and when used as a witness must be corroborated to support a conviction; but, where one who, believing that a crime is in contemplation, takes steps to detect it, or to procure evidence by which the guilty person may be punished, he is not an accomplice because his connection with the crime is after its inception. *Bush v. State* (Cr. App.) 151 S. W. 554; *Wright v. State*, 7 App. 574, 32 Am. Rep. 599. See, also, *Allison v. State*, 14 App. 122; *Steele v. State*, 19 App. 425; *Ausbrook v. State*, 70 App. 289, 156 S. W. 1177.

A witness who sought and accepted a bribe from the defendant to leave the state, but did so to secure testimony to convict defendant, did not come within the category of an accomplice so as to require charge on accomplice testimony. *Chitister v. State*, 33 App. 635, 28 S. W. 683.

Where the prosecuting witness encouraged the conspiracy and helped prepare for the commission of the offense, even though he was informing the officers of

the same, his testimony would be that of an accomplice, and uncorroborated would be insufficient to support a conviction. *Dever v. State*, 37 App. 396, 30 S. W. 1071.

Where an assistant county attorney made the first proposition and induced accused to offer a bribe, even though he did not intend to accept it, and was merely seeking to entrap or detect accused in the commission of an offense, he was an accomplice, and hence, where there was evidence tending to show that such was the case, the court should have charged that if such were the facts the assistant county attorney's testimony must be corroborated as to those facts connecting accused with the commission of the offense. *Davis v. State*, 70 App. 524, 158 S. W. 288.

5. — **Receiving stolen goods.**—Parties who knew, when they received goods from defendant, that they had been stolen from a certain store, and who secreted them, were accomplices. *Guitierrez v. State* (Cr. App.) 173 S. W. 1025; *Crutchfield v. State*, 7 App. 65; *Walker v. State* (Cr. App.) 37 S. W. 423.

The thief is an accomplice in the offense of receiving stolen property, and a conviction can not be sustained upon his testimony unless it is corroborated. *Miller v. State*, 4 App. 251; *Kaufman v. State*, 70 App. 438, 159 S. W. 58.

Where the facts, considered together, were such as of necessity to carry notice to a witness, on a trial for burglary in which larceny was committed, that the property offered for sale by accused had been stolen, the witness, buying the property, was chargeable with knowledge that it had been stolen, and the fact that he denied such knowledge did not prevent him from being an accomplice. *Johnson v. State*, 58 App. 244, 125 S. W. 16.

6. — **Participation in adultery, fornication, incest or rape.**—In a prosecution against a man for incest, the female is an accomplice, if she knowingly, voluntarily, and with the same intent which actuated him, united with him in the commission of the crime. But if, in the commission of the incestuous act, she was the victim of force, threats, fraud, or undue influence, so that she did not act voluntarily, and did not join in the commission of the act with the same intent which actuated the defendant, she would not be an accomplice. *Mercer v. State*, 17 App. 452; *Freeman v. State*, 11 App. 92, 40 Am. Rep. 787; *Dodson v. State*, 24 App. 514, 6 S. W. 548; *Jones v. State*, 23 App. 501, 5 S. W. 138; *Blanchette v. State*, 29 App. 46, 14 S. W. 392; *Tipton v. State*, 30 App. 530, 17 S. W. 1097; *Schoenfeldt v. State*, 30 App. 695, 18 S. W. 640; *Mullinix v. State* (Cr. App.) 26 S. W. 504; *Stewart v. State*, 35 App. 174, 32 S. W. 766, 60 Am. St. Rep. 35; *Skidmore v. State*, 57 App. 497, 123 S. W. 1129, 26 L. R. A. (N. S.) 466; *Wadkins v. State*, 58 App. 110, 124 S. W. 959, 137 Am. St. Rep. 922, 21 Ann. Cas. 556; *Jordan v. State*, 62 App. 388, 137 S. W. 114; *Burford v. State* (Cr. App.) 151 S. W. 538.

The testimony of the paramour in adultery when introduced in behalf of the state is that of an accomplice, and uncorroborated will not support a conviction. *Merritt v. State*, 10 App. 402; *Merritt v. State*, 12 App. 203; *Wiley v. State*, 33 App. 406, 26 S. W. 723.

In case of rape prosecutrix is not an accomplice. *Hamilton v. State*, 36 App. 372, 37 S. W. 431.

On a trial for fornication, the female is an accomplice, and the court at the request of accused must charge that the jury, to convict, must find her evidence true and corroborated, or the conviction will be set aside. *Deary v. State*, 62 App. 352, 137 S. W. 699.

In a prosecution for rape on a female under the age of consent, prosecutrix, though having consented, was not an accomplice. *Battles v. State*, 63 App. 147, 140 S. W. 783.

In a prosecution for adultery by means of habitual carnal intercourse without living together, the testimony of the female must be corroborated, for she is an accomplice. *Wallace v. State*, 63 App. 611, 141 S. W. 95.

In a trial for rape of a girl under 15 years old, she cannot be deemed an accomplice, but must be regarded as an accomplice on a charge of adultery. *Price v. State*, 64 App. 448, 142 S. W. 586.

7. — **Disorderly houses and pandering.**—A state's witness who rented a room in a disorderly house is not an accomplice. *Stone v. State*, 47 App. 575, 85 S. W. 808; *Liegeois v. State*, 73 App. 142, 164 S. W. 382.

The provision of the statute against pandering that the female for whom a room in a house of prostitution is alleged to have been procured may testify for or against accused shows an intention not to bring such witnesses within the rule governing accomplices' testimony, since, under the law, an accomplice cannot testify for a codefendant, and hence the court properly refused to charge that such female and the proprietor of the house of prostitution were accomplices. *Jones v. State*, 72 App. 496, 162 S. W. 1142.

In a prosecution for pandering, the female procured is not an accomplice within the statute relating to corroboration of accomplices. *Smith v. State*, 73 App. 145, 164 S. W. 825.

On a trial for keeping a house of assignation, two witnesses who arranged to, and did, meet two girls at accused's house ostensibly for the purpose of having sexual intercourse, one of whom was a policeman, and claimed that his sole purpose was to obtain evidence, and neither of whom were in any way, directly or indirectly, aiding or abetting accused in keeping the house for any purpose, were not accomplices. *Hearno v. State*, 73 App. 390, 165 S. W. 596.

Under Pen. Code 1911, art. 498, making it unlawful for any person to procure any female to visit a room for immoral purposes, a female inducing accused for a money consideration to procure men to visit her room for an immoral purpose, is an accomplice of accused, and he cannot be convicted on her uncorroborated testimony. *Denman v. State* (Cr. App.) 178 S. W. 332.

A prostitute, who came to a hotel with a man as her husband and so registered, and who remained after he left, and who then employed for a money consideration a porter in the hotel to locate men in the hotel with whom she could have sexual

intercourse, and who located men and directed them to her room, was an accomplice of the porter, indicted for alluring a female to visit a room for immoral purposes, in violation of Pen. Code 1911, art. 498. *Dooms v. State* (Cr. App.) 178 S. W. 334.

8. — **Perjury and false swearing.**—Trustees of a common school district signed a check or voucher, and delivered it to the defendant, whom they had employed as a teacher, in order to enable him to draw from the county treasury certain funds which were not due him, but which they contemplated would become due him in the future. Said teacher was indicted for perjury in making the required affidavit to obtain said funds, and it was held that said trustees, who testified as witnesses in said prosecution, were accomplices. *Anderson v. State*, 20 App. 312.

In prosecution for false swearing as to the age of a girl in obtaining a marriage license the girl is an accomplice within the rule requiring an accomplice's testimony to be corroborated. *Smith v. State*, 37 App. 488, 36 S. W. 586.

9. — **Corroboration of seduced female.**—See art. 789, and notes.

10. — **Violations of liquor laws.**—One buying whisky from one selling intoxicating liquor in violation of the local option law is not an accomplice, and his testimony need not be corroborated. *Trinkle v. State*, 60 App. 187, 131 S. W. 583; *Sears v. State*, 35 App. 442, 34 S. W. 124; *Terry v. State*, 46 App. 75, 79 S. W. 320; *Morrow v. State*, 56 App. 519, 120 S. W. 492; *Trinkle v. State*, 59 App. 257, 127 S. W. 1060; *Ray v. State*, 60 App. 138, 131 S. W. 542; *Moreno v. State*, 64 App. 660, 143 S. W. 156, Ann. Cas. 1914C, 863; *Neal v. State*, 70 App. 584, 157 S. W. 1192; *Creech v. State*, 70 App. 229, 158 S. W. 277; *Albright v. State*, 73 App. 113, 164 S. W. 1001; *Hightower v. State*, 73 App. 258, 165 S. W. 184; *Looper v. State* (Cr. App.) 167 S. W. 342.

Giving away whisky on election day. *Keith v. State*, 38 App. 680, 44 S. W. 847.

A purchaser of liquor is not an accomplice of the seller in his illegal sale, though soliciting the sale to be made to him. *Robertson v. State* (Cr. App.) 178 S. W. 1191.

11. — **Persons jointly indicted.**—One jointly indicted with another is not necessarily an accomplice. *Roberts v. State*, 44 Tex. 120; *Pitner v. State*, 23 App. 366, 5 S. W. 210; *Sharp v. State*, 29 App. 211, 15 S. W. 176. But if one who is jointly indicted testifies in behalf of the state upon condition that the prosecution against him is to be dismissed, he is an accomplice. *Barrara v. State*, 42 Tex. 261; *Williams v. State*, Id. 392; *White v. State*, 30 App. 652, 18 S. W. 462; *Smith v. State*, 28 App. 309, 12 S. W. 1104.

12. — **Evidence as to complicity.**—In all cases in which the law treats a witness as an accomplice, there must appear facts or circumstances showing his complicity in the offense, or creating a reasonable presumption of such complicity. *Brown v. State*, 6 App. 286. A witness cannot be regarded as an accomplice when there is nothing shown to connect him in any manner with the transaction. *Ham v. State*, 4 App. 645. But if a witness implicates himself in the crime, he must be regarded as an accomplice. *Irvin v. State*, 1 App. 302; *Kelly v. State*, Id. 629; *Freeman v. State*, 11 App. 92, 40 Am. Rep. 787; *Phillips v. State*, 17 App. 169; *Dubose v. State*, 13 App. 418; *May v. State*, 22 App. 595, 3 S. W. 781.

If a witness denies complicity, it is competent to contradict him. *Butler v. State*, 7 App. 635.

Defendant may prove a witness's complicity by any character of evidence, which would be admissible if the witness himself were on trial for the offense. *Dubose v. State*, 10 App. 230.

Where the evidence in no way connected a witness with the crime charged, he was not an accomplice, so as to authorize or require the submission to the jury of the question whether he was an accomplice. *Tate v. State* (Cr. App.) 151 S. W. 825.

Where accused, in an attempt to show that a witness was an accomplice, asked him if he had not been discharged by his employer on account of his connection with the burglary, the witness, after answering "No," and after defendant proved that he did not work for several days thereafter was properly permitted to explain that the reason he did not work was because his employer let him off for a few days for fear that, when defendant learned of his conduct, there might be trouble. *Holmes v. State*, 70 App. 214, 156 S. W. 1173.

Where accused endeavored to show that a detective was an accomplice, evidence as to his employment, and that he made daily reports to his employers, and promptly reported the burglary, was admissible. *Hyde v. State*, 73 App. 452, 165 S. W. 195.

Evidence held insufficient to show that one of the state's most material witnesses was an accomplice so as to require an instruction thereon. *Womack v. State* (Cr. App.) 170 S. W. 139.

13. — **Questions for jury.**—Directing acquittal for insufficiency of corroboration, see art. 805, and notes.

Whether a witness in a criminal case was an accomplice of accused held, under the evidence, for the jury. *Brown v. State*, 58 App. 336, 125 S. W. 915; *Wisnoski v. State* (Cr. App.) 153 S. W. 316; *Hightower v. State*, 73 App. 258, 165 S. W. 184; *Savage v. State* (Cr. App.) 170 S. W. 730; *Barker v. State* (Cr. App.) 175 S. W. 151.

When the evidence clearly shows that the witness is an accomplice it is proper for the court to state to the jury in his charge that he is an accomplice. If the evidence leaves the matter in doubt the issue should be submitted to the jury. *Wilkerson v. State* (Cr. App.) 57 S. W. 965; *Zollicoffer v. State*, 16 App. 312; *Williams v. State*, 33 App. 128, 25 S. W. 629, 28 S. W. 958, 47 Am. St. Rep. 21; *Brown v. State*, 58 App. 336, 125 S. W. 915.

If the proof tends to raise the question whether or not a state's witness is an accomplice in the offense on trial, can the trial court, in any state of case, refuse to submit to the jury the question of accomplice vel non, together with proper instructions upon the corroboration of accomplice testimony? If so, it must not only be because the proof that the witness is an accomplice is meager, but because the other proof in the case tends strongly to show that he is not. The proof in this case fairly moots the complicity of the two state's witnesses, the trial court erred in refusing to instruct the jury upon the law of accomplice testimony. *Hines v. State*, 27 App. 104, 10 S. W. 448; *O'Connor v. State*, 28 App. 288, 13 S. W. 14; *Massey v. State*, 29 App. 159, 15 S. W. 601.

The question as to whether the witness is an accomplice is for the jury. *Dela-van v. State* (Cr. App.) 29 S. W. 385.

In a prosecution for homicide, a witness testified that after the killing, the witness, accused, and C. entered into an agreement to manufacture a defense by getting another person to testify that he was out riding on the day of the homicide; that, as he approached the house of the deceased, he saw C. shoot deceased; and that before the shooting deceased stated to C. that he would kill him, C., and grabbed for his gun. Held, that whether the witness was an accomplice was properly submitted to the jury. *Pace v. State*, 58 App. 96, 124 S. W. 949.

In a prosecution for the bribery of a witness, evidence held insufficient to show that the witness was an accomplice of accused so as to take the question to the jury. *Smalley v. State*, 59 App. 95, 127 S. W. 225.

In a prosecution for murder, where there was conflicting evidence as to whether a witness handed defendant a pistol with which to shoot deceased, the court could not charge that such witness was an accomplice; the question being for the jury. *Foster v. State* (Cr. App.) 150 S. W. 936.

14. Sufficiency of evidence—Necessity of corroboration.—Transportation, delivery, etc., of liquors, see Pen. Code, art. 606p.

The preceding article is positive and peremptory, and a conviction is not warranted, and cannot be sustained, upon accomplice testimony, unless it is corroborated by other evidence, no matter how much credit the jury may give to the accomplice testimony. *Lopez v. State*, 34 Tex. 133; *Wright v. State*, 43 Tex. 170; *Coleman v. State*, 44 Tex. 109; *Morgan v. State*, Id. 511; *Roberts v. State*, Id. 119; *Dill v. State*, 1 App. 279; *Chester v. State*, Id. 703; *Davis v. State*, 2 App. 588; *Gillian v. State*, 3 App. 133; *Jones v. State*, Id. 575; *Dubose v. State*, 10 App. 230; *Powell v. State*, 15 App. 441; *House v. State*, Id. 522; *Dunn v. State*, Id. 560; *Zollicoffer v. State*, 16 App. 312; *Harrison v. State*, 17 App. 442; *Tisdale v. State*, Id. 444; *Hunnicut v. State*, 18 App. 498, 51 Am. Rep. 330; *Anderson v. State*, 20 App. 312; *Stone v. State*, 22 App. 185, 2 S. W. 585; *Dodson v. State*, 24 App. 514, 6 S. W. 548; *Blakely v. State*, 24 App. 616, 7 S. W. 233, 5 Am. St. Rep. 912; *Irvin v. State*, 1 App. 301; *Kelly v. State*, 1 App. 628; *Hoyle v. State*, 4 App. 239; *Freeman v. State*, 11 App. 92, 40 Am. Rep. 787; *Cohea v. State*, 11 App. 153; *Merritt v. State*, 12 App. 203; *Sitterlee v. State*, 13 App. 587; *Buchanan v. State*, 25 App. 546, 8 S. W. 665; *Pool v. State*, 25 App. 661, 8 S. W. 817; *Stouard v. State*, 27 App. 1, 10 S. W. 442; *Hanson v. State*, 27 App. 140, 11 S. W. 37; *Medis v. State*, 27 App. 194, 11 S. W. 112, 11 Am. St. Rep. 192; *Smith v. State*, 27 App. 196, 11 S. W. 113; *Roguemore v. State*, 28 App. 55, 11 S. W. 834; *Chumley v. State*, 28 App. 87, 12 S. W. 491; *Blanchette v. State*, 29 App. 46, 14 S. W. 392; *Tipton v. State*, 30 App. 530, 17 S. W. 1097; *Dever v. State*, 37 App. 396, 30 S. W. 1071; *Williamson v. State*, 37 App. 437, 35 S. W. 992; *Bailey v. State*, 26 App. 706, 9 S. W. 270; *Arcia v. State*, 26 App. 196, 9 S. W. 685; *Hamilton v. State*, 26 App. 206, 9 S. W. 687; *Sanders v. State* (Cr. App.) 29 S. W. 777; *Johnson v. State* (Cr. App.) 37 S. W. 327.

If proof of ownership of stolen property rests upon accomplice's testimony, it must be corroborated. *Hanson v. State*, 27 App. 140, 11 S. W. 37; *Crowell v. State*, 24 App. 404, 6 S. W. 318.

When the evidence tends to show the consent of prosecutrix, a conviction of incest cannot stand on her uncorroborated testimony. *Coburn v. State*, 36 App. 257, 36 S. W. 442; *Blanchette v. State*, 29 App. 46, 14 S. W. 392; *Dodson v. State*, 24 App. 514, 6 S. W. 548; *Schoenfeldt v. State*, 30 App. 695, 18 S. W. 640.

A conviction cannot be had on the testimony of an accomplice, unless corroborated by other evidence tending to connect accused with the offense, and the corroboration is not sufficient where it merely shows the commission of the offense. *Jones v. State*, 59 App. 559, 129 S. W. 1118; *Jordan v. State*, 62 App. 388, 137 S. W. 114.

On a criminal trial, if a witness for the state was an accomplice, or if the jury had a reasonable doubt whether he was an accomplice or not, they could not convict upon his testimony, unless they believed that it was true, that it connected accused with the offense charged, and that there was other testimony corroborative thereof, tending to connect accused with the commission of such offense. *Goldstein v. State*, 73 App. 558, 166 S. W. 149; *Deary v. State*, 62 App. 352, 137 S. W. 699.

A conviction is not warranted, and will not be supported by the uncorroborated testimony of any number of accomplices. *Roberts v. State*, 44 Tex. 120; *Heath v. State*, 7 App. 464.

At common law a conviction would be warranted upon uncorroborated accomplice testimony, but it was the practice to advise against it. *Hoyle v. State*, 4 App. 239.

The burden of proof to corroborate an accomplice witness, so as to warrant and sustain a conviction upon his testimony, is upon the state; and it is not incumbent upon the defendant to disprove the uncorroborated testimony of an accomplice. *House v. State*, 15 App. 522.

Where all the testimony of a witness is in favor of defendant an acquittal may be had thereon without corroboration. *Josef v. State*, 34 App. 446, 30 S. W. 1067.

Witness testified that he and defendant had stolen certain cattle and on the night of the theft met parties in the road and inquired for a certain pasture. Another witness testified that on the night the theft was alleged to have been committed, he met some persons who inquired about the pasture mentioned, but he could not identify the defendant. Held, the corroboration was insufficient. *Johnson v. State* (Cr. App.) 32 S. W. 1041.

When principal is used as a witness as to receiving stolen property his testimony must be corroborated both as to theft and the receiving the stolen property by the accused. *Johnson v. State*, 42 App. 440, 60 S. W. 668.

Though, in a strictly legal sense, there can be no accomplice in a misdemeanor case, there can be no conviction in such a case on the testimony of a confessed actor and participant with defendant in the crime, equally guilty with him, without other testimony than that of one who had no personal knowledge concerning defendant's participation, that his milk was polluted, evidencing merely that some one had done the act charged against defendant. *Huffman v. State*, 57 App. 399, 123 S. W. 586.

Evidence on a trial for murder held insufficient to support a conviction, in that there was no corroboration of an accomplice's testimony connecting accused with the crime. *Fair v. State*, 72 App. 95, 160 S. W. 1187.

In a prosecution for offering to bribe a witness, testimony of such witness, alleged to be an accomplice, that defendant, after his indictment, offered to bribe witness not to appear and testify against defendant did not require corroboration. *Savage v. State* (Cr. App.) 170 S. W. 730.

Defendant, indicted for burglary, could not be convicted upon the testimony of an accomplice alone, nor could two accomplices corroborate each other. *Guitierrez v. State* (Cr. App.) 173 S. W. 1025.

In a prosecution for the burglary of a box car and the taking of certain clothes therefrom, where the testimony of an accomplice that he and defendant had previously broken into a car and taken certain clothes was introduced to show the system of the offenses, the state, by other than accomplice evidence, should have identified the articles taken on the former breaking. *Nowlin v. State* (Cr. App.) 175 S. W. 1070.

One of several co-conspirators cannot be convicted on the testimony of his confederates, unless the jury believe their evidence, and there is other testimony tending to connect him with the offense. *Dillard v. State* (Cr. App.) 177 S. W. 99.

15. **Scope and extent of corroboration required.**—Corroborative evidence is sufficient if it tends to connect defendant with the crime. It need not be sufficient to convict nor need it corroborate in detail. *Wilkerson v. State* (Cr. App.) 57 S. W. 962; *Bruton v. State*, 21 Tex. 337; *Coleman v. State*, 44 Tex. 111; *Gillian v. State*, 3 App. 132; *Jones v. State*, 7 App. 457; *Clanton v. State*, 13 App. 139; *Crowell v. State*, 24 App. 404, 6 S. W. 318; *Boyd v. State*, 24 App. 570, 6 S. W. 853, 5 Am. St. Rep. 908; *Elizando v. State* 31 App. 237 20 S. W. 560; *Warren v. State* (Cr. App.) 149 S. W. 130; *Holmes v. State*, 70 App. 423, 157 S. W. 487; *Gillespie v. State*, 73 App. 585, 166 S. W. 135; *Savage v. State* (Cr. App.) 170 S. W. 730; *Cooper v. State* (Cr. App.) 177 S. W. 975.

The corroborating evidence to be sufficient, must, of itself, and without the aid of the accomplice testimony, tend in some degree to connect the defendant with the commission of the offense for which he is on trial, but it need not be sufficient of itself to establish his guilt. It must tend to connect the defendant with the offense committed. It must be as to a material matter. It must tend directly and immediately, not merely remotely, to connect the defendant with the commission of the offense. Corroboration as to immaterial facts, having no tendency to connect the defendant with the commission of the offense, is not sufficient. The corroboration must be as to a criminative fact or facts. But it need not be corroborative of any particular statement made by the accomplice. The corroboration is not sufficient if it merely shows the commission of the offense by some person; it must go further, and tend to connect the defendant with its commission. The accomplice testimony need not be corroborated circumstantially and in detail, and if corroborated in material matters, it is unimportant that it was also corroborated in immaterial matters, as it is permissible to strengthen such testimony by proof of connected incidents tending to show its reasonableness and consistency. *Dill v. State*, 1 App. 278; *Nourse v. State*, 2 App. 304; *Davis v. State*, Id. 588; *Jones v. State*, 3 App. 575; *Hoyle v. State*, 4 App. 239; *Jones v. State*, Id. 529; *Jackson v. State*, Id. 292; *Tooney v. State*, 5 App. 163; *Myers v. State*, 7 App. 640; *Simms v. State*, 8 App. 230; *Roach v. State*, Id. 478; *Bruton v. State*, 21 Tex. 337; *Watson v. State*, 9 App. 237; *Welden v. State*, 10 App. 400; *Jernigan v. State*, Id. 546; *Harper v. State*, 11 App. 1; *Cohea v. State*, Id. 622; *Powell v. State*, 15 App. 441; *Dunn v. State*, Id. 560; *Zollicoffer v. State*, 16 App. 312; *Phillips v. State*, 17 App. 169; *Harrison v. State*, Id. 442; *Tisdale v. State*, Id. 444; *Blakely v. State*, 24 App. 616, 7 S. W. 233, 5 Am. St. Rep. 912.

The corpus delicti of theft cannot be established by the uncorroborated testimony of an accomplice, but upon that issue the accomplice must be corroborated by other evidence tending to show the commission of the offense, and the defendant's connection with the commission of the same. It will not suffice to corroborate such testimony only to the extent of connecting the defendant with the commission of an act alleged to be an offense. In this case the ownership of an animal alleged in the indictment was proved only by the uncorroborated testimony of the accomplice. Held, insufficient on the issue of ownership, and therefore insufficient to support a conviction. *Crowell v. State*, 24 App. 404, 6 S. W. 318.

Every constituent element of the offense as testified to by the accomplice need not be corroborated. *Williams v. State*, 59 App. 347, 128 S. W. 1120.

Under this article and art 789, a prosecutrix is sufficiently corroborated when there are any facts that tend to show that accused committed the offense of seduction, and it is error to attempt to lay down a rule as to what particular issues of the case shall be corroborated; the word "tending," meaning to be directed as to any end, object, or purpose. *Nash v. State*, 61 App. 259, 134 S. W. 709.

In a prosecution for adultery by means of habitual carnal intercourse without living together, corroboration of the female as to one act of intercourse will not warrant a conviction on her testimony. *Wallace v. State*, 63 App. 611, 141 S. W. 95.

If an accomplice, who testified as to sales in a prosecution for pursuing the business of selling intoxicants in prohibition territory, was corroborated as to more than one sale, the jury could convict on his evidence, irrespective of a sale to any one else, and, if his testimony was corroborated as to only one sale, the state could convict, by showing, in addition to that sale, a sale to others proven by other evidence. *Hightower v. State*, 73 App. 258, 165 S. W. 184.

Under this article and art. 789, one accused of seduction may be convicted upon the testimony of the prosecutrix alone, if there is other evidence corroborative of her testimony and connecting accused with the offense charged, though there is no specific corroboration as to marriage promise. *Slaughter v. State* (Cr. App.) 174 S. W. 580.

16. — **Competency of corroborative evidence.**—The testimony of one accomplice cannot be corroborated by one or more other accomplices. *Phillips v. State*, 17 App. 169; *Jernigan v. State*, 10 App. 546; *Gonzales v. State*, 9 App. 374; *Holmes v. State*, 70 App. 214, 156 S. W. 1173; *Roberts v. State*, 44 Tex. 119; *Heath v. State*, 7 App. 464; *Harrison v. State*, 17 App. 442; *Blakely v. State*, 24 App. 616, 7 S. W. 233, 5 Am. St. Rep. 912; *Sessions v. State*, 37 App. 62, 38 S. W. 623.

An accomplice cannot corroborate his own testimony. *Jernigan v. State*, 10 App. 546; *Harper v. State*, 11 App. 1; *Dunn v. State*, 15 App. 560; *Zollicoffer v. State*, 16 App. 312; *Hannahan v. State*, 7 App. 664; *Sanders v. State*, 31 App. 525, 21 S. W. 258; *Blakely v. State*, 24 App. 616, 7 S. W. 233, 5 Am. St. Rep. 912; *Crawford v. State* (Cr. App.) 34 S. W. 927.

The testimony of an accomplice may be corroborated by that of his wife, when her testimony is admissible in the case. *Dill v. State*, 1 App. 278; *Bluman v. State*, 33 App. 43, 21 S. W. 1027, 26 S. W. 75.

Where prosecutrix alone testified that certain letters offered in evidence at the trial had been written to her by defendant, such letters could not furnish corroborative evidence, since she could not corroborate herself. *Bishop v. State* (Cr. App.) 151 S. W. 821; *Smith v. State*, 58 App. 106, 124 S. W. 919.

The testimony of an accomplice cannot be corroborated by inadmissible evidence. *Long v. State*, 39 App. 537, 47 S. W. 363.

In a prosecution for incest, testimony of witnesses that prosecutrix told them that accused had sexual intercourse with her was not competent to show the fact of intercourse, or as corroborative of the testimony of prosecutrix. *Jordan v. State*, 59 App. 208, 128 S. W. 139.

A motive for doing a criminal act is not of itself evidence corroborating the testimony of an accomplice, and the mere fact that one may have an ill will towards a third person, as indicated by his statements, is not evidence corroborating the testimony of an accomplice in an assault on the third person. *Vails v. State*, 59 App. 340, 128 S. W. 1117.

In a murder trial, the state properly showed that a gun shell was found in a tree top, where an accomplice testified accused was when he shot decedent, and the number of shot, contained in such a shell, of the size found in decedent's body. *Grant v. State* (Cr. App.) 148 S. W. 760, 42 L. R. A. (N. S.) 428.

In a murder trial, to corroborate the testimony of an accomplice that accused killed decedent, the state was properly permitted to introduce testimony that witnesses saw two men traveling along the road and across the fields on the route the accomplice said he and accused traveled; that some of the witnesses recognized accused; and other, who did not know accused, were of the opinion, when accused was afterwards pointed out to them, that he was one of the men they saw, judging from his stature, complexion, etc. *Grant v. State* (Cr. App.) 148 S. W. 760, 42 L. R. A. (N. S.) 428.

In a homicide case, where there was an issue whether a body run over by a train and found on the track was the body of the person alleged to have been killed by defendant, and as corroborative of the testimony of witnesses claimed by defendant to be accomplices that it was such person, the state was properly permitted to prove the height of deceased and the measurements of those portions of the body unmangled by the train. *Foster v. State* (Cr. App.) 150 S. W. 936.

Witnesses, alleged by defendant to be accomplices, testified that defendant killed deceased because he would not agree not to go to court to testify against him, and that deceased had stated just before he was killed that, at the request of defendant, he had failed to attend court for two terms, but now he was under bond and was going. Held, that the state was properly permitted to prove that deceased had refused to obey process twice, and had been placed under bond, as it was corroborative of the testimony of the alleged accomplices. *Foster v. State* (Cr. App.) 150 S. W. 936.

In a prosecution for robbery, where it was necessary for the state to corroborate testimony of an accomplice, who had testified that an agreement to rob had been entered into at a certain place and time, testimony that the accomplice worked for witness and that defendant was with witness at such time and place was admissible. *Perry v. State* (Cr. App.) 155 S. W. 263.

The testimony of an accomplice may be corroborated by circumstantial evidence. *Cole v. State*, 70 App. 459, 156 S. W. 929; *Holmes v. State*, 70 App. 423, 157 S. W. 487.

Where an accomplice testified as to the road traveled, the kind of vehicle and horses driven, etc., and said that defendant had offered him a pistol, testimony

of the officer who arrested him that he had a pistol was admissible as corroborative of the testimony of the accomplice. *Holmes v. State*, 70 App. 214, 156 S. W. 1173.

An accomplice cannot be corroborated by declarations made by him. *Holmes v. State*, 70 App. 214, 156 S. W. 1173.

17. **Sufficiency of corroboration.**—Evidence held to sufficiently corroborate the testimony of an accomplice to support a conviction. *Warren v. State* (Cr. App.) 149 S. W. 130; *Bailey v. State*, 26 App. 706, 9 S. W. 270; *Looman v. State*, 37 App. 276, 39 S. W. 571; *Jordan v. State*, 62 App. 388, 137 S. W. 114; *McGinsey v. State* (Cr. App.) 144 S. W. 268; *Vickers v. State* (Cr. App.) 154 S. W. 578; *Holmes v. State*, 70 App. 423, 157 S. W. 487; *Pinkerton v. State*, 71 App. 195, 160 S. W. 87.

Evidence held insufficient to corroborate testimony of an accomplice, and insufficient to convict. *House v. State*, 15 App. 522; *Vails v. State*, 59 App. 340, 128 S. W. 1117; *Jones v. State*, 59 App. 559, 129 S. W. 1118; *Franklin v. State*, 62 App. 433, 138 S. W. 112.

Witness testified that she and her stepfather were chopping cotton in a field and that defendant made her go with him to a "peach break" and there had incestuous intercourse with her; that she was barefooted and defendant wore shoes. Another witness testified that defendant and his stepdaughter were chopping cotton in the field and that later he followed the tracks of two persons, one a barefoot and the other a shoe track from where they were chopping cotton to the "peach break" where he saw an impression like some one had been lying on the ground. Held, the corroboration was sufficient. *Cesar v. State* (Cr. App.) 29 S. W. 755.

Testimony of prosecutrix in incest is sufficiently corroborated when the whole evidence shows that defendant is the only person who had the opportunity to have intercourse with her, and that she was pregnant. *Jackson v. State*, 37 App. 612, 40 S. W. 498.

Where on the trial of an accomplice the principal testified that the accomplice urged him to steal oats and after each conversation would tell him not to forget, the testimony of the principal's wife that she heard defendant tell her husband not to forget was not a corroboration of the principal. *Denson v. State*, 47 App. 439, 83 S. W. 820.

There was no sufficient corroboration where the evidence merely showed a burglary and that the goods stolen were found at the place shown by the testimony of the accomplice. *Franklin v. State*, 53 App. 388, 110 S. W. 64.

In a prosecution for burglary, evidence held insufficient to corroborate accomplices, so as to connect accused with the commission of the offense as a principal. *Maibaum v. State*, 59 App. 386, 128 S. W. 378.

An accomplice is not corroborated by proof merely that she is worthy of credit in general, or of good repute. *Beeson v. State*, 60 App. 39, 130 S. W. 1006.

In a prosecution for burglary, evidence held to sufficiently corroborate the testimony of accomplices to connect accused with the commission of the crime. *Briseno v. State*, 60 App. 98, 131 S. W. 327.

Where the prosecuting witness testified that his watch was stolen while he was in a saloon, that accused was the only person close enough to him to have taken it, and that accused's accomplice to whom the watch was delivered, and who pawned it, remained seated in a chair some distance away during the entire time he was in the saloon, there is sufficient corroboration to support a conviction on the accomplice's testimony that accused took the watch and delivered it to him to pawn. *Forward v. State*, 73 App. 561, 166 S. W. 725.

Testimony that a knife found by the body of deceased, who had been stabbed and beaten to death, belonged to accused, was sufficient corroboration of the testimony of a self-confessed accomplice to justify a conviction upon the accomplice's testimony. *McCue v. State* (Cr. App.) 170 S. W. 280.

In a prosecution for adultery, evidence that defendant had tried to get the girl's brother to induce her to withdraw her charge, agreed to give her money and to marry her, and had stated that he knew he had done wrong and wanted to show he was a man, is sufficient corroboration of the testimony of the accomplice. *Bodkins v. State* (Cr. App.) 172 S. W. 216.

On the trial of an alleged accomplice to a homicide committed by R., evidence held to corroborate R.'s testimony connecting accused with the homicide sufficiently to support a conviction. *Cooper v. State* (Cr. App.) 177 S. W. 975.

18. **Impeachment of accomplice.**—See notes under art. 791.

19. **Corroboration of accomplice impeached as witness.**—In a prosecution for burglary, a codefendant, on cross-examination, was permitted to testify that, when arrested and when before the grand jury, he made the same statement touching the crime as at the trial. This declaration was allowed to be corroborated by the witnesses. Held, that as the witness had been attacked by the defence, upon the theory that he had made contradictory statements, the self-serving declarations were admissible. *Pitts v. State*, 60 App. 524, 132 S. W. 801.

Where it is sought to show that an accomplice, testifying for the state, was testifying from corrupt motives, he can be corroborated by showing that before the motive existed he had made the same statement. *Gusemano v. State* (Cr. App.) 155 S. W. 217.

A showing that a case against an accomplice, testifying as a witness for the state, had been dismissed is an attempt to impeach the witness by showing a corrupt motive, so that the state may introduce corroborative evidence. *Gusemano v. State* (Cr. App.) 155 S. W. 217.

Where defendant, to affect the credibility of a witness who was an admitted accomplice, proved by cross-examination of the witness that he had been promised immunity from punishment in the case, there was no error in permitting the witness to state that he had made the same statement to the county attorney the day after the alleged burglary before he had been promised immunity as he had made on the stand, since an accomplice can be sustained by such proof the same as any other witness. *Holmes v. State*, 70 App. 214, 156 S. W. 1173.

Where an accomplice testified on cross-examination that the state had agreed to let him off for four years in the penitentiary on four cases they had against him, provided he would testify for the state in the case, the court properly permitted the state on redirect examination to ask him if any one had tried to get him to testify to anything except the truth. *Holmes v. State*, 70 App. 423, 157 S. W. 487.

20. **Necessity of instructions as to accomplice testimony.**—See notes to article 735, ante.

In a misdemeanor case defendant must ask the court to give a charge on accomplice's testimony before he can complain of failure to give such charge. *Williams v. State*, 53 App. 396, 110 S. W. 64.

21. — **Instructions as to who are accomplices.**—When the court leaves to the jury the question whether a witness is an accomplice, it should give the jury a guide to determine the question. *Pace v. State*, 58 App. 90, 124 S. W. 949.

In this instruction, it was unnecessary to define "accomplice," as the court charged that the witness was an accomplice. *Pitts v. State*, 60 App. 524, 132 S. W. 801.

In a homicide case, it was unnecessary for the court, under the evidence, to instruct as to who were principals, having already charged that "an accomplice is one who is connected with the crime, either before, at the time, or after the commission of the offense." *Foster v. State* (Cr. App.) 150 S. W. 936.

22. **Sufficiency of instructions as to corroboration.**—A charge in the language of the statute, with a definition of the word "accomplice" as used in the preceding article, as explained by the decisions, is usually sufficient. *Simms v. State*, 8 App. 230; *Jackson v. State*, 4 App. 292; *Avery v. State*, 10 App. 199; *Crass v. State*, 31 App. 312, 20 S. W. 579; *Elizando v. State*, 31 App. 237, 20 S. W. 560; *Simms v. State*, 8 App. 230; *Timbrook v. State*, 18 App. 1; *Ortis v. State*, Id. 282; *House v. State*, 16 App. 25; *Howell v. State*, Id. 93; *Zollicoffer v. State*, Id. 312; *Smith v. State*, 13 App. 507; *Phillips v. State*, 17 App. 169; *Harrison v. State*, Id. 442; *Irvin v. State*, 1 App. 301; *Kelly v. State*, Id. 628; *Williams v. State*, 42 Tex. 392; *Barrara v. State*, 42 Tex. 263; *Roach v. State*, 4 App. 46; *Davis v. State*, 2 App. 588; *Jones v. State*, 3 App. 575; *Crowell v. State*, 24 App. 404, 6 S. W. 318.

Where the prosecution is against two or more defendants, the court is not required to instruct that if the accomplice testimony has not been corroborated as to all of the defendants, it is not sufficient as to either of them. *Dill v. State*, 1 App. 278.

The charge need not define "corroborating evidence," nor instruct that the corroboration must relate to "some material matter." *Hoyle v. State*, 4 App. 239; *Hozier v. State*, 6 App. 501.

For an approved form of a charge upon accomplice testimony, see Willson's Cr. Forms, 928. See, also, an approved charge in *Avery v. State*, 10 App. 199. For erroneous charges, see *Crowell v. State*, 24 App. 404, 6 S. W. 318; *Spears v. State*, 24 App. 537, 7 S. W. 245.

Whether or not a witness is an accomplice, can not be made to depend upon the conclusion of the jury as to the truth or falsity of his testimony, and it is error to instruct the jury that if they find the testimony of the accomplice to be true, he is an accomplice. *Hornsberger v. State*, 19 App. 335.

To charge that the witness "is an accomplice with the defendant," is error, it being tantamount to instructing that the defendant, as well as the witness, was guilty of the offense. *Spears v. State*, 24 App. 537, 7 S. W. 245.

The charge, while correctly expounding the law applicable to accomplice testimony, failed in applying the rules of law directly to the issue of the guilt of the principal. *Cooper v. State*, 29 App. 15, 13 S. W. 1011, 25 Am. St. Rep. 712. Other decisions on this subject: *Bailey v. State*, 26 App. 706, 9 S. W. 270; *Hines v. State*, 27 App. 104, 10 S. W. 448; *Puryear v. State*, 28 App. 76, 11 S. W. 929; *O'Connor v. State*, 28 App. 288, 13 S. W. 14; *Shulze v. State*, 28 App. 316, 12 S. W. 1084; *Lockhart v. State*, 29 App. 35, 13 S. W. 1012; *Aldrich v. State*, 29 App. 394, 16 S. W. 251; *Clark v. State*, 30 App. 402, 17 S. W. 942; *Welhausen v. State*, 30 App. 623, 18 S. W. 300; *White v. State*, 30 App. 652, 18 S. W. 462; *Schoenfeldt v. State*, 30 App. 605, 18 S. W. 640.

On trial for perjury, when the court has instructed as to the quantum of proof and the law on testimony of an accomplice, it is not error to refuse a special instruction telling the jury to disregard the witness' testimony if he was not a credible person. *Beach v. State*, 32 App. 240, 22 S. W. 976.

Charge held sufficient. *West v. State* (Cr. App.) 33 S. W. 227.

An instruction that the jury could not convict accused on the testimony of H. alone, unless they first believed his testimony to be true and that it connected accused with the offense charged, and not then unless they believe that there was other testimony corroborative of H.'s testimony connecting defendant with the offense, and that the corroboration was insufficient if it merely showed the commission of the offense, was equivalent to charging that H. was an accomplice, and was sufficient on such subject. *King v. State*, 57 App. 363, 123 S. W. 135.

An instruction that certain witnesses were accomplices, and that defendant could not be found guilty on their testimony, though the jury was satisfied that it was true, and showed or tended to show that defendant was guilty as charged, unless the jury further believed that there was other evidence, outside the accomplices' testimony, tending to connect defendant with the commission of the offense charged, was erroneous. *Maibaum v. State*, 59 App. 386, 128 S. W. 378.

A charge that, though the accomplice has testified to the essential facts of the crime, there cannot be a conviction on her evidence alone, but there must be other evidence tending to show such fact, and that the corroborative evidence need not be direct and positive, but such facts and circumstances as tend to support her testimony, and which satisfy the jury that she is worthy of credit as to the essen-

tial facts, are sufficient corroboration, and that it is for the jury to say, from all the facts and circumstances in evidence, whether she has been sufficiently corroborated, is not erroneous, as it could not be understood by the jury to refer to anything else than the concrete case and the facts before them. *Beeson v. State*, 60 App. 39, 139 S. W. 1066.

A charge that a conviction could not be had upon the testimony of an accomplice unless the jury believed that his testimony was true, and that it showed or tended to show that accused was guilty of the charge, and unless they further believed that there was other evidence outside the testimony of the accomplice tending to connect accused with the commission of the offense, was erroneous; it being necessary that the evidence show beyond a reasonable doubt that accused was guilty of the charge. *Grant v. State*, 60 App. 358, 132 S. W. 350.

That the testimony of an accomplice comprised within itself every fact essential to conviction would not cure the error in an instruction. *Grant v. State*, 60 App. 358, 132 S. W. 350.

In a prosecution for burglary, the court charged that the principal witness was an accomplice, and that they could not convict upon his testimony alone, that they must believe it to be true, and find other corroborating evidence other than the fact of the commission of the crime. Held, that the charge was not objectionable as abstract. *Pitts v. State*, 60 App. 524, 132 S. W. 801.

The court instructed that a conviction could not be had upon the testimony of an accomplice, unless corroborated by other evidence tending to connect accused with the offense committed, and that the corroboration was not sufficient if it merely showed the commission of the offense; that an accomplice included all persons connected with the crime by their unlawful act or omission before, at the time, or after its commission, and whether or not they were present and participated, and that, if the jury believed that a certain witness was an accomplice or had a reasonable doubt on the question, they could not find accused guilty upon her testimony alone, unless they believed that it was true and connected accused with the offense, and unless they further believed that there was other testimony corroborating such witness and tending to connect accused with the offense, and that corroboration as to immaterial matters not connecting him with the commission of the offense was not sufficient. Held, that any defects in the instruction were not of sufficient importance to require a reversal of a judgment of conviction. *Jones v. State*, 63 App. 394, 141 S. W. 953.

Where, an accomplice testified that accused sent a message to him and a third person to meet accused, and that they met accused at his house, and there conspired to commit the crime charged, a charge that if accused sent a message the jury might consider the evidence of the accomplice concerning the message, but if accused did not send a message the jury should disregard the testimony of the accomplice, was objectionable as singling out testimony of the accomplice without charging that the testimony could not form a basis of conviction nor be used as a fact against accused as a basis of conviction unless it was corroborated. *Carlisle v. State*, 64 App. 535, 142 S. W. 1178.

It is not correct to single out in a charge on accomplice's testimony a single fact in the case where there are a number of facts testified to by the accomplice, and submit the issue on a question of verity between the accomplice and contradicting evidence, and the court, if ever authorized to do so, must caution the jury that the testimony of an accomplice cannot form the predicate of conviction unless corroborated. *Carlisle v. State*, 64 App. 535, 142 S. W. 1178.

Where, on the trial of an accomplice to a forgery of checks by a young woman, the court charged that evidence that the woman passed forged checks and collected the proceeds thereon was not evidence corroborating her testimony that accused aided and advised her to forge the checks, a charge that the corroboration was not sufficient if it merely showed the forgery by her, nor would "proof of the passing of such forged instrument be sufficient proof of corroboration," but that the corroboration required was evidence tending to show that accused either advised or encouraged her to forge the checks, was not prejudicial to accused. *Warren v. State* (Cr. App.) 149 S. W. 130.

Instructions that, in order to convict accused of fornication, the state must prove habitual carnal intercourse beyond a reasonable doubt, that the complaining witness was an accomplice, that the jury could not convict on her evidence alone, but that her evidence must be corroborated by other evidence tending to show the commission of the offense and accused's connection therewith, and that, if they believed beyond a reasonable doubt that accused had habitual carnal intercourse with her, they should convict, but, if they did not so believe, they should acquit, was not erroneous as not requiring the jury to find that the accomplice's testimony was true, as well as finding that it was corroborated. *Bailey v. State* (Cr. App.) 150 S. W. 915.

Where, in a prosecution for being an accomplice to arson, the state offered evidence corroborative only of the fact that the alleged principal burned the house, and the court charged generally as to accomplice testimony and the necessity for corroboration, a refusal of a requested charge that by corroboration, as used in the general charge, was meant that the evidence must connect the defendant with the procuring and hiring of the principal to burn the building, as charged in the indictment, and that it was not sufficient if it merely showed that such principal burned the building, was improper, as such a charge made clear the real issue. *Baggett v. State* (Cr. App.) 151 S. W. 560.

The court refused a requested charge, in a prosecution for pursuing the occupation of selling intoxicants in prohibition territory, that, if W. procured whisky to be ordered for the purpose of sale by accused, and assisted in the sale and participated in its proceeds either by receiving whisky or money, he would be an accomplice, and accused could not be convicted upon his testimony, unless there was other corroborative testimony tending to connect accused with the transaction al-

leged to have been had with W., and the corroboration was not sufficient if it merely showed the commission of the offense. Held, that the charge was properly refused, for not stating that the corroboration might be as to one of the two or more sales required to be proved, if a second sale was shown by other evidence, or that a corroboration as to two or more sales would authorize a conviction on the accomplice's testimony alone. *Hightower v. State*, 73 App. 258, 165 S. W. 184.

Where the prosecuting witness had testified to acts of incest prior to the one charged in the indictment, a charge that the witness was an accomplice, and that defendant could not be convicted upon her testimony unless it was corroborated by other evidence, outside of her testimony, tending to connect the defendant with the commission of the offense, and that the evidence of prior acts could only be considered for the light it might show upon the act charged, was correct and sufficient, and it was not error to refuse a requested charge that one part of the accomplice's testimony could not be considered as corroborative of another part, and that her testimony as to prior acts was not corroboration of the testimony as to the act charged. *Vickers v. State* (Cr. App.) 169 S. W. 669.

23. — **Authorizing conviction on accomplice testimony tending to show guilt.**—The court should charge that the jury cannot convict accused unless they believe that the accomplice's testimony is true and connects accused with the offense, and unless there is other corroborative testimony tending to connect accused with the offense, and the corroboration is not sufficient if it merely shows the commission of the offense, and an instruction that the jury can convict if the testimony of the accomplice "tends" to connect accused with the offense is erroneous. *Campbell v. State*, 57 App. 301, 123 S. W. 585; *Pace v. State*, 58 App. 90, 124 S. W. 949; *Dorham v. State*, 58 App. 283, 125 S. W. 397; *Ware v. State*, 60 App. 38, 129 S. W. 836; *Shrewder v. State*, 60 App. 659, 133 S. W. 281; *Franklin v. State*, 62 App. 433, 138 S. W. 112; *Newton v. State*, 62 App. 622, 138 S. W. 708; *Baggett v. State* (Cr. App.) 144 S. W. 1136; *Oates v. State* (Cr. App.) 149 S. W. 1194; *Savage v. State* (Cr. App.) 170 S. W. 730.

An instruction that a witness was an accomplice, and that before the jury could consider his testimony, for the purpose of showing or "tending" to show the guilt of defendant, they must first find that such testimony was true, and that it had been corroborated by the testimony of other witnesses in the case "as to matters, if any, connecting the defendant with the facts proved," is erroneous. *Long v. State*, 62 App. 540, 138 S. W. 401.

24. — **Requiring finding that accomplice testimony is true.**—An instruction that the jury could not convict accused, unless it found from the evidence that the testimony of an accomplice had been corroborated by other evidence connecting accused with the offense charged and that the corroboration was not sufficient if it merely showed the commission of the offense charged, was erroneous. *Time v. State*, 60 App. 58, 130 S. W. 1003; *Snelling v. State*, 57 App. 416, 123 S. W. 610.

In a prosecution for incest with accused's illegitimate child, the court instructed that if the jury was satisfied from the evidence that prosecutrix was an accomplice to the intercourse, or had a reasonable doubt whether or not she was, they could not find accused guilty upon her testimony alone, unless it had been corroborated as to the offense. Held, that the charge was erroneous for permitting a conviction if there was evidence corroborating the prosecutrix showing that accused committed the offense, and also for not charging that before the jury could convict on the testimony of prosecutrix they must believe that it was true and showed accused's guilt as charged. *Wadkins v. State*, 58 App. 110, 124 S. W. 959, 137 Am. St. Rep. 922, 21 Ann. Cas. 556.

In a prosecution for incest, a charge that, if the female was an accomplice, accused could not be convicted upon her testimony, unless the jury believed her testimony to be true, and that it showed, or tended to show, that accused was guilty unless there was further evidence outside her testimony connecting accused with the commission of the offense, but, if force was used and she did not voluntarily join in the act, she would not be an accomplice, and a conviction could be had upon her uncorroborated evidence, was erroneous, as it laid down a rule for the determination of the accomplice's testimony weaker than that required by law; the proper charge being that if the jury believed the testimony of the accomplice to be true, and it showed accused's guilt, and there was other testimony tending to connect the defendant with the commission of the offense, etc. *Jordan v. State*, 59 App. 208, 128 S. W. 139.

An instruction, in a prosecution for seduction, that the prosecuting witness was an accomplice, and that defendant could not be convicted solely upon her evidence, unless the jury believed it to be true and that it showed the defendant to be guilty of the offense, and that even then defendant could not be convicted unless the jury believed there was other testimony tending to connect the defendant with the offense charged, is good. *Murphy v. State* (Cr. App.) 143 S. W. 616.

Instructions that, in order to convict accused of fornication, the state must prove habitual carnal intercourse beyond a reasonable doubt, that the complaining witness was an accomplice, that the jury could not convict on her evidence alone, but that her evidence must be corroborated by other evidence tending to show the commission of the offense and accused's connection therewith, and that, if they believed beyond a reasonable doubt that accused had habitual carnal intercourse with her, they should convict, but, if they did not so believe, they should acquit, was not erroneous as not requiring the jury to find that the accomplice's testimony was true, as well as finding that it was corroborated. *Bailey v. State* (Cr. App.) 150 S. W. 915.

If there was any error in such instructions, it was harmless, and under the express provisions of art. 743, was not ground for reversal, where accused's own testimony, in connection with that shown to have been voluntarily given by him be-

fore the grand jury and which he did not contradict, showed that the testimony of the complaining witness was true. *Bailey v. State* (Cr. App.) 150 S. W. 915.

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.]

See, ante, art. 782.

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.]

See ante, art. 801, and notes.

Directing acquittal.—This article is an exception to the general rule that the jury are the exclusive judges of the credibility of the witnesses and the weight of evidence. It requires the court to pass first upon the competency and the sufficiency of the evidence, and to instruct the jury to acquit, when the requirements of the law as to the quantum of the evidence have not been fulfilled. This responsibility can not be shifted by the court upon the jury. *Gabrielsky v. State*, 13 App. 428; *Cox v. State*, 13 App. 479; *Hernandez v. State*, 18 App. 134, 51 Am. Rep. 295; *Waters v. State*, 30 App. 284, 17 S. W. 411.

Where the required proof is not forthcoming, it is fundamental error for the court to fail to instruct for acquittal. *Kitcken v. State*, 29 App. 45, 14 S. W. 392; *Smith v. State*, 22 App. 196, 2 S. W. 542.

Insufficiency of corroboration—Instructions.—Where the issue whether a witness was an accomplice was for the jury, and there was no sufficient evidence corroborating the witness, the court should charge that if the jury found that the witness was an accomplice they should acquit, because of the absence of sufficient evidence of corroboration. *Jones v. State*, 59 App. 559, 129 S. W. 1118.

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.]

See P. C., art. 304, et seq.; *Anderson v. State*, 24 App. 705, 7 S. W. 40; *Brook-in v. State*, 27 App. 701, 11 S. W. 645.

Sufficiency of evidence in general.—The falsity of the statement assigned must be shown by two credible witnesses, or one credible witness strongly corroborated by other evidence. *Smith v. State*, 22 App. 196, 2 S. W. 542; *Wilson v. State*, 27 App. 47, 10 S. W. 749, 11 Am. St. Rep. 180; *Grandison v. State*, 29 App. 136, 15 S. W. 174; *Whitaker v. State*, 37 App. 479, 36 S. W. 253; *Aguierre v. State*, 31 App. 519, 21 S. W. 256; *Meeks v. State*, 32 App. 420, 24 S. W. 98.

Perjury cannot be sustained upon proof that at other times when not on oath defendant made statements contradictory of the alleged perjury. *Brooks v. State*, 29 App. 582, 16 S. W. 542; *Waters v. State*, 30 App. 284, 17 S. W. 411; *Agar v. State*, 29 App. 605, 16 S. W. 761; *Miles v. State*, 73 App. 493, 165 S. W. 567.

Evidence held insufficient to support a conviction, under the rule that perjury must be proved by two credible witnesses, or one credible witness with strong corroborative circumstances. *Hays v. State* (Cr. App.) 173 S. W. 671; *Billingsley v. State*, 49 App. 620, 95 S. W. 520; *Cleveland v. State*, 50 App. 6, 94 S. W. 521.

This provision is but a statutory declaration of the common law. If the evidence presents "only oath against oath," it does not warrant a conviction. *Hernandez v. State*, 18 App. 134, 51 Am. Rep. 295; *Smith v. State*, 22 App. 196, 2 S. W. 542.

A "credible witness," as used in the statute, means "one who, being competent to give evidence, is worthy of belief." *Wilson v. State*, 27 App. 47, 10 S. W. 749, 11 Am. St. Rep. 180; *Kitchen v. State*, 29 App. 45, 14 S. W. 392; *Smith v. State*, 22 App. 196, 2 S. W. 542.

It is not the character of the proof required by the statute, but the number and character of the witnesses. *Plummer v. State*, 35 App. 202, 33 S. W. 228.

The oath taken and what was sworn as a predicate for the perjury or false swearing may be established by one witness. *Adams v. State*, 49 App. 361, 91 S. W. 225.

An accomplice being a discredited witness cannot be a credible witness, there must therefore be one credible witness independent of the accomplice. *Conant v. State*, 51 App. 610, 103 S. W. 898.

Evidence in a prosecution for false swearing held not to justify a peremptory charge to acquit. *Urben v. State* (Cr. App.) 178 S. W. 514.

Circumstantial evidence.—Perjury may be proven by circumstantial evidence. *Beach v. State*, 32 App. 253, 22 S. W. 976; *Plummer v. State*, 35 App. 202, 33 S. W. 228; *Rogers v. State*, 35 App. 221, 32 S. W. 1044; *Franklin v. State*, 38 App. 348, 43 S. W. 85; *Maroney v. State*, 45 App. 524, 78 S. W. 696; *Trinkle v. State*, 71 App. 64, 158 S. W. 544; *Miles v. State*, 73 App. 493, 165 S. W. 567; *Hart v. State*, 73 App. 362, 166 S. W. 152. *Contra*, *Mains v. State*, 26 App. 14, 9 S. W. 51; *Kemp v. State*, 28 App. 519, 13 S. W. 869; *Waters v. State*, 30 App. 284, 17 S. W. 411.

There may, however, be evidence technically circumstantial, yet virtually direct and positive. *Maines v. State*, 26 App. 14, 9 S. W. 51. And one witness may be corroborated by circumstantial evidence sufficient to support a conviction. *Beach v. State*, 32 App. 240, 22 S. W. 976.

And see *Butler v. State*, 36 App. 483, 38 S. W. 746; *Scott v. State*, 34 App. 41, 28 S. W. 947.

Sufficiency of corroboration.—If a conviction is sought on the testimony of a single witness, with corroboration, the corroboration must be as to a material matter. *State v. Buie*, 43 Tex. 532.

The term "corroborated strongly by other evidence" means that this other evidence shall come from another source than from the witness who is to be corroborated. The witness to be corroborated, cannot be corroborated by proof of his own acts and declarations. *Gabrielsky v. State*, 13 App. 428. It means that the corroborating evidence must tend to show the falsity of the defendant's oath in a material matter, and, in the opinion of the court and the jury, must be cogent, and calculated to convince. But such corroboration may be by circumstantial evidence, consisting of proof of independent facts, which together tend to establish the falsity of the oath, and which together strongly corroborate the testimony of the single witness who has testified to its falsity. *Hernandez v. State*, 18 App. 134, 51 Am. Rep. 295; *State v. Buie*, 43 Tex. 532; *Anderson v. State*, 20 App. 312; *Plummer v. State*, 35 App. 202, 33 S. W. 228.

An affidavit of defendant held not sufficient to corroborate the only state's witness in the absence of proof that defendant could and did read it, or that it was read to him before signing. *Scott v. State*, 34 App. 41, 28 S. W. 947.

Proof of falsity of an affidavit by one credible witness in connection with defendant's extra-judicial confession is sufficient. *Butler v. State*, 36 App. 483, 38 S. W. 746.

"Strongly corroborated" defined. *Franklin v. State*, 38 App. 346, 43 S. W. 85.

Confession in open court.—A confession in another court as a witness in another case is extrajudicial. *Butler v. State*, 36 App. 483, 38 S. W. 746.

False swearing.—This article applies to false swearing as well as perjury. *Aguierre v. State*, 31 App. 519, 21 S. W. 256.

Instructions.—Cited, *Miles v. State*, 73 App. 493, 165 S. W. 567.

To charge the jury in felony cases upon the law applicable to the case, whether asked or not, is, under our law, a duty imposed imperatively upon the trial judge. The trial being upon the plea of not guilty, and not upon confession in open court, the omission of the trial court to give in charge to the jury the substance of the above statutory provisions was error. *Washington v. State*, 22 App. 26, 3 S. W. 228; *Miller v. State*, 27 App. 497, 11 S. W. 485; *Wilson v. State*, 27 App. 47, 10 S. W. 749, 11 Am. St. Rep. 180; *Smith v. State*, 27 App. 50, 10 S. W. 751; *Tracy v. State*, 27 App. 496, 11 S. W. 484; *Brookin v. State*, 27 App. 701, 11 S. W. 645; *Grandison v. State*, 29 App. 186, 15 S. W. 174; *Holt v. State*, 48 App. 559, 89 S. W. 838.

This article or the substance thereof, should be given in charge to the jury, where the defendant has not confessed guilt in open court. *Gartman v. State*, 16 App. 215; *Aguierre v. State*, 31 App. 519, 21 S. W. 256; *Knight v. State*, 71 App. 36, 158 S. W. 543.

Where but one witness testified to the falsity of defendant's statement, it was error to refuse to instruct that if the jury believed that such witness was not a credible witness they should acquit. *Smith v. State*, 22 App. 196, 2 S. W. 543; *Kitchen v. State*, 29 App. 45, 14 S. W. 392.

A charge 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 App. 241, 22 S. W. 976, citing *Muely's Case*, 31 App. 155, 18 S. W. 411, 19 S. W. 915.

Instruction held incorrect in law, and upon the weight of evidence. *Hughes v. State*, 32 App. 379, 23 S. W. 891, citing *Muely's Case*, 31 App. 155, 18 S. W. 411, 19 S. W. 915. And see, also, *Whitaker v. State*, 37 App. 479, 36 S. W. 253.

When three witnesses testify to defendant's guilt an instruction based on this article is unnecessary. *Montgomery v. State* (Cr. App.) 40 S. W. 805.

Where, on a trial for perjury, the alleged perjured testimony and the falsity thereof were clearly established by two or more witnesses, the court having charged

that no one can be convicted for perjury except on the testimony of two credible witnesses, need not, in the absence of a request therefor, define a credible witness. *Mares v. State*, 71 App. 303, 158 S. W. 1130.

See, also, *Kitchen v. State*, 26 App. 165, 9 S. W. 461; *Sisk v. State*, 25 App. 432, 13 S. W. 647.

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.]

See P. C., art. 924. See ante, art. 454, and notes; *Garza v. State*, 38 App. 317, 42 S. W. 563; *McGlasson v. State*, 38 App. 351, 43 S. W. 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.

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

Consciousness of impending death.—It is not necessary that the declarant should state, at the time of making the statement, that it is made under a consciousness of approaching death. It is enough if it satisfactorily appears in any mode that it was made under that sanction, whether it be proved by the express language of the declarant, or be inferred from his evident danger, or the opinions of his medical or other attendants stated to him, or from his conduct, or other circumstances of the case; all of which may be resorted to in order to ascertain the state of the declarant's mind. But where it appears that the declarant, at the time of making the declaration, had any expectation or hope of recovery, however slight it may have been, and though death actually ensued an hour afterward, the declaration is inadmissible. And his belief that he will not recover, is not itself sufficient unless there also be the prospect of almost immediate dissolution. *Hunnicut v. State*, 18 App. 498, 51 Am. Rep. 330; *Burrell v. State*, 18 Tex. 713; *Edmondson v. State*, 41 Tex. 496; *Lister v. State*, 1 App. 739; *Krebs v. State*, 3 App. 348; *Green v. State*, 8 App. 71; *Pierson v. State*, 21 App. 14, 17 S. W. 468; *Ledbetter v. State*, 23 App. 247, 5 S. W. 226; *Irby v. State*, 25 App. 203, 7 S. W. 705; *Tastard v. State*, 26 App. 260, 9 S. W. 888; *Miller v. State*, 27 App. 63, 10 S. W. 445; *Cahn v. State*, 27 App. 709, 11 S. W. 723; *Fulcher v. State*, 28 App. 465, 13 S. W. 750; *Ex parte Meyers*, 33 App. 204, 26 S. W. 196; *Benson v. State*, 38 App. 487, 43 S. W. 527.

Statements made by deceased when there was no hope of recovery and with the knowledge of impending death are admissible as dying declarations. *Gant v. State*, 73 App. 279, 165 S. W. 142; *Graham v. State*, 57 App. 104, 123 S. W. 691; *Douglas v. State*, 58 App. 122, 124 S. W. 933, 137 Am. St. Rep. 930; *Drake v. State* (Cr. App.) 143 S. W. 1157; *Johnson v. State* (Cr. App.) 149 S. W. 165; *Brookins v. State*, 71 App. 101, 158 S. W. 521; *Ward v. State*, 70 App. 393, 159 S. W. 272; *Christian v. State*, 71 App. 566, 161 S. W. 101; *Corbitt v. State*, 72 App. 396, 163 S. W. 436; *Dickson v. State* (Cr. App.) 168 S. W. 862; *Francis v. State* (Cr. App.) 170 S. W. 780.

It must appear that at the time of making such declaration the declarant was conscious of approaching death, and believed there was no hope of recovering. *Edmondson v. State*, 41 Tex. 497; *Lister v. State*, 1 App. 740; *Krebs v. State*, 3 App. 348; *Miller v. State*, 27 App. 63, 10 S. W. 445; *Sims v. State*, 36 App. 154, 36 S. W. 256; *Fulcher v. State*, 28 App. 465, 13 S. W. 750, and cases cited; *Ex parte Meyers*, 33 App. 204, 26 S. W. 196; *Morgan v. State*, 54 App. 542, 113 S. W. 934; *Figaroa v. State*, 58 App. 611, 127 S. W. 193.

If deceased gives a statement which is reduced to writing, and afterwards when he realizes that he is dying he refers to and approves such statement it is admissible as dying declarations. *Bryant v. State*, 35 App. 394, 33 S. W. 978, 36 S. W. 79; *Snell v. State*, 29 App. 236, 15 S. W. 722, 25 Am. St. Rep. 723; *Drake v. State*, 25 App. 293, 7 S. W. 868; *White v. State*, 30 App. 652, 18 S. W. 462; *Bryant v. State*, 35 App. 394, 35 S. W. 978, 36 S. W. 79.

The belief of the declarant that death is inevitable may be inferred from his statement, from the nature of the wound, and other circumstances, and it is not necessary that he should apprehend that he would die in a certain number of hours or days. *Krebs v. State*, 3 App. 348.

Declarant said that he was killed, but in his great agony persistently asked his physician to "do something for him." This request of his physician did not show hope of recovery, and his declarations were properly admitted. *Hunnicut v. State*, 20 App. 632.

Where deceased stated that he was fatally shot, whether he made the statement before or after his alleged dying declarations, all occurring in the same conversation, is immaterial. *King v. State*, 34 App. 228, 29 S. W. 1086.

Immediately after the shooting deceased stated that he would get even with defendant, but a short time after he stated to his companion that the wound was mortal, and that he could not recover, and continued to make this statement until his death; held, that his dying declarations were admissible. *Polk v. State*, 35 App. 495, 34 S. W. 633.

Whatever others thought or said is immaterial, provided deceased himself entertained no hope of living. *Brande v. State* (Cr. App.) 45 S. W. 17.

There is no form of phraseology in which a party making a dying declaration must indicate the fact that he is conscious of approaching death. If this appears with reasonable clearness it is sufficient. *Keaton v. State*, 41 App. 621, 57 S. W. 1128.

Where deceased, on being informed by the attending physician that he had no hope of recovery, stated that he did not think so either, but wanted the physician to do all he could for him, a dying declaration made thereafter is not inadmissible on the ground that deceased had a lingering hope of recovery. *Beckham v. State* (Cr. App.) 176 S. W. 564.

Signature.—As the statutory requisites of a dying declaration are merely that the declarant was conscious of approaching death and believed there was no hope of recovery, that the declaration was voluntarily made, that it was not in answer to interrogatories calculated to lead deceased to any particular statement, and that at the time of making it the declarant was of sane mind, a statement made by deceased and reduced to writing is admissible in evidence, although because of weakness it was not signed by him. *Beckham v. State* (Cr. App.) 176 S. W. 564.

2. That such declaration was voluntarily made, and not through the persuasion of any person.

Voluntary character of declaration.—It must appear that such declaration was voluntarily made, and not through the persuasion of any person. *Lister v. State*, 1 App. 740; *Krebs v. State*, 3 App. 348; *Ledbetter v. State*, 23 App. 247, 5 S. W. 226; *Garza v. State*, 3 App. 286; *Pierson v. State*, 21 App. 14, 17 S. W. 468.

The declaration need not be made spontaneously. *Hunter v. State*, 59 App. 439, 129 S. W. 125.

3. That such declaration was not made in answer to interrogatories calculated to lead the deceased to make any particular statement.

Answer to interrogatories.—It must appear that such declaration was not made in answer to interrogatories calculated to lead deceased to make any particular statement. *Lister v. State*, 1 App. 740; *Krebs v. State*, 3 App. 348; *Garza v. State*, Id. 287; *Ledbetter v. State*, 23 App. 247, 5 S. W. 226. Interrogatories to a dying person are not prohibited, nor will they invalidate the declarations unless they be of a character calculated to lead the deceased to make the particular statement. *Hunnicut v. State*, 18 App. 498, 51 Am. Rep. 330. The mere fact that certain of the dying declarations were made in response to questions asked, does not take from them their voluntary and spontaneous character unless they lead to or suggest the particular answer. *Pierson v. State*, 18 App. 524; *White v. State*, 30 App. 652, 18 S. W. 462; *Testard v. State*, 26 App. 260, 9 S. W. 888; *Taylor v. State*, 38 App. 552, 43 S. W. 1019; *Williams v. State*, 10 App. 528; *Brande v. State* (Cr. App.) 45 S. W. 17; *Ward v. State*, 70 App. 393, 159 S. W. 272.

A statement reduced to writing by another, from decedent's answers to questions, which was not read to or approved by him, is not admissible as a written dying declaration. *Hunter v. State*, 59 App. 439, 129 S. W. 125.

A dying declaration made by deceased in response to questions by the attending physician as to whether deceased knew who shot him, and if the man who shot him knew whom he was shooting, is not inadmissible as being made in response to interrogatories calculated to lead to any particular statement. *Beckham v. State* (Cr. App.) 176 S. W. 564.

4. That he was of sane mind at the time of making the declaration. [O. C. 660.]

Mental condition of declarant.—It must appear that the declarant was of sane mind at the time of making the declaration. *Garza v. State*, 3 App. 287; *Ex parte Fatheree*, 34 App. 594, 31 S. W. 403.

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 App. 63, 10 S. W. 445; *Cahn v. State*, 27 App. 709, 11 S. W. 723; *Fulcher v. State*, 28 App. 465, 13 S. W. 750.

Evidence of mental capacity held insufficient. *Ledbetter v. State*, 23 App. 247, 5 S. W. 226.

On examination of a witness as to dying declarations, inquiry by the court as to the condition of mind of deceased was not error. *Chalk v. State*, 35 App. 116, 32 S. W. 534.

Dying declarations appearing to be an intelligent, continuous, and logical statement of how the killing occurred are admissible though declarant for part of the time was under the influence of opiates and had to be aroused from time to time to continue the statement. *Taylor v. State*, 38 App. 552, 43 S. W. 1019.

On necessity for charge on condition of declarant, see *Poschal v. State* (Cr. App.) 174 S. W. 1057.

Relevancy and competency of declaration.—A mere opinion or conclusion of the declarant is inadmissible. *Sorrell v. State* (Cr. App.) 169 S. W. 299; *Williams v. State*, 40 App. 505, 51 S. W. 220; *Manley v. State*, 62 App. 392, 137 S. W. 1137; *Orner v. State* (Cr. App.) 143 S. W. 935.

Dying declarations are admissible only in cases of homicide, where the death of the party making such declaration is the subject of investigation. *Wright v. State*, 41 Tex. 246; *Krebs v. State*, 3 App. 348; *Roberts v. State*, 5 App. 141; *West v. State*, 7 App. 150; *Radford v. State*, 33 App. 520, 27 S. W. 142.

A shorthand statement of fact is not objectionable as an opinion. *Gaines v. State*, 58 App. 631, 127 S. W. 181. And see *Lane v. State*, 59 App. 595, 129 S. W. 353.

This article lays down no new rule, but is merely declaratory of the common law rules of evidence with relation to dying declarations. *Benavides v. State*, 31 Tex. 579; *Black v. State*, 1 App. 368.

The name of the deceased may be proved by his dying declaration. *Lister v. State*, 1 App. 739.

They are not evidence when the homicide charged is that of any other person than the declarant. Thus, if two persons are killed in the same onslaught, the declarations of one are not admissible in a prosecution for the murder of the other. *Krebs v. State*, 3 App. 348.

Nothing can be evidence in a dying declaration that would not be so if the declarant were testifying as a witness on the trial. The mere opinion of the declarant is, therefore, inadmissible. But the declaration that the accused "killed me for nothing," is the statement of a fact, and not of opinion, and was held admissible. *Roberts v. State*, 5 App. 141.

Where a statement as to the cause of a quarrel is so interwoven with the thread of the narrative that it can not be separated without destroying the sense, this will not render the declaration inadmissible. *West v. State*, 7 App. 150.

Dying declarations may be communicated by the deceased otherwise than by articulate speech; but, however expressed, they must relate facts which deceased, if himself a witness, would be competent to attest. *Warren v. State*, 9 App. 619, 35 Am. Rep. 745.

They are not competent to prove former or extrinsic transactions, nor to show the mere opinion or belief of the deceased; and a fortiori, a witness' opinion as to what the deceased meant by an indefinite expression is not competent evidence. *Warren v. State*, 9 App. 619, 35 Am. Rep. 745.

Dying declarations are received in evidence from the necessity of the case, for the purpose of identifying the accused, establishing the circumstances of the res gestæ, and proving the transactions which resulted in the homicide; but declarations relating to former and distinct transactions are not admissible. *Temple v. State*, 15 App. 304, 49 Am. Rep. 200.

A statement of the deceased of a distinct fact, not connected with the circumstances of the death, or the immediate cause of it, is not admissible as a dying declaration, though competent and legal evidence if established by any other competent witness. *Ex parte Barber*, 16 App. 369; *West v. State*, 7 App. 150.

A statement made by deceased that "they had no occasion to shoot me," meaning the defendants, was held to be not a mere inference or opinion of the declarant, but was admissible as the statement of a fact. *Pierson v. State*, 21 App. 14, 17 S. W. 468.

The dying declaration was not admissible to prove that defendant was the father of his dying daughter's child, but if, at the time he was inflicting the injury which caused deceased's death, he stated he was the father of her child, that fact could be proved. *Ex parte Fatheree*, 34 App. 594, 31 S. W. 403.

The state may show, as a part of decedent's dying declarations, that he stated that accused killed him for nothing, and that he could not run out of it, or beg out of it. *Craft v. State*, 57 App. 257, 122 S. W. 547.

For evidence not admissible as a dying declaration, having no relation to the cause or facts of the killing, see *Jackson v. State*, 63 App. 351, 139 S. W. 1156.

Evidence was admissible of statements by decedent, made after executing a written dying declaration, stating that accused's codefendant shot him, to the effect that accused was in the room, and giving additional details not conflicting with the written declaration. *Ryan v. State*, 64 App. 628, 142 S. W. 878.

A declaration that the declarant was going to die, and his request to the witness to tell his mother that he was going to die like a man, that a coward shot him, is inadmissible, being such as he would not be permitted to testify to, if living. *Drake v. State* (Cr. App.) 143 S. W. 1157.

A statement, "this trouble came up over nothing. We had been quarreling about the books and I started to get up and go away and he cut me while I was getting up" is admissible. *Corbitt v. State*, 72 App. 396, 163 S. W. 436.

A statement by a witness to deceased after he had been shot and while he was giving a dying declaration that deceased should have known better than to have gone out with defendant to the place where the shooting occurred was inadmissible. *Sorrell v. State* (Cr. App.) 169 S. W. 299.

Predicate for admission of declaration, and method of proof.—On proof of consciousness of impending death, see *Krebs v. State*, 3 App. 348; *Fulcher v. State*, 28 App. 465, 13 S. W. 750; *Pierson v. State*, 21 App. 14, 17 S. W. 468; *Bryant v. State* 35 App. 394, 33 S. W. 978, 36 S. W. 79; *Hunter v. State*, 59 App. 439, 129 S. W. 125; *Ward v. State*, 70 App. 393, 159 S. W. 272.

When dying declarations are not *res gestæ*, each element prescribed by this article must be proved to establish the predicate for their admission. *Ledbetter v. State*, 23 App. 247, 5 S. W. 226; *Irby v. State*, 25 App. 203, 7 S. W. 705; *Fulcher v. State*, 28 App. 465, 13 S. W. 750; *Ward v. State*, 70 App. 393, 159 S. W. 272.

The correct practice is, when a dying declaration is proposed to be introduced in evidence by the state, for the court to ascertain by a preliminary examination of

the witnesses the condition of the declarant at the time of making such declaration, before admitting the same in evidence. *Benavides v. State*, 31 Tex. 579.

If a dying declaration was reduced to writing when made, it is not competent for the prosecution to prove such declaration by parol evidence, without accounting for the nonproduction of the writing. But, if the deceased made a declaration on more than one occasion, the fact that on one occasion his declaration was reduced to writing, does not preclude parol evidence proving his declaration made on another occasion, but not reduced to writing. *Krebs v. State*, 8 App. 1.

A witness to dying declarations, if he is not able to state the precise language used by the declarant, may state the substance of the declarations. *Krebs v. State*, 8 App. 1.

Objections to the introduction of dying declarations in evidence must be made on the trial. They come too late when made for the first time on a motion for new trial, and will not be considered on appeal. *Thomas v. State*, 11 App. 315; *Caldwell v. State*, 12 App. 302; *Black v. State*, 1 App. 368; *Johnson v. State*, 27 Tex. 758.

Where the dying declarations had been reduced to writing, a portion thereof being inadmissible was excluded by the court, and the remainder was admitted without expunging from the writing that portion held to be incompetent. Held correct. That when a written instrument contains both legal and illegal evidence, the court cannot be required to expunge that which is illegal. If the court points out to the jury the illegal testimony, and designates it so that the jury can identify it, it is all that can be required. *Ex parte Barber*, 16 App. 369.

On the preliminary investigation as to the admissibility of the dying declaration, a witness in behalf of the state swore that the declarant said he was dying. The defendant proposed to contradict the testimony of this witness by proving that the declarant did not say he was dying. The judge refused to hear the proposed contradictory testimony, but stated that he would admit it to go before the jury on the trial in chief, as evidence tending to impeach the credibility of the state's witness. Held that these rulings were correct. *Hunnicuttt v. State*, 20 App. 632.

One of the essential predicates to the competency of dying declarations as evidence is that, at the time they were made, the defendant was conscious of approaching death, and had no hope of recovery. See the opinion in extenso and the statement of the case for a predicate totally insufficient in this respect; wherefore the declarations of the deceased were erroneously admitted in evidence as dying declarations. *Irby v. State*, 25 App. 203, 7 S. W. 705.

If a dying declaration was reduced to writing when made, it is not competent for the prosecution to prove it by parol without accounting for the nonproduction of the writing. See this case in extenso upon the subject of dying declarations, predicate, etc. *Drake v. State*, 25 App. 293, 7 S. W. 868.

As a predicate for the introduction in evidence of the dying declarations of the deceased, the state proved that deceased was conscious and sane when he made them; that he knew his speedy death was inevitable, and that he made the said declarations voluntarily, and not in reply to questions calculated to lead him to make any particular statement. Held, that the predicate was sufficient to admit the declarations in evidence as dying declarations being made immediately after the shooting. Moreover, the statements were *res gestæ*. *Testard v. State*, 26 App. 260, 9 S. W. 888.

As a necessary predicate for the admission in evidence of dying declarations it must be established that the declarant, when he made them, was under the sense of impending death, and was sane. Consciousness of approaching death is provable, not merely by the solemn protestations of the dying person, but by any circumstance which sufficiently shows that when he made the declarations he was under the sense of impending death. See the opinion and the statement of the case for evidence held sufficient to establish the necessary predicate for the proof of dying declarations. *Miller v. State*, 27 App. 63, 10 S. W. 445.

Dying declarations of the injured female to her mother, the wife of defendant, that her father, defendant, had caused her death, could be proved by the mother, who, subsequent to the declaration, was divorced from defendant. *Ex parte Fatheree*, 34 App. 594, 31 S. W. 403.

It is not error for the court to stop the witness when he is detailing statements made by deceased and inquire the condition of deceased when he made the statements. *Chalk v. State*, 35 App. 116, 32 S. W. 534.

Testimony that deceased was rational, and that he stated that he could not recover, but was bound to die, is sufficient foundation for admitting his dying declarations. *Polk v. State*, 35 App. 495, 34 S. W. 633.

For evidence held to justify the admission of dying declarations, see *Sims v. State*, 36 App. 154, 36 S. W. 256.

On evidence as to declarant's competency as a witness, and as to his intelligence and mental condition, see *Hunter v. State*, 59 App. 439, 129 S. W. 125.

Where there are several dying declarations, an oral declaration made at a time distinct from the time the written declaration was made is admissible; the rule that secondary evidence of the contents of writings is not admissible not applying. *Hunter v. State*, 59 App. 439, 129 S. W. 125.

Where defendant contests the right of the state to introduce the dying declaration of deceased, he cannot complain that, in showing that the deceased was sane and was conscious of approaching death, his physical and mental condition are described by witnesses, and his expressions in regard to his knowledge that death must ensue, stated. *Lyles v. State*, 64 App. 621, 142 S. W. 592.

Where testimony is admitted as a predicate for the introduction of a dying declaration, it should be limited to that purpose. *Hays v. State*, 73 App. 58, 164 S. W. 841.

Where deceased after being shot came into a yard and stated that he was killed, asking for a bed to die on, such statement constituted a sufficient predicate

for the admission of his subsequent statements with reference to the difficulty as a dying declaration. *Sorrell v. State* (Cr. App.) 169 S. W. 299.

Where the state had shown that just after the shooting, when deceased made certain declarations he realized that his wound was fatal, and that he was then in his right mind, and that the same conditions existed two days later just before his death, when he made other statements, it may be inferred that they also existed during the interval at which time he made a written declaration. *Francis v. State* (Cr. App.) 170 S. W. 779.

Impeachment and contradiction.—The admission and subsequent withdrawal of dying declarations will not entitle the accused to introduce contradictory statements made by the deceased, which were neither *res gestæ*, nor dying declarations, but merely hearsay. *Sutton v. State*, 2 App. 342, cited in *Felder v. State*, 23 App. 477, 5 S. W. 145, 59 Am. Rep. 777, and held to be not inharmonious therewith.

It is competent for the defendant to impeach the dying declarations, by proving statements made by the declarant contradictory of his dying declarations. *Felder v. State*, 23 App. 477, 5 S. W. 145, 59 Am. Rep. 777.

Where accused introduces written dying declarations, he may show by parol other contemporaneous declarations, not reduced to writing, though they contradict the written declaration. *Hunter v. State*, 59 App. 439, 129 S. W. 125.

Evidence tending to impeach or contradict declaration held admissible. *Lyles v. State*, 64 App. 621, 142 S. W. 592.

Effect of evidence.—It is error for the court to instruct the jury that dying declarations constitute the highest testimony known, and must receive full faith and credit. *Walker v. State*, 37 Tex. 366.

Charge.—A charge that, before the jury could consider the evidence of dying declarations, they must find that decedent made them, if he did, when he was conscious and sane, and was conscious of impending death without hope of recovery. Held, not objectionable as unduly emphasizing such declarations and leading the jury to believe that it was not necessary that they should have been made voluntarily. *Hunter v. State*, 59 App. 439, 129 S. W. 125.

Accused's right to confront witness.—See notes to Bill of Rights, § 10 (art. 4, ante).

Though dying declarations are *ex parte* and are taken when accused does not have the right of cross-examination, they are not objectionable for that reason. *Lane v. State*, 59 App. 595, 129 S. W. 353.

Res gestæ declarations.—See notes to art. 783, ante.

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.]

See Willson's Cr. Forms, 1045; *Bram v. U. S.*, 168 U. S. 532, 18 Sup. Ct. 183, 42 L. Ed. 568.

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1. **Nature and sufficiency of confession as admission of guilt.**—A confession is one's declaration of his guilty participation in a crime. *Whorton v. State* (Cr. App.) 152 S. W. 1082. And see, also, *Ferguson v. State*, 31 App. 93, 19 S. W. 901; *Frye v. State* (Cr. App.) 146 S. W. 199.

That a document is signed by one while in custody does not make it incompetent as a standard of comparison of handwriting. *Ferguson v. State*, 61 App. 152, 136 S. W. 465; *Jones v. State*, 73 App. 152, 165 S. W. 144.

When the accused was asked by the owner of an animal which had been shot, "What made you shoot my mare?" and in reply said, "I did not shoot her with shot," it was held that such reply was not a confession of guilt. *Dover v. State*, 32 Tex. 84.

Confessions can not be deduced from mere circumstantial evidence, but must flow from positive statements. *Eckert v. State*, 9 App. 105; *Conner v. State*, 17 App. 1; *Powers v. State*, 23 App. 42, 5 S. W. 153.

A statement with reference to the future commission of an offense in pursuance of a conspiracy, made prior to the commission of an offense, is not a confession. *Banks v. State*, 13 App. 182.

Before the silence of the defendant can be construed into acquiescence or confession of the truth of any language or conduct of another in his presence inculpatory of himself, it must clearly appear that the language was heard, or the conduct understood by him at the time. *Long v. State*, 13 App. 211; *Sauls v. State*, 30 App. 496, 17 S. W. 1066. And the circumstances must be not only such as afforded him an opportunity to act or speak, but such as would also properly and naturally call for some action or reply from men similarly situated. *Ingle v. State*, 1 App. 307.

A confession is a voluntary declaration made by a person who has committed a crime, of the agency or participation which he had in the same; an admission or acknowledgment that he committed, or was concerned in, the commission of the offense with which he is charged. It is not necessary, in order to make the statement a confession, that it should be a direct acknowledgment of guilt.

Acts, as well as words, may constitute a confession, and even silence, under certain circumstances. And these characters of confession are governed by the same rules as to their admissibility, as the usual confession by words. *Nolen v. State*, 14 App. 474, 46 Am. Rep. 247, overruling *Rhodes v. State*, 11 App. 563.

A promise on the part of an accused to pay the owner for the alleged stolen property, although a circumstance that will tend to establish his guilt of theft, is not a confession that he took the property, and hence is not a confession of theft. *Willard v. State*, 26 App. 126, 9 S. W. 358.

Confession, to avail the state, must disclose criminative facts. *Musgrave v. State*, 28 App. 58, 11 S. W. 927.

Defendant on being told that another person would have him arrested said: "If he does I will kill him;" held, that the statement was admissible as a tacit confession of guilt. *McAdoo v. State* (Cr. App.) 35 S. W. 966.

Defendant under arrest need not contradict statements made by another in his presence in answer to inquiries by an officer. Such statements, though not contradicted by him, are not admissible against him. *Denton v. State*, 42 App. 427, 60 S. W. 673.

Evidence that one accused of murder, on arrest, made no statement, is inadmissible. *Ripley v. State*, 58 App. 489, 126 S. W. 586.

And see *Willard v. State*, 26 App. 126, 9 S. W. 358; *Brooks v. State*, 26 App. 184, 9 S. W. 562; *Adams v. State*, 35 App. 285, 33 S. W. 354.

2. **Confession distinguished from exculpatory statements.**—This article relates solely to "confessions" and does not include exculpatory statements. *Ferguson v. State*, 31 App. 93, 19 S. W. 901; *Quintana v. State*, 29 App. 401, 16 S. W. 258, 25 Am. St. Rep. 730. And see *Whorton v. State* (Cr. App.) 152 S. W. 1082; *Mason v. State* (Cr. App.) 168 S. W. 115.

The falsity of exculpatory statements contained in a confession may be shown by circumstances leading to a belief in their falsity, beyond a reasonable doubt, as well as by direct evidence. *Cook v. State*, 71 App. 489, 160 S. W. 465.

A statement by accused to an officer several hours after the alleged offense is not admissible in his behalf merely because he was warned at the time that what he said might be used against him, where the state did not seek to elicit any part of the statement. *Cyrus v. State* (Cr. App.) 169 S. W. 679.

3. **Admissibility of confession in general.**—Confessions not made in accordance with this law inadmissible. *Brown v. State*, 55 App. 572, 118 S. W. 145; *Brown v. State*, 71 App. 45, 158 S. W. 533; *Chism v. State*, 71 App. 389, 159 S. W. 1185.

Although a first confession may be inadmissible in evidence, a subsequent one may be free from objection and admissible. See the following cases in relation to subsequent confessions: *Thompson v. State*, 19 App. 593; *Walker v. State*, 7 App. 245, 32 Am. Rep. 595; *Maddox v. State*, 41 Tex. 205; *Walker v. State*, 9 App. 38; *Whorton v. State* (Cr. App.) 152 S. W. 1082.

A confession not made in accordance with the statute is inadmissible, even for impeachment purposes. *Prata v. State* (Cr. App.) 172 S. W. 974, following *Morales v. State*, 36 App. 234, 36 S. W. 435, 846; overruling on the point *Quintana v. State*, 29 App. 401, 16 S. W. 258, 25 Am. St. Rep. 730; *Ferguson v. State*, 31 App. 93, 19 S. W. 901, and *Phillips v. State*, 35 App. 480, 34 S. W. 272.

When a confession of the main fact would be inadmissible, a confession of

collateral facts tending to establish the main fact, is, likewise, inadmissible. *Haynie v. State*, 2 App. 168; *Taylor v. State*, 3 App. 387; *Marshall v. State*, 5 App. 273; *Nolen v. State*, 9 App. 419; *Williams v. State*, 10 App. 526; *Austin v. State*, 15 App. 388.

A defendant is not entitled to put in evidence his confession in the first instance. It must be introduced by the state. *Cock v. State*, 8 App. 659.

The perjury assigned against the accused was an alleged false statement made by him as a witness for the defense on the trial of one C. for the murder of one J. The state was permitted to produce in evidence the statements of the accused as a witness at the inquest upon the body of the said J., and also his subsequent statement to one H. with respect to the killing of J. by C. Held, that the evidence was competent as bearing directly upon the falsity of the statements upon which the perjury was assigned. *Cordway v. State*, 25 App. 405, 8 S. W. 670.

The state having proved that, on the day after the killing of J. by C., the accused told one H. that J. was unarmed when he was killed by C., the defense proposed, but was not allowed to prove, that two or three days subsequent to the homicide he told one McM. that J. had a pistol in his hand when he was shot and killed by C. Held, that exclusion of the proposed evidence was correct. *Cordway v. State*, 25 App. 405, 8 S. W. 670.

In the same conversation in which accused confessed to forging the instrument in question, he confessed embezzling other funds. Held that the latter confession was admissible to show intent. *Strang v. State*, 32 App. 219, 22 S. W. 680.

Where accused was indicted for rape and incest, but the incest count was dismissed, the relevancy and admissibility of a confession must be determined as though defendant stood charged with rape only. *Pilgrim v. State*, 59 App. 231, 128 S. W. 128.

Error in admitting a confession containing material facts is reversible. *Majors v. State*, 63 App. 488, 140 S. W. 1095.

A written confession made shortly after accused's arrest, stating her connection with the codefendant and all surrounding circumstances, was properly admitted in evidence. *Campbell v. State*, 63 App. 595, 141 S. W. 232, Ann. Cas. 1913D, 858.

In a prosecution for robbery, a confession stating on its face that it was obtained after accused was informed that he was charged with the offense of theft by firearms, but showing together with the evidence that it was the identical offense charged in the indictment for robbery, was properly admitted. *Johnson v. State* (Cr. App.) 149 S. W. 190.

A confession not admissible on the trial of accused is inadmissible against him in a subsequent prosecution for perjury committed by him as a witness in his own behalf in such trial. *Murff v. State* (Cr. App.) 172 S. W. 238.

Confession of the principal is admissible on trial of an accomplice, but only to prove the principal's guilt. *Aven v. State* (Cr. App.) 177 S. W. 82.

4. Admissibility of entire confession.—See notes to art. 811, post.

When any part of a confession is admitted in evidence, the defendant is entitled to have the whole of it admitted. *Riley v. State*, 4 App. 538; *Brown v. State*, 2 App. 139; *Harrison v. State*, 20 App. 387, 54 Am. Rep. 529; *Greene v. State*, 17 App. 395; *Jones v. State*, 13 Tex. 168, 62 Am. Dec. 550; *Powell v. State*, 37 Tex. 348; *McHenry v. State*, 40 Tex. 46. And see *Ex parte Martinez* (Cr. App.) 145 S. W. 959.

5. Confession by party not in confinement or in custody.—The mere fact that the officer intended to arrest defendant will not render a confession made by him to the officer inadmissible. *Holmes v. State*, 32 App. 361, 23 S. W. 687; *Cooper v. State* (Cr. App.) 147 S. W. 273; *Snider v. State*, 70 App. 16, 155 S. W. 533; *Turner v. State*, 72 App. 649, 163 S. W. 705; *Hiles v. State*, 73 App. 17, 163 S. W. 717; *Girtman v. State*, 73 App. 158, 164 S. W. 1008.

When the confession was freely and voluntarily made, without compulsion or persuasion, and when the person making it was not in confinement, or in the custody of an officer, it is admissible against the defendant. *Weller v. State*, 16 App. 200; *Womack v. State*, Id. 178; *Williams v. State*, 19 App. 276; *Penland v. State*, Id. 365; *Allen v. State*, 12 App. 190; *Pocket v. State*, 5 App. 552; *Speer v. State*, 4 App. 474; *Conoly v. State*, 2 App. 412; *Johnson v. State*, 20 App. 178; *Baum v. State*, 60 App. 638, 133 S. W. 271; *Tores v. State* (Cr. App.) 166 S. W. 523; *Harriss v. State* (Cr. App.) 174 S. W. 354.

When before arrest defendant voluntarily testified, his testimony is admissible against him. *Armstrong v. State*, 34 App. 248, 30 S. W. 235; *Barber v. State*, 64 App. 89, 142 S. W. 582; *Harrison v. State* (Cr. App.) 153 S. W. 139; *Mooney v. State*, 73 App. 121, 164 S. W. 828.

In the absence of statutory provisions regulating confessions not made when the defendant was in confinement, or in the custody of an officer, the common law rule on the subject controls. That rule is as follows: To be admissible, the confession must be voluntary, not obtained by improper influence, nor drawn from the party by means of threat or promise, of a character and under circumstances such as might have influenced the person making the confession. The essence of the rule is, that to qualify the confession as evidence, it must have been voluntarily made, without the appliances of hope or fear by any other person. *Womack v. State*, 16 App. 178; *Weller v. State*, Id. 200; *Collins v. State*, 20 App. 399; *Allen v. State*, 12 App. 190; *Cain v. State*, 18 Tex. 387; *Carter v. State*, 37 Tex. 362; *Speer v. State*, 4 App. 474; *Warren v. State*, 29 Tex. 369.

When confession is made by a defendant not under arrest or in confinement, the common law rule governs. *Cook v. State*, 22 App. 27, 22 S. W. 23, 40 Am. St. Rep. 758.

That defendant believed one of the crowd an officer did not render his confession inadmissible. *Lopez v. State*, 37 App. 649, 40 S. W. 972.

Evidence of accused's statement to the grand jury held admissible, though not

reduced to writing; he not having been under arrest. *Browning v. State*, 64 App. 148, 142 S. W. 1.

Statements made by defendant in his testimony in the preliminary hearing of another charged with the same burglary were properly admitted in evidence, where at the time of making such statements defendant was not under arrest or charged with the offense. *Spicer v. State* (Cr. App.) 154 S. W. 548.

Testimony before the grand jury by defendant before he was under arrest, and when he had no information that he would be arrested, which was reduced to writing and sworn to, was not a written confession by defendant under arrest within the statute relating thereto. *Rogers v. State*, 71 App. 149, 159 S. W. 40.

6. Confession while in confinement or in custody.—If one who has no reasonable ground to believe himself under arrest makes a voluntary statement as to the circumstances, such statement is admissible against him, though the parties to whom it was made were hunting for and intended to arrest him. *Craig v. State*, 30 App. 619, 18 S. W. 297. And for other decisions hereunder, see *Baker v. State*, 25 App. 1, 8 S. W. 23, 8 Am. St. Rep. 427; *Boyett v. State*, 26 App. 689, 9 S. W. 275; *Bailey v. State*, 26 App. 706, 9 S. W. 270; *Brown v. State*, 26 App. 308, 9 S. W. 613; *Hawkins v. State*, 27 App. 273, 11 S. W. 409; *Neeley v. State*, 27 App. 324, 11 S. W. 376; *Crowder v. State*, 28 App. 51, 11 S. W. 835, 19 Am. St. Rep. 811; *Walker v. State*, 28 App. 112, 12 S. W. 503; *Lienpo v. State*, 28 App. 179, 12 S. W. 588; *Searcy v. State*, 28 App. 513, 13 S. W. 782, 19 Am. St. Rep. 851; *Jackson v. State*, 29 App. 458, 16 S. W. 247; *Sands v. State*, 30 App. 579, 18 S. W. 86; *Martin v. State*, 57 App. 264, 122 S. W. 558; *Frye v. State* (Cr. App.) 146 S. W. 199; *Whorton v. State* (Cr. App.) 152 S. W. 1082; *Serrato v. State* (Cr. App.) 171 S. W. 1133.

If inculpatory declarations of the defendant are *res gestæ*, they are admissible against him, though they might be incompetent as confessions. *Powers v. State*, 23 App. 42, 5 S. W. 153. And see *Bronson v. State*, 59 App. 17, 127 S. W. 175; *Gowans v. State*, 64 App. 401, 145 S. W. 614; *Hickman v. State* (Cr. App.) 145 S. W. 914.

Actual custody, whether that of an officer or not, is sufficient to exclude the confession, if made without caution. *Warren v. State*, 29 Tex. 369. See the following cases illustrating the meaning of "confinement" and "custody." *Grosse v. State*, 11 App. 364; *Nolen v. State*, 9 App. 419; *Nolen v. State*, 14 App. 474, 46 Am. Rep. 247; *Nolen v. State*, 8 App. 585; *Conoly v. State*, 2 App. 412; *Smith v. State*, 13 App. 507; *Owens v. State*, 16 App. 448; *Williams v. State*, 19 App. 276; *Bronson v. State*, 59 App. 17, 127 S. W. 175.

When the person making a confession is in confinement, or in custody of an officer, such confession is not admissible evidence against him, unless it is shown to be within some one of the exceptions specified in the preceding article. *Ake v. State*, 30 Tex. 466; *Adams v. State*, 34 Tex. 526; *Barnes v. State*, 36 Tex. 356; *Williams v. State*, 37 Tex. 474; *Haynie v. State*, 2 App. 169; *Angell v. State*, 8 App. 451; *Williams v. State*, 10 App. 526; *O'Connell v. State*, Id. 567; *Kennon v. State*, 11 App. 356; *Lopez v. State*, 12 App. 27; *Harriss v. State* (Cr. App.) 174 S. W. 354.

It is immaterial that the offense for which the defendant was confined, or was in custody when the confession was made, is a different offense than that for which he is on trial. *O'Connell v. State*, 10 App. 567; *Taylor v. State*, 3 App. 387; *Neiderluck v. State*, 21 App. 320, 17 S. W. 467; *Grosse v. State*, 11 App. 364; *Davis v. State*, 19 App. 201.

If a witness, in an examining trial, is charged or suspected of the crime under investigation, and is aware of the fact that he is so charged or suspected, his testimony on such investigation is not admissible against him when on trial for the offense investigated. *Wood v. State*, 22 App. 431, 3 S. W. 336.

When it is shown that defendant was sent for and brought to a certain place, but it is shown he was not actually under arrest, and was not at such place against his will, his confessions and declarations made at the place are admissible against him. *Moore v. State*, 39 App. 266, 45 S. W. 809.

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 App. 270, 116 S. W. 582. And see *Martin v. State*, 57 App. 595, 124 S. W. 681.

Evidence of a statement by accused while under arrest for a misdemeanor previous to the homicide held admissible to prove motive. *Lane v. State*, 59 App. 595, 129 S. W. 353.

Accused held not under arrest so to make a confession inadmissible for failure to observe statutory requirements. *Hinsley v. State*, 60 App. 565, 132 S. W. 779.

Where the sheriff took accused and his brother to the scene of the homicide, they were under arrest. *Zimmer v. State*, 64 App. 114, 141 S. W. 781.

7. — Caution.—A confession made after due caution is legitimate evidence. *Nichols v. State*, 32 App. 391, 23 S. W. 680; *Mixon v. State*, 36 App. 66, 35 S. W. 394; *Williamson v. State*, 36 App. 225, 36 S. W. 444; *Williams v. State*, 37 App. 147, 38 S. W. 999; *Balls v. State* (Cr. App.) 40 S. W. 801; *Henry v. State*, 38 App. 306, 42 S. W. 559.

Where accused is under arrest, and is not warned, his confession is inadmissible. *Collins v. State*, 57 App. 410, 123 S. W. 582; *Rains v. State*, 33 App. 294, 26 S. W. 398; *White v. State* (Cr. App.) 38 S. W. 169; *Carlisle v. State*, 37 App. 108, 38 S. W. 991; *Fowler v. State*, 71 App. 1, 158 S. W. 1117; *Hill v. State*, 72 App. 109, 161 S. W. 118; *Perrett v. State*, 72 App. 212, 162 S. W. 882.

A voluntary statement cannot be used in evidence against the defendant, unless it was made after a proper caution, and proof must be made of the verity and genuineness of such statement. *De Warren v. State*, 29 Tex. 464; *Powell v. State*, 37 Tex. 348; *Brez v. State*, 39 Tex. 95.

Where the prisoner wrote out a confession and handed it to an officer, who, when he received it, warned him that it might be used in evidence against him, it was held that such confession was admissible, as the prisoner, after being cau-

tioned, evinced no desire to retract it; but that if he had evinced such desire, the confession would not have been admissible. *Harris v. State*, 6 App. 97; *Waite v. State*, 13 App. 169.

Ordinarily, a confession made when the party is in confinement or in custody, is not admissible unless, before it was made, the defendant was informed or cautioned that it might be used in evidence against him. And a statement made by a prisoner uncautioned, can not be made evidence by proving that the same was repeated in his presence and he made no reply thereto. *Jackson v. State*, 7 App. 363; *Shrivers v. State*, Id. 450.

When the confession by words is inadmissible, because the defendant was uncautioned, his acts or his silence would, for the same reason, be inadmissible. *Nolen v. State*, 14 App. 474, 46 Am. Rep. 247, overruling *Rhodes v. State*, 11 App. 563.

An application for a continuance, made when the defendant was in custody, can not be used in evidence against him, unless before making it he was cautioned that it might be so used. *Austin v. State*, 15 App. 388. See, also, *Gonzales v. State*, 12 App. 657; *Vickery v. State*, 7 App. 401; *Wimberly v. State*, 22 App. 506, 3 S. W. 717; *Adams v. State*, 16 App. 162.

Admonition made to defendant by magistrate, does not apply to confessions made by defendant at any other time than when making statement before the examining court. *Baker v. State*, 25 App. 1, 8 S. W. 23, 8 Am. St. Rep. 427. While a person is in jail no statement made by him either written or verbal is admissible in evidence unless he has been duly cautioned that it may be used against him. *Rix v. State*, 33 App. 353, 26 S. W. 505.

The officer testified that while taking defendant to jail he twice warned him that anything he said might be used against him, that after such warnings he asked defendant who it was with him when he went to the store, to which defendant replied "That's for me to know and you to find out if you can;" held, the testimony was admissible. *Mixon v. State*, 36 App. 66, 35 S. W. 394.

Defendant cannot be cross-examined about a confession made without warning while under arrest. *Wright v. State*, 36 App. 427, 37 S. W. 732.

The fact that defendant was excited before she was warned would afford no ground for rejecting such confessions. *Carlisle v. State*, 37 App. 108, 38 S. W. 991.

When defense is insanity; held, error to admit a confession without warning. *Hurst v. State* (Cr. App.) 40 S. W. 264.

Written statement by defendant which he had in his pocket when arrested and which he intended to give his counsel is not privileged communication and is admissible, although he was under arrest and had not been warned when it was taken from him. *Renfro v. State*, 42 App. 393, 56 S. W. 1019.

Testimony of physicians appointed on a lunacy commission held admissible, as against the objection that it was derived from statements made by accused without proper warning. *Lane v. State*, 59 App. 595, 129 S. W. 353.

Evidence of a sheriff and constable, in rebuttal, that accused did not make certain statements to them, and that they saw no marks of violence on her, except a bruised place on one of her eyes, held not objectionable as a confession not in writing, made under arrest and without warning. *Young v. State*, 61 App. 303, 135 S. W. 127.

Where accused, after being warned that he need make no statement, voluntarily went before the grand jury and testified, his statement was admissible though the warning was not in accordance with the statute. *Bailey v. State* (Cr. App.) 144 S. W. 996.

See the following other decisions upon this subject: *Pocket v. State*, 5 App. 552; *Marshall v. State*, Id. 273; *Neiderluck v. State*, 21 App. 320, 17 S. W. 467; *Davis v. State*, 19 App. 201; *Taylor v. State*, 3 App. 387; *Davis v. State*, 2 App. 588; *Kirby v. State*, 23 App. 13, 5 S. W. 165.

8. — Voluntary statements before examining court.—And a confession made before an examining court and reduced to writing, but not properly authenticated, if otherwise competent evidence, may be proved by parol. *Guy v. State*, 9 App. 161; *Alston v. State*, 41 Tex. 39.

An oral plea of guilty, made before an examining court, preceded by a proper caution, is admissible in evidence against the defendant as an extrajudicial confession, if voluntarily made. *Rice v. State*, 22 App. 654, 3 S. W. 791.

That defendant was intoxicated is not a valid objection, unless it be shown that at the time he made the statement he was intoxicated to such a degree that he was incapable of understanding the warning and caution given by the magistrate. *Lienpo v. State*, 28 App. 179, 12 S. W. 588. The defendant must be warned and cautioned by the magistrate. *Walker v. State*, 28 App. 112, 12 S. W. 503. When defendant is duly cautioned, his statement is not rendered inadmissible by the fact that he wanted to waive further examination after he had made such statement. *Shaw v. State*, 32 App. 155, 22 S. W. 588.

When defendant voluntarily testifies at an examining trial his statements are admissible against him whether he was cautioned or not, although he may have been under arrest at the time. *Dill v. State*, 35 App. 240, 33 S. W. 126, 60 Am. St. Rep. 37.

Defendant made a statement before an examining court which was reduced to writing and sworn to by him and the justice of the peace told him that his statements might be used against him; held, the statement was admissible. *Williams v. State*, 37 App. 147, 38 S. W. 999.

Statement made by defendant to justice of the peace after being duly warned, reduced to writing and signed by defendant is in compliance with this law and admissible. So also is a statement voluntarily made before a grand jury reduced to writing and signed. *Pierce v. State*, 54 App. 424, 113 S. W. 148.

Where the accused is taken before a justice of the peace and waives examination and is requested to make a statement and does so and swears to it, such statement is not a voluntary statement under this article and is not admissible

in evidence against the accused in a prosecution for perjury. *Biard v. State*, 54 App. 440, 113 S. W. 275.

While, if accused takes the stand on the examining trial as a witness and is sworn, his testimony may be reproduced against him in any subsequent trial, whether he was warned or under arrest or not, yet where he makes a statement, as required by the statute, in the examining trial, the state, before introducing such testimony, must show a warning. *Kirkpatrick v. State*, 57 App. 17, 121 S. W. 511.

Accused's testimony before the examining magistrate is admissible against him on his subsequent trial, though he does not then testify. *Pressley v. State*, 64 App. 127, 141 S. W. 215.

A sworn statement, held admissible, as accused's testimony given on the examining trial, irrespective of whether it was admissible as a "statement" made after the statutory warning. *Pressley v. State*, 64 App. 127, 141 S. W. 215.

For a full discussion of the requisites to the admissibility of a "voluntary statement," see *Kirby v. State*, 23 App. 13, 5 S. W. 165. And as to manner, etc., of making a voluntary statement, see arts. 294, 295, ante.

9. — Voluntary character of confession in general.—The mere fact that a confession was made in answers to questions propounded by an officer does not show that it was not voluntary. *Oliver v. State*, 70 App. 140, 159 S. W. 235. But see *Pinckard v. State*, 62 App. 602, 138 S. W. 601.

A confession, to be admissible in evidence, if the party was in confinement or custody when it was made, must be freely made, without compulsion or persuasion, voluntarily and after the person making it has been cautioned that it may be used against him.

To render a confession inadmissible upon the ground that it was induced by compulsion, it is not sufficient that the person making the confession was influenced by fear of legal punishment. *Gentry v. State*, 24 App. 80, 5 S. W. 660; *Thompson v. State*, 19 App. 593. But see, also, *Womack v. State*, 16 App. 178.

Confession to be admissible must be made voluntarily without compulsion or persuasion. *Lauderdale v. State*, 31 App. 46, 19 S. W. 679, 37 Am. St. Rep. 788; *Clayton v. State*, 31 App. 489, 21 S. W. 255. And defendant must be notified that his confession may be used against him. *Kirby v. State*, 23 App. 13, 5 S. W. 165.

When defendant is cautioned that his confessions may be used against him, and voluntarily, and without hope of reward makes statements, they may be admitted as evidence against him. *Nichols v. State*, 32 App. 391, 24 S. W. 680.

10. — Threats, fear, promises or other inducements.—To render a confession inadmissible, upon the ground that it was induced by a promise of some benefit, the promise must be positive, and must be made or sanctioned by a person in authority, and must be of such character as would be likely to influence the party to speak untruthfully. *Gentry v. State*, 24 App. 80, 5 S. W. 660; *Rice v. State*, 22 App. 654, 3 S. W. 791; *Thompson v. State*, 19 App. 593.

A particeps criminis who, to secure exemption from prosecution, agrees to testify against his codefendant, and when presented as a witness refuses to so testify, fairly and fully in good faith, cannot claim the benefit of such agreement. His confession, made under such agreement, if freely and voluntarily made, without persuasion or compulsion, can be used in a prosecution against him. *Neeley v. State*, 27 App. 324, 11 S. W. 376. Also on the subject: *Baker v. State*, 25 App. 1, 8 S. W. 23, 8 Am. St. Rep. 427; *Searcy v. State*, 28 App. 513, 13 S. W. 782, 19 Am. St. Rep. 851; *Jackson v. State*, 29 App. 458, 16 S. W. 247; *Cannada v. State*, 29 App. 537, 16 S. W. 341. And see, also, *Bell v. State*, 31 App. 276, 20 S. W. 549; *Clayton v. State*, 31 App. 489, 21 S. W. 255.

If the confession was made through hope of immunity, or drawn out by persuasion, it is inadmissible. *Lauderdale v. State*, 31 App. 46, 19 S. W. 679, 37 Am. St. Rep. 788.

Where the defendant made a confession after being properly warned, the fact that the officer to whom confession was made remarked to the defendant, that from the way the defendant complained in his (the officer's) opinion he would be dead in an hour, did not render the confession inadmissible. *Jackson v. State*, 49 App. 215, 91 S. W. 789.

A charge to the effect that if the accomplice's statements, made in accused's absence, were found to be true the jury would be justified in considering accused's own confession against him, though it may have been made by persuasion or compulsion, held erroneous. *Overstreet v. State* (Cr. App.) 150 S. W. 630.

See, also, upon the subject: *Cain v. State*, 18 Tex. 387; *Elizabeth v. State*, 27 Tex. 329; *Warren v. State*, 29 Tex. 369; *Haynie v. State*, 2 App. 168; *Davis v. State*, Id. 588; *Shafer v. State*, 7 App. 239; *Taylor v. State*, 3 App. 387; *Williams v. State*, 10 App. 526; *O'Connell v. State*, Id. 567; *Waite v. State*, 13 App. 169; *Bryant v. State*, 18 App. 107; *Hilcher v. State*, 60 App. 180, 131 S. W. 592; *Turner v. State*, 72 App. 649, 163 S. W. 705.

11. — Written confession.—Written confession held to meet the requirements of the statute so as to be admissible. *Harris v. State*, 64 App. 594, 144 S. W. 232; *Berry v. State*, 58 App. 291, 125 S. W. 580; *Pilgrim v. State*, 59 App. 231, 128 S. W. 128; *Pinckard v. State*, 62 App. 602, 138 S. W. 601; *Johns v. State*, 63 App. 416, 140 S. W. 1093; *Wright v. State*, 63 App. 664, 141 S. W. 228; *Maxey v. State* (Cr. App.) 145 S. W. 952; *Ex parte Martinez* (Cr. App.) 145 S. W. 959; *Rainer v. State* (Cr. App.) 148 S. W. 735; *Overstreet v. State* (Cr. App.) 150 S. W. 630; *Overstreet v. State* (Cr. App.) 150 S. W. 899; *Drake v. State* (Cr. App.) 151 S. W. 315; *Cukierski v. State* (Cr. App.) 153 S. W. 313.

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*, 59 App. 23, 126 S. W. 1142; *Robertson v. State*, 54 App. 21, 111 S. W. 741; *Jenkins v. State*, 60 App. 236, 131 S. W. 542; *Henzen v. State*, 62 App. 336, 137

S. W. 1141; *Burton v. State*, 62 App. 402, 137 S. W. 1145; *Ayers v. State*, 62 App. 428, 137 S. W. 1146.

Statements while under arrest, not reduced to writing are inadmissible. *Fry v. State*, 58 App. 169, 124 S. W. 920; *Rodríguez v. State*, 58 App. 397, 126 S. W. 264; *Majors v. State*, 63 App. 488, 140 S. W. 1095; *Brown v. State*, 71 App. 45, 158 S. W. 533.

A written confession must be complete in itself; and omissions therefrom cannot be supplied by evidence. *Overstreet v. State* (Cr. App.) 150 S. W. 630; *La Fell v. State* (Cr. App.) 153 S. W. 884.

It being shown that a defendant's voluntary confession before an examining court was made in conformity with law, but was not so authenticated as to render it admissible in evidence, it was admissible to prove the statements therein contained by parol evidence. *Guy v. State*, 9 App. 161.

An unwritten confession, made before enactment of the present law is inadmissible though it may have been admissible when made. *Askew v. State*, 59 App. 152, 127 S. W. 1037.

A confession made voluntarily after due warning, and signed by accused and afterwards read over and explained to him, is admissible though not written by him. *Kelly v. State*, 61 App. 663, 136 S. W. 58.

A voluntary confession made out of court and reduced to writing, which does not show to whom the confession is made, and which is not signed by accused and witnessed by any one, though two persons were present, is inadmissible. *Baggett v. State* (Cr. App.) 144 S. W. 1136.

A confession reduced to writing and proved by three witnesses is properly admitted in evidence. *Douglas v. State*, 73 App. 385, 165 S. W. 933.

12. — **Truth of statement of inculpatory facts or circumstances.**—The facts must be found to be true in pursuance of the statement made by defendant and from no other source. *Crowder v. State*, 28 App. 51, 11 S. W. 835, 19 Am. St. Rep. 811. But where as a result of confessions made, stolen property is found, it is immaterial whether or not defendant was under arrest. *Smith v. State*, 34 App. 124, 29 S. W. 775. See, also, *Martin v. State*, 57 App. 595, 124 S. W. 681; *Boyman v. State*, 59 App. 23, 126 S. W. 1142; *Nunn v. State*, 60 App. 86, 131 S. W. 320; *Smith v. State*, 61 App. 225, 135 S. W. 533; *Turner v. State*, 62 App. 65, 136 S. W. 486; *Lane v. State* (Cr. App.) 152 S. W. 897; *Manley v. State* (Cr. App.) 153 S. W. 1138; *Moran v. State*, 73 App. 525, 166 S. W. 161.

When in connection with a confession, the party makes a statement of facts, or of circumstances that are found to be true, which conduce to establish his guilt, such confession is admissible against him, whether it was voluntarily made or not, or whether he was first cautioned or not. The entire confession, together with such statements of facts or circumstances found to be true, are admissible in evidence against him. *Weller v. State*, 16 App. 200 (overruling, in so far as they conflict with this decision, *Davis v. State*, 8 App. 510; *Walker v. State*, 9 App. 38; *Massey v. State*, 10 App. 645; *O'Connell v. State*, Id. 567; *Kennon v. State*, 11 App. 356). See, also, *Walker v. State*, 2 App. 326; *Davis v. State*, Id. 588; *Warren v. State*, 29 Tex. 370; *Selvidge v. State*, 30 Tex. 60; *Strait v. State*, 43 Tex. 486; *Speights v. State*, 1 App. 551; *Collins v. State*, 24 App. 141, 5 S. W. 848; *Zumwalt v. State*, 5 App. 521; *Berry v. State*, 4 App. 492; *Bean v. State*, 17 App. 60; *Buntain v. State*, 15 App. 485; *Loyd v. State*, 19 App. 137; *Burfey v. State*, 3 App. 519; *Binyon v. State* (Cr. App.) 56 S. W. 340.

To render the confession admissible under this exception, the facts or circumstances must be discovered by means of the statement made. If they had already been discovered when the confession was made, or were not discovered by means of the information afforded by the defendant, the confession is not admissible. *Walker v. State*, 2 App. 326; *Allison v. State*, 14 App. 122; *Nolen v. State*, 14 App. 474, 46 Am. Rep. 247.

The truth of the inculpatory facts or circumstances must be shown by evidence, aliunde the statements of defendant. *Kennon v. State*, 11 App. 356.

If the statement be with regard to where the fruits of a crime, or the instruments with which a crime was committed, are secreted or to be found, it is not essential, in order to render the confession admissible, that such property or instruments be found in the exact place stated; but it is sufficient that they be found in the immediate vicinity of such place, and be found in consequence of the information afforded by the defendant. *Buntain v. State*, 15 App. 485; *Davis v. State*, 8 App. 510.

The facts or circumstances stated and found to be true, must be such as conduce to establish the guilt of the defendant, and if they are not of this character, the confession will not be admissible. But a single fact or circumstance stated and found to be true, and which is inculpatory of the defendant, conducing to establish his guilt of the crime for which he is on trial, will render the confession admissible. *Owens v. State*, 16 App. 448. Irrelevant facts or circumstances, which cannot conduce to the establishment of guilt, are not admissible, even though found to be true. *Warren v. State*, 29 Tex. 369.

After his voluntary statement and the examination of witnesses on the examining trial, accused made a confession of guilt which, pending examination, was signed and sworn to by him before the magistrate. In that statement he confessed to the murder of the child, and proposed to show the place where he buried it. He afterward pointed out to the magistrate and others a place where bones, hair and clothing resembling those of a child were found. Held, that the confession was admissible as a judicial confession. *Jackson v. State*, 29 App. 458, 16 S. W. 247. Other decisions on this subject: *Neeley v. State*, 27 App. 324, 11 S. W. 376; *Searcy v. State*, 28 App. 513, 13 S. W. 782, 19 Am. St. Rep. 851; *Sands v. State*, 30 App. 579, 18 S. W. 86; *Brown v. State*, 26 App. 308, 9 S. W. 613. When as a result of the confessions the clothing of deceased is found, they are admis-

sible though he was not warned by the officer. *Spearman v. State*, 34 App. 279, 30 S. W. 229; *William v. State*, 34 App. 327, 30 S. W. 669.

The confession of a defendant acknowledged the killing and pointed out the place of the burial of the body. The confession was properly admitted. *Jackson v. State*, 29 App. 458, 16 S. W. 247; *Hawkins v. State*, 27 App. 273, 11 S. W. 409.

Even though a confession was obtained by undue means, yet if by means of his statement, money of which deceased was robbed, was found, this would make the confession admissible. *Jones v. State*, 50 App. 329, 96 S. W. 931.

A confession is not admissible on the theory that the fruits of the crime were discovered by means thereof, if the fruits were known independent of the confession. *Baggett v. State* (Cr. App.) 144 S. W. 1136.

A declaration by one of two defendants, leading to the finding of part of the property, claimed to have been stolen, was not inadmissible, because made while both defendants were under arrest. *Davis v. State* (Cr. App.) 148 S. W. 302.

Where the sheriff to whom accused had confessed while in jail testified that defendant admitted the theft and told him he had given a portion of the money to one, who surrendered it to the sheriff, the confession was admissible, though not in writing. *Windham v. State* (Cr. App.) 150 S. W. 613.

Evidence that the defendant, while under arrest and unwarned, gave information from which the officers found decedent's watch, a fruit of the crime and an indication of defendant's guilt, was properly admitted in a murder case. *Ortiz v. State* (Cr. App.) 151 S. W. 1056.

The fact that the defendant in a homicide case by request takes persons to the place where they find the dead body is admissible in evidence, although he was under arrest and unwarned. *Ortiz v. State* (Cr. App.) 151 S. W. 1056.

A confession voluntarily made held properly admitted to establish the identity of deceased, and to show how and by what means he was killed. *Belcher v. State*, 71 App. 646, 161 S. W. 459.

Evidence that, on the arrest of a conspirator, he told where the others could be found, and that they were found there, was not objectionable as a confession made to officers after arrest. *Martinez v. State* (Cr. App.) 171 S. W. 1153.

13. Confessions by codefendants or by persons other than defendant.—The general rule is, that a person's confession cannot be used as evidence against any other person than himself. *Draper v. State*, 22 Tex. 400; *Hightower v. State*, Id. 605; *Ake v. State*, 30 Tex. 466; *Ake v. State*, 31 Tex. 416; *Armstead v. State*, 22 App. 51, 2 S. W. 627; *Perigo v. State*, 25 App. 533, 8 S. W. 660. See, also, *Couch v. State*, 58 App. 505, 126 S. W. 866.

A confession made by a co-conspirator with the defendant, if admissible against such co-conspirator, is also admissible against the defendant, if it was made pending the conspiracy and in furtherance thereof; but not if made after the consummation of the conspiracy. *Zumwalt v. State*, 5 App. 521; *Hannon v. State*, Id. 549; *Allen v. State*, 8 App. 67; *Cohea v. State*, 11 App. 153; *Armstead v. State*, 22 App. 51, 2 S. W. 627; *Willey v. State*, 22 App. 408, 3 S. W. 570; *Martin v. State*, 25 App. 557, 8 S. W. 682.

Where a defendant is on trial, charged as an accomplice or accessory, it is competent for the state to prove confessions made by the principal in the crime, for the sole purpose, however, of establishing the guilt of such principal; and when a confession is admitted for this purpose, the jury must be instructed that it is not evidence against the defendant for any other purpose than to establish the guilt of the principal. *Simms v. State*, 10 App. 131.

Where two defendants are being tried jointly, a confession made by one may be admitted in evidence against him, but the jury must be instructed that they cannot consider such confession against the other defendant. *Collins v. State*, 24 App. 141, 5 S. W. 848.

The confession of the principal is admissible in evidence on the trial of the accomplice. *Bluman v. State*, 33 App. 43, 21 S. W. 1027, 26 S. W. 75.

A conspiracy cannot be proven by confessions of one of the co-conspirators, the existence of the conspiracy must be proven by other evidence. *Sessions v. State*, 37 App. 62, 33 S. W. 623.

One of two co-defendants made a confession after being warned, the other one said nothing; held, such confession could not be used against the one who kept silent. *Wright v. State*, 37 App. 627, 40 S. W. 491.

On a trial for burglary, evidence that while a third person in accused's presence, both he and accused being under arrest, was making a confession, accused interrupted and asked him what he was getting from the police department for his information, was inadmissible. *Bradshaw v. State* (Cr. App.) 155 S. W. 218.

The written confession of the principal, voluntarily made, and admissible against the principal, is also admissible against the accomplice, if limited by the instructions to the sole purpose of showing the guilt of the principal. *Millner v. State* (Cr. App.) 169 S. W. 899.

14. Preliminary evidence as to admissibility of confession.—The burden is upon the state to show that the confession proposed to be given in evidence by it is admissible. And until the proper predicate is laid, the confession should not be received. *Cain v. State*, 18 Tex. 387; *Greer v. State*, 31 Tex. 129; *Angell v. State*, 8 App. 451. But a contrary doctrine to the above seems to have been held in *Williams v. State*, 19 App. 276, without reference to the cases above cited. In the *Williams* case, *supra*, the evidence left it doubtful whether the confession was made at a time when the defendant was under arrest, and it was held that the burden devolved upon the defendant to show that he was, at the time of the confession, under arrest.

After a confession has gone to the jury, it is the undoubted right of the prisoner to show, if he can, that it was not in fact voluntary, and this he may do by any evidence which conduces, in any degree, to establish that conclusion. *Cain v. State*, 18 Tex. 387.

Burden of proof is on the state to show competency. Note the several facts to be proved as predicate. *Thomas v. State*, 35 App. 178, 32 S. W. 771.

Though accused contended that his confession was secured by coercion and coaxing and influence of intoxicating liquors, it was properly introduced where the testimony of the officers and two subscribing witnesses was to the effect that it was free and voluntary. *Williams v. State* (Cr. App.) 144 S. W. 622.

A county attorney to whom accused made a confession, cannot testify as to its contents, unless a compliance with the statutory requirements is shown. *Roberts v. State* (Cr. App.) 150 S. W. 627.

The testimony of the owner that he heard that his store had been burglarized, given preliminary to proving a confession by defendant to witness, made the next morning, is admissible as fixing the time. *Whorton v. State* (Cr. App.) 151 S. W. 300.

And, generally, on the subject, see *Angell v. State*, 8 App. 451; *Burks v. State*, 24 App. 326, 6 S. W. 300; *Womack v. State*, 16 App. 178, which, compare with *Williams v. State*, 19 App. 276.

15. Determination of question of admissibility of confession.—In a capital case, when a confession is about to be offered, the proper practice is to retire the jury from the court room until the admissibility of the confession has been determined by the judge. *Carter v. State*, 37 Tex. 362.

Where testimony was intended to be objected to on the ground that when the statements were made accused was under arrest, but the fact of his arrest was not stated either as a ground of objection nor certified by the court as true in fact, there is no merit in the objection. *Lott v. State*, 53 App. 604, 127 S. W. 191.

The objection that testimony was hearsay and irrelevant does not suggest the objection that it was given by a witness under arrest who had not been warned. *Zimmer v. State*, 64 App. 114, 141 S. W. 781.

16. — Province of judge and jury.—See notes to art. 734, ante.

17. Best and secondary evidence of confession.—See notes to art. 783, ante.

18. Effect of confession.—Where the state introduces a confession, it is bound by such confession until disproved. *Menefee v. State* (Cr. App.) 149 S. W. 138; *Winkler v. State*, 58 App. 564, 126 S. W. 1134.

The state can not use part of the defendant's confession, but all he said at the time is admissible, *Jones v. State*, 13 Tex. 168, 62 Am. Dec. 550; and if it should appear, even on motion for new trial, that the confession as used was incomplete, the motion should prevail. *Powell v. State*, 37 Tex. 348. The whole confession must be taken together, though the jury need not attach equal credit or belief to all parts of it, *McHenry v. State*, 40 Tex. 46; though it seems to have been held that if the state puts the declarations of accused in evidence, it is bound by them unless they are proved to be false. *Gardiner v. State*, 33 Tex. 692.

The jury may believe that part of the confession which is inculpatory of the defendant, and reject that which is in his favor, if they see fit. *Brown v. State*, 2 App. 139; *McHenry v. State*, 40 Tex. 46.

In considering a confession a jury may accept one portion of it as true, and reject as untrue that which has been contradicted by other testimony. *Carr v. State*, 24 App. 562, 7 S. W. 328, 5 Am. St. Rep. 905; *Fulcher v. State*, 28 App. 465, 13 S. W. 750.

The whole of the confessions introduced by the state must be taken together, and the state is bound thereby, unless the confessions are shown to be untrue by the evidence, and the confessions must be considered as evidence in connection with the other facts of the case. *Pratt v. State*, 59 App. 635, 129 S. W. 364.

Where the state introduces a confession, it is bound by all the statements therein except such as are proven untrue, but it is only bound by such statements as it introduces, and, where a written statement made by accused before the grand jury is introduced, his additional oral statements are not binding on the prosecution. *Bailey v. State* (Cr. App.) 144 S. W. 996.

19. — Corroboration, and proof of corpus delicti.—See notes to Pen. Code, art. 1084, as to proof of corpus delicti in cases of homicide.

A confession alone is not sufficient to support a conviction, but may be used to aid the proof of the corpus delicti, and the conviction will be sustained if it, with the other evidence, satisfies the jury of accused's guilt beyond a reasonable doubt. *Meek v. State*, 71 App. 433, 160 S. W. 698; *Dunn v. State*, 34 App. 257, 30 S. W. 227, 53 Am. St. Rep. 714; *Gilbert v. State*, 37 App. 301, 39 S. W. 572; *Nolan v. State*, 60 App. 5, 129 S. W. 1108, Ann. Cas. 1912B, 1248; *Harris v. State*, 64 App. 594, 144 S. W. 232.

A confession should be received with great caution, and a jury should hesitate to convict upon it in the absence of some corroboration, and in cases of murder, without proof of the corpus delicti, a confession of guilt, uncorroborated by other evidence, is not sufficient to warrant a conviction. *Fields v. State*, 41 Tex. 25; *Jones v. State*, 13 Tex. 168, 62 Am. Dec. 550; *Gay v. State*, 2 App. 127; *Riley v. State*, 4 App. 538.

But the foregoing should not be given in charge to the jury, as that would be charging upon the weight of evidence. *Thuston v. State*, 18 App. 26; *Collins v. State*, 20 App. 399.

Confession in case of theft is not sufficient to support conviction without proof of corpus delicti. *Hill v. State*, 11 App. 132.

When a person charged with burglary voluntarily goes before a grand jury and confesses his guilt, he should be found guilty. *Jones v. State*, 33 App. 7, 23 S. W. 793.

The confessions of a party are sufficient to convict when the offense has been proved aliunde. *Attaway v. State*, 35 App. 403, 34 S. W. 112.

It is well settled that the corpus delicti of a crime cannot be proven by the uncorroborated confession of the party charged therewith; but if the fact that a

burglary was committed can be proved aliunde the confession of the party is sufficient to connect him with the offense. *Attaway v. State*, 35 App. 403, 34 S. W. 112.

On trial for theft of cattle the evidence was a confession of defendant corroborated by the fact that he was seen going from the direction in which the animal was slaughtered, carrying fresh beef; held, sufficient to support a conviction, although the confession was made under persuasion. *Logan v. State*, 36 App. 1, 34 S. W. 925.

That the daughter of defendant, in incest, gave birth to a child is not corroboration of his extrajudicial confession, so as to warrant a conviction. *Nolan v. State*, 60 App. 5, 129 S. W. 1108, Ann. Cas. 1912B, 1248.

The birth of a child may, in connection with other circumstances, be considered on the question of corroboration of defendant's confession of incest with the mother. *Harris v. State*, 64 App. 594, 144 S. W. 232.

In a prosecution for bigamy, defendant's prior marriage cannot be established by confessions or admissions of the defendant alone. *Johnson v. State* (Cr. App.) 150 S. W. 936.

Where defendant made a written confession that he had taken a pistol from one of the witnesses, shot at another witness, and then hid it, and that it was the pistol found by the police, evidence of independent facts germane to the question whether he was carrying a pistol was admissible, as corroborative of the confession. *Wilson v. State*, 70 App. 497, 157 S. W. 495.

20. Charge.—See notes to art. 735, ante.

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.]

Evidence admissible.—Where a part of a conversation has been admitted in evidence, the adverse party may prove the entire conversation and all conversations connected therewith. *Carter v. State*, 59 App. 73, 127 S. W. 215; *Spearman v. State*, 34 App. 279, 30 S. W. 229; *Maxey v. State*, 58 App. 118, 124 S. W. 927; *Barbee v. State*, 58 App. 129, 124 S. W. 961; *Jones v. State*, 59 App. 559, 129 S. W. 1118; *Smith v. State*, 61 App. 225, 135 S. W. 533; *Maxey v. State* (Cr. App.) 145 S. W. 952; *Lawson v. State* (Cr. App.) 148 S. W. 587; *Wilson v. State*, 70 App. 3, 155 S. W. 242; *Sims v. State*, 72 App. 621, 163 S. W. 79; *Qualls v. State*, 73 App. 212, 165 S. W. 202; *Wyres v. State* (Cr. App.) 166 S. W. 1150; *Scott v. State* (Cr. App.) 175 S. W. 1054.

It is permissible to bring out the circumstances under which threats were made, and the cause therefor at the time forming a part of the same conversation, but without permitting the witness to go into detail. *Treadway v. State* (Cr. App.) 144 S. W. 655; *Singleton v. State*, 57 App. 560, 124 S. W. 92; *Francis v. State* (Cr. App.) 170 S. W. 779.

If the state elicits part of a conversation or declaration, the defendant is entitled to all that relates to the same subject, and to all that may be necessary to a full understanding of the portion elicited by the state, or explanatory of it. *Massey v. State*, 1 App. 563; *Davis v. State*, 3 App. 91; *Riley v. State*, 4 App. 538; *Satterwhite v. State*, 6 App. 609; *Shrivers v. State*, 7 App. 450; *Pharr v. State*, 9 App. 129; *Sager v. State*, 11 App. 110; *Greene v. State*, 17 App. 395; *Penland v. State*, 19 App. 365; *Harrison v. State*, 20 App. 387, 54 Am. Rep. 529; *Stockman v. State*, 24 App. 387, 6 S. W. 298, 5 Am. St. Rep. 894. See, also, *Watson v. State*, 9 App. 237; *Raney v. State*, 20 App. 455.

If the state proves an act of the defendant material to be understood, either party is entitled to accompanying declarations explanatory of such act. *Davis v. State*, 3 App. 91; *Stockman v. State*, 24 App. 387, 6 S. W. 298, 5 Am. St. Rep. 894; *Gaither v. State*, 21 App. 527, 1 S. W. 456.

When a portion of a writing is put in evidence, it is the privilege of the other party to put the whole of such writing in evidence. *Early v. State*, 9 App. 476; *Giles v. State*, 43 App. 561, 67 S. W. 412.

This article expands the common law rule. At common law, when a confession or admission is introduced in evidence against a party, such party is entitled to prove the whole of what he said on the subject at the time of making such confession or admission. But this article does not restrict the explanatory act, declaration, conversation, or writing, to the time when the act, declaration, conversation, or writing sought to be explained, occurred, but extends the rule so as to render such acts or statements admissible, if necessary to a full understanding of, or to explain, the acts or statements introduced in evidence by the adverse party, although the same may have transpired at a time so remote even as to not be admissible as *res gestæ*. *Greene v. State*, 17 App. 395 (overruling *Shrivers v. State*, 7 App. 450, in so far as it conflicts with the above). See, also, *Raney v. State*, 20 App. 455; *Harrison v. State*, 20 App. 387, 54 Am. Rep. 529; *Smith v. State*, 46 App. 267; 81 S. W. 936, 108 Am. St. Rep. 991.

Where the evidence sought to be introduced as the balance of the conversation is purely hearsay and self-serving, it is not admissible under this article. *Chenault v. State*, 46 App. 351, 81 S. W. 972; *Hutchinson v. State*, 58 App. 223, 125 S. W. 19.

Where one admits on cross-examination that he had been indicted, the adverse party on redirect examination may properly ask what was done with such indictment. *Green v. State*, 62 App. 345, 137 S. W. 126; *Cowart v. State*, 71 App. 116, 158 S. W. 809.

Where excerpt of the testimony given by a witness is introduced for impeachment, the adverse party is entitled to the admission of the balance. *Streight v. State*, 62 App. 453, 138 S. W. 742; *Allen v. State*, 64 App. 225, 141 S. W. 983.

If part of an act is given in evidence by one party, the whole act may be inquired into by the other party. *Strauss v. State* (Cr. App.) 173 S. W. 663; *Cole v. State*, 70 App. 459, 156 S. W. 929.

Where the state elicited certain words and actions of the defendant preparatory to the difficulty, and that a remark was made by him as he took up the weapon with which the assault was alleged to have been committed, he was entitled to have that remark in evidence on cross-examination. *Taliaferro v. State*, 40 Tex. 523.

Where the assaulted party testifies that he has no ill-feeling toward the defendant, his declarations to a contrary effect made before the difficulty are admissible. *McFarlin v. State*, 41 Tex. 23.

Where the state proves the defendant's declarations, the defendant is entitled to prove by his own witness the declarations testified about by the state's witness. *Neyland v. State*, 13 App. 536.

For testimony offered under this rule, but held to be inadmissible, see *Penland v. State*, 19 App. 365; also, *Kunde v. State*, 22 App. 65, 3 S. W. 325; *Rainey v. State*, 20 App. 455.

This article is not intended to operate against a defendant, and can not be invoked by the state to exclude the declarations of the defendant made when in custody, if the same be otherwise admissible as *res gestæ*. *Harrison v. State*, 20 App. 387, 54 Am. Rep. 529.

Where declarations or statements are full and complete, and there is nothing left in doubt concerning them, other declarations or statements are not admissible to explain them. *Craig v. State*, 30 App. 619, 18 S. W. 297.

Where the state has introduced evidence of the flight of defendant, he may, in explanation thereof prove by a witness that he had informed defendant that a mob was being organized to arrest and hang him, and that he advised him to flee. *Lewallen v. State*, 33 App. 412, 26 S. W. 832.

That the state introduced evidence of a conversation between defendant and another will not render admissible a subsequent conversation upon the same subject between defendant and still another person, which is an entirely new and distinct conversation, having no connection with the previous conversation. *Atkinson v. State*, 34 App. 424, 30 S. W. 1064.

Where the state, on a prosecution for murder in the perpetration of robbery proved that about a month before the homicide deceased had sold cattle for a certain sum of money, which fact was known to defendant, it was incompetent for defendant to go back of that transaction, and prove that long prior thereto deceased complained of hard times and a need of money. *Lancaster v. State*, 36 App. 16, 35 S. W. 165.

Where the acts and declarations of the defendant were introduced in evidence as *res gestæ*, subsequent explanations thereof were held to be inadmissible. *Gibson v. State*, 23 App. 414, 5 S. W. 314; distinguished from *Greene v. State*, 17 App. 395, and *Harrison v. State*, 20 App. 387, 54 Am. Rep. 529.

The defense asked a witness why he informed the deceased that he (the witness) thought that the deceased would get well. The witness replied that deceased asked him if he would recover, and that he replied that he would, whereupon the deceased said that if he did get well the defendant would "pay for this." Upon the ground that the defense had proved this part of the conversation, the state was permitted, upon cross-examination, to prove by the witness other statements of the deceased in that conversation, detailing the circumstances of the shooting. Held, that the question of the defense did not call for any part of the conversation between the witness and the deceased, but only for the latter's reason for assuring the former of his recovery, and this did not authorize the proof admitted for the state. *Irby v. State*, 25 App. 203, 7 S. W. 705.

The prosecution having proved statements made by defendant soon after the homicide, the defense proposed to prove a different statement made by the defendant to his brother and also the fact that he then told his brother that he had made different statements, and explained to him the reasons for making them. Held, that the exclusion of the proposed evidence was error, as it clearly came within this article. *Bonnard v. State*, 25 App. 173, 7 S. W. 862, 8 Am. St. Rep. 431. And further on evidence within this article, see *Rogers v. State*, 26 App. 404, 9 S. W. 762; *Wood v. State*, 28 App. 61, 12 S. W. 405; *Gallaher v. State*, 28 App. 247, 12 S. W. 1087; *Epson v. State*, 29 App. 607, 16 S. W. 780; *Suit v. State*, 30 App. 319, 17 S. W. 458; *Craig v. State*, 30 App. 619, 18 S. W. 297; *Simmons v. State*, 31 App. 227, 20 S. W. 573; *Jackson v. State*, 31 App. 552, 21 S. W. 367.

The State having introduced contradictory statements made by the prosecutrix, defendant should have been permitted to introduce her testimony given at the examining trial. *Bozeman v. State*, 34 App. 503, 31 S. W. 389.

When statements made by defendant are offered in evidence, it is proper to show the questions to which they were an answer. *Harvey v. State*, 35 App. 545, 34 S. W. 623.

When defendant in cross-examination of a State's witness brings out part of the testimony in connection with record evidence of a former trial the State may

on re-examination bring out the remainder of such evidence. *Fitzpatrick v. State*, 37 App. 20, 38 S. W. 806.

When there were prior encounters in which several parties were engaged, and which led up to the killing, and the State confines its testimony to the immediate killing, the defense should be allowed to bring out the whole matter on cross-examination. *Shumate v. State*, 38 App. 266, 42 S. W. 600.

Where State offers part of a statement made by a witness in court, defendant cannot offer the whole statement, but only such parts as bear on the part offered by the State. *Ford v. State*, 41 App. 1, 51 S. W. 937, 53 S. W. 869.

Where defendant made a statement at time of homicide, the statement of his wife made at the same time is admissible for purpose of a full understanding of defendant's declaration. *Jennings v. State*, 42 App. 78, 57 S. W. 643.

The mere fact that defendant asks improper questions at one time does not give the State the right to prove statements highly prejudicial to defendant, even though these latter are part of same conversation brought out by defendant in the first place. *Woodward v. State*, 42 App. 188, 58 S. W. 141.

Where the State has introduced in evidence the admission of defendant that he killed deceased it is admissible to prove on cross-examination his explanation of the circumstances of the homicide made at a different time from that of the admission. *Pratt v. State*, 53 App. 281, 109 S. W. 139, 140.

Where the visit of defendant to the town in which deceased (whose death he was charged with causing by a criminal operation) lived, and acts and declarations while there were proved by the State it was error not to permit him to prove the purpose of his visit and other acts and declarations by him done and made to meet the evidence introduced by the State. *Jackson v. State*, 55 App. 79, 115 S. W. 262, 131 Am. St. Rep. 792.

Where the explanatory matter is not a part of the conversation or act introduced by the other side, it must tend to explain the acts or statements already introduced in order to be admissible. *Potts v. State*, 56 App. 39, 118 S. W. 536.

Defendant cannot ordinarily put his own declarations in issue, unless the state has offered a part. *Hutchinson v. State*, 58 App. 228, 125 S. W. 19.

Where the state introduced a witness who testified that the defendant while at the house of the deceased and of the witness, made threatening remarks against the deceased and the witness, the defendant was entitled to show that the threatening remarks toward the witness were made by the deceased himself, during the same conversation. *Hodge v. State*, 60 App. 157, 131 S. W. 577.

This article announces a proper rule of evidence in civil, as well as in criminal, cases. *Cotton v. Morrison* (Civ. App.) 140 S. W. 114.

It being the state's theory that accused killed decedent for delivering to accused's wife a letter compromising accused, and accused having shown by the wife that he became angry because she refused to tell him from whom she received the letter, the state was entitled to show whether accused at that time had threatened to cut his wife's throat. *Lacy v. State*, 63 App. 189, 140 S. W. 461.

Where the state introduces evidence indicating flight, a witness for the defendant may testify that defendant explained that he was not avoiding arrest. *Ballenger v. State*, 63 App. 657, 141 S. W. 91.

When accused offers only such parts of a dying declaration as relate to the offense for which he is tried, the state is not entitled to introduce other parts referring to a different transaction occurring several years before, except that the former difficulty might be shown to establish malice, intent, or to throw any light on the particular offense. *Hinton v. State* (Cr. App.) 144 S. W. 617.

Where accused relies on a part of a statement admitted as dying declaration, the whole statement is admissible. *Johnson v. State* (Cr. App.) 149 S. W. 165.

Accused's wife, having testified on cross-examination that she told accused of abusive conduct toward her by decedent, what accused said, if anything, when told of such conduct was admissible. *Pettis v. State* (Cr. App.) 150 S. W. 790.

And so if one admits on cross-examination that he had been arrested on a criminal charge, the adverse party, on redirect examination, may elicit the fact that he was not indicted. *Crutchfield v. State* (Cr. App.) 152 S. W. 1053.

The state may inquire into the acts and statements of accused's father, who had a quarrel with deceased only a short time before the killing, where the transaction was brought out by accused. *Coulter v. State*, 72 App. 602, 162 S. W. 885.

The state is not required to introduce all of defendant's statement or testimony introduced before the grand jury, but may introduce a portion thereof, and leave to defendant the introduction of the remainder. *Shaw v. State*, 73 App. 337, 165 S. W. 930.

Where counsel for defendant in a homicide case elicited from a witness on cross-examination a partial answer to a question as to why he did not have defendant arrested on learning that he had stolen his hog, the court properly permitted the witness to state his reason in full, though this included advice given him by a third person. *Taylor v. State* (Cr. App.) 169 S. W. 672.

It is not error to admit evidence respecting a matter which accused injected into the case on cross-examination of a witness, and concerning which he voluntarily testified on his own direct examination. *Onstott v. State* (Cr. App.) 170 S. W. 301.

Where accused, on cross-examination of the state's witness alleged to have been bribed, and to impeach his credit, showed that such witness had signed defendant's name to checks, it was proper for the state to show why he had signed defendant's name. *Savage v. State* (Cr. App.) 170 S. W. 730.

An ex parte written statement made by a witness for defendant was properly admitted on rebuttal, over defendant's objection that it was hearsay, where defendant had previously elicited testimony as to the contents of a portion thereof. *Watts v. State* (Cr. App.) 171 S. W. 202.

Where, in a prosecution for cattle theft, defendant claimed he had bought the animal from N., and on a former trial proved by G. that N. had sought to bribe

M. to testify that defendant had admitted to him that he had stolen the animal, but on the trial in question G. testified for the state that his former testimony was untrue, and that he in fact, representing himself as N., went with defendant's brother to M. and sought to bribe him to testify that defendant had told him he had stolen the steer, the court properly permitted the state to prove by N. that he in fact never went to M.'s house or made any such proposition to him. *Swafford v. State* (Cr. App.) 171 S. W. 225.

Where one of accused's witnesses who confessed to participating in the robbery stated that accused was not a participant, he may be contradicted by proof of contrary statements, although such evidence is limited to the contradiction. *Collins v. State* (Cr. App.) 178 S. W. 345.

Where one of accused's witnesses testified that he did not sign a written statement concerning the crime and could not write his name, he may be impeached by contradictory evidence. *Collins v. State* (Cr. App.) 178 S. W. 345.

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.]

Writing defined.—See Pen. Code, art. 30.

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.—Proof of execution of instruments, see *Morrow v. State*, 22 App. 239, 2 S. W. 624; *Graves v. State*, 28 App. 354, 13 S. W. 149; *Abrigo v. State*, 29 App. 143, 15 S. W. 408; *Williams v. State*, 30 App. 153, 16 S. W. 760; *Caston v. State*, 31 App. 304, 20 S. W. 585; *Golin v. State*, 37 App. 90, 38 S. W. 794.

Art. 814. [794] Evidence of handwriting by comparison.—It is 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.]

Admissibility and effect of evidence as to handwriting.—This article expressly authorizes the proof of handwriting by comparison made by experts. *Speiden v. State*, 3 App. 156, 30 Am. Rep. 126; *Hughes v. State*, 59 App. 294, 129 S. W. 837. But such proof is not alone sufficient to establish handwriting where the person whose handwriting it is alleged to be denies the same under oath. *Spicer v. State*, 52 App. 177, 105 S. W. 815; *Brooks v. State*, 57 App. 251, 122 S. W. 386; *Batte v. State*, 57 App. 125, 122 S. W. 561; *Reeseaman v. State*, 59 App. 430, 128 S. W. 1126. Proof of handwriting by comparison has always been deemed feeble and unsatisfactory. *Jones v. State*, 7 App. 457; *Heacock v. State*, 13 App. 97.

— **Competency of witnesses.**—As a general rule a witness, who is not an expert, is not competent to prove the handwriting of another person unless he has seen the person write or is conversant with his acknowledged handwriting. But where the witness has seen the handwriting of the person in question or has received letters from him, or has seen him write he may testify. *Haynie v. State*, 2 App. 168; *Long v. State*, 10 App. 186; *Haun v. State*, 13 App. 383, 44 Am. Rep. 706; *Manning v. State*, 37 App. 180, 39 S. W. 118; *Chappell v. State*, 58 App. 401, 126 S. W. 274; *Barber v. State*, 64 App. 96, 142 S. W. 577; *Barber v. State*, 64 App. 89, 142 S. W. 582. And see *Bratt v. State*, 38 App. 121, 41 S. W. 622.

To entitle a witness to be examined as an expert in the comparison of handwriting, he must, in the opinion of the court, have special practical acquaintance with the immediate line of inquiry, and the question of his competency as such expert is one for the court and not the jury, to determine. A witness offered as an expert to prove handwriting by comparison, testified that he was not experienced in the comparison of handwriting, that he was not an expert in that respect, but thought he could tell whether or not two different instruments were written by the same individual; he was held to be not qualified to testify as an expert. *Heacock v. State*, 13 App. 97. As to qualification of witness, see, also, *Walker v. State*, 14 App. 609; *Chester v. State*, 23 App. 577, 5 S. W. 125. Experienced tellers of banking houses, whose daily duties require them to pass upon signatures, etc., and who consider themselves qualified to judge of handwriting, are competent expert witnesses to prove handwriting by comparison, and their opinions with reference to such matter are admissible. *Speiden v. State*, 3 App. 156, 30 Am. Rep. 126, distinguished from *Haynie v. State*, 2 App. 168. And see *Crow v. State*, 33 App. 264, 26 S. W. 209; *Crow v. State*, 37 App. 295, 39 S. W. 574.

— **Standard of comparison.**—A signature offered as a standard of comparison must be an admitted signature, or established as genuine by undoubted evidence. The mere opinion of the witness will not suffice. *Phillips v. State*, 6 App. 364; *Hatch v. State*, 6 App. 384; *Heard v. State*, 9 App. 1; *Watson v. State*, 9 App. 237; *Long v. State*, 10 App. 186; *Rogers v. State*, 11 App. 608; *Heacock v. State*, 13 App. 97; *Walker v. State*, 14 App. 609; *Williams v. State*, 27 App. 466, 11 S. W. 481; *Caldwell v. State*, 28 App. 566, 14 S. W. 122; *Hughes v. State*, 59 App. 294, 129 S. W. 837; *Ferguson v. State*, 61 App. 152, 136 S. W. 465; *Barber v. State*, 64 App. 96, 142 S. W. 577; *Horn v. State* (Cr. App.) 150 S. W. 948; *Jones v. State*, 73 App. 152, 165 S. W. 144.

A letter written by a convicted felon can not be used as a standard of comparison. *Long v. State*, 10 App. 186. Permitting an expert witness to make a fac simile of one of the signatures in question, which, together with a genuine signature, were, over defendant's objections, exhibited to the jury, for the purpose of showing how easily the genuine signature could be counterfeited, is improper. *Thomas v. State*, 18 App. 213. It is error to permit comparison with signature written for the occasion by prosecuting witness. *McGlasson v. State*, 37 App. 620, 40 S. W. 503, 66 Am. St. Rep. 842. Where one accused of theft claimed that he purchased the property from another, under a bill of sale introduced in evidence, and the state disputed the genuineness of the signature on the bill of sale, accused could not show another bill of sale signed by such other person by his wife. *Taylor v. State*, 62 App. 611, 138 S. W. 615.

Defendant may offer in evidence, for the purpose of comparison, a letter written by himself before the accusation was made. *Mallory v. State*, 37 App. 482, 36 S. W. 751, 66 Am. St. Rep. 808. An application for an attachment, signed by defendant, offered as a standard for comparison of handwriting, is not objectionable because it was signed by defendant while he was under arrest and unwarned. *Hunt v. State*, 33 App. 252, 26 S. W. 206. Where, in a prosecution for rape, defendant introduced a letter alleged to have been signed by B. to one H., claiming that the letter was written by prosecutrix, and that she signed B.'s name thereto, and prosecutrix wrote the name of B. for comparison, the court did not err in admitting genuine letters shown to have been written and signed by B. as standards of comparison. *Battles v. State*, 63 App. 147, 140 S. W. 733.

On a trial for murder the state was properly permitted to introduce in evidence a piece of paper, which was found pinned to the fence of deceased at the point whence the fatal shot was fired, and on which there was certain writing in pencil, the proved handwriting of defendant being used as a standard of comparison, and the piece of paper being shown to be a leaf from a blank book found in defendant's house, and belonging to him. *Caldwell v. State*, 28 App. 566, 14 S. W. 122.

Comparison of handwriting by jury.—On comparison of handwriting by the jury, see also *Hatch v. State*, 6 App. 384.

Standards of comparison used by expert witnesses should not be permitted to go into the hands of the jury to be used by them as proof of the handwriting on an alleged forged instrument. See the facts upon which this ruling was based: *Chester v. State*, 23 App. 577, 5 S. W. 125.

Cross-examination of expert.—See *Barber v. State*, 64 App. 89, 142 S. W. 582.

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.]

Impeachment of witness.—The party introducing a witness (including the state) can not attack his testimony in any manner, unless the witness has stated facts injurious to such party. Mere failure to prove a given fact by a witness will not authorize an impeachment of such witness. This is the only modification of the common law rule which denies a party the right to attack the testimony of his own witness. *White v. State*, 10 App. 381; *Clanton v. State*, 13 App. 139; *Tyler v. State*, 13 App. 205; *Thomas v. State*, 14 App. 70; *Bennett v. State*, 24 App. 73, 5 S. W. 527, 5 Am. St. Rep. 875; *Williams v. State*, 25 App. 76, 7 S. W. 661; *Self v. State*, 28 App. 398, 13 S. W. 602; *Thompson v. State*, 29 App. 208, 15 S. W. 206; *Erwin v. State*, 32 App. 519, 24 S. W. 904; *Kirk v. State*, 35 App. 224, 32 S. W. 1045; *Williford v. State*, 36 App. 414, 37 S. W. 761; *Gill v. State*, 36 App. 589, 38 S. W. 190; *Bailey v. State*, 37 App. 579, 40 S. W. 281; *Storms v. State* (Cr. App.) 37 S. W. 439; *Dunagin v. State*, 38 App. 614, 44 S. W. 148; *Young v. State* (Cr. App.) 44 S. W. 835; *Ross v. State* (Cr. App.) 45 S. W. 808; *Finley v. State* (Cr. App.) 47 S. W. 1015; *Barnard v. State*, 45 App. 67, 73 S. W. 958; *Andrews v. State*, 64 App. 2, 141 S. W. 220, 42 L. R. A. (N. S.) 747; *De Leon v. State* (Cr. App.) 155 S. W. 247; *Holmes v. State*, 70 App. 423, 157 S. W. 487; *Cunningham v. State*, 73 App. 565, 166 S. W. 519; *Evans v. State* (Cr. App.) 172 S. W. 795. And a mere failure to testify is not sufficient. *Largin v. State*, 37 App. 574, 40 S. W. 280; *Price v. State* (Cr. App.) 147 S. W. 243. And of course it follows that a party cannot put a witness on the stand knowing the testimony will be adverse in order to get in another statement which would be beneficial. *Ferrett v. State* (Cr. App.) 170 S. W. 316. That the testimony of one's own witness contradicts the testimony of another witness of the party is not sufficient to entitle such to impeach the witness. *Goss v. State*, 57 App. 557, 124 S. W. 107. Surprise is not an essential to the right to impeach a witness. *Blake v. State*, 38 App. 377, 43 S. W. 107. The State cannot impeach its own witness nor the defendant's witness on collateral matters. *Jones v. State*, 51 App. 472, 101 S. W. 996; *Wright v. State*, 63 App. 429, 140 S. W. 1105. And further as to the statement above announced, see *Baum v. State*, 60 App. 638, 133 S. W. 271; *Perry v. State* (Cr. App.) 155 S. W. 263; *Hightower v. State*, 70 App. 48, 155 S. W. 533; *Loicano v. State*, 72 App. 518, 163 S. W. 64.

Testimony on cross-examination held injurious and subject to contradiction. *Alexander v. State* (Cr. App.) 151 S. W. 807; *Harris v. State* (Cr. App.) 148 S. W. 1071.

When the cross-examiner seeks to draw out new matter, the witness becomes his pro hac vice, the adverse party may insist upon the right to cross-examine upon the new matter. *Bassham v. State*, 38 Tex. 622. But a party does not make

a. witness his own if he merely recalls him for the purpose of cross-examination. *Harvey v. State*, 37 Tex. 365.

When defendant voluntarily introduces evidence which tends to impugn the character of his own witness he can not complain that he was not subsequently allowed to introduce testimony to show that the said witness's reputation for truth and veracity is good. *Mealer v. State*, 32 App. 102, 22 S. W. 142.

When court on cross-examination refuses to allow question on ground that it is not in reference to any matter brought out by State and defendant makes witness his own as to the matter, he cannot impeach him when he denies having made a statement. *Gaines v. State* (Cr. App.) 53 S. W. 624.

The State has the right to contradict its own witness and show that he has made statements contradictory of his testimony on the witness stand. But the testimony is only admissible for the purpose of attacking the credibility of the witness and not to establish any fact necessary for the State to prove. *Brown v. State*, 55 App. 9, 114 S. W. 822.

Where, in a murder case, the question whether defendant got his pistol from his room before or after the commencement of his controversy with deceased was material, and a witness for the state, testifying contrary to the testimony given by her at the preliminary hearing, stated that he got the pistol before the commencement of the controversy, the state had a right to introduce evidence tending to discredit her by showing what occurred between the witness and the prosecuting attorneys just before they placed her on the stand, and that after the killing she lived several months with the family of defendant's father-in-law. *Thompson v. State* (Cr. App.) 177 S. W. 503.

Accused is not entitled to have the jury charged to disregard evidence which she brought out on cross-examining a state's witness. *Gray v. State* (Cr. App.) 178 S. W. 337.

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.

See Willson's Cr. Forms, 883.

Interpreters.—This article does not provide an interpreter for a non-English speaking defendant. *Livar v. State*, 26 App. 115, 9 S. W. 552. But see *Zunago v. State*, 63 App. 58, 138 S. W. 713, Ann. Cas. 1913D, 665.

Motion for new trial on the ground that the interpreter was not impartial; held, properly refused. *Ramos v. State* (Cr. App.) 35 S. W. 378.

There is nothing requiring an interpreter to be unbiased as far as the defendant is concerned. *Brown v. State* (Cr. App.) 59 S. W. 1118.

It is within the judge's discretion to permit a complaining witness to serve as interpreter. *Sellers v. State*, 61 App. 140, 134 S. W. 348.

Objection that an interpreter did not fairly interpret the testimony held insufficient. *Sellers v. State*, 61 App. 140, 134 S. W. 348.

CHAPTER EIGHT

OF THE DEPOSITIONS OF WITNESSES AND TESTIMONY TAKEN BEFORE EXAMINING COURTS AND JURIES OF INQUEST

Art.	Art.
817. Defendant may have deposition taken when examination, etc.	826. Certificate of officer taking depositions.
818. May also be taken, when.	827. When two officers act, each shall sign and seal.
819. Deposition of witnesses within the state may be taken by whom.	828. Deposition before examining court may be taken without interrogatories.
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823. Objections to depositions.	832. Deposition shall not be read unless oath be made that, etc.
824. How defendant shall proceed in taking depositions.	833. District or county attorney may make oath.
825. Written interrogatories shall be filed and notice given as in civil cases.	834. Testimony taken before examining court may be read in evidence, when.

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.]

Cited, *Kerry v. State*, 17 App. 178, 50 Am. Rep. 122; *Cline v. State*, 36 App. 320, 36 S. W. 1099, 37 S. W. 722, 61 Am. St. Rep. 850; *Robertson v. State*, 63 App. 216, 142 S. W. 533, Ann. Cas. 1913C, 440.

Constitutional right to confront witnesses.—See notes to art. 4, ante, and art. 834, post.

Continuance on showing diligence as to deposition.—See notes to art. 608, subd. 2, ante.

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.]

See Willson's Cr. Forms, 884.

Cited, *Evans v. State*, 12 App. 370; *Kirkpatrick v. State*, 57 App. 17, 121 S. W. 511.

Infirm witness.—A woman who has been confined in childbirth is not "infirm." *Davis v. State*, 64 App. 8, 141 S. W. 264.

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.]

Cited, *Kerry v. State*, 17 App. 178, 50 Am. Rep. 122; *Cline v. State*, 36 App. 320, 36 S. W. 1099, 37 S. W. 722, 61 Am. St. Rep. 850.

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 commissioner of deeds and depositions for this state, who resides within the state where the deposition is to be taken. [O. C. 767.]

Cited, *Kerry v. State*, 17 App. 178, 50 Am. Rep. 122.

Officers authorized to take depositions.—A consul of the United States is qualified to take depositions in foreign countries for use in this state. *Adams v. State*, 19 App. 250.

A notary public is not authorized to take depositions in criminal cases beyond the limits of this state. *Lienpo v. State*, 28 App. 179, 12 S. W. 588.

Art. 821. [801] Depositions of non-resident witness temporarily within the state.—The deposition of a non-resident witness who may be temporarily 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.]

See Willson's Cr. Forms, 884.

Cited, *Kerry v. State*, 17 App. 178, 50 Am. Rep. 122; *Adams v. State*, 19 App. 250; *Blake v. State*, 38 App. 377, 43 S. W. 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.]

See Willson's Cr. Forms, 823, 888, 890.

Cited, *Blake v. State*, 38 App. 377, 43 S. W. 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.]

See Willson's Cr. Forms, 885, 890.

Objections.—Objections must be in writing, and are governed by the same rules which obtain in civil cases. *Blake v. State*, 38 App. 377, 43 S. W. 107. See, also,

Pinkney v. State, 12 App. 352; *Kerry v. State*, 17 App. 178, 50 Am. Rep. 122; *Adams v. State*, 19 App. 250; *Lienpo v. State*, 28 App. 179, 12 S. W. 588.

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.]

See Willson's Cr. Forms, 884.

Cited, *Kerry v. State*, 17 App. 178, 50 Am. Rep. 122; *Adams v. State*, 19 App. 250; *Hennessey v. State*, 23 App. 340, 5 S. W. 215; *Richardson v. State*, 28 App. 216, 12 S. W. 870; *Cline v. State*, 36 App. 320, 36 S. W. 1099, 37 S. W. 722, 61 Am. St. Rep. 850.

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.]

See Willson's Cr. Forms, 885, 886, 888.

Cited, *Kerry v. State*, 17 App. 178, 50 Am. Rep. 122.

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.]

See Willson's Cr. Forms, 888-890.

Cited, *Kerry v. State*, 17 App. 178, 50 Am. Rep. 122.

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.]

See Willson's Cr. Forms, 888, 890.

Cited, *Kerry v. State*, 17 App. 178, 50 Am. Rep. 122.

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.]

See Willson's Cr. Forms, 888.

Proper officers.—The officers authorized to take depositions before an examining court are enumerated in art. 819, ante.

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.]

See Willson's Cr. Forms, 888.

Cited, *Kerry v. State*, 17 App. 178, 50 Am. Rep. 122.

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.]

See Willson's Cr. Forms, 888.

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.]

See Willson's Cr. Forms, 888.

Returning and filing.—On returning and filing, see, also, *Kerry v. State*, 17 App. 178, 50 Am. Rep. 122; *Byrd v. State*, 26 App. 374, 9 S. W. 759; *Rider v. State*, 26 App. 334, 9 S. W. 688; *Lienpo v. State*, 28 App. 179, 12 S. W. 588; *Millner v. State*, 72 App. 45, 162 S. W. 348.

It was urged, against the admissibility of the written testimony of a witness, that it was not sent to the clerk of the district court sealed up in an envelope, etc. Held, that the objection was untenable in view of the fact that the said testimony was identified as that of the witness by the magistrate who reduced it to writing, and was properly certified to by him at the time it was subscribed and sworn to by the witness. *Cowell v. State*, 16 App. 57.

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.]

See Willson's Cr. Forms, 891.

Cited, *Ballinger v. State*, 11 App. 323; *Robertson v. State*, 63 App. 216, 142 S. W. 533, Ann. Cas. 1913C, 440.

Admissibility of depositions in evidence.—Depositions can not be admitted in criminal cases except upon the conditions and with the restrictions prescribed by this chapter. The consent of the district attorney and the defendant to the taking of a deposition otherwise than in accordance with the provisions of the code will not make the deposition admissible, if objected to at the trial. *Johnson v. State*, 27 Tex. 758. Unless one of the contingencies enumerated in this article is shown to have occurred depositions are not admissible. *Evans v. State*, 12 App. 370. Sufficiency of proof of predicate, see *McGee v. State*, 31 App. 71, 19 S. W. 764. As to distinction between depositions and testimony taken at examining trial, see *Cline v. State*, 36 App. 320, 36 S. W. 1099, 37 S. W. 722, 61 Am. St. Rep. 850. See, also, notes to art. 834, post.

An affidavit that "the witness resides out of the state of Texas, and is a resident of the Indian Territory," was held sufficient to admit his deposition. *Ballinger v. State*, 11 App. 323. And so an affidavit that the witness was out of this state and was a resident of another state, was held sufficient. *Kerry v. State*, 17 App. 178, 50 Am. Rep. 122.

The statement of a witness, that he "did not know where the witness was," and the further showing, by the record, that attachment for said witness had been issued to several counties and returned not found, and that said witness appeared to be a railroad hand with no permanent place of abode, and that the state had no reasonable expectation of ever being able to procure his attendance, were held to not furnish a sufficient predicate for the admission of the deposition of said witness. *Pinkney v. State*, 12 App. 352.

A predicate, sufficient to admit a deposition in evidence, is not established by proof merely that the witness is absent from the state. *Menges v. State*, 21 App. 413, 2 S. W. 812; *Cooper v. State*, 7 App. 194. Or that the witness had left for parts unknown, and that ineffectual search had been made for him. *Evans v. State*, 12 App. 370.

The "bodily infirmity" which will authorize the admission of a deposition need not amount to a permanent disability. Thus, when a witness was at home, forty miles distant from the court, confined to his house from the effects of an attack of measles, which had destroyed one of his eyes and left him a chronic invalid, and he was also afflicted with constant pain in his head, and with palpitation of the heart, it was held that his written testimony was properly admitted. *Collins v. State*, 24 App. 141, 5 S. W. 848.

Depositions taken in a civil suit are inadmissible on a criminal trial. *Luckie v. State*, 33 App. 562, 28 S. W. 533.

This statute only permits the introduction of depositions. The stenographer's notes taken at a former trial are not admissible, even if a proper predicate has been laid. *Smith v. State*, 48 App. 65, 85 S. W. 1154.

Former testimony of witnesses inadmissible where they are alive and within jurisdiction of court. *Swilley v. State*, 73 App. 619, 166 S. W. 733.

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.]

See Willson's Cr. Forms, 891.
Cited, *Martinas v. State*, 26 App. 91, 9 S. W. 356; *Crook v. State*, 27 App. 198, 11 S. W. 444; *Scruggs v. State*, 35 App. 623, 34 S. W. 951; *Robertson v. State*, 63 App. 216, 142 S. W. 533, Ann. Cas. 1913C, 440.

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.]

Admissibility of testimony of deceased or absent witnesses.—As to taking testimony before an examining court, see arts. 282-288, ante. As to taking testimony before a jury of inquest, see arts. 1065, 1078, post.

It is competent to introduce the testimony of a witness given on a former trial or before an examining court or at an inquest, the accused having had the privilege of cross-examination, if it is also shown that the witness is dead, insane or beyond the jurisdiction of the court, or is prevented from attending. Such evidence is not in contravention of the constitutional right of the accused to be confronted by the witnesses against him. *Greenwood v. State*, 35 Tex. 587; *Black v. State*, 1 App. 368; *Gilbreath v. State*, 26 App. 315, 9 S. W. 618; *Ex parte Meyers*, 33 App. 204, 26 S. W. 196; *Porch v. State*, 51 App. 7, 99 S. W. 1122; *Hobbs v. State*, 53 App. 71, 112 S. W. 308, overruling *Cline v. State*, 36 App. 320, 36 S. W. 1099, 37 S. W. 722, 61 Am. St. Rep. 850; *Cox v. State* (Cr. App.) 36 S. W. 435, and *Childers v. State*, 30 App. 160, 16 S. W. 903, 28 Am. St. Rep. 899; *Roquemore v. State*, 59 App. 568, 129 S. W. 1120; *Robertson v. State*, 63 App. 216, 142 S. W. 533, overruling Ann. Cas. 1913C, 440; *Kemper v. State*, 63 App. 1, 138 S. W. 1025. See, also, *Dowd v. State*, 52 App. 563, 108 S. W. 389; *Nixon v. State*, 53 App. 325, 109 S. W. 931; *Brown v. State*, 55 App. 572, 118 S. W. 142; *Wyatt v. State*, 58 App. 115, 124 S. W. 929, 137 Am. St. Rep. 926; *Betts v. State* (Cr. App.) 144 S. W. 677; *Mitchell v. State* (Cr. App.) 144 S. W. 1006; *Smith v. State* (Cr. App.) 148 S. W. 722; *Grant v. State* (Cr. App.) 148 S. W. 760, 42 L. R. A. (N. S.) 428; *Irving v. State* (Cr. App.) 150 S. W. 611; *Hughes v. State* (Cr. App.) 152 S. W. 912; *Millner v. State* (Cr. App.) 169 S. W. 899; *McCue v. State* (Cr. App.) 170 S. W. 280; *Echols v. State* (Cr. App.) 170 S. W. 786; *Anderson v. State* (Cr. App.) 170 S. W. 142.

Circumstantial evidence may be resorted to for the purpose of establishing the removal of a witness from the state, in order to the admission of his evidence given before the examining court; but, to be sufficient, it must be clear and convincing on the issue. *Martinas v. State*, 26 App. 91, 9 S. W. 356, holding an affidavit of the prosecuting counsel, to the effect that he had good reason to believe that the witness had removed beyond the limits of the state, and that he had caused attachments for the witness to be issued to all of the counties in the state, all of which attachments had been returned not executed, was insufficient as proof of the removal of the witness beyond the limits of the state. And see *McCollum v. State*, 29 App. 162, 14 S. W. 1020.

A witness called to reproduce the testimony of the deceased witness may state the substance thereof, and it is not essential that he should be able to repeat the exact words of it. *Black v. State*, 1 App. 368; *Greenwood v. State*, 35 Tex. 587; *Simms v. State*, 10 App. 131; *Avery v. State*, Id. 199; *Potts v. State*, 26 App. 663, 14 S. W. 456.

Predicate for the introduction of witness' testimony at the former trial held insufficient. *Pace v. State*, 61 App. 436, 135 S. W. 379; *Ripley v. State*, 58 App. 489, 126 S. W. 586.

Evidence held sufficient to authorize introduction of the testimony given by a witness at the preliminary examination. *Millner v. State* (Cr. App.) 169 S. W. 899; *Millner v. State*, 72 App. 45, 162 S. W. 348.

If the witness, at the time he testified, was a convicted felon, his testimony is not admissible, unless it be shown that his competency had been restored by a pardon. *Schell v. State*, 2 App. 30.

When a sufficient predicate has been laid for the admission of written testimony taken before an examining court or a jury of inquest, and such testimony has been reduced to writing, but has not been so authenticated as to render it admissible in evidence, or if it has not been reduced to writing, parol evidence is admissible to reproduce the testimony of the witness. *O'Connell v. State*, 10 App. 567; *Davis v. State*, 9 App. 363; *Dunlap v. State*, Id. 179, 35 Am. Rep. 736.

When a deposition has been taken before an examining court or a jury of inquest, and has been reduced to writing and certified according to law, the defendant having been present when it was taken, and having had the privilege of cross-examination afforded him; and it is shown by oath, that since said deposition was taken the witness has died, or has removed beyond the limits of the state, or has been prevented from attending court by reason of age or bodily infirmity, or

through the act or agency of the defendant, or by the act or agency of any person whose purpose it was to deprive the defendant of the benefit of the testimony, the deposition is admissible in evidence for the defendant or for the state. *Post v. State*, 10 App. 579; *Johnson v. State*, 1 App. 333; *Ray v. State*, 4 App. 450; *Sullivan v. State*, 6 App. 319, 32 Am. Rep. 580; *Cooper v. State*, 7 App. 194; *Cowell v. State*, 16 App. 57; *Garcia v. State*, 12 App. 335.

The same rules which govern the admissibility of depositions are applicable to the written testimony of witnesses, taken before an examining court or a jury of inquest. Those rules require that oath be made to some one or more of the facts specified in article 832, ante. It is not required that the oath be made in the form of an affidavit, nor is a formal independent oath necessary; but the fact or facts relied upon to render the deposition or testimony admissible may be proved by the testimony of witnesses, as any other fact in the case. *Pinkney v. State*, 12 App. 352; *Parker v. State*, 18 App. 72; *Post v. State*, 10 App. 579; *Stegald v. State*, 22 App. 464, 3 S. W. 771; *Martinas v. State*, 26 App. 91, 9 S. W. 356.

Article 832, ante, prescribes five alternative contingencies upon which a predicate may be laid for the introduction in evidence of a deposition. Unless the predicate be laid in conformity to one or more of these prescribed contingencies, the deposition can not be read in evidence. A fortiori it is not competent to reproduce oral testimony, taken before an examining court or jury of inquest, without first laying such predicate. In this respect the Code is restrictive of the common law. *Evans v. State*, 12 App. 370, overruling *Sullivan v. State*, 6 App. 319, 32 Am. Rep. 580, in so far as it holds a contrary doctrine to the above.

Where the testimony of a deceased witness, on a former trial of the case, had been reduced to writing and filed in the court in which the cause was then pending, it was held that a duly certified copy thereof would be admissible, in behalf of the defendant, to reproduce the testimony of the deceased witness, on a trial had in a county to which the venue of the case had been changed. *Walker v. State*, 13 App. 618, 44 Am. Rep. 716, note.

In the trial of a defendant charged with murder, it was held competent for the state, after laying a proper predicate, to read in evidence the testimony of a witness taken on an examining trial, wherein the defendant was charged with an assault with intent to murder, it being shown that the wounds inflicted in said assault were an efficient cause for the death of the deceased, subsequent to said examining trial, the assault and the murder being, in fact, the same transaction. *Hart v. State*, 15 App. 202, 49 Am. Rep. 188; *Dunlap v. State*, 9 App. 179, 35 Am. Rep. 736.

The word "deposition," the second word in this article, is a manifest mistake on the part of the revisers, and was used by them inadvertently for the word "testimony," or the word "evidence," and the article should read, and must be construed to read, "the testimony," etc., or, "the evidence," etc. *Kerry v. State*, 17 App. 178, 50 Am. Rep. 122.

It is not necessary that the magistrate's certificate to testimony should show affirmatively that the testimony was read by or to the witness. No particular form for such certificate is prescribed by law, and the presumption obtains that the magistrate complied with the directions of the law. *Golden v. State*, 22 App. 1, 2 S. W. 531; *O'Connell v. State*, 10 App. 567. See, also, *Clark v. State*, 28 App. 189, 12 S. W. 729, 19 Am. St. Rep. 817; *McFadden v. State*, 28 App. 241, 14 S. W. 128.

The state offered the written testimony of certain witnesses, who had testified before an examining court, after having laid the predicate, that said witnesses had removed from the state. Defendant objected on the ground that the witnesses were absent by the aid and procurement of the attorney for the state. The proof showed that the witnesses were helpless and destitute women who, after coming to Texas at the instance of the defendant, had been swindled by him out of all their means of support, and that they were aided to return to their home, in another state, by the county attorney, from motives of charity, and not for the purpose of depriving the defendant of their testimony. It was held that the testimony was properly admitted. *Golden v. State*, 22 App. 1, 2 S. W. 531.

The admission of this character of testimony rests solely upon necessity, and the rule as to its admission is an innovation upon accused's constitutional right to be confronted with the witnesses against him. Such being the case, it is important that the facts which authorize its use should be proved to exist, and such proof may be rebutted and controverted, and shown to be insufficient, and this may be done without filing a counter-affidavit controverting the same. *Stegald v. State*, 22 App. 464, 3 S. W. 771; *Menges v. State*, 21 App. 413, 2 S. W. 812. But it is too late, after verdict, to controvert the truth of the predicate. *Ballinger v. State*, 11 App. 323.

A sufficient predicate is laid by proof that the witness lives out of the state, or has removed beyond the limits of the state. Where the proof showed that the witness was an officer of the United States army; that he was temporarily on duty in this state at the time he testified; that his command, at that time, was stationed in the Indian Territory; that since he testified he had left this state to return to his command, and that a telegram, announcing his arrival there, had been received from him, it was held that a sufficient predicate had been laid to admit his testimony. *Conner v. State*, 23 App. 378, 5 S. W. 189. See, also, *Parker v. State*, 24 App. 61, 5 S. W. 653, holding that the evidence that the witness was a non-resident was sufficient.

An essential part of the predicate whereunder it is competent to reproduce, on trial, by oral proof, the evidence delivered upon the examining trial by a witness who has since died, and the record of whose testimony has been lost, is affirmative proof, not only that the defendant was present as the party on trial at the examining trial, but that he was afforded the opportunity to cross-examine the witness. Falling in this latter respect, the predicate in this case was insufficient, and the

trial court erred in admitting the reproducing testimony. *Byrd v. State*, 26 App. 374, 9 S. W. 759.

The record of testimony before the examining court, and delivered to the clerk by the magistrate who held the said court, is not an "original paper" within C. C. P. art. 636, and therefore is not a paper of which the clerk is required to keep a copy, and for that reason it is not a valid objection that, before resorting to parol reproduction of the testimony of the deceased witness, the state should first have produced a certified copy of said testimony from the clerk of the court whence the venue was changed, or account for its nonproduction. *Byrd v. State*, 26 App. 374, 9 S. W. 759.

Evidence that a witness who testified at the coroner's inquest is a resident of another state is sufficient to render admissible his testimony before the coroner. *Johnson v. State*, 26 App. 631, 10 S. W. 235.

As a predicate for the introduction in evidence of the written testimony of a witness as delivered at the examining trial, it was proved that the witness was a nonresident of the state at the time of the examining trial and at the time of the final trial. Held, that the predicate was sufficiently established. *Crook v. State*, 27 App. 198, 11 S. W. 444.

As a predicate for the oral reproduction of the testimony given before an examining court by a since deceased witness, the state proved the death of the witness, and that in all probability the record of his testimony had been destroyed by a fire, which consumed other records deposited in the courthouse. Held, that the predicate was sufficient. *Potts v. State*, 26 App. 663, 14 S. W. 456. See, also, *Gilbreath v. State*, 26 App. 315, 9 S. W. 618.

Where, on a trial for murder, it appears that the testimony of two state's witnesses had been reduced to writing in due form at an inquest during a regular proceeding before a justice of the peace, and opportunity afforded defendant for cross-examination, and that the witnesses have moved out of the state, their testimony at the inquest is admissible. *Hobbs v. State*, 53 App. 71, 112 S. W. 308, following *Porch v. State*, 51 App. 7, 99 S. W. 1122.

Predicate for the introduction of the testimony of a witness taken at the former trial, held sufficient. *Mitchell v. State* (Cr. App.) 144 S. W. 1006.

The record of the testimony of an absent witness taken on the examining trial is not objectionable when offered in evidence, because the clerk of the court had placed his file mark and the date thereof on the back of the testimony when taken. *Millner v. State*, 72 App. 45, 162 S. W. 348.

It is only when a witness has permanently gone beyond the jurisdiction of the court that his testimony given at the examining trial can be received. *Anderson v. State* (Cr. App.) 170 S. W. 142.

A sheriff's return on a subpoena, which stated that he was informed at the witness's last place of employment that the witness had left for another state, is not admissible as a foundation for the admission of the testimony of the witness taken at examining trial, being only hearsay. *Anderson v. State* (Cr. App.) 170 S. W. 142.

Letters purporting to have been written by a witness who testified at the examining trial are inadmissible to show that he was without the state unless identified as written and signed by the witness. *Anderson v. State* (Cr. App.) 170 S. W. 142.

An alleged stenographer's report of the evidence of witnesses who had gone out of the jurisdiction should not have been admitted until some proof had been given that the report was in fact the testimony given by the witnesses on the former trial. *Eads v. State* (Cr. App.) 170 S. W. 145.

In a prosecution for murder, where it was sought to impeach the defendant's witnesses as to material facts and incidents at the time of the homicide by proof that he gave no such testimony at the inquest and on a former trial, such impeaching testimony was not inadmissible because the defendant was not present at the coroner's inquest, since, where one seeks to impeach a witness by proof of former statements inconsistent with his evidence, it is immaterial whether the defendant was present or not. *Bolden v. State* (Cr. App.) 178 S. W. 533.

In a prosecution for homicide, where a witness, who testified at a former trial, had died, testimony given on such former trial, that would have been admissible if the witness was living, was admissible. *Sweat v. State* (Cr. App.) 178 S. W. 554.

Accused's statement on his examining trial given through an interpreter was not inadmissible merely because the interpreter or whoever wrote out the statement as given by the interpreter made a mistake in one particular, as the jury would hear the whole evidence as to the claimed mistake, and might disregard the statement in the particular shown to be a mistake. *Galan v. State* (Cr. App.) 177 S. W. 124.

For other decisions under this section, see *Kirby v. State*, 23 App. 13, 5 S. W. 165; *McCullum v. State*, 29 App. 162, 14 S. W. 1020; *Peddy v. State*, 31 App. 547, 21 S. W. 542.

And further as to accused's right to confront witnesses, see Bill of Rights, § 10, art. 4, ante.

TITLE 9

OF PROCEEDINGS AFTER VERDICT

Chap.	Chap.
1. Of new trials.	4. Execution of judgment.
2. Arrest of judgment.	1. Collection of pecuniary fines.
3. Judgment and sentence.	2. Enforcing judgment where the punishment is imprisonment.
1. In cases of felony.	3. Enforcing judgment in capital cases.
1½. Indeterminate and suspended sentences.	
2. Judgment in cases of misdemeanor.	

CHAPTER ONE

OF NEW TRIALS

Art.	Art.
835. Definition of "new trial."	844c. Party appealing may make statement from transcript filed by shorthand reporter; agreement of parties; shorthand reporter may make statement of facts; fees.
836. Cannot be granted except to a defendant.	845. Time for preparing and filing statement of facts and bill of exceptions; extension of time; failure to agree on statement of facts; duty of court; what constitutes filing within time.
837. New trial in felony cases shall be granted for what causes.	845a. Compensation of shorthand reporter; affidavit of inability to pay fees; false affidavit.
838. In misdemeanors, may be granted when.	845b. Duty of shorthand reporter to make transcript of evidence on request; fees.
839. Must be applied for within two days, except.	845c. Repeal; proviso.
840. Motions for new trial shall be in writing.	846. Shorthand reporter shall keep stenographic record of trial of felony cases; duty in case parties cannot agree as to testimony; condensation; furnishing transcript to attorney appointed to represent defendant.
841. State may controvert truth of causes set forth, etc.	
842. Judge shall not discuss the evidence, etc., in ruling upon motion.	
843. Effect of a new trial.	
844. When new trial is refused, statement of facts, etc.	
844a. Time for presentation of statements of fact and bills of exception; time for preparation of findings; authority of judge after expiration of term of office.	
844aa. Duties of reporter.	
844b. Duty of shorthand reporter to transcribe notes on appeal being taken; duplicate; fees.	

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.]

Nature of remedy in general.—Defendant cannot, in his motion for new trial, for the first time complain that he was not ready for trial, but should have moved for postponement or continuance. *Jones v. State* (Cr. App.) 177 S. W. 971.

Necessity of motion.—See art. 844, post.

A motion for a new trial is not essential to the defendant's right to appeal. *Cotton v. State*, 29 Tex. 186.

Errors in instructions must be reserved in a motion for new trial to be available on appeal, and in absence of a motion for a new trial in the record such errors will not be reviewed. *Harvey v. State*, 57 App. 7, 121 S. W. 605.

Errors not complained of in the trial court by making them a ground for new trial cannot be taken advantage of on appeal. *Berg v. State*, 64 App. 612, 142 S. W. 884.

Where there is no motion for a new trial in the record, all that the Court of Criminal Appeals can consider is the sufficiency of the evidence in the statement of facts and the bill of exceptions allowed by the trial court. *Rupard v. State*, 71 App. 256, 158 S. W. 285.

Matters presented by the accused in his brief, but not complained of in his motion for a new trial, were not reviewable. *Cooper v. State* (Cr. App.) 147 S. W. 273.

All matters of exception urged on appeal must have been first submitted to the trial court in a motion for new trial. *Thompson v. State*, 72 App. 6, 160 S. W. 685.

Necessity of previous objection or exception.—See art. 744, and notes.

Effect of denial of motion in arrest.—A motion for a new trial may be entertained after a motion in arrest of judgment has been made and overruled. *Mathews v. State*, 33 Tex. 102. The case of *State v. Mann*, 13 Tex. 62, holding to the contrary, having ceased to be authority since the adoption of the Code.

Necessity and effect of ruling on motion.—The overruling of a motion for new trial, being unnecessary, presents no question for review further than would be presented by the motion itself. *Miller v. State*, 72 App. 151, 161 S. W. 128.

A motion for a new trial, in a criminal case, could not be considered on appeal where the only record indicating that it was overruled was the entry on the motion docket. *Suesberry v. State*, 72 App. 439, 162 S. W. 849.

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.]

Proceedings on forfeited bail bond.—Where judgment was rendered for defendant on a forfeited bail bond, it was error to award a new trial to the state. *Perry v. State*, 14 App. 166; *Robertson v. State*, Id. 211; *Jeter v. State*, 86 Tex. 555, 26 S. W. 49, which overrule *Gary v. State*, 11 App. 527; *Holt v. State*, 20 App. 271.

This provision is applicable in a proceeding on a forfeited bail bond or recognition, and in such case the state is not entitled to a new trial. *Robertson v. State*, 14 App. 211; *Perry v. State*, Id. 166. These cases virtually, though not expressly, overrule *Gary v. State*, 11 App. 527; *Drake v. State*, 29 App. 266, 15 S. W. 725.

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.

See arts. 4 and 646, ante, and notes thereunder. See, also, sec. 10, Bill of Rights; *Davis v. Texas*, 139 U. S. 651, 11 Sup. Ct. 675, 35 L. Ed. 300.

Appointment of counsel.—See art. 558, ante.

Where no objection was made to the counsel appointed for defendant, such objection could not be raised by motion for new trial. *Barton v. State*, 34 App. 613, 31 S. W. 671.

Denial of counsel.—See arts. 297, 558, 647, 996, 1020, 1021.

Where the evidence was clearly sufficient to sustain a conviction of a felony, accused was not entitled to a new trial on the ground that he was not represented by an attorney, in the absence of anything to show that he was fraudulently imposed on, preventing the employment of an attorney. *Hayden v. State*, 61 App. 211, 134 S. W. 703.

A defendant's failure to employ counsel when not prevented by the state or court, is not ground for new trial, as the statute contemplates that the denial should be by the court or state. *Patton v. State*, 62 App. 28, 136 S. W. 42.

Trial without counsel.—A conviction would not be reversed, because accused was unrepresented by counsel at the trial, preventing him, as claimed, from fairly presenting his defense, where it did not appear that he was prevented from securing counsel by the court or by outside influences, and the character of his defense was not shown by a statement of facts or otherwise. *Cobb v. State*, 71 App. 397, 160 S. W. 78.

Where an offense was committed some time before court convened, and the case was postponed to allow defendant to arrange for counsel, and where defendant had ample time to secure counsel before it was subsequently called, a refusal to postpone again to allow him to secure counsel, and his trial without counsel, was not reversible error. *Allen v. State* (Cr. App.) 170 S. W. 309.

Absence of counsel.—Counsel for defendant, after filing a motion for a new trial, were imprisoned for contempt by the court, and, on a subsequent day, were brought before the court to argue said motion, while they were still in custody. Held, error, which entitled the defendant to a new trial without regards to the merits of the case. *Robertson v. State*, 38 Tex. 187; *Roe v. State*, 25 App. 33, 8 S. W. 463; *Washington v. State*, 25 App. 387, 8 S. W. 642; *Leeper v. State*, 29 App. 64, 14 S. W. 398; *Estrada v. State*, 29 App. 169, 15 S. W. 644; *Blackwell v. State*, 29 App. 195, 15 S. W. 597; *Lincecum v. State*, 29 App. 329, 15 S. W. 818, 25 Am. St. Rep. 727; *Young v. State*, 30 App. 308, 17 S. W. 413; *Gibbs v. State*, 30 App. 581, 18 S. W. 88.

Absence of counsel is no cause for a new trial, when a postponement of the trial on that account was not asked, and the result does not appear to have been affected by it. *Boothe v. State*, 4 App. 202; *Williams v. State*, 10 App. 528; *Walker v. State*, 13 App. 618, 44 Am. Rep. 716, note; *Madden v. State*, 1 App. 204. See *Stockholm v. State*, 24 App. 598, 7 S. W. 338.

Defendant moved for a new trial on account of absence of counsel. It appeared that no complaint was made at the trial and further that the counsel refused to represent defendant because defendant had failed to pay his fee; held, motion properly overruled. *Mullens v. State*, 35 App. 149, 32 S. W. 691.

Abandonment of case.—A judgment of conviction will not be set aside on the ground that accused, as shown by his verification alone in support of his motion for new trial, was taken by surprise, in that his attorneys, who had been employed by his relatives, refused to go into the case at the last moment, and before he had opportunity to employ other counsel, and that he was thereby deprived of witnesses who could establish a defense. *Giles v. State* (Cr. App.) 151 S. W. 1043.

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.

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| 1. Reception of report of grand jury. | 7. — Misconstruction of charge by jury. |
| 2. Denial of change of venue. | 8. — Harmless error in general. |
| 3. Omission of arraignment. | 9. Misconduct of court. |
| 4. Denial of continuance. | 10. Deprivation of statement of facts. |
| 5. Error in rulings on evidence. | 11. Inconsistent findings. |
| 6. Error as to instructions. | |

1. **Reception of report of grand jury.**—The reception of the final report of a grand jury pending a trial, accompanied by a few complimentary remarks by the court, is not a ground for a new trial. *Phillips v. State*, 6 App. 41.

2. **Denial of change of venue.**—See arts. 626-641.

See a state of facts which demanded of the trial court to change the venue of the cause upon its own motion, and having failed to do so, a new trial should have been granted. *Stegald v. State*, 22 App. 464, 3 S. W. 771; *Roe v. State*, 25 App. 33, 8 S. W. 463; *Washington v. State*, 25 App. 337, 8 S. W. 642; *Leeper v. State*, 29 App. 64, 14 S. W. 398.

3. **Omission of arraignment.**—See arts. 555-567.

The court's omission to have accused arraigned before a change of venue is no ground for a new trial. *Caldwell v. State*, 41 Tex. 86; *Goode v. State*, 57 App. 220, 123 S. W. 597.

4. **Denial of continuance.**—See art. 608, subd. 6, and notes. See, also, arts. 603, 608, subd. 2, and 616.

5. **Error in rulings on evidence.**—The admission over the defendant's objection, of illegal evidence of an important fact, material and pertinent to the issue, though but cumulative, is good ground for a new trial, no matter how probable it may be that the jury would have convicted on the legal evidence alone. *McWilliams v. State*, 44 Tex. 116; *Draper v. State*, 22 Tex. 400; *Preston v. State*, 4 App. 186; *McKnight v. State*, 6 App. 158; *Tyson v. State*, 14 App. 388; *Haynie v. State*, 2 App. 168; *Hester v. State*, 15 App. 567; *Jackson v. State*, 20 App. 190; *Saddler v. State*, Id. 195; *Jones v. State*, 7 App. 457; *Harper v. State*, 11 App. 1; *Gardner v. State*, Id. 265; *Long v. State*, 17 App. 123; *Clark v. State*, 18 App. 467; *Chumley v. State*, 20 App. 547. See, also, *Segura v. State*, 16 App. 221; *McKnight v. State*, 6 App. 158; *Malcolmson v. State*, 25 App. 267, 8 S. W. 468; *Ware v. State*, 36 App. 597, 38 S. W. 198; *Webb v. State*, 36 App. 41, 35 S. W. 380.

A defendant cannot complain of illegal evidence elicited by himself or counsel, and the admission of illegal evidence at his instance, or the instance of his counsel, or the admission of illegal evidence without objection made to it at the time will not be good ground for a new trial. *Speights v. State*, 1 App. 551; *Moore v. State*, 6 App. 563; *McDade v. State*, 27 App. 641, 11 S. W. 672, 11 Am. St. Rep. 216.

But the admission of immaterial, irrelevant, or other illegal evidence, which could have no tendency whatever to affect or prejudice the rights of the defendant, is not good ground for new trial. *Post v. State*, 10 App. 579; *Bond v. State*, 20 App. 427; *Saddler v. State*, Id. 195; *Testard v. State*, 26 App. 260, 9 S. W. 888. On harmless error, see *Hall v. State*, 32 App. 474, 24 S. W. 407; *McGee v. State*, 37 App. 668, 40 S. W. 967; *Sargent v. State*, 35 App. 325, 33 S. W. 364; *Dickson v. State*, 34 App. 1, 28 S. W. 815, 30 S. W. 807, 53 Am. St. Rep. 694; *Bluman v. State*, 33 App. 43, 21 S. W. 1027, 26 S. W. 75; *Jones v. State*, 33 App. 7, 23 S. W. 793; *Batson v. State*, 36 App. 606, 38 S. W. 48; *Wright v. State*, 36 App. 427, 37 S. W. 732.

Where no objection was reserved at the trial to the fact that a witness was not sworn, it was too late to raise such objection on motion for new trial. *Goldsmith v. State*, 32 App. 112, 22 S. W. 405.

The rejection of competent and material evidence offered by the defendant, or its exclusion after admission, is good ground for new trial; but if the evidence rejected or excluded be of a character which could not reasonably have influenced the result favorably to the defendant, a new trial should be refused. *Jinks v. State*, 35 App. 364; *Gose v. State*, 6 App. 121; *Black v. State*, 9 App. 328; *Arnold v. State*, Id. 435; *Greta v. State*, 10 App. 36; *Hinds v. State*, 11 App. 228; *Baker v. State*, Id. 262; *Russell v. State*, Id. 288; *Stone v. State*, 12 App. 219; *Logan v. State*, 17 App. 50; *Duke v. State*, 19 App. 14; *Phillips v. State*, Id. 158; *Boyd v. State*, Id. 446; *Lilly v. State*, 20 App. 1; *Favors v. State*, Id. 155; *Rainey v. State*, Id. 455; *Boothe v. State*, 4 App. 202; *Boon v. State*, 42 Tex. 237; *Self v. State*, 28 App. 398, 13 S. W. 602. On harmless error, see *Stayton v. State*, 32 App. 33, 23 S. W. 38; *White v. State*, 32 App. 625, 25 S. W. 784; *Hamblin v. State*, 34 App. 368, 30 S. W. 1075.

Alibi is available not alone upon the main issue in the case, but upon any criminative fact relied upon by the state. Having excluded competent evidence on question of alibi, new trial should have been awarded. *Taylor v. State*, 27 App. 46, 11 S. W. 35.

Objections to evidence come too late when first presented by motion for new trial. *Wright v. State*, 63 App. 664, 141 S. W. 228.

6. **Error as to instructions.**—Where a charge, though erroneous, is favorable to the defendant, or where it has been given at the request of the defendant, he cannot be heard to complain of it, and the error does not constitute good ground for a new trial, ordinarily. *Cocker v. State*, 31 Tex. 498; *Collins v. State*, 5 App. 38; *Powell v. State*, Id. 234; *Templeton v. State*, Id. 398; *Pierce v. State*, 17 App. 232; *Weaver v. State*, 19 App. 548, 53 Am. Rep. 389; *Thomas v. State*, 14 App. 200.

If a charge be applicable to the case, and in other respects sufficient, it is not a ground for a new trial that the same charge had been used on the trial of another case. *Austin v. State*, 42 Tex. 355.

That the charge read to the jury bore the style and file mark of another crimi-

nal cause did not raise any presumption that it had been used on the trial of another party, or constitute ground for new trial. *Austin v. State*, 42 Tex. 355, cited in *Lowe v. State*, 11 App. 253.

That the charge of the court was filed nunc pro tunc is not a ground for a new trial. *Nettles v. State*, 4 App. 337.

Newly discovered evidence of threats not communicated, held not ground for new trial. *Williams v. State*, 7 App. 163.

Newly discovered evidence of improper relations, without proof that they came to defendant's knowledge, held not ground for new trial. *Williams v. State*, 7 App. 163.

A motion for new trial for newly discovered evidence should state that such evidence was unknown to defendant, not merely unknown to his counsel. *Williams v. State*, 7 App. 163.

When the court in its charge has misdirected the jury as to the law of the case, a new trial should be granted. And when the court, with respect to its charge, has violated any of the provisions of the statute relating to charges of the court, and the error is excepted to at the time by the defendant, a new trial should be granted. When the error is not excepted to, but is for the first time called to the attention of the court in the motion for a new trial, it will not be error for which the judgment will be reversed on appeal, to refuse a new trial upon such ground, unless the error in the charge is of a fundamental nature, or was calculated to prejudice the rights of the defendant, in which case a new trial should be granted. *Ante*, art. 743; *Washington v. State*, 25 App. 387, 8 S. W. 612.

Conflicts in a charge will require a reversal. *Blair v. State*, 26 App. 387, 9 S. W. 890.

Newly discovered evidence of uncommunicated threats made by deceased, held not ground for new trial. *Pitts v. State*, 29 App. 374, 16 S. W. 189.

A conviction will not be reversed because of an erroneous charge which is harmless or favorable to defendant. *Green v. State*, 32 App. 298, 22 S. W. 1094, overruling *Surrell's Case*, 29 App. 321, 15 S. W. 816; *White's Case*, 28 App. 71, 12 S. W. 406; *Jenkins' Case*, 28 App. 86, 12 S. W. 411, and *Habel's Case*, 28 App. 588, 13 S. W. 1001. See art. 743, and notes.

See, also, *Nettles v. State*, 4 App. 337; *Roe v. State*, 25 App. 33, 8 S. W. 463; *Wolfforth v. State*, 31 App. 387, 20 S. W. 741.

Receiving, by the jury, of additional evidence other than that introduced on the trial, if it injuriously affects, or could injuriously affect, accused's rights, is ground for reversal. *Railey v. State*, 58 App. 1, 121 S. W. 1120, 125 S. W. 576.

7. — **Misconstruction of charge by jury.**—A juror will not be permitted to impeach his verdict by testifying that he misunderstood the charge of the court. *Collins v. State* (Cr. App.) 148 S. W. 1065; *McCulloch v. State*, 35 App. 268, 33 S. W. 230; *Davis v. State*, 43 Tex. 189.

Misconstruction of a charge by the jury is not a ground for a new trial. *Johnson v. State*, 27 Tex. 758; *Davis v. State*, 43 Tex. 189; *Rockhold v. State*, 16 App. 577.

8. — **Harmless error in general.**—See art. 743, and notes.

9. **Misconduct of court.**—It is not cause for reversal, as prejudicing the rights of the defendant, that on the first trial the court required the counsel for the defendant to testify, and forthwith caused his arrest for perjury, of which charge the counsel was subsequently acquitted, the record failing to show that the evidence sought by the state was of a confidential nature, or was otherwise improper. *Johnson v. State*, 31 App. 456, 20 S. W. 985.

There being a presumption against the purity of the verdict, where the jury has been exposed to an improper influence, defendant, tried for violation of the local option law, is sufficiently shown to have been injured by the adjournment after the swearing of the jury, and the delivery in the courtroom, in the presence of the jury, of a campaign speech of an hour and a half in favor of prohibition, to require the conviction to be set aside, there being no showing that the jury were not impressed unfavorably to defendant. *Rigsby v. State*, 64 App. 504, 142 S. W. 901, 38 L. R. A. (N. S.) 1116.

Where a trial had been proceeding for several days, and the record showed a course of delay by defendant's counsel from the beginning, it was not reversible error for the court, in view of the number of cases on the docket, to refuse defendant's counsel time to consult with his client before putting him on the stand, and to fine counsel for delay when he refused to proceed with the case as ordered. *Creech v. State*, 70 App. 229, 158 S. W. 277.

That the judge during the trial vacated the bench, walked down to the state's attorneys, and talked with them in the presence of the jury, but not in their hearing, was not error. *Gorrell v. State*, 73 App. 232, 164 S. W. 1012.

The act of the court in permitting prosecutrix, on a trial for rape, to remain in the presence of the jury during the argument of the prosecuting attorney was not prejudicial, though prosecutrix cried during the argument, but not loud enough to interrupt the orderly proceedings of the court. *Burge v. State*, 73 App. 505, 167 S. W. 63.

10. **Deprivation of statement of facts.**—See note under art. 844.

One convicted of an offense is entitled to a new trial, where he has been deprived of a statement of facts through no fault or neglect of his own. *Barr v. State*, 62 App. 58, 136 S. W. 454.

11. **Inconsistent findings.**—Any inconsistency of an implied finding in fining, at the trial, an absent witness, and finding on testimony of defendant's counsel, on the motion for new trial, that the person summoned was not such witness, cannot be complained of by defendant. *Swilley v. State* (Cr. App.) 171 S. W. 734.

3. Where the verdict has been decided by lot, or in any other manner than by a fair expression of opinion by the jurors.

Verdict decided by lot.—Where the jury, after having found the defendant guilty, arrive at the punishment to be assessed, by averaging the several assessments of the individual jurors, that is, by aggregating the punishment assessed by each juror and dividing the aggregate by the number of the jurors, and agreeing that the result of such calculation shall be the verdict of the jury absolutely, such verdict is bad, and should be set aside and a new trial granted the defendant. But where a verdict is arrived at in such manner, there being no agreement among the jurors to be bound by the result, and such result is agreed to by the jury after it has been thus ascertained, the verdict is not vitiated by the mode adopted by the jury to arrive at the punishment to be assessed. The impropriety, and that which vitiates the verdict, consists in the agreement by the jurors entered into before ascertaining the punishment in such manner, to be bound by the result. *Leverett v. State*, 3 App. 213; *Hunter v. State*, 8 App. 75; *Warren v. State*, 9 App. 619, 35 Am. Rep. 745; *Wood v. State*, 13 App. 135, 44 Am. Rep. 701; *Ulrich v. State*, 30 App. 61, 16 S. W. 769; *Pruitt v. State*, 30 App. 156, 16 S. W. 773; *White v. State*, 37 App. 651, 40 S. W. 789; *McAnally v. State* (Cr. App.) 57 S. W. 833; *Dawson v. State*, 72 App. 68, 161 S. W. 469.

A verdict should be the result of reason, deliberation, and honest conviction, and not the offspring of chance or accident. If a jury, therefore, should so far forget a sense of duty and the obligations of their oath as to determine their verdict by the casting of lots, it is the right and duty of the court to set aside the verdict and grant a new trial. *Leverett v. State*, 3 App. 213.

The complaint against the verdict is that the term of punishment was reached by "lot." The term appears to be greater than the quotient reached by the ballots cast; held, it was not vitiated. The vice is in agreeing to be bound by the verdict reached by such balloting. *Barton v. State*, 34 App. 613, 31 S. W. 671.

A new trial will not be granted because the jury in fixing the term of imprisonment agreed that each juror should write his verdict on a slip of paper, and that the sum total divided by twelve should be the term. *Barton v. State*, 34 App. 613, 31 S. W. 671.

The jurors each placed on a piece of paper the number of years he thought defendant should be imprisoned, the sum of years was divided by twelve and punishment thus assessed, but it appearing that the jury agreed to the punishment and that no one bound himself to abide the result of the proceeding; held, that new trial was properly refused. *Gaines v. State*, 37 App. 73, 37 S. W. 774.

Where a jury agrees to determine the number of years' imprisonment by lot, by a "quotient" verdict, and to abide by the result,—such a verdict being made a ground for new trial by C. C. P. art. 837,—the burden rests upon the state to show that such agreement was subsequently abandoned; and where it was shown that, after the number of years was thus determined, two of the jurors refused to abide by the result, but that after several hours' deliberation the same verdict was returned, within a fraction of a year, and it was not shown that the other ten jurors had abandoned such agreement, a new trial should have been granted. *Driver v. State*, 37 App. 160, 38 S. W. 1020.

When the jury arrives at their verdict by lot the burden is upon the state to show that the jury did not agree to be bound by the verdict arrived at in that manner; and when this is not shown and the verdict thus reached was not abandoned, a new trial should have been granted. *Id.* See also *White v. State*, 37 App. 651, 40 S. W. 789.

Eleven jurors favored assessing punishment of accused at two years in the penitentiary, while the twelfth favored three years. After discussing the matter, the twelfth juror proposed that, if the eleven would come to two years and one month, he would agree to that, to which they all agreed. Held, that such agreement was a mere compromise of their differences, and did not render the verdict objectionable, as having been arrived at by lot or chance. *Alexander v. State* (Cr. App.) 152 S. W. 436.

In a prosecution for homicide, evidence held to require a finding that the jury, though having arrived at the term of punishment by the quotient method, had not agreed to be bound thereby, and hence that the verdict was not void for that reason. *Lamb v. State* (Cr. App.) 169 S. W. 1158.

On finding the defendant guilty of any degree of murder it is improper for the jury, in fixing the penalty, to decide the same by lot. *Witty v. State* (Cr. App.) 171 S. W. 229.

A quotient verdict in a trial for homicide amounting to a sentence for 19 years and some months, which the jurors agreed to reduce by making it 19 years even, was valid. *Hicks v. State* (Cr. App.) 171 S. W. 755.

Improperly influencing assent to verdict.—That two of the jurors agreed to the verdict upon the agreement that the jury would sign a petition for the pardon of the defendant, is not such conduct as will authorize a new trial. *Montgomery v. State*, 13 App. 74.

It is no ground for new trial that one of the jurors made an affidavit that the reason he agreed to convict defendant, he feared he would otherwise incur the displeasure of the other jurors. *Pilot v. State*, 38 App. 515, 43 S. W. 112, 1024.

That jurors differed for a time as to the term of punishment is not ground for a new trial. *Balls v. State* (Cr. App.) 40 S. W. 801.

The fact that a conviction was brought about by the argument of jurors that accused after conviction would have an opportunity to seek a new trial, both before the trial court and on appeal, was not misconduct requiring a new trial, where the reference to the possibility of a new trial by the jurors was only of the most general nature. *Richards v. State*, 59 App. 203, 127 S. W. 823.

An affidavit of a juror that, after the jury had been out from Thursday evening till Saturday afternoon, the jury were informed that the presiding judge was going

home, and would not return till the following Tuesday, and would leave instructions that the jury should not be discharged till his return, unless they arrived at a verdict, whereupon the affiant gave his consent to the verdict, was not sufficient to authorize a new trial. *Bacon v. State*, 61 App. 206, 134 S. W. 690.

An affidavit of a juror that he would likely have voted to acquit the defendant, had not the foreman and other jurors told him that the defendant could try for a new trial, and then have the right of appeal, which he thought would eventually amount to an acquittal, is no ground for a new trial. *Vaughn v. State*, 62 App. 24, 136 S. W. 476.

An affidavit of a juror that he would not have agreed to a verdict of guilty unless the other jurors had agreed to sign a recommendation for defendant's pardon was insufficient to authorize or require a new trial. *Rogers v. State* (Cr. App.) 159 S. W. 40.

Where the sole defense is insanity, and an agreement on a verdict of guilty of murder in the second degree is procured as a result of the argument of certain jurors that there is a lunacy commission at the penitentiary, and that this commission is better able to pass upon defendant's insanity than the doctors who testified thereon, and that if defendant is insane he will not be placed in the penitentiary, the case will be reversed. *White v. State*, 72 App. 185, 161 S. W. 977.

A juror may not impeach the verdict, after it has been accepted by the court and the jury discharged, by proving that he yielded his judgment in an effort to agree with the other jurors. *Chant v. State*, 73 App. 345, 166 S. W. 513.

A sworn statement by one of the jurors that he at first favored an acquittal and only agreed to a verdict of guilty after other jurymen told him they would join in a petition for a pardon after a certain time does not present a ground for new trial, since a jurymen cannot thus impeach his verdict after he has been discharged. *Millner v. State* (Cr. App.) 169 S. W. 899.

Insufficient consideration.—A juror may not impeach a verdict of guilty by declarations after the discharge of the jury that, if he had had time, he would not have consented to a conviction. *Johnson v. State* (Cr. App.) 174 S. W. 1047.

Verification of application for new trial.—Though this article does not expressly require that extrinsic matters attacking a verdict be sworn to, in view of article 26, providing that whenever the Code fails to provide a rule of procedure the rules of the common law shall govern, it is necessary to the consideration of a ground of motion attacking the verdict on the ground that it was a quotient verdict, that the matter be supported by affidavit. *Hicks v. State* (Cr. App.) 171 S. W. 755.

4. Where a juror has received a bribe to convict, or has been guilty of any other corrupt conduct.

Bias or prejudice of jurors.—See art. 692 (5-13), and notes thereunder.

Where the defendant, knowing the bias or prejudice of a juror, fails to challenge him, he cannot make objection to him in a motion for a new trial. *Givens v. State*, 6 Tex. 343; *McGehee v. Shafer*, 9 Tex. 20. But a defendant is not precluded from making such objection a ground for new trial because he did not examine the juror upon his voir dire as to his bias or prejudice, unless gross negligence on his part is shown. *Hanks v. State*, 21 Tex. 526.

Where a juror, before he was impaneled, said to the alleged injured party: "I will be on the jury and will do all I can for you," it was held that a new trial should have been granted the defendant, it being shown that the prejudice of the juror was unknown to him until after the trial. *Hanks v. State*, 21 Tex. 526. But see *Aud v. State*, 36 App. 76, 35 S. W. 671, as to opportune objection.

A loose expression of a juror, not indicative of a settled mind as to the merits of a particular cause, or a mere jocular remark that "he thought the defendant ought to have been hung twenty years ago" will not entitle the defendant to a new trial. *Monroe v. State*, 23 Tex. 210, 76 Am. Dec. 58; *Hanks v. State*, 21 Tex. 526; *Simms v. State*, 8 App. 230. And, where the juror said "he would not be in the shoes of the defendant for ever so much," or that "he was going to the penitentiary anyhow," it was held that these remarks did not show prejudice of the juror. *Nash v. State*, 2 App. 362. But, where the juror said before the trial that defendant had killed a poor innocent soldier, and that he ought to have his neck broke, it was held, that in the absence of any explanation by the juror or other evidence, showing the absence of prejudice to the defendant on the part of the juror, a new trial should have been granted the defendant. *Henrie v. State*, 41 Tex. 573. So, where the juror said before the trial, that he was "a poor juror for the defendant," *Long v. State*, 10 App. 186; *Graham v. State*, 28 App. 532, 13 S. W. 1010; *Wright v. State*, 31 App. 354, 20 S. W. 756, 37 Am. St. Rep. 822.

Where it appeared that a juror was so prejudiced against defendant that he could not have a fair and impartial trial, a new trial should have been granted. *Washburn v. State*, 31 App. 352, 20 S. W. 715.

A new trial sought because of a previously expressed opinion of a juror held properly denied where it appeared that due diligence to ascertain the competency of the juror had not been used on his examination voir dire. *Armstrong v. State*, 34 App. 248, 30 S. W. 235.

A juror several months before the trial had stated to two witnesses that he hoped he could get on defendant's jury, if he could he would send him to the penitentiary. Held that a new trial should have been granted. *Long v. State*, 32 App. 140, 22 S. W. 409. When on motion for a new trial an issue of fact is raised, the decision of the lower court will not be interfered with. (*Washburn v. State*, 31 App. 352, 20 S. W. 715, distinguished.) *Shaw v. State*, 32 App. 155, 22 S. W. 588. When a juror qualified himself on his voir dire and it was afterward shown that at the time he was impaneled he had a fixed opinion as to defendant's guilt a new trial should have been granted. *McWilliams v. State*, 32 App. 269, 22 S. W. 970.

A verdict will not be set aside for prejudice of a juror summoned on a special

venire, and shown to be an honorable man, unacquainted with either defendant or deceased, or with the facts of the case, on evidence that he said to another venire man that he lived so far away that he hoped to be called on some case so as to pay expenses, and that defendant "ought to have his d—d neck broke," he testifying that he said "they would keep hauling him on the jury until he would get a chance to help break some one's neck." *Mayes v. State*, 33 App. 33, 24 S. W. 421.

A motion for a new trial, based on an allegation, supported by affidavit, that a certain juror had expressed an opinion as to the guilt of the defendant, is properly denied when the affiant makes a subsequent affidavit stating that the juror did not express any such opinion, and the juror himself denies the expression of such opinion, and states that he had not formed any, and knew nothing of the facts before the trial. *Cockerell v. State*, 25 S. W. 421, 32 App. 585.

On motion for a new trial it was claimed that a corrupt juror had qualified on his voir dire, that such juror had stated that if he got on the jury he would give defendant what belonged to him. The juror testified that he was unbiased and only meant he would give defendant a fair trial; held, new trial properly refused. *Driver v. State*, 37 App. 160, 38 S. W. 1020.

That the foreman of the jury was prejudiced against accused, being related to accused's enemy, should have been brought out before the juror was accepted, and was not ground for a new trial. *Woodland v. State*, 57 App. 352, 123 S. W. 141.

It is no ground for a new trial that before the trial the juror had expressed the belief that his opinion as to defendant's guilt disqualified him, where there is no showing that he was examined on his voir dire touching the matter. *Speer v. State*, 57 App. 297, 123 S. W. 415.

That a juror said, when leaving for the courthouse, that he would be back soon, and that he knew too much about this thing to be taken on the jury, did not indicate prejudice one way or another, and there was no error in refusing a new trial therefor. *Joseph v. State*, 59 App. 82, 127 S. W. 171.

Where two jurors had expressed opinions as to the guilt of accused, and one of them had heard the testimony on a former trial, and both testified on their voir dire that they had not formed nor expressed an opinion, and had not heard anything about the case, and accused and his attorney were ignorant of the facts until after trial, a new trial must be granted. *Robbins v. State*, 70 App. 52, 155 S. W. 936.

See, also, *Kugadt v. State*, 38 App. 681, 44 S. W. 989; *Self v. State*, 39 App. 455, 47 App. 26.

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.

Deprivation of testimony.—Where a material witness is incapacitated to testify by being panic stricken or by being intoxicated, a new trial should not be granted unless, when discovered, the party desiring to use the witness, informs the court the condition of the witness so that the court may have an examination made into the circumstances of the case. *Jackson v. State*, 18 App. 586.

A motion for a new trial based on the ground that defendant was deprived of the testimony of a witness for whom process had been issued and who had not appeared, held properly overruled where he had proceeded to trial without objection. *Carlo v. State*, 32 App. 91, 22 S. W. 147.

Pending a prosecution for robbery, the sheriff told accused's counsel that a certain person was being held in custody as being an escaped convict, for which reason he was not summoned as a witness. Later it was discovered that such person was not an escaped convict, and he was released on habeas corpus after accused was convicted. Held, that accused could not obtain a new trial under the statute providing that such may be granted where accused was prevented from securing material testimony by reason of artifice or fraud, in the absence of any showing of bad faith on the part of the sheriff. *Jackson v. State*, 60 App. 273, 131 S. W. 1076.

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.

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| 1. In general. | 7. Relevancy, materiality, and competency. |
| 2. Discretion of trial court. | 8. Cumulative evidence. |
| 3. Time of discovery. | 9. Impeachment of witness. |
| 4. Diligence in procuring evidence. | 10. Conflicting or contradicted evidence. |
| 5. Possibility of obtaining evidence. | 11. Credibility and probable effect. |
| 6. Nature and purpose of evidence in general. | 12. Acquittal of co-defendant. |
| | 13. Requisites of application. |

1. **In general.**—It is incumbent on the defendant, who asks a new trial upon the ground of newly discovered evidence, to satisfy the court: 1. That the evidence has come to his knowledge since the trial. 2. That it was not owing to a want of diligence on his part that it was not discovered sooner. 3. That on another trial it would probably produce a different result. 4. That it is competent, material to the issue, going to the merits, not merely cumulative, corroborative, collateral, or to impeach a witness. If the application is defective in establishing any of these essentials, a new trial will be refused. *Burns v. State*, 12 App. 269; *White v. State*, 10 App. 167; *Childs v. State*, Id. 183; *Burton v. State*, 9 App. 605; *Duval v. State*, 8 App. 370; *Hutto v. State*, 7 App. 44; *Williams v. State*, Id. 163;

Brown v. State, 6 App. 286; Darnell v. State, Id. 482; Walker v. State, Id. 576; Hutchinson v. State, Id. 468; Hasselmeyer v. State, Id. 21; Watson v. State, 5 App. 11; Tooney v. State, Id. 163; Templeton v. State, Id. 338; Boothe v. State, 4 App. 202; Harmon v. State, 3 App. 51; Terry v. State, Id. 236; Higginbotham v. State, Id. 447; Love v. State, Id. 501; West v. State, 2 App. 209; Johnson v. State, Id. 456; Thompson v. State, Id. 289; Gibbs v. State, 1 App. 12; Hauck v. State, Id. 357; Henderson v. State, Id. 432; Frazier v. State, 18 App. 434; Jackson v. State, Id. 586; De Olles v. State, 20 App. 145; Shaw v. State, 27 Tex. 750; Lewis v. State, 15 App. 647; Makinson v. State, 16 App. 132; McAdams v. State, 24 App. 86, 5 S. W. 826; Grate v. State, 23 App. 458, 5 S. W. 245; O'Hara v. State, 57 App. 577, 124 S. W. 95; Gray v. State (Cr. App.) 144 S. W. 283; Green v. State (Cr. App.) 147 S. W. 593; Graham v. State, 73 App. 28, 163 S. W. 726; McGaughey v. State (Cr. App.) 169 S. W. 287.

For other decisions hereunder, see Covey v. State, 23 App. 388, 5 S. W. 233; Jones v. State, 23 App. 501, 5 S. W. 135; Griffin v. State, 26 App. 163, 9 S. W. 459, 8 Am. St. Rep. 460; Browning v. State, 26 App. 432, 9 S. W. 770; Bovett v. State, 26 App. 639, 9 S. W. 275; Smith v. State, 28 App. 309, 12 S. W. 1104; Blackwell v. State, 29 App. 195, 15 S. W. 597; Lincecum v. State, 29 App. 329, 15 S. W. 818, 25 Am. St. Rep. 727; Frizzell v. State, 30 App. 42, 16 S. W. 751; Pruitt v. State, 30 App. 156, 16 S. W. 773; Young v. State, 30 App. 398, 17 S. W. 413; Gibbs v. State, 30 App. 581, 18 S. W. 88; Pickens v. State, 31 App. 554, 21 S. W. 362; Fisher v. State, 30 App. 592, 18 S. W. 90; Dillard v. State, 31 App. 67, 19 S. W. 895; McWilliams v. State, 32 App. 269, 22 S. W. 970; Moore v. State, 36 App. 88, 35 S. W. 668; Mitchell v. State, 36 App. 278, 33 S. W. 367, 36 S. W. 456; Tate v. State, 38 App. 261, 42 S. W. 535; Wilson v. State, 39 App. 365, 46 S. W. 251.

When on motion for new trial it appears that the testimony of an absent witness is material the motion should be granted. Clark v. State, 38 App. 30, 40 S. W. 992; Riojas v. State, 36 App. 182, 36 S. W. 268.

Alleged newly discovered evidence that the offense was not committed within the county held not ground for new trial. Henderson v. State, 12 Tex. 525.

See the following cases in which it was held, on appeal, that new trials should have been granted upon the ground of newly discovered evidence: Bell v. State, 1 App. 598; Strickland v. State, 13 App. 364; Heskeu v. State, 14 App. 606; Bird v. State, 16 App. 529; Trimble v. State, Id. 115; Moore v. State, 18 App. 212; Montresser v. State, 19 App. 281; Helm v. State, 20 App. 41; McCleavland v. State, 24 App. 202, 5 S. W. 664; Roy v. State, 24 App. 369, 6 S. W. 186; Hart v. State, 21 App. 163, 17 S. W. 421; Bullock v. State, 12 App. 42.

When newly discovered evidence is assigned as cause for a new trial, the application is subject to the same rules as govern in civil cases. (For the rules which govern in civil cases, see Vernon's Sayles' Civ. St. 1914, p. 1624, art. 2019.) Such an application is to be closely scrutinized, and the action of the trial court refusing it will not be revised, unless it be apparent that the discretion confided to such court has been abused to the prejudice of the defendant. Burns v. State, 12 App. 269; Bell v. State, 1 App. 598; Templeton v. State, 5 App. 398.

When a trial court entertains a reasonable doubt in regard to the right of the defendant to a new trial, where the ground of the motion is the overruling of an application for a continuance, the doubt should be resolved in favor of the defendant. Miller v. State, 18 App. 232. But where the ground of the motion is newly discovered evidence, and the trial court has a doubt upon the point of diligence to discover the evidence, or as to its character, materiality, etc., the new trial should be refused. Bronson v. State, 2 App. 46.

Evidence held not to be newly discovered where it could have been secured before trial by the use of diligence and could have been obtained from sources other than those stated in the motion. Reagan v. State, 28 App. 227, 12 S. W. 601, 19 Am. St. Rep. 833.

Denial of a new trial held proper where the testimony sought was not newly discovered. Bruce v. State, 31 App. 590, 21 S. W. 681.

Evidence which could have been known to counsel for defendant before trial is not newly discovered. Burton v. State, 33 App. 138, 25 S. W. 782.

Motion for new trial to introduce certain evidence; held, properly denied. Childers v. State, 36 App. 128, 35 S. W. 980.

The denial of a motion for new trial in a prosecution for larceny of a steer, based on newly discovered evidence, held proper in view of the nature of the evidence and the lack of diligence. Johnson v. State, 61 App. 104, 134 S. W. 225.

Newly discovered evidence for which a new trial was asked in a murder case, combined with that shown on motion for continuance for an absent witness, the denial of which was also made a ground for asking a new trial, held to show that the new trial was improperly denied. Rhea v. State (Cr. App.) 148 S. W. 578.

If the testimony of a state's witness, given on the preliminary trial, affects his testimony at the trial, defendant, having it in his possession, should then offer it, and not wait to do so on motion for new trial. White v. State (Cr. App.) 177 S. W. 93.

As regards a new trial, the testimony of one for whom defendant had issued process, and of which he knew before trial, and of whose absence he knew, when announced ready for trial, was not newly discovered. Howe v. State (Cr. App.) 177 S. W. 497.

Testimony of previous good character is not newly discovered, for purpose of new trial. Jones v. State (Cr. App.) 177 S. W. 971.

2. Discretion of trial court.—The refusal of a motion for a new trial for newly discovered evidence in a felony case will not be disturbed on appeal, unless it is apparent that the trial court abused its discretion to the prejudice of the accused. Gray v. State (Cr. App.) 144 S. W. 283; Shaw v. State, 27 Tex. 750; Burns v.

State, 12 App. 270, and cases cited; *Green v. State* (Cr. App.) 147 S. W. 593; *McGaughey v. State* (Cr. App.) 169 S. W. 287; *Taylor v. State* (Cr. App.) 169 S. W. 672.

3. Time of discovery.—If the materiality of absent testimony is first disclosed on the trial, the circumstances may be such as to entitle the defendant to a new trial. *Dunham v. State*, 3 App. 465.

A new trial will not be granted to permit a witness to testify that accused and the complaining witness had adjusted their difficulties, this evidence not being newly discovered, since, if true, accused must have known of it. *Johnson v. State* (Cr. App.) 150 S. W. 903.

Motion for new trial, on the ground of newly discovered evidence, may not be based on matters which defendant knew, as well before as after trial, that witness knew; but, in case of surprise, defendant should have taken steps for a postponement. *Burnett v. State*, 73 App. 477, 165 S. W. 581.

Where accused claimed that he was visiting at the time he was charged with making an unlawful sale of intoxicants, he is not, upon conviction, entitled to a new trial on the ground of newly discovered testimony, that the new witness rode with him on the day of the sale from one place to another; for such fact must have been within accused's knowledge. *De Lerosa v. State* (Cr. App.) 170 S. W. 312.

4. Diligence in procuring evidence.—Where a defendant has used no diligence to obtain alleged newly discovered evidence, a new trial should not be granted. *Patton v. State*, 62 App. 28, 136 S. W. 42; *Bronson v. State*, 2 App. 46; *Esher v. State*, 13 App. 607; *Mills v. State*, 13 App. 487; *Blackwell v. State*, 29 App. 194, 15 S. W. 597; *Timatis v. State*, 31 App. 556, 21 S. W. 362; *Smith v. State*, 31 App. 14, 19 S. W. 252; *Wilson v. State*, 37 App. 156, 38 S. W. 1013; *Haskins v. State* (Cr. App.) 20 S. W. 832; *McCay v. State*, 32 App. 233, 22 S. W. 974; *Delavan v. State* (Cr. App.) 29 S. W. 385; *Garner v. State*, 34 App. 356, 30 S. W. 782; *Henry v. State* (Cr. App.) 30 S. W. 802; *Blount v. State*, 34 App. 640, 31 S. W. 652; *Barber v. State*, 35 App. 70, 31 S. W. 649; *Granger v. State* (Cr. App.) 31 S. W. 671; *Carrasco v. State*, 34 App. 565, 31 S. W. 397; *Washington v. State*, 35 App. 156, 32 S. W. 694; *Porter v. State* (Cr. App.) 32 S. W. 695; *Robinson v. State*, 35 App. 181, 32 S. W. 900; *Magruder v. State*, 35 App. 214, 33 S. W. 233; *Butts v. State*, 35 App. 364, 33 S. W. 866; *Mitchell v. State*, 36 App. 278, 33 S. W. 367, 36 S. W. 456; *Carrico v. State*, 36 App. 618, 38 S. W. 37; *Kirby v. State* (Cr. App.) 38 S. W. 180; *Wells v. State* (Cr. App.) 38 S. W. 997; *English v. State* (Cr. App.) 38 S. W. 778; *Reed v. State* (Cr. App.) 38 S. W. 613; *Graves v. State* (Cr. App.) 38 S. W. 38; *Henderson v. State* (Cr. App.) 38 S. W. 605; *Foreman v. State* (Cr. App.) 39 S. W. 942; *Harraway v. State* (Cr. App.) 40 S. W. 262; *Wade v. State* (Cr. App.) 40 S. W. 933; *Jackson v. State* (Cr. App.) 40 S. W. 998; *Reagan v. State*, 57 App. 612, 124 S. W. 635; *Williams v. State*, 58 App. 284, 124 S. W. 916; *Jones v. State*, 60 App. 56, 130 S. W. 1001; *Thomas v. State*, 61 App. 505, 135 S. W. 550; *Kirksey v. State*, 61 App. 641, 135 S. W. 577; *Johnson v. State*, 62 App. 284, 136 S. W. 1058; *Parker v. State*, 63 App. 464, 140 S. W. 337; *Graves v. State* (Cr. App.) 144 S. W. 961; *Bailey v. State* (Cr. App.) 144 S. W. 996; *Hogan v. State* (Cr. App.) 147 S. W. 871; *Fowler v. State* (Cr. App.) 148 S. W. 576; *Pinson v. State* (Cr. App.) 151 S. W. 556; *Mims v. State* (Cr. App.) 153 S. W. 321; *McGowen v. State*, 73 App. 112, 164 S. W. 999; *Harris v. State* (Cr. App.) 167 S. W. 43; *Stewart v. State* (Cr. App.) 172 S. W. 979.

If an application shows upon its face that the evidence is not newly discovered, or if the facts alleged show that it is improbable that the defendant was ignorant of the existence of the evidence, if it in fact existed, a new trial should be denied. It should be made clearly to appear that the defendant was ignorant of the existence of the evidence at the time of the trial, and that such ignorance was not the result of a want of diligence on his part to discover it. *Robinson v. State*, 15 Tex. 311; *Dansby v. State*, 34 Tex. 392; *Brown v. State*, 16 Tex. 123; *Walker v. State*, 3 App. 70; *Williams v. State*, 4 App. 255; *Collins v. State*, 6 App. 72; *Thomason v. State*, 2 App. 550; *Duval v. State*, 8 App. 370; *Childs v. State*, 10 App. 183; *Koontz v. State*, 41 Tex. 570; *Poage v. State*, 43 Tex. 454; *Davidson v. State*, 33 Tex. 247; *Wheeler v. State*, 15 App. 607; *Makinson v. State*, 16 App. 133; *McVey v. State*, 23 App. 659, 5 S. W. 174; *Smith v. State*, 22 App. 350, 3 S. W. 238; *Gross v. State*, 4 App. 249; *Blount v. State*, 34 App. 640, 31 S. W. 652; *Butts v. State*, 35 App. 364, 33 S. W. 866; *Esher v. State*, 13 App. 607; *Evans v. State*, 6 App. 513; *Price v. State*, 36 App. 403, 37 S. W. 743.

New trials will not be granted for newly discovered evidence unless defendant by reasonable diligence could not have discovered the evidence at the former trial. *Henderson v. State*, 12 Tex. 525.

The allegations of the motion should be such as would have sufficed for a continuance. They should disclose the source of defendant's information, as to the newly discovered evidence, and his belief in the truth of such information, and show that there has been no lack of diligence on his part with respect to discovering and obtaining the evidence in time for the trial. It is not sufficient merely to show diligence, but it must be negated that the evidence was known before the trial. If diligence to discover the evidence before the trial be not shown, good excuse for the want of such diligence must be shown. Confinement of the defendant in jail is not good excuse for the want of diligence in the absence of a showing that he had no one outside to assist him in using the necessary diligence. *Simms v. State*, 1 App. 627; *Johnson v. State*, 2 App. 456; *Thomason v. State*, Id. 550; *Franklin v. State*, Id. 3; *Harmon v. State*, 3 App. 51; *Blake v. State*, Id. 581; *Gross v. State*, 4 App. 249; *Tooney v. State*, 5 App. 163; *Shultz v. State*, Id. 390; *Hasselmeyer v. State*, 6 App. 21; *Yanez v. State*, 6 App. 429, 32 Am. Rep. 591; *Polser v. State*, 6 App. 510; *Tuttle v. State*, Id. 556; *Goins v. State*, 41 Tex. 334; *Davidson v. State*, 33 Tex. 247; *Kemp v. State*, 38 Tex. 110; *Frazier v. State*, 18 App. 434; *Jackson v. State*, Id. 586.

Where the defendant prevented his counsel from interposing the defense of insanity, and on the trial some evidence was elicited tending to support that defense, and a motion for new trial exhibited material and newly discovered evidence of the same character, it was held that a new trial should have been granted, notwithstanding no diligence had been used to obtain the newly discovered evidence. *Schuessler v. State*, 19 App. 472.

A new trial sought for newly discovered evidence tending to reduce the grade of the offense, held properly denied where it appeared that there was a total want of diligence and the motion admitted defendant's guilt. *Timatis v. State*, 31 App. 556, 21 S. W. 362.

A new trial sought for newly discovered evidence was properly denied where the proposed witness had been subpoenaed but not put on the stand. *Powell v. State*, 36 App. 377, 37 S. W. 322.

A motion held not to disclose diligence where it merely alleged that the facts were not known to defendant and could not have been discovered by ordinary diligence. *Wilson v. State*, 37 App. 156, 38 S. W. 1013.

When no request or motion for continuance has been made for evidence of defendant's good character, a motion for new trial to allow defendant to introduce such testimony will be overruled. *Robinson v. State*, 35 App. 181, 32 S. W. 900.

A new trial for unlawfully carrying weapons will not be granted because defendant after the trial first discovered that he was on his own land when he carried the weapon. *Owens v. State* (Cr. App.) 34 S. W. 614.

Facts which defendant could have known before trial are no ground for a new trial. *Wheeler v. State* (Cr. App.) 34 S. W. 942.

When sufficient diligence is shown. *Taylor v. State* (Cr. App.) 39 S. W. 372; *Sebastian v. State* (Cr. App.) 39 S. W. 680; *Hines v. State*, 37 App. 339, 39 S. W. 925.

Testimony as to the character of prosecutrix for chastity was such that it could have been discovered by due diligence. *Woodland v. State*, 57 App. 352, 123 S. W. 141.

On a trial for robbery, a new trial for alleged newly discovered evidence that the night on which the robbery occurred was dark, etc., was properly refused; it appearing that the scene of the robbery, the location of the lights, and the state of the weather were matters known to most witnesses, and that information concerning such matters could have been obtained from a large number of persons on the slightest inquiry. *O'Hara v. State*, 57 App. 577, 124 S. W. 95.

On a prosecution for carrying a pistol, the evidence showed that defendant carried the pistol to a certain place in company with T., and on a motion for a new trial, based on the testimony of T., claimed to have been newly discovered, defendant alleged that T. was not on good terms with him. Held, that the motion was properly denied for lack of diligence. *Nicholas v. State*, 58 App. 243, 125 S. W. 30.

Where a person was not called as a witness, because defendant erroneously supposed him to be disqualified by being under a charge for a similar offense, his testimony after acquittal cannot be considered as newly discovered. *Coleman v. State*, 58 App. 451, 126 S. W. 573.

Where defendant must have known that a witness who is to furnish the alleged newly discovered evidence was present at the alleged unlawful sale of liquor, and the indictment was pending nearly a year before the trial, without any effort by defendant to ascertain what knowledge of the transaction the witness had and to procure his evidence, a new trial was properly denied. *Cooper v. State*, 58 App. 598, 126 S. W. 862.

In a prosecution for cattle theft, alleged newly discovered evidence relating to weather conditions during the period of the alleged theft, and expert testimony as to the period in which putrefaction would set up in a fresh hide, was not ground for new trial, in the absence of proof that the testimony could not have been procured by the use of due diligence before or during the trial. *La Flour v. State*, 59 App. 645, 129 S. W. 351.

Where accused knew of the existence of a part of the testimony of a witness, but did not summon the witness because he believed that his testimony would not be favorable to him, accused was not entitled to a new trial on the ground of newly discovered evidence consisting of favorable testimony of the witness. *Huggins v. State*, 60 App. 214, 131 S. W. 596.

Accused is not entitled to a new trial for newly discovered testimony of witnesses who were with him the night of the difficulty, where slight diligence would have discovered the importance of their testimony. *Sellers v. State*, 61 App. 140, 134 S. W. 348.

Where defendant was convicted of violating the local option law, he is not entitled to a new trial on the ground of newly discovered evidence of a witness who had moved to another town, where he did not show any attempt to have him present on the trial, or issue process for him. *Lee v. State*, 61 App. 607, 135 S. W. 1174.

When defendant was convicted of violating the local option law, and there was no attempt to produce a certain person as a witness on the trial, although defendant knew of his presence when the liquor was sold, he is not entitled to a new trial. *Lee v. State*, 61 App. 607, 135 S. W. 1174.

In a prosecution for keeping a disorderly house, it was not error to refuse a new trial for newly discovered evidence, where the witnesses relied on in the motion were present at the search of the premises for liquor at which time it was stated that another person than defendant claimed he owned the liquor, where defendant was also present, and he failed to show that he did not know what this testimony would be, and no diligence was shown in procuring the testimony. *Sullivan v. State*, 61 App. 657, 136 S. W. 456.

An accused who has been negligent in failing to procure evidence should not be granted a new trial for evidence discovered after conviction which might probably change the result. *Johnson v. State*, 62 App. 284, 136 S. W. 1058.

Defendant's motion for a new trial on the ground of newly discovered evidence of two witnesses was properly overruled where defendant's attorney had talked to such witnesses before the trial, and had caused them to attend the trial and be sworn as witnesses, and had placed one of them on the stand. *Drake v. State*, 62 App. 130, 136 S. W. 1064.

A new trial, asked on account of newly discovered evidence, is properly denied accused, where he had six months in which to procure his witnesses and by using diligence could have discovered the evidence before the trial. *Wilson v. State*, 63 App. 81, 138 S. W. 409.

Where defendant's attorney, in support of a motion for a new trial, alleged that he had failed to get a certified copy of the conviction of a witness against accused from a foreign state, required to prove his incompetency, because he had been informed by defendant's former attorney, who was unable to defend him because he had been appointed county attorney of such county, that, pursuant to a conversation between such former attorney and the judge, the state would raise no question that the witness was not an unpardoned federal convict, and it appeared that at the time the witness was permitted to testify, over objection, all parties knew that he was an unpardoned convict, defendant was entitled to a new trial, though defendant's attorney misunderstood the effect of the conversation between defendant's former attorney and the court. *Carden v. State*, 62 App. 545, 138 S. W. 598.

A new trial should not be awarded on the ground of newly discovered evidence, unless diligence is shown. *Franklin v. State*, 63 App. 433, 140 S. W. 1091.

Where the court, when the case was set for trial, offered to appoint counsel for accused, who stated that he would try his own case, and he knew prior to the trial of evidence establishing an alibi, relied on as a ground for new trial, but he made no effort to procure the evidence, and did not represent to the court before or at the time of the trial that there was any testimony he desired to obtain, the court properly denied a new trial on the ground of newly discovered evidence. *Adams v. State* (Cr. App.) 143 S. W. 185.

An assault was committed in March, an indictment being returned in May, and trial had in July. The accused requested no postponement or continuance in order to learn the names of parties who witnessed the assault. Held that, having ascertained those names after the trial, he was not entitled to a new trial on the ground of newly discovered evidence; it appearing that he knew from the time of the alleged assault that other persons saw the affair and exercised no proper diligence to obtain their testimony. *Scott v. State* (Cr. App.) 143 S. W. 610.

A new trial will not be granted for newly discovered evidence where the new witness lived in the same neighborhood as accused, and could have been produced on the first trial if due diligence had been exercised. *Stapp v. State* (Cr. App.) 144 S. W. 941.

An affidavit, on motion for a new trial on the ground of newly discovered evidence, which, if true, shows that when the offense was committed defendant was at work for the affiant at a certain place and time and could not have been the person who committed the offense, shows no newly discovered evidence, since, if true, it must have been known as well or better to defendant himself. *Gotcher v. State* (Cr. App.) 148 S. W. 574.

Accused applied for a new trial for newly discovered evidence of the fact that prior to the removal of the piano in question he had consulted with his attorney and been informed that he might lawfully do so. The attorney stated that he had forgotten such fact, and for that reason did not testify on the trial. Accused also sought the testimony of one C., but it appeared that C. was present when accused was arrested, and refused to be a witness for him; that he was not subpoenaed, though accused before trial told his attorney about him. Held, that a denial of the application was proper. *Height v. State* (Cr. App.) 150 S. W. 908.

When a witness has been subpoenaed, attends court, and is not placed on the witness stand, such diligence is not used as would authorize a new trial. *Clary v. State* (Cr. App.) 150 S. W. 919.

The absence of a witness was not ground for a new trial, where accused, though not tried for four months after his arrest, and though he must have known of the witness' testimony at the time of the arrest, did not apply to have the witness summoned, or move for a continuance. *Pech v. State* (Cr. App.) 154 S. W. 998.

On a motion for a new trial, where there was attached to the motion the affidavit of a person who did not testify on the trial, the court should have considered not only the evidence but the entire record, and, if the record disclosed that accused was guilty of no violation of law, the conviction should not be permitted to stand, even though proper diligence was not used to obtain such person's testimony on the trial. *Cockrell v. State*, 71 App. 543, 160 S. W. 343, 48 L. R. A. (N. S.) 1001.

An application for a new trial for newly discovered evidence was properly denied where there was no showing of diligence to procure the evidence at the trial. *Madrid v. State*, 71 App. 420, 161 S. W. 93.

Where accused desired to take advantage of the suspended sentence law, a new trial cannot be granted for newly discovered evidence that he was a law-abiding citizen, where there was no attempt to secure the attendance of witnesses to those facts, and no affidavit that this was newly discovered evidence, or that similar evidence could not have been produced at the trial. *Walker v. State*, 73 App. 99, 164 S. W. 3.

In a prosecution for homicide, the state having denied that deceased had a pistol when he was killed, and having claimed that he then owned only a small automatic, newly discovered evidence that in December, 1912, just prior to the

killing, M., in payment of a debt, gave deceased a 38 black Colt's pistol, and that neither of the witnesses testifying to this had ever disclosed their knowledge to any one until after the trial, was sufficient to entitle defendant to a new trial; it sufficiently appearing that no reasonable diligence could have discovered their testimony at the time of the trial. *Henson v. State* (Cr. App.) 168 S. W. 89.

Accused is not entitled to a new trial on the ground of newly discovered evidence tending to support his claim of alibi, where some of the evidence must have been within the knowledge of accused, and the other could have been discovered by diligence during the five years preceding trial. *McCue v. State* (Cr. App.) 170 S. W. 280.

Where accused knew during the three years the case against him was pending that his defense was that decedent had assaulted him with a knife and had cut his suspender and that he met a third person immediately after the difficulty, a new trial on the ground of newly discovered evidence of the third person, to the effect that he met accused and saw that his suspender was cut, was properly denied for want of diligence to procure the testimony at the trial. *Edwards v. State* (Cr. App.) 172 S. W. 227.

Where, on a trial for selling liquor in local option territory, a state's witness testified to buying beer from accused in the presence of two men whose names he did not know, accused could not obtain a new trial on the ground of newly discovered testimony of two persons claiming to have been present at the time testified to by the state's witness; the two persons being present in the courtroom during the trial, and one of them aiding accused's counsel in selecting the jury. *Stewart v. State* (Cr. App.) 172 S. W. 979.

Accused, who heard a witness testify to a fact at the preliminary examination held a year and a half before the trial, may not obtain a new trial on the ground of newly discovered evidence to contradict the witness. *Arias v. State* (Cr. App.) 174 S. W. 340.

There was lack of diligence, depriving defendant of any right to new trial for newly discovered evidence of H. and R. that they did not see defendant at a certain time and place; they having been in attendance at the first trial, and other witnesses having testified that, when with H. and R., at such time and place, they saw defendant. *White v. State* (Cr. App.) 177 S. W. 93.

As regards a new trial for testimony of persons who were at the scene of the homicide, there was lack of diligence in not discovering it for the trial, which was three months after the killing; defendant's father and grown brothers, interested in his case, living in the neighborhood. *Howe v. State* (Cr. App.) 177 S. W. 497.

5. Possibility of obtaining evidence.—If, on the trial, the defendant's witnesses testify differently from what he had expected, he must show, by his motion for a new trial, that the desired testimony is accessible from other sources. *Mayfield v. State*, 44 Tex. 59; *Jordan v. State*, 10 Tex. 479.

6. Nature and purpose of evidence in general.—It is not a ground for new trial that since the trial it has been discovered that the place of the offense was not within the county of conviction. *Henderson v. State*, 12 Tex. 525.

Where a state's witness recanted what she had testified against the defendant, and it was shown that she was unreliable by the affidavit of her mother, it was held that this was newly discovered evidence for which a new trial should have been granted. *Mann v. State*, 44 Tex. 642. But where the defendant's guilt is sufficiently established by other testimony than that of a recanting witness, it seems that a new trial should not, for such cause, be granted. *Young v. State*, 7 App. 461. See, also, in this connection, *Brown v. State*, 13 App. 59, where it was held that a new trial should have been granted on account of an explanation made by a state's witness of his testimony given on the trial.

Newly discovered evidence may entitle a defendant to a new trial, although it may merely tend to show that he has been convicted of a higher grade of offense than the one he actually committed. *Moore v. State*, 18 App. 212.

A new trial will not be granted to allow defendant to prove statements made by him which he did not remember while on the stand. *Shell v. State*, 32 App. 512, 24 S. W. 646.

New trial will not be granted for newly discovered evidence sought to be used in rebuttal. *Franklin v. State*, 34 App. 203, 29 S. W. 1088.

For a case where it is held that a new trial should have been granted for testimony in rebuttal of an absent witness not found before the trial, see *Owens v. State*, 35 App. 345, 33 S. W. 875.

Testimony of a witness who had testified at the trial cannot be considered as newly discovered evidence. *Williams v. State* (Cr. App.) 34 S. W. 271.

When defendant was convicted on circumstantial evidence, he should have been granted a new trial for the testimony of an absent witness by whom he expected to prove an alibi. *Curtis v. State* (Cr. App.) 40 S. W. 265.

Where, on a trial for aggravated assault, the evidence was conflicting on the issue whether accused swore at and threatened prosecutrix, and ran after her with an ax, and attempted to strike her, a new trial, on the ground of newly discovered evidence disclosing the fact that a third person had told prosecutrix that she must swear that accused took up an ax and attempted to strike her, should be granted, because the newly discovered evidence showed a conspiracy of the third person and prosecutrix to bring about a conviction on perjured testimony. *Piper v. State*, 57 App. 605, 124 S. W. 661.

In a statutory rape case, an affidavit by a witness that another witness would testify that prosecutrix was over the age of consent affords no ground for a new trial for newly discovered evidence, where the second witness was not produced when the motion for new trial was heard, nor her affidavit attached to the record; the mere hearsay affidavit of the first witness not bringing it within the rule of newly discovered evidence. *Vaughn v. State* (Cr. App.) 136 S. W. 476.

The evidence of the mother and father of the accused, who lived in the town

where he was on trial, and with whom he made his home, was not newly discovered evidence. *Garza v. State* (Cr. App.) 145 S. W. 590.

That a witness who at the trial, in which the question of its being light or dark at the time of the homicide was fully gone into, testified that it was dark, and in effect that a person could not be seen any distance, would testify that it was so dark that a witness could not have seen what she testified to have seen, is not newly discovered testimony, as regards right to a new trial. *Stephens v. State* (Cr. App.) 145 S. W. 907.

A conviction for a violation of the local option law cannot be set aside because of a discrepancy between the testimony of the prosecuting witness upon the final trial and that given in the examining trial, where this testimony was not introduced to discredit the prosecuting witness, although accused and his counsel were aware of the same, as it cannot be considered as newly discovered evidence. *Dobson v. State* (Cr. App.) 146 S. W. 546.

Where accused, charged with violating the local option law, did not know that prosecutor would testify that he purchased whisky from accused, and secured a bottle from a third person, who was present, and when prosecutor so testified accused could not obtain the attendance of the third person, who, if present, would testify that the prosecutor never obtained a bottle from him, and that the third person was never present when accused sold any whisky, accused was entitled to a new trial on the ground of newly discovered evidence. *Ferguson v. State* (Cr. App.) 147 S. W. 239.

Where a witness for the state was subsequently also put on the stand and testified for the defense, matters about which he was not then examined are not newly discovered evidence warranting a new trial. *Black v. State*, 71 App. 621, 160 S. W. 720.

The overruling of a motion for a new trial, presenting affidavits of two witnesses that they heard a conversation in which the prosecuting witness authorized defendant to sell the animal he was charged with stealing, qualified by the court's statement that it was not filed until 30 days after trial, was contradictory of defendant's own testimony, and was not newly discovered evidence, in that defendant knew or could have known of their testimony, was not error. *Smith v. State*, 73 App. 129, 164 S. W. 825.

Where, on a trial for assault with intent to murder, in which defendant relied on self-defense, the evidence was conflicting as to the making of threats against accused by the prosecuting witness, a new trial should have been granted because of the absence, due to illness, of a witness, whose affidavit was attached to the motion therefor, showing that she would have given material evidence on this point, and whose attendance defendant used due diligence to procure. *Cooley v. State*, 73 App. 325, 165 S. W. 192.

Additional evidence of a witness who was present at the trial, and whom defendant knew was with deceased shortly before the killing, could not be regarded as newly discovered, so as to form the basis of an application for a new trial. *Henson v. State* (Cr. App.) 168 S. W. 89.

The testimony of a witness that accused was with her the night a burglary was committed was not such newly discovered testimony as entitled accused to a new trial, as accused was as well aware of this fact, if true, as the witness. *Guyton v. State* (Cr. App.) 175 S. W. 1063.

7. Relevancy, materiality, and competency.—It is essential that the newly discovered evidence be competent and material. *Templeton v. State*, 5 App. 398; *Yanez v. State*, 6 App. 430, 32 Am. Rep. 591; *Polsler v. State*, 6 App. 510; *Hutchinson v. State*, 6 App. 468; *Pitts v. State*, 29 App. 374, 16 S. W. 189.

Where the materiality of the alleged newly discovered evidence of threats was not shown, inasmuch as the threats were not shown to have been communicated to defendant, a new trial was properly denied. *Williams v. State*, 7 App. 163.

Affidavit of the assaulted party, that defendant cut her by accident, held not to require a new trial where the testimony of other witnesses authorized the conviction. *Young v. State*, 7 App. 461.

Newly discovered evidence which did not tend to justify or mitigate the homicide, held not ground for new trial. *Escareno v. State*, 16 App. 85.

See newly discovered evidence which, in view of the proof on the trial, is held immaterial. *Trevinio v. State*, 27 App. 372, 11 S. W. 447; *Wood v. State*, 27 App. 393, 11 S. W. 449; *Watts v. State*, 30 App. 533, 17 S. W. 1092.

Newly discovered evidence, which was inadmissible because hearsay, held not ground for new trial. *Dillard v. State*, 31 App. 67, 19 S. W. 895.

A new trial will not be granted for newly discovered evidence of uncommunicated threats. *Pitts v. State*, 29 App. 374, 16 S. W. 189.

Where the evidence tended strongly to show that the main prosecuting witness was an accomplice, a new trial should have been granted. *Dawson v. State*, 32 App. 535, 25 S. W. 21, 40 Am. St. Rep. 791.

A new trial will not be granted when the newly discovered evidence appears to be immaterial. *Magruder v. State*, 35 App. 214, 33 S. W. 233. See, also, *Sargent v. State*, 35 App. 325, 33 S. W. 364.

On trial for rape, a witness testified that he and one T. saw defendant and prosecutrix in the act of copulation. The whereabouts of T. was unknown to both parties, and defendant was in no way put on notice of such testimony. Defendant afterwards moved for a new trial, which motion was supported by affidavit of said T., denying that he had ever seen such parties engaged in an act of carnal intercourse; held, a new trial should have been granted. *Owens v. State*, 35 App. 345, 33 S. W. 875.

To support a motion for a new trial on the ground of newly discovered evidence it must be shown that it is material, and on another trial would probably produce a result more favorable to defendant. *Belcher v. State* (Cr. App.) 37 S. W. 428.

See, also, *Allen v. State*, 36 App. 436, 37 S. W. 738; *Holliday v. State* (Cr. App.) 37 S. W. 751; *Powell v. State*, 36 App. 377, 37 S. W. 322.

A new trial for newly discovered evidence will not be granted when such evidence is merely hearsay. *Turner v. State*, 37 App. 451, 36 S. W. 87.

In a prosecution for selling intoxicating liquor, where the evidence showed that accused met two persons on a street, who told him that they wanted to get some whisky, and accused said, "All right," and told them to be at a certain place in half an hour, where they received the whisky from accused, and paid him for it, and accused claimed he had bought the liquor of a third person as an accommodation for those to whom he delivered it, newly discovered evidence of a person who claimed that he was present when accused received the whisky from the third person, saw him pay for it, and heard him say that the whisky was for friends of his, and that he saw accused deliver the whisky to one of the persons, who received it, relating wholly to the transaction between accused and the third person, was not ground for a new trial. *Ross v. State*, 57 App. 372, 123 S. W. 419.

Where the principal witness testified that he and defendant committed a burglary before 12 o'clock, evidence by another that the witness had dinner with him between 12 and 1 o'clock was wholly immaterial, and a new trial cannot be granted because of this newly discovered evidence. *Pitts v. State*, 60 App. 524, 132 S. W. 801.

In a prosecution for burglary, where all the evidence showed that the crime was committed between 10 and 2, newly discovered evidence that another person had seen the witness and a large negro on the railroad track about 12 o'clock, and that they acted suspiciously, etc., was irrelevant, and therefore insufficient to secure a new trial, on the grounds of newly discovered evidence. *Pitts v. State*, 60 App. 524, 132 S. W. 801.

Newly discovered evidence as to age and birth place of accused held not ground for new trial. *Johns v. State*, 63 App. 416, 140 S. W. 1093.

Where accused, killing an officer attempting to execute a writ of sequestration and dispossess him, justified his conduct on the ground that decedent and his assistant came to accused's premises; that he did not know who they were; that decedent or his assistant fired shots, as accused was on his way to the barn; that, after going to the barn, decedent and his assistant followed accused, who thought that his life was in danger, and killed decedent just as accused was about to be discovered—the fact that decedent and his assistant had on the evening of the killing shot at a target was not a defense, and newly discovered evidence of that fact was not ground for new trial. *Fifer v. State*, 64 App. 203, 141 S. W. 989.

Where the prosecuting witness, on the morning after the offense, positively identified accused as the person committing the offense, a new trial on the ground of newly discovered witnesses, who would testify that they met a man on the night, of the commission of the offense who admitted he was guilty of the offense, without identifying the prosecuting witness as the person on whom the offense was committed, and without describing the man in such a way as to suggest that the prosecuting witness was mistaken in identifying accused, was properly denied. *Adams v. State*, 64 App. 501, 142 S. W. 918.

One accused of homicide and his wife lived with another family consisting of deceased and his son and others, and the homicide was committed by placing arsenic in coffee, the drinking of which resulted in the death of deceased. Held, that newly discovered evidence that accused's wife had been seen alone with deceased's son, and that she had gone after the son in a buggy when he was working on the road, is immaterial, not showing that the wife had any motive in attempting to take the life of the son or his father, and so was no ground for a new trial. *Bailey v. State* (Cr. App.) 144 S. W. 996.

In a prosecution for homicide where accused had developed testimony that a calf was mortgaged, newly discovered evidence that his wife had sold a yearling is immaterial and does not entitle accused to a new trial. *Bailey v. State* (Cr. App.) 144 S. W. 996.

A new trial for homicide should be granted, where it appears that a witness will testify that he killed deceased in self-defense, that accused was not present and had nothing to do with the killing, and it also appears that such witness could not testify on the first trial, because he was then under indictment, but that he has since been tried and acquitted. *Sylvas v. State* (Cr. App.) 150 S. W. 906.

A new trial for theft from the person would not be granted for newly discovered evidence consisting of the testimony of a witness that she and accused left a moving picture show together on the evening of the crime, where it appeared that they had separated before the occurrence of the offense. *Johnson v. State*, 70 App. 347, 156 S. W. 1181.

B. Cumulative evidence.—A new trial will not be granted on the ground of newly discovered evidence which is only cumulative. *De Lerosa v. State* (Cr. App.) 170 S. W. 312; *Kemp v. State*, 38 Tex. 110; *Shultz v. State*, 5 App. 390; *Fisher v. State*, 30 App. 502, 18 S. W. 90; *Garner v. State*, 34 App. 356, 30 S. W. 782; *Washington v. State*, 35 App. 154, 156, 32 S. W. 693; *Price v. State*, 36 App. 403, 37 S. W. 743; *White v. State*, 10 App. 167; *Johnson v. State*, 2 App. 456; *Scruggs v. State*, 35 App. 622, 34 S. W. 951; *Turner v. State*, 37 App. 451, 36 S. W. 87; *Riojas v. State*, 36 App. 182, 36 App. 268; *Reagan v. State*, 57 App. 642, 124 S. W. 685; *Garza v. State* (Cr. App.) 145 S. W. 590; *Hogan v. State* (Cr. App.) 147 S. W. 871.

Evidence is cumulative, for which, though newly discovered, new trial will not be granted, where it only multiplies witnesses as to one or more facts sworn to at the trial, or only adds other circumstances of the same general character. *Howe v. State* (Cr. App.) 177 S. W. 497; *Garza v. State* (Cr. App.) 145 S. W. 590.

One of the defenses at trial was insanity, and the motion for new trial was on the ground of newly discovered evidence showing insanity; the witnesses by whom

such evidence was to be proved being accused's father and sister, who, it was claimed, would testify that his aunt was confined in an insane asylum, and a deceased brother had epilepsy. The only affidavit filed was by accused's attorney, which stated that the testimony was unknown to his attorneys at trial and negatively want of diligence; but it was not shown whether accused was claimed to have been permanently or temporarily insane, or that he was so insane as to be unable to inform his attorneys of his family history. Held, that the newly discovered testimony may have been only cumulative, and, in absence of a statement of facts, the Court of Criminal Appeals could not review a denial of the motion. *Carr v. State*, 57 App. 185, 122 S. W. 258.

Where, in a homicide case, there was considerable evidence introduced, pro and con, as to whether there was sufficient timber, weeds, and brush to obscure the presence of decedent when he was shot, so that accused could not see him, as accused claimed, alleged newly discovered testimony, relating to the physical condition of the ground and surroundings of the scene of the tragedy, embracing photographic views taken of the place from different angles of view, was merely cumulative. *Roberts v. State*, 57 App. 199, 122 S. W. 388.

It was not error to refuse one convicted of murder a new trial, asked on the ground of newly discovered evidence that decedent was reputed to be a quarrelsome man and a fugitive from justice, where the motion was supported by accused's affidavit only, where both parties had lived in the same community, and where a witness for accused testified on the trial that decedent had said he was a fugitive. *Lancaster v. State* (Cr. App.) 148 S. W. 307.

In a homicide case, where a person wilfully withheld his knowledge that defendant did not shoot deceased, knowing that the brother of defendant did, and there was no evidence that the brothers acted together, testimony of such person although cumulative of the testimony of defendant's brother at the trial, is ground for a new trial; the rule as to cumulative testimony not applying, where the newly discovered testimony may be of that force that it might show the defendant to be innocent. *Spencer v. State* (Cr. App.) 153 S. W. 858, 46 L. R. A. (N. S.) 903.

Where, in a prosecution for aggravated assault on a female while sitting in a theater chair by defendant's running his hand between the chairs and over her back, waist, and hip, he testified that the space between the chairs where prosecutrix was sitting was too small to admit his hand between them, and that he may have touched her with his foot only, additional evidence showing that the space was too small to admit the hand was cumulative, and not newly discovered so as to authorize a new trial on that ground. *Cuellar v. State* (Cr. App.) 154 S. W. 228.

Where there have been several trials and continuances, a new trial will not be granted on the ground of newly discovered testimony which is only cumulative. *McCue v. State* (Cr. App.) 170 S. W. 280.

In a prosecution for homicide, newly discovered evidence, that deceased had hired an auto and chauffeur to search for accused after making threats against his life, is not ground for new trial, where the evidence on the trial clearly showed that accused was informed that deceased was looking for him, as it was cumulative. *Quinn v. State* (Cr. App.) 170 S. W. 783.

In a prosecution for homicide, newly discovered evidence of a witness, who testified at the trial that accused had rented a revolver at a pawnshop, is not ground for new trial, where the defense at the trial cross-examined another witness as to the fact of rental and such witness denied knowledge of it. *Quinn v. State* (Cr. App.) 170 S. W. 783.

A new trial on the ground of newly discovered evidence, consisting of the testimony of a witness, merely cumulative to a fact not disputed, is properly denied. *Edwards v. State* (Cr. App.) 172 S. W. 227.

Where one indicted with defendant for the same robbery, and who was not a competent witness for defendant, was tried and acquitted, so as to make his testimony newly discovered evidence, his testimony on his first trial, which the court attached to the bill of exceptions, placing defendant where the state's evidence showed that the robbery occurred, was cumulative, and not a ground for a new trial. *Bruce v. State* (Cr. App.) 173 S. W. 301.

Where several persons besides members of accused's own family testified in support of his defense of alibi, newly discovered testimony of other outside witnesses tending to support the defense is cumulative, and affords no ground for new trial. *McCue v. State* (Cr. App.) 170 S. W. 280.

9. **Impeachment of witness.**—Newly discovered evidence which only tends to impeach the state's witness is not ground for a new trial. *Patton v. State*, 62 App. 28, 136 S. W. 42; *Barber v. State*, 35 App. 70, 31 S. W. 649; *Matkins v. State*, 33 App. 605, 28 S. W. 536; *Grate v. State*, 23 App. 458, 5 S. W. 245; *Atkins v. State*, 11 App. 8; *Terry v. State*, 3 App. 236; *Polser v. State*, 6 App. 510; *Navarro v. State* (Cr. App.) 45 S. W. 724; *Holt v. State*, 39 App. 282, 45 S. W. 1016, 46 S. W. 829; *Fields v. State*, 39 App. 488, 46 S. W. 814; *Miller v. State*, 35 App. 209, 33 S. W. 227; *Butts v. State*, 35 App. 364, 33 S. W. 866; *Scruggs v. State*, 35 App. 622, 34 S. W. 951; *Priest v. State* (Cr. App.) 34 S. W. 611; *Little v. State* (Cr. App.) 35 S. W. 659; *Storms v. State* (Cr. App.) 37 S. W. 439; *Morris v. State*, 57 App. 163, 121 S. W. 1112; *Reagan v. State*, 57 App. 642, 124 S. W. 685; *Hopkins v. State*, 61 App. 590, 135 S. W. 553; *Wormley v. State* (Cr. App.) 143 S. W. 615; *McGinsey v. State* (Cr. App.) 144 S. W. 268; *Clary v. State* (Cr. App.) 150 S. W. 919; *Pinson v. State* (Cr. App.) 151 S. W. 556; *Holmes v. State*, 70 App. 214, 156 S. W. 1172; *Black v. State*, 71 App. 621, 160 S. W. 720; *Chappell v. State*, 72 App. 191, 161 S. W. 964; *James v. State*, 72 App. 457, 163 S. W. 61; *Cole v. State*, 73 App. 457, 165 S. W. 929; *Henson v. State* (Cr. App.) 168 S. W. 89; *Hawkins v. State* (Cr. App.) 168 S. W. 93; *Dukes v. State* (Cr. App.) 168 S. W. 96; *Raleigh v. State* (Cr. App.) 168 S. W. 1050; *Merkel v. State* (Cr. App.) 171 S. W. 739; *Stewart v. State* (Cr. App.) 172 S. W. 979; *White v. State* (Cr. App.) 177 S. W. 93.

Where the state's principal witness made an affidavit stating that her testimony was incorrect and the witness' mother stated that she was unreliable, a new trial should have been granted. *Mann v. State*, 44 Tex. 642.

An exception to the rule that a new trial will not be awarded for newly discovered evidence to contradict inculpatory testimony is when the newly discovered evidence tends not to impeach the credibility of the prosecuting witness, but to show that he was mistaken as to a material fact about which he testified at the trial. *Estrada v. State*, 29 App. 169, 15 S. W. 644.

Defendant applied for a new trial on account of newly discovered evidence to disprove the testimony of a certain witness whose testimony had been a surprise to defendant; held, the application should have been granted. *Phillips v. State*, 35 App. 480, 34 S. W. 272.

Alleged newly discovered evidence that prosecutrix's reputation for virtue and chastity was bad was unavailable as ground for a new trial, being impeaching in character. *Woodland v. State*, 57 App. 352, 123 S. W. 141.

New trial may not be had for newly discovered evidence that the state's main witness to the assault by defendant was not at the place of the difficulty; it being merely collateral to impeach a witness. *Haley v. State*, 59 App. 338, 128 S. W. 1133.

A new trial may not be had on newly discovered evidence that a witness for the state was untruthful and an enemy of defendant, which fact was unknown to defendant and his counsel. *Haley v. State*, 59 App. 338, 128 S. W. 1133.

A new trial of a charge of seduction will not be granted for newly discovered evidence consisting of the testimony of a witness that, during the time prosecutrix claimed to be engaged to marry accused, she told the witness that she did not love any man well enough to marry him, since new trials will not be granted for testimony which simply tends to impeach other witnesses, and does not support the testimony of the moving party. *Stapp v. State* (Cr. App.) 144 S. W. 941.

In a prosecution for homicide committed by means of poison, newly discovered evidence that one of the state's witnesses had attempted to get another witness to testify that a horse on which accused had insurance had died of strychnine poison did not entitle accused to a new trial, because tending only to impeach the state's witness. *Bailey v. State* (Cr. App.) 144 S. W. 996.

Newly discovered evidence is not ground for a new trial, where its effect is to impeach a witness, as by denying prosecuting witness' identification of accused. *Tate v. State* (Cr. App.) 146 S. W. 169.

Newly discovered evidence, tending merely to impeach a witness, presents no ground for a new trial. *Collins v. State* (Cr. App.) 148 S. W. 1065.

Newly discovered testimony, impeaching the prosecuting witness on an immaterial issue, is not ground for new trial. *McHenry v. State* (Cr. App.) 173 S. W. 1020.

10. Conflicting or contradicted evidence.—Denial of a new trial held error where the motion was supported by an affidavit of the principal witness for the state, stating that he was mistaken in his testimony. *Brown v. State*, 13 App. 59.

An application for the testimony of a certain witness, when the witness makes affidavit that he will not testify as alleged, should be denied. *Williamson v. State*, 36 App. 225, 36 S. W. 444.

Motion for new trial on the ground that a witness who had testified to a certain state of facts would on another trial testify differently; held, properly overruled. *Trevino v. State*, 38 App. 64, 41 S. W. 608.

A new trial of a charge of seduction will not be granted for newly discovered evidence, consisting of the testimony of a witness that she was present when the child was born eight months after the alleged intercourse, and that it was a fully developed child, where a physician called for the accused had testified on the trial that a woman does frequently deliver her first child in eight months. *Stapp v. State* (Cr. App.) 144 S. W. 941.

11. Credibility and probable effect.—To authorize granting new trial on ground of newly discovered evidence, it must appear first that the evidence is probably true, and next that it would have a tendency to change result favorably to defendant. *Gass v. State* (Cr. App.) 56 S. W. 76; *Smith v. State*, 28 App. 309, 12 S. W. 1104; *Jones v. State*, 23 App. 501, 5 S. W. 138; *McVey v. State*, 23 App. 659, 5 S. W. 174; *Burgess v. State*, 33 App. 9, 24 S. W. 286; *Mitchell v. State*, 38 App. 170, 41 S. W. 816; *Shultz v. State*, 5 App. 390; *West v. State*, 2 App. 209; *Johnson v. State*, 2 App. 456; *Goins v. State*, 41 Tex. 334; *Campbell v. State*, 29 Tex. 490; *Barber v. State* (Cr. App.) 46 S. W. 233; *Higginbotham v. State*, 3 App. 447; *Fletcher v. State*, 37 App. 193, 39 S. W. 116; *Lawrence v. State*, 36 App. 173, 36 S. W. 90; *Trevino v. State*, 38 App. 64, 41 S. W. 608; *Boggs v. State*, 38 App. 82, 41 S. W. 642; *Hunter v. State*, 59 App. 439, 129 S. W. 125; *Huggins v. State*, 60 App. 214, 131 S. W. 596; *Kirksey v. State*, 61 App. 641, 135 S. W. 577; *Boyce v. State*, 62 App. 374, 137 S. W. 116.

When considered in the light of the testimony adduced on the trial, if the newly discovered evidence is not probably true, and would not be likely to change the result on another trial, a new trial should be refused. *Lewis v. State*, 15 App. 647; *Cole v. State*, 16 App. 461; *Caldwell v. State*, 12 App. 302; *Jones v. State*, 23 App. 501, 5 S. W. 138; *McVey v. State*, 23 App. 659, 5 S. W. 174. But when it is doubtful how it would affect the verdict, the doubt should be resolved in favor of the defendant. *Lindley v. State*, 11 App. 283.

Alleged newly discovered evidence of decedent's wife that whoever shot deceased was standing in the road when he shot, and was not attempting to conceal himself, that she was sitting on the gallery of the house 200 or 300 yards distant, and when she heard the firing looked up and saw the person who shot with a smoking gun in his hand stepping toward the fence toward deceased's dead body, was not probably true, and would not have probably produced an acquittal or a conviction of a lesser offense than manslaughter of which accused was found guilty

on a new trial, the witness having testified at the examining trial that the gun fire attracted her attention, when she looked the way her husband was in the field, saw his mule coming up the cotton rows with the plow, and went near enough to see that her husband was killed when she went for help, without having stated who it was that fired at deceased. *Reagan v. State*, 57 App. 642, 124 S. W. 685.

In a prosecution for murder, the state put in evidence an oral dying declaration of decedent, a 10 year old boy, who was shot with his father, to the effect: That he saw accused and his son, and told his father that they were going to kill him, but his father said they were not, and, when they had drawn near accused and his son, the latter raised up and fired on them, and they exchanged shots until decedent's father was wounded, when accused said to his son, "Shoot the little son of a bitch! Don't let him get away!" and accused's son stepped out and shot decedent; that as decedent and his father approached accused in the wagon he told decedent's father to stick up his damned head, he wanted to shoot it off. After trial accused discovered a written statement made by decedent after the shooting, at a different time, to a justice of the peace, to the same effect as the oral declaration, except that he stated in the writing that accused ordered declarant to get off the wagon, and then ordered his son to shoot him, and that accused's son fired the first shot. The statement was not signed by decedent, but was reduced to writing by the justice from his answers. Held, that the written statement would not have materially aided accused or changed the result of the trial, so that the court was not required to grant a new trial on the ground that the written dying declaration excluded the oral one, and hence that the written declaration was newly discovered evidence, requiring a new trial. *Hunter v. State*, 59 App. 439, 129 S. W. 125.

In a prosecution for statutory rape, it is no ground for new trial that prosecutrix before the grand jury testified "that the offense was committed while she was asleep, and that she did not know anything about it until it was all over, when she was awakened by the defendant, who told her not to say anything about it," as that evidence would tend to show that defendant had intercourse with the prosecutrix. *Vaughn v. State*, 62 App. 24, 136 S. W. 476.

Accused was indicted for theft of money in the fall of 1909, and was not tried until September, 1910. One of the witnesses, to procure whose evidence he asked a new trial on the ground of newly discovered evidence, worked near the courthouse, and could easily have been procured at trial, no attempt having been made to have him testify. Accused also desired to procure the evidence on the new trial of a witness who he claimed would testify that he had given accused two show tickets for a show in another town, in order to corroborate accused's testimony that he went to such town on the night of the theft to attend a show, and not in flight. He also claimed that another witness would testify on the new trial that he loaned accused \$20 on the night of the theft. Affidavits of other witnesses were filed that on the night of the robbery a man did certain things, but it was not shown that such persons knew the man was prosecuting witness, which was necessary to make the evidence material. The prosecuting witness positively identified accused as the person who robbed him. Held, that there was no abuse of discretion in denying a new trial. *Johnson v. State*, 62 App. 284, 136 S. W. 1058.

One convicted of seduction was properly denied a new trial for newly discovered testimony relating to circumstances creating merely a suspicion that prosecutrix had been indiscreet after the offense. *Browning v. State*, 64 App. 148, 142 S. W. 1.

In a prosecution for homicide by poisoning with arsenic, newly discovered evidence that accused's wife had kept arsenic in her possession does not entitle accused to a new trial, not being of such a character that it would probably produce a different result. *Bailey v. State* (Cr. App.) 144 S. W. 996.

In a prosecution for forging an order, newly discovered evidence that J. had been indicted a number of times in D. county for forgery, and that the order defendant was charged with having forged was made payable to him, was insufficient to entitle defendant to a new trial, in the absence of further showing that defendant received the order from J., or had ever met him, or showing any connection between him and the order in question. *Gibson v. State* (Cr. App.) 148 S. W. 1090.

The fact that a doctor, after testifying in an incest trial to making an examination of the person and clothing of prosecutrix, in which he discovered a certain state of facts, subsequently testified at the hearing on a motion for new trial that he made another examination after accused's conviction and discovered a different state of facts, did not present ground for a new trial, where there was no evidence that the conditions discovered at the later examination existed at the time of the former examination, especially where the facts discovered at the former examination were corroborated by other testimony and accused's confession, made shortly after the alleged occurrence. *Drake v. State* (Cr. App.) 151 S. W. 315.

Newly discovered evidence that affiant, while passing the home of prosecutrix, had seen her pull her dress up to her knees and kick up her heels in a way to attract his attention, has too slight weight on the issue of her chastity to warrant a new trial. *Black v. State*, 71 App. 621, 160 S. W. 720.

Newly discovered evidence, in a seduction case, that one H. had received a letter from prosecutrix, after he had called on her, was no ground for new trial, in the absence of any showing of any improper language in the letter. *Black v. State*, 71 App. 621, 160 S. W. 720.

Newly discovered evidence, after conviction for seduction, that persons other than affiant had made statements adverse to prosecutrix's chastity, are not ground for new trial, in the absence of any showing that the makers of the statements had been witnesses at the former trial, or would in fact testify on a new trial that the alleged statements by them were true. *Black v. State*, 71 App. 621, 160 S. W. 720.

Newly discovered evidence, in order to afford ground for a new trial, must in fact be newly discovered and such as could not by reasonable diligence have been discovered in time for the trial. It must also be probably true and of such a nature as would probably produce a different result. *Madrid v. State*, 71 App. 420, 161 S. W. 93.

A new trial for newly discovered evidence not tending to discredit the testimony of a witness, and not contradicting the state's testimony, is properly denied. *Cyrus v. State* (Cr. App.) 169 S. W. 679.

A new trial on the ground of newly discovered testimony, which will not tend to impeach prosecuting witness, but, if anything, tend to corroborate his testimony, is properly denied. *McHenry v. State* (Cr. App.) 173 S. W. 1020.

12. Acquittal of co-defendant.—To entitle a party to a new trial to obtain the testimony of an acquitted co-defendant, it must appear that the testimony which such co-defendant can give is not only important and material, but that it is also legal and competent. *Brown v. State*, 6 App. 286.

If a codefendant be tried and acquitted, or the prosecution against him be dismissed, after the defendant's conviction, a new trial will be granted the defendant to obtain the testimony of his codefendant, if it be made to appear that such testimony is competent, material, and would probably change the result on another trial. But the state may show that such testimony is not credible, and would not be likely to change the result. *Helm v. State*, 20 App. 41; *Rucker v. State*, 7 App. 549; *Williams v. State*, 4 App. 5; *Huebner v. State*, 3 App. 458; *Jones v. State*, 23 App. 501, 5 S. W. 138; *Lyles v. State*, 41 Tex. 172, 19 Am. Rep. 38; *Rich v. State*, 1 App. 206; *Howell v. State*, 10 App. 298; *Ellis v. State*, Id. 540.

Where two defendants are jointly indicted and one is tried and convicted and subsequently the other is tried and convicted, a new trial will be granted the former to obtain the testimony of the latter when it appears that the new evidence is legal and competent and material to his defense. *Gibbs v. State*, 30 App. 581, 18 S. W. 88.

In the absence of a statement of facts, a motion for a new trial to obtain the testimony of a co-defendant whose case had been dismissed, could not be considered. *Childers v. State*, 36 App. 128, 35 S. W. 980.

Defendant filed a motion for a new trial for the testimony of his codefendant who had after defendant's conviction been tried and acquitted. Held that where it was shown that the evidence was material a new trial should have been granted. *Chumley v. State*, 32 App. 255, 26 S. W. 406.

In a prosecution for burglary, there was evidence by an accomplice as to defendant's participation in the burglary and his subsequent possession of a pistol alleged to have been stolen; but the evidence was practically without corroboration. Subsequent to defendant's trial, a codefendant had been tried and acquitted, and his affidavit, presented on a motion for a new trial, covered every question testified to by the accomplice, and was contradictory to a large part of it. Held, that the evidence which the codefendant would give was material, and entitled defendant to a new trial. *Cox v. State*, 63 App. 494, 140 S. W. 445.

Where the state's case was that a codefendant, acquitted after the conviction of accused, was a principal and assisted in the crime, accused was entitled to a new trial to obtain the material testimony of the codefendant; the credibility of his testimony being for the jury. *Paggett v. State* (Cr. App.) 144 S. W. 1136.

No error is shown in refusing accused a new trial, claimed on a showing that a codefendant had pleaded guilty and had stated that he would make a confession exonerating accused, since, by pleading guilty and accepting sentence, the codefendant disqualified himself as a witness, and since, through the absence of a showing as to what evidence was offered on the trial, it cannot be said that accused's guilt was not overwhelmingly established. *Crossly v. State* (Cr. App.) 148 S. W. 1087.

Where defendant and S. were jointly indicted for burglary, and, a severance being ordered, defendant was convicted largely on the evidence of J. and wife that defendant and S. on the night of the alleged burglary appeared at his residence in a buggy with the stolen property, after which S. was tried and acquitted, accused was entitled to a new trial to obtain the testimony of S. that the evidence given by J. and wife was untrue. *Clark v. State* (Cr. App.) 155 S. W. 213.

Accused was convicted of concealing stolen property taken from a burglarized store. The state's evidence was given principally by H., an accomplice, who, with D., was arrested for the burglary. H. turned state's evidence, and testified that D. was present and participated in the burglary. After accused was convicted, D. was discharged after trial, and accused's motion for new trial contained a written statement by D. that he would testify that he was not present at the burglary, as testified by H., and had nothing to do with it. When accused was tried, D. was in jail, so that he could not then testify for accused under the statute. Held that, since D.'s testimony was material, and accused had no previous opportunity to procure it, it was error not to grant accused a new trial on that ground. *Barker v. State* (Cr. App.) 164 S. W. 383.

13. Requisites of application.—See notes under art. 840, post.

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.

As to separation of the jury, see, ante, art. 745.

Receiving other testimony.—Sending of bloody clothing to the jury room held not ground for new trial where the clothing had been introduced in evidence and it was not used by the jury in any manner not authorized by the evidence. *Spencer v. State*, 34 App. 238, 30 S. W. 46, 32 S. W. 690.

That a juror read a newspaper containing an account of the case on trial, after the jury had agreed on defendant's guilt, held not ground for new trial where it did not appear that defendant was prejudiced thereby. *Moore v. State*, 36 App. 88, 35 S. W. 668.

The clothing worn by deceased when killed was inadvertently left in the room where the jury, deliberating on their verdict, afterward found and examined it. Held, not to affect verdict. *Hendricks v. State*, 28 App. 416, 13 S. W. 672.

If the jury after having retired to deliberate shall receive testimony against the defendant, the court will not stop to inquire as to its effect on the jury but will reverse the judgment. *McWilliams v. State*, 32 App. 269, 22 S. W. 970.

On trial for murder when the clothing of deceased had been introduced in evidence it was held no error to allow the jury to take such clothing with them to their room. *Bell v. State*, 32 App. 436, 24 S. W. 418.

The fact that the jury while deliberating read a newspaper account of the trial giving the evidence adduced on trial without comment is not a ground for a new trial. *Williams v. State*, 33 App. 128, 25 S. W. 629, 28 S. W. 958, 47 Am. St. Rep. 21.

After the jury had retired, one of them got a paper stating that one of defendant's principal witnesses had been arrested charged with perjury committed on the trial. The motion does not show that the jury was affected by such statement; held, the motion was properly overruled. *Snodgrass v. State*, 36 App. 207, 36 S. W. 477.

Defendant was charged with stealing a calf. After the jury had retired it was stated to them that defendant had been in the habit of stealing calves; held, that a new trial should have been granted. *Terry v. State* (Cr. App.) 38 S. W. 986.

Where shoes were introduced in evidence which the testimony tended to show belonged to and were worn by defendant on the night of the alleged assault, it was not error to allow the jury to carry them to the jury room for purposes of inspection, where it did not appear that they were used by the jury in a manner inconsistent with the testimony. *Gresser v. State* (Cr. App.) 40 S. W. 595.

On trial for murder, after the jury had retired to consider their verdict, they were taken for private purposes to some stalls in the vicinity of and from which they could and did view the locus in quo of the homicide, and they discussed the surroundings as they saw them with reference to the testimony of important witnesses; held, this was tantamount to receiving other testimony and was evidently hurtful to defendant and will reverse the case. *Darter v. State*, 39 App. 40, 44 S. W. 850.

New trial should be granted where jury went to the scene, examined relative positions of parties to killing and of eye-witnesses, and commented thereon. This was getting other and additional evidence than that introduced upon the trial. *Nelson v. State* (Cr. App.) 58 S. W. 108.

This article appears to be mandatory and when the jury has received other material evidence, whether from one of their number or others, after they have retired to consider their verdict, the judgment will be reversed. *Blocker v. State* (Cr. App.) 61 S. W. 392.

If the jury after retiring receive other testimony, it is such misconduct as to require the granting motion for new trial. *Tutt v. State*, 49 App. 202, 91 S. W. 585.

Where the jury, on a trial for rape on a female under 15 years of age, could not agree on the age of the prosecutrix, because of the contradictory testimony of her mother, and agreed that the foreman should take the testimony of a witness as fixing the age of prosecutrix, and from that return a verdict, and after rendition of a verdict of guilty the foreman ascertained that the witness had testified that prosecutrix was over 15 years of age at the time of the offense, accused was entitled to a new trial. *Rix v. State*, 61 App. 416, 135 S. W. 150.

Statements by one juror to other jurors.—It is shown by the affidavit of a juror who tried the case that after the jury had retired to consider of their finding, one of the jurors (the foreman) stated to the jury that he knew one of the defendant's witnesses who testified in the case, and that the said defendant's witness' character was bad and that he was unworthy of belief, and affiant stated that his verdict was materially affected thereby. This witness, who was thus being impeached by the foreman of the jury, was one of, if not the most important witness for defendant. One of the grounds expressly enumerated in the statute as being sufficient to entitle a defendant to a new trial is "where the jury, after having returned to deliberate upon a case, have received other testimony," etc. With regard to the impeachment of a witness the same rule obtains as in all cases; the defendant should be confronted with the impeaching witnesses and be afforded an opportunity to cross-examine them. When the right is not accorded him the law presumes that he is injured, and will not permit a verdict to stand where such testimony has been used against him in the jury room, and where the circumstances have not been explained, nor attempted to be explained, by counter-affidavits supporting the integrity of the verdict; which was the case in this instance. *McKisick v. State*, 26 App. 673, 9 S. W. 269.

The same irregularity was held reversible error in the case of *Wharton v. State*, 45 Tex. 2, and in *Anschicks v. State*, 6 App. 524. The court should have sustained the motion for a new trial upon the ground of the motion, and because of error in overruling said motion the judgment is reversed and the cause remanded. *McKisick v. State*, 26 App. 673, 9 S. W. 269.

It is well settled that misconduct of a jury will not be ground for a new trial, unless it is shown to be such as has affected the fairness and impartiality of the trial. *Austin v. State*, 42 Tex. 355; *Johnson v. State*, 27 Tex. 758; *Jack v. State*, 26 Tex. 1; *Anschicks v. State*, 6 App. 524; *Allen v. State*, 17 App. 637; *Jack v. State*, 20 App. 656; *McDonald v. State*, 15 App. 493. A mere statement made by one juror to another in reference to the character of the defendant is not, per se, ground for a new trial. *Austin v. State*, 42 Tex. 355. Nor is a statement made by one juror to the others that he had once been robbed by a porter, the defendant being a porter and on trial for theft, it appearing that such statement did not influence the verdict. *Jack v. State*, 20 App. 656. But if the verdict was probably influenced by the statement of a juror to his fellows as to the character for credibility of a witness for the defendant, a new trial should be granted. *Anschicks v. State*, 6 App. 524. Or if the juror stated to the jury a material fact within his knowledge, but which was not in evidence, it might be cause for a new trial. *Wyers v. State*, 13 App. 57.

Where it appears that a verdict was probably influenced by the statement of a juror to his fellows as to the character or credibility of a witness for defendant, a new trial should be granted. *Lucas v. State*, 27 App. 322, 11 S. W. 443.

A mere statement by one juror to his fellows in reference to the character of defendant, is not ground for new trial, unless it appears that the verdict was probably influenced thereby. *Cox v. State*, 28 App. 92, 12 S. W. 493.

Statements made by juror to his fellow jurors, after the verdict had been agreed upon, held not ground for new trial. *Gonzales v. State*, 32 App. 611, 25 S. W. 781.

Statements by juror to his fellows that defendant had previously been in the penitentiary, held not to require a new trial in the absence of a showing that defendant was prejudiced thereby. *Itay v. State*, 35 App. 354, 33 S. W. 869.

Statement by juror to his fellows, after the verdict had been agreed on, held not to require a new trial. *Angley v. State*, 35 App. 427, 34 S. W. 116.

After retiring to consider their verdict two of the jurors told the others that defendant was the biggest rogue in the state and would be willing to hang her if they could; held, a new trial should have been granted. *Holmes v. State*, 38 App. 370, 42 S. W. 996.

A mere statement by a juror that defendant has previously been convicted and his punishment assessed at a certain number of years in the penitentiary, will not require a new trial unless it be shown that defendant was prejudiced thereby. *Morrison v. State*, 39 App. 519, 47 S. W. 369.

On a trial for rape when the jury stood six for conviction and six for acquittal, one of the jurors said that a few years before, defendant had gone into the bedroom of one of his neighbors where his wife was, and that he (the juror) heard the husband tell defendant he would kill him if he did not leave the country. Immediately thereafter the jury came in with a verdict of guilty. Held, that a new trial should have been granted. *Ellis v. State*, 33 App. 508, 27 S. W. 135. After verdict agreed on one of the jurors stated that he had heard that defendant had been in the penitentiary once before. Held, no cause for new trial. *Parker v. State* (Cr. App.) 30 S. W. 533.

On trial for murder, while the jury were considering the case, some of the jurors stated that the reputation of defendant, his father and brother, as peaceable citizens was bad. Held, that a new trial should have been granted. *Hargrove v. State*, 33 App. 431, 26 S. W. 993.

Statements of one juror to the jury that defendant had killed a certain man; held, such misconduct as would require new trial. *Mitchell v. State*, 36 App. 278, 33 S. W. 367, 36 S. W. 456.

When after the jury retired one of them made derogatory remarks concerning defendant and his antecedents, a new trial should be granted. *Mitchell v. State*, 36 App. 278, 33 S. W. 367, 36 S. W. 456.

A statement of one juror to the others, during the progress of the trial, that he was on a former grand jury that indicted defendant for another crime, is ground for a new trial. *Phipps v. State*, 36 App. 216, 36 S. W. 753.

On a motion for a new trial, defendant appended the affidavits of four jurors to the effect that one of the jurors, while the jury were considering of their verdict, said that the case would have been tried last term if W., a witness, had not feigned sickness, and remained away from court; and that said W. remained away at the instance of defendant, in order to prevent a conviction at the last term. Held, that the communication did not impair the rights of defendant. *Gallihar v. State* (Cr. App.) 37 S. W. 329.

The defense had attacked and impeached the main state's witness. After the jury had retired one of the jurors stated that he knew said witness, that he was a good boy and was honest and truthful; held, a new trial should have been granted. *Tate v. State*, 38 App. 261, 42 S. W. 595.

Where it is brought to the attention of the court that the jury had discussion of the matter of a former conviction before they found the verdict, a new trial should have been granted if the court was not satisfied from the evidence he should have probed the matter further. *Ysaguirre v. State*, 42 App. 253, 58 S. W. 1606.

Where the jury in retirement discussed facts material to accused which were not in evidence on the trial, a new trial should be granted. *Favro v. State* (Cr. App.) 59 S. W. 885.

Where the only jurors who could under the evidence have been influenced by discussion in the jury room of the fact that accused had been three times before convicted and sentenced to death, and that his codefendant had been hung for the same crime, had knowledge of such facts when they were taken as jurors and had stated that they could and would give defendant a fair and impartial trial and were voluntarily accepted, such discussion was not fatal to a conviction. *Oates v. State*, 56 App. 571, 121 S. W. 370.

In a prosecution for homicide, defendant, though claiming he shot deceased in self-defense, also testified that he sought deceased, who was the stepfather of de-

defendant's wife, to remonstrate with him for his criminal intimacy with defendant's wife and to obtain a promise from him to cease such attentions. Held, that statements made by jurors while considering their verdict that it seemed that defendant's wife was as anxious "to do it or to cohabit" as decedent was, and "I do not think a man ought to be shot down about a damned whore like that woman is," were not objectionable as receiving additional testimony after submission of the case, but where justifiable expressions of the jurors' conclusions on the proposition submitted to them. *Reagan v. State*, 57 App. 642, 124 S. W. 685.

In a prosecution for betting at a pool table, where defendant testified that he frequented the pool room, played there a great deal, and might be regarded as a booster for the house, the jury had a right to consider these things in determining a penalty; and it was not ground for a new trial that a juror, during the deliberation, in advocating a jail sentence, stated that defendant was one of the leaders in the business, which ought to be broken up, and that a fine alone would not do it. *Tinker v. State*, 58 App. 321, 125 S. W. 890.

Where, after a verdict had been reached, one of the jurors stated to the others that, after he had been in the jury box for a time, defendant's face looked familiar, and that he did not think it was defendant's first offense, it was not ground for a new trial. *Hernandez v. State*, 60 App. 30, 129 S. W. 1109.

It is ground for reversal of a conviction that the jury, in deliberating, discussed the fact, not brought out in the evidence, that defendant had been previously convicted of another crime. *Maples v. State*, 60 App. 169, 131 S. W. 567.

Where, on a trial for selling intoxicating liquor at a drug store, the testimony of the identity of accused as the person making the sale was not clearly shown, and the witnesses for accused made it impossible for him to have made the sale, the misconduct of the jury in discussing, after retirement, facts outside of the evidence, that accused kept his sister-in-law, and that the drug store openly violated the law, and that accused had bought an interest therein to sell liquor, necessitated the setting aside of a conviction. *Williamson v. State*, 62 App. 132, 136 S. W. 1071.

That some one of the jurors may, while they were deliberating, have stated one of the state's witnesses was known by him and was a good man, is not cause for reversal, all the jurors saying that it did not influence their verdict. *Allen v. State*, 62 App. 557, 138 S. W. 593.

Under the statute prohibiting reception of evidence after the jury has retired, one of the jurors should not tell the others what he knows about defendant. *Dunn v. State*, 72 App. 170, 161 S. W. 467.

Where, after the jurors had agreed on a verdict, one of the jurors remarked that accused had once separated a man and his wife, and the punishment fixed by the jury was less than that fixed by the jury on a former trial, there was no misconduct justifying the setting aside of the conviction. *Burge v. State*, 73 App. 505, 167 S. W. 63.

Where the evidence of all the jurors showed that there was no discussion of accused's former conviction, though one juror incidentally mentioned the fact, there was no misconduct of the jurors warranting the setting aside of a conviction. *Burge v. State*, 73 App. 505, 167 S. W. 63.

In a prosecution for the unlawful sale of intoxicating liquor, a question asked by one juror of another during their deliberation, whether defendant was the man who had a fight with the deputy sheriff, which question was answered in the affirmative, does not entitle the defendant to a new trial, where the evidence showed that some of the jurors did not hear the question and all of the jurors stated that it had no influence upon the verdict. *Clark v. State* (Cr. App.) 169 S. W. 895.

Conversing with persons other than jurors.—Conversation had by a juror with another than a member of the jury, in order to vitiate the verdict, must be such as was calculated to impress upon the mind of the juror a view of the case different from that made by the evidence, to the probable injury of the defendant. *March v. State*, 44 Tex. 64; *Nance v. State*, 21 App. 457, 1 S. W. 448; *Shaw v. State*, 32 App. 155, 22 S. W. 588; *Pickens v. State*, 31 App. 554, 21 S. W. 362. The refusal of a juror to talk with an outside party is not "conversing." *Johnson v. State*, 27 Tex. 758; see, ante, art. 748.

A stranger passing near the jury said: "Don't give him more than ten years;" held, no ground for new trial. *Murphy v. State* (Cr. App.) 40 S. W. 978.

Where jurors communicated with third persons, without the consent of the court, the burden is on the state to show that no injury occurred to accused. *Parshall v. State*, 62 App. 177, 138 S. W. 759.

Where jurors, after being impaneled, communicated with third persons over the telephone, without the consent of the trial court, and there was nothing to show that they had been tampered with or that they were not fair and impartial, it will not be presumed that the jurors, when testifying as to these conversations, will perjure themselves or that their evidence will be of little weight. *Parshall v. State*, 62 App. 177, 138 S. W. 759.

That jurors informed their families by telephone that they were serving on the jury was not ground for a new trial, where the state showed that accused was not injured thereby. *Bryan v. State*, 63 App. 200, 139 S. W. 981.

That a juror talked over the telephone before the verdict was returned into court, but after agreement, is not, as a matter of law, ground for new trial, especially where the officer in charge of the jury was present and heard what the juror said. *Tores v. State* (Cr. App.) 166 S. W. 523.

That the brother-in-law of one of the jurors, while in the street, called to the jury in the third story of the courthouse and asked them if they wanted some watermelons, to which one of the jurors replied, "We have two, and they are fine; that's enough for a while," etc., was not ground for a new trial. *Latham v. State* (Cr. App.) 172 S. W. 797.

Presence of persons other than jurors during deliberation.—See art. 748, ante, and notes.

The fact that a bailiff was present with the jury during their deliberations is not, per se, a ground for a new trial. But such violation of duty may be attended with circumstances that would entitle the defendant to a new trial. *Slaughter v. State*, 24 Tex. 410; *Dansby v. State*, 34 Tex. 392; *Martin v. State*, 9 App. 293; see, also, ante, art. 750.

Use of intoxicating liquors.—Prior to the adoption of the Code the mere drinking of ardent spirits by a juror was sufficient to vitiate the verdict. *Jones v. State*, 13 Tex. 168, 62 Am. Dec. 550. But now, to entitle the defendant to have the verdict set aside and a new trial granted him upon this ground, it must appear that such misconduct probably influenced the verdict. *Jack v. State*, 26 Tex. 1; *March v. State*, 44 Tex. 64; *Webb v. State*, 5 App. 596; *Tuttle v. State*, 6 App. 556; *Allen v. State*, 17 App. 637; *Davis v. State*, 3 App. 91; *Rider v. State*, 26 App. 334, 9 S. W. 688.

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.

Misconduct in general.—Mere hesitation of a juror on being polled, or answering conditionally, and with doubts, is not cause for a new trial, if he finally answered that it was his verdict. *Gose v. State*, 6 App. 121.

For misconduct of the jurors to constitute ground for new trial, it must have affected the fairness of the trial. *Anschicks v. State*, 6 App. 524.

Misconduct of the jury is not ground for new trial unless the fairness and impartiality of the trial was affected thereby. *Jack v. State*, 20 App. 656.

That a juror procured a volume of reports and read a case therefrom held not ground for new trial where it did not appear how the jurors were affected thereby or how defendant was injured. *Munos v. State*, 34 App. 472, 31 S. W. 380.

A discussion by the jurors relative to defendant's failure to testify held to require a new trial. *Wilson v. State*, 39 App. 365, 46 S. W. 251.

That a juror did not hear, or misunderstood part of the evidence, is no ground for new trial. *Keith v. State* (Cr. App.) 56 S. W. 629.

New trial should be granted where a juror was present at the scene immediately after the killing, located the wound in the body of deceased, and knew the main features of the case when he was taken as juror. *Nelson v. State* (Cr. App.) 58 S. W. 108.

Where there was a discussion of a former verdict and former punishment before the jury agreed on a term of years, and under the circumstance this discussion might have had some influence on the jury the case will be reversed. *Casey v. State*, 51 App. 433, 102 S. W. 726.

Denial of an application for a new trial for misconduct of a juror held not so clearly erroneous as to require a reversal. *Douglas v. State*, 58 App. 122, 124 S. W. 933, 137 Am. St. Rep. 930.

A new trial should be granted where it is shown that at least one juror was prejudiced against defendant; that the jurors discussed defendant's failure to testify in his own behalf; that some of the jurors asserted that defendant had recently abandoned his young wife, of which there was no evidence in the case; and that some of the jurors asserted that, if any injustice should be done defendant by the verdict, he could appeal. *Tuller v. State*, 58 App. 571, 126 S. W. 1158.

That the jury, in considering a case, discussed the fact that accused was a professional man, and was a good party to make an example of, did not require a reversal, where the evidence showed that he was a professional man, the entire jury believed him guilty, the discussion arose only over the question of punishment, the state's evidence justified the punishment assessed, and the defense was submitted by a proper instruction. *Fletcher v. State* (Cr. App.) 153 S. W. 1134.

Where several of the jury, after retirement, discussed and talked about the defendant's failure to take the stand in his own behalf, contrary to the charge of the court, such misconduct was reversible error. *Huddleston v. State*, 70 App. 260, 156 S. W. 1168. But see *Howard v. State* (Cr. App.) 174 S. W. 607.

That the foreman of the jury upon retiring stated to the others that they could not consider the fact that accused did not testify does not, where there was no discussion of the matter, constitute misconduct authorizing a new trial, being a mere reiteration of the charge of the court. *Veach v. State*, 71 App. 181, 159 S. W. 1069.

Notwithstanding the statute that the failure of an accused to testify in his own behalf shall not be taken against him or commented on by counsel, the mere fact of comment, and nothing more by some of the jurors on accused's failure to take the stand, will not necessitate a new trial. *Coffman v. State*, 73 App. 295, 165 S. W. 939.

Discretion of trial court.—Whether accused should be granted a new trial for alleged misconduct of the jury is particularly cognizable by the trial court, whose conclusion thereon will not be interfered with on appeal, unless it is clearly wrong and unsupported by the testimony. *Douglas v. State*, 58 App. 122, 124 S. W. 933, 137 Am. St. Rep. 930; *Barber v. State*, 64 App. 96, 142 S. W. 577; *Jones v. State*, 72 App. 496, 162 S. W. 1142.

Where the motion for a new trial raised the question of the bias of a juror, which was denied by him, the question cannot be reviewed, the issue having been found against accused by the trial court. *Bailey v. State* (Cr. App.) 144 S. W. 996.

Passion and prejudice.—See note under this article, subd. 4.

Separation of jury.—See arts. 745 and 746, and notes.

Evidence in general, and examination of jurors.—When a jury is being polled, the defendant cannot interrogate a juror as to the misconduct of the jury. *Bassham v. State*, 33 Tex. 622; ante, art. 768.

An affidavit seeking to attack the verdict of a jury for misconduct on the part of the jury should set out the acts complained of. *Morrison v. State*, 39 App. 519, 47 S. W. 369.

Verbal sworn statements before the judge as to misconduct of jury are sufficient without written affidavits, though it is best to follow the statute in regard to the matter. *Long v. State*, 48 App. 175, 88 S. W. 208.

The ultimate intent of this article is to inform the court with the sworn statements either written or verbal of the facts attending and manifesting the misconduct of the jury. While it is always best to follow the statute and present written affidavits still if this is not done and the witnesses are produced in court and the judge hears their sworn statements, and the defendant is not injured in his rights thereby, the case will not be reversed on this account. *Long v. State*, '48 App. 175, 88 S. W. 208.

Where a person makes an affidavit as to statements made to him by a juror showing misconduct of the jury, and defendant's counsel had all the jurors in court and craved permission of the court to go into an investigation of the matter, explaining that he was unable to get any affidavit of any juror because the jurors had agreed among themselves not to talk to him on the subject, it was the duty of the court to investigate the matter in order to remove any suspicion of unfairness in the trial. *Kanmmacher v. State*, 51 App. 118, 101 S. W. 240, 241.

The affidavit of one not a member of the jury as to misconduct of the jury raises an issue, which the court should hear and determine in order to remove any suspicion of unfairness in the trial. *Kanmmacher v. State*, 51 App. 118, 101 S. W. 240, 241.

The trial court having examined into the charge of misconduct of jurors, and the court having found that there was no misconduct, and there being evidence to sustain the finding, the judgment will not be disturbed on this account. *Fox v. State*, 53 App. 150, 109 S. W. 372.

Where affidavits in support of an application for new trial for alleged misconduct of the jury were not specific, and it was uncertain from the record whether the misconduct in fact occurred, the motion, in so far as it was based on such grounds, was properly denied. *Reagan v. State*, 57 App. 642, 124 S. W. 685.

The denial of a motion for a new trial for the jury's misconduct will not be disturbed on appeal, where the testimony on which the ruling is based is conflicting. *Williams v. State*, 58 App. 284, 124 S. W. 916.

A finding on conflicting evidence that a juror was not guilty of misconduct, supported by the statement of the juror and the other jurors, will not be disturbed on appeal. *Blount v. State*, 58 App. 509, 126 S. W. 570.

A conviction cannot be impeached for the declaration of a juror, after verdict and after the jury had dispersed, that if defendant had testified in his own behalf, and stated that his family were hungry, and that he killed the cow in question to get something to eat, he would have acquitted him. *La Flour v. State*, 59 App. 645, 129 S. W. 351.

Where, on reference by a juror to the fact that defendant had not testified, another juror stated that they could not consider this matter for any purpose, and it was not considered, and the trial court concluded that no injury was shown, defendant having received the lowest penalty, such reference by the juror was not ground for reversal. *Probest v. State*, 60 App. 608, 133 S. W. 263.

Where defendant moved for a new trial on the ground that one of the jurors had referred to the fact that defendant did not take the stand, and the motion was not verified, nor accompanied by the affidavit of any juror, though five of the six jurors were produced at the hearing of the motion and offered to the state to question, and, being sworn and questioned by the court, testified that they had not considered such fact, and had not referred to it, though one juror thought the absent juror had referred to the defendant's failure to take the stand, the matter was not presented in such a way that the appellate court can consider the action of the trial court in overruling the motion. *Smith v. State*, 62 App. 281, 136 S. W. 1063.

Where the issue was whether jurors were guilty of misconduct in considering excluded evidence during their deliberations, and the juror charged with referring to such evidence positively testified that he made no such statement, and heard no one else making it, a finding of the trial court that there was no misconduct would not be disturbed on appeal. *Sandoloski v. State* (Cr. App.) 143 S. W. 151.

Evidence that during a trial the sheriff took the jury to a restaurant for dinner where they were seated at tables at which no other customers sat, and that one or two persons passed by where they were standing without speaking to the jurymen or the jurymen to them, was insufficient to show misconduct; there being other evidence that the case was not discussed even among the members of the jury while in the restaurant. *Kinney v. State* (Cr. App.) 148 S. W. 783.

An application for a new trial for alleged misconduct of the jury must be presented by affidavit of the defendant or some other person, and, if not so presented, such ground will not be reviewed on appeal. *Waters v. State* (Cr. App.) 148 S. W. 796.

Evidence as to making and effect of remark in jury room as to defendant's failure to testify held not to show a matter of importance enough to require a new trial. *Rhodes v. State* (Cr. App.) 153 S. W. 128.

Objection, on appeal from a conviction of robbery, that the jury discussed the prevalence of robbery in the city where the offense was committed is not reviewable if not supported by the affidavit of any one purporting to know of such discussion. *Serop v. State* (Cr. App.) 154 S. W. 557.

Evidence on the issue whether the jury, before agreeing upon their verdict, had referred to defendant's failure to testify, contrary to the instructions of the court,

held to show that a juror's reference to such failure was made after the jury had agreed upon defendant's guilt, though before the fixing of the time of punishment. *Pullen v. State*, 70 App. 156, 156 S. W. 935.

Where some of the jurors in a murder case had filed affidavits to the effect that other jurors had commented on and considered the failure to testify of accused and his relatives, and all of the jurors were in court when the affidavits were considered, it was error to refuse accused's request to examine the jurors orally under oath as to the truth of the charges of misconduct. *Bonds v. State*, 71 App. 468, 169 S. W. 100.

Evidence in support of a motion for a new trial that, during the consideration of the case, one of the jurors wondered why defendant did not testify, that some one else remarked "that wasn't admissible," and some one else said, "Yes; we can't talk about that," while other jurors heard no such remarks at any time, did not constitute ground for reversal. *Cooper v. State*, 72 App. 266, 162 S. W. 364.

Where, in a homicide case, a ground of a motion for a new trial, complaining that the jury was allowed to separate during its deliberation, was not supported by affidavit, and there was no bill of exceptions reserved, the appellate court could not consider the objection. *Gant v. State*, 73 App. 279, 165 S. W. 142.

An affidavit on knowledge, information, and belief in support of motion for new trial for misconduct of the jury commenting on accused's failure to testify, made by affiant, having no knowledge of misconduct, and not giving his information or grounds for belief, is in effect no affidavit, and the court may refuse to summon the jurors to testify as to misconduct notwithstanding the provision making it competent to prove such misconduct by affidavits of jurors, especially where the court charged that the jury were the exclusive judges of the credibility of the evidence and the weight of the testimony, and that failure of accused to testify should not be taken as a circumstance against him, nor commented on. *Calyon v. State* (Cr. App.) 174 S. W. 591.

Disqualification of jurors.—That one of the jurors rendering a verdict in a criminal case had been convicted of a felony and never been pardoned, so that his citizenship had never been restored, would entitle accused to a new trial after the overruling of his original motion therefor and notice of appeal, unless the court had lost jurisdiction of the case; neither accused nor his counsel having knowledge of the disqualification until after such proceedings had been taken. *Bandick v. State*, 59 App. 9, 127 S. W. 543.

Where a juror well known to defendant's counsel, and whom he had peremptorily challenged, in fact sat on the jury, but was not discovered until the verdict was rendered, it was too late then for defendant to take advantage of the error as ground for a new trial; the juror having qualified himself on his voir dire. *Cooper v. State* (Cr. App.) 144 S. W. 937.

Affidavits and testimony of jurors as to misconduct.—An affidavit of a juror should not be received to show misconduct impeaching the verdict. *Patterson v. State*, 63 App. 297, 140 S. W. 1128; *McCulloch v. State*, 35 App. 268, 33 S. W. 230; *Hamilton v. State*, 64 App. 175, 141 S. W. 966.

If the juror answers that he is a freeholder, his affidavit to a contrary effect will not be entertained on a motion for a new trial. *Brennan v. State*, 33 Tex. 266.

Misconduct in the jury room may be shown by the voluntary affidavit of a juror. *Anschicks v. State*, 6 App. 524.

When there has been misconduct of the jury and such misconduct is of a nature to warrant the belief that the trial has not been fair and impartial, and the fact cannot be established from any other source then it may be proved by the voluntary affidavit of a juror; but when the conduct of the jury is attacked from any other source and cannot be explained by other testimony, then the conduct of the jury may be vindicated in like manner. *Hodges v. State*, 6 App. 615.

A juror cannot impeach his verdict by an affidavit stating that it was agreed by the jury that defendant would on petition of the jury be pardoned and that the verdict was found with that understanding. *Montgomery v. State*, 13 App. 74.

Separation of the jury without permission or consent of counsel may be shown by the voluntary affidavit of a juror. *Kelly v. State*, 28 App. 120, 12 S. W. 505.

Voluntary affidavits of jurors should not be received except as a last resort and then only to procure a fair and impartial verdict. *Johnson v. State*, 27 Tex. 758; *Hodges v. State*, 6 App. 615; *McCane v. State*, 33 App. 476, 26 S. W. 1087; *Weatherford v. State*, 31 App. 530, 21 S. W. 251, 37 Am. St. Rep. 828; *Testard v. State*, 26 App. 260, 9 S. W. 888.

Affidavits of jurors showing misconduct in the jury room should be discouraged. *Mitchell v. State*, 36 App. 278, 33 S. W. 367, 36 S. W. 456.

The affidavit of a juror stating that he assented to the verdict through fear of being grossly insulted by the other jurors if he refused to do so, held not to disclose ground for new trial. *Pilot v. State*, 38 App. 515, 43 S. W. 112, 1024.

Misconduct of a jury not shown by affidavits of jurors cannot be considered on appeal. *Wheatly v. State* (Cr. App.) 39 S. W. 672.

An affidavit stated that after retirement one juror made statements derogatory to the character and reputation of defendant; held, too indefinite to entitle it to consideration there being nothing in the record showing what such alleged derogatory statements were. *Harris v. State*, 39 App. 484, 46 S. W. 647.

A conviction on a prosecution for perjury, based on defendant's testimony on a prosecution for shooting craps, in which he testified that he did not shoot craps, will be reversed for misconduct of the jury; jurors making affidavit, and there being no affidavit to the contrary, that the jury appropriated defendant's convictions for shooting craps as a basis for his conviction for perjury. *Warren v. State*, 57 App. 518, 123 S. W. 1115.

It would be against public policy on motion for a new trial in a criminal case where the defense was insanity to admit testimony of the jurors that they, in fact,

believed accused to be insane, but convicted him because of their belief that, if acquitted, he would probably hurt some one else. *Turner v. State*, 61 App. 97, 133 S. W. 1052.

This subdivision does not authorize the filing or consideration of an affidavit of a juror that his consent to the verdict was procured by representation that the jury would be confined an unreasonable length of time in case of further disagreement. *Bacon v. State*, 61 App. 206, 134 S. W. 690.

A juror cannot impeach his verdict by affidavit to the effect that he would not have agreed to the verdict of guilty, unless the other jurors had agreed to sign a recommendation for defendant's pardon. *Rogers v. State*, 71 App. 149, 159 S. W. 40.

Where 11 jurors denied any misconduct arising from the fact that the jury during their deliberations discussed another case, and the testimony of the twelfth juror in support of the charge of misconduct was uncertain, a finding that there was no misconduct would not be disturbed on appeal. *Oliver v. State*, 70 App. 140, 159 S. W. 235.

Where a motion for a new trial was supported by an affidavit of certain jurors that the jury commented on the defendant's failure to testify, but nine other jurors made affidavit that the only mention was a statement by one juror, after the reading of the instructions, that they could not consider the failure to testify, the motion for a new trial was properly overruled. *Mason v. State* (Cr. App.) 168 S. W. 115.

Effect as to result.—Misconduct of the jury will not necessitate the award of a new trial, unless it be made to appear that it resulted in injury to the rights of the accused. *Testard v. State*, 26 App. 260, 9 S. W. 883. And see *McKissick v. State*, 26 App. 673, 9 S. W. 269; *Boyett v. State*, 26 App. 639, 9 S. W. 275; *Lucas v. State*, 27 App. 322, 11 S. W. 443; *Cox v. State*, 28 App. 95, 12 S. W. 493; *Hendricks v. State*, 28 App. 416, 13 S. W. 672; *Knowles v. State*, 31 App. 383, 20 S. W. 829; *Pickens v. State*, 31 App. 554, 21 S. W. 362.

In a prosecution for refusing to support his destitute minor children, the act of some of the jurors, who had the day previous sat on a jury which convicted another of wife desertion, in stating that the penalty imposed in this case should not be as severe as the first, does not warrant reversal, where some of the jurors denied that the matter had any effect upon them, and accused was not given as severe a penalty as was imposed upon the wife deserter. *Noodleman v. State* (Cr. App.) 170 S. W. 710.

Counteracting affidavits or evidence.—Defendant moved for a new trial on the ground that one of the jurors had formed an opinion before the trial, the juror made affidavit that he had formed no opinion, and that he had at first voted for an acquittal; held, that the motion was properly denied. *Duke v. State* (Cr. App.) 33 S. W. 43. See, also, *Driver v. State*, 37 App. 160, 38 S. W. 1020.

Neither a private prosecuting counsel nor any counsel interested in the case can take the affidavits of jurors in order to contest defendant's motion for new trial. *Maples v. State*, 60 App. 169, 131 S. W. 567.

It cannot be said the court erred in overruling a motion for new trial, though E. filed an affidavit that he talked with B., one of the jurors, about the case, and at his request detailed to him the facts within his knowledge, and that B. expressed the opinion that defendant should be severely punished; E. having in his testimony, on the hearing of the motion, refused to positively identify B. as the man he talked with, who was clean shaven, while B. at the hearing had whiskers, and B. by affidavit and at the hearing having denied any such conversation with E. or any one else. *Howe v. State* (Cr. App.) 177 S. W. 497.

Where, on motion for a new trial, affidavits are presented tending to show prejudice and prior opinions of jurors as to the guilt of accused, evidence on the hearing should disprove such affidavits conclusively to justify a refusal of a new trial. *Haggart v. State* (Cr. App.) 178 S. W. 328.

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.]

See *Willson's Cr. Forms*, 959.

See *Wilkins v. State*, 15 App. 420; *Leache v. State*, 22 App. 279, 3 S. W. 539, 58 Am. Rep. 638; *Spencer v. State*, 34 App. 65, 29 S. W. 159; *Hernandez v. State*, 18 App. 134, 51 Am. Rep. 295; *Rider v. State*, 26 App. 334, 9 S. W. 688; *Coleman v. State*, 26 App. 673, 9 S. W. 269; *Lucas v. State*, 27 App. 322, 11 S. W. 443; *Hendricks v. State*, 28 App. 416, 13 S. W. 672; *Gray v. State*, 61 App. 454, 135 S. W. 1179; *Jones v. State* (Cr. App.) 153 S. W. 897.

Verdict contrary to evidence.—As to the sufficiency of evidence to support a conviction, see ante, art. 782 and notes.

When the only evidence against the defendant is that of the private prosecutor, and his testimony is directly contradicted in material points by other witnesses, a new trial should be granted. *Owens v. State*, 35 Tex. 361. And where the principal witness against the defendant stultified himself, and there were other circumstances favorable to the defendant, it was held that a new trial should have been granted. *Hasselmeyer v. State*, 1 App. 690; see, also, *Spears v. State*, 2 App. 244; *Jones v. State*, 4 App. 436; *Jones v. State*, 7 App. 457.

Trial courts have both the jury and the witnesses before them, and whenever it appears that justice has not been done; that the verdict is unsupported by the

evidence, or is against the weight of the evidence, such courts should, without hesitation, grant a new trial. Much delay and expense would be saved to the parties and the state, and the ends of justice would be more likely to be attained, if the trial courts would adopt a more liberal practice in granting new trials than at present prevails. Cases frequently go before the appellate court in which the weight of the evidence is clearly against the verdict, or in which the evidence is so weak and uncertain as to leave every sound and correct mind in doubt of the guilt of the defendant. In all such cases the trial courts should grant new trials. The discretion confided by the law to trial courts to grant new trials is almost the only protection to the citizen against illegal or oppressive verdicts of prejudiced, careless, or ignorant juries. The appellate court can not always set aside a wrong verdict, but the trial court can. Where the evidence is conflicting, but there is sufficient, if credible, to support the conviction, the appellate court must affirm the conviction, but this is not necessarily the rule with the trial court in passing upon a motion for a new trial. The trial judge may pass upon the credibility of the witness in determining the motion, but this the appellate court can not do. While the enforcement of the criminal law is absolutely demanded for the protection of private and public rights, the protection of the citizen from the effects of law illegally administered is equally demanded by every sentiment of justice and principle of law. The refusal of a trial judge to grant a new trial in a proper case can not be fully corrected by appeal, and these considerations should have proper weight with trial judges in the exercise of their discretion upon motions for new trial. *State v. Webb*, 41 Tex. 67; *Turner v. State*, 38 Tex. 166; *Mullins v. State*, 37 Tex. 337; *Owens v. State*, 35 Tex. 361.

Notwithstanding juries are the exclusive judges of the facts, and of the weight of the evidence, and the credibility of the witnesses, yet the court, on a motion for a new trial, must set aside the verdict if it is contrary to the evidence, or is not supported by it. If the court is not satisfied that the evidence is sufficient to warrant the verdict, it should grant a new trial. *Loza v. State*, 1 App. 488, 28 Am. Rep. 416; *Tollett v. State*, 44 Tex. 95; *Gazley v. State*, 17 App. 267.

Where the evidence supporting the conviction was contradictory in material respects, and there was a decided and unmistakable preponderance of evidence in favor of the defendant's innocence, it was held that a new trial should have been granted. *Spears v. State*, 2 App. 244.

Convictions can not be sustained upon mere suspicions and possibilities. There must be evidence of the defendant's guilt such as the law demands, and if there is not, a new trial should be granted. *Willis v. State*, 15 App. 118; *Buntain v. State*, Id. 490; *Voight v. State*, 13 App. 21; *Wyers v. State*, Id. 57; *Harris v. State*, Id. 309; *Hogan v. State*, Id. 319; *Holder v. State*, Id. 601.

A new trial should be awarded in all cases when the evidence is insufficient to support the conviction. *Saltillo v. State*, 16 App. 249; *Zollicoffer v. State*, Id. 312; *Morrison v. State*, 17 App. 34, 50 Am. Rep. 120; *Hardin v. State*, 13 App. 192; *Hernandez v. State*, 20 App. 151.

Where facts are insufficient to support conviction for rape, new trial should be granted. *Price v. State*, 36 App. 144, 35 S. W. 988.

The defendant in a prosecution for assault with intent to murder applied for a continuance to secure the testimony of one J. The continuance being refused and the case proceeding to trial, the prosecuting witness testified that the wounds upon his person were inflicted by the defendant, and denied that he had ever stated that the said wounds were inflicted by J., the person named in the defendant's application for a continuance. The witnesses for the defense testified that, soon after the wounds were inflicted, the prosecuting witness told them that they were inflicted by said J. Other testimony established the presence and participation of J. in the difficulty. Held, that in the light of the proof a new trial should have been awarded. *Brooks v. State*, 26 App. 87, 9 S. W. 355.

Where false testimony is given on the trial on a material issue, a new trial should be granted. *Brown v. State*, 24 App. 176, 58 S. W. 134.

Where defendant moves for a new trial, after conviction for burglary, upon the ground that none of the stolen property was found in his possession, but his own confession showed that he was with the other two parties who were shown to have committed the burglary in the nighttime, and he is also shown to have been drinking that night, there is no error in overruling his motion for a new trial on the ground of insufficiency of evidence. *Kelly v. State*, 61 App. 663, 136 S. W. 58.

On a trial for murder, it was the state's contention that accused killed deceased because deceased had superseded him in the affections of B., to whom accused had been engaged to be married. Accused testified that they were engaged at the time of the homicide, that he saw deceased and B. in an attitude which led him to believe that deceased was trying to rape B., that he had loaned B. his pistol, and deceased took the pistol and snapped it at him, and pursued him, cursing him, and that, when he saw B. later, she told him that deceased had tried to rape her, and had threatened to kill him (accused), and in corroboration of his testimony that deceased at the time of the killing made a threatening gesture, and sprang towards him, a witness testified that deceased's knife was lying on the ground open at the place where he fell. B. contradicted all of this testimony. On a motion for a new trial, she swore that her testimony at the trial was false; that she was induced by others to give such testimony; and that events happened substantially as accused testified. Aside from her testimony, the evidence tended strongly to show that the killing grew out of what accused believed was an attempt by deceased to rape her. Held, that a new trial should be granted, as the conviction was apparently based on false testimony, and had B. testified differently, or not testified at all, the jury might have reached a different conclusion. *Carter v. State* (Cr. App.) 170 S. W. 739.

Conviction of degree of offense lower than that charged.—See notes under art. 743, ante.

See *Burnett v. State*, 53 App. 515, 112 S. W. 74, and cases cited, and *High v. State*, 54 App. 333, 112 S. W. 939, and cases cited.

Where the accused might have been convicted of murder, but was in fact convicted of manslaughter he was not harmed by a charge on manslaughter. *High v. State*, 54 App. 333, 112 S. W. 940.

Under the statute stating that the fact that defendant has been convicted of a lower grade of offense than that which he is guilty of is not a ground for new trial, where, in a prosecution for homicide defendant was found guilty of murder in the second degree, he cannot complain of error in the court's charge on manslaughter upon sudden impulse on the ground that the evidence does not suggest manslaughter upon sudden impulse, since it could not have injured him, as it authorized the jury to find a lower grade than he was guilty of and which the evidence warranted. *Barbee v. State*, 58 App. 129, 124 S. W. 961.

A conviction of manslaughter should be sustained, though the evidence does not establish that offense, if the evidence does show murder. *Wysong v. State* (Cr. App.) 146 S. W. 941.

Under art. 771, providing that, on a prosecution for an offense consisting of different degrees, accused may be found guilty of any degree inferior to that charged in the indictment, and article 772, subd. 2, providing that an assault with intent to commit any felony includes all assaults, and this article providing that a verdict is not contrary to the law and evidence where accused is found guilty of an offense of an inferior grade to, but of the same nature as, the offense charged, one indicted for an assault with intent to rape, and for an attempt to have carnal knowledge of a female without her consent, and with burglary at nighttime, with intent to have carnal knowledge of the female without her consent, may be convicted of aggravated assault. *Ward v. State* (Cr. App.) 151 S. W. 1073.

OTHER MATTERS RELATING TO NEW TRIALS

In general.—As to relaxing the rigor of practice relating to new trials, see *Jordan v. State*, 10 Tex. 479; *Crow v. State*, 33 App. 264, 26 S. W. 203; *Owens v. State*, 35 Tex. 361; *Mullins v. State*, 37 Tex. 337; *Turner v. State*, 38 Tex. 166; *State v. Webb*, 41 Tex. 67.

A new trial can be awarded only upon some one or more of the grounds specified in the statute. Illegal organization of the trial jury is not statutory ground for new trial. *McMahon v. State*, 17 App. 321; *Buie v. State*, 1 App. 452; *Madden v. State*, Id. 204; *Henderson v. State*, Id. 432; *Childs v. State*, 10 App. 133; *Johnson v. State*, 27 Tex. 759; *Rosborough v. State*, 43 Tex. 570. A defendant is not entitled to a new trial upon the ground that under the influence of coercion and insanity he had pleaded guilty, especially when the issue of insanity had been tried and found against him. *Branch v. State*, 1 App. 99. It is not a ground for a new trial that the jury was summoned by a state's witness, unless it be shown that the defendant was not aware of the fact, and could not, by reasonable diligence, have known it in time to exercise his right of challenge, and unless it be further shown that he was probably prejudiced thereby. *Allen v. State*, 4 App. 581; see, also, *Baker v. State*, 4 App. 223.

A new trial will not be granted on the ground that the state's witness made contradictory statements. *Walker v. State* (Cr. App.) 33 S. W. 372. Nor upon affidavits of jurors that they did not understand a plain instruction. *McCulloch v. State*, 35 App. 268, 33 S. W. 230. A new trial will be granted where record fails to show proof of venue. *Hutto v. State* (Cr. App.) 33 S. W. 223.

The fact that defendant was under 16 years of age and did not at the time of his trial know that he could have been sent to the reformatory instead of the penitentiary is not a ground for a new trial. *Davis v. State*, 39 App. 681, 47 S. W. 978.

One of the prosecuting officers in a murder case in discussing the character of defendant said, "Good character amounts to nothing. Any one can prove a good character. V. G. * * * who murdered his mother and burned her body, proved a good character." Another prosecuting officer stated to the jury that it was a matter of common knowledge that the people of the country were being criticised for not performing their duties and convicting criminals, and that he hoped such criticism would not be made concerning the actions of this jury after this case should be disposed of. The court as to the first remark objected of its own motion, stated that it was a flagrant breach of duty, and admonished and warned the speaker not to repeat his offense, instructed the jury not to consider what he had said, and that they must try the case on the evidence, and refused any apology or further allusion to the matter. The remarks of the other officer were promptly stopped with a statement by the court that the argument was improper, and should not have been made, and that the jury should disregard the argument and consider only the quality of the evidence, and as to both remarks the court offered to give a written charge, if desired, by defendant's attorneys, which charge was not requested, the improper argument is cured by the action of the parties and the court at the time, and hence is not reversible error. *Leech v. State*, 63 App. 339, 139 S. W. 1147.

Misconduct of third persons.—Where it was shown that immediately after the verdict was rendered the prosecuting witness secretly paid another state's witness a sum of money, and there was no explanation made of this transaction, it was held that a new trial should have been granted. *Bostick v. State*, 10 App. 705.

Artifice, trickery, and fraud on the part of a prosecuting officer, whereby a defendant has been induced to go to trial to his injury, are held to constitute ground for a new trial. *Eldridge v. State*, 12 App. 208; *March v. State*, 44 Tex. 64.

And so may be such conduct on the part of a state's witness. *Adams v. State*, 10 App. 677.

Threats of mob violence depriving defendant of an impartial trial, held ground for new trial. *Massey v. State*, 31 App. 371, 20 S. W. 753; *Steagald v. State*, 22 App. 464, 3 S. W. 771.

A new trial will not be granted because the audience applauded state's counsel, when the demonstration was promptly suppressed by the court. *Parker v. State*, 33 App. 111, 21 S. W. 604, 25 S. W. 967.

A new trial will not be granted on the ground that a witness was mad and did not tell the truth. *Pursley v. State* (Cr. App.) 28 S. W. 683.

When persons in the audience manifest applause at statements made by the prosecuting attorney, if it appears probable that the jury was probably influenced thereby, the court should grant a new trial. *Hamilton v. State*, 36 App. 372, 37 S. W. 431.

The mere fact that, on a trial for the murder of a teacher, the school adjourned and attended a portion of the trial, does not require a reversal of the conviction on the ground that the teachers and children attended by concert of action with a view of influencing the jury. *Long v. State*, 59 App. 103, 127 S. W. 551, Ann. Cas. 1912A, 1244.

That a witness' testimony varied from his testimony given on a previous trial is no ground for new trial. *Newton v. State* (Cr. App.) 143 S. W. 638.

That bystanders applauded on one occasion during the trial of accused, was not ground for reversal, where the court at once suppressed the demonstration, and stated that if it occurred again the room would be cleared. *Millner v. State*, 72 App. 45, 162 S. W. 348.

On a trial for seduction, it was highly improper for the prosecuting witness to kneel in the presence of the jury and offer the prayer: "Oh, dear Jesus, I do pray Thee to be with me during this my hour of trial. Oh, dear Jesus, give me just the words Thou would have me to say"—and, after being cautioned, to again utter the prayer, "Dearest Jesus, I pray Thee to be with me," though this in itself might not justify a new trial. *Cooper v. State*, 72 App. 645, 163 S. W. 424.

Intoxication of defendant.—As to whether a new trial will be granted because defendant was drunk at the time of the trial is within the discretion of the trial court, and its actions will not be revised. *Branch v. State*, 35 App. 304, 33 S. W. 356.

The granting of a new trial on account of infirmity of mind of defendant caused from drinking is in the discretion of the court. *Branch v. State*, 35 App. 304, 33 S. W. 356.

Surprise.—Surprise due to unexpected testimony is not ground for new trial. *Webb v. State*, 9 App. 490; *Childs v. State*, 10 App. 133; *Bryant v. State*, 35 App. 394, 33 S. W. 978, 36 S. W. 79; *Cunningham v. State*, 20 App. 162; *Higginbotham v. State*, 3 App. 447; *Burton v. State*, 9 App. 605.

A new trial will not be granted because a witness does not swear what was expected of him where it does not appear that on another trial any other witness will swear differently. *Mayfield v. State*, 44 Tex. 59.

The denial of a new trial sought to procure evidence, the materiality of which was first disclosed by the state's evidence, held error. *Dunham v. State*, 3 App. 465.

Surprise at testimony adduced by the state is, ordinarily, not a ground for new trial. *Walker v. State*, 7 App. 245, 32 Am. Rep. 595. Nor has the defendant a right to rely upon what a state's witness will testify. *Fagan v. State*, 3 App. 400; *Yanez v. State*, 20 Tex. 656; *Evans v. State*, 13 App. 225.

Surprise occasioned by the state's testimony, is not ordinarily ground for new trial. *Robbins v. State*, 33 App. 573, 28 S. W. 473; *Adams v. State*, 10 App. 677; *Garner v. State*, 34 App. 356, 30 S. W. 782.

That a defendant was surprised by the evidence of his own witness is not ground for a new trial. *Sinnacher v. State* (Cr. App.) 43 S. W. 512.

Absence of testimony.—The mere fact that there is absent testimony which might be procured on another trial is no ground for a new trial. *Brown v. State*, 16 Tex. 122.

Where accused's counsel, on the morning that a seduction case was set for trial, learned of two persons who claimed to have had sexual intercourse with the prosecuting witness prior to the time accused became acquainted with her, and endeavored to locate them without success, but did not ask for a continuance because the trial judge had stated that if such motion was made he would change the venue to another county, though because of the failure to make such motion the absence of such witnesses as a legal ground for a new trial was waived, their absence presented strong, equitable grounds, justifying a new trial, if the ends of justice would be best subserved, especially where the evidence was in irreconcilable conflict and other matters prejudicial to accused occurred, though not sufficient in themselves to require a new trial. *Cooper v. State*, 72 App. 645, 163 S. W. 424.

Partiality of interpreter.—Partiality of interpreter, held, not ground for new trial. *Ramos v. State* (Cr. App.) 35 S. W. 378.

Speedy trial.—A new trial will not be granted on the ground that defendant was too speedily tried, though the record shows that he was convicted on the same day that he was indicted, if he was represented by counsel, and went to trial without objection. *Butler v. State* (Cr. App.) 38 S. W. 787.

Trial jury.—Irregularities in forming the trial jury are not ground for new trial, unless the fairness of the trial is thereby affected. *Grant v. State*, 3 App. 1.

Illegal organization of the trial jury is not ground for new trial. *McMahon v. State*, 17 App. 321.

Disqualification of a trial juror is not ground for new trial, unless it appears that probable injury to defendant resulted therefrom. *Leeper v. State*, 29 App. 63, 14 S. W. 398, overruling, *Lester v. State*, 2 App. 432; *Armendares v. State*, 10 App. 44; *Boren v. State*, 23 App. 28, 4 S. W. 463; *Brackenridge v. State*, 27 App. 513, 11 S. W. 630, 4 L. R. A. 360.

The fact that a juror who sat upon the trial was neither a householder nor a freeholder is not a statutory ground for new trial, and on appeal does not constitute reversible error unless injury to the defendant be shown. *Leeper v. State*, 29 App. 64, 14 S. W. 398. And see, also, *Suit v. State*, 30 App. 319, 17 S. W. 458.

A new trial will not be granted because one juror was neither a householder nor a freeholder. *Williamson v. State*, 36 App. 225, 36 S. W. 444.

Grand jury.—The disqualification of a grand juror does not constitute cause for new trial. *Matkins v. State*, 33 App. 605, 28 S. W. 536.

Review of ruling on motion.—See notes under art. 938, post.

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.

See Willson's Cr. Forms, 959.

See notes under art. 837.

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.

See Willson's Cr. Forms, 959.

Time for filing.—This article confides to the discretion of the court the determination whether an application for a new trial made after the two days shall be allowed, and the exercise of such discretion will not be revised unless abused. *Burton v. State* (Cr. App.) 148 S. W. 805; *White v. State*, 10 App. 167; *Bullock v. State*, 12 App. 42; *Hernandez v. State*, 18 App. 134, 51 Am. Rep. 295; *Leache v. State*, 22 App. 279, 3 S. W. 539, 58 Am. Rep. 638; *Smith v. State*, 15 App. 139.

If the motion was made after the expiration of two days, and no sufficient excuse is shown for its delay, it should not be entertained. But if entertained upon its merits by the trial court, it will be presumed, on appeal, that good cause was shown why it was not filed in time. *Valentine v. State*, 6 App. 439; *Hart v. State*, 21 App. 163, 17 S. W. 421; *Hernandez v. State*, 18 App. 134, 51 Am. Rep. 295.

Striking of supplemental motion for new trial held not an abuse of discretion. *Spencer v. State*, 34 App. 65, 29 S. W. 159.

If motion for a new trial is not filed within two days after the conviction, reason for the delay must be shown. *Holloway v. State* (Cr. App.) 59 S. W. 884.

Where motion for new trial is not filed within two days after conviction, if no good reason is shown why it was not filed in time, the case will be treated in appellate court as if no motion was filed. *Young v. State*, 54 App. 379, 113 S. W. 17.

A motion for new trial for want of proper transfer from the district to the county court must be made in limine. *Miller v. State*, 59 App. 249, 128 S. W. 117.

A motion to strike a motion for new trial, because not filed within two days after the trial, nor until after sentence, is addressed to the sound discretion of the court; and its action in sustaining the motion will not be disturbed, unless the result of prejudice, and injustice resulted. *Moray v. State*, 61 App. 549, 135 S. W. 569.

Evidence held sufficient to show that defendant's attorneys were granted all the time they desired in which to file a motion for new trial. *Ex parte Martinez* (Cr. App.) 145 S. W. 959.

Where an application for a new trial, filed after two days after conviction, is not sworn to, and does not pray for permission to file it, the court on appeal will presume that the trial court in the exercise of discretion properly refused to allow it, in the absence of any evidence presented by bill of exceptions or otherwise on the motion to strike the application from the record. *Burton v. State* (Cr. App.) 148 S. W. 805.

Assignments of error filed, four months subsequent to the adjournment of the term of court at which accused was convicted, could not be considered. *Martinez v. State* (Cr. App.) 153 S. W. 886.

A motion for new trial filed after the term at which the conviction occurred comes too late. *Kinch v. State*, 70 App. 419, 156 S. W. 649.

Where the judge absented himself during a prosecution for felony, and accused desired to present the question on appeal, the court's action should be excepted to and presented for actual determination by the motion for new trial, and cannot be first raised by affidavits not filed until 80 days after adjournment, even though the judge's absence was a ground of the motion for new trial, though by agreement with the court this matter was not urged for new trial. *Romero v. State*, 72 App. 105, 160 S. W. 1193.

Must be disposed of during term.—A motion for new trial must be disposed of at the term at which it was made. *Wilcox v. State*, 31 Tex. 586.

Amendment of motion.—Whether an amended motion for new trial would be permitted after the time allowed by law for the filing of a motion for new trial is

within the sound discretion of the trial court, and, in the absence of an abuse of discretion, the ruling will not be disturbed on appeal. *Tores v. State* (Cr. App.) 166 S. W. 523; *Carusales v. State*, 47 App. 1, 82 S. W. 1038; *Kinney v. State* (Cr. App.) 144 S. W. 257.

A motion for new trial must be made during the term at which the conviction was had, and hence an amended motion made at a subsequent term was properly overruled. *Wilkins v. State*, 15 App. 420.

An objection to the admissibility of evidence comes too late, and will not be considered, when first made in the amended motion for new trial. *Siars v. State*, 63 App. 567, 140 S. W. 777.

Filing evidence.—Where the testimony relied upon as a ground for a new trial was not filed until after adjournment of the term of court at which the accused was convicted, such ground could not be reviewed. *Drake v. State* (Cr. App.) 151 S. W. 315; *Probest v. State*, 60 App. 608, 133 S. W. 263; *Maxwell v. State* (Cr. App.) 153 S. W. 324; *Cloud v. State* (Cr. App.) 153 S. W. 892; *Jones v. State* (Cr. App.) 163 S. W. 75; *Francis v. State* (Cr. App.) 170 S. W. 779; *Henderson v. State* (Cr. App.) 172 S. W. 793.

A Court of Criminal Appeals will not consider *ex parte* affidavits secured after adjournment of the trial term. *Boyce v. State*, 62 App. 374, 137 S. W. 116.

Evidence taken on the question whether the jury discussed defendant's failure to testify before arriving at their verdict, not filed until after term time, cannot be considered on appeal. *Pullen v. State*, 70 App. 156, 156 S. W. 935.

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.

For forms of such motions, see Willson's Cr. Forms, 959, 960.

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| 1. Jurisdiction. | 8. — Scope of assignment. |
| 2. Statement of grounds. | 9. Verification. |
| 3. — Reference to bill of exceptions. | 10. — Oath administered by attorney in case. |
| 4. — Competency of jurors. | 11. Amendment of motion. |
| 5. — Rulings on evidence. | 12. Affidavits and other proofs in general. |
| 6. — Charge of court. | 13. Affidavits as to newly-discovered evidence. |
| 6½. — Verdict contrary to law and evidence. | 14. — By proposed witnesses. |
| 7. — Newly discovered evidence. | |

1. Jurisdiction.—If, after conviction, the presiding judge exchanges with another, the latter may hear and determine the motion for a new trial. *State v. Womack*, 17 Tex. 237.

Where no notice of appeal was given until after the motion for a new trial was overruled, the giving of an appeal recognizance intended to be only temporary, and which was set aside on the hearing of the motion, a new recognizance being then given, did not deprive the trial court of jurisdiction of the motion. *Brown v. State* (Cr. App.) 154 S. W. 567.

2. Statement of grounds.—Where a motion for new trial was based upon the ground that appellant did not have sufficient time in which to prepare his defense, and the only thing specified is the overruling of a motion for continuance, which the appellate court holds was properly overruled, no ground is shown for reversal. *Kuykendall v. State*, 60 App. 254, 131 S. W. 1099.

An objection embodied in a motion for a new trial must point out the error relied upon that the court may know in what the complaint consists. *Ellington v. State*, 63 App. 420, 140 S. W. 1102.

Where the court is called on by motion for new trial to reconsider the refusal of a continuance, the truth, materiality, and sufficiency of its allegations are to be considered in connection with the evidence adduced at the trial. *Wade v. State* (Cr. App.) 144 S. W. 246.

A motion for a new trial in a homicide case on the ground that the verdict was contrary to the law and the testimony, that the court failed to charge all the law of self-defense, to charge as to defendant's knowledge of deceased's character and disposition from what occurred just prior to the killing, as to deceased's threats and condition, the proof showing him to be boisterous and under the influence of liquor, and that he followed up defendant and renewed the difficulty, or to charge with regard to deceased's taking defendant's money without his consent, and because of newly discovered evidence, was too general to present any question for consideration on appeal. *Jackson v. State*, 71 App. 297, 158 S. W. 813.

Objections not appearing in accused's motion for new trial cannot be considered on appeal. *Haynes v. State*, 71 App. 31, 159 S. W. 1059.

Where neither the motion for a continuance, which admittedly did not conform to the statutory requirements, nor the motion for a new trial, stated what the defendant expected to prove by the witnesses which he might desire to use, and it did appear that those witnesses knew nothing of the immediate transaction, the action of the court in overruling the motion will not be reviewed. *Valdez v. State*, 71 App. 487, 160 S. W. 341.

Under Supreme Court rules (142 S. W. vii et seq.), providing that in a motion for a new trial all grounds relied on shall be stated, or the court on appeal will not consider such grounds, the court on appeal will not consider bills of exceptions complaining of matters not presented to the trial court in the motion for a new trial. *Gant v. State*, 73 App. 279, 165 S. W. 142.

In a motion for a new trial in a criminal case every error upon which the defendant intends to rely should be presented to the trial court. *Millner v. State* (Cr. App.) 169 S. W. 899.

A motion for a new trial should always contain each ground relied upon, that the trial court may have the chance to correct its own error, if any has been committed. *Brown v. State* (Cr. App.) 176 S. W. 50.

3. — **Reference to bill of exceptions.**—Ground of motion for new trial, assigning error in admitting evidence and referring to a bill of exceptions omitted from the transcript, cannot be reviewed. *Robinson v. State*, 62 App. 645, 138 S. W. 704.

4. — **Competency of jurors.**—New trial may not be had on the ground that a juror in the case was disqualified because of insufficient residence in the county; there being nothing to show what statement the juror made, or what effort to discover the matter of his residence was made, no direct statement that his disqualification was unknown, nor any direct proof that his residence had not been sufficient, but merely an averment that the fact of his disqualification was unknown to defendant when the jury was impaneled, that his answers to questions propounded by the court were supposed by defendant to be true, and therefore he did not feel that diligence required him to interrogate the juror on questions to which he had already made answer to the court, and that subsequent to the trial, on a voir dire examination of the juror, it developed he had not lived six months in the county, and the court held him disqualified as a juror. *Haley v. State*, 59 App. 338, 128 S. W. 1133.

5. — **Rulings on evidence.**—An objection in a murder case to the introduction of a divorce decree in favor of defendant's wife, that it was immaterial and irrelevant, was too general. *Clayton v. State* (Cr. App.) 149 S. W. 119.

An objection to evidence without stating any specific ground is insufficient. *Clayton v. State* (Cr. App.) 149 S. W. 119.

It cannot be said that the court erred in denying a motion for new trial on the ground of error in rejecting evidence, in a homicide case, that accused was once confined in a state penitentiary, where the time of confinement was not shown in the motion. *Peters v. State* (Cr. App.) 155 S. W. 212.

6. — **Charge of court.**—A motion for a new trial, on the ground that the court erred in refusing special charges specified as requested by accused, was too general to be considered. *Suesberry v. State*, 72 App. 439, 162 S. W. 849; *Gould v. State* (Cr. App.) 146 S. W. 172; *Woodridge v. State* (Cr. App.) 146 S. W. 550; *Henry v. State* (Cr. App.) 146 S. W. 879; *Dickson v. State* (Cr. App.) 146 S. W. 914; *Giles v. State* (Cr. App.) 148 S. W. 317; *Hughes v. State* (Cr. App.) 149 S. W. 173; *Height v. State* (Cr. App.) 150 S. W. 908; *Spearman v. State* (Cr. App.) 152 S. W. 915, 44 L. R. A. (N. S.) 243; *Cain v. State* (Cr. App.) 153 S. W. 147; *Stewart v. State* (Cr. App.) 153 S. W. 1151; *Wilson v. State* (Cr. App.) 154 S. W. 571; *Lynch v. State*, 70 App. 449, 156 S. W. 1182; *Vick v. State*, 71 App. 50, 159 S. W. 50; *Blackburn v. State*, 71 App. 625, 160 S. W. 687; *Jones v. State*, 73 App. 152, 165 S. W. 144.

Where a motion for new trial merely complained that the court erred in its charges, the assignment of error was too general to be considered on appeal. *Barber v. State*, 64 App. 96, 142 S. W. 577; *Brown v. State* (Cr. App.) 28 S. W. 471; *Yell v. State*, 57 App. 303, 122 S. W. 871; *Talbot v. State*, 58 App. 324, 125 S. W. 906; *Kubacak v. State*, 59 App. 165, 127 S. W. 836; *Alexander v. State*, 61 App. 31, 133 S. W. 436; *Teel v. State*, 63 App. 460, 140 S. W. 340; *Barber v. State*, 64 App. 89, 142 S. W. 582; *Williams v. State* (Cr. App.) 144 S. W. 622; *Gage v. State* (Cr. App.) 151 S. W. 565; *Muldrew v. State*, 73 App. 463, 166 S. W. 156.

Objections, on a motion for new trial, that the court erred in paragraphs of his charge, identified by number, are too general to be reviewable. *Wright v. State*, 63 App. 664, 141 S. W. 228; *Keeton v. State*, 59 App. 316, 123 S. W. 404; *Lemons v. State*, 59 App. 299, 128 S. W. 416; *Phillips v. State*, 59 App. 534, 128 S. W. 1100; *Fifer v. State*, 64 App. 203, 141 S. W. 989; *Rippetoe v. State* (Cr. App.) 148 S. W. 811; *Pinson v. State* (Cr. App.) 151 S. W. 556; *Misher v. State* (Cr. App.) 152 S. W. 1049; *Wilson v. State* (Cr. App.) 154 S. W. 571.

An assignment of error that the court erred in a certain paragraph of its charge, it not being the law, not being clear and being calculated to mislead the jury, but not pointing out in what respect the charge was not the law, wherein it was not clear and in what manner it was calculated to mislead the jury, is too general to present the question for review. *Cornwell v. State*, 61 App. 122, 134 S. W. 221, Ann. Cas. 1913B, 71.

Statement that the trial court erred in its charge on a certain degree of the offense, "as the charge given was not the law; was unintelligible and confusing"—is insufficient as a ground of motion for new trial. *Jordan v. State*, 62 App. 380, 137 S. W. 133.

A ground for motion for new trial that "the court should have charged on manslaughter" is too general to present any error as to failure to so charge. *Mansfield v. State*, 62 App. 631, 138 S. W. 591.

Objection, in a motion for new trial, that the court erred in not instructing upon accused's rights to prevent decedent from taking accused's money, is insufficient to present any question of accused's right to act in defense of the property. *Mansfield v. State*, 62 App. 631, 138 S. W. 591.

An objection, in a motion for a new trial, that the charge as a whole is upon the weight of the evidence, is too general to be considered. *Mansfield v. State*, 62 App. 631, 138 S. W. 591.

When error is assigned upon the charge either by the bill of exceptions or the motion for a new trial, the specific error relied upon must be pointed out, and it is not sufficient to copy the charge complained of into the bill or motion. *Beauchamp v. State*, 63 App. 263, 140 S. W. 104.

Where a charge given in a prosecution for burglary is set out, objection in a motion for new trial, that "said definition is inaccurate, misleading and calculated

to mislead the jury to defendant's prejudice," is too general. *Dowling v. State*, 63 App. 366, 140 S. W. 224.

Objections, in motion for a new trial, that the court erred in charging upon an issue of aggravated assault, in defining assault and battery rather than aggravated assault, in failing to define the law governing manslaughter and malice aforethought, etc., are too general to point out any specific error. *Teel v. State*, 63 App. 460, 140 S. W. 340.

A ground for new trial that the court erred in not charging that the witness was an accomplice, and in submitting to the jury the issue whether he was an accomplice, is too general for consideration on appeal. *Franklin v. State*, 63 App. 438, 140 S. W. 1091.

A ground for new trial that the court erred in his main charge, wherein he attempted to charge the law defining who are principals, is too general to be considered. *Johns v. State*, 63 App. 416, 140 S. W. 1093.

An objection that the trial court erred in a paragraph of the main charge where he attempted to charge on circumstantial evidence is too general. *Ellington v. State*, 63 App. 424, 140 S. W. 1100.

Objection that the trial court in a larceny trial "erred in defining what is meant by 'fraudulent taking'" is too general. *Ellington v. State*, 63 App. 424, 140 S. W. 1100.

Objection that the trial court erred in that part of the charge wherein he attempted to define principals, because the definition is incorrect, misleading, confusing, and tends to prejudice accused's rights, is too general to be reviewed. *Ellington v. State*, 63 App. 427, 140 S. W. 1101.

Objection that an instruction is not and never was the law is too general. *Ellington v. State*, 63 App. 420, 140 S. W. 1102.

Complaint in a motion for new trial after conviction for an assault with intent to commit rape that the court erred in its charge because it was confusing and misleading is not sufficiently explicit to require consideration. *Conger v. State*, 63 App. 312, 140 S. W. 1112.

A ground for a motion for new trial that "the court erred in failing to charge the jury on manslaughter, as requested by the defendant, because the evidence fully justifies such charge," without any requested charge, is too general to be considered. *Luster v. State*, 63 App. 541, 141 S. W. 209, Ann. Cas. 1913D, 1089.

Objection to an instruction in a criminal case is not reviewable where the bill of exceptions and the motion for new trial fail to specify the ground of objection. *Adams v. State*, 64 App. 61, 141 S. W. 527.

A motion for new trial, complaining of the refusal of instructions, should state some reason or fact to show the applicability of the instructions. *Fifer v. State*, 64 App. 203, 141 S. W. 989.

A motion for a new trial in a criminal prosecution, which simply says that the court erred in refusing to grant a party's special charge "in one paragraph," is too general to preserve the alleged error for review on appeal. *Baumgarner v. State*, 64 App. 165, 142 S. W. 4.

A ground of motion for a new trial in a criminal prosecution that a paragraph of the court's charge was vague, indefinite, and unintelligible, and was calculated to and did mislead the jury, is too general to require consideration on appeal. *Howard v. State* (Cr. App.) 143 S. W. 178.

A motion for a new trial alleged error in refusing accused's special charge No. 1, "which is a peremptory instruction of the defendant, instructing them to find a verdict for said defendant," and in refusing special charge No. 2, "to the effect that the innuendoes set out in the indictment form no part of the same," and alleged error in the same general manner in refusing other charges named. Held, that the motion was not sufficiently specific to require the appellate court to review error in refusing the charges, even had the case been a felony case. *Curl v. State* (Cr. App.) 145 S. W. 602.

A motion for a new trial, on the ground that the court erred in the instructions, and in every part thereof, raises no question for review on appeal, being too general. *Henry v. State* (Cr. App.) 146 S. W. 879.

Assignments of error in a motion for a new trial "because the court erred in each and every paragraph of his general charge beginning with paragraph 6 and ending with paragraph 12, as said paragraphs did not present the law applicable to the facts proven on the trial," and "because the court erred in failing to instruct the jury in his general charge all the law applicable to the issues involving the case," are too general to be considered. *Hogue v. State* (Cr. App.) 146 S. W. 905.

Criticisms of a charge, held too general for consideration on appeal. *Smith v. State* (Cr. App.) 147 S. W. 240.

Assignments in a motion for a new trial that a verdict of the jury is against the law, and that the court failed to charge on the law applicable to the case, and an assignment of error that the court failed to charge on circumstantial evidence, which the evidence demanded, were too general to require consideration on appeal. *Kidwell v. State* (Cr. App.) 148 S. W. 305.

An assignment that the court erred in its general charge in failing to charge the law applicable to the case was too general to present anything for review. *Cruz v. State* (Cr. App.) 148 S. W. 564.

Objections that the court erred in all that part of its charge beginning with paragraph 1 and extending to and including paragraph 12, in which charge the issue of murder in the first degree was submitted, because such issue was not raised by the evidence and permitted the jury to find defendant guilty of a crime not supported by the evidence, such error being material and calculated to injure defendant's rights, and similar objections to other parts of the charge dealing with murder in the second degree and manslaughter, were too general to be considered on appeal. *Vines v. State* (Cr. App.) 148 S. W. 727.

An allegation on a motion for a new trial that "the court erred in not instructing the jury that defendant had the right to presume that deceased was going to attack him with a deadly weapon" is too general to require consideration. *Blue v. State* (Cr. App.) 148 S. W. 730.

A complaint on appeal that the court erred in failing to charge on the law of manslaughter, and in not submitting that issue under the facts in the case, was too general to require consideration. *Summers v. State* (Cr. App.) 148 S. W. 774.

An objection to the charge as a whole, and to each paragraph therein, without a statement of any grounds or reasons for the objection, was insufficient. *Waters v. State* (Cr. App.) 148 S. W. 796.

A ground in a motion for a new trial in a prosecution for homicide that the court erred "in its charge to the jury, especially in reference to insanity and drunkenness," etc., is insufficient for its generality to present possible error in the charge on insanity and drunkenness. *Teague v. State* (Cr. App.) 148 S. W. 1063.

A ground of motion for a new trial in a prosecution for homicide, which charges that the court erred "in its charge to the jury * * * in failing to submit manslaughter," is insufficient because of its generality. *Teague v. State* (Cr. App.) 148 S. W. 1063.

Where, in a prosecution for homicide, there were 17 special charges requested, 2 of which were given by the court, a ground in a motion for a new trial that the court erred "in refusing the several special charges" requested by defendant is too general. *Teague v. State* (Cr. App.) 148 S. W. 1063.

An assignment that the court "misdirected the jury as to the law in the charge" given is insufficient. *Johnson v. State* (Cr. App.) 149 S. W. 190.

An assignment of error on the ground that a charge was confusing, disconnected, and not applicable to the facts in the case is too general to be considered. *Roberts v. State* (Cr. App.) 150 S. W. 627.

An assignment of error in accused's motion for a new trial, stating merely "that the court erred in failing to give special charge" numbered as stated, is too general to be considered, since the motion for new trial must so definitely specify the reasons why the action complained of is erroneous as to direct the court's attention to the precise error complained of. *Holmes v. State* (Cr. App.) 150 S. W. 926.

An assignment of error, on the ground that "the court erred in his charge to the jury in defining manslaughter," is too general to require attention. *Alexander v. State* (Cr. App.) 151 S. W. 807.

Error in instructing on the law of manslaughter, induced by the reading by the state's counsel of certain inapplicable decisions, should have been taken advantage of by accused in his motion for a new trial. *Huffman v. State* (Cr. App.) 152 S. W. 638.

An assignment of error based on the denial of a new trial, because the court did not charge on impeaching testimony generally, and did not limit the effect of the testimony of a witness contradicting the testimony of an impeaching witness, and did not charge on the impeaching testimony of prosecutrix given before the grand jury, is too general, and will not be considered on appeal. *Cain v. State* (Cr. App.) 153 S. W. 147.

A motion for a new trial, on the ground that the court erred in not charging on mutual combat, defendant's testimony warranting such charge, was too general to present any question for review on appeal. *Martinez v. State* (Cr. App.) 153 S. W. 886.

In a prosecution for violating the local option law, a ground of motion for new trial that the court erred in the fourth paragraph of his charge, wherein he connected the defense with the state's theory, in that the jury were instructed that, if they found that accused delivered liquor to the state's witness, but did not sell the same to him, accused would not be guilty, etc., is insufficient to preserve for review objection to the instruction for failure to specify error, though accused's brief assigns error to the paragraph. *Stewart v. State* (Cr. App.) 153 S. W. 1151.

In a prosecution for homicide, an assignment of error in the motion for new trial that the court erred in not submitting to the jury in its charge the issue of manslaughter is too general to require consideration on appeal. *Garrett v. State* (Cr. App.) 155 S. W. 251.

A motion for a new trial, on the ground that the court erred in failing and refusing to give a requested instruction because such instruction was a part of the law of the case, was too general. *Dunn v. State*, 71 App. 89, 158 S. W. 300.

A motion for a new trial on the ground that the court erred in his charge to the jury is too general, not pointing out what part of the charge was erroneous, or in what respect. *Kimball v. State*, 71 App. 482, 160 S. W. 330.

A general objection to charges on first and second degree murder, manslaughter, and self-defense, on the ground that the charge violated accused's rights, in that the issues were not raised by the evidence, and because the charge was "incomplete, improper, and incorrect as propositions of law, and hurtful to the rights of defendant," was not sufficiently specific to authorize a review of the charges. *Matthews v. State*, 72 App. 654, 163 S. W. 723.

Where the motion for a new trial merely stated that the court erred in refusing to give certain specified charges, and in giving certain charges without pointing out the error in the charge as given, or assigning any reason why the requested charges should have been given, the alleged errors would not be reviewed; there being no fundamental error complained of, since the errors must be pointed out to the trial court or they cannot be urged on appeal. *Berry v. State*, 73 App. 203, 163 S. W. 964.

A motion for a new trial because the only incriminating testimony was that of accomplices, and was not corroborated, and because the court erred in refusing to give a special charge submitting the issue as to whether or not one of such witnesses was an accomplice, sufficiently raised the contention that the evidence made

an issue as to whether the witness was an accomplice, and that the court erred in refusing to submit that issue. *Goldstein v. State*, 73 App. 558, 166 S. W. 149.

An objection that an instruction was misleading and calculated to prejudice accused is too general. *Brown v. State* (Cr. App.) 169 S. W. 437.

6½. — **Verdict contrary to law or evidence.**—A motion alleging that the conviction for nonpayment of poll tax was not warranted by the evidence, is too general to require consideration on appeal of the question whether a poll tax had been levied. *Bluitt v. State*, 56 App. 525, 121 S. W. 168.

The ground of motion for new trial, "Because the verdict is not supported by the facts and the judgment is contrary to the law," is not sufficient to point out misdirection in the charge in respect to the punishment, so as to make it available on appeal, in the absence of exception to it at the trial. *Robbins v. State*, 57 App. 8, 121 S. W. 504.

Objections in a motion for new trial that the verdict is against the law and the evidence, and that the instructions were contrary to the law and evidence and misleading, are too general to be reviewed. *Springer v. State*, 63 App. 266, 140 S. W. 99.

A motion for new trial on the ground that the verdict is contrary to the law and the evidence in this, "that the evidence and all the evidence was as follows," followed by a copy of all the testimony, is too general, and need not be considered on appeal. *Sanders v. State*, 63 App. 258, 140 S. W. 103.

Where there was no attempt to show where the verdict was contrary to law or the evidence, the ground for the motion for new trial that the verdict was contrary to both was too general. *Beauchamp v. State*, 63 App. 263, 140 S. W. 104.

The grounds in a motion for new trial: "The verdict is against the law." "The verdict is against the weight of the evidence." "Because justice has not been done"—are too general to be considered. *Brogdon v. State*, 63 App. 475, 140 S. W. 352.

A complaint that the verdict is "contrary to the law" points out no error in the charge of the court. *James v. State*, 72 App. 457, 163 S. W. 61.

7. — **Newly discovered evidence.**—Requisites of motion for new trial based on newly discovered evidence. *Shaw v. State*, 27 Tex. 750; *White v. State*, 10 App. 167; *Fisher v. State*, 30 App. 502, 18 S. W. 90; *McVey v. State*, 23 App. 659, 5 S. W. 174; *Riojas v. State*, 36 App. 182, 36 S. W. 268; *Carrico v. State*, 36 App. 618, 38 S. W. 37; *Wilson v. State*, 37 App. 156, 38 S. W. 1013; *Mitchell v. State*, 38 App. 170, 41 S. W. 816.

The motion on the ground of newly discovered evidence must be sworn to by the defendant, or by his counsel, and when sworn to by his counsel must negative the defendant's knowledge of the existence of the evidence at the time of the trial, and show that the defendant could not have discovered it in time for the trial by the use of ordinary diligence. *Tuttle v. State*, 6 App. 556; *Campbell v. State*, 29 Tex. 490; *Williams v. State*, 7 App. 163.

A motion for new trial for newly discovered evidence should disclose such evidence. *Allen v. State*, 36 App. 436, 37 S. W. 738.

On motion for new trial a statement that certain facts were not known before trial and could not have been discovered does not show diligence. *Wilson v. State*, 37 App. 64, 38 S. W. 610.

A motion does not show diligence by simply alleging that the facts were not known to defendant, and could not have been discovered by the use of ordinary diligence. *Wilson v. State*, 37 App. 156, 38 S. W. 1013.

On motion for a new trial in a homicide case on the ground of newly discovered evidence, the motion set out that immediately after the killing and while accused was under great excitement he made a statement to the absent witness tending to explain the cause of the homicide, but did not otherwise set out the circumstances under which the statement was made. Held, that the motion did not sufficiently show that the statement offered to be shown by testimony would be admissible as a *res gestæ* statement, so that there was no error in refusing a new trial. *Davis v. State*, 60 App. 620, 132 S. W. 932.

Where a motion for new trial in a homicide case on the ground of newly discovered evidence does not disclose facts that would excuse the defendant from the diligence necessary in procuring the attendance of a witness whose testimony was desired, there was no error in refusing a new trial. *Davis v. State*, 60 App. 620, 132 S. W. 932.

A motion for new trial for newly discovered testimony is insufficient which fails to show what, if any, diligence was used to secure such testimony, and fails to state in terms that it could not have been discovered by the exercise of ordinary diligence. *Turner v. State*, 61 App. 97, 133 S. W. 1052.

A motion for new trial in a criminal cause, on the ground of newly discovered evidence, is insufficient, where it wholly fails to show diligence. *Milam v. State* (Cr. App.) 146 S. W. 185.

It was not error to refuse accused a new trial, asked on the ground of newly discovered testimony, where he did not certify that the witness would have testified to anything, or what the testimony would have been. *Lancaster v. State* (Cr. App.) 148 S. W. 307.

An application for new trial on the ground of newly discovered evidence must show that it was not owing to want of diligence that the evidence was not discovered, and that it did not come to accused's knowledge before the trial, and the allegations must, at least, be sufficient to entitle accused to a continuance on the ground of the absence of a witness. *Edwards v. State* (Cr. App.) 172 S. W. 227.

New trial on the ground of newly discovered evidence was properly denied, where neither accused nor any one else swore to the motion, and the newly discovered witness did not make any affidavit. *Fears v. State* (Cr. App.) 178 S. W. 518.

8. — **Scope of assignment.**—Errors not complained of in a motion for new trial cannot, though later made the subjects of assignments, be considered on appeal. *Wormley v. State* (Cr. App.) 143 S. W. 615; *Vela v. State*, 62 App. 361, 147 S. W. 120; *Day v. State*, 62 App. 448, 138 S. W. 130; *Ellington v. State*, 63 App. 420, 140 S. W. 1102; *Fifer v. State*, 64 App. 203, 141 S. W. 989; *Bailey v. State* (Cr. App.) 144 S. W. 996; *Coulter v. State*, 72 App. 602, 162 S. W. 885.

Objections to the charge, not made a ground of motion for new trial, will not be considered on appeal. *Frazier v. State*, 61 App. 647, 135 S. W. 583.

An objection that the evidence does not show an essential fact to sustain a conviction should not be considered, where it was not presented in the motion for new trial. *Taylor v. State*, 62 App. 611, 138 S. W. 615.

The court on appeal from a criminal prosecution will not consider a charge neither excepted to at the time nor made a ground for motion for a new trial. *Jones v. State* (Cr. App.) 144 S. W. 252.

Where a motion for new trial on a trial for statutory rape alleged that the court sustained an objection to evidence, and stated that it did not want to hear the theory of accused's counsel on which the evidence would be admissible, accused on appeal could not urge that the court erred in refusing to permit his attorney to state at the time what he expected to prove. *Kearse v. State* (Cr. App.) 151 S. W. 827.

A motion for a new trial, on the ground that the verdict and judgment are contrary to the law and the evidence, only raises the question on appeal whether the evidence was sufficient to sustain the verdict. *Martinez v. State* (Cr. App.) 153 S. W. 886.

Under the new rules of procedure, effective since July 1, 1913, only such matters as are presented in accused's motion for new trial can be considered by the Court of Criminal Appeals. *Jones v. State*, 73 App. 152, 165 S. W. 144.

9. **Verification.**—See *Hicks v. State* (Cr. App.) 171 S. W. 755.

A motion for a new trial not sworn to by defendant nor his counsel, when the ground stated is newly discovered evidence, is entirely insufficient. *Barber v. State*, 35 App. 70, 31 S. W. 649; *Tuttle v. State*, 6 App. 556; *Campbell v. State*, 29 Tex. 490; *Williams v. State*, 7 App. 163; *Arias v. State* (Cr. App.) 174 S. W. 340.

An appellate court cannot say that defendant, who alleges in a motion for new trial that he was forced to trial when he did not have sufficient time to hire counsel, and that counsel who were appointed for him did not have time to prepare for trial, was forced to trial without the necessary preparations, where the motion for new trial is not sworn to and there is nothing in the record to show whether it was true or not. *Robinson v. State*, 58 App. 550, 126 S. W. 276.

Error alleged in the motion for new trial, that the verdict was by lot and that the county attorney read the entire indictment to the jury, containing counts for both incest and rape, where accused only pleaded guilty to the incest count, cannot be considered on appeal, where such matters were not verified in any manner. *Pilgrim v. State*, 59 App. 499, 129 S. W. 363.

Where accused moved for a new trial on the ground that the foreman of the jury had been a member of the grand jury that presented the indictment, and that no plea of not guilty had been filed, but neither ground was verified, neither ground could be reviewed. *Johnson v. State* (Cr. App.) 143 S. W. 626.

A motion for new trial, on the ground that the court erred in permitting witnesses named to testify, cannot be considered on appeal, when in no way verified. *Vasquez v. State* (Cr. App.) 146 S. W. 168.

In a criminal case, a ground of motion for a new trial, that a certain person, during the trial, gave unsworn, inflammatory, and prejudicial information to the jury, cannot be considered, where the motion was not verified, there were no affidavits showing that such incident took place, and the evidence taken on the ground of the motion was filed after adjournment of the term. *McWhirter v. State* (Cr. App.) 146 S. W. 189.

An unverified motion for new trial on the ground of misconduct of the jury is insufficient. *Bryant v. State* (Cr. App.) 153 S. W. 1156.

A ground for motion for a new trial after conviction that some of the jurors were disqualified because they had expressed an opinion as to accused's guilt should be sworn to. *Decker v. State* (Cr. App.) 154 S. W. 566.

Where defendant contends in his motion for a new trial that the verdict of the jury was reached by lot, but the motion was not sworn to or in no way supported by any affidavit, the court need not consider it. *Salmon v. State* (Cr. App.) 154 S. W. 1023.

A motion for new trial for misconduct of the jury should be sworn to or supported by affidavit. *Brice v. State*, 72 App. 219, 162 S. W. 874.

A new trial for alleged misconduct of the jury in commenting on defendant's failure to testify was properly denied, where the motion was not sworn to, and was not supported by affidavit or other evidence. *Gorrell v. State*, 73 App. 232, 164 S. W. 1012.

A motion for a new trial on the ground that defendant had learned that he could prove by the father of prosecutrix that she was over the age of consent prior to the alleged offense was properly overruled, where the motion was not sworn to by any person, and there was no attached affidavit that the father would so testify, or any reason why, if he would so testify, an affidavit to that effect was not so attached. *Magee v. State* (Cr. App.) 168 S. W. 96.

A motion for a new trial on the ground that the verdict was reached by lot, not sworn to by appellant or any one else, and not supported by the independent affidavit of any one, was insufficient; and even though sworn to was a nullity, if made before appellant's attorney, and could not be considered by the Court of Criminal Appeals. *Hicks v. State* (Cr. App.) 171 S. W. 755.

Denial of motion for new trial on the ground that a juror was not qualified because he had not resided in the county six months, prior to the time he served

as juror, not verified or supported by any evidence, presents no error. *Davis v. State* (Cr. App.) 172 S. W. 1143.

Where defendant's bill of exceptions to the overruling of his motion for new trial showed that one of the grounds of the motion was that the attorney who represented the state was one of the grand jury panel which found the indictment, but this was in no way substantiated other than by a ground of the motion, signed by defendant's attorney and not sworn to by any one, no error was presented. *Chumley v. State* (Cr. App.) 174 S. W. 345.

10. — **Oath administered by attorney in case.**—Affidavits taken on a motion for a new trial by an attorney of record in the case cannot be considered. *Hogan v. State* (Cr. App.) 147 S. W. 871; *Williams v. State* (Cr. App.) 144 S. W. 622; *Stapp v. State* (Cr. App.) 144 S. W. 941; *Garza v. State* (Cr. App.) 145 S. W. 590; *Burnett v. State*, 73 App. 477, 165 S. W. 581; *Hicks v. State* (Cr. App.) 171 S. W. 755.

Affidavits in support of a motion for a new trial for newly discovered evidence cannot properly be taken before the applicant's attorney. *Cuellar v. State* (Cr. App.) 154 S. W. 228; *Scott v. State* (Cr. App.) 143 S. W. 610; *Gordon v. State*, 72 App. 283, 162 S. W. 522.

An affidavit made by accused in connection with his motion for a new trial for newly discovered evidence should not be made before accused's counsel, but before a disinterested person. *Peters v. State* (Cr. App.) 155 S. W. 212; *McGinsey v. State* (Cr. App.) 144 S. W. 268.

In a criminal proceeding, neither a private prosecuting counsel nor any counsel interested in the case can take the affidavits of jurors in order to contest defendant's motion for new trial. *Maples v. State*, 60 App. 169, 131 S. W. 567.

Affidavits by jurors setting up that the jury returned a quotient verdict, where made before accused's attorney who was a notary, must be disregarded; the notary being an interested person. *Crutchfield v. State* (Cr. App.) 152 S. W. 1053.

Where the affidavits raising the issue whether the jury discussed defendant's failure to testify before arriving at their verdict were sworn to before one of the attorneys in the case, they were properly stricken from the record. *Pullen v. State*, 70 App. 156, 156 S. W. 935.

11. **Amendment of motion.**—Time for filing, see art. 839, and notes.

The proposition as well as the reasons for an assignment of error must be stated in the motion for a new trial in a criminal case; it not being permissible to subsequently file assignments of error pointing out the error claimed. *Holmes v. State* (Cr. App.) 150 S. W. 928.

Assignments of error filed after the adjournment of the court for the term at which accused was tried, raising questions not presented to the trial court in a motion for new trial, will not be reviewed. *White v. State*, 70 App. 285, 157 S. W. 152.

An amended motion for a new trial could not be filed without leave of court after the denial of the original motion; defendant's remedy being by an application to the court to set aside the order overruling the original motion and to grant the motion as amended. *Bracher v. State*, 72 App. 198, 161 S. W. 124.

A document filed after the adjournment of the term at which the trial was had, and upon a motion for new trial, certified by the court reporter, but not approved by the court, could not be considered. *Graham v. State*, 73 App. 28, 163 S. W. 726.

12. **Affidavits and other proofs in general.**—A codefendant is not competent as a supporting witness on a motion for a new trial, unless no evidence was developed against him. *Delaney v. State*, 41 Tex. 601.

In a prosecution for violation of the local option law, where a motion for new trial averred that there was misconduct of the jury in speaking about the failure of defendant to take the stand, but was not verified by defendant's affidavit, or other proof offered to support it, it was properly overruled, where the affidavit of all the jurors distinctly negatived this ground for the motion. *Ray v. State*, 60 App. 138, 131 S. W. 542.

Denial of a motion for a new trial on the ground that a juror could not read or write English, not supported by proof, is not erroneous. *Gentry v. State*, 61 App. 619, 136 S. W. 50.

Where an application for a continuance is overruled, it and its contents will be considered from the standpoint of the facts as introduced before the jury, when raised on motion for new trial. *Davis v. State*, 64 App. 8, 141 S. W. 264.

A statement in a motion for new trial that accused believes a state of facts to exist does not present a matter for review, unless there is some evidence in support of the statement. *Jones v. State*, 64 App. 510, 143 S. W. 621.

An allegation in a motion for a new trial as to a disqualification of a juror will not be considered on appeal from a conviction where neither supported by evidence nor affidavit. *Williams v. State* (Cr. App.) 144 S. W. 622.

Where it appeared that the trial court heard evidence on defendant's motion for a new trial, but the evidence so heard was not in the record, the Court of Appeals would conclude that the testimony did not sustain the motion. *Hoskins v. State*, 73 App. 107, 163 S. W. 426.

13. **Affidavits as to newly-discovered evidence.**—The motion must be accompanied by the affidavits of the witnesses by whom it is alleged the newly discovered evidence can be produced, detailing the facts they will testify to, or if such affidavits cannot be obtained, good cause for failing to obtain them must be shown. *West v. State*, 2 App. 210; *Blake v. State*, 3 App. 581; *Love v. State*, Id. 501; *Evans v. State*, 6 App. 513; *Polser v. State*, Id. 510; *Dill v. State*, Id. 113; *Williams v. State*, 7 App. 163; *Stanley v. State*, 16 App. 392; *Parker v. State*, 63 App. 464, 140 S. W. 337; *McGinsey v. State* (Cr. App.) 144 S. W. 268; *McDowell v. State* (Cr. App.) 155 S. W. 521; *Clay v. State*, 73 App. 78, 164 S. W. 1; *O'Fallin v. State* (Cr. App.) 169 S. W. 897; *Arias v. State* (Cr. App.) 174 S. W. 340; *Spikes v. State* (Cr. App.) 174 S. W. 614.

The refusal of a new trial on the ground of newly discovered evidence is not error, where there was no proof of the newly discovered evidence by affidavits, and no reason stated why affidavits were not procured. *Laird v. State* (Cr. App.) 155 S. W. 260; *Williams v. State* (Cr. App.) 144 S. W. 622; *Bracher v. State*, 72 App. 198, 161 S. W. 124.

A motion for a new trial averring that one jointly indicted with accused had been discharged subsequent to accused's trial, and that he would testify to alleged facts exonerating accused, was insufficient, where no affidavit of the proposed witness was incorporated in the record, and there was nothing to verify any statement to which he would testify, and the motion was not sworn to by accused. *Martin v. State*, 57 App. 595, 124 S. W. 681.

An affidavit as to new evidence on application for a new trial as to what a member of the grand jury told affiant is not proof of the record, and is hearsay. *Vaughn v. State*, 62 App. 24, 136 S. W. 476.

On motion for rehearing, the Court of Criminal Appeals cannot consider affidavits filed for the first time in that court, alleging that since the judgment was affirmed newly discovered evidence has come to accused's knowledge, since the appellate court cannot consider matters not brought to the attention of the trial court. *Wood v. State* (Cr. App.) 150 S. W. 194.

Where the record did not show the affidavit of accused, or of a witness, that the latter would testify as claimed by accused in his motion for new trial, and accused, trying the case without the assistance of an attorney, did not account for his failure to have the witness so testify at the trial, otherwise than by the unsworn statement in the motion that he did not know how to bring out his defense, a new trial was properly denied, in the absence of any showing why he was not represented on the trial by an attorney. *Bellew v. State* (Cr. App.) 151 S. W. 542.

14. — **By proposed witnesses.**—Where the affidavits of the witnesses were not attached to a motion for new trial on the ground of newly discovered evidence, and no evidence was offered on the hearing of the motion, its denial cannot be reviewed on appeal. *Stallworth v. State* (Cr. App.) 147 S. W. 233; *Burrell v. State*, 62 App. 635, 138 S. W. 707.

A new trial for newly discovered evidence, supported by an affidavit of accused averring that he had been informed by a former sheriff after his conviction that he could prove by a third person that accused did not alight from a train at a station as proved by the state, but not supported by the affidavit of the former sheriff or by his testimony on the hearing of the motion because of his failure to remember the particulars of the conversation had with the third person, was properly denied. *Polk v. State*, 60 App. 462, 132 S. W. 134.

Alleged error, for which a new trial is asked, in denying a first application for a continuance to procure absent witnesses is entitled to greater consideration if the affidavit of the witness that he would testify as alleged is attached to the motion for new trial. *Sharp v. State*, 71 App. 633, 160 S. W. 369.

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.

See *Willson's Cr. Forms*, 960.

See ante, art. 613, and notes.

See generally, *Stanley v. State*, 16 App. 392; *White v. State*, 19 App. 343; *Smith v. State*, 28 App. 309, 12 S. W. 1104; *Kutch v. State*, 32 App. 184, 22 S. W. 594; *Lawrence v. State*, 36 App. 173, 36 S. W. 90.

Former practice.—The practice seems to have been in accordance with this article before its adoption. *Dignowitty v. State*, 17 Tex. 521, 67 Am. Dec. 670; *Reynolds v. State*, 7 App. 516.

Right of state in general to controvert grounds for new trial.—Counter affidavits may be received on behalf of the state. *Dignowitty v. State*, 17 Tex. 521; *Childs v. State*, 10 App. 183; *Richardson v. State*, 28 App. 216, 12 S. W. 870; *Ulrich v. State*, 30 App. 61, 16 S. W. 769; *Reynolds v. State*, 7 App. 516.

On motion for a new trial the state may controvert the application for a continuance as to diligence, when the refusal of such application is made a ground for new trial, although the application was not controverted upon this ground in the first instance. *Walker v. State*, 13 App. 618, 44 Am. Rep. 716, note.

Affidavits contesting the materiality and truthfulness of the alleged absent testimony are permissible only on motion for new trial, and not on a motion for continuance. *Attaway v. State*, 31 App. 475, 20 S. W. 925.

A county attorney has the right to contest any ground of the motion for new trial that suggests itself to him as not being well taken, or about which there might be a controversy as to the facts attending the grounds of the motion. *Johnson v. State*, 59 App. 11, 127 S. W. 559.

Under this article the court may hear counter affidavits and oral proof on a motion for a new trial. *Dougherty v. State*, 59 App. 464, 128 S. W. 398.

Contents of counter affidavits.—The controverting affidavits may show that the newly discovered testimony is not material, that the motion was made for the delay, and that the absent witness is a fictitious person or was absent by defendant's procurement. *Sargent v. State*, 35 App. 325, 33 S. W. 364.

Answer to counter affidavits.—Where accused desires time to answer controverting affidavits, he should ask for same before commencement of argument on the motion. *Lawrence v. State*, 36 App. 173, 36 S. W. 90.

Failure of state to take issue on motion.—It is only when the state has taken issue with the defendant on the truth of the matters set forth in the motion for a

new trial, that the trial judge is required or authorized to hear evidence by affidavit or otherwise. And when not controverted by the state, no supporting affidavit is required, except where the ground of the motion is newly discovered evidence, in which case the supporting affidavit of the proposed witness is required, if it can be obtained. *Stanley v. State*, 16 App. 392. And also that of the defendant. *Terry v. State*, 3 App. 236.

Where in a motion for a new trial, verified by the affidavit of the defendant, it was alleged that the defendant had entered the plea of guilty without being admonished by the court of the consequences of said plea, and under improper influences, it was held that the new trial should have been granted, notwithstanding the judgment entry recited that the defendant "in open court duly entered his plea of guilty," the state not having controverted the truth of said ground. *Harris v. State*, 17 App. 559.

In a trial for the theft of hogs, where the value of the hogs was a material issue, and the evidence upon that issue was uncertain, the defendant moved for a new trial upon the ground of newly discovered evidence, which tended strongly to show that the hogs were of less value than twenty dollars, the conviction being for a felony, which motion was accompanied by the affidavits of witnesses, and showed diligence, etc., and was sworn to by the defendant, and not controverted by the state; it was held that the new trial should have been granted. *Moore v. State*, 18 App. 212; *Richardson v. State*, 28 App. 216, 12 S. W. 870; *Ulrich v. State*, 30 App. 61, 16 S. W. 769; *Kelley v. State*, 31 App. 211, 20 S. W. 365.

Newly discovered evidence.—When a motion based upon the ground of newly discovered evidence has been contested by the state in the trial court, and testimony heard thereon, the refusal of the motion will not be revised on appeal, unless it clearly appears that such ruling was erroneous. *White v. State*, 19 App. 343.

A new trial sought for newly discovered evidence held properly refused where the state's affidavits showed that the evidence was not worthy of credit or likely to change the result. *Smith v. State*, 28 App. 309, 12 S. W. 1104.

Misconduct of jury.—See notes under art. 837, subd. 8.

Oral evidence.—When issue has been joined on the truth of the causes assigned in the motion, the trial judge is required to hear evidence by "affidavit or otherwise," and this authorizes him to hear oral evidence. *Childs v. State*, 10 App. 183; *Reynolds v. State*, 7 App. 516; *Rucker v. State*, Id. 549; *Wilson v. State*, 17 App. 525; *Richardson v. State*, 28 App. 216, 12 S. W. 870; *Kelley v. State*, 31 App. 211, 20 S. W. 365; *Calyon v. State* (Cr. App.) 174 S. W. 591.

Review of ruling on motion.—See notes under art. 936, post.

The determination of a motion for new trial on conflicting affidavits will not be disturbed on appeal, unless clearly erroneous. *White v. State*, 19 App. 343.

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.

See arts. 734, 736, 786, 787, ante.

Effect of disregard of article.—The inhibition contained in this article should, in the interest of justice be strictly observed, but the disregard of it does not necessitate the reversal of conviction on appeal when no error to appellant's prejudice is discovered. *Rocha v. State*, 43 App. 169, 63 S. W. 1020; *Rains v. State*, 7 App. 588.

One of the grounds of prejudice set up in the motion to transfer this case was that at the former trial the jury, upon a verdict of guilty, assessed a fine of \$250 against the defendant, and that in awarding the new trial applied for, the judge refused it on the ground set up in the motion, but granted it upon his own motion, as he stated from the bench, because the penalty assessed was totally inadequate. This action of the trial judge was not an abuse of his discretion, and does not constitute cause for reversal. It would have been otherwise had the judge made his statement in the presence of the persons subsequently impaneled as jurors for the trial of this case. *Johnson v. State*, 31 App. 456, 20 S. W. 985.

It is not cause for reversal that immediately after setting aside the first verdict the trial judge increased the defendant's bail bond to an amount beyond his ability to give. The defendant's remedy by habeas corpus to reduce bail was not affected by this action of the court. *Johnson v. State*, 31 App. 456, 20 S. W. 985.

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.]

See *Willson's Cr. Forms*, 981.

See art. 945, post.

Cited, *Sanders v. State*, 70 App. 532, 158 S. W. 291; *Ethridge v. State* (Cr. App.) 172 S. W. 786.

Effect in general.—Where, on appeal, a new trial is ordered, the case stands in the same condition as if the new trial had been granted in the trial court. *Cox v. State*, 7 App. 495; *Drake v. State*, 29 App. 266, 15 S. W. 725; *Fuller v. State*, 30 App. 560, 17 S. W. 1108; *House v. State*, 9 App. 567.

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 App. 262.

Where the accused has been acquitted of murder and convicted of manslaughter and a new trial has been granted the same evidence used on the first trial is admissible on the second. *Cornelius v. State*, 54 App. 173, 112 S. W. 1054.

Where a person charged in several counts with violations of the liquor law was convicted on one count only, a new trial should proceed alone on that count. *Broadnax v. State* (Cr. App.) 150 S. W. 1168.

The Constitution gives the district court exclusive jurisdiction of all criminal cases of the grade of a felony, and Code Cr. Proc. 1911, arts. 89, 771, 843, respectively, provide that upon the trial of a felony case, whether the proof develop a felony or misdemeanor, the court shall determine the case as to any offense included in the charge; that, where a prosecution is for an offense consisting of several degrees, the jury may find the defendant guilty of any degree inferior to that charged in the indictment; and that the effect of a new trial is to place the cause in the same position as it was before any trial was had. Held that, where accused was indicted for assault with intent to murder, the reversal on appeal of a conviction of an aggravated assault will not, in view of Code Cr. Proc. 1911, art. 945, providing that, where the Court of Criminal Appeals awards a new trial, the cause shall stand as it would have stood if a new trial had been granted by the court below, deprive the district court of jurisdiction to hear the case upon retrial, though the county court has original jurisdiction of misdemeanors. *Hughes v. State* (Cr. App.) 152 S. W. 912.

Under Code Cr. Proc. 1911, art. 903, providing that, in all appeals from convictions for felony where bail is allowed, the form of recognizance therein set forth, and which recites that accused and the sureties acknowledge themselves indebted to the state conditioned that accused shall appear before the court from day to day and from term to term and not depart therefrom without leave of the court, in order to abide a judgment of the Court of Criminal Appeals shall be sufficient, and article 843, providing that the effect of a new trial is to place the accused in the same position in which he was before any trial had taken place, a bond given to secure the release of a person convicted of felony pending an appeal becomes functus officio upon a reversal and remand of the cause, and the sureties are not liable upon accused's nonappearance on the new trial, even though no bail bond was given prior to the first conviction, in view of the fact that article 903 was enacted 21 years after the Court of Criminal Appeals had so held with reference to appeals in misdemeanor cases, and uses precisely the same language in specifying the form of a recognizance in felony cases as article 919 uses with reference to misdemeanor cases, and also in view of the long and uninterrupted acquiescence in that decision by the bench and bar. *Sanders v. State*, 70 App. 532, 158 S. W. 291.

Entry of pleas.—Dilatory pleas are available to a defendant on his second trial. *Cox v. State*, 7 App. 495.

The effect of a new trial is plainly laid down in the preceding article, and entering a plea in the former trial does not preclude a motion to set aside, exceptions, or any dilatory plea, on the subsequent trial. *Cox v. State*, 7 App. 495.

Request for instructions.—If special instructions requested on first trial are not asked on the second, they will be considered waived. *Bracken v. State*, 29 App. 362, 16 S. W. 192.

Setting aside order granting new trial.—After the court has granted a new trial he cannot set aside the judgment and then overrule the motion for a new trial. *Mathis v. State*, 40 App. 317, 50 S. W. 368.

New trial at same term.—When a motion for new trial is granted, the cause may be again tried at the same term, but the defendant should not be unduly hurried to his prejudice. *Lott v. State*, 41 Tex. 121.

Allusion to or consideration of former conviction.—The court should not allude to the former conviction in its charge, though it is not improper in an offense of degrees to inform the jury in the charge that the defendant had been acquitted of a higher grade of the offense, and was on trial only for the lower grade. *West v. State*, 7 App. 150; *Pharr v. State*, 10 App. 485.

A former conviction must not be alluded to in the argument. *Hatch v. State*, 8 App. 416, 34 Am. Rep. 751; *Moore v. State*, 21 App. 666, 2 S. W. 887.

This article applies only where defendant is a second time on trial after conviction and new trial granted. *Hargrove v. State*, 33 App. 431, 26 S. W. 993.

State cannot bring out in examination of witness the fact that defendant has been convicted in a former trial of the case. *Hamilton v. State*, 40 App. 469, 51 S. W. 217.

On a second trial for the same offense the district attorney should not be allowed to mention the former trial, neither should any evidence of the same be admitted. *Richardson v. State*, 33 App. 518, 27 S. W. 139.

Witness on second trial may be contradicted by evidence given by him on former trial. This does not violate rule that former trial shall not be referred to. *Tollett v. State* (Cr. App.) 60 S. W. 964.

Where there is a casual or accidental allusion to a former conviction, and no discussion of the same is had, it will not afford cause for reversal. *Moore v. State*, 52 App. 336, 107 S. W. 543.

Counsel for State is not permitted to refer to former conviction in cross-examination of a witness even if the defendant's counsel has incidentally alluded thereto in such a way as probably not to have injured rights of defendant. *Benson v. State*, 56 App. 52, 118 S. W. 1050.

It is reversible error for the county attorney to ask defendant: "Have you not been convicted and given 10 years in this case?" though the question was not answered, and the court at once reprimanded the attorney, and instructed the jury

that the question should not be considered for any purpose. *Wyatt v. State*, 58 App. 115, 124 S. W. 929, 137 Am. St. Rep. 926.

On a trial on appeal for violating the local option law, remarks of the city attorney to the effect that the case was an appeal case from the corporation court, where defendant was convicted, and for that reason the city attorney was in the case, were improper and in violation of the statute; a conviction in an inferior court being required to be tried de novo on appeal. *Kirksey v. State*, 58 App. 188, 125 S. W. 15.

The act of the prosecuting attorney in compelling accused to admit that he had been convicted in the case on a former trial before the court could make a ruling on objections interposed was misconduct necessitating a reversal. *May v. State*, 59 App. 141, 127 S. W. 832.

It was not error to permit the state to ask one of defendant's witnesses, on cross-examination whether he had testified at a former trial. *Grimes v. State*, 64 App. 64, 141 S. W. 261.

Where on a criminal trial the result of former trials was not in evidence, but the jury discussed the former conviction and the punishment assessed, and at least one juror agreed to a conviction because of the former convictions, the judgment would be reversed. *Clements v. State* (Cr. App.) 153 S. W. 1137.

On the second trial of a prosecution for homicide a witness who plainly showed her prejudice to accused referred to the imposition of the death sentence on the first trial. The court instructed her not to volunteer testimony, and informed the jury to disregard her statement. Held, that while this article rendered the witness' statement erroneous, the error is not prejudicial where accused declined to withdraw his announcement of ready and to consent to a continuance as suggested by the state, but merely objected to the whole matter, for accused having taken his chances on obtaining a favorable verdict below, cannot on appeal object to an error which he did not desire corrected. *Coffman v. State*, 73 App. 295, 165 S. W. 939.

It was error to compel accused as a witness in his own behalf to testify that he had been convicted on a prior trial of the same case though he invoked the benefit of the suspended sentence law. *Sorrell v. State* (Cr. App.) 169 S. W. 299.

Error in compelling defendant to testify as a witness in his own behalf that he had been convicted on a prior trial of the same case was not rendered harmless because he had accepted jurors after they had testified on their voir dire that they had heard of the former conviction, nor because accused had filed certain pleas before the jury was impaneled in which such prior conviction appeared. *Sorrell v. State* (Cr. App.) 169 S. W. 299.

Where a former conviction has been set aside, reference thereto in argument on a subsequent trial is a violation of this article, and it is the court's duty to see that the law is complied with in that regard. *Eads v. State* (Cr. App.) 170 S. W. 145.

Where a court stenographer was introduced by the state to prove for impeachment purposes that he had taken and transcribed the testimony of a witness on a former trial of the same case, the admission of his statement that the copy of the testimony identified by him was the one filed in the Court of Criminal Appeals, thus disclosing defendant's former conviction, was cured by an instruction that such statement should not be considered for any purpose. *Witty v. State* (Cr. App.) 171 S. W. 229.

— Ground for new trial.—See art. 837, and notes.

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.]

See Willson's Cr. Forms, 982, 1027, 1028.

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1. **Right to statement of facts.**—A defendant appealing after conviction held entitled to have a statement of facts certified and sent up, though he had not moved for a new trial. *Babb v. State*, 8 App. 173; *Longley v. State*, 3 App. 611.

One prosecuting his appeal in a criminal case has, under the statute, a right to a statement of acts certified as required by law and sent up with the record. *Shaffer v. State*, 58 App. 646, 127 S. W. 207.

2. Deprivation of statement of facts.—See note under arts. 837 (2), 845a.

Failure to file in time, see notes under art. 845.

A judgment of conviction will be reversed on appeal, if it be made to appear that without fault on the part of the defendant, or of his counsel, he has been deprived of a statement of facts. *Henderson v. State*, 20 App. 304; *Ruston v. State*, 15 App. 336; *Ruston v. State*, Id. 377; *Trammell v. State*, 1 App. 121; *Babb v. State*, 8 App. 173; *Sara v. State*, 22 App. 639, 3 S. W. 339; *Johnson v. State*, 16 App. 372; *Prieto v. State*, 35 App. 70, 31 S. W. 665; *Stanford v. State*, 42 App. 343, 60 S. W. 254; *Napier v. State* (Cr. App.) 57 S. W. 649; *Bryans v. State*, 29 App. 247, 15 S. W. 288; *Anginano v. State* (Cr. App.) 57 S. W. 816; *King v. State*, 59 App. 511, 129 S. W. 626; *Sargent v. State*, 61 App. 34, 133 S. W. 885; *Johnson v. State*, 71 App. 391, 159 S. W. 848; *Jones v. State* (Cr. App.) 163 S. W. 75.

Where accused was deprived, without his fault, and despite all reasonable diligence, of a statement of facts because of the oversight of the trial judge failing to approve a statement of facts as he intended to do when ordering the clerk to file it, the judgment of conviction will be reversed. *Shaffer v. State*, 58 App. 647, 127 S. W. 206.

Where, on appeal, the trial judge certified that, not agreeing that a statement of facts presented by accused was correct, he did not approve the same, but did not contradict accused's affidavit that on timely presentation of such statement and bill of exceptions he requested the judge, if he found the same incorrect, to prepare a statement and approve and file the same, and that the judge replied, "All right," it sufficiently appeared that accused was without his fault deprived of such statement and bill, and the judgment of conviction will be reversed, and the cause remanded. *Haak v. State*, 60 App. 366, 132 S. W. 358.

Where a statement of facts was signed and approved by the attorneys on both sides, and the trial judge certified that he read and approved the facts, but neglected to sign it, but filed it with the proper officer, accused was entitled to a reversal to enable him to have a properly certified statement of facts before the court on appeal. *Rawls v. State* (Cr. App.) 150 S. W. 431.

Where a state's attorney lost one statement of facts submitted by counsel of one convicted of a misdemeanor, refused to agree to another, and failed to provide one when requested to do so by the court, on advice of the opposing counsel that they were unable to agree, and the court did not make such a statement of its own accord, but certified that the failure to include it in the record was through no fault of the counsel for the appellant, all due diligence in endeavoring to have such a statement filed is shown to have been exercised, and the appellant is entitled to have the cause reversed and remanded. *Stewart v. State* (Cr. App.) 150 S. W. 902.

An appellant has the burden of preparing a complete statement of facts; consequently where accused accepted a statement of facts which did not include a written statement, made by him to the prosecuting attorney and introduced in evidence by such attorney, he cannot complain of the loss of the statement by the prosecuting attorney after the trial, it appearing that the statement of facts was signed by the court and agreed to by counsel. *Nobles v. State*, 71 App. 121, 153 S. W. 1133.

Where the attorney for defendant and the county attorney agreed on a statement of facts and presented it to the county judge, the judge should approve it if correct, and, if not, prepare and file one, and his failure to do so authorizes reversal of a conviction. *Sims v. State*, 72 App. 533, 162 S. W. 1154.

Where in a case tried in May accused relied on the court stenographer to present the statement of facts to the district judge for approval, but through an oversight the statement was filed without being presented for approval, and no effort to cure this defect was made until October when the district judge wrote the Court of Criminal Appeals, stating that he would have approved it, the judgment could not be reversed because accused was deprived of a statement of facts, as it was the duty of his attorney to place the statement of facts in the hands of the trial judge, with a request that he either approve it or prepare and file a statement of facts. *Gomez v. State* (Cr. App.) 170 S. W. 711.

Where defendant was convicted of robbery, a capital offense, and on appeal was entitled to a copy of the notes of the court stenographer, so that his counsel might make out a statement of facts, and the stenographer furnished a complete statement of facts in narrative form, which his counsel refused to file because he claimed that it was not correct in some particulars, there was no deprivation of a statement of facts, so as to require a reversal. *Giles v. State* (Cr. App.) 177 S. W. 1167.

3. — Requisites of motion for reversal.—A motion, not signed nor sworn to, to reverse and remand the case, without consideration, because accused was denied his bills of exceptions by the trial court, without fault on his part, cannot be considered. *Wooten v. State*, 57 App. 89, 121 S. W. 703.

Where a motion for rehearing, filed after a judgment of conviction had been affirmed for want of a bill of exceptions and statement of facts in the record, charged that the delay was due to the fault of the trial judge, and that affidavits of the attorneys in support thereof would be filed, but no such affidavits were ever filed, there was no sufficient showing that the appellant was deprived of his bill of exceptions or statement of facts without fault on his part, and the rehearing will be denied. *Johnson v. State*, 71 App. 391, 159 S. W. 848.

4. — Diligence of accused.—See art. 845, and notes as to diligence.

Where the bills of exceptions are so modified by the court as to deprive accused of what he believes to be fair and correct, he must take the statutory steps to

protect himself, and it is not sufficient to have the court certify that he signed the bills, with his explanations, without the knowledge of accused. *Wooten v. State*, 57 App. 89, 121 S. W. 703.

While it may be ground for reversal that the accused is deprived of a statement of facts without any want of diligence on his part, a conviction will not be reversed merely because the record does not contain a statement of facts, where there is no evidence showing that he was unable to secure the statement, or was in any manner deprived of securing same. *Abbott v. State* (Cr. App.) 152 S. W. 169.

Where it did not appear that defendant ever filed an affidavit stating that he was unable to pay the stenographer to make out a statement of facts, or that, after refusal of his verbal application to the court to require the furnishing of such a statement and his failure to agree with the district attorney as to a statement prepared, he presented it to the trial judge, informing him of such disagreement and requesting him to prepare and file a statement, he was not entitled to have the judgment reversed for failure to secure a statement of facts. *Smith v. State*, 70 App. 241, 156 S. W. 224.

Where appellant's affidavit showed that he presented to the county judge a statement of facts for his approval, that the county judge refused to approve it and failed to make out and file a statement of facts in the cause, so that it was not appellant's fault that there was no statement of facts in the record, he was deprived of a statement of facts without negligence on his part, for which his conviction will be reversed. *Cruz v. State* (Cr. App.) 172 S. W. 790.

5. **Decisions not reviewable without statement of facts.**—In the absence of a statement of facts or bill of exceptions in the record, on appeal, the court will only consider the sufficiency of the indictment or information, the applicability of the charge of the court thereunder, with respect to any state of facts which could legally have been proved, and such bills of exception, if there be any, as can be determined without a full knowledge of all the evidence in the case. It will be presumed that all the material averments in the indictment were proved by competent and sufficient evidence, and that the charge of the court conformed to the evidence, and gave all the law demanded by the evidence. *Branch v. State*, 1 App. 99; *Mahl v. State*, Id. 127; *Talley v. State*, Id. 688; *Brooks v. State*, 2 App. 1; *Bertroug v. State*, Id. 160; *Davis v. State*, Id. 162; *Grant v. State*, Id. 163; *Ferrell v. State*, Id. 399; *Mitchell v. State*, Id. 404; *Edwards v. State*, Id. 525; *Robson v. State*, 3 App. 497; *Longley v. State*, Id. 612; *Nettles v. State*, 4 App. 337; *Gross v. State*, Id. 249; *Owens v. State*, Id. 153; *Booker v. State*, Id. 564; *Carlson v. State*, 5 App. 194; *Carter v. State*, Id. 458; *Davis v. State*, 6 App. 196; *Hemanus v. State*, 7 App. 372; *Lawrence v. State*, Id. 192; *Kaskie v. State*, Id. 202; *Castanedo v. State*, Id. 582; *Keef v. State*, 44 Tex. 582; *McDonald v. State*, 33 Tex. 339; *Kindred v. State*, 32 Tex. 609; *Barrett v. State*, 25 Tex. 605; *Chandler v. State*, 2 Tex. 305; *Ashworth v. State*, 9 Tex. 490; *Earley v. State*, 9 App. 476; *Gerrold v. State*, 13 App. 345; *Thompson v. State*, 16 App. 74; *Brown v. State*, Id. 197; *Henderson v. State*, 20 App. 304; *Wade v. State*, 22 App. 256, 2 S. W. 594; *Wade v. State*, 23 App. 308, 4 S. W. 896; *Banks v. State*, 24 App. 559, 7 S. W. 327; *Coleman v. State* (Cr. App.) 30 S. W. 1060; *Benevidas v. State*, 57 App. 170, 121 S. W. 1107; *Patrick v. State* (Cr. App.) 123 S. W. 411; *Emerson v. State*, 58 App. 28, 124 S. W. 684; *Craven v. State*, 58 App. 460, 126 S. W. 574; *Armstrong v. State*, 60 App. 59, 130 S. W. 1011; *Overman v. State* (Cr. App.) 131 S. W. 1067; *Doneham v. State* (Cr. App.) 131 S. W. 1080; *Payne v. State* (Cr. App.) 131 S. W. 1080; *James v. State*, 61 App. 232, 134 S. W. 699; *Wells v. State* (Cr. App.) 134 S. W. 702; *Young v. State*, 61 App. 440, 134 S. W. 736; *Davis v. State*, 61 App. 301, 135 S. W. 129; *Griffin v. State*, 62 App. 98, 136 S. W. 778; *Bradford v. State*, 62 App. 424, 138 S. W. 118; *Contee v. State* (Cr. App.) 138 S. W. 403; *Palmer v. State*, 62 App. 539, 138 S. W. 403; *Catron v. State*, 63 App. 377, 140 S. W. 227; *Carney v. State*, 63 App. 370, 140 S. W. 440; *Sheppard v. State*, 63 App. 569, 140 S. W. 1090; *Staten v. State*, 63 App. 592, 141 S. W. 525; *Warner v. State* (Cr. App.) 147 S. W. 265; *Knight v. State* (Cr. App.) 147 S. W. 268; *Whittaker v. State* (Cr. App.) 147 S. W. 599; *Green v. State* (Cr. App.) 148 S. W. 315; *Williams v. State* (Cr. App.) 148 S. W. 563; *Flowers v. State* (Cr. App.) 148 S. W. 564; *Williams v. State* (Cr. App.) 150 S. W. 185; *Hardee v. State* (Cr. App.) 150 S. W. 610; *Sharp v. State* (Cr. App.) 150 S. W. 943; *Williams v. State* (Cr. App.) 151 S. W. 542; *Thompson v. State* (Cr. App.) 152 S. W. 893; *Thomas v. State* (Cr. App.) 152 S. W. 927; *Chapa v. State* (Cr. App.) 154 S. W. 545; *Chafino v. State* (Cr. App.) 154 S. W. 546; *Simpson v. State* (Cr. App.) 154 S. W. 999; *Richardson v. State*, 71 App. 111, 158 S. W. 517; *Fowler v. State*, 71 App. 1, 158 S. W. 1117; *Hall v. State*, 72 App. 161, 161 S. W. 457; *Perales v. State*, 72 App. 176, 161 S. W. 482; *Floyd v. State*, 72 App. 247, 161 S. W. 974; *Humphries v. State*, 72 App. 535, 163 S. W. 71; *Brown v. State* (Cr. App.) 170 S. W. 547; *McElroy v. State* (Cr. App.) 172 S. W. 1144; *Roan v. State* (Cr. App.) 177 S. W. 492.

Where no error appears in a record containing no statement of facts or bill of exceptions, the judgment will be affirmed. *Davis v. State* (Cr. App.) 122 S. W. 22; *Meyer v. State* (Cr. App.) 122 S. W. 22; *English v. State* (Cr. App.) 122 S. W. 389; *Rutherford v. State*, 59 App. 46, 126 S. W. 1154; *Mann v. State* (Cr. App.) 128 S. W. 118; *Vaughn v. State*, 59 App. 423, 128 S. W. 1134; *Armstrong v. State*, 60 App. 59, 130 S. W. 1011; *Jevrez v. State* (Cr. App.) 131 S. W. 1067; *Hosia v. State* (Cr. App.) 131 S. W. 1068; *Smith v. State* (Cr. App.) 132 S. W. 472; *Clay v. State* (Cr. App.) 152 S. W. 637; *Stout v. State* (Cr. App.) 152 S. W. 927; *Lee v. State* (Cr. App.) 153 S. W. 326; *McKinney v. State* (Cr. App.) 153 S. W. 855; *Braun v. State* (Cr. App.) 158 S. W. 302; *Wilson v. State* (Cr. App.) 173 S. W. 652.

A judgment of conviction will be affirmed where there is no bill of exceptions or statement of facts in the record, and the motion for new trial raised no question which could be considered without a statement of facts. *Shockley v. State*,

71 App. 475, 160 S. W. 452; *Walters v. State* (Cr. App.) 122 S. W. 26; *Landry v. State* (Cr. App.) 150 S. W. 197; *Redo v. State* (Cr. App.) 160 S. W. 71.

Only fundamental errors will be considered on appeal in the absence of a bill of exceptions and statement of facts. *Johnson v. State*, 29 App. 210, 15 S. W. 205; *Lynn v. State*, 28 App. 515, 13 S. W. 867.

In the absence of a statement of facts the court, on appeal, will, in support of the judgment, presume that the material allegations of the indictment were proven. *Lega v. State*, 36 App. 38, 34 S. W. 926, 35 S. W. 381.

In the absence of a statement of facts it will be presumed that the want of consent was shown. *Lega v. State*, 36 App. 38, 34 S. W. 926, 35 S. W. 381.

Where, on appeal from a conviction, the record contains neither a bill of exceptions nor a statement of facts, and the motion for a new trial is not sent up in the record, and the transcript contains only the judgment overruling the motion for a new trial, a notice of appeal, and an order granting time in which to prepare a bill, the judgment will be affirmed. *English v. State* (Cr. App.) 122 S. W. 389.

Where the indictment, judgment, and sentence are regular in form and show accused guilty as charged, the judgment of conviction must be affirmed, in absence of a statement of facts or bills of exception. *Roberts v. State*, 62 App. 7, 136 S. W. 483.

Where a writ of certiorari was granted to perfect the record in a criminal appeal, and to supply lost papers, and defendant had ample opportunity to supply the lost papers, but made no effort to do so, an affirmance of the conviction will be granted on motion of the state, in the absence of a statement of facts and bill of exceptions. *Rupard v. State*, 71 App. 256, 158 S. W. 285.

Where defendant was arrested six months before trial, an objection that he was forced to trial without an attorney to represent him cannot be considered, in the absence of a statement of facts. *North v. State*, 73 App. 521, 165 S. W. 579.

Where the evidence is not in the record, it must be presumed that evidence in support of a motion to strike out accused's plea of former jeopardy supported the action of the court in striking such plea. *Woodard v. State* (Cr. App.) 170 S. W. 309.

In the absence of a statement of facts, the court can only pass on the motion to quash the information. *Rutherford v. State* (Cr. App.) 174 S. W. 1050.

In the absence of a statement of facts, it is impossible to determine whether the issue of manslaughter in a criminal case was raised, so as to render the court's failure to submit it erroneous. *Matthews v. State* (Cr. App.) 176 S. W. 48.

6. — **Grounds for new trial in general.**—Where there is no statement of facts or bills of exception, the grounds of a motion for new trial cannot be reviewed. *Parker v. State* (Cr. App.) 163 S. W. 81; *Marsh v. State* (Cr. App.) 131 S. W. 1067; *Ehrhardt v. State* (Cr. App.) 133 S. W. 682; *Butler v. State* (Cr. App.) 136 S. W. 769; *Mackey v. State* (Cr. App.) 137 S. W. 669; *Catron v. State*, 63 App. 377, 140 S. W. 227; *Walker v. State* (Cr. App.) 148 S. W. 565; *Garlington v. State* (Cr. App.) 148 S. W. 588; *Kincaid v. State* (Cr. App.) 151 S. W. 541; *Chester v. State* (Cr. App.) 151 S. W. 1051; *Howard v. State* (Cr. App.) 154 S. W. 547; *Castro v. State* (Cr. App.) 154 S. W. 548; *Sylvester v. State* (Cr. App.) 157 S. W. 478; *Roberts v. State*, 70 App. 588, 157 S. W. 1193; *Simon v. State* (Cr. App.) 158 S. W. 285; *Sullivan v. State*, 71 App. 92, 158 S. W. 302; *Adams v. State* (Cr. App.) 158 S. W. 303; *Ray v. State*, 71 App. 268, 158 S. W. 807; *Waller v. State* (Cr. App.) 158 S. W. 994; *Humphries v. State*, 72 App. 298, 162 S. W. 522; *Austin v. State* (Cr. App.) 163 S. W. 80; *Cruz v. State* (Cr. App.) 172 S. W. 790.

Where the record on a criminal appeal contains no statement of facts, the appellate court cannot consider assignments of error in the motion for new trial on the ground that the verdict is not supported by the evidence, that the evidence does not show a material fact, in permitting the state's attorney to ask a certain question, and in admitting certain testimony, so that the judgment of conviction will be affirmed; no error appearing on the record proper. *Craven v. State*, 58 App. 460, 126 S. W. 574.

The overruling of a motion and an amended motion for new trial is not reviewable, in the absence of a statement of facts. *Parks v. State* (Cr. App.) 131 S. W. 552.

Where the record in a criminal appeal contains neither a statement of facts nor bill of exceptions, the judgment will be affirmed without a consideration of the grounds of error, assigned in the motion for new trial, that the verdict was against the law and the evidence, and that the penalty affixed was excessive, considering defendant's physical condition. *Lancaster v. State* (Cr. App.) 138 S. W. 703.

An order overruling accused's motion for new trial will not be disturbed where it appears that evidence, heard on the motion, is not preserved by a statement of facts, or otherwise. *Patterson v. State*, 63 App. 297, 140 S. W. 1128.

Where the judgment of the trial court overruling a motion for a new trial showed that the court heard evidence submitted on the hearing and overruled the motion, the court on appeal, in the absence of a statement of facts, will presume that the trial court's action was sustained by evidence. *Treadway v. State* (Cr. App.) 144 S. W. 655.

Where no bill of exceptions and statement of facts or evidence was in the record, a question which arose between the attorneys, on motion for a new trial, as to an agreement on a plea of guilty, and which was settled by the trial court, could not be reviewed. *Muckleroy v. State* (Cr. App.) 146 S. W. 199.

A ground of motion for new trial relating to the statement of facts cannot be considered on appeal in the absence of the evidence. *Lamont v. State*, 73 App. 77, 164 S. W. 3.

A matter simply alleged in the motion for new trial, but not verified by affidavit, bill of exceptions, or statement of facts, cannot be considered on appeal. *Lamont v. State*, 73 App. 77, 164 S. W. 3.

Unless the statement of facts contains the evidence presented by accused in support of his motion for new trial, it will on appeal be presumed that the lower court correctly ruled in denying the motion. *Ethridge v. State* (Cr. App.) 169 S. W. 1152.

7. — Denial of continuance, recess, or postponement.—Denial of an application for a continuance for absence of witnesses cannot be reviewed, in the absence of a statement of facts. *Clark v. State* (Cr. App.) 148 S. W. 801; *Trevinio v. State*, 2 App. 90; *Wooldridge v. State*, 13 App. 443, 44 Am. Rep. 708; *Holland v. State*, 31 App. 345, 20 S. W. 750; *Loakman v. State*, 32 App. 561, 25 S. W. 20; *Smith v. State*, 33 App. 569, 28 S. W. 471; *Bryant v. State*, 35 App. 394, 33 S. W. 978, 36 S. W. 79; *Dowdy v. State*, 9 App. 292; *Sheckles v. State*, Id. 326; *Lyons v. State*, Id. 636; *Aiken v. State*, 10 App. 610; *Word v. State*, 12 App. 174; *Childers v. State*, 36 App. 128, 35 S. W. 980; *Campbell v. State* (Cr. App.) 44 S. W. 1112; *Choate v. State*, 59 App. 266, 128 S. W. 624; *Love v. State* (Cr. App.) 150 S. W. 183; *Medford v. State* (Cr. App.) 174 S. W. 607.

Refusal of a continuance is not reviewable, in the absence of a statement of facts and bills of exceptions. *Dehunt v. State* (Cr. App.) 138 S. W. 1013; *Walker v. State* (Cr. App.) 148 S. W. 565; *Trevinio v. State*, 2 App. 90; *Richardson v. State*, Id. 322; *Willison v. State*, 7 App. 400; *Gilder v. State*, 61 App. 16, 133 S. W. 883; *Taylor v. State*, 73 App. 192, 164 S. W. 844; *Jones v. State* (Cr. App.) 177 S. W. 493.

In the absence of a showing by the statement of facts or bill of exceptions that a certain person testified as a witness, alleged error in refusing to take a recess, in order to produce the court records showing a former conviction of such person for felony, cannot be reviewed by the Court of Criminal Appeals. *Daly v. State*, 72 App. 531, 162 S. W. 1152.

8. — Incompetency of jurors.—In the absence of a statement of facts and bills of exception, the denial of a motion for new trial, requested on the ground that the grand jury was not organized according to law, cannot be reviewed, it appearing that the lower court heard the evidence on that issue. *Fowler v. State*, 71 App. 1, 158 S. W. 1117.

In the absence of a statement of facts and bills of exception, it must be presumed that the lower court correctly disposed of accused's motion to quash the venire of jurymen drawn to compose the grand jury; evidence being heard on that issue. *Fowler v. State*, 71 App. 1, 158 S. W. 1117.

Where the lower court heard evidence on the question of the fitness of a juror, it will be presumed on appeal, in the absence of a statement of facts, that the court's determination was correct and that it correctly overruled a motion for new trial on that ground. *Vick v. State*, 71 App. 50, 169 S. W. 50.

Where defendant alleged the incompetency of a juror, and the court, in overruling the motion for a new trial, stated that he heard and considered evidence thereon and overruled it, without the evidence it will be presumed that the ruling was correct. *Gowan v. State*, 73 App. 222, 164 S. W. 6.

9. — Rulings on admissibility of evidence.—Errors in rulings on evidence will not be reviewed unless the evidence is before the court. *Hobbs v. State* (Cr. App.) 28 S. W. 814; *Sullivan v. State* (Cr. App.) 28 S. W. 537; *English v. State* (Cr. App.) 28 S. W. 542; *Howard v. State* (Cr. App.) 29 S. W. 1080; *Merrell v. State* (Cr. App.) 29 S. W. 41; *Josef v. State* (Cr. App.) 29 S. W. 774; *Emerson v. State* (Cr. App.) 30 S. W. 557; *Oates v. State* (Cr. App.) 30 S. W. 554; *Micken v. State* (Cr. App.) 30 S. W. 222; *Corless v. State* (Cr. App.) 30 S. W. 223; *McCarthy v. State* (Cr. App.) 32 S. W. 691; *Todd v. State* (Cr. App.) 32 S. W. 697; *Blackwell v. State*, 33 App. 278, 26 S. W. 397, 32 S. W. 123; *Thomas v. State* (Cr. App.) 33 S. W. 127; *Penn v. State*, 36 App. 140, 35 S. W. 973; *Wright v. State*, 37 App. 146, 38 S. W. 1004; *Henrie v. State*, 41 Tex. 573; *Bell v. State*, 33 App. 163, 25 S. W. 769; *Wheeler v. State* (Cr. App.) 34 S. W. 942; *Williams v. State* (Cr. App.) 38 S. W. 990; *White v. State* (Cr. App.) 42 S. W. 303; *Tate v. State* (Cr. App.) 136 S. W. 65; *Bradford v. State*, 62 App. 424, 138 S. W. 118; *Seibert v. State*, 62 App. 538, 138 S. W. 395; *Burton v. State*, 62 App. 648, 138 S. W. 1019; *Brown v. State* (Cr. App.) 143 S. W. 183; *Lee v. State* (Cr. App.) 148 S. W. 316; *Whitehead v. State* (Cr. App.) 148 S. W. 316; *Queto v. State* (Cr. App.) 148 S. W. 564; *Wood v. State* (Cr. App.) 150 S. W. 194; *Marlow v. State* (Cr. App.) 150 S. W. 610; *Chandler v. State* (Cr. App.) 152 S. W. 1041; *Oakery v. State* (Cr. App.) 158 S. W. 285.

A prosecuting witness in a prosecution for unlawful sale of intoxicating liquors was allowed over defendant's objection to answer questions claimed to be inadmissible and leading, and the court qualified the bill of exceptions by stating that the questions were asked upon cross-examination of the witness upon matters brought out by the defendant, and that they merely summed up the previous testimony of the witness, without showing the entire examination of the witness. Held that, in the absence of any facts showing the impropriety of the questions, the court could not say that they were erroneously allowed. *Green v. State*, 62 App. 345, 137 S. W. 126.

In the absence of a statement of facts, the court on appeal cannot consider matters of evidence referred to in the motion for new trial. *Hogan v. State* (Cr. App.) 143 S. W. 184.

Objections that the court permitted the state to use defendant's wife as a witness against him, could not be reviewed, in the absence of a statement of facts. *O'Malley v. State* (Cr. App.) 148 S. W. 1034.

10. — Rulings on instructions.—Where there is neither a statement of facts nor bills of exceptions in the record, it will be presumed that the trial judge charged all the law applicable to the facts proved. *Parvin v. State*, 63 App. 63, 136 S. W. 453; *Bonnors v. State* (Cr. App.) 35 S. W. 669; *Lige v. State* (Cr. App.) 37 S. W. 329; *Wright v. State*, 37 App. 146, 38 S. W. 1004; *Balls v. State* (Cr. App.) 40 S. W. 801; *Gonzales v. State*, 58 App. 257, 125 S. W. 395; *Choate v. State*, 59 App. 266, 128 S. W. 624; *Presley v. State*, 60 App. 102, 131 S. W. 332; *Celli v. State*, 60 App. 311, 131 S. W. 597; *Fisher v. State* (Cr. App.) 135 S. W. 564; *Frazier*

v. State, 61 App. 647, 135 S. W. 583; South v. State (Cr. App.) 135 S. W. 1177; Slatter v. State, 61 App. 243, 136 S. W. 770; Bradford v. State, 62 App. 424, 138 S. W. 118; Mansfield v. State, 62 App. 631, 138 S. W. 591; Espy v. State, 63 App. 625, 140 S. W. 1088; Cortez v. State (Cr. App.) 141 S. W. 99; Diggs v. State, 64 App. 122, 141 S. W. 100; Farrell v. State, 64 App. 200, 141 S. W. 535; Payne v. State (Cr. App.) 144 S. W. 677; Grubbs v. State (Cr. App.) 146 S. W. 201; Ward v. State (Cr. App.) 146 S. W. 931; Rawls v. State (Cr. App.) 150 S. W. 431; Hughes v. State (Cr. App.) 150 S. W. 1173; Edwards v. State (Cr. App.) 152 S. W. 926; Madison v. State (Cr. App.) 152 S. W. 927; Johnson v. State (Cr. App.) 153 S. W. 849; Yeary v. State (Cr. App.) 153 S. W. 852; Rivers v. State (Cr. App.) 155 S. W. 224; Wright v. State, 70 App. 73, 156 S. W. 624; Baker v. State (Cr. App.) 157 S. W. 478; Long v. State, 71 App. 209, 159 S. W. 846; Ramos v. State (Cr. App.) 160 S. W. 380; Romero v. State, 72 App. 105, 160 S. W. 1193; Floyd v. State, 72 App. 247, 161 S. W. 974; McCaulay v. State (Cr. App.) 170 S. W. 793; Seats v. State (Cr. App.) 170 S. W. 793; Romano v. State (Cr. App.) 171 S. W. 201; Lustress v. State (Cr. App.) 177 S. W. 492; Albertson v. State (Cr. App.) 177 S. W. 969.

In the absence of a statement of facts, if the charge is applicable to any state of facts that might be proven under the indictment, the court will assume that the law of the case was properly submitted. Shrewder v. State, 62 App. 403, 136 S. W. 461, 1200; Cunningham v. State, 61 App. 232, 134 S. W. 728; Campbell v. State (Cr. App.) 144 S. W. 966; Maxwell v. State (Cr. App.) 153 S. W. 324.

If the indictment is for simple assault, and the court instructs that if committed with a whip, the conviction should be for aggravated assault, a general verdict of guilty, with the fine assessed at \$100, will be sustained as for simple assault, in the absence of a statement of facts and the full charge of the court. Barrett v. State, 25 Tex. 605.

The refusal of a requested instruction cannot be revised, no matter how correct, in the abstract, such instruction may be, in the absence of a statement of facts. Mitchell v. State, 2 App. 404; Brooker v. State, 3 App. 227.

The propriety of submitting special charges requested by defendant cannot be reviewed on appeal in the absence of a statement of facts. Stinnett v. State, 32 App. 526, 24 S. W. 908; Wilkerson v. State (Cr. App.) 45 S. W. 805; Lee v. State (Cr. App.) 44 S. W. 835; Smith v. State (Cr. App.) 44 S. W. 1090.

The instructions given and refused will not be considered on appeal in the absence of a statement of facts. Wright v. State, 37 App. 146, 38 S. W. 1004; Yawn v. State, 37 App. 205, 38 S. W. 785, 39 S. W. 105; Bryant v. State, 35 App. 394, 33 S. W. 978, 36 S. W. 79; Mootry v. State, 35 App. 450, 33 S. W. 877, 34 S. W. 126; Henrie v. State, 41 Tex. 573; Holland v. State, 31 App. 345, 20 S. W. 750; Moss v. State, 39 App. 3, 43 S. W. 983, 44 S. W. 832; Bell v. State, 33 App. 163, 25 S. W. 769; White v. State (Cr. App.) 42 S. W. 303.

Error in giving a charge not based on facts which would not give jurisdiction will not work a reversal in absence of statement of facts. Thurman v. State, 37 App. 646, 40 S. W. 792.

Where the charge given is applicable to a state of case provable under the allegations of the indictment, and the record does not contain a statement of facts, the judgment cannot be disturbed on the ground that the court failed to charge all the law applicable to the case. Yvarra v. State (Cr. App.) 43 S. W. 341.

In the absence of a statement of facts, the action of the court refusing to give appellant's requested instructions cannot be revised. McNair v. State (Cr. App.) 43 S. W. 987.

In the absence of a statement of facts, the court cannot say whether a paragraph in the charge of the trial court was harmful, or whether a special charge requested should have been given. Dannerly v. State (Cr. App.) 45 S. W. 921.

Assignments of error in the motion for new trial in defining theft of lost property by a general charge, when that was an issue under the evidence, and in refusing requested instructions, cannot be considered, in absence of the statement of facts. Williams v. State (Cr. App.) 137 S. W. 354.

Where an objection is taken to a positive error in a charge as to the testimony and corroboration of an accomplice shown to have testified in the case, and a bill of exceptions to the charge is allowed, the case will be reversed, although there is no statement of facts. Long v. State, 62 App. 540, 138 S. W. 401.

In the absence of a statement of facts, the failure of the trial court to charge on circumstantial evidence cannot be reviewed on appeal. Banks v. State, 62 App. 552, 138 S. W. 406.

Without a statement of facts containing the evidence, the Court of Criminal Appeals cannot review an objection to the charge that it failed to apply the law of aggravated assault and battery, alleged to have been raised by the evidence. Simmons v. State (Cr. App.) 146 S. W. 550.

In the absence of a statement of facts, exceptions, in a motion for a new trial, to the charge, and to the court's action eliminating or erasing certain expressions from the charge, cannot be reviewed. Simpson v. State (Cr. App.) 148 S. W. 312.

Where an indictment charged in separate counts an assault with intent to kill, an assault with intent to rob, and an attempt to rob by using and exhibiting a firearm, an instruction that if defendant did unlawfully make an assault on prosecuting witness, "and did then and there exhibit a firearm, to wit, a gun," to him, with intent by such assault and violence and putting in fear of death and bodily harm to fraudulently take from the prosecuting witness' person and possession personal property belonging to him with intent to appropriate the property to his own use, then he would be guilty as charged, etc., could not be held improper for failure to contain any limitation as to how defendant exhibited the gun, or whether the prosecuting witness was put in fear thereby, in so far as it contained the language quoted, without a statement of facts. Evans v. State (Cr. App.) 148 S. W. 573.

Where there is no statement of facts in the record, an instruction that, to constitute an assault with intent to rape, accused must assault the female with intent

to have carnal knowledge of her without her consent and against her will, by the use of force or threats, cannot be deemed erroneous, as submitting the issue of threats, for want of evidence thereof, especially since the court, in applying the law to the facts, only submitted the theory of force. *Hughes v. State* (Cr. App.) 150 S. W. 1173.

Where the record on appeal from a conviction of murder in the first degree contains no statement of facts, the refusal to submit a lesser degree in the charge cannot be reviewed on appeal. *Morgan v. State* (Cr. App.) 151 S. W. 1048.

Assignments of error as to charges on the issue of aggravated assault and the insufficiency of the evidence to support the conviction cannot be considered, in the absence of a statement of facts. *Jackson v. State*, 70 App. 292, 156 S. W. 1183.

In the absence of a statement of facts, the Court of Criminal Appeals cannot determine whether an instruction on second degree murder was erroneous, or even determine whether second degree murder was in the case under the evidence. *Thomas v. State*, 71 App. 183, 159 S. W. 1183.

In the absence of a statement of facts, the court, on appeal from a conviction of assault with intent to murder, cannot review the refusal to charge that if the assault was made with intent to rob, accused must be acquitted. *Daniels v. State*, 72 App. 286, 162 S. W. 500.

In the absence of a statement of facts, the Court of Criminal Appeals cannot determine whether it was error to refuse a requested instruction, in a prosecution for keeping a disorderly house, that, if the jury had a reasonable doubt as to whether a certain person other than defendant was a lessee of the property, they should acquit. *Hughes v. State*, 72 App. 493, 163 S. W. 71.

Refusal to give a request to charge limiting the jury's consideration of certain evidence cannot be reviewed, where the evidence sought to be limited is not given in the charge, nor in connection therewith, and the court could not tell from the record what was intended thereby. *Gorrell v. State*, 73 App. 232, 164 S. W. 1012.

On appeal from a conviction for unlawfully carrying a pistol, the refusal of a special charge, based on accused's contention that he was on his own premises, could not be reviewed, in the absence of a statement of facts, as it could not be determined whether such issue was raised by the testimony. *Boren v. State* (Cr. App.) 170 S. W. 144.

11. — **Absence of evidence and newly discovered evidence.**—In absence of a statement of facts the court will not consider whether or not the trial court erred in refusing a new trial asked for on account of newly discovered evidence. *Blackshire v. State*, 33 App. 160, 25 S. W. 771; *Augustine v. State*, 20 Tex. 450; *Brooks v. State*, 2 App. 1; *Bertroug v. State*, Id. 160; *Fletcher v. State*, 37 App. 193, 39 S. W. 116; *Carr v. State*, 57 App. 185, 122 S. W. 258; *Flowers v. State* (Cr. App.) 147 S. W. 1162; *Jennings v. State* (Cr. App.) 148 S. W. 313; *Kelly v. State* (Cr. App.) 154 S. W. 1195.

The materiality and probable truth of absent testimony, for which application for a continuance was made, cannot be determined without a statement of facts. *Trevino v. State*, 2 App. 90; *Close v. State*, 30 Tex. 631; ante, art. 616.

Motion for new trial stated as a ground that a co-defendant whose case had been dismissed would testify to certain facts. There was no statement of facts filed with the record; held, without such statement the action of the trial court will not be disturbed. *Childers v. State*, 36 App. 128, 35 S. W. 980.

In the absence of the testimony from the record, the denial of a new trial for newly discovered evidence cannot be reviewed. *Lewis v. State* (Cr. App.) 43 S. W. 82.

Defendant was convicted of forgery upon his confession, and thereafter a new trial was sought on the ground that he was mentally unsound; supporting affidavits being attached to the motion and evidence heard. Held, that the action of the court in overruling the motion could not be reviewed, where the evidence heard was not presented by statement of facts; the affidavits attached to the motion not being considered as evidence, unless introduced as such when the motion is heard. *Wilson v. State* (Cr. App.) 158 S. W. 806.

12. — **Misconduct of jury, prosecuting attorney, and others.**—Where with his motion for new trial defendant filed an affidavit of a juror setting up misconduct of the jury, and the district attorney filed a denial, in the absence of bill of exceptions and statement of facts it will be presumed that the court inquired into the matter and found the charge to be untrue. *Pickett v. State*, 56 App. 68, 118 S. W. 1039.

Where the record on appeal is not accompanied by any statement of facts as to what really transpired at a picture show attended by jurors while they were deliberating in a murder case, which act is alleged as misconduct warranting a new trial, except a statement in an affidavit that one of the pictures portrayed a killing, and the motion for new trial recites that the court heard the evidence on the motion, and overruled it, the court's action will not be disturbed. *Phillips v. State*, 59 App. 534, 128 S. W. 1100.

The matter of improper remarks of the district attorney to the jury, set out as a ground for new trial, cannot be considered on appeal, there being nothing in the record to show he used such language, or a request to have the jury instructed to disregard it. *Allen v. State*, 62 App. 557, 138 S. W. 593.

In a prosecution for crime, where the court in overruling a motion for a new trial, based on the improper conduct of a juror and supported by an affidavit which is denied by the affidavit of the juror, states that he heard the evidence, the appellate court will presume that the trial court acted properly, in the absence of the evidence upon which he based his ruling. *Black v. State*, 71 App. 43, 158 S. W. 302.

The trial court's refusal to disturb a verdict on the ground that the jury were affected by outside influences from a mob could not be disturbed on appeal in a criminal case, where the evidence heard by the trial court on that point was not brought up. *Hayter v. State* (Cr. App.) 169 S. W. 674.

Where accused fails to present by bill of exceptions the question of a juror's

misconduct on which he relied as one ground for a new trial, and does not show by any statement of facts the testimony introduced thereon at the hearing on the motion for new trial, the denial of a new trial will not be reviewed, though accused has filed a statement by the official stenographer, purporting to give such testimony, but not agreed to by the attorneys or approved by the court. *Womack v. State* (Cr. App.) 170 S. W. 139.

13. — **Verdict contrary to law and evidence.**—In the absence of a statement of facts in a criminal case, a question, raised by motion for new trial, on whether the verdict and judgment were contrary to the law and evidence, cannot be reviewed. *Quentes v. State* (Cr. App.) 151 S. W. 301; *O'Mallay v. State* (Cr. App.) 148 S. W. 1094; *Moore v. State* (Cr. App.) 138 S. W. 111; *Oueto v. State* (Cr. App.) 148 S. W. 564; *Chandler v. State* (Cr. App.) 152 S. W. 1041; *McMillan v. State* (Cr. App.) 37 S. W. 331; *Belcher v. State* (Cr. App.) 37 S. W. 428; *Williams v. State* (Cr. App.) 37 S. W. 741; *Rabby v. State* (Cr. App.) Id.; *Smith v. State*, 36 App. 442, 37 S. W. 743; *Oden v. State* (Cr. App.) 37 S. W. 327; *Crane v. State* (Cr. App.) 40 S. W. 300; *Strey v. State* (Cr. App.) 40 S. W. 997; *Cassu v. State* (Cr. App.) 121 S. W. 505; *Turner v. State* (Cr. App.) 125 S. W. 574; *Celli v. State*, 60 App. 311, 131 S. W. 597; *Espy v. State*, 63 App. 625, 140 S. W. 1088; *Jones v. State* (Cr. App.) 146 S. W. 195; *Cortez v. State* (Cr. App.) 141 S. W. 99; *Rawls v. State* (Cr. App.) 150 S. W. 431; *Romero v. State*, 72 App. 105, 160 S. W. 1193; *Seats v. State* (Cr. App.) 170 S. W. 793; *Williams v. State* (Cr. App.) 137 S. W. 354; *Ramos v. State*, 71 App. 484, 160 S. W. 330; *Eanes v. State* (Cr. App.) 131 S. W. 1090; *Payne v. State*, 60 App. 322, 131 S. W. 1101; *Wilson v. State* (Cr. App.) 134 S. W. 704; *Paris v. State* (Cr. App.) 135 S. W. 547; *Thomas v. State*, 61 App. 505, 135 S. W. 550; *Frazier v. State*, 61 App. 647, 135 S. W. 583; *Wilson v. State*, 61 App. 628, 136 S. W. 447; *Shaw v. State* (Cr. App.) 138 S. W. 112; *Battle v. State* (Cr. App.) 140 S. W. 444; *Hilliard v. State*, 63 App. 626, 141 S. W. 90; *Yeary v. State* (Cr. App.) 153 S. W. 852; *Johnson v. State* (Cr. App.) 153 S. W. 849; *Woody v. State* (Cr. App.) 141 S. W. 950; *Hickman v. State* (Cr. App.) 141 S. W. 966; *McGinsey v. State* (Cr. App.) 144 S. W. 268; *Cooper v. State* (Cr. App.) 144 S. W. 937; *Adams v. State* (Cr. App.) 148 S. W. 1090; *Williams v. State* (Cr. App.) 150 S. W. 1163; *Weatherford v. State* (Cr. App.) 152 S. W. 926; *Young v. State* (Cr. App.) 153 S. W. 1133; *Chapa v. State* (Cr. App.) 154 S. W. 545; *Parker v. State* (Cr. App.) 154 S. W. 547; *Singleton v. State* (Cr. App.) 155 S. W. 212; *Rivers v. State* (Cr. App.) 155 S. W. 224; *McCain v. State* (Cr. App.) 156 S. W. 640; *Francis v. State*, 70 App. 243, 156 S. W. 1167; *Clifton v. State*, 70 App. 346, 156 S. W. 1179; *Castenara v. State*, 70 App. 436, 156 S. W. 1180; *Spencer v. State* (Cr. App.) 157 S. W. 479; *Borland v. State* (Cr. App.) 158 S. W. 532; *Brown v. State* (Cr. App.) 158 S. W. 812; *Fitzhugh v. State* (Cr. App.) 160 S. W. 710; *Hampton v. State*, 72 App. 189, 161 S. W. 966; *Leonard v. State* (Cr. App.) 161 S. W. 966; *Mayer v. State*, 72 App. 381, 162 S. W. 520; *Iughes v. State*, 72 App. 493, 163 S. W. 71; *Powell v. State*, 73 App. 146, 164 S. W. 852; *Whittlesey v. State* (Cr. App.) 167 S. W. 345; *Heidelberg v. State* (Cr. App.) 169 S. W. 1151; *Johnson v. State* (Cr. App.) 169 S. W. 1151; *Hill v. State* (Cr. App.) 170 S. W. 149; *Wilson v. State* (Cr. App.) 170 S. W. 149; *Cassanova v. State* (Cr. App.) 173 S. W. 662; *Smith v. State* (Cr. App.) 174 S. W. 824.

Whether the evidence was sufficient to justify a conviction, could not be reviewed in the absence of a statement of facts. *Williams v. State* (Cr. App.) 43 S. W. 517; *Id.* (Cr. App.) 43 S. W. 518.

In the absence of a statement of facts or bill of exceptions preserving the testimony, the appellate court cannot review either the insufficiency of the evidence to support a conviction or the mental status of the accused. *Pyron v. State*, 62 App. 639, 138 S. W. 705.

14. — **Variance between indictment or information and proof.**—Where there is no statement of facts, the Supreme Court will inquire no further than to ascertain whether the conviction has been had on a good indictment sustaining the charge and verdict except as to matters presented by a bill of exceptions and determinable without a statement of facts, or where it appears that the conviction has not been by due course of law. But in a felony case, the Supreme Court will revise the trial court's charge where it is not warranted by the indictment and under any state of the evidence would be manifestly erroneous and likely to prejudice defendant's rights. *Brown v. State*, 16 App. 197.

Where the record on appeal contains no statement of facts and no bill of exceptions, and the motion for new trial complains of variance between the allegations of the indictment and the proof, the appellate court cannot assume, from a mere statement of the fact in the motion, that there was in fact such variance. *Isaacs v. State*, 58 App. 256, 125 S. W. 397.

An alleged variance in the name of the person injured could not be considered on appeal from a conviction of murder, where the evidence was not in the record. *Johnson v. State*, 60 App. 305, 131 S. W. 1085.

In the absence of a statement of facts, the question that the evidence discloses an offense not charged in the indictment, is not reviewable. *Moore v. State* (Cr. App.) 138 S. W. 111.

A claim of variance between the allegations and the proof cannot be reviewed, in the absence of a statement of facts. *Hilliard v. State*, 63 App. 626, 141 S. W. 90; *Clanton v. State* (Cr. App.) 148 S. W. 1095.

15. — **Matters appearing in bill of exceptions.**—In the absence of a statement of facts, the bill of exceptions must show on its face that it contains all of the evidence as to the matter complained of. *Brown v. State*, 57 App. 269, 122 S. W. 565; *Wood v. State* (Cr. App.) 150 S. W. 195.

In case of a conflict between a bill of exceptions and statement of facts, the former will control. *Ezzell v. State*, 29 App. 521, 16 S. W. 782; *Arcia v. State*, 28 App. 198, 12 S. W. 599; *Smith v. State*, 4 App. 626; *Harris v. State*, 1 App. 74.

The prosecuting attorney's reference, in violation of art. 790, to defendant's

failure to testify in his own behalf on a former trial, is available on review, even in the absence of a statement of facts, where such reference appears from the bill of exceptions. *Brown v. State*, 57 App. 269, 122 S. W. 565.

The action of the trial court in entering a nunc pro tunc order allowing the state to substitute an information for one which has been lost, where the recitals of that order show that the proceedings were regular, that a motion was presented, and that the court heard evidence, must be presumed to be correct, in the absence of a statement of facts, even though defendant preserved a bill of exception, which merely objected to the order. *Banks v. State*, 62 App. 552, 138 S. W. 406.

A bill of exceptions to remarks of the county attorney in his argument is not reviewable, in the absence of a statement of facts. *Gamble v. State* (Cr. App.) 146 S. W. 551.

16. **Denial of change of venue.**—See art. 634, and notes.

17. **Habeas corpus proceedings.**—See art. 950, and notes.

18. **Statement of facts where motion for new trial is not filed.**—A motion for new trial is not essential to the right of a defendant to have his case considered on appeal both as to questions of law and of fact. *Cotton v. State*, 29 Tex. 186; *Maloy v. State*, 33 Tex. 599; *Babb v. State*, 8 App. 173.

A convicted defendant, whether he moves for a new trial or not, has a right, if he appeals, to have a statement of the facts certified and incorporated in the record. It is the duty of counsel engaged in the trial of the cause for the state and for the defendant to aid the court in according to the defendant this legal right, and when necessary, the court may, and should, require counsel to prepare and submit their respective statements of the facts within the proper time, and should punish them for contempt of court upon their refusal to do so. *Babb v. State*, 8 App. 173; *Longley v. State*, 3 App. 611.

In view of the provision that, where defendant has failed to move for a new trial, he is, nevertheless, entitled if he appeals, to have a statement of facts certified and sent up with the record, accused's failure to move for a new trial on refusal of bail on application for habeas corpus is not ground for dismissal of his appeal in the Court of Criminal Appeals. *Ex parte Firmin*, 60 App. 368, 131 S. W. 1113.

19. **Filing.**—As to filing out of time and extension of time of filing, see art. 845, *post*.

A bill of exceptions, which does not appear to have been filed, cannot be considered on appeal. *Oliver v. State*, 58 App. 50, 124 S. W. 637; *Martinez v. State* (Cr. App.) 40 S. W. 280.

Neither the statement of facts nor the instructions will be considered unless filed in the lower court. *Jones v. State* (Cr. App.) 31 S. W. 172; *Anz v. State* (Cr. App.) 31 S. W. 174.

A statement of facts filed more than a year after the adjournment of the term of court cannot be considered. *Reed v. State* (Cr. App.) 44 S. W. 833.

Where the clerk of the trial court certified that he erroneously omitted the file marks from the transcript, the statement of facts must be considered on appeal. *Nolen v. State*, 72 App. 450, 162 S. W. 869.

20. **Preparation in general.**—When a defendant appeals, if he desires a statement of facts to go up in the record, it is his duty, or that of his counsel, to make out a written statement of the facts given in evidence on the trial, and submit the same to the prosecuting counsel for inspection and agreement. If the statement be agreed upon, the attorneys for the state and the defendant or his attorney, shall sign the same, and it shall then be submitted to the judge, who shall, if he find it correct, approve and sign it, and it shall be filed with the clerk of the court. If the statement is not agreed upon, or if the judge will not approve it as agreed upon, the parties may submit their respective statements to the judge, who shall, from his own knowledge, with the aid of such statements, make out and sign and file with said clerk a correct statement of the facts proven on the trial. The trial judge is not required in the first instance, of his own motion, to make out the statement, but it devolves upon the defendant to take the initiative steps and use diligence to obtain the statement. *Vernon's Sayles' Civ. St.* 1914, arts. 2068, 2069; *Longley v. State*, 3 App. 611; *Turner v. State*, 22 App. 42, 2 S. W. 619; *Carter v. State*, 5 App. 458.

In the absence of any showing that defendant has been deprived of a full, fair and true statement of the facts, an objection that the statement of facts was prepared without the aid of the statement prepared for defendant, will be overruled where it appears that it was prepared from an agreed statement of facts. *Drake v. State*, 29 App. 265, 15 S. W. 725.

21. **Form, contents, and requisites of statement.**—The statement of facts must contain a full and complete statement of all facts in evidence on the trial of the cause, including copies of all papers, documents, and exhibits adduced in evidence, also the proof of the venue and identification of the defendant. Rule 115 for District Courts (142 S. W. xxv). Commissions, notices, and interrogatories in depositions adduced in evidence, must not be incorporated in the statement of facts. Rule 77 for District Courts (142 S. W. xxii); *Ballinger v. State*, 11 App. 323. Nor should certificates authenticating depositions or testimony taken before examining courts or coroners' inquests be incorporated in a statement of facts. *Kirby v. State*, 23 App. 13, 5 S. W. 165. Exceptions to evidence admitted over the defendant's objection may be embraced in a statement of facts in connection with the evidence objected to, but exceptions to evidence rejected or excluded can not be embraced in a statement of facts. Rule 56 for District Courts (142 S. W. xxi); *McWhorter v. State*, 13 App. 523; *Green v. State*, 12 App. 51; *Keeton v. State*, 10 App. 686; *Cooper v. State*, 7 App. 194; *Castanedo v. State*, Id. 582.

Statement of facts must show the venue. *Massey v. State* (Cr. App.) 28 S.

W. 467. A statement of facts consisting merely of the stenographer's notes will be stricken from the record. *Emmons v. State*, 34 App. 98, 29 S. W. 474, 475.

Statement of facts made up entirely of questions and answers, where there is nothing to bring it within rules prescribed in this section, indicating that the trial judge deemed it necessary to an understanding of the case to so make and constitute said statement of facts cannot be considered. *Hargrave v. State*, 53 App. 147, 109 S. W. 164.

As the court could not take judicial notice that a city is incorporated, on appeal from a conviction of an alleged poll tax delinquent for failure to appear for work on the roads, when legally summoned by a road commissioner of the county, an allegation in the statement of facts that accused resided in the corporate limits of a certain city, if intended to raise the point that accused was a resident of an incorporated city over whose streets the county would have no control, would be insufficient. *Bluitt v. State*, 56 App. 525, 121 S. W. 168.

In a prosecution for forgery, where defendant made a motion in the trial court for a new trial and in arrest of judgment on the ground that there was a variance between the check set out in the indictment and that offered in evidence, and the record does not show whether the contention is correct, and the statement of facts shows that the check was introduced in evidence, but does not show the check itself, it will be assumed on appeal that the check as described in the indictment was the one introduced in evidence. *Gherke v. State*, 59 App. 508, 123 S. W. 380.

Where, though the instrument claimed to have been forged was set out in the record, as alleged in the indictment, the instrument produced at trial was not in the record, the statement of facts merely reciting that it was offered in evidence and identified, a variance between the instrument alleged and that proved at trial cannot be considered on appeal. *Forcy v. State*, 60 App. 206, 131 S. W. 585, 32 L. R. A. (N. S.) 327.

If the alleged libelous article is not contained in the statement of facts, in a prosecution for libel, the judgment of conviction will not be affirmed. *Samper v. State*, 73 App. 375, 166 S. W. 511.

Where the attorneys failed to agree upon a statement of facts, and the county judge, in preparing the statements, made a complete statement of the facts in evidence on the main trial and then made a separate statement of the facts of the evidence heard on the motion for new trial, which was placed after the principal statement, there was no error. *Ethridge v. State* (Cr. App.) 169 S. W. 1152.

In a prosecution for violating the local option law, where the statement of facts on motion for new trial showed that the contest was directed to the question of defendant's guilt in making a sale, and not to the question whether the local option law was in effect in the county at the time of the alleged sale, such latter contention could not be relied on on appeal from denial of the motion. *Dodson v. State* (Cr. App.) 174 S. W. 1048.

The stenographic report of proceedings at a criminal trial, including the testimony in question and answer form, cannot be considered on appeal as a statement of facts. *Stephens v. State* (Cr. App.) 177 S. W. 92.

A writing contained in the record in a criminal case, but signed by no one, cannot be considered as a statement of facts. *Jones v. State* (Cr. App.) 177 S. W. 493.

A statement by defendant in the nature of a history of the case, without evidence to sustain it, unverified, and with the record not showing exceptions said to have been taken, cannot be considered. *Pritchard v. State* (Cr. App.) 177 S. W. 959.

22. Approval, signing and authentication.—A purported statement of facts, not approved by the trial judge, cannot be considered. *Galan v. State* (Cr. App.) 150 S. W. 1171; *Wright v. State*, 37 App. 3, 35 S. W. 150, 38 S. W. 811; *Id.*, 37 App. 146, 38 S. W. 1004; *Crawford v. State*, 44 S. W. 1088; *Loakman v. State*, 32 App. 561, 25 S. W. 20; *Id.*, 32 App. 563, 25 S. W. 22; *Keef v. State*, 44 Tex. 582; *Ex parte Malone*, 35 App. 297, 31 S. W. 665, 33 S. W. 360; *Edwards v. State*, 2 App. 525; *Pelham v. State*, 30 Tex. 422; *Castleman v. State*, 39 App. 1, 43 S. W. 991, 44 S. W. 823; *Moss v. State*, 39 App. 3, 43 S. W. 983, 44 S. W. 832; *Morse v. State*, 39 App. 566, 47 S. W. 645, 50 S. W. 342; *Hurst v. State*, 39 App. 196, 45 S. W. 573; *Baldwin v. State*, 39 App. 245, 45 S. W. 714; *Ex parte Self* (Cr. App.) 38 S. W. 996; *Jones v. State* (Cr. App.) 38 S. W. 1007; *Bailey v. State*, 37 App. 579, 40 S. W. 231; *Hamilton v. State* (Cr. App.) 40 S. W. 793; *Green v. State* (Cr. App.) 43 S. W. 1003; *Id.* (Cr. App.) 43 S. W. 1005; *Bowen v. State* (Cr. App.) 42 S. W. 994; *Childers v. State*, 36 App. 128, 35 S. W. 980; *Celli v. State*, 60 App. 311, 131 S. W. 597; *Brewer v. State* (Cr. App.) 153 S. W. 622; *Gilder v. State*, 61 App. 16, 133 S. W. 883; *Young v. State*, 61 App. 440, 134 S. W. 736; *Ward v. State* (Cr. App.) 146 S. W. 931; *Kidwell v. State* (Cr. App.) 148 S. W. 305; *Williams v. State* (Cr. App.) 150 S. W. 185; *Green v. State*, 71 App. 415, 159 S. W. 1183; *Bradford v. State*, 72 App. 76, 160 S. W. 1185; *Stewart v. State* (Cr. App.) 162 S. W. 517.

A statement of facts, not signed by the attorneys or by the trial judge, cannot be considered. *Clanton v. State* (Cr. App.) 148 S. W. 1095; *Beattie v. State* (Cr. App.) 38 S. W. 173; *Franklin v. State*, 37 App. 113, 38 S. W. 802, 1016; *Counts v. State*, 37 App. 125, 38 S. W. 1024; *Bryant v. State* (Cr. App.) 153 S. W. 1156; *Chapa v. State* (Cr. App.) 154 S. W. 545; *Mayes v. State*, 72 App. 381, 162 S. W. 520; *Humphries v. State*, 72 App. 298, 162 S. W. 522; *Russell v. State* (Cr. App.) 168 S. W. 95.

Without the signature of the trial judge there can be no statement of facts. A document signed only by the counsel for the state and the defendant, though purporting to be a statement of facts, will not be considered on appeal, and is of no avail for any purpose. *Bennett v. State*, 16 App. 236; *White v. State*, 9 App. 41; *Myers v. State*, 9 App. 157; *Lawrence v. State*, 7 App. 192; *Hemanus v. State*, *Id.* 372; *Owens v. State*, 4 App. 153; *Long v. State*, *Id.* 81; *Wakefield v. State*, 3 App. 39; *Gindrat v. State*, *Id.* 573; *Trevinio v. State*, 2 App. 90; *Brooks v. State*, *Id.*

1; *Johnson v. State*, 29 Tex. 492; *Opperman v. State*, 35 Tex. 364; *Ex parte Dick*, 25 App. 73, 7 S. W. 533; *Shaffer v. State*, 58 App. 647, 127 S. W. 206; *Sheppard v. State*, 63 App. 569, 140 S. W. 1090; *Rawls v. State* (Cr. App.) 150 S. W. 431; *Taylor v. State*, 73 App. 192, 164 S. W. 844.

A statement of facts not signed and approved by the judge of the trial court will be stricken from the record. *Staten v. State*, 63 App. 592, 141 S. W. 525; *Humphries v. State*, 71 App. 551, 160 S. W. 458; *Gerrate v. State*, 71 App. 531, 160 S. W. 695.

The judge before whom the case was tried is the only person who can authenticate the statement of facts. *Graham v. State*, 10 App. 684; *Myers v. State*, 9 App. 157; *Porter v. State*, 72 App. 71, 160 S. W. 1194.

"Approved" and signed by the official signature of the judge is not a sufficient authentication or certificate to a statement of facts not agreed to and signed by counsel. *Renn v. Samos*, 42 Tex. 104. See further, *George v. State*, 25 App. 229, 8 S. W. 25; *Spencer v. State*, 25 App. 585, 8 S. W. 648; *Lynn v. State*, 28 App. 515, 13 S. W. 367. And see, also, *Aistrop v. State*, 31 App. 467, 20 S. W. 989.

When the statement is signed by the judge but not by the parties, he need not certify that the parties failed to agree to such statement, though it is the common practice to so certify. *Bowden v. State*, 2 App. 56; *Williams v. State*, 4 App. 178. And where the statement of facts is signed by the judge, though signed by but one of the parties, it is sufficiently authenticated. *Trammell v. State*, 1 App. 121.

Where the trial judge simply wrote "Approved" with his official signature, such indorsement was insufficient to authenticate the statement of facts. *Hess v. State*, 30 App. 1099, 30 App. 477.

A statement of facts held insufficiently authenticated, where it was merely indorsed "Examined, approved and ordered filed as part of the records of this case." *Wilson v. State*, 34 App. 355, 32 S. W. 529.

"Signing" is synonymous with "subscribing," and the judge must sign the statement of facts at the conclusion thereof. A certificate signed by the judge preceding the statement of the facts, that "the following is a correct statement of the facts proved on the trial," is not a sufficient authentication to entitle the document to be considered as a statement of facts. *Wade v. State*, 22 App. 256, 2 S. W. 594. A certificate signed by the judge at the conclusion of the statement of facts that such statement is "a correct statement of the facts proven," is sufficient. It need not certify that it is a correct statement of all the facts proven. And the fact that the statement of facts was approved and certified by the judge after it had been filed by the clerk was a mere irregularity which did not affect its validity. *Kerrigan v. State*, 21 App. 487, 2 S. W. 756.

Where a conviction had been affirmed because the statement of facts and bills of exceptions had not been approved by the trial judge, and on rehearing it was shown that it was through no negligence or fault of accused, the case will be reinstated on the docket, and the affirmance set aside. *King v. State*, 59 App. 511, 129 S. W. 626.

Where it appears from the record that a statement of fact has not been signed or agreed to by counsel for the state and appellant, but has been indorsed "Approved" by the trial judge, and has no caption other than the statement of facts, etc., it is not so fatally defective that it will not be regarded. *Pollock v. State*, 60 App. 265, 131 S. W. 1094.

Where a statement of facts in a criminal case was not signed by the judge, it cannot be considered, even though his failure to sign it arose out of a mistake made by counsel of accused and the county attorney. *Douglas v. State*, 62 App. 599, 138 S. W. 385.

A statement of facts heard and shown by the record on motion for new trial is not embraced by an order for filing of statement of facts and bills of exceptions on the main trial after adjournment of court. *Patterson v. State*, 63 App. 297, 140 S. W. 1128.

Where a statement of facts was not approved by the regular judge of the court nor the judge who tried the case, and no reason was given therefor, and the statement of facts did not bear the true file mark, but was dated back, it could not be considered for any purpose. *Campbell v. State* (Cr. App.) 144 S. W. 966.

On appeal in a misdemeanor case, a purported statement of facts, indefinitely identified as such, will not be considered. *Drake v. State* (Cr. App.) 145 S. W. 622.

Where the trial court was not presented with a statement of facts, or with a certification that counsel were unable to agree with the district attorney, and requesting him to prepare a statement of facts, an instrument sent up in the record could not be considered as a statement of facts; nor could the case be reversed for want of a statement of facts. *Love v. State* (Cr. App.) 150 S. W. 183.

A purported statement of facts, made out by the stenographer, but not signed or agreed to by any of the attorneys, nor approved in any way by the court, in a criminal prosecution, is insufficient for review. *Hardee v. State* (Cr. App.) 150 S. W. 610.

A statement of facts, signed only by counsel for accused and not approved by the court, could not be considered. *Flagg v. State* (Cr. App.) 153 S. W. 852.

Under this article providing for the filing of a statement of facts as in civil cases, and under Rev. St. 1895, arts. 1379, 1380 [art. 845 et seq., post] providing for the signature of statements of facts in civil cases by the judge when the parties disagree, a statement on a criminal appeal, signed by the county attorney and approved by the district judge, is subject to consideration though not signed by accused's counsel. *Serop v. State* (Cr. App.) 154 S. W. 557.

In view of the provision that the same proceeding shall be had as to statements of fact as in civil cases; and *Vernon's Sayles' Civ. St.* 1914, arts. 2068, 2069, providing that, if the parties agree upon a statement of facts, it shall be submitted to the judge, who shall approve and sign it, if correct, and if the parties do not agree, or if the judge does not approve the same, the parties may submit their

statements of fact to the judge, who shall make out and file a statement. Held, that the trial judge need not in any case approve an incorrect statement of facts; and a purported statement of facts filed with the clerk, not approved by the trial judge, but filed without his approval by accused, who ignored the statement made and signed by the trial judge, cannot be considered on appeal. *Simpson v. State* (Cr. App.) 154 S. W. 999.

A transcript, not certified by the official stenographer, not signed by the attorneys who tried the case, and not approved by the trial judge, cannot be considered on appeal for any purpose. *Wright v. State*, 70 App. 73, 156 S. W. 624.

A statement of facts which has neither been signed nor filed in the trial court should not be copied in the transcript. *St. Clair v. State*, 72 App. 37, 160 S. W. 353.

A statement of facts and bills of exceptions, not approved by the judge trying the case, but by his successor, cannot be considered on appeal. *Allen v. State*, 72 App. 277, 162 S. W. 868.

The judge who actually tried the case is the judge who must sign the statement of facts and bills of exception as required by Rev. Civ. St. 1911, art. 2076; a bystander's bill being necessary if the bill of exceptions cannot be signed and approved by the judge who tried the case. *Kaufman v. State*, 72 App. 453, 163 S. W. 74.

A statement of facts never presented to the trial judge for approval, or at least not approved by him, cannot be considered on appeal in a criminal case. *Gomez v. State* (Cr. App.) 170 S. W. 711.

Supreme Court rule 8 (142 S. W. xi) provides that all motions relating to informalities in the manner of bringing a case into court shall be filed and entered by the clerk on the motion docket within 30 days after filing of the transcript in the Court of Civil Appeals; otherwise, the objection shall be considered waived, if it can be waived by the party. Rule 9 (142 S. W. xi) provides that motion to dismiss for want of jurisdiction to try the case, and for such defects as defeat the jurisdiction in the particular case, and cannot be waived, shall also be made, filed, and docketed at that time, provided that, if made afterwards, they may be entertained by the court upon such terms as it may deem proper. Motion to strike a statement of facts was filed more than 30 days after filing of the transcript in the Court of Civil Appeals, on the ground that the statement was improperly authenticated by the trial court's having certified it as true and correct only, as shown by the stenographer's transcript. Held, that the defect in the authentication was an informality relating to the manner of bringing the cause into the appellate court, not jurisdictional, and was waived by the delay in filing the motion. *McLane v. Haydon* (Civ. App.) 178 S. W. 1197.

23. Statement of facts in misdemeanor cases.—"The stenographers' act" not applying to misdemeanor cases tried in the county court, the statement of facts must be copied into the record and properly certified by the clerk. *Carney v. State*, 63 App. 370, 140 S. W. 440; *Wagoner v. State*, 63 App. 180, 140 S. W. 339; *Brogdon v. State*, 63 App. 473, 140 S. W. 352; *Guill v. State* (Cr. App.) 146 S. W. 198.

24. Conclusiveness and effect.—The certificate of the judge is conclusive as to the matters contained in the statement, and such statement cannot be impugned by affidavits dehors the record, or in any other extraneous manner. *Rainey v. State*, 20 App. 473; *Crist v. State*, 21 App. 361, 17 S. W. 260.

Statement of facts, as it appears in the record on appeal, will control the action of the court, and no presumption or inference will be indulged as to matters not contained in that statement. *Rainey v. State*, 20 App. 473; *Crist v. State*, 21 App. 361, 17 S. W. 260; *Parker v. State*, 24 App. 68, 5 S. W. 653; *Blackwell v. State*, 29 App. 199, 15 S. W. 597. And on habeas corpus, see *Ex parte Dick*, 25 App. 73, 7 S. W. 533.

Affidavits to cure and supply fatal defects as to the authentication of a statement of facts cannot be considered on appeal. *Hess v. State*, 30 App. 477, 17 S. W. 1099.

Statement of facts approved by the judge imports absolute verity. *Bigham v. State*, 36 App. 453, 37 S. W. 753.

The mere statement of a fact in the motion for new trial is not equivalent to a finding that the fact is true, so that, where the statement of facts did not describe the alleged forged instrument, so as to show that it varied from that alleged, and there was no finding of variance, the appellate court cannot presume a variance from a statement in the motion for new trial that there was a variance. *Forcy v. State*, 60 App. 206, 131 S. W. 585.

The court, on appeal, must take the record as it is filed; and it cannot take cognizance of any mistakes in the statement of facts as agreed to. *Sandoloski v. State* (Cr. App.) 143 S. W. 151.

On appeal in a criminal prosecution, the court is bound by the record as agreed on by counsel and certified to by the court. *Betts v. State* (Cr. App.) 144 S. W. 677.

The Court of Criminal Appeals will take the record and the statement of facts shown by the trial judge's qualification thereof as true against a conflicting affidavit by accused on his motion for a new trial and in arrest. *Brown v. State* (Cr. App.) 147 S. W. 1161.

The statement of facts approved by the trial court is binding on the court on appeal. *Lester v. State* (Cr. App.) 153 S. W. 861.

Where the statement of facts showed that when the state introduced the orders of the commissioners' court showing that local option had been adopted, defendant admitted that "the orders pertaining to local option being in force be considered read," and waived their reading, it sufficiently showed that the orders were introduced in evidence, and that they showed that local option was in force, especially where the court charged that the orders established that fact, and accused made no complaint of such charge in the motion for a new trial or on the

original argument on appeal, but contended for the first time on motion for a re-hearing that the adoption of local option was not proved. *Pierce v. State* (Cr. App.) 154 S. W. 559.

A statement of facts, agreed to by the county attorney and accused's counsel, and approved by the county judge, cannot be impeached by ex parte affidavits; but the court on appeal must take the record as made on the trial of the case, and certified to it. *Boyd v. State*, 72 App. 452, 162 S. W. 850.

25. — **Relation to bill of exceptions.**—The bill of exceptions controls the statement of facts. *Best v. State*, 72 App. 201, 164 S. W. 996; *Douglas v. State*, 58 App. 122, 124 S. W. 933, 137 Am. St. Rep. 930; *Baker v. State* (Cr. App.) 145 S. W. 607.

26. **Adoption of statement in other case.**—The statement of facts in another case cannot even by agreement be adopted as or made a part of the statement in the case at bar. *Trevinio v. State*, 2 App. 90.

27. **Amendment or correction.**—It is the duty of the judge to see that the statement of facts is in all respects correct, and he may, at any time before it is certified and filed, add to or take from the same, so as to correct it according to the truth of the matter. But after the statement has been agreed to, certified, and filed, a correction should never be made except in a most palpable case of error, or upon the most satisfactory proof of same. *Stephens v. State*, 10 App. 120; *Deggs v. State*, 7 App. 359; *Courtney v. State*, 3 App. 257; *King v. Russell*, 40 Tex. 124.

An approved and certified statement of facts cannot be amended by the trial judge after expiration of the term. *Belcher v. State*, 35 App. 168, 32 S. W. 770.

Where the statement of facts in the record of a prosecution for violating the local option law does not show that local option was in force where the sale was made, it cannot be aided by a statement in the court's charge that it was an admitted fact. *Treue v. State* (Cr. App.) 44 S. W. 829.

An omission in a statement of facts, made by agreement to contain all the facts proved, cannot be cured by a statement in the court's charge that the omitted fact was admitted on the trial. *Johnson v. State* (Cr. App.) 44 S. W. 834.

After the time authorized by law has expired for the trial judge to certify a statement of facts on appeal, in a criminal case, he cannot make a change in or an addition to said statement. *Brande v. State* (Cr. App.) 45 S. W. 17.

A defendant, appealing in a criminal case, cannot, after the record is made up, and after the statement of facts has been approved, have the statement of facts amended. *Gherke v. State*, 59 App. 508, 128 S. W. 380.

The statement of facts cannot be changed or added to, and hence, where the statement of facts, in a prosecution for unlawfully selling intoxicating liquors in local option territory, failed to show that the local option law had ever been adopted, the conviction must be reversed. *Lewis v. State*, 73 App. 16, 163 S. W. 705.

28. **Compelling district clerk to send up original statement.**—The motion of defendant on appeal from a criminal case in a district court for certiorari to require the district court clerk to send up the original statement of facts if the appellate court should strike out a certified copy thereof contained in the record will be denied where the court holds that there is a proper statement of facts. *Conger v. State*, 63 App. 312, 140 S. W. 1112.

29. **Incorporation in record.**—See notes under art. 844c.

Papers copied into the transcript, purporting to be a statement of facts will be struck on motion; it being essential that the original statement of facts be brought up. *Hardgraves v. State*, 61 App. 325, 135 S. W. 132.

Where, on an appeal of a criminal case, a statement of facts is not embodied in the transcript, it will not be reviewed. *Jenkins v. State*, 64 App. 86, 141 S. W. 222.

A statement of facts which is not filed in the lower court and copied in the record by the clerk cannot be reviewed on a conviction for a misdemeanor. *Jenkins v. State*, 64 App. 88, 141 S. W. 223.

Where an original statement of facts is sent up instead of being incorporated in the transcript, it cannot be considered. *Skinner v. State*, 64 App. 84, 141 S. W. 231.

Since, in Harris county, jurisdiction over misdemeanors has been conferred upon the criminal district court, in a misdemeanor prosecution in that court, the original statement of facts should be sent up with the record. *Doyle v. State* (Cr. App.) 143 S. W. 630.

Where, owing to confusion incident to the separation of the offices of district and county clerk, the bills of exception and statement of facts taken by accused were left in the office of the county clerk, and so were not copied in the transcript, a subsequent transcript containing them, certified by the district clerk, will be considered on appeal. *Scott v. State*, 71 App. 41, 158 S. W. 814.

30. **Affidavits.**—The certificate of the trial judge to the statement of facts is conclusive and hence affidavits are inadmissible. *Crist v. State*, 21 App. 361, 17 S. W. 260; *Rainey v. State*, 20 App. 473; *Arcia v. State*, 28 App. 198, 12 S. W. 599.

Affidavits held unavailable to supply fatal defects relative to authentication of a statement of facts. *Hess v. State*, 30 App. 477, 17 S. W. 1099.

An approved statement of facts cannot be attacked by ex parte affidavits. *Biggam v. State*, 36 App. 453, 37 S. W. 753.

In the absence of a statement of facts affidavits in the record are unavailing. *Hudson v. State* (Cr. App.) 37 S. W. 325.

31. **Effect of judicial precedent.**—Where a statement of facts was made up in violation of all the rules applicable thereto, the fact that the court considered it is not a precedent for the consideration of similar statements in other cases. *Tucker v. State* (Cr. App.) 150 S. W. 191.

Art. 844a. Time for presentation of statements of fact and bills of exception; time for preparation of findings; authority of judge after expiration of term of office.—That parties to causes tried in the district and county courts of this state may, by having an order to that effect entered on the docket, be granted twenty days after the adjournment of the term at which said cause may be tried to present and have approved and filed a statement of facts, bills of exception, and the judges of such courts shall also have ten days after adjournment of the term at which said causes may be tried, in which to prepare their findings of fact and conclusions of law in cases tried before the court; when demand is made therefor. And judges whose terms of office may expire before the adjournment of the term of said court at which said cause is tried, or during said period of twenty days after the adjournment of the term, may approve such statement of facts, bills of exceptions, and file such findings of facts and conclusions of law, as above provided. [Act Mar. 8, 1887, p. 17; Act 1903, ch. 25; Act 1907, S. S., p. 446, ch. 7, § 1.]

Explanatory.—The above provision was omitted from the revised Code of Criminal Procedure of 1911, and in view of such decisions as *Berry v. State* (Cr. App.) 156 S. W. 626; *Mueller v. State*, 61 App. 544, 135 S. W. 571; *Mosher v. State*, 62 App. 42, 136 S. W. 467, is included in this compilation.

Applicable to county courts and district courts not having official stenographers.—On appeal in a misdemeanor case from a county court having no court stenographer, the statement of facts must be filed during the term unless an order of the court is made during the term authorizing it to be filed within 20 days after adjournment, in which case it must be filed within such 20 days, which time cannot be again extended, since this article was not repealed by Rev. Civ. St. 1911, or Code Cr. Proc. 1911, arts. 845, 846, re-enacting Acts 31st Leg. (1st Ex. Sess.) c. 39, §§ 7, 15, relative to the appointment of official stenographers and prescribing the time and method of making and filing statements of fact and bills of exception, nor by the act of March 31, 1911 (Acts 32d Leg. c. 119), [arts. 844b-845c] with regard to the same matter, all of which apply only to courts having official stenographers. *Durham v. State* (Cr. App.) 155 S. W. 222; *Chaney v. State*, 62 App. 67, 136 S. W. 482; *Whitaker v. State*, 62 App. 36, 136 S. W. 1072; *Morris v. State*, 63 App. 375, 140 S. W. 775; *Farrell v. State*, 64 App. 200, 141 S. W. 535; *Hall v. State*, 70 App. 240, 156 S. W. 644.

Acts 31st Leg. c. 39 [arts. 845-846, post] providing for the appointment of official stenographers in certain district courts, and that upon such appointment the other provisions of the act shall apply, section 7 of which provides that, when appeal is taken from a judgment in a district or county court, the parties shall have 30 days after the adjournment of the term in which to prepare and file a statement of facts, repealed Acts 30th Leg. c. 24, providing for the appointment of official stenographers for district courts, but did not repeal chapter 7 [art. 844a], providing that parties to a cause in the district or county court may, by having an order entered to that effect on the docket, be granted 20 days after adjournment of the term to present and have filed a statement of facts, which act remains in force as to county courts and to district courts not appointing official reporters under Acts 31st Leg. c. 39; and in a county court case, where the term adjourned October 11th and the statement of facts was not filed until November 9th, such statement cannot be considered on appeal. *Mueller v. State*, 61 App. 544, 135 S. W. 571.

Acts 1903, c. 25, following Rev. St. 1895, art. 1382, which permitted the Courts of Civil Appeals, but not the Court of Criminal Appeals, to consider statements of facts filed after 10 days from adjournment, and Rev. St. 1895, art. 1381, which empowered the court to extend the time for filing statements of facts, and authorizing county and district courts in civil and criminal cases to allow 20 days after adjournment for the filing of statements of facts, re-enacted without material change by Acts 1907 (1st Ex. Sess.) c. 7 [art. 844a, ante] with added authority to the court to take 10 days after adjournment to file findings of facts and conclusions of law when demanded, was not repealed by Acts 1907 (1st Ex. Sess.) c. 24, of the same session, which after repealing Acts 1903, c. 60, and Acts 1905, c. 112, relating to court stenographers, authorized statements of facts in the district courts only to be filed 30 days after adjournment of court, nor by Acts 1909 (1st Ex. Sess.) c. 39 [art. 846, post] relating to appointment of court stenographers, which, by section 7, allows 30 days after adjournment for filing statements of fact, that act applying only to such district courts as have appointed official shorthand reporters and to county courts at law in civil cases only having special court stenographers, and thereunder in all criminal cases in the county courts only 20 days after adjournment of court is allowed for filing the statement of facts and bill of exceptions, and, if filed after 20 days, they will be stricken from the record. *Mosher v. State*, 62 App. 42, 136 S. W. 467.

Acts 30th Leg. (1st Ex. Sess.) c. 7 [this article] which granted to parties to causes tried in the district and county courts 20 days after adjournment to file a statement of facts and bills of exception, was repealed, so far as it related to filing statements of facts in civil actions in the county court, by Acts 30th Leg. (1st Ex. Sess.) c. 24, which repealed all laws in conflict therewith. Acts 31st Leg. (1st Ex. Sess.) c. 39, repealed Acts 30th Leg. (1st Ex. Sess.) c. 24, and provided by

section 7 [art. 845, post] that on appeal from the judgment in any cause in the district or county court the parties should have 30 days after adjournment to prepare and file a statement of facts and bills of exception, and which empowered the court to allow an additional time; and by section 13 [art. 845c, post] declared that its provisions as to the time allowed for filing of the statement of facts and bills of exceptions should apply to all civil cases tried in the county court. An appeal was taken in a civil case in county court at a term which adjourned January 28th; plaintiff being given 30 days to file bills of exception and statement of facts. By a later order, the time was extended an additional 30 days, and the statement of facts and bill of exceptions was filed March 28th. Held, that the statement of facts and bills of exceptions were filed within the time prescribed by law. *Sheppard's Home v. Wood* (Civ. App.) 140 S. W. 394.

The Official Stenographers' Act of 1909 (Acts 31st Leg. [1st Ex. Sess.] c. 39) § 7 [art. 845, post] providing that on an appeal from the district or county court the parties shall have thirty days after adjournment of court in which to prepare and file a statement of facts and bills of exception, by the express provisions of section 1 [art. 1920, Vernon's Sayles' Civ. St. 1914] of that act only applies where official shorthand reporters have in fact been appointed. *Hamilton v. State* (Cr. App.) 145 S. W. 348.

A statement of facts and bills of exception, not filed until 60 days after the adjournment of court in a misdemeanor prosecution, will be stricken on motion, in view of the stenographer's act of 1911 [arts. 844aa-846]. *Phillips v. State*, 72 App. 160, 161 S. W. 459.

Time allowed for filing in general.—When the term of the county court at which a conviction was had ended December 5, 1908, a statement of facts filed January 4, 1909, cannot be considered. *Trinkle v. State*, 57 App. 567, 123 S. W. 1114.

The statement of facts and bill of exceptions filed in a prosecution for violating the local option law were filed in the county court on December 5th, court having adjourned on November 5th. Held, that the statement and bill were filed too late, and will be stricken on motion; it being necessary under Acts 30th Leg. (1st Ex. Sess.) c. 7, § 1 [this article] that they be filed within 20 days after adjournment, upon procuring an order for that purpose in term. *Looper v. State*, 62 App. 98, 136 S. W. 792.

The statement of facts and bill of exceptions filed in a prosecution for violating the local option law were filed in the county court on December 5th, court having adjourned on November 5th. Held, that the statement and bill were filed too late, and will be stricken on motion; it being necessary under this article that they be filed within 20 days after adjournment, upon procuring an order for that purpose in term. *Looper v. State*, 62 App. 98, 136 S. W. 792.

Where accused was convicted of misdemeanor in the county court, and the term of that court ended July 1st, a statement of facts filed on July 27th is too late and will not be considered on appeal. *Thompson v. State*, 64 App. 514, 142 S. W. 908.

Bills of exception not filed within 20 days after the adjournment of the county court wherein appellant was convicted of a misdemeanor, cannot be considered on appeal. *Thompson v. State*, 64 App. 514, 142 S. W. 908.

A bill of exceptions in a misdemeanor case not filed until 28 days after adjournment cannot be considered on appeal. *Gavinia v. State* (Cr. App.) 145 S. W. 594.

On appeal from a conviction, a statement of facts filed December 5th is not subject to consideration, where the trial term adjourned November 16th. *Decker v. State* (Cr. App.) 154 S. W. 566.

A statement of facts, not filed till 24 days after adjournment of the term at which defendant was tried, is too late, and so cannot be considered. *Partridge v. State*, 71 App. 302, 158 S. W. 549.

Where the term of the county court at which accused was convicted adjourned May 3d, a statement of facts and bills of exception, not approved and filed until July 2d, cannot be considered, coming more than 20 days after adjournment. *Stubbs v. State*, 71 App. 390, 160 S. W. 87.

Where the term at which defendant was convicted of a misdemeanor adjourned May 28th, a statement of facts and bill of exceptions, not filed until July 30th, could not be considered, either in passing on alleged errors or as the basis for supporting the judgment. *Hall v. State*, 72 App. 161, 161 S. W. 457.

Where a term of the county court adjourned on May 31st, a statement of facts and bills of exception filed June 30th could not be considered, since such papers must be filed within 20 days after adjournment of court. *Hart v. State*, 72 App. 160, 161 S. W. 458.

Where accused was convicted at a term of the county court which adjourned August 16th, and his statement of facts was not filed until September 15th following, it was not filed within the required 20 days after adjournment of the court and could not therefore be considered. *Hampton v. State*, 72 App. 189, 161 S. W. 966.

On appeal from a conviction for petty theft, in the county court, a statement of facts filed more than 20 days after the adjournment of the court could not be considered. *Staha v. State*, 72 App. 386, 162 S. W. 521.

Where accused was convicted at a term that adjourned September 20, 1913, and the statement of facts was not filed until October 17th, and the bills of exceptions were not filed until the 19th, the bills could not be considered, and hence matters set up in a motion for new trial could not be reviewed. *Joiner v. State*, 72 App. 620, 163 S. W. 436.

Where a statement of facts and bills of exception were not filed until nearly 90 days after adjournment of the court at which defendant was tried, they were subject to a motion to strike. *Whitehead v. State* (Cr. App.) 163 S. W. 530.

Where, in a prosecution for impersonating an officer, neither the statement of

facts nor the bills of exceptions were filed within the time allowed by law in misdemeanor cases, they would be stricken on motion. *Brown v. State* (Cr. App.) 170 S. W. 714.

In a county court case, the statement of facts and bills of exception must be filed within 20 days after adjournment or they cannot be considered. *Whitten v. State* (Cr. App.) 170 S. W. 719.

Extension of time for filing.—See Willson's Cr. Forms, 1028.

Where accused was tried in county court, where there was no court stenographer, the court had no power to extend the time for filing bills of exception and the statement of facts longer than 20 days after adjournment. *McGowen v. State*, 63 App. 85, 138 S. W. 402; *Barfield v. State*, 62 App. 400, 137 S. W. 920; *Davis v. State*, 62 App. 537, 138 S. W. 396; *Wagoner v. State*, 63 App. 180, 140 S. W. 339; *Richards v. State*, 63 App. 176, 140 S. W. 459; *Morris v. State*, 63 App. 375, 140 S. W. 775; *Wise v. State*, 63 App. 618, 140 S. W. 1085; *Foeke v. State* (Cr. App.) 144 S. W. 267; *Toliver v. State* (Cr. App.) 144 S. W. 1138; *Gavinia v. State* (Cr. App.) 145 S. W. 594; *De Friend v. State* (Cr. App.) 153 S. W. 881; *Butler v. State*, 72 App. 81, 160 S. W. 1191.

A statement of facts filed out of term time cannot be considered unless such filing was allowed by an order of court. *Williams v. State*, 35 App. 391, 33 S. W. 1080.

Whether such an order shall be made is discretionary with the trial judge. *Irby v. State*, 34 App. 283, 20 S. W. 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 App. 160, 25 S. W. 771.

And such statement of facts must have been filed within the ten days allowed. *Yungman v. State*, 35 App. 80, 31 S. W. 663; *Bonner v. State*, 38 App. 599, 44 S. W. 172. And see *Spencer v. State*, 34 App. 238, 30 S. W. 46, 32 S. W. 690.

The ten days' time which may be allowed after the adjournment of the court for filing a statement of facts, are ten days exclusive of the day of adjournment. *Moore v. State*, 7 App. 42.

If the trial court, by order entered of record, allows a statement of facts to be prepared and filed within ten days after the adjournment of the court, exceptions to evidence admitted over defendant's objections may be embodied in it, and will be considered on appeal. *Keeton v. State*, 10 App. 636.

A statement of facts must be authenticated and filed during the term of court at which the trial was had, unless during such term an order was made allowing the same to be certified and filed within ten days after the adjournment of the term. *Durley v. State*, 11 App. 172; *Brown v. State*, 16 App. 245; *Brown v. State*, *Id.* 197. Where an order has been made authorizing the filing of a statement of facts within ten days after the adjournment of the court, such order must appear in the transcript sent up on appeal, or a statement of facts filed after adjournment of the court will not be considered. And when such order has been made and appears in the transcript, a statement of facts filed after the expiration of the time allowed by such order will not be considered. *Holt v. State*, 20 App. 271; *Henderson v. State*, *Id.* 304; *Gerrold v. State*, 13 App. 345.

The court, of its own motion, may make and have entered the order allowing time after adjournment for the term to prepare, certify, and file a statement of facts, such time not to exceed ten days after the adjournment. *Henderson v. State*, 20 App. 304; *Babb v. State*, 8 App. 173.

Entry of ten-day order on judge's short minutes is not sufficient, unless carried forward in the minutes of the court. *Pangburn v. State* (Cr. App.) 56 S. W. 72.

It is the imperative duty of counsel to see that the order allowing 20 days after adjournment in which to file statement of facts is entered by the judge on the docket, and inadvertence or neglect on part of judge will not excuse counsel for failure to have the order entered. *Sampson v. State*, 45 App. 556, 78 S. W. 926.

If no order was made during the term granting defendant twenty days to file statement of facts and bills of exceptions, such order cannot be made at next succeeding term. *Nichols v. State*, 55 App. 211, 115 S. W. 1197.

A statement of facts in the record on appeal in a misdemeanor case prosecuted in the county court, which shows that it was agreed to and signed by the attorney for the state and the defendant, approved by the judge, and filed, all after the expiration of the 20 days allowed by law therefor, though within the limits of time granted by the court, does not authorize the court to consider it. *Guill v. State* (Cr. App.) 146 S. W. 198.

The court adjourned for the term at which accused was tried on March 16, 1912. An order was granted on the 15th, allowing 20 days from and after April 17, 1912, in which to file a statement of facts and bills of exception. Held, that a bill of exceptions to the refusal of an application for a continuance, filed May 15, 1912, was too late. *Willcox v. State* (Cr. App.) 150 S. W. 898.

Where the order of the county court overruling accused's motion for new trial allowed him 20 days from adjournment to prepare and file bills of exception and a statement of facts, bills of exception and a statement of facts filed subsequently thereto cannot be considered. *Terry v. State*, 70 App. 469, 157 S. W. 764.

In a misdemeanor case, where the court by verbal order extended the time within which to file a statement of facts and bills of exception, such order could not be entered nunc pro tunc after an appeal had been perfected. *Smith v. State*, 72 App. 206, 162 S. W. 835.

Where, in a misdemeanor case, the only authority to file a statement of facts and bills of exception after term time was a verbal order of the judge, a statement and bills filed within the time as so extended could not be considered. *Smith v. State*, 72 App. 206, 162 S. W. 835.

Approval by judge after his term of office has expired.—The provision of Rev. Civ. St. 1911, art. 2076, and this article that any judge whose term of office may expire during the time prescribed for the filing of the statement of facts and bill of exceptions may approve the same, the statement of facts and bill of exceptions must be approved and signed by the trial judge after his term of office, providing his signature and approval can be obtained. *Richardson v. State*, 71 App. 111, 158 S. W. 517.

Diligence of defendant and matters excusing failure to file in time.—To be entitled to the provisions of the act of March 8, 1887, it must be shown that due diligence has been used to secure the approval of the trial judge to the statement, and the filing of the same within the period prescribed; and that the failure to do these acts was not the fault of the party or his counsel, but was the result of causes beyond his control. *George v. State*, 25 App. 229, 8 S. W. 25; *Spencer v. State*, 25 App. 585, 8 S. W. 648.

Such diligence does not appear in this case, and hence we can not consider the statement of facts found in the record. *Farris v. State*, 26 App. 105, 9 S. W. 487.

A statement of facts, to be sufficient, must be approved by the trial judge and filed in the trial court, either in term time, or under an order of court, duly entered, within ten days after the adjournment of the court. This rule, however, has been so far qualified as that when the statement of facts is filed after the times specified, and the appellant shows to the satisfaction of this court that he has used due diligence to secure the approval of the trial judge and the filing of the same within the period prescribed, and that his failure was not the fault of himself or his attorney, but was the result of causes beyond his control, the said statement will be received as a part of the record in the cause, and will be considered on appeal. See the original opinion and the opinion on rehearing for circumstances, held not to bring the statement of facts tendered in this case within this rule. *George v. State*, 25 App. 229, 8 S. W. 25.

Statement of facts approved by the trial judge and filed after the adjournment of the court, or after the expiration of the subsequent ten days allowed by the court, will not be considered on appeal, unless the appellant, under the provisions of the act of March 8, 1887, shows to the satisfaction of this court that he used due diligence to procure the approval and the filing of the same within the time prescribed by law, and that his failure to do so was not due to the fault or laches of himself or his attorney, but was the result of causes beyond his control. See the opinion in extenso for a showing under this act held insufficient. *Spencer v. State*, 25 App. 585, 8 S. W. 648.

Counsel for appellant by his affidavit shows in substance that he was very busy during the ten days next after adjournment, but that on the tenth day he completed his statement and handed it to the district attorney at 12 m. of that day; that the district attorney at 3 p. m. told counsel that he could not agree. Counsel told the district attorney that he would agree to such corrections as the district attorney would make, and also informed him that he must leave on the train at half past six p. m.; that the district attorney said he was busy and could not then make the necessary alterations, but would do so later in the day. Counsel left the statement with the district attorney, with the request that the alterations be made and then presented to the judge for approval, and then be filed. Counsel on his way to take the train again saw the district attorney, who informed him that he would not agree to any part of said statement. Counsel then left on the train. Other parts of the affidavit relate to matters occurring after the ten days had passed, and, as they do not affect the question of diligence, need not be stated. *Farris v. State*, 26 App. 105, 9 S. W. 487.

If a statement of facts be not filed in time, it will not be considered on appeal, unless the appellant, in compliance with the act of March 8, 1887, shows that he used due diligence to have it authenticated and filed in time, and that the failure to do so was not attributable to him or his attorney, but resulted from causes beyond their control. See the opinion in this case for a showing held insufficient. *Id.*

A bill of exceptions not approved by the judge, and filed during the term of court, will not be considered, even though the judge certifies that the bill was handed to him during the term and he had misplaced it. *Riojas v. State*, 36 App. 182, 36 S. W. 268; *Mitchell v. State*, 36 App. 278, 33 S. W. 367, 36 S. W. 456; *McCullar v. State*, 36 App. 213, 36 S. W. 585, 61 Am. St. Rep. 847; *Russell v. State*, 35 App. 8, 29 S. W. 43.

Statement of facts filed after expiration of the time will be considered if the delay was caused by fault of the judge. *Henderson v. State*, 37 App. 79, 33 S. W. 617.

Bill of exceptions will not be considered because county attorney agreed that it might be filed after term time. *Nichols v. State*, 37 App. 616, 40 S. W. 502.

Where the term of court at which accused was tried adjourned December 10, 1910, and the statement of facts was not filed until January 6, 1911, and though defendant's attorneys filed an affidavit that the statement was presented to the county judge within 20 days after adjournment of the court, the judge made a certificate that he had no recollection when the statement was delivered to him, the bills not having been approved by the court until January 6, 1911, and there being nothing to show when they were in fact presented to the judge before the day they were approved and filed, they could not be considered. *Sullivan v. State*, 62 App. 410, 137 S. W. 700.

Presenting bills of exceptions to the county judge does not constitute a filing thereof, but it is the duty of the appellant to follow up the bill and see that it is approved by the judge and presented to the clerk for filing during the term at which the case was tried. *Diggs v. State*, 64 App. 122, 141 S. W. 100.

That the county court in a misdemeanor case, authorized under the statute to allow only 20 days after the adjournment for filing the statement of facts and

bills of exceptions, made an order allowing 30 days therefor, and at the time convinced defendant's counsel that the law authorized him to do so, is not, as against a motion to strike them, a legal excuse for not filing them in the 20 days. *Butler v. State*, 72 App. 81, 160 S. W. 1191.

During the following week after court adjourned on August 16th, accused prepared a bill of exceptions and went to the county attorney's office several times to submit the bill to him, and learned that he was in another city, and then took the papers to the county judge who declined to act upon them until the county attorney had seen them. On the 19th day after adjournment the county attorney claimed that he was then too busy to pass upon the bill, but would do so later. Accused then left the papers with the county attorney and did not again present them to the judge, and they were not presented to the judge until September 12th, 27 days after adjournment, when they were signed and filed. Held, that accused did not show such diligence in having the bill of exceptions approved and filed as required by statute and the law, so that it cannot be considered on appeal. *Laws v. State*, 73 App. 286, 164 S. W. 1015.

Where the county attorney declined to agree to the statement of facts because it was made up from the evidence in a companion case, and the county judge, on being informed of such fact, and being asked to prepare a statement of facts, declined to do so, because there was a stenographic record in the companion case and the parties ought to be able to agree, but said that he would see that an agreement was made, all of which occurred within 20 days after the adjournment of the court, accused was either entitled to have the record considered or to have a reversal because deprived of a record, though the statement of facts and bills of exception were not filed until more than 20 days after adjournment of the court. *Harris v. State* (Cr. App.) 172 S. W. 1146.

Where a statement of facts was properly approved and filed in the trial court within the required time, and should have accompanied the record, but the clerk failed to forward it, the clerk certifying to the facts and forwarding the statement of facts will make it a part of the record on appeal. *Medford v. State* (Cr. App.) 174 S. W. 607.

Effect of failure to file in time.—An appeal in a criminal case will not be reviewed, where the statement of facts or bill of exceptions is not filed until after adjournment of the term, and where there is no order entered of record, as provided for by the statute, allowing 20 days after adjournment in which to file such statement or bill. *Misso v. State*, 61 App. 241, 135 S. W. 1173; *Muse v. State* (Cr. App.) 33 S. W. 607; *Hedrick v. State* (Cr. App.) 39 S. W. 943; *Goss v. State* (Cr. App.) 40 S. W. 263; *Powell v. State* (Cr. App.) 57 S. W. 668; *Duke v. State* (Cr. App.) 57 S. W. 669; *McAvoy v. State* (Cr. App.) 58 S. W. 1010; *Durham v. State*, 57 App. 279, 122 S. W. 553; *Crane v. State*, 57 App. 476, 123 S. W. 423; *Smith v. State*, 62 App. 281, 136 S. W. 1063; *Gentry v. State*, 62 App. 497, 137 S. W. 696; *Davis v. State*, 62 App. 537, 138 S. W. 396; *Haynes v. State*, 63 App. 181, 139 S. W. 1155; *Byrd v. State*, 63 App. 487, 140 S. W. 1087; *Hamilton v. State* (Cr. App.) 145 S. W. 348; *Lee v. State* (Cr. App.) 148 S. W. 316; *Snell v. State* (Cr. App.) 150 S. W. 615; *Yoakum v. State* (Cr. App.) 150 S. W. 910; *Smith v. State* (Cr. App.) 152 S. W. 173; *Wildner v. State* (Cr. App.) 152 S. W. 1041; *Yeary v. State* (Cr. App.) 153 S. W. 852; *De Friend v. State* (Cr. App.) 153 S. W. 881; *Gibbs v. State*, 70 App. 278, 156 S. W. 687; *Stephens v. State*, 71 App. 308, 158 S. W. 531; *Stephens v. State*, 71 App. 308, 158 S. W. 532; *St. Clair v. State*, 72 App. 37, 160 S. W. 353; *Wilson v. State*, 71 App. 547, 160 S. W. 454; *Calhoun v. State*, 72 App. 24, 160 S. W. 706; *Stoner v. State*, 72 App. 482, 162 S. W. 836; *Newsome v. State*, 72 App. 453, 162 S. W. 891; *Pena v. State*, 72 App. 621, 163 S. W. 74; *Archer v. State*, 73 App. 15, 163 S. W. 441; *Powell v. State*, 73 App. 146, 164 S. W. 852; *Renteria v. State* (Cr. App.) 171 S. W. 712; *Herrera v. State* (Cr. App.) 175 S. W. 696.

In a prosecution for misdemeanor tried in the county court, statements of fact and bills of exception filed after the adjournment of the court will be stricken, unless permission of the court to so file them appears of record. *Sharp v. State* (Cr. App.) 150 S. W. 943; *Ikard v. State* (Cr. App.) 135 S. W. 547; *Dilliard v. State*, 62 App. 321, 137 S. W. 356; *Brogdon v. State*, 63 App. 473, 140 S. W. 353; *Diggs v. State*, 64 App. 122, 141 S. W. 100; *Collins v. State*, 72 App. 44, 161 S. W. 115; *Ferguson v. State*, 72 App. 494, 163 S. W. 65; *McAdams v. State* (Cr. App.) 172 S. W. 792; *Henderson v. State* (Cr. App.) 172 S. W. 793.

A statement of facts filed after the adjournment of the trial court without an order therefor is no part of the record. *Partin v. State* (Cr. App.) 30 S. W. 1067.

A statement of facts filed after term time without consent is no part of the record. *Valdes v. State* (Cr. App.) 35 S. W. 372.

Statement of facts filed after time allowed cannot be considered. *Lewis v. State* (Cr. App.) 39 S. W. 370.

Statement of facts and bills of exceptions, filed more than 20 days after adjournment, will on motion of the state be stricken out. *Moon v. State* (Cr. App.) 177 S. W. 970.

Duplicate statement.—Under Acts 30th Leg. (1st Ex. Sess.) cc. 7, 24, and Acts 31st Leg. (1st Ex. Sess.) c. 39, prescribing the time and method of filing statements of facts and bills of exception, a statement of facts on appeal from criminal cases tried in the district court must be filed in duplicate, while in criminal cases tried in the county court the statement of facts need not be filed in duplicate, and must be copied in the transcript. *Morris v. State*, 63 App. 63, 140 S. W. 775.

Under the statute authorizing the court to grant 20 days after adjournment for filing statements of fact, a statement of facts in county court misdemeanor cases is not prepared by a stenographer in duplicate, but only one copy is made by the attorneys or the court, and must necessarily be copied into the record, and not sent up separately. *Salinas v. State* (Cr. App.) 142 S. W. 908.

Time allowed under former law (Rev. St. 1895, art. 1365).—See *Harrison v. State*, 16 App. 325; *Morris v. State*, 17 App. 660; *Shubert v. State*, 20 App. 320; *Stewart*

v. State, 24 App. 418; Cummins v. State, 12 App. 121; Golden v. State, 22 App. 1, 2 S. W. 531; Clement v. State, 22 App. 23, 2 S. W. 379; Tomlin v. State, 25 App. 676, 8 S. W. 931; Burke v. State, 25 App. 172, 7 S. W. 873; Livar v. State, 26 App. 115, 9 S. W. 552; Jacobs v. State, 28 App. 79, 12 S. W. 408; Exon v. State, 33 App. 461, 26 S. W. 1088; Frisby v. State, 26 App. 180, 9 S. W. 463; Wiseman v. State, 32 App. 454, 24 S. W. 413; Brown v. State, 33 App. 147, 25 S. W. 789; Blackwell v. State, 33 App. 278, 26 S. W. 397, 32 S. W. 128; Parker v. State (Cr. App.) 34 S. W. 264; Bryant v. State, 35 App. 394, 36 S. W. 79; Moye v. State (Cr. App.) 38 S. W. 38; Williams v. State, 37 App. 147, 38 S. W. 990; Culp v. State (Cr. App.) 40 S. W. 488; Harper v. State, 41 App. 353, 55 S. W. 178; Culver v. State, 42 App. 645, 62 S. W. 923.

Art. 844aa. Duties of reporter.—It shall be the duty of the official shorthand reporter to attend all sessions of the court; to take full shorthand notes of all the oral testimony offered in every case tried in said court, together with all objections to the admissibility of testimony, the rulings and remarks of the court thereon, and all exceptions to such rulings; to preserve all shorthand notes taken in said court for future use or reference for four years, and to furnish to any person a transcript in question and answer form of all such evidence or other proceedings or any portion thereof, upon the payment to him of the compensation hereinafter provided. [Rev. St. 1911, art. 1923, superseded. Act 1911, p. 264, sec. 4.]

See notes under art. 844c.

Recording objections to charge.—See Jefferson Cotton Oil & Fertilizer Co. v. Pridgen & Congleton (Civ. App.) 172 S. W. 739.

Art. 844b. Duty of shorthand reporter to transcribe notes on appeal being taken; duplicate; fees.—In case an appeal is perfected from the judgment rendered in any case, the official shorthand reporter shall transcribe the testimony and other proceedings recorded by him in said case in the form of questions and answers, certifying that such transcript is true and correct, and shall file the same in the office of the clerk of the court within such reasonable time as may be fixed by written order of the court. Said transcript shall be made in duplicate; for which said transcript the official shorthand reporter shall be paid the sum of fifteen cents per folio of one hundred words for the original copy and no charge shall be made for the duplicate copy, said transcript to be paid for by the party ordering the same on delivery, and the amount so paid shall be taxed as costs. [Act 1903, ch. 60; Act 1905, ch. 112; Act 1907, 1st S. S. ch. 24, § 5, repealed; Act 1909, p. 376, § 5, repealed; Act 1911, p. 265, ch. 119, § 5.]

Explanatory.—Act 1909, p. 376, §§ 5, 6, 8, 9, 13, were omitted from the revision of 1911, and the act amendatory thereof is, for convenience, inserted in this compilation as arts. 844b–845b, the provisions thereof having reference to criminal cases.

Construing provisions together.—This article and articles 844c and 845c must be construed together, and, where the parties on appeal have agreed to a statement of facts by virtue of article 845c, they lose the right to object that this article and article 844c have not been complied with. Gulf, C. & S. F. Ry. Co. v. Prazak (Civ. App.) 170 S. W. 859.

Recording objections to charge.—See Jefferson Cotton Oil & Fertilizer Co. v. Pridgen & Congleton (Civ. App.) 172 S. W. 739.

Form and contents of statement.—See notes under art. 1924, Vernon's Sayles' Civ. St. 1914.

Under this article and the following article, the statement of facts must be reduced to a narrative, and not in question and answer form. Mooney v. State, 73 App. 121, 164 S. W. 828.

What constitutes independent transcript.—Under this article, and articles 844c and 845c, where appellant, without ordering any transcript of the testimony in the form of questions and answers, and without any such transcript having been prepared or filed, procured the official reporter to prepare a narrative form of statement of facts, which was agreed to by the parties and approved by the trial judge, and which was presumably prepared from the notes taken at the trial, and not from any transcript thereof, the reporter did not act officially in preparing such transcript, but unofficially as the agent of appellant, and the statement constituted a "statement of facts independent of the transcript of the notes of the reporter," as permitted by article 845c. Canode v. Sewell (Civ. App.) 170 S. W. 271.

Authentication in addition to certification by stenographer.—A copy of a statement of facts, certified by the official stenographer and filed in the trial court, but not authenticated, cannot be considered on appeal. Kemper v. State, 57 App. 355, 123 S. W. 131.

Where the record contained what purported to be the alleged newly discovered testimony presented on motion for new trial, certified by the stenographer alone, and in no way authenticated or approved by the trial judge, or agreed to by the parties, it could not be considered for any purpose. *Herrin v. State* (Cr. App.) 173 S. W. 1198.

Filing stenographer's transcript.—Under this article the stenographer's transcript was never intended to be filed in the appellate court, but was to be used by the party ordering the transcript in preparing the statement of facts. *Rader v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 137 S. W. 718.

Preparation of statement of facts.—Under this article, and articles 844c and 845c, where appellant, without ordering any transcript of the testimony in the form of questions and answers, and without any such transcript having been prepared or filed, procured the official reporter to prepare a narrative form of statement of facts, which was agreed to by the parties and approved by the trial judge, and which was presumably prepared from the notes taken at the trial, and not from any transcript thereof, the reporter did not act officially in preparing such transcript, but unofficially as the agent of appellant, and the statement constituted a "statement of facts independent of the transcript of the notes of the reporter," as permitted by article 845c. *Canode v. Sewell* (Civ. App.) 170 S. W. 271.

A statement of facts prepared from the stenographer's notes, no transcript of which had been filed, should be stricken, where the parties have not agreed to a statement prepared in some other manner as authorized by article 845c. *Gulf, C. & S. F. Ry. Co. v. Prazak* (Civ. App.) 170 S. W. 859.

The party appealing from a judgment where the testimony below was taken down as prescribed by this article, without requesting any transcript in that form or in narrative form, prepared a statement of facts to which appellee did not agree, but which was approved and ordered filed. Held, in view of article 844c, that article 845c only meant that the parties might agree to dispense with the official transcript, but did not give the appellant the right to require appellee to pass upon such statement, which would not be considered as a statement of facts.—*Buffalo Bayou Co. v. Lorentz* (Civ. App.) 170 S. W. 1052.

In view of articles 844c and 845c, an appellant might, without having the reporter prepare the transcript, prepare a statement of facts which, when approved by the trial judge, will be considered, though the appellee did not agree thereto. *Ft. Worth Pub. Co. v. Armstrong* (Civ. App.) 175 S. W. 1113.

Filing transcript in duplicate, and sending up original statement of facts.—Under the provision requiring the official reporter to transcribe the testimony, certifying that the transcript is correct, and file it with the clerk; and article 844c requiring appellant to prepare a statement of facts in duplicate, and that the original shall be sent up as a part of the record on appeal. Held that, where it was not sent up with the record, a purported statement of facts, copied into the record, will be stricken on motion. *Hardgraves v. State*, 61 App. 422, 135 S. W. 144; *Davis v. State*, 61 App. 301, 135 S. W. 129; *Slatter v. State*, 61 App. 243, 136 S. W. 770.

The law now requires the statement of facts to be filed in duplicate in felony cases, and the original to be sent with the papers to the appellate court. *La Grone v. State*, 61 App. 170, 135 S. W. 121.

In the county courts a statement of facts must be copied into the record and certified to by the clerk, instead of the original statement being sent up, as in felony cases. *Looper v. State*, 62 App. 96, 136 S. W. 791.

Under Acts 30th Leg. (1st Ex. Sess.) cc. 7, 24, and Acts 31st Leg. (1st Ex. Sess.) c. 39 [arts. 844a-846] prescribing the time and method of filing statements of facts and bills of exception, a statement of facts on appeal from criminal cases tried in the district court must be filed in duplicate, while in criminal cases tried in the county court the statement of facts need not be filed in duplicate, and must be copied in the transcript. *Morris v. State*, 63 App. 375, 140 S. W. 775.

Under Acts 32d Leg. c. 119, § 1 [Vernon's Sayles' Civ. St. 1914, art. 1920] which provides that, "for the purpose of preserving a record in all cases for the information of the courts, jury, and parties, the judges of the district courts shall appoint official shorthand reporters for such courts," and this article and article 844c, which provide that the transcript of the evidence in question and answer form, as well as the statement of facts in narrative form, "shall be filed in duplicate," the statement of facts should be made out in duplicate, one of which should be filed in the district court. *Witherspoon v. Crawford* (Civ. App.) 153 S. W. 633.

Art. 844c. Party appealing may make statement from transcript filed by shorthand reporter; agreement of parties; shorthand reporter may make statement of facts; fees.—Upon the filing in the office of the clerk of the court by the official shorthand reporter of his transcript as provided in Section 5 of this Act [art. 844b], the party appealing shall prepare or cause to be prepared from the transcript filed by the official shorthand reporter, as provided in Section 5 of this Act, a statement of facts, in duplicate, which shall consist of the evidence adduced upon the trial, both oral and by deposition, stated in succinct manner and without unnecessary repetition, together with copies of such documents, sketches, maps and other matters as were used in evidence. It shall not be necessary to copy said statement of facts in the transcript of the clerk, on appeal, but the same shall, when agreed to by the parties and approv-

ed by the judge, or in the event of a failure of the parties to agree and a statement of facts is prepared and certified by the judge trying the case, be filed in duplicate with the clerk of the court, and the original thereof shall be sent up as a part of the record in the cause on appeal. Provided, however, that the official shorthand reporter shall, when requested by the party appealing, prepare from the transcript filed by the official shorthand reporter, as provided in Section 5 of this Act, a statement of facts in narrative form, in duplicate, and deliver the same to the party appealing, for which said statement of facts he shall be paid by the party appealing the sum of fifteen cents per folio of 100 words for the original copy, and no charge should be made for the duplicate copy, and such amount shall not be taxed as costs in the case. [Act 1903, ch. 60; Act 1905, ch. 112; Act 1907, 1st S. S., ch. 24, § 6, repealed; Act 1909, p. 376, § 6, repealed; Act 1911, p. 265, ch. 119, § 6.]

See notes under art. 844b. For notes as to civil cases arising under this article, see Vernon's Sayles' Civ. St. 1914, art. 2070.

Sufficiency of statement of facts.—In view of this article and article 844aa, a statement of facts, which merely recited that "the following facts were proven in the trial," giving a narrative statement of what purported to be some of the evidence, was insufficient for not showing that it contained all of the evidence at trial. *Witherspoon v. Crawford* (Civ. App.) 153 S. W. 633.

Succinct statement without unnecessary repetition.—See Vernon's Sayles' Civ. St. 1914, art. 2070, note 14.

Under an act of the Thirtieth Legislature (Laws 1907, c. 24, § 6), a statement of facts consisting of questions and answers will not be considered on appeal. *Choate v. State*, 59 App. 266, 128 S. W. 624.

Under Acts 32d Leg. c. 119, § 6, which provides that a party appealing shall prepare from the transcript filed by the official shorthand reporter, a statement of facts, in duplicate, in a succinct manner and without unnecessary repetition, records containing the statement of facts in question and answer form will not be considered on review. *Hart v. State* (Cr. App.) 150 S. W. 188; *Mooney v. State*, 73 App. 121, 164 S. W. 828.

Sending up original statement of facts.—See notes under art. 844.

Under Acts 31st Leg. (1st Called Sess.) c. 39, § 5 [art. 844b] requiring the official reporter to transcribe the testimony, certifying that the transcript is correct, and file it with the clerk; and this article requiring appellant to prepare a statement of facts in duplicate, and that the original shall be sent up as a part of the record on appeal, held that, where it was not sent up with the record, a purported statement of facts, copied into the record, will be stricken on motion. *Hardgraves v. State*, 61 App. 422, 135 S. W. 144.

Under Acts 31st Leg. (1st Ex. Sess.) c. 39, §§ 5, 6, providing that the statement of facts shall be prepared in duplicate, and that the original shall be sent to the Court of Criminal Appeals, the court cannot consider a statement of facts copied in the record. *Slatter v. State*, 61 App. 243, 136 S. W. 770.

Under Acts 30th Leg. (1st Ex. Sess.) cc. 7, 24, and Acts 31st Leg. (1st Ex. Sess.) c. 39, prescribing the time and method of filing statements of facts and bills of exception, a statement of facts on appeal from criminal cases tried in the district court must be filed in duplicate, while in criminal cases tried in the county court the statement of facts need not be filed in duplicate, and must be copied in the transcript. *Morris v. State*, 63 App. 375, 140 S. W. 775.

Sending up original documents.—Where, in a prosecution for practicing medicine without a license, there was introduced in evidence defendant's letter head, a printed circular, and card, which were fully identified, it was proper for the court in the exercise of discretion to allow the originals to be sent up as part of the record on appeal. *Singh v. State* (Cr. App.) 146 S. W. 891.

Under Vernon's Sayles' Civ. St. 1914, art. 2068, and this article, and district court rules 72-74 (67 S. W. xxv), prescribing the manner of preparing statements of facts, instruments or parts of them bearing on a question presented should be copied into the statement of facts, and the original instruments should not be attached to it. *Texas Cent. R. Co. v. McCall* (Civ. App.) 166 S. W. 925.

Preparation of statement of facts by parties.—See notes under art. 844b.

Art. 845. Time for preparing and filing statement of facts and bill of exceptions; extension of time; failure to agree on statement of facts; duty of court; what constitutes filing within time.—When an appeal is taken from the judgment rendered in any cause in any district or county court, the parties to the suit shall be entitled to any [and] they are hereby granted thirty days after the day of adjournment of court in which to prepare or cause to be prepared, and to file a statement of facts and bills of exception; 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 exception. Provided,

that the court trying such cause shall have the power in term time or vacation, upon the application of either party, for good cause, to extend the several times as hereinbefore provided for the preparation and filing of the statement of facts and bills of exception, 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 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 same, together with the 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 exception 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 exception. Provided, further, that when the parties fail to agree upon a statement of facts, the judge shall not be required to prepare such statement of facts, unless the party appealing, by himself or attorney, within the time allowed for filing, shall present to the judge a statement of facts, and shall certify thereon, over his signature, that to the best of his knowledge and belief, it is a full and fair statement of all the facts proven on the trial. Provided that any statement of facts filed before the time for filing the transcript in the appellate court expires, shall be considered as having been filed within time allowed by law for filing same. [Act 1903, ch. 60; Act 1905, ch. 112; Act 1907, S. S., ch. 24; Act 1909, p. 376, § 7, repealed; Act 1911, p. 266, ch. 119, § 7.]

See Willson's Cr. Forms, 937, 1027, 1028, p. 687.

For notes in civil cases arising under this provision, see Vernon's Sayles' Civ. St. 1914, art. 2073.

Cited, *Redman v. State* (Cr. App.) 149 S. W. 670.

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| 1. Explanatory. | 14. Approval and authentication of statement or bill. |
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1. Explanatory.—Art. 845, as it appeared in the revision of 1911, is superseded by Act 1911, ch. 119, § 13, which repeals Act 1909, p. 374, ch. 39, the act from which the superseded article was taken.

2. This article not applicable to county courts and district courts having no official shorthand reporter.—See art. 844a, and notes thereunder.

3. Does not repeal article 844a.—See notes under art. 844a, ante.

4. Time allowed for filing in general.—A statement of facts and bill of exceptions, filed November 15th, while the term at which accused was convicted adjourned on August 20th preceding, will not be considered on appeal. *Russell v. State*, 58 App. 187, 125 S. W. 24.

Where the term of court at which accused was convicted convened on September 20, 1909, and adjourned on December 4, 1909, bills of exceptions filed on May 10, 1910, cannot be considered on appeal. *Oliver v. State*, 60 App. 62, 131 S. W. 215.

Acts 30th Leg. (1st Ex. Sess.) c. 7 [art. 844a, ante] which granted to parties to causes tried in the district and county courts 20 days after adjournment to file a statement of facts and bills of exception, was repealed, so far as it related to filing

statements of facts in civil actions in the county court, by Acts 30th Leg. (1st Ex. Sess.) c. 24, which repealed all laws in conflict therewith. Acts 31st Leg. (1st Ex. Sess.) c. 39, repealed Acts 30th Leg. (1st Ex. Sess.) c. 24, and provided by section 7 [this article] that on appeal from the judgment in any cause in the district or county court the parties should have 30 days after adjournment to prepare and file a statement of facts and bills of exception, and which empowered the court to allow an additional time; and by section 13 declared that its provisions as to the time allowed for filing of the statement of facts and bills of exceptions should apply to all civil cases tried in the county court. An appeal was taken in a civil case in county court at a term which adjourned January 28th; plaintiff being given 30 days to file bills of exception and statement of facts. By a later order the time was extended an additional 30 days, and the statement of facts and bill of exceptions was filed March 28th. Held, that the statement of facts and bills of exceptions were filed within the time prescribed by law. *Sheppard's Home v. Wood* (Civ. App.) 140 S. W. 394. But see art. 844a, and notes thereunder.

The provision of this article that statements of facts filed before the time for filing the transcript in the appellate court expires is filed in time allows 90 days in which to file such statements of fact in criminal cases. *Gavinia v. State* (Cr. App.) 145 S. W. 594.

A statement of facts, filed October 25th, while court adjourned on July 1st preceding, is not filed in time, in the absence of any showing why the order, allowing accused 30 days after adjournment in which to file the statement, was not complied with, or of any request for an extension of time. *Griego v. State* (Cr. App.) 145 S. W. 613.

Where a conviction was had at a term which adjourned on the 14th of October, a statement of facts complaining that accused was placed in jail, which was filed December 12th, is too late to present any matter for review. *Jacobs v. State* (Cr. App.) 146 S. W. 558.

Where the statement of facts and bills of exception were not filed until 130 days after the entry of sentence at a term of court which continued more than 8 weeks, they could not be considered, though the trial court granted extensions of time. *Knight v. State* (Cr. App.) 147 S. W. 268.

Under this article a bill filed August 31, 1911, cannot be considered where the trial term adjourned April 21, 1911. *Crowell v. State* (Cr. App.) 148 S. W. 570.

A purported statement of facts, heard on defendant's motion for a continuance, contained in the record, but which was not filed until after adjournment of the term, cannot be considered on appeal. *Gotcher v. State* (Cr. App.) 148 S. W. 574.

A statement of facts filed after sentence, entered nunc pro tunc at a term subsequent to that at which conviction was had, cannot be considered on appeal; for a statement of facts must be filed at the term at which the jury returned the verdict and judgment entered. *Kinch v. State*, 70 App. 419, 156 S. W. 649.

Where the term of court is more than eight weeks long, the time in which to file bills of exceptions and statement of facts begins to run from the date of sentence. *Roberts v. State*, 70 App. 588, 157 S. W. 1193.

A bill of exceptions, not filed in the trial court until more than 90 days had elapsed from the adjournment of court for the term, cannot be considered on appeal; the time for filing not having been extended. *Richardson v. State*, 71 App. 111, 158 S. W. 517.

In view of this article and rules 1 and 2, adopted by the Supreme Court for the Court of Criminal Appeals (142 S. W. xvii), requiring the filing of transcripts within 90 days, bills of exceptions and statement of facts in a criminal prosecution, tried at a term of court which began August 5th and adjourned November 2d, cannot be considered, where accused's motion for new trial was overruled on August 26th, and the bills and statements were not filed until November 29th, 95 days after the overruling of the motion. *Fowler v. State*, 71 App. 1, 158 S. W. 1117.

Where the trial court adjourned on December 21, 1912, and the statement of facts and bill of exceptions in a criminal prosecution were not filed until May 8th following, they were too late and cannot be considered. *Johnson v. State*, 71 App. 391, 159 S. W. 848.

Where court adjourned on January 4th, after judgment of conviction, a statement of facts not filed until April 14th was filed too late, and cannot be considered on appeal. *Thomas v. State*, 71 App. 183, 159 S. W. 1183.

A statement of facts must be filed in the lower court within 90 days after adjournment, and hence a statement of facts not filed until September 17th comes too late to be considered on an appeal from a judgment convicting accused of murder at a term which adjourned May 30th. *Smith v. State*, 72 App. 12, 160 S. W. 681.

Where in a criminal case the bills of exception were filed 183 days after the adjournment of court, and the statement of facts 150 days after the adjournment, and no excuse for the delay was given, the matters contained in the bills and statement cannot be considered. *Bradford v. State*, 72 App. 5, 160 S. W. 681.

Where sentence was pronounced upon accused on the 25th day of January, the records in his appeal should be filed with the Court of Criminal Appeals not later than April 25th. *Meyer v. State*, 72 App. 98, 160 S. W. 1190.

A purported statement of facts, not filed in the trial court until six months after adjournment, cannot be considered on a criminal appeal, and will be stricken. *Arrisman v. State*, 72 App. 45, 161 S. W. 118.

Bills of exceptions not filed in the trial court in a criminal prosecution until the sixtieth day after adjournment for the term, and after appellant had, within 30 days allowed for filing a statement of facts and bills of exceptions, attempted to extend the time for another 30 days, were too late, and will be stricken on motion. *Boyd v. State*, 72 App. 159, 161 S. W. 459.

A statement of facts and bills of exception, not filed until 60 days after the adjournment of court in a misdemeanor prosecution, will be stricken on motion, in view of the stenographer's act of 1911. *Phillips v. State*, 72 App. 160, 161 S. W. 459.

The statement of facts and bills of exceptions must be filed within 90 days after

the adjournment of the term at which accused was convicted, and, if subsequently filed, will be stricken. *Dosh v. State*, 72 App. 239, 161 S. W. 979.

Where the court in which defendant was convicted of violating the local option law adjourned February 21st, and the statement of facts and bills of exception were not filed until March 12th, and the record contained no order allowing time after adjournment for filing of the facts and bills, as is necessary in a misdemeanor case, none of the matters set forth for revision could be considered. *Messer v. State* (Cr. App.) 167 S. W. 342.

Where the time for filing the bills of exception and statement of facts expired January 22d, and they were not filed until February 9th, no sufficient excuse appearing therefor, the judgment must be affirmed. *Roberts v. State* (Cr. App.) 168 S. W. 98.

A statement of facts not filed until 63 days after the adjournment of the term of the county court, and a bill of exceptions not filed until 69 days after adjournment, cannot be considered on appeal. *Schapiro v. State* (Cr. App.) 169 S. W. 683.

Under C. C. P. 1911, art. 845, bills of exception filed more than 30 days after adjournment cannot be considered where no order of extension was procured. *Bell v. State* (Cr. App.) 169 S. W. 1150.

Where the term at which the case was tried adjourned May 9, 1914, and there was no order allowing any time after the term to file a statement of facts, a purported statement of facts filed May 21, 1914, would be stricken, because not filed in term time. *Hatcher v. State* (Cr. App.) 170 S. W. 725.

A statement of facts, not filed until four months after the adjournment of the term of court at which defendant was convicted, could not be considered on appeal. *Romano v. State* (Cr. App.) 171 S. W. 201.

Under Acts 32d Leg. c. 119, § 7 (this article), allowing the filing of bills of exception within 30 days after adjournment without order of court, and providing that if bills are not filed within such 30 days they cannot be legally filed unless the court, by order authorizes their filing, a bystanders' bill proven up and filed 38 days after adjournment of court would not be considered, where the only order in the record was one granting defendant 30 days after adjournment in which to file a statement of facts and bill of exceptions. *Hicks v. State* (Cr. App.) 171 S. W. 755.

A bill of exceptions, unlike a statement of facts which can be filed within 90 days after adjournment, must be filed within the time limited, and, unless so filed, cannot be considered. *Glasper v. State* (Cr. App.) 174 S. W. 585.

Bills of exception and statements of facts, not presented to the trial court until more than 100 days after adjournment, cannot be considered. *Matthews v. State* (Cr. App.) 176 S. W. 48.

Appellant was tried during a term of court which adjourned January 23, 1915. During the term no order was made authorizing the filing of a bill of exceptions or a statement of facts after term time. On February 12th appellant filed a bill of exceptions. On February 22d, in vacation, the court extended the time for filing a statement of facts for 30 days. The statement was not filed until March 29th. Held, that the bill of exceptions and statement of facts could not be considered, because filed too late and without an order permitting it during term time. *Becker v. State* (Cr. App.) 176 S. W. 566.

On appeal in a habeas corpus proceeding, a statement of facts filed over 100 days after the adjournment of court could not be considered, there being no showing that the failure to get the statement of facts was not due to the relator's fault. *Ex parte Richie* (Cr. App.) 177 S. W. 85.

A purported statement of facts delivered by the court stenographer to the appellant's attorney on October 5, 1914, and some weeks afterwards presented to the district attorney, who signed it as correct, but did not agree that it should be filed as of the proper time, which had expired September 15, 1914, and afterwards presented to the court for approval, would not be considered. *Lewis v. State* (Cr. App.) 177 S. W. 972.

Where the term of court continued more than eight weeks, the time in which bills of exception could be filed must be calculated from the date on which sentence was passed; and where sentence was pronounced on June 6, 1914, the last day on which bills of exception could be filed was September 4th following, and when not filed till thereafter they must be stricken from the record on motion. *Demarco v. State* (Cr. App.) 178 S. W. 1024.

5. Motion for new trial.—Where an issue of fact is raised by the motion for new trial, statements of fact or bills of exception relating to testimony heard must be filed within term time, for, while this article allows bills of exception and statements of fact to be filed after adjournment, such act refers exclusively to statements of fact adduced on the trial itself. *Bailey v. State* (Cr. App.) 144 S. W. 996; *Treadway v. State* (Cr. App.) 144 S. W. 655; *Kinney v. State* (Cr. App.) 148 S. W. 783; *Brewer v. State* (Cr. App.) 153 S. W. 622; *Lucas v. State* (Cr. App.) 155 S. W. 527; *Robbins v. State*, 70 App. 52, 155 S. W. 936; *Hall v. State*, 70 App. 590, 158 S. W. 272; *McGaughy v. State* (Cr. App.) 169 S. W. 287; *Vick v. State*, 71 App. 50, 159 S. W. 50; *Johnson v. State*, 71 App. 620, 160 S. W. 695; *Matthews v. State*, 71 App. 374, 160 S. W. 1185; *Brice v. State*, 72 App. 219, 162 S. W. 874; *Hoskins v. State*, 73 App. 107, 163 S. W. 426; *Graham v. State*, 73 App. 28, 163 S. W. 726; *Knight v. State*, 64 App. 541, 144 S. W. 967; *Bain v. State*, 73 App. 528, 166 S. W. 505; *Dukes v. State* (Cr. App.) 168 S. W. 96; *Ethridge v. State* (Cr. App.) 169 S. W. 1152; *Guerrero v. State* (Cr. App.) 171 S. W. 731; *Merkel v. State* (Cr. App.) 171 S. W. 738; *Dodson v. State* (Cr. App.) 174 S. W. 1048.

Evidence adduced on new matter in the motion for new trial not reserved by a bill of exceptions, but simply copied in the transcript, signed by neither the district attorney nor the attorney for defendant, and bearing filing marks 30 days after the term, cannot be reviewed. *Clary v. State* (Cr. App.) 150 S. W. 919.

Under Act March 31, 1911 (Acts 32d Leg. c. 119) § 7, giving the parties to a suit 30 days after the adjournment of the term in which to prepare the statement of

facts and bills of exception, and authorizing the court to extend the time, but not so as to delay the filing of the transcript within the time fixed by law, but, if the term may continue for more than 8 weeks, giving 30 days after the entry of final judgment to file the statement of facts and bills of exception, unless the court shall extend the time, a statement of facts and bills of exceptions in a criminal case, tried at a term which continued more than 8 weeks, which were not filed within the time fixed for the filing of the transcript after the motion for new trial was overruled, must be stricken. *Williams v. State* (Cr. App.) 177 S. W. 971.

6. **Motion for change of venue.**—See art. 634, ante, and notes.

7. **Completion of record by certiorari.**—Under Court of Criminal Appeals rule 2 (31 Tex. Cr. R. 652, 102 Tex. xxxvi, 67 S. W. xx), and Courts of Civil Appeals rules 8, 11 (102 Tex. xxvi, xxvii, 67 S. W. xiv), providing that motions for certiorari to perfect the record on appeal must be filed before the day on which the cause is set for hearing, it is too late, after submission and decision, to complete the record by certiorari, where accused through his attorney knew before and at the time of the submission of the defects in the record. *Farrell v. State*, 141 S. W. 535.

8. **Erroneous dating, and extrinsic evidence to show time of filing.**—Neither the trial judge nor any other person has authority to antedate bills of exception and statement of fact. *Gowan v. State*, 73 App. 222, 164 S. W. 6; *Sandifer v. State*, 63 App. 361, 139 S. W. 1155; *Campbell v. State* (Cr. App.) 144 S. W. 966.

Though the indorsement on the statement of facts and bill of exceptions, "Filed September, 1909," does not show that they were filed within 30 days of the adjournment of the trial court, August 21st, so as to entitle them to consideration, this may be aided by affidavit showing the time of filing. *Sargent v. State*, 61 App. 34, 133 S. W. 885.

Where it reasonably appears that a statement of facts was filed within the time allowed, though the file mark placed thereon makes it one day late, the defendant is entitled to the benefit of the doubt, and the statement should be considered. *Ely v. State* (Cr. App.) 152 S. W. 631.

A statement of facts, bearing no file marks and not showing when it was filed in the trial court, cannot be considered on appeal. *Nolen v. State*, 72 App. 459, 161 S. W. 869.

This court will on appeal, whenever necessary, go behind the filing marks on a statement of facts or on bills of exception to determine whether such statement and bills were in fact legally filed. *Gowan v. State*, 73 App. 222, 164 S. W. 6.

Where defendant's statement of facts, though appearing to have been filed on January 2d, was not made out and certified by the stenographer until March 7th, allowing 11 days for presentation to the district attorney and trial judge and for filing within the time allowed by law, and was not presented to the trial judge or the prosecuting officer or filed within that time, it will be stricken from the record. *Gowan v. State*, 73 App. 222, 164 S. W. 6.

An order of the trial court that the statement of facts, filed in a criminal case on September 26th, be filed as of July 27th, being unauthorized the clerk properly refused to obey such order. *Wertheimer v. State* (Cr. App.) 171 S. W. 224.

The trial court has no right to order the clerk of court to place on bills of exception a different file mark from that which they should bear. *Demarco v. State* (Cr. App.) 178 S. W. 1024.

9. **Extension of time for preparation and filing.**—See Willson's Cr. Forms, 1028.

This article 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*, 58 App. 90, 124 S. W. 949.

Where the court adjourned on the 16th day of September, and an application to extend the time to file a statement of facts was granted by the judge to November 1st, a statement of facts which is filed before the expiration of the extended time should not be stricken out on motion for failure to file within the time required by law. *Pace v. State*, 58 App. 90, 124 S. W. 949.

Where the court adjourned on February 25th, the 30 days allowed for filing bills of exceptions and a statement of facts expired March 27th, so that an order extending the time made on March 28th was without authority, there being nothing to extend, and the bills of exceptions and a statement of facts filed after such date cannot be considered on appeal. *Griffin v. State*, 59 App. 424, 128 S. W. 1134.

An order extending the time must be made within the time originally fixed, and, after the expiration of time, the court may not extend the time. *Sanders v. State*, 60 App. 34, 129 S. W. 605.

The term of court at which accused was tried began October 1, 1909, and adjourned January 1, 1910. The trial was on October 4, 1909. Sentence was pronounced December 19, 1909, and the bill of exceptions was filed February 15, 1910, and the statement of facts on February 17, 1910. On February 10, 1910, an order was entered extending the time for filing bills of exception and statement of facts. Held, that the court did not have authority after the expiration of the term, to order the extension of the time for filing bills of exception and statement of facts; and, even if it had such authority, it could only be exercised within 30 days after final judgment, as prescribed by this article, and the order in question, having been entered thereafter, was ineffectual. *Armstrong v. State*, 60 App. 59, 130 S. W. 1011.

Whether the time to file the statement of facts in a criminal case shall be extended is in the discretion of the trial court. *Frazier v. State*, 61 App. 647, 135 S. W. 583.

Accused's motion for a new trial was overruled on March 25, 1910, and notice of appeal then given. The court adjourned on April 2d, when the term ended, there being four terms, each beginning, respectively, on the first Mondays in Jan-

uary, April, July, and October. Without application, orders were entered on May 2d, May 30th, July 29th, July 27th, and August 26th, giving accused 30 days from those dates for filing a statement of facts, but none was filed, and sent up in the record which was filed in the Court of Criminal Appeals on December 2, 1910. No statement is claimed by accused to have been made out until September 22d or 23d, and it was not delivered to the county attorney until about October 1st, and was never presented to the trial judge. Held, that accused was at fault in not having a statement of facts in the record; he not having presented a statement to opposing counsel or the trial judge within a reasonable time. *Roberts v. State*, 62 App. 7, 136 S. W. 483.

In view of articles 844 and 910, this article is mandatory, and, construed in view of the other statutes, does not authorize the trial court to grant extensions of time for filing a statement of facts beyond 90 days from the final judgment, which in criminal cases is the sentence, or from adjournment of the court. *Roberts v. State*, 62 App. 7, 136 S. W. 483.

Where there is in the record on appeal an order extending the time for filing the statement of facts, but none extending the time for the filing of bills of exception, a bill of exceptions filed more than 30 days after the adjournment of the term of court at which accused was tried must be stricken from the record. *Arrington v. State*, 62 App. 357, 137 S. W. 669.

Under this article, a district judge cannot, during vacation, when the cause was tried at a term lasting more than eight weeks, extend the time for filing. *Pecos & N. T. R. Co. v. Cox*, 104 Tex. 556, 140 S. W. 1078.

Statement of facts and bills of exceptions filed 51 days after adjournment are too late and will be stricken, though the court attempted to allow 90 days after adjournment for their filing. *Bryant v. State* (Cr. App.) 147 S. W. 251.

This article requires bills of exceptions to be filed within 30 days after the adjournment of the trial term, except that for good cause shown the trial court may extend the time not exceeding 90 days; but the statute prohibits extension so as to delay filing of the record in the appellate court. Transcripts in civil cases must be filed within 90 days from adjournment, and art. 930, requires transcripts in criminal cases to be prepared in preference to civil cases. Held that courts are powerless to authorize filing of bills after expiration of the 90-day period. *Crowell v. State*, 104 Ark. 298, 148 S. W. 570.

Where accused was convicted at a term which lasted more than eight weeks, and upon the overruling of his motion for new trial on August 26th the court granted him 30 days' additional time in which to file his bills of exception and a statement of facts, a statement of facts and bills of exception not filed until the last of November cannot be considered, because coming too late; accused only having the 30 days allowed by law and the 30 days additional allowed by the court in which to file those instruments. *Harrison v. State*, 71 App. 40, 158 S. W. 1120.

Under this article allowing the filing of bills of exception within 30 days after adjournment without order of court, and providing that if bills are not filed within such 30 days they cannot be legally filed unless the court, by order authorizes their filing, a bystanders' bill proven up and filed 38 days after adjournment of court would not be considered, where the only order in the record was one granting defendant 30 days after adjournment in which to file a statement of facts and bill of exceptions. *Hicks v. State* (Cr. App.) 171 S. W. 755.

10. — Making an entry of order.—A statement of facts cannot be considered by the Court of Criminal Appeals, where it was filed after adjournment of the trial term, if the record shows no order authorizing filing after adjournment. *Gamble v. State* (Cr. App.) 146 S. W. 551; *Sqyres v. State* (Cr. App.) 146 S. W. 932.

Under the statute, where the trial court continues in session more than 8 weeks, the statement of facts must be filed in 30 days after sentence, unless an order be entered extending the time. *Earles v. State*, 59 App. 353, 128 S. W. 902.

An order extending the time for filing a statement of facts, in order to be available, must be entered before the expiration of 30 days allowed for that purpose, on adjournment of the court. *Presley v. State*, 60 App. 102, 131 S. W. 332.

Where a statement of facts is filed after 30 days from final judgment or adjournment, the record must show that an extension of time for filing was properly granted by the trial court, and must also show such extension where the statement is filed after 60 days from final judgment or adjournment. *Roberts v. State*, 62 App. 7, 136 S. W. 483.

The provision that if the term of court may be continued more than 8 weeks, bills of exceptions shall be filed within 30 days after final judgment, unless further time is granted by an order entered of record, is mandatory, and where there was no order in the transcript extending the time, bills filed more than 30 days after the entry of final judgment could not be considered. *Gibson v. State* (Cr. App.) 148 S. W. 1090.

A bill of exceptions, not filed within 30 days allowed by law, cannot be considered, unless the record contains an order extending the time. *Gaines v. State* (Cr. App.) 150 S. W. 199.

Under Code Cr. Proc. 1911, art. 845, giving to the trial court jurisdiction both in term time and vacation to extend the time for filing bills of exceptions for not longer than 90 days, the court having granted an order allowing accused 30 days' additional time to file bills of exceptions, but the clerk, by oversight, having failed to enter that part of the order on his record, and such oversight not having been discovered until some 50 days had expired, during which time an appeal had been taken, the trial court was authorized to grant a motion directing the clerk to enter the order granting the extension nunc pro tunc. *Murff v. State* (Cr. App.) 172 S. W. 238.

11. — Extrinsic evidence of order of court.—The practice of requiring the Court of Criminal Appeals to consider affidavits to determine whether orders ex-

tending the time for filing the statement of facts or bills of exception have been made is condemned. *Roberts v. State*, 62 App. 7, 136 S. W. 483.

12. — Agreement of parties affecting time of filing.—Bills of exceptions and statement of facts not filed in the trial court within the time prescribed by statute will not be considered on appeal, notwithstanding any agreement of attorneys or order of district judge; but, if the delay be through fault of the prosecuting officers, there will be a reversal. *Brice v. State*, 72 App. 219, 162 S. W. 874; *Lewis v. State* (Cr. App.) 59 S. W. 886; *Kemper v. State*, 57 App. 355, 123 S. W. 131; *Atchison, T. & S. F. Ry. Co. v. Cox* (Civ. App.) 136 S. W. 569; *Shrewder v. State*, 62 App. 403, 136 S. W. 461, 1200.

Under the provision that, when a term of court may by law continue more than 8 weeks, the statement of facts and bills of exception shall be filed within 30 days after final judgment, unless the court, by order entered of record, shall extend the time, an appellant's time to file a statement of facts and bills of exception is not extended by a written agreement between counsel, approved by the trial judge, but not entered of record, that they may be filed after such time, nor by oral representations by appellee's counsel that he had 90 days in which to file. *Harris v. Camp* (Civ. App.) 148 S. W. 597.

13. — Extension by appellate court.—In a prosecution for murder, where the trial court at the next term after denial of a new trial and after an appeal was taken refused to conform the judgment to the verdict, time for filing bills of exception and a statement of facts cannot be granted by the appellate court; the statute requiring such instruments to be filed at the term in which the conviction occurs or within a specified time after adjournment. *Robison v. State* (Cr. App.) 150 S. W. 912.

14. Approval and authentication of statement or bill.—See notes under arts. 744 and 844, ante.

A statement of facts approved and certified by the judge, "The foregoing statement of facts is by me approved as a full and complete statement of all the facts proved on the trial," is sufficiently authenticated so as to authorize a holding that the judge so made it because the attorneys did not agree. *Hopkins v. State*, 61 App. 590, 135 S. W. 553.

Where the certificate of the trial judge stated that a statement of facts was already on file in the case, and that it was signed by the counsel for all the parties, and that the same is correct, and that this certificate is approved with a certain qualification, and none of the attorneys had signed the certificate, it will be considered as a valid certificate by the trial judge, for Acts 31st Leg., 1st Ex. Sess. c. 39 [arts. 844a-846] did not prescribe any form, and it is evident that the parties failed to agree on the certificate, and the trial court neglected to strike out the statement that it was signed by the attorneys. *Rader v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 137 S. W. 718.

14½. Certificate of party to proffered statement of facts.—Under the provision of this article that, when the parties fail to agree upon a statement of facts, the judge shall not be required to prepare such statement, unless the party appealing, by himself or attorney, within the time allowed for filing, shall present a statement of facts and certify thereon over his signature that to the best of his knowledge and belief it is a full and fair statement of all the facts proven on the trial, where appellant's attorney, presenting the statement of facts to the judge for approval upon disagreement of the parties, failed to append the indicated certificate, such omission did not render the statement of facts, as approved and certified by the judge, improper, and subject to striking on motion to the Court of Civil Appeals, since the statute is directory in the sense that the certificate is for the benefit of the trial judge, and he may waive noncompliance. *McLane v. Haydon* (Civ. App.) 178 S. W. 1197.

15. Effect of failure to present and file in time.—Under this article, a statement of facts or bill of exceptions filed more than 30 days after adjournment of court without any order having been entered authorizing the same to be so filed cannot be considered on appeal. *Cofield et al v. Supreme Camp of American Woodmen* (Civ. App.) 151 S. W. 341; *Patrick v. State* (Cr. App.) 123 S. W. 411; *Campbell v. State*, 57 App. 301, 123 S. W. 583; *Oliver v. State*, 58 App. 50, 124 S. W. 637; *Ewing v. State*, 59 App. 147, 127 S. W. 835; *Vaughn v. State*, 59 App. 423, 128 S. W. 1134; *Brunk v. State*, 60 App. 263, 131 S. W. 1125; *Phillip v. State*, 60 App. 431, 132 S. W. 355; *Roberts v. State*, 62 App. 7, 136 S. W. 483; *Seibert v. State*, 62 App. 538, 133 S. W. 398; *Mansfield v. State*, 62 App. 631, 138 S. W. 591; *Hart v. State* (Cr. App.) 150 S. W. 188; *Giles v. State* (Cr. App.) 150 S. W. 907; *Johnson v. State* (Cr. App.) 150 S. W. 1175; *Sanders v. State*, 70 App. 209, 156 S. W. 927; *Lisenbee v. State*, 72 App. 494, 162 S. W. 1150; *Gowan v. State*, 73 App. 222, 164 S. W. 6; *Willis v. State* (Cr. App.) 166 S. W. 1172; *Ross v. State* (Cr. App.) 170 S. W. 305.

Bills of exceptions and statements of facts not filed until after the time allowed by the court, cannot be considered on appeal. *Parker v. State*, 63 App. 464, 140 S. W. 337; *Smith v. State*, 33 App. 569, 28 S. W. 471; *Hall v. State*, 33 App. 537, 28 S. W. 200; *Rix v. State* (Cr. App.) 28 S. W. 198; *Tullis v. State* (Cr. App.) 28 S. W. 199; *Nelson v. State* (Cr. App.) 29 S. W. 471; *Williams v. State* (Cr. App.) 29 S. W. 1070; *Pertain v. State* (Cr. App.) 30 S. W. 1067; *Armstrong v. State*, 34 App. 642, 31 S. W. 647; *Woods v. State* (Cr. App.) 31 S. W. 666; *Cook v. State* (Cr. App.) 33 S. W. 359; *Bow v. State* (Cr. App.) 33 S. W. 866; *Henderson v. State* (Cr. App.) 33 S. W. 536; *Agnes v. State*, 59 App. 507, 128 S. W. 616; *Jenkins v. State*, 59 App. 475, 128 S. W. 1113; *Gunter v. State* (Cr. App.) 146 S. W. 933.

A purported statement of facts cannot be considered where the attorneys failed to agree upon it, and it was not presented to the trial judge within the time required by law. *Shrewder v. State*, 62 App. 403, 136 S. W. 461, 1200.

Where the statement of facts was filed too late to be considered, it will be pro-

sumed on appeal that the venue was properly proved. *Brown v. State* (Cr. App.) 170 S. W. 714.

16. — **Affirmance of judgment.**—The filing, pending an appeal, of the statement of facts 30 days after the term at which conviction was had, was too late, so that the appellate court must affirm the judgment. *Sewall v. State* (Cr. App.) 130 S. W. 1003.

Where the record showed that the trial court heard evidence on motions to quash the grand jury venire on specified grounds, and overruled them, and a purported statement of the evidence, not agreed to by the attorneys nor approved by the court, was filed after the adjournment of the term, the court on appeal could not review the ruling, but must assume that the trial court found in accordance with the evidence. *Washington v. State* (Cr. App.) 147 S. W. 276.

Where accused was convicted at a term of court which continued more than 8 weeks, and more than 90 days elapsed after the motion for a new trial was overruled and sentence pronounced, and no statement of facts or bills of exception have been filed in the trial court, the judgment will be affirmed. *Carden v. State*, 70 App. 271, 156 S. W. 683.

17. — **Dismissal of appeal.**—That bills of exception and the statement of facts were not filed until more than 16 months after adjournment of the term at which appellant was convicted warrants dismissal of his appeal on motion by the Attorney General. *Brinson v. State* (Cr. App.) 150 S. W. 776.

18. — **Striking statement or bill from record.**—A statement of facts or bill of exceptions, not filed within the time fixed by law, will be stricken out on the motion of the state. *Griffin v. State*, 62 App. 98, 136 S. W. 778; *Frazier v. State*, 61 App. 647, 135 S. W. 583; *Terry v. State*, 62 App. 73, 136 S. W. 485; *Inabnit v. State*, 63 App. 88, 138 S. W. 1013; *Hamilton v. State*, 64 App. 175, 141 S. W. 966; *Boyd v. State* (Cr. App.) 150 S. W. 612; *Serop v. State* (Cr. App.) 154 S. W. 557; *Ruby v. State* (Cr. App.) 174 S. W. 824; *Rutherford v. State* (Cr. App.) 174 S. W. 1050.

A statement of facts or bill of exceptions, not filed within the time as extended, will be stricken out, in the absence of any showing of a further extension, or any excuse for the failure to duly file the statement. *Sebedra v. State*, 63 App. 578, 140 S. W. 779; *Harwell v. State*, 62 App. 117, 126 S. W. 1067; *Moore v. State*, 62 App. 119, 136 S. W. 1067; *Feeny v. State*, 62 App. 585, 138 S. W. 135.

19. — **Deprivation of statement of facts as ground for reversal.**—See notes under arts. 837 (2) and 844.

Where accused is deprived of a statement of facts without neglect on his part and he has used due diligence to procure it, he is entitled to a reversal to enable him to have his case fairly tried on the facts adduced against him. *Rawls v. State* (Cr. App.) 150 S. W. 431; *Edwards v. State* (Cr. App.) 145 S. W. 346; *Parker v. State* (Cr. App.) 145 S. W. 347.

Where a failure to file a statement of facts in a criminal cause within the time granted was due to no negligence of the appellant's counsel, but rather to a failure of the state's attorney to agree to one prepared, and his refusal to do anything in the way of getting such a statement, when requested to do so by the court, appellant was deprived of a statement without his fault, and a reversal is warranted. *Lyster v. State* (Cr. App.) 151 S. W. 302.

Defendant's motion for a new trial was overruled, and, on counsel's affidavit of his inability to pay for a statement of facts, the court refused an order to make up a statement, on the ground that more than 30 days had elapsed from the overruling of the motion for a new trial, and offered to approve any statement agreed upon by defendant and the district attorney, and, though defendant's attorney left a statement of facts with the district attorney, he did not report their failure to agree thereon, in which case the court would have made the statement and included it in the record. Held, that the conviction would not be reversed, on the ground that defendant had been deprived of a statement of facts; it being only in those cases where, through the fault or negligence of the state's attorney or the wrongful acts of the trial judge, such statement is lacking, that a reversal is authorized. *Green v. State* (Cr. App.) 153 S. W. 621.

Where, immediately on the overruling of accused's motion for new trial, three days before adjournment accused called to the court's attention that he was entitled to a statement of facts under the Stenographers' Act of 1911 (Acts 32d Leg. c. 119, arts. 844a-846 C. C. P.), and within 12 days after adjournment filed an affidavit stating those facts and praying the immediate preparation and forwarding of a transcript of the record to the Court of Criminal Appeals, is not entitled to a reversal on the ground that he was deprived of a statement of facts; it not appearing that after adjournment he made any effort to procure it, and it being apparent that he prayed the preparation of the transcript without it, though there was yet over two months in which it could be filed. *Archer v. State* (Cr. App.) 168 S. W. 857.

Where accused, through no fault of his own, but through the refusal of the judge to consider the matter, because leaving on his vacation, is unable to file a statement of facts until after expiration of the 90 days allowed, the judgment should be reversed on appeal. *Wertheimer v. State* (Cr. App.) 171 S. W. 224.

20. **Diligence and matters excusing failure to file in time.**—Where a statement of facts has not been filed in time, it may, nevertheless, be considered on appeal, if it be shown to the satisfaction of the court of appeals that the defendant used due diligence to have the same authenticated and filed in time, and that the failure to file the same in time was not due to the fault or laches of the defendant or his attorney, but was the result of causes beyond their control. *Vernon's Sayles' Civ. St.* 1914, art. 2074. *George v. State*, 25 App. 229, 8 S. W. 25; *Spencer v. State*, 25 App. 585, 8 S. W. 648; *Lynn v. State*, 28 App. 515, 13 S. W. 867; *Johnson v. State*, 29 App. 210, 15 S. W. 205; *Ratcliff v. State*, 29 App. 248, 15 S. W. 596; *Drake v. State*, 29 App. 266, 15 S. W. 725; *Suit v. State*, 30 App. 319, 17 S. W. 458; *Hess v.*

State, 30 App. 477, 17 S. W. 1099; Bell v. State, 31 App. 521, 21 S. W. 259; Sanders v. State, 60 App. 34, 129 S. W. 605; Johnson v. State, 71 App. 391, 159 S. W. 848; Jones v. State (Cr. App.) 163 S. W. 75; Solis v. State (Cr. App.) 174 S. W. 343.

It is the imperative duty of the appellant and his counsel to secure the approval of the judge to bills of exception, and to see that they are filed in time. Roberts v. State (Cr. App.) 168 S. W. 98; Sullivan v. State, 62 App. 410, 137 S. W. 700; St. Clair v. State, 72 App. 37, 160 S. W. 353; Gowan v. State, 73 App. 222, 164 S. W. 6.

In considering question of diligence in not getting statement of facts filed in time, each case must rest on its own peculiar facts viewed in the light of all the surroundings at the time the party is exercising diligence in preparing it. Cannon v. State, 41 App. 467, 56 S. W. 355.

The failure of the clerk of the trial court to place his file mark on the original statement of facts filed, together with a copy thereof, in time, does not preclude the court on appeal from considering the statement. Campbell v. State, 57 App. 301, 123 S. W. 583.

Counsel for accused presented the statement of facts to the county attorney during the term at which accused was convicted, asking the county attorney to agree to the statement. The county attorney agreed to sign the statement, and later informed defendant's counsel that it had been filed and approved. Defendant's counsel had never signed it, nor did they authorize the county attorney to sign their names, and neither did they present the statement to the court. Held, that they had not exercised such diligence as to excuse a failure to have the statement approved within time. Douglas v. State, 62 App. 599, 138 S. W. 385.

A statement of facts will be considered on appeal, though not filed within the time required by law, where the trial judge certifies that he caused the failure to file in time. Mansfield v. State, 62 App. 631, 138 S. W. 591.

Where a statement of facts, filed one day too late, could not be filed earlier on account of the illness of the district attorney and accused's attorney, and the statement was agreed to by the parties and approved by the trial court, the court on appeal will consider it. Villa v. State, 63 App. 537, 141 S. W. 104.

Where an application by accused under article 845a that the stenographer be required to furnish a statement of facts without pay on the ground that he is too poor to pay for it was not presented to or acted on by the court, he did not tender the fees for a statement of facts, and no motion for an extension of time within which to file such statement was made until 50 days after the adjournment of the term, his conviction will not be reversed for failure to furnish him such statement. Negrete v. State (Cr. App.) 147 S. W. 587.

Where a defendant in a criminal prosecution complied with the provision of article 845a, that on filing pauper affidavit the court shall order the official stenographer to make transcript in duplicate, the neglect of the stenographer to comply with an order of the trial judge within the time extended to perfect the appeal will not preclude the defendant from having the court on appeal pass on his case, and it will upon showing of the stenographer's misconduct make an order for the preparation of the statement. Jones v. State (Cr. App.) 147 S. W. 587.

The overruling of a continuance on the ground of the absence of a witness cannot be considered on appeal, unless the ruling is excepted to and preserved by bill of exceptions filed within the time permitted by law; and the mere fact that the bill was presented to the trial court within the time, and that it did not approve it until after the time, does not authorize the court, on appeal to consider the bill. Gaines v. State (Cr. App.) 150 S. W. 199.

On an appeal in a criminal case, statement of facts and bills of exception, filed four months after the adjournment of the term at which accused was convicted, could not be considered, where no application for an extension of time was made for 98 days after such adjournment, and where, although defendants were in jail and claimed that the failure of their original attorneys to file such bills and statement was without their knowledge, it was not shown that they had made any inquiry within the time allowed by law. Martinez v. State (Cr. App.) 153 S. W. 886.

Where accused's statement of facts was approved by the attorneys on both sides and handed to the judge for his approval on the thirteenth day after court adjourned, and the judge promised to approve and file the statement within the time allowed, but did not do so owing to a misapprehension of the length of time within which the statement must be filed, and it appeared that the statement filed out of time was correct, it would be considered on appeal. Gibbs v. State, 70 App. 278, 156 S. W. 687.

Where the stenographer in a case not capital fails to perform his duty of preparing a statement of facts as ordered by the court, the remedy of accused is by mandamus, which must be applied for within the time fixed for the filing of a statement of facts. Roberts v. State, 70 App. 588, 157 S. W. 1193.

Where the court stenographer prepared a transcript of the proceedings for accused, who was a pauper, before the expiration of the 90 days within which he was required by this article to file his statement of facts, the failure of the stenographer to prepare it within the 30 days allowed by the court does not deprive accused of a statement so as to entitle the unapproved transcript to consideration on appeal. Romero v. State, 72 App. 105, 160 S. W. 1193.

It was not a sufficient excuse for appellant's failure to procure a statement of facts that the officers of the state failed to agree on or return the proposed statement in time; it being the duty of defendant's attorney under such circumstances to present his proposed statement to the judge and ask him to approve the same, or himself prepare and file a statement in the event he does not find the one presented correct. Iovanovich v. State, 72 App. 126, 161 S. W. 98.

Where accused employed his own attorney to defend him, the negligence of such attorney in failing to present a statement of facts to the judge for approval in time will be imputed to accused. Bracher v. State, 72 App. 198, 161 S. W. 124.

That the trial judge, after receiving the bill of exceptions within the time allowed for approving same, stated that he could not give his approval until he had received the statement of facts did not excuse the failure of accused to secure bills of exception in time, where he made no application for extension of the time: it being obligatory upon counsel to follow up bills of exception and see that they are approved and signed. *Chavario v. State*, 72 App. 240, 161 S. W. 972.

Appellant is chargeable with lack of diligence, where the statement of facts is not presented to the trial judge for his signature within the time allowed by law, though it was prepared and delivered to the state's attorney in ample time, and through his neglect it was not seasonably filed. *Davis v. State* (Cr. App.) 167 S. W. 1108, L. R. A. 1915A, 572.

That the stenographer made affidavit that the delay in the preparation of the statement of facts was occasioned by his wife's sickness was not a sufficient excuse for not filing a statement in time, as appellant should have mandated the stenographer, or his attorneys should have prepared a statement as permitted by Stenographer's Act (Acts 31st Leg. [1st Ex. Sess.] c. 39) § 13 [art. 845c. post], especially as the stenographer's affidavit showed that he was in attendance at court every day. *Roberts v. State* (Cr. App.) 168 S. W. 98.

21. Filing within time required by law for filing transcript.—The provision that a statement of fact filed before the time for filing the transcript in the appellate court expires shall be considered as filed in time does not apply to bills of exceptions. *Gavinia v. State* (Cr. App.) 145 S. W. 594.

The provision that any statement of facts, filed before the time for filing the transcript in the appellate court expires, shall be considered as filed in time, authorizes the Court of Civil Appeals to consider a statement filed within 90 days; but it does not impose on the trial judge the duty of making or approving within 90 days a statement not filed within the time limited by other provisions of that statute. *Harris v. Camp* (Civ. App.) 148 S. W. 597.

Under the provision that the trial court may extend the time for filing the statement of facts in the trial court, but that it shall not be so extended as to delay the filing of the record in the appellate court within the time prescribed by law, the time for filing the statement of facts in a criminal case may, at most, not be extended more than 90 days beyond the adjournment of the term of the trial court; the law requiring the transcript in a civil case to be filed in the appellate court within 90 days from the adjournment of the term of the trial court, and while fixing no time for filing the transcript in a criminal case in the appellate court, providing that on adjournment of the court the clerk shall "immediately" make out, and forward to the appellate court, the transcript, and that transcripts in criminal cases shall be made out before those in civil cases. *Maxwell v. State* (Cr. App.) 153 S. W. 324.

A statement of facts is filed within time if filed as required by this article providing that, if the statement of facts is filed in the trial court before the time for filing the transcript in the appellate court, it is deemed to have been filed within time, though it was not in fact filed within 30 days after adjournment of the trial court. *Witherspoon v. Crawford* (Civ. App.) 153 S. W. 633.

The provision that any statement of facts filed before the time for filing the transcript in the appellate court expires shall be considered as having been filed within the time allowed by law, applies to writs of error as well as to appeals; and hence a statement of facts filed at any time within 12 months after final judgment is in time in case of a writ of error. *Louisiana-Rio Grande Canal Co. v. Quinn* (Civ. App.) 160 S. W. 151.

The provision that any statement of facts filed before the time for filing the transcript in the appellate court shall be considered as having been filed within the time allowed by law, has no reference to bills of exception, and will not justify an extension of the time of filing. *Louisiana-Rio Grande Canal Co. v. Quinn* (Civ. App.) 160 S. W. 151.

Under the provision that the statement of facts may be filed at any time before the time for filing the transcript in the Court of Criminal Appeals, an accused person has 90 days in which to file his statement of facts. *Romero v. State*, 72 App. 105, 160 S. W. 1193.

In view of the provision that a statement of facts in a felony case may be filed, at any time before the time for filing the transcript in the appellate court expires, which, in counties where the term of court exceeds eight weeks, is 90 days after sentence, held, that where, in such a county, accused was sentenced on February 24th and a statement of facts was not presented to the trial judge until August 30th following, it was too late. *Bracher v. State*, 72 App. 198, 161 S. W. 124.

The filing of a statement of facts and bills of exception within 90 days from adjournment of court would not entitle them to consideration, where they were not approved until after the expiration of 90 days, since the filing was not authorized until they were approved. *Jones v. State* (Cr. App.) 163 S. W. 75.

Where court adjourned April 5th, and about July 1st the trial judge went to G. on his vacation, first advising the county attorney that if any disagreement as to statements of facts or bills of exception arose he would immediately return and take up the matter, and counsel neither notified him in order that he might return nor went to G. to have the bills and statement approved and, though filed July 3d, they were not approved until after the expiration of 90 days from the adjournment of court, they could not be considered, as no diligence to procure their approval in time appeared. *Jones v. State* (Cr. App.) 163 S. W. 75.

Where a bill of exceptions and the statement of facts are not filed within the 90 days after adjournment allowed by statute, and there is no showing why it was not done, they cannot be considered. *Armstrong v. State*, 72 App. 658, 164 S. W. 381.

Under the provision of this article that any statement of facts filed before the time for filing the transcript in the appellate court expires shall be considered as

filed within the time allowed by law, and irrespective of Courts of Civil Appeals rule 8 (142 S. W. xi), relating to motions as to informalities in bringing a case into court, a statement of facts on appeal from a final judgment rendered April 23d, not filed within the 60 days granted for the filing of a statement of facts and bills of exception, but before expiration of the time for filing the transcript in the Court of Civil Appeals, was duly filed; but the bills of exception did not fall within such rule. *Tyler v. Sowders* (Civ. App.) 172 S. W. 205.

Under the provision that any statement of facts, filed before the time for filing the transcript in the appellate court expires, shall be considered as having been filed within the time allowed by law, where a case was tried at the March term of the county court, which adjourned on the 21st, no order appearing in the record extending the time for filing the statement of facts, which was shown to have been filed July 17th, such statement of facts was filed in time. *McLane v. Haydon* (Civ. App.) 178 S. W. 1197.

The provision that any statement of facts, filed before the time for filing the transcript in the appellate court expires, shall be considered as having been filed within the time allowed by law, applies to the manner of filing the statement of facts and the time therefor when the cause is taken to the appellate court by petition in error. *McLane v. Haydon* (Civ. App.) 178 S. W. 1197.

22. Time allowed where parties are unable to agree as to facts.—Where accused and the county attorney were unable to agree on the statement of facts, and accused presented a statement of facts to the judge within the time required, whereupon the judge made out and signed a statement of facts himself, accused was entitled to have such statement considered on appeal, though it was not filed in time. *Diggs v. State*, 64 App. 122, 141 S. W. 100.

23. Consideration of original statement of facts.—The case may, on rehearing, be considered with the statement of facts, the original, filed in time, having, since the first hearing, been sent up separately, as required by the statute in a felony case, though at the former hearing the statement of facts as copied in the transcript was stricken out because of noncompliance with such statute. *Leggett v. State*, 62 App. 99, 136 S. W. 784.

Art. 845a. Compensation of shorthand reporter; affidavit of inability to pay fees; false affidavit.—The official shorthand reporter shall receive a per diem compensation of five dollars for each and every day he shall be in attendance upon the court for which he is appointed, in addition to the compensation for transcript fees as provided for in this Act, said compensation shall be paid monthly by the commissioners court of the county in which the court sits, out of the general fund of the county, upon the certificate of the district judge. Provided, however, in districts of two or more counties the official shorthand reporter shall receive a salary of \$1500.00 per annum, in addition to the compensation for transcript fees as provided for in this Act to be paid monthly by the counties of the district in proportion to the number of weeks provided by law for holding court in the respective counties. Provided that in a district wherein in any county in the district the term may continue until the business is disposed of, each county shall pay in proportion to the time court is actually held in such county. Provided, that when any criminal case is appealed and the defendant is not able to pay for a transcript as provided for in Section 5 of this Act [art. 844b], or to give security therefor, he may make affidavit of such fact, and upon the making and filing of such affidavit, the court shall order the stenographer to make such transcript in duplicate, and deliver them as herein provided in civil cases, but the stenographer shall receive no pay for same; provided, that should any such affidavit so made by such defendant be false he shall be prosecuted and punished as is now provided by law for making false affidavits. In any civil case where the appellant or plaintiff in error has made the proof required to appeal his case without bond, such appellant or plaintiff in error may make affidavit of such fact, and upon the making and filing of such affidavit, the court shall order the stenographer to make a transcript as provided in Section 5 of this Act, and deliver same as herein provided in other cases, but the stenographer shall receive no pay for same; provided that should any such affidavit so made by such appellant or plaintiff in error be false he shall be prosecuted and punished as is now provided by law for making false

affidavits. [Act 1903, ch. 60; Act 1905, ch. 112; Act 1907, S. S. ch. 24; Act 1909, p. 376, § 8, repealed; Act 1911, p. 267, ch. 119, § 8.]

For notes in civil cases arising under this provision, see Vernon's Sayles' Civ. St. 1914, arts. 1925, 2071.

Reversal for deprivation of statement of facts.—See notes under arts. 844 and 845.

A conviction will not be reversed for failure of the official stenographer to furnish accused a statement of facts within 30 days from adjournment of the term, affidavit of appellant's inability to pay therefor having been filed, as required by Acts 31st Leg. (1st Ex. Sess.) c. 39, where, instead of presenting the statement for approval when received, within 90 days of adjournment, and attempting to procure an extension of time, affidavits seeking to show improper conduct by the trial judge were filed. *Bazzanno v. State*, 62 App. 47, 136 S. W. 257.

In order to obtain a reversal of a conviction, on the ground that accused was deprived of a statement of facts, the record should affirmatively show that the court made an order on an affidavit that accused was unable to pay for a statement of facts, so as to require the stenographer to furnish such statement. *Wood v. State* (Cr. App.) 150 S. W. 194.

If the stenographer did not comply with the judge's order requiring him to furnish a statement of facts to an indigent accused upon affidavit, accused is required to sue out mandamus to compel the issuance of the statement by the stenographer, to enable accused to procure a reversal for failure to have a statement of facts. *Wood v. State* (Cr. App.) 150 S. W. 194.

Where, on accused's affidavit of inability to pay, the court rightfully refused a free transcript, because he was represented by employed counsel, and there was no attempt to make up a statement of facts from memory of the evidence, and no attempt to show why a statement of facts was not made up by counsel, nor any showing that they were unable to do so, it cannot be held that accused was deprived of a statement of facts through no fault on his part. *Jackson v. State*, 70 App. 292, 156 S. W. 1183.

Where the official stenographer failed to comply with the order of the court to furnish a transcript of his notes, and the court took no steps to compel him to do so, and the stenographer could not comply with the order of the Court of Criminal Appeals because he had lost a part of his notes, the case must be reversed and remanded. *Burden v. State*, 70 App. 349, 156 S. W. 1197.

Where the court, after accused had filed a pauper's affidavit, ordered the stenographer to make out a statement of facts, the stenographer's refusal to make out same on the ground that he was entitled to pay therefor did not excuse the want of a statement of facts in the record, where accused did not resort to mandamus or any other process to compel obedience to the order, and there was ample time before adjournment of the court and also within the time allowed for filing the statement to have resorted to such proceedings. *Chavario v. State*, 72 App. 240, 161 S. W. 972.

Where a pauper defendant, convicted of a capital crime, secured an order for the preparation of a statement of facts by the official stenographer, but the statement was not furnished, and he then, within the time allowed, wrote out a statement from memory, which the trial judge did not approve, the conviction will be reversed, and the cause remanded. *Gonzales v. State* (Cr. App.) 175 S. W. 706.

Excuses for failure to file statement or bill in time.—See notes under art. 845.

Affidavit of inability to pay.—Certiorari does not lie to bring a statement of facts into the record, where it does not appear that appellant exhausted his statutory remedies to obtain the statement; a mere showing that an affidavit was filed showing his inability to pay for the statement, and requesting that the stenographer be ordered to prepare one, being insufficient. *Olivus v. State*, 61 App. 191, 134 S. W. 694.

Where accused declined to make an affidavit that he was not able to give security for a transcript, so as to entitle him to a free statement of facts, under this article, but merely made an affidavit that he was not able to pay for a transcript, he cannot assign error to a refusal to order a statement of facts to be made without cost. *Kelly v. State* (Cr. App.) 155 S. W. 225.

Under Act March 31, 1911 (Acts 32d Leg. c. 119) § 8, providing that on an affidavit in forma pauperis, seeking to have the court stenographer make a report of the trial without pay, the court shall make an order as in civil cases, such order is within the discretion of the court after hearing the affidavit and the evidence thereon, and where an affidavit was never presented to or acted upon by the court, and showed no reason why appellant had not made out a statement of facts without regard to the stenographer's report within the 90 days allowed by law, a purported statement of facts delivered to defendant by the court stenographer would not be considered. *Lewis v. State* (Cr. App.) 177 S. W. 972.

Art. 845b. Duty of shorthand reporter to make transcript of evidence on request; fees.—At the request of any party to the suit it shall be the duty of the official shorthand reporter to make a transcript in typewriting of all the evidence and other proceedings or any portion thereof, in question and answer form, as provided in Section 5 of this Act [art. 844b], which transcript shall be paid for at the rate of fifteen cents per folio of 100 words by and be the prop-

erty of the person ordering the same. [Act 1909, p. 376, § 9; repealed; Act 1911, p. 267, ch. 119, § 9.]

For notes in civil cases arising under this provision, see Vernon's Sayles' Civ. St. 1914, art. 1926.

Diligence of accused.—Where, after 60 days' additional time was granted accused for procuring a statement of facts and bill of exceptions upon the stenographer's failure to furnish them within the 30 days after adjournment, the only effort accused made to procure the statement, etc., from the stenographer was to offer to pay for them when made out, there was not sufficient diligence shown, as he should have applied to the court for process to compel the stenographer to prepare them. *Peddy v. State*, 63 App. 483, 140 S. W. 229.

Art. 845c. Repeal; proviso.—That Chapter 39, page 374, Acts of the First Called Session of the Thirty-first Legislature of the State of Texas, providing for the appointment of court stenographers, prescribing their duties and regulating their charges and compensation, and all other laws or parts of laws in conflict with this Act be, and the same are hereby expressly repealed; provided, however, that nothing in this Act shall be so construed as to prevent parties from preparing statements of facts on appeal independent of the transcript of the notes of the official shorthand reporter. [Act 1911, p. 268, ch. 119, § 13.]

See notes under arts. 844b-845b and art. 2072, Vernon's Sayles' Civ. St. 1914.

Explanatory.—Laws 1909, ch. 39, § 14, the act above repealed, repeals the former act (Laws 1907, 1st S. S. ch. 24) but provides "that nothing in this act shall be so construed as to prevent parties from preparing statements of facts on appeal independent of the transcript of the notes of the official shorthand reporter."

Certification of statement of facts by defendant's attorney.—Acts 31st Leg. (1st Ex. Sess.) c. 39 [art. 1920, Vernon's Sayles' Civ. St. 1914], authorizes the judges of the district courts to appoint official stenographers, but that the act shall not prevent parties from preparing statements of facts on appeal independently of the official stenographer, and that a statement of facts made by a court stenographer should be in duplicate and certified, both of which should be filed in the court below, the duplicate preserved there and the original sent up on appeal. Held, on appeal from a criminal case in a district court which was not shown to have any official stenographer, that a certified copy of the original statement of facts prepared by defendant's attorney and approved by the judge would not be stricken out. *Conger v. State*, 63 App. 312, 140 S. W. 1112.

Unofficial preparation of transcript by stenographer.—Where appellant, without ordering any transcript of the testimony in the form of questions and answers, and without any such transcript having been prepared or filed, procured the official reporter to prepare a narrative form of statement of facts, which was agreed to by the parties and approved by the trial judge, and which was presumably prepared from the notes taken at the trial, and not from any transcript thereof, the reporter did not act officially in preparing such transcript, but unofficially as the agent of appellant, and the statement constituted a "statement of facts independent of the transcript of the notes of the reporter," as permitted by this article. *Canode v. Sewell* (Civ. App.) 170 S. W. 271.

Repeal of provisions in civil statutes.—Vernon's Sayles' Civ. St. 1914, art. 2068, authorizing a statement of facts to be made up by agreement, and article 2069, authorizing submission, where the parties cannot agree, of their respective statements to the judge, who shall make out, sign, and file a correct statement, were not superseded or repealed by this article; the word "parties" referring to the party appealing, and such proviso not meaning that the official stenographer's report can be dispensed with only by the agreement of the parties. *Camden Fire Ins. Ass'n v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 175 S. W. 816.

Art. 846. Shorthand reporter shall keep stenographic record of trial of felony cases; duty in case parties cannot agree as to testimony; condensation; furnishing transcript to attorney appointed to represent defendant.—In 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 the 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 exception; provided,

that such stenographer's report when carried into the statement of facts or bills of exception, 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 said defendant, if convicted, and where an appeal is prosecuted, with a transcript of his notes as provided in Section 5 of this Act [art. 844b], 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 herein in civil cases. [Act 1907, ch. 24, § 5; Act 1909, p. 379, repealed; Act 1911, p. 268, ch. 119, § 14.]

Explanatory.—Act 1911, ch. 119, § 13, repeals Act 1909, 1st S. S., p. 371, ch. 39. As art. 846, as it appeared in the revision of 1911, was constructed from the repealed act, such article is superseded. The new provision is given the same article number in this compilation.

Duty of stenographers to make transcript.—It is only in a case where one is charged with a capital offense and the court appoints an attorney for him that he is entitled as a matter of right to have the stenographer make out a transcript of his notes, and in all other cases he must use diligence to see that the stenographer complies with the order requiring him to make out a statement of facts. *Roberts v. State*, 70 App. 588, 157 S. W. 1193.

Copying evidence into transcript.—The evidence in a felony case being required by the statute to be sent up separately from the transcript, the facts being copied into and sent up in the transcript cannot be considered. *Leggett v. State*, 62 App. 99, 136 S. W. 784.

Condensation.—A literal transcript of the stenographer's notes of the evidence taken on the trial will not be considered on review as a statement of facts. *Brown v. State*, 57 App. 269, 122 S. W. 565.

A statement of facts, wholly made up of questions and answers and a verbatim copy of the stenographer's notes, is made up in violation of the statute, and cannot be considered on appeal. *Kemper v. State*, 57 App. 355, 123 S. W. 131.

A statement of facts with reference to the denial of an application for a change of venue was objectionable, where for the most part it was a reproduction of the stenographer's notes in the form of questions and answers. *King v. State*, 57 App. 363, 123 S. W. 135.

A statement of facts on appeal in a felony case, consisting of a verbatim stenographic report of the evidence, cannot be considered in the absence of a showing in the record that the trial judge deemed a statement in such form necessary. Acts 30th Leg. c. 24, § 5, prohibiting such form except when he deems it necessary. *Felder v. State*, 59 App. 144, 127 S. W. 1055.

A purported statement of facts consisting of the stenographer's report, showing not only the questions and answers of the witnesses but other unnecessary matter, will be stricken out on motion. *Claussen v. State*, 70 App. 607, 157 S. W. 477.

A stenographic report of the trial of a case, made out in the form of questions and answers and including the objections and argument of counsel on both sides on the objections, together with the remarks and rulings of the court, cannot be considered as a statement of facts on appeal. *Criner v. State*, 71 App. 369, 159 S. W. 1059.

A purported statement of facts made up entirely of questions and answers, and not approved either by counsel or the trial judge, though certified to be correct by the official stenographer, cannot be considered. *King v. State*, 72 App. 394, 162 S. W. 890.

Where there is no possibility that the attorneys or the court below could not have agreed on the testimony without the questions and answers, the trial judge's certificate that they are necessary to elucidate the fact or question involved is not conclusive, and their inclusion is improper. *Cooley v. State*, 73 App. 325, 165 S. W. 192.

Transcript for attorney appointed by court.—The provision of this article that in all cases where the court is required to and does appoint an attorney to represent the defendant in criminal action the official reporter shall be required to furnish the attorney with a transcript of his notes, etc., when construed with section 8 [art. 845a] does not authorize the furnishing of a transcript of the evidence to an accused who was represented by employed counsel. *Jackson v. State*, 70 App. 292, 156 S. W. 1183.

Under art. 558, requiring the court in capital felony cases to appoint counsel for accused too poor to employ counsel, and the provision of this article that court stenographers, when an appeal is perfected, shall transcribe the testimony and that where the court appoints an attorney for accused the stenographer shall furnish a transcript, the court, in a capital felony case, must, where it appoints an attorney for accused because he is too poor to employ counsel, require the official stenographer when an appeal is perfected to furnish a transcript, and where the court orders the stenographer so to do it must see that the order is complied with. *Burden v. State*, 70 App. 349, 156 S. W. 1197.

Under Act March 31, 1911, § 14, allowing to a defendant convicted of a capital offense, who cannot and has not employed an attorney to represent her and for whom the court has appointed an attorney, a free statement of facts from the reporter, a purported statement of facts delivered by the court stenographer to defendant's attorney after conviction for felony theft could not be considered. *Lewis v. State* (Cr. App.) 177 S. W. 972.

Reversal for deprivation of statement of facts.—See notes under arts. 844 and 845.

CHAPTER TWO

ARREST OF JUDGMENT

Art.	Art.
847. Definition of.	851. Effect of arresting a judgment.
848. Must be made in two days, etc.	852. Court may discharge defendant,
849. Shall be granted for what cause.	when.
850. Shall not be, etc.	

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 writing, and the record must show the grounds of the motion. [O. C. 675.]

See Willson's Cr. Forms, 961, 983.

Cited, *Hamilton v. State* (Cr. App.) 145 S. W. 348.

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.]

See Willson's Cr. Forms, 961.

See art. 861, subd. 3, and notes.

In general.—A motion in arrest of judgment, on the ground that the party making the affidavit on which the information was based made his mark instead of signing his name, filed more than two days after the verdict of the jury comes too late, though a motion to quash might be entertained. *Lewis v. State*, 50 App. 331, 97 S. W. 481, 482.

It is not error to strike out a motion in arrest of judgment, not filed within two days after judgment of conviction is rendered. *Reno v. State*, 56 App. 242, 120 S. W. 430.

An objection that an information for selling intoxicating liquors in prohibition territory does not show that the election putting prohibition into effect was held before the passage of the Act of April 24, 1909, c. 35 [art. 597, Pen. Code], making such sale a felony, is an objection to the form of the information, and to be available an exception must be taken before announcement for trial and a motion in arrest of judgment filed within two days after judgment, as required by this article, and a conviction under such an information will be sustained where the information is first attacked by a motion in arrest of judgment filed eight days after judgment. *Hamilton v. State* (Cr. App.) 145 S. W. 348.

Practice on appeal.—A motion for new trial could not be considered where it was filed more than two days after verdict and no excuse was assigned for the delay. *Valentine v. State*, 6 App. 439. And see *Reno v. State*, 56 App. 229, 120 S. W. 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.]

See Willson's Cr. Forms, 961.

As to distinction between substantial defects and defects of form in indictments and informations, see ante, arts. 575, 576, and notes.

Cited, *Hamilton v. State* (Cr. App.) 145 S. W. 348.

Defective verdict.—Where the indictment charged an offense divided into degrees, a general verdict assessing a penalty applicable only to an inferior degree and not finding defendant not guilty of the higher degrees, was ground for a motion in arrest of judgment. *Slaughter v. State*, 24 Tex. 410.

A motion for new trial on the ground that the verdict was not responsive to the indictment and did not show defendant's guilt, could, if necessary, be regarded as a motion in arrest of judgment. *Senterfit v. State*, 41 Tex. 186.

Where the verdict is insufficient to support a judgment, a motion in arrest of judgment is proper and should be sustained. *Howell v. State*, 10 App. 298.

Defects in indictment or information.—See notes under art. 451, ante, "Requisite 5." And see *Slaughter v. State*, 24 Tex. 410; *Calvin v. State*, 25 Tex. 789; *Senferfit v. State*, 41 Tex. 186.

A motion in arrest of judgment reaches substantial defects only. It is not available to reach defects of form in the indictment, or clerical mistakes. It can be based upon no other ground than such as would be good upon exception to an indictment or information for a substantial defect therein. And such ground must be apparent of record. *State v. Vahl*, 20 Tex. 779; *Peter v. State*, 11 Tex. 762; *Reynolds v. State*, Id. 120; *Terrell v. State*, 41 Tex. 464; *Gibbs v. State*, Id. 491; *Long v. State*, 43 Tex. 467; *Mathews v. State*, 44 Tex. 376; *Golden v. State*, 32 Tex. 737; *Spence v. State*, 1 App. 541; *Coates v. State*, 2 App. 16; *Houillion v. State*, 3 App. 537; *Jinks v. State*, 5 App. 68; *West v. State*, 6 App. 485; *Wilson v. State*, Id. 154; *Friedlander v. State*, 7 App. 204; *Hutto v. State*, Id. 44; *Johnson v. State*, Id. 210; *Douglass v. State*, 8 App. 520; *Beardall v. State*, 9 App. 263; *Rountree v. State*, 10 App. 110; *Johnson v. State*, 14 App. 306; *Walker v. State*, Id. 609; *Ogden v. State*, 15 App. 454; *Branch v. State*, Id. 96; *Cowell v. State*, 16 App. 57; *Lott v. State*, 18 App. 627; *Niland v. State*, 19 App. 166; *Williams v. State*, Id. 276; *Weaver v. State*, 19 App. 547, 53 Am. Rep. 389; *Williams v. State*, 20 App. 357; *Rangel v. State*, 22 App. 642, 3 S. W. 783; *McDaniel v. State*, 24 App. 552, 7 S. W. 249; *Jefferson v. State*, 24 App. 535, 7 S. W. 244.

Where the indictment or information is substantially defective, a motion in arrest of judgment should be sustained. See the following instances: *Strickland v. State*, 19 App. 518; *Longenotti v. State*, 22 App. 61, 2 S. W. 620; *Hickman v. State*, 22 App. 441, 2 S. W. 640; *Anderson v. State*, 20 App. 595; *Trimble v. State*, 16 App. 115.

It is not a good objection in arrest of judgment that the indictment is not marked "filed." *Reynolds v. State*, 11 Tex. 120.

The failure of an indictment to allege that it was presented in court is a defect of form and is not available on motion in arrest of judgment. *Jones v. State*, 32 App. 110, 22 S. W. 149.

Different dates in different counts do not vitiate conviction nor require arrest of judgment. *Shuman v. State*, 34 App. 69, 29 S. W. 160.

A motion to quash information because there is no file mark on the complaint must be made before the trial, and not in arrest of judgment. *Jessel v. State*, 42 App. 72, 57 S. W. 826.

Objections to the sufficiency of an indictment may be raised by motion in arrest of judgment. *Brown v. State*, 60 App. 505, 132 S. W. 789.

An indictment being presented, received by the court, and entered on the minutes, remains pending till it is tried by the court or dismissed by the district attorney; so that it is no ground for quashing it, or arrest of judgment, that defendant not having been arrested, it was placed on the retired docket to be brought forward on the trial docket when defendant should be arrested. *Allen v. State*, 62 App. 557, 138 S. W. 593.

An information charging a gift of intoxicating liquor while an election was being held was not defective so as to furnish a ground for arrest of judgment because it also charged that the defendant informed the other person of the whereabouts of the intoxicating liquor; it being permissible by the use of the conjunction "and" to allege that a misdemeanor was committed in any of the ways defined by statute. *Walker v. State* (Cr. App.) 151 S. W. 318.

The defect in an information bearing no file mark, and not specifically charging that the offense was committed before presentation, cannot be taken advantage of by motion in arrest, but only by motion to quash. *Hall v. State*, 70 App. 240, 156 S. W. 644.

The fact that the word "capable," in a sentence in an indictment for selling liquor charging that the liquor was capable of producing intoxication, was misspelled "capapble," was not ground for motion in arrest of judgment under arts. 476, 480, 849, 850, providing that such motion can only be granted for substantial defects; the word having been correctly spelled in the complaint, and the information providing that it was preferred in connection with the complaint. *Figueroa v. State*, 71 App. 371, 159 S. W. 1188.

A defective and insufficient indictment may be assailed by a motion in arrest of judgment. *Robertson v. State*, 31 Tex. 36.

A motion in arrest complaining that the record did not show return of the indictment into court, held properly overruled where the indictment had been substituted without objection for one that had been destroyed, and the objection was made for the first time after change of venue and trial. *Caldwell v. State*, 41 Tex. 86.

Overruling of motion in arrest of judgment complaining of a substantial defect in the indictment for assault, held error. *Ranch v. State*, 5 App. 363.

A defective indictment held to vitiate the conviction, though no objection was made by motion in arrest of judgment. *Ryan v. State*, 3 App. 254.

A motion in arrest of judgment held not available to present the objections that the finding and return of the indictment was not entered on the minutes, and that the names did not show the ordering and drawing of a special venire. *Rather v. State*, 25 App. 623, 9 S. W. 69.

An indictment held sufficient, on motion in arrest of judgment, to sustain a conviction of murder in the first degree. *Green v. State*, 27 App. 244, 11 S. W. 114.

A motion in arrest complaining of variance in the names of defendants in different allegations of the indictment, held properly overruled. *Wampler v. State*, 28 App. 352, 13 S. W. 144.

A motion in arrest held properly overruled when based on the ground that a prior indictment was pending against defendant for the same offense. *Bonner v. State*, 29 App. 223, 15 S. W. 821.

A motion in arrest of judgment held well taken where the indictment for theft of a cow was wholly insufficient for failure to allege want of consent. *Swink v. State*, 32 App. 530, 24 S. W. 893.

Use of word "at" for "in" in an information in stating the place at which the aggravated assault was committed, held not ground for a motion in arrest of judgment. *Blackwell v. State*, 33 App. 278, 26 S. W. 397, 32 S. W. 128.

Overruling of motion in arrest of judgment which complained of a fatal variance between the purport and tenor clause of the indictment, held error. *Fite v. State*, 36 App. 4, 34 S. W. 922.

In prosecutions for violations of the local option law, objections that the indictment failed to allege that the law was in operation in the county where the violation was charged to have occurred are matters of form only, and cannot be raised on motion in arrest, but must be raised in limine on motion to quash. *Dobson v. State* (Cr. App.) 146 S. W. 546.

— **Objection waived.**—An objection by motion in arrest on the ground that no copy of the indictment was served, held too late when first made after verdict. *Bonner v. State*, 29 App. 223, 15 S. W. 821.

Where defendant pleads to the indictment without moving to quash same or filing plea to the jurisdiction, it is too late thereafter to make such objection by motion in arrest of judgment. *Bonner v. State*, 38 App. 599, 44 S. W. 172.

Variance between allegations and proof.—Where there is a material variance between the allegations of an information and the complaint upon which it is based, the judgment should be arrested on motion. *Lanham v. State*, 9 App. 232; *Smith v. State*, Id. 475.

Variance between complaint and information.—The fact that a complaint alleges an offense to have been committed "on or about" a certain date, and the information omits the phrase "on or about," is no ground for arrest of judgment. *Dave v. State* (Cr. App.) 29 S. W. 1093.

Verdict.—A general verdict of guilty on an indictment containing good and bad counts will be sustained, in the absence of a motion to quash the defective counts, or of objections to evidence tending to support them. *Fry v. State*, 36 App. 582, 37 S. W. 741, 38 S. W. 168.

Issues on motion.—A motion in arrest of judgment raises the question of the sufficiency of the indictment to support the judgment. *Washington v. State*, 41 Tex. 583; *Berliner v. State*, 6 App. 182. And see *Trimble v. State*, 16 App. 115; *Strickland v. State*, 19 App. 518.

A motion in arrest brings in review the sufficiency as to matter of substance of the indictment to support a judgment, but does not raise the question as to the want of evidence or its sufficiency. It is a suggestion merely that judgment can not be legally rendered on the verdict. *Washington v. State*, 41 Tex. 583; *Berliner v. State*, 6 App. 181; *West v. State*, Id. 485.

Order of transfer.—The order of transfer under article 483, ante, cannot be questioned by motion in arrest of judgment. *Coker v. State*, 7 App. 83; *Bonner v. State*, 38 App. 599, 44 S. W. 172, citing *Friedlander v. State*, 7 App. 204.

Pendency of appeal.—Pendency of appeal from conviction under former indictment for same offense held not ground for motion in arrest. *Williams v. State*, 20 App. 357, and cases cited. And see *Johnson v. State*, 22 App. 206, 2 S. W. 609.

Art. 850. [828] Shall not be, etc.—No judgment shall be arrested for want of form. [O. C. 679.]

See Willson's Cr. Forms, 961.

See notes under art. 849.

Cited, *Hamilton v. State* (Cr. App.) 145 S. W. 348.

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.]

See Willson's Cr. Forms, 983.

See *Calvin v. State*, 25 Tex. 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.]

See Willson's Cr. Forms, 983.

CHAPTER THREE

JUDGMENT AND SENTENCE

Art. 1. IN CASES OF FELONY

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1½. INDETERMINATE AND SUSPENDED SENTENCES

- 865a. Indeterminate sentences of persons convicted of certain felonies.

Art.

- 865b. Suspended sentence.
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2. JUDGMENT IN CASES OF MISDEMEANOR

866. May be rendered in absence of defendant.
 867. Judgment when the punishment is fine only.
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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.

See Willson's Cr. Forms, 962, 963, 968, 969, 973-975, 998.

In general.—As to diligence of counsel respecting the record, see district court rule 119 (142 S. W. xxvi); *Dement v. State*, 39 App. 271, 45 S. W. 917.

"Judgment of conviction" defined. *Pennington v. State*, 11 App. 281, citing *Mayfield v. State*, 40 Tex. 289, and *Nathan v. State*, 28 Tex. 326.

Form and requisites of judgment.—Judgment will be reversed if it does not show defendant's plea. *Gilmore v. State*, 37 App. 178, 105, 39 S. W. 105; *Wood v. State*, 37 App. 89, 38 S. W. 623; *Click v. State*, 39 S. W. 370.

The appeal will be dismissed for want of a final judgment where this article has not been complied with. *Mirelles v. State*, 13 App. 346; *Pennington v. State*, 11 App. 281; *Calvin v. State*, 23 Tex. 577.

Judgment failing to recite that plea was entered is insufficient to sustain conviction. *Williams v. State* (Cr. App.) 40 S. W. 283; *Boggs v. State*, 38 App. 82, 41 S. W. 642.

In capital cases all the prescribed forms of law, however apparently unimportant in themselves, must be observed. The right to exact the ultimate penalty must appear clear and perfect in every particular, both in form and substance. *Burrell v. State*, 16 Tex. 147; *Calvin v. State*, 25 Tex. 789; *Rothschild v. State*, 7 App. 519.

A final judgment of conviction may be said to consist of two parts: 1. The facts judicially ascertained, together with the manner of ascertaining them, enter-

ed of record. 2. The recorded declaration of the court pronouncing the legal consequences of the facts thus judicially ascertained. Both of these parts are equally essential. In the first part there should be set forth the title and number of the case, the calling of the case for trial, the appearance of the parties, the plea of the defendant, and, if "not guilty," the selection, impaneling, and swearing of the jury, the submission of the evidence, the charge of the court, the return of the verdict and the finding of the jury. In the second part it should be declared upon the record, in connection with the verdict, that it is considered by the court that the defendant is adjudged to be guilty of the offense as found by the jury, and that the defendant be punished as it has been determined by the jury, setting forth the amount, or the duration and place of punishment, in accordance with the nature and terms of the punishment prescribed in the verdict. *Mayfield v. State*, 40 Tex. 289. This article was framed by the revisers from the decision above quoted. See, also, *Butler v. State*, 1 App. 638; *Young v. State*, Id. 64; *Trimble v. State*, 2 App. 303; *Choate v. State*, Id. 302; *Anschincks v. State*, 43 Tex. 587; *Calvin v. State*, 23 Tex. 578; *Shultz v. State*, 13 Tex. 403; *Labbaite v. State*, 4 App. 169; *Keeller v. State*, Id. 527; *Pennington v. State*, 11 App. 281; *Gaither v. State*, 21 App. 527, 1 S. W. 456; *Ellis v. State*, 10 App. 324.

If the record recites that "the following jury was impaneled," setting out only eleven names, the error is fatal. *Rich v. State*, 1 App. 206; *Huebner v. State*, 3 App. 458. The names need not be recited in the judgment, though, if exception be taken to any juror, it is good practice to set them out. *Morton v. State*, 3 App. 510.

The requisite of a final judgment of conviction prescribed in the ninth clause of this article, that the defendant "is adjudged to be guilty of the offense as found by the jury," has reference to felony cases, and does not apply in misdemeanor cases. *Hill v. State*, 11 App. 379.

The judgment entry in felony cases should show that the judgment was entered in the presence of the defendant prior to pronouncement of sentence. *Mapes v. State*, 13 App. 85; *Gordon v. State*, 13 App. 196.

The judgment entry must be in substantial compliance with the requirements of this article. *Mirelles v. State*, 13 App. 346, citing *Pennington v. State*, 11 App. 281; *Calvin v. State*, 23 Tex. 577.

It is not required that the fact that the indictment or information was read to the jury, shall be recited in the judgment entry as is directed with regard to the defendant's plea. The proper practice, however, is to make the judgment entry, immediately preceding the plea, set forth such fact. Nevertheless, such fact may be sufficiently authenticated in any part of the record, as in the charge of the court to the jury. *White v. State*, 18 App. 57.

The proper practice is to make the judgment entry, immediately preceding the plea, set forth the fact that the indictment was read to the jury; but this is not one of the statutory requisites of the judgment, and its omission will not invalidate the judgment. *White v. State*, 18 App. 57.

A judgment erroneously awarding costs against a defendant convicted of murder in the first degree will be reformed on appeal. *Jackson v. State*, 25 App. 314, 7 S. W. 872.

Final judgment must show that evidence was introduced. *Creswell v. State*, 37 App. 335, 39 S. W. 372, 935.

The final judgment must show compliance with subdiv. 9. *Gaither v. State*, 21 App. 527, 1 S. W. 456; *Mirelles v. State*, 13 App. 346; *Anschincks v. State*, 43 Tex. 587; *Choate v. State*, 2 App. 302, and cases cited.

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

In a capital conviction the judgment need not declare the manner in which the death penalty shall be executed. *Steagald v. State*, 22 App. 464, 3 S. W. 771. Nor should it adjudge costs against the defendant. *Lanham v. State*, 7 App. 126, post, art. 1136.

In capital felonies the record must show an arraignment and plea, but these are usually shown by a separate entry upon the minutes, and not in the judgment entry, though it would be sufficient to set them forth in the judgment entry. *Smith v. State*, 21 App. 277, 17 S. W. 471.

A judgment of conviction must recite that a jury was selected, impaneled, and sworn. *Anderson v. State*, 32 App. 528, 24 S. W. 897.

Judgment failing to show selection of jury, as required by this article will be reversed. *Yates v. State*, 37 App. 347, 39 S. W. 933.

Judgment must show that the evidence was introduced. *Creswell v. State*, 37 App. 335, 39 S. W. 372, 935.

To sustain a conviction record must show making and entering of plea, selection and impaneling of jury and submission of evidence. *Oliver v. State* (Cr. App.) 40 S. W. 273.

In a misdemeanor it is not necessary that the judgment show an offense or nomine of which appellant has been convicted. *Kiefel v. State*, 49 App. 308, 94 S. W. 463.

The record must contain a final judgment. The recital in the record that "it is ordered adjudged and decreed by the court that the defendant Caskey be fined \$50 and costs" is not a final judgment. Even the verdict is not set out in the record. *Caskey v. State* (Cr. App.) 108 S. W. 666.

Under this article a judgment consists of the facts judicially ascertained, together with the manner of ascertaining them, entered of record, and the recorded declaration of the court pronouncing the legal consequence of the facts thus judicially ascertained, and both of these parts are equally essential. *Robinson v. State*, 58 App. 550, 126 S. W. 276.

In view of the verdict of guilty, as charged, copied in the judgment, and the indictment properly charging the engaging in and pursuit of the business of selling

intoxicating liquors after the prohibition law was properly and legally put in force, held, the judgment and sentence, when taken together, were not insufficient, as not showing that defendant had been convicted of any offense. *Veherana v. State*, 72 App. 4, 160 S. W. 711.

Conformity to indictment, verdict, or other parts of record.—The judgment must follow the indictment, even as to the defendant's name. *Schutze v. State*, 30 Tex. 598. A misrecital therein as to the date of the verdict is immaterial. *Alexander v. State*, 4 App. 261; see, also, *Stewart v. State*, 4 App. 419; *Mills v. State*, Id. 263, for instances of other immaterial errors. It need not recite the names of the jurors who tried the case, nor the exact oath which was administered to the jury. The usual form is, "thereupon a jury, to wit: A. B., and eleven others, were duly selected, impaneled, and sworn," and this is sufficient. If the entry undertakes to set forth the names of the jurors, it must set forth the legal number, no more and no less, or the judgment will be set aside. If it undertakes to recite the oath administered to the jury, and recites a different oath than that prescribed by law, the judgment will be bad. *Ante*, arts. 698, 700.

That the word "years" was omitted after the figure designating the number of years in the verdict as copied in the judgment, did not require a reversal. *Long v. State*, 1 App. 709.

If the indictment and verdict are for "conspiracy to commit burglary," the judgment is erroneous if it adjudges the accused guilty of "conspiracy to commit robbery." *Johnson v. State*, 3 App. 599.

In entering a verdict upon the minutes, the clerk should copy it verbatim et literatim, and should so transcribe it into the transcript on appeal. It is an unwarranted tampering with the record for him to do otherwise. *Crockett v. State*, 14 App. 226.

Record of judgment.—That the term of imprisonment was omitted from the verdict as copied in the judgment did not require a reversal where the verdict as rendered was complete and in proper form. *McInturf v. State*, 20 App. 335.

Defendant was convicted of an attempt to commit arson; the judge through mistake sentenced him for arson, held immaterial. *Ex parte Strey* (Cr. App.) 28 S. W. 811. See, also, *Smith v. State*, 34 App. 123, 29 S. W. 774.

Defendant, a female under the age of sixteen years, was convicted of murder in the second degree, and the jury assessed her punishment at confinement for life in the state reformatory. The court entered judgment confining defendant in the penitentiary for life; held, incorrect. The law does not authorize the confinement of females in the reformatory. *Ex parte Mathews*, 38 App. 617, 44 S. W. 153.

Where the only offense submitted was assault with intent to rob, and a general verdict of guilty was returned, it was error to render judgment for assault with intent to murder. *Hernandez v. State*, 60 App. 382, 131 S. W. 1091.

The court cannot accept a verdict and permit it to stand and yet refuse to abide by it and impose a sentence not authorized thereby. *Baker v. State*, 70 App. 618, 158 S. W. 598.

All judgments of court must be entered of record, and this necessarily includes interlocutory judgments as well as judgments on exception or demurrer to pleadings. *Rust v. State*, 31 App. 75, 19 S. W. 763. And see, also, *Reyna v. State*, 26 App. 686, 14 S. W. 455.

A judgment by a court of record can only be evidenced by its records. *Gustie v. State*, 44 App. 272, 70 S. W. 751.

Correction of judgment.—In a misdemeanor case, as in a civil case, the court has full control over its judgment until the adjournment of the trial term, and may, 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. *Nietcalf v. State*, 21 App. 174, 17 S. W. 142. But this power does not extend to cases where punishment has already been inflicted in whole or in part under the judgment rendered. See an instance in which it was held that the power could not legally be exercised: *Grisham v. State*, 19 App. 504; *Cunningham v. State*, 26 App. 83, 9 S. W. 62. And see *Ex parte Cox*, 29 App. 84, 14 S. W. 396; *Ex parte Dockery*, 38 App. 293, 42 S. W. 599.

The court has authority to correct its judgments at any time during the term. *Bruce v. State*, 36 App. 53, 35 S. W. 383.

A court has power to, at any time during the term, correct the record so as to correspond with the facts in the case. *Carr v. State*, 36 App. 359, 37 S. W. 426.

The court may correct the record so as to show that sentence was pronounced immediately at defendant's request. *Doans v. State*, 36 App. 468, 37 S. W. 751.

A judgment may, on notice, be corrected to correspond with the indictment and the verdict. *Kingsbury v. State*, 37 App. 259, 39 S. W. 365.

In view of articles 859 and 938 the appellate court has power to reform the judgment to conform to the facts, where it had all the data necessary to do so, since if, under this article, the lower court had power to amend and reform the judgment after the term, there was no reason why the appellate court, having all the data before it, could not also do it. *Robinson v. State*, 58 App. 550, 136 S. W. 276.

During term time the district court has jurisdiction to alter, modify, or correct its judgments and decrees rendered during the term. *Ex parte Ogden*, 63 App. 380, 140 S. W. 345.

The Court of Criminal Appeals may, after an appeal has been taken, conform the judgment to the verdict. *Robison v. State* (Cr. App.) 150 S. W. 912.

What constitutes final judgment.—See notes under art. 894, post.

A judgment overruling a motion for a new trial, or in arrest of judgment, or disposing of exceptions to an indictment, is not a final judgment. *State v. Paschal*, 22 Tex. 584; *Roberts v. State*, 3 App. 47; *State v. Thornton*, 32 Tex. 104.

An entry, "it is, therefore, ordered, adjudged, and decreed by the court that the

sheriff take the defendant in custody until the fine and costs are paid," is not a final judgment. *Butler v. State*, 2 App. 529.

In felony cases, the sentence is in fact the final judgment; it must be pronounced before appeal can be prosecuted. *Arcia v. State*, 26 App. 193, 9 S. W. 685. See *Mapes v. State*, 13 App. 85.

Sentence is the final judgment in our practice. *Arcia v. State*, 26 App. 193, 9 S. W. 685.

A judgment is final where it terminates the rights of the parties and the case. 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 App. 21; *Braden v. State*, Id., 22, and *Want v. State*, Id., 24.) *Terry v. State*, 30 App. 408, 17 S. W. 1075; *Ex parte Dickerson*, 30 App. 448, 17 S. W. 1076.

A judgment is always final if it terminates the right of the parties with reference to the particular suit. It is not necessary that it be a judgment upon the merits; if it definitely puts the case out of court, it is final. *Terry v. State*, 30 App. 409, 17 S. W. 1075.

A judgment rendered against sureties on a bail bond, is not a final judgment from which an appeal will lie, where no disposition has been made of the case as to the principal. *Cox v. State*, 34 App. 94, 29 S. W. 273, and cases cited.

A judgment in a felony case, not containing the ninth and tenth requisites of this article, is defective and not final. *Longoria v. State* (Cr. App.) 44 S. W. 1089.

See this case for a judgment in a misdemeanor case held not to be a final judgment. *Traylor v. State* (Cr. App.) 106 S. W. 142.

Conclusiveness and collateral attack.—A final judgment can be collaterally attacked only when it is void. *Johnson v. State*, 39 App. 625, 48 S. W. 70.

Every presumption to uphold the judgment of the trial court will be invoked by the appellate court. The party attacking such judgment on appeal must show sufficient cause to set it aside. *Gordon v. State*, 29 App. 410, 16 S. W. 337; *Brown v. State*, 32 App. 119, 22 S. W. 596; *Hall v. State*, 33 App. 537, 28 S. W. 200.

The affidavit of the defendant setting out that he did not plead to the indictment will not suffice to controvert the recital in the judgment that he did plead to it. To be sufficient such affidavit must be supported by proof. *Id.*

Every presumption is indulged in favor of the correctness of judgments of the court, and a person attacking such judgment must overcome all of such presumptions. *Harris v. State*, 39 App. 484, 46 S. W. 647.

Joint or several judgment.—In a joint prosecution the verdict and judgment should be against each of the defendants separately; a joint verdict and judgment, being invalid, cannot be sustained. *Medis v. State*, 27 App. 194, 11 S. W. 112, 11 Am. St. Rep. 192; *Whitcomb v. State*, 30 App. 269, 17 S. W. 258; *Caesar v. State*, 30 App. 274, 17 S. W. 258; *Hays v. State*, 30 App. 472, 17 S. W. 1063. See *Flynn v. State*, 8 App. 398; *Sterling v. State*, 25 App. 716, 9 S. W. 45, 8 Am. St. Rep. 452; *Cunningham v. State*, 26 App. 83, 9 S. W. 62; *Medis v. State*, 27 App. 194, 11 S. W. 112, 11 Am. St. Rep. 192; *Hays v. State*, 30 App. 472, 17 S. W. 1063; *Hogg v. State*, 40 App. 110, 48 S. W. 580.

A verdict reading, "We * * * find the defendants * * * guilty of murder in the first degree * * * and assess their punishment at death," held not to import a joint verdict which would be satisfied by the death of either defendant. *Mootry v. State*, 35 App. 450, 33 S. W. 877, 34 S. W. 126.

A verdict reading, "We * * * find the defendants * * * guilty of murder in the first degree and assess their punishment at life imprisonment," held a separate finding relative to the punishment of each defendant. *Polk v. State*, 35 App. 495, 34 S. W. 633.

Final judgment prerequisite to appeal.—See notes under art. 856, post.

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.

See *Willson's Cr. Forms*, 964.

See *Pennington v. State*, 11 App. 281; *Johnson v. State*, 14 App. 306; *Mayfield v. State*, 40 Tex. 289; *Nathan v. State*, 28 Tex. 326; *Arcia v. State*, 26 App. 193, 9 S. W. 685; *Woods v. State*, 26 App. 490, 10 S. W. 108; *Terry v. State*, 30 App. 408, 17 S. W. 1075.

Cited, *Sartain v. State*, 10 App. 651, 38 Am. Rep. 649.

Minutes of pronouncement.—Sentence may be entered without memoranda in judges' minutes, to show that it has been pronounced. *Gonzales v. State*, 35 App. 339, 33 S. W. 363, 60 Am. St. Rep. 51.

Requisites of judgment of sentence.—A judgment of conviction recited that the defendant is guilty as confessed in his plea of guilty, and, his punishment having been fixed at "five years confinement in the penitentiary," he is to be punished "by confinement in the penitentiary for five years." The judgment of sentence, after reciting the provisions of the judgment of conviction, ordered that defendant be delivered to the superintendent of penitentiaries, by whom he "shall be confined in said _____ for five years, in accordance with the provisions of the law governing the _____ of said state." Held, that such defects in the judgment of sentence were not ground for reversal. *Patton v. State*, 62 App. 28, 136 S. W. 42.

That such judgment of sentence was not numbered or dated was not ground for reversal. *Patton v. State*, 62 App. 28, 136 S. W. 42.

Practice.—*Fletcher v. State*, 37 App. 193, 39 S. W. 116.

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.]

See Willson's Cr. Forms, 964.

See *Arcia v. State*, 26 App. 193, 9 S. W. 685; *Woods v. State*, 26 App. 490, 10 S. W. 108.

Reargument of motion for new trial.—After motion for new trial was overruled and sentence pronounced, a reargument of the motion did not affect the sentence. *Fletcher v. State*, 37 App. 193, 39 S. W. 116.

Presence of defendant.—In felony cases the judgment must be entered in the presence of the defendant and preceding the pronouncing of the sentence, and the judgment entry should show a compliance with this requirement. *Mapes v. State*, 13 App. 85; *Gordon v. State*, Id. 196.

Defendant must be present at the hearing of a motion to enter judgment nunc pro tunc after dismissal of an appeal, unless he waives the right to be present. *Madison v. State*, 17 App. 479; *Mapes v. State*, 13 App. 85; *Vestal v. State*, 3 App. 648.

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.]

See Willson's Cr. Forms, 964-967, 985.

See art. 68, ante; art. 917, post.

See *Arcia v. State*, 26 App. 193, 9 S. W. 685; *Woods v. State*, 26 App. 490, 10 S. W. 108.

Historical.—Before the enactment of this article, when the defendant appealed, sentence was in all cases suspended until after the affirmance of the judgment of conviction in the appellate court. *Smith v. State*, 41 Tex. 352; *Bozier v. State*, 5 App. 221; *Brown v. State*, Id. 546; *Pate v. State*, 21 App. 191, 17 S. W. 461; *O'Connell v. State*, 18 Tex. 343.

Judgment including sentence prerequisite to appeal.—Sentence after conviction of any offense less than capital is prerequisite to an appeal. *Crow v. State* (Cr. App.) 36 S. W. 93; *Hart v. State*, 14 App. 322; *Walters v. State*, 18 App. 8; *Arcia v. State*, 26 App. 193, 9 S. W. 685; *Taylor v. State*, 14 App. 340; *Cheatham v. State* (Cr. App.) 44 S. W. 1094; *Jones v. State*, 43 App. 419, 66 S. W. 559; *Heinzman v. State*, 34 App. 76, 29 S. W. 156, 482; *Pate v. State*, 21 App. 191, 17 S. W. 461; *Foster v. State*, 64 App. 531, 143 S. W. 625; *Kinch v. State* (Cr. App.) 150 S. W. 610.

An appeal will not lie until after rendition of final judgment. *Smith v. State*, 1 App. 516. See *Downs v. State*, 7 App. 483; *Longoria v. State* (Cr. App.) 44 S. W. 1089.

An appeal will lie after conviction of murder in the first degree only after rendition of final judgment and entry of same of record. *Darnell v. State*, 24 App. 6, 5 S. W. 522; *Washington v. State*, 31 App. 84, 19 S. W. 900, and cases cited; *Estes v. State*, 38 App. 506, 43 S. W. 982; *Robinson v. State*, 58 App. 550, 126 S. W. 276.

An appeal can be prosecuted only from a final judgment of conviction. There is no conviction until judgment has been rendered and entered adjudging defendant to be guilty of an offense. *Washington v. State*, 31 App. 84, 19 S. W. 900; *Darnell v. State*, 24 App. 6, 5 S. W. 522.

The record in all felony cases must show final judgment and sentence, except that where the death penalty is assessed, sentence will be suspended until decision of court of criminal appeals has been received. *Boone v. State* (Cr. App.) 59 S. W. 267.

Sentence after conviction is essential to a final judgment; and, in the absence, an appeal must be dismissed. *Woodridge v. State*, 61 App. 324, 135 S. W. 124.

Under this article one at whose instance sentence was suspended had no right of appeal before sentence was pronounced. *Bierman v. State*, 73 App. 284, 164 S. W. 840.

Jurisdiction after appeal perfected.—The trial court cannot conform the judgment to the verdict after an appeal has been taken. *Robison v. State* (Cr. App.) 150 S. W. 912.

Judgment before sentence.—In felony cases the judgment must be entered before the pronouncing of the sentence. *Mapes v. State*, 13 App. 85; *Gordon v. State*, 13 App. 196.

Time in which appeal must be taken.—In death penalty cases in order to give court of criminal appeals jurisdiction, the appeal must be taken at the term at which defendant is tried and convicted. *Roan v. State* (Cr. App.) 65 S. W. 1069.

Time for pronouncement of sentence.—When the verdict is for murder with the death penalty, and an appeal is taken, sentence must be suspended until the deci-

sion has been received. On a conviction of murder, with a life term in the penitentiary, sentence may be pronounced after notice of appeal has been given. *Taylor v. State*, 14 App. 340.

Where defendant on conviction of murder in the first degree gave no notice of appeal, a sentence imposed upon him on the same date was not void. *Ex parte Martinez* (Cr. App.) 145 S. W. 959.

Correction of sentence.—A sentence providing that it should be carried into execution after expiration of the term of imprisonment in another suit, instead of from date, could be corrected by the Supreme Court. *Prince v. State*, 44 Tex. 480.

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.]

See *Ex parte Parker*, 35 App. 12, 29 S. W. 480, 790.

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.]

Reception of verdict on Sunday.—A verdict can not be received on Sunday, the day after the term of the court has legally expired. Such a verdict is a nullity, and will not support a judgment and sentence. *Harper v. State*, 43 Tex. 431.

Where the term ended at 12 o'clock p. m. Saturday, March 30, a verdict and judgment rendered on the next day were void. *Ex parte Juneman v. State*, 28 App. 486, 13 S. W. 783, and cases cited, and see *Ex parte Parker*, 35 App. 12, 29 S. W. 480, 790.

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.]

See *Willson's Cr. Forms*, 1005, 1008.

Effect of perfection of appeal.—Motion for new trial was overruled, and notice of appeal given, but no final judgment entered; held, the appeal having been perfected, the lower court had lost jurisdiction and a judgment entered nunc pro tunc is void. *Estes v. State*, 38 App. 506, 43 S. W. 982.

Entry nunc pro tunc.—For forms relating to a judgment nunc pro tunc, see *Willson's Cr. Forms*, 1005-1008.

A defendant may also cause final judgment to be entered nunc pro tunc and appeal therefrom, even when a former appeal was dismissed because of his escape. *Smith v. State*, 1 App. 408-516.

If an appeal has been taken, but no final judgment has been entered, and the appeal is dismissed, it is the proper practice to cause the final judgment to be entered at a subsequent term in the court a quo, nunc pro tunc, and from such judgment the defendant may again prosecute an appeal. Where the state desires to have a judgment nunc pro tunc entered, a motion for that purpose must be filed, and notice of such motion must be served upon the defendant at least three days before the motion is acted upon, and the defendant must be personally present when such motion is disposed of, unless the defendant, in person, should waive such notice and personal presence. *Madison v. State*, 17 App. 479; *Mapes v. State*, 13 App. 85; *Vestal v. State*, 3 App. 648.

Under art. 916 (providing that an appeal in effect suspends all further proceedings in the court in which the conviction was had, except so far as it may be necessary to restore any portion of the record lost or destroyed, after appeal taken), the trial court cannot enter a recognizance on the minutes nunc pro tunc. *Quarles v. State*, 37 App. 302, 39 S. W. 668.

After an appeal before final judgment, judgment nunc pro tunc cannot be entered, and the appeal must be dismissed. *Tucker v. State*, 62 App. 46, 136 S. W. 258.

— **Special judge.**—A special judge, who tried the case equally with the regular judge, may enter the judgment nunc pro tunc even at a subsequent term. *Pennington v. State*, 11 App. 281.

Correction of judgment at subsequent term.—The court has no authority at a subsequent term to correct a judicial error in a judgment rendered at a former term in proceedings on a forfeited bail bond. *Collins v. State*, 16 App. 274.

The statute does not authorize the correction of the judgment at a subsequent term, so as to authorize the prosecution of an appeal, and the notice of appeal must be entered during the term at which the judgment was entered. *Offield v. State*, 61 App. 340, 135 S. W. 568.

Sentence after term or at subsequent term.—When a motion for new trial is presented and overruled just before time for court to adjourn, on the last day of the term, judgment and sentence entered up immediately, but after the expiration of the term, is valid. *Ex parte Parker*, 35 App. 12, 29 S. W. 480, 790.

Where a defendant has been convicted, and motion for new trial overruled, and notice of appeal given and the court adjourns without having passed sentence, the court cannot sentence defendant at a succeeding term, because the power of the district court over the case has ceased except to substitute lost or destroyed records as provided in article 884. *Hinman v. State*, 54 App. 434, 113 S. W. 281.

Entry of sentence.—Where the indictment, verdict and judgment are before the court, sentence may be entered without any memoranda in the judge's minutes or other record to show that sentence has been pronounced. *Gonzales v. State*, 35 App. 333, 33 S. W. 363, 60 Am. St. Rep. 51.

Practice.—See *Hinman v. State*, 54 App. 434, 113 S. W. 280.

On appeal.—See *McCorquodale v. State*, 54 App. 344, 98 S. W. 879.

In view of this article and article 938 the appellate court had power to reform the judgment to conform to the facts, where it had all the data necessary to do so, since if, under section 853, the lower court had power to amend and reform the judgment after the term, there was no reason why the appellate court, having all the data before it, could not also do it. *Robinson v. State*, 58 App. 550, 126 S. W. 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.]

See *Willson's Cr. Forms*, 964.

Presumptions.—It is not essential that the record on appeal should affirmatively show that, before pronouncing sentence, the defendant was asked if he had anything to say why the sentence should not be pronounced against him. If the record be silent as to this, it will be presumed that the trial court performed its duty and asked the defendant the statutory question. *Bohannon v. State*, 14 App. 271. To authorize the reversal of a conviction for noncompliance with the preceding article, it must be made to appear that the trial judge refused to ask the defendant the statutory question, and thereby deprived him of his legal right to be heard in bar thereof. *Johnson v. State*, 14 App. 306.

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.

See *Willson's Cr. Forms*, 989.

See post, arts. 1017-1020, and notes. And see *Darnell v. State*, 24 App. 6, 5 S. W. 522.

Review of denial of trial.—Denial of motion to try sanity of defendant after sentence is not reviewable. *Humphreys v. State* (Cr. App.) 39 S. W. 679.

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.

See *Willson's Cr. Forms*, 990.

Necessity of motion.—In order for a defendant to bring himself within the terms of this subdivision he must allege and prove that he had not previously filed a motion for a new trial or a motion in arrest of judgment, either or both as the case may be. *Hines v. State*, 44 App. 319, 70 S. W. 956.

Meritorious motion.—When defendant had no counsel until about 13 days after his conviction, and when called up for sentence he interposed a motion for a new

trial which showed merit, during the same term of court, the motion should have been heard. *Bird v. State*, 48 App. 188, 87 S. W. 147.

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.]

See Willson's Cr. Forms, 978, 988-991, 1009.

Appeal under subdivision 4.—In criminal cases the right of appeal exists only where the defendant has been found and adjudged to be guilty of an offense. An appeal can only be prosecuted from a final judgment of conviction. It is clear that it is the intention of the statute (C. C. P., subdivision 4, of article 861) that the verdict of the jury and the judgment of the trial court upon the issue of identity shall be final and conclusive, and no appeal therefrom lies to this court. *Washington v. State*, 31 App. 84, 19 S. W. 900.

Additional grounds of objection.—In addition to the above statutory matters, which will bar the sentence, an objection that there is no indictment in the case charging him with an offense, is a valid bar to sentence. *Fate v. State*, 21 App. 191, 17 S. W. 461; *Beardall v. State*, 4 App. 631; *Beardall v. State*, 9 App. 262.

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.]

See Willson's Cr. Forms, 967, 986, 987, 1002, 1009.

Historical.—Prior to the enactment of this article, cumulative punishment could not be assessed and adjudged against a defendant. *Baker v. State*, 11 App. 262; *Hannahan v. State*, 7 App. 664; *Prince v. State*, 44 Tex. 480.

Constitutionality.—This article does not conflict with section 13 of the Bill of Rights, and is not unconstitutional. *Lillard v. State*, 17 App. 114. See, also, *Shumaker v. State*, 10 App. 117; *Lockhart v. State*, 29 App. 35, 13 S. W. 1012; *Ex parte Cox*, 29 App. 84, 14 S. W. 396; *Ex parte Hunt*, 28 App. 361, 13 S. W. 145.

Application and purpose of article.—To authorize the cumulative punishment under this article, it is not essential that the cases should have been tried at the same term of court. *Ex parte Moseley*, 30 App. 338, 17 S. W. 418. Nor is it essential that the cumulative punishment be assessed in the original judgment of conviction; it is sufficient if it be assessed in the final judgment. *Id.* And on the subject, see *Ex parte Rice*, 26 App. 343, 9 S. W. 615; *Ex parte Cox*, 29 App. 85, 14 S. W. 396.

The trial court is authorized to make a sentence in one case cumulative of that pronounced against defendant in a preceding conviction. C. C. P. art. 800. *Smith v. State*, 34 App. 123, 29 S. W. 774.

This article applies to all cases where parties are punished by confinement in the county jail. *Stewart v. State*, 37 App. 135, 33 S. W. 1143.

The law authorizes a cumulative sentence where defendant has been convicted of a felony in some other county or at some former term of court. *Miller v. State* (Cr. App.) 44 S. W. 162.

A cumulative sentence upon two or more convictions against a defendant is valid. *Paris v. State*, 61 App. 503, 135 S. W. 381.

The object of this article is to provide for cumulative punishment; and where one is sentenced to the penitentiary pending his motion for new trial after conviction of another offense, the sentence on the latter conviction is properly made to begin on the termination of the former sentence. *Culwell v. State*, 70 App. 596, 157 S. W. 765.

Under this article the second or subsequent sentence, which is cumulative, may be a jail sentence for a misdemeanor. *Ex parte Davis*, 71 App. 538, 160 S. W. 459.

Where accused, who was convicted of felony, had been convicted about a year before for another offense and sentenced to two years' confinement in the penitentiary, and the record did not show that she had not been pardoned, the court, in accordance with this article properly sentenced accused to confinement in the penitentiary for a term of years to begin at the expiration of the first term. *Forrester v. State*, 73 App. 61, 163 S. W. 87.

This article applies only where there has been a final conviction in the first case, and hence not where an appeal in that case is pending. *Law v. State*, 73 App. 5, 163 S. W. 90.

Necessity of order of court.—Where the court does not order in its judgment that two or more sentences in different prosecutions shall be cumulative, as permitted by this article, the terms of imprisonment run concurrently. *Ex parte Davis*, 71 App. 538, 160 S. W. 459.

Sufficiency of information.—Where an information charging the offense of keeping a disorderly house was intended to charge only one offense as having been committed in two different ways, only one punishment is authorized; but, if each count was intended to and did charge a separate and distinct offense, a conviction might be had under all and punishment assessed for each count. *Sanders v. State*, 70 App. 209, 156 S. W. 927.

Where an information consisted of two counts, the first charging defendant with keeping a disorderly house in which immoral women were permitted to reside, and the second charging the keeping of a disorderly house in which intoxicating liquors were sold without a license, and the jury found accused guilty, under each count, assessing a separate punishment, the judgment will be sustained; the information, instructions, and verdict showing that accused was found guilty of two distinct offenses and was not receiving double punishment for the same one. *Sanders v. State*, 70 App. 209, 156 S. W. 927.

Cumulation of sentence alone.—When subsequent sentences were cumulated in the sentence only, and not in the judgment they are not void. *Ex parte Crawford*, 36 App. 180, 36 S. W. 92.

Computation of sentences.—Accused was arrested and charged with theft and burglary, and at his examining trial for burglary on June 18th was bound over and remanded to jail in default of giving bond, and on June 20th was convicted of theft, and sentenced to four months in the county jail. Held, that the time accused was in jail after his conviction for theft and commitment until he was tried and sentenced to the penitentiary for burglary should be considered as a part of the four months' jail sentence, since the sentence for theft could not be cumulated, because there had then been no prior conviction. *Ex parte Davis*, 71 App. 538, 160 S. W. 459.

Presumption.—On passing sentence the judge remarked, "This sentence will begin at the expiration of the sentence you are now serving out." It was objected that there was no proof of former conviction. Held, in absence of proof it will be presumed that the court's action was proper under this article. *King v. State*, 32 App. 463, 24 S. W. 514.

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.]

See Willson's Cr. Forms, 964.
See art. 938, and notes.

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.]

See Willson's Cr. Forms, 1009.

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.

See Willson's Cr. Forms, 1010-1013.
See post, art. 1056; *Ex parte Lawson* (Cr. App.) 175 S. W. 698.

1½. INDETERMINATE AND SUSPENDED SENTENCES

Art. 865a. Indeterminate sentences of persons convicted of certain felonies.—That whenever any person seventeen years of age or over shall be on trial for any felony, the jury trying said cause shall

not only ascertain whether or not said person is guilty of the offense charged in the indictment, but shall also in the verdict assess the punishment or penalty within the period of time fixed by law as the maximum and minimum penalty for such offense, provided, if the jury shall assess the punishment for such offense at a longer period of time than the minimum period of imprisonment in the penitentiary for such offense, then the judge presiding in such cause, in passing sentence on such person, instead of pronouncing a definite time of imprisonment in the penitentiary on such person so convicted, he shall pronounce upon such person an indeterminate sentence of imprisonment in the penitentiary, fixing in such sentence the minimum and maximum terms thereof, fixing in said sentence as the minimum time of imprisonment in the penitentiary the time now or hereafter prescribed by law as the minimum time of imprisonment in the penitentiary, and as the maximum time of such imprisonment the term fixed by the jury in their verdict as punishment for such offense; provided, that if the punishment assessed by the jury shall be by pecuniary fine only, or imprisonment in the county jail, or both fine and imprisonment in the county jail, then the provisions of this act shall not apply. [Act 1913, S. S., p. 4, sec. 1, superseding Act 1913, p. 262, sec. 1.]

Constitutionality of acts.—Indeterminate sentence law (Acts 33d Leg. c. 132), providing that, instead of pronouncing a definite term of imprisonment after finding or verdict of guilty, the court trying the case shall pronounce an indeterminate sentence of imprisonment in the penitentiary for a term, stating in such sentence the minimum and maximum limits thereof, fixing as the minimum time for such imprisonment the time now or hereafter prescribed by law as the minimum time of imprisonment for the punishment of such offense, and as the maximum time the maximum time now or hereafter prescribed by law as a penalty for such offense. Held, that such act necessarily applied to offenses, the minimum punishment for which in many instances was a mere fine, and hence the act was void, within Pen. Code 1911, art. 6, providing that whenever it appears that a provision is so indefinitely framed or of such doubtful construction that it cannot be understood, either from the language in which it is expressed or from some other written law of the state, it shall be regarded as wholly inoperative. *Ex parte Marshall*, 72 App. 83, 161 S. W. 112.

The constitutional provision entitling accused to trial by jury does not preclude the Legislature from providing that the jury shall only pass on the question of guilt or innocence and that the punishment shall be assessed by the court. *Ex parte Marshall*, 72 App. 83, 161 S. W. 112.

The indeterminate sentence law passed at the regular session of the 33d Legislature (Acts 33d Leg. c. 132) having been declared unconstitutional, accused, charged with murder alleged to have been committed October 1, 1901, for which he was placed on trial in July, 1913, was entitled as of right to have his punishment assessed by the jury, as provided by Code Cr. Proc. 1911, art. 770. *Johnson v. State*, 72 App. 178, 161 S. W. 1998.

The Indeterminate Sentence Law (Acts 33d Leg. c. 132) is invalid. *Davis v. State*, 73 App. 272, 164 S. W. 849.

In view of the invalidity of Suspended Sentence Act April 3, 1913 (Acts 33d Leg. c. 132), the court may direct the jury to assess the penalty, instead of merely finding accused guilty, and the court may then afterwards impose the punishment. *Lopez v. State*, 73 App. 624, 166 S. W. 154.

Repeal of statutes imposing death penalty.—The indeterminate sentence law (Acts 33d Leg. 1st Called Sess. c. 5), amending Acts 33d Leg. c. 132, did not operate to impliedly repeal those statutes, authorizing the assessment of the death penalty for specified offenses. *Harris v. State* (Cr. App.) 169 S. W. 657.

Application to crimes committed before passage of act.—Under Pen. Code 1911, arts. 15-19, providing that, where a penalty is ameliorated by a subsequent law, a party committing an offense prior to the adoption of the subsequent law shall be punished under the later law unless he shall elect otherwise, but that in other respects the defendant shall be tried under the old law, where a defendant was charged with committing a murder before Pen. Code 1911, arts. 1140, 1141, defining murder, were amended by Act April 3, 1913 (Acts 33d Leg. c. 132), the court should charge the jury as to the definition of murder under the old law, but, as to the penalty, under the new law. *Robbins v. State*, 73 App. 367, 166 S. W. 528.

Nature of offense.—Where accused was convicted of violating the local prohibition law, he was entitled to an indeterminate sentence. *Jarrot v. State* (Cr. App.) 168 S. W. 95.

Functions of court and jury.—Though the indeterminate sentence law is not a question for the jury, that the court in response to their request informed them as to its operation is not reversible error, where he correctly informed them and the jury imposed almost the minimum punishment. *Clark v. State* (Cr. App.) 174 S. W. 354.

Form and requisites of verdict.—A verdict convicting accused of manslaughter and fixing the punishment is not objectionable because not indeterminate, since,

under the indeterminate sentence law, the jury finds the verdict, and the court fixes the punishment from the lowest term specified to the amount fixed by the jury. *Clay v. State* (Cr. App.) 170 S. W. 743.

Form and requisites of sentence.—Under the second indeterminate sentence law, an accused, whose punishment was fixed by the jury at three years in the penitentiary, should be sentenced to imprisonment for a period of not less than two and not more than three years. *Simmons v. State*, 73 App. 288, 164 S. W. 843.

Where, in a prosecution for rape, the jury assessed the punishment at 99 years, the court should have, under the indeterminate sentence law, sentenced defendant for not less than 5 nor more than 99 years. *Fate v. State*, 73 App. 278, 164 S. W. 1018.

Under the indeterminate sentence law, the punishment of one convicted of murder, fixed at 17 years in the penitentiary, must be modified so as to provide for confinement therein for not less than 5 years nor more than 17 years. *Cole v. State*, 73 App. 457, 165 S. W. 929.

Under Act Aug. 18, 1913 (Acts 33d Leg. [Extra Sess.] c. 5), the court, on sentencing one convicted of selling whisky in a prohibition county, cannot sentence accused for two years, the time fixed by the verdict; but the sentence must be made in accordance with the statute. *Martoni v. State* (Cr. App.) 167 S. W. 349.

Under the indeterminate sentence law, where the jury assessed the punishment for burglary at five years' imprisonment, accused should have been sentenced for not less than two nor more than five years. *Bering v. State* (Cr. App.) 168 S. W. 100.

The jury having adjudged 25 years' imprisonment to the defendant, the court should have given an indeterminate sentence of from 5 to 25 years instead of a fixed term. *Vasquez v. State* (Cr. App.) 172 S. W. 225.

Where defendant was convicted of murder, the judgment should have been under the indeterminate sentence law, sentencing him to the penitentiary for not less than five years nor longer than his natural life. *Orange v. State* (Cr. App.) 173 S. W. 297.

A sentence of imprisonment must not be for a specified term, but must follow the indeterminate sentence law (Acts 33d Leg. c. 132). *Guyton v. State* (Cr. App.) 175 S. W. 1063.

The verdict being for two years, the court cannot, under the indeterminate sentence law, pronounce sentence of not less than two years nor more than five years; for the punishment cannot exceed that fixed by the jury, and, if this exceeds the minimum, the sentence should be not in excess of that fixed by the jury, nor less than the minimum. *Ford v. State* (Cr. App.) 177 S. W. 970.

In a prosecution for running a gambling house, evidence that defendant after his arrest was again seen at such house was inadmissible on a plea of suspended sentence; other transactions than that with which defendant stands charged being material only as to his reputation or standing. *Caruth v. State* (Cr. App.) 177 S. W. 973.

Where one, who pleaded guilty of burglary, filed a plea asking that sentence be suspended, the state could cross-examine him, after his taking the stand to testify that he had never been convicted of a felony, as to the mode and manner of committing the offense, as an aid to the jury in determining whether they should suspend sentence. *Brown v. State* (Cr. App.) 177 S. W. 1161.

Reformation of judgment in appellate court.—*Cisneros v. State* (Cr. App.) 174 S. W. 608; *Vasquez v. State* (Cr. App.) 172 S. W. 225; *Perales v. State* (Cr. App.) 172 S. W. 790; *Mendoza v. State* (Cr. App.) 172 S. W. 790; *Ortiz v. State* (Cr. App.) 173 S. W. 300; *Alzaida v. State* (Cr. App.) 173 S. W. 298; *Pullun v. State* (Cr. App.) 168 S. W. 530; *Gutierrez v. State* (Cr. App.) 170 S. W. 717.

Sentence for an indeterminate period of from 2 to 45 years on a conviction for 45 years for pandering would be reformed, by entering a sentence in accordance with the Indeterminate Sentence Law (Acts 33d Leg. c. 132), providing a punishment of not less than 5 years. *Lustress v. State* (Cr. App.) 177 S. W. 492.

Art. 865b. Suspended sentence.—That when there is a conviction of any felony in any district court of this state, except murder, perjury, burglary of a private residence, robbery, arson, incest, bigamy and abortion, the court shall suspend sentence upon application made therefor in writing by the defendant, which shall be sworn to and filed before the trial begins, when the punishment assessed by the jury shall not exceed five years confinement in the penitentiary; and in all cases where defendant is charged with felonies other than those named in section 1 hereof [this article], when the defendant has no counsel, it shall be the duty of the court to inform the defendant of his right to make such application, and the court shall appoint counsel to prepare and present same if desired by defendant; provided, that in no case shall sentence be suspended except when the proof shall show and the jury shall find in their verdict that the defendant has never before been convicted of a felony in this state or any other state. This Act is not to be construed as preventing the jury from passing on the guilt or innocence of the defendant, but he may enter

his plea of not guilty at the same time with said affidavit. [Act 1911, p. 67, superseded. Act 1913, p. 8, sec. 1.]

Constitutionality and validity of acts.—Const. art. 4, § 11, provides that, in all criminal cases except treason and impeachment, the governor shall have power after conviction to grant reprieves, commutations of punishment, and pardons, etc. Acts 32d Leg. c. 44, provided that the district court judges may in prosecutions for certain offenses at defendant's request submit to the jury the issue as to whether or not the defendant has ever been charged with or convicted of crime, and, if the jury finds that he has not been, the judge may suspend the sentence on conviction. Such suspension is for an indefinite time with the power in the court to revoke on a violation of a requirement of good behavior, and compel the convict to undergo the penalty of the original sentence, or on good behavior for a time equal to double that of the sentence to bring the party into court and set aside and annul the former judgment. Held, that a pardon is an act of grace which exempts an individual on whom it is bestowed from the punishment the law inflicted for a crime which he has committed, and, although the word "pardon" is not used in the statute, as that is the effect of the statute, it is void within the constitutional provision prohibiting the exercise of powers delegated to one of the departments of government by either of the other two departments. *Snodgrass v. State* (Cr. App.) 150 S. W. 102, 41 L. R. A. (N. S.) 1144.

Such act is invalid as in contravention of Const. art. 16, § 2, which commands the legislature to enact laws to exclude from office, serving on juries, and the right of suffrage, those convicted of bribery, perjury, forgery, or other high crimes. *Id.*

Such act is not valid as an exercise of the court's power to grant a new trial, as it does not contemplate another trial of the defendant, but rather a discharge regardless of the fact that guilt has been established in a court of competent jurisdiction beyond question, and as it contemplates action by the court at a time after the end of the term at which the judgment was entered, since under arts. 2023, 2025, no court may grant a new trial or change its judgment at a subsequent term. *Id.*

Such act is not unconstitutional in authorizing district courts to suspend sentences in certain cases as an invasion of the right to "reprieve" or grant "commutations of punishment" reserved to the governor by Const. art. 4, § 11, as a "reprieve" postpones the execution of a sentence to a day certain, whereas a "suspension" is for an indefinite time, and a "commutation" is the changing of the punishment assessed to a less punishment (citing 7 Words and Phrases, pp. 6115, 6116). *Id.*

Under Const. art. 5, § 5, which gives the right of appeal only under such regulations and restrictions as the legislature may prescribe, Acts 32d Leg. c. 44, is not unconstitutional as a suspension of the right of appeal, as the legislature has that power. *Id.*

The word "conviction," in Const. art. 4, § 11, which provides that in all criminal cases, except treason and impeachment, the governor shall have power after "conviction" to grant reprieves, commutations of punishment, and pardons, etc., means simply the determination of guilt by the jury, and does not embrace the sentence, so that a person becomes subject to pardon whenever that issue is finally determined, and a court has no inherent authority by postponement of sentence to relieve a person legally convicted of crime of the punishment fixed by law, and Acts 32d Leg. c. 44, is not constitutional as within that power. *Id.*

Const. art. 1, § 28, provides that no law shall be suspended except by the legislature itself. Held, Acts 32d Leg. c. 44, is unconstitutional as an authorization to the district courts to suspend a law or right of appeal. *Snodgrass v. State* (Cr. App.) 150 S. W. 178.

Such act confers upon the district courts the discretionary power not only to grant a "conditional pardon," which is an indefinite suspension of sentence on conditions, but also to set aside a conviction and restore the convict to all his rights, which is an essential element of the pardoning power, and it is unconstitutional as an invasion of the governor's prerogative. *Id.*

Though the Constitution provides that no law shall be revised or amended by reference to its title, but in amending laws the section amended shall be re-enacted, the Legislature may by a general law provide that no punishment shall be assessed on the jury finding that it is accused's first offense, and thereby make such provision applicable to the statutes punishing offenses. *Baker v. State*, 70 App. 618, 158 S. W. 998.

The act of the Thirty-Third Legislature providing that if, before trial, accused request in writing that the issue whether he has been convicted of a felony shall be submitted to the jury, and if they find he has not been convicted, they may find that no punishment shall be assessed, if within a given period he commits no further offense, is within the legislative power vested by Const. art. 3, § 1, in the Legislature to fix by law the punishment of offenses, and merely provides that in given contingencies no punishment shall be suffered for the first violation of a penal law, but does not interfere with the pardoning power conferred by the Constitution on the Governor. *Baker v. State*, 70 App. 618, 158 S. W. 998.

The act of the Thirty-Third Legislature authorizing a suspension of sentence on the jury finding that it is accused's first offense is a part of each article of the Code prescribing punishment and provides that the jury in passing on the guilt or innocence of accused shall hear evidence as to the life of accused and determine the facts, and preserves inviolate the right of trial by jury guaranteed by Const. Bill of Rights. *Baker v. State*, 70 App. 618, 158 S. W. 998.

Acts 33d Leg. c. 7, providing for the suspension of sentence in certain cases upon recommendation of the jury, is valid, since there is a broad distinction between the suspension of sentence which would interfere with the pardoning power and

the suspension of the judgment or its execution by preventing the passing of sentence which does not interfere with such power, as that power does not attach or become operative until after the final judgment or sentence. *King v. State*, 72 App. 394, 162 S. W. 890.

The statute authorizing suspension of sentence on recommendation of the jury is constitutional. *Cook v. State*, 73 App. 548, 165 S. W. 573.

Repeal of prior acts.—The Indeterminate Sentence Act April 3, 1913 (Acts 33d Leg. c. 132), being void, did not repeal the Suspended Sentence Act Feb. 11, 1913 (Acts 33d Leg. c. 7), which act is expressly declared to be unaffected by the Second Indeterminate Sentence Act enacted August 18, 1913 (Acts 33d Leg. [1st Called Sess.] c. 5) § 10, and hence it is improper to deny the submission of an accused's plea, made in accordance with the Suspended Sentence Act. *Carter v. State*, 73 App. 334, 165 S. W. 200.

Crimes included in act.—The act providing for the suspension of sentence does not apply to burglary, and, on a trial for burglary, it is not error to refuse to submit to the jury the question of suspension of sentence, in case of a conviction. *Black v. State*, 73 App. 475, 165 S. W. 571.

Propriety of suspension.—That accused has previously been convicted of a felony bars him of the right to file a plea for suspension of sentence under Acts 33d Leg. c. 7; but, where he has not been convicted of a felony, he may file a plea, and where his reputation justifies the suspension of the sentence on the theory that he will reform, if clemency is extended, and that society will not suffer, it may be done, but, where his reputation as shown by the life he has lived is such that there is but little or no hope of reformation without punishment, and that the best interests of society demand his imprisonment, the punishment should not be suspended. *Williamson v. State* (Cr. App.) 167 S. W. 360.

"Conviction of felony."—The term "conviction of a felony," referred to in the suspended sentence law, means a final conviction, and hence the fact that accused invoked the benefit of such law did not place on him the burden of proving that a former jury on the prior trial of the same case had returned a verdict of guilty, which, for some reason, had been vacated; and hence it was error to compel accused as a witness in his own behalf to testify that he had been convicted on a prior trial of the same case. *Sorrell v. State* (Cr. App.) 169 S. W. 299.

Appeal from order setting aside order suspending sentence.—An appeal lies from an order setting aside an order suspending sentence during good behavior. *Ex parte Lawson* (Cr. App.) 175 S. W. 698.

Act of 1911 not applicable to causes pending.—Where, after accused was convicted of following the business of selling intoxicating liquors in prohibition territory, the Legislature, during the pendency of his appeal, passed the suspended sentence law (Acts 32d Leg. c. 44), which provided that if a person on trial requests in writing that his general reputation be inquired into, and the proof shall show and the jury shall find that he has never before been convicted of a felony, and the jury shall recommend that the sentence be suspended, the court shall suspend the sentence, the accused is not entitled to any benefit from such act; it appearing that it did not expressly apply to offenders whose appeals were pending, and the act expressly insisted upon a demand in writing prior to trial in order to give an accused the benefit of its provisions, and did not give the trial judge any authority to suspend sentence upon his own motion. *Monroe v. State*, 70 App. 245, 157 S. W. 154.

Art. 865c. Testimony as to defendant's reputation and criminal history.—The court shall permit testimony and submit the question as to the general reputation of defendant to enable the jury to determine whether to recommend the suspension of sentence, and as to whether the defendant has ever before been convicted of a felony; such testimony shall be heard and such question submitted only upon the request in writing by the defendant; provided, that in all cases sentence shall be suspended if the jury recommends it in their verdict. Provided further, that in such cases, neither the verdict of conviction nor the judgment entered thereon shall become final, except under the conditions and in the manner and at the time provided for by section 4 of this Act. [Id. sec. 2.]

Section 4, above referred to, is art. 6095f, *Vernon's Sayles' Civ. St.* 1914.

Necessity and sufficiency of application by accused.—Under Act Feb. 11, 1913 (Acts 33d Leg. c. 7), requiring a defendant seeking to take advantage of the suspended sentence law to file his sworn plea before the trial begins, such a plea was filed too late, and the court was not required to submit it to the jury, where it was filed after the motion for a continuance was overruled, and the selection of the jury had commenced. *Muldrew v. State*, 73 App. 463, 166 S. W. 156.

Under Acts 33d Leg. c. 7, § 1, providing that before a sentence can be suspended, an application for suspension must be made in writing, a recommendation in the verdict that sentence be suspended may be disregarded by the judge, where no application for suspension was filed before the verdict was rendered. *Barnett v. State* (Cr. App.) 170 S. W. 143.

Where no application for suspended sentence was made by accused, the jury has no right to recommend such suspension. *Speer v. State* (Cr. App.) 171 S. W. 201.

"General reputation."—Under this article the "general reputation of defendant" is such reputation for a peaceable, law-abiding man. *Campbell v. State*, 73 App. 198, 164 S. W. 850.

Submission of matter to jury.—Where the evidence of the bad reputation of accused, who filed a plea for suspension of sentence, based on his arrest for offenses not involving moral turpitude, was received to enable the jury to determine whether they would suspend punishment in case of his conviction, the court should specifically charge that the testimony should not be considered as affecting the credibility of accused as a witness. *Williamson v. State* (Cr. App.) 167 S. W. 360.

In a criminal prosecution, where accused introduced no evidence which would authorize the jury to suspend his sentence, error in the charge submitting his plea for a suspension of sentence is harmless. *Hawkins v. State* (Cr. App.) 168 S. W. 93.

Where, on a criminal trial, accused filed a plea for a suspended sentence, but the court failed to instruct in regard thereto, except in giving the form of verdict, and refused a special charge to disregard the statement of the district attorney, in his argument, that the jury could not recommend a suspension of sentence because of the lack of proof as to accused's good reputation, the conviction would be reversed. *Onstott v. State* (Cr. App.) 170 S. W. 301.

Proof as to prior reputation.—Accused, charged with selling whisky in a prohibition county, who filed his sworn plea for suspension of sentence, if convicted, thereby put his general reputation in issue, and the state could show that he had been indicted for various offenses, including unlawful sales of liquor in prohibition territory, and that indictments other than the one on which he was being tried were pending against him. *Martoni v. State* (Cr. App.) 167 S. W. 349.

Where accused, charged with selling whisky in a prohibition county, filed a plea for suspended sentence, evidence that he had obtained a United States internal revenue license to sell whisky in prohibition territory was admissible to aid the jury in determining whether, under the circumstances, they would suspend the sentence. *Martoni v. State* (Cr. App.) 167 S. W. 349.

Where accused filed a plea for suspended sentence, and testified in his own behalf, the state on cross-examination could ask him as to the number of times he had been arrested and confined in jail, though the offenses did not involve moral turpitude. *Williamson v. State* (Cr. App.) 167 S. W. 360.

Where accused files a plea for a suspended sentence he puts his reputation in issue, and any legitimate evidence bearing thereon is admissible, and the state may show his bad reputation as a law-abiding citizen by proving his arrest for offenses not involving moral turpitude. *Williamson v. State* (Cr. App.) 167 S. W. 360.

Where witnesses for accused, who filed a plea for a suspended sentence, testified that accused's reputation for truth, veracity, honesty, and as a law-abiding citizen was good, the state on cross-examination could ask them whether they had not heard of accused being charged with violations of the law, though such violations did not involve moral turpitude. *Williamson v. State* (Cr. App.) 167 S. W. 360.

On a trial for violating the prohibition law in which accused filed a plea for a suspended sentence, it was not error to permit the state to ask one of accused's witnesses whether the witness knew that accused was running an assignation house, especially where no objection was made to a question asked accused whether he was running such a house. *Conatser v. State* (Cr. App.) 170 S. W. 314.

The only prerequisite to the right of the jury to suspend a sentence is that they must first find that defendant had not theretofore been convicted of a felony, and while evidence of his prior reputation is admissible on that issue, it is not a prerequisite to a right to suspend a sentence. *Simonds v. State* (Cr. App.) 175 S. W. 1064.

Recommendation by jury.—Where the jury found that the present conviction of theft was accused's first offense and recommended suspension of sentence, the trial court could not sentence accused to the penitentiary but must release him upon such recognizance as is provided by Acts 33d Leg. c. 7. *Brown v. State*, 71 App. 212, 158 S. W. 807.

Where the jury found that accused had never before been convicted, and specifically recommended a suspension of his sentence, the trial court cannot sentence him to the penitentiary, but must heed the recommendation of the jury. *Martin v. State*, 71 App. 212, 158 S. W. 994.

Where the jury in response to the court's instruction returned a verdict finding accused guilty, as charged, of engaging in the business of unlawfully selling intoxicating liquors, assessing his punishment at two years, and further found that he had never before been convicted, accused is not entitled to have his sentence suspended because the court is not given a discretion as to the suspension of sentences; that power being vested in the jury. *Roberts v. State*, 71 App. 77, 158 S. W. 1003.

Where the questions involved in the suspended sentence law are submitted to the jury, who fail or refuse to recommend a suspension of the sentence, the court has no authority to suspend. *Potter v. State*, 71 App. 209, 159 S. W. 846.

That the court at accused's request submitted the question of suspending the sentence, and that the jury made no recommendation or return on that issue, did not present error. *Dawson v. State*, 72 App. 68, 161 S. W. 469.

Where the jury found accused's previous good character, and that he had not been previously convicted of a felony, but did not recommend that the execution of the judgment be suspended, the court could not suspend such execution. *King v. State*, 72 App. 394, 162 S. W. 890.

An accused, who elected to avail himself of the benefit of the suspended sentence law, is not entitled to a suspension of the sentence merely because the jury found that this was the first time he had been convicted of a felony, where their verdict did not recommend suspension. *Bowen v. State*, 72 App. 404, 162 S. W. 1146.

Under the statute relative to suspending sentence, the question of suspending sentence is for the jury in determining the question of punishment, and, where the jury fails or refuses to suspend sentence, it cannot be suspended, though they find that accused has not previously violated any law. *Cook v. State*, 73 App. 548, 165 S. W. 573.

Since the trial court has no jurisdiction to suspend sentence unless expressly so recommended by the jury, where accused filed a plea to suspend his sentence and pleaded guilty, a verdict finding accused guilty and assessing his punishment at two years in the penitentiary, but expressly reciting that the jury could not agree on the suspension of sentence, constituted a mistrial, and was insufficient to sustain a judgment sentencing accused to two years in the penitentiary without suspension of his sentence. *Mills v. State* (Cr. App.) 168 S. W. 88.

Where the court gave the jury a form of verdict in case they found accused guilty and desired to recommend a suspension of sentence and a form in case they did not desire to so recommend, the action of the jury in adopting the latter form was a specific finding that they did not recommend suspension of sentence. *Brown v. State* (Cr. App.) 169 S. W. 897.

Where a verdict of guilty recited "that defendant has never before been convicted of a felony," but contained no recommendation for suspension of sentence, the court could not suspend sentence. *Johnson v. State* (Cr. App.) 169 S. W. 1151.

The right to object to the failure of the verdict to make any recommendation of suspension of sentence was waived where the accused first complained thereof in his amended motion for a new trial filed on May 16th after rendition of verdict on May 6th. *Walker v. State* (Cr. App.) 169 S. W. 1156.

Though, under the statute authorizing the suspension of sentences, evidence as to accused's previous reputation is admissible to assist the jury in determining whether they will suspend the sentence, a finding that his previous reputation was not good does not prevent them from recommending a suspension of sentence, they being authorized to make such recommendation, unless accused has previously been convicted of a felony. *Onstott v. State* (Cr. App.) 170 S. W. 301.

The failure of the verdict to dispose of the question as to recommending a suspension of sentence, it being silent on the subject, was not error available on a motion for a new trial. *Conatser v. State* (Cr. App.) 170 S. W. 314.

Appealability of order for suspended sentence.—Under this article and article 865e a conviction with suspended sentence was not a final appealable judgment. *Bierman v. State*, 73 App. 284, 164 S. W. 840.

Conviction affecting competency as witness.—Under the provision of this article that where the jury recommends a suspension of sentence, neither the conviction nor the judgment entered thereon shall become final except under article 865e a witness who had pleaded guilty of assault to murder, but whose sentence had been suspended was not incompetent as a witness as being a convicted criminal. *Espinoza v. State*, 73 App. 237, 165 S. W. 208. But see *Simonds v. State*, 175 S. W. 1064.

Art. 865d. Form of judgment; "good behavior" defined.—When sentence is suspended the judgment of the court on that subject shall be that sentence of the judgment of conviction shall be suspended during the good behavior of the defendant. By the term "good behavior" is meant that the defendant shall not be convicted of any felony during the time of such suspension. [Id. sec. 3.]

Art. 865e. Conviction of other felony; pronouncement of sentence.—Upon the final conviction of the defendant of any other felony, pending the suspension of sentence, the court granting such suspension shall cause a *capias* to issue for the arrest of the defendant, if he is not then in the custody of such court, and upon the execution of a *capias*, and during a term of the court shall pronounce sentence upon the original judgment of conviction, and shall cumulate the punishment of the first with the punishment of any subsequent conviction or convictions, and in such cases no new trial shall be granted in the first conviction. [Id. sec. 4.]

Cited, *Espinoza v. State*, 73 App. 237, 165 S. W. 208.

Pleas of guilty to several felonies.—Where, immediately after accused entered a plea of guilty in a prosecution for forgery, and the jury had returned a verdict, she entered another plea of guilty to another similar charge, and imprisonment in the penitentiary was assessed, she, having entered pleas of guilty to two felonies on the same day, was not entitled to a suspension of either sentence under Suspended Sentence Law (Acts 32d Leg. c. 44) § 4. *Weatherford v. State*, 73 App. 440, 166 S. W. 149.

Art. 865f. Expiration of suspension period; disposition of cause; effect of judgment of conviction.—In any case of suspended sentence, as provided herein, upon the expiration of the time assessed as punishment by the jury, the defendant may make his written and sworn application for a new trial and dismissal of such case, stating therein that since such former trial and conviction, he has not been

convicted of any felony, and that there is not now pending against him any felony charge, which application shall be heard by the court during the first term time after same is filed, and, if it shall appear to the court, upon the hearing of such application, that the defendant has not been convicted of any other felony and that there is not then pending against him any other charge of felony, the court shall enter an order reciting the fact, and shall grant the defendant a new trial and shall then dismiss said cause; provided, further, that if the defendant is prevented from physical disability or other good cause from applying to the court to have the judgment of conviction set aside at the time provided for, he may make such application at the first term when such physical disability or other good cause no longer exists. After the setting aside and dismissal of any judgment of conviction as herein provided for, the fact of such conviction shall not be shown or inquired into for any purpose, except in cases where the defendant has been again indicted for a felony and invokes the benefit of this Act. [Id. sec. 5.]

Art. 865g. Pendency of other charge; extension of suspension period.—If at the expiration of the time assessed by the jury as punishment, there be pending against the defendant any other charge of felony, the court shall, upon application of the defendant, (which shall be in writing, and shall state under his oath that he is not guilty of such charge), further suspend the sentence to await the final disposition of such other prosecution. [Id. sec. 6.]

Art. 865h. Release on recognizance.—When sentence is suspended the defendant shall be released upon his recognizance in such sum as may be fixed by the court during such suspension. [Id. sec. 7.]

Art. 865i. Laws repealed.—That all laws and parts of laws in conflict herewith be and the same are hereby repealed. [Id. sec. 8.]

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.]

See *Mapes v. State*, 13 App. 85; *Ex parte Lee Quong*, 34 App. 511, 31 S. W. 391; *Cain v. State*, 15 App. 41, and notes under art. 855.

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.

See *Willson's Cr. Forms*, 999.

See art. 871.

Form and requisites of judgment.—See notes under art. 853, ante.

A judgment on conviction that it is therefore ordered that the state "do have and recover of and from said" defendant "the sum of \$10, * * * for which execution may issue, and that he be remanded to the custody of the sheriff until said fine and costs are fully paid as the law provides, and that, should he escape from custody, *capias pro fine* may issue," was a final judgment, from which an appeal would lie. *Heatherly v. State*, 14 App. 21; *Braden v. State*, Id. 22; and *Want v. State*, Id. 24, overruled, so far as they conflict herewith. *Terry v. State*, 30 App. 403, 17 S. W. 1075.

Where the defendant did not appear on the trial in person, but by attorney, and the judgment was that "execution or commitment issue" for the fine and costs, it was held that it was not a valid final judgment; that the judgment should have been that *capias* issue for the arrest of the defendant, commanding his detention in

jail until the payment of the fine and costs, and that execution issue against his property for the fine and costs, and for want of a final judgment the appeal was dismissed. *Heatherly v. State*, 14 App. 21.

The judgment must conform to the statute, or the appeal therefrom will be dismissed. If the defendant be present when it is rendered, it must command that he be committed to jail until the payment of the fine and costs. *Braden v. State*, 14 App. 22.

The requisites of a judgment in a misdemeanor case are the same as those prescribed for felony cases by art. 853, ante, except the tenth and eleventh clauses of that article, which are not essential in misdemeanor cases. *Want v. State*, 14 App. 24.

A judgment which failed to show that the jury was selected, empaneled and sworn, was invalid. *Yates v. State*, 37 App. 347, 39 S. W. 933.

Joint judgment.—Two or more parties being prosecuted to conviction for misdemeanor, it is error to render joint verdict and judgment. The judgment must assess the penalty against each defendant. *Sterling v. State*, 25 App. 716, 9 S. W. 45, 8 Am. St. Rep. 452; *Cunningham v. State*, 26 App. 83, 9 S. W. 62; *Flynn v. State*, 8 App. 398; *Whitcomb v. State*, 30 App. 269, 17 S. W. 258; *Hogg v. State*, 40 App. 109, 48 S. W. 580; *Caesar v. State*, 30 App. 274, 17 S. W. 258. And see *Hill v. State*, 11 App. 379.

A verdict reading "We the jury find the defendants guilty as charged and assess the fine at \$100," held to assess a joint penalty and be invalid. *Cunningham v. State*, 26 App. 83, 9 S. W. 62.

Presence of defendant.—The provisions of this and art. 646, ante, reconciled. *Cain v. State*, 15 App. 41.

Imprisonment for debt.—Fines are not "debts," and imprisonment to enforce their collection is constitutional. *Dixon v. State*, 2 Tex. 481; *Luckey v. State*, 14 Tex. 400; Const., art. 1, sec. 18; *Ex parte Robertson*, 27 App. 628, 11 S. W. 669, 11 Am. St. Rep. 207; *Ex parte Mann*, 39 App. 491, 46 S. W. 828, 73 Am. St. Rep. 961.

Duration of imprisonment.—Under this article and art. 868, and arts. 6232-6256, *Vernon's Sayles' Civ. St. 1914*, providing for the hiring out of convicts for not more than one year, one convicted of a misdemeanor and sentenced to jail may be confined in jail for the costs not more than one year in addition to the imprisonment imposed for the offense. *Ex parte Spiller*, 63 App. 93, 138 S. W. 1013.

Correction of judgment.—See notes under art. 853, ante.

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.

See *Willson's Cr. Forms*, 1001.

Taxation of costs after conviction or adjournment.—A judgment sentencing one convicted of a misdemeanor to jail for 30 days and until the costs of the prosecution are paid permits the clerk to tax costs after conviction or the adjournment of the court, and the costs so taxed are a part of the costs referred to in the judgment. *Ex parte Spiller*, 63 App. 93, 138 S. W. 1013.

Enforcement by proper process.—Persons cannot be legally imprisoned for contempt by the district court, simply on an oral order to an officer to confine them in jail and without the issuance of a writ of commitment. *Ex parte Kearby*, 35 App. 634, 34 S. W. 962; *Ex parte Ogden*, 63 App. 380, 140 S. W. 345; *Ex parte Dena*, 63 App. 379, 140 S. W. 346.

Correction of judgment.—See notes under art. 853, ante.

Duration of imprisonment.—See note under art. 867.

CHAPTER FOUR

EXECUTION OF JUDGMENT

1. COLLECTION OF PECUNIARY FINES	Art.	
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870. Recognizances, etc., payable in what.	2. ENFORCING JUDGMENT WHEN THE PUNISHMENT IS IMPRISONMENT	
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884. Executed how.	890. When execution cannot take place in jail.
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887. Reasonable request of convict.	
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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.

See Willson's Cr. Forms, 579.

See arts. 856, 878, 1051, post.

Cited, *Ex parte Spiller*, 63 App. 93, 138 S. W. 1015.

Imprisonment for debt.—See note under art. 867, ante.

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.]

See Willson's Cr. Forms, 579.

In general.—Cited, *Ex parte Spiller*, 63 App. 93, 138 S. W. 1013.

A promissory note can not be accepted in payment of a fine. *Clark v. State*, 3 App. 338. Confederate money was not receivable in payment of a fine. *Boone v. State*, 31 Tex. 557. A fine is not a debt, and a judgment therefor does not bear interest. *Dixon v. State*, 2 Tex. 481; *State v. Steen*, 14 Tex. 396.

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.]

See Willson's Cr. Forms, 579.

Cited, *Ex parte Spiller*, 63 App. 93, 138 S. W. 1013.

Actual imprisonment required.—This means actual imprisonment within the four walls of the jail, and if the defendant be permitted to go at large, the officer, to whose custody he was committed, is liable to prosecution for an escape, and the defendant may be retaken and recommitted. *Luckey v. State*, 14 Tex. 400; *Ex parte Dickerson*, 30 App. 448, 17 S. W. 1076.

A prisoner out of jail under a void agreement with the sheriff is deemed an escaped prisoner. *Ex parte Wyatt*, 29 App. 398, 16 S. W. 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.

See Willson's Cr. Forms, 794.

See *Ex parte Dickerson*, 30 App. 448, 17 S. W. 1076, citing *Terry v. State*, 30 App. 408, 17 S. W. 1075.

Cited, *Ex parte Spiller*, 63 App. 93, 138 S. W. 1013.

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.]

See Willson's Cr. Forms, 794.

Cited, *Ex parte Spiller*, 63 App. 93, 138 S. W. 1013.

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.

See Willson's Cr. Forms, 794.

Cited, *Ex parte Spiller*, 63 App. 93, 138 S. W. 1014.

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.]

See, *ante*, art. 867; *Ex parte Dickerson*, 30 App. 448, 17 S. W. 1076.

Cited, *Ex parte Spiller*, 63 App. 93, 138 S. W. 1013.

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.

See *Ex parte Price*, 11 App. 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.

Cited, *Ex parte Spiller*, 63 App. 93, 138 S. W. 1013.

For the law relating to county convicts, see *Vernon's Sayles' Civ. St.* 1914, title 104, chapters 3 and 4.

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.]

See *Wilson's Cr. Forms*, 1019.

Cited, *Ex parte Spiller*, 63 App. 93, 138 S. W. 1013.

Construction and operation in general.—See generally, *Ex parte Cox*, 29 App. 84, 14 S. W. 396; *Ex parte Dampier*, 24 App. 561, 7 S. W. 330; *Ex parte Anderson*, 34 App. 14, 28 S. W. 807; *Ex parte Hall*, 34 App. 617, 31 S. W. 640; *Ex parte Bates*, 37 App. 548, 40 S. W. 269; *Ex parte Jones*, 38 App. 142, 41 S. W. 628; *Ex parte Dockery*, 38 App. 293, 42 S. W. 599. And see *Vernon's Sayles' Civ. St.* 1914, arts. 6232-6256.

No person against whom a pecuniary fine has been assessed as punishment for a felony can lawfully be hired out to raise the money to pay the fine and costs. *Ward v. White*, 86 Tex. 170, 23 S. W. 981.

It is only when there is no workhouse or farm, and no public improvements upon which the convict can be put to work, and when the county authorities have failed to hire him out, that the convict can claim the benefit of the preceding article. *Ex parte Bogle*, 20 App. 127. For form of oath to be made by county convict, see *Willson's Cr. Forms*, 1019; see, also, *Ex parte Stubblefield*, 1 App. 757. A county convict, who is also confined on an accusation of felony, cannot be discharged from custody under the preceding article, nor can he be hired out. *Ex parte Godfrey*, 11 App. 34. See, also, *Childers v. State*, 25 App. 658, 8 S. W. 928; *Phipps v. State*, 25 App. 660, 8 S. W. 929; *Ex parte Hunt*, 28 App. 361, 13 S. W. 145.

A person legally imprisoned under a judgment, assessing against him a pecuni-

any fine, is not entitled to the writ of habeas corpus to compel the county judge to hire him out for the purpose of paying his fine. *Ex parte Thompson*, 32 App. 274, 22 S. W. 876.

The statute does not authorize the hiring out of one convicted of a felony, but this does not require his release. *Ex parte Biela*, 46 App. 487, 51 S. W. 739.

If one is kept in jail after he makes affidavit that he is unable to pay fine and costs, he is entitled to be discharged when at the rate of three dollars per day he has stayed in jail long enough to discharge the fine and costs. *Ex parte Spears*, 49 App. 231, 90 S. W. 1011.

Where one is confined in jail after having been convicted of a misdemeanor and fined a sufficient length of time to discharge the fine at three dollars a day, and has not been put to work he is entitled to be discharged, he having made affidavit that he was unable to pay the fine and costs. *Ex parte Clayton*, 51 App. 553, 103 S. W. 630.

Imposition of both fine and imprisonment.—Where relator was sentenced to both fine and imprisonment, he will not be released on conclusion of the imprisonment, unless his fine is paid. *Ex parte Ketton* (Cr. App.) 30 S. W. 798.

Where accused is sentenced to imprisonment and fined, while the two punishments cannot be imposed at the same time, imprisonment need not necessarily be first imposed, and if the fine is first exacted it will not extinguish the imprisonment punishment, which may be imposed thereafter. *Ex parte Stephens*, 59 App. 177, 127 S. W. 819.

2. ENFORCING JUDGMENT 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.]

See Willson's Cr. Forms, 1018.

See *Luckey v. State*, 14 Tex. 400; *Ex parte Wyatt*, 29 App. 398, 16 S. W. 301. *Ex parte Dockery*, 38 App. 293, 42 S. W. 599; *Ex parte Spiller*, 63 App. 93, 138 S. W. 1013.

Sentence to both fine and imprisonment.—Where accused is sentenced to imprisonment and fined, while the two punishments cannot be imposed at the same time, imprisonment need not necessarily be first imposed, and if the fine is first exacted it will not extinguish the imprisonment punishment, which may be imposed thereafter. *Ex parte Stephens*, 59 App. 177, 127 S. W. 819.

Defendant at large on bail.—When defendant is at large on bail after sentence during appeal in habeas corpus proceedings, he is not entitled to have the time deducted from his sentence. *Ex parte Branch*, 37 App. 318, 39 S. W. 932.

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.]

See Willson's Cr. Forms, 1001, 1016, 1017.

See *Ex parte Wyatt*, 29 App. 398, 16 S. W. 301; *Ex parte Dockery*, 38 App. 293, 42 S. W. 599; *Ex parte Spiller*, 63 App. 93, 138 S. W. 1013.

Sentence to both fine and imprisonment.—Where accused is sentenced to imprisonment and fined, while the two punishments cannot be imposed at the same time, imprisonment need not necessarily be first imposed, and if the fine is first exacted it will not extinguish the imprisonment punishment, which may be imposed thereafter. *Ex parte Stephens*, 59 App. 177, 127 S. W. 819.

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.

See Willson's Cr. Forms, 1017, 1018.

Cited, *Ex parte Spiller*, 63 App. 93, 138 S. W. 1013.

Art. 882. [860] Further execution of judgment, etc; when term of imprisonment begins.—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.

See Vernon's Sayles' Civ. St. 1914, arts. 6172-6231.

Cited, *Ex parte Spiller*, 63 App. 93, 138 S. W. 1013.

Where no appeal is taken.—This article has been construed to mean that when a party is condemned to the penitentiary for any term, he must be imprisoned in the penitentiary, but, after he has reached and been actually imprisoned in said penitentiary, the term of his imprisonment is to be estimated to begin from the date of the sentence, in a case where no appeal has been taken. *Sartain v. State*, 10 App. 651, 38 Am. Rep. 649.

Where appeal is taken.—One's sentence begins from the date his case was finally disposed of in the court of criminal appeals, and the mandate issued; for having appealed to the court of criminal appeals he cannot take advantage of his delays in the commencement of his sentence. When one withdraws his appeal, the term of his sentence begins when he withdraws his appeal and the order granting the same is entered. *Ex parte Carey* (Cr. App.) 64 S. W. 241.

Where one convicted of forgery appealed to the Court of Criminal Appeals, and after the affirmance of the conviction filed two successive motions for rehearing, and then asked for stay of mandate in order that he might apply to the United States Supreme Court for writ of error, which application was denied, and the mandate then issued by Court of Criminal Appeals, during all of which time the accused was out on recognizance, the sentence did not begin to run in any event until the mandate was issued by the Court of Criminal Appeals. *State ex rel. Looney v. Hamblen* (Cr. App.) 169 S. W. 678.

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.]

See Vernon's Sayles' Civ. St. 1914, art. 5110.

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.]

Explanatory.—This provision, in so far as it relates to the militia, may be superseded by the militia act of 1905. See Vernon's Sayles' Civ. St. 1914, arts. 5831, 5832.

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.]

See Willson's Cr. Forms, 1014, 1015.

TITLE 10

APPEAL, AND WRIT OF ERROR

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| Art. | Art. |
| 893. State can not appeal. | 923. When appeal bond or recognizance is defective, appellate court may allow appellant to file new bond. |
| 894. Defendant may appeal. | 924. Appeal bond shall be given within what time. |
| 895. From district and county court to court of criminal appeals. | 925. Trial in county court shall be de novo. |
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| | 958. Clerk shall certify the judgment, etc. |
| | 959. Who shall take bail bond. |
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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.]

See Willson's Cr. Forms, 1158.

See ante, art. 497, and notes, post, art. 961.

Art. 894. [872] Defendant may appeal.—A defendant in any criminal action, upon conviction, has the right of appeal under the rules hereinafter prescribed.

Writ of error in scire facias, see post, art. 961.

Nature of right.—The right of a convicted defendant to appeal exists independent of statute, being given by the constitution; and even if rules are not provided by legislation for its exercise, or impossible conditions are imposed upon its exercise, yet the right will be sustained. *Republic of Texas v. Smith*, Dallam, 407; *Laturner v. State*, 9 Tex. 451. The right of appeal must be exercised in conformity with the law in force at the time of the conviction. *Brill v. State*, 13 Tex. 79. But see *Smyrl v. State*, 40 Tex. 121, where an appeal was sustained, although it had not been perfected in conformity with the law in force at the time it was taken.

Appeal will not be from a judgment imposing a fine and costs, where defendant paid the judgment before moving for a new trial. *Payne v. State*, 12 App. 160.

Decisions reviewable in general.—There is no appeal from an order overruling a motion to reduce bail. *Ex parte Wright*, 40 App. 136, 49 S. W. 104.

Appeal does not lie from an ex parte proceeding in the trial court on the issue of insanity, after trial and conviction. *Darnell v. State*, 24 App. 6, 5 S. W. 522.

The issue being only of identity, under art. 861, subd. 4, ante, appeal does not lie. *Washington v. State*, 31 App. 84, 19 S. W. 900.

Accused cannot allege error to the sustaining of his own objections to evidence offered by the state. *Clark v. State* (Cr. App.) 148 S. W. 801.

An appeal lies from an order setting aside an order suspending sentence during good behavior. *Ex parte Lawson* (Cr. App.) 175 S. W. 698.

Finality of judgment.—See arts. 68 and 853, ante, and notes.

An appeal can only be from a final judgment of conviction rendered and entered of record, and unless such a judgment appears of record on appeal, the appeal will be dismissed for want of jurisdiction. *Republic of Texas v. Laughlin*, Dallam, 412; *Nash v. Republic*, Id. 631; *Shannon v. State*, 7 Tex. 492; *Schultz v. State*, 13 Tex. 403; *Burrell v. State*, 16 Tex. 147; *Calvin v. State*, 23 Tex. 577; *Henry v. State*, 24 Tex. 361; *State v. Pierce*, 26 Tex. 114; *Nathan v. State*, 28 Tex. 326; *Dooly v. State*, 33 Tex. 712; *Murray v. State*, 35 Tex. 472; *Fulcher v. State*, 38 Tex. 505; *Mayfield v. State*, 40 Tex. 289; *State v. Thompson*, 41 Tex. 523; *Anschincks v. State*, 43 Tex. 587; *Young v. State*, 1 App. 64; *Smith v. State*, Id. 408; *Labbaitte v. State*, 4 App. 169; *Pennington v. State*, 11 App. 281; *Mireiles v. State*, 13 App. 346; *Braden v. State*, 14 App. 22; *Heatherly v. State*, Id. 21. A contrary doctrine to the above was held in *Ashworth v. State*, 9 Tex. 490; *Hoppe v. State*, 32 Tex. 388; *Nelson v. State*, Id. 71; but these cases have been expressly overruled. *Fulcher v. State*, 38 Tex. 505; *Mayfield v. State*, 40 Tex. 289; *Butler v. State*, 1 App. 638; *Choate v. State*, 2 App. 302; *Trimble v. State*, 2 App. 303; *Butler v. State*, 2 App. 529; *Roberts v. State*, 3 App. 47; *Darnell v. State*, 24 App. 6, 5 S. W. 522; *Estes v. State*, 38 App. 506, 43 S. W. 982; *Cox v. State*, 34 App. 94, 29 S. W. 273, and cases cited.

The right of appeal exists only when a judgment final of conviction has been rendered and entered against the defendant. *Payne v. State*, 12 App. 160.

A judgment is final if it definitely puts the case out of court whether rendered upon the merits or not. *Terry v. State*, 30 App. 408, 17 S. W. 1075, overruling in points of conflict, *Heatherly's Cases*, 14 App. 21, *Braden's Case*, Id., 22, and *Want's Case*, Id. 24.

In view of art. 867, ante, held, that a judgment on conviction that it is therefore ordered that the state "do have and recover of and from said" defendant "the sum of \$10, * * * for which execution may issue, and that he be remanded to the custody of the sheriff until said fine and costs are fully paid as the law provides, and that, should he escape from custody, capias pro fine may issue," was a final judgment, from which an appeal would lie. *Heatherly v. State*, 14 Tex. App. 21; *Braden v. State*, Id. 22; and *Want v. State*, Id. 24, overruled, so far as they conflict herewith. *Terry v. State*, 30 App. 408, 17 S. W. 1075.

The record must contain a final judgment. The recital in the record that "it is ordered, adjudged and decreed by the court that the defendant Caskey be fined \$50 and costs" is not a final judgment. Even the verdict is not set out in the record. *Caskey v. State* (Cr. App.) 108 S. W. 666.

An order, amending an original order directing the issuance of a writ of habeas corpus, by directing the return of the writ to the district court of another county than the one specified in the original order, is not appealable, as the order is only an interlocutory one. *Ex parte McFarlane*, 61 App. 204, 134 S. W. 685.

Under the Suspended Sentence Law (arts. 865c, 865e, ante) a conviction with suspended sentence was not a final appealable judgment. *Bierman v. State*, 73 App. 284, 164 S. W. 840.

Contempt proceedings.—An appeal does not lie in cases of contempt. *Floyd v. State*, 7 Tex. 215; *Jordan v. State*, 14 Tex. 436; *Crow v. State*, 24 Tex. 12; *Casey v. State*, 25 Tex. 380; *State v. Thurmond*, 37 Tex. 340. A fine against a defaulting juror is a proceeding for contempt, and an appeal does not lie in such case. *Ex parte Kilgore*, 3 App. 247; *Carter v. State*, 4 App. 165.

Review on habeas corpus. *Holman v. Mayor of Austin*, 34 Tex. 668; *Ex parte Degener*, 30 App. 566, 17 S. W. 1111; *Ex parte Kearby*, 35 App. 531, 34 S. W. 635; *Id.*, 35 App. 634, 34 S. W. 962; *Ex parte Park*, 37 App. 590, 40 S. W. 300, 66 Am. St. Rep. 835.

Appeal will not lie from a judgment in proceedings in accordance with art. 528 et seq., fining one for contempt of court in refusing to obey a subpoena. *Pegram v. State*, 72 App. 176, 161 S. W. 458.

Necessity of motion for new trial.—See arts. 835, 844, and notes.

Defects in proceedings for appeal.—An attempted appeal before final judgment has been entered is nugatory and will not prevent an appeal after a final judgment has been entered in the trial court. *Smith v. State*, 1 App. 516; *Downs v. State*, 7 App. 483. And see *Thompson v. State*, 35 App. 505, 34 S. W. 124, 612; *Cryer v. State*, 36 App. 621, 37 S. W. 753, 38 S. W. 203; *Wright v. State*, 37 App. 3, 35 S. W. 150, 38 S. W. 811.

Where an appeal has been dismissed for the want of a recognizance, or because the recognizance is insufficient, or because notice of appeal was not given and entered upon the minutes, a second appeal is not allowable. *Ex parte Jones*, 7 App. 365; *Peterson & Fitch v. State*, 32 Tex. 477.

Under this article and articles 882 and 883 where accused was convicted at a term ending September 3, 1910, and the only notice of appeal appears to have been given October 1, 1910, the appeal must be dismissed. *Offield v. State*, 61 App. 585, 135 S. W. 566.

Abatement of appeal.—An appeal abates on the death of the defendant. *March v. State*, 5 App. 450; *Pastiofsky v. State* (Cr. App.) 28 S. W. 947.

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.]

See, ante, arts. 68, 86, 87. See 31 App. 647.

Disbarment proceedings.—A proceeding against an attorney or counselor at law, charging him with fraudulent or dishonorable conduct, and having for its object to strike him from the roll of practicing attorneys, is a criminal or quasi criminal case, from which an appeal can only lie to the court of criminal appeals. *Following State v. Tunstall*, 51 Tex. 81. *Cummings v. State*, 31 App. 406, 20 S. W. 706.

Habeas corpus.—Under the constitutional provision giving the Court of Criminal Appeals jurisdiction only in criminal cases, it has no jurisdiction of an application for a writ of habeas corpus by a person committed to jail for violating a temporary injunction, in an action brought by the county attorney to enjoin him and other proprietors of theaters and moving picture shows from giving shows therein on Sunday, and charging a fee for admission thereto, though the act sought to be enjoined is a violation of the Penal Code 1911, art. 302, since the action was a civil case, especially in view of Rev. St. 1911, art. 1529 (same article in *Vernon's Sayles' Civ. St. 1911*), authorizing the Supreme Court, or any justice thereof to issue writs of habeas corpus 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 made in any civil cause. *Ex parte Zuccaro*, 72 App. 214, 162 S. W. 844.

Conclusiveness of decisions of supreme court.—While the construction of the civil statutes by the Supreme Court is final and will be followed by the Court of Criminal Appeals, that court, in construing the criminal statutes and enforcing the criminal laws, must follow its own judgment, though contrary to the decisions of the Supreme Court. *Barnes v. State* (Cr. App.) 170 S. W. 548, L. R. A. 1915C, 101.

Art. 895a. Appeals from criminal district court of Harris county.—Appeals and writs of error may be prosecuted from the said criminal district court [Criminal District Court of Harris County (art. 97m, ante)] to the Court of Criminal Appeals, in the same manner and form as from district courts in like cases. [Act 1911, p. 113, ch. 67, § 15.]

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.

See, ante, arts. 87, 101, 105; post, arts. 1009, 1010, 26 App. 220; "Appendix," sec. 27, 31 App. 647; *Tooke v. State*, 23 App. 10, 3 S. W. 782.

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 App. 342, 11 S. W. 414.

Constitutionality of act conferring appellate jurisdiction on county court in county having criminal district court.—*Kruegel v. State* (Cr. App.) 84 S. W. 1064.

Invasion of jurisdiction of court of criminal appeals.—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 App. 342, 11 S. W. 414; *Cornelius v. Dallas*, 37 App. 309, 39 S. W. 679.

Jurisdiction of lower court.—If the justice court was without jurisdiction, the county court acquired none by appeal. *Neil v. State*, 43 Tex. 91; *Uecker v. State*, 4 App. 234.

Amount of fine imposed in county court as affecting appeal to higher court.—See art. 87, ante, and notes.

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 *Tooke v. State*, 23 App. 10, 3 S. W. 782.

Art. 899. Defendant must be personally present, when; verdict may be received in his absence, when; presumption that he was present, when.

Explanatory.—The revisers of 1911 overlooked the fact that the above provision superseded art. 633 of the revision of 1895 (art. 646 of the revision of 1911). Inasmuch as the provision is not directly related to appellate procedure the text is taken out of this position and transferred to art. 646, and there appended to the superseded provision with an appropriate explanatory note. The decisions relating to the statute will also be found under art. 646.

Art. 900. Defendant in felony cases on bail shall remain on bail until verdict of guilty.

Explanatory.—The revisers of 1911 overlooked the fact that the above provision superseded art. 635, and perhaps art. 636 of the revision of 1895 (arts. 648, 649 of the revision of 1911). Inasmuch as this provision has nothing to do with practice on appeal the text is removed from this place in the statute, and in this compilation is appended to art. 648, ante, with an explanatory note. The decisions relating to the subject of the article will be found under arts. 648 and 649, ante.

Forms.—See Willson's Cr. Forms, 1020.

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. [Act 1907, p. 31.]

Former law.—See *Tooke v. State*, 23 App. 10, 3 S. W. 782. Defendant is not entitled to bail after conviction. *Ex parte Ezell*, 40 Tex. 451, 19 Am. Rep. 32.

When the conviction is in a felony case he must be committed to jail until the decision of the court of appeals can be made. Where an offense is punishable in the alternative, with imprisonment in the penitentiary, or by fine, and the defendant is convicted, and his punishment assessed at a fine, his conviction is in a felony case, and he is not entitled to appeal on recognizance. *Campbell v. State*, 22 App. 262, 2 S. W. 825; *overruling Sisk v. State*, 9 App. 90; *P. C.* arts. 55, 56. In a misdemeanor case the defendant, upon appeal, may enter into recognizance. *Post*, arts. 918, 919.

There is no law authorizing the release of appellant on bail pending appeal in felony cases, but he must be confined pending such appeal. *Ex parte Smith* (Cr. App.) 64 S. W. 1053.

Before Acts 30th Leg. c. 19, regulating bail in felony cases and prescribing the form of the recognizance, the Court of Criminal Appeals could not take cognizance of a case unless the appellant was in custody as the court would be without jurisdiction; hence where appellant was not in custody, and he had not entered into a sufficient recognizance, which is equivalent to an escape, his appeal will be dismissed. *Jordan v. State*, 59 App. 208, 128 S. W. 139.

Requisites of recognizance.—See art. 903, and notes.

Forms.—See Willson's Cr. Forms, 796, 1020.

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 dis-

strict 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.]

Requisites of recognizance.—See art. 903, and notes.

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 themselves 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.]

See Willson's Cr. Forms, 796.

Requisites of bond in general.—A recognizance on appeal in a prosecution for violating the local option law was defective for not binding appellant to abide the judgment of the Court of Criminal Appeals “in this case.” *Lindsey v. State*, 59 App. 273, 128 S. W. 336.

A recognizance on appeal which fails to show the court in which accused was tried, and before which he obligates himself to appear, is fatally defective, and the appeal must be dismissed. *Hughes v. State*, 62 App. 288, 136 S. W. 1068.

Where an appeal bond, copied in the record, is not in compliance with this article, the appeal will be dismissed. *Black v. State* (Cr. App.) 151 S. W. 1053.

Statement of nature of offense and extent of punishment.—Recognizance on appeal, to be sufficient, must state that the bribe was offered with one or the other intents named in the statute. *Hardin v. State*, 36 App. 460, 37 S. W. 735.

A recognizance on appeal is fatally defective that fails to state the amount of the punishment or its character. *Watson v. State*, 62 App. 620, 138 S. W. 611.

Where a recognizance does not state the punishment assessed against accused in compliance with this article, his appeal must be dismissed. *White v. State* (Cr. App.) 151 S. W. 826.

Duration of liability on bond.—In view of art. 843, a bond given to secure the release of a person convicted of felony pending an appeal becomes functus officio upon a reversal and remand of the cause, and the sureties are not liable upon accused's nonappearance on the new trial, even though no bail bond was given prior to the first conviction, in view of the fact that article 903 was enacted 21 years after the Court of Criminal Appeals had so held with reference to appeals in misdemeanor cases, and uses precisely the same language in specifying the form of a recognizance in felony cases as article 919 uses with reference to misdemeanor cases, and also in view of the long and uninterrupted acquiescence in that decision by the bench and bar. *Sanders v. State*, 70 App. 532, 158 S. W. 291.

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.]

Cited, *Sanders v. State*, 70 App. 532, 158 S. W. 291.

Approval of bond.—Under this article an appeal bond, properly approved by the sheriff, but which, instead of being approved by the judge who tried the case, is approved by another judge, signing himself as special judge, is insufficient, and the appeal will be dismissed. *Wells v. State* (Cr. App.) 150 S. W. 1163.

Requisites of bond.—See notes under art. 903.

Where an appeal bond, copied in the record, is not in compliance with this article and article 903, the appeal will be dismissed. *Black v. State* (Cr. App.) 151 S. W. 1053.

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. [Act 22d Leg., S. S.]

Application for transcript.—If the application be in writing it need not be incorporated in the transcript. A certified copy thereof accompanying the transcript will be sufficient. If it be oral in term time, the better practice is for the transcript to contain it. *Ayers v. State*, 12 App. 450; *Reynolds v. State*, 8 App. 209; see, also, *Blum v. Wettermark*, 58 Tex. 125. Under the original act the defendant

only was accorded the right to prosecute the appeal immediately. *Meyer v. State*, 3 App. 219; *Powell v. State*, Id. 630.

Term of court to which returnable.—When an appeal is returned to a term of the court of appeals to which it is not returnable under the law, the said court is without jurisdiction to determine it at said term. But if it be a felony case, and has been returned under this article, the court has jurisdiction to determine it. *Ayers v. State*, 12 App. 450.

Extension of time for filing statement of facts.—Art. 845 is mandatory, and, construed in view of this article and art. 844, does not authorize the trial court to grant extensions of time for filing a statement of facts beyond 90 days from the final judgment, which in criminal cases is the sentence, or from adjournment of the court. *Roberts v. State*, 62 App. 7, 136 S. W. 483.

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 art. 856. See, also, *Knight v. State*, 7 App. 206. See "Appendix," sec. 30, 31 App. 647.

Pendency of case in appellate court.—In view of art. 916, though a motion for a new trial had been overruled and notice of appeal given, the case could not be considered as pending in the Court of Criminal Appeals as long as the term of the lower court was in session, unless the transcript had been taken out during the term and filed in the upper court, in which case the lower court could not take any action affecting the appeal. *Bundick v. State*, 59 App. 9, 127 S. W. 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.

See Willson's Cr. Forms, 1158-1161.

See former rule 77 for court of criminal appeals, 2 App. 645.

Constitutionality.—This article is not in violation of sections 10 and 19 of article 1 of the constitution. Said sections have no application to proceedings had after conviction. *Loyd v. State*, 19 App. 137; see, also, *Brown v. State*, 5 App. 126; *Young v. State*, 3 App. 384; *Gresham v. State*, 1 App. 458, as to constitutionality of such legislation.

Effect of escape in general.—Defendant having, pending his appeal, escaped from the custody of the sheriff, and not voluntarily returned within 10 days, the appeal will be dismissed. *Burton v. State*, 63 App. 374, 140 S. W. 226; *Lunsford v. State*, 10 App. 118; *Hammons v. State*, 35 App. 17, 29 S. W. 780; *Gatliff v. State* (Cr. App.) 28 S. W. 466; *Dement v. State* (Cr. App.) 30 S. W. 358; *Brannon v. State* (Cr. App.) 40 S. W. 495; *Sanders v. State* (Cr. App.) 40 S. W. 495; *Hinds v. State* (Cr. App.) 40 S. W. 792; *Insoll v. State*, Id.; *Isom v. State* (Cr. App.) 70 S. W. 23; *Hines v. State*, 44 App. 319, 70 S. W. 955; *Hard v. State*, 63 App. 482, 140 S. W. 336; *Buckley v. State* (Cr. App.) 147 S. W. 579; *Tate v. State* (Cr. App.) 151 S. W. 541; *Cobb v. State* (Cr. App.) 154 S. W. 1195; *McDonald v. State*, 70 App. 80, 156 S. W. 209; *Tyler v. State* (Cr. App.) 170 S. W. 280.

If the defendant, after conviction and pending his appeal, escapes, the court of appeals is thereby ousted of jurisdiction of such appeal, and jurisdiction thereof can be reinvested only by the voluntary return of the defendant into the custody of the officer from whom he escaped, within ten days. If the defendant be recaptured before the lapse of ten days, his escape, nevertheless, divests the court of appeals of jurisdiction of the appeal. A recapture within ten days, while preventing a voluntary return of the defendant into custody, will not restore jurisdiction of the appeal. *Lunsford v. State*, 10 App. 118; *Ex parte Wood*, 19 App. 46; *Loyd v. State*, Id. 137.

What constitutes escape.—See *Owens v. State*, 32 App. 373, 23 S. W. 988.

The word "escape," as used in this article, means that the prisoner has "actually and completely withdrawn himself from custody, and has got free and gone at large." *Loyd v. State*, 19 App. 137.

Where defendant escapes from jail and is pursued and is out of sight three or four minutes, and is recaptured, it is not such an escape as will authorize dismissal of appeal. *Johnson v. State*, 41 App. 9, 51 S. W. 911, 54 S. W. 593.

Where defendant, convicted of a misdemeanor, did not enter into a recognizance at the term of his conviction, but after the term had expired gave bond to the sheriff, who released him from custody, such release constituted an "escape," requiring a dismissal of the appeal. *Roberson v. State*, 60 App. 514, 132 S. W. 766.

Return to custody.—Recapture is not voluntary return, and will not reinstate appeal. *Ex parte Wood*, 19 App. 46; *Loyd v. State*, Id., 137; *Lunsford v. State*, 10 App. 118.

When a defendant escapes after conviction, but before sentence has been pronounced, and is recaptured and sentenced, he may then appeal, and his escape before sentence will not affect his right of appeal. *Pate v. State*, 21 App. 191, 17 S. W. 461; *Walters v. State*, 18 App. 8.

An escaped prisoner must deliver himself to the sheriff of county from which he escaped pending appeal within ten days or his appeal will be dismissed. *Hammons v. State*, 35 App. 18, 29 S. W. 780.

In computing the ten days within which an escaped defendant must surrender in order to preserve his appeal, the day of escape must be excluded. *Hammons v. State*, 35 App. 17, 29 S. W. 780.

Reading article to jury.—*Lucas v. State*, 50 App. 219, 95 S. W. 1056.

Former law.—Before the enactment of this article, the practice in such cases was not uniform, and the escape of the defendant did not forfeit his appeal, but only his right to prosecute it while at large. *Ex parte Coupland*, 26 Tex. 386; *Moore v. State*, 44 Tex. 595.

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.

See *Willson's Cr. Forms*, 1160.

See *Loyd v. State*, 19 App. 137; *Ex parte Wood*, Id. 46; *Owens v. State*, 32 App. 373, 23 S. W. 988; "Appendix," sec. 31, 31 App. 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.]

See *Willson's Cr. Forms*, 982.

Cited, *Murff v. State* (Cr. App.) 172 S. W. 238.

Time for perfecting appeal in general.—A recognizance must be entered in open court in term time, and cannot be entered after adjournment. *White v. State* (Cr. App.) 146 S. W. 937; *Grant v. State*, 8 App. 432; *Koritz v. State*, 27 App. 53, 10 S. W. 757; *Quarles v. State*, 37 App. 362, 39 S. W. 668; *Youngman v. State*, 38 App. 459, 42 S. W. 988, 43 S. W. 519, and cases cited; *Roberson v. State*, 60 App. 514, 132 S. W. 766; *Craig v. State* (Cr. App.) 147 S. W. 251.

Notice of appeal and recognizance must be entered upon the minutes during the term at which conviction occurred and not afterwards, else appeal will be dismissed. *Harkrider v. State*, 48 App. 573, 90 S. W. 653; *Young v. State*, 60 App. 290, 131 S. W. 413.

The proper time to give notice of appeal is when the lower court has overruled the motion for new trial. *Young v. State*, 60 App. 290, 131 S. W. 413.

Where accused was convicted at a term ending September 3, 1910, and the only notice of appeal appears to have been given October 1, 1910, the appeal must be dismissed. *Offield v. State*, 61 App. 585, 135 S. W. 566.

The court of Criminal Appeals has no jurisdiction of a misdemeanor appeal, where accused did not enter into a recognizance during the term, but attempted to perfect the appeal by executing an appeal bond after the adjournment of court. *Hamilton v. State* (Cr. App.) 150 S. W. 775.

On conviction of a misdemeanor, an appeal bond not entered into until after adjournment of the term does not confer jurisdiction on the appellate court. *French v. State* (Cr. App.) 153 S. W. 858.

One convicted of a misdemeanor and not in custody can only perfect an appeal under arts. 918, 920, 923, by entering into a recognizance during the term, and the giving of an appeal bond, or of a recognizance subsequent to the term is insufficient. *Knowlton v. State* (Cr. App.) 169 S. W. 674.

Appeal from judgment corrected or entered nunc pro tunc.—Appeal may be taken from a final judgment of conviction entered nunc pro tunc at a subsequent term. *Scott v. State*, 26 Tex. 116; *O'Connell v. State*, 18 Tex. 343; *Smith v. State*, 1 App. 408, Id., 1 App. 516; *Madison v. State*, 17 App. 479; *Mapes v. State*, 13 App. 85; *Gordon v. State*, Id. 196; *Nelson v. State*, 21 App. 351, 17 S. W. 466. See, also, post, art. 917.

Under this article and art. 859 ante, correction of the judgment at a subsequent term does not authorize an appeal after the term of conviction. *Offield v. State*, 61 App. 340, 135 S. W. 368.

Effect of motion to set aside judgment at subsequent term.—Notice of appeal, to confer jurisdiction on the Court of Criminal Appeals, must be given during the term in which sentence is pronounced; and where notice of appeal is given at a term subsequent to the one in which sentence was pronounced, the appeal must be dismissed, though at such subsequent term accused moved to set aside the sentence, because he had not been served with notice of the fact that he would be sentenced. *Jones v. State*, 62 App. 356, 137 S. W. 670.

Entry of notice or recognizance nunc pro tunc.—After an appeal has been taken the court has no power to enter a recognizance on the minutes nunc pro tunc. *Quarles v. State*, 37 App. 362, 39 S. W. 668; *Peterson v. State*, 32 Tex. 477; *Harris v. State*, 2 App. 134; *Clark v. State*, 3 App. 338; *Grant v. State*, 8 App. 432.

The entry of a notice of appeal nunc pro tunc at a subsequent term was without authority of law and did not confer jurisdiction on the appellate court. Such an entry, however, is proper in case of an appeal from a judgment final on a forfeited bail bond. *Morse v. State*, 39 App. 566, 47 S. W. 645, 50 S. W. 342; *Clay v. State*, 56 App. 515, 120 S. W. 418.

Correction of entry as to recognizance.—The minutes of the county court recording the recognizance in a criminal case should not be erased and interlined after adjournment for the term, so as to show by insertion the punishment imposed upon accused. *Hughes v. State* (Cr. App.) 145 S. W. 917.

Art. 915. [883] Appeal how taken; entry of notice after term.
—An appeal is taken by giving notice thereof in open court at the term of court at which conviction is had, and having the same entered of record; provided, that if notice of appeal is given at the term at which the conviction is had, and the same is not entered of record, by making proof of that fact, the judge of the court trying the cause may order same entered of record either in term time or vacation by entering in the minutes of his court an order to that effect, which said entry when so made shall bear date as of date when notice of appeal was actually given in open court. [O. C. 726; Act 1915, p. 159, ch. 104, § 1, amending art. 915, C. C. P.]

See Willson's Cr. Forms, 982, 1020.

See ante, art. 68 and notes; *Teague v. State*, 53 App. 503, 111 S. W. 405; *Clay v. State*, 56 App. 515, 120 S. W. 418, and cases cited.

Cited, *Murff v. State* (Cr. App.) 172 S. W. 238; *Tores v. State* (Cr. App.) 166 S. W. 523.

Necessity and requisites of notice in general.—The appeal will be dismissed if the record does not show that notice of appeal was given. *Love v. State* (Cr. App.) 90 S. W. 169; *Hicklin v. State*, 31 Tex. 492; *Lewis v. State* (Cr. App.) 29 S. W. 778; *York v. City of Dallas* (Cr. App.) 30 S. W. 223; *Pace v. State* (Cr. App.) 32 S. W. 700; *Whipple v. State* (Cr. App.) 33 S. W. 1080; *White v. State* (Cr. App.) 38 S. W. 199; *Mason v. State*, Id. 610; *Dilworth v. State*, 36 App. 189, 36 S. W. 274; *Id.* (Cr. App.) 38 S. W. 615; *Neimire v. State*, Id. 783; *Voyles v. State*, Id.; *Marrow v. State* (Cr. App.) 38 S. W. 1003; *Hurlock v. State* (Cr. App.) 43 S. W. 992; *Beck v. State* (Cr. App.) 76 S. W. 923; *Roberts v. State* (Cr. App.) 89 S. W. 828; *Dennis v. State* (Cr. App.) 99 S. W. 1016; *Teague v. State*, 53 App. 503, 506, 507, 111 S. W. 405; *Clay v. State*, 56 App. 515, 120 S. W. 418; *Nickerson v. State* (Cr. App.) 126 S. W. 601; *Smith v. State* (Cr. App.) 132 S. W. 472; *Woody v. State* (Cr. App.) 141 S. W. 950; *Gregg v. State* (Cr. App.) 143 S. W. 183; *Ex parte Martinez* (Cr. App.) 145 S. W. 959; *Clay v. State* (Cr. App.) 150 S. W. 430; *Sylvester v. State* (Cr. App.) 157 S. W. 478; *Murgatroyd v. State* (Cr. App.) 161 S. W. 962; *Young v. State*, 72 App. 275, 161 S. W. 973; *Modwell v. State* (Cr. App.) 166 S. W. 504; *Griffin v. State* (Cr. App.) 174 S. W. 351; *Parish v. State* (Cr. App.) 177 S. W. 93.

Notice of appeal given in open court, and entered of record, is essential to the jurisdiction of the court of appeals, and unless such notice appears on the record, the appeal will be dismissed. *Lawrence v. State*, 14 Tex. 432; *Hughes v. State*, 33 Tex. 683; *Young v. State*, 60 App. 290, 131 S. W. 413; *Solari v. State*, 3 App. 482; *Fairchild v. State*, 23 Tex. 176; *Johnson v. State*, 8 App. 671; *Truss v. State*, 38 App. 291, 43 S. W. 92; *Thomas v. State*, 56 App. 246, 119 S. W. 846. The proper time for defendant to give notice of appeal is when the trial court has overruled his motion for a new trial. *Wilson v. State*, 12 App. 481. But the notice may be given and entered of record at any time after conviction, during the term of the court at which the judgment of conviction is entered against him. *Bozier v. State*, 5 App. 220. It may be given and entered at a subsequent term upon the entry of a judgment or sentence nunc pro tunc. *O'Connell v. State*, 18 Tex. 343; *Scott v. State*, 26 Tex. 116; *Smith v. State*, 1 App. 408; *S. C.*, 1 App. 516; *Mapes v. State*, 13 App. 85; *Madison v. State*, 17 App. 479. There is no prescribed form for the entry of a notice of appeal. But the entry of such notice upon the judge's docket merely will not be sufficient. It must be entered of record upon the minutes of the court. The statute is imperative. *Long v. State*, 3 App. 321. Where the term of the court at which the conviction was had has adjourned, without notice of appeal, the court of appeals has no jurisdiction. *Clark v. State*, 3 App. 338.

There are but two exceptions to the rule that an appeal must be taken in a criminal case by giving notice thereof in open court and having the same entered of record; one when final judgment is not entered as stated, in cases less than capital and is cured by motion to have same entered nunc pro tunc at a subsequent term; and the other in scire facias, where notice of appeal is given and not entered of record. *Roan v. State* (Cr. App.) 65 S. W. 1069. See *Morse v. State*, 39 App. 566, 47 S. W. 645, 50 S. W. 342.

A request by accused to fix the amount of recognizance on appeal is not a notice of appeal. *Young v. State*, 60 App. 290, 131 S. W. 413.

The proper time to give notice of appeal is when the lower court has overruled the motion for new trial. *Young v. State*, 60 App. 290, 131 S. W. 413.

Where accused was convicted at a term ending September 3, 1910, and the only

notice of appeal appears to have been given October 1, 1910, the appeal must be dismissed. *Offield v. State*, 61 App. 585, 135 S. W. 566.

A misdemeanor appeal will be dismissed, where the record does not contain a notice of appeal. *Palmer v. State*, 63 App. 614, 141 S. W. 109.

Evidence held sufficient to show that no notice of appeal from a conviction was given. *Ex parte Martinez* (Cr. App.) 145 S. W. 959.

A notice of appeal referred to in the sentence pronounced, part of the minutes of the court, bearing evidence that notice of appeal was given in open court, confers jurisdiction on the Court of Criminal Appeals. *Brannan v. State* (Cr. App.) 175 S. W. 697.

Prevention of defendant from giving notice of appeal.—Where a person convicted of a crime gives notice of appeal, and the trial court wilfully refuses or inadvertently fails to enter such notice, or where he is prevented through force or fear from giving notice of appeal, the Court of Criminal Appeals, upon application made in reasonable time, may issue a writ of mandamus compelling the entry of the notice given or prevented from being given. *Ex parte Martinez* (Cr. App.) 145 S. W. 959.

Evidence held insufficient to establish that defendant's counsel were prevented by a mob from giving notice of appeal. *Ex parte Martinez* (Cr. App.) 145 S. W. 959.

On application for writ of habeas corpus after relator's conviction of murder in the first degree, evidence held insufficient to show that he was prevented from giving notice of appeal by duress. *Ex parte Martinez* (Cr. App.) 145 S. W. 959.

Entry of notice.—Judgment stated that defendant gave notice of appeal in open court which is here now entered of record; held, sufficient. *Conoley v. State*, 37 App. 510, 40 S. W. 295.

An entry on the judge's docket that notice of appeal was given is not an entry of record. It must be entered on the minutes. *Lenox v. State*, 55 App. 259, 116 S. W. 816.

A recitation, at the close of a sentence, that as defendant had given notice of appeal the judgment would be suspended, was insufficient as an entry of notice of appeal. *Raines v. State* (Cr. App.) 151 S. W. 811.

Where the notice of appeal was not entered of record in the minutes of the court, the trial judge had no authority in vacation to amend the record by having the clerk enter up a judgment showing that notice of appeal was given. *Rios v. State* (Cr. App.) 174 S. W. 1050.

The notice of appeal must be entered of record in the minutes of the court, in order that jurisdiction of the Court of Criminal Appeals may attach, and it is not sufficient that the judge's private docket shows that notice of appeal was given. *Rios v. State* (Cr. App.) 174 S. W. 1050.

Withdrawal of notice.—The rules of the Court of Criminal Appeals require that a request to withdraw accused's appeal must be signed in person and sworn to by accused. *Jennings v. State* (Cr. App.) 151 S. W. 1050; *Wartelsky v. State*, 38 App. 629, 44 S. W. 510; *Catron v. State*, 63 App. 377, 140 S. W. 227.

Where a request for the withdrawal of an appeal in a criminal case is filed after the appeal has been perfected, and the term of court at which the defendant was tried has adjourned, under the rules of court the request must be signed and acknowledged by the defendant. *Gonzales v. State*, 61 App. 503, 135 S. W. 381.

Review by certiorari where no notice given.—Under Const. art. 5, § 5, the Court of Criminal Appeals has power only to issue a writ of habeas corpus, and no other writ, in cases where the court has not obtained jurisdiction, and hence where it has no such jurisdiction of the case by reason of a failure to give notice of appeal, it has no power to review a case under the common-law writ of certiorari. *Ex parte Martinez* (Cr. App.) 145 S. W. 959.

Appeal from justices' and other inferior courts.—See art. 922, and notes.

Notice of appeal from justice court must be given, and entry of the same made upon the justice docket. *McDougall v. State*, 32 App. 174, 22 S. W. 593.

Appeal from justice to county court was dismissed because notice of appeal was not given, but the law having been changed while the case was pending in court of criminal appeals so as to dispense with such notice, the judgment of the county court dismissing the appeal will be reversed, because the law affected a remedy and not a vested right. *McKennon v. State*, 42 App. 371, 60 S. W. 41, 96 Am. St. Rep. 802.

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 substi-

tuted at said term as in other cases. [O. C. 727; Act Mar. 30, 1885, p. 72; Act Apr. 1, 1887, p. 94.]

See *Morse v. State*, 39 App. 566, 47 S. W. 645, 50 S. W. 342.

Cited, *Woodmen of the World v. Dodd* (Civ. App.) 134 S. W. 254.

Former law.—Prior to the amendment of this article the record could not be amended or substituted after appeal, as the appeal divested the trial court of all further jurisdiction over the case. *Turner v. State*, 16 App. 318; *Knight v. State*, 7 App. 206; *Hill v. State*, 4 App. 559; *Gerard v. State*, 10 App. 690.

Effect of appeal in general.—Accused, who on the overruling of his motion for new trial gave notice in open court of an appeal, could not, without withdrawing the notice of appeal and without leave of court, file an amended motion for new trial. *Tores v. State* (Cr. App.) 166 S. W. 523.

Affidavits of grand jurors filed by the district attorney after the case had been appealed could not be considered either by the trial court or the Court of Criminal Appeals, as provided by this article. *Henson v. State* (Cr. App.) 168 S. W. 89.

Transfer of jurisdiction.—See *Saragosa v. State*, 40 App. 64, 46 S. W. 250, 48 S. W. 190; *Dement v. State*, 39 App. 271, 45 S. W. 917.

Pending appeal to the criminal court of appeals, the trial court can take no steps with reference to the case until the appellate court has finally disposed of said appeal except where some portion of the record has been lost or destroyed after notice of appeal has been given. After the appeal has been consummated the trial court can take no action whatever in the case. *Sausley v. State*, 48 App. 563, 90 S. W. 641; *Quarles v. State*, 37 App. 362, 39 S. W. 668; *Hinman v. State*, 54 App. 434, 113 S. W. 280; *Nichols v. State*, 55 App. 211, 115 S. W. 1196; *Estes v. State*, 38 App. 506, 43 S. W. 982; *Bundick v. State*, 59 App. 9, 127 S. W. 543.

Sentence can not be pronounced and the convict hurried off to the penitentiary until the appellate tribunal is heard from, *Smith v. State*, 41 Tex. 352; nor can the court a quo make any order in the case pending appeal. *Hill v. State*, 4 App. 559. It is error to sentence a prisoner after appeal, and over his objections (before the act of 1879). *Bozier v. State*, 5 App. 220; and, pending appeal, the minutes can not be amended so as to show entry of plea. *Knight v. State*, 7 App. 206.

When term ends, notice of appeal having been given, jurisdiction of appellate court attaches, and judgment of trial court cannot be entered at succeeding term nunc pro tunc. *Estes v. State*, 38 App. 506, 43 S. W. 982.

Though a motion for a new trial had been overruled and notice of appeal given, the case could not be considered as pending in the Court of Criminal Appeals as long as the term of the lower court was in session, unless the transcript had been taken out during the term and filed in the upper court, in which case the lower court could not take any action affecting the appeal, article 911 providing that the transcript may be filed in the Court of Criminal Appeals and the case tried while the court in which the conviction was had is still in session. *Bundick v. State*, 59 App. 9, 127 S. W. 543.

The provision of this article suspending the trial court's jurisdiction pending an appeal, except to substitute or supply lost papers, applies only to the proceedings in which a conviction was had, and does not prevent a new indictment for the same offense after dismissal of the first prosecution on appeal, but before receipt of the mandate in the lower court. *Ex parte Jones*, 60 App. 29, 129 S. W. 632.

The trial court, under this article, is without authority to enter a nunc pro tunc order, so as to confer jurisdiction on the appellate court, and where the notice of appeal was given during the term at which conviction was had, and the clerk of the court failed to enter the notice in the minutes of the court, although entered in the motion docket, jurisdiction of an appeal is not given by subsequently entering the notice nunc pro tunc. *Offield v. State*, 61 App. 585, 135 S. W. 566.

The jurisdiction of the Court of Criminal Appeals attaches immediately upon the entry of notice of appeal, and stays any punishment assessed against the appellant. *Ex parte Bradenburg*, 63 App. 577, 140 S. W. 780.

The trial court cannot conform the judgment to the verdict after an appeal has been taken. *Robison v. State* (Cr. App.) 150 S. W. 912.

An order changing the venue in a criminal case after a reversal on a former appeal was not invalid because made at a special term, the order for the convening of which was made before the mandate reached the district court, where it appeared from the time elapsing after the issuance of the mandate, from the order changing the venue itself, and from the qualification of the bill of exceptions thereto that the mandate had reached that court before the order changing the venue was made. *Mayhew v. State* (Cr. App.) 155 S. W. 191.

Where the overruling of an amended motion for a new trial appeared only on the motion docket and was not carried into the minutes of the court, the court could not, after the adjournment of the term, and while an appeal was pending, enter nunc pro tunc an order overruling such motion. *Suesberry v. State*, 72 App. 439, 162 S. W. 849.

Under this article and art. 915, a notice of appeal, given in open court and entered of record, perfects the appeal, and the jurisdiction of the Court of Criminal Appeals attaches. *Tores v. State* (Cr. App.) 166 S. W. 523.

Defendant's recognition, after conviction, did not oust the trial court of jurisdiction to determine his motion for a new trial, as it requires a notice of appeal to attach the jurisdiction of the Court of Criminal Appeals; and, even if defendant gave notice of an appeal, the trial court had jurisdiction over the judgment until the end of the term. *Collins v. State* (Cr. App.) 171 S. W. 729.

Substitution of lost papers.—See ante, art. 482, and notes.

The entry of an order for ten days to file statement of facts is not one for the substitution of a lost or destroyed record, and cannot be made nunc pro tunc. *Lewis v. State*, 34 App. 126, 29 S. W. 384, 774, 30 S. W. 231.

Defective recognizance cannot be substituted by a good one in the court a quo, pending appeal. *Youngman v. State*, 38 App. 459, 42 S. W. 988, 43 S. W. 519.

After the record in a case has been filed with the court of appeals the trial court can make no further orders in the case except to substitute lost papers. *Sheegog v. State*, 39 App. 126, 44 S. W. 1109.

This article was not intended to fix the time for the substitution of lost papers, so as to make it absolutely of the essence of right to substitute. The object of the statute is simply to authorize the substitution of lost papers pending the appeal, and to require that reasonable diligence should be used in the substitution thereof. *McHenry v. State*, 42 App. 542, 61 S. W. 311.

The trial court may permit the substitution of a lost information, where the trial judge stated that in his opinion he had the information when he wrote the charge, and where the county clerk thought he had the information when he wrote the judgment, and three persons testified that an information had been prepared and filed, and only one witness testified that he had examined the papers on the day of the trial, and that he could not find the information. *James v. State*, 62 App. 610, 138 S. W. 408.

Contempt by sheriff.—Where the clerk, after defendant's notice of appeal from a conviction for a misdemeanor, improperly issued a writ of commitment, directing the sheriff to collect the fine and costs from defendant pending his appeal, the sheriff, who put defendant to work on the public roads under such order, but who, on learning that an appeal had been perfected, again placed the defendant in jail, whence he was taken without the sheriff's knowledge, but again returned to jail, and who showed that his placing of the prisoner on the county roads was not willful, was not in contempt of court, so as to be subject to fine or punishment. *Ex parte Bradenburg*, 63 App. 577, 140 S. W. 780.

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.]

See ante, arts. 855 and 856.

Operation in general.—Under this article accused can appeal at any time during the term at which he was convicted. *Barr v. State*, 62 App. 58, 136 S. W. 454.

Accused being entitled to enter notice of appeal during the term at which he was convicted, it was improper to remove him to the penitentiary, where his motion for new trial had been overruled and the notice of appeal was entered. *Ex parte Barr*, 62 App. 62, 136 S. W. 456.

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.]

See Willson's Cr. Forms, 797, 1021.

Necessity of recognizance.—If defendant does not enter into recognizance, he must be committed to jail pending his appeal, and the record on appeal must show a sufficient recognizance, or must show affirmatively that the defendant is in jail, otherwise the appeal will be dismissed. *Harris v. State*, 2 App. 134; *Young v. State*, 8 App. 81; *Evans v. State*, Id. 671; *Johnson v. State*, 26 Tex. 117; *White v. State*, 11 Tex. 769; *Alexander v. State*, 12 Tex. 540; *Lawrence v. State*, 14 Tex. 432; *Hicklin v. State*, 31 Tex. 492; *State v. Watson*, 33 Tex. 337; *Crow v. State*, 41 Tex. 468; *Holman v. State*, 10 Tex. 558; *State v. Paschal*, 22 Tex. 584; *State v. Fatheree*, 23 Tex. 202; *Buie v. State*, 1 App. 58; *Taylor v. State*, 1 App. 663; *Allison v. State*, 33 App. 501, 26 S. W. 1080; *Maxey v. State*, 41 App. 556, 55 S. W. 823; *Vaughan v. State* (Cr. App.) 40 S. W. 263; *Walton v. State* (Cr. App.) 66 S. W. 546; *Green v. State* (Cr. App.) 76 S. W. 927; *Jones v. State* (Cr. App.) 78 S. W. 226, Id. (Cr. App.) 78 S. W. 227; *Lane v. State* (Cr. App.) 82 S. W. 1034; *Childress v. State* (Cr. App.) 81 S. W. 302; *Roberts v. State* (Cr. App.) 89 S. W. 828; *Brinson v. State* (Cr. App.) 150 S. W. 776.

When no recognizance is given, judgment must show that appellant has been continuously in jail. To state that he is now in jail is not sufficient. *Bruce v. State*, 40 App. 378, 50 S. W. 721.

Where no recognizance is given the transcript must show that defendant has been continuously in jail since conviction. *Woods v. State* (Cr. App.) 55 S. W. 50.

On a sheriff's certificate that a party is in jail, in order to give appellate court jurisdiction the certificate must show that he has been continuously in jail since conviction. *McHenry v. State*, 42 App. 469, 60 S. W. 880.

It is the duty of appellant and his counsel to see that the proper recognizance is entered into and that it is properly entered on the minutes of the court below. *Saulfy v. State* (Cr. App.) 83 S. W. 710.

Motion to dismiss the appeal in a misdemeanor case is well taken; the recognizance not containing the statement, necessary under arts. 918-920, to allow the appellate court to take jurisdiction, of the amount of the punishment inflicted. *Merfett v. State*, 61 App. 538, 135 S. W. 573.

Where, though accused's recognizance was fixed at a certain sum, the record on his appeal does not contain a recognizance, or show affirmatively that accused is in jail, the appeal will be dismissed. *Sandifer v. State*, 63 App. 361, 139 S. W. 1155.

Appeal bond or recognizance.—The statute does not authorize the giving of an appeal bond in lieu of a recognizance upon appeal to the Court of Criminal Appeals in a misdemeanor case. *Palmer v. State*, 63 App. 614, 141 S. W. 109; *Bacon v. State*, 10 Tex. 98; *Herron v. State*, 27 Tex. 337; *Jones v. State*, 1 App. 485; *Arnold v. State*, 3 App. 437; *Cook v. State*, 8 App. 671; *Hamilton v. State* (Cr. App.) 150 S. W. 775; *Wells v. State* (Cr. App.) 150 S. W. 899.

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 App. 485.

An appeal bond, signed by appellant and two sureties, is not a compliance with the statute, providing that a party appealing to the Court of Criminal Appeals from conviction of a misdemeanor may avoid confinement in jail during the appeal by entering into a recognizance in open court, and the appeal will be dismissed. *Johnson v. State* (Cr. App.) 143 S. W. 1165.

The Court of Criminal Appeals has no jurisdiction of an appeal from a conviction of a misdemeanor, where the appellant does not enter into any recognizance during the term of court, although six days after adjournment he enters into a bond, giving sureties approved by the clerk alone. *Saye v. State* (Cr. App.) 145 S. W. 1189.

Time for giving recognizance.—See notes under art. 914.

Presentation of bond to sheriff.—An appeal bond, presented to the sheriff, who approved it, is not a compliance with this article and the appeal on motion of the state will be dismissed. *Terry v. State*, 64 App. 497, 142 S. W. 875.

Who may execute.—A recognizance must be entered into by defendant in person, not by his attorney. *Chaney v. State*, 23 Tex. 23; *Ferrill v. State*, 29 Tex. 489.

Extrinsic evidence.—Notwithstanding the record fails to show a recognizance, it may be shown by proof de hors the record, that in fact a sufficient recognizance was entered into, and in such case the appeal will be entertained. *Craddock v. State*, 15 App. 641.

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 App. 556, 55 S. W. 833.

What constitutes escape.—See notes under art. 912.

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.]

See Willson's Cr. Forms, 797, 1021. See, also, notes under arts. 914-916, 918.

Cited, *Sanders v. State*, 70 App. 532, 158 S. W. 291.

Requisites in general.—See *Cryer v. State*, 36 App. 621, 37 S. W. 753, 38 S. W. 203; *Thompson v. State*, 35 App. 505, 34 S. W. 124, 612; *Freeman v. State*, 36 Tex. 254.

A recognizance failing to show in what court conviction was had is fatally defective. *Biglow v. State*, 36 App. 402, 37 S. W. 330; *Bryant v. State* (Cr. App.) 58 S. W. 1022; *Bird v. State*, 61 App. 205, 134 S. W. 687.

The rules governing recognizances entered into for the appearance of the defendant for trial, are also applicable to a recognizance on appeal. Ante, art. 320 et seq.; *Buie v. State*, 1 App. 58; *State v. Stout*, 28 Tex. 327; *Horton v. State*, 30

Tex. 191; Payne v. State, Id. 397; Bennett v. State, Id. 446; Hicklin v. State, 31 Tex. 492.

A recognizance which recites a conviction in county court, where the judgment was in fact one dismissing an appeal from justice court, is insufficient. Armento v. State, 33 App. 539, 28 S. W. 200.

In this case is given a form of a recognizance in a misdemeanor case appealed to court of criminal appeals. See, also, defective appeal bond from corporation court to county court. Horton v. State, 43 App. 600, 63 S. W. 172.

Statement that recognizance was taken "before the court in session" instead of in "open court" does not render the recognizance insufficient. Haley v. State, 45 App. 102, 74 S. W. 39.

Where the word "counseled" is used in the recognizance instead of the word "convicted" the appeal will be dismissed. Allen v. State, 47 App. 65, 79 S. W. 308.

A bond, in place of a recognizance on appeal, reciting that appellant was charged with the offense of unlawfully selling intoxicating liquors, as charged in the information duly presented and pending against him, and that he should well and truly make his personal appearance before the county court of S. county before the next regular term thereof, to be held in S. county at a specified date, and then and there remain from term to term and from day to day, to abide the action of the Court of Criminal Appeals, was not a compliance with the statute, requiring a recognizance on appeal, setting out, among other things, that appellant was convicted of a misdemeanor, and reciting the punishment assessed against him. Craig v. State, 62 App. 299, 137 S. W. 667.

Statement of nature of offense and extent of punishment.—Unless the recognizance states the punishment it is fatally defective. Clark v. State, 41 App. 635, 56 S. W. 623; May v. State, 40 App. 196, 49 S. W. 402; Johnson v. State (Cr. App.) 49 S. W. 594; Martin v. State (Cr. App.) 89 S. W. 642; Eldert v. State (Cr. App.) 92 S. W. 40; McDade v. State (Cr. App.) 56 S. W. 916; Floyd v. State (Cr. App.) 73 S. W. 969; Wellborn v. State (Cr. App.) 61 S. W. 306; Lee v. State (Cr. App.) 72 S. W. 186; Moore v. State, 44 App. 526, 72 S. W. 595; Spradling v. State (Cr. App.) 71 S. W. 17; Murphy v. State (Cr. App.) 61 S. W. 405; Lovic v. State (Cr. App.) 62 S. W. 748; Bertoni v. State (Cr. App.) 71 S. W. 963; Seguin v. State (Cr. App.) 62 S. W. 753; Weber v. State (Cr. App.) 68 S. W. 269; De Valeria v. State (Cr. App.) 67 S. W. 1020; Austin v. State (Cr. App.) 64 S. W. 1041; Lindsey v. State (Cr. App.) 65 S. W. 905; Greer v. State (Cr. App.) 70 S. W. 23; Waits v. State (Cr. App.) 65 S. W. 917; Kapps v. State (Cr. App.) 70 S. W. 83; Waldrip v. State (Cr. App.) 66 S. W. 555; Hogue v. State (Cr. App.) 70 S. W. 217; Doran v. State (Cr. App.) 72 S. W. 585; Franklin v. State (Cr. App.) 76 S. W. 759; Bean v. State, Id.; Bourland v. State (Cr. App.) 77 S. W. 455; Allen v. State (Cr. App.) 79 S. W. 537; Noble v. State (Cr. App.) 82 S. W. 511; Hart v. State, 47 App. 502, 84 S. W. 592; Smith v. State (Cr. App.) 86 S. W. 334; Saufly v. State (Cr. App.) 83 S. W. 710; Dove v. State (Cr. App.) 89 S. W. 646; Burton v. State, 48 App. 544, 90 S. W. 498; Harris v. State, 58 App. 523, 126 S. W. 890; Tidwell v. State, 58 App. 577, 126 S. W. 1128; Bird v. State, 61 App. 205, 134 S. W. 687; Engman v. State, 61 App. 496, 135 S. W. 565; Merfett v. State, 61 App. 538, 135 S. W. 573; Wilson v. State, 61 App. 628, 136 S. W. 447; Harden v. State, 62 App. 84, 136 S. W. 768; Novy v. State, 62 App. 492, 138 S. W. 139; Goodwin v. State, 63 App. 140, 138 S. W. 399; Campbell v. State, 62 App. 561, 138 S. W. 607; Haynes v. State, 63 App. 181, 139 S. W. 1155; Palmer v. State, 63 App. 614, 141 S. W. 109; Hughes v. State (Cr. App.) 145 S. W. 917; Gunter v. State (Cr. App.) 146 S. W. 923; Ferguson v. State (Cr. App.) 147 S. W. 239; Decker v. State (Cr. App.) 147 S. W. 259; White v. State (Cr. App.) 147 S. W. 598; Howell v. State (Cr. App.) 148 S. W. 302; Bush v. State (Cr. App.) 151 S. W. 554; Butler v. State (Cr. App.) 153 S. W. 326; Martoni v. State (Cr. App.) 166 S. W. 1169; Warner v. State (Cr. App.) 167 S. W. 1109.

A recognizance on appeal in a misdemeanor case which did not state that the appellant was convicted of a misdemeanor or of any offense defined by law, or state the penalty assessed, was wholly insufficient. Autry v. State (Cr. App.) 147 S. W. 251; Davis v. State, 47 App. 148, 82 S. W. 512; Drake v. State (Cr. App.) 135 S. W. 123; Ikard v. State (Cr. App.) 135 S. W. 547; Engman v. State, 61 App. 496, 135 S. W. 565; Banker v. State (Cr. App.) 145 S. W. 339; Stallworth v. State (Cr. App.) 147 S. W. 238.

Failure of a recognizance on appeal to show that appellant has been convicted of any offense is a defect for which the appeal will be dismissed on motion. Hoyle v. State, 62 App. 297, 137 S. W. 355; Jones v. State, 8 App. 365; Wells v. State, 8 App. 671; Bradley v. State (Cr. App.) 136 S. W. 446; Gunter v. State (Cr. App.) 146 S. W. 933; Lockett v. State (Cr. App.) 148 S. W. 305.

On appeal in a criminal case the recognizance must recite the offense charged and if it be not an offense eo nomine its essential ingredients must be set out. Turner v. State, 41 Tex. 549; Killingsworth v. State, 7 App. 28; Schoonmaker v. State, 37 App. 424, 35 S. W. 969; Mullinix v. State, 32 App. 116, 22 S. W. 407; Nash v. State, 32 App. 368, 24 S. W. 32, 26 S. W. 412 (distinguishing Mullinix's case, 32 App. 116, 22 S. W. 407, and Magee's case, 7 App. 99, and McKay's case, 8 App. 672); Morgan v. State, 32 App. 413, 23 S. W. 1107; Youngman v. State, 38 App. 459, 42 S. W. 988, 43 S. W. 519.

Defendant was convicted of carrying "on and about" his person a pistol. Recognizance recited carrying "on or about" his person a pistol; held, insufficient. Polly v. State (Cr. App.) 40 S. W. 283; Lowery v. State (Cr. App.) 38 S. W. 609; Harris v. State, 58 App. 523, 126 S. W. 890.

A recognizance, given in a misdemeanor prosecution for unlawfully carrying a pistol, was defective, where it merely stated that accused "carried concealed weapons." Palmer v. State, 63 App. 614, 141 S. W. 109; Engman v. State, 61 App. 496, 135 S. W. 565.

A recognizance on appeal is sufficient if it states the statutory definition of the offense, though such recital might not be sufficient in an indictment. Collins v. State, 39 App. 30, 44 S. W. 846.

Recognition on appeal must set out the constituent elements of the particular offense, as there is no such offense per se as malicious mischief. *Koritz v. State*, 27 App. 53, 10 S. W. 757; *Killingsworth v. State*, 7 App. 28; *Waterman v. State*, 3 App. 671.

Extortion is not an offense eo nomine, and a recognition on appeal, must set out the essential ingredients of the offense. *Brackenridge v. State*, 27 App. 513, 11 S. W. 630, 4 L. R. A. 360; *Johnson v. State*, 38 App. 26, 40 S. W. 982.

Recognition for offense under P. C. art. 1349, recited that the defendant stands charged with "receiving and concealing stolen property of the value of ten dollars," etc. It was objected to the recognition that it was insufficient and invalid because it used the word "stolen" instead of the statutory words "acquired in such manner that the acquisition comes within the meaning of the term 'theft.'" Held, that under our Code the word "stolen" was sufficient in the recognition, though it would not be in an indictment. *Sands v. State*, 30 App. 579, 13 S. W. 86.

A recognition on conviction of selling liquor as agent of another must recite the agency. *Johnson v. State*, 34 App. 106, 29 S. W. 472.

A recognition must recite the offense charged as well as that of which accused was convicted. *Sheppard v. State* (Cr. App.) 32 S. W. 530; *Pace v. State* (Cr. App.) 32 S. W. 697.

A bond reciting a conviction of "violating the Sunday law" is insufficient. *Pace v. State* (Cr. App.) 32 S. W. 700.

A recognition reciting that accused was convicted of "unlawfully carrying a pistol" is insufficient. *Blackshear v. State* (Cr. App.) 33 S. W. 222.

Recognition on appeal, reciting the offense in the alternative and failing to recite that appellant owned taxable property in said school district, is fatally defective. *Whitehead v. State*, 35 App. 437, 34 S. W. 114.

A recognition on appeal from a conviction for violating the local option law, which recites that the appellant was charged with "selling intoxicating liquors in a prohibited district," is fatally defective. *Leach v. State*, 35 App. 449, 34 S. W. 124.

A bail bond reciting a conviction for carrying "brass knucks" instead of "brass knuckles" is insufficient. *Mills v. State*, 36 App. 71, 35 S. W. 370.

A recognition reciting the appellants stand charged with unlawfully selling liquors in a prohibition district states no offense. *McMeans v. State*, 37 App. 130, 38 S. W. 998.

Reciting that defendant stands charged with "shooting an ox," held, insufficient. *Wilson v. State* (Cr. App.) 40 S. W. 279.

Defendant was indicted for an assault with intent to murder, and convicted of an aggravated assault, the recognition recited that he was indicted and convicted of aggravated assault; held, sufficient. *Morrison v. State*, 37 App. 601, 40 S. W. 591. "For driving cattle across a quarantine line" does not state an offense. *Coggin v. State*, 38 App. 40, 40 S. W. 984.

Libel is, eo nomine, an offense which is defined by our statute, and a recognition on appeal which recites the offense as "libel," without setting out the constituent elements, is sufficient. *Jones v. State*, 38 App. 364, 43 S. W. 78, 70 Am. St. Rep. 751.

Appeal will be dismissed if the recognition states the judgment incorrectly. *Driggs v. State*, 43 App. 406, 66 S. W. 546.

A recognition in a case of selling liquor to a minor must state that the sale was made to the minor "without the written consent of the parent or guardian or some one standing in their stead." *Mitchell v. State* (Cr. App.) 72 S. W. 594.

A recognition that merely recites that appellant stands charged with offense of swindling and has been convicted and fined is insufficient to support an appeal. *Cater v. State* (Cr. App.) 77 S. W. 13; *Holcomb v. State* (Cr. App.) 78 S. W. 231; *Hart v. State*, 47 App. 502, 84 S. W. 592.

The recognition on appeal in a prosecution for violating the local option law should state that accused had been convicted of a misdemeanor, and not that he had been convicted of the offense of unlawfully selling intoxicating liquors in a prohibited district; that not being an offense eo nomine. *Lindsey v. State*, 59 App. 273, 128 S. W. 386.

A recognition on appeal from a conviction, which recites that accused was convicted of carrying a pistol and his punishment assessed at a fine of 100, is insufficient for failing to recite, as required in the form prescribed by law, that he was convicted of a misdemeanor. *Roberts v. State*, 60 App. 111, 131 S. W. 321.

A recognition on appeal from a conviction of a violation of the pistol law, which recites that accused was convicted "for carrying a pistol," is insufficient for failing to state the offense, since one, to violate the law, must carry a pistol on or about his person, or in some other prohibited manner. *Roberts v. State*, 60 App. 111, 131 S. W. 321.

Where a recognition on appeal from a judgment convicting defendant of violating the local option law did not recite that defendant was convicted of a misdemeanor, nor show the punishment assessed, it was insufficient to sustain the appeal. *Switzer v. State*, 61 App. 206, 134 S. W. 705.

A recognition on appeal from a conviction of violating the local option law, which recites that appellant stands charged with unlawfully selling intoxicants in local option territory and has been convicted of such offense, but does not recite, as the statutory form requires, that he was convicted of a misdemeanor, nor the amount of his punishment, is insufficient. *Henry v. State*, 61 App. 187, 135 S. W. 571.

A recognition on appeal from a conviction for permitting stock to run at large, which recites that accused stands charged with violating the stock law, and that he has been convicted of the offense, is insufficient because it does not recite that accused stands charged and is convicted of a misdemeanor. *Black v. State*, 62 App. 77, 136 S. W. 478.

A recognition on appeal in a misdemeanor case, which states that appellant was "charged with the offense of horse racing on public road," and was convicted

of such offense, does not charge any offense, and the appeal must be dismissed, on motion of the state. *Ballard v. State* (Cr. App.) 143 S. W. 184.

A recognizance, stating that appellant has been convicted of the "offense of aggravated assault," is insufficient to support an appeal. *Hinton v. State* (Cr. App.) 144 S. W. 617.

A recognizance, which merely stated that the offense charged was running a horse race on a public road, did not sufficiently describe the statutory ingredients of the offense. *Hughes v. State* (Cr. App.) 145 S. W. 917.

A recognizance, which does not state the punishment except that it was not under \$100, is not sufficient where the fine fixed by the jury was exactly \$100; the statute requiring that the punishment found by the jury must be stated. *Wildner v. State* (Cr. App.) 152 S. W. 1041.

A recognizance reciting that appellant stood charged with the offense of knowingly turning stock on the inclosed lands of another without his consent, but not showing that he had been convicted or the amount of the judgment of conviction as the statute requires, was insufficient. *Thornton v. State*, 70 App. 45, 156 S. W. 210.

Statement of obligation.—A recognizance failing to bind appellant to abide the judgment "in this case" is fatally defective. *Duffer v. State* (Cr. App.) 38 S. W. 997; *Tucker v. State* (Cr. App.) 38 S. W. 1001; *Fortenberry v. State* (Cr. App.) 72 S. W. 586. *Id.*, 44 App. 535, 72 S. W. 588; *Brock v. State* (Cr. App.) 72 S. W. 599; *Mason v. State* (Cr. App.) 74 S. W. 25; *Heinen v. State* (Cr. App.) 74 S. W. 776; *Armstrong v. State* (Cr. App.) 77 S. W. 446; *Lockett v. State* (Cr. App.) 78 S. W. 234; *Perkins v. State*, *Id.* 346; *Robertson v. State*, 45 App. 516, 78 S. W. 517; *Mallard v. State* (Cr. App.) 83 S. W. 1115; *Lindsey v. State*, 59 App. 273, 128 S. W. 386; *Harden v. State*, 62 App. 84, 136 S. W. 768; *Darnell v. State*, 72 App. 271, 161 S. W. 971; *Bodkins v. State* (Cr. App.) 172 S. W. 216.

A recognizance requiring appellant to abide the judgment of the Court of Appeals is fatally defective. *Ray v. State* (Cr. App.) 35 S. W. 368; *Volney v. State*, *Id.* 658; *Schwarzlase v. State*, *Id.* 368; *Manes v. State*, 20 Tex. 38; *Carroll v. State*, 6 App. 463; *Blackshear v. State* (Cr. App.) 33 S. W. 222; *Bohanon v. State* (Cr. App.) 33 S. W. 866; *McAfee v. State* (Cr. App.) 33 S. W. 970; *Starr v. State* (Cr. App.) 40 S. W. 790; *Dun v. State*, *Id.* 287.

The recognizance on appeal must bind the defendant to "abide the judgment of the court of criminal appeals in this case." *Cryer v. State*, 36 App. 621, 37 S. W. 753, 38 S. W. 203; *Harkey v. State* (Cr. App.) 66 S. W. 559.

An omission of the word "appear" is fatal. *Manes v. State*, 20 Tex. 38; *Carroll v. State*, 6 App. 463.

The recognizance must require the defendant "to abide the judgment of the court of appeals." But it is sufficient if it requires him "to abide the judgment of the appellate court." *Wilson v. State*, 7 App. 38; *Allen v. State*, 1 App. 514. A recognizance conditioned to appear "until his said appeal has been decided by the court of appeals, then to be null and void," is fatally defective. *Taylor v. State*, 1 App. 663.

One of the conditions prescribed by the form is that the cognizor "will not depart without leave of his court," that is, the trial court. Unless the recognizance recites this condition it is not in substantial compliance with the prescribed form, and is fatally defective. *Howard v. State*, 30 App. 680, 18 S. W. 790.

Since the act of 1892, repealing chapter 2 of title 2 of the Code of Criminal Procedure, and creating the court of criminal appeals, it is essential that recognizance on an appeal to that court shall obligate the cognizor to abide the decision of the "court of criminal appeals." Recognizance to the "court of appeals," that court being no longer in existence, is of no force. *Cummings v. State*, 31 App. 406, 20 S. W. 706.

With the adoption of the amendments to the judiciary article of the constitution, "the court of appeals" passed out of existence, and was substituted, as to its criminal jurisdiction, by the "court of criminal appeals." By section 22 of the act creating the "court of criminal appeals," prescribing the form for recognizances on appeals in misdemeanor cases, the form prescribed requires that the cognizor shall obligate himself to abide the judgment of the "court of criminal appeals;" and section 33 of said act expressly inhibits the court of criminal appeals from entertaining jurisdiction of any case unless the recognizance shall comply substantially with the prescribed form. Held, that a recognizance binding the appellant to "abide the judgment of the court of appeals" is fatally defective. *Neubauer v. State*, 31 App. 513, 21 S. W. 363.

A recognizance to "abide the judgment of the court of criminal appeals" is sufficient though it omits "of the State of Texas." *Anderson v. State* (Cr. App.) 36 S. W. 97.

A recognizance failing to recite that defendant is bound to appear before the court in which he was tried and convicted is insufficient. *Henry v. State* (Cr. App.) 38 S. W. 609.

The recognizance is not insufficient if it says that the principal is bound in the sum of \$200, and each surety is bound in the sum of \$200, instead of saying that each is severally bound in the sum of \$200. *Haley v. State*, 45 App. 102, 74 S. W. 39.

A recognizance that binds defendant to appear at "next regular term, and there remain from day to day, and from term to term of said court," is fatally defective. *Franklin v. State* (Cr. App.) 76 S. W. 470.

A recognizance requiring the defendant to appear before the court from time to time is fatally defective. *Samamiego v. State* (Cr. App.) 80 S. W. 996.

Joint or separate recognizances.—When two or more persons jointly convicted desire to appeal they must give separate appeal bonds. *Goldman & Co. v. State*, 35 App. 436, 34 S. W. 122; *Irvin v. State* (Cr. App.) 32 S. W. 899; *Bowers v. State* (Cr. App.) 33 S. W. 974; *McMeans v. State*, 37 App. 130, 38 S. W. 998; *Hodges v. State* (Cr. App.) 38 S. W. 1019; *Hogg v. State*, 40 App. 109, 48 S. W. 580.

Time for filing.—See notes under art. 914.

Liability on bond.—In all cases less than felony, when the case is affirmed on appeal, the sureties on defendant's recognizance are liable for the costs in the appellate court for which the clerk may issue execution. *Benson v. State*, 39 App. 56, 44 S. W. 167, 1091; *Tafolla v. State*, 72 App. 180, 161 S. W. 1091, 166 S. W. 508.

Where a recognizance is fatally defective and the appeal is dismissed on that account, it is insufficient to support a judgment against the sureties for the forfeiture thereof. *Hannon v. State*, 48 App. 199, 87 S. W. 152.

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.

See "Appendix," sec. 33, 31 App. 648. See also, notes under art. 919.

Substantial compliance necessary.—An appeal from a conviction will be dismissed, where the recognizance is insufficient to confer jurisdiction on the appellate court. *Bacon v. State*, 72 App. 296, 162 S. W. 517; *Angel v. State* (Cr. App.) 80 S. W. 380; *Ehlert v. State* (Cr. App.) 92 S. W. 40; *Parvin v. State*, 62 App. 63, 136 S. W. 453; *Rupard v. State*, 71 App. 256, 158 S. W. 285; *Towery v. State*, 72 App. 297, 162 S. W. 498; *Humphries v. State* (Cr. App.) 162 S. W. 517; *Oswald v. State*, 73 App. 144, 164 S. W. 831; *Knowlton v. State* (Cr. App.) 169 S. W. 674.

The preceding article prescribes a form for a recognizance on appeal in a misdemeanor case, and a failure to conform to it is an inexcusable dereliction of official duty. *Mathena v. State*, 15 App. 460. To be valid, the recognizance must comply substantially with the form so presented. But a substantial compliance with the form is all that is required. *Freeman v. State*, 36 Tex. 254; *Taylor v. State*, 1 App. 663; *Buie v. State*, *Id.* 58.

Where appellant was indicted for murder and convicted of aggravated assault, and the recognizance did not comply with the law relating either to a felony or a misdemeanor conviction, an appeal therefrom will be dismissed. *Poster v. State* (Cr. App.) 148 S. W. 583.

Necessity of recognizance.—See arts. 902 and 918, and notes.

Requisites of recognizance.—See arts. 903 and 919 and notes.

Time for entering into recognizance.—See art. 914, and notes.

Amendment or correction.—Practice with reference to correcting clerical mistakes in the transcription of the recognizance into the record of the appeal. *Cradock v. State*, 15 App. 641; *Collins v. State*, 34 App. 95, 29 S. W. 274; *Thompson v. State*, 35 App. 505, 34 S. W. 124, 612; *Cryer v. State*, 36 App. 621, 37 S. W. 753, 38 S. W. 203; *Cannady v. State*, 37 App. 123, 38 S. W. 610, 1004.

Art. 920a. Appeals to what courts; trial de novo; appeals how governed.—Appeals from judgments rendered by such corporation courts shall be heard by the county court, except in cases where the county courts have no jurisdiction, in which counties such appeals shall be heard by the district court of such counties, unless in such county there is a criminal district court, in which case the appeal shall be from the corporation courts to the said criminal district court; and, in all such appeals to such county court, district court, or criminal district court, the trial shall be de novo, the same as if the prosecution had been originally commenced in that court. Said appeals shall be governed by the rules of practice and procedure for appeals from justices' courts to the county court, as far as the same may be applicable. [Act 1899, p. 43, sec. 16.]

See art. 109a, and explanatory note thereunder.

See *Bautsch v. City of Galveston*, 27 App. 342, 11 S. W. 414; *Ex parte McNamara*, 33 App. 363, 26 S. W. 506; *Leach v. State*, 36 App. 248, 36 S. W. 471; *Cornelius v. City of Dallas*, 37 App. 309, 39 S. W. 679.

Appeal bond.—See art. 2097, *Vernon's Sayles' Civ. St.* 1914.

An appeal bond that shows the parties, the title of, the date of the judgment, and amount of fine but lacks the file number of the case, sufficiently identifies the case appealed from. *Thielen v. State*, 43 App. 310, 65 S. W. 533.

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.]

See Willson's Cr. Forms, 1022, 1023, 1043. See, also, *Robinson v. State*, 34 App. 131, 29 S. W. 788; *Richardson v. State*, 3 App. 69; *Ward v. State*, 38 App. 545, 43 S. W. 985.

Necessity and requisites of bond.—The right of appeal in the cases mentioned in the preceding article is not available to a defendant, unless he files with the court in which the judgment was rendered a valid statutory appeal bond, such as is enforceable against him and his securities. A bond which contains a condition not required by law is not a valid bond, and will not sustain an appeal. *Watson v. State*, 20 App. 382; *Turner v. State*, 14 App. 168. It is not required that an appeal bond shall name the offense of which the defendant has been convicted. *Miller v. State*, 21 App. 275, 17 S. W. 429. It is not essential to the validity of an appeal bond that the signature of the defendant should appear at the end of it. If he writes his name in any part of it, for the purpose of giving authenticity to it, the signature is sufficient. *Taylor v. State*, 16 App. 514; *Richardson v. State*, 3 App. 69.

See this case for bond that a defendant must give when he appeals from judgment of conviction in justice court to county court. *Bunton v. State*, 52 App. 618, 108 S. W. 373.

A new appeal bond may be filed in the district or county court in a case appealed from a justice or mayor's court and the form prescribed in the *Bunton* case, supra, may be used. *Moore v. State*, 49 App. 43, 90 S. W. 499.

Condition of bond that defendant shall pay all fines and costs in the county court and all costs in the recorder's court, held, more onerous than the statute requires. *Cavanaugh v. City of Fort Worth*, 26 App. 85, 9 S. W. 273.

Bond conditioned that defendant shall "prosecute her appeal with effect, and shall pay such fine and costs as shall be adjudged against her by the county court, as well as other costs that may be adjudged against her in the court below," held, sufficient. *Elkins v. State*, 26 App. 220, 9 S. W. 491.

It is not necessary to state the offense of which the principal was convicted. *Robinson v. State*, 34 App. 131, 29 S. W. 788.

In prosecution for violation of a city ordinance the bond must run to the city and not the state. *Buchanan v. City of Whitesboro*, 37 App. 121, 38 S. W. 1003. And see *Ex parte Boland*, 11 App. 159, and *Bautsch v. City of Galveston*, 27 App. 342, 11 S. W. 414, for discussion on this subject.

That defendant had no lawyer, and relied on the justice and constable to perfect his appeal is no excuse for failure to file the bond in the justice court. *Ward v. State*, 38 App. 545, 43 S. W. 985.

If the appeal bond conforms substantially to the requirements of this article, it is sufficient, although it may not comply literally therewith. *Cyechawaich v. State*, 23 App. 430, 5 S. W. 119. An appeal bond which correctly describes the judgment appealed from as to the number of the cause, the court before which the cause was tried, and the amount of the judgment, although it omits the date of the rendition of the judgment, is sufficiently certain to support an appeal. *Eichman v. State*, 22 App. 137, 2 S. W. 538.

This article, prior to its amendment, provided for appeal bonds from justice courts, which was the same as was provided for appeals in corporation courts, and did not provide any particular form for such appeal bonds. An appeal bond was not fatally defective which lacked the file number of the case. *Thielen v. State*, 43 App. 310, 65 S. W. 533, 534.

In appeal from corporation court bond must state that defendant has been convicted of a misdemeanor, and must state the court and amount of fine. *Roberts v. State* (Cr. App.) 68 S. W. 272.

By the amendment of this article by the Legislature of 1901, the conditions of an appeal bond in justice and corporation courts have been changed, and the bond must be in the terms of the law as amended. *Martin v. State*, 44 App. 197, 69 S. W. 509.

In case of appeal from the justice to the county court, if the bond does not state the time of holding next term of county court the appeal will be dismissed. *Smith v. State*, 45 App. 567, 78 S. W. 937.

A bond in an appeal case from justice to county court must recite that appellant was convicted on an information or complaint. *Day v. State*, 47 App. 113, 80 S. W. 374.

A bond which gives the style of the case number and the court and recites that there was a judgment rendered against the defendant convicting him of unlawfully carrying on and about his person a pistol, a misdemeanor, etc., and that he had given notice of appeal to the county court of B. County is good. *McCarty v. State*, 50 App. 25, 94 S. W. 899.

Appeal bond which omits the condition that the appellant will prosecute his appeal with effect, etc., is fatally defective. *Bunton v. State*, 52 App. 618, 108 S. W. 373.

A bond on appeal from a conviction in justice court is insufficient, warranting dismissal of the appeal, if it does not bind accused to appear at any particular place. *Barrow v. State*, 62 App. 423, 138 S. W. 109.

A bond on appeal from the justice court conditioned upon the defendant making "her appearance before the county court" is in substantial conformity with the statutory requirement that it be conditioned to "make her personal appearance." *Anderson v. State* (Cr. App.) 166 S. W. 1164.

— **Amount of bond.**—See *Drum v. City of Fort Worth*, 25 App. 664, 8 S. W. 819; *Childers v. State*, 25 App. 658, 8 S. W. 928; *McGill v. State*, 36 App. 108, 35 S. W. 656.

The county court acquires no jurisdiction on appeal in a criminal case from a corporation court where the bond obligates the sureties to pay \$40, as the statute requires that the bond shall in no case be less than \$50. *Xydias v. State*, 45 App. 422, 76 S. W. 761.

An objection that a bond given on appeal from a conviction in a justice court was invalid because it was not in an amount double the fine and costs, which objection was not supported by proof in the record, and was first made in the amended motion for a new trial, will not be considered on appeal from the forfeiture of the bond. *Anderson v. State* (Cr. App.) 166 S. W. 1164.

Approval of bond.—Date of bond as affected by time of approval, see *Holt v. State*, 20 App. 271; *Faubion v. State*, 21 App. 494, 2 S. W. 830; *Williamson v. State*, 32 App. 213, 22 S. W. 686.

An appeal bond must be approved by the court from whose judgment the appeal is prosecuted, in an amount equal at least to double the amount of the fine and costs adjudged against the appellant. The appellate court cannot approve an appeal bond. *Miller v. State*, 21 App. 275, 17 S. W. 429. The requirement that the justice of the peace shall approve an appeal bond is directory, and the bond is not a nullity because he neglects to indorse his approval upon it. His approval may be inferred from his return of the bond to the appellate court. *Taylor v. State*, 16 App. 514; *Dyches v. State*, 24 Tex. 266; *Doughty v. State*, 33 Tex. 1; *Cundiff v. State*, 38 Tex. 641.

Satisfaction of bond.—See *Phipps v. State*, 25 App. 660, 8 S. W. 929; *Childers v. State*, 25 App. 658, 8 S. W. 928; *Johnson v. State*, 32 App. 333, 22 S. W. 406; *Robinson v. State*, 34 App. 131, 29 S. W. 788.

Personal appearance not necessary. *PAGE v. State*, 9 App. 466.

Forfeiture.—A bond may be forfeited if the defendant fails to appear, even though her attorney did appear and announce ready for trial. *Anderson v. State* (Cr. App.) 166 S. W. 1164.

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.]

See *Willson's Cr. Forms*, 1022, 1023, 1043.

Application of article.—This act regulating appeals and authorizing same to be prosecuted without giving notice, does not apply to appeals from county courts. *Dennis v. State* (Cr. App.) 99 S. W. 1017.

Necessity of notice of appeal.—See art. 915, and notes.

Recital in appeal bond as to giving notice is not a compliance with the statute. *Ball v. State*, 31 App. 214, 20 S. W. 363.

Before the passage of the above act it was held absolutely necessary for defendant to give notice of appeal. *McGill v. State*, 36 App. 108, 35 S. W. 656; *Truss v. State*, 38 App. 291, 43 S. W. 92; *McDougall v. State*, 32 App. 174, 22 S. W. 593.

Effect of appeal.—Where, after conviction before a justice of the peace, relator appealed to the county court, which, after continuing the case, forfeited relator's appeal bond, and subsequently, on motion of the county attorney, the case was dismissed from the docket, the jurisdiction of the justice having been terminated by the appeal, he had no authority, the case not having been sent back with a writ of procedendo, to enter the writ of execution or *capias pro fine* on the judgment of conviction. *Ex parte Hoard*, 63 App. 519, 140 S. W. 449.

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.]

Effect of defects in general.—Though the recognizance must state that appellant was convicted of a misdemeanor, and the amount of punishment assessed against him, a new recognizance can be filed curing the defects, and the case decided on

its merits. *Weil v. State* (Cr. App.) 91 S. W. 232; *Tidwell v. State*, 58 App. 577, 126 S. W. 1128; *Hoyle v. State*, 62 App. 297, 137 S. W. 355.

An appeal from a criminal prosecution will be dismissed where no sufficient recognizance or appeal bond is filed. *Pope v. State* (Cr. App.) 143 S. W. 611; *Walker v. State* (Cr. App.) 129 S. W. 369; *Knowlton v. State* (Cr. App.) 169 S. W. 674.

On appeal in a misdemeanor case if pending a motion to dismiss appeal on account of an insufficient recognizance a sufficient recognizance is filed, the motion will be overruled. *Collins v. State*, 34 App. 95, 29 S. W. 274.

When a defect in a recognizance is shown to be a mistake of the clerk, and it is shown that the original recognizance is in due form the cause will not be dismissed, or if dismissed will be reinstated. *Cannady v. State*, 37 App. 123, 38 S. W. 610, 1004.

Right to file new recognizance.—When a sufficient recognizance has been given it is not error to refuse to allow a new recognizance. *Thompson v. State*, 35 App. 352, 33 S. W. 871.

Reinstatement of appeal.—A criminal appeal, dismissed for want of a sufficient recognizance, may be reinstated upon motion, accompanied by a sufficient recognizance. *Thomas v. State* (Cr. App.) 147 S. W. 578; *Chancey v. State*, 48 App. 535, 90 S. W. 633; *Jordan v. State*, 59 App. 208, 128 S. W. 139; *Ikard v. State* (Cr. App.) 135 S. W. 547; *Hinton v. State* (Cr. App.) 144 S. W. 617; *White v. State* (Cr. App.) 151 S. W. 826; *Ausbrook v. State*, 70 App. 289, 156 S. W. 1177. See *Craddock v. State*, 15 App. 641; *Cryer v. State*, 36 App. 621, 37 S. W. 753, 38 S. W. 203.

Where a recognizance was fatally defective, and a motion to dismiss had been made and sustained for that reason, a review could not be had by tendering a sufficient bond in the Court of Criminal Appeals; the proper practice being to enter into a new sufficient recognizance before the court or judge who tried the case. *Howell v. State* (Cr. App.) 148 S. W. 302.

Curing failure to enter recognizance.—An appellant who did not enter into a recognizance during term time is not entitled to file a new or amended recognizance. *Johnson v. State* (Cr. App.) 143 S. W. 1165.

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.

See *Willson's Cr. Forms*, 1023.

See *Miller v. State*, 21 App. 275, 17 S. W. 429.

Necessity of bond.—A sufficient appeal bond is essential to the appellate jurisdiction of the district court. *Skidmore v. State* (Cr. App.) 37 S. W. 859.

Execution of bond.—An appeal bond can be signed in the body instead of at the end, but this practice is not commended. *McHowell v. State*, 41 App. 227, 53 S. W. 630.

Requisites of bond.—An appeal bond must be in the terms of and not variant from the judgment rendered. An appeal bond from a corporation court must be made payable to the city in which the court is. *Sparr v. State*, 42 App. 416, 56 S. W. 915.

An appeal bond from justice to county court is defective if it falls to state place of holding the county court. *Russell v. State* (Cr. App.) 84 S. W. 589.

If the bond is in substantial compliance with the statute it is sufficient without following the statute literally. *Holland v. State*, 48 App. 393, 88 S. W. 361.

Defective bond and cure thereof.—Where defendant was convicted in justice court and a defective appeal bond to county court was given and the defendant allowed to go free, he could not afterwards within the 10 days again subject himself to jurisdiction of justice court and give another and sufficient bond, so as to perfect his appeal. An imperfect appeal bond from justice to county court cannot be amended. There are two ways by which county court can acquire jurisdiction. One is where defendant remains in custody of sheriff and the record so shows. The other is where he gives a good appeal bond. *Guenzel v. State*, 47 App. 111, 80 S. W. 371.

Necessity of motion for new trial in justice's court.—It is not necessary to file motion for new trial in justice's court, in order to appeal. *Ivey v. State*, 48 App. 254, 87 S. W. 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.]

See *Kirksey v. State*, 58 App. 188, 125 S. W. 15.

Effect of judgment of lower court.—On appeal from a conviction in the corporation court, accused is entitled to a trial de novo in the county court, and hence the judgment rendered against him in the corporation court is inadmissible. *Martoni v. State* (Cr. App.) 166 S. W. 1169.

Jurisdiction of court of criminal appeals as affected by trial de novo.—See arts. 86 and 87, ante, and notes.

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.

See Willson's Cr. Forms, 1026.

See *Ex parte Ambrose*, 32 App. 468, 24 S. W. 291; *Smith v. State*, 31 App. 315, 20 S. W. 707.

Ordinance.—If the conviction was for perjury in a municipal court on a prosecution for violation of an ordinance, the record on appeal must contain the ordinance, the charge upon which the trial was had, together with an affirmative showing of jurisdiction in the municipal court. *Lawrence v. State*, 2 App. 479.

Inclusion in transcript.—See art. 929, and note.

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.

When forfeiture may be decreed.—Where a defendant appeals to the county court from a judgment of an inferior court, imposing a fine merely, he may appear either in person or by attorney on the trial *de novo*, and a forfeiture of his appeal bond cannot be taken when he appears by attorney only, until he has failed to discharge the fine and costs which may have been adjudged against him in the county court. *Page v. State*, 9 App. 466. But see *McNamara v. State*, 33 App. 363, 26 S. W. 506, as to effect of failure to appear either in person or by attorney, and holding that it is improper in such case to dismiss for want of prosecution.

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.]

See Willson's Cr. Forms, 1024.

See *Ballinger v. State*, 11 App. 324; *Jones v. State*, 38 App. 87, 40 S. W. 807, 41 S. W. 638, 70 Am. St. Rep. 719; *Vance v. State*, 34 App. 395, 30 S. W. 792; *Crowell v. State* (Cr. App.) 148 S. W. 570.

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| 1. What the record must contain or show in general. | 10. Time for preparation and filing. |
| 2. Indictment, information or complaint. | 11. Certification or other authentication of transcript. |
| 3. Verdict, judgment and sentence. | 12. Correction or alteration of record. |
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| | 19. Consideration of matters not shown by record. |

1. **What the record must contain or show in general.**—For particular matters, see notes under articles dealing with requisites in appellate procedure.

See *Mitchell v. State*, 1 App. 725; *Lockwood v. State*, 1 App. 749; *Trevinio v. State*, 2 App. 90; *Lowe v. State*, 11 App. 253; *McWhorter v. State*, 13 App. 523; *Crockett v. State*, 14 App. 226; *Ex parte Pate*, 21 App. 190, 17 S. W. 460; *Ex parte Reed*, 34 App. 9, 28 S. W. 689; *Lopez v. State*, 42 Tex. 298.

When a case is tried by a special judge, the manner of the selection or appointment of such judge, together with the reasons therefor, and the fact that the oath of office was administered to him, must appear in the transcript. *Ante*, art. 620. If the record fails to show that the special judge took the oath of office, the judgment will be reversed. *Weatherford v. State* (Cr. App.) 28 S. W. 814.

On appeal, the record must show that the jury was a legal one, but a general recital to that effect will be sufficient without naming any one of the jury, but if the record undertakes to name the members of the jury, and names more or less than the legal number, it will be fatal to the conviction. Marks v. State, 10 App. 334; Gerard v. State, Id. 690; Rich v. State, 1 App. 206; Huebner v. State, 3 App. 458; Morton v. State, Id. 510.

Because a pleading, etc., is stricken out, the clerk should not omit it from the transcript. All the proceedings should be sent up. McWhorter v. State, 13 App. 523.

Judgment of conviction will be reversed when transcript does not show a written charge. Brown v. State (Cr. App.) 27 S. W. 137.

When the record fails to show the jurisdiction of the appellate court the appeal will be dismissed. Bernadoni v. State (Cr. App.) 34 S. W. 112.

When the record contains neither sentence nor notice of appeal the appeal will be dismissed. Simmons v. State (Cr. App.) 36 S. W. 95.

The transcript of the record on appeal must show the jurisdiction of the appellate court, or the appeal will be dismissed. Anderson v. State (Cr. App.) 131 S. W. 1067.

The record in a prosecution for violating the local option law must show that the local option law was in effect in the county in which the sale was alleged to have occurred. Green v. State (Cr. App.) 155 S. W. 210.

The record should clearly show by whom the prosecution was conducted, and should explain and make clear the doubt as to the exact nature of the proceedings, where the information was signed by a private prosecutor and the state appeared by special county attorney, but the record seemed to show that the county attorney conducted the case in part, and officially signed the statement of facts. Graham v. State, 72 App. 9, 160 S. W. 714.

2. Indictment, information, or complaint.—The original or a certified copy of the indictment or information must appear in the transcript. Beardall v. State, 4 App. 631; Pierce v. State, 14 App. 365; Harwood v. State, 16 App. 416; Bridges v. State, 17 App. 579.

When there is no indictment or information in the record, the judgment will be reversed and the cause remanded. Harwood v. State, 16 App. 416; Bridges v. State, 17 App. 579; Pierce v. State, 14 App. 365; Beardall v. State, 4 App. 631.

Indictment in a felony prosecution must be shown in the transcript to give jurisdiction on appeal. Saragosa v. State, 40 App. 66, 46 S. W. 250, 48 S. W. 190.

An affidavit or complaint is a prerequisite to a prosecution by information, and when no complaint is found in the record the prosecution will be dismissed. Dickinson v. State, 38 App. 472, 41 S. W. 759, 43 S. W. 520.

3. Verdict, judgment and sentence.—Unless the record on appeal shows a valid final judgment in the court below the appeal will be dismissed. Estes v. State, 38 App. 506, 43 S. W. 982; Coleman v. State (Cr. App.) 28 S. W. 351; Herring v. State (Cr. App.) 37 S. W. 425.

The record on appeal must show the judgment of the court, and such judgment must show defendant's plea. Wood v. State, 37 App. 39, 38 S. W. 623.

Where the record does not show any verdict, and the purported judgment does not give the verdict, the appeal must be dismissed for want of jurisdiction. Hernandez v. State (Cr. App.) 147 S. W. 598.

The record on appeal should contain the court's judgment on a motion to require the state to elect which offense it would rely upon in asking for a conviction. Mora v. State (Cr. App.) 167 S. W. 344.

4. Proceedings after verdict and judgment.—Where the transcript on appeal in a criminal prosecution contains no notice of appeal, the appeal will be dismissed on motion. Stuart v. State (Cr. App.) 123 S. W. 590; Narsingle v. State (Cr. App.) 146 S. W. 934.

Where the record states that accused himself gave notice of appeal on the day of trial, the court on appeal may look to the record to see if the facts sustain the judgment. Moray v. State, 61 App. 547, 135 S. W. 569.

5. Original papers.—See art. 926.

See Ex parte Reed, 34 App. 9, 28 S. W. 689.

When original papers are ordered sent up they should not be incorporated in the transcript, but should be identified and verified by proper certificate of the clerk and sent with the transcript. State v. Morris, 43 Tex. 372; Carroll v. State, 24 App. 313, 6 S. W. 42; Brewer v. State, 32 App. 74, 22 S. W. 41, 40 Am. St. Rep. 760; Kennedy v. State, 33 App. 183, 26 S. W. 78.

6. Statement of facts and proceedings relating thereto.—See art. 844, and notes.

7. Showing as to filing of papers.—The file mark of each paper, together with the clerk's signature thereto, should be shown. Krebs v. State, 3 App. 348; Brown v. State, Id. 294; Harrison v. State, Id. 558; Clampitt v. State, 3 App. 638; Thompson v. State, 4 App. 44; Dishongh v. State, Id. 153; Doyle v. State, Id. 253; Hill v. State, Id. 559; Krautz v. State, Id. 534; Hunt v. State, Id. 53; Richarte v. State, 5 App. 359; Kennedy v. State, 9 App. 399. But see Lowe v. State, 11 App. 253.

A motion for a new trial cannot be considered as a part of the record, unless it is filed. Harvey v. State, 57 App. 7, 121 S. W. 605.

In making up a transcript of the record of a criminal case, it is the duty of the clerk to include the complaint as part of the record, though it has no file mark thereon, where accused in no way objected to the consideration of the complaint or information in the court below. Golden v. State (Cr. App.) 146 S. W. 945.

8. Unnecessary matter.—See Ratcliff v. State, 29 App. 248, 15 S. W. 596.

In preparing transcripts clerks should be careful to not insert any foreign or superfluous matter. Ex parte writings, attached to the transcript as addenda or explanatory notes, are no part of the record, and will be stricken out. Wheeler v.

State, 15 App. 607; *Rainey v. State*, 20 App. 455. Depositions, see *Ballinger v. State*, 11 App. 323. Order of court impaneling the grand jury. *Vance v. State*, 34 App. 395, 30 S. W. 792. Stenographic report of the evidence, see *Ex parte Isaacs*, 35 App. 80, 31 S. W. 641; *Butler v. State*, 33 App. 232, 26 S. W. 201; *Emmons v. State*, 34 App. 98, 29 S. W. 474, 475.

9. **Mode of preparation.**—See *Tyrell v. State* (Cr. App.) 44 S. W. 159.

Clerks should be careful to prepare transcripts in conformity to the statute and the rules of court. The ends of justice are frequently delayed and sometimes actually frustrated by their inexcusable neglect of this duty. *Mitchell v. State*, 1 App. 725; *Lockwood v. State*, Id. 749.

In making out a transcript it is the duty of the clerk to copy the matter transcribed verbatim et literatim. He is not authorized to interpolate or omit sentences or words, but must follow the originals strictly. *Crockett v. State*, 14 App. 226.

A transcript and statement of fact on appeal in a criminal case should be prepared by writing one side of the paper only, and without frequent interlineations and erasures, and transcripts showing such defects will not hereafter be considered. *Waters v. State* (Cr. App.) 148 S. W. 796.

10. **Time for preparation and filing.**—See notes under art. 931, post.

11. **Certification or other authentication of transcript.**—A separate certificate of the clerk to each proceeding contained in the transcript is unnecessary and improper. *Trevino v. State*, 2 App. 90.

The transcript must be fastened at the upper end with tape or ribbon, and sealed over the tie with the seal of the court, and folded and indorsed as follows:

A. B., appellant,

v.

The State of Texas, appellee.

Fromcounty district court (or county court), A. D., 18.. [Rule 114 for District Courts, 142 S. W. xxv.]

The transcript must be tied and sealed, and the seal must be over and not under the tie. *Sweeney v. State*, 5 App. 41; *Holden v. State*, 1 App. 225; *Ex parte Barrier*, 17 App. 585. See, also, *Brown v. State*, 3 App. 294.

Papers forwarded with transcript but not certified as part of the record will not be considered. *Powell v. State*, 36 App. 377, 37 S. W. 322.

Original papers sent up with the record will not be considered on a criminal appeal unless certified by the clerk below as being the original papers used on the trial. *Feeny v. State*, 62 App. 585, 138 S. W. 135.

The clerk of a court should under no circumstances certify a transcript in a case without personal knowledge that it is a correct copy of the records in his office. *Parrish v. State* (Cr. App.) 150 S. W. 453.

The court on appeal may only look to the authenticated record in considering the case on appeal, or any question raised or presented therein, and it may not look to the oral assertions of accused or his attorney in oral argument. *Kearse v. State* (Cr. App.) 151 S. W. 827.

A paper not certified or verified as part of the transcript in the criminal case cannot be considered on appeal. *Cheesebourn v. State*, 70 App. 612, 157 S. W. 761.

12. **Correction or alteration of record.**—Certiorari, or consent of parties litigant, are the only modes by which omissions in transcripts can be supplied. *Exon v. State*, 33 App. 461, 26 S. W. 1088; *Chiles v. State*, 1 App. 27.

Where transcript has been altered without authority after it has left clerk's hands the appeal will be dismissed. *Ward v. State* (Cr. App.) 55 S. W. 497.

Where the record on appeal has been corrected so as to show that the failure to insert in the transcript the approval of the judge to the statement of facts was an oversight, and that the statement of facts was approved, the case will be considered on the merits. *Gilder v. State*, 61 App. 16, 133 S. W. 883.

13. **Certiorari to perfect record.**—See Willson's Cr. Forms, 1158, and court rules. See, also, *Garner v. State*, 36 Tex. 633.

Motion for certiorari to bring up an interlocutory judgment and a recognizance is insufficient where such motion fails to show that the judgment was in fact rendered or the recognizance entered into. *Johnson v. State*, 26 Tex. 117.

Certiorari will be granted to perfect a transcript defective through carelessness or neglect. *Mitchell v. State*, 1 App. 725; *Brown v. State*, 3 App. 295. A defective transcript can only be perfected by certiorari or by agreement of the parties. *Chiles v. State*, 1 App. 28. The certiorari is directed to the clerk and not the court below, and he must embody in his return, not omissions, but the proceedings. *Hill v. State*, 4 App. 559. Where the clerk failed to authenticate a transcript, he was ordered to make out and send up a complete transcript properly authenticated. *Cox v. State*, 7 App. 1. The record entry of the impaneling of the grand jury which returned the indictment is no part of a transcript, and a certiorari to supply such record will not be awarded. *Fuller v. State*, 19 App. 339.

Instructions requested on a former trial cannot be brought up by certiorari where the request was not renewed at the later trial. *Bracken v. State*, 29 App. 362, 16 S. W. 192.

The defect must be one that is capable of being cured. Where notice of appeal was not entered as required by statute certiorari is unavailing. *Ball v. State*, 31 App. 214, 20 S. W. 363.

As remedy in case of improper refusal of judge and adverse attorneys to settle bill of exceptions. *Exon v. State*, 33 App. 461, 26 S. W. 1088.

The office of certiorari is to perfect a record, not to obtain a rehearing, or recall a mandate for purpose of reinstating the case. *Longorio v. State*, 40 App. 104, 48 S. W. 514.

In certiorari to perfect record on appeal, application must point out defect to be corrected, and if an order or pleading is to be corrected copy of same must be attached to the application. *Nunn v. State*, 40 App. 436, 50 S. W. 713.

Where the transcript is so badly written that it is unintelligible certiorari will issue to compel clerk to send up perfect transcript. *Searcy v. State*, 40 App. 462, 50 S. W. 699, 51 S. W. 1119, 53 S. W. 344.

Where, on certiorari, the corrected record showed all the facts essential to confer jurisdiction on appeal, an order of dismissal previously entered will be set aside, and the cause reinstated. *Clay v. State* (Cr. App.) 150 S. W. 430.

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

Under Rev. St. 1911, art. 1608 (same article in *Vernon's Sayles' Civ. St.* 1914), authorizing the transcript to be filed after the 90 days allowed on good cause shown where plaintiffs in error from a judgment on a forfeited bail recognizance file their petition December 5, 1913, and resist on October 26th a certificate of affirmance and postpone a motion for rehearing because prematurely brought, the record showing delaying tactics, plaintiffs in error's motion in the rehearing for certiorari to bring up the transcript and time for filing briefs, etc., will be denied; the state having brought up the record of the cause. *Cruz v. State* (Cr. App.) 172 S. W. 235.

Where defendant moved for certiorari to perfect the record so as to include his motion for a new trial, and accompanied his motion with a certified copy of the motion for a new trial, the court would consider it as a part of the record, and pass thereon without having it brought up by certiorari. *Bruce v. State* (Cr. App.) 173 S. W. 301.

14. Contempt of court.—Since all transcripts in civil cases must be filed within 90 days after the date of perfecting the appeal, it is the duty of the clerk to prepare and transmit transcripts in criminal cases in which appeals have been taken within not to exceed 90 days from the date of perfecting the appeal, which duty will be enforced by contempt proceedings. *Northcutt v. State*, 70 App. 577, 158 S. W. 1004.

Where the clerk of a court from which an appeal in a criminal case has been taken is prevented, by the negligence or willful misconduct of accused's attorney in withdrawing or withholding necessary records, from preparing and transmitting the transcript to the Court of Criminal Appeals within 90 days after the taking of the appeal, the attorney will be held guilty of contempt of the Court of Criminal Appeals, and punished accordingly. *Northcutt v. State*, 70 App. 577, 158 S. W. 1004.

15. Imposition of costs.—A clerk of the county court who filed apparently contradictory affidavits in a case as to the papers filed for record with him which papers were lost after delivery for filing with him will be required to pay the cost of issuing citation and service on him for the purpose of bringing up the papers. *Parrish v. State* (Cr. App.) 150 S. W. 453.

An attorney for appellant who was the cause of an incorrect transcript being certified to the Court of Civil Appeals and negligently permitted the papers in the case to be lost will be taxed with all the costs of the proceeding in an attempt to procure a correct transcript, except that part taxed against the clerk of the court, who was also negligent in the matter. *Parrish v. State* (Cr. App.) 150 S. W. 453.

16. Rules of court.—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, 142 S. W. xxv; District Court rules, 72a and 76.

17. Review dependent on scope of record.—See arts. 744 and 844, ante, and notes.

Where the motion for continuance is not in the record, the ruling thereon cannot be reviewed on appeal. *James v. State* (Cr. App.) 167 S. W. 727; *Swift v. State*, 8 App. 614; *Taylor v. State*, 14 App. 340; *Purdy v. State* (Cr. App.) 36 S. W. 82; *Foote v. State* (Cr. App.) 144 S. W. 275; *Herrera v. State* (Cr. App.) 170 S. W. 719.

A defendant seeking to reverse a judgment must bring up the case so as to present the particular points decided of which he complains, and it must appear that the error complained of was in a matter material to the issue. If the record is silent as to the grounds of complaint, and no error is apparent of record, the judgment will not be disturbed. *Drummond v. State*, 2 Tex. 156; *Chandler v. State*, Id. 305; *Bailey v. State*, Id. 202; *McKissick v. State*, 2 Tex. 356; *Gorman v. State*, 22 Tex. 592; *Meredith v. State*, 40 Tex. 480; *Escareno v. State*, 16 App. 85. It must appear from the record that the conviction is wrong or unjust, or it will not be set aside. *Thompson v. State*, 1 App. 56. By the record alone is a cause determinable on appeal. *Brown v. State*, 11 App. 451; *Rainey v. State*, 20 App. 473.

A conviction cannot be reversed because of claimed error in the refusal to give special charges, where the charges refused are not contained in the record. *Ellis v. State*, 58 App. 289, 125 S. W. 575.

In a prosecution for theft of a pay check, an objection that the check was not the subject of theft because it was not properly indorsed, and contained a provision that without such indorsement it was invalid, cannot be considered on appeal where the check does not appear in the record. *Fulshear v. State*, 59 App. 376, 128 S. W. 134.

Where a reversal was sought because of a variance between the name of the person killed as charged in the indictment and the name as proved, the Court of Criminal Appeals could not consider evidence taken at the examining trial in support of such objection, in lieu of the evidence introduced at the trial, which was not in the record. *Johnson v. State*, 60 App. 305, 131 S. W. 1085.

Any error in refusing a charge that the jury disregard statements in arguments

by the county attorney cannot be reviewed, where there is nothing in the record to show that such statements were made except the statement to that effect in the charge refused. *Dulin v. State*, 60 App. 376, 131 S. W. 1105.

Where the original indictment does not accompany the transcript, and the copy does not disclose any irregularity, an objection that the indictment was mutilated can not be considered. *Skinner v. State*, 64 App. 84, 141 S. W. 231.

Where the record does not even show that a charge was given, the appellate court cannot consider grounds in a motion for a new trial complaining of the charge. *Doyle v. State* (Cr. App.) 143 S. W. 630.

Objections in the motion for new trial to a charge not in the record cannot be considered on appeal. *Knight v. State*, 64 App. 541, 144 S. W. 967.

An objection that the court erred in compelling the defendant to go to trial without sufficient time to prepare his defense was not reviewable where the record contained no motion for continuance or postponement, or any fact authorizing the matter to be reviewed. *Garza v. State* (Cr. App.) 145 S. W. 590.

Affidavits, certificates, and letters filed in the reviewing court, but not contained in the record, and not relating to any matter occurring on the trial, cannot be considered on appeal, though they relate to matters of seeming importance occurring subsequent to the trial. *Garza v. State* (Cr. App.) 145 S. W. 590.

Misconduct of a juror in stating a matter of his own knowledge to his fellow jurors, made a ground for motion for new trial, but which was contested by the state, is not reviewable on appeal from a conviction, where the evidence as to the fact of the juror's statement is not in the record. *O'Marrow v. State* (Cr. App.) 147 S. W. 252.

Where requested charges are not copied in the transcript, the refusal thereof cannot be reviewed on appeal. *Cruz v. State* (Cr. App.) 148 S. W. 564.

Refusal to charge on self-defense in a prosecution for aggravated assault could not be reviewed, in the absence of the evidence. *Williams v. State* (Cr. App.) 150 S. W. 1163.

A ground of a motion for new trial that the court erred in refusing to submit special instructions cannot be considered in the absence of the evidence. *Wilder v. State* (Cr. App.) 152 S. W. 1041.

In the absence of the evidence in the record, the Court of Criminal Appeals cannot consider error in failing to charge on the law of simple assault in a prosecution for aggravated assault. *Reeves v. State* (Cr. App.) 153 S. W. 127.

In the absence of the evidence in the record, the Court of Criminal Appeals cannot consider alleged statements of the prosecuting attorney outside of the record. *Reeves v. State* (Cr. App.) 153 S. W. 127.

Where no bill of exceptions is reserved verifying the fact that a juror sat on a former trial of the case, and the record contains no evidence showing such fact, error in overruling the motion for new trial on that ground cannot be reviewed. *Reeves v. State* (Cr. App.) 153 S. W. 127.

Where the evidence on a motion for new trial, based on misconduct of jurors, was not in the record, a denial of such motion could not be reviewed. *Brewer v. State* (Cr. App.) 153 S. W. 622.

Where a knife, said to have been in the possession of the deceased at the time he was killed, is not described by the witnesses or sent to the appellate court as an exhibit, the court cannot say there was error in refusing to charge on presumption arising from the use of a deadly weapon by the deceased. *Reagan v. State*, 70 App. 498, 157 S. W. 483.

Alleged errors assigned in motion for a new trial concerning the admission of testimony and the insufficiency thereof to sustain a conviction cannot be reviewed, where the evidence is not in the record. *Fitzgerald v. State* (Cr. App.) 168 S. W. 529.

Refusal of requested charges will not be reviewed where the record does not show when they were requested, and where no bill of exceptions to the refusal is in the record. *Williams v. State* (Cr. App.) 174 S. W. 1042.

Where the evidence on motion for new trial because of misconduct of the jury is not in the record, denial of the motion is not reviewable. *Johnson v. State* (Cr. App.) 174 S. W. 1047.

18. Presumptions in aid of record.—See notes under arts. 634, 743, 938. In absence of bill of exceptions or statement of facts, see arts. 744 and 844, and notes.

Where there is no entry in the trial court disposing of a motion for a new trial, it will be presumed on appeal that the motion was abandoned and not acted upon. *Laird v. State*, 15 Tex. 317.

Regularity of previous proceedings is presumed when not shown by the transcript. *Nash v. State*, 2 App. 362; *Williams v. State*, 29 App. 89, 14 S. W. 388, overruling on the point, *Steagald's Case*, 22 App. 464, 3 S. W. 771.

In the absence of showing in the record to the contrary, it will be presumed that the trial court, in denying a new trial on the ground of a juror's misconduct charged in *ex parte* affidavits, properly found against the charge. *Speer v. State*, 57 App. 297, 123 S. W. 415.

The appellate court in reviewing the denial of a continuance on the ground of absent witnesses cannot presume that diligence was exercised, where the record fails to show process for such witnesses. *Brown v. State*, 62 App. 592, 138 S. W. 604.

It must be presumed on appeal that the evidence justified the overruling of a motion for a new trial on the ground of misconduct of the jury, where the evidence taken on the motion is not in the appellate record. *Moray v. State* (Cr. App.) 145 S. W. 592.

In the absence of a showing in the appellate record to the contrary, it must be presumed that the trial court properly admitted an alleged confession in evidence. *Ward v. State* (Cr. App.) 146 S. W. 931.

The judgment stating that, in hearing defendant's motion for a new trial on the ground of prejudice of a juror, it heard the evidence thereon, it must be presumed that the evidence, not shown by the judgment or record, did not sustain defendant's contention. *Poteet v. State* (Cr. App.) 153 S. W. 863.

Where the record does not show that the court did not submit its charge to the attorneys for both sides after the evidence was concluded and before the argument began, as required by law, the court on appeal will presume that the law was complied with. *Lopez v. State*, 73 App. 624, 166 S. W. 154.

19. Consideration of matters not shown by record.—Court cannot look in record of companion case to ascertain applicability of charge. *Thurman v. State*, 37 App. 646, 40 S. W. 795.

In a prosecution for unlawfully selling intoxicating liquors, an instrument alleging that the law making such an act a felony in local option territory went into effect after the people of the county had adopted local option, supported by a certified copy of the order of the commissioners' court declaring the result of such election filed in the Court of Appeals by appellant with a motion to dismiss, cannot be considered. *Nelson v. State*, 61 App. 55, 134 S. W. 218.

The Court of Criminal Appeals cannot consider *ex parte* affidavits filed with appellant's brief in which new issues are sought to be made. *Sellers v. State*, 61 App. 140, 134 S. W. 348.

The court on appeal cannot consider the testimony in another case of one therein charged as principal in the same offense, since to do so would be considering evidence which the law prohibits in the trial court. *Wisnoski v. State* (Cr. App.) 153 S. W. 316.

Ex parte affidavits, containing evidence tending to support the defendant's testimony at the trial, but not contained in the record on appeal, cannot be considered, since that would be to reopen the case and convert the Court of Criminal Appeals into a trial court on the merits of the case, and to substitute its finding on the facts, as thus presented, for the verdict. *Pye v. State*, 71 App. 94, 154 S. W. 222.

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.]

See Willson's Cr. Forms, 1024.

Validity of rules.—Supreme Court rule 116 (142 S. W. xxv), adopted under Const. art. 5, § 25, empowering it to make rules of procedure not inconsistent with law, and providing that the transcript of the record in a misdemeanor case must be delivered to the party appealing or his counsel, and, if not applied for before the twentieth day before the commencement of the term of the Court of Criminal Appeals to which the appeal is returnable, the clerk shall transmit it to the clerk of that court, was invalid, because inconsistent with this article and art. 931. *McElroy v. State* (Cr. App.) 172 S. W. 1144.

Power of courts to extend time for filing bills of exceptions.—In view of art. 845, and this article courts are powerless to authorize filing of bills after expiration of the 90-day period. *Crowell v. State* (Cr. App.) 148 S. W. 570.

Time for transmission of transcripts.—Since all transcripts in civil cases must be filed within 90 days after the date of perfecting the appeal, it is the duty of the clerk to prepare and transmit transcripts in criminal cases in which appeals have been taken within not to exceed 90 days from the date of perfecting the appeal, which duty will be enforced by contempt proceedings. *Norheutt v. State*, 70 App. 577, 158 S. W. 1004.

Art. 931. [897] Transcript, 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.]

See Willson's Cr. Forms, 1024.

See *Rust v. State*, 14 App. 19. See, also, Rules 117, 118, for District Courts (142 S. W. p. xxv.)

See, also, *Cummings v. State*, 31 App. 406, 20 S. W. 706.

Cited, *Lord v. State*, 73 App. 109, 164 S. W. 1021.

Delivery to defendant or his counsel.—In felony cases transcripts must be forwarded by mail, and may not be delivered to the defendant or his counsel. *Lockwood v. State*, 1 App. 749.

A transcript which shows to have been delivered to appellant's attorneys and sent by them to the clerk of the Court of Appeals will be stricken out and a new transcript ordered. *Pilot v. State*, 38 App. 515, 43 S. W. 112, 1024.

The clerk and not the attorneys must forward the transcript by mail to court of criminal appeals, as well in misdemeanor as in felony cases. The rules of the Supreme Court governing court of criminal appeals as to transcripts cannot override the statutory law on same subject. *Dyer v. State*, 44 App. 78, 68 S. W. 685.

Transmission by mail.—Transcript in felony cases must be sent to appellate court by the clerk through the mail. *Pilot v. State*, 38 App. 517, 43 S. W. 112, 1024.

Time for preparation and filing.—Transcript on appeal from judgment on forfeited bail bond must be filed within ninety days. *Hollenbeck v. State*, 40 App. 584, 51 S. W. 373.

The record should be promptly transmitted by the clerk to the Court of Criminal Appeals, whenever possible. *Terry v. State*, 60 App. 60, 130 S. W. 1004.

Unless the transcript is filed within the time required by law on a criminal appeal, the appellate court cannot consider the appeal. *Sandifer v. State*, 63 App. 361, 139 S. W. 1155.

Under C. C. P. arts. 961, 962, which authorizes review of judgments on bail bonds on writs of error as in civil suits, and under the rule of the Supreme Court for the government of the Courts of Civil Appeals, which prohibits consideration of a case where the transcript is not filed within 90 days from the filing of the petition for writ of error, and no showing is made why the same was not forwarded within that time, a writ of error to review a judgment forfeiting a bail bond will be dismissed, where the transcript was not filed within that time. *Ayers v. State* (Cr. App.) 146 S. W. 171.

Appeals from a final judgment on a forfeited bail bond are regulated by the law governing appeals in civil cases, and where a final judgment on a forfeited bail bond was rendered September 19th, at a term of court which adjourned October 14th, an appeal from the judgment must be dismissed, where the record was not filed in the court on appeal until February 17th following. *Darnell v. State* (Cr. App.) 147 S. W. 599.

Although the law requires that the transcript shall immediately be made out and forwarded to this court, this court will consider the case, regardless of the time in which it may be filed, since the law places the duty on the clerks, and defendants cannot be held responsible for their negligence. *Gould v. State* (Cr. App.) 153 S. W. 326.

Transcripts are required to be made up and filed in the Court of Criminal Appeals at once upon adjournment of the trial court. *Walker v. State*, 70 App. 84, 156 S. W. 206.

Where attorneys of persons convicted of crime prevent the filing of the transcript within the ninety days fixed by law, the appeal will, in the absence of good reason shown, be dismissed. *Francis v. State*, 70 App. 243, 156 S. W. 1167.

The transcript, even in a criminal appeal, cannot be considered where more than 90 days have elapsed between the adjournment of a trial and the filing; that being the time allowed for filing transcripts in civil cases. *Francis v. State*, 70 App. 243, 156 S. W. 1167.

Since, in criminal cases, it is the duty of the clerk, and not the attorney, to file the transcript in the appellate court, the appeal will be considered, though not filed in time, if the delay was not due to the negligence of the attorney; but, where the failure of the clerk to file in time was due to the failure of the attorney to perfect the record in the lower court in the time allowed by law, it will not be considered. *Lord v. State*, 73 App. 109, 164 S. W. 1021.

Certiorari to perfect transcript.—See notes under art. 929, ante.

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.]

See Willson's Cr. Forms, 1025; Rule 118 for District Courts (142 S. W. xxvi.)

Failure to make list.—Clerks of the court who fail to make out a list of all criminal cases appealed, in accordance with this article, may be cited to show cause for their failure, and in the absence of excuse will be punished. *Francis v. State*, 70 App. 243, 156 S. W. 1167.

Since all transcripts in civil cases must be filed within 90 days after the date of perfecting the appeal, it is the duty of the clerk to prepare and transmit transcripts in criminal cases in which appeals have been taken within not to exceed 90 days from the date of perfecting the appeal, which duty will be enforced by contempt proceedings. *Northcutt v. State*, 70 App. 577, 158 S. W. 1004.

Where the clerk of a court from which an appeal in a criminal case has been taken is prevented, by the negligence or wilful misconduct of accused's attorney in withdrawing or withholding necessary records, from preparing and transmitting the transcript to the Court of Criminal Appeals within 90 days after the taking of the appeal, the attorney will be held guilty of contempt of the Court of Criminal Appeals, and punished accordingly. *Northcutt v. State*, 70 App. 577, 158 S. W. 1004.

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.]

See Rule 118 for District Court (142 S. W. xxvi.)

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.]

Cited, *Lord v. State*, 73 App. 109, 164 S. W. 1021.

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.]

Cited, *Lord v. State*, 73 App. 109, 164 S. W. 1021.

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.]

See *Rust v. State*, 14 App. 19; *Vernon's Sayles' Civ. St. 1914*, art. 1600; *Rules for Courts of Civil Appeals*, 1 to 7b (142 S. W. x).

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.]

See *Rust v. State*, 14 App. 19.

When cases may be heard.—Where a transcript in a misdemeanor case was filed in the appellate court subsequent to the day set apart for the submission of causes from the county from which the appeal was taken, held, that under the provisions of this article and art. 931, the case being returnable to this term, the court had jurisdiction to hear and determine it "at the earliest time consistent with a due regard for the rights of the parties and a proper administration of justice." *Cummings v. State*, 31 App. 406, 20 S. W. 706.

Advancing case.—The Court of Criminal Appeals will not advance a homicide case for hearing on the ground that accused is a member of the Legislature, and should be free in the event of a probable called session to discharge his duties without the embarrassment of being under a conviction for felony, where it was not certain that there would be a call session, and there were many cases of great public importance which should be advanced in the public interest, and also some cases theretofore submitted in which the defendants were in confinement. *Gaines v. State*, 58 App. 631, 127 S. W. 181.

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.]

Cited, *Ex parte Firmin*, 60 App. 222, 131 S. W. 1116; *Himmelfarb v. State* (Cr. App.) 174 S. W. 586.

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40. — Prejudice from asking of leading questions.
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45. — Prejudice from improper argument and other misconduct of prosecuting attorney.
46. — Prejudice from error in instructions.
47. — Prejudice from misconduct of jurors.
48. — Prejudice from error in verdict.
49. Rehearing.

1. **Scope of review in general.**—The Court of Criminal Appeals only considers matters raised by bills of exception or in the motion for new trial, and does not consider "assignments of error." *Tilmeyer v. State*, 62 App. 272, 136 S. W. 1060.

Material questions presented in the motion to quash the complaint and information will be reviewed. *Gentry v. State*, 62 App. 497, 137 S. W. 696.

The Court of Appeals in passing on the denial of a continuance for absence of a witness takes into consideration the entire record. *Waters v. State* (Cr. App.) 148 S. W. 796.

The Court of Criminal Appeals will consider and pass on all questions raised in the trial court, unless expressly waived in the Court of Criminal Appeals; and a question raised in the court below and not presented in the brief on appeal is not thereby waived. *Robertson v. State* (Cr. App.) 150 S. W. 893.

The court on appeal will merely pass on whether the trial court erred in its rulings on the objections raised before it. *Irby v. State* (Cr. App.) 155 S. W. 543.

As the state cannot appeal in criminal cases, the only matter which the Court of Criminal Appeals can review is whether error was committed against accused; and, if so, was the error prejudicial. *McCue v. State* (Cr. App.) 170 S. W. 280.

2. **Affirmance, reversal, or dismissal in general.**—See under the heads of the different offenses, and under other appropriate heads, for errors for which the appeal will be dismissed or the judgment reversed and the cause remanded.

See *Vernon's Sayles' Civ. St.* 1914, Title 31, ch. 10; Title 32, ch. 11; *Rules for the Supreme Court*, 4 (142 S. W. viii); *Rules for Court of Civil Appeals*, 63-67 (142 S. W. xvi); *Willson's Cr. Forms*, 1159; *Bailey v. State*, 11 App. 140; *Ayers v. State*, 12 App. 450; *Craddock v. State*, 15 App. 641.

See *Cox v. State*, 8 App. 254, 34 Am. Rep. 746; *Saine v. State*, 14 App. 144; *Thompson v. State*, 15 App. 39; *Lasher v. State*, 30 App. 387, 17 S. W. 1064, 28 Am. St. Rep. 922; *Bird v. State*, 37 App. 408, 35 S. W. 382.

Nothing being presented for revision, the record being without a motion for new trial, statement of facts, or bill of exceptions, there must be an affirmance. *Squires v. State* (Cr. App.) 135 S. W. 568; *Wells v. State* (Cr. App.) 134 S. W. 702; *Watkins v. State* (Cr. App.) 135 S. W. 563; *Bean v. State* (Cr. App.) 135 S. W. 1177.

The court will reverse if defendant has not had a fair and impartial trial. *Burt v. State*, 38 App. 397, 40 S. W. 1000, 43 S. W. 344, 39 L. R. A. 305, 330. Or when he has been denied any legal right to the prejudice of his case. *Pridgen v. State*, 31 Tex. 420. Or when the court committed any radical prejudicial error in its charge. *Spears v. State*, 8 App. 467; *Spradling v. State*, 30 App. 595, 17 S. W. 1117.

The denial of a new trial will not be disturbed on appeal unless some principle of law has been violated, misconceived, or disregarded to the prejudice of accused, or there is good reason to apprehend that injustice has been done. *Jordon v. State*, 10 Tex. 479.

A denial of any legal right, in a felony case, which is calculated to injure the defendant, is ordinarily cause for reversal and for remanding the case for a new trial. A conviction must be in accordance with law, or it can not be affirmed on appeal, is a general rule to which the exceptions are few. *Pridgen v. State*, 31 Tex. 420; *Rich v. State*, 1 App. 296; *Lunsford v. State*, Id. 448, 28 Am. Rep. 414.

An appeal will be dismissed when a defendant in person, by written application duly authenticated by the clerk of the trial court, requests that his appeal be dismissed. But an appeal will not be dismissed upon request of defendant's attorney. *Paul v. State*, 17 App. 583. Nor will an appeal be dismissed after the judgment has been reversed and the prosecution dismissed, merely because the defendant desires such action. *Maddox v. State*, 14 App. 447.

Conviction affirmed, no errors being assigned. *Phelps v. State* (Cr. App.) 40 S. W. 488.

The law on which a prosecution was based being unconstitutional, a conviction will be reversed on appeal, and the prosecution ordered dismissed. *McFarlin v. State* (Cr. App.) 123 S. W. 133.

Where there is a good count in the information, on reversal of a general verdict of conviction for defects in one count, the cause will be remanded for a new trial, rather than dismissed. *Smith v. State*, 57 App. 609, 124 S. W. 665.

Where there was a written request for affirmance, purporting to be signed by appellant, although his signature was not certified by any officer, and his counsel also filed a statement that the appellant had decided not to prosecute his case further, the judgment will be affirmed. *Ellis v. State*, 58 App. 289, 125 S. W. 575.

A criminal case will not be reversed because the state's counsel were inaccurate either in their understanding or statement of the law of the case. *Edwards v. State*, 58 App. 342, 125 S. W. 894.

While the local option law provides that one may be prosecuted for selling intoxicants in territory where an election has been held under the local option law and the result has been declared favorable to the law, and that the fact that a contest is invoked will not prevent a conviction during such contest, a conviction pending such contest cannot stand, where the local option election has been held invalid by the Court of Civil Appeals, and accused, on appeal from his conviction, may take advantage of the decision invalidating the election. *Henry v. State*, 61 App. 187, 135 S. W. 571.

Where an information charging accused with a misdemeanor was based on an affidavit which was made a part of the record, the conviction will not be disturbed because a complaint charging accused with the misdemeanor did not become part of the record in the case owing to the lack of a file mark by the clerk. *Golden v. State* (Cr. App.) 146 S. W. 945.

3. Presumptions in general.—See notes under arts. 743, 744, 844. In aid of record, see notes under art. 929.

Regularity in the proceedings in the trial court will be presumed in the absence of any showing in the record to the contrary. *English v. State*, 4 Tex. 125; *Carter v. State*, 12 Tex. 500, 62 Am. Dec. 539; *Farrar v. State*, 5 App. 489; *Carr v. State*, Id. 153; *Yanez v. State*, 6 App. 429, 32 Am. Rep. 591; *Handline v. State*, 6 App. 347; *Montgomery v. State*, 4 App. 140; *Nash v. State*, 2 App. 362; *Escareno v. State*, 16 App. 85.

Record on appeal showing no action by court below on exceptions to indictment, the presumption obtains that they were waived. *Myers v. State*, 31 Tex. 173; *State v. Thompson*, 18 Tex. 526.

In the absence of a showing to the contrary, it will be presumed that the trial judge complied with the provisions of article 860 requiring the defendant, before sentence, be asked if he has anything to say. Furthermore, to authorize reversal on this ground it must appear by proper bill, that the court refused to query the defendant as required. *Johnson v. State*, 14 App. 306; *Bohannon v. State*, Id. 272.

Defects in pleadings will not be supplied by presumption. *Massie v. State*, 30 App. 65, 16 S. W. 770.

Presumptions in aid and support of the judgment will always be indulged. *Brown v. State*, 32 App. 119, 22 S. W. 596.

The court, on a trial for violating the local option law, must assume that the election putting the law in force was valid, where there was no contest as provided by Acts 30th Leg. 1907, p. 447, c. 8; and it cannot consider questions as to the sufficiency of the orders and judgments of the commissioners' court putting local option into effect. *Wesley v. State*, 57 App. 277, 122 S. W. 550.

Where the affidavit in support of the motion for a new trial on the ground of newly discovered evidence averred facts with great particularity, so that the state could easily meet it, had the facts been untrue, and there was no attempt by the state to meet it, the court on appeal will presume that the matters are correctly stated in the affidavit. *Piper v. State*, 57 App. 605, 124 S. W. 661.

Where the record showed that one B. was the county judge of a certain county, the Court of Criminal Appeals would judicially determine that he was authorized to administer oaths, and it would be presumed, in the absence of anything to the contrary, that such B., as county judge, took the complaint in the case, though the name of the county was omitted. *Cardenas v. State*, 58 App. 109, 124 S. W. 953.

Where the trial court testified positively that he gave a charge that was lost, and not copied in the transcript, and one or two witnesses corroborated him, and the foreman of the jury testified that he had no recollection of the giving of such a charge, the court on appeal would assume that the charge had been given so that the conviction would not be set aside on the ground that the charge had not been given. *Sharp v. State*, 61 App. 247, 134 S. W. 333.

Where appellant does not show in what way a conviction is contrary to the law and the evidence, the court cannot say there was error. *Mosley v. State*, 61 App. 294, 135 S. W. 148.

Where a jury is waived, and the case submitted to the court, which finds accused guilty, the court on appeal must presume that the trial court considered all theories of the case, and found as a fact against accused's contentions. *Hooper v. State*, 62 App. 105, 136 S. W. 790.

In a criminal prosecution, where the indictment was in two counts, and the verdict of conviction was general, it will be presumed that the jury and the court below applied the verdict and judgment to the first count, as to which the evidence was sufficient. *Hubbard v. State* (Cr. App.) 147 S. W. 260.

Where there are several counts in an indictment, some good and others bad, and there has been no election or dismissal as to the bad counts, a general verdict will be presumed to have been based on the good counts. *Warner v. State* (Cr. App.) 147 S. W. 265.

On review of the court's action in permitting a witness to testify who has been convicted of violating the bankruptcy act and sentenced to 18 months imprisonment in the United States penitentiary, where the record does not show of what offense under the bankruptcy act he was convicted, and the court in approving the bill of exceptions states that the offense was not a felony at the time of his conviction, it will be presumed that the trial court had information upon which his finding was based; there being penitentiary offenses in violation of the bankruptcy act which are not felonies. *Williams v. State* (Cr. App.) 147 S. W. 571.

The Court of Criminal Appeals presumes that the trial judges will act fairly towards all attorneys appearing in their courts, and give all persons accused of crime an impartial trial, until it is made to appear otherwise by record. *Perry v. State* (Cr. App.) 155 S. W. 263.

Where the court defined in its instructions the offense of manslaughter, of which accused was convicted, accused, complaining of the definition, must point out the errors therein, or the court will not review it. *Betts v. State*, 71 App. 204, 159 S. W. 1069.

Where the statement of facts, showing the testimony heard on motion for new trial on the ground of newly discovered evidence, was not filed in time, the court on appeal must presume that the trial court was justified in denying a new trial. *Dukes v. State* (Cr. App.) 168 S. W. 96.

Where an inadmissible statement of deceased's opinion that "he was shot down like John Ross" was deliberately introduced, and there was nothing in the record to disclose what its weight or effect would probably be before the jury, its character being such as could reasonably be hurtful, the appellate court was bound to presume that the state, in offering the testimony, did so intelligently and that it was helpful to the state and detrimental to accused. *Sorrell v. State* (Cr. App.) 169 S. W. 299.

Where an election adopting prohibition in a county was not contested within the statutory time, the court must conclusively presume, on a trial for violating the prohibition law, that all the steps taken to enact prohibition in the county were legal. *Longmire v. State* (Cr. App.) 171 S. W. 1165.

In a prosecution for murder, where accused took a bill of exception in advance to anything and everything that a special prosecuting attorney might say in his closing argument, which was not supported by the record or was of an inflammatory nature, or injurious to accused, it was incumbent upon accused at the close of the argument to point out those portions of the speech to which he objected, and therefore, on appeal, the court would conclude that the only portions of the argument not acceptable to the defendant were those as to which he presented special charges requesting the court to instruct not to consider such portions of the address. *Bolden v. State* (Cr. App.) 178 S. W. 533.

4. Presumption as to proof of venue.—See *McDonald v. State* (Cr. App.) 152 S. W. 1061; *Johnson v. State*, 72 App. 387, 162 S. W. 512.

Under this article as amended, 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 App. 351, 43 S. W. 93.

On appeal in a criminal case, the court must presume that the venue was proven below, in the absence of any bill of exceptions. *Garrett v. State*, 61 App. 514, 135 S. W. 532.

An objection that the evidence failed to show the venue of the theft in the county of the trial could not be reviewed, where there was some evidence to fix the venue in such county, and the bill of exceptions did not contain the evidence of venue; it being insufficient that the bill to the court's refusal to give defendant's peremptory instruction stated that defendant excepted thereto because the state failed to prove venue, or that the court in approving the bill referred to the statement of facts for the evidence. *Lane v. State* (Cr. App.) 152 S. W. 897.

Where the jury may reasonably conclude from the evidence that an offense was committed in the county alleged, this court will not disturb its finding. *Pye v. State*, 71 App. 94, 154 S. W. 222.

Under this article accused cannot object for the first time on motion for new trial to the state's failure to prove the venue. *Thompson v. State*, 72 App. 6, 160 S. W. 685.

The question of venue was not contested at the trial, nor until motion for a new trial, and the court, in approving appellant's bill of exceptions overruling the motion on that ground, stated that the venue was shown circumstantially in numerous ways throughout the record, more particularly by certain evidence specified as to the place where the killing occurred and the body found. Held, that the Court of Criminal Appeals was required to presume that the venue was sufficiently proved. *Belcher v. State*, 71 App. 646, 161 S. W. 459.

It will be presumed that the venue was proven as alleged, unless the question of venue was made an issue in the trial and the question presented by a bill of exceptions. *Brown v. State*, 71 App. 353, 162 S. W. 339.

Where the statement of facts was filed too late to be considered, it will be

presumed on appeal that the venue was properly proved. *Brown v. State* (Cr. App.) 170 S. W. 714.

5. **Presumption as to impaneling and swearing of jury.**—See ante, art. 692, and notes, as to what must be shown by the record to entitle defendant to complain of error in overruling challenges to jurors for cause.

On appeal, if the record fails to show that the jury were sworn, or if it shows that any other than the statutory oath was administered to them, the conviction will be set aside. It is sufficient, however, if the record recites that the jury were "duly sworn," or "were lawfully sworn to try said cause." *Nels v. State*, 2 Tex. 280; *Arthur v. State*, 3 Tex. 403; *Baird v. State*, 38 Tex. 599; *Faith v. State*, 32 Tex. 373; *Cotton v. State*, Id. 614; *Martin v. State*, 40 Tex. 19; *Bawcom v. State*, 41 Tex. 189; *Howard v. State*, 8 App. 612; *Berry v. State*, 10 App. 315; *Kelly v. State*, 13 App. 158; *Dresch v. State*, 14 App. 175; *McHenry v. State*, Id. 209; *Curiel v. State*, 20 App. 130; *Stephens v. State*, 33 App. 101, 25 S. W. 286.

It is not essential that the oath administered to the jury should be set out in the judgment entry. If a wrong oath was administered, the fact may be shown on appeal by a bill of exception. *Preston v. State*, 8 App. 30. But if the oath be set out in the judgment entry, and as set out it is not the oath prescribed, the judgment will be reversed. *Holland v. State*, 14 App. 182.

Where the judgment overruling a motion for new trial on the ground of disqualification of jurors recited that the trial court heard the motion and the evidence admitted thereon, the court on appeal must assume, in the absence of the record authenticating the evidence, that the evidence to which the trial court referred justified its decision, and that it was not confined alone to the affidavits attached to the motion and to the state's resistance thereof. *Dougherty v. State*, 59 App. 464, 128 S. W. 398.

A judgment as shown by the record on appeal recited that the jury was composed of 12 men, whose names were given, but the verdict signed by the foreman as required by art. 764, ante, was by a name not corresponding to any of those recited as in the panel. This discrepancy, however, was not adverted to or noticed in the motion for a new trial, and was not questioned or raised by bill of exceptions, affidavit, or otherwise. Held that, in absence of proof, it should be held that accused was tried by a jury of 12 required by Const. art. 5, § 13, and art. 645, ante; the foreman's name being presumed to be improperly stated in copying the verdict. *Petty v. State*, 59 App. 586, 129 S. W. 615.

Under this article a judgment of conviction, reciting that "thereupon a jury, to wit — and 11 others were duly selected," etc., raises no presumption that the jury was composed of more than 12; the blank being left for the name of the twelfth man, who is always foreman. *Patton v. State*, 62 App. 28, 136 S. W. 42.

6. **Presumption as to arraignment and plea.**—See *Martinez v. State* (Cr. App.) 153 S. W. 886.

If record shows plea of not guilty, but is silent as to arraignment, it will be presumed that latter was waived. *West v. State*, 40 App. 151, 49 S. W. 95.

Recital that the defendant pleaded to the indictment is not sufficiently controlled by the defendant's affidavit to the contrary, unsupported by proof. *Gordon v. State*, 29 App. 410, 16 S. W. 337.

If the record in a capital case, on appeal, shows that the defendant pleaded "not guilty," but shows no arraignment, it will be presumed that an arraignment was waived. *Morris v. State*, 30 App. 95, 16 S. W. 757; *McGrew v. State*, 31 App. 336, 20 S. W. 740.

Arraignment, plea of not guilty, etc., will be presumed, unless it affirmatively appears to the contrary on the record. *Webb v. State* (Cr. App.) 55 S. W. 493.

In the absence of some exception in the court below to the failure to enter the plea it will be presumed in the appellate court that a plea was entered in the court below; but the failure to plead in the trial court can be taken advantage of by bill of exception, or in the motion for new trial or by motion in arrest of judgment. *Mays v. State*, 51 App. 32, 101 S. W. 233, 234.

Where there is no special plea in the record on appeal, the court cannot assume that such a plea of former conviction was interposed as would require a submission of the issue to the jury. *Lindley v. State*, 57 App. 305, 122 S. W. 873.

Where the judgment recited that a plea of not guilty was entered by defendant, and he made no objection that he had not been called on to plead in the trial court until he raised the point on a motion for a new trial after verdict, his failure to plead if he did not do so in fact was waived. *Davis v. State*, 70 App. 563, 158 S. W. 283.

7. **Presumption as to certification and filing of charge.**—In absence of bill of exceptions it will be presumed that the charge was signed by the judge and filed by the clerk. *Jackson v. State*, 42 App. 497, 60 S. W. 963.

If it is made affirmatively to appear that the charge was not signed by the judge, when such fact is evidenced by proper bill, the case will be reversed. *Alberson v. State*, 54 App. 8, 111 S. W. 413.

Where a special charge is not marked "given" or "refused" and the bill of exceptions does not complain of its refusal, the court on appeal will presume that it was given. *Cole v. State*, 70 App. 459, 156 S. W. 929.

8. **Necessity, requisites, and approval of bill of exceptions.**—See arts. 744, 844a-846, ante.

9. **Reformation and correction of judgment.**—Under this article, the court of appeals, in a proper case, will reform either the judgment or sentence or both, so as to make them conform to each other and to the verdict. *Rivers v. State*, 10 App. 177; *Hill v. State*, Id. 673; *McDonald v. State*, 14 App. 504; *Short v. State*, 23 App. 312, 4 S. W. 903; *Robinson v. State*, 24 App. 4, 5 S. W. 509; *Ex parte Hunt*, 28 App. 361, 13 S. W. 145; *Lockhart v. State*, 29 App. 35, 13 S. W. 1012; *Ex parte Cox*, 29 App. 85, 14 S. W. 396; *Ex parte Moseley*, 30 App. 338, 17 S. W. 418; *Peter-son v. State*, 25 App. 70, 7 S. W. 530; *Turner v. State*, 44 App. 69, 68 S. W. 512;

Robinson v. State, 58 App. 550, 126 S. W. 276; Robison v. State (Cr. App.) 150 S. W. 912; Martinez v. State (Cr. App.) 153 S. W. 886; Veherana v. State, 72 App. 4, 160 S. W. 711. See Lanham v. State, 7 App. 126; Carr v. State, 9 App. 463; Jackson v. State, 25 App. 314, 7 S. W. 872; Reyna v. State, 26 App. 666, 14 S. W. 455; Purcell v. State, 29 App. 1, 13 S. W. 993; Thomas v. State, 31 App. 82, 19 S. W. 901; Ex parte Mathews, 38 App. 617, 44 S. W. 153.

Where the trial court erroneously sentenced accused, convicted of murder, to a certain term, the judgment will be reformed on appeal to comply with the indeterminate sentence law. Ortiz v. State (Cr. App.) 173 S. W. 300; Pullum v. State (Cr. App.) 168 S. W. 530; Millner v. State (Cr. App.) 169 S. W. 899; Bell v. State (Cr. App.) 169 S. W. 1150; Gúterrez v. State (Cr. App.) 170 S. W. 717; Vasquez v. State (Cr. App.) 172 S. W. 225; Perales v. State (Cr. App.) 172 S. W. 790; Mendoza v. State (Cr. App.) 172 S. W. 790; Alzalda v. State (Cr. App.) 173 S. W. 298; Cisneros v. State (Cr. App.) 174 S. W. 608.

Where sentence and judgment are correct in every way except as to assessing cumulative punishment, court of criminal appeals can reform and affirm the judgment. Bullard v. State, 40 App. 272, 50 S. W. 348.

Where the verdict is based on one count of an indictment, and the judgment and sentence is for an offense set out in another count, there is nothing on which the court can base a reformation. Small v. State (Cr. App.) 38 S. W. 798. See, also, O'Bryan v. State, 27 App. 339, 11 S. W. 443; Womble v. State (Cr. App.) 43 S. W. 114. But see Ex parte Strey (Cr. App.) 28 S. W. 811, and Peterson v. State, 25 App. 70, 7 S. W. 530.

Where defendant was charged and convicted of passing forged instrument, but sentenced for forgery, appellate court will reform judgment so as to make it for passing forged instrument and affirm. Burks v. State (Cr. App.) 55 S. W. 826.

Where the verdict and judgment show that the punishment was fixed at two years confinement in the penitentiary while the sentence recites that it is five years, the Court of Criminal Appeals can reform and correct the sentence so as to make it conform to the judgment and verdict. Laudermilk v. State, 47 App. 427, 83 S. W. 1108.

The court of criminal appeals has the power, after the adjournment of the term at which a case has been affirmed and after a motion for rehearing has been overruled, to reform and correct the judgment, by supplying an omission in the judgment of the trial court. The omission being of such a nature as the trial court could correct were the case sent back to the trial court for correction, the appellate court could itself make the correction in the judgment. McCorquodale v. State, 54 App. 344, 98 S. W. 885.

Where, on a trial for violating the local option law, the jury assessed the punishment of accused at a fine and imprisonment in jail, a judgment which merely decreed the recovery of the fine and costs was incomplete, and the court on appeal, on the motion of the state, would reform the judgment so as to make it comply with the verdict. Gipson v. State, 58 App. 403, 126 S. W. 267.

Where, in a prosecution for forgery, the jury are instructed to base their verdict on a count of the indictment for uttering a forged instrument, a verdict and sentence adjudging defendant guilty of forgery is erroneous and will be reformed in the appellate court to conform to the count submitted. Chappell v. State, 58 App. 401, 126 S. W. 274.

Defendant was convicted of murder, and the death penalty fixed, and the judgment of the court failed to show the arraignment of defendant and the impaneling of the jury or the submission of the evidence. Held, in view of art. 859, that the appellate court had power to reform the judgment to conform to the facts, where it had all the data necessary to do so, since if, under art. 853, the lower court had power to amend and reform the judgment after the term, there was no reason why the appellate court, having all the data before it, could not also do it. Robinson v. State, 58 App. 550, 126 S. W. 276.

Where a judgment of conviction for assault with intent to murder was rendered when the verdict was guilty of assault with intent to rob, the Court of Criminal Appeals will, on appeal, reform the judgment to conform to the verdict. Hernandez v. State, 60 App. 382, 131 S. W. 1091.

Where the indictment, charge, verdict, and judgment clearly showed that accused was convicted of burglary, but he was sentenced for assault with intent to murder, the sentence will be corrected on appeal to show that it was for burglary. Gradington v. State (Cr. App.) 155 S. W. 210.

Under this article a judgment which is too vague and indefinite may be reformed on appeal, where the indictment, charge of the court, and verdict are all a part of the record. Monroe v. State, 70 App. 245, 157 S. W. 154.

Error of the court, under the Indeterminate Sentence Law (art. 865a, ante), in not assessing the punishment of defendant, found guilty of murder, at confinement for not less than five nor more than ten years, the jury having assessed it at a greater number of years than the minimum term, will be cured on appeal, as required by this article. Davis v. State, 73 App. 49, 163 S. W. 442.

10. Review of discretionary action.—See notes under art. 608, and other specific articles.

The ruling of the trial court refusing a new trial will not be revised on appeal, unless it shall appear that such court has not exercised its discretion according to the established rules of law. Shultz v. State, 5 App. 390.

Alleged misconduct of the jury in reaching their verdict by lot being cognizable by the trial court, its conclusion, unless clearly wrong and unsupported by the testimony, will not be interfered with on appeal. Benevidas v. State, 57 App. 170, 121 S. W. 1107.

The discretion of the trial court in limiting the cross-examination of witnesses as to matters sought to be inquired into for the purpose of affecting the credibility of the witnesses and relating to matters quite remote from the case in hand is not

subject to review; no abuse of discretion being shown. *Sweeney v. State*, 59 App. 370, 128 S. W. 390.

The discretion of a trial judge in selecting jury commissioners is not subject to review by an appellate court. *Columbo v. State* (Cr. App.) 145 S. W. 910.

In a criminal prosecution, where accused did not object to the testimony of prosecutrix or attempt to show on the voir dire examination that she was too insane to testify, the admission of her testimony rests in the sound discretion of the trial court, which will not be reviewed, in an absence of a showing of abuse. *Hubbard v. State* (Cr. App.) 147 S. W. 260.

11. Law of the case.—Where the trial court follows a decision on a former appeal on the second trial of that identical case, the same question will not be reviewed again unless it was shown that some injury resulted to defendant by following such decision. *Lee v. State* (Cr. App.) 148 S. W. 706.

A ruling on a former appeal that a portion of a dying declaration was inadmissible was the law of the case, and such portion was therefore properly excluded on retrial. *Manley v. State* (Cr. App.) 154 S. W. 1008.

Where rulings on evidence and instructions were reviewed by the court on appeal, they will not be reviewed on a subsequent appeal in the same case. *Betts v. State*, 71 App. 204, 159 S. W. 1969.

Where a confession, held inadmissible on a former appeal, was, upon a subsequent trial for the same offense, again admitted in evidence, the admission is error; the former judgment having settled the law as to the admissibility of the confession. *Perrett v. State* (Cr. App.) 170 S. W. 316.

12. What the judgment must contain.—See article 853, ante.

13. What must be shown by the record.—See notes under art. 929 and other articles of this chapter.

14. Invited error.—The admission in evidence of a statement brought out by accused on cross-examination was not reversible error on his appeal; there being no motion to exclude such statement from evidence. *Bryan v. State*, 63 App. 200, 139 S. W. 981; *Platinburg v. State*, 57 App. 375, 123 S. W. 421; *Marsden v. State*, 59 App. 36, 126 S. W. 1160; *Edwards v. State*, 61 App. 307, 135 S. W. 540; *Cunningham v. State*, 73 App. 565, 166 S. W. 519.

Accused cannot complain of invited error resulting from the court giving an instruction at his request. *Wynne v. State*, 59 App. 126, 127 S. W. 213; *Decker v. State*, 58 App. 159, 124 S. W. 912.

Where an erroneous charge is given at the instance or invitation of a party, it is not error of which he can complain, and, where a charge as given is the same as one requested, it is not error to refuse the requested charge, nor will it be ground for reversal that the charge given is wrong; it being deemed a charge in compliance with the request. *Cornwell v. State*, 61 App. 122, 134 S. W. 221, Ann. Cas. 1913B, 71.

Accused cannot complain because the state was permitted in cross-examining accused's witnesses to his good reputation to ask whether they had heard of certain misconduct by him, where there was no objection to evidence of such misconduct. *Butler v. State*, 61 App. 133, 134 S. W. 230.

Since the state's counsel in a prosecution for homicide in the cross-examination of a witness was entitled to lay a predicate from a memorandum in his hands, defendant, having brought out the fact that such memorandum was grand jury testimony, could not complain of the use made thereof by the state; the court at defendant's instance having required the state to submit the paper to the jury for inspection. *Edwards v. State*, 61 App. 307, 135 S. W. 540.

Accused may not complain of testimony elicited by questions propounded by his attorney and given in answer thereto. *Sanders v. State*, 63 App. 258, 140 S. W. 103.

Any error in a charge because of use of certain language is invited; such language being in a similar charge requested by defendant. *Whorton v. State* (Cr. App.) 152 S. W. 1082.

Where accused stated at the time that he had no objection to the whole of a conversation being elicited, and himself elicited a part of the conversation, he cannot complain on appeal that thereafter the witness was permitted to detail the whole conversation which was necessary to enable the jury to understand the matter and determine the weight to be given to the part elicited by defendant. *Scott v. State* (Cr. App.) 175 S. W. 1054.

Though the court opened the door wide in admitting evidence of the loss of papers as a basis for secondary evidence of their contents, accused could not complain thereof, where the broadness of the inquiry was due to his own insistence that the evidence was insufficient to permit secondary evidence. *Bunker v. State* (Cr. App.) 177 S. W. 108.

15. Harmless error.—The court of criminal appeals is not authorized to reverse unless it is made to appear that error complained of is calculated to injure the rights of appellant. *Hofheintz v. State*, 45 App. 117, 74 S. W. 311; *De Los Santos v. State* (Cr. App.) 146 S. W. 919.

In prosecutions for misdemeanors, where alleged errors are excepted to, but no special charges are asked covering them, error based thereon will be held harmless on appeal. *Stone v. State*, 57 App. 321, 123 S. W. 582.

Any error in trying a criminal case before the district court as an ordinary criminal case, instead of transferring it to the juvenile docket, on the ground that defendant was under 16 years of age, was not reversible where it was not shown that accused was injured thereby; the procedure being the same in either court. *Ragsdale v. State*, 61 App. 145, 134 S. W. 234.

Where accused has been indicted and convicted of manslaughter, he cannot object that the evidence was such that, if it showed any offense, it was a higher grade of homicide. *Campbell v. State* (Cr. App.) 144 S. W. 966.

In a prosecution for violating the prohibition law, accused cannot complain that

the prosecutor lost a written statement made by him prior to the trial, which was introduced by the state, and so was included in the statement of facts; for the statement must obviously have been detrimental to accused. *Nobles v. State*, 71 App. 121, 158 S. W. 1133.

Where accused, charged with unlawfully selling liquor, did not in due time request the court to require an election on which of three sales proved a conviction would be sought, he could not complain of the failure of the court to require an election, for his conviction could be pleaded as former jeopardy for any of the offenses proved. *Fears v. State* (Cr. App.) 178 S. W. 518.

16. — **Denial of change of venue.**—*Lemons v. State*, 59 App. 299, 128 S. W. 416.

17. — **Denial of separate trial.**—*Black v. State* (Cr. App.) 143 S. W. 932.

18. — **Denial of continuance.**—*Frazier v. State*, 61 App. 647, 135 S. W. 583; *Bosley v. State* (Cr. App.) 153 S. W. 878; *Hiles v. State*, 73 App. 17, 163 S. W. 717; *Burnett v. State*, 73 App. 477, 165 S. W. 581.

The overruling of a motion for a continuance on the ground of the absence of a witness who would testify only on the issue of guilt of accused of manslaughter was not erroneous, where accused was found guilty of manslaughter only, and was subjected to the lowest penalty. *Egbert v. State* (Cr. App.) 176 S. W. 560.

The court on appeal will not reverse a judgment refusing a continuance and the overruling of a motion for new trial based upon the application for a continuance, unless it appears from the evidence adduced at the trial that the proposed absent testimony was relevant, material, and probably true. *Stacy v. State* (Cr. App.) 177 S. W. 114.

19. — **Absence of judge.**—*White v. State*, 61 App. 498, 135 S. W. 562.

20. — **Remarks and other acts of judge.**—*Newton v. State* (Cr. App.) 143 S. W. 638; *Mitchell v. State* (Cr. App.) 144 S. W. 1006; *Ferrell v. State* (Cr. App.) 152 S. W. 901; *Mayhew v. State* (Cr. App.) 155 S. W. 191; *Silvas v. State*, 71 App. 213, 159 S. W. 223; *Reed v. State* (Cr. App.) 168 S. W. 541.

21. — **Misconduct of persons not connected with trial.**—*Canon v. State*, 59 App. 398, 128 S. W. 141; *Lane v. State*, 59 App. 595, 129 S. W. 353; *Ryan v. State*, 64 App. 628, 142 S. W. 878.

22. — **Rulings as to jurors.**—It is well settled that unless objection is shown to one or more jurors who try the case, the ruling of the trial court who tried the competency or incompetency of such jurors will not be inquired into on appeal, even though the defendant had exhausted his peremptory challenges. *Holland v. State*, 31 App. 345, 20 S. W. 750; *Hudson v. State*, 28 App. 323, 13 S. W. 388; *Nalley v. State*, 28 App. 387, 13 S. W. 670; *Leeper v. State*, 29 App. 64, 14 S. W. 399; *Blackwell v. State*, 29 App. 195, 15 S. W. 597; *Roberts v. State*, 30 App. 291, 17 S. W. 450; *Williams v. State*, 30 App. 354, 17 S. W. 408; *White v. State*, 30 App. 652, 18 S. W. 462; *Heacock v. State*, 13 App. 97; *Cock v. State*, 8 App. 659; *Gardenhire v. State*, 6 App. 147; *Ray v. State*, 4 App. 450; *Bryan v. State*, 63 App. 200, 139 S. W. 981; *Berg v. State*, 64 App. 612, 142 S. W. 884; *Ellis v. State*, 154 S. W. 1010; *Luttrell v. State*, 70 App. 183, 157 S. W. 157; *Holmes v. State*, 70 App. 423, 157 S. W. 487; *Reynolds v. State*, 71 App. 454, 160 S. W. 362; *Havard v. State*, 73 App. 578, 166 S. W. 507.

Driving a defendant to a peremptory challenge of an incompetent juror is not cause for reversal, when he fails to exhaust his challenges. The objectionable juror, to constitute reversible error, must be forced upon the defendant, and serve as a juror on the trial. The sole inquiry upon appeal is not whether the court erred in the process of impaneling the jury, but whether the defendant was tried by a fair and impartial jury. The mere fact that the defendant exhausted his challenges signifies nothing, unless it be shown that thereafter an obnoxious juror was forced upon him, or that in some manner he suffered prejudice. *Henning v. State*, 24 App. 315, 6 S. W. 137; *Krebs v. State*, 8 App. 1; *Grissom v. State*, Id. 386; *Tooney v. State*, Id. 452; *Hollis v. State*, Id. 620; *McKinney v. State*, Id. 626; *Cock v. State*, Id. 659; *Rothschild v. State*, 7 App. 519; *Myers v. State*, Id. 640; *Sharp v. State*, 6 App. 650; *Bejarano v. State*, Id. 265; *Tuttle v. State*, Id. 556; *Johnson v. State*, 27 Tex. 758; *Burrell v. State*, 18 Tex. 713; *Lum v. State*, 11 App. 483; *Loggins v. State*, 12 App. 65; *Massey v. State*, 10 App. 646; *Bass v. State*, 59 App. 186, 127 S. W. 1020; *Duke v. State*, 61 App. 441, 134 S. W. 705; *Beaupre v. State*, 70 App. 19, 156 S. W. 625. But if one objectionable juror is forced upon the defendant after he has exhausted his peremptory challenges, he will be entitled to have the action of the court revised, not only as to that particular juror, but as to any juror against whom objection was urged which should have been sustained. *Holt v. State*, 9 App. 571; *Loggins v. State*, 12 App. 65.

Error in rulings on challenges to jurors does not necessitate a reversal of the conviction, unless an objectionable juror was forced upon the defendant and sat in the case; but the inquiry in the appellate court is whether the court's action defeated the constitutional right to a fair and impartial jury. *Myers v. State* (Cr. App.) 177 S. W. 1167.

23. — **Prejudice from defects in and rulings on indictment, information, and complaint.**—See notes under art. 476, ante.

24. — **Refusal to place witnesses under the rule.**—See *Clary v. State* (Cr. App.) 150 S. W. 919.

25. — **Admission of evidence—Materiality and effect in general.**—See *Trent v. State*, 31 App. 251, 20 S. W. 547; *Batson v. State*, 36 App. 606, 38 S. W. 48; *Elliot v. State*, 39 App. 242, 45 S. W. 711; *Welch v. State*, 57 App. 111, 122 S. W. 880; *Marsden v. State*, 59 App. 36, 126 S. W. 1160; *Ross v. State*, 60 App. 547, 132 S. W. 793; *Bowen v. State*, 60 App. 595, 133 S. W. 256; *Taylor v. State*, 62 App. 611, 138 S. W. 615; *Davis v. State*, 63 App. 453, 140 S. W. 349; *Morville v. State*, 63 App. 553, 141 S. W. 102; *Wright v. State*, 63 App. 664, 141 S. W. 228; *Staten v. State*, 63 App. 592, 141 S. W. 625; *Williams v. State* (Cr. App.) 143 S. W. 634; *Treadway v. State*

(Cr. App.) 144 S. W. 655; Knight v. State, 64 App. 541, 144 S. W. 967; Maxey v. State (Cr. App.) 145 S. W. 952; Sweeney v. State (Cr. App.) 146 S. W. 883; Chapman v. State (Cr. App.) 147 S. W. 580; Simms v. State (Cr. App.) 148 S. W. 786; Tucker v. State (Cr. App.) 150 S. W. 190; Woods v. State (Cr. App.) 151 S. W. 296; Byrd v. State (Cr. App.) 151 S. W. 1068; Polk v. State (Cr. App.) 152 S. W. 907; Hughes v. State (Cr. App.) 152 S. W. 912; Wingate v. State (Cr. App.) 152 S. W. 1078; Cain v. State (Cr. App.) 153 S. W. 147; Valigura v. State (Cr. App.) 153 S. W. 856; Cameron v. State (Cr. App.) 153 S. W. 867; Nesbitt v. State (Cr. App.) 155 S. W. 203; Taff v. State (Cr. App.) 155 S. W. 214; Simmons v. State (Cr. App.) 155 S. W. 229; Christie v. State (Cr. App.) 155 S. W. 541; Holmes v. State, 70 App. 423, 157 S. W. 487; Cowser v. State, 70 App. 265, 157 S. W. 758; Cheesebourn v. State, 70 App. 612, 157 S. W. 761; Rupard v. State, 71 App. 256, 158 S. W. 285; Key v. State, 71 App. 485, 160 S. W. 354; Sands v. State, 73 App. 282, 164 S. W. 1014; Jones v. State, 73 App. 152, 165 S. W. 144; Durfee v. State, 73 App. 165, 165 S. W. 180; Miles v. State, 73 App. 493, 165 S. W. 567; Cunningham v. State, 73 App. 565, 166 S. W. 519; Hewitt v. State (Cr. App.) 167 S. W. 40; Willis v. State (Cr. App.) 167 S. W. 352; Lamb v. State (Cr. App.) 168 S. W. 534; Gomez v. State (Cr. App.) 170 S. W. 711; Barnett v. State (Cr. App.) 176 S. W. 580; Jackson v. State (Cr. App.) 178 S. W. 521.

26. — **Contradiction of evidence improperly admitted.**—See Brown v. State (Cr. App.) 150 S. W. 436.

27. — **Error in admitting evidence cured by proper admission of other evidence of same fact.**—Particular instances illustrating general rule, see McGee v. State, 37 App. 668, 40 S. W. 967; Railey v. State, 58 App. 1, 121 S. W. 1120, 125 S. W. 576; Rowan v. State, 57 App. 625, 124 S. W. 668, 136 Am. St. Rep. 1005; Pace v. State, 58 App. 90, 124 S. W. 949; Gaines v. State, 58 App. 631, 127 S. W. 181; Hookman v. State, 59 App. 183, 127 S. W. 825; Windham v. State, 59 App. 366, 128 S. W. 1130; Heimes v. State, 59 App. 420, 129 S. W. 123; Hunter v. State, 59 App. 439, 129 S. W. 125; Ray v. State, 60 App. 138, 131 S. W. 542; Chandler v. State, 60 App. 329, 131 S. W. 598; Ross v. State, 60 App. 547, 132 S. W. 793; Germany v. State, 62 App. 276, 137 S. W. 130, Ann. Cas. 1913C, 477; Knight v. State, 64 App. 541, 144 S. W. 967; Bailey v. State (Cr. App.) 144 S. W. 996; Horn v. State (Cr. App.) 150 S. W. 948; Kearsse v. State (Cr. App.) 151 S. W. 827; Whorton v. State (Cr. App.) 152 S. W. 1082; Brown v. State (Cr. App.) 154 S. W. 568; Smith v. State, 70 App. 62, 156 S. W. 214; Comegys v. State, 70 App. 495, 156 S. W. 642; Cole v. State, 70 App. 459, 156 S. W. 929; Pullen v. State, 70 App. 156, 156 S. W. 935; Thompson v. State, 70 App. 610, 157 S. W. 494; Wright v. State, 73 App. 178, 163 S. W. 976; McGowen v. State, 73 App. 112, 164 S. W. 999; Miles v. State, 73 App. 493, 165 S. W. 567; Douglas v. State, 73 App. 385, 165 S. W. 933; Hodges v. State, 73 App. 378, 166 S. W. 512; Burge v. State, 73 App. 505, 167 S. W. 63; Sorell v. State (Cr. App.) 167 S. W. 256.

The admission of illegal evidence of an important fact, material and pertinent to the issue, and which is additional to other facts legally in evidence, is error for which a conviction will be set aside, however certain it may be that the jury would have found a verdict of guilty upon other sufficient evidence adduced on the trial. McWilliams v. State, 44 Tex. 117; Saddler v. State, 20 App. 195.

But the erroneous admission of evidence, which is neither pertinent nor material to an issue in the case, and which could have no tendency whatever to affect or prejudice the rights of the defendant, is not cause for reversal. Post v. State, 10 App. 579. But see in this connection Tyson v. State, 14 App. 358, and cases there cited; see, also, Saddler v. State, 20 App. 195; Bond v. State, Id. 427; Malcolmson v. State, 25 App. 267, 8 S. W. 468.

In felony cases less than capital, and in misdemeanor cases, a conviction will not be set aside on appeal, on account of the admission of illegal evidence against the defendant, unless such evidence was material and relevant, and the legal evidence in the case is insufficient to warrant the conviction. The court looks to the whole record in determining whether the illegal evidence was relevant and material. This rule does not obtain in a capital felony. On the contrary, a capital conviction will be set aside, if illegal evidence has been admitted over the defendant's objection, and he has duly reserved exceptions, and the court will not inquire whether there is sufficient legal evidence to sustain the conviction, or whether the verdict was influenced by the illegal evidence. Hester v. State, 15 App. 567; Preston v. State, 4 App. 200; Bigby v. State, 5 App. 101; Haynie v. State, 2 App. 168; Evans v. State, 13 App. 225; Logan v. State, 17 App. 50; Draper v. State, 22 Tex. 400; Somerville v. State, 6 App. 433; Jones v. State, 7 App. 457.

But the admission of immaterial evidence, even in a capital case, when not objected to in the court below, is not necessarily cause for a reversal of the conviction. It may, however, become cause for reversal, if the jury, by imputing undue importance to it, may have been misled to the prejudice of the defendant, or if the charge gives undue prominence to it. Simms v. State, 8 App. 230.

Admission of inadmissible testimony will not require reversal unless its effect upon the defendant's case was probably injurious. King v. State, 42 App. 108, 57 S. W. 840, 96 Am. St. Rep. 792.

If such evidence was incompetent, its admission was not reversible error, where other evidence to the same effect was received without objection. Love v. State (Cr. App.) 150 S. W. 920.

28. — **Error in admitting evidence of facts admitted by defendant.**—See Ward v. State, 55 App. 362, 116 S. W. 1154; Clayton v. State (Cr. App.) 149 S. W. 119; Overstreet v. State (Cr. App.) 150 S. W. 899; Boyd v. State, 72 App. 521, 163 S. W. 67; Latham v. State (Cr. App.) 172 S. W. 797.

29. — **Waiver of privilege by witness.**—The error in requiring a witness to answer questions which she refused to answer on the ground of self-incrimination is harmless, where the witness, on afterwards taking the stand, waived her privilege. Bybee v. State (Cr. App.) 168 S. W. 520.

30. — **Error cured by withdrawal of evidence.**—Error in admitting evidence, held cured by withdrawal of same from jury. *Gent v. State*, 57 App. 414, 123 S. W. 594; *Jones v. State*, 33 App. 7, 23 S. W. 793; *Belcher v. State*, 39 App. 121, 44 S. W. 1106; *Goode v. State*, 57 App. 220, 123 S. W. 597; *Darnell v. State*, 58 App. 555, 126 S. W. 1122; *Beeson v. State*, 60 App. 39, 130 S. W. 1006; *Liles v. State*, 62 App. 32, 135 S. W. 1177; *Sandoloski v. State* (Cr. App.) 143 S. W. 151; *Lacome v. State* (Cr. App.) 143 S. W. 626; *Stapp v. State* (Cr. App.) 144 S. W. 941; *Sweeney v. State* (Cr. App.) 146 S. W. 883; *Rich v. State* (Cr. App.) 147 S. W. 588; *Cukierski v. State* (Cr. App.) 153 S. W. 313; *Cowser v. State*, 70 App. 265, 157 S. W. 758; *Hyde v. State*, 73 App. 452, 165 S. W. 195; *Hearne v. State*, 73 App. 390, 165 S. W. 596; *Martoni v. State* (Cr. App.) 167 S. W. 349; *Latham v. State* (Cr. App.) 172 S. W. 797.

Error held not cured by withdrawal. *Kemper v. State*, 63 App. 1, 138 S. W. 1025; *Clements v. State*, 61 App. 161, 134 S. W. 728; *Coffman v. State*, 62 App. 88, 136 S. W. 779; *Miller v. State* (Cr. App.) 144 S. W. 239; *Latham v. State* (Cr. App.) 172 S. W. 797; *Davis v. State* (Cr. App.) 172 S. W. 978.

Error cannot be predicated on an answer of a witness; it having been unresponsive and excluded on objection. *Howard v. State* (Cr. App.) 178 S. W. 506.

31. — **Error in admitting evidence cured by verdict.**—Error held cured where the jury assessed the minimum punishment. *Whorton v. State* (Cr. App.) 151 S. W. 300; *Boyd v. State*, 57 App. 250, 122 S. W. 393; *Hines v. State*, 57 App. 216, 123 S. W. 411; *Patton v. State*, 62 App. 28, 136 S. W. 42; *Renn v. State*, 64 App. 639, 143 S. W. 167; *Davis v. State* (Cr. App.) 151 S. W. 313; *Mims v. State* (Cr. App.) 153 S. W. 321; *Anderson v. State*, 71 App. 27, 159 S. W. 847; *Hickman v. State*, 71 App. 483, 160 S. W. 382; *McCue v. State* (Cr. App.) 170 S. W. 280; *Francis v. State* (Cr. App.) 170 S. W. 779.

If the punishment is above the minimum, the admission of inadmissible evidence will require a reversal, for its admission might have been prejudicial. *King v. State*, 42 App. 108, 57 S. W. 840, 96 Am. St. Rep. 792; *Roquemore v. State*, 59 App. 568, 129 S. W. 1120.

32. — **Cure of error in admitting opinion or expert evidence.**—See *Graves v. State*, 58 App. 42, 124 S. W. 676; *Decker v. State*, 58 App. 159, 124 S. W. 912; *Pollard v. State*, 58 App. 299, 125 S. W. 390; *Ashley v. State*, 58 App. 420, 126 S. W. 589; *Barber v. State*, 64 App. 96, 142 S. W. 577.

33. — **Cure of error in admitting parol evidence as to writings.**—See *Hamer v. State*, 60 App. 341, 131 S. W. 813; *Haywood v. State*, 61 App. 92, 134 S. W. 218; *Tores v. State* (Cr. App.) 166 S. W. 523.

34. — **Prejudicial effect of evidence of other offenses.**—See *Haney v. State*, 57 App. 158, 122 S. W. 34; *Neumann v. State*, 58 App. 248, 125 S. W. 28; *Windham v. State*, 59 App. 366, 128 S. W. 1130; *Hightower v. State*, 60 App. 109, 131 S. W. 324; *Moore v. State* (Cr. App.) 144 S. W. 598; *Dugat v. State* (Cr. App.) 148 S. W. 789; *Harrison v. State* (Cr. App.) 151 S. W. 552; *Roberts v. State*, 70 App. 297, 156 S. W. 651; *McGill v. State*, 71 App. 443, 160 S. W. 353; *Ford v. State*, 73 App. 174, 164 S. W. 826.

35. — **Prejudice from admission of evidence as to flight.**—See *Damron v. State*, 58 App. 255, 125 S. W. 396.

36. — **Prejudice from erroneous admission of evidence as to acts and declarations of accused.**—See *Pollard v. State*, 58 App. 299, 125 S. W. 390; *Alsop v. State* (Cr. App.) 153 S. W. 624; *Nesbitt v. State* (Cr. App.) 155 S. W. 203; *Smith v. State*, 73 App. 521, 165 S. W. 574.

37. — **Prejudice from denial of motion to strike evidence.**—See *Harris v. State* (Cr. App.) 148 S. W. 1074; *Pullen v. State*, 70 App. 156, 156 S. W. 935.

38. — **Prejudicial effect of error in exclusion of evidence—Materiality and effect of evidence.**—See *Skaggs v. State*, 31 App. 563, 21 S. W. 257; *Walker v. State*, 25 App. 448, 8 S. W. 644; *Chancey v. State*, 58 App. 54, 124 S. W. 426; *Bordeaux v. State*, 58 App. 61, 124 S. W. 640; *White v. State*, 60 App. 559, 132 S. W. 790; *Ross v. State*, 60 App. 547, 132 S. W. 793; *Diaz v. State*, 62 App. 317, 137 S. W. 377; *Clardy v. State* (Cr. App.) 147 S. W. 568; *Redman v. State* (Cr. App.) 149 S. W. 670; *Salmon v. State* (Cr. App.) 154 S. W. 1023; *Davis v. State*, 73 App. 49, 163 S. W. 442; *Albright v. State*, 73 App. 116, 164 S. W. 1001.

39. — **Error in exclusion of evidence cured by other evidence of same or other witness.**—See *Zachary v. State*, 57 App. 179, 122 S. W. 263; *Joy v. State*, 57 App. 93, 123 S. W. 584; *Spencer v. State*, 59 App. 217, 128 S. W. 118; *Canon v. State*, 59 App. 398, 128 S. W. 141; *Hardeman v. State*, 61 App. 111, 133 S. W. 1056; *Thompson v. State*, 61 App. 250, 134 S. W. 350; *Battles v. State*, 63 App. 147, 140 S. W. 783; *Hughes v. State* (Cr. App.) 149 S. W. 173; *Kearse v. State* (Cr. App.) 151 S. W. 827; *Shaffer v. State* (Cr. App.) 151 S. W. 1061; *Stephens v. State* (Cr. App.) 154 S. W. 996; *Salmon v. State* (Cr. App.) 154 S. W. 1023; *McKelvey v. State* (Cr. App.) 155 S. W. 932; *Mason v. State* (Cr. App.) 168 S. W. 115; *Bybee v. State* (Cr. App.) 168 S. W. 526.

40. — **Prejudice from asking of leading questions.**—See *Browning v. State*, 64 App. 148, 142 S. W. 1; *Hill v. State* (Cr. App.) 173 S. W. 1022.

Where the evidence as a whole clearly established a date material to the prosecution, the fact that counsel for the state was allowed to lead the prosecutrix so as to have her clearly fix the date was harmless. *Grimes v. State* (Cr. App.) 178 S. W. 523.

In such case, where there was no showing as to what the witness would have answered, the remark, if on the weight of the evidence, was harmless. *Grimes v. State* (Cr. App.) 178 S. W. 523.

41. — **Prejudice from improper cross and re-direct examination.**—See *Washington v. State*, 58 App. 345, 125 S. W. 917; *Lacy v. State*, 63 App. 189, 140 S. W.

461; *Ellington v. State*, 63 App. 420, 140 S. W. 1102; *Wilson v. State*, 71 App. 426, 160 S. W. 967.

42. — **Error in question cured by answer.**—See *Graham v. State*, 57 App. 104, 123 S. W. 691; *Keeton v. State*, 59 App. 316, 128 S. W. 404; *Phillips v. State*, 59 App. 534, 128 S. W. 1100; *Butler v. State*, 61 App. 133, 134 S. W. 230; *Leggett v. State*, 62 App. 99, 136 S. W. 784; *Jordan v. State*, 62 App. 388, 137 S. W. 114; *Hickey v. State*, 62 App. 568, 138 S. W. 1051; *Lacy v. State*, 63 App. 189, 140 S. W. 461; *Wright v. State*, 63 App. 429, 140 S. W. 1105; *Bailey v. State* (Cr. App.) 144 S. W. 996; *Williams v. State* (Cr. App.) 148 S. W. 763; *Pettis v. State* (Cr. App.) 150 S. W. 790; *Woods v. State* (Cr. App.) 151 S. W. 296; *Ward v. State*, 70 App. 393, 159 S. W. 272; *Curry v. State*, 72 App. 463, 162 S. W. 851; *Ford v. State*, 73 App. 174, 164 S. W. 826; *Hearne v. State*, 73 App. 390, 165 S. W. 596.

43. — **Error in question not answered.**—See *Lewis v. State*, 59 App. 51, 126 S. W. 1137; *Lane v. State*, 59 App. 595, 129 S. W. 353; *Harding v. State*, 60 App. 327, 131 S. W. 1092; *Alexander v. State*, 61 App. 31, 133 S. W. 436; *Florence v. State*, 61 App. 238, 134 S. W. 689; *Sweeney v. State* (Cr. App.) 146 S. W. 883; *Overstreet v. State* (Cr. App.) 150 S. W. 899; *Woods v. State* (Cr. App.) 151 S. W. 296; *Rasberry v. State*, 72 App. 13, 160 S. W. 682; *Christian v. State*, 71 App. 566, 161 S. W. 101.

44. — **Prejudice from erroneous impeachment of witness.**—See *Holland v. State*, 60 App. 117, 131 S. W. 563; *Miller v. State* (Cr. App.) 150 S. W. 635; *Holmes v. State* (Cr. App.) 150 S. W. 926.

45. — **Prejudice from improper argument and other misconduct of prosecuting attorney.**—See *Graham v. State*, 57 App. 104, 123 S. W. 691; *Davis v. State*, 57 App. 545, 124 S. W. 104; *Chancey v. State*, 58 App. 54, 124 S. W. 426; *Gowans v. State* (Cr. App.) 145 S. W. 614; *Love v. State* (Cr. App.) 150 S. W. 920; *Bosley v. State* (Cr. App.) 153 S. W. 878; *Rodriguez v. State*, 71 App. 108, 158 S. W. 537; *Thompson v. State*, 72 App. 659, 163 S. W. 973; *McGowen v. State*, 73 App. 112, 164 S. W. 999; *Hewitt v. State* (Cr. App.) 167 S. W. 40.

46. — **Prejudice from error in instructions.**—See notes under art. 743, ante.

47. — **Prejudice from misconduct of jurors.**—See *O'Marrow v. State* (Cr. App.) 147 S. W. 252; *Pullen v. State*, 70 App. 156, 156 S. W. 935.

48. — **Prejudice from error in verdict.**—See *McLain v. State*, 62 App. 118, 136 S. W. 1057; *Myers v. State* (Cr. App.) 144 S. W. 1134; *Essery v. State*, 72 App. 414, 163 S. W. 17.

49. **Rehearing.**—See *Ayers v. State*, 12 App. 450.

Constitutional power of Court of Appeals, see *Craddock v. State*, 15 App. 641. See, also, *Bailey v. State*, 11 App. 140.

Withdrawal of motion by appellant, see *Loggins v. State*, 32 App. 364, 24 S. W. 512.

Argument on rehearing, see *Gonzales v. State*, 35 App. 33, 29 S. W. 1091, 30 S. W. 224.

Where it is determined after the dismissal of an appeal that the term of court in which defendant was convicted was not legally held, and for that reason the conviction was void, the appeal will not be reinstated. *Thompson v. State*, 59 App. 498, 124 S. W. 659.

Accused may not for the first time on his motion for rehearing, after affirmation of the judgment of conviction, suggest a new view in support of his contention that the court erred in failing to give a requested charge. *Harrelson v. State*, 60 App. 534, 132 S. W. 783.

Accused in a misdemeanor case may not for the first time raise the question on rehearing that the court erred in not charging on circumstantial evidence. *Bradley v. State* (Cr. App.) 136 S. W. 446.

On a motion for rehearing, the Court of Criminal Appeals cannot consider affidavits presented to it in the first instance, showing that defendant had a good defense to the prosecution, especially where no reasons were given why the witnesses were not called to testify at the trial. *Scott v. State* (Cr. App.) 175 S. W. 1054.

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.]

Cited, *Ex parte Firmin*, 60 App. 222, 131 S. W. 1116.

Review of sufficiency of evidence.—See notes under art. 786.

Verdict contrary to evidence.—On appeal from a conviction of simple assault on an information charging an aggravated assault, accused cannot urge that the verdict is contrary to the evidence, on the ground that it clearly showed an aggravated assault, if any. *Garrett v. State*, 61 App. 514, 135 S. W. 532.

Rehearing.—See notes under art. 938.

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.]

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.]

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.]

See, ante, arts. 856, 858, 859, and notes.

When term of imprisonment begins.—See art. 882, ante, and notes.

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 pronounced 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 arts. 479, 575, 576, 593, 594, 856, 858, 859 and notes.

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.]

See *Thompson v. State*, 17 App. 318.

Cited, *Hogg v. State*, 40 App. 109, 48 S. W. 580; *Wells v. State*, 21 App. 594, 2 S. W. 806.

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.]

See art. 843, ante; *Beardall v. State*, 9 App. 262; *Wells v. State*, 21 App. 594, 2 S. W. 806; *Drake v. State*, 29 App. 265, 15 S. W. 725; *Dupree v. State*, 56 App. 562, 120 S. W. 871, 23 L. R. A. (N. S.) 596, 133 Am. St. Rep. 998.

Cited, *Sanders v. State*, 70 App. 532, 158 S. W. 291.

Effect as to jurisdiction of lower court.—The Constitution gives the district court exclusive jurisdiction of all criminal cases of the grade of a felony, and C. C. P. 1911, arts. 89, 771, 843, respectively, provide that upon the trial of a felony case, whether the proof develop a felony or misdemeanor, the court shall determine the case as to any offense included in the charge; that, where a prosecution is for an offense consisting of several degrees, the jury may find the defendant guilty of any degree inferior to that charged in the indictment; and that the effect of a new trial is to place the cause in the same position as it was before any trial was had. Held that, where accused was indicted for assault with intent to murder, the reversal on appeal of a conviction of an aggravated assault will not, in view of this article deprive the district court of jurisdiction to hear the case upon retrial, though the county court has original jurisdiction of misdemeanors. *Hughes v. State* (Cr. App.) 152 S. W. 912.

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.]

See, ante, arts. 479, 575, 576, 593, 594, 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.]

See notes under arts. 479, 575, 576, 593, 594.

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.]

See arts. 901-908, ante.

Necessity of giving new bail.—The insertion of this provision in the Revised Code does not necessitate the giving of new bail in every case. If the accused was on bail before conviction, his original recognizance remains in force. *Ex parte Guffee*, 8 App. 409. See *Wells v. State*, 21 App. 594, 2 S. W. 806.

Art. 949. [915] May make rules; briefs and oral argument.—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.]

See *Willson's Cr. Forms*, 1162.

See Rules 29-54 for Court of Civil Appeals (142 S. W. xii-xv); *Sparks v. State* (Cr. App.) 47 S. W. 976. See, also, *Vernon's Sayles' Civ. St.* 1914, arts. 1547, 1614, 2115.

Validity of rules.—The rules of the Supreme Court governing Court of Criminal Appeals as to transcripts cannot override the statutory law on same subject. *Dyer v. State*, 44 App. 78, 68 S. W. 685.

Supreme Court rule 116 (142 S. W. xxv), adopted under Const. art. 5, § 25, empowering it to make rules of procedure not inconsistent with law, and providing that the transcript of the record in a misdemeanor case must be delivered to the party appealing or his counsel, and, if not applied for before the twentieth day before the commencement of the term of the Court of Criminal Appeals to which the appeal is returnable, the clerk shall transmit it to the clerk of that court, was invalid, because inconsistent with C. C. P. 1911, arts. 930, 931, providing that the clerk shall prepare transcripts in all criminal cases and forward them to the clerk of the Court of Criminal Appeals. *McElroy v. State* (Cr. App.) 172 S. W. 1144.

Briefs and argument.—Scope of argument on rehearing, see *Gonzales v. State*, 35 App. 23, 29 S. W. 1091, 30 S. W. 224.

Brief unaccompanied by affidavit showing that one copy had been filed in the trial court will be stricken out. *Lewis v. State* (Cr. App.) 38 S. W. 205.

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.]

See *Willson's Cr. Forms*, 1104.

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| 1. Right of appeal in general. | 6. Transmission and filing of transcript. |
| 2. Decisions reviewable. | 7. Statement of facts. |
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| 4. Consideration as original application. | 9. Contempt of appellate court. |
| 5. Requisites of transcript. | 10. Bail. |

1. Right of appeal in general.—Where a party sues out a habeas corpus, and is remanded and allowed to enter into a recognizance on appeal, the Court of Criminal Appeals has no jurisdiction, and the appeal will be dismissed. *Ex parte Parvin*, 63 App. 512, 140 S. W. 439; *Ex parte Stephenson*, 63 App. 274, 140 S. W. 94; *Ex parte Simpkins*, 72 App. 90, 161 S. W. 97; *Ex parte Crumpton* (Cr. App.) 167 S. W. 844.

Pending an appeal in habeas corpus proceedings, the relator must remain in custody, otherwise, the court will not entertain his appeal. *Ex parte Tyer*, 61 App. 66, 133 S. W. 1046. That he is in custody must affirmatively appear from the rec-

ord. Ex parte Snyder, 39 App. 120, 44 S. W. 1108; Ex parte Talbutt, 39 App. 12, 44 S. W. 832. See, also, Ex parte Peyton, 2 App. 295; Ex parte Cohn, 2 App. 380; Griffin v. State, 5 App. 457; Ex parte Erwin, 7 App. 288; Ex parte Cole, 14 App. 579; Ex parte Wood, 19 App. 46; Ex parte Branch, 36 App. 384, 37 S. W. 421.

Where no writ has been issued an appeal will be dismissed where its only object is to certify a point in issue to this court. Ex parte Jones, 34 App. 344, 30 S. W. 806.

Where the county court remands the party who has sued out a writ of habeas corpus, and fixes an appeal bond, which the relator files, this court will not entertain the appeal if he be not in custody, since pending appeal the relator must remain in custody. Ex parte Stephenson, 63 App. 274, 140 S. W. 94.

In habeas corpus, where the writ is denied, the Court of Criminal Appeals will not entertain an appeal unless the relator is in custody. Ex parte Eldridge, 72 App. 529, 162 S. W. 1149.

2. Decisions reviewable.—No appeal can be taken from a refusal to issue a writ of habeas corpus. Ex parte Copley (Cr. App.) 153 S. W. 325; the respondent having no right of appeal. McFarland v. Johnson, 27 Tex. 105; Ex parte Ainsworth, 27 Tex. 731; Dirks v. State, 33 Tex. 227; Thomas v. State, 40 Tex. 6; Ex parte Barnett (Cr. App.) 167 S. W. 845; Ex parte Muse (Cr. App.) 168 S. W. 520.

No appeal lies from the dismissal of the writ, which is tantamount to refusing it in the first instance. Ex parte Strong, 34 App. 309, 30 S. W. 666; Ex parte Thomas, 61 App. 573, 136 S. W. 60. The remedy is to sue out an original application before another judge. Ex parte Blankenship (Cr. App.) 57 S. W. 647. See, also, Ex parte Hodges (Cr. App.) 45 S. W. 913.

Refusal to grant the writ is not a final judgment, and will not support appeal. Ex parte Ainsworth, 27 Tex. 731; Ex parte Coopwood, 44 Tex. 467; Yarbrough v. State, 2 Tex. 519; Ex parte Strong, 34 App. 309, 30 S. W. 666.

An order, amending an original order directing the issuance of a writ of habeas corpus, by directing the return of the writ to the district court of another county than the one specified in the original order, is not appealable, as the order is only an interlocutory one. Ex parte McFarlane, 61 App. 204, 134 S. W. 685.

Where an appeal was taken from an order dismissing a writ of habeas corpus, and was dismissed for want of jurisdiction, on the ground that the motion to dismiss in the trial court was in the nature of a demurrer, and that dismissal pursuant to such motion did not authorize an appeal, such ruling was tantamount to a refusal of the writ in the original instance, and was nonappealable. Ex parte Ryan, 62 App. 19, 136 S. W. 65.

The Court of Criminal Appeals has no jurisdiction of an appeal from the judgment in a habeas corpus proceeding remanding the petitioner to the custody of the sheriff, where he is admitted to bail pending the appeal. Ex parte Harvey (Cr. App.) 177 S. W. 1174.

3. Withdrawal of appeal.—Ex parte Jones, 7 App. 365.

4. Consideration as original application.—In such appeals the cause is not remanded, but the court of appeals acts originally. Ex parte Erwin, 7 App. 288; Ex parte Foster, 5 App. 625, 32 Am. Rep. 577.

Where petitioner was entitled to a writ of habeas corpus and to a hearing thereon, but the judge of the district court of the county where he was indicted was disqualified, and an appeal was taken from an order of a judge of another county dismissing a writ granted by him and erroneously made returnable for hearing in his own county, the Court of Criminal Appeals would hear the application as an original proceeding. Ex parte Andrus (Cr. App.) 153 S. W. 621.

5. Requisites of transcript.—Transcript must contain copy of the writ under which the relator is held. Sheldon v. Boyce, 20 Tex. 828. It should also, in case of an application for bail, disclose relator's pecuniary circumstances. Miller v. State, 42 Tex. 309; Ex parte Cochran, 20 App. 242; Ex parte Terry, Id. 486; Ex parte Walker, 3 App. 668; McConnell v. State, 13 App. 390; Ruston v. State, 15 App. 324; Ex parte Coldiron, 15 App. 464; Ex parte Catney, 17 App. 332. Agreement in record as to ability. See Ex parte O'Connor, 22 App. 660, 3 S. W. 340. As to certificate, tie, seal, etc., see Ex parte Barrier, 17 App. 585; Ex parte Kramer, 19 App. 123.

Where habeas corpus trial is had in vacation the judge must certify to the transcript of the record. Clerk can not do this. See Ex parte Malone, 35 App. 297, 31 S. W. 665, 33 S. W. 360; Ex parte Calvin, 40 App. 84, 48 S. W. 518; Overstreet v. State, 39 App. 468, 46 S. W. 929.

Where the attorneys for relator, applying for habeas corpus after his conviction of murder in the first degree, were furnished a transcript of the proceedings on the trial of the case, which did not include the orders convening the special term of the district court at which defendant was convicted, nor the order appointing jury commissioners, and the transcript introduced by the state included those papers, the two transcripts did not conflict with each other. Ex parte Martinez (Cr. App.) 145 S. W. 959.

6. Transmission and filing of transcript.—The rules governing the transmission of transcripts in other criminal cases do not govern in habeas corpus appeals. Ex parte Kramer, 19 App. 123. See, also, Ex parte Barrier, 17 App. 585.

7. Statement of facts.—In a habeas corpus case, on appeal, a statement of facts will not be considered unless it be authenticated and filed as in other cases. Ex parte Cole, 14 App. 579; Ex parte Barber, 16 App. 369; Ex parte Dick, 25 App. 73, 7 S. W. 533; Ex parte Isaacs, 35 App. 80, 31 S. W. 641; Ex parte Williams, 39 App. 524, 47 S. W. 365, 1118; Ex parte Calvin, 40 App. 84, 48 S. W. 518. And see, also, Ex parte Overstreet, 39 App. 468, 46 S. W. 929.

The judgment of the trial court upon habeas corpus to admit to bail cannot be reviewed, in the absence of a statement of facts. Ex parte Teague (Cr. App.) 145 S. W. 620; Ex parte Northern, 63 App. 275, 140 S. W. 95.

Statement of facts must be approved and authenticated. *Sheldon v. Boyce*, 20 Tex. 828.

Where habeas corpus trial is had before judge in vacation, on appeal therefrom there must be a statement of facts prepared as in other cases. *Ex parte Malone*, 35 App. 298, 31 S. W. 665, 33 S. W. 360.

Refusal to reduce bail in habeas corpus proceedings to compel its reduction, on the ground that accused was unable to give bail at the amount fixed, cannot be reviewed, where the record contains no evidence or statement of facts showing accused's inability to give bail. *Ex parte Naill*, 59 App. 140, 127 S. W. 1031.

An agreement of counsel that the facts stated in accused's application for habeas corpus are true did not make the application a part of the record as a statement of facts or evidence, so as to authorize review of questions requiring evidence in the record in order to review them, in the absence of approval of such agreement by the trial court. *Ex parte Naill*, 59 App. 140, 127 S. W. 1031.

Refusal to reduce bail in habeas corpus proceedings to compel its reduction, on the ground that accused was unable to give bail at the amount fixed, cannot be reviewed, where the record contains no evidence or statement of facts showing accused's inability to give bail. *Ex parte Naill*, 59 App. 140, 127 S. W. 1031.

The petition for writ of habeas corpus is a mere pleading, and not evidence of the averments therein contained; and the appellate court cannot, in the absence of the statements of facts, determine whether petitioner was unlawfully committed for an alleged contempt of a lower court. *Ex parte Thomas* (Cr. App.) 145 S. W. 601.

The court, on appeal from an order in habeas corpus remanding the applicant to the custody of an officer for delivery to an agent of a sister state, must presume that the judgment of the lower court was correct and supported by the evidence, in the absence of any statement of facts or other matters shown by the record. *Ex parte Basham* (Cr. App.) 145 S. W. 619.

On appeal from a judgment remanding the applicant for a writ of habeas corpus into custody, where there was no statement of facts, it must be held that the judgment of the lower court was correct, and that there was ample evidence to sustain it; the application or petition not being evidence of the facts therein stated. *Ex parte Welburn*, 70 App. 464, 157 S. W. 154.

8. Effect of appeal.—Where accused, after having been committed for contempt, sued out a writ of habeas corpus, which was dismissed, and accused remanded to the custody of the chief of police, such officer, after notice of appeal, could not work accused on the highways, in satisfaction of his sentence, pending the appeal. *Ex parte Ryan*, 62 App. 19, 136 S. W. 65.

9. Contempt of appellate court.—Where an appeal is taken from an order dismissing a writ of habeas corpus, the appellate court is alone entitled to determine the question of its jurisdiction to determine such appeal, and until it makes that determination any interference with the subject-matter of the proceeding may be the subject of contempt. *Ex parte Ryan*, 62 App. 19, 136 S. W. 65.

Where a police officer, having accused in charge under commitment for contempt, worked him on the highways, pending appeal from an order dismissing the writ of habeas corpus, first without notice that an appeal had been taken, and then under the advice of the city's legal adviser that he had authority so to do, and in proceedings for contempt stated that he had no intent to violate any jurisdiction of the appellate court, or place himself in contempt, his contempt was purged. *Ex parte Ryan*, 62 App. 19, 136 S. W. 65.

10. Bail.—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 App. 384, 37 S. W. 421; *s. c.*, 37 App. 318, 39 S. W. 932.

In a habeas corpus proceeding by a prisoner who was temporarily released and subsequently rearrested, he could not be released from custody pending an appeal from a judgment remanding him to custody by entering into a recognizance or appeal bond. *Ex parte Richie* (Cr. App.) 177 S. W. 85.

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.]

See *Ex parte Coupland*, 26 Tex. 386.

Rule prior to statute.—See *Republic v. McCulloch*, Dallah, 357.

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.]

Cited, *Ex parte Lynn*, 19 App. 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.]

See *Ex parte Rothschild*, 2 App. 560; *Ex parte Foster*, 5 App. 625, 32 Am. Rep. 577; *Parker v. State*, 5 App. 579.

Cited, *Ex parte Firmin*, 60 App. 368, 131 S. W. 1113.

Review in general.—No reversal for admission of improper evidence. *Ex parte Smith*, 23 App. 100, 5 S. W. 99.

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 by the court on appeal. *Ex parte Pearce*, 32 App. 301, 23 S. W. 15.

On affirming a judgment denying a writ of habeas corpus to one restrained under a *capias* on a murder charge, the Court of Criminal Appeals properly withholds any opinion excepting that implied by the disposition of the appeal. *Ex parte McFarlane* (Cr. App.) 129 S. W. 610.

The Court of Criminal Appeals on habeas corpus for the discharge of one imprisoned for contempt for violating an injunction granted by the district court must assume that the injunction was properly granted. *Ex parte Looper*, 61 App. 129, 134 S. W. 345, Ann. Cas. 1913B, 32.

Review of facts, and comment on evidence.—On reversal of judgment in habeas corpus proceedings denying bail, the court will not discuss the facts. *Sharp v. State*, 1 App. 299; *Ex parte Day*, 3 App. 328; *Ex parte Winters* (Cr. App.) 32 S. W. 897; *Ex parte McKinney*, 5 App. 500; *Ex parte Moore*, 5 App. 103; *Ex parte Beaupre* (Cr. App.) 135 S. W. 547; *Ex parte Sperger*, 62 App. 133, 137 S. W. 351; *Ex parte Lawrence* (Cr. App.) 137 S. W. 697.

The appellate court will not review conflicting evidence. *Drury v. State*, 25 Tex. 45; *Ex parte Moore*, 5 App. 103; *Ex parte Beacom*, 12 App. 318. And see *Ex parte Smith*, 23 App. 100, 5 S. W. 99; *Ex parte Evers*, 29 App. 539, 16 S. W. 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.]

Nature of mandate.—The Court of Criminal Appeals cannot reverse a judgment in habeas corpus proceedings and direct the trial court to proceed further in any way, but must itself render the judgment the trial court should have rendered, which is operative directly upon the officer or person having custody of the applicant. *Ex parte Firmin*, 60 App. 222, 131 S. W. 1116; *Ex parte Foster*, 5 App. 625, 33 Am. Rep. 577; *Ex parte Erwin*, 7 App. 288; *Ex parte Cole*, 14 App. 579; *Ex parte Firmin*, 60 App. 368, 131 S. W. 1113.

Allowance of bail as to one of several applicants.—*Ex parte Williams*, 18 App. 653; *Ex parte Hanson*, 27 App. 591, 11 S. W. 641.

Consideration as original application.—See notes under art. 950, ante.

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.]

See, ante, art. 219. And on a question of practice, see *Jones v. State*, 33 App. 492, 26 S. W. 1082, 47 Am. St. Rep. 46.

Cited, *Ex parte Firmin*, 60 App. 368, 131 S. W. 1113.

Subsequent reduction of bail.—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 Tex. 579.

Directing proceedings in trial court.—The Court of Criminal Appeals cannot reverse a judgment in habeas corpus proceedings and direct the trial court to proceed further in any way, but must itself render the judgment the trial court should have rendered, which is operative directly upon the officer or person having custody of the applicant. *Ex parte Firmin*, 60 App. 222, 131 S. W. 1116.

Second appeal after dismissal of first appeal.—See *Ex parte Jones*, 7 App. 365.

Rehearing.—Even if a proceeding by habeas corpus in the Court of Criminal Appeals to obtain relator's discharge from confinement under an order of a house of the Legislature holding him guilty of contempt were a criminal case, that court would not be debarred from granting a rehearing after deciding there was no contempt and discharging relator; the court being merely a reviewing tribunal, and in no sense trying the case. *Per Harper and Prendergast, JJ.; Davidson, P. J.*, dissenting. *Ex parte Wolters*, 64 App. 238, 144 S. W. 531.

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.]

See Pen. Code, art. 1045; *State v. Sparks*, 27 Tex. 627, s. c., Id., 27 Tex. 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.]

Directing proceedings in trial court.—The Court of Criminal Appeals cannot reverse a judgment in habeas corpus proceedings and direct the trial court to proceed further in any way, but must itself render the judgment the trial court should have rendered, which is operative directly upon the officer or person having custody of the applicant. *Ex parte Firmin*, 60 App. 222, 131 S. W. 1116.

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.]

Notice of appeal.—Notice by sureties on a bail bond of appeal to the Court of Civil Appeals from a judgment forfeiting the bond confers no jurisdiction on the Court of Criminal Appeals. *Ayers v. State* (Cr. App.) 146 S. W. 171.

Time for filing transcript.—See notes under art. 931.

Dismissal.—An appeal from a judgment forfeiting a bail bond will be dismissed, on motion signed and sworn to by appellants personally. *James v. State* (Cr. App.) 128 S. W. 613.

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 rendered in the district or county court, revised upon writ of error, as in other civil suits. [O. C. 738b.]

Right of review.—As in other criminal cases, the state can not be awarded a new trial, nor is the state entitled to an appeal or writ of error, notwithstanding art. 960 and this article. *Perry v. State*, 14 App. 166; *Robertson v. State*, Id. 211; *State v. Arrington*, 13 App. 611; *Hart v. State*, Id. 555; *State v. Ward*, 9 App. 462. But a defendant in such proceeding may have a new trial, or may prosecute an appeal or writ of error, as in civil cases. *Bailey v. State*, 26 App. 341, 9 S. W. 758.

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.]

See, ante, art. 497.

Cited, *Barrett v. State* (Cr. App.) 151 S. W. 558.

Filing transcript.—Under arts. 961, 962, which authorizes review of judgments on bail bonds on writs of error as in civil suits, and under the rule of the Supreme Court for the government of the Courts of Civil Appeals, which prohibits consideration of a case where the transcript is not filed within 90 days from the filing of the petition for writ of error, and no showing is made why the same was not forwarded within that time, a writ of error to review a judgment forfeiting a bail bond will be dismissed, where the transcript was not filed within that time. *Ayers v. State* (Cr. App.) 146 S. W. 171.

Where an appeal from a judgment against the sureties on a bail bond was perfected by giving of notice of appeal and a bond, as provided by Rev. St. 1895, art. 1387 (*Vernon's Sayles' Civ. St. 1914*, art. 2084), but the transcript was not filed in the appellate court within 90 days after perfecting of the appeal as required by article 1015 (*Vernon's Sayles' Civ. St. 1914*, art. 1608), the court could on a certifi-

cate of affirmance filed by the state affirm the judgment. *Savage v. State* (Cr. App.) 148 S. W. 584.

Brief and statement of facts.—Appeal from judgment on forfeited bail bond will be dismissed where no brief, as required by rule 102 of district and county courts (142 S. W. xxiv) and rule 29 of civil courts of appeals (142 S. W. xii), has been filed in court below nor in court of criminal appeals. *Frost v. State* (Cr. App.) 57 S. W. 669; *Heiman v. State*, 70 App. 480, 158 S. W. 276; *Thetford v. State* (Cr. App.) 169 S. W. 1153.

Statement of facts and briefs for appeal are governed by the same rules that apply in civil cases. *Emmons v. State*, 34 App. 98, 29 S. W. 474, 475; *Blain v. State*, 34 App. 417, 31 S. W. 366; *Jay v. State*, 34 App. 98, 29 S. W. 472; *Morse v. State*, 39 App. 566, 47 S. W. 645, 50 S. W. 342.

Construction of bond.—A bail bond bound the defendant to appear at “the next term of court on the 11th day of September, 1911,” and the 11th of September fell during the same term of court in which the bond was issued. Held, under this article and art. 321, subd. 5, that, as the bond fixed a definite time for the appearance at a time when the court was legally in session, the specific time fixed will control, and render the bond certain and sufficient in spite of the inconsistent matter therein. *Barrett v. State* (Cr. App.) 151 S. W. 558.

Defect in appeal bond.—On appeal from the forfeiture of a bail bond, the same rules govern as govern in civil matters, and, where the appeal is dismissed for a defect in the appeal bond, the appellants may still prosecute their appeal by filing a proper bond. *Anderson v. State* (Cr. App.) 166 S. W. 1164.

TITLE 11

OF PROCEEDINGS IN CRIMINAL ACTIONS BEFORE JUSTICES OF THE PEACE, MAYORS AND RECORDERS

Chap.	Chap.
1. General provisions.	3. Of the trial and its incidents.
2. Of the arrest of the defendant.	4. The judgment and execution.

CHAPTER ONE

GENERAL PROVISIONS

Art.	Art.
963. Mayors shall exercise criminal jurisdiction.	968f. Jury and witness fees, and enforcing attendance of witnesses according to code of criminal procedure.
964. Mayors or recorders governed by same rules as justices of the peace.	968g. Judge may punish for contempt as county judge; may take recognizances, admit to bail, etc., under rules in county court.
965. Mayors and justices of the peace have concurrent jurisdiction.	968h. Process, how served; defendant entitled to notice of complaint, if demanded.
966. In towns and villages embracing territory in two counties, procedure on appeals from; and examining trials before mayors or recorders.	968i. Proceedings when a peace bond, etc., given before mayor, etc., has been forfeited.
967. Warrant issued by mayor, directed to whom.	968j. Fees of recorder, etc., how prescribed; paid out of city treasury; fines and costs collected and disposed of, how; committals; city liable to officers of appellate court, when; court to be always open.
968. Warrant issued by mayor, etc., may be executed, where.	969. Justices, etc., shall keep a criminal docket, which shall show, etc.
968a. Right of trial before jury.	970. Justices, etc., shall file transcript of docket with clerk of district court, etc.
968b. Rules of pleading, practice and procedure.	
968c. Complaint, how commenced and concluded; prosecution conducted by city attorney or deputy; county attorney may also represent state, but no fees; process.	
968d. Council to prescribe rules for collecting fees and costs, practice, etc.; rules in meantime.	
968e. Fines and costs paid into city treasury, etc.	

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.]

Repeal of article.—This article seems to be entirely superseded by the Corporation Court Act (arts. 109a-109g, 920a, 968b-968j, 1177a, of this Code). But the continued existence of this article, together with articles 108, 964 and 965, is recognized by certain allusions in the opinion in *State ex rel. Bergeron v. Travis County Court* (Cr. App.) 174 S. W. 365, as well as by its incorporation in the revision of 1911. See, also, arts. 908 and 918, Rev. St. 1911. It seems evident, however, that in cities, towns, and villages in which a corporation court has been organized the former provisions relating to mayors and recorders have no application. The substance of this article and art. 108 is carried into the new act (art. 109b, ante). Art. 964 is displaced by section 6 of the new act (art. 968b, post). Art. 965 contains provisions not covered by the Corporation Court act, and would seem to be operative in localities possessing a Corporation Court. Art. 109, ante, in so far as it relates to mayors and recorders in cities having corporation courts is superseded by section 6 of the Corporation Court Act (art. 968b, post). Arts. 1175-1177, relating to fees in mayors' and recorders' courts are likewise superseded by section 15 of the Corporation Court Act (art. 968j, post). Arts. 1185 and 1191 are made applicable to the corporation court by section 12 of the Corporation Court Act (art. 968f, post). Art. 966 may have operative effect as to the corporation court. Art. 967 is not applicable to the corporation court in view of section 14 (art. 968h, post). Arts. 968-970, as far as applicable to mayors and recorders, have no direct counterpart in the corporation court act, unless the general provision adopting the practice of the county court (art. 968b, post) excludes their application to the corporation court.

Constitutionality.—In *Blessing v. City of Galveston* (1875) 42 Tex. 641, it was held, that under the constitution, the legislature had power to create municipal judicial tribunals to enforce the police powers delegated to the municipal body. In 1877, the Supreme Court, in *Ex parte Towles*, 48 Tex. 413, held that the jurisdic-

tion of the various courts named in the constitution was fixed by that document, and the legislature had no power to alter that jurisdiction by the creation of a special tribunal, the powers conferred on which would intrench on the constitutional authority of one of the regularly created courts. The Towles decision was followed in 1884 by the decision in *Gibson v. Templeton*, 62 Tex. 555. In *Ex parte Ginnocchio* (1891) 30 App. 584, 18 S. W. 82, the Court of Appeals held that a special statute creating a court with exclusive jurisdiction over violations of the Sunday laws in the City of Ft. Worth was unconstitutional in so far as it excluded the jurisdiction of justices of the peace over the same subject. In *Leach v. State* (1896) 36 App. 248, 36 S. W. 471, the Court of Criminal Appeals held that the legislature is without power to create a municipal court with jurisdiction concurrent with the constitutional state courts over violations of state laws. The decision in the Leach case, supra, was overruled by the Supreme Court in *Harris County v. Stewart* (1897) 91 Tex. 133, 41 S. W. 650, and it was held that, under the power conferred by Const. art. 5, § 1, to "establish such other courts as it (the legislature) may deem necessary," and to "prescribe the jurisdiction and organization thereof," the legislature was authorized to confer on a city recorder's court jurisdiction to try offenses against the general penal laws of the state. In the following year the Court of Criminal Appeals, in *Ex parte Fagg*, 38 App. 573, 44 S. W. 294, 40 L. R. A. 212, and *Ex parte Coombs* (1898) 38 App. 648, 44 S. W. 854, adhered to its decision in the Leach case, supra, and held that the legislature was without constitutional authority to create a corporation court with jurisdiction exclusive of or concurrent with the regular state courts to try violations of the penal laws. But in 1900 the Court of Criminal Appeals overruled its decisions in the Leach and Coombs cases, and in *Ex parte Wilbarger*, 41 App. 514, 55 S. W. 968, held that the act of the 26th Legislature creating the corporation court, was not violative of Const. art. 5, § 1, in that it infringed the jurisdiction of the state courts, or of Const. art. 5, § 18, limiting the number of justices in each county, and that such act was not invalid as conferring both state and municipal jurisdiction on the same court. In *Ex parte Hart*, 41 App. 581, 56 S. W. 341, *Ex parte Abrams*, 56 App. 465, 120 S. W. 883, 18 Ann. Cas. 45, and *Ex parte Hubbard*, 63 App. 516, 140 S. W. 451, the Court of Criminal Appeals followed its decision in the Wilbarger case, and in *State ex rel. Bergeron v. Travis County Court* (Cr. App.) 74 S. W. 365, it held that articles 963, 964, and 965, of the C. of C. P. of 1911, were valid enactments.

There seems no good reason why the Corporation Court Act should not be incorporated into the criminal statutes, the jurisdiction of the court being entirely criminal, and the act creating it being a qualification of, or co-ordinate provision with, articles 108, 109, 963-965, 1175-1177, 1185, 1191. In view of the situation the act is inserted in this compilation as arts. 109a-109g, 929a, 968b-968j, 1177a.

See, also, *Ex parte Whitlow*, 59 Tex. 273; *Davis v. State*, 2 App. 425; *Ex parte Boland*, 11 App. 159; *Ex parte Wilson*, 14 App. 592; *Bautsch v. State*, 27 App. 342, 11 S. W. 414; *McLain v. State*, 31 App. 558, 21 S. W. 365; *Corey v. State*, 28 App. 490, 13 S. W. 778; *Ex parte Knox* (Cr. App.) 39 S. W. 670; *Holland v. State* (Cr. App.) 39 S. W. 675; *May v. Finley*, 91 Tex. 352, 43 S. W. 257; *Crowley v. City of Dallas* (Cr. App.) 44 S. W. 865; *Ballard v. City of Dallas* (Cr. App.) 44 S. W. 864; *Ex parte Wickson* (Cr. App.) 47 S. W. 643.

Ex officio jurisdiction.—Mayors and recorders had no ex officio jurisdiction under the Constitution of 1869. *Holmes v. State*, 44 Tex. 631; *Bigby v. Tyler*, 44 Tex. 351.

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 Willson's Cr. Forms, 985.

Validity of article.—See note under art. 963, ante.

Repeal of article.—See note under art. 963.

Trial by jury.—See *Burns v. La Grange*, 17 Tex. 415; *Smith v. San Antonio*, 17 Tex. 643.

Appeal.—See *Bautsch v. City of Galveston*, 27 App. 342, 11 S. W. 414; *Ex parte McNamara*, 33 App. 363, 26 S. W. 506; *Leach v. State*, 36 App. 248, 36 S. W. 471.

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. [Act 1879, Extra Session, ch. 19.]

See notes under art. 302, Pen. Code.

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| 1. Constitutionality and repeal. | 6. — Exclusive power of municipal-
ity. |
| 2. Prior law. | 7. — Conflicting regulations. |
| 3. Police power of city in general. | 8. — Taxation of subjects not tax-
ed by state. |
| 4. Concurrent and conflicting power of
state and municipality. | 9. — Nature and extent of punish-
ment imposed. |
| 5. — Power of municipality to
make regulations on subjects cov-
ered by Penal Code. | 10. — Matters of procedure. |

1. Constitutionality and repeal.—See notes under art. 963, ante.

2. Prior law.—Before the enactment of this article a conviction under a city ordinance did not bar a prosecution by the state. *Hamilton v. State*, 3 App. 643; *Bingham v. State*, 2 App. 21.

3. Police power of city in general.—See *Milliken v. City of Weatherford*, 54 Tex. 388, 38 Am. Rep. 629; *Ayres v. City of Dallas*, 32 App. 603, 25 S. W. 631.

A Sunday ordinance held not unconstitutional but to protect the inhabitants of the city in the enjoyment of the religious privileges secured by the Bill of Rights. *Gabel v. City of Houston*, 29 Tex. 335.

An incorporated town of less than 1000 inhabitants can enact the State Sunday law into its ordinances, and in any event the mayor of such town would have jurisdiction under article 601 [528] of the Revised Statutes of 1895 to hear and determine Sunday law violations. *Ex parte Abram*, 34 App. 10, 28 S. W. 818, distinguishing *Grace's case*, 9 App. 381, and *Flood's case*, 19 App. 584.

When the charter of a municipality authorizes it to make laws consistent with the constitution and state laws, it may make it an offense to be drunk within the corporate limits. *Ex parte Oliver*, 3 App. 345.

Municipal corporations, like all other corporations, derive their powers from legislative grant, and can do no act for which authority is not expressly given, or may not be reasonably inferred. *Flood v. State*, 19 App. 584; *Craddock v. State*, 18 App. 567.

The effect of article 7452 of *Vernon's Sayles' Civ. St.* 1914, is to confer upon city councils the power to enact ordinances declaring what hours on Sunday drinking houses, etc., shall be closed, but it can not be construed to empower city councils to enact ordinances regulating the hours on Sundays when goods, etc., may be sold. *Flood v. State*, 19 App. 584, overruling upon this point *Craddock v. State*, 18 App. 567. See, also, *Bohmy v. State*, 21 App. 597, 2 S. W. 886. For decisions as to ordinances with respect to disorderly houses, see *Ex parte Wilson*, 14 App. 592; *Handley v. State*, 16 App. 444; *Davis v. State*, 2 App. 425.

An ordinance requiring the marshal and policeman to shoot all dogs not muzzled found on the street is void. *Lynn v. State*, 33 App. 153, 25 S. W. 779.

The Legislature may confer on cities the power to regulate peddling within their jurisdictions. *Ex parte Henson*, 49 App. 177, 90 S. W. 874.

4. Concurrent and conflicting power of state and municipality.—Where the charter of a city authorizes it "to locate and regulate variety theaters," and "to prevent the sale * * * of any intoxicating liquors" therein, an ordinance is valid, declaring it a penal offense for one connected with a variety theater to sell intoxicating liquors, though such offense is not defined in the Penal Code. *Ayers v. City of Dallas*, 32 App. 603, 25 S. W. 631.

It is not a valid objection that the ordinance makes that act an offense which is not defined in the Penal Code of the state. In preservation of the life, health, good order, and public morals, many acts not unlawful in themselves, or not defined or punished by the Penal Code, may be prohibited by the ordinances. *Ayers v. City of Dallas*, 32 App. 603, 25 S. W. 631.

The power of the state to license peddlers does not exclude the right of cities under the authority of statute to regulate them and to prohibit their use of certain streets and the public square. *Ex parte Henson*, 49 App. 177, 90 S. W. 874.

5. — Power of municipality to make regulations on subjects covered by Penal Code.—See *Hamilton v. State*, 3 App. 643.

A city council has no authority, and cannot be authorized by the legislature, to pass an ordinance punishing an act which is made an offense and punished by statute. *Ballard v. City of Dallas* (Cr. App.) 44 S. W. 864; *Crowley v. Same* (Cr. App.) 44 S. W. 865; *Ex parte Fagg*, 38 App. 573, 44 S. W. 294, 40 L. R. A. 212; *Coombs v. State*, 38 App. 648, 44 S. W. 854. *Ex parte Wickson* (Cr. App.) 47 S. W. 643.

An affray, though an offense, by statute, against the state, may by ordinance be made an offense against a city, so as to authorize prosecution under the ordinance. *Ex parte Freeland*, 38 App. 321, 42 S. W. 295.

6. — Exclusive power of municipality.—See *Craddock v. State*, 18 App. 567; *Ex parte Garza*, 28 App. 381, 13 S. W. 779, 19 Am. St. Rep. 845; *Ex parte Coombs*, 38 App. 648, 44 S. W. 854.

The power conferred by act of 1871 on the corporate authorities of Waco to license houses of prostitution operates to exempt holders of licenses granted under it from punishment under the provisions of Pen. Code 1856, making the keeping such houses a misdemeanor. *Davis v. State*, 2 App. 425.

Section 56 of the charter of the city of Ft. Worth (Sp. Laws 1889, p. 78), which provides that the common council of said city shall have power "to close drinking houses * * * and all places or establishments where intoxicating or fermented liquors are sold on Sunday," does not vest in the city exclusive power by ordinance to regulate, control, and prohibit the traffic in liquor on Sunday within the corpo-

rate limits of the city, so as to supersede, within the city limits, the operation of the state laws against such offense. *Ex parte Ginnocchio*, 30 App. 584, 18 S. W. 82.

An ordinance requiring policemen to shoot unmuzzled dogs found in any public highway in the city cannot be alleged as an excuse for discharging a firearm in a public street in violation of Pen. Code, art. 473. *Lynn v. State*, 33 App. 153, 25 S. W. 779.

Dallas City Charter (Sp. Laws 1907, c. 71) granted to it authority to regulate billiard and pool halls within its limits, and gave the city all the power to enact police regulations in respect thereto which the Legislature itself possessed. *Ex parte Brewer* (Cr. App.) 152 S. W. 1068; *Ex parte Pitchios* (Cr. App.) 152 S. W. 1074.

The city of Dallas is not exempted from the general laws regarding house draining and plumbing (Rev. St. 1911, arts. 986-998), because Dallas Charter, art. 14, § 29, gives the city the exclusive right to control such matters, as such provision in effect confers upon the city the right to suspend the state laws, which authority cannot be conferred. *Davis v. Holland* (Civ. App.) 168 S. W. 11.

7. — **Conflicting regulations.**—See *Davis v. State*, 2 App. 425; *Ex parte Slaren*, 3 App. 662; *Ex parte Boland*, 11 App. 159; *Augerhoffer v. State*, 15 App. 613; *Ex parte Sundstrom*, 25 App. 133, 8 S. W. 207; *McLain v. State*, 31 App. 558, 21 S. W. 365; *Ex parte Bell*, 32 App. 308, 22 S. W. 1040, 40 Am. St. Rep. 778.

Pen. Code, art. 302, makes it an offense for any trader to sell on Sunday. A city ordinance empowered the council to prescribe hours for closing places of business. Held, that the council could not license traders to sell before nine and after four on Sunday. *Flood v. State*, 19 App. 584.

Where traffic on Sunday is prohibited by a law of the state, an ordinance of a city allowing such traffic between certain hours is void. *Bohmy v. State*, 21 App. 597, 2 S. W. 886.

A city ordinance requiring railroad companies to ring bells while their engines are in motion within the city limits is not invalid because a statute (Vernon's Sayles' Civ. St. 1914, art. 6564) only requires such signals to be given just before and while crossing highways. *Gulf, C. & S. F. Ry. Co. v. Calvert*, 11 Civ. App. 297, 32 S. W. 246.

Under Const. art. 1, § 28, declaring that the legislature only shall have power to suspend the laws of the state, and Vernon's Sayles' Civ. St. 1914, art. 6564, requiring locomotives to whistle at crossings, Dallas city ordinance prohibiting the blowing of a steam whistle in the city limits is unconstitutional, and hence, in a suit against a railroad for injuries caused by being struck by a train at a crossing in the city of Dallas, it was error to refuse to charge that it was the duty of defendant to sound the whistle at the crossing. *Curtis v. Gulf, C. & S. F. Ry. Co.*, 26 Civ. App. 304, 63 S. W. 149.

Beaumont City Charter, § 33 (Sp. Laws 1899, p. 159), provides that the city may, by ordinance, exercise such powers as may be necessary under the state law to suppress gambling houses, lotteries, and pool selling. Section 85 provides that nothing contained in the act shall be construed to suspend any of the penal laws of the state, and that the council may pass any ordinance, within the limitations of the act, not in conflict with such penal laws. Acts 25th Leg. (Sp. Sess.) p. 51, subd. 13, provides for a state tax levy upon selling pools on horse races; and Beaumont City Charter, § 71, authorizes the city council to levy a similar city tax. Held, that the city had no power to prohibit pool selling on horse races, since such prohibition would be in conflict with the penal laws of the state. *Ex parte Powell*, 43 App. 391, 66 S. W. 298.

A municipal ordinance prohibiting pool selling on horse races, and providing for a punishment against any saloon keeper permitting pool selling on his premises, is void, being in conflict with a state law licensing the selling of pools on horse races. *Ex parte Ogden*, 43 App. 531, 66 S. W. 1100.

Ordinances authorizing the opening of saloons and sales of liquor in a city on Sunday, except certain hours, being violative of the state law, are void. *Fay v. State*, 44 App. 381, 71 S. W. 603; *Arroyo v. State* (Cr. App.) 69 S. W. 503.

Beaumont City Charter (Acts 29th Leg., Sp. Laws 1905, p. 435, c. 49, § 104), conferring on the city council the right to prescribe by ordinance in what part of the city saloons shall not be conducted, but providing that the city may not prohibit the business in the whole city, and an ordinance in pursuance thereof, specifying territory in which saloons shall not be allowed, and providing that the ordinance shall not affect liquor licenses from the federal, state, county, or municipal authorities then in force within the city limits, are not in conflict with the Baskin-McGregor act (Acts 30th Leg., Laws 1907, p. 260, c. 138, § 10), a general state law providing that one desiring a retail liquor dealer's license may petition therefor, stating the place where the business is to be conducted, and, if the place be in any block of any city where there are more bona fide residences than business houses, the petition shall be accompanied with the written consent of the majority of bona fide householders in the block, etc. *Andrews v. City of Beaumont*, 51 Civ. App. 625, 113 S. W. 614.

Where there is a conflict between the statute and an ordinance, the latter must yield, if either must be held invalid. *Mantel v. State*, 55 App. 456, 117 S. W. 855, 131 Am. St. Rep. 818; *Sue Lung v. State* (Cr. App.) 117 S. W. 857.

The city of Dallas may adopt ordinances to protect the public health, provided they conform to the state law. *Id.*

Houston City Charter of 1903 (Sp. Acts 1903, c. 20) § 12, authorizing the city to prohibit and punish keepers and inmates of bawdyhouses, and to segregate and regulate the same, does not authorize the city to establish a reservation for lewd women, and suspend the laws punishing prostitution, and the keeping of houses of prostitution therein, and the council may not license the crime. *McDonald v. Denton* (Civ. App.) 132 S. W. 823.

Under Const. 1876, art. 1, § 28, providing that no power of suspending laws shall be exercised except by the Legislature, Houston City Charter of 1903 (Sp. Acts

1903, c. 20) § 12, cannot authorize the city to set apart a portion of the city where lewd women may ply their vocation with immunity. *Id.*

A municipal ordinance making it unlawful for any person to rent any house to any lewd women outside of prescribed limits impliedly makes it lawful to rent houses to such persons within the prescribed limits, and is invalid as suspending the laws of the state punishing prostitution and the keeping of houses of prostitution. *Id.*

The Dallas ordinance prohibiting bawdyhouses except in a defined district is not void as conflicting with the Penal Code prohibition against keeping such houses; no penalty being prescribed nor license given. *Hatcher v. City of Dallas* (Civ. App.) 133 S. W. 914.

Dallas city ordinance regulating, colonizing, and segregating keepers and inmates of bawdyhouses is in violation of Pen. Code, art. 500, as amended by Laws 1907, c. 132, providing that any person who shall keep a disorderly house, shall be punished by fine, imprisonment, etc., and invalid, Const. art. 1, § 28, providing that no power to suspend laws shall be exercised except by the Legislature, so that the city had no authority to suspend article 500 within the specified district. *Brown Cracker & Candy Co. v. City of Dallas*, 104 Tex. 290, 137 S. W. 342, Ann. Cas. 1914B, 504.

A town ordinance forbidding pool halls to be open after 9 o'clock p. m. held in direct conflict with the state law. *Ex parte Farley* (Cr. App.) 144 S. W. 530.

Ordinance of city of Ft. Worth, making it unlawful for white person and negro to have sexual intercourse, each act constituting a separate offense, held not invalid, as conflicting with Pen. Code, art. 490, defining adultery, or article 494, defining fornication. *Strauss v. State* (Cr. App.) 173 S. W. 663.

8. — Taxation of subjects not taxed by state.—See *Hoefling v. San Antonio*, 85 Tex. 228, 20 S. W. 85, 16 L. R. A. 608; *Hirshfield v. City of Dallas*, 29 App. 242, 15 S. W. 124; *Ex parte Terrell*, 40 App. 28, 48 S. W. 504.

9. — Nature and extent of punishment imposed.—See *Ex parte Gregory*, 1 App. 753; *McNeil v. State*, 29 App. 48, 14 S. W. 393; *McLain v. State*, 31 App. 558, 21 S. W. 365.

Where a state law provides as a penalty for the obstruction of the streets of towns a fine not to exceed \$500, a town ordinance punishing the obstruction of its streets by fine not in excess of \$25 conflicts with the state law, and is void. *Ex parte Cross*, 44 App. 376, 71 S. W. 289.

A municipal ordinance punishing any person engaging in the bunco business by a penalty of not less than \$101 nor more than \$500, when construed as prohibiting gambling, is invalid, because in conflict with the Penal Code, punishing gambling, and prescribing a punishment of not less than \$10 nor more than \$25 for a violation thereof. *Clark v. State*, 46 App. 566, 81 S. W. 722.

Wherever the penalty in a municipal ordinance exceeds or is less than the penalty prescribed by the state law for the same offense, the ordinance is invalid. *Ex parte McHenry* (Cr. App.) 103 S. W. 390.

Rev. St. 1895, art. 419, empowers cities and towns to cause all able-bodied male inhabitants above 18 to work on the roads and to enforce the provision by ordinances. Rev. St. 1895, art. 4730a, amends the article by limiting the ages of persons liable to such work to from 21 to 45. Held, that the Legislature delegated full power to the cities and towns, and they might impose such penalties to enforce the labor of citizens as they saw fit, without reference to the state law as to working the roads, subject to limitation of punishment as fixed by their local courts, and hence an ordinance providing for a fine not exceeding \$25 was not invalid because imposing a penalty in excess of Pen. Code 1895, art. 491, providing a fine not to exceed \$10 in such cases. *Ex parte Drake*, 55 App. 235, 116 S. W. 49.

Dallas City Charter (Sp. Laws 1907, p. 580, c. 71) art. 2, § 3, subd. 37, and C. C. P. 1895, art. 965, prohibit ordinances fixing a less penalty for an offense than is fixed by statute for a like offense. The state pure food law makes violations of some of its provisions punishable by imprisonment, and others by a maximum fine of \$500. A Dallas city ordinance covers the state law and prescribes a punishment of not less than \$25 nor more than \$200 for violation of its provisions. Held, that the ordinance is invalid. *Mantel v. State*, 55 App. 456, 117 S. W. 855, 131 Am. St. Rep. 818; *Sue Lung v. Same* (Cr. App.) 117 S. W. 857.

A town ordinance prescribing a less punishment for an offense similar to one under the state law than that fixed by the state law is void. *Ex parte Farley* (Cr. App.) 144 S. W. 530.

Under C. C. P. art. 965, an ordinance denouncing an offense denounced by the general law must prescribe the same penalty, and is admissible in evidence in a prosecution of such violation. *Neuvar v. State*, 72 App. 410, 163 S. W. 58.

10. — Matters of procedure.—Art. 975, post, providing that offenses against the state shall be prosecuted in the name of the state does not preclude a municipal corporation from prosecuting in its own name an offense against its penal ordinances; article 986 providing that defendant shall not be discharged for any informality, etc. *Ex parte Boland*, 11 App. 159.

A portion of a city charter which purported to give exclusive jurisdiction to the city court of all violations of the Sunday law within the city limits between 12 p. m. Saturday and 9 a. m. Sunday and 4 p. m. Sunday and 12 p. m. Sunday, held void as attempting to destroy the jurisdiction of justice courts created by the constitution. *Ex parte Ginnochio*, 30 App. 584, 18 S. W. 32.

Under San Antonio city charter, which provides (section 103) that the city council shall have power to pass and repeal ordinances, rules, and police regulations, the city council had no authority to pass an ordinance empowering police officers to arrest, without warrant, any citizen who might be by them deemed suspicious, as art. 261, only authorizes such arrest 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." *Joske v. Irvine* (Civ. App.) 43 S. W. 278.

An act granting a municipal corporation authority to make an offense against the state also an offense against the city, with power to prosecute therefor in the city court, as contrary to ordinance, violates Const. art. 5, § 12, requiring all prosecutions of offenses against the state to be in the name of the state, and to conclude against its peace and dignity. *Ex parte Fagg*, 38 App. 573, 44 S. W. 294, 40 L. R. A. 212.

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. [Act 1897, p. 193.]

Constitutionality and repeal.—See notes under art. 963.

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.

See Willson's Cr. Forms, 985.

See ante, articles 259, et seq.

Constitutionality and repeal.—See notes under art. 963.

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.

See ante, arts. 265, et seq.

Constitutionality and repeal.—See notes under art. 963.

Art. 968a. [406] [362] Right of trial before jury.—Every person brought before the mayor or recorder, to be tried for an offense for which the penalty may be fine or imprisonment, or both, shall be entitled, if he shall demand it, to be tried by a jury of six legal voters of the city, who shall be summoned, impaneled and qualified as jurors in justices' courts under the laws of the state. [Act 1875, 2 S. S., p. 113, sec. 19.]

See *Burns v. La Grange*, 17 Tex. 415; *Smith v. San Antonio*, 17 Tex. 643.

Explanatory.—The above article was not included in the C. C. P. of 1911, and is carried into this compilation from the civil statutes to make a complete exposition in the criminal statutes of the provisions relating to mayors' and recorders' courts.

Art. 968b. Rules of pleading, practice and procedure.—All rules of pleading, practice and procedure now established for the county court shall apply in said corporation court in each such city, town or village, in so far as the same are applicable, except that the proceedings in said court shall be commenced by complaint in the manner and under the regulations, as now provided by law, in cases prosecuted before justices of the peace, and except that the recorder need not charge the jury except upon charges requested in writing by the defendant or his attorney; which such charges he shall have power

to give or refuse under the same rules and regulations now applicable to the granting or refusing of such charges by the county judge in criminal cases. Complaints before such court hereby created and established may be sworn to before the recorder, clerk of said court, the city secretary, the city attorney or his deputy, each and all of which officers, for that purpose, shall have power to administer oaths; or it may be sworn to before any other officer authorized by law to administer oaths; provided, that, in all cities, towns and villages in this state not operating under special charters, the rules of pleading, practice and procedure now established for justices courts shall apply to said corporation courts in such cities, towns and villages in so far as the same are applicable. [Act 1899, p. 42, sec. 6.]

Explanatory.—In *Blessing v. City of Galveston* (1875) 42 Tex. 641, it was held that under the constitution, the legislature had power to create municipal judicial tribunals to enforce the police powers delegated to the municipal body. In 1877, the Supreme Court, in *Ex parte Towles*, 48 Tex. 413, held that the jurisdiction of the various courts named in the constitution was fixed by that document, and the legislature had no power to alter that jurisdiction by the creation of a special tribunal, the powers conferred on which would intrench on the constitutional authority of one of the regularly created courts. The *Towles* decision was followed in 1884 by the decision in *Gibson v. Templeton*, 62 Tex. 555. In *Ex parte Ginnocchio* (1891) 30 App. 534, 18 S. W. 82, the Court of Appeals held that a special statute creating a court with exclusive jurisdiction over violations of the Sunday Laws in the City of Ft. Worth was unconstitutional in so far as it excluded the jurisdiction of justices of the peace over the same subject. In *Leach v. State* (1896) 36 App. 248, 36 S. W. 471, the Court of Criminal Appeals held that the legislature is without power to create a municipal court with jurisdiction concurrent with the constitutional state courts over violations of state laws. The decision in the *Leach* case, *supra*, was overruled by the Supreme Court in *Harris County v. Stewart* (1897) 91 Tex. 133, 41 S. W. 650, and it was held that, under the power conferred by Const. art. 5, § 1, to "establish such other courts as it (the legislature) may deem necessary" and to "prescribe the jurisdiction and organization thereof," the legislature was authorized to confer on a city recorder's court jurisdiction to try offenses against the general penal laws of the state. In the following year (1898) the Court of Criminal Appeals in *Ex parte Fagg*, 38 App. 573, 44 S. W. 294, 40 L. R. A. 212, and *Ex parte Coombs*, 38 App. 648, 44 S. W. 854, adhered to its decision in the *Leach* case, *supra*, and held that the legislature was without constitutional authority to create a corporation court with jurisdiction exclusive of or concurrent with the regular state courts to try violations of the penal laws. But in 1900 the Court of Criminal Appeals overruled its decisions in the *Leach* and *Coombs* cases, and in *Ex parte Wilbarger*, 41 App. 514, 55 S. W. 968, held that the act of the 26th Legislature creating the Corporation Court, was not violative of Const. art. 5, § 1, in that it infringed the jurisdiction of the state courts, or of Const. art. 5, § 18, limiting the number of justices in each county, and that such act was not invalid, as conferring both state and municipal jurisdiction on the same court. In *Ex parte Hart*, 41 App. 581, 56 S. W. 341; *Ex parte Freedman*, 47 App. 487, 83 S. W. 1125; *Ex parte Abrams*, 56 App. 465, 120 S. W. 883, 18 Ann. Cas. 45; *Ex parte Hubbard*, 63 App. 516, 140 S. W. 451, the Court of Criminal Appeals followed its decision in the *Wilbarger* case, and in *State ex rel. Bergeron v. Travis County Court* (Cr. App.) 174 S. W. 365, it held that articles 963, 964 and 965 of the Code of Criminal Procedure of 1911, were valid enactments. There seems no good reason why the Corporation Court Act should not be incorporated into the Criminal statutes, the jurisdiction of the court being entirely criminal, and the act creating it being a qualification of, or co-ordinate provision with, articles 108, 963-965, C. C. P. In view of the situation the act is inserted in this compilation as arts. 109a-109g, 920a, 968b-968j, 1177a.

City attorney—Authority to administer oaths.—The authority of a city attorney to administer oaths is limited to swearing affiants to complaints in corporation courts. *Johnson v. State*, 47 App. 530, 85 S. W. 274.

Where a city was operating under the general act applying to cities of its class, and its city court was not operating under the corporation court act (Acts 26th Leg. p. 40), authorizing city attorneys to take affidavits in criminal cases, the city attorney could not take the affidavit and swear the complainant in a prosecution for violating the local option law. *Kirksey v. State*, 53 App. 188, 125 S. W. 15.

Art. 968c. Complaint, how commenced and concluded; prosecution conducted by city attorney or deputy; county attorney may also represent state; but no fees; process.—In all prosecutions in said court, whether under an ordinance or under the provisions of the Penal Code, the complaint shall commence in the name of the state of Texas, and shall conclude, "against the peace and dignity of the state;" and, where the offense is covered by an ordinance, the complaint may also conclude, as "contrary to the said ordinance;" and all prosecutions in such court shall be conducted by the city attorney of such city, town or village, or by his deputy; but the county

attorney of the county in which said city, town or village is situated may, if he so desires, also represent the state of Texas in such prosecutions, but, in all such cases, the said county attorney shall not be entitled to receive any fees or other compensation whatever for said services, and in no case shall the said county attorney have the power to dismiss any prosecution pending in said court, unless for reasons filed and approved by the recorder of said court. [Id. sec. 8.]

See note under art. 968b.

County attorney.—The county attorney has the exclusive right to appear in person or by deputy, and represent the state in all cases pending in a corporation court to which the state is a party, but he is entitled to no fees for so doing. *Howth v. Greer*, 40 Civ. App. 552, 90 S. W. 212, 213.

— **Constitutionality of provision of this article as to compensation of county attorney.**—See *Ex parte Wilbarger*, 41 App. 514, 55 S. W. 968, 971.

City attorney—Compensation.—Under a resolution of a city council, a city attorney held entitled to a pro rata share in commissions due city attorney on judgments collected by the city in suits brought by him, but not decided when he went out of office. *City of Houston v. Stewart*, 40 Civ. App. 499, 90 S. W. 49.

Under a resolution of a city council, a city attorney held entitled to commissions on taxes paid the city after he went out of office on judgments obtained by him. *Id.*

Under a resolution of a city council, giving city attorney a commission on sums collected by him by suit to enforce collection of taxes, the city held liable for arbitrarily releasing a portion of the judgment, or purchasing any of the property in satisfaction thereof. *Id.*

A city held to have had authority to give certain compensation for the collection of taxes by the city attorney. *Id.*

— **Representing state.**—Under charter requiring city attorney to represent the state in the recorder's court on request, in prosecutions for violations of Penal Code, held, that city attorney was entitled to such fees as would be payable to district or county attorney. *Harris County v. Stewart*, 91 Tex. 133, 41 S. W. 650.

When acting as justice of the peace, held, that city recorder could appoint city attorney to represent the state in prosecutions only when district or county attorney failed to attend. *Id.*

A city attorney is not entitled to fees for prosecuting criminals in the recorder's court in a county that has a county attorney. *Harris County v. Stewart*, 17 Civ. App. 1, 43 S. W. 52.

— **Increase of salary during term of office.**—See notes under art. 7086, *Vernon's Sayles' Civ. St.* 1914.

Art. 968d. Council to prescribe rules for collecting fees and costs, practice, etc.; rules in meantime.—The council or board of aldermen of each such city, town or village shall, from time to time, by ordinance, prescribe such rules, not inconsistent with the provisions of this chapter nor other laws of this state, as in the discretion of the council or board of aldermen may be proper to enforce, by execution against the property of the defendant, or imprisonment of the defendant, the collection of all costs and fines imposed by such court as herein created and established, and shall also have power to adopt such rules and regulations concerning the practice and procedure in such court as said council or board of aldermen may deem proper, not inconsistent with the provisions of this chapter nor other law of this state; and, until the passage of such ordinance, all rules and regulations of such city, town or village now in force concerning the municipal courts therein, and the enforcement of collection of fines and costs imposed by such court, shall be applicable to the court hereby created and established. [Id. sec. 9.]

See note under art. 968b.

Art. 968e. Fines and costs paid into city treasury, etc.—All costs and fines imposed by the said court in any city, town or village, in any prosecution therein, shall be paid into the city treasury of said city, town or village, for the use and benefit of the city, town or village. [Id. sec. 10.]

Constitutionality.—See *Ex parte Wilbarger*, 41 App. 514, 55 S. W. 968, 971.

Art. 968f. Jury and witness fees, and enforcing attendance of witnesses according to Code of Criminal Procedure.—The provisions of the Code of Criminal Procedure now in force regulating the amount and collection of jury and witness fees, and for enforcing

the attendance of witnesses in criminal cases tried before a justice of the peace, shall, so far as applicable, govern and be applicable to the trial of cases before the corporation court herein created and established. [Id. sec. 12.]

Art. 968g. Judge may punish for contempt as county judge; may take recognizances, admit to bail, etc., under rules in county court.—The judge of said corporation court shall have the power to punish for contempt to the same extent and under the same circumstances as the county judge may punish for contempt of the county court. He shall have power to take recognizances, admit to bail, and forfeit recognizances and bail bonds under such rules and regulations as now govern the taking and forfeiture of the same in the county court. [Id. sec. 13.]

May punish for contempt.—Under this article and art. 968b, construed with art. 1770, Vernon's Sayles' Civ. St. 1914, giving a county court power to punish, as stated, one guilty of contempt, a corporation court established under this act had the same power to punish for contempt as a county court. *Ex parte Hubbard*, 63 App. 516, 140 S. W. 451.

Art. 968h. Process, how served; defendant entitled to notice of complaint, if demanded.—All process issuing out of said corporation court shall be served by the chief of police or any policeman or marshal of the city, town or village within which it is situated, under the same rules and regulations as are now provided by law for the service by sheriffs and constables of process issuing out of the county court, so far as the same are applicable. But each defendant shall be entitled to at least one day's notice of any complaint against him, if such time be demanded. [Id. sec. 14.]

¹See note under art. 968b.

Art. 968i. [552] [481] Proceedings when a peace bond, etc., given before mayor, etc., has been forfeited.—Whenever any person has been required by the mayor or recorder to give a peace bond, or a bond for good behavior, or any similar bond under this title, and has complied with such orders, and been guilty of a violation or infraction of such bond, and the same is proved or established to the satisfaction of that officer in any trial or complaint, such party so offending may be fined in the sum of two hundred dollars and imprisoned for two months; and the city in its corporate name may sue in any court having jurisdiction for the recovery of the penalty of such bond. [Act 1875, p. 256, § 133. R. S. 1879, 481.]

¹See note under art. 968b.

Art. 968j. Fees of recorder, etc., how prescribed; paid out of city treasury; fines and costs collected and disposed of, how; committals; city liable to officers of appellate court, when; court to be always open.—Unless provided by special charter, the council or board of aldermen of each city, town or village shall, by ordinance, prescribe the compensation and fees which shall be paid to the recorder, city attorney, city secretary and other officers of said court, which compensation and fees shall be paid out of the treasury of the said city, town or village. In all such cases, the fines imposed on appeal, together with the costs imposed in the corporation court, and the court to which the appeal is taken, shall be collected of the defendant and his bondsmen, and such fine and the costs of the corporation court shall, when collected, be paid into the treasury of the city, town or village. When the defendant in such cases is committed to custody, he shall be committed to the custody of the chief of police or city marshal of such city, town or village, to be held by him in accordance with the ordinance of such city, town or village, providing for the custody of prisoners convicted before such corporation court; and said city, town or village shall be liable to the officers of the court to which the appeal is taken for the costs due

them when such defendant has fully discharged such fine and costs. Such corporation court shall hold no terms, and shall be at all times open for the transaction of business. [Act 1899, p. 43, sec. 15.]

See note under art. 968b.

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.]

See Willson's Cr. Forms, 1043, 1044.

See, also, post, art. 992. See, also, notes under art. 963, ante.

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.

See Willson's Cr. Forms, 1044.

See Ex parte Ambrose, 32 App. 468, 24 S. W. 291. And see notes under art. 963, ante.

CHAPTER TWO

OF THE ARREST OF THE DEFENDANT

Art.	Art.
971. Warrant may issue without complaint, when.	977. Witnesses may be fined, etc., for refusing to make statements, etc.
972. When complaint is made, shall be reduced to writing, etc.	978. How warrant is executed.
973. What the complaint must state	979. Any person may be authorized to execute warrant.
974. Warrant shall issue, when.	980. Where an offense has been committed in another county, etc.
975. Requisites of warrant of arrest.	
976. Justices may summon witnesses to disclose crime, etc.	

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.]

See Willson's Cr. Forms, 1029.

Arrest in other than summary proceedings.—See articles 260, 265 and 267, ante. Cited, Harris County v. Stewart, 91 Tex. 133, 41 S. W. 650.

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.]

Complaint in other than summary proceedings.—See notes under arts. 34 and 269 et seq., ante.

Necessity of complaint.—Harris County v. Stewart, 91 Tex. 133, 41 S. W. 650.

Prosecution by complaint alone.—Prosecutions for a felony must be upon indictment found by the grand jury, prosecutions for misdemeanors upon an information founded upon a complaint when brought in the county court, but under this article in prosecutions in justice court, only a complaint was required, and hence a complaint sworn to before the county attorney, without any information filed was sufficient therein. Ex parte Nitsche (Cr. App.) 170 S. W. 1101.

Jurat.—An information must be supported by a valid complaint. The jurat to the complaint must be signed by the officer officially. Scott v. State, 9 App. 434; Robertson v. State, 25 App. 529, 8 S. W. 659; Neiman v. State, 29 App. 360, 16 S. W. 253.

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.]

See Willson's Cr. Forms, 1030.

Complaint in other than summary proceedings.—See notes under arts. 34 and 269 et seq., ante.

Requisites of complaint.—Cited, Harris County v. Stewart, 91 Tex. 133, 41 S. W. 650; Mistrot v. State, 72 App. 408, 162 S. W. 833.

Neither the constitutional beginning nor conclusion is essential to a complaint. Ex parte Jackson, 50 App. 324, 95 S. W. 1047.

It is unnecessary to name the person swearing to a criminal complaint in the body of the complaint, and hence the complaint was not defective because the name in the body of the complaint and that signed thereto was not the same. Dunn v. State, 71 App. 89, 158 S. W. 300.

The complaint does not fail to charge an offense because using "wilful" where the statute uses "knowingly"; the words being synonymous and "wilful" being of more extensive meaning (citing Words and Phrases, vol. 8, pp. 7468-7481, 7835, 7836; vol. 5, pp. 3937, 3939). Ex parte Cowden (Cr. App.) 168 S. W. 539.

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.]

See Willson's Cr. Forms, 1031.

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.]

See Willson's Cr. Forms, 1029, 1031.

Warrant in other than summary proceedings.—See ante, arts. 265, 266 and notes. Cited, *Sullivan v. State* (Cr. App.) 148 S. W. 1091.

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.]

Power and duty of justice.—Where a justice of the peace knows of his own knowledge, or under circumstances of a particular case has cause to believe, that an offense has been or is about to be committed against the laws of the State, he has no authority to directly require the offender's arrest, but is authorized to summon witnesses, and he can become a witness himself. Under such circumstances it is the duty of the justice of the peace to institute proceedings against the offender, and cause witnesses to come before him, and if it develops that the suspected person is probably guilty it is his duty to have him arrested and tried. If he fails to do this, the failure is a dereliction of duty, and if in consideration of his failure he accepts a bribe he is guilty of an offense without regard to the actual guilt of the person who has been arrested and tried. *Morawietz v. State*, 46 App. 436, 80 S. W. 998.

Inspection of testimony.—Where the proceedings are authorized by law, whether at an inquest, or to discover the murderer, the testimony of the witnesses taken down is a public document, and a defendant has the right on proper motion to inspect and use it if he deems it necessary. *Jenkins v. State*, 45 App. 173, 75 S. W. 312.

The right of inspection as authorized under this article and art. 977, post, does not extend to confessions of an accused made before the grand jury, and in possession of state's counsel. *Goode v. State*, 57 App. 220, 123 S. W. 597.

Error, if any, in refusing to compel the state's counsel to deliver to accused such confessions for inspection, it not appearing that either she or her counsel were ignorant of their nature, was cured where they were in fact turned over to counsel for their examination. *Goode v. State*, 57 App. 220, 123 S. W. 597.

Allegation of indictment.—The indictment should not allege the tribunal before which the perjury (in this case) was committed as a "justice of the peace sitting as a court of inquiry" but as follows: "Said justice having good cause to believe that an offense against the laws of the State had been committed in Fisher county, to wit, theft of certain cotton, etc., and having jurisdiction to examine into the same caused said W. F. Morris to come before him as a witness," etc. The court might in common parlance be termed a court of inquiry to disclose crime, but the statute does not so term it, and it is always best to follow the terms of the statute. *Morris v. State*, 47 App. 420, 83 S. W. 1127.

Territorial jurisdiction.—Cited, *Barnes v. State* (Cr. App.) 152 S. W. 1043.

One justice of the peace cannot go into another justice's precinct where there is a resident qualified justice of the peace and institute or hold a court of inquiry under this article. But he can go as a magistrate to hold an examining trial. *Brown v. State*, 55 App. 572, 118 S. W. 142, 143.

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.]

Confession as public record.—See notes under article 976, ante.

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.]

See Willson's Cr. Forms, 1035.

Confession as public record.—See notes under article 976, ante.

Execution of warrant in general.—See articles 280 and 318, ante.

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.]

See Willson's Cr. Forms, 958, 1031.

Execution of warrant in general.—See article 278, ante.

Officer entitled to carry pistol.—When one has been duly appointed and is acting under this article he has the rights and privileges of a peace officer and is entitled to carry his pistol. *Jenkins v. State*, 47 App. 224, 82 S. W. 1036.

Extent and termination of authority.—*O'Neal v. State*, 32 App. 42, 22 S. W. 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.]

See Willson's Cr. Forms, 958, 1034.

Complaint in general.—See article 281, ante.

Warrant to whom directed.—A warrant issued by a justice must be directed to an officer of his own county. *Toliver v. State*, 32 App. 444, 24 S. W. 286.

CHAPTER THREE

OF THE TRIAL AND ITS INCIDENTS

Art.		Art.	
981.	Justice shall try cause without delay.	998.	Jury to be kept together till they agree.
982.	Defendant may waive trial by jury.	999.	If the jury fail to agree, shall be discharged.
983.	Jury shall be summoned if defendant does not waive same.	1000.	When court adjourns the defendant shall enter into bail.
984.	Juror may be fined, etc.	1001.	When the jury have agreed upon a verdict.
985.	Complaint, etc., shall be read to defendant.	1002.	Justice shall enter verdict.
986.	Defendant shall not be discharged by reason of informality, etc.	1003.	Defendant placed in jail, when.
987.	Challenge of jurors.	1004.	New trial may be granted defendant.
988.	Other jurors summoned, when.	1005.	Application must be made in one day.
989.	Oath to be administered to jury.	1006.	When new trial is granted, another trial without delay.
990.	Defendant shall plead, etc.	1007.	Only one new trial shall be granted.
991.	The only special plea.	1008.	State not entitled to new trial.
992.	Pleadings are oral.	1009.	Notice of appeal [Superseded].
993.	Proceedings upon plea of guilty.	1010.	Effect of appeal.
994.	When defendant refuses to plead, etc.	1011.	Judgments, etc., shall be in open court.
995.	Witnesses examined, by whom.		
996.	Defendant may appear by counsel; argument of counsel.		
997.	Rules of evidence.		

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.]

See article 109, ante.

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.

See Willson's Cr. Forms, 1039, 1041.

Right to jury trial.—See articles 10 and 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.]

See Willson's Cr. Forms, 1037.

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.]

See Willson's Cr. Forms, 1039, 1040.

Information not necessary.—See *Ex parte Nitsche* (Cr. App.) 170 S. W. 1101.

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 challenges 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.]

See Willson's Cr. Forms, 953, 1033.

Oath as affecting perjury.—On a trial for perjury wherein it was insisted that the offense had not been committed, because the jury had not been sworn in the case on trial before the justice of the peace, on which trial it was alleged the accused had committed the perjury charged, held the correct rule is, that if the court has jurisdiction of the subject-matter of the suit, and the oath is required by law, irregularities in the proceedings will not prevent perjury. *Smith v. State*, 31 App. 315, 20 S. W. 707.

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.]

See Willson's Cr. Forms, 1036.

Plea by constable.—A constable cannot in the absence of the defendant in a misdemeanor case make a plea of guilty for him. *Ex parte Jones*, 46 App. 433, 80 S. W. 996.

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.]

See Willson's Cr. Forms, 1036; ante, art. 572.

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.]

See Willson's Cr. Forms, 1036.

Duty to keep docket, see 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.]

See Willson's Cr. Forms, 1036, 1041; ante, art. 566.

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.]

See Willson's Cr. Forms, 993, 1036.

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.]

See Willson's Cr. Forms, 993.

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.]

See Willson's Cr. Forms, 993.

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.]

See Willson's Cr. Forms, 993.

See, 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 au-

thorized 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.

Time for granting new trial.—When a justice grants a new trial more than ten days after judgment, a judgment on second trial is void. *Odle v. Davis* (Civ. App.) 35 S. W. 721.

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.

See article 836, ante.

Art. 1009. [974] Notice of appeal. [Superseded by Act 1899, p. 233; art. 922, ante.]

See Willson's Cr. Forms, 1022, 1043.

See notes under arts. 915, 921 and 922, ante.

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.

See article 916 and notes.

Explanatory.—The provision of the above article as to notice of appeal is superseded by Act 1899, p. 233 (art. 922, ante).

Jurisdiction of county court.—If the justice's court has no jurisdiction of the case, an appeal confers none upon the county court. *Billingsly v. State*, 3 App. 686.

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.]

Public trial.—See articles 4 and 23, ante.

Entry of judgment.—Judgment not entered until 9 days after its announcement is not void under this article. *Ex parte Quong Lee*, 34 App. 511, 31 S. W. 391.

CHAPTER FOUR

THE JUDGMENT AND EXECUTION

Art. 1012. The judgment.	Art. 1015. Defendant may be discharged from jail, how.
1013. Capias for defendant, when.	1016. Peace officer bound to execute process.
1014. Execution shall issue.	

Article 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.]

See Willson's Cr. Forms, 1039-1042.

Requisites.—A judgment of justice court, which shows that guilt of defendant is ascertained, the amount of his fine determined and it is adjudged that he be committed to the county jail until the fine and costs were paid in full is essentially a final judgment in a justice court. *Funderburk v. State* (Cr. App.) 64 S. W. 1060.

File marks.—It is no objection to the admissibility in evidence of the file papers and judgment of a justice court that the justice's file mark did not show of what precinct he was justice. *Smith v. State*, 31 App. 315, 20 S. W. 707.

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.

See ante, art. 867 and notes.

Warrant to be executed in another county is void.—*Toliver v. State*, 32 App. 444, 24 S. W. 286.

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.

See 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.]

See ante, arts. 43, 44, 47; Pen. Code, arts. 326, 327.

TITLE 12

MISCELLANEOUS PROCEEDINGS

Chap.		Chap.	
1.	Of inquiry as to the insanity of the defendant after conviction.	4.	Of remitting fines and forfeitures, reprieves, commutations of punishment and pardons.
2.	Disposition of stolen property.		
3.	Reports of officers charged by law with the collection of money.		

CHAPTER ONE

OF INQUIRIES AS TO THE INSANITY OF THE DEFENDANT AFTER CONVICTION

Art.		Art.	
1017.	Insanity after conviction.	1024.	Court shall commit insane defendant, etc.
1018.	Information as to insanity of defendant.	1025.	Shall be confined in lunatic asylum until, etc.
1019.	Courts shall impanel jury.	1026.	When the defendant becomes sane.
1020.	Defendant's counsel may open and conclude.	1027.	Affidavit of sanity of defendant.
1021.	Court shall appoint counsel, when.	1028.	Proceedings upon affidavit.
1022.	No special formality required on trial.	1029.	When defendant is again found to be insane.
1023.	When defendant is found insane, further proceedings suspended, until, etc.	1030.	Conviction shall be enforced, when.

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.]

See Willson's Cr. Forms, 929, 958, 978, 979.
See *Holland v. State*, 52 App. 160, 105 S. W. 812.

Construction of chapter.—This chapter relates to insanity "after" conviction. *Guagando v. State*, 41 Tex. 626.

Insanity before conviction.—See Pen. Code, art. 39.

Refusal of inquiry.—Under this and the following article, it was not reversible error to refuse an inquiry on affidavit made one month after the trial stating that accused "is" insane, where an issue as to his sanity was tried in the main case. *Springer v. State*, 63 App. 266, 140 S. W. 99.

Insanity as preventing sentence.—See ante, art. 861, subd. 2.

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.]

See Willson's Cr. Forms, 929, 979.
See *Holland v. State*, 52 App. 160, 105 S. W. 812.
Cited, *Guagando v. State*, 41 Tex. 626.

Refusal of inquiry.—Under this and the preceding article, it was not reversible error to refuse an inquiry on affidavit made one month after the trial stating that accused "is" insane, where an issue as to his sanity was tried in the main case. *Springer v. State*, 63 App. 266, 140 S. W. 99.

Art. 1019. [984] 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.]

See Willson's Cr. Forms, 929, 979.
See ante, art. 861, subd. 2.

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.]

See Willson's Cr. Forms, 929.

Trial on issue of insanity before conviction.—*Shirley v. State*, 37 App. 475, 36 S. W. 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.]

See Willson's Cr. Forms, 929, 979.

Art. 1022. [987] No special formality required on trial.—No special formality is necessary in conducting the proceedings authorized by this chapter. The court shall see that the inquiry is conducted in such a manner as to lead to a satisfactory conclusion. [O. C. 784.]

See Willson's Cr. Forms, 929.

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.]

See Willson's Cr. Forms, 929, 980.

Judgment.—If after conviction defendant is tried upon the issue of sanity *vel non*, an appeal cannot be taken from the judgment based upon the verdict. If defendant is found to be sane the judgment of guilty will be enforced. If insane he will be adjudged a lunatic and confined as the law requires. *Holland v. State*, 52 App. 160, 105 S. W. 813.

Restraint pending trial.—Under art. 39, providing that no person becoming insane after committing an offense shall be tried while insane, and this and the next two articles providing one found to have become insane after indictment and before trial may be restrained in an insane asylum, as authorized by *Vernon's Sayles' Civ. St.* 1914, art. 120, until he becomes sane, and he must be returned for trial to the custody of the court having jurisdiction, and he may not be released on bail in the meantime, though the offense charged is bailable. *Wilson v. State* (Cr. App.) 149 S. W. 117.

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.]

See Willson's Cr. Forms, 929, 980.

Restraint pending trial.—See notes under art. 1023, ante.

Art. 1025. [990] Shall be confined in lunatic asylum until, etc.—When a defendant 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.

See Willson's Cr. Forms, 929.

Restraint pending trial.—See note under art. 1023, ante.

Art. 1026. [991] When the defendant becomes sane.—Should the defendant 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.

See Willson's Cr. Forms, 929.

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.

See Willson's Cr. Forms, 929.

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.

See Willson's Cr. Forms, 929.

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.

See Willson's Cr. Forms, 929.

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.]

See Willson's Cr. Forms, 929, 979.

Appealability of judgment.—The effect of this article is to make the judgment of the trial court, adjudging the defendant to be sane conclusive and not appealable. *Darnell v. State*, 24 App. 6, 5 S. W. 522.

CHAPTER TWO

DISPOSITION OF STOLEN PROPERTY

Art.		Art.	
1031.	Subject to order of proper court.	1039.	Owner may recover proceeds of property sold, or money, etc.
1032.	Restored on trial for theft to proper owner.	1040.	When the property is a written instrument.
1033.	Schedule to be filed by officer.	1041.	Proceedings to recover written instrument.
1034.	May be restored to owner, etc., when.	1042.	Claimant shall pay charges on property.
1035.	When delivered, bond may be required.	1043.	Charges of officer where property is sold.
1036.	Requisites of the bond, etc.	1044.	This chapter applies to what cases.
1037.	Property shall be sold, when and how.		
1038.	Money, how disposed of.		

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.]

Duty of officer.—It is the duty of an officer after taking charge of property, which has been stolen, to hold it subject to the order of the magistrate at the examining trial, or of the court trying the accused on the charge of the theft. *Murray v. Lyons* (Civ. App.) 95 S. W. 621, 622.

Search warrants.—See ante, arts. 355, 383.

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.]

See Willson's Cr. Forms, 1116.

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.]

Search warrant.—See 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.]

See Willson's Cr. Forms, 1117.

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.]

See Willson's Cr. Forms, 1118, 1119.

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.

See Willson's Cr. Forms, 1119.

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

<p>Art. 1045. Reports of moneys collected.</p>	<p>Art. 1049. Report to embrace all moneys except taxes.</p>
<p>1046. What the report shall state.</p>	<p>1050. Money collected shall be paid to county treasurer.</p>
<p>1047. Report of moneys collected for county.</p>	
<p>1048. What officers shall make report.</p>	

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.]

See Willson's Cr. Forms, 1130, 1131.

See Pen. Code, art. 395; McLennan County v. Boggess, 104 Tex. 311, 137 S. W. 346.

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.]

See Willson's Cr. Forms, 1130, 1131, 1132.

See McLennan County v. Boggess, 104 Tex. 311, 137 S. W. 346.

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.]

See Willson's Cr. Forms, 195.

See Pen. Code, art. 396; McLennan County v. Boggess, 104 Tex. 311, 137 S. W. 346.

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.]

See Willson's Cr. Forms, 195, 1130, 1131.

See Pen. Code, arts. 395, 396, 397; McLennan County v. Boggess, 104 Tex. 311, 137 S. W. 346.

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.]

See Willson's Cr. Forms, 1130, 1131.

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.]

CHAPTER FOUR

OF REMITTING FINES AND FORFEITURES, AND OF RE- PRIEVES, COMMUTATIONS OF PUNISHMENT AND PARDONS

Art.	Art.
1051. Governor may remit fines, etc.	1057g. Commissioners may authorize release on parole, when.
1052. May remit forfeitures.	1057h. Warrant for retaking of prisoner.
1053. Shall file reasons for his action in office of secretary of state.	1057i. Warrant, how executed; fees.
1054. May pardon treason, when.	1057j. Board to be notified of warrant; prisoner declared delinquent, when; imprisonment.
1055. May commute penalty of death, etc.	1057k. Absolute discharge, when.
1056. May delay execution of death penalty.	1057l. Power of pardon or commutation not impaired.
1057. Governor's acts shall be under the great seal of the state, etc.	1057m. Commissioners to appoint agent or inspector; duties.
1057a. Convicts paroled, when.	1057n. Parole of prisoners serving under indeterminate sentence; continuance of supervision.
1057b. Paroled prisoners to remain under control of board of prison commissioners; retaking; warrants.	1057o. Restoration of citizenship.
1057c. Meetings of commissioners; prisoner may apply for parole or discharge, when.	1057p. Application of art. 6217, Rev. Civ. St., to prisoners not paroled under this act.
1057d. Record of prisoner; transfer to other place of confinement; copy.	1057q. Laws repealed.
1057e. Report by wardens as to prisoners entitled to parole.	1057r. Governor shall appoint.
1057f. Action of prison commissioners on reports of wardens.	1057s. Shall keep record.
	1057t. Shall examine applications for pardons, etc.

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.]

See Const. art. 4, § 11 (Vernon's Sayles' Civ. St. 1914, vol. 1, p. xxxiv).

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| 1. Remission of forfeiture. | 7. ——— Conditional pardon. |
| 2. Remission of costs. | 8. ——— Revocation. |
| 3. Remission of penalty. | 9. ——— Operation and effect. |
| 4. Pardon. | 10. ——— Affecting competency as witness. |
| 5. ——— Suspension of sentence. | 11. "Conviction." |
| 6. ——— Filing in court of appeals. | |

1. **Remission of forfeiture.**—The governor may remit a forfeiture at any time before final judgment and a general remission includes the commissions of the prosecuting attorney. *State v. Dyches*, 28 Tex. 535.

2. **Remission of costs.**—Costs cannot be remitted without consent of the parties to whom the same are due. *Luckey v. State*, 14 Tex. 400. See, also, *Ex parte Mann*, 39 App. 491, 46 S. W. 828, 73 Am. St. Rep. 961.

3. **Remission of penalty.**—The court has no authority to remit a penalty. *Luckey v. State*, 14 Tex. 400.

4. **Pardon.**—There can be a pardon only after conviction. *Camron v. State*, 32 App. 180, 22 S. W. 682, 40 Am. St. Rep. 763.

Governor has no power to pardon person committed for contempt, since a proceeding for contempt is not a "criminal case," within constitution. *Taylor v. Goodrich*, 25 Civ. App. 109, 40 S. W. 515.

A pardon reciting that it is granted because the convict's testimony is needed in a criminal case is not invalid. *Locklin v. State* (Cr. App.) 75 S. W. 305.

A pardon restoring the convict to rights of citizenship may be granted after the expiration of his term of service. *Locklin v. State* (Cr. App.) 75 S. W. 305.

The validity of a pardon restoring a convict to rights of citizenship is not affected by a recital of the grant of a previous pardon. *Id.*

A "pardon" is a remission of guilt or an act of grace proceeding from the power intrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed, and that power, under our Constitution, may be exercised by the President of the United States and the Governors of the several states. *Ex parte Rice*, 72 App. 587, 162 S. W. 891.

5. ——— **Suspension of sentence.**—See art. 865b, and notes. And see *Snodgrass v. State* (Cr. App.) 150 S. W. 178.

6. ——— **Filing in court of appeals.**—A pardon obtained after affirmance of judgment on appeal and before mandate issues may be filed in the court of appeals, and on application the judgment will be made to conform to it. *Chambless v. State*, 20 Tex. 197; *Smith v. State*, 26 App. 49, 9 S. W. 274.

7. ——— **Conditional pardon.**—See *Snodgrass v. State* (Cr. App.) 150 S. W. 178. Condition permitting revocation of pardon held void. *Taylor v. State*, 41 App. 148, 51 S. W. 1106.

The power to grant absolute pardons carries with it the power to grant conditional pardons and to make the pardon contingent upon any conditions, so long as they are not illegal, that the pardoning power desires to impose. *Ex parte Rice*, 72 App. 587, 162 S. W. 891.

8. ——— **Revocation.**—The power to grant pardons does not carry with it the right to revoke them, and an unconditional pardon, once accepted and acted upon, is irrevocable unless it was procured by fraud. *Ex parte Rice*, 72 App. 587, 162 S. W. 891. See, also, *Rosson v. State*, 23 App. 287, 4 S. W. 897; *Ex parte Rosson*, 24 App. 226, 5 S. W. 666.

A pardon once granted will not be revoked merely upon allegations that it was secured by fraud, but the fraud must be judicially ascertained. *Ex parte Rice*, 72 App. 587, 162 S. W. 891.

A conditional pardon is as absolute an act upon the conditions named as an unconditional pardon, and when granted cannot be revoked by the pardoning power except for a violation of the conditions; and hence the Governor cannot revoke a conditional pardon because after-discovered evidence leads him to believe that clemency was ill-advised. *Ex parte Rice*, 72 App. 587, 162 S. W. 891.

9. ——— **Operation and effect.**—A pardon held not to operate as a release of the payment of costs adjudged against a misdemeanor. *Ex parte Mann*, 39 App. 491, 46 S. W. 828, 73 Am. St. Rep. 961.

A pardon of one who had been convicted in two cases held to be only in one of them, so that he was incompetent as a witness. *Miller v. State*, 46 App. 59, 79 S. W. 567, 3 Ann. Cas. 645.

A pardon of one convicted of burglary, which grants to the convict a full pardon and restores him to full citizenship to take effect at the expiration of the term of imprisonment, is a full pardon taking effect on the termination of the sentence. *Holmes v. State*, 70 App. 423, 157 S. W. 487.

10. ——— **Affecting competency as witness.**—See art. 788, subd. 3, and notes.

11. **"Conviction."**—Cited, *Rivers v. State*, 10 App. 177; *Carr v. State*, 19 App. 635, 53 Am. Rep. 395; *Hunnicut v. State*, 20 App. 632; *Easterwood v. State*, 34 App. 400, 31 S. W. 294.

The word "conviction," in Const. art. 4, § 11, which provides that in all criminal cases, except treason and impeachment, the Governor shall have power after "conviction" to grant reprieves, commutations of punishment, and pardons, etc., means simply the determination of guilt by the jury, and does not embrace the sentence, so that a person becomes subject to pardon whenever that issue is finally determined, and a court has no inherent authority by postponement of sentence to

relieve a person legally convicted of crime of the punishment fixed by law, and Acts 32d Leg. c. 44, C. C. P. art. 865B, which confers on the district courts the power to relieve from the effect of conviction in certain crimes, is not constitutional as within that power. *Snodgrass v. State* (Cr. App.) 150 S. W. 162.

Art. 1052. [1017] May remit forfeitures.—The governor shall have power to remit forfeitures of recognizances and bail bonds. [Id.]

See notes under art. 1051.

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.

Art. 1057a. Convicts paroled, when.—Meritorious prisoners who are now or may hereafter be in prison under a sentence to penal servitude may be allowed to go upon parole, outside of the building and jurisdiction of the penitentiary authorities subject to the provisions of this act, and to such regulations and conditions as may be made by the board of prison commissioners, with the approval of the governor of this state, and such parole shall be made only by the governor, or with his approval. [Article 6089, Rev. St. 1911; Act 1911, p. 64, sec. 1; Act 1913, S. S., p. 4, sec. 2, amending Act 1913, p. 262, sec. 2.]

See amendment to constitution, adopted November 5, 1912 (art. 17, § 58), *Vernon's Sayles' Civ. St. 1914*, vol. 1, p. lxix.

Explanatory.—This article amends Acts 1913, p. 262, sec. 2, which superseded art. 6089, Rev. St. 1911, and, it would seem, Acts 1911, p. 64, sec. 1, which reads as follows: "The board of prison commissioners shall have power to make, establish and amend rules and regulations, subject to the approval of the governor, under which meritorious prisoners, who are now or hereafter may be imprisoned, under a sentence to penal servitude, and who may have served the minimum term fixed by statute, for commission of offenses of which they were convicted, may be allowed to go upon parole outside the buildings and jurisdiction of the penitentiary authorities, subject to the exceptions hereinafter contained."

Art. 1057b. Paroled prisoners to remain under control of board of prison commissioners; retaking; warrants.—While on such parole such prisoners shall remain under the control of the board of prison commissioners and subject at any time to be taken back within the physical possession and control of the said board of prison commissioners as under the original sentence, but such retaking shall be at the direction of the governor, and all orders and warrants issued by said board of prison commissioners under such authority for the retaking of such prisoners shall be sufficient warrants for all officers named therein to return to actual custody and parole convicts, and it is hereby made the duty of all officers to execute such orders as ordinary criminal processes. [Article 6090, Rev. St. 1911; Act 1911, p. 64, sec. 2; Act 1913, S. S., p. 4, sec. 3, amending Act 1913, p. 262.]

See amendment to constitution, adopted November 5, 1912 (art. 17, § 58), Vernon's Sayles' Civ. St. 1914, vol. 1, p. lxix.

Art. 1057c. Meetings of commissioners; prisoner may apply for parole or discharge, when.—The board of prison commissioners shall meet at each of the prisons of this state from time to time, as they shall deem necessary. At each meeting of said board held at any prison in this state, every prisoner confined in said prison whose minimum sentence has expired shall be given an opportunity to appear before said board and apply for his release upon parole or for an absolute discharge as hereinafter provided, and said board is hereby prohibited from entertaining any other form of application or petition for the release upon parole or absolute discharge of any prisoner; provided, that any prisoner now serving or who may hereafter be sentenced to serve a term of imprisonment in the state penitentiary shall be paroled, if the prisoner so desires, three months before the expiration of his term of service, after deducting from his sentence all commutations for good behavior, and such parole shall extend until such prisoner shall violate the parole rules or the expiration of such prisoner's original term of imprisonment, unless terminated by the restoration of citizenship by the governor. [Act 1911, p. 64, sec. 3.]

Art. 1057d. Record of prisoner; transfer to other place of confinement; copy.—The wardens or sergeants or guards of such prisoners, or who have in custody convicts subject to parole under this act, shall cause to be kept at such prison or place of confinement at which such convicts are confined an accurate record of each prisoner therein confined upon sentence, as aforesaid, which record shall include a biographical sketch covering such items as may indicate the cause of the criminal character or conduct of the prisoner, and also a record of the demeanor, education and labor of the prisoner while confined thereat, and whenever such prisoner is transferred from one prison or place of confinement to another, a copy of such record or an abstract of the substance thereof, together with certified copy of the sentence of such prisoner shall be transmitted with such prisoner to the prison or place of confinement to which he shall be transferred and delivered to the prison officer in charge thereof and retained by him as a part of the record of such prisoner. [Act 1911, p. 64, sec. 4; Act 1913, S. S., p. 4, sec. 4, amending Act 1913, p. 262.]

Explanatory.—This article and articles 1057e and 1057f would seem to supersede art. 6091, Rev. St. 1911, which was substantially re-enacted by Acts 1913, p. 262, sec. 3. Section 3 in Acts 1913, p. 262, reads as follows: "No convict confined in the Texas penitentiaries shall be considered eligible for parole, and no application for parole shall be considered by the prison commissioners until such prisoner is recommended as worthy of such consideration by a chaplain of the penitentiaries, and, before consideration by the prison commissioners, notice of such recommendation shall be published in a newspaper in the county from which such prisoner was

sentenced, and, if none be there published, then in the county whose county site is nearest thereto, provided the expense of such publication shall not exceed one dollar; and in no case shall any prisoner be paroled, unless there is in the judgment of the prison commissioners reasonable ground to believe that he will, if released, live and remain at liberty, without violating the law, and that his release is not incompatible with the welfare of society; and such judgment shall be based upon the record and character of the prisoner established in prison, and his general reputation for honesty and peace prior to conviction. And no petition or other form of application for the release of any prisoner shall be entertained by the said commission, and no attorney or outside persons of any kind shall be allowed to appear before the prison commissioners as applicants for the parole of a prisoner. But these requirements shall not prevent the said prison commissioners from making such inquiries as they may deem desirable in regard to the previous history or environment of such prisoner, and in regard to his probable surroundings if paroled; but such inquiries shall be instituted by the prison commissioners, superintendent, and assistant superintendent, board of pardons, and all such information thus received shall be considered and treated as confidential."

Art. 1057e. Report by wardens as to prisoners entitled to parole.—It shall be the duty of the wardens of such prisoners to make or cause to be made to the board of prison commissioners a written report based upon the record of such prisoner as to whether or not such prisoner shall be paroled or pardoned, and such report shall be made with reference to each prisoner in charge of such warden, and shall give the reasons for such recommendations as are made, and if no recommendations are made the report shall so state, such reports to be made semi-annually. [Act 1911, p. 64; Act 1913, S. S., p. 4, sec. 5, amending Act 1913, p. 262.]

See note under art. 1057d.

Art. 1057f. Action of prison commissioners on reports of wardens.—It shall be the duty of the board of prison commissioners to receive and preserve said reports and recommendations, provided for in this act, and to consider the same and to approve or disapprove the same within three months after the same are received and to transmit a report of such recommendations for parole or pardon as they approve to the governor of this state without delay. [Act 1911, p. 64; Act 1913, S. S., p. 4, sec. 6, amending Act 1913, p. 262.]

See note under art. 1057d.

Art. 1057g. Commissioners may authorize release on parole, when.—If it shall appear to said board of prison commissioners, from a report by the warden or sergeant of such prison, or upon an application by a convict for release on parole as hereinbefore provided, that there is reasonable probability that such applicant will live and remain at liberty without violating the law, then said board of prison commissioners may authorize the release of such applicant upon parole, and such applicant shall thereupon be allowed to go upon parole outside of said prison walls and enclosure, upon the terms and conditions as said board shall prescribe, but to remain while so on parole in the legal custody and under the control of the said board of prison commissioners until the expiration of the maximum term specified in his sentence as hereinbefore provided, or until his absolute discharge as hereinafter provided. [Act 1911, p. 64, sec. 5.]

Art. 1057h. Warrant for retaking of prisoner.—If such board of prison commissioners, or any two members thereof, shall have reasonable cause to believe that a prisoner so on parole has violated his parole and has lapsed or is probably about to lapse into criminal ways or company, then such board, or any two members thereof, may issue their warrant for the retaking of such prisoner, at any time prior to the maximum period for which such prisoner might have been confined within the prison walls upon his sentence, which time shall be specified in such warrant. [Id. sec. 6.]

Art. 1057i. Warrant, how executed; fees.—Any officer of said prison, or any officer authorized to serve criminal process within

this state, to whom such warrant shall be delivered, is authorized and required to execute said warrant by taking said prisoner and returning him to said prison within the time specified in said warrant. Such officer, other than an officer of the prison, shall be entitled to receive the same fees therefor as upon the execution of a warrant of arrest at the place where said prisoner shall be retaken, and as for transporting a convict from the place of arrest to the prison, in case such officer also transports said prisoner to the prison. Such fees of the officer in executing said warrant shall be paid by the prison commissioners out of the funds of the prison. [Id. sec. 7.]

Art. 1057j. Board to be notified of warrant; prisoner declared delinquent, when; imprisonment.—At the next meeting of the board of prison commissioners held at such prison after the issuing of the warrant for the retaking of any paroled prisoner said board shall be notified thereof. If said prisoner shall have been returned to said prison he shall be given an opportunity to appear before said board and the said board may after such opportunity has been given, or in case said prisoner has not been returned, declare said prisoner to be delinquent, and he shall, whenever arrested by virtue of such warrant, be thereafter imprisoned in said prison for a period equal to the unexpired maximum term of sentence of such prisoner at the time of such delinquency is declared, unless sooner released on parole or absolutely discharged by the board of prison commissioners. [Id. sec. 8.]

Explanatory.—A part of the subject-matter of this article was carried into section 4 of Acts 1913, p. 262, and on the amendment of that act by Acts 1913, S. S., p. 4, it was omitted. Section 4 of Acts 1913, p. 262, reads as follows: "Any prisoner violating the conditions of his parole, as prescribed by rules issued by said commissioners, when by a formal order entered in the proceedings of same, he is declared delinquent, shall thereafter be treated as an escaped prisoner, owing service to the state, and shall be liable when arrested to serve out the unexpired period, and the time from the date of his declared delinquency to the date of his arrest shall not be counted as any part or portion of time served. Any prisoner at large on parole committing a fresh crime, and, upon conviction thereof, being sentenced anew to the penitentiary, shall be subject to serve a second sentence after the first sentence is served or annulled, to commence from the date of termination of his liability upon the first or former sentence." The effect of the omission from the amendatory act of the subject-matter in question may present a matter for judicial construction.

Art. 1057k. Absolute discharge, when.—If it shall appear to the said board of prison commissioners that there is a reasonable probability that any prisoner so on parole will live and remain at liberty without violating the law, and that his absolute discharge from imprisonment is not incompatible with the welfare of society, then said board of prison commissioners shall issue to such prisoner an absolute discharge from imprisonment upon such sentence and which shall be effective therefor. [Id. sec. 9.]

Art. 1057l. Power of pardon or commutation not impaired.—Nothing herein contained shall be construed to impair the power of the governor of this state to grant pardon or commutation in any case. [Id. sec. 10.]

Art. 1057m. Commissioners to appoint agent or inspector; duties.—Said board of prison commissioners shall appoint an agent or inspector whose duty it shall be to aid and secure proper employment for all prisoners who have so conducted themselves as to be entitled to get out from such prison on parole, and to keep the said board informed of the conduct of such prisoner when out on parole, and to make a report as to each prisoner in such matters on the first day of each month for the preceding month. [Id. sec. 11.]

Art. 1057n. Parole of prisoners serving under indeterminate sentence; continuance of supervision.—Whenever any prisoner

servicing an indeterminate sentence, as provided in section 1 [art. 865a] of this Act shall have served for twelve months, on parole, in a manner acceptable to the board of prison commissioners, the said board shall certify such fact to the governor, with the recommendation that the said prisoner be pardoned and finally discharged from the sentence under which he is serving. But it shall be the duty of the prison commission to continue its supervision and care over such paroled prisoner until such time as the governor shall pardon and finally discharge from custody the said prisoner; provided, that in no case shall any prisoner be held for a longer term than the maximum provided by the sentence for the crime of which the said prisoner was convicted. [Act 1913, S. S., p. 4, sec. 7, amending Act 1913, p. 262, sec. 5.]

Art. 1057o. Restoration of citizenship.—When a convict who has been paroled shall have complied with the rules and conditions governing his parole until the end of the term to which he was sentenced, and without a revocation of his parole, he shall, upon a written or printed discharge from the superintendent and prison commissioners, setting forth these facts, be recommended by the board to the governor for restoration of his citizenship by the governor of the state of Texas. [Art. 6095, Rev. St. 1911; Act 1911, p. 64, sec. 15; Act 1913, S. S., p. 4, sec. 8, amending Act 1913, p. 262, sec. 6.]

Art. 1057p. Application of Art. 6217, Rev. Civ. St., to prisoners not paroled under this act.—If a prisoner, sentenced to the penitentiary, shall not be paroled under the provisions of this Act, or if he shall only be sentenced to serve the minimum term of imprisonment fixed by law, then article 6217 of the Revised Civil Statutes of Texas shall apply to his sentence, and he shall be entitled to such commutation or reduction of time as in said article provided under the conditions therein named. [Id. sec. 9.]

Art. 1057q. Laws repealed.—No provision of this law shall in any manner be held to in anywise repeal, limit or affect in any manner the provisions of chapter seven (7) of the Acts of the thirty-third legislature [arts. 865b-865i], providing for suspension of sentence in certain cases, and the provisions of said chapter 7 of the Acts of the thirty-third legislature shall apply to the trial of all cases under the conditions therein stipulated, and not specifically exempted from the operation thereof by the terms of said law. [Id. sec. 10.]

Art. 1057r. Governor shall appoint.—The governor is hereby authorized to appoint two qualified voters of the state of Texas, and who shall perform such duties as may be directed by him consistent with the constitution, as he may deem necessary in disposing of all applications for pardon. The said two voters shall be known as the board of pardon advisers, and shall be paid out of any money in the treasury not otherwise appropriated a salary of two thousand dollars each per annum on monthly vouchers approved by the governor. [Act 1897, p. 49, ch. 50; amended Act 1905, p. 68.]

Art. 1057s. Shall keep record.—Said board shall be required to keep a record, in which will be entered every case sent it by the governor, giving the docket number of the convict, his name, when and where convicted, his sentence, his offense, when received from the governor, the action taken by said board, and the date of said action. [Id. sec. 2.]

Art. 1057t. Shall examine applications for pardons, etc.—Said board shall be given a room in the capitol, properly furnished with necessary furniture and file cases, and provided with such station-

ery, letter books and other appliances which may be necessary for the speedy and proper transaction and dispatch of the business for which it is organized. In addition to the thorough examination of each application which the governor may refer to said board, and reporting its recommendation thereon to him, it shall perform any other work in connection with said business the governor may direct; and said board shall spend such time each year as may be necessary in personally looking into the condition of such convicts as it may desire, or as may be designated by either the governor, the superintendent of penitentiaries, or either of his assistants, or by the prison physician, or either of the commissioners, giving special attention to the cases of those of long service, who may be thus designated, and who have no means or facilities for getting a proper petition before the governor, to the end that the board may have before it such data as will enable it to judge the condition of each. All cases shall be taken up, considered and acted upon by said board in the regular order of reference by the governor, except when it appears to said board there is extraordinary emergency in any case. [Id. sec. 3.]

TITLE 13
OF INQUESTS

Chap.	Chap.
1. Inquests upon dead bodies.	2. Fire inquests.

CHAPTER ONE
INQUESTS UPON DEAD BODIES

Art.	Art.
1058. Inquests shall be held, by whom and in what cases.	1070. Peace officer shall execute warrant of arrest.
1059. Body may be disinterred.	1071. Warrant shall be sufficient if, etc.
1060. Physician may be called in.	1072. If the justice find that a person killed the deceased.
1061. Chemical analysis in certain cases.	1073. Bail bond shall be sufficient if, etc.
1062. Upon what information justice may act.	1074. Warrant of arrest, when.
1063. Duty of sheriff, etc.	1075. Requisites of warrant.
1064. Justice shall issue subpoenas.	1076. Peace officer shall execute warrant.
1065. Testimony of witnesses to be reduced to writing, etc.	1077. Accused may be arrested, etc., pending inquest.
1066. Inquest may be held in private.	1078. Justice shall certify proceedings to district court.
1067. Proceedings shall not be interfered with.	1079. Shall preserve all evidence.
1068. Justice shall keep a minute book, wherein he shall set forth, etc.	1080. Witness may be required to give bail.
1069. Where the killing was the act of any person.	

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.]

See Willson's Cr. Forms, 1150, 1152, 1153.

Construction of article.—This and the articles following it do not seem to apply where as a defensive matter such examination and autopsy are sought, nor do they seem to apply where in aid either of the State or defendant such evidence is sought in any case actually pending on a legal charge. They seem to relate to preliminary investigations in aid of prosecutions, with a view of ferreting out crime. *Gray v. State*, 55 App. 90, 114 S. W. 642, 22 L. R. A. (N. S.) 513.

Coroner.—There is no such officer as "coroner" now, and an indictment for perjury committed on an inquest must not allege that the oath was administered by the coroner. *Stewart v. State*, 6 App. 184. The verdict of a coroner's jury is competent evidence, not as proof positive of what it contains, but simply as the opinion of the jury; but its exclusion when offered by the defendant is not material, unless it is apparent that the finding was affected by such exclusion. *Ballew v. State*, 36 Tex. 98.

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.]

Charge on county.—Before the enactment of this article, the services of a medical expert at an inquest were held a proper charge upon the county in *Rutherford v. Harris County*, 3 Willson, Civ. Cas. Ct. App. § 114. But, *contra*, see *Fears v. Nacogdoches County*, 71 Tex. 337, 9 S. W. 265.

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 physician 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.]

Repeal of laws.—The following articles of the Old Code of Criminal Procedure were repealed by the act of March 17, 1887, p. 31, viz.:

Art. 992. The justice of the peace may summon a jury of inquest himself, or may direct an order to any peace officer for that purpose.

Art. 993. A jury of inquest shall consist of six men, citizens of the proper county, freeholders, householders, and qualified electors.

Art. 994. A person summoned as a juror in such cases who refuses to obey the summons may be fined by the justice of the peace not exceeding ten dollars.

Art. 995. The justice of the peace shall, as soon as a jury is summoned, proceed with them to the place where the dead body may be, for the purpose of inquiring into the cause of the death.

Art. 996. The following oath shall be, by the justice of the peace, administered to the jury: "You swear that you will diligently inquire into the cause, manner, time, and circumstances of the death of the person whose body lies before you, and that you will thereupon make presentment of the truth, the whole truth, and nothing but the truth, so help you God."

Art. 1064. [1027] Justice shall issue subpœnas.—The justice of the peace shall have power to issue subpœnas 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.]

See Willson's Cr. Forms, 1120, 1121.

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.]

See Willson's Cr. Forms, 1122.

Use of testimony for impeachment purposes.—Statements made by a witness, at an inquest, but not contained in his written testimony is not admissible to impeach him. *Moffatt v. State*, 35 App. 257, 33 S. W. 344.

On a trial for murder an unsigned writing claimed by the state to be evidence of one of defendant's witnesses at an inquest on deceased's body and which a witness for the state said he took down at the time was not admissible to show what

defendant's witness testified at said inquest in order to impeach him or for any other purpose under this article. *Price v. State* (Cr. App.) 43 S. W. 96.

Failure to reduce to writing.—Evidence given at an inquest can be reproduced on another trial whether it has been reduced to writing or not. The statute requires that it shall be reduced to writing; but if this is not done, the statute does not go farther and say that it shall not be used on another trial. *Stanley v. State* (Cr. App.) 74 S. W. 319.

The fact that the evidence given at an inquest, on which an indictment for perjury is based, was not reduced to writing, as required by this article, affords no ground of objection to witnesses testifying as to what the evidence was. *Stanley v. State* (Cr. App.) 74 S. W. 319.

Testimony before examining court.—See ante, art. 834.

Certification of testimony.—See article 1078, post.

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.]

Compulsory attendance of accused.—The justice may compel accused to attend the inquest, though he protests against it. *Ex parte Meyers*, 33 App. 204, 26 S. W. 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.]

Repeal of laws.—The following article was repealed by the act of March 17, 1887, p. 31, viz.: Art. 1001. After having examined into the cause, time, manner, and place of the death of the deceased, the jury shall form their verdict, setting forth distinctly the facts relating thereto, which they find to be true, which verdict shall not be valid unless signed by the justice of the peace and each of the jurors.

Persons entitled to examine witness.—It is intimated that at an inquest, a person other than those mentioned in this article may ask questions of a witness, if he is authorized by the justice of the peace to do so. *Stanley v. State* (Cr. App.) 74 S. W. 320.

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.

Warrant in general.—See 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 warrant.—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.]

Execution of warrant in general.—See 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 already 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.]

Examining court.—The justice may hold an examining court while holding his inquest. *Ex parte Meyers*, 33 App. 204, 26 S. W. 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.

See Willson's Cr. Forms, 1122.

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

Art.		Art.	
1081.	Investigation shall be had upon complaint, etc.	1085.	Warrant shall issue for person charged, when.
1082.	Proceedings in such case.	1086.	Testimony of witnesses shall be reduced to writing, etc.
1083.	Verdict of jury.	1087.	Compensation of officers, etc.
1084.	Witness shall be bound over, when.		

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.]

See Willson's Cr. Forms, 1123.

Explanatory.—This chapter may be superseded by Act 1910, S. S., p. 125, ch. 8, §§ 6-9, as amended by Act 1913, p. 195, §§ 8-11 (Vernon's Sayles' Civ. St. 1914, arts. 4881-4884), providing for investigations by the state fire marshal.

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.]

See Willson's Cr. Forms, 1124.

See note under art. 1081.

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 cir-

cumstances of such fire they shall find, and certify accordingly. [Id., § 3.]

See Willson's Cr. Forms, 1124.

Explanatory.—This article contemplates the summoning of a jury in spite of the fact that art. 1082, ante, refers to the preceding chapter relating to inquests on dead bodies, for the procedure in fire inquests. The chapter referred to however has dispensed with a jury. See, also, note under art. 1081.

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.]

See note under art. 1081.

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.]

See note under art. 1081.

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.]

See Willson's Cr. Forms, 1124.

See note under art. 1081.

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.]

See note under art. 1081.

Fees.—See, post, arts. 1156, 1158.

TITLE 14

OF FUGITIVES FROM JUSTICE

<p>Art. 1088. Fugitive from justice delivered up, when.</p> <p>1089. Judicial and peace officers shall aid in the arrest of.</p> <p>1090. Magistrate shall issue warrant for arrest of fugitive, when.</p> <p>1091. Complaint shall be sufficient if it recites, etc.</p> <p>1092. Warrant of arrest from magistrate shall direct, what.</p> <p>1093. Shall require bail or commit accused, when.</p> <p>1094. Certified transcript of indictment evidence.</p> <p>1095. Person arrested shall not be committed, or, etc.</p> <p>1096. Magistrate shall notify secretary of state.</p>	<p>Art. 1097. Shall also notify district or county attorney, who shall notify, etc.</p> <p>1098. Secretary of state shall communicate information, etc.</p> <p>1099. Accused shall be discharged, when.</p> <p>1100. Shall not be arrested a second time, except, etc.</p> <p>1101. Governor of the state can demand fugitive from justice, how.</p> <p>1102. Reasonable pay to persons commissioned, etc.</p> <p>1103. Governor may offer a reward, when.</p> <p>1104. Shall be published, how.</p> <p>1105. Reward shall be paid by state.</p> <p>1105a. List of fugitives to be sent to adjutant general.</p>
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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.]

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| <ol style="list-style-type: none"> 1. What law governs. 2. Who are fugitives from justice. 3. Requisition. 4. Conflicting requisitions. 5. Priority of prosecutions. 6. Executive warrant. 7. Kidnapping. 8. "Charge" as including "conviction." | <ol style="list-style-type: none"> 9. Prosecution by information. 10. Sentence as affecting right to extradition. 11. Questions determined. 12. Presumptions. 13. Escape after arrest. 14. Bail. 15. Habeas corpus. |
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1. **What law governs.**—The extradition of fugitives from the justice of a state is provided for by Const. U. S. art. 4, § 2, providing that, where a person charged in any state with crime shall flee from justice and be found in another state, he shall on demand of the executive of the state from which he fled be delivered up to be removed to that state, and by federal statutes enacted in furtherance of the provision, and a state statute in aid thereof need not be complied with; and where a fugitive was arrested by an officer on information furnished him from the sister state, and on hearing the Governor issued his warrant, the fugitive could not complain that he was not arrested. *Ex parte Bergman*, 60 App. 8, 130 S. W. 174.

The laws of a state cannot control the definition of a fugitive from justice within Rev. St. U. S. § 5278 (U. S. Comp. St. 1901, p. 3597), providing for the extradition of a person after indictment found or affidavit made charging him with having committed treason, felony or other crime, which include not only offenses punishable by death or imprisonment in the penitentiary, but misdemeanors as well. *Ex parte Bergman*, 60 App. 8, 130 S. W. 174.

The states having delegated their authority over matters of extradition to the federal government, the decisions of the federal courts are conclusive on the state courts with reference to such subject. *Ex parte Lewis* (Cr. App.) 170 S. W. 1098.

2. **Who are fugitives from justice.**—A person who commits a crime in one state and departs therefrom and is found in another is a "fugitive from justice." *Ex parte McDaniel* (Cr. App.) 173 S. W. 1018.

3. **Requisition.**—Where the requisition shows (1) that an affidavit (on indictment found) has been lodged in the demanding State and (2) that a demand was made by the Governor of that State stating that the affidavit (or indictment) is authentic, it contains every essential requirement of law. *Ex parte Denning* (Cr. App.) 100 S. W. 402.

A requisition made upon the 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 prisoner arrested under such circumstances could only obtain relief on habeas corpus by showing that the presumption on which the governor acted was unfounded in fact. *Hibler v. State*, 43 Tex. 197.

As to certificate to the requisition of the demanding governor, see *Ex parte Stanley*, 25 App. 372, 8 S. W. 645, 8 Am. St. Rep. 440.

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 App. 629, 100 S. W. 401.

Where the record in extradition proceedings contained an affidavit by the county attorney, sworn to before a magistrate the papers were not fatally defective because the original affidavit by complainant was sworn to before a notary public, and not before a magistrate, as required by Rev. St. U. S. § 5278 (U. S. Comp. St. 1913, § 10126). *Ex parte Faihtinger*, 72 App. 632, 163 S. W. 441.

A statement of the Governor of a demanding state in his requisition for the return of a prisoner that he is a fugitive from justice and a similar statement in the proclamation of the Governor of the state honoring the requisition, makes a prima facie case that such is the fact. *Ex parte Faihtinger*, 72 App. 632, 163 S. W. 441.

It is not necessary for the Governor of a state, in granting a requisition for the return of a fugitive from justice, to definitely describe the offense in the requisition. *Ex parte Faihtinger*, 72 App. 632, 163 S. W. 441.

Where the Governor of a demanding state in extradition proceedings recited in his warrant that it appeared, from the annexed application for requisition and other papers, which the Governor certified to be authentic and duly authenticated in accordance with the laws of the state, etc., that accused was charged with the crime of selling and disposing of mortgaged property, committed in T. county, Okl., and the papers so attached included a complaint which charged the elements of such offense created by Rev. Laws Okl. 1910, § 2755, it was not necessary that the offense should be defined in the requisition with the definiteness and particularity required in an indictment or information. *Ex parte Faihtinger*, 72 App. 632, 163 S. W. 441.

4. Conflicting requisitions.—Under Const. U. S. art. 4, § 2, providing that a person charged in any state with crime, who shall flee from justice and be found in another state, shall on demand of the executive of the state from which he fled be delivered up to be removed to the state having jurisdiction of the crime and this article a fugitive brought into Texas by requisition from another state may, while in custody, be surrendered to a third state on it demanding his return for a crime committed therein. *Ex parte Innes* (Cr. App.) 173 S. W. 291.

5. Priority of prosecutions.—A fugitive from justice charged with crime committed in this state will not be delivered to the demanding state until the final disposition of the case against him in this state. *Hobbs v. State*, 32 App. 312, 22 S. W. 1035, 40 Am. St. Rep. 782.

6. Executive warrant.—A warrant issued by the governor of this state for the arrest of a fugitive from justice of another state, should show on its face, by recital at least, that it was issued upon a requisition from such other state, accompanied by an indictment found, or affidavit made, charging the alleged fugitive with having committed a crime. *Ex parte Thornton*, 9 Tex. 635. See, also, *Hibler v. State*, 43 Tex. 197.

It is not essential to the sufficiency of an extradition warrant that it shall set out in full or be accompanied by the indictment or affidavit upon which it is based. The rule is that if "the papers upon which the warrant of extradition is issued are withheld by the executive, the warrant itself can be looked to for the evidence that the essential conditions of its issuance have been complied with, and it is sufficient if it recites what the law requires."

Recital in the warrant of extradition that the demand of the governor of the demanding state for the fugitives "was accompanied by a copy of said affidavit duly certified as authentic" is equivalent to a recital in the warrant that the said copy was certified as authentic by the governor of the demanding state.

If the demand for the extradition of the fugitive states facts which show that he is a fugitive from the demanding state to this state, it is sufficient, without stating directly that he fled from the demanding state, and had taken refuge in this state.

A warrant of extradition need not show that the crime charged against the fugitive in the indictment or affidavit is an offense against the laws of the demanding state.

The state was permitted to read in evidence a copy of an affidavit made in California, charging the relator with the offense of obtaining money under false pretenses. Held, that the said copy being no part of the respondent's return, nor attached thereto, nor accompanying the warrant, nor authenticated as evidence, nor shown, nor claimed to be evidence upon which the warrant was based, its admission in evidence was error, but not such error as will operate to discharge the relator. *Ex parte Stanley*, 25 App. 372, 8 S. W. 645, 8 Am. St. Rep. 440.

The warrant of arrest issued by the Governor in an extradition proceeding must name the offense with which the accused is charged in the State to which it is sought to take him. *Ex parte Thomas*, 53 App. 37, 108 S. W. 664, 126 Am. St. Rep. 786.

7. Kidnapping.—A person accused of crime committed in this state is amenable in the courts of this state, notwithstanding he was kidnapped in another state or territory, and brought thence against his will and without lawful authority. *Brook-in v. State*, 26 App. 121, 9 S. W. 735.

A fugitive from the justice of a sister state was illegally brought into Texas by citizens of Mexico. The officers of Texas were not parties to the illegal conduct, but they arrested the fugitive on their attention being called to his presence in the state. Subsequently the Governor of Texas honored a requisition of the Governor of the sister state. Held, that the fugitive was not entitled to his discharge on habeas corpus. *Ex parte Wilson* (Cr. App.) 140 S. W. 98, 36 L. R. A. (N. S.) 243.

8. "Charge" as including "conviction."—Where a person was legally charged under the laws of a sister state with an offense, and was legally convicted thereof

under an information filed by the prosecuting officer of the sister state and such person subsequently fled to the state of Texas, the Governor of Texas properly issued his extradition warrant on a proper demand therefor; the word "charged," within Const. U. S. art. 4, § 2, and the federal statutes relating to extradition applying to persons convicted as well as to persons merely sought for the purpose of trial. *Ex parte Bergman*, 60 App. 8, 130 S. W. 174.

9. **Prosecution by information.**—Under Const. U. S. art. 4, § 2, providing that "a person charged in any state" may be extradited, and Rev. St. U. S. § 5278 (U. S. Comp. St. 1913, § 10126), providing that whenever the executive of any state demands any person as a fugitive from justice, and produces a copy of an indictment found or affidavit made before a magistrate, the person demanded shall be surrendered, a person charged by an information alone and who has not been convicted cannot be extradited. *Ex parte Bergman*, 60 App. 8, 130 S. W. 174.

10. **Sentence as affecting right to extradition.**—Where a defendant, after conviction in a sister state, fled from the justice of that state, the mere fact that in the judgment of conviction there was imposed a pecuniary fine and sentence to jail did not show that he was not guilty of a felony within Const. U. S. art. 4, § 2, and the federal statutes relating to extradition, there being nothing to show that under the law of the sister state accused might not have been imprisoned in the penitentiary. *Ex parte Bergman*, 60 App. 8, 130 S. W. 174.

11. **Questions determined.**—Where a person is arrested for extradition as a fugitive from justice, the question of his guilt or innocence will not be tried. *Ex parte Hancock* (Cr. App.) 170 S. W. 145.

12. **Presumptions.**—In the absence of a showing to the contrary, the court will presume that the Governor in issuing his warrant for the arrest of a fugitive from the justice of a sister state acted only on a proper and legal requisition by the Governor of the sister state; and recitals in the warrant for the arrest of the fugitive that the demand was accompanied by a copy of the indictment and judgment duly certified as authentic by the Governor of the sister state were conclusive on habeas corpus when not disputed, and the mere fact that an instrument signed by the Governor of the sister state was insufficient as a demand was not sufficient to contradict the recitals in the absence of a showing that such instrument was the only paper presented by the Governor of the sister state to the Governor of Texas. *Ex parte Bergman*, 60 App. 8, 130 S. W. 174.

13. **Escape after arrest.**—See art. 1100, and note.

14. **Bail.**—See art. 1093, post, and notes under art. 6, ante.

15. **Habeas corpus.**—See notes under article 160, ante, and article 177, ante.

Cited, *Ex parte Lipshitz*, 59 App. 179, 127 S. W. 817.

In habeas corpus by a person arrested pursuant to a requisition from the Governor of another state, his own testimony that he was not guilty of the offense charged was properly excluded. *Ex parte Brown* (Cr. App.) 178 S. W. 366.

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 apprehension of the person accused. [O. C. 882.]

See Willson's Cr. Forms, 1125.

Cited, *Ex parte Lake*, 37 App. 656, 40 S. W. 727, 66 Am. St. Rep. 848.

Complaint.—The affidavit or complaint upon which a requisition from the Governor of another state was based recited that the complainant, being duly sworn, stated that accused, being the bailee of certain watches therein described, feloniously converted them to his own use with intent to steal them, and that the complainant had just and reasonable ground to believe, and did believe, that accused committed such offense. Held, that the affidavit when considered as a whole, was not made on information and belief, and was sufficient. *Ex parte Brown* (Cr. App.) 178 S. W. 366.

Executive warrant.—See notes under article 1088, ante.

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.]

See Willson's Cr. Forms, 1125.

Cited, *Ex parte Lake*, 37 App. 656, 40 S. W. 727, 66 Am. St. Rep. 848.

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.

See Willson's Cr. Forms, 1126.

Warrants in general.—See arts. 265 and 266, *ante*.

Cited, *Ex parte Lake*, 37 App. 656, 40 S. W. 727, 66 Am. St. Rep. 848.

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.]

See Willson's Cr. Forms, 1127, 1128.

Bail.—When a fugitive from justice is arrested on a requisition and warrant he is not entitled to bail. *Ex parte Erwin*, 7 App. 288.

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.]

See Willson's Cr. Forms, 1127.

See *Ex parte Lipshitz*, 59 App. 179, 127 S. W. 817.

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.]

See Willson's Cr. Forms, 1129.

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.

See Willson's Cr. Forms, 1129.

See *Ex parte Lipshitz*, 59 App. 179, 127 S. W. 817.

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 com-

mitment or the date of the bail bond, he shall be discharged. [O. C. 889.]

See Willson's Cr. Forms, 1127.

See Ex parte Lipshitz, 59 App. 179, 127 S. W. 817.

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.]

See Ex parte Lipshitz, 59 App. 179, 127 S. W. 817.

Escape.—When a fugitive from another state has been extradited and escapes and returns to this state, another warrant for his arrest may be issued without waiting for another requisition. Ex parte Hobbs, 32 App. 312, 22 S. W. 1035, 40 Am. St. Rep. 782.

Art. 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.]

Prosecution for different offense.—A person extradited upon a requisition of the governor of this state from another state of the United States, may be tried for a different offense than that for which he was extradited. Ham v. State, 4 App. 645; Kelley v. State, 13 App. 158; Underwood v. State, 38 App. 193, 41 S. W. 618. But where a defendant was extradited from Mexico for theft, it was held that he could not be tried for embezzlement. Blandford v. State, 10 App. 627.

Waiver of objections to jurisdiction.—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 App. 405, 8 S. W. 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 App. 193, 41 S. W. 618.

Trial of person forcibly removed from another state.—A person accused of crime in this state may be tried for it in this state, though he was kidnapped in the other state, and brought back against his will, and without lawful authority. Brookin v. State, 26 App. 121, 9 S. W. 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.

Right to reward in general.—Lauve v. Balfour, 1 White & W. Civ. Cas. Ct. App. § 726; Adair v. Cooper, 25 Tex. 548; Blain v. Pacific Express Co., 69 Tex. 74, 6 S. W. 679; Kasling v. Morris, 71 Tex. 584, 9 S. W. 739, 10 Am. St. Rep. 797; Ward v. Keystone Land & Cattle Co. (Civ. App.) 38 S. W. 532; Southwestern Telegraph & Telephone Co. v. Priest, 31 Civ. App. 345, 72 S. W. 241; Broadnax v. Ledbetter, 100 Tex. 375, 99 S. W. 1111, 9 L. R. A. (N. S.) 1057; Rochelle v. Pacific Express Co., 56 Civ. App. 142, 120 S. W. 543; Tobin v. McComb (Civ. App.) 156 S. W. 237.

Art. 1105a. List of fugitives to be sent to adjutant general.—It shall be the duty of each sheriff in this state, upon the close of any regular term of the district court in his county, or within thirty days thereafter, to make out and forward by mail to the adjutant general of this state a certified list of all persons who, after indictment for a felony, have fled from said county. Such lists shall contain the full name of each of such fugitives, with a description giving his age, height, weight, color and occupation, the complexion of skin and the color of eyes and hair, and any peculiarities in person, speech, manner or gait that may serve to identify such fugitive, so far as the sheriff may be able to give them, and shall state the offense with which such person is charged. The adjutant general shall prescribe, have printed and forward to the sheriffs of the several counties the necessary blanks upon which are to be made the lists herein required. [Act 1887, p. 44, sec. 1; Amend. 1895, Sen. Jour. No. 97, p. 484.]

Explanatory.—The above provision was omitted from the revision of 1911. As it is directly pertinent to the subject of fugitives from justice, it is inserted in this compilation for convenience of reference.

TITLE 15

OF COSTS IN CRIMINAL ACTIONS

Chap.	Chap.
1. Taxation of costs. 2. Of costs paid by the state. <ol style="list-style-type: none"> 1. Fees and compensation in general. 2. Compensation of clerk of district court, district attorney, county attorney, sheriff and constables in counties in which 3000 or more votes are cast. 3. Fees and compensation of clerk of district court, district attorney, county attorney, sheriff and constables in counties casting less than 3000 votes. 	2. Of costs paid by the state—Continued. <ol style="list-style-type: none"> 4. Accounts of officers. 5. Fees of witnesses. 3. Of costs paid by counties. 4. Of costs paid by defendant. <ol style="list-style-type: none"> 1. In the court of criminal appeals. 2. In the district and county courts. 3. In justices', mayors' and recorders' courts. 4. Jury and trial fees. 5. Witness fees.

CHAPTER ONE

TAXATION OF COSTS

Art.	Art.
1106. Certain officers shall keep fee books. 1107. Fee book shall show what. 1108. No cost shall be taxed that is not provided for by law. 1109. Costs payable in lawful currency. 1110. No costs payable until, etc.	1111. Bill of costs shall accompany case, when. 1112. Costs shall not be taxed after defendant has paid. 1113. Costs may be retaxed, when and how. 1114. Fee book evidence.

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.

See *Boon v. State*, 12 App. 100.

Extortion.—See P. C., arts. 363, 365.

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

1. FEES AND COMPENSATION IN GENERAL

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.]

See art. 1164, post.

Several defendants.—Although there may be several defendants in one indictment, yet the judgment is against each one separately, and on appeal each defendant's case is treated as a separate one, and fee for attorney-general allowed in each case. Hogg v. State, 40 App. 110, 48 S. W. 580.

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.]

See art. 1165, post.

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. 1117a [1119 and 1137, Rev. C. C. P. 1911]. [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.

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 com-

plied with. [Act Mar. 3, 1833, p. 22; Act 1903, ch. 142; Act 1907, S. S., p. 466, amending art. 1092, Rev. C. C. P. 1895.]

Explanatory.—The above provision, amendatory of art. 1092, Rev. C. C. P. 1895, was divided by the revision commissioners of 1911, part of it being inserted as art. 1119, and the other part as art. 1137. No reason appears for this separation. Art. 1128 Rev. C. C. P. 1911, a seemingly spurious creation of the revision commissioners, has made art. 1119, Rev. C. C. P. 1911, applicable to counties casting 3,000 votes or more, while art. 1137 was cast into the lot of counties casting less than 3,000 votes. An examination of the act of 1897, and a comparison of its provisions with the other legislation on the subject of this chapter of the statutes seems to result in the conclusion that the act of 1897, in dividing the counties into two classes, was intended to have but a limited scope, and was not designed to array all the legislation on the subject of fees into two divisions, as is done by the unfortunate insertion of art. 1128 in the Rev. C. C. P. of 1911. The sensible disposition of the matter would seem to be to limit the operation of the act of 1897 to the ordinary fees of the officers named. Much of the legislation is obviously incapable of classification to one or the other of the county groups, and is clearly applicable to all the counties. While the act of 1897 left the then existing provisions to apply to counties casting less than 3,000 votes, some of the subsequent amendments of these old provisions seem to have been made without legislative realization of the effect of the act of 1897, and some of such amendments introduce new features, which are seemingly intended to apply to all the counties. The compilers of this statute, in order to make the provisions capable of being understood, have renumbered and rearranged the articles of the statute and placed them under appropriate headings. The decisions in such cases as *Berry v. State* (Cr. App.) 156 S. W. 626; *Stevens v. State*, 70 App. 565, 159 S. W. 505; *Robertson v. State*, 70 App. 307, 159 S. W. 713; and *Williams v. State*, 71 App. 6, 159 S. W. 732, seem to warrant this course.

Art. 1117b [1120, Rev. C. C. P. 1911]. Fees allowed district attorneys of districts composed of two or more counties; assistant district attorney; salary; removal.—In addition to the five hundred dollars now allowed them by law, district attorneys in all judicial districts of 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 the 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 commission 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 the same over 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. Provided, further, that in districts composed of two or more counties, and in which said district there is a county containing a city of thirty-five thousand population or over, according to the last Federal census, the district attorney in such district shall, with the approval of the County Commissioners Court of such county, be authorized to appoint one assistant district attorney, who shall receive a salary of not to exceed one hundred and fifty dollars per month, such salary to be paid by such county, payable monthly; and, provided further, that such assistant district attorney, when so appointed, shall take the

oath of office, and be authorized to represent the State in such county, and such authority to be exercised under the direction of the district attorney, and such assistant district attorney shall be subject to removal at the will of the district attorney. Such assistant district attorney shall be authorized to perform any duty devolving upon the district attorney and to perform and exercise any power conferred by law upon the district attorney when by him so authorized. [Act 1907, ch. 175; Act 1909, p. 238; Act 1915, p. 199, ch. 127, § 1, amending art. "1120, of Title 15, of Chapter 2, of the Penal Code."]

Explanatory.—Act 1915, ch. 127, § 1, purports to amend "article 1120, of Title 15, of chapter 2, of C. C. P."

The position of the above provision in the statutes has been changed in this compilation, so as to remove it from the effect of art. 1128, Rev. C. C. P. 1911, an article inserted by the revision commissioners under a seeming misapprehension. See note under art. 1117a. The provision for compensation of district attorneys in districts containing several counties has apparently no relation to the division of counties into classes made by Act 1897, S. S. ch. 5. It would seem that the act is applicable to all the counties of the state.

Art. 1117c [1121, Rev. C. C. P. 1911]. [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.

Explanatory.—What has been said in the notes to the two preceding articles is applicable to this article. Its number and arrangement have been changed to remove it from the effect of art. 1128 Rev. C. C. P. 1911. The only possible effect that the act of 1897 could have on this article would be to make it applicable to counties casting less than 3,000 votes. The revisers gave it the very opposite effect. It would seem that the above provision applies to all of the counties of the state.

Art. 1117d [1125, Rev. C. C. P. 1911]. [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.]

Explanatory.—The above provision was, by mistake, made applicable only to counties casting more than 3,000 votes. To avoid this result, its number and its position in the statutes are changed. See notes under the three preceding articles.

Art. 1117e [1126, Rev. C. C. P. 1911]. [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.]

Explanatory.—The above provision obviously applies to all the counties of the state, notwithstanding its limitation by art. 1128, Rev. C. C. P. 1911. Its number and position have been changed for the reasons indicated in the notes to the four preceding articles.

Art. 1117f [1135, Rev. C. C. P. 1911]. [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.]

See note under art. 1117a, ante.

Confinement in jail.—Under this and the following article and Vernon's Sayles' Civ. St. 1914, art. 6244, providing for the hiring out of a convict committed to jail

in default of payment of fine and costs, one indicted for murder and convicted of aggravated assault and battery and punished by confinement in jail for 30 days may be confined in jail for the costs previously paid by the state. *Ex parte Spiller*, 63 App. 93, 138 S. W. 1013.

Art. 1117g [1136, Rev. C. C. P. 1911]. [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.]

See note under art. 1117a, ante; art. 61, ante.

Capital conviction.—No judgment for costs should be entered where there is a capital conviction though costs may be adjudged against a convict in a capital case without vitiating the judgment for conviction. *Lanham v. State*, 7 App. 126; *Jackson v. State*, 25 App. 314, 7 S. W. 872.

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

Confinement in jail.—Under this and the preceding article and *Vernon's Sayles' Civ. St.* 1914, art. 6244, providing for the hiring out of a convict committed to jail in default of payment of fine and costs, one indicted for murder and convicted of aggravated assault and battery and punished by confinement in jail for 30 days may be confined in jail for the costs previously paid by the state. *Ex parte Spiller*, 63 App. 93, 138 S. W. 1013.

2. COMPENSATION OF CLERK OF DISTRICT COURT, DISTRICT ATTORNEY, COUNTY ATTORNEY, SHERIFF AND CONSTABLES IN COUNTIES IN WHICH 3,000 OR MORE VOTES ARE CAST

Art. 1117h. Fees and compensation in felony cases.—That hereafter, in all the counties in this State, where there shall have been cast at the next preceding presidential election 3000 votes or over, the clerks of the district courts, district attorneys, county attorneys, sheriffs and constables shall receive from the State the following fees and compensation in felony cases, and no more: [Act 1897, S. S., p. 5, ch. 5, § 1.]

Explanatory.—The above section of the act of 1897 was omitted from the revision of 1911. In view of the decisions in *Berry v. State* (Cr. App.) 156 S. W. 626; *Stevens v. State*, 70 App. 565, 159 S. W. 505, and other cases, it is included in this compilation to aid in clearing up the complicated situation presented in the revision. See notes under arts. 1117a–1117e, ante.

Maximum compensation.—See art. 110, Pen. Code.

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. [Act 1897, 1st S. S., p. 5, § 3.]

See *Willson's Cr. Forms*, 1133.

See arts. 110–110b, Pen. Code.

Arts. 1119–1121.—See arts. 1117a–1117c, ante, and notes thereunder.

See Willson's Cr. Forms, 1133, 1133a.

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 attach-

ments 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 1897, S. S., ch. 5, § 4; Act 1901, ch. 119; Act 1901, 1st S. S., p. 21.]

See Willson's Cr. Forms, 1134.
See art. 110, Pen. Code.

Amount of fees.—Under Acts 27th Leg. (1st Ex. Sess.) c. 11, allowing a sheriff 5 cents a mile in going after a prisoner and 10 cents a mile in returning, a sheriff would be entitled to \$4.20 for bringing a prisoner 42 miles in returning him to the place of trial. Buzan v. State, 59 App. 213, 128 S. W. 388.

Perjury in affidavit.—See art. 305, Pen. Code, and notes.

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, § 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, § 6.]

Arts. 1125, 1126. See arts. 1117d and 1117e, ante, and notes thereunder.

See Willson's Cr. Forms, 1134.

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. [Act 1897, 1st S. S., p. 5, § 2.]

See Willson's Cr. Forms, 1135.
See, also, arts. 110, 111, Pen. Code, and art. 1137b, post.

Art. 1127a. Other counties controlled by previously existing laws.—That in those counties where there shall have been cast at the next preceding presidential election less than 3000 votes the clerk of the district courts, district attorneys, county attorneys, sheriffs and constables shall receive from the state the fees and compensation in felony cases allowed under now existing laws, and are not intended to be affected by the provisions of sections 1, 2, 3, 4, 5 and

6 [arts. 1117a, 1118, 1122–1124, 1127] of this act. [Act 1897, S. S., p. 8, ch. 5, § 7.]

Explanatory.—The above provision was carried into the revision of 1911 as art. 1128, and was made to read as follows: '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.' In view of what is said in the notes to arts. 1117a–1117f, ante, the provision is inserted in this compilation, as art. 1127a, in the words of its original enactment.

Art. 1128. See art. 1117a, ante, and note thereunder.

See Willson's Cr. Forms, 1135.

3. FEES AND COMPENSATION OF CLERK OF DISTRICT COURT, DISTRICT ATTORNEY, COUNTY ATTORNEY, SHERIFF AND CONSTABLES IN COUNTIES CASTING LESS THAN 3,000 VOTES

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. [Act 1889, ch. 45.]

[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 Mar. 3, 1883, p. 22; Act 1903, p. 231.]

See Willson's Cr. Forms, 1135.

Explanatory.—The second paragraph of this article was derived from Act 1903, p. 230, amending art. 1092, Rev. C. C. P. 1895. Art. 1092, Rev. C. C. P. was again amended by Act 1907, S. S. p. 466, ch. 14, and the provision as to fees in habeas corpus proceedings was omitted. The result is that this provision had been repealed at the time it was carried into the revision. See *Berry v. State* (Cr. App.) 156 S. W. 626; *Stevens v. State*, 70 App. 565, 159 S. W. 505; *Robertson v. State*, 70 App. 307, 159 S. W. 713; *Williams v. State*, 71 App. 6, 159 S. W. 732.

The subsisting part of this article is confined in its operation to counties casting less than 3,000 votes at the last presidential election, by Act 1897, S. S. ch. 5, §§ 1, 7 (arts. 1117h, 1127a, ante.)

Recording fees.—See art. 111, Pen. Code.

Swearing witness to his account.—See art. 1137b, post.

Penalty for failure to charge up and report fees.—See art. 113, Pen. Code.

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 traveled in summoning or attaching each additional witness. When process is sent by mail to any officer away from the county seat, or returned by mail by such officer, he shall only be allowed to charge mileage for the miles actually traveled by him in executing such process, and the return of the officer shall show the character of the service and miles actually traveled in accordance with this 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. [Act 1891, ch. 93; Act 1895, ch. 93.]

See Willson's Cr. Forms, 1134.

See arts. 1117h and 1127a, ante, limiting the above article to counties casting less than 3,000 votes. See, also, art. 110, Pen. Code.

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. [Act 1889, S. S., ch. 16, § 62; amended 1895, p. 148.]

See arts. 1117h and 1127a limiting the above article to counties casting less than 3,000 votes. See, also, arts. 110-110b, Pen. Code.

4. ACCOUNTS OF OFFICERS

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. [Act of 1879, Ex. Ses., ch. 46.]

See Willson's Cr. Forms, 1133-1135.

Accounting for fees collected.—See arts. 115-115b, Pen. Code.

Review of accounts.—The State Comptroller has no power to review accounts of prosecuting attorneys, sheriffs, and clerks in felony cases approved by the district judge under this and the following article; the judge's approval being a judicial and not a ministerial act. *Rochelle v. Lane*, 105 Tex. 350, 148 S. W. 558.

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.]

See Willson's Cr. Forms, 1136, 1138.

Review of accounts.—The State Comptroller has no power to review accounts of prosecuting attorneys, sheriffs, and clerks in felony cases approved by the district judge under this and the preceding article; the judge's approval being a judicial and not a ministerial act. *Rochelle v. Lane*, 105 Tex. 350, 148 S. W. 558.

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.]

Arts. 1135–1137. See arts. 1117a, 1117f, 1117g, ante, and notes thereunder.

See Willson's Cr. Forms, 1137, 1138.

Art. 1137a. Duty of district judge to examine accounts of sheriff.—It shall be the duty of the district judge to inspect the accounts in felony cases of the sheriffs in his district and to see that no charge is made against the State for serving subpoenas and for the mileage traveled in serving same in any case unless the provisions of Section 1 of this Act [art. 526a, ante] have been complied with, and if upon examination of the account it shall appear to the district judge that subpoenas have been served by the sheriff, or any of his deputies in cases where the proper applications have not been made and granted as provided for in said Section 1 of this Act, then it shall be the duty of said judge to deduct from said sheriff's account the charges made for serving such subpoenas and the mileage charged for serving same. [Act 1913, p. 320, ch. 150, § 3.]

See art. 392a, Pen. Code, and arts. 526a and 1189a, C. C. P.

5. FEES OF WITNESSES

Art. 1137b. Fees of witnesses; proviso.—All witnesses residing in the county of the prosecution, when summoned under the provisions of this Act to appear and give evidence in any felony case, shall be entitled to one dollar per day for each day they may have been necessarily absent from their homes or business in attendance upon court, said fees to be paid by the State, and the Comptroller of Public Accounts is hereby authorized to draw a warrant against the State Treasury for same when the accounts are properly presented to him, approved by the presiding district judge, and when after inspection by him he finds said accounts to be correct; provided, that

no witnesses fees shall be paid to peace officers, nor to any witness in habeas corpus cases, or summoned on a motion for change of venue; and provided, further, that no fees shall be approved by the court in any case where the charge includes a misdemeanor case until the case is finally disposed of, and in case of a conviction for misdemeanor no fees shall be paid by the State; and provided, further, that witnesses attending court in more than one case at the same time shall receive fees in only one case; and provided, further, that in no event the State shall pay per diem in any one case more than five dollars to any witness in any one case at any one term of the court; and provided, further, that the fee to be collected by the district clerk for swearing each witness to his account for his attendance in a case shall be ten cents. [Act 1913, 1st S. S., p. 20, ch. 13, § 1, amending Act 1913, ch. 150, § 4.]

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 expected 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 1897, S. S. ch. 19; Act 1903, p. 230; Act 1905, p. 375.]

See Willson's Cr. Forms, 1138.

See art. 114, Pen. Code.

Conclusiveness of action by judge.—The action of the judge in allowing or disallowing the account of a witness for his fees is conclusive and is not subject to review or control by mandamus or otherwise. *Murray v. Gillespie*, 96 Tex. 285, 72 S. W. 161.

CHAPTER THREE
OF COSTS PAID BY COUNTIES

Art.	Art.	
1139. County shall be liable for what costs.	1151. Same subject.	
1140. Shall be responsible for food and lodging of jurors.	1152. Same in case of change of venue.	
1141. Juror may pay his own expenses and draw scrip.	1153. Same subject.	
1142. Allowance to sheriff for prisoners.	1154. Fees of county judge.	
1143. Allowance for guards.	1155. How collected.	
1144. Sheriff shall pay what expenses, to be reimbursed by county.	1155a. Fees and salary of judge of county court of Bexar county for criminal cases.	
1145. Sheriff shall present account to district judge.	1156. Fee of justice for holding an inquest.	
1146. Judge shall examine account, etc.	1157. Commissioners court shall act upon account.	
1147. Judge shall give sheriff draft upon county treasurer.	1158. Pay of petit jurors.	
1148. Account for keeping prisoners.	1159. If not sworn, not entitled to pay.	
1149. Commissioners' court shall examine account, and order draft, etc.	1160. Pay of grand jurors.	
1150. Expenses, etc., of prisoner from another county.	1161. Pay of bailiffs.	
	1162. Certificates for pay of jurors and bailiffs.	
	1163. Drafts and certificates receivable for county taxes.	
	1163a. Costs to be paid officers	

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.]

Cases dismissed.—Counties are not liable for costs due clerks in cases of misdemeanors, or of felonies dismissed. *Colorado County v. Beethe*, 44 Tex. 447.

Compensation of expert.—When a justice of the peace, for the purposes of an inquest, employs an expert to make a post mortem examination of the dead body, etc., the county is liable for reasonable compensation for such service. And where it is necessary for the purposes of an inquest to disinter a dead body, the county is liable for the expenses of disinterring, and also of re-interring. *Rutherford v. Harris County*, 3 Willson, Civ. Cas. Ct. App. § 114.

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.]

See Willson's Cr. Forms, 1139, 1146.

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.]

See Willson's Cr. Forms, 1139.

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 each prisoner for each day such amount as may be fixed by the commissioners court, provided, the same shall be reasonably sufficient as compensation for such service, and in no event shall it be less than forty cents per day for each prisoner, nor more than fifty cents for each prisoner per day.

2. 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.

3. The reasonable funeral expenses in case of death. [Act Aug. 23, 1876, p. 290, § 11; Act 1911, p. 107, ch. 64, § 1; amending art. 1097, C. C. P. 1895.]

See Willson's Cr. Forms, 1142.

Construction of former law.—Where there are more than four prisoners the sheriff is entitled to only 30 cents a day for each of them. *Hammond v. Lamar County*, 18 Civ. App. 188, 44 S. W. 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 the board of such guard, nor shall any allowance be made for jailer or turnkey, except in counties having forty thousand population or more. In such counties of forty thousand population or more, the commissioners' court may allow each jail guard, jailer and turnkey two dollars and fifty cents per day. [Act Aug. 23, 1876, p. 290; Act 1909, p. 98; Act 1915, 1st S. S., p. 40, ch. 20, § 1, amending art. 1143, C. C. P.]

See Willson's Cr. Forms, 1142.

Approval of employment of guard.—The power of a sheriff to employ guards is expressly limited and defined by article 7127, *Vernon's Sayles' Civ. St.* 1914, and he can only make such employment with the approval of the commissioners' court, or in cases of emergency, with the approval of the county judge, except in the single instance where there is no jail in the county. A county can not be sued upon a claim until such claim has first been presented to the commissioners' court for allowance, and such court has neglected or refused to audit and allow the same or any part thereof. *McDade v. Waller County*, 3 App. C. C., sec. 139. See, also, 3 App. C. C. §§ 110, 111.

Art. 1144. [1099] Sheriff shall pay what expenses, 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.]

See Willson's Cr. Forms, 1139.

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.]

See Willson's Cr. Forms, 1140.

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.]

See Willson's Cr. Forms, 1141.

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.

See Willson's Cr. Forms, 1142.

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 Willson's Cr. Forms, 1143.

Ordering draft drawn as ministerial act.—The ordering by the commissioner's court of a draft to be drawn as required by this article is purely a ministerial act and one for the refusal of the performance of which mandamus will lie against said commissioner's court. *Denman v. Coffee*, 42 Civ. App. 78, 91 S. W. 802.

Draft as receivable for taxes.—See art. 1163, post.

Conclusiveness of action on account.—The action of the commissioners' court upon a sheriff's account for board and guards of prisoners is conclusive, in the absence of a showing that such court had abused its discretion, or that the allowance was not sufficient for the support of the prisoners. *Fayette County v. Faires*, 44 Tex. 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.

See Willson's Cr. Forms, 1144-1146.

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.]

See Willson's Cr. Forms, 1146.

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.]

See Willson's Cr. Forms, 1147.

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.]

See Willson's Cr. Forms, 1147.

Art. 1155a. Fees and salary of judge of county court of Bexar county for criminal cases.—The judge of the County Court of Bexar County for Criminal Cases shall collect the same fees provided by law for county judges in similar cases, all of which shall be paid by him monthly into the County Treasury, and he shall receive a salary of three thousand (\$3,000.00) dollars annually, to be paid monthly out of the County Treasury by the Commissioners Court. The county judge of Bexar County shall receive, in addition to the other fees allowed by law, a salary for the ex-officio duties of his office of not less than twenty-five hundred (\$2,500.00) dollars per annum. [Act 1915, p. 80, ch. 39, § 12.]

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.]

See Willson's Cr. Forms, 1148, 1149.

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.

See Willson's Cr. Forms, 1149.

Art. 1158. [1113] Pay of petit jurors.—Each juror who serves in the trial of any criminal case in any court of criminal jurisdiction, or who has been sworn as a juror for the term or week, shall receive two dollars and fifty cents (\$2.50) 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 the jurors in justice 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 court shall receive more than one dollar (\$1.00) for each day or fraction of a day he may serve as such juror. [Act Feb. 21, 1879; Act Mar. 15, 1881, p. 32; Act 1911, p. 109, ch. 66, § 1, amending art. 1113, C. C. P. 1895.]

See Willson's Cr. Forms, 1146, 1151.

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.

See Willson's Cr. Forms, 1152.

Art. 1160. [1115] Pay of grand jurors.—Grand jurors shall each receive two dollars and fifty cents (\$2.50) per day for each day and for each fraction of a day that they may serve as such. [Act Feb. 16, 1883, p. 11; Act 1911, p. 109, ch. 66, § 1, amending art. 1115, C. C. P. 1895.]

See Willson's Cr. Forms, 1146, 1151.

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.

See Willson's Cr. Forms, 1154, 1155.

Art. 1162. [1117] Certificates for pay of jurors and bailiffs.—The amount due jurors 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.

See Willson's Cr. Forms, 1150–1153, 1155.

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.]

Art. 1163a. Costs to be paid officers.—Whenever a convict, who has been committed to jail in default of payment of fine and costs adjudged against him, has satisfied such fine and costs in full by labor in the workhouse, on the county farm, on the public roads of the county, or upon any public works of the county, said county in

which said conviction was had shall be liable to each officer and witness having costs in the case against said convict for only one-half of such costs; and the county judge of said county shall issue his warrant upon the county treasurer in favor of each officer and witness for one-half of all such legal costs as may have been taxed up against said convict, not to include commissions; and the same shall be paid out of the road and bridge fund of the county, or out of any other county funds not otherwise appropriated. [Act 1876, p. 229, sec. 8. Amend. 1895, p. 179, ch. 115, § 1; Rev. St. 1911, art. 6247.]

Explanatory.—The above provision was not carried into the revision of 1911. It is included in this compilation on account of its pertinence to the subject of costs in criminal cases.

Former law.—A county was liable under article 3600, Rev. St. 1879, before its amendment in 1895, embodied in this article, for such costs only as were legally adjudged against the convict. *Harris County v. Stewart*, 91 Tex. 133, 41 S. W. 650.

This article, which was article 3742, Rev. St. 1895, is an amendment to article 3600, Rev. St. 1879, and was enacted in 1895. County attorneys are entitled to commissions earned prior to the amendment of 1895, but not afterwards. *Fears v. Ellis County*, 20 Civ. App. 159, 49 S. W. 139.

CHAPTER FOUR

OF COSTS TO BE PAID BY DEFENDANT

	Art.
1. IN THE COURT OF CRIMINAL APPEALS	
1164. Fees of attorney general in misdemeanor cases.	1177a. Costs to be collected as provided by ordinances but not greater than in justices' courts.
1165. Clerk allowed fees not to exceed \$2,500 per annum.	1178. Fees of county attorneys representing state in corporation courts.
1166. Shall be taxed against defendant.	1179. In case of several defendants, and where defendant pleads guilty.
1167. Costs when taxed against defendant.	1180. No fee allowed attorney, etc.
	1181. Fee of justice of the peace sitting as examining court in misdemeanor case.
2. IN THE DISTRICT AND COUNTY COURTS	1182. Fees of sheriff and other officers in such examining court.
1168. Fees of district and county attorneys.	
1169. Fee of county attorney in local option case.	4. JURY AND TRIAL FEES
1170. In case of joint defendants.	1183. In district and county courts.
1171. Attorney appointed entitled to the fee.	1184. Trial fee in county courts.
1172. Fees of district and county clerks.	1185. Jury fee in justices', mayors' and recorders' courts.
1173. Fees of sheriff or other peace officer.	1186. Where there are several defendants.
1174. Fees of sheriff and other officers in lunacy case.	1187. Jury fees collected as other costs.
	5. WITNESS FEES
3. IN JUSTICES', MAYORS' AND RECORDERS' COURTS	1188. Fees of witnesses in criminal cases.
1175. Fees of justices, mayors, and recorders.	1189. Shall be taxed against defendant upon, etc.
1176. Fees of constables and other peace officers.	1190. No fees allowed, unless, etc.
1177. Fees of state's attorney.	1191. Clerks, etc., shall keep books, in which shall be entered, etc.
	1192. Witness liable for costs, when.

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. [Act 22d Leg., ch. 16, § 63.]

See Willson's Cr. Forms, 1156.

See art. 1115, ante.

Joint defendants.—The fee is taxable for each defendant, though they were convicted jointly. *Hogg v. State*, 40 App. 109, 48 S. W. 580.

Liability on recognizance for fee and costs of collection.—Arbuthnot v. State, 38 App. 509, 34 S. W. 269, 43 S. W. 1024; Benson v. State, 39 App. 56, 44 S. W. 167, 1091.

Fee is taxable as costs.—See Arbuthnot v. State, 38 App. 509, 34 S. W. 269, 43 S. W. 1024.

Art. 1165. [1120] Clerk allowed fees not to exceed \$2,500 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.]

See Willson's Cr. Forms, 1156.

See art. 1116, ante; Bonn v. State, 12 App. 100.

Several defendants.—The clerk is entitled to \$10 for each defendant whose sentence is affirmed though one judgment included fines against several defendants, since, in effect, it is a separate judgment against each. Hogg v. State, 40 App. 109, 48 S. W. 580.

Liability on recognizance for fee and cost of collection.—See Arbuthnot v. State, 38 App. 509, 34 S. W. 269, 43 S. W. 1024; Benson v. State, 39 App. 56, 44 S. W. 167, 1091.

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.

See Willson's Cr. Forms, 1156.

Liability on recognizance for fees and costs of collection.—Arbuthnot v. State, 38 App. 509, 34 S. W. 269, 43 S. W. 1024; Benson v. State, 39 App. 56, 44 S. W. 167, 1091.

Fee taxable as costs.—See Arbuthnot v. State, 38 App. 509, 34 S. W. 269, 43 S. W. 1024.

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.]

See Willson's Cr. Forms, 1156.

Liability on recognizance.—Benson v. State, 39 App. 56, 44 S. W. 167, 1091; Arbuthnot v. State, 38 App. 509, 34 S. W. 269, 43 S. W. 1024.

Effect of death pending appeal.—See Kelly v. State (Cr. App.) 66 S. W. 774.

Reversal.—Where case is reversed and new information is filed, all costs prior to filing second information are excluded. Mayo v. State (Cr. App.) 55 S. W. 338.

Dismissal for defective recognizance.—Roberts v. State (Cr. App.) 68 S. W. 989.

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.]

See Willson's Cr. Forms, 1156.

Fees in different courts in same case.—See *Huizar v. State* (Cr. App.) 63 S. W. 329.

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 *subpœna*, 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.]

Failure to take bond from accused.—Where accused when arrested was entitled to give bond, and offered to give adequate bond, but was refused opportunity to do so, he should not be taxed with the expenses of the sheriff in going after him and returning him to the county of trial. *Buzan v. State*, 59 App. 213, 128 S. W. 388.

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 subpœnas in such lunacy cases, shall receive the same fees as are now allowed them by law for taking complaints, issuing warrants and subpœnas in criminal misdemeanor cases. Constables shall receive, for executing warrants and serving subpœnas 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.]

Taxation of costs in dismissed cases improper.—See *McArthur v. State*, 41 App. 635, 57 S. W. 847.

3. IN JUSTICES', MAYORS' AND RECORDERS' COURTS

Art. 1175. [1128] Fees of justices, mayors and recorders.—Justices of 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 subpœna 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. [Act Aug. 23, 1876, p. 289, § 12.]

See Willson's Cr. Forms, 1137, 1156.

Explanatory.—Laws 1897, S. S. ch. 5, § 25, provides as follows: "Justices of the peace shall receive for the following services the following fees: For filing each paper, 5 cents; each continuance, 10 cents." From a consideration of this act as a whole it would seem that an amendment of the above article was not intended, and that the design of the new act was to supplement the civil statutes. See Vernon's Sayles' Civ. St. 1914, art. 3867.

Costs on appeal.—The \$1.50 for transcript and twenty-five cents for approving appeal bond are part of fine and costs in a case appealed from justice to county court. *Shields v. State* (Cr. App.) 57 S. W. 670.

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.

Unlawful arrest.—See *Ex parte Sykes*, 46 App. 51, 79 S. W. 538.

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.

Fees in different courts in same case.—See *Huizar v. State* (Cr. App.) 63 S. W. 329.

Art. 1177a. Costs to be collected as provided by ordinances, but not greater than in justices' courts.—There shall be taxed against, and collected of, each defendant, in case of his conviction before such court, [corporation court] such costs as may be provided for by ordinance of the said city, town or village; but in no case shall the council or board of aldermen of any such city, town or village, prescribe the collection of greater costs than are prescribed by law to be collected of defendants convicted before justices of the peace. [Act 1899, p. 42, § 11.]

See arts. 968d-968f, 968j, ante.

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.]

Validity of article.—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 App. 135, 122 S. W. 29, 136 Am. St. Rep. 977.

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 defendant 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.]

Costs at examining trial.—Defendant, on conviction, may not be taxed as part of the costs, with the justice's court costs for holding the examining trial. *Wade v. State*, 48 App. 512, 90 S. W. 503.

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.

See Willson's Cr. Forms, 1156.

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, may-

or'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.]

See Willson's Cr. Forms, 1156.

Mileage.—A witness is entitled to mileage for only one trip going from and returning home from one term of court, and per diem only for the days he actually attends court, including time consumed in going from and returning home. *McArthur v. State*, 41 App. 635, 57 S. W. 850.

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.]

See Willson's Cr. Forms, 1156, 1157.

Necessity of affidavit.—To entitle a witness to recover his fees as part of the costs in the case, he must have been subpoenaed or attached in the case, and must prove up his attendance by an affidavit in writing. It is not sufficient that the clerk swore the witness verbally. *Stewart v. State*, 38 App. 627, 44 S. W. 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

Art. 1193.	Commissions allowed district and county attorneys.	Art. 1194.	Commissions allowed sheriff or other officer.
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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. [Act of 1879, ch. 126, p. 133.]

Penalties for violation of anti-trust law.—This article does not apply to civil actions in behalf of the State to recover penalties and a district clerk is not entitled to recover five per cent. of the judgment for penalties of the anti-trust law. *State v. Hart*, 96 Tex. 102, 70 S. W. 948.

Construction of "clerk."—The word "clerk," means clerk of the court in which an action is brought, or is pending, or in which a proceeding is had (quoting 2 Words and Phrases, 1226). *McLennan County v. Boggess*, 104 Tex. 311, 137 S. W. 346.

Construction of "judgments recovered."—The phrase "judgments recovered," applies appropriately to judgments in scire facias cases, as forfeited bail bonds or recognizances; but fees of clerks in civil cases are otherwise provided for and the act is not cumulative. *State v. Norrell*, 53 Tex. 427.

Remission of forfeiture.—Remission of a fine by the governor defeats the right of the attorney general or the county or district attorney to a commission. *State v. Dyches*, 28 Tex. 535; *Smith v. State*, 26 App. 49, 9 S. W. 274.

Justices of the peace.—This article does not authorize compensation to justices of the peace for clerical services performed by them in cases in which fines were collected. *McLennan County v. Boggess*, 104 Tex. 311, 137 S. W. 346.

This article does not authorize more than one commission for fines collected in justices' courts, and a justice retaining 5 per cent. of the fines collected cannot pay the constable 5 per cent., but he must pay the district or county attorney 10 per cent. as required by this article, and pay 85 per cent. to the county. *McLennan County v. Boggess* (Civ. App.) 139 S. W. 1054.

Nisi judgments.—While a nisi judgment is in some senses a "judgment," it is not a judgment within this article and hence the incumbent in the office of clerk of a district court when final judgment was rendered under forfeiture of a bail bond, and not his predecessor, who was the incumbent when nisi judgment was obtained, is entitled to the commission. *McHugh v. Reese* (Civ. App.) 149 S. W. 743.

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; Act 21st Leg., April 2, 1889, ch. 85, p. 95, §§ 12, 14.]

Remission of forfeiture or fine.—A general remission of a forfeiture or fine, by the governor, includes the commissions of the district or county attorney. *State v. Dyches*, 28 Tex. 535.

Justices of the peace.—This article does not authorize more than one commission for fines collected in justices' courts, and a justice retaining 5 per cent. of the fines collected cannot pay the constable 5 per cent., but he must pay the district or county attorney 10 per cent. as required by article 1193, and pay 85 per cent. to the county. *McLennan County v. Boggess* (Civ. App.) 139 S. W. 1054.

TITLE 17

DELINQUENT CHILDREN

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| STATE JUVENILE TRAINING SCHOOL | | |
| Art. | Art. | |
| 1195. Male persons under the age of seventeen accused of felony to be prosecuted as juvenile delinquents; committed to State Industrial School for Boys upon indeterminate sentence; time of detention; proof of age; proviso. | 1203. Commitment of delinquent to care of proper person or institution or of probation officer; age limit; order of court; detention homes and parental schools; special tax; election. | |
| 1196. Duty of officers in case of escapes from institution; cost incurred. | 1204. Report to juvenile court by persons having custody of delinquent; responsibility of custodian. | |
| DELINQUENT CHILD, TO REGULATE THE CONTROL AND TREATMENT OF SAME | | |
| 1197. Delinquent child, defined; disposition of child under act not to have evidentiary effect. | 1205. [Repealed.] | |
| 1198. Jurisdiction of district and county courts; jury trial; entry of findings; name of court. | 1206. Commitment of incorrigible boys to State Industrial School for Boys; petition by parent or guardian; expenses; discharge on nonpayment; conveyance to institution. | |
| 1199. Sworn complaint or information; requisites. | 1207. Construction of act; expenses how paid. | |
| 1200. Proceedings on complaint, notice to parent or guardian; contempt proceedings against parent or guardian; confinement of child; security for appearance. | GIRLS' TRAINING SCHOOL | |
| 1201. Courts always open for disposition of cases; proceedings not to be had in justice or police courts except to transfer causes to juvenile courts. | 1207a. Dependent or delinquent girls may be committed by juvenile court, etc.; mentally deficient or diseased girls; examination. | |
| 1202. Probation officers; appointment; duties and powers; compensation; oath; number. | 1207b. Duties of court; transcript; conveyance to school, etc. | |
| DELINQUENT SCHOOL CHILDREN | | |
| | 1207c. Incorrigible pupils to be proceeded against in juvenile court; parole of child; bond to secure good behavior; report by school officers and teachers; violation of parole; commitment to training school. | |
| | 1207d. Repeal and partial invalidity. | |

STATE JUVENILE TRAINING SCHOOL

Article 1195. [1145] Male persons under the age of seventeen accused of felony to be prosecuted as juvenile delinquents; committed to State Industrial School for Boys upon indeterminate sentence; time of detention; proof of age; proviso.—When an indictment is returned by the grand jury of any county charging any male juvenile under the age of seventeen 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 seventeen years of age, said judge shall dismiss such prosecution and proceed to try the juvenile as a delinquent, under the provisions of this Act. If said juvenile be found to be delinquent, and sentence be not suspended, as provided in the laws of this State in cases of felony on first offense the defendant shall be committed to the State Industrial School for Boys upon an indeterminate sentence; provided, that such defendant shall not be detained in said school after he has reached the age of twenty-one years. Such defendant shall be conveyed to the said school by the probation officer, sheriff or any peace officer designated by the court; provided, that such conviction and detention in said school shall not deprive defendant of any of his rights of citizenship when he shall become of legal age; and provided, further, 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 seventeen years of age, before the judgment of commitment to said institution shall be entered. The officer conveying any defendant to said school shall be paid by the county in which conviction is rendered the actual traveling expenses of said officer and defendant: provided, further, that nothing in this Act shall be held to affect, modify or vitiate any judgment heretofore entered confining any defendant to the State Institution for the Training of Juveniles: but the unexpired portion of any such judgment shall be fulfilled by the confinement of any such defendant in the State Industrial School for Boys. [Act 1895, ch. 68; Act 1909, p. 100; Act 1913, p. 214, ch. 112, § 1, amending art. 1195, C. C. P. 1911.]

See Vernon's Sayles' Civ. St. 1914, arts. 2184-2201b, 5221-5234i.

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| 1. Explanatory. | 9. Necessity of finding as to age. |
| 2. Validity of statute. | 10. Specification of age in verdict. |
| 3. — Former laws. | 11. Age at time of trial as controlling. |
| 4. Repeal of civil statute. | 12. Capital punishment. |
| 5. Female delinquents. | 13. Continuance. |
| 6. Indeterminate sentence. | 14. Place of confinement. |
| 7. Trial of issue as to age. | 15. Jury. |
| 8. Necessity of transfer of cause. | 16. — Assessment of punishment. |

1. **Explanatory.**—Acts 1913, S. S. ch. 6, amending art. 5221 of the Rev. St. of 1911, changes the name of the institution mentioned above to "The State Juvenile Training School." It seems to have been the intention of the legislature to change the name of the institution from "State Institution for the Training of Juveniles" to "State Industrial School for Boys," but that intention was never carried out. See, in this connection, *Ex parte Bartee* (Cr. App.) 174 S. W. 1051.

2. **Validity of statute.**—The statute authorizing the quashing of indictments against boys under 17 and girls under 18 years of age, and the institution of proceedings against them in the county court, as delinquent children, is not in violation of the state or federal Constitution; there being no attempt to give the district and county court concurrent jurisdiction of felonies and misdemeanors. Nor is it in contravention of Pen. Code 1911, arts. 1, 3, declaring that no person shall be punished for any act or omission, unless it shall be a criminal offense, for the proceeding is not criminal in its nature, but an exercise by the state of power of *parens patriæ*. *Ex parte Bartee* (Cr. App.) 174 S. W. 1051.

3. — **Former laws.**—Section 12 of the act creating the house of reformatory and correction C. C. P. 1895, art. 1145 was constitutional. *Washington v. State*, 28 App. 411, 13 S. W. 606.

The statute, providing for the incarceration of criminals under 16 years of age in a reformatory, instead of the penitentiary, is not unconstitutional. *Johns v. State*, 63 App. 416, 140 S. W. 1093.

4. **Repeal of civil statute.**—Act April 2, 1889 (Acts 21st Leg. c. 85), incorporated in Code Cr. Proc. 1895, as articles 1145 and 1146, provided that, when a male person under 16 years of age was convicted of felony, and his imprisonment was assessed at 5 years, he should be committed to the reformatory. Act April 5, 1907 (Acts 30th Leg. c. 65), in ten sections defines and prescribes the procedure for trial of a delinquent child. Act April 5, 1907, was copied in the Code Cr. Proc. 1911 as articles 1197 to 1206; the earlier act being incorporated as articles 1195 and 1196. The revisers also included the same act in Rev. St. 1911, as articles 2191 to 2201, inclusive. Both compilations were adopted by the Legislature. Acts 33d Leg. c. 112, amended Code Cr. Proc., arts. 1195 to 1207, and at the special session of the Legislature (Acts 33d Leg. [Sp. Sess.] c. 6), Rev. St. 1911, arts. 5221-5234, relating to the same general subject, were amended and re-enacted. Act 1907, §§ 9, 10, appearing in Vernon's Sayles' Civ. St. 1914, as articles 2199-2201, were not changed. Code Cr. Proc. art. 1195, as amended, provides that, when a male juvenile under 17 years of age is indicted for a felony, he may set up that fact, and the court shall have the power to dismiss the prosecution and try the juvenile as a delinquent. Vernon's Sayles' Civ. St. 1914, art. 5229, contains similar provisions, while article 2199 provides that the county or district court may order a delinquent child, charged with crime, to be prosecuted under the criminal laws of the state as other criminals, but that no child under 16 years of age shall be so prosecuted without the order being first entered. Held that, as repeals by implication are not favored, arts. 2199, 2200, were not repealed, and the district court had jurisdiction to try a juvenile offender. *McCallen v. State* (Cr. App.) 174 S. W. 611.

5. **Female delinquents.**—Under the amending act of April 2, 1889, a female convict can not be confined in the house of reformatory. *Ex parte Creel*, 29 App. 439, 16 S. W. 256. See article 1201, post. And see *Ex parte Matthews*, 38 App. 617, 44 S. W. 153.

6. **Indeterminate sentence.**—That relator was sentenced to the State Juvenile Training School for a period of not less than two nor more than five years does not render the judgment void, notwithstanding the later law provided for an indeterminate sentence of not more than five years. *Ex parte Bartee* (Cr. App.) 174 S. W. 1051.

7. **Trial of issue as to age.**—Where accused at the commission of the offense was over 16 years old, his imprisonment would be in the penitentiary; and there was no error in not submitting the issue of his age, that the jury might assess his punishment in the reformatory, in their discretion. *Munger v. State*, 57 App. 384, 122 S. W. 874.

The issue of the age of an offender must be disposed of at the trial, and where the officer making an arrest was informed that accused was not within the act, a judgment finding him guilty of misdemeanor theft and assessing his punishment at a fine and imprisonment is not void. *Ex parte Winfield* (Cr. App.) 168 S. W. 92.

8. **Necessity of transfer of cause.**—The district court was not bound under act of 1909 to dismiss or transfer upon a showing, that defendant was under sixteen, but could order the case tried before it. *Ragsdale v. State*, 61 App. 145, 134 S. W. 234.

9. **Necessity of finding as to age.**—Code Cr. Proc. 1895, art. 1145, did not require a finding as to age, where accused was conceded to be sufficiently old to be criminally responsible, and his punishment exceeded five years. *Perry v. State*, 61 App. 2, 133 S. W. 685.

10. **Specification of age in verdict.**—Under the former law it was necessary for the verdict to specify the age of accused. *Watson v. State*, 49 App. 371, 92 S. W. 807; *Bates v. State*, 50 App. 568, 99 S. W. 551; *Lewis v. State* (Cr. App.) 99 S. W. 1011; *Eyrd v. State*, 55 App. 390, 116 S. W. 1146. See, also, *Aikins v. State*, 49 App. 229, 91 S. W. 791; *Simmons v. State*, 50 App. 527, 97 S. W. 1052; *Henderson v. State*, 50 App. 620, 99 S. W. 1001.

11. **Age at time of trial as controlling.**—Under this article before its amendment in 1913, one who was over 16 years of age when brought to trial could not claim the right to be tried as a juvenile because he was under 16 years when the offense was committed. *Arrendell v. State*, 60 App. 350, 131 S. W. 1096.

12. **Capital punishment.**—Capital punishment cannot be inflicted on an offender under seventeen years old, and in all such cases accused is entitled to bail. *Ex parte Walker*, 28 App. 246, 13 S. W. 861; *Walker v. State*, 28 App. 503, 13 S. W. 860; *Wilcox v. State*, 32 App. 284, 22 S. W. 1109.

13. **Continuance.**—It was not reversible error to refuse a continuance for absent testimony as to accused's age, where the jury had an opportunity to observe him, and there was no suggestion of mental irresponsibility, and his punishment was fixed at seven years. *Perry v. State*, 61 App. 2, 133 S. W. 685.

14. **Place of confinement.**—Requirement of former law that verdict should specify place of imprisonment, see *Washington v. State*, 28 App. 411, 13 S. W. 606; *Duncan v. State*, 29 App. 141, 15 S. W. 407; *Hays v. State*, 30 App. 472, 17 S. W. 1063; *Sanchez v. State*, 31 App. 484, 21 S. W. 364. See, also, *Trent v. State*, 31 App. 251, 20 S. W. 547; *Green v. State*, 32 App. 298, 22 S. W. 1094; *Evans v. State*, 35 App. 485, 34 S. W. 285; *Ex parte Wood*, 36 App. 7, 34 S. W. 965; *Rocha v. State*, 38 App. 69, 41 S. W. 611.

Under this article, before its amendment in 1913, one over sixteen years old at time of commission of offense, 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 App. 384, 122 S. W. 874.

Under this article before its amendment in 1913 the court was not required to instruct, in a prosecution of two defendants under 16 years of age, that the verdict should fix the place of confinement, but properly instructed that, if the verdict of conviction imposed a sentence of confinement for 5 years or less, the judgment of the court would be for confinement in the state institution for the training of juveniles, but would be for confinement in the penitentiary if the verdict was for more than 5 years' confinement. *Ragsdale v. State*, 61 App. 145, 134 S. W. 234.

15. **Jury.**—Where a boy under 15 years of age was charged with theft, it was proper for the court to have a jury summoned to pass on the guilt or innocence of the child, after which the court would fix the punishment. *Windham v. State* (Cr. App.) 150 S. W. 613.

16. — **Assessment of punishment.**—Cited, *Bowen v. State*, 72 App. 404, 162 S. W. 1146.

Where the jury returned a verdict sentencing accused to confinement in the House of Correction and Reformatory, and judgment was entered upon the verdict, it was improper for the court to change the judgment so as to assess the punishment at three years at the State Institution for the Training of Juveniles, even though that institution had supplanted the Reformatory, which had been abolished. *Zimmer v. State*, 64 App. 114, 141 S. W. 781.

A felon under 16 (now 17) may be confined either in the penitentiary or at the State Institution for the Training of Juveniles. *Zimmer v. State*, 64 App. 114, 141 S. W. 781.

Where, in a prosecution for theft, the case had been transferred to the juvenile court, it was proper to refuse a request to charge that, if the jury found defendant guilty, they should assess his punishment at confinement in the county jail for any length of time not exceeding two years, and by fine not exceeding \$500, or imprisonment without fine. *Windham v. State* (Cr. App.) 150 S. W. 613.

Art. 1196. [1146] Duty of officers in case of escapes from institution; cost incurred.—If any person confined in the State Industrial School for Boys, after judgment of conviction for a delinquency, 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 school, and they shall be returned by said

sheriff or other peace officer to said school, 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 school; 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. [Act 1909, p. 101; Act 1913, p. 214, ch. 112, § 2, amending art. 1196, C. C. P. 1911.]

See notes under art. 1195.

DELINQUENT CHILD, TO REGULATE THE CONTROL AND TREATMENT OF SAME

Art. 1197. "Delinquent child" defined; disposition of child under Act not to have evidentiary effect.—The words "delinquent child" shall include any male child under seventeen years of age, or any female child under eighteen 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 habitually 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 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 Act 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 Act. [Act 1907, p. 137; Act 1913, p. 215, ch. 112, § 3, amending art. 1197, C. C. P. 1911.]

See Vernon's Sayles' Civ. St. 1914, arts. 2184-2201b, 5221-5234l.

See Edmanson v. State, 64 App. 413, 142 S. W. 887.

Repeal of civil statute.—See notes under art. 1195, ante.

Change in name of institution as authorizing discharge.—Relator, who was found to be a delinquent child, was ordered carried to the "State Institution for the Training of Juveniles." Acts 33d Leg. (1st Called Sess.) c. 6, § 8 (Vernon's Sayles' Civ. St. 1914, art. 5228), by which the name was changed to the "State Juvenile Training School," declared that all inmates sentenced to the first institution should serve out their unexpired term. Held, that the change in the name did not warrant relator's discharge. Ex parte Bartee (Cr. App.) 174 S. W. 1051.

Necessity of indictment.—Under Acts 33d Leg. c. 112, and 1st Called Sess. c. 6, § 8 (Vernon's Sayles' Civ. St. 1914, art. 5228), a child can be proceeded against as a delinquent without the filing of an indictment against him. Ex parte Bartee (Cr. App.) 174 S. W. 1051.

Art. 1198. Jurisdiction of district and county courts; jury trial; entry of findings; name of court.—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. 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." [Act 1907, p. 138; Act 1913, p. 215, ch. 112, § 4, amending art. 1198, C. C. P. 1911.]

Repeal of civil statute.—See notes under article 1195, ante.

Art. 1199. Sworn complaint or information; requisites.—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 any 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." [Act 1907, p. 138; Act 1913, p. 215, ch. 112, § 5, amending art. 1199, C. C. P. 1911.]

Art. 1200. Proceedings on complaint; notice to parent or guardian; contempt proceedings against parent or guardian; confinement of child; security for appearance.—Upon filing of complaint under this Act, 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 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 other 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 Act shall be incarcerated in any compartment or a jail or lock-up in which persons over eighteen years of age are being kept or detained; and further provided, that it shall be the duty of the proper authorities of all counties with a population of over one hundred thousand to provide a suitable place for the detention of children coming under this Act, except and apart from any jail or lock-up in which older persons are incarcerated. 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. [Act 1907, p. 138; Act 1913, p. 215, ch. 112, § 6, amending art. 1200, C. C. P. 1911.]

Incarceration pending delinquency proceedings.—This section has reference to confinement of the child during proceedings brought under the terms of the act, and not to confinement of persons under 16 years of age in jail to await trial in due season when such detention is necessary to secure their safety until trial. *Ex parte Thomas*, 56 App. 66, 118 S. W. 1054.

Art. 1201. Courts always open for disposition of cases; proceedings not to be had in justice or police courts except to transfer causes to juvenile courts.—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 male child under seventeen years of age, or female child under eighteen years of age, 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. [Act 1907, p. 139; Act 1913, p. 216, ch. 112, § 7, amending art. 1201, C. C. P. 1911.]

Art. 1202. Probation officers; appointment; duties and powers; compensation; oath; number.—The county courts of the several counties in this State shall have authority to appoint any number of discreet persons of good moral character to serve as probation officers during the pleasure of the court, said probation officers to receive no compensation from the county treasury except as herein provided. It shall be the duty of the clerk of the court, if practicable, to notify the said probation officer or officers when any child is to be brought before the court; it shall be the duty of such probation officer to make investigation of such case; to be present in court to represent the interests of the child when the case is heard; to furnish to such court such information and assistance as the court or judge may require, and to take charge of any child before and after the trial, as may be directed by the court. The number of probation officers to receive compensation from the county, named and designated by the county court, shall be as follows:

In counties having a population of less than thirty-five thousand one probation officer may be appointed by the county judge when in his opinion the services of such officer are needed; and in counties of thirty-five to one hundred thousand one probation officer may be appointed by the county judge. The county judge shall select such probation officer from a list of three furnished by a nominating committee composed of three members, as follows: The County Superintendent of Public Instruction, and the superintendents, or if there be no superintendents, then the principals of the two largest independent school districts in such county. Such probation officer shall receive a salary not to exceed twelve hundred dollars per annum, and expenses may be allowed such probation officer by the county in a sum not to exceed two hundred dollars per annum.

In counties having a population of more than one hundred thousand, the county judge shall appoint not fewer than two probation officers from lists furnished him by the nominating committee, as provided above. The chief probation officer shall receive a salary not to exceed fifteen hundred dollars and necessary expenses not to exceed two hundred dollars per year. Other probation officers shall receive salaries not to exceed nine hundred dollars per year and all necessary expenses not to exceed two hundred dollars.

In the appointment of all probation officers under the provisions of this Act, the county judge may upon the nomination of the committee of three hereinbefore provided for, select for such office any school attendance officer or officers of the county or of school districts in the county that may be provided for any compulsory school attendance law now in force in this State, or that may hereafter be passed, and the salary and expenses of such joint probation and attendance officer or officers shall be paid jointly by the county and school authorities upon any basis of division they may agree upon.

Probation officers receiving a salary or other compensation from the county, provided for by this Act, are hereby vested with all the power and authority of police or sheriffs to make arrests and perform any other duties ordinarily required by policemen and sheriffs which may be incident to their office or necessary or convenient to the performance of their duties; provided, that other probation officers may be vested with like power and authority upon a written

certificate from the county judge that they are persons of discretion and good character and that it is the desire of the court to vest them with all the power and authority conferred by law upon probation officers receiving compensation from the county.

Salaries or compensation of paid probation officers permitted by this Act shall be fixed by the county judge, not to exceed sums herein mentioned, and any bills for expenses not exceeding the sums herein provided for, shall be certified to by the county judge as being necessary in and about the performance of the duties of probation officer or officers. It shall be the duty of the commissioner's court of the county to provide the necessary funds for the payment of the salaries and expenses of the probation officers provided for under this Act. The appointment of probation officers as herein designated shall be filed in the office of the clerk of the county court. Probation officers shall take an oath, such as may be required of other county officers, to perform their duties, and file it in the office of the clerk of the county court.

Nothing herein contained, however, shall be held to limit or abridge the power of the county judge to appoint any number of persons as probation officers. And upon a vote of the county commissioners' court the county judge may appoint as many additional salaried probation officers as the court may direct. As a basis for the reckoning of the population of any county affected by this Section, the last Federal census shall be used. [Act 1907, p. 139; Act 1913, p. 216, ch. 112, § 8, amending art. 1202, C. C. P. 1911.]

Art. 1203. Commitment of delinquent to care of proper person, or institution or of probation officer; age limit; order of court; detention homes and parental schools; special tax; election.—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 the probation officer or to the care or custody of any other proper person, and may allow said child to remain in its own home, subject to 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 to do so. Authority is hereby granted to all counties in this State to establish detention homes and parental schools for dependent delinquent juveniles, and it shall be lawful for the commissioners' court

to appropriate from the general fund of the county such sum or sums as may be necessary to establish, equip and maintain such detention homes and parental schools as may be necessary to care for the dependent and delinquent children of the county. In like manner any county in which no such detention home or parental school exists may appropriate such funds as may be necessary to pay for the board and for the proper care and training of its dependent and delinquent juveniles in the detention home or parental school of any county that may agree to receive them and at such rates of board and tuition as shall be agreed upon by the commissioners' courts of the counties concerned; provided, when, in the opinion of the commissioners' court, it is desirable to levy a special tax for establishing and maintaining such detention home or parental school, or for paying the board and tuition of dependent and delinquent children as herein provided the said court may bring the question of levying such special tax to a vote of the qualified voters of the county at a special election held for that purpose, and the said court must submit the said question to the voters when requested to do so by a petition signed by ten per cent of the qualified voters of the county. All elections held under the provisions of this section shall be governed in all respects not herein specified to the contrary by the laws of this State governing elections for the levy of special school taxes. [Act 1907, p. 139; Act 1913, p. 218, ch. 112, § 9, amending art. 1203, C. C. P. 1911.]

Nature of proceeding.—Proceedings for commitment under this article are "criminal" in their nature, so that the court of Criminal Appeals had jurisdiction of an application by the alleged delinquent for habeas corpus. *Ex parte McDowell* (Cr. App.) 172 S. W. 213.

Discretion of court.—This article leaves the disposition of the child to the discretion of the court. *Ex parte McDowell* (Cr. App.) 172 S. W. 213.

Release on habeas corpus.—Where the court ordered a child committed for two years as a delinquent, and subsequently made an order releasing the child, it was entitled to release on habeas corpus; the second order being valid if the first was valid, and the detention being unauthorized if the first order was invalid. *Ex parte McDowell* (Cr. App.) 172 S. W. 213.

Art. 1204. Report to juvenile court by persons having custody of delinquent; responsibility of custodian.—The court or the 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 the children or ability to care for children is not satisfactory to the court. [Act 1907, p. 140; Act 1913, p. 219, ch. 112, § 10, amending art. 1204, C. C. P. 1911.]

Art. 1205. [Repealed by Act 1913, ch. 112, § 13.]

Art. 1206. Commitment of incorrigible boys to State Industrial School for Boys; petition by parent or guardian; expenses; discharge on nonpayment; conveyance to institution.—Any parent or guardian of any incorrigible boy, under the age of seventeen 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 Industrial School for Boys. The court shall set the case down for hearing and shall 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 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 school shall discharge such boy and return him to his home.

The expense of conveying all boys committed to said school 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 Industrial School for Boys; provided, that the court may send the boy to the school without escort, if he deem it prudent. [Act 1909, p. 102; Act 1913, p. 219, ch. 112, § 11, amending art. 1206, C. C. P. 1911.]

Art. 1207. Construction of Act; expenses how paid.—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 restoration to society 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; Act 1913, p. 219, ch. 112, § 12, superseding art. 1207, C. C. P. 1911.]

GIRLS' TRAINING SCHOOL

Art. 1207a. Dependent or delinquent girls may be committed by juvenile court, etc.; mentally deficient or diseased girls; examination.—Whenever any girl between the ages of seven and eighteen years shall be brought before any juvenile court upon petition of any person in this state or the humane society or any institution of a similar purpose or character, charged with being a dependent or delinquent child as these terms are defined in the statutes of this state, the court may, if in the opinion of the judge, the girls' training school is the proper place for her, commit such girl to said girls' training school during her minority; provided, that no girl shall be committed to the girls' training school who is feeble-minded, epileptic or insane, and that any girl committed to said girls' training school who is afflicted with a venereal, tubercular or other communicable disease, shall be assigned to a distinct and separate building of the institution and shall not be allowed to associate with the other wards until cured of said disease or diseases.

No girl shall be admitted to the institution until she has been examined by the training school physician, and such physician issuing a certificate showing her exact state or condition in reference to said qualifications hereinabove enumerated. [Act 1913, p. 289, sec. 5.]

Explanatory.—Sections 1-4, 7, 8, 10, 11, of this act, relate to the establishment of the girls' training school, and are inserted in Vernon's Sayles' Civ. St. 1914, as articles 5234a-5234h.

Art. 1207b. Duties of court; transcript; conveyance to school, etc.—It shall be the duty of the court committing any girl to the girls' training school, in addition to the commitment, to annex a carefully prepared transcript of the trial to aid the officials of the institution in better understanding and classifying the girl. The court shall also designate some reputable woman to convey the girl to the institution. The cost of conveying any girl committed to this institution shall be paid by the county from which she is committed,

provided that no compensation shall be allowed beyond the actual and necessary expenses of the party conveying and the girl conveyed. [Id. sec. 6.]

DELINQUENT SCHOOL CHILDREN

Art. 1207c. Incurrable pupils to be proceeded against in juvenile court; parole of child; bond to secure good behavior; report by school officers and teachers; violation of parole; commitment to training school.—Any child within the compulsory school attendance ages who shall be insubordinate, disorderly, vicious or immoral in conduct, or who persistently violates the reasonable rules and regulations of the school which he attends, or who otherwise persistently misbehaves therein so as to render himself an incurrable, shall be reported to the person exercising the duties of attendance officer of said school, who shall proceed against such child in the juvenile court as herein provided [art. 1513g, Penal Code]. If such child is found guilty upon a charge or charges made against him in said court, the judge of said court shall have the power to parole said child, after requiring the parent or other person standing in parental relation, to execute a bond in the sum of not less than ten dollars, conditioned that said child shall attend school regularly and comply with all the rules and regulations of said school. If the Superintendent or principal of any school shall report to the school attendance officer acting for said school that said child has violated the conditions of his parole, said attendance officer shall proceed against such child before the judge of the juvenile court, as in the first case herein mentioned, and if said child shall be found guilty of violating the conditions of said parole, the bond provided for herein shall forthwith be declared forfeited, and shall be collected in the same manner as other forfeited bonds under the general laws of this State, and the proceeds of same paid into the available school fund of the common school district or the independent school district, as the case may be; and the judge of said court shall have the power in his discretion, after a fair and impartial hearing given to said child, to parole said child again, requiring such bond as he may deem prudent, and require said child to again enter school. If said child shall violate the conditions of the second parole and shall be convicted of same, he shall be committed to a suitable training school as may be agreed upon by the parent of the child and the judge of the juvenile court in which the child is convicted. [Act 1915, p. 97, ch. 49, § 9.]

Art. 1207d. Repeal and partial invalidity.—All laws and parts of laws in conflict with this Act are hereby repealed, and in case it is declared by the courts that any section or provision of this Act is unconstitutional, such decision shall not impair other sections or provisions of this Act. [Id., § 10.]

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] seal of State at my office in the City of Austin,
Texas, this the 2nd day of December, A. D.
1911. C. C. McDONALD,
Secretary of State.

List of Acts, Passed Subsequent to the Revision of 1895, Omitted from the Revised Code of Criminal Procedure of 1911, and Included in This Compilation in Accordance with the Explanation Given in the Preface in the Front of This Book

Date of Law.	Chap.	Sec.	Article in this Compilation.	Subject of Act.
1895	115 (Sen. Jour. No. 97, p. 484; Rev. St. 1911, Art. 7133)	1	1163a 1105a	County's Liability for Costs. Requiring List of Fugitives to be Sent to Adjutant General.
1897 (S. S.)	5 12	1, 7 1	1117h, 1127a 618, 618a	Fees of Office. Designation of Special Judge in Cases in which District Judge is Disqualified.
1899	33		109a-109g, 920a, 968b-968h, 968j, 1177a	Creation of Corporation Court.
1903	25		844a	Time for Filing Statement of Facts.
1905	14		661a	Summoning Jurors in Capital Cases.
	48	1-3	1057r-1057t	Appointment of Pardon Advisers.
	104	70	291a	Persons Belonging to Active Militia Exempt from Arrest on any Civil Process while going to or Returning from Military Duty.
	104	73	264a	Powers of Commanding Officer in Relation to Trespassing upon Camp Grounds, etc., or Sale of Intoxicating Liquors.
	104	132	26a	No Action or Proceeding may be Prosecuted against a Member of the Military Force of State in Certain Cases.
	104	133	632a	Officer or Member of Military Force shall have Power to Change Venue in Certain Cases.
1907	19	1	646	Presence of Accused at Trial.
	19	2	648	Bail Pending Trial.

Acts Passed Prior to the Revision of the Code of Criminal Procedure in 1895, and Omitted from That Code, but Revived by Inclusion in the Revised Civil Statutes

Date of Law.	Civil Statutes.	Art. in This Compilation.	Subject of Act.
1875 (2d S. S.) p. 113, § 19	Rev. St. 1911; Art. 008	968a	Right of Trial by Jury before Mayor or Recorder.
1875, p. 256, § 133	Id. Art. 919	968i	Forfeiture of Peace Bonds in Mayors' and Recorders' Courts.
1893, p. 118	Id. Arts. 2220-2235	97a-97ee	Creating Criminal District Court of Dallas County.

TABLE OF SESSION LAWS

1911-1915

Showing the articles of the Code of Criminal Procedure under which the various acts applicable to such Code still in force will be found.

LAWS		Article	1911		Article
1911			<i>Special Session</i>		
Ch. 43	1057e, 1057f	Ch. 19, § 197f
§ 11057a	§ 297ff
§ 21057b	§ 397g
§ 31057c	§ 497gg
§ 41057d	§ 597h
§ 51057g	§ 697hh
§ 61057h			
§ 71057i			
§ 81057j			
§ 91057k			
§ 101057l			
§ 111057m			
§ 151057o			
Ch. 44865b, note	Ch. 7, § 1865b
Ch. 64, § 11142	§ 2865c
Ch. 66, § 11158, 1160	§ 3865d
Ch. 67, § 197m	§ 4865e
§ 297mm	§ 5865f
§ 397n	§ 6865g
§ 497nn	§ 7865h
§ 597nnn	§ 8865i
§ 697o	Ch. 8, § 1104s
§ 797oo	§ 2104ss
§ 897p	§ 3104sss
§ 997pp	§ 4104ssss
§ 10645a	§ 5104t
§ 1197ppp	§ 6104tt
§ 1297q	§ 7104ttt
§ 1397qq	Ch. 89, § 197i
§ 1497r	Ch. 112, § 11195
§ 1597rr, 895a	§ 21196
§ 1697rrr	§ 31197
§ 1797s	§ 41198
§ 17a97ss	§ 51199
§ 1897sss	§ 61200
§ 1997t	§ 71201
§ 2097tt	§ 81202
§ 2197ttt	§ 91203
§ 2297u	§ 101204
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