# Texas Historical Statutes Project

1925
CODE OF CRIMINAL PROCEDURE
OF THE
STATE OF TEXAS


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# THE CODE

OF

# CRIMINAL PROCEDURE

OF THE

# STATE OF TEXAS

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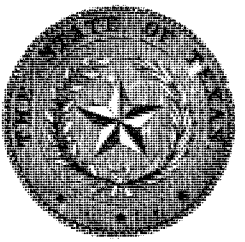
ADOPTED AT THE REGULAR SESSION OF THE
THIRTY-NINTH LEGISLATURE
1925



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

# THE CODE OF CRIMINAL PROCEDURE

## TITLE 1

### INTRODUCTORY.


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### CHAPTER ONE.

### GENERAL PROVISIONS.


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Article 1. [1] **Objects of this code.**—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 is 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, Act Feb. 15, 1858.]

Art. 2. [3] **Due course of law.**—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. [Bill of Rights, Sec. 19.]

Art. 3. [4] **Rights of accused.**—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. No person shall be held to answer for a felony unless on indictment of a grand jury. [Bill of Rights, Sec. 10.]

Art. 4. [5] **Searches and seizures.**—The people shall be secure in their persons, houses, papers and possessions from all unreasonable seizures or searches. 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, Sec. 9.]

Art. 4a. **Relating to unlawful and unreasonable seizures and searches.**—It shall be unlawful for any person or peace officer, or State ranger, to search the private residence, actual place of habitation, place of business, person or personal possessions of any person, without having first obtained a search warrant as required by law.

Art. 4b. **Penalty.**—Any person violating any provision of this Act shall be deemed guilty of a misdemeanor and upon conviction shall be punished by fine of not less than $100.00 nor more than $500.00, or by confinement in the county jail not more than six months, or by both such fine and imprisonment. [Acts 1925, p. 357.]

Art. 5. [6] **Right to bail.**—All prisoners shall be bailable by sufficient sureties, unless for capital offenses where the proof is evident. This provision shall not be so construed as to prevent bail after indictment found, upon examination of the evidence in such manner as may be prescribed by law. [Bill of Rights, Sec. 11.]

Art. 6. [7] **Habeas corpus.**—The writ of habeas corpus is a writ of right and shall never be suspended. [Bill of Rights, Sec. 12.]

Art. 7. [8] **Cruelty forbidden.**—Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted. [Bill of Rights, Sec. 13.]

Art. 8. [9] **Jeopardy.**—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, Sec. 14.]

Art. 9. [20] [21] **Acquittal a bar.**—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 be prosecuted again in a court having jurisdiction.

Art. 10. [10] **Right to jury.**—The right of trial by jury shall remain inviolate. [Bill of Rights, Sec. 15.]

Art. 11. [22] [23] **Waiver of rights.**—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.]

Art. 12. [21] [22] **Jury in felony.**—No person can be convicted of a felony except upon the verdict of a jury duly rendered and recorded. [O. C. 22.]

Art. 13. [11] **Liberty of speech and 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. 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, Sec. 8.]

Art. 14. [12] **Religious belief.**—No person shall be disqualified to give evidence in any court 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, Sec. 5.]

Art. 15. [13] **Outlawry and transportation.**—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, Sec. 20.]

Art. 16. [14] **Corruption of blood, etc.** — No conviction shall work corruption of blood or forfeiture of estate. [Bill of Rights, Sec. 21.]

Art. 17. [15] **Conviction of treason.**—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, Sec. 22.]

Art. 18. [16] **Privilege of legislators.**—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, Sec. 14.]

Art. 19. [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, Sec. 5.]

Art. 20. [19] **Dignity of State.**—All judges of the Supreme Court, Court of Criminal 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 authority of the State of Texas, and conclude, "against the peace and dignity of the State." [Const., Art. 5, Sec. 12.]

Art. 21. [23] [24] **Public trial.** — The proceedings and trials in all courts shall be public. [O. C. 23.]

Art. 22. [24] [25] **Confronted by witnesses.**—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.]

Art. 23. [25] [26] **Construction of this Code.**—The provisions of this Code shall be liberally construed, so as to attain

the objects intended by the legislature: The prevention, suppression and punishment of crime. [O. C. 25.]

Art. 24. [26] [27] **Common law governs.**—If 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.]

## CHAPTER TWO.

## GENERAL DUTIES OF OFFICERS.

### 1. DISTRICT AND COUNTY ATTORNEYS.


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Art. 25. [30] [31] **Duties of district attorneys.**—Each district attorney shall 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. 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. 30-31.]

Art. 26. [32] [33] **Duties of county attorneys.**—The county attorney shall attend the terms of all courts in his county below the grade of district court, and shall represent the State in all criminal cases under examination or prosecution in said county; and in the absence of the district attorney he shall represent the State alone, or when requested, shall aid the district attorney in the prosecution of any case in behalf of the State in the district court, and in such cases he shall receive all or one-half of the fees allowed by law to district attorneys, according as he acted alone or jointly. [Acts 1879, p. 94.]

Art. 27. [33] [34] **When officer neglects duty.**—It shall be the duty of the district or county attorney to present by information to the court having jurisdiction, any officer 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 he shall bring to the notice of the grand jury any act 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. [Acts 1876, p. 86.]

Art. 28. [34] [35] **Shall draw complaints.**—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. [Id.]

Art. 29. [35] [36] **When complaint is made.**—If the offense be a misdemeanor, the attorney shall forthwith prepare an information based upon such complaint and file the same in the court having jurisdiction. If the offense be a felony, he shall forthwith file the complaint with a magistrate of the county. [Id.]

Art. 30. [36] [37] **May administer oaths.**—For the purpose mentioned in the two preceding articles, district and county attorneys are authorized to administer oaths. [Id.]

Art. 31. [38] [39] **Attorney pro tem.**—Whenever any district or county attorney fails 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 is allowed the district attorney 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.

Art. 32. [40] [41] **Disqualified.**—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.]

## 2. MAGISTRATES.


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Art. 33. [41] [42] **Who are magistrates.**—Each of the following officers is a "magistrate" within the meaning of this Code: The judges of the Supreme Court, the judges of the Court of Criminal Appeals, the judges of the district court, the county judge, any county commissioner, the justices of the peace, the mayor or recorder of an incorporated city or town.

Art. 34. [42] [43] **Duty of magistrates.**—It is the duty of every magistrate to preserve the peace within his jurisdiction by the use of all lawful means; to issue all process intended to aid in preventing and suppressing crime; to cause the arrest of offenders by the use of lawful means in order that they may be brought to punishment. [O. C. 32.]

Art. 35. [62] [63] **"Examining court."**—When the magistrate sits for the purpose of inquiring into a criminal accusation against any person, this is called an "examining court."

## 3. PEACE OFFICERS.


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Art. 36. [43] [44] **Who are peace officers.**—The following are "peace officers:" the sheriff and his deputies, constable, the marshal or policemen of an incorporated town or city, the officers, non-commissioned officers and privates of the State ranger force, and any private person specially appointed to execute criminal process. [O. C. 53, Acts 1919, p. 264.]

Art. 37. [44] [45] **Duties and powers.**—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 tried. [O. C. 34.]

Art. 38. [45] [46] **May summon aid.**—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. [O. C. 44.]

Art. 39. [46] [47] **Person refusing to aid.**—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 proper district or county attorney, in order that he may be prosecuted for the offense. [O. C. 45.]

Art. 40. [47] [48] **Neglecting to execute process.**—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. The payment of such fine shall be enforced in the same manner as fines for contempt in civil cases. [Act Feb. 11, 1860.]

## 4. SHERIFFS.


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Art. 41. [48] [49] **Conservator of the peace.**—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 offenders, until an examination or trial can be had. [Act May 12, 1846, p. 265.]

Art. 42. [50] [51] **Custody of prisoners.**—When a prisoner is committed to jail by warrant from a magistrate or court, he shall be placed in jail by the sheriff. 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 in a bailable case, give the person arrested a reasonable time to procure bail; but, he shall so guard the accused as to prevent escape.

Art. 43. [51] **Report as to prisoners.**—At each term of any court having criminal jurisdiction, the sheriff shall give

notice to the district or county attorney as to all prisoners in his custody and of the authority under which he detains them.

Art. 44. [54] [55] **Deputy.**—Wherever a duty is imposed by this Code upon the sheriff, the same duty may lawfully be performed by his deputy. 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.]

### 5. DISTRICT AND COUNTY CLERKS.


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Art. 45. [55] [56] **Duty of clerks.**—Each clerk of the district or county court shall receive and file all papers in respect to criminal proceedings, issue all process in such cases, and perform all other duties imposed upon them by law.

Art. 46. [56] [57] **Power of deputy clerks.**—Whenever a duty is imposed upon the clerk of the district or county court, the same may be lawfully performed by his deputy. [O. C. 48.]

Art. 47. [57] [58] **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 their records.

## CHAPTER THREE.

## DEFINITIONS.


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Art. 48. [58-59] **Words and phrases.**—All words, phrases and terms used in this Code are to be taken and understood in their usual acceptation in common language, except where specially defined; and, unless herein specially excepted have the meaning which is given to them in the Penal Code.

Art. 49. [60] [61] **Criminal action.**—A criminal action is prosecuted in the name of the State of Texas against the accused, and is conducted by some person acting under the authority of the State, in accordance with its laws. [O. C. 51.]

Art. 50. [61] [62] **"Officers".** — The general term "officers" includes both magistrates and peace officers. [O. C. 54.]

# TITLE 2

## COURTS AND CRIMINAL JURISDICTION.


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Art. 51. [63] [64] **What courts have criminal jurisdiction.**—The following courts have jurisdiction in criminal actions:

1. The Court of Criminal Appeals;
2. The district courts;
3. The criminal district courts;
4. The county courts;
5. All county courts at law with criminal jurisdiction;
6. Justice courts;
7. Corporation courts.

Art. 52. **Certain courts continued.**—Each of the following courts shall continue with the jurisdiction, organization, terms and powers now existing until otherwise provided by law:

1. Criminal District Court of Dallas County. [Acts 1893, p. 118; Acts 1915, pp. 74, 138; Acts 1917, pp. 315, 341.]
2. Criminal District Court No. 2 of Dallas County. [Acts 1st C. S. 1911, p. 136; Acts 1915, pp. 74, 138; Acts 1917, p. 315.]
3. Criminal District Court of Harris County. [Acts 1911, p. 111.]
4. Criminal District Court of Tarrant County. [Acts 1917, p. 144; Acts 2nd C. S. 1919, p. 246.]
5. Criminal District Court of Travis County. [Acts 1923, p. 129.]
6. Criminal District Court for the Counties of Nueces, Kleberg, Kennedy, Willacy and Cameron. [Acts 1st C. S. 1921, p. 18.]
7. All County Courts at Law.

Art. 53. [68-86-87] **Court of Criminal Appeals.**—The Court of Criminal Appeals shall have appellate jurisdiction coextensive with the limits of the State in all criminal cases. This article shall not be so construed as to embrace any case which has been appealed from any inferior court to the county court or county court at law, in which the fine imposed by the county court or county court at law shall not exceed one hundred dollars.

Art. 54. [88] [87] **Jurisdiction of district courts.**—District courts and criminal district courts shall have original jurisdiction in criminal cases of the grade of felony, and of all misdemeanors involving official misconduct.

Art. 55. [89] [88] **When felony includes misdemeanor.**—Upon the trial of a felony case, the court shall hear and determine the case as to any grade of offense included in the indictment, whether the proof shows a felony or a misdemeanor.

Art. 56. [98] [91] **Jurisdiction of county courts.**—The county courts shall have original jurisdiction of all misdemeanors of which exclusive original jurisdiction is not given to the justice court, and when the fine to be imposed shall exceed two hundred dollars. [Const., Art. 5, Sec. 16.]

Art. 57. [101-897] **Appellate jurisdiction of county courts.**—The county courts shall have appellate jurisdiction in criminal cases of which justice courts and other inferior courts have original jurisdiction.

Art. 58. [106] [95] **Appeal from inferior court.**—If the jurisdiction of any county court has been transferred to the district court or to a county court at law, then an appeal from a justice or other inferior court will lie to the court to which such appellate jurisdiction has been transferred. [Acts 1879, p. 126.]

Art. 59. [99] [92] **To forfeit bail bonds.**—County courts and county courts at law shall have jurisdiction in the forfeiture and final judgment of all bonds and recognizances taken in criminal cases of which said courts have jurisdiction.

Art. 60. [106] [96] **Jurisdiction of justice courts.**—Justices of the peace shall have jurisdiction in criminal cases where the fine to be imposed by law may not exceed two hundred dollars. [Const., Art. 5, Sec. 19.]

Art. 61. [107] [97] **Justice may forfeit bail bond.**—A justice of the peace shall have the power to take forfeitures of all bail bonds given for the appearance of any party at his court, regardless of the amount. [Acts 1876, p. 155.]

Art. 62. [108] [98] **Corporation court.**—The corporation court in each incorporated city, town or village of this State shall have jurisdiction within the corporate limits in all criminal cases arising under the ordinances of such city, town or village, and shall have concurrent jurisdiction 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 punishment is by fine only, and where the maximum of such fine may not exceed two hundred dollars, and arising within such corporate limits. [Acts 1899, p. 40.]

Art. 63. [109] [99] **May sit at any time.**—Justice courts and corporation courts may sit at any time to try criminal cases over which they have jurisdiction.

Art. 64. [63] **Concurrent jurisdiction.**—When two or more courts have concurrent jurisdiction of any criminal offense, the court in which an indictment or a complaint shall first be filed shall retain jurisdiction of such offense to the exclusion of all other courts. [Acts 1903, p. 194.]

# TITLE 3

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


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## CHAPTER ONE.

### PREVENTING OFFENSES BY THE ACT OF A PRIVATE PERSON.


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Art. 65. [110] [100] **May prevent.**—The commission of offenses may be prevented either by lawful resistance or by the intervention of the officers of the law. [O. C. 66.]

Art. 66. [111] [101] **Resistance to protect person.**—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.]

Art. 67. [112] [102] **To protect property.**—Resistance may also 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.]

Art. 68. [113] [103] **Limit to resistance.**—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.]

Art. 69. [114] [104] **Excessive force.**—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. 70. [115] [105] **Other person 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. 71. [116] [106] **Defense of another.**—The same rules which regulate the conduct of the person about to be injured, in repelling 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.]

## CHAPTER TWO.

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


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Art. 72. [117] [107] **When magistrate hears threat.**—It is the duty of every magistrate, when he may have heard, in any manner, that a threat has been made by one person to do some injury to the person or property of another, immediately to give notice to some peace officer, in order that such peace officer may use lawful means to prevent the injury. [O. C. 73.]

Art. 73. [119] [109] **Threat to take life.**—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.]

Art. 74. [118] [108] **On attempt to injure.**—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.]

Art. 75. [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. [O. C. 76.]

Art. 76. [121] [111] **Duty of peace officer as to threats.**—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.]

Art. 77. [122] [112] **Peace officer to prevent injury.**—Whenever, in the presence of a peace officer, or within his view, one person is about to commit an offense against the person or property of another, it is his duty to prevent it; and, for this purpose, he may summon any number of the citizens of his county to his aid. He must use the amount of force necessary to prevent the commission of the offense, and no greater. [O. C. 92.]

Art. 78. [123] [113] **Conduct of peace officer.**—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.]

## CHAPTER THREE.

## PROCEEDINGS BEFORE MAGISTRATES TO PREVENT OFFENSES.


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Art. 79. [124] [114] **Shall issue warrant.**—Whenever a magistrate is informed upon oath that an offense is about to be committed against the person or property of the informant, or of another, or that any person has threatened to commit an offense, it is his duty immediately to issue a warrant for the arrest of the accused, that he may be brought before such magistrate or before some other named in the warrant. [O. C. 80.]

Art. 80. [125] [115] **Accused brought before magistrate.**—When the accused has been brought before the magistrate, he shall hear proof as to the accusation, and, if he be satisfied that there is just reason to apprehend that the offense was intended to be committed, or that the threat was seriously made, he shall make an order that the accused enter into bond in such sum as he may in his discretion require, conditioned that he will not commit such offense, and that he will keep the peace toward the person threatened or about to be injured, and toward all others for one year from the date of such bond. [O. C. 81.]

Art. 81. [126] [116] **Form of peace bond.**—Such bond shall be sufficient if it be payable to the State of Texas, conditioned as required in said order of the magistrate, 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 a defense in a suit thereon. [O. C. 84.]

Art. 82. [127] [117] **Oath of surety; bond filed.**—The officer taking such bond shall require the sureties of the accused to make oath as to the value of their property as pointed out with regard to bail bonds. Such officer shall forthwith deposit such bond and oaths in the office of the clerk of the county where such bond is taken. [O. C. 90.]

Art. 83. [128] [118] **Amount of bail.**—Magistrates, in fixing the amount of such bonds, shall be governed by the pecuniary circumstances of the accused and the nature of the offense threatened or about to be committed. [O. C. 90.]

Art. 84. [129] [119] **Surety may exonerate himself.**—A surety upon any such bond may, at any time before a breach thereof, exonerate himself from the obligations of the same by delivering to any magistrate of the county where such bond was taken the person of the defendant; and such magistrate shall in

that case again require of the defendant bond, with other security in the same amount as the first bond; and the same proceeding shall be had as in the first instance, but the one year's time shall commence to run from the date of the first order. [O. C. 89.]

Art. 85 [130] [120] **Failure to give bond.**—If the defendant fail to give bond, he shall be committed to jail for one year from the date of the first order requiring such bond. [O. C. 82.]

Art. 86. [131] [121] **Discharge of defendant.**—A defendant committed for failing to give bond 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. 87. [132] [122] **May discharge defendant.**—If the magistrate believes 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 accused, and may, in his discretion, tax the cost of the proceeding against the party making the complaint.

Art. 88. [133] [123] **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 this State, the person accused of such intended publication may be required to enter into bond with security not to sell, publish or circulate such libelous publication, and the same proceedings be had as in the cases before enumerated in this chapter. [O. C. 95.]

Art. 89. [159] [149] **Destruction of libel.**—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 another copies of such libel intended for publication, sale or distribution, order all such copies to be seized and destroyed by the sheriff or other proper officer. [O. C. 116.]

Art. 90. [134] [124] **When defendant has committed a crime.**—If it appears from the evidence before the magistrate that the defendant has committed a criminal offense, the same proceedings shall be had as in other cases where parties are charged with crime. [O. C. 91.]

Art. 91. [135] [125] **Costs.**—If the accused is found subject to the charge and required to give bond, the costs of the proceeding shall be adjudged against him. [O. C. 95.]

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

Art. 93. [137] [127] **Suit on bond.**—A suit to forfeit any

bond taken under the provisions of this chapter shall be brought in the name of the State by the district or county attorney in the county where the bond was taken. [O. C. 87.]

Art. 94. [138] [128] **Limitation and procedure.** — 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 same rules as civil actions, except that the sureties may be sued without joining the principal. To entitle the State to recover, it shall only be necessary to prove that the accused violated any condition of said bond. The full amount of such bond may be recovered of the accused and the sureties. [O. C. 88.]

## CHAPTER FOUR.

## SUPPRESSION OF RIOTS AND OTHER DISTURBANCES.


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| Military aid in executing process | 96 | Unlawful assembly | 101 |
| Military aid in suppressing riots | 97 | Suppression at election | 102 |
| Dispersing riot | 98 | Power of special constable | 103 |
| Officer may call aid | 99 | | |


Art. 95. [139] 129] **Officer may require aid.**—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. [O. C. 95.]

Art. 96. [140] [130] **Military aid in executing process.**—If it be represented to the Governor in such manner as to satisfy him that the power of the county is not sufficient to enable the sheriff to execute process, he may, on application, order any military company of volunteers or militia company from another county to aid in overcoming such resistance. [O. C. 98.]

Art. 97. [141] [131] **Military aid 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.]

Art. 98. [142] [132] **Dispersing riot.**—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.]

Art. 99. [143] [133] **Officer may call aid.**—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. 100. [144] [134] **Means 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 neces-

sary 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.]

Art. 101. [145] [135] **Unlawful assembly.**—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.]

Art. 102. [146] [136] **Suppression at election.**—To suppress 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. Before the same is delivered to such special constable, he shall take an oath before the magistrate to suppress, by lawful means, all riots, unlawful assemblies and breaches of the peace of which he may receive information, and to act impartially between all parties and persons interested in the result of the election. [O. C. 106.]

Art. 103. [147] [137] **Power of special constable.**—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.]

## CHAPTER FIVE.

## OFFENSES INJURIOUS TO PUBLIC HEALTH.


| | Article | | Article |
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| Refusal to give bond | 105 | Proof | 108 |
| Requisites of bond | 106 | Unwholesome food | 109 |


Art. 104. [148] [138] **Trade injurious to health.**—After an indictment or information has been presented against any person for carrying on a trade, business or occupation injurious to the health of those in the neighborhood, the court shall have power, on the application of any one interested, and after hearing proof both for and against the accused, to restrain the defendant, in such penalty as may be deemed proper, from carrying on such trade, business or occupation, or may make such order respecting the manner and place of carrying on the same as may be deemed advisable; and, if, upon trial, the defendant be convicted, the restraint shall be made perpetual, and the party shall be required to enter into bond, with security, not to continue such trade, business or occupation to the detriment of the health of such neighborhood, or of any other neighborhood within the county. [O. C. 108.]

Art. 105. [149] [139] **Refusal to give bond.**—If the party refuses to give bond when required under the provisions of the preceding article, the court may either commit him to jail, or make an order requiring the sheriff to seize upon the implements of such trade, business or occupation, or the goods and property used in conducting such trade, business or occupation, and destroy the same. [O. C. 108.]

Art. 106. [150] [140] **Requisites of bond.**—Such bond shall be payable to the State of Texas, in a reasonable amount to be fixed by the court, conditioned that the defendant will not carry on such trade, business or occupation, naming the same, at such place, naming the place, or at any other place in the county, to the detriment of the health of the neighborhood. Said bond shall be signed by the defendant and his sureties and dated, and shall be approved by the court taking the same, and filed in such court. [O. C. 109.]

Art. 107. [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, 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. 108. [152] [142] **Proof.**—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. 109. [153] [143] **Unwholesome food.**—After conviction for selling unwholesome food 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. [O. C. 108.]

## CHAPTER SIX.

## OBSTRUCTIONS OF PUBLIC HIGHWAYS.

Art. 110. [155] [145] **Order to remove.**—After prosecution begun against any person for obstructing any highway, 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. 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 with the papers in the cause. [O. C. 113.]

Art. 111. [156] [146] **Bond of applicant.**—If the defendant 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. 112. [158] [148] **Removal.**—Upon the conviction of a defendant for obstructing a public highway, if such obstruction still exists, the court shall order the sheriff or other proper officer to forthwith remove the same at the cost of the defendant, to be taxed and collected as other costs in the case.

## CHAPTER SEVEN.

## HABEAS CORPUS.

### 1. DEFINITION AND OBJECT OF THE WRIT.


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Art. 113. [160-161] **What writ is.**—The writ of habeas corpus is the remedy to be used when any person is restrained in his liberty. It 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. 117-118.]

Art. 114. [162] [152] **To whom directed.**—The writ runs in the name of "The State of Texas." It is addressed to a person having another under restraint, or in his custody, describing, as near as may be, the name of the office, if any, of the person to whom it is directed, and the name of the person said to be detained. It shall fix the time and place of return, and be signed by the judge, or by the clerk with his seal, where issued by a court. [O. C. 119.]

Art. 115. [163] [153] **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 of its issuance. [O. C. 120.]

Art. 116. [164] [154] **Construction.**—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.]

### 2. BY WHOM AND WHEN GRANTED.


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Art. 117. [69-84-92-100-165] **By whom writ may be granted.**—The Court of Criminal Appeals, the district courts, the county courts, or any judge of said courts, have power to issue the writ of habeas corpus; and it is their duty, upon

proper application, to grant the writ under the rules prescribed by law.

Art. 118. [166] [156] **Returnable to any county.**—Before indictment found, the writ may be made returnable to any county in the State. [O. C. 123.]

Art. 119. [167] [157] **Return to certain county.** — 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.]

Art. 120. [168] [158] **Applicant charged with felony.**—If a person is confined after indictment on a charge of felony, he may apply to the judge of the court 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.

Art. 121. [169] [159] **Applicant charged with misdemeanor.**—If 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.

Art. 122. [170] [160] **Proceedings under the writ.**—When application has been made to a judge under the circumstances set forth in the two preceding articles, he shall appoint a time when he will examine the cause of the applicant, and issue the writ returnable at that time, in the county where the offense is charged in the indictment or information to have been committed. He shall also specify some place in the county where he will hear the application. [O. C. 129.]

Art. 123. [171] [161] **Early hearing.**—The time so appointed shall be the earliest day which the judge can devote to hearing the cause of the applicant. [O. C. 127.]

Art. 124. [172] [162] **Who may present petition.**—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. 125. [173] [163] **"Applicant".** — The word "applicant," as used in this chapter, refers to the person for whose relief the writ is asked, tho the petition may be signed and presented by any other person. [O. C. 129.]

Art. 126. [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 in his liberty.

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

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

Art. 127. [175] [165] **Writ granted without delay.**—The writ of habeas corpus shall be granted without delay by the judge or court receiving the petition, unless it be manifest from the petition itself, or some documents annexed to it, that the party is entitled to no relief whatever. [O. C. 131.]

Art. 128. [176] [166] **Writ may issue without application.**—A judge of the district or county court who has knowledge that any person is illegally confined or restrained in his liberty within his district or county may, if the case be one within his jurisdiction, issue the writ of habeas corpus, without any application being made for the same. [O. C. 132.]

Art. 129. [177] [167] **Judge may issue warrant of arrest.**—Whenever it appears by satisfactory evidence to any judge authorized to issue such writ 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 judge 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.]

Art. 130. [178] [168] **May arrest detainer.**—Where it appears by the proof offered, under circumstances mentioned in the preceding article, that the person charged with having illegal custody of the prisoner is, by such act, guilty of an offense against the law, the judge may, in the warrant, order that he be arrested and brought before him; and, upon examination, he may be committed, discharged, or held to bail, as the law and the nature of the case may require. [O. C. 134.]

Art. 131. [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, either remanding into custody, discharging or admitting to bail the party so imprisoned or restrained. [O. C. 135.]

Art. 132. [180] [170] **Officer executing warrant.**—The same power may be exercised by the officer executing the warrant in cases arising under the foregoing articles as is exercised in the execution of warrants of arrest. [O. C. 136.]

Art. 133. [181] [171] **Constructive custody.**—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 coercive measures by threats, menaces or the fear of injury, whereby one person exer-

cises a control over the person of another, and detains him within certain limits. [O. C. 137.]

Art. 134. [182] [172] **"Restraint".** — 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.]

Art. 135. [183] [173] **Scope of writ.**—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.]

Art. 136. [184] [174] **One committed in default of bail.**—
—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. If the proof sustains the petition, it will entitle the party to be discharged, or have the bail reduced. [O. C. 141.]

Art. 137. [185] [175] **Person afflicted with disease.** — When a judge or court authorized to grant writs of habeas corpus shall be satisfied, upon investigation, that a person in legal custody is afflicted with a disease which will render a removal necessary for the preservation of life, an order may be made for the removal of the prisoner to some other place where his health will not be likely to suffer; or he may be admitted to bail when it appears that any species of confinement will endanger his life. [O. C. 141.]

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


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Art. 138. [186] [176] **Who may serve writ.**—The service of the writ may be made by any person competent to testify. [O. C. 143.]

Art. 139. [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 per-

son 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 his return, the manner and the time of the service of the writ. [O. C. 144.]

Art. 140. [188] [178] **Return under oath.**—The return of a writ of habeas corpus, under the provisions of the preceding article, if made by any person other than an officer, shall be under oath. [O. C. 145.]

Art. 141. [189] [179] **Must make return.**—The person on whom the writ of habeas corpus is served shall immediately obey the same, and make the return required by law upon the copy of the original writ served on him, and this, whether the writ be directed to him or not. [O. C. 146.]

Art. 142. [190] [180] **How return is 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, if any, by virtue of which he holds the person in custody.

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

Art. 143. [191] [181] **Applicant brought before judge.**—The person on whom the writ is served shall bring before the judge the person in his custody, or under his restraint, unless it be made to appear that by reason of sickness he can not be removed; in which case, another day may be appointed by the judge or court for hearing the cause, and for the production of the person confined; or the application may be heard and decided without the production of the person detained, by the consent of his counsel. [O. C. 149.]

Art. 144. [192] [182] **Custody pending examination.**—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. The safekeeping 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.

Art. 145. [193] [183] **Court shall allow time.**—The court

or judge granting the writ of habeas corpus shall allow reasonable time for the production of the person detained in custody.

Art. 146. [194] [184] **Disobeying writ.** — 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. When such person has been arrested and brought before the court or judge, if he still refuses to return the writ, or does not produce the person in his custody, he shall be committed to jail 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.]

Art. 147. [195] [185] **Further penalty 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. It shall be deemed that a person has disobeyed the writ who detains a prisoner a longer time than three days after service thereof, unless where further time is allowed in the writ for making the return thereto. [O. C. 152.]

Art. 148. [196] [186] **Applicant may be brought before court.**—In case of disobedience of the writ of habeas corpus, the person for whose relief it is intended may also be brought before the court or judge having competent authority, by an order for that purpose, issued to any peace officer or other proper person specially named. [O. C. 153.]

Art. 149. [197] [187] **Death, etc., 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, the court or judge shall proceed to hear testimony; and the facts stated in the return shall be proved by satisfactory evidence. [O. C. 154.]

Art. 150. [198] [188] **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. 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 shall be sufficient proof of the death of the prisoner at the hearing of an application under habeas corpus. [O. C. 158.]

Art. 151. [199] [189] **Who shall represent the State.**—If neither the county or district attorney be present, the judge may appoint some qualified practicing attorney to represent the State, who shall be paid the same fee allowed district attorneys for like services. [O. C. 156.]

Art. 152. [200] [190] **Prisoner discharged.**—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, cannot for any cause be lawfully prolonged, the applicant shall be discharged. [O. C. 157.]

Art. 153. [201] [191] **Where party is indicted for capital offense.**—If it appears 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 State and the applicant and may either remand or admit him to bail, as the law and the facts may justify. [O. C. 158.]

Art. 154. [202] [192] **If court has no jurisdiction.**—If it appear by the return and papers attached that 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.

Art. 155. [203] [193] **Presumption of innocence.**—No presumption of guilt arises from the mere fact that a criminal accusation has been made before a competent authority.

Art. 156. [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.]

Art. 157. [205] [195] **Void or informal.**—If it appears 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. [O. C. 161.]

Art. 158. [206] [196] **If proof shows offense.**—Where, upon an examination under habeas corpus, it appears 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. [O. C. 162.]

Art. 159. [207] [197] **May summon magistrate.**—To ascertain 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. [O. C. 163.]

Art. 160. [208] [198] **Written issue 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 suffi

ciency of, or controvert the return or 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. 161. [209] [199] **Order of argument.**—The applicant shall have the right by himself or counsel to open and conclude the argument upon the trial under habeas corpus. [O. C. 165.]

Art. 162. [210] [200] **Costs.**—The judge trying the cause under habeas corpus may make such order as is deemed 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. 163. [211] [201] **Record of 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 in any other case in such court. When the application is heard out of the county where the offense was committed, or in the Court of Criminal 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.]

Art. 164. [212] [202] **Proceedings had in vacation.**—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, who shall keep them safely. [O. C. 168.]

Art. 165. [213] [203] **Construing the two preceding articles.**—The two preceding articles refer only to cases where an applicant is held under accusation for some offense; in all other cases the proceedings had before the judge shall be filed and kept by the clerk of the court hearing the case. [O. C. 169.]

Art. 166. [214] [204] **Court may grant necessary orders.** 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 process to enforce the attendance of witnesses.

Art. 167. [215] [205] **Meaning of "return."**—The word "return", as used in this chapter, 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.


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Art. 168. [216] [206] **Effect of discharge before indictment.**—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 surrendered by his bail. [O. C. 172.]

Art. 169. [217] [207] **Writ after indictment.**—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 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, nor shall he be again entitled to the writ of habeas corpus, except in the special cases mentioned in this chapter. [O. C. 173.]

Art. 170. [218] [208] **Person committed for a capital offense.**—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 137 and 171. [O. C. 174.]

Art. 171. [219] [209] **Obtaining writ a second time.**—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 application. [O. C. 175.]

Art. 172. [220] [210] **Refusing to execute writ.**—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 refuses to execute the same according to his directions, or who wantonly delays the service or execution of the same, shall be liable to fine as for contempt of court. [O. C. 178.]

Art. 173. [221] [211] **Refusal to obey writ.**—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, shall be dealt with as provided in article 146 of this Code. [O. C. 178.]

Art. 174. [222] [212] **Refusal to give copy of process.**—Any jailer, sheriff or other officer who has a prisoner in his custody and refuses, upon demand, to furnish a copy of the process under which he holds the person, is guilty of an offense. [O. C. 179.]

Art. 175. [223] [213] **Held under Federal authority.**—No person shall be discharged under the writ of habeas corpus who is in custody by virtue of a commitment for any offense ex-

clusively cognizable by the courts of the United States, or by order or process issuing out of such courts in cases where they have jurisdiction, or who is held by virtue of any legal engagement or enlistment in the army, or who, being rightfully subject to the rules and articles of war, is confined by any one legally acting under the authority thereof, or who is held as a prisoner of war under the authority of the United States. [O. C. 180.]

Art. 176. [224] [214] **Application of chapter.**—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.]

# TITLE 4

## LIMITATION AND VENUE.


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## CHAPTER ONE.

## LIMITATION.


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Art. 177. [225] [215] **Treason and forgery.**—An indictment for treason may be presented within twenty years, and for forgery or the uttering, using or passing of forged instruments, within ten years from the time of the commission of the offense, and not afterward. [O. C. 182.]

Art. 178. [226] [216] **Rape.**—An indictment for rape may be presented within one year, and not afterward. [O. C. 184.]

Art. 179. [227] [217] **Theft, etc., five years.**—An indictment for felony theft, arson, burglary, robbery and counterfeiting may be presented within five years, and not afterward. [O. C. 183.]

Art. 180. [228] [218] **Other felonies.**—An indictment for any other felony 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.]

Art. 181. [229] [219] **Misdemeanors, two years.**—An indictment or information for any misdemeanor may be presented within two years from the commission of the offense, and not afterward. [O. C. 186.]

Art. 182. [230] [220] **Computation.**—The day on which the offense was committed and the day on which the indictment or information is presented shall be excluded from the computation of time.

Art. 183. [231] [221] **Absence from the State not computed.**—The time during which the accused is absent from the State shall not be computed in the period of limitation.

Art. 184. [232] [222] **An indictment is "presented," when.**—An indictment is considered as "presented," when it has been duly acted upon by the grand jury and received by the court.

Art. 185. [233] [223] **An information is "presented," when.**—An information is considered as "presented" when it has been filed by the proper officer in the proper court.

## CHAPTER TWO.

## VENUE.


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Art. 186. [234] [224] **Offenses not committed in the State.**—Prosecutions for offenses committed wholly or in part without, and made punishable by law within this State, may be begun and carried on in any county in which the offender is found. [O. C. 190.]

Art. 187. [235] [225] **Forgery.**—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, or deposited or placed with another person, firm, association or corporation either for collection or credit for the account of any person, firm, association or corporation. All forging and uttering, using or passing of forged instruments in writing which concern or affect the title to land in this State may be prosecuted in Travis County, or in the county in which such land, or any part thereof, is situated. [Acts 1st C. S. 1921, p. 39.]

Art. 188. [236] [226] **Counterfeiting.** — 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.]

Art. 189. [237] [227] **Perjury and false swearing.**—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.]

Art. 190. [238] [228] **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. [O. C. 191.]

Art. 191. [239] [229] **Person dying out of the State.**—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. 192. [240] [230] **Person within the State inflicting injury on another out of the State.**—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. 193. [241] [231] **Person without the State inflicting an injury on one within.**—If a person, being at the time without 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. 194. [242] [232] **Committed on a boundary stream.**—If an offense be committed upon any river or stream, the boundary of this State, it may be prosecuted in the county the boundary of which is upon such stream or river, and the county seat of which is nearest the place where the offense was committed. [O. C. 195.]

Art. 195. [243] [233] **Injured in one county and dying in another.**—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.]

Art. 196. [244] [234] **Committed on a boundary.**—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. [O. C. 197.]

Art. 197. [245] [235] **Theft.**—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 it. [O. C. 198.]

Art. 198. [246] **Mortgaged property.**—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. [Acts 1899, p. 8.]

Art. 199. [247] [236] **Accomplices and accessories to theft.**—Accomplices and accessories to 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. [Acts 1889, p. 37.]

Art. 200. [248] [237] **Receiving and concealing stolen property.**—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.]

Art. 201. [249] [238] **By commissioner of deeds.**—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.]

Art. 202. [250] [239] **On vessels.**—An offense committed

on board a vessel which is at the time upon any navigable water within the boundaries of this State, 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.]

Art. 203. [251] [240] **Embezzlement.**—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.]

Art. 204. [252] [241] **False imprisonment, kidnapping and abduction.**—Venue for false imprisonment, kidnapping 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, kidnapped or taken in such manner as to constitute abduction may have been carried. [O. C. 204.]

Art. 205. [253] [242] **Conspiracy.** — 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 country, 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 Travis County.

Art. 206. **Bigamy.** — Bigamy may be prosecuted in the county where the bigamous marriage occurred or in any county in this State in which the parties to such bigamous marriage may live or cohabit together as man and wife. [Acts 1921, p. 139.]

Art. 207. [254] **Rape.** — Rape may be prosecuted in the county in which it is committed, or in any county of the judicial district in which it 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 article that rape has probably been committed, he shall immediately, if his court be in session, and if not in session, then, at the first term thereafter in any county of the district, call the attention of the grand jury thereto; and, if his court be in session, but the grand jury has been discharged, he shall immediately recall said grand jury to investigate the accusation. Prosecutions for rape shall take precedence in all cases in all courts; and the district courts are authorized and directed to change the venue in such cases whenever it shall be necessary to secure a speedy trial. [Acts 1st C. S. 1897, p. 16.]

Art. 208. [255] [243] **Conviction or acquittal in another 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, un-

der the laws of the place where the offense was committed, is a bar to the prosecution in this State. [O. C. 205.]

Art. 209. [256] [244] **Jurisdiction in different counties.**—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.]

Art. 210. [257] [245] **Proof of venue.**—In all cases mentioned in 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. To sustain the allegation of venue, it shall only be necessary to prove that by reason of the facts in the case, the county where such prosecution is carried on has jurisdiction. [O. C. 207.]

Art. 211. [258] [246] **Other offenses.**—If venue is not specifically stated, the proper county for the prosecution of offenses is that in which the offense was committed. [O. C. 208.]

# TITLE 5

## ARREST, COMMITMENT AND BAIL.


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## CHAPTER ONE.

### ARREST WITHOUT WARRANT.


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Art. 212. [259] [247] **Offense within view.**—A peace officer or any other person, may, without warrant, arrest an offender when the offense is committed in his presence or within his view, if the offense is one classed as a felony, or as an "offense against the public peace." [O. C. 209.]

Art. 213. [260] [248] **Within view of magistrate.** — 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 verbally orders the arrest of the offender. [O. C. 210.]

Art. 214. [261] [249] **Authority of municipality.** — 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.]

Art. 215. [262] [250] **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 accused. [O. C. 212.]

Art. 216. [263] [251] **Rights of officer.**—In each case enumerated where arrests may be lawfully made without warrant, the officer or person making the arrest is justified in adopting all the measures which he might adopt in cases of arrest under warrant. [O. C. 213.]

Art. 217. [264] [252] **Must take offender before magistrate.**—In each case 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.[

## CHAPTER TWO.

## ARREST UNDER WARRANT.


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Art. 218. [265] [253] **"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.]

Art. 219. [266] [254] **Requisites of warrant.**—It issues in the name of "The State of Texas," and shall be 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 unknown, 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.]

Art. 220. [267] [255] **Magistrate may issue warrant.**—Magistrates may issue warrants of arrest:

1. In any case 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 any case named in this Code where they are specially authorized to issue such warrants. [O. C. 217, 218.]

Art. 221. [268] [256] **"Complaint".**—The affidavit made before the magistrate or district or county attorney is called a complaint if it charges the commission of an offense. [O. C. 219.]

Art. 222. [269] [257] **Requisites of complaint.**—The complaint shall be 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 show that the accused has committed some offense against the laws of the State, either directly 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 signed by the affiant by writing his name or affixing his mark. [O. C. 220.]

Art. 223. [270] [258] **Warrant extends to every part of the State.**—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.; Acts 1905, p. 385.]

Art. 224. [271] [259] **Warrant issued by other magistrate.**—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 of the same meaning will be sufficient. The indorsement shall be dated, and signed officially by the magistrate making it. [O. C. 222; Acts 1905, p. 385.]

Art. 225. [272] [260] **Warrant may be telegraphed.**—A warrant of arrest may be forwarded by telegraph from any telegraph office to another in this State. If issued by any magistrate named in article 223, the peace officer receiving the same shall execute it without delay. If it be issued by any other magistrate than is named in article 223, the peace officer receiving the same shall 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.]

Art. 226. [273] [261] **Complaint by telegraph.**—A complaint in accordance with article 222, 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. [Id.]

Art. 227. [274] [262] **Copy to be deposited.**—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. 228. [275] [263] **Duty of telegraph manager.**—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.]

Art. 229. [276] [264] **Warrant or complaint must be under seal.**—No manager of a telegraph office shall receive and forward a warrant or complaint 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 district or county clerk of his county that he is a legally qualified justice of the peace of such county; nor shall it be lawful for any magistrate to indorse a warrant received by telegraph, or issue a warrant upon a complaint received by telegraph, unless all the requirements of the law in relation thereto have been fully complied with. [Id.]

Art. 230. [277] [265] **Telegram prepaid.**—Whoever presents 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. 231. [278] [266] **Warrant may be directed to any person.**—If 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 such delay will be occasioned in procuring the services of a peace officer that the accused will probably escape, such warrant 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.]

Art. 232. [279] [267] **Private person executing warrant.**—No person other than a peace officer can be compelled to execute a warrant of arrest; but, if any person shall undertake its execution, 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 apply to peace officers. [O. C. 224.]

Art. 233. [280] [268] **How warrant is executed.**—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.]

Art. 234. [281] [269] **Arrest for out-county felony.**—One arrested in one county for felony committed in another shall in all cases be taken before some magistrate of the county where it was alleged the offense was committed. [O. C. 226.]

Art. 235. [282] [270] **Arrest for out-county misdemeanor.**—One arrested for a misdemeanor shall be taken before a magistrate of the county where the arrest takes place who shall take

bail and transmit immediately the bond so taken to the court having jurisdiction of the offense. [O. C. 226.]

Art. 236. [283] [271] **Notice of arrest.**—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. 237. [284] [272] **Duty of sheriff receiving notice.**—The sheriff receiving the notice shall forthwith go or send for the prisoner and have him brought before the proper court or magistrate.

Art. 238. [285] [273] **Prisoner discharged if not timely demanded.**—If the proper officer of the county where the offense is alleged to have been committed does 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. 239. [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.]

Art. 240. [287] [275] **Time of arrest.**—An arrest may be made on any day or at any time of the day or night. [O. C. 228.]

Art. 241. [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.]

Art. 242. [289] [277] **May break door.**—In case of felony, the officer may break down the door of any house for the purpose of making an arrest, if he be refused admittance after giving notice of his authority and purpose. [O. C. 230.]

Art. 243. [290] [278] **Authority to arrest must be made known.**—In executing a warrant of arrest, it shall always be made known to the accused under what authority the arrest is made; and, if requested, the warrant shall be exhibited to him. [O. C. 231.]

Art. 244. [291] [279] **Escaped prisoner.**—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.]

## CHAPTER THREE.

## THE COMMITMENT OR DISCHARGE OF THE ACCUSED.


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Art. 245. [292] [280] **Examining trial.**—When the accused 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 counsel. [O. C. 233.]

Art. 246. [293] [281] **Examination postponed.**—The magistrate may at the request of either party postpone the examination to procure testimony; but the accused shall in the meanwhile be detained in custody 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.]

Art. 247. [294] [282] **Warning to accused.**—Before the examination of the witnesses, the magistrate shall inform the accused that it is his right to make a statement relative to the accusation brought against him, but at the same time shall 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.]

Art. 248. [295] [283] **Voluntary statement.**—If the accused desires to make a voluntary statement, he may do so before the examination of any witness, but not afterward. His statement shall be reduced to writing by or under the direction of the magistrate, or by the accused or his counsel, and shall be signed by the accused by affixing his name or mark, but shall not be sworn to by him. The magistrate shall attest by his own certificate and signature to the execution and signing of the statement. [O. C. 235, 242, 243.]

Art. 249. [296] [284] **Witness placed under rule.**—The magistrate shall, if requested by the accused or his counsel, or by the prosecutor, have all the witnesses placed in charge of an officer, so that the testimony given by any one witness shall not be heard by any of the others. [O. C. 235.]

Art. 250. [297] [285] **Counsel may examine witness.**—If any person appear to prosecute as counsel for the State, he shall have the right to question the witnesses on 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. 251. [298] [286] **Same rules of evidence as on final trial.**—The same rules of evidence shall apply to and govern a trial before an examining court that apply to and govern a final trial.

Art. 252. [299] [287] **Presence of the accused.**—The examination of each witness shall be in the presence of the accused. [O. C. 240.]

Art. 253. [300] [288] **Testimony reduced to writing.**—The testimony of each witness shall be reduced to writing by or under the direction of the magistrate, and shall then be read over to the witness, or he may read it over himself. 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. [O. C. 238.]

Art. 254. [301] [289] **Attachment for witness.**—The magistrate has the power in all cases, where a witness resides or is in the county where the prosecution is pending, to issue an attachment for the purpose of enforcing the attendance of such witness; this he may do without having previously issued a subpoena for that purpose. [O. C. 244.]

Art. 255. [302] [290] **Attachment to another county.**—The magistrate may issue an attachment for a witness to any county in the State, when affidavit is made by the party applying therefor that the testimony of the witness is material to the prosecution, or the defense, as the case may be; and the affidavit shall further state the facts which it is expected will be proved by the witness; and, if the facts set forth are not considered material by the magistrate, or, if they be admitted to be true by the adverse party, the attachment shall not issue. [O. C. 246.]

Art. 256. [303] [291] **Witness need not be tendered fees.**—A witness attached need not be tendered his witness fees or expenses. [O. C. 246.]

Art. 257. [304] [292] **Attachment executed forthwith.**—The officer receiving the attachment shall execute it forthwith by bringing before the magistrate the witness named therein, unless such witness shall give bail for his appearance before the magistrate at the time and place required by the writ. [O. C. 245.]

Art. 258. [305] [293] **Postponing examination.**—After examining the witnesses in attendance, if it appear to the magistrate that there is other important testimony which may be had by a postponement, he shall, at the request of the prosecutor or of the defendant, postpone the hearing 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 sworn statement be made by the defendant, or the prosecutor, setting forth the name and residence of the witness, and the facts which it is expected will be proved. If it be testimony other than that of a witness, the statement made shall set forth the nature of the evidence. If the magis-

trate 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. 259. [306] [294] **Capital Offense; who may discharge.**—Upon examination of one accused of a capital offense, no magistrate other than a judge of the Court of Criminal Appeals, district court or 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.]

Art. 260. [307] [295] **If insufficient bail has been taken.**—Where it is made to appear by affidavit to a judge of the Court of Criminal 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.]

Art. 261. [308] [296] **Decision of magistrate.**—After the examining trial has been had, the magistrate shall make an order committing the defendant to the jail of the proper county, discharging him or admitting him to bail, as the law and facts of the case may require. [O. C. 250.]

Art. 262. [309] [297] **When no safe jail.**—If there is no safe jail in the county in which the prosecution is carried on, the magistrate may commit to the nearest safe jail in any other county. [O. C. 251.]

Art. 263. [310] [298] **Warrant in such case.**—The 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 to whom he is sent. [O. C. 252.]

Art. 264. [311] [299] **Commitment.**—A 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 bail has been granted, the amount of bail shall be stated in the warrant. [O. C. 253.]

Art. 265. [313] [301] **Duty of sheriff as to prisoners.**—Every sheriff shall 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 es-

cape 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.]

Art. 266. [314] [302] **Discharge not final.**—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.]

## CHAPTER FOUR.

## BAIL.

### 1. GENERAL RULES AS TO BAIL.


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Art. 267. [315] [303] **Definition of "bail".**—"Bail" is the security given by the accused that he will appear and answer before the proper court the accusation brought against him. [O. C. 257, 258.]

Art. 268. [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 against him. Such undertaking is not signed, but is made a matter of record in the court where the same is entered into. [O. C. 259.]

Art. 269. [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.]

Art. 270. [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, 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. [O. C. 261.]

Art. 271. [319] [307] **What "bail" includes.**—Wherever the word "bail" is used with reference to the security given by the defendant, it applies as well to recognizances as to bail bonds. When a defendant is said to be "on bail," or to have "given bail," it applies as well to recognizances as to bail bonds. [O. C. 262.]

### 2. RECOGNIZANCE AND BAIL BOND.


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| Requisites of a bail bond | 273 |
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Art. 272. [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.

2. If the defendant is charged with 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 it state the time and place when the defendant is bound to appear and the court before which he is bound to appear. [O. C. 263, Acts 1899, p. 111.]

Art. 273. [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 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 name or mark by the principal and sureties.

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, Acts 1899, p. 111.]

Art. 274. [322] [310] **Rules applicable to all cases of bail.**—The rules 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, 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.]

Art. 275. [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.]

Art. 276. [324] [312] **Disqualified sureties.**—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.]

Art. 277. [325] [313] **How bail taken.**—Every court, judge, magistrate or other officer taking bail shall 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.]

Art. 278. [326] [314] **Exempt property.**—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 principal or sureties. [O. C. 270.]

Art. 279. [327] [315] **Sufficiency of sureties ascertained.**—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 its sufficiency, the following oath shall be made in writing and subscribed by the sureties: "I, do swear 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 said amount or more."

(Dated_____, and attest by the judge of the court, clerk, magistrate or sheriff.)

Such affidavit shall be filed with the papers of the proceedings.

Art. 280. [328] [316] **Affidavit not conclusive.**—Such affidavit shall not be conclusive as to the sufficiency of the security; and, if the court or officer taking the recognizance or bail bond is not fully satisfied as to the sufficiency of the security offered, further evidence shall be required before approving the same.

Art. 281. [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 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 so used 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 ability to make bail is to be regarded, and proof may be taken upon this point. [O. C. 272.]

### 3. SURRENDER OF THE PRINCIPAL.


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Art. 282. [330] [318] **Surety may surrender his principal.**—Those who have become bail for the accused, or either of them, may at any time relieve themselves of their undertaking by sur-

rendering the accused into the custody of the sheriff of the county where he is prosecuted. [O. C. 273.]

Art. 283. [331-334] **When surrender is made during term.** —If 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. If he fails or refuses to give bail, the court shall make an order that he be committed to jail until the bail is given, and this shall be a sufficient commitment without any written order to the sheriff.

Art. 284. [332-335] **Surrender in vacation.** — When the surrender is made at any other time than during the session of the court, the sheriff may take the necessary bail bond, but if 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.

Art. 285. [333] [321] **Surety may obtain a warrant.**—Any surety, desiring to surrender his principal, may upon making 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.]

Art. 286. [336] [324] **Bail in misdemeanor.**—The sheriff, or other peace officer, in cases of misdemeanor, has authority, 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.]

Art. 287. [337] [325] **Bail in felony.**—In cases of felony, when the accused is in custody of the sheriff or other peace officer, and the court before which the prosecution is pending is in session in the county where the accused is in custody, the court shall fix the amount of bail, if it is a bailable case; and the sheriff, or other peace officer, unless it be the police of a city, is authorized to take a bail bond of the accused 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. It shall not be necessary for the defendant or his sureties to appear in court. [O. C. 280, Acts 1907, p. 148.]

Art. 288. [338] [326] **May take bail in felony.**—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 officer may consider reasonable. [O. C. 281.]

Art. 289. [339] [327] **Sureties severally bound.**—In all recognizances, bail bonds or other bonds, taken under any provision of this Code, the sureties shall be severally bound. Where a surrender of the principal is made by one or more of them, all the sureties shall be considered discharged. [O. C. 281-283.]

## 4. BAIL BEFORE THE EXAMINING COURT.


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Art. 290. [340] [328] **General rules applicable.**—All general rules in this chapter are applicable to bail taken before an examining court. [O. C. 284.]

Art. 291. [341] [329] **Proceedings when bail is granted.**—After a full examination of the testimony, the magistrate shall, if the case be one where bail may properly be granted and ought to be required, proceed to make an order that the accused execute a bail bond with sufficient security, conditioned for his appearance before the proper court. [O. C. 285.]

Art. 292. [343] [331] **Time given to procure bail.**—Reasonable time shall be given the accused to procure security.

Art. 293. [344] [332] **When bail is not given.**—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 commitment accordingly. [O. C. 290.]

Art. 294. [345] [333] **When ready to give bail.** — If the party be ready to give bail, the magistrate shall cause to be prepared a bail bond, which shall be signed by the accused and his surety or sureties. [O. C. 291.]

Art. 295. [346] [334] **Accused liberated.**—When the accused has given the required bond, either to the magistrate or the officer having him in custody, he shall at once be set at liberty. [O. C. 293-294.]

Art. 296. [347] [335] **Shall certify proceedings.** — The magistrate, before whom an examination has taken place upon a criminal accusation, shall certify to all the proceedings had before him, as well where he discharges, holds to bail or commits, and transmit them, sealed up, to the court before which the defendant may be tried, writing his name across the seals of the envelope. The voluntary statement of the defendant, the testimony, bail bonds, and every other proceeding in the case, shall be thus delivered to the clerk of the proper court, without delay. [O. C. 295.]

Art. 297. [348] [336] **Duty of clerks who receive such proceedings.**—If the proceedings be delivered to a district clerk, he shall keep them safely and deliver the same to the next grand jury. If the proceedings are delivered to a county clerk, he shall without delay deliver them to the district or county attorney of his county.

Art. 298. [349] [337] **In case of no arrest.**—Upon failure from any cause to arrest the accused the magistrate shall file with the proper clerk the complaint, warrant of arrest, and a list of the witnesses. [O. C. 296.]

Art. 299. [350] [338] **Waiving examination.**—The accused may waive an examining trial in any bailable case and consent for the magistrate to require bail of him; but the prosecutor or

magistrate may examine the witnesses for the State as in other cases. The magistrate shall send to the proper clerk with the other proceedings in the case a list of the witnesses for the State, their residence and whether examined.

## 5. BAIL BY WITNESSES.


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Art. 300. [351] [339] **Witnesses to give bond.**—Witnesses for 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. An individual bond shall be taken of a witness who makes oath that he is unable to give security or deposit a sufficient amount of money in lieu thereof. [O. C. 297.]

Art. 301. [352] [340] **Security of 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.]

Art. 302. [353] [341] **Force of witness bond.**—The bond given by a witness for his appearance shall have the same force and effect as a bail bond and may be forfeited and recovered upon in the same manner. [O. C. 299.]

Art. 303. [354] [342] **Witness may be committed.**—A witness required to give bail who fails or refuses to do so and fails to make the affidavit provided for in article 300 shall be committed to jail as in other cases of a failure to give bail when required; but shall be released from custody upon giving such bail or upon making said affidavit and giving his individual bond.

# TITLE 6

## SEARCH WARRANTS.

### 1. GENERAL RULES.


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| When it may issue | 305 | For property not stolen | 308 |
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Art. 304. [355] [343] **"Search warrant."**—A "search warrant" is a written order, issued by a magistrate, and directed to a peace officer, commanding him to search for personal property, and to seize the same and bring it before such magistrate; or it is a like written order, commanding a peace officer to search a suspected place where it is alleged stolen property is commonly concealed, or implements kept for the purpose of being used in the commission of any designated offense. [O. C. 300.]

Art. 305. [356] [344] **When it may issue.**—A search warrant may be issued:

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 use 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. [O. C. 301.]

Art. 306. [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 stealing or concealing it. [O. C. 302.]

Art. 307. [358] [346] **"Stolen".**—The word "stolen," as used in this title, is intended to embrace also the acquisition of property by any means made penal by the law of the State.

Art. 308. [359] [347] **For property not stolen.**—When it is alleged that the property was acquired other than by theft, the particular manner of its acquisition must be set forth in the complaint and in the warrant. [O. C. 304.]

Art. 309. [360] [348] **Rules applicable.**—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 any provision of the Penal Code.

## 2. ISSUANCE OF SEARCH WARRANTS.


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Art. 310. [361] [349] **When place is known.**—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 written sworn complaint 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 and value of the property alleged to be stolen or concealed.
3. The place where it is alleged to be concealed.
4. The time, as near as may be, when the property is alleged to have been stolen. [O. C. 307.]

Art. 311. [362] [350] **General application.**—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 written sworn complaint is made setting forth:

1. The name of the person suspected of being the thief, or an accurate description of him, if his name be unknown, or that the thief is unknown.
2. An accurate description of the property, and its probable value.
3. The time, as near as may be, when the property is supposed to have been stolen.
4. That the person complaining has good ground to believe that the property was stolen by the person alleged to be the thief. [O. C. 306.]

Art. 312. [363] [351] **Application to search other places.**—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 on written sworn complaint, 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. [O. C. 308.]

Art. 313. [364] [352] **Warrant to arrest may issue with search warrant.**—The magistrate, at the time of issuing a

search warrant, may also issue a warrant for the arrest of the person accused of having stolen the property, or of having concealed the same, or of having in his possession or charge property concealed at a suspected place, or of having possession of implements designed for use in the commission of the offense of forgery, counterfeiting or burglary, or of having the charge of arms or munitions prepared for the purpose of insurrection, or of having prepared such arms or munitions, or who may be, in any legal manner, accused of being accomplice or accessory to any offense above enumerated. [O. C. 309.]

Art. 314. [365] [353] **Search warrant may order arrest.**—The search warrant may, in addition to commanding the peace officer to seize property, also require him to bring before the magistrate the person accused of having stolen or concealed the property.

Art. 315. [366] [354] **To seize property.**—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 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.
3. 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.
4. That it be dated and signed by the magistrate, and directed to sheriff or other peace officer of the proper county.

Art. 316. [367] [355] **To search suspected place.**—A warrant to search a suspected place shall be 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. [O. C. 312.]

### 3. EXECUTION OF SEARCH WARRANT.


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Art. 317. [368] [356] **Warrant executed without delay.**—

Any peace officer to whom a search warrant is delivered shall execute it without delay and forthwith return it 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. [O. C. 313, 319.]

Art. 318. [369] [357] **Days allowed for warrant to run.**—The time allowed for the execution of a search warrant shall be three whole days, exclusive of the day of its issuance and of the day of its execution.

Art. 319. [370] [358] **Officer to give notice of purpose.**—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. 320. [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. 321. [372] [360] **When officer may enter by force.**—In the execution of a search warrant, the officer may break down a door or a window of any house which he is ordered to search, if he can not effect an entrance by other less violent means; but, when the warrant issues only for the purpose of discovering property stolen or otherwise obtained in violation of the penal law, without designating any particular place where it is supposed to be concealed, no such authority is given to the officer executing the same. [O. C. 317.]

Art. 322. [373] [361] **Shall seize accused and property.**—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. 323. [374] [362] **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. 324. [375] [363] **How return made.**—Upon returning the search warrant, the officer shall state on the back of the same, or on some paper attached to it, the manner in which it has been executed, and shall likewise deliver to the magistrate an inventory of the property, implements, arms or munitions taken in his possession under the warrant. [O. C. 321.]

Art. 325. [376] [364] **Preventing consequences of theft.**—All persons have a right to prevent the consequences of theft by seizing any personal property which has been stolen, and bring-

ing 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.]

### 4. RETURN OF A SEARCH WARRANT.


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Art. 326. [377] [365] **Disposition of stolen property.**—When property is taken under any provision of this title and delivered to a magistrate, he shall, if it appear that the same was acquired in violation of the penal law, dispose of it according to the rules prescribed in this Code with reference to the disposition of stolen property. [O. C. 322.]

Art. 327. [378] [366] **Custody of property found.**—When a warrant has been issued to search 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. [O. C. 323.]

Art. 328. [379] [367] **Magistrate shall investigate.**—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. [O. C. 330.]

Art. 329. [380] [368] **Shall discharge defendant.**—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 taken from him, except implements which appear to be designed for forging, counterfeiting or burglary. 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. 330. [381] [369] **Schedule.**—The 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 so seized. [O. C. 324.]

Art. 331. [382] [370] **Examining trial.**—The magistrate shall proceed to deal with the accused as in other cases before an examining court if he is satisfied there was good ground for issuing the warrant. [O. C. 331.]

Art. 332. [383] [371] **Certify record 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. [O. C. 334.]

# TITLE 7

## AFTER COMMITMENT OR BAIL AND BEFORE THE TRIAL.


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## CHAPTER ONE.

## ORGANIZATION OF THE GRAND JURY.


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Art. 333. [384] [372] **Jury commissioners.**—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. Be intelligent citizens of the county and able to read and write.
2. Be qualified jurors and freeholders in the county.
3. Be residents of different portions of the county.
4. Have no suit in said court which requires the intervention of a jury. [Acts 1876, p. 79.]

Art. 334. [385] [373] **Notified of appointment.**—The judge shall cause the proper officer to notify such appointees of such appointment, and when and where they are to appear. [Id.]

Art. 335. [386] [374] **Oath of commissioners.**—When the appointees appear before the judge, he shall administer to them the following oath: "You do swear faithfully to discharge the duties required of you as jury commissioners; that you will not knowingly elect any man as juryman whom you believe to be unfit and not qualified; that you will not make known to any one the name of any juryman selected by you and reported to the court; that you will not, directly or indirectly, converse with any one selected by you as a juryman concerning the merits of any case to be tried at the next term of this court, until after said cause may be tried or continued, or the jury discharged." [Id.]

Art. 336. [387] [375] **Instructed.**—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 to a suitable room to be secured by the

sheriff for that purpose. The clerk shall furnish them the necessary stationery, the names of those appearing from the records of the court to be exempt or disqualified from serving on the jury at each term, and the last assessment roll of the county. [Id.]

Art. 337. [388] [376] **Kept free from intrusion.**—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 complete their duties. [Id.]

Art. 338. [389] [377] **Shall select grand jurors.**—The jury commissioners shall select sixteen men from the citizens of the different portions of the county to be summoned as grand jurors for the next term of the court. [Id.]

Art. 339. [390] [378] **Qualifications.**—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 that the requisite number of jurors who have paid their poll taxes can not be found within the county, the court shall not regard 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 for theft or of any felony. [Id., p. 78; O. C. 289; Const., art. 16, sec. 19; Acts 1903, 1st C. S. p. 16.]

Art. 340. [391] [379] **Names returned.**—The names of those 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 being for 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, direct the same to the district judge and deliver it to him in open court. [Id.]

Art. 341. [392] [380] **List to clerk.**—The judge shall deliver the envelope containing the list of grand jurors to the clerk or one of his deputies in open court without opening the same. [Id.]

Art. 342. [393] [381] **Oath to clerk.**—Before the list of grand jurors is delivered to the clerk, 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 you, nor permit them to be opened until the time pre-

scribed 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. 343. [394] [382] **Deputy clerk sworn.**—Should the clerk subsequently appoint a deputy, such clerk shall administer to him the same oath, at the time of such appointment. [Id.]

Art. 344. [395] [383] **Clerk shall open lists.** — Within thirty days of the next term of the district court and not before, the clerk shall open the envelope containing the list of grand jurors, make out a copy of the names of those selected as grand jurors, certify to it under his official seal and deliver it to the sheriff. [Id.]

Art. 345. [396] [384] **Summoning.**—The sheriff shall summon the persons named in the list at least three days, exclusive of the day of service, prior to the first day of the term of court at which they are to serve, by giving personal notice to each juror of the time and place when and where he is to attend as a grand juror, or by leaving at his place of residence with a member of his family over sixteen years old a written notice to such juror that he has been selected as a grand juror, and the time and place when and where he is to attend. [Id.]

Art. 346. [397] [385] **Return of officer.**—The 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. If any of said jurors have not been summoned, he shall also state in his certificate the reason why they have not been summoned. [Id.]

Art. 347. [398] [386] **Absent juror fined.**—A juror 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.]

Art. 348. [399] [387] **Failure to select.**—If there should be a failure from any cause 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, to serve as grand jurors. [O. C. 347.]

Art. 349. [400] [388] **If less than twelve attend.**—When less than twelve of those summoned to serve as grand jurors are found to be in attendance and qualified to so serve, 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.]

Art. 350. [401] [389] **Jurors to attend forthwith.**—The jurors provided for in the two preceding articles shall be summoned in person to attend before the court forthwith.

Art. 351. [402] [390] **To summon qualified men.** — Upon directing the sheriff to summon grand jurors not selected by the

jury commissioners, the court shall instruct him that he must summon no person to serve as a grand juror who does not possess the qualifications prescribed by law.

Art. 352. [403] [391] **To test qualifications.**—When as many as twelve men summoned to serve as grand jurors are in attendance upon the court, it shall proceed to test their qualifications as such. [O. C. 345.]

Art. 353. [404] [392] **Interrogated.**—Each person who is presented to serve as a grand juror shall, before being impaneled, be interrogated on oath by the court or under his direction, touching his qualifications. [O. C. 349.]

Art. 354. [405] [393] **Mode of test.**—In trying the qualifications of any person to serve as a grand juror, he shall be asked:

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?

2. Are you a freeholder in this State or a householder in this county?

3. Are you able to read and write? [O. C. 350; Acts 1st C. S. 1903, p. 16.]

Art. 355. [406] [394] **Qualified juror accepted.**—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; Id.]

Art. 356. [407] [395] **Excused if disqualified.**—Any person summoned who does not possess the requisite qualifications shall be excused by the court from serving. [O. C. 352.]

Art. 357. [408] [396] **Jury impaneled.** — 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 person presented to serve as a grand juror. [O. C. 353.]

Art. 358. [409] [397] **Any person may challenge.**—Before the grand jury has been impaneled, any person may challenge the array of jurors or any person presented as a grand juror. 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.]

Art. 359. [410] [398] **"Array".**—By the array of grand jurors is meant the whole body of persons summoned to serve as such before they have been impaneled. [O. C. 368.]

Art. 360. [411] [399] **"Impaneled" and "panel".**—A grand juror is said to be "impaneled" after his qualifications have been tried and he has been sworn. By "panel" is meant the whole body of grand jurors. [O. C. 360.]

Art. 361. [412] [400] **Challenge to array.**—A challenge to the array shall be made in writing for these causes only:

1. That those summoned as grand jurors are not in fact those 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.

Art. 362. [413] [401] **Challenge to juror.**—A challenge to a particular grand juror may be made orally for the following causes only:

1. That he is not a qualified grand juror.

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 one who has been held to bail or who is in confinement upon a criminal accusation. [O. C. 364.]

Art. 363. [414] [402] **Summarily decided.**—When a challenge to the array or to any individual has been made, the court shall hear proof and decide in a summary manner whether the challenge be well founded or not. [O. C. 365.]

Art. 364. [415] [403] **Other jurors summoned.** — The court shall order another grand jury to be summoned if the challenge to the array be sustained, or order the panel to be completed if by challenge to any particular grand juror their number be reduced below twelve.

Art. 365. [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 the jurors: "You solemnly swear 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." [Acts 1875, p. 166.]

Art. 366. [417] [405] **To instruct jury.**—The court shall instruct the grand jury as to their duty.

Art. 367. [418] [406] **Bailiffs appointed.**—The court may appoint one or more bailiffs 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 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."

Art. 368. [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 the foreman may require

of him. One bailiff shall be always with the grand jury, if two or more are appointed.

Art. 369. [420] [408] **Bailiff violating duty.**—No bailiff shall take part in the discussions or deliberations of the grand jury nor be present when they are discussing or voting upon a question. The grand jury shall report to the court any violation of duty by a bailiff and the court may punish him for such violation as for contempt.

Art. 370. [421] [409] **Another foreman appointed.**—If the foreman of the grand jury is from any cause absent or unable or disqualified to act, the court shall appoint in his place some other member of the body.

Art. 371. [422] [410] **Quorum.**—Nine members shall be a quorum for the purpose of discharging any duty or exercising any right properly belonging to the grand jury.

Art. 372. [423] [411] **Reassembled.**—A grand jury discharged by the court for the term may be reassembled by the court at any time during the term. If one or more of them fail to reassemble, the court may complete the panel by impaneling other men in their stead in accordance with the rules provided in this chapter for completing the grand jury in the first instance.

## CHAPTER TWO.

## DUTIES AND POWERS OF THE GRAND JURY.


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Art. 373. [424] [412] **Grand jury room.**—After the grand jury is organized they shall proceed to the discharge of their duties in a suitable place which the sheriff shall prepare for their sessions. [O. C. 371.]

Art. 374. [425] [413] **Deliberations secret.**—The deliberations of the grand jury shall be secret. Any grand juror or bailiff who divulges anything transpiring before them in the course of their official duties shall be liable to a fine as for contempt of the court, not exceeding one hundred dollars, and to imprisonment not exceeding five days. [O. C. 372.]

Art. 375. [426] [414] **State's attorney may go before.**—The attorney representing the State may go before the grand jury at any time except when they are discussing the propriety of finding an indictment or voting upon the same. [O. C. 373.]

Art. 376. [427] [415] **Attorney may examine witnesses.**—The attorney representing the State may examine the witnesses before the grand jury and may advise as to the proper mode of interrogating them. [O. C. 375.]

Art. 377. [428] [416] **May send for attorney.**—It is the

right of the grand jury to send for the State's attorney and ask his advice upon any matter of law or upon any question arising respecting the proper discharge of their duties. [O. C. 374.]

Art. 378. [429] [417] **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.]

Art. 379. [430] [418] **Foreman shall preside.**—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 members of the body to act as clerks for the grand jury.

Art. 380. [431] [419] **Adjournments.** — 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. With the consent of the court, they may adjourn for a longer time, and shall as near as may be, conform their adjournments to those of the court. [O. C. 377.]

Art. 381. [432] [420] **Duties of grand jury.**—The grand jury shall inquire into all offenses liable to indictment of which any member may have knowledge, or of which they shall be informed by the attorney representing the State, or any other credible person. [O. C. 378.]

Art. 382. [433] [421] **Foreman may issue process.**—The foreman 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 under investigation. [O. C. 379, Act Aug. 15, 1870.]

Art. 383. [434] [422] **Attachment for out-county witness.** —The foreman or the attorney representing the State may, upon written application 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. Such attachment shall command the sheriff or any constable of the county where such witness resides to arrest such witness, and have him before the grand jury at the time and place specified in the writ. [Act Aug. 15, 1870.]

Art. 384. [435] [423] **Attachment in vacation.**—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.]

Art. 385. [436] [424] **Execution of process.**—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 district clerk. If the process is returned not executed, the return shall state why it was not executed.

Art. 386. [437] [425] **Evasion of process.**—If it be made to appear satisfactorily to the court that a witness for whom an 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. 387. [438] [426] **When witness refuses to testify.**—When a witness, brought in any manner before a grand jury, refuses to testify, such fact 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.]

Art. 388. [439] [427] **Oaths to witnesses.**—The following oath shall be administered by the foreman, or under his direction, to each witness before being interrogated: "You solemnly swear 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." [Acts 1875, p. 108.]

Art. 389. [440] [428] **How witness questioned.** — The grand jury, in propounding questions to a witness, shall direct the examination to the person accused or suspected, shall state the offense with which he is charged, the county where the offense is said to have been committed, and, as nearly as may be, the time of the commission of the offense; but should the jury think it necessary, they may ask the witness in general terms whether he has knowledge of the violation of any particular law by any person, and, if so, by what person. [O. C. 383.]

Art. 390. [441] [429] **Felony by one unknown.**—When a felony has been committed in any county within the jurisdiction of the grand jury, and the name of the offender 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. 391. [442-443] **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 an indictment, and, if nine members concur in finding the bill, the foreman shall make a memorandum of the same with such data as will enable the attorney who represents the State to write the indictment. [O. C. 385.]

Art. 392. [444] [432] **Indictment prepared.**—The attorney representing the State shall prepare all indictments which have been found, with as little delay as possible, and deliver them to the foreman, who shall sign the same officially, and said attorney shall indorse thereon the names of the witnesses upon whose testimony the same was found. [O. C. 387.]

Art. 393. [445] [433] **Indictment presented.**—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. At least nine members of the grand jury must be present on such occasion. [O. C. 388.]

Art. 394. [446] [434] **Presentment entered of record.**—The fact of a presentment of indictment in open court by a grand jury shall be entered upon the minutes 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. [Acts 1876, p. 8.]

## CHAPTER THREE.

## INDICTMENTS AND INFORMATIONS.


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Art. 395. [450] [438] **"Indictment"**—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.]

Art. 396. [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 authority of the State of Texas."

2. It must appear 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 give a reasonably accurate description of him.

5. It must show that the place where the offense was com-

mitted 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.

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."

9. It shall be signed officially by the foreman of the grand jury. [O. C. 395.]

Art. 397. [452] [440] **What should be stated.**—Everything should be stated in an indictment which is necessary to prove. [O. C. 396.]

Art. 398. [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.]

Art. 399. [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.]

Art. 400. [455] [443] **Allegation of venue.**—When 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.]

Art. 401. [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 accused, a reasonably accurate description of him shall be given in the indictment.

Art. 402. [457] [445] **Allegation of ownership.**—Where one person owns the property, and another person has the possession 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.

Art. 403. [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.

Art. 404. [459] [447] **"Felonious" and "feloniously".** — It is not necessary to use the words "felonious" or "feloniously" in any indictment.

Art. 405. [460] [448] **Certainty; what sufficient.**—An indictment 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. [Acts 1881, p. 60.]

Art. 406. [461] [449] **Special and general terms**—When a statute 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. To charge an unlawful sale, it is necessary to name the purchaser.

Art. 407. [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. [Id.]

Art. 408. [465] [453] **Perjury and false swearing.** — 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 proceeding with which the false statement is connected, nor the commission or authority of the court or person before whom the false statement was made; 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 or false swearing is assigned. [Acts 1881, p. 60; Acts 1923, p. 83.]

Art. 409. [470] [458] **Certain forms of indictments.**—The following forms of indictments are sufficient:

Form No. 1—General form: In the name and by authority of the State of Texas: The grand jury of_____county, State of Texas, duly organized at the_____term, A. D. _____, of the district court of said county, in said court at said term, do present that_____, (defendant) on the_____day of_____A. D._____, in said

county and State, did_____(description of offense) against the peace and dignity of the State.

_____, Foreman of the grand jury.

Form No. 2—Murder: "A B did with malice aforethought kill C D by shooting him with a gun;" or, "by cutting him with a knife."

Art. 410. [474] [462] **Following statutory words.**—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. [Acts 1881, p. 60.]

Art. 411. [475] [463] **Matters of judicial notice.**—Presumptions of law and 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) need not be stated in an indictment. [Id.]

Art. 412. [476] [464] **Defects of form.** — An indictment shall not be held insufficient, nor shall the trial, judgment or other proceedings thereon be affected, by reason of any defect of form which does not prejudice the substantial rights of the defendant. [Id.]

Art. 413. [477] [465] **"Information."**—An "information" is a written statement filed and presented in behalf of the State by the district or county attorney, charging the defendant with an offense which may by law be so prosecuted. [O. C. 402.]

Art. 414. [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 authority of the State of Texas."
2. That it appear to have been presented in a court having jurisdiction of the offense set forth.
3. That it appear to have been presented by the proper officer.
4. That it contain the name of the accused, or state 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 mentioned 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 it conclude, "Against the peace and dignity of the State."
9. It must be signed by the district or county attorney, officially. [O. C. 403.]

Art. 415. [479] [467] **Information based upon complaint.** —No information shall be presented until affidavit has been

made by some credible person charging the defendant with an offense. The affidavit shall be 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.]

Art. 416. [480] [468] **Rules as to indictment apply to information.**—The rules with respect to allegations in an indictment and the certainty required apply also to an information.

Art. 417. [481] [469] **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. An indictment or information shall be sufficient if any one of its counts be sufficient.

Art. 418. [482] [470] **When indictment has been lost, 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. In such case, another indictment or information may be substituted, upon the written statement of such 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.

Art. 419. [483] [471] **Order transferring cases.** — Upon the filing of an indictment in the district court which charges an offense over which such court has no jurisdiction, the judge of such court shall make an order transferring the same to such inferior court as may have jurisdiction, stating in such order the cause transferred and to what court transferred. [Const. Art. 5, Sec. 17; Act Aug. 12, 1876, p. 135; Acts 1879, p. 71; Acts 1881, p. 2.]

Art. 420. [484] [472] **Causes transferred to justice court.** —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 grand jury on the indictment or otherwise. 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 such cause may be transferred shall have jurisdiction to try the same. [Const., Art. 5, Sec. 16; Act April 3, 1879, p. 71; Acts 1876, p. 135.]

Art. 421. [485] [473] **Duty on transfer.**—The clerk of the court, without delay, shall deliver the indictments in all cases transferred, together with all the papers relating to each case, to the proper court or justice, as directed in the order of transfer; and shall accompany each case with a certified copy of all the proceedings taken therein in the district court, and with a

bill of the costs that have accrued therein in the district court. The said costs shall be taxed in the court in which said cause is tried, in the event of a conviction. [Acts 1876, p. 135.]

Art. 422. [486] [474] **Proceedings of inferior court.**—Any case so transferred shall be entered on the docket of the court to which it is transferred. All process thereon shall be issued and the defendant tried as if the case had originated in the court to which it was transferred. [Id.]

Art. 423. [487] [475] **Cause improvidently 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-transferred 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.

## CHAPTER FOUR.

## PROCEEDINGS PRELIMINARY TO TRIAL.

### 1. FORFEITURE OF BAIL.


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Art. 424. [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.]

Art. 425. [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 court house door, 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.

Art. 426. [490] [478] **Citation to sureties.**—After the adjournment of the court, a citation shall issue 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. It shall not be necessary to give notice to the defendant. [O. C. 409.]

Art. 427. [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 offense with which the principal is charged as set out in the bond or recognizance, and state the date of such obligation.
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.

Art. 428. [492] [480] **Citation as in civil actions.**—Sureties shall be entited 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 as in civil actions. [O. C. 412.]

Art. 429. [493] [481] **Citation 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 as in civil actions.

Art. 430. [494] [482] **Cost of publication.**—When service of citation is made by publication, the county in which the forfeiture has been taken shall pay the costs thereof, to be taxed as costs in the case.

Art. 431. [495] [483] **Service out of the State.**—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 of such person, stating the facts of such service, shall be a sufficient return.

Art. 432. [496] [484] **When surety is dead.**—If the surety is dead at the time the forfeiture is taken, the forfeiture shall nevertheless be valid. The final judgment shall not be rendered where a surety has died, either before or after the forfeiture has been taken, unless his excutor, 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.

Art. 433. [497] [485] **Scire facias docket.**—When a forfeiture has been declared upon a recognizance or bail bond, the court or clerk shall docket the case upon the scire facias or upon the civil docket, in the name of the State of Texas, as plaintiff, and the principal and his sureties, as defendants; and the pro-

ceedings had therein shall be governed by the same rules governing other civil suits.

Art. 434. [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.]

Art. 435. [499] [487] **Proceedings not set aside for defect of form.**—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.

Art. 436. [500] [488] **Causes which will exonerate.**—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. 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 suretes. 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 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. [O. C. 414.]

Art. 437. [501] [489] **Judgment final.**—When, upon a trial of the issues presented, 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. The costs shall be equally divided between the sureties, if there be more than one. [O. C. 417.]

Art. 438. [502] [490] **Judgment final by default.**—When the sureties have been duly cited and fail to answer, and the principal also fails to answer within the time limited for answer-

ing in other civil actions, the court shall enter judgment final by default.

Art. 439. [503] [491] **The court may remit.**—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.]

Art. 440. [504] [492] **Forfeiture set aside.**—When the principal appears before the entry of final judgment, and sufficient cause is shown for his failure to appear before the forfeiture is taken, and a trial is had of the criminal action pending against him, he shall be entitled to have the forfeiture set aside. 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. [O. C. 416.]

## 2. THE CAPIAS.


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Art. 441. [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.

Art. 442. [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 and the time when it is returnable.
5. That it be dated and attested officially by the authority issuing the same. [O. C. 421.]

Art. 443. [507] [495] **Capias in felony.**—A capias shall be immediately issued by the district clerk upon each indictment for felony presented, and shall be delivered by the clerk or mailed to the sheriff of the county where the sheriff resides or is to be found.

Art. 444. [508] [496] **In misdemeanor case.**—In misdemeanor cases the capias shall issue from the court having jurisdiction of the same. A capias need not issue for a defendant in custody or under bail.

Art. 445. [509] [497] **Capias after forfeiture.**—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 436, in which case the defendant and his sureties shall remain bound under his present recognizance or bail bond.

Art. 446. [510] [498] **New bail in felony case.**—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.

Art. 447. [511] [499] **Capias does not lose its force.**—A capias shall not lose its force if not executed and returned at the time fixed in the writ, but may be executed at any time afterward, and return made. 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. 448. [512] [500] **Reasons for retaining capias.**—When the capias is not returned at the time fixed in the writ, the officer holding it shall notify the court from whence it was issued, in writing, of his reasons for retaining it.

Art. 449. [513] [501] **Capias to several counties.**—Capiases for a defendant may be issued to as many counties as the district or county attorney may direct.

Art. 450. [514] [502] **Bail in felony.**—In cases of arrest for felony in the county where the prosecution is pending, during a term of court, the officer making the arrest may take bail as provided in article 287. [Acts 1907, p. 148.]

Art. 451. [513] [503] **Sheriff may take bail in felony.**—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.]

Art. 452. [516] [504] **Court shall fix bail in felony.**—In felony cases which are bailable, the court shall, before adjourning, fix and enter upon the minutes the amount of the bail to be required in each case. The clerk shall indorse upon the capias the amount of bail required. In case of neglect to so comply with this article, the arrest of the defendant, and the bail bond taken by the sheriff, shall be as legal as if there had been no such omission. [O. C. 424.]

Art. 453 [517] [505] **Who may arrest under capias.**—A capias may be executed by any constable or other peace officer. In felony cases, the defendant must be delivered forthwith to the sheriff of the county where the arrest is made, togther with the writ under which he was taken. [O. C. 425.]

Art. 454. [518] [506] **Bail in misdemeanor.**—Any officer making an arrest under a capias in a misdemeanor may in term time or vacation take bail of the defendant. [O. C. 426.]

Art. 455. [519] [507] **Arrest in capital case.**—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 commitment. This article is applicable when the arrest is made in the county where the prosecution is pending.

Art. 456. [520] [508] **Arrest in capital case in another county.**—In each capital case where a defendant is arrested under a capias in a county other than that in which the case is pending, the sheriff who arrests, or to whom the defendant is delivered, shall convey him forthwith to the county from which the capias issued and deliver him to the sheriff of such county.

Art. 457. [521] [509] **Return of bail bond and capias.**—When an arrest has been made and a bail bond taken, such bond, together with the capias, shall be returned forthwith to the proper court. [O. C. 422.]

Art. 458. [522] [510] **Detaining accused in out-county jail.**—If a defendant be placed in jail out of the county of the prosecution, on a 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 charge is a misdemeanor, he shall be discharged from custody if not applied for and taken by the sheriff of the proper county before the end of ten days from the day of his commitment. [O. C. 434.]

Art. 459. [523] [511] **Unsafe jail.**—The preceding article shall not apply if the defendant has been placed in jail out of the county for the want of a safe jail in the proper county.

Art. 460. [524] [512] **Return of capias.**—The return of the capias shall be made to the court from which it is issued. 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 it shall be fully stated. 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 he has as to the defendant's whereabouts.

### 3. SUBPOENA AND ATTACHMENT.


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Art. 461. [525] [513] **Definition of "subpoena".**—A "subpoena" is a writ issued to the sheriff or other proper officer commanding him to summon one or more persons therein named to appear at a certain term of the court, or on a certain day, to

testify in a criminal action, or 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.

Art. 462. [526] [514] **Subpoena duces tecum.**—If a witness have in his possession any instrument of writing or other thing desired as evidence, the subpoena may specify such evidence and direct that the witness bring the same with him and produce it in court.

Art. 463. [526-529] **Subpoena and application therefor.**—Before the clerk or his deputy shall be required or permitted to issue a subpoena in any felony case pending in any district or criminal district court of this State of which he is clerk or deputy, the defendant or his attorney or the State's attorney shall make written sworn application to such clerk for each witness desired. Such application shall state the name of each witness desired, the location and avocation, if known, and that the testimony of said witness is believed to be material to the State or the defense. As far as practicable such clerk shall include in one subpoena the names of all witnesses for the State and defendant, and such process shall show that the witnesses are summoned for the State and defendant. When a witness has been served with process by one party, it shall inure to the benefit of the opposite party in case he should need said witness. [Acts 1889, p. 145, Acts 1st C. S. 1897, p. 5, Acts 1913, p. 319.]

Art. 464. [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 as to the whereabouts of the witness.

Art. 465. [528] [516] **Refusing to obey.**—If a witness refuse to obey a subpoena, he may be fined at the discretion of the court, as follows: In a felony case, not exceeding five hundred dollars; in a misdemeanor case, not exceeding one hundred dollars. [O. C. 444-445.]

Art. 466. [530] [518] **What is disobedience of a subpoena.**—It shall be held 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 on 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.]

Art. 467. [531] [519] **Fine against witness conditional.**—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, Acts 1895, p. 95.]

Art. 468. [532] [520] **Witness may show cause.**—A witness cited to show cause, as provided in the preceding article, may do so under oath, in writing or verbally, at any time before judgment final is entered against him; but, if he fails to show cause within the time limited for answering in civil actions, a judgment final by default shall be entered against him. [O. C. 448; Id.]

Art. 469. [533] [521] **Court may remit fine.**—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 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. Said fine shall be collected as fines in misdemeanor cases. [O. C. 452; Id.]

Art. 470. [534] [522] **When witness appears and testifies.**—When a fine has been entered against a witness, but no trial of the cause takes place, and such witness afterward appears and testifies upon the trial thereof, it shall be discretionary with the judge, though no good excuse be rendered, to reduce the fine or remit it altogether; but the witness, in such case, shall, nevertheless, be adjudged to pay all the costs accruing in the proceeding against him by reason of his failure to attend. [O. C. 449.]

Art. 471. [535] [523] **Requisites of an attachment.**—An "attachment" is a writ issued by a clerk of a court under seal, 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. [O. C. 439.]

Art. 472. [536] [524] **When attachment may issue.**—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.]

Art. 473. [537] [524a] **Attachment for resident witness.**—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, the clerk shall forthwith issue an attachment for such witness; provided, that in mis-

demeanor cases, when the witness makes oath that he can not give surety, the officer executing the attachment shall take his personal bond. [Acts 1897, p. 30.]

Art. 474. [538] [525a] **To secure attendance before grand jury.**—At any time before the first day of any term of the district court, the clerk, upon application of the State's attorney, shall issue a subpoena for any witness who resides in the county. If at the time such application is made, such attorney files 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. 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 not exceeding five hundred dollars, to be collected as fines and costs in other criminal cases. [Acts 1899, p. 245.]

Art. 475. [539] **Application for out-county witness.**—Where a witness resides out of the county in which the prosecution is pending, the State or the defendant shall be entitled, either in term time or in vacation, to a subpoena to compel the attendance of such witness on application to the proper clerk or magistrate. Such application shall be in the manner and form as provided in article 463. [Acts 1st C. S. 1897, p. 58.]

Art. 476. [540] **Duty of officer receiving said subpoena.**—The officer receiving said subpoena shall execute the same by delivering a copy thereof to each witness therein named. 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 as to the whereabouts of said witness. [Id.]

Art. 477. [541] **Subpoena returnable forthwith.**—When a subpoena is returnable forthwith, the officer shall immediately serve the witness with a 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. If said witness makes affidavit of his inability from lack of funds to appear in obedience to said subpoena, the officer executing the same shall 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. [Id.]

Art. 478. [542] **Certificate to officer.**—The clerk, magistrate, or foreman of the grand jury, issuing said process, immediately upon the return of said subpoena, if issued in a felony case, shall 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 district judge and recorded

by the district clerk in a 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.]

Art. 479. [543] **Subpoena returnable at future day.**—If the subpoena be returnable at some future date, the officer shall have authority to take a good 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. If said witness refuse to give bond, he shall be kept in custody until such time as he starts in obedience to said subpoena, when he shall be, upon affidavit being made, provided with funds necessary to appear in obedience to said subpoena. [Id.]

Art. 480. [544] **Stating bail in subpoena.**—The court or magistrate issuing said subpoena may direct therein the amount of the bond to be required. The officer may fix the amount if not specified, and, in either case, shall require sufficient security, to be approved by himself. [Id.]

Art. 481. [545] **Witness fined and attached.**—If a witness summoned from without the county refuse to obey a subpoena, he shall be fined by the court or magistrate 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. The court may 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 fees, unless it appears to the court that such disobedience is excusable, when the witness may receive the same pay as if he had not been attached. Said fine when made final and all costs thereon shall be collected as in other criminal cases. Said fine and judgment may be set aside in vacation or at the same or any subsequent term of the court for good cause shown, after the witness testifies or has been discharged. The following words shall be written or printed on the face of such subpoena for out-county witnesses: "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.]

Art. 482. [546] [535] **Witness released.**—A witness who is in custody for failing to give bond shall be at once released upon giving the bond required.

Art. 483. [547] [536] **Witness recognized.**—Witnesses on behalf of the State or defendant may, at the request of either party, be required to enter into recognizance in an amount to be

fixed by the court to appear and testify in a criminal action; but, if it shall appear to the court that any witness is unable to give security upon such recognizance, he shall be recognized without security.

Art. 484. [548] [537] **Personal recognizance of witness.**—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.

Art. 485. [549] [538] **Enforcing forfeiture.** — 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 case. [O. C. 437b.]

Art. 486. [550] [539] **No surrender after forfeiture.**—The sureties of a witness have no right, in any case, to discharge themselves by the surrender of such witness, after the forfeiture of their recognizance or bond. [O. C. 453.]

### 4. SERVICE OF A COPY OF THE INDICTMENT.


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| Service and return | 488 | In misdemeanor | 490 |


Art. 487. [551] [540] **In felony.**—In every case of felony, when the accused is in custody, or as soon as he may be arrested, the clerk of the court where an indictment has been presented shall immediately make a certified copy of the same, and deliver such copy to the sheriff, together with a writ directed to such sheriff, commanding him forthwith to deliver such certified copy to the accused. [O. C. 458.]

Art. 488. [552] [541] **Service and return.**—Upon receipt of such writ and copy, the sheriff shall immediately deliver such certified copy of the indictment to the accused and return the writ to the clerk issuing the same, with his return thereon, showing when and how the same was executed.

Art. 489. [553] [542] **If on bail in felony.**—When the accused, 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 on request deliver a copy of the same to the accused or his counsel, at the earliest possible time. [O. C. 460.]

Art. 490. [554] [543] **In misdemeanor.**—In misdemeanors, it shall not be necessary before trial to furnish the accused with a copy of the indictment or information; but he or his counsel may demand a copy, which shall be given as early as possible.

### 5. ARRAIGNMENT.


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| Purpose of arraignment | 492 | Where name is unknown | 498 |
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| Name as stated in indictment | 495 | Plea of guilty | 501 |
| If defendant suggests different name | 496 | Jury on plea of guilty | 502 |
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Art. 491. [555] [544] **No arraignment.**—There shall be no

arraignment of a defendant except upon an indictment for a capital offense. [O. C. 461.]

Art. 492. [556] [545] **Purpose of arraignment.**—An arraignment takes place for the purpose of fixing his identity and hearing his plea. [O. C. 462.]

Art. 493. [557] [446] **Time of arraignment.**—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.]

Art. 494. [558] [547] **Court shall appoint counsel.**—When the accused 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. The counsel so appointed shall have at least one day to prepare for trial. [O. C. 466.]

Art. 495. [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.

Art. 496. [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 as to give his true name, and the cause proceed as if the true name had been first recited in the indictment. [O. C. 469.]

Art. 497. [561] [550] **If accused refuses to give his real name.**—If the defendant alleges that he is not indicted by his true name, and refuses to say what his real name is, the cause shall proceed as if the name stated in the indictment were true; and the defendant shall not be allowed to contradict the same by way of defense. [O. C. 470.]

Art. 498. [562] [551] **Where name is unknown.**—A defendant described as a person whose name is unknown may have the indictment so corrected as to give therein his true name.

Art. 499. [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.]

Art. 500. [564] [553] **Plea of not guilty entered.**—If the defendant answer that he is not guilty, the same shall be entered upon the minutes of the court; if he refuse to answer, the plea of not guilty shall in like manner be entered. [O. C. 473.]

Art. 501. [565] [554] **Plea of guilty.**—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.]

Art. 502. [566] [555] **Jury on plea of guilty.**—Where a defendant in a case of felony persists in pleading guilty, if the punishment is not absolutely fixed by law, a jury shall be impaneled to assess the punishment, and evidence submitted to enable them to decide thereupon. [O. C. 476.]

Art. 503. [567] [556] **Correcting name.**—In any case, the same proceedings shall be had with respect to the name of the defendant and the correction of the indictment or information as provided with respect to the same in capital cases. [O. C. 479.]

## 6. THE PLEADINGS IN CRIMINAL ACTIONS.


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Art. 504. [568] [557] **Indictment or information.**—The primary pleading in a criminal action on the part of the State is the indictment or information. [O. C. 481.]

Art. 505. [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 accusation presented against him.
3. An exception to the indictment or information for some matter of form or substance.
4. A plea of guilty.
5. A plea of not guilty. [O. C. 482.]

Art. 506. [570] [559] **Motion to set aside indictment.**—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 based upon a valid complaint.
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.]

Art. 507. [571] [560] **Motion tried by judge.**—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.]

Art. 508. [572] [561] **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.

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.]

Art. 509. [573] [562] **Special plea verified.**—Every special plea shall be verified by the affidavit of the defendant.

Art. 510. [574] [563] **Special plea tried by jury.**—All issues of fact presented by a special plea shall be tried by a jury.

Art. 511. [575] [564] **Exception to substance of indictment.**—There is no exception to the substance of an indictment or information, except:

1. That it does not appear therefrom that an offense against the law was committed by the defendant.

2. That it appears from the face thereof 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 it shows upon its face that the court trying the case has no jurisdiction thereof. [O. C. 487.]

Art. 512. [576] [565] **Exception to form of indictment.**—Exceptions to the form of an indictment or information may be taken for the following causes only:

1. That it does not appear to have been presented in the proper court, as required by law.

2. The want of any other requisite or form prescribed by articles 396 and 414, 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 State's attorney. [O. C. 488.]

Art. 513. [577] [566] **Written pleadings.**—All motions to set aside an indictment or information and all special pleas and exceptions shall be in writing. [O. C. 489.]

Art. 514. [578] [567] **Two days allowed for filing 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.

Art. 515. [579] [568] **Time after service.**—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.

Art. 516. [580] [569] **May file written pleadings at any time.**—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.]

Art. 517. [581] [570] **Plea of guilty in felony.**—A plea of guilty in a felony case must be made in open court by the defendant in person; and the proceedings shall be as provided in articles 501 and 502.

Art. 518. [582] [571] **Plea of guilty in misdemeanor.**—A plea of guilty in a misdemeanor case may be made either by the defendant or his counsel in open court. In such case, the defendant or his counsel may waive a jury, and the punishment may

be assessed by the court, either upon or without evidence, at the discretion of the court.

Art. 519. **Change of venue to plead guilty.**—When in any county which is located in a judicial district composed of more than one county, a party is charged with a felony and the maximum punishment therefor shall not exceed fifteen years, and the district court of said county is not in session, such party may, if he desires to plead guilty, make application to the district judge of such district for a change of venue to the county in which said court is in session, and said district judge may enter an order changing the venue of said cause to the county in which the court is then in session, and the defendant may plead guilty to said charge in said court to which the venue has been changed. [Acts 1917, p. 350.]

Art. 520. [584] [573] **Plea of not guilty, how made.**—The plea of not guilty may be made orally by the defendant or by his counsel in open court. If the defendant refuses to plead, the plea of not guilty shall be entered for him by the court. [O. C. 480.]

Art. 521. [585] [574] **Plea of not guilty 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 508. [O C. 497.]

## 7. MOTIONS, PLEAS AND EXCEPTIONS.


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Art. 522. [587] [576] **Motions heard without delay.**—The motion to set aside an indictment or information, and all exceptions, shall be heard together and decided without delay.

Art. 523. [588] [577] **Time of hearing.**—The court, at its discretion, may hear and determine such motions and exceptions at any time before a trial has been entered upon, but not afterward.

Art. 524. [589] [578] **Order of argument.**—The counsel of the defendant has the right to open and conclude the argument upon all pleadings of the defendant presented for the decision of the judge.

Art. 525. [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.]

Art. 526. [591] [580] **Process for testimony on pleadings.**

—Where the matters involved in any written pleading depend in whole or in part upon testimony, and not altogether upon the record of the court, every process known to the law may be obtained on behalf of either party to procure 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.

Art. 527. [592] [581] **Quashing charge in misdemeanor.**—If the motion to set aside or the exception to an indictment or information is sustained, the defendant in a misdemeanor case shall be discharged, but may be again prosecuted within the time allowed by law. [O. C. 504.]

Art. 528. [593] [582] **Quashing indictment in felony.**—If the motion to set aside or the exception to the indictment in cases of felony be sustained, the defendant shall not therefor be discharged, but may immediately be recommitted by order of the court, upon motion of the State's attorney or without motion; and proceedings may afterward be had against him as if no prosecution had ever been commenced. [O. C. 505.]

Art. 529. [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 presented, he shall be fully discharged. [O. C. 506.]

Art. 530. [595] [584] **If 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 a penal offense. [O. C. 507.]

Art. 531. [596] [585] **When defendant is held by order of court.**—If the motion to set aside the indictment or any exception thereto is sustained, but the court refuses to discharge the defendant, then at the expiration of ten days from the order sustaining such motions or exceptions, the defendant shall be discharged, unless in the meanwhile complaint has been made before a magistrate charging him with an offense, or unless another indictment has been presented against him for such offense.

Art. 532. [597] [586] **Exception on account of form.**—If the exception to an indictment or information is only on account of form, it shall be amended, if defective, and the cause proceed upon such amended charge. [O. C. 508.]

Art. 533. [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.

Art. 534. [599] [588] **How amended.**—All amendments of an indictment or information shall be made with the leave of the court and under its direction.

Art. 535. [600] [589] **State may except to plea.**—When a special plea is filed by the defendant, the State may except to it for substantial defects. 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.]

Art. 536. [601] [590] **Former acquittal or conviction.**—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 judgment was had upon indictment or information, in which case the prosecution shall be barred for all grades of the offense.

Art. 537. [602] [591] **Plea allowed.**—Judgment shall, in no case, be given against the defendant where his motion, exception or plea is overruled; but in all cases the plea of not guilty may be made by or for him. [O. C. 512.]

## 8. CONTINUANCE.


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Art. 538. [603] [592] **By operation of law.**—Criminal actions are continued by operation of law if the accused has not been arrested or if there is not sufficient time for trial at that term of court. [O. C. 513.]

Art. 539. [604] [593] **By agreement.**—A criminal action may be continued by consent of the parties thereto, in open court, at any time.

Art. 540. [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 fully set forth in the application. [O. C. 514, 517, 520.]

Art. 541. [606] [595] **First application by State.**—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 to be issued, or to have applied for, a subpoena, in cases where the law authorized an attachment to issue.

3. That the testimony of the witness is believed by the applicant to be material for the State. [O. C. 515.]

Art. 542. [607] [596] **Subsequent application by State.**—On any subsequent application for a continuance by the State,

for the want of a witness, the application, in addition to the requisites in the preceding article, must show:

1. The facts which the applicant expects to establish by the witness, and it must appear to the court that they are material.

2. That the applicant expects to be able to procure the attendance of the witness at the next term of the court.

3. That the testimony can not be procured from any other source during the present term of the court. [O. C. 516.]

Art. 543. [608] [597] **First application by defendant.**—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:

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 authorized an attachment to issue.

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. 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. If 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 or postponed to a future day of the same term.

Art. 544. [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.

2. That the defendant has reasonable expectation of procuring the same at the next term of the court. [O. C. 516.]

Art. 545. [610] [599] **Application sworn to.**—All applications for continuance on the part of the defendant must be sworn to by himself. [O. C. 521.]

Art. 546. [611] [600] **Written motion not necessary.**—No written motion for continuance is necessary; the motion, based upon the application, may be made orally. [O. C. 522.]

Art. 547. [612] [601] **Controverting application.**—Any material fact stated, affecting diligence, in an application for a

continuance, may be denied in writing by the adverse party. The denial shall be supported by the oath of some credible person, and filed as soon as practicable after the filing of such application.

Art. 548. [613] [602] **When denial is filed.**—When such denial is filed, 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.

Art. 549. [614] [603] **Argument.**—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 it.

Art. 550. [615] [604] **Bail resulting from continuance.**—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, 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.

Art. 551. [616] [605] **Continuance after trial is begun.**—A continuance or postponement may be granted on the application of the State or defendant after the trial has begun, when it is made to appear to the satisfaction of the court that by some unexpected occurrence since the trial began, which no reasonable diligence could have anticipated, the applicant is so taken by surprise that a fair trial can not be had. [O. C. 526.]

## 9. DISQUALIFICATION OF THE JUDGE.


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Art. 552. [617] [606] **Causes which disqualify.**—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.

Art. 553. [618] [607] **District judge disqualified.**—Whenever any case is pending in which the district judge or criminal district judge is disqualified from trying the same, no change of venue shall be made necessary thereby; but the judge presiding shall certify that fact to the Governor, whereupon the Governor shall designate some district judge in an adjoining district to exchange and try such case. The Governor shall notify both judges of such order, and said judges shall exchange districts for the purpose of disposing of such case. In case of sickness or other reasons rendering it impossible to exchange, then the parties or their counsels shall have the right to agree upon an attorney of the court for the trial thereof. If said judges shall be prevented from exchanging districts and the parties and their counsels shall fail to agree upon an attorney of the court for a trial thereof, that fact shall be certified to the

Governor by either judge, whereupon the Governor shall appoint a person legally qualified to act as judge in the trial of the case. [Acts 1st C. S. 1897, p. 39, Acts 1915, p. 86.]

Art. 554. [621] **County judge disqualified.** — When the judge of the county court or county court at law is disqualified in any criminal case pending in the court of which he is judge, the parties may, by consent, agree upon a special judge to try such case. If they fail to agree upon a special judge to try such case, on or before the third day of the term at which such case may be called for trial, the judge presiding shall forthwith certify that fact to the Governor, who shall forthwith appoint some practicing attorney to try such case. [Acts 1893, p. 83.]

Art. 555. [620-622] **Special judge to take oath.**—The attorney agreed upon or appointed shall, before he enters upon his duties as special judge, take the oath of office required by the Constitution.

Art. 556. [620-622] **Record made by clerk.**—When a special judge is agreed upon by the parties or appointed by the Governor, as above provided, the clerk shall enter in the minutes 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.

2. That such special judge (naming him) was by consent of the parties agreed upon or was appointed by the Governor to try the cause.

3. That the oath of office prescribed by law has been duly administered to such special judge. [Acts 1st C. S. 1897, p. 39.]

Art. 557. [623] [610b] **Compensation.**—A special judge selected or appointed in accordance with the preceding articles shall receive the same compensation as provided by law for regular judges in similar cases. [Id.]

Art. 558. [624] [611] **Justice disqualified.**—If a justice of the peace be disqualified from sitting in any criminal action pending before him, he shall transfer the same to the nearest justice of the peace of the county who is not disqualified to try it.

Art. 559. [625] [612] **Order of transfer.**—In cases provided for in the preceding article, 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. The rules governing the transfer of cases from the district to inferior courts shall govern in the transfer of cases under the preceding article.

## 10. CHANGE OF VENUE.


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Art. 560. [626] [613] **On court's own motion.**—Whenever

in any case of felony the 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. [Acts 1876, p. 274; Const., Art. 5, Sec. 45.]

Art. 561. [627] [614] **State may have.**—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 witness, 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. [Acts 1876, p. 274.]

Art. 562. [628] [615] **Granted on application of defendant.**—A change of venue may be granted on the written application of the defendant, supported by his own affidavit and the affidavit of at least two credible persons, residents of the county where the prosecution is instituted, for either of the following causes, the truth and sufficiency of which the court shall determine:

1. That there exists in the county where the prosecution is commenced so great a prejudice against him that he can not obtain a fair and impartial trial.

2. That there is a dangerous combination against him instigated by influential persons, by reason of which he cannot expect a fair trial. [O. C. 527.]

Art. 563. [629] [616] **Where jury can not be procured.**—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 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.]

Art. 564. [630] [617] **Time to make application.**—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.]

Art. 565. [631] [618] **Changed to nearest county.**—Upon

the grant of a change of venue, the 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.]

Art. 566. [632] [619] **If adjoining counties objectionable.** —If it be shown in the application 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.]

Art. 567. [633] [620] **Application may be controverted.**— 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. The issue thus formed shall be tried by the judge, and the application granted or refused, as the law and facts shall warrant.

Art. 568. [634] [621] **Bill of exceptions.** — 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.

Art. 569. **Changed for militiamen.**—If the accused is an officer or member of the military forces of this State and is indicted for any injury to persons or property done while performing, or endeavoring to perform, any duty required of him by the laws governing such forces, the court in which such indictment is pending, upon the application of the accused, supported by the affidavit of two credible persons to the effect that they have good reason to believe that such accused cannot have a fair and impartial trial before such court, shall change the venue of such cause to some court of competent jurisdiction in another county not subject to the same or some other disqualification. [Acts 1905, p. 204.]

Art. 570. [635-636] **Clerk's duties on 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 send the same, together with all the original papers in the case, to the clerk of the court to which the venue has been changed, first making a correct certified copy of the same, and retain such copy in his office to be used in case any original be lost.

Art. 571. [637] [624] **Recognizance of defendant.**—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 until discharged. [O. C. 534.]

Art. 572. [638] [625] **Failure to give recognizance.**—A defendant who fails to give recognizance shall be safely kept in custody by the sheriff.

Art. 573. [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 court of the county to which the case is to be taken, and he shall be delivered by the sheriff as directed in the order. [O. C. 535.]

Art. 574. [640] [627] **If court be in session.**—If the court of the county to which the case is removed be then in session, the defendant shall be forthwith delivered to the sheriff of such county. [O. C. 536.]

Art. 575. [641] [628] **Witness need not again be summoned.**—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, as if there had been no such transfer.

## 11. DISMISSING PROSECUTIONS.

Defendant in custody and no indictment presented ..... Article 576
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Art. 576. [642] [629] **Defendant in custody and no indictment presented.**—When a defendant has been detained in custoday 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.]

Art. 577. [37-643] **Dismissal by State's attorney.** — The district or county attorney may, by permission of the court, dismiss a criminal action at any time upon filing a written statement with the papers in the case setting out his reasons for such dismissal, which shall be incorporated in the judgment of dismissal. No case shall be dismissed without the consent of the presiding judge.

# TITLE 8

## TRIAL AND ITS INCIDENTS.


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## CHAPTER ONE.

### THE MODE OF TRIAL.


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Art. 578. [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.

Art. 579. **Failure to pay poll tax.**—Failure to pay poll tax shall not disqualify any person from jury service. [Acts 1905, p. 207.]

Art. 580. [646] [633] **Presence of defendant.**—In all prosecutions for felonies, the defendant must be personally present at the trial, and he must likewise be present in all cases of misdemeanor when the punishment or any part thereof is imprisonment in jail. 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. [Acts 1907, p. 31.]

Art. 581. [647] [634] **May appear by counsel.**—In other misdemeanor cases, the defendant may, by consent of the State's attorney, appear by counsel, and the trial may proceed without his personal presence. [O. C. 541.]

Art. 582. [648-900] **On bail during trial.**—Where the accused is on bail when the trial commences, such bail shall not thereby be considered as discharged until the jury shall return into court a verdict of guilty or not guilty. 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 as under the law he has before the trial commences; but immediately upon the return into court of a verdict of guilty, he shall be placed in the custody of the sheriff, and his bail considered discharged. Where the accused is convicted in a misdemeanor case and is on bail when the trial commences, such bail shall not thereby be considered discharged until the defendant's motion for a new trial has been overruled by the court. [Acts 1907, p. 31, Acts 1917, p. 300.]

Art. 583. [649] [636] **Sureties bound in case of mistrial.**

—If there be a mistrial in a felony case, the original sureties of the defendant shall be still held bound for his appearance until they surrender him in accordance with the provisions of this Code. [O. C. 543.]

Art. 584. [650] [637] **Criminal docket.**—Each clerk of a court of record having criminal jurisdiction shall keep a docket in which shall be set down the style and file number of each criminal action, the nature of the offense, the names of counsel, the proceedings had therein, and the date of each proceeding. [O. C. 544.]

Art. 585. [651] [638] **To fix 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. 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.]

Art. 586. [652] [639] **Term of county court.**—Each county court 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. [Acts 1876, p. 17.]

## CHAPTER TWO.

### SPECIAL VENIRE IN CAPITAL CASES.


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Art. 587. [655] [642] **"Special venire".**—A "special venire" is a writ issued in a capital case by order of the district court, commanding the sheriff to summon such a number of persons, not less than thirty-six, as the court 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.]

Art. 588. [656-657] **Order for special venire.**—At any time after his arrest upon an indictment, the defendant may obtain an order for a special venire upon a written motion 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. The State's attorney may also obtain such order upon oral or written motion.

Art. 589. [658] [645] **Order of court.**—The order of court for the issuance of the writ shall specify the number of persons required to be summoned, and the time when they shall attend, and the time when such writ shall be returnable. The clerk shall forthwith issue the writ in accordance with such order.

Art. 590. [659] [646] **Setting capital cases.**—A capital case may, by agreement of the parties, be set 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.

Art. 591. [660] [647] **Drawing from wheel.**—In all counties having therein a city of twenty thousand or more population as shown by the preceding Federal census, whenever a special venire is ordered, the district clerk, in the presence and under the direction of the judge, shall draw from the wheel containing the names of the jurors the number of names required for such special venire, and prepare a list of such names in the order in which drawn from the wheel, and attach such list to the writ and deliver same to the sheriff. The cards containing such names shall be sealed in an envelope and 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 their names shall be put by the clerk 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 in the wheel containing the names of eligible jurors. [Acts 1907, p. 271; Acts 1911, p. 150.]

Art. 592. **Venire in other counties.**—Whenever a special venire is ordered in counties not included within the provisions of the preceding article, the name of each person selected by the jury commissioners to do jury service for the term at which such venire is required 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 such special venire, 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. [Acts 1905, p. 17; Acts 1919, p. 62.]

Art. 593. **Special venire list.**—The jury commissioners shall select one man for every one hundred of population in any county, or a greater or less number if so directed by the court, and these shall constitute a special venire list from which shall be drawn the names of those who shall answer summons to the special venire facias, after the petit jurors for the term have been drawn on any venire one time during such term. The drawing of the veniremen from the special venire list shall be done in the same manner prescribed for other jurors. No citizen who has served as a petit juror for one week during any term of court shall during said term be compelled to answer summons to more than one special venire; nor shall any citizen be compelled to answer summons to a special venire more than twice during any one term of court. The provisions of this and the succeeding article shall not apply in counties having a population of less than two thousand, nor to counties under the Jury Wheel Law. [Acts 1905, p. 17.]

Art. 594. [661] **Further venire service.**—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 special venire, then the names of the persons selected by said commissioners, and which form the special venire list, shall be placed upon tickets and drawn in the same manner as provided in the second preceding article; and the clerk shall prevent the name of any person from appearing more than twice on all of such lists. [Id.]

Art. 595. [666] [648] **Venire ordered by court.**—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 citizens who are qualified jurors in the county to make the number required by the special venire.

Art. 596. [667] [649] **Ordering talesmen.** — On failure from any cause to select a jury from those summoned upon the special venire, the court shall order the sheriff to summon any number of men that it may deem advisable, for the formation of the jury.

Art. 597. [668] [650] **Service of writ.**—The officer executing the writ shall summon the men whose names are upon the list attached to the writ to be before the court at the time named in the writ to serve as veniremen. Such summons shall be made verbally upon each juror in person. [Acts 1905, p. 17.]

Art. 598. [669] [651] **Return of writ.**—The officer executing such writ shall return the same promptly on or before the time it is returnable. The return shall state the names of those summoned, and as to those not summoned, it shall state the diligence used to summon them and the cause of the failure to summon them.

Art. 599. [670] [652] **Instructions to sheriff.**—When the sheriff is ordered by the court to summon persons upon a special venire whose names have not been selected under the Jury Wheel Law or the special venire list, 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 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 such bias or prejudice. [O. C. 553.]

Art. 600. [671] [653] **Jury list served on defendant.**—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. The sheriff shall immediately deliver such copy to the defendant, and return the writ, indorsing thereon the manner and time of its execution.

Art. 601. [672] [654] **Time of service.**—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, except where he waives the right or is on bail. 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 have been returned to the clerk of the court in which said case 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; Acts 1887, p. 5.]

## CHAPTER THREE.

### FORMATION OF THE JURY IN CAPITAL CASES.


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| Passing juror for challenge | 613 | Special pay for veniremen | 625 |


Art. 602. [673] [655] **Jurors called.**—When a 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. Those not present may be fined not exceeding fifty dollars. An attachment may issue on request of either party for any absent summoned juror, to have him brought forthwith before the court. [O. C. 555.]

Art. 603. [674] [656] **Sworn to answer questions.**—To those present the court shall cause to be administered this 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."

Art. 604. [675] [657] **Excuses.**—The court shall then hear and determine excuses offered for not serving as a juror, and if he deems the excuse sufficient, he shall discharge the juror.

Art. 605. [676] **Claiming exemption.**—Any person summoned as a juror who is exempt by law from jury service, may, if he desires to claim his exemption, make an affidavit stating his exemption, and file it at any time before the convening of said court with the clerk thereof, which shall be sufficient excuse without appearing in person. The affidavit may be sworn to before the officer summoning such juror. [Acts 1907, p. 216.]

Art. 606. [677] [658] **Excused by consent.**—One summoned upon a special venire may by consent of both parties be excused from attendance by the court at any time before he is impaneled.

Art. 607. [678] [659] **Challenge to array first heard.**—The court shall hear and determine a challenge to the array before trying those summoned as to their qualifications.

Art. 608. [679-683] **Challenge to the array.**—Either party may challenge the array only on the ground that the officer summoning the jury has wilfully summoned jurors with a view to

securing a conviction or an acquittal. All such challenges must be in writing setting forth distinctly the grounds of such challenge. When made by the defendant, it must be supported by his affidavit or the affidavit of any credible person. When such challenge is made, the judge shall hear evidence and decide without delay whether or not the challenge shall be sustained. This article does not apply when the jurors summoned have been selected by jury commissioners.

Art. 609. [684] [665] **When challenge is sustained.**—The array of jurors summoned shall be discharged if the challenge be sustained, and the court shall order other jurors to be summoned in their stead, and direct that the officer who summoned those so discharged, and on account of whose misconduct the challenge has been sustained shall not summon any other jurors in the case.

Art. 610. [685] [666] **List of new venire.**—When a challenge to the array has been sustained, the defendant shall be entitled, as in the first instance, to service of a copy of the list of names of those summoned by order of the court.

Art. 611. [686] [667] **Court to try qualifications.**—When no challenge to the array has been made, or if made, has been overruled, the court shall proceed to try the qualifications of those present who have been summoned to serve as jurors.

Art. 612. [687] [668] **Mode of testing.**—In testing the qualifications of a juror after he has been sworn, he shall be asked 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 he answers both 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. [Acts 1st C. S. 1903, p. 16; Acts 1905, p. 207.]

Art. 613. [688-689] **Passing juror for challenge.**—A juror held to be qualified shall be passed for acceptance or challenge first to the State and then to the defendant. Challenges to jurors are either peremptory or for cause.

Art. 614. [690] [671] **A peremptory challenge.**—A peremptory challenge is made to a juror without assigning any reason therefor. [O. C. 571.]

Art. 615. [691] [672] **Number of challenges.**—In capital cases, both the State and defendant shall be entitled to fifteen peremptory challenges. Where two or more defendants are tried together, the State shall be entitled to eight peremptory challenges for each defendant; and each defendant shall be entitled to eight peremptory challenges. [Acts 1897, p. 12.]

Art. 616. [692] [673] **Reasons for challenge for cause.**—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.

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. To ascertain whether this cause of challenge exists, the juror shall first be asked whether, in his opinion, the conclusion 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 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 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. 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; Acts 1st C. S. 1903, p. 16; Acts 1905, p. 207.]

Art. 617. [693] [674] **Other evidence on challenge.**—Upon a challenge for cause, the examination is not confined to the answers of the juror, but other evidence may be heard for or against the challenge. [O. C. 577.]

Art. 618. [694] [675] **Certain questions not to be asked.**

—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 some legal accusation with theft or any felony. [O. C. 577.]

Art. 619. [695] [676] **Absolute disqualification.**—No juror shall be impaneled when it appears that he is subject to the third, fourth or fifth clause of challenge in article 616, tho both parties may consent.

Art. 620. [696] [677] **Names called in 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. Each juror shall be tried and passed upon separately. 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 such absence. [O. C. 556-558.]

Art. 621. [697] [678] **Judge to decide qualifications.**—The court is the judge, after proper examination, of the qualifications of a juror, and shall decide all challenges without delay and without argument thereupon. [O. C. 579.]

Art. 622. [698] [679] **Oath 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 the defendant, you will a true verdict render, according to the law and the evidence, so help you God." [O. C. 563.]

Art. 623. [699] [680] **Jurors shall not separate.**—The court may adjourn veniremen to any day of the term; but when jurors have been sworn in a case, those 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 each party and in charge of an officer. [O. C. 605.]

Art. 624. [700] [681] **Persons not selected.**—When a jury of twelve men has been completed, the others in attendance under a summons to appear as jurors in the case shall be discharged from further attendance therein.

Art. 625. [701] **Special pay for veniremen.**—All men summoned on special venire who 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. No person shall receive pay as a special venireman and regular juror for the same day. No per diem shall, in any event, be allowed any venireman under this article, 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. [Acts 1907, p. 214.]

## CHAPTER FOUR.

## JURY IN CASES NOT CAPITAL.


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| Preparing jury list | 627 | Number in misdemeanors | 635 |
| Delivery of jury list | 628 | Making peremptory challenge | 636 |
| Summoning talesmen | 629 | Lists returned to clerk | 637 |
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| Number reduced by challenge | 631 | Oath to jury | 639 |
| Grounds of challenge | 632 | When there are no regular jurors | 640 |
| Peremptory challenges made | 633 | Challenge to array | 641 |


Art. 626. **Jury list in certain counties.**—In counties having three or more district courts, the trial judge, upon the demand of the defendant or his attorney, or of the State's counsel, in a case not capital, shall cause the names of all the members of the general panel available for service as jurors in such case to be placed in a receptacle and well shaken, and said judge shall draw therefrom the names of a sufficient number of jurors from which a jury may be selected to try such case, and such names shall be written, in the order drawn, on the jury list from which the jury is to be selected to try such case. Within the meaning of this article, a criminal court with jurisdiction in felony cases shall be considered a district court. [Acts 1917, p. 147; Acts 1919, p. 6.]

Art. 627. [702] [682] **Preparing jury list.**—When the parties have announced ready for trial in a case not capital, the clerk shall write the name of each regular juror 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. [Acts 1876, p. 82.]

Art. 628. [703] [683] **Delivery of jury list.**—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 State's counsel and the other to the defendant or his attorney. [Id.]

Art. 629. [704] [684] **Summoning talesmen.**—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 deems necessary to complete the panel. The names of those thus summoned shall be placed in the box and drawn and entered upon the slips as provided in the preceding articles.

Art. 630. [705] [685] **Challenge for cause.**—When 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 desires to challege any juror for cause, the challege shall now be made, and the procedure in such case shall be the same as in capital cases.

Art. 631. [706] [686] **Number reduced by challenge.**—If

the challenges reduce the number of jurors to less than will constitute a legal jury, the court shall order other jurors to be drawn or summoned and their names written upon the list instead of those set aside for cause.

Art. 632. [707] [687] **Grounds of challenge.** — Challenges for cause in all criminal actions are the same as provided in capital cases in article 616, except cause 11 in said article.

Art. 633. [708] [688] **Peremptory challenges made.**— When a juror has been 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 may proceed to make their peremptory challenges.

Art. 634. [709] [689] **Number of challenges.**—In noncapital felonies the State and the defendant shall each be entitled to ten peremptory challenges. If two or more defendants are tried together, each defendant shall be entitled to five peremptory challenges, and the State to five for each defendant. [O. C. 573; Acts 1897, p. 13.]

Art. 635. [710] [690] **Number in misdemeanors.** — The State and the defendant shall each be entitled to five peremptory challenges in a misdemeanor tried in the district court and to three in the county court or county court at law. If two or more defendants are tried together, each defendant shall be entitled to three such challenges in either court. [O. C. 574.]

Art. 636. [711] [691] **Making peremptory challenge.**—The party desiring to challenge any juror peremptorily shall erase the name of such juror from the list furnished him by the clerk.

Art. 637. [712] [692] **Lists returned to clerk.**—When the parties have made or declined to make their peremptory challenges, they shall deliver their lists to the clerk. 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; those whose names are called shall be the jury. [Id.]

Art. 638. [713] [693] **If jury is incomplete.**—When, by peremptory challenges, the jury is left incomplete, the court shall direct other jurors to be drawn or summoned to complete the jury; and such other jurors shall be impaneled as in the first instance.

Art. 639. [714] [694] **Oath to jury.**—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 the defendant, you will a true verdict render according to the law and the evidence, so help you God." [O. C. 563.]

Art. 640. [715] [695] **When no regular jurors.** — 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 sum-

mon forthwith such number of qualified persons as it may deem sufficient; and, from those summoned, a jury shall be formed.

Art. 641. [716] [696] **Challenge to array.**—The array of jurors may be challenged by either party for the causes and in the manner provided in capital cases.

## CHAPTER FIVE.

## THE TRIAL BEFORE THE JURY.


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Art. 642. [717] [697] **Order of proceeding in trial.**—A jury being impaneled in any criminal action, the cause shall proceed in the following order:

1. The indictment or information shall be read to the jury by the attorney prosecuting.

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 State's attorney 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 offered.

5. The nature of the defenses relied upon and the facts expected to be proved in their support shall be stated by defendant's counsel.

6. The testimony on the part of the defendant shall be offered.

7. Rebutting testimony may be offered on the part of each party. [O. C. 580.]

Art. 643. [718] [698] **Testimony at any time.**—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.]

Art. 644. [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 testi-

mony as delivered by any other witness in the cause. This is termed placing witnesses under rule. [O. C. 582.]

Art. 645. [720-721] **Part of witnesses 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 of the witnesses in the case placed under rule. The enforcement of the rule is in the discretion of the court.

Art. 646. [722] [702] **Not to hear testimony.**—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 any testimony in the case.

Art. 647. [723] [703] **Instructed by the court.** — 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. 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.

Art. 648. [724] [704] **Order of argument.**—The order of argument may be regulated by the presiding judge; but the State's counsel shall have the right to make the concluding address to the jury. [O. C. 585.]

Art. 649. [725] [705] **Number of arguments.**—The court shall never restrict the argument in felony cases to a number of addresses less than two on each side. [O. C. 586.]

Art. 650. [726] [706] **Severance.**—Two or more defendants jointly prosecuted may sever in the trial upon the request of either. [O. C. 587.]

Art. 651. [727] [707] **Severance on separate indictments.** —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 so stating, and that the evidence of such other party or parties is material for the defense of the affiant, and that affiant believes that there is not sufficient evidence against said party or parties to secure his or their conviction; and such party whose evidence is so sought shall be tried first. Such affidavit shall not, without other sufficient cause, operate as a continuance to either party. [Acts 1887, p. 33.]

Art. 652. [728] [708] **Order of trial.**—If a severance is granted, the defendants may agree upon the order in which they are to be tried, but if they fail to agree, the court shall direct the order of the trial.

Art. 653. [729] [709] **May dismiss to use witness.**—The State's attorney may, at any time, under the rules provided in this Code, dismiss a prosecution as to one or more defendants

jointly indicted with others; and the person so discharged may be used as a witness by either party. [O. C. 588.]

Art. 654. [730] [710] **Lack of evidence against joint defendant.**—When it is apparent that there is no evidence against a defendant jointly prosecuted with others, the jury shall be directed to find a verdict as to such defendant; and, if they acquit, he may be introduced as a witness in the case.

Art. 655. [731-733] **Discharge before verdict.**—If it appears during 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. The accused shall also be discharged; but such discharge shall be no bar in any case to a prosecution before the proper court for any offense.

Art. 656. [732] [712] **Court may commit.**—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 felony cases order the accused 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 him to enter into recognizance to answer before the proper court; in which case a certified copy of the recognizance shall be sent forthwith to the clerk of the proper court, to be enforced by that court in case of forfeiture. [O. C. 591.]

Art. 657. [734] **Jury are judges of fact.**—The jury are the exclusive judges of the facts, but they are bound to receive the law from the court and be governed thereby. [O. C. 593.]

Art. 658. [735-736] **Charge of court.**—In each felony case the judge shall, before the argument begins, deliver to the jury a written charge, distinctly setting forth the law applicable to the case; not expressing any opinion as to the weight of the evidence, not summing up the testimony, discussing the facts or using any argument in his charge calculated to arouse the sympathy or excite the passions of the jury. 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. [Acts 1913, p. 278.]

Art. 659. [737] [717] **Requested special charges.**—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 show clearly what the modification is. [Id.]

Art. 660. **Final charge.**—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 658, and thereupon the judge shall read his charge to the jury as finally writ-

ten, 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 658. 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. [Id.]

Art. 661. [738] [718] **Charge certified by judge.**—The general charge given by the court and all special charges given or refused shall be certified by the judge and filed among the papers in the cause. [O. C. 595.]

Art. 662. [739] [719] **Charge in misdemeanor.**—The court is not required to charge the jury in a misdemeanor case, except at the request of counsel on either side. When so requested he shall give or refuse such charges, with or without modification, as are asked in writing. [O. C. 598.]

Art. 663. [740] [720] **Verbal charge.**—A verbal charge shall be given only in a misdemeanor case, and then only by consent of the parties.

Art. 664. [741] [721] **Reading special charges.** — The judge shall read to the jury only such special charges as he gives.

Art. 665. [742] [722] **Jury may take charge.** — The jury may take to their jury room the charges given by the court after the same have been filed. They shall not be permitted to take with them any charge or part thereof which the court has refused to give. [O. C. 601.]

Art. 666. [743] [723] **Review of charge on appeal.** — Whenever it appears by the record in any criminal action upon appeal that any requirement of the eight preceding articles has been disregarded, the judgment shall not be reversed unless the error appearing from the record was calculated to injure the rights of defendant, or unless it appears from the record that the defendant has not had a fair and impartial trial. All objections to the charge and to the refusal or modification of special charges shall be made at the time of the trial. [O. C. 602; Acts 1897, p. 17; Acts 1913, p. 278.]

Art. 667. [744] [724] **Bill of exceptions.**—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.

Art. 668. [745] [725] **Separation of jury.**—After the jury has been sworn and impaneled to try any felony case, they shall not be permitted to separate until they have returned a verdict, unless by permission of the court, with the consent of the attor-

ney representing the State and the defendant, and in charge of an officer. [O. C. 605.]

Art. 669. [746] [726] **Separation in misdemeanor.** — In misdemeanor cases 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 while so separated.

Art. 670. [747] [727] **To provide jury room.**—The sheriff shall provide a suitable room for the deliberation of the jury and supply them with such necessary food and lodging as he can obtain. No intoxicating liquor shall be furnished them. [O. C. 606.]

Art. 671. [748] [728] **Conversing with jury.**—No person shall be permitted to be with a jury while they are deliberating upon a case, nor 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. No person shall be permitted to converse with the juror about the case on trial.

Art. 672. [749] [729] **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.

Art. 673. [750] [730] **Officer shall attend jury.**—To supply all the reasonable wants of the jury, and to keep them together and to prevent 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 any call made upon him, 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.]

Art. 674. [751] [731] **Written evidence.**—The jury may take with them any writing used as evidence. [O. C. 610.]

Art. 675. [752] [732] **Foreman of jury.**—Each jury shall appoint one of their body foreman. [O. C. 611.]

Art. 676. [753] [733] **Jury may communicate with court.** —When the jury wish to communicate with the court, they shall so notify 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 verbally or in writing, what they desire to communicate. [O. C. 612, 613.]

Art. 677. [754] [734] **Jury may ask further instruction.** —The jury, after having retired, may ask further instruction of the judge as to 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, 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.]

Art. 678. [755] [735] **Jury may have witness re-examined.**—If the jury disagree as to the statement of any witness, they may, upon applying to the court, have such witness recalled, and the judge shall direct him to repeat his testimony as to the point in dispute, and no other, and as nearly as he can in the language he used on the trial. [O. C. 615.]

Art. 679. [756] [736] **Presence of defendant.**—In felony but not in misdemeanor cases, the defendant shall be present in the court when any such proceeding is had as mentioned in the three preceding articles, and his counsel shall also be called.

Art. 680. [757] [737] **If a juror becomes sick.**—After the retirement of the jury in a felony case, if 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.]

Art. 681. [758] [738] **Discharging jury in misdemeanor.**—If nine of the jury can be kept together in a misdemeanor case in the district court, they shall not be discharged. If more than three of the twelve are discharged, the entire jury shall be discharged. [Acts 1876, p. 82.]

Art. 682. [759] [739] **Disagreement of jury.**—After the cause is submitted to the jury, they may be discharged when they can not agree and both parties consent to their discharge; or the court may in its discretion discharge them where they have been kept together for such time as to render it altogether improbable that they can agree. [O. C. 619.]

Art. 683. [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.]

Art. 684. [761] [741] **Discharge without verdict.**—When a jury has been discharged, as provided in the four preceding articles, without having rendered a verdict, the cause may be again tried at the same or another term. [O. C. 621.]

Art. 685. [762] [742] **Court open for jury.**—The court during the deliberations of the jury may proceed with other business or adjourn from time to time, but shall be deemed open for all purposes connected with the case before the jury.

## CHAPTER SIX.

## THE VERDICT.


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Art. 686. [763] [743] **"Verdict".**—A verdict is a written

declaration by a jury of their decision of the issues submitted to them in the case.

Art. 687. [764] [744] **Verdict in felony.** — Not less than twelve jurors can render and return a verdict in a felony case. It must be concurred in by each juror and signed by the foreman.

Art. 688. [765] [745] **Verdict by nine jurors.**—In misdemeanor cases in the district court, where one or more 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 juror rendering it. [Acts 1876, p. 82.]

Art. 689. [766] [746] **In county court.**—In the county court the verdict must be concurred in by each juror.

Art. 690 [767] [747] **When jury have agreed.**—When the jury agree upon a verdict, they shall be brought into court by the proper officer; and if they state that they have agreed, the verdict shall be read aloud by the clerk. If in proper form and no juror dissents therefrom, and neither party requests a poll of the jury, the verdict shall be entered upon the minutes of the court. [O. C. 623.]

Art. 691. [768] [748] **Polling the jury.**—The State or the defendant shall have the right 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.]

Art. 692. [769] [749] **Presence of defendant.**—In felony cases the defendant must be present when the verdict is read unless his absence is wilful or voluntary. A verdict in a misdemeanor case may be received and read in the absence of defendant. [Acts 1907, p. 31.]

Art. 693. [770] [750] **Verdict must be general.**—The verdict in every criminal action must be general. Where there are special pleas upon which the jury are to find, they must say in their verdict that the allegations in such pleas are true or untrue. If the plea is not guilty, they must find that the defendant is either "guilty" or "not guilty," and they shall assess the punishment in all cases where the same is not absolutely fixed by law to some particular penalty. [O. C. 626.]

Art. 694. [771] [751] **Offenses of different degree charged.**—In a prosecution for an offense including lower offenses, the jury may find the defendant not guilty of the higher offense, but guilty of any lower offense included. [O. C. 630.]

Art. 695. [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 aggravated and simple assault and battery.

4. Burglary, which includes every species of house breaking and theft or other felony when charged in the indictment in connection with the burglary.

5. Riot, which includes unlawful assembly.

6. Kidnapping or abduction, which includes false imprisonment.

7. 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. [O. C. 631.]

Art. 696. [773-774] **Informal verdict.**—If the verdict of the jury 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. 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.

Art. 697. [775-776] **Defendants tried jointly.**—Where several defendants are tried together, the jury may convict each defendant they find guilty and acquit others. If they agree to a verdict as to one or more, they may find a verdict in accordance with such agreement, and if they can not agree as to others, a mistrial may be entered as to them.

Art. 698. [777-778] **Judgment on verdict.**—On each verdict of acquittal or conviction, the proper judgment shall be entered immediately. If acquitted the defendant shall be at once discharged from all further liability upon the charge for which he was tried.

Art. 699. [779] [759] **Verdict of guilty in felony.**—When a verdict of guilty is rendered in a felony case, the defendant shall remain in custody to await the further action of the court thereon. [O. C. 634.]

Art. 700. [780] [760] **Acquitted for insanity.**—When the defendant is acquitted on the grounds of insanity, the jury shall so state in their verdict. [O. C. 636.]

Art. 701. [781] [761] **If jury believes accused 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 if they are of opinion that a person pleading guilty is insane they shall so report to the court, and an issue as to that fact shall be tried before another jury; and if, upon such trial, it be found that the defendant is insane, such proceedings shall be had as directed in cases where a defendant becomes insane after conviction. [O. C. 637.]

Art. 702. [782] [762] **Acquittal of higher offense as jeopardy.**—If a defendant, prosecuted for an offense which includes within it lesser offenses, 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.]

## CHAPTER SEVEN.

## EVIDENCE IN CRIMINAL ACTIONS.

### 1. GENERAL RULES.


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| Rules of common law | 703 | Jury are judges of facts | 706 |
| Rules of civil statute | 704 | Judge shall not discuss evidence | 707 |
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Art. 703. [783] [763] **Rules of common law.**—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 other statute of the State. [O. C. 638.]

Art. 704. [784] [764] **Rules of civil statute.**—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.]

Art. 705. [785] [765] **Presumption of innocence.**—The defendant in a criminal case is presumed to be innocent until his guilt is established by legal evidence beyond a reasonable doubt, and in case of reasonable doubt as to his guilt he is entitled to be acquitted. [O. C. 640.]

Art. 706. [786] [766] **Jury are 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.]

Art. 707. [787] [767] [729] **Judge shall not discuss evidence.**—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.

### 2. PERSONS WHO MAY TESTIFY.


| | Article | | Article |
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| Defendant may testify | 710 | Defendant jointly indicted | 716 |
| Principals, accomplices or accessories | 711 | Judge as witness | 717 |
| Court may determine competency | 712 | Testimony of accomplice | 718 |
| All others competent witnesses | 713 | Injured party | 719 |


Art. 708. **Persons competent to testify:**

All persons are competent to testify in criminal cases 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, and who are confined in the penitentiary, shall not be permitted to testify in person in any court, for the State or for the defendant, but their deposition may be taken by the defendant as in other criminal cases provided by law. [Acts 1925, p. 145.]

Art. 709. [789] [769] **Female alleged to be seduced.**—In prosecutions for seduction, the female alleged to have been seduced shall be permitted to testify; but no conviction shall be had upon her testimony unless the same is corroborated by other evidence tending to connect the defendant with the offense charged. [Acts 1891, p. 34.]

Art. 710. [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 party on trial. [Acts 1889, p. 37.]

Art. 711. [791] [771] **Principals, accomplices or accessories.**—Persons charged as principals, accomplices or accessories, whether in the same 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.]

Art. 712. [792] [772] **Court may determine competency.**—The court may, upon suggestion made, or of its own option, interrogate a person who is offered as a witness, to ascertain whether he is competent to testify, or the competency or incompetency of the witness may be shown by evidence. [O. C. 645.]

Art. 713. [793] [773] **All others competent witnesses.**—All other persons, except those enumerated in articles 708 and 714, 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.]

Art. 714. [794-795] **Husband or wife as witness.**—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 existed, 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. 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.]

Art. 715. [796] [776] [736] **Religious opinion.**—No person is incompetent to testify on account of his religious opinion or for the want of any religious belief. [Bill of Rights, Sec. 5.]

Art. 716. [797] [777] [737] **Defendant jointly indicted.**—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.

Art. 717. [798-9-800] **Judge as a witness.**—The trial judge is a competent witness for either the State or the accused, and may be sworn by the clerk of his court and examined, but he is not required to testify if he declares that there is no fact within his knowledge important in the case.

Art. 718. [801] [781] **Testimony of accomplice.**—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.]

Art. 719. [802] [782] **Injured party.**—In trials for forgery, the person whose name is alleged to have been forged is a competent witness; and unless otherwise specially provided for, the person injured, or attempted to be injured, is a competent witness. [O. C. 658.]

### 3. EVIDENCE AS TO PARTICULAR OFFENSES.


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| Two witnesses in treason | 720 | Perjury and false swearing | 723 |
| Evidence in treason | 721 | Intent to defraud in forgery | 724 |
| Two witnesses required | 722 | | |


Art. 720. [803] [783] **Two witnesses in treason.**—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. 721. [804] [784] **Evidence in treason.** — 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. 722. [805] [785] **Two witnesses 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.]

Art. 723. [806] [786] **Perjury and false swearing.**—In trials for perjury or false swearing, 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.]

Art. 724. [807] [787] **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 forgery in the Penal Code. [O. C. 659.]

## 4. DYING DECLARATIONS AND CONFESSIONS.


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| Dying declarations | 725 | When confession shall not be used. | 727 |
| Confession | 726 | | |


Art. 725. [808] [788] **Dying declarations.**—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.

2. That such declaration was voluntarily made, and not through the persuasion of any person.

3. That such declaration was not made in answer to interrogatories calculated to lead the deceased to make any particular statement.

4. That he was of sane mind at the time of making the declaration. [O. C. 660.]

Art. 726. [809] [789] **Confession.**—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. 727. [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. If the defendant is unable to write his name, and signs 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; Acts 1907, p. 219.]

Art. 727a. **Evidence not to be used.**—No evidence obtained by an officer or other person in violation of any provision of the Constitution or laws of the State of Texas, or of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case. [Acts 1925, p. 186.]

## 5. MISCELLANEOUS PROVISIONS.


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| If subscribing witness denies execution . ..... | 730 | Interpreter . ..... | 733 |


Art. 728. [811] [791] **Part of an act, declaration, etc.**—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 letters on the same subject between the same parties may be given. 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.]

Art. 729. [812] [792] **Written part of instrument controls.**—When an instrument is partly written and partly printed, the written shall control the printed portion when the two are inconsistent. [O. C. 665.]

Art. 730. [813] [793] **If subscribing witness denies execution.**—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.]

Art. 731. [814] [794] **Evidence of handwriting.**—It is competent to give evidence of handwriting by comparison, made by experts or by the jury. Proof by comparison only shall not be sufficient to establish the handwriting of a witness who denies his signature under oath. [O. C. 667.]

Art. 732. [815] [795] **Attacking testimony of his own witness.**—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.]

Art. 733. [816] [796] **Interpreter.**—When a witness does not understand and speak the English language, an interpreter must be sworn to interpret for him. Any person may be sub-

poenaed, attached or recognized in any criminal action or proceeding, to appear before the proper judge or court to act as interpreter therein, under the same rules and penalties as are provided for witnesses. Such interpreters shall receive the same pay as interpreters receive in civil suits.

## CHAPTER EIGHT.

## DEPOSITIONS.


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Art. 734. [817] [797] **In examining court.**—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 named in this chapter. 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.]

Art. 735. [818] [798] **Aged, infirm or non-resident.**—Depositions of witnesses may also, at the request of the defendant, be taken when the witness resides out of the State, or when the witness is aged or infirm. [O. C. 765.]

Art. 736. [819] [799] **Within the State.**—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: a county judge, notary public, district clerk and county clerk. [O. C. 766.]

Art. 737. [820] [800] **Without the State.**—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.]

Art. 738. [821] [801] **Of temporary resident.**—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.]

Art. 739. [822] [802] **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 this Code. [O. C. 769.]

Art. 740. [823] [803] **Objections to depositions.**—The rules of procedure as to objections to depositions in civil ac-

tions shall govern in criminal actions when not in conflict with this Code. [O. C. 770.]

Art. 741. [824] [804] **Affidavit of defendant.**—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 an affidavit stating the facts necessary to constitute a good reason for taking the same; and also 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.]

Art. 742. [825] [805] **Written interrogatories.** — 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 proper attorney for the State the length of time required for service of interrogatories in civil actions. [O. C. 765.]

Art. 743. [826] [806] **Certificate.**—Where depositions are taken under commission in criminal actions, the officer or officers taking the same shall certify that the person deposing is the identical person named in the commission, and is a credible person; or, if they can not certify to the identity of the witness, there shall be an affidavit of some person attached to the deposition proving the identity and credibility of such witness, and the officer or officers shall certify that the person making the affidavit is known to them, and is worthy of credit. [O. C. 773.]

Art. 744. [827] [807] **By two officers.**—Where it is required that two officers shall act in executing a commission to take depositions, the official seal and signature of each shall be attached to the certificate authenticating the deposition. [O. C. 774.]

Art. 745. [828] [808] **Without interrogatories.**—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 each party shall be allowed full liberty of cross-examination. [O. C. 775.]

Art. 746. [829] [809] **Taken without commission.**—The depositions of witnesses taken before an examining court may be taken without a commission. 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.]

Art. 747. [830] [810] **Officer shall take.**—Where any of the officers, other than a supreme or district judge, are called upon to take a deposition before an examining court, it is their duty to attend and take the same. [O. C. 777.]

Art. 748. [831] [811] **Return.**—A deposition taken in an examining court shall be sealed up and delivered by the officer to the clerk of the court having jurisdiction to try the offense; in all other cases the return of depositions may be made as provided in civil actions. [O. C. 778.]

Art. 749. [832-833] **Predicate to read.**—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. When the deposition is sought to be used by the State, the oath may be made by any credible person. When sought to be used by the defendant, the oath shall be made by him in person.

Art. 750. [834] [814] **Reproducing testimony.**—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 preceding article for the reading in evidence of depositions.

# TITLE 9

## PROCEEDINGS AFTER VERDICT.


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## CHAPTER ONE.

### NEW TRIALS.


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| Grounds for new trial in felony | 753 | Judge not to discuss evidence | 758 |
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Art. 751. [835] [815] **Definition of "new trial."**—A "new trial" is the rehearing of a criminal action, after verdict, before the judge or another jury. [O. C. 669.]

Art. 752. [836] [816] **Granted only to accused.** — A new trial can in no case be granted where the verdict or judgment has been rendered for the accused. [O. C. 670.]

Art. 753. [837] [817] **Grounds for new trial in felony.**— 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.

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.

3. Where the verdict has been decided by lot, or in any other manner than by a fair expression of opinion by the jurors.

4. Where a juror has received a bribe to convict, or has been guilty of any other corrupt conduct.

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.

6. Where new testimony material to the defendant has been discovered since the trial. A motion for a new trial on this ground shall be governed by the rules which regulate civil suits.

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. The mere drinking of liquor by a juror shall not be sufficient ground for a new trial.

8. Where, from the misconduct of the jury, the court is of opinion that the defendant has not received a fair and impartial trial. It shall be competent to prove such misconduct by the voluntary affidavit of a juror; and the verdict may, in like manner be sustained by such affidavit.

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.]

Art. 754. [838] [818] **In misdemeanors.** — New trials in misdemeanor cases may be granted for any cause specified in the preceding article, except that contained in subdivision one of said article.

Art. 755. [839] [819] **Time to apply for new trial.**—A new trial must be applied for within two days after the conviction; but in felony cases for good cause shown, the court may allow the motion 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 after the conviction, the motion shall be made before the adjournment.

Art. 756. [840] [820] **Motion to be in writing.**—All motions for new trials shall set forth distinctly in writing the grounds upon which the new trial is asked.

Art. 757. [841] [821] **State may controvert motion.**—The State may take issue with the defendant upon the truth of any cause 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.

Art. 758. [842] [822] **Judge not to discuss evidence.**—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 party.

Art. 759. [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 conviction shall be regarded as no presumption of guilt, nor shall it be alluded to in the argument. [O. C. 674.]

Art. 760. [844-5-6] **Statement of facts and bills of exception.**—

1. Right to statement.—If a new trial be refused, a statement of facts may be made, ordered, agreed to, approved and certified 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.

2. To accompany transcript.—The statement of facts in felony cases shall not be copied in the transcript of the clerk, but when agreed to by the parties and approved by the judge, shall be filed in duplicate with the clerk, and the original sent up as a part of the record in the cause on appeal; and like procedure shall be followed if the statement of facts is prepared by the parties or by the judge on the failure of the parties to agree. On appeal from a conviction of misdemeanor, the statement of facts shall be copied in the transcript.

3. Failure to agree.—In all felony cases appealed, whenever the State and defendant can not agree as to the testimony of any witness, then so much of the transcript of the official court reporter's report with reference to each such disputed fact shall be inserted in the statement of facts as is necessary to show what the witness testified to in regard to the same, and consti-

tute a part of the statement of facts, and the same shall apply to the preparation of bills of exception. 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.

4. Statement prepared by judge.—When the duty devolves upon the court to prepare the statement of facts, he shall have such time in which to do so as he deems necessary, not to exceed forty days after he receives the defendant's statement of facts.

5. Time to file.—The term "statement of facts," as used in this subdivision, includes only the facts adduced upon the trial upon the issue of guilt. A statement of facts in a felony case filed within ninety days from the date the notice of appeal is given shall be considered as having been filed within the time allowed by law for filing same, notwithstanding the succeeding provisions of this subdivision. When an appeal is taken from the judgment rendered in any criminal action in any district court, criminal district court, county court, or county court at law, the defendant shall be entitled, with or without an order of court, to thirty days after the day of adjournment of court in which to prepare or cause to be prepared and filed 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, and shall have the power in term time or vacation, upon the application of either party for good cause, to extend the several times for the preparation and filing of the statement of facts and bills of exception, but the same shall not be so extended as to delay the filing thereof within ninety days from the date the notice of appeal is given. If the term of any of said courts 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.

6. When defendant cannot pay.—When any felony case is appealed and the defendant is not able to pay for a transcript of the testimony or give security therefor, he may make affidavit of such fact, and upon the making of such affidavit, the court shall order the official court reporter to make a narrative statement of facts and deliver it to such defendant. In all cases where the court is required to and does appoint an attorney to represent the defendant in a criminal action, such 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. For each said service he shall be paid by the State of Texas, upon the certificate of the trial judge, one-half of the rate provided by law in civil cases.

7. Independent statement.—Nothing in this chapter shall be so construed as to prevent parties from preparing a statement of facts on appeal in a felony or misdemeanor case independent of the transcript of the notes of the official reporter, or from

buying a narrative statement of facts from such reporter, and agreeing thereto, without having to order or pay for a question and answer statement.

## CHAPTER TWO.

## ARREST OF JUDGMENT.


| | Article | | Article |
|---|---|---|---|
| "Motion in arrest of judgment"... | 761 | Want of form..... | 764 |
| Time to make motion..... | 762 | Effect of arresting judgment..... | 765 |
| Granted for substantial defect.... | 763 | | |


Art. 761. [847] [825] **"Motion in arrest of judgment."**—A motion in arrest of judgment is an oral or written suggestion to the court on the part of defendant that judgment has not been legally rendered against him. The record must show the grounds of the motion. [O. C. 675.]

Art. 762. [848] [826] **Time to make motion.**—The motion must be made within two days after the conviction; or if the court adjourns before the expiration of such time, then it may be made at any time before final adjournment for the term. [O. C. 676.]

Art. 763. [849] [827] **Granted for substantial defect.**—Such motion shall be granted upon any ground which may be good upon exception to an indictment or information for any substantial defect therein. [O. C. 678.]

Art. 764. [850] [828] **Want of form.**—No judgment shall be arrested for want of form.

Art. 765. [851-852] **Effect of arresting 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. If not so satisfied, the defendant shall be discharged.

## CHAPTER THREE.

## JUDGMENT AND SENTENCE.

### 1. IN CASES OF FELONY.


| | Article | | Article |
|---|---|---|---|
| "Judgment" . ..... | 766 | Cumulative or concurrent sentence | 774 |
| "Sentence" . ..... | 767 | Indeterminate sentence . ..... | 775 |
| Time of judgment and sentence... | 768 | Suspended sentence . ..... | 776 |
| Sentence when appeal is taken... | 769 | Judgment suspending sentence.... | 777 |
| If court is about to adjourn..... | 770 | Procedure as to suspended sentence | 778 |
| Shall grant time to prepare appeal | 771 | Suspended sentence made final.... | 779 |
| Sentence nunc pro tunc..... | 772 | Dismissal of charge..... | 780 |
| Reasons to prevent sentence..... | 773 | Defendant recognized . ..... | 781 |


Art. 766. [853] [831] **"Judgment".**—A 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.

Art. 767. [854] [832] **"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.

Art. 768. [855] [833] **Time of judgment and sentence.**— If a new trial is not granted nor the judgment arrested in a felony case, 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.]

Art. 769. [856] [834] **Sentence when appeal is taken.**— When an appeal is taken from a death penalty, sentence shall not be pronounced, but shall be suspended until the decision of the Court of Criminal Appeals has been received. In all other cases of felony, sentence shall be pronounced before the appeal is taken. Upon the affirmance of the judgment by the appellate court, the clerk shall at once send its mandate to the clerk of the court from which the appeal was taken, there to be duly recorded. [O. C. 683.]

Art. 770. [857] [835] **If court is about to adjourn.**—If a conviction takes place so late in the term of the court as not to allow 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.]

Art. 771. [858] [836] **Shall grant time to prepare appeal.** —If, at the time a verdict is returned into court, there be less than six hours remaining, before the court, by law, must adjourn, the district judge shall 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 Criminal 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.]

Art. 772. [859] [837] **Sentence nunc pro tunc.**—If there is a failure from any cause whatever to enter judgment and pronounce sentence 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 judment arrested, or an appeal has been taken. [O. C. 686.]

Art. 773. [860-861] **Reasons to prevent sentence.**—Before

pronouncing sentence in a case of a felony, the defendant shall be asked whether he has anything to say why the sentence should not be pronounced against him. 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.

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. 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.

3. Where there has not been a motion for a new trial, or a motion in arrest of judgment made, the defendant may answer that he has good grounds for either or both of these motions and either or both motions may be immediately entered and disposed of, although more than two days may have elapsed since the rendition of the verdict.

4. When a person who has been convicted of felony escapes after conviction and before sentence, and an individual supposed to be the same has been arrested, he may, before sentence is pronounced, deny that he is the person convicted, and an issue be accordingly tried before a jury as to his identity. [O. C. 688.]

Art. 774. [840] [862] **Cumulative or concurrent sentence.**—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 jail for a term of imprisonment, judgment and sentence shall be pronounced in each case in the same manner as if there had been but one conviction, except that in the discretion of the court, the judgment in the second and subsequent convictions may either be that the punishment shall begin when the judgment and sentence in the preceding conviction has ceased to operate, or that the punishment shall run concurrently with the other case or cases, and sentence and execution shall be accordingly. [Acts 1883, p. 8; Acts 1919, p. 25.]

Art. 775. **Indeterminate sentence.**—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 of 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 such sen-

tence 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 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.

Art. 775a. **Parole.**—Where the maximum sentence is not four times as great as the minimum sentence, and the convict has served the minimum sentence and has a perfect prison record or where the maximum sentence is greater than four times the minimum sentence, and the convict has served one-fourth of the maximum sentence and has a perfect prison record, such convict shall be paroled during good behavior for the balance of the term imposed upon him; provided that before a parole shall be granted the board of pardons shall examine and approve the convict's record and said board may consider the past record as well as the prison record of convicts. [Acts 1925, p. 377.]

Art. 776. **Suspended sentence.**—Where there is a conviction of any felony in any district or criminal district court of this State, except murder, perjury, burglary of a private residence at night, robbery, arson, incest, bigamy, seduction, and abortion, and the punishment assessed by the jury shall not exceed five years, the court shall suspend sentence upon written sworn application made therefor by the defendant, filed before the trial begins. When the defendant has no counsel, the court shall 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. 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 or in any other State. This law is not to be construed as preventing the jury from passing on the guilt of the defendant, but he may enter a plea of not guilty. [Acts 1913, p. 8.]

Art. 777. **Judgment suspending sentence.** — When sentence is suspended, the judgment shall be that sentence of the judgment of conviction shall be suspended during the good behavior of the defendant. By "good behavior" is meant that the defendant shall not be convicted of any felony during the time of such suspension. [Id.]

Art. 778. **Procedure as to suspended sentence.**—The court shall permit testimony as to the general reputation of defendant to enable the jury to determine whether to recommend the suspension of sentence, and submit the question 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. In such cases, neither the verdict of conviction nor the judgment entered thereon shall become final, except in the man-

ner and at the time provided by the succeeding article. [Id.]

Art. 779. **Suspended sentence made final.** — 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 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.]

Art. 780. **Dismissal of charges.**—In any case of suspended sentence, at any time after the expiration of the time assessed as punishment by the jury, the defendant may make his written sworn motion 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, which motion shall be heard by the court during the first term time after same is filed. If it appears to the court, upon such hearing, that the defendant has not been convicted of any other felony, the court shall enter an order reciting the fact, and shall grant the defendant a new trial and shall then dismiss said cause. 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 law. [Id.]

Art. 781. **Defendant recognized.**—When sentence is suspended, the defendant shall be released upon his recognizance in such sum as the court may fix. [Id.]

## 2. JUDGMENT IN CASES OF MISDEMEANOR.

| | Article | | Article |
|---|---|---|---|
| In absence of defendant | 782 | On other punishment | 784 |
| As to fine | 783 | | |

Art. 782. [866] [844] **In absence of defendant.** — The judgment in a misdemeanor case may be rendered in the absence of the defendant. [O. C. 691.]

Art. 783. [867] [845] **As to fine.**—When the defendant is only fined the judgment shall be that the State of Texas recover of the defendant the amount of such fine and all 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.

Art. 784. [868] [846] **On other punishment.**—If the punishment is any other than a fine, the judgment shall specify it, and order it enforced by the proper process. It shall also adjudge the costs against the defendant, and order the collection thereof as in other cases.

## CHAPTER FOUR.

## EXECUTION OF JUDGMENT.

### 1. IN MISDEMEANOR CASES.


| | Article | | Article |
|---|---|---|---|
| Discharging judgment for fine | 785 | Further enforcement of judgment | 792 |
| Payable in money | 786 | Fine discharged | 793 |
| Pay or jail | 787 | To do manual labor | 794 |
| If defendant is absent | 788 | Authority for imprisonment | 795 |
| Capias shall recite what | 789 | Capias for imprisonment | 796 |
| Capias may issue to any county | 790 | Discharge of defendant | 797 |
| Execution for fine and costs | 791 | | |


Art. 785. [869] [847] **Discharging judgment for fine.**—When the judgment against a defendant is for a fine and costs he shall be discharged from the same:

1. When the amount thereof has been fully paid.
2. When remitted by the proper authority.
3. When he has remained in custody for the time required by law to satisfy the amount thereof.

Art. 786. [870] [848] **Payable in 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.]

Art. 787. [871] [849] **Pay or jail.**—When a 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 by law. A certified copy of such judgment shall be sufficient to authorize such imprisonment. [O. C. 694, 695.]

Art. 788. [872] [850] **If defendant is absent.**—When a pecuniary fine has been adjudged against a defendant not present, a capias shall forthwith be issued for his arrest. The sheriff shall execute the same by placing the defendant in jail.

Art. 789. [873] [851] **Capias shall recite what.**—Where such capias issues, it shall state the rendition and amount of the judgment and the amount unpaid thereon, and command the sheriff to take 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. [O. C. 700.]

Art. 790. [874] [852] **Capias may issue to any county.**—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, but no bail shall be taken in such cases.

Art. 791. [875-6] **Execution for fine and costs.**—In each case of pecuniary fine, an execution may issue for the fine and costs, tho a capias was issued for the defendant; and a capias may issue for the defendant tho an execution was issued against his property. The execution shall be collected and returned as in civil actions. 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 be returned satisfied.

Art. 792. [877] [855] **Further enforcement of 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 provisions of this Code.

Art. 793. [878] [856] **Fine discharged.**—When a defendant is convicted of a misdemeanor and his punishment is assessed at a pecuniary fine, if he is unable to pay the fine and costs adjudged against him, he may for such time as will satisfy the judgment be put to work in the workhouse, or on the county farm, or public improvements of the county, as provided in the succeeding article, or if there be no such workhouse, farm or improvements, he shall be imprisoned in jail for a sufficient length of time to discharge the full amount of fine and costs adjudged against him; rating such labor or imprisonment at three dollars for each day thereof.

Art. 794. **To do manual labor.**—Where the punishment assessed in a conviction for misdemeanor is confinement in jail for more than one day, or where in such conviction the punishment is assessed only at a pecuniary fine and the party so convicted is unable to pay the fine and costs adjudged against him, those so convicted shall be required to do manual labor in accordance with the provisions of this article under the following rules and regulations:

1. Each commissioners court may provide for the erection of a workhouse and the establishment of a county farm in connection therewith for the purpose of utilizing the labor of said parties so convicted.

2. Such farms and workhouses shall be under the control and management of the commissioners court, and said court may adopt such rules and regulations not inconsistent with the laws as they deem necessary for the successful management and operation of said institutions and for effectively utilizing said labor.

3. Such overseers and guards may be employed under the authority of the commissioners court as may be necessary to prevent escapes and to enforce such labor, and they shall be paid out of the county treasury such compensation as said court may prescribe.

4. Those so convicted shall be so guarded while at work as to prevent escape.

5. They shall be put to labor upon the public roads, bridges or other public works of the county when their labor cannot be utilized in the county workhouse or county farm.

6. They shall be required to labor not less than eight nor more than ten hours each day, Sundays excepted. No person shall ever be required to work for more than one year.

7. One who refuses to labor or is otherwise refractory or insubordinate may be punished by solitary confinement on bread and water or in such other manner as the commissioners court may direct.

8. When not at labor they may be confined in jail or the

workhouse, as may be most convenient, or as the regulations of the commissioners court may prescribe.

9. A female shall in no case be required to do manual labor except in the workhouse.

10. One who from age, disease, or other physical or mental disability is unable to do manual labor shall not be required to work, but shall remain in jail until his term of imprisonment is ended, or until the fine and costs adjudged against him are discharged according to law. His inability to do manual labor may be determined by a physician appointed for that purpose by the county judge or the commissioners court, who shall be paid for such service such compensation as said court may allow.

11. One convicted of a misdemeanor whose punishment either in whole or in part is imprisonment in jail may avoid manual labor by payment into the county treasury of one dollar for each day of the term of his imprisonment, and the receipt of the county treasurer to that effect shall be sufficient authority for the sheriff to detain him in jail without labor.

Art. 795. [879] [857] **Authority for imprisonment.**—When, by the judgment of the court, a defendant is to be imprisoned in jail, a certified copy of such judgment shall be sufficient authority for the sheriff to place such defendant in jail.

Art. 796. [880] [858] **Capias for imprisonment.**—A capias issued for the arrest and commitment of one convicted of a misdemeanor, the penalty of which or any part thereof is imprisonment in jail, 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 place such defendant in jail.

Art. 797. [881] [859] **Discharge of defendant.**—A defendant who has remained in jail the length of time required by the judgment shall be discharged. The sheriff shall return the copy of the judgment, or the capias under which the defendant was imprisoned, to the proper court, stating how it was executed.

## 2. ENFORCING JUDGMENT IN CAPITAL CASES.


| | Article | | Article |
|---|---|---|---|
| Execution of convict | 798 | Escape after sentence | 805 |
| Warrant for execution | 799 | Escape from penitentiary | 806 |
| Taken to penitentiary | 800 | Return of warden | 807 |
| Visitors | 801 | Treatment of condemned | 808 |
| Executioner | 802 | Body of convict | 809 |
| Place of execution | 803 | Fee for executing convict | 810 |
| Present at execution | 804 | Preventing rescue | 811 |


Art. 798. **Execution of convict.**—Whenever the sentence of death is pronounced against a convict, the sentence shall be executed at any time before the hour of sunrise on the day set for the execution not less than thirty days from the date of sentence, as the court may adjudge, by causing to pass through the body of the convict a current of electricity of sufficient intensity to cause death, and the application and continuance of such current through the body of such convict until such convict is dead. [Acts 2nd. C. S. 1923, p. 111.]

Art. 799. **Warrant of execution.**—Whenever any person is sentenced to death, the clerk of the court in which the sentence is pronounced, shall within ten days after sentence has been pronounced, issue a warrant under the seal of the court for the execution of the sentence of death, which shall recite the fact of conviction, setting forth specifically the offense, the judgment of the court, the time fixed for his execution, and directed to the warden of the State Penitentiary at Huntsville, commanding him to proceed, at the time and place named in the sentence, to carry the same into execution, as provided in the preceding article, and shall deliver such warrant to the sheriff of the county in which such judgment of conviction was had, to be by him delivered to the said warden, together with the condemned person. [Id.]

Art. 800. **Taken to penitentiary.**—Immediately upon the receipt of such warrant, the sheriff shall transport such condemned person to the State Penitentiary at Huntsville, and shall deliver him and the warrant aforesaid into the hands of the warden and shall take from the warden his receipt for such person and such warrant, which receipt the sheriff shall return to the office of the clerk of the court where the judgment of death was rendered. For his services, the sheriff shall be entitled to the same compensation as is now allowed by law to sheriffs for removing or conveying prisoners under the provisions of Section 4 of Article 1029 or 1030 of the Code of Criminal Procedure. [Id.]

Art. 801. **Visitors.** — Upon the receipt of such condemned person by the warden of the State Penitentiary, he shall be confined therein until the time for his execution arrives, and, while so confined, all persons outside of said prison shall be denied access to him, except his physician and lawyer, who shall be admitted to see him when necessary to his health or for the transaction of business, and the relatives, friends and spiritual advisors of the condemned person, who shall be admitted to see and converse with him at all proper times, under such reasonable rules and regulations as may be made by the Board of Prison Commissioners. [Id.]

Art. 802. **Executioner.**—The warden of the State Penitentiary at Huntsville, or in case of his death, disability or absence, his deputy, shall be the executioner. In the event of the death or disability or absence of both the warden and his deputy, the executioner shall be that person appointed by the Board of Prison Commissioners for that purpose. [Id.]

Art. 803. **Place of execution.** — The execution shall take place at the State Penitentiary at Huntsville, in a room arranged for that purpose. [Id.]

Art. 804. **Present at execution.**—The following persons may be present at the execution, and none other; the executioner, and such persons as may be necessary to assist him in conducting the execution; the Board of Prison Commissioners, two physicians, including the prison physician, the spiritual advisor of the condemned; the chaplain of the penitentiary, the county judge and sheriff of the county in which the penitentiary is situated. and any of the relatives or friends of the condemned per-

son that he may request, not exceeding five in number, shall be admitted. No convict shall be permitted by the prison authorities to witness the execution. [Id.]

Art. 805. **Escape after sentence.**—If the condemned escape after sentence and before his delivery to the warden, and be not rearrested until after the time fixed for execution, any person may arrest and commit him to the jail of the county in which he was sentenced; and thereupon the court by whom the condemned was sentenced, either in term time or vacation, on notice of such arrest being given by the sheriff, shall again appoint a time for the execution, not less than thirty days from such appointment, which appointment shall be by the clerk of said court immediately certified to the warden of the State Penitentiary and such clerk shall place such certificate in the hands of the sheriff, who shall deliver the same, together with the warrant aforesaid and the condemned person to the warden, who shall receipt to the sheriff for the same and proceed at the appointed time to carry the sentence of death into execution as hereinabove provided. [Id.]

Art. 806. **Escape from penitentiary.**—If the condemned person escape after his delivery to the warden, and be not retaken before the time appointed for his execution, any person may arrest and commit him to the State Penitentiary whereupon the warden shall certify the fact of his escape and recapture to the court in which sentence was passed; and the court, either in term time or vacation, shall again appoint a time for the execution which shall not be less than thirty days from the date of such appointment; and thereupon the clerk of such court shall certify such appointment to the warden, who shall proceed at the time so appointed to execute the condemned, as hereinabove provided. The sheriff or other officer or other person performing any service under this and the preceding article shall receive the same compensation as is provided for similar services under the provisions of Articles 1029 or 1030 of the Code of Criminal Procedure. [Id.]

Art. 807. **Return of warden.**—When the execution of sentence is suspended or respited to another date, the same shall be noted on the warrant and on the arrival of such date, the warden shall proceed with such execution; and in case of death of any condemned person before the time for his execution arrives, or if he should be pardoned or his sentence commuted by the Governor, no execution shall be had, but in such case, as well as when the sentence is executed, the warden shall return the warrant and certificate, with a statement of any such act and with his proceedings endorsed thereon, together with the statement 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 to the clerk of the court in which the sentence was passed, who shall record said warrant and return in the minutes of the court, provided that the body of the person electrocuted may be returned to the county in

which conviction was had at the expense of the county, when so requested by the convict's relatives. [Id.]

Art. 808. [888] **Treatment of condemned.**—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. 809. [891] [869] **Body of convict.** — The body of a convict shall be decently buried, at the expense of the county in which the indictment which resulted in conviction was found, 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. 810. **Fee for executing convict.**—The warden, or other person, conducting the execution shall be allowed therefor twenty-five dollars to be paid by the county in which judgment of execution was rendered, and the commissioners court of such county shall approve such account and order it paid out of the general funds of the county, upon the certificate of the district clerk of the county, showing the return by the warden of the death warrant, with execution of sentence endorsed thereon.

Art. 811. **Preventing rescue.** — 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. [Id.]

# TITLE 10

## APPEAL AND WRIT OF ERROR.


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Art. 812. [893] [871] **State can not appeal.** — The State shall have no right of appeal in criminal actions. [Const., Art. 5, Sec. 26.]

Art. 813. [894] [872] **Defendant may appeal.**—A defendant in any criminal action has the right of appeal under the rules hereinafter prescribed.

Art. 814. [898] [875] **Presence in appellate court.**—The defendant need not be personally present upon the hearing of his cause in the Court of Criminal Appeals, but if not in jail he may appear in person. [Acts 1892, p. 38.]

Art. 815. [901] [876] **Felony recognizance pending appeal.** —Where the punishment of the defendant has been assessed at confinement in the penitentiary for any period of fifteen years or less, and such conviction is appealed from, by entering into a recognizance in said court the defendant thus convicted shall have the right to remain on bail while such appeal is pending and until the judgment appealed from is affirmed by the appellate court and the mandate thereof filed with the clerk of the trial court. [Acts 1907, p. 31.]

Art. 816. [902] **Jail or recognizance.**—Where the defendant appeals from a conviction in any felony case and where bail is allowed by the provisions of the preceding article, he shall, if he be in custody, be committed to jail unless he duly enters into a recognizance to appear. If he be in custody his notice of appeal shall have no effect to release him from such custody until he enters into recognizance. No recognizance shall be taken if the defendant is not in custody of the sheriff at the time thereof. [Id.]

Art. 817. [903] **Form for recognizances in felony appeal.**—In all appeals from convictions for felonies where bail is allowed by law, the following form of recognizance shall be considered sufficient when substantially followed:

"The State of Texas,
No. vs.
A. B.

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 severally indebted to the State of Texas in the sum of $_____, conditioned that the said A. B., who has been convicted of a felony in this court, 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 therefrom without leave of this court, in order to abide the judgment of the Court of Criminal Appeals of the State of Texas." [Id.]

Art. 818. [904] **Bail pending appeal.**—If for any cause the defendant fails to enter into such recognizance, but gave notice of and took an appeal from such conviction during such term, he may give bail and obtain his release from custody by giving, after the expiration of such term of court, 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 fixed by the court, upon the conditions as are provided for in such recognizances. 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. When said bond is so given and approved, the defendant shall be released from custody. [Id.]

Art. 819. [906] **Receipt of mandate.**—When the clerk of any 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 and forthwith 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 as directed. [Id.]

Art. 820. [907] **Capias may issue to any county.**—Such capias may issue 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.]

Art. 821. [908] **Right of appeal not abridged.**—The right of appeal, as otherwise provided by law, shall in no wise be abridged by any provision of this chapter. [Id.]

Art. 822. [910] [878] **Appeal prosecuted immediately.**—An appeal may be prosecuted immediately to the Court of Criminal Appeals, and the clerk shall without delay make out and forward the record to the Court of Criminal Appeals.

Art. 823. [911] [879] **When transcript may be filed.**—The transcript may be filed in the Court of Criminal Appeals, and the case tried in said court while the court in which the conviction was had is yet in session. Upon an affirmance of the judgment by the appellate court, sentence may be pronounced by the trial court at the same term at which the conviction was had. [Acts 1st C. S. 1891, p. 38.]

Art. 824. [912] [880] **Escape pending appeal.**—If the defendant, pending an appeal in a felony case, makes his escape from custody, the jurisdiction of the Court of Criminal Appeals shall no longer attach in the case. Upon the fact of such escape being made to appear, the court shall, on motion of the State's attorney, dismiss the appeal; but the order dismissing the appeal shall be set aside if it is made to appear that the defendant has voluntarily returned within ten days to the custody of the officer from whom he escaped. [Id.]

Art. 825. [913] [881] **Sheriff to report escape.**—When any such escape occurs, the sheriff who had the prisoner 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 State Prosecuting Attorney. Such report shall be sufficient evidence of the fact of such escape to authorize the dismissal of the appeal.

Art. 826. [914] [882] **May appeal during term.**—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.]

Art. 827. [915] **Notice of appeal.**—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. If notice of appeal is given at the term at which the conviction is had and the same is not entered of record, then by making proof of the fact, the judge of the court trying the cause shall order the same entered of record either in term time or vacation by entering in the minutes of his court an order to that effect. Said entry when so made shall bear date as of date when notice of appeal was actually given in open court. [Acts 1915, p. 159.]

Art. 828. [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. 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 appellate court shall postpone the consideration of such appeal until the next term of said court from which said appeal

was taken; and the said record shall be substituted at said term as in other cases. [O. C. 727.]

Art. 829. [917] [885] **Appeal 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.]

Art. 830. [918] **Bail pending misdemeanor appeal.**—When the defendent appeals in any misdemeanor case to the Court of Criminal Appeals, he shall, if he be in custody, be committed to jail unless he enter into recognizance as provided by law. If for any cause the defendant fails to enter into recognizance during the term at which he was tried, but gave notice and took an appeal from such conviction, he shall be permitted to give bail and obtain his release from custody by giving, after the expiration of such term of court, his bail bond to the sheriff with two or more good and sufficient sureties, in which the defendant and his sureties shall acknowledge themselves severally indebted to the State of Texas in the sum conditioned as provided in recognizance on appeal. Before the defendant shall be released on such bail bond the same must be approved by the sheriff or the judge trying the cause or his successor in office. When such bail bond is so given and approved, the defendant shall be released from custody. [Acts 1919, p. 23.]

Art. 831. [919-920] **Form of misdemeanor recognizance.**—In appeal cases of misdemeanor, the following form of recognizance shall be sufficient, and, when substantially complied with, shall confer jurisdiction upon the Court of Criminal Appeals, of such appeals:

"State of Texas,
No. vs.
A. B.

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 sum of.....dollars; conditioned, that the said A. B., who has been convicted in this cause of a misdemeanor, 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." [Acts 1897, p. 5.]

Art. 832. [905-919] **Procedure as to bail pending appeal.**—The amount of any recognizance or bail bond given in any felony or misdemeanor case to perfect an appeal from any court to the Court of Criminal Appeals shall be fixed by the court in which the judgment appealed from was rendered. The sufficiency of the security thereon shall be tested, and the same proceedings had in case of forfeiture, as in other cases of recognizances and bail bonds. [Acts 1st C. S. 1892, p. 38; Acts 1897, p. 5.]

Art. 833. [921] [889] **Appeals from justice and corporation courts.**—In appeals from the judgments of justice or corporation courts, the defendant shall, if he be in custody, be committed to jail unless he give bond with 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 recite that in said cause the defendant was convicted and has appealed, and be conditioned that the defendant shall make his personal appearance before the court to which the appeal is taken instanter, if said court be then in session; and if said court be not in session, then 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 in said court. [Acts 1876, p. 167, Acts 1901, p. 291, Acts 4th C. S. 1918, p. 34.]

Art. 834. [922] **Filing bond perfects appeal.**—In appeals from justice and corporation courts, when the appeal bond provided for in the preceding article has been filed with the justice or judge who tried the case, the appeal in such case shall be held to be perfected. No appeal shall be dismissed because defendant failed to give notice of appeal in open court, nor on account of any defect in the transcript. [Acts 1899, p. 233.]

Art. 835. [923] **Appellate court may allow new bond.**—When an appeal is taken from the judgment of any court of this State, by filing a bond or entering into a recognizance within the time prescribed by law in such cases, and the court to which appeal is taken determines 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. [Acts 1905, p. 224.]

Art. 836. [924] [890] **Appeal bond 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.

Art. 837. [925] [891] **Trials de novo.**—In all appeals from justice and corporation 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, Sec. 16.]

Art. 838. [926] [892] **Original papers sent up.**—In appeals from justice and corporation 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 shall be delivered without delay to the clerk of the court to which the appeal was taken, who shall file the same and docket the case.

Art. 839. [927] [893] **Witnesses not again summoned.**—

In the cases mentioned in the preceding article, the witnesses who have been summoned or attached to appear in the case before the court below, shall appear before the court to which the appeal is taken without further process. 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 such court.

Art. 840. [928] [894] **Rules governing 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 court to which such appeal is taken.

Art. 841. [929] [895] **Clerk to prepare transcript.**—The clerk of a court from which an appeal is taken shall prepare as soon as practicable, a transcript in every case in which an appeal has been taken, which shall contain all the proceedings had in the case and conform to the rules governing transcripts in civil cases. [O. C. 729.]

Art. 842. [930] [896] **Transcript in felony prepared first.**—The clerk shall prepare transcripts in felony cases that have been appealed in preference to misdemeanor cases and shall prepare transcripts in all criminal cases appealed in preference to civil cases. [O. C. 729.]

Art. 843. [931] [897] **Forwarding transcript.**—As soon as prepared, the clerk shall forward the transcript by safe conveyance, charges paid, enclosed in a securely sealed envelope, directed to the clerk of the Court of Criminal Appeals. [Acts 1st C. S. 1892, p. 39.]

Art. 844. [932-933] **Clerk to make list of cases.**—The clerk, immediately after the adjournment of the court at which appeals were taken, shall make out a certificate under his seal showing a list of each cause appealed. This certificate shall show the style of the cause, the offense, the date judgment was rendered, and the date the appeal was taken; and the clerk shall send it to the clerk of the appellate court. [Id.]

Art. 845. [934-935] **Failure to receive transcript.**—When it appears by the clerk's certificate that an appeal has been taken but that 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, such clerk shall immediately notify the clerk of the proper court that the same has not been received, and such clerk without delay shall prepare and forward another transcript as in the first instance, and notify the clerk of the appellate court by letter of the fact that such transcript has been forwarded and how and when it was forwarded. [Id.]

Art. 846. [937] [903] **Appeals, when 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.]

Art. 847. [938] [904] **Presumptions 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 nature of the case may require. 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 court's charge was certified by the judge and filed by the clerk 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 approved by the judge of the court below, or proven up by by-standers, as provided by law, and duly incorporated in the transcript. In each case by it decided, the Court of Criminal Appeals shall deliver a written opinion, setting forth the reason for such decision. [Acts 1897, p. 11.]

Art. 848. [939] [905] **Cases remanded.**—The Court of Criminal Appeals may reverse the judgment in a criminal action, as well upon the law as upon the facts. A cause reversed because the verdict is contrary to the evidence shall be remanded for new trial. [Acts 1st C. S. 1892, p. 39.]

Art. 849. [940] [906] **Duty of clerk after judgment.**—When the judgment of the Court of Criminal Appeals is final, the clerk shall make out the proper certificate of the proceedings had and judgment rendered, and mail the same to the clerk of the proper court. [Id.]

Art. 850. [941] [907] **Mandate to be filed.**—When the mandate of the Court of Criminal Appeals is received by the proper clerk, he shall file it with the papers of the cause, and note it upon the docket. [Id.]

Art. 851. [944] [910] **When misdemeanor is affirmed.**—In misdemeanor cases 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, as if no appeal had been taken. [O. C. 749.]

Art. 852. [945] [911] **Effect of reversal.**—Where the Court of Criminal Appeals 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 1st C. S. 1892, p. 40.]

Art. 853. [946] [912] **Motion in arrest of judgment.**—Where the 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 appellate court directs the cause to be dismissed. [Id.]

Art. 854. [947] [913] **Defendant discharged, when.**—When the Court of Criminal Appeals reverses a judgment and orders the cause to be dismissed, the defendant, if in custody, must be discharged. The clerk of the appellate court shall at once transmit to the officer having custody of defendant an order by telegraph or mail. [Id.]

Art. 855. [948] [914] **Bail after reversal.**—When a felony case 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. The clerk of the appellate court shall send the officer having custody of the defendant an order to that effect. [Id.]

Art. 856. [949] [915] **Hearing in appellate court.**—The Court of Criminal Appeals may make rules of procedure as to the hearing of criminal actions upon appeal. In every case at least two counsel for the appellant shall be heard, if they desire it, either by brief or by oral or written argument, or both. [Id.]

Art. 857. [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.

Art. 858. [951-952-953] **Hearing habeas corpus.**—Cases of habeas corpus, taken to the Court of Criminal Appeals by appeal, shall be heard at the earliest practicable time. The defendant need not be personally present, and such appeal shall be heard and determined upon the law and the facts arising upon record. 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.

Art. 859. [954] [920] **Orders on appeal.**—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 1st C. S. 1892, p. 40.]

Art. 860. [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.]

Art. 861. [957] [923] **Appellant 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.]

Art. 862. [958] [924] **Judgment to be certified.**—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.]

Art. 863. [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.]

Art. 864. [960] [926] **Appeal on forfeitures.**—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.

Art. 865. [961] [927] **Writ of error.**—The defendant may also have any such judgment as is mentioned in the preceding article, and which may have been rendered in courts other than the justice and corporation courts, revised upon writ of error.

Art. 866. [962] [928] **Rules in forfeitures.**—In the cases provided for in the two preceding articles, the proceedings shall be regulated by the same rules that govern civil actions where an appeal is taken or a writ of error sued out.

# TITLE 11

## JUSTICE AND CORPORATION COURTS.

### 1. CORPORATION COURTS.


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Art. 867. **Complaint.**—Proceedings in a corporation court shall be commenced by complaint, which shall begin: "In the name and by authority of the State of Texas," and shall conclude, "Against the peace and dignity of the State," and if the offense is only covered by an ordinance, it may also conclude "Contrary to the said ordinance." The recorder need not charge the jury except upon charges requested in writing by the defendant or his attorney, and he may give or refuse such charges. Complaints before such court may be sworn to before any officer authorized to administer oaths or before the recorder, clerk of the court, city secretary, city attorney or his deputy, each of whom, for that purpose, shall have power to administer oaths. [Acts 1899, p. 42.]

Art. 868. **Seal.**—The said court shall have a seal with a star of five points in the center and the words "Corporation Court in _____, Texas" the impress of which shall be attached to all papers issued out of said court except subpoenas, and shall be used to authenticate the official acts of the clerk and of the recorder. [Id.]

Art. 869. **Prosecutions.**—All prosecutions in a corporation court shall be conducted by the city attorney of such city, town or village, or by his deputy. The county attorney of the county in which said city, town or village is situated may, if he so desires, also represent the State in such prosecutions. In such cases, the said county attorney shall not be entitled to receive any fees or other compensation whatever for said services. The county attorney shall have no power to dismiss any prosecution pending in said court unless for reasons filed and approved by the recorder. [Id.]

Art. 870. **Service of process.**—All process issuing out of a corporation court shall be served by a policeman or marshal of the city, town or village within which it is situated, under the same rules as are provided by law for the service by sheriffs and constables of process issuing out of the justice court, so far as applicable. Each defendant shall be entitled to at least one day's notice of any complaint against him, if such time be demanded. [Id.]

Art. 871. **Commitment.**—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 providing for

the custody of prisoners convicted before such corporation court. [Id.]

Art. 872. **Fines and costs, etc.**—The governing body of each incorporated city, town or village shall by ordinance prescribe such rules, not inconsistent with any law of this State, as 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, and shall also have power to adopt such rules and regulations concerning the practice and procedure in such court as said governing body may deem proper, not inconsistent with any law of this State. All such fines shall be paid into the city treasury for the use and benefit of the city, town or village. [Id.]

Art. 873. **Collection of costs.**—Such costs as may be provided for by ordinance shall be taxed against each defendant convicted, but in no case shall the ordinance prescribe the collection of greater costs than are prescribed by law to be collected of one convicted in a justice court. [Id.]

Art. 874. **Jury fees, etc.**—The provisions of this Code reguating the amount and collection of jury and witness fees, and for enforcing the attendance of witnesses in criminal cases tried in the justice court shall, so far as applicable, govern such corporation court. [Id.]

Art. 875. **Officers' fees.**—Unless provided by special charter, the governing body of each city, town or village by ordinance shall prescribe the compensation and fees which shall be paid to the recorder, city attorney, city secretary and other officers of said court, to be paid out of the municipal treasury. [Id.]

Art. 876. **Appeal.**—Appeals from a corporation court shall be heard by the county court except in cases where the county court has no jurisdiction, in which counties such appeals shall be heard by the proper court. In such appeals the trial shall be de novo. Said appeals shall be governed by the rules of practice and procedure for appeals from justice courts to the county court, as far as applicable. [Id.]

Art. 877. **Disposition of fees.**—The fine imposed on appeal and the costs imposed on appeal and in the corporation court shall be collected of the defendant, and such fine and the cost of the corporation court when collected shall be paid into the municipal treasury. [Id]

Art. 878. **Contempt and bail.**—The recorder may 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 as govern such taking and forfeiture in the county court. [Id.]

## 2. JUSTICE COURTS.


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Art. 879. [969] [934] **Criminal docket.**—Each justice of

the peace and each recorder shall keep a docket in which he shall enter the proceedings in each trial had before him, which docket shall show:

1. The style of the action.
2. The nature of the offense charged.
3. The date the warrant was issued and the return made thereon.
4. The time when the examination or trial was had, and, if 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 decision thereon.
8. If an appeal was taken.
9. The time when, and the manner in which, the judgment was enforced. [O. C. 817; Acts 1876, p. 156.]

Art. 880. [970] [935] **To file transcript of docket.**—At each term of the district court, each justice of the peace 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, of all criminal cases examined or tried before him since the last term of such district court; and such clerk shall immediately deliver such transcript to the foreman of the grand jury.

Art. 881. [971] [936] **Warrant without complaint.**—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.

Art. 882. [972] [937] **Complaint shall be written.**—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. It shall be duly attested by the 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. [Acts 1876, p. 165.]

Art. 883. [973] [938] **What 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, in plain and intelligible words.
3. 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.]

Art. 884. [974] [939] **Warrant shall issue.**—When the requirements of the preceding article have been complied with, the justice shall issue a warrant for the arrest of the accused and deliver the same to the proper officer to be executed. [Id.; O. C. 821.]

Art. 885. [975] [940] **Requisites of warrant.**—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 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.

Art. 886. [976] [941] **Court of inquiry.**—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 in relation thereto. If it appears from the statement of any witness that an offense has been committed, the justice shall reduce said statements to writing and cause the same to be sworn to by each witness making the same; and, issue a warrant for the arrest of the offender, the same as if complaint had been made and filed.

Art. 887. [977] [942] **Witnesses refusing to testify.**—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.

Art. 888. [979] [944] **Any person may 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. In such case, such person shall have the same powers, and shall be subject to the same rules that govern peace officers in like cases. [Acts 1876, p. 166.]

Art. 889. [980] [945] **Offenses committed in another county.**—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, such justice shall issue his warrant for the arrest of the accused, directed as in other cases, commanding that the accused be arrested and taken before any magistrate of the county where such felony is alleged to have been committed, forthwith, for examination as in other cases. [Id.]

## 3. TRIAL IN JUSTICE COURT.


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Art. 890. [981] [946] **To 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.]

Art. 891. [982] [947] **Defendant may waive jury.**—The accused may waive a trial by jury; and, in such case, the justice shall hear and determine the case without a jury.

Art. 892. [983-984] **Jury summoned.**—If the accused 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. 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. Any man so summoned who fails to attend may be fined not exceeding twenty dollars for contempt. [O. C. 836; Acts 1876, p. 167.]

Art. 893. [985] [950] **Complaint read.**—If the warrant issued upon a complaint made to the justice, the complaint shall be read to the defendant. If issued by the justice without previous complaint, he shall state to the defendant the accusation against him. [O. C. 824.]

Art. 894. [986] [951] **Not discharged for informality.**—A defendant shall not be discharged by reason of any informality in the complaint or warrant. The proceeding before the justice shall be conducted without reference to technical rules. [O. C. 825.]

Art. 895. [987] [952] **Challenge of jurors.**—In all jury trials in the justice court the State and each defendant 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. [Acts 1876, p. 160.]

Art. 896. [988] [953] **Other jurors summoned.**—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 men to form the jury.

Art. 897. [989] [954] **Oath to jury.**—The justice shall administer the following oath to the jury: "Each of you do

solemnly swear that you will well and truly try the cause about to be submitted to you and a true verdict render therein, according to the law and the evidence, so help you God." [O. C. 834.]

Art. 898. [990] [955] **Defendant shall plead.**—After the jury is impaneled, the defendant may plead guilty or not guilty or the special plea named in the succeeding article. [O. C. 829.]

Art. 899. [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.]

Art. 900. [992] [957] **Pleading is oral.**—All pleading in justice court is oral. The justice shall note upon his docket the plea offered. [O. C. 831.]

Art. 901. [993] [958] **Plea of guilty.**—Proof as to the offense shall be heard upon a plea of guilty and the punishment assessed by the court or jury. [O. C. 832.]

Art. 902. [994] [959] **If defendant refuses to plead.**—The justice shall enter a plea of not guilty if the defendant refuses to plead. [O. C. 833.]

Art. 903. [995] [960] **Witnesses examined by whom.**—The justice shall examine the witnesses if the State is not represented by counsel. [O. C. 835.]

Art. 904. [996] [961] **May appear by counsel.**—The defendant has a right to appear by counsel as in all other cases. Not more than one counsel shall conduct either the prosecution or defense. State's counsel may open and conclude the argument. [O. C. 836.]

Art. 905. [997] [962] **Rules of evidence.**—The rules of evidence which govern the trials of criminal actions in the district court shall apply to such actions in justice courts. [O. C. 837.]

Art. 906. [998] [963] **Jury kept together.**—The jury shall retire in charge of an officer when the cause is submitted to them, and be kept together until they agree to a verdict or are discharged. [O. C. 838.]

Art. 907. [999] [964] **Mistrial.**—A jury shall be discharged if they fail to agree to a verdict after being kept together a reasonable time. If there be time left on the same day, another jury may be impaneled to try the cause, or the justice may adjourn for not more than two days and again impanel a jury to try such cause. [O. C. 839.]

Art. 908. [1000] [965] **Defendant to give bail.**—In case of adjournment, the justice shall require the defendant to give bail for his appearance. If he fails to give bail he may be held in custody. [O. C. 840.]

Art. 909. [1001-1002] **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 and shall enter it upon his docket and render the proper judgment thereon.

Art. 910. [1003] [968] **Defendant placed in jail.**—Whenever, by the provisions of this title, the peace officer is authorized to retain a defendant in custody, he may place him in jail or any other place where he can be safely kept. [O. C. 844.]

Art. 911. [1004] [969] **New trial granted.**—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. [Acts 1876, p. 176.]

Art. 912. [1005] [970] **Motion for new trial.**—An application for a new trial must be made within one day after the rendition of judgment, and not afterward; and the execution of the judgment shall not be stayed until a new trial has been granted.

Art. 913. [1006-1007] **Only one new trial granted.**—Not more than one new trial shall be granted the defendant in the same case. When a new trial has been granted, the justice shall proceed, as soon as practicable, to try the case again.

Art. 914. [1008] [973] **State not entitled to new trial.**—In no case shall the State be entitled to a new trial.

Art. 915. [1010] [975] **Effect of appeal.**—When a defendant files the appeal bond required by law with the justice, all further proceeding in the case in the justice court shall cease.

Art. 916. [1011] [976] **Judgments in open court.**—All judgments and final orders of the justice shall be rendered in open court and entered upon his docket. [Acts 1876, p. 162.]

## 4. JUDGMENT IN JUSTICE COURT.


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Art. 917. [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 and costs, and that the defendant remain in custody of the sheriff until the fine and costs are paid; and that execution issue to collect the same. [O. C. 845.]

Art. 918. [1013] [978] **Capias.**—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 he is legally discharged.

Art. 919. [1014] [979] **Execution.**—In each case of conviction before a justice from which no appeal is taken, an execution shall issue 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. 920. [1015] [980] **Discharged from jail.**—A defendant placed in jail on account of failure to pay the fine and costs can be discharged on habeas corpus by showing:

1. That he is too poor to pay the fine and costs, and

2. 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 application to such justice; and when such application is granted, the justice shall note the same on his docket.

# TITLE 12

## MISCELLANEOUS PROCEEDINGS.


| | Chapter | | Chapter |
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## CHAPTER ONE.

### INSANITY AFTER CONVICTION.


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| If defendant is found insane | 925 | When defendant is again insane | 931 |
| To commit insane defendant | 926 | Conviction to be enforced | 932 |


Art. 921. [1017-19] **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 as in criminal cases to try the question of insanity. [O. C. 781-3.]

Art. 922. [1018] [983] **Affidavit of insanity.**—Information to the court as to the insanity of a defendant may be given by the affidavit of any respectable person, stating that there is good reason to believe that the defendant has become insane. [O. C. 782.]

Art. 923. [1021] [986] **Court to appoint counsel.**—If the defendant has no counsel, the court shall appoint counsel to conduct the trial for him. [O. C. 787.]

Art. 924. [1019-22] **Trial.**—No special formality is necessary in conducting the proceedings authorized by this chapter. The court shall see that the inquiry is so conducted as to lead to a satisfactory conclusion. The counsel for the defendant has the right to open and conclude the argument upon the trial of such issue of insanity.

Art. 925. [1023] [988] **If the defendant is found insane.**—Upon the trial of an issue of insanity, if the defendant is found to be insane, all further proceedings in the case against him shall be suspended until he becomes sane. [O. C. 788, 789.]

Art. 926. [1024] [989] **To commit insane defendant.**—If a defendant is found to be insane, the court shall make and have entered upon the minutes an order committing the defendant to the custody of the sheriff, to be kept subject to the further order of the county judge of the county. [O. C. 793.]

Art. 927. [1025] [990] **Confined in asylum.**—When a defendant has been committed, as provided in the preceding article, the proceedings shall forthwith be certified to the county judge, who shall at once take the necessary steps to have the defendant confined in the lunatic asylum until he becomes sane.

Art. 928. [1026] [991] **When a defendant becomes sane.**—If the defendant becomes 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, if he is found to be

sane, the conviction shall be enforced against him as if the proceedings had never been suspended.

Art. 929. [1027] [992] **Affidavit of sanity.**—The fact that the defendant has become sane may be made known to the court in which the conviction was had by the official written certificate of the superintendent of the lunatic asylum, where he is confined, or, if not confined in the lunatic asylum, by the affidavit of any credible person.

Art. 930. [1028] [993] **Proceedings upon affidavit.**—When such certificate or affidavit is presented to the judge or court, either in vacation or term time, such judge or court shall issue a writ, directed to the officer having custody of such defendant, commanding such officer to bring the defendant before the court immediately, if the court be then in session; and if not then in session, to bring the defendant before the court at its next regular term for the county in which the conviction was had; which writ shall be served and returned as in the case of the writ of habeas corpus, and under like penalties for disobedience.

Art. 931. [1029] [994] **When defendant is again insane.**—A defendant again found to be insane shall be remanded to the custody of the superintendent of the lunatic asylum or other proper officer.

Art. 932. [1030] [995] **Conviction to be enforced.**—Upon the trial of the issue of insanity, if it is found that the defendant is sane, the judgment of conviction shall be enforced as if no such inquiry had been made. [O. C. 791.]

## CHAPTER TWO.

## DISPOSITION OF STOLEN PROPERTY.


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Art. 933. [1031] [996] **Subject to order of court.**—An officer who comes into custody of property alleged to have been stolen must hold it subject to the order of the proper court or magistrate. [O. C. 794.]

Art. 934. [1032] [997] **Restored on trial.**—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 trying the case shall order the property to be restored to the person appearing by the proof to be the owner of the same. [O. C. 795.]

Art. 935. [1033] [998] **Schedule.**—When an officer seizes property alleged to have been stolen, he shall 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.]

Art. 936. [1034] [999] **Restored to owner.**—Upon an examining trial, if it is proved to the satisfaction of the magis-

trate that any person is the true owner of property alleged to have been stolen, and which is in possession of a peace officer, he may, by written order, direct the property to be restored to such owner. [O. C. 797.]

Art. 937. [1035-6] **Bond required.**—If the magistrate has any doubt as to the ownership of the property, he may require a bond of the claimant for its redelivery in case it 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 as to its possession. Such bond shall be in a sum equal to the value of the property, with sufficient security, payable to and approved by the county judge of the county in which the property is in custody. Such bond shall be filed in the office of the county clerk of such county, and in case of a breach thereof may be sued upon in such county by any claimant of the property, or by the county treasurer of such county.

Art. 938. [1037-8] **Property sold.**—If the property is not claimed within six months from the conviction of the person accused of illegally acquiring it, the sheriff shall sell it for cash, after advertising for ten days as under execution. The proceeds of such sale, after deducting all expenses of keeping such property and costs of sale, shall be paid into the treasury of the county where the defendant was convicted. Money stolen shall be paid into the county treasury if not claimed by the proper owner within six months.

Art. 939. [1039] [1004] **Owner may recover.**—The real owner of the property or money disposed of shall have twelve months within which to present his claim to the commissioners court for the money paid to such county treasurer. If his claim is denied by such court, he may sue the county treasurer, and, upon sufficient proof, recover judgment therefor against such county.

Art. 940. [1040-1] **Written instrument.** — If the property is a written instrument, it shall be deposited with the county clerk of the county where the proceedings are had, subject to the claim of any person who may establish his right thereto. The claimant of any such written instrument shall file his written sworn claim thereto with the county judge. 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 any provision of this chapter, and may also before such delivery require the written instrument to be recorded in the minutes of his court.

Art. 941. [1042] [1007] **Claimant to pay charges.**—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. If said charges are not paid, the property shall be sold as under execution; and the proceeds of sale, after

the payment of said charges and costs of sale, paid to the owner of such property.

Art. 942. [1043] [1008] **Charges of officer.**—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. 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 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. 943. [1044] [1009] **Scope of chapter.**—Each provision of this chapter relating to stolen property applies as well to property acquired in any manner which makes the acquisition a penal offense.

## CHAPTER THREE.

### COLLECTION OF MONEY.


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Art. 944. [1045] [1010] **Reports of money collected.**—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 have come to their hands since the last term of their respective courts aforesaid. [Acts 1874, p. 182.]

Art. 945. [1046] [1011] **Contents of report.**—Such report 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 so state.

Art. 946. [1047] [1012] **Report of collections for county.**—A report, such as is required by the two preceding articles, shall also be made of all moneys collected for the county, which report shall be made to each regular term of the commissioners court for each county. [Id.]

Art. 947. [1048] [1013] **What officers to report.**—The officers charged by law with the collection of money, within the meaning of the three preceding articles, and who are required to make the reports therein mentioned, are: District and county attorneys, clerks of the district and county courts, sheriffs, constables, and justices of the peace. [Id.]

Art. 948. [1049] [1014] **Report to embrace all moneys.**—The moneys required to be reported embrace all moneys collected for the State or county other than taxes. [Id.]

Art. 949. [1050] [1015] **Money collected paid to treasurer.**

—Money collected by an officer upon recognizances, bail bonds and other obligations recovered upon in the name of the State under any provision of this Code, and all fines, forfeitures, judgments and jury fees, collected under any provision of this Code, shall forthwith be 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.]

Art. 950. [1193] [1143] **Commissions on collections.**—The district or county attorney shall be entitled to ten per cent of all fines, forfeitures or moneys collected for the State or county, upon judgments recovered by him; and the clerk of the court in which said judgments are rendered shall be entitled to five per cent of the amount of said judgments, to be paid out of the amount when collected. [Acts 1879, p. 133.]

Art. 951. [1194] [1144] **Commissions to other officer.**—The sheriff or other officer who collects money for the State or county, under any provision of this Code, except jury fees, shall be entitled to retain five per cent thereof when collected. [Acts 1876, p. 287; Acts 1889, p. 95.]

## CHAPTER FOUR.

## PARDON AND PAROLE.


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Art. 952. [1051] [1016] **Governor may pardon, etc.**—In all criminal actions, except treason and impeachment, the Governor shall have power, after conviction, to remit fines, grant reprives, commutations of punishment and pardons. [Const., Art. 4, Sec. 11.]

Art. 953. [1054] [1019] **May pardon treason.**—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. [Id.]

Art. 954. [1052] [1017] **May remit forfeitures.**—The Governor shall have power to remit forfeitures of recognizances and bail bonds. [Id.]

Art. 955. [1055] [1020] **May commute death penalty.**—The Governor shall have the authority to commute the punishment in every case of capital felony, except treason, by changing the penalty of death to imprisonment for life, or for a term of years, 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.

Art. 956. [1056] [1021] **May delay execution.**—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 proper officer, and such warrant shall be executed and returned to the proper court as if it had been issued from such court.

Art. 957. [1053] [1018] **Shall file reasons.**—When the Governor remits fines or forfeitures, or grants reprieves, commutation of punishment or pardons, he shall file in the office of Secretary of State his reasons therefor.

Art. 958. [1057] [1022] **Governor's acts under seal.**—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. 959. **Power of parole.**—Meritorious prisoners who may 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 title, and to such regulations and conditions as may be made by the Board of Prison Commissioners, with the approval of the Governor. Such parole shall be made only by the Governor, or with his approval. [Acts 1905, p. 33; Acts 1911, p. 64; Acts 1913, p. 262; Acts 1st. C. S. 1913, p. 4.]

Art. 960. **Power to recall.**—While on 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 said Board as under the original sentence. Such retaking shall be at the direction of the Governor, and all orders and warrants issued by said Board under such authority for the retaking of such prisoners shall be sufficient warrant for all officers named therein to return to actual custody such paroled convicts, and it is the duty of all officers to execute such orders as ordinary criminal processes. [Id.]

Art. 961. **Record of prisoner.**—The wardens or sergeants or guards of such prisoners, or whoever has in custody convicts subject to parole under this title, 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. Such 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. 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 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. [Acts 1st. C. S. 1913, p. 4.]

Art. 962. **Optional parole.** — Any prisoner now serving or who may be sentenced to serve a term of imprisonment in the 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 until the expiration of such prisoner's original term of imprisonment, unless terminated by the restoration of citizenship by the Governor. [Acts 1911, p. 64.]

Art. 963. **Report of warden.** — The wardens of such prisoners shall make or cause to be made to the Board of Prison Commissioners semi-annually, 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 reasons for such recommendations as are made, and if no recommendations are made, the report shall so state. [Acts 1st. C. S. 1913, p. 4.]

Art. 964. **Action on report.**—The Board shall preserve said reports and recommendations and consider the same, and approve or disapprove the same within three months after the same are received. They shall transmit to the Governor without delay a report of such recommendations for parole or pardon as they shall approve. [Id.]

Art. 965. **May recommend discharge.**—Whenever any prisoner serving an indeterminate sentence, as provided by law, shall have served for twelve months on parole in a manner acceptable to the Board, it 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. The Board shall continue its supervision and care over such paroled prisoner until such time as the Governor shall pardon him. [Id.]

Art. 966. **May restore citizenship.**—When a convict who has been paroled has 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 discharge from the Superintendent and Prison Commissioners, setting forth these facts, be recommended by the Board to the Governor for restoration of his citizenship. [Id.]

Art. 967. **Reduction of time.**—If a prisoner sentenced to the penitentiary shall not be paroled under the provisions of this title, or if he shall only be sentenced to serve the minimum term of imprisonment fixed by law, then the general rule shall apply to his sentence, and he shall be entitled to such reduction of time as provided by law. [Id.]

# TITLE 13

## INQUESTS.

### 1. UPON DEAD BODIES.


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Art. 968. [1058] [1023] **When held.**—Any justice of the peace shall be authorized, and it shall be his duty, to hold inquests without a jury within his county, in the following cases:

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 a 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; Acts 1887, p. 31.]

Art. 969. [1059] [1024] **Body disinterred.**—When a body upon which an inquest ought to have been held has been interred, the justice may cause it to be disinterred for the purpose of holding such inquest. [O. C. 852.]

Art. 970. [1060] **Physician called in.**—Upon an inquest held to ascertain the cause of death the justice shall, if he deems it necessary, call in the county health officer, or, if there be none, or if it be impracticable to secure his services, then some regular physician, to make an autopsy in order to determine whether the death was occasioned by violence; and if so, its nature and character. 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 commissioners court after ascertaining the amount and nature of the work performed in making such autopsy. [Acts 1893, p. 155.]

Art. 971. [1061] [1024] **Chemical analysis.**—If upon such inquest, it becomes necessary to determine whether the death has been produced by poison, the justice upon request of the physician performing such autopsy shall 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. The commissioners court of the county shall pay a reasonable fee to such expert or chemist for his services not to exceed fifty dollars. [Id.]

Art. 972. [1062] [1025] **Upon what justice may act.**—The

justice shall act in such cases upon information given him by any credible person or upon facts within his own knowledge. [O. C. 853.]

Art. 973. [1063] [1026] **Death in jail.**—The sheriff and every keeper of any prison shall inform such justice of the death of any person confined therein. [O. C. 854.]

Art. 974. [1064] [1027] **Subpoenas.**—The justice may issue subpoenas to enforce the attendance of witnesses upon an inquest and may issue attachments for those subpoenaed who fail to attend.

Art. 975. [1065] [1028] **Testimony.** — Witnesses shall be sworn and examined by the justice and their testimony reduced to writing by or under his direction, and subscribed by them.

Art. 976. [1066] [1029] **Private inquest.**—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.]

Art. 977. [1067] [1030] **Hindering proceedings.** — If any other persons than the justice, the accused and his counsel, and the counsel for the State, are present at the inquest, they shall not interfere with the proceedings. No question shall be asked a witness, except by the justice, the accused or his counsel, and the counsel for the State. The justice of the peace may fine any person violating this article for contempt of court, not exceeding twenty dollars, and may cause such person to be placed in custody of a peace officer; and removed from the presence of the inquest. [O. C. 862.]

Art. 978. [1068] [1031] **Inquest record.**—The justice 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, 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; Acts 1887, p. 32.]

Art. 979. [1069] [1032] **In homicide cases.**—When the justice has knowledge that the killing was the act of any person, or when an affidavit is made that such person has killed the deceased, a warrant may issue 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. 980. [1070] [1033] **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. 981. [1072] [1035] **If slayer arrested.**—If it be found by the justice, 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. [Acts 1887, p. 32.]

Art. 982. [1073] [1036] **Bail bond.**—A bail bond taken before a justice shall be sufficient if it state the grade of offense of which the party is accused, be payable to the State of Texas, be dated and signed by the principal and his surety. Such bond may be forfeited, and judgment recovered thereon, and the same collected as in the case of any other bail bond.

Art. 983. [1074] [1037] **Warrant of arrest.**—When, by the evidence adduced before a justice 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.; Acts 1887, p. 32.]

Art. 984. [1071-1075] **Requisites of warrant.**—A warrant of arrest 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. 985. [1076] [1039] **Officer shall execute warrant.**—The peace officer into whose hands such warrant may come shall forthwith execute the same by arresting the accused and taking him before the magistrate named in the warrant; and the same proceedings shall be had thereon as in other cases where persons accused of offenses are brought before him. [O. C. 874.]

Art. 986. [1077] [1040] **Arrest pending inquest.**—Nothing contained in this title shall prevent proceedings being had for the arrest and examination of an accused before a magistrate, pending the inquest. 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.]

Art. 987. [1078] [1041] **To certify proceedings.**—The justice holding an inquest shall certify to the proceedings, and shall enclose in an envelope the testimony taken, the finding of the justice, the bail bonds, if any, and all other papers connected with the inquest, shall seal up such envelope and without delay deliver it properly endorsed to the clerk of the district court, who shall safely keep the same in his office subject to the order of the court. [Acts 1887, p. 32.]

Art. 988. [1079] [1042] **Evidence.**—The justice shall preserve all evidence 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 who caused such death, and deliver all such evidence to the district clerk, who shall keep the same safely, subject to the order of the court.

Art. 989. [1080] [1043] **Witnesses to give bail.**—The justice, if he deems it proper, may 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.

## 2. FIRE INQUESTS.


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Art. 990. [1081] [1044] **Investigation.**—When an affidavit is made by a credible person before any justice of the peace that there is ground to believe that any building has been unlawfully set or attempted to be set on fire, such justice shall cause the truth of such complaint to be investigated. [Act June 2, 1873, p. 171]

Art. 991. [1082] [1045] **Proceedings.**—The proceedings in such case shall be governed by the laws relating to inquests upon dead bodies. The officer conducting such investigation shall have the same powers as are conferred upon justices of the peace in the preceding articles of this chapter. [Id.]

Art. 992. [1083] [1046] **Verdict.**—The jury after inspecting the place in question and after hearing the testimony, shall deliver to the justice holding such inquest their written signed verdict 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 are guilty thereof, either as principal or accessory, and in what manner. If such jury is unable to so ascertain they shall find and certify accordingly. [Id.]

Art. 993. [1084] [1047] **Witnesses bound over.**—If the jury find that any building has been unlawfully set on fire or has been attempted so to be, the justice 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.]

Art. 994. [1085] [1048] **Warrant for accused.**—If the person charged with the offense, if any, 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.]

Art. 995. [1086] [1049] **Testimony written down.**—In all such investigations, the testimony of all witnesses examined before the jury shall be reduced to writing by or under the direction of the justice and signed by each witness. Such testimony together with the verdict and all bail bonds taken in the case shall be certified to and returned by the justice to the next district or criminal district court of his county. [Id.]

Art. 996. [1087] [1050] **Compensation.**—The pay of the officers and jury making such investigation shall be the same as that allowed for the holding of an inquest upon a dead body, so far as applicable, and shall be paid in like manner. [Id.]

# TITLE 14

## FUGITIVES FROM JUSTICE.


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Art. 997. [1088] [1051] **Delivered up.**—A person charged in any other State or territory of the United States with treason or any felony 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.]

Art. 998. [1089-1092] **To aid in arrest.**—All peace officers of the State shall 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 fled. [O. C. 879.]

Art. 999. [1090] [1053] **Magistrate's warrant.**—When a complaint is made to a magistrate that any person within his jurisdiction is a fugitive from justice from another State or territory, he shall issue a warrant of arrest directing a peace officer to apprehend and bring the accused before him.

Art. 1000. [1091] [1054] **Complaint.**—The complaint shall be sufficient if it recites:

1. The name of the person accused.
2. The State or territory from which he has fled.
3. The offense committed by the accused.
4. That he has fled to this State from the State or territory where the offense was committed.
5. That the act alleged to have been committed by the accused is a violation of the penal law of the State or territory from which he fled. [O. C. 883.]

Art. 1001. [1093-4-5] **Bail or commitment.**—When the accused is brought before the magistrate, he shall hear proof, and if satisfied that the accused is charged in another State or territory with the offense named in the complaint, he shall require of him bail with sufficient security, in such amount as the magistrate deems reasonable, to appear before such magistrate at a specified time. 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. A properly certified transcript of an indictment against the accused is sufficient to show that he is charged with the crime alleged. One arrested under the provisions of this title shall not be committed or held to bail for a longer time than ninety days.

Art. 1002. [1096-7-8] **Notice of arrest.**—The magistrate who held or committed such fugitive shall immediately notify the Secretary of State and the district or county attorney of his

county of such fact and the date thereof, stating the name of such fugitive, the State or territory from which he fled, and the crime with which he is charged; and such officers so notified shall in turn notify the Governor of the proper State or territory.

Art. 1003. [1099] [1062] **Discharge.**—A fugitive not arrested under a warrant from the Governor of this State before the expiration of ninety days from the day of his commitment or the date of the bail bond shall be discharged. [O. C. 889.]

Art. 1004. [1100] [1063] **Second arrest.**—A person who has once been arrested under the provisions of this title and discharged 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.]

Art. 1005. [1101] [1064] **Governor may demand fugitive.** —When the Governor deems it proper to demand a person who has commmitted an offense in this State and has fled to another State or territory, he may commission any suitable person to take such requisition. The accused, 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.]

Art. 1006. [1102] [1065] **Pay of agent.** — The officer or person so commissioned shall receive such compensation only as the Governor shall allow for such service, to be paid out of the State treasury upon a certificate of the Governor reciting the service rendered and the allowance therefor. [O. C. 881, Acts 1923, p. 397.]

Art. 1007. [1103-4-5] **Reward.**—The Governor may offer a reward for the apprehension of one accused of a felony in this State who is evading arrest, by causing such offer to be published in such manner as he deems most likely to effect the arrest. The reward shall be paid out of the State treasury to the person who becomes entitled to it upon a certificate of the Governor reciting the facts which entitle such person to receive it.

Art. 1008. **Sheriff to report.**—Each sheriff upon the close of any regular term of the district or criminal district court in his county, or within thirty days thereafter, shall make out and mail to the Adjutant General 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 such fugitive, the offense with which he is charged, and a description giving his age, height, weight, color and occupation, the complexion of skin and the color of eyes and hair, and any peculiarity in person, speech, manner or gait that may serve to identify such person so far as the sheriff may be able to give them. The Adjutant General shall prescribe and forward to all sheriffs the necessary blanks upon which are to be made the lists herein required. [Acts 1887, p. 44.]

# TITLE 15

## COSTS IN CRIMINAL ACTIONS.


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## CHAPTER ONE.

## TAXATION OF COSTS.


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| Extortion | 1011 | Costs retaxed | 1016 |
| Costs payable in money | 1012 | Fee book evidence | 1017 |
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Art. 1009. [1106] [1069] **Fee books.**—Each clerk of a court, county judge, justice of the peace, sheriff, constable and marshal, shall keep a fee book and enter therein all fees charged for service rendered in any criminal action or proceeding; which book may be inspected by any person interested in such costs. [Acts 1876, p. 203.]

Art. 1010. [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 shall name the officer or person to whom such costs are due, and state each item of costs separately.

Art. 1011. [1108] [1071] **Extortion.** — No item of costs shall be taxed for a purported service which was not performed, or for a service for which no fee is expressly provided by law.

Art. 1012. [1109] [1072] **Costs payable in money.** — All costs in criminal actions or proceedings are due and payable in money.

Art. 1013. [1110] [1073] **When costs payable.**—No costs shall be payable by any person until there be produced, or ready to be produced, unto the person chargeable with the same, a written bill containing the items of such costs, signed by the officer to whom such costs are due or by whom the same are charged.

Art. 1014. [1111] [1074] **Bill of costs to accompany appeal.** —When 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 complete bill of all costs that have accrued therein, certified to and signed by the proper officer of the court from which the same is forwarded.

Art. 1015. [1112] [1075] **Taxing after payment.**—No further costs shall be taxed against or collected from a defendant after he has paid the costs taxed against him at the time of such payment, unless otherwise adjudged by the court upon a proper motion filed for that purpose.

Art. 1016. [1113] [1076] **Costs retaxed.**—Whenever costs have been erroneously taxed against a defendant, he may have the error corrected, and the costs properly taxed, upon filing a written motion for that purpose in the court in which the case is

then or was last pending. Such motion may be made at any time within one year after the final disposition of the case in which the costs were taxed, and not afterward. Notice of such motion shall be given to each party to be affected thereby, as in the case of a similar motion in a civil action.

Art. 1017. [1114] [1077] **Fee book evidence.**—The items of costs taxed in an officer's fee book shall be prima facie evidence of the correctness of such items.

## CHAPTER TWO.

### COSTS PAID BY THE STATE.


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Art. 1018. [1136] [1091] **Defendant liable for costs.**—When the defendant is convicted, the costs and fees paid by the State under this title shall be a charge against him, except when sentenced to death or to imprisonment for life, and when collected shall be paid into the State Treasury. [O. C. 956.]

Art. 1019. [1124-1135] **Conviction for misdemeanor.**—If the defendant is indicted for a felony and convicted of a misdemeanor, no costs shall be paid by the State to any officer.

Art. 1020. [1119-1137] **Fees in examining court.**—In each case where a county judge or a justice of the peace shall sit as an examining court in a felony case, 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. 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 for 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. 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. The account of the officer and the approval of the judge must show that the provisions of this article are complied with. [Acts 1st. C. S. 1907, p. 466.]

Art. 1021. [1120] **District attorneys of two or more counties.**—District attorneys in all judicial districts composed of two counties or more shall receive from the State as pay for their services the sum of five hundred dollars per annum, and in addition thereto shall receive 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 upon the sworn account of the district attorney, approved by the district judge, who shall certify that the attendance of said district attorney for the number of days mentioned in his account was necessary, after which said account shall be recorded in the minutes of the district court. The maximum number of days for which compensation is allowed shall not exceed two hundred and thirty days in any one year. All commissions and fees allowed district attorneys by law, in districts composed of two or more counties shall, when collected, be paid to the district clerk of the county of his residence, who shall pay the same over to the State Treasurer. [Acts 1925, p. 406.]

Art. 1022. [1121] [1082] **If 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 final conviction, except in habeas corpus cases, in which cases only one fee shall be allowed, without regard to the number of defendants or whether they are tried jointly or separately.

Art. 1023. **Fees in trust cases.** — For every conviction obtained under the provisions of the anti-trust laws, the State shall pay to the county or district attorney in such prosecution the sum of two hundred and fifty dollars. 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. [Acts 1907, p. 458.]

Art. 1024. **Attorney for Dallas and Harris counties.**—In addition to the fees allowed by law to other district attorneys for other services, the Criminal District Attorney of Dallas county and the Criminal District Attorney of Harris county shall each receive the following fees:

For all convictions of felony when the defendant does not

appeal or dies or escapes after appeal and before final judgment of the appellate court, or when the judgment is affirmed on appeal, thirty dollars for each felony other than felonious homicide, and forty dollars for each such homicide. For representing the State in each case of habeas corpus where the applicant is charged with felony, twenty dollars. [Acts 1911, p. 116, Acts 1917, p. 316.]

Art. 1025. [1118-1131] **Fees to district and county attorneys.**—In each county where there have been cast at the preceding presidential election 3000 votes or over, the district or county attorney shall receive the following fees:

For all convictions of felony when the defendant does not appeal, or dies or escapes after appeal and before final judgment of the appellate court, or when the judgment is affirmed on appeal, twenty-four dollars for each felony other than felonious homicide, and forty dollars for each such homicide.

For representing the State in each case of habeas corpus where the applicant is charged with felony, sixteen dollars.

In each county where less than 3000 such votes have been so cast, such attorney shall receive thirty dollars for each such conviction of felony other than homicide, and fifty dollars for each such conviction of felonious homicide, and twenty dollars for each such habeas corpus case. [Acts 1895, p. 148; Acts 1st. C. S. 1897, p. 5.]

Art. 1026. [1127-1129] **Fees of district clerk.**—In each county where there have been cast at the preceding presidential election 3000 votes or over, the district clerk or criminal district clerk shall receive the following fees: Eight dollars for each felony case finally disposed of without trial or dismissed, or tried by jury whether the defendant be acquitted or convicted; eight cents for each one hundred words in each transcript on appeal or change of venue; eighty cents for entering judgment in habeas corpus cases, and eight cents for each one hundred words for preparing transcript in habeas corpus cases. In no event shall the fees in habeas corpus cases exceed eight dollars in any one case. In each county where less than 3000 such votes have been so cast, such clerk shall receive ten dollars for each felony case so disposed of, and ten cents for each one hundred words in such transcripts, and one dollar for entering judgment in each habeas corpus. The district clerk of any county shall receive fifty cents for recording each account of the sheriff. [Acts 1st. C. S. 1897, p. 5.]

Art. 1027. [1123-1130] **Officers to repay State.**—In all cases when the defendant shall be finally convicted of a misdemeanor, the Sheriff shall return to the State Treasurer a sum of money equal to the amount he received from the State in such case, and the sheriff and his bondsmen shall be responsible to the State for such sum. In such cases all fees received by the district clerk shall be refunded by him to the State. [Acts 1903, p. 112, Acts 1923, p. 402.]

Art. 1028. [1123-1130] **Sheriff due fees after approval.**—All fees accruing under the two succeeding articles shall be due and payable at the close of each term of the district court, after being duly approved, except as provided for in subdivisions 7 and

8 of said articles, which shall be paid when approved by the judge under whose order the writ was issued.

Art. 1029. [1122] **Fees to sheriff or constable.**—In each county where there have been cast at the preceding presidential election 3000 votes or more, the sheriff and constable 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 each prisoner to jail, he shall receive the mileage provided in subdivision 4.

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 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 be allowed eight cents per mile for each additional prisoner.

5. 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. The return of the officer shall show the character of the services, and the miles actually traveled in accordance with this subdivision; and his account shall show the facts.

6. For service of criminal process, not otherwise provided for, the sum of five cents a mile going and returning shall be allowed. If two or more persons are mentioned in the same or different writs, the rule prescribed in subdivision 5 shall apply.

7. 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 witnesses were 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 paid out for feeding horses, and to whom; if meals and lodgings are 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. No item for expenses shall be allowed, unless the officer present with his account to the officer whose duty it is to approve the same, a written receipt for each item of account, except as to such items as are furnished by the officer himself. When meals and lodgings are furnished by the officer in person, conveying the witness, he shall be allowed to receive not exceeding twenty-five cents per meal, and twenty-five cents per night for lodging. Each said receipt 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 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. 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 is willing and able to give bond, the sheriff shall not be entitled to any compensation for conveying such witness. All accounts for fees in criminal cases, by sheriffs, shall be sworn to by the said officer, 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. 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 district clerk in a book kept by him for that purpose, which shall constitute a part of the proceedings or minutes of the court. 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 a witness shall take 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 the 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. The Comptroller may require

from such officer a certified copy of all such process before auditing any account. When no inquest or examining trial has been held at which sufficient evidence is 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 testimony of non-resident witnesses, the district judge may have attachments issued to other counties for witnesses not to exceed the number for which the sheriff may receive pay as provided for by law, to testify before grand juries; provided, 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 7 of this article shall apply to the officers affected thereby in all counties in Texas.

8. For attending a prisoner on habeas corpus, for each day, four dollars, together with mileage as provided in subdivision 4 when removing such prisoner out of the county, under an order issued by a district or appellate judge. [Acts 1923, p. 399.]

Art. 1030. [1130] **Fees to sheriff or constable.**—In each county where there have been cast at the preceding presidential election less than 3000 votes, the sheriff or constable shall receive the following fees when the charge is a felony:

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 4 shall be allowed; provided, that in counties that have a population of less than forty thousand inhabitants, as shown by the preceding Federal census, the following fees shall apply: For executing each warrant of arrest or capias, or for making arrest without warrant, when authorized by law, three dollars and fifteen cents for each mile actually and necessarily traveled in going to place of arrest, and for conveying prisoners to jail, mileage as provided for in subdivision 4 shall be allowed; and one dollar shall be allowed for the approval of a bond.

2. For summoning or attaching each witness, fifty cents; provided that in counties that have a population of less than forty thousand inhabitants, as shown by the preceding Federal census, the following fees shall apply: For summoning or attaching each witness, fifty cents, and where a bond is required of said witness, for the approval of said bond, one dollar.

3. For summoning jury in each case, where jury is actually sworn in, two dollars.

4. 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.

5. 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 dupli-

cate 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; provided, that in counties that have a population of less than forty thousand inhabitants, as shown by the preceding Federal census, the following fees shall apply: For each mile the officer may be compelled to travel in executing criminal process, summoning or attaching witnesses, ten cents; provided, that in no case shall he be allowed to duplicate his mileage when two or more witnesses are named in the same or different writs in any case and he shall serve process on them in the same vicinity or neighborhood, during the same trip, he shall not charge mileage for serving such witness to and from the county seat, but shall only charge one mileage, and for such additional miles only as are actually and necessarily traveled in summoning or attaching each additional witness. When process is sent by mail to any officer away from the county seat or returned by mail by such officer, he shall only be allowed to charge mileage for the miles actually traveled by him in executing such process, and the return of the officer shall show the character of the service and the miles actually traveled in accordance with this subdivision; and his accounts shall show the facts.

6. To officers for service of criminal process not otherwise provided for, the sum of five cents a mile going and returning, shall be allowed; provided, if two or more persons are mentioned in the same or different writs, the rules prescribed in subdivision 5 shall apply; provided, that in counties that have a population of less than forty thousand inhabitants, as shown by the preceding Federal census, the following fees shall apply: To officers for service of criminal process not otherwise provided for, the sum of ten cents a mile going and returning shall be allowed; provided, if two or more persons are mentioned in the same or different writs, the rule prescribed in subdivision 5 shall apply.

7. For conveying a witness attached by him to any court, or grand jury, or in 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 the nearest railroad station, and miles actually traveled to

reach the court; if horses or vehicles are used, from whom hired, and price paid, and length of time consumed, and the 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. 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. 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 account shall be sworn to by the officer, 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 district clerk 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. The Comptroller may require from such officer a certified copy of all such process before auditing any such account.

8. For attending a prisoner on habeas corpus, for each day, four dollars, 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. [Acts 1923, p. 402.]

Art. 1031. [1125] [1084] **Services by officer other than sheriff.**—When services have been rendered by any peace officer other than a sheriff, such as are enumerated in the two pre-

ceding articles, such officer shall receive the same fees therefor as are allowed the sheriff. The same shall be taxed in the sheriff's bill of costs, and noted therein as costs due such peace officer; and when received by such sheriff, he shall pay the same to such peace officer. [O. C. 953, 954.]

Art. 1032. [1126] [1085] **Sheriff shall not charge fees, 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. [Acts 1885, p. 76.]

Art. 1033. [1132] [1087] **Officer shall make out cost bill.** —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 of the costs claimed to be due them by the State, respectively, in the felony cases tried at that term; the bill shall show:

1. The style and number of each case.
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.
7. The court shall inquire whether there have been several prosecutions for a transaction that is but one offense in law. 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.
8. Where the defendants in a case have severed on the trial, the judge shall not allow the charges for service of process and mileage to be duplicated in each case as tried; but only such additional fees shall be allowed as are caused by the severance. [Acts S. S. 1879, p. 41.]

Art. 1034. [1133] [1088] **Judge to examine bill, etc.**—The district judge, when any such bill is presented to him, shall examine the same carefully, and inquire into the correctness thereof, and approve the same, in whole or in part, or 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, the clerk thereof shall make a certified copy from the minutes of said court of said bill, and the action of the judge thereon, and send the same by registered letter to the Comptroller.

Fees due district clerks for recording 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. [Acts 1903, p. 112.]

Art. 1035. [1134] [1089] **Duty of Comptroller.** — The Comptroller upon the receipt of such claim, and said certified copy of the minutes of said court, shall closely and carefully examine the same, and, if correct, draw his warrant on the State Treasurer for the amount due, and in favor of the officer entitled to the same. 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 the character of the services performed. All such claims or accounts not sent to or placed on file in the office of the Comptroller within twelve months from the date of the final disposition of the case in which the services were rendered, shall be forever barred. [Acts 1883, p. 75.]

Art. 1036. [1138] [1003] **Witness fees.**—

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 testify in a felony case, and who appears 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 practical 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 law their actual traveling expenses, not exceeding three cents per mile, going to and returning from the court or grand jury, by the nearest practical 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 the district clerk, 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. When the grand jury shall certify to the district judge that sufficient evidence cannot be secured upon which to find an indictment, except upon testimony of non-resident witnesses, the district judge may have subpoenas issued as provided for by 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, which certificate and affidavit must be made at the time of procuring the attachment for, or taking the recognizance of, the witness. The judge to whom an application for attachment is made may, in his discretion, grant or refuse such application, when presented in term time.

3. Before the close of each term of the district court, the witness shall make affidavit stating the number of miles he will have traveled going to and returning from the court, by the nearest practical 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 the papers of the case. No witness shall receive pay for his services as a witness in more than one case at any one term of the court. Fees shall not be allowed to more than two witnesses to the same fact, unless the judge before whom the cause is tried shall, after such case has been disposed of, certify that such witnesses 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. The district or criminal district judge, when any such bill is presented to him, shall examine the same carefully, and inquire into the correctness thereof and approve the same, in whole or in part, or 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, the clerk thereof shall make a certified copy from the minutes of said court of said bill, and the action of the judge thereon, and send the same by registered letter to the Comptroller, for which service the clerk shall be entitled to a fee of twenty-five cents to be paid by the witness.

5. The Comptroller, upon the receipt of such claim and certified copy of the minutes of said court, shall carefully examine the same, and if correct draw his warrant on the State Treasurer for the amount due in favor of the witness entitled to the same. 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. All such claims or accounts not transmitted to, or placed on file in, the office of the Comptroller 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. [Acts 1905, p. 375.]

## CHAPTER THREE.

## COSTS PAID BY COUNTIES.


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Art. 1037. [1139] [1094] **County liable for costs.**—Each county shall be liable for all expense incurred on account of the safe keeping of prisoners confined in jail or kept under guard, except prisoners brought from another county for safe keeping, or on habeas corpus or change of venue; in which cases, the county from which the prisoner is brought shall be liable for the expense of his safe keeping. [O. C. 957.]

Art. 1038. [1140] [1095] **Food and lodging of jurors.**—Each county shall be liable for the expense of food and lodging for jurors impaneled in a felony case, but no script shall be issued or money paid to the jurors whose expenses are so paid. [O. C. 958.]

Art. 1039. [1141] [1096] **Juror may pay his own expenses.**—A juror may pay his own expenses and draw his script; but the county is responsible in the first place for all expense incurred by the sheriff in providing suitable food and lodging for the jury, not to exceed two dollars a day.

Art. 1040. [1142] **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 the safekeep of each prisoner for each day the sum of fifteen cents, not to exceed the sum of two hundred dollars per month.

2. For support and maintenance, for each prisoner for each day such an amount as may be fixed by the commissioners court, provided the same shall be reasonably sufficient for such purpose, and in no event shall it be less than forty cents per day nor more than seventy-five cents per day for each prisoner. The net profits shall constitute fees of office and shall be accounted for by the sheriff in his annual report as other fees now provided by law. The sheriff shall in such report furnish an itemized verified account of all expenditures made by him for feeding and maintenance of prisoners, accompanying such report with receipts and vouchers in support of such items of expenditure, and the difference between such expenditures and the amount allowed by the commissioners court shall be deemed to constitute the net profits for which said officer shall account as fees of office.

3. For necessary medical bill and reasonable extra compen-

sation for attention to a prisoner during sickness, such an amount as the commissioners court of the county where the prisoner is confined may determine to be just and proper.

4. For reasonable funeral expenses in case of death. [Acts 1923, p. 405.]

Art. 1041. [1143] **Guards and Matrons.**—The sheriff shall be allowed for each guard or matron necessarily employed in the safe-keeping of prisoners two dollars and fifty cents for each day. No allowance shall be made for the board of such guard or matron, nor shall any allowance be made for jailer or turnkey, except in counties of forty thousand population or more. In such counties of forty thousand or more the commissioners court may allow each jail guard, matron, jailer and turnkey four dollars and fifty cents per day. [Acts 1921, p. 231.]

Art. 1042. [1144] [1099] **Sheriff reimbursed.**—The sheriff shall pay the expenses of jurors impaneled in cases of felony (except when they are paid by the juror himself), the expenses 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. 1043. [1145] [1100] **Sheriff shall present account.**—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 case of trials for felony during the term at which his account is presented. Such account shall state the number and style of the cases in which the jurors were impaneled, and specify by name each juror's expenses paid by such sheriff, and the number of days the same were paid, and shall be verified by the affidavit of such sheriff. [O. C. 962.]

Art. 1044. [1146] [1101] **Judge shall examine account.**—Such account shall be carefully examined by the district judge; and he shall approve it, or so much thereof as he finds correct. He shall write his approval of said account, specifying the amount for which it is approved, date and sign the same officially, and shall cause the same to be filed in the office of the district clerk of the county liable therefor. [O. C. 963.]

Art. 1045. [1147] [1102] **Judge shall give sheriff draft.**—The district judge shall give 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 such treasurer, shall be paid in like manner as jury certificates are paid. [O. C. 964.]

Art. 1046. [1148] [1103] **Account for keeping prisoners.**—At each regular term of the commissioners court, the sheriff shall present to such court his account verified by his affidavit for the expense incurred by him since the last account presented for the safe-keeping and maintenance of prisoners, including guards employed, if any. Such account shall state the name of each prisoner, each item of expense incurred on account of such prisoner, the date of each item, the name of each guard em-

ployed, the length of time employed and the purpose of such employment.

Art. 1047. [1149] [1104] **Court to examine account.**—The commissioners court shall examine such account and allow the same, or so much thereof as is reasonable and in accordance with law, and shall order a draft issued to the sheriff upon the county treasurer for the amount so allowed. Such account shall be filed and kept in the office of such court.

Art. 1048. [1150] [1105] **Expenses of prisoner from another county.**—If the expenses incurred are for the safe-keeping and maintenance of a prisoner from another county, the sheriff shall make out a separate account therefor, and submit the same to the county judge of his county, who shall carefully examine the same, write thereon his approval for such amount as he finds correct and sign and date such approval officially.

Art. 1049. [1151] [1106] **Draft to sheriff.**—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 issued to the sheriff upon the county treasurer for the amount allowed.

Art. 1050. [1152] [1107] **In case of change of venue.**—In all causes where indictments have been presented against persons in one county 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 for jurors in trying such causes. [Acts 1881, p. 52.]

Art. 1051. [1153] [1108] **Account in change of venue.**—The county commissioners of each county at each regular meeting shall ascertain whether, since the last regular meeting, any person has been tried for crime upon a change of venue from any other county. If they find such to be the case they shall 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 from which the said cause was removed; which account shall be paid in the same manner as accounts for the safe keeping of prisoners. [Id.]

Art. 1052. [1154-1155] **Fees of county judge.**—Three dollars shall be paid to the county judge by the county for each criminal action tried and finally disposed of before him. Such judge shall present to the commissioners court of his county, at a regular term thereof, a written account specifying each criminal action in which he claims such fee, which account shall be certified to be correct by such judge and filed with the county clerk. 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. [Acts 1st C. S. 1879, p. 40.]

Art. 1053. [1156] [1111] **Inquest fee.**—A justice of the peace shall be entitled, for 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. 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 commissioners court of the county in which the inquest may be held and the superintendent of penitentiaries. [Acts 1876, p. 291; Acts 1883, p. 39; Acts 1st C. S. 1917, p. 52.]

Art. 1054. [1157] [1112] **Pay for inquest.**—Any officer 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. 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. Such account shall be filed and kept in the office of the county clerk.

Art. 1055. **Half costs paid officers.**—The county shall be liable to each officer and witness having costs in a misdemeanor case for only one-half thereof where the defendant has satisfied the fine and costs adjudged against him in full by labor in the workhouse, on the county farm, on the public roads or upon any public works of the county; and to pay such half of such legal costs as may have been so taxed, not including commissions, the county judge shall issue his warrant upon the county treasurer in favor of the proper party, and the same shall be paid out of the road and bridge fund or other funds not otherwise appropriated. [Acts 1895, p. 179.]

Art. 1056. [1158-60] **Pay of jurors.** — Each juror in the district or criminal district court, county court, or county court at law, except special veniremen whose pay is now fixed by law, shall receive three dollars for each day and for each fraction of a day that he may attend as such juror, to be paid out of the jury fund of the county in which he may so serve. Jurors in justice courts who serve in the trial of criminal cases in such courts shall receive fifty cents in each case they sit as jurors, provided that no juror in such court shall receive more than one dollar for each day or fraction of a day he may serve as such juror. Grand jurors shall each receive two dollars and fifty cents for each day and for each fraction of a day that they may serve as such. [Acts 1911, p. 110; Acts 1919, p. 35.]

Art. 1057. [1159] [1114] **No pay for unsworn juror.**—One summoned who attends as a juror shall receive no pay as a juror if he has not been sworn as such in a case or for the term or week.

Art. 1058. [1161] **Pay of bailiffs.**—Each grand jury bailiff appointed as such bailiff by the court shall receive as compensation for his services the sum of $3.00 for each day that he may serve as a grand jury bailiff. Each grand jury bailiff appointed as such bailiff by the court in counties of a population of 150,000 or more according to the 1920 census of the United

States shall receive as compensation for his services the sum of $5.00 for each day that he may serve as a grand jury bailiff. The sheriff or deputy sheriff attending the Fourteenth, Forty-fourth, Sixty-eighth, Ninety-fifth and One Hundred and First Judicial District Courts of Dallas County, Texas, shall be paid the sum of five dollars for each and every day that he shall so serve as bailiff of each of the said courts. [Acts 1925, p. 273.]

Art. 1059. [1162] [1117] **Certificates for pay.** — The amount due jurors and bailiffs shall be paid by the county treasurer, upon the certificate of the proper clerk or the justice of the peace, stating the service, when and by whom rendered, and the amount due therefor.

Art. 1060. [1163] [1118] **Receivable for taxes.**—Drafts drawn and certificates issued under the provisions of this chapter may be transferred by delivery, and shall without further action or acceptance by any authority, except registration by the county treasurer, be receivable from the holder thereof at par for all county taxes. [O. C. 968.]

## CHAPTER FOUR.

## COSTS TO BE PAID BY DEFENDANT.

### 1. IN DISTRICT AND COUNTY COURTS.


| | Article | | Article |
|---|---|---|---|
| District and county attorneys | 1061 | District and county clerks | 1064 |
| Joint defendants | 1062 | Peace officers | 1065 |
| Attorney appointed | 1063 | | |


Art. 1061. [1168] [1123] **District and county attorneys.**—District and county attorneys shall be allowed the following fees in cases tried in the district or county courts, or a county court at law, 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 when on appeal the judgment is affirmed, ten dollars. [Acts 1876, p. 284.]

Art. 1062. [1170] [1124] **Joint defendants.**—Where several defendants are tried together, but one fee shall be allowed and taxed in the case for the district or county attorney. Where the defendants sever and are tried separately, a fee shall be allowed and taxed for each trial.

Art. 1063. [1171] [1125] **Attorney appointed.** — An attorney appointed by the court to represent the State in the absence of the district or county attorney shall be entitled to the fee allowed by law to the district or county attorney.

Art. 1064. [1172] [1126] **District and county clerks.**—The following fees shall be allowed the clerks of the district and county courts:

1. For issuing each capias or other original writ, seventy-five cents.

2. For entering each appearance, fifteen cents.

3. For docketing cause, to be charged but once, twenty-five cents.
4. For swearing and impaneling a jury, and receiving and recording the verdict, fifty cents.
5. For swearing each witness, ten cents.
6. For issuing each subpoena, twenty-five cents.
7. For each additional name inserted therein, fifteen cents.
8. For issuing each attachment, fifty cents.
9. For entering each order not otherwise provided for, fifty cents.
10. For filing each paper, ten cents.
11. For entering judgment, fifty cents.
12. For entering each continuance, twenty-five cents.
13. For entering each motion or rule, ten cents.
14. For entering each recognizance, fifty cents.
15. For entering each indictment or information, ten cents.
16. For each commitment, one dollar.
17. For each transcript on appeal, for each one hundred words, ten cents. [Id.]

Art. 1065. [1173] **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, two dollars.
2. For summoning each witness, seventy-five 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 and fifty cents.
5. For each commitment or release, one dollar.
6. Jury fee, in each case where a jury is actually summoned, one dollar.
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, four dollars.
8. For conveying a witness attached by him to any court out of his county, four dollars for each day or fractional part thereof, and 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 one-half cents.
11. For each mile he may be compelled to travel in executing

criminal process and summoning or attaching witness, seven and one-half cents. For traveling in the service of process not otherwise provided for, the sum of seven and one-half 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 only for the distance actually and necessarily traveled in the same. [Acts 1923, p. 406.]

## 2. IN JUSTICE'S COURTS.


| | Article | | Article |
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| Fees of justices | 1066 | No fee allowed attorney | 1070 |
| Fees of peace officers | 1067 | Examining court in misdemeanor | 1071 |
| Fees of State's attorney | 1068 | Officers in examining court | 1072 |
| Joint prosecution | 1069 | | |


Art. 1066. [1175] [1128] **Fees of Justices.**—Justices of the peace shall receive the following fees in criminal actions tried before them, to be collected of the defendant in case of his conviction:

1. For each warrant, seventy-five cents.
2. For each bond taken, fifty cents.
3. For each subpoena for one witness, twenty-five cents.
4. For each additional name inserted therein, ten cents.
5. For docketing each case, ten cents.
6. For each continuance, twenty cents.
7. For swearing each witness in court, ten cents.
8. For administering any other oath or affirmation without a certificate, ten cents.
9. For administering an oath or affirmation with a certificate thereof, twenty-five cents.
10. Jury fee where a case is tried by jury, fifty cents.
11. For each order in a case, twenty-five cents.
12. For each final judgment, fifty cents.
13. For each application for a new trial with the final judgment thereof, 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. [Acts 1876, p. 291.]

Art. 1067. [1176] [1129] **Fees of peace officers.** — Constables, marshals or other peace officers who execute process, and perform services for justices in criminal actions, shall receive the same fees allowed to sheriffs for the same services.

Art. 1068. [1177] [1130] **Fees of State's attorney.**—If the defendant pleads guilty to a charge before a justice, the fee allowed the attorney representing the State shall be five dollars. The attorney who represents the State in a criminal action in a

justice's court shall receive, for each conviction on a plea of not guilty, where no appeal is taken, ten dollars.

Art. 1069. [1179] [1131] **Joint prosecution.**—Where several defendants are prosecuted jointly, and do not sever on trial, but one attorney's fees shall be allowed.

Art. 1070. [1180] [1132] **No fee allowed attorney.** — 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, that when pleas of guilty are accepted in any justice court, at any other time than the regular term thereof, the county attorney shall receive the sum of five dollars. In no case shall the county attorney, in consideration of a plea of guilty remit any part of his lawful fee. [Acts 1903, p. 219.]

Art. 1071. [1181] **Examining court in misdmeanor.**—Justices of the peace who sit as an examining court in misdemeanor cases shall be entitled to the same fees allowed by law to such justices for similar services in the trial of such cases, not to exceed three dollars in any one case, to be paid by the defendant in case of final conviction. [Acts 1907, p. 215.]

Art. 1072. [1182] **Officers in examining court.** — Sheriffs and constables serving process and attending any examining court in the examination of a misdemeanor case shall be entitled to such fees as are allowed by law for similar services in the trial of such cases, not to exceed three dollars in any one case, to be paid by the defendant in case of final conviction. [Id.]

### 3. JURY AND TRIAL FEES.


| | Article | | Article |
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| In district and county courts | 1073 | Several defendants | 1076 |
| Trial fee | 1074 | Jury fee collected | 1077 |
| Jury fee in justice court | 1075 | | |


Art. 1073. [1183] [1133] **In district and county courts.**—In each criminal action tried by a jury in the district or county court, or county court at law, a jury fee of five dollars shall be taxed against the defendant if he is convicted.

Art. 1074. [1184] [1134] **Trial fee.**—In each case of conviction in the county court or county court at law, whether by a jury or by the judge, there shall be taxed 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 over in the same manner as in the case of a jury fee.

Art. 1075. [1185] [1135] **Jury fee in justice court.**—If the defendant is convicted in a criminal action tried by a jury in a justice court, a jury fee of three dollars shall be taxed against him.

Art. 1076. [1186] [1136] **Several defendants.** — Only one jury fee shall be taxed against several defendants tried jointly. A jury fee shall be taxed in each trial if they sever and are tried separately.

Art. 1077. [1187] [1137] **Jury fee collected.**—A jury fee

shall be collected as other costs in a case, and the officer collecting it shall forthwith pay it to the county treasurer of the county where the conviction was had.

## 4. WITNESS FEES.


| | Article | | Article |
|---|---|---|---|
| Fees of witnesses | 1078 | Witness record | 1081 |
| Taxed against defendant | 1079 | Witness liable for costs | 1082 |
| No fees allowed | 1080 | | |


Art. 1078. [1188] [1138] **Fees of witnesses.**—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.

Art. 1079. [1189] [1139] **Taxed against defendant.**—Upon conviction, the costs accruing from the attendance of witnesses shall be taxed against the defendant, upon the affidavit 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. The affidavit shall be filed with the papers in the case. [O. C. 457.]

Art. 1080. [1190] [1140] **No fees allowed.**—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. 1081. [1191] [1141] **Witness record.**—Each clerk of the district and county court or county court at law, and each justice of the peace, 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. 1082. [1192] [1142] **Witness liable for costs.**—In any criminal case 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 why he failed to obey the subpoena. [O. C. 979.]

# TITLE 16

## DELINQUENT CHILD.


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Art. 1083. **"Delinquent child."**—The term "delinquent child" shall include any boy under seventeen years of age or any girl under eighteen years of age who violates any penal law of this State, 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 is guilty of immoral conduct in a public place, or who knowingly patronizes or visits any place where a gambling device is being operated, or who habitually wanders about the street in the night time without being on any business or occupation, or who habitually wanders about any railroad yard or tracks, or habitually jumps on and off moving trains or who enters any car or engine without lawful authority. Any such 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, and as otherwise so provided so as to effect the object of this law. [Acts 4th C. S. 1918, p. 43.]

Art. 1084. **Indictment.** — If an indictment does not allege the age of the accused to be within the juvenile limits, then at any time before announcement of ready, the accused, or the parent, guardian, attorney or next friend of the accused may make and file an affidavit in court setting up that such accused is a male then under seventeen years of age, or is a female then under eighteen years of age. When such affidavit is filed, the judge shall hear evidence on the question of the age of the accused, and if he is satisfied therefrom that the accused, if a male is then under the age of seventeen years, or if a female is then under the age of eighteen years, the judge shall transfer the case to the juvenile docket, and proceed to try the child under the same indictment as a delinquent child.

Art. 1085. **Information and complaint.** — A proceeding against a delinquent child may be begun by an information based upon a sworn complaint, each of which shall state in general terms that the acts alleged constitute such child a delinquent child, and shall conform in other respects to the rules governing prosecutions for misdemeanors begun by information and complaint. Any proceeding so begun which states upon the face of the information that the age of the child is under seventeen in the case of males and under eighteen years in the case of females shall not be regarded as charging said child with a felony or a misdemeanor but as a delinquent child, although such acts alleged would otherwise charge a felony or a misdemeanor. If such pleading does not allege the age of the accused, then the accused, his or her parent, guardian, attorney or next friend,

may make and file an affidavit at any time before announcement of ready setting up the age of the accused, and on proof that such age is within the juvenile limits, the case shall be transferred to the juvenile docket, or, if the court is not a juvenile court to the proper juvenile court, entered on the juvenile docket and proceeded with against the accused as a delinquent child upon the same information and complaint.

Art. 1086. **Proof of age.**—The age of the accused shall not be admitted by the attorney representing the State, but shall be proved to the satisfaction of the court as in other cases where the age of a person is in question.

Art. 1087. **Arrest and custody.**—Upon filing of the proper charge, warrant or capias may issue as in other cases, but no incarceration of the child proceeded against thereunder shall be had unless, in the opinion of the judge of the court, or in his absence, then in the opinion of the officer executing the writ, it shall be necessary to insure the attendance of such child in court at the time required. To avoid such incarceration, the officer executing the process shall 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 such officer 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. If such child fails to appear when the court may require, the person or persons responsible for its appearance as herein provided, unless in the opinion of the court there shall be reasonable cause for such failure, may be punished for contempt of court. Where such child has so failed to appear, any warrant or capias issued in such case may be executed as in other cases. No child within the juvenile age shall be incarcerated in any compartment of a jail or lockup in which persons over the juvenile age are being detained. The proper authorities of all counties with a population of over one hundred thousand shall provide a suitable place for the detention of such children apart from any jail or lockup in which older persons are confined. Any such child shall have the right to give bond or other security for its appearance at the trial of such case. The court may appoint counsel to defend such child.

Art. 1088. **Taken before court.**—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 or corporation court upon a complaint sworn out in such court, or for any other reason, such justice or judge shall transfer the case to said county or district court. In any such case the court may hear and dispose of the case as if such child had been brought before the court upon information.

Art. 1089. **Verdict and judgment.**—When a juvenile is tried by a jury the verdict shall state the time and place of confinement. The proper judgment shall be rendered on the verdict.

Art. 1090. **Term of commitment.**—Any juvenile found by the court or jury to be a delinquent child shall be committed to the place or institution provided by law for such child, for an indeterminate period not extending beyond the time when such child shall reach the age of twenty-one years.

Art. 1091. **Substitution of place of confinement.** — In any proceeding in any juvenile court, the court or jury may substitute as a place of commitment any detention home, parental school, or school for girls or boys, established by any county, and the further disposition of the juvenile shall be governed as provided for by the laws relating to delinquent children.

Art. 1092. **Effect of conviction.**—A disposition of any delinquent child under this law or any evidence given in such case, shall not, in any civil, criminal, or other cause or proceeding whatever, in any court, be lawful or proper evidence against any child for any purpose whatever, except in subsequent cases against the same child under this law. Neither the conviction of the accused as a delinquent child nor the service of sentence thereunder shall deprive him or her of any rights of citizenship when such child shall become of full age.

Art. 1093. **Appeal.**—A prosecution and conviction of a juvenile shall be regarded as a criminal or misdemeanor case, and an appeal lies from such conviction directly to the Court of Criminal Appeals of Texas, the appeal to be governed by the same rules as apply in cases of misdemeanor.

## GENERAL REPEALING CLAUSE.

### Section 3.

Art. 1. Be it further enacted by the Legislature of the State of Texas: That all penal laws and all laws relating to criminal procedure in this State, that are not embraced in this Act and that have not been enacted during the present session of the Legislature, be and the same are hereby repealed. All laws and parts of laws relating to crime omitted from this Act have been intentionally omitted, and all additions have been intentionally added, and this Act shall be construed to be an independent Act of the Legislature enacted under the caption hereof, and the articles contained in this Act, as revised, re-written, changed, combined and codified shall not be construed as a continuation of former laws, except as otherwise herein provided.

Art. 2. The importance of this Act, and the near approach of the close of this session of the Legislature, and the fact that it is impossible to read this Act on any day or on three several days, creates an emergency and an imperative public necessity that the Constitutional rule requiring bills to be read on three several days be suspended, and it is so enacted.

Art. 3. This Act shall take effect and be in force from and after twelve o'clock, Meridian, of the First day of September, Anno Domini, One Thousand Nine Hundred and Twenty-five.

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