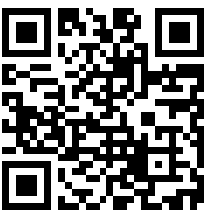
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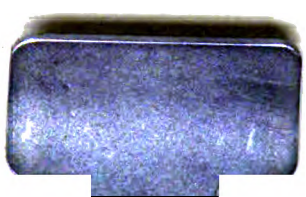


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Texas. Laws, statutes, etc. Codes, Criminal

BRANCH'S

ANNOTATED PENAL CODE

OF THE

STATE OF TEXAS

With Notes, Citations and Trial Briefs,
and Some Forms

A WORK ON STATUTORY CRIMINAL LAW

BY

E. T. BRANCH

Of the Houston Bar. Author of "Branch's Criminal Law"

VOLUME II

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TITLE XII

OFFENSES AFFECTING PUBLIC HEALTH

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CHAPTER I

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Article 694. (423) **Offensive trades and nuisances.**—If any person shall carry on any trade, business or occupation injurious to the health of those who reside in the vicinity, or shall suffer any substance which has that effect to remain on premises in his possession, he shall be punished by fine not less than ten nor more than one hundred dollars; and each separate day of carrying on such business, trade or occupation, or of permitting such substance to remain on the premises shall be considered a separate offense.

Art. 695. (424) **Pollution or obstruction of water courses.**—If any person shall in any wise pollute or obstruct any water course, lake, pond, marsh or common sewer, or continue such obstruction or pollution, so as to render the same unwholesome or offensive to the inhabitants of the county, city, town or neighborhood thereabout, he shall be fined in a sum not exceeding five hundred dollars. (Act Feb. 11, 1860, Acts of 1860, p. 97.)

Sec. 1294. **Pollution of water courses.**—It shall be unlawful for any person, firm or corporation, private or municipal, to pollute any water course, or other public body of water, from which water is taken for the uses of farm, live stock, drinking and domestic purposes, in the State of Texas, by the discharge, directly or indirectly,

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of any sewage or unclean water or unclean or polluting matter or thing therein, or in such proximity thereto as that it will probably reach and pollute the waters of such water course or other public body of water from which water is taken, for the uses of farm live stock, drinking and domestic purposes; provided, however, that the provisions of this bill shall not affect any municipal corporation situated on tide water; that is to say, where the tide ebbs and flows in such water course. A violation of this provision shall be punished by a fine of not less than one hundred dollars and not more than one thousand dollars. When the offense shall have been committed by a firm, partnership or association, each member thereof who has knowledge of the commission of such offense, shall be held guilty. When committed by a private corporation, the officers and members of the board of directors, having knowledge of the commission of such offense, shall each be deemed guilty; and when by a municipal corporation, the mayor and each member of the board of aldermen or commission, having knowledge of the commission of such offense, as the case may be, shall be held guilty as representatives of the municipality; and each person so indicated as above shall be subject to the punishment provided hereinbefore; provided, however, that the payment of the fine by one of the persons so named shall be a satisfaction of the penalty as against his associates for the offenses for which he may have been convicted; provided, the provisions of this Act shall not apply to any place or premises located without the limits of an incorporated town or city, nor to manufacturing plants whose affluents contain no organic matter that will putrify, or any poisonous compounds, or any bacteria dangerous to public health or destructive of the fish life of streams or other public bodies of water. (Act of March 27, 1913, Sec. 1. Acts of 1913, p. 90, amended by Act Feb. 25, 1915, Acts 1915, p. 38.)

Sec. 1295. **Providing for injunction.**—Upon the conviction of any person under section 1 of this Act, it shall be the duty of the court, or judge of the court, in which such conviction is had, to issue a writ of injunction, enjoining and restraining the person or persons or corporation responsible for such pollution, from a further continuance of such pollution; and for a violation of such injunction, the said court and the judge thereof shall have the power of fine and imprisonment, as for contempt of court, within the limits prescribed by law in other cases; provided, that this remedy by injunction and punishment for violation thereof shall be cumulative of the penalty fixed by section 1 of this Act; and the assessment of a fine for contempt shall be no bar to a prosecution under section 1; neither shall a conviction and payment of fine under section 1 be a bar to contempt proceedings under this section. (Act of March 27, 1913, Sec. 2, Acts of 1913, p. 90.)

Sec. 1296. **Building dams.**—The building of dams on defendant's own land for the purpose of irrigation is not an offense under article 695 of the Penal Code, although it causes water to overflow on the land of another. Stacy v. State, 54 Texas Crim. Rep. 611; 114 S. W. 807.

Art. 696. (425) **Leaving dead animal in road.**—If any person shall leave the carcass, or body of any horse, mule, ox, steer, cow or other animal which died in the actual possession of such person in any public road or highway, or in any street or alley of any village, town or city in this State, or within fifty yards of such public road, highway, street or alley, or shall leave any such carcass or body within five hundred yards of any private residence, he shall be fined in any sum not less than five dollars, nor more than one hundred dollars. (Act April 7, 1874, amended by the Act of March 31, 1913, Acts of 1913, p. 155.)

Sec. 1297. **Form for complaint.**

In the name and by the authority of the State of Texas:

Before me the undersigned authority on this day personally appeared..... who being by me duly sworn, deposes and says that John Doe heretofore on the..... day of ..... A. D. ..... in the county of ..... and State of Texas did leave the carcass and body of a horse (or "mule" or whatever animal it was) which died in the actual possession of said John Doe in (or "within fifty yards of") a public road there situate and leading from..... to ..... in said county.

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and commonly known as the.....road (or "a street in the city of..... there situate and known as.....street," etc.) (or "within five hundred yards of a private residence there situate, to wit, the private residence of.....").

Against the peace and dignity of the State.

.....

Subscribed and sworn to before me this the.....day of.....A. D. .....

.....(affiant)

J. P. Prec. No....., ...county, Texas.

Sec. 1298. **Leaving dead animal near road or residence.**—Article 696, making it an offense to leave the body of dead animals which died in the actual possession of such person in or near a public road, etc., applies only where such animal was in the manual possession of such person at the time it died. Ogg v. State, 48 Texas Crim. Rep. 231; 87 S. W. 348.

Art. 697. **Public buildings, railways, persons, etc., subject to rules of health officer.**—If any person having control of any public building, or any agent, manager, operator, employe or receiver of any railway company, sleeping car company, or any individual, shall fail to comply with the provisions of this chapter, and the rules and regulations promulgated by the State Health Officer, under the provisions thereof, he shall be deemed guilty of a misdemeanor, and, upon conviction, shall be punished by a fine of not less than fifty nor more than two hundred dollars. (Act 1903, p. 180.)

Sec. 1299. **Harboring a leper.**—Any person within this State who shall knowingly harbor or conceal any leper shall be deemed guilty of a misdemeanor and upon conviction shall be fined not less than fifty dollars and not more than five hundred dollars for every day of such concealment. (Sec. 7, Act April 21, 1909, Acts 1909, p. 336.)

Sec. 1300. **Sterilizing dishes.**—Any person or persons conducting or managing or their agents of any hotel, cafe, restaurant and any other public place where meals are served, must sterilize in hot boiling water, all plates, cups, saucers, knives, forks, spoons and such other utensils as may be used in serving meals and drinks, after being used and before permitting them to be used again; provided that the water in which said eating utensils are sterilized, shall be changed every two hours; provided further that no napkins shall be furnished for use after being used once until laundered. Any person or persons conducting or managing or their agents of any public eating house who violates the provisions hereof shall be fined not less than five dollars nor more than one hundred dollars for each separate offense. (Act Feb. 12, 1915, Acts 1915, p. 10.)

CHAPTER II

SALE OF UNWHOLESOME FOOD, DRINK OR MEDICINE, OR MILL PRODUCTS

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Art. 698. (426) **Selling flesh not slaughtered, or slaughtered when diseased.**—If any person shall knowingly sell the flesh of any animal dying otherwise than by slaughter, or slaughtered when diseased, he shall be fined as provided in article 711 of this chapter.

Sec. 1301. **Form for complaint.**

In the name and by the authority of the State of Texas:

Before me the undersigned authority on this day personally appeared..... who being by me duly sworn, deposes and says that John Doe heretofore on the..... day of ..... A. D. ..... in the county of ..... and State of Texas did knowingly sell for food, an adulterated article of food, to wit, the flesh of an animal, to wit, a cow (or "calf" or whatever animal it was) which said animal died otherwise than by slaughter to ..... without then and there making the same fully known to the said ....., the said John Doe then and there at the time of said sale well knowing that said animal had died as aforesaid.

Against the peace and dignity of the State.

.....(affiant)

Subscribed and sworn to before me this ..... day of ..... A. D. .....

.....

J. P. Prec. No....., ...county, Texas.

Sec. 1302. **Selling diseased meat—Form for complaint.**

In the name and by the authority of the State of Texas:

Before me the undersigned authority on this day personally appeared..... who being by me duly sworn, deposes and says that John Doe heretofore on the..... day of.....A. D.....in the county of.....and State of Texas did knowingly sell to ..... for food an adulterated article of food, to wit, the flesh of an animal, to wit, a calf (or "cow" or whatever it was) slaughtered when diseased, and being then and there the product of a diseased animal, without then and there making the same fully known to the said ..... the said John Doe then and there well knowing that said animal was slaughtered when diseased.

Against the peace and dignity of the State.

.....(affiant)

Subscribed and sworn to before me this ..... day of ..... A. D. .....

.....

J. P. Prec. No....., ...county, Texas.

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Sec. 1303. **Selling diseased meat.**—If the statute requires the sale to be made "knowingly," the proof must show that defendant knew the meat was diseased when he sold it. Teague v. State, 25 Texas Crim. App. 577; 8 S. W. 667.

If the purchaser is alleged to be unknown and the proof shows that his name could have been ascertained by the use of ordinary or proper diligence the allegation is not proven. Marxen v. State, 44 Texas Crim. Rep. 41; 68 S. W. 277.

Sec. 1304. **Pure Food Law.**

Art. 699. (Repealed by Act of March 13, 1911.)

Sec. 1305. **Manufacture or sale of adulterated or misbranded food or drug.**—No person, firm or corporation, shall within this State manufacture for sale, have in his possession with the intent to sell, offer or expose for sale, or sell or exchange any article of food or drug which is adulterated or misbranded within the meaning of this Act. The term "food" as used herein shall include all articles used for food, drink, flavoring, confectionery or condiment, by man, whether simple, mixed or compounded. That the term "drug" as used in this Act shall include all medicines and preparations for internal or external use recognized in the United States Pharmacopoeia or National Formulary, and any substance or mixture of substances intended to be used for the cure, mitigation or prevention of disease of either man or animal. (Act of March 13, 1911, Acts of 1911, p. 76. Sec. 1.)

Sec. 1306. **Indictment, information, and complaint.**—The particular way in which the article of food or drug was adulterated or misbranded should be alleged as the other sections of the "Pure Food Law" are descriptive of those terms, and defendant is entitled to know the facts relied on to make the State's case, so that he may, if he can, be prepared to meet it. Dorsey v. State, 38 Texas Crim. Rep. 527; 44 S. W. 514 (in effect overruling on this point Sanchez v. State, 27 Texas Crim. App. 15; 10 S. W. 756).

Art. 700. **Adulterated foods, etc., defined.**—(Repealed by Act of March 13, 1911.)

Sec. 1307. **"Adulterated" defined.**—For the purposes of this Act an Article shall be deemed to be adulterated:

(a) In the case of drugs;

(1) If, when sold under or by a name, recognized in the eighth decennial revision of the United States Pharmacopoeia or in such United States Pharmacopoeia as was official at the time of labeling it, or in the National Formulary, it differs from the standard strength, quality or purity laid down therein;

(2) If, when sold under or by a name not recognized in the eighth decennial revision of the United States Pharmacopoeia, but which is found in some other pharmacopoeia or other standard work on materia medica, it differs materially from the standard of strength, quality or purity laid down in such work;

(3) If its strength, quality or purity falls below the professed standard under which it is sold.

(b) In the case of confectionery:

If it contains terra alba, barytes, talc, chrome yellow, or other mineral substance or poisonous color or flavor, or other ingredients deleterious or detrimental to health or any vinous, malt or spirituous liquor or compound, or narcotic drug.

(c) In the case of food;

(1) If any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength;

(2) If any substance has been substituted wholly or in part for the article;

(3) If any valuable constituent of the article has been wholly or in part abstracted, or if the product be below that standard of quality, quantity, strength or purity represented to the purchaser or consumer;

(4) If it be mixed, colored or powdered, coated or stained in a manner whereby damage or inferiority is concealed;

(5) If it contain any added poisonous or other added deleterious ingredient which may render such article injurious to health, provided, that when in the preparation of food products for shipment they are preserved by any external application applied in such manner that the preservative is necessarily removed mechanically, or

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by maceration in water or otherwise, and directions for the removal of said preservative shall be printed on the covering of the package, the provisions of this Act shall be construed as applying only when said products are ready for consumption;

(6) if it consists in whole or in part of a filthy, decomposed or putrid animal or vegetable substance, or any portion of an animal or vegetable unfit for food, whether manufactured or not, or if it is the product of a diseased animal, or one that has died otherwise than by slaughter. (Act of March 13, 1911, Acts of 1911, p. 76, Sec. 2.)

Sec. 1308. **"Filthy" defined.**—For the purpose of this Act, the term "filthy" shall be deemed to apply to food not securely protected from flies, dust, dirt, and as far as may be necessary by all reasonable means from all foreign or injurious contaminations. (Act of March 13, 1911, Acts of 1911, p. 76, Sec. 2.)

Art. 701. **Misbranded articles of food, etc., defined.**—(Repealed by Act of March 13, 1911.)

Sec. 1309. **"Misbranded" defined.**—The term "misbranded," as used herein, shall apply to all drugs or articles of food or articles which enter into the composition of food, the package or label of which shall bear any statement, design or device regarding such article or the ingredients or substances contained therein which shall be false or misleading in any particular.

For the purposes of this Act an article shall also be deemed to be misbranded:

(a) In the case of drugs;

(1) if it be an imitation of or offered for sale under the name of another article;

(2) if the contents of the package as originally put up shall have been removed in whole or in part and other contents shall have been placed in such package, or if the package fail to bear a statement on the label of the quantity or proportion of any morphine, phenocetice, opium, cocaine, heroin alpha, or beta eucaine, chloroform, cannabis indicia, chloral hydrate, or acetanelid or any derivative or preparation of any such substances contained therein:

(b) In the case of food:

(1) if it be an imitation of or offered for sale under the distinctive name of another article;

(2) if it be labeled or branded so as to deceive or mislead the purchaser or purport to be a foreign product when not so, or if the contents of the package as originally put up shall have been removed in whole or in part and other contents shall have been placed in such package, or if it fails to bear a statement on the label of the quantity or proportion of any morphine, opium, cocaine, heroin alpha, or beta eucaine, phenacetin chloroform, cannabis indicia, chloral hydrate or acetanelid, or any derivative or preparation of any of such substances contained therein;

(3) if in package form and the contents are stated in terms of weight or measure, they are not plainly and correctly stated on the outside of the package;

(4) if the package containing it or its labels bear any statement, design or device regarding the ingredients or the substances contained therein, which statement, design or device shall be false or misleading in any particular, provided that an article of food which does not contain any added poisonous or deleterious ingredient shall not be deemed to be adulterated or misbranded in the following cases: First, in case of mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced; second, in the case of articles labeled, branded or tagged so as to plainly indicate that they are compounds, imitations or blends; that the term "blend," as used herein, shall be construed to mean a mixture of like substances, not excluding harmless coloring or flavoring ingredients used for the purpose of coloring and flavoring only; and provided, further, that nothing in this Act shall be construed as requiring or compelling proprietors or manufacturers of proprietary foods which contain no unwholesome added ingredients to disclose their trade formulas except in so far as the provisions of this Act may require to secure freedom from adulteration or misbranding. (Act of March 13, 1911, Acts of 1911, p. 76, Sec. 3.)

Art. 702. (Repealed by Act of March 13, 1911.)

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Art. 703. **Cider not produced wholly from juice of fruit.**—It shall be unlawful for any person to manufacture, sell, offer or expose for sale or exchange, any cider not produced wholly from the juice of fruit. (Acts 1909, p. 168, Chapter 94. Act of 1911 states that the Act of 1909 is repealed.)

Sec. 1310. **Manufacture or sale of food to which has been added preservatives.**—It shall be unlawful for any person to manufacture, sell, offer or expose for sale or exchange any article of food to which has been added formaldehyde, boric acid or borates, benzoic acid or benzoate sulphurous acids or sulphites, salacyclic acid or salacylates, abrastal, beta naphthal, fluorine compounds, dulcin, glucin cocaine, sulphuric acid or other mineral acid except phosphoric acid, any preparation of lead or copper or other ingredient injurious to health; provided that nothing in this Act shall be construed as prohibiting the sale of catsups, sauces, concentrated fruits, fruit juices, and like substances preserved with one-tenth of one per cent of benzoate of soda, or the equivalent benzoic acid, when a statement of such fact is plainly indicated upon the label; provided, further, that the oxides of sulphur may be used for bleaching, clarifying and refining food products. (Act of March 13, 1911, Acts of 1911, p. 76, Sec. 4.)

Art. 704. **Manufacture or sale of food to which has been added certain acids, etc., prohibited.**—(This article is substantially like Sec. 4, Act of 1911, copied in the preceding section.)

Art. 705. **Baking powder compound to be labeled.**—(This article is the same as section 5 of the Act of March 13, 1911, copied in the following section.)

Sec. 1311. **Baking powder to be labeled.**—Whoever manufactures for sale within this State, or offers or exposes for sale or exchange or sells any baking powder or compound intended for use as a baking powder under any name or title whatsoever shall securely affix or cause to be securely affixed to the outside of every box, can or package containing such baking powder or like mixture or compound a label distinctly printed in plain capital letters in the English language, containing the name and residence of the manufacturer or dealer, and the ingredients of the baking powder. Baking powder containing less than 10 per cent of available carbon dioxide shall be deemed to be adulterated. (Act of March 13, 1911, Acts of 1911, p. 76, Sec. 5.)

Art. 706. **Watered, adulterated or impure milk.**—(This article is substantially the same as section 6 of the Act of 1911, the only difference is that the latter omits the words "fermentation or" before the words "putrefaction.")

Sec. 1312. **Watered, adulterated or impure milk.**—It shall be unlawful for any person either by himself or agent to sell or expose for sale or exchange any unwholesome, watered, adulterated or impure milk or swill milk or colostrum, or milk from cows kept upon garbage, swill or any other substance in a state of putrefaction or other deleterious substances, or from cows kept in connection with any family in which there are infectious diseases, or from sick or diseased cows; provided, "skim milk" may be sold if on the can, or package from which such milk is sold, the words "skim milk" are distinctly painted in letters not less than one inch in length. (Act of March 13, 1911, Acts of 1911, p. 76, Sec. 6.)

Sec. 1313. **Adulterated or impure milk.**—Under the former statute making knowledge of the seller an element of the offense the burden was on the State to show that defendant knew the milk was adulterated when he sold it or offered it for sale. Sanchez v. State, 27 Texas Crim. App. 15; 10 S. W. 756; but under the Act of 1911 the burden is on defendant to show mistake of fact, if any there was, and the State is not required in the first instance to show that defendant knew that the milk was watered, adulterated or impure.

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Art. 707. **City council has power to appoint inspector of milk.**—Authority is hereby given the common council, or commission of any city or town, to appoint an inspector of milk in any such city or town, and to fix his compensation. (Acts of 1909, p. 169.)

Art. 708. **Dealer not to be prosecuted, when.**—(This article has the same words as section 7 of the Act of March 13, 1911.)

Sec. 1314. **Dealer not to be prosecuted, when.**—No dealer shall be prosecuted under the provisions of this Act, when he can establish a guaranty signed by the wholesaler, jobber, manufacturer, or other party residing within this State or in the United States from whom he purchases such article, to the effect that the same is not adulterated or misbranded within the meaning of this Act, designating it. Said guaranty, to afford protection, shall contain the name and address of the party making the sale of such articles to such dealer, and in such case said party or parties shall be amenable to the prosecutions, fines and other penalties, which would attach, in due course to the dealer under the provisions of this Act. (Act of March 13, 1911, Acts of 1911, p. 76, Sec. 7.)

Art. 709. **Dairy and food commissioner not to furnish certificates of purity.**—(This article has the same words as section 17 of the Act of March 13, 1911.)

Art. 710. **Obstructing dairy and food commissioner.**—(This article is repealed by the Act of March 13, 1911, section 19 of that Act prescribing a penalty of $25 to $200.)

Art. 711. **Penalty for violating any provision of this law.**—(This article is repealed by the Act of March 13, 1911, section 8 of that Act prescribing the same penalty of $25 to $200.)

Sec. 1315. **Penalty for violating pure food law.**—Whoever shall do any of the acts or things prohibited, or wilfully neglect or refuse to do any of the acts or the things enjoined by this Act, or in any way violate any of its provisions, shall be deemed guilty of a misdemeanor, and shall be punished by a fine of not less than $25.00 nor more than $200.00. (Act of March 13, 1911, Acts of 1911, p. 76, Sec. 8.)

Sec. 1316. **Duty of Dairy and Food Commissioner.**—It shall be the duty of the Dairy and Food Commissioner, or any inspector or deputy appointed by him, to carefully inquire into the quality of the foods and drug products manufactured or sold or exposed for sale, or offered for sale in this State, and they may in a lawful manner procure samples of the same and make due and careful examination and analysis of all or of any such food and drug products, to discover if the same are adulterated, or misbranded, impure, or unwholesome, in contravention of this Act, and it shall be the duty of the commissioner to make complaint against the manufacturer or vendor thereof, in the proper county, and furnish the evidence thereon and thereof to obtain a conviction for the offense charged. The Dairy and Food Commissioner, or his inspectors, or any person by him duly appointed for that purpose, shall make complaint and cause proceedings to be commenced against any person for the violation of any of the laws relative to adulterated, misbranded, impure or unwholesome food, and in such case he shall not be obliged to furnish security for costs; and he shall have power in the performance of his duties to enter into any creamery, factory, store, salesroom, drug store or laboratory, or place where he has reason to believe foods or drugs are made, prepared, sold or offered for sale or exchange, and to open any cask, tub, jar, bottle or package containing or supposed to contain any article of food or drug and examine or cause to be examined the contents thereof, and take therefrom samples for analysis. The persons making such inspection shall take such sample of such article or product and he shall mark and seal such sample and shall tender at the time of taking it to the manufacturer or vendor of such product or to the person having the custody of the same the value thereof, and a statement in writing of the reason for taking such sample. It shall also be the duty of the Dairy and

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Food Commissioner to formulate, publish and enforce such rules and regulations as may be necessary to enforce this Act, and he shall adopt the standards for foods, food products, beverages, drugs, etc., and the methods of analysis recognized as official by the United States Department of Agriculture in so far as they are applicable in the light of modern discovery and scientific research. (Act of March 13, 1911, Acts of 1911, p. 76, Sec. 16.)

Sec. 1317. **Commissioner or deputies not to furnish testimonials.**—It shall be unlawful for the Dairy and Food Commissioner or his deputy or assistants while they hold office to furnish to any individual, firm or corporation any certificate as to the purity or excellence of any article manufactured or sold to or by them to be used as food or drug or in the preparation of food or drugs. (Act of March 13, 1911, Acts of 1911, p. 76, Sec. 17.)

Sec. 1318. **Hindering Food Commissioner or assistant.**—Any person who shall wilfully hinder or obstruct the Dairy and Food Commissioner, or his inspector, or other persons by him duly authorized in the exercise of the powers conferred upon him by this Act, shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than $25.00 nor more than $200.00. (Act of March 13, 1911, Acts of 1911, p. 76, Sec. 19.)

MILL PRODUCTS

Art. 712. **Standard weights, etc.**—Mill products hereinafter mentioned shall have the following standard weights, viz.: Flour, one hundred and ninety-six pounds per barrel, or forty-eight pounds per sack; corn meal, bolted or unbolted, thirty-five pounds per sack, and feed made from cereals of any kind, whether pure, mixed or adulterated, one hundred pounds per sack. Fractional barrels and sacks shall weigh in the same proportion; and these weights shall be net and exclusive of the barrel or sack in which such product is packed. (Acts 1905, p. 227, Sec. 1.)

Art. 713. **Correct name and net weight to be on box, etc.**—The correct name and the true net weight of the contents of each and every hogshead, barrel, box, cask, bale, sack or package of any of the foregoing products, whether sold in single packages or lots, shall be plainly marked, branded or stenciled in large, legible letters and figures, not less than two inches in size, upon the exterior of such hogshead, barrel, box, cask, bale, sack or package in a conspicuous place, as the head in case of hogsheads or barrels, and the front or branded side in case of sacks, bales or packages; and it shall be unlawful for any person, firm or corporation, or the agent, employe or representative of any person, firm or corporation, to sell or exchange, or offer for sale or exchange, any of such products so packed or contained, until the provisions hereof have been complied with. (Acts 1905, p. 227, Sec. 2.)

Art. 714. **Mixed or adulterated cereals to be marked.**—It shall be unlawful for any person, firm or corporation, or the agent, employe or representative of any person, firm or corporation, to sell or exchange or offer for sale or exchange, whether in single packages or lots, any product composed of mixed cereals of any kind or any cereal adulterated in any manner, unless the word "adulterated" is plainly marked, printed or stenciled diagonally across the other marks or brands, if

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any, on the hogshead, barrel, box, bale, cask, sack or package containing the same, or in case there are no other marks thereon, then across such hogshead, barrel, box, cask, bale, sack or package, in a conspicuous place in large legible letters and figures not less than two inches in size. (Acts 1905, p. 227, Sec. 3.)

Art. 715. **Penalty.**—If any person shall knowingly violate the provisions of this law, he shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in any sum not less than twenty-five dollars nor more than one thousand dollars, and each transaction shall be deemed a separate offense. (Acts 1905, p. 227, Sec. 4.)

Art. 716. **Manufactured wheat or corn products, packages how marked or branded.**—Any person, firm, corporation or agent, employe or representative of any person, firm, corporation, manufacturer or dealer in said manufactured wheat or corn products in original packages, and offering the same for sale in this State, whether said packages are sold singly or in lots, and all manufacturers or dealers of flour, meal or feed from the above enumerated grain products in this State, when offering the same for sale in original packages, whether sold in single packages or lots, shall place in large, legible letters and figures, not less than two inches in size, on the package or packages so offered for sale, the name of the contents and the actual net weight of the contents of said package or packages; and it shall be unlawful for any such person to sell, or offer to sell, any of the articles mentioned in this Act which have been falsely labeled, knowing the same to be falsely labeled. All adulterated wheat or corn products shall have stamped upon the sacks or barrels, "adulterated." (Act 1899, p. 304.)

CHAPTER III

NURSERY AND FARM PRODUCTS

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Article 717. **Keeping trees, etc., affected with contagious disease.**—No person in this State shall knowingly or wilfully keep any peach, almond, apricot, nectarine or other trees affected with the contagious

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disease known as yellows. Nor shall any person keep for sale any apple, peach, plum or other tree affected with nematode galls, crown galls, or root rot. Nor shall any person knowingly or wilfully keep any plum, cherry or other trees affected with the contagious disease or fungus known as black knot; nor any tree, shrub or plant infested with or by the San Jose scale or other insect pest dangerously injurious to, or destructive of, trees, shrubs or other plants; nor any orange or lemon trees, citrus stocks, cape jasmines or other trees, plants or shrubs infested with "white fly" or other injurious insect pests or contagious diseases of citrus fruits; nor subtropical plants, shrubs, evergreens or ornamentals; nor any china, forest or other trees, shrubs or plants, infested with injurious insect pests or contagious diseases. Every such tree, shrub or plant shall be a public nuisance, and as such it shall be the duty of the Commissioner of Agriculture or his representatives to abate it and no damage shall be awarded for entering upon the premises upon which there are trees, shrubs or plants infected with yellows, black knot, crown gall or other infectious or dangerous disease, or infested with San Jose scale or other dangerous insect pest, for the purpose of legally inspecting the same; nor shall any damages be awarded for the treatment by the Commissioner of Agriculture, or his duly authorized agents or representatives, of such trees, shrubs or plants, or for altogether destroying such trees if necessary to suppress such insect, pest or disease, if done in accordance with the provisions of this article. But the owner of the trees, shrubs or plants shall be notified immediately upon its being determined that such trees, shrubs or plants should be destroyed, by a notice in writing signed by the commissioner or the person or persons representing him, which said notice in writing shall be delivered in person to the owner of such trees, shrubs or plants, or left at the usual place of residence of such owner, or if such owner be not a resident of the locality, to notify by leaving such notice with the person in charge of the premises, trees, shrubs or plants, or in whose possession they may be. Such notice shall contain a brief statement of the facts found to exist, whereby it is necessary to destroy such trees, shrubs or plants, and shall call attention to the law under which it is proposed to destroy them, and the owner shall within ten days from the date upon which such notice shall have been received, remove and burn all such diseased or infected trees, shrubs or plants. If, however, in the judgment of said commissioner, or person representing him, any tree, shrub or plant infected with any disease, or infested with dangerously injurious insects, can be treated with sufficient remedies, he may direct such treatment to be carried out by the owner under the direction of the commissioner, agent, employe or representatives. In case of objections to the findings of the chief inspector, employes or representatives of the commissioner, an appeal may be made to the commissioner, whose decision shall be final. An appeal must be taken within five days from service of said notice, and shall act as a stay of proceedings until it is heard and decided. When the commissioner, or chief inspector, or employe, or representa-

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tive appointed by him, shall determine that any tree or trees, shrubs or other plants must be treated or destroyed forthwith, he may employ all necessary assistance for that purpose, and such representative or representatives, agent or agents, employe or employes may enter upon any or all premises necessary for the purpose of such treatment, removal or destruction. But such commissioner or the person representing him shall, before such treatment or destruction, first require the owner or person in charge of the trees, shrubs or plants, to treat or destroy same as the case may be; and upon the refusal or neglect upon the part of said owner or person in charge to so treat or destroy such trees, plants or shrubs, then such commissioner, chief inspector, or person or persons representing him shall treat or destroy such trees, shrubs or plants, and all charges and expenses thereof shall be paid by such owner or person in charge of said trees, shrubs or plants, and shall constitute a legal claim against such owner or person in charge, which may be recovered in any court having jurisdiction upon the suit of such commissioner or chief inspector, or the county attorney of the county where the premises are situated, together with all costs, including an attorney fee of ten dollars, to be taxed as other costs. (Acts 1909, p. 316, Sec. 1.)

Art. 718. **Commissioner of Agriculture cause examination of.**—The Commissioner of Agriculture shall cause an examination to be made at least once each year of each and every nursery or other place where trees, shrubs or plants, commonly known as nursery stock, are grown or exposed for sale, for the purpose of ascertaining whether the trees, shrubs or plants therein kept, or propagated for sale, are infected with contagious disease or diseases, or infested with insect pests. If after such examination it is found that the said trees, shrubs or other plants so examined are apparently free in all respects from any contagious or infectious disease or diseases, dangerously injurious insect pest or pests, the said commissioners shall isue to the owner or proprietor of the stock so examined a certificate, setting forth the fact that the stock so examined was at the time of such examination apparently free from any and all such disease or diseases, insect pest or pests. No such certificate shall be negotiable or transferable, and shall be void if sold or transferred. Any such act or sale or transference shall be punishable as provided by this section. (Acts 1909, p. 316, Sec. 2.)

Art. 719. **Nursery stock shipped to be accompanied by certificate.**—All nursery stock consigned for shipment, or shipped by freight, express or other means of transportation shall be accompanied by a copy of said certificate attached to each car, box, bale, bundle or package. It is specially provided that when such box, bale, bundle or package, contains nursery stock to be delivered to more than one individual, partnership or corporation, that each portion of such nursery stock to be delivered to such individual, partnership or corporation shall also bear a copy of the certificate of inspection issued as provided in this article. Should any individual, partnership or corporation, nursery

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agent, or dealer or broker, send out or deliver, within the State, trees, vines, shrubs, plants, buds or cuttings, commonly known as nursery stock, and which are subject to the attacks of insects and diseases above provided for, unless he has in his possession a copy of said certificate, dated within a year thereof, deface or destroy such certificate, or wrongfully be in possession of such certificate, or fail to attach proper tags on each and every shipment, such tags bearing a copy of the said certificate, he shall be guilty of a misdemeanor, and upon conviction, shall be punished by a fine of not less than one hundred nor more than two hundred dollars. (Acts 1909, p. 316, Sec. 2.)

Art. 720. **Shipment into State to be accompanied by certificate.**—No individual, partnership or corporation, outside the State shall be permitted to ship nursery stock into this State without first filing with the Commissioner of Agriculture a certified copy of his or their certificate of inspection, issued by the proper authorities in the State in which the proposed shipment originates. This certificate must show that the stock to be shipped has been examined by the proper officer of inspection in that State or Province, and that the stock is apparently free from all dangerous insect pests or contagious diseases; and that when fumigation is required by the Commissioner of Agriculture, that the stock has been properly fumigated. Immediately upon receipt of the filing with the Commissioner of Agriculture of this certificate, he shall, in addition, make further investigation as to the moral standing and integrity of the applicant as will satisfy him that the applicant is entitled to receive a certificate. A fee of five dollars shall be required from the applicant upon receipt of which, the Commissioner of Agriculture may issue a certificate permitting the applicant to ship into the State. Each box, bale or package of nursery stock from outside the State shall bear a tag on which is printed a copy of the certificate of this State, and also a copy of the certificate of the State in which it originates. (Acts 1909, p. 316, Sec. 3.)

Art. 721. **Carrier not to receive, when.**—No transportation company or common carrier shall receive, transport or deliver shipments of nursery stock originating either within or without the State which do not bear shipping tags or labels showing the certificate of inspection of the State in which it originates, together with the permit from this State, if it be a shipment from without the State. Any individual, partnership or corporation from without the State, or any agent of any transportation company, common carrier, or any person or persons who shall violate the provisions of this article, shall be guilty of a misdemeanor, and upon conviction shall be fined not less than fifty nor more than two hundred dollars, together with all costs for each offense. Provided, that no transportation company or common carrier shall be liable for damages to the consignee or consignor for refusing to receive for transportation or delivery such trees, packages, bales, bundles or boxes, when not accompanied by copies of the certificates provided for in this article. The agent of such companies or common carriers shall report

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any such shipment to the Commissioner of Agriculture immediately. Shipments of nursery stock into this State, or originating within the State, without tags or proper certificates, as provided for in this article, shall be fined as provided herein. (Acts 1909, p. 316, Sec. 3.)

Art. 722. **Power to revoke certificate.**—The commissioner shall have the power to revoke any certificate which has been issued, when he shall find that false representations have been made by the party or parties to whom certificates have been issued, or who have refused to comply with the law, instructions, rules and regulations given by the Commissioner of Agriculture in reference to the provisions of this law and its enforcement. Any individual, partnership, or corporation, who shall be guilty of interfering with, refusing or preventing, the Commissioner of Agriculture, or his representatives, in the execution of their official duties, to enter upon any premises owned, used or leased by them, and any person who shall make false representations for the purpose of obtaining a certificate from the Commissioner of Agriculture shall be guilty of a misdemeanor, and upon conviction shall be fined not less than twenty-five dollars nor more than two hundred dollars, together with all costs for each offense. (Acts 1909, p. 316, Sec. 4.)

Art. 723. **Commissioner of Agriculture shall enforce.**—The Commissioner of Agriculture shall enforce the provisions of this law, and make and enforce such rules and regulations as may be deemed necessary for carrying the same into effect, not inconsistent with the same, and for the inspection of nurseries, orchards, forest trees, greenhouses and any other premises, deemed necessary to carry out the provisions of this law, together with all products originating from same within the meaning of this law. He shall also appoint one person who shall be designated as chief inspector, whose duty it shall be to inspect, or cause to be inspected, under the direction of the Commissioner of Agriculture, all trees, plants and shrubs, of every kind whatsoever, grown, produced or offered for sale by any nursery, dealer, individual or corporation in this State, and also to inspect, or cause to be inspected all orchards provided for in this law, and may employ such other person or persons, expert or experts, as may be necessary from time to time for administering and carrying into operation and enforcing the provisions of this law; provided, that the chief inspector employed under the provisions of this law shall not, during the time of such service, be interested in, or connected with, any nursery business whatsoever. The said commissioner shall fix and collect reasonable fees for the inspection, as provided for in this law, provided that not less than two dollars and fifty cents nor more than fifteen dollars shall be charged for each inspection under the provisions of this law. All fees, collected under the provisions of this article, shall be paid to the Department of Agriculture, and credited to the fund provided for administering this law. (Acts of 1909, p. 316, Sec. 5.)

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Art. 724. **Giving false certificate.**—If the said commissioner or any of his agents or employes give a false certificate, or a certificate without an actual examination of the nursery stock for which said certificate is given, to any owner, proprietor or lessee of any nursery, or owner of nursery stock, or to any other person, for use under the provisions of this law, he shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than five hundred dollars nor more than one thousand dollars for each offense. (Acts of 1909, p. 316, Sec. 6.)

Art. 725. **"Nursery stock" defined.**—The term "nursery stock," within the meaning of this law, shall include all fruit trees and vines, shade trees and forest trees, whether such shade or forest trees be especially grown for sale in a nursery or taken from the forests and offered for sale, all scions, seedlings, roses, evergreens, shrubbery or ornamentals, also such greenhouse plants or propagation stock, all classes of berry plants, cut flowers taken from plants, bushes, shrubs or other trees growing in this State, which may be a medium for disseminating injurious insect pests and contagious diseases. (Acts of 1909, p. 316, Sec. 8.)

Art. 726. **"Nursery" defined.**—The term "nursery" shall be construed to mean any grounds or premises on which nursery stock is grown, or exposed for sale. "Being in the nursery business" applies to any individual, partnership or corporation which may either sell or grow, or both grow and sell, nursery stock, regardless of the variety or quantity of nursery stock sold or grown. (Acts of 1909, p. 316, Sec. 8.)

Art. 727. **"Dealer" defined.**—The term "dealer" shall be construed to apply to any individual, partnership or corporation not growers of nursery stock, but who buy and sell nursery stock for the purpose of reselling and reshipping under their own name or title, independently of any control of those from whom they purchase. An "agent of a nursery or dealer" shall be construed to apply to any individual, partnership or corporation selling nursery stock, either as being entirely under the control of the nursery or dealer with whom the nursery stock offered for barter and traffic originates, or some co-operative basis for handling nursery stock with the grower or dealer, as specified in this article. That any such agent shall have proper credentials from the dealer he represents or co-operates with, and failing in that, any such agent shall be classed as a dealer, and subject to such rules and regulations as may be adopted relative to them, and shall be amenable to the same penalties for violations of any provisions of this law, or the rules and regulations of the commissioner. Provided, that any agent of any dealer or nurseryman, as specified in this article, who shall knowingly deliver to any individual, partnership or corporation, any tree, shrub, or plant infested or diseased, as specified in the provisions of this law, even though such trees, shrubs or plants are received in a box, bale or package, bearing a certificate of inspection, as provided in this law, shall be guilty of a misdemeanor, and upon conviction shall be fined not less than twenty-

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five dollars nor more than five hundred dollars for each such delivery to each individual, partnership or corporation. (Acts of 1909, p. 316, Sec. 8.)

Art. 728. **Making false representations.**—That any person, persons, company of persons, co-partnership, any member of a company or co-partnership, any corporation or any stockholder or officer thereof, any agent, servant or employe of any such person, persons, company of persons, co-partnership, member or stockholder of any company, co-partnership, or corporation or officer aforesaid who shall hereafter knowingly make any false representation or representations of the name, quality or nature of any nursery product for the purpose of inducing any vendee to buy the same, or who shall deliver to any vendee, knowingly, any such product other than that contracted for, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than one hundred dollars nor more than five hundred dollars, or imprisoned in the county jail not less than thirty days nor more than six months, or both so fined and imprisoned. (Acts of 1907, p. 304, Sec. 1.)

Art. 729. **Statute of limitation shall run, when.**—The statute of limitation shall not begin to run against a prosecution under the foregoing article until such product shall have developed and disclosed the fraud. (Acts of 1907, p. 304, Sec. 2.)

CHAPTER IV

FEED STUFFS AND BOLL WORM POISON

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Article 730. **Printed on tag, certificate of name, number of pounds, and analysis.**—Every lot or parcel of concentrated feeding stuffs, as defined in article 732, used for feeding farm live stock, sold, offered or

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exposed for sale in the State of Texas, for use within this State, shall have printed on a tag, described in article 734, a plainly printed statement clearly and truly certifying the number of net pounds of feeding stuff in the package, stating the name or names of material of which such weight is composed, where the contents are of a mixed nature, the name, brand or trade mark under which the article is sold, the name and address of the manufacturer or importer, the place of manufacture, such information as is required by article 740, if any, and a chemical analysis stating the minimum percentages it contains of crude protein, allowing one per cent of nitrogen to equal six and one-quarter per cent of protein, of crude fat, of nitrogen-free extract, and the maximum percentage it contains of crude fiber; these constituents to be determined by the methods adopted at the time by the Association of Official Agricultural Chemists of the United States. Mill products, hereinafter mentioned, shall have the following standard weight, viz: Flour, one hundred and ninety-six pounds per barrel, or forty-eight pounds per sack; corn meal, bolted or unbolted, thirty-five pounds per sack; rice bran, one hundred and forty-three pounds per sack; rice polish, two hundred pounds per sack; and other feeds made from cereals of any kind, whether pure, mixed or adulterated, one hundred pounds per sack. Fractional barrels and sacks shall weigh in the same proportion, and those weights shall be net and exclusive of the barrel or sack in which said product is packed. And any person, firm or association of persons, engaged in the manufacture of mill products of any character whatsoever, who shall use any bag, box, barrel or any other receptacle, into which to put such product other than the one bearing the name of such mill manufacturing the same, shall be guilty of a misdemeanor, and upon conviction therefor, shall be fined in any sum from one hundred dollars to one thousand dollars, or in addition thereto, be confined in the county jail for a term of thirty days, or both such fine and imprisonment. (Acts 1907, p. 243, Sec. 1.)

Art. 731. **"Concentrated commercial feeding stuffs" defined.**—The term "concentrated commercial feeding stuffs" as herein used, shall not include hay or straw, the whole seed or grains of wheat, rye, barley, oats, Indian corn, rice, buckwheat or broom corn, or any other whole or unground grains or seeds. (Acts 1905, p. 207, Sec. 2.)

Art. 732. **"Concentrated feed stuffs" defined.**—The term "concentrated feed stuffs" as herein used, shall include wheat bran, wheat shorts, linseed meals, cotton seed meals, pea meals, cocoanut meals, gluten meals, gluten feeds, maize feeds, starch feeds, sugar feeds, dried brewer's grains, malt sprouts, hominy feeds, cerealine feeds, rice meals, rice bran, rice polish, rice hulls, oat feeds, corn and oat chops, corn chops, ground beef or mixed fish feeds, and all other materials of similar nature not included in this article. (Acts of 1905, p. 207, Sec. 3.)

Art. 733. **Manufacturer or seller to file what, and deposit samples.**—Before any concentrated feeding stuff, as defined in article 732, is so

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offered or exposed for sale, the importer, manufacturer and party who causes it to be sold, or offered for sale, within the State of Texas, for use within this State, shall, for each and every feed stuff, bearing a distinguishing name and trade mark, file with the director of the Texas Agricultural and Experiment Station a certified copy of the statement named in article 730, and shall also deposit with said director a sealed glass jar or bottle containing not less than one pound of the feeding stuff to be sold or offered for sale, accompanied by an affidavit that it is a fair average sample thereof, and corresponds within reasonable limits to the feeding stuff which it represents in the percentage of protein, fat and crude fiber, and nitrogen-free extract which it contains. This shall not be construed to apply to farmers who grind their own feed stuff, and who do not adulterate same. (Acts of 1907, p. 243, Sec. 4.)

Art. 734. **To pay inspection tax and affix tag.**—The manufacturer, importer, agent or seller of each concentrated commercial feeding stuff, as defined in article 731 shall, before the article is offered for sale, pay to the director of the Texas Agricultural Experiment Station, an inspection tax of ten cents for each ton of such concentrated feeding stuff sold or offered for sale in the State of Texas, for use within this State, and shall affix to each lot shipped in bulk, and to each bag, barrel or other package of such concentrated feeding stuffs a tag to be furnished by said director, stating that all charges specified in said section have been paid. The director of said Texas Agricultural Experiment Station is hereby empowered to prescribe the form of such tags, and adopt such regulations as may be necessary for the enforcement of this law. Whenever the manufacturer or importer or shipper of a concentrated feeding stuff shall have filed a statement made in article 730, and have paid the inspection tax, no agent or seller of said manufacturer, inspector or shipper shall be required to file such statement or pay such tax. The amount of the inspection tax and penalties received by said director shall be paid into the State Treasury. So much of the inspection tax and penalties collected under this act shall be paid by the State Treasurer to the Treasurer of the Texas Agricultural and Mechanical College as the director of the Texas Agricultural Experiment Station may show by his bills has been expended in performing the duties required by this act, but in no case to exceed the amount of the inspection tax and penalties received by the State Treasurer under this act. Provided, the excess, if any, for the next two years may be used as it accrues, by the Board of Directors of the Agricultural and Mechanical College for the purpose of putting up a station administration building, to provide the necessary offices and laboratory space, in order that the purposes of this act may be carried out. (Acts of 1907, p. 243, Sec. 5.)

Art. 735. **Penalty for failure to affix tag or label.**—Any manufacturer, importer or agent, selling, offering or exposing for sale, any concentrated commercial feeding stuff, as defined in article 731 (it should be 732) without the statement required by article 730, and the tax tag required by article 734, or with a label stating that said feeding stuff

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contains substantially a larger percentage of protein, fat or nitrogen-free extract, or a smaller quantity of crude fiber than is contained therein, and any person violating any other provision of this law, shall on conviction in a court of competent jurisdiction be fined not less than one hundred dollars nor more than five hundred dollars for the first conviction, and not less than five hundred nor more than one thousand dollars for each subsequent conviction. (Acts of 1907, p. 243, Sec. 6.)

Art. 736. **Penalty for counterfeiting tag.**—Any person who shall counterfeit or use a counterfeit of the tag or tags prescribed by this law, knowing the same to be counterfeited, or who shall use them a second time after the said tags shall have been once attached shall be guilty of a misdemeanor, and on conviction thereof, shall be fined in a sum not exceeding five hundred dollars, one-half of which fine shall be paid to the informer; which fine may be doubled or tripled at each second or third conviction, and so on progressively for subsequent convictions. (Acts of 1905, p. 207, Sec. 7.)

Art. 737. **Shall furnish list of names or trade marks.**—All manufacturers and importers of concentrated commercial feeding stuffs, or dealers in same, shall, when requested, furnish the director of the Texas Experiment Station with a complete list of names or trade-marks of such feeding stuffs. (Acts of 1905, p. 207, Sec. 8.)

Art. 738. **Analysis to be made and published annually.**—The director of the Texas Agricultural Experiment Station shall cause one analysis or more to be made annually of each concentrated commercial feeding stuff sold, or offered for sale, under the provisions of this act. Said director is hereby authorized in person, or by deputy, to take a sample not exceeding two pounds in weight for analysis from any lot or package of concentrated commercial feeding stuff which may be in the possession of any manufacturer, importer, agent, dealer or buyer in this State, but said sample shall be drawn or taken in the presence of said party or parties in interest or their representatives, and shall be taken from a parcel, lot or number of parcels, which shall not be less than five per cent of the whole lot inspected, and shall be thoroughly mixed and divided into two samples and placed in glass or metal vessels, carefully sealed, and a label placed on each, stating the name or brand of the feeding stuff or material sampled, the name of the party from whose stock the sample is drawn and the date and place of taking such sample; and said label shall be signed by the director or his deputy and the party or parties at interest, or their representative present at the taking and sealing of said sample; provided, that where the party or parties at interest refuse to be present and take part in the sampling of the said feed stuffs, the director or his deputy may take said samples in the presence of two disinterested witnesses; one of said duplicate samples shall be retained by the director, and the other shall be left with the party whose stock was sampled, and the sample or samples retained by the director shall be for comparison with the certified statements made in articles

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730 and 733. The result of the analysis of the sample or samples so prescribed, together with such additional information as circumstances advise, shall be published in reports or bulletins by the Texas Agricultural and Mechanical College from time to time. (Acts of 1905, p. 207, Sec. 9.)

Art. 739. **"Importer" defined.**—The term "importer" for all the purposes of this law shall be taken to mean all such persons as shall bring into or offer for sale within this State concentrated commercial feeding stuffs manufactured without this State. (Acts of 1905, p. 207, Sec. 10.)

Art. 740. **Manufacture or sale of adulterated feed stuffs.**—Any person manufacturing, selling or offering for sale any adulterated feeding stuff within this State, shall upon conviction therefor, be punished by a fine of not less than twenty-five dollars and not more than two hundred dollars or be imprisoned in the county jail for a term of not less than thirty days and not more than sixty days, or by both such fine and imprisonment. For the purpose of this act a feeding stuff shall be deemed to be adulterated if it contains any sawdust, dirt, damaged feed, or any foreign matter whatever, or if it is in any respect not what it is represented to be, or if any rice hulls or chaff, peanut shells, corncobs, oat hulls, or other similar substances of little or no feeding value are admixed therewith; provided, that no wholesome mixture of feeding stuffs shall be deemed to be adulterated if the true percentage of constituents thereof is plainly and clearly stated on the package, and made known to the purchaser at the time of the sale. It shall be the duty of the Director of the Experiment Station to examine or have examined for adulteration all suspicious samples of feeding stuffs, and such other samples as may be desirable. (Acts of 1907, p. 243, Sec. 11.)

BOLL WORM POISON

Art. 741. **Samples to be deposited.**—Before any commercial fertilizer or commercial poison, or any chemical mixture used as a commercial fertilizer or commercial poison such as london purple, arsenic, paris green, or any poison used for the purpose of destroying the boll worm, or other pests, are sold or offered for sale in this State, the manufacturer, agent, importer or party who sells or offers it for sale within this State shall deposit with the professor of chemistry of the Agricultural and Mechanical College a sealed tin can, bottle or jar, containing not less than one pound of the fertilizer or commercial poison offered for sale, with an affidavit that it is a fair sample taken from several barrels, boxes, sacks or from quantities in larger bulk of the article thus to be sold or offered for sale; provided, the unmixed substance, cotton seed meal, land plaster, salt, ashes, lime, green sand marl, uncrushed bones and animal excrements shall be exempt from the operation of this law. (Acts 1899, p. 64, Sec. 1.)

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Art. 742. **Analysis fee paid by whom.**—The manufacturer, importer, vendor or agent of any commercial fertilizer, or commercial poison as referred to in article 741, shall pay annually to the treasurer of the Agricultural and Mechanical College an analysis fee of fifteen dollars for each and every fertilizer or commercial poison sold, exposed or offered for sale within this State. Such payment shall be made at the time the sample of fertilizer or commercial poison is submitted to the professor of chemistry for analysis. (Acts 1899, p. 64, Sec. 2.)

Art. 743. **Professor of chemistry to print analysis in form of label.**—After the sample fee has been paid, as provided for in article 742, it shall be the duty of the professor of chemistry of the Agricultural and Mechanical College to analyze, or have analyzed under his direction, any sample of a commercial fertilizer or commercial poison in accordance with the requirements of the foregoing sections of this law. The professor of chemistry shall print the result of such analysis in the form of a label, which shall set forth the name of the manufacturer, the brand of the fertilizer, or commercial poison, and the essential ingredients contained in such fertilizer or commercial poison, viz:

1. Available nitrogen and its equivalent in ammonia.
2. Soluble phosphoric acid; total available phosphoric acid.
3. Reverted phosphoric acid.
4. Total phosphoric acid.
5. Potash, soluble in water.

This, however, shall not preclude the professor of chemistry from setting forth any other ingredients which the fertilizer may contain. And he shall place upon each label the money value of such fertilizer or commercial poison, computed from its composition as he may determine. He shall furnish such labels in quantities of five hundred or multiples thereof at a cost of one dollar per one hundred, the money to be paid directly to the treasurer of the Agricultural and Mechanical College. (Acts 1899, p. 64, Sec. 3.)

Art. 744. **Every package shall be labeled.**—Every box, barrel, keg or other package or quantity of commercial fertilizer or commercial poison (within the limitation of article 741) in any shape or form sold or offered for sale in this State, shall have attached to it in a conspicuous place the label as provided for in article 743, with the signature of the professor of chemistry attached. (Acts 1899, p. 64, Sec. 4.)

Art. 745. **Samples may be taken for comparison.**—The professor of chemistry, or any duly authorized agent of his, is hereby authorized to select from any package of commercial fertilizer or commercial poison sold, or exposed for sale, in this State, a quantity not to exceed two pounds, for a sample to be used for the purpose of an official analysis, and for comparison with the sample furnished by the manufacturer, agent or vendor for official analysis. (Acts 1899, p. 64, Sec. 5.)

Art. 746. **Penalty for violating or evading this law.**—Any manufacturer, agent or vendor of any commercial fertilizer or commercial

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poison who shall offer or expose for sale any such fertilizer or commercial poison, without having previously complied with the provisions of this chapter, shall be fined not less than fifty and not more than five hundred dollars for each violation or evasion of this law. (Acts 1899, p. 64, Sec. 6.)

CHAPTER V

COCAINE, MORPHINE, OPIUM, AND CHLORAL HYDRATE

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Article 747. **Sale or gift except on prescription unlawful.**—It shall be unlawful for any person, firm or corporation to sell, furnish or give away cocaine, salts of cocaine or preparations containing cocaine or salts of cocaine, or any morphine, or salts of morphine, or preparations containing morphine or salts of morphine, or any opium or preparations containing opium, or any chloral hydrate or preparations containing chloral hydrate, except upon the original written order or prescription of a lawfully authorized practitioner of medicine, dentistry or veterinary medicine, which order or prescription shall be dated and shall contain the name of the person for whom prescribed, or if ordered by a practitioner of veterinary medicine, shall state the kind of animal for which ordered and shall be signed by the person giving the prescription or order. Such written order or prescription shall be permanently retained on file by the person, firm or corporation who shall compound or dispense the article ordered or prescribed, and it shall not be recompounded or dispensed a second time, except upon the written order of the original prescriber for each and every subsequent compounding or dispensing. No copy or duplicate of such written order or prescription shall be made or delivered to any person, but the original shall at all times be open to inspection by properly authorized officers of the law. Provided, however, that the above provisions shall not apply to preparations containing not more than two grains of opium, or not more than one-eighth grain of morphine, nor not more than two grains of chloral hydrate, or not more than one-sixteenth grain of cocaine, in one fluid ounce, or if solid preparation, in one avoirdupois ounce; provided also that the above provisions shall not apply to preparations recommended in good faith for diarrhoea or cholera, each bottle or package of which is accompanied by specific directions for use, and the caution against habitual use, nor to linaments or ointments when plainly labeled, "For external use only." And provided further, that the above provisions

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shall not apply to sales at wholesale jobbers, wholesalers and manufacturers to retail druggists, nor to sales at retail by retail druggists to regular practitioners of medicine, dentistry or veterinary medicine, nor to sales made to manufacturers of proprietary or pharmaceutical preparations for use in the manufacture of such preparations, nor the sales to hospitals, colleges, scientific or public institutions; nor to the sale of patent or proprietary medicines sold by druggists or others, containing any of the foregoing substances, the sale of which is prohibited by this law; provided, such preparations be not compounded or sold for the purpose of the evasion of this law. (Acts 1905, p. 45, Sec. 1.)

Sec. 1319. **Form for complaint.**
In the name and by the authority of the State of Texas:

Before me the undersigned authority on this day personally appeared ..... who being by me duly sworn deposes and says that John Doe heretofore on the ..... day of ....., A. D. ....., in the county of ..... and State of Texas, did then and there unlawfully sell (or "furnish," or "give away") cocaine (or "cocaine and morphine," or "opium," or whatever drug it was) to .....; the same not then and there being so done by the said John Doe upon the original written order or prescription of a lawfully authorized practitioner of medicine, dentistry, or veterinary medicine.

Against the peace and dignity of the State.

.....(Affiant)

Subscribed and sworn to before me this the ..... day of ....., A. D. .....

.....
J. P., Prec. No. .., ... county, Texas.

Sec. 1320. **Alleging this offense.**—In alleging an unlawful sale of cocaine or other drug, under article 747 of the Penal Code, which is based upon the Act of 1905, it is not necessary to further negative the execptions than as indicated in the above form, since the other exceptions are not descriptive of such offense, but are purely defensive matters. Brown v. State, 168 S. W. 861.

It is proper to allege in the language of the statute that the unlawful sale or gift of drugs was not done "upon the original written order or prescription of a lawfully authorized practitioner of medicine, dentistry, or veterinary medicine," because it is an allegation of failure of duty and demands an allegation in the alternative, being an exception to the general rule of the use of "and" and "or." Byrd v. State, 162 S. W. 362.

Art. 748. **Furnishing or prescribing to habitual user.**—It shall be unlawful for any practitioner of medicine, dentistry or veterinary medicine to furnish to or prescribe for the use of any habitual user of the same, any cocaine or morphine, or any salts or compound of cocaine or morphine, or any preparation containing cocaine or morphine or their salts, or any opium or chloral hydrate, or any preparation containing opium or chloral hydrate, and it shall also be unlawful for any practitioner of dentistry to prescribe any of the foregoing substances for the use of any person not under his treatment in the regular practice of his profession, or for any practitioner of veterinary medicine to prescribe any of the foregoing substances for the use of any human being; provided, however, that the provisions of this section shall not be construed to prevent any lawfully authorized practitioner of medicine from prescribing in good faith for the use of any habitual user of narcotic drugs

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such substances as he may deem necessary for the treatment of such habit. (Acts 1905, p. 45, Sec. 2.)

Sec. 1321. **Form for complaint.**
In the name and by authority of the State of Texas:

Before me the undersigned authority on this day personally appeared ..... who being by me duly sworn deposes and says that John Doe heretofore on the ..... day of....., A. D.....in the county of.....and State of Texas did knowingly furnish cocaine to ..... and did then and there knowingly prescribe cocaine for the use of said ....., the said ..... being then and there a habitual user of the same, and the said John Doe then and there being a practitioner of medicine, and the said John Doe then and there well knew the said ..... to be a habitual user of the same, and did not deem it necessary for the treatment of such habit to prescribe said drug, and the same was not then and there prescribed in good faith for the use of said .....

Against the peace and dignity of the State.

.....(Affiant)

Subscribed and sworn to before me this the ..... day of ....., A. D. .....

.....
J. P., Prec. No. .., ... county, Texas.

Sec. 1322. **Alleging this offense.**—The exceptions contained in the enacting clause of article 748 are so interwoven with the description of the offense as to make it necessary to negative them in an indictment or other pleading. Blair v. State, 50 Texas Crim. Rep. 235; 96 S. W. 23. Blair v. State, 97 S. W. 89.

(The statute should be amended, and the exceptions placed in a separate article, so it would not be necessary to negative them.)

Art. 749. **Penalty.**—Any person who shall knowingly violate any of the provisions of this law shall be deemed guilty of a misdemeanor, and upon conviction for the first offense, shall be fined not less than twenty-five dollars nor more than fifty dollars, and upon conviction for a second offense, shall be fined not less than fifty dollars nor more than one hundred dollars, and upon a conviction for a third and all subsequent offenses, shall be fined not less than one hundred dollars nor more than two hundred dollars, and shall be imprisoned in the county jail for not less than six months. It shall be the duty of the grand jury to make presentments for violations of this law. (Acts 1905, p. 45, Sec. 3.)

CHAPTER VI

UNLAWFUL PRACTICE OF MEDICINE

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Article 750. **Authority to practice to be registered.**—It shall be unlawful for any one to practice medicine in any of its branches upon human beings within the limits of this State who has not registered in the district clerk's office of the county in which he resides, his authority for so practicing, as herein prescribed, together with his age, postoffice address, place of birth, school of practice to which he professes to belong, subscribed and verified by oath, which, if wilfully false, shall subject the applicant to conviction and punishment for false swearing as provided by law. The fact of such oath and record shall be indorsed by the district clerk upon the certificate. The holder of the certificate must have the same recorded upon each change of residence to another county, and the absence of such record shall be prima facie evidence of the want of possession of such certificate. (Act of April 17, 1907, Acts of 1907, p. 224, Sec. 4.)

Art. 751. **District clerk to keep medical register.**—It is hereby made the duty of the district clerk of each county in this State to purchase a book of suitable size, to be known as the "Medical Register" of such county, and set apart one full page for the registration of each physician, and to record in the same the name and record of each practitioner who presents a certificate from the State Board of Examiners, issued under this act. The clerk shall receive the sum of one dollar from each physician so registered, which shall be his full compensation for all duties required under this act. When any physician shall die or remove from the county, or have his license revoked, it shall be the duty of said clerk to make a note of facts at the bottom of the page as closing the record. On the first day of January in each year, said clerk shall, on request of the board, certify to the office of the State Board of Medical Examiners a correct list of the physicians then registered in the county, together with such other information as said board may require. Any district clerk, upon conviction of knowingly violating any of the provisions of this act, shall be fined not more than fifty dollars. (Act of April 17, 1907, Acts of 1907, p. 224, Sec. 5.)

Art. 752. **Practitioner to receive verification license.**—All legal practitioners of medicine in this State, who, practicing under the provisions of previous laws, or under diplomas of a reputable and legal college of medicine, have not already received license from a State Medi-

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cal Examining Board of this State, shall present to the Board of Medical Examiners for the State of Texas documents, or legally certified transcripts of documents, sufficient to establish the existence and validity of such diplomas or of the valid and existing license heretofore issued by previous examining boards of this State, or exemption existing under any law, and shall receive from said board verification license, which shall be recorded in the district clerk's office in the county in which the licentiates may reside. Such verification license shall be issued for a fee of fifty cents to all practitioners who have not already received a license from the State Board of Medical Examiners of this State. It is especially provided that those whose claims to State licenses rest upon diplomas from medical colleges recorded from January 1, 1891, to July 9, 1901, shall present to the State Board of Medical Examiners satisfactory evidence that their diplomas were issued from bona fide medical colleges of reputable standing, which shall be decided by the Board of Medical Examiners before they are entitled to a certificate from said board. This board may, at its discretion, arrange for reciprocity in license with the authorities of other States and Territories having requirements equal to those established by this act. License may be granted applicants for license under such reciprocity on payment of twenty dollars. (Act of April 17, 1907, Acts of 1907, p. 224, Sec. 6.)

Art. 753. **Examination before board.**—All applicants for license to practice medicine in this State who are not licensed under the provisions of the preceding article must successfully pass an examination before the Board of Medical Examiners established by this act. Applicants, to be eligible for examination, must present satisfactory evidence to the board that they are more than twenty-one years of age, of good moral character and graduates of bona fide reputable medical schools. Such schools shall be considered reputable within the meaning of this law, whose entrance requirements and courses of instruction are as high as those adopted by the better class of medical schools of the United States, whose course of instruction shall embrace not less than four terms of five months each. Application for examination must be made in writing under affidavit to the secretary of the board, on forms prepared by the board, accompanied by a fee of fifteen dollars; except when an applicant desires to practice obstetrics alone, the fee shall be five dollars. Such applicants shall be given due notice of the date and place of examination. Applicants to practice obstetrics in the State of Texas, under proper application, shall be examined by the board in obstetrics only, and upon satisfactory examination shall be licensed to practice that branch only; provided, this shall not apply to those who do not follow obstetrics as a profession, and who do not advertise themselves as obstetricians or midwives, or hold themselves out to the public as so practicing. In case any applicant, because of failure to pass examination, be refused a license, he or she shall, after one year, be permitted to take a second examination without an additional fee. (Act of April 17, 1907, Acts of 1907, p. 224, Sec. 7.)

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Art. 754. **Act not applicable, when.**—Nothing in this law shall be construed as to discriminate against any particular school or system of medical practice. This act shall not apply to dentists legally qualified and registered under the laws of this State who confine their practice strictly to dentistry; nor to nurses who practice only nursing; nor to masseurs, in their particular sphere of labor, who publicly represent themselves as such; nor to commissioned or contract surgeons of the United States Army, Navy or Public Health and Marine Hospital Service, in the performance of their duties, but such shall not engage in private practice without license from the Board of Medical Examiners; nor to legally qualified physicians of other states called in consultation, but who do not open offices or appoint places in this State where patients may be met or called to see. This act shall be so construed as to apply to persons other than licensed druggists of this State not pretending to be physicians, who offer for sale on the streets or other public places remedies which they recommend for the cure of disease. (Act of April 17, 1907, Acts of 1907, p. 224, Sec. 10.)

Art. 755. **Shall be regarded as practicing medicine, when.**—Any person shall be regarded as practicing medicine within the meaning of this act:

(1) Who shall publicly profess to be a physician or surgeon and shall treat, or offer to treat any disease or disorder, mental or physical, or any physical deformity or injury, by any system or method, or to effect cures thereof.

(2) Or who shall treat or offer to treat any disease or disorder, mental or physical, or any physical deformity or injury by any system or method or to effect cures thereof and charge therefor, directly or indirectly, money or other compensation. (Act of April 17, 1907, Acts of 1907, p. 224, Sec. 13.)

Sec. 1323. **Statute construed.**—"Medicine" embraces the art of healing by whatever scientific or supposedly scientific method; the art of preventing, curing or alleviating diseases, and remedying as far as possible the results of accident or violence, and is broad enough to include any method that is supposed to possess curative power, and includes one who undertakes cures by rubbing the patient. Ex parte Collins, 57 Texas Crim. Rep. 2; 121 S. W. 501. Newman v. State, 58 Texas Crim. Rep. 223; 124 S. W. 956. Dankworth v. State, 61 Texas Crim. Rep. 157; 136 S. W. 788. Newman v. State, 61 Texas Crim. Rep. 338; 134 S. W. 688. Germany v. State, 62 Texas Crim. Rep. 276; 137 S. W. 130. Singh v. State, 146 S. W. 893. Milling v. State, 150 S. W. 434. Collins v. State, 152 S. W. 1047. Lewis v. State, 155 S. W. 523.

An osteopath has to take out a license under the Act of 1907. Ex parte Collins, 57 Texas Crim. Rep. 2; 121 S. W. 501. Collins v. State, 152 S. W. 1047.

Under subdivision 2 of article 755 a person may be liable under the statute whether or not he holds himself out as a physician or surgeon. Collins v. State, 152 S. W. 1047. Singh v. State, 146 S. W. 891. Mueller v. State, 153 S. W. 1142.

It is not encumbent on the State, under subdivision 2 of article 755 to show that the practice of defendant was by any system or method, but simply that he treated a disease or disorder, mental or physical, or any physical deformity or injury, and charged therefor, whether that treatment was by any system or method or not. Singh v. State, 146 S. W. 893. Collins v. State, 152 S. W. 1047. Mueller v. State, 153 S. W. 1142. Newman v. State, 163 S. W. 427.

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The Legislature has authority to define the term "practicing medicine" so as to cover all treatment or offer of treatment of disease or disorder, physical deformity or injury, by any system or method or pretended system or method. Ex parte Collins, 57 Texas Crim. Rep. 2; 121 S. W. 501. Newman v. State, 58 Texas Crim. Rep. 223; 124 S. W. 956. Dankworth v. State, 61 Texas Crim. Rep. 157; 136 S. W. 788. Germany v. State, 62 Texas Crim. Rep. 276; 137 S. W. 130. Singh v. State, 146 S. W. 893. Milling v. State, 150 S. W. 434. Collins v. State, 152 S. W. 1047. Lewis v. State, 155 S. W. 523. Herrington v. State, 166 S. W. 721.

It is no defense that defendant treated persons for disease as the manager of a corporation. Norwood v. State, 158 S. W. 271.

Art. 756. **Practicing in violation of law—Penalty.**—Any person practicing medicine in this State in violation of the provisions of this law shall, upon conviction thereof, be fined in any sum not less than fifty dollars nor more than five hundred dollars, and by imprisonment in the county jail for a term not exceeding six months, and each day of such violation shall constitute a separate offense, and in no such case shall the violator be entitled to recover anything for the services rendered. (Act of April 17, 1907, Acts of 1907, p. 224, Sec. 14.)

Sec. 1324. **Statute is constitutional.**—The Act of April 17, 1907, regulating the practice of medicine is constitutional under the police power of the State. Ex parte Collins, 57 Texas Crim. Rep. 2; 121 S. W. 501. Dankworth v. State, 61 Texas Crim. Rep. 157; 136 S. W. 789. Germany v. State, 62 Texas Crim. Rep. 276; 137 S. W. 130. Singh v. State, 146 S. W. 891. Milling v. State, 150 S. W. 434. Collins v. State, 152 S. W. 1047. Lewis v. State, 155 S. W. 523. Byrd v. State, 162 S. W. 360. Herrington v. State, 166 S. W. 721.

Sec. 1325. **Indictment or information.**—Indictments held good: Stiles v. State, 148 S. W. 326 (overruled in Young v. State, 167 S. W. 1112). Milling v. State, 150 S. W. 435. White v. State, 157 S. W. 152. Byrd v. State, 162 S. W. 360.

The indictment need not negative exceptions not contained in the enacting clause. Blasdell v. State, 5 Texas Crim. App. 263. Logan v. State, 5 Texas Crim. App. 306. Antle v. State, 6 Texas Crim. App. 202. Newman v. State, 58 Texas Crim. Rep. 223; 124 S. W. 956. Dankworth v. State, 61 Texas Crim. Rep. 157; 136 S. W. 788. Milling v. State, 150 S .W. 434.

If any exceptions are contained in the enacting clause and constitute part of the description of the offense they should be negatived. State v. Goldman, 44 Texas 104. Salter v. State, 44 Texas Crim. Rep. 591; 73 S. W. 395.

It is not necessary to allege that defendant professed to be a physician or surgeon if the phase of the statute relied on includes any person who treats or offers to treat any disease or disorder, physical deformity or injury, or to effect cures thereof, and charge therefor. Singh v. State, 146 S. W. 891.

When the statute is general in its terms, it is sufficient to allege that defendant "did practice medicine," and it is not necessary that the particular branch or department of medicine should be alleged. Antle v. State, 6 Texas Crim. App. 205. Singh v. State, 146 S. W. 893. Milling v. State, 150 S. W. 434. Byrd v. State, 162 S. W. 360.

It should be alleged that the defendant practiced for hire if the phase of the statute relied on uses those words. Marshall v. State, 56 Texas Crim. Rep. 205; 119 S. W. 310.

When required by the wording of the statute relied on, an indictment is bad if it fails to allege that defendant resided in the county, or that his license was not recorded in the district clerk's office of the county of his residence. Lockhart v. State, 58 Texas Crim. Rep. 73; 124 S. W. 923. Young v. State, 167 S. W. 1112 (overruling Stiles v. State, 148 S. W. 326).

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When required by the wording of the statute relied on it must be alleged that defendant was a resident of, or was sojourning in the county of the prosecution. Person v. State, 53 Texas Crim. Rep. 335; 109 S. W. 935. Marshall v. State, 56 Texas Crim. Rep. 205; 119 S. W. 310. Lockhart v. State, 58 Texas Crim. Rep. 73; 124 S. W. 923. Lockhart v. State, 58 Texas Crim. Rep. 80; 124 S. W. 923. Young v. State, 167 S. W. 1112.

When the statute or phase of the statute under which the conviction is sought does not make the residence of defendant a part of the offense it is not necessary to allege his place of residence.

An allegation that defendant "did treat a disease or disorder, to wit, tuberculosis," is not bad for uncertainty. White v. State, 157 S. W. 152.

An indictment or information for unlawfully practicing medicine is ordinarily sufficient if it follows the language of the statute. Rutherford v. State, 174 S. W. 1050.

Sec. 1326. **Evidence.**—Defendant is entitled to prove that he comes within any of the statutory exceptions, or that he was legally entitled to practice. Smith v. State, 5 Texas Crim. App. 318.

The burden of proof is on defendant to show that he was entitled to practice medicine, that being a fact peculiarly within his knowledge. Dankworth v. State, 61 Texas Crim. Rep. 157; 136 S. W. 789. Collins v. State, 152 S. W. 1047.

It is no defense that the board refused to examine defendant, or that he was arbitrarily refused a license. Stone v. State, 48 Texas Crim. Rep. 114; 86 S. W. 1029.

The State is entitled to prove that defendat held himself out as a physician or surgeon to the community in which he lived or sojourned. Antle v. State, 6 Texas Crim. App. 202.

If the allegation relied on is that defendant "did practice medicine" it is supported by proof of engaging in the practice of medicine in any of its branches, the act being otherwise unlawful. Antle v. State, 6 Texas Crim. App. 202. Singh v. State, 146 S. W. 893. Milling v. State, 150 S. W. 434.

When it is an issue whether or not defendant was engaged in the practice of medicine for pay, the State is entitled to prove that defendant treated diseases for pay or offered to treat diseases for pay for other persons than the prosecuting witness. Singh v. State, 146 S. W. 891. Mueller v. State, 153 S. W. 1142.

A returned bank check given to defendant and showing on its face that it was for medical treatment is admissible in evidence as a circumstance showing that defendant accepted the check as payment for such treatment. Singh v. State, 146 S. W. 891.

An allegation that defendant treated a person for consumption is descriptive and must be proven. Norwood v. State, 158 S. W. 271.

To sustain a conviction the proof must show where defendant resided if the place of his residence is a phase of the offense of which he was convicted. Young v. State, 59 Texas Crim. Rep. 358; 128 S. W. 1103.

When a physician removes to another county he must have his certificate recorded in the latter county. Hilliard v. State, 7 Texas Crim. App. 70.

Sec. 1327. **Charge of the court.**—When the residence of defendant is an issue in the case it is error to assume in the charge to the jury that defendant's residence has been proven if there is any doubt on that point. Kellogg v. State, 58 Texas Crim. Rep. 84; 124 S. W. 958.

If either a diploma or a certificate would entitle the defendant to practice, it is error to charge the jury to convict unless they find that defendant had both. Aldenhoven v. State, 42 Texas Crim. Rep. 6; 56 S. W. 914.

If the evidence raises the issue of mistake of fact as to defendant having had his certificate recorded, it is error to refuse to charge on such issue. Pettit v. State,

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28 Texas Crim. App. 240; 14 S. W. 127. Price v. State, 40 Texas Crim. Rep. 431; 50 S. W. 700.

Art. 757. (441) **Not applicable, to what cases.**—The provisions of this chapter shall not apply to any person who has been regularly engaged in the general practice of medicine, in any of its branches or departments, in this State, for five consecutive years prior to January 1, 1875; nor to any person who may have legally qualified himself to practice medicine under the provisions of an act entitled "An act to regulate the practice of medicine" passed May 16, 1873; nor to all those who were practicing medicine in Texas prior to January 1, 1885; nor to all those who began the practice of medicine in this State after the above date, who have complied with the laws of this State, regulating the practice of medicine, in force. (Act 1901, p. 14.)

Art. 758. **Births and deaths to be recorded.**—All physicians, surgeons or accoucheurs who may attend at the birth of a child, or, in the absence of such attendance, either parent of the child, shall report the fact to the clerk of the county court, together with the name of the parent or parents, the sex of the child and the race to which the child belongs, and whether of foreign or native parents, whether still born or alive, within thirty days after said birth occurs, under a penalty of five dollars for each failure to do so; to be collected as other fines for misdemeanors are. All physicians, surgeons, accoucheurs and coroners, cognizant of death, shall report the same, together with the race, nativity, age, sex, residence, whether alien or citizen, and the cause of death, to the clerk of the county court within thirty days after the occurrence, under a penalty of not less than five dollars nor more than fifty dollars for each failure to do so; these data to be recorded as a part of the vital statistics of the county and State, and the clerk of the county court shall be paid by the county ten cents for each birth or death so recorded, and he shall report monthly all these data to the department of public health and vital statistics. In default of so reporting, he shall be fined not less than fifty dollars for each offense. (Acts 1903, p. 220.)

SOLICITING PATIENTS

Sec. 1328. **Employing persons to solicit patients.**—If any physician, surgeon, osteopath, masseur, or any other person who practices medicine or the art of healing the sick or the afflicted, with or without the use of medicine, shall employ or agree to employ, pay or promise to pay, or reward or promise to reward any person, persons, firm, association of persons, partnership, or corporation for securing, soliciting or drumming patients or patronage, such physician, surgeon, osteopath, masseur, or any other person who practices medicine or the art of healing the sick or afflicted, with or without the use of medicine, shall be deemed guilty of a misdemeanor, and upon conviction shall be punished as hereinafter provided. (Act of March 13, 1911, Acts of 1911, p. 97, Sec. 1.)

Sec. 1329. **Accepting pay for soliciting patients.**—If any person, firm, association of persons, co-partnership or corporation shall accept or agree to accept any payment, fee or reward, or anything of value for securing, soliciting or drumming for patients or patronage for any physician, surgeon, osteopath, masseur or any other person who practices medicine or the art of healing with or without medicine shall be deemed guilty of a misdemeanor, and upon conviction, shall be punished as hereinafter provided. (Act of March 13, 1911, Acts of 1911, p. 97, Sec. 2.)

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Sec. 1330. **Advertising permitted.**—Provided, that nothing in this Act shall be construed to prohibit the inserting in a newspaper or newspapers of an advertisement of a person's business, profession and place of business, or from advertising by handbills and paying for services in distributing same. (Act of March 13, 1911, Acts of 1911, p. 97, Sec. 4.)

Sec. 1331. **Penalty for soliciting.**—Any person violating any of the provisions of this Act shall, upon conviction thereof, be fined in any sum not less than $100.00 nor more than $200.00 for each and every offense, and each and every payment or reward or fee or agreement to pay or accept a reward or fee shall constitute a separate offense. (Act of March 13, 1911, Acts of 1911, p. 97, Sec. 3.)

Sec. 1332. **No one exempt from testifying.**—No person shall be exempt from giving testimony in any proceedings for the enforcement of this Act, but the testimony given by a witness shall not be used against him or her in any criminal action or proceeding, nor shall any criminal action or proceeding be brought against such witness on account of any testimony so given by him or her. (Act of March 13, 1911, Acts of 1911, p. 97, Sec. 5.)

VETERINARY MEDICINE AND SURGERY

Sec. 1333. **Must apply for license.**—Any person desiring to practice veterinary surgery in this State shall make application to the State Board of Veterinary Medical Examiners, as provided for by the Act of March 16, 1911, relating to "Veterinary Medicine and Surgery." Provided that nothing in this Act shall prohibit any person who has practiced veterinary surgery for five years prior to the enactment of this law from practicing in their county or residence only, without license by making affidavit before the district clerk of his county that he has practiced veterinary surgery for five years, but if such person shall move from such county of residence he shall comply with all the requirements of this Act before he shall be allowed to practice. (Act of March 16, 1911, Acts of 1911, p. 132, Sec. 5.)

Sec. 1334. **Veterinary license to be recorded.**—Any person receiving a certificate of license from the Board of Veterinary Medical Examiners shall forthwith have it recorded in the office of the district clerk of the county in which he makes his residence, and shall display it in his regular place of business. The date of recording shall be recorded thereon, and said license, when so recorded, shall not be collaterally questioned, except as hereinafter provided. Until the license is recorded the holder shall not exercise any of the rights or privileges therein conferred; and in case said license is not recorded within three months from its date of issue it shall become invalid. The district clerk shall be paid his fee for recording such certificate by holder thereof. Any registered veterinarian removing his residence from one county in this State into another county in order to practice shall in like manner record his certificate of license in the county to which he removes. Practitioners who have registered in the county in which they reside may go from one county to another on professional business without being required to register. (Act of March 16, 1911, Acts of 1911, p. 132, Sec. 8.)

Sec. 1335. **Unlawful practice of veterinary medicine or surgery.**—Every person who practices or attempts to practice veterinary medicine, surgery and dentistry in this State without first having complied with the provisions of this Act shall for each and every day of such practice be guilty of a misdemeanor, and upon conviction thereof shall be fined in the sum of not less than twenty-five dollars nor more than two hundred dollars. (Act of March 16, 1911, Acts of 1911, p. 132, Sec. 12.)

Sec. 1336. **"Practicing" defined.**—Any person shall be regarded as practicing veterinary medicine, surgery or dentistry within the meaning of this law who professes publicly to be a veterinary surgeon or dentist, or who appends to his name any initials or title implying qualifications to practice or who shall treat, operate on or prescribe for any physical ailment in or any physical injury to or deformity of any domestic animal for which he shall receive compensation, either directly or indirectly. Nothing in this Act shall be construed to interfere with or punish veterinarians in the United States Army or in the United States Bureau of Animal Industry, while so commissioned, or any lawfully qualified veterinarians residing in other States or countries meeting registered veterinaries of this State on consultation, or any veteri-

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narian residing on the border of a neighboring State and duly authorized under the laws thereof to practice extending into the limits of this State; provided, that such practitioner shall not open any office or appoint a place to meet patients within the limits of Texas. Nothing in this law shall apply to persons gratuitously treating animals. It is further provided that the operations known as "dehorning," "castrating," and "spaying" shall not be regarded as the practice of veterinary surgery, nor the vaccination of cattle for blackleg as the practice of veterinary medicine, and nothing in this law shall be construed to prohibit anyone whomsoever from performing any of these operations on any wild or domestic animal. (Act of March 16, 1911, Acts of 1911, p. 132, Sec. 13.)

Sec. 1337. **Veterinary statute is constitutional.**—The Act of March 16, 1911, regulating the practice of veterinary medicine, surgery and dentistry, is constitutional as a reasonable exercise of the police power of the State. Pistole v. State, 150 S. W. 618.

CHAPTER VII

DENTISTRY

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Article 759. **Dentist to obtain certificate.**—It shall be unlawful for any person to practice or attempt to practice dentistry or dental surgery in the State of Texas without first having obtained a certificate from the State board of dental examiners; provided, that physicians and surgeons may in the regular practice of their profession, extract teeth or make application for the relief of pain; and provided further, that nothing herein shall apply to any person legally engaged in the practice of dentistry or dental surgery in this State, at the time of the passage of this law. (Acts of 1905, p. 143, Sec. 1.)

Art. 760. **Unlawful to extract teeth, when.**—It shall be unlawful for any person or persons to extract teeth, or perform any other operation pertaining to dentistry, for pay, or for the purpose of advertising, exhibiting or selling any medicine or instrument or business of any kind or description whatsoever, unless such person or persons shall first have complied with the provisions of this title. (Acts of 1905, p. 143, Sec. 2.)

Art. 761. **Board of examiners created.**—A board of examiners consisting of six practicing dentists of acknowledged ability as such is hereby created, who shall have authority to issue certificates to persons in the practice of dentistry or dental surgery in the State of Texas, who

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are legally practicing the same at the time of the passage of this law, and issue certificates to all applicants who may hereafter apply to said board and pass a satisfactory examination. (Acts of 1905, p. 143, Sec. 3.)

Art. 762. **Appointed by Governor.**—The members of said board shall be appointed by the Governor, and shall serve for two years, excepting that the members of the board first appointed shall be made as follows:

Three for one year, and three for two years, respectively, and until their successors are duly appointed.

In case of vacancy occurring in said board by resignation, removal from the State, or by death, such vacancy may be filled for its unexpired term by the Governor. (Acts of 1905, p. 143, Sec. 4.)

Art. 763. **Board shall make oath.**—Before entering upon the duties of his office, each and every member of this board shall make oath before any officer authorized to administer an obligation who shall be empowered to use a seal of office, that he will faithfully discharge the duties incumbent upon him to the best of his ability. The same shall be filed for record with the county clerk (of the county) in which affiant resides. The county clerk shall receive for recording the same, fifty cents. (Acts of 1905, p. 143, Sec. 5.)

Art. 764. **Board shall keep record.**—Said board shall keep a record in which shall be registered the names and residences or places of business of all persons authorized under this title to practice dentistry or dental surgery in this State. It shall elect one of its members president and one secretary thereof, and it shall meet at least once in each year, and as much oftener and at such times and places as it may deem necessary. A majority of the members of said board shall constitute a quorum, and the proceedings thereof shall be open to the public. (Acts of 1905, p. 143, Sec. 6.)

Art. 765. **Application and examination of applicant.**—Any person desiring to commence the practice of dentistry or dental surgery within this State after the passage of this law, shall before commencing such practice make application to said board, and upon undergoing a satisfactory examination before said board, shall be entitled to a certificate from said board granting such person the right to practice dentistry or dental surgery within this State. (Acts of 1905, p. 143, Sec. 7.)

Art. 766. **License in vacation.**—Any member of said board may, when the board is not in session, grant a license to practice dentistry to any person whom such member finds on examination to be qualified, on the payment of two dollars by such person. A license so granted shall be valid until the next meeting of the board, but no longer. Each member shall make a report of license so granted by him, at the meeting of the board following the granting of the license. A member shall not grant a license under the provisions of this article to one who

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has been rejected by the board as disqualified. (Acts of 1905, p. 143, Sec. 8.)

Art. 767. **License to be recorded.**—Every person to whom license is issued by said board of examiners shall within thirty days from the date thereof, present the same to the clerk of the county in which he or she resides or expects to practice, who shall officially record said license in his office book, provided for that purpose, and shall be entitled to a fee of fifty cents for his services. (Acts of 1905, p. 143, Sec. 9.)

Art. 768. **Penalty.**—Any person who shall violate this law by practicing or attempting to practice dentistry or dental surgery within this State without first complying with the provisions of this law, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined in a sum of not less than twenty-five nor more than three hundred dollars for each and every offense, each day in the practice constituting an offense. All fines collected from prosecutions under this law shall be appropriated to the common school funds in the county where collected. (Acts of 1905, p. 143, Sec. 13.)

Sec. 1338. **Indictment or information.**—The indictment or information must negative the exceptions so as to show that defendant was not authorized to practice dentistry or dental surgery when such exceptions are contained in the enacting clause. Derrick v. State, 34 Texas Crim. Rep. 21; 28 S. W. 818. McCann v. State, 40 Texas Crim. Rep. 111; 48 S. W. 512.

In negativing exceptions, a general negative is sufficient. Doyle v. State, 143 S. W. 630.

Art. 769. **Practicing dentistry to sell or advertise medicine, etc.**—Any person or persons who shall violate this law by extracting teeth or performing any other operation pertaining to dentistry for the purpose of advertising, exhibiting or selling any medicine, instrument or business of any kind or description, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined in a sum of not less than twenty-five nor more than three hundred dollars for each and every offense. (Acts of 1905, p. 143, Sec. 14.)

Art. 770. (454) **Burden of proof on defendant to show authority.**—On the trial of any person indicted under the provisions of this law (chapter) it shall be incumbent upon the defendant, in order to exempt him from the penalties of this law, to show that he has authority under the law to practice dentistry in this State. (Acts of 1889, p. 90, Sec. 13.)

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CHAPTER VIII

PHARMACY

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Article 771. **Unlawful for unlicensed person to conduct pharmacy, etc.**—It shall be unlawful for any person not licensed as a pharmacist, within the meaning of this law, to conduct or manage any pharmacy, drug or chemical store, apothecary shop or other place of business for the retailing, compounding or dispensing of any drug, chemical or poison, or for the compounding of physician's prescriptions, or to keep exposed for sale at retail any drug, chemicals or poisons, except as hereinafter provided, or for any person not licensed as a pharmacist or assistant pharmacist, within the meaning of this law, to compound, dispense or sell at retail any drug, chemical, poison, or pharmaceutical preparation upon the prescription of a physician, or otherwise, or to compound physician's prescriptions except as an aid to, or under the supervision of a person licensed as a pharmacist under this law. And it shall be unlawful for any owner or manager of a pharmacy, or drug store, or other place of business, to cause or permit any other than a person licensed as a pharmacist or assistant pharmacist to compound, dispense or sell at retail any medicine or poison, except as an aid to or under the supervision of a person licensed as a pharmacist. Provided, however, that nothing in this section shall be construed to prevent any person from engaging in the business herein described as proprietors and owners thereof, provided such proprietors or owners shall have employed in his business to conduct same, some one qualified under this act, nor to interfere with any legally registered practitioner of medicine or dentistry in the compounding of his prescriptions, or to prevent him from supplying his patients such medicine as he may deem proper, nor with exclusively wholesale business of any dealer who shall be licensed as a pharmacist, or who shall keep in his employ at least one person who is licensed as a pharmacist, nor with the selling at retail of non-poisonous domestic remedies, nor with the sale of patent or proprietary preparations, when sold in unbroken packages, nor with the sale of poisonous substances

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which are sold exclusively for use in the arts, or for use as insecticides, when such substances are sold in unbroken packages bearing a label having plainly printed upon it the name of the contents, the word "poison" and the names of at least two readily obtainable antidotes. (Acts 1907, p. 349, Sec. 1.)

Art. 772. **Persons heretofore registered entitled to certificates.**—All persons heretofore registered by district boards as pharmaceutical examiners shall, upon presenting proof of such registration in accordance with the law regulating the practice of pharmacy then in force, and the payment of one dollar, be entitled to a certificate of registration as licensed pharmacist, under the meaning of this law, from the State Board of Pharmacy, without examination. Such application shall be made to the State Board of Pharmacy within ninety days after the first meeting of said board. Proprietors and employes of such proprietors who are actively engaged in the preparation of physician's prescriptions, and compounding and blending of medicines in towns of less than one thousand inhabitants in the State of Texas, and also proprietors and employes of such proprietors who shall become so engaged in such towns during the next five years after the passage of this law, shall be exempt from examination, provided he or she will register as required in this law, and upon paying said Board of Pharmacy one dollar, shall receive a certificate of registration which shall entitle such person to practice pharmacy in towns of one thousand inhabitants or under. Provided, that should such person fail to apply for registration within ninety days, from and after the first meeting of said board, said party shall be required to pay the same fee as in original registration. Every person who shall hereafter desire to be licensed as a pharmacist shall file with the secretary of the Board of Pharmacy an application upon blanks furnished by the Board of Pharmacy for that purpose, duly verified under oath, setting forth the name and age of the applicant, the place or places at which, and the time spent in the study of the science and art of pharmacy, the experience in the compounding of physicians' prescriptions which the applicant has had under the direction of a legally licensed pharmacist, and shall appear at a time and place designated by the Board of Pharmacy, and submit to an examination as to his or her qualifications for registration as a licensed pharmacist or assistant pharmacist, provided, however, if any applicant should fail to pass a satisfactory examination, he or she may at any subsequent meeting of the Board of Pharmacy, within six months, be permitted to be re-examined, without cost. (Acts 1907, p. 349, Sec. 2.)

Art. 773. **Qualifications of applicant.**—In order to be licensed as a pharmacist within the meaning of this act, an applicant shall be not less than twenty-one years of age, and shall have been licensed as an assistant pharmacist for not less than two years prior to his application for license as a pharmacist, or he shall present to the board satisfactory evidence that he is a graduate of a reputable school or college of pharmacy, or that he has had four years practical experience in pharmacy

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under the instruction of a pharmacist, and he shall also pass a satisfactory examination by or under the direction of a Board of Pharmacy. In order to be licensed as an assistant pharmacist within the meaning of this law, an applicant shall not be less than eighteen years of age, and shall have a sufficient preliminary general education, and shall have not less than two years experience in pharmacy, and shall pass a satisfactory examination by or under the direction of the Board of Pharmacy. Provided, however, that in the case of persons who have attended a reputable school or college of pharmacy, the actual time of attendance at school or college of pharmacy, may be deducted from the time of experience required of pharmacist and assistant pharmacist, but in no case shall less than two years experience be required for registration as a licensed pharmacist. (Acts 1907, p. 349, Sec. 3.)

Art. 774. **When board shall enroll name and issue license.**—If the applicant for license as a pharmacist or assistant pharmacist has complied with all the requirements of the two preceding articles, the Board of Pharmacy shall enroll his name upon the register of pharmacist or assistant pharmacist, and issue to him a license, which shall entitle him to practice as pharmacist or assistant pharmacist for a period of two years from the date of said license. The Board of Pharmacy may refuse to grant a license to any person guilty of a felony or gross immorality, or who is addicted to the use of alcoholic liquors or narcotic drugs to such an extent as to render him unfit to practice, and the Board of Pharmacy, after due notice and herein (hearing) may revoke a license for like cause, or any license which has been procured by fraud. (Acts 1907, p. 349, Sec. 4.)

Art. 775. **When board may issue license without examination.**—The Board of Pharmacy may issue license to practice as pharmacist or assistant pharmacist in this State, without examination, to such persons as have been legally registered or licensed as pharmacists or assistant pharmacists in other States or foreign countries; provided, that the applicant for such license shall present satisfactory evidence of qualifications equal to those required from licentiates in this State, and that he was registered or licensed by examination in such other State or foreign country, and that the standard of competency required in such other State or foreign country accords similar recognition to the licentiates of this State. Applicants for license under this article shall with their application forward to the secretary of the Board of Pharmacy the same fees as are required of other candidates for license. (Acts 1907, p. 349. Sec. 5.)

Art. 776. **License and removal conspicuously posted.**—Every certificate of license to practice as pharmacist or assistant pharmacist, and every license to any proprietor or employe to conduct a drug store in towns of not more than one thousand inhabitants, as above provided, and every renewal of such license shall be conspicuously exposed in the pharmacy or drug store or place of business of which the pharmacist or

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assistant pharmacist or other person to whom it is issued is the owner or manager, or in which he is employed. Every licensed pharmacist or assistant pharmacist who desires to continue in the practice of his profession shall, within thirty days next preceding the expiration of his license or permit, file with the board an application for the renewal thereof, which application shall be accompanied by the fee hereinafter prescribed. If the board shall find that the applicant has been legally licensed in this State, and is entitled to a renewal of license, or to a renewal of such permit, it shall issue to him a certificate attesting the fact. If any pharmacist or assistant pharmacist shall fail, for a period of sixty days after the expiration of his license, to make application to the board for its renewal, his name shall be erased from the register of licensed pharmacist or assistant pharmacist, and such person, in order to become registered as a licensed pharmacist or assistant pharmacist, shall be required to pay the same fee as in the case of original registration. The name of the responsible manager of every pharmacy, drug store or apothecary shop, shall be conspicuously displayed outside of such place of business. (Acts 1907, p. 349, Sec. 6.)

Art. 777. **When board to examine and report to Governor.**—It shall be the duty of the board to examine all applications for registration of such persons as may be entitled to the same under the provisions of this law, and to make an annual report to the Governor, a copy of which shall be furnished to the Texas State Pharmaceutical Association, upon the condition of pharmacy in Texas, which report shall embrace all the proceedings of the board, and give an itemized account of all money received and disbursed by said board, and said itemized account of money paid out by said board shall show to whom paid and specifically for what purpose it was paid, and also the names of all pharmacists duly registered under this act. And it shall be the further duty of the board to deliver all money on hand at the end of the term of each board after all outstanding debts have been paid over to their successors in office. (Acts 1907, p. 349, Sec. 10.)

Art. 778. **Board to hold meetings to examine.**—The Texas State Board of Pharmacy shall hold meetings for the examination of applicants for registration, and for the transaction of such other business as may legally come before it, at least once in four months, and such additional meetings as may be necessary; provided, that said regular meetings shall be held on the third Tuesdays of January, May and September of each year, in such cities or places as the said board may select, or such cities or places as shall be deemed most convenient for applicants. Due notice of such meetings shall be given by publication in such papers as may be selected by the board, thirty days in advance of said meetings. Three members shall constitute a quorum for the transaction of any and all business. The president and secretary shall have the power to administer oaths in all matters pertaining to the examination and registration of pharmacist and assistant pharmacist. The board shall keep a record of its proceedings and a register of all

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persons to whom certificates or license as pharmacist or assistant pharmacist and permits have been issued, and all renewals thereof, and the books and register of the board or a copy of any part thereof, certified by the secretary, shall be accepted as competent evidence in all the courts. (Acts 1907, p. 349, Sec. 11.)

Art. 779. **May issue temporary certificate.**—Any member of the Board of Pharmacy may issue a temporary certificate upon satisfactory proof that the applicant is competent; said temporary certificate shall be null and void after the first meeting of the Board of Pharmacy next after the granting said temporary certificate; provided that not more than one temporary certificate shall ever be granted to any one person. (Acts 1907, p. 349, Sec. 12.)

Art. 780. **Board may charge and collect fees.**—The Board of Pharmacy shall be entitled to charge and collect the following fees: For the examination of an applicant for license as a pharmacist, five dollars; for the examination of an applicant for license as an assistant pharmacist, two dollars and fifty cents; for renewing the license as a pharmacist, one dollar; for renewing the license as assistant pharmacist, one dollar; for issuing license to any proprietor or employe to conduct a drug store in towns of not more than one thousand inhabitants, one dollar; all fees shall be paid before any applicant may be admitted to examination or his name placed upon the register of pharmacists, or assistant pharmacist, or before any license or permit or any renewal thereof may be issued by the board. (Acts 1907, p. 349, Sec. 13.)

Art. 781. **Penalty.**—Whoever, not being licensed as a pharmacist, shall conduct or manage any drug store or other place of business for the compounding, dispensing or sale at retail of any drugs, medicine or poisons, or for the compounding of physicians' prescriptions contrary to the provisions of articles 771 and 772 shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be fined not less than twenty-five dollars nor more than one hundred dollars, and each week such drug store or pharmacy or other place of business is so unlawfully conducted shall be held to constitute a separate and distinct offense. Whoever not being licensed as a pharmacist or assistant pharmacist shall compound, dispense or sell at retail any drugs, medicine, poison or pharmaceutical preparation even upon a physician's prescription or otherwise, and whoever being the owner or manager of the drug store, pharmacy or other place of business, shall cause or permit any one not licensed as a pharmacist or assistant pharmacist to dispense, sell at retail or compound any drug, medicine, poison or physician's prescription, contrary to the provisions of articles 771 and 772 shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than ten dollars nor more than one hundred dollars. Any license or permit or renewal thereof, obtained through fraud, or by any false or fraudulent representations, shall be void and of no effect in law. Any person who shall make any false or fraudulent representations for the

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purpose of procuring a license or permit or renewal thereof, either for himself or for another, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined not less than twenty-five dollars nor more than one hundred dollars, and any person who shall wilfully make a false affidavit for the purpose of procuring a license or permit or renewal thereof, either for himself or for another, shall be deemed guilty of perjury, and upon conviction thereof shall be subject to like penalties as in other cases of perjury. Whoever being the holder of any license or permit granted under this act, shall fail to expose such license or permit, or any renewal thereof, in a conspicuous position in the place of business to which such license or permit relates, or in which the holder thereof is employed, contrary to the provisions of article 776 shall upon conviction thereof be fined not less than five dollars nor more than twenty-five dollars, and each week that such license, permit or renewal shall not be exposed, shall be held to constitute a separate and distinct offense, and whoever being the holder of any license or permit granted under this act, shall, after the expiration of such license or permit, and without renewing the same, continue to carry on the business for which such license or permit was granted, contrary to the provisions of article 776, shall upon conviction thereof, be fined not less than five dollars nor more than twenty-five dollars. (Acts 1907, p. 349, Sec. 14.)

CHAPTER IX

NURSING AND EMBALMING

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Article 782. **Unlawfully practicing as trained nurse.**—It shall be unlawful for any person to practice nursing as a trained, graduate or registered nurse without a certificate from the State Board of Nurse Examiners. A nurse who has received his or her certificate shall be styled and known as a "Registered Nurse." No other person shall assume such title or use the abbreviation "R. N." or any other letters to indicate that he or she is a trained, graduate or registered nurse. (Acts 1909, p. 228, Sec. 4.)

Art. 783. **Penalty.**—Any person violating the provisions of this law, or who shall make any false representations to said board in applying for a certificate, shall be guilty of a misdemeanor, and upon conviction be punished by a fine of not more than three hundred dollars. (Acts 1909, p. 228, Sec. 8.)

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Art. 784. **Embalmer to have license.**—Every person engaged, or desiring to engage, in the practice of embalming, in connection with the care and disposition of dead human bodies, within the State of Texas, shall make a written application to the State Board of Embalming for a license, accompanying the same with a license fee of five dollars, whereupon the applicant as aforesaid, shall present himself or herself before said board at a time and place to be fixed by said board, and if the board shall find upon examination that the applicant is of good moral character, possessed of the knowledge of the venous, arterial system, the location of the heart, lungs, bladder, womb and other organs of the human body, and the location of abdominal, pleural and thoracic cavities, location of the carotid, bracharal, radial, ulnar, femoral and tibinal arteries, a knowledge of the science of embalming and the care and disposition of the dead, and has a reasonable knowledge of sanitation and the disinfection of bodies of diseased persons, and the apartment, clothing and bedding in case of death by infectious or contagious diseases, the board shall issue to said applicant a license as a duly licensed embalmer, authorizing him to practice the science of embalming. Such license shall be signed by a majority of the board and attested by its seal. All persons receiving license under the provisions of this law shall have said license registered in the county clerk's office in the county in the jurisdiction of which it is proposed to carry on said practice, and shall display said license in a conspicuous place of business of said person so licensed. (Acts 1903, p. 124.)

Art. 785. **Embalmer to renew license.**—Eery registered embalmer who desires to continue the practice of his profession shall annually thereafter, during the time he shall continue in such practice, on such date as said board may determine, pay to the secretary of said board a fee of two dollars for the renewal of said license. (Acts 1903, p. 125.)

Art. 786. **Unlawful embalming.**—It shall be unlawful for any person not a registered embalmer, to embalm or pretend to practice the science of embalming, in connection with the care and disposition of the dead, unless said person is a registered embalmer, within the meaning of this chapter. (Acts 1903, p. 125.)

Art. 787. **Not to apply when and to whom.**—Nothing in this law shall apply to, or in any manner interfere with the duties of any municipal, county, and State officer, or State institution, nor shall this law apply to any person simply engaged in the furnishing of burial receptacles for the dead, but shall only apply to such person or persons engaged in the business of embalming in connection with the care and disposition of the dead. (Acts 1903, p. 125.)

Art. 788. **Penalty.**—Any person who shall embalm, or attempt to practice the science of embalming, in connection with the care and disposition of the dead, without having complied with the provisions of this law, shall be guilty of a misdemeanor, and upon conviction thereof, before any court shall be sentenced to pay a fine of not less than fifty

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dollars or not more than one hundred dollars for each and every offense. All fines collected for the violation of any of the provisions of this law shall be paid into the public school fund of the state. (Acts 1903, p. 125.)

CHAPTER X

VIOLATIONS OF QUARANTINE

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Article 789. (472) **Vessel landing from infected port.**—After the legal establishment of any quarantine station on the coast of this State, if any vessel shall land or arrive at such station from any infected port without a bill of health from the proper officer of said port, or with a false bill of health, the master or commanding officer of such vessel shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not less than five hundred nor more than five thousand dollars. (Act Aug. 13, 1870, amended by Acts 1901, p. 305.)

Art. 790. (473) **Passing station without permission.**—Any master or commanding officer of a vessel that passes or attempts to pass any quarantine station on the coast of this State during the continuance of the quarantine without having first obtained permission from the health officer of such station so to do, shall be punished by imprisonment in the penitentiary not less than two nor more than five years, or by fine not less than five hundred nor more than ten thousand dollars. (Act Aug. 13, 1870.)

Art. 791. (474) **Going ashore without permission.**—Any person belonging to or on board of a vessel placed under quarantine, who shall go ashore without the written permission of the health officer of the station shall be fined not less than fifty nor more than five hundred dollars. (Act Aug. 13, 1870.)

Art. 792. (475) **Landing goods without permission.**—Any master or officer of a vessel placed under quarantine, who shall land or permit to be landed from said vessel any goods, wares, merchandise or article whatsoever, while the same is under quarantine, without the written permission of the health officer of the quarantine station shall be fined

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not less than fifty nor more than one thousand dollars for each article so landed. (Act Aug. 13, 1870.)

Art. 793. (476) **Leaving quarantine station.** — Any person detained at any quarantine station, who shall wilfully absent himself without leave of the officer having charge thereof, shall be deemed guilty of a misdemeanor, and on conviction thereof by any court of competent jurisdiction, shall be punished by a fine of not less than ten dollars nor more than one thousand dollars. (Act April 12, 1883.)

Art. 794. (477) **Officer or employe violating quarantine law.**— Any health officer, guard or other employe who shall knowingly and wilfully disobey or in any manner knowingly neglect or fail to perform any duty imposed upon him by the provisions of quarantine laws, rules and regulations of this State, or who shall disobey knowingly an order emanating from superior authority, shall be fined upon conviction by a court of competent jurisdiction in a sum not exceeding one thousand dollars; provided, that in the meaning of this article the Governor and State Health Officer shall alone be deemed superior authority. (Act of April 12, 1883.)

Art. 795. (478) **Evading quarantine guards, etc.**—Any person coming from any port or district infected with yellow fever, or any other infectious or contagious disease, who shall knowingly evade any guard or pass through any cordon of quarantine duly established, shall be deemed guilty of a misdemeanor, and upon conviction by any court of competent jurisdiction be punished by fine not exceeding one thousand dollars. (Act of April 12, 1883.)

Art. 796. (478a) **Violating quarantine regulations.**—Any person who shall knowingly and wilfully violate any regulation of quarantine established by the Governor, the State Health Officer, or the health officer of any county or city of this State, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than twenty, nor more than one thousand dollars. (Act of April 23, 1901, Acts of 1901, p. 305.)

Sec. 1339. **Indictment or information.**—An indictment or information under article 796 for leaving a pest house is bad if it fails to allege that a quarantine was legally established and that defendant was placed in quarantine. Haney v. State, 52 Texas Crim. Rep. 485; 107 S. W. 836.

Art. 797. (478b) **Person in charge of train or boat.**—If any conductor, or person in charge of any train, ship, steamboat or any other kind of common carriers, shall knowingly and wilfully bring into this State, any person or thing contrary to the quarantine regulations as proclaimed by the Governor, or State Health Officer, such conductor or person so knowingly or wilfully offending, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not to exceed five hundred dollars. (Act of April 23, 1901, Acts of 1901, p. 305.)

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Art. 798. (478c) **Merchant or person violating Governor's proclamation.**—Any merchant or other person who shall knowingly and wilfully order the shipment, or knowingly and wilfully receive any merchandise whose shipment into the State is prohibited by the Governor's proclamation, or any person who knowingly and wilfully sells and proceeds to deliver such merchandise or other article as above, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not exceeding five hundred dollars. (Act of April 23, 1901, Acts of 1901, p. 305.)

Art. 799. (478d) **Physician concealing contagious disease.**—Any physician who shall knowingly conceal any case of contagious disease, or who shall fail to report to the county or city health officer any case of contagious disease of which he may have knowledge, shall, upon conviction, be fined in any sum not less than twenty-five dollars nor more than one hundred dollars. (Act of April 23, 1901, Acts of 1901, p. 305.)

CHAPTER XI

TEXAS STATE BOARD OF HEALTH

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Article 800. **Creating same.**—The Department of Public Health and Vital Statistics as now existing under the laws of this State is hereby abolished, and that there be created and established in its stead a State Board of Health, to be officially designated as Texas State Board of Health, which shall consist of seven members, who shall be legally qualified practicing physicians, who shall have had at least ten years' experience in actual practice of medicine within the State of Texas, of good professional standing, who shall be graduates of reputable medical colleges, to be appointed biennially by the Governor as soon as practicable after the passage of this bill, and thereafter on or before the tenth day of March following his inauguration. One member of said board, who shall be appointed by the Governor and confirmed by the Senate, shall be designated by the Governor as State Health Officer, and who shall be president and executive officer of the board. The members of said board shall hold their office for a term of two years, and until

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their successors shall be appointed and qualified, unless sooner removed for cause. (Sec. 1, Act of April 21, 1909, Acts of 1909, p. 340.)

Art. 801. **Power conferred.**—Power is hereby conferred on the Texas State Board of Health to prepare a sanitary code to be known as the Sanitary Code for Texas, which shall provide rules and regulations for the promotion and protection of the public health and for the general amelioration of the sanitary and hygienic condition within this State, for the suppression and prevention of infectious and contagious diseases and for the proper enforcement of quarantine, isolation and control of such diseases; provided, however, that where a patient can be treated with reasonable safety to the public health, he shall not be removed from his home without his consent, or the consent of the parents or guardian, in case of a minor, which said code, when so made, adopted, approved by the Governor, published and promulgated, shall have the force of law in all respects as far as relates to the following subjects:

(a) In the management of quarantine and disinfection with respect to all contagious, infectious diseases and exposures.

(b) In the government of quarantine and disinfection of all pestilential diseases, such as bubonic plague, Asiatic cholera, leprosy, typhus and yellow fever.

(c) For the inspection, sanitation and disinfection of all railway coaches (including interurban cars), sleeping cars, street cars, waiting rooms, toilet rooms in cars and stations, depots and stations; the regulations for the proper protection of the public water, ventilation and heat supplies in such places, and the sanitary conduct and condition of all persons within such places.

(d) Governing the reporting by physicians and health officers of the presence in any locality of all contagious and infectious diseases.

(e) Governing the manner and method of collecting and reporting all vital and mortuary statistics, including reports of births and deaths, designating to whom and by whom such report shall be made and the form of same.

(f) Governing the preparation for transportation of dead bodies. Provided, that said Texas State Board of Health shall prepare and adopt at such time as they may deem proper and expedient an Advisory Supplement to such Sanitary Code for Texas which shall contain rules and regulations on the following subjects:

(1) Prescribing and fixing the standard for disinfectants; requiring employment of disinfectants of proper quality and standard for the disinfection of all premises as directed by the board.

(2) Regulating the proper sanitary disposition of sewerage, garbage, and offal, and the proper drainage of unsanitary premises.

(3) Governing the proper interment and disinterment of dead bodies.

(4) Regulating the examination and inspection both ante mortem and post mortem of all animals which may be intended for supplying

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food products of meat for human consumption; regulating and governing the protection of the public with reference to the sale and use of diseased animals for producing food products or meat, the manner of feeding to animals designated for producing food products for human consumption all offensive or diseased producing food stuffs; regulating the inspection, examination and management of all dairy cows and herds for the purpose of controlling and suppressing tuberculosis and other diseases liable to be communicated from animal to man.

(5) Regulating the sanitary condition of slaughter houses, meat markets and dairies.

(6) Rules and regulations for the sanitation and disinfection of public buildings; provided, that a public building is hereby declared to be any building owned by the State or any county or any city school building, college or university of any class, any dance hall, music hall, saloon, fire hall, skating rink, theater, theatorium, moving picture show, circus, pavillion, office building, hotel, lodging house, restaurant, lecture hall, place of public worship or any building or place used for the congregation, occupation or entertainment, amusement or instruction of the public.

(7) Rules and regulations to govern and control the conduct and operation of markets, peddlers' wagons, and all other places and methods of exposure for sale of meats, fish, poultry, game, fruits, vegetables and all perishable articles of food exposed for sale, and to regulate the time and method of such exposure, and to prescribe and limit methods for the preservation of such articles of food, and to prohibit the doing of any act or the use of any method with respect thereto, which said board shall deem prejudicial to the public health; provided, that any condemnation of any such article of food shall be in writing and a record of the same shall be kept by said health department. Provided, that such Advisory Supplement to Sanitary Code for Texas shall be advisory only. It shall be the duty of all city and county health officers, members of city councils, city and county commissioners to co-operate at all times with the Texas State Board of Health in enforcing the rules and regulations contained in such Advisory Supplement, and any city or town in this State may by a majority of its city council or commissioners and whenever the subject matter relates to the public schools, with the approval of a majority of the members of the school board of such city or town, adopt such Advisory Supplement, and the rules and regulations therein contained shall thereafter have the full force and effect of law in such city or town; provided, that the commissioners court of any county in this State may by a majority vote adopt said Advisory Supplement to the Sanitary Code for Texas and thereafter the rules and regulations contained in such Advisory Supplement shall have the full force and effect of law outside of all incorporated cities and towns in such county. (Sec. 10, Act of April 21, 1909, Acts of 1909, p. 340.)

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Art. 802. **Penalty for violating sanitary code.**—Any person who shall violate any of the rules and regulations contained in the Sanitary Code for Texas as embraced in subdivisions a, b, c, d, e, and ("f" omitted) of article 801, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined in any sum not less than ten dollars and not more than one thousand dollars. (Sec. 10, Act of April 21, 1909, Acts of 1909, p. 340.)

Art. 803. **Violating regulations.**—Any person who shall wilfully violate any of the rules and regulations contained in the Advisory Supplement to the Sanitary Code for Texas, embraced in subdivisions 1, 2, 3, 4, 5, 6, and 7 of article 801, when same shall have been adopted by the city or county in which said person shall have violated such rules and regulations, he shall be deemed guilty of a misdemeanor and upon conviction shall be fined in any sum not less than five dollars and not more than two hundred dollars. (Sec. 10, Act of April 21, 1909, Acts of 1909, p. 340.)

Art. 804. **When code to be published.**—On adoption of the said code by votes of a majority of the members of the board, and approved by the Governor, it shall be published at length for one time in official monthly bulletin of the State Board of Health, and at least three times for three consecutive weeks in three daily newspapers of the State, after which adoption, approval and publication, it shall become operative and have the absolute force of law, and any person who shall violate any of the rules, regulations in said sanitary code after its adoption and publication as above provided for, shall be deemed guilty of a misdemeanor, and upon conviction shall be fined as herein prescribed. (Sec. 10, Act of April 21, 1909, Acts of 1909, p. 340.)

Art. 805. **Rules to be enforced by courts.**—And it is hereby made the duty of the several courts of this State having jurisdiction over such offenses, according to the grade thereof, to enforce and carry into effect each and all of the rules and regulations as promulgated in said Sanitary Code of Texas, when they shall have the force and effect of law as provided herein, and to impose and collect penalties, in the amounts therein specified, from all persons found guilty of any violations thereof. (Sec. 10, Act of April 21, 1909, Acts of 1909, p. 340.)

Art. 806. **Members, inspectors and officers of board peace officers.**—Each member of the said Texas State Board of Health and each of its inspectors and officers is hereby constituted a peace officer, and shall have power to arrest persons violating any of the provisions of the sanitary code to be adopted by the board, of the violation of any public health, sanitary or quarantine law of the State, and such member, officer or inspector may so arrest such offenders without warrant when the offense is committed within the presence or sight of such member, officer or inspector, but otherwise only when in the execution of a warrant issued by a proper officer. (Sec. 13, Act of April 21, 1909, Acts of 1909, p. 340.)

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Art. 807. **Other officers to assist.**—It is hereby made the duty of all sheriffs and their deputies, and constables and their deputies, police officers, town marshals, State Rangers, and all other peace officers, to assist in the apprehension and arrest of all persons violating any provisions, rules, ordinances or laws or the Sanitary Code for Texas, as it may be adopted by said board, or for violation of any public health, sanitary or quarantine laws of the Sanitary Code for Texas, as it may be adopted by said inspectors and officers of said board, to apprehend and arrest all persons who may commit any offense against the public health laws of this State, or the rules, regulations, ordinances and laws of the Sanitary Code for Texas when adopted, published and promulgated by said Board of Health, as provided in this law, when charged to execute a warrant of arrest issued by the proper officer for the apprehension and arrest of all persons charged with so offending. (Sec. 13, Act of April 21, 1909, Acts of 1909, p. 340.)

Art. 808. **Buildings and premises may be inspected.**—The members of the board of health and every person duly authorized by them, upon presentation of proper authority in writing, are hereby empowered, whenever they may deem it necessary in pursuance of their duties, to enter into, examine, investigate, inspect and view all grounds, public buildings, factories, slaughter houses, packing houses, abbatoirs, dairies, bakeries, manufactories, hotels, restaurants and all other public places and public buildings where they may deem it proper to enter, for the discovery and suppression of disease, and for the enforcement of the rules, regulations and ordinances of the Sanitary Code for Texas after it has been adopted, promulgated and published by the board for the enforcement of any and all health laws, sanitary laws, or quarantine regulations of this State. (Sec. 14, Act of April 21, 1909, Acts of 1909, p. 340.)

Art. 809. **Oaths may be administered.**—The members of said board of health and its officers are hereby severally authorized and empowered to administer oaths and to summon witnesses and compel their attendance in all matters proper for the said board to investigate, such as the determination of nuisances, investigation of public water supplies, investigation of any sanitary conditions within the State, investigation of the existence of infection or the investigation of any and all matters requiring the exercise of the discretionary powers invested in said board and its officers and members, and in the general scope of its authority invested by this law. The several district judges and courts are hereby charged with the duty of aiding said board in its investigations and in compelling due observance of this law, and in the event any witness summoned by said board or any of the officers or members of the same, shall prove disobedient or disrespectful to the lawful authority of such board, officer or member, such person shall be punished by the district court of the county in which such witness is summoned to appear as for contempt of said district court. (Sec. 15, Act of April 21, 1909, Acts of 1909, p. 340.)

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Art. 810. **Perjury before board.**—Any witness when summoned to appear before said board who shall falsely testify as to any matters proper for the determination of any question which the board may be investigating shall be deemed guilty of perjury, and shall be punished as provided by law for the offense of perjury. (Sec. 16, Act of April 21, 1909, Acts of 1909, p. 340.)

Sec. 1340. Violating Sanitary Code.—Any person who shall violate any of the rules, regulations or provisions of the Sanitary Code of Texas, as set forth in the Act of March 23, 1911, shall be deemed guilty of a misdemeanor and upon conviction shall be fined in any sum not less than ten dollars and not more than one thousand dollars. (Act March 23, 1911, Acts 1911, p. 188. This Act amends Section 10 of Chapter 30 of the Acts of 1909.)

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TITLE XIII

OFFENSES AGAINST PUBLIC PROPERTY

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CHAPTER I

OBSTRUCTION OF NAVIGABLE STREAMS, ROADS, STREETS, ALLEYS, ETC.

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Article 811. (479) (404) **Obstruction of navigable stream.**—If any person shall obstruct the navigation of any stream which can be navigated by steam, keel, or flatboats, by cutting and felling trees, or by building on or across the same any dyke, mill dam, bridge, or other obstruction, he shall be fined not less than fifty nor more than five hundred dollars. (O. C. 428.)

Sec. 1341. **Obstructing public road.**
Sec. 1342. Form for complaint.
Sec. 1343. Indictment, information, or complaint.
Sec. 1344. Public road.
Sec. 1345. Condemnation and compensation.
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Sec. 1347. Acting on advice of others.
Sec. 1348. Evidence.
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Sec. 1350. Evidence insufficient.
Sec. 1351. Charge of the court.
Sec. 1352. Obstruction of streets.

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Art. 812. (480) (405) **Obstructing public road, street, etc.**—If any person shall wilfully obstruct or injure or cause to be obstructed or injured, in any manner whatsoever, any public road or highway, or any street or alley in any incorporated or unincorporated town or city, or any public bridge or causeway within this State, he shall be fined in a sum not exceeding two hundred dollars. (O. C. 399d. Acts 1860, p. 97. Amended by Act April 3, 1913, Acts 1913, p. 258.)

Sec. 1342. Form for complaint.

In the name and by the authority of the State of Texas:

Before me the undersigned authority on this day personally appeared..... who being by me duly sworn, deposes and says that John Doe heretofore on the..... day of ..... A. D. ..... in the county of ..... and State of Texas did wilfully obstruct and injure and cause to be obstructed and injured a public road (or "highway," or "street in the city of....," or "street in the town of....," or "alley in the city of ....," or "alley in the town of....," or "public bridge," or "public causeway") there situate, the same being then and there commonly known as the ..... public road (or "as Main street," or "the Galveston causeway," or whatever it was) and leading from ..... in said county to ..... therein (or "to the county line of said county," or whatever description is appropriate) by then and there building a fence across said public road (or "street" or whatever it was, or "by then and there digging a ditch across said public road," or whatever way it was obstructed or injured).

Against the peace and dignity of the State.

.....(affiant)

Subscribed and sworn to before me this the ..... day of ..... A. D. .....

.....

County Attorney ..... county, Texas.

Sec. 1343. Indictment, information, or complaint.—It is not necessary to allege the material of which the obstruction is made, or to negative the idea that defendant was authorized to place the obstruction further than to allege it was wilful, nor is it necessary to allege that the road had been laid off by the proper authorities. State v. Collins, 38 Texas 189.

It is necessary to allege that the road obstructed was a "public road." McClanahan v. State, 21 Texas Crim. App. 429; 2 S. W. 813.

It may be alleged in the same count that defendant "did wilfully obstruct and injure and cause to be obstructed and injured," the different phases of the statute not being repugnant to each other and the punishment being the same. Day v. State, 14 Texas Crim. App. 30. Patterson v. State, 48 Texas Crim. Rep. 322; 88 S. W. 226.

An allegation that defendant wilfully obstructed "a public road and highway" does not charge two distinct offenses. Larce v. State, 30 Texas Crim. App. 374; 17 S. W. 934.

If the statute only makes it an offense to obstruct a street or alley of an incorporated town or city, an indictment for obstructing a street or alley, to be sufficient, must allege that the town or city was incorporated. McClanahan v. State, 21 Texas Crim. App. 429; 2 S. W. 813. Martin v. State, 162 S. W. 1145, but under the amendment of 1913, it is immaterial whether the town or city be incorporated, and hence it is not necessary under that statute to allege whether or not the town or city was incorporated or unincorporated.

Sec. 1344. Public road.—The legislature has the right to create the commissioners court a tribunal to condemn land for public roads, and may prescribe the procedure in regard thereto. Crouch v. State, 39 Texas Crim. Rep. 146; 45 S. W. 578.

A public road is one which the commissioners court has designated by boundaries and location, and has assigned hands to work, and the hands do work it, and the public use it as such. Ward v. State, 42 Texas Crim. Rep. 435; 60 S. W. 757. Race v. State, 43 Texas Crim. Rep. 438; 66 S. W. 560.

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A road may be shown to be a public road by proof of long continued usage, and by an order of the commissioners court assigning hands to work same, whether regularly condemned or not. McWhorter v. State, 43 Texas 666. Michel v. State, 12 Texas Crim. App. 108. Berry v. State, 12 Texas Crim. App. 249. Hall v. State, 13 Texas Crim. App. 269. Jolly v. State, 19 Texas Crim. App. 76. Race v. State, 43 Texas Crim. Rep. 438; 66 S. W. 560. Dyerle v. State, 68 S. W. 174.

There must be some official recognition of the particular road obstructed before there can be a successful prosecution. Ehlers v. State, 44 Texas Crim. Rep. 157; 69 S. W. 148.

There is no law which will give the public the right, simply by user for a short time, to disregard wholly a public road as legally established and to establish one for themselves. Hall v. State, 13 Texas Crim. App. 269. Owen v. State, 24 Texas Crim. App. 201; 5 S. W. 830.

A road overseer has no right to make a road a public road, and a county judge is clearly without authority so to do. Ehlers v. State, 44 Texas Crim. Rep. 157; 69 S. W. 148.

A permissive using not adverse to defendant's rights will not establish a public road by prescription. Owen v. State, 24 Texas Crim. App. 201; 5 S. W. 830. Smith v. State, 40 S. W. 736. Farr v. State, 55 Texas Crim. Rep. 271; 116 S. W. 570.

Ten years adverse possession will establish a public road by prescription. Ward v. State, 42 Texas Crim. Rep. 439; 60 S. W. 757.

A conviction will not be sustained for obstructing an imaginary public road which only exists on paper, where the road as actually laid out has been used and traveled as the public road. Day v. State, 14 Texas Crim. App. 30.

Where a road runs over an open space of country promiscuously along different routes, a road overseer cannot legally select some route and himself designate it as a public road. Hatfield v. State, 67 S. W. 110.

Although hands had been assigned to work the road, the road cannot be considered a public road if the order of the court nowhere states how the road shall run, and where it appears to have been located according to the caprice or judgment of the overseer. Laroe v. State, 30 Texas Crim. App. 376; 17 S. W. 934. Ehlers v. State, 44 Texas Crim. Rep. 157; 69 S. W. 148, and in such case defendant may fence his land so as to allow the public an easement. Dyerle v. State, 68 S. W. 175.

Where land is used indiscriminately as a highway, and the road ran between no designated points or along no definite lines, then and in that event defendant would have a right to fence his land. Murphy v. State, 23 Texas Crim. App. 333; 4 S. W. 906. Dyerle v. State, 68 S. W. 175.

If the road was never cut out and opened, and was only surveyed since filing the complaint against defendant for obstructing it, defendant should be acquitted of that charge. Kennedy v. State, 40 S. W. 590.

Sec. 1345. **Condemnation and compensation.**—If defendant's land had never been used as a public road, it cannot be legally taken by the county for a public road without being condemned. Thompson v. State, 22 Texas Crim. App. 328; 3 S. W. 232. Bradley v. State, 22 Texas Crim. App. 330; 2 S. W. 828. Race v. State, 43 Texas Crim. Rep. 441; 66 S. W. 560. McMillan v. State, 77 S. W. 790. Lewis v. State, 64 Texas Crim. Rep. 110; 141 S. W. 532. Jones v. State, 153 S. W. 622.

After a public road has been laid out and established and used and recognized as a public road, defendant is not entitled on a prosecution for obstructing it to complain of a lack of proper notice on the part of the jury of review. Kelley v. State, 46 Texas Crim. Rep. 32; 80 S. W. 382.

Where the State relies alone on condemnation proceedings to show that the road obstructed was a public road, a strict compliance with the statute must be proven, and if there is evidence to support the issue the jury should be charged

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that if the jury of review were not sworn they should acquit. Davidson v. State, 16 Texas Crim. App. 340. Lewis v. State, 64 Texas Crim. Rep. 110; 141 S. W. 532.

Where the road was attempted to be changed from a third class road to a second class road without giving defendant compensation for his land, he has a right, when promptly asserted, to obstruct the road by erecting gates across it. Thompson v. State, 22 Texas Crim. App. 328; 3 S. W. 232. Bradley v. State, 22 Texas Crim. App. 330; 2 S. W. 828.

After a road is established and used as a public road, defendant is not entitled to disregard the orders of the court and obstruct the road, although he received no compensation for his land. He has his remedy in the courts for his compensation. Gowenhour v. State, 33 Texas Crim. Rep. 538; 28 S. W. 201. Crouch v. State, 39 Texas Crim. Rep. 146; 45 S. W. 578. Dodson v. State, 49 S. W. 78. Ward v. State, 42 Texas Crim. Rep. 436; 60 S. W. 757. Race v. State, 43 Texas Crim. Rep. 439; 66 S. W. 560.

Obstructing a public road is not recognized as a legal method of enforcing the payment of compensation for land taken for public use where the commissioners court has designated the land as a public road, although the order be irregular, where the court has assigned hands to work said road and the hands have worked it and the public use it as a public road. In such case it becomes a public road and defendant's remedy for his compensation would be in a civil proceeding. Race v. State, 43 Texas Crim. Rep. 441; 66 S. W. 560.

Defendant cannot successfully set up as a defense to a prosecution for obstructing a public road the fact that the owner of the land had received no compensation for it. Ward v. State, 42 Texas Crim. Rep. 436; 60 S. W. 757. Race v. State, 43 Texas Crim. Rep. 439; 66 S. W. 560.

Sec. 1346. **Wilful.**—The term "wilful" means with evil intent, or with legal malice, or without reasonable grounds for believing the act to be lawful, and a charge so informing the jury gives them a correct definition of that term. Shubert v. State, 16 Texas Crim. App. 645. Trice v. State, 17 Texas Crim. App. 43. Parsons v. State, 26 Texas Crim. App. 192; 9 S. W. 490.

A charge is correct which informs the jury that by the term "wilful" is meant that defendant knew at the time of the alleged obstruction that said road was a public road and that said obstruction was placed there, if it was obstructed, with an evil intent. Cornelison v. State, 40 Texas Crim. Rep. 161; 49 S. W. 384.

It is error to authorize the jury to convict defendant without requiring them to find that the public road was "wilfully" obstructed. Dyerle v. State, 63 S. W. 631.

In a prosecution for wilfully obstructing a public road, the charge of the court should define the term "wilfully." Trice v. State, 17 Texas Crim. App. 43. Sneed v. State, 28 Texas Crim. App. 56; 11 S. W. 834. Lensing v. State, 45 S. W. 573. Dyerle v. State, 63 S. W. 631. Woody v. State, 69 S. W. 155.

Although the term "wilfully" be defined in the charge, it is error when there is evidence to support the theory, to refuse a special charge instructing the jury that if the obstruction was not wilful they should acquit, thus presenting affirmatively the defensive theory. Dyerle v. State, 68 S. W. 175. Richardson v. State, 47 Texas Crim. Rep. 596; 85 S. W. 282.

Although the term "wilfully" be defined in the charge, yet if there is evidence that the act was not wilful it is error to refuse a charge instructing the jury that notwithstanding they may find that the road was obstructed they should acquit if it was not wilfully done; especially where the act was occasioned by an act in itself legal, that is an indirect obstruction. Richardson v. State, 47 Texas Crim. Rep. 596; 85 S. W. 282 (dam).

Sec. 1347. **Acting on advice of others.**—The fact that defendant had taken the advice of counsel to the effect that the road was not legal will not relieve his obstruction of it from being wilful. Crouch v. State, 39 Texas Crim. Rep. 146; 45 S. W. 578. Ward v. State, 42 Texas Crim. Rep. 437; 60 S. W. 757.

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Where the facts show that defendant knew that he was obstructing a road that had been established and used by the public as a public road, it is not error to exclude testimony of what others may have advised him as to fencing it up or as to the validity of the road. Kelley v. State, 46 Texas Crim. Rep. 32; 80 S. W. 382.

It is no defense that defendant obeyed orders of a superior officer of a railroad company where he knew he was fencing a public road. Sanders v. State, 26 S. W. 62.

Sec. 1348. **Evidence.**—Proof that the jury of review were sworn may be made by oral testimony. Ewing v. State, 38 S. W. 618.

The report of the jury of review adopted by an order of the commissioners court cannot legally be varied by oral testimony. Rust v. State, 158 S. W. 519.

Orders of the commissioners court made subsequent to the alleged obstruction are not admissible. Hatfield v. State, 67 S. W. 111. McMillan v. State, 77 S. W. 790. Richardson v. State, 46 Texas Crim. Rep. 84; 79 S. W. 536.

It is error to exclude an order of the commissioners' court which of itself, or in connection with other testimony, tends to show that there was no public road at the point of obstruction. Laroe v. State, 30 Texas Crim. App. 375; 17 S. W. 934.

Where the road obstructed had been in long continued use as a public road, and had been recognized by the commissioners court by assigning hands to work it, it is not error to exclude testimony showing that the field notes really called for a different route. Dodson v. State, 49 S. W. 78.

The best evidence that hands were assigned to work the road is the orders of the commissioners court, and the testimony of the commissioners as to such fact is secondary evidence. Hatfield v. State, 67 S. W. 111. McMillan v. State, 77 S. W. 790.

It is error to prove that at the time of the trial the obstruction was still on the road. Richardson v. State, 47 Texas Crim. Rep. 595; 84 S. W. 282.

It is error to permit a witness to testify that the road obstructed was "a public road," such testimony being hearsay when the witness knows nothing of the establishment thereof from his own knowledge. Isham v. State, 49 Texas Crim. Rep. 325; 92 S. W. 808.

If the public road or street is unnecessarily described by giving its class or otherwise, the allegation, being descriptive, must be proved as laid. Meuly v. State, 3 Texas Crim. App. 383. Carney v. State, 175 S. W. 155.

It is error to refuse to permit defendant, as bearing on his intent, to prove that he had been told by a witness that the witness had himself laid out the road without an order from the commissioners court. Laroe v. State, 30 Texas Crim. App. 376; 17 S. W. 934.

Where defendant if guilty at all was guilty as a principal on account of aiding another to obstruct the road, it is error to exclude testimony which tends to show that the other had permission from the Commissioners Court to make a change in the road, as showing that his act was not wilful. Craighead v. State, 55 Texas Crim. Rep. 341; 116 S. W. 579.

It is error to refuse to permit defendant to prove that when he was preparing to enclose his land he was told by the adjacent land owner to go ahead and enclose it as he, the adjacent owner, would move his fence back so as to leave a road of the proper width. This testimony is admissible to rebut the theory that the obstruction was wilful. Sneed v. State, 28 Texas Crim. App. 56; 11 S. W. 834.

It is error to permit the State to prove the obstruction by defendant of other roads than the road alleged to have been obstructed when such proof tends to solve no issue in the case. Chaffin v. State, 24 S. W. 411. Dyerle v. State, 68 S. W. 174.

On the issue as to whether the obstruction relied on was wilful, the State is entitled to prove that defendant had been previously indicted for wilfully obstructing the same road. Dodson v. State, 49 S. W. 79.

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Proof of declarations of defendant tending to prove that the obstruction was wilfully done is admissible. Brown v. State, 166 S. W. 508.

Sec. 1349. **Convictions sustained.**—Proof that defendant wilfully obstructed a road actually used and recognized as a public road will sustain a conviction. Dodson v. State, 49 S. W. 78. Brown v. State, 166 S. W. 508.

A person has no right to fence a public road along a creek bank to the bridge, although the public could only cross the road on a bridge. Cornelison v. State, 40 Texas Crim. Rep. 161; 49 S. W. 384.

Sec. 1350. **Evidence insufficient.**—Two things are absolutely necessary before a conviction for wilfully obstructing a public road will be sustained, first, there must be proof that a public road was obstructed, second, there must be proof that the act was wilfully done. Meyer v. State, 37 Texas Crim. Rep. 463; 36 S. W. 255. Jones v. State, 153 S. W. 622.

Where the road was sought to be laid out under the statute, and the statutory requirements were not complied with until some time after the road was obstructed, a conviction will not be sustained. Green v. State, 49 Texas Crim. Rep. 156; 90 S. W. 1098.

It is the duty of the county to open a road, and a failure to remove a fence that was on the road before it was established as a public road will not constitute the offense of wilfully obstructing a public road. Rankin v. State, 25 Texas Crim. App. 694; 8 S. W. 932.

Where defendant had the lines surveyed before he built his fence and according to the survey built the fence upon his own land, a conviction for wilfully obstructing the public road will not be sustained if he believed the land was his when he built the fence. Parsons v. State, 26 Texas Crim. App. 192; 9 S. W. 490. Johnson v. State, 14 S. W. 396.

The offense of wilfully obstructing a public road consists mainly in the fact that the act was "wilful," and when the allegation that it was "wilfully" obstructed is not supported by the testimony defendant should be acquitted, and, under such circumstances, if a conviction be secured, it will not be permitted to stand. Shubert v. State, 16 Texas Crim. App. 645. Trice v. State, 17 Texas Crim. App. 43. Owen v. State, 24 Texas Crim. App. 201; 5 S. W. 830. Parsons v. State, 26 Texas Crim. App. 192; 9 S. W. 490. Sneed v. State, 28 Texas Crim. App. 56; 11 S. W. 834. Johnson v. State, 14 S. W. 396. Laroe v. State, 30 Texas Crim. App. 374; 17 S. W. 934. McMillan v. State, 77 S. W. 790. Isham v. State, 49 Texas Crim. Rep. 324; 92 S. W. 808. Farrier v. State, 54 Texas Crim. Rep. 537; 113 S. W. 763. Hubbard v. State, 56 Texas Crim. Rep. 217; 119 S. W. 310.

If defendant believed as a fact that the road was not a public road he would not be guilty of wilfully obstructing it. Guthrie v. State, 23 Texas Crim. App. 339; 4 S. W. 906. Laroe v. State, 30 Texas Crim. App. 376; 17 S. W. 934. McMillan v. State, 77 S. W. 790.

If defendant obstructed the road under a mistake of fact not arising from a want of proper care on his part, he would not be guilty of a wilful obstruction thereof if he would have been excusable had his conjecture as to the fact been correct. Johnson v. State, 14 S. W. 396. Sanborn v. State, 21 Texas Crim. App. 155; 17 S. W. 475. Guthrie v. State, 23 Texas Crim. App. 339; 4 S. W. 906.

Other judgments reversed for insufficiency of evidence: Heune v. State, 17 Texas Crim. App. 426. Conner v. State, 21 Texas Crim. App. 176; 17 S. W. 157. Baker v. State, 21 Texas Crim. App. 264; 17 S. W. 144. Watson v. State, 25 Texas Crim. App. 651; 8 S. W. 817. Farr v. State, 55 Texas Crim. Rep. 271; 116 S. W. 570. Lewis v. State, 64 Texas Crim. Rep. 110; 141 S. W. 532.

Sec. 1351. **Charge of the court.**—If the State relies upon a title to the road by limitation and there is evidence that the use was not adverse, this issue should be submitted to the jury. Rust v. State, 158 S. W. 519.

A charge is erroneous which places the reasonable doubt against defendant and requires the jury before they can acquit to find beyond a reasonable doubt that the

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obstruction was not on the road. Jacobs v. State, 55 Texas Crim. Rep. 149; 115 S. W. 581.

It is error to charge the jury that the law presumes that the road, if obstructed, was wilfully obstructed, and that it rests with the defendant to show accident or innocent intention. Brinkoeter v. State, 14 Texas Crim. App. 67. Drinkoeter v. State, 16 Texas Crim. App. 73.

It is error to refuse to charge the jury that the intent to violate the law is a constituent element of the offense, and that it must appear that the obstruction was wilful on the part of the defendant, and that such intent is not presumed from the obstruction but must be proven as a fact. Lensing v. State, 45 S. W. 572.

Where part of defendant's land was attempted to be taken for a public road, the jury should be charged, when there is evidence thereof, that if the jury of review failed to describe the road by metes and bounds the testimony would not sustain a verdict of guilty. Isham v. State, 49 Texas Crim. Rep. 326; 92 S. W. 808.

Where it is an issue as to whether or not the road obstructed was in fact a public road, the charge of the court should not invade the province of the jury by assuming therein that the road was a public road. Hall v. State, 13 Texas Crim. App. 269.

Where there is a controversy as to whether the regular traveled road crossed defendant's obstruction, the jury should be charged that the traveled road must cross defendant's obstruction and that that particular portion is so regarded by the overseer and worked. Torno v. State, 75 S. W. 500.

A charge is correct which informs the jury that a public road is one that has been actually reviewed and laid out on the ground by a jury of review appointed by and acting under the authority of the Commissioners Court, and their written report describing said road has been approved by such court and recorded in the minutes thereof. Kelley v. State, 46 Texas Crim. Rep. 33; 80 S. W. 382.

Where the testimony raises the issue, it is error to refuse to charge the jury that if defendant built the fence as charged, but that he built it upon his own land, or had a reasonable ground for believing that his act was lawful, they should acquit. Dyerle v. State, 68 S. W. 175.

Where there is testimony raising the issue, it is error to refuse to charge the jury that if defendant believed he built the fence on his own land, or if the jury had a reasonable doubt about it, they should acquit. Craighead v. State, 55 Texas Crim. Rep. 461; 117 S. W. 816.

Where defendant claims he was a hired hand and thought his employer had a right to build the obstruction and did not know of any wilful intent on the part of his employer, it is error to refuse to give the jury a charge presenting this defensive theory. Craighead v. State, 55 Texas Crim. Rep. 342; 116 S. W. 579.

Sec. 1352. **Obstruction of streets.**—A city ordinance prescribing a less penalty for obstructing the streets of the city than is prescribed by the State law is invalid. Ex parte Cross, 44 Texas Crim. Rep. 376; 71 S. W. 289. Ex parte McHenry, 103 S. W. 390.

Under the Act of 1913, amending the penalty for wilfully obstructing a street or alley of a city or town so as to make the punishment by fine only in a sum not to exceed two hundred dollars, Corporation courts and Justice courts may finally try such cases under the State law.

Where defendant is charged with wilfully obstructing a street of a town or city, it is error to exclude an ordinance of such town or city authorizing such use of the street. Echols v. State, 12 Texas Crim. App. 615.

Art. 813. (481) (405a) **Riding or driving over bridge.**—If any person shall ride or drive over any bridge belonging to a county, or to any municipal or private corporation, faster than a walk, he shall be fined in any sum not exceeding one hundred dollars. (Acts 1891, p. 131.)

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Sec. 1353. Form for complaint.

In the name and by the authority of the State of Texas:

Before me the undersigned authority on this day personally appeared ..... who being by me duly sworn deposes and says that John Doe heretofore on the ..... day of ....., A. D. ....., in the county of ....., and State of Texas, did ride (or "drive") over a bridge there situate and then and there belonging to said county (or "to a municipal corporation, to wit, the city of ....., in said county," or "to a private corporation, to wit, ..."), the said bridge then and there being commonly known as the ..... bridge.

Against the peace and dignity of the State.

.....(Affiant)

Subscribed and sworn to before me this the ..... day of ....., A. D. .....

.....
County Attorney, ... county, Texas.

Art. 814. **Name of owner of automobile to be registered.**—All owners of automobiles or motor vehicles shall before using such vehicles or machines upon the public roads, streets or driveways, register with the county clerk of the county in which he resides, his name, which name shall be registered by the county clerk in consecutive order in a book to be kept for that purpose, and shall be numbered in the order of their registration, and it shall be the duty of such owner or owners to display in a conspicuous place on said machine the number so registered, which number shall be in figures not less than six inches in height. The county clerk shall be paid by such owner or owners a fee of fifty cents for each machine registered. (Sec. 1, Act April 15, 1907, Acts 1907, p. 193.)

Art. 815. **Speeding auto or motor vehicle.**—No automobile or motor vehicle shall be driven or operated upon any public road, street or driveway at a greater rate of speed than eighteen miles an hour, or upon any public road, street or driveway within the built up portions of any city, town or village, the limits of which shall be fixed by the municipal officers thereof, at a greater rate of speed than eight miles an hour, except where such city or town may by an ordinance or by-law allow a greater rate of speed, provided the speed limit shall not apply to race courses or speedways. (Sec. 2, Act April 15, 1907, Acts 1907, p. 193.)

Sec. 1354. "Speeding" statute construed.—The Act of 1907, directing against the speeding of automobiles and motor vehicles, is valid. Byrd v. State, 59 Texas Crim. Rep. 513; 129 S. W. 620.

It is no defense to speeding the automobile that defendant was driving the car under the control of another, unless the proof shows that the driver was under duress and so drove the car at the instance and requirement of another. Goodwin v. State, 63 Texas Crim. Rep. 140; 138 S. W. 400.

The statute does not require that the speed limit be exceeded "wilfully," and it is not error to refuse to charge the jury that if defendant did not wilfully exceed the speed limit they should acquit. Goodwin v. State, 63 Texas Crim. Rep. 140; 138 S. W. 400.

A city whose only authority over automobiles is limited to regulation is not authorized to pass an ordinance making it unlawful for any person under the age of sixteen years of age to operate an automobile upon the streets of such city. Ex parte Epperson, 61 Texas Crim. Rep. 237; 134 S. W. 685.

Sec. 1355. Speeding—Form for complaint.

In the name and by the authority of the State of Texas:

Before me the undersigned authority on this day personally appeared .....

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who being by me duly sworn deposes and says that John Doe heretofore on the ..... day of ....., A. D. ....., in the county of ....., and State of Texas, did drive and operate an automobile at a greater rate of speed than eighteen miles an hour upon a public road there situate, the said public road not then and there being a race course or speedway, and the said public road being the road leading from ..... to ..... in said county and being then and there commonly known as the ..... public road.

Against the peace and dignity of the State.

.....(Affiant)

Subscribed and sworn to before me this the ..... day of ....., A. D. ....

Justice of the Peace, Prec. No. ...., ... county, Texas.

Sec. 1356. **Speeding—Indictment, information, or complaint.**—The statute against exceeding the speed limit in driving or operating an automobile or motor vehicle not applying to race courses or speedways, and the exception being contained in the enacting clause and being descriptive, it is necessary to allege that the road, street, or driveway upon which the machine was driven or operated was not a race course or speedway. Byrd v. State, 59 Texas Crim. Rep. 513; 129 S. W. 620.

In order to comply with the rules of pleading, the public road upon which the speed limit was exceeded should be described so as to put defendant upon notice of what he has to defend against, and to identify the transaction, and to lay a predicate for proof that the road was a public road. The same rule of pleading applies as in cases of obstructing a public road. In Goodwin v. State, 63 Texas Crim. Rep. 142, 138 S. W. 400, an information was held good which did not in any way describe the public road, but it appears that the attention of the Appellate Court was not called to this defect therein.

An allegation that the road upon which the automobile was speeded was a public road must be sustained by proof. Allen v. State, 169 S. W. 1151.

Art. 816. **Not to be operated without regard to rights of others.**—No person in charge of an automobile or motor vehicle on any public road, street or driveway shall drive the same at any speed greater than is reasonable and proper, having regard to the traffic and use of the public road, street or driveway by others, or so as to endanger the life or limb of any person thereon. (Sec. 3, Act April 15, 1907, Acts 1907, p. 194.)

Art. 817. **Racing auto on public road, street or driveway.**—All drivers or operators of automobiles or motor vehicles are prohibited from racing upon any public road, street or driveway. (Sec. 4, Act April 15, 1907, Acts 1907, p. 194.)

Art. 818. **Operator to bring machine to a standstill on signal.**—Any person driving or operating an automobile or motor vehicle shall at the request, or signal by putting up the hand, or by other visible signal from a person riding or driving a horse or horses or other domestic animal, cause such vehicle or machine to come to a standstill as quickly as possible, and to remain stationary long enough to allow such animal to pass. (Sec. 5, Act April 15, 1907, Acts 1907, p. 194.)

Art. 819. **Auto to have noise producer and lamp.**—Every driver or operator of an automobile or motor vehicle shall have attached thereto a suitable bell or other appliance for giving notice of its approach, so that when such attachment is rung or otherwise operated it may be heard a distance of three hundred feet, and shall carry a lighted lamp between

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one hour after (sundown) and one hour before sunrise. (Sec. 6, Act April 15, 1907, Acts 1907, p. 194.)

Art. 820. **Penalty for violating six preceding articles.**—Every one who violates any of the six preceding articles shall be punished by a fine of not less than five dollars nor more than one hundred dollars. (Sec. 7, Act April 15, 1907, Acts 1907, p. 194.)

Art. 821. (482) **Destroying, injuring, or misplacing bridge, etc.**—Any person who shall knowingly or wilfully destroy, injure or misplace any bridge, culvert, drain, sewer, ditch, signboard, mile post or tile, or anything of like character placed upon any road for the benefit of the same, shall be guilty of a misdemeanor, and upon conviction thereof, punished by fine of not more than five hundred dollars, and shall be liable to the county and any person injured for all damages caused thereby. (Sec. 22, Acts 1891, p. 153.)

Art. 822. (482a) **Regulating transportation of traction engine.**—It shall be unlawful for any person to transport or carry over any public bridge or culvert upon any public road or highway, or any street or alley in any incorporated town or city, any traction engine with lugs on the wheels thereof, and to carry or transport over any such public bridge or culvert any traction engine or separator without having first provided and placed in position skids upon which the wheels of said traction engine or separator shall be run, which said skids shall be not less than three inches thick, twelve inches in width and sixteen feet in length, and any person violating the provisions of this article shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not exceeding five hundred dollars. (Act April 13, 1907, Acts 1907, p. 189.)

Art. 823. (483) (406) **Permission to obstruct street or alley.**—No person shall be punished under article 812 who places obstructions in the streets or alleys of an incorporated city or town for purposes of building or improvement under the sanction of the corporate authorities of such city or town. (O. C. 399d. Acts 1860, p. 97.)

Art. 824. (484) (407) **Commissioners' court may regulate removal of obstructions.**—Nothing in this chapter contained shall be so construed as to prevent the commissioners' courts of the several counties, or the municipal authorities of towns or cities, from adopting such regulations as they may deem proper relative to the removal of obstructions from public roads, streets or bridges, and to enforce the same by due process of law. (O. C. 430.)

Art. 825. (485) (407a) **Commissioners' court may control streets, etc., when.**—In all cities and incorporated towns in the State of Texas in which from any cause there is not a de facto municipal government in the active discharge of their official duties, the commissioners' court of the county in which such city or incorporated town is situated, shall

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assume and have control of the streets and alleys thereof, and shall have the same worked under the law and regulations for the working of public roads, and such streets and alleys for the purposes of this law shall be held and denominated public roads, provided, that all residents of any city or town having no de facto city government, not otherwise exempt from road duty, shall be liable to road service as in other cases. (Act March 4, 1885, Acts 1885, p. 25.)

Art. 826. (485a) **Obstructing public ditch or diverting water.**—If any person shall wilfully obstruct any public ditch or shall wilfully divert the water from its proper channel, he shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than five nor more than five hundred dollars, and shall also be liable for any and all damages accruing to any person or persons or corporation or county for any such act. (Acts 1895, p. 155, sec. 15.)

Sec. 1357. **Obstructing railway crossing.**—It shall hereafter be unlawful for any railway company or any officer, agent, servant, receiver or receivers of any railway corporation to wilfully obstruct for more than five minutes at any one time any street, railway crossing or public highway in this State by permitting their trains to stand on or across such crossing or crossings, and any person, firm or corporation, or the officers, agents, servants, receiver or receivers of any corporation violating any of the provisions of this law shall, upon conviction thereof, be fined in any sum not less than five nor more than one hundred dollars. (Act March 19, 1915, Acts 1915, p. 109.)

CHAPTER II

PUBLIC ROADS AND IRRIGATION

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Article 827. (486) (408) **Refusal to serve as overseer.**—If any person subject to public road duty under the laws of this State, shall wilfully fail or refuse to serve as overseer of any road in his road district or precinct, when duly appointed as such overseer by the commis-

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sioners' court of his county, he shall be fined not less than ten nor more than fifty dollars. (Acts 1876, p. 67.)

Art. 828. (487) (409) **Failure of duty as overseer.**—If any overseer of a public road in this State shall wilfully fail, neglect or refuse to perform any duty imposed upon him by law, or shall so fail, neglect or refuse to keep the roads, bridges and causeways in his precinct or district clear of obstructions and in good order, or shall wilfully suffer such roads, bridges or causeways to remain uncleared and out of repair for twenty days at any one time, he shall be fined not less than ten nor more than twenty-five dollars. (Acts 1876, p. 68.)

Sec. 1358. **Failure of duty as overseer.**—To render an overseer of a public road guilty of an offense under article 828 of the Penal Code, his failure, neglect or refusal to perform the duties imposed upon him as such overseer must be **wilful**—that is, with an evil intent, with legal malice, without reasonable grounds for believing such failure, neglect or refusal to be lawful, and without legal justification. Moore v. State, 27 Texas Crim. App. 439; 11 S. W. 457. Parker v. State, 29 Texas Crim. App. 372; 16 S. W. 186. Howell v. State, 29 Texas Crim. App. 592; 16 S. W. 533.

All that should be required, and all the law intends to require, is reasonable diligence and effort on the part of an overseer to perform the duties enjoined upon him, and what will amount to such reasonable diligence and effort must be determined by the facts of each particular case. If reasonable diligence and effort be exercised, there can be no **wilful** failure, neglect or refusal to perform duty. Moore v. State, 27 Texas Crim. App. 439; 11 S. W. 457.

Indictment against an overseer for wilful failure, neglect and refusal to keep road in good repair held good. Howell v. State, 29 Texas Crim. App. 592; 16 S. W. 533.

By the terms of article 828 there are various ways of violating its provisions. The pleader may base the indictment, information, or complaint upon any phase of it, and if sufficiently pleaded it will not be subject to demurrer. Howell v. State, 29 Texas Crim. App. 592; 16 S. W. 533.

Art. 829. (488) (410) **Failure of duty as overseer.**—If any overseer of a public road in this State shall fail, within six months after his appointment as such, to measure the road or roads in his precinct or district and set up posts of lasting timber at the end of each mile leading from the court house, or some other noted place or town, and to mark on such posts in legible words and figures the distance in miles to such court house, or other noted place, or shall fail, when any such post is destroyed or removed, to replace the same with another marked as the original, or shall fail to affix or set up at the forks of all public roads in his district or precinct index boards with the directions pointing toward the most noted places to which they lead, he shall be fined in the sum of five dollars. (Acts 1876, p. 67.)

Art. 830. (489) **Failure of duty as road commissioner**—Any road commissioner who shall wilfully fail to comply with any duty required of him shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by fine of not less than twenty-five nor more than two hundred dollars. (Sec. 5, Act April 6, 1889, Acts 1889, p. 135.)

Art. 831. (490) **Failure of duty as road superintendent.**—Any road superintendent who shall wilfully fail or refuse to comply with any

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provision of law or order of the commissioners' court shall be guilty of a misdemeanor, and on conviction thereof, punished by fine of not less than twenty-five nor more than two hundred dollars for each offense. (Sec. 21, p. 153, Acts 1891.)

Art. 832. (491) (411) **Failure to attend when summoned.**—If any person liable to work upon the public roads, after being legally summoned, shall fail or refuse to attend, either in person or by able and competent substitute, or fail or refuse to furnish his team or tools at the time and place designated by the person summoning him, or to pay to such road overseer the sum of one dollar for each day he may have been notified to work on the public roads, or to pay to such overseer the sum of one dollar and fifty cents for each day he may have been notified to furnish his team for road work, or having attended shall fail or refuse to perform good service or any other duty required of him by law, or the person under whom he may work, or if any one shall fail to comply with any duty required of him as provided by law shall be deemed guilty of a misdemeanor and upon conviction thereof fined in any sum not exceeding twenty-five dollars. (Acts 1876, p. 60, amended by Sec. 10, Act April 18, 1901, Acts 1901, p. 280.)

Sec. 1359. **Failure to work road—Form for complaint.**

In the name and by the authority of the State of Texas:

Before me the undersigned authority on this day personally appeared..... who being by me duly sworn deposes and says that John Doe heretofore on the .....day of.....A. D.....in the county of.....and State of Texas after being legally summoned by.....then and there the road overseer of road precinct number.....in said county to attend for road work on a public road in said precinct then and there commonly known as the.....public road, and leading from.....to.....in said county, on the..... day of.....A. D.....the place and time last named being the time and place designated by said person so summoning him, did then and there fail and refuse to attend either in person or by able and competent substitute at said time and place so designated, the said John Doe being then and there a person liable to work upon the public roads and being then and there a road hand in said precinct, nor did the said John Doe then and there in lieu of such failure to attend pay to said overseer the sum of one dollar for each day he was notified to work on said public road.

Against the peace and dignity of the State.

.....(affiant).

Subscribed and sworn to before me this the.....day of.....A. D.....

.....

J. P. Prec. No....., ...county, Texas.

Sec. 1360. **Failure to furnish team—Form for complaint.**

In the name and by the authority of the State of Texas:

Before me the undersigned authority on this day personally appeared..... who being by me duly sworn deposes and says that John Doe heretofore on the .....day of.....A. D.....in the county of.....and State of Texas was then and there legally summoned by.....then and there the road overseer of road precinct number.....in said county to attend for road work on a public road in said precinct then and there commonly known as the..... public road, and leading from.....to.....in said county, on the .....day of.....A. D.....the place and time last named being the time and place designated by said person so summoning him, and the said John Doe was then and there a road hand in said precinct and then and there a person liable to work upon the public roads, and at the same time of so notifying the said John Doe to attend at said time and place so designated the said overseer did then

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and there also summon the said John Doe who was then and there the owner of a team suitable for road work, to bring such team with him to be used in working upon said road during the time the said John Doe was so notified to work thereon, and after said notice as aforesaid the said John Doe did then and there at said time and place so designated fail and refuse to furnish his said team as notified to do, nor did the said John Doe then and there pay to said overseer the sum of one dollar and fifty cents per day for each day he was so notified to furnish his said team for said road work in lieu of said failure and refusal.

Against the peace and dignity of the State.

.....(affiant).

Subscribed and sworn to before me this the.....day of.....A. D.....

.....

J. P. Prec. No....., ...county, Texas.

Sec. 1361. **Alleging failure of duty of road hand.**—The term "wilfully" is not used in article 832 of the Penal Code, and it is not necessary therefore that such term be used in the indictment, information, or complaint.

Article 832 of the Penal Code denounces a failure to perform acts which it is the duty of the road hand to do, hence it is proper to allege that defendant did not attend work or pay in lieu thereof. He is not required to do both, and under this statute to allege that he did not attend and did not pay charges no offense because he is not required to do both. This statute is an exception to the ordinary use of "and" instead of "or," and permits of and requires the allegation in the alternative.

An indictment, information, or complaint for failure of a road hand to perform road duty should not join in several road hands as defendants in the same pleading. Each such defendant should be separately charged with his failure of duty. Bennett et al. v. State, 26 Texas Crim. App. 671; 14 S. W. 336.

An indictment, information, or complaint against a road hand for failure to perform road duty should allege in terms that he was liable under the law to work upon the public roads. Bennett et al. v. State, 26 Texas Crim. App. 671; 14 S. W. 336.

Sec. 1362. **Failing to work the road.**—A resident citizen of a city is not liable to road duty outside of the city limits when the city charter confers upon the city authorities exclusive power and control over the streets, alleys, and public ways therein, and the city has assumed the exercise of such power. Ex parte Roberts, 28 Texas Crim. App. 43; 11 S. W. 782. Ex parte Koen, 58 Texas Crim. Rep. 279; 125 S. W. 401.

General authority over streets given a city incorporated by special act will not authorize the passage of a city ordinance making it a penal offense to fail to work the streets of such city when no express authority is given therefor. Ex parte Grace, 9 Texas Crim. App. 381. Ex parte Campbell, 22 S. W. 1020.

A city ordinance making it a penal offense to fail to work the streets is valid where it was passed by a city incorporated under the general law and where the ordinance strictly followed the power granted. Ex parte Bowen, 34 Texas Crim. Rep. 107; 29 S. W. 269.

The burden of proof is upon the State to show that defendant was liable to work upon the public road alleged. Wynn v. State, 42 S. W. 289. Anselin v. State, 160 S. W. 713.

If the proof shows that there is no such road or road precinct as alleged, the variance is fatal. Wynn v. State, 42 S. W. 289.

Art. 833. (493) (412) **Failure to open boundary lines.**—Whenever the commissioners' court of any county in this State shall duly declare the boundary lines between the lands of different persons a public highway, in accordance with law, if any person or owner shall fail, neglect or refuse, for twelve months after legal notice thereof, to leave open his land, free from all obstructions, for ten feet on his side of the

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line designated, he shall be fined not more than twenty dollars for each month after the twelve months aforesaid in which he may so fail, neglect or refuse. (Acts 1876, p. 69.)

Art. 834. (494) (413) **Leaving gates open on third-class roads.**—Any person or persons placing a gate on or across any third-class road, or on or across any road such as is designated in article 833 of the Penal Code, shall be required to keep said gate and the approaches to the same in good order, and the gate shall be ten feet wide and so constructed as to cause no unnecessary delay to the traveling public in opening and shutting the same; and provide a fastening to hold said gate open until the passengers go through and such person or persons shall place a permanent hitching post and stile block on each side of and within sixty feet of such gate. Any person or persons who may hereafter place a gate on or across a third class road, or on or across any road such as is designated in article 493 (833), who shall wilfully or negligently fail to comply with the requirements of this article shall be deemed guilty of a misdemeanor, and on conviction may be fined in any sum not less than five nor more than twenty dollars for each offense, and each week of said (such) failure shall constitute a separate offense. Any person or persons who shall wilfully or negligently leave open any gate on or across any third class road, or on or across any road such as is designated in article 493 (833), shall be deemed guilty of a misdemeanor, and on conviction may be fined in any sum as above provided for. (O. C. 413, amended by Act Feb. 2, 1884, Acts 1884, S. S. p. 18.)

Art. 835. (495) (414) **Violation of irrigation laws.**—If any person amenable to the laws governing irrigation shall fail or refuse to work on any ditch or aqueduct when summoned so to do by the proper authority he shall be fined not less than one nor more than five dollars. (Act Dec. 20, 1861, Acts 1861, p. 8.)

Art. 836. **Obstructing drainage ditch.**—If any person shall wilfully or negligently obstruct or cause to be obstructed any ditch constructed under the drainage law of this State, he shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than ten dollars nor more than one hundred dollars. (Sec. 15, Act April 11, 1899, Acts 1899, p. 100.)

Art. 837. (496) **Injuring irrigation canal, etc.**—Any person who shall wilfully or through gross negligence injure any irrigating canal or its appurtenances, wells or reservoirs, or who shall waste the water thereof, or shall take the water therefrom without authority, shall be deemed guilty of a misdemeanor, and for each offense shall be liable to a fine not exceeding two hundred dollars. (Sec. 14, Act March 19, 1889, Acts 1889, p. 102. Amended by Act June 5, 1899, Acts 1899, p. 301.)

Sec. 1363. Injuring irrigation canal.—Article 803a of the Penal Code of 1895, which was based upon Sec. 15, of the Act of 1895, p. 25, and which was worded the same as article 837 (496) except that the word "dams" followed next after the word "wells" therein was omitted from the Penal Code of 1911.

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An indictment or information for taking water from an irrigating canal without authority should allege the ownership of the canal from which the water was taken. Dolan v. State, 60 Texas Crim. Rep. 5; 129 S. W. 840.

If there is evidence that defendant had authority to use the water the court should give a charge presenting this theory to the jury. Cordero v. State, 58 S. W. 102.

When the language of the statute relied on requires that the act be done wilfully before it constitutes a penal offense, the court should charge the jury, when there is evidence to support the theory, that unless the water was taken from the irrigating ditch "wilfully" they should acquit. Cordero v. State, 58 S. W. 102.

The term "wilfully" means with evil intent, or with legal malice, or without reasonable grounds for believing the act to be lawful.

Sec. 1364. **Irrigation laws.**
Sec. 1365. Using water without permit.
Sec. 1366. Conservation of storm water.
Sec. 1367. Use of streams for conveying stored water.
Sec. 1368. Penalty for unlawful interference.
Sec. 1369. Interference with headgates, etc.
Sec. 1370. Penalty for injuring works.
Sec. 1371. Polluting or obstructing canals, etc.
Sec. 1372. Diversion of water.
Sec. 1373. Permit to divert water.
Sec. 1374. Unlawfully diverting water.
Sec. 1375. Johnson Grass or Russian Thistle.
Sec. 1376. "Waste" defined.
Sec. 1377. Causing or permitting waste.
Sec. 1378. Log of artesian well.

Sec. 1365. **Using water without permit.**—Any person, association of persons, corporation or irrigation district, or any agent, officer, employe or representative of any person, association of persons, corporation or irrigation district, who shall wilfully take, divert or appropriate any of the water of this State, or the use of such water, for any purpose, without first complying with all the provisions of this Act, shall be deemed guilty of a misdemeanor; and on conviction thereof shall be fined in any sum not exceeding one hundred dollars, or by imprisonment in the county jail for a term not exceeding six months, or by both such fine and imprisonment; and each day that such taking, diversion or appropriation of water shall continue shall constitute a separate offense; and the possession of such water, except when the right to its use is acquired in accordance with the provisions of law, shall be prima facie proof of the guilt of the person, association of persons, corporation, irrigation district, or the agent, officer, employe or representative of any person, association of persons, corporation or irrigation district. (Sec. 39, Act April 9, 1913, Acts 1913, p. 367.)

Sec. 1366. **Conservation of storm water authorized.**—Any person, association of persons, corporation, or irrigation district having in possession and control storm, flood, or rain waters conserved or stored under the provisions of this law may enter into contract to supply same to any person, association of persons, corporation, or irrigation district having the right to acquire such use. (Sec. 50, Act April 9, 1913, Acts 1913, p. 370.)

Sec. 1367. **Use of streams for conveying stored water.**—For the purpose of conveying and delivering storm, flood or rain water from the place of storage to the place of use as provided in the preceding Section, it shall be lawful for any person, association of persons, corporation or irrigation district to use the banks and bed of any flowing natural stream within this State. (Sec. 51, Act April 9, 1913, Acts 1913, p. 370.)

Sec. 1368. **Penalty for unlawful interference.**—Any person, association of persons, corporation, or irrigation district, or the agent, officer, employee, or representative of any such person, association of persons, corporation, or irrigation district who shall wilfully interfere with the passage of or take, divert, or appropriate such

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conserved or stored water during the passage and delivery thereof as provided in the last two preceding sections, shall be deemed guilty of a misdemeanor and upon conviction thereof, shall be fined in any sum not exceeding one hundred dollars, or by imprisonment in the county jail for a term not exceeding six months, or by both such fine and imprisonment. (Sec. 52, Act April 9, 1913, Acts 1913, p. 371.)

Sec. 1369. **Interference with headgates, etc.**—Any person who shall wilfully open, close, change or interfere with any headgate or water box, without lawful authority, or who shall wilfully use water or conduct water in or through his ditch or upon his land, to which water he is not entitled, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined in any sum of not less than ten dollars, and not more than one hundred dollars, or by imprisonment in the county jail for a term not exceeding sixty days; provided, that the possession or use of water to which the person using or possessing same shall not lawfully be entitled shall be prima facie proof of the guilt of the person so using or in possession of same. (Sec. 69, Act April 9, 1913, Acts 1913, p. 374.)

Sec. 1370. **Penalty for injuring works.**—Any person or persons who shall knowingly and wilfully cut, dig, break down, destroy, or injure, or open any gate, bank, embankment or side of any ditch, canal, reservoir, flume, tunnel or feeder or pump or machinery, building, structure or other work, which is the property of another, or in which another owns an interest, or which is in the lawful possession or use of another or others, and which is used for the purpose of irrigation or milling or mining, or manufacturing, or for the development of power or for domestic purposes, or for stock raising, with intent maliciously to injure any person, association or corporation or irrigation district, or for the gain of any person, association or corporation, so cutting, digging, breaking, injuring or opening any such work hereinbefore in this Section named, or with the intent of stealing or taking or causing to run out or waste out of any such ditch, canal or reservoir, feeder or flume, any water for his own profit, benefit or advantage or to the injury of any person, association or corporation lawfully entitled to the use of such water or to the use or management of such ditch, canal, tunnel, reservoir, feeder, flume, machinery, structure or other irrigation work, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than ten dollars nor more than one thousand dollars, and may be punished by imprisonment in the county jail for any term not exceeding two years, or by both such fine and imprisonment. (Sec. 70, Act April 9, 1913, Acts 1913, p. 374.)

Sec. 1371. **Polluting or obstructing canals, etc.**—Any person or persons who shall deposit in any canal, lateral, reservoir or lake, used for any of the purposes enumerated in this Act, the carcass of any dead animal, tin cans, discarded buckets or pails, garbage, ashes, baling or barbed wire, earth, offal or refuse of any character, or any other article or articles which might pollute or obstruct the flow of water in any such canal or other similar structure, shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in any sum not less than ten dollars nor more than one hundred dollars, or by imprisonment in the county jail for a term not exceeding six months, or by both such fine and imprisonment. (Sec. 71, Act April 9, 1913, Acts 1913, p. 374.)

Sec. 1372. **Diversion of water from watershed.**—It shall be unlawful for any person, association of persons, corporation, or irrigation district to take or divert any of the water of the ordinary flow, underflow, or storm flow of any stream, water course, or watershed in this State into any other natural stream, water course, or watershed to the prejudice of any person or property situated within the watershed from which such water is proposed to be taken or diverted. (Sec. 81, Act April 9, 1913, Acts 1913, p. 376.)

Sec. 1373. **Permit to divert water.**—Before any person, association of persons, corporation, or irrigation district shall take any water from any natural stream, water course, or watershed in this State into any other watershed, such person, association of persons, corporation, or irrigation district shall make application to the Board of Water Engineers for a permit so to take or divert such waters, and no such permit shall be issued by the board until after full hearing as to the rights to be affected thereby. (Sec. 82, Act April 9, 1913, Acts 1913, p. 376.)

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Sec. 1374. **Unlawfully diverting water.**—If any person, association of persons, corporation, irrigation district, or the agent, attorney, employe, or representative of any such person, association of persons, corporation or irrigation district, shall take or divert any waters from one natural stream, water course, or watershed into any other watershed contrary to the provisions of the last two preceding Sections of this Act, he, it or they, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine in any sum not less than one hundred dollars nor more than five hundred dollars or by imprisonment in the county jail for any term not exceeding six months, and each day that such taking or diversion shall continue shall constitute a separate offense. (Sec. 83, Act April 9, 1913, Acts 1913, p. 377.)

Sec. 1375. **Johnson Grass or Russian Thistle.**—It shall be unlawful for any person, association of persons, corporation or irrigation district owning, leasing or operating any ditch or canal or reservoir or cultivating any lands, abutting upon any reservoir, ditch, flume, canal, waste-way or lateral to permit Johnson Grass or Russian Thistle to go to seed upon such reservoir, ditch, flume, canal, waste-way or lateral within ten feet of the high water line of any such reservoir, ditch, flume, canal, waste-way or lateral, where the same crosses or lies upon land in the ownership or control of any such person, association of persons, corporation or irrigation district, and any one violating the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction therefor shall be fined in any sum not less than twenty-five dollars nor more than five hundred dollars, or by imprisonment in the county jail not less than thirty days nor more than six months, or by both such fine and imprisonment. (Sec. 90, Act April 9, 1913, Acts 1913, p. 378.)

Sec. 1376. **"Waste" defined.**—Waste is defined for the purposes of this Act in relation to artesian wells to be the causing, suffering or permitting the waters of an artesian well to run into any river, creek or other natural water course or drain, superficial or underground channel, bayou, or into any sewer, street, road, highway, or upon the land of any other person than that of the owner of such well, or upon the public lands, or to run or percolate through the strata above that in which such water is found; unless it be used for the purposes and in the manner in which it may be lawfully used on the premises of the owner of such well; provided, that nothing in this Section shall be construed to prevent the use of such water, if suitable, for the proper irrigation of trees standing along or upon any street, road or highway, or for ornamental ponds or fountains, or the propagation of fish or for the purposes authorized by this Act. (Sec. 93, Act April 9, 1913, Acts 1913, p. 378.)

Sec. 1377. **Causing or permitting waste from artesian well.**—Any person causing, suffering, or permitting the waste of water from an artesian well as defined in the last preceding Section shall be deemed guilty of a misdemeanor, and upon conviction therefor shall be fined in any sum not less than twenty-five dollars nor more than five hundred or by imprisonment in the county jail for any period not exceeding six months, or by both such fine and imprisonment. (Sec. 94, Act April 9, 1913, Acts 1913, p. 378.)

Sec. 1378. **Log of artesian well.**—Any person boring or causing to be bored any artesian well shall keep a complete and accurate record of the depth and thickness and character of the different strata penetrated, and when such well is completed, shall transmit by registered mail to the Board of Water Engineers a copy of such record. Any person violating the provisions of this Section shall be deemed guilty of a misdemeanor and upon conviction therefor shall be fined in any sum not less than ten dollars nor more than one hundred dollars. (Sec. 95, Act April 9, 1913, Acts 1913, p. 378.)

(Nothing in the three preceding sections applies to oil wells. Sec. 96, Act April 9, 1913, Acts 1913, p. 379.)

Sec. 1379. **Toll roads.**
Sec. 1380. Trespassing on toll road.
Sec. 1381. Obstructing toll road.

Sec. 1380. **Trespassing on toll road.**—It shall be unlawful for any person to trespass or enter upon the property or right of way of a toll road corporation without its consent except as to crossings provided by law, and any person so trespassing or unlawfully entering thereupon shall be deemed guilty of a misdemeanor and upon

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conviction shall be fined in a sum not less than twenty-five nor more than one hundred dollars. (Sec. 24, Act March 31, 1913, Acts 1913, p. 146.)

Sec. 1381. **Obstructing toll road.**—It shall be unlawful for any person to in any manner obstruct any toll road, or to place thereon any thing or substance which would be reasonably calculated to result in injury to any patron of such road, or damage to any vehicle which might be run over the same; and any person so placing any such obstruction or thing or substance on any such road shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in a sum not less than fifty dollars nor more than two hundred dollars. (Sec. 25, Act March 31, 1913, Acts 1913, p. 146.)

Sec. 1382. **Trespassing on toll bridge.**—If any person or persons in this State shall wilfully enter upon any toll bridge maintained wholly or partly within this State without the consent of those in charge of such bridge, with the intent to avoid the payment of the toll lawfully chargeable for crossing the same, such person or persons shall be deemed trespassers and guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than five dollars nor more than one hundred dollars. (Acts March 22, 1915, Acts 1915, p. 154.)

CHAPTER III

FERRIES

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Article 838. (497) (415) (430a) **Keeping ferry without license.**—If any person or firm shall keep any ferry over any water course, navigable stream, lake or bay in this State, and shall charge or receive any money, property, or other valuable thing, for crossing passengers or property at such ferry, without first obtaining license, as is now or may hereafter be required by law, such person or firm shall be punished by fine not less than fifty nor more than two hundred dollars. (Acts 1860, p. 98.)

Art. 839. (498) (416) **Failure to keep good boats, etc.**—If the owner of any licensed ferry in this State shall fail to keep at all times good, safe and substantial boats, sufficient in number for the ready accommodation of the public, or shall fail to keep the banks on each side of the ferry in good repair, and so graded that the ascent shall not exceed one foot in every seven feet from the water's edge to the top of the bank, or shall fail to give ready attendance on all passengers desiring to cross with their animals, wagons, or other property, or shall charge higher rates of ferriage than those fixed by the proper authority, he shall be fined not less than ten nor more than one hundred dollars. (Acts 1875, p. 58.)

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CHAPTER IV

PUBLIC GROUNDS AND BUILDINGS

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Sec. 1383. **Injuring or defacing public building.**
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Sec. 1386. Charge of the court.

Article 840. (499) (417) **Injuring or defacing a public building.**—If any person shall wilfully injure or deface any public building, or the furniture therein in this State, he shall be fined not less than five nor more than five hundred dollars. The word "deface" in this chapter shall be held to apply to writing, carving or scratching on the walls or plastering or furniture of said building, or staining the same with paint or any other article which will produce a discoloration of the same. (Act Jan. 4, 1862, Acts 1862, p. 51. Amended by Act May 14, 1888, Sec. 2, Acts 1888, p. 5.)

Art. 841. (500) (418) **"Public building" defined.**—The term "public building" as used in the preceding article means the capitol and all other buildings in the capitol grounds at the seat of government, including the general land office and the executive mansion, the various State asylums and all buildings belonging to either, all college or university buildings erected by the State, all court houses and jails and all other buildings held for public use by any department or branch of government, State, county or municipal; and the specific enumeration of the above shall not exclude other buildings not named, properly coming

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within the meaning and description of a public building. (Added in revising.)

Art. 842. (501) (419) **All officers to report violations.**—It is the especial duty of all executive officers of the State and the county officers of the various counties to aid in the execution of the two preceding articles, and to report all violations thereof to the proper authorities for immediate prosecution. (Act Jan. 4, 1862, Acts 1862, p. 51.)

Sec. 1384. **Indictment or information for injuring or defacing a public building.**—If the public building injured or defaced is specifically named in the statute, it is not necessary to allege that it was a public building held for public use. If the building injured or defaced is not specifically named in the statute, it is necessary to allege that it was a "public building," and that it was "held for public use." Brown v. State, 16 Texas Crim. App. 248. Pratt v. State, 19 Texas Crim. App. 276. Clark v. State, 23 Texas Crim. App. 260; 5 S. W. 115. Burkhalter v. State, 104 S. W. 901. Hughes v. State, 59 Texas Crim. Rep. 360; 128 S. W. 904.

An indictment is good if it is therein alleged that defendant "did wilfully injure and deface a public building then and there held for public use to wit, the..... (naming it) school house, by then and there breaking and knocking the windows out of said building." Clark v. State, 23 Texas Crim. App. 262; 5 S. W. 115. Mitchell v. State, 62 S. W. 572. Thurston v. State, 58 Texas Crim. Rep. 309; 125 S. W. 31.

Sec. 1385. **Evidence.**—Convictions sustained. Mitchell v. State, 62 S. W. 572. Thurston v. State, 58 Texas Crim. Rep. 308; 125 S. W. 31.

A conviction will not be sustained on proof which amounts to a mere suspicion. Weatherford v. State, 49 Texas Crim. Rep. 293; 91 S. W. 591.

The evidence is insufficient to sustain a conviction if it fails to show that the building was a public building. Cleavinger v. State, 43 Texas Crim. Rep. 274; 65 S. W. 89.

Sec. 1386. **Charge of the court.**—The term "wilfully" means with evil intent, or with legal malice, or without reasonable grounds for believing the act to be lawful.

The failure to define the term "wilfully" in the charge to the jury will not be reversible error if defendant did not except to said omission at the time nor ask a special charge correctly defining that term. Clark v. State, 23 Texas Crim. App. 262; 5 S. W. 115.

When supported by the testimony, it is proper to charge the jury that the term "deface," as used in the charge, applies to staining the said building with any article which will produce a discoloration of the same, and that such staining, if any, need not be of a permanent or lasting character. Mitchell v. State, 62 S. W. 572.

Art. 843. (502) (420) **Driving in capitol grounds.**—If any person shall drive, ride or lead, or cause to be driven, ridden or led, any horse or other animal to the capitol grounds at the seat of government, or into the inclosure of the State cemetery, without the consent of the keeper or superintendent of said grounds or cemetery, he shall be fined not exceeding twenty-five dollars. (Acts 1874, p. 165.)

Art. 844. **Injuring roadway, public grounds, or State property.**—It shall be unlawful for any person or persons to drive, or cause to be driven, over or along any roadway in any of the public grounds of this State, any heavy vehicle, or vehicle for carrying merchandise, or vehicle

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heavily loaded, or otherwise reasonably calculated to injure or deface such roadways, or to make their maintenance more expensive; or to drive, or cause to be driven, any vehicle or conveyance of any kind, or to drive, or cause to be ridden, any animal of any kind, over, across, or along any of the footpaths or walks in such grounds, or on the turf of such grounds, or at any place therein, except on and along the roadways and at the hitching places provided therefor; or to hitch any horse or team in any of said public grounds, or to the fences surrounding the same, unless at some place especially provided therefor, or to cause or permit any horse, not being driven to some vehicle or ridden, or any cow, sheep, goat, hog, or other animal reasonably calculated to injure said grounds, or anything pertaining thereto, or go into or remain in any portion of said grounds; or to cut, pull, break, bruise, remove, or in anywise injure any tree, or shrub or vegetation of any kind growing thereon; or disturbing any birds' nests or eggs; or to in anywise injure, deface or in any way interfere with any chair, bench, seat, hydrant, frame, fence, gate, erection or structure of any kind therein or thereon or connected therewith; or to fish or wash or bathe in or any way pollute the waters of any lake or pond, or stream therein, or to obscenely or indecently expose any part of his or her person, or to do any indecent act thereon. Any person violating any of the several provisions of this law shall be guilty of a misdemeanor, and shall be fined in any sum not less than five nor more than one hundred dollars. (Acts 1903, p. 187.)

Art. 845. **Not to apply, when.**—This law shall not apply to anything done by the lawful custodian of the public grounds on which said act is performed, or under his authority and direction, and which is done in the reasonable discharge of his duties as such custodian, or in the use of such grounds for the purpose to which they are dedicated by the State. (Acts 1903, p. 187.)

Art. 846. **"Public grounds" defined.**—The term "public grounds," as used in this law, includes all grounds owned by the State, and used and maintained by it in connection with any public building or institution, whether for governmental, educational, eleemosynary or other purpose, and all State cemeteries and all parks maintained at the expense of the public. (Acts 1903, p. 187.)

Art. 847. (503) (421) **Hitching in capitol grounds.**—If any person shall hitch any animal to any tree or shrub in the capitol grounds or State cemetery, he shall be punished as prescribed in the preceding article. (Acts 1874, p. 165. This article is dependent on article 843 (502) for its penalty, notwithstanding its faulty position in the Penal Code of 1911.)

Art. 848. (503a) **Pass keys to State capitol.**—It shall not be lawful for any person to make or have made, or to keep in his possession, a pass or master key to the rooms and apartments in the State capitol, unless authorized to do so by the superintendent of public buildings and

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grounds, and any person violating the provisions of this article shall be deemed guilty of a misdemeanor, and on conviction shall be fined in any sum not exceeding one hundred dollars. (Acts 1895, p. 79.)

Art. 849. (504) (422) **Taking property from public grounds.**—If any person shall take, remove, injure or destroy any species of public property pertaining to (any) public building, as defined in article 841, or to the grounds belonging to such building, he shall be fined not less than twenty-five nor more than one hundred dollars. (Added in revising.)

Art. 850. (505) (422a) **Fencing, using, etc., public lands.**—It shall be unlawful for any person to fence, use, occupy or appropriate, by herding or line-riding, any portion of the public lands of the State, or of the lands belonging to any particular fund specified in this act, without having first obtained a lease of such lands in accordance with the provisions of this act. Any person, whether owner of stock, manager, agent, employe or servant, who shall fence, use, occupy or appropriate by herding or line-riding, any portion of such lands without a lease thereof, shall be deemed guilty of a misdemeanor, and shall, upon conviction, be fined not less than one hundred nor more than one thousand dollars, and in addition thereto shall be imprisoned in the county jail for a period of not less than three months nor more than two years. Each day of such fencing, using, occupying, or appropriating, by herding or line-riding, shall be deemed a separate offense, and any person so offending may be prosecuted, by indictment or information, in the proper court of the county where any portion of the land lies or to which it may be attached for judicial purposes, or in the county of Travis, and jurisdiction of such offenses is hereby vested in said courts; and in case any indictment or information is preferred or filed against a non-resident of this State for a violation of this article, it shall be the duty of the Governor to demand the extradition of the defendant from the proper officer of any State or Territory where he may be found, in order that he may be brought to trial. "Fencing," within the meaning of this article, is the erection of any structure of wood, wire, or both, or any other material intended to prevent the passage of cattle, horses, mules, asses, sheep, goats, or hogs, whether the same shall inclose lands on all sides or be erected on one or more sides. Any appropriation of land belonging to any particular fund specified in this act, or of the public lands of this State, without having first obtained a lease thereof, by fencing of any kind, or by inclosures consisting partly of fencing and partly of natural obstacles, or impediments to the passage of live stock, shall be deemed an unlawful appropriation, punishable as provided in this article for appropriating such lands, and each day said land is so appropriated shall be deemed a separate offense. (Sec. 18, Act April 1, 1887, Acts 1887, p. 89.)

Art. 851. (506) (422b) **Not applicable, when.**—The provisions of this act as set forth in the preceding article shall not apply to persons

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who are moving or gathering or holding for shipment any stock mentioned in said article: Provided, The said persons have not erected any fence on such lands, or continue on said lands longer than one week. (Sec. 19, Act April 1, 1887.)

Art. 852. (507) **Turning loose too many stock on leasehold land.**—No purchaser or other person than the lessee of public free school, asylum and public lands shall be permitted to turn loose within such leasehold more than one head of horses or mules or cattle for any ten acres of land purchased, owned or controlled by him and uninclosed, or in lieu thereof, four head of sheep or goats to every ten acres so purchased, owned or controlled and uninclosed. Each violation of this provision of this article, which restricts the number of stock that may be turned loose on lands leased from the State shall be an offense, and the owner on conviction, shall be punished by a fine not less than one dollar for each head of stock he may so turn loose and each thirty days violation of the provisions of this article shall constitute a separate offense. (Sec. 15, Act April 1, 1887, amended by Act April 28, 1891, Acts 1891, p. 180.)

Art. 853. (509) **Other statutes relating to public lands.**—Each and every person who shall have inclosed, by fencing or otherwise, any of the public free school lands belonging to the State, and shall use the same to the exclusion of the public, shall pay an annual rental value therefor of the sum of twenty-five dollars for each section so inclosed. (Sec. 1.)

And it shall be the duty of the surveyor of each county to make a report to the county commissioners' court on the first Monday in June each year of the number of sections of public school lands in his county inclosed during the past year, and the names of the person or persons controlling such inclosed lands, and the number of sections controlled by him or them respectively. (Sec. 2.)

And the said court at the first regular term thereafter, shall make a list of the names of the persons controlling such public free school lands, the number of sections so controlled by each person and the aggregate amount due from each person, at the rate of twenty-five dollars for each section so inclosed and controlled; which list shall be recorded by the clerk of said court, and a certified copy thereof forwarded by him to the comptroller of public accounts, and a like copy delivered to the collector of taxes for said county. (Sec. 3.)

The collector of taxes on the receipt of such list shall proceed to collect the same under the same provisions and penalties as is imposed by law for the collection of taxes. (Sec. 4.)

All moneys collected under the provisions of this act shall be paid by the collector into the State treasury and constitute a part of the available school fund; provided, that the State may resume control of said land at any time. (Sec. 5.)

Any person who shall control inclosed lands belonging to the public free schools and fail to pay the rental value as specified under the

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provisions of this act upon the demand of the collector, shall be subject to prosecution upon complaint, information or indictment, and fined in the sum of one hundred dollars for each section so inclosed. (Sec. 6.) (Act of April 17, 1879, Acts 1879, p. 101. Sections 1-6.)

Art. 854. **Fencing land of another.**—If any person or corporation shall knowingly make or permit to remain standing any fence on or around the land of another, or the public, public school, university or asylum lands of this State, without the written consent of the owner thereof duly acknowledged, or a duly executed lease of such land from the proper authority in a case of public, public school, university or asylum lands, as the case may be, duly recorded in the county where the land lies or to which it is attached for judicial purposes, he shall be deemed guilty of a misdemeanor, and upon conviction thereof, fined in any sum not less than fifty cents nor more than one dollar per acre per month for each month so inclosed, or fined and imprisoned in the county jail for any period not over two years. Within the meaning of person, as used in this act, is included every man managing or controlling for a corporation, firm or joint stock company, and any and every individual or person who shall aid, assist or direct in the violation of this act. Half of all fines collected under the provisions of this act shall be paid to the person or persons informing on the person or corporation who shall unlawfully inclose any land; provided, that each three months said land is so inclosed shall constitute a separate offense. A fence within the meaning of this act is any structure of wood, wire, or both, or any other material intended to prevent the passage of cattle, horses, mules, asses, sheep, goats or hogs. Where persons or corporations have unlawfully fenced land belonging to the State, or public school, university or asylum lands, it shall be the duty of the attorney general, either in person or by proxy, to institute proceedings in the name of the State against any person or incorporation so unlawfully inclosing said lands; and the expense incurred in employing counsel to prosecute such cases shall be deducted from the fine or fines collected from any person or corporation violating the provisions of this act, the balance to be paid to the fund to which it belongs. (Act Feb. 7, 1884, p. 68, Sec. 1.)

Art. 855. **Articles that apply to prosecutions.**—In all prosecutions under this chapter, the provisions of articles 1290 and 1291 of the Penal Code of the State of Texas shall apply. (Act Feb. 7, 1884, p. 69, Sec. 3.)

Art. 856. **When the law does not apply.**—This chapter shall not apply to persons who have heretofore settled upon lands not their own, where the inclosure is two hundred acres or less, and where the principal pursuit of such person upon the land is that of agriculture. (Act Feb. 7, 1884, p. 69, Sec. 4.)

Sec. 1387. **Fencing land of another.**—If the defendant appears to have had any fair color of title, or if the title of prosecutor be brought into doubt at all, defendant should be acquitted. The criminal statutes were not meant to be used for the purpose of deciding a contention between two adjoining land owners as to

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the true location of their division line where each has made claim to that portion of the land upon which the fence was erected. Clark v. State, 23 Texas Crim. App. 618; 5 S. W. 163.

An indictment under article 854, to be sufficient, must show the length of time the fence was permitted to remain, each three months being a separate offense. If the fence remained less than three months no offense was committed under article 854. Gibbs v. State, 39 Texas Crim. Rep. 476; 46 S. W. 645.

Although part of the fine goes to the informer under article 854 the prosecution must and may be commenced and carried on, as in prosecutions for other offenses, "in the name and by the authority of the State of Texas." Gibbs v. State, 39 Texas Crim. Rep. 476; 46 S. W. 645.

An allegation that the land was a half section is sufficiently definite to show the number of acres fenced. Gibbs v. State, 39 Texas Crim. Rep. 476; 46 S. W. 645.

Under article 854 the fine is dependent upon the number of acres inclosed, and it is therefore necessary to allege the number of acres inclosed.

An indictment which simply charges that defendant permitted a fence to remain around the inclosure of another charges no offense. It must be alleged either that defendant made the fence, or that he was connected in some way with making it. Carney v. State, 39 S. W. 661.

Art. 857. **Unlawful to herd horses, etc.**—It shall be unlawful for any person, firm or corporation to herd, or aid in herding, or cause to be herded, loose-herded or detained for grazing by line-riding, any cattle, horses, mules, asses, sheep or goats on any vacant public domain, school, university or asylum lands within this State, unless the same shall have been leased from the proper authority; provided, that this section of this act shall not apply to persons herding such stock, in gathering for, or carrying to and from market, or in moving the same from one section of the country to another. (Sec. 6, Act Feb. 7, 1884, Acts 1884, p. 70.)

Art. 858. **Penalty.**—Any person who shall knowingly violate any of the provisions of article 857 shall be guilty of a misdemeanor, and upon conviction, shall be fined one hundred dollars for each year or part of a year, for each section or part of a section (meaning six hundred and forty acres of land or less, whether surveyed in sections or not) which shall be used contrary to the provisions of said article. (Sec. 7, Act Feb. 7, 1884, Acts 1884, p. 70.)

(An indictment under articles 857 and 858, to be sufficient, must allege that the acts were "knowingly" done, it not being an offense thereunder unless the statute was "knowingly" violated.)

Art. 859. (509a) **Turning loose excess of stock on leased lands.**—Each violation of the provisions of article 852 of this Code, which restricts the number of stock that may be turned loose on lands leased from the State, shall be an offense; and the offender on conviction shall be punished by fine of one dollar for each head of stock he may so turn loose; and each thirty days violation of the provisions of said article shall constitute a separate offense. (Acts 1895, p. 71.)

Art. 860. (509b) **Illegal fencing, etc., of public lands.**—It shall be unlawful for any person to fence, use, occupy or appropriate by herding or line-riding, any portion of the public lands of the State, or of the

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lands belonging to the public free schools or asylums, without having first obtained a lease of such lands. Any person, whether owner of stock, manager, agent, employe or servant, who shall fence, use, occupy or appropriate by herding or line-riding any portion of such lands without a lease thereof, shall be deemed guilty of a misdemeanor, and shall, upon conviction, be fined not less than one hundred nor more than one thousand dollars, and in addition thereto, shall be imprisoned in the county jail for a period of not less than three months nor more than two years. Each day of such fencing, occupying, using or appropriating by herding or line-riding shall be deemed a separate offense; and any person so offending may be prosecuted by indictment or information in the proper court of the county where any portion of the land lies, or to which it may be attached for judicial purposes, or in the county of Travis, and jurisdiction of such offenses is hereby vested in said courts; and in case any indictment or information is preferred or filed against a non-resident of this State for a violation of this article, it shall be the duty of the Governor to demand the extradition of the defendant from the proper officer of any State or Territory where he may be found, in order that he may be brought to trial. "Fencing" within the meaning of this article is the erection of any structure of wood, wire, or both, or any other material intended to prevent the passage of cattle, horses, mules, asses, sheep, goats or hogs, whether the same shall inclose lands on all sides or be erected on one or more sides. Any appropriation of land belonging to any particular fund specified in said act or of any of the public lands of this State, without having first obtained a lease thereof, by fencing of any kind, or by inclosures consisting partly of fencing and partly of natural obstacles or impediments to the passage of live stock shall be deemed an unlawful appropriation, punishable as provided in this article for appropriating such lands, and each day said land is appropriated shall be deemed a separate offense. (Sec. 25, p. 74, Acts 1895.)

CHAPTER V

FIRE ESCAPES

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Article 861. **Fire escapes to be provided.**—Every building or structure kept, used or maintained as, or advertised as, or held out to the public to be an inn, hotel or public lodging house or place where sleeping accommodations are furnished to the public, whether with or

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without meals, shall have and be provided with, at each and every floor above the second floor, or at every floor twenty feet or more above the ground, two or more iron or steel fire escapes to be attached securely on the outside of the walls of such buildings or structures, and such buildings or structures shall have and be provided with a way of egress to said fire escapes, which way of egress and fire escapes shall, at all times be kept free and clear of obstructions and in good repair and ready and suitable for immediate use. (Sec. 1, Act April 6, 1907, Acts 1907, p. 164.)

Art. 862. **How constructed.**—Said fire escapes shall consist of iron or steel ladders reaching from the roof of the building to within twelve feet of the ground, and the rungs of said ladders must be at least six inches from the wall, so that a secure foothold and handhold on same may be had, and the ladders must be securely bolted to and through the wall, and must be capable of sustaining a weight of fifteen hundred pounds avoirdupois, and that each floor above the ground floor, with proper open connections and exit to these ladders, shall be iron or steel balconies or landings, with strongly braced iron or steel hand railings, capable of sustaining a weight of fifteen hundred pounds avoirdupois. Said landings or balconies and the hand railings thereof shall be securely bolted to and through the walls, and, in case of wooden buildings said ladders, landings or balconies and hand railings shall be securely bolted to and through or clamped with iron or steel clamps to and around the upright studding or frame proper of the building. (Sec. 2, Act April 6, 1907, Acts 1907, p. 164.)

Art. 863. **Where located.**—All fire escapes shall be located as far as possible, consistent with accessibility from stairways, elevator hatchways and other openings in the floors and shall be located on two or more sides of the building and as far apart as is consistent with the construction and location of the building. (Sec. 3, Act April 6, 1907, Acts 1907, p. 164.)

Art. 864. **Placards indicating way to.**—Placards or signs indicating plainly the way to fire escapes shall be placed and kept continuously in conspicuous places in the offices, hallways and in every bedroom of such building. (Sec. 4, Act April 6, 1907, Acts 1907, p. 164.)

Art. 865. **Rope in bedroom.**—Every building or structure not more than two stories high from the ground, and where the second floor is less than twenty feet above the ground, kept, used or maintained as, or advertised as, or held out to the public to be, an inn, hotel or public lodging house or place where sleeping accommodations are furnished to the public, whether with or without meals, shall have and be provided with, in every bedroom on the floor above the ground floor, a Manilla or hemp rope of at least five-eighths of an inch thickness, firmly knotted at least at every fifteen inches of its length, and long enough to reach within four feet of the ground, and to be securely fastened within the room not

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less than three feet above the base or sill of the window or opening, and so with strength of rope and fastening be capable of sustaining a weight of not less than five hundred pounds avoirdupois. (Sec. 5, Act April 6, 1907, Acts 1907, p. 164.)

Art. 866. **Penalty.**—Any person or persons owning, keeping or maintaining, controlling or managing any building or structure kept as, used as, maintained as, or advertised as, or held out to the public to be, an inn, hotel, public lodging house or place where sleeping accommodations are furnished to the public, whether with or without meals, in violation of the provisions of this act, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined not less than twenty-five nor more than two hundred dollars, and each and every day any person owning, keeping, maintaining, controlling or managing any building or structure kept as, maintained as, or advertised as, or held out to the public to be, an inn, hotel, public lodging house or place where sleeping accommodations are furnished to the public, whether with or without meals, in violation of the provisions of this law, shall constitute a separate offense. (Sec. 6, Act April 6, 1907, Acts 1907, p. 165.)

Art. 867. **Tenant or lessee may erect fire escape.**—The tenant or sub-tenant, lessee or sub-lessee of any building coming within the provisions and requirements of this act may, when the owner or his agent fails to comply with the provisions of this act, contract for and have constructed and erected said fire escapes in accordance with the requirements of this law, and may deduct the cost of same from the amount due, or the amounts that may become due such landlord or lessor on account of the rent or lease of such building. (Sec. 7, Act April 6, 1907, Acts 1907, p. 165.)

Sec. 1388. **Violating law relating to fire escapes.**—The owners, tenants, firms, corporations, agents or other persons in charge of any business within the Act of February 16, 1915, relating to fire escapes, who shall fail or neglect, after a written notice has been given them in accordance with law, to comply with any of the provisions of said law which are applicable to the building owned, leased, or in his charge, shall be deemed guilty of a misdemeanor, and be punished by a fine of not less than fifty dollars, nor more than two hundred dollars. (Sec. 4, Act Feb. 16, 1915, Acts 1915, p. 20.)

CHAPTER VI

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Art. 869. **Entrap or net fish (except minnows), certain counties exempt.**—(This article is based upon Chapter 49, Act March 16, 1909, Acts 1909, p. 95. Chapter 49, Acts 1909, was expressly repealed by Chapter 110, Acts 1911, p. 226. Chapter 49, Acts 1909, was amended by Chapter 113, Acts 1911, p. 232 so as to except Coryell county. Chapter 110, Acts of 1911, Sec. 4 was amended by Chapter 17, p. 104 of the Acts of the 1st. Called Session of 1911. Chapter 49, Acts 1909, was amended by Chapter 96, Acts 1913, p. 181. Chapter 96, Acts 1913, p. 181, was amended by Act Feb. 16, 1915, Acts 1915, p. 15. In Section 2, Acts 1913, p. 276, article 869 is in terms declared to be repealed. See article 923f, Act 1913, p. 274, copied in its place in this Code.)

Sec. 1389. Fishing in Medina county.—The special law for the preservation of fish in the valley of the Medina river in Medina county is found on p. 135, Acts Regular Session 1915.

Art. 870. **Entrap or net in any lake, pool or pond, burden of proof.**—(This article was based on section 3 Act of March 16, 1909, Chapter 49, Acts of 1909, p. 96, and the penalty was by fine of not less than twenty-five nor more than one hundred dollars. On page 228, Acts of 1911, Sec. 5, Act of March 25, 1911, it was re-enacted in the same language and the penalty increased to imprisonment in the county jail for not less than twenty and not more than sixty days in addition to the fine of not less than twenty-five nor more than one hundred dollars, and by Act of March 25, 1911, on page 233, it was re-enacted in the same language with the penalty only by fine of not less than twenty-five nor more than one hundred dollars. Without the penalty it reads as follows:) Any person who shall take, catch, ensnare or entrap any fish by means of nets or seines or by muddying, ditching or draining in any lake, pool or pond in any county within this State without the consent of the owner of such lake, pool or pond shall be subject to the penalty . . . and in all prosecutions under this law, the burden of proof of such consent of the owner shall devolve and be upon the defendant.

Art. 871. **Conviction may be had on unsupported testimony of accomplice.**—Any court, officer or tribunal having jurisdiction of the offense set forth in this chapter, or any district or county attorney, may subpoena persons and compel their attendance as witnesses to testify as to violations of any of the provisions of this law, and any person so summoned and examined shall not be liable to prosecution for any of the violations of this law about which he may testify, and a conviction

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for said offense may be had upon the unsupported evidence of an accomplice or participant. (Formerly part of Article 512 Code of 1895.)

Art. 872. (513) (425a) **Duty of persons erecting mill dams.**—It shall be the duty of every person, firm, or corporation, municipal or private, who has heretofore erected, or who may hereafter erect any dam, water weir, or other obstruction or weirs on any regular flowing stream within this State to build, construct and keep in repair fish ways, or fish ladders, at such dam, water weir, or obstruction, so that at all seasons of the year fish may ascend above such dam, weir, or obstruction, to deposit their spawn. Any person, firm or corporation, or the agent or employe or officer of any corporation, whether private or municipal, who shall erect such dam, weir, obstruction, or any firm, person, or corporation whether private or municipal, who shall own or maintain, any such dam, obstruction or weir, who shall fail or refuse to build, construct and keep in repair such fish way, or fish ladder, within 90 days after having been notified by the Fish, Game and Oyster Commissioner of this State to do so, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not less than $25.00 nor more than $500.00; provided, that each week after the expiration of 90 days after receiving notice, as herein provided that such person, firm or corporation, municipal or private, shall fail or refuse to so build, construct and keep in repair, such fish way or fish ladder, shall constitute a separate offense. (Sec. 1, Act March 31, 1881, Acts 1881, p. 83, amended by Act March 22, 1915, Acts 1915, p. 118.)

Art. 873. **Limiting fish that may be taken and sold.**—It shall be and is unlawful for any person to take in any way more than fifty pounds of any fresh water fish for sale or barter for money or anything of value whatsoever; provided, that any one person shall be allowed to take and sell as much as fifty pounds of fish in one week, and no more than fifty pounds of fish in any one week of seven days; provided, the counties of Wharton and Nueces shall be exempt from the provisions of this law. (Sec. 1, Acts 1905, p. 222.)

Art. 874. **Killing and sale of squirrels.**—It shall be and is unlawful for any person to kill more than ten squirrels in any one day of twenty-four hours and it is not lawful for any person to sell more than five squirrels in any one week of seven days. (Sec. 2, Acts 1905, p. 222.)

Art. 875. **Penalty, counties exempt.**—If any person shall violate any provision of the two preceding articles, said person shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than five dollars with confinement in the county jail not less than one day nor more than ten days. Provided the said provisions shall not apply to any county situated in the ninth and twelfth and thirty-first and fifth and eighteenth and twenty-first and seventeenth and tenth and second and twenty-fourth and fifteenth and fourteenth senatorial districts of Texas. (Sec. 3, Acts 1905, p. 222.)

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Art. 876. **Montgomery county squirrels.**—It shall be unlawful for any person to sell or offer for sale or ship for sale in the county of Montgomery, any squirrels, and any person violating the provisions of this article, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than twenty-five nor more than one hundred dollars. (Acts 1909, p. 117.)

Sec. 1390. **Liberty county squirrels.**—"It shall be unlawful for any person to ship or cause to be shipped, or for any express company, railroad company or other common carrier or the officers, agents, servants or employes of the same, to receive for the purpose of transportation, or to transport, carry or take beyond the limits of the county of Liberty in the State of Texas any wild squirrels. Any person violating the provisions of this Section shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not less than ten nor more than one hundred dollars; and each such shipment shall constitute a separate offense." (Acts 1911, p. 98.)

Art. 877. **Taking fish in Montgomery and Newton counties.**—It shall be unlawful for any person in the counties of Montgomery and Newton in the State of Texas at any time during the year to take, catch, ensnare or entrap any fish by means of nets, traps, poison or dynamite, or in any other manner than with the ordinary hook and line or trot line, in any of the fresh waters, lakes or streams of this State in said counties, and any person violating the provisions of this article shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than twenty-five dollars and not more than one hundred dollars; provided, that this article shall not be construed to prevent the catching of fish by nets in any of the lakes in said county except Grand Lake. (Acts 1909, p. 133.)

Art. 878. **Wild game property of public.**—All the wild deer, wild antelope, wild Rocky Mountain sheep, wild turkey, wild ducks, wild geese, wild grouse, wild prairie chickens (pinnated grouse), wild Mongolian or English pheasants, wild quail or partridges, wild doves, wild pigeons, wild plover, wild snipe, wild jacksnipe, wild curlews, wild robins, wild Mexican pheasants or chachalaca, and all other wild animals, wild birds and wild fowls found within the borders of this State, shall be and the same are hereby declared to be the property of the public. (Sec. 1, Act April 19, 1907, Acts 1907, p. 278.)

Art. 879. **Killing or having wild bird other than game bird.**—It shall be unlawful for any person in the State of Texas to kill, catch or have in his or her possession, living or dead, any wild bird, other than a game bird, or to purchase, to offer or expose for sale, transport or ship within or without the State, any such wild bird after it has been killed or caught, except as permitted by this law, and no part of the plumage, skin or body of any bird protected by this article shall be sold or had in possession for sale. For the purposes of this article the following only shall be considered game birds: wild turkey, wild ducks, wild geese, wild grouse, wild prairie chicken (pinnated grouse), wild Mongolian or English pheasants, wild quail or partridges, wild doves, wild pigeons, wild plover, wild snipe, wild jacksnipe, wild curlews, wild robins and

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wild Mexican pheasants or Chachalaca. (Sec. 2, Act April 19, 1907, Acts 1907, p. 278.)

Art. 880. **Nests or eggs of wild birds.**—It shall be unlawful for any person in the State of Texas to take or needlessly destroy the nest or eggs of any wild bird, or have such nest or eggs in his or her possession, except as permitted by this law. (Sec. 3, Act April 19, 1907, Acts 1907, p. 279.)

Art. 881. **Penalty for two preceding articles.**—Any person violating any of the provisions of articles 879 and 880 shall be deemed guilty of a misdemeanor and shall upon conviction be fined not less than ten nor more than one hundred dollars for each bird, living or dead, or a part of a bird, nest or set of eggs or part thereof, possessed in violation of this law. (Sec. 4, Act April 19, 1907, amended by Act March 13, 1911, Acts 1911, p. 101.)

Art. 882. **Sale, offer, or purchase of game or game birds.**—Whoever shall sell or offer for sale, have in his or her possession for the purpose of sale, or whoever shall purchase or have in his possession after purchase any wild deer, wild antelope or wild Rocky Mountain sheep, killed in this State, or the carcass thereof, or the hide thereof, or the antlers thereof, or whoever shall sell or offer for sale, or have in his possession for the purpose of sale, or whoever shall purchase or have in his possession after purchase any of the game or game birds mentioned in article 878 killed or taken within this State shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than ten nor more than one hundred dollars. (Sec. 5, Act April 19, 1907, amended by Act March 13, 1911, Acts 1911, p. 101.)

Sec. 1391. Game Law is constitutional.—The Act of 1907 prohibiting the sale of game birds is constitutional. Ex parte Blardone, 55 Texas Crim. Rep. 189; 115 S. W. 838 (dissenting opinion, 116 S. W. 1199.) Ex parte Brady, 57 Texas Crim. Rep. 29; 121 S. W. 1149.

Art. 883. **Netting or trapping wild bird or wild fowl.**—The netting or trapping of any wild bird or wild fowl mentioned in sections 1 and 2 (articles 878 and 879) at any season of the year is hereby prohibited; and any person violating the provisions of this article shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than ten nor more than one hundred dollars. (Sec. 6, Act April 19, 1907, amended by Act March 13, 1911, Acts 1911, p. 102.)

Art. 884. **Destroying wild geese or ducks otherwise than by gun.**—It shall be unlawful to destroy any wild geese or wild ducks by any means otherwise than by an ordinary gun, capable of being held to and shot from the shoulder, and whoever violates the provisions of this article shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than ten nor more than one hundred dollars. (Sec. 7, Act April 19, 1907, amended by Act March 13, 1911, Acts 1911, p. 102.)

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Art. 885. (430b) **Killing wild fowl at night.**—If any person shall, in either of the counties of Harris, Jefferson, Galveston, Brazoria, Matagorda, Nueces, Aransas, Refugio, Lavaca, San Patricio, Cameron, Hidalgo or Calhoun, shoot or shoot at, with a gun of any description, or hunt or kill in any manner, any wild duck, wild goose, or any other kind of wild aquatic fowl at night, that is, between sunset and sunrise, he shall be fined not less than five nor more than twenty dollars. (Acts 1901, p. 301.)

Art. 886. **Certain game not to be killed for five years.**—It shall be unlawful for any person to kill, take or destroy any wild Mongolian or English pheasant, wild prairie chicken (pinnated grouse), wild antelope or wild Rocky Mountain sheep, for the space of five years next after this Act takes effect; and any person violating the provisions hereof shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than ten nor more than one hundred dollars. (Sec. 8, Act April 19, 1907, amended by Act March 13, 1911, Acts 1911, p. 102, so as to eliminate jail penalty.)

Art. 887. (518) (429) **Killing certain harmless birds.**—If any person shall wilfully kill, or in any manner injure, any mocking bird, whippoorwill, nighthawk, blue bird, red bird, finch, thrush, linnet, wren, martin, swallow, bobolink, cat bird, nonpareil, scissortail, he shall be deemed guilty of a misdemeanor, and, upon conviction before a justice of the peace or other court of competent jurisdiction, he shall be fined in a sum of not less than five nor more than fifteen dollars. (Acts 1881, p. 30.)

Art. 888. (519) **Killing certain birds, etc.**—If any person shall wilfully kill a seagull, tern, shearwater, egret, heron or pelican, or shall wilfully take from their nests, or in any manner destroy any egg or eggs of any seagull, tern, shearwater, egret, heron or pelican, he shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than five nor more than twenty-five dollars; provided that the killing of any of the birds above enumerated, or taking of their eggs with intent to preserve the same for scientific purposes shall not be construed to be a violation of this act. (Acts 1891, p. 90.)

Art. 889. **Hunting in closed season.**—It shall be unlawful for any person to kill, ensnare or entrap, or in any way destroy any wild deer in the period of time embraced between the first day of January and the first day of November in each year; provided it shall be unlawful for any person at any season of the year to take, kill, trap or ensnare any wild female deer or shatter (spotted) fawn within this State; and provided, further, that it shall be unlawful for any person to take, kill, trap or ensnare more than three wild buck during the months of November and December of any one year; provided, it shall be unlawful to kill any wild turkey in the period of time embraced between the first day of April and the first day of December of each year, or more than three

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wild turkey in the period of time embraced in the months of December, January and February of each year, or any wild quail or partridge, or any dove within the period of time embraced between the first day of February and the first day of November in each year; provided, it shall be unlawful, except herein elsewhere provided, for any person in any one day to kill or destroy more than twenty-five of the birds or fowls mentioned in article 878 that are permitted to be taken or killed in any one day. It shall further be unlawful for any person at any time to hunt deer or other game mentioned in article 878 by aid of what is commonly known as a hunting lamp or lantern, or any other light used for the purpose of hunting at night; and after the space of five years next after this Act takes effect, it shall be unlawful for any person to kill, trap or ensnare or in any way destroy any wild antelope or Rocky Mountain sheep in the period of time embraced between the first day of January and the first day of November of each year; provided further, that it shall be unlawful for any person to kill, trap or ensnare more than two wild antelopes or one Rocky Mountain sheep during the months of November and December of each year; and any wild Mongolian or English pheasants, wild turkey or any prairie chicken (pinnated grouse), in the period of time embraced between the first day of February and the first day of November of each year. Any person violating any provision of this article shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than ten nor more than one hundred dollars. (Sec. 9, Act April 19, 1907, amended by Act March 13, 1911, Acts, 1911, p. 102.)

Art. 889a. **Using call or decoy in hunting deer.**—It shall be unlawful for any person at any time of the year within this State to use a deer call, whistle, decoy, horn, call, pipe, reed, or other device, mechanical or natural, for the purpose of calling or attracting the attention of any deer, and any person hunting deer by such means, or attempting to use such means in hunting deer, shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars or by imprisonment of not less than twenty days or more than ninety days, or by both said fine and imprisonment, and each and every unlawful act shall constitute a separate offense. (Act March 22, 1915, Acts 1915, p. 162.)

Art. 889a. **Closed season on doves.**—It shall be unlawful for any person within this State to kill, ensnare, entrap or in any way destroy any wild doves between the first day of March and the first day of September of any year. (Act March 22, 1915, Acts 1915, p. 189, amended act June 4, 1915, Acts 1st Called Session 1915, p. 43.)

Art. 889b. It shall be unlawful for any person in this State to kill, entrap, ensnare, or in any way destroy any bob-whites, quail or partridges in this State, between the first day of February and the first day of December of any year; provided, it shall be unlawful for any person at any time to kill or destroy in one day more than fifteen of the birds

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or fowls mentioned in this Act or in Article 878 of this chapter. (Act March 22, 1915, Acts 1915, p. 189, amended Act June 4, 1915, Acts 1st. Called Session, p. 43.)

Sec. 1391½. **Penalty.**—Any person violating the provisions of this law shall be deemed guilty of a misdemeanor and on conviction shall be punished by a fine of not less than ten dollars nor more than one hundred dollars, or by imprisonment in the county jail for not less than five nor more than thirty days, or by both such fine and imprisonment. (Act June 4, 1915, Acts 1st Called Session 1915, p. 43.)

Art. 890. **Common carrier receiving or transporting.**—It shall be unlawful for any express company, railroad company, or other common carrier, or the officers, agents, servants or employes of the same, to receive for the purpose of transportation, or to transport, carry or take beyond the limits of the State, or within this State, except as hereinafter provided, any wild animal, bird or water fowl mentioned in article 878, or the carcass thereof, or the hide thereof. Any person violating the provisions of this article shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than ten nor more than one hundred dollars. Provided, that each shipment shall constitute a separate offense, and that such express company, or other common carrier, or its agents, servants or employes shall have the privilege of examining any suspected package for the purpose of determining whether such package contains any of the articles mentioned herein. (Sec. 10, Act April 19, 1907, amended by Act March 13, 1911, Acts 1911, p. 103.)

Art. 891. **Unlawfully transporting, affidavit.**—Nothing in this chapter shall be construed to prohibit the transportation or shipment of any of the game, birds or wild fowls mentioned in article 878 when lawfully taken or killed, from the place of shipment to the home of the person who killed the same; provided, the person who killed said game, birds or fowls, shall accompany said game, birds or fowls on the same train or common carrier from the point of shipment to the said point of destination, and provided further, that the person desiring to ship or transport said game, birds or fowls shall first make the following affidavit in writing before some officer authorized by law to administer oaths, and deliver same to said railroad or common carrier, or to the agent of said railroad or common carrier, at the point of shipment; and upon filing the affidavit, such party shall be permitted to transport to his home in accordance herewith not exceeding twenty-five of any wild game bird, when such number is permitted to be killed or the kind offered for shipment, except wild duck, provided that such party may be permitted to transport seventy-five wild ducks upon the filing the affidavit containing the provisions as stipulated in the affidavit prescribed:

State of Texas, County of..... Before me, the undersigned authority, on this day personally appeared....., who, after being by me duly sworn, upon oath says: I live at..... in the county of....., in the State of .....;

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that I have killed (state the number and kind of game, birds or fowls), which I desire to ship from.....in.....county, to my home, which game I killed for my own use and not for sale, and same shall not be sold, and same will be accompanied by me from the point of shipment to the point of destination; that I have not killed or shipped exceeding three buck deer during this hunting season and have not killed or shipped exceeding twenty-five birds or fowls mentioned in Section 1 of this Act, except wild ducks, in any one day during the present hunting season; and that I have in no way violated any of the provisions of this bill; (and if such game to be shipped be wild duck, then such party shall further make affidavit) that the shipment I offer is wild duck only; that the number does not exceed seventy-five, and I killed the said duck in three days consecutively, and that I did not kill more than twenty-five of same in any one day.

Sworn to and subscribed by.....before me this..... day of.....19.....

.....

Name and official character of officer.

And thereupon said game birds or fowls shall be transported or shipped by railroad or other common carrier in the name of the person making said affidavit to the home of said person, and shall mark on the card attached to said game, birds or fowls the words, "Affidavit Made." Any person violating the provisions of this Section shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than ten nor more than one hundred dollars. (Sec. 11, Act April 19, 1907, Amended by Act March 13, 1911, Acts 1911, p. 103.)

Sec. 1392. **Unlawfully transporting game.**—Proof of a conversation had with a Notary Public in the absence of defendant to the effect that defendant did not make the affidavit is hearsay. Hirsch v. State, 50 Texas Crim. Rep. 1; 95 S. W. 513.

Proof that defendant had some ducks in a wagon in which he had gone to and from the hunting grounds is insufficient to show that he shipped or carried ducks on a train. Hirsch v. State, 50 Texas Crim. Rep. 1; 95 S. W. 513.

The opinion of a non-expert witness as to similarity of handwriting based on comparison of writing is not admissible. Jordt v. State, 50 Texas Crim. Rep. 2; 95 S. W. 514.

If the guilt of defendant rests wholly, in a legal sense, upon circumstantial evidence, the court should give a charge on that subject. Jordt v. State, 50 Texas Crim. Rep. 2; 95 S. W. 514.

If the allegation relied on is that defendant transported game from one place to another, the court should give a charge requiring the jury to believe beyond a reasonable doubt from the evidence that defendant did transport the game as alleged. Jordt v. State, 50 Texas Crim. Rep. 2; 95 S. W. 514.

Art. 892. **What birds not protected.**—The English or European house sparrows, hawks, crows, buzzards, black birds, rice birds and owls are not included among the birds protected by this chapter. Nothing herein contained shall be construed to prevent any person or persons from killing birds that are at the time destroying his growing crop. (Sec. 12, Act April 19, 1907, Acts 1907, p. 282.)

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Art. 893. **Keeping bird as a domestic pet.**—Nothing in this chapter shall prevent the keeping of any bird in a cage as a domestic pet, provided that such bird shall not be sold or exchanged or offered for sale or exchange, or transported out of the State, provided that nothing herein contained shall be construed to prohibit the sale or shipment of canary birds or parrots. (Sec. 13, Act April 19, 1907, Acts 1907, p. 282.)

Art. 894. **Importing birds.**—Whenever in this chapter the possession of any bird is prohibited, said prohibition shall apply equally to a bird coming from outside the State as to one taken within the State. (Sec. 14, Act April 19, 1907, Acts 1907, p. 282.)

Art. 895. **Possession during closed season prima facie evidence.**—Possession at any time of the year during which the game, birds and wild fowl of the State are protected herein shall be prima facie evidence of the guilt of the person in possession thereof. (Sec. 15, Act April 19, 1907, Acts 1907, p. 282.)

Art. 896. **Game, Fish and Oyster Commissioner to enforce law.**—It is hereby made a special duty of the Game, Fish and Oyster Commissioner to enforce the statutes of this State for the protection and preservation of wild game and wild birds, and to bring or cause to be brought actions and proceedings in the name of the State of Texas to recover any and all fines and penalties provided for in the laws now in force or that may hereafter be enacted relating to wild game and wild birds. Said Game, Fish and Oyster Commissioner may make complaint and cause proceedings to be commenced against any person for violation of any of the laws for the protection and propagation of game or birds without the sanction of the county attorney (of the county) in which such proceedings are commenced, and in such case he shall not be required to furnish security for costs. Said Commissioner shall at any and all times seize and take possession of all birds and animals that have been caught, taken or killed, or had in possession or under control, or have been shipped contrary to any of the laws of this State and such seizure may be made without a warrant. All birds or animals seized by the Commissioner shall be disposed of in such manner as may be directed by any court having competent jurisdiction to hear and determine cases for violation of the game and bird laws of this State. (Sec. 2, Act April 18, 1907, Acts 1907, p. 254.)

Art. 897. **Authority of Commissioner.**—Said Game, Fish and Oyster Commissioner shall have the same power and authority to serve criminal process as sheriffs and shall have the same power as sheriffs to require aid in executing such process.

Said Commissioner may arrest without warrant any person found by him in the act of violating any of the laws for the protection or propagation of game or wild birds, and shall take such person forthwith before a magistrate having jurisdiction. Such arrests may be made on Sunday, and in which case the person arrested shall be taken before a

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magistrate having jurisdiction and proceeded against as soon as may be, on a week day following the arrest. (Sec. 3, Act April 18, 1907, Acts 1907, p. 255.)

Art. 898. **Penalty for hunting without license, etc.**—Any person violating the provisions of this law shall be punished upon conviction by fine not exceeding one hundred dollars and the cost of prosecution or imprisonment in the county jail not exceeding thirty days, or by both such fine and imprisonment in the discretion of the court.

And the court shall sentence the offender to be confined in the county jail until such fine is paid for any period not exceeding one hundred days; and in all cases where a fine and imprisonment is imposed, the sentence (judgment) shall provide that if the fine and costs are not paid at the time of the expiration of such imprisonment, the person serving such sentence shall be further detained in jail until such fine and costs are paid, for any period stated, provided that the whole term of imprisonment shall not exceed six months. (Sec. 13, Act April 18, 1907, Acts 1907, p. 257.)

Art. 899. **Hunting license to be procured.**—It shall hereafter be unlawful for any person who has not been a bona fide inhabitant of and resident citizen of this State for six months last past to hunt for or kill any game or birds protected by the laws of this State without first procuring a hunting license from the Game, Fish and Oyster Commissioner permitting him to do so, and by paying to said commissioner the sum of fifteen dollars. Said license shall be dated when issued, and shall remain in force until the first day of September, following thereafter. It shall hereafter be unlawful for any person to hunt or kill any game quadrupeds or game girds or wild fowl protected by the game laws of this State, except in the county of his residence or in the counties adjoining the county of his residence or on land owned or controlled by him, without first obtaining a State hunting license from the Game, Fish and Oyster Commissioner, permitting him to do so. Any person who has been a bona fide resident of this State for six months last past may procure a hunting license to hunt outside the boundaries of the county in which he resides, by paying a license fee of one dollar and seventy-five cents to the county clerk of the county in which he resides, to be dated when issued. Such license shall expire the first day of September of each year following such date. Said license shall authorize the person named therein to use firearms in the hunting or killing game birds during the hunting season of that year, but only in the manner and time prescribed by law. Said license shall limit the number and quality of game which may be taken or killed, in accordance with the provisions of law governing the subject. (Sec. 8, Act April 18, 1907, Acts 1907, p. 256, amended by Act May 24, 1909, Acts 1909, p. 456.)

Art. 900. **Hunter refusing to show license.**—Any person found hunting in open season any game protected by the laws of the State, and who shall refuse to show his license herein provided for to any sheriff,

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deputy sheriff, constable, game commissioner or deputy game commissioner, or any other person or persons on whose lands said person or persons are found hunting or to any person who has the land under their control, on demand, shall be deemed guilty of a violation of the provisions of this law, and upon conviction shall be liable to the penalties provided herein. (Sec. 8, Act April 18, 1907, Acts 1907, p. 256, amended by Act May 24, 1909, p. 456.)

Art. 901. (525) **Culls of oysters to be scattered.**—It shall be unlawful for any person to fail or refuse to scatter the culls of such oysters as he may take from the oyster reefs as directed by the Game, Fish and Oyster Commissioner, and any person so failing or refusing to scatter such culls, as directed, by the Commissioner, shall be deemed guilty of a misdemeanor and on conviction shall be fined in a sum of not less than ten nor more than one hundred dollars. And on such conviction the Game, Fish and Oyster Commissioner may cancel the license of the captain of the boat, and he shall also cancel the license of such person to gather oysters, on which such person is employed or for which he is gathering oysters, and no new license shall be issued to such captain or to such person convicted for a period of three years. (Sec. 2, Acts 1891, p. 155, amended by Acts 1913, p. 268.)

Art. 902. (526) **Planting prohibited, when.**—It shall be unlawful for any person to plant or purchase oysters for planting, bedding or depositing, or for marketing, or for any other purpose whatever, from the first day of May to the first day of September in any year, except by permission of the Game, Fish and Oyster Commissioner, and, if any person shall violate the provisions of this article, he shall be deemed guilty of a misdemeanor, and, on conviction shall be fined for each offense not less than ten nor more than one hundred dollars. (Sec. 6, Acts 1891, p. 155, amended by Acts 1913, p. 269.)

Art. 903. (526a) **Unlawful to receive for shipment, when.**—It shall be unlawful for any transportation company operating within this State, its officers, agents or employes, to receive for shipment, or to ship, within the boundaries of this State, from the first day of May to the first day of September of any year, any oysters from any public bed or reef, for depositing or for marketing; providing, that nothing in this chapter shall be so construed as to prohibit any such transportation company, its officers, agents or employes, from shipping, or receiving for shipment, any oysters taken from a private bed, located under the laws of this State, offered for shipment by the owner or owners, locator or locators, of such bed; such fact to be established by the written affidavit of the person or persons offering such oysters for shipment, made before an officer authorized to take oaths. Any officer, agent or employee of such transportation company, violating the provisions of this section (article) shall be deemed guilty of a misdemeanor, and, upon conviction shall be fined for each offense not less than ten nor

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more than one hundred dollars. (Act April 18, 1907, Acts 1907, p. 238, amended Acts 1913, p. 269.)

Art. 904. (528) **Unlawful to rake, dredge, etc.**—It shall be unlawful for any person or persons to rake, dredge or excavate with machinery any public oyster bed or oyster reefs in the waters of this State without first having obtained permission of the Game, Fish and Oyster Commissioner to so dredge or excavate with machinery. Any person or persons who shall violate the provisions of this article shall, on conviction, be fined in any sum not less than five hundred nor more than one thousand dollars. Each day's violation of any of the provisions of this article shall constitute a separate offense. (Sec. 8, Acts 1891, p. 157, amended by Acts 1913, p. 269.)

Art. 905. (529) **Unlawful to destroy or deface buoy.**—Any person who shall wilfully deface, injure or destroy or remove any buoy, markers, or fence, or any parts thereof, used to designate or enclose a private oyster bed in this State, without the consent of the owner thereof, or any buoy, marker or sign placed or used by the Game, Fish or (and) Oyster Commissioner for the purpose of designating any waters closed against fishing or oyster taking, without the consent of the Game, Fish and Oyster Commissioner, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined in any sum not less than ten nor more than two hundred dollars. (Sec. 9, Acts 1891, p. 157, amended Acts 1899, p. 77, amended Acts 1901, p. 302, amended Acts 1913, p. 269.)

Art. 906. (529b) **Unlawful to catch fish, green turtle, etc., how and when.**—It will be unlawful for any person to catch or attempt to catch any fish, green turtle, loggerhead, terrapin or shrimp in any of the bays or navigable waters of this State, within the limits or within one mile of the limits of any city or town in this State, with seines, dragnets, fykes, set nets, trammel nets, traps, dams or weirs. A town or city in the meaning of this Act shall be a collection of one hundred families within an area of one square mile. Any one violating any of the provisions of this Act (article) shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be fined in any sum not less than twenty-five nor more than two hundred dollars. In all prosecutions under the provisions of this Act, the identification of the boat from which such violation or violations occur shall be prima facie evidence against the owner, lessee, person or persons in charge or master of such boat. (Acts 1897, p. 213, amended Acts 1913, p. 269.)

Art. 907. (529c) **Fishing with poison or explosives.**—The catching, taking or killing of fish, green turtle or terrapin in any of the salt waters or fresh waters, lakes or streams in the State by poison, lime, dynamite, nitro-glycerine, giant powder or other explosives, is hereby prohibited; and any person offending against this article, shall be deemed guilty of a misdemeanor, and upon conviction shall be fined

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not less than twenty-five nor more than two hundred dollars; and by confinement in the county jail not less than thirty nor more than ninety days. (Sec. 23, Acts 1895, p. 172, amended Acts 1897, p. 126, amended Acts 1913, p. 270.)

Sec. 1393. **Fishing with explosives.**—If the use of "dynamite" is the only means alleged, the evidence is insufficient if such allegation is not proven. Gill v. State, 45 Texas Crim. Rep. 256; 76 S. W. 575.

If the statute by its language protects only "fresh" waters, it must be alleged that the fish were taken in "fresh waters." Taylor v. State, 55 S. W. 832. Under article 907, as amended in 1913, it is immaterial whether the waters were fresh or salt, and it is not necessary thereunder to allege whether the waters were fresh or salt.

Art. 908. (529d) **Failing to take out license as a fisherman.**—Any person who shall engage in the business of fishing or catching green turtle or terrapin or shrimp for market without first having procured a license therefor, shall be guilty of a misdemeanor and, upon conviction, shall be fined not less than ten dollars nor more than two hundred dollars. (Sec. 25, Acts 1895, p. 173, amended Acts 1897, p. 126, amended Acts 1913, p. 270.)

Art. 909. (529e) **Weight of fish limited.**—It shall be unlawful for any person to have in his or her possession or to sell or ship any red fish more than twelve pounds in weight or less than one-half pound in weight; any trout of less than three-fourths of one pound in weight; sheephead, flounder, Spanish mackerel or pompano of less than one-half pound in weight. It shall also be unlawful for any person to place or stretch in or across any water any seine or net for the purpose of catching or holding fish for a longer period of time than ten hours. Any person offending against this article shall, upon conviction, be fined in any sum not less than ten nor more than two hundred dollars. (Sec. 26, Acts 1895, p. 173, amended Acts 1899, p. 78, amended Acts 1901, p. 302, amended Acts 1907, p. 238, amended Acts 1909, p. 329, amended Acts 1913, p. 270.)

Art. 910. (529f) **Underweight green turtle and terrapin.**—It shall be unlawful for any person to sell or ship any green turtle of less than twelve pounds in weight or terrapin of less than six inches in length of under shell, or to catch or sell any terrapin from the first day of May to the first day of August. Any person offending against this article shall, upon conviction, be fined in any sum not less than ten nor more than two hundred dollars. (Sec. 27, Acts 1895, p. 173, amended Acts 1913, p. 270.)

Art. 911. (529g) **Drag seining.**—It shall be unlawful for any person, during the breeding season, consisting of the months intervening between June first and September first of each year, to catch any fish or terrapin in the bays, tidal or coastal waters of this State by the use of a drag seine; or to drag any seine or net or other device, except a minnow seine for catching bait of not more than twenty feet in length

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or a shrimp seine of not more than fifty feet in length for catching shrimp only. And, it shall be unlawful for any person to place or set or drag any net or seine or use any other device for taking fish, other than the ordinary hook and line or cast net, or minnow seine of not more than twenty feet in length, within the waters of any pass leading from the Texas coastal waters into the Gulf of Mexico, or within one mile of such pass, or within the waters of any pass, stream or canal leading from one body of Texas bay or coastal waters into another body of such waters. And the Game, Fish and Oyster Commissioner, whenever he has reason to believe that fish are breeding, or that it is destructive to fish, to permit fishing in any of such tidal waters, shall have power and authority to close such waters against fishing with any net, seine or other device, except by hook and line or cast net or minnow net of no greater length than twenty feet; but such commissioner shall give notice of his intention to close any such waters against fishing with nets and seines for two weeks prior to such closing by posting notices in public places near such waters; and after the date set in such notices for the closing of such waters, it shall be unlawful to drag, seine or set nets in such waters for that period of time that the commissioner shall in the notices declare they shall be closed. Any person offending against the provisions of this Article, shall be deemed guilty of a misdemeanor and upon conviction shall be punished by fine of not less than $25.00 nor more than $200.00; and each day shall constitute a separate offense, and in all prosecutions under this article the identification of the boat from which the violation occurred shall be prima facie evidence against the owner of (or) the party last in charge of such seines or nets or on such boat.

Nothing in the foregoing article shall be taken to prohibit fishing on the Gulf Beach outside of one mile of the passes at any time and with any net or seine authorized by the provisions of this chapter. And provided further, that this section is not intended to prevent the use of trammel nets, gill nets or other nets, when used strictly as set nets, except in passes, streams, canals and in waters within one mile of passes leading from coastal waters into the Gulf of Mexico. (Sec. 28, p. 173, Acts 1895; amended Acts 1897, p. 126; amended Acts 1899, p. 78; amended Acts 1901, p. 302; amended Acts 1905, p. 132; amended Acts 1909, p. 329; amended Acts 1913, p. 270; amended Act August 19, 1913, Acts 1913, 1st Called Session, p. 33.)

Sec. 1394. Drag seining in breeding season.—All parties who act together in the commission of a misdemeanor are guilty as principals. Gavania v. State, 145 S. W. 594.

Art. 912. (529h) **Regulating drag seining, etc.**—Any person fishing with a drag seine or set net, for sale or market, shall return all fish, green turtle or terrapin of the sizes and weights specified in articles 909 and 910 of the Penal Code to the water, while they are yet alive, except sharks, gars, rays, catfish and sawfish; and the size of the meshes of the fish seines shall not be less than one and one-half inches square,

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not including the bag nor shall any seine exceed twelve hundred feet in length; and any person offending against this article shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined not less than ten dollars nor more than two hundred dollars. (Sec. 29, Acts 1895, p. 174, amended Acts 1897, p. 127, amended Acts 1909, p. 331, amended Acts 1913, p. 271.)

Art. 913. (529i) **Coast Survey Charts admissible in evidence.**—All United States Coast Survey Charts covering the coast of Texas shall be admissible as evidence in all prosecutions under this Act. (Sec. 30, Acts 1895, p. 174, amended Acts 1913, p. 271.)

Art. 914. (529j) **Taking oysters in closed season.**—It shall be unlawful for any person to take or catch oysters from any public beds or reefs, for sale or for market, from the first day of April to the first of September of each year. Any person offending against this article shall be deemed guilty of a misdemeanor, and upon conviction, shall be fined not less than ten dollars nor more than two hundred dollars; and each day shall constitute a separate offense; provided that part of Laguna Madre, south and west of Baffin's Bay, be exempted from the operation of this article. (Sec. 32 Acts 1895, p. 174, amended Acts 1907, p. 239, amended Acts 1909, p. 331, amended Acts 1913, p. 271.)

Art. 915. (529j½) **Screening intake water pipe.**—It shall be the duty of every person, firm or corporation using pumps for the purpose of taking water from the public waters of the State, when directed to do so by the Game, Fish and Oyster Commissioner to place screens over the mouth of the intake pipe for the purpose of preventing fish from entering said pipe. The size of and regulations for placing such screens shall be designated by the Game, Fish and Oyster Commission. Any person, firm or corporation failing to comply with this article, after notification by the Game, Fish and Oyster Commissioner so to do shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than fifty dollars nor more than two hundred dollars; and each day shall constitute a separate offense. (Act 1909, p. 331, amended Acts 1913, p. 271.)

Art. 916. (529l) **Taking fish or oysters with seine, net or tongs, without license.**—It shall be unlawful for any person to catch any fish, green turtle or terrapin, with seine or set net for market, in any of the bays or coast waters of this State, or gather any oysters with tongs or otherwise, for market or planting, from any of the public reefs or beds in this State, without having a license from the Game, Fish and Oyster Commissioner, or his deputy. Any person offending against this article shall be deemed guilty of a misdemeanor, and upon conviction, shall be fined not less than ten dollars nor more than two hundred dollars; and each day shall constitute a separate offense. (Sec. 34, Acts 1895, p. 175, amended Acts 1899, p. 79, amended Acts 1913, p. 271.)

Art. 917. **Wholesale fish and oyster dealer to have license.**—For the protection of the fish and oyster industry any individual, firm or

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corporation, engaged in or who may engage in, the business of a wholesale dealer or dealers in fish and oysters, shall on or before the first day of September of each year, secure from the Game, Fish and Oyster Commissioner, or one of his deputies, a license granting such individual, firm or corporation, permission to engage in said occupation. For the purpose of obtaining this license the applicant desiring same must make written application to the Game, Fish and Oyster Commissioner, or one of his deputies, in which he (the applicant) shall set forth, under oath, if required, that he is a citizen of the United States; he shall also agree that, because of the privilege which he applies for from the State of Texas, that all products handled by him shall at all times be subject to the inspection of the Game, Fish and Oyster Commissioner, or any of his deputies; and in said application he shall authorize said Commissioner or any of his deputies to enter his place of business, or any place where he may have such products stored, and inspect same. He shall also agree to keep a correct record of all fish and oysters handled by him under this chapter in a book to be furnished by the Game, Fish and Oyster Commissioner, and further, that failure on his part to keep a correct record shall be grounds for the forfeiture of his license granted him under the application aforesaid. This application, having been duly executed and delivered to the Game, Fish and Oyster Commissioner, or any of his deputies, together with the fee for same, it shall then be the duty of the Game, Fish and Oyster Commissioner, or his deputy, to issue to the applicant a license to engage in the business set forth in the application. Said license must be signed by the Game, Fish and Oyster Commissioner, or one of his deputies, stamped with the seal of his office, and state the name of the licensee, place of business and the kind of license applied for, and shall be good for twelve months following the date of issuance. For such license the applicant shall pay one dollar for each one thousand pounds of fish handled by him, and a tax of one cent per barrel on oysters handled by him, which tax shall be paid monthly; the tax to be paid on the first of each month, which may be due upon the said products handled during the preceding month, as shown by the record books hereinbefore mentioned. And any person, firm or corporation, or association of persons, or any officer, agent or employee of any company, corporation or association of persons who shall engage in the business of a wholesale dealer in fish and oysters, or either, without procuring a license to follow said business, or without paying the tax required by this article, shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than one hundred dollars nor more than two hundred dollars, and each day such business may be engaged in in violation of this article shall constitute a separate offense; and upon conviction for pursuing said occupation without payment of the tax required by law or for any other violation of the game, fish and oyster law, the license of such dealer shall be forfeited. A wholesale dealer, within the meaning of this article, is one who is engaged in the fish and oyster business as a

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dealer, supplying the retail and wholesale trade, or either, by sales in quantities of fifty pounds or more of fish, and of oysters of five barrels or more. (Acts 1909, p. 327, amended Acts 1913, p. 272.)

Art. 918. (529n) **Selling unculled cargo of oysters.**—Any person offering for sale, or who shall sell, any cargo of oysters which shall contain more than five per cent of young oysters, shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not less than ten dollars nor more than two hundred dollars. Any oyster that measures less than three and one-half inches from hinge to mouth shall be deemed a young oyster for the purpose of this and the preceding article. (Sec. 36, Acts 1895, p. 175, amended Acts 1909, p. 331, amended Acts 1913, p. 273. The "preceding article" referred to in article 918 was Section 35, Acts 1895, p. 175, article 529m of the Penal Code of 1895, amended by Acts 1897, p. 127, and was omitted from the Penal Code of 1911.)

Art. 919. (529o) **Unculled cargo of oysters.**—It shall be the duty of the Game, Fish and Oyster Commissioner or his deputy, when he thinks that any cargo of oysters offered for sale, contains more than five per cent of young oysters, to take as many as he may deem necessary from such cargo, cull them and measure the young oysters, or those that measure less than three and one-half inches from the hinge to the mouth, and ascertain to the best of his ability, the proportion of the young oysters by number to the marketable oysters; and, if the young oysters be in greater proportion than five per cent, the cargo shall be deemed unculled, and the owner shall be deemed guilty of the offense prescribed in article 918 of the Penal Code. (Sec. 37, Acts 1895, p. 175, amended Acts 1907, p. 239, amended Acts 1909, p. 331, amended Acts 1913, p. 273.)

Art. 920. (529p) **Theft of oysters.**—It shall be unlawful for any person to take oysters from a private bed, or to take oysters deposited by one making up a cargo for market or family use, without the consent or permission of the owner thereof; and anyone offending any provisions of this article shall be deemed guilty of theft, and upon conviction, shall be punished as provided by law for the offense of theft. (Sec. 41, Acts 1895, p. 177, amended Acts 1913, p. 273.)

Art. 921. (529t) **Selling oysters taken for planting.**—It shall be unlawful for any person gathering oysters for planting on locations obtained from the State or on private property, to sell, market or in any way dispose of oysters so gathered at the time of gathering, for any other purpose than planting, provided, this shall not be considered as meaning the right to dispose of a location or oyster bed. Any person offending against this article shall be deemed guilty of a misdemeanor and upon conviction shall be fined in any sum not less than fifty nor more than two hundred dollars. (Acts 1897, p. 128, amended Acts 1913, p. 273.)

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Art. 922. (529u) **Gathering seed oysters without license.**—It shall be unlawful for any person, firm or corporation or joint stock company to gather seed oysters for planting without having first obtained a permit or license to do so from the Game, Fish and Oyster Commissioner, or his deputy, said permit or license to designate the reef or beds from which the applicant is allowed to gather seed oysters; and any person, agent, employee or officer of a firm, corporation or joint stock company gathering or having gathered oysters for planting from any bed or reef (not) designated, or who has not a permit or license for gathering seed oysters, shall be guilty of a misdemeanor, and upon conviction shall be fined not less than fifty nor more than two hundred dollars. (Acts 1899, p. 80, amended Acts 1913, p. 273.)

Art. 923. (529x) **Selling fish, etc., without license.**—Any person who shall market or offer to market any fish, turtle, terrapin, shrimp or oysters taken from salt waters of this State, or any fish taken from any fresh water lakes or streams, in any quantity greater than fifty pounds, shall pay the tax and obtain the permit, as prescribed by law, before disposing of any part of said product, and if he or any other person shall sell or shall dispose of any part of said product for shipment or storage before obtaining said permit, the person so selling or disposing of said product, or any part thereof, shall be deemed guilty of a misdemeanor, and upon a conviction, shall be fined not less than ten nor more than two hundred dollars. In prosecutions in this and other similar cases, the fact of the fish, turtle, terrapin, shrimp and oysters being of the varieties that are found in the waters of this State shall be prima facie evidence that said fish, turtle, terrapin, shrimp or oysters were taken from the waters of this State. (Acts 1905, p. 134, amended Acts 1913, p. 273.)

Art. 923a. **Permission to dredge oyster reef.**—Whenever the Game, Fish and Oyster Commissioner believes that an oyster bed can be improved by the use of dredges in it, he may grant the use of such dredges in such reefs, but only under the superintendence, supervision and in the presence of a deputy Fish and Oyster Commissioner. (Acts 1913, p. 274.)

Art. 923b. **Public oyster reef may be closed.**—Whenever the Game, Fish and Oyster Commissioner believes that any public reef is being overworked or damaged in any way he may close such reef against any one taking oysters from it, but before he closes such reef he shall give two weeks' notice of such closing posting notices in such fish houses as are in two towns nearest such reefs. In such notices he shall state the date of closing and the time for which such reefs shall be closed. (Acts 1913, p. 274.)

Art. 923c. **Property used in violating law may be seized.**—Nets, seines, boats or other devices for catching fish, unlawfully used in the waters of this State, or boats, dredges, barges and tongs unlawfully used in violating the oyster laws of this State, are hereby declared

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public nuisances and may be summarily seized, destroyed and abated by the Game, Fish and Oyster Commissioner, or his deputies and no action for damages shall be maintained against such Commissioner or his deputies for such seizure, destruction and abatement. (Acts 1913, p. 274.)

Art. 923d. **Taking oysters from closed reef.**—Any person who shall take any oysters from any oyster reef which has been closed by the Game, Fish and Oyster Commissioner shall be deemed guilty of a misdemeanor and on conviction shall be fined in a sum of not less than twenty-five nor more than two hundred dollars. (Acts 1913, p. 274.)

Art. 923e. **Jurisdiction of justice of the peace.**—Complaint against any person for the violation of the game, fish and oyster laws of this State may be made before any justice of the peace of the county in which the offense is charged to have been committed, and he shall have jurisdiction to try and dispose of such cases, provided the penalties prescribed for such offenses are within the jurisdiction of justices of the peace. (Acts 1913, p. 274.)

Art. 923f. **Unlawfully taking fish in fresh waters.**—It shall be unlawful for any person to take or catch any fish in the public fresh water rivers, creeks, lakes, bayous, pools, lagoons or tanks of this State by any other means than by the ordinary hook and line or trout (trot) line, or by set or drag net or or (by) seine the meshes of which are less than three inches square, or trammel net, the meshes of any part of which are less than four inches square or by a minnow seine of no more than twenty feet in length, and it shall be unlawful for any person to place in the public fresh water rivers, creeks, lakes, bayous, pools, lagoons or tanks of this State any net or other device or trap for taking or catching fish other than a set net or drag net or seine, the meshes of which are less than four inches square. Any person violating any provision of this Section (article) shall be deemed guilty of a misdemeanor, and upon conviction, shall be fined any sum not less than twenty-five nor more than one hundred dollars. All fresh water streams or bayous emptying into the tidal waters of this State are, for the purposes of this Act, hereby declared fresh water streams to their mouths. (Acts 1913, p. 274.)

Art. 923g. **Seine or drag net in forbidden waters.**—It shall be unlawful for any person to carry into or have in his possession in any waters where seining is prohibited, any seine or drag net, and any such person who shall carry into or have in his possession any such seine or drag net shall be deemed guilty of a misdemeanor, and upon conviction, shall be fined in a sum of not less than ten nor more than one hundred dollars, and any seine or drag net so carried into or found in such waters shall be deemed a nuisance, and the Game, Fish and Oyster Commissioner or his deputy are required to abate such nuisance by the destruction of such nets, as provided in this Act. Provided, that this

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Act shall not apply to the closed waters within one mile of any town. (Acts 1913, p. 275.)

Art. 923h. **License forfeited on conviction.**—On the conviction of any wholesale dealer or the conviction of any licensed fisherman or oysterman, the license of such dealer shall be forfeited and the Game, Fish (and) Oyster Commissioner shall not issue to such dealer, fisherman or oysterman another license for a period of three years. (Acts 1913, p. 275.)

Art. 923i. **Obstructing or diverting waters.**—It shall be unlawful for any person to wilfully obstruct the natural flow of waters into any of the public waters of this State or two (to) wilfully divert the water from any of the public lakes, streams or ponds of this State, except for domestic or other necessary uses or for irrigation purposes, and any person so offending shall be deemed guilty of a misdemeanor, and upon conviction, shall be fined in a sum of not less than fifty nor more than one hundred dollars. (Acts 1913, p. 275.)

Art. 923j. **Using illegal measures in selling oysters.**—Any person who uses any measure in the sale of oysters other than the measure established by this Act shall be deemed guilty of a misdemeanor, and upon conviction, shall be fined in a sum of not less than ten nor more than one hundred dollars. (Acts 1913, p. 275.)

Art. 923k. **Wilfully taking boat, etc., of another into prohibited waters.**—Any person who shall wilfully and with intent to injure the owner, take any boat, seine or net or other device for fishing into prohibited waters, or shall use said articles for the unlawful taking or catching of fish, so as to cause the destruction of same, shall be guilty of a misdemeanor and punished by a fine of not less than ten nor more than two hundred dollars, and by confinement in the county jail not less than thirty nor more than ninety days. (Acts 1913, p. 275.)

Art. 923l. **Fresh waters may be seined for natural enemies of fish.**—The provisions of this Act relative to use of seines in fresh water streams shall not prevent the seining for gars, turtle and other natural enemies of fish, under the supervision of the Game, Fish and Oyster Commissioner or a deputy; and the commissioners' court of any county is hereby authorized to have any stream, creek or lake in said county seined for the purpose of destroying any gar, turtle or other natural enemies of the fish which may be caught from such waters, said seining to be done under the supervision of and in the presence of the Game, Fish and Oyster Commissioner or a deputy. The expenses of said seining to be borne by the said county, or by the citizens thereof; all good or edible fish which may be caught or taken in said seine to be returned to the waters. (Acts 1913, p. 275.)

Sec. 1395. **Marl, sand, shells or mudshells.**—"If any person, association of persons, corporate or otherwise, shall, for himself or itself, or for or on behalf of or under the direction of another person, association of persons, corporate or otherwise, take or carry away any of the marl, sand or shells or mudshell included

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in this Act, or shall disturb any of said marl, sand, shells or mudshell or oyster beds or fishing waters, or shall fish in any fresh water lake or shall operate in or upon any of said places for any purpose other than that necessary or incident to navigation or dredging under State or Federal authority, without having first obtained a written permit from the Game, Fish and Oyster Commissioner for the territory in which such operation is carried on, such person, association of persons, corporate or otherwise, shall be deemed guilty of a misdemeanor, and upon conviction, shall be fined in a sum of money not less than ten dollars nor more than two hundred dollars, and one-half of the proceeds arising from such fines shall be appropriated to the road and bridge fund of the county in which the conviction is had and one-half shall be appropriated to the fish and oyster fund." (Act March 14, 1911, Sec. 9, Acts 1911, p. 120.)

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TITLE XIV

OFFENSES AGAINST TRADE, COMMERCE, AND THE CURRENT COIN

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CHAPTER I

FORGERY AND OTHER OFFENSES AFFECTING WRITTEN INSTRUMENTS

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Article 924. (530) (431) **"Forgery" defined.**—He is guilty of forgery who without lawful authority, and with intent to injure or defraud, shall make a false instrument in writing purporting to be the act of another, in such manner that the false instrument so made would (if the same were true) have created, increased, diminished, discharged or defeated any pecuniary obligation, or would have transferred, or in any manner have affected any property whatever. (O. C. 431.)

Sec. 1396. **Forgery of ordinary commercial instrument—Form for indictment.** 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 John Doe on the.....day of.....A. D..... in said county and State did without lawful authority and with intent to injure and defraud make a false instrument in writing which said false instrument in writing so made was then and there of the tenor following: (Here copy the forged writing according to its tenor—making an exact copy thereof—and, when necessary, adding whatever explanatory or extrinsic averments may be needed to show that it was the subject of forgery).

Against the peace and dignity of the State.

.....

Foreman of the grand jury.

Sec. 1397. **Alleging the forged instrument.**—The forged instrument should be set out by its tenor—copied literally—and if it is set out substantially the indictment for forgery will be bad unless some good reason is alleged why it is not set out by its tenor. Thomas v. State, 18 Texas Crim. App. 221. Smith v. State, 18 Texas Crim. App. 399.

If the forged instrument is set out substantially and the testimony on the trial discloses that the grand jury by the use of reasonable diligence could have ascertained the wording—tenor—thereof, then the law requires that they should have done so, and their failure to do so will constitute error upon the trial if a variance is shown. Carlton v. State, 60 Texas Crim. Rep. 584; 132 S. W. 775. Collum v. State, 153 S. W. 1144.

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An allegation that the forged instrument "is to the tenor substantially as follows" is bad for repugnancy. Edgerton v. State, 70 S. W. 90.

An allegation that the forged instrument "is in substance and effect as follows, to wit" is not an allegation that it is set out by its tenor. Thomas v. State, 18 Texas Crim. App. 221.

If it is alleged that defendant made a false instrument in writing "described as follows, to wit," it shows that it was intended to set out such instrument by its tenor. Miller v. State, 34 S. W. 267.

Entries, indorsements, memorandums, monograms, or revenue stamps, which were made or placed upon the forged instrument, subsequent to the forgery or which constitute no part of the forgery relied on, need not be set out in the indictment. Labbaite v. State, 6 Texas Crim. App. 262. Hennessey v. State, 23 Texas Crim. App. 354; 5 S. W. 215. Burks v. State, 24 Texas Crim. App. 326; 6 S. W. 300. DeAlberts v. State, 34 Texas Crim. Rep. 510; 31 S. W. 391 (monogram). King v. State, 38 S. W. 199. Leslie v. State, 47 S. W. 368 (indorsement). Lovejoy v. State, 40 Texas Crim. Rep. 98; 48 S. W. 520. Adkins v. State, 41 Texas Crim. Rep. 579; 56 S. W. 63. Giles v. State, 57 S. W. 99. Beer v. State, 42 Texas Crim. Rep. 505; 60 S. W. 962 (revenue stamp). Bader v. State, 44 Texas Crim. Rep. 184; 69 S. W. 506 (indorsement). Brady v. State, 74 S. W. 771. Crayton v. State, 47 Texas Crim. Rep. 91; 80 S. W. 839 (entries). McGee v. State, 62 Texas Crim. Rep. 358; 137 S. W. 686 (indorsement). Wesley v. State, 150 S. W. 197. Whorton v. State, 152 S. W. 1089. Davis v. State, 156 S. W. 1171 (memorandum).

If the instrument alleged to be forged would not be complete on the part of the maker without an indorsement, the indorsement must be alleged. Overly v. State, 34 Texas Crim. Rep. 500; 31 S. W. 377 (railroad ticket). Robinson v. State, 35 Texas Crim. Rep. 54; 43 S. W. 526 (railroad ticket).

Sec. 1398. **Extrinsic, innuendo or explanatory averments.**—Extrinsic averments are such additional allegations as show a writing, otherwise incomplete, to be the subject of forgery. Innuendo or explanatory averments are meant to merely explain or make clear the terms of the writing itself. Cagle v. State, 39 Texas Crim. Rep. 112; 44 S. W. 1097. Head v. State, 72 S. W. 394.

If the instrument in writing alleged to be forged is such on its face as, if true, that it creates or increases a pecuniary obligation, such as a check, draft, note or other ordinary commercial instrument, and will afford the basis of a civil action without resorting to extrinsic testimony, then a charge of forgery can be based thereon without any extrinsic averments. Hendricks v. State, 26 Texas Crim. App. 176; 9 S. W. 555. Reeves v. State, 51 Texas Crim. Rep. 604; 103 S. W. 894. Reeseman v. State, 59 Texas Crim. Rep. 430; 128 S. W. 1128. Carter v. State, 61 Texas Crim. Rep. 609; 136 S. W. 47. Davis v. State, 156 S. W. 1171. Cheesebourge v. State, 157 S. W. 762.

If the instrument in writing alleged to be forged contains unintelligible words or abbreviations, or misspelled or ambiguous words or figures, the indictment should explain what was intended thereby. Colter v. State, 40 Texas Crim. Rep. 165; 49 S. W. 379. Crawford v. State, 40 Texas Crim. Rep. 345; 50 S. W. 378. Polk v. State, 40 Texas Crim. Rep. 668; 51 S. W. 909. Lynch v. State, 41 Texas Crim. Rep. 211; 53 S. W. 693. McBride v. State, 48 Texas Crim. Rep. 213; 88 S. W. 237. Lamb v. State, 148 S. W. 1088.

If the instrument in writing alleged to be forged is not an ordinary commercial instrument, the indictment should explain by proper averments the connection the different parties had with the instrument, and explain the meaning of all doubtful terms. Cagle v. State, 39 Texas Crim. Rep. 109; 44 S. W. 1097. Beasley v. State, 39 Texas Crim. Rep. 688; 47 S. W. 991. Colter v. State, 40 Texas Crim. Rep. 165; 49 S. W. 379. Crawford v. State, 40 Texas Crim. Rep. 344; 50 S. W. 378. Polk v. State, 40 Texas Crim. Rep. 668; 51 S. W. 909. Joiner v. State, 46 Texas Crim. Rep. 409; 80 S. W. 531. Joiner v. State, 48 Texas Crim. Rep. 360; 87 S. W. 1039. Bagley v. State, 63 Texas Crim. Rep. 606; 141 S. W. 107.

If the instrument in writing alleged to be forged is not one of the ordinary instruments used in commercial transactions, but is contractual in form and depends

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on extrinsic facts to create or defeat a liability, such extrinsic facts should be alleged in the indictment. King v. State, 27 Texas Crim. App. 568; 11 S. W. 525 (weight certificate). Simms v. State, 32 Texas Crim. Rep. 277; 22 S. W. 876 (transfer of note). Carder v. State, 35 Texas Crim. Rep. 107; 31 S. W. 678 (membership in a business association). Womble v. State, 39 Texas Crim. Rep. 25; 44 S. W. 827 (order). Cagle v. State, 39 Texas Crim. Rep. 109; 44 S. W. 1097 (release). Colter v. State, 40 Texas Crim. Rep. 165; 49 S. W. 379 (order for goods). Crawford v. State, 40 Texas Crim. Rep. 344; 50 S. W. 378 (order for goods). Munoz v. State, 40 Texas Crim. Rep. 457; 50 S. W. 949 (census). Johnson v. State, 40 Texas Crim. Rep. 611; 51 S. W. 382 (deed to homestead). Polk v. State, 40 Texas Crim. Rep. 668; 51 S. W. 909 (order for goods). Lynch v. State, 41 Texas Crim. Rep. 209; 53 S. W. 693 (cotton yard receipt). Black v. State, 42 Texas Crim. Rep. 585; 61 S. W. 478 (receipt). Wilson v. State, 75 S. W. 504 (offer to stand for debt of another). Huckaby v. State, 45 Texas Crim. Rep. 581; 78 S. W. 942 (will). Williams v. State, 47 Texas Crim. Rep. 605; 85 S. W. 800 (disclaimer). Knezek v. State, 49 Texas Crim. Rep. 157; 90 S. W. 1099 (receipt). Belden v. State, 50 Texas Crim. Rep. 565; 99 S. W. 563 (order for money). Pelton v. State, 60 Texas Crim. Rep. 412; 132 S. W. 483 (receipt).

In an indictment for forgery of an ordinary receipt for money, it is necessary to allege by proper extrinsic averments the existence of the debt (the pecuniary obligation) which such receipt, if genuine, could defeat, diminish, or discharge. Black v. State, 42 Texas Crim. Rep. 585; 61 S. W. 478. Knezek v. State, 49 Texas Crim. Rep. 157; 90 S. W. 1099. Pelton v. State, 60 Texas Crim. Rep. 412; 132 S. W. 483.

If the instrument in writing alleged to be forged is not an ordinary commercial instrument, the indictment should, when required by the terms of the instrument, contain such extrinsic averments as will show the connection between the person whose name purports to be signed and the company or corporation whom such signature, if genuine, could affect. Hutton v. State, 38 S. W. 209. Beasley v. State, 39 Texas Crim. Rep. 689; 47 S. W. 991. Crawford v. State, 40 Texas Crim. Rep. 344; 50 S. W. 378. Lynch v. State, 41 Texas Crim. Rep. 211; 53 S. W. 693. Joiner v. State, 48 Texas Crim. Rep. 360; 87 S. W. 1039.

If the instrument in writing alleged to be forged bears a date, which, if true, would make the forgery barred by limitation, extrinsic averments should be made explaining the apparent repugnancy between the date of such instrument and the allegation of the date of the forgery. Hickman v. State, 44 Texas Crim. Rep. 533; 72 S. W. 587.

If an order for goods contains a request to charge them to the purported maker of the order, it is not necessary to allege how such instrument in writing, if true, created a pecuniary obligation. Rollins v. State, 22 Texas Crim. App. 548; 3 S. W. 759. Hendricks v. State, 26 Texas Crim. App. 176; 9 S. W. 555.

If a written order for goods alleged to be forged does not contain a request to charge them to the purported maker of the order, extrinsic averments should be made showing how much order could, if true, create a pecuniary obligation. Womble v. State, 39 Texas Crim. Rep. 25; 44 S. W. 827. Crawford v. State, 40 Texas Crim. Rep. 344; 50 S. W. 378.

An indictment based on a forged order for goods should contain extrinsic averments showing who the person or firm to whom the order was addressed was, and, if a merchant, it should be alleged that he had such goods as the order called for for sale. Womble v. State, 39 Texas Crim. Rep. 25; 44 S. W. 827. Colter v. State, 40 Texas Crim. Rep. 165; 49 S. W. 379. Crawford v. State, 40 Texas Crim. Rep. 344; 50 S. W. 378. Polk v. State, 40 Texas Crim. Rep. 668; 51 S. W. 909. Forcy v. State, 60 Texas Crim. Rep. 206; 131 S. W. 585.

If the name of the defendant in a forged order for goods is not correctly set out on the face of such order and the order is not in favor of the "bearer," extrinsic averments should be made showing that defendant was the party in whose favor it was drawn and to whom it was intended the goods should be sold or delivered. Colter v. State, 40 Texas Crim. Rep. 165; 49 S. W. 379. Crawford v. State, 40 Texas Crim. Rep. 344; 50 S. W. 378.

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If the instrument in writing alleged to be forged is an ordinary commercial instrument and the words "or bearer" are used in connection with the name of the payee so that it is made payable to bearer, it is not necessary to explain any abbreviations used in stating the name of the payee, nor is it necessary to allege whether the payee was a firm, a corporation, or a partnership. Carter v. State, 61 Texas Crim. Rep. 609; 136 S. W. 47.

Inserting innuendo averments in the tenor clause does not constitute a variance. Alexander v. State, 28 Texas Crim. App. 188; 12 S. W. 595. Chappel v. State, 58 Texas Crim. Rep. 52; 124 S. W. 657. *Contra:* Forcy v. State, 55 Texas Crim. Rep. 545; 117 S. W. 834. (The "innuendo averments" in these indictments were mostly extrinsic averments, and should not be inserted in the tenor clause. "Tenor" means an exact copy.)

If the alleged forged instrument is an ordinary commercial instrument and would be the subject of forgery without any explanatory averments as the act of and drawn on fictitious persons, it does not vitiate the indictment to allege the names really intended. Rubio v. State, 50 Texas Crim. Rep. 178; 95 S. W. 120.

When the alleged forged instrument is an ordinary bank check, draft, promissory note, or other ordinary commercial instrument importing a pecuniary obligation on its face, it is not necessary to allege that the payee is a firm, partnership or corporation. Webb v. State, 39 Texas Crim. Rep. 534; 47 S. W. 356. Usher v. State, 47 Texas Crim. Rep. 93; 81 S. W. 309. Whittaker v. State, 147 S. W. 599. Davis v. State, 156 S. W. 1171.

If the alleged forged instrument was an agreement to become members of a certain business men's association and to pay a stated amount as dues, it should be alleged whether such beneficiary was a partnership, joint stock company or a corporation. Carder v. State, 35 Texas Crim. Rep. 105; 31 S. W. 678.

Where the check or draft alleged to be forged is drawn on a bank, it is not necessary to allege that the bank was incorporated or unincorporated, the bank not being the injured party. Lucas v. State, 39 Texas Crim. Rep. 48; 44 S. W. 825. Webb v. State, 39 Texas Crim. Rep. 534; 47 S. W. 356. Usher v. State, 47 Texas Crim. Rep. 97; 81 S. W. 309. Carter v. State, 55 Texas Crim. Rep. 46; 114 S. W. 839. Reeseman v. State, 59 Texas Crim. Rep. 433; 128 S. W. 1127. Brown v. State, 60 Texas Crim. Rep. 506; 132 S. W. 790. Davis v. State, 156 S. W. 1171.

If the alleged forged instrument is not an ordinary commercial instrument, and the name purporting to be signed thereto is not applicable to a private person, there should be an extrinsic averment showing whether it was a corporation, joint stock company, or a partnership. Lynch v. State, 41 Texas Crim. Rep. 209; 53 S. W. 693.

If the alleged forged instrument is an order to charge goods to a certain "company," there should be an extrinsic averment showing whether it was a corporation, joint stock company, or a partnership. Hutton v. State, 38 S. W. 209.

If the alleged forged instrument is an ordinary commercial instrument importing a pecuniary obligation on its face and is signed by a name applicable to a firm, it need only be set out by its tenor, and in such case it is not necessary to allege the names of the individual members or to allege that their names were unknown. Howard v. State, 37 Texas Crim. Rep. 496; 36 S. W. 475 ("John Finnigan & Co.") Brod v. State, 42 Texas Crim. Rep. 71; 57 S. W. 671 ("Humphries & Co.") Brown v. State, 60 Texas Crim. Rep. 506; 132 S. W. 789. Morville v. State, 63 Texas Crim. Rep. 551; 141 S. W. 98.

It is an indispensable element in the crime of forgery that the forged instrument in writing must be such that, if the same were true, it would have created, increased, diminished, discharged or defeated any peculary obligation, or would have transferred, or in any manner have affected any property whatever, and it must appear from the face of the indictment that it is legally of such a character, either from the face of the instrument itself, or if that alone does not show it to be so, then by the additional averments of such extrinsic facts as render it of that character. King v. State, 27 Texas Crim. App. 568; 11 S. W. 525. Carder v. State, 35 Texas Crim. Rep.

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107; 31 S. W. 678. Lynch v. State, 41 Texas Crim. Rep. 209; 53 S. W. 693. Black v. State, 42 Texas Crim. Rep. 585; 61 S. W. 478. Williams v. State, 47 Texas Crim. Rep. 605; 85 S. W. 800. Bagley v. State, 63 Texas Crim. Rep. 606; 141 S. W. 107. Whitmire v. State, 156 S. W. 1179.

Sec. 1399. **Alleging intent to defraud.**—It is not necessary to allege whom defendant intended to defraud. It is sufficient to allege, in the language of the statute, that the false instrument in writing was made without lawful authority and with intent to defraud. Labbaite v. State, 6 Texas Crim. App. 261. Westbrook v. State, 23 Texas Crim. App. 402; 5 S. W. 248. English v. State, 30 Texas Crim. App. 470; 18 S. W. 94. Howard v. State, 37 Texas Crim. Rep. 496; 36 S. W. 475. Allen v. State, 44 Texas Crim. Rep. 63; 68 S. W. 286. Crayton v. State, 47 Texas Crim. Rep. 90; 80 S. W. 839. Carter v. State, 55 Texas Crim. Rep. 46; 114 S. W. 839. Barber v. State, 64 Texas Crim. Rep. 89; 142 S. W. 582. Davis v. State, 156 S. W. 1171.

Sec. 1400. **Purporting to be the act of another.**—If the only name signed to the alleged forged instrument is not the same as the allegation of defendant's name and such instrument is set out in the indictment by its tenor, that is, copied literally, it shows on its face whose act it purports to be, and in such case it is not necessary to allege in terms whose act it purports to be. When a fact is alleged according to its outward form it is not necessary to also allege its legal effect. Howard v. State, 37 Texas Crim. Rep. 494; 36 S. W. 475.

If the instrument in writing alleged to be forged is set out in the indictment by its tenor, it is not necessary to allege that it purports to be the act of another nor is it necessary to allege whose act it purports to be when it is apparent from an inspection of the face of the indictment that it does not purport to be the act of defendant only. Labbaite v. State, 6 Texas Crim. App. 261. English v. State, 30 Texas Crim. App. 470; 18 S. W. 94. Gibbons v. State, 36 Texas Crim. Rep. 469; 37 S. W. 861. Howard v. State, 37 Texas Crim. Rep. 497; 36 S. W. 475. Millsaps v. State, 38 Texas Crim. Rep. 572; 43 S. W. 1015. Webb v. State, 39 Texas Crim. Rep. 535; 47 S. W. 357. Rhudy v. State, 42 Texas Crim. Rep. 225; 58 S. W. 1007. Huckaby v. State, 45 Texas Crim. Rep. 581; 78 S. W. 942. Reeseman v. State, 59 Texas Crim. Rep. 430; 128 S. W. 1128. Hardin v. State, 60 Texas Crim. Rep. 129; 131 S. W. 552. Barber v. State, 64 Texas Crim. Rep. 89; 142 S. W. 582. Whittaker v. State, 147 S. W. 599. Pye v. State, 154 S. W. 225.

If the only name forged was the same as the allegation of defendant's name, it should be alleged that the forged instrument in writing purported to be the act of another. Huckaby v. State, 45 Texas Crim. Rep. 581; 78 S. W. 942. Hardin v. State, 60 Texas Crim. Rep. 129; 131 S. W. 552.

The indictment need not contain a purport clause although defendant's own name be signed to the forged instrument if it is set out by its tenor and shows other names than defendant's signed thereto; in such event it is an allegation of the forgery of one or more of the other names. Webb v. State, 39 Texas Crim. Rep. 534; 47 S. W. 356.

Sec. 1401. **Variance between purport and tenor clause.**—A variance between the purport and tenor clause as to the name of the payee in the alleged forged instrument is fatal to the validity of the indictment. Roberts v. State, 2 Texas Crim. App. 4.

The variance is fatal where it is alleged that the false instrument in writing purports to be a joint obligation and on its face it appears to be the obligation of only one person. Glenn v. State, 65 S. W. 369.

Where it is alleged in the unnecessary purport clause that the instrument purported to be the act of a corporation, and as set out it is signed by persons as officers only, the variance is fatal. Millsaps v. State, 38 Texas Crim. Rep. 571; 43 S. W. 1015.

If the unnecessary purport clause alleges that the forged instrument purported to be the act of a certain named person, and the tenor clause shows that such person's name was erased by a line drawn through it, the variance is fatal. Becker v. State, 18 S. W. 550.

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If the purport clause of the indictment alleges the forged instrument to be the act of one or more named persons and the instrument as set out by its tenor purports to be the act of more or less persons than alleged in the purport clause, the variance is fatal to the validity of the indictment. Campbell v. State, 35 Texas Crim. Rep. 182; 32 S. W. 899. Fite v. State, 34 S. W. 921. Fite v. State, 36 Texas Crim. Rep. 4; 34 S. W. 922. Stephens v. State, 36 Texas Crim. Rep. 386; 37 S. W. 425. Gibbons v. State, 36 Texas Crim. Rep. 469; 37 S. W. 861. Booth v. State, 36 Texas Crim. Rep. 600; 38 S. W. 196. Stephens v. State, 38 S. W. 997. Stephens v. State, 38 S. W. 1150. Thulemeyer v. State, 38 Texas Crim. Rep. 349; 43 S. W. 83. Millsaps v. State, 38 Texas Crim. Rep. 570; 43 S. W. 1015. Crayton v. State, 45 Texas Crim. Rep. 84; 73 S. W. 1046. Mayers v. State, 47 Texas Crim. Rep. 624; 85 S. W. 804. Tracy v. State, 49 Texas Crim. Rep. 38; 90 S. W. 308.

Any variance between the purport and tenor clauses as to whose act the forged instrument purports to be is fatal. Westbrook v. State, 23 Texas Crim. App. 402; 5 S. W. 248 ("Chatman" and "Chapman"). English v. State, 30 Texas Crim. App. 471; 18 S. W. 94 ("M. R. Lewis" and "R. M. Lewis"). Overly v. State, 34 Texas Crim. Rep. 500; 31 S. W. 377. Booth v. State, 36 Texas Crim. Rep. 600; 38 S. W. 196. Thulemeyer v. State, 38 Texas Crim. Rep. 349; 43 S. W. 83 ("William M. Cook Jr.," and "Wm. Cook, pr. W. M. Cook Jr."). Millsaps v. State, 38 Texas Crim. Rep. 571; 43 S. W. 1015. Black v. State, 46 Texas Crim. Rep. 109; 79 S. W. 308 ("Haynes" and "Haygens"). Webb v. State, 47 Texas Crim. Rep. 306; 83 S. W. 394 ("Oz. Smith" and "O. Smith"). Tracy v. State, 49 Texas Crim. Rep. 38; 90 S. W. 308.

If the purport clause alleges that the forged instrument purported to be the act of one named person, and the tenor clause shows that that person merely purported to sign it for another, the effect being that, if true, the latter would be bound, the variance is fatal. Thulemeyer v. State, 38 Texas Crim. Rep. 349; 43 S. W. 83.

There is no variance between an allegation in the unnecessary purport clause that the forged instrument purported to be the act of "Morgan & Co." and the tenor of the instrument showing that it was signed "Morgan & Co. M." Young v. State, 40 S. W. 793.

There is no variance between the purport clause alleging that the forged instrument purported to be the act of "George N. Yard" and the tenor clause showing that it was signed "George N. Yard, paymaster," the word "paymaster" being merely descriptive and not part of the name. Carter v. State, 55 Texas Crim. Rep. 46; 114 S. W. 839.

The terms "Sr." or "Jr." may be rejected from the purport clause as surplusage in order to avoid a variance, such additions being no part of a person's legal name. Lassiter v. State, 35 Texas Crim. Rep. 541; 34 S. W. 751.

If the indictment unnecessarily has a purport clause, the forged instrument itself, as well as the signature thereto, will be looked to and may be used for the purpose of avoiding a supposed variance. Ham v. State, 4 Texas Crim. App. 672. Mee v. State, 23 Texas Crim. App. 567; 5 S. W. 243.

There is no variance between the purport and tenor clauses where the purport clause alleges the forged instrument to be the act of one person, and the tenor clause shows that it purports to be his act alone and that the other names signed thereto purport only to be witnesses to his signature. Rountree v. State, 58 S. W. 106.

If the purport clause alleges that the forged instrument purports to be the act of named individuals and there is no allegation that said persons constituted a firm, there is no variance between the purport and the tenor clauses if the names are correctly alleged in both clauses. Sawyers v. State, 39 Texas Crim. Rep. 481; 46 S. W. 814.

Where the purport clause alleges that the forged instrument purports to be the act of a named person "a fictitious person," the term "a fictitious person" is merely descriptive of the person, and will not operate to constitute a variance. Hocker v. State, 34 Texas Crim. Rep. 359; 30 S. W. 783.

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Sec. 1402. **Forgery and passing may be alleged in one indictment.**—An indictment may contain separate counts charging forgery and passing the forged instrument, and the State is not required to elect as to which count it relies upon for conviction. Barnwell v. State, 1 Texas Crim. App. 747. Boles v. State, 13 Texas Crim. App. 656. Dovalina v. State, 14 Texas Crim. App. 314. Chester v. State, 23 Texas Crim. App. 581; 5 S. W. 125. Carr v. State, 36 Texas Crim. Rep. 3; 34 S. W. 949. Jacobs v. State, 42 Texas Crim. Rep. 353; 59 S. W. 1111.

Where forgery and passing the forged instrument are charged in the same indictment a conviction cannot legally be had for both offenses. Crawford v. State, 31 Texas Crim. Rep. 51; 19 S. W. 766. Carr v. State, 36 Texas Crim. Rep. 3; 34 S. W. 949. Pitts v. State, 40 Texas Crim. Rep. 667; 51 S. W. 906.

Sec. 1403. **Other allegations.**—An indictment for forgery or passing a forged instrument need not allege that the forged instrument in writing, if true, would create, increase, diminish, discharge or defeat any pecuniary obligation, if it appears on the face of such instrument as alleged that it could have that effect. Morris v. State, 17 Texas Crim. App. 667. Davis v. State, 156 S. W. 1171.

An indictment for forgery need not contain the term "knowingly," it not being a part of the statutory definition. Morris v. State, 17 Texas Crim. App. 667.

An indictment for forgery is bad for repugnancy if it is alleged therein that the false instrument in writing created a pecuniary obligation on the purported maker, since this is an averment that the instrument was genuine. Scott v. State, 40 Texas Crim. Rep. 107; 48 S. W. 523.

If the name as signed to the instrument in writing alleged to be forged may be read in more than one way, the indictment may contain separate counts spelling the alleged forged name in each count in a different way so as to prevent a variance. The State is not required to elect between such counts. Nichols v. State, 39 Texas Crim. Rep. 82; 44 S. W. 1091.

In an indictment for forgery it is necessary to allege that the false instrument in writing was made without lawful authority. Shanks v. State, 25 Texas Supplement 326. Ham v. State, 4 Texas Crim. App. 678. Hatch v. State, 6 Texas Crim. App. 397.

Sec. 1404. **Forgery indictments held good.**—Miller v. State, 34 S. W. 267 (indorsement). Howard v. State, 37 Texas Crim. Rep. 495; 36 S. W. 475 (check). Roberts v. State, 53 S. W. 864 (order for goods). Franklin v. State, 46 Texas Crim. Rep. 181; 78 S. W. 934 (altering). Hall v. State, 55 Texas Crim. Rep. 267; 116 S. W. 808 (order for goods). Reeseman v. State, 59 Texas Crim. Rep. 430; 128 S. W. 1127 (check). McGee v. State, 62 Texas Crim. Rep. 358; 137 S. W. 686 (fictitious person). Barber v. State, 64 Texas Crim. Rep. 89; 142 S. W. 582 (receipt). Whittaker v. State, 147 S. W. 599 (commercial instrument). Thompson v. State, 152 S. W. 894 (deed). Dreeben v. State, 162 S. W. 502 (indorsement). Lamb-Campbell v. State, 162 S. W. 879 (receipt). Ritter v. State, 176 S. W. 727 (R. R. discharge certificate).

Sec. 1405. **Venue in cases of forgery and passing.**—A prosecution for the offense of forgery may be commenced and carried on in any county where the false instrument in writing was forged either entirely or by alteration, or in any county where the same was used or passed or attempted to be used or passed by defendant or his innocent agent. Mason v. State, 32 Texas Crim. Rep. 95; 22 S. W. 144. Hocker v. State, 34 Texas Crim. Rep. 359; 30 S. W. 783. Thulemeyer v. State, 34 Texas Crim. Rep. 619; 31 S. W. 659. Batte v. State, 57 Texas Crim. Rep. 125; 122 S. W. 563. Meredith v. State, 164 S. W. 1020.

Defendant may be prosecuted for forgery or for passing in any county in this State in which he passed the forged instrument in writing although it was forged in another State. Batte v. State, 57 Texas Crim. Rep. 125; 122 S. W. 563.

If the forged instrument is sent through the mail—an innocent agent—the venue for the offense of knowingly passing the same is in the county where the same was received from the mail and negotiated. Jessup v. State, 44 Texas Crim. Rep. 89; 68 S. W. 988.

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If the forged instrument is sent to another county and there passed by an innocent agent of defendant who passes it under the instructions of defendant, then, in a legal sense, defendant was present when such instrument was passed, no matter where he was at such time in fact, and the venue may be laid in the county where it was so passed. Ellis v. State, 22 S. W. 678. Strang v. State, 32 Texas Crim. Rep. 219; 22 S. W. 680.

Where defendant has parted with the forged instrument and has no further property in or control over the same, a prosecution therefor cannot legally be commenced and carried on in some other county in which some other person who owns said instrument has subsequently passed or attempted to pass it. Thulemeyer v. State, 34 Texas Crim. Rep. 619; 31 S. W. 659.

An allegation that defendant made the forged instrument in the county where the indictment was presented is supported by proof that he made it in some other county or State and passed it in the county where the indictment was presented. Hocker v. State, 34 Texas Crim. Rep. 359; 30 S. W. 783. Batte v. State, 57 Texas Crim. Rep. 125; 122 S. W. 563. Meredith v. State, 164 S. W. 1020.

Venue may be shown by circumstantial evidence as well as by direct testimony. McGlasson v. State, 38 Texas Crim. Rep. 360; 43 S. W. 93. Murphree v. State, 55 Texas Crim. Rep. 316; 115 S. W. 1189. Pye v. State, 154 S. W. 222.

Sec. 1406. **Forgery—Statute construed.**—Forgery, under our Code, is making, without lawful authority and with intent to injure or defraud, a false instrument in writing purporting to be the act of another, in such manner that the false instrument so made would, if the same were true, have created, increased, diminished, discharged or defeated any pecuniary obligation, or would have transferred, or in any manner have affected any property whatever. Ham v. State, 4 Texas Crim. App. 678. Johnson v. State, 9 Texas Crim. App. 251. Anderson v. State, 20 Texas Crim. App. 596. Fischl v. State, 54 Texas Crim. Rep. 57; 111 S. W. 410.

The definition of forgery under our Code is not as broad as the common law definition which includes almost every writing known to the affairs of men. Rogers v. State, 8 Texas Crim. App. 403.

If the proof shows the same transaction to be both forgery and swindling, the prosecution should be for the forgery. Hirshfield v. State, 11 Texas Crim. App. 207. Witherspoon v. State, 37 S. W. 433. Scott v. State, 40 Texas Crim. Rep. 105; 48 S. W. 523. Abel v. State, 97 S. W. 1055. Ashmore v. State, 150 S. W. 196.

Although the name forged be the same as defendant's it is a forgery if he represents it to be the name of a person other than himself. Edwards v. State, 53 Texas Crim. Rep. 50; 108 S. W. 673.

Where defendant induced another to sign a bail bond and then passed it as the act of a third person of the same name, he is guilty of forgery of the name of the third person. Peel v. State, 35 Texas Crim. Rep. 308; 33 S. W. 541.

To constitute forgery it is not necessary that the forged order be accepted, or that any money was paid to or that any property was acquired by defendant. Keeler v. State, 15 Texas Crim. App. 113. Crawford v. State, 31 Texas Crim. Rep. 54; 19 S. W. 766.

One "makes" a false instrument in writing who, knowing the illegal purpose intended, writes the signature or the whole or any part of such instrument. Darbyshire v. State, 36 Texas Crim. Rep. 547; 38 S. W. 173. Wheeler v. State, 62 Texas Crim. Rep. 370; 137 S. W. 124.

The signing of another's name without intent to injure or defraud is not forgery. Montgomery v. State, 12 Texas Crim. App. 323. Montgomery v. State, 13 Texas Crim. App. 74. McCay v. State, 32 Texas Crim. Rep. 233; 22 S. W. 974. Jones v. State, 69 S. W. 143. Fench v. State, 60 Texas Crim. Rep. 432; 132 S. W. 478. Whitmire v. State, 156 S. W. 1179.

It is no defense to a prosecution for forging the name of another that the person whose name was forged was indebted to defendant because defendant could not expect

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to pass such forged paper on such person. Plemons v. State, 44 Texas Crim. Rep. 555; 72 S. W. 854. Morville v. State, 63 Texas Crim. Rep. 551; 141 S. W. 98.

Sec. 1407. **Using innocent agent.**—If defendant procures an innocent agent to commit the forgery, or to pass the forged instrument as true, the act of such agent is the act of defendant, and, in law, defendant was present when an act was done by his innocent agent, although in fact he was at that time in a distant county or State. Ellis v. State, 22 S. W. 678. Strang v. State, 32 Texas Crim. Rep. 228; 22 S. W. 680 (passing). Carr v. State, 36 Texas Crim. Rep. 3; 34 S. W. 949. Jessup v. State, 44 Texas Crim. Rep. 89; 68 S. W. 988 (passing).

Sec. 1408. **What writings constitute forgery.**—An instrument in writing to be the subject of forgery must be valid, if genuine, for the purpose intended. If it is void or invalid on its face and it cannot be made good by innuendo or extrinsic averments, it is not the subject of forgery. Rollins v. State, 22 Texas Crim. App. 548; 3 S. W. 759. Hendricks v. State, 26 Texas Crim. App. 176; 9 S. W. 555. Simms v. State, 32 Texas Crim. Rep. 277; 22 S. W. 876. Munoz v. State, 40 Texas Crim. Rep. 457; 50 S. W. 950. Johnson v. State, 40 Texas Crim. Rep. 611; 51 S. W. 382 (deed to homestead not separately acknowledged by the wife). Bagley v. State, 63 Texas Crim. Rep. 606; 141 S. W. 107 (required a seal to be valid and had no seal).

An instrument in writing to be the subject of forgery must on its face purport to be the act of another, and when void on its face for want of a signature in any part of it is not the subject of forgery. Anderson v. State, 20 Texas Crim. App. 595.

A false enumeration of school children showing on its face that it was made at a time not authorized by law and therefore could not constitute an obligation against the State is not the subject of forgery. Munoz v. State, 40 Texas Crim. Rep. 457; 50 S. W. 950.

If the instrument in writing alleged to be forged is not void or invalid on its face, but merely obscure or of doubtful meaning, it may be made the basis of forgery by averments showing what is meant by the doubtful or misspelled terms, or by such extrinsic averments as show it to be valid, if genuine, for the purpose intended. Rollins v. State, 22 Texas Crim. App. 550; 3 S. W. 759 (order for goods). Williams v. State, 24 Texas Crim. App. 345; 6 S. W. 531 (order for goods). Daud v. State, 34 Texas Crim. Rep. 360; 31 S. W. 376 (time check). Scott v. State, 40 Texas Crim. Rep. 106; 48 S. W. 523 ("standing good" for board). Davis v. State, 69 S. W. 73 (signed by initials only). Allen v. State, 44 Texas Crim. Rep. 63; 68 S. W. 286 (order for money). Head v. State, 72 S. W. 394 (order for goods). Plemons v. State, 44 Texas Crim. Rep. 555; 72 S. W. 854 (order for money). Forcy v. State, 60 Texas Crim. Rep. 206; 131 S. W. 585 (order for goods). Green v. State, 63 Texas Crim. Rep. 510; 140 S. W. 444 (order for money). Barber v. State, 64 Texas Crim. Rep. 89; 142 S. W. 582 (receipt). Johnson v. State, 170 S. W. 144 (order for money).

If the instrument in writing alleged to be forged on its face creates a pecuniary obligation and is complete so far as the purported maker is concerned, and is on its face good and valid for the purpose for which it purports to be made, it may be the subject of forgery, although the testimony on the trial shows the existence or non-existence of facts which would defeat the instrument if the same were true. King v. State, 42 Texas Crim. Rep. 109; 57 S. W. 840 (proof showed that the purported maker of the note was a married woman). Tracy v. State, 49 Texas Crim. Rep. 39; 90 S. W. 308 (school voucher purporting on its face to be for repairs). Miller v. State, 50 Texas Crim. Rep. 536; 100 S. W. 380 (proof showed that the altered check was drawn by a married woman living with her husband). Spicer v. State, 52 Texas Crim. Rep. 178; 105 S. W. 813 (check not endorsed). Jones v. State, 60 Texas Crim. Rep. 67; 130 S. W. 1012 (bond in guardianship valid on its face).

Ordinarily a fair test of whether an instrument in writing alleged to be forged is the subject of forgery is: would the holder of same, if the same were true, be enabled to maintain or defeat a civil suit by such instrument? Fonville v. State, 17 Texas Crim. App. 382. Dooley v. State, 21 Texas Crim. App. 549; 2 S. W. 884.

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Hendricks v. State, 26 Texas Crim. App. 17; 9 S. W. 555. Daud v. State, 34 Texas Crim. Rep. 464; 31 S. W. 376. Scott v. State, 40 Texas Crim. Rep. 107; 48 S. W. 523. Gray v. State, 44 Texas Crim. Rep. 478; 72 S. W. 858. Green v. State, 63 Texas Crim. Rep. 510; 140 S. W. 444. Barber v. State, 64 Texas Crim. Rep. 89; 142 S. W. 583.

An instrument in writing falsely made may be a forgery although if it had been genuine other steps must have been taken before the instrument would have been perfected and these steps were not taken. Phillips v. State, 6 Texas Crim. App. 364. Costley v. State, 14 Texas Crim. App. 156. Lassiter v. State, 35 Texas Crim. Rep. 540; 34 S. W. 751. Jones v. State, 60 Texas Crim. Rep. 67; 130 S. W. 1012. Wheeler v. State, 62 Texas Crim. Rep. 370; 137 S. W. 124.

It is not required that the instrument in writing alleged to be forged, if true, should in fact discharge or defeat the obligation; it is the subject of forgery if its tendency is such. Fonville v. State, 17 Texas Crim. App. 382. Barber v. State, 64 Texas Crim. Rep. 89; 142 S. W. 583.

A forged receipt may be made the basis of forgery by alleging and proving the existence of the debt which such receipt, if true, would tend to diminish, discharge or defeat. Fonville v. State, 17 Texas Crim. App. 382. Black v. State, 42 Texas Crim. Rep. 585; 61 S. W. 478. Knezek v. State, 49 Texas Crim. Rep. 157; 90 S. W. 1099. Pelton v. State, 60 Texas Crim. Rep. 412; 132 S. W. 483. Barber v. State, 64 Texas Crim. Rep. 89; 142 S. W. 582.

A railroad ticket is the subject of forgery. Overly v. State, 34 Texas Crim. Rep. 500; 31 S. W. 377. Robinson v. State, 35 Texas Crim. Rep. 54; 43 S. W. 526.

A railroad time check for labor performed is the subject of forgery. Daud v. State, 34 Texas Crim. Rep. 460; 31 S. W. 376. Carter v. State, 55 Texas Crim. Rep. 46; 114 S. W. 839.

A school voucher is the subject of forgery. Thomas v. State, 18 Texas Crim. App. 213. Mee v. State, 23 Texas Crim. App. 566; 5 S. W. 243. Kennedy v. State, 33 Texas Crim. Rep. 183; 26 S. W. 78. Caffey v. State, 36 Texas Crim. Rep. 198; 36 S. W. 32. Tracy v. State, 49 Texas Crim. Rep. 37; 90 S. W. 308.

An order for merchandise may be the subject of forgery. Hendricks v. State, 26 Texas Crim. App. 176; 9 S. W. 555. Reddick v. State, 31 Texas Crim. Rep. 587; 21 S. W. 684. Head v. State, 72 S. W. 394.

A bill of lading may be the subject of forgery. Fischl v. State, 54 Texas Crim. Rep. 56; 111 S. W. 410.

A cotton order, when properly explained, may be the subject of forgery. Davis v. State, 69 S. W. 73.

A bail bond may be the subject of forgery, and it is not necessary that it should have been forfeited or attempted to be forfeited before it is the subject of an assignment and prosecution for forgery. Costley v. State, 14 Texas Crim. App. 156. Peel v. State, 35 Texas Crim. Rep. 308; 33 S. W. 541.

A bond for costs may be the subject of forgery. Carr v. State, 36 Texas Crim. Rep. 3; 34 S. W. 949.

An appeal bond may be the subject of forgery. Smith v. State, 32 S. W. 696.

The absence of a revenue stamp will not prevent the writing from being the subject of forgery. Thomas v. State, 40 Texas Crim. Rep. 564; 51 S. W. 242. Hanks v. State, 54 S. W. 587. King v. State, 42 Texas Crim. Rep. 109; 57 S. W. 840.

Forgery may be committed by fraudulently signing the name of another to a telegram. Dooley v. State, 21 Texas Crim. App. 549; 2 S. W. 884.

The making of the false instrument in writing may constitute forgery although the purported maker was dead at the time his name was signed thereto. Brewer v. State, 32 Texas Crim. Rep. 74; 22 S. W. 41.

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A false instrument in writing which bears no date may be the subject of forgery. Boles v. State, 13 Texas Crim. App. 657. Dixon v. State, 26 S. W. 501.

A false instrument in writing not addressed to anyone may be the subject of forgery. Kennedy v. State, 33 Texas Crim. Rep. 189; 26 S. W. 78. Dixon v. State, 26 S. W. 501. Allen v. State, 44 Texas Crim. Rep. 63; 68 S. W. 286. Johnson v. State, 99 S. W. 404. Green v. State, 63 Texas Crim. Rep. 510; 140 S. W. 444.

A false instrument in writing may be the subject of forgery, although the signature of the purported maker does not appear at the end of such instrument. Crawford v. State, 31 Texas Crim. Rep. 54; 19 S. W. 766. Elkins v. State, 35 Texas Crim. Rep. 207; 32 S. W. 1047.

A check or draft need not show on its face upon whom it is drawn. Johnson v. State, 99 S. W. 404. Bowen v. State, 162 S. W. 1146.

If the forged instrument would, if the same were true, in any manner have affected any property, it is the subject of forgery. Alexander v. State, 28 Texas Crim. App. 187; 12 S. W. 595.

A forged written order reading "please send my diploma to me by this young man. W. W. Wolfe," is the subject of forgery when such additional averments are made as to show to the court that the same would, if true, have affected any property. Alexander v. State, 28 Texas Crim. App. 187; 12 S. W. 595.

Forgery may be committed by fraudulently indorsing the name of the payee on the back of a pension warrant. Dreeben v. State, 162 S. W. 501.

Sec. 1409. **Variance in the proof.**—Tenor means or imports an exact copy and is a descriptive averment, and where the instrument in writing alleged to be forged is set out by its tenor, or "as follows," the writing offered in evidence must conform thereto with almost minute precision. Roberts v. State, 2 Texas Crim. App. 4. Murphy v. State, 6 Texas Crim. App. 555. Ex parte Rogers, 10 Texas Crim. App. 664. Thomas v. State, 18 Texas Crim. App. 222. Edgerton v. State, 70 S. W. 90. Webb v. State, 47 Texas Crim. Rep. 307; 83 S. W. 394. Williams v. State, 47 Texas Crim. Rep. 606; 85 S. W. 800. Fischl v. State, 54 Texas Crim. Rep. 58; 111 S. W. 410. Feeney v. State, 58 Texas Crim. Rep. 152; 124 S. W. 945. Bedford v. State, 60 Texas Crim. Rep. 83; 131 S. W. 314. Simmons v. State, 61 Texas Crim. Rep. 8; 133 S. W. 687. Mills v. State, 145 S. W. 368.

On appeal if the Statement of Facts shows that the instrument in writing alleged to be forged was introduced in evidence, but it is not copied in such Statement of Facts, it will not be presumed that it differed from the instrument set out or described in the indictment. Defendant must have the truth of his objections verified. Gherke v. State, 59 Texas Crim. Rep. 508; 128 S. W. 380. Forcy v. State, 60 Texas Crim. Rep. 206; 131 S. W. 585.

A bill of exceptions objecting to the introduction in evidence of the alleged forged instrument on the ground of variance must point out the supposed variance and must show as a fact that the matters stated as objections were in fact true. Smith v. State, 32 S. W. 696. Cheesebourge v. State, 157 S. W. 761.

When a variance is claimed it should be remembered that the State is not required to allege or prove that the instrument in writing alleged to be forged was burdened or ornamented with stamps, monograms, memorandums, indorsements, or writings, which are not a part of the alleged forgery relied on or which were placed on such instrument subsequent to the alleged forgery. Proof that the instrument alleged to be forged had on it those things or added matters which were unnecessary to set out in the indictment will not cause a variance between the allegation and the proof. Labbaite v. State, 6 Texas Crim. App. 262. Hennessey v. State, 23 Texas Crim. App. 354; 5 S. W. 215. Burks v. State, 24 Texas Crim. App. 326; 6 S. W. 300. DeAlberts v. State, 34 Texas Crim. Rep. 510; 31 S. W. 391. King v. State, 38 S. W. 199. Leslie v. State, 47 S. W. 368. Lovejoy v. State, 40 Texas Crim. Rep. 98; 48 S. W. 520. Adkins v. State, 41 Texas Crim. Rep. 579; 56 S. W. 63. Giles v. State, 57 S. W. 99. Beer v. State, 42 Texas Crim. Rep. 505; 60 S. W. 962. Bader v. State, 44 Texas Crim. Rep. 184; 69 S. W. 506. Brady v. State, 74 S. W. 771. Crayton v. State, 47 Texas Crim. Rep. 91; 80 S. W. 839. Johnson v. State,

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99 S. W. 404. McGee v. State, 62 Texas Crim. Rep. 358; 137 S. W. 686. Jordan v. State, 143 S. W. 623. Wesley v. State, 150 S. W. 197. Whorton v. State, 152 S. W. 1089. Davis v. State, 156 S. W. 1171.

An indictment charging the forgery of a United States money order is not sustained by proof that defendant forged the signature of the payee to a receipt thereon. Pierce v. State, 38 Texas Crim. Rep. 604; 44 S. W. 292.

Where it was alleged that the forged instrument in writing was in the possession of defendant and that it was therefore set out in substance, and it was alleged that a signature on said instrument was "J. N. Webb," and there was evidence that it was signed "N. Webb," the jury should be charged that if the instrument was signed "N. Webb" they should acquit on account of the variance. Webb v. State, 39 Texas Crim. Rep. 535; 47 S. W. 357, but the rule is not so strict as to the date or body of the alleged forged instrument when it is set out only in substance. Dudley v. State, 58 S. W. 111. Baird v. State, 51 Texas Crim. Rep. 322; 101 S. W. 991.

The misplacing of the dot of, or the failure to dot the letter "i" does not constitute a variance. Hennessey v. State, 23 Texas Crim. App. 353; 5 S. W. 215.

In a prosecution for a forgery which depends on extrinsic facts to be forgery, if the proof shows that the name of the party owning the property sought to be obtained by means of the forgery is different from the name signed to the forged instrument, and there is no allegation showing that the name signed was intended for that of such party the variance is fatal. Potter v. State, 9 Texas Crim. App. 56. (This allegation should be made by extrinsic averment, and not in a purport clause as suggested in this decision. To make the allegation as therein suggested would be to cause a variance between the purport and tenor clause.)

Sec. 1410. **Fictitious person.**—If it is alleged in the indictment that the purported maker of the instrument in writing alleged to be forged was a fictitious person the allegation must be proven. Feeney v. State, 58 Texas Crim. Rep. 152; 124 S. W. 944. Feeny v. State, 62 Texas Crim. Rep. 587; 138 S. W. 135.

If it is alleged in the indictment that the purported maker of the alleged forged instrument was a fictitious person, the charge should submit this issue to the jury. Feeney v. State, 58 Texas Crim. Rep. 152; 124 S. W. 944.

The signing of a fictitious name with intent to defraud may constitute forgery. Barnwell v. State, 1 Texas Crim. App. 748. Davis v. State, 34 Texas Crim. Rep. 117; 29 S. W. 478. Hocker v. State, 34 Texas Crim. Rep. 359; 30 S. W. 783. Williams v. State, 32 S. W. 532. Johnson v. State, 35 Texas Crim. Rep. 272; 33 S. W. 231. Chapman v. State, 34 S. W. 621. Davis v. State, 37 Texas Crim. Rep. 218; 39 S. W. 296. Adkins v. State, 41 Texas Crim. Rep. 577; 56 S. W. 63. Allen v. State, 44 Texas Crim. Rep. 63; 68 S. W. 286. Boswell v. State, 59 Texas Crim. Rep. 16; 127 S. W. 822. Feeny v. State, 62 Texas Crim. Rep. 585; 138 S. W. 136.

When the instrument in writing alleged to be forged is an ordinary commercial instrument creating a pecuniary obligation on its face and requiring no extrinsic averments to create a liability, it is not necessary to allege that the purported maker was a fictitious person, and, when it is not alleged who was intended to be defrauded thereby, proof may be made, under the allegation that such instrument was made without lawful authority, that the purported maker was a fictitious person. Davis v. State, 34 Texas Crim. Rep. 117; 29 S. W. 478. Williams v. State, 32 S. W. 532. Johnson v. State, 35 Texas Crim. Rep. 272; 33 S. W. 231. Chapman v. State, 34 S. W. 621. Davis v. State, 37 Texas Crim. Rep. 218; 39 S. W. 296. Howard v. State, 37 Texas Crim. Rep. 494; 36 S. W. 475. Spicer v. State, 52 Texas Crim. Rep. 178; 105 S. W. 813. Fluewellian v. State, 59 Texas Crim. Rep. 335; 128 S. W. 621.

When the instrument in writing alleged to be a forgery is set out by its tenor it is apparent from an inspection of such tenor clause whose act it purports to be, and it is therefore unnecessary to allege in terms whose act it purports to be, but if the unnecessary purport clause alleges that it purports to be the act of a named person and the tenor clause shows it purports to be the act of such person, there is no variance if the proof shows the name was fictitious. Davis v. State, 37 Texas Crim. Rep. 218; 39 S. W. 296.

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The fact that the forgery was committed by defendant signing a fictitious name, or a name other than his own, in the presence of the injured party for a consideration would render it none the less forgery, where defendant's name was unknown to such party except as stated by defendant and as signed to the forged paper. Adkins v. State, 41 Texas Crim. Rep. 577; 56 S. W. 63. Walderen v. State, 174 S. W. 348.

A charge is correct which informs the jury that if the purported maker was a fictitious person and defendant knew it, and the name was signed with intent to defraud, and that defendant so knowing did knowingly pass it to the person alleged as true and genuine he would be guilty of knowingly passing a forged instrument. Davis v. State, 34 Texas Crim. Rep. 117; 29 S. W. 478. Chapman v. State, 34 S. W. 621.

The testimony of witnesses who live in the community and who are well acquainted therein is admissible to show that a named person does not live in that community, as tending to show that there is no such person. Dawson v. State, 38 Texas Crim. Rep. 50; 41 S. W. 599. Fluewellian v. State, 59 Texas Crim. Rep. 334; 128 S. W. 621. Feeny v. State, 62 Texas Crim. Rep. 585; 138 S. W. 136.

It is error to admit testimony that the name of the person alleged or claimed to be a fictitious person does not appear on the tax rolls. Lassiter v. State, 49 Texas Crim. Rep. 533; 94 S. W. 233.

The testimony of an officer that he had sought in two counties for a person is not admissible as tending to show that there is no such person. Johnson v. State, 76 S. W. 925.

Undelivered and unclaimed letters are not admissible as proof that the person to whom they were addressed did not live in that neighborhood. Dawson v. State, 38 Texas Crim. Rep. 50; 41 S. W. 599.

Subpoenas and the returns thereon showing that the person sought to be subpoenaed was not found are not admissible to show that there was no such person. Taylor v. State, 50 Texas Crim. Rep. 383; 97 S. W. 474.

Sec. 1411. **Handwriting.**—A witness may testify as to the handwriting of the person whose writing is in question when it is shown that the witness has seen such person write. Haynie v. State, 2 Texas Crim. App. 168. Hunt v. State, 33 Texas Crim. Rep. 252; 26 S. W. 206. Grooms v. State, 40 Texas Crim. Rep. 330; 50 S. W. 370. Ferguson v. State, 61 Texas Crim. Rep. 152; 136 S. W. 465. Barber v. State, 64 Texas Crim. Rep. 101; 142 S. W. 580. Leonard v. State, 152 S. W. 632. Whorton v. State, 152 S. W. 1089.

The fact that defendant was under arrest at the time the witness saw him write his name is not ground for excluding proof of that fact when it is introduced and used for the purpose of a comparison of handwriting. Williams v. State, 27 Texas Crim. App. 471; 11 S. W. 481. Hunt v. State, 33 Texas Crim. Rep. 252; 26 S. W. 206. Ferguson v. State, 61 Texas Crim. Rep. 154; 136 S. W. 465. Jones v. State, 165 S. W. 145.

When it is sought to establish the genuineness or falsity of a writing or signature by comparison of handwritings, there must be a standard of comparison established, either by the production of a writing or signature admitted to be genuine, or by establishing by clear and indisputable testimony such a standard of comparison. Phillips v. State, 6 Texas Crim. App. 364. Hatch v. State, 6 Texas Crim. App. 384. Heard v. State, 9 Texas Crim. App. 19. Heacock v. State, 13 Texas Crim. App. 134. Chester v. State, 23 Texas Crim. App. 583; 5 S. W. 125. Williams v. State, 27 Texas Crim. App. 471; 11 S. W. 481. Whittle v. State, 43 Texas Crim. Rep. 474; 66 S. W. 771. Hughes v. State, 59 Texas Crim. Rep. 294; 129 S. W. 837. Horn v. State, 150 S. W. 949.

It is error to let a signature or writing go into the hands of the jury as a standard of comparison which is only proven to be in defendant's handwriting by proof of comparison by experts. Chester v. State, 23 Texas Crim. App. 583; 5 S. W. 125.

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Proof is not admissible that a signature of a party to an alleged forged paper is not similar to his signature to another paper he had executed, where the other paper is not produced for comparison. Whittle v. State, 43 Texas Crim. Rep. 474; 66 S. W. 771.

It is error to permit the prosecuting witness to write his name in the presence of the jury and then have that signature submitted to the jury as a standard of comparison. McGlasson v. State, 37 Texas Crim. Rep. 625; 40 S. W. 503. Whittle v. State, 43 Texas Crim. Rep. 474; 66 S. W. 772.

No writing will be admitted in evidence for the mere purpose of comparison. Gregory v. State, 37 S. W. 752.

The signature of defendant to his motion for continuance or to his application for an attachment proved up by a witness who saw him sign it is admissible as a standard of comparison. Williams v. State, 27 Texas Crim. App. 471; 11 S. W. 481. Gaut v. State, 49 Texas Crim. Rep. 495; 94 S. W. 1034.

Before a bail bond is admissible in evidence as a standard of comparison it must be proven that defendant signed it in person. Horn v. State, 150 S. W. 948.

A letter written by defendant prior to the alleged forgery may be put in evidence for the purpose of comparison with the alleged forged instrument although defendant is the only witness who testifies that he wrote the letter. Mallory v. State, 37 Texas Crim. Rep. 485; 36 S. W. 751.

An admitted writing already in evidence for other purposes and the disputed writing may be submitted directly to the jury for their comparison. Mahon v. State, 46 Texas Crim. Rep. 240; 79 S. W. 28. Ferguson v. State, 61 Texas Crim. Rep. 152; 136 S. W. 465.

It is error to permit a witness who does not qualify as an expert on handwriting and whose avocation has not been such as to qualify him to judge to give his opinion as to a disputed writing from comparison. Heacock v. State, 13 Texas Crim. App. 98. Haun v. State, 13 Texas Crim. App. 389. Jordt v. State, 50 Texas Crim. Rep. 2; 95 S. W. 514.

A witness who qualifies himself to speak as an expert on handwriting may give his opinion from comparison as to a disputed writing. Grooms v. State, 50 Texas Crim. Rep. 319; 50 S. W. 370. Hughes v. State, 59 Texas Crim. Rep. 294; 129 S. W. 837.

A bank cashier or teller, who says he has had experience in examining and comparing signatures and writings, may give his opinion as to a disputed writing or signature from comparison. A witness may be an expert by reason of his experience and learning although he may not consider himself one. Speiden v. State, 3 Texas Crim. App. 156. Crow v. State, 33 Texas Crim. Rep. 264; 26 S. W. 209. Bratt v. State, 38 Texas Crim. Rep. 121; 41 S. W. 622. Riley v. State, 44 S. W. 499.

Proof of comparison only is not sufficient to establish the fact that defendant made the writing where he denies it under oath as a witness. Spicer v. State, 52 Texas Crim. Rep. 180; 105 S. W. 813. Mahs v. State, 54 Texas Crim. Rep. 393; 113 S. W. 11. Brooks v. State, 57 Texas Crim. Rep. 251; 122 S. W. 386. Batte v. State, 57 Texas Crim. Rep. 125; 122 S. W. 563.

Proof by comparison that defendant made the instrument in writing alleged to be forged when corroborated by other circumstances showing guilty knowledge, motive, opportunity, etc., may be sufficient to sustain a conviction for forgery. Raines v. State, 56 Texas Crim. Rep. 97; 119 S. W. 93. Batte v. State, 57 Texas Crim. Rep. 125; 122 S. W. 563. Hughes v. State, 59 Texas Crim. Rep. 294; 129 S. W. 837.

While proof by comparison only is not sufficient in itself to establish the fact that defendant is the person who fraudulently altered a genuine writing, yet such proof when properly made is admissible for whatever it is worth. Frye v. State, 146 S. W. 199.

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When better evidence can not be obtained, the State may prove that the alleged forged paper was not made by the purported maker by proving that the signature alleged to be forged was in the handwriting of defendant. Grooms v. State, 40 Texas Crim. Rep. 330; 50 S. W. 370.

A test as to the genuineness of the disputed signature may be made by placing it over an admitted genuine signature properly in evidence and then placing both papers to the light, so as to show that the alleged forgery was made by tracing the genuine signature on the forged paper. Barber v. State, 64 Texas Crim. Rep. 89; 142 S. W. 584. Barber v. State, 64 Texas Crim. Rep. 101; 142 S. W. 580.

It is error to permit an expert to make an imitation or copy of the signature of the person whose name is alleged to have been forged in order to show the jury how easily such genuine signature could be counterfeited or forged. Thomas v. State, 18 Texas Crim. App. 223.

The jury may be permitted to use a magnifying glass in examining papers admitted in evidence, and may be permitted to carry such glass with them in their retirement for use during their deliberations. Hatch v. State, 6 Texas Crim. App. 395.

Sec. 1412. **Proof of other offenses.**—Proof of other forgeries or other passing or attempted passing or possession of forged paper by defendant is admissible in evidence when such proof is a part of the *res gestæ*, or if it tends to show intent, identity, or system when intent, identity, or system is an issue, or when it tends to connect defendant with the offense with which he is being tried, or when it tends to defeat the defensive theory. Ham v. State, 4 Texas Crim. App. 645. Francis v. State, 7 Texas Crim. App. 501. Heard v. State, 9 Texas Crim. App. 20. Fonville v. State, 17 Texas Crim. App. 382. Hennessey v. State, 23 Texas Crim. App. 354; 5 S. W. 215. Mason v. State, 31 Texas Crim. Rep. 309; 20 S. W. 564. Burge v. State, 32 Texas Crim. Rep. 360; 23 S. W. 692. Mallory v. State, 37 Texas Crim. Rep. 482; 36 S. W. 757. McGlasson v. State, 37 Texas Crim. Rep. 622; 40 S. W. 503. Taylor v. State, 47 Texas Crim. Rep. 101; 81 S. W. 933. Pelton v. State, 60 Texas Crim. Rep. 412; 132 S. W. 480. Howard v. State, 143 S. W. 178. Warren v. State, 149 S. W. 130. Dugat v. State, 160 S. W. 376. Johnson v. State, 170 S. W. 144.

Proof of other distinct and disconnected forgeries and passing of forged instruments is not admissible. Proof of other offenses should never be admitted in a criminal case when the only purpose such proof could serve would be to show that defendant was a criminal generally. Defendant should be tried on the merits of each case. Hinson v. State, 51 Texas Crim. Rep. 104; 100 S. W. 939. Horn v. State, 150 S. W. 948.

Proof of other disconnected offenses is not admissible. Burge v. State, 32 Texas Crim. Rep. 359; 23 S. W. 692. Pelton v. State, 60 Texas Crim. Rep. 419; 132 S. W. 480. Horn v. State, 150 S. W. 948.

A bill of exceptions taken to the introduction in evidence of other forgeries or passings must be sufficient in and of itself to manifest the supposed error. The presumption on appeal is that the ruling of the trial court was correct, and facts stated as reasons for objection to such proof must be shown to be in fact true. Mallory v. State, 36 S. W. 750. Phillips v. State, 50 S. W. 378. Kyle v. State, 53 S. W. 846.

On a trial for the forgery evidence of the passing of the alleged forged instrument is admissible to show the intent to defraud. Fischl v. State, 54 Texas Crim. Rep. 57; 111 S. W. 410.

When intent is an issue, for the purpose of showing intent the State may prove that defendant attempted to pass the same instrument in writing to others than the alleged injured party. Burks v. State, 24 Texas Crim. App. 330; 6 S. W. 300. Burks v. State, 24 Texas Crim. App. 332; 6 S. W. 303. Leslie v. State, 47 S. W. 368.

Testimony that defendant was found in possession of similar instruments of writing, partially or wholly forged, is not admissible when there is no issue of intent. Joiner v. State, 46 Texas Crim. Rep. 411; 80 S. W. 531.

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Where the forgery and the passing were completed acts long before the forged paper was paid, it is error to prove that it was paid by the purported maker. Joiner v. State, 46 Texas Crim. Rep. 411; 80 S. W. 531.

Sec. 1413. **Forged paper must be introduced in evidence.**—On a trial for forgery or passing a forged instrument, if the instrument in writing alleged to be forged is not shown to be lost or destroyed, or in the possession of the defendant, it must be introduced in evidence. Dovalina v. State, 14 Texas Crim. App. 312. Strickland v. State, 13 S. W. 865. Ratcliff v. State, 29 Texas Crim. App. 248; 15 S. W. 596. Bobbit v. State, 59 Texas Crim. Rep. 314; 128 S. W. 1104. Muniz v. State, 59 Texas Crim. Rep. 365; 128 S. W. 1104.

When the Statement of Facts is filed in the Appellate Court, and fails to contain a copy of the instrument in writing alleged to be forged and which should have been introduced in evidence on the trial, the Appellate Court will hear and determine the case upon the Statement of Facts as filed. Ratcliff v. State, 29 Texas Crim. App. 248; 15 S. W. 596. (The opinion shows that the alleged forged instrument was read in evidence, and while a certiorari was properly denied, it should have been held that the burden was on the appellant to show that the alleged forged instrument read in evidence was at variance with the allegations.)

In cases of forgery and passing, the instrument in writing alleged to be forged is admissible in evidence where it is in harmony with the allegations of the indictment, and even though it be a recorded instrument notice is not required to be given to defendant nor need it be filed in the criminal case prior to the trial thereof. Caston v. State, 31 Texas Crim. Rep. 304; 20 S. W. 585.

Sec. 1414. **Secondary evidence of the forged instrument.**—If the instrument in writing alleged to be forged is lost or destroyed secondary evidence of its contents is admissible in evidence upon proper predicate being laid. Slatter v. State, 61 Texas Crim. Rep. 243; 136 S. W. 770. Wesley v. State, 150 S. W. 197.

If the instrument in writing alleged to be forged is lost or destroyed, or is in possession of the defendant who after proper and timely notice fails to produce it, secondary evidence of its contents may be received when a proper predicate is laid therefor. Henderson v. State, 14 Texas 503. Mason v. State, 32 Texas Crim. Rep. 95; 22 S. W. 144. Thornley v. State, 36 Texas Crim. Rep. 122; 34 S. W. 264. Slatter v. State, 61 Texas Crim. Rep. 243; 136 S. W. 770. Wesley v. State, 150 S. W. 197. Meredith v. State, 164 S. W. 1019.

A mere allegation in the indictment that the instrument in writing alleged to be forged is in the possession of defendant is not a notice to produce such instrument on the trial. Proper and timely notice to produce the alleged forged instrument in writing claimed to be in the possession of the defendant must be given before secondary evidence of its contents is admissible. Rollins v. State, 21 Texas Crim. App. 151; 17 S. W. 466. State v. Tucker, 137 S. W. 870.

Where it is alleged that the instrument in writing alleged to be forged is in the possession of defendant, a notice to produce the same on the trial of the case may be incorporated in the indictment. Thornley v. State, 36 Texas Crim. Rep. 122; 34 S. W. 264.

A proper predicate must be laid, showing a reasonable presumption of loss of the alleged forged instrument and diligent search therefor, before secondary evidence of its contents is admissible under the claim made that it is a lost writing. Haun v. State, 13 Texas Crim. App. 387.

Sec. 1415. **Circumstantial evidence.**—In a case depending wholly on circumstantial evidence the nature of the case in many instances demands a greater latitude in the presentation of the evidence of the circumstances than where a conviction is sought on direct testimony. Horn v. State, 150 S. W. 949. Whorton v. State, 152 S. W. 1082.

In a forgery case, the *factum probandum*—the main fact to be proved—is the making or altering of the instrument in writing alleged to be a forgery, and where proof of such making or altering is wholly dependent upon circumstantial evidence,

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the court should charge the jury the law applicable to such evidence. Hanks v. State, 56 S. W. 922. Dysart v. State, 46 Texas Crim. Rep. 53; 79 S. W. 534.

If defendant admits making the alleged forged instrument a charge on circumstantial evidence is not required, although defendant claimed he had authority to make it. Usher v. State, 47 Texas Crim. Rep. 93; 81 S. W. 309. Clary v. State, 150 S. W. 919.

Sec. 1416. **Authority or want of authority.**—The State must prove that the instrument in writing alleged to be a forgery was made without lawful authority. Shanks v. State, 25 Texas Supplement 326. Ham v. State, 4 Texas Crim. App. 678. Hatch v. State, 6 Texas Crim. App. 397. Brown v. State, 55 Texas Crim. Rep. 9; 114 S. W. 820.

The State may ask the person whose name purports to be signed to the alleged forged instrument if he authorized the defendant to sign his name thereto. Douglass v. State, 148 S. W. 1089.

It is no defense that defendant misspelled the name of the person whose name he forged to a check or draft, and where the language of such paper or the representations of defendant as to who signed it, reasonably indicate the person whose name was intended to be forged, such person may testify that he never signed it or gave defendant authority to sign it. Davis v. State, 34 Texas Crim. Rep. 117; 29 S. W. 478. Williams v. State, 32 S. W. 532. Davis v. State, 37 Texas Crim. Rep. 218; 39 S. W. 296. Spicer v. State, 52 Texas Crim. Rep. 177; 105 S. W. 813.

Testimony of prosecutor that he did not remember whether or not he gave defendant authority to sign the alleged forged instrument, but that his best judgment was that he did not, fails to show that it was made without lawful authority. Roberts v. State, 53 S. W. 864.

If there is an issue as to the want of authority to make the alleged forged instrument, the State is not entitled to prove as original evidence that the prosecuting witness had always repudiated the signature thereto. McGlasson v. State, 38 Texas Crim. Rep. 361; 43 S. W. 93.

It is not every signing another man's name without authority which constitutes forgery. There must inhere in the act an intent to injure or defraud. If there is a reasonable and honest belief that the signature will be approved, there can be no forgery. McCay v. State, 32 Texas Crim. Rep. 239; 22 S. W. 974.

If there is evidence raising the issue the court should charge the jury affirmatively on the issue of whether defendant had reasonable ground for and did believe that he had authority to make the instrument in writing alleged to be forged. Williams v. State, 24 Texas Crim. App. 342; 6 S. W. 531. Sweet v. State, 28 Texas Crim. App. 223; 15 S. W. 590. McCay v. State, 32 Texas Crim. Rep. 233; 22 S. W. 974. Knowles v. State, 74 S. W. 767. White v. State, 61 Texas Crim. Rep. 498; 135 S. W. 562. Cyphers v. State, 150 S. W. 187 (the court did and charge was correct). Davis v. State, 156 S. W. 1171 (court did and charge was correct).

Testimony that defendant thought his friend would not object to defendant's action in signing his name does not raise the issue of authority to make the alleged forged instrument where there was no course of dealing between them to justify such belief. Carlton v. State, 60 Texas Crim. Rep. 584; 132 S. W. 775. Meredith v. State, 164 S. W. 1020.

It is not error to refuse to charge the jury that if the person whose name was alleged to be forged ratified the action of the person who did sign it they should acquit; this is not the law. Countee v. State, 32 S. W. 127.

If defendant had the express or implied authority to sign the name of the purported maker to the alleged forged instrument there is no forgery. Brown v. State, 55 Texas Crim. Rep. 9; 114 S. W. 820. Fench v. State, 60 Texas Crim. Rep. 432; 132 S. W. 478.

Sec. 1417. **Evidence.**—The mere fact that a witness after testifying to the facts leading up to the inevitable conclusion that the writing is a forgery declares it

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to be such is not reversible error. Hughes v. State, 59 Texas Crim. Rep. 294; 129 S. W. 837. Barber v. State, 64 Texas Crim. Rep. 101; 142 S. W. 580.

If the indictment contains counts charging forgery and passing and each count is supported by testimony the State is not required to elect between such counts. Williams v. State, 24 Texas Crim. App. 345; 6 S. W. 531. Carr v. State, 36 Texas Crim. Rep. 3; 34 S. W. 949.

The prosecuting witness is not entitled to give in evidence his opinion as to whether or not defendant intended to defraud him. Howard v. State, 143 S. W. 181.

The fact that defendant after passing the forged instrument notified the party whose name he had forged of his action in the matter will not of itself relieve the transaction of the fraud. Malton v. State, 29 Texas Crim. App. 529; 16 S. W. 423.

Where the defense is that defendant had signed his true name to the alleged forged instrument, and the State shows that he went by other names and had signed other papers by other names (for the purpose of showing his methods), it is a question for the jury as to whether he had in fact signed his true name. Murphy v. State, 49 Texas Crim. Rep. 488; 93 S. W. 543.

The confession of defendant may be used to aid the proof of the corpus delicti. Gray v. State, 44 Texas Crim. Rep. 477; 72 S. W. 858.

An allegation in an indictment for forgery that the injured party was a corporation may be proved by oral testimony. White v. State, 61 Texas Crim. Rep. 498; 135 S. W. 562.

The act of another in paying off the alleged forged instrument is not binding on defendant unless he was in some way connected with such payment or authorized it, and unless this is shown proof of such payment is not admissible against him. Webb v. State, 47 Texas Crim. Rep. 306; 83 S. W. 394.

If the testimony of the State witnesses who identify defendant is only contradicted but is not sought to be impeached, and the defense is an alibi, it is error to permit an officer to testify that he got a description from such witnesses and then upon such description arrested the defendant. Mallory v. State, 37 Texas Crim. Rep. 484; 36 S. W. 751.

Testimony explaining the connection of various persons with the alleged forged instrument and explaining the meaning of doubtful terms is not admissible in the absence of proper allegations. Beasley v. State, 39 Texas Crim. Rep. 688; 47 S. W. 991. Joiner v. State, 46 Texas Crim. Rep. 411; 80 S. W. 531.

If proof of defendant's financial condition would not antagonize the fact of forgery the judgment will not be reversed because such proof was excluded. DeAlberts v. State, 34 Texas Crim. Rep. 510; 31 S. W. 391.

The State is not required to prove that the purported maker was a fictitious person, or that defendant did not have the right to sign the alleged forged instrument, when the proof is that defendant represented his name to be that signed, and that it was not his name, and that he obtained money or other property on such instrument. Carter v. State, 61 Texas Crim. Rep. 609; 136 S. W. 47.

Where the words or figures used sustain of themselves the meaning given by the innuendo averments, error in permitting the State to prove the innuendo averments is harmless. Daud v. State, 34 Texas Crim. Rep. 460; 31 S. W. 376. Colter v. State, 41 Texas Crim. Rep. 80; 51 S. W. 945.

The State has the right to prove that the alleged forged signature was written plainly at the time it was executed and by wear and tear had been somewhat dimmed and obliterated. Inman v. State, 35 Texas Crim. Rep. 36; 30 S. W. 219.

Proof that defendant passed a forged instrument in writing is not of itself sufficient to prove that he forged it. Dovalina v. State, 14 Texas Crim. App. 312. Millsaps v. State, 38 Texas Crim. Rep. 570; 43 S. W. 1015.

Sec. 1418. **Charge of the court.**—If the charge of the court requires the jury to find beyond a reasonable doubt the existence of every ingredient of the offense

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before they are authorized to convict, it is not necessary to give the statutory definition of forgery. Smith v. State, 32 S. W. 696. Adkins v. State, 41 Texas Crim. Rep. 577; 56 S. W. 63. Ritter v. State, 176 S. W. 727.

The charge may inform the jury of the legal effect of the alleged forged instrument. Burks v. State, 24 Texas Crim. App. 326; 6 S. W. 300. Williams v. State, 32 S. W. 544. Hall v. State, 55 Texas Crim. Rep. 268; 116 S. W. 808.

Whether the instrument in writing alleged to be forged would, if the same were true, have created a pecuniary obligation is a question of law to be passed on by the court, and it is not necessary to submit that question to the jury. Williams v. State, 32 S. W. 544, but the error in submitting such question to the jury could only injure the State. Daud v. State, 34 Texas Crim. Rep. 460; 31 S. W. 376.

When it is alleged that the false instrument was made with intent to injure and defraud, it is not error to use the statutory words "injure or defraud" in the charge to the jury. Howard v. State, 143 S. W. 181.

The charge should apply the law to the facts. Mere abstract definitions do not constitute a charge. Francis v. State, 7 Texas Crim. App. 515.

The court may select any one count of the indictment which is supported by the evidence and submit that count alone to the jury. This is tantamount to an election by the State to rely upon the count submitted and an abandonment of the counts not submitted. Stephens v. State, 36 Texas Crim. Rep. 386; 37 S. W. 425. Adkins v. State, 41 Texas Crim. Rep. 579; 56 S. W. 63.

If there is evidence that a witness is so connected with the alleged offense as to be *particeps criminis*, the court should apply the law of accomplice testimony to his evidence given in behalf of the State. Robinson v. State, 35 Texas Crim. Rep. 54; 43 S. W. 526. Lattimore v. State, 57 S. W. 644.

Where there is evidence to the effect that the alleged forged instrument was not a forgery, but was given to defendant by the maker in payment of a gambling or other debt, the court should charge the jury affirmatively that if he obtained the instrument in this manner he is entitled to an acquittal. Webb v. State, 47 Texas Crim. Rep. 306; 83 S. W. 394.

It is error to charge the jury that it is sufficient if possibly some one might be defrauded by the forgery, but such charge is not reversibly erroneous if there is no reason suggested for defendant's conduct consistent with fair dealing, or if such charge could not injure the defendant. Green v. State, 36 Texas Crim. Rep. 109; 35 S. W. 971. Lucas v. State, 39 Texas Crim. Rep. 48; 44 S. W. 825. Ashmore v. State, 150 S. W. 196.

It is error to charge the jury that when an instrument is shown to be a forgery and shown to be in the possession of some one other than the person whose act it purports to be, such possession standing alone, is sufficient to warrant a conviction for the execution of the same. Millsaps v. State, 38 Texas Crim. Rep. 570; 43 S. W. 1015.

Evidence of the possession of, or attempts to pass, or of the passing by defendant of other alleged forged instruments should be limited in the charge if the jury, without such limitation, would be reasonably likely to use such testimony injuriously to defendant for purposes other than warranted thereby. Francis v. State, 7 Texas Crim. App. 501. Burks v. State, 24 Texas Crim. App. 330; 6 S. W. 300. Burks v. State, 24 Texas Crim. App. 332; 6 S. W. 303. Thornley v. State, 36 Texas Crim. Rep. 124; 35 S. W. 981. Pelton v. State, 60 Texas Crim. Rep. 412; 132 S. W. 480.

In limiting the proof of other supposed forgeries growing out of or connected with the alleged forgery for which defendant is being tried, the charge should not assume that such collateral instruments in writing are forgeries, but the jury should be charged that before they could consider such collateral matters they must be found beyond a reasonable doubt to be forgeries. Taylor v. State, 50 Texas Crim. Rep. 384; 97 S. W. 474. Pelton v. State, 60 Texas Crim. Rep. 420; 132 S. W. 480.

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Art. 924a. **Forgery of obligation of foreign government.**—He is guilty of forgery who without lawful authority and with intent to injure or defraud shall falsely make, alter, forge or counterfeit any bond, certificate, obligation, or instrument in writing having a value or purporting to be of value issued by or purporting to be issued by or under the authority or direction of any foreign government or de facto foreign government or any officer or agent of any foreign government or de facto foreign government, or any person or persons claiming to act by or under the authority of any foreign government or de facto foreign government or claiming by right of any office, military or civil, to have a right in any foreign country to issue money, bills of exchange, notes, or any papers circulating as money or mediums of exchange in any foreign country or portion thereof, or purporting to be redeemable in money or other thing of value, and any person violating any of the provisions of this article shall be punished as provided in article 936 of this Title and Chapter. (Act Sep. 16, 1914.)

Art. 924b. **Passing obligation of foreign government.**—If any person shall knowingly pass as true or attempt to pass as true any such forged instrument in writing as is mentioned and defined in article 924a he shall be punished as provided by article 937 of this Title and Chapter. (Act Sep. 16, 1914.)

Art. 924c. **Possession of obligation of foreign government.**—If any person shall knowingly have in his possession any instrument of writing, the making of which is by law an offense under the provisions of article 924a hereof, with intent to use or pass the same as true, he shall be punished as is provided in article 939 of this Title and Chapter. (Act Sep. 16, 1914.)

Art. 925. (531) (432) **Alteration also forgery.**—He is also guilty of forgery who, without lawful authority, and with intent to injure or defraud, shall alter an instrument in writing then already in existence, by whomsoever made, in such manner that the alteration would (if it had been legally made) have created, increased, diminished, discharged or defeated any pecuniary obligation, or would have transferred, or in any manner have affected any property whatever. (O. C. 432.)

Sec. 1419. **Indictment for forgery by alteration.**—Indictments held good: Miller v. State, 34 S. W. 267 (indorsement of a draft). Franklin v. State, 46 Texas Crim. Rep. 181; 78 S. W. 934 (face of check altered). Carter v. State, 55 Texas Crim. Rep. 45; 114 S. W. 839 (indorsement of check). Horn v. State, 150 S. W. 948 (face of voucher check altered).

Where the name of the payee of a genuine negotiable instrument is forged on the back thereof, the entire instrument is then properly described as "a forged instrument in writing," since a person may be guilty of making or altering, as the case may be, who knowing the illegal purpose intended, shall write or cause to be written, the signature, or the whole or any part of a forged instrument. Strang v. State, 32 Texas Crim. Rep. 228; 22 S. W. 680. Miller v. State, 34 S. W. 267.

An indictment intended to charge a forgery by alteration, to be sufficient, must set out the exact manner in which the instrument in writing already in existence was altered. State v. Knippa, 29 Texas 295. Strang v. State, 32 Texas Crim.

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Rep. 227; 22 S. W. 680. Overly v. State, 34 Texas Crim. Rep. 502; 31 S. W. 377. Robinson v. State, 35 Texas Crim. Rep. 54; 43 S. W. 526.

If the words added are ambiguous or so misspelled as to be of doubtful meaning the indictment should contain proper averments explaining what is meant by the additions to the original writing. Polk v. State, 40 Texas Crim. Rep. 668; 51 S. W. 909.

Where the writing alleged to have been altered as set out by its tenor does not purport on its face to be a joint obligation, and it is alleged that it created a joint obligation had the alteration been legally made, the variance is fatal in the absence of extrinsic averments showing how it could create a joint obligation. Glenn v. State, 65 S. W. 368.

An indictment for altering a check drawn on a bank need not allege that the bank was incorporated. Lucas v. State, 39 Texas Crim. Rep. 48; 44 S. W. 825.

If the forgery consists in inserting a point of destination and in placing a stamp on a railroad ticket, these matters should be distinctly averred in the indictment. Overly v. State, 34 Texas Crim. Rep. 502; 31 S. W. 377. Robinson v. State, 35 Texas Crim. Rep. 54; 43 S. W. 526.

Sec. 1420. **Forgery by alteration.**—An account against the State which was fraudulently altered after approval is a forgery by alteration. Hennessey v. State, 23 Texas Crim. App. 340; 5 S. W. 215.

Fraudulently adding the names of persons as sureties on a negotiable note is a forgery by alteration. Green v. State, 36 Texas Crim. Rep. 109; 35 S. W. 971.

Fraudulently indorsing the name of the payee of a negotiable instrument on the back thereof is a forgery by alteration. Strang v. State, 32 Texas Crim. Rep. 228; 22 S. W. 680. Miller v. State, 34 S. W. 267. Carter v. State, 55 Texas Crim. Rep. 46; 114 S. W. 839.

Fraudulently adding the names of more persons to a promissory note is a forgery by alteration. Lovejoy v. State, 40 Texas Crim. Rep. 97; 48 S. W. 520.

Fraudulently raising the amount on the face of a negotiable instrument is a forgery by alteration. Hennessey v. State, 23 Texas Crim. App. 340; 5 S. W. 215. Mason v. State, 32 Texas Crim. Rep. 95; 22 S. W. 144. Lucas v. State, 39 Texas Crim. Rep. 48; 44 S. W. 825. Franklin v. State, 46 Texas Crim. Rep. 181; 78 S. W. 934. Frye v. State, 146 S. W. 199.

A scholastic census taken at a time not authorized by law is not the subject of forgery by alteration. Munoz v. State, 40 Texas Crim. Rep. 459; 50 S. W. 949.

A check drawn by a married woman living with her husband is the subject of forgery by alteration. Miller v. State, 50 Texas Crim. Rep. 536; 100 S. W. 380.

Raising the amount specified in a receipt is not forgery if there was no debt in existence which could be diminished, discharged or defeated by such altered receipt if the alteration had been legally made. Knezek v. State, 49 Texas Crim. Rep. 157; 90 S. W. 1099.

To constitute forgery by altering there must be an intent to defraud, and a fraudulent intent was not shown where a boy raised an order for merchandise given him by his employer, but kept within the amount really due him, and where he returned and told about it. Markowski v. State, 56 Texas Crim. Rep. 556; 120 S. W. 195.

As a circumstance tending to show that defendant fraudulently altered a genuine check it may be shown that he received the check before it was altered and afterwards cashed the altered check. Frye v. State, 146 S. W. 199.

Sec. 1421. **Charge of the court on altering.**—The court should charge on circumstantial evidence when the evidence tending to establish the fact that defendant made the alteration relied on is wholly circumstantial. Dysart v. State, 46 Texas Crim. Rep. 52; 79 S. W. 534.

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If there is evidence to support the theory that the maker may have made a mistake in writing the amount, and that the instrument was not in fact altered, the charge should submit this theory to the jury. Bell v. State, 21 Texas Crim. App. 274; 17 S. W. 155.

If there is no allegation of forgery by alteration the court should not charge on such theory. Johnson v. State, 40 Texas Crim. Rep. 605; 51 S. W. 382.

When the proof shows without controversy that some person added a name to the paper alleged to be forged by such altering, a charge is not erroneous which assumes that fact where the jury are required to believe beyond a reasonable doubt that defendant added it before they could convict, and are further charged that if some person other than defendant added it the jury should acquit defendant. Baird v. State, 51 Texas Crim. Rep. 322; 101 S. W. 991.

Art. 926. (532) (433) **Intent necessary.**—The false making or alteration, to constitute forgery, must be done with intent to injure or defraud, and the injury must be such as affects one pecuniarily, or in relation to his property. (O. C. 442.)

Art. 927. (533) (434) **"Instrument in writing" defined.**—The words "instrument in writing," as used in articles 924 and 925, and elsewhere in this chapter, include every writing purporting to make known or declare the will or intention of the party whose act it purports to be, whether the same be of record or under seal or private signature, or whatever other form it may have. It must be upon paper or parchment, or some substance made to resemble either of them. The words may be written, printed, stamped or made in any other way, or by any other device. And the words "in writing," "write," "written," include all these modes of making. An instrument, partly printed or stamped, and partly written, is an instrument in writing. In order to come within the definition of forgery, the signature, when made otherwise than by writing, must be made to resemble manuscript. (O. C. 434.)

Sec. 1422. **Instrument in writing.**—If the writing alleged to be a forgery is written in the third person and unsigned, so that on its face it does not purport to be the act of another it is not an "instrument in writing" within the meaning of the statute on forgery. Anderson v. State, 20 Texas Crim. App. 595.

If the signature to the alleged forged instrument was not made by writing nor made in such manner as to resemble manuscript, as where the alleged forgery was by filling in over a printed signature, it does not come within the definition of forgery. Heath v. State, 49 Texas Crim. Rep. 49; 89 S. W. 1063.

Art. 928. (534) (435) **"Alter" defined.**—The word "alter," in the definition of forgery, means to erase or obliterate any word, letter or figure, to extract the writing altogether, or to substitute other words, letters or figures for those erased, obliterated or extracted, to add any other word, letter or figure to the original instrument, or to make any other change whatever which shall have the effect to create, increase, diminish, discharge or defeat a pecuniary obligation, or to transfer, or in any other way affect any property whatever. (O. C. 438.)

Art. 929. (535) (436) **"Another" includes what.**—The instrument must purport to be the act of "another," and within the meaning

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of this word, as used in defining forgery, are included this State, the United States, or either of the States or Territories of the Union; all the several branches of the government of either of them; all public or private bodies, politic and corporate; all courts; all officers, public or private, in their official capacity; all partnerships in professions or trades; and all other persons, whether real or fictitious, except the person engaged in the forgery. (O. C. 439.)

Art. 930. (536) (437) **"Pecuniary obligation" defined.**—"Pecuniary obligation" means every instrument having money for its object, and every obligation for the breach of which a civil action for damages may be lawfully brought. (O. C. 440.)

Art. 931. (537) (438) **"Transferred or in any manner have affected" defined.**—By an instrument which would "have transferred or in any manner have affected" property, is meant every species of conveyance, or undertaking in writing, which supposes a right in the person purporting to execute it, to dispose of or change the character of property of every kind, and which can have such effect when genuine. (O. C. 441.)

Sec. 1423. **Instrument affecting property.**—If the instrument in writing alleged to be forged was an order for the delivery of personal property of the purported maker, and which, if genuine, could have changed the possession of such property, it is the subject of forgery. Alexander v. State, 28 Texas Crim. App. 186; 12 S. W. 595.

Art. 932. (538) (439) **All participants guilty.**—He is guilty of making or altering, as the case may be, under articles 924 and 925, who, knowing the illegal purpose intended, shall write, or cause to be written, the signature, or the whole or any part of a forged instrument. All persons engaged in the illegal act are deemed guilty of forgery. (O. C. 435.)

Sec. 1424. **Principals.**—All persons are principals who are guilty of acting together in the commission of the forgery. Mason v. State, 32 Texas Crim. Rep. 95; 22 S. W. 408. Peel v. State, 35 Texas Crim. Rep. 312; 33 S. W. 541. Dillard v. State, 177 S. W. 99.

One who procures another to write the forged signature is guilty of forgery whether the person actually signing such name is a guilty or an innocent agent. Peel v. State, 35 Texas Crim. Rep. 312; 33 S. W. 541.

Art. 933. (539) (440) **Filling up over signature.**—It is a forgery to make, with intent to defraud or injure, a written instrument, by filling up over a genuine signature, or by writing on the opposite side of a paper so as to make the signature appear as an indorsement. (O. C. 436.)

Sec. 1425. **Filling up over signature.**—One may be convicted for knowingly passing a forged instrument in writing which was made by filling up over a genuine signature. Hooper v. State, 30 Texas Crim. App. 412; 17 S. W. 1066. Bunker v. State, 177 S. W. 109.

Filling up over a printed signature is not forgery, but if a swindle was perpetrated with the aid of such a paper, defendant may be prosecuted for swindling. Heath v. State, 49 Texas Crim. Rep. 49; 89 S. W. 1063.

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Art. 934. (540) (441) **Person not guilty, when.**—When the person making or altering an instrument in writing acts under an authority which he has good reason to believe, and actually does believe, to be sufficient, he is not guilty of forgery, though the authority be in fact insufficient and void. (O. C. 437.)

Art. 935. (540a) **Altering teacher's certificate.**—Any person who shall unlawfully and wilfully raise, change, or alter any teacher's certificate or diploma, or other instrument having the force of a teacher's certificate, shall be deemed guilty of forgery, and upon conviction thereof shall be punished by confinement in the penitentiary for a term of not less than two nor more than seven years. (Sec. 80, Act May 20, 1893, Acts 1893, p. 205.)

Sec. 1426. **Teacher's certificate.**—Wilfully altering a teacher's certificate is forgery. Dudley v. State, 58 S. W. 111. Brooks v. State, 45 Texas Crim. Rep. 206; 75 S. W. 508.

One who knowingly passes as true an altered teacher's certificate may be prosecuted and convicted for knowingly passing as true a forged instrument in writing. Brooks v. State, 45 Texas Crim. Rep. 206; 75 S. W. 508 (indictment held good).

Art. 936. (541) (442) **Penalty for forgery.**—If any person be guilty of forgery he shall be punished by confinement in the penitentiary not less than two nor more than seven years. (O. C. 433.)

Sec. 1427. **Passing forged instrument.**
Sec. 1428. Form for indictment.
Sec. 1429. Indictment for passing.
Sec. 1430. Evidence.
Sec. 1431. Charge of the court.

Art. 937. (542) (443) **Passing forged instrument.**—If any person shall knowingly pass as true, or attempt to pass as true, any such forged instrument in writing as is mentioned and defined in the preceding articles of this chapter, he shall be punished by imprisonment in the penitentiary not less than two nor more than five years. (O. C. 443.)

Sec. 1428. **Form for indictment.**
In the name and by the 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 John Doe on the ..... day of ..... A. D. ..... in said county and State did knowingly pass as true (or "did knowingly attempt to pass as true") to ..... a forged instrument in writing of the tenor following: (here set out instrument as in a case of forgery); which said instrument in writing the said John Doe then and there well knew to be forged and did then and there so pass (or "attempt to pass") the same as true with the intent to injure and defraud.

Against the peace and dignity of the State.

.....
Foreman of the grand jury.

Sec. 1429. **Indictment for passing.**—Indictments for passing a forged instrument held good: Peterson v. State, 25 Texas Crim. App. 71; 7 S. W. 530 (order for money). Thurmond v. State, 25 Texas Crim. App. 366; 8 S. W. 473 (note). Strang v. State, 32 Texas Crim. Rep. 220; 22 S. W. 680 (altered check). Daud v. State, 34 Texas Crim. Rep. 361; 31 S. W. 376 (railroad time check). Brooks v. State, 45 Texas Crim. Rep. 206; 75 S. W. 508 (altered teacher's certificate). Forcy v. State,

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60 Texas Crim. Rep. 206; 8 S. W. 473 (order for goods). Smith v. State, 176 S. W. 49 (attempt to pass check).

It may be alleged that the forged instrument was passed on the person to whom it was in fact passed, although such person may have accepted it or paid it for a bank, company, firm, partnership, corporation or for another person. The capacity in which the party to whom it was passed acted is immaterial. Strang v. State, 32 Texas Crim. Rep. 219; 22 S. W. 680. Riley v. State, 44 S. W. 498. Heimes v. State, 59 Texas Crim. Rep. 420; 129 S. W. 124.

In an indictment for knowingly passing or attempting to pass as true a forged instrument, it is not necessary to allege in terms that such instrument "had theretofore been made without lawful authority and with intent to defraud." Thurmond v. State, 25 Texas Crim. App. 366; 8 S. W. 473. Cagle v. State, 39 Texas Crim. Rep. 111; 44 S. W. 1097. Brown v. State, 60 Texas Crim. Rep. 506; 132 S. W. 789.

If the indictment sets out the forged instrument by its tenor it is not necessary to allege that it purports to be the act of another nor is it necessary to allege whose act it purports to be, unless the only name signed thereto is identical with the allegation of defendant's name. Thurmond v. State, 25 Texas Crim. App. 366; 8 S. W. 473. Hardin v. State, 60 Texas Crim. Rep. 129; 131 S. W. 552.

In an indictment for passing or attempting to pass a forged instrument, the language of the statute requires it to be alleged in some way that the act was "knowingly" done, but there is nothing in the statute that renders the word 'wilfully" or "unlawfully" or "fraudulently" or "feloniously" necessary.

If the instrument in writing alleged to be a forged instrument would not sustain a prosecution for forgery, it cannot lawfully form the basis of a prosecution for passing or attempting to pass the same. Anderson v. State, 20 Texas Crim. App. 598. Knezek v. State, 49 Texas Crim. Rep. 157; 90 S. W. 1099. Bagley v. State, 63 Texas Crim. Rep. 606; 141 S. W. 107.

In alleging a passing of a negotiable instrument which had been altered by forging an endorsement on the back thereof, the instrument after it was altered was "a forged instrument in writing," and it is proper to allege that defendant knowingly passed "a forged instrument in writing," and then, after setting it out by its tenor, to allege that he knew the endorsement was forged. Strang v. State, 32 Texas Crim. Rep. 219; 22 S. W. 680.

If the alleged forged instrument is not an ordinary commercial paper, and is alleged to have been passed on one person with intent to defraud a certain company, there should be an allegation showing some relation or connection between the person to whom it was passed and the company whom it would defraud. Bagley v. State, 63 Texas Crim. Rep. 606; 141 S. W. 107.

In setting out the forged instrument in an indictment for passing or attempting to pass, the same rules apply as are applicable to indictments for forgery. Simms v. State, 32 Texas Crim. Rep. 277; 22 S. W. 876. Cagle v. State, 39 Texas Crim. Rep. 109; 44 S. W. 1097. Bagley v. State, 63 Texas Crim. Rep. 606; 141 S. W. 107.

It may be alleged in the same count that the accused "did knowingly pass as true and did knowingly attempt to pass as true" and proof of either phase of the statute so alleged would be sufficient.

Sec. 1430. **Evidence.**—If the allegation is that the forged instrument was passed on a certain named person, and the proof is that he was acting as clerk, cashier, teller, agent, or in some other fiduciary capacity, there is no variance under such allegation and proof that such instrument was passed to him. The capacity in which the party on whom the forged instrument was passed acted is immaterial. Strang v. State, 32 Texas Crim. App. 219; 22 S. W. 680. Heimes v. State, 59 Texas Crim. Rep. 420; 129 S. W. 123.

It is necessary to allege to whom the forged instrument was passed and such allegation must be proved as laid. Huntly v. State, 34 S. W. 923. Riley v. State, 44 S. W. 498. Morris v. State, 52 Texas Crim. Rep. 288; 106 S. W. 383. Forcy v. State, 55 Texas Crim. Rep. 545; 117 S. W. 834.

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If the testimony shows that defendant did not undertake to pass the alleged forged instrument on the person alleged, but that such person merely received it from one who took it from defendant and carried it to the person alleged to get his "O. K.," there is a variance. Huntly v. State, 34 S. W. 923. Morris v. State, 52 Texas Crim. Rep. 288; 106 S. W. 383.

Although the forged instrument be delivered to one employe of a concern, yet if another be called in and defendant tries to induce the latter to cash it, a finding of the jury that defendant attempted to pass it on the latter will not be disturbed. Houston v. State, 59 Texas Crim. Rep. 505; 128 S. W. 619.

If it is alleged that the forged instrument was passed upon a corporation, the allegation, being descriptive, must be proven as laid. Wisdom v. State, 49 Texas Crim. Rep. 534; 95 S. W. 505.

The act of defendant's innocent agent in passing the alleged forged instrument is the act of defendant, and proof of that fact supports an allegation that it was passed by defendant, and in law defendant was present when an act was done by his innocent agent wherever he may be in fact. Ellis v. State, 22 S. W. 678. Strang v. State, 32 Texas Crim. Rep. 219; 22 S. W. 680. Jessup v. State, 44 Texas Crim. Rep. 89; 68 S. W. 988.

The offense of passing a forged instrument is not complete until the paper is negotiated, that is, actually passed, and as long as it is in the hands of the party charged with passing it, or in the hands of or in the charge of the innocent agent of such party, there is no passing. The mail is an innocent agent. Ellis v. State, 22 S. W. 678. Thulemeyer v. State, 34 Texas Crim. Rep. 619; 31 S. W. 659. Jessup v. State, 44 Texas Crim. Rep. 89; 68 S. W. 988.

Where a bank takes a forged check from defendant for collection and same is paid by another bank, the check is passed on the latter, the forwarding bank being the innocent agent of defendant. Ellis v. State, 22 S. W. 678.

Those acting together in knowingly passing the forged instrument are principals. Mason v. State, 31 Texas Crim. Rep. 306; 20 S. W. 564.

The evidence does not show a passing where the party on whom it is alleged the instrument was passed only forwarded it to another purely as an accommodation. Bagley v. State, 63 Texas Crim. Rep. 606; 141 S. W. 107.

Passing the forged instrument in pledge is a passing. Thurmond v. State, 25 Texas Crim. App. 371; 8 S. W. 473. Nichols v. State, 39 Texas Crim. Rep. 80; 44 S. W. 1091.

The State may prove, as an act of spoliation, that after passing the instrument in writing alleged to be forged, defendant returned to the place, redeemed and destroyed it. Riley v. State, 44 S. W. 499.

As tending to shed light upon whether or not a check was a forgery, it may be shown that the bank on which it was drawn refused to pay it. Wesley v. State, 150 S. W. 197.

Under the allegation that the defendant did pass a forged instrument in writing, the State is entitled to prove that the purported maker did not sign the alleged forged instrument. Thornley v. State, 36 Texas Crim. Rep. 124; 34 S. W. 264.

Where the instrument in writing passed as true by defendant was a forgery and he knew it when he passed it, and it is not alleged whom he intended to defraud nor that the purported maker was a fictitious person, it may be shown by the person whose name the language of the instrument or the representation of defendant indicates was intended to be forged that it was not signed by him or by his authority, although the name so intended be misspelled, and if the instrument be such on its face, as if true, would create a pecuniary obligation, a conviction may be sustained, without any allegation as to the mistake in making the signature, either on the theory that it was the forgery of the signature of the person intended, or as the signature of a fictitious person. Davis v. State, 34 Texas Crim. Rep. 117; 29 S. W. 478. Williams v. State, 32 S. W. 532. Spicer v. State, 52 Texas Crim. Rep. 177; 105 S. W. 813. Boswell v. State, 59 Texas Crim. Rep. 161; 127 S. W. 822.

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If the conduct of defendant repels the idea that he knew the instrument in writing passed by him was a forgery, the evidence is insufficient to sustain a conviction for knowingly passing as true a forged instrument. Leeper v. State, 27 Texas Crim. App. 699; 11 S. W. 644.

If defendant denies any knowledge of or any connection with the alleged forged instrument, the State, to show guilty knowledge, may prove that he attempted to pass the same instrument to another person. Leslie v. State, 47 S. W. 368.

If defendant on passing a forged note, check or draft made payable to himself represents the maker to be at a certain place and engaged in a particular business, or otherwise identifies him, proof that it is not that person's paper is prima facie proof that it is a forgery. Barnwell v. State, 1 Texas Crim. App. 745. Davis v. State, 34 Texas Crim. Rep. 117; 29 S. W. 478.

If a written instrument had been so altered as to constitute it a forgery, the knowledge of such alteration in passing the altered instrument as true constitutes the offense of knowingly passing as true a forged instrument. Strang v. State, 32 Texas Crim. Rep. 228; 22 S. W. 680.

The fact that the person to whom the forged instrument was passed added a date to the writing does not affect the liability of defendant, since an undated writing may be the subject of forgery. Boles v. State, 13 Texas Crim. App. 657.

On a trial for knowingly passing an altered receipt the evidence is insufficient if it fails to show that at the time such altered receipt was passed there was in existence any debt which such receipt, if true, would diminish, discharge or defeat. Knezek v. State, 49 Texas Crim. Rep. 157; 90 S. W. 1099.

It is no defense to a charge of knowingly passing as true a forged instrument that the name of defendant is the same as the purported maker of the instrument where it is alleged and proven that defendant represented that it was the act of another person of the same name. Edwards v. State, 53 Texas Crim. Rep. 50; 108 S. W. 673.

The date when the alleged forged instrument was passed may be proven by oral testimony as original evidence although a written entry may have been made showing such date. Laudermilk v. State, 47 Texas Crim. Rep. 427; 83 S. W. 1107.

Proof of oral statements of a criminative nature made by defendant while under arrest and not admissible as a part of the *res gestæ* is not admissible either as original evidence or to impeach defendant as a witness. Brown v. State, 158 S. W. 533.

When the jury have solved the issues presented in the testimony under a fair and proper charge of the court, and have found that defendant is guilty of knowingly passing as true the forged instrument in writing set out or described in the indictment, and that verdict has been approved by the trial court, and there is sufficient evidence in the record, if believed, to sustain such verdict, it will not be disturbed on the facts on appeal unless clearly wrong. Hooper v. State, 30 Texas Crim. App. 412; 17 S. W. 1066. Hall v. State, 55 Texas Crim. Rep. 267; 116 S. W. 808. Williams v. State, 58 Texas Crim. Rep. 82; 124 S. W. 955.

Sec. 1431. **Charge of the court.**—The main fact to be proved in a case of knowingly passing as true a forged instrument is the passing of a forged instrument with knowledge on the part of the utterer at that time that it was a forgery, and where proof of this depends wholly on circumstantial evidence a charge on that subject should be given. The fact that the passing was proved by direct evidence will not relieve the court of the duty of charging on circumstantial evidence when the fact that the instrument was a forgery and defendant's knowledge that it was a forgery depends wholly on circumstantial evidence. Nichols v. State, 39 Texas Crim. Rep. 80; 44 S. W. 1091. Lassiter v. State, 49 Texas Crim. Rep. 533; 94 S. W. 233. *Contra:* Wesley v. State, 150 S. W. 197.

Where the facts in the case place defendant in such juxtaposition to the main fact, that is, the circumstances showing his knowledge that the instrument passed by him was forged, indicating that he forged it, he is then brought in such proximity or juxtaposition in regard to the question of knowledge as to take the case out of the

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realm of circumstantial evidence. Gaut v. State, 49 Texas Crim. Rep. 493; 94 S. W. 1034. Williams v. State, 58 Texas Crim. Rep. 82; 124 S. W. 955.

The charge should require the jury to find that the alleged forged instrument was passed with intent to defraud. Feeney v. State, 58 Texas Crim. Rep. 152; 124 S. W. 944.

Where the jury are charged that the alleged forged instrument must have been passed with intent to defraud, it is not error to also instruct them that it was unnecessary that the intent be to defraud any particular person. Riley v. State, 44 S. W. 499.

It is error to fail to require the jury to find that defendant knew the instrument was a forgery when he passed it, and a charge that he would be guilty if he knowingly passed it does not sufficiently present that issue. Feeney v. State, 58 Texas Crim. Rep. 152; 124 S. W. 945.

If there is evidence which, if true, shows that defendant purchased the forged instrument and at the time of passing it was ignorant of the fact that it was forged, the charge of the court should affirmatively submit this defensive theory to the jury. Garza v. State, 38 Texas Crim. Rep. 317; 42 S. W. 563. Wolf v. State, 53 S. W. 108 (correct charge on this theory).

If there is evidence that defendant obtained the forged instrument from another and that he believed it to be genuine when he obtained and passed it, the charge sufficiently presents this theory if the jury are informed thereby that defendant could not be convicted if he honestly believed when he passed it that it was genuine. Wolf v. State, 53 S. W. 108.

That the court in charging the jury called the offense forgery will not require a reversal when the mistake is merely clerical and harmless. Ellis v. State, 22 S. W. 678.

Objections to the charge of the court should be specific so that the trial court may have an opportunity to correct the supposed error. Williams v. State, 59 Texas Crim. Rep. 82; 124 S. W. 955.

The terms "knowingly" and "pass" are used in their ordinary meaning, and it is not necessary to define those terms in the charge to the jury. Peterson v. State, 25 Texas Crim. App. 72; 7 S. W. 530.

It is not error to assume in the charge that the person who passed the alleged forged instrument was the agent of defendant if the agency is an admitted fact. Strang v. State, 32 Texas Crim. Rep. 228; 22 S. W. 680.

The charge should, in some way, define forgery. Ham v. State, 4 Texas Crim. App. 677.

It is not necessary to give the statutory definition of forgery in a case of passing if the jury are required to find that the instrument alleged to be forged was made without lawful authority and with intent to injure or defraud. Williams v. State, 32 S. W. 544.

If there is evidence that defendant did not pass the alleged forged instrument to the party alleged, or that he handed it to a clerk or other person who paid it, or accepted it and carried it to the party alleged, the court should charge the jury that if the instrument was passed to such clerk or other person than the party alleged they should acquit. Huntly v. State, 34 S. W. 923. Riley v. State, 44 S. W. 498. Lassiter v. State, 49 Texas Crim. Rep. 533; 94 S. W. 233. Brown v. State, 158 S. W. 533.

If defendant denies being present and passing the alleged forged instrument, testimony that he attempted to pass the same instrument to other persons need not be limited in the charge when he is not on trial for attempting to pass it. Leslie v. State, 47 S. W. 368.

When defendant is on trial for passing a forged instrument the charge of the court should limit proof of the passing of or attempts to pass the same or other instruments claimed to be forged if such proof is not admissible to prove the main issue, but is admissible only to prove intent or system. Burks v. State, 24 Texas

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Crim. App. 326; 6 S. W. 300. Thornley v. State, 36 Texas Crim. Rep. 124; 35 S. W. 981. Mallory v. State, 37 Texas Crim. Rep. 482; 36 S. W. 751.

Art. 938. (534) (444) **Preparing implements for forgery.**—Whoever shall prepare in this State any implements or materials, or engrave any plate for the purpose of being used in forging the notes of any bank, whether within this State or out of it, and whether the same be incorporated or not, or who shall have in his possession in this State any such implements, materials or engraved plate, with intent to be used for the purpose above mentioned, shall be imprisoned in the penitentiary not less than two nor more than five years. (O. C. 444.)

Sec. 1432. **Possession with intent to pass.**
Sec. 1433. Form for indictment.
Sec. 1434. Indictment.
Sec. 1435. Evidence.

Art. 939. (544) (445) **Possession of forged instrument with intent to pass.**—If any person shall knowingly have in his possession any instrument of writing, the making of which is by law an offense, with intent to use or pass the same as true, he shall be punished by confinement in the penitentiary not less than two nor more than five years. (O. C. 445, amended Act Feb. 12, 1858, Acts 1858, p. 169.)

Sec. 1433. **Form for indictment.**

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 John Doe on the ..... day of ....., A. D. ....., in said county and State did knowingly have in his possession with fraudulent intent to use and pass the same as true a forged instrument in writing of the tenor following: (Here set out the forged instrument by its tenor as in forgery).

And which said forged instrument the said John Doe then and there knew to be forged.

Against the peace and dignity of the State.

.....
Foreman of the grand jury.

Sec. 1434. **Indictment.**—It is not necessary to allege whose act the forged instrument purports to be when it is set out by its tenor unless the only name signed to it is the same name as the allegation of defendant's name, because it will then appear from an inspection of the indictment whose act it purports to be.

It is unnecessary to allege who made the forged instrument, or that it was made without lawful authority and with intent to injure and defraud, if it is alleged to be a "forged instrument in writing." Defendant's knowledge that it was forged, and his intent to use or pass the same as true is the gist of this offense.

In the case of Elkins v. State, 35 Texas Crim. Rep. 207; 32 S. W. 1047, the indictment approved is bad for failure to allege that defendant "knowingly" had the instrument, or that he knew it was forged.

It is not necessary to allege to whom defendant attempted to pass the forged instrument. Reeves v. State, 51 Texas Crim. Rep. 604; 103 S. W. 894.

If the forged instrument as set out by its tenor creates on its face a pecuniary obligation, it is not necessary to allege or prove that it was indorsed, and in such event no explanatory or innuendo averments are necessary in the indictment. Reeves v. State, 51 Texas Crim. Rep. 604; 103 S. W. 894.

Sec. 1435. **Evidence.**—If the conduct of defendant repels the idea that he intended to pass the forged instrument in his possession with fraudulent intent, a con-

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viction for knowingly having a forged instrument in his possession with intent to pass it as true will not be sustained. Jones v. State, 69 S. W. 143.

If defendant believed that he had a right to use the alleged forged instrument and no intent to defraud is shown, either directly or circumstantially, a conviction will not be sustained. Jones v. State, 69 S. W. 143.

Art. 940. (545) (446) **Evidence in case of bank bills.**—Upon the trial of any indictment for the forgery of any bank bill, or for passing, or attempting to pass, any such bill as true, or for knowingly having in possession any such forged bank bill, evidence that bills or notes, purporting to be issued by any bank, are commonly received as currency, or proof of the existence of such bank by parol testimony, shall be deemed sufficient to show its legal establishment and existence. (O. C. 446.)

Sec. 1436. **Falsely reading or interpreting instrument.**
Sec. 1437. Indictment.
Sec. 1438. Evidence.

Art. 941. (546) (447) **Falsely reading instrument.**—If any one with intent to defraud shall, either by falsely reading, or falsely interpreting, any pecuniary obligation or instrument in writing, which would in any manner affect property, or by misrepresenting its contents, induce any one to sign such instrument as his act, or give assent to it in such manner as would make it his act, if not done under mistake, the person so offending shall be imprisoned in the penitentiary not less than two nor more than five years. (O. C. 447.)

Sec. 1437. **Indictment.**—A good indictment is set out in the opinion in the case of Lewis v. State, 48 Texas Crim. Rep. 151; 86 S. W. 1027, and is a good precedent for falsely interpreting a written instrument, or for misrepresenting its contents.

Sec. 1438. **Evidence.**—If the injured party intended to sign an instrument in writing showing on its face that it was a mortgage, and defendant by false reading or by misrepresenting its contents and with intent to defraud induces such party to sign a deed in form, the offense is committed although as between the parties the instrument was a mortgage. Lewis v. State, 48 Texas Crim. Rep. 149; 86 S. W. 1027.

The prosecuting witness cannot be bolstered up by proof that he had entered a civil suit to set aside an instrument in writing which he claims to have signed under mistake caused by the fraudulent misinterpreting of its contents by defendant or by false reading thereof by defendant. Lewis v. State, 48 Texas Crim. Rep. 149; 86 S. W. 1027.

Art. 942. (547) (448) **Substituting one instrument for another.**—If any person, with intent to defraud, shall substitute one instrument in writing for another, and by this means induce any person to sign an instrument materially different from that which he intended to sign, he shall be punished by imprisonment in the penitentiary not less than two nor more than five years. (O. C. 448.)

Art. 943. **Altering or injuring public records or papers.**—If any person, without authority of law, shall wilfully and maliciously change, alter, mutilate, destroy, deface or injure any book, paper, record or any other document, required or permitted by law to be kept by any officer within this State, he shall be deemed guilty of a felony and on convic-

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tion thereof shall be punished by a fine not exceeding five thousand dollars, or by imprisonment in the penitentiary not less than one nor more than five years. (Act June 5, 1899, Acts 1899, p. 301.)

Sec. 1439. **Falsely personating another.**
Sec. 1440. Form for indictment.
Sec. 1441. Statute construed.

Art. 944. (548) (449) **Falsely personating another.**—If one shall falsely personate another, whether bearing the same name or not, and, in such assumed character, shall give authority to any person to sign such assumed name to any instrument in writing which, if genuine, would create, increase, diminish or discharge any pecuniary obligation, or would transfer, or in any way affect any property, he shall be imprisoned in the penitentiary not less than two nor more than seven years. (O. C. 449.)

Sec. 1440. **Form for indictment.**
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 John Doe on the ..... day of ....., A. D. ....., in said county and State did falsely personate ..... (or "another person of the same name, to wit, John Doe of ..... county, Texas"), and did then and there falsely assume the name and character of such other person, and did then and there in such assumed character and with intent to defraud give authority to ..... to sign such assumed name to an instrument in writing of the tenor following: (Here set out the instrument as in a case of forgery).

Against the peace and dignity of the State.

.....
Foreman of the grand jury.

Sec. 1441. **Statute construed.**—To warrant a conviction of defendant for the offense of falsely personating another and in that assumed character giving authority to another to sign such assumed name, the State must prove each essential element of the offense. Thompson v. State, 24 S. W. 298.

Cases arising under article 944 (548) (449) must be shown to have been conceived in fraud, and consummated by falsely personating another under the circumstances set forth in such article of the Penal Code, before a conviction is warranted thereunder. Thompson v. State, 24 S. W. 298.

Sec. 1442. **False personation in acknowledgments.**
Sec. 1443. Indictment.
Sec. 1444. Statute construed.

Art. 945. (549) (450) **False personation in acknowledgments.**—If any person shall falsely personate another, whether bearing the same name or not, and in such assumed character shall, before any officer authorized by law to authenticate instruments of writing for registration, acknowledge the execution of an instrument of writing purporting to convey, or in any manner affect, an interest in property, such instrument purporting to be the act of the person whose name is so assumed, and the acknowledgment thereof being such as would entitle the instrument to be registered, he shall be punished by confinement in the penitentiary not less than two nor more than ten years. (O. C. 450.)

Sec. 1443. **Indictment.**—It is not necessary to allege the whereabouts or residence of the party alleged to have been falsely personated, his whereabouts or resi-

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dence being a matter immaterial to the issue. Freeman v. State, 20 Texas Crim. App. 564.

The written instrument acknowledged in the assumed character and the acknowledgment thereof should be set out in the indictment by its tenor, or by its substance with good reason for so pleading it. Martin v. State, 1 Texas Crim. App. 586.

An indictment for falsely personating another and in such assumed character acknowledging the execution of an instrument in writing affecting an interest in property should negative the idea that the defendant was authorized by the maker thereof to make such acknowledgment. Martin v. State, 1 Texas Crim. App. 586.

When the instrument in writing the acknowledgment to which was made in the assumed character of the grantor purports to convey land, a sufficiently definite description of such land should be contained in the indictment. Martin v. State, 1 Texas Crim. App. 586.

Sec. 1444. **Statute construed.**—To sustain a conviction for false personation there must be satisfactory evidence that defendant did in fact falsely personate another and in such assumed character make the acknowledgment alleged. Freeman v. State, 20 Texas Crim. App. 558.

Art. 946. (549a) (450a) **Procedure.**—A conviction for any of the offenses mentioned in articles 924, 937 and 939 of this Code shall be a bar to any other prosecution under said articles based upon the same transaction or same forged instrument of writing; provided, that one or more of said several offenses may be charged by separate counts in the same bill of indictment, and prosecuted together to final judgment without election by the State as to which it relies upon for a conviction; and provided further, a judgment of conviction shall specify which offense or under which count the defendant is found guilty, and shall assess but one penalty not exceeding the greatest punishment fixed by law to the highest grade of offense of which defendant is convicted; and it is hereby declared unlawful for any county or district attorney or any person acting as such to wilfully or knowingly demand or receive fees for more than one prosecution that could have been combined or prosecuted in one bill of indictment, and subject to the penalties prescribed by law for the punishment of extortion of illegal fees. (Act April 29, 1895, Acts 1895, p. 106.)

Sec. 1445. **Former jeopardy.**—Before the Act of April 29, 1895, it was held that an acquittal for either of the offenses of forgery, passing or attempting to pass a forged instrument, or having a forged instrument with intent to use or pass it, was not a bar to a subsequent prosecution for another of such offenses although based upon the same transaction or upon the same forged instrument (Hooper v. State, 30 Texas Crim. App. 412; 17 S. W. 1066. Reddick v. State, 31 Texas Crim. Rep. 587; 21 S. W. 684), and this Act, now article 946, does not change that rule, but makes only a conviction for any of such offenses a bar to a prosecution for any of the others based upon the same transaction or same forged instrument. Green v. State, 36 Texas Crim. Rep. 109; 35 S. W. 971. Preston v. State, 41 Texas Crim. Rep. 300; 53 S. W. 127. Woodard v. State, 170 S. W. 309.

Sec. 1446. **The judgment of conviction.**—Under article 946 (549a) (450a) of the Penal Code, when the prosecution is for forgery, passing or attempting to pass a forged instrument, or having a forged instrument with intent to use or pass it, the judgment of conviction, to be sufficient, must specify which offense or under which count the defendant is found guilty. Jacobs v. State, 42 Texas Crim. Rep. 353; 59 S. W. 1111.

When the indictment has separate counts for forgery and passing, and both counts are supported by evidence and are submitted to the jury, or if only one count

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is submitted, a general verdict is sufficient without specifying the offense or count, and under such verdict the court has authority to specify the offense of which defendant is adjudged guilty. Lovejoy v. State, 40 Texas Crim. Rep. 89; 48 S. W. 520. Jacobs v. State, 42 Texas Crim. Rep. 353; 59 S. W. 1111. Brooks v. State, 45 Texas Crim. Rep. 206; 75 S. W. 508.

Where defendant was indicted only for passing a forged instrument and found guilty of that offense, and the court erroneously adjudged him guilty of forgery, the Appellate Court, having the same data for correction as the trial court would have, will reform and correct the judgment in accordance with the indictment and verdict of the jury. Burks v. State, 55 S. W. 824. Turner v. State, 44 Texas Crim. Rep. 69; 68 S. W. 511.

CHAPTER II

FORGERY OF LAND TITLES, ETC.

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Article 947. (550) (451) **"Forgery of patents," etc.**—Every person who falsely makes, alters, forges, or counterfeits, or causes or procures to be falsely made, altered, forged, or counterfeited, or in any way aids, assists, advises, or encourages the false making, altering, forging, or counterfeiting of any certificate, field notes, returns, survey, map, plat, report, order, decree, record, patent, deed, power of attorney, transfer, assignment, release, conveyance, or title paper, or acknowledgment, or proof of record, or certificate of record belonging to or pertaining to any instrument or paper, or any seal, official or private stamp, scroll, mark, date, signature, or any paper, or any evidence of any right, title, or claim of any character, or any instrument in writing, document, paper or memorandum, or file of any character whatsoever, in relation to or affecting lands, or any interest in lands in this State, with the intent to make money or other valuable thing thereby, or with intent to set up a claim or title, or aid or assist any one else in setting up a claim or title to lands or any interest in lands, or to prosecute or defend a suit, or aid or assist any one else in prosecuting or defending a suit with respect to lands, or to cast a cloud upon the title, or in any way injure, obtain the advantage of, or prejudice the rights or interest of, the true owners of lands, or with any fraudulent intent whatever, shall be deemed guilty of forgery, and be punished by imprisonment

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in the State penitentiary at hard labor not less than five nor more than twenty years. (Act July 28, 1876, Acts 1876, p. 59.)

Sec. 1447. **Forgery affecting land—Form for indictment.**
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 John Doe on the ..... day of ....., A. D. .....; in said county and State without lawful authority and with fraudulent intent, and with the intent to make money thereby, and with intent to cast a cloud upon the title to the land hereinafter described [or with any of the other intents named in the statute, alleging any or all conjunctively, proof of either intent so alleged being sufficient], did then and there falsely make and forge and cause and procure to be falsely made and forged a certain instrument in writing (or "paper," or whatever it was) in relation to and affecting lands and interest to lands in this State, the same being then and there of the tenor following: [Here copy the forged instrument or paper or whatever it was in full, making an exact copy, adding whatever extrinsic averments as will show it to be the subject of forgery if it does not show on its face a complete instrument relating to or affecting lands in this State. It is not necessary to allege whose act it purports to be when the forgery itself when set out so shows on its face].

Against the peace and dignity of the State.

.....
Foreman of the grand jury.

Sec. 1448. **Subjects of land forgery.**—A deed not acknowledged is the subject of forgery if it is such as that, if true, it would afford the basis of a civil action for specific performance. Lassiter v. State, 35 Texas Crim. Rep. 540; 34 S. W. 751.

If the alleged forged deed is valid on its face it is the subject of forgery, and it is no defense that the purported grantor had in fact no title to the property described in such deed. Henderson v. State, 14 Texas 517.

A deed prepared for the transfer of land in which the name of the transferee is left blank to be afterwards filled out is the subject of forgery. Phillips v. State, 6 Texas Crim. App. 378.

Sec. 1449. **Evidence.**—Testimony which shows the intent and purpose of defendant in having the alleged forged instrument placed on record is admissible. Preston v. State, 40 Texas Crim. Rep. 80; 48 S. W. 581.

The State may prove defendant's admission, made while not under arrest for the forgery, that he had the deeds alleged to have been forged in his possession. Grooms v. State, 40 Texas Crim. Rep. 319; 50 S. W. 370.

A writing executed or made at the same time as the alleged forged instrument, and which is explanatory of the alleged forgery, is admissible in evidence. Preston v. State, 40 Texas Crim. Rep. 79; 48 S. W. 581.

While the State may show that defendant was acquainted with the person who personated the owner of the land in executing the deed, yet it is error, in the absence of any other fact or circumstance, to prove that they were seen together several months after the forgery. Preston v. State, 40 Texas Crim. Rep. 80; 48 S. W. 581.

If the indictment charges only the forgery of a deed and does not set out a certificate of acknowledgment, there is no variance if the deed described therein with a certificate of acknowledgment appended thereto is offered in evidence. Lassiter v. State, 35 Texas Crim. Rep. 540; 34 S. W. 751.

When better evidence is not available the State may make its case by circumstantial evidence. Henderson v. State, 14 Texas 503. Grooms v. State, 40 Texas Crim. Rep. 330; 50 S. W. 370.

If unable to secure better evidence the State may prove that the alleged forgery was not made by the purported maker by proving that the signature alleged to be forged was in the handwriting of defendant. Grooms v. State, 40 Texas Crim. Rep. 330; 50 S. W. 370.

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Tenor imports an exact copy and where the alleged forged instrument is set out by its tenor the instrument offered in evidence must conform thereto with almost minute precision. Ex parte Rogers, 10 Texas Crim. App. 664. Bedford v. State, 60 Texas Crim. Rep. 83; 131 S. W. 314.

Signatures of the person whose name is alleged to have been forged appended to ancient archives of the General Land Office of Texas are admissible in evidence as a standard of comparison. Rogers v. State, 11 Texas Crim. App. 620.

Sec. 1450. **Photographs.**—Photographic copies of writings may be admitted in evidence if the proper predicate is laid. Grooms v. State, 40 Texas Crim. Rep. 329; 50 S. W. 370.

Art. 948. (551) (452) **False certificate by officers forgery.**—If any person authorized by law to take the proof of acknowledgment of any instrument, document or paper whatsoever, affecting or relating to the title of lands in this State, wilfully and falsely certify that such proof or acknowledgment was duly made, or if any person fraudulently affixes a fictitious or pretended signature purporting to be that of an officer or any other person, though such person never was an officer or never existed, he shall be deemed guilty of forgery and punished as provided in article 947 of this chapter. (Act July 28, 1876, Acts 1876, p. 59.)

Sec. 1451. **Indictment.**—Indictment held good: Thompson v. State, 152 S. W. 893.

Art. 949. (552) (453) **Knowingly uttering forged instruments.**—Every person who knowingly utters, publishes, passes, or uses, or who in any way aids, assists in or advises the uttering, publishing, passing, or using as true and genuine any false, forged, altered, or counterfeited certificate, field-notes, returns, survey, map, plat, report, order, decree, record, patent, deed, power of attorney, transfer, assignment, release, conveyance, title papers, acknowledgment or proof for record or certificate of record belonging to or pertaining to any instrument or paper, or any evidence of any right, title or claim of any character whatsoever, or any instrument in writing, document, paper, memorandum or file, or any official or private seal, or any scroll, mark, date, or signature in any way relating to, or having any connection with land, or any interest in land in this State, with the intent mentioned in article 947 of this chapter, or with any other fraudulent intent whatsoever, shall be deemed guilty and be punished in like manner as is provided in article 947 of this chapter. And the filing or causing or directing to be filed, or causing or directing to be recorded, in the General Land Office of the State, or in any office of record or in any court in this State, or the sending through the mails or by express, or in any other way, for the purpose of filing or record of any such false, altered, forged or counterfeited matter, documents, conveyances, papers, or things, knowing the same to be false, altered, forged or counterfeited, shall be an uttering, publishing, and using within the meaning of this article. (Act July 28, 1876, Acts 1876, p. 59.)

Sec. 1452. **Uttering land forgery—Form for indictment.**

In the name and by the 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

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at said term do present that John Doe on the ..... day of ..... A. D. ....., in said county and State with fraudulent intent and with the intent to make money thereby and with intent to cast a cloud upon the title of the land herein described [or with any of the other intents named in the statute] did knowingly utter, publish, and use as true and genuine a false and forged deed (or "power of attorney," or whatever it was) relating to land and having connection with land and interest in land in said State, which said deed (or "power of attorney," or whatever it was) was then and there of the tenor following: (here copy it literally) and which said instrument had theretofore been made without lawful authority and with intent to injure and defraud and with the intent to make money thereby, and the said John Doe did then and there cause and direct the same to be filed in the office of the county clerk of said county or ("send the same through the United States mail to the clerk of the County Court of said county for the purpose of filing and recording the same," or whatever way it was uttered), and the said John Doe did then and there when he did as aforesaid knowingly utter, publish and use as true the same, well knew that the same was false and forged.

Against the peace and dignity of the State.

.....

Foreman of the grand jury.

Art. 950. (553) (454) **Non-residents may commit—Venue.**—Persons out of the State may commit and be liable to indictment and conviction for committing any of the offenses enumerated in this chapter, which do not in their commission necessarily require a personal presence in this State—the object of this chapter being to reach and punish all persons offending against its provisions, whether within or without the State. An indictment, under this chapter, may be presented by the grand jury of Travis county, in this State, or in the county where the offense was committed, or in the county where the land lies about which the offenses named in this chapter were committed. (Act July 28, 1876, Acts 1876, p. 59.)

Sec. 1453. **Venue.**—The statute is constitutional which provides for punishment in Texas of forgers who forge our land titles whether the forgery is committed in this State or not. Ham v. State, 4 Texas Crim. App. 645. Francis v. State, 7 Texas Crim. App. 501. Johnson v. State, 9 Texas Crim. App. 249. Ex parte Rogers, 10 Texas Crim. App. 663. Rogers v. State, 11 Texas Crim. App. 621. Hanks v. State, 13 Texas Crim. App. 289.

The defendant may be tried in Travis county for land forgery committed in another county or in another State when the forgery affects land in this State. Ham v. State, 4 Texas Crim. App. 645. Francis v. State, 7 Texas Crim. App. 510. Ex parte Rogers, 10 Texas Crim. App. 663. Rogers v. State, 11 Texas Crim. App. 608. Hanks v. State, 13 Texas Crim. App. 289. Grooms v. State, 40 Texas Crim. Rep. 327; 50 S. W. 370.

All forgeries 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 the land, or a part thereof, concerning or affecting the title to which the forgery has been committed, is situated. Grooms v. State, 40 Texas Crim. Rep. 327; 50 S. W. 370. Pye v. State, 154 S. W. 222.

Sec. 1454. **Uttering land forgery.**—The filing or causing or directing to be filed, or causing or directing to be recorded, in the General Land Office of this State, or in any office of record or in any court in this State, or the sending through the mails or express in any way for the purpose of filing or record of any false, altered, forged or counterfeited matter, documents, papers or things in any way relating to or having any connection with land or any interest in land in this State knowing the same to be false, altered, forged or counterfeited, is an uttering, publishing and using. Johnson v. State, 9 Texas Crim. App. 249.

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If the indictment alleges the uttering of a false and forged writing affecting land, the proof is sufficient if it shows the uttering of a false or forged writing affecting land in this State. Johnson v. State, 9 Texas Crim. App. 252. Dillard v. State, 177 S. W. 99.

Art. 951. (554) (455) **Proof and allegations.**—Upon indictment under this chapter, to warrant a conviction, it shall only be necessary to prove that the person charged took any one step, or did any one act or thing in the commission of the offense, if from such step, act or thing any of the intentions hereinbefore mentioned, or any other fraudulent intention, may be reasonably inferred; nor shall it be any defense to a prosecution under this chapter that the matter, act, deed, instrument or thing was in law, either as to substance or form, void, or that the same was not in fact used for the purpose for which it was made or designed; and it shall only be necessary in an indictment under this chapter to state with reasonable certainty the act constituting the offense, and charge, in connection therewith, in general terms, the intention to defraud, without naming the person or persons it was intended to defraud; and, on trial of such indictment, it shall be sufficient and shall not be deemed a variance if there appears to be an intent to defraud the United States, or any State, Territory, county, city, town, or village, or any body corporate, or any public officer in his official capacity, or any co-partnership, or member thereof, or any particular person. (Act July 28, 1876, Acts 1876, p. 59.)

Art. 952. (555) (456) **Venue.**—Indictments under this chapter may be presented and the offenses prosecuted in any of the counties prescribed in title 4, chapter 2, of the Code of Criminal Procedure. (Act July 28, 1876, Acts 1876, p. 59, changed in revising 1911.)

Note: The preceding article formerly provided that "indictments under this chapter may be presented and the offenses prosecuted in any of the counties prescribed in this chapter or in the Code of Criminal Procedure."

Art. 953. (556) (457) **Rules in forgery applicable.**—The rules prescribed in chapter 1 of this title, relative to the offense of forgery, so far as the same are applicable, shall apply to the various offenses enumerated in this chapter. (Act July 28, 1876, Acts 1876, p. 59.)

CHAPTER III

COUNTERFEITING AND DIMINISHING VALUE OF CURRENT COIN

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Article 954. (557) (459) **"Counterfeiting" defined.**—He is guilty of counterfeiting who makes, in the semblance of true gold or silver coin, any coin of whatever denomination, having in its composition a less proportion of the precious metal of which the true coin intended to be imitated is composed than is contained in such true coin, with intent that the same should be passed in this State or elsewhere. (O. C. 451.)

Art. 955. (558) (460) **"Altering" also counterfeiting.**—He is also guilty of counterfeiting who, with like intent, alters any coin of lower value so as to make it resemble coin of higher value. (O. C. 452.)

Sec. 1455. **Altering.**—A counterfeit coin may be made by treating a copper cent with some chemical so as to make it resemble a silver dime when the intent is to pass it as a dime and when the resemblance is sufficiently strong to deceive persons using ordinary care. It is not necessary that the resemblance be perfect, and it is enough that the similarity in the likeness is sufficient to deceive a man of ordinary observation. Glass v. State, 45 Texas Crim. Rep. 605; 78 S. W. 1068.

Art. 956. (559) (461) **Resemblance need not be perfect.**—The resemblance between the true and the false coin need not be perfect to constitute the offense of counterfeiting. (O. C. 453.)

Art. 957. (560) (462) **Punishment.**—Any person who shall counterfeit any gold or silver coin shall be punished by imprisonment in the penitentiary not less than five nor more than ten years. (O. C. 455.)

Sec. 1456. **Counterfeiting by making coin—Form for indictment.**

In the name and by the 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 John Doe on the ..... day of ....., A. D. ....., in said county and State did make, in the semblance of true silver (or "gold") coin of the United States of the denomination hereinafter stated which then and there passed as money in said country by law and by usage, a counterfeit coin of the denomination of twenty-five cents (or "one dollar," or whatever it was) which said counterfeit coin had then and there in its composition a less proportion of silver (or "gold") than is contained in a genuine coin of such denomination, with the intent then and there that said counterfeit coin should be passed in this State or elsewhere as a true silver (or "gold") coin of said denomination.

Against the peace and dignity of the State.

.....

Foreman of the grand jury.

Sec. 1457. **Counterfeiting by altering—Form for indictment.**

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 John Doe on the ..... day of ....., A. D. ....., in said county and State did with intent that the same should be passed by

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him in this State or elsewhere as coin of higher value alter a true coin of the United States of America of the denomination and value of one cent (or "three cents," or whatever it was) which then and there passed as money in said country by law and by usage so as to make said coin resemble a coin of said country of higher value, to wit, a dime, of the value of ten cents, by then and there putting on said first named coin some solution and composition the nature of which is to the grand jury unknown.

Against the peace and dignity of the State.

.....

Foreman of the grand jury.

Sec. 1458. **State courts have jurisdiction.**—State courts have jurisdiction of the crime of counterfeiting. Martin v. State, 18 Texas Crim. App. 224. Stroube v. State, 40 Texas Crim. Rep. 583; 51 S. W. 357.

Sec. 1459. **Venue.**—The offense of counterfeiting may be prosecuted in any county where the offense was committed, or where the counterfeit coin was passed or attempted to be passed. Stroube v. State, 40 Texas Crim. Rep. 581; 51 S. W. 357.

Art. 958. (561) (463) **Passing counterfeit coin.**—If any person, with intent to defraud, shall pass, or offer to pass, as true, or bring into this State, or have in his possession, with intent to pass as true, any counterfeit coin, knowing the same to be counterfeit, he shall be punished by imprisonment in the penitentiary not less than two nor more than five years. (O. C. 455.)

Sec. 1460. **Passing counterfeit coin—Form for indictment.**

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 John Doe on the ..... day of ....., A. D. ....., in said county and State did with intent to defraud then and there pass (or "offer to pass") as true to ..... a counterfeit coin of the denomination of twenty-five cents (or "one dollar," or whatever it was) and which said counterfeit coin had been theretofore made in the semblance of true silver (or "gold") coin of the United States of said denomination which then and there passed as money in said country by law and by usage, and said counterfeit coin had then and there in its composition a less proportion of silver (or "gold") than is contained in a genuine coin of such denomination and had been made with the intent that same should be passed in this State or elsewhere as a true silver (or "gold") coin of said denomination, and the said John Doe when he as aforesaid did pass (or "offer to pass") said counterfeit coin then and there well knew the same to be counterfeit.

Against the peace and dignity of the State.

.....

Foreman of the grand jury.

Sec. 1461. **Passing counterfeit coin.**—Where proof of the attendant circumstances shows the intent to defraud, a conviction for passing counterfeit coin may be sustained where the coin passed had been altered so as to make it resemble a coin of higher value, and where the resemblance, although not perfect, was sufficient to deceive a person of ordinary observation under the circumstances. Glass v. State, 45 Texas Crim. App. 605; 78 S. W. 1068.

Art. 959. (562) (464) **Making dies, etc.**—If any person, with the intention of committing the offense of counterfeiting, or of aiding therein, shall make or repair, or shall have in his possession any die, mould or other instrument whatever, designed or adapted, or usually employed for making coin, or shall prepare, or have in his possession, any base metal prepared for coinage, with intent that the same may be used for the purpose of counterfeiting, he shall be punished by imprisonment in the penitentiary not less than two nor more than five years. (O. C. 456.)

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Sec. 1462. **Making dies, etc.—Form for indictment.**
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 John Doe on the ..... day of ....., A. D. ....., in said county and State did with the intention of committing the offense of counterfeiting and with the intention of aiding therein then and there make and repair and did then and there have in his possession a die and a mould designed and adapted and usually employed for making coin, and did then and there prepare and did then and there have in his possession base metal prepared for coinage with intent then and there that the same might be used for counterfeiting.

Against the peace and dignity of the State.

.....
Foreman of the grand jury.

(An indictment in the language of the statute is sufficient to charge the offense of having in possession instruments or metal adapted and intended for counterfeiting. Long v. State, 10 Texas Crim. App. 194.)

Art. 960. (563) (465) **Passing coin of diminished value.**—If any person shall, with intent to profit thereby, diminish the weight of any gold or silver coin, and shall afterward pass it for the value it would have had before it was so diminished, or send it to any place, whether in the State or out of it, with the intent that the same may be passed, he shall be punished by imprisonment in the penitentiary not less than two nor more than five years. (O. C. 457, amended Acts 1858, p. 169.)

Art. 961. (564) (466) **"Gold and silver coin" defined.**—By the gold or silver coin mentioned in this chapter is meant any piece of gold or silver of which one of these metals is the principal component part, and which passes as money in the United States, either by law or usage, whether the same be of the coinage of the United States or of any foreign country. (O. C. 458.)

Art. 962. (565) (467) **What sufficient to constitute passing.**—It is sufficient to constitute the offense of passing, or attempting to pass, under the provisions of this chapter, if the counterfeit coin be delivered or offered to another, with the intention of defrauding, or enabling such other person to defraud, although such counterfeit coin be not delivered or offered at the full value which it would bear if genuine. (O. C. 459.)

CHAPTER IV

OFFENSES WHICH AFFECT FOREIGN COMMERCE

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Article 963. (566) (468) **Shipping articles without inspection.**—If any person shall export from this state, or ship for the purpose of exportation to any one of the United States or to any foreign port, any article of commerce which, by any law of the State, may be required to be inspected by a public inspector, without having caused said inspection to be made according to law, he shall be fined not exceeding one hundred dollars. (O. C. 460.)

Art. 964. (567) (469) **Altering marks, etc.**—If any person shall counterfeit or alter the mark, brand or stamp directed by any law of the State to be put on any article of commerce, or on the box, cask or package containing the same, he shall be punished by fine not exceeding one thousand dollars, or by imprisonment in the county jail not exceeding one year. (O. C. 461.)

Art. 965. (568) (470) **False packing.**—If any person shall, with intent to defraud, put into any hogshead, barrel, cask or keg, or into any bale, box or package containing merchandise or other commodity usually sold by weight, any article whatever of less value than the merchandise with which such bale, box, package, hogshead, barrel, cask or keg is apparently filled, or with intent to defraud, shall sell or barter, give in payment, or expose to sale, or ship for exportation, any such hogshead, barrel, cask, keg, box, bale or package of merchandise, or other commodity, with any such article of inferior value concealed therein, he shall be punished by confinement in the county jail not exceeding one year, or by fine not exceeding one thousand dollars. (O. C. 462.)

Sec. 1463. **Indictment or information.**—If a damaged product of the same kind, or an article inferior in quality of the same kind is fraudulently concealed within the package, the indictment or information should be drawn under article 966, the article covering this offense. Lidtke v. State, 27 Texas Crim. App. 500; 11 S. W. 629.

Indictment held good: Holden v. State, 18 Texas Crim. App. 105.

In alleging the false packing, or the sale after the false packing, the intent to defraud should be alleged. Holden v. State, 18 Texas Crim. App. 105.

It is not necessary to allege the name of the person intended to be defrauded. Holden v. State, 18 Texas Crim. App. 105.

If the indictment charges several parties with false packing and in the same count charges one of the parties with the sale of the faked package, the allegations as to the sale, not being descriptive, may be rejected as surplusage, and such an indictment is not bad for duplicity because the two phases of the statute are not repugnant and the punishment is the same. Holden v. State, 18 Texas Crim. App. 105.

Sec. 1464. **Evidence.**—To sustain a conviction for false packing guilty knowledge must be shown. The gist of the offense is the intent to defraud. Lidtke v. State, 27 Texas Crim. App. 500; 11 S. W. 629. Anderson v. State, 30 Texas Crim. App. 701; 18 S. W. 866.

If defendant put sand into the cotton seed he put it into the bale of cotton when it was packed and baled under his direction, whether or not he was present when it was packed and baled. Jones v. State, 22 Texas Crim. App. 680; 5 S. W. 478.

If defendant was present and with guilty knowledge helped pack the falsely packed package he is a principal offender. Holden v. State, 18 Texas Crim. App. 105.

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A conviction for the sale of a package falsely packed will not be sustained if it is not shown that at the time of the sale defendant had knowledge that it was falsely packed, or that the circumstances were such as charged him with notice of its condition and made his failure to examine into it or disclose its condition proof of his intent to defraud. Anderson v. State, 30 Texas Crim. App. 701; 18 S. W. 866.

There is no law punishing the sale of a bale of cotton packed with an inferior quality of cotton. Lidtke v. State, 27 Texas Crim. App. 500; 11 S. W. 629; but under article 966 (569) it is an offense to conceal within a bale of cotton any cotton of an inferior quality when the intent is to deceive and defraud. (See Sec. 1491.)

Sec. 1465. **Charge of the court.**—The charge of the court should be limited to the law of the case, the case as made by the indictment and the testimony. Jones v. State, 22 Texas Crim. App. 680; 3 S. W. 478.

A broader abstract definition than authorized by the allegations of the indictment should not be given, but is not reversibly erroneous if the charge, in applying the law to the facts, conforms to the allegations and proof. Jordan v. State, 60 Texas Crim. Rep. 178; 131 S. W. 539.

The charge is erroneous if it is therein assumed as a fact that the article of less value was put into the package; whether the offense was committed should be left to the jury. Jones v. State, 22 Texas Crim. App. 680; 3 S. W. 478 (in this case it being so shown without controversy the charge could not have injured the defendant).

Art. 966. (569) (471) **False packing with inferior quality.**—If any person shall, with intent to deceive and defraud, conceal within any hogshead, cask, barrel, box, bale, keg or package, containing merchandise or other commodity, any merchandise or commodity of a quality inferior to that (with) which such hogshead, cask, barrel, bale, keg or package is (apparently) filled, or any substance of less value, he shall be fined not exceeding five hundred dollars. (O. C. 463, amended Acts 1858, p. 170.)

Sec. 1466. **Indictment or information.**—Information held good: Jordan v. State, 60 Texas Crim. Rep. 178; 131 S. W. 539.

If the information is based only on that phase of the statute which prohibits the concealing within the bale containing any commodity any commodity of a quality inferior to that with which such bale is apparently filled, it is not necessary to allege that such inferior commodity was "of less value." Jordan v. State, 60 Texas Crim. Rep. 178; 131 S. W. 539.

Sec. 1467. **Charge of the court.**—A broader abstract definition than authorized by the allegations and the testimony should not be given, but will not be reversibly erroneous if, in applying the law to the facts, the charge conforms to the allegations and proof. Jordan v. State, 60 Texas Crim. Rep. 178; 131 S. W. 539.

Art. 967. (570) (472) **Fraudulent insurance.**—If any person shall cause insurance to be made in this State upon any merchandise or other commodity represented to be already shipped, or about to be shipped, at any place, whether within this State or out of it, and shall with the intent to defraud the insurer, ship articles of value less than one-half the represented value of those insured, or of a different kind from those insured, he shall be punished by fine in a sum not exceeding the amount for which such merchandise or commodity may be insured. (O. C. 464.)

Art. 968. (571) (473) **Harboring deserting seamen.**—The municipal authorities of incorporated towns and cities being shipping

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ports, may make such regulations as are deemed proper for the punishment of keepers of boarding houses and others, who knowingly lodge, entertain, or conceal seamen who have deserted from any merchant vessel in their respective ports; but they shall not affix a higher penalty for such offense than a fine of fifty dollars or imprisonment in jail for thirty days. (O. C. 465.)

CHAPTER V

PUBLIC WAREHOUSEMEN AND WAREHOUSES

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Articles 969 to 977, inclusive, of the Penal Code of 1911 were amended by the Act of Aug. 21, 1913, Acts First Called Session 1913, p. 93, so as to read as follows:

Sec. 1468. **"Public warehousemen" and "warehouses" defined.**—All persons, firms, companies or corporations who shall receive cotton, tobacco, wheat, rye, oats, rice, oil, or any kind of produce, wares, merchandise, or any description or (of) personal property in store for hire, under the provisions of this Act, shall be deemed and taken to be public warehousemen; and all warehouses which shall be owned or controlled, conducted and managed in accordance with the provisions of this Act, shall be deemed and taken to be public warehouses, provided that a public warehouse for the storage of cotton may, within the meaning of this Act, include a lot or parcel of land inclosed with a lawful fence, the gates or entrances to which shall be kept securely locked at night. (Sec. 2, Act Aug. 21, 1913.)

Sec. 1469. **Certificate and bond.**—The owner, proprietor, lessee or manager of any public warehouse, whether an individual, firm or corporation, before transacting any business in such public warehouse shall procure from the county clerk of the county in which the warehouse or warehouses are situated, a certificate that he is transacting business as a public warehouseman under the laws of the State of Texas, which certificate shall be issued by said clerk upon a written application, setting forth the location and name of such warehouse or warehouses, and the name of each person, individual, or a member of the firm, interested as owner or principal in the management of the same, or, if the warehouse is owned or managed by a corporation, the names of the president, secretary and treasurer of such corporation shall be stated, which application shall be received and filed by such clerk and preserved in his office, and the said certificate shall give authority to carry on and conduct the business of a public warehouse within the meaning of this Act, and shall be revokable only by the District Court of the county in which the warehouse or warehouses are situated, upon a proceeding before the court, on complaint by written petition of any person, setting forth the particular violation of the law, and upon process, procedure and proof, as in other civil cases. The person receiving a certificate, as herein provided for, shall file with the county clerk granting same, a bond payable to the State

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of Texas, with good and sufficient surety, to be approved by said clerk, in the penal sum of five thousand dollars, conditioned for the faithful performance of his duty as a public warehouseman,—which said bond shall be filed and preserved in the office of such clerk. (Sec. 3, Act Aug. 21, 1913.)

Sec. 1470. **Warehouse receipts for property stored.**—On application of the owner or depositor of the property stored in a public warehouse, the warehouseman shall issue, over his own signature, or that of his duly authorized agent, a public warehouse receipt therefor, to the order of the person entitled thereto; which receipt shall purport to be issued by a public warehouse, shall bear date of the day of its issue, and shall state upon its face the name of the warehouse and its location, the description, quantity, number and marks of the property stored, where such receipt is for cotton it shall state the class and weight, and the date on which it was originally received in warehouse, and that it is deliverable upon the return of the receipt, properly indorsed by the person to whose order it was issued, and on payment of all charges for storage, and insurance, which charges shall be stated on the face of the receipt. All such receipts shall be numbered consecutively, in the order of their issue; and when such receipt is for cotton, the receipt shall state whether the cotton therein described is exposed to the weather or is under shelter; and a correct record of such receipts shall be kept in a well-bound book, which shall be, at all reasonable hours, open to examination by any interested person; and no two receipts bearing the same number shall be issued from the same warehouse during the same year, nor shall any duplicate receipts be issued, except in the case of a lost or destroyed receipt, in which case the new receipt shall bear the same date and number as the original, and shall be plainly marked on its face, "duplicate" and provided, that no such duplicate receipt shall be issued by the public warehouseman until adequate security acceptable to the warehouseman be deposited with or to the order of said warehouseman, to protect the party or parties who may finally hold the original receipt in good faith and for a valuable consideration. (Sec. 4, Act Aug. 21, 1913.)

Sec. 1471. **Receipt for cotton.**—The Commissioner of Insurance and Banking shall provide a uniform public warehouse receipt for cotton which shall be used by all public warehouses coming under the provisions of this Act, which said receipt shall conform in all respects to the provisions herein set out. In addition to the other provisions such receipt shall have a blank form on the back thereof, to be filled in and signed by the owner of the cotton showing whether or not such cotton is free from encumbrance or liens of any kind. (Sec. 6, Act Aug. 21, 1913.)

Sec. 1472. **Negotiable receipt for cotton must show liens.**—If there is any encumbrance or liens of any kind on said cotton at the time of its storage the nature and amount of same shall be clearly set out and it is hereby made the duty of the public warehouseman or his authorized agent issuing the receipt, to have said blank filled in and signed by the owner of the cotton before issuing a negotiable receipt against same; provided, however, such statement need not be made if a non-negotiable receipt is desired, but in such cases the public warehouseman issuing said receipt shall write or stamp across the face thereof the words "not negotiable." (Sec. 7, Act Aug. 21, 1913.)

Sec. 1473. **Exchange of negotiable receipt for one not negotiable.**—If a person holding a non-negotiable receipt for cotton as is herein provided for, shall desire to obtain a negotiable receipt in lieu thereof, he shall return said non-negotiable receipt to the public warehouse issuing same and thereupon shall comply in every respect with the provisions of this chapter relating to negotiable receipts, and upon compliance therewith a negotiable receipt shall be issued to him in lieu of said non-negotiable receipt, and said non-negotiable receipt thereupon shall be cancelled, and the word "cancelled" plainly marked in ink across the face thereof. (Sec. 8, Act Aug. 21, 1913.)

Sec. 1474. **False statement concerning liens against cotton.**—Any person making a false statement concerning liens, mortgages, encumbrances or indebtedness or (of) whatsoever nature against the cotton, or who shall in any particular conceal the existence of liens, mortgages, encumbrances or indebtedness of any kind that may exist against such cotton, or who shall fail to truthfully make the statements provided for by this Act, shall be deemed guilty of a felony, and upon conviction thereof shall be punished by a fine of one thousand dollars, or imprisonment in the penitentiary for one year, or by both such fine and imprisonment. (Sec. 9, Act Aug. 21, 1913.)

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Sec. 1475. **Receipt to issue only after delivery.**—No public warehouse receipt shall be issued except upon the actual previous delivery of the goods in the public warehouse or on the premises, and under the control of the public warehouseman by whom it purports to be issued; and the name of the warehouse shall invariably be specified in such receipt. (Sec. 10, Act Aug. 21, 1913.)

Sec. 1476. **When and to whom goods stored shall be delivered.**—On the presentation and return to the warehouseman of any public warehouse receipt issued by him and properly indorsed, and the tender of all proper warehouse charges upon the property represented by it, such property shall be delivered immediately to the holder of such receipt; but no public warehouseman who shall issue a receipt for goods shall, under any circumstances or upon any order or guarantee whatsoever, deliver the property for which receipts have been issued, until the said receipt shall have been surrendered and cancelled, except in case of lost receipts as provided for in Section 4; and, in default of the strict compliance with the provisions of this article, he shall be held liable to the legal holder of the receipt for the full value of the property therein described, as it appeared on the day of the default, and shall, furthermore, be liable to the special penalty herein provided. Upon delivery of the goods from the warehouse, upon any receipt, such receipt shall be plainly marked in ink across its face with the words "cancelled," with the name of the person cancelling the same, and shall thereafter be void, and shall not again be put in circulation. (Sec. 11, Act Aug. 21, 1913.)

Sec. 1477. **Public warehouseman not to limit his liability.**—No public warehouseman shall insert in the public warehouse receipt issued by him any language limiting or modifying his liabilities or responsibilities as imposed by the laws of this State, excepting, "not accountable for leakage or depreciation," or words of like import and meaning. (Sec. 12, Act Aug. 21, 1913.)

Sec. 1478. **Receipt negotiable.**—The receipt issued against property stored in public warehouses, as herein provided for shall be negotiable and transferable by endorsement in blank or by special endorsement, and delivery in the same manner and to the same extent as bills of exchange and promissory notes now are, without other formality; and the transferee or holder of such public warehouse receipt shall be considered and held as the actual and exclusive owner, to all intents and purposes, of the property therein described, subject only to the lien and privilege of the public warehouseman for storage and other warehouse charges; provided, however, that all such public warehouse receipts as shall have the words "not negotiable" plainly written or stamped on the face thereof, shall be exempt from the provisions of this article; and provided, further, that no public warehouseman shall issue warehouse receipts against his own property in his own warehouse; but, upon sale of such property in good faith may issue to the purchaser his public warehouse receipt in form and manner as herein provided, which issue and delivery of the receipt shall be deemed to complete the sale, and shall constitute the purchaser full owner, as aforesaid, of the property therein described. Nothing in this last clause shall be construed to exempt the issuer of said receipt for his own goods in his own public warehouse, from complying with and being subject in all respects, to all other articles of this chapter. (Sec. 13, Act Aug. 21, 1913.)

Sec. 1479. **Public warehouseman violating this law.**—Any public warehouseman who violates any of the provisions of this law shall be deemed guilty of criminal offense, and, upon indictment and conviction thereof, shall be punished by fine in any sum not exceeding five thousand dollars, or imprisonment in the State penitentiary not exceeding two years, or by both such fine and imprisonment. (Sec. 14, Act. Aug. 21, 1913.)

Sec. 1480. **Not applicable to private warehousemen.**—Nothing in this law shall be construed to apply to private warehouses or to the issue of receipts by their owners or managers under existing laws, or to prohibit public warehousemen from issuing such receipts as are now issued by private warehousemen under existing laws; provided, that such private warehouse receipts issued by public warehousemen shall never be written on a form or blank indicating that it is issued from a public warehouse, but shall, on the contrary, bear on its face, in large characters, the words, "not a public warehouse receipt." (Sec. 16, Act Aug. 21, 1913.)

(State bonded emergency warehouses, Act Sept. 14, 1914.)

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Sec. 1481. Permanent warehouse act.
Sec. 1482. Member of board engaging in business.
Sec. 1483. Issuing receipt without receiving goods.
Sec. 1484. Issuing fraudulent receipt.
Sec. 1485. Issuing fraudulent duplicate receipt.
Sec. 1486. Issuing receipt without stating ownership.
Sec. 1487. Unlawful delivery from warehouse.
Sec. 1488. Fraudulently negotiating receipt.
Sec. 1489. General penalty.
Sec. 1490. Unfair sampling of cotton.
Sec. 1491. Wilfully plating cotton.
Sec. 1492. Fraudulently circulating notes.
Sec. 1493. Unlawfully depositing certificates.

Sec. 1482. **Member of board engaging in business.**—Any member of the Board of Supervisors of Warehouses, who shall during his term of office, engage in the business of warehouseman, commission merchant, cotton merchant, or cotton broker, after entering upon the duties of his office, shall be guilty of a felony, and upon conviction shall be confined in the penitentiary for a period not less than one nor more than two years. (Sec. 32, Act Sept. 26, 1914.)

Sec. 1483. **Issuing receipt without receiving goods.**—Any officer, agent or servant of a corporation chartered under this Act, who issues or aids in issuing a receipt, knowing that the goods for which such receipt is issued have not been actually received by such corporation, or are not under its control at the time of issuing such receipt, shall be guilty of a felony, and upon conviction shall be punished for each offense by imprisonment in the State penitentiary for not exceeding three years, or by a fine not exceeding five thousand dollars, or by both such fine and imprisonment. (Sec. 33, Act Sept. 26, 1914.)

Sec. 1484. **Issuing fraudulent receipt.**—Any officer, agent or servant of a corporation chartered under this Act who fraudulently issues, or aids in fraudulently issuing a receipt for goods, knowing that it contains any false statement, other than that described in Section 33 of this Act, shall be guilty of a felony, and upon conviction shall be punished for each offense by confinement in the State penitentiary for any period of time not exceeding two years, or by fine not exceeding one thousand dollars, or by both such fine and imprisonment. (Sec. 34, Act Sept. 26, 1914.)

Sec. 1485. **Issuing fraudulent duplicate receipt.**—Any officer, agent or servant of a corporation chartered under this Act, who issues or aids in issuing a duplicate or additional negotiable receipt for goods, knowing that a former negotiable receipt for the same goods, or any part of them, is outstanding and uncancelled, without plainly placing on the face thereof the word "duplicate," as provided for in the case of a lost or destroyed receipt, shall be guilty of a felony, and upon conviction shall be punished for each offense by confinement in the State penitentiary for any period of time not exceeding two years, or by fine not exceeding five thousand dollars, or by both such fine and imprisonment. (Sec. 35, Act. Sept. 26, 1914.)

Sec. 1486. **Issuing receipt without stating ownership.**—Where there are deposited with or held by a corporation chartered hereunder, goods owned by it, either solely or jointly, or in common with others, then any of its officers, agents or servants, who, knowing its ownership, issue or aids in issuing a negotiable receipt for such goods which does not state such ownership, shall be guilty of a felony, and upon conviction shall be punished for each offense by imprisonment in the State penitentiary for any period of time not exceeding one year, or by a fine not exceeding one thousand dollars, or by both such fine and imprisonment. (Sec. 36, Act. Sept. 26, 1914.)

Sec. 1487. **Unlawfully delivering goods from warehouse.**—Any officer, agent or servant of a corporation chartered hereunder, who delivers goods out of the possession of such corporation, knowing that a negotiable receipt, the negotiation of which would transfer the right to the possession of such goods, is outstanding and uncancelled, without obtaining possession of such receipt at, or before, the time of such delivery, shall, except in cases of lost or destroyed receipts, be guilty of a felony and upon conviction shall be punished for each offense by

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fmprisonment in the State penitentiary for any period of time not exceeding one year, or by fine not exceeding one thousand dollars, or by both such fine and imprisonment. (Sec. 37, Act. Sept. 26, 1914.)

Sec. 1488. **Fraudulently negotiating warehouse receipt.**—Any person who deposits goods with a corporation chartered hereunder, to which he has not title, or upon which there is a lien or mortgage, and who takes for such goods a negotiable receipt, which he afterwards negotiates with intent to defraud, without disclosing his want of title or the existence of the lien or mortgage, shall be guilty of a felony, and upon conviction shall be punished for each offense by imprisonment in the State penitentiary for any period of time not exceeding two years, or by fine not exceeding five thousand dollars, or by both such fine and imprisonment. (Sec. 38, Act. Sept. 26, 1914.)

Sec. 1489. **General penalty for violating permanent warehouse law.**—Any person who wilfully and knowingly violates any of the provisions of this Act for which a penalty is not otherwise provided, or who wilfully and knowingly does any act or thing prohibited by this Act, for which no penalty is herein provided, or who wilfully and knowingly fails to do any act or thing herein required of him by the provisions of this Act and for which no penalty is herein provided, shall be deemed guilty of a misdemeanor, and upon conviction, shall be punished by fine not exceeding one thousand dollars, or by confinement in the county jail for any period of time not exceeding one year, or by both such fine and imprisonment. (Sec. 39, Act Sept. 26, 1914.)

Sec. 1490. **Unfair sampling of cotton.**—Any ginner or any agent, servant or employee of the corporation conducting the business of ginning cotton under the terms and provisions of this Act, who shall knowingly and wilfully fail to take three true and correct samples of each bale of cotton ginned by him, as provided for in this Act, and to preserve and label the same as provided for in this Act, or who knowingly and wilfully takes and preserves untrue, unfair and incorrect samples of any bale of cotton ginned by him, or who knowingly and wilfully mislabels any samples of cotton taken by him under the terms and provisions of this Act, shall be guilty of a misdemeanor, and, upon conviction, shall be punished by a fine not to exceed five hundred dollars. (Sec. 40, Act Sept. 26, 1914.)

Sec. 1491. **Wilfully plating cotton.**—Each and every ginner and any officer, servant or employee of a corporation, person or gin company, conducting the gin business under the provisions of this Act, who shall wilfully and knowingly plate a bale of cotton, which is to say, who shall wilfully and knowingly place on the outside of said bale a better grade and quality of cotton than on the inside of said bale, for the purpose of deceiving, shall be guilty of a felony and upon conviction shall be punished by confinement in the State penitentiary for any period of time not exceeding two years, or by fine not exceeding five thousand dollars, or by both such fine and imprisonment, and each and every purchaser, or agent thereof, who knowingly and wilfully takes a sample from any bale of cotton on which a purchase is made and said sample is not a true and correct one, shall be guilty of a misdemeanor and shall upon conviction be punished by a fine not less than one hundred dollars nor more than three hundred dollars. (Sec. 41, Act Sept. 26, 1914.)

Sec. 1492. **Fraudulently signing and circulating notes.**—Any person other than the keeper and manager of the bonded warehouse herein provided for, and any person other than the owner of said certificates, who shall sign said certificates or any of said promissory notes herein provided for and put the same in circulation, shall be guilty of a felony, and shall be punished on conviction for said offense for a term of years not less than two nor more than ten years in the penitentiary. (Act April 2, 1915, Acts 1915, p. 227.)

Sec. 1493. **Unlawfully depositing warehouse certificate.**—No person holding such cotton or grain certificates issued by the keepers of the bonded warehouse under this law shall place said certificates or offer to place said certificates in any State bank or banks in this State for the purpose of obtaining the benefits of this Act in any instance where there is a prior landlord's lien or mortgage, and any person violating this provision shall be deemed guilty of swindling, and shall be punished as provided in our Penal Code defining swindling. (Sec. 9, Act April 2, 1915, Acts 1915, p. 228.)

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CHAPTER VI

COTTON

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Article 978. **"Public ginner" defined—Form of certificate.**—All custom ginners of seed cotton in this State are hereby declared to be public ginners. Any person or persons, firm or corporation in this State, before engaging in the business of public ginners, shall obtain from the county clerk of the county in which gin is located a certificate after the following form:

Number ———

This is to certify that.....
of.....County, Texas, has this day filed affidavit required by law, of all public ginners in this State.

(Seal.) .....
County Clerk of.....County, Texas.

(Sec. 1, Act April 23, 1907, Acts 1907, p. 313.)

Art. 979. **Form of affidavit.**—The form of affidavit to be made to and filed with the county clerk, shall be as follows:

I, ... of
.....County, Texas, do solemnly swear that I will, so long as I may operate a public gin, make and forward a true and correct report of the number of bales of cotton ginned by me to the Commissioner of Agriculture at Austin, as required by law.

(Sec. 2, Act April 23, 1907.)

Art. 980. **Duty of county clerk.**—The county clerk shall number each certificate issued by him consecutively, beginning at number one;

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and shall immediately forward to the Commissioner of Agriculture the name and postoffice address to whom certificate was issued. The clerk shall issue certificates to all ginners and shall take the affidavits as herein required without cost to ginners. (Sec. 3, Act April 23, 1907.)

Art. 981. **Duty of Commissioner of Agriculture.**—The Commissioner of Agriculture upon receipt of information of the issuance of a ginner's certificate from any county clerk in this State, shall immediately forward all necesary blanks to the public ginner for making official cotton report, which shall consist of the following:

Envelopes addressed to the Commissioner of Agriculture, Austin, Texas; and there shall be printed upon the upper left hand corner the words, "Official Cotton Report of.....County," also blanks, to-wit:

Official Cotton Report.
Certificate No. .....
.....19....

Commissioner of Agriculture,
Austin, Texas.

Sir: This is to certify that I have ginned..... bales of cotton from the.....day of..... 19.... to the.....day of.....19....

(Signed).....

(Sec. 4, Act of April 23, 1907.)

Art. 982. **Public ginner to forward report.**—All public ginners shall make and forward reports to the Commissioner of Agriculture, on the blanks furnished them, by the third of each month, stating the exact number of bales ginned by them the preceding calendar month. This report must be made by all ginners, unless they have ceased to operate, the notice of which must be forwarded to the Commissioner of Agriculture. These reports must be securely sealed by ginners. (Sec. 5, Act April 23, 1907.)

Art. 983. **Information made public when.**—The Commissioner of Agriculture shall open on the eighth of each month and tabulate the official cotton reports of the various counties, in the presence of three creditable witnesses, who shall be appointed by the Governor. The complete report, showing total number of bales of cotton ginned, shall be given out to the public, including the press, at eleven o'clock a. m., on the ninth of each month. (Sec. 6, Act April 23, 1907.)

Art. 984. **Giving advance information.**—If the Commissioner of Agriculture, his assistants, or any one else connected with the opening and tabulating of these official cotton reports, or any other person shall give out any information as to the number of bales of cotton ginned before the time specified by this act, shall, upon conviction, be confined in the penitentiary not less than one year nor more than three years. (Sec. 7, Act April 23, 1907.)

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Art. 985. **County clerk or public ginner offending.**—All county clerks and public ginners who violate any of the provisions of this act are guilty of a misdemeanor, and upon conviction shall be fined not less than twenty-five nor more than two hundred dollars. (Sec. 8, Act April 23, 1907.)

Art. 986. **Ginner to keep record.**—Every person, firm, corporation or association of persons owning, controlling or operating a public cotton gin in this State, shall keep or cause to be kept a public record of all cotton brought to them for ginning and packing. Such record shall correctly show the amount of cotton received, date of its receipt, by whom brought to the gin and the name or names of the party or parties claiming to own the same. (Sec. 1, Act April 17, 1901, Acts 1901, p. 263.)

Art. 987. **Ginner shall mark each bale.**—Said ginner after ginning and packing said cotton shall place or cause to be placed on each bale of cotton the initials of the party or parties claiming to own said cotton, under which he shall place some private ginner's mark, all of which shall be put upon record in the book before mentioned. (Sec. 2, Act April 17, 1901.)

Art. 988. **Buyer not to alter or deface marks.**—Every person, firm, corporation or association of persons who shall buy cotton in this State, shall not change, alter, or deface the marks and brands on such cotton. (Sec. 3, Act April 17, 1901.)

Art. 989. **Penalty.**—Any person, firm, corporation or association of persons failing, neglecting, or refusing to comply with any of the provisions of this act shall be punished by a fine in any sum not more than twenty-five dollars. (Sec. 4, Act April 17, 1901, Acts of 1901, p. 263.)

Sec. 1494. TARE.

Sec. 1495. Tare to be marked on bale.—The owners, lessees, operators or receivers of all cotton gins, in this State, shall stamp or write, upon each and every bale of cotton ginned by them, in plain figures, the weight of the bagging and ties in which the cotton is wrapped, said figures to be written or stamped with indelible ink, and shall be not less than four inches in height and three inches in width, and shall be preceded by the word "tare," written or stamped upon the bale with indelible ink, the letters composing said word to be not less than four inches in height and three inches in width. Any person wilfully violating the provision of this section shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than ten, nor more than one hundred dollars. (Sec. 1, Act March 8, 1911, Acts 1911, p. 47.)

Sec. 1496. Compressor to mark tare.—The owners, lessees, operators or receivers of all compressors in this State, shall write or stamp upon each and every bale of cotton compressed by them, the word and figures placed upon such bale or bales of cotton by the ginner ginning the same, in compliance with section 1 of this Act, in the same manner as provided for ginners in said section 1, should such word and figures be defaced or hidden during the process of compression. Any person wilfully violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction, shall be punished by a fine of not less than ten dollars, nor more than one hundred dollars. (Sec. 2, Act March 8, 1911.)

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Sec. 1497. **Each unmarked bale a separate offense.**—Each bale of cotton ginned and each bale of cotton compressed without having placed thereon the word and figures as provided in sections 1 and 2, respectively, of this Act, shall constitute a separate offense. (Sec. 3, Act March 8, 1911.)

Sec. 1498. **Making excessive deduction for tare.**—It shall be unlawful for any person, firm, corporation, cotton exchange or board of trade, to make a greater deduction for tare, either from the gross weight of any bale of cotton or the price of same than is shown by the figures placed upon the bale in compliance with section 1 of this Act. (Sec. 4, Act March 8, 1911.)

Sec. 1499. **Penalty for excessive deduction.**—Any person, firm, corporation, cotton exchange, or board of trade, or any agent of any person, firm, corporation, cotton exchange, or board of trade who violates the provisions of section 4 of this Act, shall be deemed guilty of a misdemeanor, and upon conviction, shall be punished by a fine of not less than ten nor more than one hundred dollars. (Sec. 5, Act March 8, 1911.)

Sec. 1500. **Each bale a separate offense.**—Each bale from which a greater deduction for tare is made than is shown by the figures written or stamped upon same shall constitute a separate offense. (Sec. 6, Act March 8, 1911.)

CHAPTER VII

FALSE WEIGHTS AND MEASURES

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Article 990. (572) **Penalty for using.**—If any person shall use a false balance, weight or measure in weighing or measuring anything whatever, purchased or sold by himself, or bartered, shipped or delivered by him for sale, or bartered, or pledged, or given in payment, knowing the same to be false, and with intent to defraud, he shall be punished by fine not exceeding three hundred dollars. (O. C. 466.)

Art. 991. (573) **Definition.**—A false weight or measure is such as is not in conformity with the standard which is or may be established by a law of this State. (O. C. 467.)

Art. 992. (574) **Destruction of on conviction.**—When a warrant of arrest is issued in case of offenses under this chapter, the magistrate shall direct the false balances, weights or measures to be seized and kept by the sheriff until the trial of defendant, and in case of conviction, the same shall be destroyed. (O. C. 468.)

Art. 993. **Diversion from electric, water, or gas meter.**—Whoever intentionally by any means or device prevents electric current, water or gas from passing through any meter or meters belonging to a person, corporation or company, engaged in the manufacture or sale of electricity, water or gas, for lighting, power or other purposes, furnished such person to register the current of electricity, water or gas, passing

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through meters; or intentionally prevents a meter from duly registering the quantity of electricity, water or gas, supplied, or in any way interferes with its proper action or just registration, or without the consent of such person, corporation or company, intentionally diverts any electric current from any wire, or water or gas from any pipe or pipes of such person, corporation or company, or otherwise intentionally uses, or causes to be used without the consent of such person, corporation or company, any electricity or gas manufactured, or water produced or distributed by such person, corporation or company, or any person, corporation or company who retains possession of, or refuses to deliver any meter or meters, lamp or lamps, or other appliances which may be or may have been loaned them by any person, corporation or company for the purpose of furnishing electricity, water or gas, through the same, with the intent to defraud such person, corporation or company, or if any person, corporation or company engaged in the manufacture or sale of electricity, water, or gas for lighting, power or other purposes, shall knowingly misread any meter or overcharge any customer for such light, water or gas furnished, shall for every such offense be punished by a fine of not less than twenty-five dollars, and not more than one hundred dollars. Every person, firm or corporation engaged in the business referred to in this act shall keep displayed at all times, in a conspicuous place in their office, a printed copy of this act. (Acts 1905, p. 205.)

CHAPTER VIII

PUBLIC WEIGHERS

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Article 994. (575) (477) **Using false balances.**—If any person is elected or appointed public weigher under the laws of this State, or if any person whomsoever who is engaged in the business of weighing for the public, and who holds himself out to weigh for the public, shall fraudulently use any false balances, scales or instruments for weighing, or shall in the exercise of his duty as such public weigher, or as such weigher for the public, fraudulently give the wrong weight of any article whatever weighed by him, he shall be punished by fine of not less than one hundred dollars nor more than five hundred dollars, or by imprisonment in the county jail not to exceed one year. (O. C. 469. Amended Acts 1901, p. 257.)

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Art. 995. (576) (478) **Giving false certificate.**—If any public weigher in this State, or his deputy, or if any person whomsoever who is engaged in the business of weighing for the public, or who holds himself out to weigh for the public, shall wilfully or fraudulently certify to or sign any false weight of cotton, sugar, wool, hides, or other commodity, he shall be punished by a fine of not less than twenty-five dollars nor more than one hundred dollars. (Acts 1875, p. 164, amended Acts 1901, p. 257.)

Art. 996. (577) (478a) **Other than public weigher shall not weigh.**—It shall not be lawful for any person other than a regularly appointed weigher, or his deputy, to weigh any cotton, wool, sugar or hides required to be weighed, sold or offered for sale in any city having a public weigher duly qualified. Any person or persons so offending shall be deemed guilty of a misdemeanor, and upon conviction before any court of competent jurisdiction, shall suffer a fine of five dollars for each and every bale of cotton, bale or sack of wool, hogshead or barrel of sugar, bale or loose hide, so weighed. (Sec. 7, Acts 1879, p. 116.)

Art. 997. (578) (478b) **Unlawful to employ private weigher.**—It shall not be lawful for any factor, commission merchant, or any other person or persons, to employ any one other than a regularly appointed and qualified public weigher, or his deputy, to weigh any cotton, wool, sugar or hides required to be weighed, sold or offered for sale in any city having a public weigher duly qualified, and any person or persons violating this provision shall be liable, at the suit of the public weigher of such city, or either of such public weighers, to damages in any sum not less than five dollars for each bale of cotton, bale or sack of wool, hogshead or barrel of sugar, or bale of hides, so unlawfully weighed, to be recovered in any court of such county having jurisdiction thereof; provided, any owner shipping any produce named in this article to any town or city having a public weigher may, by written instructions, authorize his factor, commission merchant or agent to have such produce weighed by private weighers, if he prefers so to do, and in all such cases, the prohibitions and penalties embraced in this article and in the preceding article shall not apply. (Sec. 8, Acts 1879, p. 116.)

Art. 998. (579) (478c) **Person may weigh his own produce.**—Nothing in this law shall prevent any person, firm or corporation from weighing his own cotton, wool, sugar, hay, grain or pecans in person; providing that in places where there are no public weighers appointed or elected, that any person who shall weigh cotton, wool, sugar, grain, hay or pecans for compensation shall be required, before weighing such produce, to enter into a bond, with at least two good and sufficient sureties, in the sum of twenty-five hundred dollars, approved and payable as in the case of public weighers referred to in this chapter, and conditioned that he will faithfully perform the duties of his office, and turn

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over all property weighed by him on demand of the owner; provided that this article shall not apply to merchant flouring mills. (Sec. 10, Acts 1879, p. 116, amended Acts 1905, p. 117.)

Art. 999. **Unlawful weighing.**—Any person who shall weigh or offer to weigh any cotton, wool, sugar or hides for compensation for the public without complying with all the provisions of this law, shall be guilty of a misdemeanor, and upon conviction shall be fined in any sum not exceeding two hundred dollars. (Acts 1905, p. 117.)

Sec. 1501. **Decisions.**—Ex parte Hunter, 34 Texas Crim. Rep. 114; 29 S. W. 482. Johnson v. Martin, 12 S. W. 321. Watts et al. v. State, 61 Texas 184. Davidson et al. v. Sadler et al., 57 S. W. 54. Paschal v. Inman, 151 S. W. 569. Martin et al. v. Johnston, 33 S. W. 306.

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Article 1000. (580) (479) **False certificate by notary public.**—If any notary public shall make any false certificate as to the proof or acknowledgment of any instrument of writing relating to commerce or navigation to which, by law, he is authorized to certify, or shall make any false certificates as to the proof or acknowledgment of any letter of attorney, or other instrument of writing relating to commerce or navigation, to which he may by law certify, he shall be punished by confinement in the penitentiary not less than two nor more than five years. (O. C. 470.)

Art. 1001. (581) (480) **False declaration or protest.**—If any notary public shall make any false declaration or protest respecting any matter or thing relating to commerce or navigation, or to commercial instruments, where, by law, he is authorized to make such declaration or protest, he shall be punished as prescribed in the preceding article. (O. C. 471.)

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Art. 1002. (582) (481) **Preceding articles embrace what.**—The provisions of the two preceding articles are intended to embrace all acts of a notary public done in his official capacity within the proper sphere of his duties, and which arise out of transactions respecting navigation or commerce. (O. C. 472.)

Art. 1003. (583) (482) **False declaration by master of vessel.**—If any master or other officer of a vessel, with intent to defraud, shall make a false declaration or protest as to the loss or damage of any vessel or cargo, he shall be punished by confinement in the penitentiary not less than two nor more than five years. (O. C. 473.)

Art. 1004. (584) (482a) **Unlawfully throwing ballast.**—It shall be unlawful to throw into the sea any part of the ballast of any vessel within six miles of any bar or harbor in this State. (Sec. 1, Act April 23, 1879, Acts 1879, p. 153.)

Art. 1005. (585) (482b) **Penalty.**—If any ballast shall be thrown into the sea within the limits forbidden by this law from any vessel, the master or officer in charge thereof at the time, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than one hundred dollars nor more than two hundred dollars. (Sec. 2, Act April 23, 1879, Acts 1879, p. 153.)

Art. 1006. (586) (483) **False entry in book of account.**—If any person, with intent to defraud, shall make, or cause to be made, any false entry in any book kept as a book of accounts, or shall, with like intent, alter, or cause to be altered, any item of an account kept or entered in such book, he shall be fined not less than one hundred nor more than one thousand dollars, or be punished by confinement in the penitentiary not less than two nor more than five years.

(Pope v. State, 170 S. W. 150.)

Art. 1007. **Commission merchant failing to give bond.**—Any commission merchant, or the officers or agents of such, whether the merchant is a resident of this State or not, who shall advertise or solicit business as a commission merchant, or who shall pursue in any way the occupation of a commission merchant, without having made the bond or bonds required by law, shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in any sum not less than one hundred dollars and not more than one thousand dollars. (Sec. 4, Act March 23, 1907, Acts of 1907, p. 61. See the section following this article.)

Sec. 1502. Commission merchant failing to give bond.—Any commission merchant, as herein defined, who shall engage in business as such commission merchant, without first making and filing the bond provided by law shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not less than one hundred dollars, nor more than five hundred dollars. (Acts 1913, p. 179.)

Sec. 1503. "Livestock commission merchant" defined.—Any person, firm or corporation pursuing or who shall pursue the business of selling livestock, cattle,

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cows, calves, bulls, steers, hogs, sheep, mules, horses, jacks and jennets, or any of them upon consignment for a commission or other charges, or who shall solicit consignments of livestock as a commission merchant or who shall advertise or hold himself out to be such, shall be deemed and held to be a livestock commission merchant within the meaning of this law. (Sec. 1, Act March 27, 1913, Acts of 1913, p. 93.)

Sec. 1504. **Livestock commission merchant failing to give bond.**—Any person who shall advertise or solicit business as a livestock commission merchant, or who shall pursue in any way the occupation of a livestock commission merchant, without having made the bond or bonds as required by this Act, shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in any sum not more than five thousand dollars, or by imprisonment in the county jail for not less than one month and not more than twelve months, or by both such fine and imprisonment. (Sec. 4, Act March 27, 1913, Acts 1913, p. 93.)

Sec. 1505. **"Contracting stevedore" defined.**—"A contracting stevedore, within the meaning of this Act, is any person, firm, association of persons, or corporation that contracts with any ship, agent, owners, masters, managers or captains of vessels, or with any other person or corporation, for the purpose of loading or unloading, or of having loaded or unloaded any vessel, ship or water craft." (Sec. 1, Act March 31, 1913, Acts 1913, p. 153.)

Sec. 1506. **Unlawfully pursuing occupation of contracting stevedore.**—It shall hereafter be unlawful for any contracting stevedore to engage in the business or pursue the occupation of loading and unloading or having loaded or unloaded by the employment of labor therefor any ship, vessel or water craft in this State without first obtaining the license and executing the bond (as provided by law), and any such person who pursues said occupation without first qualifying as provided by this Act shall be guilty of a misdemeanor, and on conviction shall be fined in any sum not less than one hundred nor more than five hundred dollars for each day he shall pursue such occupation or business without thus qualifying and any member of a firm or association or any manager of a corporation who comes within the meaning of a contracting stevedore who shall thus offend shall be amenable to prosecution. (Sec. 2, Act March 31, 1913, Acts 1913, p. 154.)

Sec. 1507. **Commercial fertilizer.**
Sec. 1508. Branding or labeling.
Sec. 1509. Statement to be furnished State Chemist.
Sec. 1510. Certain words prohibited on bag.
Sec. 1511. Tax tags.
Sec. 1512. Interfering with chemist taking sample.
Sec. 1513. Sale of inferior fertilizer.
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Sec. 1515. Penalty.
Sec. 1516. "Commercial fertilizer" defined.
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Sec. 1519. "Adulterated fertilizer" defined.
Sec. 1520. Sale of bulk fertilizer.
Sec. 1521. Using counterfeit tag, or tag, bag or label of another.
Sec. 1522. General penalty.

Sec. 1508. **Branding or labeling commercial fertilizer.**—"All corporations, firms or persons, before selling or offering for sale any commercial fertilizer for use within this State, shall brand or attach to each bag, barrel or package a plainly printed statement, showing the brand or name of said fertilizer, the net weight of the contents of the package, the name and address of the corporation, firm or person registering said fertilizer and the minimum percentages guaranteed to be present of available phosphoric acid, of nitrogen and of potash soluble in distilled water. Only such potash shall be claimed to be present as sulphate, which is in excess of the quantity required to combine with the chlorine present, less one-half per cent. In bone meal, tankage, or other similar products, the phosphoric acid shall be claimed as total phosphoric acid, unless it be desired to claim available phosphoric acid only, in which latter case the guarantee must take the form above

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set forth. In the case of bone meal and tankage, information showing the fineness of the product may be branded or attached to the package; provided it takes a form approved by the State Chemist. All branding or labeling must be durable and legible, and so placed and arranged as to be easily read." (Sec. 1, Act March 27, 1911, Acts 1911, p. 218.)

Sec. 1509. **Statement to be furnished State Chemist.**—All firms, corporations or persons, before selling or offering for sale any commercial fertilizer for use within this State, shall annually file with the State Chemist a certified statement giving the information required by the preceding section and the true names and sources of all the ingredients used in the manufacture of said fertilizer. If the same fertilizer is sold under a different name or names, said fact shall be stated, and the different brands which are identical shall be named. If the source of any ingredient is changed, notification must be promptly furnished the State Chemist. A copy of the brand or stamp on the bag or other package or on the label attached thereto shall be filed with the State Chemist on or before delivery to the dealers, agents or consumers in this State, which brand or stamp shall be uniformly used during the fiscal year for which it is filed, but such brand or stamp shall truly set forth the data required in said preceding section, and be otherwise in accordance with the provisions of this chapter. On receipt of the certified statement above described, and the copy of the brand or stamp and after compliance with other requirements of this chapter, the State Chemist shall issue a certificate of registration for the commercial fertilizer, which shall be in force until the succeeding September 1st. A brand name previously registered shall not be allowed to be registered by another firm, corporation or individual, and no brand or name shall be allowed to be registered which is so nearly similar to another as to lead to uncertainty, confusion or fraud. The party whom the previous records of the State Chemist's office show to have first registered the name shall be permitted to retain it, subject, however, to appeal and hearing before the State Chemist to determine who is entitled to the brand; but the action of the State Chemist shall be without prejudice to the legal rights of the parties to the brand or trade-mark. No brand or name once registered shall be changed to a lower grade at any subsequent registration. (Sec. 2, Act March 27, 1911, Acts 1911, p. 218.)

Sec. 1510. **Certain words prohibited on bag or package.**—The words "high grade" shall not appear upon any bag or other package of any complete fertilizer which complete fertilizer contains, by its guaranteed analysis, less than ten per cent available phosphoric acid, one and sixty-five one hundredths per cent nitrogen and two per cent of potash, or a grade or analysis of equal total commercial value; the word "standard" shall not appear upon any bag or other package of any complete fertilizer which contains, by its guaranteed analysis, less than eight per cent available phosphoric acid, one and sixty-five one hundredths per cent nitrogen and two per cent potash, or a grade or analysis of equal total commercial value; the words "high grade" shall not appear upon any bag or other package of any acid phosphate with potash, which shall contain, by its guaranteed analysis, less than thirteen per cent available phosphoric acid, and one per cent of potash, or a grade or analysis of equal total commercial value; the word "standard" shall not appear upon any bag or other package of any acid phosphate with potash which shall contain, by its guaranteed analysis, less than eleven per cent available phosphoric acid, and one per cent potash, or a grade or analysis of equal total commercial value; the words "high grade" shall not appear upon any bag or other package of any plain acid phosphate which shall contain by its guaranteed analysis, less than fourteen per cent available phosphoric acid; and the word "standard" shall not appear upon any bag or other package of any plain acid phosphate which shall contain by its guaranteed analysis less than twelve per cent available phosphoric acid. The word "standard" shall not appear upon any bag or other package of acid phosphate with nitrogen which shall contain, by its guaranteed analysis, less than nine per cent of available phosphoric acid and two per cent nitrogen, or a grade or analysis of equal total commercial value. It is hereby further provided that no commercial fertilizer shall be sold, offered or exposed for sale for use within this State, upon which the use of the words "high grade" or "standard" is prohibited by this Section, unless the words "low grade" is printed in two-inch letters in a conspicuous place upon the package of said commercial fertilizer. Provided, further, that no claim or guarantee for less than one per cent of phosphoric acid or of potash, or for less than a 0.82 per cent of

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nitrogen, shall be allowed in any commercial fertilizer. (Sec. 3, Act March 27, 1911, Acts 1911, p. 219.)

Sec. 1511. **Tax tags.**—All firms, corporations or persons engaged in the manufacture or sale of commercial fertilizers shall pay to the State Chemist an inspection tax of twenty-five cents per ton (2,000 pounds) for such commercial fertilizers sold or exposed or offered for sale in this State in order to entitle the same to inspection and delivery, and shall attach a tag furnished by the State Chemist as evidence that said tax is paid, and goods so tagged shall not be liable to any further tax. But nothing contained in this Section shall interfere with fertilizers passing through the State in transit; nor shall apply to the delivery of fertilizing materials in bulk to fertilizing factories for manufacturing purposes. Firms, corporations or persons, or agents representing them, who have registered their brands in compliance with this law shall forward to the State Chemist a request for tax tags, stating that the said tags are to be used upon the brands of commercial fertilizers registered and sold in accordance with this chapter, and said request shall be accompanied with the inspection tax, whereupon it shall be the duty of the State Chemist to issue tags to parties applying, who shall attach said tags to each bag, barrel or package thereof. All firms, corporations or persons are hereby forbidden to attach the tag prescribed by this Section to any bag, barrel or package of any commercial fertilizer which has not been previously registered as required by this chapter and which is not in accordance with all other provisions of this chapter. No tags shall be used after the end of the fiscal year for which they are issued, and they shall not be redeemed by the State Chemist. The fiscal year shall be comprised between the dates of September 1st and August 31st inclusive. (Sec. 4, Act March 27, 1911, Acts 1911, p. 220.)

Sec. 1512. **Interfering with chemist taking sample.**—The State Chemist shall cause one analysis or more to be made annually of such commercial fertilizer sold or offered for sale under the provisions of this Act as may be sampled under his direction. The State Chemist, in person or by deputy, shall have power to enter into any car, warehouse, store, building, boat, vessel, steamboat, or place, supposed to contain fertilizers for the purpose of inspection or sampling, and shall have the power to take a sample for analysis, not exceeding two pounds, from any package or lot of fertilizer found within the State. Any person who opposes the entrance of said chemist or deputy, or in any way interferes with the discharge of his duty, shall be liable to a fine of not less than fifty dollars and not more than five hundred dollars. (Sec. 5, Act March 27, 1911, Acts 1911, p. 221.)

Sec. 1513. **Unlawfully offering or selling inferior fertilizer.**—Any person, firm or corporation who shall intentionally or knowingly sell or offer for sale any commercial fertilizer for use within this State which is materially below the guaranteed value in plant food, shall be guilty of a misdemeanor, and upon conviction shall be fined not less than fifty dollars nor more than two hundred dollars for the first offense, and not less than two hundred dollars nor more than five hundred dollars for each subsequent offense. (Sec. 6, Act March 27, 1911, Acts 1911, p. 221.)

Sec. 1514. **Forbidden materials in fertilizer.**—It shall be unlawful to sell or offer for sale, in this State, any fertilizer or fertilizing materials which contain an undue quantity of hair, or which contains leather scraps, peat, or other substances of low availability as food for plants, but in which such forbidden materials aid in making up the required or guaranteed analysis. The presence of any forbidden material shall vitiate the whole; provided that manufacturers who desire to use any such material may do so under such regulations as the State Chemist may prescribe, if it be shown that it is available for a proper purpose. (Sec. 7, Act March 27, 1911, Acts 1911, p. 222.)

Sec. 1515. **Penalty.**—Every firm, corporation or person who shall sell or offer for sale any commercial fertilizer without having attached thereto such labels, stamps and tags as are required by law, or who shall use the required tag a second time to avoid the payment of the tonnage charge, or who shall sell adulterated or misbranded fertilizer within the meaning of this Act shall be guilty of a misdemeanor and upon conviction shall be fined not less than fifty nor more than two hundred dollars for each offense. (Sec. 11, Act March 27, 1911, Acts 1911, p. 223.)

Sec. 1516. **"Commercial fertilizer" defined.**—A commercial fertilizer is hereby defined as any material, substance or mixture, which contains or is claimed to con-

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tain more than one per cent of total phosphoric acid, or of potash, or of nitrogen, and which is used for application to the soil to promote the growth of crops, or any substance, material or mixture, which is claimed to exert a beneficial action upon the soil or to promote the growth of crops; provided, that following substances: lime, limestone, marl, unground bones, stock-pen manure, barn-yard manure, or the excrement of any domestic animal, shall be exempt from the provisions of this chapter, in case that said manure or excrement has not been dried or manipulated or otherwise treated or is not claimed to have a value of more than four dollars a ton. (Sec. 12, Act March 27, 1911, Acts 1911, p. 223.)

Sec. 1517. **Selling adulterated or misbranded fertilizer.**—Any person, firm or corporation manufacturing, selling or offering for sale any adulterated or misbranded commercial fertilizer for use within this State shall, upon conviction thereof, be punished by a fine of not less than twenty-five dollars nor more than two hundred dollars. (Sec. 13, Act March 27, 1911, Acts 1911, p. 224.)

Sec. 1518. **"Misbranded fertilizer" defined.**—A fertilizer shall be deemed to be misbranded if it carries any false or misleading statement upon or attached to the package, or if false or misleading statements concerning its agricultural value are made on the package or in any printed advertising matter issued by the corporation, firm or individual that registered said fertilizer, or if the number of net pounds set forth upon the package is not substantially correct. (Sec. 13, Act March 27, 1911, Acts 1911, p. 224.)

Sec. 1519. **"Adulterated fertilizer" defined.**—A fertilizer is adulterated if it contains any substance or substances injurious to the crop or to the soil, or if the guaranteed valuation exceeds the valuation of the plant food found on analysis ten per cent or more, or if any of the plant food constituents falls twenty per cent or more below the guaranteed composition. (Sec. 13, Act March 27, 1911, Acts 1911, p. 224.)

Sec. 1520. **Sale of bulk fertilizer.**—Manufacturers, jobbers, dealers or manipulators of commercial fertilizers may sell acid phosphate or other commercial fertilizer in bulk to persons, individuals or firms who desire to purchase the same for their own use on their own land but not for sale or distribution, under rules and regulations prescribed by the State Chemist which will not be inconsistent with the provisions of this chapter; provided, that inspection tax shall be paid upon such fertilizer as provided herein. But if such bulk fertilizer is offered for sale or distribution, it must be tagged and branded and otherwise accord with the provisions of this chapter. (Sec. 14, Act March 27, 1911, Acts 1911, p. 224.)

Sec. 1521. **Using counterfeit tag, or tag, bag, or label of another.**—Any person, party, or manufacturer who uses the fertilizer tags, bags or labels of some other person, party or manufacturer, in such a way as to deceive or tend to deceive, or who counterfeits, or uses a counterfeit, of the tax tag prescribed in this chapter, shall be subject to a fine of not less than one hundred dollars, and not more than five hundred dollars. (Sec. 15, Act March 27, 1911, Acts 1911, p. 224.)

Sec. 1522. **General penalty.**—Any person, corporation or firm violating any provision of this chapter for which a penalty is not otherwise provided herein, shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not less than fifty dollars nor more than two hundred dollars. (Sec. 18, Act March 27, 1911, Acts 1911, p. 225.)

Sec. 1523. **Building and Loan Associations.**
Sec. 1524. Violating building and loan association law.
Sec. 1525. Acting for unauthorized association.

Sec. 1524. **Violating building and loan association law.**—Every officer, director, member of any committee, clerk or agent of any building and loan association doing business in this State, who embezzles, abstracts or misapplies any of the moneys, funds or credits of such corporation, who issues or puts into circulation any warrant or other orders, who assigns, transfers, cancels or delivers up any note, bond, draft, mortgage, judgment, decree, or any other written instrument belonging to such association, who certifies to or makes a false entry in any book, report or statement of or to such association, with intent in either case to deceive, injure or defraud such association, or any member thereof, or to deceive any one appointed to examine the

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affairs of such association, shall be deemed guilty of a felony, and on conviction thereof shall be imprisoned in the State penitentiary for a period of not less than one year nor more than ten years. Any officer whose duty it is, failing to make the reports required by this Act, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined not less than twenty-five dollars nor more than two hundred dollars, or shall be imprisoned not less than one month nor more than six months. (Sec. 23, Act Aug. 21, 1913.)

Sec. 1525. **Acting for unauthorized association.**—It shall be unlawful for any person to act as agent for any building and loan association not authorized to do business in this State, or to solicit, sell, or dispose of any shares of any such unauthorized association; and any person or persons acting for any such unauthorized association, or in any manner aiding in the transaction of the business of such association in this State, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not less than fifty dollars, nor more than five hundred dollars for each offense, and in default of payment of such fine shall be imprisoned in the county jail for a period not to exceed one year. All fines collected under the provisions of this section shall be paid into the State Treasury. (Sec. 35, Act Aug. 21, 1913.)

Sec. 1526. **Certified Public Accountant.**
Sec. 1527. Unlawfully acting as accountant.
Sec. 1528. Accountant falsifying report.

Sec. 1527. **Unlawfully acting as accountant.**—If any person represents himself to the public as having received a certificate as provided for in this law, or advertises as a "certified Public Accountant," or uses the initials "C. P. A.," or otherwise falsely holds himself out as being qualified under this law, while practicing in this State, without having actually received such certificate, or it has been recalled or revoked, and he shall continue to use the initials "C. P. A.," or shall refuse to surrender such certificate after revocation thereof, or shall otherwise violate any provision of this Act, he shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined any sum not to exceed two hundred dollars. No audit company, incorporated or unincorporated, shall use the title "Certified Public Accountants" or the initials "C. P. A.," and no firm or partnership shall use this title, or these initials, unless each member of said firm or partnership is a legal holder of a certificate issued under the provisions hereof, and any violation of these provisions shall be punished by a fine not to exceed the sum of two hundred dollars. The use by any person, firm or corporation of the abbreviated title "Certified Accountant," or of the initials "C. A.," shall be construed a violation of this law and shall subject such person, firm or corporation to a fine not to exceed the sum of two hundred dollars. (Act March 22, 1915, Acts 1915, p. 188.)

Sec. 1528. **Accountant falsifying report.**—If any person practicing in the State of Texas as a Certified Public Accountant under this Act shall wilfully falsify any report or statement bearing upon any examination, investigation or report made by him or under his direction as such Certified Public Accountant, he shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than one hundred dollars or more than one thousand dollars. (Sec. 13, Act March 22, 1915, Acts 1915, p. 188.)

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TITLE XV

OFFENSES AGAINST THE PERSON

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CHAPTER I

ASSAULT AND ASSAULT AND BATTERY

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Art. 1008. (587) **"Assault and battery" defined.**—The use of any unlawful violence upon the person of another with intent to injure him, whatever be the means or the degree of violence used, is an assault and battery. Any attempt to commit a battery, or any threatening gesture showing in itself or by words accompanying it, an immediate intention, coupled with an ability to commit a battery, is an assault.

Sec. 1529. **Simple assault—Form for complaint.**
In the name and by the authority of the State of Texas:
Before me the undersigned authority on this day personally appeared..... who being by me duly sworn, deposes and says that John Doe heretofore on the .....day of.....A. D.....in the county of.....and State of Texas did in and upon.....make an assault.
Against the peace and dignity of the State.
.....(affiant).
Subscribed and sworn to before me this the.....day of.....A. D.....
.....
Justice of the Peace, Prec. No....., ...Co., Texas.

Sec. 1530. **Assault and battery—Form for complaint.**
In the name and by authority of the State of Texas:
Before me the undersigned authority on this day personally appeared..... who being by me duly sworn, deposes and says that John Doe heretofore on the .....day of.....A. D.....in the county of.....and State of Texas did in and upon.....make an assault and battery, and did then and there unlawfully with his fist (or "foot" or whatever it was) strike the said .....
Against the peace and dignity of the State.
.....(affiant).
Subscribed and sworn to before me this the.....day of.....A. D.....
.....
Justice of the Peace, Prec. No....., ...Co., Texas.

Sec. 1531. **Indictment, information or complaint.**—It is not necessary to allege in terms that an assault was "unlawful." State v. Lutterloh, 22 Texas 211. State v. Hays, 41 Texas 526. State v. Hartman, 41 Texas 562.

It is not necessary to allege in terms that an assault was made "with intent to injure." State v. Allen, 30 Texas 59. State v. Hays, 41 Texas 526. State v. Hartman, 41 Texas 562. Bronson v. State, 2 Texas Crim. App. 46. Forrest v. State, 3 Texas Crim. App. 232. Ferguson v. State, 4 Texas Crim. App. 157. Milstead v. State, 19 Texas Crim. App. 491. Rogers v. State, 40 Texas Crim. Rep. 356; 50 S. W. 338. Saye v. State, 54 Texas Crim. Rep. 431; 114 S. W. 804. Cromwell v. State, 60 Texas Crim. Rep. 183; 131 S. W. 595. Yelton v. State, 170 S. W. 319.

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It is not necessary to allege in terms that defendant attempted to commit a battery, or that he had an immediate intention coupled with an ability to commit a battery. Forrest v. State, 3 Texas Crim. App. 232.

In alleging a simple assault it is not necessary to allege the particular acts of violence constituting the assault, nor need the means used be alleged. Browning v. State, 2 Texas Crim. App. 47. Marshall v. State, 13 Texas Crim. App. 492. Roberson v. State, 15 Texas Crim. App. 317.

An indictment or information which alleges that defendant did make an aggravated assault, without alleging any of the statutory grounds which cause an assault to become aggravated, charges only a simple assault. Browning v. State, 2 Texas Crim. App. 47. Wilks v. State, 3 Texas Crim. App. 34. Griffin v. State, 12 Texas Crim. App. 423. Key v. State, 12 Texas Crim. App. 506. Allen v. State, 13 Texas Crim. App. 28. Lawson v. State, 13 Texas Crim. App. 83. Marshall v. State, 13 Texas Crim. App. 492. Price v. State, 35 Texas Crim. Rep. 501; 34 S. W. 622. McCutcheon v. State, 49 Texas Crim. App. 607; 95 S. W. 525.

The name of the person assaulted must be alleged if known, and if not known it may be alleged that the name was unknown to the grand jury, or to the affiant. State v. Snow, 41 Texas 596. Ranch v. State, 5 Texas Crim. App. 363. Rutherford v. State, 13 Texas Crim. App. 92.

A verdict is not contrary to the law and the evidence, so as to entitle a defendant to take advantage of it, when the defendant is found guilty of an offense of inferior grade to, but of the same nature as, the offense charged. Defendant is not entitled to complain that he was found guilty of a simple assault under an indictment or information correctly charging an aggravated assault although the evidence shows him guilty of an aggravated assault. Foster v. State, 25 Texas Crim. App. 545; 8 S. W. 664. Davis v. State, 42 S. W. 290. Ross v. State, 45 S. W. 808. Singleton v. State, 40 Texas Crim. Rep. 455; 50 S. W. 951. Jay v. State, 41 Texas Crim. Rep. 451; 55 S. W. 335. Jaehnig v. State, 57 Texas Crim. Rep. 186; 122 S. W. 267. Jenkins v. State, 60 Texas Crim. Rep. 465; 132 S. W. 133. Garrett v. State, 61 Texas Crim. Rep. 514; 135 S. W. 532. Ely v. State, 152 S. W. 631.

Sec. 1532. **Evidence.**—If defendant is charged with a simple assault only, a battery may be proven when it is a part of the *res gestæ* of the assault. Davis v. State, 90 S. W. 646. Dool v. State, 150 S. W. 626.

Proof of mere drunkenness is no defense to an assault. Perkins v. State, 144 S. W. 245.

The fact that defendant is restrained after he made the assault, and is prevented from also committing a battery does not relieve him from liability for making the assault. Gann v. State, 40 S. W. 725.

If the facts fail to show that defendant had an immediate purpose to do any violence to the person alleged to have been assaulted, no assault is shown. Young v. State, 7 Texas Crim. App. 75. Fondren v. State, 16 Texas Crim. App. 48. Flournoy v. State, 25 Texas Crim. App. 244; 7 S. W. 865. Marthall v. State, 34 Texas Crim. Rep. 25; 36 S. W. 1062. Lee v. State, 34 Texas Crim. Rep. 519; 31 S. W. 667. McCutcheon v. State, 49 Texas Crim. Rep. 607; 95 S. W. 525. Bush v. State, 52 Texas Crim. Rep. 398; 107 S. W. 348.

Where the violence used by the defendant was in self defense a conviction will not be permitted to stand. Pease v. State, 13 Texas Crim. App. 18. Priest v. State, 34 S. W. 611. Harrison v. State, 102 S. W. 412. Kelton v. State, 160 S. W. 343. Dunnaway v. State, 163 S. W. 426. Jeffers v. State, 173 S. W. 1038.

The fact that his assailant is a woman or a child does not deprive defendant of the right of self defense. Leonard v. State, 27 Texas Crim. App. 186; 11 S. W. 112. Latham v. State, 39 Texas Crim. Rep. 472; 46 S. W. 638. Kelton v. State, 160 S. W. 343.

An assault is an attempt to commit a battery. McKay v. State, 44 Texas 48. Bodeman v. State, 40 S. W. 981.

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Violence inflicted by accident without such a degree of carelessness or negligence on the part of defendant as rendered it criminal is not an assault and battery. Dickenson v. State, 24 Texas Crim. App. 121; 5 S. W. 648.

To constitute an assault it is sufficient that there be an act done indicating an intention to commit a battery immediately, coupled with the ability to do it. Higginbotham v. State, 23 Texas 575. Johnson v. State, 14 Texas Crim. App. 311. Yawn v. State, 37 Texas Crim. Rep. 205; 39 S. W. 105. Brister v. State, 40 Texas Crim. Rep. 505; 51 S. W. 393.

The rules as to provoking a difficulty apply to all grades of assault. Powell v. State, 32 Texas Crim. Rep. 230; 22 S. W. 677. Shaw v. State, 73 S. W. 1046.

The evidence is insufficient if the name of the assaulted party is not proven as alleged, either by proof that such party was commonly known or called by the name alleged, or that it was in fact the name of such party or of the same sound. Goode v. State, 2 Texas Crim. App. 520. Osborne v. State, 14 Texas Crim. App. 225.

Art. 1009. (588) **Intent presumed, and "injury" defined.**—When an injury is caused by violence to the person, the intent to injure is presumed, and it rests with the person inflicting the injury to show the accident or innocent intention. The injury intended may be either bodily pain, constraint, a sense of shame or other disagreeable emotion of the mind.

Sec. 1533. **Intent to injure.**—If no injury was inflicted, the intent to injure will not be presumed, but must be proven. Ware v. State, 24 Texas Crim. App. 521; 7 S. W. 240. Tubbs v. State, 50 Texas Crim. Rep. 143; 95 S. W. 112. Hubbard v. State, 56 Texas Crim. Rep. 274; 119 S. W. 846.

Though injury was inflicted, yet if the evidence repels the presumption of the intent to injure there is no assault. Rutherford v. State, 13 Texas Crim. App. 92. Dickenson v. State, 24 Texas Crim. App. 125; 5 S. W. 648. McConnell v. State, 25 Texas Crim. App. 329; 8 S. W. 275. Circle v. State, 22 S. W. 603. Jordan v. State, 84 S. W. 823.

Sec. 1534. **Intent to injure—Charge of the court.**—If injury was inflicted, and there is no evidence that it was accidental or unintentional, it is proper to charge the jury that the intent to injure is presumed and that the burden is on defendant to show the accident or innocent intention. Thompson v. State, 89 S. W. 1081.

The presumption of innocence is stronger than the presumption of injury, and when the defense is that the injury was accidentally inflicted, and there is evidence to support that defense, it is error to charge the jury that the burden is on defendant to show accident or innocent intention. Acrey v. State, 51 Texas Crim. Rep. 35; 100 S. W. 954. Atkinson v. State, 62 Texas Crim. Rep. 419; 138 S. W. 125.

If the violence inflicted was not *per se* unlawful, being such as defendant had the right to inflict, if moderately done, it is error to charge the jury that when violence is inflicted the intent to injure is presumed. Dowlen v. State, 14 Texas Crim. App. 65.

If no injury was inflicted, it is error to charge the jury that when injury is inflicted the intent to injure is presumed. Tubbs v. State, 50 Texas Crim. Rep. 143; 95 S. W. 112.

If there is evidence that the injury was inflicted by pure accident, defendant is entitled to an affirmative charge on this theory. Weaver v. State, 24 S. W. 648. Calhoun v. State, 71 S. W. 279. Menach v. State, 97 S. W. 503. Owens v. State, 62 Texas Crim. Rep. 129; 136 S. W. 1057. Carrel v. State, 178 S. W. 331.

The court is not required to charge on the theory that defendant did not intend to injure, or that he inflicted the injury by accident, when there is no testimony to support such theory. Jordan v. State, 146 S. W. 881. Yelton v. State, 170 S. W. 319.

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If the intent to injure is a vital issue in the case it is error to refuse to give instructions affirmatively submitting the defensive theory. Floyd v. State, 29 Texas Crim. App. 345; 15 S. W. 819. Stermer v. State, 45 Texas Crim. Rep. 183; 78 S. W. 1072. Lee v. State, 47 Texas Crim. Rep. 612; 85 S. W. 798. Atkinson v. State, 62 Texas Crim. Rep. 419; 138 S. W. 125. Perkins v. State, 62 Texas Crim. Rep. 508; 138 S. W. 133. Calliham v. State, 150 S. W. 617. Warner v. State, 167 S. W. 1109.

If no injury was inflicted, or if the injury was of slight character, or if the issue is raised that the injury was accidental or unintentional, it is error to refuse to charge the jury that they must find that defendant had the intent to injure. Brown v. State, 42 Texas Crim. Rep. 417; 60 S. W. 548. Lee v. State, 47 Texas Crim. Rep. 614; 85 S. W. 798. Atkinson v. State, 62 Texas Crim. Rep. 419; 138 S. W. 125. Perkins v. State, 62 Texas Crim. Rep. 508; 138 S. W. 133.

A charge does not assume the injury where the recital is that "where an injury is actually caused by violence to the person the intent to injure is presumed." Young v. State, 31 Texas Crim. Rep. 26; 19 S. W. 431. Hill v. State, 37 Texas Crim. Rep. 279; 38 S. W. 987. Stripling v. State, 47 Texas Crim. Rep. 119; 80 S. W. 376 (overruling on this point Floyd v. State, 29 Texas Crim. App. 345; 15 S. W. 819). Miller v. State, 150 S. W. 636.

Art. 1010. (589) **May be committed on person not intended.**—An assault, or an assault and battery, may be committed, though the person actually injured thereby was not the person intended to be injured.

Sec. 1535. **Assault on person not intended.**—If defendant in attempting to unlawfully inflict violence upon one person inflicts violence upon another person whom he did not intend to injure, he is as responsible for an assault, assault and battery, aggravated assault and battery, or for assault with intent to murder, upon the person actually injured, as he would have been had he succeeded in his original unlawful intention. Powell v. State, 32 Texas Crim. Rep. 230; 22 S. W. 677. Mathis v. State, 39 Texas Crim. Rep. 549; 47 S. W. 464. Smith v. State, 95 S. W. 1057. Moore v. State, 107 S. W. 834. Ward v. State, 63 Texas Crim. Rep. 198; 140 S. W. 1111. Vining v. State, 146 S. W. 909.

If defendant in attempting to inflict violence upon one person inflicts violence upon a person whom he did not intend to injure, he is guilty of no offense if he would have been excusable or justifiable in inflicting violence upon the person against whom his badly aimed efforts were directed. Plummer v. State, 4 Texas Crim. App. 310. Clark v. State, 19 Texas Crim. App. 495. Turner v. State, 35 Texas Crim. Rep. 369; 33 S. W. 972. Powell v. State, 70 S. W. 218. McCullough v. State, 62 Texas Crim. Rep. 126; 136 S. W. 1055. Vining v. State, 146 S. W. 909. Jackson v. State, 147 S. W. 589. Hobbs v. State, 151 S. W. 809.

Art. 1011. (590) **How it may be committed.**—An assault, or assault and battery, may be committed by the use of any part of the body of the person committing the offense, as of the hand, foot, head, or by the use of any inanimate object, as a stick, knife, or anything else capable of inflicting the slightest injury, or by the use of any animate object, as by throwing one person against another, or driving a horse or other animal against the person.

Art. 1012. (591) **Any means capable of injury sufficient.**—Any means used by the person assaulting, as by spitting in the face or otherwise, which is capable of inflicting an injury, comes within the definition of an assault, or an assault and battery, as the case may be.

Art. 1013. (592) **"Coupled with ability to commit" defined.**—By the terms "coupled with an ability to commit," as used in article 1008, is meant—

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1. That the person making the assault must be in such a position that, if not prevented, he may inflict a battery upon the person assailed.

2. That he must be within such distance of the person so assailed as to make it within his power to commit the battery by the use of the means with which he attempts it.

3. It follows, that one who is, at the time of making an attempt to commit a battery, under such restraint as to deprive him of the power to act, or who is at so great a distance from the person assailed as that he can not reach his person by the use of the means with which he makes the attempt, is not guilty of an assault. But the use of any dangerous weapon, or the semblance thereof, in an angry or threatening manner, with intent to alarm another, and under circumstances calculated to effect that object, comes within the meaning of an assault. (Amended in revising in 1879 by adding the last sentence of subdivision 3.)

Sec. 1536. **"Ability to commit a battery."**—The court need not define to the jury the term "ability to commit a battery" when the State's case shows both an assault and battery, and the defendant's case is that no such transaction occurred at all. Vivian v. State, 152 S. W. 895.

When the proof shows without controversy that a battery was made, it is not necessary to define the term "ability to commit a battery." There can be no question as to the "ability to commit a battery" when a battery was in fact committed.

The "ability to commit a battery" is not essential where the fact relied on is the use of a dangerous weapon, or the semblance thereof, with intent to alarm. Kief v. State, 10 Texas Crim. App. 286.

To constitute an assault the proof must show the ability to commit a battery by the use of the means attempted. Marthall v. State, 34 Texas Crim. Rep. 22; 36 S. W. 1062.

If there is evidence that the person upon whom the assault is alleged to have been made was beyond the reach of the means used, the court should give a charge defining the term "ability to commit a battery." Jarnigan v. State, 6 Texas Crim. App. 465. Boles v. State, 18 Texas Crim. App. 422. Piper v. State, 57 Texas Crim. Rep. 605; 124 S. W. 661.

If there is evidence that the person on whom it is alleged the assault was made was beyond the reach of the means used, the court should give a charge directly applying the law to the facts, and the refusal of such a charge is not cured by giving general definitions of the term "ability to commit a battery." Piper v. State, 57 Texas Crim. Rep. 608; 124 S. W. 661.

Proof of the intention to commit an assault cannot supply the failure to prove that defendant had the ability to commit it. Sloan v. State, 76 S. W. 922.

Sec. 1537. **Intent to alarm or scare.**—The use of any dangerous weapon, or the semblance thereof, in an angry or threatening manner, with intent to alarm another, and under circumstances calculated to effect that object, is an assault. Kief v. State, 10 Texas Crim. App. 286. King v. State, 61 Texas Crim. Rep. 427; 135 S. W. 136. Yelton v. State, 170 S. W. 319.

The theory of the use of a dangerous weapon or the semblance thereof should not be included in the charge of the court when there is no evidence of such an assault. Taylor v. State, 47 Texas Crim. Rep. 123; 80 S. W. 378. Menach v. State, 97 S. W. 503. Johnson v. State, 59 Texas Crim. Rep. 265; 128 S. W. 614.

If the indictment or information directly charges aggravated assault, it is error to authorize a conviction on the theory of the use of a dangerous weapon with

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intent to alarm when there is no allegation to support such theory. Smith v. State, 51 Texas Crim. Rep. 645; 104 S. W. 899.

When the indictment or information directly alleges aggravated assault with a deadly weapon, the court is authorized to charge on simple assault on the theory that the weapon was used to alarm. Smith v. State, 57 S. W. 949. Werner v. State, 68 S. W. 681. Smith v. State, 62 Texas Crim. Rep. 281; 136 S. W. 1063. Yelton v. State, 170 S. W. 318.

Defendant cannot be convicted of an assault on the theory of shooting to scare when the indictment alleges that the assault was made by shooting prosecutor with a pistol. Simpson v. State, 48 Texas Crim. Rep. 333; 87 S. W. 826.

If defendant unlawfully presents a dangerous weapon, or the semblance thereof, or unlawfully shoots the weapon, with intent only to alarm or scare, or otherwise unlawfully uses it in an angry or threatening manner, with intent to alarm another, and under circumstances calculated to effect that object, he is guilty of a simple assault. Bean v. State, 49 S. W. 394. Mozee v. State, 51 S. W. 251. Tollett v. State, 55 S. W. 335. Smith v. State, 57 S. W. 949. Catling v. State, 72 S. W. 853. Bouldin v. State, 74 S. W. 907. Wright v. State, 77 S. W. 809. Pastrana v. State, 48 Texas Crim. Rep. 224; 87 S. W. 347. Ivory v. State, 48 Texas Crim. Rep. 279; 87 S. W. 699. Reyes v. State, 48 Texas Crim. Rep. 346; 88 S. W. 245. Barnett v. State, 93 S. W. 722. McCutcheon v. State, 49 Texas Crim. Rep. 609; 95 S. W. 525. Haygood v. State, 51 Texas Crim. Rep. 618; 103 S. W. 890. Hall v. State, 105 S. W. 816. Drake v. State, 62 Texas Crim. Rep. 131; 136 S. W. 1064. Shuffield v. State, 62 Texas Crim. Rep. 556; 138 S. W. 402.

(Some of the earlier cases attempt to draw a distinction between a dangerous weapon used to alarm and a deadly weapon used to alarm, and some of them hold that it is aggravated assault to shoot to scare. Moore v. State, 33 Texas Crim. Rep. 311; 26 S. W. 403. Moore v. State, 33 Texas Crim. Rep. 351; 26 S. W. 404. Ulun v. State, 32 S. W. 699. Pearce v. State, 37 Texas Crim. Rep. 643; 40 S. W. 806. Vann v. State, 43 Texas Crim. Rep. 244; 64 S. W. 243. Angel v. State, 45 Texas Crim. Rep. 135; 74 S. W. 553. If the court had kept in mind the definition of the term "deadly weapon" there would have been no confusion on this point. When a pistol or gun, whether fired or presented or rudely displayed, is only used to alarm, it is not a "deadly weapon," because it is not then from the manner of its use "calculated or likely to produce death or serious bodily injury." A weapon used only with intent to alarm is not a "deadly weapon," and such an assault is only a simple assault, but such an assault may become aggravated, doubtless, when committed upon a female or child by an adult male.)

The use of the weapon used to alarm or scare must be **unlawful** before it constitutes an assault. White v. State, 29 Texas Crim. App. 530; 16 S. W. 340. Reddick v. State, 47 S. W. 995. Allen v. State, 68 S. W. 675. White v. State, 68 S. W. 689. Trimble v. State, 57 Texas Crim. Rep. 439; 125 S. W. 40.

If there is evidence that defendant shot only with intent to alarm or scare, he is entitled to an affirmative charge on this theory, although he also claims self defense. Stanton v. State, 29 S. W. 476. Mozee v. State, 51 S. W. 251. Smith v. State, 57 S. W. 949. Catling v. State, 72 S. W. 853. Bouldin v. State, 74 S. W. 907. Pastrana v. State, 48 Texas Crim. Rep. 224; 87 S. W. 347. Ivory v. State, 48 Texas Crim. Rep. 279; 87 S. W. 699. Reyes v. State, 48 Texas Crim. Rep. 346; 88 S. W. 245. Barnett v. State, 93 S. W. 722. Hall v. State, 105 S. W. 816. Thomas v. State, 60 Texas Crim. Rep. 84; 131 S. W. 314.

If there is evidence that would authorize the conviction of defendant for simple assault on the theory that he shot to alarm or scare, it is error to charge the jury to acquit him if they find he shot to scare. A jury is unwilling to acquit a person responsible in some degree. Pastrana v. State, 48 Texas Crim. Rep. 224; 87 S. W. 347.

It is error to authorize a conviction on the theory of a dangerous weapon used with intent to alarm where the testimony is that the alleged assaulted party had turned his back and was going away and did not see or know that defendant had drawn a weapon. Hunt v. State, 13 S. W. 858.

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Art. 1014. (593) **When violence does not amount to an assault.**—Violence used to the person does not amount to an assault or battery in the following cases:

1. In the exercise of the right of moderate restraint or correction given by law to the parent over the child, the guardian over the ward, the master over his apprentice, the teacher over the scholar.

2. For the preservation of order in a meeting for religious, political or other lawful purposes.

3. The preservation of the peace, or to prevent the commission of offenses.

4. In preventing or interrupting an intrusion upon the lawful possession of property.

5. In making a lawful arrest and detaining the party arrested, in obedience to the lawful order of a magistrate or court, and in overcoming resistance to such lawful order.

6. In self defense or in defense of another against unlawful violence offered to his person or property.

Sec. 1538. **Teacher and pupil.**—Under an indictment or information alleging an aggravated assault upon a child, a conviction may be had for simple assault. Ely v. State, 152 S. W. 631.

It is a presumption in favor of the teacher that in correcting the pupil he did so in the exercise and within the bounds of lawful authority. Dowlen v. State, 14 Texas Crim. App. 65. Metcalf v. State, 21 Texas Crim. App. 174; 17 S. W. 142. Stephens v. State, 44 Texas Crim. Rep. 67; 68 S. W. 281. Ely v. State, 152 S. W. 631.

Whether the whipping of the scholar by the teacher was moderate or excessive is a question of fact for the jury. Dowlen v. State, 14 Texas Crim. App. 66. Howerton v. State, 43 S. W. 1018.

Proof of the opinion of a witness that the whipping was moderate or excessive is not admissible. An opinion is not admissible when it embraces the whole merits of a controversy. Smith v. State, 20 S. W. 360. Howerton v. State, 43 S. W. 1018. Funderbunk v. State, 64 S. W. 1061.

A teacher is guilty of an assault on his scholar where he exceeds his authority and administers an excessive whipping. Bell v. State, 18 Texas Crim. App. 53. Spear v. State, 25 S. W. 125. Whitley v. State, 33 Texas Crim. Rep. 172; 25 S. W. 1072. Howerton v. State, 43 S. W. 1018.

Even if severe injury was inflicted on the pupil, yet if the whipping was with no intent to injure and for correction, the teacher would not be guilty of an assault. Stephens v. State, 44 Texas Crim. Rep. 67; 68 S. W. 281. Greer v. State, 106 S. W. 360. Ely v. State, 152 S. W. 631.

The teacher may inflict moderate punishment upon the scholar for an infraction of school rules which was committed away from school and not during school hours. Bolding v. State, 23 Texas Crim. App. 175; 4 S. W. 579. Hutton v. State, 23 Texas Crim. App. 387; 5 S. W. 122.

Defendant is entitled to an affirmative charge on his right to correct the scholar for refusal to comply with reasonable rules of the school. Thomason v. State, 43 S. W. 1013. Greer v. State, 106 S. W. 360.

Proof of the severity of the whipping and of the injuries inflicted by the teacher upon the scholar is admissible. Kinnard v. State, 35 Texas Crim. Rep. 278; 33 S. W. 234.

Proof of complaints as to the nature or effect of injuries made too long after the infliction thereof is not admissible. Dowlen v. State, 14 Texas Crim. App. 64.

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The teacher is entitled to testify as to his intent and purpose in inflicting the punishment upon the scholar. Kinnard v. State, 35 Texas Crim. Rep. 276; 33 S. W. 234.

Defendant is not entitled to prove his self serving declarations made after the alleged assault under such circumstances as not to be a part of the *res gestæ*, and when such declarations were not part of a conversation put in evidence by the State. Kinnard v. State, 35 Texas Crim. Rep. 278; 33 S. W. 234.

An unnecessary allegation of the means used does not vitiate the indictment or information, but its effect is to confine the State to proof of the means so alleged. Kinnard v. State, 35 Texas Crim. Rep. 278; 33 S. W. 234.

The teacher having the right to correct the scholar, when moderately done, the presumption is that such violence was not with intent to injure, and in such a case it is error to charge the jury that when an injury is inflicted it devolves upon the defendant to show accident or innocent intention. Dowlen v. State, 14 Texas Crim. Rep. 61.

Art. 1015. (594) **Degree of force permissible.**—In all the cases mentioned in the preceding article, where violence is permitted to effect a lawful purpose, only that degree of force must be used which is necessary to effect such purpose.

Sec. 1539. **Excessive force.**—It is error to charge the jury upon the issue of excessive force when the testimony does not authorize the submission of such issue. Harmon v. State, 84 S. W. 831. Harrison v. State, 48 Texas Crim. Rep. 44; 85 S. W. 1058. Marsden v. State, 53 Texas Crim. Rep. 458; 110 S. W. 897. Aycock v. State, 55 Texas Crim. Rep. 142; 115 S. W. 591. Parish v. State, 153 S. W. 327. Corley v. State, 155 S. W. 227. Russell v. State, 158 S. W. 546. Shoemaker v. State, 160 S. W. 356. Fisher v. State, 168 S. W. 528.

Defendant has a right to use reasonable force in defense of his property, being responsible only for excessive force. Souther v. State, 18 Texas Crim. App. 352. Vann v. State, 43 Texas Crim. Rep. 244; 64 S. W. 243.

If an officer in making an arrest uses excessive force he is guilty of an assault. Skidmore v. State, 43 Texas 93. Skidmore v. State, 2 Texas Crim. App. 20. Pilcher v. State, 32 Texas Crim. Rep. 557; 25 S. W. 24.

Art. 1016. (595) **Verbal provocation no justification.**—No verbal provocation justifies an assault and battery, but insulting and abusive words may be given in mitigation of the punishment affixed to the offense.

Sec. 1540. **Verbal provocation.**—A verbal provocation does not justify an assault and battery, but proof of such provocation may be made in mitigation of punishment. Such a provocation will not reduce an aggravated assault to a simple assault. Welburn v. State, 24 S. W. 651. Timon v. State, 34 Texas Crim. Rep. 363; 30 S. W. 808.

Art. 1017. (596) **"Battery," how used.**—The word "battery" is used in this Code in the same sense as "assault and battery."

Art. 1018. (597) **Degrees of assault.**—An assault is either a simple assault, an aggravated assault, or an assault with intent to commit some other offense.

Art. 1019. (598) **Punishment for simple assault.**—The punishment for a simple assault, or for assault and battery, unattended with circumstances of aggravation, shall be a fine of not less than five nor more than twenty-five dollars.

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Sec. 1541. **USING ABUSIVE LANGUAGE.**

Art. 1020. (599) **Abusive language an offense.**—If any person shall, in the presence or hearing of another, curse or abuse such person, or use any violently abusive language to such person concerning him or any of his female relatives, under circumstances reasonably calculated to provoke a breach of the peace, he shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined in a sum not less than five nor more than one hundred dollars. (Act of March 8, 1887, Acts of 1887, p. 13.)

Sec. 1542. **Using abusive language—Form for complaint.**

In the name and by the authority of the State of Texas:

Before me the undersigned authority on this day personally appeared..... who being by me duly sworn, deposes and says that John Doe heretofore on the .....day of.....A. D.....in the county of.....and State of Texas did in the presence and hearing of ..... curse and abuse the said .....and did then and there use violently abusive language to said..... concerning him (or "her") under circumstances reasonably calculated to provoke a breach of the peace.

Against the peace and dignity of the State.

.....(affiant).

Subscribed and sworn to before me this the.....day of.....A. D.....

.....

J. P. Prec. No....., ...county, Texas.

Sec. 1543. **Using abusive language—Allegation of.**—An indictment, information, or complaint for using abusive language need not set out the language used. Foreman v. State, 31 Texas Crim. Rep. 477; 20 S. W. 1109 (overruling Elkins v. State, 26 Texas Crim. App. 220; 9 S. W. 491). Bryson v. State, 39 S. W. 365. Trezevant v. State, 47 Texas Crim. Rep. 502; 84 S. W. 828.

The use of the words "in a manner" instead of the words "reasonably calculated" will not vitiate the pleading. Trezevant v. State, 47 Texas Crim. Rep. 502; 84 S. W. 828.

If the language is set out and it could only apply to the person to whom it was addressed as alleged, the information is not bad for failing to allege in terms that it was used "concerning him." Menasco v. State, 32 Texas Crim. Rep. 582; 25 S. W. 422.

A complaint for using abusive language is bad if there is no allegation that it was used in the presence or hearing of the injured party. Elkins v. State, 26 Texas Crim. App. 220; 9 S. W. 491.

Sec. 1544. **Evidence.**—Using abusive language is not a recognized legal method of protecting or defending property. Deaton v. State, 53 Texas Crim. Rep. 393; 110 S. W. 69.

The fact that the other party cursed defendant first is no defense, but proof of that fact may be made in mitigation of punishment. Christmas v. State, 44 S. W. 175. Watkins v. State, 44 S. W. 507. Easter v. State, 160 S. W. 74.

The statute is violated if the abusive language was used either in the presence or hearing of the party abused. Christmas v. State, 44 S. W. 175. Watkins v. State, 44 S. W. 507. Wilborne v. State, 66 S. W. 559.

The evidence should be restricted to the issues made by the allegations of the complaint. Vanhouser v. State, 52 Texas Crim. Rep. 602; 108 S. W. 387.

It is no defense to a prosecution for using abusive language that the defendant was in his own house when he used the abusive language. Baumgarner v. State, 142 S. W. 4.

A conviction was sustained where the proof showed that defendant called prosecutor a "God damned liar." Johnson v. State, 66 S. W. 1097.

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Where defendant testifies that he did not curse and had never cursed in his life, it may be shown that he used profane language on other occasions than the one charged. Lampkin v. State, 47 Texas Crim. Rep. 625; 85 S. W. 803.

To disqualify a proposed witness for defendant it must be shown not only that the witness was charged with the same offense, but that it was the same transaction. Secker v. State, 28 Texas Crim. App. 479; 13 S. W. 774.

Sec. 1545. **Charge of the court.**—The charge of the court should not be broader than the allegations, but if in applying the law to the facts, the charge conforms to the allegations, a broader abstract definition is not reversibly erroneous. Baumgarner v. State, 142 S. W. 4.

It is proper to charge that abusive language used toward defendant would not justify defendant in cursing another, but that such language could be considered in mitigation of the penalty should he be found guilty. Christmas v. State, 44 S. W. 175. Watkins v. State, 44 S. W. 507.

An exception to the charge of the court must, to be sufficient, specifically point out the supposed error. A general exception is not sufficient. Baumgarner v. State, 142 S. W. 4.

Sec. 1546. **Verdict.**—The verdict need not state which phase of the statute the jury found defendant guilty of. A general verdict is sufficient. Wilborne v. State, 66 S. W. 559.

Sec. 1547. **INTIMIDATION.**

Art. 1021. (600) **Intimidation of another.**—Any person who shall, by threatening words, or by acts of violence or intimidation, prevent or attempt to prevent another from engaging or remaining in or from performing the duties of any lawful employment, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by fine of not less than twenty-five nor more than five hundred dollars, or by confinement not less than one nor more than six months in the county jail. (Act of March 8, 1887, Acts of 1887, p. 13.)

Sec. 1548. **Intimidation—Form for information.**

In the name and by authority of the State of Texas:

..... County Attorney of ..... county, Texas, comes in behalf of the State of Texas and presents in and to the County Court of ..... county, Texas, at the ..... term, A. D. ..... of said court that John Doe heretofore on the ..... day of ..... A. D. ..... in said county and State, did by threatening words and by acts of violence and by intimidation attempt to prevent and did then and there prevent ..... from engaging in and remaining in and from performing the duties of a lawful employment, to wit, the employment of cultivating a cotton crop (or whatever the lawful employment was, stating it), the said ..... being then and there about to engage in and remain in and perform the duties of said lawful employment on said cotton crop there situate.

Against the peace and dignity of the State.

.....

County Attorney ..... county, Texas.

Sec. 1549. **Intimidation—Indictment or information.**—An indictment or information for intimidation need not set forth the words constituting the threat nor specify the particular acts of violence or intimidation. It is sufficient to charge, following the language of the statute, that defendant "did by threatening words and by acts of violence and by intimidation attempt to prevent and did prevent," etc. Diggs v. State, 64 Texas Crim. Rep. 122; 141 S. W. 101.

An indictment or information for intimidation is bad if it fails to allege the nature of the lawful employment in which the person intimidated was engaged. Luter v. State, 32 Texas Crim. Rep. 69; 22 S. W. 140.

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Sec. 1550. **Intimidation—Statute construed.**—In order to constitute the offense of intimidation the employment interfered with must be a lawful employment. Luter v. State, 32 Texas Crim. Rep. 69; 22 S. W. 140.

The statute is broad enough to prevent unlawful interference with the duties of any lawful employment whether the party interfered with be an employee or working for himself. Nelson v. State, 57 S. W. 645.

The statute was enacted as a means of preventing persons from interfering with others who are performing labor or engaging in some lawful business by means of which they were earning a support and maintenance. Franklin v. State, 61 Texas Crim. Rep. 235; 134 S. W. 702.

Where prosecutor took up some mules that were depredating upon his crop, and claimed damages, and defendant went and took the mules away over the protest of prosecutor and by threats of violence, it did not constitute the offense of intimidation. Franklin v. State, 61 Texas Crim. Rep. 235; 134 S. W. 702.

Where prosecutor was employed to keep a pasture gate closed, the failure of defendant to close the gate after he had passed through it does not constitute the offense of intimidation. Luter v. State, 32 Texas Crim. Rep. 69; 23 S. W. 140.

Where defendant and another were the owners of adjacent tracts of land and there was a dispute as to the division fence between the two tracts, and defendant refused to permit the other to move and reset a fence until the division line had been surveyed and established, and the testimony brought the title of prosecutor into doubt, the controversy should be settled in a civil suit. Boyd v. State, 28 Texas Crim. App. 524; 13 S. W. 864.

Sec. 1551. **Intimidation—Charge of court.**—The court is not called on to give requested charges which find no support in the testimony. Diggs v. State, 64 Texas Crim. Rep. 122; 141 S. W. 100.

CHAPTER II

AGGRAVATED ASSAULT AND BATTERY

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Art. 1022. (601) **Definition.**—An assault or battery becomes aggravated when committed under any of the following circumstances:

1. When committed upon an officer in the lawful discharge of the duties of his office, if it was known or declared to the offender that the person assaulted was an officer discharging an official duty.

Sec. 1552. **Assault upon an officer—Form of information.**

In the name and by the authority of the State of Texas:

..... County attorney of ..... county, Texas, comes in behalf of the State of Texas and presents in and to the County Court of ..... county, Texas, at the ..... term, A. D. ..... of said court that John Doe heretofore on the ..... day of ..... A. D. ..... in said county and State, did in and upon ..... make an aggravated assault, the said ..... being then and there an officer, to wit, a policeman of an incorporated city there situate, to wit, Brownsville (or "Beaumont" or whatever city it is, or "the sheriff of said county" or whatever office it was), the said officer being then and there in the

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lawful discharge of the duties of his office as such officer, which fact was then and there well known to the said John Doe (or "and it was then and there before said assault was committed declared to the said John Doe that the said officer was an officer discharging an official duty," or both allegations may be made in the same count conjunctively, and proof of either will be sufficient.)

Against the peace and dignity of the State.

.....

County Attorney ..... county, Texas.

Sec. 1553. **Indictment or information.**—If aggravated assault be directly charged, it must be alleged that the person assaulted was an officer in the lawful discharge of the duties of his office, and that defendant knew, or that it was declared to him that such person was an officer discharging an official duty. Johnson v. State, 26 Texas 117. State v. Coffey, 41 Texas 46. Bristow v. State, 36 Texas Crim. Rep. 379; 37 S. W. 326. Jeanes v. State, 60 Texas Crim. Rep. 440; 132 S. W. 353.

Under an ordinary indictment for assault to murder defendant may be convicted of an aggravated assault upon an officer in the lawful discharge of the duties of his office, and under such an indictment it may be proven that the person assaulted was an officer, although there is no allegation that he was an officer. Hodges v. State, 6 Texas Crim. App. 621. Lyons v. State, 9 Texas Crim. App. 636. Lacoume v. State, 143 S. W. 627.

An indictment or information for an aggravated assault upon an officer in the lawful discharge of the duties of his office will support a conviction for either aggravated or simple assault. Jay v. State, 41 Texas Crim. Rep. 451; 55 S. W. 335. Baker v. State, 53 Texas Crim. Rep. 14; 108 S. W. 665.

Sec. 1554. **Evidence.**—Proof of the official character of an officer may be made by oral testimony. Hardin v. State, 40 Texas Crim. Rep. 217; 49 S. W. 607.

The statute protects *de facto* officers. Brown v. State, 42 Texas Crim. Rep. 417; 60 S. W. 548.

When defendant is directly charged with aggravated assault, the proof to be sufficient to support a conviction for aggravated assault, must show that the officer was at the time of the assault in the lawful discharge of the duties of his office, if that is the only ground of aggravation alleged. Jeanes v. State, 60 Texas Crim. Rep. 440; 132 S. W. 353. Nickerson v. State, 154 S. W. 993.

The word "officer" when not specially defined is to be taken and construed in the sense in which it is understood in common language, taking into consideration the context and subject matter relative to which it is employed. Sanner v. State, 2 Texas Crim. App. 458.

A policeman of an incorporated city or town is an officer. Sanner v. State, 2 Texas Crim. App. 458. Hull v. State, 50 Texas Crim. Rep. 607; 100 S. W. 405. Lacoume v. State, 143 S. W. 627.

Defendant has a right to relieve himself of the restraint if the arrest was illegal. Franklin v. State, 27 Texas Crim. App. 136; 11 S. W. 35. Massie v. State, 27 Texas Crim. App. 617; 11 S. W. 638. Williams v. State, 64 Texas Crim. Rep. 491; 142 S. W. 899.

A person, even though illegally arrested, has no right to maliciously or wantonly assault an officer when the force is not used for the purpose of effecting his release from such arrest. Nickerson v. State, 154 S. W. 992.

The fact that the defendant was an officer is no defense to an unprovoked and wanton assault. Skidmore v. State, 43 Texas 93. Skidmore v. State, 2 Texas Crim. App. 20. Beaverts v. State, 4 Texas Crim. App. 175. Pilcher v. State, 32 Texas Crim. Rep. 557; 25 S. W. 24.

Sec. 1555. **Assault on officer—Charge of court.**—If the proof shows without controversy that the person assaulted was a de facto officer, that fact may be assumed in the charge of the court. Brown v. State, 42 Texas Crim. Rep. 417; 60 S. W. 548.

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Where the violence used was of a slight character, or there is any suggestion that it was unintentional or accidental, the court should give the jury a charge to the effect that such violence must be with intent to injure. Brown v. State, 42 Texas Crim. Rep. 419; 60 S. W. 548.

2. When committed in a court of justice, or in any place of religious worship, or in any place where persons are assembled for the purpose of innocent amusement.

Sec. 1556. **Assault in a court of justice—Form for information.**
In the name and by the authority of the State of Texas:

.....County Attorney of ....., ... county, Texas, comes in behalf of the State of Texas, and presents in and to the County Court of ..... county, Texas, at the ..... term, A. D. ..... of said court that John Doe heretofore on the ..... day of ..... A. D. ..... in said county and State did, in a court of justice there situate, to wit, the justice court of precinct number ..... of said county (or "the District Court of said county," or other court, naming it) then and there in session, in and upon ..... make an aggravated assault.

Against the peace and dignity of the State.

.....
County Attorney ..... county, Texas.

(State v. Hunter, 44 Texas 94. Milstead v. State, 19 Texas Crim. App. 491.)

Sec. 1557. **Indictment or information.**—It is not necessary to allege that the court was lawfully in session, or to specify what court it was in which the assault was made, or that it was a court of any particular grade. State v. Murrah, 25 Texas 759. Milstead v. State, 19 Texas Crim. App. 491.

It is not necessary to allege in terms that the assault was "unlawful," nor that it was made with "intent to injure." Milstead v. State, 19 Texas Crim. App. 491.

An indictment charging an aggravated assault committed in a court of justice will support a conviction for either aggravated or simple assault. Milstead v. State, 19 Texas Crim. App. 490.

Sec. 1558. **Assault in a place of religious worship—Form for information.**
In the name and by the authority of the State of Texas:

..... County Attorney of ..... county, Texas, comes in behalf of the State of Texas and presents in and to the County Court of ..... county, Texas, at the ..... term, A. D. ..... of said court that John Doe heretofore on the ..... day of ..... A. D. ..... in said county and State, did, in a place of religious worship there situate, to-wit, Oak Grove Church (or "Moss Bluff School House" or whatever place it was), a place where persons were then and there assembled for the purpose of religious worship, in and upon ..... make an aggravated assault.

Against the peace and dignity of the State.

.....
County Attorney ..... county, Texas.

Sec. 1559. **Assault in a place of religious worship.**—An indictment is not bad because the allegation is that the assault was made "at" instead of "in" a place of religious worship. Blackwell v. State, 30 Texas Crim. App. 418; 17 S. W. 1061.

The term "in a place of religious worship" includes and protects the congregation while assembling, while assembled, and while dispersing. Pollock v. State, 60 Texas Crim. Rep. 265; 131 S. W. 1094.

An arbor outside of the house, used in connection with and as a part of the house, and which was used in cases of emergency and which was used at the time the assault was made for holding religious services, is a part of the house, and the assault may be alleged to have been made in the house. Blackwell v. State, 30 Texas Crim. App. 418; 17 S. W. 1061.

3. When the person committing the offense goes into the house of a private family and is there guilty of an assault and battery.

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Sec. 1560. **Form for information.**
In the name and by the authority of the State of Texas:

..... County Attorney of ..... county, Texas, comes in behalf of the State of Texas and presents in and to the County Court of ..... county, Texas, at the ..... term, A. D. ..... of said court that John Doe heretofore on the ..... day of ..... A. D. ..... in said county and State did go into the house of a private family, to wit, the house of ..... and his family, then and there occupied by said ..... and his family, and did then and there while in said house of said private family in and upon ....., a person then and there in said house, make an aggravated assault and battery, and did then and there strike said ..... with his fist (or "with a pistol" or whatever way the battery was committed).

Against the peace and dignity of the State.

.....
County Attorney ..... county, Texas.

Sec. 1561. **Indictment or information for assault and battery in a private house.**—The failure to allege that defendant did go into the house of a private family will render an indictment or information defective for aggravated assault and battery. State v. Cass, 41 Texas 552.

An allegation that defendant did go into a "residence" is not equivalent to an allegation that he did go into the house of a private family. State v. Cass, 41 Texas 552.

To constitute the offense of aggravated assault and battery by going into the house of a private family and there making an assault and battery, defendant must have gone "into" the house and a battery as well as an assault must be made, and the indictment or information must so allege to be good for aggravated assault and battery. Pederson v. State, 21 Texas Crim. App. 485; 1 S. W. 521.

An allegation that the assault was committed "at" the house is not equivalent to an allegation that an assault and battery was committed "in" the house. Pederson v. State, 21 Texas Crim. App. 485; 1 S. W. 521.

An indictment or information for an aggravated assault and battery committed by going into the house of a private family and there making an assault and battery will support a conviction for either an aggravated assault and battery or a simple assault. Garrett v. State, 61 Texas Crim. Rep. 514; 135 S. W. 532.

Sec. 1562. **Assault in house of a private family.**—An assault and battery becomes aggravated when the person committing the offense goes into the house of a private family and is there guilty of an assault and battery. State v. Cass, 41 Texas 552. Pederson v. State, 21 Texas Crim. App. 485; 1 S. W. 521. Herd v. State, 50 Texas Crim. Rep. 600; 99 S. W. 1119. Ward v. State, 151 S. W. 1073.

The term "house of a private family" means the entire house and includes the gallery of the house. Herd v. State, 50 Texas Crim. Rep. 600; 99 S. W. 1119.

The subdivision of the statute causing an assault and battery to become aggravated when made in the house of a private family is not intended to make an assault and battery become aggravated when committed by a person in his own house. The object of the statute is to protect private families from intrusion into their homes and from assaults and batteries made therein by persons who are not members of the family and who have no legal right to be upon the premises without the consent of the family. Hall v. State, 16 Texas Crim. App. 12.

4. When committed by a person of robust health or strength upon one who is aged or decrepit.

Sec. 1563. **Assault on aged or decrepit person—Form for information.**
In the name and by the authority of the State of Texas:

.....County Attorney of ..... county, Texas, comes in behalf of the State of Texas and presents in and to the County Court of ..... county, Texas, at the ..... term, A. D. ..... of said court that John Doe heretofore on the ..... day of ..... A. D. ..... in said county and State did in and

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upon ..... make an aggravated assault, the said John Doe being then and there a person of robust health and strength, and the said ..... being then and there an aged (or "a decrepit") person.

Against the peace and dignity of the State.

.....
County Attorney ..... county, Texas.

Sec. 1564. **"Aged" defined.**—The term "aged" is used in its ordinary sense, it not being specially defined by statute, and means a person past the alloted time of seventy years of age. Hall v. State, 16 Texas Crim. App. 11. Black v. State, 67 S. W. 113. Little v. State, 61 Texas Crim. Rep. 197; 135 S. W. 119.

Sec. 1565. **"Decrepit" defined.**—The term "decrepit" is used in its ordinary sense, it not being specially defined by statute, and a decrepit person is one who is disabled, incapable or incompetent, from either physical or mental weakness or defects whether produced by age or other causes, to such an extent as to render such person comparatively helpless in a personal conflict with a person of robust health or strength. Bowden v. State, 2 Texas Crim. App. 56. Hall v. State, 16 Texas Crim. App. 6. Powell v. State, 32 Texas Crim. Rep. 230; 22 S. W. 677. Davis v. State, 58 Texas Crim. Rep. 461; 126 S. W. 863. Little v. State, 61 Texas Crim. Rep. 197; 135 S. W. 119.

Sec. 1566. **Assault upon aged or decrepit person.**—If the indictment or information directly charges aggravated assault, it is error to authorize a conviction upon the theory that the injured party was aged or decrepit if there is no allegation to support the charge. Ferguson v. State, 4 Texas Crim. App. 156. Clubb v. State, 14 Texas Crim. App. 192.

5. When committed by an adult male upon the person of a female or child, or by an adult female upon the person of a child.

Sec. 1567. **Assault by adult male upon a female or child—Form for information.**

In the name and by the authority of the State of Texas:

..... County Attorney of ..... county, Texas, comes in behalf of the State of Texas and presents in and to the County Court of ..... county, Texas, at the ..... term, A. D. ..... of said court that John Doe heretofore on the ..... day of ..... A. D. ..... in said county and State did in and upon ..... make an aggravated assault, the said John Doe being then and there an adult male and the said ..... being then and there a female (or "child").

Against the peace and dignity of the State.

.....
County Attorney ..... county, Texas.

Sec. 1568. **Adult male—Indictment or information.**—If the only ground of aggravation sought to be alleged is that defendant was an adult male, and the word "adult" is omitted and the age of defendant not alleged, the indictment or information does not allege an aggravated assault. Blackburn v. State, 39 Texas 154. Griffin v. State, 12 Texas Crim. App. 423. Lawson v. State, 13 Texas Crim. App. 84. Schrader v. State. 17 S. W. 1101. Price v. State, 35 Texas Crim. Rep. 501; 34 S. W. 622.

Under an indictment for murder, assault to murder, rape, or assault to rape, the defendant may be convicted as an adult male for aggravated assault although there is no direct allegation that he was an adult male. Bittick v. State, 40 Texas 120. Davis v. State, 20 Texas Crim. App. 302. Kearse v. State, 88 S. W. 364. Lofton v. State, 59 Texas Crim. Rep. 270; 128 S. W. 384.

An indictment or information for aggravated assault need not allege the means used if it is alleged that the defendant was an adult male and that the injured party was a female. Collins v. State, 5 Texas Crim. App. 38. Duke v. State, 35 Texas Crim. Rep. 283; 33 S. W. 349. Webb v. State, 68 S. W. 276. Stokes v. State, 46 Texas Crim. Rep. 357; 81 S. W. 1213. Stripling v. State, 47 Texas Crim. Rep. 117; 80 S. W. 376. Wilson v. State, 160 S. W. 454.

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If it is alleged that defendant was an adult male and that the injured party was a female, an unnecessary allegation of the means used will not vitiate the pleading, but the allegation of means, being descriptive, cannot be rejected as surplusage, but must be proved as alleged. Kinnard v. State, 35 Texas Crim. Rep. 276; 33 S. W. 234. Webb v. State, 36 Texas Crim. Rep. 40; 35 S. W. 380.

If it is alleged that the defendant was an adult male and that the injured party was a female, the means used in committing the assault may be proven under such allegation. Collins v. State, 5 Texas Crim. App. 38. Duke v. State, 35 Texas Crim. Rep. 283; 33 S. W. 349.

An indictment for aggravated assault upon a female need not allege the age of the female. Hill v. State, 37 Texas Crim. Rep. 279; 39 S. W. 666. Rogers v. State, 40 Texas Crim. Rep. 355; 50 S. W. 338.

An indictment for aggravated assault need not allege in terms an intent to injure. Saye v. State, 54 Texas Crim. Rep. 430; 114 S. W. 804.

In alleging the name of the female assaulted, the name she was known by at the time the assault was made should be alleged, although she may have married afterwards. Rutherford v. State, 13 Texas Crim. App. 92. Cain v. State, 153 S. W. 154.

An indictment or information charging an aggravated assault by an adult male upon a female or child will support a conviction for simple assault. A defendant has no right to complain that a lesser grade of an offense is found than that charged or proven. Foster v. State, 25 Texas Crim. App. 543, 8 S. W. 664. Davis v. State, 42 S. W. 290. Ross v. State, 45 S. W. 808. Singleton v. State, 40 Texas Crim. Rep. 455; 50 S. W. 951.

Sec. 1569. **"Adult male" defined.**—An "adult male" is a male person of the age of twenty-one years or over. Schenault v. State, 10 Texas Crim. App. 410. George v. State, 11 Texas Crim. App. 95. Hall v. State, 16 Texas Crim. App. 6. Gilbraith v. State, 13 S. W. 607. Ellers v. State, 55 S. W. 813. Hartsell v. State, 55 Texas Crim. Rep. 389; 116 S. W. 1159. White v. State, 151 S. W. 826.

Sec. 1570. **Adult male—Proof of.**—If the ground of aggravation relied on is that defendant was an adult male, the proof is insufficient to support a conviction for aggravated assault if it fails to show that defendant was a male person of full age, twenty-one years or over, at the time the assault was made. Schenault v. State, 10 Texas Crim. App. 410. Andrews v. State, 13 Texas Crim. App. 343. Robinson v. State, 25 Texas Crim. App. 111; 7 S. W. 531. Kemp v. State, 25 Texas Crim. App. 589; 8 S. W. 804. Ellers v. State, 55 S. W. 813. Davis v. State, 76 S. W. 466. Smith v. State, 51 Texas Crim. Rep. 645; 104 S. W. 899. Hartsell v. State, 55 Texas Crim. Rep. 389; 116 S. W. 1159. White v. State, 151 S. W. 826.

On appeal if the age of defendant is not shown and it is not stated in terms that he was an adult male when the assault was made, the judgment will not be reversed for want of evidence that he was an adult male if he is so spoken of or described by the witnesses as makes it clearly apparent that he was an adult male. Tracy v. State, 44 Texas 10. Veal v. State, 8 Texas Crim. App. 477. Henkel v. State, 27 Texas Crim. App. 512; 11 S. W. 671. Holliday v. State, 35 Texas Crim. Rep. 134; 32 S. W. 538. Tucker v. State, 43 S. W. 106. Stone v. State, 57 Texas Crim. Rep. 321; 123 S. W. 582. Johnson v. State, 59 Texas Crim. Rep. 263; 128 S. W. 614. Robinson v. State, 145 S. W. 345.

Sec. 1571. **Female—Proof of.**—On appeal if it is not stated in terms that the injured party was a female, the judgment will not be reversed for want of evidence of that fact if the injured party is so spoken of or described by the witnesses as makes it clearly apparent that such party was a female. Tracy v. State, 44 Texas 10. Veal v. State, 8 Texas Crim. App. 477. Pilcher v. State, 32 Texas Crim. Rep. 557; 25 S. W. 24. Slawson v. State, 39 Texas Crim. Rep. 176; 45 S. W. 575. Johnson v. State, 59 Texas Crim. Rep. 263; 128 S. W. 614. Robinson v. State, 145 S. W. 345.

A female making a simple assault upon another female is not liable for the independent act of an adult male in joining in, but she may be liable as a principal by acting with him. Kemp v. State, 25 Texas Crim. App. 589; 8 S. W. 804.

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Sec. 1572. **Adult male—Charge of court.**—If the proof shows without controversy that defendant was an adult male when the assault was made, the charge is not erroneous in assuming that such was the fact. Davis v. State, 6 Texas Crim. App. 133. Holliday v. State, 35 Texas Crim. Rep. 135; 32 S. W. 531. Robinson v. State, 145 S. W. 345.

If aggravated assault is directly alleged, it is error to authorize a conviction on the theory that defendant was an adult male if there is no allegation to support the charge. Gorman v. State, 42 Texas 223.

If there is no evidence that defendant had passed his minority at the time the assault was made, it is error to charge on aggravated assault if the only theory of aggravated assault is an assault committed by an adult male. George v. State, 11 Texas Crim. App. 95. Porter v. State, 33 Texas Crim. Rep. 385; 26 S. W. 626. Ellers v. State, 55 S. W. 813.

Sec. 1573. **"Child" defined.**—The term "child," not being specially defined is used in its ordinary sense. The term "child" is not synonymous with the term "minor," the age of fourteen in boys and the age of twelve years in girls limits the age of childhood. McGregor v. State, 4 Texas Crim. App. 599. Allen v. State, 7 Texas Crim. App. 298. Bell v. State, 18 Texas Crim. App. 53. Thompson v. State, 46 Texas Crim. Rep. 412; 80 S. W. 623. Wilman v. State, 63 Texas Crim. Rep. 623; 141 S. W. 110.

On appeal if there is no evidence in terms that the injured party was a child, but he is spoken of by the witnesses as "a boy," it is sufficient to show, in the absence of other evidence, that he was a child. Bell v. State, 18 Texas Crim. App. 56.

The term "child" does not include a servant. Davis v. State, 6 Texas Crim. App. 141.

Sec. 1574. **Assault upon a child.**—Correction by the parent of his child is not a violation of the law if moderately done. Goode v. State, 77 S. W. 799.

Whether the punishment of the child was moderate or excessive is a question of fact for the jury. Stanfield v. State, 43 Texas 167. Earnest v. State, 152 S. W. 638.

The right of moderate restraint or correction given by law to the parent over the child extends to one who stands in the place of the parent. Gorman v. State, 42 Texas 222. Snowden v. State, 12 Texas Crim. App. 105. Turner v. State, 35 Texas Crim. Rep. 369; 33 S. W. 972. Wilman v. State, 63 Texas Crim. Rep. 623; 141 S. W. 110.

Defendant may testify as to his object and purpose in striking the child, the intent to injure being the essence of the offense. Berry v. State, 30 Texas Crim. App. 424; 17 S. W. 1080.

Proof of complaints as to the nature or effect of injuries is not admissible when made by the child too long after the alleged assault to be admissible as *res gestæ*. Dowlen v. State, 14 Texas Crim. App. 66.

Sec. 1575. **Indecent familiarity—Indictment.**—To draw a good indictment or information for aggravated assault where the State relies on proof of indecent familiarity with a female, the pleader should charge some statutory ground of aggravation, either an assault by an adult male upon a female or that means such as inflicts disgrace were used, or a conviction may be had for aggravated assault committed by indecent familiarity under an indictment charging some felony which includes all phases of aggravated assault. Pefferling v. State, 40 Texas 492. Ridout v. State, 6 Texas Crim. App. 249. Henkel v. State, 27 Texas Crim. App. 510; 11 S. W. 671. Robertson v. State, 30 Texas Crim. App. 498; 17 S. W. 1068. Price v. State, 35 Texas Crim. Rep. 504; 34 S. W. 622. Slawson v. State, 39 Texas Crim. Rep. 176; 45 S. W. 575.

An indictment or information directly charging aggravated assault upon a female need not allege the age of the female, and under such pleading proof of her

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age may be made as part of the circumstances of the transaction. Hill v. State, 37 Texas Crim. Rep. 279; 39 S. W. 666. Rogers v. State, 40 Texas Crim. Rep. 355; 50 S. W. 338. Stripling v. State, 47 Texas Crim. Rep. 117; 80 S. W. 376.

If defendant was a minor, and it is sought to prosecute him for aggravated assault by indecent familiarity with a female the indictment or information for aggravated assault should be drawn under the subdivision which provides that an assault and battery becomes aggravated when the means used is such as inflicts disgrace. George v. State, 11 Texas Crim. App. 95. Slawson v. State, 39 Texas Crim. Rep. 178; 45 S. W. 575 (opinion sets out a good information).

Sec. 1576. **Indecent familiarity—Evidence.**—Indecent familiarity with the person of a female against her will with intent to injure constitutes an aggravated assault. Curry v. State, 4 Texas Crim. App. 574. Ridout v. State, 6 Texas Crim. App. 249. Veal v. State, 8 Texas Crim. App. 474. Atkins v. State, 11 Texas Crim. App. 8. Henkel v. State, 27 Texas Crim. App. 510; 11 S. W. 671. Young v. State, 31 Texas Crim. Rep. 24; 19 S. W. 431. Fletcher v. State, 153 S. W. 1134. Cuellar v. State, 154 S. W. 228.

Proof of the consent of a girl of tender years to the indecent familiarity of defendant with her person is no defense. Hill v. State, 37 Texas Crim. Rep. 283; 39 S. W. 666. Rogers v. State, 40 Texas Crim. Rep. 357; 50 S. W. 338. Scroggins v. State, 51 S. W. 232. Knight v. State, 48 Texas Crim. Rep. 41; 85 S. W. 1067. St. John v. State, 178 S. W. 360.

Although defendant put his hand on the private parts of a woman without her consent, the evidence is insufficient if it fails to show that his action caused a sense of shame. Hawes v. State, 44 S. W. 1094, but she need not so state in words if the circumstances show that his action had that effect. Young v. State, 31 Texas Crim. Rep. 26; 19 S. W. 431.

Where defendant's wife was sick and he went in her nurse's room and asked the nurse to "give him some," and she left the room with defendant following and asking her to return, the fact that she cut her leg in getting over a fence did not constitute an assault, nor did his request for carnal favors. Loid v. State, 55 Texas Crim. Rep. 403; 116 S. W. 807.

It is error to exclude testimony that prosecutrix had previously granted carnal favors to defendant or had admitted to him that she had granted such favors to others, where the defense is that defendant thought his familiarity was agreeable. Donaldson v. State, 10 Texas Crim. App. 307. Wilson v. State, 67 S. W. 106.

A request for a kiss, made by words or signs, unaccompanied with any act showing that defendant intended to use violence to force compliance with his request, is not an assault. Kiersey v. State, 22 S. W. 37. Fuller v. State, 44 Texas Crim. Rep. 463; 72 S. W. 184.

In a prosecution for aggravated assault, proof of recent complaint of the female, unless a part of the *res gestæ*, is not admissible as original evidence for the State. Veal v. State, 8 Texas Crim. App. 476. Saye v. State, 54 Texas Crim. Rep. 431; 114 S. W. 804. Porterfield v. State, 141 S. W. 968. Calliham v. State, 150 S. W. 617.

If defendant first asks the prosecutrix to tell who she reported the alleged familiarity to, it is not error to permit the State to prove by the person to whom she testified she reported it that she did complain of it, where the details of the complaint are not gone into. Grantland v. State, 146 S. W. 196.

Sec. 1577. **Indecent familiarity—Charge of the court.**—Under an allegation that an assault was made by an adult male upon a female it is proper to charge the jury, when supported by the evidence, that an assault becomes aggravated by indecent familiarity with the person of a female by an adult male against her will and without her consent. Sample v. State, 52 Texas Crim. Rep. 505; 108 S. W. 685.

The charge of the court should not ignore the "intent to injure," it being an essential element of aggravated assault. Crawford v. State, 21 Texas Crim. App. 454; 1 S. W. 446. Stripling v. State, 47 Texas Crim. Rep. 120; 80 S. W. 376.

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Lee v. State, 47 Texas Crim. Rep. 612; 85 S. W. 798. Koen v. State, 50 Texas Crim. Rep. 145; 95 S. W. 114.

If there is evidence to support the theory, it is error to refuse to charge that if no bodily pain, or no sense of shame or other disagreeable emotion of the mind was produced by the acts of defendant, the jury should acquit him. Stermer v. State, 46 Texas Crim. Rep. 183; 78 S. W. 1072. Koen v. State, 50 Texas Crim. Rep. 145; 95 S. W. 114.

If there is evidence to support it it is error to refuse to charge that if defendant did not intend to injure, but thought his attempts to embrace or kiss the prosecutrix would be agreeable, he should be acquitted. Chambless v. State, 46 Texas Crim. Rep. 1; 79 S. W. 577. Stripling v. State, 47 Texas Crim. Rep. 120; 80 S. W. 376. Kearse v. State, 88 S. W. 364. Weaver v. State, 146 S. W. 927. Calliham v. State, 150 S. W. 617. McGill v. State, 160 S. W. 353.

Where prosecutrix testified to deliberate and intentional indecent familiarity with her person, and defendant testified it was an accident, it is not necessary to charge on "sense of shame." Halsell v. State, 53 Texas Crim. Rep. 511; 110 S. W. 441.

If there is evidence that defendant had reason to believe that his embraces and his invitation to copulate would be agreeable, the court should give a charge based on this theory. Shields v. State, 39 Texas Crim. Rep. 13; 44 S. W. 844. Chambless v. State, 46 Texas Crim. Rep. 1; 79 S. W. 577. Lee v. State, 47 Texas Crim. Rep. 612; 85 S. W. 798.

If there is evidence that the female was over the age of consent and that she consented to the familiarity of defendant, the court should give a charge affirmatively presenting that defensive theory. Taylor v. State, 24 Texas Crim. App. 299; 6 S. W. 42. Isaacs v. State, 25 S. W. 1073. Saye v. State, 54 Texas Crim. Rep. 430; 114 S. W. 804. McGill v. State, 160 S. W. 353.

Consent of a girl of tender years is no defense to any grade of assault, and in such case the court is not required to charge the jury that the act of indecent familiarity must have been committed without the consent of the child. Knight v. State, 48 Texas Crim. Rep. 41; 85 S. W. 1067.

If the testimony raises the issue that the female was over the age of consent, and consented to all that defendant did, it is error to charge the jury that if he assaulted her and his purpose was to have carnal knowledge of her with her consent he would be guilty of aggravated assault, because if she consented to all that he did he would be guilty of no offense. Taylor v. State, 24 Texas Crim. App. 299; 6 S. W. 42. Isaacs v. State, 25 S. W. 1073.

If there is evidence that defendant did not intend an assault, but only touched the female unintentionally or with no improper motive, he is entitled to an affirmative charge on this defensive theory. Menach v. State, 97 S. W. 503. Porterfield v. State, 64 Texas Crim. Rep. 179; 141 S. W. 968.

6. When the instrument or means used is such as inflicts disgrace upon the person assaulted, as an assault or battery with a whip or cowhide.

Sec. 1578. **Form for information.**

In the name and by authority of the State of Texas:

.....County Attorney of.....county, Texas, comes in behalf of the State of Texas and presents in and to the County Court of.....county, Texas, at the.....term, A. D.....of said court that John Doe heretofore on the.....day of.....A. D.....in said county and State did in and upon.....make an aggravated assault and battery by then and there striking the said.....with a whip (or "cowhide," or whatever it was), the said instrument used being such as did then and there inflict disgrace upon the said .....

Against the peace and dignity of the State.

.....

County Attorney.....county, Texas.

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Sec. 1579. **Statute construed.**—An assault or battery becomes aggravated when the instrument or means used is such as inflicts disgrace upon the person assaulted, as an assault or battery with a whip or cowhide. Coolidge v. State, 24 S. W. 904. Slawson v. State, 39 Texas Crim. Rep. 176; 45 S. W. 575. Caples v. State, 155 S. W. 267. Yates v. State, 162 S. W. 499.

When an assault or battery is committed with a whip or cowhide the law presumes that such instrument inflicts disgrace. Coolidge v. State, 24 S. W. 904.

An assault and battery may become aggravated when the means used is a stick and switches where such instrument is unlawfully used to inflict a whipping. Caples v. State, 155 S. W. 267.

The instrument or means used which may cause an assault or battery to become aggravated when their use is such as inflicts disgrace upon the person assaulted is not limited to the statutory illustration of a whip or cowhide. The illustration is explanatory and not restrictive. Slawson v. State, 39 Texas Crim. Rep. 176; 45 S. W. 575. Caples v. State, 155 S. W. 267.

Sec. 1580. **Proof of whipping.**—Proof of the results of an examination of the body of the person whipped, made shortly after the whipping, may be shown. Caples v. State, 155 S. W. 267.

7. When a serious bodily injury is inflicted upon the person assaulted.

Sec. 1581. **Assault inflicting serious bodily injury—Form for information.** In the name and by the authority of the State of Texas:

.....County Attorney of.....county, Texas, comes in behalf of the State of Texas, and presents in and to the County Court of..... county, Texas, at the.....term A. D.....of said court that John Doe heretofore on the.....day of.....A. D.....in said county and State did in and upon.....make an aggravated assault and battery and did then and there inflict serious bodily injury upon the said.....by then and there striking the said.....with a bottle (or "kicking the said....." or whatever the means were).

Against the peace and dignity of the State.

.....

County Attorney.....county, Texas.

(Hyde v. State, 168 S. W. 535.)

Sec. 1582. **Serious bodily injury—Indictment.**—Under an ordinary indictment for murder or assault to murder, the defendant may be convicted of aggravated assault when the proof shows that serious bodily injury was inflicted upon the person assaulted, if the means, when alleged, are proven. Green v. State, 8 Texas Crim. App. 71. Bean v. State, 25 Texas Crim. App. 346; 8 S. W. 278.

When "serious bodily injury" is the only ground of aggravation relied on, it must be alleged, otherwise than by implication and recital, that defendant did inflict serious bodily injury upon the person assaulted. Miles v. State, 23 Texas Crim. App. 410; 5 S. W. 250.

Sec. 1583. **"Serious bodily injury"—Defined and construed.**—To constitute "serious bodily injury," the injury must be grave, not trivial, such an injury as gives rise to apprehension of danger to life, health or limb. Buchanan v. State, 13 S. W. 1000. George v. State, 21 Texas Crim. App. 315; 17 S. W. 351. Stevens v. State, 27 Texas Crim. App. 461; 11 S. W. 459. Halsell v. State, 29 Texas Crim. App. 22; 18 S. W. 418. Whitten v. State, 28 S. W. 474. Wilson v. State, 34 Texas Crim. Rep. 64; 29 S. W. 41. Bruce v. State, 41 Texas Crim. Rep. 27; 51 S. W. 954. Yeary v. State, 66 S. W. 1106. Black v. State, 67 S. W. 113. Head v. State, 52 Texas Crim. Rep. 488; 107 S. W. 829. Housley v. State, 55 Texas Crim. Rep. 372; 116 S. W. 816. Miller v. State, 59 Texas Crim. Rep. 249; 128 S. W. 117. Wimberly v. State, 60 Texas Crim. Rep. 65; 130 S. W. 1002. Hamilton v. State, 60 Texas Crim. Rep. 258; 131 S. W. 1127. Shelton v. State, 150 S. W. 940. Spiller v. State, 150 S. W. 1164. Parish v. State, 153 S. W. 327. Nickerson v. State, 154 S. W. 992. Calvert v. State, 170 S. W. 744.

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To constitute "serious bodily injury" it is not required that the injury be necessarily such as may result in death. Cheek v. State, 4 Texas Crim. App. 448. Bruce v. State, 41 Texas Crim. Rep. 27; 51 S. W. 954. Housley v. State, 55 Texas Crim. Rep. 372; 116 S. W. 816. Fulkerson v. State, 57 Texas Crim. Rep. 80; 121 S. W. 1111. Wimberly v. State, 60 Texas Crim. Rep. 65; 130 S. W. 1002.

The result of a blow in the face which knocks a grown man down, renders him unconscious, fractures his jaw-bone, and knocks out some of his teeth, is "serious bodily injury." Thomas v. State, 55 Texas Crim. Rep. 295; 116 S. W. 601.

Where prosecutor had a gash cut in his throat five inches long around his neck, and a gash three inches long on his cheek, and the injuries were such as to create apprehension, it was "serious bodily injury." Wimberly v. State, 60 Texas Crim. Rep. 65; 130 S. W. 1002.

Where the scalp was cut an inch or two long and to the bone by a blow from the butt end of a billiard cue weighing about a pound, it was "serious bodily injury." Housley v. State, 55 Texas Crim. Rep. 372; 116 S. W. 816.

Proof of a dislocation of the shoulder may justify a finding of "serious bodily injury." Robey v. State, 163 S. W. 713.

Bruises inflicted on the person by a strap which are shown not to be of a serious nature otherwise than they might be subject to infection do not amount to "serious bodily injury." Parish v. State, 153 S. W. 327.

A wound about an inch and a half long and an inch deep, made with a knife, and which caused the injured party to carry his arm in a sling for a few days, is not "serious bodily injury." Miller v. State, 59 Texas Crim. Rep. 249; 128 S. W. 117.

Where the injured party was cut three times in the back and laid up about four days, and the doctor said that he did not consider the wounds serious, the infliction of "serious bodily injury" was not shown. Wilson v. State, 34 Texas Crim. Rep. 64; 29 S. W. 41.

Where the injured party was thrown down and choked, and kicked in the head when he got up, raising a knot, and then kicked in the nose, and was confined in bed two days and was well in nine days, it was held that "serious bodily injury" was not shown. Head v. State, 52 Texas Crim. Rep. 489; 107 S. W. 829.

Biting off a small portion of a person's ear is not inflicting "serious bodily injury." George v. State, 21 Texas Crim. App. 317; 17 S. W. 351.

Where the injured party was choked almost to insensibility and had one of his ribs broken by the pressure of defendant's knees on his breast, it was held that this was not sufficient to show "serious bodily injury." Halsell v. State, 29 Texas Crim. App. 22; 18 S. W. 418.

Sec. 1584. **Serious bodily injury—Charge of the court.**—The term "serious bodily injury," not being specially defined by statute, is used in its ordinary meaning, and it is not error to fail or refuse to define that term in the charge of the court. De Los Santos v. State, 31 S. W. 395. Bruce v. State, 41 Texas Crim. Rep. 31; 51 S. W. 954. Thomas v. State, 55 Texas Crim. Rep. 295; 116 S. W. 601. *Contra:* Porter v. State, 60 Texas Crim. Rep. 590; 132 S. W. 935.

When there is no testimony that the injuries inflicted were serious, and the issue of "serious bodily injury" is submitted to the jury as a basis of conviction, the court should explain what is meant by the term "serious bodily injury." Shelton v. State, 150 S. W. 941.

A charge is correct which informs the jury that by the term "serious bodily injury" is meant such an injury as gives rise to apprehension, an injury which is attended with danger. Bagley v. State, 150 S. W. 773.

In charging on defendant's right to defend against an apprehension or fear of "serious bodily injury," it is error to define that term as "such injury as might eventuate in death or might probably cause death." Cheek v. State, 4 Texas Crim. App. 448. Bruce v. State, 41 Texas Crim. Rep. 30; 51 S. W. 954.

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If the indictment or information directly charges aggravated assault, it is error to authorize a conviction on the theory that serious bodily injury was inflicted if there is no allegation to support such charge. Coney v. State, 43 Texas 414. Kennedy v. State, 9 Texas Crim. App. 403. Hunt v. State, 9 Texas Crim. App. 405.

8. When committed with deadly weapons under circumstances not amounting to an intent to murder or maim.

Sec. 1585. **Assault with deadly weapon—Form for information.** In the name and by the authority of the State of Texas:

.....County Attorney of.....county, Texas, comes in behalf of the State of Texas and presents in and to the County Court of..... county, Texas, at the.....term A. D.....of said court that John Doe heretofore on the.....day of.....A. D.....in said county and State did with a deadly weapon, to wit, a pistol (or "knife," or whatever it was), in and upon.....make an aggravated assault* and did then and there strike (or "cut") said.....with said deadly weapon, and the said John Doe did then and there and thereby inflict serious bodily injury upon the said.....

Against the peace and dignity of the State.

.....

County Attorney.....county, Texas.

[If a battery was not committed, the above form as far as the asterisk will suffice for the charging part.]

(The pleader can leave off the allegation of serious bodily injury if desired, but if included no election can legally be required between the two phases of aggravated assault therein alleged, and both phases may be alleged in the same count because they are merely different ways of committing the same offense and they are not repugnant to each other and the punishment is the same. Proof of either phase so alleged would be sufficient. Black v. State, 67 S. W. 113.)

Sec. 1586. **Assault with a deadly weapon—Indictment or information.**—Where in separate counts two grounds of aggravation are alleged, to wit, the use of a deadly weapon and inflicting serious injury, the State can not be driven to elect upon which count a conviction will be sought. Timon v. State, 34 Texas Crim. Rep. 363; 30 S. W. 808. Black v. State, 67 S. W. 113.

If it is sought to allege aggravated assault directly and the ground of aggravation relied on is the use of a deadly weapon, the indictment or information, to be sufficient, must not only name the weapon, but must allege in terms that it was a deadly weapon. Wilks v. State, 3 Texas Crim. App. 34. Williamson v. State, 5 Texas Crim. App. 487. Flynn v. State, 8 Texas Crim. App. 368. Key v. State, 12 Texas Crim. App. 512. Miles v. State, 23 Texas Crim. App. 410; 5 S. W. 250.

It is not necessary in alleging aggravated assault committed with a deadly weapon to allege also that it was done "under circumstances not amounting to an intent to murder or maim." State v. Franklin, 36 Texas 155. Brown v. State, 2 Texas Crim. App. 61. Hunt v. State, 6 Texas Crim. App. 663.

If it is alleged in terms that the assault was made with a deadly weapon, it is not necessary to further allege that defendant was in carrying or striking distance nor to allege how it was used. Burton v. State, 3 Texas Crim. App. 408. Hunt v. State, 6 Texas Crim. App. 663. Vann v. State, 43 Texas Crim. Rep. 244; 64 S. W. 243.

A material variance between the information and the complaint on which it is based as to the name of the weapon used in making the assault is fatal. Ferguson v. State, 4 Texas Crim. App. 156. Parsons v. State, 9 Texas Crim. App. 204. Smith v. State, 57 Texas Crim. Rep. 609; 124 S. W. 665.

It is not necessary to allege in terms that the assault was "unlawful." State v. Lutterloh, 22 Texas 211. State v. Hays, 41 Texas 526. State v. Hartman, 41 Texas 562.

Under an indictment or information charging an aggravated assault with a deadly weapon a conviction may be had for a simple assault. Dunn v. State, 158 S. W. 300. Yelton v. State, 170 S. W. 319.

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An indictment or information charges an aggravated assault where the charging part is, with time and venue, that defendant "did with a deadly weapon, to wit, a pistol, in and upon.....make an aggravated assault." Hunt v. State, 6 Texas Crim. App. 663. Vann v. State, 43 Texas Crim. Rep. 244; 64 S. W. 243.

Sec. 1587. **Proof of a deadly weapon.**—If the only proof that the weapon used in the assault was a deadly weapon is that it was a pistol used as a bludgeon, the proof is insufficient to show that it was a deadly weapon. When an instrument or weapon is used to strike with, the size, weight, and effect should be shown in order that there may be some evidence from which to determine whether or not, as used, it was a deadly weapon. Skidmore v. State, 43 Texas 93. Key v. State, 12 Texas Crim. App. 506. Pierce v. State, 21 Texas Crim. App. 547; 1 S. W. 463. Ballard v. State, 13 S. W. 674. Jenkins v. State, 30 Texas Crim. App. 379; 17 S. W. 938. Stephenson v. State, 33 Texas Crim. Rep. 162; 25 S. W. 784. McLendon v. State, 66 S. W. 553. Black v. State, 67 S. W. 113. Peacock v. State, 52 Texas Crim. Rep. 435; 107 S. W. 346.

If the pistol was not used as a bludgeon, it will be presumed, in the absence of proof to the contrary, that it was loaded. Crow v. State, 41 Texas 471. Forrest v. State, 3 Texas Crim. App. 332. Burton v. State, 3 Texas Crim. App. 408. Lockland v. State, 45 Texas Crim. Rep. 87; 73 S. W. 1054. Ford v. State, 51 Texas Crim. Rep. 443; 102 S. W. 404. Cromwell v. State, 60 Texas Crim. Rep. 183; 131 S. W. 595.

The burden of proof is upon the defendant to show that his gun or pistol was unloaded, that being a fact peculiarly within his knowledge. Caldwell v. State, 5 Texas 18. Crow v. State, 41 Texas 471. Forrest v. State, 3 Texas Crim. App. 232. Burton v. State, 3 Texas Crim. App. 408. Cromwell v. State, 60 Texas Crim. Rep. 183; 131 S. W. 595. Myers v. State, 163 S. W. 432.

If defendant struck gently with the pistol, and could have struck more licks, it shows that he was not using it as a deadly weapon. McLendon v. State, 66 S. W. 554.

The wounds inflicted upon the person assaulted will be looked to in determining whether or not the pistol, knife, or other weapon used, was a deadly weapon, and proof that the wounds thereby inflicted were of a serious nature and of the size and weight of the weapon, or either, and of the manner of its use may be sufficient to show that the weapon as used was a deadly weapon. Chambers v. State, 42 Texas 254. Briggs v. State, 6 Texas Crim. App. 146. Ashton v. State, 31 Texas Crim. Rep. 479; 21 S. W. 47. Walters v. State, 37 Texas Crim. Rep. 389; 35 S. W. 652. Walters v. State, 40 S. W. 794. Martinez v. State, 56 S. W. 58. Scott v. State, 42 Texas Crim. Rep. 608; 62 S. W. 419 (razor). Thomas v. State, 44 Texas Crim. Rep. 345; 72 S. W. 178. Goodman v. State, 49 Texas Crim. Rep. 188; 91 S. W. 796. Armstrong v. State, 50 Texas Crim. Rep. 26; 96 S. W. 15. Prescott v. State, 54 Texas Crim. Rep. 485; 113 S. W. 531. Boykin v. State, 59 Texas Crim. Rep. 267; 128 S. W. 382.

A knife is not *per se* a deadly weapon. The size and shape of the blade, the manner of its use, and the nature and extent of the injuries inflicted should be proven, in order that there may be some basis to determine whether or not, in the manner of its use, it was a deadly weapon. Hilliard v. State, 17 Texas Crim. App. 210. Howard v. State, 18 Texas Crim. App. 351. Warren v. State, 22 Texas Crim. App. 392; 3 S. W. 240. Thompson v. State, 24 Texas Crim. App. 383; 6 S. W. 296. Parks v. State, 15 S. W. 174. Whitten v. State, 28 S. W. 474. Wilson v. State, 34 Texas Crim. Rep. 64; 29 S. W. 41. Martinez v. State, 35 Texas Crim. Rep. 386; 33 S. W. 970. Craiger v. State, 48 Texas Crim. Rep. 500; 88 S. W. 208. Hext v. State, 48 Texas Crim. Rep. 576; 90 S. W. 43. Wilson v. State, 49 Texas Crim. Rep. 59; 90 S. W. 312. Goodman v. State, 49 Texas Crim. Rep. 188; 91 S. W. 795. Barnes v. State, 52 Texas Crim. Rep. 408; 107 S. W. 823. Henderson v. State, 55 Texas Crim. Rep. 173; 115 S. W. 588. Hightower v. State, 56 Texas Crim. Rep. 248; 119 S. W. 691. Snowberger v. State, 58 Texas Crim. Rep. 530; 126 S. W. 882. Burleson v. State, 164 S. W. 851. Reeves v. State, 168 S. W. 860.

The opinion of a physician is admissible to prove the nature of a wound and its probable cause and effect. Waite v. State, 13 Texas Crim. App. 169. Hardin v. State, 51 Texas Crim. Rep. 562; 103 S. W. 401. Chisom v. State, 179 S. W. 103.

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An axe is not *per se* a deadly weapon. Gladney v. State, 12 S. W. 868. Melton v. State, 30 Texas Crim. App. 273; 17 S. W. 257. Bush v. State, 52 Texas Crim. Rep. 398; 107 S. W. 348.

A saw is not *per se* a deadly weapon. Fisher v. State, 151 S. W. 544.

A chair is not *per se* a deadly weapon. Kouns v. State, 3 Texas Crim. App. 13.

A baseball bat is not *per se* a deadly weapon. Crow v. State, 55 Texas Crim. Rep. 202; 116 S. W. 52.

A loaded walking stick is not *per se* a deadly weapon. Stevens v. State, 27 Texas Crim. App. 461; 11 S. W. 459.

A fence pole is not necessarily a deadly weapon. Wilson v. State, 15 Texas Crim. App. 155.

A rock or an iron pipe is not *per se* a deadly weapon. Nichols v. State, 24 Texas Crim. App. 137; 5 S. W. 661. Honeywell v. State, 40 Texas Crim. Rep. 199; 49 S. W. 586. Danforth v. State, 44 Texas Crim. Rep. 112; 69 S. W. 159.

A stick of cord wood, or other stick, or a club, is not necessarily a deadly weapon. Boyd v. State, 28 Texas Crim. App. 137; 12 S. W. 737. Shaw v. State, 34 Texas Crim. Rep. 442; 31 S. W. 361. Fitch v. State, 37 Texas Crim. Rep. 502; 36 S. W. 584. Washington v. State, 55 Texas Crim. Rep. 483; 110 S. W. 751. Hamilton v. State, 60 Texas Crim. Rep. 258; 131 S. W. 1127. Smith v. State, 61 Texas Crim. Rep. 349; 135 S. W. 153. Russell v. State, 158 S. W. 547.

Sec. 1588. **Deadly weapon—Charge of the court.**—A charge is correct which informs the jury that a deadly weapon is one which, from the manner used, is calculated or likely to produce death or serious bodily injury. Kouns v. State, 3 Texas Crim. App. 13. McReynolds v. State, 4 Texas Crim. App. 328. Hardy v. State, 36 Texas Crim. Rep. 400; 37 S. W. 434. Wilson v. State, 37 Texas Crim. Rep. 159; 38 S. W. 1013. Henry v. State, 54 S. W. 592. Tollett v. State, 55 S. W. 335. Leal v. State, 46 Texas Crim. Rep. 336; 81 S. W. 961. Prescott v. State, 54 Texas Crim. Rep. 485; 113 S. W. 531. Harris v. State, 162 S. W. 1150.

When a pistol was used to strike with, it is error to charge the jury that a pistol is a deadly weapon. Skidmore v. State, 43 Texas 93.

If the weapon was used to strike with, it is error to refuse a charge correctly defining a deadly weapon and applying the law to the facts. Hardin v. State, 47 Texas Crim. Rep. 493; 84 S. W. 591.

A charge is erroneous which submits the idea that a weapon used to strike with is a deadly weapon without regard to the manner of its use and the intent of the person so using it. Shaw v. State, 34 Texas Crim. Rep. 442; 31 S. W. 361. Fitch v. State, 37 Texas Crim. Rep. 502; 36 S. W. 584. Honeywell v. State, 40 Texas Crim. Rep. 199; 49 S. W. 586. Danforth v. State, 44 Texas Crim. Rep. 105; 69 S. W. 159. Posey v. State, 46 Texas Crim. Rep. 192; 78 S. W. 689. Crow v. State, 55 Texas Crim. Rep. 202; 116 S. W. 52.

Where the instrument or weapon was used to strike with, and may or may not have been a deadly weapon, the term "deadly weapon" should be defined in the charge of the court. Kouns v. State, 3 Texas Crim. App. 13. Howard v. State, 18 Texas Crim. App. 348. Lawson v. State, 32 S. W. 895.

Failure to define the term "deadly weapon" is not reversible error if there is no question as to its being a deadly weapon. Martinez v. State, 56 S. W. 58. Wheeler v. State, 56 Texas Crim. Rep. 550; 121 S. W. 166. Lofton v. State, 59 Texas Crim. Rep. 270; 128 S. W. 384. Kosmoroski v. State, 59 Texas Crim. Rep. 296; 127 S. W. 1056.

When a pistol or gun is used as a firearm, it is not necessary to define the term "deadly weapon." Gallaher v. State, 28 Texas Crim. App. 266; 12 S. W. 1087. Lofton v. State, 59 Texas Crim. Rep. 270; 128 S. W. 384. Kosmoroski v. State, 59 Texas Crim. Rep. 296; 127 S. W. 1056. Hartfield v. State, 61 Texas Crim. Rep. 515; 134 S. W. 1180. Catlett v. State, 169 S. W. 673.

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It is error to define a deadly weapon as a gun used within carrying distance if the proof shows the parties were so far apart as that it was barely possible and not probable that serious bodily injury could have been inflicted. Scott v. State, 46 Texas Crim. Rep. 317; 81 S. W. 952.

It is not error to define a deadly weapon as a gun used as a firmarm within carrying distance if the proof shows that defendant fired on the injured party at close range. Juley v. State, 45 Texas Crim. Rep. 391; 76 S. W. 468. Kosmoroski v. State, 59 Texas Crim. Rep. 296; 127 S. W. 1056.

If there is evidence that the gun was shot only to frighten, a charge is erroneous if the jury are told that a "loaded gun used as a firearm within gunshot distance is a deadly weapon." Angel v. State, 45 Texas Crim. Rep. 137; 74 S. W. 553.

If the indictment or information directly charges aggravated assault, it is error to authorize a conviction for aggravated assault on the theory that a deadly weapon was used if it is not alleged in terms that a deadly weapon was used. Mansfield v. State, 63 S. W. 630.

The court should charge the jury on simple assault if the allegation that the weapon was a deadly weapon is not proven and the injuries inflicted were not serious. Wilson v. State, 34 Texas Crim. Rep. 64; 29 S. W. 41. Barnes v. State, 52 Texas Crim. Rep. 407; 107 S. W. 823. Peacock v. State, 52 Texas Crim. Rep. 436; 107 S. W. 346.

Sec. 1589. **Proof of means used.**—If the indictment, information, or complaint alleges the means by which the assault was committed, such allegation, whether necessary or unnecessary, being descriptive, must be substantially proven as alleged. Under an indictment charging murder, assault to murder, aggravated or simple assault, which alleges the means, a conviction will not be sustained even for simple assault unless the means alleged is substantially proven. McGee v. State, 5 Texas Crim. App. 492. Kennedy v. State, 9 Texas Crim. App. 403. McGrew v. State, 19 Texas Crim. App. 302. Holliday v. State, 35 Texas Crim. Rep. 133; 32 S. W. 538. Kinnard v. State, 35 Texas Crim. Rep. 276; 33 S. W. 234. Herald v. State, 37 Texas Crim. Rep. 409; 35 S. W. 670. Jones v. State, 62 S. W. 758. Mansfield v. State, 63 S. W. 630. Harrison v. State, 48 Texas Crim. Rep. 44; 85 S. W. 1058. Simpson v. State, 48 Texas Crim. Rep. 333; 87 S. W. 826. Hext v. State, 48 Texas Crim. Rep. 576; 90 S. W. 43. Maloney v. State, 57 Texas Crim. Rep. 435; 125 S. W. 36. Maxwell v. State, 145 S. W. 1190.

An allegation that the means used was a knife is not supported by proof of a stick. Herald v. State, 37 Texas Crim. Rep. 409; 35 S. W. 670; nor by proof of a gun. Weaver v. State, 24 Texas 387.

An allegation that the means used was a bottle is not supported by proof of a glass. Jones v. State, 62 S. W. 758.

An allegation that means used was a "bois d'arc stick" is not supported by proof of a picket. McGrew v. State, 19 Texas Crim. App. 304.

An allegation that the means used was one kind of stick or piece of wood is supported by proof that another kind of stick or piece of wood capable of inflicting the same character of wound was used. Holliday v. State, 35 Texas Crim. Rep. 133; 32 S. W. 538.

An allegation that the means used was a "gun" or a "pistol" is supported by proof of any kind of firearm capable of inflicting the same character of wound. Douglass v. State, 26 Texas Crim. App. 109; 9 S. W. 489. Monk v. State, 27 Texas Crim. App. 450; 11 S. W. 460. Brown v. State, 43 Texas Crim. Rep. 293; 65 S. W. 529. Taylor v. State, 44 Texas Crim. Rep. 550; 72 S. W. 396. Lopez v. State, 166 S. W. 155.

An allegation that the means used was the "fist" is supported by proof of the use of the open hand. Allen v. State, 36 Texas Crim. Rep. 436; 37 S. W. 738.

In proving the means used only the substance of the issue need be proven. Holliday v. State, 35 Texas Crim. Rep. 133; 32 S. W. 538. Allen v. State, 36 Texas Crim. Rep. 436; 37 S. W. 738. Chisom v. State, 179 S. W. 103.

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In cases of assault to murder the term "bowie knife" is specially defined, and includes a "butcher knife." Hernandez v. State, 32 Texas Crim. Rep. 271; 22 S. W. 972.

When it is alleged that the means used was unknown to the grand jury, the State may prove the efforts made by the grand jury in trying to ascertain the character and kind of means used. Mason v. State, 168 S. W. 118.

9. When committed with premeditated design, and by the use of means calculated to inflict great bodily injury.

Sec. 1590. **Assault with premeditated design—Form for information.**
In the name and by the authority of the State of Texas:

....., County Attorney of ..... county, Texas, comes in behalf of the State of Texas, and presents in and to the County Court of ..... county, Texas, at the ..... term, A. D. ....., of said court that John Doe heretofore on the ..... day of ....., A. D. ....., in said county and State did, with premeditated design and by the use of means calculated to inflict great bodily injury, to wit, his fists (or "a bottle," or whatever the means were), in and upon ..... make an aggravated assault and battery, and did then and there by the use of said means and with premeditated design beat, bruise, and wound the said .....

Against the peace and dignity of the State.

.....
County Attorney, ... county, Texas.

Sec. 1591. **Alleging assault with premeditated design.**—An indictment or information for an assault with premeditated design is not bad for duplicity because it is also alleged in the same count that the means used was a deadly weapon, the two phases of aggravated assault not being repugnant to each other and the punishment being the same. Coney v. State, 2 Texas Crim. App. 62. Tucker v. State, 6 Texas Crim. App. 251.

An indictment is good which alleges an aggravated assault made with premeditated design and by the use of means calculated to inflict great bodily injury, and that the means used was the fist. The fist may be such means when used with such design and in such manner as is calculated to inflict great bodily injury. Keley v. State, 12 Texas Crim. App. 245.

Sec. 1592. **Assault with premeditated design—Evidence.**—Under an allegation that the assault was made with premeditated design and by the use of means calculated to inflict great bodily injury, it is not necessary to show that great bodily injury was in fact inflicted. Coney v. State, 2 Texas Crim. App. 62. Yeary v. State, 66 S. W. 1107. Hodges v. State, 166 S. W. 512.

When the jury have solved the issues presented in the testimony under a fair and proper charge of the court, and have found defendant guilty, and that verdict has been approved by the judge who tried the case, and there is sufficient evidence in the record, if believed, to sustain the verdict, it will not be disturbed on the facts on appeal unless clearly wrong. Blain v. State, 78 S. W. 518. Johnson v. State, 59 Texas Crim. Rep. 425; 128 S. W. 1123.

Sec. 1593. **Assault with premeditated design—Charge of court.**—If the indictment or information directly charges aggravated assault, it is error to authorize the jury to convict on the theory that the assault was made with premeditated design if there is no allegation to support such theory. Pinson v. State, 23 Texas 579. McGee v. State, 5 Texas Crim. App. 492. Kennedy v. State, 9 Texas Crim. App. 403. Hunt v. State, 9 Texas Crim. App. 404. Reid v. State, 9 Texas Crim. App. 472. Grayson v. State, 42 S. W. 293. Mansfield v. State, 63 S. W. 630. Winzel v. State, 47 Texas Crim. Rep. 267; 83 S. W. 187.

It is error to frame the charge so as to authorize a conviction if defendant had a preconceived design at any time prior to the assault, instead of requiring this design to exist at the time of the assault. Decker v. State, 58 Texas Crim. Rep. 159; 124 S. W. 915.

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Where an assault with premeditated design is alleged, a charge thereon is justified by proof that defendant and another determined to assault the injured party and followed and set upon him unawares and beat him. Blain v. State, 78 S. W. 518.

10. When committed by any person or persons in disguise.

Sec. 1594. **Assault by person in disguise—Form for information.**
In the name and by the authority of the State of Texas:

....., County Attorney of ..... county, Texas, comes in behalf of the State of Texas and presents in and to the County Court of ..... county, Texas, at the ..... term, A. D. ....., of said court that John Doe heretofore on the ..... day of ....., A. D. ....., in said county and State did while in disguise then and there in and upon ..... make an aggravated assault.

Against the peace and dignity of the State.

.....
County Attorney, ... county, Texas.

Art. 1023. (602) **Aggravation may be of different degrees.**—The circumstances of aggravation, mentioned in the preceding article, are of different degrees, and the jury are to consider these circumstances in forming their verdict and assessing the punishment.

Art. 1024. (603) **Punishment.**—The punishment for an aggravated assault or battery shall be a fine not less than twenty-five nor more than one thousand dollars, or imprisonment in the county jail not less than one month nor more than two years, or by both such fine and imprisonment.

Sec. 1595. **Verdict.**—If both aggravated assault and simple assault are submitted to the jury for their finding, a verdict assessing the punishment at a fine of $25 or less is void for uncertainty if it fails to name the grade of assault. Bowen v. State, 28 Texas Crim. App. 498; 13 S. W. 787. Hays v. State, 33 Texas Crim. Rep. 546; 28 S. W. 203. Lee v. State, 41 Texas Crim. Rep. 557; 55 S. W. 814. Rousey v. State, 65 S. W. 372. Williams v. State, 44 Texas Crim. Rep. 318; 70 S. W. 957. Winzel v. State, 47 Texas Crim. Rep. 267; 83 S. W. 187. Moody v. State, 52 Texas Crim. Rep. 233; 105 S. W. 1127. Aycock v. State, 55 Texas Crim. Rep. 142; 115 S. W. 591. Evans v. State, 57 Texas Crim. Rep. 176; 122 S. W. 392.

If aggravated assault is the only issue submitted to the jury a verdict assessing a punishment appropriate to that offense need not state the grade of assault. Franks v. State, 4 Texas Crim. App. 431. Cooper v. State, 20 S. W. 979. Styles v. State, 37 Texas Crim. Rep. 599; 40 S. W. 498. Millard v. State, 59 S. W. 273. Lockland v. State, 45 Texas Crim. Rep. 87; 73 S. W. 1054. Heinen v. State, 74 S. W. 776. Carmicle v. State, 172 S. W. 238.

If higher degrees are ignored in the charge and simple assault is the only offense submitted to the jury, a general verdict assessing a fine applicable to simple assault is sufficient. Styles v. State, 37 Texas Crim. Rep. 599; 40 S. W. 498. McCulloch v. State, 65 S. W. 94. Wilson v. State, 74 S. W. 315. Winzel v. State, 47 Texas Crim. Rep. 267; 83 S. W. 187. Carpenter v. State, 153 S. W. 883.

Where the verdict taking into consideration the circumstances of aggravation assesses a punishment so unusually severe as to be excessive, it should be set aside. Robinson v. State, 25 Texas Crim. App. 113; 7 S. W. 531. Chambless v. State, 46 Texas Crim. Rep. 1; 79 S. W. 577.

Sec. 1596. **Verbal charge.**—The statute provides that no verbal charge shall be given in any case whatever, except in cases of misdemeanor, and then only by consent of the parties. Killman v. State, 2 Texas Crim. App. 222. Jordan v. State, 5 Texas Crim. App. 422. Melton v. State, 12 Texas Crim. App. 488. Garrison v. State, 54 Texas Crim. Rep. 600; 114 S. W. 128.

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The court is not bound to give a written charge in a misdemeanor case even when requested, if the request is not accompanied by the written charge prepared by the party desiring it. Sparks v. State, 23 Texas Crim. App. 448; 5 S. W. 135. Waechter v. State, 34 Texas Crim. Rep. 297; 30 S. W. 444. Killman v. State, 2 Texas Crim. App. 222. Murray v. State, 38 Texas Crim. Rep. 677; 44 S. W. 830. Bush v. State, 70 S. W. 550. Black v. State, 47 S. W. 992. Banks v. State, 62 Texas Crim. Rep. 555; 138 S. W. 406. Mealer v. State, 145 S. W. 354.

Requested instructions are not required to be given by the court, even when correct, unless they are written and presented by the party desiring them. Surrell v. State, 29 Texas Crim. App. 321; 15 S. W. 816. Stephens v. State, 31 Texas Crim. Rep. 369; 20 S. W. 826. Murray v. State, 38 Texas Crim. Rep. 677; 44 S. W. 830. Osborne v. State, 56 S. W. 53. Bush v. State, 70 S. W. 550.

It is not error to refuse to give a verbal charge, however correctly stated. Defendant or his counsel must write out and present the charge, and it then becomes the duty of the judge to give or refuse it with or without modification. Murray v. State, 38 Texas Crim. Rep. 677; 44 S. W. 830. Osborne v. State, 56 S. W. 53. Bush v. State, 70 S. W. 550.

An objection made for the first time after verdict to the action of the court in giving a verbal charge in a misdemeanor case comes too late. Vanwey v. State, 41 Texas 629. Franklin v. State, 2 Texas Crim. App. 8. Goode v. State, 2 Texas Crim. App. 523. Garrison v. State, 54 Texas Crim. Rep. 600; 114 S. W. 128.

It is error for the trial judge, over objection of the defendant, to deliver a verbal charge to the jury. Chamberlain v. State, 2 Texas Crim. App. 451. Jordan v. State, 5 Texas Crim. App. 422. Trippett v. State, 5 Texas Crim. App. 595. Williams v. State, 5 Texas Crim. App. 615. Lawrence v. State, 7 Texas Crim. App. 192. Melton v. State, 12 Texas Crim. App. 488. Wilson v. State, 15 Texas Crim. App. 154. Harkey v. State, 33 Texas Crim. Rep. 100; 25 S. W. 291. Edwards v. State, 69 S. W. 144.

In a misdemeanor case a verbal charge may be given by consent of the parties. Vick v. State, 69 S. W. 156.

The failure to object and reserve a bill of exception at the time to the court's action in giving a verbal charge in a case of misdemeanor is an implied consent to a verbal charge.

Although defendant presents no written instruction, it is error to give a verbal charge over his objections, but such error will not require a reversal if the verbal charge given is not set out in the bill of exception. Rumage v. State, 55 S. W. 64.

In a misdemeanor case where no charge appears in the record on appeal, it will be presumed that a verbal charge was given by consent of the parties, or that no charge was given, and if the former, that the charge so given was correct. Bowden v. State, 2 Texas Crim. App. 56. Newton v. State, 3 Texas Crim. App. 245. Sullivan v. State, 61 Texas Crim. Rep. 657; 136 S. W. 456.

The mere statement of the penalty by the court is not a charge, within the contemplation of the statute. Bush v. State, 70 S. W. 550.

Reading articles from the code to the jury over objection of defendant is giving a verbal charge. Wilson v. State, 15 Texas Crim. App. 150.

When the jury return into court and ask for further instructions, and the court charges them verbally over defendant's objection, the judgment will be reversed, even in the absence of a statement of facts, where the error is presented by a proper bill of exceptions taken at the time. Chamberlain v. State, 2 Texas Crim. App. 451. Lawrence v. State, 7 Texas Crim. App. 192.

Where a charge is required to be given the jury in a felony case it must be in writing; a verbal instruction will not suffice. West v. State, 2 Texas Crim. App. 209. Winfrey v. State, 41 Texas Crim. Rep. 538; 56 S. W. 919.

A verbal caution or instruction given to a jury in a felony case intended to limit or restrict the purpose for which certain testimony was introduced is not equivalent to a charge in writing. A verbal charge is not authorized in a felony case. Thompson

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v. State, 28 Texas Crim. App. 209; 15 S. W. 206. Hargrove v. State, 33 Texas Crim. Rep. 454; 26 S. W. 993. Winfrey v. State, 41 Texas Crim. Rep. 538; 56 S. W. 919.

Sec. 1597. **Assault with a prohibited weapon—The statute.**—If any person shall wilfully commit an assault or an assault and battery upon another with a pistol, dirk, dagger, slung shot, sword cane, spear or knuckles made of any metal or made of any hard substance, bowie knife, or any knife manufactured or sold for the purpose of offense or defense, while the same is being carried unlawfully by the person committing said assault, he shall be deemed guilty of an assault with a prohibited weapon and upon conviction shall be punished by a fine not to exceed two thousand dollars or by imprisonment in the county jail not to exceed two years, or by confinement in the penitentiary for not more than five years. (Sec. 1, Act of April 2, 1913, Acts of 1913, p. 237.)

The above shall not be construed to in any manner affect Article 475 of the Revised Penal Code of 1911 relating to unlawfully carrying arms, but shall be cumulative thereof and is intended to create the offense of assault with prohibited weapons and prescribing penalty thereof. (Sec. 2, Act of April 2, 1913, Acts of 1913, p. 237.)

Sec. 1598. **Assault with prohibited weapon—Form for indictment.**
In the name and by the 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 John Doe on the ..... day of ....., A. D. ....., in said county and State did while then and there unlawfully carrying on and about his person knuckles made of any metal or hard substance (or "a pistol," or whatever the prohibited weapon was) with said knuckles (or "pistol" or whatever it was) in and upon ..... make an assault (and if it is desired to also allege a battery, add "and did then and there with said weapon so unlawfully carried strike, beat, bruise, and wound the said .....").

Against the peace and dignity of the State.

.....
Foreman of the grand jury.

Sec. 1599. **Indictment.**—An indictment for an assault committed while unlawfully carrying a prohibited weapon should allege facts showing that such weapon was unlawfully carried. Denton v. State, 172 S. W. 796.

Sec. 1600. **Hazing—The statute—"Hazing" defined.**—It shall be unlawful for any student of the University of Texas, of the A. & M. College of Texas, of any normal school of Texas, or of any other State educational institution of this State, to engage in what is commonly known and recognized as hazing, or to encourage, aid or assist any other person thus offending.

For the purpose of making plain what is meant herein by "hazing," same is defined as follows:

(a) Any wilful act by one student alone or acting with others, directed against any other student of such educational institution, done for the purpose of submitting such student made the subject of the attack committed, to indignity or humiliation, without his consent.

(b) Any wilful act of any one student alone, or acting with others, directed against any other student of such educational institution, done for the purpose of intimidating such student attacked by threatening such student with social or other ostracism, or of submitting such student to ignominy, shame, or disgrace among his fellow students, and acts calculated to produce such results.

(c) Any wilful act of any one student alone, or acting with others, directed against any other student of such educational institution, done for the purpose of humbling, or that is reasonably calculated to humble the pride, stifle the ambition, or blight the courage of such student attacked, or to discourage any such student from longer remaining in such educational institution or to reasonably cause him to leave such institution rather than submit to such acts.

(d) Any wilful act by any one student alone, or acting with others, in striking, beating, bruising or maiming; or seriously offering, threatening, or attempting to strike, beat, bruise, or maim, or to do or seriously offer, threaten, or attempt to do physical violence to any student of any such educational institution or any assault

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upon any such students made for the purpose of committing any of the acts, or producing any of the results to such student as defined in subdivisions (a), (b), or (c) of this section. (Sec. 1, Act of April 3, 1913, Acts of 1913, p. 239.)

Sec. 1601. **Teacher, etc., assisting student in hazing.**—It shall be unlawful for any teacher, instructor, member of any faculty, or any officer or director, or a member of any governing board of any of such educational institutions to knowingly permit, encourage, aid or assist any student in committing the offense of hazing, or to wilfully acquiesce in the commission of such offense, or to fail to promptly report his knowledge or any reasonable information within his knowledge of the presence and practice of hazing in the institution in which he may be serving, to the executive head or governing board of such institution, and any act of omission or commission shall be deemed "hazing" under the provisions of this Act. (Sec. 2, Act of April 3, 1913, Acts of 1913, p. 239.)

Sec. 1602. **Student punished, how.**—Any student of any of the said State educational institutions of this State who shall commit the offense of hazing, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by fine of not less than twenty-five dollars nor more than two hundred and fifty dollars, or shall be confined in the county jail for not less than ten days nor more than three months, or by both such fine and imprisonment. (Sec. 3, Act of April 3, 1913, Acts of 1913, p. 239.)

Sec. 1603. **Teacher, etc., punished, how.**—Any teacher, instructor, or member of any faculty, or officer or director of any such educational institution who shall commit the offense of hazing shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than fifty dollars or not more than five hundred dollars, or shall be imprisoned in the county jail for a period of not less than thirty days or not more than six months or by both such fine and imprisonment, and in addition thereto shall be immediately discharged and removed from his then position or office in such institution, and shall thereafter be ineligible to reinstatement or re-employment as teacher, instructor, member of faculty, officer, or director in any such State educational institution for a period of three years. (Sec. 4, Act of April 3, 1913, Acts of 1913, p. 239.)

Sec. 1604. **Construction of statute.**—It is especially provided in this Act that nothing herein shall be construed as in any manner affecting or repealing any of the laws of this State respecting homicide, or murder of any degree, manslaughter, assault with intent to murder, or aggravated assault. (Sec. 5, Act of April 3, 1913, Acts of 1913, p. 239.)

Sec. 1605. **Whipping inmate of Training School.**—Corporal punishment in any form shall not be inflicted upon the inmates of the State Training School except as a last resort to maintain discipline, and then only in the presence of the superintendent and a resident nurse; and at no time shall any inmate be struck more than twenty times, and that only with such instrument and in such manner as will inflict reasonable and moderate punishment, considering the age, size and strength of the culprit and the strength of the person administering such punishment, and at no time shall any weapon or instrument of torture be used, or any instrument which by its make, coupled with the manner of its use would be calculated to inflict bodily injury. Anyone violating the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not less than $25.00 nor more than $100.00 or sentenced to not less than thirty days, nor more than ninety days in jail, or by both such fine and imprisonment. (Sec. 15, Act Aug. 16, 1913, Acts First Called Session 1913, p. 11.)

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CHAPTER III

ASSAULTS WITH INTENT TO COMMIT SOME OTHER OFFENSE

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Article 1025. (604) (499) **Assault with intent to maim, etc.**—If any person shall assault another with intent to commit the offense of maiming, disfiguring, or castration, he shall be punished by fine not exceeding one thousand dollars, or by imprisonment in the penitentiary not less than two nor more than five years; and if such assault be made by a person or persons in disguise, the penalty shall be double. (O. C. 492, amended by Act Nov. 6, 1871, Acts 1871, p. 20.)

Sec. 1606. **Assault with intent to maim.**
Sec. 1607. Form of indictment.
Sec. 1608. Indictment.
Sec. 1609. Evidence.

Sec. 1607. **Form of indictment for assault to maim.**
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 John Doe on the ..... day of ....., A. D. ....., in said county and State in and upon ..... did make an assault and did then and there wilfully and maliciously attempt to put out the eye (or "bite off the ear," or whatever it was) of the said .....

Against the peace and dignity of the State.

.....
Foreman of the grand jury.

Sec. 1608. **Indictment for assault with intent to maim.**—In an indictment for an assault with intent to commit an offense, the same particularity is not required as in an indictment for the completed offense. Cole v. State, 62 Texas Crim. Rep. 270; 138 S. W. 109.

Sec. 1609. **Evidence.**—An assault with intent to maim is constituted by the existence of the facts which bring the offense within the definition of an assault, coupled with an intention to commit the offense of maiming. Cole v. State, 62 Texas Crim. Rep. 270; 138 S. W. 109.

If the defendant justifies her attempt to cut off the prosecutor's penis by testifying that he attempted to rape her and denies that he ever had carnal knowledge of

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her, the State may defeat such defense by proof that she had frequently extended him carnal favors. Cole v. State, 62 Texas Crim. Rep. 270; 138 S. W. 109.

Sec. 1610. **Assault with intent to disfigure.**
Sec. 1611. Form of indictment.
Sec. 1612. Indictment.

Sec. 1611. **Form of indictment for assault to disfigure.**
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 John Doe on the ..... day of ....., A. D. ....., in said county and State in and upon ..... did make an assault and did then and there wilfully and maliciously by means of a knife (or "piece of iron," or whatever instrument it was) attempt to place a mark upon the face (or "arm," or whatever part of the person it was) of the said .....

Against the peace and dignity of the State.

.....
Foreman of the grand jury.

Sec. 1612. **Indictment for assault with intent to disfigure.**—A form good for an assault with intent to disfigure by throwing carbolic acid is set out in Lee v. State, 148 S. W. 567.

Art. 1026. (605) (500) **Assault with intent to murder.**—If any person shall assault another with intent to murder, he shall be punished by confinement in the penitentiary not less than two nor more than fifteen years; if the assault be made with a bowie knife or dagger, or in disguise, or by laying in wait, or by shooting into a private residence, the punishment shall be double. (O. C. 493, amended by Act Nov. 6, 1871, Acts 1871, p. 20, amended by Acts 1903, p. 160.)

Sec. 1613. **Assault with intent to murder.**
Sec. 1614. Form of indictment.
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Sec. 1681. Should charge on every theory of assault.
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Sec. 1683. Charge on aggravated assault not required.

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Sec. 1614. **Form of indictment for assault to murder.**
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 John Doe on the ..... day of ....., A. D. ....., in said county and State with malice aforethought in and upon ..... did make an assault with the intent then and there to kill the said .....
Against the peace and dignity of the State.

.....
Foreman of the grand jury.

(Lyons v. State, 9 Texas Crim. App. 636. Smith v. State, 31 Texas Crim. Rep. 34; 19 S. W. 546. Jackson v. State, 48 Texas Crim. Rep. 650; 90 S. W. 34.)

Sec. 1615. **Form of indictment for assault to murder.**
In the name and by the 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 John Doe on the ..... day of ....., A. D. ....., in said county and State in and upon ..... did make an assault with the intent then and there to murder the said .....
Against the peace and dignity of the State.

.....
Foreman of the grand jury.

(Martin v. State, 40 Texas 19. Mills v. State, 13 Texas Crim. App. 491. Gordon v. State, 23 Texas Crim. App. 219; 4 S. W. 885. Gilford v. State, 54 Texas Crim. Rep. 511; 114 S. W. 138. Athey v. State, 54 Texas Crim. Rep. 599; 114 S. W. 113. Waters v. State, 148 S. W. 797.)

Sec. 1616. **Form of indictment for assault to murder.**
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 John Doe on the ..... day of ....., A. D. ....., in said county and State did with malice aforethought shoot ..... with the intent then and there to kill the said .....
Against the peace and dignity of the State.

.....
Foreman of the grand jury.

(Carr v. State, 41 Texas 547.)

Sec. 1617. **Allegation of malice aforethought.**—The term "malice aforethought" need not be alleged in an indictment for an assault with intent to murder if it is alleged in terms that the assault was made "with intent to murder." Martin v. State, 40 Texas 19. Mills v. State, 13 Texas Crim. App. 491. Gordon v. State, 23 Texas Crim. App. 219; 4 S. W. 883. Gilford v. State, 54 Texas Crim. Rep. 511; 114 S. W. 138. Athey v. State, 54 Texas Crim. Rep. 599; 114 S. W. 113. Waters v. State, 148 S. W. 797.

Sec. 1618. **Allegation of intent.**—An allegation that the intent was "to murder" is sufficient and the word "kill" need not be used. Gordon v. State, 23 Texas Crim. App. 219; 4 S. W. 883. Gilford v. State, 54 Texas Crim. Rep. 511; 114 S. W. 138.

An indictment does not charge assault with intent to murder if it fails to allege directly and not by inference who the accused intended to murder, though it alleges who was assaulted. Wimberly v. State, 7 Texas Crim. App. 329.

An indictment does not charge an assault with intent to murder if it fails to allege the intent. Bartlett v. State, 21 Texas Crim. App. 500; 2 S. W. 829.

The omission of the final letter of the word "intent" will not vitiate an indictment for an assault with intent to murder. Stinson v. State, 173 S. W. 1039.

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The omission of the preposition "to" in alleging the intent is fatal to the validity of the indictment as an indictment for an assault with intent to murder. Jones v. State, 21 Texas Crim. App. 349; 17 S. W. 424.

Sec. 1619. **Alleging intent "to kill and murder."**—An allegation that the assault was made with the intent to "kill and murder" is good. Bittick v. State, 40 Texas 119. Lyons v. State, 9 Texas Crim. App. 636. Price v. State, 22 Texas Crim. App. 110; 2 S. W. 622. Athey v. State, 54 Texas Crim. Rep. 599; 114 S. W. 113. Garza v. State, 145 S. W. 591.

Sec. 1620. **Word "murder" need not be used.**—An indictment is good for assault with intent to murder if the charging part is, together with time and venue, that the accused with malice aforethought did make an assault upon the injured party with intent to kill him. Lyons v. State, 9 Texas Crim. App. 636. Smith v. State, 31 Texas Crim. Rep. 34; 19 S. W. 546. Jackson v. State, 48 Texas Crim. Rep. 650; 90 S. W. 34.

Sec. 1621. **Alleging assault according to the outward form.**—An allegation that the accused with malice aforethought shot the injured party with intent to kill him, or shot him with intent to murder him, charges an assault according to the outward form of pleading; the legal effect of such an allegation is to charge an assault. The allegation would be supported by proof that the accused shot or shot at the alleged injured party, because a battery includes an assault. Carr v. State, 41 Texas 547.

Sec. 1622. **Omission of "said."**—An allegation that the assault was made upon one Sarah Pearson with the intent "to murder the Sarah Pearson" is good though the word "said" is omitted. Pearson v. State, 86 S. W. 325.

Sec. 1623. **Means used need not be alleged.**—An indictment for an assault with intent to murder need not allege the means used nor the manner of their use. Bittick v. State, 40 Texas 117. Mayfield v. State, 40 Texas 61. Nash v. State, 2 Texas Crim. App. 364. Hines v. State, 3 Texas Crim. App. 483. Montgomery v. State, 4 Texas Crim. App. 140. Payne v. State, 5 Texas Crim. App. 35. Davis v. State, 20 Texas Crim. App. 302. Price v. State, 22 Texas Crim. App. 110; 2 S. W. 622. Douglass v. State, 26 Texas Crim. App. 109; 9 S. W. 489. Mathis v. State, 39 Texas Crim. Rep. 550; 47 S. W. 464.

The accused is not liable for the double punishment authorized by statute when the assault was made with a bowie-knife or dagger unless it is alleged in terms that it was so made. Garcia v. State, 19 Texas Crim. App. 389.

Sec. 1624. **Charging defendant as a principal.**—The acts which make the defendant a principal need not be alleged in the indictment; he may be charged directly with the commission of the offense although it may not have actually been committed by him. Mills v. State, 13 Texas Crim. App. 489.

Sec. 1625. **Alleging assault on more than one person.**—If there is nothing on the face of the indictment to show that the assaults were committed at different times, an indictment is not defective on account of alleging an assault with intent to murder two or more persons. Scott v. State, 46 Texas Crim. Rep. 311; 81 S. W. 950.

Sec. 1626. **Other allegations.**—In an indictment for an assault with intent to commit murder the same particularity is not required as if it was sought to charge the accused with murder. State v. Croft, 15 Texas 575. Montgomery v. State, 4 Texas Crim. App. 141.

An indictment for assault with intent to murder which names the weapon used need not allege the manner of its use. State v. Croft, 15 Texas 575.

The use of "and" for "an" will not vitiate an otherwise good indictment. Martin v. State, 40 Texas 19.

"One thousand nine hundred four" means 1904. Pearson v. State, 86 S. W. 325.

Sec. 1627. **Conviction may be had under indictment for murder.**—Under an ordinary indictment for murder a conviction may be had for assault with intent to murder. Stapp v. State, 3 Texas Crim. App. 138. Green v. State, 8 Texas Crim. App. 71. Peterson v. State, 12 Texas Crim. App. 655. Morgan v. State, 16 Texas Crim. App. 593.

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Sec. 1628. **Indictment includes aggravated or simple assault.**—Under an ordinary indictment for assault with intent to murder, the accused may be convicted of any phase of aggravated assault or simple assault made by the testimony. Bittick v. State, 40 Texas 117. Moore v. State, 7 Texas Crim. App. 19. Green v. State, 8 Texas Crim. App. 71. Davis v. State, 20 Texas Crim. App. 302. Bolding v. State, 23 Texas Crim. App. 175; 4 S. W. 579. Bean v. State, 25 Texas Crim. App. 346; 8 S. W. 278. Lofton v. State, 59 Texas Crim. Rep. 270; 128 S. W. 385. Wimberly v. State, 60 Texas Crim. Rep. 65; 130 S. W. 1002. Lacoume v. State, 143 S. W. 627.

An allegation of the means used in an assault with intent to murder being descriptive of the assault cannot be rejected as surplusage, so if an unnecessary allegation of the means used is made the accused can only be convicted for an assault made with the means alleged. Foster v. State, 39 Texas Crim. Rep. 399; 46 S. W. 231.

Sec. 1629. **Former jeopardy.**—A conviction for unlawfully carrying a pistol is no bar to a prosecution for an assault with intent to murder. Thomas v. State, 40 Texas 37.

A former conviction for robbery will bar a prosecution for assault with intent to murder if the same assault is relied on in both cases. Moore v. State, 33 Texas Crim. Rep. 166; 25 S. W. 1120.

If the accused wounded more than one person by the same shot or stroke, a conviction for assault with intent to murder one of such persons will bar a prosecution for the assault on any of the others. Sadberry v. State, 39 Texas Crim. Rep. 466; 46 S. W. 639.

A conviction for a simple assault in the Justice Court which was based upon a complaint is not a bar to a prosecution for an assault with intent to murder. Davis v. State, 39 Texas Crim. Rep. 683; 47 S. W. 978.

Art. 1027. (606) (501) **"Bowie-knife" and "dagger" defined.**—A "bowie-knife" or "dagger," as the terms are here and elsewhere used, means any knife intended to be worn upon the person which is capable of inflicting death and not commonly known as a pocket knife. (O. C. 611.)

Sec. 1630. **Proof of bowie-knife.**—An allegation that the assault was committed with a "bowie-knife" is supported by proof that it was committed with a butcher knife. Hernandez v. State, 32 Texas Crim. Rep. 271; 22 S. W. 972.

Sec. 1631. **Use of bowie-knife must be alleged.**—The court is not authorized to submit the double punishment to the jury in the absence of an allegation that the assault was committed with a bowie-knife or dagger. If the means used in the assault are not alleged proof that a bowie-knife or dagger was used would not constitute a variance. Garcia v. State, 19 Texas Crim. App. 389.

Art. 1028. (607) (502) **Test on trial of assault to murder.**—Whenever it appears upon a trial for assault with intent to murder that the offense would have been murder had death resulted therefrom, the person committing such assault is deemed to have done the same with that intent. (O. C. 497.)

Sec. 1632. **Test on trial.**—The statute providing that whenever it appears upon a trial for assault with intent to murder that the offense would have been murder had death resulted therefrom, the person committing such assault is deemed to have done the same with intent to murder, is applicable only where there exists the specific intent to kill; it simply prescribes a test by which to determine whether the offense was an assault with intent to murder, but in thus affording a test does not dispense with the very gist of the offense, that is, a specific intent to kill. White v. State, 13 Texas Crim. App. 259. Davis v. State, 15 Texas Crim. App. 479. Prescott v. State, 52 Texas Crim. Rep. 35; 105 S. W. 192.

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Murder may be committed if the intent be to inflict upon the person killed serious bodily injury which may cause his death, though a specific intent to kill may not be shown, but to constitute an assault with intent to murder there must be a specific intent to kill. White v. State, 13 Texas Crim. App. 259. Harrell v. State, 13 Texas Crim. App. 377. Davis v. State, 15 Texas Crim. App. 475. Carter v. State, 28 Texas Crim. App. 355; 13 S. W. 147. Prescott v. State, 52 Texas Crim. Rep. 35; 105 S. W. 192. Young v. State, 151 S. W. 1046.

To constitute an assault with intent to murder two things must concur: first, an assault, and second, a specific intent to kill with malice aforethought. White v. State, 13 Texas Crim. App. 259. Harrell v. State, 13 Texas Crim. App. 377. Gillespie v. State, 13 Texas Crim. App. 415. Davis v. State, 15 Texas Crim. App. 475. Pruitt v. State, 20 Texas Crim. App. 129. McCullough v. State, 24 Texas Crim. App. 129; 5 S. W. 839. White v. State, 34 Texas Crim. Rep. 153; 29 S. W. 1094. Prescott v. State, 52 Texas Crim. Rep. 35; 105 S. W. 192. Young v. State, 151 S. W. 1046.

Malice is as much an element and ingredient of the offense of assault with intent to murder as it is in murder. Hodges v. State, 3 Texas Crim. App. 470. Caruthers v. State, 13 Texas Crim. App. 339.

If the proof shows an assault with intent to murder it is no defense that defendant shot the injured party for the purpose of robbery. Jones v. State, 50 Texas Crim. Rep. 194; 95 S. W. 1044.

The charge of the court is not required to contain the statute providing in effect that the criterion of the offense consists in the fact that had death resulted from the assault the homicide would have been murder. Williams v. State, 38 Texas Crim. Rep. 145; 41 S. W. 626.

The accused would not be guilty of a higher grade of offense than aggravated assault if the proof shows that had death resulted the offense would be manslaughter. Hodges v. State, 3 Texas Crim. App. 473. Johnson v. State, 5 Texas Crim. App. 47. Spivey v. State, 30 Texas Crim. App. 343; 17 S. W. 546. Mays v. State, 19 S. W. 504.

Sec. 1633. **Malice aforethought.**—Malice aforethought is a condition of the mind which shows a heart regardless of social duty and fatally bent on mischief, the existence of which is inferred from acts committed or words spoken. Hayes v. State, 14 Texas Crim. App. 330.

If malice aforethought is sufficiently defined in the charge to the jury though not in the usual form, the charge is sufficient in that regard. Williams v. State, 61 Texas Crim. Rep. 589; 135 S. W. 552.

The charge of the court need not notice the distinctions between express and implied malice as proof of either would be sufficient. Anderson v. State, 1 Texas Crim. App. 730. Wilson v. State, 4 Texas Crim. App. 642. Ulun v. State, 32 S. W. 699. Simmons v. State, 146 S. W. 550.

A charge defining the term "malice aforethought" only as "the voluntary doing of an unlawful act with the intent, means and ability to accomplish the reasonable and probable consequences of it" is erroneous because such definition would also apply to simple and aggravated assault. Hayes v. State, 14 Texas Crim. App. 330.

A charge on assault with intent to murder is erroneous if it fails to contain a proper definition of the term "malice aforethought." Anderson v. State, 1 Texas Crim. App. 730. Williams v. State, 3 Texas Crim. App. 316. Hodges v. State, 3 Texas Crim. App. 472. Ewing v. State, 4 Texas Crim. App. 417. Daniels v. State, 4 Texas Crim. App. 429. Johnson v. State, 4 Texas Crim. App. 598. Garza v. State, 11 Texas Crim. App. 345. Caruthers v. State, 13 Texas Crim. App. 339. Hayes v. State, 14 Texas Crim. App. 330. Moody v. State, 30 Texas Crim. App. 422; 18 S. W. 94. Harrell v. State, 41 Texas Crim. Rep. 507; 55 S. W. 824.

A charge authorizing a conviction on the theory that defendant acted with express malice is erroneous if there is no proof of express malice. Halsford v. State, 53 Texas Crim. Rep. 44; 108 S. W. 381.

Sec. 1634. **Express malice not necessary to be proven.**—The intent to kill need not be formed in a cool and deliberate mind but may originate in a mind inflamed or

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ruffled by passion or drink, inasmuch as an assault with intent to murder may be either upon express or implied malice. Anderson v. State, 1 Texas Crim. App. 730. Ayres v. State, 26 S. W. 396. Stewart v. State, 50 S. W. 459. Little v. State, 42 Texas Crim. Rep. 551; 61 S. W. 483. Chaney v. State, 50 Texas Crim. Rep. 479; 98 S. W. 847. Jackson v. State, 54 Texas Crim. Rep. 607; 114 S. W. 136. Duncan v. State, 55 Texas Crim. Rep. 168; 115 S. W. 837.

It is not necessary to constitute an assault with intent to murder that the proof show that if death had resulted the offense would have been murder with express malice. It is essential that the proof show a specific intent to kill. Anderson v. State, 1 Texas Crim. App. 730. Stapp v. State, 3 Texas Crim. App. 148. Wilson v. State, 4 Texas Crim. App. 642. Davis v. State, 15 Texas Crim. App. 475. Patrick v. State, 33 S. W. 352. Mathis v. State, 39 Texas Crim. Rep. 549; 47 S. W. 464. Stewart v. State, 50 S. W. 459. Parker v. State, 53 S. W. 115. Hamilton v. State, 41 Texas Crim. Rep. 644; 56 S. W. 926. Smith v. State, 95 S. W. 1057. Jackson v. State, 54 Texas Crim. Rep. 607; 114 S. W. 136. Williams v. State, 57 Texas Crim. Rep. 492; 123 S. W. 1110.

Sec. 1635. **May prove that defendant is a principal.**—The acts which make defendant a principal may be proved although they are not alleged in the indictment; one may be charged directly with the commission of the offense although the offense may not have actually been committed by him. Mills v. State, 13 Texas Crim. App. 489.

Sec. 1636. **Proof of intent to kill.**—If a deadly weapon is used in a deadly manner the inference is almost conclusive that the intent was to kill. If the weapon used was not of itself a deadly weapon, the intent to kill may be established by other facts. Hatton v. State, 31 Texas Crim. Rep. 586; 21 S. W. 679. Franklin v. State, 37 Texas Crim. Rep. 113; 38 S. W. 1016. Walters v. State, 37 Texas Crim. Rep. 388; 35 S. W. 652. Walters v. State, 40 S. W. 794. Wright v. State, 48 Texas Crim. Rep. 613; 90 S. W. 36. Jackson v. State, 48 Texas Crim. Rep. 648; 90 S. W. 34. Colbert v. State, 52 Texas Crim. Rep. 486; 107 S. W. 1115. Lay v. State, 54 Texas Crim. Rep. 64; 111 S. W. 735. Williams v. State, 57 Texas Crim. Rep. 492; 123 S. W. 1110. Stanton v. State, 151 S. W. 808. Luttrell v. State, 157 S. W. 163.

When relevant, the defendant may prove, as bearing on his intent, that he is an expert pistol shot, but he is not entitled to prove specific instances of his skill in shooting. Moore v. State, 33 Texas Crim. Rep. 306; 26 S. W. 403.

Sec. 1637. **"Deadly weapon" defined.**—A deadly weapon is one which, from the manner used, is calculated or likely to produce death or serious bodily injury, and a charge is correct which so informs the jury. Wilson v. State, 37 Texas Crim. Rep. 156; 38 S. W. 1013. Tollett v. State, 55 S. W. 335. Prescott v. State, 54 Texas Crim. Rep. 485; 113 S. W. 531. Harris v. State, 162 S. W. 1150.

Sec. 1638. **Proof of a deadly weapon.**—A deadly weapon is one which, from the manner used, is calculated or likely to produce death or serious bodily injury. Wilson v. State, 37 Texas Crim. Rep. 156; 38 S. W. 1013. Scott v. State, 42 Texas Crim. Rep. 607; 62 S. W. 419.

A razor may be shown to be a deadly weapon from the manner of its use and from the character of the wound inflicted. Barton v. State, 34 Texas Crim. Rep. 613; 31 S. W. 671. Ford v. State, 56 S. W. 338. Scott v. State, 42 Texas Crim. Rep. 607; 62 S. W. 419.

An ordinary pocket knife or any other knife may be used in such a manner as to evidence an intention to take life. Walters v. State, 37 Texas Crim. Rep. 388; 35 S. W. 652. Walters v. State, 40 S. W. 794. Thomas v. State, 44 Texas Crim. Rep. 344; 72 S. W. 178. Colbert v. State, 52 Texas Crim. Rep. 486; 107 S. W. 1115. Prescott v. State, 54 Texas Crim. Rep. 485; 113 S. W. 531. Luttrell v. State, 157 S. W. 157. Jones v. State, 167 S. W. 1110.

A physician who has examined the wounds on the alleged injured party may give his opinion as to whether the weapon with which they were inflicted was a weapon calculated or likely to produce death or serious bodily injury. Sebastian v. State, 41 Texas Crim. Rep. 250; 53 S. W. 875. Nesbitt v. State, 171 S. W. 1127.

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Sec. 1639. **Wounds may be looked to.**—The wounds inflicted on the injured party may be looked to in determining whether or not the knife or other weapon used by defendant was a deadly weapon. Walters v. State, 37 Texas Crim. Rep. 388; 35 S. W. 652. Walters v. State, 40 S. W. 794. Thomas v. State, 44 Texas Crim. Rep. 344; 72 S. W. 178. Garcia v. State, 48 Texas Crim. Rep. 528; 89 S. W. 647. Colbert v. State, 52 Texas Crim. Rep. 486; 107 S. W. 1115. Prescott v. State, 54 Texas Crim. Rep. 485; 113 S. W. 531.

Sec. 1640. **Exhibiting wounds to the jury.**—The court should not permit the wounds of the prosecuting witness to be exhibited to the jury when such exhibition would serve no useful purpose and might tend to inflame the jury. Chapman v. State, 147 S. W. 580.

The court should not permit the prosecuting witness to exhibit his wounds to the jury when they have been changed by operations so as to shed no light upon the issue as to where he was shot. Graves v. State, 58 Texas Crim. Rep. 42; 124 S. W. 678.

The wounds or scars of the prosecuting witness may be exhibited to the jury if such exhibition would serve some useful purpose in solving the issues in the case. Mayes v. State, 100 S. W. 386.

Sec. 1641. **Weapon may be exhibited to the jury.**—It is competent to exhibit to the jury the weapon with which the alleged assault was made and to identify the same as the weapon used in such assault. McBrayer v. State, 34 S. W. 114. Jackson v. State, 48 Texas Crim. Rep. 650; 90 S. W. 34.

Sec. 1642. **Proof that gun was unloaded.**—The burden of proof is on defendant to show that his gun or pistol was unloaded, and the fact that it snapped does not raise the issue. Bedford v. State, 44 Texas Crim. Rep. 97; 69 S. W. 158.

Sec. 1643. **Proof that injured party was armed or unarmed.**—The State is entitled to prove that the injured party was not armed and made no movement as though to draw a weapon or make an attack on defendant in any way at the time defendant made the alleged assault. Williams v. State, 30 Texas Crim. App. 444; 17 S. W. 1071. Jowell v. State, 44 Texas Crim. Rep. 328; 71 S. W. 286.

Sec. 1644. **Assault.**—In every assault there must be an intention to injure, coupled with an act which must at least be the beginning of an attempt to injure then, and not an act of preparation for some contemplated injury that may afterwards be inflicted. Johnson v. State, 43 Texas 576.

The grasping of a gun with the unlawful intention of then inflicting injury is an assault, and if the intention was then to kill, with malice aforethought, it is an assault with intent to murder though the party was seized before he presented or discharged the gun. Higginbotham v. State, 23 Texas 574. Johnson v. State, 14 Texas Crim. App. 306. Barbee v. State, 34 Texas Crim. Rep. 129; 29 S. W. 776.

To constitute an assault with intent to murder the threatening gesture must be coupled with an ability to commit a battery upon the person attempted to be assaulted. Smith v. State, 32 Texas 593. McCullough v. State, 24 Texas Crim. App. 128; 5 S. W. 839.

Sec. 1645. **Motive.**—Antecedent menaces, former quarrels, and former grudges between the parties may be proven to show malice and motive. Carr v. State, 41 Texas 543. Anderson v. State, 15 Texas Crim. App. 447. Sullivan v. State, 31 Texas Crim. Rep. 488; 20 S. W. 927. Keye v. State, 53 Texas Crim. Rep. 320; 111 S. W. 400. Ward v. State, 63 Texas Crim. Rep. 194; 140 S. W. 1109. Brewer v. State, 153 S. W. 623.

In cases of assault with intent to murder, or aggravated or simple assault, proof of motive is admissible as in cases of murder. Moore v. State, 31 Texas Crim. Rep. 234; 20 S. W. 563. Crass v. State, 31 Texas Crim. Rep. 312; 20 S. W. 579. Sullivan v. State, 31 Texas Crim. Rep. 488; 20 S. W. 927. Hall v. State, 31 Texas Crim. Rep. 565; 21 S. W. 368. Martin v. State, 41 Texas Crim. Rep. 242; 53 S. W. 849. Hamilton v. State, 41 Texas Crim. Rep. 644; 56 S. W. 926. Ward v. State, 63 Texas Crim. Rep. 194; 140 S. W. 1109. Brewer v. State, 153 S. W. 623. Irving v. State, 156 S. W. 641.

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Testimony that prosecutor had on a prior occasion been shot or powder-burned by defendant is not admissible where the incident was a mere accident and when it could not illustrate the intent or make manifest any motive or purpose of defendant in the transaction for which he is now being tried. Goebel v. State, 45 Texas Crim. Rep. 415; 76 S. W. 460.

(The subject of motive is further briefed in Sec. 1878.)

Sec. 1646. **May prove that injured party was an officer.**—Under an ordinary indictment for assault with intent to murder the State may prove that the alleged injured party was an officer at the time of the alleged assault. An indictment for assault with intent to murder need not contain an allegation that the injured party was an officer in order to admit proof of that fact. Hodges v. State, 6 Texas Crim. App. 621. Lyons v. State, 9 Texas Crim. App. 636. Lacoume v. State, 143 S. W. 627.

Sec. 1647. **Proving the name of the injured party.**—The name of the injured party must be proved as charged in the indictment, either by proof that he was known or sometimes called by that name, or that it was in fact his name or of the same sound. Stewart v. State, 31 Texas Crim. Rep. 153; 19 S. W. 908. Luttrell v. State, 143 S. W. 629.

Where the name of the injured party is alleged in the indictment, the proof, to be sufficient, must correspond with the allegation. Hardin v. State, 26 Texas 113. Rutherford v. State, 13 Texas Crim. App. 92. Stewart v. State, 31 Texas Crim. Rep. 153; 19 S. W. 908. Haygood v. State, 51 Texas Crim. Rep. 618; 103 S. W. 890. Brown v. State, 53 Texas Crim. Rep. 303; 109 S. W. 188. Luttrell v. State, 143 S. W. 629.

Proof that the injured party was known by the name alleged is sufficient proof of his name. If a party is known by one name as well as another it is immaterial which is his true name. Thompson v. State, 30 S. W. 667. Gafford v. State, 100 S. W. 375.

Sec. 1648. **Date of offense.**—The State is not bound by the date alleged, and may prove that the assault was committed either before or after the date alleged if the date proven is a date anterior to the presentment of the indictment and not so remote as to be barred by limitation. Crass v. State, 30 Texas Crim. App. 480; 17 S. W. 1096.

The proof must show that the assault was committed prior to the presentment of the indictment. Moore v. State, 48 Texas Crim. Rep. 394; 88 S. W. 228.

Sec. 1649. **Limitation.**—To be sufficient the proof must show that the offense was not barred by limitation when the indictment was presented. Stewart v. State, 31 Texas Crim. Rep. 153; 19 S. W. 908. Fulcher v. State, 33 Texas Crim. Rep. 22; 24 S. W. 292.

Sec. 1650. **Wife of defendant may testify.**—Though the alleged injured party was the wife of defendant when he assaulted her, she is a competent witness for the State on his trial for any grade of assault. When the wife of the accused is a competent witness in the case on trial she may be compelled to testify. Bramlette v. State, 21 Texas Crim. App. 618; 2 S. W. 765.

Sec. 1651. **State's proof may be controverted.**—If the State puts in evidence charges of improper conduct made by the alleged injured party against defendant, it is error to refuse to permit defendant to introduce testimony to disprove such charges. Wadlington v. State, 19 Texas Crim. App. 274. Tillery v. State, 24 Texas Crim. App. 273; 5 S. W. 842. Hawthorne v. State, 28 Texas Crim. App. 215; 12 S. W. 603. Skelton v. State, 51 S. W. 943.

Sec. 1652. **Accidental injury.**—If the accused, with malice aforethought, in the attempt to kill one person accidentally injures another, he may be successfully prosecuted for an assault with intent to murder the person he actually injured. Mathis v. State, 39 Texas Crim. Rep. 549; 47 S. W. 464. Smith v. State, 95 S. W. 1057. Moore v. State, 107 S. W. 834. Ward v. State, 63 Texas Crim. Rep. 198; 140 S. W. 1111. Vining v. State, 146 S. W. 909.

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If the accused attempts to murder one person and fails to hit him and the shot or stroke injures another, the State may prosecute the accused for an assault with intent to murder the person he intended to kill but failed to hit, and on the trial of such case may make proof of the result of his unsuccessful shot or stroke.

If the testimony shows that the injury was accidentally inflicted without intent to injure, it will not sustain a conviction for assault with intent to murder. McGuire v. State, 43 Texas 210.

A charge which informs the jury that an assault may be committed though the person actually injured thereby was not the person intended to be injured is correct. Darity v. State, 38 Texas Crim. Rep. 546; 43 S. W. 982. Mathis v. State, 39 Texas Crim. Rep. 551; 47 S. W. 464. Smith v. State, 95 S. W. 1057. Moore v. State, 107 S. W. 834. Ward v. State, 63 Texas Crim. Rep. 198; 140 S. W. 1111. Vining v. State, 146 S. W. 909.

If there is evidence that the pistol was accidentally discharged, a charge is correct which instructs the jury that if they had a reasonable doubt as to whether the pistol was accidentally discharged they should acquit the defendant. Wagner v. State, 35 Texas Crim. Rep. 255; 33 S. W. 124. Alvarez v. State, 58 S. W. 1014. Irving v. State, 156 S. W. 641.

If there is evidence that the injuries were inflicted by accident this theory should be submitted to the jury in an affirmative manner. Carr v. State, 48 Texas Crim. Rep. 287; 87 S. W. 346. Maldonado et al. v. State, 156 S. W. 648.

Sec. 1653. **Need not prove actual injury.**—Proof of infliction of injury on the person is not absolutely essential to a conviction for an assault with intent to murder. Lynn v. State, 23 S. W. 689. Givens v. State, 35 Texas Crim. Rep. 563; 34 S. W. 626. Hanley v. State, 47 S. W. 371. Bean v. State, 51 S. W. 946. Little v. State, 42 Texas Crim. Rep. 551; 61 S. W. 483. Bedford v. State, 44 Texas Crim. Rep. 97; 69 S. W. 158. Franklin v. State, 82 S. W. 514. Olds v. State, 54 Texas Crim. Rep. 413; 113 S. W. 273. Windham v. State, 59 Texas Crim. Rep. 366; 128 S. W. 1130.

Sec. 1654. **Proof as to self-defense.**—The law of self-defense in cases of homicide applies also to cases of assault with intent to murder. Edwards v. State, 5 Texas Crim. App. 593.

Where it is a material inquiry and issue whether or not the defendant went to where the injured party was and where the difficulty occurred with innocent intent or with the evil intent of provoking a difficulty with such party, it is competent for defendant to prove advice and facts showing that he went with innocent intent and for a lawful purpose. Irby v. State, 25 Texas Crim. App. 215; 7 S. W. 705. Farrar v. State, 29 Texas Crim. App. 250; 15 S. W. 719. Simmons v. State, 31 Texas Crim. Rep. 227; 20 S. W. 573.

Sec. 1655. **Declarations of defendant.**—Defendant is not entitled to put in evidence proof of self-serving declarations made after the assault which is not admissible as a part of the *res gestæ* nor as a part of a detailed conversation put in evidence by the State. Johnson v. State, 1 Texas Crim. App. 130. Good v. State, 18 Texas Crim. App. 39. Gaines v. State, 37 S. W. 331. Little v. State, 42 Texas Crim. Rep. 551; 61 S. W. 483.

Sec. 1656. **Declarations of injured party.**—It is error to exclude proof of the declarations of the alleged injured party which were made so soon after the difficulty occurred as to be a part of the *res gestæ* of the difficulty, and which tends to show his animus therein and that he provoked it. Black v. State, 8 Texas Crim. App. 329.

Sec. 1657. **Res gestæ.**—Statements of the injured party made a short time after the injuries were inflicted may be admitted as a part of the *res gestæ* where circumstances prevented earlier statements, or where suffering excludes the idea of fabrication, and where the statements are voluntary and spontaneous. Waechter v. State, 34 Texas Crim. Rep. 297; 30 S. W. 444. Graves v. State, 58 Texas Crim. Rep. 42; 124 S. W. 678.

Testimony that the injured party was robbed of some money while defendant was beating him is admissible as a part of the *res gestæ*. Richards v. State, 34 Texas Crim. Rep. 277; 30 S. W. 229.

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As a part of the *res gestæ* and as tending to show the state of mind of the accused, it may be shown that immediately after or simultaneous with the assault on the alleged injured party he assaulted another person, and the details of both assaults may be shown. Denson v. State, 35 S. W. 150. Irving v. State, 156 S. W. 641.

Sec. 1658. **Drunkenness.**—Mere voluntary drunkenness will not of itself reduce an assault with intent to murder committed with malice aforethought either express or implied to a lower degree of assault. Pugh v. State, 2 Texas Crim. App. 539. Jeffries v. State, 9 Texas Crim. App. 598. Hernandez v. State, 32 Texas Crim. Rep. 271; 22 S. W. 972. Little v. State, 42 Texas Crim. Rep. 551; 61 S. W. 483. Bell v. State, 77 S. W. 787. Baldwin v. State, 148 S. W. 312.

Mere voluntary drunkenness is no defense to crime, and it is not error to fail or refuse to charge the jury that if defendant was too drunk to form the specific intent to murder he should be acquitted of assault with intent to murder. Jeffries v. State, 9 Texas Crim. App. 598. Little v. State, 42 Texas Crim. Rep. 551; 61 S. W. 483. Bell v. State, 77 S. W. 787. Baldwin v. State, 148 S. W. 312.

If it tends to illustrate any issue in the case the defendant may prove that the alleged injured party was under the influence of liquor. Thomas v. State, 40 Texas 42. Hobbs v. State, 16 Texas Crim. App. 520.

Sec. 1659. **Convictions sustained.**—When the jury have solved the issues presented in the testimony under a fair and proper charge of the court and have found defendant guilty of an assault with intent to murder and that verdict has been approved by the judge who tried the case, it will not be disturbed on the facts on appeal unless clearly wrong if there is sufficient evidence in the record, if believed, to sustain it. Trevinio v. State, 27 Texas Crim. App. 372; 11 S. W. 447. Wilks v. State, 27 Texas Crim. App. 381; 11 S. W. 415. Wood v. State, 27 Texas Crim. App. 401; 11 S. W. 449. Sullivan v. State, 31 Texas Crim. Rep. 486; 20 S. W. 927. Lynn v. State, 23 S. W. 689. Goodson v. State, 24 S. W. 281. Guyun v. State, 29 S. W. 791. White v. State, 34 Texas Crim. Rep. 153; 29 S. W. 1094. Halliburton v. State, 34 Texas Crim. Rep. 410; 31 S. W. 297. Turner v. State, 37 Texas Crim. Rep. 451; 36 S. W. 87. Steinhauser v. State, 48 S. W. 506. Mayes v. State, 100 S. W. 386. Biard v. State, 100 S. W. 937. Drennan v. State, 53 Texas Crim. Rep. 311; 109 S. W. 1090. Gilford v. State, 54 Texas Crim. Rep. 510; 114 S. W. 138. Duncan v. State, 55 Texas Crim. Rep. 168; 115 S. W. 837. McDonald v. State, 55 Texas Crim. Rep. 208; 116 S. W. 47. Neeley v. State, 56 Texas Crim. Rep. 508; 120 S. W. 876. Mosley v. State, 61 Texas Crim. Rep. 294; 135 S. W. 148. Barrego v. State, 61 Texas Crim. Rep. 625; 136 S. W. 41. McDaniel v. State, 63 Texas Crim. Rep. 359; 139 S. W. 1154. York v. State, 64 Texas Crim. Rep. 153; 142 S. W. 8. Simms v. State, 148 S. W. 786. King v. State, 152 S. W. 629. Luttrell v. State, 157 S. W. 157. Wilson v. State, 158 S. W. 512. Jones v. State, 167 S. W. 1110. Catlett v. State, 169 S. W. 673. McGrew v. State, 172 S. W. 234.

If the assault was committed with malice aforethought with the specific intent to kill and with an instrument capable of producing death used in such manner as to evidence an intention to take life, and there are no extenuating circumstances, and the assault is coupled with the ability to commit a battery, it is an assault with intent to murder. Yanez v. State, 20 Texas 660. Stapp v. State, 3 Texas Crim. App. 138. Collins v. State, 6 Texas Crim. App. 72. Meyers v. State, 14 Texas Crim. App. 35. Johnson v. State, 14 Texas Crim. App. 306. Watts v. State, 30 Texas Crim. App. 533; 17 S. W. 1092. Hatton v. State, 31 Texas Crim. Rep. 586; 21 S. W. 679. Brown v. State, 28 S. W. 471. Jowell v. State, 44 Texas Crim. Rep. 328; 71 S. W. 286. Barbee v. State, 34 Texas Crim. Rep. 129; 29 S. W. 776. Barton v. State, 34 Texas Crim. Rep. 613; 31 S. W. 671. Givens v. State, 35 Texas Crim. Rep. 563; 34 S. W. 626. Myer v. State, 38 S. W. 193. Franklin v. State, 37 Texas Crim. Rep. 113; 38 S. W. 1016. Poe v. State, 47 S. W. 471. Atkins v. State, 53 S. W. 858. Bell v. State, 77 S. W. 787. Johnson v. State, 47 Texas Crim. Rep. 300; 85 S. W. 312. Wright v. State, 48 Texas Crim. Rep. 613; 90 S. W. 36. Biard v. State, 100 S. W. 937. Colbert v. State, 52 Texas Crim. Rep. 486; 107 S. W. 1115. Lay v. State, 54 Texas Crim. Rep. 64; 111 S. W. 735. Olds v. State, 54 Texas Crim. Rep. 411; 113 S. W. 272. Jackson v. State, 54 Texas Crim. Rep. 605; 114 S. W. 136. Pemberton v. State, 55 Texas Crim. Rep. 464; 117 S. W. 837. Williams v. State, 56 Texas Crim. Rep. 225; 120 S. W. 421. Nelson v.

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State, 57 Texas Crim. Rep. 339; 123 S. W. 132. Williams v. State, 57 Texas Crim. Rep. 492; 123 S. W. 1110. Kuykendall v. State, 60 Texas Crim. Rep. 254; 131 S. W. 1099. Catlett v. State, 169 S. W. 673.

Where defendant has committed an assault with intent to murder the fact that he does not finish killing the injured party will not of itself reduce the grade of his already completed offense. Trevinio v. State, 27 Texas Crim. App. 372; 11 S. W. 447. Duncan v. State, 55 Texas Crim. Rep. 168; 115 S. W. 837.

Although adequate cause existed for the assault by defendant made with the intent to kill, yet if his mind was capable of cool reflection the jury is authorized to find that the assault was made with malice aforethought and to convict him of assault with intent to murder. Poe v. State, 47 S. W. 471. Kuykendall v. State, 60 Texas Crim. Rep. 254; 131 S. W. 1099.

Sec. 1660. **Evidence insufficient if intent to kill is not shown.**—A conviction for assault with intent to murder is not supported by the evidence if the proof fails to show the specific intent to kill. McGuire v. State, 43 Texas 210. Burch v. State, 43 Texas 376. Jobe v. State, 1 Texas Crim. App. 183. Ewing v. State, 4 Texas Crim. App. 417. Black v. State, 8 Texas Crim. App. 329. Garcia v. State, 23 Texas Crim. App. 712; 5 S. W. 186. Hammons v. State, 29 Texas Crim. App. 445; 16 S. W. 99. Lyons v. State, 30 Texas Crim. App. 642; 18 S. W. 416. Ming v. State, 24 S. W. 29. Patrick v. State, 33 S. W. 352. Foster v. State, 39 Texas Crim. Rep. 399; 46 S. W. 231. Parker v. State, 53 S. W. 115. Cage v. State, 77 S. W. 806. Reyes v. State, 48 Texas Crim. Rep. 346; 88 S. W. 245. Nalley v. State, 51 Texas Crim. Rep. 58; 100 S. W. 385.

Sec. 1661. **Evidence insufficient.**—When a conspiracy is not shown defendant is not responsible for the independent act of a third person in coming up and stabbing the alleged injured party. Ming v. State, 24 S. W. 29.

If the weapon is not shown to be a deadly weapon or the wounds inflicted are not shown to be serious, the proof does not show an assault with intent to murder though defendant said he intended to kill; the desire to kill is not proof that the weapon used was a deadly weapon. Foster v. State, 39 Texas Crim. Rep. 399; 46 S. W. 231. Sloan v. State, 76 S. W. 922. Cage v. State, 77 S. W. 806. Nalley v. State, 51 Texas Crim. Rep. 58; 100 S. W. 385.

Proof that the weapon used was a pocket knife is not sufficient of itself to show that the intent was to kill or that such knife was a deadly weapon. Martinez v. State, 35 Texas Crim. Rep. 386; 33 S. W. 970. Johnson v. State, 49 Texas Crim. Rep. 429; 93 S. W. 735. Barnes v. State, 52 Texas Crim. Rep. 407; 107 S. W. 823. Ross v. State, 61 Texas Crim. Rep. 12; 133 S. W. 688.

A conviction for assault with intent to murder will not be sustained if the proof shows that defendant was acting under the immediate influence of sudden passion aroused by an adequate cause. Mays v. State, 19 S. W. 504.

Sec. 1662. **Sufficiency of circumstantial evidence.**—A conviction for an assault with intent to murder may be based upon circumstantial evidence if the circumstances proven exclude every other reasonable hypothesis except that of defendant's guilt. Young v. State, 44 Texas 98. Meyers v. State, 14 Texas Crim. App. 35.

Circumstantial evidence which is no stronger against the defendant than it is against another is insufficient to sustain a conviction when there is no proof of acting together. Clifton v. State, 39 Texas Crim. Rep. 619; 47 S. W. 642.

A conviction based upon circumstantial evidence will not be sustained if the circumstances proven do not exclude every other reasonable hypothesis except that of the defendant's guilt. The law demands a greater degree of certainty than a mere probability or strong suspicion. Roseborough v. State, 43 Texas 570. Clifton v. State, 39 Texas Crim. Rep. 619; 47 S. W. 642.

Sec. 1663. **Charge on circumstantial evidence required.**—The court should charge on circumstantial evidence if the inculpatory proof is wholly circumstantial. Eckert v. State, 9 Texas Crim. App. 105.

Sec. 1664. **Charge on circumstantial evidence not required.**—The law of circumstantial evidence need not be charged to the jury if there is evidence that

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defendant admitted assaulting the alleged injured party. Christian v. State, 62 S. W. 423. McKinney v. State, 48 Texas Crim. Rep. 405; 88 S. W. 1012.

Sec. 1665. **Charge of the court.**—A charge is not erroneous which in submitting the issue of assault with intent to murder requires the jury to find beyond a reasonable doubt that the assault was not made under the influence of sudden passion arising from an adequate cause or was not in self defense before they are authorized to convict of assault with intent to murder. Williams v. State, 38 Texas Crim. Rep. 145; 41 S. W. 626. Barr v. State, 56 Texas Crim. Rep. 374; 120 S. W. 422 (overruling Bagley v. State, 103 S. W. 874.)

Though defendant did not know the alleged injured party when he shot him while riding in a wagon, a charge is correct which instructs the jury that they could convict defendant of assault with intent to murder if they found that he fired a pistol into a wagon with either express or implied malice, with intent to kill any person riding therein. Christian v. State, 62 S. W. 423.

Errors in the charge as to the issue of assault with intent to murder pass out of the case when the conviction is for aggravated or simple assault and the errors do not prejudice the other issues in the case. Blackwell v. State, 33 Texas Crim. Rep. 278; 26 S. W. 397. Tollett v. State, 55 S. W. 335.

A charge is erroneous if it assumes that a weapon used to strike with is a deadly weapon. Sheffield v. State, 1 Texas Crim. App. 640.

A charge is erroneous when the jury are therein authorized to convict both defendants on proof of the guilt of either. Maldonado et al. v. State, 156 S. W. 647.

It is error to charge the jury that pointing a pistol at another is an assault with intent to murder. Agitone v. State, 41 Texas 503. Walker v. State, 7 Texas Crim. App. 627.

A charge is erroneous if it assumes that defendant shot at the alleged injured party if that fact is an issue. Walker v. State, 7 Texas Crim. App. 630.

In submitting the name of the person whom it is alleged defendant intended to kill, the charge should be confined to one or more of those named in the indictment, if others were in the crowd. It is error to authorize a conviction on the theory that the intent was to kill some person not mentioned in the indictment. Brown v. State, 16 Texas Crim. App. 199. Choice v. State, 52 Texas Crim. Rep. 287; 106 S. W. 387. Spencer v. State, 52 Texas Crim. Rep. 292; 106 S. W. 386. Brailaford v. State, 158 S. W. 541.

Sec. 1666. **Murder need not be defined in the charge.**—On a trial for assault with intent to murder the charge to the jury need not contain any definitions of murder if the term "malice aforethought" is properly defined and the jury are required to find beyond a reasonable doubt that the defendant made an assault with malice aforethought with intent to kill. Wagner v. State, 35 Texas Crim. Rep. 255; 33 S. W. 124. Passmore v. State, 64 S. W. 1040. Williams v. State, 61 Texas Crim. Rep. 589; 135 S. W. 552.

Sec. 1667. **Defining "assault" in the charge.**—The charge of the court should in some way inform the jury of the meaning of an assault. Campbell v. State, 9 Texas Crim. App. 147. Driskill v. State, 22 Texas Crim. App. 60; 2 S. W. 622.

If there is no issue as to the ability to commit a battery a charge requiring the jury to find that defendant acting with malice aforethought shot or cut the alleged injured party is equivalent to a definition of the term "assault." Wagner v. State, 35 Texas Crim. Rep. 255; 33 S. W. 124. Williams v. State, 38 Texas Crim. Rep. 144; 41 S. W. 626. Williams v. State, 61 Texas Crim. Rep. 589; 135 S. W. 552.

A charge instructing the jury that if defendant cut the prosecuting witness it would be an assault is erroneous, because to constitute an assault the act must be unlawful. Ponton v. State, 35 Texas Crim. Rep. 597; 34 S. W. 950.

If it is an issue as to whether the attempted violence was coupled with an ability to commit a battery, the charge to the jury should instruct them as to the ability to commit a battery. McCullough v. State, 24 Texas Crim. App. 128; 5 S. W. 839.

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Sec. 1668. **No particular form of charge is required.**—No particular form of charge is required in a case of assault with intent to murder. If the charge defines an assault and malice aforethought and requires the jury to find beyond a reasonable doubt that the defendant with malice aforethought made an assault on the alleged injured party with the intent to kill it is ordinarily sufficient. Farrar v. State, 29 Texas Crim. App. 255; 15 S. W. 719. Hooper v. State, 29 Texas Crim. App. 617; 16 S. W. 655. White v. State, 34 Texas Crim. Rep. 155; 29 S. W. 1094. Wagner v. State, 35 Texas Crim. Rep. 255; 33 S. W. 124. Grayson v. State, 35 Texas Crim. Rep. 629; 34 S. W. 961. Williams v. State, 38 Texas Crim. Rep. 145; 41 S. W. 626. Henry v. State, 54 S. W. 594. Riojos v. State, 55 S. W. 172. Alvarez v. State, 58 S. W. 1013. Passmore v. State, 64 S. W. 1040. Mosely v. State, 70 S. W. 546. Williams v. State, 61 Texas Crim. Rep. 589; 135 S. W. 552. Luttrell v. State, 157 S. W. 164.

Sec. 1669. **Charge should be construed as a whole.**—The charge of the court should be construed as a whole. Luttrell v. State, 157 S. W. 163.

Sec. 1670. **Charge on intent.**—A charge on assault to murder is not required to contain the word "specific." Mosely v. State, 70 S. W. 546.

A charge is erroneous if in effect it authorizes a conviction for assault with intent to murder on proof of intent to maim. Cooper v. State, 60 Texas Crim. Rep. 411; 132 S. W. 355.

If defendant testifies that he did not intend to kill he is entitled to an affirmative submission of his theory. Carr v. State, 48 Texas Crim. Rep. 287; 87 S. W. 346. Scott v. State, 60 Texas Crim. Rep. 318; 131 S. W. 1072.

The charge is erroneous if it instructs the jury that if the offense would have been murder had death resulted then the law presumes the intent to kill. Walker v. State, 7 Texas Crim. App. 630. White v. State, 13 Texas Crim. App. 259. Courtney v. State, 13 Texas Crim. App. 502. Davis v. State, 15 Texas Crim. App. 475.

The charge is erroneous if it authorizes a conviction for assault with intent to murder whether the intent was to kill or not. An assault with intent to murder cannot be committed unless there existed the specific intent to kill. White v. State, 13 Texas Crim. App. 259. Gillespie v. State, 13 Texas Crim. App. 415. Courtney v. State, 13 Texas Crim. App. 502. Davis v. State, 15 Texas Crim. App. 475. Carter v. State, 28 Texas Crim. App. 359; 13 S. W. 147. Williams v. State, 30 Texas Crim. App. 446; 17 S. W. 1071. Williams v. State, 77 S. W. 447. Prescott v. State, 52 Texas Crim. Rep. 35; 105 S. W. 192. Cooper v. State, 60 Texas Crim. Rep. 411; 132 S. W. 355.

A charge is fundamentally erroneous if it authorizes a conviction for an assault with intent to murder without requiring the jury to find an intent to kill. Johnson v. State, 1 Texas Crim. App. 611. Walker v. State, 7 Texas Crim. App. 630. White v. State, 13 Texas Crim. App. 259. Courtney v. State, 13 Texas Crim. App. 502. Davis v. State, 15 Texas Crim. App. 475. Williams v. State, 77 S. W. 447. Carr v. State, 48 Texas Crim. Rep. 287; 87 S. W. 346. Prescott v. State, 52 Texas Crim. Rep. 35; 105 S. W. 192.

A charge is erroneous if it instructs the jury to convict of assault with intent to murder if they find that the intent was "to kill or to inflict serious bodily injury." If the assault was made with the intent to inflict serious bodily injury and not to kill it would not be an assault with intent to murder. Gillespie v. State, 13 Texas Crim. App. 415. Pruitt v. State, 20 Texas Crim. App. 129. Moore et al. v. State, 26 Texas Crim. App. 333; 9 S. W. 610. Carter v. State, 28 Texas Crim. App. 360; 13 S. W. 147. Williams v. State, 30 Texas Crim. App. 446; 17 S. W. 1071. Prescott v. State, 52 Texas Crim. Rep. 35; 105 S. W. 192.

It is error to charge the jury that if defendant used a deadly weapon the law presumes that he intended to kill. Agitone v. State, 41 Texas 503. Walker v. State, 7 Texas Crim. App. 630.

A charge is erroneous if it instructs the jury that defendant would be guilty of assault with intent to murder if he fired his pistol at the alleged injured party with

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intent to kill, since such a charge ignores malice aforethought. Peterson v. State, 12 Texas Crim. App. 656. Carr v. State, 48 Texas Crim. Rep. 288; 87 S. W. 346.

Sec. 1671. **Limiting testimony in the charge.**—It is not necessary to limit in the charge proof of matters which could only be used by the jury to show the motive of defendant in committing the assault for which he is then being tried. Hamilton v. State, 41 Texas Crim. Rep. 644; 56 S. W. 926. Wilson v. State, 155 S. W. 243.

If more than one person was wounded by the shot intended for the alleged injured party, it is not necessary to limit the testimony with reference to the shooting of the others where the charge is confined to the assault alleged. Alvarez v. State, 58 S. W. 1014.

Sec. 1672. **Charge on self defense.**—The law of self defense in cases of homicide applies also to cases of assault with intent to murder. Edwards v. State, 5 Texas Crim. App. 594.

It is not error to restrict the right of self defense to an actual attack if the only theory of self defense presented by the testimony is an actual attack, and the danger, if any there was, was patent and real to defendant. Moore v. State, 31 Texas Crim. Rep. 234; 20 S. W. 563. Moody v. State, 59 S. W. 894.

When self defense is an issue it is error to charge the jury that when the facts have been proved which constitute the offense it then devolves upon the defendant to establish the facts and circumstances on which he relies to excuse or justify the prohibited act. Jones v. State, 13 Texas Crim. App. 1.

A charge is error if its effect is to deprive defendant of his right of self defense if the jury find that he brought on the difficulty; if the conflict was only brought on to have a fist fight, he would not be deprived of his ground of adequate cause if great injury was inflicted on him by means of superior strength. Halsford v. State, 53 Texas Crim. Rep. 46; 108 S. W. 381.

Sec. 1673. **One may defend against any assault.**—A person has a right to defend against an ordinary attack as well as against one which would produce fear of death or serious bodily injury, and if there is evidence that the accused was defending himself or another against an ordinary assault it is error to restrict his right of self defense to the right to defend against an attack producing a fear of death or serious bodily injury. McLendon v. State, 66 S. W. 553. Crawford v. State, 70 S. W. 548. Price v. State, 46 Texas Crim. Rep. 80; 79 S. W. 540. Rea v. State, 46 Texas Crim. Rep. 454; 80 S. W. 1003. Collins v. State, 47 Texas Crim. Rep. 115; 81 S. W. 300. Sprinkle v. State, 49 Texas Crim. Rep. 224; 91 S. W. 787. Hix v. State, 51 Texas Crim. Rep. 431; 102 S. W. 405. Little v. State, 61 Texas Crim. Rep. 197; 135 S. W. 120. Smith v. State, 61 Texas Crim. Rep. 349; 135 S. W. 152.

Sec. 1674. **Provoking the difficulty.**—The rules as to provoking the difficulty which apply in cases of murder and manslaughter apply also to cases of assault with intent to murder, except there must be the specific intent to kill in order to constitute assault with intent to murder. Carter v. State, 28 Texas Crim. App. 355; 13 S. W. 147. Williams v. State, 30 Texas Crim. App. 446; 17 S. W. 1071. Mundine v. State, 37 Texas Crim. Rep. 5; 38 S. W. 619. Beard v. State, 47 Texas Crim. Rep. 50; 81 S. W. 33. Solis v. State, 174 S. W. 343.

When death does not result and the court charges on provoking the difficulty the charge should instruct the jury that if defendant provoked the difficulty with no intent to kill, the final assault in apparent self defense would be no higher than aggravated assault. Carter v. State, 28 Texas Crim. App. 355; 13 S. W. 147. Beard v. State, 47 Texas Crim. Rep. 50; 81 S. W. 33. Solis v. State, 174 S. W. 343.

In a prosecution for assault with intent to murder if the charge instructs the jury that if defendant provoked the difficulty with an apparent intention of killing he would be guilty of an assault with intent to murder, it is error to fail to also instruct them that if the intention was not to kill he would not be guilty of a higher grade of offense than aggravated assault. Sanders v. State, 50 Texas Crim. Rep. 430; 97 S. W. 1046. Solis v. State, 174 S. W. 343.

Sec. 1675. **Charge on defensive theory.**—A defendant is entitled to a distinct and affirmative, and not merely an implied or negative, presentation of the issues

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which arise upon his evidence, in order to prevent the jury from ignoring his defenses, and to conduct them to a proper verdict if they find his evidence to be true. Martin v. State, 57 Texas Crim. Rep. 264; 122 S. W. 560.

The defendant is entitled to a charge on the testimony introduced and it is immaterial from what source it comes. Every defensive theory which fairly arises from the testimony should be affirmatively submitted to the jury whether the theory be presented by the evidence of the State or defense, or by both. Sowell v. State, 32 Texas Crim. Rep. 482; 24 S. W. 504. Keith v. State, 50 Texas Crim. Rep. 67; 94 S. W. 1044.

Where defendant's sister-in-law gave birth to a baby claiming that he was its father and the baby was hid in the brush, defendant was entitled to a charge on his claim that his wife hid the baby. Martin v. State, 57 Texas Crim. Rep. 264; 122 S. W. 559.

Where the child of defendant and his wife's sister was taken away from the house and hid, but not hurt, and the testimony suggested that he might have wanted to avoid the shame by hiding it until it could be removed, the court should have charged on that theory. Martin v. State, 57 Texas Crim. Rep. 264; 122 S. W. 558.

Sec. 1676. **Charge on mitigating circumstances.**—Where there were two difficulties a few minutes apart it is error to charge the jury that if defendant was struck and went off, armed herself and came back with the intent to kill, that the previous assault upon her would be no excuse. Ross v. State, 53 Texas Crim. Rep. 278; 109 S. W. 194.

If the issue of manslaughter had death resulted would be in the case on the theory of former insults to a female relation of the accused, it is error to charge the jury that the provocation must arise at the time of the difficulty. Whaley v. State, 9 Texas Crim. App. 305.

It is error to limit adequate cause to the theory that the alleged injured party struck defendant when the testimony is that he was about to strike. Williams v. State, 15 Texas Crim. App. 617.

It is error to submit a state of facts which, if true, would constitute aggravated assault, and then instruct the jury that if they so found the facts to be defendant would be guilty of assault with intent to murder. Beaty v. State, 30 Texas Crim. App. 677; 18 S. W. 646.

A charge is erroneous if it requires the jury to believe not only that adequate cause and passion existed, but that defendant did not have the specific intent to kill; the existence of either would reduce the offense from assault with intent to murder to a lower grade of assault. Chatman v. State, 40 Texas Crim. Rep. 278; 50 S. W. 396.

A charge is erroneous if it authorizes a conviction for aggravated assault only upon the theory that the testimony fails to show the intent to kill and fails to show that if death had resulted the defendant would be guilty of murder; the failure to show either would not authorize a conviction for assault with intent to murder. Carter v. State, 28 Texas Crim. App. 359; 13 S. W. 147.

If there is an issue as to defendants weapon being *per se* deadly and testimony that it was used to cut or strike with while he was under the influence of sudden passion, the court should charge on the presumption arising from the use of such weapon and apply the law to the facts. Johnson v. State, 49 Texas Crim. Rep. 429; 93 S. W. 735. Ross v. State, 61 Texas Crim. Rep. 12; 133 S. W. 688. Pool v. State, 62 Texas Crim. Rep. 360; 137 S. W. 666.

Sec. 1677. **Charge on theory of no intent to kill.**—If there is testimony which, if true, would render it doubtful whether the accused intended to kill when he assaulted the alleged injured party, the court should charge on this theory of aggravated assault. Walker v. State, 7 Texas Crim. App. 627. Harrell v. State, 13 Texas Crim. App. 377. Carter v. State, 28 Texas Crim. App. 355; 13 S. W. 147. Moore v. State, 33 Texas Crim. Rep. 306; 26 S. W. 403. Smith v. State, 36 Texas Crim. Rep. 573; 38 S. W. 167. Mathis v. State, 39 Texas Crim. Rep. 549; 47 S. W. 464. Cubine v. State, 44 Texas Crim. Rep. 598; 73 S. W. 396. Angel v. State, 45 Texas

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Crim. Rep. 137; 74 S. W. 553. Pastrana v. State, 48 Texas Crim. Rep. 224; 87 S. W. 347. Prescott v. State, 52 Texas Crim. Rep. 35; 105 S. W. 192. Henderson v. State, 55 Texas Crim. Rep. 16; 115 S. W. 45. Oliver v. State, 60 Texas Crim. Rep. 62; 131 S. W. 215. Thomas v. State, 60 Texas Crim. Rep. 84; 131 S. W. 314. Armstrong v. State, 60 Texas Crim. Rep. 316; 131 S. W. 1074. Scott v. State, 60 Texas Crim. Rep. 318; 131 S. W. 1073. Malone v. State, 60 Texas Crim. Rep. 509; 132 S. W. 769. Leigh v. State, 145 S. W. 920. Young et al. v. State, 151 S. W. 1046.

Sec. 1678. **Charge on theory of manslaughter.**—If, had death resulted, the issue of manslaughter would be in the case, the court should charge on aggravated assault on the theory of sudden passion aroused by an adequate cause. Marshall v. State, 40 Texas 200. Hodges v. State, 3 Texas Crim. App. 470. Hobbs v. State, 16 Texas Crim. App. 523. Lewis v. State, 18 Texas Crim. App. 119. Wadlington v. State, 19 Texas Crim. App. 273. Garcia v. State, 19 Texas Crim. App. 389. Roberts v. State, 23 Texas Crim. App. 171; 4 S. W. 879. Howard v. State, 23 Texas Crim. App. 265; 5 S. W. 231. Spivey v. State, 30 Texas Crim. App. 343; 17 S. W. 546. Beaty v. State, 30 Texas Crim. App. 679; 18 S. W. 646. Sowell v. State, 32 Texas Crim. Rep. 482; 24 S. W. 504. Goode v. State, 32 Texas Crim. Rep. 505; 24 S. W. 102. Slaughter v. State, 34 Texas Crim. Rep. 81; 29 S. W. 161. Stevens v. State, 38 Texas Crim. Rep. 550; 43 S. W. 1005. Chatman v. State, 40 Texas Crim. Rep. 272; 50 S. W. 396. Cage v. State, 55 S. W. 63. Hall v. State, 42 Texas Crim. Rep. 444; 60 S. W. 769. Mooney v. State, 65 S. W. 926. Evans v. State, 76 S. W. 467. Carlisle v. State, 77 S. W. 213. Spiller v. State, 77 S. W. 809. Canister v. State, 46 Texas Crim. Rep. 221; 79 S. W. 24. Palmer v. State, 47 Texas Crim. Rep. 268; 83 S. W. 202. Cooper v. State, 48 Texas Crim. Rep. 36; 85 S. W. 1059. Jackson v. State, 48 Texas Crim. Rep. 373; 88 S. W. 239. Cooper v. State, 49 Texas Crim. Rep. 28; 89 S. W. 1068. Furgerson v. State, 58 Texas Crim. Rep. 431; 126 S. W. 594. Recen v. State, 58 Texas Crim. Rep. 457; 126 S. W. 577. Hobbs v. State, 151 S. W. 809. Sanchez et al. v. State, 156 S. W. 218. Brailaford v. State, 158 S. W. 541. Daniels v. State, 160 S. W. 707. Solis v. State, 174 S. W. 343.

If had death resulted the issue of manslaughter would be in the case based on an insult to a female relation, the court should charge on aggravated assault on this theory. Williams v. State, 30 Texas Crim. App. 447; 17 S. W. 1071. Wilson v. State, 154 S. W. 1017.

In a prosecution for an assault with intent to murder, if the testimony should show that had death resulted the offense would have been manslaughter, then the accused cannot be convicted of a higher grade of offense than aggravated assault. Hodges v. State, 3 Texas Crim. App. 473. Johnson v. State, 5 Texas Crim. App. 47. Spivey v. State, 30 Texas Crim. App. 343; 17 S. W. 546. Mays v. State, 19 S. W. 504. Solis v. State, 174 S. W. 343.

If had death resulted the issue of manslaughter would be in the case based on an attempted illegal arrest, the court should charge on aggravated assault on this theory. Sanchez et al. v. State, 156 S. W. 218.

Sec. 1679. **Aggravated assault on theory of excessive force.**—In a prosecution for assault with intent to murder, if there is testimony that defendant was defending against an ordinary attack with the fists and cut the alleged injured party with a knife, the issue of aggravated assault is raised if the knife was a deadly weapon. Collins v. State, 47 Texas Crim. Rep. 115; 81 S. W. 300.

If there is testimony that prosecutor began the difficulty by throwing a rock at defendant and was then cut with a knife with no specific intent to kill, this theory of aggravated assault should be submitted to the jury. Heath v. State, 57 Texas Crim. Rep. 59; 121 S. W. 862.

In a prosecution for assault with intent to murder, the issue of aggravated assault is in the case if there is testimony that defendant after shooting in self defense fired more shots after the danger had ceased. Hobbs v. State, 16 Texas Crim. App. 523. Cooper v. State, 49 Texas Crim. Rep. 31; 89 S. W. 1068.

Sec. 1680. **When charge on aggravated assault should be given.**—The failure of the court to charge on aggravated assault cannot be successfully complained of for the first time on appeal. Pena v. State, 38 Texas Crim. Rep. 333; 42 S. W. 991. Cubine v. State, 45 Texas Crim. Rep. 110; 74 S. W. 39.

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Even though defendant plead guilty to an indictment charging assault with intent to murder, the court should charge on aggravated assault if that theory is presented by the testimony. Jackson v. State, 48 Texas Crim. Rep. 373; 88 S. W. 239.

If the testimony fails to show that defendant was in reaching distance of the alleged injured party by the means used, so that he could have killed him, the court should charge on aggravated assault. Thomas v. State, 60 Texas Crim. Rep. 84; 131 S. W. 314.

If it is an issue whether the weapon used was a deadly weapon the court should charge on aggravated assault. Martinez v. State, 35 Texas Crim. Rep. 386; 33 S. W. 970. Smith v. State, 36 Texas Crim. Rep. 569; 38 S. W. 167. Chavana v. State, 51 S. W. 380. Cage v. State, 55 S. W. 63. Johnson v. State, 49 Texas Crim. Rep. 429; 93 S. W. 735. Armstrong v. State, 60 Texas Crim. Rep. 316; 131 S. W. 1074.

Sec. 1681. **Should charge on every phase of aggravated assault.**—The court should charge on every phase of aggravated assault made by the evidence, whether the theory is presented by the testimony of the State or defense or by both. Wadlington v. State, 19 Texas Crim. App. 275. Hawthorne v. State, 28 Texas Crim. App. 214; 12 S. W. 603. Carter v. State, 28 Texas Crim. App. 355; 13 S. W. 147. Spivey v. State, 30 Texas Crim. App. 343; 17 S. W. 546. Sowell v. State, 32 Texas Crim. Rep. 482; 24 S. W. 504. Mathis v. State, 39 Texas Crim. Rep. 549; 47 S. W. 464. Chatman v. State, 40 Texas Crim. Rep. 278; 50 S. W. 396. Angel v. State, 45 Texas Crim. Rep. 137; 74 S. W. 553. Palmer v. State, 47 Texas Crim. Rep. 268; 83 S. W. 202. Cooper v. State, 49 Texas Crim. Rep. 28; 89 S. W. 1068. Henderson v. State, 55 Texas Crim. Rep. 16; 115 S. W. 45. Heath v. State, 57 Texas Crim. Rep. 59; 121 S. W. 862. Armstrong v. State, 60 Texas Crim. Rep. 316; 131 S. W. 1074. Malone v. State, 60 Texas Crim. Rep. 509; 132 S. W. 769. Leggett v. State, 62 Texas Crim. Rep. 104; 136 S. W. 787. Leigh v. State, 145 S. W. 920. Young et al. v. State, 151 S. W. 1046. Sanchez et al. v. State, 156 S. W. 218.

Sec. 1682. **Charge on simple assault should be given.**—If there is evidence that defendant used excessive force in defending himself from an ordinary assault with the fist and cut the alleged injured party in defense of such attack, the court should charge on simple assault if it is an issue as to whether the knife as used was a deadly weapon. Collins v. State, 47 Texas Crim. Rep. 115; 81 S. W. 300.

The court should charge on simple assault when there is no proof that the weapon used by defendant was a deadly weapon and no proof that serious bodily injury was inflicted. Barnes v. State, 52 Texas Crim. Rep. 407; 107 S. W. 823. Peacock v. State, 52 Texas Crim. Rep. 432; 107 S. W. 346. Little v. State, 61 Texas Crim. Rep. 197; 135 S. W. 120. Smith v. State, 61 Texas Crim. Rep. 349; 135 S. W. 152.

Sec. 1683. **Charge on aggravated assault not required.**—When the proof shows, without controversy, an intent to kill, it is not necessary to charge on aggravated assault on the theory that there was no intent to kill. Bussey v. State, 153 S. W. 874. Bussey v. State, 160 S. W. 697.

If the case is either assault with intent to murder or perfect self defense, it is not error to fail to charge on aggravated assault. Moore v. State, 31 Texas Crim. Rep. 234; 20 S. W. 563. Phillips v. State, 36 S. W. 86. Phillips v. State, 36 S. W. 441. Turner v. State, 37 Texas Crim. Rep. 451; 36 S. W. 87. Barnes v. State, 39 Texas Crim. Rep. 187; 45 S. W. 495. Moody v. State, 59 S. W. 894. Duval v. State, 70 S. W. 543. Goebel v. State, 45 Texas Crim. Rep. 415; 76 S. W. 460. Johnson v. State, 47 Texas Crim. Rep. 300; 85 S. W. 812. Moore v. State, 53 Texas Crim. Rep. 114; 107 S. W. 833. Burr v. State, 64 Texas Crim. Rep. 495; 142 S. W. 919. Smith v. State, 143 S. W. 643. Thomas v. State, 154 S. W. 995. Lamb v. State, 168 S. W. 534.

If the case is either assault with intent to murder or that the accused is guilty of no offense, it is not error to fail to charge on aggravated assault. Pugh v. State, 2 Texas Crim. App. 539. Sims v. State, 4 Texas Crim. App. 144. Winn v.

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State, 5 Texas Crim. App. 624. Collins v. State, 6 Texas Crim. App. 72. Baker v. State, 7 Texas Crim. App. 615. Bramlette v. State, 21 Texas Crim. App. 611; 2 S. W. 765. Barbee v. State, 34 Texas Crim. Rep. 129; 29 S. W. 776. Halliburton v. State, 34 Texas Crim. Rep. 410; 31 S. W. 297. Schrimscher v. State, 36 Texas Crim. Rep. 461; 37 S. W. 864. Harris v. State, 47 S. W. 643. Ford v. State, 56 S. W. 338. Wilson v. State, 45 Texas Crim. Rep. 63; 73 S. W. 964. Colbert v. State, 52 Texas Crim. Rep. 486; 107 S. W. 1115. Harding v. State, 60 Texas Crim. Rep. 327; 131 S. W. 1092. Gray v. State, 144 S. W. 283. Thomas v. State, 154 S. W. 995. Rogers v. State, 159 S. W. 44.

If, had death resulted, the issue of manslaughter would not be in the case, it is not error to fail to charge on aggravated assault on the theory of sudden passion aroused by an adequate cause. Anderson v. State, 15 Texas Crim. App. 453. Taylor v. State, 17 Texas Crim. App. 49. Granger v. State, 24 Texas Crim. App. 45; 5 S. W. 648. Rider v. State, 26 Texas Crim. App. 340; 9 S. W. 688. Dickson v. State, 22 S. W. 679. Ayres v. State, 26 S. W. 396. Barbee v. State, 34 Texas Crim. Rep. 129; 29 S. W. 776. Summers v. State, 33 S. W. 124. Harris v. State, 47 S. W. 643. Armstrong v. State, 60 Texas Crim. Rep. 316; 131 S. W. 1074. Wormley v. State, 143 S. W. 615. Thomas v. State, 154 S. W. 995. Rogers v. State, 159 S. W. 44. Woods v. State, 159 S. W. 1183.

The fact that the alleged injured party called defendant "a son of a bitch" and charged him witih an attempt to rape his (prosecutor's) wife will not of itself require a charge on aggravated assault. A verbal insult to the defendant is not adequate cause. Barbee v. State, 34 Texas Crim. Rep. 129; 29 S. W. 776. Woods v. State, 159 S. W. 1183.

If the proof shows, without controversy, that the assault was made with the intent to murder, it is not error to fail to charge on aggravated assault. Bramlette v. State, 21 Texas Crim. App. 611; 2 S. W. 765. Wilson v. State, 45 Texas Crim. Rep. 63; 73 S. W. 964.

Sec. 1684. Assault with intent to rape.

Sec. 1685. Form of indictment.
Sec. 1686. Another form.
Sec. 1687. Form of indictment.
Sec. 1688. Form when female is under age.
Sec. 1689. Another form when female is under age.
Sec. 1690. Indictment when female is under age.
Sec. 1691. Indictment for assault to rape.
Sec. 1692. "Woman" defined.
Sec. 1693. Test of an assault to rape.
Sec. 1694. Prosecutrix not an accomplice.
Sec. 1695. Assault to rape a girl under age.
Sec. 1696. Charge as to consent.
Sec. 1697. Character of prosecutrix.
Sec. 1698. Abandonment of intention.
Sec. 1699. Evidence sufficient.
Sec. 1700. Test of sufficiency of evidence.
Sec. 1701. Evidence insufficient.
Sec. 1702. Defendant's testimony as to intent.
Sec. 1703. Character of defendant.
Sec. 1704. Age of female.
Sec. 1705. Examination of ground.
Sec. 1706. "Assault" should be defined.
Sec. 1707. Charge should be clear and distinct.
Sec. 1708. Charge as to intent.
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Sec. 1710. Charge on the weight of the evidence.
Sec. 1711. Charge of the court.
Sec. 1712. Should charge on aggravated assault.
Sec. 1713. Charge on aggravated assault not required.
Sec. 2481. Identification.

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Sec. 1784. Complaint of prosecutrix.
Sec. 1771. Competency of child witness.
Sec. 1770. Proof of age.

Art. 1029. (608) (503) **Assault with intent to rape.**—If any person shall assault a woman with intent to commit the offense of rape, he shall be punished by confinement in the penitentiary for any term of years not less than two. (O. C. 494, amended by Act April 29, 1895, Acts 1895, p. 104.)

Sec. 1685. **Form of indictment for assault to rape a woman.**
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 John Doe heretofore on the.....day of..... A. D.....in said county and State in and upon.....a woman, did make an assault with the intent then and there by force and without her consent to ravish and have carnal knowledge of the said.....

Against the peace and dignity of the State.

.....
Foreman of the grand jury.

(Hewitt v. State, 15 Texas Crim. App. 80. Gibson v. State, 17 Texas Crim. App. 576. Lights v. State, 21 Texas Crim. App. 312; 17 S. W. 428. Oxsheer v. State, 38 Texas Crim. Rep. 499; 43 S. W. 335. Turman v. State, 50 Texas Crim. Rep. 8; 95 S. W. 533. Westerman v. State, 53 Texas Crim. App. 111; 111 S. W. 635.)

Sec. 1686. **Form of indictment for assault with intent to rape a woman.**
In the name and by the 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 John Doe heretofore on the.....day of..... A. D.....in said county and State in and upon.....a woman, did make an assault and did then and there by force and without her consent attempt to ravish and have carnal knowledge of the said.....

Against the peace and dignity of the State.

.....
Foreman of the grand jury.

(Taylor v. State, 44 Texas Crim. Rep. 154; 69 S. W. 149. Shockley v. State, 160 S. W. 542.)

Sec. 1687. **Form of indictment for assault to rape a woman.**
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 John Doe heretofore on the.....day of..... A. D.....in said county and State then and there in and upon.....a woman, did make an assault with the intent then and there to commit the offense of rape upon the said.....by then and there attempting by force and without her consent to ravish and have carnal knowledge of the said.....

Against the peace and dignity of the State.

.....
Foreman of the grand jury.

(Oxsheer v. State, 38 Texas Crim. Rep. 499; 43 S. W. 335.)

Sec. 1688. **Form of indictment for assault to rape a female under age.**
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 John Doe heretofore on the.....day of..... A. D.....in said county and State in and upon.....did make an assault with the intent then and there to have carnal knowledge of the said.....,

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the said.....being then and there a female under the age of fifteen years and not being then and there the wife of the said John Doe.

Against the peace and dignity of the State.

.....

Foreman of the grand jury.

(It is not necessary to allege more than it is necessary to prove. Fowler v. State, 148 S. W. 576.)

Sec. 1689. **Form of indictment for assault to rape a female under age.** 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 John Doe heretofore on the.....day of..... A. D.....in said county and State in and upon.....a female then and there under the age of fifteen years other than the wife of the said John Doe did make an assault and did then and there attempt to ravish and have carnal knowledge of the said.....

Against the peace and dignity of the State.

.....

Foreman of the grand jury.

(McAvoy v. State, 41 Texas Crim. Rep. 57; 51 S. W. 928. Herbert v. State, 49 Texas Crim. Rep. 78; 90 S. W. 653. Alexander v. State, 58 Texas Crim. Rep. 621; 127 S. W. 190. Fowler v. State, 148 S. W. 576.)

Sec. 1690. **Indictment for assault to rape a female under age.**—The word "attempt" is a word of more comprehensive meaning than the word "intent" and includes the latter, hence an allegation that the accused assaulted the female and attempted to ravish or have carnal knowledge of her is in effect an allegation that such was his intent. Curry v. State, 4 Texas Crim. App. 574. Taylor v. State, 44 Texas Crim. Rep. 154; 69 S. W. 149. Fowler v. State, 148 S. W. 576.

If the female is alleged to be under the age of consent the indictment must allege that she was not the wife of the accused. Edwards v. State, 37 Texas Crim. Rep. 242; 39 S. W. 368. Dudley v. State, 37 Texas Crim. Rep. 543; 40 S. W. 269.

If the prosecutrix is alleged to be under the age of consent, it is not necessary to allege in terms whether or not she consented, consent being immaterial. Taylor v. State, 50 Texas Crim. Rep. 362; 97 S. W. 94. Alexander v. State, 58 Texas Crim. Rep. 621; 127 S. W. 190. Fowler v. State, 148 S. W. 576.

An allegation in the same count that the assault was made with the intent to ravish and have carnal knowledge of a female under the age of consent simply charges an assault with intent to rape with force and without force, and does not affect the validity of the indictment. The use of the word "ravish" neither helps nor hurts the indictment when the female assaulted is alleged to be under the age of consent. McAvoy v. State, 41 Texas Crim. Rep. 56; 51 S. W. 928. Alexander v. State, 58 Texas Crim. Rep. 621; 127 S. W. 190. Fowler v. State, 148 S. W. 576.

Sec. 1691. **Indictment for assault to rape.**—In order to meet the proof as it transpires and to prevent a variance, it may be alleged in one count that the female assaulted was under the age of consent and in another count the allegations as to age may be omitted.

It is not necessary to allege in terms that the injured party was a female if the name or the pronoun used clearly refers to a female. Battle v. State, 4 Texas Crim. App. 596. Taylor v. State, 50 Texas Crim. Rep. 362; 97 S. W. 94.

In an indictment for assault with intent to rape it is not necessary to allege that the accused is a male person or that he is over the age of fourteen years. Davis v. State, 42 Texas 226. Taylor v. State, 50 Texas Crim. Rep. 362; 97 S. W. 94. Lemons v. State, 59 Texas Crim. Rep. 299; 128 S. W. 416.

The use of the word "ravish" implies both force and want of consent. Alexander v. State, 58 Texas Crim. Rep. 622; 127 S. W. 190.

When it is not alleged that the female assaulted was under the age of consent or that she was mentally diseased, it is not necessary to allege that she was not

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the wife of the accused. Caldenas v. State, 40 S. W. 980. Belcher v. State, 39 Texas Crim. Rep. 123; 44 S. W. 519.

Sec. 1692. **"Woman" defined.**—In the statute defining the offense of an assault with intent to rape the word "woman" is used to signify a female person of any age. Gibson v. State, 17 Texas Crim. App. 576. Cromeans v. State, 59 Texas Crim. Rep. 616; 129 S. W. 1115. Rogers v. State, 143 S. W. 631.

Sec. 1693. **Test of an assault to rape.**—An assault with intent to commit rape is constituted by the existence of the facts which bring the offense within the definition of an assault, coupled with an intention to commit the offense of rape. Thompson v. State, 43 Texas 583. Carroll v. State, 24 Texas Crim. App. 366; 6 S. W. 190. Washington v. State, 51 Texas Crim. Rep. 546; 103 S. W. 879. Cotton v. State, 52 Texas Crim. Rep. 57; 105 S. W. 185. Cromeans v. State, 59 Texas Crim. Rep. 615; 129 S. W. 1115. Love v. State, 150 S. W. 920. Gage v. State, 151 S. W. 568. Taff v. State, 155 S. W. 214. Allen v. State, 177 S. W. 88.

Sec. 1694. **Prosecutrix not an accomplice.**—The female on whom the assault with intent to rape is alleged to have been committed is not an accomplice though she may have consented to all that the defendant did to her. If she was over the age of consent and consented there would be no assault with intent to rape; if she is alleged and proven to have been under the age of consent, she is a victim and not an accomplice whether defendant attempted to have carnal knowledge of her with or without her consent. Keith v. State, 56 S. W. 628. Duckett v. State, 150 S. W. 1181.

Sec. 1695. **Assault with intent to rape a female under age.**—An assault with intent to rape a female under the age of consent may be committed by a male person taking hold of and handling her in such a way as to show a present intent to then have carnal knowledge of her, and if this is shown to the satisfaction of the jury beyond a reasonable doubt it is immaterial that the accused expected her to consent or that she did in fact consent to his doing what he did, unless the accused did not intend to obtain carnal knowledge of her at the very time. Croomes v. State, 40 Texas Crim. Rep. 672; 51 S. W. 924. Alexander v. State, 58 Texas Crim. Rep. 622; 127 S. W. 190. Cromeans v. State, 59 Texas Crim. Rep. 611; 129 S. W. 1131. Hightower v. State, 143 S. W. 1168. Duckett v. State, 150 S. W. 1177.

The taking hold and handling of a female person under the age of consent with the present intent to so subject her to the power of the male as that he may now accomplish the act of carnal knowledge of her will constitute an assault with intent to rape whether she consents or not. Croomes v. State, 40 Texas Crim. Rep. 672; 51 S. W. 924; 53 S. W. 882. Wilson v. State, 73 S. W. 16. Sanders v. State, 54 Texas Crim. Rep. 171; 112 S. W. 938. Alexander v. State, 58 Texas Crim. Rep. 622; 127 S. W. 190. Cromeans v. State, 59 Texas Crim. Rep. 611; 129 S. W. 1131. Hightower v. State, 143 S. W. 1168. Collins v. State, 148 S. W. 1065. Love v. State, 150 S. W. 920. Duckett v. State, 150 S. W. 1177.

The defendant may be guilty of an assault with intent to rape a female under the age of consent although her effective speed prevented him from ever touching her, where his intent is manifested by a request for "a piece" and by running her. Gage v. State, 151 S. W. 565.

An assault with intent to rape a female under the age of consent is shown by proof that the accused made an effort to penetrate her female organ with his male member, whether she consented to such effort or not. The force used in the effort to penetrate her is sufficient to constitute this offense. Comer v. State, 20 S. W. 547. Allen v. State, 36 Texas Crim. Rep. 383; 37 S. W. 429. Callison v. State, 37 Texas Crim. Rep. 217; 39 S. W. 300. Edwards v. State, 37 Texas Crim. Rep. 243; 38 S. W. 996. Croomes v. State, 40 Texas Crim. Rep. 672; 51 S. W. 924; 53 S. W. 882. Blair v. State, 60 S. W. 879. Wilson v. State, 73 S. W. 16. Herbert v. State, 49 Texas Crim. Rep. 72; 90 S. W. 653. Bourland v. State, 49 Texas Crim. Rep. 197; 93 S. W. 115. Sanders v. State, 54 Texas Crim. Rep. 171; 112 S. W. 938. Hightower v. State, 143 S. W. 1168. Fowler v. State, 148 S. W. 576. Clinton v. State, 148 S. W. 1087.

The force—the same character of force required in an assault—must be carried far enough to establish the then ulterior intent of the accused to have carnal knowl-

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edge of the female at the very time. Graybill v. State, 41 Texas Crim. Rep. 286; 53 S. W. 851. Carter v. State, 44 Texas Crim. Rep. 315; 70 S. W. 971. Cromeans v. State, 59 Texas Crim. Rep. 611; 129 S. W. 1131. Blair v. State, 60 Texas Crim. Rep. 363; 132 S. W. 358.

Solicitation, accompanied with the expectation of consent and laying on of hands without the use of such force as indicates a purpose to obtain carnal knowledge at the very time, does not amount to an assault with intent to rape. Graybill v. State, 41 Texas Crim. Rep. 286; 53 S. W. 851. Alexander v. State, 58 Texas Crim. Rep. 621; 127 S. W. 189. Cromeans v. State, 59 Texas Crim. Rep. 611; 129 S. W. 1131. Blair v. State, 60 Texas Crim. Rep. 363; 132 S. W. 358.

Where the female made no complaint for some time, it is error to refuse to permit her to testify that she had been told by a person unfriendly to defendant who had influence with her to swear enough against defendant to put him in the penitentiary. Liles v. State, 58 Texas Crim. Rep. 310; 125 S. W. 921.

Sec. 1696. **Charge as to consent of the female when under age.**—If the female is alleged and proven to have been under the age of consent it is proper to refuse to charge the jury that they must find that the assault, if made, was made without her consent. Hightower v. State, 143 S. W. 1168.

When the indictment does not allege that the female was under the age of consent and there is evidence that she consented, the court should charge the jury that if she consented they must acquit of assault to rape. Craig v. State, 18 Texas Crim. App. 321. Moore v. State, 20 Texas Crim. App. 278. Serio v. State, 22 Texas Crim. App. 637; 3 S. W. 784. Jenkins v. State, 34 Texas Crim. Rep. 201; 29 S. W. 1078. Munoz v. State, 47 Texas Crim. Rep. 577; 85 S. W. 11.

If the female is alleged and proven to have been under the age of consent, a charge is correct which instructs the jury that if they find from the evidence beyond a reasonable doubt that the defendant made an assault upon the person of the female alleged to have been assaulted with the intent to then have carnal knowledge of her with or without her consent, and that she was not his wife and was then under the age of fifteen years, they should find him guilty of an assault with intent to rape. Herbert v. State, 49 Texas Crim. Rep. 73; 90 S. W. 653. Hightower v. State, 143 S. W. 1170. Duckett v. State, 150 S. W. 1181.

Sec. 1697. **Character of prosecutrix.**—The fact that the woman is of loose virtue is not of itself a defense to an assault with intent to rape. Taff v. State, 155 S. W. 214.

If it is not alleged that the female was under the age of consent, it is error to exclude proof of her bad general reputation for chastity, as it tends to explain why defendant took liberties with her. Shields v. State, 32 Texas Crim. Rep. 502; 23 S. W. 893. Steinke v. State, 33 Texas Crim. Rep. 65; 24 S. W. 909.

Where defendant testifies that he "not only did not try to take it but would not have had to do anything but ask for it" his testimony tends to impeach the character of the prosecutrix for chastity and authorizes the State to prove her good general reputation for virtue and chastity. Holland v. State, 60 Texas Crim. Rep. 117; 131 S. W. 564.

(This subject is briefed more fully in the chapter on Rape.)

Sec. 1698. **Abandonment of intention.**—When defendant has gone far enough to make himself guilty of an assault with intent to commit rape, his abandonment of the enterprise is no defense. Shepard v. State, 34 Texas Crim. Rep. 35; 28 S. W. 816. Ross v. State, 60 Texas Crim. Rep. 547; 132 S. W. 799. White v. State, 60 Texas Crim. Rep. 559; 132 S. W. 790. Stewart v. State, 61 Texas Crim. Rep. 90; 133 S. W. 1051. Conger v. State, 63 Texas Crim. Rep. 312; 140 S. W. 1112.

Sec. 1699. **Evidence sufficient.**—If the facts show that it was owing to no lack of effort on the part of the accused that he did not accomplish his purpose to rape the woman, and that it was only on account of her effective resistance and speed that she escaped, a conviction approved by the trial judge, whose duty it is to set it aside if not satisfied therewith, will not be disturbed on the facts on appeal.

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Stout v. State, 22 Texas Crim. App. 339; 3 S. W. 231. Crew v. State, 22 S. W. 973. Schroeder v. State, 36 S. W. 94. Berry v. State, 44 Texas Crim. Rep. 398; 72 S. W. 170. Castle v. State, 49 Texas Crim. Rep. 1; 90 S. W. 32. Rogers v. State, 143 S. W. 631. Taff v. State, 155 S. W. 214. Allen v. State, 177 S. W. 88.

If the testimony shows an assault coupled with a present intention to have carnal knowledge of the woman without her consent by force and at all hazards, it will support a conviction for assault with intent to rape though defendant fled or desisted when assistance came. Stout v. State, 22 Texas Crim. App. 339; 3 S. W. 231. McCleaveland v. State, 24 Texas Crim. App. 202; 5 S. W. 664. Schroeder v. State, 36 S. W. 94. Riddling v. State, 77 S. W. 805. Perkins v. State, 80 S. W. 619. Bawcom v. State, 49 Texas Crim. Rep. 417; 94 S. W. 462. Washington v. State, 51 Texas Crim. Rep. 546; 103 S. W. 879. Ross v. State, 60 Texas Crim. Rep. 547; 132 S. W. 799. Calyon v. State, 174 S. W. 591.

Sec. 1700. **Test of sufficiency of evidence.**—When the female is not alleged to have been under the age of consent, to be guilty of an assault with intent to commit rape the defendant must have made an assault upon the woman with the intent to then have carnal knowledge of her by the use of such force as might reasonably be supposed sufficient to overcome resistance, taking into consideration the relative strength of the parties and other circumstances of the case, and if his intention falls short of this, he is not guilty of an assault with intent to rape, however outrageous the assault may be. There must be sufficient evidence to authorize the jury to believe that it was his intention to have the carnal knowledge at the time at all hazards; that he intended to use sufficient force to accomplish his purpose notwithstanding any resistance the woman might make. Pefferling v. State, 40 Texas 494. Thompson v. State, 43 Texas 584. Curry v. State, 4 Texas Crim. App. 579. House v. State, 9 Texas Crim. App. 53. Saddler v. State, 12 Texas Crim. App. 194. Sanford v. State, 12 Texas Crim. App. 196. Peterson v. State, 14 Texas Crim. App. 163. Jones v. State, 18 Texas Crim. App. 485. Carroll v. State, 24 Texas Crim. App. 366; 6 S. W. 190. Passmore v. State, 29 Texas Crim. App. 241; 15 S. W. 286. Mooney v. State, 29 Texas Crim. App. 257; 15 S. W. 724. Robertson v. State, 30 Texas Crim. App. 498; 17 S. W. 1068. Power v. State, 30 Texas Crim. App. 662; 18 S. W. 552. Shields v. State, 32 Texas Crim. Rep. 503; 23 S. W. 893. Steinke v. State, 33 Texas Crim. Rep. 66; 25 S. W. 287. Marthall v. State, 34 Texas Crim. Rep. 22; 36 S. W. 1062. Mathews v. State, 34 Texas Crim. Rep. 479; 31 S. W. 381. Bozeman v. State, 34 Texas Crim. Rep. 503; 31 S. W. 389. Dockery v. State, 35 Texas Crim. Rep. 489; 34 S. W. 281. Ellenberg v. State, 36 Texas Crim. Rep. 139; 35 S. W. 989. Laco v. State, 38 S. W. 176. O'Brien v. State, 40 S. W. 969. Clark v. State, 39 Texas Crim. Rep. 152; 45 S. W. 696. Owens v. State, 39 Texas Crim. Rep. 391; 46 S. W. 240. Hancock v. State, 47 S. W. 465. McCullough v. State, 47 S. W. 990. Draper v. State, 57 S. W. 655. Wood v. State, 61 S. W. 309. Caddell v. State, 44 Texas Crim. Rep. 215; 70 S. W. 91. Sirmons v. State, 44 Texas Crim. Rep. 488; 72 S. W. 395. Coffee v. State. 76 S. W. 761. Dina v. State, 46 Texas Crim. Rep. 405; 78 S. W. 229. Ross v. State, 78 S. W. 503. Ross v. State, 78 S. W. 514. Scott v. State, 51 Texas Crim. Rep. 5; 100 S. W. 159. Warren v. State, 51 Texas Crim. Rep. 599; 103 S. W. 888. Cotton v. State, 52 Texas Crim. Rep. 57; 105 S. W. 185. Collins v. State, 52 Texas Crim. Rep. 455; 107 S. W. 852. Eiley v. State, 55 Texas Crim. Rep. 1; 114 S. W. 793. Taff v. State, 143 S. W. 1156.

Sec. 1701. **Evidence insufficient.**—To constitute an assault with intent to commit rape it is essential that a specific intent to commit rape be established by the testimony, and it must go beyond a mere possibility of such intent. House v. State, 9 Texas Crim. App. 568. Elam v. State, 20 S. W. 710. Shields v. State, 32 Texas Crim. Rep. 498; 23 S. W. 893. Laco v. State, 38 S. W. 176. Graybill v. State, 41 Texas Crim. Rep. 286; 53 S. W. 851. Sirmons v. State, 44 Texas Crim. Rep. 488; 72 S. W. 395. Dina v. State, 46 Texas Crim. Rep. 402; 78 S. W. 229. Cotton v. State, 52 Texas Crim. Rep. 57; 105 S. W. 185.

A request for the satisfaction of the sexual cravings of defendant though accompanied by threats of injury if refused or accompanied with laying on of hands does not constitute an assault with intent to rape where he desisted from the assault on meeting with an unequivocal refusal. Saddler v. State, 12 Texas Crim. App. 194.

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Steinke v. State, 33 Texas Crim. Rep. 66; 25 S. W. 287. Ross v. State, 78 S. W. 503. Ross v. State, 78 S. W. 514.

Touching a female on the leg or body does not of itself constitute an assault with intent to rape, however outrageous and unwarranted the assault may be, where defendant does not manifest his purpose to gratify his carnal desire at all hazards, but desists or flees without further indicating his intent to be to overcome any resistance that she might make. Steinke v. State, 33 Texas Crim. Rep. 66; 25 S. W. 287. Mitchell v. State, 33 Texas Crim. Rep. 575; 28 S. W. 475. O'Brien v. State, 40 S. W. 969. Sirmons v. State, 44 Texas Crim. Rep. 488; 72 S. W. 395. Dina v. State, 46 Texas Crim. Rep. 402; 78 S. W. 229. Scott v. State, 51 Texas Crim. Rep. 6; 100 S. W. 159. Cotton v. State, 52 Texas Crim. Rep. 57; 105 S. W. 185.

Where the mother of prosecutrix on hearing a noise from her daughter's bed got up to investigate and after going to the bed left the room, and prosecutrix then called her father who came in time to see the hired man getting out of her bed, an assault with intent to rape is not shown. Eiley v. State, 55 Texas Crim. Rep. 1; 114 S. W. 793.

Sec. 1702. **Defendant's testimony as to his intent.**—On a trial for assault with intent to rape the defendant may testify as to his motives and intentions. Berry v. State, 30 Texas Crim. App. 423; 17 S. W. 1080. Lewallen v. State, 33 Texas Crim. Rep. 412; 26 S. W. 832.

Sec. 1703. **Character of defendant.**—On a trial for assault with intent to rape criminal intent being of the essence of the offense, the accused may prove his general good character. Jones v. State, 10 Texas Crim. App. 552. Lincecum v. State, 29 Texas Crim. App. 331; 15 S. W. 818.

Sec. 1704. **Age of female.**—Though it is not alleged that the female assaulted was under the age of consent it is not error to admit proof of her age as a part of the circumstances of the case. Rogers v. State, 143 S. W. 631.

(The rules as to proving age will be found in the chapter on Rape.)

Sec. 1705. **Examination of ground.**—It is error to permit a witness to testify that he saw where prosecutrix and defendant had sat or wallowed on the ground; he should state the facts where the opinion would be too conjectural. Liles v. State, 58 Texas Crim. Rep. 310; 125 S. W. 921.

Sec. 1706. **"Assault" should be defined.**—The term "assault" should be defined in the charge to the jury. Hemanus v. State, 7 Texas Crim. App. 372.

It is not error to fail to define the term "assault" if in applying the law to the facts the jury are required to find the existence of facts which in law constitute an assault. Collins v. State, 148 S. W. 1065.

Sec. 1707. **Charge should be clear and distinct.**—The charge of the court should be limited to such facts as are both alleged and proven. Railsback v. State, 53 Texas Crim. Rep. 545; 110 S. W. 916.

If there are two counts in the indictment the charge should not mingle the two phases, but should give a clear and distinct enunciation of the different phases of the law applicable to each. McAvoy v. State, 41 Texas Crim. Rep. 58; 51 S. W. 928.

If there is evidence to support the issue of aggravated assault as well as the issue of an assault with intent to rape the issues should be squarely and distinctly submitted to the jury. Irving v. State, 9 Texas Crim. App. 69. McGee v. State, 21 Texas Crim. App. 670; 2 S. W. 890.

The assault and the intent to have carnal knowledge must concur as to time and the charge should make this clear to the jury. Hudson v. State, 49 Texas Crim. Rep. 27; 90 S. W. 177.

Sec. 1708. **Charge as to intent.**—In a case of assault with intent to rape it is error to charge the jury that the injury intended may be either bodily pain, constraint, sense of shame, or other disagreeable emotion of the mind. Carter v. State, 44 Texas Crim. Rep. 314; 70 S. W. 971. Hudson v. State, 49 Texas Crim. Rep. 26;

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90 S. W. 177. Fewox v. State, 49 Texas Crim. Rep. 172; 90 S. W. 178. Henderson v. State, 49 Texas Crim. Rep. 512; 93 S. W. 550.

In a case of assault with intent to rape it is error to charge the jury that it rests with defendant to show accident or innocent intention. Thomas v. State, 16 Texas Crim. App. 539. Burney v. State, 21 Texas Crim. App. 565; 1 S. W. 458.

If there is no evidence suggesting the issue of assault with intent to rape the court should not charge on such issue. Dusek v. State, 48 Texas Crim. Rep. 519; 89 S. W. 271.

If there is evidence that the defendant did not intend to penetrate the person of prosecutrix the court should charge affirmatively on this theory. McGee v. State, 21 Texas Crim. App. 670; 2 S. W. 890. Alexander v. State, 58 Texas Crim. Rep. 623; 127 S. W. 190.

Sec. 1709. **Charge as to force.**—When it is not alleged that the female was under the age of consent, it is error to fail to charge the jury that they must find that defendant intended to use such force as might reasonably be supposed sufficient to overcome resistance, taking into consideration the relative strength of the parties and other circumstances of the case. Brown v. State, 27 Texas Crim. App. 336; 11 S. W. 412. Walton v. State, 29 Texas Crim. App. 166; 15 S. W. 646. Shields v. State, 32 Texas Crim. Rep. 502; 23 S. W. 893. Caddell v. State, 44 Texas Crim. Rep. 213; 70 S. W. 91.

A charge in the language of the preceding paragraph is correct. Conger v. State, 63 Texas Crim. Rep. 312; 140 S. W. 1125.

If the female is alleged and proven to have been under the age of consent the court need not define the word "force" and need not charge the jury to find that defendant intended to use such force as might reasonably be sufficient to overcome resistance. Alexander v. State, 58 Texas Crim. Rep. 621; 127 S. W. 190. Hightower v. State, 143 S. W. 1168. Scott v. State, 166 S. W. 729.

If the proof shows, without controversy, that prosecutrix used all the force necessary, it is not reversible error to fail to charge that she must have put forth her utmost efforts. Barnett v. State, 42 Texas Crim. Rep. 304; 62 S. W. 765.

If the proof shows, without controversy, that prosecutrix made resistance to the utmost and there is no issue of consent and the jury are properly charged as to the force necessary to constitute the offense of an assault with intent to rape, it is not error to refuse to charge that defendant must have intended to have carnal knowledge of her at all hazards. Bawcom v. State, 49 Texas Crim. Rep. 417; 94 S. W. 462.

Sec. 1710. **Charge on the weight of the evidence.**—A charge which does not instruct the jury that any of the facts are proved but simply informs them that if such were the facts defendant would be guilty, is not on the weight of the evidence. Sanders v. State, 54 Texas Crim. Rep. 171; 112 S. W. 938.

A charge which instructs the jury that the uncorroborated testimony of the prosecutrix is sufficient to convict is on the weight of the evidence. Cox v. State, 44 S. W. 157.

Sec. 1711. **Charge of the court.**—If there is no evidence that defendant was frightened away, it is error to charge the jury that defendant might be guilty though he was frightened away. Suggs v. State, 46 Texas Crim. Rep. 151; 79 S. W. 307.

It is error to charge the jury that an assault with intent to rape can be established by proof of threats. Burney v. State, 21 Texas Crim. App. 572; 1 S. W. 458. Cox v. State, 44 S. W. 157.

If there is evidence that the outcry of prosecutrix was caused by the attempt of defendant to take his ring away from her it is error to fail to charge the jury affirmatively on this theory. Freeman v. State, 52 Texas Crim. Rep. 502; 107 S. W. 1127.

If there is evidence impeaching the character of prosecutrix for chastity or proof that she had previously extended carnal favors to defendant, it is error to limit such testimony to the issue of credibility and other issues so as to prevent its consideration

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for the purposes for which it was admissible. Freeman v. State, 52 Texas Crim. Rep. 503; 107 S. W. 1127.

A charge on circumstantial evidence is not required if the facts and circumstances of the case are of such a character as to place the defendant in such close proximity and juxtaposition to the main fact as to render a charge on circumstantial evidence unnecessary. Allen v. State, 36 Texas Crim. Rep. 383; 37 S. W. 429.

Sec. 1712. **Court should charge on aggravated assault.**—There is a manifest difference between an assault with intent to commit rape and an assault with intent to have an improper connection; any such violent and indecent familiarity with the person of a woman against her will when the latter is the extent of the purpose and intent of defendant is an aggravated assault, and if the testimony raises such issue it is error to fail or refuse to charge on aggravated assault. Pefferling v. State, 40 Texas 492. Curry v. State, 4 Texas Crim. App. 578. Thomas v. State, 16 Texas Crim. App. 535. McGee v. State, 21 Texas Crim. App. 670; 2 S. W. 890. Robertson v. State, 30 Texas Crim. App. 498; 17 S. W. 1068. Shields v. State, 32 Texas Crim. Rep. 503; 23 S. W. 893. Cox v. State, 44 S. W. 157. McCullough v. State, 47 S. W. 990. Taylor v. State, 50 Texas Crim. Rep. 362; 97 S. W. 94. Taff v. State, 143 S. W. 1156.

In Porter v. State, 33 Texas Crim. Rep. 387; 26 S. W. 626, it was held that if defendant was not an adult male he would be guilty of a simple assault if he did not intend to have carnal knowledge of the woman at all events and notwithstanding any resistance on her part. This case has been followed, but the law is that if the means used is such as inflicts disgrace upon the person assaulted it is an aggravated assault whether the defendant is a minor or not.

(The subject of indecent familiarity is briefed at length in the chapter on "Aggravated Assault.")

If the female is alleged and proven to have been under the age of consent and there is evidence that defendant took hold of her without the intent to then have carnal knowledge of her and there is proof of indecent familiarity, the court should submit the issue of aggravated assault to the jury. Alexander v. State, 58 Texas Crim. Rep. 621; 127 S. W. 190. Vivian v. State, 152 S. W. 895 (court did and charge was correct). Scott v. State, 166 S. W. 729.

Sec. 1713. **Not necessary to charge on aggravated assault.**—If the case is either assault with intent to rape or that defendant is not guilty of any offense, it is not error to fail or refuse to charge on the issue of aggravated assault. Dorsey v. State, 1 Texas Crim. App. 33. Long v. State, 46 S. W. 640. Ricks v. State, 48 Texas Crim. Rep. 229; 87 S. W. 345. Herbert v. State, 49 Texas Crim. Rep. 72; 90 S. W. 653. Fowler v. State, 148 S. W. 576. Hooper et al. v. State, 160 S. W. 1187.

Sec. 1714. **Assault with intent to rob.**
Sec. 1715. Form for indictment.
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Sec. 1723. Charge of the court.

Art. 1030. (609) (504) **Assault with intent to rob.**—If any person shall assault another with the intent to commit the offense of robbery, he shall be punished by confinement in the penitentiary not less than two nor more than ten years. (O. C. 495, amended by Acts 1858, p. 171.)

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Sec. 1715. **Form for indictment.**
In the name and by authority of the State of Texas:

The grand jury of ..... County, Texas, duly organized at the ..... term, A. D. ..... of the District Court of said county, in said court at said term, do present that John Doe on the ..... day of ..... A. D. ..... in said county and State in and upon ..... did make an assault and did then and there by said assault and by violence attempt to fraudulently take from the person and possession of the said ..... the personal property of the said ..... with the intent then and there to appropriate the same to the use of him, the said John Doe.

Against the peace and dignity of the State.

.....
Foreman of the grand jury.

(Robbery, under our statute, may be committed without putting the alleged injured party in fear of life or bodily injury.)

Sec. 1716. **Indictment for assault with intent to rob.**—In an indictment for an assault with intent to rob the constituent elements of robbery need not be alleged. Morris v. State, 13 Texas Crim. App. 73.

In an indictment for an assault with intent to rob it is not necessary to describe the property which the defendant intended to take, nor is it essential to aver that the defendant intended to deprive the owner of the property of the value of it. Morris v. State, 13 Texas Crim. App. 73. Crumes v. State, 28 Texas Crim. App. 518; 13 S. W. 868.

An indictment for an assault with intent to rob need not allege that the defendant intended to appropriate the property to his own use. Morris v. State, 13 Texas Crim. App. 73.

In charging an assault with intent to commit some other offense, the same particularity is not required as is required in charging the offense itself. Morris v. State, 13 Texas Crim. App. 73.

An indictment for an assault with intent to rob which alleges the assault and an attempt by means of the assault to fraudulently take the property of the alleged injured party from his person with the intent to appropriate it to the use of the taker is sufficient without alleging in terms that the intent was to rob. Atkinson v. State, 34 Texas Crim. Rep. 424; 30 S. W. 1064. Runnels v. State, 34 Texas Crim. Rep. 431; 30 S. W. 1065. Clark v. State, 41 Texas Crim. Rep. 641; 56 S. W. 621. Adams v. State, 62 S. W. 1059.

Sec. 1717. **Statute construed.**—An assault with intent to rob is constituted by the existence of the facts which bring the offense within the definition of an assault, coupled with an intention to commit robbery. Walters v. State, 56 Texas Crim. Rep. 11; 118 S. W. 543.

Where the offense would have been theft from the person had the property been reduced to possession by defendant, an unsuccessful attempt to take it is not an assault with intent to rob. Walters v. State, 56 Texas Crim. Rep. 10; 118 S. W. 543.

It is not necessary for the alleged injured party to have money or property in order to be the subject of an assault with intent to rob. Angley v. State, 35 Texas Crim. Rep. 434; 34 S. W. 116. Adams v. State, 62 S. W. 1059.

Sec. 1718. **Evidence.**—A witness for defendant who testifies to an alibi for defendant may be impeached by a written confession of the witness contradictory of his testimony as to the alibi. Wingate v. State, 152 S. W. 1078.

When the purpose is to show why the robber failed to get his money, the alleged injured party may testify that he had his money in his shoe and that it was his custom to so carry it. Chafino v. State, 154 S. W. 546.

Defendant's identity as the criminal may rest alone upon his uncorroborated confession. Cox v. State, 69 S. W. 147.

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It is error to admit proof of the declarations of a co-conspirator or co-defendant made after the consummation of the conspiracy and in the absence of defendant. Morris v. State, 13 Texas Crim. App. 73.

Sec. 1719. **Convictions sustained.**—In the following cases convictions for assault with intent to rob were sustained on appeal. Kerrigan v. State, 21 Texas Crim. App. 487; 2 S. W. 756. Williams v. State, 38 S. W. 202. Adams v. State, 62 S. W. 1059. Cox v. State, 69 S. W. 145. Burns v. State, 70 S. W. 24. Hernandez v. State, 60 Texas Crim. Rep. 382; 131 S. W. 1091. Wingate v. State, 152 S. W. 1078. Chafino v. State, 154 S. W. 546. Drysdale v. State, 156 S. W. 685.

Where defendant sprang in front of prosecutor and ordered him to hold up his hands and prosecutor ran, the parties being strangers and it being at night; a finding that defendant intended to rob will be sustained, there being no evidence of any other intent. Long v. State, 47 Texas Crim. Rep. 296; 83 S. W. 384.

Sec. 1720. **Evidence insufficient.**—A conviction for an assault with intent to rob will not be sustained if the proof is insufficient to show a specific intent to rob. Denman v. State, 47 S. W. 366. Sanders v. State, 53 Texas Crim. Rep. 613; 111 S. W. 157.

A conviction will not be sustained upon the uncorroborated or insufficiently corroborated testimony of an accomplice. Brooks v. State, 37 S. W. 739.

Sec. 1721. **Former jeopardy.**—A conviction for burglary is not a bar to a prosecution for an assault with intent to rob though both offenses were a part of the same transaction. Adams v. State, 62 S. W. 1059.

Sec. 1722. **Charge on circumstantial evidence.**—If there is direct testimony from any source, even from an accomplice, that defendant is the person who attempted to rob the alleged injured party, a charge on circumstantial evidence is not required. Atkinson v. State, 34 Texas Crim. Rep. 424; 30 S. W. 1064.

If it is only by a process of inference from the facts in evidence that it can be determined that defendant was the party who attempted to rob the alleged injured party, a charge on circumstantial evidence is required. Robertson v. State, 10 Texas Crim. App. 609.

Sec. 1723. **Charge of the court.**—The charge is correct when every element of the offense of an assault with intent to rob is submitted and required to be found by the jury before they were authorized to convict. Evans v. State, 148 S. W. 573.

Art. 1031. (610) (506) **Assault in attempting to commit burglary.**—If any person in attempting to commit burglary shall assault another, he shall be punished by confinement in the penitentiary not less than two nor more than five years. (O. C. 496, amended by Acts 1858, p. 171.)

Sec. 1724. **Assault while attempting to commit burglary.**—An indictment for an assault committed by one while attempting to commit burglary should allege the attempt to commit burglary as fully as if that offense was sought to be alleged, and then allege that in attempting to commit the burglary aforesaid the accused in and upon the injured party did make an assault.

Art. 1032. (611) (506) **Test of an assault with intent to commit an offense.**—An assault with intent to commit any other offense is constituted by the existence of the facts which bring the offense within the definition of an assault, coupled with an intention to commit such other offense, as of maiming, murder, rape or robbery. (O. C. 499.)

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CHAPTER IV

MAIMING, DISFIGURING, AND CASTRATION

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Article 1033. (612) **"Maiming" defined.**—To maim is to wilfully and maliciously cut off or otherwise deprive a person of the hand, arm, finger, toe, foot, leg, nose, or ear; to put out an eye or in any way to deprive a person of any other member of his body.

Art. 1034. (613) **Punishment.**—If any person shall commit the offense of maiming, he shall be punished by confinement in the penitentiary not less than two nor more than ten years.

Sec. 1725. **Maiming—Form for indictment.**

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 John Doe on the ..... day of ..... A. D. ..... in said county and State, did wilfully and maliciously deprive ..... of a member of his body, to wit, the hand (or "the arm" or whatever member it was) by then and there wilfully and maliciously cutting off said member with a knife (or "biting off said member" or "putting out his eye with a stick" or whatever way the injured party was deprived of the member of his body), and the said John Doe did then and there thereby maim the said .....

Against the peace and dignity of the State.

.....

Foreman of the grand jury.

Sec. 1726. **Indictment for maiming.**—Indictment for maiming held good where defendant deprived the injured party of his hand by setting fire to a cannon cracker in the hand of the injured party. Neblett v. State, 47 Texas Crim. Rep. 573; 85 S. W. 813.

Sec. 1727. **"Wilfully" defined.**—When the prosecution is for maiming and not for assault to maim a specific intent to maim is not necessary. The term "wilfully," as used in the maiming statute, does not mean any more than in other cases. If the maiming was actually effected, if the act was committed with evil intent, with legal malice, without reasonable grounds for believing it to be lawful, and without legal justification or excuse, it is wilful and malicious whether or not it was com-

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mitted with a specific intent to maim. Davis v. State, 22 Texas Crim. App. 50; 2 S. W. 630. Key v. State, 161 S. W. 121.

The term "wilfully" means with evil intent, with legal malice, without reasonable grounds for believing the act to be lawful, and without legal justification. Bowers v. State, 24 Texas Crim. App. 549; 7 S. W. 247. Key v. State, 161 S. W. 121.

Sec. 1728. **"Maliciously" defined.**—A malicious act is one committed in a state of mind which shows a heart regardless of social duty and fatally bent on mischief; a wrongful act intentionally done without legal justification or excuse. Bowers v. State, 24 Texas Crim. App. 549; 7 S. W. 247. Key v. State, 161 S. W. 121.

Sec. 1729. **Maiming—Evidence.**—Under an indictment for maiming defendant may be convicted of an aggravated assault or of a simple assault. Pool v. State, 59 Texas Crim. Rep. 482; 129 S. W. 1135, but not of an assault with intent to murder. Davis v. State, 22 Texas Crim. Rep. 51; 2 S. W. 630.

The court should not reject evidence which tends to show that the violence was not inflicted wilfully and maliciously within the meaning of those terms. Bowers v. State, 24 Texas Crim. App. 549; 7 S. W. 247.

A "front tooth" is a member of the body. If the tooth was only described as "a corner tooth," it would be for the jury to say whether or not it was a front tooth. High v. State, 26 Texas Crim. App. 572; 10 S. W. 238.

To constitute the offense of maiming, the act must be done both wilfully and maliciously. Bowers v. State, 24 Texas Crim. App. 549; 7 S. W. 247.

To maim is to wilfully and maliciously cut off or otherwise deprive a person of the hand, arm, finger, toe, foot, leg, nose, or ear; to put out an eye, or in any way to deprive a person of any other member of his body. Bowers v. State, 24 Texas Crim. App. 542; 7 S. W. 247. Pool v. State, 59 Texas Crim. Rep. 482; 129 S. W. 1135.

The offense of maiming may be committed by wilfully and maliciously shooting off a toe of the injured party. Davis v. State, 22 Texas Crim. App. 45; 2 S. W. 630.

If defendant intended only to commit a simple assault and in attempting to commit it maims another, he is guilty of maiming, but is entitled to receive only the lowest penalty affixed by law to the offense of maiming. Key v. State, 161 S. W. 121.

Sec. 1730. **Maiming—Charge of the court.**—The charge of the court should contain a definition of the terms "wilfully" and "maliciously." Davis v. State, 22 Texas Crim. App. 50; 2 S. W. 630. Bowers v. State, 24 Texas Crim. App. 542; 7 S. W. 247.

It is error to assume in the charge of the court that a part of the body not named in the statutory definition of "maiming" is a member of the body. It should be left to the jury. Slattery v. State, 41 Texas 619.

Biting off a portion of a member of the body is not necessarily maiming. It should be left to the jury in such cases whether or not the member was so injured as to substantially deprive the injured party of it. Slattery v. State, 41 Texas 619. Bowers v. State, 24 Texas Crim. App. 551; 7 S. W. 247. Pool v. State, 59 Texas Crim. Rep. 482; 129 S. W. 1135.

Art. 1035. (614) **"Disfiguring" defined.**—To disfigure is to wilfully and maliciously place any mark, by means of a knife or other instrument, upon the face or other part of the person.

Art. 1036. (615) **Punishment for disfiguring.**—If any person shall disfigure another, he shall be punished by confinement in the penitentiary, not less than two nor more than five years, or by fine not exceeding two thousand dollars. (Acts of 1858, p. 171.)

Sec. 1731. **Disfiguring—Form for indictment.**

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

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at said term do present that John Doe on the.....day of..... A. D..... in said county and State did wilfully and maliciously place a mark upon the face (or other part of the person, naming it) of.....by means of a knife (or "by throwing carbolic acid upon the face of said....." or "by placing a hot iron upon the face of said....." or by means of whatever instrument was used, naming it) and the said John Doe did then and there by means of said instrument disfigure the said.....

Against the peace and dignity of the State.

.....

Foreman of the grand jury.

Sec. 1732. **Disfiguring—Statute construed.**—Under the statute making it a felony to disfigure another by means of a knife "or other instrument," the term "instrument" means anything which will place a mark upon the face or any other part of the person, and includes carbolic acid. Lee v. State, 148 S. W. 567.

To "disfigure" is to wilfully and maliciously place any mark by means of a knife or other instrument upon the face or other part of the person. Pool v. State, 59 Texas Crim. Rep. 482; 129 S. W. 1135. Lee v. State, 148 S. W. 567.

(The indictment in Lee v. State, 148 S. W. 567, was held good, and is good for the offense of an assault with intent to commit the offense of disfiguring, but is not good as an indictment for disfiguring because there is no allegation that defendant did place a mark on the face of the injured party.)

Art. 1037. (616) **"Castration" defined.**—To castrate is to wilfully and maliciously deprive any person of either or both, or any part of either or both of the testicles.

Art. 1038. (617) **Punishment for castration.**—If any person shall commit the offense of castration, he shall be punished by confinement in the penitentiary not less than five nor more than fifteen years.

Sec. 1733. **Castration—Form for indictment.**

In the name and by the 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 John Doe on the.....day of.....A. D..... in said county and State did wilfully and maliciously deprive.....of one (or "both") of his testicles (or "of part of one of his testicles") by then and there cutting it (or "them") out with a knife (or whatever means was used to accomplish the act, stating it or alleging that the means used were unknown to the grand jury).

Against the peace and dignity of the State.

.....

Foreman of the grand jury.

CHAPTER V

FALSE IMPRISONMENT

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Article 1039. (618) **"False imprisonment" defined.**—False imprisonment is the wilful detention of another against his consent, and where it is not expressly authorized by law, whether such detention be effected by an assault, by actual violence to the person, by threats or by any other means which restrains the party so detained from removing from one place to another as he may see proper.

Art. 1040. (619) **Assault or violence same as in assault and battery.**—The assault or violence may be such as is spoken of in defining the offense of assault and battery.

Art. 1041. (620) **What impediment necessary.**—The impediment must be such as is in its nature calculated to detain the person and from which he can not by ordinary means relieve himself.

Art. 1042. (621) **Threat, effect of.**—The threat must be such as is calculated to operate upon the person threatened and inspire a just fear of some injury to his person, reputation or property, or to the person, reputation or property of another; and the jury are to consider the age, sex, condition, disposition or health of the person threatened in determining whether the threat was sufficient to intimidate and prevent such person from moving beyond the bounds in which he was detained.

Art. 1043. (622) **What detention is not.**—It is not an offense to detain a person in the cases and for the objects mentioned in article 1014 (593), as justifying the use of force, but, whenever it is assumed as a justification that such circumstances existed, it must be shown also that the detention was necessary to effect any of the objects set forth in said article.

Sec. 1734. **Statute construed.**—False imprisonment is the wilful detention of another against his consent, and where it is not expressly authorized by law, whether such detention be effected by an assault, by actual violence to the person, by threats, or by any other means which restrains the party so detained from removing from one place to another as he may see proper. Giroux v. State, 40 Texas 98. Woods v. State, 3 Texas Crim. App. 204. Herring v. State, 3 Texas Crim. App. 111. Harkins v. State, 6 Texas Crim. App. 452. Maner v. State, 8 Texas Crim. App. 361. Staples v. State, 14 Texas Crim. App. 136. Smyth v. State, 51 Texas Crim. Rep. 412; 103 S. W. 899.

The assault or violence may be such as is spoken of in defining the offense of assault and battery. Meyer v. State, 49 S. W. 600. Smyth v. State, 51 Texas Crim. Rep. 412; 103 S. W. 899.

The impediment must be such as is in its nature calculated to detain the person and from which he cannot by ordinary means relieve himself. Maner v. State, 8 Texas Crim. App. 361. McClure v. State, 26 Texas Crim. App. 102; 9 S. W. 353.

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The threat must be such as is calculated to operate upon the person threatened and inspire a just fear of some injury to his person, reputation or property, or to the person, reputation or property of another; and the jury are to consider the age, sex, condition, disposition or health of the person threatened in determining whether the threat was sufficient to intimidate and prevent such person from moving beyond the bounds in which he was detained. Herring v. State, 3 Texas Crim. App. 108. McClure v. State, 26 Texas Crim. App. 102; 9 S. W. 353. Meyer v. State, 49 S. W. 600.

A mistake of law is no defense to a prosecution for false imprisonment. Staples v. State, 14 Texas Crim. App. 136. Smyth v. State, 51 Texas Crim. Rep. 415; 103 S. W. 899.

A mere unavoidable delay in taking bail of a person arrested for crime does not subject an officer to a prosecution for false imprisonment. Cargill v. State, 8 Texas Crim. App. 431.

An officer will not be guilty of false imprisonment because he refuses bond for and confines one who is drunk until he becomes sufficiently sober and rational as not to be a nuisance to peaceable and orderly citizens. Beville v. State, 16 Texas Crim. App. 70. Mosley v. State, 23 Texas Crim. App. 409; 4 S. W. 907.

One who aids an officer in making an illegal arrest without a warrant aids him at his peril and is bound to know whether the officer is entitled to make the arrest. Staples v. State, 14 Texas Crim. App. 136. Smyth v. State, 51 Texas Crim. Rep. 408; 103 S. W. 899.

When one is a mere volunteer he is held to knowledge of his right to interfere. If the protection is only to be afforded by a warrant in the hands of another, and he interferes, he does so at his peril. Kirbie v. State, 5 Texas App. 62, but defendant may prove his reasons for making an arrest not authorized by law, and show in support of such belief that legal proceedings had been instituted against the arrested party for the supposed offense, and may show the nature of such proceedings; such proof is admissible in mitigation of punishment. Staples v. State, 14 Texas Crim. App. 141.

The status of a defendant who is a mere volunteer in making an arrest is fixed at the time of the arrest, and does not depend on the final result of the charge upon which the arrest was made. Kirbie v. State, 5 Tex. App. 63, but in mitigation of the penalty defendant may show the result of the charge in order to prove that the party unlawfully arrested was justly suspected of crime. Staples v. State, 14 Texas Crim. App. 141.

Sec. 1735. **False imprisonment—Form for indictment.**
In the name and by the 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 John Doe on the.....day of.....A. D..... in said county and State did wilfully detain.....against his consent and without authority of law, and did then and there commit an assault upon the person of the said.....and did then and there by said assault, and by actual violence to the person of the said.....and by threats, wilfully detain and restrain the said.....from removing from one place to another as the said .....might see proper.

Against the peace and dignity of the State.

.....
Foreman of the grand jury.

Sec. 1736. **Indictment.**—The legality of the detention must be negatived. Redfield v. State, 24 Texas 134.

Indictment for false imprisonment by threats held good. Herring v. State, 3 Texas Crim. App. 110.

An information must, in substance, charge the same offense as that alleged in the complaint, and a want of conformity in the allegations as to matters of substance vitiates the information. Hanson v. State, 61 S. W. 120.

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The *gravamen* of the offense of false imprisonment is the wilful detention of another against his consent and where it is not authorized by law, and while the mode or manner of effecting the detention should be alleged, it is sufficient to set it forth in the language of the statute. The character of the assault or the threats is a matter of proof and not of pleading. Maner v. State, 8 Texas Crim. App. 361.

Sec. 1737. **Evidence.**—If threats is the mode of detention alleged and relied on, it is not necessary to prove express verbal threats, but they may consist of acts, gestures, or the like, which, equally with words, may be calculated to operate upon the person threatened and inspire a just fear of some injury to his person, reputation, or property. Herring v. State, 3 Texas Crim. App. 108. Maner v. State, 8 Texas Crim. App. 361.

The State is confined to the particular mode of detention alleged, and proof of detention effected by an assault will not support an allegation of detention by threats. Maner v. State, 8 Texas Crim. App. 361.

The imprisonment is presumed to be unlawful until the contrary is shown, and it is for the defendant to justify it by proving that it was authorized by law. Kirbie v. State, 5 Texas Crim. App. 63. Smyth v. State, 51 Texas Crim. Rep. 413; 103 S. W. 899, but defendant, in mitigation of the penalty may prove facts showing why he thought the arrest was lawful. Staples v. State, 14 Texas Crim. App. 141.

The State may put in evidence proof of admissions of defendant which are part of the *res gestæ*. Maner v. State, 8 Texas Crim. App. 361.

It is not error to exclude proof of the threats of injury to defendant made by the party detained after the offense was committed. Harkins v. State, 6 Texas Crim. App. 452.

A conviction for false imprisonment will not be sustained if it is merely shown that defendant did nothing to prevent others from committing the offense. Walker v. State, 25 Texas Crim. App. 443; 8 S. W. 647.

A conviction for false imprisonment will not be sustained if the testimony fails to show that defendant was guilty of a wilful detention against the consent of the alleged injured party. Hightower v. State, 22 Texas 605. Boyd v. State, 11 Texas Crim. App. 80. Mosley v. State, 23 Texas Crim. App. 409; 4 S. W. 907. McClure v. State, 26 Texas Crim. App. 102; 9 S. W. 353.

Sec. 1738. **Charge of the court.**—The term "wilfully" means with evil intent or legal malice or without reasonable grounds for believing the act to be lawful. Smyth v. State, 51 Texas Crim. Rep. 415; 103 S. W. 899.

The court may charge the statutory provision as to threats when threats are alleged and proven. Meyer v. State, 49 S. W. 600.

A charge is correct when the jury are thereby informed that "it is sufficient imprisonment to stop a man from going in any direction he may see proper; and it is not necessary that he be detained in any particular spot, so he is prevented from moving from place to place, or in the direction he wishes to go." Woods v. State, 3 Texas Crim. App. 204.

If, from all the circumstances, the law would authorize the arrest, by a fair construction, defendant would not be guilty of false imprisonment because the authority to arrest was not expressly given. If the arrest was made without a warrant the jury should not be charged that defendant must have express lawful authority to make the arrest. Beville v. State, 16 Texas Crim. App. 70.

If there is evidence to support the theory, it is error to refuse to charge that a mere contest and wordy altercation between two parties for the possession of an article of personal property, each in good faith claiming the right thereto, and in which the party in possession and sought to be dispossessed voluntarily and of his own accord remained at the place of altercation for the purpose of better protecting his possession, and where he was not detained or sought to be detained by the other, would not constitute false imprisonment. McClure v. State, 26 Texas Crim. App. 102; 9 S. W. 353.

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Where defendant, an officer, legally arrested without a warrant a person while drunk on the street and while disturbing the peace, and another undertook to release the drunk by force, it is error to refuse to charge that if such were the facts it was the duty of defendant to arrest each of such persons. Mosley v. State, 23 Texas Crim. App. 409; 4 S. W. 907.

Art. 1044. (623) **Punishment.**—Any person who shall be guilty of the offense of false imprisonment shall be fined not exceeding five hundred dollars, and may be confined in the county jail not exceeding one year.

Sec. 1739. **Penalty is fine or imprisonment.**—The Code leaves it discretionary with the jury whether they will impose imprisonment or not. The court should charge the jury that the punishment for false imprisonment is by fine or imprisonment. Redfield v. State, 24 Texas 133.

Art. 1045. (624) **Detention after discharge on habeas corpus.**—If any officer or other person shall hold or detain in any manner any one who has been ordered to be discharged by any court or judge, upon the hearing of a writ of habeas corpus, he shall suffer double the punishment prescribed in the preceding article.

Art. 1046. (625) **Refusal to allow consultation with counsel.**—If any officer or other person having the custody of a prisoner in this State shall wilfully prevent such prisoner from consulting or communicating with counsel, or from obtaining the advice or services of counsel in the protection or prosecution of his legal rights, he shall be punished by imprisonment in the county jail not less than sixty days nor more than six months, and by fine not exceeding one thousand dollars.

Sec. 1740. **Right to consult with counsel.**—A person under arrest has a right to consult or communicate with counsel, or to obtain the advice or services of counsel in the protection or prosecution of his legal rights. Hamilton v. State, 153 S. W. 331.

CHAPTER VI

MINORS

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Article 1047. (625a) **Enticing minors from legal custody.**—Any person in this State who shall knowingly entice or decoy any minor in the State away from the custody of his parent or guardian, or person standing in the stead of such parent or guardian, shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by fine not less than twenty-five nor more than two hundred dollars. In all cases where charitable and benevolent institutions have established homes for dependent orphans of their deceased members, and the person legally entitled to the guardianship of such orphans surrenders them to such homes for support, maintenance, and education, such institutions, under their agencies, rules, and regulations, shall have and exercise over such orphans all the rights of natural guardians, as standing in the place of their parents. (Acts of 1893, p. 114.)

Sec. 1741. **Statute construed.**—The statute, in order to constitute this offense, requires that the minor be **knowingly** enticed or decoyed away from the custody of his parent or guardian. Cummins v. State, 36 Texas Crim. Rep. 398; 37 S. W. 435. Cockrell v. State, 160 S. W. 343.

The bare fact that one hires a minor with knowledge that the minor has a parent living is not sufficient to constitute the offense of knowingly enticing a minor. Cummins v. State, 36 Texas Crim. Rep. 398; 37 S. W. 435.

It must be shown that the minor left at the instance and suggestion and by the persuasion of the defendant. Cockrell v. State, 160 S. W. 343.

Sec. 1742. **Enticing a minor—Form for complaint.**

In the name and by authority of the State of Texas:

Before me the undersigned authority on this day personally appeared..... who, being by me duly sworn, deposes and says that John Doe, in the county of .....and State of Texas, heretofore on the.....day of..... A. D.....did knowingly entice and decoy.....a minor in said State of Texas away from the custody of.....the parent of said minor.

Against the peace and dignity of the state.

.....(affiant).

Subscribed and sworn to before me this the.....day of.....A. D.....

.....

J. P. Prec. No....., ...county, Texas.

Art. 1048. **Sale, etc., of weapons to minor.**—If any person in this State shall knowingly sell, give or barter, or cause to be sold, given or bartered to any minor, any pistol, dirk, dagger, slung shot, sword-cane, spear, or knuckles made of any metal or hard substance, bowie knife or any other knife manufactured or sold for the purpose of offense or defense, without the written consent of the parent or guardian of such minor, or of some one standing in lieu thereof, he shall be punished by fine of not less than twenty-five dollars nor more than two hundred dollars, or by imprisonment in the county jail not less than ten nor more than thirty days, or by both such fine and imprisonment. (Acts of 1897, p. 221.)

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Sec. 1743. **Form for information.**
In the name and by authority of the State of Texas:
.....County Attorney of.....county, Texas, comes in behalf of the State of Texas and presents in and to the County Court of..... county, Texas, at the.....term, A. D.....of said court that John Doe heretofore on the.....day of.....A. D....., in said county and State, did knowingly sell, give and barter, and did then and there cause to be sold, given and bartered to.....a minor, a pistol (or "dirk" or whatever it was), without the written consent of the parent or guardian of such minor or of some one standing in lieu thereof.
Against the peace and dignity of the State.
.....
County Attorney.....county, Texas.

Art. 1049. **Sale, etc., of cigarette or tobacco to minor.**—Any person who shall sell, give or barter, or cause to be sold, given or bartered, to any person under the age of sixteen years, or knowingly sell to any other person for delivering to such minor, without the written consent of the parent or guardian of such minor any cigarette or tobacco in any of its forms, shall be fined not less than ten nor more than one hundred dollars. (Acts of 1899, p. 237.)

Sec. 1744. **Form for complaint.**
In the name and by the authority of the State of Texas:
Before me the undersigned authority on this day personally appeared..... who, being by me duly sworn, deposes and says that John Doe, in the county of .....and State of Texas, heretofore on the.....day of..... A. D.....did sell, give and barter, and did then and there cause to be sold, given and bartered to.....a minor, then and there under the age of sixteen years, without the written consent of the parent or guardian of such minor, a package of cigarettes (or "a sack of tobacco," or "a cigar").
Against the peace and dignity of the State.
.....(affiant).
Subscribed and sworn to before me this the.....day of.....A. D.....
.....
J. P. Prec. No....., ... Co., Texas.

Sec. 1745. **Sale of cigarette to another for delivery to minor—Form for complaint.**
In the name and by authority of the State of Texas:
Before me the undersigned authority on this day personally appeared..... who, being by me duly sworn, deposes and says that John Doe, in the county of .....and State of Texas, heretofore on the.....day of..... A. D.....did knowingly sell to.....a package of cigarettes (or "a sack of tobacco" or "a piece of chewing tobacco" or "a cigar") for delivery to..... a minor, then and there under the age of sixteen years, without the written consent of the parent or guardian of such minor.
Against the peace and dignity of the State.
.....(affiant).
Subscribed and sworn to before me this the.....day of.....A. D.....
.....
J. P. Prec. No....., ...county, Texas.

Sec. 1746. **Child labor—The statute.**

Sec. 1. Any person, or any agent, or any employe of any person, firm or corporation who shall hereafter employ any child under the age of fifteen years to labor in or about any manufacturing or other establishment using dangerous machinery, or about the machinery in any mill or factory, or in any distillery, brewery, or to labor in any capacity in the manufacture of goods for immoral purposes, or where their health may be impaired or morals debased, or shall send any such child to any disorderly house, bawdy house, or assignation house, or having the control of such child, shall permit him or her to go to any such house, shall be

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deemed guilty of a misdemeanor, and, upon conviction, shall be fined not less than fifty dollars nor more than two hundred dollars, and each day the provisions of this Act are violated shall constitute a separate offense.

Sec. 1a. Such person, firm or corporation, or any agent thereof shall give free access at all times to the Commissioner of Labor Statistics of the State of Texas, and his deputies, for the inspection of their premises and of the methods employed, to insure compliance with the provisions of the foregoing section.

Sec. 2. Any person, agent, or any employe of any person, firm of corporation, who shall hereafter employ any child under the age of 17 years to labor in or about any quarry or mine shall be punished as provided for in Section 1 of this Act.

Sec. 2a. (Is the same as Section 1a.)

Sec. 3. Chapter 28 of the General Laws of the twenty-eighth Legislature, Regular Session, being "An Act to regulate the employment of children in factories, mills, mines, breweries, manufacturing establishments and other establishments using machinery and to provide penalties for the violation of the same," be and the same is hereby, expressly repealed, and any and all laws and parts of laws in conflict with this Act, be and the same are hereby repealed. (Act of March 13, 1911, Acts of 1911, p. 75.)

Art. 1050. **Employing child under twelve years forbidden, where.**—(Repealed by the Act of March 13, 1911; see preceding section.)

Art. 1051. **Employing child between twelve and fourteen forbidden, where.**—(Repealed by the Act of March 13, 1911; see preceding section.)

Art. 1052. **Employing child under sixteen forbidden, where.**—(Repealed by the Act of March 13, 1911; see preceding section. Articles 1050, 1051, and 1052 of the Penal Code of 1911 were arranged from the Act of the Twenty-eighth Legislature, chapter 28, page 40, of the Acts of 1903.)

Art. 1053. **Permitting minor to remain in pool room, etc.**—If any owner, lessee or manager of any billiard hall, pool hall, ten pin alley or bowling alley, or any employe therein, whether intoxicating liquors are sold in such place or not, shall permit any person under the age of twenty-one years to enter such place of business and remain therein for any length of time, without the consent of the parent of such minor, or someone standing in their place and stead, or shall permit any person under twenty-one years of age to play billiards or pool, or roll on any ten pin or bowling alley in such place of business without the consent of the parent of such minor, or some one standing in their place and stead, shall be guilty of a misdemeanor, and on conviction thereof shall be fined in any sum not less than twenty dollars nor more than one hundred dollars. (Acts of 1905, p. 105.)

Sec. 1747. **Statute construed.**—Art. 1053 does not use the term "knowingly," and it is not necessary for the State to show that defendant knew the boy was a minor. The burden is on defendant to show mistake of fact where the statute does not require that he knew the party to be a minor. Rainbolt v. State, 49 Texas Crim. Rep. 427; 93 S. W. 737. Stark v. State, 160 S. W. 454.

Sec. 1748. **Permitting minor to play pool—Form for complaint.**

In the name and by the authority of the State of Texas:

Before me the undersigned authority, on this day personally appeared..... who, being by me duly sworn, deposes and says that John Doe, in the county of .....and State of Texas, heretofore on the.....day of..... A. D.....was then and there the owner, lessee and manager of a pool hall there situate, and the said John Doe did then and there permit.....a minor, to

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play pool in such place of business without the consent of either parent of such minor, or some one standing in their place and stead.

Against the peace and dignity of the State.

.....(affiant).

Subscribed and sworn to before me on this the.....day of.....A. D.....

.....

J. P. Prec. No....., ...county, Texas.

Sec. 1749. **Evidence.**—It is error to exclude a written order purporting to give consent of the parent of the minor to his playing pool. Proof of the circumstances under which defendant received the order is admissible as going to show mistake of fact. Simpson v. State, 58 Texas Crim. Rep. 253; 125 S. W. 398.

Sec. 1750. **Selling or giving intoxicating liquor to minor.**—Article 1054 of the Penal Code of 1911 purports to be the Act of 1909, but article 593 of the Penal Code of 1911 contains the whole of the Act of 1909, while article 1054 has only the last part of the Act of 1909 and confuses that Act with old article 400, article 400 not being intended to be amended, nor was it by the Act of 1909. Article 593 (400) has the head-note "selling to minors," but does not mention selling in the article itself. I will treat the sale, gift, and delivery of intoxicating liquors to minors, immediately following article 593, chapter seven, title eleven of this book, where the subject properly belongs.

Art. 1054. **Selling or giving intoxicating liquor to minor.**—Any person who shall knowingly sell or give or deliver, or cause to be sold, given or delivered, or be in any way interested in the sale, gift or delivery of any spirituous, vinous, malt or intoxicating liquors to any person under the age of twenty-one years without the written consent of the parent or guardian of such person who is under the age of twenty-one years, shall be guilty of a misdemeanor, and shall be fined therefor not less than twenty-five nor more than one hundred dollars; and any person who as agent for or employed by an express company or other common carrier, or who, as agent for or employe of any other person, firm or corporation, delivers or causes to be delivered any spirituous, vinous or intoxicating liquors to any other person under the age of twenty-one years, whether consigned to such person or some other person, without the written consent of the parent or guardian of such minor or person under the age of twenty-one years, shall be guilty of a misdemeanor, and shall be punished upon conviction therefor by a fine of not less than twenty-five nor more than one hundred dollars.

Art. 1055. **Encouraging, contributing, etc., to the delinquency or dependency of child.**—In all cases where any child shall be a "delinquent child" or a "neglected or dependent child" as defined in the statutes of this State, the parent or parents, legal guardian or persons having the custody of such child, or any person responsible for or who, by any act, encourages, causes or contributes to the delinquency or dependency of such child shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not to exceed one thousand dollars, or by imprisonment in the county jail for any period not exceeding one year, or by both such fine and imprisonment. The court may impose conditions on any person found guilty under this law, and, so long as such person shall comply therewith to the satisfaction of the court, the judgment imposed may be suspended. (Act 1907, p. 209.)

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CHAPTER VII

KIDNAPPING AND ABDUCTION

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Article 1056. (626) **"Kidnapping" defined.**—When any person is falsely imprisoned for the purpose of being removed from the State, or if a minor under the age of seventeen years, for the purpose of being concealed or taken from the lawful possession of a parent or guardian, such false imprisonment is "kidnapping." If the person kidnapped be under the age of fifteen years, it is not necessary that there should be force in order to constitute the offense of kidnapping. (Act Feb. 12, 1858, p. 171-2.)

Art. 1057. (627) **Punishment.**—The punishment for kidnapping shall be imprisonment in the penitentiary not less than two nor more than five years, or fine not exceeding two thousand dollars.

Art. 1058. (628) **If person kidnapped be actually removed.**—If the person so falsely imprisoned be actually removed out of the State, the punishment shall be imprisonment in the penitentiary not less than two nor more than ten years.

Sec. 1751. **Kidnapping to remove from State—Form for indictment.**
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 John Doe on the ..... day of ..... A. D. ....., in said county and State, did wilfully detain ..... against the consent of the said ..... and without authority of law, and did then and there commit an assault upon the person of the said ....., and did then and there by said assault, and by threats, and by actual violence to the person of the said ..... restrain the said ..... from removing from one place to another as the said ..... might see proper, and

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the said John Doe did then and there in the manner and by the means aforesaid falsely imprison, and kidnap, and wilfully detain the said ..... for the purpose of removing the said ..... from the State of Texas.

Against the peace and dignity of the State.

.....

Foreman of the grand jury.

Sec. 1752. **Kidnapping a minor—Form for indictment.**

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 John Doe on the ..... day of ..... A. D. ....., in said county and State did wilfully detain ....., a minor then and there under the age of seventeen years, against the consent of the said minor and without authority of law, and did then and there commit an assault upon the person of the said minor and did then and there by said assault, and by threats, and by actual violence to the person of said minor restrain the said minor from removing from one place to another as the said minor might see proper, and the said John Doe did then and there in the manner and by the means aforesaid falsely imprison, kidnap, and wilfully detain the said minor for the purpose of being concealed and taken from the lawful possession of ....., who was then and there the parent of said minor.

Against the peace and dignity of the State.

.....

Foreman of the grand jury.

Sec. 1753. **Indictment for kidnapping.**—Kidnapping is an aggravated false imprisonment, and it is not sufficient to charge the defendant with kidnapping generally, but the indictment should allege specifically the facts and circumstances which constitute that offense. Click v. State, 3 Texas 287.

To constitute false imprisonment, which is a constituent element of the offense of kidnapping, the detention must be against the consent of the person wilfully detained; hence in an indictment for kidnapping it must be alleged that the detention was against the consent of the person kidnapped. Click v. State, 3 Texas 287.

Kidnapping and abduction, being offenses of the same character, may be charged in the indictment in different counts. Mason v. State, 29 Texas Crim. App. 29; 14 S. W. 71.

Art. 1059. (629) **"Abduction" defined.**—"Abduction" is the false imprisonment of a woman with intent to force her into a marriage or for the purpose of prostitution.

Art. 1060. (630) **Abduction of female under fourteen.**—If a female under the age of fourteen be taken for the purpose of marriage or prostitution from her parent, guardian or other person having the legal charge of her, it is abduction, whether she consent or not, and although a marriage afterward take place between the parties.

Art. 1061. (631) **Abduction complete, when.**—The offense of abduction is complete if the female be detained as long as twelve hours, though she may afterwards be relieved from such detention without marriage or prostitution.

Sec. 1754. **Abduction of woman—Form for indictment.**

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 John Doe on the ..... day of ..... A. D.

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....., in said county and State, did wilfully detain ....., a woman, against the consent of the said woman and without authority of law, and did then and there commit an assault upon the person of the said woman and did then and there by said assault, and by threats, and by actual violence to the person of said woman restrain the said woman from removing from one place to another as she might see proper, and the said John Doe did then and there in the manner and by the means aforesaid falsely imprison, abduct, and wilfully detain said woman for as long as twelve hours, with the intent then and there to force her into a marriage with the said John Doe.

Against the peace and dignity of the State.

.....

Foreman of the grand jury.

Sec. 1755. **Abduction of woman for prostitution—Form for indictment.** 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 John Doe on the ..... day of ..... A. D. ....., in said county and State, did wilfully detain ....., a woman, against the consent of the said woman and without authority of law for as long as twelve hours, and did then and there commit an assault upon the person of the said woman and did then and there by said assault, and by threats, and by actual violence to the person of said woman restrain the said woman from removing from one place to another as she might see proper, and the said John Doe did then and there in the manner and by the means aforesaid falsely imprison, abduct, and wilfully detain said woman for the purpose of prostitution.

Against the peace and dignity of the State.

.....

Foreman of the grand jury.

Sec. 1756. **Abduction of female under fourteen—Form for indictment.** 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 John Doe on the ..... day of ..... A. D. ....., in said county and State, did take and abduct ....., a female then and there under the age of fourteen years, from her parent, ..., who then and there had legal charge of her, and the said John Doe did then and there so take her for the purpose of prostitution.

Against the peace and dignity of the State.

.....

Foreman of the grand jury.

(False imprisonment is not an element of the offense of abduction of a female under fourteen years of age, and it is immaterial whether she consent or not to the abduction.)

Sec. 1757. **Indictment for felonious abduction.**—Under article 1062 (632) simple abduction becomes a felony if by reason of the abduction the woman be forced into marriage or prostituted. When such is the case an allegation of that fact can be added to the preceding forms.

Sec. 1758. **Kidnapping and abduction—Construction of statute.**—If no force was used in taking the female or in keeping her, she going and remaining with defendant voluntarily, consenting to all his propositions and acts, then such facts will not constitute kidnapping whatever be the age of the female. Castillo v. State, 29 Texas Crim. App. 127; 14 S. W. 1011.

Where defendant was tried under an indictment charging kidnapping, felonious abduction and simple abduction, and convicted of simple abduction, he can only be legally prosecuted on a subsequent trial for the simple abduction. Mason v. State, 29 Texas Crim. App. 30; 14 S. W. 71.

When a female under fourteen years of age is abducted for the purpose of prostitution and prostituted, a mistake of fact as to her age is no defense. Tores v. State, 63 S. W. 880.

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In abduction if defendant's purpose in taking the girl away was to have carnal knowledge of her individually, this would be a "prostitution" of her. Lopez v. State, 156 S. W. 217.

The offense of abduction can be committed even though an act of carnal knowledge never took place. Lopez v. State, 156 S. W. 217.

It is no defense to a prosecution for abduction that the defendant could have been indicted for rape. Lopez v. State, 156 S. W. 217.

Sec. 1759. **Kidnapping and abduction—Evidence.**—The female alleged to have been kidnapped is not an accomplice witness. Mason v. State, 29 Texas Crim. App. 30; 14 S. W. 71.

Where a witness saw the parties when they had the injured party in charge taking him away, he may testify to that fact although he did not see them take bodily charge of him. Nunez v. State, 156 S. W. 933.

When a conspiracy is shown, proof of the acts, words and conduct of any of the conspirators, done or said before the termination of the conspiracy in furtherance of the common design, is admissible whether the party on trial was actually present at all times or not. Nunez v. State, 156 S. W. 933.

A conviction for abduction of a female under the age of fourteen years will not be sustained when the evidence shows that she was over that age at the time of the alleged abduction. Mason v. State, 29 Texas Crim. App. 30; 14 S. W. 71. Lopez v. State, 156 S. W. 217.

Sec. 1760. **Kidnapping and abduction—Charge of court.**—It is not necessary for the charge of the court to include definitions of phases of the offense not relied on. Tores v. State, 63 S. W. 880.

It is not necessary to define the term "prostitution" in the charge. Tores v. State, 63 S. W. 880.

If the issue is raised that defendant was mistaken in the age of the girl, believing her to be over seventeen, and that such mistake did not arise from a want of proper care, and that the girl went with him voluntarily, the jury should be instructed to acquit if they have a reasonable doubt thereof. Mason v. State, 29 Texas Crim. App. 30; 14 S. W. 71.

Where a female under the age of fourteen years of age is taken away from her parents without their consent, and prostituted, the court is not required to give a charge on mistake of fact as to defendant believing her to be over that age. Tores v. State, 63 S. W. 880.

Art. 1062. (632) **Punishment for abduction.**—Any person who shall be guilty of abduction shall be punished by a fine not exceeding two thousand dollars. If, by reason of such abduction, a woman be forced into marriage, the punishment shall be confinement in the penitentiary not less than two nor more than five years; and if by reason of such abduction a woman be prostituted, the punishment shall be confinement in the penitentiary not less than three nor more than twenty years.

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CHAPTER VIII

RAPE

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Article 1063. (633) (528) **"Rape" defined.**—Rape is the carnal knowledge of a woman without her consent, obtained by force, threats or fraud, or the carnal knowledge of a woman other than the wife of the person having such carnal knowledge with or without consent, and with or without use of force, threats, or fraud, such woman being so mentally diseased at the time as to have no will to oppose the act of carnal knowledge, the person having carnal knowledge of her knowing her to be so mentally diseased; or the carnal knowledge of a female under the age of fifteen years, other than the wife of the person, with or without her consent, and with or without the use of force, threats or fraud. (Amended by Act April 13, 1891, p. 96, amended by Act of 1895, p. 79.)

Sec. 1761. **Venue.**—The statute is constitutional which authorizes the prosecution for rape in any county of the judicial district in which the rape was committed. Mischer v. State, 41 Texas Crim. Rep. 212; 53 S. W. 627. Bartlett v. State, 53 S. W. 629. Griffey v. State, 56 S. W. 52. Dies v. State, 56 Texas Crim. Rep. 33; 117 S. W. 979. Brown v. State, 57 Texas Crim. Rep. 269; 122 S. W. 566. Eckermann v. State, 57 Texas Crim. Rep. 287; 123 S. W. 424.

If the indictment is presented by the grand jury of a county other than the county where the rape was committed, the indictment should allege that the rape was committed in the county where it occurred. Mischer v. State, 41 Texas Crim. Rep. 222; 53 S. W. 627.

It is not necessary to allege that the county in which the indictment was presented and the county in which the rape was committed are in the same judicial district. The court takes judicial knowledge of the counties in the district. Mischer v. State, 41 Texas Crim. Rep. 212; 53 S. W. 627.

Sec. 1762. **Limitation.**—An indictment for the offense of rape may be presented within one year, and not afterward. Anschicks v. State, 6 Texas Crim. App. 524. Carr v. State, 36 Texas Crim. Rep. 390; 37 S. W. 426. Duncan v. State, 59 S. W. 267. Ex parte Black, 55 Texas Crim. Rep. 121; 113 S. W. 534.

The one year limitation is restricted by statute to the offense of rape, and prosecutions for attempt to rape and for assault with intent to rape fall within the purview of the general statute of three years provided for "all other felonies." Moore v. State, 20 Texas Crim. App. 280.

A judgment of conviction for rape will be reversed on appeal if there is no evidence in the statement of facts that the act of rape relied on was within one year prior to the time the indictment was presented. Duncan v. State, 59 S. W. 267.

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Defendant may show that the rape was barred by limitation, and in support of that theory may prove that the pregnancy of prosecutrix was caused by another. Foreman v. State, 61 Texas Crim. Rep. 56; 134 S. W. 229.

Sec. 1763. **Indictment for rape.**—It is not necessary that an indictment for rape should allege the character of the force, or specify the threats used. It is sufficient to allege in general terms that the rape was accomplished by force, or by threats, or fraud, or by all these means together. Cooper v. State, 22 Texas Crim. App. 419; 3 S. W. 334.

An indictment for rape may allege in one count that the rape was committed by force, threats and fraud, and proof of either will be sufficient. Cornelius v. State, 13 Texas Crim. App. 352. Sharp v. State, 15 Texas Crim. App. 184 (and the State is not required to elect in such event). Lawson v. State, 17 Texas Crim. App. 302. Cooper v. State, 22 Texas Crim. App. 429; 3 S. W. 334.

If it is alleged in the indictment that defendant "did ravish," it is equivalent to alleging that the carnal knowledge was obtained by force and without the consent of the woman. Davis v. State, 42 Texas 228. Williams v. State, 1 Texas Crim. App. 90. Walling v. State, 7 Texas Crim. App. 625. Elschlep v. State, 11 Texas Crim. App. 302. Hewitt v. State, 15 Texas Crim. App. 80. Gibson v. State, 17 Texas Crim. App. 577. Jones v. State, 18 Texas Crim. App. 488. Fields v. State, 39 Texas Crim. Rep. 488; 46 S. W. 814.

If the indictment fails to contain an allegation that the carnal knowledge was had by force, or that defendant "did ravish," it does not charge a rape by force. Elschlep v. State, 11 Texas Crim. App. 301.

The word "violently" is equivalent to an allegation of force. Gutierrez v. State, 44 Texas 588. Walling v. State, 7 Texas Crim. App. 625.

Where prosecutrix is referred to in the indictment as "her," or if she is alleged to be "a female," the indictment is not defective for failure to use the statutory word "woman." Robertson v. State, 31 Texas 36. Battle v. State, 4 Texas Crim. App. 596. O'Rourke v. State, 8 Texas Crim. App. 70. Gibson v. State, 17 Texas Crim. App. 576. Taylor v. State, 50 Texas Crim. Rep. 363; 97 S. W. 94.

An indictment which simply alleges that defendant did rape a female charges no offense. Brinster v. State, 12 Texas Crim. App. 612.

An indictment for rape on a woman not alleged to be mentally diseased or under the age of consent need not allege that she was not the wife of the defendant. Caidenas v. State, 40 S. W. 980. Belcher v. State, 39 Texas Crim. Rep. 123; 44 S. W. 519.

Rape and incest based upon the same transaction may be alleged in different counts so as to prevent a variance upon the trial. Owens v. State, 35 Texas Crim. Rep. 350; 33 S. W. 875.

A woman may be indicted for rape (on the theory that she was a principal), and the facts which make her a principal need not be alleged. Any principal may be directly charged with the commission of an offense, and it is not necessary to allege an acting together. Campbell v. State, 63 Texas Crim. Rep. 595; 141 S. W. 233.

It is not necessary to allege that the defendant is a male person, nor is it necessary to allege that he was over fourteen years of age when the alleged rape was committed. Davis v. State, 42 Texas 226. Greenlee v. State, 4 Texas Crim. App. 346. Word v. State, 12 Texas Crim. App. 182. Cornelius v. State, 13 Texas Crim. App. 252. Holland v. State, 14 Texas Crim. App. 182. Taylor v. State, 50 Texas Crim. Rep. 363; 97 S. W. 94.

It is proper, and necessary, to allege the name of the prosecutrix as it was at the time of the alleged rape, although she may have married afterwards. Cain v. State, 153 S. W. 154.

Facts may be alleged according to their legal effect as well as according to their outward form. It is a physical impossibility to commit a rape without at the same

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time committing an assault; hence an indictment which alleges a rape also alleges an assault.

Sec. 1764. **Form for indictment for rape upon woman mentally diseased.** 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 John Doe on the ..... day of ..... A. D. ....., in said county and State, did have carnal knowledge of ....., a woman other than the wife of said John Doe, the said woman being then and there so mentally diseased at the time of said carnal knowledge as to have no will to oppose said act of carnal knowledge, and the said John Doe then and there knowing her to be so mentally diseased.

Against the peace and dignity of the State.

.....
Foreman of the grand jury.

Sec. 1765. **Rape upon woman mentally diseased—Indictment.**—Consent being immaterial when the woman is alleged and proven to be so mentally diseased at the time of the act of carnal knowledge as to have no will to oppose it, it need not be alleged that the carnal knowledge was "with her consent" or that it was "without her consent." Caruth v. State, 25 S. W. 778.

Force, threats or fraud being immaterial when the woman is alleged and proven to be so mentally diseased at the time of the act of carnal knowledge as to have no will to oppose it, it is not necessary to allege that carnal knowledge of such woman was had with or without the use of force, threats or fraud.

Sec. 1766. **Rape upon woman mentally diseased—Evidence.**—If the indictment alleges that the woman was mentally diseased, she is not a competent witness for the State in support of that count. Lee v. State, 43 Texas Crim. Rep. 285; 64 S. W. 1047.

If the prosecutrix is insane when offered as a witness, or was insane when the events happened about which she is called to testify, she is not a competent witness. Lopez v. State, 30 Texas Crim. App. 487; 17 S. W. 1058.

If the indictment contains two counts, one of which alleges that the woman was mentally diseased, the action of the State in placing her on the stand is an endorsement of her sanity. If the proof fails to show her to have been so mentally diseased at the time of the carnal knowledge as to have no will to oppose the act, a general verdict will not be sustained when both counts are submitted to the jury. Thompson v. State, 33 Texas Crim. Rep. 474; 26 S. W. 987 (unless the evidence is sufficient under both counts. Hubbard v. State, 147 S. W. 260).

If consent is an issue, proof of the mental condition of the woman is admissible as a part of the "other circumstances of the case." Segrest v. State, 57 S. W. 845. Hubbard v. State, 147 S. W. 260.

Insanity cannot be proven by general reputation. Ellis v. State, 33 Texas Crim. Rep. 86; 24 S. W. 894, nor by the guess of a non-expert. Fredrickson v. State, 44 Texas Crim. Rep. 289; 70 S. W. 754.

If one count charges a rape by force and threats and the other rape upon a woman mentally diseased, both counts being based upon the same transaction, the State cannot be required to elect between such counts. Thompson v. State, 33 Texas Crim. Rep. 472; 26 S. W. 987. Hubbard v. State, 147 S. W. 260.

Sec. 1767. **Rape upon woman mentally diseased—Charge of court.**—If the indictment does not allege that the woman was mentally diseased, but force and want of consent is relied on, it is error to charge the jury that if the woman was mentally diseased she would be presumed to be incapable of giving her consent. Baldwin v. State, 15 Texas Crim. App. 275.

It is not error to charge the jury that defendant must prove by a preponderance of the testimony that prosecutrix is insane when there is no allegation in the indictment that she was mentally diseased. Batterton v. State, 52 Texas Crim. Rep. 381; 107 S. W. 826. Jenkins v. State, 60 Texas Crim. Rep. 240; 131 S. W. 545.

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The court should not submit to the jury as a basis for conviction a count alleging the woman to have been mentally diseased at the time the carnal knowledge was had when there is not sufficient evidence to support it. Thompson v. State, 33 Texas Crim. Rep. 472; 26 S. W. 987.

Where there is allegation and proof to support it, it would be proper to charge the jury that if they believe from the evidence beyond a reasonable doubt that the defendant did at the time and place alleged have carnal knowledge of ....., a woman other than the wife of the defendant, and that she was at the time so mentally diseased as to have no will to oppose said act of carnal knowledge, if any, and that the defendant then and there knew her to be so mentally diseased, that then he would be guilty of rape.

Sec. 1768. **Form of indictment when female is under age.**
In the name and by the 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 John Doe heretofore on the ..... day of ....., A. D. ....., in said county and State, did have carnal knowledge of ....., a female then and there under the age of fifteen years and then and there not being the wife of the said John Doe; against the peace and dignity of the State.

.....
Foreman of the grand jury.

Sec. 1769. **Rape of female under age of consent—Indictment.**—If it is alleged that the female was under the age of consent at the time defendant had carnal knowledge of her, it is not necessary to allege in terms that she consented, or that she did not consent. Carnal knowledge of a female under the age of consent other than the wife of the person having such carnal knowledge is rape, whether or not she consented. Mayo v. State, 7 Texas Crim. App. 342. Moore v. State, 20 Texas Crim. App. 278. Taylor v. State, 50 Texas Crim. Rep. 362; 97 S. W. 94. Fowler v. State, 148 S. W. 576. Brown v. State, 176 S. W. 51.

The offense of rape is complete when carnal knowledge—sexual intercourse—is had with a female under the age of consent other than the wife of the person having such carnal knowledge, whether such carnal knowledge was had with or without her consent and with or without force, threats or fraud. It follows that it is not necessary in an indictment for rape of a female under the age of consent to allege want of consent or the means used, or that defendant did make an assault, or did ravish. Davis v. State, 42 Texas 226. Mayo v. State, 7 Texas Crim. App. 342. Moore v. State, 20 Texas Crim. App. 278. Nicholas v. State, 23 Texas Crim. App. 317; 5 S. W. 239. Taylor v. State, 50 Texas Crim. Rep. 362; 97 S. W. 94. Fowler v. State, 148 S. W. 576.

It is not necessary to allege in terms that the injured party was a female if the name or the pronoun used clearly refers to a female. Battle v. State, 4 Texas Crim. App. 595. Taylor v. State, 50 Texas Crim. Rep. 362; 97 S. W. 94.

If the indictment contains an allegation that defendant "did ravish," it is equivalent to an allegation that he obtained carnal knowledge. Fields v. State, 39 Texas Crim. Rep. 488; 46 S. W. 814.

An indictment for rape upon a female under the age of consent must allege in some way that she was not the wife of the defendant because of the unnecessary inclusion of this exception in the statutory definition. Rice v. State, 37 Texas Crim. Rep. 36; 38 S. W. 801. Bice v. State, 37 Texas Crim. Rep. 38; 38 S. W. 803. Edwards v. State, 37 Texas Crim. Rep. 243; 39 S. W. 368. Dudley v. State, 37 Texas Crim. Rep. 543; 40 S. W. 269.

Alleging in the same count that the rape of a female under the age of consent was committed with force, threats and fraud, and that defendant made an assault, and that he did ravish, and had carnal knowledge does not render the indictment bad for duplicity; these unnecessary allegations may be rejected as surplusage, or may be regarded as charging a rape by force and without force. Davis v. State, 42 Texas 228. O'Rourke v. State, 8 Texas Crim. App. 70. Fields v. State, 39 Texas Crim.

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Rep. 488; 46 S. W. 814. Buchanan v. State, 41 Texas Crim. Rep. 128; 52 S. W. 769. Gray v. State, 43 Texas Crim. Rep. 300; 65 S. W. 375. Taylor v. State, 50 Texas Crim. Rep. 362; 97 S. W. 94. Vaughn v. State, 62 Texas Crim. Rep. 24; 136 S. W. 476.

Sec. 1770. **Proof of age.**—In a prosecution for rape upon a female under the age of consent, the burden of proof is upon the State to prove beyond a reasonable doubt that she was under the age of consent at the time of the alleged rape. Lawrence v. State, 32 S. W. 539. Parnell v. State, 42 S. W. 563. Stone v. State, 45 Texas Crim. Rep. 91; 73 S. W. 956. Simpson v. State, 46 Texas Crim. Rep. 551; 81 S. W. 320.

Proof of general reputation is not admissible to prove age. Sims v. State, 70 S. W. 90. Cowden v. State, 150 S. W. 779. Tate v. State, 150 S. W. 781.

Church records are not admissible to prove age. Tores v. State, 63 S. W. 881.

An entry on a school register which is based on the statement of the pupil is admissible to disprove age. Sorell v. State, 167 S. W. 357.

An entry on a school register, which is but the conclusion of the writer, is not admissible to prove age. Simpson v. State, 46 Texas Crim. Rep. 552; 81 S. W. 320.

Entries showing age are not admissible as original evidence if the person who made them is present and testifies. Stone v. State, 45 Texas Crim. Rep. 93; 73 S. W. 956. Twiggs v. State, 75 S. W. 531. Rowan v. State, 57 Texas Crim. Rep. 625; 124 S. W. 669; but the erroneous admission of such entry will not require a reversal if there is no issue as to age and the age is legally proven without controversy. Haywood v. State, 61 Texas Crim. Rep. 92; 134 S. W. 218.

A book kept by a physician, where the proper predicate is laid, is admissible to show the date of birth. Neill v. State, 49 Texas Crim. Rep. 222; 91 S. W. 791.

The record in the family Bible as to age is original evidence. Tull v. State, 55 S. W. 61.

If the date of the birth of the person whose age is in question is fixed by the happening of some event, the date of the event may be proven. Donley v. State, 44 Texas Crim. Rep. 428; 71 S. W. 958. Curry v. State, 50 Texas Crim. Rep. 160; 94 S. W. 1058.

Age may be proved by the testimony of the person whose age is in question, and the fact that such knowledge is derived from the statement of the parent does not render the testimony inadmissible. Reed v. State, 29 S. W. 1074. Lewis v. State, 64 S. W. 240. Knowles v. State, 44 Texas Crim. Rep. 324; 72 S. W. 398. Curry v. State, 50 Texas Crim. Rep. 159; 94 S. W. 1058. Sheppard v. State, 56 Texas Crim. Rep. 605; 120 S. W. 446. Vaughn v. State, 62 Texas Crim. Rep. 26; 136 S. W. 476. Lott v. State, 146 S. W. 544. Boyd v. State, 163 S. W. 69.

A mother may testify to the age of her child where her testimony is based upon her own knowledge, although she may not be able to give the date of the birth. Vaughn v. State, 62 Texas Crim. Rep. 26; 136 S. W. 476.

A witness is not permitted to state what a relative of the person whose age is in question said the age was, unless it be shown that the relative was dead. Hearsay testimony as to age must be based upon information derived from deceased relatives, family history, or from declarations of deceased relatives. Tull v. State, 55 S. W. 61. Donley v. State, 44 Texas Crim. Rep. 428; 71 S. W. 959. Sheppard v. State, 56 Texas Crim. Rep. 606; 120 S. W. 446.

A witness who testifies as to the age of prosecutrix when age is an issue may be impeached by proof of contradictory statements as to the age of such party. Bussey v. State, 59 Texas Crim. Rep. 260; 127 S. W. 1035.

A witness who is impeached by proof of contradictory statements as to age may be supported by proof of similar statements made before any motive could have existed to falsify. Walton v. State, 178 S. W. 358.

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A witness may give his opinion as to the age of the person whose age is in question, where the opinion is based on physical appearance with reference to size and development, and may cite collateral facts on which he bases his recollection, but is not entitled to state how others would be impressed by the physical marks of age of such person. Bice v. State, 37 Texas Crim. Rep. 38; 38 S. W. 803. Donley v. State, 44 Texas Crim. Rep. 429; 71 S. W. 958. Poulder v. State, 157 S. W. 166.

The burden of proof is upon the State to prove non-age when it is a constituent element of the offense. Lawrence v. State, 32 S. W. 539. Parnell v. State, 42 S. W. 563. Stone v. State, 45 Texas Crim. Rep. 91; 73 S. W. 956. Simpson v. State, 46 Texas Crim. Rep. 551; 81 S. W. 320. Wilman v. State, 63 Texas Crim. Rep. 623; 141 S. W. 110.

When nonage is not a constituent element of the offense, the burden of proof is on defendant to prove his nonage when he relies on it as a defense. Ake v. State, 6 Texas Crim. App. 415. Ellis v. State, 30 Texas Crim. App. 601; 18 S. W. 139. Wilcox v. State, 33 Texas Crim. Rep. 392; 26 S. W. 989. Williams v. State, 177 S. W. 965.

Newly discovered testimony as to age may entitle defendant to a new trial. Brock v. State, 44 Texas Crim. Rep. 335; 71 S. W. 20.

The age of the accused at the time of the trial and not his age when the offense was committed determines whether or not he is a "juvenile." Arrendell v. State, 60 Texas Crim. Rep. 350; 131 S. W. 1096.

One born on January first is one year old on December thirty-first of the same year; hence, a person is thirteen years of age the day before his or her thirteenth birthday, fifteen years of age the day before his or her fifteenth birthday, and twenty-one years of age the day before his or her twenty-first birthday. Linhart v. State, 33 Texas Crim. Rep. 507; 27 S. W. 260.

Sec. 1771. **Child as a witness.**—When over four years and under fourteen years of age, the competency of a child as a witness is determinable by an examination, and the action of the trial court thereon will not be revised on appeal in the absence of a showing that its discretion was abused, and unless an abuse of discretion is apparent. Johnson v. State, 1 Texas Crim. App. 610. Brown v. State, 2 Texas Crim. App. 122. Mason v. State, 2 Texas Crim. App. 192. Brown v. State, 6 Texas Crim. App. 311. Ake v. State, 6 Texas Crim. App. 398. Burk v. State, 8 Texas Crim. App. 342. Taylor v. State, 22 Texas Crim. App. 544; 3 S. W. 753. Hawkins v. State, 27 Texas Crim. App. 285; 11 S. W. 409. Williams v. State, 30 Texas Crim. App. 444; 17 S. W. 1071. Comer v. State, 20 S. W. 547. Wolfforth v. State, 31 Texas Crim. Rep. 398; 20 S. W. 741. Parker v. State, 33 Texas Crim. Rep. 123; 21 S. W. 604. Partin v. State, 30 S. W. 1067. Murphy v. State, 36 Texas Crim. Rep. 29; 35 S. W. 174. Oxsheer v. State, 38 Texas Crim. Rep. 505; 43 S. W. 335. Sancedo v. State, 69 S. W. 142. Reyna v. State, 75 S. W. 25. Moore v. State, 49 Texas Crim. Rep. 449; 96 S. W. 327. McCormick v. State, 52 Texas Crim. Rep. 494; 108 S. W. 669. Anderson v. State, 53 Texas Crim. Rep. 347; 110 S. W. 54. Munger v. State, 57 Texas Crim. Rep. 384; 122 S. W. 876. Streight v. State, 62 Texas Crim. Rep. 453; 138 S. W. 747. Zunago v. State, 63 Texas Crim. Rep. 64; 138 S. W. 713. Finch v. State, 158 S. W. 510. Smith v. State, 164 S. W. 838. Cole v. State, 165 S. W. 929. Douglass v. State, 165 S. W. 933. Brown v. State, 176 S. W. 51.

Children 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, are incompetent as witnesses. Williams v. State, 12 Texas Crim. App. 137. Holst v. State, 23 Texas Crim. App. 9; 3 S. W. 757. Lawson v. State, 51 S. W. 346. Mays v. State, 58 Texas Crim. Rep. 653; 127 S. W. 546.

The admission of a child's evidence is properly within the sound discretion of the trial court. McCormick v. State, 52 Texas Crim. Rep. 495; 108 S. W. 669. Zunago v. State, 63 Texas Crim. Rep. 64; 138 S. W. 713. Brown v. State, 176 S. W. 51.

The fact that a child's testimony is intelligently given and that it believes that it is wrong to lie seems to commend its competency more than its knowledge of an

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obligation of an oath or its idea of where liars go now or hereafter. Ake v. State, 6 Texas Crim. App. 402. Hawkins v. State, 27 Texas Crim. App. 285; 11 S. W. 409. Nichols v. State, 32 Texas Crim. Rep. 401; 23 S. W. 680. Partin v. State, 30 S. W. 1067. Murphy v. State, 36 Texas Crim. Rep. 29; 35 S. W. 174. Scroggins v. State, 51 S. W. 232. Sancedo v. State, 69 S. W. 142. Reyna v. State, 75 S. W. 25. McCormick v. State, 52 Texas Crim. Rep. 494; 108 S. W. 669. Anderson v. State, 53 Texas Crim. Rep. 347; 110 S. W. 54. Munger v. State, 57 Texas Crim. Rep. 384; 122 S. W. 876. Zunago v. State, 63 Texas Crim. Rep. 64; 138 S. W. 713. Brown v. State, 176 S. W. 51.

A child is not disqualified as a witness because it thinks people who tell lies are put in jail. Peterson v. State, 47 Ga. 524. Scroggins v. State, 51 S. W. 232.

If a child is pronounced incompetent by the judge and is taken out during the trial and instructed and then brought back and on further examination pronounced competent, this procedure is erroneous, it being in effect simply telling the child what to swear. Taylor v. State, 22 Texas Crim. App. 544; 3 S. W. 753.

A bill of exceptions taken to the ruling of the court in admitting or rejecting a child as a witness will not be considered if it fails to set out the examination of the child. Moore v. State, 49 Texas Crim. Rep. 449; 96 S. W. 327. Munger v. State, 57 Texas Crim. Rep. 384; 122 S. W. 875.

The rejection of a witness of tender years cannot be reviewed on appeal in the absence of a bill of exceptions showing the facts. Keith v. State, 50 Texas Crim. Rep. 66; 94 S. W. 1044.

Sec. 1772. **Mistake of fact as to age.**—The decisions hold that a mistake of fact as to the female being over the age of consent at the time defendant obtained carnal knowledge of her is no defense. Edens v. State, 43 S. W. 89. Manning v. State, 43 Texas Crim. Rep. 303; 65 S. W. 920. Smith v. State, 44 Texas Crim. Rep. 142; 68 S. W. 995. Smith v. State, 73 S. W. 404. Robertson v. State, 51 Texas Crim. Rep. 495; 102 S. W. 1130. Zachary v. State, 57 Texas Crim. Rep. 179; 122 S. W. 265. Pilgrim v. State, 59 Texas Crim. Rep. 231; 128 S. W. 128. Martin v. State, 165 S. W. 580.

Sec. 1773. **Proof that prosecutrix was not the wife of defendant.**—Under the present statutes in a case of rape of a female under the age of consent, the State must prove that she was not the wife of the party obtaining carnal knowledge of her. This should be proved by direct testimony, and it is error to prove it indirectly by showing that he was married to another, and it is error in such cases to prove that defendant was a married man. Smith v. State, 44 Texas Crim. Rep. 137; 68 S. W. 995. Smith v. State, 74 S. W. 556. Stripling v. State, 47 Texas Crim. Rep. 118; 80 S. W. 376. Jenkins v. State, 60 Texas Crim. Rep. 241; 131 S. W. 542. (But is not always reversible error. Battles v. State, 63 Texas Crim. Rep. 147; 140 S. W. 785.)

If the State proves that defendant told prosecutrix that he was not a married man, it is error to refuse to permit defendant to prove that she had been notified that he was a married man. Simpson v. State, 45 Texas Crim. Rep. 320; 77 S. W. 819.

The court judicially knows that a white person and a negro cannot legally marry. Munger v. State, 57 Texas Crim. Rep. 384; 122 S. W. 876.

If the female is shown to have been under fourteen years of age when defendant obtained carnal knowledge of her, she could not have been the wife of defendant, and such proof is sufficient to show that she was not the wife of defendant. Hardy v. State, 37 Texas Crim. Rep. 55; 38 S. W. 615. Munger v. State, 57 Texas Crim. Rep. 384; 122 S. W. 876.

On appeal from a conviction for rape of a female under the age of consent, it is not necessary that there be evidence in terms that the female was not the wife of the defendant if such fact be apparent from the facts in evidence. Munger v. State, 57 Texas Crim. Rep. 384; 122 S. W. 876. Gent v. State, 57 Texas Crim. Rep. 415; 123 S. W. 594.

At any time before the close of the argument of counsel to the jury, the court may permit the State to re-call the prosecutrix and prove that she was not the wife of the defendant. Greenwood v. State, 168 S. W. 100.

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Sec. 1774. **Prosecutrix is not an accomplice.**—The woman or girl from whom defendant obtained the carnal knowledge is not guilty of rape because she consented to his having carnal knowledge of her. If she consents to carnal knowledge of her by defendant, and the act constitutes, notwithstanding such consent, the offense of rape, then she is a victim and not an accomplice, and the court is not required to apply the law of accomplice testimony to her testimony. Goss v. State, 40 Texas 522. Gazley v. State, 17 Texas Crim. App. 277. Hamilton v. State, 36 Texas Crim. Rep. 372; 37 S. W. 431. Keith v. State, 56 S. W. 629. Hamilton v. State, 41 Texas Crim. Rep. 602; 58 S. W. 93. Donley v. State, 44 Texas Crim. Rep. 429; 71 S. W. 958. Smith v. State, 73 S. W. 404. Hill v. State, 77 S. W. 808. Wallace v. State, 48 Texas Crim. Rep. 548; 89 S. W. 827. Price v. State, 56 Texas Crim. Rep. 83; 119 S. W. 99. Battles v. State, 63 Texas Crim. Rep. 147; 140 S. W. 786. Melton v. State, 158 S. W. 550.

Sec. 1775. **Rape of female under age of consent—Evidence.**—The fact that the girl consented to or solicited the carnal embrace is no defense when it is alleged and proven that she was under the age of consent at the time defendant had carnal knowledge of her. Rodgers v. State, 30 Texas Crim. App. 528; 17 S. W. 1077. Gonzales v. State, 31 S. W. 371. Exon v. State, 33 S. W. 336. Hamilton v. State, 36 Texas Crim. Rep. 374; 37 S. W. 431. Hardy v. State, 37 Texas Crim. Rep. 55; 38 S. W. 615. Forrester v. State, 38 Texas Crim. Rep. 245; 42 S. W. 400. Buchanan v. State, 41 Texas Crim. Rep. 133; 52 S. W. 769. Gonzales v. State, 62 S. W. 1060. Ramsey v. State, 63 S. W. 875. Price v. State, 44 Texas Crim. Rep. 304; 70 S. W. 966. Smith v. State, 74 S. W. 557. Rodgers v. State, 47 Texas Crim. Rep. 195; 82 S. W. 1041. Brown v. State, 48 Texas Crim. Rep. 159; 87 S. W. 159. Robertson v. State, 51 Texas Crim. Rep. 494; 102 S. W. 1130. Banton v. State, 53 Texas Crim. Rep. 250; 109 S. W. 159. Whitehead v. State, 61 Texas Crim. Rep. 558; 137 S. W. 369. Hightower v. State, 143 S. W. 1168. Vandenberg v. State, 148 S. W. 315.

To constitute rape upon a female under the age of consent no more force is required than that necessarily involved in the act of penetration. Rodgers v. State, 30 Texas Crim. App. 528; 17 S. W. 1077. Vaughn v. State, 62 Texas Crim. Rep. 24; 136 S. W. 476. Ulmer v. State, 160 S. W. 1188. Turner v. State, 163 S. W. 707.

If it is alleged and proven that the female was under the age of consent at the time defendant had carnal knowledge of her, and was not his wife at that time, it is immaterial that she was married to a third person although she consented to defendant having carnal knowledge of her. Smith v. State, 74 S. W. 557.

Carnal knowledge of a female under the age of consent and not the wife of the person having carnal knowledge of her is rape, no matter what the circumstances, and the question of consent or whether the carnal knowledge was had by force, threats or fraud is wholly immaterial. Anschicks v. State, 6 Texas Crim. App. 524. Mayo v. State, 7 Texas Crim. App. 347. Moore v. State, 20 Texas Crim. App. 278. Rodgers v. State, 30 Texas Crim. App. 510; 17 S. W. 1077. Whitehead v. State, 61 Texas Crim. Rep. 558; 137 S. W. 356. Vaughn v. State, 62 Texas Crim. Rep. 24; 136 S. W. 476. Hightower v. State, 143 S. W. 1168. Vandenberg v. State, 148 S. W. 315. Fowler v. State, 148 S. W. 596. Turner v. State, 163 S. W. 707.

If the female is alleged to have been under the age of consent at the time defendant had carnal knowledge of her, an unnecessary allegation that defendant "did ravish," or that the carnal knowledge was "by force," or "by threats," or "by fraud," may be rejected as surplusage. Davis v. State, 42 Texas 226. O'Rourke v. State, 8 Texas Crim. App. 70. Fields v. State, 39 Texas Crim. Rep. 488; 46 S. W. 814. Buchanan v. State, 41 Texas Crim. Rep. 128; 52 S. W. 769. Gray v. State, 43 Texas Crim. Rep. 300; 65 S. W. 375. Taylor v. State, 50 Texas Crim. Rep. 362; 97 S. W. 94. Vaughn v. State, 62 Texas Crim. Rep. 24; 136 S. W. 476. Turner v. State, 163 S. W. 707.

The State is entitled to show that the carnal knowledge of a female alleged to have been under the age of consent at the time defendant had carnal knowledge of her was had by force, although force is not alleged and is not necessary to be proven. Hutcherson v. State, 62 Texas Crim. Rep. 1; 136 S. W. 53. Boyd v. State, 163 S. W. 69. Brown v. State, 176 S. W. 51.

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It is not error to prove that defendant was the father or stepfather of the prosecutrix. Barra v. State, 50 Texas Crim. Rep. 360; 97 S. W. 94. Smith v. State, 51 Texas Crim. Rep. 137; 100 S. W. 924.

If defendant threatened the girl at the time he had carnal knowledge of her, proof of the threats is admissable as a part of the *res gestæ*. Carter v. State, 45 Texas Crim. Rep. 432; 76 S. W. 437.

A conviction may be had on circumstantial evidence when it is sufficient to exclude every other reasonable hypothesis except that of defendant's guilt. McWhirter v. State, 146 S. W. 189. Melton v. State, 158 S. W. 550.

It is within the sound discretion of the court to permit leading questions to be put to prosecutrix on her direct examination where she appears to be a hostile or reluctant witness. Hill v. State, 77 S. W. 808. Roberson v. State, 53 Texas Crim. Rep. 297; 109 S. W. 160. Campbell v. State, 62 Texas Crim. Rep. 561; 138 S. W. 607. Clardy v. State, 147 S. W. 568.

It is not error to exclude evidence that the mother of the girl ran a whore house. Manning v. State, 43 Texas Crim. Rep. 303; 65 S. W. 920.

Where defendant denies that he had carnal knowledge of the girl he is entitled to prove, for the purpose of affecting her credit as a witness, that she was an inmate of a house of prostitution immediately prior to the alleged act. Bigliben v. State, 151 S. W. 1044.

When it is alleged that the female was under the age of consent, it is error to permit the State to prove that she had fits and had had such fits pretty much all her life, consent not being an element of this offense. Johnson v. State, 42 Texas Crim. Rep. 298; 59 S. W. 898.

It is error to permit the State to prove that the parent of the female alleged to have been raped went armed to seek defendant. The opinion of the parent as to defendant's guilt is not legitimate evidence. Adams v. State, 52 Texas Crim. Rep. 15; 105 S. W. 197.

It is error to permit the State to prove that the witness had her suspicions aroused from seeing letters. Rowan v. State, 57 Texas Crim. Rep. 625; 124 S. W. 672.

Carnal knowledge of a female under the age of consent following their agreement to marry at some future time does not raise the issue of a common law marriage. Wofford v. State, 60 Texas Crim. Rep. 624; 132 S. W. 929.

In the absence of a proper bill of exceptions showing that the girl did not possess sufficient intellect to relate the transaction, or that she did not understand the obligation of an oath, it will be presumed that she was competent to testify. Moore v. State, 49 Texas Crim. Rep. 449; 96 S. W. 327. Munger v. State, 57 Texas Crim. Rep. 384; 122 S. W. 875.

The bare fact that the proof shows that the female was under the age of consent will not support a conviction for rape if she consented to carnal knowledge of her, when there is no allegation that she was under the age of consent. Craig v. State, 18 Texas Crim. App. 321. Serio v. State, 22 Texas Crim. App. 637; 3 S. W. 784. Jenkins v. State, 34 Texas Crim. Rep. 201; 29 S. W. 1078. Munoz v. State, 47 Texas Crim. Rep. 577; 85 S. W. 11.

If the evidence does not comport with human experience, or with the truth, the conviction will be set aside. Gazley v. State, 17 Texas Crim. App. 278. Montressor v. State, 19 Texas Crim. App. 281. Kee v. State, 65 S. W. 517. Adkins v. State, 65 S. W. 925. Donoghue v. State, 79 S. W. 309. Dusek v. State, 48 Texas Crim. Rep. 519; 89 S. W. 271. Alcorn v. State, 94 S. W. 468. Logan v. State, 148 S. W. 713. Edmondson v. State, 150 S. W. 917.

If the prosecutrix is not corroborated, and is contradicted by proof of the results of a medical examination, the evidence is insufficient to support a conviction. Draper v. State, 57 S. W. 655.

If the only evidence of penetration is that of the prosecutrix, and she retracts it on cross examination, a conviction for rape will not be sustained. Elam v. State,

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20 S. W. 710. Blair v. State, 56 S. W. 622. Duckworth v. State, 42 Texas Crim. Rep. 75; 57 S. W. 665.

Sec. 1776. **Rape of girl under age of consent—Charge of court.**—It is proper to charge the jury that if any person have carnal knowledge of a female under the age of consent, unless such female is then and there the wife of such person, he is guilty of rape. Gonzales v. State, 31 S. W. 371. Buchanan v. State, 41 Texas Crim. Rep. 132; 52 S. W. 769. Gonzales v. State, 62 S. W. 1060. Price v. State, 44 Texas Crim. Rep. 304; 70 S. W. 967. Hill v. State, 77 S. W. 808. Graham v. State, 163 S. W. 728. Hamilton v. State, 168 S. W. 538.

When the female is alleged and proven to have been under the age of consent, a charge is not erroneous which omits the language "with or without her consent," because in such case it is immaterial whether or not such female did consent. Gonzales v. State, 31 S. W. 371. Hill v. State, 77 S. W. 808.

When it is alleged and proven that the female was under the age of consent, an unnecessary allegation of force will not require a charge upon the theory of force. Rodgers v. State, 30 Texas Crim. App. 510; 17 S. W. 1077. Vaughn v. State, 62 Texas Crim. Rep. 24; 136 S. W. 476. Kinch v. State, 156 S. W. 649. Turner v. State, 163 S. W. 707.

It is error to charge the jury that if defendant believed the prosecutrix to be over the age of consent at the time the carnal knowledge was obtained they could consider such fact in mitigation of punishment. Smith v. State, 44 Texas Crim. Rep. 142; 68 S. W. 995.

If the State's case is carnal knowledge with the consent of a female under the age of consent, and there is evidence that she was over the age of consent at the time the carnal knowledge was obtained, the charge of the court should affirmatively submit the defensive theory as to her age. Taylor v. State, 24 Texas Crim. App. 299; 6 S. W. 42. Simpson v. State, 46 Texas Crim. Rep. 551; 81 S. W. 320. Cowden v. State, 150 S. W. 779. Tate v. State, 150 S. W. 781. Northcutt v. State, 158 S. W. 1004 (court did give correct charge).

When there is no allegation that the female was under the age of consent, but simply a rape by force is alleged, the court is not authorized to instruct the jury to convict defendant on a state of case not alleged, and in such a case it would be error to ignore the allegation of force and want of consent, and instruct the jury to convict defendant of rape if they found that he had carnal knowledge of a female under the age of consent. Moore v. State, 20 Texas Crim. App. 275. Jenkins v. State, 34 Texas Crim. Rep. 201; 29 S. W. 1078. Munoz v. State, 47 Texas Crim. Rep. 577; 85 S. W. 11.

Art. 1064. (634) **Definition of "force."**—The definition of "force," as applicable to assault and battery, applies also to the crime of rape, and it must have been such as might reasonably be supposed sufficient to overcome resistance, taking into consideration the relative strength of the parties, and other circumstances of the case.

Sec. 1777. **Form for indictment for rape by force.**

In the name and by the 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 John Doe on the ..... day of ..... A. D. ....., in said county and State, did then and there ravish and obtain carnal knowledge of ....., a woman, by force without her consent.

Against the peace and dignity of the State.

.....
Foreman of the grand jury.

Sec. 1778. **Form for indictment for rape by force and threats.**

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

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said court at said term do present that John Doe on the ..... day of ..... A. D. ....., in said county and State, did then and there ravish and obtain carnal knowledge of ....., a woman, by force and threats without her consent.

Against the peace and dignity of the State.

.....

Foreman of the grand jury.

Sec. 1779. **Rape by force—Statute construed.**—To constitute rape by force the "force" must have been such as might reasonably be supposed sufficient to overcome resistance, taking into consideration the relative strength of the parties, and other circumstances of the case. Jenkins v. State, 1 Texas Crim. App. 356. Anschicks v. State, 6 Texas Crim. App. 524. Jones v. State, 10 Texas Crim. App. 552. Favors v. State, 20 Texas Crim. App. 161. Fitzgerald v. State, 20 Texas Crim. App. 294. Rhem v. State, 29 Texas Crim. App. 509; 16 S. W. 338. Rhea v. State, 30 Texas Crim. App. 486; 17 S. W. 531. Price v. State, 36 Texas Crim. Rep. 143; 35 S. W. 988. Ship v. State, 45 S. W. 909. Perez v. State, 48 Texas Crim. Rep. 226; 87 S. W. 350. Elliott v. State, 49 Texas Crim. Rep. 435; 93 S. W. 742. Smith v. State, 56 Texas Crim. Rep. 323; 120 S. W. 188. Conger v. State, 63 Texas Crim. Rep. 312; 140 S. W. 1125.

Mere copulation coupled with passive acquiescence is not rape by force; there must be resistance on the part of the woman depending in amount on the circumstances surrounding her at the time, and the relative strength of herself and defendant. Jenkins v. State, 1 Texas Crim. App. 356. Anschicks v. State, 6 Texas Crim. App. 524. Hooker v. State, 29 Texas Crim. App. 327; 15 S. W. 285. Rhea v. State, 30 Texas Crim. App. 486; 17 S. W. 931. Price v. State, 36 Texas Crim. Rep. 143; 35 S. W. 988. Tittle v. State, 38 S. W. 202. Elliott v. State, 49 Texas Crim. Rep. 435; 93 S. W. 742. Perez v. State, 50 Texas Crim. Rep. 37; 94 S. W. 1036. Cowles v. State, 51 Texas Crim. Rep. 498; 102 S. W. 1128.

Threats apart, every exertion in the power of the women, under the circumstances, must be made to prevent the penetration of her person, or consent will be presumed. Dickey v. State, 21 Texas Crim. App. 430; 2 S. W. 809. Mooney v. State, 29 Texas Crim. App. 257; 15 S. W. 724. Rhea v. State, 30 Texas Crim. App. 483; 17 S. W. 931. Price v. State, 36 Texas Crim. Rep. 143; 35 S. W. 988. Elliott v. State, 49 Texas Crim. Rep. 435; 93 S. W. 742. Perez v. State, 50 Texas Crim. Rep. 37; 94 S. W. 1036. Smith v. State, 56 Texas Crim. Rep. 323; 120 S. W. 188.

The mere formal statement of the woman that she did not consent is not the criterion of rape by force; although some force be used, she must resist. A feigned resistance does not show want of consent. Anschicks v. State, 6 Texas Crim. App. 524. Dickey v. State, 21 Texas Crim. App. 430; 2 S. W. 809. Piess v. State, 23 Texas Crim. App. 73; 3 S. W. 576. Rhea v. State, 30 Texas Crim. App. 486; 17 S. W. 931. Tittle v. State, 38 S. W. 202. Edmondson v. State, 44 S. W. 154. Ship v. State, 45 S. W. 909. Perez v. State, 48 Texas Crim. Rep. 226; 87 S. W. 350. Elliott v. State, 49 Texas Crim. Rep. 435; 93 S. W. 742. Perez v. State, 50 Texas Crim. Rep. 37; 94 S. W. 1036. Cowles v. State, 51 Texas Crim. Rep. 498; 102 S. W. 1128. Smith v. State, 56 Texas Crim. Rep. 323; 120 S. W. 188.

If the private parts of a woman are penetrated by the male member of a man while she is asleep, and no "stratagem" has been used which induced her to believe that the offender was her husband, the force involved in such act of penetration is sufficient to meet the statutory definition of "force." Mooney v. State, 29 Texas Crim. App. 257; 15 S. W. 724. Payne v. State, 38 Texas Crim. Rep. 494; 43 S. W. 515. Payne v. State, 40 Texas Crim. Rep. 202; 49 S. W. 604.

It is no defense to a rape by force that the woman was not a chaste female. Wilson v. State, 17 Texas Crim. App. 525. Wragg v. State, 145 S. W. 342.

The husband cannot be guilty of rape, or of assault with intent to rape his lawful wife, where he is the actual party to the penetration of her person or the attempt to do so. Frazier v. State, 48 Texas Crim. Rep. 142; 86 S. W. 754.

If the evidence does not comport with human experience or with the truth a conviction will be set aside. Jones v. State, 153 S. W. 136.

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When the female is alleged and proven to have been under the age of consent at the time the defendant obtained carnal knowledge of her, and she was not then his wife, it is rape whether force was used or not, and in such case article 1064 (634) has no application. Rodgers v. State, 30 Texas Crim. App. 510; 17 S. W. 1077. Ricks v. State, 48 Texas Crim. Rep. 230; 87 S. W. 345. Whitehead v. State, 61 Texas Crim. Rep. 558; 137 S. W. 356. Ulmer v. State, 160 S. W. 1188.

Sec. 1780. **Rape by force—Charge of court.**—A charge on "force" is correct when the jury are thereby informed that the force must have been such as might reasonably be supposed sufficient to overcome resistance, taking into consideration the relative strength of the parties, and other circumstances of the case. Anschicks v. State, 6 Texas Crim. App. 534. Favors v. State, 20 Texas Crim. App. 161. Fitzgerald v. State, 20 Texas Crim. App. 294. Conger v. State, 63 Texas Crim. Rep. 335; 140 S. W. 1125.

A charge defining "force" is too restrictive if it fails to authorize the jury to consider the "other circumstances of the case." Jenkins v. State, 34 Texas Crim. Rep. 202; 29 S. W. 1078.

It is error to charge that the jury in considering "force" might take into consideration "the experience and condition in life" of the parties. Kennon v. State, 42 S. W. 378.

If "force" is the means relied on, the charge of the court should define that term to the jury. Jenkins v. State, 1 Texas Crim. App. 355. Jones v. State, 10 Texas Crim. App. 559.

If the indictment, or the count upon which the State elects to rely, contains no allegation that the female was under the age of consent, and the allegation is that the rape was committed by force and threats, or either, it is error, although the proof shows the female to be under the age of consent, to authorize the jury to convict if they find that she consented to the carnal knowledge. Craig v. State, 18 Texas Crim. App. 321. Moore v. State, 20 Texas Crim. App. 275. Serio v. State, 22 Texas Crim. App. 637; 3 S. W. 784. Jenkins v. State, 34 Texas Crim. Rep. 201; 29 S. W. 1078. Munoz v. State, 47 Texas Crim. Rep. 577; 85 S. W. 11.

If force is alleged and relied on, and the evidence raises the issue of little or no resistance, defendant is entitled to an affirmative charge directing an acquittal if the jury have a reasonable doubt as to whether the woman used every exertion within her power to resist the act. Owens v. State, 39 Texas Crim. Rep. 398; 46 S. W. 240. Perez v. State, 48 Texas Crim. Rep. 227; 87 S. W. 350.

The court should not charge the jury that resistance must be made to prevent the "crime," as the use of the word "crime" assumes that an offense has been committed. Pettus v. State, 58 Texas Crim. Rep. 549; 126 S. W. 869.

When the consent of the woman would be a defense, and there is evidence that carnal knowledge of her was obtained with her consent, defendant is entitled to an affirmative charge on this theory. Clark v. State, 30 Texas 448. Taylor v. State, 24 Texas Crim. App. 299; 6 S. W. 42. Owens v. State, 39 Texas Crim. Rep. 398; 46 S. W. 240. Segrest v. State, 57 S. W. 845. Pettus v. State, 58 Texas Crim. Rep. 546; 126 S. W. 869.

The court should not charge the jury that consent is the main issue in the case. Pettus v. State, 58 Texas Crim. Rep. 546; 126 S. W. 869.

When consent would be a defense, and letters or other testimony tending to show that the carnal knowledge was obtained by consent are in evidence, it is error to charge the jury that they should not consider such testimony on the issue of force, or to limit it to the issue of consent. Smith v. State, 56 Texas Crim. Rep. 319; 120 S. W. 188.

If force is the means alleged and relied on, it is error to charge the jury that if the proof shows that the woman was so mentally diseased as to have no will to oppose the act she would be presumed to be incapable of giving consent. Baldwin v. State, 15 Texas Crim. App. 275.

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If the indictment does not allege that the woman was mentally diseased, but proof of that fact is made, it is error to charge that such testimony was only for the purpose of estimating the efficiency of any resistance that she might have made. Segrest v. State, 57 S. W. 845.

Art. 1065. (635) **What "threat" sufficient.**—The "threat" must be such as might reasonably create a just fear of death, or great bodily harm, in view of the relative condition of the parties as to health, strength and all other circumstances of the case.

Sec. 1781. **Form of indictment for rape by threats.**
In the name and by the 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 John Doe heretofore on the ..... day of ....., A. D. ....., in said county and State did by threats obtain carnal knowledge of ....., a woman, without her consent; against the peace and dignity of the State.

.....
Foreman of the grand jury.

Sec. 1782. **Threats.**—When both force and threats are alleged and there is evidence of each, it is not necessary that either the force or the threats alone measure up to the standard of the statutory definition; the cogency which one contributes to the other may be sufficient to constitute all that is required. Sharp v. State, 15 Texas Crim. App. 185. Bass v. State, 16 Texas Crim. App. 62. Sawyer v. State, 39 Texas Crim. Rep. 557; 47 S. W. 650. Perez v. State, 50 Texas Crim. Rep. 37; 94 S. W. 1036. Brown v. State, 52 Texas Crim. Rep. 267; 106 S. W. 368. Cole v. State, 57 Texas Crim. Rep. 51; 123 S. W. 410.

Though force is the only means alleged, proof of threats made during the transaction is admissible as part of the *res gestæ*. Bass v. State, 16 Texas Crim. App. 68. Sawyer v. State, 39 Texas Crim. Rep. 557; 47 S. W. 650.

Proof of declarations of defendant showing his bent of mind, and his threats to obtain carnal knowledge, is admissible although his intended victim be not named, if subsequent facts show with reasonable certainty to whom he referred, or if the declaration or threat was such as to evidence a determination of raping some female in the immediate future. Wood v. State, 28 Texas Crim. App. 64; 12 S. W. 405. Massey v. State, 31 Texas Crim. Rep. 379; 20 S. W. 758. Ricks v. State, 48 Texas Crim. Rep. 230; 87 S. W. 345. Bawcom v. State, 49 Texas Crim. Rep. 418; 94 S. W. 462. Sharp v. State, 160 S. W. 370.

Proof of a declaration of defendant is not admissible when so remote that there is no logical connection between it and the particular act under investigation. Tomlin v. State, 25 Texas Crim. App. 676; 8 S. W. 931. Haggart v. State, 178 S. W. 328.

When threats is the means alleged, as part of the "other circumstances of the case," proof may be made of former threats against the woman and of violent and brutal assaults and batteries which tended to subjugate her will to that of defendant. Sharp v. State, 15 Texas Crim. App. 171.

Sec. 1783. **Rape by threats—Charge of court.**—If a rape by threats is alleged, and the case as made by the evidence is a rape accomplished by means of threats, it is proper to restrict the jury to a consideration of that means alone. Sharp v. State, 15 Texas Crim. App. 187. Cooper v. State, 22 Texas Crim. App. 430; 3 S. W. 334.

If the indictment does not allege threats as the means, it is error to authorize a conviction on the theory that the rape was committed by threats. Williams v. State, 1 Texas Crim. App. 90.

If there is no proof that the carnal knowledge was obtained by the use of threats, it is error to authorize the jury to convict on the theory that the rape was committed by threats. Serio v. State, 22 Texas Crim. App. 638; 3 S. W. 784.

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The threat must be such as might reasonably create a just fear of death, or great bodily harm, in view of the relative condition of the parties as to health, strength, and all other circumstances of the case, and if threats is the means relied on it is error to fail to so charge the jury. Jones v. State, 10 Texas Crim. App. 559.

Sec. 1784. **Complaint or outcry of prosecutrix.**—The statements and conduct of prosecutrix said and done shortly after the transaction may be proven as original evidence if suffering excludes the idea of fabrication, and the statements or conduct are spontaneous and instinctive, and there is no break or let-down in the continuity of the transaction. Time is not the sole test for either the admision or rejection of such proof; instinctiveness is the requisite. Lights v. State, 21 Texas Crim. App. 314; 17 S. W. 428. Castillo v. State, 31 Texas Crim. Rep. 150; 19 S. W. 892. Sentell v. State, 34 Texas Crim. Rep. 260; 30 S. W. 226. Price v. State, 35 Texas Crim. Rep. 504; 34 S. W. 622. Croomes v. State, 40 Texas Crim. Rep. 672; 51 S. W. 924. Ramsey v. State, 63 S. W. 876. Wells v. State, 43 Texas Crim. Rep. 453; 67 S. W. 1020. Berry v. State, 44 Texas Crim. Rep. 395; 72 S. W. 170. Kenney v. State, 79 S. W. 817. Thomas v. State, 47 Texas Crim. Rep. 535; 84 S. W. 823. Turman v. State, 50 Texas Crim. Rep. 10; 95 S. W. 533. Lemons v. State, 59 Texas Crim. Rep. 308; 128 S. W. 421. Conger v. State, 63 Texas Crim. Rep. 312; 140 S. W. 1122. Rogers v. State, 143 S. W. 633. Wade v. State, 144 S. W. 247. Duckett v. State, 150 S. W. 1181. Fuller v. State, 154 S. W. 1021. Valdez v. State, 160 S. W. 341. Sharp v. State, 160 S. W. 371.

When there is a break or let-down in the continuity of the transaction, so that the statement or conduct of prosecutrix is not spontaneous, but is rather her relation of the event rather than the event speaking through her, then proof of such statement or conduct is not admissible as a part of the *res gestæ*, and as original evidence the State is confined to proof of the fact that she made complaint, but the particulars of it, or proof that she named defendant as the guilty party, is not admissible. Pefferling v. State, 40 Texas 492. Lawson v. State, 17 Texas Crim. App. 303. Johnson v. State, 21 Texas Crim. App. 379; 17 S. W. 252. McGee v. State, 21 Texas Crim. App. 671; 2 S. W. 890. Holst v. State, 23 Texas Crim. App. 7; 3 S. W. 757. Caudle v. State, 34 Texas Crim. Rep. 26; 28 S. W. 810. Reddick v. State, 35 Texas Crim. Rep. 463; 34 S. W. 274. Carter v. State, 44 Texas Crim. Rep. 313; 70 S. W. 971. Cowles v. State, 51 Texas Crim. Rep. 498; 102 S. W. 1128.

Prosecutrix may be sustained by proof of similar statements the same as any other witness, when it is sought to impeach her by proof of her contradictory statements as to the alleged rape; in this event the details of her "recent complaint" may be put in evidence for the purpose of sustaining her as a witness. Sentell v. State, 34 Texas Crim. Rep. 260; 30 S. W. 226. Cox v. State, 44 S. W. 157. Simpson v. State, 46 Texas Crim. Rep. 552; 81 S. W. 320. Whitehead v. State, 61 Texas Crim. Rep. 558; 137 S. W. 356. Campbell v. State, 62 Texas Crim. Rep. 561; 138 S. W. 609. Rogers v. State, 143 S. W. 633. Northcutt v. State, 158 S. W. 1005. Hamilton v. State, 168 S. W. 536.

Except as to the right to prove the fact that she made complaint, the prosecutrix stands precisely on the same ground, and no better, than a witness in any other case. Reddick v. State, 35 Texas Crim. Rep. 469; 34 S. W. 274.

Recent complaint by prosecutrix, her state and appearance, marks of violence, and the condition of her clothing, shortly after the alleged occurrence, may be proven as original evidence. Pefferling v. State, 40 Texas 387. Lawson v. State, 17 Texas Crim. App. 303. Lights v. State, 21 Texas Crim. App. 314; 17 S. W. 428. Grimmett v. State, 22 Texas Crim. App. 41; 2 S. W. 631. Holst v. State, 23 Texas Crim. App. 7; 3 S. W. 757. Reddick v. State, 35 Texas Crim. Rep. 463; 34 S. W. 274. Roberson v. State, 49 S. W. 399. Pettus v. State, 58 Texas Crim. Rep. 546; 126 S. W. 869. Conger v. State, 63 Texas Crim. Rep. 312; 140 S. W. 1122. Grimes v. State, 64 Texas Crim. Rep. 64; 141 S. W. 263. Rogers v. State, 143 S. W. 633. Jacobs v. State, 146 S. W. 558. Ortiz v. State, 151 S. W. 1059. Sharp v. State, 160 S. W. 371. Ulmer v. State, 160 S. W. 1189.

Proof that prosecutrix failed to make outcry or to discover the alleged rape within a reasonable time is admissible to discredit her testimony. Rogers v. State, 1 Texas Crim. App. 191.

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The State may show why prosecutrix did not make outcry or complaint, or the reason why she delayed making it. Sharp v. State, 15 Texas Crim. App. 189. Warren v. State, 54 Texas Crim. Rep. 444; 114 S. W. 380. Pettus v. State, 58 Texas Crim. Rep. 546; 126 S. W. 869. Ross v. State, 60 Texas Crim. Rep. 556; 132 S. W. 793. Ortiz v. State, 151 S. W. 1059.

Though prosecutrix made no complaint until ten days after the alleged rape, yet in view of threats made to prevent a disclosure, it is not error to admit proof of the fact that she made complaint, details of the complaint not being introduced as a part of such proof. Pettus v. State, 58 Texas Crim. Rep. 546; 126 S. W. 869.

The court is not required to charge the jury that failure to make outcry should be considered in determining the credibility of prosecutrix. Ramsey v. State, 63 S. W. 875. Thomas v. State, 70 S. W. 93.

If the female was alleged and proven to be under the age of consent the failure to make outcry can only be used to rebut the idea of carnal knowledge at all, consent being immaterial. Ramsey v. State, 63 S. W. 875.

If prosecutrix is alleged and proven to have been under the age of consent at the time the carnal knowledge of her was obtained, her failure to make outcry or to discover the offense will not defeat the State's case; consent being immaterial. Hamilton v. State, 36 Texas Crim. Rep. 374; 37 S. W. 431. Ramsey v. State, 63 S. W. 875. Hill v. State, 77 S. W. 808.

A conviction will not be sustained on the uncorroborated testimony of a woman who waits too long before she announces her decision that she has been raped, especially if she has met persons who would have given her protection, or where she went with defendant after the supposed rape, or where her pregnancy or her being detected in the act was a motive for her statement. Topolanck v. State, 40 Texas 161. Rhea v. State, 30 Texas Crim. App. 485; 17 S. W. 931. Thompson v. State, 33 Texas Crim. Rep. 475; 26 S. W. 987. Price v. State, 36 Texas Crim. Rep. 144; 35 S. W. 988. Tittle v. State, 38 S. W. 202. Monroe v. State, 13 Southern Reporter 884. Kennon v. State, 42 S. W. 376. Baldridge v. State, 45 Texas Crim. Rep. 198; 74 S. W. 916. Elliott v. State, 49 Texas Crim. Rep. 436; 93 S. W. 742. Cowles v. State, 51 Texas Crim. Rep. 499; 102 S. W. 1128. Black v. State, 113 S. W. 534. Tyler v. State, 64 Texas Crim. Rep. 512; 143 S. W. 620. Baker v. State, 169 S. W. 1154.

A conviction will not be sustained on the uncorroborated testimony of a woman who failed to make prompt outcry, and where if her testimony was true it was susceptible of corroboration, or where facts stated by her which were capable of corroboration were disproved. Lawson v. State, 17 Texas Crim. App. 304. Arnett v. State, 40 Texas Crim. Rep. 617; 51 S. W. 385. Cowles v. State, 51 Texas Crim. Rep. 498; 102 S. W. 1128.

Sec. 1785. **Condition and examination of the person of prosecutrix.**—The state and appearance of prosecutrix, marks of violence on her person, and the condition of her clothing, shortly after the alleged rape, may be proven as original evidence. Pefferling v. State, 40 Texas 387. Lawson v. State, 17 Texas Crim. App. 303. Lights v. State, 21 Texas Crim. App. 314; 17 S. W. 428. Grimmett v. State, 22 Texas Crim. App. 41; 2 S. W. 631. Holst v. State, 23 Texas Crim. App. 7; 3 S. W. 757. Reddick v. State, 35 Texas Crim. Rep. 463; 34 S. W. 274. Roberson v. State, 49 S. W. 399. Pettus v. State, 58 Texas Crim. Rep. 546; 126 S. W. 869. Conger v. State, 63 Texas Crim. Rep. 312; 140 S. W. 1122. Grimes v. State, 64 Texas Crim. Rep. 64; 141 S. W. 263. Rogers v. State, 143 S. W. 633. Jacobs v. State, 146 S. W. 558. Ortiz v. State, 151 S. W. 1059. Sharp v. State, 160 S. W. 371. Burge v. State, 167 S. W. 63.

Proof of the condition of prosecutrix after the alleged rape is admissible when the examination was not too remote if it sheds light upon the issue of force and consent. Jacobs v. State, 146 S. W. 558. Sharp v. State, 160 S. W. 371. Burge v. State, 167 S. W. 63.

Proof of the result of an examination of the prosecutrix made by a physician is admissible unless too remote. Pless v. State, 23 Texas Crim. App. 73; 3 S. W. 576 (five weeks). Gonzales v. State, 32 Texas Crim. Rep. 611; 25 S. W. 781 (two

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months). Hutcherson v. State, 62 Texas Crim. Rep. 5; 136 S. W. 53 (five days). Smith v. State, 63 Texas Crim. Rep. 185; 140 S. W. 1096. Thompson v. State, 157 S. W. 494 (ten days). Boyd v. State, 163 S. W. 69.

Sec. 1786. **Reputation of prosecutrix.**—If the veracity of prosecutrix is attacked by a claim of a conspiracy between her and another to falsely accuse defendant of rape, the State may support her testimony by proof of her general reputation for truth. Helton v. State, 125 S. W. 21.

If the defendant impeaches the testimony of the prosecutrix by proof that she made statements contradictory of her testimony on the trial, she may be sustained by proof of her general reputation for truth. Brown v. State, 52 Texas Crim. Rep. 267; 106 S. W. 368.

Where there is no attack made upon the veracity of the prosecutrix, it is not proper to permit the State to prove her general reputation for truth. Helton v. State, 125 S. W. 21.

If defendant's testimony attacks the chastity of the prosecutrix, she may be sustained by proof of her good reputation for chastity. Warren v. State, 54 Texas Crim. Rep. 443; 114 S. W. 380. Holland v. State, 60 Texas Crim. Rep. 117; 131 S. W. 563. Wilkerson v. State, 60 Texas Crim. Rep. 395; 131 S. W. 1108. Jacobs v. State, 146 S. W. 560.

If defendant attempts to attack the character of prosecutrix for chastity she may be sustained by proof of her good reputation in that respect. Wilson v. State, 17 Texas Crim. App. 525.

If consent is not an issue, proof of bad general reputation of prosecutrix for chastity is not admissible. Ross v. State, 60 Texas Crim. Rep. 554; 132 S. W. 793.

If consent is an issue, for the purpose of raising the presumption that she yielded her assent, and was not in fact forced, the defendant may impeach the character of the prosecutrix for chastity by proof of her general reputation in that respect, or he may show that she had previously granted carnal favors to him. Pefferling v. State, 40 Texas 491. Rogers v. State, 1 Texas Crim. App. 190. Jenkins v. State, 1 Texas Crim. App. 347. Mayo v. State, 7 Texas Crim. App. 342. Lawson v. State, 17 Texas Crim. App. 302. Wilson v. State, 17 Texas Crim. App. 533. Tyler v. State, 46 Texas Crim. Rep. 12; 79 S. W. 558.

Where defendant's witness testified that the reputation for chastity was bad, and on cross-examination stated that it was about on an average for unmarried darkies, defendant was entitled to re-direct examination to ask him what he meant by the expression. Favors v. State, 20 Texas Crim. App. 160.

Proof that prosecutrix had several years before the alleged rape given birth to an illegitimate child is admissible on proof of "general reputation" for chastity, when consent is an issue. Wilson v. State, 17 Texas Crim. App. 525.

Sec. 1787. **Proof of intercourse with others.**—Testimony that prosecutrix had had intercourse with others than defendant is not admissible if it would not tend to solve any issue in the case. Lawson v. State, 17 Texas Crim. App. 302. Wilson v. State, 17 Texas Crim. App. 533. Price v. State, 44 Texas Crim. Rep. 304; 70 S. W. 966. Knowles v. State, 44 Texas Crim. Rep. 325; 72 S. W. 398. Whitehead v. State, 61 Texas Crim. Rep. 558; 137 S. W. 356. Clardy v. State, 147 S. W. 568.

If prosecutrix, whether under or over the age of consent, testifies that she never had had intercourse with any one but defendant, he may prove that she had had intercourse with another when such proof tends to show that defendant was not responsible for her pregnancy. Bice v. State, 37 Texas Crim. Rep. 43; 38 S. W. 803. Bader v. State, 57 Texas Crim. Rep. 293; 122 S. W. 556. Parker v. State, 62 Texas Crim. Rep. 64; 136 S. W. 453 (under age).

When the only purpose is to weaken the testimony of the State as to want of consent, proof of specific instances of unchastity, except with the defendant, is not admissible. Rogers v. State, 1 Texas Crim. App. 190. Mayo v. State, 7 Texas Crim. App. 349. Lawson v. State, 17 Texas Crim. App. 302. Wilson v. State, 17 Texas Crim. App. 533.

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Where the condition of the private parts of prosecutrix is relied on to show the act of intercourse, defendant may introduce evidence, direct or circumstantial, of intercourse between prosecutrix and others to show the cause of the condition, and to rebut the contention that it was caused by him. In other words he may impute the crime to another. Bice v. State, 37 Texas Crim. Rep. 43; 38 S. W. 803. Knowles v. State, 44 Texas Crim. Rep. 322; 72 S. W. 398. Bader v. State, 57 Texas Crim. Rep. 293; 122 S. W. 556. Skidmore v. State, 57 Texas Crim. Rep. 497; 123 S. W. 1130.

When it tends to show that the carnal knowledge of prosecutrix obtained by defendant was barred by limitation, he may prove that another had carnal knowledge of her. Foreman v. State, 61 Texas Crim. Rep. 56; 134 S. W. 229.

The fact that a female under the age of consent had had sexual intercourse with others than defendant is no defense to proof that defendant had carnal knowledge of her, when it is alleged and proven that she was under the age of consent at the time defendant obtained carnal knowledge of her. Knowles v. State, 44 Texas Crim. Rep. 325; 72 S. W. 398. Whitehead v. State, 61 Texas Crim. Rep. 567; 137 S. W. 356. Clardy v. State, 147 S. W. 568. Kearse v. State, 151 S. W. 827. Bigliben v. State, 151 S. W. 1044.

Defendant may prove that prosecutrix had been granting carnal favors to a boy, and that upon being upbraided about it by her sister, stated that if any talk was made about it she would lay it on defendant. Shoemaker v. State, 58 Texas Crim. Rep. 518; 126 S. W. 889.

Sec. 1788. **Other acts.**—Proof of acts of violence or misconduct of defendant toward prosecutrix after the supposed rape, and which are not admissible as a part of the *res gestæ*, of that transaction, is not admissible. Smith v. State, 44 Texas Crim. Rep. 141; 68 S. W. 995. Ball v. State, 44 Texas Crim. Rep. 489; 72 S. W. 384. Smith v. State, 73 S. W. 402.

Proof of acts of carnal intercourse other than the one relied on for conviction is not admissible when such proof tends to solve no issue, and even if put in evidence by defendant, the details of the other acts are not admissible for the State. Smith v. State, 44 Texas Crim. Rep. 141; 68 S. W. 995. Barnett v. State, 44 Texas Crim. Rep. 592; 73 S. W. 399. Smith v. State, 73 S. W. 402. Hackney v. State, 74 S. W. 554. Smith v. State, 74 S. W. 556. Henard v. State, 47 Texas Crim. Rep. 172; 82 S. W. 655. Wiggins v. State, 47 Texas Crim. Rep. 538; 84 S. W. 821. Schults v. State, 49 Texas Crim. Rep. 353; 91 S. W. 786. Henderson v. State, 49 Texas Crim. Rep. 511; 93 S. W. 550. Grimes v. State, 64 Texas Crim. Rep. 64; 141 S. W. 261.

The later decisions overrule in part the former opinions of the court holding that proof of other acts of carnal intercourse than the one relied on is not admissible to show the probability that defendant obtained the carnal knowledge relied on, and hold that where the female is alleged and proven to be under the age of consent that the rule is different and that each and every act of carnal knowledge is but a step in the continued transaction and proof of each is admissible when the facts show long continued association and acts and conduct evidently intended to accomplish sexual intercourse after obtaining the love and affection and control of the child, and when such proof tends to solve some issue in the case. Battles v. State, 63 Texas Crim. Rep. 147; 140 S. W. 783. Smith v. State, 64 Texas Crim. Rep. 454; 142 S. W. 1173. Lott v. State, 146 S. W. 544. Clardy v. State, 147 S. W. 569. Cain v. State, 153 S. W. 154. Ulmer v. State, 160 S. W. 1188. Cooper v. State, 162 S. W. 365. Williamson v. State, 163 S. W. 435. Abernathy v. State, 174 S. W. 339. Haggart v. State, 178 S. W. 328.

Testimony showing merely intimacy and long and continued association is admissible as a circumstance to show the probability that defendant had the act of intercourse relied on. Henard v. State, 47 Texas Crim. Rep. 173; 82 S. W. 655. Barra v. State, 50 Texas Crim. Rep. 359; 97 S. W. 94. Battles v. State, 53 Texas Crim. Rep. 207; 109 S. W. 195. Rowan v. State, 57 Texas Crim. Rep. 625; 124 S. W. 671. Battles v. State, 63 Texas Crim. Rep. 147; 140 S. W. 785. Clardy v. State, 147 S. W. 570.

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If there is no issue as to the consent of the prosecutrix, it is error to admit proof of ill-treatment at other times. Smith v. State, 51 Texas Crim. Rep. 139; 100 S. W. 924.

Sec. 1789. **Election by the State.**—If the evidence disclosed more than one act of carnal knowledge, the State is required to elect as to which act a conviction will be sought, and the charge of the court should confine the jury to the act elected and relied on by the State, and properly limit the application of the testimony as to other acts. Batchelor v. State, 41 Texas Crim. Rep. 501; 55 S. W. 491. Stone v. State, 45 Texas Crim. Rep. 92; 73 S. W. 956. Powell v. State, 47 Texas Crim. Rep. 155; 82 S. W. 516. Henderson v. State, 49 Texas Crim. Rep. 512; 93 S. W. 550. Bader v. State, 57 Texas Crim. Rep. 293; 122 S. W. 556. Battles v. State, 63 Texas Crim. Rep. 157; 140 S. W. 783. Ulmer v. State, 160 S. W. 1188. Mora v. State, 167 S. W. 344. Haggart v. State, 178 S. W. 328.

Sec. 1790. **Baby of prosecutrix.**—Prosecutrix may testify that defendant is the father of her child. Whitehead v. State, 61 Texas Crim. Rep. 558; 137 S. W. 368. Cooper v. State, 162 S. W. 365. Abernathy v. State, 174 S. W. 339.

The State may prove by prosecutrix that defendant is the father of the child in her arms. Whitehead v. State, 61 Texas Crim. Rep. 565; 137 S. W. 368.

It is error to permit the exhibition of a baby for the purpose of comparison in order to prove that defendant is its father, or to admit opinion evidence as to similarity between defendant and the baby. Higginbotham v. State, 20 S. W. 360. Barnes v. State, 37 Texas Crim. Rep. 329; 39 S. W. 684. Copeland v. State, 40 S. W. 589. Kilpatrick v. State, 39 Texas Crim. Rep. 11; 44 S. W. 830. Hilton v. State, 41 Texas Crim. Rep. 193; 53 S. W. 113. Gray v. State, 43 Texas Crim. Rep. 300; 65 S. W. 375.

Sec. 1791. **Rape—Evidence.**—Proof of physical indications on the ground, to be admissible, must show that the examination was made recently after the supposed rape. Lawson v. State, 17 Texas Crim. App. 304. Sharp v. State, 160 S. W. 371.

Proof of acts and declarations of the husband of prosecutrix and of other persons, made in the absence of defendant after the supposed rape, is not admissible against defendant as tending to show that the husband had entered into a conspiracy to destroy the reputation and chastity of his own wife. Williams v. State, 55 Texas Crim. Rep. 65; 115 S. W. 35.

If defendant testifies the court should not permit a cross examination on extraneous matters which do not affect his credibility as a witness, but instead have a tendency to create a prejudice against him as being an immoral man. Campbell v. State, 62 Texas Crim. Rep. 561; 138 S. W. 607.

Where defendant's theory is that the woman left home with him under an agreement to have sexual intercourse with him, and her testimony is that she left for the purpose of marrying him, it may be proven by his letters to her, and by her declarations when leaving, that her testimony as to her purpose is true. Warren v. State, 54 Texas Crim. Rep. 446; 114 S. W. 380.

Testimony is admissible which tends to show that the woman was assisting to conceal the transaction, and that she claimed rape because she was practically found out while engaged in the carnal act. Edmondson v. State, 36 S. W. 270.

Proof that prior to the supposed rape a witness had rejected an offer of defendant to furnish him "a good piece" because defendant had declined to tell her name unless witness would agree to accept the offer is not admissible when there is nothing to show that defendant had reference to prosecutrix. Schults v. State, 49 Texas Crim. Rep. 352; 91 S. W. 786.

Proof that a relative of defendant had made a blunt offer of marriage to prosecutrix after the supposed rape is not admissible against defendant, in the absence of proof showing that he was causing this to be done in order to relieve himself in some way from the consequence of the rape. Schults v. State, 49 Texas Crim. Rep. 352; 91 S. W. 786.

If want of consent was the vital point in the case, and a new trial is asked for based upon the affidavit of prosecutrix admitting that she had sworn falsely as to

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her want of consent, the new trial should be granted. Townsend v. State, 22 S. W. 405.

It is proper to ask prosecutrix the question "was it done with or without your consent?" Coates v. State, 2 Texas Crim. App. 19.

Proof that immediately after identifying defendant prosecutrix fainted is not admissible as original evidence. Reddick v. State, 35 Texas Crim. Rep. 463; 34 S. W. 274. Turman v. State, 50 Texas Crim. Rep. 11; 95 S. W. 533.

Defendant's identity as the criminal may rest alone upon his uncorroborated confession. Fredrickson v. State, 44 Texas Crim. Rep. 288; 70 S. W. 754.

The confession of defendant may be used to aid the proof of the corpus delicti. Bradshaw v. State, 49 Texas Crim. Rep. 165; 94 S. W. 223. Austin v. State, 51 Texas Crim. Rep. 328; 101 S. W. 1162.

Sec. 1792. **Declarations of one incompetent to testify.**—Declarations made by the injured party which are a part of the *res gestæ* of the transaction declared on may be proved by any competent witness who heard them made, and the fact that the injured party was not or is not a competent witness does not change the rule. Croomes v. State, 40 Texas Crim. Rep. 675; 51 S. W. 924. Neely v. State, 56 S. W. 625. Flores v. State, 79 S. W. 809. Kenney v. State, 79 S. W. 817. Thomas v. State, 47 Texas Crim. Rep. 534; 84 S. W. 823. Hunter v. State, 54 Texas Crim. Rep. 226; 114 S. W. 125.

To render declarations admissible as a part of the *res gestæ*, it is not necessary to show that the declarant would have been a competent witness. Cook v. State, 22 Texas Crim. App. 525; 3 S. W. 749. Croomes v. State, 40 Texas Crim. Rep. 675; 51 S. W. 924. Neely v. State, 56 S. W. 625. Flores v. State, 79 S. W. 809. Kenney v. State, 79 S. W. 817. Thomas v. State, 47 Texas Crim. Rep. 534; 84 S. W. 823. Wilson v. State, 49 Texas Crim. Rep. 58; 90 S. W. 312. Hunter v. State, 54 Texas Crim. Rep. 226; 114 S. W. 125. Robbins v. State, 166 S. W. 529.

Declarations made by the injured party which are not a part of the *res gestæ* are not admissible in evidence on account of the fact that the injured party is not a competent witness. Smith v. State, 41 Texas 354. Long v. State, 10 Texas Crim. App. 197. Holst v. State, 23 Texas Crim. App. 7; 3 S. W. 757.

Sec. 1793. **Argument of counsel.**—State's counsel, in rape cases especially, should not let their zeal or desire to secure a conviction lead them into the error of discussing or referring to facts not in evidence, abusing the defendant or any of his witnesses, appealing or referring to mobs, or using anything else than proper deductions from the testimony. Gazley v. State, 17 Texas Crim. App. 283. Bryson v. State, 20 Texas Crim. App. 572. Thompson v. State, 33 Texas Crim. Rep. 475; 26 S. W. 987. Smith v. State, 44 Texas Crim. Rep. 137; 68 S. W. 995. Fredrickson v. State, 44 Texas Crim. Rep. 288; 70 S. W. 754. Tyler v. State, 46 Texas Crim. Rep. 13; 79 S. W. 558. Battles v. State, 53 Texas Crim. Rep. 207; 109 S. W. 195. Holloway v. State, 54 Texas Crim. Rep. 473; 113 S. W. 929. Hemphill v. State, 165 S. W. 462.

In rape cases it is error for counsel to urge the jury to convict defendant for fear he may rape some of their family. Holloway v. State, 54 Texas Crim. Rep. 473; 113 S. W. 929. Hemphill v. State, 165 S. W. 462.

In a rape case it is error for State's counsel to mention other rapes not in evidence. Bryson v. State, 20 Texas Crim. App. 572. Battles v. State, 53 Texas Crim. Rep. 207; 109 S. W. 195.

It is improper for State's counsel to argue to the jury that they should convict the defendant because the people desire it, or because a mob did not hang or burn him, or because a mob might harm him if he was acquitted. The defendant in a rape case, as well as in other cases, is entitled to a fair trial free from excitement or prejudice. Conn v. State, 11 Texas Crim. App. 400. Thompson v. State, 33 Texas Crim. Rep. 475; 26 S. W. 987. Smith v. State, 44 Texas Crim. Rep. 142; 68 S. W. 995. Powell v. State, 70 S. W. 218. Hemphill v. State, 165 S. W. 462.

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(For other authorities on argument of counsel see the section entitled "Argument of counsel" in Title 2, Chapter 1, of this Code.)

Sec. 1794. **Rape—Charge of court.**—The charge of the court should not embrace definitions not alleged or proven, but if the charge properly applies the law to the facts, it is not reversible error if the general definition of the offense in another paragraph of the charge is broader than the allegations of the indictment. Bryant v. State, 46 Texas Crim. Rep. 127; 79 S. W. 554. Salazar v. State, 55 Texas Crim. Rep. 310; 116 S. W. 819. Wade v. State, 144 S. W. 248.

If in applying the law to the facts the charge contains all the constituent elements of rape, the jury could not be misled by a failure to include the element of "want of consent" in the general definition of rape. Pettiway v. State, 37 S. W. 860.

If the case is either rape, or that defendant is guilty of no offense, it is not necessary to charge on other grades of assault. Hill v. State, 77 S. W. 808. Bryant v. State, 46 Texas Crim. Rep. 127; 79 S. W. 554. Brown v. State, 48 Texas Crim. Rep. 159; 87 S. W. 159. Ricks v. State, 48 Texas Crim. Rep. 230; 87 S. W. 345. Dies v. State, 56 Texas Crim. Rep. 32; 117 S. W. 979.

It is proper to refuse to charge the jury that the reputation and condition of life of the prosecutrix should be viewed by the jury in the light of mitigating the punishment. This would be a charge upon the weight of the evidence. Thomas v. State, 70 S. W. 93.

General definitions of rape need not be included in the charge of the court when the jury are required to find beyond a reasonable doubt before they are authorized to convict, the existence of every element necessary to constitute the rape alleged.

Art. 1066. (636) **"Fraud" Defined.**—The fraud must consist in the use of some stratagem by which the woman is induced to believe the offender is her husband, or in administering, without her knowledge or consent, some substance producing unnatural sexual desire, or such stupor as prevents or weakens resistance, and committing the offense while she is under the influence of such substance. It is a presumption of law, which cannot be rebutted by testimony, that no consent was given under the circumstances mentioned in this article.

Sec. 1795. **Rape by fraud—Statute construed.**—When some substance is not administered to the woman, the fraud must consist in the use of some stratagem by which the woman is induced to believe that the offender is her husband. The term "stratagem" means some artifice; a trick, plan or scheme by which the woman is deceived into believing the offender to be her husband. King v. State, 22 Texas Crim. App. 653; 3 S. W. 342. Mooney v. State, 29 Texas Crim. App. 260; 15 S. W. 724. Ledbetter v. State, 33 Texas Crim. Rep. 400; 26 S. W. 725. Payne v. State, 38 Texas Crim. Rep. 498; 43 S. W. 515. Payne v. State, 40 Texas Crim. Rep. 204; 49 S. W. 604. Lee v. State, 44 Texas Crim. Rep. 360; 72 S. W. 1005. Huffman v. State, 46 Texas Crim. Rep. 428; 80 S. W. 625.

If a married woman is induced by the stratagem used by defendant to believe that he is her husband, and under such belief consents to the carnal knowledge, it is rape by fraud. Ledbetter v. State, 33 Texas Crim. Rep. 400; 26 S. W. 725.

Penetration of a married woman while she is asleep, whether she wakes up after penetration or not, is not rape by fraud, there being no stratagem used. King v. State, 22 Texas Crim. App. 653; 3 S. W. 342. Payne v. State, 38 Texas Crim. Rep. 498; 43 S. W. 515. Payne v. State, 40 Texas Crim. Rep. 204; 49 S. W. 604. Huffman v. State, 46 Texas Crim. Rep. 428; 80 S. W. 625.

If some substance producing such stupor as prevents or weakens resistance is administered without the knowledge or consent of the woman, and carnal knowledge

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of her is had while she is under the influence of such substance, it is rape by fraud. Milton v. State, 23 Texas Crim. App. 209; 4 S. W. 574. Melton v. State, 24 Texas Crim. App. 284; 6 S. W. 39. Ford v. State, 41 Texas Crim. Rep. 270; 53 S. W. 846.

The statute protects an unmarried woman if a stratagem is used which induces her to believe that the offender is her husband. Lee v. State, 44 Texas Crim. Rep. 360; 72 S. W. 1005. Wilkerson v. State, 60 Texas Crim. Rep. 388; 131 S. W. 1108.

Sec. 1796. **Mock marriage as fraud.**—If the fraud practiced upon a single woman—such as a mock marriage—induced her to believe that the offender was her husband, carnal knowledge obtained by the use of such stratagem is rape by fraud. Lee v. State, 44 Texas Crim. Rep. 360; 72 S. W. 1005. Wilkerson v. State, 60 Texas Crim. Rep. 388; 131 S. W. 1108. Melton v. State, 158 S. W. 550.

If the fraud consists of a mock marriage, by the use of which stratagem prosecutrix was induced to believe that defendant was her husband, the State may show that he some time prior or later married another woman, as bearing on his intent in going through the form of a marriage with prosecutrix. Lee v. State, 44 Texas Crim. Rep. 357; 72 S. W. 1005. Wilkerson v. State, 60 Texas Crim. Rep. 388; 131 S. W. 1111.

If the State proves a subsequent legal marriage with another woman for the purpose of showing the intent of defendant in going through a mock marriage with prosecutrix, it is error to permit the State to prove that defendant abducted the second woman. Lee v. State, 44 Texas Crim. Rep. 357; 72 S. W. 1005.

If the stratagem used was a mock marriage the State may prove declarations of defendant as to his property and money, as affecting the probability of prosecutrix consenting to be his wife. Wilkerson v. State, 60 Texas Crim. Rep. 395; 131 S. W. 1108 (but the State is not entitled to prove that such declarations were false).

If the fraud relied on is a mock marriage, the State may prove any act, declaration or conduct of prosecutrix, while occupying to all the world the relation of husband and wife, and explanatory of their relations consistent with their apparent attitude. Wilkerson v. State, 60 Texas Crim. Rep. 395; 131 S. W. 1108.

If the fraud relied on is a mock marriage, the State may prove the declarations of prosecutrix made when it was first brought to her attention that the marriage was a nullity and that in truth she was not the wife of defendant. Wilkerson v. State, 60 Texas Crim. Rep. 396; 131 S. W. 1108 (but statements or letters of prosecutrix adverse to defendant made or written after this time in defendant's absence, or while he was under arrest, would be but narrative in its nature and hearsay).

If the State proves that defendant was a married man for the purpose of showing his intent in going through the form of a marriage with prosecutrix, it is error to permit the State to show that he had children, or to go into details of his relations towards his wife or children when proof of such matters could only serve to incense the jury against him. Wilkerson v. State, 60 Texas Crim. Rep. 388; 131 S. W. 1108.

If the fraud consists of a mock marriage, the State may prove the good reputation of prosecutrix for chastity and truth if she is attacked by questions seeking to elicit from her the fact, and which is strongly calculated to induce the jury to believe, that she had willingly left home with defendant to engage in carnal intercourse; to show the truth of her intentions, and to show what manner of woman she was. Wilkerson v. State, 60 Texas Crim. Rep. 395; 131 S. W. 1108.

Sec. 1797. **Form for indictment—Rape by fraud.**
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 John Doe on the ..... day of ..... A. D. ....., in said county and State, did have carnal knowledge of ....., a woman other than the wife of said John Doe, the said woman being then and there the wife of ....., and the said John Doe did then and there obtain

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such carnal knowledge of said married woman without her consent by fraud by the use then and there of a stratagem by which the said married woman was then and there induced to believe that the said John Doe was then and there her husband.

Against the peace and dignity of the State.

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Foreman of the grand jury.

Sec. 1798. **Form for indictment—Rape by fraud.**

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 John Doe on the ..... day of ..... A. D. ....., in said county and State, did obtain carnal knowledge of ....., a woman, without her consent, by fraud, and the said John Doe did then and there, without the knowledge of said woman, administer to her a substance called chloroform, producing such stupor as prevented and weakened resistance on her part to such carnal knowledge, and the said John Doe did then and there obtain such carnal knowledge while said woman was then and there under the influence of such substance.

Against the peace and dignity of the State.

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Foreman of the grand jury.

Sec. 1799. **Form for indictment—Rape by fraud.**

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 John Doe on the ..... day of ..... A. D. ....., in said county and State, did obtain carnal knowledge of ....., an unmarried woman, without her consent, by fraud, and the said John Doe did then and there obtain said carnal knowledge by the use of a stratagem, a sham and pretended marriage, by which the said woman was then and there induced to believe that the said John Doe was her husband.

Against the peace and dignity of the State.

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Foreman of the grand jury.

Sec. 1800. **Rape by fraud—Want of consent.**—When the State proves that the carnal knowledge was obtained by "fraud," "want of consent" is thereby proven, for it is a presumption of law, which cannot be rebutted by testimony, that no consent was given when carnal knowledge was obtained by the use of a stratagem by which the woman is induced to believe the offender is her husband, or when the carnal knowledge was had while the woman was under the influence of some substance, administered to her by the defendant without her knowledge or consent, producing unnatural sexual desire, or such stupor as prevents or weakens resistance.

Sec. 1801. **Indictment for rape by fraud.**—In an indictment for rape by fraud the particular kind of fraud need not be alleged. Franklin v. State, 34 Texas Crim. Rep. 209; 29 S. W. 1088. Payne v. State, 38 Texas Crim. Rep. 497; 43 S. W. 515.

A general allegation that the rape was by fraud will not be sufficient to admit proof that defendant personated the husband and by such stratagem obtained carnal knowledge of a married woman. When the rape is by fraud in personating the husband, it should be alleged that she was a married woman and not the wife of the accused, and it is better to give the name of her husband. Payne v. State, 38 Texas Crim. Rep. 497; 43 S. W. 515.

Sec. 1802. **Charge on rape by fraud.**—It is error to authorize the jury to convict on the theory that the rape was committed by fraud if there is no allegation of fraud. Williams v. State, 1 Texas Crim. App. 90.

The charge of the court should be confined to the proof. If there is no evidence of fraud, it is error to authorize a conviction on the theory that the rape was committed by fraud. Serio v. State, 22 Texas Crim. App. 638; 3 S. W. 784. Mooney

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v. State, 29 Texas Crim. App. 260; 15 S. W. 724. Payne v. State, 38 Texas Crim. Rep. 497; 43 S. W. 515.

Where prosecutrix claimed that defendant gave her some candy and that her passion was immediately aroused and that she immediately satisfied it, it is error to authorize a conviction on the theory that the candy produced a stupor. Baldridge v. State, 45 Texas Crim. Rep. 197; 74 S. W. 916.

Art. 1067. (637) **Penetration only need be proved.**—Penetration only is necessary to be proved upon a trial for rape.

Sec. 1803. **Penetration.**—It is error to charge the jury that "penetration only is necessary to be proved" without in some way informing the jury that penetration only is sufficient to constitute "carnal knowledge." The jury should not be left under the impression, by an isolated paragraph, that mere proof of penetration constitutes rape. Serio v. State, 22 Texas Crim. App. 638; 3 S. W. 784. Johnson v. State, 27 Texas Crim. App. 176; 11 S. W. 106.

It is not error to fail to charge the jury that penetration only is necessary to be proved. Lujano v. State, 32 Texas Crim. Rep. 419; 24 S. W. 97.

Error in defining the term "penetration" is harmless if the proof shows without controversy that penetration was effected. Ledbetter v. State, 33 Texas Crim. Rep. 400; 26 S. W. 725. Kinch v. State, 156 S. W. 649.

Proof of penetration is proof of carnal knowledge and that is what is meant by article 1067. On trials for rape, penetration, whether with or without injection or emission is sufficient, if proved, to show carnal knowledge. Word v. State, 12 Texas Crim. App. 183. Johnson v. State, 27 Texas Crim. App. 163; 11 S. W. 106. Rodgers v. State, 30 Texas Crim. App. 528; 17 S. W. 1077. Lujano v. State, 32 Texas Crim. Rep. 419; 24 S. W. 97.

Penetration is necessary to be proved upon a trial for rape, and a conviction for rape will not be sustained if penetration is not proven beyond a reasonable doubt. Davis v. State, 43 Texas 189. Baldwin v. State, 15 Texas Crim. App. 275. Elam v. State, 20 S. W. 710. Blair v. State, 56 S. W. 622. Duckworth v. State, 42 Texas Crim. Rep. 75; 57 S. W. 665.

When direct evidence cannot be had, the fact of penetration may be established by circumstantial evidence. Word v. State, 12 Texas Crim. App. 183. Dies v. State, 56 Texas Crim. Rep. 36; 117 S. W. 979.

The court should charge the jury that penetration must be proven beyond a reasonable doubt before they can convict of rape. Davis v. State, 43 Texas 189.

Where the charge of the court uses the term "carnal knowledge," it is not reversible error to use the expression "penetration of the person of the female by that of the male," although the charge might, with propriety, be more specific. Burk v. State, 8 Texas Crim. App. 336. Wilson v. State, 17 Texas Crim. App. 537.

Where the jury are instructed that to warrant a conviction for rape the fact of penetration must be established beyond a reasonable doubt, and are informed what penetration means, it is not error to further charge the jury that it is not necessary that the act of copulation should have been complete, but penetration only as before explained is necessary to be proved, though such penetration need not have been to any particular depth. Fitzgerald v. State, 20 Texas Crim. App. 294. Rodgers v. State, 30 Texas Crim. App. 528; 17 S. W. 1077. Boyd v. State, 163 S. W. 68.

Art. 1068. (638) **Defendant must be over fourteen.**—No person under the age of fourteen, at the time the offense is charged to have been committed, can be convicted of rape, or assault with intent to commit the offense.

Sec. 1804. **Age of defendant.**—Capacity to commit crime need never be alleged; hence it is not necessary to allege in the indictment that defendant is a

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male person, or that he was over fourteen years of age when the alleged rape was committed. Davis v. State, 42 Texas 226. Greenlee v. State, 4 Texas Crim. App. 346. Word v. State, 12 Texas Crim. App. 182. Cornelius v. State, 13 Texas Crim. App. 252. Holland v. State, 14 Texas Crim. App. 182. Taylor v. State, 50 Texas Crim. Rep. 363; 97 S. W. 94.

The failure to submit to the jury whether or not defendant was under fourteen years of age at the time the offense was charged to have been committed will not require a reversal if the failure to so charge could not have injured the rights of defendant. Wilcox v. State, 33 Texas Crim. Rep. 392; 26 S. W. 989.

The burden of proving his nonage rests upon defendant. Wilcox v. State, 33 Texas Crim. Rep. 394; 26 S. W. 989.

Art. 1069. (639) **Punishment.**—Whoever shall be guilty of rape shall be punished by death or by confinement in the penitentiary for life, or for any term of years not less than five, in the discretion of the jury.

Sec. 1805. **Punishment.**—If the offense was committed by defendant before he arrived at the age of seventeen years he cannot legally be punished with death. The burden is on defendant to prove his nonage. Ake v. State, 6 Texas Crim. App. 398. Ingram v. State, 29 Texas Crim. App. 33; 14 S. W. 457. Ellis v. State, 30 Texas Crim. App. 601; 18 S. W. 139. Wilcox v. State, 32 Texas Crim. Rep. 384; 22 S. W. 1109. Wilcox v. State, 33 Texas Crim. Rep. 392; 26 S. W. 989. Williams v. State, 177 S. W. 965.

Art. 1070. (640) **Conviction may be had for "attempt."**—If it appear, on the trial of an indictment for rape, that the offense, though not committed, was attempted by the use of any of the means spoken of in articles 1064, 1065 and 1066, but not such as to bring the offense within the definition of an assault with intent to commit rape, the jury may find the defendant guilty of an attempt to commit the offense, and affix the punishment prescribed in article 1029.

Sec. 1806. **Form for indictment—Attempt to rape.**

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 John Doe on the ..... day of ..... A. D. ....., in said county and State, did by force, threats and fraud, attempt to ravish and have carnal knowledge of ....., a woman, without her consent.

Against the peace and dignity of the State.

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Foreman of the grand jury.

Sec. 1807. **Form for indictment—Attempt to rape a female under age of consent.**

In the name and by the 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 John Doe on the ..... day of ..... A. D. ....., in said county and State, did by force, threats and fraud, attempt to ravish and have carnal knowledge of ....., a female then and there under the age of fifteen years, the said female not being then and there the wife of the said John Doe.

Against the peace and dignity of the State.

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Foreman of the grand jury.

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Sec. 1808. **Form for indictment—Attempt to rape a woman mentally diseased.** 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 John Doe on the ..... day of ..... A. D. ....., in said county and State, did by force, threats and fraud, attempt to ravish and have carnal knowledge of ....., a woman other than the wife of the said John Doe, and the said woman being then and there so mentally diseased as to have no will to oppose the act of carnal knowledge, and the said John Doe then and there knowing her to be so mentally diseased.

Against the peace and dignity of the State.

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Foreman of the grand jury.

Sec. 1809. **Form for indictment—Attempt to rape a married woman.** In the name and by the 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 John Doe on the ..... day of ..... A. D. ....., in said county and State, did by fraud attempt to obtain carnal knowledge of ....., a woman other than the wife of the said John Doe, and said woman being then and there a married woman and being then and there the wife of .....

Against the peace and dignity of the State.

.....

Foreman of the grand jury.

Sec. 1810. **Indictment for attempt to rape.**—An attempt to commit rape may be charged directly in the indictment, or a conviction for an attempt to commit rape may be had under an indictment for rape. Melton v. State, 24 Texas Crim. App. 284; 6 S. W. 39. Reagan v. State, 28 Texas Crim. App. 227; 12 S. W. 601. West v. State, 21 S. W. 686. Franklin v. State, 34 Texas Crim. Rep. 210; 29 S. W. 1088.

The very definition of the offense of attempt to commit rape excludes the question of assault; hence an indictment does not charge an attempt to commit rape if it alleges an assault. Taylor v. State, 44 Texas Crim. Rep. 155; 69 S. W. 149. Wyvias v. State, 64 Texas Crim. Rep. 236; 142 S. W. 585. Shockley v. State, 160 S. W. 452.

An assault with intent to commit rape and attempt to commit rape are two distinct substantive offenses; hence an indictment for the former will not support proof of an attempt to commit rape. Brown v. State, 7 Texas Crim. App. 569. Burney v. State, 21 Texas Crim. App. 565; 1 S. W. 458. Milton v. State, 23 Texas Crim. App. 209; 4 S. W. 574. Ford v. State, 41 Texas Crim. Rep. 270; 53 S. W. 846. Taylor v. State, 44 Texas Crim. Rep. 155; 69 S. W. 149. Wyvias v. State, 64 Texas Crim. Rep. 236; 142 S. W. 585. Shockley v. State, 160 S. W. 452.

It is not competent to indict for an assault with intent to rape and convict upon evidence establishing an attempt to rape by fraud. Milton v. State, 23 Texas Crim. App. 209; 4 S. W. 574. Ford v. State, 41 Texas Crim. Rep. 270; 53 S. W. 846. Wyvias v. State, 64 Texas Crim. Rep. 236; 142 S. W. 585.

An indictment for attempt to rape a female either under or over the age of consent is bad if there is no allegation that the attempt was made by force, threats and fraud, or by either force, threats or fraud. Warren v. State, 38 Texas Crim. Rep. 152; 41 S. W. 635. Wyvias v. State, 64 Texas Crim. Rep. 236; 142 S. W. 585.

If an indictment for attempt to commit rape is based alone upon the use of "threats," it is not necessary to allege that the threats were directed against the person of the female. Reagan v. State, 28 Texas Crim. App. 231; 12 S. W. 601.

If it is alleged that the prosecutrix was a "married woman," the name of her husband need not be alleged. Franklin v. State, 34 Texas Crim. Rep. 210; 29 S. W. 1088.

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An indictment for an attempt to commit rape by fraud need not allege the facts necessary to constitute the fraud. Franklin v. State, 34 Texas Crim. Rep. 209; 29 S. W. 1088.

Sec. 1811. **Attempt to rape—Statute construed.**—The distinction between an assault with intent to commit rape and an attempt to commit rape is that the former requires proof of force or attempted force, while the latter may be supported by proof of either force, threats or fraud. Another distinction is that when the force used amounts to an assault then it ceases to be an attempt; when the attempt ceases the assault begins and takes its place. If the force actually used is such as to constitute the offense an assault with intent to commit rape, then it is no longer a mere attempt. Brown v. State, 7 Texas Crim. App. 569. Burney v. State, 21 Texas Crim. App. 572; 1 S. W. 458. Taylor v. State, 22 Texas Crim. App. 529; 3 S. W. 753. Milton v. State, 23 Texas Crim. App. 209; 4 S. W. 574. West v. State, 21 S. W. 686. McAdoo v. State, 35 Texas Crim. Rep. 605; 34 S. W. 955. Warren v. State, 38 Texas Crim. Rep. 152; 41 S. W. 635. Moon v. State, 45 S. W. 806. Waire v. State, 64 S. W. 1061. Holloway v. State, 54 Texas Crim. Rep. 473; 113 S. W. 929. Wyvias v. State, 64 Texas Crim. Rep. 236; 142 S. W. 585.

An attempt to commit rape can only be committed by the use of either force, threats or fraud, whether the female be over or under the age of consent. Warren v. State, 38 Texas Crim. Rep. 152; 41 S. W. 635. Wyvias v. State, 64 Texas Crim. Rep. 236; 142 S. W. 585. *Contra:* Mayo v. State, 7 Texas Crim. App. 348.

To constitute an attempt to commit rape by force, defendant must intend to use such force as is calculated to overcome resistance, taking into consideration the relative strength of the parties and the other circumstances of the case, and must go beyond mere preparation, but in the attempt must fall short of an assault. West v. State, 21 S. W. 686. Bozeman v. State, 34 Texas Crim. Rep. 507; 31 S. W. 389. McAdoo v. State, 35 Texas Crim. Rep. 605; 34 S. W. 955. Warren v. State, 38 Texas Crim. Rep. 152; 41 S. W. 635. Byas v. State, 41 Texas Crim. Rep. 55; 51 S. W. 923. Wyvias v. State, 64 Texas Crim. Rep. 236; 142 S. W. 585.

An attempt is an endeavor to accomplish a crime carried beyond mere preparation, but falling short of the ultimate design in any part of it. Franklin v. State, 34 Texas Crim. Rep. 210; 29 S. W. 1088. McAdoo v. State, 35 Texas Crim. Rep. 603; 34 S. W. 955. Byas v. State, 41 Texas Crim. Rep. 55; 51 S. W. 923.

If the evidence shows an assault with intent to commit rape a conviction for an attempt to commit rape will not be sustained. McAdoo v. State, 35 Texas Crim. Rep. 605; 34 S. W. 955. Warren v. State, 38 Texas Crim. Rep. 152; 41 S. W. 635. Moon v. State, 45 S. W. 806. Waire v. State, 64 S. W. 1061. Taylor v. State, 44 Texas Crim. Rep. 155; 69 S. W. 149. Wyvias v. State, 64 Texas Crim. Rep. 236; 142 S. W. 585.

If the evidence shows only an attempt to commit rape a conviction for an assault with intent to commit rape will not be sustained. Milton v. State, 23 Texas App. 209; 4 S. W. 574. Ford v. State, 41 Texas Crim. Rep. 270; 53 S. W. 846.

The use of chloroform comes within the meaning of "fraud," but not "force." Milton v. State, 23 Texas App. 209; 4 S. W. 574. Melton v. State, 24 Texas App. 284; 6 S. W. 39. Ford v. State, 41 Texas Crim. Rep. 270; 53 S. W. 846.

Sec. 1812. **Attempt to rape—Charge of court.**—An "attempt" is an endeavor to accomplish a crime carried beyond mere preparation, but falling short of the ultimate design in any part of it. Franklin v. State, 34 Texas Crim. Rep. 210; 29 S. W. 1088. McAdoo v. State, 35 Texas Crim. Rep. 603; 34 S. W. 955. Byas v. State, 41 Texas Crim. Rep. 55; 51 S. W. 923.

A charge is erroneous if it authorizes a conviction for an attempt to commit rape by force unless it defines "force" as defined by statute, and informs the jury that defendant must have intended to use such force at the time, but in the actual attempt he fell short of the use of such force as would constitute an assault. McAdoo v. State, 35 Texas Crim. Rep. 605; 34 S. W. 955. Warren v. State, 38 Texas Crim. Rep. 152; 41 S. W. 635.

A charge is erroneous if it authorizes a conviction for an attempt to commit rape on a female under the age of consent without requiring the jury to find that

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defendant intended to use such force (when force is alone involved) as would be reasonably calculated to overcome resistance. Warren v. State, 38 Texas Crim. Rep. 152; 41 S. W. 635. Wyvias v. State, 64 Texas Crim. Rep. 236; 142 S. W. 585. *Contra:* Mayo v. State, 7 Texas Crim. App. 348.

If threats are the only means alleged, the charge should inform the jury that defendant must have had at the time the ulterior purpose to have carnal knowledge by means of the threats used. Moon v. State, 45 S. W. 806.

If the indictment is for attempt to commit rape by fraud, and not for rape, it is not error to fail to require the jury to find that the prosecutrix believed defendant to be her husband; the gravamen of the offense of attempt to commit rape by fraud does not depend on the belief of the female, but on the fraudulent acts of the defendant. Franklin v. State, 34 Texas Crim. Rep. 212; 29 S. W. 1088.

CHAPTER IX

ABORTION

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Article 1071. (641) **Definition and punishment.**—If any person shall designedly administer to a pregnant woman, or knowingly procure to be administered with her consent, any drug or medicine, or shall use toward her any violence, or means whatever, externally or internally applied, and shall thereby procure an abortion, he shall be punished by confinement in the penitentiary not less than two nor more than five years; if it be done without her consent, the punishment shall be doubled. By the term "abortion" is meant that the life of the fetus

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or embryo shall be destroyed in the woman's womb, or that a premature birth thereof be caused. (Act 1907, p. 55.)

Sec. 1813. **Abortion by drugs or medicine—Form for indictment.**
In the name and by the authority of the State of Texas:

The grand jury of....., 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 John Doe on the.....day of.....A. D.....in said county and State, did designedly administer and knowingly procure to be administered to ....., a pregnant woman, with her consent, a drug and medicine calculated to produce an abortion, and did then and there thereby destroy the life of the fetus in the womb of said woman (or "did then and there thereby cause a premature birth of the fetus with which said woman was then and there pregnant"), and did then and there by the use of the means aforesaid thereby procure an abortion as aforesaid.

Against the peace and dignity of the State.

.....
Foreman of the grand jury.

(If the abortion was procured without the consent of the woman, it should be so alleged, or it may be alleged in one count it was procured "with her consent" and in another count "without her consent.")

Sec. 1814. **Abortion by assault—Form for indictment.**
In the name and by authority of the State of Texas:

The grand jury of....., 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 John Doe on the.....day of.....A. D.....in said county and State, did in and upon the person of....., a pregnant woman, make an assault, and the said John Doe did then and there strike and kick the said pregnant woman, and did then and there by the use of said means then and there designedly used without her consent thereby destroy the life of the fetus in the womb of said woman (or "did then and there thereby cause a premature birth of the fetus with which said woman was then and there pregnant"), and did then and there by the use of the means aforesaid thereby procure an abortion as aforesaid.

Against the peace and dignity of the State.

.....
Foreman of the grand jury.

(The terms "embryo" and "fetus" not being specially defined are used in article 1071 (641) in their ordinary meaning. The term "embryo" is generally applied to the fecundated germ in the early stages of its development in the womb and until the period of quickening, after which period of its increase the name "fetus" is given to it. Sometimes the meaning of these terms is reversed, and often as here they are used indiscriminately. In this article, taking it as a whole, the terms "fetus" and "embryo" have the same meaning. The words "unborn child" are words of equivalent meaning to either term as here used.)

Sec. 1815. **Abortion by other means—Form for indictment.**
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 John Doe on the.....day of.....A. D..... in said county and State, did with (or "without") the consent of....., a pregnant woman, insert into the vagina and womb of said woman a penholder, and a metallic instrument the name and character of which instrument in unknown to the grand jury, then and there calculated to produce an abortion, and did then and there by the use of said means produce an abortion of the said woman and did then and there thereby destroy the life of the fetus in the womb of said woman (or "did then and thereby cause a premature birth of the fetus with which said woman was then and there pregnant").

Against the peace and dignity of the State.

.....
Foreman of the grand jury.

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Sec. 1816. **Statute construed.**—The offense of abortion is sufficiently defined by the statute. Jackson v. State, 55 Texas Crim. Rep. 89; 115 S. W. 262.

Although prosecutrix aborted in another county, the venue is properly laid in the county where defendant performed the acts which resulted in the abortion. Moore v. State, 37 Texas Crim. Rep. 565; 40 S. W. 287.

If one prescribed the means and furnishes it to a pregnant woman for the purpose of procuring an abortion, and an abortion is thereby procured, he is a principal, and such proof supports an allegation that defendant administered the drug or medicine or used the means, since her act in so doing by his direction is his act, she being an innocent agent, although consenting, and in such case in law defendant was present when she used the means so furnished whether in fact he was present or not. There can be no accomplice without a principal and the woman on whom the abortion is procured or attempted is never a principal. If defendant furnished the means for procuring an abortion to a pregnant woman, knowing the purpose intended, he is a principal and not an accomplice, whether he is present or not when she uses the means furnished to her by the defendant. Willingham v. State, 33 Texas Crim. Rep. 98; 25 S. W. 424. Moore v. State, 37 Texas Crim. Rep. 561; 40 S. W. 287.

The accused may be guilty of abortion as an accomplice though he did not furnish the means for procuring it. Fondren v. State, 169 S. W. 411.

Art. 1072. (642) **Furnishing the means; an accomplice.**—Any person who furnishes the means for procuring an abortion, knowing the purpose intended, is guilty as an accomplice.

Sec. 1817. **Furnishing the means to procure an abortion—Form for indictment.** 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 John Doe on the.....day of.....A. D..... in said county and State, did knowingly furnish the means for procuring an abortion, in this to wit, one Richard Roe on or about said date in said county and State did designedly administer to....., a pregnant woman, with her consent, (or "without her consent") a drug and medicine calculated to produce an abortion, and did then and there thereby destroy the life of the embryo (or "fetus") in the womb of said woman (or "did then and there thereby cause a premature birth of the fetus with which said woman was then and there pregnant"), and the said Richard Roe did then and there by the use of the means aforesaid procure an abortion of the said woman as aforesaid, and the said John Doe then and there and before the said abortion was procured as aforesaid did then and there know the purpose of the said Richard Roe and did then and there furnish the said means for procuring said abortion as aforesaid to said Richard Roe knowing the purpose intended as aforesaid.

Against the peace and dignity of the State.

.....

Foreman of the grand jury.

Art. 1073. (643) **Attempt at abortion.**—If the means used shall fail to produce an abortion, the offender is nevertheless guilty of an attempt to produce abortion, provided it be shown that such means were calculated to produce that result, and shall be punished by fine not less than one hundred nor more than one thousand dollars. (Act Feb. 12, 1858, p. 172.)

Sec. 1818. **Attempt at abortion—Form for indictment.**

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 John Doe on the.....day of.....A. D.....

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in said county and State, did attempt to produce an abortion on....., a pregnant woman, and the said John Doe did then and there designedly administer to said woman a drug and medicine calculated to produce an abortion with the intent and purpose then and there to destroy the life of the fetus in the womb of said woman (or "with the intent and purpose then and there to cause a premature birth of the fetus with which said woman was then and there pregnant") and which said means were then and there calculated to produce that result, and the means so used then and there by the said John Doe did fail to produce the abortion of said woman as intended and attempted as aforesaid.

Against the peace and dignity of the State.

.....

Foreman of the grand jury.

Sec. 1819. **Indictment for abortion and attempt.**—In an indictment for an attempt at abortion on a pregnant woman, it is not necessary to allege in terms that the attempt was made "with her consent" or "without her consent," the punishment for an attempt being the same regardless of whether or not she consented to the attempt. It is otherwise with an indictment for abortion.

Indictments held good: Navarro v. State, 24 Texas Crim. App. 378 (abortion). Watson v. State, 9 Texas Crim. App. 242 (attempt). Fondren v. State, 169 S. W. 411 (accomplice). Gray v. State, 178 S. W. 337.

To be sufficient the indictment must allege the means used. State v. Rupe, 41 Texas 33.

It is not necessary to negative in the indictment the exception contained in Article 1076 (646) as to an abortion procured or attempted to be procured by medical advice for the purpose of saving the life of the mother. This is purely a matter of defense. State v. Rupe, 41 Texas 33.

An indictment for abortion, or for an attempt to procure an abortion, need not give the name of the drug, medicine, or instrument used if it contains an allegation that such drug, medicine or instrument was calculated to procure an abortion. Watson v. State, 9 Texas Crim. App. 242. Cave v. State, 33 Texas Crim. Rep. 335; 26 S. W. 503. Reum v. State, 49 Texas Crim. Rep. 128; 90 S. W. 1109.

It is not necessary to specify the kind, quality, or quantity of the drug or medicine if it is alleged that it was calculated to produce an abortion. Watson v. State, 9 Texas Crim. App. 243.

An indictment is not duplicitous if it charges in the same count several means of accomplishing the same result, where the punishment is the same. Reum v. State, 49 Texas Crim. Rep. 128; 90 S. W. 1109.

An indictment is duplicitous if it alleges in the same count the procuring an abortion and furnishing the means to procure an abortion. Wandell v. State, 25 S. W. 27.

If the same transaction is charged in different counts, each count alleging a different mode or means of doing the same act constituting the offense, the State is not required to elect on which count a conviction will be sought where there is proof supporting each count submitted to the jury. Moore v. State, 37 Texas Crim. Rep. 559; 40 S. W. 287. Reum v. State, 49 Texas Crim. Rep. 129; 90 S. W. 1109.

Sec. 1820. **Wife as a witness.**—The wife is a competent witness against her husband in an abortion case where the means used was personal violence towards her. Navarro v. State, 24 Texas Crim. App. 378; 6 S. W. 542 (kicked her).

The wife is not a competent witness against her husband where no personal violence was used upon her in attempting to procure the abortion, and where the means used was the administration of a drug or medicine with her consent. Miller v. State, 37 Texas Crim. Rep. 575; 40 S. W. 313.

The wife is not a competent witness against her husband in a prosecution for an abortion where the abortion was performed on her before she married him. Miller v. State, 37 Texas Crim. Rep. 575; 40 S. W. 313.

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Sec. 1821. **Accomplice testimony.**—The court does not have to apply the law of accomplice testimony to the testimony of prosecutrix, although she consented to the procuring of the abortion, or to the attempt to procure it. Watson v. State, 9 Texas Crim. App. 244. Willingham v. State, 33 Texas Crim. Rep. 99; 25 S. W. 424. Miller v. State, 37 Texas Crim. Rep. 575; 40 S. W. 313. Hunter v. State, 38 Texas Crim. Rep. 61; 41 S. W. 602. Shaw v. State, 165 S. W. 931. Fondren v. State, 169 S. W. 411. Gray v. State, 178 S. W. 337.

Where the father of prosecutrix agreed to and encouraged defendant in the attempt to procure an abortion on her, the law of accomplice testimony should be applied to his testimony given in behalf of the State. Watson v. State, 9 Texas Crim. App. 243.

Sec. 1822. **Evidence.**—Where the prosecution is for abortion, the State is entitled to prove that the same means were used on different occasions to procure the abortion. King v. State, 35 Texas Crim. Rep. 479; 34 S. W. 282.

Where the means alleged are shown to have been used, it is not a variance if the proof shows that other means were used as auxiliary aids to procure the abortion. Moore v. State, 37 Texas Crim. Rep. 562; 40 S. W. 287. Reum v. State, 49 Texas Crim. Rep. 125; 90 S. W. 1109. Shaw v. State, 165 S. W. 931.

The prosecutrix may testify that she was pregnant and may tell who was responsible therefor. Link v. State, 164 S. W. 987. Shaw v. State, 165 S. W. 930.

The State may prove that defendant volunteered to introduce one of his "friends" to prosecutrix and offered to assist him in making the carnal acquaintance of prosecutrix, as showing that defendant was laying a predicate to shift the responsibility of her pregnancy. Fretwell v. State, 43 Texas Crim. Rep. 507; 67 S. W. 1021.

Where the father of prosecutrix testifies against defendant, it is error to refuse to permit defendant to prove that the witness had demanded money from him as a condition upon which he would not prosecute, the proof being admissible to show the animus of the witness and to affect his credibility. Watson v. State, 9 Texas Crim. App. 238.

The admission of oral testimony as to the contents of telegrams tending to show that defendant was taking prosecutrix to another place for the purpose of having an abortion performed on her, is not cured by a withdrawal of such testimony after same had been admitted and argued, when the objection was timely made that the telegrams were the best evidence of their contents. Durham v. State, 45 Texas Crim. Rep. 475; 76 S. W. 563.

Proof of the opinion of prosecutrix that the means used caused the abortion is not admissible. Navarro v. State, 24 Texas Crim. App. 381; 6 S. W. 542. Stanley v. State, 44 Texas Crim. Rep. 606; 73 S. W. 400.

In a prosecution for abortion, it is error to permit the prosecutrix to testify that defendant "killed the child," or that he "came very near killing her." King v. State, 35 Texas Crim. Rep. 479; 34 S. W. 282.

Where the woman would not have been permitted to give her opinion as to the cause of the abortion had she been on the witness stand, her opinion cannot legally be gotten before the jury by proof of her declarations although they were made in the presence of defendant. Stanley v. State, 44 Texas Crim. Rep. 607; 73 S. W. 400.

It is within the sound discretion of the court to permit the State to propound leading questions to prosecutrix on direct examination where she appears to be hostile to the State, or in the interest of defendant, or unwilling to give evidence. Navarro v. State, 24 Texas Crim. App. 378; 6 S. W. 542. Moore v. State, 37 Texas Crim. Rep. 552; 40 S. W. 287.

Where defendant during the time he was administering drugs to produce an abortion and before he resorted to a penstaff, had a blacksmith to make a pair of tweezers, which the smith exhibited to defendant and received further directions as to how to complete the same, proof of these facts may be shown for the purpose

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of proving the intent of defendant in the matter of procuring the abortion. Moore v. State, 37 Texas Crim. Rep. 566; 40 S. W. 287.

Where defendant denies being responsible for the pregnancy of prosecutrix, and introduces testimony that she had admitted having extended carnal favors to others, the State may prove her general reputation for chastity. Fondren v. State, 169 S. W. 411.

Proof that the accused had produced abortions on other women is not admissible if such proof would only tend to show that he was a criminal generally. Gray v. State, 178 S. W. 337.

Sec. 1823. **Motive.**—To show a motive on defendant's part to produce the abortion, the State is entitled to prove that the pregnancy of prosecutrix was caused by him. Fretwell v. State, 43 Texas Crim. Rep. 506; 67 S. W. 1021. Fondren v. State, 169 S. W. 411.

Sec. 1824. **Convictions sustained.**—Cave v. State, 33 Texas Crim. Rep. 335; 26 S. W. 503 (attempt). Moore v. State, 37 Texas Crim. Rep. 552; 40 S. W. 287 (abortion). Hunter v. State, 38 Texas Crim. Rep. 61; 41 S. W. 602 (attempt). Reum v. State, 49 Texas Crim. Rep. 125; 90 S. W. 1109 (abortion). Link v. State, 164 S. W. 987 (unknown instrument). Shaw v. State, 165 S. W. 930 (abortion). Fondren v. State, 169 S. W. 411 (accomplice).

Sec. 1825. **Evidence held insufficient.**—Griffith v. State, 9 Texas Crim. App. 372 (abortion).

Although defendant intended to produce an abortion and furnished sufficient medicine for that purpose, yet if prosecutrix took less than the amount prescribed by defendant and the amount actually taken was not calculated to produce an abortion, a conviction for an attempt to produce an abortion will not be sustained. Fretwell v. State, 43 Texas Crim. Rep. 510; 67 S. W. 1021.

Where the evidence fails to show that the means used were calculated to produce an abortion, it will not sustain a conviction for an attempt to produce an abortion although it is evident that it was the purpose and desire of defendant to produce that result. Willaims v. State, 19 S. W. 897. Fretwell v. State, 43 Texas Crim. Rep. 510; 67 S. W. 1021.

Sec. 1826. **Charge of the court.**—Charge held correct: "By the word abortion is meant the act of miscarriage or producing a child from the mother before the natural time, with premeditated or intentional design to prevent the birth of a natural child. By the term producing a child before the natural time is meant, at any time from gestation or the moment of pregnancy, to the time when the fetus is perfectly formed. And to cause or produce an abortion is to cause or produce this premature bringing forth of the fetus from the womb of a pregnant woman." Reum v. State, 49 Texas Crim. Rep. 126; 90 S. W. 1109.

(Since the Act of 1907, the term "abortion" is defined by statute.)

Error in using the word "external" in mentioning the violence is harmless although there is no evidence of external violence, where the proof is short and clear and the jury are properly required to find that there was internal violence. Reum v. State, 49 Texas Crim. Rep. 130; 90 S. W. 1109.

The action of the court in not submitting as a basis for conviction one or more of the counts of the indictment is tantamount to an election by the State to abandon such count or counts. Moore v. State, 37 Texas Crim. Rep. 558; 40 S. W. 287.

Art. 1074. (644) **In case of death, murder.**—If the death of the mother is occasioned by an abortion so produced, or by an attempt to effect the same, it is murder.

Sec. 1827. **Murder in producing abortion—Form for indictment.**

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

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said term do present that John Doe on the.....day of.....A. D..... in said county and State, did produce an abortion on....., a pregnant woman, she being then and there pregnant of an unborn child, and then and there the mother of said unborn child, and said John Doe did then and there designedly administer to said pregnant woman a drug and medicine calculated to produce an abortion and did then and there thereby destroy the life of the embryo in the womb of said woman (or "cause a premature birth of the unborn child with which said woman was then and there pregnant"), and on the.....day of..... A. D.....in said county and State, said woman did then and there die, and the death of said mother was then and there occasioned by said abortion so produced by the said John Doe as aforesaid, and so the grand jury aforesaid do present that said John Doe did then and there in the manner and by the means aforesaid of his malice aforethought kill and murder said.....

Against the peace and dignity of the State.

.....

Foreman of the grand jury.

Sec. 1828. **Murder by attempting to effect an abortion—Form for indictment.** 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 John Doe on the.....day of.....A. D..... in said county and State did attempt to produce and effect an abortion on....., a pregnant woman, and the said John Doe did then and there designedly administer to said woman a drug and medicine calculated to produce an abortion with the intent and purpose then and there to destroy the life of the unborn child in the womb of said woman (or "with the intent and purpose then and there to cause a premature birth of the unborn child with which said woman was then and there pregnant"), and which said means were then and there calculated to produce that result, and the means so used then and there by the said John Doe did fail to produce and effect the abortion of said woman as intended and attempted as aforesaid, and on the.....day of.....A. D.....in said county and State, the said .....the mother of said unborn child, did die, and the death of said mother was then and there occasioned by the said attempt of said John Doe as aforesaid to produce and effect an abortion on said mother as aforesaid, and so the grand jury aforesaid do present that said John Doe did then and there in the manner and by the means aforesaid of his malice aforethought kill and murder said.....

Against the peace and dignity of the State.

.....

Foreman of the grand jury.

Sec. 1829. **Evidence.**—A post-morten examination of the uterus, in order to afford anything like a satisfactory result, must be soon after the death of the mother and before the parts have become decomposed. Wilson v. State, 41 Texas Crim. Rep. 183; 53 S. W. 122.

The fact that defendant was the father of the unborn child cannot be proved by the dying declaration of the mother, unless defendant stated that he was its father while he was inflicting the injuries. Ex parte Fatheree, 34 Texas Crim. Rep. 595; 31 S. W. 403.

Before the statute was passed abolishing the degrees of murder, it was held that it was not murder in the first degree *per se* if the death of the mother was occasioned by an abortion, and that to sustain a verdict for murder in the first degree the evidence must establish that the homicide was upon express malice. Ex parte Fatheree, 34 Texas Crim. Rep. 595; 31 S. W. 403.

Where the State shows that defendant went to the place where it was claimed an abortion was produced, it is error to exclude proof of acts and conversations explaining the visit and showing that it was for another purpose. Jackson v. State, 55 Texas Crim. Rep. 85; 115 S. W. 262.

Evidence held insufficient to show that the death of the mother was caused by an abortion. Wilson v. State, 41 Texas Crim. Rep. 179; 53 S. W. 122, or that defendant inserted the instrument, Wilson v. State, 58 S. W. 1009.

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Sec. 1830. **Charge of court.**—Where there were three circumstances which might have produced the abortion either of which would entitle defendant to an acquittal, and the court charged on two but ignored the proof that deceased had made an experiment with a hat-pin, the omission to submit such defensive theory is error. Jackson v. State, 55 Texas Crim. Rep. 86; 115 S. W. 262.

The court should not charge on alibi when that issue is not raised by the testimony. Jackson v. State, 55 Texas Crim. Rep. 88; 115 S. W. 262.

Art. 1075. (645) **Destroying unborn child.**—If any person shall, during parturition of the mother, destroy the vitality or life in a child, in a state of being born, and before actual birth, which child would otherwise have been born alive, he shall be punished by confinement in the penitentiary for life, or any period not less than five years, at the discretion of the jury.

Sec. 1831. **Form for indictment.**

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 John Doe on the.....day of.....A. D..... in said county and State, did with malice aforethought destroy the vitality and life in a child then and there in a state of being born and before actual birth and during the parturition of.....the mother of said child, and which child would then and there otherwise have been born alive, and the said John Doe did then and there so destroy the vitality and life in said child by then and there stabbing the said child with a knife, and by then and there choking and strangling it to death, and by then and there striking it with his hand and fist, and by ways and means to the grand jurors unknown.

Against the peace and dignity of the State.

.....

Foreman of the grand jury.

Sec. 1832. **Indictment.**—The instrument or means used in destroying the vitality or life in the child should be alleged. State v. Rupe, 41 Texas 33.

It is not necessary to allege that the life of the child was not destroyed by the advice of a physician in order to save the life of its mother. State v. Rupe, 41 Texas 33.

Sec. 1833. **Evidence.**—Under the statute, article 1075 (645), the evidence is insufficient to sustain a conviction if it fails to show that the child was in a state of being born at the time of the destruction of its vitality or life, and that during the parturition of its mother and before actual birth its vitality or life was destroyed, and that but for the destruction of its vitality or life it would have been born alive. Evans v. State, 48 Texas Crim. Rep. 589; 89 S. W. 974. Hardin v. State, 52 Texas Crim. Rep. 238; 106 S. W. 352.

Art. 1076. (646) **Not punishable when procured by medical advice.**—Nothing contained in this chapter shall be deemed to apply to the case of an abortion procured or attempted to be procured by medical advice for the purpose of saving the life of the mother.

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CHAPTER X

ADMINISTERING POISONOUS AND INJURIOUS POTIONS

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Article 1077. (647) **Poisoning food, well, etc.**—If any person shall mingle or cause to be mingled any other noxious potion or substance with any drink, food or medicine, with intent to kill or injure any other person, or shall wilfully poison or cause to be poisoned any spring, well, cistern or reservoir of water with such intent, he shall be punished by imprisonment in the penitentiary not less than two nor more than ten years.

Sec. 1834. **Statute construed.**—Article 1077 (647) of the Penal Code is sufficiently definite to make the acts therein named a penal offense. Runnels v. State, 45 Texas Crim. Rep. 446; 77 S. W. 458.

The term "any other noxious potion or substance" as used in article 1077 (647) of the Penal Code is a broader term than "poison," and embraces any poison, or any hurtful or baneful liquid, or any solid of a hurtful or baneful character. Runnels v. State, 45 Texas Crim. Rep. 446; 77 S. W. 458.

If the noxious potion was mingled with the drink with intent to injure, the offense is made out although it did not accomplish the result intended. Davis v. State, 4 Texas Crim. App. 458. Runnels v. State, 45 Texas Crim. Rep. 446; 77 S. W. 458.

Simple syrup is a "drink," within the meaning of article 1077 (647) of the Penal Code, when the evidence shows that it was being prepared to be used with other ingredients as a drink. Runnels v. State, 45 Texas Crim. Rep. 446; 77 S. W. 458.

If by reason of mingling any noxious potion or substance with food or drink with intent to kill or injure the death of a person be caused within one year, the offender is deemed guilty of murder, but if death is not so caused the offense is not an assault with intent to murder. Garnet v. State, 1 Texas Crim. App. 605.

Sec. 1835. **Poisoning drink or food—Form for indictment.**

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

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at said term do present that John Doe on the.....day of.....A. D..... in said county and State, did mingle and cause to be mingled a noxious potion (or "substance"), to wit, croton oil (or "strychnine" or whatever it was) with a drink (or "food" or "medicine") to wit, coffee (or "milk" or whatever it was) with the intent then and there to kill and injure.....and other persons to the grand jury unknown.

Against the peace and dignity of the State.

.....

Foreman of the grand jury.

Sec. 1836. **Poisoning spring, well, cistern or reservoir—Form for indictment.** 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 John Doe on the.....day of.....A. D..... in said county and State, did put a noxious substance, to wit, a poison known as strychnine (or "the carcass of a dead dog" or whatever it was) into the spring (or "well" or "cistern" or "reservoir of water") of.....near the private residence there situate of said.....who with his family, as the said John Doe then and there well knew, were in the habit of using said water for drinking and cooking purposes, and the said John Doe did then and there and thereby poison and cause to be poisoned the said spring (or "well," etc.) with the intent then and there to kill and to injure the said.....and his family and other persons to the grand jury unknown.

Against the peace and dignity of the State.

.....

Foreman of the grand jury.

Sec. 1837. **Indictment.**—Indictment for mingling poison with coffee held good. Davis v. State, 4 Texas Crim. App. 458.

An indictment for the offense of mingling any noxious potion or substance with drink, food or medicine, with intent to kill or injure any other person, need not use the term "wilfully," that term not being a part of the statutory definition. Davis v. State, 4 Texas Crim. App. 458.

Art. 1078. (648) **Causing another to inhale injurious substances.** —If any person shall, with intent to injure, cause another person to inhale, or swallow any substance injurious to health, or any of the functions of the body, or if such substance was administered with intent to kill, he shall be punished by confinement in the penitentiary not less than two nor more than five years. (Act Feb. 12, 1858, p. 172.)

Sec. 1838. **Causing another to inhale injurious substance—Form for indictment.**

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 John Doe on the ..... day of ..... A. D. ....., in said county and State, did cause ..... to involuntarily inhale a substance injurious to health and the functions of the body, to wit (here state what it was), with the intent then and there to injure and kill the said .....

Against the peace and dignity of the State.

.....

Foreman of the grand jury.

Sec. 1839. **Attempt to poison—Form for indictment.**

In the name and by the 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 John Doe on the ..... day of ..... A. D. ....., in said county and State, did then and there cause ..... to swallow a substance injurious to health and the functions of the body, to wit, the said John

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Doe did then and there cause the said ..... to swallow a poison known as strychnine (or whatever it was), which was then and there mingled with coffee (or whatever it was), the said John Doe then and there well knowing that the said substance was mingled with said drink (or "medicine" or whatever it was) and the said ..... not knowing that it contained such substance and the said John Doe did then and there cause the said ..... to swallow said substance with the intent then and there to injure and kill the said .....

Against the peace and dignity of the State.

.....

Foreman of the grand jury.

Sec. 1840. **Evidence.**—Where a large quantity of croton oil was mingled with coffee it is competent to permit a physician to testify as to what would be the effect of croton oil in large quantities. Davis v. State, 4 Texas Crim. App. 456.

When a witness is attacked by proof that he made statements contradictory of material testimony given by him on the trial, he may be sustained by proof of his good general reputation for truth. Runnels v. State, 45 Texas Crim. Rep. 450; 77 S. W. 458.

The State may prove facts going to show a motive for the attempt to poison, if such proof has any logical connection with the attempt. Ellington v. State, 48 Texas Crim. Rep. 160; 87 S. W. 153.

When defendant is on trial for an attempt to poison his wife it may be shown that she owned separate property and that he had tried to get her to make a will in his favor, if proof of these facts would tend to show motive. Ellington v. State, 48 Texas Crim. Rep. 160; 87 S. W. 153.

Proof of a disconnected incident which sheds no light upon the issue, but could only serve to prejudice the jury against defendant should not be admitted. Runnels v. State, 45 Texas Crim. Rep. 446; 77 S. W. 458. Miller v. State, 144 S. W. 239.

There must be some testimony of a tangible character tending to connect defendant with an isolated circumstance before proof of it is admissible against him. Runnels v. State, 45 Texas Crim. Rep. 446; 77 S. W. 458.

Proof of subsequent disconnected matters which could shed no light upon whether or not defendant was guilty is not admissible in evidence. Miller v. State, 144 S. W. 239.

The divorced wife or husband of defendant is not competent to testify as to a confidential communication made while the marriage relation existed between them. Miller v. State, 144 S. W. 239.

The error in admitting illegal testimony is not cured by restricting it to certain purposes in the charge of the court. Miller v. State, 144 S. W. 239.

Sec. 1841. **Charge of the court.**—It is neither necessary nor proper to charge the law as to assault with intent to murder when the allegation relied on is poisoning food or drink. Garnet v. State, 1 Texas Crim. App. 605.

If the evidence that defendant "mingled" the poison with the food or drink is wholly circumstantial, the court should charge the jury on circumstantial evidence. Runnels v. State, 45 Texas Crim. Rep. 446; 77 S. W. 458.

In doubtful cases the court should give a charge informing the jury that the burden of proof is upon the State to show that defendant mingled the poison with the drink. Miller v. State, 144 S. W. 239.

When only one count of the indictment is submitted to the jury the abandoned counts are eliminated should circumstances require a subsequent trial. Miller v. State, 144 S. W. 239.

Where the allegation in the indictment is that defendant did mingle the noxious potion with intent to kill and injure two named persons, it is not error in charging the jury to submit the intent as to only one of the persons named. Terry v. State, 62 Texas Crim. Rep. 73; 136 S. W. 485.

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A charge does not assume that defendant mingled the poison with the drink when the jury are required to find beyond a reasonable doubt before they could convict that defendant did mingle it with the drink and that after so mingling it, did, with intent to injure, cause the injured party to drink it. Ellington v. State, 48 Texas Crim. Rep. 160; 87 S. W. 153.

The court is not required to charge the jury that they cannot convict defendant on confessions alone when the *corpus delicti* is proven independently of his confession. Ellington v. State, 48 Texas Crim. Rep. 160; 87 S. W. 153.

A charge is correct when supported by allegation and proof, which informs the jury that if defendant mingled strychnine in simple syrup, and that the same was a drink, and that said strychnine was a noxious potion or substance, with intent to injure or kill persons whose names were to the grand jurors unknown, etc., to find him guilty, although in fact he did not mingle enough strychnine with the syrup to injure or kill any person. Runnels v. State, 45 Texas Crim. Rep. 446; 77 S. W. 458.

Art. 1079. (649 (544) **Death within a year, murder.**—If by reason of the commission of the offenses named in the two preceding articles, the death of a person be caused within one year, the offender shall be deemed guilty of murder and be punished accordingly. (O. C. 539.)

Sec. 1842. **Murder by poisoning.**
Sec. 1843. Form of indictment.
Sec. 1844. Indictment.
Sec. 1845. Proof of means used.
Sec. 1846. Cause of death.
Sec. 1847. Declarations of deceased.
Sec. 1848. Evidence.
Sec. 1871. Circumstantial evidence.
Sec. 116. Letters as evidence.
Sec. 130. Imputing the crime to another.
Sec. 1849. Convictions sustained.
Sec. 1850. Charge of the court.

Sec. 1843. **Form of indictment for murder by poison.**
In the name and by the 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 John Doe on the ..... day of ..... A. D. ..... in said county and State, did then and there with malice aforethought kill ..... by poison, to wit, the said John Doe did then and there mingle and cause to be mingled a certain noxious potion (or "substance") to wit, croton oil (or "strychnine" or whatever it was) with a drink (or "food," or "medicine") to wit, coffee (or "milk" or "quinine" or whatever it was) with the intent then and there to injure and kill the said ....., he, the said John Doe, then and there well knowing that the said ..... would take and swallow the said poisoned drink (or "food" or "medicine"), then and there intending that the said ..... should do so, and the said ..... did then and there, not knowing that the said drink (or "food" or "medicine") was so poisoned, take and swallow the same, and the said ....., of the poison aforesaid, so mingled in the said drink (or "food" or "medicine") as aforesaid, and by him (or "her") swallowed as aforesaid did on the ..... day of ..... A. D. ..... in the county and State aforesaid, die.

And the grand jury aforesaid in and to said court do further present that John Doe on the ..... day of ..... A. D. ..... in said county and State did then and there with malice aforethought kill ..... by poison, to wit, the said John Doe did then and there cause the said ..... to swallow a substance injurious to health and the functions of the body, to wit, the said John Doe did then and there cause the said ..... to swallow a poison known as strychnine (or "arsenic," or whatever it was) which was then and there

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mingled with coffee (or "water," or whatever it was, if anything), the said John Doe then and there well knowing that the said substance was mingled with said drink (or "medicine," or whatever it was, if anything) and the said ..... not knowing that it contained such substance, and the said John Doe did then and there cause the said ..... to swallow said substance with the intent then and there to injure and kill the said ....., and the said ..... of the substance aforesaid, and by him (or "her") swallowed as aforesaid did on the ..... day of ..... A. D. ....., in the county and State aforesaid, die.

Against the peace and dignity of the State.

.....
Foreman of the grand jury.

(Morrison v. State, 40 Texas Crim. Rep. 487; 51 S. W. 360.)

Sec. 1844. **Indictment for murder by poison.**—An indictment for murder by poison need not in terms allege that the act was "unlawfully" done. Morrison v. State, 40 Texas Crim. Rep. 488; 51 S. W. 361.

An indictment for murder by poisoning need not allege that the poison charged to have been administered was in quantities sufficient to produce death. Marshall v. State, 5 Texas Crim. App. 275. Morrison v. State, 40 Texas Crim. Rep. 488; 51 S. W. 361.

If it is alleged that the noxious potion or substance was "poison," it is not necessary to allege in terms that it was deadly, either in its nature or quantity. Morrison v. State, 40 Texas Crim. Rep. 488; 51 S. W. 361.

An indictment for murder by poisoning need not allege how much of the poison was taken. Morrison v. State, 40 Texas Crim. Rep. 488; 51 S. W. 361.

An indictment for murder by poisoning is bad if it fails to negative the idea that deceased voluntary took the poison or that it was taken by deceased without knowledge as to what it was or its deadly effect, unless it is alleged that it was administered by force, threats or fraud. Sanders v. State, 54 Texas Crim. Rep. 102; 112 S. W. 68.

Sec. 1845. **Proof of means used.**—The manner of the administration of the poison is not descriptive of the offense and need not be proven strictly as alleged. In proving the means used in committing a murder only the substance of the issue need be proven. Johnson v. State, 29 Texas Crim. App. 152; 15 S. W. 647.

An allegation that the murder was committed by means of poison mingled with water in a bucket is supported by proof that it was caused by means of poison mingled with coffee in a kettle. Johnson v. State, 29 Texas Crim. App. 152; 15 S. W. 647.

Sec. 1846. **Cause of death.**—The proof in order to support a conviction for murder alleged to have been committed by poisoning must show that deceased came to his death by poisoning. Heacock v. State, 13 Texas Crim. App. 97. Wilson v. State, 41 Texas Crim. Rep. 179; 53 S. W. 122.

The cause of death may be proven by circumstantial evidence and without the aid of expert testimony. Johnson v. State, 29 Texas Crim. App. 153; 15 S. W. 647.

It is not essential that a chemical analysis of the stomach of the deceased should have been made in order to ascertain whether or not death was caused by poison if death by poison is clearly and satisfactorily proved by other evidence. Johnson v. State, 29 Texas Crim. App. 153; 15 S. W. 647.

If the expert chemist who testifies to the result of his examination of the contents of the stomach of deceased is unable to identify the stomach examined by him as being the stomach of the deceased, the identification may be made by other competent witnesses. Johnson v. State, 20 Texas Crim. App. 187.

Sec. 1847. **Declarations of deceased.**—The dying declarations of deceased or her declarations which are a part of the *res gestæ* may be admitted in evidence for the State although she was the wife of the accused. Johnson v. State, 30 Texas

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Crim. App. 420; 17 S. W. 1070. Rice v. State, 54 Texas Crim. Rep. 149; 112 S. W. 229.

When it becomes necessary to prove the mental or physical condition of the deceased, the State may prove her declarations as to her mental or physical condition. Johnson v. State, 30 Texas Crim. App. 420; 17 S. W. 1070. Morrison v. State, 40 Texas Crim. Rep. 491; 51 S. W. 358.

Proof of a statement of deceased that defendant had put something in the drink, which statement is not a part of the *res gestæ* nor a part of a dying declaration, is not admissible when made in the absence of defendant. Orner v. State, 143 S. W. 937.

Sec. 1848. **Evidence.**—When defendant is on trial for the murder of his wife by poison, the State may prove that he was restless and indifferent while in the presence of his suffering wife who was dying from poison. Rice v. State, 54 Texas Crim. Rep. 159; 112 S. W. 229.

Sec. 1849. **Convictions sustained.**—Convictions for murder by poison were sustained on appeal in the following cases. Johnson v. State, 20 Texas Crim. App. 178. Carlisle v. State, 37 Texas Crim. Rep. 108; 38 S. W. 991. Hamlin v. State, 39 Texas Crim. Rep. 579; 47 S. W. 656. Bailey v. State, 144 S. W. 996.

Convictions of defendant for the murder of his wife by poison were sustained on appeal in the following cases. Roe v. State, 25 Texas Crim. App. 33; 8 S. W. 463. Morrison v. State, 40 Texas Crim. Rep. 473; 51 S. W. 358. Speights v. State, 41 Texas Crim. Rep. 323; 54 S. W. 595. Rice v. State, 54 Texas Crim. Rep. 149; 112 S. W. 229.

Sec. 1850. **Charge of the court.**—The charge should define the term "malice aforethought." Tooney v. State, 5 Texas Crim. App. 191.

The charge of the court should require the jury to find that the homicide was committed with malice aforethought. Hamlin v. State, 39 Texas Crim. Rep. 605; 47 S. W. 656.

If the issue is simply whether the homicide was a murder by poison or that defendant was guilty of no offense it is not error to fail to charge on murder with implied malice. Bailey v. State, 144 S. W. 996.

A charge submitting the theory that another may have committed the murder was held correct in Bailey v. State, 144 S. W. 996.

The court should not charge on the theory that the poison was administered with the intent to rob if there is no allegation of such intent. Tooney v. State, 5 Texas Crim. App. 192.

The charge should follow the allegations in the indictment with respect to the intent with which the poison was administered. Tooney v. State, 5 Texas Crim. App. 192.

When there is no testimony to support such theory, it is error to authorize a conviction on the theory that deceased took the poison believing it to be a medicine. Sanders v. State, 54 Texas Crim. Rep. 109; 112 S. W. 68.

If the purpose of defendant was to commit a felony and he knowingly administered poison to his victim, the crime is murder and the court is not called on to charge the jury that if his purpose was only to stupefy it would not be murder. Rupe v. State, 42 Texas Crim. Rep. 493; 61 S. W. 929.

If there is evidence to support the theory that deceased took the poison voluntarily—that is, committed suicide—defendant is entitled to an affirmative charge on this theory. Bennett v. State, 39 Texas Crim. Rep. 652; 48 S. W. 68. Sanders v. State, 54 Texas Crim. Rep. 101; 112 S. W. 68.

It is error to authorize a conviction on the theory that defendant furnished the means and that deceased knowing the deadly nature of the means committed suicide; however, if defendant administered the poison himself, though at the request of

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deceased, it would not be suicide. Grace v. State, 44 Texas Crim. Rep. 195; 69 S. W. 529. Sanders v. State, 54 Texas Crim. Rep. 105; 112 S. W. 68.

If the allegation is that defendant mingled poison with a drink a charge is erroneous if it authorizes the conviction of defendant without requiring the jury to find that he mingled the poison with the drink. Brooks v. State, 42 Texas Crim. Rep. 347; 60 S. W. 53.

If there is evidence that deceased may have been poisoned from other sources or by other means than defendant the charge should affirmatively submit this theory. Orner v. State, 143 S. W. 938.

Art. 1080. (650) (545) **Malpractice punishable.**—If any person engaged in the practice of medicine and claiming to be a physician, shall, by the use of any noxious substance, administered in a grossly ignorant manner, produce death, or other great bodily injury, he shall be punished for the offense as any other person would be who had given such substance knowing it to be injurious and intending to kill or injure. (O. C. 540.)

CHAPTER XI

HOMICIDE

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Article 1081. (651) (546) **"Homicide" defined.**—"Homicide" is the destruction of the life of one human being by the act, agency, procurement, or culpable omission of another. (O. C. 541.)

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Art. 1082. (652) (547) **Destruction of life must be complete.**—The destruction of life must be complete by such act, agency, procurement or omission; but although the injury which caused death might not under other circumstances have proved fatal, yet if such injury be the cause of death, without its appearing that there has been any gross neglect or manifestly improper treatment of the person injured, it is homicide. (O. C. 542.)

Art. 1083. (653) (548) **Foregoing article refers to acts of others.**—The foregoing article, in what is said of gross neglect or improper treatment, has reference to the acts of some person other than him who inflicts the first injury, as of the physician, nurse or other attendant. If the person inflicting the injury which makes it necessary to call aid in preserving the life of the person injured shall wilfully fail or neglect to call such aid, he shall be deemed equally guilty as if the injury were one which would inevitably lead to death. (O. C. 543.)

Sec. 1851. **Cause of death.**—The opinion of medical experts as to the cause of the death is always admissible when such cause is involved in doubt and there were no witnesses to the occurrence. Shelton v. State, 34 Texas 663. Powell v. State, 13 Texas Crim. App. 254. Lovelady v. State, 14 Texas Crim. App. 559.

The cause of the death may be proved by circumstantial evidence and without the aid of expert testimony. Johnson v. State, 29 Texas Crim. App. 153; 15 S. W. 647. Thompson v. State, 38 Texas Crim. Rep. 339; 42 S. W. 974. Lucas v. State, 155 S. W. 527.

If there is no evidence of any other cause for the death than the act of the slayer, and his act is sufficient to either cause death or to produce a disease that caused the death, then the slayer is responsible for the death. Powell v. State, 13 Texas Crim. App. 244. Thompson v. State, 38 Texas Crim. Rep. 339; 42 S. W. 976. Scott v. State, 47 S. W. 531. Franklin v. State, 41 Texas Crim. Rep. 21; 51 S. W. 951 (deceased refused to have his leg amputated). Outley v. State, 99 S. W. 95. Lahue v. State, 51 Texas Crim. Rep. 159; 101 S. W. 1008. Vela v. State, 62 Texas Crim. Rep. 361; 137 S. W. 120.

After a doctor has testified as to the cause of the death, he is not entitled to testify that the other doctors present at the examination concurred in his opinion; this is hearsay. Morgan v. State, 16 Texas Crim. App. 621.

Though the wound was not probed, the result and effect thereof may be sufficiently manifested by the fact that, coincident with its infliction, the deceased, who was up to that time in good health, immediately fell and died within a short time. Thompson v. State, 38 Texas Crim. Rep. 335; 42 S. W. 974. Armstrong v. State, 50 Texas Crim. Rep. 26; 96 S. W. 15.

If deceased was suffering from a disease or a wound and defendant's shot or blows hastened the death of deceased, defendant would be responsible for the death. An accused cannot speculate as to how long his victim may live with an incurable disease or mortal wound when he inflicts a wound that hastens the death or the action of the fatal disease. Powell v. State, 13 Texas Crim. App. 244. Gardner v. State, 44 Texas Crim. Rep. 572; 73 S. W. 13. Garner v. State, 45 Texas Crim. Rep. 310; 77 S. W. 797. Duque v. State, 56 Texas Crim. Rep. 214; 119 S. W. 687. Maddox v. State, 173 S. W. 1026.

Under ordinary circumstances, if a person is struck by one party, but death is caused by an independent act of another without concert with the first party, the second and not the first party will be held responsible for the death. Ware v. State, 41 Texas Crim. Rep. 417; 55 S. W. 342. Duque v. State, 56 Texas Crim. Rep. 214; 119 S. W. 687.

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Where deceased was struck several blows with a club and his assailant was pulled away, and then defendant picked up the club and while deceased was still alive struck him several blows, the conviction of defendant for murder was sustained. Duque v. State, 56 Texas Crim. Rep. 214; 119 S. W. 687.

Sec. 1852. **Charge on cause of death.**—If there is evidence that deceased did not die from the act of defendant and that defendant was not the agent that caused the complete destruction of his life, the court should charge the jury affirmatively on this issue. Morgan v. State, 16 Texas Crim. App. 593. Liskosski v. State, 23 Texas Crim. App. 169; 3 S. W. 96. Johnson v. State, 43 Texas Crim. Rep. 283; 65 S. W. 92. Garner v. State, 45 Texas Crim. Rep. 310; 77 S. W. 797. Armsworthy v. State, 48 Texas Crim. Rep. 418; 88 S. W. 215. Noble v. State, 54 Texas Crim. Rep. 436; 113 S. W. 281.

If the disease that caused the death of deceased was produced by the injuries inflicted by defendant and there is no issue of a supervening cause for the death or of negligence of a physician or others, it is not error to fail to charge the jury that if they have a reasonable doubt as to whether the wound inflicted upon deceased caused his death they should acquit the defendant of murder. Williams v. State, 2 Texas Crim. App. 282. Hart v. State, 15 Texas Crim. App. 231. Wood v. State, 31 Texas Crim. Rep. 571; 21 S. W. 602. Smith v. State, 33 Texas Crim. Rep. 513; 27 S. W. 137. Outley v. State, 99 S. W. 95. Lahue v. State, 51 Texas Crim. Rep. 159; 101 S. W. 1008. Paschal v. State, 174 S. W. 1060.

If the testimony raises the issue that the death of deceased may have been caused from some other means than from the injuries inflicted by the defendant, an affirmative charge on that issue should be given. Morgan v. State, 16 Texas Crim. App. 593. Garner v. State, 45 Texas Crim. Rep. 310; 77 S. W. 797. Noble v. State, 54 Texas Crim. Rep. 436; 113 S. W. 281. Betts v. State, 57 Texas Crim. Rep. 389; 124 S. W. 425.

It is error to authorize a conviction on the theory that the death resulted from a cause which is not shown by the testimony to be the cause of the death. Betts v. State, 57 Texas Crim. Rep. 389; 124 S. W. 424.

Sec. 1853. **Wounds.**—The opinion of a physician is admissible as to the probable cause, nature, effect and consequence of a wound, and the extent of the injury. Waite v. State, 13 Texas Crim. App. 180. Banks v. State, 13 Texas Crim. App. 182. Powell v. State, 13 Texas Crim. App. 244. Lovelady v. State, 14 Texas Crim. App. 560. Kirk v. State, 37 S. W. 440. Henry v. State, 49 S. W. 97. Sebastian v. State, 41 Texas Crim. Rep. 250; 53 S. W. 875. Ozark v. State, 51 Texas Crim. Rep. 109; 100 S. W. 927. Hardin v. State, 51 Texas Crim. Rep. 562; 103 S. W. 401. Betts v. State, 60 Texas Crim. Rep. 634; 133 S. W. 251. Streight v. State, 62 Texas Crim. Rep. 453; 138 S. W. 746. Spates v. State, 62 Texas Crim. Rep. 532; 138 S. W. 395. Lacoume v. State, 143 S. W. 626. Williams v. State, 144 S. W. 626. Harris v. State, 148 S. W. 1076. Singleton v. State, 167 S. W. 46. Brown v. State, 174 S. W. 362. Chisom v. State, 179 S. W. 103.

A physician who has examined the wounds in question may testify as to their size, range, extent, and the position in the body. Stovall v. State, 53 Texas Crim. Rep. 36; 108 S. W. 699. Graves v. State, 58 Texas Crim. Rep. 42; 124 S. W. 678.

A physician, being an expert, may be permitted to testify that the side of the ear, the temple, and back of it, were places of tenderness, vital spots and that it was dangerous to receive a blow there. Sebastian v. State, 41 Texas Crim. Rep. 250; 53 S. W. 875.

Testimony of a physician that a person whose jugular vein was severed could not be moved fifteen feet without leaving traces of blood is admissible. Pilot v. State, 38 Texas Crim. Rep. 519; 43 S. W. 1024. Simmons v. State, 55 Texas Crim. Rep. 446; 117 S. W. 141.

A physician may be permitted to testify as to how soon and how much a person wounded would bleed, and as to how far he could travel or be moved with or without showing signs of blood. Pilot v. State, 38 Texas Crim. Rep. 519; 43 S. W. 1024. Simmons v. State, 55 Texas Crim. Rep. 446; 117 S. W. 141.

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If the opinion of the witness as to the manner in which the injuries were inflicted, though incompetent, did not and could not operate to the prejudice of defendant, its admission is not ground for reversal. Steagald v. State, 24 Texas Crim. App. 207; 5 S. W. 853.

A physician who did not see the transaction is not entitled to attempt to reproduce it before the jury by stating his opinion as to the position of the parties and the manner in which he thinks the injuries were received. Steagald v. State, 24 Texas Crim. App. 207; 5 S. W. 853. Williams v. State, 30 Texas Crim. App. 447; 17 S. W. 1071. Barnard v. State, 45 Texas Crim. Rep. 67; 73 S. W. 957. Cavaness v. State, 45 Texas Crim. Rep. 209; 74 S. W. 908. Pearson v. State, 56 Texas Crim. Rep. 611; 120 S. W. 1004.

A non-expert witness may testify to the fact that bruises were inflicted, and to their appearance when examined. Pilcher v. State, 32 Texas Crim. Rep. 560; 25 S. W. 24.

It is error to exclude proof that when the arm of deceased was placed on his hip the wounds on his arm and on his body were in line. Carson v. State, 57 Texas Crim. Rep. 394; 123 S. W. 592.

Any witness may testify that the bullet holes in the back of deceased were lower than the bullet holes in the breast. Balls v. State, 40 S. W. 801.

A non-expert witness is not entitled to state his theory of what caused a wound when he never saw the wound. Conde v. State, 33 Texas Crim. Rep. 10; 24 S. W. 415.

When a witness is shown to be familiar with shot guns and Winchesters, he may testify that a wound had the appearance of having been made with a shot gun or Winchester bullet. Morris v. State, 30 Texas Crim. App. 116; 16 S. W. 757.

A witness who made a test may testify that a knife found on the ground near deceased was so broad that it could not be made to enter the wound. Espinoza v. State, 165 S. W. 209.

Sec. 1854. **Proof of entry and exit of wound.**—A witness who has had experience in examining wounds may testify as to which wound was the place of entry or exit. Roe v. State, 55 Texas Crim. Rep. 130; 115 S. W. 593. Welch v. State, 57 Texas Crim. Rep. 111; 122 S. W. 884. Graves v. State, 58 Texas Crim. Rep. 42; 124 S. W. 678. Vines v. State, 148 S. W. 727. Roberts v. State, 156 S. W. 651.

A witness should not be permitted to give his opinion as to the place of entry or exit of a wound where the wounds have been tampered with and enlarged before the examination made by the witness. Roberts v. State, 156 S. W. 651.

Sec. 1855. **Clothing as evidence.**—It is permissible to introduce bloody clothing in evidence only when the introduction serves to illustrate some point or solve some question, or serves to throw light upon the matter connected with the proper solution of the case, and under no other circumstances; but whenever the introduction of such clothing would, in the light of the whole case, aid the jury in arriving at the very truth of the matter, the court should not hesitate to admit its production and exhibition. King v. State, 13 Texas Crim. App. 280. Thomas v. State, 45 Texas Crim. Rep. 115; 74 S. W. 36. Adams v. State, 48 Texas Crim. Rep. 460; 93 S. W. 116. Sue v. State, 52 Texas Crim. Rep. 126; 105 S. W. 804. Dobbs v. State, 54 Texas Crim. Rep. 555; 113 S. W. 924. Milo v. State, 59 Texas Crim. Rep. 202; 127 S. W. 1028. Canon v. State, 59 Texas Crim. Rep. 405; 128 S. W. 141. Williams v. State, 60 Texas Crim. Rep. 460; 132 S. W. 345. Williams v. State, 61 Texas Crim. Rep. 363; 136 S. W. 771. Jackson v. State, 63 Texas Crim. Rep. 358; 139 S. W. 1160. York v. State, 64 Texas Crim. Rep. 153; 142 S. W. 9. Welch v. State, 147 S. W. 577. Anderson v. State, 148 S. W. 804. Reagan v. State, 157 S. W. 483. Durfee v. State, 165 S. W. 180. Johnson v. State, 167 S. W. 737.

Articles of clothing worn by deceased, or by the party assaulted, at the time of the homicide or assault, may be introduced in evidence for the purpose of identification or for any other purpose tending to prove the case. Hubby v. State, 8 Texas Crim. App. 605. Early v. State, 9 Texas Crim. App. 485. King v. State, 13 Texas

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Crim. App. 280. Hart v. State, 15 Texas Crim. App. 202. Levy v. State, 28 Texas Crim. App. 209; 12 S. W. 596. Frizzell v. State, 30 Texas Crim. App. 56; 16 S. W. 751. Kidwell v. State, 35 Texas Crim. Rep. 265; 33 S. W. 342. Mitchell v. State, 38 Texas Crim. Rep. 185; 41 S. W. 816. Kugadt v. State, 38 Texas Crim. Rep. 693; 44 S. W. 989. Long v. State, 46 S. W. 640. Gregory v. State, 48 S. W. 578. Head v. State, 40 Texas Crim. Rep. 267; 50 S. W. 352. Barkman v. State, 41 Texas Crim. Rep. 109; 52 S. W. 73. Johnson v. State, 44 Texas Crim. Rep. 334; 71 S. W. 25. Boyd v. State, 50 Texas Crim. Rep. 141; 94 S. W. 1053. Clark v. State, 51 Texas Crim. Rep. 520; 102 S. W. 1136. Milo v. State, 59 Texas Crim. Rep. 202; 127 S. W. 1028. Canon v. State, 59 Texas Crim. Rep. 405; 128 S. W. 146. Williams v. State, 60 Texas Crim. Rep. 460; 132 S. W. 345. Jackson v. State, 63 Texas Crim. Rep. 358; 139 S. W. 1160. Anderson v. State, 148 S. W. 804. Peters v. State, 155 S. W. 212. Carter v. State, 170 S. W. 742.

If there is no question as to the location of the wounds and their effect and character, bloody clothing should not be exhibited to the jury if its admission and exhibition could only serve the purpose of inflaming the minds of the jury. Cole v. State, 45 Texas Crim. Rep. 232; 75 S. W. 527. Christian v. State, 46 Texas Crim. Rep. 50; 79 S. W. 562. Melton v. State, 47 Texas Crim. Rep. 455; 83 S. W. 822. Crenshaw v. State, 48 Texas Crim. Rep. 77; 85 S. W. 1147. Puryear v. State, 50 Texas Crim. Rep. 462; 98 S. W. 258. Williams v. State, 61 Texas Crim. Rep. 363; 136 S. W. 771. Lacoume v. State, 143 S. W. 626. Corley v. State, 155 S. W. 227.

A judgment of conviction will not be reversed because of the admission of bloody clothes if the lowest penalty was assessed. Long v. State, 48 Texas Crim. Rep. 179; 88 S. W. 203.

The fact that part of the clothing serves some useful or relevant purpose is no excuse for admitting the other parts which do not. Lucas v. State, 50 Texas Crim. Rep. 220; 95 S. W. 1055. Williams v. State, 61 Texas Crim. Rep. 363; 136 S. W. 771.

The clothing is sufficiently identified as that of deceased if the circumstances show no opportunity for fabrication. Kidwell v. State, 35 Texas Crim. Rep. 265; 33 S. W. 342. Head v. State, 40 Texas Crim. Rep. 267; 50 S. W. 352. Harris v. State, 148 S. W. 1074.

The bill of exceptions should show the circumstances under which the clothing was introduced in evidence. Spears v. State, 41 Texas Crim. Rep. 532; 56 S. W. 347.

Sec. 1856. **Maps, diagrams, and plats.**—Authenticated maps, plans, or diagrams of buildings and other objects and places which cannot be brought into court are admissible in evidence. Smith v. State, 21 Texas Crim. App. 305; 17 S. W. 471. Rodriquez v. State, 32 Texas Crim. Rep. 262; 22 S. W. 978. Carter v. State, 39 Texas Crim. Rep. 349; 46 S. W. 236. Reynolds v. State, 160 S. W. 364. Bullock v. State, 165 S. W. 199.

A plat made by deceased as a part of his dying declaration may be admitted in evidence. Grubb v. State, 43 Texas Crim. Rep. 75; 63 S. W. 314.

Sec. 1857. **Photographs.**—If a photograph would serve to illustrate any fact in the case or to shed light upon the transaction it is admissible in evidence, but it is not admissible if it is neither necessary or instructive and when it would only tend to inflame the minds of the jury to tend to create confusion. Monson v. State, 63 S. W. 649. Willis v. State, 49 Texas Crim. Rep. 145; 90 S. W. 1100. Young v. State, 49 Texas Crim. Rep. 213; 92 S. W. 843. Newcomb v. State, 49 Texas Crim. Rep. 557; 95 S. W. 1048. Lindsey v. State, 50 Texas Crim. Rep. 435; 98 S. W. 856. Powell v. State, 50 Texas Crim. Rep. 597; 99 S. W. 1005. Gibson v. State, 53 Texas Crim. Rep. 370; 110 S. W. 41. Sanchez v. State, 149 S. W. 126.

When the cause of death is an issue, it is competent to introduce in evidence in connection with the expert testimony a photograph of the head of deceased showing the condition of the brain after the removal of the skull at the autopsy, and which photograph, the experts testify, correctly represents the conditions which it purports to show. Monson v. State, 63 S. W. 649.

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Photographic copies of writings are admissible where the writing is shown to be in the possession of the opposite party and is not produced on proper notice. Grooms v. State, 40 Texas Crim. Rep. 329; 50 S. W. 370.

Sec. 1858. **Proof of means.**—The proof must show that deceased came to his death from the use of some—any or all—of the means alleged in the indictment. Treadwell v. State, 16 Texas Crim. App. 560. Lightfoot v. State, 20 Texas Crim. App. 98. Monk v. State, 27 Texas Crim. App. 458; 11 S. W. 460. Conde v. State, 33 Texas Crim. Rep. 13; 24 S. W. 415. Crenshaw v. State, 29 S. W. 787. Burt v. State, 38 Texas Crim. Rep. 440; 40 S. W. 1000. Medina v. State, 49 S. W. 380. Follis v. State, 46 Texas Crim. Rep. 202; 78 S. W. 1069.

The confession of defendant is not sufficient of itself to prove the means alleged to have been used in the commission of the offense. Follis v. State, 46 Texas Crim. Rep. 202; 78 S. W. 1069.

An allegation that the means used was "a gun" or "a pistol" is supported by proof of the use of any kind of firearm capable of inflicting the same character of wound. In proving the means used, only the substance of the issue need be proven. Douglass v. State, 26 Texas Crim. App. 109; 9 S. W. 489. Monk v. State, 27 Texas Crim. App. 450; 11 S. W. 460. Brown v. State, 43 Texas Crim. Rep. 293; 65 S. W. 529. Taylor v. State, 44 Texas Crim. Rep. 550; 72 S. W. 396. Lopez v. State, 166 S. W. 155. Chisom v. State, 179 S. W. 103.

(Other authorities will be found in the section entitled "Proof of means used" in chapter 2, Title 15, of this Penal Code.)

Sec. 1859. **Improper treatment.**—If there is evidence of improper treatment of deceased by a physician or other attendant, the court should charge affirmatively on this theory. Brown v. State, 38 Texas 482. Morgan v. State, 16 Texas Crim. App. 593. Johnson v. State, 43 Texas Crim. Rep. 283; 65 S. W. 92. Garner v. State, 45 Texas Crim. Rep. 308; 77 S. W. 797. McMillan v. State, 58 Texas Crim. Rep. 525; 126 S. W. 877.

If the issue is raised the court should charge the jury affirmatively that if the wound would not of itself have caused the death of deceased, but the death was caused by some disease superinduced by improper treatment or gross neglect, then defendant would not be responsible for the death. Johnson v. State, 43 Texas Crim. Rep. 283; 65 S. W. 92.

The neglect or improper treatment need not cause the death before defendant is relieved from responsibility of murder. Morgan v. State, 16 Texas Crim. App. 593.

The refusal of deceased to let his wounded leg be amputated does not necessarily prevent the case from being one of murder where the wound caused the death and there is no evidence of gross neglect or improper treatment. Franklin v. State, 41 Texas Crim. Rep. 25; 51 S. W. 951.

If there is evidence of gross neglect or improper treatment the court should charge on the issue of assault with intent to murder. Morgan v. State, 16 Texas Crim. App. 593. Noble v. State, 54 Texas Crim. Rep. 436; 113 S. W. 281.

If the charge of the court merely informs the jury that defendant would not be guilty of murder if his act did not cause the death of deceased, it is erroneous for failing to state of what offense he would be guilty if the injury was unlawfully inflicted by him. Morgan v. State, 16 Texas Crim. App. 593. Noble v. State, 54 Texas Crim. Rep. 436; 113 S. W. 281.

If a wound causes a disease which produces death and there is no evidence of gross neglect or improper treatment, the death is imputable to the wound. Powell v. State, 13 Texas Crim. App. 254. Hart v. State, 15 Texas Crim. App. 231. Morgan v. State, 16 Texas Crim. App. 593. Smith v. State, 33 Texas Crim. Rep. 517; 27 S. W. 137. Franklin v. State, 41 Texas Crim. Rep. 21; 51 S. W. 951. Outley v. State, 99 S. W. 95. Lahue v. State, 51 Texas Crim. Rep. 159; 101 S. W. 1011. Francis v. State, 170 S. W. 781.

The court is not required to charge on the issue of improper treatment if there is no evidence to support such theory, though some doctors say the wounds inflicted

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were not necessarily mortal. Wood v. State, 31 Texas Crim. Rep. 572; 21 S. W. 602. Outley v. State, 99 S. W. 95.

It is error to charge on the theory that deceased died from neglect or improper treatment at the hands of defendant when such issue is not in the case. Taylor v. State, 41 Texas Crim. Rep. 150; 51 S. W. 1106. Lee v. State, 44 Texas Crim. Rep. 462; 72 S. W. 195.

Sec. 1860. **Failure to call aid.**—A charge on the theory that defendant failed or neglected to call aid is erroneous if the evidence does not raise such issue. Ware v. State, 41 Texas Crim. Rep. 416; 55 S. W. 342. Lee v. State, 44 Texas Crim. Rep. 462; 72 S. W. 195.

If there is no evidence to support the theory, it is error to charge the statute in reference to the failure to call aid in preserving the life of the person injured, especially if the court fails to charge on manslaughter, assault with intent to murder, or any grade of assault. Taylor v. State, 41 Texas Crim. Rep. 150; 51 S. W. 1106.

Sec. 1861. **Dying declarations.**
Sec. 1862. Dying declarations.
Sec. 1863. Predicate.
Sec. 1864. Insufficient predicates.
Sec. 1865. Declarations not admissible though predicate be sufficient.
Sec. 1866. Dying declarations made in answer to questions.
Sec. 1867. Dying declarations reduced to writing.
Sec. 1868. Impeaching the dying declaration.
Sec. 1869. Dying declaration of a child.
Sec. 1870. Charge on dying declarations.

Sec. 1862. **Dying declarations.**—A dying declaration whether written or oral, when the proper predicate is laid, is admissible testimony, and does not violate any constitutional inhibition. Burrell v. State, 18 Texas 731. Black v. State, 1 Texas Crim. App. 384. Taylor v. State, 38 Texas Crim. Rep. 563; 43 S. W. 1019. Payne v. State, 45 Texas Crim. Rep. 564; 78 S. W. 934. Bennett v. State, 47 Texas Crim. Rep. 57; 81 S. W. 30. Brookins v. State, 158 S. W. 522.

A dying declaration is not rendered inadmissible because of the fact that eye-witnesses to the homicide testify. Lyles v. State, 48 Texas Crim. Rep. 121; 86 S. W. 763.

Non-experts may testify as to the sanity of declarant when he made the declarations. Lyles v. State, 48 Texas Crim. Rep. 121; 86 S. W. 763.

A witness unable to state the precise language may state the substance of the declaration. Roberts v. State, 5 Texas Crim. App. 149. Krebs v. State, 8 Texas Crim. App. 29.

Where part of a dying declaration is so interwoven with the narrative as its separation would destroy the sense, it may be admitted in evidence though not a statement of the circumstances of the homicide. West v. State, 7 Texas Crim. App. 155. Bennett v. State, 75 S. W. 317.

The name of the deceased may be proven by the dying declaration. Lister v. State, 1 Texas Crim. App. 742.

Venue may be proven by the dying declaration. Medina v. State, 43 Texas Crim. Rep. 53; 63 S. W. 331.

Sec. 1863. **Predicate.**—To render the dying declaration admissible for either party, it must first be satisfactorily proved: 1. That at the time of making such declarations he was conscious of approaching death and believed there was no hope of recovering. 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. Lister v. State, 1 Texas Crim. App. 740. Ledbetter v. State, 23 Texas Crim. App. 256; 5 S. W. 226. Craven v. State, 49 Texas Crim. Rep. 80; 90 S. W. 311.

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Before dying declarations are admissible in evidence, it is essential and is a preliminary fact to be proved by the party offering them that they were made under a sense of impending death, but it is not necessary that they should be stated at the time, to be so made. It is enough, if it satisfactorily appear in any mode, that they were made under that sanction; whether it be directly proved by the express language of the declarant, or be inferred from his evident danger, or the opinions of the medical or other attendants stated to him, or from his conduct or other circumstances of the case, all of which are resorted to, in order to ascertain the state of the declarant's mind. Hunnicutt v. State, 18 Texas Crim. App. 516. Cook v. State, 22 Texas Crim. App. 526; 3 S. W. 749. Miller v. State, 27 Texas Crim. App. 81; 10 S. W. 445. King v. State, 34 Texas Crim. Rep. 237; 29 S. W. 1086. Connell v. State, 46 Texas Crim. Rep. 261; 81 S. W. 746. Thomas v. State, 49 Texas Crim. Rep. 642; 95 S. W. 1069. Sims v. State, 36 Texas Crim. Rep. 165; 36 S. W. 256. Douglass v. State, 58 Texas Crim. Rep. 122; 124 S. W. 937. Johnson v. State, 149 S. W. 165. Christian v. State, 161 S. W. 101. Sorell v. State, 169 S. W. 299.

If the declarations were made under a consciousness of impending death without hope of recovery, the length of time deceased lived after making them appears to be immaterial. Fulcher v. State, 28 Texas Crim. App. 472; 13 S. W. 750. Crockett v. State, 45 Texas Crim. Rep. 280; 77 S. W. 4. Hunter v. State, 54 Texas Crim. Rep. 229; 114 S. W. 125. Brookins v. State, 158 S. W. 522. Francis v. State, 170 S. W. 779.

If the declarant had no hope of life it is immaterial what others thought or said. Brande v. State, 45 S. W. 18.

When deceased knew that he was dying, the mere fact that deceased continually asked the doctor to do something for him will not exclude his dying declaration. Hunnicutt v. State, 20 Texas Crim. App. 638. Beckham v. State, 176 S. W. 565.

When defendant is charged with the murder of his wife by poison, her declarations, if the proper predicate is laid, are not inadmissible on the ground that she was his wife. Rice v. State, 54 Texas Crim. Rep. 166; 112 S. W. 229.

Sec. 1864. **Insufficient predicates.**—A bill of exceptions taken to the supposed error in admitting proof of a dying declaration without laying the proper predicate to be sufficient must contain, and state it contains, all the predicate laid upon which the declaration was admitted, and must also set out the declaration. Highsmith v. State, 41 Texas Crim. Rep. 37; 50 S. W. 723. Edens v. State, 41 Texas Crim. Rep. 523; 55 S. W. 815. Hopkins v. State, 53 S. W. 621. Gutirrez v. State, 59 S. W. 274. Medina v. State, 43 Texas Crim. Rep. 52; 63 S. W. 331. Francis v. State, 170 S. W. 782.

The predicate is not sufficient if the proof fails to establish the fact that the declarant, at the time of making the declaration, was conscious of approaching death and believed there was no hope of recovery. Ledbetter v. State, 23 Texas Crim. App. 256; 5 S. W. 226. Phillips v. State, 50 Texas Crim. Rep. 129; 94 S. W. 1051. Meyers v. State, 33 Texas Crim. Rep. 204; 26 S. W. 196. Craven v. State, 49 Texas Crim. Rep. 81; 90 S. W. 311.

A sufficient predicate is not shown where the only statement of deceased indicating approaching death was his statement that he believed he was fatally shot. Craven v. State, 49 Texas Crim. Rep. 81; 90 S. W. 311.

The State must show that the declarant was under the "immediate apprehension of death," and it is not sufficient that the declarant believed she was going to die and would never get well, when the wounds were not necessarily fatal. Edmondson v. State, 41 Texas 500. Irby v. State, 25 Texas Crim. App. 214; 7 S. W. 705.

The predicate is insufficient where deceased merely assented to a question asking him if he realized he was in a critical condition, and where the evidence fails to show that he was then conscious of approaching death. Phillips v. State, 50 Texas Crim. Rep. 129; 94 S. W. 1051.

The predicate is insufficient if it fails to show that the declarant was of sane mind at the time of making the declaration. Ledbetter v. State, 23 Texas Crim. App. 256; 5 S. W. 226. Fatheree v. State, 34 Texas Crim. Rep. 595; 31 S. W. 403.

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Where the declarations had been reduced to writing, and the declarant then stated there were some immaterial alterations he wanted to make, but did not do it on account of weakness, the declarations are not admissible. Drake v. State, 25 Texas Crim. App. 312; 7 S. W. 868.

Sec. 1865. **Declarations not admissible though predicate be sufficient.**—Dying declarations are only admissible where the death of the declarant is the subject of the charge, and the circumstances of the death the subject of the dying declaration. Krebs v. State, 3 Texas Crim. App. 360. West v. State, 7 Texas Crim. App. 156. Radford v. State, 33 Texas Crim. Rep. 526; 27 S. W. 143. Craven v. State, 49 Texas Crim. Rep. 78; 90 S. W. 311. Jackson v. State, 63 Texas Crim. Rep. 351; 139 S. W. 1160. Hinton v. State, 144 S. W. 617.

A dying declaration is confined to the immediate facts of the homicide, and it is error to admit as a part of the dying declaration, statements of declarant as to what occurred on former occasions or meetings. Warren v. State, 9 Texas Crim. App. 629. Thomas v. State, 11 Texas Crim. App. 317. Wakefield v. State, 50 Texas Crim. Rep. 125; 94 S. W. 1046. Winfrey v. State, 41 Texas Crim. Rep. 538; 56 S. W. 919. Hinton v. State, 144 S. W. 617.

A statement by deceased of a distinct fact not connected with the circumstances of the death or the immediate cause of it is not admissible as a dying declaration, though competent and legal evidence if proved by any other competent witness. Barber v. State, 16 Texas Crim. App. 369. Winfrey v. State, 41 Texas Crim. Rep. 538; 56 S. W. 919.

Nothing is admissible in a dying declaration that would not be admissible were the declarant sworn as a witness. Roberts v. State, 5 Texas Crim. App. 141. Warren v. State, 9 Texas Crim. App. 629. Manley v. State, 62 Texas Crim. Rep. 392; 137 S. W. 1140. Drake v. State, 143 S. W. 1160. Sorell v. State, 169 S. W. 303.

The statement of declarant that he was "killed for nothing," or "shot without cause" is a shorthand rendering of the facts and not a mere opinion. Roberts v. State, 5 Texas Crim. App. 150. Pierson v. State, 21 Texas Crim. App. 59; 17 S. W. 468. Sims v. State, 36 Texas Crim. Rep. 165; 36 S. W. 256. Connell v. State, 46 Texas Crim. Rep. 261; 81 S. W. 746. Lockhart v. State, 53 Texas Crim. Rep. 593; 111 S. W. 1024. Craft v. State, 57 Texas Crim. Rep. 261; 122 S. W. 548. Gaines v. State, 58 Texas Crim. Rep. 631; 127 S. W. 185. Corbitt v. State, 163 S. W. 436.

A mere opinion, which the declarant would not be entitled to put in evidence were he alive and on the witness stand, is not admissible as a dying declaration. Warren v. State, 9 Texas Crim. App. 629. Williams v. State, 40 Texas Crim. Rep. 570; 51 S. W. 224. Bateson v. State, 46 Texas Crim. Rep. 45; 80 S. W. 88. Manley v. State, 62 Texas Crim. Rep. 392; 127 S. W. 1140. Drake v. State, 143 S. W. 1160. Sorell v. State, 169 S. W. 303.

If the statement of deceased is a shorthand rendering of the facts, as shown by the statement or the context, it is admissible though apparently an opinion. Sims v. State, 36 Texas Crim. Rep. 165; 36 S. W. 256. Connell v. State, 46 Texas Crim. Rep. 261; 81 S. W. 746. Lockhart v. State, 53 Texas Crim. Rep. 593; 111 S. W. 1024. Craft v. State, 57 Texas Crim. Rep. 261; 122 S. W. 548. Gaines v. State, 58 Texas Crim. Rep. 631; 127 S. W. 185. Lane v. State, 59 Texas Crim. Rep. 603; 129 S. W. 353.

As a part of the dying declaration, it is error to admit proof that the declarant said he forgave defendant, or to admit proof of the advice he gave his family, or to admit proof of other extraneous matters which could only serve to arouse the sympathies of the jury in favor of deceased, and against defendant. Bateson v. State, 46 Texas Crim. Rep. 45; 80 S. W. 88. Wilson v. State, 49 Texas Crim. Rep. 56; 90 S. W. 312. Rice v. State, 51 Texas Crim. Rep. 280; 103 S. W. 1156. Jackson v. State, 63 Texas Crim. Rep. 351; 139 S. W. 1160. Drake v. State, 143 S. W. 1160. Hays v. State, 164 S. W. 841. Sorrell v. State, 169 S. W. 303.

It is error to exclude part of the dying declaration which shows deceased did not know how the shooting occurred and to admit the remainder which makes out a case against defendant. Arnwine v. State, 50 Texas Crim. Rep. 258; 96 S. W. 4.

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Sec. 1866. **Dying declarations made in answer to questions.**—It is no objection to a dying declaration, otherwise admissible, that the same was made in answer to questions, if the interrogatories were not calculated to lead the deceased to make any particular statement. Hunnicutt v. State, 18 Texas Crim. App. 516. Pierson v. State, 18 Texas Crim. App. 562. White v. State, 30 Texas Crim. Rep. 655; 18 S. W. 462. Taylor v. State, 38 Texas Crim. Rep. 563; 43 S. W. 1019. Brande v. State, 45 S. W. 18. Grubb v. State, 43 Texas Crim. Rep. 75; 63 S. W. 314. Hunter v. State, 59 Texas Crim. Rep. 455; 129 S. W. 125. Ward v. State, 159 S. W. 277. Beckham v. State, 176 S. W. 565.

A declaration sought to be admitted as a dying declaration is not admissible if it was made in response to leading and suggestive question. Lockhart v. State, 53 Texas Crim. Rep. 592; 111 S. W. 1024.

Sec. 1867. **Dying declarations reduced to writing.**—An oral declaration made at the same time with those which were reduced to writing is not admissible. If reduced to writing, the writing is the best evidence. Adams v. State, 19 S. W. 907. Drake v. State, 25 Texas Crim. App. 312; 7 S. W. 868. Krebs v. State, 8 Texas Crim. App. 1.

If more than one statement is made, an oral statement is not rendered inadmissible because another declaration made at a different time was reduced to writing. Krebs v. State, 8 Texas Crim. App. 1. Hopkins v. State, 43 Texas Crim. Rep. 263; 64 S. W. 933. Francis v. State, 170 S. W. 779.

A written declaration may be supplemented by proof of declarations not reduced to writing. Herd v. State, 43 Texas Crim. Rep. 578; 67 S. W. 495. Ryan v. State, 64 Texas Crim. Rep. 628; 142 S. W. 880.

If deceased gives a version of what occurred at the time the fatal wound was received and it is reduced to writing, and afterwards, he, while of sane mind and while conscious of approaching death and without hope of recovery, refers to and approves the writing as corerct, it is admissible as a dying declaration. Snell v. State, 29 Texas Crim. App. 239; 15 S. W. 722. Bryant v. State, 35 Texas Crim. Rep. 397; 33 S. W. 978.

A written instrument not signed by deceased nor read over to him nor affirmed by him to be correct is not to be treated as a written instrument. It is then a mere memorandum. Hunter v. State, 59 Texas Crim. Rep. 460; 129 S. W. 125.

Sec. 1868. **Impeaching the dying declaration.**—Defendant is entitled to impeach the credit of the deceased when his oral or written dying declaration is admitted in evidence by proof of his having made statements inconsistent with such dying declaration as to the homicide and its cause. The same necessity which admits proof of a dying declaration dispenses with the necessity of a predicate when it is sought to impeach such declaration. Strickland v. State, 13 Texas Crim. App. 371. Felder v. State, 23 Texas Crim. App. 489; 5 S. W. 145. Hamblin v. State, 34 Texas Crim. Rep. 385; 30 S. W. 1075. Herd v. State, 43 Texas Crim. Rep. 578; 67 S. W. 495. Phillips v. State, 50 Texas Crim. Rep. 129; 94 S. W. 1051. McCorquodale v. State, 54 Texas Crim. Rep. 357; 98 S. W. 879. Hunter v. State, 59 Texas Crim. Rep. 453; 129 S. W. 125. Lyles v. State, 64 Texas Crim. Rep. 621; 142 S. W. 592.

A continuance should be granted for proof of material statements of deceased which contradict his dying declaration. Strickland v. State, 13 Texas Crim. App. 371. Phillips v. State, 50 Texas Crim. Rep. 129; 94 S. W. 1051.

It is not error to exclude testimony that deceased had made statements different from the dying declaration if the impeaching witness is unable to state the substance of the variant statements. Snell v. State, 29 Texas Crim. App. 239; 15 S. W. 722.

If the statement proposed to be introduced for impeachment, but which otherwise would not be admissible, is not inconsistent with the dying declaration in evidence, it is not error to exclude it. McCorquodale v. State, 54 Texas Crim. Rep. 357; 98 S. W. 879. Hunter v. State, 59 Texas Crim. Rep. 453; 129 S. W. 125.

Sec. 1869. **Dying declarations of a child.**—Where the proof shows that the deceased child would have been a competent witness at the time of the homicide, and

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the other demands of the statute are met, it is proper to admit the dying declaration of such child. Hunter v. State, 54 Texas Crim. Rep. 228; 114 S. W. 125. Hunter v. State, 59 Texas Crim. Rep. 439; 129 S. W. 125.

To show that the deceased child would have been a competent witness if alive, the State may show the competency, intelligence and the responsibility in moral conception of such witness. Hunter v. State, 59 Texas Crim. Rep. 439; 129 S. W. 125.

Sec. 1870. **Charge on dying declaration.**—When there is an issue in regard to the proper predicate for the admission of dying declarations, the charge should submit that as an issue of fact to be determined by the jury, with instructions to disregard such declarations if that issue is found favorable to defendant. Taylor v. State, 38 Texas Crim. Rep. 567; 43 S. W. 1019 (did and charge held correct). Brown v. State, 54 Texas Crim. Rep. 129; 112 S. W. 80. Jackson v. State, 55 Texas Crim. Rep. 84; 115 S. W. 262. Hunter v. State, 59 Texas Crim. Rep. 454; 129 S. W. 125 (did and charge was correct). Ward v. State, 159 S. W. 277 (did and charge held correct).

If there is testimony sufficient to show a proper predicate and testimony attacking its sufficiency, it is proper to submit the issue to the jury. Martinez v. State, 56 S. W. 58. McCorquodale v. State, 54 Texas Crim. App. 356; 98 S. W. 879. Hopkins v. State, 53 S. W. 621. Hunter v. State, 59 Texas Crim. Rep. 454; 129 S. W. 125.

If the testimony is conclusive as to the predicate being sufficient and there is no evidence attacking its sufficiency, there is no necessity to charge the jury that they must find that the declaration was made under the safeguards required by law. Highsmith v. State, 41 Texas Crim. Rep. 38; 50 S. W. 723. Connell v. State, 45 Texas Crim. Rep. 161; 75 S. W. 512.

It is not error to fail to require the jury to find that deceased had no hope of recovery if there is no evidence that there was any hope of recovery. Ward v. State, 159 S. W. 277.

Where there is doubt as to the mental status of the declarant, the court should guard this matter by an appropriate charge. Roberts v. State, 48 Texas Crim. Rep. 379; 88 S. W. 221.

Where a doctor declined to give a suffering girl any relief until he was told who had performed an abortion on her, and though she said she was dying, her cries were perhaps caused by her intense pain rather than a deliberate belief that death was impending, and this proof raised an issue as to the condition of her mind at the time as to being under duress or over-persuasion or not under sense of approaching death, and it is error to fail to charge the jury that if such was the case they should disregard her declarations. Jackson v. State, 55 Texas Crim. Rep. 82; 115 S. W. 262.

The charge of the court is on the weight of the evidence if it states that dying declarations are worthy of the same or more credit than other evidence. No eulogy on the subject is called for. Walker v. State, 37 Texas 385. Walker v. State, 42 Texas 371. Walker v. State, 13 Texas Crim. App. 639.

Sec. 1871. **Circumstantial evidence.**
Sec. 1872. Circumstantial evidence.
Sec. 1873. When charge should be given.
Sec. 1874. Charge need not be given.
Sec. 1875. Correct charges on circumstantial evidence.
Sec. 1876. Errors in charge on circumstantial evidence.
Sec. 1877. Sufficiency of.

Sec. 1872. **Circumstantial evidence.**—When a foul assassination has occurred and the circumstances attending and surrounding it are shrouded in mystery, the command of the law is, "turn on the light." Preston v. State, 8 Texas Crim. App. 33. Harris v. State, 31 Texas Crim. Rep. 415; 20 S. W. 916.

In cases depending wholly upon circumstantial evidence the mind seeks to explore every possible source from which any light, however feeble, may be derived. Noftsinger v. State, 7 Texas Crim. App. 322. Early v. State, 9 Texas Crim. App. 485.

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Simms v. State, 10 Texas Crim. App. 165. Bailey v. State, 144 S. W. 1005. Belcher v. State, 161 S. W. 459. Durfee v. State, 165 S. W. 182. Archer v. State, 168 S. W. 857. Gonzales v. State, 171 S. W. 1147. Hand v. State, 179 S. W. 1156.

When the evidence is wholly circumstantial every fact and circumstance reasonably calculated to illuminate the transaction should be permitted to go to and be weighed by the jury. Noftsinger v. State, 7 Texas Crim. App. 301. Bouldin v. State, 8 Texas Crim. App. 332. Washington v. State, 8 Texas Crim. App. 377. Simms v. State, 10 Texas Crim. App. 165. Bailey v. State, 144 S. W. 1005. Belcher v. State, 161 S. W. 459. Durfee v. State, 165 S. W. 182. Archer v. State, 168 S. W. 857.

Sec. 1873. **When the law of circumstantial evidence should be charged.**—In murder the main fact to be proved—the *factum probandum*—is that the accused inflicted the fatal wound, that he killed the deceased or acted together with the party who did, and if the **main fact** is proved as a matter of **inference** from other facts in evidence the case rests wholly, in a legal sense, upon circumstantial evidence, and a jury called to pass upon a case of that character should be informed by the charge of the court as to the nature of such evidence and as to the test provided by law to determine the sufficiency of circumstantial evidence. Harrison v. State, 6 Texas Crim. App. 42. Hunt v. State, 7 Texas Crim. App. 212. Harris v. State, 15 Texas Crim. App. 638. Conner v. State, 17 Texas Crim. App. 15. Riley v. State, 20 Texas Crim. App. 105. Puryear v. State, 28 Texas Crim. App. 73; 11 S. W. 929. Leftwich v. State, 34 Texas Crim. Rep. 489; 31 S. W. 385. Trijo v. State, 45 Texas Crim. Rep. 131; 74 S. W. 546. Early v. State, 50 Texas Crim. Rep. 344; 97 S. W. 82. Huddleston v. State, 156 S. W. 1168.

If it is only by a process of inference from the confession or admission that it can be determined that defendant did the killing or was a guilty participant therein, the court in a murder case should charge the jury as to the rules of law governing circumstantial evidence. Eckert v. State, 9 Texas Crim. App. 105. Harris v. State, 15 Texas Crim. App. 638. Trijo v. State, 45 Texas Crim. Rep. 131; 74 S. W. 546.

Though the proof shows that defendant was present at the scene of the homicide, but he denies guilty participation and there is no direct evidence that he aided in the killing, the court should charge on circumstantial evidence. Burrell v. State, 18 Texas 732. Early v. State, 50 Texas Crim. Rep. 344; 97 S. W. 82.

Sec. 1874. **Charge on circumstantial evidence not required.**—Where there is direct evidence from any source that defendant killed the deceased, a charge on circumstantial evidence is not required because the intent with which the homicide was committed is only to be inferred from circumstances. Russell v. State, 38 Texas Crim. Rep. 596; 44 S. W. 159. Alexander v. State, 40 Texas Crim. Rep. 407; 49 S. W. 229. Dobbs v. State, 51 Texas Crim. Rep. 629; 103 S. W. 918. Strickland v. State, 161 S. W. 110. Herrera v. State, 170 S. W. 719. Egbert v. State, 176 S. W. 561.

Proof that defendant admitted or confessed to having killed the deceased is direct and not circumstantial evidence of the main inculpatory fact, and a charge on circumstantial evidence is not required when proof of such admission or confession is in evidence. Heard v. State, 24 Texas Crim. App. 111; 5 S. W. 846. Smith v. State, 28 Texas Crim. App. 315; 12 S. W. 1104. White v. State, 32 Texas Crim. Rep. 625; 25 S. W. 784. Hedrick v. State, 40 Texas Crim. Rep. 536; 51 S. W. 252. Gantt v. State, 105 S. W. 799. Strickland v. State, 161 S. W. 110. Womack v. State, 170 S. W. 141. Cook v. State, 171 S. W. 227. Guerrero v. State, 171 S. W. 733.

In a prosecution for any grade of unlawful homicide if defendant admits that he killed the deceased the case is not one which rests wholly on circumstantial evidence. It is only when the inculpatory evidence is wholly circumstantial that an instruction as to that character of evidence is demanded. Heard v. State, 24 Texas Crim. App. 111; 5 S. W. 846. Clore v. State, 26 Texas Crim. App. 630; 10 S. W. 242. Johnson v. State, 28 Texas Crim. App. 25; 11 S. W. 667. Smith v. State, 28 Texas Crim. App. 315; 12 S. W. 1104. Self v. State, 28 Texas Crim. App. 409; 13 S. W. 602. Keith v. State, 50 Texas Crim. Rep. 63; 94 S. W. 1044. Dobbs v. State, 51 Texas Crim. Rep. 629; 103 S. W. 918. Gantt v. State, 105 S. W. 799. Barnes v. State, 53 Texas Crim. Rep. 629; 111 S. W. 943. High v. State, 54 Texas Crim. Rep. 337; 112 S. W. 939. Strickland v. State, 161 S. W. 110. Coulter v. State, 162 S. W. 885. Thompson v. State, 163 S. W. 974.

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If there is direct testimony from any source that defendant killed the deceased then there is direct evidence of the main fact to be proved and the case does not wholly rest upon circumstantial evidence. Tooney v. State, 8 Texas Crim. App. 462. Wooldridge v. State, 13 Texas Crim. App. 454. Sharpe v. State, 17 Texas Crim. App. 499. Venters v. State, 18 Texas Crim. App. 211. Hunnicutt v. State, 18 Texas Crim. App. 522. Johnson v. State, 28 Texas Crim. App. 25; 11 S. W. 667. Smith v. State, 28 Texas Crim. App. 315; 12 S. W. 1104. Weathersby v. State, 29 Texas Crim. Rep. 309; 15 S. W. 823. Surrell v. State, 29 Texas Crim. App. 326; 15 S. W. 816. Isaacs v. State, 36 Texas Crim. Rep. 531; 38 S. W. 40. Dobbs v. State, 51 Texas Crim. Rep. 629; 103 S. W. 918. Barnes v. State, 53 Texas Crim. Rep. 629; 111 S. W. 943. Strickland v. State, 161 S. W. 110.

A charge on circumstantial evidence is not required if there is proof that deceased, either as a part of a dying declaration or as a part of the *res gestæ*, stated that defendant shot him. Smith v. State, 21 Texas Crim. App. 307; 17 S. W. 471. Crews v. State, 34 Texas Crim. Rep. 543; 31 S. W. 373. Polk v. State, 35 Texas Crim. Rep. 495; 34 S. W. 633. Hernandez v. State, 47 Texas Crim. Rep. 21; 81 S. W. 1210. Tinsley v. State, 52 Texas Crim. Rep. 98; 106 S. W. 347. Jones v. State, 52 Texas Crim. Rep. 305; 106 S. W. 345. Potts v. State, 56 Texas Crim. Rep. 43; 118 S. W. 537.

The fact that the only direct testimony comes from an accomplice witness does not make it necessary to charge on circumstantial evidence. Wampler v. State, 28 Texas Crim. App. 353; 13 S. W. 144. Thompson v. State, 33 Texas Crim. Rep. 222; 26 S. W. 198. Kidwell v. State, 35 Texas Crim. Rep. 267; 33 S. W. 342. McKinney v. State, 48 Texas Crim. Rep. 405; 88 S. W. 1012. Tune v. State, 49 Texas Crim. Rep. 448; 94 S. W. 231. Perry v. State, 155 S. W. 265. Johnson v. State, 162 S. W. 512.

If the facts proven are in such close juxtaposition to the main fact to be proved as to be equivalent to direct testimony, a charge on circumstantial evidence is not required. Holt v. State, 9 Texas Crim. App. 582. Crews v. State, 34 Texas Crim. Rep. 543; 31 S. W. 373. Cabrera v. State, 56 Texas Crim. Rep. 141; 118 S. W. 1057. Bass v. State, 59 Texas Crim. Rep. 191; 127 S. W. 1020.

Sec. 1875. **Correct charges on circumstantial evidence.**—No particular set of words or phrases need be employed in charging on circumstantial evidence, but the charge in some way must contain the **test of exclusion**; circumstantial evidence being sufficient only when it excludes every other reasonable hypothesis except that of defendant's guilt. Rye v. State, 8 Texas Crim. App. 160. Barr v. State, 10 Texas Crim. App. 510. Ray v. State, 13 Texas Crim. App. 55. Chitister v. State, 33 Texas Crim. Rep. 638; 28 S. W. 683. Jones v. State, 34 Texas Crim. Rep. 491; 30 S. W. 1059. Smith v. State, 35 Texas Crim. Rep. 621; 33 S. W. 339. Reeseman v. State, 59 Texas Crim. Rep. 437; 128 S. W. 1129. Wheeler v. State, 61 Texas Crim. Rep. 536; 136 S. W. 73. Powers v. State, 152 S. W. 910. Bosley v. State, 153 S. W. 878.

In order to warrant a conviction on circumstantial evidence each fact necessary to establish defendant's guilt must be proven by the evidence to the satisfaction of the jury beyond a reasonable doubt; all such facts must be consistent with each other and with the defendant's guilt, and all the circumstances taken together must be of a conclusive nature leading on the whole to a satisfactory conclusion and producing in effect a reasonable and moral certainty that the defendant committed the offense charged, and must exclude every other reasonable hypothesis except that of defendant's guilt. Baldez v. State, 37 Texas Crim. Rep. 413; 35 S. W. 664. Trevino v. State, 38 Texas Crim. Rep. 66; 41 S. W. 608. Blount v. State, 64 S. W. 1050. Wheeler v. State, 61 Texas Crim. Rep. 536; 136 S. W. 73. Gordon v. State, 62 Texas Crim. Rep. 638; 138 S. W. 705. Harris v. State, 148 S. W. 1080. Manley v. State, 153 S. W. 1141. Coffman v. State, 165 S. W. 942.

In order to warrant a conviction on circumstantial evidence each fact necessary to the conclusion sought to be established must be proved by competent evidence beyond a reasonable doubt; all the facts (that is, the facts necessary to the conclusion) must be consistent with each other and with the main fact sought to be proved; and the circumstances, taken together, must be of a conclusive nature, leading, on the whole, to a satisfactory conclusion, and producing in effect a rea-

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sonable and moral certainty that the accused, and no other person, committed the offense charged. It is not sufficient that the circumstances coincide with, account for, and therefore render probable the guilt of the defendant; they must exclude every other reasonable hypothesis except that of defendant's guilt, and unless they do so beyond a reasonable doubt you will find the defendant not guilty. Pogue v. State, 12 Texas Crim. App. 293. Boggs v. State, 38 Texas Crim. Rep. 83; 41 S. W. 642. Diaz v. State, 62 Texas Crim. Rep. 320; 137 S. W. 377. Harris v. State, 148 S. W. 1080. Earnest v. State, 152 S. W. 639. Manley v. State, 153 S. W. 1141. McGee v. State, 155 S. W. 246. Brown v. State, 169 S. W. 449.

Where the court charges on circumstantial evidence it is not necessary that the charge state in terms that the case is one of circumstantial evidence. Pennington v. State, 48 S. W. 507. Henderson v. State, 50 Texas Crim. Rep. 268; 96 S. W. 37. Flagg v. State, 153 S. W. 852.

If the charge on circumstantial evidence contains the test of exclusion, it need not in terms require the jury to find "that defendant and no other person" committed the offense charged. Moore v. State, 39 Texas Crim. Rep. 266; 45 S. W. 809. Boersh v. State, 62 S. W. 1060. Ramirez v. State, 43 Texas Crim. Rep. 455; 66 S. W. 1101. Bell v. State, 71 S. W. 24. Moseley v. State, 59 Texas Crim. Rep. 90; 127 S. W. 178.

If the charge on circumstantial evidence requires the jury to find that defendant and no other person committed the offense charged, it contains the test of exclusion, and, if suicide is not an issue, it is not defective for failing to state that the circumstances must exclude every other reasonable hypothesis except that of defendant's guilt. Crow v. State, 37 Texas Crim. Rep. 300; 39 S. W. 574. Hill v. State, 37 Texas Crim. Rep. 415; 35 S. W. 660. Henderson v. State, 50 Texas Crim. Rep. 268; 96 S. W. 37. Williams v. State, 98 S. W. 246. Harris v. State, 148 S. W. 1080.

Sec. 1876. **Errors in charge on circumstantial evidence.**—Charging on circumstantial evidence when the evidence is direct is not injurious to defendant and is therefore no ground for a reversal. Surrell v. State, 29 Texas Crim. App. 326; 15 S. W. 816. Smith v. State, 34 Texas Crim. Rep. 272; 30 S. W. 236. Little v. State, 39 Texas Crim. Rep. 654; 47 S. W. 984. Frazier v. State, 64 S. W. 934. Gibson v. State, 45 Texas Crim. Rep. 313; 77 S. W. 812. Watkins v. State, 105 S. W. 790. Gilbert v. State, 57 Texas Crim. Rep. 85; 121 S. W. 1126. Platinburg v. State, 57 Texas Crim. Rep. 375; 123 S. W. 421.

In charging on circumstantial evidence the court should not assume that the offense was committed. Beaver v. State, 86 S. W. 1020.

If the charge calls the jury's attention to a certain disputed fact and informs them that the evidence on that point is circumstantial, the charge is on the weight of the evidence so singled out. Beard v. State, 57 Texas Crim. Rep. 323; 123 S. W. 149.

A charge too incomplete to enable the jury to understand and apply the rules governing circumstantial evidence is erroneous. Barr v. State, 10 Texas Crim. App. 510. Robertson v. State, 10 Texas Crim. App. 602. Bryant v. State, 16 Texas Crim. App. 149. Bookser v. State, 26 Texas Crim. App. 593; 10 S. W. 219. Hannah v. State, 27 Texas Crim. App. 627; 11 S. W. 781. Woods v. State, 27 Texas Crim. App. 586; 11 S. W. 723. Williamson v. State, 30 Texas Crim. App. 331; 17 S. W. 722. Roebuck v. State, 40 Texas Crim. Rep. 691; 51 S. W. 914. Davis v. State, 54 S. W. 583. Nix v. State, 55 Texas Crim. Rep. 54; 114 S. W. 805.

A charge on circumstantial evidence to be sufficient must in some way instruct the jury that the circumstances must exclude every other reasonable hypothesis except that of defendant's guilt; such a charge must contain the test of exclusion. Barr v. State, 10 Texas Crim. App. 510. Robertson v. State, 10 Texas Crim. App. 602. Williamson v. State, 30 Texas Crim. App. 331; 17 S. W. 722. Jones v. State, 34 Texas Crim. Rep. 491; 30 S. W. 1059. Harris v. State, 34 Texas Crim. Rep. 495; 31 S. W. 388. Smith v. State, 35 Texas Crim. Rep. 621; 33 S. W. 339.

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If the charge on circumstantial evidence requires the jury to find that "no other person committed the offense charged," it is equivalent to instructing them that the circumstances proven must exclude every other reasonable hypothesis except that of defendant's guilt. Crow v. State, 37 Texas Crim. Rep. 300; 39 S. W. 574. Hill v. State, 37 Texas Crim. Rep. 415; 35 S. W. 600. Henderson v. State, 50 Texas Crim. Rep. 268; 96 S. W. 37.

If two counts or phases of the alleged offense are submitted to the jury and each is supported by circumstantial evidence, a charge applying the law of circumstantial evidence to only one count or phase is an assumption that in the opinion of the court there is direct evidence of defendant's guilt under the other. Nolen v. State, 8 Texas Crim. App. 596. Rupe v. State, 57 Texas Crim. Rep. 588; 124 S. W. 655.

If two defendants are jointly on trial and the charge limits the law of circumstantial evidence to the case of one of them, it gives the jury to understand that the case of the other is supported by direct proof. Conner v. State, 17 Texas Crim. App. 15.

The court should refrain from attempts to adorn the charge on circumstantial evidence with a preface, such as disquisitions upon the value or force of such evidence. If the circumstances are able to stand by their own vigor and strength, they need no eulogy upon their manhood; if not, it is not fair for the court to lend a helping hand. Harrison v. State, 8 Texas Crim. App. 184. Harrison v. State, 9 Texas Crim. App. 408. Post v. State, 10 Texas Crim. App. 596. Alonzo v. State, 15 Texas Crim. App. 387. White v. State, 19 Texas Crim. App. 358. McClesky v. State, 13 S. W. 997. Horton v. State, 19 S. W. 899. Roberts v. State, 60 Texas Crim. Rep. 20; 129 S. W. 611.

Sec. 1877. **Sufficiency of circumstantial evidence.**—If the evidence shows as strong a case against another as it does against the defendant and there is no proof that they acted together, a conviction will not be sustained. Washington v. State, 16 Texas Crim. App. 377. Stouard v. State, 27 Texas Crim. App. 13; 10 S. W. 442. Lowe v. State, 77 S. W. 220.

A conviction based on circumstantial evidence will not be sustained if the circumstances proven do not exclude every other reasonable hypothesis except that of defendant's guilt. Proof which only amounts to a strong suspicion or mere probability is not sufficient to support a conviction. Pogue v. State, 12 Texas Crim. App. 283. Hogan v. State, 13 Texas Crim. App. 319. Kunde v. State, 22 Texas Crim. App. 99; 3 S. W. 325. Gay v. State, 42 Texas Crim. Rep. 450; 60 S. W. 771. Hernandez v. State, 72 S. W. 840.

To sustain a conviction it should appear not only that an offense as charged has been committed, but there should also be proof to a degree of certainty greater than a mere probability or strong suspicion tending to establish that the party charged was the person who committed it or was a participant in its commission. There must be legal and competent evidence pertinently identifying the defendant with the transaction constituting the offense charged against him. Tollett v. State, 44 Texas 95. Porter v. State, 1 Texas Crim. App. 399. Jones v. State, 4 Texas Crim. App. 436. Gill v. State, 36 Texas Crim. Rep. 595; 38 S. W. 190. Clifton v. State, 39 Texas Crim. Rep. 619; 47 S. W. 642.

Sec. 1878. **Motive.**
- Sec. 1879. Proof of motive.
- Sec. 1880. Former indictments or cases.
- Sec. 1881. Prior difficulties and indignities.
- Sec. 1882. Extraneous matters.
- Sec. 1883. Remote motive.
- Sec. 693. Motives of co-conspirator.
- Sec. 1930. Undisclosed motives of deceased.
- Sec. 1930. Facts unknown to defendant.
- Sec. 1884. Explanation of motive.
- Sec. 1884. Defendant's testimony as to motive.
- Sec. 130. Imputing crime to another.
- Sec. 1885. Charge on motive.

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Sec. 1879. **Proof of motive.**—The proposed testimony, to be admissible as proof of motive, must fairly tend to raise an inference in favor of the existence of a motive on the part of the accused to commit the alleged offense for which he is on trial. Somerville v. State, 6 Texas Crim. App. 437. McKinney v. State, 8 Texas Crim. App. 626. Phillips v. State, 22 Texas Crim. App. 139; 2 S. W. 601. Plew v. State, 35 S. W. 366. Barkman v. State, 52 S. W. 69. Woodward v. State, 42 Texas Crim. Rep. 188; 58 S. W. 135. Kirklin v. State, 164 S. W. 1016.

The State may prove the financial condition of deceased and the accused when such testimony is relevant and tends to show a motive for the homicide. Cordova v. State, 6 Texas Crim. App. 226. Early v. State, 9 Texas Crim. App. 476. Lancaster v. State, 36 Texas Crim. Rep. 161; 35 S. W. 165. Garza v. State, 39 Texas Crim. Rep. 358; 46 S. W. 242.

The State is entitled to show that property belonging to deceased was found in the possession of defendant where such proof tends to show that robbery was a motive for the homicide. Pharr v. State, 9 Texas Crim. App. 129. Morris v. State, 30 Texas Crim. App. 95; 16 S. W. 757. Little v. State, 39 Texas Crim. Rep. 654; 47 S. W. 984.

The State may prove facts showing that defendant expected to inherit the property of deceased when such proof tends to show a motive for the homicide. Golin v. State, 37 Texas Crim. Rep. 90; 38 S. W. 794.

The fact that defendant was under arrest on another charge is no reason for excluding proof of his statements which show malice toward the person he afterwards killed. Lane v. State, 59 Texas Crim. Rep. 595; 129 S. W. 358.

If it tends to show a motive it may be proven that deceased and defendant were rival candidates for a public office. Johnson v. State, 149 S. W. 165.

It may be proven that deceased, within the knowledge of defendant, knew that defendant was engaged in making counterfeit money, if it tends to show that defendant desired to get rid of him on that account. Smith v. State, 44 Texas Crim. Rep. 53; 68 S. W. 267.

To establish the probable feelings of defendant toward deceased and to discover and illustrate the motive for defendant's actions at the time of the homicide, the State may prove that his employer had difficulties with him and had threatened to discharge him and employ deceased. Powers v. State, 23 Texas Crim. App. 42; 5 S. W. 153.

It is not error to permit the prosecuting witness to testify that he didn't know what caused defendant to strike him unless it was because he was on a jury which found against defendant. Trimble v. State, 22 S. W. 879.

Proof that defendant was arrested on suspicion for the murder of the brother of deceased, but not indicted, is not admissible to prove a motive for killing deceased. Pryor v. State, 40 Texas Crim. Rep. 643; 51 S. W. 375.

When it tends to show a motive for killing deceased the State may prove that deceased killed the brother of defendant. Pryor v. State, 40 Texas Crim. Rep. 643; 51 S. W. 375.

A petition for a writ of injunction filed by deceased against defendant, the order granting the writ, and the writ itself, may be introduced in evidence when it is relevant and shows motive and malice. Turner v. State, 33 Texas Crim. Rep. 103; 25 S. W. 635.

Where deceased was aiding the wife of defendant in her divorce suit, it may be shown, where such facts show a motive for the homicide, that such a suit had been instituted and that an injunction had been obtained and an affidavit made charging defendant with violating it, but the allegations of the petition and the details should not be put in evidence. Powdrill v. State, 62 Texas Crim. Rep. 442; 138 S. W. 114.

When the wife of defendant is the alleged injured party it is competent to prove that she had sued him for a divorce and that the suit was pending when

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the alleged offense was committed, but the allegations of her petition should not be permitted to be read and go in as evidence. Pinckord v. State, 13 Texas Crim. App. 478.

It may be shown that defendant and the wife of deceased were criminally intimate when it is also shown that defendant knew that deceased was aware of such intimacy and when such proof would illustrate the relation of the parties and show motive. Weaver v. State, 43 Texas Crim. Rep. 340; 65 S. W. 534. Pannell v. State, 59 Texas Crim. Rep. 383; 128 S. W. 133.

Where the State's theory is that defendant and the wife of deceased were criminally intimate and killed deceased to get him out of the way, it is not error to admit proof of such intimacy. Anderson v. State, 53 Texas Crim. Rep. 347; 110 S. W. 54. Millner v. State, 169 S. W. 899.

When defendant is on trial for the murder of his wife, the State, for the purpose of showing that defendant had a motive to commit the murder, may prove that she was unfaithful to him, if such fact is shown to have been known to him at the time of the homicide. Phillips v. State, 22 Texas Crim. App. 139; 2 S. W. 601.

When defendant is on trial for the murder of his wife it may be shown by him on cross-examination, when such proof is relevant, that his wife had brought a divorce suit against him charging him with adultery. Malcek v. State, 33 Texas Crim. Rep. 14; 24 S. W. 417.

When the homicide occurred because of remarks of deceased about defendant's conduct with a woman, the State may prove defendant's relationship with her if such proof shows a motive for the killing. Menefee v. State, 50 Texas Crim. Rep. 249; 97 S. W. 486.

When defendant is on trial for the murder of his wife it may be shown that he was infatuated or criminally intimate with another woman if such proof tends to show a motive for murdering his wife. Wilkerson v. State, 31 Texas Crim. Rep. 86; 19 S. W. 903. Morrison v. State, 40 Texas Crim. Rep. 473; 51 S. W. 358. Rice v. State, 54 Texas Crim. Rep. 149; 112 S. W. 229.

When defendant is on trial for the murder of his wife the State may show all that was done by him which was a part of one general system to murder his wife in order to be free to marry the woman with whom he was infatuated. Morrison v. State, 40 Texas Crim. Rep. 473; 51 S. W. 358.

Sec. 1880. **Former indictments or cases as showing motive.**—The State may prove the relation of deceased to a former case if it furnishes a reason for ill-will on defendant's part toward deceased. Dill v. State, 1 Texas Crim. App. 287. Rucker v. State, 7 Texas Crim. App. 549. Powell v. State, 13 Texas Crim. App. 252. Kunde v. State, 22 Texas Crim. App. 65; 3 S. W. 325. Johnson v. State, 29 Texas Crim. App. 150; 15 S. W. 647. Crass v. State, 31 Texas Crim. Rep. 312; 20 S. W. 579. Easterwood v. State, 34 Texas Crim. Rep. 400; 31 S. W. 294. Barkman v. State, 41 Texas Crim. Rep. 105; 52 S. W. 73. Renfro v. State, 42 Texas Crim. Rep. 393; 56 S. W. 1013. Moore v. State, 96 S. W. 323. Porch v. State, 50 Texas Crim. Rep. 335; 99 S. W. 102. Canon v. State, 59 Texas Crim. Rep. 398; 128 S. W. 141. Harrelson v. State, 60 Texas Crim. Rep. 534; 132 S. W. 785. Mitchell v. State, 144 S. W. 1008. Vines v. State, 148 S. W. 727. Foster v. State, 150 S. W. 937.

Proof that deceased was a witness in a theft case against a relative of defendant is admissible when it tends to show motive. Easterwood v. State, 34 Texas Crim. Rep. 400; 31 S. W. 294.

When it tends to show a motive for the murder of deceased, it may be proven that defendant was under indictment for theft of property of deceased. Dubose v. State, 13 Texas Crim. App. 418. Canon v. State, 59 Texas Crim. Rep. 398; 128 S. W. 141.

An indictment pending against defendant for an assault with intent to murder the deceased is admissible as tending to establish a motive on the part of defendant

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impelling him to the murder of the deceased. Dubose v. State, 13 Texas Crim. App. 418. Taylor v. State, 14 Texas Crim. App. 340. Hart v. State, 15 Texas Crim. App. 227. Robbins v. State, 166 S. W. 528.

When it tends to show motive and malice in the killing of deceased, the State may read in evidence an indictment pending against defendant charging him with the murder of the child of deceased. Hudson v. State, 28 Texas Crim. App. 340; 13 S. W. 388.

An affidavit made by deceased shortly before the homicide charging defendant with a violation of law and which was made for the purpose of having defendant arrested and tried for such violation and which was pending at the time of the homicide is admissible for the purpose of showing motive. Robinson v. State, 16 Texas Crim. App. 354.

A former indictment against defendant charging him with a separate offense from the one for which he is on trial may be put in evidence to show motive when it tends to support the theory that defendant intended to prevent adverse disclosures by deceased who was a witness against him. Dill v. State, 1 Texas Crim. App. 287. Dubose v. State, 13 Texas Crim. App. 418. Taylor v. State, 14 Texas Crim. App. 340. Johnson v. State, 29 Texas Crim. App. 150; 15 S. W. 647. Chandler v. State, 60 Texas Crim. Rep. 329; 131 S. W. 598.

An indictment againts defendant's brother charging him with the theft of property of deceased is admissible if it tends to prove a motive for the killing of deceased by defendant. Coward v. State, 6 Texas Crim. App. 70.

If in connection with the other facts in the case it tends to show motive, the State may prove that defendant, some few years before deceased was shot, had been convicted for burglary of deceased's house and had served his term and returned. Powell v. State, 13 Texas Crim. App. 252.

Sec. 1881. **Prior difficulties, assaults, quarrels and indignities.**—Antecedent menaces, prior assaults, former grudges, and former quarrels between the parties may be proven to show the state of mind and malice of the accused at the time of the alleged offense and to establish a motive for its commission. Washington v. State, 8 Texas Crim. App. 377. McKinney v. State, 8 Texas Crim. App. 626. Anderson v. State, 15 Texas Crim. App. 447. Howard v. State, 25 Texas Crim. App. 686; 8 S. W. 929. Sullivan v. State, 31 Texas Crim. Rep. 488; 20 S. W. 927. Medina v. State, 49 S. W. 380. Martin v. State, 41 Texas Crim. Rep. 242; 53 S. W. 849. Powdrill v. State, 62 Texas Crim. Rep. 442; 138 S. W. 114. Davis v. State, 143 S. W. 1161 (but not when too remote). Welch v. State, 147 S. W. 572. Kelly v. State, 151 S. W. 304. Gradington v. State, 155 S. W. 210. Powdrill v. State, 155 S. W. 231. Hill v. State, 161 S. W. 118. Corbitt v. State, 163 S. W. 436. Coffman v. State, 165 S. W. 939. Hill v. State, 168 S. W. 864. Guerrero v. State, 171 S. W. 732.

When defendant is on trial for the murder of his wife or for an assault with intent to murder her, proof of a course of ill-treatment, slights and indignities, of previous assaults, and of separation, may be made to prove malice and motive. Hall v. State, 31 Texas Crim. Rep. 565; 21 S. W. 368. Medina v. State, 49 S. W. 380. Spears v. State, 41 Texas Crim. Rep. 533; 56 S. W. 347. Hamilton v. State, 41 Texas Crim. Rep. 644; 56 S. W. 926. Combs v. State, 55 Texas Crim. Rep. 337; 116 S. W. 584. Wilson v. State, 60 Texas Crim. Rep. 1; 129 S. W. 613. Asbeck v. State, 156 S. W. 925. Stanton v. State, 158 S. W. 994. Coffman v. State, 165 S. W. 939. Paschal v. State, 174 S. W. 1060.

Proof of the details of previous difficulties between defendant and deceased is admissible when such proof tends to show motive and tends to show who probably began the fatal difficulty. Carr v. State, 41 Texas 541. Howard v. State, 25 Texas Crim. App. 686; 8 S. W. 929. Jackson v. State, 28 Texas Crim. App. 108; 12 S. W. 501. Morrison v. State, 37 Texas Crim. Rep. 601; 40 S. W. 591. Pratt v. State, 53 Texas Crim. Rep. 282; 109 S. W. 138. Waters v. State, 54 Texas Crim. Rep. 327; 114 S. W. 628.

In a case of circumstantial evidence the State may prove the details of a prior difficulty between defendant and deceased with a view of showing the relations of

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the parties and to show who was probably the aggressor at the time of the homicide. Pratt v. State, 53 Texas Crim. Rep. 282; 109 S. W. 138. Waters v. State, 54 Texas Crim. Rep. 327; 114 S. W. 628.

When defendant is on trial for the murder of his child, the State may prove, to show malice and ill-will, that on several occasions he severely beat the child. Betts v. State, 57 Texas Crim. Rep. 391; 124 S. W. 424. Betts v. State, 144 S. W. 678.

Sec. 1882. **Extraneous and disconnected matters.**—Proof of facts which show motive is admissible although it involves proof of an extraneous crime. Hamblin v. State, 41 Texas Crim. Rep. 140; 50 S. W. 1019. Smith v. State, 44 Texas Crim. Rep. 59; 68 S. W. 267.

The mere fact that in proving motive for a homicide or an assault that a separate crime may be proven does not render proof of such motive inadmissible. Blackwell v. State, 29 Texas Crim. App. 194; 15 S. W. 597. Morris v. State, 30 Texas Crim. App. 95; 16 S. W. 757. Morrison v. State, 40 Texas Crim. Rep. 473; 51 S. W. 358. Renfro v. State, 42 Texas Crim. Rep. 404; 56 S. W. 1013. Vines v. State, 148 S. W. 727.

Proof of an extraneous crime or disconnected transaction should not be admitted to show motive unless there is some logical connection between it and the particular act under investigation. Somerville v. State, 6 Texas Crim. App. 437. Phillips v. State, 22 Texas Crim. App. 139; 2 S. W. 601. Plew v. State, 35 S. W. 366. Barkman v. State, 52 S. W. 69. Woodward v. State, 42 Texas Crim. Rep. 188; 58 S. W. 135. Price v. State, 65 S. W. 909. Miller v. State, 144 S. W. 239.

Testimony of extraneous and disconnected matters which could only prejudice the jury against defendant is not admissible when the homicide is not shown to have grown out of any circumstance connected with such matters. Phillips v. State, 22 Texas Crim. App. 139; 2 S. W. 601. Barkman v. State, 52 S. W. 69. Price v. State, 65 S. W. 909. Walker v. State, 44 Texas Crim. Rep. 569; 72 S. W. 997. Goebel v. State, 45 Texas Crim. Rep. 415; 76 S. W. 460. Drake v. State, 143 S. W. 1159. Johnson v. State, 149 S. W. 165. Maldonado v. State, 156 S. W. 647.

Proof that defendant was living in adultery with the wife of deceased is not admissible when that fact had nothing to do with the homicide. Price v. State, 65 S. W. 909.

Defendant's adultery with the wife of the deceased may be shown to establish his motive for the homicide when there is a logical connection between the adultery and the homicide. Ex parte Mosby, 31 Texas 566. Weaver v. State, 43 Texas Crim. Rep. 340; 65 S. W. 534.

Proof of an indictment for adultery found subsequent to the homicide is not admissible to prove motive, it being but the opinion of the grand jury. Newman v. State, 58 Texas Crim. Rep. 448; 126 S. W. 581.

It is error to prove remarks of defendant about a matter which had no relation to the homicide and which could only serve to prejudice the jury against defendant. Phillips v. State, 22 Texas Crim. App. 139; 2 S. W. 601. Fossett v. State, 41 Texas Crim. Rep. 400; 55 S. W. 497. Woodward v. State, 42 Texas Crim. Rep. 188; 58 S. W. 135. Walker v. State, 44 Texas Crim. Rep. 569; 72 S. W. 997. Drake v. State, 143 S. W. 1159. Johnson v. State, 149 S. W. 165.

It may be shown that defendant was charged with crime and had escaped and resisted arrest in other localities if such proof tends to show the motive of defendant in committing the alleged murder for which he is on trial. Vines v. State, 148 S. W. 727.

Proof of a decree of divorce rendered after the commission of the alleged offense is not admissible in support of the proof of motive. Pinckord v. State, 13 Texas Crim. App. 478.

Proof of the details of an extraneous crime or supposed extraneous crime will not be permitted to be introduced in evidence even to show motive. Smith v. State,

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44 Texas Crim. Rep. 59; 68 S. W. 267. Powdrill v. State, 62 Texas Crim. Rep. 442; 138 S. W. 114. Menefee v. State, 149 S. W. 142.

When a conspiracy or acting together is not shown, proof of acts and conduct of others than defendant showing a motive to kill deceased is not admissible against defendant. Figaroa v. State, 58 Texas Crim. Rep. 611; 127 S. W. 196. Wallace v. State, 145 S. W. 925. Larue v. State, 146 S. W. 194.

Sec. 1883. **Remote motive.**—Remoteness of the act or acts proven for the purpose of showing motive may go to the probative force of the testimony, but the fact that such testimony is remote is not of itself a reason for excluding it if there is a logical connection between it and the particular act under investigation. Dill v. State, 1 Texas Crim. App. 278. Jones v. State, 4 Texas Crim. App. 436. Hall v. State, 31 Texas Crim. Rep. 565; 21 S. W. 368. Medina v. State, 49 S. W. 380. Weaver v. State, 43 Texas Crim. Rep. 340; 65 S. W. 534. Baum v. State, 60 Texas Crim. Rep. 638; 133 S. W. 271. Streight v. State, 62 Texas Crim. Rep. 453; 138 S. W. 742. Asbeck v. State, 156 S. W. 925.

When the acts or declarations proposed to be proven to show a motive for the commission of the alleged offense for which defendant is on trial are so remote as not to afford a fair inference for the existence of a motive to commit the act under investigation, proof of same should be rejected. Tomlin v. State, 25 Texas Crim. App. 685; 8 S. W. 931. Woodward v. State, 42 Texas Crim. Rep. 188; 58 S. W. 135. McAnear v. State, 43 Texas Crim. Rep. 521; 67 S. W. 117. Wilburn v. State, 77 S. W. 3. French v. State, 47 Texas Crim. Rep. 572; 85 S. W. 4. Wakefield v. State, 50 Texas Crim. Rep. 125; 94 S. W. 1046. Davis v. State, 143 S. W. 1161.

Where the act is remote and not followed by other acts of the same character or general nature, proof of same should not be admitted to show motive. Woodward v. State, 42 Texas Crim. Rep. 188; 58 S. W. 135. Davis v. State, 143 S. W. 1161.

Sec. 1884. **Defendant's testimony as to his motive or intent.**—The defendant is entitled to explain his motives when motive or intent is an issue. Berry v. State, 30 Texas Crim. App. 423; 17 S. W. 1080. Lewallen v. State, 33 Texas Crim. Rep. 412; 26 S. W. 832. Kinnard v. State, 35 Texas Crim. Rep. 276; 33 S. W. 234. Matthews v. State, 42 S. W. 375. Turner v. State, 51 S. W. 366. Murmutt v. State, 67 S. W. 509. Pratt v. State, 50 Texas Crim. Rep. 227; 96 S. W. 8. Money v. State, 97 S. W. 91.

When the State proves a motive for the act under investigation, the defendant has a right to disprove or explain the facts relied on to show motive. Lancaster v. State, 31 S. W. 517. Plew v. State, 35 S. W. 366. Morrison v. State, 37 Texas Crim. Rep. 601; 40 S. W. 591. Skelton v. State, 51 S. W. 943. Goebel v. State, 45 Texas Crim. Rep. 415; 76 S. W. 460. Pratt v. State, 50 Texas Crim. Rep. 227; 96 S. W. 8. Early v. State, 51 Texas Crim. Rep. 382; 103 S. W. 868.

Sec. 1885. **Charge of the court on motive.**—It is not necessary to limit testimony only going to prove a main issue in the case, such as defendant's motive and malice in the commission of the alleged offense for which he is on trial. Brown v. State, 24 Texas Crim. App. 170; 5 S. W. 685. Hudson v. State, 28 Texas Crim. App. 341; 13 S. W. 388. Leeper and Powell v. State, 29 Texas Crim. App. 69; 14 S. W. 398. Malcek v. State, 33 Texas Crim. Rep. 20; 24 S. W. 417. Hamilton v. State, 41 Texas Crim. Rep. 652; 56 S. W. 926. Terry v. State, 45 Texas Crim. Rep. 264; 76 S. W. 928. Jenkins v. State, 59 Texas Crim. Rep. 478; 128 S. W. 1113. Wilson v. State, 60 Texas Crim. Rep. 1; 129 S. W. 613. Harrelson v. State, 60 Texas Crim. Rep. 543; 132 S. W. 786. Millican v. State, 63 Texas Crim. Rep. 440; 140 S. W. 1142. Mitchell v. State, 144 S. W. 1010. Boyd v. State, 150 S. W. 612. Brock v. State, 151 S. W. 801. Mims v. State, 153 S. W. 321. Gradington v. State, 155 S. W. 210.

When an indictment against defendant for another offense is introduced in evidence to show motive, it is not necessary or proper to limit it in the charge of the court. It is not necessary to limit testimony which is admissible to prove the main issue. Hudson v. State, 28 Texas Crim. App. 341; 13 S. W. 388. Wilson v. State, 60 Texas Crim. Rep. 1; 129 S. W. 613. Harrelson v. State, 60 Texas Crim. Rep. 543; 132 S. W. 783.

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When another transaction or a separate offense forms part and parcel of the motive and *res gestæ* of the motive, it is not necessary or proper to charge on the same since such a charge would be on the weight of the evidence so singled out and would give undue prominence to the testimony as to motive. Terry v. State, 45 Texas Crim. Rep. 264; 76 S. W. 928. Pannell v. State, 54 Texas Crim. Rep. 498; 113 S. W. 537. Roquemore v. State, 54 Texas Crim. Rep. 592; 114 S. W. 140. Mims v. State, 153 S. W. 321.

It is not necessary to limit testimony admitted for the purpose of showing that the relations between the parties were not at all harmonious where the jury could have considered the testimony for no other purpose. Malcek v. State, 33 Texas Crim. Rep. 14; 24 S. W. 417.

The court should not charge the jury that a former difficulty may be considered to throw light upon the motives and purposes with which the parties acted in the fatal meeting. The appearances of danger must be viewed from the standpoint of defendant and he is not bound by the secret motives of deceased. Roquemore v. State, 54 Texas Crim. Rep. 592; 114 S. W. 140.

It is error to limit to the question of motive proof of acts occurring long after the commission of the alleged offense. Rice v. State, 49 Texas Crim. Rep. 585; 94 S. W. 1024.

When no conspiracy or acting together is shown it is error to authorize the jury to consider as showing motive on the part of the party or parties who killed deceased certain acts of others than defendant committed in his absence. Figaroa v. State, 58 Texas Crim. Rep. 611; 127 S. W. 193.

Art. 1084. (654) (549) **Body of deceased must be found.**—No person shall be convicted of any grade of homicide unless the body of the deceased, or portions of it, are found and sufficiently identified to establish the fact of the death of the person charged to have been killed. (O. C. 544, amended by Act March 8, 1887, Acts 1887, p. 14.)

Sec. 1886. **Corpus delicti.**
Sec. 1887. Former statute.
Sec. 1888. Body of deceased must be found.
Sec. 1889. Indentification of body of deceased.
Sec. 1890. Confessions and the corpus delicti.
Sec. 1890. Sufficient proof of corpus delicti.
Sec. 1891. Insufficient proof of corpus delicti.
Sec. 1892. Charge on corpus delicti.

Sec. 1887. **Former statute.**—Prior to the Act of March 8, 1887, the statute provided that no person should be convicted of any grade of homicide unless the body of deceased, or portions of it, were found and sufficiently identified to establish the fact of killing. Walker v. State, 14 Texas Crim. App. 609.

Sec. 1888. **Body of deceased must be found.**—The corpus delicti is never established, no matter what the proof as regards the death of the deceased may be, unless the body, or portions thereof, are found and sufficiently identified to establish the death of the person charged to have been killed. Walker v. State, 14 Texas Crim. App. 609. Gay v. State, 42 Texas Crim. Rep. 450; 60 S. W. 771.

Sec. 1889. **Identification of body of deceased.**—Circumstantial evidence may be sufficient to identify the body or portions of the body found as being that of the person charged to have been killed, and circumstantial evidence may be resorted to in order to identify the remains when decomposition, partial destruction, or other causes render positive identification impossible. Wilson v. State, 43 Texas 472. Campbell v. State, 8 Texas Crim. App. 84. Lum v. State, 11 Texas Crim. App. 483. Spear v. State, 16 Texas Crim. App. 98. Scott v. State, 23 Texas Crim. App. 521; 5 S. W. 142. Kugadt v. State, 38 Texas Crim. Rep. 681; 44 S. W. 989. Carter v. State, 40 Texas Crim. Rep. 225; 49 S. W. 74. Gay v. State, 40 Texas Crim. Rep. 242; 49 S. W. 612. McCue v. State, 170 S. W. 280.

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The testimony may be sufficient to identify the remains as those of the person charged to have been killed although the body was burned up. Schulze v. State, 28 Texas Crim. App. 316; 12 S. W. 1084. Kugadt v. State, 38 Texas Crim. Rep. 681; 44 S. W. 989. Lott v. State, 60 Texas Crim. Rep. 162; 131 S. W. 553. Chandler v. State, 60 Texas Crim. Rep. 338; 131 S. W. 598. Southern v. State, 60 Texas Crim. Rep. 579; 132 S. W. 778.

Sec. 1890. **Sufficient proof of corpus delicti—Confessions.**—In prosecutions for murder, the State must establish clearly and satisfactorily the corpus delicti. The corpus delicti consists of two things: first, a criminal act, and second, the defendant's agency in the commission of such act. Lovelady v. State, 14 Texas Crim. App. 560. Wilson v. State, 41 Texas Crim. Rep. 180; 53 S. W. 122. Gay v. State, 42 Texas Crim. Rep. 456; 60 S. W. 771. Williams v. State, 65 S. W. 1060.

To prove the corpus delicti in a murder case the State must prove the death of deceased by violence inflicted by another and must show by confession or otherwise that defendant was a guilty agent. Wilson v. State, 41 Texas Crim. Rep. 179; 53 S. W. 122. Williams v. State, 65 S. W. 1060.

Where the fact that someone murdered deceased is proven by wounds or marks of violence on deceased, concealment or destruction of the body, and the body or portions thereof are found and sufficiently identified to establish the death of the person charged to have been killed, the confession of defendant may be sufficient to sustain a finding that he was the guilty party. Kugadt v. State, 38 Texas Crim. Rep. 694; 44 S. W. 989. Wilson v. State, 39 Texas Crim. Rep. 365; 46 S. W. 251. White v. State, 40 Texas Crim. Rep. 370; 50 S. W. 705. Sullivan v. State, 40 Texas Crim. Rep. 639; 51 S. W. 375. Gallegos v. State, 48 Texas Crim. Rep. 62; 85 S. W. 1150. Gallegos v. State, 49 Texas Crim. Rep. 115; 90 S. W. 492. Lott v. State, 60 Texas Crim. Rep. 162; 131 S. W. 555. Southern v. State, 60 Texas Crim. Rep. 579; 132 S. W. 778.

The confession of defendant may aid, corroborate the testimony of the accomplice witness, and, when both are taken together, may be sufficient to prove the corpus delicti beyond a reasonable doubt when the body of deceased, or portions thereof, are found and sufficiently identified to establish the death of the person charged to have been killed. Anderson v. State, 34 Texas Crim. Rep. 546; 31 S. W. 673.

The confession may be used to aid the proof of the corpus delicti. Jackson v. State, 29 Texas Crim. App. 464; 16 S. W. 247. Anderson v. State, 34 Texas Crim. Rep. 549; 31 S. W. 673. Kugadt v. State, 38 Texas Crim. Rep. 694; 44 S. W. 989. White v. State, 40 Texas Crim. Rep. 370; 50 S. W. 705. Sullivan v. State, 40 Texas Crim. Rep. 639; 51 S. W. 375. Gallegos v. State, 48 Texas Crim. Rep. 62; 85 S. W. 1150. Gallegos v. State, 49 Texas Crim. Rep. 115; 90 S. W. 492. Lott v. State, 60 Texas Crim. Rep. 162; 131 S. W. 555. Southern v. State, 60 Texas Crim. Rep. 579; 132 S. W. 778.

An extrajudicial confession alone, without proof of the corpus delicti, is insufficient to sustain a conviction. Harris v. State, 28 Texas Crim. App. 308; 12 S. W. 1102. Follis v. State, 46 Texas Crim. Rep. 202; 78 S. W. 1069. Follis v. State, 51 Texas Crim. Rep. 490; 101 S. W. 242. Ellison v. State, 59 Texas Crim. Rep. 3; 127 S. W. 542.

Defendant's identity as the criminal may rest alone upon his uncorroborated confession. Sullivan v. State, 40 Texas Crim. Rep. 639; 51 S. W. 375. Gallegos v. State, 49 Texas Crim. Rep. 115; 90 S. W. 492.

Circumstantial evidence may be sufficient to show that the death of deceased was caused by violence inflicted by another. Morris v. State, 30 Texas Crim. App. 95; 16 S. W. 757. Wilson v. State, 39 Texas Crim. Rep. 365; 46 S. W. 251. Porch v. State, 50 Texas Crim. Rep. 335; 99 S. W. 102. Lucas v. State, 155 S. W. 527.

Sec. 1891. **Insufficient proof of corpus delicti.**—To sustain a conviction for murder, the State must show a homicide. Homicide is the destruction of the life of one human being by the act, agency, procurement, or culpable omission of another. Treadwell v. State, 16 Texas Crim. App. 560. Conde v. State, 35 Texas Crim. Rep. 98; 34 S. W. 286.

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The corpus delicti in a murder case is not proven if the testimony is not sufficient to identify the remains as those of the person charged to have been killed. Wilson v. State, 41 Texas 324. Walker v. State, 14 Texas Crim. App. 637. Ah Hang v. State, 18 Texas Crim. App. 675. Lightfoot v. State, 20 Texas Crim. App. 96. Gay v. State, 42 Texas Crim. Rep. 450; 60 S. W. 771 (body burned up).

If the identity of the remains found as being those of the person charged to have been killed rests wholly upon circumstantial evidence, the proof of identity, to be sufficient, must exclude every other reasonable hypothesis except that the remains are those of such person. The law requires a greater degree of proof than a mere probability or a strong suspicion. Walker v. State, 14 Texas Crim. App. 609. Gay v. State, 42 Texas Crim. Rep. 450; 60 S. W. 771.

The uncorroborated testimony of an accomplice witness is not sufficient to prove the corpus delicti. Hunter v. State, 34 Texas Crim. Rep. 599; 31 S. W. 674. Truelove v. State, 44 Texas Crim. Rep. 386; 71 S. W. 601.

Proof of the corpus delicti is not sufficient when the death of deceased by violence inflicted by another is not proven. Lovelady v. State, 14 Texas Crim. App. 545. Robinson v. State, 16 Texas Crim. App. 347. Treadwell v. State, 16 Texas Crim. App. 560. Lovelady v. State, 17 Texas Crim. App. 286. Hunter v. State, 34 Texas Crim. Rep. 599; 31 S. W. 674. Conde v. State, 35 Texas Crim. Rep. 98; 34 S. W. 286. Williams v. State, 65 S. W. 1060. Follis v. State, 51 Texas Crim. Rep. 186; 101 S. W. 242.

The confession of defendant is not sufficient to corroborate an accomplice witness when the accomplice alone testifies to the confession. Hunter v. State, 34 Texas Crim. Rep. 599; 31 S. W. 674.

The testimony of a person unfamiliar with anatomy that a skeleton was that of a female is not sufficient to establish that fact. Wilson v. State, 41 Texas 324.

Proof that defendant was seen with deceased a short while before the homicide and that he left town and did not return for some time is not sufficient to show that he was guilty of murder. Hernandez v. State, 72 S. W. 840.

Sec. 1892. **Charge on corpus delicti.**—Where the identification of the skeleton as being that of the person charged to have been killed is weak, the court should charge the jury that defendant could not be convicted of any grade of homicide unless the body, or portions of it, are found and sufficiently identified to establish the fact of the death of the person charged to have been killed. Williams v. State, 65 S. W. 1060. Chandler v. State, 60 Texas Crim. Rep. 338; 131 S. W. 598 (court did and charge was correct).

It is not necessary to charge the statute requiring the finding of the body or portions of it if the jury are required to find beyond a reasonable doubt the fact of the killing, that the person charged to have been killed was dead and that defendant killed him. Southern v. State, 60 Texas Crim. Rep. 578; 132 S. W. 778.

The charge of the court should inform the jury that the testimony as to the disappearance of deceased should not be considered by them in determining the identity of the remains found. Gay v. State, 42 Texas Crim. Rep. 456; 60 S. W. 771.

Where the only proof that deceased met death by violence was the testimony of an accomplice who claimed that defendant confessed that he had drowned deceased, the charge should require the jury to find that there was other evidence tending to show that defendant drowned the deceased. Hunter v. State, 34 Texas Crim. Rep. 599; 31 S. W. 674.

Art. 1085. (655) (550) **Person killed must be in existence.**—The person upon whom the homicide is alleged to have been committed must be in existence by actual birth. It is homicide, however, to destroy human life actually in existence, however frail such existence may be, or however near extinction from other causes. (O. C. 445.)

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Sec. 1893. **Homicide of one barely alive.**—It is homicide to destroy human life actually in existence however frail such existence may be or however near extinction from other causes. Ware v. State, 41 Texas Crim. Rep. 417; 55 S. W. 342. Gardner v. State, 44 Texas Crim. Rep. 572; 73 S. W. 13. Garner v. State, 45 Texas Crim. Rep. 310; 77 S. W. 797. Duque v. State, 56 Texas Crim. Rep. 214; 119 S. W. 687.

Sec. 1894. **Infanticide.**
Sec. 1895. Indictment.
Sec. 1896. Evidence.
Sec. 1897. Convictions sustained.
Sec. 1898. Evidence insufficient.
Sec. 1899. Charge of the court.

Sec. 1895. **Indictment for infanticide.**—Indictments for infanticide held good: Sheppard v. State, 17 Texas Crim. App. 80. Triggs v. State, 53 S. W. 104. Gossett v. State, 57 Texas Crim. Rep. 43; 123 S. W. 428.

Several means of accomplishing the same result may be alleged in the same count of the indictment, and proof that death was caused by any or all of the means alleged is sufficient. Medina v. State, 49 S. W. 380. Jones v. State, 63 Texas Crim. Rep. 394; 141 S. W. 955.

An indictment for infanticide should allege the means used. State v. Rupe, 41 Texas 33.

An indictment for infanticide may allege that the means used were unknown. Sheppard v. State, 17 Texas Crim. App. 81.

An indictment for the murder of an infant need not allege either the age or the sex of such infant. Triggs v. State, 53 S. W. 104.

If the sex of the infant alleged to have been murdered is unnecessarily alleged, the proof, to be sufficient, must support such descriptive allegation. Wallace v. State, 10 Texas Crim. App. 269. Triggs v. State, 53 S. W. 104.

If the child alleged to have been murdered had no name or if the name was unknown to the grand jury, it is sufficient to allege that fact, giving the name of its mother. Puryear v. State, 28 Texas Crim. App. 75; 11 S. W. 929. Triggs v. State, 53 S. W. 104. Gossett v. State, 57 Texas Crim. Rep. 43; 123 S. W. 428.

Where neither the name of the child alleged to have been murdered nor the name of its mother is alleged, the indictment is not supported by proof that the name of its mother was known to the grand jury. McCloy v. State, 47 Texas Crim. Rep. 125; 80 S. W. 524 (defendant was its mother).

Sec. 1896. **Evidence in cases of infanticide.**—As a part of the corpus delicti, the State must establish that the child was born alive, that is, the State must prove a complete expulsion of the child from the body of the mother, alive. Until thus expelled and living the child is not the subject of homicide. Wallace v. State, 10 Texas Crim. App. 270. Josef v. State, 34 Texas Crim. Rep. 447; 30 S. W. 1067. Ellison v. State, 59 Texas Crim. Rep. 3; 127 S. W. 542.

Besides proving that the child alleged to have been killed was in existence by actual birth, the State must establish, as the other part of the corpus delicti, that the child, after being born alive, came to its death by some criminal means or agency and that defendant is a guilty agent. Sheppard v. State, 17 Texas Crim. App. 81. Harris v. State, 28 Texas Crim. App. 308; 12 S. W. 1102. Warren v. State, 30 Texas Crim. App. 58; 16 S. W. 747. Harris v. State, 30 Texas Crim. App. 550; 17 S. W. 1110. Josef v. State, 34 Texas Crim. Rep. 447; 30 S. W. 1067. Ellison v. State, 59 Texas Crim. Rep. 3; 127 S. W. 542.

A confession alone is insufficient to establish the corpus delicti. Harris v. State, 28 Texas Crim. App. 308; 12 S. W. 1102. Ellison v. State, 59 Texas Crim. Rep. 3; 127 S. W. 542.

In cases of infanticide a confession must be corroborated as to the child being born alive and also as to its coming to its death by some criminal means or agency.

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Harris v. State, 28 Texas Crim. App. 308; 12 S. W. 1102. Harris v. State, 30 Texas Crim. App. 550; 17 S. W. 1110.

The confession of defendant may be corroborated by circumstantial evidence. Harris v. State, 28 Texas Crim. App. 308; 12 S. W. 1102.

The mother of the child is not an accomplice witness from the mere fact that it was murdered in her presence. Jones v. State, 63 Texas Crim. Rep. 394; 141 S. W. 953.

The fact that the mother of the child would be an accomplice witness if the prosecution was for incest will not of itself make her occupy the attitude of an accomplice witness when another is on trial for the murder of her child. Johnson v. State, 24 S. W. 285.

A physician who has qualified as an expert may be permitted to testify that the injuries on the child could have been made with a man's fist or with a blunt instrument. Tune v. State, 49 Texas Crim. Rep. 448; 94 S. W. 231. Jones v. State, 63 Texas Crim. Rep. 394; 141 S. W. 953.

Hypothetical questions may be put to medical experts. Cordes v. State, 54 Texas Crim. Rep. 211; 112 S. W. 943.

It is admissible as a shorthand rendering of the facts for a witness to testify that defendant "looked as if she was in the family way," or that "she looked like she was going to have a baby." Cordes v. State, 54 Texas Crim. Rep. 209; 112 S. W. 943.

On a trial of the accused for the murder of her child the State may prove that her husband was not its father. Fletcher v. State, 68 S. W. 173.

A conversation between defendant and his wife overheard by the witness while he was attending the mother of the child as a physician may be admitted in evidence, it not being a privileged communication. Steagald v. State, 22 Texas Crim. App. 488; 3 S. W. 771.

Sec. 1897. **Convictions sustained.**—Steagald v. State, 24 Texas Crim. App. 207; 5 S. W. 853 (murdered his daughter's baby). Johnson v. State, 24 S. W. 285 (murdered his daughter's baby). Red v. State, 53 S. W. 618 (defendant was a principal. Sufficient corroboration of accomplice.). Johnson v. State, 45 Texas Crim. Rep. 453; 77 S. W. 15 (corpus delicti proven). Tune v. State, 49 Texas Crim. Rep. 445; 94 S. W. 231 (sufficient corroboration of accomplice). Jones v. State, 63 Texas Crim. Rep. 394; 141 S. W. 953.

Circumstantial evidence is sufficient to support a conviction when the circumstances proven are sufficient to exclude every other reasonable hypothesis except that of defendant's guilt. Warren v. State, 26 S. W. 403. Aud and Townsend v. State, 36 Texas Crim. Rep. 82; 35 S. W. 671. Cordes v. State, 54 Texas Crim. Rep. 206; 112 S. W. 943. Gossett v. State, 57 Texas Crim. Rep. 43; 123 S. W. 428.

Sec. 1898. **Evidence insufficient.**—A conviction for infanticide will not be sustained if the evidence is insufficient to show that the infant was born alive. Wallace v. State, 10 Texas Crim. App. 255. Nobles v. State, 68 S. W. 989. Berryman v. State, 51 Texas Crim. Rep. 192; 101 S. W. 225. McCowan v. State, 51 Texas Crim. Rep. 205; 101 S. W. 1157. Ellison v. State, 59 Texas Crim. Rep. 3; 127 S. W. 542 (confession not corroborated).

A conviction for infanticide will not be sustained if the proof is insufficient to show that the infant alleged to have been killed was dead. Puryear v. State, 28 Texas Crim. App. 78; 11 S. W. 929 (no corroboration of accomplice). McCowan v. State, 51 Texas Crim. Rep. 205; 101 S. W. 1157 (no corroboration of accomplice).

A conviction for the murder of a child will not be sustained if the proof is insufficient to show that the child was killed by defendant or that defendant was a principal in the murder. Elizabeth v. State, 27 Texas 329. Fletcher v. State, 68 S. W. 173.

A conviction for the murder of a child will not be sustained if the proof is insufficient to show that it came to its death by some criminal means or agency. Sheppard v. State, 17 Texas Crim. App. 81. Harris v. State, 28 Texas Crim. App. 308;

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12 S. W. 1102 (confession not corroborated). Warren v. State, 30 Texas Crim. App. 58; 16 S. W. 747. Harris v. State, 30 Texas Crim. App. 550; 17 S. W. 1110 (confession not sufficiently corroborated). Josef v. State, 34 Texas Crim. Rep. 446; 30 S. W. 1067. Fletcher v. State, 68 S. W. 173. McCowan v. State, 51 Texas Crim. Rep. 205; 101 S. W. 1157. Ellison v. State, 59 Texas Crim. Rep. 3; 127 S. W. 542 (confession not corroborated).

Sec. 1899. **Charge of the court.**—Charges held correct: Wallace v. State, 10 Texas Crim. App. 274 (complete). Red v. State, 53 S. W. 618. Cordes v. State, 54 Texas Crim. Rep. 212; 112 S. W. 943 (complete). Jones v. State, 63 Texas Crim. Rep. 394; 141 S. W. 953.

The court is authorized to submit the law of principals to the jury when there is evidence that defendant acted with another in murdering the child. Aud and Townsend v. State, 36 Texas Crim. Rep. 76; 35 S. W. 671. Jones v. State, 63 Texas Crim. Rep. 394; 141 S. W. 953.

The charge may submit to the jury any or all of the means alleged and used in the murder which find support in the testimony, and proof that the murder was committed by any or all of the means alleged is sufficient. Jones v. State, 63 Texas Crim. Rep. 394; 141 S. W. 953.

A charge on circumstantial evidence is not required if there is direct evidence that the accused did the killing, though such direct evidence comes only from an accomplice witness. Red v. State, 53 S. W. 618.

If the issue is in the case an affirmative charge on the theory of strangulation before birth should be given. Wallace v. State, 7 Texas Crim. App. 573.

When the proof shows, without controversy, that the child was born alive and subsequently killed, it is not error to refuse to charge the jury that the child must have been in existence by actual birth. Tune v. State, 49 Texas Crim. Rep. 448; 94 S. W. 231.

If murder in the first and second degrees is involved in the law of the case it is error not to charge on murder in the second degree unless the proof is so cogent as to show express malice and to exclude implied malice. Ellison v. State, 59 Texas Crim. Rep. 3; 127 S. W. 542.

It is not error to fail to charge on murder in the second degree if the testimony clearly establishes a premeditated and formed design on the part of defendant to destroy the life of the child killed, and no circumstance suggests the issue of murder in the second degree. Tune v. State, 49 Texas Crim. Rep. 445; 94 S. W. 231.

Errors in the charge on murder in the first degree pass out of the case where the conviction is not for that degree when they do not prejudice the other issues in the case. Jones v. State, 63 Texas Crim. Rep. 394; 141 S. W. 953.

If murder in the first and second degrees is involved in the law of the case the court should charge on murder in the second degree if there is testimony to support the theory that defendant killed her child on a rash impulse, conceived and executed while her mind was by pain and anguish incapable of cool reflection. Wallace v. State, 7 Texas Crim. App. 572. Ellison v. State, 59 Texas Crim. Rep. 3; 127 S. W. 542.

If the court charges on murder in the first degree, a charge is erroneous if the jury are thereby instructed that if another unlawfully killed the deceased and that defendant knew the unlawful intent and purpose of such other and did with express malice aforethought aid, etc., he would be guilty of murder in the first degree; the charge should require the jury to find that the actual slayer acted with express malice aforethought. Red v. State, 39 Texas Crim. Rep. 667; 47 S. W. 1003.

Art. 1086. (656) (551) **Homicide produced by words, etc.**—Although it is necessary to constitute homicide that it shall result from some act of the party accused, yet, if words be used which are reason-

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ably calculated to produce and do produce an act which is the immediate cause of death, it is homicide; as for example, if a blind man, a stranger, a child, or a person of unsound mind, be directed by words to a precipice or other dangerous place where he falls and is killed; or if one be directed to take any article of medicine, food or drink, known to be poisonous and which does produce a fatal effect; in these and like cases, the person so operating upon the mind or conduct of the person injured shall be deemed guilty of homicide. (O. C. 546.)

Sec. 1900. **Homicide by indirect means.**—A party, in order to be guilty of culpable homicide, need not do the act of killing directly, but he can produce the cause thus by indirection—such as by force or threats operating upon the mind or conduct of another, and causing that other to take a place of danger where he is liable to be killed. Taylor v. State, 41 Texas Crim. Rep. 573; 55 S. W. 961. Keaton v. State, 41 Texas Crim. Rep. 621; 57 S. W. 1125.

Sec. 1901. **Homicide of one person by act intended for another.**—If defendant, under circumstances which would make the homicide murder in the first degree, shoots at one person and kills one whom he did not intend to kill, the homicide is murder in the second degree. McCoy v. State, 25 Texas 33. Taylor v. State, 3 Texas Crim. App. 387. Halbert v. State, 3 Texas Crim. App. 656. McConnell v. State, 13 Texas Crim. App. 390. Clark v. State, 19 Texas Crim. App. 495. Musick v. State, 21 Texas Crim. App. 69; 18 S. W. 95. Breedlove v. State, 26 Texas Crim. App. 445; 9 S. W. 768. Richards v. State, 35 Texas Crim. Rep. 43; 30 S. W. 805. Lankster v. State, 41 Texas Crim. Rep. 603; 56 S. W. 65. Howard v. State, 58 S. W. 77. Sparks v. State, 77 S. W. 811. Thomas v. State, 53 Texas Crim. Rep. 276; 109 S. W. 194. Barnes v. State, 57 Texas Crim. Rep. 449; 125 S. W. 39. McCullough v. State, 62 Texas Crim. Rep. 126; 136 S. W. 1055. Rainer v. State, 148 S. W. 735. Cooper v. State, 154 S. W. 991.

It is proper to charge the jury that if defendant acting with malice aforethought, either express or implied, shot at one person and killed deceased, he would be guilty of murder in the second degree. Thomas v. State, 53 Texas Crim. Rep. 276; 109 S. W. 194. Rainer v. State, 148 S. W. 735.

If A shoots at B and kills C, it is murder in the second degree if the killing of B, had he been thus killed, would have been murder in either degree. Richards v. State, 35 Texas Crim. Rep. 38; 30 S. W. 805. Perry v. State, 45 S. W. 566. Howard v. State, 58 S. W. 77. Sparks v. State, 77 S. W. 811. McCullough v. State, 62 Texas Crim. Rep. 126; 136 S. W. 1055. Rainer v. State, 148 S. W. 735. Cooper v. State, 154 S. W. 991.

One committing an assault with intent to murder who accidentally kills a third person is guilty of murder with implied malice. McConnell v. State, 13 Texas Crim. App. 390. Clark v. State, 19 Texas Crim. App. 495.

The accidental killing of one person in the attempt with malice aforethought to kill another is murder and not negligent homicide. Richards v. State, 35 Texas Crim. Rep. 38; 30 S. W. 805. Wheatly v. State, 39 S. W. 672.

If defendant with malice aforethought starts to kill one person and is forced during the difficulty to kill another in self-defense, the homicide will not be higher than murder with implied malice. Honeycutt v. State, 42 Texas Crim. Rep. 131; 57 S. W. 806.

If murder in both degrees is involved in the law of the case and there is evidence that defendant did not intend to kill deceased but intended, with malice aforethought to kill another, he is entitled to an affirmative charge on the theory that the killing of deceased in the attempt to murder another would be murder in the second degree, and a general charge on implied malice is not sufficient if the State's case is murder on express malice towards deceased. Howard v. State, 58 S. W. 79. McCullough v. State, 62 Texas Crim. Rep. 126; 136 S. W. 1055.

An indictment seeking to charge defendant as an accomplice to the murder of a person who was killed by the principal through mistake while intending to kill

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another should allege the agreement and the murder according to the real facts. Cooper v. State, 154 S. W. 989. Cooper v. State, 177 S. W. 980 (sets out correct form).

If defendant would have been guilty of manslaughter had he killed the person intended, the unintentional killing of another in the attempt to kill the person intended would be manslaughter because the crime intended would be manslaughter. Ferrell v. State, 43 Texas 503. Clark v. State, 19 Texas Crim. App. 495. Leggett v. State, 21 Texas Crim. App. 382; 17 S. W. 159. Peter v. State, 23 Texas Crim. App. 687; 5 S. W. 228. Honeycutt v. State, 42 Texas Crim. Rep. 132; 57 S. W. 806. Hjeronymous v. State, 47 Texas Crim. Rep. 366; 83 S. W. 708. Nelson v. State, 48 Texas Crim. Rep. 274; 87 S. W. 143. Barnes v. State, 57 Texas Crim. Rep. 451; 125 S. W. 39. McCullough v. State, 62 Texas Crim. Rep. 126; 136 S. W. 1055. Vining v. State, 146 S. W. 909. Hobbs v. State, 151 S. W. 809. Whiten v. State, 160 S. W. 462.

If defendant provoked the difficulty with no intent to kill or to inflict serious bodily injury and a different person than the one first provoked interferes and defendant is forced to kill the latter in self-defense, he is guilty of manslaughter. Honeycutt v. State, 42 Texas Crim. Rep. 131; 57 S. W. 806.

If defendant in attempting to make an illegal arrest kills in self-defense he is guilty of manslaughter although he was mistaken in the identity of the person he attempted to arrest, unless by retiring from the difficulty in an unequivocal manner and his adversary then renewing the combat his perfect right of self-defense revives. Peter v. State, 23 Texas Crim. App. 687; 5 S. W. 228. Carter v. State, 30 Texas Crim. App. 558; 17 S. W. 1102.

When the defensive theory is that defendant killed the deceased really believing he was another person, it is error in charging on manslaughter to charge the jury that it is not enough that the mind is agitated by the passion arising from a provocation given by some other person than the party killed. Wilson v. State, 156 S. W. 1185.

If defendant's theory is that deceased was killed by a third party shooting at him and killing deceased, it is error to present this defense upon the theory that the third party shot at deceased. Bennett v. State, 75 S. W. 314.

When the defensive theory is that defendant killed deceased mistaking him for a third person, defendant may prove his acts, words, and conduct upon being informed that it was deceased and not the third person that he had killed. Wilson v. State, 156 S. W. 1185.

When defendant kills deceased really believing that he was another person who had threatened him, the charge on self-defense should be so framed as to give him the same right to act as if it in fact was the other person who was approaching him. Wilson v. State, 156 S. W. 1185.

When defendant is prosecuted for any grade of assault or for the murder of the person actually injured, he is entitled to show any excuse, justification, or mitigation, as he would have the right to show if he had injured the person he intended to injure. Vining v. State, 146 S. W. 909. Wilson v. State, 156 S. W. 1185.

If the homicide would have been justifiable on the theory that it was committed by the husband upon the person of one taken in adultery with the wife, the unintentional shooting of the wife in the attempt to kill her paramour would be no offense. Pena v. State, 38 Texas Crim. Rep. 333; 42 S. W. 991. Powell v. State, 70 S. W. 218.

If defendant in exercising his perfect right of self-defense accidentally kills a bystander or a third person he is guilty of no offense. Plummer v. State, 4 Texas Crim. App. 310. Clark v. State, 19 Texas Crim. App. 503. Perry v. State, 45 S. W. 566. Lankster v. State, 41 Texas Crim. Rep. 603; 56 S. W. 65. Lankster v. State, 72 S. W. 388. Hunter v. State, 59 Texas Crim. Rep. 457; 129 S. W. 125 (this opinion gives the trial court's able charge on this theory). McCullough v. State, 62 Texas Crim. Rep. 126; 136 S. W. 1055. Vining v. State, 146 S. W. 909. Jackson v. State, 147 S. W. 589. Hobbs v. State, 151 S. W. 809.

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If there is evidence that defendant was acting in perfect self-defense when he unintentionally killed a third person in shooting at his adversary, it is error to restrict his right of self-defense by including in the charge the theory that his preparation for self-defense must not endanger the life of the third person. Lankster v. State, 41 Texas Crim. Rep. 603; 56 S. W. 65.

CHAPTER XII

JUSTIFIABLE HOMICIDE

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Article 1087. (657) (552) **When justifiable.**—Homicide is justifiable in the cases enumerated in the succeeding articles of this chapter. (O. C. 547.)

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1. Of a Public Enemy

Art. 1088. (658) (553) **Killing a public enemy.**—It is lawful to kill a public enemy, not only in the prosecution of war, but when he may be in the act of hostile invasion or occupation of any part of the State. A public enemy is any person acting under the authority or enlisted in the service of any government at war with this State or with the United States. Persons belonging to hostile tribes of Indians, who habitually commit depredations upon the lives or property of inhabitants of this State, and all persons acting with such tribes are public enemies, and this whether found in the act of committing such depredations or under circumstances which sufficiently show an intention to do so. (O. C. 548.)

Art. 1089. (659) (554) **But not by poison.**—Homicide of a public enemy by poison or the use of poisoned weapons is not justifiable. (O. C. 549.)

Art. 1090. (660) (555) **Nor a deserter, prisoner, etc.**—Homicide of a public enemy who is a deserter or prisoner of war, or the bearer of a flag of truce, is not justifiable. (O. C. 550.)

2. Of a Convict

Art. 1091. (661) (556) **Execution of a convict.**—The execution of a convict for a capital offense, by a legally qualified officer, under the warrant of a court of competent jurisdiction, is justifiable when the same takes place in the manner authorized by law and directed by warrant. (O. C. 551.)

3. By Officers, etc.

Art. 1092. (662) (557) **By officer in execution of lawful order.**—Homicide by an officer in the execution of the lawful orders of magistrates and courts is justifiable when he is violently resisted and has just ground to fear danger to his own life in executing the order. (O. C. 552.)

Art. 1093. (663) (558) **Even though order is erroneous.**—The officer is justifiable, though there may have been an error of judgment on the part of the magistrate or court, if the order emanated from a proper authority. (O. C. 553.)

Art. 1094. (664) (559) **Qualification of the foregoing.**—The rule set forth in the two preceding articles is subject to the following restrictions:

1. The order must be that of a magistrate or a court having lawful authority to issue it.
2. It must have such form as the law requires to give it validity.
3. The person executing the order must be some officer duly authorized by law to execute the order, or some person specially appointed in accordance with law for the performance of the duty.

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4. If the person executing the order be an officer, and performing a duty which no other person can by law perform, he must have taken the oath of office and given bond, where such is required by law.

5. The order must be executed in the manner directed by law, and the person executing the same must make known his purpose and the capacity in which he acts.

6. If the order be a written one, and the person against whom it issues, before resistance offered, wishes to see the same, or hear it read, the person charged with its execution shall produce the order and show it or read it.

7. In making an arrest under a written order, the person acting under such order shall, in all cases, declare to the party against whom it is directed the offense of which he is accused, and state the nature of the warrant, unless prevented therefrom by the act of the party to be arrested.

8. The officer or other person executing an order of arrest is required to use such force as may be necessary to prevent an escape when it is attempted, but he shall not in any case kill one who attempts to escape, unless in making or attempting such escape the life of the officer is endangered, or he is threatened with great bodily injury.

9. In overcoming a resistance to the execution of an order, the officer or person executing the same may oppose such force as is necessary to overcome the resistance, but he shall not take the life of the person resisting, unless he has just ground to fear that his own life will be taken, or that he will suffer great bodily injury in the execution of the order.

10. A prisoner under sentence of death, or of imprisonment in the penitentiary, or attempting to escape from the penitentiary, may be killed by the officer having legal custody of him, if his escape can in no other manner be prevented. (O. C. 554.)

Art. 1095. (665) (560) **Order may be written or verbal.**—The order referred to in this chapter may be either written or verbal, where a verbal order is allowed for the arrest of a person. (O. C. 555.)

Art. 1096. (666) (561) **Written order includes what.**—Under written orders are included all process in a criminal or civil action which directs the seizure of the person or of property. (O. C. 556.)

Art. 1097. (667) (562) **Verbal order justifies only in felony.**—No officer or other person ordered verbally to arrest another is justified in killing except the arrest be in a case of felony, or for the prevention of a felony. (O. C. 557.)

Art. 1098. (668) (563) **Persons aiding officer justified.**—Persons called in aid of an officer, in the performance of a duty, are justified in the same manner as the officer himself. (O. C. 558.)

Art. 1099. (669) (564) **Persons aiding resistance or escape.**—All persons opposing the execution of the order, or aiding in an escape,

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may be treated in the same manner as the person against whom the order is directed, or who is attempting to escape. (O. C. 559.)

Art. 1100. (670) (565) **Federal officers included.**—Officers acting under the authority of the laws or courts of the United States have the same rights and are liable to the rules prescribed in this chapter. (O. C. 560.)

Sec. 1902. **Officer killing one trying to escape.**—The officer or other person executing an order of arrest is required to use such force as may be necessary to prevent an escape when it is attempted, but he shall not, in any case, kill one who attempts to escape, unless in making, or attempting such escape, the life of the officer is endangered, or he is threatened with great bodily injury. Caldwell v. State, 41 Texas 97. Giebel v. State, 28 Texas Crim. App. 151; 12 S. W. 591. Roe v. State, 55 Texas Crim. Rep. 132; 115 S. W. 593.

An officer is guilty of murder with implied malice if he kills a prisoner who after his arrest neither resists or attacks the officer but was simply running away to make his escape from such custody when he was killed. Caldwell v. State, 41 Texas 97. Giebel v. State, 28 Texas Crim. App. 151; 12 S. W. 591.

An officer is not justified in killing a prisoner in his custody though there be some resistance to the arrest where the conduct of the prisoner was not such as to cause the officer to reasonably believe that he was in danger of death or great bodily injury. Giebel v. State, 28 Texas Crim. App. 151; 12 S. W. 591. Buchanan v. State, 52 Texas Crim. Rep. 235; 106 S. W. 134.

Sec. 1903. **Officer killing one resisting arrest.**—In overcoming a resistance to the execution of an order, the officer or person executing the same may oppose such force as is necessary to overcome the resistance, but he shall not take the life of the person resisting, unless he has just ground to fear that his own life will be taken, or that he will suffer great bodily injury in the execution of the order. Plasters v. State, 1 Texas Crim. App. 682.

If the defensive theory is that the deceased was killed in self-defense while resisting a lawful arrest and there is evidence that deceased knew the purpose and capacity of the accused, the charge is too restrictive if it requires the accused to have made known to deceased the capacity in which he was acting and his purpose to make the arrest. Plasters v. State, 1 Texas Crim. App. 683.

If the defensive theory is that deceased was killed in self-defense while resisting a lawful arrest and that the accused acted on a reasonable apprehension of death or great bodily injury, the charge is too restrictive if it limits the apprehension to a fear of death only. Plasters v. State, 1 Texas Crim. App. 682.

If the deceased was killed in an attempt to illegally arrest him, the slaying officer stands in the attitude of a trespasser and the homicide cannot be of a less grade than manslaughter, though done upon reasonable apprehension of death or great bodily injury, and though such officer was mistaken in the identity of the person he sought to so arrest. Peter v. State, 23 Texas Crim. App. 687; 5 S. W. 228. Carter v. State, 30 Texas Crim. App. 551; 17 S. W. 1102.

Sec. 1904. **Officer killing a convict.**—A prisoner under sentence of imprisonment in the penitentiary who is attempting to escape from the penitentiary may be killed by the officer having legal custody of him if his escape can in no other manner be prevented. Ex parte Russell, 160 S. W. 75.

The law does not give to an officer attempting to re-arrest an escaped convict the same authority to kill in order to prevent his escape from re-arrest that it gives to an officer having legal custody of a convict who is attempting to escape. Wright v. State, 44 Texas 645.

Sec. 1905. **Convict killing officer.**—The fact that the accused was a convict and deprived of his liberty will not excuse or justify him in killing his guard in order to regain his liberty. Washington et al. v. State, 1 Texas Crim. App. 647. Wallace v. State, 20 Texas Crim. App. 372.

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It is no defense or extenuation that defendant, a convict, in order to acquire his liberty, killed the officer whose duty it was to pursue and recapture him. Wallace v. State, 20 Texas Crim. App. 372.

The fact that the accused was a prisoner and committed the murder to effect his escape from custody affords no excuse, justification, or even extenuation of his crime. Waite v. State, 13 Texas Crim. App. 181.

Sec. 1906. **Homicide of person aiding escape.**—When an officer has one person under arrest and a third person comes up and assaults the officer, the officer is not justified in killing such third person unless such attack produces an apprehension of death or serious bodily injury, and if the attack is of a milder character and the officer kills under the passion aroused thereby the homicide is manslaughter. Williams v. State, 41 Texas Crim. Rep. 365; 54 S. W. 759.

Art. 1101. (671) (566) **In suppressing riots.**—Homicide is justifiable when necessary to suppress a riot, when the same is attempted to be suppressed in the manner pointed out in the Code of Criminal Procedure, and can in no way be suppressed except by taking life. (O. C. 561.)

Art. 1102. (672) (567) **Adultery as justification.**—Homicide is justifiable when committed by the husband upon the person of any one taken in the act of adultery with the wife, provided the killing take place before the parties to the act of adultery have separated. (O. C. 562.)

Art. 1103. (673) (568) **Connivance in or assent to the adultery.**—Homicide cannot be justified by reason of the existence of the circumstances spoken of in the preceding article, where it appears that there has been, on the part of the husband, any connivance in or assent to the adulterous connection. (O. C. 563.)

Sec. 1907. **Adultery as justification for homicide.**—Homicide is justifiable when committed by the husband upon the person of any one taken in the act of adultery with the wife, provided the killing take place before the parties to the act of adultery have separated. Adultery with the wife is not a justification for homicide where it appears that there has been, on the part of the husband, any connivance in or assent to the adulterous connection. Price v. State, 18 Texas Crim. App. 474. Massie v. State, 30 Texas Crim. Rep. 64; 16 S. W. 770. Morrison v. State, 39 Texas Crim. Rep. 521; 47 S. W. 369. Giles v. State, 43 Texas Crim. Rep. 561; 67 S. W. 411. Dewberry v. State, 74 S. W. 307. Gregory v. State, 50 Texas Crim. Rep. 77; 94 S. W. 902. Richards v. State, 53 Texas Crim. Rep. 415; 110 S. W. 432. Williams v. State, 165 S. W. 583.

By the term "adultery," as used in the statute making adultery with the wife a justification for homicide is not meant statutory adultery, but it may be one single act of illicit intercourse, and the charge of the court should so inform the jury. Price v. State, 18 Texas Crim. App. 484.

The charge should explain to the jury what is meant by the words "taken in the act." Price v. State, 18 Texas Crim. App. 483.

The husband is not required to see the *rem in re* if the appearances were of a character as would have created the reasonable apprehension and conviction in a person of ordinary mind that the parties then either were about, or were, or just had engaged in the carnal act. Price v. State, 18 Texas Crim. App. 483. Dewberry v. State, 74 S. W. 307. Gregory v. State, 50 Texas Crim. Rep. 77; 94 S. W. 902. Richards v. State, 53 Texas Crim. Rep. 415; 110 S. W. 432.

It is error to charge the jury that the husband must see the parties together in such position as indicates to a "rational mind" that they had committed or were

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about to commit adultery; defendant is to be judged from his own standpoint and not from the standpoint of a rational mind. Price v. State, 18 Texas Crim. App. 483. Gregory v. State, 50 Texas Crim. Rep. 77; 94 S. W. 902.

Where the husband suspected his wife of being criminally intimate with deceased and hid under the house and heard sounds indicating that they were enjoying the carnal act, and when they came out he pursued them and met them together and then killed deceased, the court should instruct the jury that if these were the facts he should be acquitted, although defendant assigned another motive for the homicide. Morrison v. State, 39 Texas Crim. Rep. 521; 47 S. W. 369.

The statute makes no exception in favor of one place or another, and the charge is erroneous if it burdens the defense with the theory that the wife had resorted to a place that was not decent. Giles v. State, 43 Texas Crim. Rep. 561; 67 S. W. 411.

The charge should explain to the jury what is meant by the words "before the parties to the act of adultery have separated." The statute contemplates only that the parties are still together in company with each other, after the act, when the homicide is committed. Price v. State, 18 Texas Crim. App. 484. Morrison v. State, 39 Texas Crim. Rep. 521; 47 S. W. 369.

If mistake of fact is an issue, and the court charges on it, the charge should not suggest that the mistake "may possibly" exist. Richards v. State, 53 Texas Crim. Rep. 415; 110 S. W. 432.

If there is evidence of former adultery as well as adultery at the time of the homicide, and the court desires to use the word "discovered" in the charge, the two issues of adequate cause and justification should not be confused in the charge and the charge should explain to the jury what is meant by the word "discovered." Dewberry v. State, 74 S. W. 307. Richards v. State, 53 Texas Crim. Rep. 415; 110 S. W. 432.

If there is evidence, from a confession or otherwise, that defendant shot his wife intentionally while she was taken in the act of adultery, the court should submit this theory to the jury although defendant testifies on the trial that he shot her accidentally in shooting at her paramour. Williams v. State, 165 S. W. 583.

Where the defensive theory is present adultery as justification, absent testimony of previous adultery is not material so as to entitle defendant to a continuance where the defendant knew of such previous conduct before the absent witness purported to communicate such fact to him, and the homicide was not on the first meeting after the previous adultery was discovered. Massie v. State, 30 Texas Crim. App. 64; 16 S. W. 770.

4. DEFENSE OF PERSON OR PROPERTY

Sec. 1908. **Self-defense.**
Sec. 1909. Homicide in self-defense is justifiable.
Sec. 1910. Court should charge statute.
Sec. 1911. Defense of another.
Sec. 1915. Homicide in preventing robbery.
Sec. 1916. Maiming as justification.
Sec. 1917. To prevent burglary and theft.
Sec. 1918. Presumption from use of weapon by deceased.
Sec. 2093. Character of deceased.
Sec. 1919. Resort to other means.
Sec. 1920. Charge on excessive force.
Sec. 1921. Retreat.
Sec. 1922. Apparent danger.
Sec. 1924. Defense must appear necessary.
Sec. 1928. Standpoint of defendant.
Sec. 1929. State of mind.
Sec. 1930. Facts unknown to defendant.
Sec. 1931. Proof that deceased was armed or unarmed.
Sec. 1932. Newly discovered evidence of deceased being armed.

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Sec. 1933. Condition of deceased's weapon.
Sec. 1934. More assailants than one.
Sec. 1935. Fear of serious bodily injury.
Sec. 1936. One may defend against any attack.
Sec. 1937. If charge mentions weapons of deceased.
Sec. 1938. Affirmative charge should be given.
Sec. 1939. Omission of word in the charge.
Sec. 1940. Signing the charge.
Sec. 1941. Filing the charge.
Sec. 1942. May charge State's theory of self-defense.
Sec. 1943. Burden of proof.
Sec. 1944. Charge grouping the facts.
Sec. 1945. Other charges on self-defense.
Sec. 1946. Invited error.
Sec. 1947. Right to seek explanation.
Sec. 1948. Requiring defendant to go on peaceful mission.
Sec. 1949. Right to go armed.
Sec. 1950. Need not charge on right to go armed.
Sec. 1951. Imperfect self-defense.
Sec. 1952. Provoking the difficulty.
Sec. 1959. Mutual combat.
Sec. 1963. Abandonment of difficulty.
Sec. 1967. Right to pursue.
Sec. 1968. Right to continue to shoot.
Sec. 1969. Error to charge on self-defense.
Sec. 1970. Error to fail to charge on self-defense.
Sec. 1971. Not error to fail to charge on self-defense.
Sec. 1972. Defense of property.
Sec. 1976. Homicide in resisting arrest.

Art. 1104. (674) (569) **In defense of person and property.**—Homicide is permitted in the necessary defense of person or property, under the circumstances and subject to the rules herein set forth. (O. C. 567.)

Sec. 1909. **Homicide in self-defense is justifiable.**—When the facts proven show that the homicide was committed in necessary self-defense and while legally exercising that right, the jury is not authorized to arbitrarily convict the accused of murder or manslaughter. Smith v. State, 15 Texas Crim. App. 338. Garello v. State, 31 Texas Crim. Rep. 56; 20 S. W. 179. Hallowel v. State, 28 S. W. 468. Carson v. State, 43 Texas Crim. Rep. 265; 64 S. W. 1046. Chambless v. State, 77 S. W. 2. Clarkston v. State, 79 S. W. 304. Chambless v. State, 97 S. W. 472. Green v. State, 162 S. W. 1151.

Art. 1105. (675) (570) **In preventing other felonies, etc.**—Homicide is permitted by law when inflicted for the purpose of preventing the offense of murder, rape, robbery, maiming, disfiguring, castration, arson, burglary and theft at night, or when inflicted upon a person or persons who are found armed with deadly weapons and in disguise in the night time on premises not his or their own, whether the homicide be committed by the party about to be injured or by some person in his behalf, when the killing takes place under the following circumstances:

1. It must reasonably appear by the acts or by words, coupled with the acts of the person killed, that it was the purpose and intent of such person to commit one of the offenses above named.

2. The killing must take place while the person killed was in the

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act of committing the offense, or after some act done by him showing evidently an intent to commit such offense.

3. It must take place before the offense committed by the party killed is actually completed; except that, in case of rape, the ravisher may be killed at any time before he has escaped from the presence of his victim, and except, also, in the cases hereafter enumerated.

Sec. 1910. **Court should charge statute.**—When called for by the testimony, it is error to refuse to charge the provisions of the statute permitting a homicide when inflicted for the purpose of preventing the offense of murder, etc., when the danger reasonably appears to defendant, viewed from his standpoint, by the acts or by words coupled with the acts of the person killed that it was the purpose and intent of such person to commit such offense. Sanchez v. State, 149 S. W. 124.

4. Where the killing takes place to prevent the murder of some other person, it shall not be deemed that the murder is completed so long as the offender is still inflicting violence, though the mortal wound may have been given.

Sec. 1911. **Defense of another.**
Sec. 1912. Defense of another.
Sec. 1913. Error to fail to charge on.
Sec. 1914. Charge on defense of another.

Sec. 1912. **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, but no greater. Sterling v. State, 15 Texas Crim. App. 256.

Whatever one may do for himself he may do for another, and this is to be viewed from the standpoint of the defendant. Johnson v. State, 5 Texas Crim. App. 47. Sterling v. State, 15 Texas Crim. App. 256. Glover v. State, 33 Texas Crim. Rep. 227; 26 S. W. 204. Glaze v. State, 45 S. W. 906. Garcia v. State, 57 S. W. 650. Johnson v. State, 59 S. W. 269. Monson v. State, 63 S. W. 647. Palmer v. State, 47 Texas Crim. Rep. 270; 83 S. W. 202. Martinez v. State, 88 S. W. 234. Parnell v. State, 50 Texas Crim. Rep. 424; 98 S. W. 269. Griffin v. State, 57 Texas Crim. Rep. 280; 122 S. W. 553. Scott v. State, 60 Texas Crim. Rep. 318; 131 S. W. 1073. Little v. State, 61 Texas Crim. Rep. 197; 135 S. W. 120. Mayhew v. State, 144 S. W. 230. Coulter v. State, 160 S. W. 80. McAnthony v. State, 174 S. W. 1046.

The apprehension of danger must always be viewed from the standpoint of the accused whether he acts in his own behalf or in behalf of another. Snell v. State, 29 Texas Crim. App. 236; 15 S. W. 722. Saens v. State, 20 S. W. 739. Glover v. State, 33 Texas Crim. Rep. 227; 26 S. W. 204. Parnell v. State, 50 Texas Crim. Rep. 420; 98 S. W. 269. Griffin v. State, 57 Texas Crim. Rep. 280; 122 S. W. 553. Williams v. State, 61 Texas Crim. Rep. 356; 136 S. W. 771. Mayhew v. State, 144 S. W. 229. Coulter v. State, 160 S. W. 80.

The culpability of one who acts in defense of another is measured by the intent with which he acted and not by the intent of the other, unless the party so acting knew or might reasonably have known such intent. Guffee v. State, 8 Texas Crim. App. 187. Foster v. State, 8 Texas Crim. App. 253. Snell v. State, 29 Texas Crim. App. 240; 15 S. W. 722. Glover v. State, 33 Texas Crim. Rep. 227; 26 S. W. 204. Hargrove v. State, 33 Texas Crim. Rep. 431; 26 S. W. 993. Henry v. State, 50 S. W. 399. Monson v. State, 63 S. W. 650. Chambers v. State, 46 Texas Crim. Rep. 66; 79 S. W. 572. Parnell v. State, 50 Texas Crim. Rep. 420; 98 S. W. 269. Day v. State, 62 Texas Crim. Rep. 413; 138 S. W. 127. Mayhew v. State, 144 S. W. 231. Coulter v. State, 160 S. W. 80.

A party acting in defense of another is only bound to answer for his own intent; the intent of his co-defendant, unless he adopts the same and acts with the same intent, does not bind him at all. Snell v. State, 29 Texas Crim. App. 240; 15 S. W.

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722. Hargrove v. State, 33 Texas Crim. Rep. 431; 26 S. W. 993. Parnell v. State, 50 Texas Crim. Rep. 423; 98 S. W. 269. Day v. State, 62 Texas Crim. Rep. 413; 138 S. W. 127. Mayhew v. State, 144 S. W. 229. Coulter v. State, 160 S. W. 80.

Defendant loses the perfect right of self-defense in behalf of another if he aided the other to provoke the difficulty. Woodrich v. State, 90 S. W. 882. Mayhew v. State, 144 S. W. 229.

If the testimony makes it uncertain whether deceased intended to kill defendant or another, defendant would not have to wait to determine who deceased intended to kill before he would have the right to act. Glover v. State, 33 Texas Crim. Rep. 227; 26 S. W. 204. Glaze v. State, 45 S. W. 906.

If deceased brought about a difficulty with defendant's brother, and taking an unfair advantage of him, put him in danger of his life or of serious bodily injury and defendant on that account interfered and killed deceased, it would be a homicide in self-defense. Chambers v. State, 46 Texas Crim. Rep. 66; 79 S. W. 572.

If defendant knew nothing about who brought on the difficulty between his brother and deceased, and came upon the scene and saw his brother in peril of his life or of serious bodily injury and interfered and killed deceased, it would be a homicide in self-defense. Chambers v. State, 46 Texas Crim. Rep. 66; 79 S. W. 572. Parnell v. State, 50 Texas Crim. Rep. 420; 98 S. W. 269. Little v. State, 61 Texas Crim. Rep. 197; 135 S. W. 120. Mayhew v. State, 144 S. W. 231.

If murder in both degrees is involved, it is error to fail to charge upon murder in the second degree if there is evidence that defendant's first intimation of the difficulty was a call for help and he went to the assistance of another and found him struggling with deceased and killed deceased after he had abandoned the difficulty and while he was doing nothing. Reyons v. State, 32 Texas Crim. Rep. 153; 22 S. W. 590.

Though defendant began the difficulty, he would be guilty of no offense if his brother, seeing him in danger, armed himself and approached deceased for the purpose of protecting his brother's life and was fired upon by deceased, making it necessary for the brother to kill in self-defense, though in the exchange of shots between the brother and deceased defendant grappled deceased solely for the purpose of preventing deceased from killing the brother. Butler v. State, 33 Texas Crim. Rep. 235; 26 S. W. 232.

If from the testimony, looking to all the surrounding facts, it reasonably appeared to defendant that it was necessary to kill deceased in order to liberate his brother from an unlawful arrest of a violent and dangerous character, the jury should acquit. If the party illegally arrested had the right to regain his liberty, his brother had the right to liberate him. Dyson v. State, 14 Texas Crim. App. 463.

Sec. 1913. **Error to fail to charge on defense of another.**—If there is evidence that defendant was acting in defense of another, he is entitled to an affirmative charge on this theory. Guffee v. State, 8 Texas Crim. App. 187. Branch v. State, 15 Texas Crim. App. 96. Sterling v. State, 15 Texas Crim. App. 249. Bonner v. State, 29 Texas Crim. App. 231; 15 S. W. 821. Martinez v. State, 88 S. W. 234. Scott v. State, 60 Texas Crim. Rep. 318; 131 S. W. 1073. Johnson v. State, 60 Texas Crim. Rep. 512; 132 S. W. 804. Little v. State, 61 Texas Crim. Rep. 197; 135 S. W. 120. Williams v. State, 61 Texas Crim. Rep. 356; 136 S. W. 771. Pace v. State, 61 Texas Crim. Rep. 439; 135 S. W. 379. Vickers v. State, 157 S. W. 767. Trevino v. State, 161 S. W. 109.

If there is evidence that defendant was acting in defense of his father or his son, the charge of the court should present such defensive theory in an affirmative manner. Saens v. State, 20 S. W. 737. Phipps v. State, 34 Texas Crim. Rep. 610; 31 S. W. 657. Johnson v. State, 59 S. W. 269. Parnell v. State, 50 Texas Crim. Rep. 423; 98 S. W. 269. Terrell v. State, 53 Texas Crim. Rep. 604; 111 S. W. 152. Coons v. State, 151 S. W. 820.

When the issue is raised, the court should charge the jury that defendant would have a right to defend his brother and should present such theory in an affirmative manner. Guffee v. State, 8 Texas Crim. App. 187. Foster v. State, 8 Texas Crim. App.

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253. Alford v. State, 8 Texas Crim. App. 567. Ross v. State, 10 Texas Crim. App. 466. North v. State, 12 Texas Crim. App. 111. Ashworth v. State, 19 Texas Crim. App. 194. Snell v. State, 29 Texas Crim. App. 240; 15 S. W. 722. Butler v. State, 33 Texas Crim. Rep. 234; 26 S. W. 201. Palmer v. State, 47 Texas Crim. Rep. 270; 83 S. W. 202. Voight v. State, 53 Texas Crim. Rep. 271; 109 S. W. 205. Griffin v. State, 57 Texas Crim. Rep. 280; 122 S. W. 553. Scott v. State, 60 Texas Crim. Rep. 318; 131 S. W. 1073. Johnson v. State, 60 Texas Crim. Rep. 512; 132 S. W. 804. Little v. State, 61 Texas Crim. Rep. 197; 135 S. W. 120. Vickers v. State, 157 S. W. 767.

If there is evidence that when defendant came upon the scene he saw deceased about to attack his brother and deceased then turned on him to include him in the difficulty, the court should charge on defense of another as well as on self-defense. Sterling v. State, 15 Texas Crim. App. 249. Voight v. State, 53 Texas Crim. Rep. 271; 109 S. W. 205.

In submitting the issue of manslaughter, the charge of the court should not limit the right of self-defense to defendant's right to defend himself, when there is evidence that he was acting in defense of another. Vickers v. State, 157 S. W. 767.

Sec. 1914. **Charge on defense of another.**—If there is evidence that defendant was acting in defense of another and no evidence that he was acting in defense of himself, the court should only charge on defense of another. McGrath v. State, 35 Texas Crim. Rep. 425; 34 S. W. 127. Garza v. State, 48 Texas Crim. Rep. 383; 88 S. W. 231. Early v. State, 51 Texas Crim. Rep. 392; 103 S. W. 868. Vickers v. State, 157 S. W. 767.

The charge of the court should not submit the theory of defense of another when there is no evidence to support it. Bedford v. State, 36 Texas Crim. Rep. 477; 38 S. W. 210. Mitchell v. State, 38 Texas Crim. Rep. 170; 41 S. W. 816. Rembert v. State, 148 S. W. 1097. Singleton v. State, 167 S. W. 49.

If there is evidence that defendant was acting in defense of himself as well as evidence that he was acting in defense of another, the charge of the court should present both theories in an affirmative manner. Sterling v. State, 15 Texas Crim. App. 249. Glover v. State, 33 Texas Crim. Rep. 227; 26 S. W. 204. Bedford v. State, 36 Texas Crim. Rep. 477; 38 S. W. 210. Monson v. State, 63 S. W. 649. Voight v. State, 53 Texas Crim. Rep. 271; 109 S. W. 205. Johnson v. State, 60 Texas Crim. Rep. 512; 132 S. W. 804. Little v. State, 61 Texas Crim. Rep. 197; 135 S. W. 120. Williams v. State, 61 Texas Crim. Rep. 356; 136 S. W. 771.

In submitting the theory of defense of another, the charge should apply the law to the facts; a mere abstract charge is not sufficient. Johnson v. State, 60 Texas Crim. Rep. 512; 132 S. W. 804. Vickers v. State, 157 S. W. 767.

The charge should present the theory of defense of another from the standpoint of the defendant at the time he acted, and should not lead the jury to believe that they should view the apprehension of danger in the light of subsequent events. Williams v. State, 61 Texas Crim. Rep. 356; 136 S. W. 771.

A charge which makes defendant guilty of murder or manslaughter on a theory which is consistent with self-defense is erroneous. Terrell v. State, 53 Texas Crim. Rep. 607; 111 S. W. 152. Pannell v. State, 54 Texas Crim. Rep. 498; 113 S. W. 537. Casey v. State, 54 Texas Crim. Rep. 587; 113 S. W. 534.

If defendant killed deceased in defense of another, the charge of the court is erroneous if it binds his intent to the other participants in the tragedy regardless of whether he knew their purpose and intent or not. Guffee v. State, 8 Texas Crim. App. 187. Foster v. State, 8 Texas Crim. App. 253. Henry v. State, 50 S. W. 399. Monson v. State, 63 S. W. 650. Parnell v. State, 50 Texas Crim. Rep. 424; 98 S. W. 269. Mayhew v. State, 144 S. W. 231.

Whether defendant, who acted in defense of another, would be bound by the fact that the other had provoked the difficulty or that there was a mutual combat, depends upon defendant's knowledge of the antecedent facts, and the charge is erroneous if it ignores the issue of whether or not defendant knew of such facts. Guffee v. State,

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8 Texas Crim. App. 187. Foster v. State, 8 Texas Crim. App. 253. Snell v. State, 29 Texas Crim. App. 240; 15 S. W. 722. Glover v. State, 33 Texas Crim. Rep. 227; 26 S. W. 204. Hargrove v. State, 33 Texas Crim. Rep. 431; 26 S. W. 993. Henry v. State, 50 S. W. 399. Monson v. State, 63 S. W. 650. Chambers v. State, 46 Texas Crim. Rep. 66; 79 S. W. 572. Parnell v. State, 50 Texas Crim. Rep. 420; 98 S. W. 269. Mayhew v. State, 144 S. W. 231.

If defendant and his brother agreed to assault deceased, but not with the intent of inflicting death or serious bodily injury upon him, and in furtherance of such agreement the brother brought on the difficulty with deceased, and deceased obtained the advantage and put the brother in danger of death or of serious bodily injury and defendant then interfered and killed deceased, the defendant would have the imperfect right of self-defense and such homicide would be manslaughter, and it is error to charge the jury that such a homicide would be murder. Chambers v. State, 46 Texas Crim. Rep. 66; 79 S. W. 572.

It is error to charge the jury that defendant must resort to other means in defense of another, where the other, if attacked at all, was attacked with a deadly weapon. Branch v. State, 15 Texas Crim. App. 96. Shumate v. State, 38 Texas Crim. Rep. 279; 42 S. W. 600.

Where deceased knocked a friend of defendant down and defendant immediately shot, it is error to restrict defendant's right to act to the theory that he only had a right to prevent the murder of his friend. Garcia v. State, 57 S. W. 651.

Defendant has a right to defend his sons from any character of assault, and the charge should not restrict his defense to the question as to whether his sons were in danger of death or serious bodily injury when there is evidence that the attack on his sons was of a milder character. Smith v. State, 61 Texas Crim. Rep. 349; 135 S. W. 152.

If there is no evidence that prosecutor had ceased assaulting a third person, it is error to charge the jury that defendant would be guilty if he assaulted prosecutor after the first assault had ceased. Horton v. State, 34 S. W. 612.

When there is no evidence of any such agreement, it is error to charge the jury that defendant could not claim self-defense in defending another if it had been agreed by defendant and another to assault the alleged injured party. Day v. State, 62 Texas Crim. Rep. 413; 138 S. W. 127.

Where defendant went to the defense of his father, an old and sickly man, who was being attacked by a strong and healthy man, the court should charge the jury to consider the relative strength of the parties and defendant's knowledge of the habit of deceased in going armed; defendant knowing of such habit and deceased using no weapons in the attack on the father. Terrell v. State, 53 Texas Crim. Rep. 608; 111 S. W. 152.

Where defendant went to where the homicide occurred to prevent the abduction of his sister, and deceased approached and made such a demonstration as caused defendant to apprehend danger to himself, the sister being absent, the charge should present the theory that defendant was about to be attacked and should not restrict an acquittal to a killing to protect the sister from abduction. Bedford v. State, 36 Texas Crim. Rep. 477; 38 S. W. 210.

5. If homicide takes place in preventing a robbery, it shall be justifiable if done while the robber is in the presence of the person robbed, or is flying with the money or other article taken by him.

Sec. 1915. **Homicide in preventing a robbery.**—A homicide is justifiable if committed to prevent a robbery and done while the robber is in the presence of the person robbed or is flying with the property taken by him. Smith v. State, 31 Texas Crim. Rep. 14; 19 S. W. 252.

If the defensive theory is that deceased was robbing defendant, the failure to charge the statutory provisions as to a homicide committed to prevent a robbery is not reversible error if the charge instructs the jury that if they have a reasonable

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doubt that the facts testified to by defendant were true they should acquit. Welch v. State, 57 Texas Crim. Rep. 122; 122 S. W. 886.

6. In cases of maiming, disfiguring, or castration, the homicide may take place at any time while the offender is mistreating with violence the person injured, though he may have completed the offense.

Sec. 1916. **Maiming as justification.**—If it is an issue as to whether the deceased at the time of the homicide had committed the offense of maiming upon the defendant and was still mistreating him with violence when the fatal shot was fired, the charge of the court should affirmatively submit the defensive theory to the jury. High v. State, 26 Texas Crim. App. 545; 10 S. W. 238.

7. In case of arson, the homicide may be inflicted while the offender is in or at the building or other property burnt, or flying from the place before the destruction of the same.

8. In cases of burglary and theft by night, the homicide is justifiable at any time while the offender is in the building or at the place where the theft is committed, or is within reach of gunshot from such place or building.

Sec. 1917. **Homicide to prevent burglary and theft.**—The law permits a homicide when committed to prevent a theft at night, and the homicide in such case is justifiable at any time while the offender is at the place where the theft is committed or within reach of gunshot from such place, and if the issue is raised, the court should charge the law applicable to such theory. Laws v. State, 26 Texas Crim. App. 643; 10 S. W. 220. Whitten v. State, 29 Texas Crim. App. 504; 16 S. W. 296. Newman v. State, 58 Texas Crim. Rep. 443; 126 S. W. 578. Slack v. State, 149 S. W. 107.

Where the accused shoots a man who was prowling around his place at night, the court should not limit his right to shoot to a defense of himself or some of his family, but when the purpose of deceased was undisclosed at the time of the homicide the charge should include the habitation of the accused and other matters mentioned in the statute which might afford a justification. Richardson v. State, 7 Texas Crim. App. 486. Laws v. State, 26 Texas Crim. App. 654; 10 S. W. 220. Whitten v. State, 29 Texas Crim. App. 504; 16 S. W. 296. Newman v. State, 58 Texas Crim. Rep. 443; 126 S. W. 578.

If it is material whether deceased was killed at night the charge of the court should define the term "night." By the term "night time" so far as it relates to burglary and theft at night is meant any time of the twenty-four hours from thirty minutes after sunset until thirty minutes before sunrise. Laws v. State, 26 Texas Crim. App. 643; 10 S. W. 220. Whitten v. State, 29 Texas Crim. App. 504; 16 S. W. 296.

9. When the party slain in disguise is engaged in any attempt, by word, gesture, or otherwise, to alarm some other person or persons and put them in bodily fear. (O. C. 568, amended by Act Nov. 6, 1871, Acts 1871, p. 20-21.)

Art. 1106. (676) (571) **Presumption from use of weapon by deceased.**—When the homicide takes place to prevent murder, maiming, disfiguring or castration, if the weapons or means used by the party attempting or committing such murder, maiming, disfiguring or castration are such as would have been calculated to produce that result, it is to be presumed that the person so using them designed to inflict the injury. (O. C. 569.)

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Sec. 1918. **Presumption from use of weapon by deceased.**—When there is evidence showing with reasonable probability that the adversary of the accused was in the act of murder or attempting to commit murder, and a deadly weapon was used by him, then the law presumes that it was his purpose to kill and murder the accused, and if the deceased was making an attack on the accused and was using a deadly weapon, then the law presumes and the jury should presume that deceased designed to kill and murder the accused, and drawing a pistol during such attack, if any, is "using" it. Ward v. State, 30 Texas Crim. App. 687; 18 S. W. 793. McMichael v. State, 49 Texas Crim. Rep. 425; 93 S. W. 724. Holmes v. State, 155 S. W. 207.

A threat to draw a weapon is not "using" it; there must be some step taken toward the use of the weapon. Spencer v. State, 59 Texas Crim. Rep. 222; 128 S. W. 121. Blue v. State, 148 S. W. 730.

Where the testimony raises the issue as to whether defendant was acting in defense of another who was being or about to be assaulted by deceased with a deadly weapon, it is reversible error to fail to charge that if deceased was attempting to commit or was committing an assault on such other person and that the weapon used was a deadly weapon, then the law presumes that he intended to kill and murder such other, and in such case defendant would have the right to slay at once to prevent such murder. Kendall v. State, 8 Texas Crim. App. 583. Cline v. State, 28 S. W. 684. Paderes v. State, 45 S. W. 914. Borden v. State, 42 Texas Crim. Rep. 652; 62 S. W. 1064. Yardley v. State, 50 Texas Crim. Rep. 647; 100 S. W. 399 (deceased shot first). Deneaner v. State, 58 Texas Crim. Rep. 624; 127 S. W. 201.

The supposed error in failing to charge upon the presumption arising from the use of a deadly weapon by deceased will not be revised if raised for the first time on appeal. Pratt v. State, 59 Texas Crim. Rep. 176; 127 S. W. 827.

Where deceased is about to attack or is advancing on defendant with a deadly weapon, the law presumes that deceased intends to kill and murder defendant, and where deceased is so armed, and his purpose is in any way doubtful, it is reversible error to fail to charge the jury that if deceased was about to advance or was advancing on defendant with a deadly weapon that the law presumes that he intended to kill defendant or do him some serious bodily injury. King v. State, 13 Texas Crim. App. 282 (pursuing with a pistol). Jones v. State, 17 Texas Crim. App. 612 (attack with an ax). Pierce v. State, 21 Texas Crim. App. 548; 1 S. W. 463 (advancing with a knife). Cochran v. State, 28 Texas Crim. App. 431; 13 S. W. 651 (advancing with a billiard cue). Ward v. State, 30 Texas Crim. App. 689; 18 S. W. 793 (drawing pistol on defendant). Borden v. State, 42 Texas Crim. Rep. 652; 62 S. W. 1064 (gun). Hall v. State, 43 Texas Crim. Rep. 484; 66 S. W. 783 (advancing with pistol). Teel v. State, 69 S. W. 532 (seized pistol—apparent danger). Cooper v. State, 48 Texas Crim. Rep. 36; 85 S. W. 1059 (advance with knife). Ivory v. State, 48 Texas Crim. Rep. 282; 87 S. W. 699 (advance with knife). McMichael v. State, 49 Texas Crim. Rep. 425; 93 S. W. 724 (drew pistol). Hudson v. State, 59 Texas Crim. Rep. 650; 129 S. W. 1127 (knife). Polk v. State, 60 Texas Crim. Rep. 499; 132 S. W. 767 (attack with loaded quirt). Best v. State, 61 Texas Crim. Rep. 554; 135 S. W. 582 (advance with knife). Williams v. State, 144 S. W. 620 (advance with knife). Johnson v. State, 149 S. W. 165. Edwards v. State, 151 S. W. 294 (iron bar). Holmes v. State, 155 S. W. 205.

Where defendant testifies to a threatened assault by deceased while the latter had a gun in his hand and his finger on the trigger, the court should charge on the presumption arising from the use of a deadly weapon by deceased though the other testimony shows that deceased was unarmed. Duke v. State, 56 Texas Crim. Rep. 503; 120 S. W. 894.

Where defendant testified that deceased was shooting at him, it is error to fail to charge that in such case the law presumes that deceased intended to murder him. Smith v. State, 57 Texas Crim. Rep. 455; 123 S. W. 701. Bankston v. State, 175 S. W. 1069.

When there is evidence that defendant was defending against an actual attack by deceased who was shooting at defendant, the court should charge the jury the

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presumption of law arising from the use of a deadly weapon by deceased. Scott v. State, 46 Texas Crim. Rep. 313; 81 S. W. 950. Clark v. State, 56 Texas Crim. Rep. 294; 120 S. W. 179. Foster v. State, 148 S. W. 583. Hammons v. State, 177 S. W. 495.

It is not reversible error to fail to charge upon the presumption arising from the use of a deadly weapon by the alleged injured party when there could be no question that if he did in fact shoot at defendant as claimed no jury of ordinary intelligence could have any doubt as to his intent being to kill. Barnes v. State, 39 Texas Crim. Rep. 189; 45 S. W. 495.

Where if an attack was made on defendant at all it was made with a pistol, it is not reversible error to fail to charge the presumption of law arising from the use of a deadly weapon by deceased. Stanley v. State, 44 S. W. 519.

Though the State proved circumstantially that deceased was unarmed, the court should charge on the presumption arising from the use of a deadly weapon by deceased if there is testimony that deceased with a drawn pistol in his hand was about to assault defendant. McMichael v. State, 49 Texas Crim. Rep. 425; 93 S. W. 724.

There is no occasion to charge upon the presumption from the use of a deadly weapon by deceased if there is no evidence that deceased used a weapon in the assault made by him. Bryant v. State, 47 S. W. 374. Spencer v. State, 59 Texas Crim. Rep. 223; 128 S. W. 121.

There is no necessity to charge upon the presumption from the use of a deadly weapon by deceased if there is no evidence of any assault on defendant. Sargent v. State, 35 Texas Crim. Rep. 339; 33 S. W. 364.

It is not necessary to charge upon the presumption from the use of a weapon by deceased when the testimony fails to show that his weapon was, as a matter of law, a deadly weapon. Renow v. State, 56 Texas Crim. Rep. 343; 120 S. W. 174. Spencer v. State, 59 Texas Crim. Rep. 222; 128 S. W. 121. Reagan v. State, 157 S. W. 483.

It is not error to fail to charge on the presumption from the use of a deadly weapon by deceased if the proof fails to show that the knife used by deceased was a deadly weapon. Goodman v. State, 49 Texas Crim. Rep. 188; 91 S. W. 795. Reagan v. State, 157 S. W. 483.

Where the defense is based only on the theory of apparent danger and there is no evidence that deceased was armed, the court should not charge on the presumption from the use of a weapon by deceased. Andrews v. State, 76 S. W. 919.

Though defendant only claims a hip-pocket movement, a charge on the presumption from the use of a weapon by deceased, though unnecessary, is favorable to defendant and not reversible error. Gay v. State, 58 Texas Crim. Rep. 472; 125 S. W. 900. Wells v. State, 63 Texas Crim. Rep. 620; 141 S. W. 97. Drake v. State, 153 S. W. 848.

When self-defense is an issue a charge on the presumption from the use of a deadly weapon by deceased is not error though there is no evidence that deceased was armed with a deadly weapon. Freeman v. State, 40 Texas Crim. Rep. 551; 46 S. W. 641. Elmore v. State, 78 S. W. 521. Drake v. State, 153 S. W. 848.

Where deceased was only armed with a rock, it is not error to charge on the presumption arising from the use of a deadly weapon by deceased and also on a lesser attack than one to kill or to inflict serious bodily injury. Skaggs v. State, 31 Texas Crim. Rep. 563; 21 S. W. 257.

Where the charge affirmatively informs the jury that if deceased was attempting to draw or open a knife for the purpose of making an assault on defendant, or was cutting him with a knife, or if defendant believed that deceased was doing this, that then defendant would have the right to cut or stab deceased against this threatened attack, and that if they so believe or have a reasonable doubt thereof they should find him not guilty, it is in effect a charge on the presumption from the use of a deadly weapon by deceased. Ward v. State, 159 S. W. 272.

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If the danger to defendant, if any, was from a threatened deadly attack with a gun and the charge informed the jury that if the deceased was in the act of making an unlawful attack upon the defendant with a gun he should be acquitted, the charge is not reversibly erroneous for failing to charge the presumption arising from the use of a deadly weapon by deceased. Alexander v. State, 63 Texas Crim. Rep. 102; 138 S. W. 721.

Art. 1107. (677) (572) **Defense against milder attack.**—Homicide is justifiable also in the protection of the person or property against any other unlawful and violent attack besides those mentioned in the preceding article, and in such cases all other means must be resorted to for the prevention of the injury, and the killing must take place while the person killed is in the very act of making such unlawful and violent attack, and any person interfering in such case in behalf of the party about to be injured is not justifiable in killing the aggressor, unless the life or person of the injured party is in peril by reason of such attack upon his property. (O. C. 570.)

Sec. 1919. **Resort to other means.**—By the term "resort to other means" is not meant that all other possible means to avert the injury must be first resorted to, but only that all other means reasonably proper and effective should be first invoked before resorting to a right which, under the most favorable aspect of any case, must be deemed lamentable in its exercise. Kendall v. State, 8 Texas Crim. App. 578. Terrell v. State, 53 Texas Crim. Rep. 608; 111 S. W. 152.

If a charge on the issue is authorized at all, the charge should require the defendant to have resorted to all reasonable means at hand. Kendall v. State, 8 Texas Crim. App. 578. Terrell v. State, 53 Texas Crim. Rep. 608; 111 S. W. 152.

Where deceased was making an attack with his fists, it is proper to charge the jury that defendant must have resorted to all other reasonable means at hand except retreat before killing, and that the killing must take place while the deceased was in the very act of making the attack. Bryant v. State, 47 S. W. 375. Best v. State, 58 Texas Crim. Rep. 327; 125 S. W. 911.

If the attack, if made at all, was an attack less than one to murder or to inflict serious bodily injury, the court is authorized to charge the jury that defendant must have resorted to other means, except retreat, before he was authorized to kill. Robins v. State, 9 Texas Crim. App. 670. Hill v. State, 10 Texas Crim. App. 618. Skaggs v. State, 31 Texas Crim. Rep. 563; 21 S. W. 257. Maines v. State, 35 Texas Crim. Rep. 113; 31 S. W. 667. Williford v. State, 38 Texas Crim. Rep. 395; 42 S. W. 972. Taylor v. State, 38 Texas Crim. Rep. 552; 43 S. W. 1019. Bryant v. State, 47 S. W. 375. Best v. State, 58 Texas Crim. Rep. 327; 125 S. W. 911.

Where the court is authorized to charge the jury upon the theory that defendant must have resorted to other means, the issue should be submitted from the standpoint of defendant, and the charge is erroneous if it instructs the jury that if there were other means of preventing the injury defendant could not claim perfect self defense. Vinson v. State, 55 Texas Crim. Rep. 494; 117 S. W. 846.

It is error to charge the jury that defendant must resort to other means in defense of another, where the other, if attacked at all, was attacked with a deadly weapon. Kendall v. State, 8 Texas Crim. App. 582. Robins v. State, 9 Texas Crim. App. 666. Hunnicutt v. State, 18 Texas Crim. App. 498. Shumate v. State, 38 Texas Crim. Rep. 279; 42 S. W. 600.

A charge which requires defendant to resort to other means before he could kill is erroneous when the defensive theory is that his life had been threatened and that deceased made a hostile demonstration at the time of the homicide. Crenshaw v. State, 48 Texas Crim. Rep. 78; 85 S. W. 1147. Maclin v. State, 144 S. W. 953.

If the defensive theory is that deceased was making a demonstration toward a concealed weapon and that defendant was not apprised of the nature of the weapon,

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it is error to charge the jury that defendant must resort to other means than retreat before having the right to kill. Floyd v. State, 52 Texas Crim. Rep. 104; 105 S. W. 791.

Where defendant went to the defense of his sickly father who was being severely beaten by a younger and stronger man who was using his fists, defendant knowing that deceased was in the habit of going armed, it is error in the charge to require defendant to resort to other means before he could kill in defense of his father. Terrell v. State, 53 Texas Crim. Rep. 608; 111 S. W. 152.

If the attack, if made at all, was made with a deadly weapon, and from defendant's standpoint at the time produced a reasonable expectation or fear of death or of serious bodily injury, it is error to charge the jury on the theory that defendant must have resorted to other means than retreat to avoid the necessity of killing his assailant. Ainsworth v. State, 8 Texas Crim. App. 537. Kendall v. State, 8 Texas Crim. App. 582. Foster v. State, 11 Texas Crim. App. 108. Branch v. State, 15 Texas Crim. App. 103. Gilly v. State, 15 Texas Crim. App. 301. Cartwright v. State, 16 Texas Crim. App. 487. Morgan v. State, 16 Texas Crim. App. 634. Risby v. State, 17 Texas Crim. App. 520. Hunnicutt v. State, 18 Texas Crim. App. 498. Hunnicutt v. State, 20 Texas Crim. App. 643. Williams v. State, 22 Texas Crim. App. 497; 4 S. W. 64. Orman v. State, 22 Texas Crim. App. 604; 3 S. W. 468. Orman v. State, 24 Texas Crim. App. 502; 6 S. W. 544. Kelly v. State, 27 Texas Crim. App. 566; 11 S. W. 627. Baltrip v. State, 30 Texas Crim. App. 545; 17 S. W. 1106. Cline v. State, 28 S. W. 684. Shumate v. State, 38 Texas Crim. Rep. 279; 42 S. W. 600. McCandless v. State, 42 Texas Crim. Rep. 60; 57 S. W. 672. Casner v. State, 42 Texas Crim. Rep. 124; 57 S. W. 821. Poole v. State, 45 Texas Crim. Rep. 348; 76 S. W. 565. Crenshaw v. State, 48 Texas Crim. Rep. 78; 85 S. W. 1147. Floyd v. State, 52 Texas Crim. Rep. 104; 105 S. W. 791. Snowberger v. State, 58 Texas Crim. Rep. 544; 126 S. W. 885. Anderson v. State, 60 Texas Crim. Rep. 314; 131 S. W. 1124. Edwards v. State, 60 Texas Crim. Rep. 326; 131 S. W. 1078. Best v. State, 61 Texas Crim. Rep. 551; 135 S. W. 581. Maclin v. State, 144 S. W. 953. Trevino v. State, 160 S. W. 109.

If defendant acts under a reasonable expectation or fear of death or of serious bodily injury, produced by the acts of his adversary at the time of the homicide, he is not bound to retreat nor to resort to other means of averting such danger, but may slay his adversary if the danger be imminent and pressing, or if it reasonably appears so to be to defendant, viewed from his standpoint at the time. Hill v. State, 10 Texas Crim. App. 625. Foster v. State, 11 Texas Crim. App. 108. King v. State, 13 Texas Crim. App. 277. Branch v. State, 15 Texas Crim. App. 103. Gilly v. State, 15 Texas Crim. App. 301. Cartwright v. State, 16 Texas Crim. App. 487. Hunnicutt v. State, 18 Texas Crim. App. 522. Hunnicutt v. State, 20 Texas Crim. App. 643. Williams v. State, 22 Texas Crim. App. 497; 4 S. W. 64. Orman v. State, 22 Texas Crim. App. 620; 3 S. W. 468. Kelly v. State, 27 Texas Crim. App. 566; 11 S. W. 627. Baltrip v. State, 30 Texas Crim. App. 545; 17 S. W. 1106. Crenshaw v. State, 48 Texas Crim. Rep. 78; 85 S. W. 1147. Snowberger v. State, 58 Texas Crim. Rep. 544; 126 S. W. 885. Williams v. State, 61 Texas Crim. Rep. 361; 136 S. W. 771. Best v. State, 61 Texas Crim. Rep. 551; 135 S. W. 581. Maclin v. State, 144 S. W. 953.

Sec. 1920. **Charges on excessive force.**—The words "but no more force than the circumstances reasonably indicate to be necessary" should not be used in the definition of self defense unless excessive force is an issue, and later on the court intends, in applying the law to the facts, to submit properly the use of more force than is necessary. Kinney v. State, 144 S. W. 261. Summers v. State, 148 S. W. 774. Holmes v. State, 155 S. W. 205. Finch v. State, 158 S. W. 510. Ward v. State, 159 S. W. 283.

If the charge directly applying the law of self defense to the facts does so accurately and does not mention or suggest excessive force, a judgment will not be reversed because of a general definition of self defense in a former paragraph which contains the statement "that no more force than the circumstances reasonably indicate to be necessary" can be used, although such general statement should not be included when excessive force is not an issue. Moss v. State, 60 Texas Crim. Rep. 272; 131 S. W. 1090. Kinney v. State, 144 S. W. 261. Summers v. State, 148 S. W. 774. Holmes v. State, 155 S. W. 205. Ward v. State, 159 S. W. 283.

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It is error to charge on the theory of excessive force if the evidence shows that if the defendant was authorized to use any force at all he was authorized to use all the force he did use. Scott v. State, 46 Texas Crim. Rep. 313; 81 S. W. 950. Rice v. State, 51 Texas Crim. Rep. 286; 103 S. W. 1156. Huddleston v. State, 54 Texas Crim. Rep. 93; 112 S. W. 65. Comegys v. State, 62 Texas Crim. Rep. 231; 137 S. W. 349. Ballard v. State, 62 Texas Crim. Rep. 435; 138 S. W. 122. Mayhew v. State, 144 S. W. 230. Castro v. State, 146 S. W. 554. Antu v. State, 147 S. W. 234. Parish v. State, 153 S. W. 327. Lyons v. State, 159 S. W. 1070.

When the State's case is an unprovoked attack and defendant's case is perfect self defense and where if defendant had the right of self defense at all the question of excessive force is not involved, it is error to charge the jury that if defendant used more force than necessary to protect himself he would be the aggressor. Rice v. State, 51 Texas Crim. Rep. 286; 103 S. W. 1156. Terrell v. State, 53 Texas Crim. Rep. 604; 111 S. W. 152. Hightower v. State, 56 Texas Crim. Rep. 252; 119 S. W. 691. Mayhew v. State, 144 S. W. 230. Kirklin v. State, 164 S. W. 1016.

When there is no evidence of excessive force and when, if defendant's theory is to be credited, he acted while his adversary was making an attack upon him, it is error to charge the jury that defendant was not authorized in using more force than the circumstances reasonably indicated to be necessary and that the right of self defense continues so long as danger appears to exist. Scott v. State, 46 Texas Crim. Rep. 313; 81 S. W. 950. Huddleston v. State, 54 Texas Crim. Rep. 93; 112 S. W. 64. Carson v. State, 57 Texas Crim. Rep. 394; 123 S. W. 591. Comegys v. State, 62 Texas Crim. Rep. 231; 137 S. W. 349. Mayhew v. State, 144 S. W. 230. Castro v. State, 146 S. W. 554. Antu v. State, 147 S. W. 234. Lyons v. State, 159 S. W. 1070.

When defendant was acting in defense of another, it is error to charge on the theory of excessive force when that issue is not in the case. Mayhew v. State, 144 S. W. 230.

If, taking the defensive theory as true, defendant had the right to use all the force he did use, and there is no evidence that he used any more force than was necessary, it is error to charge the jury that "the act must not exceed the bounds of mere defense and prevention." Ballard v. State, 62 Texas Crim. Rep. 435; 138 S. W. 122.

Art. 1108. (678) (573) **Retreat not necessary.**—The party whose person or property is so unlawfully attacked is not bound to retreat in order to avoid the necessity of killing his assailant. (O. C. 571.)

Sec. 1921. **Retreat.**—The doctrine of "retreat" is not applicable to cases of imperfect self defense. Carter v. State, 30 Texas Crim. App. 551; 17 S. W. 1102. Cornelius v. State, 54 Texas Crim. Rep. 182; 112 S. W. 1051.

If defendant did retreat it is not necessary to charge that he did not have to retreat. May v. State, 23 Texas Crim. App. 146; 4 S. W. 591. Hudson v. State, 28 Texas Crim. App. 341; 13 S. W. 388.

Where the facts and issues made do not require such a charge, it is not error to fail to charge the jury that defendant did not have to retreat in order to avoid the necessity of killing his assailant. Bell v. State, 17 Texas Crim. App. 551. Carter v. State, 30 Texas Crim. App. 551; 17 S. W. 1102. Hunt v. State, 33 Texas Crim. Rep. 259; 26 S. W. 206. Smith v. State, 33 Texas Crim. Rep. 517; 27 S. W. 137. Montgomery v. State, 45 Texas Crim. Rep. 376; 77 S. W. 788. Cornelius v. State, 54 Texas Crim. Rep. 182; 112 S. W. 1051.

If the only theory of self defense is that defendant had no opportunity to retreat; that he was in such a situation that he had either to kill at once or be killed, it is not reversible error to fail to charge that he did not have to retreat in order to avoid the necessity of killing his assailant. Bell v. State, 17 Texas Crim. App. 551. White v. State, 23 Texas Crim. App. 163; 3 S. W. 710. Lee v. State, 24 S. W. 509. Hunt v. State, 33 Texas Crim. Rep. 259; 26 S. W. 206. Smith v. State, 33 Texas Crim. Rep. 517; 27 S. W. 137. Montgomery v. State, 45 Texas Crim. Rep. 376; 77 S. W. 788.

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If the charge does not in any manner suggest that resort must be had to other means before the killing and the jury are charged that defendant could resist and overcome force with force, it is tantamount to charging that defendant was not bound to retreat. Montgomery v. State, 45 Texas Crim. Rep. 376; 77 S. W. 788.

If defendant has placed himself in the wrong in another's house by refusing to leave he is bound to submit to the force necessary to put him out, and his right to resist the force used would not be called into existence until the owner was in the act of using, or was manifestly about to use, more force than necessary to put him out. Hinton v. State, 24 Texas 460.

If there is evidence that defendant was acting in self defense and did not retreat, it is error to fail to charge the jury that defendant was not bound to retreat in order to avoid the necessity of killing his assailant. West v. State, 2 Texas Crim. App. 476. Lister v. State, 3 Texas Crim. App. 28. Ross v. State, 10 Texas Crim. App. 466. Williams v. State, 14 Texas Crim. App. 112. Gilly v. State, 15 Texas Crim. App. 287. Short v. State, 15 Texas Crim. App. 376. Bell v. State, 17 Texas Crim. App. 551. Arto v. State, 19 Texas Crim. App. 135. Pierce v. State, 21 Texas Crim. App. 548; 1 S. W. 463. Parker v. State, 22 Texas Crim. App. 109; 3 S. W. 100. High v. State, 26 Texas Crim. App. 568; 10 S. W. 238. Gonzales v. State, 28 Texas Crim. App. 136; 12 S. W. 733. Ball v. State, 29 Texas Crim. App. 126; 14 S. W. 1012. Williams v. State, 30 Texas Crim. App. 447; 17 S. W. 1071. Hooper v. State, 44 Texas Crim. Rep. 125; 69 S. W. 149. Crawford v. State, 70 S. W. 548. Alexander v. State, 70 S. W. 748.

If there is evidence that defendant was defending against apparent danger, it is error to restrict the right not to retreat to actual danger. Baltrip v. State, 30 Texas Crim. App. 545; 17 S. W. 1106. Alexander v. State, 70 S. W. 748. Cooper v. State, 49 Texas Crim. Rep. 28; 89 S. W. 1068.

The law does not require a person to abandon the streets at the behest of his adversary, nor does it require him to avoid his adversary. Clay v. State, 44 Texas Crim. Rep. 136; 69 S. W. 413.

The right of defendant not to retreat should be applied to the charge on self defense and not restricted only to the issue of threats. Gonzales v. State, 28 Texas Crim. App. 136; 12 S. W. 733.

Where defendant had abandoned a difficulty provoked by him and it was renewed by his adversary, the court should charge the jury that defendant did not have to retreat. Hooper v. State, 44 Texas Crim. Rep. 125; 69 S. W. 149.

If there is evidence that defendant killed deceased in defense of another, defendant himself being in no danger, the doctrine of retreat should be applied to the person attacked. Dobbs v. State, 51 Texas Crim. Rep. 117; 100 S. W. 946.

When defendant's theory is that he was acting in defense of another as well as of himself and the charge limits the right not to retreat to the person attacked, there is no error if the proof shows that the other person was retreating or was not aware of danger from deceased. Roe v. State, 55 Texas Crim. Rep. 131; 115 S. W. 593.

Art. 1109. (679) (574) **Requisites of the attack.**—The attack upon the person of an individual, in order to justify homicide, must be such as produces a reasonable expectation or fear of death, or some serious bodily injury. (O. C. 572.)

Sec. 1922. **Apparent danger.**
Sec. 1923. Apparent danger.
Sec. 1924. Defense must appear necessary.
Sec. 1925. Charge on apparent danger.
Sec. 1926. Error to fail to charge.
Sec. 1927. Not error to fail to charge.
Sec. 1928. Standpoint of defendant.

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Sec. 1923. **Apparent danger.**—No apprehension of danger previously entertained will justify the commission of homicide; it must be an apprehension existing at the time the prisoner struck the blow. May v. State, 6 Texas Crim. App. 192. Holt v. State, 9 Texas Crim. App. 584. Penland v. State, 19 Texas Crim. App. 365. Taylor v. State, 33 Texas Crim. Rep. 531; 28 S. W. 957. Anderson v. State, 63 Texas Crim. Rep. 525; 140 S. W. 457.

It is not enough that the party believed himself in danger, unless the facts and circumstances were such that the jury can say he had reasonable grounds for his belief. Blake v. State, 3 Texas Crim. App. 589. May v. State, 6 Texas Crim. App. 193. Clampitt v. State, 9 Texas Crim. App. 27.

A reasonable apprehension of death or serious bodily injury will justify a party in using all the necessary force to protect his person or his life, and it is not necessary that there be actual danger, provided he acted on a reasonable apprehension of danger, viewed from his standpoint at the time. Horbach v. State, 43 Texas 242. Lister v. State, 3 Texas Crim. App. 17. Cheek v. State, 4 Texas Crim. App. 449. Marnoch v. State, 7 Texas Crim. App. 275. Richardson v. State, 7 Texas Crim. App. 493. Smith v. State, 15 Texas Crim. App. 346. Brumley v. State, 21 Texas Crim. App. 240; 17 S. W. 140. Spearman v. State, 23 Texas Crim. App. 224; 4 S. W. 586. Phipps v. State, 34 Texas Crim. Rep. 564; 31 S. W. 397. Harris v. State, 37 Texas Crim. Rep. 454; 36 S. W. 263. Poole v. State, 45 Texas Crim. Rep. 365; 76 S. W. 565. Dodson v. State, 45 Texas Crim. Rep. 571; 78 S. W. 940. Watson v. State, 50 Texas Crim. Rep. 176; 95 S. W. 115. Davis v. State, 52 Texas Crim. Rep. 149; 106 S. W. 144. Winn v. State, 54 Texas Crim. Rep. 538; 113 S. W. 918.

Each juror must place himself in the position of the defendant at the time of the homicide, and determine from all the facts, as they appeared to defendant at the time of the killing, whether his apprehension or fear of death or serious bodily injury was reasonable; and if so they should acquit. Bell v. State, 20 Texas Crim. App. 450. Spearman v. State, 23 Texas Crim. App. 224; 4 S. W. 586.

Proof of the effect produced on a bystander by the conduct of deceased at the time of the homicide would illustrate the effect likely to be produced in the mind of defendant and is admissible in evidence. Thomas v. State, 40 Texas 36. Cochran v. State, 28 Texas Crim. App. 431; 13 S. W. 651. Robinson v. State, 57 S. W. 811. Scott v. State, 51 Texas Crim. Rep. 390; 93 S. W. 112. Latham v. State, 172 S. W. 797.

Sec. 1924. **Defense must appear necessary.**—The defense must appear necessary whether it arises from real or apparent danger. Weaver v. State, 19 Texas Crim. App. 567. Giebel v. State, 28 Texas Crim. App. 172; 12 S. W. 591. Williford v. State, 38 Texas Crim. Rep. 393; 42 S. W. 972. Bush v. State, 40 Texas Crim. Rep. 542; 51 S. W. 238. Herrington v. State, 63 S. W. 562. Williams v. State, 148 S. W. 771.

The word "necessarily" is not of the same meaning as the word "reasonably," and the court should not charge the jury that it must "necessarily" appear from the acts or words of deceased that defendant was in danger. Stevenson v. State, 17 Texas Crim. App. 634.

It is error to charge the jury that self defense is limited to a case of "extreme necessity" or as a "last resort." King v. State, 13 Texas Crim. App. 281.

Sec. 1925. **Charge on apparent danger.**—A charge on apparent danger should apply the law to the facts. Edwards v. State, 151 S. W. 294.

A charge on apparent danger is erroneous if it authorizes the jury to determine whether there was a reasonable appearance of danger. The theory of apparent danger should be submitted from the standpoint of the defendant. Jordan v. State, 11 Texas Crim. App. 449. Adams v. State, 47 Texas Crim. Rep. 347; 84 S. W. 231. Swain v. State, 48 Texas Crim. Rep. 103; 86 S. W. 335. Lyons v. State, 159 S. W. 1072.

It is the belief of defendant as to the existence of facts, and not the truth of the facts, that should be submitted to the jury. Arthur v. State, 46 Texas Crim.

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Rep. 479; 80 S. W. 1017. Stacy v. State, 48 Texas Crim. Rep. 95; 86 S. W. 327. Swain v. State, 48 Texas Crim. Rep. 98; 86 S. W. 335. Puryear v. State, 50 Texas Crim. Rep. 464; 98 S. W. 258. Winn v. State, 54 Texas Crim. Rep. 538; 113 S. W. 918. Williams v. State, 61 Texas Crim. Rep. 356; 136 S. W. 771. Maclin v. State, 144 S. W. 951. Black v. State, 145 S. W. 944. Bussey v. State, 153 S. W. 874. Lyons v. State, 159 S. W. 1072.

A charge is erroneous if it makes the right of self defense hinge upon the fact as to whether the defendant "honestly" believed that he was in danger. Tillery v. State, 24 Texas Crim. App. 271; 5 S. W. 842.

If defendant claims that he believed deceased was reaching behind the counter for a pistol, a charge is erroneous if it requires the jury to find that there was a pistol behind the counter. Puryear v. State, 50 Texas Crim. Rep. 464; 98 S. W. 258.

If the issue is raised, the charge should inform the jury that if the conduct of deceased was such, under the circumstances, as to reasonably produce upon the mind of defendant the belief that deceased was about to kill or inflict serious bodily injury upon him, the homicide would be justifiable, though the danger was not real but only apparent. Jones v. State, 17 Texas Crim. App. 612. Cochran v. State, 28 Texas Crim. App. 431; 13 S. W. 651.

If the conduct of deceased at the time of the homicide, viewed from the standpoint of defendant at the time, was such as to reasonably produce upon the mind of defendant a reasonable expectation or fear of death or serious bodily injury, the homicide would be justifiable, although in fact the danger was not real but only apparent. Marnoch v. State, 7 Texas Crim. App. 275. Jones v. State, 17 Texas Crim. App. 612. Bell v. State, 20 Texas Crim. App. 450. Patillo v. State, 22 Texas Crim. App. 593; 3 S. W. 766. Cochran v. State, 28 Texas Crim. App. 431; 13 S. W. 651.

A reasonable apprehension of death or serious bodily injury will justify the defendant in using all necessary force to protect his life or person, and it is not necessary that there should be actual danger, provided he acted upon a reasonable apprehension of danger as it appeared to him from his standpoint at the time; and in such case if defendant was acting under such real or apparent apprehension of danger he would in no event be bound to retreat in order to avoid the necessity of killing his assailant. Cochran v. State, 28 Texas Crim. App. 431; 13 S. W. 651. Williford v. State, 38 Texas Crim. Rep. 395; 42 S. W. 972. Newcomb v. State, 49 Texas Crim. Rep. 561; 95 S. W. 1048. Fizini v. State, 100 S. W. 396. Ringo v. State, 54 Texas Crim. Rep. 561; 114 S. W. 119. Puryear v. State, 56 Texas Crim. Rep. 240; 118 S. W. 1042. Ward v. State, 59 Texas Crim. Rep. 65; 126 S. W. 1145.

If at the time defendant fired the fatal shot, it reasonably appeared to him from the circumstances of the case, viewed from his standpoint, that the deceased was about to shoot him, he was justified in killing deceased, although in fact the jury might believe from the evidence that he was in no danger at the time of being shot by deceased. Jones v. State, 17 Texas Crim. App. 612. Gonzales v. State, 28 Texas Crim. App. 135; 12 S. W. 733. Nalley v. State, 28 Texas Crim. App. 391; 13 S. W. 670. Reed v. State, 32 Texas Crim. Rep. 25; 22 S. W. 22. Swain v. State, 48 Texas Crim. Rep. 98; 86 S. W. 335. Johnson v. State, 63 Texas Crim. Rep. 50; 138 S. W. 1024.

If it reasonably appeared to the defendant from the circumstances of the case, viewed from his standpoint at the time, that the danger existed, and he acted under the reasonable belief that it did exist, he was justified in defending against it to the same extent and under the same rules permitted in case the danger had been real. Jones v. State, 17 Texas Crim. App. 612. Tillery v. State, 24 Texas Crim. App. 272; 5 S. W. 842. Meuly v. State, 26 Texas Crim. App. 305; 9 S. W. 563. Swanner v. State, 58 S. W. 74. Snowberger v. State, 58 Texas Crim. Rep. 530; 126 S. W. 885.

If followed by a charge on apparent danger, it is not error, though the danger was apparent only, to charge the jury that "all self defense rests upon necessity;

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where there is no necessity to kill, it cannot be self defense." Williford v. State, 38 Texas Crim. Rep. 395; 42 S. W. 972.

Sec. 1926. **Error to fail to charge on apparent danger.**—If there is evidence to support the theory that defendant had the right to defend against appearances of danger, it is error to restrict the right of self defense to the theory of an actual attack or actual danger. Marnoch v. State, 7 Texas Crim. App. 275. Pharr v. State, 7 Texas Crim. App. 477. Boddy v. State, 14 Texas Crim. App. 528. Moore v. State, 15 Texas Crim. App. 22. Jones v. State, 17 Texas Crim. App. 612. Phipps v. State, 34 Texas Crim. Rep. 564; 31 S. W. 397. Phipps v. State, 34 Texas Crim. Rep. 610; 31 S. W. 657. Carter v. State, 37 Texas Crim. Rep. 403; 35 S. W. 378. Harris v. State, 37 Texas Crim. Rep. 454; 36 S. W. 263. Alexander v. State, 70 S. W. 748. Nix v. State, 74 S. W. 764. Terry v. State, 45 Texas Crim. Rep. 264; 76 S. W. 928. Poole v. State, 45 Texas Crim. Rep. 365; 76 S. W. 565. Cooper v. State, 48 Texas Crim. Rep. 36; 85 S. W. 1059. Puryear v. State, 50 Texas Crim. Rep. 464; 98 S. W. 258. Barnes v. State, 57 Texas Crim. Rep. 450; 125 S. W. 39. Duke v. State, 61 Texas Crim. Rep. 19; 133 S. W. 433. Johnson v. State, 63 Texas Crim. Rep. 50; 138 S. W. 1024. Parish v. State, 153 S. W. 327. Holmes v. State, 155 S. W. 205. Lyons v. State, 159 S. W. 1072. Ballard v. State, 160 S. W. 716. Andrus v. State, 165 S. W. 189.

If the testimony is that deceased made a demonstration to draw a weapon or was only preparing to attack before defendant began to shoot, a charge on self defense is erroneous if it bases the right of self defense on the theory that deceased had made an attack on defendant. Boddy v. State, 14 Texas Crim. App. 528. Phipps v. State, 34 Texas Crim. Rep. 564; 31 S. W. 397. Phipps v. State, 34 Texas Crim. Rep. 610; 31 S. W. 657. Stewart v. State, 40 Texas Crim. Rep. 649; 51 S. W. 907. Seeley v. State, 43 Texas Crim. Rep. 68; 63 S. W. 309. Brady v. State, 65 S. W. 521. Nix v. State, 74 S. W. 764. Poole v. State, 45 Texas Crim. Rep. 365; 76 S. W. 565. Harrison v. State, 48 Texas Crim. Rep. 45; 85 S. W. 1058. Watson v. State, 50 Texas Crim. Rep. 176; 95 S. W. 115. Benson v. State, 51 Texas Crim. Rep. 380; 103 S. W. 911. Barnes v. State, 57 Texas Crim. Rep. 450; 125 S. W. 39. Duke v. State, 61 Texas Crim. Rep. 19; 133 S. W. 433. Johnson v. State, 63 Texas Crim. Rep. 56; 138 S. W. 1024. Rhea v. State, 148 S. W. 578. Lyons v. State, 159 S. W. 1072. Ballard v. State, 160 S. W. 716. Andrus v. State, 165 S. W. 189.

If the testimony is that deceased made a demonstration to draw a pistol or that he was in the act of drawing it, the charge eliminates apparent danger if it predicates self defense on the theory that deceased drew his pistol and pointed or presented it at defendant. Riptoe v. State, 42 S. W. 381. Graham v. State, 61 S. W. 714.

Where the testimony is that the alleged injured party did not strike defendant but was attempting to do so, the charge eliminates apparent danger if it instructs the jury that if defendant stabbed such party without such party having struck him they should convict. McFarlin v. State, 41 Texas 24.

Where defendant was ordered off the premises of deceased and was leaving in obedience to the order of deceased, and deceased then stepped off the gallery with his pistol in his hand and advanced on defendant, it is error to limit the right of self defense to actual danger if the testimony is conflicting as to who fired the first shot. Rodriguez v. State, 58 Texas Crim. Rep. 397; 126 S. W. 266.

If there is evidence that deceased was reaching for a weapon, the charge is erroneous if it instructs the jury that the act of deceased, in order to entitle defendant to defend himself, must not be a "mere act of preparation to attack." Boddy v. State, 14 Texas Crim. App. 540.

A charge is erroneous if it directs the jury to acquit if they find that defendant took the life of deceased in order to save his own life or to prevent a serious bodily injury at that very moment about to be inflicted upon him. Self defense does not require any such positive proof of danger. Marnoch v. State, 7 Texas Crim. App. 275.

A charge is erroneous if it bases the right of self defense upon the fact that the life of defendant was actually endangered or that he was in actual danger of

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serious bodily injury. Rodriguez v. State, 8 Texas Crim. App. 131. Babb v. State, 8 Texas Crim. App. 176. Cartwright v. State, 16 Texas Crim. App. 487.

A charge is erroneous if it instructs the jury that defendant would not be justified if he "could have known by reasonable care exercised" that he was in no danger. Jordan v. State, 11 Texas Crim. App. 449.

Defendant has a right to act upon the appearances of danger, and it is error to charge the jury that if they believe that defendant acted in his own necessary self defense against an attack made by his adversary and that he did not use greater force than necessary to prevent such attack they should acquit. Marsden v. State, 53 Texas Crim. Rep. 458; 110 S. W. 897. Parish v. State, 153 S. W. 327.

Sec. 1927. **Not error to fail to charge on apparent danger.**—It is not error to restrict the right of self defense to actual danger if the defensive theory is that deceased had his gun or pistol cocked and presented in a firing position, since this, if true, would be an attack. Godwin v. State, 39 Texas Crim. Rep. 404; 46 S. W. 226. Simmons v. State, 55 Texas Crim. Rep. 448; 117 S. W. 141.

An advance to close quarters with a drawn knife is an attack, and if this is the defensive theory it is not error to restrict the right of self defense to the theory that deceased had made an attack instead of charging on the theory that he was about to attack. Cavil v. State, 25 S. W. 628. Crockett v. State, 45 Texas Crim. Rep. 276; 77 S. W. 4. Bearden v. State, 46 Texas Crim. Rep. 144; 79 S. W. 37. Payton v. State, 60 Texas Crim. Rep. 481; 132 S. W. 130. Young v. State, 61 Texas Crim. Rep. 303; 135 S. W. 127. Rodriquez v. State, 158 S. W. 537.

If, taking the defensive theory as true, deceased caught hold of defendant and raised his knife as if to strike, the issue is one of real danger only. Cavil v. State, 25 S. W. 628. Rodriquez v. State, 158 S. W. 537.

It is not error to restrict the right of self defense to an actual attack if the only theory of self defense presented by the testimony is an actual attack, and the danger, if danger there was, was patent and real to defendant. White v. State, 23 Texas Crim. App. 162; 3 S. W. 710. Bowman v. State, 20 S. W. 558. Moore v. State, 31 Texas Crim. Rep. 234; 20 S. W. 563. Sutton v. State, 31 Texas Crim. Rep. 298; 20 S. W. 564. Cavil v. State, 25 S. W. 628. Stacey v. State, 33 S. W. 348. Thompson v. State, 35 Texas Crim. Rep. 353; 33 S. W. 871. Williford v. State, 38 Texas Crim. Rep. 393; 42 S. W. 972. Godwin v. State, 39 Texas Crim. Rep. 404; 46 S. W. 226. Renfro v. State, 42 Texas Crim. Rep. 393; 56 S. W. 1013. Moody v. State, 59 S. W. 894. Crockett v. State, 45 Texas Crim. Rep. 276; 77 S. W. 4. Bearden v. State, 46 Texas Crim. Rep. 144; 79 S. W. 37. Logan v. State, 46 Texas Crim. Rep. 574; 81 S. W. 721. Casey v. State, 54 Texas Crim. Rep. 587; 113 S. W. 584. Payton v. State, 60 Texas Crim. Rep. 481; 132 S. W. 130. Young v. State, 61 Texas Crim. Rep. 303; 135 S. W. 127. Lee v. State, 148 S. W. 706. Rodriquez v. State, 158 S. W. 537.

Sec. 1928. **Standpoint of defendant.**—Whether the danger is real or apparent is to be determined from the defendant's standpoint. Richardson v. State, 7 Texas Crim. App. 493. Jordan v. State, 11 Texas Crim. App. 448. Jones v. State, 17 Texas Crim. App. 612. Bell v. State, 20 Texas Crim. App. 450. Gonzales v. State, 28 Texas Crim. App. 135; 12 S. W. 733. Casner v. State, 42 Texas Crim. Rep. 122; 57 S. W. 821. Norris v. State, 42 Texas Crim. Rep. 565; 61 S. W. 493. Beard v. State, 47 Texas Crim. Rep. 51; 81 S. W. 33. Harrison v. State, 48 Texas Crim. Rep. 44; 85 S. W. 1058. Swain v. State, 48 Texas Crim. Rep. 98; 86 S. W. 335. Aycock v. State, 55 Texas Crim. Rep. 143; 115 S. W. 591. Vinson v. State, 55 Texas Crim. Rep. 494; 117 S. W. 846. Williams v. State, 61 Texas Crim. Rep. 356; 136 S. W. 771. Maclin v. State, 144 S. W. 951. Black v. State, 145 S. W. 944. Lyons v. State, 159 S. W. 1072.

A charge on self defense is erroneous if it fails to present the issue of self defense from the standpoint of defendant and requires the jury to find that the danger in fact existed. Jordan v. State, 11 Texas Crim. App. 447. Bell v. State, 20 Texas Crim. App. 450. Patillo v. State, 22 Texas Crim. App. 593; 3 S. W. 766. Cochran v. State, 28 Texas Crim. App. 422; 13 S. W. 651. Bonner v. State, 29 Texas Crim. App. 231; 15 S. W. 821. Dodson v. State, 45 Texas Crim. Rep.

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571; 78 S. W. 940. Beard v. State, 47 Texas Crim. Rep. 51; 81 S. W. 33. Adams v. State, 47 Texas Crim. Rep. 355; 84 S. W. 231. Stacy v. State, 48 Texas Crim. Rep. 95; 86 S. W. 327. Swain v. State, 48 Texas Crim. Rep. 98; 86 S. W. 335. Winn v. State, 54 Texas Crim. Rep. 538; 113 S. W. 918. Vinson v. State, 55 Texas Crim. Rep. 494; 117 S. W. 846. Williams v. State, 61 Texas Crim. Rep. 356; 136 S. W. 771. Maclin v. State, 144 S. W. 954. Parish v. State, 153 S. W. 327. Knox v. State, 167 S. W. 729.

A charge on apparent danger should directly instruct the jury that the reasonableness of the apprehension of danger should be judged from defendant's standpoint. Gonzales v. State, 28 Texas Crim. App. 135; 12 S. W. 733. Adams v. State, 47 Texas Crim. Rep. 347; 84 S. W. 231. Swain v. State, 48 Texas Crim. Rep. 103; 86 S. W. 335. Williams v. State, 61 Texas Crim. Rep. 356; 136 S. W. 771. Maclin v. State, 144 S. W. 951. Black v. State, 145 S. W. 944.

If the court correctly charges the jury that the danger or appearances of danger must be viewed from the standpoint of the defendant, it is not necessary to repeat this in every paragraph of the charge. Payton v. State, 60 Texas Crim. Rep. 475; 132 S. W. 127. Owens v. State, 63 Texas Crim. Rep. 633; 141 S. W. 530.

A charge on self defense is erroneous if it submits the appearances of danger from the standpoint of deceased instead of from the standpoint of defendant. Casner v. State, 42 Texas Crim. Rep. 122; 57 S. W. 821. Norris v. State, 42 Texas Crim. Rep. 565; 61 S. W. 493.

If it reasonably appeared to the defendant, from his standpoint, from the circumstances of the case, that the danger existed, and he acted under the reasonable belief that it did exist, he was justified in defending against it to the same extent and under the same rules permitted in case the danger had been real. Tillery v. State, 24 Texas Crim. App. 272; 5 S. W. 842.

The court should not instruct the jury to view the appearances of danger from the standpoint of defendant "as near as they are able." Brownlee v. State, 48 Texas Crim. Rep. 412; 87 S. W. 1153.

It is error to make the defendant's right of self defense turn upon the recognition of him by deceased. Adams v. State, 44 Texas Crim. Rep. 65; 68 S. W. 271.

A charge is erroneous if it instructs the jury that defendant would be justified in killing his adversary according to whether the apprehension of danger was correct or not. Lankster v. State, 42 Texas Crim. Rep. 363; 59 S. W. 888.

Self defense should be charged from defendant's standpoint, and it is error to charge that if "the jury believe" that parties were acting together to attack defendant they should acquit. Beard v. State, 47 Texas Crim. Rep. 51; 81 S. W. 33. Black v. State, 145 S. W. 944.

It is error to authorize the jury to consider whether there was apparent danger from the standpoint of "a man of ordinary judgment" instead of submitting the theory from the standpoint of defendant. Aycock v. State, 55 Texas Crim. Rep. 143; 115 S. W. 591.

It is error to charge the jury that deceased had the right to fire the first shot if, viewed from his standpoint, he believed that he was in danger. Casner v. State, 42 Texas Crim. Rep. 122; 57 S. W. 821.

It is error to charge the jury that in exercising the right of self defense, defendant is only permitted to use such a degree of violence as is necessary to prevent or protect himself against the unlawful violence of his adversary; his right of self defense is only limited by what reasonably appeared to him to be dangerous at the time, viewed from his standpoint, and no other. Aycock v. State, 55 Texas Crim. Rep. 143; 115 S. W. 591. Parish v. State, 153 S. W. 327.

A charge deprives defendant of the right to have the appearances of danger viewed from his standpoint if it instructs the jury that homicide to be justifiable must be in fact in self defense and not colorably so. Babb v. State, 8 Texas Crim. App. 176. Spearman v. State, 23 Texas Crim. App. 229; 4 S. W. 586.

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It is error to charge that a previous difficulty between the parties may be considered as throwing light upon the intent with which the parties may have acted in the fatal meeting; defendant is not bound by the intent of deceased, and a previous difficulty could only be looked to in throwing light upon defendant's motives and intent. Roquemore v. State, 54 Texas Crim. Rep. 596; 114 S. W. 140.

A charge is erroneous if it instructs the jury that it is their duty to look at the transaction, from what they believe from the evidence, was the standpoint of the defendant at the time; such charge may lead the jury to infer that they should judge of the transaction in the light of what the after developments showed the real facts to be instead of viewing it from defendant's standpoint at the time. Simmons v. State, 55 Texas Crim. Rep. 449; 117 S. W. 141. Castro v. State, 146 S. W. 553. Lee v. State, 148 S. W. 706. Kirklin v. State, 164 S. W. 1016.

It is the belief of defendant as to the existence of facts, and not the truth of the facts, that should be submitted to the jury. Arthur v. Sate, 46 Texas Crim. Rep. 479; 80 S. W. 1017. Stacy v. State, 48 Texas Crim. Rep. 95; 86 S. W. 327. Swain v. State, 48 Texas Crim. Rep. 98; 86 S. W. 335. Puryear v. State, 50 Texas Crim. Rep. 464; 98 S. W. 258. Winn v. State, 54 Texas Crim. Rep. 538; 113 S. W. 918. Williams v. State, 61 Texas Crim. Rep. 356; 136 S. W. 771. Maclin v. State, 144 S. W. 951. Black v. State, 145 S. W. 944. Bussey v. State, 153 S. W. 874. Lyons v. State, 159 S. W. 1072. Andrus v. State, 165 S. W. 189.

Sec. 1929. **State of mind.**—Proof of antecedent menaces, previous threats, remarks showing ill-will, and of former grudges and quarrels between the parties is admissible when such proof tends to show the state of mind of defendant at the time of the homicide. Howard v. State, 25 Texas Crim. App. 691; 8 S. W. 929. Sullivan v. State, 31 Texas Crim. Rep. 486; 20 S. W. 927. Bradley v. State, 60 Texas Crim. Rep. 402; 132 S. W. 484. Harrelson v. State, 60 Texas Crim. Rep. 541; 132 S. W. 786.

In a case of circumstantial evidence it is proper to prove that after the homicide and before the arrest of defendant he was very nervous and absent minded. Noftsinger v. State, 7 Texas Crim. App. 323. Brown v. State, 174 S. W. 363.

It is error to exclude testimony as to defendant's mental condition and impairment of mind where it tends to throw light upon his state of mind at the time of the homicide. Pratt v. State, 50 Texas Crim. Rep. 232; 96 S. W. 8.

When self defense is an issue proof of a declaration of deceased showing a hostile state of mind towards defendant, although not tantamount to a direct threat against defendant, is admissible as tending to show who was probably the aggressor. Bethune v. State, 49 Texas Crim. Rep. 169; 90 S. W. 1014. Jennings v. State, 60 Texas Crim. Rep. 424; 132 S. W. 473. McMillan v. State, 143 S. W. 1174.

When the state of mind of the defendant is an issue, proof of his declarations made shortly after the homicide is admissible if it tends to shed light on such issue. Manning v. State, 164 S. W. 11.

When self defense is an issue, defendant may prove that after being threatened he sent a friend to make overtures to deceased. Schauer v. State, 60 S. W. 251.

Proof of declarations of defendant made prior to the homicide showing his desire for peace and his apprehension of danger from deceased is admissible when self defense is an issue, and an objection that such testimony may be easily manufactured goes only to the weight of the testimony. Everett v. State, 30 Texas Crim. App. 682; 18 S. W. 674. Simmons v. State, 31 Texas Crim. Rep. 227; 20 S. W. 573. Nelson v. State, 58 S. W. 107. Schauer v. State, 60 S. W. 251. Poole v. State, 45 Texas Crim. Rep. 348; 76 S. W. 565.

The effect produced on a bystander by the conduct of deceased would illustrate the effect likely to be produced in the mind of defendant and proof of same is admissible. Thomas v. State, 40 Texas 36. Cochran v. State, 28 Texas Crim. App. 431; 13 S. W. 651. Robinson v. State, 57 S. W. 812. Scott v. State, 51 Texas Crim. Rep. 390; 93 S. W. 112. Latham v. State, 172 S. W. 797.

When self defense is an issue and the State proves that defendant went armed to where deceased was, defendant may prove the conversations had with his rela-

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tives or friends just before he went, in which they advised him to go and try to convince deceased that he was not guilty of the charges brought against him by deceased. Simmons v. State, 31 Texas Crim. Rep. 227; 20 S. W. 573.

When relevant defendant may prove that he told another before the homicide about his family trouble and about the acts of deceased in endeavoring to keep his wife from living with him. Cole v. State, 48 Texas Crim. Rep. 443; 88 S. W. 341. Burnam v. State, 61 Texas Crim. Rep. 51; 133 S. W. 1045.

If the homicide grew out of an attempt on the part of deceased to keep defendant's wife from going or living with him and it is an issue as to the state of her feelings towards defendant, it is error to exclude her letters to defendant written prior to the homicide expressing love for him, as these facts would bear upon the state of defendant's mind. Cole v. State, 45 Texas Crim. Rep. 233; 75 S. W. 527.

The state of mind of deceased is not an issue where she was murdered while she was asleep. Brown v. State, 169 S. W. 437.

Sec. 1930. **Facts unknown to defendant.**—If defendant knew or was informed prior to the homicide of the motive, purpose, reason, declarations, or acts of deceased, proof of same is admissible if it tends to solve any issue in the case. Casner v. State, 43 Texas Crim. Rep. 14; 62 S. W. 913. Grace v. State, 44 Texas Crim. Rep. 196; 69 S. W. 529. Rush v. State, 76 S. W. 927. Burnett v. State, 46 Texas Crim. Rep. 119; 79 S. W. 550. Hunter v. State, 59 Texas Crim. Rep. 459; 129 S. W. 136. Maclin v. State, 144 S. W. 960.

If proof of facts unknown to defendant at the time of the homicide is admitted without objection it is too late to complain thereof for the first time on appeal; of if the bill of exceptions fails to show that an objection was made on the trial which was specific enough to call the trial court's attention to the rules governing such testimony, or if the bill of exceptions fails to show as a fact that the facts were unknown to the defendant prior to the homicide, the supposed error will not be revised on appeal. Waggoner v. State, 98 S. W. 257. Hunter v. State, 59 Texas Crim. Rep. 458; 129 S. W. 136. Harrelson v. State, 60 Texas Crim. Rep. 545; 132 S. W. 783. Singleton v. State, 167 S. W. 46. Eads v. State, 176 S. W. 576.

Proof of movements of deceased not known to defendant may be admitted if it is a mere matter of inducement and does not affect a defensive theory. Bozanno v. State, 60 Texas Crim. Rep. 507; 132 S. W. 777. Singleton v. State, 167 S. W. 46. Eads v. State, 176 S. W. 576.

When the deceased has made threats against the defendant, proof of his subsequent declarations of pacific intent, not communicated to the defendant, is not admissible. Nelson v. State, 58 S. W. 108. Wall v. State, 62 S. W. 1063. Bradley v. State, 60 Texas Crim. Rep. 398; 132 S. W. 488. Johnson v. State, 148 S. W. 108.

It is error to make self defense depend upon whether deceased's gun was a deadly weapon where it was not shown that defendant knew it was not. Bode v. State, 6 Texas Crim. App. 424.

Defendant can only be bound so far as matters reasonably appeared to him at the time he acted. Proof of deceased's undisclosed reason or motive in being where he was or in going to the scene of the homicide, or proof as to his real destination if unknown to defendant at the time he acted is not admissible against defendant where it tends to affect his defensive theory. Brumley v. State, 21 Texas Crim. App. 238; 17 S. W. 140. Johnson v. State, 22 Texas Crim. App. 224; 2 S. W. 609. Ball v. State, 29 Texas Crim. App. 125; 14 S W. 1012. Gilcrease v. State, 33 Texas Crim. Rep. 619; 28 S. W. 531. Young v. State, 41 Texas Crim. Rep. 444; 55 S. W. 331. Stell v. State, 58 S. W. 75. Woodward v. State, 42 Texas Crim. Rep. 207; 58 S. W. 135. Stanton v. State, 42 Texas Crim. Rep. 271; 59 S. W. 271. Wall v. State, 62 S. W. 1063. Wooley v. State, 64 S. W. 1054 (the fact that such testimony is a part of the *res gestæ* is no exception to this rule). Adams v. State, 64 S. W. 1056. Adams v. State, 44 Texas Crim. Rep. 66; 68 S. W. 271. Gray v. State, 47 Texas Crim. Rep. 377; 83 S. W. 705. Saye v. State, 50 Texas Crim. Rep. 572; 99 S. W. 551. Tillman v. State, 51 Texas Crim. Rep. 204; 101 S. W. 210. Pratt v. State, 53 Texas Crim. Rep. 281; 109 S. W. 138. Gant v. State, 55 Texas Crim. Rep. 291;

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116 S. W. 801. Bradley v. State, 60 Texas Crim. Rep. 407; 132 S. W. 488. Kemper v. State, 63 Texas Crim. Rep. 1; 138 S. W. 1029. Maclin v. State, 144 S. W. 960. Kincaid v. State, 145 S. W. 597. Black v. State, 145 S. W. 949. Johnson v. State, 148 S. W. 328. Cook v. State, 160 S. W. 465. Kirklin v. State, 164 S. W. 1016.

Proof of the undisclosed motives, reasons or purposes of deceased, if inadmissible as original evidence cannot be legally gotten before the jury under the theory that they are a proper part of a dying declaration. Winfrey v. State, 41 Texas Crim. Rep. 538; 56 S. W. 919. Johnson v. State, 148 S. W. 328.

Proof of hearsay statements and declarations made by third persons and which were unknown to defendant when he acted is not admissible against him to show motive on his part. Walker v. State, 63 Texas Crim. Rep. 499; 140 S. W. 455.

Proof of facts not directly or circumstantially shown to be known to defendant at the time of the homicide is not admissible against him to show motive on his part. Phillips v. State, 22 Texas Crim. App. 139; 2 S. W. 601. Attaway v. State, 41 Texas Crim. Rep. 397; 55 S. W. 45. Terry v. State, 45 Texas Crim. Rep. 272; 76 S. W. 928. Maclin v. State, 144 S. W. 960. DeLeon v. State, 155 S. W. 248.

The State is not entitled to prove that deceased in his neighborhood was reputed to have money, where defendant did not live in that neighborhood and it is not shown that he knew of such reputation. Lancaster v. State, 31 S. W. 516.

Proof that defendant's wife was unfaithful to him is not admissible against him to show motive on his part to murder her, where such fact is not directly or circumstantially shown to have been known to him at the time of the homicide. Phillips v. State, 22 Texas Crim. App. 139; 2 S. W. 601.

Proof that defendant's wife had appealed to other persons for protection from him is not admissible against him where such fact is not shown to have been known to defendant at the time of the homicide. Robbins v. State, 166 S. W. 530.

Proof that deceased was going to prosecute defendant for cattle theft is not admissible when it is not shown that defendant knew of such fact prior to the homicide. Maclin v. State, 144 S. W. 960.

Proof that deceased was a witness against defendant is not admissible when it is not shown that such fact was known to defendant prior to the homicide. Terry v. State, 45 Texas Crim. Rep. 272; 76 S. W. 928.

Though it is properly shown that deceased was a witness against defendant, yet statements of deceased as to what his evidence would have been are not admissible in evidence when it is not shown that defendant had knowledge thereof prior to the homicide. Attaway v. State, 41 Texas Crim. Rep. 397; 55 S. W. 45.

Proof that a marriage license was issued authorizing the marriage of deceased with the divorced wife of defendant is not admissible when it is not shown that defendant knew of such fact prior to the homicide. Kirklin v. State, 164 S. W. 1016.

The State is not entitled to prove facts not shown to have been known to defendant which show improper conduct between his wife and deceased at other times than the time claimed by defendant to have been communicated to him prior to the homicide. Richards v. State, 53 Texas Crim. Rep. 412; 110 S. W. 432. Young v. State, 59 Texas Crim. Rep. 139; 127 S. W. 1059.

Where defendant believed at the time of the homicide that deceased had burned his barn, the State is not entitled to prove an alibi for deceased. Winn v. State, 54 Texas Crim. Rep. 540; 113 S. W. 918.

Proof that a street, which it was defendant's duty to guard, was closed without proper authority, is not admissible when such fact was not shown to have been known to defendant prior to the homicide. Manley v. State, 62 Texas Crim. Rep. 392; 137 S. W. 1139.

Proof that deceased who was the publisher of a paper in which an article libeling defendant appeared did not write the article is not admissible when it is not shown that defendant knew that fact prior to the homicide. Williams v. State, 40 Texas Crim. Rep. 569; 51 S. W. 224.

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Proof of a custom as to turning aside for a loaded wagon is not admissible against defendant when it is not shown that he knew of such custom at the time of the difficulty. Tubbs v. State, 50 Texas Crim. Rep. 143; 95 S. W. 112.

When not shown to have been known to defendant at the time of the homicide, the State is not entitled to prove declarations of deceased expressing friendship for defendant, a desire for peace, or any other act or declaration that affects the defensive theory. Fuller v. State, 30 Texas Crim. App. 564; 17 S. W. 1108. Stell v. State, 58 S. W. 75. Casner v. State, 43 Texas Crim. Rep. 14; 62 S. W. 914. Clay v. State, 44 Texas Crim. Rep. 136; 69 S. W. 413. Burnett v. State, 46 Texas Crim. Rep. 118; 79 S. W. 550. Gray v. State, 47 Texas Crim. Rep. 378; 83 S. W. 705. Maroney v. State, 95 S. W. 109. Casey v. State, 50 Texas Crim. Rep. 394; 97 S. W. 496.

If defendant's witness testifies to warning defendant that his adversary had it in for him and would kill him if he did not mind, it is error to permit the witness to detail on cross examination the conversation which led to the witness forming the conclusion and which shows a conditional threat, where it is not shown that defendant had knowledge of what was really said. Simpson v. State, 48 Texas Crim. Rep. 331; 87 S. W. 826. Kemper v. State, 63 Texas Crim. Rep. 1; 138 S. W. 1029.

The time elapsing between difficulties may be proven without showing the details of the movements of deceased, and when not shown to have been known to defendant proof of acts and declarations of deceased which affects the defensive theory and tends to show an abandonment of a hostile purpose is not admissible. Burnett v. State, 46 Texas Crim. Rep. 118; 79 S. W. 550.

Proof of intentions of third persons is not admissible against defendant when it affects the defensive theory and is not shown to have been known to defendant at the time he acted. Bowen v. State, 47 Texas Crim. Rep. 146; 82 S. W. 520.

Proof of the actions of another showing an apprehension of a difficulty is not admissible against defendant when it is not shown that he knew thereof when he acted. Woodward v. State, 42 Texas Crim. Rep. 206; 58 S. W. 135.

Proof as to why deceased had bought a gun is not admissible when it is not shown that defendant had knowledge of such reason at the time of the homicide. Cook v. State, 160 S. W. 465.

When not shown to have been known to defendant, the State is not entitled to prove the reasons of parties as to why they went armed to the house of defendant in the dead hours of night. Tillman v. State, 51 Texas Crim. Rep. 204; 101 S. W. 210.

When defendant is not shown to have had knowledge thereof, the State is not entitled to prove that deceased had no deadly purpose in going to the place of the homicide and that he did not go there for the purpose of executing threats. Wall v. State, 62 S. W. 1063. Adams v. State, 44 Texas Crim. Rep. 64; 68 S. W. 271. Bradley v. State, 60 Texas Crim. Rep. 402; 132 S. W. 488.

When self defense is an issue and it is not shown that defendant had knowledge thereof prior to the homicide, proof that deceased armed himself for another purpose than to injure defendant is not admissible. Woodward v. State, 51 S. W. 1122. Nelson v. State, 58 S. W. 108. Bradley v. State, 60 Texas Crim. Rep. 402; 132 S. W. 488.

If self defense is an issue and it is not shown that the fact was known to defendant, proof that the reason why deceased had a pistol was because his wife advised him to take it to town for a purpose not connected with defendant is not admissible. Woodward v. State, 51 S. W. 1122.

If self defense is an issue, proof of conversations between others showing why defendant's adversary went armed is not admissible against defendant when knowledge thereof is not brought home to defendant. Dowell v. State, 58 Texas Crim. Rep. 482; 126 S. W. 874. Walker v. State, 63 Texas Crim. Rep. 499; 140 S. W. 455. Ponder v. State, 155 S. W. 245.

Proof of declarations of deceased or another as to why he went armed to meet defendant is not admissible against defendant when he is not shown to have known

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thereof. Gilcrease v. State, 33 Texas Crim. Rep. 619; 28 S. W. 531. Bradley v. State, 60 Texas Crim. Rep. 402; 132 S. W. 484.

Proof of the reason why the son of deceased came to the scene of the homicide is not admissible if it tends to impair the defensive theory and is not shown to have been known to defendant. Maroney v. State, 95 S. W. 109. Bradley v. State, 60 Texas Crim. Rep. 402; 132 S. W. 484.

When self defense is an issue proof that deceased had a habit of putting his hands in the waistband of his pants is not admissible when defendant is not shown to have knowledge of such habit. Phipps v. State, 34 Texas Crim. Rep. 564; 31 S. W. 397.

Proof that deceased, when drawing his pistol, said that he was going to arrest defendant is not admissible when unknown to defendant and when such proof tends to impair the defensive theory. Clark v. State, 56 Texas Crim. Rep. 298; 120 S. W. 179.

Proof of what defendant's adversary intended to say when he put his hand on defendant and started to speak is not admissible if it tends to impair the defensive theory. Darnell v. State, 58 Texas Crim. Rep. 585; 126 S. W. 1126.

Proof of deceased's nice behavior at a dance is not admissible when defendant had no knowledge thereof. Brownlee v. State, 48 Texas Crim. Rep. 409; 87 S. W. 1153.

When it tends to impair the defensive theory and was unknown to defendant, proof that just before going to where the homicide occurred deceased told his mother to hurry up supper so they could make ice cream after supper is inadmissible. Gant v. State, 55 Texas Crim. Rep. 291; 116 S. W. 801.

Proof of the physical condition of deceased is not admissible where such proof would tend to impair the defensive theory and where such condition is not shown to have been known to defendant. Brownlee v. State, 48 Texas Crim. Rep. 410; 87 S. W. 1153. Cole v. State, 48 Texas Crim. Rep. 445; 88 S. W. 341.

When unknown to defendant, the State is not entitled to prove that a third person had relinquished his claim and recognized the title of deceased to a disputed piece of land of which defendant was in possession and about which the killing occurred. Sims v. State, 38 Texas Crim. Rep. 643; 44 S. W. 522.

Sec. 1931. **Proof that deceased was armed or unarmed.**—The State is entitled to prove that the deceased was not armed and made no movement to draw a weapon or make an attack on defendant in any way at the time of the homicide. Williams v. State, 30 Texas Crim. App. 444; 17 S. W. 1071. Jowell v. State, 44 Texas Crim. Rep. 328; 71 S. W. 286. Graham v. State, 57 Texas Crim. Rep. 104; 123 S. W. 693. Dougherty v. State, 59 Texas Crim. Rep. 469; 128 S. W. 401. Swanney v. State, 146 S. W. 548. Decker v. State, 154 S. W. 566.

The State is entitled to prove that deceased was unarmed at the time of the homicide in support of the theory that he was not the aggressor or that he was not reaching for a weapon when he was killed. Seeley v. State, 43 Texas Crim. Rep. 69; 63 S. W. 309. Grubb v. State, 43 Texas Crim. Rep. 75; 63 S. W. 314. Thomas v. State, 45 Texas Crim. Rep. 114; 74 S. W. 36. Waggoner v. State, 98 S. W. 257. Dougherty v. State, 59 Texas Crim. Rep. 469; 128 S. W. 401. Swanney v. State, 146 S. W. 548. Decker v. State, 154 S. W. 566.

When such testimony serves to illustrate a point in the case, the State may show that at the time of the homicide deceased owned no firearms and had none at home. Pettis v. State, 47 Texas Crim. Rep. 75; 81 S. W. 312.

When self defense is an issue the defendant is entitled to prove that a weapon picked up at the scene of the homicide belonged to deceased. Lilly v. State, 20 Texas Crim. App. 8.

When a witness has already related the position of himself and the parties with reference to each other and all that he had heard and seen during the difficulty, it is not error to permit him to testify that he was in a position to see if deceased

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had anything in his hands during the time of the difficulty with defendant and that he did not see anything. Tate v. State, 35 Texas Crim. Rep. 234; 33 S. W. 121. McGrath v. State, 35 Texas Crim. Rep. 413; 34 S. W. 127.

Where a witness has already related all that he heard and saw and has stated the positions of himself and the parties with reference to each other, it is not error to permit him to testify that if any weapons had been on the ground where the difficulty occurred he would have seen them. Tate v. State, 35 Texas Crim. Rep. 234; 33 S. W. 121.

When self-defense is an issue and there is a conflict as to whether deceased was armed and as to who was the aggressor, a continuance should be granted for proof that deceased was armed at the time of the difficulty. Gilcrease v. State, 33 Texas Crim. Rep. 639; 28 S. W. 531.

Defendant is entitled to prove that as he started to go to where deceased was he was informed that deceased was armed. Simmons v. State, 31 Texas Crim. Rep. 227; 20 S. W. 573.

Where the State proves by the declarations of deceased that he was not armed, it is competent for defendant to rebut such declarations by proof of contradictory declarations of deceased showing that he was armed. Ellison v. State, 12 Texas Crim. App. 581.

Proof of the bloody condition or personal appearance of deceased shortly after the difficulty is not admissible as bearing on whether he was in such condition as that he would likely get rid of a pistol. Rice v. State, 51 Texas Crim. Rep. 279; 103 S. W. 1156.

Proof that deceased was armed is not admissible if he was doing nothing when he was killed and if such proof would shed no light upon the case. Briggs v. State, 6 Texas Crim. App. 144. McCullough v. State, 23 Texas Crim. App. 620; 5 S. W. 175.

When self defense is an issue the State is not entitled to prove as original evidence that deceased was not in the habit of carrying a pistol. McCandless v. State, 42 Texas Crim. Rep. 59; 57 S. W. 672.

Proof that deceased at one time carried a pistol is not admissible when it was not on the day of or at the time of the homicide when the purpose is merely to show that defendant reasonably believed he was armed at the time he was killed. Hysaw v. State, 155 S. W. 942.

If self defense is an issue it may be shown that deceased habitually carried weapons or it may be proven by general reputation of such habit. Horbach v. State, 43 Texas 248. Branch v. State, 15 Texas Crim. App. 101. Lilly v. State, 20 Texas Crim. App. 9. Glenewinkel v. State, 61 S. W. 123. Maclin v. State, 144 S. W. 957. Hysaw v. State, 155 S. W. 942.

When self defense is an issue it may be shown that deceased habitually went armed or it may be shown that he bore the general reputation of habitually going armed, but proof of isolated instances of his having a pistol is not admissible when it is not shown that such instances were known to defendant prior to the homicide. Andrus v. State, 165 S. W. 189.

Sec. 1932. **Newly discovered evidence of deceased being armed.**—If defendant alone testifies that deceased made a demonstration as if to draw a pistol and there was no testimony on the trial that defendant had a pistol, newly discovered evidence of deceased having a pistol may entitle defendant to a new trial. Clark v. State, 51 Texas Crim. Rep. 519; 102 S. W. 1136. Henson v. State, 168 S. W. 89.

Sec. 1933. **Condition of deceased's weapon.**—The condition of deceased pistol may be shown if it sheds light upon the issue of how many shots were fired and who fired them. Godwin v. State, 39 Texas Crim. Rep. 405; 46 S. W. 226.

When self defense is an issue, proof that the pistol used by deceased was unloaded is not admissible when that fact was not known to defendant. Bode v. State, 6 Texas Crim. App. 424. Roberts v. State, 48 Texas Crim. Rep. 381; 88 S. W. 221.

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When self defense is an issue, proof that the gun of deceased was loaded with small shot is not admissible when defendant is not shown to have any knowledge of that fact. Carr v. State, 41 Texas Crim. Rep. 380; 55 S. W. 51.

When self defense is an issue, proof that the pistol of deceased was loaded in such a way that it could not be fired is not admissible when defendant is not shown to have any knowledge of that fact. Everett v. State, 30 Texas Crim. App. 682; 18 S. W. 674.

Sec. 1934. **More assailants than one.**—Where self defense is fully charged as to the acts of deceased, it is sufficient reference to the acts of other assailants if the charge instructs the jury that if there were more assailants than one that the slayer had the right to act upon the hostile demonstrations of either one or all of them and to kill either one of them if it reasonably appeared to him that they were present for the purpose and acting together to take his life or do him some serious bodily injury. Thomas v. State, 49 Texas Crim. Rep. 644; 95 S. W. 1069. Carson v. State, 57 Texas Crim. Rep. 398; 123 S. W. 592. Scott v. State, 143 S. W. 610.

If there is evidence that more than one assailed defendant, the charge of the court is too restrictive if it confines the right of self defense to the acts of deceased. Cartwright v. State, 16 Texas Crim. App. 487. Bean v. State, 25 Texas Crim. App. 357; 8 S. W. 278. Francis v. State, 55 S. W. 489. Stell v. State, 58 S. W. 77. Garner v. State, 45 Texas Crim. Rep. 311; 77 S. W. 797. Recen v. State, 58 Texas Crim. Rep. 457; 126 S. W. 577. Black v. State, 145 S. W. 947.

If there is evidence, viewed from defendant's standpoint, that defendant was in danger from more than one assailant, the charge should instruct the jury that defendant had a right to defend against all or either. Barron v. State, 23 Texas Crim. App. 475; 5 S. W. 237. Norris v. State, 42 Texas Crim. Rep. 566; 61 S. W. 493. Seeley v. State, 43 Texas Crim. Rep. 66; 63 S. W. 309. Garner v. State, 45 Texas Crim. Rep. 308; 77 S. W. 797. Stacy v. State, 48 Texas Crim. Rep. 97; 86 S. W. 327. Roberts v. State, 48 Texas Crim. Rep. 380; 88 S. W. 221. Arnwine v. State, 50 Texas Crim. Rep. 254; 96 S. W. 4. Gant v. State, 55 Texas Crim. Rep. 292; 116 S. W. 801. Recen v. State, 58 Texas Crim. Rep. 457; 126 S. W. 577. Black v. State, 145 S. W. 947.

If defendant's case is that he was defending against more assailants than one, and the State's case tends to show that only deceased was attacking him, it is error to fail to also charge on the theory that he was attacked only by deceased. Garner v. State, 45 Texas Crim. Rep. 311; 77 S. W. 797.

If there is evidence of more assailants than one, the charge should inform the jury that the defendant could defend against either, and it is error to require the jury to find or believe that more than one assailant attacked the defendant. McLaughlin v. State, 10 Texas Crim. App. 360. Cartwright v. State, 16 Texas Crim. App. 487. Jones v. State, 20 Texas Crim. App. 665. Bean v. State, 25 Texas Crim. App. 357; 8 S. W. 278. Meuly v. State, 26 Texas Crim. App. 306; 9 S. W. 563. Carter v. State, 37 Texas Crim. Rep. 403; 35 S. W. 378. Stell v. State, 58 S. W. 76. Seeley v. State, 43 Texas Crim. Rep. 66; 63 S. W. 309. Garner v. State, 45 Texas Crim. Rep. 311; 77 S. W. 797. Scott v. State, 46 Texas Crim. Rep. 314; 81 S. W. 950. Stacy v. State, 48 Texas Crim. Rep. 97; 86 S. W. 327. Nelson v. State, 48 Texas Crim. Rep. 278; 87 S. W. 143. Mayhew v. State, 144 S. W. 229. Black v. State, 145 S. W. 947.

If there is no evidence of any other assailant than deceased at the time of the homicide, it is not necessary to charge on the theory that defendant was defending against more assailants than one. Lenz v. State, 48 Texas Crim. Rep. 2; 85 S. W. 1068. Jenkins v. State, 59 Texas Crim. Rep. 478; 128 S. W. 1113. Fifer v. State, 64 Texas Crim. Rep. 203; 141 S. W. 989. Holmes v. State, 155 S. W. 205.

It is not reversible error to fail to charge on defendant's right to defend against more than one assailant if the third person was doing nothing at the time of the homicide and if the charge would not likely have been of benefit to defendant. Lenz v. State, 48 Texas Crim. Rep. 2; 85 S. W. 1068. Fifer v. State, 64 Texas Crim. Rep. 203; 141 S. W. 989.

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Where defendant claims that deceased and another attacked him, and the proof shows that as defendant reached for his pistol the other ran away before defendant shot deceased, it is not error to fail to include in the charge the right to defend against more than one assailant. Lenz v. State, 48 Texas Crim. Rep. 2; 85 S. W. 1068. Jenkins v. State, 59 Texas Crim. Rep. 478; 128 S. W. 1113. Fifer v. State, 64 Texas Crim. Rep. 203; 141 S. W. 989.

When proof of a recent previous difficulty between defendant and another is in evidence, it is error to charge the jury that the fact, if it was a fact, that defendant was in the wrong in the first difficulty could not be considered in passing upon whether defendant was the aggressor in the final difficulty; defendant's theory being that deceased and the other party were joining in an attack on him. Brown v. State, 54 Texas Crim. Rep. 128; 112 S. W. 80.

Sec. 1935. **Fear of serious bodily injury justifies.**—An attack upon the person of an individual such as produces a reasonable expectation or fear of some serious bodily injury will justify a homicide committed in necessary defense of such an attack, whether the danger is real or only apparent, and it is error to omit to charge upon defendant's right to defend himself against receiving serious bodily injury and to restrict the charge to the prevention of murder, unless the proof shows that the attack, if made at all, was with the evident intention of killing. Anderson v. State, 1 Texas Crim. App. 733. Gilly v. State, 15 Texas Crim. App. 301. Short v. State, 15 Texas Crim. App. 370. Hunnicutt v. State, 18 Texas Crim. App. 522. Hunnicutt v. State, 20 Texas Crim. App. 643. Fuller v. State, 30 Texas Crim. App. 565; 17 S. W. 1108. Hampton v. State, 65 S. W. 527. Crenshaw v. State, 48 Texas Crim. Rep. 78; 85 S. W. 1147. McDowell v. State, 55 Texas Crim. Rep. 599; 117 S. W. 831. Gaines v. State, 58 Texas Crim. Rep. 643; 127 S. W. 188.

If the testimony shows that if any attack was made it was made with intent to kill, it is not reversible error to fail to include in the charge the right to defend against a reasonable apprehension of serious bodily injury. Mitchell v. State, 38 Texas Crim. Rep. 192; 41 S. W. 816. Matthews v. State, 42 Texas Crim. Rep. 47; 58 S. W. 86. Curtis v. State, 59 S. W. 264. Tilmyer v. State, 58 Texas Crim. Rep. 562; 126 S. W. 870.

A charge authorizing defense against an apprehension of serious bodily injury is erroneous if it defines that term as such injury as might probably cause death. Bruce v. State, 41 Texas Crim. Rep. 30; 51 S. W. 954 (choking defendant).

The charge is erroneous if it adds to defendant's burden an adjective qualifying "serious bodily injury," such as the word "great." Jones v. State, 44 Texas Crim. Rep. 409; 71 S. W. 962.

Sec. 1936. **One may defend against any attack.**—If defendant's adversary was using his fists, or a whip or other mild weapon or instrument, it is error to restrict defendant's right to defend himself to an attack producing a reasonable expectation or fear of death or some serious bodily injury. Garcia v. State, 57 S. W. 651. McLendon v. State, 66 S. W. 554. Crawford v. State, 70 S. W. 548. Price v. State, 46 Texas Crim. Rep. 82; 79 S. W. 540. Rea v. State, 46 Texas Crim. Rep. 454; 80 S. W. 1003. Collins v. State, 47 Texas Crim. Rep. 115; 81 S. W. 300. Sprinkle v. State, 49 Texas Crim. Rep. 224; 91 S. W. 787. Hix v. State, 51 Texas Crim. Rep. 431; 102 S. W. 405. Little v. State, 61 Texas Crim. Rep. 197; 135 S. W. 120. Smith v. State, 61 Texas Crim. Rep. 349; 135 S. W. 152. Kinslow v. State, 147 S. W. 249.

A charge restricting the right of self defense to an attack producing a reasonable apprehension of death or serious bodily injury is not erroneous if there is no evidence that the danger from a milder attack was immediate, imminent and pressing. Bryant v. State, 51 Texas Crim. Rep. 66; 100 S. W. 373.

Sec. 1937. **If charge mentions weapons of deceased.**—If the charge of the court mentions the weapons used by deceased or by the alleged injured party it should mention all of them, and in such case the charge is erroneous if it fails to instruct the jury that defendant could defend against either of such weapons. Wilson v. State, 46 Texas Crim. Rep. 527; 81 S. W. 34. Hayman v. State, 47 Texas Crim. Rep. 266; 83 S. W. 204. Gafford v. State, 99 S. W. 998.

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If the charge mentions the weapons used by the alleged injured party, it should not name all of them in the conjunctive, as the defendant was entitled to defend against either. Gafford v. State, 99 S. W. 998.

Sec. 1938. **Affirmative charge on self defense should be given.**—When self defense is an issue the accused is entitled to an affirmative charge on that theory, and a negative charge is not sufficient. Gardner v. State, 11 Texas Crim. App. 273. Hackett v. State, 13 Texas Crim. App. 414. Tillery v. State, 24 Texas Crim. App. 272; 5 S. W. 842. Thompson v. State, 24 Texas Crim. App. 383; 6 S. W. 296. Bonner v. State, 29 Texas Crim. App. 231; 15 S. W. 821. Williams v. State, 61 Texas Crim. Rep. 356; 136 S. W. 771.

When entitled to a charge on self defense, defendant should have a clear, distinct and affirmative charge on that subject not entangled with a lot of provisos and qualifications. Morrison v. State, 37 Texas Crim. Rep. 601; 40 S. W. 591. Drake v. State, 45 Texas Crim. Rep. 273; 77 S. W. 7. Vann v. State, 45 Texas Crim. Rep. 444; 77 S. W. 813. Price v. State, 46 Texas Crim. Rep. 80; 79 S. W. 540. Goodman v. State, 47 Texas Crim. Rep. 392; 83 S. W. 196. Sprinkle v. State, 49 Texas Crim. Rep. 225; 91 S. W. 788. Burnett v. State, 51 Texas Crim. Rep. 20; 100 S. W. 381. McDowell v. State, 55 Texas Crim. Rep. 600; 117 S. W. 831. McMillan v. State, 58 Texas Crim. Rep. 525; 126 S. W. 877. Aycock v. State, 61 Texas Crim. Rep. 9; 133 S. W. 683. Williams v. State, 61 Texas Crim. Rep. 356; 135 S. W. 771. Best v. State, 61 Texas Crim. Rep. 551; 135 S. W. 582. Robbins v. State, 155 S. W. 936. Fisher v. State, 168 S. W. 528.

Sec. 1939. **Omission of a word in the charge.**—The omission of a word in the charge of the court which is sufficiently supplied by the context, and which would be supplied by any juror of ordinary intelligence, is not reversible error. Hill v. State, 11 Texas Crim. App. 470. Arrington v. State, 20 S. W. 927. Champ v. State, 32 Texas Crim. Rep. 87; 22 S. W. 678. Lane v. State, 41 Texas Crim. Rep. 558; 55 S. W. 831. Toler v. State, 41 Texas Crim. Rep. 660; 56 S. W. 917. Green v. State, 52 Texas Crim. Rep. 47; 105 S. W. 205. Hester v. State, 55 Texas Crim. Rep. 374; 116 S. W. 1150. Leonard v. State, 56 Texas Crim. Rep. 84; 119 S. W. 98. Cromwell v. State, 59 Texas Crim. Rep. 525; 129 S. W. 623.

The omission of a word in the charge of the court which changes the entire meaning of a sentence so as to make it highly injurious to defendant will constitute reversible error. Clampitt v. State, 3 Texas Crim. App. 641. Sanders v. State, 17 Texas Crim. App. 224. Goolsby v. State, 59 Texas Crim. Rep. 528; 129 S. W. 625.

Sec. 1940. **Signing the charge.**—The general charge given by the court, as well as the charges requested by either party and given or refused by the court, should be signed by the judge. The signature of the judge is a sufficient certification. The presumption on appeal is that the charge was certified—signed—by the judge before the charge was read to the jury unless the contrary is shown by a bill of exception. Jackson v. State, 62 S. W. 914. Alberson v. State, 54 Texas Crim. Rep. 9; 111 S. W. 412.

The failure to sign the charge will not require a reversal unless injury to the rights of the defendant be shown. Shetters v. State, 147 S. W. 582.

When the failure to sign the main charge, or an additional charge, or a requested charge, is calculated to injure the rights of the defendant, it will require a reversal. Logan v. State, 40 Texas Crim. Rep. 87; 48 S. W. 575. Jones v. State, 48 Texas Crim. Rep. 32; 85 S. W. 1075. Alberson v. State, 54 Texas Crim. Rep. 9; 111 S. W. 412.

Sec. 1941. **Filing the charge.**—The general charge given by the court, as well as those requested by either party and given or refused by the court, should be filed, and should bear the file mark of the clerk, and the transcript on appeal should show the file mark of the clerk and the date when it was filed. It may be filed *nunc pro tunc*, and injury must be shown before the failure to file it will require a reversal. The presumption on appeal is that the charge was filed by the clerk before it was read to the jury unless it affirmatively appears to the contrary by a bill of exceptions. Nettles v. State, 4 Texas Crim. App. 337. Long v. State, 4 Texas Crim. App. 81. Hill v. State, 4 Texas Crim. App. 559. Lowe v. State, 11 Texas Crim.

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App. 253. Lyles v. State, 64 Texas Crim. Rep. 625; 142 S. W. 592. Shetters v. State, 147 S. W. 582.

Sec. 1942. **May charge State's theory of self defense.**—The charge may submit the State's theory of the claim of self defense. Humphries v. State, 25 Texas Crim. App. 132; 7 S. W. 663. Garner v. State, 34 Texas Crim. Rep. 356; 30 S. W. 782. Logan v. State, 46 Texas Crim. Rep. 575; 81 S. W. 721. Howard v. State, 53 Texas Crim. Rep. 382; 111 S. W. 1038. Arnwine v. State, 54 Texas Crim. Rep. 216; 114 S. W. 797. Bordeaux v. State, 58 Texas Crim. Rep. 71; 124 S. W. 646. Roberts v. State, 168 S. W. 110.

Sec. 1943. **Burden of proof.**—A charge on self defense shifts the burden of proof if it requires the jury to believe beyond a reasonable doubt that defendant acted in self defense. Scott v. State, 46 Texas Crim. Rep. 86; 79 S. W. 543.

When self defense is an issue, it is error to charge the jury that when the facts have been proved which constitute the offense it devolves upon the defendant to establish the facts and circumstances on which he relies to excuse or justify the prohibited act. Ainsworth v. State, 8 Texas Crim. App. 532. Luera v. State, 12 Texas Crim. App. 259. Jones v. State, 13 Texas Crim. App. 1.

The charge shifts the burden if it requires the jury to believe that defendant acted in self defense before they could acquit, and it is error to refuse to apply the doctrine of reasonable doubt to the theory of self defense when requested. Stuart v. State, 57 Texas Crim. Rep. 593; 124 S. W. 656. Knox v. State, 167 S. W. 729.

If self defense is an issue it is error to charge the jury that if they believe beyond a reasonable doubt that injury was inflicted by defendant upon deceased, or the alleged injured party, that the law presumes the intent to injure and that it rests with defendant to show accident or innocent intention. Jones v. State, 13 Texas Crim. App. 1. Branch v. State, 15 Texas Crim. App. 102. Hardin v. State, 57 Texas Crim. Rep. 401; 123 S. W. 616.

The charge is erroneous if it requires the jury to find that defendant was "justified in believing" or "had the right to reasonably believe" that it was necessary to shoot. Reeves v. State, 34 Texas Crim. Rep. 487; 31 S. W. 382. Dodson v. State, 45 Texas Crim. Rep. 571; 78 S. W. 940.

If the defensive theory is that the homicide was justifiable because committed to prevent a rape, the charge should not require the jury to find beyond a reasonable doubt that the deceased was attempting to commit the rape. Scott v. State, 46 Texas Crim. Rep. 85; 79 S. W. 543.

Sec. 1944. **Charge grouping the facts.**—A charge on self defense should not group a number of facts and require the jury to believe them all before they are authorized to acquit. Willis v. State, 75 S. W. 798. Nix v. State, 45 Texas Crim. Rep. 504; 78 S. W. 227. Dodson v. State, 45 Texas Crim. Rep. 571; 78 S. W. 940. Hightower v. State, 56 Texas Crim. Rep. 252; 119 S. W. 691. Graves v. State, 58 Texas Crim. Rep. 42; 124 S. W. 678. McMillan v. State, 165 S. W. 576.

Sec. 1945. **Other charges on self defense.**—Defendant does not forfeit his right of self defense because he had made up his mind to kill deceased, and it is error to so charge the jury. Manis v. State, 41 Texas Crim. Rep. 615; 58 S. W. 81. Pratt v. State, 50 Texas Crim. Rep. 230; 96 S. W. 8.

It is error to destroy the charge on self defense by charging the jury that if the killing was not in pursuance of a previously formed design they should acquit. Manis v. State, 41 Texas Crim. Rep. 615; 58 S. W. 81.

It is error to charge the jury that defendant must decide for himself, at his peril, as to whether the circumstances were such as to furnish an apprehension of danger. Evans v. State, 57 Texas Crim. Rep. 174; 122 S. W. 392.

It is error to charge the jury that if defendant was partly actuated by motives of revenge he could not claim self defense; if the act was done in self defense the law does not concern itself with the other motives. Shumate v. State, 38 Texas Crim. Rep. 278; 42 S. W. 600.

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A charge on self defense is erroneous if it requires defendant to have fired under the influence of "terror." Arto v. State, 19 Texas Crim. App. 135.

A reference in the charge of the court to the attack by the adversary of defendant as a "supposed attack" is on the weight of the evidence in being calculated to lead the jury to believe that in the opinion of the trial judge there was no attack. Hinton v. State, 144 S. W. 618.

If the charge of the court selects one or more of the facts in evidence and instructs the jury that defendant cannot justify thereon, the charge is on the weight of the facts singled out and tends to prevent the jury from considering them in connection with the other facts. Craiger v. State, 48 Texas Crim. Rep. 505; 88 S. W. 208.

When words accompanied the acts of deceased the charge of the court should include both, and in such case the court should not charge only that it must appear from the acts of deceased that it was his purpose to commit murder. Lundy v. State, 59 Texas Crim. Rep. 136; 127 S. W. 1035.

Sec. 1946. **Invited Error.**—The doctrine of invited error is based upon estoppel, and if a special instruction is requested by defendant, and the court gives the requested charge, either in the form requested or in substance, the defendant is estopped from successfully urging any error invited by the instruction asked by him. Tuller v. State, 8 Texas Crim. App. 509. Hall v. State, 28 Texas Crim. App. 148; 12 S. W. 739. Carbough v. State, 49 Texas Crim. Rep. 454; 93 S. W. 738. Harris v. State, 61 S. W. 124. Moxie and Brackens v. State, 54 Texas Crim. Rep. 529; 114 S. W. 375. Myers v. State, 56 Texas Crim. Rep. 224; 118 S. W. 1034. Minor v. State, 56 Texas Crim. Rep. 433; 120 S. W. 860. Cornwell v. State, 61 Texas Crim. Rep. 122; 134 S. W. 223. Ellington v. State, 63 Texas Crim. Rep. 424; 140 S. W. 1100. Stewart v. State, 153 S. W. 1151. McKelvey v. State, 155 S. W. 932. Meek v. State, 160 S. W. 698. Brown v. State, 169 S. W. 437. DeLerosa v. State, 170 S. W. 312.

Where the charge, although erroneous, has been given at the instance or invitation of the defendant, it is not error of which he can successfully complain. Carbough v. State, 49 Texas Crim. Rep. 454; 93 S. W. 738. Moxie and Brackens v. State, 54 Texas Crim. Rep. 529; 114 S. W. 375.

If the trial court has refrained from charging on some issue in the case at the request of the defendant it is not ground for reversal. Dudley v. State, 40 Texas Crim. Rep. 37; 48 S. W. 179. Ellington v. State, 63 Texas Crim. Rep. 425; 140 S. W. 1100.

Estoppel operates against defendant only to the extent of the instruction asked by him, and does not protect modifications made by the court. Muely v. State, 31 Texas Crim. Rep. 171; 19 S. W. 915.

Sec. 1947. **Right to seek explanation.**—There is no question that one may speak to another about derogatory charges or statements made or circulated by such other person, without intending or even desiring to provoke a difficulty or to produce an occasion for injuring the other, but to act, if necessary, in self defense. If then, without any provocation on defendant's part, the insult is repeated, and defendant, roused to passion thereby, replies in kind, and is immediately attacked, he has the perfect right of self defense. The fact that one with a grievance arms himself and seeks an interview with the man who wrongs him is not necessarily a provocation, nor does it place defendant necessarily in the wrong. Cartwright v. State, 14 Texas Crim. App. 502. Shannon v. State, 35 Texas Crim. Rep. 6; 28 S. W. 687. Newman et al. v. State, 69 S. W. 519. Melton v. State, 47 Texas Crim. Rep. 458; 83 S. W. 822. Keith v. State, 50 Texas Crim. Rep. 67; 94 S. W. 1044. Mitchell v. State, 50 Texas Crim. Rep. 181; 96 S. W. 43. Quinn v. State, 50 Texas Crim. Rep. 209; 96 S. W. 33. Crowson v. State, 51 Texas Crim. Rep. 12; 100 S. W. 782. Stewart v. State, 52 Texas Crim. Rep. 284; 106 S. W. 689. Gray v. State, 55 Texas Crim. Rep. 90; 114 S. W. 635. Ballard v. State, 62 Texas Crim. Rep. 435; 138 S. W. 122. Parish v. State, 153 S. W. 327.

A charge on the right of defendant to go to deceased for the purpose of explaining and satisfying him in regard to charges made against defendant should not be

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made to depend upon defendant's innocence of the charge which deceased had made. Simmons v. State, 31 Texas Crim. Rep. 227; 20 S. W. 573.

If there is evidence that defendant went to the house of deceased to ask an explanation of an insult, and that before defendant did any hostile act he was attacked by deceased and his wife, the charge should instruct the jury that defendant had the right to defend against either. Nelson v. State, 48 Texas Crim. Rep. 278; 87 S. W. 143.

Where defendant had been publicly charged with theft by deceased, and on meeting with deceased rode along friendly with him and suddenly presented his gun and said deceased had to take it back, and on deceased reaching for his gun, without warning to desist, shot him down, it is not error to refuse to charge on the right to seek an explanation or on self-defense. Williams v. State, 25 S. W. 788.

Sec. 1948. **Requiring defendant to have gone on peaceful mission.**—A charge on the right to go armed to seek an explanation is erroneous if it limits the right to the theory that defendant must have gone "on a peaceful mission" or "in a peaceable manner." McCleary v. State, 57 Texas Crim. Rep. 139; 122 S. W. 28. Gaines v. State, 58 Texas Crim. Rep. 631; 127 S. W. 188. Duke v. State, 61 Texas Crim. Rep. 19; 133 S. W. 435. Mason v. State, 163 S. W. 66. Sorrell v. State, 169 S. W. 299.

It is error to limit the right of defendant to go and ask an explanation to the theory that he must have gone "in a friendly spirit." King v. State, 51 Texas Crim. Rep. 210; 101 S. W. 237.

A charge on the right to go armed is erroneous if it limits that right to the idea that defendant must have gone "without any hostile intentions." Nix v. State, 45 Texas Crim. Rep. 504; 78 S. W. 227. Robbins v. State, 155 S. W. 936.

It is error to charge the jury that the right of self defense would not be abridged if defendant armed himself for any lawful purpose; an unlawful intent does not abridge the right of self defense if defendant did not provoke the difficulty by words or acts. Gant v. State, 55 Texas Crim. Rep. 292; 116 S. W. 801.

A charge that defendant would not have the right to arm himself for the purpose of killing deceased is misleading because it does not tell the jury what he would be guilty of. Cheatham v. State, 57 Texas Crim. Rep. 442; 125 S. W. 565.

Sec. 1949. **Right to go armed.**—If one has put himself in the wrong in another's house or premises and refuses to go when requested, the owner has a right to make him go and has the right, if he apprehends any danger, to arm himself. Hinton v. State, 24 Texas 454. Yantis v. State, 49 Texas Crim. Rep. 410; 94 S. W. 1019. Humphrey v. State, 165 S. W. 589.

When defendant's only weapon was an ordinary pocket knife the charge should not tell the jury that he had a right to arm himself. Thornton v. State, 65 S. W. 1108.

A person whose life has been threatened has a right to arm himself and to determine to shoot if attacked, and his so acting does not deprive him of the right of self defense. Schauer v. State, 60 S. W. 252. Duke v. State, 61 Texas Crim. Rep. 19; 133 S. W. 435.

If there were two difficulties, the charge should not submit the theory that defendant armed himself after the first if the proof does not show that he did. Castro v. State, 40 S. W. 987.

It is error to charge the jury that defendant would be guilty of murder if he armed himself and with intent to kill deceased went to where deceased was and on the arrival of deceased killed him; such a charge cuts off the right of self defense. Lynch v. State, 24 Texas Crim. App. 361; 6 S W. 190. Pratt v. State, 50 Texas Crim. Rep. 230; 96 S. W. 8.

A charge on defendant's right to go armed shifts the burden and is erroneous if it is prefaced with the statement that he had such right if the jury believe beyond

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a reasonable doubt that he had been informed of insults. Stacy v. State, 53 Texas Crim. Rep. 464; 110 S. W. 901.

If there is evidence to support the theory the charge should inform the jury that defendant had a right to seek deceased for an explanation of an insult to a female relation of defendant and that in so doing he had a right to arm himself to resist any anticipated attack. Melton v. State, 47 Texas Crim. Rep. 458; 83 S. W. 822.

Defendant has a right to arm himself if he fears trouble with, or in anticipation of trouble with deceased, and if self defense is an issue the court should charge on his right. Borden v. State, 42 Texas Crim. Rep. 648; 62 S. W. 1064. Nix v. State, 45 Texas Crim. Rep. 504; 78 S. W. 227. Keith v. State, 50 Texas Crim. Rep. 67; 94 S. W. 1044. Mitchell v. State, 50 Texas Crim. Rep. 181; 96 S. W. 43. Quinn v. State, 50 Texas Crim. Rep. 209; 96 S. W. 33.

Sec. 1950. **Need not charge on right to go armed.**—If the court does not limit defendant's right of self defense by a charge on provoking the difficulty, or otherwise, but gives him the perfect right of self defense on every defensive theory, it is not error to refuse to charge on his right to arm himself and seek an explanation. Williford v. State, 38 Texas Crim. Rep. 396; 42 S. W. 972. Harrelson v. State, 60 Texas Crim. Rep. 539; 132 S. W. 783. Holmes v. State, 155 S. W. 205. Fox v. State, 158 S. W. 1141. Strickland v. State, 161 S. W. 110. Carey v. State, 167 S. W. 368. Ford v. State, 177 S. W. 1176.

If the court does not charge on provoking the difficulty nor in any manner limits defendant's right of self defense by reason of his being armed, it is not necessary to charge on his right to go armed if defendant's claim is that the homicide occurred on a casual meeting. Harrelson v. State, 60 Texas Crim. Rep. 539; 132 S. W. 783. Holmes v. State, 155 S. W. 205. Strickland v. State, 161 S. W. 110.

The right to go armed need not be charged on if self defense is not in the case. Sanders v. State, 83 S. W. 712.

If defendant admits that he went off and armed himself and returned to provoke a difficulty and that he did provoke it, it is not error to fail to charge on the right to go armed to seek a retraction of a previous insult. Puryear v. State, 56 Texas Crim. Rep. 238; 118 S. W. 1042.

Sec. 1951. **Imperfect self defense.**—If the wrongful act of defendant produced the occasion or condition wherein it became necessary for his own safety that he kill, he is not entitled to the perfect right of self defense, but the grade of homicide is regulated according to the magnitude of the wrong, and if defendant intended an ordinary battery or was a mere trespasser his right of self defense would not be wholly lost, but would be imperfect, and as such, might reduce the homicide to manslaughter. Reed v. State, 11 Texas Crim. App. 509. King v. State, 13 Texas Crim. App. 283. Arto v. State, 19 Texas Crim. App. 136. Peter v. State, 23 Texas Crim. App. 687; 5 S. W. 228. Habel v. State, 28 Texas Crim. App. 588; 13 S. W. 1001. Carter v. State, 30 Texas Crim. App. 551; 17 S. W. 1102. Franklin v. State, 30 Texas Crim. App. 628; 18 S. W. 468. Polk v. State, 30 Texas Crim. App. 657; 18 S. W. 466. Franklin v. State, 34 Texas Crim. Rep. 287; 30 S. W. 231. Nicks v. State, 46 Texas Crim. Rep. 241; 79 S. W. 35. Yarborough v. State, 147 S. W. 272. Carver v. State, 148 S. W. 746.

The charge of the court should not leave the jury in the dark as to what offense defendant would be guilty of if he produced the occasion, nor as to what facts would not deprive him of self defense though he be not free from blame, but should apply the law to the facts. Franklin v. State, 34 Texas Crim. Rep. 287; 30 S. W. 231.

The court should remember that defendant and not deceased is on trial, and should submit the different theories from the standpoint of defendant. Reed v. State, 11 Texas Crim. App. 509. King v. State, 13 Texas Crim. App. 283. Varnell v. State, 26 Texas Crim. App. 56; 9 S. W. 65. Meuly v. State, 26 Texas Crim. App. 274; 9 S. W. 563. Carter v. State, 30 Texas Crim. App. 551; 17 S. W. 1102. Franklin v. State, 34 Texas Crim. Rep. 286; 30 S. W. 231. Pannell v. State, 54 Texas Crim. Rep. 498; 113 S. W. 537.

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Defendant does not forfeit his perfect right of self defense, if entitled to it otherwise, on account of having had on a prior occasion carnal knowledge of the wife or other female relation of the deceased. Varnell v. State, 26 Texas Crim. App. 56; 9 S. W. 65. Pannell v. State, 54 Texas Crim. Rep. 498; 113 S. W. 537.

It is error to charge the jury that if defendant and the wife of deceased were taken in the act of adultery by deceased and that deceased then attacked defendant that defendant had no right to resist such attack. Reed v. State, 11 Texas Crim. App. 509.

Defendant would be a wrong doer if he went to the house of deceased for the purpose of being carnally entertained by the wife of deceased, and if forced to kill the deceased to save his own life would be guilty of manslaughter. Franklin v. State, 30 Texas Crim. App. 641; 18 S. W. 468. Nicks v. State, 46 Texas Crim. Rep. 241; 79 S. W. 35.

If defendant went to the house of the deceased merely to get a place to sleep and by permission of the wife laid down on the bed to await the coming of the husband, such conduct, while imprudent, would not make him a wrong doer so as to impair his right of self defense. Franklin v. State, 30 Texas Crim. Rep. 628; 18 S. W. 468. Franklin v. State, 34 Texas Crim. Rep. 286; 30 S. W. 231.

If the act, though wrongful, be not illegal, and be not intended to provoke a difficulty nor reasonably calculated to produce the occasion and necessity to take life, the party killing in self defense is justifiable. Cartwright v. State, 14 Texas Crim. App. 486. White v. State, 23 Texas Crim. App. 164; 3 S. W. 710. Franklin v. State, 30 Texas Crim. App. 628; 18 S. W. 468. Franklin v. State, 34 Texas Crim. Rep. 286; 30 S. W. 231. Hall v. State, 43 Texas Crim. Rep. 487; 66 S. W. 783. Hjeronymus v. State, 46 Texas Crim. Rep. 160; 79 S. W. 313. Young v. State, 53 Texas Crim. Rep. 419; 110 S. W. 445. Best v. State, 58 Texas Crim. Rep. 327; 125 S. W. 913.

If defendant went to see his child at the request of his wife and on his refusal to go she undertook to shoot him, his right of self defense would not be forfeited. Hall v. State, 42 Texas Crim. Rep. 449; 60 S. W. 769. Hall v. State, 43 Texas Crim. Rep. 488; 66 S. W. 783.

Going to see one's child, it having been taken by the mother to her father's house, does not forfeit his right of self defense if defendant did nothing to provoke a difficulty after going there, though defendant had been forbidden to visit the premises and had not been invited by the wife. Hall v. State, 43 Texas Crim. Rep. 487; 66 S. W. 783. Hjeronymus v. State, 46 Texas Crim. Rep. 160; 79 S. W. 313.

Defendant forfeits his right of self defense if, with intent to kill the deceased, he enters the house of deceased and provokes the occasion which results in the homicide. Arto v. State, 19 Texas Crim. App. 136. Roach v. State, 21 Texas Crim. App. 254; 17 S. W. 464. Hall v. State, 43 Texas Crim. Rep. 487; 66 S. W. 783.

Self defense is not in the case where defendant, believing that his wife had been ravished by deceased, sees deceased pass by and pursues him with a drawn pistol and kills him when he reached for a gun. Doss v. State, 43 Texas Crim. Rep. 551; 67 S. W. 321.

Where defendant not only seeks deceased, but knowing that deceased is armed approaches him with a pistol and by words gets deceased wrought up so that deceased attacks him, he is estopped from claiming self defense. Gilleland v. State, 44 Texas 356. Smart v. State, 101 S. W. 990.

Defendant has the perfect right of self defense where she shot to frighten deceased off her premises and was then attacked by deceased. White v. State, 68 S. W. 689.

Sec. 1952. **Provoking the difficulty.**
Sec. 1953. Effect of provoking the difficulty.
Sec. 1954. Not error to charge on issue.
Sec. 1955. Error to charge on issue.

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Sec. 1956. Errors in charge on provoking difficulty.
Sec. 1957. Charge should be distinct.
Sec. 1958. Charge on converse theory.

Sec. 1953. **Effect of provoking the difficulty.**—If the difficulty was provoked by defendant with the intent to kill or to inflict serious bodily injury, the homicide is murder, although defendant was forced to kill to save his own life. Green v. State, 12 Texas Crim. App. 449. Thuston v. State, 21 Texas Crim. App. 245; 17 S. W. 474. Thumm v. State, 24 Texas Crim. App. 703; 7 S. W. 236. Jackson v. State, 32 Texas Crim. Rep. 211; 22 S. W. 831. Keeton v. State, 59 Texas Crim. Rep. 316; 128 S. W. 413.

If defendant provoked the difficulty with no intent to kill or to inflict serious bodily injury upon the deceased and thereby brought about the necessity of killing the deceased to save his own life or to prevent serious bodily injury being inflicted upon him by deceased, the homicide would be manslaughter. Green v. State, 12 Texas Crim. App. 449. Jones v. State, 17 Texas Crim. App. 611. Thuston v. State, 21 Texas Crim. App. 245; 17 S. W. 474. Cahn v. State, 27 Texas Crim. App. 738; 11 S. W. 723. Carter v. State, 28 Texas Crim. App. 355; 13 S. W. 147. Carter v. State, 37 Texas Crim. Rep. 406; 35 S. W. 378. Hawkins v. State, 36 S. W. 443. Young v. State, 41 Texas Crim. Rep. 446; 55 S. W. 331. Beard v. State, 47 Texas Crim. Rep. 50; 81 S. W. 33. Lahue v. State, 51 Texas Crim. Rep. 163; 101 S. W. 1008. Bice v. State, 55 Texas Crim. Rep. 533; 117 S. W. 163. Keeton v. State, 59 Texas Crim. Rep. 316; 128 S. W. 413. Gray v. State, 61 Texas Crim. Rep. 454; 135 S. W. 1179.

If the defendant provoked the combat or produced the occasion in order to have a pretext for killing his adversary or inflicting serious bodily injury upon him, the killing will be murder, no matter to what extremity he may have been reduced in the combat. Green v. State, 12 Texas Crim. App. 449. Cartwright v. State, 14 Texas Crim. App. 486. Cunningham v. State, 17 Texas Crim. App. 95. Arto v. State, 19 Texas Crim. App. 136. Thuston v. State, 21 Texas Crim. App. 248; 17 S. W. 474. Roach v. State, 21 Texas Crim. App. 254; 17 S. W. 464. Crist v. State, 21 Texas Crim. App. 367; 17 S. W. 260. Allen v. State, 24 Texas Crim. App. 224; 6 S. W. 187. Thumm v. State, 24 Texas Crim. App. 703; 7 S. W. 236. Johnson v. State, 26 Texas Crim. App. 631; 10 S. W. 235. Saens v. State, 20 S. W. 739. Warren v. State, 31 Texas Crim. Rep. 573; 21 S. W. 680. Puryear v. State, 56 Texas Crim. Rep. 238; 118 S. W. 1042. Keeton v. State, 59 Texas Crim. Rep. 316; 128 S. W. 413.

"But if he (the slayer) provoked the combat or produced the occasion without any felonious intent—intending, for instance, an ordinary assault and battery merely—the final killing in self defense will be manslaughter." Cunningham v. State, 17 Texas Crim. App. 95 (this proposition occurs in many cases, but it does not state the true dividing line according to the law of Texas. Under the law of Texas if the slayer provokes the combat with the apparent intention of doing serious bodily injury to the deceased the offense is not manslaughter. The decisions referred to do not state the true dividing line in murder cases when they base it on the existence or non-existence of a felonious intent. Green v. State, 12 Texas Crim. App. 449. Thuston v. State, 21 Texas Crim. App. 248; 17 S. W. 474. Jackson v. State, 32 Texas Crim. Rep. 211; 22 S. W. 831. Keeton v. State, 59 Texas Crim. Rep. 316; 128 S. W. 413).

In cases of assault with intent to murder the dividing line as to provoking the difficulty is based on the existence or non-existence of a specific intent to kill, because it requires a specific intent to kill to constitute an assault with intent to murder. Williams v. State, 30 Texas Crim. App. 446; 17 S. W. 1071.

If defendant provoked the difficulty with no intent to kill, the final killing in self defense would be manslaughter. (These cases do not mention "serious bodily injury.") King v. State, 13 Texas Crim. App. 284. Cunningham v. State, 17 Texas Crim. App. 95. White v. State, 23 Texas Crim. App. 164; 3 S. W. 710. Arrelano v. State, 24 Texas Crim. App. 43; 5 S. W. 526. Varnell v. State, 26 Texas Crim. App. 67; 9 S. W. 65. Tollett v. State, 55 S. W. 575. Pedro v. State, 48 Texas Crim. Rep. 407; 88 S. W. 233. Brownlee v. State, 48 Texas Crim. Rep. 412; 87

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S. W. 1153. Casey v. State, 50 Texas Crim. Rep. 392; 97 S. W. 496. Parnell v. State, 50 Texas Crim. Rep. 425; 98 S. W. 269. Sanders v. State, 50 Texas Crim. Rep. 430; 97 S. W. 1046.

Though defendant provoke a difficulty, yet if he abandons it in good faith his perfect right of self defense revives. Palmer v. State, 15 S. W. 287. Wills v. State, 22 S. W. 969. Stanton v. State, 29 S. W. 476. Morgan v. State, 34 Texas Crim. Rep. 226; 29 S. W. 1092. Lindsey v. State, 35 Texas Crim. Rep. 164; 32 S. W. 768. Edwards v. State, 60 Texas Crim. Rep. 323; 131 S. W. 1078.

Sec. 1954. **Not error to charge on provoking the difficulty.**—While defendant must have said or did something at the time of the homicide to provoke deceased to attack him so as to have a pretext for killing the deceased, yet prior acts will be looked to to give character to what defendant said or did at the time of the homicide so as to determine his intent and to explain his words and acts. McGrew v. State, 49 S. W. 228. Mason v. State, 163 S. W. 66.

Though defendant be only on trial for manslaughter, still, if the issue of provoking the difficulty is in the case the court may submit it to the jury so that the State may have the benefit of the theory that defendant is estopped from claiming self defense. Levy v. State, 28 Texas Crim. App. 211; 12 S. W. 596. Gray v. State, 61 Texas Crim. Rep. 454; 135 S. W. 1179.

If the testimony for the State shows that defendant sought deceased with intent to provoke a difficulty and offered him an insult before the shooting started, it is not error to charge on provoking the difficulty. Barstado v. State, 48 Texas Crim. Rep. 255; 87 S. W. 344. Gray v. State, 61 Texas Crim. Rep. 454; 135 S. W. 1179. Sorrell v. State, 169 S. W. 299.

It is not error to charge on provoking the difficulty if there is testimony that defendant first cursed deceased before either made an assault, and the State's theory is that defendant made the first assault and defendant's theory is self defense. Coleman v. State, 25 S. W. 772. Bateson v. State, 46 Texas Crim. Rep. 46; 80 S. W. 88.

The issue of provoking the difficulty is raised by testimony that defendant took the injured party aside and on his refusal to recant a statement cursed him whereupon the injured party struck defendant. Coleman v. State, 49 Texas Crim. Rep. 357; 91 S. W. 783.

It is not error to charge on provoking the difficulty when there is testimony that defendant cursed deceased and that deceased then picked up a stick and started toward defendant. Tardy v. State, 47 Texas Crim. Rep. 444; 83 S. W. 1128. Best v. State, 61 Texas Crim. Rep. 554; 135 S. W. 582.

Circumstantial evidence may be cogent enough to authorize a charge on provoking the difficulty. Tate v. State, 35 Texas Crim. Rep. 235; 33 S. W. 121. Rogers v. State, 159 S. W. 44.

An illegal arrest by defendant may raise the issue of provoking the difficulty. Peter v. State, 23 Texas Crim. App. 687; 5 S. W. 228. Demarco v. State, 60 Texas Crim. Rep. 185; 131 S. W. 589.

The issue of provoking the difficulty is raised by testimony that defendant called prosecutrix a bitch and that prosecutrix then hit defendant with her fist and that defendant then struck her with a hatchet. Sanders v. State, 83 S. W. 712.

Where defendant himself testified that he went off to get a pistol and returned to where deceased was for the purpose of provoking a difficulty and that on again meeting deceased he cursed deceased, the court is authorized to submit the issue of provoking the difficulty. Puryear v. State, 50 Texas Crim. Rep. 464; 98 S. W. 258. Cornelius v. State, 54 Texas Crim. Rep. 186; 112 S. W. 1051. Puryear v. State, 56 Texas Crim. Rep. 238; 118 S. W. 1042.

If defendant went to the house of the prosecuting witness and called him out and told him he was going to shoot him and prosecutor then stepped back to get a gun, it is proper to charge on provoking the difficulty and it is immaterial who fired the first shot. Turner v. State, 40 S. W. 980.

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It is not error to charge on provoking the difficulty where defendant's theory is that he stopped deceased to ask an explanation of some charges and was attacked by deceased, and deceased, through his dying declaration, stated that defendant first struck him with a stick and on being attacked drew a pistol and shot him. Gaines v. State, 58 Texas Crim. Rep. 631; 127 S. W. 181.

Defendant may provoke a difficulty by persisting in tying his mule to a tree on the premises of the injured party after being forbidden to do so. Taylor v. State, 47 Texas Crim. Rep. 122; 80 S. W. 378.

When the court charges on defendant's right to seek an explanation, an instruction that if he intended to provoke a difficulty he could not justify on the ground of self defense is proper where defendant knew that deceased would be provoked by the demand for an apology. Winters v. State, 51 S. W. 1110.

The issue of provoking the difficulty is raised by the testimony of the injured party that defendant, instead of seeking an explanation, would not let him explain but threw a brick at him and drew a pistol whereupon he went after a gun and snapped it at defendant and that then defendant fired on him. Mozee v. State, 51 S. W. 250.

When supported by the testimony it is not error to charge the jury that if defendant entered into a quarrel with the intention of killing deceased or inflicting serious bodily injury upon him and continued to press the difficulty until he shot and killed deceased that he would be guilty of murder. Bice v. State, 55 Texas Crim. Rep. 533; 117 S. W. 163.

If defendant is only on trial for manslaughter and the issue of provoking the difficulty is in the case, a charge that defendant would be guilty of manslaughter if he provoked the difficulty with intent to kill or inflict serious bodily injury is favorable to defendant, since he would be guilty of manslaughter if he provoked the difficulty with intent to only inflict an ordinary battery. Gray v. State, 61 Texas Crim. Rep. 454; 135 S. W. 1179.

It is not reversible error to submit the issue of provoking the difficulty if self defense is not in the case and defendant is awarded the lowest term for manslaughter. Gonzales v. State, 29 S. W. 1091. James v. State, 33 S. W. 342. Abram v. State, 36 Texas Crim. Rep. 46; 35 S. W. 389. Rhea v. State, 37 Texas Crim. Rep. 138; 38 S. W. 1012. Godwin v. State, 39 Texas Crim. Rep. 408; 46 S. W. 226. Burks v. State, 40 Texas Crim. Rep. 171; 49 S. W. 389.

It is not reversible error to charge on provoking the difficulty when that issue is not raised if it clearly appears that no injury resulted from the charge. Abram v. State, 36 Texas Crim. Rep. 46; 35 S. W. 389. Kinney v. State, 144 S. W. 257.

Charges on provoking the difficulty approved. Matthews v. State, 42 Texas Crim. Rep. 31; 58 S. W. 86. Tardy v. State, 47 Texas Crim. Rep. 444; 83 S. W. 1128. Woodward v. State, 54 Texas Crim. Rep. 88; 111 S. W. 941. Prescott v. State. 54 Texas Crim. Rep. 485; 113 S. W. 531. Gray v. State, 61 Texas Crim. Rep. 454; 135 S. W. 1179.

Sec. 1955. **Error to charge on provoking the difficulty.**—If the only question involved is, "who made the first attack," the issue of provoking the difficulty is not in the case. Phillips v. State, 36 S. W. 86. Phillips v. State, 36 S. W. 441. Red v. State, 39 Texas Crim. Rep. 424; 46 S. W. 408. McCandless v. State, 42 Texas Crim. Rep. 61; 57 S. W. 672. White v. State, 42 Texas Crim. Rep. 570; 62 S. W. 575. Casner v. State, 43 Texas Crim. Rep. 12; 62 S. W. 914. Dodd v. State, 68 S. W. 992. Pollard v. State, 45 Texas Crim. Rep. 121; 73 S. W. 953. McMahon v. State, 46 Texas Crim. Rep. 549; 81 S. W. 296. Reese v. State, 49 Texas Crim. Rep. 243; 91 S. W. 583. Edwards v. State, 60 Texas Crim. Rep. 323; 131 S. W. 1078. Sanchez et al. v. State, 156 S. W. 220.

A charge on provoking the difficulty should never be given unless self defense is an issue and there are facts in evidence which show that deceased made the first assault on defendant and that defendant, in order to have a pretext for killing or inflicting bodily injury upon deceased, did some act or used some words intended

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to and calculated to bring on a difficulty. Varnell v. State, 26 Texas Crim. App. 56; 9 S. W. 65. Wilson v. State, 36 S. W. 587. Grayson v. State, 57 S. W. 809. White v. State, 42 Texas Crim. Rep. 571; 62 S. W. 575. Casner v. State, 43 Texas Crim. Rep. 12; 62 S. W. 914. McMahon v. State, 46 Texas Crim. Rep. 549; 81 S. W. 296. Burnett v. State, 51 Texas Crim. Rep. 22; 100 S. W. 381. Johnson v. State, 149 S. W. 165. Sanchez et al. v. State, 156 S. W. 220.

Where with no intention of provoking a difficulty, it is found that the words, acts, or conduct of defendant, though not intended to do so, had the effect of inducing deceased to assault him, it cannot be held that he thereby loses the right of self defense or that such right is in any respect impaired. Varnell v. State, 26 Texas Crim. App. 56; 9 S. W. 65. Foster v. State, 28 Texas Crim. App. 45; 11 S. W. 832. Franklin v. State, 34 Texas Crim. Rep. 286; 30 S. W. 231. Winters v. State, 37 Texas Crim. Rep. 582; 40 S. W. 303. McCandless v. State, 42 Texas Crim. Rep. 64; 57 S. W. 672. Hall v. State, 43 Texas Crim. Rep. 487; 67 S. W. 783. Poer v. State, 67 S. W. 501. Hjeronymus v. State, 46 Texas Crim. Rep. 160; 79 S. W. 313. Young v. State, 53 Texas Crim. Rep. 419; 110 S. W. 445.

If deceased was the aggressor and began the difficulty on his own initiative, it is error to charge on provoking the difficulty. Jones v. State, 17 Texas Crim. App. 611. Dent v. State, 46 Texas Crim. Rep. 173; 79 S. W. 525. Crowson v. State, 51 Texas Crim. Rep. 14; 100 S. W. 782. Edwards v. State, 60 Texas Crim. Rep. 323; 131 S. W. 1078. Day v. State, 62 Texas Crim. Rep. 413; 138 S. W. 127. Johnson v. State, 149 S. W. 165.

If the State's case is an unprovoked homicide and defendant's case is perfect self defense, the issue of provoking the difficulty is not in the case; beginning a difficulty is not provoking it. Cline v. State, 28 S. W. 684. Wilson v. State, 36 S. W. 588. Red v. State, 39 Texas Crim. Rep. 424; 46 S. W. 408. Casner v. State, 43 Texas Crim. Rep. 12; 62 S. W. 914. Dodd v. State, 68 S. W. 992. Williams v. State, 44 Texas Crim. Rep. 115; 69 S. W. 415. Dent v. State, 46 Texas Crim. Rep. 173; 79 S. W. 525. Smith v. State, 48 Texas Crim. Rep. 203; 87 S. W. 151. Carr v. State, 48 Texas Crim. Rep. 288; 87 S. W. 346. Roberts v. State, 48 Texas Crim. Rep. 380; 88 S. W. 221. Reese v. State, 49 Texas Crim. Rep. 243; 91 S. W. 583. Burnett v. State, 51 Texas Crim. Rep. 23; 100 S. W. 381. Lockhart v. State, 53 Texas Crim. Rep. 595; 111 S. W. 1024.

It is error to charge on the issue on provoking the difficulty when the testimony does not raise that issue because it puts defendant in the wrong and is a limitation on the right of self defense. Thomas v. State, 40 Texas 45. Jones v. State, 17 Texas Crim. App. 611. Tillery v. State, 24 Texas Crim. App. 271; 5 S. W. 842. Varnell v. State, 26 Texas Crim. Rep. 56; 9 S. W. 65. Foster v. State, 28 Texas Crim. App. 50; 11 S. W. 832. Fowler v. State, 22 S. W. 587. Milrainey v. State, 33 Texas Crim. Rep. 592; 28 S. W. 537. Gilcrease v. State, 33 Texas Crim. Rep. 630; 28 S. W. 531. Morgan v. State, 34 Texas Crim. Rep. 225; 29 S. W. 1092. Thomas v. State, 34 Texas Crim. Rep. 481; 31 S. W. 170. Wilson v. State, 36 S. W. 587. Koller v. State, 36 Texas Crim. Rep. 500; 38 S. W. 44. Glaze v. State, 45 S. W. 906. McGlothlin v. State, 53 S. W. 871. McCandless v. State, 42 Texas Crim. Rep. 58; 57 S. W. 672. Grayson v. State, 57 S. W. 809. White v. State, 42 Texas Crim. Rep. 567; 62 S. W. 575. Casner v. State, 43 Texas Crim. Rep. 14; 62 S. W. 914. Cook v. State, 43 Texas Crim. Rep. 188; 63 S. W. 872. Ross v. State, 46 Texas Crim. Rep. 452; 80 S. W. 1004. Rea v. State, 46 Texas Crim. Rep. 454; 80 S. W. 1003. Arthur v. State, 46 Texas Crim. Rep. 477; 80 S. W. 1017. Wilson v. State, 46 Texas Crim. Rep. 526; 81 S. W. 34. Smith v. State, 48 Texas Crim. Rep. 204; 87 S. W. 151. Maroney v. State, 95 S. W. 110. Crowson v. State, 51 Texas Crim. Rep. 12; 100 S. W. 782. Lockhart v. State, 53 Texas Crim. Rep. 596; 111 S. W. 1024. Culp v. State, 58 Texas Crim. Rep. 74; 124 S. W. 946. Edwards v. State, 60 Texas Crim. Rep. 323; 131 S. W. 1078. Day v. State, 62 Texas Crim. Rep. 413; 138 S. W. 127. Johnson v. State, 149 S. W. 165. Irving v. State, 150 S. W. 611. Sanchez et al. v. State, 156 S. W. 220. Thomas v. State, 160 S. W. 71. Humphrey v. State, 165 S. W. 589.

The fact that deceased got mad and reached for a weapon on defendant asking him a question in good humor does not raise the issue of provoking the difficulty.

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McCandless v. State, 42 Texas Crim. Rep. 64; 57 S. W. 672. Poer v. State, 67 S. W. 501.

The fact that defendant began the difficulty by making an effort to shoot the injured party whereupon the latter knocked him down does not raise the issue of provoking the difficulty. Cook v. State, 43 Texas Crim. Rep. 188; 63 S. W. 872.

The issue of provoking the difficulty is not raised by testimony that defendant entered a saloon looking for a person whom he believed was in a back room, and that deceased became offended because defendant did not seem to take his word for it readily that the person was not there and assaulted defendant. Lucas v. State, 49 Texas Crim. Rep. 138; 90 S. W. 880.

A charge on provoking the difficulty is not authorized where defendant was merely insistent that the injured party should go with him to a certain person in order to explain what defendant claimed such person had told him had been said about him by the injured party; the difficulty being a casual difficulty. Sprinkle v. State, 49 Texas Crim. Rep. 225; 91 S. W. 787.

It is error to charge on provoking the difficulty where defendant had a difficulty and went off and on coming back began to shoot before the injured party did anything. Ross v. State, 46 Texas Crim. Rep. 452; 80 S. W. 1004.

Where defendant, though armed, had a casual meeting with deceased and asked him a question in a friendly way and received an insulting reply to which he replied in kind and then started to leave when deceased cursed him and made a demonstration for a weapon, it is error to charge on provoking the difficulty. McCandless v. State, 42 Texas Crim. Rep. 64; 57 S. W. 672.

The mere fact that defendant voluntarily entered into a deadly conflict with deceased does not raise the issue of provoking the difficulty. Koller v. State, 36 Texas Crim. Rep. 500; 38 S. W. 44.

It is error to charge on provoking the difficulty if the State's case is an unprovoked assault and defendant's case shows at most an agreement to a mutual combat. Walters v. State, 37 Texas Crim. Rep. 390; 35 S. W. 652.

A casual difficulty, in which defendant after being assaulted extended an invitation to fight, while it might be considered an invitation to a mutual combat, does not raise the issue of provoking the difficulty. Koller v. State, 36 Texas Crim. Rep. 500; 38 S. W. 44. Walters v. State, 37 Texas Crim. Rep. 390; 35 S. W. 652. Renow v. State, 49 Texas Crim. Rep. 284; 92 S. W. 801.

Where the deceased challenged the father of defendant to an ordinary combat and the father, who was unarmed, accepted the challenge, and deceased was running for his gun when defendant shot him in the back, the issue of provoking the difficulty is not in the case. Saens v. State, 20 S. W. 739.

Where defendant was absent when the fight started and did not know that his brother had provoked the difficulty, and when he came up he saw his brother being assaulted, it is error to charge on provoking the difficulty as to defendant. Chambers v. State, 46 Texas Crim. Rep. 65; 79 S. W. 572.

Where defendant and deceased had words and defendant cursed deceased, but retreated, and on deceased advancing ordered him to stop and then fired, defendant claiming that deceased had an ax handle and the State claiming that he was unarmed, it is error to charge on provoking the difficulty. Munden v. State, 64 S. W. 239.

Even though defendant arms himself and returns to renew or provoke a difficulty, it is error to charge on provoking the difficulty where on his return he says or does nothing with the intention of provoking a difficulty but is himself attacked by his adversary. Crow v. State, 48 Texas Crim. Rep. 421; 88 S. W. 814.

No matter what the purpose of defendant in seeking deceased if, when he met him, he said or did nothing calculated and intended to provoke a difficulty and deceased first assaulted him, defendant would have the perfect right of self defense. Airhart v. State, 40 Texas Crim. Rep. 472; 51 S. W. 214. Crow v. State, 48 Texas Crim. Rep. 421; 88 S. W. 814.

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The mere fact that defendant arms himself and seeks a party for the purpose of provoking a difficulty will not of itself deprive defendant of the right of self defense unless he does some act or utters some words intended to and calculated to provoke a difficulty. Cartwright v. State, 14 Texas Crim. App. 499. Ball v. State, 29 Texas Crim. App. 107; 14 S. W. 1012. Airhart v. State, 40 Texas Crim. Rep. 470; 51 S. W. 214. Cook v. State, 43 Texas Crim. Rep. 188; 63 S. W. 872. Hall v. State, 43 Texas Crim. Rep. 487; 66 S. W. 783. Dodd v. State, 68 S. W. 992. Crow v. State, 48 Texas Crim. Rep. 421; 88 S. W. 814. Leito v. State, 49 Texas Crim. Rep. 313; 92 S. W. 418.

Going to a place, though armed, will not of itself deprive a party of the right of self defense. Cartwright v. State, 14 Texas Crim. App. 502. Shannon v. State, 35 Texas Crim. Rep. 6; 28 S. W. 687. Wilson v. State, 36 S. W. 588. Grayson v. State, 57 S. W. 809. Hall v. State, 42 Texas Crim. Rep. 449; 60 S. W. 769. Dodd v. State, 68 S. W. 992. Crow v. State, 48 Texas Crim. Rep. 421; 88 S. W. 814. Humphrey v. State, 165 S. W. 589.

The mere fact that one with a grievance arms himself and seeks an interview with the man who wronged him is not, of itself, provoking a difficulty. Shannon v. State, 35 Texas Crim. Rep. 6; 28 S. W. 687. Hall v. State, 42 Texas Crim. Rep. 449; 60 S. W. 769.

Defendant is not deprived of his right of self defense because he seeks his adversary for the purpose of having an explanation or peaceful solution of their troubles, though he arm himself so as to protect himself should he be attacked. Shannon v. State, 35 Texas Crim. Rep. 6; 28 S. W. 687. Hall v. State, 42 Texas Crim. Rep. 449; 60 S. W. 769. Newman et al. v. State, 69 S. W. 519. Melton v. State, 47 Texas Crim. Rep. 458; 83 S. W. 822. Keith v. State, 50 Texas Crim. Rep. 67; 94 S. W. 1044. Mitchell v. State, 50 Texas Crim. Rep. 181; 96 S. W. 43. Quinn v. State, 50 Texas Crim. Rep. 209; 96 S. W. 33. Crowson v. State, 51 Texas Crim. Rep. 12; 100 S. W. 782. Stewart v. State, 52 Texas Crim. Rep. 284; 106 S. W. 689. Gray v. State, 55 Texas Crim. Rep. 90; 114 S. W. 635. Ballard v. State, 62 Texas Crim. Rep. 435; 138 S. W. 122. Parish v. State, 153 S. W. 327.

The issue of provoking the difficulty is not in the case where the State's theory is that defendant sought deceased and attacked him first, and defendant's theory is that he asked for an explanation of some ill-treatment and was met with no reply except an attempt to draw a weapon. Pollard v. State, 45 Texas Crim. Rep. 121; 73 S. W. 953. Crowson v. State, 51 Texas Crim. Rep. 14; 100 S. W. 782.

Where defendant had been insulted and on asking for an explanation was met with a repetition of the insult, the issue of provoking the difficulty is not in the case though defendant armed himself before he sought the explanation. Shannon v. State, 35 Texas Crim. Rep. 6; 28 S. W. 687.

Sec. 1956. **Errors in charge on provoking the difficulty.**—The charge should not by frequent repetitions place too prominently before the jury the theory of provoking the difficulty. Bonner v. State, 29 Texas Crim. App. 232; 15 S. W. 821.

The question as to whether defendant intended to provoke the difficulty must be left to the jury; the court is not authorized to decide it as a matter of law. Carter v. State, 37 Texas Crim. Rep. 408; 35 S. W. 378. Woodward v. State, 50 Texas Crim. Rep. 301; 97 S. W. 499. Young v. State, 53 Texas Crim. Rep. 418; 110 S. W. 445. Gray v. State, 55 Texas Crim. Rep. 98; 114 S. W. 635.

Some acts may be committed of such a nature as to carry with them the intent to provoke a difficulty, but in all cases the court should submit to the jury the question of intention. Carter v. State, 37 Texas Crim. Rep. 403; 35 S. W. 378. Gray v. State, 55 Texas Crim. Rep. 90; 114 S. W. 635. Best v. State, 58 Texas Crim. Rep. 334; 125 S. W. 913.

A charge is erroneous if it instructs the jury that if the act of defendant was calculated to provoke a difficulty he could not claim self defense, because it fails to require the jury to find that he intended to provoke it. Thornton v. State, 65 S. W. 1107. Sprinkle v. State, 49 Texas Crim. Rep. 225; 91 S. W. 787. Best v. State, 58 Texas Crim. Rep. 327; 125 S. W. 913.

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It is error to charge the jury that if the words or acts of defendant were calculated to provoke a difficulty he could not justify on the ground of self defense though he did not intend to provoke the difficulty. Young v. State, 53 Texas Crim. Rep. 418; 110 S. W. 445.

If all the testimony shows that defendant did not seek a meeting with intent to provoke a difficulty, but that it was for some other purpose, such as to play a game of cards, it is error to charge on the theory that defendant "sought" a meeting with intent to provoke a difficulty. Thomas v. State, 34 Texas Crim. Rep. 481; 31 S. W. 170.

When it is a question whether the defendant was deprived of the right of self defense the intention of defendant is of the highest importance. To be deprived of the right of self defense defendant must not only provoke the difficulty but he must have intended to do so, and a charge on provoking the difficulty is erroneous if it omits the intent of the defendant. White v. State, 23 Texas Crim. App. 163; 3 S. W. 710. Saens v. State, 20 S. W. 739. Carter v. State, 37 Texas Crim. Rep. 407; 35 S. W. 378. Winters v. State, 37 Texas Crim. Rep. 586; 40 S. W. 303. Thornton v. State, 65 S. W. 1107. Sprinkle v. State, 49 Texas Crim. Rep. 225; 91 S. W. 787. Young v. State, 53 Texas Crim. Rep. 416; 110 S. W. 445. Gray v. State, 55 Texas Crim. Rep. 90; 114 S. W. 635. Gardner v. State, 57 Texas Crim. Rep. 471; 125 S. W. 14. Best v. State, 58 Texas Crim. Rep. 327; 125 S. W. 913. McGregor v. State, 160 S. W. 711.

A charge which deprives defendant of the right of self defense if he intended to provoke a difficulty is erroneous if it fails to require the jury to find that he did or said something which was calculated to and which did provoke it. Smith v. State, 48 Texas Crim. Rep. 203; 87 S. W. 151. Ware v. State, 152 S. W. 1074.

A charge is erroneous if it makes the mere arming himself with the intent to provoke a difficulty deprive defendant of the right of self defense without requiring the jury to find that the difficulty was provoked by some act or words of defendant. Tardy v. State, 46 Texas Crim. Rep. 219; 78 S. W. 1077. Robbins v. State, 155 S. W. 936.

It is error to charge the jury that the fact that defendant armed himself and went to a certain place to seek an explanation would not abridge his right of self defense; defendant's right of self defense would not be abridged unless he did or said something intended and calculated to provoke a difficulty. Gant v. State, 55 Texas Crim. Rep. 292; 116 S. W. 801.

Where defendant after a difficulty went off and came back armed, it is error to charge the jury that if he got his pistol to protect himself and came back with the intention of escaping from the building and shot in self defense the jury should acquit; because if he was attacked on his return from upstairs before he made any demonstration he had a right to defend himself regardless of his intention in arming himself. Hutchinson v. State, 42 S. W. 992.

A charge on provoking the difficulty is erroneous if it fails to inform the jury that the language or act must be reasonably calculated to provoke the difficulty. Sanders v. State, 50 Texas Crim. Rep. 430; 97 S. W. 1046. (*Contra:* Matthews v. State, 42 Texas Crim. Rep. 50; 58 S. W. 86.)

Laying in wait does not of itself forfeit the right of self defense, and it is error to charge the jury that if defendant laid in wait for the injured party he could not claim self defense. Cheatham v. State, 57 Texas Crim. Rep. 442; 125 S. W. 565.

If it is an issue as to whether the language which is claimed to have provoked the difficulty was used, the court should charge the jury that if it was not used they should not consider the question of provoking the difficulty. Stacy v. State, 48 Texas Crim. Rep. 98; 86 S. W. 327. Shoemaker v. State, 160 S. W. 356.

It is error to charge the jury that when defendant's own act was in violation of law then the law takes that into consideration in limiting his right of self defense. King v. State, 51 Texas Crim. Rep. 210; 101 S. W. 237.

A charge is erroneous if it makes the mere going of defendant to a place with intent to provoke a difficulty forfeit his right of self defense. The intent of defendant

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in going to the place where the final difficulty occurred is immaterial unless he does some act or says some words on arriving there which is intended to and calculated to provoke a difficulty. Ball v. State, 29 Texas Crim. App. 126; 14 S. W. 1012. Airhart v. State, 40 Texas Crim. Rep. 470; 51 S. W. 214. Grayson v. State, 57 S. W. 809. Hjeronymus v. State, 46 Texas Crim. Rep. 161; 79 S. W. 313. Franks v. State, 47 Texas Crim. Rep. 648; 88 S. W. 923. King v. State, 51 Texas Crim. Rep. 210; 101 S. W. 237. Tilmyer v. State, 58 Texas Crim. Rep. 562; 126 S. W. 870. Kincaid v. State, 145 S. W. 598.

A charge is erroneous if it makes the mere seeking a party with intent to provoke a difficulty forfeit the right of self defense and omits to require the jury to find that by words or acts defendant did provoke it. Cartwright v. State, 14 Texas Crim. App. 499. Airhart v. State, 40 Texas Crim. App. 470; 51 S. W. 214. Mozee v. State, 51 S. W. 251. Thomas v. State, 51 S. W. 1109. Wrage v. State, 41 Texas Crim. Rep. 372; 54 S. W. 602. Johnson v. State, 43 Texas Crim. Rep. 478; 66 S. W. 845. Dodd v. State, 68 S. W. 992. Price v. State, 46 Texas Crim. Rep. 82; 79 S. W. 540. Bearden v. State, 46 Texas Crim. Rep. 148; 79 S. W. 37. Tardy v. State, 46 Texas Crim. Rep. 219; 78 S. W. 1077. Franks v. State, 47 Texas Crim. Rep. 648; 88 S. W. 923. Smith v. State, 48 Texas Crim. Rep. 203; 87 S. W. 151. Barstado v. State, 48 Texas Crim. Rep. 255; 87 S. W. 344. Garza v. State, 48 Texas Crim. Rep. 384; 88 S. W. 231. Prescott v. State, 101 S. W. 217. King v. State, 51 Texas Crim. Rep. 210; 101 S. W. 237. Cheatham v. State, 57 Texas Crim. Rep. 442; 125 S. W. 565. Tilmyer v. State, 58 Texas Crim. Rep. 562; 126 S. W. 870. Kincaid v. State, 145 S. W. 598.

If the meeting was casual, the charge should not submit the theory that the defendant "sought" the meeting for the purpose of provoking the difficulty. Bearden v. State, 46 Texas Crim. Rep. 148; 79 S. W. 37.

A charge is erroneous if it makes the mere pursuit of deceased with intent to provoke or renew a difficulty deprive defendant of the right of self defense without requiring the jury to find that after coming up with deceased the defendant used some language or did some act calculated to and with the intent to provoke a difficulty. Franks v. State, 47 Texas Crim. Rep. 648; 88 S. W. 923.

A charge that "no man can bring on a dangerous conflict, slay his antagonist, and then justify on the ground of self defense" is stating the rule too broadly and is misleading. Logan v. State, 17 Texas Crim. App. 59. White v. State, 23 Texas Crim. App. 163; 3 S. W. 710. Morgan v. State, 34 Texas Crim. Rep. 226; 29 S. W. 1092.

It is not necessary to collate in the charge of the court the facts or circumstances which evidence provoking the difficulty. Alexander v. State, 40 Texas Crim. Rep. 407; 49 S. W. 229. McCandless v. State, 42 Texas Crim. Rep. 61; 57 S. W. 672. Matthews v. State, 42 Texas Crim. Rep. 50; 58 S. W. 86. Jennings v. State, 42 Texas Crim. Rep. 84; 57 S. W. 642. White v. State, 42 Texas Crim. Rep. 571; 62 S. W. 575. Giesecke v. State, 64 Texas Crim. Rep. 532; 142 S. W. 1180.

While it is not necessary for the charge of the court to collate the facts or circumstances which evidence the provocation, still the charge should furnish the jury some measure of what it takes to provoke a difficulty, which may be given in general terms. Morgan v. State, 34 Texas Crim. Rep. 226; 29 S. W. 1092. Mundine v. State, 37 Texas Crim. Rep. 16; 38 S. W. 619. McCandless v. State, 42 Texas Crim. Rep. 61; 57 S. W. 672. White v. State, 42 Texas Crim. Rep. 571; 62 S. W. 575. Bearden v. State, 46 Texas Crim. Rep. 149; 79 S. W. 37. Drake v. State, 46 Texas Crim. Rep. 450; 80 S. W. 1005.

If defendant was a participant in a difficulty, it is error to charge the jury that he forfeits the right of self defense if another provoked the difficulty if the charge fails to require the jury to find that defendant knew that such other had provoked the difficulty. Kees v. State, 44 Texas Crim. Rep. 543; 72 S. W. 855.

Where defendant interferes on behalf of his son who is being attacked with a knife by deceased, without knowing that his son had provoked the difficulty, defendant has the perfect right of self-defense in behalf of his son, and it is error to charge on provoking the difficulty and bind defendant to the intent of his son. Chambers v.

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State, 46 Texas Crim. Rep. 65; 79 S. W. 572. Pedro v. State, 48 Texas Crim. Rep. 407; 88 S. W. 233. Parnell v. State, 50 Texas Crim. Rep. 424; 98 S. W. 269.

If the charge on provoking the difficulty is erroneous and prejudicial to defendant, the error is not cured by giving a correct requested charge if the jury are apt to be confused by the conflict in the instructions. Franks v. State, 47 Texas Crim. Rep. 648; 88 S. W. 923.

If the testimony shows that the difficulty was provoked with no other intent than to kill or to inflict serious bodily injury, it is not error to fail to charge on the theory that the difficulty was provoked with intent to commit only an ordinary battery. Keeton v. State, 59 Texas Crim. Rep. 316; 128 S. W. 411.

It is error to charge the jury that the homicide would be murder if defendant by his own wrongful act brought about the necessity of killing deceased. If the intent was not to commit a felony, or to kill or to inflict serious bodily injury upon the deceased, the final killing in self-defense would not be necessarily higher than manslaughter. Reed v. State, 11 Texas Crim. App. 509. King v. State, 13 Texas Crim. App. 283. Thuston v. State, 21 Texas Crim. App. 245; 17 S. W. 474. Gonzales v. State, 28 Texas Crim. App. 136; 12 S. W. 733. Nicks v. State, 46 Texas Crim. Rep. 241; 79 S. W. 35.

If the charge informs the jury that defendant would be guilty of murder if he provoked the difficulty with an apparent intention of killing, it is error to fail to charge that if the intention was not to kill the offense would be no higher than manslaughter. (These cases do not mention serious bodily injury; if the intent was to inflict serious bodily injury, it would not be manslaughter.) Tollett v. State, 55 S. W. 575. Casey v. State, 50 Texas Crim. Rep. 392; 97 S. W. 496. Parnell v. State, 50 Texas Crim. Rep. 425; 98 S. W. 269.

If defendant is on trial for assault with intent to murder, it is error to charge the jury that he could not justify on the ground of self-defense if he provoked the difficulty with intent to kill or to inflict serious bodily injury, unless the charge further states that if he provoked the difficulty with the intent only to inflict serious bodily injury or to commit an ordinary battery, the final assault in self-defense would not be higher than aggravated assault, because in order to constitute an assault with intent to murder it requires a specific intent to kill. Williams v. State, 30 Texas Crim. App. 446; 17 S. W. 1071.

Sec. 1957. **Charge should be distinct.**—When self-defense is an issue, the charge on provoking the difficulty should be in a distinct paragraph and should not be given so as to deprive defendant of a separate, distinct, and affirmative charge on self-defense, apart from and untrammelled by the issue of provoking the difficulty. Winters v. State, 37 Texas Crim. Rep. 582; 40 S. W. 303. Castro v. State, 40 S. W. 987. Drake v. State, 45 Texas Crim. Rep. 273; 77 S. W. 7. Vann v. State, 45 Texas Crim. Rep. 444; 77 S. W. 813. Price v. State, 46 Texas Crim. Rep. 80; 79 S. W. 540. Beard v. State, 47 Texas Crim. Rep. 50; 81 S. W. 33. Goodman v. State, 47 Texas Crim. Rep. 392; 83 S. W. 196. Sprinkle v. State, 49 Texas Crim. Rep. 225; 91 S. W. 788. Burnett v. State, 51 Texas Crim. Rep. 20; 100 S. W. 381. McMillan v. State, 58 Texas Crim. Rep. 528; 126 S. W. 877. Walker v. State, 63 Texas Crim. Rep. 499; 140 S. W. 455. Irving v. State, 150 S. W. 611.

Sec. 1958. **Charge on converse theory of provoking the difficulty.**—If the court does not charge on provoking the difficulty and the charge nowhere limits the perfect right of self-defense, it is not error to fail to charge the converse theory of provoking a difficulty. Harrelson v. State, 60 Texas Crim. Rep. 534; 132 S. W. 783.

When the charge of the court instructs the jury that if defendant provoked the difficulty with intent to kill the homicide would be murder, it is error to fail to charge the converse theory that if he provoked the difficulty with no intent to kill or to inflict serious bodily injury the homicide would be no higher than manslaughter. Lester v. State, 2 Texas Crim. App. 450. Green v. State, 12 Texas Crim. App. 449. Thuston v. State, 21 Texas Crim. App. 245; 17 S. W. 474. Cahn v. State, 27 Texas Crim. App. 738; 11 S. W. 723. Carter v. State, 28 Texas Crim. App. 360; 13 S. W. 147. Young v. State, 41 Texas Crim. Rep. 446; 55 S. W. 331. Beard v. State, 47 Texas Crim. Rep. 50; 81 S. W. 33. Sanders v. State, 50 Texas Crim. Rep. 430; 97 S. W. 1046. Sorrell v. State, 169 S. W. 299.

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The court should charge the converse theory; that is, that defendant did not intend to provoke the difficulty. Garza v. State, 48 Texas Crim. Rep. 384; 88 S. W. 231. Gaines v. State, 58 Texas Crim. Rep. 631; 127 S. W. 187. Edwards v. State, 60 Texas Crim. Rep. 323; 131 S. W. 1078.

When the issue of provoking the difficulty is charged from the State's standpoint, it is error to fail to charge the converse theory when there is testimony that deceased provoked it. Craiger v. State, 48 Texas Crim. Rep. 505; 88 S. W. 208. McMillan v. State, 58 Texas Crim. Rep. 528; 126 S. W. 877. Gaines v. State, 58 Texas Crim. Rep. 631; 127 S. W. 187. Walker v. State, 63 Texas Crim. Rep. 501; 140 S. W. 455. Ware v. State, 152 S. W. 1077. Ponder v. State, 155 S. W. 244.

When a charge on provoking the difficulty is given, the charge should, when there is testimony to support it, submit the converse theory of a casual meeting. Bonner v. State, 29 Texas Crim. App. 231; 15 S. W. 821.

When there is testimony that defendant accosted deceased on a peaceful mission, the court should charge the converse theory of provoking the difficulty if the State's theory of that issue is submitted to the jury in the charge. Bonnard v. State, 25 Texas Crim. App. 174; 7 S. W. 862. Stewart v. State, 36 Texas Crim. Rep. 35; 35 S. W. 985.

When a charge on provoking the difficulty is given, the converse of that theory should be given; that is, that the injured party did not make the first assault, or that defendant did no act to provoke it or did not use the language attributed to him. Wrage v. State, 41 Texas Crim. Rep. 369; 54 S. W. 602. Drake v. State, 46 Texas Crim. Rep. 448; 80 S. W. 1005. Edwards v. State, 60 Texas Crim. Rep. 323; 131 S. W. 1078. Shoemaker v. State, 160 S. W. 356. McGregor v. State, 160 S. W. 711.

The court should charge the converse of the theory that the words or acts of defendant were calculated to provoke a difficulty; that is, that if nothing defendant said or did was of such character as should in reason or probably would in fact provoke a difficulty the jury should disregard the theory of provoking the difficulty. Gaines v. State, 58 Texas Crim. Rep. 631; 127 S. W. 187.

When there is no testimony to support the theory, the court is not required to charge on the theory that the difficulty was provoked with intent to commit only an ordinary battery. Keeton v. State, 59 Texas Crim. Rep. 316; 128 S. W. 411.

When the State's theory of provoking the difficulty is submitted to the jury, the converse of that theory should also be submitted so as not to leave the defendant at a disadvantage before the jury. Lester v. State, 2 Texas Crim. App. 450. Francis v. State, 55 S. W. 489. Garza v. State, 48 Texas Crim. Rep. 384; 88 S. W. 231. Craiger v. State, 48 Texas Crim. Rep. 505; 88 S. W. 208. Woodward v. State, 50 Texas Crim. Rep. 301; 97 S. W. 499. Gaines v. State, 58 Texas Crim. Rep. 631; 127 S. W. 187. Walker v. State, 63 Texas Crim. Rep. 499; 140 S. W. 455. Ware v. State, 152 S. W. 1074. Ponder v. State, 155 S. W. 244. McGregor v. State, 160 S. W. 711.

Sec. 1959. **Mutual combat.**
Sec. 1960. Effect of a mutual combat.
Sec. 1961. Error to charge on mutual combat.
Sec. 1962. Charge on mutual combat.

Sec. 1960. **Effect of a mutual combat.**—Self-defense is not in the case if the State's case is murder and the defendant's case is mutual combat. Nairn v. State, 45 S. W. 703.

If defendant voluntarily engages in a mutual combat with deadly weapons, where death or serious bodily injury likely to result in death might ensue, the homicide is murder. Habel v. State, 28 Texas Crim. App. 588; 13 S. W. 1001. Anthony v. State, 62 Texas Crim. Rep. 138; 136 S. W. 1097.

If defendant voluntarily engages in a mutual combat while under the influence of sudden passion arising from an adequate cause, the homicide would be manslaughter though the agreement was to fight with deadly weapons. Gonzales v. State, 28 Texas Crim. App. 136; 12 S. W. 733.

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When parties mutually engage in a combat with deadly weapons under circumstances which would not reduce to manslaughter, if either is killed the party killing would be guilty of murder, and the fact that the combat is mutual will not of itself reduce the homicide to manslaughter. Crist v. State, 21 Texas Crim. App. 367; 17 S. W. 260. Pugh v. State, 151 S. W. 546.

The common-law rule that a homicide is manslaughter if the parties agree to fight with deadly weapons and no undue advantage is taken by the slayer is not the law in Texas; such a homicide would be murder unless the slayer was acting under the immediate influence of sudden passion arising from an adequate cause. Crist v. State, 21 Texas Crim. App. 367; 17 S. W. 260. Spearman v. State, 23 Texas Crim. App. 229; 4 S. W. 586. Mitchell v. State, 38 Texas Crim. Rep. 188; 41 S. W. 816.

If defendant entered willingly into a combat without intending to kill and deceased first resorted to deadly weapons, the homicide would be manslaughter. Delgado v. State, 34 Texas Crim. Rep. 159; 29 S. W. 1070. Stacey v. State, 33 S. W. 348. Reed v. State, 161 S. W. 97.

If defendant merely intended to engage in an ordinary affray and was forced to kill in self-defense, the homicide would be manslaughter. Habel v. State, 28 Texas Crim. App. 603; 13 S. W. 1001. Anthony v. State, 62 Texas Crim. Rep. 138; 136 S. W. 1097. Reed v. State, 161 S. W. 97.

If defendant enters into a mutual combat without intending to do serious bodily injury and resorts to deadly weapons when more force was used by his adversary than he originally contemplated, the homicide will be manslaughter. Habel v. State, 28 Texas Crim. App. 603; 13 S. W. 1001. Carter v. State, 37 Texas Crim. Rep. 406; 35 S. W. 378. McGill v. State, 60 Texas Crim. Rep. 619; 132 S. W. 941. Anthony v. State, 62 Texas Crim. Rep. 138; 136 S. W. 1097. Reed v. State, 161 S. W. 97.

If defendant and deceased enter willingly into a combat without intending to kill and deceased inflicts great injury upon defendant, the homicide is manslaughter if defendant kills in a passion caused by such injury. Williams v. State, 25 Texas Crim. App. 225; 7 S. W. 666.

If all the testimony shows that defendant was the aggressor and brought on the difficulty, it is no defense to him that deceased may have engaged voluntarily with him in an encounter in which deadly weapons were to be used. Godwin v. State, 39 Texas Crim. Rep. 471; 43 S. W. 336.

If defendant and deceased entered into a combat under an agreement to fight with their fists and defendant intended to and did resort to deadly weapons, he cannot justify the homicide on the ground of self-defense. Bordeaux v. State, 58 Texas Crim. Rep. 61; 124 S. W. 645.

If the testimony shows, without controversy, that the homicide was the result of a mutual combat, self-defense and the law of retreat are not issues in the case. Foreman v. State, 33 Texas Crim. Rep. 277; 26 S. W. 212.

Evidence raising the issue of a mutual combat does not necessarily raise the issue of a duel, and if the testimony fails to show that prearrangement to fight with deadly weapons which would constitute a duel it is error to submit such issue to the jury. Guerrero v. State, 39 Texas Crim. Rep. 665; 47 S. W. 655.

Sec. 1961. **Error to charge on mutual combat.**—It is error to charge on mutual combat if one or the other provoked the difficulty and the one not chargeable with this acted in self-defense. Rosborough v. State, 21 Texas Crim. App. 675; 1 S. W. 459. Kelly v. State, 27 Texas Crim. App. 565; 11 S. W. 627. Maines v. State, 35 Texas Crim. Rep. 113; 31 S. W. 667. Reese v. State, 49 Texas Crim. Rep. 243; 91 S. W. 583. Voight v. State, 53 Texas Crim. Rep. 270; 109 S. W. 205. Newton v. State, 58 Texas Crim. Rep. 316; 125 S. W. 908.

The fact that two parties mutually fight or do fight, and in that sense there is a mutuality of combat, does not suggest the issue of mutual combat which takes away the right of self-defense. Waldon v. State, 34 Texas Crim. Rep. 93; 29 S. W. 273. Reese v. State, 49 Texas Crim. Rep. 243; 91 S. W. 583. Newton v. State, 58 Texas Crim. Rep. 316; 125 S. W. 908.

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If the case is either an unprovoked murder or a homicide in self-defense, the issue being "who made the first attack?" mutual combat is not an issue. Red v. State, 39 Texas Crim. Rep. 424; 46 S. W. 408.

Mutual combat is not an issue because of the mere fact that deceased followed defendant and that defendant went to a house and subsequently returned with a gun and shot deceased. Armsworthy v. State, 49 Texas Crim. Rep. 622; 95 S. W. 526.

Mutual combat is not an issue where deceased is the aggressor and forces the fight on defendant so that he either has to fight or retreat. Voight v. State, 53 Texas Crim. Rep. 270; 109 S. W. 205.

A person whose life has been threatened has a right to arm himself and determine to shoot if attacked, and his so doing does not of itself raise the issue of mutual combat. Schauer v. State, 60 S. W. 252.

Mutual combat is not an issue where deceased after a difficulty told defendant he would see him later to which defendant replied that he would be ready, and deceased then went off, armed himself, and returned and brought on the difficulty; no time or place having been fixed for a meeting. Clay v. State, 44 Texas Crim. Rep. 135; 69 S. W. 413.

A charge on mutual combat is a limitation on the right of self-defense, and it is error to charge on the theory of a mutual combat when that issue is not in the case. Everett v. State, 30 Texas Crim. App. 682; 18 S. W. 674. Maines v. State, 35 Texas Crim. Rep. 113; 31 S. W. 667. Ingram v. State, 43 S. W. 518. Red v. State, 39 Texas Crim. Rep. 424; 46 S. W. 408. Schauer v. State, 60 S. W. 252. Stringfellow v. State, 42 Texas Crim. Rep. 590; 61 S. W. 719. Clay v. State, 44 Texas Crim. Rep. 135; 69 S. W. 413. Chapman v. State, 48 Texas Crim. Rep. 19; 85 S. W. 1073. Reese v. State, 49 Texas Crim. Rep. 243; 91 S. W. 583. Voight v. State, 53 Texas Crim. Rep. 270; 109 S. W. 205. Havard v. State, 55 Texas Crim. Rep. 213; 115 S. W. 1185. Newton v. State, 58 Texas Crim. Rep. 316; 125 S. W. 908.

If more than the minimum penalty is assessed an error in charging on mutual combat is not harmless though self-defense is not in the case, because by placing defendant in the wrong the jury may have been influenced as to the penalty. Waldon v. State, 34 Texas Crim. Rep. 93; 29 S. W. 273.

If the facts show, without controversy, that defendant provoked the difficulty, an error in charging on mutual combat is harmless if the conviction is for manslaughter with the lowest term. Polk v. State, 30 Texas Crim. App. 657; 18 S. W. 466.

Sec. 1962. **Charge on mutual combat.**—The charge should not by repetition and elaboration give undue prominence to the issue of mutual combat. Jennings v. State, 7 Texas Crim. App. 358.

A charge on mutual combat being a limitation upon the right of self-defense, the court should apply the rules of mutual combat to the facts in evidence and not leave the jury to grope its way in darkness as to the attitude of defendant. The charge should inform the jury as to what offense defendant would be guilty of if he did engage in mutual combat. Williams v. State, 25 Texas Crim. App. 225; 7 S. W. 666. Stringfellow v. State, 42 Texas Crim. Rep. 591; 61 S. W. 719.

If there is evidence that defendant when he engaged in the mutual combat was under the immediate influence of sudden passion arising from an adequate cause, the court should charge the jury that a homicide committed under such circumstances would be manslaughter. Gonzales v. State, 28 Texas Crim. App. 136; 12 S. W. 733. McGill v. State, 60 Texas Crim. Rep. 619; 132 S. W. 941.

A charge is correct if the jury are thereby informed that if the parties voluntarily engaged in a mutual combat with deadly weapons and intending to kill the homicide would be murder. Unless there is evidence of "adequate cause" it is not necessary to charge on the theory that the homicide would be reduced to manslaughter if committed in a mutual combat with deadly weapons. Spearman v. State, 23 Texas Crim. App. 229; 4 S. W. 586. Mitchell v. State, 38 Texas Crim. Rep. 188; 41 S. W. 816.

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If there is evidence of a mutual combat it is not necessary for the charge of the court to make a direct application of the law of such issue to murder and manslaughter. The charge of the court should be construed as a whole. Gardner v. State, 59 S. W. 1115.

When the testimony does not raise such issue, it is error to charge on the theory that defendant took undue advantage of his adversary. Walters v. State, 37 Texas Crim. Rep. 391; 35 S. W. 652.

If there is evidence that defendant, seeing that a conflict was inevitable, invited deceased elsewhere for the purpose of freeing himself from the danger and was attacked by deceased, his right of self-defense should not be abridged and the charge should submit this theory to the jury. Lee v. State, 21 Texas Crim. App. 241; 17 S. W. 425.

If there is evidence controverting the theory of mutual combat, the charge should submit the converse of the State's theory; that is, that if defendant did not enter into the combat voluntarily he would not forfeit his perfect right of self-defense. Lee v. State, 21 Texas Crim. App. 241; 17 S. W. 425. Christian v. State, 46 Texas Crim. Rep. 50; 79 S. W. 562.

It is not error to refuse to give defendant's theory of mutual combat and his abandonment of the same where the court does not limit self-defense by charging on the State's theory of mutual combat. Guerrero v. State, 41 Texas Crim. Rep. 161; 53 S. W. 120.

If defendant voluntarily makes himself a party to a controversy between others which is about to terminate in a difficulty, knowing that it would or probably might result in death or some serious bodily injury that might produce death, the doctrine of self-defense does not apply, and it is not error to charge on mutual combat when the testimony supports such theory. Mitchell v. State, 38 Texas Crim. Rep. 189; 41 S. W. 816.

It is not error to fail to charge on mutual combat where defendant was not convicted of murder in the first degree and where if there was any mutual combat it was with deadly weapons. Coffman v. State, 56 Texas Crim. Rep. 77; 119 S. W. 1148.

The court is not authorized to charge the jury as a matter of law that if defendant drew a deadly weapon during the fight and killed deceased the homicide would be murder in the second degree. McGill v. State, 60 Texas Crim. Rep. 619; 132 S. W. 941.

If murder in both degrees is involved, the court should charge on murder in the second degree if there is evidence that defendant was in a disturbed state of mind when he entered into the mutual combat. Guerrero v. State, 39 Texas Crim. Rep. 662; 47 S. W. 655.

Sec. 1963. **Abandonment of difficulty.**
Sec. 1964. Abandonment revives self-defense.
Sec. 1965. Abandonment by defendant.
Sec. 1966. Abandonment by deceased.
Sec. 1967. Right to pursue.

Sec. 1964. **Abandonment of difficulty revives self-defense.**—Though one provokes or furnishes the occasion for a difficulty, yet if he abandons the difficulty in good faith and clearly announces his desire for peace, then if he be pursued his right of self-defense revives. Roach v. State, 21 Texas Crim. App. 254; 17 S. W. 464. Peter v. State, 23 Texas Crim. App. 684; 55 S. W. 228. Johnson v. State, 26 Texas Crim. App. 642; 10 S. W. 235. Jackson v. State, 28 Texas Crim. App. 111; 12 S. W. 501. Brazzil v. State, 28 Texas Crim. App. 587; 13 S. W. 1006. Palmer v. State, 15 S. W. 287. Roberts v. State, 30 Texas Crim. App. 306; 17 S. W. 450. Carter v. State, 30 Texas Crim. App. 558; 17 S. W. 1102. Wills v. State, 22 S. W. 969. Stanton v. State, 29 S. W. 476. Morgan v. State, 34 Texas Crim. Rep. 226; 29 S. W. 1092. Lindsey v. State, 35 Texas Crim. Rep. 164; 32 S. W. 768. Chambers v. State, 86 S. W. 752. Cox v. State, 57 Texas Crim. Rep. 427; 123 S. W. 696; Edwards v. State, 60 Texas Crim. Rep. 323; 131 S. W. 1078. Edwards v. State, 151 S. W. 294. Ware v. State, 152 S. W. 1074.

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To entitle defendant to a charge on abandonment of the difficulty, there must be evidence that he indicated his intention of abandoning it so that his adversary so understood it. Roberts v. State, 30 Texas Crim. App. 306; 17 S. W. 450. Chalk v. State, 35 Texas Crim. Rep. 129; 32 S. W. 534. Kelly v. State, 151 S. W. 310.

A party abandoning a difficulty, whether at his own instance or at the instance of a third person, is considered as abandoning the difficulty. Chambers v. State, 86 S. W. 752.

Though defendant or one with him provokes a difficulty, yet if they abandon the difficulty in good faith the right of self-defense revives, and if then pursued defendant has the perfect right of self-defense, either in defense of himself or his companion. Stanton v. State, 29 S. W. 476.

An abandonment of the difficulty in good faith revives the perfect right of self-defense against a new party whom defendant meets suddenly while in retreat from the others if defendant believes himself in danger from the new party alone or from him and the others. Palmer v. State, 15 S. W. 287.

Though defendant went upon the premises of another with intent to kill him, yet if he abandoned such intention in good faith and tried to escape from or avoid his adversary and was pursued, his perfect right of self-defense revives. Roach v. State, 21 Texas Crim. App. 254; 17 S. W. 464.

If defendant went into another's house with intent to have carnal knowledge of his neighbor's wife but abandoned such purpose and was pursued and attacked he would have the perfect right of self-defense. McSpatton v. State, 30 Texas Crim. App. 616; 18 S. W. 298. Cox v. State, 57 Texas Crim. Rep. 427; 123 S. W. 696.

Sec. 1965. **Abandonment of difficulty by defendant.**—The issue of abandonment of the difficulty does not arise where the difficulty was continuous, the only change being in the position of the parties during the progress of the encounter. Downey v. State, 33 Texas Crim. Rep. 381; 26 S. W. 627. Chalk v. State, 35 Texas Crim. Rep. 116; 32 S. W. 534. Courtney v. State, 57 S. W. 654. Wilson v. State, 46 Texas Crim. Rep. 527; 81 S. W. 34. Renow v. State, 49 Texas Crim. Rep. 281; 92 S. W. 801. Gaines v. State, 58 Texas Crim. Rep. 631; 127 S. W. 187. Coker v. State, 59 Texas Crim. Rep. 243; 128 S. W. 137. Kelly v. State, 151 S. W. 304.

It is error to charge on the theory of an abandonment of the difficulty by defendant if there is no proof that he produced the occasion or provoked the difficulty. Renow v. State, 49 Texas Crim. Rep. 284; 92 S. W. 801. Humphrey v. State, 165 S. W. 589.

To entitle defendant to a charge on abandonment of the difficulty, there must be evidence that he indicated his intention of abandoning the difficulty so that his adversary so understood it. Roberts v. State, 30 Texas Crim. App. 306; 17 S. W. 450. Chalk v. State, 35 Texas Crim. Rep. 129; 32 S. W. 534. Kelly v. State, 151 S. W. 304.

A mere retreat and firing back is not an abandonment. Burris v. State, 34 Texas Crim. Rep. 387; 30 S. W. 785.

The issue of abandonment of the difficulty does not arise from proof that defendant after provoking it abandoned it, while his co-conspirators remained and continued it; having engaged in the conspiracy his co-conspirators must also have abandoned it, defendant being responsible for their acts. Burris v. State, 34 Texas Crim. Rep. 387; 30 S. W. 785.

If the charge does not submit the State's theory of a mutual combat but ignores that theory altogether, it is not error to fail to charge on defendant's theory of mutual combat and his abandonment thereof where a general charge on self-defense is given. Guerrero v. State, 41 Texas Crim. Rep. 165; 53 S. W. 119.

In the absence of any evidence of bad faith in the abandonment of the difficulty by defendant, the charge of the court should not suggest bad faith by requiring the abandonment to have been in good faith. Wills v. State, 22 S. W. 969. Thorn-

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ton v. State, 65 S. W. 1107. Renow v. State, 49 Texas Crim. Rep. 284; 92 S. W. 801. Kelly v. State, 151 S. W. 310.

If there is evidence which raises the issue of abandonment of the difficulty on the part of defendant and renewal thereof by his adversary, the court should charge on such issue. Johnson v. State, 26 Texas Crim. App. 642; 10 S. W. 235. Jackson v. State, 28 Texas Crim. App. 111; 12 S. W. 501. Brazzil v. State, 28 Texas Crim. App. 584; 13 S. W. 1006. McSpatton v. State, 30 Texas Crim. App. 616; 18 S. W. 298. Stanton v. State, 29 S. W. 476. Lindsey v. State, 35 Texas Crim. Rep. 164; 32 S. W. 768. Moss v. State, 59 Texas Crim. Rep. 68; 126 S. W. 1151. Edwards v. State, 60 Texas Crim. Rep. 323; 131 S. W. 1078. Ware v. State, 152 S. W. 1074.

Sec. 1966. **Abandonment of difficulty by deceased.**—If the proof shows that at the time of the shooting deceased had abandoned the difficulty, it is proper to charge the jury that if defendant knew that deceased had abandoned the difficulty and that he was in no danger when he shot at deceased then he could not claim self-defense. Bordeaux v. State, 58 Texas Crim. Rep. 61; 124 S. W. 645.

A charge that if deceased had abandoned the difficulty and defendant so understood it and he then killed deceased he could not claim self-defense is insufficient; it fails to state what offense defendant would be guilty of if he did kill deceased under such circumstances, for if defendant had been acting in the defensive before such abandonment such killing would be no higher than manslaughter. West v. State, 2 Texas Crim. App. 476. St. Clair v. State, 49 Texas Crim. Rep. 483; 92 S. W. 1095. Johnson v. State, 63 Texas Crim. Rep. 50; 138 S. W. 1021. Mason v. State, 163 S. W. 66.

If the court charges on the theory that the deceased had abandoned the difficulty and that defendant renewed it, it is error to charge that if "it reasonably appeared to defendant that he had abandoned the same," etc.; the charge should be that if deceased had in fact abandoned the difficulty and that defendant knew it and renewed the attack he could not claim self-defense. Coker v. State, 59 Texas Crim. Rep. 241; 128 S. W. 138.

It is error to charge on the theory of an abandonment of the difficulty by deceased, if at the time defendant shot him he arose from the prostrate form of defendant's son and was shot while in a half-stooped position and was shot again as he stood erect. Morris v. State, 50 Texas Crim. Rep. 515; 98 S. W. 873.

If the State's theory of abandonment of the difficulty is submitted, the court should also submit the defensive theory when there is evidence that after the fatal wounds were given defendant pursued the deceased and struck him without then inflicting a wound. Rodriguez v. State, 155 S. W. 530.

If the defensive theory is that there was no abandonment of the difficulty by deceased but that his action was for the purpose of getting a better vantage ground from which to carry on the battle, the court should charge on this theory. McMahon v. State, 46 Texas Crim. Rep. 548; 81 S. W. 296. St. Clair v. State, 49 Texas Crim. Rep. 483; 92 S. W. 1095.

If the issue is raised the court should charge the jury that if defendant did not reasonably believe that deceased had withdrawn from the difficulty but that by his retreating he was seeking a vantage ground to renew the attack then defendant would have a right to follow him into the building in order to protect himself. McMahon v. State, 46 Texas Crim. Rep. 548; 81 S. W. 296.

Sec. 1967. **Right to pursue.**—The person attacked not only need not retreat but may pursue his adversary until he finds himself out of danger. West v. State, 2 Texas Crim. App. 476. Waldon v. State, 34 Texas Crim. Rep. 92; 29 S. W. 273. Stanley v. State, 44 S. W. 519. Johnson v. State, 50 S. W. 343. Morgan v. State, 43 Texas Crim. Rep. 549; 67 S. W. 420. Wilson v. State, 46 Texas Crim. Rep. 527; 81 S. W. 34.

If there is no testimony that defendant did pursue his adversary, it is not necessary to charge the jury on the right to pursue. Dittmer v. State, 45 Texas Crim. Rep. 103; 74 S. W. 34.

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A charge informing the jury that defendant had the right to act until all danger or appearances of danger had passed presents the issue of the right to pursue. Dickey v. State, 98 S. W. 269.

Sec. 1968. **Right to continue to shoot.**—When there is no evidence that any shots were fired after deceased retreated, it is not error to fail to charge on defendant's right to shoot until all danger had passed. Woodward v. State, 54 Texas Crim. Rep. 89; 111 S. W. 941.

When the facts call for it, it is error to refuse to charge the jury that if defendant had the right to fire the first shot then he had a right to continue shooting until the danger had ceased. Smith v. State, 57 Texas Crim. Rep. 455; 123 S. W. 701. Best v. State, 61 Texas Crim. Rep. 554; 135 S. W. 582.

When there were a number of shots fired on each side, it is error to fail to charge the jury that defendant had a right to shoot as long as it reasonably appeared to him that he was in danger. Clark v. State, 56 Texas Crim. Rep. 295; 120 S. W. 179.

It is not error to charge the jury that defendant had a right to continue to shoot as long as danger, real or apparent, considered from his standpoint, continued to exist. Overcash v. State, 148 S. W. 703. Burnaman v. State, 159 S. W. 258.

If it reasonably appeared to defendant, viewed from his standpoint at the time, that his life was in danger from the acts and conduct of deceased, then he had a right not only to kill, but to act so long as these appearances of danger existed in his mind. Swain v. State, 48 Texas Crim. Rep. 104; 86 S. W. 335. Best v. State, 61 Texas Crim. Rep. 554; 135 S. W. 582. Foster v. State, 148 S. W. 583.

If the defendant's theory is that his first shot was accidental and that his second shot was his first intentional shot, it is error to charge the jury that if the first shot was justifiable then defendant would have the right to continue to shoot. Bearden v. State, 46 Texas Crim. Rep. 150; 79 S. W. 37.

If the charge submits the State's theory that defendant shot deceased after the danger had ceased, it should also submit the converse theory that if defendant did not know that the danger had ceased but reasonably believed that it was continuing then he would have the right to continue to shoot. Sargent v. State, 35 Texas Crim. Rep. 338; 33 S. W. 364. Jones v. State, 44 Texas Crim. Rep. 408; 71 S. W. 962. Duke v. State, 61 Texas Crim. Rep. 22; 133 S. W. 433. Foster v. State, 148 S. W. 583.

The court is not required to charge the jury that if either of the first few shots were fatal and the final shot was not then the firing of any shot after the fatal shot was fired is immaterial. Decker v. State, 154 S. W. 566.

Sec. 1969. **Error to charge on self-defense.**—If the facts show, without controversy, that defendant did the killing, a charge on self-defense when that issue is not raised is not ordinarily ground for reversal. Gilly v. State, 15 Texas Crim. App. 303. McDonald v. State, 15 Texas Crim. App. 493. Hawthorne v. State, 28 Texas Crim. App. 214; 12 S. W. 603. Corporal v. State, 24 S. W. 96. James v. State, 33 S. W. 342. Caton v. State, 38 S. W. 192. Yardley v. State, 50 Texas Crim. Rep. 647; 100 S. W. 400. Recen v. State, 58 Texas Crim. Rep. 459; 126 S. W. 577. Montgomery v. State, 151 S. W. 813. Hicks v. State, 171 S. W. 761.

If there is no evidence of self-defense and the defensive theory is an alibi, a charge on self-defense is calculated to impress the jury with the belief that the trial judge was of the opinion that defendant was present at the homicide. Anderson v. State, 34 Texas Crim. Rep. 546; 31 S. W. 673. Yardley v. State, 50 Texas Crim. Rep. 647; 100 S. W. 400. Mattison v. State, 54 Texas Crim. Rep. 515; 114 S. W. 824.

When the State seeks to hold defendant as a principal on the theory that he aided the slayer, a charge on self-defense when there is no evidence of self-defense is calculated to unduly involve and prejudice the issue of whether defendant aided the slayer. Monroe v. State, 47 Texas Crim. Rep. 63; 81 S. W. 726. Early v. State, 51 Texas Crim. Rep. 392; 103 S. W. 868.

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Sec. 1970. **Error to fail to charge on self-defense.**—If there is evidence raising the issue of self-defense the court is not the judge of its probable truth, but that issue should be fairly and affirmatively submitted to the jury. Wasson v. State, 3 Texas Crim. App. 474. Robles v. State, 5 Texas Crim. App. 358. Edwards v. State, 5 Texas Crim. App. 593. Luera v. State, 12 Texas Crim. App. 257. Pogue v. State, 12 Texas Crim. App. 283. Jackson v. State, 15 Texas Crim. App. 84. Snell v. State, 29 Texas Crim. App. 236; 15 S. W. 722. Bedford v. State, 36 Texas Crim. Rep. 477; 38 S. W. 210. Ennis v. State, 38 S. W. 998. Newsome v. State, 75 S. W. 296. Carden v. State, 62 Texas Crim. Rep. 607; 138 S. W. 397. Luttrell v. State, 143 S. W. 628. Jackson v. State, 147 S. W. 589. Holmes v. State, 150 S. W. 926. Wilson v. State, 154 S. W. 1017. Cook v. State, 160 S. W. 465.

If there is evidence from which the jury may deduce a finding of self-defense—on the doctrine of principals or otherwise—the court should charge on that issue although defendant denies striking the injured party. Prater v. State, 60 Texas Crim. Rep. 88; 131 S. W. 325.

The law of self-defense should be submitted where there is evidence that deceased was trying to take a gun from a third party and threatening to kill defendant. Newsome v. State, 75 S. W. 296.

If there is evidence that in trying to defend himself the defendant accidentally killed the deceased, the charge should submit the theory of self-defense though defendant claims the homicide was an accident. Wesley v. State, 65 S. W. 904. Teel v. State, 69 S. W. 531. Carden v. State, 62 Texas Crim. Rep. 609; 138 S. W. 397.

The court should charge on self-defense where there is evidence that defendant met deceased at night and after being fired on by deceased took the gun away from him and immediately shot him. Orta v. State, 44 Texas Crim. Rep. 393; 71 S. W. 755.

The fact that the assailant is a woman or a child does not deprive the party assailed of the right of self-defense. Leonard v. State, 27 Texas Crim. App. 186; 11 S. W. 112. Latham v. State, 39 Texas Crim. Rep. 472; 46 S. W. 638. Kelton v. State, 160 S. W. 343.

Sec. 1971. **Not error to fail to charge on self-defense.**—Though threats of deceased are in evidence, it is not error to fail or refuse to charge on self-defense if there is no evidence that at the time defendant killed him deceased was doing any act which then manifested an intention to execute the threats. Irwin v. State, 43 Texas 236. Allen v. State, 17 Texas Crim. App. 637. Penland v. State, 19 Texas Crim. App. 365. Lynch v. State, 24 Texas Crim. App. 364; 6 S. W. 190. Hughes v. State, 47 Texas Crim. Rep. 216; 82 S. W. 1037.

If the proof shows, without controversy, a mutual combat, self-defense is not in the case. Foreman v. State, 33 Texas Crim. Rep. 276; 26 S. W. 212.

A judgment of conviction will not be reversed for the failure of the court to charge on self-defense if the only evidence in the record upon which that issue could possibly arise is so weak, light, and trivial that its application is remote, and it clearly appears that no honest jury could reasonably be influenced by it. Navarro v. State, 43 S. W. 105. Burton v. State, 148 S. W. 805. Cloud v. State, 153 S. W. 892.

It is not error to refuse to submit the issue of self-defense to the jury where deceased and a third person were engaged in an ordinary fist fight at the time defendant came up and fired the fatal shot. Turner v. State, 33 Texas Crim. Rep. 103; 25 S. W. 635.

Where defendant went armed to secure an apology from deceased, and deceased said he was unarmed and asked defendant to wait until he could get a gun and when he started off defendant shot him, self-defense is not an issue. Herrington v. State, 63 S. W. 563. Franks v. State, 54 Texas Crim. Rep. 577; 113 S. W. 941. Clampitt v. State, 146 S. W. 929.

Where defendant prefers to rely upon his proof which, if true, excludes the fact that he was engaged in the difficulty at all, and requests the court not to charge on

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self-defense, he is not entitled to complain of the failure to charge on self-defense. Dudley v. State, 40 Texas Crim. Rep. 31; 48 S. W. 179.

It is not error to fail to charge on self-defense if there is no evidence upon which the theory of self-defense can be predicated. Peck v. State, 5 Texas Crim. App. 611. Phelps v. State, 15 Texas Crim. App. 55. Melton v. State, 24 Texas Crim. App. 47; 5. S. W. 652. Thumm v. State, 24 Texas Crim. App. 703; 7 S. W. 236. Miller v. State, 27 Texas Crim. App. 63; 10 S. W. 445. Hooper v. State, 29 Texas Crim. App. 614; 16 S. W. 655. Hastings v. State, 32 Texas Crim. Rep. 372; 23 S. W. 797. Houston v. State, 34 Texas Crim. Rep. 587; 31 S. W. 403. Rutledge v. State, 33 S. W. 347. Doss v. State, 43 Texas Crim. Rep. 551; 67 S. W. 321. Lewis v. State, 75 S. W. 788. Snell v. State, 56 Texas Crim. Rep. 302; 119 S. W. 859. Baum v. State, 60 Texas Crim. Rep. 638; 133 S. W. 271. Zunago v. State, 63 Texas Crim. Rep. 58; 138 S. W. 720. Ricen v. State, 63 Texas Crim. Rep. 89; 138 S. W. 403. Clampett v. State, 146 S. W. 929. Yarborough v. State, 147 S. W. 272. Burton v. State, 148 S. W. 805. Cloud v. State, 153 S. W. 892. Martin v. State, 160 S. W. 968.

Art. 1110. (680) (575) **Circumstances justifying in defense of property.**—When, under article 1107, a homicide is committed in the protection of property, it must be done under the following circumstances:

1. The possession must be of corporeal property, and not of a mere right, and the possession must be actual and not merely constructive.

2. The possession must be legal, though the right of the property may not be in the possessor.

3. If possession be once lost, it is not lawful to regain it by such means as result in homicide.

4. Every other effort in his power must have been made by the possessor to repel the aggression before he will be justified in killing. (O. C. 573.)

Sec. 1972. **Defense of property.**
Sec. 1973. Defense of property.
Sec. 1974. Defense of property—Evidence.
Sec. 1975. Charge as to defense of property.

Sec. 1973. **Defense of property.**—The defense of one's habitation is a right limited only in extent by the same rules which govern in the defense of the person. Richardson v. State, 7 Texas Crim. App. 493. Weaver v. State, 19 Texas Crim. App. 547. Newman v. State, 58 Texas Crim. Rep. 447; 126 S. W. 578.

Where a person has put himself in the wrong on the premises of another, the owner has a right to put such person off his premises by the use of such force as will reasonably accomplish the purpose. The use of such force as will reasonably accomplish the purpose must be exercised and regulated by the amount of resistance. Drake v. State, 5 Texas Crim. App. 662. Turner v. State, 16 Texas Crim. App. 390. Yantis v. State, 49 Texas Crim. Rep. 410; 94 S. W. 1019. Holcomb v. State, 54 Texas Crim. Rep. 489; 113 S. W. 755.

When a person has put himself in the wrong in one's house and refuses, when requested, to leave the house, the owner has a right to make him go, and has the right if he apprehends any danger to arm himself to compel compliance with the request to leave. Hinton v. State, 24 Texas 454. Turner v. State, 16 Texas Crim. App. 390. Yantis v. State, 49 Texas Crim. Rep. 410; 94 S. W. 1019.

Where possession of property is once lost, it is not lawful to regain it by such means as result in homicide. Callicoatte v. State, 22 S. W. 1041. Carr v. State, 41 Texas Crim. Rep. 380; 55 S. W. 51. Gay v. State, 58 Texas Crim. Rep. 472; 125 S. W. 899. Fifer v. State, 64 Texas Crim. Rep. 203; 141 S. W. 989.

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If the defendant surrendered claimed property, he is not entitled to regain possession by force. Lockland v. State, 45 Texas Crim. Rep. 87; 73 S. W. 1054. Fifer v. State, 64 Texas Crim. Rep. 203; 141 S. W. 989.

Where defendant's rights to the premises has been finally adjudged against him by the courts and he has been legally dispossessed, he has no right to take a gun, go back on the premises, and set himself up in defiance of the courts and forcibly retain possession of such premises. Fifer v. State, 64 Texas Crim. Rep. 203; 141 S. W. 989.

The law having provided means of ejecting a trespasser in actual possession of premises, the landlord is not authorized to use a shotgun as a substitute, though the real tenant had sublet the premises without the consent of the landlord. Gay v. State, 58 Texas Crim. Rep. 472; 125 S. W. 899.

When defendant is in peaceable possession of property, he has a right to defend such possession even against a claimant who in fact may be the owner. Carr v. State, 41 Texas Crim. Rep. 380; 55 S. W. 51. Weaver v. State, 76 S. W. 564.

Reasonable force must be used in preventing an unlawful entrance into a house or in ejecting a trespasser or a wrongdoer. Sargent v. State, 35 Texas Crim. Rep. 325; 33 S. W. 364. McCray v. State, 38 Texas Crim. Rep. 609; 44 S. W. 170. Wells v. State, 63 Texas Crim. Rep. 618; 141 S. W. 96.

If a trespasser goes with the intent and with the means to commit a felony if necessary to accomplish the end intended, the owner of the property may repel force with force. Ross v. State, 10 Texas Crim. App. 466. Circle v. State, 22 S. W. 603. Sims v. State, 36 Texas Crim. Rep. 172; 36 S. W. 256.

Where deceased is attacking property only, a third person cannot justify the homicide unless the life or person of the injured party be in peril by reason of such attack on the property. Lilly v. State, 20 Texas Crim. App. 11.

A party is authorized to use whatever force is reasonably necessary to repel an aggression upon his property in order to prevent the same from being unlawfully taken away from him. Ross v. State, 10 Texas Crim. App. 465. Howell v. State, 57 S. W. 835. Lassiter v. State, 163 S. W. 710. Hillis v. State, 166 S. W. 1154.

In defense of property only, all other means at hand, except retreat, must be be resorted to to prevent the injury, and the killing must take place while deceased was in the very act of making the violent attack on the property; but if the conduct of the deceased was such as to produce in the mind of the defendant a reasonable expectation or fear of death or serious bodily injury he would not be required to resort to other means, but may act at once and with the most effective means. Ross v. State, 10 Texas Crim. App. 466. Lilly v. State, 20 Texas Crim. App. 11. Ledbetter v. State, 26 Texas Crim. App. 34; 9 S. W. 60. Lassiter v. State, 163 S. W. 710. Humphrey v. State, 165 S. W. 589.

If in a dispute between defendant and another over possession of property, a third person appeared and began to shoot at defendant before defendant attempted to attack his adversary, defendant would have a right to stand his ground and kill such third person. Smith v. State, 57 Texas Crim. Rep. 455; 123 S. W. 701.

Sec. 1974. **Defense of property—Evidence.**—If the proof shows, without controversy, that defendant was in legal possession of the property, it is error to permit the State to prove that he was not in rightful possession thereof. Carr v. State, 41 Texas Crim. Rep. 380; 55 S. W. 51.

Where the right of possession was settled by the courts in favor of defendant and he was placed in possession, it is error to permit the State to prove that since the death of deceased a judgment for the premises was rendered in favor of the heirs of the deceased. Carr v. State, 41 Texas Crim. Rep. 384; 55 S. W. 51.

Where the homicide occurred over a dispute as to who had the right to use certain property, it is error to admit proof of legal advice given to the father of deceased in the absence of defendant to the effect that deceased had the right to the possession of the property. Smith v. State, 57 Texas Crim. Rep. 455; 123 S. W. 700.

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The State is entitled to prove facts showing that defendant's right to the premises had been finally adjudged against him; that he had been legally dispossessed and had unlawfully re-entered and was attempting by force to retain possession of property that had been finally adjudged to not belong to him, and may prove facts tending to show that his claim of being the owner was not in good faith. Fifer v. State, 64 Texas Crim. Rep. 203; 141 S. W. 989.

Defendant may prove that his adversary had been notified to keep off defendant's premises if such poof tends to show danger from a trespasser at the time of the difficulty. Coleman v. State, 45 Texas Crim. Rep. 120; 74 S. W. 24.

Whether self-defense is an issue or not, the defendant is entitled to show acts of the injured party incroaching upon his property rights as tending to show his state of mind and as showing adequate cause. Roch v. State, 52 Texas Crim. Rep. 49; 105 S. W. 202.

Where the homicide occurred while defendant was watching a dance, he having gone with the head of the house for no unlawful purpose, it is error to permit the State to prove that he had not been invited on account of bad feeling between him and the lady of the house. Stephens v. State, 20 Texas Crim. App. 269.

Sec. 1975. **Charge on defense of property.**—If there is any question as to who was in fact the owner, it is error to require the jury to find that defendant was in "rightful" possession. The terms "rightful possession" and "legal possession" do not mean the same thing. Sims v. State, 36 Texas Crim. Rep. 170; 36 S. W. 256.

If the evidence is undisputed that defendant was in actual (legal) possession of the property, the legality of defendant's possession should be assumed as a fact in the charge as it is the foundation of his defense. Sims v. State, 38 Texas Crim. Rep. 645; 44 S. W. 522.

When the issue is defense of premises from intrusion by deceased, the charge of the court should inform the jury as to what constitutes actual lawful possession of property. McGlothlin v. State, 53 S. W. 871.

When there is evidence to support the theory, it is error to refuse to charge on defendant's right to defend his actual possession of property. Hopkins v. State, 53 S. W. 621.

It is error to charge the jury that a killing to prevent a forcible taking of property under a belief that it was necessary to do so to protect such property would be manslaughter. Pryse v. State, 54 Texas Crim. Rep. 528; 113 S. W. 938.

It is proper to charge on the issue of defense of property when there is evidence known to defendant prior to the homicide that the purpose of deceased was only to take defendant's gun away from him. Williams v. State, 59 Texas Crim. Rep. 624; 129 S. W. 838.

If deceased abandoned whatever designs he may have had on defendant's property and defendant went off and got a gun and pursued and killed him, it is not error to fail to charge on defense of property. Tolliver v. State, 53 Texas Crim. Rep. 329; 111 S. W. 655.

A charge is erroneous if it requires the jury to find that the threatened injury to the property was accompanied by violence to defendant. Lilly v. State, 20 Texas Crim. App. 9.

Defendant has a right to defend against an unwarranted intrusion of his home, and when this issue is raised the court should charge on his right to defend against this kind of attack. French v. State, 55 Texas Crim. Rep. 538; 117 S. W. 848. Wells v. State, 63 Texas Crim. Rep. 618; 141 S. W. 96 (court did and charge was correct).

If the issue is an unlawful entrance into defendant's house not accompanied by an attack or threatened attack of a deadly or a serious character, it is proper to charge the jury that defendant would not be authorized to kill to prevent such unlawful entrance without exhausting all other reasonable means to stop the deceased

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before resorting to the act of killing him. Sargent v. State, 35 Texas Crim. Rep. 325; 33 S. W. 364. Wells v. State, 63 Texas Crim. Rep. 618; 141 S. W. 96.

If the evidence raises the issue, the charge should instruct the jury that if deceased used more force than necessary to effect the expulsion of defendant he thereby became himself an aggressor and no longer entitled to the immunity which the law up to that point had afforded him in the defense of his home. Turner v. State, 16 Texas Crim. App. 390.

When the charge of the court instructs the jury that deceased had the right to use all necessary force to put defendant off his premises and that defendant could not justify resistance to such force, the charge should also inform the jury, if there is evidence to support it, that if deceased used more force than necessary he himself became an aggressor and to the extent of defending against this excessive force the law would accord to defendant the right of self-defense. Turner v. State, 16 Texas Crim. App. 390.

If defendant was an invited guest, it is error to charge upon the theory that he invaded the premises. Turner v. State, 16 Texas Crim. App. 390.

Where defendant was an invited guest of deceased, a charge that deceased had a right to eject him from the premises assumes that defendant had done something that justified ejection; but if given, the converse should be given on the theory that defendant had done nothing to justify ejection, if the proof is doubtful or conflicting on that point. Holcomb v. State, 54 Texas Crim. Rep. 489; 113 S. W. 755.

If there is evidence that defendant could have resorted to an injunction to prevent the deceased from moving the fence in controversy, the charge should instruct the jury that defendant need not have resorted to such a measure, if the charge requires defendant to have resorted to "other means." Sims v. State, 36 Texas Crim. Rep. 171; 36 S. W. 256.

If there is evidence of self-defense against an attack which was reasonably calculated to produce in the mind of the defendant a reasonable expectation or fear of death or serious bodily injury, it is error to restrict the charge on self-defense to defense of property. Lilly v. State, 20 Texas Crim. App. 1. Woodring v. State, 33 Texas Crim. Rep. 29; 24 S. W. 293. Lassiter v. State, 163 S. W. 710.

Where defendant in defense of property is justifiable in striking deceased and deceased then advances on him to attack him, defendant is not bound to retreat but may kill if the conduct of deceased, viewed from defendant's standpoint at the time, produces in the mind of defendant a reasonable expectation or fear of death or serious bodily injury, and if such issue is raised the court should so instruct the jury. Lilly v. State, 20 Texas Crim. App. 1. Woodring v. State, 33 Texas Crim. Rep. 29; 24 S. W. 293.

If defendant who is in legal possession of property does no more than is reasonably necessary to protect such possession and the deceased then made an attack on him which caused him to reasonably believe that his life was in danger or his person in danger of serious bodily injury from such attack, then, under such circumstances, he would have a right to kill the deceased, and the court should so charge the jury. Lilly v. State, 20 Texas Crim. App. 1. Woodring v. State, 33 Texas Crim. Rep. 29; 24 S. W. 293. Woodring v. State, 34 Texas Crim. Rep. 422; 30 S. W. 1060 (court did). Lassiter v. State, 163 S. W. 710.

Sec. 1976. **Homicide in resisting arrest.**
Sec. 1977. Official character of officer.
Sec. 1978. *De facto* officer.
Sec. 1979. Arrest without warrant.
Sec. 1980. Homicide in resisting arrest.
Sec. 1981. Evidence.
Sec. 1982. Charge of the court.

Sec. 1977. **Official character of officer may be proven by parol.**—On the trial of a criminal case, the official character of a public officer may be shown by oral testimony, and is sufficient if it shows the person to be a *de facto* officer. It is only when

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the issue is directly between the officer and the public that the official character of the officer must be proven by the commission or other written evidence of the right of such officer to act as such. Temple v. State, 15 Texas Crim. App. 314. Woodson v. State, 24 Texas Crim. App. 161; 6 S. W. 184. Jacobs v. State, 28 Texas Crim. App. 83; 12 S. W. 408. Hardin v. State, 40 Texas Crim. Rep. 217; 49 S. W. 607. DeLucenay v. State, 68 S. W. 797. Mahon v. State, 46 Texas Crim. Rep. 237; 79 S. W. 28. Baker v. State, 56 Texas Crim. Rep. 16; 118 S. W. 542.

Sec. 1978. **De facto officer.**—A *de facto* officer is one who acts under color of a known and valid appointment, but has failed to conform to some precedent requirement, as to take an oath, give a bond, and the like. Weatherford v. State, 31 Texas Crim. Rep. 535; 21 S. W. 251. Tracey v. State, 93 S. W. 541. Hull v. State, 50 Texas Crim. Rep. 607; 100 S. W. 403.

A *de facto* officer may also be one inducted into office without regard to any colorable election or appointment where there is so long an exercise of the office and acquiescence therein of the public as to afford to an individual citizen the strong presumption that the party was duly appointed. Tracey v. State, 93 S. W. 541.

Sec. 1979. **Arrest without warrant.**—A policeman is a peace officer. Hull v. State, 50 Texas Crim. Rep. 607; 100 S. W. 405.

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." Johnson v. State, 5 Texas Crim. App. 46. Lacy v. State, 7 Texas Crim. App. 411. Staples v. State, 14 Texas Crim. App. 136. Weaver v. State, 19 Texas Crim. App. 569. Leache v. State, 22 Texas Crim. App. 314; 3 S. W. 539. Russell v. State, 37 Texas Crim. Rep. 314; 39 S. W. 674. Montgomery v. State, 43 Texas Crim. Rep. 304; 65 S. W. 537. Hull v. State, 50 Texas Crim. Rep. 607; 100 S. W. 403. Purdy v. State, 60 Texas Crim. Rep. 130; 131 S. W. 558.

A charge is erroneous if it authorizes and justifies an arrest without warrant when the offense was one classed as an offense against the public peace not committed in the presence or within the view of the arresting party. Williams v. State, 64 Texas Crim. Rep. 491; 142 S. W. 900.

Where it is shown by satisfactory proof to a peace officer, upon the representation of a credible person, that a felony has been committed and that the offender is about to escape, so that there is no time to procure a warrant, such peace officer may, without warrant, pursue and arrest the person accused. Stewart v. State, 26 S. W. 203. Cortez v. State, 43 Texas Crim. Rep. 386; 66 S. W. 453. Cortez v. State, 44 Texas Crim. Rep. 179; 69 S. W. 537. Cortez v. State, 47 Texas Crim. Rep. 16; 83 S. W. 812.

An escaped convict may be arrested without warrant by either an officer or by a private person. Wallace v. State, 20 Texas Crim. App. 360. Ex parte Sherwood, 29 Texas Crim. App. 337; 15 S. W. 812.

When an officer has one person legally in his custody, he may arrest without a warrant a third person who attempts to take the prisoner from him by force. Mosley v. State, 23 Texas Crim. App. 409; 4 S. W. 907.

A party violating the law by unlawfully carrying arms may be arrested without a warrant by any peace officer upon his own knowledge or upon information from some credible person, although such party is not present or within reach of the officer at the time the information was obtained, and although there be time and opportunity to obtain a warrant of arrest. Hodges v. State, 6 Texas Crim. App. 620. Jacobs v. State, 28 Texas Crim. App. 85; 12 S. W. 408. Ex parte Sherwood, 29 Texas Crim. App. 334; 15 S. W. 812. Miller v. State, 32 Texas Crim. Rep. 349; 20 S. W. 1103. Allen v. State, 66 S. W. 674. Earles v. State, 47 Texas Crim. Rep. 564; 85 S. W. 1. Hull v. State, 50 Texas Crim. Rep. 607; 100 S. W. 403. Earles v. State, 52 Texas Crim. Rep. 145; 106 S. W. 138. Condron v. State, 62 Texas Crim. Rep. 485; 138 S. W. 597. Ricen v. State, 63 Texas Crim. Rep. 89; 138 S. W. 403. Condron v. State, 155 S. W. 253.

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When there is no proof to support it, the court should not charge upon the theory that the deceased officer was attempting to arrest the defendant for unlawfully carrying a pistol. Murphy v. State, 36 Texas Crim. Rep. 31; 35 S. W. 174.

All persons have a right to prevent the consequences of theft by seizing any personal property which has been stolen, and bringing it, with the supposed offender if he can be taken, before a magistrate for examination, or delivering the same to a peace officer for that purpose. To justify such seizure there must, however, be reasonable grounds to suppose the property to be stolen, and the seizure must be openly made and the proceedings had without delay. Luera v. State, 12 Texas Crim. App. 257. Porez v. State, 29 Texas Crim. App. 618; 16 S. W. 750. English v. State, 34 Texas Crim. Rep. 199; 30 S. W. 233.

Mere suspicion that a person is in possession of stolen property will not authorize an arrest without warrant. Lacy v. State, 7 Texas Crim. App. 411.

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. Haller v. State, 162 S. W. 873.

A city has authority to pass an ordinance authorizing a policeman to arrest without warrant any person found drunk in a public place within the city limits. Beville v. State, 16 Texas Crim. App. 70. Mosley v. State, 23 Texas Crim. App. 409; 4 S. W. 907. Early v. State, 50 Texas Crim. Rep. 350; 97 S. W. 82.

A city may pass an ordinance authorizing a policeman to arrest without warrant a person violating within the view of such officer an ordinance prohibiting hack drivers and kindred classes of people from taking a stand at certain places for the purpose of soliciting passengers. Vann v. State, 45 Texas Crim. Rep. 441; 77 S. W. 813.

Sec. 1980. **Homicide in resisting arrest.**—An illegal arrest is regarded in law as a continuous assault of an aggravated nature. Alford v. State, 8 Texas Crim. App. 566. Earles v. State, 94 S. W. 465.

The fact that an officer uses greater force than is necessary to effect the arrest does not of itself justify killing him where it does not reasonably appear to the defendant that he is in danger of death or some serious bodily injury. Alford v. State, 8 Texas Crim. App. 568. Condron v. State, 155 S. W. 253.

Whether the arrest was legal or illegal, the power to arrest may be exercised in such a wanton and menacing manner as to threaten the accused with loss of life or with serious bodily injury; in such a case, although the attempted arrest was lawful, the homicide would be justifiable. Tiner v. State, 44 Texas 128. James v. State, 44 Texas 314. Alford v. State, 8 Texas Crim. App. 568. Jones v. State, 26 Texas Crim. App. 12; 9 S. W. 53. Ex parte Sherwood, 29 Texas Crim. App. 336; 15 S. W. 812. Vann v. State, 45 Texas Crim. Rep. 445; 77 S. W. 813. (If the attack was of a milder character, manslaughter would be presented on account of a homicide committed in sudden passion caused by such character of arrest. Alford v. State, 8 Texas Crim. App. 568. Vann v. State, 45 Texas Crim. Rep. 443; 77 S. W. 813.)

If the attempted arrest is illegal, the defendant has the same right to resist it as if the officer was merely a private citizen. Alford v. State, 8 Texas Crim. App. 563. Miers v. State, 34 Texas Crim. Rep. 161; 29 S. W. 1074. Lynch v. State, 41 Texas Crim. Rep. 510; 57 S. W. 1130. Earles v. State, 94 S. W. 466.

If authority to make the arrest is wanting, the person attempting such arrest is a trespasser, and the person so arrested can resist him, regardless of his knowledge that the arrest was illegal, using such force only as is reasonably necessary to prevent the arrest or free himself from the illegal restraint. Alford v. State, 8 Texas Crim. App. 563. Cortez v. State, 44 Texas Crim. Rep. 182; 69 S. W. 537. Cortez v. State, 47 Texas Crim. Rep. 18; 83 S. W. 812. Earles v. State, 47 Texas Crim. Rep. 559; 85 S. W. 1.

If defendant was illegally arrested, he has the same right to regain his liberty, though he submitted to the arrest, as he had in preventing the illegal arrest. Sub-

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mission to illegal restraint does not convert the trespass into a legal act. Miers v. State, 34 Texas Crim. Rep. 186; 29 S. W. 1074.

There is no rule of law that he who flees from an attempted arrest in cases of misdemeanor thereby forfeits his right to defend his life. Tiner v. State, 44 Texas 128.

The insertion of defendant's name in a warrant by the officer after the same has been delivered to him is a fraud when done without authority, and does not vest the officer with authority to arrest the defendant by virtue of such warrant. Alford v. State, 8 Texas Crim. App. 562.

The bare fact that defendant proves to be armed does not vest the officer with authority to make an arrest on suspicion that he was armed. Mooney v. State, 65 S. W. 927.

If the officer fails to disclose his authority, but simply takes hold of defendant or assaults him, the latter is justified in resisting such unlawful arrest with whatever force is reasonably necessary, viewed from his standpoint at the time. Tiner v. State, 44 Texas 128. Montgomery v. State, 43 Texas Crim. Rep. 304; 65 S. W. 537. Cortez v. State, 43 Texas Crim. Rep. 375; 66 S. W. 453.

While it is the duty of an officer attempting to arrest to make known his purpose and the capacity in which he acts, yet if the purpose and capacity is known to the defendant when the arrest is attempted, and the arrest is otherwise lawful, submission to arrest is a duty and resistance is unjustifiable. Tiner v. State, 44 Texas 131. Plasters v. State, 1 Texas Crim. App. 683. Purdy v. State, 60 Texas Crim. Rep. 130; 131 S. W. 558.

If there is no evidence that defendant knew the party attempting his arrest to be an officer, and the officer had time to make his purpose known and did not, it is error to charge the jury on the theory that submission to arrest is a duty and resistance thereto is unjustifiable. Lynch v. State, 41 Texas Crim. Rep. 513; 57 S. W. 1130.

Defendant will not be heard to say that he is not bound by what passed between officers and his father in his view though not in his hearing, where he knew they were officers and where no opportunity was afforded the deceased, after he came to where defendant was, to declare his purpose. Smith v. State, 48 Texas Crim. Rep. 239; 89 S. W. 817.

If while time presses with the escaping party in sight, the acts and declarations of an officer or officers are such as in reason and fairness to induce the conviction on the part of deceased that aid is desired and are such as in substance to amount to a summons, he is to be regarded as legally summoned. The law looks to the substance and not to the letter of such summons. Purdy v. State, 60 Texas Crim. Rep. 130; 131 S. W. 558.

The law sets such a high value upon the liberty of a citizen that an attempt to arrest him unlawfully is esteemed a great provocation, and if it produces such passion as renders him incapable of cool reflection it may reduce the homicide to manslaughter. Goodman v. State, 4 Texas Crim. App. 352. Johnson v. State, 5 Texas Crim. App. 47. Alford v. State, 8 Texas Crim. App. 566. Ross v. State, 10 Texas Crim. App. 464. Dyson v. State, 14 Texas Crim. App. 461. Ledbetter v. State, 23 Texas Crim. App. 258; 5 S. W. 226. Peter v. State, 23 Texas Crim. App. 687; 5 S. W. 228. Jones v. State, 26 Texas Crim. App. 12; 9 S. W. 53. Meuly v. State, 26 Texas Crim. App. 274; 9 S. W. 563. Ex parte Sherwood, 29 Texas Crim. App. 335; 15 S. W. 812. Miller v. State, 31 Texas Crim. Rep. 639; 21 S. W. 925. Mundine v. State, 37 Texas Crim. Rep. 15; 38 S. W. 619. Hardin v. State, 40 Texas Crim. Rep. 220; 49 S. W. 607. Lynch v. State, 41 Texas Crim. Rep. 510; 57 S. W. 1130. Mooney v. State, 65 S. W. 927. Cortez v. State, 44 Texas Crim. Rep. 182; 69 S. W. 537. Scott v. State, 49 Texas Crim. Rep. 389; 93 S. W. 112. Earles v. State, 94 S. W. 465.

If the defendant determines in advance to kill the first officer who attempts his arrest, and the killing is done with a weapon deliberately prepared beforehand to resist the arrest, the homicide is murder. Ex parte Sherwood, 29 Texas Crim. App.

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334; 15 S. W. 812. Miller v. State, 31 Texas Crim. Rep. 609; 21 S. W. 925. Miller v. State, 32 Texas Crim. Rep. 351; 20 S. W. 1103. English v. State, 34 Texas Crim. Rep. 190; 30 S. W. 233. Purdy v. State, 60 Texas Crim. Rep. 130; 131 S. W. 558.

If defendant and another are acting together, and had, before the homicide, determined that they would not be arrested for their crime or crimes—that they would resist to the death all attempts to arrest them—it is immaterial which of them killed deceased who was lawfully attempting their arrest. English v. State, 34 Texas Crim. Rep. 190; 30 S. W. 233.

Sec. 1981. **Evidence.**—To show a basis for the arrest, the State is entitled to prove that the officer had been informed that defendant had a pistol on his person. Jacobs v. State, 28 Texas Crim. App. 84; 12 S. W. 408. Miller v. State, 32 Texas Crim. Rep. 349; 20 S. W. 1103. Hull v. State, 50 Texas Crim. Rep. 607; 100 S. W. 405. Earles v. State, 52 Texas Crim. Rep. 145; 106 S. W. 138.

In order to show the authority of the officer to make the arrest without a warrant, the State is entitled to show what information he received. Jacobs v. State, 28 Texas Crim. App. 84; 12 S. W. 408. Miller v. State, 32 Texas Crim. Rep. 349; 20 S. W. 1103. Cortez v. State, 47 Texas Crim. Rep. 16; 83 S. W. 812. Hull v. State, 50 Texas Crim. Rep. 607; 100 S. W. 405. Earles v. State, 52 Texas Crim. Rep. 145; 106 S. W. 138.

The State is entitled to prove facts tending to show that defendant had resolved to resist arrest at all hazards, regardless of whether the attempted arrest was legal or not. Jacobs v. State, 28 Texas Crim. App. 79; 12 S. W. 408. Miller v. State, 31 Texas Crim. Rep. 636; 21 S. W. 925. Miller v. State, 32 Texas Crim. Rep. 349; 20 S. W. 1103. Stewart v. State, 26 S. W. 203. English v. State, 34 Texas Crim. Rep. 199; 30 S. W. 233. Cortez v. State, 43 Texas Crim. Rep. 384; 66 S. W. 453. Hull v. State, 50 Texas Crim. Rep. 607; 100 S. W. 405. Purdy v. State, 60 Texas Crim. Rep. 130; 131 S. W. 558. Vines v. State, 148 S. W. 727. Stewart et al. v. State, 174 S. W. 1077.

Where the officer summoned help before he went to arrest defendant, it is error to admit proof of the reasons why the officer wanted assistance. Owen v. State, 58 Texas Crim. Rep. 261; 125 S. W. 407.

If the proof fails to show authority for the arrest without a warrant, the testimony relating thereto should be excluded. Cortez v. State, 44 Texas Crim. Rep. 179; 69 S. W. 537.

It is error to refuse to permit the defendant to prove that the arrest or attempted arrest was illegal. Goodman v. State, 4 Texas Crim. App. 352.

Sec. 1982. **Charge of the court.**—It is not error to assume in the charge that the arrest was legal if the evidence on that point is clear and is not controverted. Sierra v. State, 37 Texas Crim. Rep. 432; 35 S. W. 982.

If the attempted arrest was illegal, the charge should so inform the jury. Miers v. State, 34 Texas Crim. Rep. 161; 29 S. W. 1074. Russell v. State, 37 Texas Crim. Rep. 317; 39 S. W. 1074. Cortez v. State, 44 Texas Crim. Rep. 181; 69 S. W. 537.

If the testimony is conflicting as to whether the arrest was legal or illegal, it is proper to submit that issue to the jury. Earles v. State, 52 Texas Crim. Rep. 148; 106 S. W. 138. Stewart et al. v. State, 174 S. W. 1077.

When there is no evidence to support it, it is error to authorize a conviction upon the theory that the homicide was committed to prevent a legal arrest. Ross v. State, 10 Texas Crim. App. 462. Arthur v. State, 46 Texas Crim. Rep. 477; 80 S. W. 1017.

When there is no proof to support the theory, it is error to charge the jury upon the subject of authority to arrest for a breach of the peace in the presence or within the view of the deceased. Ross v. State, 10 Texas Crim. App. 463.

The law of arrest without warrant should be charged if a posse approached defendant without a warrant, and there is evidence from which the jury might con-

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clude that the posse did not announce or that defendant did not know their purpose. Cortez v. State, 43 Texas Crim. Rep. 386; 66 S. W. 453. Sanchez et al. v. State, 156 S. W. 220.

If the officer did not disclose his authority and there is no evidence that defendant knew that he was an officer, it is error to charge on the right to arrest without warrant on suspicion that defendant was armed. Mooney v. State, 65 S. W. 927.

Where defendant's claim is that the officer attacked him on sight, and the officer's claim is that, without stating his authority, he merely threw his gun down on defendant and ordered him to throw up his hands, when defendant began to shoot, it is error to authorize the jury to consider that the acts of defendant could excuse an officer from making known his authority and purpose. Owen v. State, 58 Texas Crim. Rep. 261; 125 S. W. 408.

Where defendant's claim is that the officer, instead of trying to arrest him, was trying to kill him, it is error to charge the jury that they could take into consideration the previous acts and conduct of defendant, if any, in determining whether the officer used more force than necessary in making the arrest. Owen v. State, 58 Texas Crim. Rep. 261; 125 S. W. 407.

A charge limiting the right of self-defense to knowledge that the alleged injured party was an officer is erroneous if the defendant would have the right to defend himself whether such party was an officer or not. Owen v. State, 58 Texas Crim. Rep. 261; 125 S. W. 406.

It is error to charge the jury that an officer is bound to execute a warrant of arrest, as such charge might lead the jury to believe that defendant had no right to offer resistance though attacked and not informed that the party was an officer. Owen v. State, 58 Texas Crim. Rep. 261; 125 S. W. 407.

It is error to charge the jury that an officer has a right to summon assistance to aid him in making an arrest "when he reasonably believes he is not able to arrest a party who it is his duty to arrest." The jury should simply be informed, if desired, that the officer had a right to summon assistance. Owen v. State, 58 Texas Crim. Rep. 261; 125 S. W. 407.

A charge is erroneous if it makes the right of self-defense hinge upon whether defendant was the person named in the writ and the further fact that deceased was making an unlawful attack upon him reasonably calculated to produce an apprehension of death or serious bodily injury; since if the latter was the fact defendant's right of self-defense would be complete whether he was the person named in the writ or not. Jones v. State, 26 Texas Crim. Rep. 13; 9 S. W. 53.

If the illegal arrest is of an extraordinary character, the court should charge the jury that if looking to all surrounding facts it reasonably appeared to defendant that it was necessary to kill deceased in order to liberate himself or another from such arrest then they should acquit. Dyson v. State, 14 Texas Crim. App. 454.

When there is evidence to support it, the court should submit the theory that if deceased attempted the arrest in a lawful manner and defendant resisted the arrest, drew a weapon, and fired at the officer, he could not claim self-defense, but if defendant did not resist but merely sought to escape or evade arrest, then the officer had no right to kill him, and if, under such circumstances, deceased first drew a weapon and fired on defendant, the right of self-defense would be perfect. Tiner v. State, 44 Texas 128. Hardin v. State, 40 Texas Crim. Rep. 220; 49 S. W. 607.

The court should charge the jury on the lower grades of homicide if the record leaves the court in the dark as to what was said and done at the crucial point of the attempted arrest. Moore v. State, 40 Texas Crim. Rep. 444; 50 S. W. 942.

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CHAPTER XIII

EXCUSABLE HOMICIDE

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Article 1111. (681) (576) **Excusable homicide defined.**—Homicide is excusable when the death of a human being happens by accident or misfortune, though caused by the act of another, who is in the prosecution of a lawful object by lawful means. (O. C. 575.)

Art. 1112. (682) (577) **The lawful act must be done by lawful means.**—The lawful act causing the death of another must be done by lawful means and used in a lawful degree. Though lawful for the parent, guardian, schoolmaster, or master to chastise the child, ward, scholar, or apprentice; yet if this be done with an instrument likely to produce death, or if with a proper instrument the chastisement be cruelly inflicted and death result, it is murder. (O. C. 576.)

Sec. 1983. **Proof of accident.**—Proof that immediately after the killing defendant said it was accidental is admissible as a part of the *res gestæ*. Teel v. State, 69 S. W. 531.

Whether or not a wound was accidentally or intentionally inflicted is not a subject of expert testimony. Davis v. State, 154 S. W. 552.

If the defensive theory is that the homicide was an accident, it is error to admit proof, when no connection is shown between the two transactions and no criminality attached to the first, that defendant had on a prior occasion accidentally killed another person. Barkman v. State, 52 S. W. 69.

Where defendant at the time of the alleged accidental discharge of his pistol was in the act of preparing to kill one person of his malice aforethought and the pistol was accidentally discharged while deceased was endeavoring to prevent defendant from carrying his purpose into execution, then defendant would be guilty of murder with implied malice. Wheatly v. State, 39 S. W. 672.

Where defendant claims that the killing of his wife was accidental, the State may show separation, slights and indignities for the purpose of showing a motive for an intentional killing. Combs v. State, 55 Texas Crim. Rep. 337; 116 S. W. 584.

Proof that defendant's pistol was tricky is not admissible if there is no evidence that the homicide was an accident. Truett v. State, 168 S. W. 523.

Sec. 1984. **Charge on the theory of accident.**—If there is evidence to support the theory of accident, the court should give the jury an affirmative charge on such issue. Calhoun v. State, 71 S. W. 279. Carr v. State, 48 Texas Crim. Rep. 287; 87 S. W. 346. McCray v. State, 63 Texas Crim. Rep. 522; 140 S. W. 442. Hamilton v. State, 64 Texas Crim. Rep. 175; 141 S. W. 967. McDowell v. State, 151 S. W. 1049. Maldonado et al. v. State, 156 S. W. 647.

A charge on the theory of pure accident should when required be given disconnected from the theory of self-defense, or at least given in such a way as not to infringe the right of self-defense. McDowell v. State, 151 S. W. 1049.

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If there is evidence that in trying to defend himself defendant's gun or pistol was accidentally discharged, the court should charge on the theory of self-defense as well as on accident. Wesley v. State, 65 S. W. 904. Teel v. State, 69 S. W. 531. Carden v. State, 62 Texas Crim. Rep. 607; 138 S. W. 397.

If there is evidence that defendant was using his gun or pistol as a bludgeon in self-defense and that it was accidentally discharged, a charge is too broad if it submits the theory of accidental discharge only and ignores the theory of self-defense. Wesley v. State, 65 S. W. 904. Teel v. State, 69 S. W. 531. Carden v. State, 62 Texas Crim. Rep. 607; 138 S. W. 397.

The court should not charge on the theory that the homicide was accidental if there is no evidence to support such theory. Black v. State, 145 S. W. 948.

If there is evidence that the homicide was an accident it is error to charge the jury that the burden is on the defendant to show the accident or innocent intention. Jones v. State, 13 Texas Crim. App. 1. Richardson v. State, 32 Texas Crim. Rep. 524; 24 S. W. 894.

A charge is correct if the jury are thereby instructed that if they believe that the pistol was discharged by defendant, but have a reasonable doubt as to whether the same was discharged accidentally, they should acquit. Houston v. State, 26 Texas Crim. App. 660; 14 S. W. 352. Alvarez v. State, 58 S. W. 1014. Hill v. State, 168 S. W. 865.

If the testimony raises the theory that the act was an accident without that degree of carelessness or negligence which the law regards as criminal, the charge should simply submit the theory that it was an accident, without complicating it with the idea that defendant was in the prosecution of a lawful object by lawful means. Miller v. State, 52 Texas Crim. Rep. 78; 105 S. W. 502. Hodge v. State, 60 Texas Crim. Rep. 157; 131 S. W. 577.

It is error to charge the jury that if in preparing to defend himself defendant accidentally killed another he would be excused if the act of preparation was not such as apparently endangered life; it makes no difference whether in preparing to defend himself one apparently or actually endangers the life of another. Lankster v. State, 41 Texas Crim. Rep. 605; 56 S. W. 65.

When negligent homicide is an issue and is properly submitted, a charge on the theory of accident is correct which instructs the jury in effect that if defendant did not intend to kill deceased and was not guilty of negligence and carelessness in firing the pistol then they should acquit him if they had a reasonable doubt that he fired the pistol accidentally, that is, without intending to do so. Biggerstaff v. State, 59 Texas Crim. Rep. 575; 129 S. W. 840.

CHAPTER XIV

HOMICIDE BY NEGLIGENCE

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Article 1113. (683) (578) **Two kinds.**—Homicide by negligence is of two kinds:

1. Such as happens in the performance of a lawful act; and
2. That which occurs in the performance of an unlawful act.

1. In the Performance of a Lawful Act.

Art. 1114. (684) (579) **Negligent homicide in the first degree.**—If any person in the performance of a lawful act shall, by negligence and carelessness, cause the death of another, he is guilty of negligent homicide of the first degree. (O. C. 578.)

Art. 1115. (685) (580) **"Lawful act" defined.**—A "lawful act" is one not forbidden by the penal law and which would give no just occasion for a civil action. (O. C. 579.)

Sec. 1985. **The offense is sufficiently defined.**—The offense of negligent homicide is sufficiently defined by the statute. Morris v. State, 35 Texas Crim. Rep. 316; 33 S. W. 539.

Art. 1116. (686) (581) **Must be an apparent danger of causing death.**—To constitute this offense there must be an apparent danger of causing the death of the person killed, or some other. (O. C. 580.)

Sec. 1986. **Must be an apparent danger of causing death.**—A charge on negligent homicide should instruct the jury that in the act of handling the weapon there must be an apparent danger of causing the death of the person killed or some other. Saye v. State, 50 Texas Crim. Rep. 569; 99 S. W. 551.

Where deceased was riding in defendant's vehicle and defendant was driving his team in a furious and rapid manner he was charged with notice that his acts did endanger the life of deceased, and it is not necessary to hinge his guilt on his consciousness that his acts were endangering the life of deceased. Morris v. State, 35 Texas Crim. Rep. 317; 33 S. W. 539.

Art. 1117. (687) (582) **How distinguished from excusable homicide.**—The want of proper care and caution distinguishes this offense from excusable homicide. The degree of care and caution is such as a man of ordinary prudence would use under like circumstances. (O. C. 581.)

Sec. 1987. **Distinction between negligent and excusable homicide.**—Testimony that the homicide was caused by defendant's gun being accidentally discharged

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while he was scuffling with a third person raises the issue of accident but not of negligent homicide. Scott v. State, 47 Texas Crim. Rep. 570; 85 S. W. 1060.

Testimony that deceased had a knife in her hand and that while she and defendant, her husband, were scuffling over a purse which she had taken from him this knife fatally but accidentally cut her raises the issue of accident but not of negligent homicide. Davis v. State, 143 S .W. 1161.

The issue of negligent homicide is not raised by testimony supporting the defensive theory that defendant's gun was accidentally discharged when he threw it up to protect himself against the advance of deceased. Green v. State, 58 Texas Crim. Rep. 428; 126 S. W. 860.

If the State's case is murder and defendant's theory is an accident without negligence, the issue of negligent homicide is not in the case. Williams v. State, 45 Texas Crim. Rep. 218; 75 S. W. 859. Holland v. State, 55 Texas Crim. Rep. 27; 115 S. W. 48. Green v. State, 58 Texas Crim. Rep. 429; 126 S. W. 860. Wilson v. State, 60 Texas Crim. Rep. 1; 129 S. W. 613. Hodge v. State, 60 Texas Crim. Rep. 157; 131 S. W. 577. Davis v. State, 143 S. W. 1162. Manley v. State, 154 S. W. 1008.

If the State's case is murder and defendant's theory is accidental firing caused by another grabbing his gun, the issue of negligent homicide is not in the case. Williams v. State, 45 Texas Crim. Rep. 218; 75 S. W. 859. Jones v. State, 95 S. W. 539.

Proof that defendant shot deceased accidentally while attempting to strike him with a pistol in self-defense does not raise the issue of negligent homicide. Teel v. State, 73 S. W. 11.

Sec. 1988. **Proper care and caution.**—The want of proper care and caution distinguishes negligent homicide from excusable homicide. Blalock v. State, 40 Texas Crim. Rep. 155; 49 S. W. 100. Davis v. State, 143 S. W. 1162. Manley v. State, 154 S. W. 1008.

If negligent homicide is an issue the accused is entitled to prove his general reputation for being a prudent and cautious officer. Saye v. State, 50 Texas Crim. Rep. 572; 99 S. W. 551.

If there is evidence to support the theory the court should give a charge directing the jury to acquit "if defendant did not know and in the exercise of ordinary care and caution did not know the gun was loaded." McCray v. State, 63 Texas Crim. Rep. 522; 140 S. W. 442.

It is proper to charge the jury that defendant would be guilty of negligent homicide in the first degree if, without using proper care and caution, he shot deceased while mistaking him for wild game. Bertrong v. State, 2 Texas Crim. App. 160.

One who with no apparent intention of killing drives his vehicle at such a rapid and dangerous speed as to endanger the life of the occupants is guilty of negligent homicide whether the occupant was thrown out or was thrown from it and killed while exercising his volition to escape the danger. Morris v. State, 35 Texas Crim. Rep. 317; 33 S. W. 539.

Where there was a good deal of firing along a road from persons coming from a social gathering, and defendant said he fired several shots and may have accidently shot deceased, it is error not to charge on negligent homicide. Morton v. State, 71 S. W. 281.

If there is no admission of the homicide and no testimony that suggests that defendant may have accidentally shot the deceased it is not error to fail to charge on negligent homicide. Morton v. State, 43 Texas Crim. Rep. 538; 67 S. W. 115.

If the State's case is murder and defendant's theory is that he drew his weapon in self-defense to bluff deceased and that in the struggle deceased in some way received the fatal cut, the issue of negligent homicide is not in the case. Accident

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and negligence must concur to constitute negligent homicide. Spears v. State, 41 Texas Crim. Rep. 536; 56 S. W. 347.

When there is testimony to support it, the court should charge on negligent homicide in the first degree on the theory that the death of the deceased child was negligently caused by upsetting a buggy. McConnell v. State, 22 Texas Crim. App. 354; 3 S. W. 699.

The want of proper care and caution distinguishes negligent homicide from excusable homicide, and a charge is correct which informs the jury that the degree of care and caution required is such as a man of ordinary prudence would use under like circumstances. Bertrong v. State, 2 Texas Crim. App. 160. Morris v. State, 35 Texas Crim. Rep. 316; 33 S. W. 539. Brittain v. State, 36 Texas Crim. Rep. 406; 37 S. W. 758.

A conviction of a physician based on the theory of a want of proper care and caution in examining a patient will not be sustained when the testimony is not sufficient to support such theory. Gorden v. State, 90 S. W. 637.

If the defendant was doing an act lawful in itself, such as trying to take a gun away from his wife, the issue of negligent homicide is not in the case if there is no proof of negligence on his part. Blalock v. State, 40 Texas Crim. Rep. 155; 49 S. W. 100.

Sec. 1989. **Negligence by omission.**—There can be no criminal negligence by omission to do an act unless it was the especial duty of the party to do the act omitted. Anderson v. State, 27 Texas Crim. App. 177; 11 S. W. 33.

Art. 1118. (688) (583) **Examples.**—Throwing timbers by a workman from the roof or upper part of the house in a public street or highway, or where a number of persons are known to be around the house, or discharging firearms on or near a public highway, other than a street in a town or city, in such manner as would be likely to injure persons who might be passing, are examples of negligent homicide of the first degree, in case of death resulting therefrom. If death is caused by the careless discharge of firearms in a public street of a town or city, the offense will be of a higher degree. (O. C. 582.)

Art. 1119. (689) (584) **Must be no apparent intention to kill.**—To bring the offense within the definition of homicide by negligence, either of the first or second degree, there must be no apparent intention to kill. (O. C. 584.)

Sec. 1990. **No apparent intent to kill.**—An intentional killing is not negligent homicide. Thompson v. State, 2 Texas Crim. App. 558. Dwyer v. State, 12 Texas Crim. App. 540. Tomerlin v. State, 26 S. W. 66. Flynn v. State, 43 Texas Crim. Rep. 407; 66 S. W. 556.

The court need not charge on negligent homicide in the absence of facts showing no apparent intention to kill. Aiken v. State, 10 Texas Crim. App. 617. Houston v. State, 34 Texas Crim. Rep. 587; 31 S. W. 403. Clifton v. State, 47 Texas Crim. Rep. 478; 84 S. W. 237.

Proof of an intentional firing into an occupied passenger coach does not raise the issue of negligent homicide. Aiken v. State, 10 Texas Crim. App. 617.

If the fatal shot was intentionally and recklessly fired into an occupied house the homicide would not be negligent homicide, and it is not error to so charge the jury. Russell v. State, 38 Texas Crim. Rep. 596; 44 S. W. 159. Holland v. State, 55 Texas Crim. Rep. 27; 115 S. W. 48.

If all the testimony shows an intentional killing the court should not charge the jury on negligent homicide. Dwyer v. State, 12 Texas Crim. App. 540. Ruth-

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erford v. State, 15 Texas Crim. App. 248. Houston v. State, 34 Texas Crim. Rep. 587; 31 S. W. 403. Flynn v. State, 43 Texas Crim. Rep. 407; 66 S. W. 551.

Negligent homicide is not an issue where the homicide was committed in sudden passion by striking deceased an intentional blow. Rutherford v. State, 15 Texas Crim. App. 248.

In the cases of Robins v. State, 9 Texas Crim. App. 666 and Robins v. State, 9 Texas Crim App. 671, it was held that where there was no apparent intent to kill the court should charge on negligent homicide. These cases are not correct, for the facts showing an intentional blow without negligence, the issue of negligent homicide was not raised; on the contrary if the defendants did not intend to kill, but intended to beat the deceased with a stick, a weapon not necessarily deadly, but calculated to inflict, and which did inflict, serious bodily injury, the issue of aggravated assault but not of negligent homicide is raised.

If the State's case is an intentional shooting and defendant denies the shooting, and there is no other evidence that the shot was fired with no apparent intention to kill, negligent homicide is not an issue. Clifton v. State, 47 Texas Crim. Rep. 478; 84 S. W. 237.

If defendant was attempting to shoot deceased and his pistol was accidentally discharged while deceased was trying to take it away from him the issue of negligent homicide is not in the case. Williams v. State, 45 Texas Crim. Rep. 218; 75 S. W. 859.

Art. 1120. (690) (585) **Homicide must be consequence of the act.**—The homicide must be the consequence of the act done or attempted to be done. (O. C. 585.)

Art. 1121. (691) (586) **Punishment.**—Negligent homicide of the first degree shall be punished by confinement in the county jail not exceeding one year, or by fine not exceeding one thousand dollars. (O. C. 586.)

Sec. 1991. **Indictment.**—Indictment for negligent homicide in the first degree held good. Morris v. State, 35 Texas Crim. Rep. 314.

A conviction for negligent homicide may be had under an ordinary indictment for murder. Bradshaw v. State, 50 S. W. 359. Windham v. State, 173 S. W. 661.

Sec. 1992. **Former jeopardy.**—If defendant was convicted of negligent homicide and the conviction was set aside he is acquitted of all higher grades of homicide. Flynn v. State, 43 Texas Crim. Rep. 408; 66 S. W. 551.

2. In the Performance of an Unlawful Act.

Art. 1122. (692) (587) **Previous rules apply to second degree.**—The definitions, rules and provisions of the preceding articles of this chapter, with respect to negligent homicide of the first degree, apply also to the offense of negligent homicide of the second degree, or such as is committed in the prosecution of an unlawful act, except when contrary to the following provisions. (O. C. 587.)

Art. 1123. (693) (588) **Can only be committed, when.**—Negligent homicide of the second degree can only be committed when the person guilty thereof is in the act of committing or attempting the commission of an unlawful act. (O. C. 588.)

Art. 1124. (694) (589) **"Unlawful act" includes what.**—Within the meaning of an "unlawful act" as used in this chapter are included:

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1. Such acts as by the penal law are called misdemeanors; and
2. Such acts, not being penal offenses, as would give just occasion for a civil action. (O. C. 589.)

Sec. 1993. **Negligent homicide in the second degree.**—If there is evidence that the homicide was accidental and the result of negligence while defendant was in the performance of an unlawful act, not a felony, producing an apparent danger of death, the court should charge on negligent homicide in the second degree. Curtis v. State, 22 Texas Crim. App. 238; 3 S. W. 86. Mitchell v. State, 36 Texas Crim. Rep. 315; 36 S. W. 456. Sewall v. State, 148 S. W. 569. Hill v. State, 161 S. W. 119. Chant v. State, 166 S. W. 513. Egbert v. State, 176 S. W. 560.

The court is authorized to charge on negligent homicide in the second degree if there is evidence to support the theory that defendant shot only to scare deceased and killed him while he was not attacking or about to attack defendant. Reddick v. State, 47 S. W. 995. Saye v. State, 50 Texas Crim. Rep. 574; 99 S. W. 551.

The court should charge on negligent homicide in the second degree if there is evidence raising the theory of no apparent intent to kill and that defendant was rudely displaying his pistol and that such conduct might and did produce an apparent danger of causing death. Howard v. State, 25 Texas Crim. App. 692; 8 S. W. 929. Brittain v. State, 36 Texas Crim. Rep. 412; 37 S. W. 758 (court did and charge was correct). Windham v. State, 173 S. W. 661.

Sec. 1994. **Homicide caused by rudely displaying a pistol.**—If the defendant is rudely displaying a pistol and there is apparent danger of causing the death of the deceased or another, and the homicide is committed with no apparent intention of killing, it is negligent homicide in the second degree. Howard v. State, 25 Texas Crim. App. 692; 8 S. W. 929. Brittain v. State, 36 Texas Crim. Rep. 412; 37 S. W. 758 (correct charge). Russell v. State, 38 Texas Crim. Rep. 596; 44 S. W. 159. Sewall v. State, 148 S. W. 569. Windham v. State, 173 S. W. 661.

Art. 1125. (695) (590) **When intent is to commit a felony.**—When one in the execution of or in attempting to execute an act made a felony by the penal law, shall kill another, though without an apparent intention to kill, the offense does not come within the definition of negligent homicide. (O. C. 590.)

Sec. 1995. **Unintentional killing in attempt at felony.**—A homicide committed in the execution of or in attempting to execute an act made a felony, though without an apparent intention to kill, is not negligent homicide. McConnell v. State, 13 Texas Crim. App. 390. Clark v. State, 19 Texas Crim. App. 495. Richards v. State, 35 Texas Crim. Rep. 38; 30 S. W. 805. Holland v. State, 55 Texas Crim. Rep. 27; 115 S. W. 48.

Where defendant in the unlawful attempt to kill one person unintentionally kills one whom he did not intend to injure the offense is not negligent homicide. The subject is briefed at length in section 1901.

Art. 1126. (696) (591) **In attempt at misdemeanor, punishment.**—When the unlawful act attempted or executed is known as a misdemeanor, the punishment of negligent homicide committed in the execution of such unlawful act shall be imprisonment in the county jail not exceeding three years, or by fine not exceeding three thousand dollars. (O. C. 591.)

Art. 1127. (697) (592) **Punishment.**—If the act intended is one for which an action would lie, but not an offense against the penal law, the homicide resulting therefrom is a misdemeanor, and may be punished by fine not exceeding one thousand dollars, and by imprisonment in the county jail not exceeding one year. (O. C. 592.)

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Sec. 1996. **Other rules as to charge on negligent homicide.**—The court should charge on negligent homicide if such theory finds support in the testimony. Elliston v. State, 10 Texas Crim. App. 361. Sewall v. State, 148 S. W. 569. Whiten v. State, 160 S. W. 462. Hill v. State, 161 S. W. 119. Chant v. State, 166 S. W. 513.

The charge does not shift the burden where in applying the law to the facts it authorizes a conviction for negligent homicide if the jury believe beyond a reasonable doubt the facts which are necessary to constitute that offense. Talbot v. State, 58 Texas Crim. Rep. 324; 125 S. W. 907.

If the jury are instructed that if the killing was an accident they should acquit, it is not reversible error to fail to charge on negligent homicide. Garner v. State, 24 S. W. 420. Becknell v. State, 47 Texas Crim. Rep. 240; 82 S. W. 1039. Combs v. State, 52 Texas Crim. Rep. 616; 108 S. W. 649. Joy v. State, 57 Texas Crim. Rep. 102; 123 S. W. 588.

If defendant claims he shot to scare deceased and killed him accidentally and the court instructs the jury that if the homicide so occurred they should acquit, it is not error to fail to charge on negligent homicide. Joy v. State, 57 Texas Crim. Rep. 102; 123 S. W. 588.

CHAPTER XV

MANSLAUGHTER

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Article 1128. (698) (593) **Definition of manslaughter.**—Manslaughter is voluntary homicide committed under the immediate influence of sudden passion arising from an adequate cause, but neither excused nor justified by law. (O. C. 594.)

Sec. 1997. **Form of indictment.**

In the name and by authority of the State of Texas:

The grand jury of ..... county, State of Texas, organized at the ..... term, A. D. ....., of the District Court of said county, in said court at said term do present that John Doe on the ..... day of ..... A. D. ....., in said county and State did while under the immediate influence of sudden passion arising from an adequate cause voluntarily kill ..... by shooting the said ..... with a gun (or "cutting the said ..... with a knife," or whatever the means was), the said homicide being then and there neither justified nor excused by law.

Against the peace and dignity of the State.

.....

Foreman of the grand jury.

Sec. 1998. **Indictment for manslaughter.**—An indictment in the common-law form for manslaughter does not charge that offense under our statutes, since man-

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slaughter and negligent homicide, as defined by our statutes, was embraced in the common-law definition of manslaughter. Jennings v. State, 7 Texas Crim. App. 350.

Sec. 1999. **Limitation.**—Under the present statute, manslaughter is barred if the indictment is not presented within three years from the commission of the offense, and under an indictment for murder a conviction cannot be legally had for manslaughter if such indictment was not presented within such time. White v. State, 4 Texas Crim. App. 488. Fulcher v. State, 33 Texas Crim. Rep. 22; 24 S. W. 292.

On appeal from a conviction of manslaughter it must appear from the statement of facts that the homicide was committed at a time prior to the presentment of the indictment, and the record must further show that the offense was not barred at the time of such presentment. Temple v. State, 15 Texas Crim. App. 315.

Art. 1129. (699) (594) **"Under the influence of sudden passion" explained.**—By the expression "under the immediate influence of sudden passion" is meant:

1. That the provocation must arise at the time of the commission of the offense, and that the passion is not the result of a former provocation.

2. The act must be directly caused by the passion arising out of the provocation. It is not enough that the mind is merely agitated by passion arising from some other provocation, or a provocation given by some person other than the party killed.

3. The passion intended is either of the emotions of the mind known as anger, rage, sudden resentment, or terror, rendering it incapable of cool reflection. (O. C. 596.)

Sec. 2000. **Cooling time.**—If the charge of the court affirmatively submits as adequate cause the matters occurring at the former difficulty or at the former and the fatal difficulty, the failure to charge on "cooling time" is favorable to defendant. Ham v. State, 98 S. W. 878. Mosley v. State, 61 Texas Crim. Rep. 297; 135 S. W. 148. Myers v. State, 160 S. W. 679.

It is proper to charge "cooling time" from the standpoint of "a person of ordinary temper." Hurst v. State, 40 Texas Crim. Rep. 380; 46 S. W. 635.

If the adequate cause relied on is an insult to a female relation, it is error to charge the jury that if defendant's mind had time to cool the homicide would not be manslaughter. Eanes v. State, 10 Texas Crim. App. 450. Orman v. State, 24 Texas Crim. App. 504; 6 S. W. 544. Jones v. State, 33 Texas Crim. Rep. 499; 26 S. W. 1082.

The issue of "cooling time" is not involved if the adequate cause be an insult to a female relation; the question then is, was defendant cool? Eanes v. State, 10 Texas Crim. App. 450. Orman v. State, 24 Texas Crim. App. 504; 6 S. W. 544. Halliburton v. State, 32 Texas Crim. Rep. 56; 22 S. W. 48. Jones v. State, 33 Texas Crim. Rep. 492; 26 S. W. 1082. Franks v. State, 47 Texas Crim. Rep. 644; 88 S. W. 923.

If an insult to a female relation is not the provocation, then however great the provocation may have been, if there be sufficient time for the passion to subside and for reason to interpose, an unlawful homicide is murder. Mackey v. State, 13 Texas Crim. App. 363. Wadlington v. State, 19 Texas Crim. App. 275. Franks v. State, 47 Texas Crim. Rep. 644; 88 S. W. 923.

If an insult to a female relation is not involved, it is not error to charge the jury that if sufficient time had elapsed since the first difficulty for the passion caused thereby to subside and for defendant's reason to interpose so as to comprehend the consequences of the act about to be committed then the homicide would not be manslaughter, and it is not error to fail to require the jury to find as a fact that defendant

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was cool. Surrell v. State, 29 Texas Crim. App. 324; 15 S. W. 816. Franks v. State, 47 Texas Crim. Rep. 644; 88 S. W. 923. Williams v. State, 148 S. W. 769.

If "cooling time" is an issue, the jury and not the court is entitled to decide whether or not defendant's mind had time to cool. Mackey v. State, 13 Texas Crim. App. 363. Murray v. State, 35 S. W. 990. Ross v. State, 53 Texas Crim. Rep. 279; 109 S. W. 194.

When there is evidence also raising the issue of manslaughter on account of matters occurring at the time of the final difficulty, it is error to charge the jury that if defendant's mind had time to cool they would not consider the question of manslaughter. Cooper v. State, 49 Texas Crim. Rep. 30; 89 S. W. 1068.

If the difficulty was a continuous one from its inception to its close, it is not necessary to charge on cooling time. Hancock v. State, 47 Texas Crim. Rep. 7; 83 S. W. 696. Ivory v. State, 48 Texas Crim. Rep. 282; 87 S. W. 699. Armstrong v. State, 50 Texas Crim. Rep. 26; 96 S. W. 15. Perkins v. State, 97 S. W. 1047. Long v. State, 59 Texas Crim. Rep. 113; 127 S. W. 551.

It is not necessary to charge on "cooling time" where the first difficulty was not of sufficient importance to have been adequate cause, and especially where the court authorizes the jury, in determining the adequacy of the provocation arising at the time of the homicide, to look to all the other facts and circumstances in the case. Miller v. State, 27 Texas Crim. App. 63; 10 S. W. 445. Thomas v. State, 49 Texas Crim. Rep. 643; 95 S. W. 1069. Jay v. State, 52 Texas Crim. Rep. 571; 109 S. W. 131. Jay v. State, 56 Texas Crim. Rep. 113; 120 S. W. 449. Johnson v. State, 167 S. W. 742.

Where there are two different difficulties and defendant was the aggressor in the first, or entered into it willingly and without having had great bodily injury inflicted upon him, adequate cause could not be predicated on such first difficulty and "cooling time" would not be an issue. Cole v. State, 35 Texas Crim. Rep. 385; 33 S. W. 968.

If there is evidence of adequate cause arising at the time of the homicide and also evidence of adequate cause arising from a previous difficulty, and the difficulty was not continuous and only a short time intervened, the court should charge on both phases of adequate cause and on cooling time in connection with the first. Murray v. State, 35 S. W. 990. Mundine v. State, 37 Texas Crim. Rep. 5; 38 S. W. 619. Castro v. State, 40 S. W. 985. Thomas v. State, 42 Texas Crim. Rep. 387; 56 S. W. 70. Cooper v. State, 48 Texas Crim. Rep. 36; 85 S. W. 1059. Brownlee v. State, 48 Texas Crim. Rep. 410; 87 S. W. 1153. Cooper v. State, 49 Texas Crim. Rep. 30; 89 S. W. 1068. Watson v. State, 50 Texas Crim. Rep. 173; 95 S. W. 115. Dixon v. State, 51 Texas Crim. Rep. 555; 103 S. W. 399. Ross v. State, 53 Texas Crim. Rep. 279; 109 S. W. 194. Love v. State, 158 S. W. 526.

If there is evidence of a previous difficulty between the parties a short time prior to the fatal difficulty and adequate cause could be predicated on the first, the court should charge on adequate cause based on the first difficulty in connection with cooling time. Wadlington v. State, 19 Texas Crim. App. 275 (2 minutes). Murray v. State, 35 S. W. 990 (2 minutes). Mundine v. State, 37 Texas Crim. Rep. 5; 38 S. W. 619 (one hour). Castro v. State, 40 S. W. 985. Thomas v. State, 42 Texas Crim. Rep. 387; 56 S. W. 70 (3 hours). Hayman v. State, 47 Texas Crim. Rep. 266; 83 S. W. 204 (20 minutes). Cooper v. State, 48 Texas Crim. Rep. 36; 85 S. W. 1059 (2 minutes). Brownlee v. State, 48 Texas Crim. Rep. 410; 87 S. W. 1153 (5 minutes). Cooper v. State, 49 Texas Crim. Rep. 30; 89 S. W. 1068 (20 minutes). Watson v. State, 50 Texas Crim. Rep. 173; 95 S. W. 115 (5 minutes). Dixon v. State, 51 Texas Crim. Rep. 555; 103 S. W. 399 (one hour). Ross v. State, 53 Texas Crim. Rep. 279; 109 S. W. 194 (5 minutes). Huddleston v. State, 54 Texas Crim. Rep. 96; 112 S. W. 64 (one and a half hours). Leggett v. State, 62 Texas Crim. Rep. 99; 136 S. W. 787 (one hour). Luttrell v. State, 143 S. W. 628 (3 minutes). Love v. State, 158 S. W. 526 (30 minutes).

When the issue of cooling time is in the case, it is proper for the court to charge thereon. Cox v. State, 60 Texas Crim. Rep. 471; 132 S. W. 125.

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Sec. 2001. **Passion from other provocation.**—The court should not charge the jury that it is not enough that the mind be agitated from some other provocation or a provocation given by some person other than the party killed, if there is evidence of a provocation given by a party acting together with deceased. Garcia v. State, 156 S. W. 941.

The charge of the court should not confine adequate cause to the acts of deceased if there is evidence that another was acting with deceased. Byrd v. State, 39 Texas Crim. Rep. 609; 47 S. W. 721. Stacy v. State, 48 Texas Crim. Rep. 97; 96 S. W. 327. Brown v. State, 54 Texas Crim. Rep. 127; 112 S. W. 80. Garcia v. State, 156 S. W. 941. House v. State, 171 S. W. 210.

If there is no evidence of any provocation except from deceased, the court should not charge the jury that it is not enough that the mind be agitated from some other provocation or a provocation given by some person other than the party killed. Fuller v. State, 54 Texas Crim. Rep. 460; 113 S. W. 541. Gallagher v. State, 55 Texas Crim. Rep. 52; 115 S. W. 46. Craft v. State, 57 Texas Crim. Rep. 260; 122 S. W. 547. McDowell v. State, 151 S. W. 1049.

Sec. 2002. **Proof of passion.**—When time elapses between the happening of the cause and the homicide, the existence of the passion becomes a material subject of inquiry; but where the fatal shot or stroke follows quickly on the cause and there is an absence of premeditation or of any other motive, then the existence of the passion may be assumed from the homicide itself as a presumption of fact. Childers v. State, 33 Texas Crim. Rep. 512; 27 S. W. 133.

Though certain facts, as a matter of law, are made adequate cause by statute, it is proper to leave it to the jury as to whether defendant's mind was incapable of cool reflection. Williams v. State, 24 Texas Crim. App. 666; 7 S. W. 333. Knowles v. State, 31 Texas Crim. Rep. 385; 20 S. W. 829. Fendrick v. State, 39 Texas Crim. Rep. 147; 45 S. W. 589. Warthan v. State, 41 Texas Crim. Rep. 389; 55 S. W. 55. Chatman v. State, 55 S. W. 346. Gillespie v. State, 53 Texas Crim. Rep. 168; 109 S. W. 158. Holcomb v. State, 54 Texas Crim. Rep. 489; 113 S. W. 755. Jordan v. State, 62 Texas Crim. Rep. 386; 137 S. W. 133. Oldham v. State, 63 Texas Crim. Rep. 527; 142 S. W. 13. Rogers v. State, 149 S. W. 129. Davis v. State, 163 S. W. 442.

Where the testimony tends to show that passion was aroused by an adequate cause, the question whether the act of killing was caused by the passion is for the jury and not for the court to pass upon. Mackey v. State, 13 Texas Crim. App. 360. Wadlington v. State, 19 Texas Crim. App. 266. Meuly v. State, 26 Texas Crim. App. 274; 9 S. W. 563.

The jury and not the court is entitled to pass on the question whether the act was caused by the passion, and it is error to charge the jury in effect that if deceased retreated and fled after striking defendant and that while so fleeing defendant shot him with intent to kill, the offense, if death resulted, would be murder. Mackey v. State, 13 Texas Crim. App. 360.

Art. 1130. (700) (595) **"Adequate cause" explained.**—By the expression "adequate cause" is meant such as would commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper sufficient to render the mind incapable of cool reflection. (O. C. 597.)

Sec. 2003. **Not error to charge on manslaughter.**—Giving a charge on manslaughter when that issue is not in the case is favorable to defendant, and when manslaughter is not an issue errors in the charge on manslaughter will not cause a reversal if the errors do not prejudice the other issues in the case. Pickens v. State, 31 Texas Crim. Rep. 554; 21 S. W. 362. Eggleston v. State, 59 Texas Crim. Rep. 548; 128 S. W. 1105. Alexander v. State, 63 Texas Crim. Rep. 102; 138 S. W. 721. Wysong v. State, 146 S. W. 941. Stewart v. State, 158 S. W. 996. Wilson v. State, 160 S. W. 86. Christian v. State, 161 S. W. 101. Johnson v. State, 167 S. W. 736.

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Sec. 2004. **Excepting to failure to charge on manslaughter.**—An exception that "the court erred in failing to charge on manslaughter" is too general to present the supposed error for revision; the exception to be sufficient to present the matter for revision should recite the facts showing wherein the issue of manslaughter was raised by the testimony. Mansfield v. State, 62 Texas Crim. Rep. 631; 138 S. W. 591. Luster v. State, 63 Texas Crim. Rep. 548; 141 S. W. 214. Teague v. State, 148 S. W. 1063. Garrett v. State, 155 S. W. 251. Chant v. State, 166 S. W. 513.

Sec. 2005. **"Person of ordinary temper."**—Though the defense is insanity, it is not error to use the statutory words "person of ordinary temper" in connection with the charge on manslaughter. Hurst v. State, 40 Texas Crim. Rep. 380; 46 S. W. 635.

The charge is erroneous if it requires the jury to regard defendant not only as a man of ordinary temper but also as a man of courage. Gardner v. State, 40 Texas Crim. Rep. 21; 48 S. W. 170.

Sec. 2006. **Illegal arrest as adequate cause.**—An illegal arrest, made or attempted, may be adequate cause. Meuly v. State, 26 Texas Crim. App. 274; 9 S. W. 563. Mooney v. State, 65 S. W. 927. Earles v. State, 94 S. W. 466.

If an officer was attempting to arrest defendant in a lawful manner and the defendant resisted such arrest and the officer then used more force than was necessary to effect the arrest, defendant would have the right to resist such excessive force, and if he killed the officer under such circumstances the homicide might be manslaughter. Hardin v. State, 40 Texas Crim. Rep. 220; 49 S. W. 607.

Whether the arrest is legal or illegal, if defendant is struck by the officer while the officer is in no danger the blow is adequate cause. An officer has no right to beat up a helpless prisoner. Scott v. State, 49 Texas Crim. Rep. 389; 93 S. W. 112.

If there is evidence that defendant did not know deceased was an officer, the charge should instruct the jury that he had a right to resist what appeared to him to be an illegal arrest and that if he was struck by the officer the blow would be adequate cause and that if passion was thereby engendered he would be guilty of no higher offense than manslaughter. Scott v. State, 49 Texas Crim. Rep. 389; 93 S. W. 112.

(See "Homicide in resisting arrest," section 1976.)

Sec. 2007. **Excessive force may raise issue of manslaughter.**—If defendant fired the first shot or shots in self-defense and then fired the fatal shot after it appeared to him that the danger was passed and was over, the firing of such subsequent shot raises the issue of manslaughter. West v. State, 2 Texas Crim. App. 476. Mackey v. State, 13 Texas Crim. App. 360. Hobbs v. State, 16 Texas Crim. App. 523. Gregory v. State, 48 S. W. 579. Tollett v. State, 55 S. W. 575. Hall v. State, 43 Texas Crim. Rep. 259; 64 S. W. 248. Hooper v. State, 44 Texas Crim. Rep. 128; 69 S. W. 149. Cooper v. State, 49 Texas Crim. Rep. 31; 89 S. W. 1068. St. Clair v. State, 49 Texas Crim. Rep. 483; 92 S. W. 1095. Johnson v. State, 63 Texas Crim. Rep. 50; 138 S. W. 1021. Mason v. State, 163 S. W. 66. McCampbell v. State, 174 S. W. 347.

If deceased was attacking defendant with his fists or with other means which was not sufficient to produce a reasonable expectation or fear of death or serious bodily injury defendant would have a right to defend himself against such attack, but the use of excessive force where there was other means at hand, other than retreat, reasonably proper and effective to protect himself from the injury would raise the issue of manslaughter. Reynolds v. State, 14 Texas Crim. App. 435. Brande v. State, 45 S. W. 17. Gardner v. State, 40 Texas Crim. Rep. 19; 48 S. W. 170. Riley v. State, 81 S. W. 711. Floyd v. State, 52 Texas Crim. Rep. 103; 105 S. W. 791. Brown v. State, 54 Texas Crim. Rep. 126; 112 S. W. 80. Vinson v. State, 55 Texas Crim. Rep. 493; 117 S. W. 846.

If defendant interferes for the protection of another where deceased was the aggressor and such interference was not in pursuance of a previously formed design, manslaughter is an issue if defendant used more force than was reasonably necessary for protection and killed the deceased. Moffatt v. State, 35 Texas Crim. Rep. 257; 33 S. W. 344.

If the testimony supports the theory that the deceased had ceased the attack or if the weapon of deceased was not one that by the manner and use of it was calcu-

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lated to kill or inflict serious bodily injury and defendant's mind became excited beyond cool reflection, the issue of manslaughter is raised. Brande v. State, 45 S. W. 17. Riley v. State, 81 S. W. 711. Harris v. State, 48 Texas Crim. Rep. 627; 89 S. W. 1064. Johnson v. State, 63 Texas Crim. Rep. 50; 138 S. W. 1021.

Sec. 2008. **Manslaughter from imperfect self-defense.**—The charge of the court should not ignore the phases of manslaughter which may arise on account of imperfect self-defense. Franklin v. State, 30 Texas Crim. App. 628; 18 S. W. 468. Nicks v. State, 46 Texas Crim. Rep. 241; 79 S. W. 35. Brown v. State, 54 Texas Crim. Rep. 126; 112 S. W. 80.

If defendant was attacked by deceased while taken in the act of adultery with the wife of deceased, defendant would have the imperfect right of self-defense, and, adultery being a misdemeanor, the homicide, which would otherwise be in self-defense, would be manslaughter. Reed v. State, 11 Texas Crim. App. 509.

Defendant would be a wrongdoer if he went to the house of deceased for the purpose of receiving carnal favors from the wife of the deceased, and the homicide, which otherwise would be in self-defense, would be manslaughter. Franklin v. State, 30 Texas Crim. App. 641; 18 S. W. 468. Nicks v. State, 46 Texas Crim. Rep. 241; 79 S. W. 35.

Where defendant was a mere trespasser upon the premises of another, and without any intent to kill or to inflict serious bodily injury, thus produced the occasion which resulted in his shooting an occupant of the premises, his right of self-defense would be imperfect and such as would cause the homicide, which otherwise would be in self-defense, to amount to manslaughter. King v. State, 13 Texas Crim. App. 283. Arto v. State, 19 Texas Crim. App. 136. Roach v. State, 21 Texas Crim. App. 254; 17 S. W. 464.

A verbal provocation does not justify an assault, and if defendant resents a verbal provocation by a simple assault and is then forced to kill to protect himself the homicide will be manslaughter though defendant did not intend to provoke a difficulty; defendant being held responsible for the reasonable and natural consequences of his act. Polk v. State, 30 Texas Crim. App. 657; 18 S. W. 466.

Sec. 2009. **Causes not named in the statute.**—The circumstances or conditions which may constitute adequate cause are not restricted to those specifically named in the statute as adequate causes; other causes may exist, and if there is evidence which supports the theory of adequate cause and that the killing was on passion arising therefrom the court is not the judge of its probable truth, but should leave it to the jury. Johnson v. State, 43 Texas 615. West v. State, 2 Texas Crim. App. 460. Guffee v. State, 8 Texas Crim. App. 201. Rutherford v. State, 15 Texas Crim. App. 247. Sterling v. State, 15 Texas Crim. App. 257. Williams v. State, 15 Texas Crim. App. 623. Wadlington v. State, 19 Texas Crim. App. 273. Childers v. State, 33 Texas Crim. Rep. 512; 27 S. W. 133. Rice v. State, 51 Texas Crim. Rep. 285; 103 S. W. 1156.

It is not always essential that the blow be actually struck, nor is bodily pain absolutely essential to adequate cause, but any circumstance or condition such as would commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper sufficient to render the mind incapable of cool reflection is adequate cause. Rutherford v. State, 15 Texas Crim. App. 247. Williams v. State, 15 Texas Crim. App. 617. Meuly v. State, 26 Texas Crim. App. 274; 9 S. W. 563. Bonner v. State, 29 Texas Crim. App. 230; 15 S. W. 821. Childers v. State, 33 Texas Crim. Rep. 512; 27 S. W. 133. Gilcrease v. State, 33 Texas Crim. Rep. 619; 28 S. W. 531. Watson v. State, 50 Texas Crim. Rep. 175; 95 S. W. 115. Williams v. State, 61 Texas Crim. Rep. 361; 136 S. W. 771.

The adequate cause is estimated, not by pain, but passion. Williams v. State, 15 Texas Crim. App. 623. Wadlington v. State, 19 Texas Crim. App. 274.

An act standing alone may not be a sufficient provocation, but may be ample when it is one of a series of similar acts, or when it has been preceded by an insolent and aggravating course of conduct whether similar or not to the act committed at the time of the homicide. Wadlington v. State, 19 Texas Crim. App. 274. Johnson v.

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State, 22 Texas Crim. App. 226; 2 S. W. 609. Howard v. State, 23 Texas Crim. App. 280; 5 S. W. 231. Lienpo v. State, 28 Texas Crim. App. 179; 12 S. W. 588. Bracken v. State, 29 Texas Crim. App. 362; 16 S. W. 192. Baltrip v. State, 30 Texas Crim. App. 548; 17 S. W. 1106. Adams v. State, 42 Texas Crim. Rep. 366; 60 S. W. 47.

Manslaughter is an issue if there is testimony that deceased had imposed upon defendant by an insolent and aggravated course of conduct and was forced to desist and was carried away and that on the first meeting thereafter he used language or made demonstrations tending to show that he was about to renew his former provocations. Baltrip v. State, 30 Texas Crim. App. 548; 17 S. W. 1106.

The slaying of defendant's relative or friend in the immediate presence of defendant may constitute adequate cause. Guffee v. State, 8 Texas Crim. App. 201. Moore v. State, 26 Texas Crim. App. 333; 9 S. W. 610. Young v. State, 41 Texas Crim. Rep. 447; 55 S. W. 331.

An unprovoked assault on a friend may constitute adequate cause. Moore v. State, 26 Texas Crim. App. 333; 9 S. W. 610. Beckham v. State, 69 S. W. 536. Harrison v. State, 47 Texas Crim. Rep. 401; 83 S. W. 699. Casey v. State, 50 Texas Crim. Rep. 392; 97 S. W. 496.

Manslaughter may be raised by testimony that defendant heard of his brother being shot at and that when he went to the scene he was advanced on in a threatening manner by deceased. Thomas v. State, 48 Texas Crim. Rep. 68; 85 S. W. 1154.

The whipping by deceased of defendant's child may raise the issue of manslaughter. Maria v. State, 28 Texas 698.

The fact that armed men compelled defendant's hands to quit work may constitute adequate cause. Lyles v. State, 41 Texas 180.

The fact that armed men in a threatening manner ordered defendant to desist from doing that which he had a right to do may constitute adequate cause. Gilcrease v. State, 33 Texas Crim. Rep. 619; 28 S. W. 531.

The fact that deceased came into defendant's yard and called him out and cursed him may constitute adequate cause. Riptoe v. State, 42 S. W. 381.

Manslaughter is an issue if there is testimony that deceased "chunked" defendant's house at night and that defendant went out to protect his father who had gone for officers and met deceased and after some words shot him. Larson v. State, 29 S. W. 782.

An attempt to unlawfully seize the property of the defendant may raise the issue of manslaughter if such attempt aroused the passions of the defendant to such an extent as to render the mind incapable of cool reflection. Ledbetter v. State, 26 Texas Crim. App. 34; 9 S. W. 60.

If deceased was attempting to take away the child of defendant and it was not necessary to kill him to prevent it, the court should pertinently charge on this phase of manslaughter. Cole v. State, 45 Texas Crim. Rep. 225; 75 S. W. 527.

If the injury was inflicted in a cruel manner but not for the purpose of killing, the homicide may be manslaughter. Taylor v. State, 41 Texas Crim. Rep. 151; 51 S. W. 1106 (whipped child with a rope). Lee v. State, 44 Texas Crim. Rep. 460; 72 S. W. 195 (whipped baby with a belt). Betts v. State, 60 Texas Crim. Rep. 635; 133 S. W. 254 (beat child).

"In every case where it becomes a question whether or not there was an intention to kill on the part of the slayer suggested by the character of the weapon used not being deadly, it is the duty of the court to submit the issue of manslaughter." Johnson v. State, 42 Texas Crim. Rep. 377; 60 S. W. 48. (This case and the Taylor Lee, and Betts cases, cited in the preceding paragraph, indicate that the statute, article 1150 (720) by reason of its wording requires a charge of manslaughter though there be no adequate cause. The writer is of the opinion that the words that the slayer "is deemed guilty of murder or manslaughter according to the other facts of the case" mean simply, when imperfect self-defense is not involved, that if the circum-

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stances attending an unlawful homicide show an evil or cruel disposition or that it was the intention of the slayer to kill, he is deemed guilty of murder if there is no adequate cause or manslaughter if there is an adequate cause, though the instrument or the means used may not in their nature be such as to ordinarily produce death. Hill v. State, 11 Texas Crim. App. 470.)

The mere fact that the injured party advanced on defendant is not sufficient of itself to constitute adequate cause where he stopped when defendant drew his pistol and then turned and fled. Smith v. State, 20 S. W. 831.

If there is no intention to kill, yet if the means used in an unlawful killing were in their nature calculated to produce death and the killing is under sudden passion, the slayer would be guilty of manslaughter. Thompson v. State, 24 Texas Crim. App. 386; 6 S. W. 296.

Art. 1131. (701) (596) **What are not adequate causes.**—Insulting words or gestures, or an assault and battery so slight as to show no intention to inflict pain or injury, or an injury to property unaccompanied by violence, are not adequate causes. (O. C. 598.)

Sec. 2010. **Insulting words to defendant.**—Insulting words which are merely an insult to defendant himself and not in the nature of a slander or insult towards his female relation are not sufficient, of themselves, to constitute adequate cause. Atkinson v. State, 20 Texas 530. Boyett v. State, 2 Texas Crim. App. 100. Clore v. State, 26 Texas Crim. App. 628; 10 S. W. 242. Graham v. State, 33 S. W. 537. Fitzpatrick v. State, 37 Texas Crim. Rep. 34; 38 S. W. 806. Swann v. State, 39 Texas Crim. Rep. 317; 46 S. W. 36. Bruster v. State, 50 Texas Crim. Rep. 150; 95 S. W. 1066. Lara v. State, 50 Texas Crim. Rep. 164; 95 S. W. 1083. Washington v. State, 50 Texas Crim. Rep. 356; 96 S. W. 1084. Davis v. State, 57 Texas Crim. Rep. 549; 124 S. W. 104. Woods v. State, 159 S. W. 1183. Wilson v. State, 160 S. W. 86. Shaw v. State, 160 S. W. 103. Trevino v. State, 161 S. W. 109. Johnson v. State, 167 S. W. 736. Ahearn v. State, 179 S. W. 1150.

To call defendant "a son of a bitch" is to use insulting words to defendant, but the use of such words is not a predicate for manslaughter on the theory that it is an insult to his mother. Simmons v. State, 23 Texas Crim. App. 653; 5 S. W. 208. Granger v. State, 24 Texas Crim. App. 45; 5 S. W. 648. Levy v. State, 28 Texas Crim. App. 210; 12 S. W. 596. Barbee v. State, 34 Texas Crim. Rep. 129; 29 S. W. 776. Fitzpatrick v. State, 37 Texas Crim. Rep. 34; 38 S. W. 806. Driver v. State, 65 S. W. 528. Hayman v. State, 47 Texas Crim. Rep. 266; 83 S. W. 204. Washington v. State, 50 Texas Crim. Rep. 356; 96 S. W. 1084. Davis v. State, 57 Texas Crim. Rep. 549; 124 S. W. 104. Woods v. State, 159 S. W. 1183. Wilson v. State, 160 S. W. 86. Johnson v. State, 167 S. W. 736. Ahearn v. State, 179 S. W. 1150.

If the proof shows that insulting words were addressed to defendant but were not in the nature of a slander to any of his female relations, it is not error to charge the jury that insulting words are not deemed adequate cause. Davis v. State, 57 Texas Crim. Rep. 549; 124 S. W. 106.

The court should not charge the jury that insulting words are not adequate cause if such words are coupled with other insulting and aggravating conduct. Reagan v. State, 157 S. W. 486.

Sec. 2011. **Slight assault and battery.**—It is error to charge the jury that an assault and battery so slight as to show no intention to inflict injury is not adequate cause, when the assault, if made at all, was not of that nature and caused pain or bloodshed or was calculated to do so, and was evidently made, if made, with intent to injure. Williams v. State, 25 Texas Crim. App. 224; 7 S. W. 666. Lee v. State, 54 Texas Crim. Rep. 382; 113 S. W. 301. Reagan v. State, 157 S. W. 486.

An assault too slight in itself to constitute adequate cause may become such by being coupled with insulting words. Wadlington v. State, 19 Texas Crim. App. 274.

An assault too slight to constitute adequate cause may become so if there is evidence that defendant thought deceased was about to draw a weapon. Shrivers v. State, 7 Texas Crim. App. 456.

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Sec. 2012. **Injury to property.**—An injury to property unaccompanied by violence is not adequate cause. Wisnoski v. State, 153 S. W. 318.

An attempt to seize property or excessive force in defense of property may raise the issue of manslaughter. Ledbetter v. State, 26 Texas Crim. App. 34; 9 S. W. 60. Milrainey v. State, 33 Texas Crim. Rep. 577; 28 S. W. 537. Andrews v. State, 76 S. W. 918.

Sec. 2013. **Accident is not adequate cause.**—Manslaughter is not an issue if murder and accident are the only two theories presented by the testimony. Wilson v. State, 60 Texas Crim. Rep. 1; 129 S. W. 613. Chant v. State, 166 S. W. 513.

When the State's case is that defendant murdered his wife and his claim is that the homicide was an accident, the issue of manslaughter is not raised by proof that she was whipping their child if there is no proof that the whipping was not such as she was entitled to inflict. Wilson v. State, 60 Texas Crim. Rep. 1; 129 S. W. 613.

It is error to fail to charge on manslaughter when there is evidence to support such theory, though defendant claims that the homicide was an accident. Green v. State, 58 Texas Crim. Rep. 428; 126 S. W. 860.

Sec. 2014. **When case is either murder or self defense.**—If the case is either murder or perfect self defense, it is not error to fail to charge on manslaughter. Williams v. State, 2 Texas Crim. App. 287. Grissom v. State, 4 Texas Crim. App. 387. Homberg v. State, 12 Texas Crim. App. 1. Self v. State, 28 Texas Crim. App. 409; 13 S. W. 602. Angus v. State, 29 Texas Crim. App. 62; 14 S. W. 443. Floyd v. State, 29 Texas Crim. App. 355; 16 S. W. 188. Mealer v. State, 32 Texas Crim. Rep. 102; 22 S. W. 142. McGrath v. State, 35 Texas Crim. Rep. 425; 34 S. W. 127. Hardcastle v. State, 36 Texas Crim. Rep. 562; 38 S. W. 186. Flournoy v. State, 42 S. W. 984. Ford v. State, 40 Texas Crim. Rep. 284; 50 S. W. 350. Solomon v. State, 65 S. W. 915. Greer v. State, 65 S. W. 1075. Cavaness v. State, 45 Texas Crim. Rep. 210; 74 S. W. 908. Lenz v. State, 48 Texas Crim. Rep. 2; 85 S. W. 1068. Jirou v. State, 53 Texas Crim. Rep. 18; 108 S. W. 655. Shelton v. State, 54 Texas Crim. Rep. 590; 114 S. W. 122. Ward v. State, 59 Texas Crim. Rep. 62; 126 S. W. 1146. Canon v. State, 59 Texas Crim. Rep. 408; 128 S. W. 146. Dougherty v. State, 59 Texas Crim. Rep. 471; 128 S. W. 401. Eggleston v. State, 59 Texas Crim. Rep. 548; 128 S. W. 1105. Moss v. State, 60 Texas Crim. Rep. 272; 131 S. W. 1088. Jennings v. State, 60 Texas Crim. Rep. 425; 132 S. W. 473. Alexander v. State, 63 Texas Crim. Rep. 102; 138 S. W. 721. Fifer v. State, 64 Texas Crim. Rep. 203; 141 S. W. 989. Kinney v. State, 144 S. W. 261. Treadway v. State, 144 S. W. 655. Burns v. State, 145 S. W. 364. Blue v. State, 148 S. W. 730. Summers v. State, 148 S. W. 774. Powdrill v. State, 155 S. W. 231. Shaw v. State, 161 S. W. 963. Johnson v. State, 167 S. W. 741.

Where no injuries were inflicted on the defendant and there is no proof of threats known to him prior to the homicide and no proof of any adequate cause, the mere fact that self defense is in the case from the standpoint of apparent danger does not raise the issue of manslaughter. Ford v. State, 40 Texas Crim. Rep. 284; 50 S. W. 350. Dougherty v. State, 59 Texas Crim. Rep. 471; 128 S. W. 402. Luster v. State, 63 Texas Crim. Rep. 541; 141 S. W. 214. Johnson v. State, 167 S. W. 736. Lamb v. State, 168 S. W. 534. Lamb v. State, 169 S. W. 1158.

It is error to fail to charge on manslaughter when there is evidence to support such theory, though defendant claims self defense. Bonner v. State, 29 Texas Crim. App. 230; 15 S. W. 821. Swain v. State, 48 Texas Crim. Rep. 98; 86 S. W. 335. Nelson v. State, 48 Texas Crim. Rep. 274; 87 S. W. 143. Lara v. State, 48 Texas Crim. Rep. 572; 89 S. W. 840. Rice v. State, 51 Texas Crim. Rep. 285; 103 S. W. 1156. Miller v. State, 52 Texas Crim. Rep. 78; 105 S. W. 502. Lee v. State, 54 Texas Crim. Rep. 385; 113 S. W. 301. Green v. State, 58 Texas Crim. Rep. 428; 126 S. W. 860. Williams v. State, 61 Texas Crim. Rep. 361; 136 S. W. 771.

If the issue is raised that defendant in exercising his right to defend himself acted with undue precipitation against the demonstration of his adversary, the court should charge on manslaughter. Rutherford v. State, 15 Texas Crim. App. 247. Bonner v. State, 29 Texas Crim. App. 230; 15 S. W. 821. Cooper v. State, 49 Texas Crim. Rep. 31; 89 S. W. 1068. Rice v. State, 51 Texas Crim. Rep. 285; 103 S. W.

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1156. Floyd v. State, 52 Texas Crim. Rep. 103; 105 S. W. 791. Casey v. State, 54 Texas Crim. Rep. 587; 113 S. W. 534.

Sec. 2015. **Threats as affecting adequate cause.**—The mere fact that threats by deceased are shown does not of itself raise the issue of manslaughter. Jackson v. State, 30 Texas Crim. App. 664; 18 S. W. 643. Blount v. State, 58 Texas Crim. Rep. 509; 126 S. W. 570. Hardeman v. State, 61 Texas Crim. Rep. 113; 133 S. W. 1057.

An overt act which is insufficient to show that deceased was about to execute his threat and which may be insufficient to even raise the issue of self defense is sufficient to raise the issue of manslaughter if there is evidence that the threat was known to defendant prior to the homicide. Reed v. State, 9 Texas Crim. App. 318. Brunet v. State, 12 Texas Crim. App. 521. Neyland v. State, 13 Texas Crim. App. 549. Johnson v. State, 22 Texas Crim. App. 225; 2 S. W. 609. Howard v. State, 23 Texas Crim. App. 265; 5 S. W. 231. Alexander v. State, 25 Texas Crim. App. 266; 7 S. W. 867. Harris v. State, 15 S. W. 172. Swain v. State, 48 Texas Crim. Rep. 98; 86 S. W. 335. Lundy v. State, 48 Texas Crim. Rep. 218; 87 S. W. 352. Lara v. State, 48 Texas Crim. Rep. 572; 89 S. W. 840. Harris v. State, 48 Texas Crim. Rep. 627; 89 S. W. 1064. Fuller v. State, 95 S. W. 1039. Clark v. State, 51 Texas Crim. Rep. 521; 102 S. W. 1136. Burnett v. State, 53 Texas Crim. Rep. 518; 112 S. W. 74. Williams v. State, 61 Texas Crim. Rep. 361; 136 S. W. 771. Masters v. State, 160 S. W. 693.

In connection with previous threats known to defendant prior to the homicide, a sudden meeting whereby defendant became incapable of cool reflection and apprehensive of death or serious bodily injury may raise the issue of manslaughter. Howard v. State, 23 Texas Crim. App. 279; 5 S. W. 231. Swain v. State, 48 Texas Crim. Rep. 99; 86 S. W. 335. Yancy v. State, 48 Texas Crim. Rep. 172; 87 S. W. 693. Anderson v. State, 60 Texas Crim. Rep. 314; 131 S. W. 1124.

Manslaughter is an issue if there is evidence of previous trouble between the parties and of a threat and demonstration by deceased at the time of the homicide. Franklin v. State, 48 S. W. 178. Swain v. State, 48 Texas Crim. Rep. 98; 86 S. W. 335. Williams v. State, 61 Texas Crim. Rep. 361; 136 S. W. 771.

Art. 1132. (702) (597) **What are adequate causes.**—The following are deemed adequate causes:

1. An assault and battery by the deceased, causing pain or bloodshed.

Sec. 2016. **Need not cause pain and bloodshed.**—If the proof does not show, without controversy, that the assault and battery by deceased caused pain and bloodshed, it is error to charge the jury that an assault and battery by deceased causing pain and bloodshed is adequate cause. Foster v. State, 8 Texas Crim. App. 252. Hardy v. State, 37 S. W. 737. Garner v. State, 45 Texas Crim. Rep. 310; 77 S. W. 798. Bagley v. State, 103 S. W. 874. Huddleston v. State, 54 Texas Crim. Rep. 96; 112 S. W. 64.

If the proof shows, without controversy, that the assault and battery caused pain and bloodshed, it is not reversible error to couple both results in the charge. Gilford v. State, 50 Texas Crim. Rep. 514; 114 S. W. 138. Anthony v. State, 62 Texas Crim. Rep. 155; 136 S. W. 1097.

Sec. 2017. **Defining "assault and battery."**—If the charge informs the jury that an assault and battery by deceased causing pain is adequate cause, it is not reversible error to fail to define the term "assault and battery." Bearden v. State, 44 Texas Crim. Rep. 583; 73 S. W. 17.

Sec. 2018. **Assault and battery as adequate cause.**—An assault and battery by the deceased, causing pain or bloodshed, is deemed an adequate cause, and the court should charge on manslaughter when there is evidence that the homicide was committed on sudden passion caused by such assault and battery. Williams v. State, 7 Texas Crim. App. 399. Luera v. State, 12 Texas Crim. App. 257. Jones v. State, 29 Texas Crim. App. 340; 15 S. W. 403. Guerrero v. State, 39 Texas Crim. Rep. 666; 47 S. W. 655. Folks v. State, 58 S. W. 98. Gardner v. State, 44 Texas Crim. Rep.

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572; 73 S. W. 13. Hjeronymous v. State, 47 Texas Crim. Rep. 366; 83 S. W. 708. Cooper v. State, 48 Texas Crim. Rep. 36; 85 S. W. 1059. Martinez v. State, 48 Texas Crim. Rep. 532; 89 S. W. 642. Fuller v. State, 95 S. W. 1039. Wood v. State, 150 S. W. 780. Herrera v. State, 170 S. W. 719.

If there is evidence of an assault and battery on defendant by deceased, it is not necessary that there be testimony in terms that it caused pain, but if such would be the natural consequence of such assault or if such assault amounted to such an indignity as would cause mental pain, it would be adequate cause. Danforth v. State, 44 Texas Crim. Rep. 114; 69 S. W. 159. Gardner v. State, 44 Texas Crim. Rep. 572; 73 S. W. 13. Hayman v. State, 47 Texas Crim. Rep. 266; 83 S. W. 204. Arnwine v. State, 49 Texas Crim. Rep. 5; 90 S. W. 39.

Manslaughter is an issue where there is evidence that the parties were strangers, and that defendant was assaulted and bent down and held and cursed by a stronger man. Gardner v. State, 44 Texas Crim. Rep. 573; 73 S. W. 13.

Where the parties are strangers, a sudden and unexpected attack in the dark inflicting wounds on defendant raises the issue of manslaughter. Recen v. State, 58 Texas Crim. Rep. 457; 126 S. W. 577.

Sec. 2019. **Charge on assault as adequate cause.**—If there is evidence of a condition or circumstance made adequate cause by statute, as an assault and battery by deceased causing pain or bloodshed, it is error to leave it to the jury to find whether it constitutes adequate cause; the charge should inform the jury that it is adequate cause. Hill v. State, 8 Texas Crim. App. 142. Griffin v. State, 40 Texas Crim. Rep. 316; 50 S. W. 366. Warthan v. State, 41 Texas Crim. Rep. 389; 55 S. W. 55. Connell v. State, 45 Texas Crim. Rep. 162; 75 S. W. 512. Dodson v. State, 45 Texas Crim. Rep. 571; 78 S. W. 940. Renow v. State, 49 Texas Crim. Rep. 285; 92 S. W. 801. Scott v. State, 49 Texas Crim. Rep. 390; 93 S. W. 112. Earles v. State, 94 S. W. 466. Lee v. State, 54 Texas Crim. Rep. 382; 113 S. W. 301. Gallagher v. State, 55 Texas Crim. Rep. 52; 115 S. W. 46. Hightower v. State, 56 Texas Crim. Rep. 250; 119 S. W. 691. Craft v. State, 57 Texas Crim. Rep. 260; 122 S. W. 547. Morrison v. State, 61 Texas Crim. Rep. 223; 135 S. W. 551. Leggett v. State, 62 Texas Crim. Rep. 99; 136 S. W. 787. Luttrell v. State, 143 S. W. 628. Williams v. State, 144 S. W. 620. Smith v. State, 148 S. W. 699. Gaines v. State, 148 S. W. 717. Rodriguez v. State, 155 S. W. 530.

If a condition or circumstance made adequate cause by statute is in evidence, the charge should not only inform the jury that the same is adequate cause, but should apply the law to the facts and instruct them, for example, that if the blow was struck and that it caused pain or bloodshed and that it aroused the defendant to such a degree of anger, rage, sudden resentment, or terror as rendered his mind incapable of cool reflection at the time of the homicide, that then he should not be found guilty of anything higher than manslaughter. Griffin v. State, 40 Texas Crim. Rep. 312; 50 S. W. 366. Attaway v. State, 41 Texas Crim. Rep. 399; 55 S. W. 45. Dodson v. State, 45 Texas Crim. Rep. 571; 78 S. W. 940. Ware v. State, 49 Texas Crim. Rep. 416; 92 S. W. 1095. Horn v. State, 50 Texas Crim. Rep. 409; 97 S. W. 822. Gillespie v. State, 53 Texas Crim. Rep. 167; 109 S. W. 158. Brown v. State, 54 Texas Crim. Rep. 126; 112 S. W. 80. Craft v. State, 57 Texas Crim. Rep. 260; 122 S. W. 548. Smith v. State, 148 S. W. 699. Gaines v. State, 148 S. W. 717. Rogers v. State, 149 S. W. 129. Hobbs v. State, 151 S. W. 809. Ware v. State, 152 S. W. 1074. Love v. State, 158 S. W. 526.

A charge is erroneous if it instructs the jury that an assault and battery by the deceased causing pain "might" constitute adequate cause. Connell v. State, 45 Texas Crim. Rep. 162; 75 S. W. 520.

A charge is erroneous if it instructs the jury that an assault and battery causing "severe" pain is adequate cause. Tickle v. State, 6 Texas Crim. App. 641.

2. A serious personal conflict, in which great injury is inflicted by the person killed, by means of weapons, or other instruments of violence, or by means of great superiority of personal strength, although the person guilty of the homicide was the aggressor; provided such

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aggression was not made with intent to bring on a conflict and for the purpose of killing.

Sec. 2020. **Great injury as adequate cause.**—Where defendant is the aggressor in a previous difficulty or enters into it willingly, adequate cause cannot be predicated upon the passion aroused by that difficulty, unless great bodily injury by means of weapons or other instruments of violence or by means of great superiority of personal strength was inflicted on defendant. Cole v. State, 35 Texas Crim. Rep. 385; 33 S. W. 968.

If there is evidence that defendant was the aggressor, but that such aggression was not made with the intent to bring on a conflict and for the purpose of killing or inflicting serious bodily injury upon the deceased, and that a serious personal conflict ensued in which great injury was inflicted upon the defendant by the deceased by means of weapons or other instruments of violence or by means of great superiority of personal strength, the court should charge on manslaughter upon this theory of statutory adequate cause. Lawrence v. State, 10 Texas Crim. App. 500. Ellison v. State, 12 Texas Crim. App. 582. Wood v. State, 150 S. W. 780.

When there is no testimony of a serious personal conflict in which great bodily injury was inflicted by deceased upon defendant, it is not necessary to charge on this theory of manslaughter. Wheeler v. State, 58 Texas Crim. Rep. 296; 125 S. W. 29.

3. Adultery of the person killed with the wife of the person guilty of the homicide, provided the killing occur as soon as the fact of an illicit connection is discovered.

Sec. 2021. **Adultery with wife as adequate cause.**—Adultery of deceased with the wife of the slayer is adequate cause, provided the killing occurred as soon as the fact of an illicit connection was discovered. (Homicide is justifiable when committed by the husband upon the person of one taken in the act of adultery with his wife, provided that the killing take place before the parties to the act of adultery have separated.) Williams v. State, 7 Texas Crim. App. 169. Paulin v. State, 21 Texas Crim. App. 436; 1 S. W. 453. Ex parte Jones, 31 Texas Crim. Rep. 447; 20 S. W. 983. Pickens v. State, 31 Texas Crim. Rep. 554; 21 S. W. 362. Morrison v. State, 39 Texas Crim. Rep. 522; 47 S. W. 369. Griffin v. State, 54 S. W. 586. Attaway v. State, 41 Texas Crim. Rep. 399; 55 S. W. 45. Doss v. State, 43 Texas Crim. Rep. 551; 67 S. W. 321. Finch v. State, 70 S. W. 207. Dewberry v. State, 74 S. W. 307. Richards v. State, 53 Texas Crim. Rep. 400; 110 S. W. 432.

If defendant relies on present adultery as justification and on former adultery as adequate cause, the charge is misleading if it instructs the jury that the homicide would be manslaughter if the killing occurred as soon as the fact of an illicit connection was "discovered." Dewberry v. State, 74 S. W. 307. Richards v. State, 53 Texas Crim. Rep. 400; 110 S. W. 432.

If adultery of deceased with the wife of the slayer is relied on as adequate cause, the charge is erroneous if in connection with this theory of manslaughter it instructs the jury that the provocation must arise at the time of the homicide or that the passion must not be the result of a former provocation. Paulin v. State, 21 Texas Crim. App. 436; 1 S. W. 453. Attaway v. State, 41 Texas Crim. Rep. 399; 55 S. W. 45.

If manslaughter is an issue on account of previous adultery of the deceased with the wife of the slayer, the charge should not only inform the jury that such adultery is adequate cause but should apply the law to the facts and instruct the jury that if the killing was on the first meeting after the fact of such illicit connection was made known to defendant and that the same caused passion to not find him guilty of anything higher than manslaughter. Attaway v. State, 41 Texas Crim. Rep. 399; 55 S. W. 45. Finch v. State, 70 S. W. 207.

If there is no question as to defendant's belief that his wife had been ravished by deceased and that the first time he saw deceased he pursued and killed him and

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there is no question as to the passion, no higher verdict than manslaughter should be sustained. Doss v. State, 43 Texas Crim. Rep. 551; 67 S. W. 321.

In the absence of passion that reduces murder to manslaughter, the adequate cause may become cogent evidence of malice. The existence of adequate cause alone will not reduce an unlawful homicide to manslaughter. Pickens v. State, 31 Texas Crim. Rep. 554; 21 S. W. 362.

Manslaughter is not an issue on account of the previous adultery of deceased with the wife of the slayer if the homicide did not occur on the first meeting of the parties after the slayer was informed of such adultery. Pickens v. State, 31 Texas Crim. Rep. 554; 21 S. W. 362.

4. Insulting words or conduct of the person killed towards a female relation of the party guilty of the homicide. (O. C. 599.)

Art. 1133. (703) (598) **Time of killing for insult to female.**—When it is sought to reduce the homicide to the grade of manslaughter by reason of the existence of the circumstances specified in the fourth subdivision of article 1132 of the Penal Code, it must appear that the killing took place immediately upon the happening of the insulting conduct, or the uttering of the insulting words, or so soon thereafter as the party killing may meet with the party killed, after having been informed of such insults. (O. C. 599a, Acts 1858, pp. 172 and 173.)

Sec. 2022. **"Meet" defined and construed.**—The word "meet" signifies that the parties were brought into such proximity as would enable the defendant to act in the premises, whether he was armed or unarmed. Pitts v. State, 29 Texas Crim. App. 377; 16 S. W. 189. Gillespie v. State, 53 Texas Crim. Rep. 168; 109 S. W. 158.

It is not error to refuse to charge the jury that the word "meet" means the first time that defendant came in contact with deceased while defendant was armed. Pitts v. State, 29 Texas Crim. App. 377; 16 S. W. 189.

Whether such a meeting as the law contemplates has taken place is ordinarily a question of fact for the jury. Pitts v. State, 29 Texas Crim. App. 379; 16 S. W. 189. Young v. State, 69 S. W. 153.

If it is an issue as to whether the homicide was on the first meeting after the insult was communicated to the slayer, the word "meet" should be defined and the issue submitted to the jury. Young v. State, 69 S. W. 153.

If the charge does not limit the meeting to a casual meeting, it is not error to fail to charge that the meeting may be an intended meeting. Allen v. State, 44 Texas Crim. Rep. 207; 70 S. W. 85.

Sec. 2023. **If defendant knew insult to be true.**—Insulting words of deceased toward a female relation of defendant is not adequate cause if defendant knew such words to be true. Redman v. State, 52 Texas Crim. Rep. 596; 108 S. W. 365. Redman v. State, 149 S. W. 670.

When there is evidence to support the theory that defendant knew the insulting words of deceased toward the female relation of defendant to be true, it is proper to charge the jury that if defendant knew such statement to be true it would not be adequate cause. Redman v. State, 52 Texas Crim. Rep. 596; 108 S. W. 365. Redman v. State, 149 S. W. 670.

Sec. 2024. **When insult to female is not adequate cause.**—Though there be evidence of insulting words or conduct of deceased toward a female relation of the slayer, it is not error to fail or refuse to charge on manslaughter on this theory if there is no evidence that the killing took place immediately upon the happening of the insulting conduct, or the uttering of the insulting words, or upon the first meeting of the parties after the slayer was informed of such insult. Gibson v. State, 23 Texas Crim. App. 414; 5 S. W. 314. Melton v. State, 24 Texas Crim. App.

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60; 5 S. W. 652. Parker v. State, 24 Texas Crim. App. 61; 5 S. W. 653. Evers v. State, 31 Texas Crim. Rep. 324; 20 S. W. 744. Bledsoe v. State, 34 S. W. 120. Hardcastle v. State, 36 Texas Crim. Rep. 562; 38 S. W. 186. Squires v. State, 54 S. W. 772. Townsell v. State, 78 S. W. 939. Ricks v. State, 48 Texas Crim. Rep. 268; 87 S. W. 1036. Tyler v. State, 48 Texas Crim. Rep. 611; 90 S. W. 33. Moss v. State, 60 Texas Crim. Rep. 272; 131 S. W. 1088. Mansfield v. State, 62 Texas Crim. Rep. 631; 138 S. W. 591.

If there is no evidence that defendant heard or was informed prior to the homicide of the insult to his female relation, it is not error to fail or refuse to charge on manslaughter based on the proof of such insult. Gibson v. State, 23 Texas Crim. App. 414; 5 S. W. 314. Cockerell v. State, 32 Texas Crim. Rep. 592; 25 S. W. 421.

Insulting words of deceased toward a female relation of defendant do not constitute adequate cause where defendant leaves without killing immediately upon the uttering of such insulting words. Evers v. State, 31 Texas Crim. Rep. 324; 20 S. W. 744. Pickens v. State, 31 Texas Crim. Rep. 554; 21 S. W. 362. Townsell v. State, 78 S. W. 939. Moss v. State, 60 Texas Crim. Rep. 272; 131 S. W. 1088.

An insult to a female in defendant's presence is not of itself adequate cause if she was not related to defendant nor then under his protection. Moody v. State, 59 S. W. 894.

A female defendant is not a relation of herself, and insulting words directed to her stand on the same basis as if she were a male. Moore v. State, 33 Texas Crim. Rep. 351; 26 S. W. 404. Bruster v. State, 50 Texas Crim. Rep. 149; 95 S. W. 1066.

Sec. 2025. **Failure to charge on insult.**—When there is testimony of insulting words or conduct of deceased toward a female relation of the slayer and evidence that the killing took place immediately upon the happening of the insulting conduct or the uttering of the insulting words, or on the first meeting of the parties after the slayer was informed of such insult, then there is evidence of adequate cause, and it is error to fail or refuse to charge on manslaughter on this theory of adequate cause, leaving it to the jury to determine whether the killing was on passion aroused thereby. Richardson v. State, 9 Texas Crim. App. 617. Smith v. State, 15 Texas Crim. App. 338. Williams v. State, 30 Texas Crim. App. 447; 17 S. W. 1071. Jones v. State, 33 Texas Crim. Rep. 492; 26 S. W. 1082. Morrison v. State, 39 Texas Crim. Rep. 522; 47 S. W. 369. Young v. State, 69 S. W. 153. McComas v. State, 75 S. W. 533. Willis v. State, 75 S. W. 796. Nelson v. State, 48 Texas Crim. Rep. 278; 87 S. W. 143. Fisher v. State, 50 Texas Crim. Rep. 471; 98 S. W. 852. Stapleton v. State, 56 Texas Crim. Rep. 425; 120 S. W. 866. Green v. State, 58 Texas Crim. Rep. 428; 126 S. W. 860.

Sec. 2026. **Female need not be present.**—The statute includes insulting words of deceased toward a female relation of the slayer whether she was present or absent when such words were uttered. Hudson v. State, 6 Texas Crim. App. 575.

Sec. 2027. **Insult need not offend female.**—The insulting words or conduct of deceased toward a female relation of the slayer need not necessarily be such as to cause offense to the female herself. Garrett v. State, 36 Texas Crim. Rep. 233; 36 S. W. 454. Young v. State, 69 S. W. 153. Wright v. State, 52 Texas Crim. Rep. 543; 107 S. W. 822. Rogers v. State, 149 S. W. 129.

Sec. 2028. **Adequate cause may be proof of malice.**—Though the homicide be on the first meeting after the insulting words or conduct of deceased toward the female relation of defendant was made known to defendant, yet if the mind of defendant at the time of the homicide was capable of cool reflection the homicide may be murder. The existence of adequate cause alone will not reduce an unlawful homicide to manslaughter. Breedlove v. State, 26 Texas Crim. App. 453; 9 S. W. 768. Massie v. State, 30 Texas Crim. App. 64; 16 S. W. 770. Ex parte Jones, 31 Texas Crim. Rep. 422; 20 S. W. 983. Jones v. State, 33 Texas Crim. Rep. 492; 26 S. W. 1082. Fendrick v. State, 39 Texas Crim. Rep. 147; 45 S. W. 589. Jones v. State, 47 Texas Crim. Rep. 515; 85 S. W. 5. Gillespie v. State, 53 Texas Crim. Rep. 168; 109 S. W. 158. Rogers v. State, 149 S. W. 129. Redman v. State, 149 S. W. 670. Davis v. State, 155 S. W. 549. Hicks v. State, 171 S. W. 767.

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Sec. 2029. **Passion a matter for the jury.**—When the statutory adequate cause of insulting words or conduct of deceased toward a female relation of the slayer is in evidence, the question whether the homicide was on passion is a proper subject of inquiry for the jury. Williams v. State, 24 Texas Crim. App. 666; 7 S. W. 333. Norman v. State, 26 Texas Crim. App. 227; 9 S. W. 606. Knowles v. State, 31 Texas Crim. Rep. 385; 20 S. W. 829. Jones v. State, 33 Texas Crim. Rep. 492; 26 S. W. 1082. Crews v. State, 34 Texas Crim. Rep. 544; 31 S. W. 373. Gillespie v. State, 53 Texas Crim. Rep. 168; 109 S. W. 158. Holcomb v. State, 54 Texas Crim. Rep. 489; 113 S. W. 755. Jordan v. State, 62 Texas Crim. Rep. 386; 137 S. W. 133. Oldham v. State, 63 Texas Crim. Rep. 527; 142 S. W. 13. Rogers v. State, 149 S. W. 129. Davis v. State, 163 S. W. 442.

A charge is erroneous if its effect is to instruct the jury that if defendant sought deceased for the purpose of killing him the previous insults to the female relation of defendant would not reduce the homicide to manslaughter; the controlling question is whether the homicide was the result of passion upon an adequate cause or whether it was done deliberately and upon a premeditated design. Halliburton v. State, 32 Texas Crim. Rep. 56; 22 S. W. 48.

Sec. 2030. **When insult is real cause of killing.**—If no other conclusion can be reached than that the insult to the wife of the defendant was the real cause of the killing, and that it was upon passion and on the first meeting, the case is not one of murder. Doss v. State, 43 Texas Crim. Rep. 551; 67 S. W. 321. Stewart v. State, 52 Texas Crim. Rep. 284; 106 S. W. 685.

If the killing was on the first meeting after defendant was informed of the insult to his female relation and was committed while his mind was incapable of cool reflection, it is immaterial whether the meeting with deceased was casual or intended or whether he waylaid the deceased. Halliburton v. State, 32 Texas Crim. Rep. 56; 22 S. W. 48. Allen v. State, 44 Texas Crim. Rep. 207; 70 S. W. 85. Nelson v. State, 48 Texas Crim. Rep. 278; 87 S. W. 143. Cheatham v. State, 57 Texas Crim. Rep. 442; 125 S. W. 565.

If the killing was on the first meeting after defendant was informed of the insult to his female relation and was committed while his mind was incapable of cool reflection, it is immaterial that he conspired with others to go with him to where deceased was. Nelson v. State, 48 Texas Crim. Rep. 278; 87 S. W. 143.

Sec. 2031. **Insult viewed from defendant's standpoint.**—If defendant believed that the insulting words or conduct of deceased toward his female relation were uttered or done, then such insult is real as to him, though in fact untrue. Jones v. State, 33 Texas Crim. Rep. 492; 26 S. W. 1082. Messer v. State, 43 Texas Crim. Rep. 107; 63 S. W. 643. Hudson v. State, 43 Texas Crim. Rep. 423; 66 S. W. 668. McAnear v. State, 43 Texas Crim. Rep. 518; 67 S. W. 117. Canister v. State, 46 Texas Crim. Rep. 223; 79 S. W. 24. Bays v. State, 50 Texas Crim. Rep. 551; 99 S. W. 561. Gillespie v. State, 53 Texas Crim. Rep. 168; 109 S. W. 158. Morrison v. State, 61 Texas Crim. Rep. 223; 135 S. W. 551. Sweat v. State, 178 S. W. 554.

If there is no controversy as to what defendant was informed deceased had said, it is error to charge the jury that it is for them to determine "as to just what" was told defendant. Fuller v. State, 50 Texas Crim. Rep. 21; 95 S. W. 541.

If the proof shows, without controversy, that defendant was informed of the insult, the court should not charge the jury on a theory that he had not been informed. Fuller v. State, 50 Texas Crim. Rep. 24; 95 S. W. 541.

When there is evidence to support the theory, the court should charge the jury that whether deceased had insulted the female relation or not, if defendant believed the report, the same to him was real, and if acting on such belief, and laboring under passion which rendered his mind incapable of cool reflection, he killed deceased upon the first meeting after being apprised of such insult, he would be guilty of no higher offense than manslaughter. The matter should be presented from the standpoint of the defendant. Jones v. State, 33 Texas Crim. Rep. 492; 26 S. W. 1082. Messer v. State, 43 Texas Crim. Rep. 107; 63 S. W. 643. Hudson v. State, 43 Texas Crim. Rep. 423; 66 S. W. 668. McAnear v. State, 43 Texas Crim. Rep. 518; 67 S. W. 117. Bays v. State, 50 Texas Crim. Rep. 551; 99 S. W. 561. Gillespie v. State,

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53 Texas Crim. Rep. 168; 109 S. W. 158. Morrison v. State, 61 Texas Crim. Rep. 223; 135 S. W. 551. Sweat v. State, 178 S. W. 554.

It is error to limit testimony of hearsay insults to the issue of the credibility of a witness who denied communicating the insults to defendant. Defendant's belief, and not the truth of the communication is the issue. Hill v. State, 52 Texas Crim. Rep. 245; 106 S. W. 145.

It is error to charge the jury that it must appear to them that the insult was the real cause of the killing; if defendant believed the report it would make no difference whether it was in fact true or not. McAnear v. State, 43 Texas Crim. Rep. 518; 67 S. W. 117.

Sec. 2032. **State's proof as to insult.**—For the purpose of showing that the claim of insult is a fabrication and that defendant was not informed of any such insult, the State may prove language or conduct of the female claimed to have been insulted which was said or done subsequent to the alleged insult and which is inconsistent with the theory that she was in fact insulted. Jones v. State, 38 Texas Crim. Rep. 105; 40 S. W. 807. Marsh v. State, 54 Texas Crim. Rep. 147; 112 S. W. 321. Proctor v. State, 54 Texas Crim. Rep. 259; 112 S. W. 770. Barbee v. State, 58 Texas Crim. Rep. 129; 124 S. W. 964. Long v. State, 59 Texas Crim. Rep. 103; 127 S. W. 554. Cameron v. State, 153 S. W. 867.

Where defendant's wife claims to have been insulted by deceased, the State may show that her son afterward went to work for deceased and that she, though knowing that fact, made no protest. Barbee v. State, 58 Texas Crim. Rep. 129; 124 S. W. 964.

When the female relation of defendant testifies to insults toward her by deceased, she may be impeached by proof of contradictory statements made either in the presence or the absence of defendant as to what the real insult was; such proof is admissible as going to show the improbability of her telling defendant what she testifies she told him. Proctor v. State, 54 Texas Crim. Rep. 259; 112 S. W. 770. Long v. State, 59 Texas Crim. Rep. 103; 127 S. W. 555.

If the female relation of the slayer testifies that prior to the homicide she informed him that deceased had insulted her, she may be impeached by proof that after the homicide she stated that deceased had not insulted her. Long v. State, 59 Texas Crim. Rep. 103; 127 S. W. 555.

Where defendant's female relation claimed to have informed him of an insult toward her by deceased, and as a part of the story claimed to have been related stated that a certain person told her of certain conduct of deceased toward her, the State may show that such person had not told her of such conduct. Long v. State, 59 Texas Crim. Rep. 103; 127 S. W. 554.

If defendant's wife testifies that deceased raped her and that she informed the defendant thereof, the State may prove an alibi for deceased as tending to render it improbable that defendant was so informed. Cameron v. State, 153 S. W. 867.

If there is testimony of insulting words of deceased toward a female relation of defendant, it is error to permit the State to prove complimentary remarks made about her by deceased on a previous occasion. Fossett v. State, 41 Texas Crim. Rep. 407; 55 S. W. 497.

As going to the intent of defendant, the State may ask him on cross examination if he would not have shot deceased on account of the insult even if deceased had not made the demonstration that defendant testified he made. Reagan v. State, 57 Texas Crim. Rep. 644; 124 S. W. 685.

Sec. 2033. **Proving similar statements of insulted female.**—If the State contends that the testimony of the female as to being insulted by deceased is a fabrication, defendant may sustain her testimony by proof of her statements made before the homicide which are in consonance with the disclosure claimed to have been made by her to defendant. Jones v. State, 38 Texas Crim. Rep. 103; 40 S. W. 807. Jones v. State, 38 Texas Crim. Rep. 119; 41 S. W. 638. Akin v. State, 56 Texas Crim. Rep. 328; 119 S. W. 863.

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Sec. 2034. **Defendant's proof as to the insult.**—Proof of an insult to the female before she became related to the defendant is admissible if it tends to shed light upon the insult relied on. Jones v. State, 33 Texas Crim. Rep. 492; 26 S. W. 1082.

To support the insult relied on, defendant may prove as original evidence remarks of deceased showing an inclination or tendency to become familiar with women. Messer v. State, 43 Texas Crim. Rep. 109; 63 S. W. 643. McAnear v. State, 43 Texas Crim. Rep. 520; 67 S. W. 117.

Letters from defendant's female relation written to deceased and letters of deceased, found in the possession of the deceased, are admissible though their contents were not known to defendant prior to the homicide if they support defendant's claim that the homicide was on account of improper relations between deceased and such female. McAnear v. State, 43 Texas Crim. Rep. 522; 67 S. W. 117.

Proof that defendant told others prior to the homicide of the insult offered to his female relation and proof of its apparent effect on him is admissible as tending to rebut the contention of the State that the defense was fabricated, and is also admissible as tending to show that the insult had been communicated to him. Hammond v. State, 28 Texas Crim. App. 415; 13 S. W. 605. Utzman v. State, 32 Texas Crim. Rep. 430; 24 S. W. 412. Jones v. State, 38 Texas Crim. Rep. 102; 40 S. W. 807. Messer v. State, 43 Texas Crim. Rep. 109; 63 S. W. 643.

To show the communication of the insult to him prior to the homicide, defendant may prove as original evidence that the witness had been told by the female relation of defendant about the insult and that the witness had in turn told defendant about it prior to the homicide; the fact that such relation also testifies to the communication does not preclude defendant from proving it by other witnesses. Jones v. State, 38 Texas Crim. Rep. 104; 40 S. W. 807.

If there is a fresh insult at the time of the homicide, defendant may prove prior insults to the same relation as tending to show that the killing was solely on account of the insult to his female relation although the killing was not on the first meeting after such prior insults. Richardson v. State, 28 Texas Crim. App. 221; 12 S. W. 870.

If defendant found his wife in company with deceased at a certain house, it is error to exclude proof of the general reputation of such house as a house of prostitution when the purpose is to show a basis for defendant's belief that his wife and deceased were unduly intimate. Young v. State, 54 Texas Crim. Rep. 420; 113 S. W. 277.

Though defendant testifies that he acted in self defense only and that he went to the home of deceased only to get some clothes, it is error to exclude proof that he had been informed that his mother had been struck by deceased; theories of the defense are not limited by the personal testimony of a defendant. Stapleton v. State, 56 Texas Crim. Rep. 425; 120 S. W. 866.

If there is evidence that deceased had slandered defendant's female relation by stating in effect that defendant had been criminally intimate with her, it is error to exclude proof that defendant's conduct toward such relation was decent and proper; since the alleged slander, if true, would not be adequate cause. Redman v. State, 52 Texas Crim. Rep. 594; 108 S. W. 365.

Sec. 2035. **Proof of uncommunicated insult.**—Proof of uncommunicated remarks of a similar nature made by deceased about the female relation of defendant is admissible as tending to show the probable truth of the testimony as to the insult that had been communicated. Fossett v. State, 41 Texas Crim. Rep. 400; 55 S. W. 497. Hill v. State, 52 Texas Crim. Rep. 246; 106 S. W. 145. Davis v. State, 155 S. W. 549. Walker v. State, 156 S. W. 208.

Sec. 2036. **Proof of insult not admissible.**—It is not error to exclude testimony of insulting words or conduct of deceased toward a female relation of the slayer if the offer of this testimony is not coupled with any offer on the part of defendant or his counsel to show that, prior to the homicide, the same was communicated to him and that thereafter he killed deceased on his first meeting with him. Howard v.

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State, 23 Texas Crim. App. 276; 5 S. W. 231. Cockerell v. State, 32 Texas Crim. Rep. 592; 25 S. W. 421. Wright v. State, 36 Texas Crim. Rep. 431; 37 S. W. 732. McVey v. State, 81 S. W. 740.

Sec. 2037. **Provocation need not arise at the time.**—Where the sole cause for reducing a homicide to manslaughter is previous insults to a female relation of the slayer and the homicide is on the first meeting after he was informed of such insults, it is error to charge the jury that the provocation must arise at the time of the homicide or that the homicide must not be the result of a former provocation, and this manifest error is not cured by charging the jury that they may look to all the other facts in the case. Whaley v. State, 9 Texas Crim. App. 306. Eanes v. State, 10 Texas Crim. App. 450. Niland v. State, 19 Texas Crim. App. 174. Paulin v. State, 21 Texas Crim. App. 447; 1 S. W. 453. Williams v. State, 24 Texas Crim. App. 666; 7 S. W. 333. Tucker v. State, 50 S. W. 711. Martin v. State, 40 Texas Crim. Rep. 664; 51 S. W. 912. Attaway v. State, 41 Texas Crim. Rep. 399; 55 S. W. 45. Maxwell v. State, 56 S. W. 62. Melton v. State, 47 Texas Crim. Rep. 458; 83 S. W. 822. Bays v. State, 50 Texas Crim. Rep. 551; 99 S. W. 561. Stewart v. State, 52 Texas Crim. Rep. 283; 106 S. W. 685. Redman v. State, 52 Texas Crim. Rep. 595; 108 S. W. 365. Akin v. State, 56 Texas Crim. Rep. 325; 119 S. W. 863. Kincaid v. State, 145 S. W. 597.

If there are two phases of adequate cause in the case and the court properly charges on adequate cause based on an insult to a female relation, it is not error to include in the distinct charge on adequate cause based on an assault the proposition that the provocation must arise at the time of the homicide. Barbee v. State, 50 Texas Crim. Rep. 429; 97 S. W. 1058.

Sec. 2038. **Charge on insult to female relation.**—It is not error to charge the jury that the fact that defendant had been informed of insulting words or conduct toward his female relation would not prevent the homicide from being unlawful. Hobbs v. State, 55 Texas Crim. Rep. 306; 117 S. W. 811.

It is error to restrict adequate cause to the theory of insults to the daughter of defendant if there is also evidence of adequate cause arising from an insult to his wife, but both theories should be distinctly presented. McComas v. State, 75 S. W. 533.

It is error to require the jury to find that the insult to the female relation of defendant was accompanied with threats or an attack before it would be adequate cause. The charge should instruct the jury as a matter of law that insulting words or conduct of deceased toward a female relation of the slayer is adequate cause. Gillespie v. State, 53 Texas Crim. Rep. 168; 109 S. W. 158. Barbee v. State, 58 Texas Crim. Rep. 129; 124 S. W. 967. Munos v. State, 58 Texas Crim. Rep. 147; 124 S. W. 941.

Where the adequate cause relied on is insulting words or conduct of deceased toward a female relation of the slayer, it is error to leave it to the jury to determine whether such insult is adequate cause. The charge should instruct the jury that such insult is adequate cause and should apply the law to the facts. Gillespie v. State, 53 Texas Crim. Rep. 167; 109 S. W. 158. Fuller v. State, 54 Texas Crim. Rep. 454; 113 S. W. 541. Morrison v. State, 61 Texas Crim. Rep. 223; 135 S. W. 551. Williams v. State, 144 S. W. 620. Gaines v. State, 148 S. W. 717. Rogers v. State, 149 S. W. 129. Hobbs v. State, 151 S. W. 809.

If the female relation of defendant claims to have informed defendant of more than one instance of misconduct, the charge is not required to single out any one instance but may submit all the circumstances to the jury. Long v. State, 59 Texas Crim. Rep. 103; 127 S. W. 556.

If the issue of manslaughter is only raised by testimony of an insult to a female relation of the defendant, the court should not charge on any other phase of manslaughter. Attaway v. State, 41 Texas Crim. Rep. 398; 55 S. W. 45. Bays v. State, 50 Texas Crim. Rep. 551; 99 S. W. 561. Redman v. State, 52 Texas Crim. Rep. 595; 108 S. W. 365. Gillespie v. State, 53 Texas Crim. Rep. 168; 109 S. W. 158.

A charge is erroneous if its effect is to deprive defendant of the benefit of manslaughter if the jury find that he failed to demand an apology from deceased before shooting him on account of the insult. Kincaid v. State, 145 S. W. 597.

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A charge suggests to the jury that manslaughter is not in the case if it fails to instruct the jury to convict of manslaughter if they find the insult and that the killing was on passion, but without authorizing such conviction instructs the jury that if the killing was not on passion but in pursuance of a previous design it would be murder. Fuller v. State, 50 Texas Crim. Rep. 23; 95 S. W. 541.

It is error to charge, in connection with adequate cause based on proof of a communicated insult to a female relation of defendant, that portion of the statute which requires the passion to be "sudden." Orman v. State, 22 Texas Crim. Rep. 618; 3 S. W. 468. Stewart v. State, 52 Texas Crim. Rep. 283; 106 S. W. 685. Gillespie v. State, 53 Texas Crim. Rep. 167; 109 S. W. 158. Jaynes v. State, 150 S. W. 441 (held not reversible error if the killing occurred within an hour after the communication).

If there is evidence of other matters occurring prior to the insulting words or conduct relied on which would tend to intensify the provocation or tend to increase the passion, the charge is too restrictive if it confines the jury to the immediate provocation and it should instruct the jury that in determining whether the killing was while defendant's mind was incapable of cool reflection they should look to all the other facts and circumstances in the case. Orman v. State, 24 Texas Crim. App. 503; 6 S. W. 544. Freeman v. State, 46 Texas Crim. Rep. 322; 81 S. W. 953. Venters v. State, 47 Texas Crim. Rep. 281; 83 S. W. 832. Reinhardt v. State, 60 Texas Crim. Rep. 662; 133 S. W. 265. Walker v. State, 156 S. W. 206.

Sec. 2039. **Fresh insult.**—If the homicide was on the first meeting after the insult was communicated to defendant and there is evidence of a fresh provocation occurring at the time of the homicide, the defendant is entitled to a charge on each theory. Richardson v. State, 28 Texas Crim. App. 221; 12 S. W. 870. Tucker v. State, 50 S. W. 711. Martin v. State, 40 Texas Crim. Rep. 665; 51 S. W. 912. McAnear v. State, 43 Texas Crim. Rep. 523; 67 S. W. 117. Young v. State, 54 Texas Crim. Rep. 423; 113 S. W. 277. Holcomb v. State, 54 Texas Crim. Rep. 489; 113 S. W. 755. Akin v. State, 56 Texas Crim. Rep. 328; 119 S. W. 863. Barbee v. State, 58 Texas Crim. Rep. 129; 124 S. W. 967. Washington v. State, 151 S. W. 818. Walker v. State, 156 S. W. 206.

If manslaughter is in the case from the standpoint of a previous insult to a female relation of defendant and also from an admission by deceased of such insult at the time of the homicide or from any other adequate cause arising at the time of the homicide, the charge of the court should affirmatively present these matters so that the jury will understand that either provocation is sufficient to reduce the homicide to manslaughter, passion being present. Richardson v. State, 28 Texas Crim. App. 221; 12 S. W. 870. Tucker v. State, 50 S. W. 711. Hudson v. State, 43 Texas Crim. Rep. 423; 66 S. W. 668. Holcomb v. State, 54 Texas Crim. Rep. 489; 113 S. W. 755. Akin v. State, 56 Texas Crim. Rep. 325; 119 S. W. 863. Barbee v. State, 58 Texas Crim. Rep. 129; 124 S. W. 967. Washington v. State, 151 S. W. 818. Walker v. State, 156 S. W. 206.

Where defendant had suspected his wife and deceased of illicit relations and on asking deceased about it the latter admitted it whereupon defendant immediately killed him, the court should charge affirmatively on the new insult. Young v. State, 54 Texas Crim. Rep. 423; 113 S. W. 277.

If deceased, when accosted in respect to an insult to a female relation of the slayer, admits that he had insulted her, this is a new and aggravated insult, and renders unimportant the belief of defendant as to what he had been told about the prior insult, and it is error to burden the fresh provocation with the theory of the belief of defendant as to the previous insult. McAnear v. State, 43 Texas Crim. Rep. 523; 67 S. W. 117. Akin v. State, 56 Texas Crim. Rep. 328; 119 S. W. 863.

If the communication to defendant of an insult by deceased towards the wife of defendant is very general, and after the first meeting of deceased and defendant the wife of defendant makes a more specific statement confirming the first communication, the charge of the court should direct the attention of the jury to the new communication. Bays v. State, 50 Texas Crim. Rep. 548; 99 S. W. 561.

If the issue is raised, the court should charge the jury that if defendant did not believe the insulting words had been used and sought deceased and asked him if he

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had uttered them and deceased then repeated the insult then this would be a fresh provocation, and the charge should present this phase of adequate cause to the jury. Richardson v. State, 28 Texas Crim. App. 221; 12 S. W. 870. Redman v. State, 52 Texas Crim. Rep. 595; 108 S. W. 365.

Where there has been a meeting after the first provocation and defendant is afterwards informed of other insults to his female relation and the killing occurs on the first meeting after the fresh provocation, the charge should apply the law pertinently to the fresh provocation, authorizing the jury to look to the preceding facts and matters to intensify the fresh provocation. Richardson v. State, 28 Texas Crim. App. 221; 12 S. W. 870. Venters v. State, 47 Texas Crim. Rep. 281; 83 S. W. 832. Rogers v. State, 149 S. W. 129.

Where defendant is informed by others than his wife of insults to her and meets deceased who denies it and defendant believes him, but on meeting his wife is told of it by her and believes her, he would still have the right to have the law charged with reference to a first meeting after his wife informed him that deceased had insulted her. Maxwell v. State, 56 S. W. 62. Loyd v. State, 46 Texas Crim. Rep. 535; 81 S. W. 293.

If defendant was informed of adulterous conduct of his wife and deceased, but did not believe it, and afterwards met them under such circumstances as corroborated his previous information, he is entitled to a charge on this phase of manslaughter based on his belief as to such matters. Canister v. State, 46 Texas Crim. Rep. 223; 79 S. W. 24.

Art. 1134. (704) (599) **General character of female in issue.**—In every case where the defense spoken of in the preceding article is relied on, it shall be competent to prove the general character of the female insulted, in order to ascertain the extent of the provocation. (O. C. 599b, Acts 1858, p. 173.)

Sec. 2040. **Proof of character of insulted female.**—When insulting words or conduct of deceased toward a female relation of the slayer is relied on as adequate cause, it is competent to prove the general character of such female in order to ascertain the extent of the provocation. Wood v. State, 31 Texas Crim. Rep. 571; 21 S. W. 602. Griffin v. State, 54 S. W. 586. Fox v. State, 158 S. W. 1141.

Proof of specific acts impugning the conduct and chastity of the female relation claimed to have been insulted cannot be used against the slaying relative in the absence of information or knowledge on his part of such acts. Richards v. State, 53 Texas Crim. Rep. 412; 110 S. W. 432. Young v. State, 59 Texas Crim. Rep. 139; 127 S. W. 1059.

In the absence of proof that the general character of the female relation of defendant claimed to have been insulted was bad, the presumption is that it was good. Hammond v. State, 28 Texas Crim. App. 415; 13 S. W. 605.

Sec. 2041. **Deceased's character for chastity.**—Proof of the bad general reputation for chastity of deceased is not admissible where the only issue is whether defendant is the party who murdered deceased. Hall v. State, 158 S. W. 272.

The bad general reputation for chastity of deceased may be shown where there is evidence that the homicide was on account of the rape of the wife of defendant, to show that defendant believed the communication to him of such conduct and to add probability to the theory that he acted on such belief. Jones v. State, 38 Texas Crim. Rep. 87; 41 S. W. 638. Tatum v. State, 43 Texas Crim. Rep. 415; 66 S. W. 553. McComas v. State, 72 S. W. 189. Orange v. State, 47 Texas Crim. Rep. 338; 83 S. W. 385.

Proof of the bad general reputation of the deceased for chastity is admissible where there is evidence that the homicide was on account of illicit intercourse with the wife of defendant, although the homicide was not upon the first meeting, if such proof would tend to show such a state of mind on the part of defendant as to

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defeat the issue of express malice, or if it tends to lessen the penalty. Orange v. State, 47 Texas Crim. Rep. 338; 83 S. W. 385.

Proof of the general reputation of deceased for chastity cannot be made by proof of isolated acts of lewdness. Jones v. State, 38 Texas Crim. Rep. 104; 40 S. W. 807.

Art. 1135. (705) (600) **Discretion of jury in such cases.**—The jury shall be at liberty to determine in every case whether, under all the circumstances, the insulting words or gestures were the real cause of the killing. (O. C. 599c, Acts 1858, p. 173.)

Art. 1136. (706) (601) **"Relation" includes whom.**—Any female under the permanent or temporary protection of the accused, at the time of the killing, shall also be included within the meaning of the term "relation." (O. C. 599d, Acts 1858, p. 173.)

Sec. 2042. **"Female relation" defined.**—Any female under the permanent or temporary protection of the accused at the time of the killing is included within the meaning of the term "female relation." Clanton v. State, 20 Texas Crim. App. 631. Ex parte Jones, 31 Texas Crim. Rep. 422; 20 S. W. 983. Willis v. State, 75 S. W. 796. Williams v. State, 144 S. W. 620. Gaines v. State, 148 S. W. 717. Masters v. State, 160 S. W. 693.

A guest of the house while under the temporary protection of the accused is within the meaning of the term "female relation." Williams v. State, 144 S. W. 620.

A female related by marriage to the slayer is his female relation. Clanton v. State, 20 Texas Crim. App. 632.

The mother is the female relation of her son within the contemplation of the statute. Stapleton v. State, 56 Texas Crim. Rep. 422; 120 S. W. 866.

One's wife, mother, sister, or other female relation, though married, is still his female relation. The marriage of a female does not dissolve relationship. Willis v. State, 75 S. W. 796. Masters v. State, 160 S. W. 693.

The fact that the wife of defendant had abandoned him does not deny him the benefit of an adequate cause based on insults to her while living apart from him. Wright v. State, 52 Texas Crim. Rep. 543; 107 S. W. 822.

It is an insult to a female relation to falsely charge defendant with keeping his cousin as his mistress. Fisher v. State, 50 Texas Crim. Rep. 471; 98 S. W. 852.

One's promised wife is not necessarily his female relation. Carter v. State, 170 S. W. 739.

Sec. 2043. **Distinction between actual and statutory relation.**—If the insulted female was an actual relation of the slayer, by either blood or marriage, it is not required that she should be under his protection, either permanent or temporary, at the time of the insult or at the time of the killing. Clanton v. State, 20 Texas Crim. App. 631. Willis v. State, 75 S. W. 796. Wright v. State, 52 Texas Crim. Rep. 543; 107 S. W. 822.

The difference between the cases of an actual relation and the statutory relationship of protection is, that while in both cases the insult must be given while the relationship exists, the killing may occur at the first meeting in the case of the actual relative, and in the statutory relationship it must occur during the existence of the relationship. If the insulted female not actually related leaves the protection of the slayer before the first meeting with the one insulting her occurs, the right to act is gone. Ex parte Jones, 31 Texas Crim. Rep. 447; 20 S. W. 983.

Where the insulted female is not an actual relation of the slayer, the insult must have been given to her while under the protection of the slayer and the killing must also be done while she is under his protection. Ex parte Jones, 31 Texas Crim. Rep. 446; 20 S. W. 983. Jones v. State, 33 Texas Crim. Rep. 492; 26 S. W. 1082.

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Insulting words or conduct of deceased toward a female while she was not under the permanent or temporary protection of the slayer and before she became related to the slayer will not, of itself, constitute adequate cause. Ex parte Jones, 31 Texas Crim. Rep. 422; 20 S. W. 983. Jones v. State, 33 Texas Crim. Rep. 492; 26 S. W. 1082.

Art. 1137. (707) (602) **Passion must actually exist.**—In order to reduce a voluntary homicide to the grade of manslaughter, it is necessary not only that adequate cause existed to produce the state of mind referred to in the third subdivision of article 1129, but also that such state of mind did actually exist at the time of the commission of the offense. (O. C. 600.)

Sec. 2044. **Adequate cause and passion must combine.**—The existence of adequate cause alone will not reduce an unlawful homicide to the grade of manslaughter, for if the mind of the slayer at the time of the homicide was capable of cool reflection the homicide may be murder, although adequate cause exists. Breedlove v. State, 26 Texas Crim. App. 453; 9 S. W. 768. Massie v. State, 30 Texas Crim. App. 64; 16 S. W. 770. Ex parte Jones, 31 Texas Crim. Rep. 422; 20 S. W. 983. Jones v. State, 33 Texas Crim. Rep. 492; 26 S. W. 1082. Fendrick v. State, 39 Texas Crim. Rep. 147; 45 S. W. 589. Jones v. State, 47 Texas Crim. Rep. 515; 85 S. W. 5. Gillespie v. State, 53 Texas Crim. Rep. 168; 109 S. W. 158. Rogers v. State, 149 S. W. 129. Redman v. State, 149 S. W. 670. Davis v. State, 155 S. W. 549.

An unlawful homicide committed in sudden passion upon an inadequate cause is murder with implied malice. Atkinson v. State, 20 Texas 522. Farrer v. State, 42 Texas 271. Halbert v. State, 3 Texas Crim. App. 659. Powell v. State, 5 Texas Crim. App. 246. Ex parte Jones, 31 Texas Crim. Rep. 448; 20 S. W. 983. Reyons v. State, 32 Texas Crim. Rep. 153; 22 S. W. 590. Trevino v. State, 38 Texas Crim. Rep. 64; 41 S. W. 609. Black v. State, 68 S. W. 683. Rice v. State, 51 Texas Crim. Rep. 283; 103 S. W. 1156. Cordono v. State, 56 Texas Crim. Rep. 459; 120 S. W. 471. Johnson v. State, 149 S. W. 165. Lamb v. State, 169 S. W. 1163.

Sec. 2045. **Manslaughter should be charged.**—It is error to fail to charge on manslaughter when there is testimony to support such theory though the defendant offers proof of an alibi. Lewis v. State, 48 Texas Crim. Rep. 614; 89 S. W. 1073.

If there is evidence which, however weak or inconclusive it may seem to the court, tends to prove facts from which the jury may deduce a finding of manslaughter, it is error to fail to charge on manslaughter. Robles v. State, 5 Texas Crim. App. 358. Williams v. State, 7 Texas Crim. App. 396. Shrivers v. State, 7 Texas Crim. App. 456. Reed v. State, 9 Texas Crim. App. 318. McLaughlin v. State, 10 Texas Crim. App. 359. Neyland v. State, 13 Texas Crim. App. 549. Reynolds v. State, 14 Texas Crim. App. 435. Moore v. State, 15 Texas Crim. App. 1. Rutherford v. State, 15 Texas Crim. App. 247. Hobbs v. State, 16 Texas Crim. App. 523. Tow v. State, 22 Texas Crim. App. 175; 2 S. W. 582. Liskosski v. State, 23 Texas Crim. App. 165; 3 S. W. 696. Howard v. State, 23 Texas Crim. App. 265; 5 S. W. 231. Meuly v. State, 26 Texas Crim. App. 307; 9 S. W. 563. Harris v. State, 15 S. W. 172. Bonner v. State, 29 Texas Crim. App. 230; 15 S. W. 821. Jones v. State, 29 Texas Crim. App. 340; 15 S. W. 403. Riptoe v. State, 42 S. W. 381. Brande v. State, 45 S. W. 17. Morrison v. State, 39 Texas Crim. Rep. 522; 47 S. W. 369. Moore v. State, 40 Texas Crim. Rep. 444; 50 S. W. 942. Folks v. State, 58 S. W. 98. Riley v. State, 81 S. W. 711. Hjeronymous v. State, 47 Texas Crim. Rep. 366; 83 S. W. 708. Harrison v. State, 47 Texas Crim. Rep. 402; 83 S. W. 699. Cooper v. State, 48 Texas Crim. Rep. 36; 85 S. W. 1059. Thomas v. State, 48 Texas Crim. Rep. 68; 85 S. W. 1154. Swain v. State, 48 Texas Crim. Rep. 98; 86 S. W. 335. Martinez v. State, 48 Texas Crim. Rep. 532; 89 S. W. 642. Arnwine v. State, 49 Texas Crim. Rep. 5; 90 S. W. 39. Keith v. State, 50 Texas Crim. Rep. 67; 94 S. W. 1044. Casey v. State, 50 Texas Crim. Rep. 392; 97 S. W. 496. Rice v. State, 51 Texas Crim. Rep. 285; 103 S. W. 1156. Miller v. State, 52 Texas Crim. Rep. 78; 105 S. W. 502. Floyd v. State, 52 Texas Crim. Rep. 103; 105 S. W. 791. Casey v. State, 54 Texas Crim. Rep. 587; 113 S. W. 534. Green v. State, 58 Texas Crim. Rep. 428; 126 S. W. 861. Recen v. State, 58 Texas Crim. Rep. 457; 126 S. W. 577. Casey v. State, 59 Texas

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Crim. Rep. 429; 128 S. W. 1125. Williams v. State, 61 Texas Crim. Rep. 361; 136 S. W. 771. Wood v. State, 150 S. W. 780.

Sec. 2046. **Charge on principals.**—Though there can be no accomplice to manslaughter, still the law of principals may and can apply in manslaughter. Cartwright v. State, 16 Texas Crim. App. 486. Moffatt v. State, 35 Texas Crim. Rep. 257; 33 S. W. 344. Williams v. State, 40 Texas Crim. Rep. 565; 51 S. W. 224. Harrison v. State, 47 Texas Crim. Rep. 401; 83 S. W. 699. Burnam v. State, 61 Texas Crim. Rep. 616; 135 S. W. 1175.

If defendant aids and abets another in a killing and the killing on the part of the slayer would be manslaughter, the issue of manslaughter is in the case as to defendant. Moffatt v. State, 35 Texas Crim. Rep. 257; 33 S. W. 344. Williams v. State, 40 Texas Crim. Rep. 565; 51 S. W. 224. Harrison v. State, 47 Texas Crim. Rep. 401; 83 S. W. 699. Burnam v. State, 61 Texas Crim. Rep. 616; 135 S. W. 1175.

Though defendant admits the killing, yet if there is other evidence that another did it and that defendant aided, the charge of the court should not ignore the defense of manslaughter predicated on the theory that the other did the killing under circumstances which would reduce the homicide to manslaughter, and should give defendant the benefit of a charge on principals. Williams v. State, 40 Texas Crim. Rep. 565; 51 S. W. 224.

Though defendant denies that he did the killing or aided in it or that he advised or agreed to it, still if there is evidence that another did it and that defendant was connected with it so as to make him a principal, the charge of the court should not ignore the defense of manslaughter as to defendant if there is evidence that raises the issue of manslaughter as to the slayer. Cartwright v. State, 16 Texas Crim. App. 486. Burnam v. State, 61 Texas Crim. Rep. 616; 135 S. W. 1175.

Sec. 2047. **Negative charge not sufficient.**—A charge on manslaughter is erroneous if it presents the issue in a mere negative or abstract form. Johnson v. State, 43 Texas 614. McLaughlin v. State, 10 Texas Crim. App. 357. Babb v. State, 12 Texas Crim. App. 491. Hawthorne v. State, 28 Texas Crim. App. 314; 12 S. W. 603. Cochran v. State, 28 Texas Crim. App. 430; 13 S. W. 651. Attaway v. State, 41 Texas Crim. Rep. 398; 55 S. W. 45. Cole v. State, 45 Texas Crim. Rep. 231; 75 S. W. 527.

Sec. 2048. **Grouping the facts.**—A charge is erroneous if it groups a number of facts and practically requires the jury to find the existence of them all before they could conclude that there was adequate cause. Hightower v. State, 53 Texas Crim. Rep. 488; 110 S. W. 750.

If the charge of the court undertakes to group the facts, it is error to omit any of the conditions or circumstances which could be adequate cause or which might tend to intensify the provocation. Wheeler v. State, 54 Texas Crim. Rep. 51; 111 S. W. 1022. Gant v. State, 55 Texas Crim. Rep. 292; 116 S. W. 801. Blocker v. State, 61 Texas Crim. Rep. 413; 135 S. W. 131. Snead v. State, 158 S. W. 530.

It is error to require the jury to find that a number of things existed before they could find adequate cause when one or more would be ample. Arnwine v. State, 50 Texas Crim. Rep. 259; 96 S. W. 4. Gillespie v. State, 53 Texas Crim. Rep. 168; 109 S. W. 158. Hightower v. State, 53 Texas Crim. Rep. 488; 110 S. W. 750. Barbee v. State, 58 Texas Crim. Rep. 129; 124 S. W. 967. Munos v. State, 58 Texas Crim. Rep. 150; 124 S. W. 941.

A charge grouping the facts is not erroneous if the proof shows that all the facts grouped were true. Foster v. State, 45 Texas Crim. Rep. 101; 74 S. W. 29.

When the charge informs the jury that they may look to the other facts of the case, it need not enumerate the other facts. Magruder v. State, 35 Texas Crim. Rep. 219; 33 S. W. 233. Young v. State, 54 Texas Crim. Rep. 423; 113 S. W. 277. Giles v. State, 60 Texas Crim. Rep. 439; 132 S. W. 359.

When no cause made adequate cause as a matter of law by the statute is in evidence, a general charge on adequate cause and manslaughter is sufficient and the charge need not enumerate or group the facts. Sargent v. State, 35 Texas Crim.

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Rep. 338; 33 S. W. 364. Carson v. State, 43 Texas Crim. Rep. 265; 64 S. W. 1046. Anderson v. State, 43 Texas Crim. Rep. 277; 65 S. W. 523. Scott v. State, 43 Texas Crim. Rep. 598; 68 S. W. 177. Thomas v. State, 49 Texas Crim. Rep. 642; 95 S. W. 1069. Thomas v. State, 96 S. W. 930. Bruster v. State, 50 Texas Crim. Rep. 149; 95 S. W. 1066. Hightower v. State, 53 Texas Crim. Rep. 488; 110 S. W. 750. Brookins v. State, 158 S. W. 521.

A charge on manslaughter should not include as adequate cause matters which are not in evidence and which the jury would therefore be bound to find against the defendant. Cochran v. State, 28 Texas Crim. App. 430; 13 S. W. 651. Gilcrease v. State, 33 Texas Crim. Rep. 630; 28 S. W. 531. Lucas v. State, 49 Texas Crim. Rep. 138; 90 S. W. 880. Halsford v. State, 53 Texas Crim. Rep. 46; 108 S. W. 381.

It is error to submit facts which, if true, would show the homicide to have been committed in self-defense, and then authorize the jury to convict of manslaughter if they so found the facts to be. Terrell v. State, 53 Texas Crim. Rep. 608; 111 S. W. 152. Pannell v. State, 54 Texas Crim. Rep. 502; 113 S. W. 537. Casey v. State, 54 Texas Crim. Rep. 586; 113 S. W. 534. Ballard v. State, 62 Texas Crim. Rep. 35; 138 S. W. 122.

If adequate cause would be the same whether defendant abandoned the difficulty or not, the charge should not burden the issue of manslaughter with the issue of abandoning the difficulty. Huddleston v. State, 54 Texas Crim. Rep. 98; 112 S. W. 64.

Sec. 2049. **Charging jury to look to all the facts.**—A charge is not restrictive in confining the jury to the facts occurring at the time of the homicide if there is no evidence of anything occurring before which tends to broaden the provocation. White v. State, 34 Texas Crim. Rep. 156; 29 S. W. 1094. Woodring v. State, 34 Texas Crim. Rep. 423; 30 S. W. 1060. Kidwell v. State, 35 Texas Crim. Rep. 267; 33 S. W. 342.

If there is evidence tending to intensify the provocation given by deceased at the time of the homicide, such as former threats, insults, etc., or which would tend to increase the probability that defendant's mind was incapable of cool reflection at the time of the homicide, the charge is too restrictive if it confines the jury to the phase of adequate cause occurring at the time of the homicide; it should authorize the jury to look to all the other facts and circumstances in the case. Miles v. State, 18 Texas Crim. App. 156. Orman v. State, 24 Texas Crim. App. 503; 6 S. W. 544. Hawthorne v. State, 28 Texas Crim. App. 212; 12 S. W. 603. Bracken v. State, 29 Texas Crim. App. 367; 16 S. W. 192. Murray v. State, 35 S. W. 990. Castro v. State, 40 S. W. 985. Martin v. State, 40 Texas Crim. Rep. 666; 51 S. W. 912. Spangler v. State, 41 Texas Crim. Rep. 432; 55 S. W. 326. Stanton v. State, 42 Texas Crim. Rep. 272; 59 S. W. 271. Adams v. State, 42 Texas Crim. Rep. 366; 60 S. W. 47. Nix v. State, 74 S. W. 764. Johnson v. State, 46 Texas Crim. Rep. 295; 81 S. W. 945. Freeman v. State, 46 Texas Crim. Rep. 322; 81 S. W. 953. Venters v. State, 47 Texas Crim. Rep. 281; 83 S. W. 832. Manning v. State, 48 Texas Crim. Rep. 57; 85 S. W. 1149. Ivory v. State, 48 Texas Crim. Rep. 282; 87 S. W. 699. McHenry v. State, 54 Texas Crim. Rep. 479; 114 S. W. 115. Reinhardt v. State, 60 Texas Crim. Rep. 662; 133 S. W. 265. Barnes v. State, 61 Texas Crim. Rep. 37; 133 S. W. 891. Reagan v. State, 157 S. W. 483. Burton v. State, 178 S. W. 334.

Where the testimony shows a number of conditions or circumstances tending, either singly or collectively, to constitute adequate cause, the charge should leave the jury free to consider them all in determining whether adequate cause existed and whether the defendant's mind was incapable of cool reflection. Miles v. State, 18 Texas Crim. App. 170. Cochran v. State, 28 Texas Crim. App. 429; 13 S. W. 651. Bracken v. State, 29 Texas Crim. App. 367; 16 S. W. 192. Adams v. State, 42 Texas Crim. Rep. 367; 60 S. W. 47. Freeman v. State, 49 Texas Crim. Rep. 318; 81 S. W. 953. Wheeler v. State, 54 Texas Crim. Rep. 51; 111 S. W. 1022. Reagan v. State, 157 S. W. 483. Love v. State, 158 S. W. 526.

If there was a previous difficulty between the parties, it is error to charge the jury to disregard the matters then occurring if defendant was at fault. Roquemore v. State, 59 Texas Crim. Rep. 568; 129 S. W. 1124.

Sec. 2050. **Charge shifting the burden of proof.**—In the paragraph applying the law to the facts, the charge does not shift the burden of proof if the jury are

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therein instructed to find defendant guilty of manslaughter if they "believe beyond a reasonable doubt" that he is guilty of that grade of homicide. Pitts v. State, 29 Texas Crim. App. 379; 16 S. W. 189. Spangler v. State, 42 Texas Crim. Rep. 245; 61 S. W. 314. Oldham v. State, 63 Texas Crim. Rep. 527; 142 S. W. 17. Hendricks v. State, 154 S. W. 1005.

Sec. 2051. **Charge should be construed as a whole.**—In submitting the paragraph on manslaughter, it is not error to fail to require the jury to find that the homicide was not in self defense. Foster v. State, 51 Texas Crim. Rep. 77; 100 S. W. 1159.

A charge on manslaughter should be construed as a whole. Champ v. State, 32 Texas Crim. Rep. 87; 22 S. W. 678.

Sec. 2052. **Requiring intent to kill.**—If the weapon or instrument used by defendant to strike with in a sudden and casual difficulty was not *per se* a deadly weapon, the charge authorizing a conviction for manslaughter is erroneous if it fails to require the jury to find that defendant intended to kill. Perrin v. State, 45 Texas Crim. Rep. 561; 78 S. W. 930.

When negligent homicide is an issue, the charge should not authorize the jury to convict of manslaughter without requiring them to find an intent to kill. Whiten v. State, 160 S. W. 462.

Sec. 2053. **"Sudden transport of passion."**—The charge should not require the jury to find that defendant was in a "transport" of passion. Eanes v. State, 10 Texas Crim. App. 450. Kannmacher v. State, 51 Texas Crim. Rep. 125; 101 S. W. 238. Clark v. State, 51 Texas Crim. Rep. 522; 102 S. W. 1136. Redman v. State, 52 Texas Crim. Rep. 596; 108 S. W. 365. Halsford v. State, 53 Texas Crim. Rep. 47; 108 S. W. 381.

A charge requiring the jury to find that defendant was in a "transport" of passion is not necessarily reversible error. Waters v. State, 54 Texas Crim. Rep. 322; 114 S. W. 628. Bice v. State, 55 Texas Crim. Rep. 535; 117 S. W. 163. Jay v. State, 56 Texas Crim. Rep. 114; 120 S. W. 449. Coulter v. State, 162 S. W. 885.

Sec. 2054. **When former conviction was for manslaughter.**—If a judgment of conviction for manslaughter had under an indictment charging murder has been set aside or reversed, the court is not required on a subsequent trial to charge the jury that if the evidence shows murder defendant should be acquitted of manslaughter. Campbell v. State, 10 Texas Crim. App. 566. Carter v. State, 40 S. W. 498. Turner v. State, 41 Texas Crim. Rep. 337; 54 S. W. 579. Pickett v. State, 43 Texas Crim. Rep. 1; 63 S. W. 325. Burnett v. State, 53 Texas Crim. Rep. 520; 112 S. W. 74. Cornelius v. State, 54 Texas Crim. Rep. 178; 112 S. W. 1051. Gray v. State, 61 Texas Crim. Rep. 454; 135 S. W. 1179.

Sec. 2055. **Charge restricting adequate cause to cause not proven.**—A charge on manslaughter is erroneous if it restricts adequate cause to a single cause and that a cause not shown by the testimony. Any condition or circumstance which is capable of creating and which does create sudden passion sufficient to render the mind of a person of ordinary temper incapable of cool reflection is adequate cause. Hawthorne v. State, 28 Texas Crim. App. 214; 12 S. W. 603. Cochran v. State, 28 Texas Crim. App. 430; 13 S. W. 651. Gilcrease v. State, 33 Texas Crim. Rep. 630; 28 S. W. 531. Lucas v. State, 49 Texas Crim. Rep. 138; 90 S. W. 880.

Sec. 2056. **Harmless errors in charge on manslaughter.**—Errors in the charge on manslaughter pass out of the case if the facts conclusively show that defendant is guilty of that offense and the minimum punishment is assessed, and where the error in the charge did not injure defendant's rights in respect to a lower offense or to the question of self defense and did not tend to bring about a conviction. Munos v. State, 58 Texas Crim. Rep. 147; 124 S. W. 941.

Art. 1138. (708) (603) **Provoking contest.**—Though a homicide may take place under circumstances showing no deliberation, yet if the person guilty thereof provoked a contest with the apparent intention of

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killing, or doing serious bodily injury to the deceased, the offense does not come within the definition of manslaughter. (O. C. 603.)

Sec. 2057. **Provoking the difficulty.**—Even if defendant intended to and did provoke the difficulty, the homicide would be manslaughter if the conflict was not brought on to kill or to inflict serious bodily injury upon deceased. Young v. State, 41 Texas Crim. Rep. 446; 55 S. W. 331. Honeycutt v. State, 42 Texas Crim. Rep. 132; 57 S. W. 806. Halsford v. State, 53 Texas Crim. Rep. 45; 108 S. W. 381. Gray v. State, 61 Texas Crim. Rep. 454; 135 S. W. 1179.

If the difficulty was provoked by defendant with the intent to kill or to inflict serious bodily injury upon the deceased, the homicide in apparent self defense is murder and not manslaughter. Green v. State, 12 Texas Crim. App. 449. Thumm v. State, 24 Texas Crim. App. 703; 7 S. W. 236. Jackson v. State, 32 Texas Crim. Rep. 211; 22 S. W. 831. Keeton v. State, 59 Texas Crim. Rep. 316; 128 S. W. 413.

(The subjects of "provoking the difficulty," "mutual combat," "imperfect self defense" and "illegal arrest" are treated in chapter 12.)

Art. 1139. (709) (604) **Punishment for manslaughter.**—Manslaughter is of various degrees of culpability, according to the circumstances under which it was committed. It shall be punished by imprisonment in the penitentiary not less than two nor more than five years. (O. C. 602, amended by Acts 1858, p. 173.)

CHAPTER XVI

MURDER

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Article 1140. (710) **"Murder" defined.**—Every person with sound memory and discretion who, with malice aforethought shall unlawfully kill any person within this State shall be guilty of murder. Murder is distinguishable from every other species of homicide by the

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absence of circumstances which reduce the offense to negligent homicide, or manslaughter, or which excuse or justify the homicide. (O. C. 607, Act Feb. 12, 1858, amended by Act April 3, 1913, Acts 1913, p. 238.)

Art. 1141. **Punishment for murder.**—The punishment for murder shall be death or confinement in the penitentiary for life or for any terms of years not less than five. (Act April 3, 1913, Acts 1913, p. 238.)

Sec. 2058. **Form of indictment for murder.**—
In the name and by the 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 John Doe on the.....day of.....A. D....., in said county and State, did with malice aforethought kill.....by shooting him with a pistol (or "by cutting him with a knife," or whatever the means were).

Against the peace and dignity of the State.

.....
Foreman of the grand jury.

Sec. 2059. **Indictment for murder.**—An indictment charging that defendant did with malice aforethought kill the deceased by shooting him with a pistol is good for any degree of murder, and will support a conviction for any lower grade of homicide, or aggravated or simple assault. Henrie v. State, 41 Texas 573. Dwyer v. State, 12 Texas Crim. App. 539. Peterson v. State, 12 Texas Crim. App. 655 (assault with intent to murder). Bohannon v. State, 14 Texas Crim. App. 299. Sharpe v. State, 17 Texas Crim. App. 486. Lucas v. State, 19 Texas Crim. App. 79. Banks v. State, 24 Texas Crim. App. 560; 7 S. W. 327. Green v. State, 27 Texas Crim. App. 244. Giebel v. State, 28 Texas Crim. App. 168; 12 S. W. 591. Smith v. State, 31 Texas Crim. Rep. 16; 19 S. W. 252. Scott v. State, 31 Texas Crim. Rep. 363; 20 S. W. 755. Bradshaw v. State, 50 S. W. 359 (negligent homicide). Lee v. State, 44 Texas Crim. Rep. 461; 72 S. W. 195. Ringo v. State, 54 Texas Crim. Rep. 566; 114 S. W. 119. Zunago v. State, 63 Texas Crim. Rep. 60; 138 S. W. 713.

The words "deprive of life" are equivalent to the word "kill." Walker v. State, 14 Texas Crim. App. 627.

An indictment may state that defendant "did kill and murder;" the words "and murder" not being descriptive may be rejected as surplusage. Scott v. State, 31 Texas Crim. Rep. 363; 20 S. W. 755. Rocha v. State, 43 Texas Crim. Rep. 171; 63 S. W. 1018.

An indictment for murder need not use the word "feloniously." Calvin v. State, 25 Texas 793.

An indictment for murder need not use the word "unlawfully." Thompson v. State, 36 Texas 331. Bean v. State, 17 Texas Crim. App. 68. Stephens v. State, 20 Texas Crim. App. 269. Jackson v. State, 25 Texas Crim. App. 323; 7 S. W. 872. Hall v. State, 28 Texas Crim. App. 147; 12 S. W. 739. Hunter v. State, 30 Texas Crim. App. 316; 17 S. W. 414. Morrison v. State, 40 Texas Crim. Rep. 488; 51 S. W. 358.

An indictment for murder need not use the word "murdered." Caldwell v. State, 28 Texas Crim. App. 576; 14 S. W. 122.

An indictment must allege that defendant "did kill" the deceased; "did murder" is not equivalent to "did kill." Strickland v. State, 19 Texas Crim. App. 518. Pierce v. State, 21 Texas Crim. App. 669; 3 S. W. 111.

The failure to allege "malice aforethought" is fatal. McElroy v. State, 14 Texas Crim. App. 236.

The omission of the word "aforethought" is fatal. Cravey v. State, 36 Texas Crim. Rep. 91; 35 S. W. 658.

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It may be alleged that defendant did kill deceased "in some way or manner, and by some means, instruments and weapons, to the jurors unknown." Walker v. State, 14 Texas Crim. App. 627. Sheppard v. State, 17 Texas Crim. App. 81.

If means used were unknown to the grand jury, or where it is doubtful how death was caused, it may be alleged that it was done by some means unknown to the grand jury. Sheppard v. State, 17 Texas Crim. App. 81. Walker v. State, 14 Texas Crim. App. 627. Harris v. State, 37 Texas Crim. Rep. 447; 36 S. W. 89. King v. State, 57 Texas Crim. Rep. 371; 123 S. W. 135.

An indictment charging that defendant did kill deceased by striking or beating him with a piece of pipe need not set forth the size or weight thereof. Beaver v. State, 63 Texas Crim. Rep. 581; 142 S. W. 11.

An indictment for murder is bad if it fails to state the means or weapons used, or allege that they are unknown. Williams v. State, 36 Texas 352. Drye v. State, 14 Texas Crim. App. 191. Jackson v. State, 34 Texas Crim. Rep. 38; 28 S. W. 815. Huddleston v. State, 156 S. W. 1169.

An allegation in an indictment for murder that deceased was killed "with some sharp instrument" is not a sufficient designation of the instrument. Huddleston v. State, 156 S. W. 1169.

An indictment for murder may allege different means of killing in the same count. Dill v. State, 1 Texas Crim. App. 285. Gonzales v. State, 5 Texas Crim. App. 590. Medina v. State, 49 S. W. 380. Burt v. State, 38 Texas Crim. Rep. 440; 40 S. W. 1000. (The State is not required to elect on which means alleged a conviction will be sought, and proof that death was caused by any or all of the means alleged is sufficient.)

An indictment for murder need not allege that the weapon or instrument used was a deadly weapon. Lee v. State, 44 Texas Crim. Rep. 461; 72 S. W. 195.

In an indictment for murder a general description of the means used is sufficient. Drye v. State, 14 Texas Crim. App. 191. Lee v. State, 44 Texas Crim. Rep. 461; 72 S. W. 195. Beaver v. State, 63 Texas Crim. Rep. 581; 142 S. W. 11.

An indictment for murder need not allege the portion of the body in which the mortal wound was inflicted. Wilkerson v. State, 2 Texas Crim. App. 255. Williams v. State, 3 Texas Crim. App. 123. Longley v. State, 3 Texas Crim. App. 616. Strickland v. State, 19 Texas Crim. App. 520. Giebel v. State, 28 Texas Crim. App. 168; 12 S. W. 591. Cudd v. State, 28 Texas Crim. App. 129; 12 S. W. 1010.

An indictment for murder need not alleged that defendant was "a person of sound memory and discretion." Bean v. State, 17 Texas Crim. App. 68.

An indictment for murder need not alleged that the deceased was "a reasonable creature in being." Perry v. State, 44 Texas 475. Bohannon v. State, 14 Texas Crim. App. 299. Ogden v. State, 15 Texas Crim. App. 459. Bean v. State, 17 Texas Crim. App. 68. Wade v. State, 23 Texas Crim. App. 308; 4 S. W. 896. Ringo v. State, 54 Texas Crim. Rep. 566; 114 S. W. 119. Zunago v. State, 63 Texas Crim. Rep. 58; 138 S. W. 720.

An indictment for murder need not allege the date of the death of deceased. Cudd v. State, 28 Texas Crim. App. 128; 12 S. W. 1010. Reddick v. State, 47 S. W. 994.

If there is nothing on the face of the indictment to show that the murders were committed at different times, the indictment is not bad on account of alleging the murder of two or more persons in the same count. Rucker v. State, 7 Texas Crim. App. 551. Chivarrio v. State, 15 Texas Crim. App. 334.

An indictment which charges a murder with "malice aforethought" charges murder in the first degree; the use of the word "express" is unnecessary. Henrie v. State, 41 Texas 578. Perry v. State, 44 Texas 475. Longley v. State, 3 Texas Crim. App. 616. Bohannon v. State, 14 Texas Crim. App. 299. Sharpe v. State, 17 Texas Crim. App. 486. Penland v. State, 19 Texas Crim. App. 375. Banks v.

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State, 24 Texas Crim. App. 560; 7 S. W. 327. Smith v. State, 31 Texas Crim. Rep. 16; 19 S. W. 252. White v. State, 42 S. W. 303.

If two or more defendants are jointly indicted, the indictment is not bad because the allegation is that the murder was committed with "his" malice aforethought. Wilson v. State, 49 Texas Crim. Rep. 54; 90 S. W. 312.

It is not necessary to allege in the indictment the facts relied upon to show the defendant to be a principal, although the murder with which he is charged may not have been actually committed by him. Davis v. State, 3 Texas Crim. App. 91.

An indictment for murder against two or more defendants need not allege that they "acted together," and such allegation if made, not being descriptive, may be rejected as surplusage. Watson v. State, 28 Texas Crim. App. 34; 12 S. W. 404.

If the indictment alleges that the murder was committed in the perpetration of burglary and arson (or other felony) it is not necessary to set out the constituent elements of burglary, etc. Oates v. State, 48 Texas Crim. Rep. 135; 86 S. W. 769. Jones v. State, 53 Texas Crim. Rep. 136; 110 S. W. 741.

Where an indictment in the usual form charges murder, it charges all kinds or species of murder that could be committed by the means alleged, and if the party used the means and committed the homicide in the perpetration or in the attempt at the perpetration of arson, rape, robbery, or burglary, all this may be proven without specific allegations, and a conviction had therefor under such indictment. Roach v. State, 8 Texas Crim. App. 490. Reyes v. State, 10 Texas Crim. App. 6. Sharpe v. State, 17 Texas Crim. App. 498. Giles v. State, 23 Texas Crim. App. 283; 4 S. W. 910. Washington v. State, 25 Texas Crim. App. 393; 8 S. W. 642. Mendez v. State, 29 Texas Crim. App. 612; 16 S. W. 766. May v. State, 33 Texas Crim. Rep. 81; 24 S. W. 910. Wilkins v. State, 35 Texas Crim. Rep. 530; 34 S. W. 627. Hedrick v. State, 40 Texas Crim. Rep. 536; 51 S. W. 252. Nite v. State, 41 Texas Crim. Rep. 347; 54 S. W. 763. Williams v. State, 64 S. W. 1042. Oates v. State, 48 Texas Crim. Rep. 135; 86 S. W. 769. Jones v. State, 53 Texas Crim. Rep. 136; 110 S. W. 741.

Under an indictment for murder a conviction may be had for aggravated assault. Green v. State, 8 Texas Crim. App. 73.

Sec. 2060. **Effect of change in the statute.**—The Act of 1913 made all killings with malice aforethought murder without dividing murder into degrees as was formerly done. Shaw v. State, 160 S. W. 103.

The Act of 1913 made all killings with malice aforethought amount to murder whether the killing was on express or implied malice, but this Act did not repeal the former law with reference to a killing with implied malice aforethought, but as to homicides committed before the taking effect of said Act simply increased the punishment for what was formerly murder in the second degree and ameliorated the penalty as to a killing with express malice aforethought. Shaw v. State, 160 S. W. 103. Cook v. State, 160 S. W. 465. Andrus v. State, 165 S. W. 189. Sorrell v. State, 169 S. W. 301.

When the accused is on trial for a homicide committed before the taking effect of the Act of 1913, abolishing the degrees of murder, he is entitled on his election to have the law charged as it was in force at the time the homicide was committed. Hill v. State, 161 S. W. 120. Johnson v. State, 161 S. W. 1098. Ybarra v. State, 164 S. W. 10. Herrera v. State, 170 S. W. 720. Castillo v. State, 172 S. W. 788.

Sec. 2061. **Murder in perpetration of robbery or burglary.**—It is error to authorize a conviction on the theory that deceased was killed in the perpetration of robbery without requiring the jury to find that the homicide was upon malice aforethought. It requires malice aforethought to constitute murder. Pharr v. State, 7 Texas Crim. App. 477. Oates v. State, 51 Texas Crim. Rep. 453; 103 S. W. 859. Grant v. State, 60 Texas Crim. Rep. 361; 132 S. W. 350.

If the circumstances indicate that robbery was the only motive for the homicide, the court is authorized to charge on murder in the perpetration of robbery. Ransom v. State, 70 S. W. 960. Elsworth v. State, 54 Texas Crim. Rep. 41; 111 S. W. 963. Ridge v. State, 61 Texas Crim. Rep. 214; 134 S. W. 732.

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If there is no controversy about the homicide being committed in the perpetration of robbery the term "robbery" need not be defined in the charge. Ransom v. State, 70 S. W. 960.

All murder committed in the perpetration or attempted perpetration of robbery is murder in the first degree, whether the person killed be the one robbed, or attempted to be robbed, or whether it be some other person. Milo v. State, 59 Texas Crim. Rep. 202; 127 S. W. 1025.

Under an ordinary indictment for murder, charging murder with malice aforethought, proof may be made that it was committed in the perpetration of robbery, and the court may charge on such issue. Roach v. State, 8 Texas Crim. App. 491. Sharpe v. State, 17 Texas Crim. App. 498. Giles v. State, 23 Texas Crim. App. 283; 4 S. W. 886. Mendez v. State, 29 Texas Crim. App. 612; 16 S. W. 766. May v. State, 33 Texas Crim. Rep. 81; 24 S. W. 910. Radford v. State, 33 Texas Crim. Rep. 520; 27 S. W. 143. Wilkins v. State, 35 Texas Crim. Rep. 530; 34 S. W. 627. Nite v. State, 41 Texas Crim. Rep. 347; 54 S. W. 763. Williams v. State, 64 S. W. 1042. Ransom v. State, 70 S. W. 960. Johnson v. State, 44 Texas Crim. Rep. 332; 71 S. W. 25. Ridge v. State, 61 Texas Crim. Rep. 214; 134 S. W. 732.

If the indictment charges murder with malice aforethought, it charges all kinds or species of murder that could be committed by the means alleged, and if the party used the means and committed the murder in the perpetration of arson, rape, robbery or burglary, all this may be proven without specific allegations, and a conviction had therefor under such indictment. Mitchell v. State, 1 Texas Crim. App. 203. Roach v. State, 8 Texas Crim. App. 490. Reyes v. State, 10 Texas Crim. App. 6. Sharpe v. State, 17 Texas Crim. App. 498. Washington v. State, 25 Texas Crim. App. 393; 8 S. W. 642. Smith v. State, 31 Texas Crim. Rep. 17; 19 S. W. 252. May v. State, 33 Texas Crim. Rep. 74; 24 S. W. 910. Radford v. State, 33 Texas Crim. Rep. 520; 27 S. W. 143. Wilkins v. State, 35 Texas Crim. Rep. 530; 34 S. W. 627. Hedrick v. State, 40 Texas Crim. Rep. 536; 51 S. W. 252. Williams v. State, 64 S. W. 1042. Ransom v. State, 70 S. W. 960. Jones v. State, 53 Texas Crim. Rep. 136; 110 S. W. 741. Ridge v. State, 61 Texas Crim. Rep. 214; 134 S. W. 732.

Murder committed in the perpetration of robbery is of itself murder in the first degree, and such a murder fully evidences express malice. Gonzales v. State, 19 Texas Crim. App. 400. Smith v. State, 31 Texas Crim. Rep. 17; 19 S. W. 252. May v. State, 33 Texas Crim. Rep. 74; 24 S. W. 910. Burleson v. State, 33 Texas Crim. Rep. 549; 28 S. W. 198. Isaacs v. State, 36 Texas Crim. Rep. 505; 38 S. W. 40. Nite v. State, 41 Texas Crim. Rep. 340; 54 S. W. 763. Taylor v. State, 41 Texas Crim. Rep. 564; 55 S. W. 961. Keaton v. State, 41 Texas Crim. Rep. 621; 57 S. W. 1125. Johnson v. State, 44 Texas Crim. Rep. 332; 71 S. W. 25. Elsworth v. State, 54 Texas Crim. Rep. 38; 111 S. W. 963. Miller v. State, 58 Texas Crim. Rep. 600; 126 S. W. 865. Milo v. State, 59 Texas Crim. Rep. 202; 127 S. W. 1025.

If the defensive theory was that deceased was robbing defendant, and the court directed an acquittal if the jury had a reasonable doubt that the facts as testified to by defendant were true, it is not error to fail to charge the statute in reference to defense against robbery. Welch v. State, 57 Texas Crim. Rep. 122; 122 S. W. 886.

If the homicide was committed in the effort to release prisoners from jail, it is error to charge on the theory that the homicide was committed in the perpetration of burglary. Kipper v. State, 42 Texas Crim. Rep. 617; 62 S. W. 420. Carroll v. State, 62 S. W. 1061.

If the murder was committed in the perpetration of burglary, and the charge of the court requires the jury to find the facts constituting burglary before they could convict, it is not necessary to define burglary in the charge. Jones v. State, 53 Texas Crim. Rep. 137; 110 S. W. 741.

Sec. 2062. **Charge on murder in the first degree.**—In order to warrant a verdict of murder in the first degree, malice must be shown by the evidence to have existed; that is, the jury must be satisfied from the evidence, beyond a reasonable doubt, that the killing was a consummation of a previously formed design to take the life of the person killed, and that the design was formed deliberately with a sedate mind, that is, at the time the design was formed the mind of the person killing was

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self-possessed and capable of contemplating the consequences of the act proposed to be done. There is, however, no definite space of time necessary to intervene between the formed design to kill and the actual killing. A single moment of time may be sufficient; all that is required is that the mind be cool and deliberate in forming its purpose, and the design to kill is formed. Burt v. State, 38 Texas Crim. Rep. 451; 43 S. W. 344. Fendrick v. State, 56 S. W. 626. Brown v. State, 169 S. W. 449.

When an unlawful killing is established, the condition of the mind of the party killing, at the time, just before and just after the killing is an important consideration in determining the grade of the homicide; and in determining whether murder has been committed with express malice, the important questions for a jury to consider are: do the facts and circumstances in the case at the time of the killing, and before and after that time, having connection with or relation to it, furnish satisfactory evidence of a sedate and deliberate mind, on the part of the party killing, at the time he does the act? and do these facts and circumstances show a formed design to take the life of the party killed, or to inflict on the person killed some serious bodily harm, which in its necessary and probable consequences, may result in his or her death? McCoy v. State, 25 Texas 44. Burt v. State, 38 Texas Crim. Rep. 450; 43 S. W. 344. Alexander v. State, 40 Texas Crim. Rep. 404; 49 S. W. 229.

To warrant a conviction of murder in the first degree, the jury must be satisfied by the evidence, beyond a reasonable doubt, that the defendant before the act, deliberately formed the design with a calm and sedate mind to kill the deceased; that he selected and used the weapon or instrument or means reasonably sufficient to accomplish the death by the mode and manner of its use. The act must not result from a mere sudden, rash and immediate design, springing from an inconsiderate impulse, passion or excitement, however unjustifiable and unwarrantable it may be. Burt v. State, 38 Texas Crim. Rep. 451; 43 S. W. 344.

It is not error to charge that the difference in the degrees of murder does not result from the length of time taken to form the design or the speed with which it was executed. Farrer v. State, 42 Texas 273. Lewis v. State, 15 Texas Crim. App. 657. Miller v. State, 32 Texas Crim. Rep. 338. Smith v. State, 33 Texas Crim. Rep. 513; 27 S. W. 137. Burt v. State, 38 Texas Crim. Rep. 451; 43 S. W. 344. Howard v. State, 58 S. W. 78.

Charging in effect that reckless disregard of human life may show express malice is not error, as upon an issue not raised, where the homicide was an assassination. Burt v. State, 38 Texas Crim. Rep. 439; 40 S. W. 1000. Manning v. State, 51 Texas Crim. Rep. 214; 98 S. W. 251. Cabrera v. State, 56 Texas Crim. Rep. 150; 118 S. W. 1057.

If the facts raised the issue, it is error to refuse to charge that the jury cannot convict of murder in the first degree unless they find beyond a reasonable doubt that the killing was not the result of a sudden, rash and inconsiderate impulse or passion. Cordono v. State, 56 Texas Crim. Rep. 459; 120 S. W. 471.

If the charge requires the jury to find that the homicide was upon express malice, defendant has no complaint because the court did not charge upon a homicide committed in the perpetration of rape. Washington v. State, 25 Texas Crim. App. 387; 8 S. W. 642.

It is not necessary to define the terms "cool, sedate and deliberate." Beard v. State, 41 Texas Crim. Rep. 173; 53 S. W. 348.

It is not error to charge that the term "sedate and deliberate mind" does not mean that the "mind must be absolutely unruffled." Hall v. State, 33 Texas Crim. Rep. 19; 26 S. W. 72. (*Contra:* Gaines v. State, 53 S. W. 623). Spears v. State, 41 Texas Crim. Rep. 537; 56 S. W. 347.

Where defendant had severely whipped deceased, his child, with a belt, but the whipping was not the cause of death, it is error to authorize a conviction on the theory that death resulted from the whipping. Betts v. State, 57 Texas Crim. Rep. 389; 124 S. W. 424.

Lying in wait is simply evidence of express malice, and a charge is error which in effect states that a murder committed while defendant was lying in wait would

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be murder in the first degree. Osborne v. State, 23 Texas Crim. App. 446; 5 S. W. 251.

It is error to charge that murder on implied malice is murder in the first degree. Pickett v. State, 12 Texas Crim. App. 86. Baltrip v. State, 30 Texas Crim. App. 548; 17 S. W. 1106.

If the indictment contains an allegation that the murder was committed by means unknown to the grand jury, and the evidence supports such theory, it is proper to submit it as a basis for conviction. King v. State, 57 Texas Crim. Rep. 370; 123 S. W. 135.

Where defendant is indicted and tried as an accomplice, it is proper to charge the jury that if he commanded, advised, or encouraged the party killing to murder deceased, and that such party murdered deceased, defendant not being present, the defendant would be guilty of murder. Wilkerson v. State, 57 S. W. 956.

If there is no evidence of sufficient cogency to justify a charge on murder in the first degree, the court should not charge on such issue. Barnes v. State, 57 Texas Crim. Rep. 449; 125 S. W. 39. Thomas v. State, 57 Texas Crim. Rep. 454; 125 S. W. 35.

Errors in the charge on murder in first degree will not be revised when the conviction is not for that degree, and when the error does not prejudice the other issues in the case. Halbert v. State, 3 Texas Crim. App. 658. Hill v. State, 5 Texas Crim. App. 7. Summers v. State, 5 Texas Crim. App. 380. Venters v. State, 18 Texas Crim. App. 198. McGrath v. State, 35 Texas Crim. Rep. 423; 34 S. W. 127. Carrol v. State, 56 S. W. 913. Thurman v. State, 86 S. W. 1015. Lucas v. State, 50 Texas Crim. Rep. 219; 95 S. W. 1055. Hardin v. State, 51 Texas Crim. Rep. 559; 103 S. W. 401. Adams v. State, 105 S. W. 497. Stovall v. State, 53 Texas Crim. Rep. 36; 108 S. W. 699. Marsh v. State, 54 Texas Crim. Rep. 149; 112 S. W. 321. High v. State, 54 Texas Crim. Rep. 336; 112 S. W. 939. Pryse v. State, 54 Texas Crim. Rep. 528; 113 S. W. 930. Jackson v. State, 55 Texas Crim. Rep. 88; 115 S. W. 262. Dougherty v. State, 59 Texas Crim. Rep. 469; 128 S. W. 401. Hampton v. State, 63 Texas Crim. Rep. 101; 138 S. W. 1017. Wells v. State, 63 Texas Crim. Rep. 619; 141 S. W. 96. Jordan v. State, 141 S. W. 787. Jones v. State, 141 S. W. 963. Kinney v. State, 144 S. W. 261.

It is not ordinarily error to charge on murder in the first degree though the evidence did not raise the issue, when defendant was not convicted of that degree. Blake v. State, 3 Texas Crim. App. 583. Hopkins v. State, 53 S. W. 621. Martinez v. State, 57 S. W. 839. White v. State, 44 Texas Crim. Rep. 347; 72 S. W. 173. Sparks v. State, 77 S. W. 811. Nelson v. State, 51 Texas Crim. Rep. 351; 101 S. W. 1012. Hardin v. State, 51 Texas Crim. Rep. 563; 103 S. W. 401. Ringo v. State, 54 Texas Crim. Rep. 569; 114 S. W. 119. Potts v. State, 56 Texas Crim. Rep. 43; 118 S. W. 535. Joy v. State, 57 Texas Crim. Rep. 93; 123 S. W. 588. Pollard v. State, 58 Texas Crim. Rep. 299; 125 S. W. 393. Bass v. State, 59 Texas Crim. Rep. 189; 127 S. W. 1023. Dougherty v. State, 59 Texas Crim. Rep. 469; 128 S. W. 401. Jordan v. State, 62 Texas Crim. Rep. 280; 137 S. W. 133. Matthews v. State, 163 S. W. 724. Francis v. State, 170 S. W. 781.

Sec. 2063. **Charge on express malice.**—Express malice, which is absolutely essential to constitute murder in the first degree, is where one with sedate, deliberate mind, and formed design unlawfully kills another, which formed design is evidenced by external circumstances discovering that inward intention. Sharpe v. State, 17 Texas Crim. App. 499. Martinez v. State, 30 Texas Crim. App. 137; 16 S. W. 767. Miller v. State, 32 Texas Crim. Rep. 338. Burt v. State, 38 Texas Crim. Rep. 450; 43 S. W. 344.

The charge should not give the theory of express malice undue prominence. Moore v. State, 15 Texas Crim. App. 19.

A charge is error if it leaves the jury to conclude that they might infer express malice without proof of such facts as would warrant the inference. Moore v. State, 15 Texas Crim. App. 21.

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A charge is error which defines "express malice" as being where one with a cool and sedate mind, in pursuance of a formed design to kill another does kill him; such charge by omitting the word "unlawfully" embraces both excusable and justifiable homicide. Pickens v. State, 13 Texas Crim. App. 357. Crook v. State, 27 Texas Crim. App. 242; 11 S. W. 444. Cahn v. State, 27 Texas Crim. App. 738; 11 S. W. 723. Gonzales v. State, 28 Texas Crim. App. 135; 12 S. W. 733.

In applying the law of murder in the first degree to the facts the charge should not omit the words "express malice aforethought." Bennett v. State, 39 Texas Crim. Rep. 653; 48 S. W. 69.

Sec. 2064. **Charge on malice aforethought.**—Malice aforethought is a condition of the mind which shows a heart regardless of social duty and fatally bent on mischief, the existence of which is inferred from acts committed or words spoken. Harris v. State, 8 Texas Crim. App. 109. Hayes v. State, 14 Texas Crim. App. 331. Martinez v. State, 30 Texas Crim. App. 129; 16 S. W. 767. Ellis v. State, 30 Texas Crim. App. 604; 18 S. W. 139. Jackson v. State, 31 Texas Crim. Rep. 552; 21 S. W. 367. Vela v. State, 33 Texas Crim. Rep. 326; 26 S. W. 396. Harrell v. State, 39 Texas Crim. Rep. 228; 45 S. W. 581. Patterson v. State, 60 S. W. 560. Crowell v. State, 148 S. W. 571.

Malice in its legal sense means the intentional doing of a wrongful act toward another without legal justification or excuse. McKinney v. State, 8 Texas Crim. App. 643. Gallaher v. State, 28 Texas Crim. App. 266; 12 S. W. 1087.

The term "malice" as used in its legal sense means the wilful and intentional doing of a wrongful act without legal justification or excuse, and is a state or condition of the mind which shows a heart regardless of social duty and fatally bent on mischief, the existence of which is inferred from acts committed or words spoken. Ellis v. State, 30 Texas Crim. App. 604; 18 S. W. 139.

Malice aforethought includes all those states of the mind under which the killing of a person takes place without any cause which will, in law, justify, excuse, or extenuate the homicide. Tooney v. State, 5 Texas Crim. App. 163.

A charge defining the term "malice aforethought" need not use the word "aforethought." Martinez v. State, 30 Texas Crim. App. 129; 16 S. W. 767. Vela v. State, 33 Texas Crim. Rep. 326; 26 S. W. 396. Harrell v. State, 39 Texas Crim. Rep. 228; 45 S. W. 581.

A charge is error if it defines the term "malice aforethought" only as "the voluntary doing of an unlawful act with the intent, means and ability to accomplish the reasonable and probable consequences of it." Hayes v. State, 14 Texas Crim. App. 331.

A charge on murder is erroneous if "malice" is in no way defined. Holmes v. State, 11 Texas Crim. App. 223. Burkhart v. State, 18 Texas Crim. App. 622.

It is not error to fail to define "malice aforethought" if express malice and implied malice are properly defined. Cravey v. State, 36 Texas Crim. Rep. 92; 35 S. W. 658. Moore v. State, 50 S. W. 355. Hamp v. State, 60 S. W. 46. (*Contra:* Boyd v. State, 28 Texas Crim. App. 139; 12 S. W. 737. Childers v. State, 13 S. W. 650. Ainsworth v. State, 29 Texas Crim. App. 604; 16 S. W. 652. Washington v. State, 16 S. W. 653. Callahan v. State, 30 Texas Crim. App. 275; 17 S. W. 275. Moody v. State, 30 Texas Crim. App. 422; 18 S. W. 94.)

A charge which omits a definition of "malice aforethought" is error, though "express malice" is properly defined. Crook v. State, 27 Texas Crim. App. 242; 11 S. W. 44. Callahan v. State, 30 Texas Crim. App. 275; 17 S. W. 257.

Sec. 2065. **Murder in the second degree.**—An unexplained killing is murder in the second degree. Hamby v. State, 36 Texas 523. Brown v. State, 174 S. W. 364.

If there is an absence of evidence tending to mitigate, justify or excuse an intentional killing, and the evidence does not show that the homicide was upon express malice, the jury is authorized to infer the existence of malice, and a murder on implied malice is murder in the second degree. Hamby v. State, 36 Texas 523.

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Navarro v. State, 43 S. W. 105. Wheeler v. State, 54 Texas Crim. Rep. 51; 111 S. W. 1022. Potts v. State, 56 Texas Crim. Rep. 44; 118 S. W. 535. Dougherty v. State, 59 Texas Crim. Rep. 470; 128 S. W. 401. Wilson v. State, 60 Texas Crim. Rep. 3; 129 S. W. 614.

If the design to unlawfully kill is formed while the mind is incapable of cool reflection, not produced by such adequate cause as would reduce the homicide to manslaughter, and such design is carried into effect before there has been time for the passion to cool to the extent of contemplating the consequences of the act, the homicide, however unjustifiable and unwarranted it may be, is not of a higher grade than murder in the second degree. Atkinson v. State, 20 Texas 522. Farrer v. State, 42 Texas 271. Primus v. State, 2 Texas Crim. App. 369. Halbert v. State, 3 Texas Crim. App. 659. Powell v. State, 5 Texas Crim. App. 246. Jones v. State, 29 Texas Crim. App. 340; 15 S. W. 403. Sherar v. State, 30 Texas Crim. App. 349; 17 S. W. 621. Reyons v. State, 32 Texas Crim. Rep. 153; 22 S. W. 590. Childers v. State, 33 Texas Crim. Rep. 511; 27 S. W. 133. Rice v. State, 51 Texas Crim. Rep. 283; 103 S. W. 1156. Dixon v. State, 51 Texas Crim. Rep. 555; 103 S. W. 399. Potts v. State, 56 Texas Crim. Rep. 44; 118 S. W. 535. Cordono v. State, 56 Texas Crim. Rep. 459; 120 S. W. 471.

A homicide committed in sudden passion upon an inadequate cause is murder in the second degree. Atkinson v. State, 20 Texas 522. Farrer v. State, 42 Texas 271. Halbert v. State, 3 Texas Crim. App. 659. Powell v. State, 5 Texas Crim. App. 246. Jones v. State, 31 Texas Crim. Rep. 448; 20 S. W. 983. Reyons v. State, 32 Texas Crim. Rep. 153; 22 S. W. 590. Trevino v. State, 38 Texas Crim. Rep. 64; 41 S. W. 609. Black v. State, 68 S. W. 683. Rice v. State, 51 Texas Crim. Rep. 283; 103 S. W. 1156. Cordono v. State, 56 Texas Crim. Rep. 459; 120 S. W. 471.

Under an indictment alleging murder with express malice aforethought, a conviction may be had for murder in the second degree; the word "express" may be rejected as surplusage. Singleton v. State, 1 Texas Crim. App. 501. Riptoe v. State, 42 S. W. 381. Lee v. State, 148 S. W. 706.

Sec. 2066. **Charge on murder in second degree.**—Form recommended when manslaughter and self-defense are issues: Best v. State, 58 Texas Crim. Rep. 330; 125 S. W. 911. Hendricks v. State, 154 S. W. 1006.

Where it is shown that a homicide was intentionally committed, and the facts show that it was done neither with express malice nor under circumstances excusing, justifying or mitigating the act, the law in that event implies malice, and the offense is murder in the second degree. Harris v. State, 8 Texas Crim. App. 90. Douglass v. State, 8 Texas Crim. App. 520. Neyland v. State, 13 Texas Crim. App. 549. Gonzales v. State, 30 Texas Crim. App. 224; 16 S. W. 978. Overcash v. State, 148 S. W. 701. Cooper v. State, 161 S. W. 1094.

Implied malice is that which the law infers from or imputes to certain acts, however suddenly done; thus, when the fact of an unlawful killing is established, and the facts do not establish express malice beyond a reasonable doubt, nor tend to mitigate, excuse or justify the act, then the law implies malice, and the murder is in the second degree; and the law does not further define murder in the second degree, than if the killing is shown to be unlawful, and there is nothing in evidence on the one hand showing express malice, and on the other hand there is nothing in evidence that will reduce the killing below the grade of murder, then the law implies malice and the homicide is murder in the second degree. Harris v. State, 8 Texas Crim. App. 90. Hart v. State, 21 Texas Crim. App. 170; 17 S. W. 421. McGrath v. State, 35 Texas Crim. Rep. 423; 34 S. W. 127. Smith v. State, 45 Texas Crim. Rep. 553; 78 S. W. 694. Barton v. State, 53 Texas Crim. Rep. 445; 111 S. W. 1042. Carson v. State, 57 Texas Crim. Rep. 398; 123 S. W. 592. Eggleston v. State, 59 Texas Crim. Rep. 549; 128 S. W. 1105. Edwards v. State, 61 Texas Crim. Rep. 318; 135 S. W. 540. Burns v. State, 145 S. W. 356. Hendricks v. State, 154 S. W. 1005. Smith v. State, 156 S. W. 216. Brookins v. State, 158 S. W. 522. Cooper v. State, 161 S. W. 1094. Hicks v. State, 171 S. W. 759.

All the necessary ingredients of murder in the second degree, when that issue is submitted to the jury, should be embodied (or the jury definitely referred to other parts of the charge) in the charge applying the law to the facts. Abbata v. State,

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51 Texas Crim. Rep. 512; 102 S. W. 1125. McDowell v. State, 55 Texas Crim. Rep. 599; 117 S. W. 831. Smith v. State, 57 Texas Crim. Rep. 587; 124 S. W. 680. Best v. State, 58 Texas Crim. Rep. 327; 125 S. W. 911. McMillan v. State, 58 Texas Crim. Rep. 525; 126 S. W. 877. Blocker v. State, 61 Texas Crim. Rep. 414; 135 S. W. 131.

If the trial court gives defendant the benefit of the doubt, and charges on murder in the second degree, when it should have been proper to have only charged on murder in the first degree, defendant is not entitled to complain because the court charged on murder in the second degree, though there be no evidence of murder in the second degree. Templeton v. State, 5 Texas Crim. App. 407. Davis v. State, 14 Texas Crim. App. 655. McDonald v. State, 15 Texas Crim. App. 500. Hardy v. Texas, 31 Texas Crim. Rep. 293; 20 S. W. 561. Briscoe v. State, 37 Texas Crim. Rep. 464; 36 S. W. 281. Caton v. State, 38 S. W. 192. Augustine v. Texas, 41 Texas Crim. Rep. 69; 52 S. W. 77. Thomas v. State, 43 Texas Crim. Rep. 23; 62 S. W. 919. Johnson v. State, 45 S. W. 901. Williams v. State, 64 S. W. 1042. Hamilton v. State, 64 Texas Crim. Rep. 175; 141 S. W. 967.

If the charge, in applying the law to the facts, does not in terms require the jury to find that the homicide was either unlawful or upon malice aforethought, but facts required to be found would constitute murder in the second degree, there is no error. Puryear v. State, 56 Texas Crim. Rep. 235; 118 S. W. 1042. Davis v. State, 57 Texas Crim. Rep. 545; 124 S. W. 105. Pratt v. State, 59 Texas Crim. Rep. 171; 127 S. W. 829. Crutchfield v. State, 152 S. W. 1053. Thomas v. State, 159 S. W. 1183.

If the issue of manslaughter or self-defense is not in the case, it is not error to charge that it would be murder in the second degree if defendant with a deadly weapon and in a sudden passion aroused without adequate cause and with intent to kill did shoot and kill deceased. Wheeler v. State, 56 Texas Crim. Rep. 550; 121 S. W. 166.

A charge which fails to require the killing to be unlawful or upon malice, but authorizes a conviction for murder in the second degree if killing was done in a sudden passion aroused without adequate cause, is not error if manslaughter and self-defense are correctly charged. Smith v. State, 48 Texas Crim. Rep. 250; 89 S. W. 817.

If the court charges on manslaughter and self-defense, the charge on murder is not error because it authorizes a conviction for murder in the second degree if the killing was on implied malice and fails to mention manslaughter and self-defense in that immediate connection. A charge should be construed as a whole. Hernandez v. State, 53 Texas Crim. Rep. 469; 110 S. W. 753. Brookins v. State, 158 S. W. 522. Hicks v. State, 171 S. W. 760.

If the issue of manslaughter is not in the case, it is not error to charge that if the intent to kill was formed in a mind disturbed by passion, which was not justifiable, the homicide would be murder in the second degree. Mitchell v. State, 51 Texas Crim. Rep. 75; 100 S. W. 930.

If defendant had been convicted of murder in the second degree, and thereby acquitted of murder in the first degree, it is not error to charge on a subsequent trial that if the evidence established either express or implied malice it would warrant a conviction for murder in the second degree. Conde v. State, 35 Texas Crim. Rep. 98; 34 S. W. 286. Moore v. State, 52 Texas Crim. Rep. 336; 107 S. W. 540. Woodward v. State, 54 Texas Crim. Rep. 87; 111 S. W. 941. Williams v. State, 148 S. W. 768.

When defendant had been convicted on a former trial of murder in the second degree, the court is not required on a subsequent trial to charge the jury to acquit if the evidence shows a homicide on express malice. Fuller v. State, 30 Texas Crim. App. 562; 17 S. W. 1108. Conde v. State, 35 Texas Crim. Rep. 98; 34 S. W. 286. Harvey v. State, 35 Texas Crim. Rep. 560; 34 S. W. 623. Martin v. State, 42 Texas Crim. Rep. 147; 58 S. W. 112. Woodward v. State, 54 Texas Crim. Rep. 87; 111 S. W. 941.

It is proper to charge that if the jury believe beyond a reasonable doubt that defendant was guilty of murder, yet if they had a reasonable doubt whether it was upon express or implied malice they would give defendant the benefit of such doubt

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and find him guilty of no higher grade of offense than murder in the second degree. Kinney v. State, 144 S. W. 261.

The words "mitigate, excuse or justify" when used in a charge need not be defined, they having a well understood meaning. Kelly v. State, 151 S. W. 308.

Sec. 2067. **Errors in charge on murder in second degree.**—A charge is error which authorizes a conviction for murder "if defendant did kill as alleged in the indictment," not requiring killing to be unlawful nor upon malice aforethought. Shrivers v. State, 7 Texas Crim. App. 455. Abbata v. State, 51 Texas Crim. Rep. 512; 102 S. W. 1125. Smith v. State, 57 Texas Crim. Rep. 587; 124 S. W. 680. Best v. State, 58 Texas Crim. Rep. 330; 125 S. W. 911. McMillan v. State, 58 Texas Crim. Rep. 525; 126 S. W. 877. Blocker v. State, 61 Texas Crim. Rep. 414; 135 S. W. 131. Patton v. State, 62 Texas Crim. Rep. 71; 136 S. W. 459. Anderson v. State, 144 S. W. 281. Kincaid v. State, 145 S. W. 597. McDowell v. State, 151 S. W. 1049.

If there is any issue of a lower grade of offense than murder in the second degree, it is error to charge jury to convict of murder in the second degree if they find that defendant did, with a deadly weapon, unlawfully kill deceased; the charge should, in some way, require the jury to find that the killing was upon implied malice. Shrivers v. State, 7 Texas Crim. App. 455. Morales v. State, 36 Texas Crim. Rep. 242; 36 S. W. 435. Clark v. State, 51 Texas Crim. Rep. 521; 102 S. W. 1136. Smith v. State, 57 Texas Crim. Rep. 587; 124 S. W. 680. Blocker v. State, 61 Texas Crim. Rep. 414; 135 S. W. 131.

If there is any issue of a lower grade of offense than murder, it is error to charge that if the jury find that defendant unlawfully killed deceased, but that testimony did not raise the issue of murder in the first degree, then defendant would be guilty of murder in the second degree. An "unlawful killing" will also embrace manslaughter and negligent homicide. Green v. State, 58 Texas Crim. Rep. 428; 126 S. W. 861.

It is error to charge that the law implies malice from an unlawful killing unless the circumstances make it evident that the killing was justified or mitigated. Morgan v. State, 16 Texas Crim. App. 622 (overruling Sharpe v. State, 6 Texas Crim. App. 650).

A charge is erroneous if it requires the jury to find that the evidence fails to show or establish manslaughter or self-defense, before they can convict of murder in the second degree; it puts the burden on defendant to establish manslaughter or self-defense. Green v. State, 49 Texas Crim. Rep. 652; 98 S. W. 1059. Casey v. State, 90 S. W. 1018.

If the charge mentions "adequate cause," that term should be somewhere defined in the charge. Neyland v. State, 13 Texas Crim. App. 547. Pollard v. State, 45 Texas Crim. Rep. 126; 73 S. W. 953. Beckham v. State, 69 S. W. 536.

If the charge does not require the jury to find that the killing was done with implied malice, but authorizes a conviction if done in a passion aroused without adequate cause, the charge is error if "adequate cause" be nowhere defined. Thomas v. State, 45 Texas Crim. Rep. 115; 74 S. W. 36. Pollard v. State, 45 Texas Crim. Rep. 125; 73 S. W. 953. Harrison v. State, 47 Texas Crim. Rep. 402; 83 S. W. 699. Whitaker v. State, 12 Texas Crim. App. 443.

The charge is error when manslaughter is not submitted if the jury are charged that defendant would be guilty of murder in the second degree if they find that the defendant did not act under the immediate influence of sudden passion arising from an adequate cause. Spivey v. State, 45 Texas Crim. Rep. 498; 77 S. W. 444.

A charge is error if the jury are thereby instructed that if the acting principal killed deceased and that defendant was a principal he would be guilty of murder in the second degree. The charge should in some way require the jury to find that the killing on the part of the slayer was on implied malice. Patton v. State, 62 Texas Crim. Rep. 71; 136 S. W. 459.

A charge is reversible error which submits the idea that to reduce to murder in the second degree the killing should have been in a "sudden transport" of passion.

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Kannmacher v. State, 51 Texas Crim. Rep. 124; 101 S. W. 238. Clark v. State, 51 Texas Crim. Rep. 522; 102 S. W. 1136. Redman v. State, 52 Texas Crim. Rep. 595; 108 S. W. 365. Gaines v. State, 53 S. W. 262. *Contra:* McCorquodale v. State, 54 Texas Crim. Rep. 359; 98 S. W. 879. Puryear v. State, 56 Texas Crim. Rep. 233; 118 S. W. 1042. Clark v. State, 56 Texas Crim. Rep. 293; 120 S. W. 179.

A charge is error which authorizes a conviction for murder in the second degree if the jury find a state of facts which would also embrace or which would constitute only manslaughter. Miles v. State, 18 Texas Crim. App. 168. Van v. State, 21 Texas Crim. App. 676; 2 S. W. 882. Morales v. State, 36 Texas Crim. Rep. 242; 36 S. W. 435. Ray v. State, 46 Crim. Rep. 511; 81 S. W. 737. Smith v. State, 57 Texas Crim. Rep. 587; 124 S. W. 680. Kincaid v. State, 145 S. W. 597. McDowell v. State, 151 S. W. 1048. Roberts v. State, 156 S. W. 651. Gusman v. State, 171 S. W. 772.

In stating the circumstances the absence of which authorizes the inference of implied malice, the charge should not ignore circumstances which mitigate a homicide. Ellison v. State, 12 Texas Crim. App. 581. Neyland v. State, 13 Texas Crim. App. 549. Turner v. State, 16 Texas Crim. App. 391. Roberts v. State, 156 S. W. 651.

A charge is error which includes the intent and purpose of defendant in going to where deceased was where such intent was not to do harm to deceased and requires the jury to find immaterial matters before they can refuse the homicide to murder in the second degree. Cordono v. State, 56 Texas Crim. Rep. 459; 120 S. W. 471.

When manslaughter or negligent homicide is an issue, it is error to charge the jury that malice will be implied from an unlawful killing where in applying the law to the facts the jury are charged that if they believe defendant killed deceased with implied malice and not in self-defense they should find him guilty of murder in the second degree. Roberts v. State, 156 S. W. 651. Garcia v. State, 156 S. W. 939. Smith v. State, 161 S. W. 477.

A charge is error which states that every rash and inconsiderate killing under some sudden impulse wherein there is no sedate mind and formed design to kill is murder in the second degree. Miles v. State, 18 Texas Crim. App. 168. Van v. State, 21 Texas Crim. App. 676; 2 S. W. 882.

A charge is error which makes one or more emotions of the mind the only mental excitement available to defendant before homicide can be reduced to murder in the second degree, when there is evidence of other and different emotions. Cordono v. State, 56 Texas Crim. Rep. 458; 120 S. W. 471.

A charge is error if the jury are instructed that it is for the defendant to show facts which mitigate or reduce the offense below murder. Guffee v. State, 8 Texas Crim. App. 187.

If the conviction is for a lower grade of offence than murder, errors in the charge as to murder pass out of the case, unless they are such as probably contributed to defendant's conviction. Williams v. State, 25 Texas Crim. App. 76; 7 S. W. 661. Johnson v. State, 61 Texas Crim. Rep. 635. Ballard v. State, 62 Texas Crim. Rep. 435; 138 S. W. 121. Wells v. State, 145 S. W. 950. Cukierski v. State, 153 S. W. 315. Condron v. State, 155 S. W. 253.

Sec. 2068. **Failure to charge on murder in second degree.**—Before the court will be justified in failing or refusing to charge on the issue of murder in the second degree, the facts must be of such a cogent character as not only to constitute murder in the first degree, but to exclude murder in the second degree. If there is any doubt, however, slight, the court should not solve it against defendant, but should leave the matter to be decided by the jury under appropriate instructions. Farrer v. State, 42 Texas 274. Benevides v. State, 14 Texas Crim. App. 385. Blocker v. State, 27 Texas Crim. App. 40; 10 S. W. 439. Jones v. State, 29 Texas Crim. App. 338; 15 S. W. 403. Fendrick v. State, 39 Texas Crim. Rep. 147; 45 S. W. 589. O'Neill v. State, 45 S. W. 592. Bennett v. State, 39 Texas Crim. Rep. 652; 48 S. W. 69. Guerrero v. State, 39 Texas Crim. Rep. 662; 47 S. W. 655. Trijo v. State, 45 Texas Crim. Rep. 131; 74 S. W. 546. Johnson v. State, 48 Texas Crim. Rep. 427; 88 S. W. 223. Cordono v. State, 56 Texas Crim. Rep. 457; 120 S. W. 471. Barlow v.

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State, 61 Texas Crim. Rep. 64; 133 S. W. 1050. Menefee v. State, 149 S. W. 140. Heidelberg v. State, 159 S. W. 1187.

A case can rarely arise where self-defense is an issue, and yet the court be authorized to refuse to charge on murder in the second degree. Guerrero v. State, 39 Texas Crim. Rep. 662; 47 S. W. 655.

It can rarely happen that where the court is required to charge on manslaughter, there would be no phase of the case demanding a charge on murder in the second degree. Fendrick v. State, 39 Texas Crim. Rep. 147; 45 S. W. 589.

When the issue of accidental meeting and a killing on a sudden transport of frenzy and jealousy is in the case, the court should charge on murder in the second degree. Cordono v. State, 56 Texas Crim. Rep. 457; 120 S. W. 471. (Defendant plead guilty.)

If defendant is tried as an accomplice, he is entitled to a charge on murder in the second degree if the principal would have been were he on trial. O'Neill v. State, 45 S. W. 592.

When the evidence of the killing is circumstantial, so that the state of mind in which the design to kill was formed cannot be definitely shown, the court should charge on murder in the second degree. Jones v. State, 29 Texas Crim. App. 338; 15 S. W. 403. Bennett v. State, 39 Texas Crim. Rep. 652; 48 S. W. 69. Menefee v. State, 149 S. W. 140.

If the issue is simply an assassination upon express malice, or that defendant is not guilty, it is not necessary to charge on murder in the second degree. (Evidence in the following cases was circumstantial.) Washington v. State, 1 Texas Crim. App. 647. Davis v. State, 14 Texas Crim. App. 645. Bryant v. State, 18 Texas Crim. App. 107. Johnson v. State, 18 Texas Crim. App. 385. Ringo v. State, 26 S. W. 73. Caldwell v. State, 28 Texas Crim. App. 566; 14 S. W. 122. Hughes v. State, 29 Texas Crim. App. 565; 16 S. W. 548. Henry v. State, 30 S. W. 802. Chapman v. State, 34 Texas Crim. Rep. 27; 28 S. W. 811. Morgan v. State, 41 Texas Crim. Rep. 103; 51 S. W. 902. Beard v. State, 41 Texas Crim. Rep. 173; 53 S. W. 349. Pearl v. State, 43 Texas Crim. Rep. 189; 63 S. W. 1013. Squires v. State, 54 S. W. 770. Monmouth v. State, 54 Texas Crim. Rep. 407; 114 S. W. 114. Wynne v. State, 59 Texas Crim. Rep. 126; 127 S. W. 214.

If the issue is simply whether defendant is guilty of an assassination on express malice, or that he is not guilty of any offense, the court is not required to charge on murder in the second degree. Darnell v. State, 15 Texas Crim. App. 70. Smith v. State, 15 Texas Crim. App. 139. Gomez v. State, 15 Texas Crim. App. 327. Rhodes v. State, 17 Texas Crim. App. 579. May v. State, 22 Texas Crim. App. 595. Henning v. State, 24 Texas Crim. App. 325. Trumble v. State, 25 Texas Crim. App. 631; 8 S. W. 814. O'Connor v. State, 28 Texas Crim. App. 288; 13 S. W. 14. White v. State, 30 Texas Crim. App. 652; 18 S. W. 462. Thomas v. State, 33 Texas Crim. Rep. 615; 28 S. W. 534. Smith v. State, 40 Texas Crim. Rep. 391; 50 S. W. 938. Swan v. State, 47 S. W. 362. Macklin v. State, 53 Texas Crim. Rep. 197; 109 S. W. 145. King v. State, 57 Texas Crim. Rep. 371; 123 S. W. 135. Wynne v. State, 59 Texas Crim. Rep. 126; 127 S. W. 213. Cain v. State, 63 Texas Crim. Rep. 87; 138 S. W. 405. Mitchell v. State, 144 S. W. 1011.

If the issue is simply whether defendant was guilty of murder in the perpetration, or in the attempt at perpetration of robbery, or that he was guilty of no offense, it is not necessary to charge on murder in the second degree. Williams v. State, 30 Texas Crim. App. 368; 17 S. W. 408. Turner v. State, 48 Texas Crim. Rep. 585; 89 S. W. 975. Parker v. State, 49 S. W. 80. Johnson v. State, 49 Texas Crim. Rep. 316; 94 S. W. 224. Elsworth v. State, 54 Texas Crim. Rep. 38; 111 S. W. 963. Miller v. State, 58 Texas Crim. Rep. 600; 126 S. W. 865.

If the issue is simply whether defendant was guilty of murder by poisoning, or that he was guilty of no offense, it is not necessary to charge on murder in the second degree. Bailey v. State, 145 S. W. 996.

Sec. 2069. Cooling time in murder.—When the design to kill has its origin in an inflamed and excited mind, incapable of such sedate and deliberate action as is

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compatible with express malice, and such design is carried into immediate effect before there has been cooling time for passion, or for the excitement to abate and the mental equilibrium to be restored, the killing under such circumstances, no matter how such passion or excitement may have been induced or originated, cannot be murder on express malice. Farrer v. State, 42 Texas 272. Dixon v. State, 51 Texas Crim. Rep. 555; 103 S. W. 399. Powdrill v. State, 62 Texas Crim. Rep. 442; 138 S. W. 114.

When the theory of an insult to a female relative is not involved, the question of cooling time is a matter of law and not of fact and the court may so treat it in the charge, leaving it to the jury to find out whether defendants had time to cool. Franks v. State, 47 Texas Crim. Rep. 645; 88 S. W. 925. Surrell v. State, 29 Texas Crim. App. 324.

If the difficulty was continuous, it is not necessary for the charge to define "cooling time." Kannmacher v. State, 51 Texas Crim. Rep. 124; 101 S. W. 238.

If the insult offered to defendant by deceased on the first difficulty, or meeting, was calculated to excite his passion (which is a question for the jury), and the intent to kill was then formed and was carried out before cooling time ensued, it would not be murder in the first degree, and when such issue is made, the charge should instruct the jury on cooling time between the degrees of murder. Rice v. State, 51 Texas Crim. Rep. 283; 103 S. W. 1156. Dixon v. State, 51 Texas Crim. Rep. 555; 103 S. W. 399. Powdrill v. State, 62 Texas Crim. Rep. 442; 138 S. W. 114.

Where two hours before the homicide deceased had made defendant apologize on bended knees the court should charge that if the intent to kill was formed while the mind was not cool and sedate and the killing occurred before cooling time elapsed the homicide would not be greater than murder in the second degree. Manning v. State, 43 Texas Crim. Rep. 57; 83 S. W. 1149.

When the homicide occurred an hour after a difficulty between friends, it is error not to submit the issue of "cooling time" as between the degrees of murder. Dixon v. State, 51 Texas Crim. Rep. 555; 103 S. W. 399.

It is error to charge that if sufficient time had elapsed between a previous quarrel and the time of the homicide for passion to subside and reason to resume its sway that defendant would be guilty of murder in the first degree; such charge leaves the jury without the right to inquire into the circumstances immediately connected with and surrounding the parties at the time of the killing. Murray v. State, 1 Texas Crim. App. 420.

Art. 1142. (712) **Verdict must find degree of murder.**—If the jury shall find any person guilty of murder, they shall also find by their verdict whether it is of the first or second degree; and if any person shall plead guilty to an indictment for murder, a jury shall be summoned to find of what degree of murder he is guilty, and in either case they shall also find the punishment. (Act Feb. 12, 1858, p. 174, repealed by Act April 3, 1915, Acts 1915, p. 238.)

Sec. 2070. **Verdict in murder case must find degree.**—The verdict in a conviction for murder must find the degree of murder. The statute when both degrees of murder is involved is mandatory. Buster v. State, 42 Texas 315. Colbath v. State, 2 Texas Crim. App. 391. Brown v. State, 3 Texas Crim. App. 315. Krebs v. State, 3 Texas Crim. App. 361. Dubose v. State, 13 Texas Crim. App. 424. Wooldridge v. State, 13 Texas Crim. App. 455. Sanders v. State, 18 Texas Crim. App. 372. Armstead v. State, 22 Texas Crim. App. 59; 2 S. W. 627. Zwicker v. State, 27 Texas Crim. App. 559; 11 S. W. 633. Johnson v. State, 30 Texas Crim. App. 421; 17 S. W. 1070 (indictment for murder by poisoning). McCloud v. State, 37 Texas Crim. Rep. 237; 39 S. W. 104. Harbolt v. State, 40 S. W. 983. Brooks v. State, 42 Texas Crim. Rep. 347; 60 S. W. 53 (indictment for murder by poisoning). Thomas v. State, 43 Texas Crim. Rep. 23; 62 S. W. 919 (defendant tried as an accomplice). Lyles v. State, 48 Texas Crim. Rep. 119; 86 S. W. 763. Orner v. State, 143 S. W. 935.

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When only one degree of murder is submitted to the jury and the punishment assessed is applicable to that degree, the statute requiring the verdict to state the degree of murder is not mandatory. Essery v. State, 163 S. W. 17.

If the issue of murder in the first degree is not submitted to the jury for a finding, they need not state in their verdict the degree of murder of which they find defendant guilty. Taylor v. State, 169 S. W. 672.

A verdict is good which recites that the jury find defendant guilty of being an accomplice to the offense of murder in the first degree and assesses an appropriate penalty. Carbough v. State, 49 Texas Crim. Rep. 456; 93 S. W. 738.

When murder in both degrees is not submitted to the jury for a finding, the verdict need not recite in terms that the jury find the defendant guilty of murder if the punishment assessed is applicable only to that offense. Roberts v. State, 168 S. W. 107.

Art. 1143. (713) (608) **Threats and character of deceased.**—Where a defendant accused of murder seeks to justify himself on the ground of threats against his own life, he may be permitted to introduce evidence of the threats made, but the same shall not be regarded as affording a justification for the offense unless it be shown that at the time of the homicide the person killed by some act then done manifested an intention to execute the threat so made. In every instance where proof of threats has been made, it shall be competent to introduce evidence of the general character of the deceased. Such evidence shall extend only to an inquiry as to whether the deceased was a man of violent or dangerous character, or a man of kind and inoffensive disposition, or whether he was such a person as might reasonably be expected to execute a threat made.

Sec. 2071. **Threats.**
Sec. 2072. Threats of defendant may be proved.
Sec. 2073. Threats of defendant not admissible.
Sec. 2074. Charge on threats made by defendant.
Sec. 2075. Threats made during the difficulty.
Sec. 2076. Threats made direct to defendant.
Sec. 2077. Threats made by deceased.
Sec. 2078. General threats of deceased.
Sec. 2079. Uncommunicated threats.
Sec. 2080. Charge on uncommunicated threats.
Sec. 2081. Need not charge on uncommunicated threats.
Sec. 2082. Charges held correct.
Sec. 2083. Threats and self-defense should be charged.
Sec. 2084. Charge on threats and self-defense.
Sec. 2085. Threats need not be in fact made.
Sec. 2086. Charge as to threat being seriously made.
Sec. 2087. Charge on immediate intention.
Sec. 2088. Charge on "overt act."
Sec. 2089. Should charge on self-defense alone.
Sec. 2090. Threat to do bodily injury.
Sec. 2091. Continuance for proof of threats.
Sec. 2092. Newly discovered evidence of threats.
Sec. 2093. Character of deceased.

Sec. 2072. **Threats made by the defendant may be proved.**—Though the name of deceased be not mentioned when the threat was made, yet proof of same is admissible if it can be reasonably gathered that deceased was meant or included in the threat. Hardy v. State, 31 Texas Crim. Rep. 289; 20 S. W. 561. Miller v. State, 31 Texas Crim. Rep. 636; 21 S. W. 925. Williams v. State, 40 Texas Crim. Rep. 501; 51 S. W. 220. Sebastian v. State, 41 Texas Crim. Rep. 251; 53 S. W. 875. Thomas

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v. State, 42 Texas Crim. Rep. 386; 56 S. W. 70. Taylor v. State, 44 Texas Crim. Rep. 549; 72 S. W. 396. Marchan v. State, 45 Texas Crim. Rep. 214; 75 S. W. 532. Holloway v. State, 45 Texas Crim. Rep. 306; 77 S. W. 14. Armstrong v. State, 50 Texas Crim. Rep. 469; 98 S. W. 844. Mathis v. State, 34 Texas Crim. Rep. 39; 28 S. W. 817. Davis v. State, 56 S. W. 53. Pace v. State, 153 S. W. 132. De La Garza v. State, 61 S. W. 485. Williams v. State, 61 Texas Crim. Rep. 356; 136 S. W. 771. McKelvey v. State, 155 S. W. 935. Harper v. State, 170 S. W. 722. Howe v. State, 177 S. W. 497.

Where defendant makes a statement which shows a malignant disposition, and suggests that he is fatally bent on mischief, and which shows in connection with his act of preparation, reckless disregard of the safety of anyone and everyone who might antagonize him, and as showing a malignant disposition toward a class of persons as might or would embrace the deceased, the statement is admissible. Miller v. State, 31 Texas Crim. Rep. 636; 21 S. W. 925. Mathis v. State, 34 Texas Crim. Rep. 39; 28 S. W. 817. Taylor v. State, 44 Texas Crim. Rep. 549; 72 S. W. 396. Helvenston v. State, 53 Texas Crim. Rep. 638; 111 S. W. 959. Hiles v. State, 163 S. W. 717.

When the threat, although remote, tends to explain the main and the immediate cause of the killing, an objection to it is more to the weight than to its admissibility. Leech v. State, 63 Texas Crim. Rep. 339; 139 S. W. 1152. Powdrill v. State, 155 S. W. 231.

Proof of antecedent threats made by the defendant against deceased is admissible to show motive or malice, or to shed light upon the issue of who began the fatal difficulty. Rucker v. State, 7 Texas Crim. App. 549. McKinney v. State, 8 Texas Crim. App. 626. Anderson v. State, 15 Texas Crim. App. 447. McCoy v. State, 27 Texas Crim. App. 431; 11 S. W. 454. Frizzell v. State, 30 Texas Crim. App. 55; 16 S. W. 751. Slade v. State, 29 Texas Crim. App. 381; 16 S. W. 253. Cline v. State, 33 Texas Crim. Rep. 491; 27 S. W. 128. Menefee v. State, 50 Texas Crim. Rep. 249; 97 S. W. 486. Owen v. State, 52 Texas Crim. App. 68; 105 S. W. 513. Brown v. State, 56 Texas Crim. Rep. 389; 120 S. W. 444. Wheeler v. State, 62 Texas Crim. Rep. 528; 136 S. W. 68. Leech v. State, 63 Texas Crim. Rep. 347; 139 S. W. 1152. Powdrill v. State, 155 S. W. 231. Flores v. State, 162 S. W. 883. Bryant v. State, 35 Texas Crim. Rep. 394; 33 S. W. 978.

Although the threats were followed by reconciliation which ordinarily would render the threat inadmissible, yet where the threats were repeated when defendant would again become angered, proof of same is admissible. Brown v. State, 56 Texas Crim. Rep. 393; 120 S. W. 444.

Where two persons were shot by the defendant during the same transaction, and the motive for the shooting of both was the same, the State may prove on a trial for the shooting of either the threats made by defendant against both. Menefee v. State, 50 Texas Crim. Rep. 249; 97 S. W. 486.

If threats by defendant are proved, it is error to refuse to permit him to prove that they were made on account of a different cause than that shown by the State, and that he had abandoned the idea of harming deceased on the original provocation and that the homicide was the result of a fresh provocation. Utzman v. State, 32 Texas Crim. Rep. 430; 24 S. W. 412.

If threats by defendant are proved, defendant may prove that on a subsequent occasion a witness talked to him about the difficulties with deceased, and defendant proposed to drop them. Gaines v. State, 38 Texas Crim. Rep. 229; 42 S. W. 385.

When threats made by defendant against deceased are shown, it is error to refuse to permit defendant to testify that they were not seriously made and that he had no intention of killing deceased. Pratt v. State, 50 Texas Crim. Rep. 227; 96 S. W. 11.

Sec. 2073. **Threats made by defendant not admissible.**—Evidence of general threats made by defendant when such threats are not shown to have been directed towards deceased or to embrace him is not admissible, and especially where the only proof of malice against deceased arises subsequent to such general threat. Strange v. State, 38 Texas Crim. Rep. 280; 42 S. W. 551. Godwin v. State, 38 Texas Crim. Rep. 469; 43 S. W. 336. Holley v. State, 39 Texas Crim. Rep. 307; 46 S. W.

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39. Fossett v. State, 41 Texas Crim. Rep. 406; 55 S. W. 497. Hall v. State, 43 Texas Crim. Rep. 259; 64 S. W. 248. Morton v. State, 43 Texas Crim. Rep. 536; 67 S. W. 115. McMahon v. State, 46 Texas Crim. Rep. 547; 81 S. W. 296. Harrison v. State, 47 Texas Crim. Rep. 398; 83 S. W. 699. Earles v. State, 47 Texas Crim. Rep. 562; 85 S. W. 1. Barbee v. State, 50 Texas Crim. Rep. 428; 97 S. W. 1058. Garrett v. State, 52 Texas Crim. Rep. 258; 106 S. W. 389. Helvenston v. State, 53 Texas Crim. Rep. 638; 111 S. W. 959. Bradley v. State, 54 Texas Crim. Rep. 54; 111 S. W. 733. Fuller v. State, 54 Texas Crim. Rep. 455; 113 S. W. 541. Holland v. State, 55 Texas Crim. Rep. 28; 115 S. W. 48. Duke v. State, 61 Texas Crim. Rep. 19; 133 S. W. 434. Maclin v. State, 144 S. W. 959. Rogers v. State, 149 S. W. 129. Wade v. State, 172 S. W. 215.

It is error to admit proof that defendant stated before the homicide "when I go after anybody I generally get them" when it is clear that defendant had no reference to deceased with whom at that time he was friendly. Lucas v. State, 50 Texas Crim. Rep. 219; 95 S. W. 1055.

The mere fact that prior to the homicide defendant said he was going to kill a person of the same race or nationality of which deceased was a member or native will not of itself show that such general threat in any way referred to deceased. Barbee v. State, 50 Texas Crim. Rep. 428; 97 S. W. 1058. Garrett v. State, 52 Texas Crim. Rep. 258; 106 S. W. 389. Fuller v. State, 54 Texas Crim. Rep. 456; 113 S. W. 541.

The burden is on the State to show that the threat made by defendant was directed against deceased or embraced him. Holley v. State, 39 Texas Crim. Rep. 307; 46 S. W. 39. Gaines v. State, 53 S. W. 626. Duke v. State, 61 Texas Crim. Rep. 19; 133 S. W. 434. Maclin v. State, 144 S. W. 959. Sorrell v. State, 169 S. W. 306.

It is error to prove that defendant made threats against others than deceased, when such threats are distinct and independent, and could only serve the purpose of showing that defendant was a bad man generally. Brown v. State, 56 Texas Crim. Rep. 391; 120 S. W. 444. Strange v. State, 38 Texas Crim. Rep. 283; 42 S. W. 551. Harrison v. State, 47 Texas Crim. Rep. 398; 83 S. W. 699.

It is not admissible as original evidence to prove by a witness that he never heard deceased make any threats against defendant. Maclin v. State, 144 S. W. 958.

If the threat of defendant was conditional to be executed upon a further contingency, in order to be admissible it must be shown that the condition is connected in some way with the deceased, and the threat must be based upon some act to be performed or not to be performed by the deceased. Maclin v. State, 144 S. W. 959.

Sec. 2074. **Charge on threats made by defendant.**—If there is proof of threats made by defendant, it is error to refuse to charge the jury that such threats, if any, would not deprive him of the right of self-defense if he did or said nothing which was intended to induce deceased to attack him. Smith v. State, 15 Texas Crim. App. 338. Parker v. State, 18 Texas Crim. App. 90. White v. State, 23 Texas Crim. App. 154; 3 S. W. 710. Stanley v. State, 62 Texas Crim. Rep. 306; 137 S. W. 704.

Where threats of defendant are proven and his testimony is that there was no intention of executing them or that they were jocular, the court is not required to charge the jury that if such was the case they should not consider such threats. Brock v. State, 151 S. W. 801.

A charge on the theory that threats were made by defendant should not be given if there is no proof to support it. Lankster v. State, 41 Texas Crim. Rep. 605; 56 S. W. 65.

Sec. 2075. **Threats made during the difficulty.**—If there is no proof of antecedent threats, it is not necessary to charge the jury on threats made at the time of and during the fatal difficulty. Hancock v. State, 47 Texas Crim. Rep. 3; 83 S. W. 696. Armstrong v. State, 50 Texas Crim. Rep. 27; 96 S. W. 15. Davis v. State, 52 Texas Crim. Rep. 149; 106 S. W. 144. Dobbs v. State, 54 Texas Crim. Rep. 552; 113 S. W. 924. Wilson v. State, 160 S. W. 83. Belcher v. State, 161 S. W. 466. Johnson v. State, 167 S. W. 743. Francis v. State, 175 S. W. 705.

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Threats made an hour or more before the fatal difficulty are not regarded as threats made during the difficulty, where the difficulty was not continuous. Penton v. State, 53 Texas Crim. Rep. 323; 109 S. W. 937.

Sec. 2076. **Threats made direct to defendant.**—The fact that the threats were made direct to the defendant will not excuse the court from the charging the law of threats in connection with self-defense, where such threats were made some time prior to the difficulty. Thomson v. State, 49 Texas Crim. Rep. 384; 93 S. W. 111. Penton v. State, 53 Texas Crim. Rep. 323; 109 S. W. 937.

Sec. 2077. **Threats made by deceased.**—Proof of threats made by deceased against defendant is admissible if there is evidence that the homicide was in sudden passion, or if there is evidence of apparent danger or of a hostile demonstration by deceased, or if the testimony is conflicting as to who began the difficulty. King v. State, 9 Texas Crim. App. 556. Howard v. State, 23 Texas Crim. App. 278; 5 S. W. 231. Reeves v. State, 34 Texas Crim. Rep. 486; 31 S. W. 382. Wallace v. State, 44 Texas Crim. Rep. 303; 70 S. W. 756. Williams v. State, 70 S. W. 756. Poole v. State, 45 Texas Crim. Rep. 348; 76 S. W. 565. Adams v. State, 47 Texas Crim. Rep. 355; 84 S. W. 231. Bethune v. State, 49 Texas Crim. Rep. 166; 90 S. W. 1014.

Proof that threats made by deceased were communicated to the defendant may be made by any person who heard the communication. Logan v. State, 17 Texas Crim. App. 58.

It is not necessary that the statement of deceased be tantamount to a direct threat against defendant if it showed the state of mind or animus of deceased toward defendant. Bethune v. State, 49 Texas Crim. Rep. 166; 90 S. W. 1014. Bradley v. State, 60 Texas Crim. Rep. 402; 132 S. W. 484. Jennings v. State, 60 Texas Crim. Rep. 424; 132 S. W. 473. McMillan v. State, 143 S. W. 1174.

Defendant may prove a conversation between deceased and another showing ill-will of deceased toward him if self-defense is an issue and it is a question as to who was most likely to begin the difficulty. Bradley v. State, 60 Texas Crim. Rep. 402; 132 S. W. 484. McMillan v. State, 143 S. W. 1174.

Defendant may prove the conversation which called the threat forth so as to show that it came about in a natural way, and so would serve to strengthen the testimony of the witness as to the threat. Poole v. State, 45 Texas Crim. Rep. 364; 76 S. W. 565. Adams v. State, 47 Texas Crim. Rep. 355; 84 S. W. 233.

If self-defense is an issue and there is evidence of threats made by deceased, it is error to exclude proof of the part of the conversation in which the threat was made which tends to show the seriousness of the threat. Poole v. State, 45 Texas Crim. Rep. 348; 76 S. W. 565. Adams v. State, 47 Texas Crim. Rep. 355; 84 S. W. 233.

When threats made by deceased are proven, it is error for the State to ask defendant or any other witness if deceased had been put under a peace bond or if any complaint had been made against him on that account. Newman v. State, 70 S. W. 951.

It is not error to exclude proof of threats made by deceased if there is no evidence that defendant, viewed from his standpoint, believed that he was in danger from deceased at the time of the homicide, no issue of apparent danger, and no evidence that the threats were so recent as that defendant may have formed the design to kill in a mind disturbed by passion and which he carried into execution before cooling time had elapsed. Irwin v. State, 43 Texas 241. Ruby v. State, 9 Texas Crim. App. 356. Holt v. State, 9 Texas Crim. App. 583. Allen v. State, 17 Texas Crim. App. 644. Penland v. State, 19 Texas Crim. App. 365. Brooks v. State, 24 Texas Crim. App. 274; 5 S. W. 852. Mealer v. State, 32 Texas Crim. Rep. 107; 22 S. W. 142. Highsmith v. State, 41 Texas Crim. Rep. 32; 50 S. W. 723. Sue v. State, 52 Texas Crim. Rep. 125; 105 S. W. 824.

Antecedent threats or former hostile acts will not authorize a person to arm himself, seek his enemy, and assassinate him. Lander v. State, 12 Texas 462. Johnson v. State, 27 Texas 758. Ex parte Taylor, 33 Texas Crim. Rep. 531; 28 S. W. 957. Wright v. State, 40 Texas Crim. Rep. 449; 50 S. W. 940.

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Sec. 2078. **General threats by deceased.**—Proof of a threat made by deceased is not admissible if it is so general as to have no reference to defendant nor to include the latter within its scope. Gregory v. State, 48 S. W. 578. Highsmith v. State, 41 Texas Crim. Rep. 37; 50 S. W. 723. Heffington v. State, 41 Texas Crim. Rep. 318; 54 S. W. 755.

Though the name of defendant be not mentioned when the threat of deceased is made, yet proof of same is admissible if it can be reasonably gathered that defendant was meant or included in the threat. Bethune v. State, 49 Texas Crim. Rep. 166; 90 S. W. 1014.

Sec. 2079. **Uncommunicated threats.**—Proof of an uncommunicated threat made by deceased against defendant is admissible where it is an issue as to who made the first demonstration or who began or who was most likely to begin the difficulty. Pitts v. State, 29 Texas Crim. App. 380; 16 S. W. 189. Stewart v. State, 36 Texas Crim. Rep. 130; 35 S. W. 985. Trotter v. State, 37 Texas Crim. Rep. 468; 36 S. W. 278. Williams v. State, 70 S. W. 756. Huddleston v. State, 54 Texas Crim. Rep. 98; 112 S. W. 64. Pate v. State, 54 Texas Crim. Rep. 462; 113 S. W. 759. McMillan v. State, 143 S. W. 1174. Bankston v. State, 175 S. W. 1069.

Sec. 2080. **Charge on uncommunicated threats.**—If it is a vital issue as to who was the aggressor, the court should charge the jury as to the uncommunicated threats of deceased. Kirklin v. State, 164 S. W. 1016.

It is error to charge the jury only that proof of uncommunicated threats may be considered in determining the state of mind of deceased, since such proof is also admissible to show who probably began the difficulty. Sebastian v. State, 42 Texas Crim. Rep. 84; 57 S. W. 820. Huddleston v. State, 54 Texas Crim. Rep. 98; 112 S. W. 64.

If there is no proof that the threats were communicated to defendant prior to the homicide, it is not error to fail to charge on threats in connection with self-defense. Dobbs v. State, 54 Texas Crim. Rep. 552; 113 S. W. 924. Washington v. State, 56 Texas Crim. Rep. 197; 119 S. W. 689.

When there is testimony of an unucommunicated threat but no proof of a communicated threat, it is error to suggest to the jury in the charge that the killing was on account of defendant's fear that deceased would sometime attack him, and in such case it is error to charge the jury that fear caused by threats affords no justification. Arnwine v. State, 50 Texas Crim. Rep. 258; 96 S. W. 4.

Sec. 2081. **Need not charge on uncommunicated threats.**—When the question as to who began the difficulty is of no importance, it is not error to fail to charge the jury as to uncommunicated threats. Lancaster v. State, 148 S. W. 307.

It is not error to fail to charge the jury as to uncommunicated threats if such charge would be of no benefit to the defendant. Lancaster v. State, 148 S. W. 307. Carver v. State, 148 S. W. 746.

Sec. 2082. **Charges held correct.**—The charges on threats in connection with self-defense which were given in the following cases were held correct. Glover v. State, 107 S. W. 854. Darnell v. State, 58 Texas Crim. Rep. 585; 126 S. W. 1127. Hudson v. State, 59 Texas Crim. Rep. 650; 129 S. W. 1125 (no issue as to threats being in fact made). Lewis v. State, 59 Texas Crim. Rep. 51; 126 S. W. 1138. Bradley v. State, 60 Texas Crim. Rep. 402; 132 S. W. 484. Edwards v. State, 61 Texas Crim. Rep. 319; 135 S. W. 546. Tilmyer v. State, 62 Texas Crim. Rep. 272; 136 S. W. 1062. Carver v. State, 148 S. W. 746. Burnam v. State, 148 S. W. 759. Williams v. State, 148 S. W. 771. Shed v. State, 153 S. W. 125. Eads v. State, 176 S. W. 575.

Sec. 2083. **Threats and self-defense should be charged.**—If there is evidence of communicated threats and of an overt act by deceased at the time of the homicide not amounting to an actual attack, the court should charge the jury affirmatively on the law of threats in connection with self-defense. Sims v. State, 9 Texas Crim. App. 593. Williams v. State, 22 Texas Crim. App. 505; 4 S. W. 64. Wheelis v. State, 23 Texas Crim. App. 238; 5 S. W. 224. Tillery v. State, 24 Texas Crim. App. 251; 5 S. W. 842. Alexander v. State, 25 Texas Crim. App. 266; 7 S. W. 867. Chapman v. State, 42 Texas Crim. Rep. 138; 57 S. W. 965. Fielding v. State, 48 Texas Crim. Rep. 334; 87

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S. W. 1044. Armsworthy v. State, 48 Texas Crim. Rep. 413; 88 S. W. 215. Thomson v. State, 49 Texas Crim. Rep. 384; 93 S. W. 111. Jay v. State, 52 Texas Crim. Rep. 567; 109 S. W. 131. Carden v. State, 59 Texas Crim. Rep. 501; 129 S. W. 362. Reinhardt v. State, 60 Texas Crim. Rep. 667; 133 S. W. 265. Masters v. State, 160 S. W. 693. Rutherford v. State, 164 S. W. 383.

If the evidence is defense from actual danger only, it is not error to fail to charge the jury on threats in connection with self-defense. Chalk v. State, 35 Texas Crim. Rep. 129; 32 S. W. 534. Barnes v. State, 39 Texas Crim. Rep. 184; 45 S. W. 495 (*Contra:* Spangler v. State, 42 Texas Crim. Rep. 233; 61 S. W. 314 [rehearing]. Bankston v. State, 175 S. W. 1069.)

If self-defense is in the case from the standpoint of threats and apparent danger, defendant is entitled to an affirmative charge on this theory, and it is error to restrict the right to defend against threats and an overt act to the theory that defendant's pistol was accidentally discharged. Carden v. State, 59 Texas Crim. Rep. 501; 129 S. W. 362.

Sec. 2084. **Charge on threats and self-defense.**—A negative charge on threats in connection with self-defense is not sufficient. The charge should in some way instruct the jury that if the defendant believed that deceased had threatened to take his life or do him some serious bodily injury, and that this threat had been communicated to defendant before the homicide, and that at the time of the homicide it reasonably appeared to defendant, viewed from his standpoint at the time, that deceased by some act then done manifested an intention to then execute such threat, then defendant would have the right to kill. Sims v. State, 9 Texas Crim. App. 594. Bonner v. State, 29 Texas Crim. App. 232; 15 S. W. 821. Gaines v. State, 53 S. W. 625. Cline v. State, 71 S. W. 23. Sebastian v. State, 42 Texas Crim. Rep. 84; 57 S. W. 820. Watson v. State, 50 Texas Crim. Rep. 175; 95 S. W. 115. Mitchell v. State, 50 Texas Crim. Rep. 181; 96 S. W. 43. Pratt v. State, 50 Texas Crim. Rep. 228; 96 S. W. 8. Fisher v. State, 50 Texas Crim. Rep. 472; 98 S. W. 852. Hightower v. State, 56 Texas Crim. Rep. 251; 119 S. W. 691. Eads v. State, 143 S. W. 1163. Ware v. State, 152 S. W. 1074.

If a correct affirmative charge on threats in connection with self-defense is given the court may charge the converse of that theory. Gatling v. State, 76 S. W. 471.

The charge is erroneous if it informs the jury that defendant would be justified if deceased was making some demonstration to "justify the belief" that he was about to execute the threat. Bonner v. State, 29 Texas Crim. App. 232; 15 S. W. 821.

When threats and an overt act by deceased are relied on, it is error to include in the charge on such theory the question of the relative strength of the parties. Lockhart v. State, 53 Texas Crim. Rep. 594; 111 S. W. 1024.

A charge on threats in connection with self-defense should not require the jury to find that defendant had been informed that deceased was a dangerous man. St. Clair v. State, 49 Texas Crim. Rep. 484; 92 S. W. 1095.

In connection with the charge on threats and self-defense, it is error to charge the jury that the threats would not justify the homicide if defendant prepared himself with a gun for the purpose of seeking deceased with the intent to kill him. Tilmyer v. State, 58 Texas Crim. Rep. 562; 126 S. W. 870.

A charge on threats in connection with self-defense is too restrictive and ignores the appearances of danger if it requires the jury to find that deceased manifested an intention to execute the threat. Sims v. State, 9 Texas Crim. App. 594. Gonzales v. State, 28 Texas Crim. App. 135; 12 S. W. 733. Swain v. State, 48 Texas Crim. Rep. 98; 86 S. W. 335. Barnes v. State, 61 Texas Crim. Rep. 46; 133 S. W. 892.

A charge on threats in connection with self-defense ignores the standpoint of defendant if it requires the jury to find that deceased manifested an intention to execute the threats. Sims v. State, 9 Texas Crim. App. 594. Beard v. State, 47 Texas Crim. Rep. 50; 81 S. W. 33. Adams v. State, 47 Texas Crim. Rep. 347; 84 S. W. 231. Buckner v. State, 55 Texas Crim. Rep. 517; 117 S. W. 802. Ayers v. State, 62 Texas Crim. Rep. 428; 137 S. W. 1146. Eads v. State, 143 S. W. 1163. Maclin v. State, 144 S. W. 955.

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Sec. 2085. **Threats need not be in fact made.**—When the State seeks to raise an issue as to the threat being made or communicated, it is error to require the jury to find that the threats were in fact made, since defendant would have the right to act on them if he believed they were made. Swain v. State, 48 Texas Crim. Rep. 103; 86 S. W. 335. Huddleston v. State, 54 Texas Crim. Rep. 93; 112 S. W. 64. Buckner v. State, 55 Texas Crim. Rep. 517; 117 S. W. 802. Hightower v. State, 56 Texas Crim. Rep. 251; 119 S. W. 691. Lundy v. State, 59 Texas Crim. Rep. 136; 127 S. W. 1034. Eads v. State, 143 S. W. 1163. Mayhew v. State, 144 S. W. 229. Maclin v. State, 144 S. W. 955. Bussey v. State, 153 S. W. 874. Robbins v. State, 155 S. W. 938. Smith v. State, 156 S. W. 214. Andrus v. State, 165 S. W. 189.

If no issue is made as to the making of the threats, a charge is not reversibly erroneous because the jury are therein instructed to find that the threats of deceased were in fact made. Hudson v. State, 59 Texas Crim. Rep. 657; 129 S. W. 1125. Kelly v. State, 151 S. W. 304. Salmon v. State, 154 S. W. 1023. Brookins v. State, 158 S. W. 521. Carey v. State, 167 S. W. 366.

Sec. 2086. **Charge as to threat being seriously made.**—The charge should not require the jury to find that the threat of deceased was seriously made. Wilson v. State, 18 Texas Crim. App. 584. Swain v. State, 48 Texas Crim. Rep. 103; 86 S. W. 335.

Where the proof shows, without controversy, that the threat of deceased, if made at all, was seriously made, it is not necessary to give the jury a charge informing them that if defendant believed it was seriously made it is not necessary for them to believe the threat was seriously made. Burnam v. State, 148 S. W. 757.

Sec. 2087. **Charge on immediate intention.**—The act done by deceased manifesting his intention to execute his threat must be such a one as shows an immediate intention, and it is not error to interpolate the word "immediate" in the charge to the jury and thereby qualify the word "intention" as used in the statute. Lynch v. State, 24 Texas Crim. App. 365; 6 S. W. 190. Herrington v. State, 63 S. W. 562.

Sec. 2088. **Charge on "overt act."**—It is impracticable to name or define the "overt act" in a charge on threats in connection with self-defense. The law does not define the term "overt act," and a charge on self-defense in connection with threats is erroneous if it requires actual danger in addition to proof of threats. Irwin v. State, 43 Texas 241. Miles v. State, 18 Texas Crim. App. 171. Swain v. State, 48 Texas Crim. Rep. 102; 86 S. W. 335. Lockhart v. State, 53 Texas Crim. Rep. 595; 111 S. W. 1024. Graves v. State, 58 Texas Crim. Rep. 42; 124 S. W. 677. Burnam v. State, 61 Texas Crim. Rep. 51; 133 S. W. 1045. Lyons v. State, 159 S. W. 1072.

The charge should not add to defendant's burden by requiring "a hostile overt act" by deceased in addition to threats to kill. Burnam v. State, 61 Texas Crim. Rep. 51; 133 S. W. 1045.

Sec. 2089. **Should charge on self-defense without threats.**—Whenever self-defense is an issue, defendant is entitled to a distinct and affirmative charge on that issue, apart from and untrammeled by a charge on self-defense in connection with threats. Sutton v. State, 2 Texas Crim. App. 349. Nalley v. State, 30 Texas Crim. App. 458; 17 S. W. 1084. Swain v. State, 48 Texas Crim. Rep. 98; 86 S. W. 335. Fuller v. State, 95 S. W. 1039. McDowell v. State, 55 Texas Crim. Rep. 600; 117 S. W. 831. Lundy v. State, 59 Texas Crim. Rep. 135; 127 S. W. 1034. Williams v. State, 61 Texas Crim. Rep. 356; 136 S. W. 771. Castro v. State, 146 S. W. 553. Ware v. State, 152 S. W. 1074. Lyons v. State, 159 S. W. 1072. Manly v. State, 176 S. W. 724.

Sec. 2090. **Charge on threat to do serious bodily injury.**—If the defensive theory, if true, shows that deceased intended to kill defendant, it is not reversible error to fail to include the right to defend against an apprehension of serious bodily injury. Tilmyer v. State, 58 Texas Crim. Rep. 562; 126 S. W. 870.

The charge on self-defense in connection with threats should apply the law applicable to a reasonable apprehension or fear of serious bodily injury as well as to a reasonable apprehension or fear of death. A party has the same right to defend his person from serious bodily injury under the law of threats as he would to protect

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his life. McDowell v. State, 55 Texas Crim. Rep. 599; 117 S. W. 831. Lundy v. State, 59 Texas Crim. Rep. 135; 127 S. W. 1032. Barnes v. State, 61 Texas Crim. Rep. 47; 133 S. W. 892. Maclin v. State, 144 S. W. 951. Lyons v. State, 159 S. W. 1072.

One has the right to defend himself against any attack, and the charge should not limit the threat to a threat to kill or do serious bodily injury when the proof is a threat to merely whip defendant. Hix v. State, 51 Texas Crim. Rep. 432; 102 S. W. 405.

Sec. 2091. **Continuance for proof of threats.**—It is not error to refuse a continuance for proof of communicated threats, if State's case is murder, and defendant's theory is a mutual combat. Nairn v. State, 45 S. W. 703.

It is no objection to a first application for a continuance to secure proof of threats that the absent testimony would be cumulative. Wells v. State, 145 S. W. 950.

It is not error to refuse a continuance for proof of threats if the motion fails to show that at the time of the homicide the deceased by any act then done manifested an intention to execute the threat. Carter v. State, 8 Texas Crim. App. 375. Ruby v. State, 9 Texas Crim. App. 356.

The order overruling the motion for continuance will not be revised on appeal if the proof fails to show that deceased at the time of the homicide by any act then done manifested an intention to execute the threat, or if self-defense is not in the case. Allen v. State, 17 Texas Crim. App. 644. Williams v. State, 51 Texas Crim. Rep. 354; 102 S. W. 1147. Ruby v. State, 9 Texas Crim. App. 356. Ellis v. State, 30 Texas Crim. App. 603; 18 S. W. 139. McGrath v. State, 35 Texas Crim. Rep. 420; 34 S. W. 127. Kimberlain v. State, 47 Texas Crim. Rep. 235; 82 S. W. 1043. Dow v. State, 31 Texas Crim. Rep. 287; 20 S. W. 583. Norris v. State, 32 Texas Crim. Rep. 172; 22 S. W. 592.

The order refusing a continuance for threats will not be revised on appeal if the proof shows that the conduct of deceased was manifest and did not require proof of threats to give it additional significance. Highsmith v. State, 41 Texas Crim. Rep. 45; 51 S. W. 919. Turner v. State, 46 S. W. 833.

Where there is no question from the evidence as to who was the aggressor in the difficulty, the refusal of a continuance for proof of an uncommunicated threat will not require a reversal. Turner v. State, 46 S. W. 833.

The discretion of the court in refusing a continuance sought to secure proof of communicated threats will not be revised when defendant takes the stand as a witness and does not testify that any threat had been communicated to him by the absent witness. Wells v. State, 145 S. W. 950.

The refusal of a continuance for proof of a threat will not require a reversal when the fact that deceased threatened to kill defendant is amply proven on the trial. Gaines v. State, 38 Texas Crim. Rep. 202; 42 S. W. 385.

The judgment will be reversed if a continuance for threats is improperly overruled, self-defense being an issue. Allphin v. State, 41 Texas 81. Wilson v. State, 18 Texas Crim. App. 576. Akin v. State, 12 S. W. 1101. Tankersley v. State, 31 Texas Crim. Rep. 595; 21 S. W. 787. Gilcrease v. State, 33 Texas Crim. Rep. 629; 28 S. W. 531. Logan v. State, 39 Texas Crim. Rep. 575; 47 S. W. 645. Casey v. State, 51 Texas Crim. Rep. 433; 102 S. W. 725 (slight diligence). Morgan v. State, 54 Texas Crim. Rep. 542; 113 S. W. 934. Ware v. State, 49 Texas Crim. Rep. 414; 92 S. W. 1093. Self v. State, 28 Texas Crim. App. 410; 13 S. W. 602. Cooley v. State, 165 S. W. 192.

Where the issue of unprovoked murder or self-defense is sharply drawn, and proof of communicated threats would be of importance, a second application should be granted, though the testimony sought was somewhat cumulative. Gilcrease v. State, 33 Texas Crim. Rep. 629; 28 S. W. 531.

Though self-defense be not in the case, yet if proof of communicated threats in support of very insulting language used at the time of the difficulty would aid in

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assessing the punishment, a first continuance should be granted. Cameron v. State, 57 Texas Crim. Rep. 316; 122 S. W. 870.

In setting out the threats, the application should state the language of deceased, instead of setting out the threat in mere general terms. Wrage v. State, 41 Texas Crim. Rep. 371; 54 S. W. 602.

Sec. 2092. **Newly discovered evidence of threats.**—Where it was a vital question as to who began the difficulty or who was most likely the aggressor, a new trial should be granted for newly discovered evidence of uncommunicated threats. Price v. State, 43 S. W. 96. Pate v. State, 54 Texas Crim. Rep. 462; 113 S. W. 759.

Newly discovered evidence of uncommunicated threats is not ground for new trial if there was no evidence that deceased did any act at the time of the killing which could show any hostile intention toward defendant. Williams v. State, 7 Texas Crim. App. 163.

Newly discovered evidence of uncommunicated threats is not ground for new trial when there is no doubt as to the fact that defendant and not the deceased was the aggressor and began the difficulty, and where such threats would throw no light upon the case. Williams v. State, 7 Texas Crim. App. 163. Pitts v. State, 29 Texas Crim. App. 374; 16 S. W. 189. Richardson v. State, 176 S. W. 732.

Where there has been one or more continuances granted to defendant, newly discovered evidence of uncommunicated threats is not ground for new trial if such new evidence would be cumulative. Edwards v. State, 172 S. W. 231.

Sec. 2093. **Character of deceased.**
Sec. 2094. Specific acts.
Sec. 2095. General reputation of deceased.
Sec. 2041. Character for chastity.

Sec. 2094. **Specific acts of violence by deceased.**—Proof of specific acts of violence on the part of deceased is not admissible if there is no evidence that defendant knew of these matters prior to the homicide. Patterson v. State, 56 S. W. 59. Willis v. State, 49 Texas Crim. Rep. 142; 90 S. W. 1100. Lubbock v. State, 147 S. W. 258. Smith v. State, 156 S. W. 215. Wilson v. State, 158 S. W. 513. Harper v. State, 170 S. W. 723. Echols v. State, 170 S. W. 789.

Proof of specific acts of deceased tending to show that he was a violent or dangerous man is not admissible if no predicate is laid for the introduction of such proof. Horbach v. State, 43 Texas 242. Hudson v. State, 6 Texas Crim. App. 572. Frye v. State, 7 Texas Crim. App. 96. Creswell v. State, 14 Texas Crim. App. 17. Walker v. State, 28 Texas Crim. App. 505; 13 S. W. 860. Bowman v. State, 21 S. W. 48. Skaggs v. State, 31 Texas Crim. Rep. 564; 21 S. W. 257. Spangler v. State, 41 Texas Crim. Rep. 427; 55 S. W. 326. Willis v. State, 49 Texas Crim. Rep. 142; 90 S. W. 1100. Jay v. State, 52 Texas Crim. Rep. 570; 109 S. W. 131. Earles v. State, 52 Texas Crim. Rep. 146; 106 S. W. 138. Lubbock v. State, 147 S. W. 258. Smith v. State, 156 S. W. 215. Johnson v. State, 167 S. W. 733.

When relevant, defendant may prove that on a prior occasion deceased told him he had been sent to the penitentiary for murder. Dodson v. State, 44 Texas Crim. Rep. 204; 70 S. W. 969.

When relevant, a witness may testify that deceased had an ungovernable temper. McCoy v. State, 47 Texas Crim. Rep. 237; 82 S. W. 1044.

If defendant proves threats made by deceased and that he was a man who would be likely to execute a threat seriously made, the State may prove by a witness who had been intimately associated with deceased for years that he had never known deceased to carry a pistol. Williams v. State, 148 S. W. 766.

To discredit his testimony, a witness testifying to the good reputation of deceased for peace may be asked about specific acts of violence. Nelson v. State, 58 S. W. 107.

When relevant, proof of boisterous conduct of deceased in and about saloons a short time before the homicide is admissible to show his state of mind. Hampton v. State, 65 S. W. 527.

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Proof that the injured party had assaulted others a short time before the difficulty with defendant is admissible if it is an issue as to who began the difficulty. Jackson v. State, 62 Texas Crim. Rep. 541; 138 S. W. 411.

If self-defense or the state of defendant's mind is an issue, proof of prior assaults on defendant by deceased is admissible whether part of the *res gestæ* or not. Russell v. State, 11 Texas Crim. App. 288. Jackson v. State, 28 Texas Crim. App. 111; 12 S. W. 501. Glenewinkel v. State, 61 S. W. 124. Williams v. State, 70 S. W. 756. Wallace v. State, 44 Texas Crim. Rep. 303; 70 S. W. 756. Clay v. State, 157 S. W. 164.

The fact that defendant has proved the bad general reputation of deceased for violence does not of itself preclude him from proving specific acts of unlawful violence known to him prior to the homicide. Smith v. State, 148 S. W. 699.

If self-defense is in the case, defendant may prove that he was informed by others prior to the homicide that deceased had told them of many exploits of a kind to illustrate his dangerous and desperate character. Childers v. State, 30 Texas Crim. App. 160; 16 S. W. 903.

When self-defense is an issue, defendant may prove that on a return from a visit to town deceased told him that if he had been indicted by the tax assessor for improperly rendering his taxes he would have killed him. Cole v. State, 48 Texas Crim. Rep. 444; 88 S. W. 341.

Defendant may introduce the record of conviction of deceased for manslaughter if he knew thereof before the homicide and if self-defense is an issue. Brunet v. State, 12 Texas Crim. App. 521. Johnson v. State, 28 Texas Crim. App. 17; 11 S. W. 667.

Defendant is entitled to have in evidence any fact which tends to prove the good faith of his belief that he believed that he was in danger from deceased at the time of the homicide. Dodson v. State, 44 Texas Crim. Rep. 204; 70 S. W. 969. Smith v. State, 148 S. W. 699. Clay v. State, 157 S. W. 164.

When self-defense is an issue, defendant is entitled to prove any fact known to him prior to the homicide, hearsay or not, which would go to explain his condition of mind at the time of the homicide and his grounds for apprehension as against his adversary. Ball v. State, 29 Texas Crim. App. 125; 14 S. W. 1012. Childers v. State, 30 Texas Crim. App. 160; 16 S. W. 903. Poer v. State, 67 S. W. 500. Dodson v. State, 44 Texas Crim. Rep. 204; 70 S. W. 969. Cole v. State, 48 Texas Crim. Rep. 444; 88 S. W. 341. Spencer v. State, 59 Texas Crim. Rep. 225; 128 S. W. 122. Smith v. State, 148 S. W. 699. Clay v. State, 157 S. W. 164.

If self-defense is an issue, defendant may prove anything known to him prior to the homicide about deceased as going to show why defendant acted. Proof of specific acts of unlawful violence committed by deceased on others is admissible, if defendant knew of them prior to the homicide, to show who was probably the aggressor, and to show the state of mind of defendant, and to shed light upon the standpoint of defendant at the time of the homicide. Russell v. State, 11 Texas Crim. App. 288. Brunet v. State, 12 Texas Crim. App. 521. Childers v. State, 30 Texas Crim. App. 160; 16 S. W. 903. Skaggs v. State, 31 Texas Crim. Rep. 564; 21 S. W. 257. Poer v. State, 67 S. W. 500. Spangler v. State, 41 Texas Crim. Rep. 430; 55 S. W. 326. Crow v. State, 48 Texas Crim. Rep. 420; 88 S. W. 814. Spencer v. State, 59 Texas Crim. Rep. 225; 128 S. W. 122. Smith v. State, 148 S. W. 699. Jones v. State, 153 S. W. 310. Hysaw v. State, 155 S. W. 941.

The following decisions written by the same judge seem to hold that proof by specific acts is not admissible to show the character of deceased: Heffington v. State, 41 Texas Crim. Rep. 319; 54 S. W. 755. Darter v. State, 39 Texas Crim. Rep. 44; 44 S. W. 850. Connell v. State, 45 Texas Crim. Rep. 153; 75 S. W. 512. Poole v. State, 45 Texas Crim. Rep. 362; 76 S. W. 565. The correct rule is recognized by the same judge in the Spangler case, 41 Texas Crim. Rep. 430, 55 S. W. 326, and in Dodson v. State, 44 Texas Crim. Rep. 204; 70 S. W. 969.

The State, in cross-examination of the witness who testifies to specific acts of violence by deceased, is permitted to go into the particulars of the specific acts for

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the purpose of showing that the deceased was justifiable, or of rebutting defendant's theory that such acts showed him to have been a violent and dangerous man. Hysaw v. State, 155 S. W. 942. Bullock v. State, 165 S. W. 196.

Sec. 2095. **General reputation of deceased's character.**—The rules as to proving the character of defendant's adversary apply to any grade of assault and are not limited to cases of homicide. Bingham v. State, 6 Texas Crim. App. 179. Lewallen v. State, 6 Texas Crim. App. 475. West v. State, 18 Texas Crim. App. 640. Smith v. State, 55 Texas Crim. Rep. 630; 118 S. W. 145. Daniels v. State, 58 Texas Crim. Rep. 569; 126 S. W. 1153.

In every instance where proof of threats has been made it is competent to introduce evidence of the general character of the deceased; such evidence shall extend only to an inquiry as to whether the deceased was a man of violent or dangerous character or a man of kind and inoffensive disposition, or whether he was such a person as might reasonably be expected to execute a threat made. Russell v. State, 11 Texas Crim. App. 296. Sims v. State, 38 Texas Crim. Rep. 642; 44 S. W. 522. Menefee v. State, 50 Texas Crim. Rep. 249; 97 S. W. 486. Smith v. State, 55 Texas Crim. Rep. 630; 118 S. W. 145. Williams v. State, 61 Texas Crim. Rep. 356; 136 S. W. 771.

When self-defense is an issue and defendant has proved communicated threats of deceased, the State is then entitled to prove the good character of deceased for peace. Russell v. State, 11 Texas Crim. App. 296. Sims v. State, 38 Texas Crim. Rep. 642; 44 S. W. 522. Menefee v. State, 50 Texas Crim. Rep. 250; 97 S. W. 486. Cornelius v. State, 54 Texas Crim. Rep. 177; 112 S. W. 1051. Smith v. State, 55 Texas Crim. Rep. 630; 118 S. W. 146. Darnell v. State, 58 Texas Crim. Rep. 585; 126 S. W. 1127. Canon v. State, 59 Texas Crim. Rep. 407; 128 S. W. 146. Edwards v. State, 61 Texas Crim. Rep. 307; 135 S. W. 540. Williams v. State, 61 Texas Crim. Rep. 356; 136 S. W. 771.

When self-defense is an issue and defendant has proved threats of deceased made direct to him, the State is then entitled to prove the good character of deceased for peace. Jirou v. State, 53 Texas Crim. Rep. 21; 108 S. W. 655. Edwards v. State, 61 Texas Crim. Rep. 307; 135 S. W. 540. Williams v. State, 61 Texas Crim. Rep. 356; 136 S. W. 771.

Proof of communicated threats of deceased when introduced in evidence by defendant authorizes the State to prove the good character for peace of deceased though the defendant offers no proof of the character of deceased. Russell v. State, 11 Texas Crim. App. 296. Sims v. State, 38 Texas Crim. Rep. 642; 44 S. W. 522. Cornelius v. State, 54 Texas Crim. Rep. 177; 112 S. W. 1051. Canon v. State, 59 Texas Crim. Rep. 407; 128 S. W. 146. Williams v. State, 61 Texas Crim. Rep. 356; 136 S. W. 771.

If the defendant introduces evidence of communicated threats and relies on such threats and a demonstration, the State may take the initiative and introduce proof of the good character of deceased for peace. Rhea v. State, 37 Texas Crim. Rep. 140; 38 S. W. 1012. Menefee v. State, 50 Texas Crim. Rep. 250; 97 S. W. 486. Streight v. State, 62 Texas Crim. Rep. 453; 138 S. W. 747.

The general reputation of the deceased is not admissible for the State if the defendant has not in some way put it in issue. Graves v. State, 14 Texas Crim. App. 120. Miers v. State, 34 Texas Crim. Rep. 188; 29 S. W. 1074. Keith v. State, 50 Texas Crim. Rep. 65; 94 S. W. 1044. Dawson v. State, 155 S. W. 266. Wilson v. State, 156 S. W. 1185. Solis v. State, 174 S. W. 343.

The general reputation of the deceased as being a peaceable and law-abiding citizen may be proven by the State when such reputation is put in issue by the defendant. Berry v. State, 163 S. W. 965. Bullock v. State, 165 S. W. 200. Ghent v. State, 176 S. W. 566.

If defendant has not directly attacked the reputation of deceased nor proven communicated threats, proof of uncommunicated threats will not authorize the State to prove the good character of deceased for peace. Arnwine v. State, 50 Texas Crim. Rep. 256; 96 S. W. 4. Arnwine v. State, 50 Texas Crim. Rep. 477; 99 S. W. 97.

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When the defensive theory is that defendant killed deceased in self-defense mistaking him for another person and defendant proves that threats were made by the other person but does not attack the character of deceased or prove that deceased made threats, the State may prove the good character for peace of the other person but not of deceased. Wilson v. State, 156 S. W. 1185.

If defendant has not first put directly in issue the character of deceased, the State is not entitled on cross-examination of defendant to prove by him the good character or peaceful disposition of deceased. Puryear v. State, 50 Texas Crim. Rep. 461; 98 S. W. 258.

The State is not entitled to show the character of deceased by asking a hypothetical question as to what he would probably do if he had received a certain message from defendant. Hunter v. State, 54 Texas Crim. Rep. 227; 114 S. W. 125.

The general reputation of deceased or of the assaulted party is not admissible in evidence in answer to proof of specific acts offered as mitigation or justification; defendant not putting the reputation directly in issue. Moore v. State, 46 Texas Crim. Rep. 54; 79 S. W. 565. Melton v. State, 47 Texas Crim. Rep. 456; 83 S. W. 822. Gregory v. State, 50 Texas Crim. Rep. 77; 94 S. W. 1041. Wakefield v. State, 50 Texas Crim. Rep. 126; 94 S. W. 1046. Smith v. State, 100 S. W. 924. Blocker v. State, 61 Texas Crim. Rep. 413; 135 S. W. 131. Dawson v. State, 155 S. W. 266. Hysaw v. State, 155 S. W. 952.

If defendant has not put the general reputation of deceased in issue by a direct attack upon it, proof of the good reputation of deceased for chastity is not admissible in answer to proof that he had debauched the wife of defendant. Moore v. State, 46 Texas Crim. Rep. 54; 79 S. W. 565. Melton v. State, 47 Texas Crim. Rep. 456; 83 S. W. 822. Gregory v. State, 50 Texas Crim. Rep. 77; 94 S. W. 1041.

Defendant is not entitled to prove the general reputation of the assaulted party for violence if there is no evidence of any demonstration by such party at the time of the alleged assault. Irwin v. State, 43 Texas 241. Horbach v. State, 43 Texas 242. Stevens v. State, 1 Texas Crim. App. 592. Nash v. State, 2 Texas Crim. App. 364. Roberts v. State, 5 Texas Crim. App. 147. Brown v. State, 6 Texas Crim. App. 315. Creswell v. State, 14 Texas Crim. App. 17. Brooks v. State, 24 Texas Crim. App. 274; 5 S. W. 852. Evers v. State, 31 Texas Crim. Rep. 324; 20 S. W. 744. Roch v. State, 52 Texas Crim. Rep. 52; 105 S. W. 202.

When defendant did not know of the character of the deceased and there is no issue of threats in the case, it is not error to exclude proof of the character of deceased for violence. Earles v. State, 52 Texas Crim. Rep. 146; 106 S. W. 138.

If self-defense is an issue, defendant may prove the general character for violence of his adversary to show who probably began the difficulty; such proof is admissible whether threats be in the case or not. Allphin v. State, 41 Texas 81. Horbach v. State, 43 Texas 242. Lewallen v. State, 6 Texas Crim. App. 475. Williams v. State, 14 Texas Crim. App. 109. Moore v. State, 15 Texas Crim. App. 17. West v. State, 18 Texas Crim. App. 640. Daniels v. State, 58 Texas Crim. Rep. 569; 126 S. W. 1153.

If self-defense is an issue and there is evidence of uncommunicated threats made by deceased, defendant is entitled to prove the dangerous character of deceased as a man likely to execute such threats, in order that the jury might determine who was most likely the aggressor. Yantis v. State, 49 Texas Crim. Rep. 405; 94 S. W. 1019.

Proof of the character of deceased for honesty is not ordinarily admissible. Plasters v. State, 1 Texas Crim. App. 683.

Art. 1144. (714) **Punishment for murder in first and second degree.**—The punishment of murder in the first degree shall be death or confinement in the penitentiary for life, and the punishment of murder in the second degree shall be confinement in the penitentiary for not less than five years. (Act Feb. 12, 1858, p. 173, repealed by the Act of April 3, 1913, Acts 1913, p. 238.)

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Sec. 2096. **Murder in the first degree.**—If a sudden killing is so deliberate as to satisfy and come within the definition of express malice, it may be murder in the first degree, though there be no proof of motive. Gaitan v. State, 11 Texas Crim. App. 544. Lewis v. State, 15 Texas Crim. App. 665. Clark v. State, 29 Texas Crim. App. 257; 16 S. W. 187. Lawrence v. State, 36 Texas Crim. Rep. 173; 36 S. W. 90. Walker v. State, 38 S. W. 788. Cano v. State, 53 Texas Crim. Rep. 609; 111 S. W. 406. Crawford v. State, 56 Texas Crim. Rep. 211; 119 S. W. 690. Snowberger v. State, 58 Texas Crim. Rep. 530; 126 S. W. 884. Wynne v. State, 59 Texas Crim. Rep. 117; 127 S. W. 197. Butler v. State, 61 Texas Crim. Rep. 133; 134 S. W. 230. Calderon v. State, 63 Texas Crim. Rep. 639; 141 S. W. 251. Parsons v. State, 157 S. W. 939.

To constitute murder in the first degree the act must not result from a mere sudden, rash, and immediate design, springing from an inconsiderate impulse, passion, or excitement, however unjustifiable and unwarranted it may be. For in such case the sedate, deliberate mind is wanting, and without it there can be no express malice. Farrer v. State, 42 Texas 271. Halbert v. State, 3 Texas Crim. App. 659. Powell v. State, 5 Texas Crim. App. 246. Cox v. State, 5 Texas Crim. App. 493. Jones v. State, 29 Texas Crim. App. 340; 15 S. W. 403. Sherar v. State, 30 Texas Crim. App. 349; 17 S. W. 621. Reyons v. State, 32 Texas Crim. Rep. 153; 22 S. W. 590. Childers v. State, 33 Texas Crim. Rep. 511; 27 S. W. 133. Garner v. State, 45 Texas Crim. Rep. 308; 77 S. W. 797. Rice v. State, 51 Texas Crim. Rep. 283; 103 S. W. 1156. Dixon v. State, 51 Texas Crim. Rep. 555; 103 S. W. 399. Potts v. State, 56 Texas Crim. Rep. 44; 118 S. W. 535. Cordono v. State, 56 Texas Crim. Rep. 459; 120 S. W. 471. Thomas v. State, 57 Texas Crim. Rep. 452; 125 S. W. 35.

Where the origin or the reason for the difficulty is not shown, the parties being engaged in deadly conflict when first seen by the witnesses, the evidence does not show murder in the first degree. Wheeler v. State, 54 Texas Crim. Rep. 51; 111 S. W. 1022.

It is no defense or extenuation that defendant, a State convict, to secure his liberty, killed the officer whose duty it was to pursue and capture him. Washington v. State, 1 Texas Crim. App. 647. Wallace v. State, 20 Texas Crim. App. 372.

If defendant with express malice aforethought, before the homicide advised, commanded, or encouraged the principal to kill the deceased, and the principal did with express malice aforethought kill the deceased, defendant not being present, then defendant would be guilty of "murder in the first degree." Carlisle v. State, 31 Texas Crim. Rep. 537; 21 S. W. 358. Wilkerson v. State, 57 S. W. 956.

The State is not entitled to put the widow of deceased on the witness stand and prove by her the number of children left by deceased, and their ages, when such proof could serve no purpose except to excite the sympathy and prejudice of the jury. Faulkner v. State, 43 Texas Crim. Rep. 325; 65 S. W. 1093.

CHAPTER XVII

DUELING

	Sec.	Art.
Dueling		1145
Dueling	2097	
Homicide committed in a duel		1146
Homicide committed in a duel	2098	

Article 1145. (715) (610) **Dueling.**—Any person who shall, within this State, fight a duel with deadly weapons, or send or accept a challenge to fight a duel with deadly weapons, either within the State or out of it, or who shall act as a second, or knowingly aid or assist

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in any manner those thus offending, shall be deemed guilty of a felony, and upon conviction shall be punished by confinement in the penitentiary not less than two nor more than five years. (O. C. 603, amended in revising in 1879 as to penalty.)

Sec. 2097. **Duel.**—A conviction for sending a challenge to fight a duel with deadly weapons will not be sustained if there is no proof identifying the defendant as the party who sent the challenge. Daughtry v. State, 54 Texas Crim. Rep. 394; 113 S. W. 14.

Art. 1146. (716) (611) **Homicide committed in a duel.**—If, in any duel hereafter fought in this State, either of the combatants be killed, or receive a wound from which he afterwards dies within three months, the survivor shall be deemed guilty of murder in the first degree and be punished accordingly. (O. C. 605, amended in revising in 1879 as to penalty.)

Sec. 2098. **Homicide committed in a duel.**—Evidence raising the issue of mutual combat does not necessarily raise the issue of a duel, and it is error to submit the issue of a duel if the testimony fails to show that prearrangement to fight with deadly weapons which would constitute a duel. Guerrero v. State, 39 Texas Crim. Rep. 665; 47 S. W. 655.

CHAPTER XVIII

GENERAL PROVISIONS RELATING TO HOMICIDE

	Sec.	Art.
Means or instrument used must be considered		1147
Presumption from use of weapon by defendant	2099	
Statute should not be charged in abstract form	2100	
If injury be done in a cruel manner		1148
When injury is inflicted in cruel manner	2101	
If in sudden passion not with deadly weapon		1149
Instrument used in striking as deadly weapon	2102	
Homicide by striking in sudden passion	2103	
If evil or cruel disposition be exhibited		1150
Statute construed	2104	

Article 1147. (717) **Means or instrument used must be considered.**—The instrument or means by which a homicide is committed are to be taken into consideration in judging of the intent of the party offending; if the instrument be one not likely to produce death, it is not to be presumed that death was designed, unless, from the manner in which it was used, such intention evidently appears.

Sec. 2099. **Presumption from use of weapon by defendant.**—If the proof shows, without controversy, that the weapon or means used by the slayer was a deadly weapon *per se* and that he intended to kill, it is error to charge the jury that the instrument or means by which the homicide was committed is to be taken into consideration in judging of the intent of the accused. Presumptions of law which are against a defendant should not ordinarily be included in the charge. Borden v. State, 42 Texas Crim. Rep. 648; 62 S. W. 1064. Spivey v. State, 45 Texas Crim. Rep. 496; 77 S. W. 444. Burnett v. State, 46 Texas Crim. Rep. 119; 79 S. W. 550. Gallagher v. State, 55 Texas Crim. Rep. 51; 115 S. W. 46. Andrus v. State, 165 S. W. 189. (*Contra:* Campos v. State, 50 Texas Crim. Rep. 104; 95 S. W. 1042. McKenzie v.

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State, 96 S. W. 933. Barbee v. State, 50 Texas Crim. Rep. 429; 97 S. W. 1058. Manning v. State, 51 Texas Crim. Rep. 215; 98 S. W. 251.)

If the defense is neither insanity nor accident, the error in charging article 1147 as to the intent of defendant, when there is no issue as to his intent, is not reversible error. Young v. State, 102 S. W. 1145. Early v. State, 51 Texas Crim. Rep. 386; 103 S. W. 868.

If there is an issue as to the deadly character of the weapon used in committing the homicide, it is not error to charge that the instrument by which the homicide was committed is to be taken into consideration in judging of the intent of the defendant as to whether he intended to kill. Hardin v. State, 51 Texas Crim. Rep. 559; 103 S. W. 401. Ford v. State, 64 Texas Crim. Rep. 14; 142 S. W. 6.

If the weapon used in committing the homicide was not *per se* a deadly weapon, the intent to kill is a question for the jury. Hardin v. State, 51 Texas Crim. Rep. 559; 103 S. W. 401. Price v. State, 60 Texas Crim. Rep. 91; 131 S. W. 319. Ford v. State, 64 Texas Crim. Rep. 14; 142 S. W. 6.

A charge shifts the burden if it requires the jury to find beyond a reasonable doubt that the weapon used by defendant was not a deadly weapon. Terrell v. State, 53 Texas Crim. Rep. 606; 111 S. W. 152.

A charge on article 1147 is erroneous if it omits to inform the jury that if the instrument be one not likely to cause death it is not to be presumed that death was designed unless from the manner in which it was used such intention evidently appears. It is error to charge the jury that if the manner of its use was calculated to produce death that then the law presumes the intent to kill. Shaw v. State, 34 Texas Crim. Rep. 444; 31 S. W. 361.

It is not reversible error not to have charged Article 1147 if defendant was convicted of aggravated assault and there is no issue of simple assault. Halsford v. State, 56 Texas Crim. Rep. 120; 120 S. W. 193.

In all cases where the weapon or means used was not necessarily a deadly weapon, the court should charge article 1147 and require the jury to find the evident intention to kill. Johnson v. State, 42 Texas Crim. Rep. 379; 60 S. W. 48. Danforth v. State, 44 Texas Crim. Rep. 105; 69 S. W. 159. Posey v. State, 46 Texas Crim. Rep. 190; 78 S. W. 689. Lucas v. State, 49 Texas Crim. Rep. 137; 90 S. W. 880. Washington v. State, 53 Texas Crim. Rep. 481; 110 S. W. 751. Crow v. State, 55 Texas Crim. Rep. 202; 116 S. W. 52. Betts v. State, 60 Texas Crim. Rep. 631; 133 S. W. 253. Pool v. State, 62 Texas Crim. Rep. 360; 137 S. W. 666. Reeves v. State, 168 S. W. 860.

The facts may show an evident intention to kill. Joseph v. State, 59 Texas Crim. Rep. 82; 127 S. W. 171. Pettis v. State, 150 S. W. 790. Crutchfield v. State, 152 S. W. 1053. Ward v. State, 159 S. W. 272. Girtman v. State, 164 S. W. 1008.

When the homicide is committed with a weapon that is *per se* a deadly weapon, the issue of aggravated assault is not raised by testimony that the accused did not intend to kill. Thompson v. State, 24 Texas Crim. App. 386; 6 S. W. 296. Walker v. State, 169 S. W. 1156.

It is error to charge the jury that every one is presumed to intend whatever would be the reasonable and probable result of his own act and the means used by him. Washington v. State, 53 Texas Crim. Rep. 480; 110 S. W. 751. Thomas v. State, 57 Texas Crim. Rep. 452; 125 S. W. 35.

A charge is erroneous if the jury are thereby instructed that the intention of defendant is to be determined not alone from the manner in which the instrument or means was used but also by all the surrounding circumstances at the time. Grant v. State, 56 Texas Crim. Rep. 416; 120 S. W. 481.

When the court charges the jury that if the instrument was not a deadly weapon they will not presume that the death of deceased was designed by defendant unless they find that such intention evidently appears, the court should also inform the jury as to what offense defendant would be guilty of if the instrument was not a deadly weapon and there was no intent to kill. Beaupre v. State, 156 S. W. 625.

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If an ax is used in such a manner as shows an evident intention to kill deceased and there is no evidence that such is not the intention, it is not error to fail to charge on aggravated assault based on the theory of no intent to kill. Penton v. State, 149 S. W. 190.

When self-defense is an issue it is error to charge the jury that defendant would be guilty of murder or manslaughter if it evidently appears from the manner in which the weapon was used that defendant intended to kill; such a charge eliminates self-defense. Terrell v. State, 53 Texas Crim. Rep. 607; 111 S. W. 152.

When a homicide occurs under the influence of sudden passion by the use of means not in their nature calculated to produce death and without a specific intent to kill and the wound inflicted by the defendant caused serious bodily injury, it is not error to fail to charge on simple assault. Kinslow v. State, 147 S. W. 249.

Sec. 2100. **Statute should not be charged in abstract form.**—Article 1147 (717) should not be charged only in abstract form, but should be applied to the facts of the case so that the jury will not grope in darkness as to the attitude or liability of defendant should they find that he did not intend to kill. Griffin v. State, 40 Texas Crim. Rep. 315; 50 S. W. 366. Johnson v. State, 42 Texas Crim. Rep. 379; 60 S. W. 48. Posey v. State, 46 Texas Crim. Rep. 190; 78 S. W. 689. Pool v. State, 62 Texas Crim. Rep. 360; 137 S. W. 666.

Art. 1148. (718) **If injury be done in a cruel manner.**—If any injury be inflicted in a cruel manner, though with an instrument not likely under ordinary circumstances to produce death, the killing will be manslaughter or murder, according to the facts of the case.

Sec. 2101. **When injury is inflicted in cruel manner.**—If there is no evidence to support it, the charge should not submit the theory that the injury was inflicted in a cruel manner. Whitaker v. State, 12 Texas Crim. App. 441. Griffin v. State, 40 Texas Crim. Rep. 315; 50 S. W. 366.

Proof that defendant with malice aforethought beat a child to death with a rope may sustain a conviction for murder with express malice. Taylor v. State, 57 S. W. 812.

Art. 1149. (719) **If in sudden passion not with deadly weapon.**—Where a homicide occurs under the influence of sudden passion, but by the use of means not in their nature calculated to produce death, the person killing is not deemed guilty of the homicide, unless it appear that there was an intention to kill, but the party from whose act the death resulted may be prosecuted for and convicted of any grade of assault and battery.

Sec. 2102. **Instrument used in striking as deadly weapon.**—An instrument or weapon used to strike with is not *per se* a deadly weapon; nor is it the law that because death resulted, therefore the conclusion is that the weapon used was a deadly weapon. Sheffield v. State, 1 Texas Crim. App. 641. Dones v. State, 8 Texas Crim. App. 112. Hill v. State, 11 Texas Crim. App. 470. Boyd v. State, 28 Texas Crim. App. 139; 12 S. W. 737. Shaw v. State, 34 Texas Crim. Rep. 442; 31 S. W. 361. Fitch v. State, 37 Texas Crim. Rep. 502; 36 S. W. 584. Honeywell v. State, 40 Texas Crim. Rep. 199; 49 S. W. 586. Danforth v. State, 44 Texas Crim. Rep. 105; 69 S. W. 159. Lee v. State, 44 Texas Crim. Rep. 460; 72 S. W. 195. Posey v. State, 46 Texas Crim. Rep. 192; 78 S. W. 689. Craiger v. State, 48 Texas Crim. Rep. 500; 88 S. W. 208. Coleman v. State, 49 Texas Crim. Rep. 85; 90 S. W. 499. Washington v. State, 53 Texas Crim. Rep. 481; 110 S. W. 751. Crow v. State, 55 Texas Crim. Rep. 202; 116 S. W. 52. Vinson v. State, 55 Texas Crim. Rep. 494; 117 S. W. 846. Betts v. State, 57 Texas Crim. Rep. 389; 124 S. W. 425. Coker v. State, 59 Texas Crim. Rep. 241; 128 S. W. 138. Jones v. State, 153 S. W. 310. Hysaw v. State, 155 S. W. 942. Reeves v. State, 168 S. W. 860.

(Other authorities as to "deadly weapons" will be found in sec. 1587.)

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Sec. 2103. **Homicide by striking in sudden passion.**—If the homicide was committed with a knife and the intent to kill is not shown beyond and without controversy, the charge of the court should inform the jury that the instrument by which a homicide is committed is to be taken into consideration in judging of the intent of the party killing and that if the instrument be one not likely to produce death it is not to be presumed that death was designed unless from the manner in which it was used such intention evidently appears, and if the homicide occurs under the influence of sudden passion by the use of a knife not *per se* a deadly weapon and the intent to kill is not shown beyond and without controversy the court should charge (Article 1149) on the grade of assault and battery raised by the testimony. Thompson v. State, 24 Texas Crim. App. 386; 6 S. W. 296. Martinez v. State, 35 Texas Crim. Rep. 386; 33 S. W. 970. Newsome v. State, 75 S. W. 295. Craiger v. State, 48 Texas Crim. Rep. 500; 88 S. W. 208. Wilson v. State, 49 Texas Crim. Rep. 59; 90 S. W. 312. Lucas v. State, 49 Texas Crim. Rep. 137; 90 S. W. 880. Thompson v. State, 49 Texas Crim. Rep. 385; 93 S. W. 111. Johnson v. State, 49 Texas Crim. Rep. 431; 93 S. W. 735. Vinson v. State, 55 Texas Crim. Rep. 494; 117 S. W. 846. McDowell v. State, 55 Texas Crim. Rep. 600; 117 S. W. 831. Hightower v. State, 56 Texas Crim. Rep. 251; 119 S. W. 691. Snowberger v. State, 58 Texas Crim. Rep. 530; 126 S. W. 882. Ross v. State, 61 Texas Crim. Rep. 12; 133 S. W. 688. Jones v. State, 153 S. W. 310. Blackshear v. State, 154 S. W. 565. Green v. State, 154 S. W. 1003. Dawson v. State, 155 S. W. 266. Hysaw v. State, 155 S. W. 941. Trevino v. State, 161 S. W. 108. Bolden v. State, 166 S. W. 503. Reeves v. State, 168 S. W. 860.

If the homicide was committed with a weapon or instrument which is not *per se* a deadly weapon and the intent to kill is not shown beyond and without controversy, the charge of the court should inform the jury that the instrument or means by which a homicide is committed is to be taken into consideration in judging of the intent of the party killing and that if the instrument or means be one not likely to produce death it is not to be presumed that death was designed unless from the manner in which the same was used such intention evidently appears, and if the homicide occurs under the influence of sudden passion by the use of a weapon or instrument not *per se* a deadly weapon and the intent to kill is not shown beyond and without controversy the court should charge (Article 1149) on the grade of assault and battery raised by the testimony. Dones v. State, 8 Texas Crim. App. 112 (glass tumbler). Hill v. State, 11 Texas Crim. App. 470 (whipped child). Nichols v. State, 24 Texas Crim. App. 137; 5 S. W. 661 (stone). Boyd v. State, 28 Texas Crim. App. 139; 12 S. W. 737 (stick). Shaw v. State, 34 Texas Crim. Rep. 444; 31 S. W. 361 (stick). Fitch v. State, 37 Texas Crim. Rep. 502; 36 S. W. 584. Honeywell v. State, 40 Texas Crim. Rep. 199; 49 S. W. 586 (rock). Griffin v. State, 40 Texas Crim. Rep. 314; 50 S. W. 366 (beer glass). Taylor v. State, 41 Texas Crim. Rep. 151; 51 S. W. 1106 (whipped child with rope). Johnson v. State, 42 Texas Crim. Rep. 377; 60 S. W. 48 (stick). Runnels v. State, 42 Texas Crim. Rep. 555; 61 S. W. 479 (rock). Danforth v. State, 44 Texas Crim. Rep. 105; 69 S. W. 159 (iron pipe). Lee v. State, 44 Texas Crim. Rep. 460; 72 S. W. 195 (whipped baby to death with leather belt). Perrin v. State, 45 Texas Crim. Rep. 560; 78 S. W. 930 (stick). Coleman v. State, 49 Texas Crim. Rep. 85; 90 S. W. 499 (stick or whip). Posey v. State, 49 Texas Crim. Rep. 190; 78 S. W. 689 (iron weight). Washington v. State, 53 Texas Crim. Rep. 481; 110 S. W. 751 (stick of stove wood). Crow v. State, 55 Texas Crim. Rep. 202; 116 S. W. 52 (base ball bat). Grant v. State, 56 Texas Crim. Rep. 416; 120 S. W. 481 (fists and feet). Betts v. State, 57 Texas Crim. Rep. 389; 124 S. W. 425 (belt). Ashley v. State, 58 Texas Crim. Rep. 423; 126 S. W. 589 (crowbar). Coker v. State, 59 Texas Crim. Rep. 241; 116 S. W. 52 (stick). McGill v. State, 60 Texas Crim. Rep. 614; 132 S. W. 941. Betts v. State, 133 S. W. 253 (brush and hands). Grant v. State, 143 S. W. 929 (fists and feet). Harris v. State, 148 S. W. 107 (stick). McDowell v. State, 151 S. W. 1049. Huddleston v. State, 156 S. W. 1168. Mitchell v. State, 158 S. W. 812 (stick). House v. State, 171 S. W. 206 (ax handle).

Art. 1150. (720) **If evil or cruel disposition be exhibited.**—Where the circumstances attending a homicide show an evil or cruel disposition, or that it was the design of the person offending to kill, he is deemed guilty of murder or manslaughter, according to the other facts

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of the case, though the instrument or means used may not in their nature be such as to produce death ordinarily.

Sec. 2104. **Statute construed.**—If the injury was inflicted in a cruel manner not for the purpose of killing, the homicide may be manslaughter. Taylor v. State, 41 Texas Crim. Rep. 151; 51 S. W. 1106 (whipped child with rope). Lee v. State, 44 Texas Crim. Rep. 460; 72 S. W. 195 (whipped baby with belt). Betts v. State, 60 Texas Crim. Rep. 635; 133 S. W. 254 (beat child to death).

"In every case where it becomes a question whether or not there was an intention to kill on the part of the slayer suggested by the character of the weapon used not being deadly, it is the duty of the court to submit the issue of manslaughter." Johnson v. State, 42 Texas Crim. Rep. 377; 60 S. W. 48 (this case and the Taylor, Lee and Betts cases, cited in the preceding paragraph, indicate that the statute, Article 1150 (720) by reason of its wording requires a charge on manslaughter though there be no adequate cause. The writer is of the opinion that the words that the slayer "is deemed guilty of murder or manslaughter according to the other facts of the case" mean simply, when imperfect self-defense is not involved, that if the circumstances attending an unlawful homicide show an evil or cruel disposition or that it was the intention of the slayer to kill, he is deemed guilty of murder if there is no adequate cause or manslaughter if there is an adequate cause, though the instrument or the means used may not in their nature be such as to ordinarily produce death. Hill v. State, 11 Texas Crim. App. 470).

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TITLE XVI

OFFENSES AGAINST REPUTATION

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CHAPTER I

LIBEL

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Article 1151. (721) **"Libel" defined.**—He is guilty of "libel" who, with intent to injure, makes, writes, prints, publishes, sells or circulates any malicious statement affecting the reputation of another in respect to any matter or thing pointed out in this chapter.

Art. 1152. (722) **Punishment.**—If any person be guilty of libel he shall be punished by fine not less than one hundred nor more than two thousand dollars, or by imprisonment in the county jail not exceeding two years; and the court may enter up judgment and issue an order thereupon directing the sheriff to seize and destroy all the publications, prints, paintings or engravings constituting the libel as charged in the indictment or information.

Sec. 2105. **Statute construed.**—The penal statute as to libel is constitutional, and does not violate the provisions of the constitution as to the freedom of the press. Morton v. State, 3 Texas Crim. App. 515.

It is a violation of the statute to libel any sect, company, or class of men without naming any person in particular who may belong to such class. Jones v. State, 38 Texas Crim. Rep. 367; 43 S. W. 78.

Sec. 2106. **Form for indictment.**—
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 John Doe on the....day of.....A. D....., in said county and State did with intent to injure....., make (or "write," etc.), a malicious written (or "printed," etc.) statement affecting the reputation of ....., the said malicious statement being of the tenor following: (here copy the libel literally—make an exact copy—and if necessary allege such innuendo or extrinsic averments or both as will enable the court to see, as a matter of law, that it is libel.)

Against the peace and dignity of the State.

.....

Foreman of the grand jury.

Sec. 2107. **Indictment for libel.**—It is not necessary to allege in terms that the acts of defendant were libelous, or that they were wickedly committed. Baldwin v. State, 39 Texas Crim. Rep. 248; 45 S. W. 714.

Indictments and informations held sufficient to charge the offense of libel. Morton v. State, 3 Texas Crim. App. 511 (newspaper). Woody v. State, 16 Texas Crim. App. 253 (newspaper). Jones v. State, 38 Texas Crim. Rep. 367; 43 S. W. 78 (newspaper). Squires v. State, 39 Texas Crim. Rep. 102; 45 S. W. 147 (libel *per se;* charged a Democratic candidate with claiming to be a Populist, and sending secret circulars seeking their support). Smith v. State, 39 Texas Crim. Rep. 321; 45 S. W. 1013 (newspaper). Mankins v. State, 41 Texas Crim. Rep. 668; 57 S. W. 950 (letter). Lockhard v. State, 43 Texas Crim. Rep. 64; 63 S. W. 566 (pamphlet). Gonzales v. State, 58 Texas Crim. Rep. 141; 124 S. W. 938 (newspaper).

If the libel charges a person with a penal offense, it is not necessary to allege in terms that it charges him with a penal offense. Jones v. State, 38 Texas Crim. Rep. 367; 43 S. W. 78. Mankins v. State, 41 Texas Crim. Rep. 668; 57 S. W. 950. Lockhard v. State, 43 Texas Crim. Rep. 64; 63 S. W. 566.

Where the indictment sets out statements so plain and unmistakable in their meaning that no intelligent person could fail to understand and comprehend what was intended by them (outward form), it is not necessary to allege their legal effect. Jones v. State, 38 Texas Crim. Rep. 366; 43 S. W. 78. Mankins v. State, 41 Texas Crim. Rep. 668; 57 S. W. 950. Lockhard v. State, 43 Texas Crim. Rep. 64; 63 S. W. 566.

If the indictment alleges facts which authorize the prosecution, it is not necessary to aver that such facts come within one of the clauses of the statute, stating the

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clause. Mankins v. State, 41 Texas Crim. Rep. 668; 57 S. W. 950. Lockhard v. State, 43 Texas Crim. Rep. 64; 63 S. W. 566.

If a person is charged by the libel with conduct clearly disgraceful to him as a member of society and the natural consequence of which is to bring him into contempt among honorable persons, it is not necessary, when the language of the libel imports and shows this to be the purpose, to allege in terms that such libelous statement, though not a penal offense, does disgrace him as a member of society and the natural consequence of which is to bring him into contempt among honorable persons. Jones v. State, 38 Texas Crim. Rep. 367; 43 S. W. 78. Squires v. State, 39 Texas Crim. Rep. 102; 45 S. W. 147. Mankins v. State, 41 Texas Crim. Rep. 688; 57 S. W. 950. Lockhard v. State, 43 Texas Crim. Rep. 64; 63 S. W. 566.

Libel is punished on account of its tendency to injure the reputation of a person, and if this intent is alleged, the indictment is sufficient wthout the additional averment of the tendency and intent to create a breach of the peace. Coulson v. State, 16 Texas Crim. App. 189.

Where it is alleged that the libel was circulated by depositing it in the post office, it need not be alleged to whom the libel was addressed, or whether it was addressed at all or not. Mankins v. State, 41 Texas Crim. Rep. 669; 57 S. W. 950.

Where the article is lengthy and contains much matter that is not libelous the indictment must single out the portions claimed to be libelous. McKie v. State, 37 Texas Crim. Rep. 544; 40 S. W. 305. Nordhaus v. State, 40 S. W. 804. Byrd v. State, 38 Texas Crim. Rep. 634; 44 S. W. 521. Jackson v. State, 77 S. W. 223.

Libel belongs to that class of cases in which it is held to be absolutely necessary to set out in the indictment or information the alleged libelous matter according to its tenor. The obscenity of the language will not excuse the failure to so plead it. Coulson v. State, 16 Texas Crim. App. 196.

If the indictment alleges that the libel is set out by its substance, it is fatally defective, although the libel be set out according to its tenor. Coulson v. State, 16 Texas Crim. App. 195. Edgerton v. State, 70 S. W. 90.

Unless the publication refers to and identifies some particular act disgraceful to the person spoken of, it must be shown by innuendo averments what was meant. McKie v. State, 37 Texas Crim. Rep. 544; 40 S. W. 305.

Where there might be many meanings given to the language used in the alleged libel, an innuendo averment cannot add to or enlarge or change the sense of the previous words. The innuendo must naturally flow from the words used in the alleged libel. McCauley v. State, 64 Texas Crim. Rep. 183; 141 S. W. 975.

If the innuendo averments give to the language of the alleged libel a meaning not ordinarily flowing from such language, and is a strained and unauthorized construction thereof, the count containing such averments is defective. McCauley v. State, 64 Texas Crim. Rep. 183; 141 S. W. 975.

Art. 1153. (723) **Publishing writing purporting to be done by another.**—If any person, with intent to injure the reputation of another, shall, without lawful authority, make, publish or circulate a writing purporting to be the act of some other person, and which comes within the definition of libel, as given in this chapter, he shall be punished in the same manner as if the act purported to be his own; and the rules with respect to libel apply also to the making and circulation of such false writing.

Sec. 2108. **Form for indictment.**—In the case of Squires v. State, 39 Texas Crim. Rep. 102; 45 S. W. 147 will be found a good form under the preceding statute.

Art. 1154. (724) **"Maker" explained.**—He is the maker of a libel who originally contrived and either executed it himself by writ-

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ing, printing, engraving or painting, or dictated or caused it to be done by others.

Art. 1155. (725) **"Publisher."**—He is the publisher of a libel who, either of his own will or by the persuasion or dictation of another, executes the same in any of the modes pointed out as constituting a libel; but if any one by force or threats is compelled to execute such libel he is guilty of no offense.

Sec. 2109. **Publication.**—Writing a letter and depositing it in the post office constitutes a publication whether the letter be addressed or not. Smith v. State, 32 Texas 598. Coulson v. State, 16 Texas Crim. App. 189. Mankins v. State, 41 Texas Crim. Rep. 669; 57 S. W. 950.

A private letter not shown to anyone and not intended by defendant to be seen by anyone but the person to whom it is addressed, if deposited in the mails is a publication of a libel, if it be of such character as that, if made public, it would affect the reputation of the person about whom it is written. Coulson v. State, 16 Texas Crim. App. 196.

Art. 1156. (726) **Circulating.**—He is guilty of circulating a libel who, knowing its contents, either sells, distributes or gives, or who, with malicious design, reads or exhibits it to others.

Sec. 2110. **Circulating.**—Reading and exhibiting a libel to others is circulating it. Woody v. State, 16 Texas Crim. App. 252.

Art. 1157. (727) **The ideas the statement must convey.**—The written, printed or published statement, to come within the definition of libel, must convey the idea either:

1. That the person to whom it refers has been guilty of some penal offense; or
2. That he has been guilty of some act or omission which, though not a penal offense, is disgraceful to him as a member of society, and the natural consequence of which is to bring him into contempt among honorable persons; or
3. That he has some moral vice, or physical or mental defect or disease, which renders him unfit for intercourse with respectable society, and such as should cause him to be generally avoided; or
4. That he is notoriously of bad or infamous character; or
5. That any person in office, or a candidate therefor, is dishonest, and therefore unworthy of such office, or that while in office he has been guilty of some malfeasance rendering him unworthy of the place.

Art. 1158. (728) **Mode of publication.**—A libel may be either written, printed, engraved, etched, or painted, but no verbal defamation comes within the meaning thereof; and whenever a defendant is accused of libel by means of a painting, engraving, or caricature, it must clearly appear therefrom that the person said to be defamed was, in fact, intended to be represented by such painting, engraving, or caricature.

Art. 1159. (729) **A manuscript must be circulated.**—In order to render any manuscript a libel, it must be circulated or posted up in some public place.

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Art. 1160. (730) **Editor, etc., prima facie guilty.**—If the libel be in printed form, and issues or is sold in any office or shop where a public newspaper is conducted, or where books or other printed works are sold or printed, the editor, publisher, and proprietor of such newspaper, or any one of them, or the owner of such shop, is to be deemed guilty of making or circulating such libel until the contrary is made on the trial to appear.

Art. 1161. (731) **Editor, etc., may avoid responsibility.**—The editor, publisher, or proprietor of a public newspaper may avoid the responsibility of making or publishing a libel by giving the true author of the same, provided such author be a resident of this State and a person of good character, except in cases where it is shown that such editor, publisher, or proprietor caused the libel to be published with malicious design.

Art. 1162. (732) **Mechanical executor not guilty, unless.**—No person shall be convicted of libel merely on evidence that he has made a manuscript copy of a libel or has performed the manual labor of printing it, unless it be shown positively that such person was actuated by a malicious design against the person defamed. But the person for whose account or by whose order it was printed shall be presumed to have known the intent of the publication, and shall be liable for the offense.

Art. 1163. (733) **Actual injury not necessary.**—It is sufficient to constitute the offense of libel if the natural consequence of the publication of the same is to injure the person defamed, although no actual injury to his reputation has been sustained.

Art. 1164. (734) **Intent to injure presumed.**—The intent to injure is to be presumed if such would be the natural consequence of the libel, though no actual proof be made that the defendant had such design; and in all trials of libel the jury are to judge from the facts proved relative to the malicious design of the defendant as to what penalty ought to be imposed under the restrictions herein prescribed.

Sec. 2111. **Intent to injure presumed.**—Unless upon the trial the evidence discloses that the libelous matter charged falls within the class of privileged communications, malice or intent to injure is presumed. Smith v. State, 32 Texas 597 (letter).

Art. 1165. (735) **True statement concerning candidate not libel.**—It is no offense to make true statements of fact or express opinions as to the integrity or other qualifications of a candidate for any office or public place or appointment.

(Aldama v. State, 163 S. W. 730.)

Art. 1166. (736) **Nor concerning qualifications of professional men.**—It is no offense to publish true statements of fact as to the qualifications of any person for any occupation, profession, or trade.

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Art. 1167. (737) **No criticism of any book, etc.**—It is no offense to publish any criticism or examination of any work of literature, science, or art, or any opinion as to the qualifications or merits of the author of such work.

Art. 1168. (738) **The offense relates to persons only.**—To constitute libel, there must be some injury intended to the reputation of persons, and no publication as to the government, or any of the branches thereof as such, is an offense under the name of seditious writings or any other name.

Art. 1169. (739) **Respecting religious systems, etc.**—It is no libel to make publications respecting the merits or doctrines of any particular religion, system of morals or politics, or of any particular form of government.

Art. 1170. (740) **Corporation can not be libeled.**—It is no libel to make any publication respecting a body politic or corporate as such.

Art. 1171. (741) **Nor legislative or judicial proceedings, unless, etc.**—It is no libel to publish any statement respecting any legislative or judicial proceedings, whether the statement be in fact true or not, unless in such statement a charge of corruption is made against some person acting in a legislative or judicial capacity.

Art. 1172. (742) **Recorder of minutes, etc., not liable.**—Where any person by virtue of his office is required to record the proceedings of any department of the government or of any body corporate or politic, or of any association organized for purposes of business, or as a religious, moral, benevolent, literary, or scientific institution, he can not be charged with libel for any entry upon the minutes or records of such department, body, or association, made in the course of his official duties.

Sec. 2112. **Recorder liable.**—A preacher was guilty of libel where he insisted on putting prosecutor's name on the church records as the father of a bastard child, after he knew that prosecutor had been acquitted of seduction and after prosecutor had denied the imputation. Kubricht v. State, 44 Texas Crim. Rep. 94; 69 S. W. 157.

A malicious statement affecting the reputation of another made with malice and with intent to injure is not protected because it was entered on the records of some institution. Kubricht v. State, 44 Texas Crim. Rep. 94; 69 S. W. 157.

Art. 1173. (743) **But all members of the association who assent are.**—If any false statement be entered upon the minutes or record of proceedings of any corporate body or association included within the meaning of the preceding article, which would be libel if written, printed, published, or circulated by an individual, according to the previous articles of this chapter, the persons being members of such body or association, who assent to and direct such libelous statement to be made, are guilty of libel under the same rules as if the false statement had been written, published, or circulated in any other manner than as a part of the record or proceedings of such body or association, subject, however, to the restrictions contained in the succeeding article.

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Art. 1174. (744) **Intent to injure not presumed, unless, etc.**—The libelous statement referred to in the preceding article is not to be presumed to have been made with intent to injure, from the mere fact that such would be the natural result thereof, unless it appear from other facts that the statement was in fact made with that intention.

Art. 1175. (745) **"Malicious" signifies what.**—The word "malicious" is used to signify an act done with evil or mischievous design, and it is not necessary to prove any special facts showing ill feeling on the part of the person who is concerned in making, printing, publishing, or circulating a libelous statement against the person injured thereby.

Art. 1176. (746) **Statement in legislative or judicial proceedings not included.**—No statement made in the course of a legislative or judicial proceeding, whether true or false, although made with intent to injure and from malicious purposes, comes within the definition of libel.

Sec. 2113. **Statement in course of judicial proceeding.**—A false statement in a complaint made in the course of a judicial proceeding is not libel or slander. Lindsey v. State, 18 Texas Crim. App. 280.

Art. 1177. (747) **Truth of statement may be shown, when.**—In the following cases, the truth of any statement charged as libel may be shown in justification of the defendant:

1. Where the publication purports to be an investigation of the official conduct of officers or men in a public capacity.
2. Where it is stated in the libel that a person has been guilty of some penal offense, and the time, place, and nature of the offense is specified in the publication.
3. Where it is stated in the libel that a person is of notoriously bad or infamous character.
4. Where the publication charges any person in office, or a candidate therefor, with a want of honesty, or of having been guilty of some malfeasance in office, rendering him unworthy of the place. In other cases the truth of the facts stated in the libel can not be inquired into.

Sec. 2114. **Proving the truth of the libel.**—In Smith v. State, 32 Texas 594, it is stated that if the libelee is a private person, the truth of the alleged libel cannot be shown. This statement is *dicta*, besides the statute provides for such proof where the libel, as charged, comes within one of the classes in which the statute permits the truth of the libel to be proven. Johnson v. State, 31 Texas Crim. Rep. 463; 20 S. W. 985. Williams v. State, 40 Texas Crim. Rep. 497; 51 S. W. 220.

If the libel, as charged, does not come within one of the classes in which the statute permits the truth of the libel to be proven, it is not error to exclude proof offered for that purpose. Johnson v. State, 31 Texas Crim. Rep. 463; 20 S. W. 985.

Where it is stated in the libel that a person has been guilty of some penal offense, and the time, place, and nature of the offense is specified in the publication, it is error to exclude proof tending to show the truth of the alleged libel. Johnson v. State, 31 Texas Crim. Rep. 465; 20 S. W. 980. Johnson v. State, 31 Texas Crim. Rep. 570; 21 S. W. 541.

If a penal offense is charged generally in the alleged libel (see Smith v. State, 32 Texas 594, as an illustration, where the libelee was termed "a hireling murderer")

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without stating the time and place and nature of the offense, the truth of the libel cannot be proved, although in fact the alleged libel was true. Johnson v. State, 31 Texas Crim. Rep. 465; 20 S. W. 980.

Although there is no express charge of a penal offense in the alleged libel, yet if it appears by innuendo, and time and place and fairly stated, it is error to exclude proof of the truth of such statement charged as libel or to restrict the proof to narrower limits than the language of the alleged libel itself. Johnson v. State, 31 Texas Crim. Rep. 570; 21 S. W. 541.

If it is charged in the indictment that defendant conveyed the idea that the prosecutor was of notoriously bad and infamous character, it is error to exclude proof of the general character of prosecutor. Leader v. State, 4 Texas Crim. App. 163.

While it would be competent to prove the general reputation of the libelee for dishonesty when that is the statement charged as libel, it is not error to exclude proof of rumors and conversations in regard to the specific act charged. Baldwin v. State, 39 Texas Crim. Rep. 250; 45 S. W. 714.

When not admissible to prove the truth of the statement charged as libel, proof of the bad general reputation for truth and veracity of the libelee is not admissible where the libelee did not testify on the trial. McArthur v. State, 41 Texas Crim. Rep. 638; 57 S. W. 847.

Art. 1178. (748) **Province of jury.**—The jury in every case of libel are not only the judges of the facts and of the law, under the direction of the court, in accordance with the constitution, but they are judges of the intent with which a libel may have been published or circulated, subject to the rules prescribed in this chapter; and in rendering their verdict they are to be governed by a consideration of the nature of the charge contained in the libel, the general reputation of the person said to be defamed, and the degree of malice exhibited by the defendant in the commission of the offense.

Sec. 2115. **Jury are the judges of the law.**—It is proper to charge the jury in a prosecution for libel, it never being intended that the jury should construe the law for themselves and without direction from the court. McArthur v. State, 41 Texas Crim. Rep. 639; 57 S. W. 847.

Sec. 2116. **Evidence.**—If part of a publication is alleged as libelous, the whole is admissible as a part of the *res gestæ*, and to show the animus of defendant. Byrd v. State, 39 Texas Crim. Rep. 634; 44 S. W. 521.

It may be proven that the witness had seen a copy of the libel circulated, and had heard defendant make a statement about it, when such proof tends to show motive and malice. Lockhard v. State, 43 Texas Crim. Rep. 64; 63 S. W. 566.

Where the State offers proof of declarations as to his motives and purposes in publishing the libel, it is not error to exclude proof of declarations of defendant favorable to him where they constitute no part of the declarations introduced by the State. McArthur v. State, 41 Texas Crim. Rep. 639; 57 S. W. 847.

Proof that the publication was in a newspaper is admissible whether or not it is alleged in the indictment that the publication was in a newspaper. Baldwin v. State, 39 Texas Crim. Rep. 249; 45 S. W. 714.

(Art. 1178 (748) of the Penal Code authorizes the jury in rendering their verdict to be governed, among other things, by the general reputation of the person said to be defamed. From this article it would seem that proof of the general reputation of such person would be admissible for whatever it is worth. The case of McArthur v. State, 41 Texas Crim. Rep. 639; 57 S. W. 847 is rather indefinite on this proposition, and probably the court failed to notice the language of this article. Besides, the lowest penalty was assessed in that case.)

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Sec. 2117. **Variance.**—It is sufficient to prove substantially the words charged, and proof of additional words not altering the meaning of those singled out and alleged as libelous will not constitute a variance. McArthur v. State, 41 Texas Crim. Rep. 638; 57 S. W. 847.

Where the indictment singles out parts of the publication as libelous, there is no variance because of an omission or variance in punctuation, or because the article "a" was used for the article "the," or because the singular was used for the plural. McArthur v. State, 41 Texas Crim. Rep. 638; 57 S. W. 847.

It is not a variance because the indictment fails to set out the words on the cover of a pamphlet which only shows who sold it. McArthur v. State, 41 Texas Crim. Rep. 637; 57 S. W. 847.

To allege a publication in English words and prove a publication in another tongue is a variance. When the libel is in a foreign language, it should be set out in such language together witih a translation into English. Stichtd v. State, 25 Texas Crim. App. 425; 8 S. W. 477.

Sec. 2118. **Evidence sufficient.**—If defendant was part owner of the paper and set up the libelous article in type, he is responsible for the libel, although he had nothing to do with writing it. Baldwin v. State, 39 Texas Crim. Rep. 250; 45 S. W. 714.

If defendant was the employee of a paper and wrote the libelous article, he is guilty of libel although he was out of the city when it was published. Noble v. State, 38 Texas Crim. Rep. 369; 43 S. W. 80.

Convictions sustained on appeal. Smith v. State, 32 Texas 597 (letter). Woody v. State, 16 Texas Crim. App. 252 (newspaper). Johnson v. State, 31 Texas Crim. Rep. 456; 20 S. W. 985 (newspaper). Smith v. State, 39 Texas Crim. Rep. 321; 45 S. W. 1013 (newspaper). McArthur v. State, 41 Texas Crim. Rep. 635; 57 S. W. 847 (pamphlet). Mankins v. State, 41 Texas Crim. Rep. 662; 57 S. W. 950 (letter). Lockhard v. State, 43 Texas Crim. Rep. 61; 63 S. W. 566 (pamphlet). Kubricht v. State, 44 Texas Crim. Rep. 94; 69 S. W. 157 (entry on church records).

If the writing alleged to be libelous is not in the Statement of Facts the judgment of conviction will be reversed. Samper v. State, 166 S. W. 511.

Sec. 2119. **Charge of court.**—It is proper to charge the jury in libel cases, it never being intended that the jury should construe the law for themselves without direction from the court. McArthur v. State, 41 Texas Crim. Rep. 639; 57 S. W. 847.

A charge is erroneous when it authorizes a conviction on a phase of the publication which is not libelous. Squires v. State, 39 Texas Crim. Rep. 108; 45 S. W. 147.

A charge that the truth of a statement charged as libel may be shown in justification by the defendant is erroneous when the court has refused to permit such proof, and such charge is wholly unwarranted by the statute, which clearly defines in what cases proof of the truth of the libel is admissible. Johnson v. State, 31 Texas Crim. Rep. 464; 20 S. W. 980.

Art. 1179. (749) **This title relates only to penal action.**—This title regulates the law with regard to libel when prosecuted as a penal offense, and is not intended to have any operation upon the subject so far as relates to civil remedies for the recovery of damages.

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CHAPTER II

SLANDER

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Article 1180. (750) **Definition and punishment.**—If any person shall, orally or otherwise, falsely and maliciously, or falsely and wantonly, impute to any female in this State, married or unmarried, a want of chastity, he shall be deemed guilty of slander, and upon conviction, shall be fined not less than one hundred nor more than one thousand dollars, and the jury may, in addition thereto, find a verdict for the imprisonment of defendant in the county jail not exceeding one year.

Art. 1181. (751) **Procedure in prosecution for.**—In any prosecution under this chapter, it shall not be necessary for the State to show that such imputation was false, but the defendant may in justification show the truth of the imputation, and the general reputation for chastity of the female alleged to have been slandered may be inquired into.

Sec. 2120. **Form for indictment.**

In the name and by the 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 John Doe on the.....day of.....A. D..... in said county and State did orally and falsely and maliciously and falsely and wantonly impute to a married (or "unmarried") female in this State, to wit ....., a want of chastity, in this to wit, the said John Doe did then and there in the presence and hearing of.....and divers other persons falsely and maliciously and falsely and wantonly say of and concerning said female that (here set out the statement claimed to be slanderous, together with such innuendo averments as will explain any word of doubtful or ambiguous meaning).

Against the peace and dignity of the State.

.....

Foreman of the grand jury.

Sec. 2121. **Indictment.**—Indictments for slander held good. Patterson v. State, 12 Texas Crim. App. 473. Kyle v. State, 55 Texas Crim. Rep. 361; 116 S. W. 598. Curl v. State, 145 S. W. 603.

The indictment or information should allege whether the female claimed to be slandered was married or unmarried. Clark v. State, 32 Texas Crim. Rep. 412;

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24 S. W. 25. Fox v. State, 101 S. W. 808, but if the alleged statement would be slander whether the female was married or unmarried, the failure to so allege would be immaterial. Wallace v. State, 49 S. W. 395.

An indictment for slander is insufficient where the alleged slander was a statement that prosecutrix was pregnant if it fails to exclude the idea that she was lawfully or legitimately pregnant. Clark v. State, 32 Texas Crim. Rep. 412; 24 S. W. 25.

An indictment or information for slander is bad if there is no allegation that the slander was uttered or spoken in the presence of anyone. McMahon v. State, 13 Texas Crim. App. 222. Wiseman v. State, 14 Texas Crim. App. 75.

Where it is alleged that the slander was made to a person named and also to "divers other persons," it is not necessary to allege the names of the other persons. England v. State, 49 S. W. 379. Lefever v. State, 49 S. W. 383.

A variance between the information and the complaint as to the name of the person in whose presence it is alleged the slander was uttered is fatal to the validity of the information. Davis v. State, 22 S. W. 979.

An indictment or information for slander is bad if there is a failure to allege in terms that defendant did impute a want of chastity to the female. Neely v. State, 32 Texas Crim. Rep. 371; 23 S. W. 798.

An indictment or information for slander may allege in the same count an imputation of a want of chastity to two or more females. Wallace v. State, 49 S. W. 395. Roberts v. State, 51 Texas Crim. Rep. 28; 100 S. W. 150.

An indictment for slander is not bad because it alleges that defendant imputed a want of chastity to a female, and then sets out the names of more than one female. Roberts v. State, 51 Texas Crim. Rep. 28; 100 S. W. 150.

If the indictment or information fails to set out the words (or acts) constituting the slander, it is fatally defective. Lagrone v. State, 12 Texas Crim. App. 426. Melton v. State, 12 Texas Crim. App. 552. Hammers v. State, 13 Texas Crim. App. 344. Wiseman v. State, 14 Texas Crim. App. 75.

An indictment or information for slander, to be sufficient, must set out substantially the language or whatever else constitutes the imputation of a want of chastity. Lagrone v. State, 12 Texas Crim. App. 426. Melton v. State, 12 Texas Crim. App. 552. Hammers v. State, 13 Texas Crim. App. 344. Wiseman v. State, 14 Texas Crim. App. 75.

Where the words set out do not impute a want of chastity the indictment is bad unless it contains averments showing what was meant by the language used. Woods v. State, 58 Texas Crim. Rep. 103; 124 S. W. 918.

Innuendo averments are unnecessary when the words set out clearly impute a want of chastity. Hatcher v. State, 170 S. W. 725.

Where the obvious meaning of defendant's statement is that he had had carnal knowledge of the prosecutrix, no innuendo averments are necessary to explain what he meant although the word he used to denote the carnal act is not in the dictionary, when the word is in common use as a short and expressive, though vulgar, term to denote that act. When it comes to words denoting the act by which one gratifies the reproductive instinct, judges will not claim any more ignorance as judges than they have as men. Knight v. State, 49 S. W. 383.

Where the statement claimed to be slander was that defendant said he saw prosecutrix and a man "getting there," it was susceptible of the meaning given it by the innuendo to the effect that the parties were engaged in sexual intercourse. Whitehead v. State, 39 Texas Crim. Rep. 90; 45 S. W. 10.

If the slander was spoken in a foreign tongue the indictment or information should set out the words in that language, together with a translation into English. Stichtd v. State, 25 Texas Crim. App. 425; 8 S. W. 477.

Sec. 2122. **Statute construed.**—The Legislature has authority to dispense with proof on the part of the State as to the falsity of the imputation of a want of chastity

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of the female claimed to have been slandered, as the law presumes the chastity of every woman. Lagrone v. State, 12 Texas Crim. App. 426.

A woman may be unchaste and still have no reputation for unchastity; such a woman is not the subject of slander. Van Dusen v. State, 34 Texas Crim. Rep. 456; 30 S. W. 1073.

However vulgar and abusive the statement of defendant may be, if it cannot properly or legally be construed as imputing to the female a want of chastity, it is not slander. Gooing v. State, 98 S. W. 857. Fox v. State, 101 S. W. 808.

The innuendo must naturally flow from the words used in the alleged slander; it cannot enlarge or change the sense of the words as alleged. If the innuendo averments give to the language of the alleged slander a meaning not ordinarily and naturally flowing from such language, and is an unauthorized and strained construction thereof, the allegation is bad. Gooing v. State, 98 S. W. 857.

The fact that the slander was uttered to protect a friend is no defense, but is evidence of deliberation and malice. Shaw v. State, 28 Texas Crim. App. 236; 12 S. W. 741.

If the language evidently was intended to convey the idea that the female spoken of was lewd, it is immaterial whether she was married or single. Wallace v. State, 49 S. W. 395. Fox v. State, 101 S. W. 808.

Where the only statement claimed to be slander was that defendant said that "he had a big time with her," it is not susceptible of the meaning that he had carnal intercourse with her. Gooing v. State, 98 S. W. 857.

Where defendant said of a female that another was "monkeying with her" and "doing what he pleased with her," an innuendo which avers that he meant that the other fellow was having carnal knowledge of her is justified. Dickson v. State, 34 Texas Crim. Rep. 1; 30 S. W. 807.

An acquittal for slandering one female is not a bar to a prosecution for slandering another, although the slander was uttered at the same time. Collins v. State, 39 Texas Crim. Rep. 32; 44 S. W. 846.

Sec. 2123. **Privileged communications.**—A statement in a complaint duly sworn to as the beginning of a criminal prosecution is a statement made in the course of a judicial proceeding and is absolutely privileged, however false and malicious and slanderous the statement may be, and an indictment or information for slander cannot be based on any statement made therein. Lindsey v. State, 18 Texas Crim. App. 281.

Statements made to the husband or father of the female claimed to be slandered are privileged where defendant is pressed by him to speak on that subject. Davis v. State, 22 S. W. 979. McDonald v. State, 164 S. W. 831.

Where it was reported to the father that defendant had slandered his daughter, and defendant when approached by the father made a statement to him of what he had heard, the statement to the father was a privileged communication. Hix v. State, 20 S. W. 550. Davis v. State, 22 S. W. 979 (see Robison v. State, 179 S. W. 1157).

Where the father of prosecutrix made no inquiry of defendant as to the slander, the mere fact that defendant slandered her in the presence of her father would not make the slander privileged. Richmond v. State, 58 Texas Crim. Rep. 435; 126 S. W. 597. Davis v. State, 167 S. W. 1108.

Sec. 2124. **Slander of the wife.**—A prosecution may be maintained against the husband for the slander of his wife. Stayton v. State, 46 Texas Crim. Rep. 208; 78 S. W. 1071.

The wife is not a competent witness for the State against her husband in a slander case. Baxter v. State, 34 Texas Crim. Rep. 516; 31 S. W. 394.

The State is entitled to cross-examine defendant as to his attentions to another woman if such testimony would tend to prove a motive for slandering his wife. Elder v. State, 151 S. W. 1052.

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If the wife of defendant was unchaste, he is not guilty of slander in imputing a want of chastity to her, although he knew that she was unchaste when he married her. Baxter v. State, 34 Texas Crim. Rep. 518; 31 S. W. 394.

Sec. 2125. **Reputation and character of the female.**—Where an inquiry into the reputation for chastity of the female claimed to have been slandered establishes the fact that her reputation in that respect was bad, the defendant is entitled to an acquittal. Shaw v. State, 28 Texas Crim. App. 238; 12 S. W. 741. Crane v. State, 30 Texas Crim. App. 465; 17 S. W. 939. Richmond v. State, 58 Texas Crim. Rep. 435; 126 S. W. 596.

It is error to confine proof of the reputation of prosecutrix to the county in which she resided at the time of the alleged slander. Crane v. State, 30 Texas Crim. App. 465; 17 S. W. 939. Ballew v. State, 48 Texas Crim. Rep. 46; 85 S. W. 1063.

Proof of unchastity of the female alleged to have been slandered may be made by proof of specific acts as well as by proof of her general reputation for unchastity. Van Dusen v. State, 34 Texas Crim. Rep. 458; 30 S. W. 1073 (modifying Patterson v. State, 12 Texas Crim. App. 459).

If the slander imputed is general as that the female "is a whore" proof of specific acts of illicit intercourse is admissible. Wagner v. State, 17 Texas Crim. App. 554.

Where the alleged slander was a statement made to a married woman that she was a whore, defendant is not entitled to prove that she had lived in adultery with her husband before their marriage. Wagner v. State, 17 Texas Crim. App. 554.

Where the slander alleged was that defendant said that the female was a "whore," it is error to exclude testimony that she and another had had illicit intercourse; such testimony is also admissible on the issue of intent. Duke v. State, 19 Texas Crim. App. 14. Van Dusen v. State, 34 Texas.Crim. Rep. 459; 30 S. W. 1073.

If the slander alleged is a statement as to a specific act of illicit intercourse, it is error to exclude proof of a prior act between the same parties. Wood v. State, 32 Texas Crim. Rep. 478; 24 S. W. 284.

It is proper to exclude testimony of acts of frailty on the part of the prosecutrix when the only attack made on her chastity is attempted to be made by proof of acts occuring long subsequent to the alleged slander. Jackson v. State, 42 Texas Crim. Rep. 498; 60 S. W. 963.

It is error to permit the State to prove that prosecutrix has a good reputation for chastity at the time of the trial, because it shows that she has suffered no damage by reason of the alleged slander, and shows the opinion of the community as to their belief in the alleged slander. Bowers v. State, 45 Texas Crim. Rep. 189; 75 S. W. 299. Gipson v. State, 77 S. W. 216.

Sec. 2126. **Proof of other slanders.**—To show intent, when intent is an issue, proof is admissible of statements made on other occasions imputing a want of chastity to the prosecutrix. Manning v. State, 37 Texas Crim. Rep. 184; 39 S. W. 118. Collins v. State, 39 Texas Crim. Rep. 32; 44 S. W. 846. West v. State, 44 Texas Crim. Rep. 418; 71 S. W. 967. Stayton v. State, 46 Texas Crim. Rep. 207; 78 S. W. 1071. Adams v. State, 62 Texas Crim. Rep. 426; 138 S. W. 117. Curl v. State, 145 S. W. 605.

It is not error to permit the State to prove that on other occasions after the alleged slander that defendant used the same or similar language, to show the spirit and animus of defendant in speaking the words alleged. Whitehead v. State, 39 Texas Crim. Rep. 92; 45 S. W. 10.

(Unless some of the matters, such as intent and animus are directly in issue, proof of other separate and distinct slanders may probably result in getting a conviction set aside. When the only purpose proof of other slanderous remarks could serve would be to prejudice the jury against defendant the State does not need such proof, and it should not be admitted. Tippens v. State, 43 S. W. 1001. Roberts v. State, 51 Texas Crim. Rep. 27; 100 S. W. 150. Porter v. State, 107 S. W. 817.)

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Proof of a new and independent slander uttered long after the slander declared on and which has no connection with it is not admissible. Roberts v. State, 51 Texas Crim. Rep. 27; 100 S. W. 150.

To give color to the language set out in the indictment or information and which is claimed to impute a want of chastity, and to support the innuendo, and as part of the *res gestæ*, it is not error to admit proof of all that was said on the subject at the time the alleged slanderous statement was made. Dickson v. State, 34 Texas Crim. Rep. 1; 30 S. W. 807. Whitehead v. State, 39 Texas Crim. Rep. 91; 45 S. W. 10.

Where defendant is on trial for slander, testimony that he also, at another time, imputed a want of chastity to a relative of prosecutrix, is not admissible. Tippens v. State, 43 S. W. 1000.

Proof that defendant was also defendant in a "church trial" for the alleged slander and of the result of that trial is not admissible. Tippens v. State, 43 S. W. 1000.

Sec. 2127. **Variance.**—It being necessary that the slanderous words should be substantially alleged it follows that they must be substantially proved as alleged. This means that the essential, important and material portion of the slander, as alleged, must be proven. All the words need not be proven, but enough of the words alleged must be proven, as alleged, to constitute the slander. It will not do to allege one imputation and prove another, although the words proved are of the same import as those alleged and convey the same idea. If the language proven is substantially different from that alleged the variance is fatal. Conlee v. State, 14 Texas Crim. App. 224. Humbard v. State, 21 Texas Crim. App. 208; 17 S. W. 126. Frisby v. State, 26 Texas Crim. App. 183; 9 S. W. 463. Berry v. State, 27 Texas Crim. App. 483; 11 S. W. 521. Rogers v. State, 30 Texas Crim. App. 463; 17 S. W. 548. Barnett v. State, 35 Texas Crim. Rep. 281; 33 S. W. 340. Tippens v. State, 43 S. W. 1000. West v. State, 44 Texas Crim. Rep. 419; 71 S. W. 967. Porter v. State, 107 S. W. 817. Dobbs v. State, 55 Texas Crim. Rep. 485; 117 S. W. 799. Hasley v. State, 57 Texas Crim. Rep. 400; 123 S. W. 596. Simer v. State, 62 Texas Crim. Rep. 514; 138 S. W. 388. McDonald v. State, 164 S. W. 831. Hill v. State, 173 S. W. 1024.

Where defendant was charged with saying that he had "had carnal intercourse" with a girl, proof that he said he had "fucked" her is a variance. Barnett v. State, 35 Texas Crim. Rep. 281; 33 S. W. 340.

An allegation that defendant said that prosecutrix was unchaste is not sustained by proof that he said that the whole family were whores. Frisby v. State, 26 Texas Crim. App. 180; 9 S. W. 463.

An allegation of slander is not sustained by proof of the conclusion or opinion of a witness as to the effect of the words. The words as laid must be substantially proven. Riddle v. State, 30 Texas Crim. App. 425; 17 S. W. 1073.

It is not a variance to prove additional language to that alleged if it does not vary the meaning. Whitehead v. State, 39 Texas Crim. Rep. 91; 45 S. W. 10. Gipson v. State, 77 S. W. 216. Kelley v. State, 51 Texas Crim. Rep. 152; 101 S. W. 230 (in this case the additional language was an adjective which emphasized the epithet used).

Proof of additional language than alleged constitutes a variance if the additional language proven is essential to an understanding of that alleged and varies the meaning of that alleged. Roberts v. State, 51 Texas Crim. Rep. 28; 100 S. W. 150.

If the slanderous words are alleged to have been uttered to two persons at the same time they must be proved to have been uttered as alleged, and proof that they were made to each of the persons at different times is a variance. Knight v. State, 49 S. W. 383.

If the indictment or information for slander unnecessarily names more than one person as having been present when the slander was uttered, the allegation, being descriptive, must be proved as laid. Neely v. State, 32 Texas Crim. Rep. 370; 23 S. W. 798.

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To allege a slander in English words and prove that the words were uttered in another tongue is a variance. When the slander is uttered in a foreign language it should be alleged in that language together with a translation into English, and whatever innuendo averments are necessary need only be alleged in the English language. Stichtd v. State, 25 Texas Crim. App. 425; 8 S. W. 477.

Sec. 2128. **Evidence.**—The State is required to prove the words constituting the alleged slander substantially as alleged, but whether they have the meaning attributed to them by the innuendo averments, if any, is a question for the jury to decide. Dickson v. State, 34 Texas Crim. Rep. 4; 30 S. W. 807.

If the words used clearly and unequivocally indicated the meaning defendant intended to convey, and clearly inputed a want of chastity, the error in permitting the witnesses to testify what they understood by the words used is harmless. Dickson v. State, 34 Texas Crim. Rep. 4; 30 S. W. 807. Collins v. State, 39 Texas Crim. Rep. 32; 44 S. W. 846.

Where the meaning of the words alleged is clear and unambiguous and different words are proven, it is error to permit the State to prove that the witness understood the words used to correspond in meaning with those alleged. Berry v. State, 27 Texas Crim. App. 483; 11 S. W. 521. Riddle v. State, 30 Texas Crim. App. 425; 17 S. W. 1073.

In the case of Riddle v. State, 30 Texas Crim. App. 425; 17 S. W. 1073, the court held that where the statements alleged do not necessarily impute a want of chastity, but are aided by innuendo averments, that it is necessary to prove the innuendo averments, and that a conviction will not be sustained where none of the witnesses testify that the impression created upon their minds was the meaning set out in the innuendo, but this holding is not the law and in effect is overruled by Dickson v. State, 34 Texas Crim. Rep. 4; 30 S. W. 807 and Collins v. State, 39 Texas Crim. Rep. 32; 44 S. W. 846.

Where the slander is alleged to have been uttered in the presence of one named person and "divers others," it is not necessary to prove that others were present if their names are not given. Collins v. State, 39 Texas Crim. Rep. 33; 44 S. W. 846. England v. State, 49 S. W. 379.

It is not error to exclude proof that the persons to whom defendant uttered the alleged slander believed that defendant was telling the truth and had really seen what he claimed to have seen. Whitehead v. State, 39 Texas Crim. Rep. 92; 45 S. W. 10.

It is error to permit the State to prove that a witness, with whom prosecutrix stayed, saw nothing in her actions or conduct indicating that she was not virtuous. Richmond v. State, 58 Texas Crim. Rep. 435; 126 S. W. 597.

It is not error for the court to refuse to require prosecutrix over her objection to undergo a personal examination of her person to determine whether or not she was chaste. Whitehead v. State, 39 Texas Crim. Rep. 91; 45 S. W. 10. Bowers v. State, 45 Texas Crim. Rep. 189; 75 S. W. 299.

It is error to permit the State to prove remarks of defendant showing his contempt for a man who would secure carnal favors from a lady and then tell about it and as to what ought to be done with such a man. Bowers v. State, 45 Texas Crim. Rep. 185; 75 S. W. 299.

Where the imputation alleged is that prosecutrix was a whore, proof of her declaration that she was going to a whore house is admissible to show the probable truth of the imputation and to show lack of malice. McMahon v. State, 13 Texas Crim. App. 222.

It is error to exclude proof, offered upon the issue of intent, that for three years prior to the alleged slander the report was current in the neighborhood where the parties involved lived that carnal relations existed as stated by defendant. Humbard v. State, 21 Texas Crim. App. 209; 17 S. W. 126.

Where a witness on cross-examination testified that he had heard reports imputing a want of chastity to prosecutrix, and on re-direct examination stated that

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he had traced them to defendant, and on re-cross examination said a preacher told him so, his testimony on that point was hearsay. Tippens v. State, 43 S. W. 1001.

Defendant may, in justification, show the truth of the imputation alleged. McMahon v. State, 13 Texas Crim. App. 222. Crane v. State, 30 Texas Crim. App. 465; 17 S. W. 939. Elder v. State, 151 S. W. 1052. McDonald v. State, 164 S. W. 831.

Where the testimony shows the prosecutrix to be a whore and that was the alleged slander a conviction for slander will not be sustained. Lasky v. State, 18 S. W. 465.

Where prosecutrix denied having granted any carnal favors to defendant, but did not deny the testimony of other witnesses who testified that they had carnal knowledge of her, she was not chaste, and the evidence will not support a conviction for slander, although the State proved her good reputation. Lefevre v. State, 49 S. W. 383.

Where the State proves the speaking of the words and their falsity, the jury is authorized to infer that they were maliciously spoken. England v. State, 49 S. W. 379.

The evidence is insufficient if the name of prosecutrix is not proven as alleged in the indictment or information, either by proof that she was known or called by the name alleged, or that it was in fact her name. Humbard v. State, 21 Texas Crim. App. 208; 17 S. W. 126.

Sec. 2129. **Charge of the court.**—It is not error to charge the jury that the law presumes the chastity of every woman. Collins v. State, 39 Texas Crim. Rep. 33; 44 S. W. 846.

It is not error to charge the jury that the burden is on defendant to show justification. McMahon v. State, 13 Texas Crim. App. 224.

When supported by allegation and proof it is proper to charge the jury that defendant would be guilty if the words were uttered falsely and maliciously "or" falsely and wantonly. Kelley v. State, 51 Texas Crim. Rep. 151; 101 S. W. 230.

It is not error to fail to define the terms "maliciously" and "wantonly" in the absence of a requested charge. Kyle v. State, 55 Texas Crim. Rep. 358; 116 S. W. 596.

Where there is evidence to support the theory, the court should give a requested charge instructing the jury to acquit if they find the statements were made yet have a reasonable doubt as to whether they were made maliciously or wantonly. Tippens v. State, 43 S. W. 1001.

It is error to refuse to give a charge defining the terms "maliciously" and "wantonly." Rainwater v. State, 46 Texas Crim. Rep. 496; 81 S. W. 38. Roberts v. State, 143 S. W. 614.

When it is alleged that the statements were falsely and maliciously made, it is not error to refuse to charge the jury that unless the statements were falsely and wantonly made they should acquit. Ethridge v. State, 169 S. W. 1152.

It is error to refuse to charge that unless the jury find that the imputation was maliciously and wantonly made, notwithstanding it was shown to be false, they must acquit. Stayton v. State, 46 Texas Crim. Rep. 209; 78 S. W. 1071. Elder v. State, 151 S. W. 1052.

Where the allegation is only that defendant "orally" imputed a want of chastity to the female, it is error to authorize a conviction if he imputed it "orally or otherwise." Woods v. State, 58 Texas Crim. Rep. 103; 124 S. W. 918.

A charge is correct which instructs the jury to acquit if they believe that the statements made by defendant, if any, were true, or if the jury have a reasonable doubt as to whether or not the statements were true. West v. State, 44 Texas Crim. Rep. 419; 71 S. W. 967.

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A charge shifts the burden if it directs an acquittal if the jury believe that defendant has established the truth of the alleged statement beyond a reasonable doubt. Manning v. State, 37 Texas Crim. Rep. 183; 39 S. W. 118. Ballew v. State, 48 Texas Crim. Rep. 46; 85 S. W. 1063.

The court is not required to charge the jury that the State must prove the identical language alleged. Hill v. State, 173 S. W. 1024.

If proof of other statements than those alleged or proof of the same statements made at other times is admitted in evidence, the court should give a requested charge limiting the proof of such other statements to the purpose for which they were introduced. Collins v. State, 39 Texas Crim. Rep. 32; 44 S. W. 846. Stayton v. State, 46 Texas Crim. Rep. 207; 78 S. W. 1071. Adams v. State, 62 Texas Crim. Rep. 426; 138 S. W. 117.

It is error to authorize the jury to convict defendant if they find that he uttered the alleged slander in the presence or hearing of others than the person alleged. Tippens v. State, 43 S. W. 1001. Adams v. State, 62 Texas Crim. Rep. 426; 138 S. W. 117.

While the pleader should allege the name of one person to give the defendant notice of the time and occasion on which the slander was uttered, yet when he alleges the names of two or more as being present he should prove the allegation, for the names then become descriptive allegations and impose the necessity of proof, and in such case it is error to charge the jury to convict if they find that the words were spoken in the presence of the persons named "or either of them." Neely v. State, 32 Texas Crim. Rep. 370; 23 S. W. 798.

When there is evidence that the reputation of the prosecutrix for chastity was bad, it is error to refuse to charge the jury that if her reputation for chastity was bad at the time the statements were made they should acquit. Shaw v. State, 28 Texas Crim. App. 238; 12 S. W. 741.

The charge of the court should confine the jury's findings as to the general reputation of prosecutrix to the time of the alleged slander and not authorize an inquiry into such reputation at the time of the trial. Richmond v. State, 58 Texas Crim. Rep. 435; 126 S. W. 596.

A charge shifts the burden if the jury are required to find beyond a reasonable doubt before they can acquit that the general reputation of prosecutrix for chastity was bad. Manning v. State, 37 Texas Crim. Rep. 183; 39 S. W. 118. Ballew v. State, 48 Texas Crim. Rep. 46; 85 S. W. 1063. McDonald v. State, 164 S. W. 831.

Where there is evidence to show that the general reputation for chastity of prosecutrix was bad, it is error to refuse to charge the jury that if such was the fact they should acquit, and the error is not cured by a charge directing the jury to acquit if her general reputation was bad. Dobbs v. State, 55 Texas Crim. Rep. 483; 117 S. W. 799.

CHAPTER III

SENDING ANONYMOUS LETTERS

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Article 1182. **Sending or delivering—Punishment.**—If any person shall send, or cause to be sent, deliver, or cause to be delivered, to any other person any anonymous letter or written instrument of any char-

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acter whatsoever, reflecting upon the integrity, chastity, virtue, good character or reputation of the person to whom such letter or written instrument is sent or addressed, or of any other person, or wherein the life of such person is threatened, said person so sending such letter or written instrument shall be guilty of a misdemeanor, and on conviction thereof, shall be punished by a fine of not less than two hundred and fifty dollars nor more than one thousand dollars, and by imprisonment in the county jail for not less than one month nor more than twelve months. (Act 1909, p. 138.)

Art. 1183. **Definition of.**—By an anonymous letter or written instrument, within the meaning of this law, is meant where the sender of such letter or written instrument withholds his or her full and true name from the same, or where no name is signed thereto, or where a fictitious name is signed thereto, or where any description of such sender instead of a name is used, such as "a friend," or "a true friend" or the like. (Acts 1909, p. 138.)

Sec. 2130. **Indictment.**—An information for sending or delivering an anonymous letter reflecting on the chastity or reputation of another need not set out the letter. Bradfield v. State, 166 S. W. 734.

Art. 1184. **Joint offender may be made to testify.**—If two or more persons are concerned in the composition or sending of any anonymous letter or written instrument, as hereinbefore prohibited by this law, then either of such persons shall be compelled to testify thereto; and the fact that such testimony will incriminate such person shall not exempt such person from testifying in regard thereto; provided, that where such person has been compelled to testify in regard thereto as above stated, then, in that event, when such person has testified fully, fairly and truthfully in regard thereto, then such person shall not be prosecuted under this law for the particular offense about which such person has so testified. (Acts 1909, p. 138.)

Sec. 2131. **Evidence.**—A conviction for delivering an anonymous letter reflecting upon the chastity of the lady to whom it was addressed will not be sustained if there is no evidence that it was in the handwriting of defendant or that he knew its contents when he delivered it to her. Sims v. State, 158 S. W. 287.

The Act of 1909 makes no provision in terms for the punishment of the party delivering the anonymous letter, but it has been held that the punishment provided for one "sending" includes one who delivers. Bradfield v. State, 166 S. W. 735.

CHAPTER IV

FALSE ACCUSATION AND THREATS OF PROSECUTION

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Article 1185. (752) **Combination to falsely accuse another.**—If any two or more persons shall combine falsely to accuse another of an offense, and shall, in pursuance of such combination, make such accusation before a court or magistrate, or in any newspaper or other public print, or by the circulation of hand bills, or in any other public manner, by writing, they shall be punished by fine not exceeding two thousand dollars, or by imprisonment in the county jail not exceeding two years.

Sec. 2132. **Form for information.**

In the name and by authority of the State of Texas:

..... County Attorney of ..... county, Texas, comes in behalf of the State of Texas and presents in and to the County Court of ..... county, Texas, at the ..... term, A. D. ....., of said court that ..... and ..... heretofore on the ..... day of ....., A. D. ....., in said county and State, did combine falsely to accuse ..... of an offense, to wit, the offense hereinafter described, and said ..... and ..... did then and there, in pursuance of such combination, make such accusation in writing before ..... then and there Justice of the Peace in and for Precinct number one of said county (or other court or magistrate, stating it), the said accusation being then and there of the tenor following (here copy it literally); and the said accusation so made in pursuance of such combination was then and there false as they the said ..... and ..... then and there well knew when they so made it and combined to make it.

Against the peace and dignity of the State.

.....
County Attorney, ... county, Texas.

Art. 1186. (753) **Combination to extort money.**—If the purpose of such combination be to extort money or any pecuniary advantage, the punishment shall be by fine not to exceed two thousand dollars, and imprisonment in the penitentiary not to exceed three years.

Sec. 2133. **Form for indictment.**

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 ..... and ..... on the ..... day of ....., A. D. ....., in said county and State did combine falsely to accuse ..... of an offense, to wit, the offense hereinafter described, and the said ..... and ..... did then and there in pursuance of such combination make such accusation in writing before ....., then and there Justice of the Peace, precinct number ..... of said county, the said accusation being then and there of the tenor following: (here copy it literally), and the said accusation so made by them in pursuance of such combination was then and there false as they then and there well knew when they so made it and combined to make it, and the purpose of such combination was then and there to extort money from said .....

Against the peace and dignity of the State.

.....
Foreman of the grand jury.

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Art. 1187. (754) **Threats of prosecution to extort money.**—If any person, with intent to extort money, or any pecuniary advantage, shall threaten to accuse another of a felony, before any court, or to publish any other statement respecting him which would come within the meaning of libel, he shall be punished in the manner set forth in article 1185.

Sec. 2134. **Form for information.**
In the name and by authority of the State of Texas:

....., County Attorney of ..... county, Texas, comes in behalf of the State of Texas and presents in and to the County Court of ..... county, Texas, at the ..... term, A. D. ....., of said court that John Doe heretofore on the ..... day of ....., A. D. ....., in said county and State did with intent to extort money and a pecuniary advantage from ..... then and there threaten to accuse the said ..... before a court of a felony, to wit, the crime of sodomy with a mare (or "theft of the horse of said John Doe," or whatever felony it was, and it is sufficient to state this in general terms).

Against the peace and dignity of the State.

.....
County Attorney, ... county, Texas.

Sec. 2135. **Descriptive allegations.**—If the indictment or information names the court before which defendant threatened to prosecute, the allegation, being descriptive of the threat, must be proved as laid. Strange v. State, 33 Texas Crim. Rep. 315; 26 S. W. 406.

Art. 1188. (755) **Publishing another as a coward.**—If any person shall, in any newspaper or hand bill, or by notice posted up in any place, publish another as a coward, or use toward him other opprobrious language, he shall be fined in an amount not exceeding two hundred dollars; and, if such publication or posting be in consequence of a refusal to fight a duel, the punishment shall be by fine of not less than five hundred nor more than one thousand dollars.

Sec. 2136. **Form for complaint.**
In the name and by the authority of the State of Texas:

Before me, the undersigned authority, on this day personally appeared ....., who, being by me duly sworn, deposes and says that John Doe heretofore on the ..... day of ....., A. D. ....., in the county of ..... and State of Texas did in a newspaper published in said county and State known as ..... (giving the name), (or "in a hand bill" or "by a notice posted up on the post-office door in the town of ..... in said county," or other place, naming it), then and there publish ..... as a coward, the said publication in said newspaper (or "the said hand bill" or "the said notice") being as follows, to wit: (here copy it literally).

Against the peace and dignity of the State.

.....(affiant.)

Subscribed and sworn to before me this the ..... day of ..... A. D. .....

.....
Justice of the Peace, Prec. No. ...., ... Co., Texas.

Art. 1189. **"Whitecapping" defined, punishment for.**—Any person who shall post any anonymous notice or make any threats or signs or skull and cross bones, or shall by any other method post any character or style of notice or threat to do personal violence or injury to property on or near the premises of another, or who shall cause the same to be sent with the intention of interfering in any way with the right of such

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person to occupy said premises or to follow any legitimate occupation, calling or profession, or with the intention of causing such person to abandon such premises, or precincts, or county, in which such person may reside, shall be deemed guilty of the offense of whitecapping, and upon conviction therefor shall be punished by confinement in the State penitentiary for any period of time not less than two years, nor more than five years. (Acts of 1899, p. 215.)

Sec. 2137. **Indictment.**—Indictment held good. Dunn v. State, 43 Texas Crim. Rep. 25; 63 S. W. 571.

Indictments held bad. Bettis v. State, 48 Texas Crim. Rep. 22; 85 S. W. 1074. Atchley v. State, 56 Texas Crim. Rep. 570; 120 S. W. 1010.

An indictment for whitecapping is bad if it alleges that the object of the notice was to interfere with one person when the notice itself shows that it was directed to another person. Bettis v. State, 48 Texas Crim. Rep. 22; 85 S. W. 1074.

If the notice is directed to negroes working for prosecutor, the indictment should allege that it was sent to interfere with such negroes. Bettis v. State, 48 Texas Crim. Rep. 22; 85 S. W. 1074.

Where the innuendo averments do not naturally flow from the words used, and materially enlarge their natural meaning, the indictment is bad. Atchley v. State, 56 Texas Crim. Rep. 570; 120 S. W. 1010.

Sec. 2138. **Evidence.**—Each notice mailed at the same time to different parties is a separate offense. Dunn v. State, 43 Texas Crim. Rep. 25; 63 S. W. 571.

The notice need not contain threats of violence if it was sent with the intention to make the party abandon his premises. Dunn v. State, 43 Texas Crim. Rep. 25; 63 S. W. 571.

If intent or identity is an issue, proof of other notices sent to other parties than the prosecuting witness is admissible. Dunn v. State, 43 Texas Crim. Rep. 25; 63 S. W. 571.

CHAPTER V

BLACKLISTING

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Article 1190. **What constitutes discrimination against persons seeking employment.**—Either or any of the following acts shall constitute discrimination against persons seeking employment:

1. Where any corporation, or receiver of the same, doing business in this state, or any agent or officer of any such corporation or receiver, shall blacklist, prevent, or attempt to prevent, by word, printing, sign,

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list or other means, directly or indirectly, any discharged employe, or any employe who may have voluntarily left said corporation's service, from obtaining employment with any other person, company, or corporation, except by truthfully stating in writing, on request of such former employe, the reason why such employe was discharged, or why his relationship to such company ceased.

2. Where any corporation, or receiver of the same, doing business in this state, or any officer or agent of such corporation or receiver, shall by any means, directly or indirectly, communicate to any other person or corporation any information in regard to a person who may seek employment of such person or corporation, and fails to give such person in regard to whom the communication may be made, within ten days after demand therefor, a complete copy of such communication, if in writing, and a true statement, if by sign or other means not in writing, and the names and addresses of all persons or corporations to whom said communication shall have been made.

3. Where any corporation, or receiver of the same, doing business in this State, or any agent or employe of such corporation or receiver, shall have discharged an employe, and such employe demands a statement in writing of the cause of his discharge, and such corporation, receiver, agent or employe thereof fails to furnish a true statement of the same to such discharged employe within ten days after such demand, or where any corporation or receiver of the same, or any officer or agent of such corporation, or receiver shall fail, within ten days after written demand for the same, to furnish to any employe voluntarily leaving the service of such corporation or receiver, a statement in writing that such employe did leave such service voluntarily, or where any corporation or receiver of the same doing business within this state, shall fail to show in any statement under the provision of this law the number of years and months during which such employe was in the service of the said corporation or receiver in each and every separate capacity or position in which he was employed, and whether his services were satisfactory, in each such capacity or not, or where any such corporation or receiver shall fail, within ten days after written demand for the same, to furnish to any such employe a true copy of the statement originally given to such employe for his use in case he shall have lost, or is otherwise deprived of the use of, the said original statement.

4. Where any corporation, or receiver of same, doing business in this state, or any agent or officer of the same, shall have received any request, notice or communication, either in writing or otherwise, from any person, company or corporation, preventing or calculated to prevent the employment of a person seeking employment, and shall fail to furnish to such person seeking employment, within ten days after a demand in writing therefor, a true statement of such request, notice or communication, and if in writing, a true copy of same, and, if otherwise than in writing, a true statement thereof, and a true inter-

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pretation of its meaning, and the names and addresses of the persons, company or corporation furnishing the same.

5. Where any corporation, or receiver of the same, doing business in this State, or any officer or agent of such corporation or receiver, discharging an employe, shall have failed to give such employe a true statement of the causes of his discharge within ten days after a demand in writing therefor, and shall thereafter furnish any other person or corporation any statement or communication in regard to such discharge, unless at the request of the discharged employe.

6. Where any corporation, or receiver of same, doing business in this State, or any officer or agent of such corporation or receiver shall discriminate against any person seeking employment on account of his having participated in a strike.

7. Where any corporation, or receiver of the same, doing business in this State, or any officer or agent of such corporation, or receiver, shall give any information or communication in regard to a person seeking employment, having participated in any strike, unless such person violated the law during his participation on such strike, or in connection therewith, and unless such information is given in compliance with subdivision 1 of article 1190. (Act 1909, p. 160.)

Art. 1191. **Penalty for violating preceding article.**—Every person violating any of the provisions of the preceding article shall be guilty of a misdemeanor, and, upon conviction, shall be punished by imprisonment in the county jail for not less than one month nor more than one year. (Act 1907, p. 143.)

Art. 1192. **Prosecutions under, what is prima facie proof.**—In prosecutions for the violation of any of the provisions of this law, evidence that any person has acted as the agent of a corporation in the transaction of its business in this state shall be received as prima facie proof that his act in the name, behalf or interest of the corporation of which he was acting as the agent, was the act of the corporation. (Id., p. 143.)

Art. 1193. **"Blacklisting" defined.**—He is also guilty of "blacklisting" who places, or causes to be placed, the name of any discharged employe, or any employe who has voluntarily left the service of any individual, firm, company or corporation on any book or list, or publishes it in any newspaper, periodical, letter or circular, with the intent to prevent said employes from securing employment of any kind with any other person, firm, corporation or company, either in a public or private capacity. (Act 1901, p. 264.)

Art. 1194. **Same prohibited.**—No corporation, company, or individual shall blacklist or publish, or cause to be blacklisted or published, any employe, mechanic, or laborer discharged by such corporation, company, or individual, with the intent and for the purpose of preventing such employe, mechanic or laborer from engaging in or secur-

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ing similar or other employment from any other corporation, company or individual. (Id., p. 264.)

Art. 1195. **Penalty for.**—If any officer or agent of any corporation, company or individual, or other person, shall blacklist or publish, or cause to be blacklisted or published, any employe, mechanic or laborer discharged by such corporation, company or individual, with the intent and for the purpose of preventing such employe, mechanic or laborer from engaging in or securing similar or other employment from any other corporation, company or individual, or shall in any manner conspire or contrive by correspondence or otherwise, to prevent such discharged employe from procuring employment, as provided in articles 1193 and 1194, he shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than fifty nor more than two hundred and fifty dollars, or be imprisoned in the county jail not less than thirty nor more than ninety days or both. (Id., p. 264.)

Art. 1196. **Exceptions, when.**—But this law shall not be construed as prohibiting any corporation, company or individual, from giving in writing, on application from such discharged employe, or any corporation, company or individual who may desire to employ such discharged employe, a truthful statement of the reason for such discharge; provided, that said written cause of discharge, when so made by such person, agent, company or corporation, shall never be used as the cause for an action for libel, either civil or criminal, against the person, agent, company or corporation so furnishing same. (Id., p. 264.)

Art. 1197. **Servants or employes not to be coerced.**—It shall be unlawful for any person or persons, corporation or firm, or any agent, manager or board of managers, or servant, or any corporation or firm in this State to coerce or require any servant or employe to deal with or purchase any article of food, clothing or merchandise of any kind whatever from any person, association, corporation or company, or at any place or store whatever. And it shall be unlawful for any such person or persons, or agent, manager, or board of managers or servants to exclude from work, or to punish or black list any of said employes for failure to deal with any such person or persons or any firm, company or corporation, or to purchase any article of food, clothing or merchandise whatever at any store or any place whatever. (Act 1903, p. 89.)

Art. 1198. **Penalty for.**—Any person or persons, company or corporation or association, or any agent, manager or managers, or servant of any company, corporation or association, described in the foregoing article who shall violate any of the provisions of the preceding article, shall be guilty of a misdemeanor, and upon conviction shall be fined not less than fifty nor more than two hundred dollars for each offense. (Id., p. 89.)

Art. 1199. **Witness summoned and examined, when.**—Upon the application of the attorney general, or of any district or county attor-

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ney, made to any justice of the peace in this State, and stating that he has reason to believe that a witness, who is to be found in the county of which said justice of the peace is an officer, knows of a violation of any of the provisions of this chapter, it shall be the duty of the justice of the peace to whom such application is made to have summoned and to have examined such witness in relation to violations of any of the provisions of this chapter, said witness to be summoned as provided for in criminal cases. The said witness shall be duly sworn, and the justice of the peace shall cause the statements of the witness to be reduced to writing and signed and sworn to before him; and such sworn statement shall be delivered to the attorney general, district or county attorney, upon whose application the witness was summoned. Should the witness, summoned as aforesaid, fail to appear or to make statements of the facts within his knowledge, under oath, or to sign the same after it has been reduced to writing, he shall be guilty of contempt of court, and may be fined not exceeding one hundred dollars, and may be attached and imprisoned in the county jail until he shall make a full statement of all the facts within his knowledge with reference to the matter inquired about. Any person so summoned and examined shall not be liable to prosecution for any violation of the provisions of this chapter about which he may testify fully and without reserve. (Act 1907, p. 143, Sec. 7.)

(In the case of St. Louis Southwestern Ry. Co. of Texas v. Griffin, 171 S. W. 703, it was held to be beyond the power of the Legislature to pass a law compelling corporations to give reasons for discharging an employee.)

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TITLE XVII

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CHAPTER I

ARSON

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Article 1200. (756) (651) **"Arson" defined.**—"Arson" is the wilful burning of any house included within the meaning of the succeeding article of this chapter. (O. C. 679.)

Sec. 2139. **Burning occupied private house—Form for indictment.**
In the name and by the 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 John Doe on the ..... day of ....., A. D. ....., in said county and State did wilfully burn a house there situate and then and there occupied by and in the possession of ..... (or "did wilfully burn the house of ..... there situate").

Against the peace and dignity of the State.

.....
Foreman of the grand jury.

Sec. 2140. **Burning vacant house—Form for indictment.**
In the name and by the 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 John Doe on the ..... day of ....., A. D. ....., in said county and State did wilfully burn the house of ..... there situate.

Against the peace and dignity of the State.

.....
Foreman of the grand jury.

Sec. 2141. **Burning public building—Form for indictment.**
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 John Doe on the ..... day of ....., A. D. ....., in said county and State did wilfully burn a house there situate, the same being the jail of said county (or "a public school building of said county then and there held for the use of the public") the title to which was then and there in ....., the county judge of said county.

Against the peace and dignity of the State.

.....
Foreman of the grand jury.

Sec. 2142. **Tenant burning house—Form for indictment.**
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 John Doe on the ..... day of ....., A. D. ....., in said county and State was then and there the tenant of ....., the owner of a house there situate, and the said John Doe as such tenant did then and there occupy said house, and the said John Doe did then and there wilfully burn

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said house (Kelley v. State, 44 Texas Crim. Rep. 187; 70 S. W. 20; or it may be alleged that "John Doe, on the ..... day of ....., A. D....., in said county and State did wilfully burn the house of ..... there situate," and proof that defendant was a tenant in possession would be no defense when the title is alleged in the real owner. Gutgesell v. State, 43 S. W. 1016. Dunlop v. State, 50 Texas Crim. Rep. 504; 98 S. W. 845).

Against the peace and dignity of the State.

.....

Foreman of the grand jury.

Sec. 2143. **Owner burning house—Form for indictment.**

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 John Doe on the ..... day of ....., A. D. ....., in said county and State was the owner of a house there situate, and the said John Doe did then and there wilfully burn said house, the same being situated within the town (or "city") of ....., in said county (or "there then and there being within said house property belonging to another, to wit, ..." or "there then and there being apparent danger by reason of the burning thereof that the life and person of ..... would be thereby endangered" or "there then and there being apparent danger by reason of the burning thereof that the safety of a house then and there belonging to a person other than the said John Doe would be endangered" or "the said house then and there being insured").

Against the peace and dignity of the State.

.....

Foreman of the grand jury.

Sec. 2144. **Arson by explosion—Form for indictment.**—If the house itself, and not merely the pieces after being detached by the explosion and separated from the house, was burned by the explosion or as a result therefrom, an ordinary indictment for arson will answer, it not being necessary to allege how the house was burned. If the house was not burned but was exploded by means of some explosive matter, the offense is arson, but in such case the following form should be used:

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 John Doe on the ..... day of ....., A. D. ....., in said county and State did wilfully blow up, explode, and destroy the house of ..... there situate by means of gunpowder and by means of dynamite and by means of some explosive matter to the grand jury unknown (or "being the owner of a house there situate, the same being in the city of ..... in said county" or "being then and there insured," etc., "did," etc.)

Against the peace and dignity of the State.

.....

Foreman of the grand jury.

Sec. 2145. **Indictment.**—Indictments for arson held good: Thomas v. State, 41 Texas 28. Tuller v. State, 8 Texas Crim. App. 502. Rogers v. State, 26 Texas Crim. App. 428; 9 S. W. 762. Kelley v. State, 44 Texas Crim. Rep. 187; 70 S. W. 20. Arnold v. State, 168 S. W. 123 (accomplice). Tinker v. State, 179 S. W. 573.

It is not necessary to allege that the burning was malicious and felonious. Thomas v. State, 41 Texas 28. Tuller v. State, 8 Texas Crim. App. 504.

Charging in one count the burning of a house and the burning of personal property will make that count bad for duplicity, the punishment being different. Samuels v. State, 29 S. W. 1079.

An indictment is not bad for duplicity because it alleges that a child was in the house which was set on fire and that bodily injury less than death was caused to the child by the burning thereof, that being an allegation necessary to authorize the increased punishment under article 1222 of the Penal Code. Beaumont v. State, 1 Texas Crim. App. 536.

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An indictment setting forth the status of defendant as a tenant in possession and alleging ownership in the real owner is sufficient without further alleging the elements of arson committed by the owner. Kelley v. State, 44 Texas Crim. Rep. 187; 70 S. W. 20. *Contra:* Tuller v. State, 8 Texas Crim. App. 507. Mulligan v. State, 25 Texas Crim. App. 199; 7 S. W. 664.

It may be alleged that the house was "there situate," or its location may be shown by an allegation that it was "then and there occupied by .....," or "then and there occupied and owned by .....," the words "then and there" referring to the time and county previously stated. Baker v. State, 25 Texas Crim. App. 25; 8 S. W. 23.

Sec. 2146. **Indictment against owner.**—An indictment against an owner for burning his own house need not allege the amount of the insurance, nor the name of the company in which it was insured, nor any other fact in relation to the insurance, if it is alleged in terms that it "was insured." Baker v. State, 25 Texas Crim. App. 25; 8 S. W. 23. Arnold v. State, 168 S. W. 123.

It is not necessary to allege who owned the houses which were endangered by the burning of his own house by defendant, ownership thereof being immaterial if they were owned by persons other than defendant. Baker v. State, 25 Texas Crim. App. 25; 8 S. W. 23.

Sec. 2147. **Allegation of ownership.**—Ownership of a house belonging to the estate of a deceased person may be alleged in any one of the heirs. Kelley v. State, 44 Texas Crim. Rep. 187; 70 S. W. 20.

An indictment for arson may charge ownership in the owner of the fee where defendant set fire to a house which he occupied as a tenant. Gutgesell v. State, 43 S. W. 1016. Dunlap v. State, 50 Texas Crim. Rep. 505; 98 S. W. 845.

Where the defendant was not the occupant of the house burned ownership thereof may be charged in the occupant. Tuller v. State, 8 Texas Crim. App. 504. Wyley v. State, 34 Texas Crim. Rep. 515; 31 S. W. 393.

Sec. 2148. **Election between counts.**—Where the same transaction is charged, different counts may be inserted in the indictment to meet the proof as it transpires and to prevent a variance, and in such case the State can not be driven to elect as to which count will be relied on for a conviction. Baker v. State, 25 Texas Crim. App. 25; 8 S. W. 23.

Sec. 2149. **Proof of ownership.**—Where the building burned was the property of the State, ownership may be proven by oral testimony. Anderson v. State, 159 S. W. 847.

The ownership of a building belonging to the county may be alleged in the county judge and ownership proven in him by oral testimony, because the title is in him as a matter of law. Hester v. State, 51 S. W. 932.

The ownership of a house may be proved by oral testimony where it is alleged in the actual occupant thereof. Wilson v. State, 24 S. W. 649. Wyley v. State, 34 Texas Crim. Rep. 515; 31 S. W. 393. Allen v. State, 62 Texas Crim. Rep. 505; 137 S. W. 1136. Pinckard v. State, 62 Texas Crim. Rep. 602; 138 S. W. 603.

Where the house burned was private property and unoccupied ownership cannot legally be proven by oral testimony. Goldsmith v. State, 46 Texas Crim. Rep. 558; 81 S. W. 710.

If defendant occupied the house under a lease from the alleged owner he cannot be heard to deny the title of his landlord. Rogers v. State, 26 Texas Crim. App. 429; 9 S. W. 762.

Where ownership is not alleged in defendant but in the actual occupant, the allegation of ownership is merely to describe and identify the subject of the crime and the title is not in issue, and under such allegation courts will not inquire into the title if the proof shows that the person alleged as owner was the actual occupant. In arson possession is ownership, except when one not the real owner but merely in possession burns the house he occupies. Wyley v. State, 34 Texas Crim. Rep. 515; 31

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S. W. 393. Allen v. State, 62 Texas Crim. Rep. 505; 137 S. W. 1136. Pinckard v. State, 62 Texas Crim. Rep. 602; 138 S. W. 603.

In protecting his house from being burned by others, the law regards a tenant in possession as the owner thereof, but when a tenant burns the house he occupies as a tenant he is in no sense an owner of that house. One cannot wilfully burn another's house and then successfully defend on the ground that he had leased or rented it.

Article 1201. (757) (652) **"House" defined.**—A "house" is any building, edifice, or structure inclosed with walls and covered, whatever may be the materials used for building. (O. C. 680.)

Sec. 2150. **House.**—Any building, edifice, or structure inclosed with walls and covered, whatever be the material used for the building, is a house within the meaning of the statute against arson. Smith v. State, 23 Texas Crim. App. 362; 5 S. W. 219. Allen v. State, 62 Texas Crim. Rep. 505; 137 S. W. 1136. Rogers v. State, 159 S. W. 40.

If no issue is made on the trial that the burned structure was not a house, and it is spoken of by the witnesses as a "house," a conviction will not be set aside on the ground that the State did not prove that the "house" had walls. Jones v. State, 5 Texas Crim. App. 132.

A gin, set up on posts, the lower part not enclosed being used for the engine, and the enclosed upper part being used for the gin house proper, is a "house." Caddell v. State, 50 Texas Crim. Rep. 380; 97 S. W. 705.

Where defendant tore down a log house and then burned up the logs, he can not be legally convicted for burning a "house." Mulligan v. State, 25 Texas Crim. App. 202; 7 S. W. 664.

Art. 1202. (758) (653) **Offense complete, when.**—The burning is complete when the fire has actually communicated to a house, though it may be neither destroyed nor seriously injured. (O. C. 684.)

Sec. 2151. **Must be a burning.**—To support an allegation that defendant did burn it must be shown that the house was burned to some extent and proof that the house was simply scorched or smoked does not show a burning. Woolsey v. State, 30 Texas Crim. App. 348; 17 S. W. 546. Moore v. State, 51 Texas Crim. Rep. 468; 103 S. W. 188.

Art. 1203. (759) (654) **"Design" the essence of the offense.**—It is of no consequence by what means the fire is communicated to a house, if the burning is with design. It may be by setting fire to any combustible material communicating therewith, by an explosion, or by any other means. (O. C. 685.)

Sec. 2152. **Means.**—Under an allegation that defendant "did burn" it may be shown that the house was burned by an explosion, but under such an allegation the exploding of the house is not arson unless it resulted in setting the house on fire. Landers v. State, 39 Texas Crim. Rep. 672; 47 S. W. 1008.

It is of no consequence by what means the fire is communicated to the house if the burning is designed. Smith v. State, 23 Texas Crim. App. 362; 5 S. W. 219.

Art. 1204. (760) (655) **Intent presumed when.**—When fire is communicated to a house by means of the burning of another house, or some combustible matter, it shall be presumed that the intent was to destroy every house actually burnt; provided there was any apparent danger of such destruction. (O. C. 686.)

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Art. 1205. (761) (656) **Explosions included.**—The explosion of a house by means of gunpowder, or other explosive matter, comes within the meaning of arson. (O. C. 687.)

Sec. 2153. **Arson by explosion.**—The intent of the Legislature was to make the explosion of a house by some explosive matter constitute an offense whether the house was thereby burned or not, and the fact that the offense is called arson does not affect the proposition. An indictment may be directly drawn under article 1205 charging the explosion of the house, and under such indictment it would be immaterial whether the house was burned if it was blown up, but if the indictment is for ordinary arson alleging a burning the proof must show that the explosion resulted in setting the house on fire. Landers v. State, 39 Texas Crim. App. 672; 47 S. W. 1008.

Under an ordinary indictment for arson, not based directly on an explosion, but alleging a burning, it is error to refuse to charge that the explosion of a house by means of explosive matter does not come within the definition of arson unless it results in setting the house on fire. Landers v. State, 39 Texas Crim. Rep. 672; 47 S. W. 1008.

Under an ordinary indictment for arson, the burning of parts of the house after being detached from the house by an explosion is not arson. Landers v. State, 39 Texas Crim. Rep. 672; 47 S. W. 1008.

Art. 1206. (762) (657) **House destroyed to save others.**—A house blown up or otherwise destroyed for the purpose of saving another house from fire is not within the meaning of arson. (O. C. 688.)

Art. 1207. (763) (658) **Owner may destroy, except when.**—The owner of a house may destroy it by fire or explosion without incurring the penalty of arson, except in the cases mentioned in the succeeding article. (O. C. 689.)

Art. 1208. (764) (659) **Owner liable, when.**—When a house is within a town or city, or when it is insured, or when there is within it any property belonging to another, or when there is apparent danger by reason of the burning thereof, that the life or person of some individual, or the safety of some house belonging to another will be endangered, the owner, if he burn the same, is guilty of arson, and shall be punished accordingly. (O. C. 690.)

Art. 1209. (765) (660) **Part owner can not burn.**—One of the part owners of a house is not permitted to burn it. (O. C. 691.)

Art. 1210. (766) (661) **Punishment.**—If any person be guilty of arson, he shall be punished by confinement in the penitentiary not less than five nor more than twenty years. (O. C. 694.)

Sec. 2154. **Wilful.**—To be sufficient the indictment for arson must allege that the burning was "wilfully" done.

The term "wilful" should be defined in the charge to the jury. Erwin v. State, 61 S. W. 390.

The term "wilful" means with evil intent, with legal malice, or without reasonable ground for believing the act to be lawful.

Fire caused by accident or negligence is not wilful. Pipe v. State, 3 Texas Crim. App. 56.

Sec. 2155. **Prisoner burning jail.**—The fact that the only intent of defendant in setting fire to the jail was to effect his escape does not prevent such burning from

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amounting to arson where the burning was wilfully done. Smith v. State, 23 Texas Crim. App. 357; 5 S. W. 219 (overruling Delaney v. State, 41 Texas 601). Willis v. State, 32 Texas Crim. Rep. 534; 25 S. W. 123.

Sec. 2156. **Motive.**—Proof of entries made by defendant is admissible where they show that he was trying to defraud the insurance company by claiming to have received goods into his house which were never put in there. Rogers v. State, 26 Texas Crim. App. 429; 9 S. W. 762. Dawson v. State, 38 Texas Crim. Rep. 50; 41 S. W. 599.

If entries made by defendant and claimed to be false by the State are in evidence, it is error to exclude proof of declarations about the entries which tends to explain the force of the apparently false entries. Rogers v. State, 26 Texas Crim. App. 430; 9 S. W. 762.

It is not permissible to prove by the alleged injured party that he did not know of any one who had anything against him. Moore v. State, 51 Texas Crim. Rep. 470; 103 S. W. 188.

To show motive, proof of prior difficulties between defendant and the owner of the house or any of the inmates is admissible. Davis v. State, 15 Texas Crim. App. 596. Oliver v. State, 33 Texas Crim. Rep. 545; 28 S. W. 202.

Where the State, to show motive, proves that defendant carried insurance, he is entitled to rebut the inference by proof of his assets, and by proof of any other fact that would support the theory that it was against his interest to burn the house. Dunlap v. State, 50 Texas Crim. Rep. 505; 98 S. W. 845.

Sec. 2157. **Evidence.**—The best evidence of whether the house was insured, and as to the amount of the insurance, and the names of the companies, is the policy itself, and it is error to admit secondary evidence of these matters without a proper predicate therefor. Moore v. State, 146 S. W. 184. Brown v. State, 150 S. W. 438. Crowder v. State, 177 S. W. 501.

On a trial for arson where the jail was burned, it may be shown that defendant, while confined in jail and unwarned, threatened to burn up the jail. A threat to commit an offense in the future may be proven on the trial for that offense whether defendant was under arrest when he made the threat or not. Delany v. State, 41 Texas 603.

It is error to admit as original evidence proof of conversations between others, had in the absence of defendant, about goods found in the house. Chumley v. State, 20 Texas Crim. App. 557.

It is error to admit in evidence against defendant ex parte affidavits of others charging him with the crime. Chumley v. State, 20 Texas Crim. App. 557.

Want of consent of the owner is not an ingredient of arson, and need not be proven. Caddell v. State, 50 Texas Crim. Rep. 380; 97 S. W. 705.

If defendant be unnecessarily described as a tenant, such descriptive averment must be proved as laid. Woolsey v. State, 30 Texas Crim. App. 347; 17 S. W. 546.

Where one of the defendants is described as a tenant, but the indictment does not allege to whom such defendant attorned, the allegation is supported by proof that such defendant was a tenant of the co-defendant. Woolsey v. State, 30 Texas Crim. App. 347; 17 S. W. 546.

In proving evasive answers of defendant, it is error to admit testimony that witnesses told defendant that it was the opinion of the people of the city that he burned the house. Gutgesell v. State, 43 S. W. 1016.

It is error to prove that defendant participated in the burning of other houses where such proof does not show "system," but merely that defendant was a systematic criminal, and when such proof does not tend to solve any issue in the case. Smith v. State, 52 Texas Crim. Rep. 80; 105 S. W. 501.

Where the alleged owner is not a witness, it is error to admit as original evidence against defendant indictments against the owner for arson and other offenses. Erwin v. State, 61 S. W. 390.

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It is error to permit the State to prove that before the offense of arson for which defendant was on trial had been committed, defendant was under charge for another distinct crime—was a fugitive evading arrest—and the steps which the officers of the law had taken to secure his arrest for said crime. Chumley v. State, 20 Texas Crim. App. 556.

It is error to permit proof that the reason why witness did not make any effort to remove goods from the burning house was because defendant's clerk, while defendant was not present, told him not to take them as it might affect the insurance. Bluman v. State, 33 Texas Crim. Rep. 62; 26 S. W. 75.

It is error to permit witnesses to give their opinion that defendant could have saved some of the goods from the fire, this not being a matter on which one could be an expert. Bluman v. State. 33 Texas Crim. Rep. 62; 26 S. W. 75.

Where defendant is being tried as an accomplice to arson, a confession of the principal which would be admissible against the principal if he were on trial is admissible to show the guilt of the principal. Bluman v. State, 33 Texas Crim. Rep. 43; 21 S. W. 1027. Aven v. State, 177 S. W. 82.

An unnecessary allegation that the burning was "maliciously" done, not being descriptive, may be rejected as surplusage and need not be proven. Arnold v. State, 168 S. W. 124.

Sec. 2158. **Convictions for arson sustained.**—Beaumont v. State, 1 Texas Crim. App. 533. Pennington v. State, 13 Texas Crim. App. 44. Davis v. State, 15 Texas Crim. App. 594 (defendant identified only by his voice). Blanchette v. State, 24 S. W. 507. Kelley v. State, 44 Texas Crim. Rep. 187; 70 S. W. 20. Caddell v. State, 50 Texas Crim. Rep. 380; 97 S. W. 705. Rice v. State, 50 Texas Crim. Rep. 648; 100 S. W. 771. Wigfall v. State, 57 Texas Crim. Rep. 639; 124 S. W. 650. Glaser v. State, 60 Texas Crim. Rep. 379; 131 S. W. 1097. Allen v. State, 62 Texas Crim. Rep. 505; 137 S. W. 1133. Pinckard v. State, 62 Texas Crim. Rep. 602; 138 S. W. 601. Rogers v. State, 159 S. W. 40. Walker v. State, 167 S. W. 339 (circumstantial evidence). Arnold v. State, 168 S. W. 122 (accomplice to arson).

The evidence is sufficient where defendant got wood, placed it on the steps, wilfully set fire to it and it communicated to the door and up the door to the top and if not put out would have reached the roof. Blanchette v. State, 24 S. W. 507.

Sec. 2159. **Evidence insufficient.**—Evidence held insufficient: McMahon v. State, 17 Texas Crim. App. 321. Mulligan v. State, 25 Texas Crim. App. 199; 7 S. W. 664. Smith v. State, 38 S. W. 201 (no corroboration of accomplice witness). Hester v. State, 51 S. W. 932. Brown v. State, 150 S. W. 436.

Evidence held insufficient to show that defendant was guilty as a principal. Tullis v. State, 41 Texas 598. Dawson v. State, 38 Texas Crim. Rep. 55; 41 S. W. 599. Brown v. State, 150 S. W. 436.

To convict defendant as an accomplice to the crime of arson he must be indicted as such. Landers v. State, 39 Texas Crim. Rep. 674; 47 S. W. 1008.

If the evidence is wholly circumstantial, it must, to be sufficient to sustain a conviction, exclude every other reasonable hypothesis except that of defendant's guilt. Mere suspicion is not sufficient. Landers v. State, 39 Texas Crim. Rep. 674; 47 S. W. 1008. Brown v. State, 150 S. W. 436.

Sec. 2160. **Charge of the court.**—Charges held correct: Kelley v. State, 44 Texas Crim. Rep. 187; 70 S. W. 20. Wigfall v. State, 57 Texas Crim. Rep. 639; 124 S. W. 650.

If the issues are left to be decided by the jury the charge is not on the weight of the evidence. Glaser v. State, 60 Texas Crim. Rep. 379; 131 S. W. 1097.

In charging on the law of principals the charge should directly apply the law to the facts. Moore v. State, 146 S. W. 183.

Where defendant was not the owner of the house and the case is submitted on the theory that the house was burned to obtain the insurance, the charge should

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require the jury to find beyond a reasonable doubt that defendant knew the house was insured and that he was guilty of burning the house in order that the insurance might be obtained. Moore v. State, 146 S. W. 183.

Where the main evidence against defendant was that he removed property from the house before it was burned, and this denied by defendant and a claim made that another did it without the knowledge of defendant, the court should charge on this issue. Brown v. State, 150 S. W. 436.

A charge on circumstantial evidence is not required when a confession of defendant admitting that he set fire to the house is in evidence. Anderson v. State, 159 S. W. 847. Vandeveer v. State, 173 S. W. 1197.

It is error to assume in the charge of the court that the house was burned, when there is evidence that it was merely scorched and smoked. Moore v. State, 51 Texas Crim. Rep. 468; 103 S. W. 188.

If there is evidence to support the theory, it is error to refuse to charge that if the house was simply scorched or smoked then this would not be a burning and that if such was the fact defendant should be acquitted. Woolsey v. State, 30 Texas Crim. App. 348; 17 S. W. 546. Moore v. State, 51 Texas Crim. Rep. 468; 103 S. W. 188.

When the evidence shows that the house caught fire and blazed up, and there is no testimony that it was simply scorched or smoked, it is not error to refuse to charge on the theory that it was simply scorched or smoked. Wigfall v. State, 57 Texas Crim. Rep. 639; 124 S. W. 650.

Art. 1211. (767) (662) **Burning certain State buildings.**—If any person shall wilfully burn the capitol building of the State, the treasury building, or comptroller's office, the supreme court building, the executive mansion, or the general land office, he shall be punished by confinement in the penitentiary for life. (O. C. 694.)

Sec. 2161. **Attempt at arson.**
Sec. 2162. Form for indictment.
Sec. 2163. Attempt by owner—Form for indictment.
Sec. 2164. "Attempt" defined.
Sec. 2165. Indictment.

Art. 1212. (768) (663) **Attempt at arson.**—If any person shall, by any means calculated to effect the object, attempt to commit the offense of arson, he shall be punished by confinement in the penitentiary not less than two nor more than seven years. (O. C. 708.)

Sec. 2162. **Attempt at arson—Form for indictment.**
In the name and by the 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 John Doe on the ..... day of ....., A. D. ....., in said county and State did wilfully and with intent to burn the house of .....there situate and by means calculated to effect the object attempt to burn said house, and did then and there wilfully pour a quantity of kerosene oil, a combustible liquid upon the floor of said house, and did then and there wilfully set fire to the same (or "did then and there wilfully set fire to a pile of shavings, a combustible material, communicating with said house and being under the floor thereof" or other means stating what).

Against the peace and dignity of the State.

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Foreman of the grand jury.

Sec. 2163. **Attempt at arson by owner—Form for indictment.**
In the name and by the 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

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at said term do present that John Doe on the ..... day of ....., A. D. ....., in said county and State was then and there owner of a house there situate, the same being insured (or "the same being within the city of ....., in said county" or whatever would make the owner liable in case of arson) and the said John Doe did then and there wilfully and with intent to burn said house and by means calculated to effect the object attempt to burn said house and did then and there wilfully pour kerosene oil, a combustible liquid upon the floor of said house and did then and there wilfully set fire to the same.

Against the peace and dignity of the State.

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Foreman of the grand jury.

Sec. 2164. **"Attempt" defined.**—An attempt to commit a crime is an endeavor to accomplish it, carried beyond mere preparation, but falling short of the ultimate design in any part of it.

Sec. 2165. **Indictment.**—Indictment for attempt at arson held good. Woods v. State, 150 S. W. 633.

CHAPTER II

OTHER WILFUL BURNING

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Article 1213. (769) (664) **Rules of arson applicable.**—The rules and definitions contained in the preceding chapter with respect to arson apply also to wilful burnings under the provisions of this chapter, where they are not clearly inapplicable. (O. C. 697.)

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Art. 1214. (770) (665) **Burning other buildings, hay, lumber, etc.**—If any person shall wilfully burn any building not coming within the description of a house as defined in the preceding chapter, or shall wilfully burn any stack of corn, hay, fodder, grain, or flax, or any pile of boards, lumber, or wood, or any fence or other enclosure, the property of another, he shall be punished by confinement in the penitentiary not less than two nor more than five years, or by fine not exceeding two thousand dollars. (O. C. 698.)

Sec. 2166. **Burning unfinished house—Form for indictment.**
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 John Doe on the.....day of.....A. D..... in said county and State did wilfully burn a building there situate, the same not being inclosed with walls and covered, and the said building then and there being the property of another, to wit.....

Against the peace and dignity of the State.

.....
Foreman of the grand jury.

Sec. 2167. **Burning a stack of corn, etc.—Form for indictment.**
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 John Doe on the.....day of.....A. D..... in said county and State did wilfully burn a stack of corn (or "stack of hay" or "stack of fodder," or "stack of grain," or "stack of flax") there situate and then and there the property of another, to wit.....

Against the peace and dignity of the State.

.....
Foreman of the grand jury.

Sec. 2168. **Burning lumber, etc.—Form for indictment.**
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 John Doe on the.....day of.....A. D..... in said county and State did wilfully burn a pile of boards (or "pile of lumber" or "pile of wood" or "a fence" or "an enclosure of.....") there situate and then and there the property of another to wit.....

Against the peace and dignity of the State.

.....
Foreman of the grand jury.

Sec. 2169. **Indictment for burning stack.**—Indictment held good. Cesure v. State, 1 Texas Crim. App. 20.

Sec. 2170. **Wilful.**—The term "wilful" means with evil intent, or without reasonable ground for believing the act to be lawful. Fire caused by accident or negligence is not wilful. Pipes v. State, 3 Texas Crim. App. 56.

Art. 1215. (771) (666) **Ship, or other vessel, or boat.**—If any person shall wilfully burn any ship or other vessel, or any boat of any kind whatsoever, he shall be punished by confinement in the penitentiary not less than two nor more than seven years, or by fine not exceeding two thousand dollars. (O. C. 699.)

Art. 1216. (772) (667) **Offense complete when.**—This offense is complete only when some person other than the person offending has

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an interest in the property by insurance or otherwise at the time the burning takes place. (O. C. 700.)

Sec. 2171. **Burning ship, vessel or boat—Form for indictment.**
In the name and by the 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 John Doe on the.....day of.....A. D..... in said county and State did wilfully burn a ship there situate (or "sloop," or "tug," or "row boat," or whatever vessel or boat it was), the same being then and there insured against loss or damage from fire (or "the same being then and there the property of another, to wit.....," or "the same being then and there partly owned by another, to wit.....").

Against the peace and dignity of the State.

.....
Foreman of the grand jury.

Art. 1217. (773) (668) **Bridge burning.**—If any person shall wilfully burn any bridge, which by law or usage, is a public highway, he shall be punished by imprisonment in the penitentiary not less than two nor more than seven years, or by fine not exceeding five thousand dollars. (O. C. 701, amended Acts 1858, p. 177.)

Sec. 2172. **Bridge burning—Form for indictment.**
In the name and by the 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 John Doe on the.....day of.....A. D..... in said county and State did wilfully burn a bridge there situate, the same being then and there by law and by usage a public highway, and being the bridge over .....river (or "lake" or whatever stream, or ditch, or low land, or railroad, it was over) on the public road there situate leading from.....to..... in said county.

Against the peace and dignity of the State.

.....
Foreman of the grand jury.

Art. 1218. (774) (669) **Burning woodland or prairie.**—If any person shall wilfully or negligently set fire to, or burn, or cause to be burned, any woodland or prairie, not his own, he shall be punished by fine not less than fifty nor more than three hundred dollars. (O. C. 701, amended Acts 1883, p. 102.)

Sec. 2173. **Burning woodland or prairie—Form for information.**
In the name and by the authority of the State of Texas:

.....County Attorney of.....county, State of Texas, comes in behalf of said State, and presents in and to the County Court of..... county, Texas, at the.....term, A. D.....of said court that John Doe heretofore on the.....day of.....A. D.....in said county and State did wilfully and negligently set fire to and burn and cause to be burned certain woodland (or "a certain prairie") there situate, the same not being his own, and being then and there owned by.....

Against the peace and dignity of the State.

.....
County Attorney.....county, Texas.

Sec. 2174. **Burning woodland or prairie—Indictment.**—In State v. White, 41 Texas 64, an indictment for burning the prairie which did not allege who owned the prairie was sustained, although that point was not discussed or raised. It is safer to allege the ownership of the woodland or prairie, or it may be identified by the name by which it is commonly known and called in addition to the allegation that it was not defendant's own.

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Art. 1219. (775) (670) **Offense complete when.**—The offense named in the foregoing article is complete where the person offending sets fire to his own woodland or prairie and the fire communicates to the woodland or prairie of another. (O. C. 703.)

Art. 1220. (776) (671) **Burning insured personal property.**—If any person with intent to defraud, shall wilfully burn any personal property owned by himself, which shall be at the time insured against loss or damage from fire, he shall be punished by confinement in the penitentiary not less than two nor more than five years. (O. C. 704, amended Acts 1858, p. 178.)

Sec. 2175. **Burning insured personal property—Form for indictment.** In the name and by the 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 John Doe on the.....day of.....A. D..... in said county and State did with intent to defraud wilfully burn an automobile (or "flying machine" or whatever it was) the same being then and there personal property owned by himself, and being then and there at the time of said burning insured against loss or damage from fire.

Against the peace and dignity of the State.

.....

Foreman of the grand jury.

Art. 1221. (777) (672) **Burning personal property of another.**—If any person shall wilfully burn any personal property belonging to another, the punishment for which is not otherwise provided for in this chapter, he shall be fined not exceeding two thousand dollars. (O. C. 705.)

Sec. 2176. **Burning personal property of another—Form for information.** In the name and by the authority of the State of Texas:

.....County Attorney of.....county, State of Texas, comes in behalf of the State of Texas and presents in and to the County Court of..... county, Texas, at the.....term, A. D.....of said court that John Doe heretofore on the.....day of.....A. D.....in said county and State did wilfully burn one hat (or "wagon" or whatever it was) then and there the personal property of and belonging to.....

Against the peace and dignity of the State.

.....

County Attorney.....county, Texas.

Art. 1222. (778) (673) **Punishment doubled in case of personal injury.**—If any bodily injury less than death is suffered by any person by reason of the commission of any of the offenses named in this and the preceding chapter, the punishment may be increased by the jury so as not to exceed double that which is prescribed in cases where no such injury is suffered. (O. C. 706.)

Sec. 2177. **Personal injury caused by arson.**—Before the increased punishment authorized in case of bodily injury caused by committting arson can legally be imposed there must be an allegation of such injury. The addition of an allegation of bodily injury to an indictment charging arson does not render the indictment duplicitous, as such allegation is necessary to warrant the increased punishment. Beaumont v. State, 1 Texas Crim. App. 533.

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Art. 1223. (779) (674) **When death ensues, murder.**—Where death is occasioned by any of the offenses described in this and the preceding chapter, the offender is guilty of murder. (O. C. 707.)

Art. 1224. (780) (675) **Attempts at other wilful burning.**—If any person shall, by any means calculated to effect the object, attempt to commit any of the offenses enumerated in this chapter, he shall receive such punishment as may be assessed by the jury, not to exceed one-half of the penalty which would have been affixed in case the offense attempted had been actually committed; provided, that when the punishment shall be confinement in the penitentiary in no case shall the lowest term be less than two years. (O. C. 708, amended Acts 1858, p. 178.)

Art. 1225. (781) (675a) **Wilfully firing grass in inclosure of another.**—Any person who shall wilfully fire any grass within any inclosure, not his own, in this State, with intent to destroy the grass in such pasture, or any part thereof, or any person who shall fire the grass on the outside of any inclosure with the intent to destroy the grass in such inclosure, by the communication of said fire to the grass within, shall be deemed guilty of a felony, and upon conviction, punished by confinement in the state penitentiary for a term of not less than two nor more than five years. (Act Feb. 7, 1884, Acts 1884, p. 66.)

Sec. 2178. **Firing grass—Form for indictment.**
In the name and by the 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 John Doe on the.....day of.....A. D..... in said county and State did wilfully fire the grass within an enclosure not his own, the same being then and there a pasture there situate and belonging to..... with the intent then and there to destroy the grass in said pasture.

And the grand jury aforesaid do further present that John Doe on the..... day of.....A. D.....in said county and State did wilfully fire the grass on the outside of an enclosure not his own, the same being then and there a pasture there situate and belonging to.....with the intent to destroy the grass in such enclosure by the communication of said fire to the grass within same.

Against the peace and dignity of the State.

.....
Foreman of the grand jury.

Sec. 2179. **Firing grass—Indictment.**—Indictment held good. Phillips v. State, 17 Texas Crim. App. 173.

Sec. 2180. **Evidence.**—In a prosecution for firing grass proof of ownership may be made by oral testimony. Phillips v. State, 17 Texas Crim. App. 174.

Prima facie proof of ownership on the part of the State is all that is required to throw upon defendant the burden of proving that the enclosure was his own. Proof of a mere possessory title is prima facie proof of ownership in these cases. Phillips v. State, 17 Texas Crim. App. 174.

One accomplice cannot corroborate another. Phillips v. State, 17 Texas Crim. App. 169.

Art. 1226. (782) (675b) **Wilfully firing grass with intent to injure.**—If any person shall wilfully, and with intent to injure the owner or owners of the stock grazing thereon, set fire to any grass upon

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land not his own, with intent to destroy the same, he shall be confined in the State penitentiary for a period of not less than one year nor more than three years. (Act Feb. 7, 1884, Acts 1884, p. 66.)

Sec. 2181. **Form for indictment.**

In the name and by the 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 John Doe on the.....day of.....A. D..... in said county and State did wilfully and with intent to injure.....who was then and there the owner of the stock then and there grazing thereon set fire to the grass upon land there situate not his own, the said land belonging to..... (or "the said land then and there in the possession of and controlled by.....") with the intent then and there to destroy the same.

Against the peace and dignity of the State.

.....

Foreman of the grand jury.

CHAPTER III

MALICIOUS MISCHIEF

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Article 1227. (783) (676) **Wilfully sinking vessels, etc.**—If any person shall wilfully and maliciously cast away, sink, or destroy, in any way other than by fire, any vessel or boat which, together with its cargo, if any, shall be of the value of one hundred dollars or more, he shall be punished by imprisonment in the penitentiary not less than two nor more than five years, or by fine not exceeding two thousand dollars. If the life of any person is lost by such act, the offender is guilty of murder. (O. C. 709, amended by Acts 1858, p. 178.)

Sec. 2182. **Wilfully sinking or destroying vessel or boat—Form for indictment.** 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 John Doe on the ..... day of ....., A. D. ....., in said county and State did wilfully and maliciously cast away (or "did then and there wilfully and maliciously sink," or "did then and there wilfully and maliciously destroy by cutting it to pieces with an axe," or otherwise, stating how, so as to show that it was not destroyed by fire) a vessel (or "boat") then and there belonging to ....., the same being then and there (or "with its cargo") of the value of one hundred dollars (or "two hundred dollars," or whatever sum it was).

Against the peace and dignity of the State.

.....

Foreman of the grand jury.

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Art. 1228. (784) (677) **Telegraph or telephone.**—If any person shall intentionally break, cut, pull, or tear down, misplace, or in any other manner injure any telegraph or telephone wire, post, machinery, or other necessary appurtenances to any telegraph or telephone line, or in any way wilfully obstruct or interfere with the transmission of messages along such telegraph or telephone line, he shall be punished by confinement in the penitentiary not less than two nor more than five years, or by fine not less than one hundred nor more than two thousand dollars. (O. C. 710, amended Acts 1885, p. 10.)

Sec. 2183. **Injury to telegraph or telephone—Form for indictment.**
In the name and by the 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 John Doe on the ..... day of ..... A. D. ....., in said county and State did wilfully and intentionally break, cut, pull, and tear down (or "misplace" or in any other manner injure, stating how) a telegraph (or "telephone") wire (or "post," etc.), the same being then and there on the telegraph (or "telephone") line of and being then and there the property of ..... and being then and there a necessary appurtenance to said line.

Against the peace and dignity of the State.

.....
Foreman of the grand jury.

Sec. 2184. **Obstructing railroad track.**
Sec. 2185. Form for indictment.
Sec. 2186. Indictment.
Sec. 2187. The obstruction.
Sec. 2188. Evidence.
Sec. 2189. Charge of the court.

Art. 1229. (785) (678) **Obstructing railroad tracks, etc.**—If any person shall wilfully place any obstruction upon the track of any railroad, or remove any rail therefrom, or displace or interfere with any switch thereof, or in any way injure such road, or shall do any damage to any railroad, locomotive, tender, or car, whereby the life of any person might be endangered, he shall be punished by imprisonment in the penitentiary not less than two nor more than seven years. If the life of any person be lost by such unlawful act, the offender is guilty of murder. (O. C. 711, amended by Act March 8, 1887, Acts 1887, p. 14.)

Sec. 2185. **Obstructing railroad track—Form for indictment.**
In the name and by the 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 John Doe on the ..... day of ....., A. D. ....., in said county and State did wilfully place an obstruction, to wit, a large piece of iron (or "a number of rocks" or "a large rock" or whatever it was) upon the track of a railroad there situate, to wit, the track of the Galveston, Harrisburg & San Antonio Railroad (or "Texas & Pacific Railroad," or whatever railroad it was) whereby the lives of persons were endangered.

Against the peace and dignity of the State.

.....
Foreman of the grand jury.

Sec. 2186. **Indictment.**—Indictments held good. Barton v. State, 28 Texas Crim. App. 483; 13 S. W. 783. Stanfield v. State, 43 Texas Crim. Rep. 10; 62 S. W. 917. Tuller v. State, 58 Texas Crim. Rep. 571; 126 S. W. 1159.

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Where consent of the owner is not a defense, or is not an element of the offense, it is not necessary to allege whether the railroad track was owned by an individual, partnership, or a corporation. Clay v. State, 146 S. W. 167.

It is not necessary to specify in the indictment the persons whose lives were endangered. Barton v. State, 28 Texas Crim. App. 483; 13 S. W. 783.

Sec. 2187. **The obstruction.**—The word "obstruction," not being specially defined, is used in its ordinary sense and meaning, and includes any material, object, thing, or substance the effect of which as used would be to endanger human life, and includes grease. Tuller v. State, 58 Texas Crim. Rep. 571; 126 S. W. 1159.

Sec. 2188. **Evidence.**—If motive, intent, or identity is an issue, the State may prove other contemporaneous obstructions, in which defendant participated. The court should not hesitate to admit such testimony if any of these matters are in issue and it tends to solve some issue in the case, but if none of these matters are in issue, and such proof would not tend to solve any issue in the case, and the only purpose it could serve would be to prejudice the jury against defendant, it should not be admitted or permitted to be inquired into. Such proof if admitted should be limited in the charge of the court. Barton v. State, 28 Texas Crim. Ap. 483; 13 S. W. 783. Stanfield v. State, 43 Texas Crim. Rep. 10; 62 S. W. 917. Tuller v. State, 58 Texas Crim. Rep. 571; 126 S. W. 1159.

To show that human life might be endangered by the obstruction, the State should introduce testimony to show whether the place on the track where the obstruction was placed was on a level or embankment, main track or switch, and the usual speed of trains along that road. Bullion v. State, 7 Texas Crim. App. 463. Cox v. State, 59 S. W. 903.

It is proper to permit a person of experience and knowledge to testify whether or not the obstruction placed on the railroad track was such as to endanger the lives of persons traveling on trains traversing the tracks of such railroad. Clay v. State, 146 S. W. 167.

If the evidence shows as strong a case against another as it does against defendant and there is no proof of their acting together, a conviction will not be sustained. Cox v. State, 59 S. W. 903.

Sec. 2189. **Charge of the court.**—A charge that the obstruction must be such an obstruction whereby the lives of persons were endangered is a sufficient definition of that term. Clay v. State, 146 S. W. 167.

The charge of the court is on the weight of the evidence if it is so framed as that it may impress the jury with the belief that the court thought that defendant did place the obstruction on the track. Stanfield v. State, 43 Texas Crim. Rep. 11; 62 S. W. 917.

If there is evidence raising the issue that another or others placed the obstruction, defendant not being connected therewith, the court should submit this theory to the jury and instruct them to acquit defendant if another or others committed the offense. Kirby v. State, 49 Texas Crim. Rep. 517; 93 S. W. 1030.

If the charge authorizes the conviction of defendant upon the theory that he was present and aiding or encouraging the party who actually placed the obstruction, and there is evidence that defendant did not aid or encourage, the charge should submit such defensive theory. Stanfield v. State, 43 Texas Crim. Rep. 11; 62 S. W. 917.

Where there is testimony of an obstruction at another point which did not endanger human life, the charge should inform the jury that it was admitted only to show, if it did, intent or motive, but that they should not consider it at all unless they first found that defendant did place an obstruction which did endanger human life. Tuller v. State, 58 Texas Crim. Rep. 571; 126 S. W. 1159.

The court is not required to define in the charge what would be a legal railroad company, it being immaterial whether the company was a legal corporation or not if it was operating a railroad in this State. Clay v. State, 146 S. W. 167.

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Sec. 2190. **Killing or injuring animals.**
Sec. 2191. Form for complaint.
Sec. 2192. Indictment.
Sec. 2193. "Wilful" defined.
Sec. 2194. "Maim" defined.
Sec. 2195. Statute construed.
Sec. 2196. Defense of property.
Sec. 2197. Character of animal.
Sec. 2198. Evidence.
Sec. 2199. Circumstantial evidence.
Sec. 2200. Charge of the court.

Art. 1230. (786) (679) **Killing animal to injure owner.**—If any person shall wilfully kill, maim, wound, poison, or disfigure any horse, ass, mule, cattle, sheep, goat, swine, dog, or other domesticated animal, or any domesticated bird, of another, with intent to injure the owner thereof, he shall be fined not less than ten nor more than two hundred dollars. And in prosecutions under this article, the intent to injure may be presumed from the perpetration of the act. (O. C. 713, amended Acts 1858, p. 178, amended in revising 1879 by adding the words "or other domesticated animal, or any domesticated bird".)

Sec. 2191. **Form for complaint.**

In the name and by the authority of the State of Texas:

Before me the undersigned authority on this day personally appeared ..... who being by me duly sworn deposes and says that John Doe heretofore on the ..... day of ....., A. D. ....., in the county of ....., and State of Texas, did wilfully kill (or "did wilfully maim, wound, poison and disfigure") a horse (or "an ass," or "a mule," or "one head of cattle," or "one sheep," or "one goat," or "one swine," or "one dog," or "a domesticated animal, to wit, ...," naming it, or "a domesticated bird, to wit, ...," naming it) of another with the intent then and there to injure ....., the owner thereof.

Against the peace and dignity of the State.

.....(affiant).

Subscribed and sworn to before me this the.....day of.....A. D.....

.....

J. P. Prec. No....., ...county, Texas.

Sec. 2192. **Indictment, information, or complaint.**—When an animal is mentioned in the statute by name or species, it is not necessary to also allege in terms that it was a domesticated animal. Rivers v. State, 10 Texas Crim. App. 179.

If the statute requires that the act be "wilfully" done before it constitutes an offense, it is necessary to the validity of the indictment, information and complaint, or the complaint, that the word "wilfully" be used therein to characterize the act. Uecker v. State, 4 Texas Crim. App. 234.

It is not necessary to allege the amount of the injury done to the owner, nor to allege the value of the animal, where the penalty does not depend thereon.

In alleging what animal was wilfully killed or injured, it is safer to use the words of the statute because the statutory words are applicable to all animals that come within the class named and afford therefore a wider latitude in the proof, but if the pleader desires, the particular animal may be designated and described, as "one hog," "one cow," "an ox," and the like. Any unnecessary descriptive averments do not vitiate an otherwise good pleading, but the descriptive averments of the animal must be proved as laid. Rivers v. State, 10 Texas Crim. App. 177.

Sec. 2193. **"Wilful" defined.**—The term "wilful" means with evil intent, or with legal malice, or without reasonable grounds for believing the act to be lawful. Thomas v. State, 14 Texas Crim. App. 204. Lane v. State, 16 Texas Crim. App. 172. Henderson v. State, 53 Texas Crim. Rep. 533; 111 S. W. 736.

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Sec. 2194. **"Maim" defined.**—The term "maim" when used to designate an injury to a dumb animal means to cripple. Turman v. State, 4 Texas Crim. App. 586.

Sec. 2195. **Statute construed.**—A conviction for wounding an animal with intent to injure the owner is not sustained when the proof fails to show that the wounding was wilful, as where it was done in defense of person or property. Lane v. State, 16 Texas Crim. App. 172. Owens v. State, 25 Texas Crim. App. 552; 8 S. W. 658. Alexander v. State, 70 S. W. 425.

When the act of killing or injuring the animal is shown to have been wilful, the intent to injure the owner is presumed. Lane v. State, 16 Texas Crim. App. 177.

Sec. 2196. **Defense of property.**—If an animal be killed or injured by a person in the necessary defense or protection of his property, after he had ineffectually used ordinary care to otherwise protect such property, such killing or injury will not be deemed to be either wilful or wanton within the meaning of those terms. Thomas v. State, 14 Texas Crim. App. 200. Lane v. State, 16 Texas Crim. App. 172. Farmer v. State, 21 Texas Crim. App. 425; 2 S. W. 767. Owens v. State, 25 Texas Crim. App. 552; 8 S. W. 658. Hoak v. State, 26 S. W. 508. Alexander v. State, 70 S. W. 425. Caldwell v. State, 55 Texas Crim. Rep. 164; 115 S. W. 597.

It is error to reject testimony that the presence of dogs in the pasture would have probably caused defendant's ewes to miscarry, when such testimony is offered to show that the killing of the dogs was not wilful. Caldwell v. State, 55 Texas Crim. Rep. 165; 115 S. W. 597.

Defendant is entitled to prove that the hog killed was trespassing on his crop and that his enclosure was surrounded with a good fence, and it is no objection to such testimony that the hog law was in force. McMahan v. State, 29 Texas Crim. App. 348; 16 S. W. 171.

When there is evidence that the animal or domesticated bird was killed or wounded to prevent injury to defendant's stock or to his crop, which, if true, would show that the act was not wilful, it is error to refuse a charge affirmatively presenting the defensive theory. Farmer v. State, 21 Texas Crim. App. 423; 2 S. W. 767. Woods v. State, 27 Texas Crim. App. 586; 11 S. W. 723. Swinger v. State, 51 Texas Crim. Rep. 397; 102 S. W. 114. Huffman v. State, 53 Texas Crim. Rep. 489; 110 S. W. 749.

It is error to make the guilt of defendant depend upon whether or not he used greater force than was necessary in defense of his property. Excessive force is not an issue where guilt depends upon whether or not the injury to the animal was wilful or wanton, excepting in so far as it might be considered by the jury in determining the real issue, which is, did defendant commit the act wilfully or wantonly? Farmer v. State, 21 Texas Crim. App. 423; 2 S. W. 767.

Sec. 2197. **Character of animal.**—Defendant is not entitled to prove the bad character of an animal if the animal was doing nothing which would excuse or justify him in attacking it. Atchinson v. State, 44 Texas Crim. Rep. 553; 72 S. W. 998.

To rebut the theory that the act was wilful or wanton, it may be shown that the animal was a breachy animal, a fence breaker, or was in the habit of trespassing upon crops, or that it was then trespassing upon defendant's crop. Branch v. State, 41 Texas 622. Lott v. State, 9 Texas Crim. App. 206. Davis v. State, 12 Texas Crim. App. 11. Reedy v. State, 22 Texas Crim. App. 271; 2 S. W. 591. Brewer v. State, 28 Texas Crim. App. 565; 13 S. W. 1004. McMahan v. State, 29 Texas Crim. App. 348; 16 S. W. 171. Huffman v. State, 53 Texas Crim. Rep. 489; 110 S. W. 749.

To rebut the theory that the killing of the animal was wilful or wanton, it may be shown that it was a trespasser and an annoyance, and that as soon as defendant killed it he sent the value of it in money to the owner. Lott v. State, 9 Texas Crim. App. 206.

If the killing of the animal was in fact wilful, it is no defense that defendant afterwards undertook to satisfy the owner. Wallace v. State, 30 Texas 758.

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Where it appears the animal was killed in defense of a crop, the burden is on the state to show that the crop was not properly protected in order to show that the act was wilful or wanton. Davis v. State, 12 Texas Crim. App. 11.

The mere fact that the dog was of bad character, or had on a former occasion done some mischief, will not justify a wilful or wanton killing thereof when there was nothing to excuse or justify the killing when it was done. McDaniel v. State, 5 Texas Crim. App. 475. Atchinson v. State, 44 Texas Crim. Rep. 551; 72 S. W. 998.

Sec. 2198. **Evidence.**—Proof that an animal was beaten or shot will not support an allegation that it was killed. Burgman v. State, 34 S. W. 111. Miller v. State, 42 S. W. 298. Johnson v. State, 70 S. W. 83.

It may be alleged in the same count that defendant "did wound and kill" the animal, and proof of either will be sufficient, the punishment being the same and the two phases of the statute not being repugnant to each other.

Where the injury must be wilful, wanton, or malicious, in order to constitute an offense, testimony to rebut the theory that it was so inflicted is admissible. Lott v. State, 9 Texas Crim. App. 206. Reedy v. State, 22 Texas Crim. App. 271; 2 S. W. 591. Brewer v. State, 28 Texas Crim. App. 565; 13 S. W. 1004. Woodward v. State, 33 Texas Crim. Rep. 554; 28 S. W. 204. Caldwell v. State, 55 Texas Crim. Rep. 165; 115 S. W. 597.

Proof that defendant had formerly committed a similar offense is not admissible when there is no connection between the two transactions. Smith v. State, 24 S. W. 27.

Sec. 2199. **Circumstantial evidence.**—A conviction on circumstantial evidence will not be sustained where the circumstances proven do not exclude every other reasonable hypothesis except that of defendant's guilt. Scroggins v. State, 34 S. W. 115. Miller v. State, 42 S. W. 298. Porter v. State, 48 Texas Crim. Rep. 125; 86 S. W. 767. Nicholson v. State, 49 Texas Crim. Rep. 102; 90 S. W. 1011. High v. State, 61 Texas Crim. Rep. 432; 135 S. W. 135.

A conviction on circumstantial evidence will be sustained if the circumstances proven exclude every other reasonable hypothesis except that of defendant's guilt. Sands v. State, 164 S. W. 1014.

Proof of threats and of bare motive to commit the offense is not sufficient to sustain a conviction. Proof which amounts to a mere suspicion is not sufficient. Scroggins v. State, 34 S. W. 115. Nicholson v. State, 49 Texas Crim. Rep. 102; 90 S. W. 1011. High v. State, 61 Texas Crim. Rep. 432; 135 S. W. 135.

Sec. 2200. **Charge of the court.**—In submitting as a basis for conviction the theory that defendant killed a domesticated bird of another with intent to injure the owner, the charge should require the jury to find that the killing was "wilfully" done. Swinger v. State, 51 Texas Crim. Rep. 397; 102 S. W. 114.

The term "wilfully" should be defined in the charge of the court. The term "wilfully" means with evil intent, or with legal malice, or without reasonable grounds for believing the act to be lawful. Lane v. State, 16 Texas Crim. App. 172. Farmer v. State, 21 Texas Crim. App. 423; 2 S. W. 767.

The charge should be confined to the animal or class of animals as alleged. Haynes v. State, 10 Texas Crim. App. 480.

If the statute provides that the intent to injure the owner may be presumed from the perpetration of the act, it is not error to so charge the jury. Lane v. State, 16 Texas Crim. App. 172 (when the case of Newton v. State, 3 Texas Crim. App. 245 was decided, the statute did not contain this provision).

Sec. 2201. **Cruelty to animals.**
Sec. 2202. Form for complaint.
Sec. 2203. Indictment.
Sec. 2204. Statute construed.
Sec. 2205. "Wilfully" defined.

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Sec. 2206. "Wantonly" defined.
Sec. 2199. Circumstantial evidence.
Sec. 2196. Defense of property.
Sec. 2197. Character of animal.
Sec. 2207. Evidence.
Sec. 2208. Charge of the court.
Sec. 2209. Cruelty to animals.
Sec. 2210. Failure to feed and water impounded animal.
Sec. 2211. Treatment of fowls, etc.
Sec. 2212. "Animal," etc., defined.

Art. 1231. (787) (680) **Wantonly killing dumb animals, etc.**—If any person shall wilfully or wantonly kill, maim, wound, disfigure, poison, or cruelly and unmercifully beat or abuse any horse, ass, mule, cattle, sheep, goat, swine, dog or other domesticated animal, or any domesticated bird, he shall be fined not less than five nor more than one hundred dollars. (O. C. 714, changed in revising 1879 by adding the word "disfigure," and by causing the words "wilfully and wantonly" to read "wilfully or wantonly," and amended by Acts 1901, p. 289, as to penalty.)

Sec. 2202. **Form for complaint.**
In the name and by the authority of the State of Texas:

Before me the undersigned authority on this day personally appeared..... who being by me duly sworn deposes and says that John Doe heretofore on the .....day of.....A. D.....in the county of.....and State of Texas did wilfully and wantonly kill (or "maim and wound and disfigure," or "poison," or "did cruelly and unmercifully beat and abuse") a horse (or "an ass," or "a mule," or "one head of cattle," or "one sheep," or "one goat," or "one head of swine," or "one hog," or "a dog," or a domesticated animal, to wit.....," or a domesticated bird, to wit, a "chicken," etc.).

Against the peace and dignity of the State.

.....(affiant).

Subscribed and sworn to before me this the.....day of.....A. D.....

.....

J. P. Prec. No....., ...county, Texas.

Sec. 2203. **Indictment, information, or complaint.**—Under article 1231 (787) it is sufficient to allege, besides time and venue, that defendant "did cruelly and unmercifully beat and abuse" any animal or bird protected thereby, without further alleging that it was done wilfully or wantonly. The statute makes it an offense to "cruelly and unmercifully beat or abuse," and that phase of the statute is complete in itself. Burgman v. State, 34 S. W. 111.

Under the statute making it an offense to wilfully "or" wantonly kill or wound an animal, it may be alleged that it was done "wilfully and wantonly" and proof of either will be sufficient, or it may be alleged that it was done "wilfully," or that it was done "wantonly." Rountree v. State, 10 Texas Crim. App. 110.

It is not necessary that any of the animals specifically named in the statute should be further described as "domesticated animals." Rivers v. State, 10 Texas Crim. App. 178.

Article 1231 (787) is intended for the protection of the animals and domesticated birds mentioned therein without reference to the owner thereof, and in alleging a violation of this article it is not necessary to allege the ownership of the animal or bird, or to negative the idea that it was the property of the defendant, or to allege that the act was done without the consent of the owner. It is immaterial whether defendant or anyone else was the owner, or whether it had any owner. Benson v. State, 1 Texas Crim. App. 6. Rose v. State, 1 Texas Crim. App. 401. Collier v. State, 4 Texas Crim. App. 12. Turman v. State, 4 Texas Crim. App. 586. Darnell v. State, 6 Texas Crim. App. 482. Irvin v. State, 7 Texas Crim.

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App. 79. McLaurine v. State, 28 Texas Crim. App. 530; 13 S. W. 992. Hobbs v. State, 170 S. W. 1100.

An unnecessary allegation of ownership will not vitiate an otherwise good indictment for malicious mischief, but the allegation of ownership, whether necessary or unnecessary, must be proved as laid. Rose v. State, 1 Texas Crim. App. 401. Collier v. State, 4 Texas Crim. App. 12. McLaurine v. State, 28 Texas Crim. App. 530; 13 S. W. 992.

Sec. 2204. **Statute construed.**—The object in enacting article 1231 (787) was to protect the domesticated animals and birds mentioned therein without regard to whether they were owned by defendant or anyone else, or whether or not they had an owner, and one violating its terms may be convicted therefor although the owner of the domesticated animal or bird killed or injured. Benson v. State, 1 Texas Crim. App. 6. Darnell v. State, 6 Texas Crim. App. 482. Tinsley v. State, 22 S. W. 39.

One may be convicted of the offense of wilfully or wantonly killing or wounding a domesticated animal although at the time it was so done the animal was in an enclosure surrounded by an insufficient fence. Cryer v. State, 36 Texas Crim. Rep. 623; 38 S. W. 203 (overruling on this point Payne v. State, 17 Texas Crim. App. 40. McRay v. State, 18 Texas Crim. App. 331. Brewer v. State, 28 Texas Crim. App. 565; 13 S. W. 1004).

Sec. 2205. **"Wilfully" defined.**—The term "wilfully" means with evil intent, or with legal malice, or without reasonable grounds for believing the act to be lawful. Thomas v. State, 14 Texas Crim. App. 204. Lane v. State, 16 Texas Crim. App. 172. Henderson v. State, 53 Texas Crim. Rep. 533; 111 S. W. 736.

Sec. 2206. **"Wantonly" defined.**—An act is said to be "wantonly" done when it is committed regardless of the rights of another, in reckless sport, or under such circumstances as evince a wicked or mischievous intent without excuse. Thomas v. State, 14 Texas Crim. App. 200. Henderson v. State, 53 Texas Crim. Rep. 533; 111 S. W. 736.

Sec. 2207. **Evidence.**—When the stock law is in force a person is not required to fence against hogs. Brewer v. State, 28 Texas Crim. App. 565; 13 S. W. 1004. Hoak v. State, 26 S. W. 508. Gerdes v. State, 34 S. W. 268. McCampbell v. State, 45 S. W. 711.

In Reid v. State, 8 Texas Crim. App. 430, it was held that an allegation that defendant "did wound and kill a certain mule" was not sustained by proof that it was wounded but not killed. This decision is not correct, for the statute makes it an offense to wound "or" kill, and the two phases of the statute not being repugnant to each other, and the punishment being the same, they may be charged conjunctively in the same count and proof of either would be sufficient under such allegation.

Proof that an animal was beaten or shot will not support an allegation that it was killed. Burgman v. State, 34 S. W. 111. Miller v. State, 42 S. W. 298. Johnson v. State, 70 S. W. 83.

When the value of the animal killed is not an element of the offense, the value thereof is immaterial and need not be proven, but proving value over objection will not be reversible error where only a small fine was assessed. Henderson v. State, 53 Texas Crim. Rep. 533; 111 S. W. 736.

Sec. 2208. **Charge of the court.**—If the statute requires the killing or wounding to be wilfully or wantonly done before it is an offense, it is error to charge the jury that when the killing or wounding is proved it devolves upon the defendant to justify or excuse the act. The burden is on the State to prove that the act was wilfully or wantonly done as alleged. Thomas v. State, 14 Texas Crim. App. 200.

Where the allegation is that defendant "did wilfully and wantonly" wound the animal, it is error to refuse a requested charge correctly defining those terms when such definition is not given in the main charge. Browder v. State, 30 Texas Crim. App. 614; 18 S. W. 197.

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Where the allegation is that defendant "did wilfully and wantonly" kill the animal, it is error to charge the jury to convict if they believe defendant "unlawfully" killed the animal. The killing may have been unlawful without being either wilful or wanton. Jones v. State, 9 Texas Crim. App. 178.

Defendant's testimony that he beat his horse to teach it obedience does not require a charge on that theory when his own and all the other testimony shows that he cruelly and unmercifully beat the animal. Tinsley v. State, 22 S. W. 39.

A failure to define the terms "wilfully" or "wantonly" is not reversible error unless a requested charge correctly defining those terms is requested and refused and exception reserved. Clark v. State, 23 Texas Crim. App. 260; 5 S. W. 115.

Sec. 2209. **Cruelty to animals.**—"Every person who overdrives, wilfully overloads, drives when overloaded, overworks, tortures, torments, deprives of necessary sustenance, unnecessarily or cruelly beats, or needlessly mutilates, or kills, or carries in or upon any vehicle, or otherwise in a cruel or inhumane manner, or causes or procures to be done, or who having the charge or custody of any animal unnecessarily fails to provide it with proper food, or drink or cruelly abandons it, shall, upon conviction, be punished by fine of not less than ten dollars nor more than two hundred and fifty dollars." (Sec. 1, Act March 31, 1913, Acts 1913, p. 168.)

Sec. 2210. **Failing to feed and water impounded animal.**—"Every person who shall impound, or cause to be impounded in any pound or corral under the laws of this State or of any municipality in this State, any animal, shall supply to the same during such confinement a sufficient quantity of wholesome food and water, and in default thereof, upon conviction, be punished by fine or (of) not less than five nor more than fifty dollars." (Sec. 2, Act March 31, 1913, Acts 1913, p. 168.)

Sec. 2211. **Sanitary and humane treatment of fowls, etc.**—"Every person who shall receive live fowls, poultry or other birds for transportation or to be confined on wagons or stands, or by the owners of grocery stores, commission houses, or other market houses, or by other persons when to be closely confined shall place same immediately in coops, crates or cages made of open slats or wire on at least three sides, and of such height, that the fowls can stand upright without touching the top, and shall have troughs or other receptacles easy of access at all times by the birds confined therein and so placed that their contents shall not be defiled by them, in which troughs or other receptacles clean water and suitable food shall be constantly kept; shall keep such coops, crates, or cages in a clean and wholesome condition; shall place only such numbers in each coop, crate or cage as can stand without crowding one another, but have room to move around; shall not expose same to undue heat or cold; shall remove immediately all injured, diseased or dead fowls or other birds, and in default thereof shall, upon conviction, be punished by fine of not less than five nor more than two hundred dollars, or by both such fine and imprisonment, for each offense." (Sec. 4, Act March 31, 1913, Acts 1913, p. 168.)

Sec. 2212. **"Animal," etc., defined.**—"In this Act the word 'animal' shall be held to include every living dumb creature; the words 'torture' and 'cruelty' shall be held to include every act, omission or neglect whereby unnecessary or unjustifiable pain or suffering is caused, permitted or allowed to continue, when there is a reasonable remedy or relief, and the words 'owner' and 'person' shall be held to include corporations, and the knowledge and act of agents and employees of corporations in regard to animals transported, owned, employed by or in custody of the corporation shall be held to be the knowledge and acts of such corporations." (Sec. 12, Act March 31, 1913, Acts 1913, p. 170.)

Sec. 2213. **Using animals without consent of owner.**
Sec. 2214. Form for complaint.
Sec. 2215. Evidence.

Art. 1232. (788) (680a) **Using animals without consent of owner.**—Any person who shall hereafter take and use, or take up and use, any horse, mare, gelding, mule, ox, cow, or any other dumb animal, the property of another, and without the consent of the owner thereof, shall be fined in any sum not less than ten nor more than one hundred

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dollars; provided that nothing herein contained shall prevent a prosecution for the theft of such animal whenever the offense of which said party shall be guilty shall come within the meaning of that crime; provided, that this article shall not be construed as in any way to interfere with the laws regulating estrays. (Acts of 1879, p. 129, amended by Act June 5, 1889, Acts 1889, p. 319, by adding the words "take and use.")

Sec. 2214. **Form for complaint.**
In the name and by the authority of the State of Texas:

Before me the undersigned authority on this day personally appeared..... who, being by me duly sworn, deposes and says that John Doe heretofore on the .....day of.....A. D.....in the county of.....and State of Texas did take and use, and did then and there take up and use, a horse (or "mare" or whatever it was) the property of.....the owner thereof without the consent of said owner.

Against the peace and dignity of the State.

.....(affiant).

Subscribed and sworn to before me this the.....day of.....A. D.....

.....

J. P. Prec. No....., ...county, Texas.

Sec. 2215. **Evidence.**—The punishment being the same and the two ways by which the statute may be violated not being repugnant to each other, it may be alleged in the same count that defendant "did take and use and did take up and use" the animal, and proof of either phase so alleged will be sufficient.

The term "take up" as used in the statute apprehends that the animal is running on the range, or is loose and not confined in actual possession. Cochran v. State, 36 Texas Crim. Rep. 115; 35 S. W. 968.

Proof that the animal was unhitched from where it was tied and then ridden off does not support an allegation that it was taken "up" and used, but would support an allegation that defendant "did take and use." Cochran v. State, 36 Texas Crim. Rep. 115; 35 S. W. 968.

Sec. 2216. **Using auto or vehicle without consent.**—Whoever purposely takes, drives or operates, or purposely causes to be taken, driven or operated upon the public road, highway or other public place, any motor vehicle, bicycle, buggy, carriage or other horse driven vehicle, without the consent of the owner thereof shall, if the value of such motor vehicle, bicycle or other vehicle is thirty-five dollars or more, be imprisoned in the county jail for not less than six months nor more than one year, or if the value is less than that sum, be fined not more than two hundred dollars, or imprisoned not more than thirty days, or both. (Sec. 1, Act April 2, 1913, Acts 1913, p. 187, amended by Act March 22, 1915, Acts 1915, p. 160, by omitting the words "shall steal or.")

Art. 1233. (789) (681) **Removing buoy, etc.**—If any person shall wilfully and mischievously remove any buoy, beacon, light or any other mark or signal erected for the purpose of indicating the channel in any bay, river, lake or other navigable water within the State, or shall erect any false buoy, beacon, light or mark or signal to indicate the channel in any such bay, river, lake or other navigable water, with intent to mislead or deceive, he shall be punished by confinement in the penitentiary not less than two nor more than five years, or by fine not exceeding two thousand dollars; and if death occurs by reason of such unlawful conduct, the offender is guilty of murder. (O. C. 715, amended Acts 1858, p. 179.)

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Sec. 2217. **Removing parts of vehicle, etc.**—"Whoever shall maliciously or with intent to steal or without authority from the owner, unlawfully removes from any motor vehicle or bicycle any portion of the running or steering gear, pump, or any tire, rim, robe, cover, tube, clock, casing, radiator, fire-extinguisher, tool, lamp, starter, battery, coil, spring, gas or oil tank, bell or any signal device, speedometer, license, number, horn, box, basket, trunk or carrier, shield, hood, oiler, gauge, grease-cup, chain, lock, nut, bracket, valve, bolt, rod, cap, screws, wire, spark-plug, pipe, carbureter, magneto, fan, belt, cylinder, switch, brake, electric bulbs, or any device, emblem or monogram thereon or any attachment, fastenings or other appurtenances, or any other part or parts attached to said motor vehicle which are necessary in the use, control, repair or operation thereof, or whoever knowingly buys, receives or has in his possession, any of such articles or any part thereof so unlawfully removed as aforesaid, shall be imprisoned in the county jail not less than six months nor more than one year." (Sec. 2, Act April 2, 1913, Acts 1913, p. 187.)

Sec. 2218. **Mischief with motor vehicle.**—"Whoever purposely and without authority from the owners, shall start or cause to be started, the motor of any motor vehicle, or whoever purposely and maliciously shall shift or change the starting device or gears of a standing motor vehicle to a position other than that in which they were left by the owner or driver of said motor vehicle, or whoever shall purposely cut, mark, scratch or damage the chassis, running gear, body, sides, top, robe, covering or upholstering of a motor vehicle, the property of another, or shall purposely destroy any part thereof with or by any liquid or other substance, or shall cut, mash, mark, or in any other way destroy or damage the cylinder, radiator, steering gear, fire-extinguisher, fan, belt, valve, pipe, wire, cap, lamp, gas or oil tank, cup, signal, device, clock, chain, tool, coil, spring, speedometer, starter, battery, spark-plug, brake, tool box, oiler, pump, switch, nut, casing, tire, rim, tube, box, basket, trunk, or carrier, rod, bolt, shield, fender, bracket, gauge, glass, hood, lock, cap, screw, carbureter, magneto, license, number, electric bulb or any device, emblem, monogram or any other attachment, fastening or appurtenance of a motor vehicle, without the permission of the owner thereof, or whoever purposely shall drain or start the drainage of any radiator or oil tank upon a motor vehicle without permission of the owner thereof, or whoever purposely shall put any metallic or other substance or liquid in the radiator, carbureter, oil-tank, grease cup, oilers, lamps or machinery of a motor vehicle, with the intent to injure or damage the same or impede the working of the machinery, or whoever shall maliciously tighten or loosen any bracket, bolt, wire nut, screw, or other fastening on a motor vehicle, or whoever shall purposely release the brake upon a standing motor vehicle, with the intent to injure said machine, shall, upon conviction thereof, be imprisoned in the county jail for not less than six months or more than one year." (Sec. 3, Act April 2, 1913, Acts 1913, p. 187.)

Art. 1234. (790) (682) **Robbing orchards, gardens, etc.**—If any person shall take or carry away from the farm, orchard, garden or vineyard of another, without his consent, any fruit, melons or garden vegetables, he shall be fined in any sum not exceeding one hundred dollars. (Act April 4, 1874, Acts 1874, p. 55.)

Sec. 2219. **Form for complaint.**

In the name and by the authority of the State of Texas:

Before me the undersigned authority on this day personally appeared..... who, being by me duly sworn, deposes and says that John Doe heretofore on the .....day of.....A. D.....in the county of.....and State of Texas did take and carry away fruit, melons and garden vegetables from the farm (or "orchard," or "garden," or "vineyard") of.....there situate without the consent of the said.....

Against the peace and dignity of the State.

.....(affiant).

Subscribed and sworn to before me this the.....day of.....A. D.....

.....

J. P. Prec. No....., ...county, Texas.

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Sec. 2220. **Injuring property.**
Sec. 2221. Form for information.
Sec. 2222. Indictment or information.
Sec. 2223. Statute construed.
Sec. 2224. Evidence.
Sec. 2225. Wilful.

Art. 1235. (791) (683) **Destroying fruit, corn, etc.**—If any person shall wilfully and mischievously injure or destroy any growing fruit, corn, grain, or other like agricultural products, or if any person shall wilfully or mischievously injure or destroy any real or personal property of any description whatever, in such manner as that the injury does not come within the description of any of the offenses against property otherwise provided for by this Code, he shall be punished by fine not exceeding one thousand dollars; provided, that when the value of the property injured is fifty dollars or less, then in that event, he shall be punished by fine not exceeding two hundred dollars. (O. C. 716, amended Act March 22, 1889, Acts 1889, p. 35.)

Sec. 2221. **Injuring personal property—Form for information.**
In the name and by the authority of the State of Texas:

.....County Attorney of.....county, Texas, comes in behalf of the State of Texas, and presents in and to the County Court of..... county, Texas at the.....term, A. D.....of said court that John Doe heretofore on the.....day of.....A. D.....in said county and State did wilfully and mischievously injure (or "destroy") certain personal property then and there of the value of.....dollars, the same being then and there a buggy (or "a buggy harness" or whatever it was) then and there the property of..... by then and there scraping the paint therefrom with a knife (or "by hacking and cutting the same with a knife," or other manner, stating how the injury was inflicted so that it may be determined from the face of the pleading whether the injury comes within the description of any of the offenses against property otherwise provided for by the Penal Code).

Against the peace and dignity of the State.

.....
County Attorney.....county, Texas.

Sec. 2222. **Indictment or information.**—Indictments held good. Adams v. State, 47 Texas Crim. Rep. 38; 81 S. W. 963 (injuring real estate). Craighead v. State, 55 Texas Crim. Rep. 386; 117 S. W. 128 (injuring telephone posts).

In an indictment or information under article 1235 (791) it is not necessary to allege in terms that the injury does not come within the description of any of the offenses against property otherwise provided for by the Penal Code. This will appear as a matter of law from the face of the pleading. Todd v. State, 39 Texas Crim. Rep. 232; 45 S. W. 596. Adams v. State, 47 Texas Crim. Rep. 35; 81 S. W. 963.

The penalty being dependent on the value of the property injured, it is necessary to allege the value of the property injured. Beaufire v. State, 37 Texas Crim. Rep. 50; 38 S. W. 608. Stanton v. State, 45 Texas Crim. Rep. 168; 74 S. W. 771.

Where a buggy was injured by removing a tap, it is necessary to allege the value of the buggy—the property injured—and an allegation that the tap was of value is not an allegation of the value of the property injured. Beaufire v. State, 37 Texas Crim. Rep. 50; 38 S. W. 608.

In an indictment or information under article 1235 (791) the ownership of the property injured should be alleged. Woodward v. State, 35 Texas Crim. Rep. 554; 28 S. W. 204. Adams v. State, 47 Texas Crim. Rep. 39; 81 S. W. 963.

The nature and character of the injury should be alleged so that it may be determined from the face of the pleading whether the injury comes within the

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description of any other article of the Penal Code. Todd v. State, 39 Texas Crim. Rep. 232; 45 S. W. 596.

It is not necessary to allege that the wilful injury to the real estate was without the consent of the owner. Ritter v. State, 33 Texas 608.

Where the real injury done to the land was to the house alleged to constitute at the time it was knocked down a part of the realty, an allegation of the value of the house is an allegation of the value of the real estate injured. Price v. State, 49 Texas Crim. Rep. 343; 92 S. W. 811.

Sec. 2223. **Statute construed.**—Before the amendment of 1889, it was held that the statute only protected agricultural property. Murray and Anthony v. State, 21 Texas Crim. App. 620; 2 S. W. 757. Beeson v. State, 23 Texas Crim. App. 406; 5 S. W. 118. Terry v. State, 25 Texas Crim. App. 714; 8 S. W. 934. The amendment of 1889, and the statute as now worded, article 1235 (791) makes it a misdemeanor if any person shall wilfully or mischievously injure or destroy any real or personal property of any description whatever, in such manner as that the injury does not come within the description of any of the offenses against property otherwise provided for by the Penal Code, and the penalty depends upon the value of the property injured. Beaufire v. State, 37 Texas Crim. Rep. 50; 38 S. W. 608. Stanton v. State, 45 Texas Crim. Rep. 168; 74 S. W. 771.

Tearing down a house may constitute an injury to real property. Ritter v. State, 33 Texas 608.

To injure personal property by burning is not malicious mischief, the offense being otherwise provided for by the Penal Code. Stanton v. State, 45 Texas Crim. Rep. 168; 74 S. W. 771.

Injury to a fence comes within other articles of the Penal Code and is not malicious mischief under article 1235 (791). White v. State, 27 Texas Crim. App. 638; 11 S. W. 643.

The real property referred to in the statute refers to the real property of another. The statute was intended as a protection of the owner against injury to his property and not of a mere possessory right to the property. One cannot be legally punished under article 1235 (791) of the Penal Code for injuring his own property. Adams v. State, 47 Texas Crim. Rep. 35; 81 S. W. 963.

Sec. 2224. **Evidence.**—To sustain an allegation that property was injured there must be proof that the property alleged to have been injured was in fact injured. Rose v. State, 19 Texas Crim. App. 470. Patterson v. State, 41 Texas Crim. Rep. 412; 55 S. W. 338.

Where the injury alleged was digging a ditch, the State may prove that defendant began digging the ditch some days prior to the date alleged, it being a part of the *res gestæ*. Adams v. State, 47 Texas Crim. Rep. 35; 81 S. W. 963.

Where prosecutor treated defendant as having the legal title and simply foreclosed on the land, it cannot be said that the legal title was in prosecutor, and defendant after judgment of foreclosure and before sale would have a right to remove a house built by him after his purchase. Price v. State, 49 Texas Crim. Rep. 343; 92 S. W. 811.

Where the injury must be wilfully or mischievously done in order to constitute an offense, testimony which tends to rebut the theory that it was so done is admissible. Woodward v. State, 33 Texas Crim. Rep. 554; 28 S. W. 204. Adams v. State, 47 Texas Crim. Rep. 40; 81 S. W. 963. Caldwell v. State, 55 Texas Crim. Rep. 165; 115 S. W. 597.

A charge of malicious mischief is not sustained if it is shown that defendant acted in good faith or under a claim of right. Rose v. State, 19 Texas Crim. App. 470. Brady v. State, 26 S. W. 621. Woodward v. State, 33 Texas Crim. Rep. 554; 28 S. W. 204.

When the value of the real property injured affects the penalty, the value of the whole tract of land is not necessarily the value of the property injured. Adams v. State, 47 Texas Crim. Rep. 35; 81 S. W. 963.

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A conviction will not be sustained when the only evidence that defendant is guilty comes from an accomplice witness. Huffman v. State, 53 Texas Crim. Rep. 399; 123 S. W. 596.

When the party alleged to have caused the injury claims to be the actual owner of the real property alleged to have been injured, he may make proof of such ownership by his deeds or other evidence of title. Adams v. State, 47 Texas Crim. Rep. 35; 81 S. W. 963.

Sec. 2225. **Wilful.**—The term "wilful" means with evil intent, or with legal malice, or without reasonable ground for believing the act to be lawful. Rose v. State, 19 Texas Crim. App. 470.

Art. 1236. (791a) **Introducing Johnson grass.**—If any person in this State shall knowingly, wilfully, and with intent to injure, sow, scatter, or place, on any land not his own, the seed or roots of Johnson grass, or Russian thistle, or wilfully and knowingly sell or give away any oats, hay, straw, seed or grain, containing or intermixed with the seeds or roots of Johnson grass, to any one who is ignorant of the fact that such seeds or roots are so contained in or intermixed with such oats, hay, straw, seed or grain, he shall be deemed guilty of a misdemeanor, and on conviction thereof, he shall be punished by fine of not less than twenty-five dollars and not more than one thousand dollars. (Act April 29, 1895, Acts 1895, p. 160, Sec. 1.)

Art. 1237. (791b) **Requisites of indictment.**—In prosecutions under the preceding article, it shall not be necessary for the indictment to allege the name of the owner of the land, nor shall it be necessary for the State to prove the name of such owner, but it shall be sufficient to allege and prove that the land was not the property of the person accused. (Act April 29, 1895, Acts 1895, p. 160, Sec. 2.)

Art. 1238. (792) (683a) **Injuring, etc., baggage.**—Any baggage-master, express agent, stage or hack driver, or other common carrier, whose duty it is to handle, remove, transfer or to take care of trunks, valises, boxes, or other baggage while loading, transporting, unloading, transferring, delivering, storing or handling the same, whether or not in the employ of any transportation company or common carrier, who shall maliciously or carelessly or recklessly break, injure or destroy the said baggage, shall be deemed guilty of a misdemeanor, and on conviction be fined a sum not exceeding one hundred dollars; provided that a prosecution for a misdemeanor as provided in this article shall not be a bar to a civil action for damages. (Act March 5, 1881, Acts 1881, p. 17.)

Art. 1239. (793) (683b) **Throwing or firing into car, etc.**—Any person who shall wilfully or maliciously throw a stone or other missile, or fire any gun, or pistol, at, against, or into, any engine, tender, coach, passenger car, whether moving or not, or any other car of any moving train on any railway, or any railway depot, or any private residence, school house, church house, court house, store house, hotel, or other public or private building, public or private tent, sailboat or steamboat, in this State, shall be deemed guilty of a misdemeanor, and on convic-

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tion therefor, shall be fined in any sum of not less than five dollars nor more than one thousand dollars, or be confined in the county jail for any term of not less than ten days nor more than two years. During such term such convict may be put to hard labor. (Act March 22, 1889, Acts 1889, p. 36, amended by Acts 1895, p. 161, and by Acts 1897, p. 41.)

Sec. 2226. **Throwing or firing into railway car, etc.—Form for information.** In the name and by the authority of the State of Texas:

.....County Attorney of.....county, Texas, comes in behalf of the State of Texas and presents in and to the County Court of.....county, Texas, at the.....term, A. D.....of said court that John Doe heretofore on the.....day of....., A. D.....in said county and State did wilfully and maliciously throw a stone (or "brick," or other missile, naming it, or "fire a gun" or "fire a pistol") at, against and into an engine (or "tender," or "coach," or "passenger car," or ....., the same being a car of a moving train") on the railway of the Galveston, Harrisburg and San Antonio Railroad Company (or other railway, naming it) there situate (or "the private residence of..... there situate" or other place protected by the statute, naming it properly).

Against the peace and dignity of the State.

.....

County Attorney.....county, Texas.

Sec. 2227. **Indictment or information.**—A material variance between the information and the complaint on which it is based as to the name of the place fired into will vitiate the information. Landrum v. State, 37 Texas Crim. Rep. 666; 40 S. W. 737.

Sec. 2228. **Evidence.**—It is not competent to prove that a witness suspected that defendant or his family had thrown rocks at the house on prior occasions. Wade v. State, 48 Texas Crim. Rep. 512; 90 S. W. 503.

Sec. 2229. **Throwing glass, etc., in road.**—It shall be unlawful for a person to wilfully throw or deposit in or on any public road, street or alley any glass bottle, glass, nails, tacks, hoops, wire, cans or any other substance likely to injure any person, animal, automobile or vehicle, and any person violating any of the provisions hereof shall, upon conviction thereof, be fined any sum not less than five dollars nor more than two hundred dollars. (Acts 1913, p. 131.)

Sec. 2230. **Breaking, pulling down, or injuring a fence.**
Sec. 2231. The statute.
Sec. 2232. Form for information.
Sec. 2233. Indictment or information.
Sec. 2234. Statute construed.
Sec. 2235. Evidence.
Sec. 2236. Charge of the court.

Art. 1240. (794) (684) **Injuring fence, leaving open gates.**—If any person shall break, pull down or injure the fence of another without his consent, or shall wilfully and without the consent of the owner thereof open and leave open any gate leading into the enclosure of another, or shall knowingly cause any hogs, cattle, mules, horses or other stock to go within the enclosed lands of another without his consent, or shall tie or stake out, or cause to be tied or staked out, to graze within any inclosed lands not his own and without the consent of the owner, any horse, mule or other animal, he shall be fined in any sum not less than ten nor more than one hundred dollars, and in addition thereto, may be imprisoned in the county jail not exceeding one year. (Act April 23, 1873, Acts 1873, p. 41.)

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Sec. 2231. **The statute.**—Art 1240 (794) provides that "if any person shall break, pull down, or injure the fence of another without his consent" he is guilty of a misdemeanor. Dennis v. State, 43 Texas Crim. Rep. 465; 66 S. W. 838.

Sec. 2232. **Injuring a fence—Form for information.**

In the name and by the authority of the State of Texas:

.....County Attorney of.....county, Texas, comes in behalf of the State of Texas and presents in and to the County Court of..... county, Texas, at the.....term, A. D.....of said court that John Doe heretofore on the.....day of....., A. D.....in said county and State did break, pull down, and injure the fence of.....without the consent of the said.....

Against the peace and dignity of the State.

.....

County Attorney.....county, Texas.

(Brewer v. State, 5 Texas Crim. App. 248.)

Sec. 2233. **Indictment or information.**—An indictment or information for injuring a fence is bad if there is no allegation that it was done without the consent of the owner thereof. Govitt v. State, 25 Texas Crim. App. 419; 8 S. W. 478.

Where the fence is alleged to be the fence of two or more persons, it must be alleged that it was injured without the consent of each of the owners. The consent of either joint owner being a defense, it may be alleged that it was "without the consent of either of the said A. B. or the said C. D." Govitt v. State, 25 Texas Crim. App. 419; 8 S. W. 478.

If the fence when injured by defendant was the joint property of two or more persons, ownership of the fence may be alleged in either joint owner. Hurlburt v. State, 12 Texas Crim. App. 252.

If the owner of the fence is not the owner of the land, the want of consent of each and all of the owners of the land enclosed by the injured fence should be negatived in the indictment. Anderson v. State, 29 S. W. 786. Keizewetter v. State, 34 Texas Crim. Rep. 513; 31 S. W. 395.

An information for breaking, pulling down, or injuring a fence is sufficient if it follows the language of the statute. Brewer v. State, 5 Texas Crim. App. 248.

Sec. 2234. **Statute construed.**—Article 1240 (794) which makes it a misdemeanor to break, pull down, or injure the fence of another without his consent, applies to all fences, and is not limited to fences enclosing agricultural lands. Jessel v. State, 42 Texas Crim. Rep. 73; 57 S. W. 826. Dennis v. State, 43 Texas Crim. Rep. 464; 66 S. W. 838. McNeely v. State, 50 Texas Crim. Rep. 280; 96 S. W. 1083.

In a prosecution for breaking, pulling down, or injuring a fence, the question of title—rightful possession—is not involved, only the issue as to the actual, quiet, and peaceable possession being material. Jenkins v. State, 7 Texas Crim. App. 146. Behrens v. State, 14 Texas Crim. App. 121. Carter v. State, 18 Texas Crim. App. 573. Arbuthnot v. State, 38 Texas Crim. Rep. 509; 34 S. W. 269. Kalkosch v. State, 46 Texas Crim. Rep. 94; 80 S. W. 85. Pate v. State, 46 Texas Crim. Rep. 485; 81 S. W. 737. Fitzsimon v. State, 62 Texas Crim. Rep. 440; 138 S. W. 110. Johns v. State, 174 S. W. 610.

If defendant had a claim or title to the property he should enforce it through the courts, and is not entitled to injure the fence of one in the actual, quiet, and peaceable possession thereof. Smith v. State, 79 S. W. 34. Johns v. State, 174 S. W. 610.

Where prosecutor was a trespasser on the land of defendant, and not in the actual, quiet, and peaceable possession of the land, defendant would have the right to pull the fence down. Jones v. State, 20 S. W. 926. Oliver v. State, 37 S. W. 427. McNeely v. State, 50 Texas Crim. Rep. 279; 96 S. W. 1083. Farmer v. State, 58 Texas Crim. Rep. 171; 124 S. W. 926.

A tenant in possession has the right to use the enclosure for any legitimate purpose which will not cause injury to the actual owner, and to let down the fence for

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such purpose is not an offense. Coggins v. State, 12 Texas Crim. App. 109. Jones v. State, 18 Texas Crim. App. 366. Woodward v. State, 19 Texas Crim. App. 516. Hooks v. State, 25 Texas Crim. App. 601; 8 S. W. 803. White v. State, 27 Texas Crim. App. 638; 11 S. W. 643.

One joint owner is not justified in breaking a partition fence if injury could result to the other. Hurlburt v. State, 12 Texas Crim. App. 252.

Defendant has a right to pull down a fence which obstructs his egress or ingress to his house, where no injury could result to the other joint tenant. Scott v. State, 56 S. W. 61. McCuen v. State, 43 Texas Crim. Rep. 614; 68 S. W. 180.

An obstruction may legally be removed from a public road. Schott v. State, 7 Texas Crim. App. 616. Gowenour v. State, 33 Texas Crim. Rep. 538; 28 S. W. 201.

A contract to use property will not justify, on breach, its injury. Ball v. State, 44 Texas Crim. Rep. 185; 69 S. W. 512.

Unconnected posts do not constitute a fence. Burch v. State, 67 S. W. 500.

If defendant's cattle be wrongfully impounded he has a right to regain possession of them by letting down a fence, if he does not create a breach of the peace. Klien v. State, 39 S. W. 369.

Where defendant removed a division fence without notice, and prosecutor averted the danger to his crop by again connecting his fence with that of defendant, he is not a trespasser although the connecting portion of his fence was on defendant's land, and defendant violates the law by pulling down the portion of the fence erected by prosecutor for the purpose of closing the gap in his enclosure caused by the removal of the division fence by defendant. Jamison v. State, 27 Texas Crim. App. 442; 11 S. W. 483.

The breaking, pulling down, or injuring a fence being a misdemeanor, one is a principal therein although the acts committed by him would only make him an accomplice if the offense was a felony. Caudle v. State, 74 S. W. 545.

Article 1240 (794) is not repealed by the succeeding article 1241 which is composed of additional elements. Roberts v. State, 17 Texas Crim. App. 148.

Sec. 2235. **Injuring a fence—Evidence.**—Injuring a fence being in the nature of a trespass, the possessory ownership may be proven by oral testimony. Joy v. State, 41 Texas Crim. Rep. 49; 51 S. W. 933.

A deed offered by defendant is admissible in evidence if it tends to show the extent of the possession. McCuen v. State, 43 Texas Crim. Rep. 613; 68 S. W. 180. Pate v. State, 46 Texas Crim. Rep. 483; 81 S. W. 737. Fitzsimon v. State, 59 Texas Crim. Rep. 540; 128 S. W. 903.

If more than one person is alleged as the owner of the fence, the want of consent of each one must be proven. Brumley v. State, 12 Texas Crim. App. 609. Govitt v. State, 25 Texas Crim. App. 419; 8 S. W. 478. Anderson v. State, 29 S. W. 786.

A notice, or proof of a notice prohibiting trespassers, is not admissible to show want of consent of the owner, unless it be shown that such owner made or authorized the notice. Caudle v. State, 74 S. W. 545.

Want of consent of the owner may be shown by circumstantial evidence when the owner is out of the State. Caudle v. State, 74 S. W. 545.

If the State fails to prove actual, quiet, and peaceable possession in the person in whom ownership of the fence is laid, defendant should be acquitted. Bybee v. State, 20 S. W. 824. Oliver v. State, 37 S. W. 427. Farmer v. State, 58 Texas Crim. Rep. 171; 124 S. W. 926. Fitzsimon v. State, 62 Texas Crim. Rep. 440; 138 S. W. 110.

The State is not required to prove the want of consent of persons not mentioned in the indictment, and if defendant had the consent of any one authorized to give consent who is not mentioned in the indictment he may make such proof, but the

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fact that the State proves want of consent of a person not mentioned in the indictment does not injure defendant. Caudle v. State, 74 S. W. 545.

Where the fence was pulled down for the convenience of defendant he may prove implied consent of the owner by proof of a custom in that respect. Caudle v. State, 74 S. W. 545. Giddings v. State, 47 Texas Crim. Rep. 360; 83 S. W. 694. Giddings v. State, 50 Texas Crim. Rep. 333; 96 S. W. 926.

What was said by the parties when the fence was broken is admissible as a part of the *res gestæ*. Meador v. State, 162 S. W. 1155.

To defeat the defensive theory that defendant acted under the belief that he owned the land, the State may prove that he also tore down the fence around another inclosure. Johns v. State, 174 S. W. 610.

Sec. 2236. **Injuring a fence—Charge of court.**—Where there is evidence of good faith, based on a claim of ownership and other evidences thereof, a charge should be given presenting this theory. Becker v. State, 56 State Crim. Rep. 92; 119 S. W. 95.

It is error to charge the jury to convict defendant if he authorized another to pull down the fence without also requiring the jury to find that the fence was pulled down. Gordon v. State, 53 Texas Crim. Rep. 624; 111 S. W. 146.

It is error to charge the jury that the title to the land is not a question for their consideration only so far as to show to whom the rightful possession belonged. Behrens v. State, 14 Texas Crim. App. 121.

It is error to burden a charge on mistake of fact by requiring the jury to find that in addition to being mistaken about a fact which would excuse defendant, they must find the existence of another fact of which there was no testimony. Giddings v. State, 50 Texas Crim. Rep. 333; 96 S. W. 926.

The failure to charge on the defensive theory in a misdemeanor case is not reversible error in the absence of a requested charge thereon and when no exception was reserved at the time to such omission. Treadwell v. State, 64 Texas Crim. Rep. 83; 141 S. W. 219.

Sec. 2237. **Staking animal to graze.**
Sec. 2238. The statute.
Sec. 2239. Form for information.
Sec. 2240. Statute construed.

Sec. 2238. **The statute.**—Article 1240 (794) makes it a misdemeanor if any person shall tie or stake out, or cause to be tied or staked out, to graze within any enclosed lands not his own and without the consent of the owner, any horse, mule or other animal. Daley v. State, 40 Texas Crim. Rep. 101; 48 S. W. 515.

Sec. 2239. **Staking animal to graze—Form for information.**

In the name and by authority of the State of Texas:

.....County Attorney of.....county, Texas, comes in behalf of the State of Texas and presents in and to the County Court of..... county, Texas, at the.....term, A. D.....of said court that John Doe heretofore on the.....day of....., A. D.....in said county and State did tie and stake out and cause to be tied and staked out a horse (or "mule," or other animal, naming it) within inclosed lands not his own but then and there the property of.....the owner thereof then and there without the consent of said owner.

Against the peace and dignity of the State.

.....

County Attorney.....county, Texas.

Sec. 2240. **Staking animal to graze—Statute construed.**—The term "inclosed lands" is not limited to such land as is cultivated, and includes pasture land. Daley v. State, 40 Texas Crim. Rep. 101; 48 S. W. 515.

Under the statute it is not necessary that the inclosure be fenced. A stream may form part of the protection of the inclosure. Daley v. State, 40 Texas Crim. Rep. 101; 48 S. W. 515.

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The term "inclosed lands not his own" has reference to the possessory right, and not necessarily to the title to the land. Daley v. State, 40 Texas Crim. Rep. 101; 48 S. W. 515.

Where defendant staked out his horse to graze within the inclosure of another without his consent, it is no defense that the staking was a mere incident of a hunt. Daley v. State, 40 Texas Crim. Rep. 101; 48 S. W. 515.

Sec. 2241. **Causing stock to go within inclosure of another.**
Sec. 2242. The statute.
Sec. 2243. Form for information.
Sec. 2244. Statute construed.

Sec. 2242. **The statute.**—Article 1240 (794) makes it a misdemeanor if any person shall knowingly cause any hogs, cattle, mules, horses or other stock to go within the inclosed lands of another without his consent. Cleveland v. State, 8 Texas Crim. App. 44. Yarbrough v. State, 28 Texas Crim. App. 481; 13 S. W. 775. Clayton v. State, 25 S. W. 122. Thornton v. State, 156 S. W. 210.

Sec. 2243. **Form for information.**
In the name and by authority of the State of Texas:

.....County Attorney of..... county, Texas, comes in behalf of the State of Texas and presents in and to the County Court of.....county, Texas, at the.....term, A. D.....of said court that John Doe heretofore on the.....day of.....A. D.....in said county and State did knowingly cause certain hogs (or "mules," or whatever stock it was) to go within the inclosed lands of another there situate, to wit, the inclosed lands of..... then and there without the consent of the said.....

Against the peace and dignity of the State.

.....
County Attorney.....county, Texas.

Sec. 2244. **Statute construed.**—The term "inclosed lands of another," as used in article 1240 (794), has reference to the possessory right, and not necessarily to the title to the land. Clayton v. State, 25 S. W. 122. Dickens v. State, 46 S. W. 246. Barber v. State, 42 Texas Crim. Rep. 626; 63 S. W. 323. Thornton v. State, 156 S. W. 210.

To constitute it an offense to cause stock to go within the inclosed lands of another the act must be **knowingly** done. Yarbrough v. State, 28 Texas Crim. App. 481; 13 S. W. 775.

Where defendant turned his cattle into an inclosure where he had been in the habit of previously turning them with consent of the owner, and did not know that the inclosure had been sold or transferred, he would not be guilty of **knowingly** causing them to go within the inclosure of the new owner. Yarbrough v. State, 28 Texas Crim. App. 481; 13 S. W. 775.

The owner of land has a right to use it and is not debarred that right by the acts of others in inclosing it in a general pasture. Yarbrough v. State, 37 Texas Crim. Rep. 357; 39 S. W. 941.

If the tenant is in possession and control by the terms of his tenancy, he has a right to control the inclosure for all reasonable purposes. Coggins v. State, 12 Texas Crim. App. 109. Thornton v. State, 156 S. W. 210.

A separate parcel within an inclosure held and cultivated by the alleged owner is as much his inclosed land, within the purview of the law, as if entirely isolated and fenced apart from the general inclosure. Cleveland v. State, 8 Texas Crim. App. 44. Gartrell v. State, 61 S. W. 487.

Defendant would not be guilty if he was not a trespasser in causing the stock to go within the inclosure, and may defend on proof that he had the consent of a joint owner. Jones and Williams v. State, 18 Texas Crim. App. 366.

Defendant cannot be legally convicted for causing stock to go within an inclosed pasture leased from the State through the gate where another statute gives him

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authority to have his stock pass through such pasture. Broyles v. State, 41 Texas Crim. Rep. 553; 55 S. W. 966.

An allegation of ownership in one person is not sustained by proof that two persons were in joint ownership and that both were attending to the inclosure and managing the same. Tanner v. State, 50 S. W. 347.

Sec. 2245. **Opening and leaving gate open.**
Sec. 2246. The statute.
Sec. 2247. Form for information.
Sec. 2248. Statute construed.

Sec. 2246. **The statute.**—Article 1240 (794) makes it a misdemeanor if any person shall wilfully and without the consent of the owner thereof open and leave open any gate leading into the inclosure of another. Jolly v. State, 19 Texas Crim. App. 76.

Sec. 2247. **Form for information.**
In the name and by authority of the State of Texas:

.....County Attorney of.....county, Texas, comes in behalf of the State of Texas and presents in and to the County Court of..... county, Texas, at the.....term, A. D.....of said court that John Doe heretofore on the.....day of.....A. D.....in said county and State did wilfully open and leave open a gate leading into the inclosure of..... there situate, then and there without the consent of the said.....the owner thereof.

Against the peace and dignity of the State.

.....
County Attorney.....county, Texas.

Sec. 2248. **Statute construed.**—A prosecution for wilfully opening and leaving open a gate cannot legally be maintained under article 1240 (794) if the gate was across a public road. If the gate was across a public road of the third class, a prosecution for leaving it open should be had under article 834 (494), and if the gate was across a public road of the first or second class it was an obstruction which any citizen would have the legal right peaceably to pull down and leave open. Jolly v. State, 19 Texas Crim. App. 76.

A road may be shown to be a public road by other evidence than the production of the order of the county court establishing it as such. Jolly v. State, 19 Texas Crim. App. 76.

Proof that the gate was across a public road is a complete defense to a prosecution under article 1240 (794) for opening and leaving open a gate leading into the inclosure of another. Jolly v. State, 19 Texas Crim. App. 76.

The term "inclosure of another," as used in article 1240 (794) is not limited to cultivated lands, and includes an inclosed pasture. Hankins v. State, 39 Texas Crim. Rep. 261; 45 S. W. 807.

Where two or more persons are present and acting together in wilfully opening and leaving open a gate leading into the inclosure of another without his consent, it is immaterial which one opened the gate or left it open, all so acting being principal offenders. Hankins v. State, 39 Texas Crim. Rep. 261; 45 S. W. 807.

Sec. 2249. **Local option stock law.**
Sec. 2250. Statute construed.
Sec. 2251. Indictment.
Sec. 2252. Evidence.

Art. 1241. **Violating local option stock law.**—Any person who shall wilfully turn out, or cause to be turned out, on land not his own or under his control, or who shall wilfully fail or refuse to keep up any stock, prohibited by law from running at large in any county or subdivision of any county in this State, in which the stock law has been

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adopted, or who shall wilfully allow such stock to trespass upon the land of another, in such county, or subdivision thereof, or who shall wilfully permit to run at large any stock of his own, or of which he is the agent, or of which he has the control, and not permitted to run at large in any county or subdivision of any county in this State, in which the stock law has been adopted, shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by fine in any sum not less than five and not more than fifty dollars. (Acts 1897, p. 112; Sec. 20a, Act April 3, 1907, Acts 1907, p. 124.)

Sec. 2250. **Statute construed.**—The statute authorizing a local option stock law was held constitutional in Roberson v. State, 42 Texas Crim. Rep. 595; 63 S. W. 884. Ex parte Cowden, 168 S. W. 539.

To authorize a criminal prosecution under article 1241, the law prohibiting the stock from running at large in any county or subdivision in which the stock law has been adopted must have been voted on and adopted since the Act of 1897 took effect. If the local option stock law was not voted on and adopted while it carried a penal penalty, such law with such penalty is not in force. McElroy v. State, 39 Texas Crim. Rep. 529; 47 S. W. 359. Johnson v. State, 52 Texas Crim. Rep. 296; 106 S. W. 374.

Article 1241 of the Penal Code authorizing a criminal prosecution for permitting stock to run at large in violation of the local option stock law may be enforced in any county or subdivision thereof which voted to adopt such stock law after the Act of 1897 (article 1241) went into effect. Roberson v. State, 42 Texas Crim. Rep. 595; 63 S. W. 884.

It makes no difference in prosecutions for permitting stock to run at large in violation of the local option stock law whether the county is an agricultural or stock-raising county. Roberson v. State, 42 Texas Crim. Rep. 595; 63 S. W. 884.

A stock law election may be ordered within such territory as may be selected by the Commissioners' Court. Ex parte Thompkins, 47 Texas Crim. Rep. 356; 83 S. W. 379. Bishop v. State, 167 S. W. 363.

The law authorizing a stock law election governs the general election law as to such stock law elections when the two are in conflict. Ex parte Kimbrell, 47 Texas Crim. Rep. 333; 83 S. W. 382.

If the petition for the stock law election is filed at the regular term of the Commissioners' Court that ordered the election, instead of being filed prior thereto, the election so ordered is void. The election cannot be legally ordered at the term the petition is filed. The statute provides that the election to determine whether or not stock shall run at large shall be ordered at the next term after filing the petition. Robertson v. State, 44 Texas Crim. Rep. 270; 70 S. W. 542. Barlow v. State, 47 Texas Crim. Rep. 114; 80 S. W. 375. Cox v. State, 88 S. W. 812.

If the petition be from the freeholders of a subdivision of a county, such subdivision shall be particularly described and the boundaries thereof designated, and simply giving the number of a justice precinct will not supply the omission to set out the boundaries. Cox v. State, 88 S. W. 812. Ex parte Gulledge, 57 Texas Crim. Rep. 156; 122 S. W. 21.

The election is void if the question submitted and voted on is stated in the alternative, so that it is impossible to determine whether the people intended to prohibit the running at large of one or of all kinds of the stock named therein. McElroy v. State, 39 Texas Crim. Rep. 529; 47 S. W. 359.

If the statute requires the county judge to declare and publish the result of the election, an election is void if these prerequisites are not complied with. King v. State, 74 S. W. 773.

Sec. 2251. **Indictment.**—An indictment under article 1241 of the Penal Code for permitting stock to run at large in any county or subdivision of a county in

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which the stock law has been adopted is bad if it fails to directly allege that an election was held, or if it fails to directly allege the purpose for which the election was held or the result thereof. King v. State, 74 S. W. 773. Hill v. State, 58 Texas Crim. Rep. 79; 124 S. W. 940.

Information held good. Fisher v. State, 160 S. W. 684.

Sec. 2252. **Evidence.**—To establish the charge, it is permissible to prove that defendant's animal was not kept up by him from time to time, and that it was permitted to run at large from time to time. Black v. State, 62 Texas Crim. Rep. 77; 136 S. W. 478.

An objection to oral proof of the existence of a stock or hog law is properly sustained where it is offered to defeat a prosecution for malicious mischief. Kaffenberger v. State, 34 Texas Crim. Rep. 142; 29 S. W. 779.

Sec. 2253. **Fence cutting.**
Sec. 2254. Form for indictment.
Sec. 2255. Indictment.
Sec. 2256. Evidence.

Art. 1242. (795) (684a) **Wantonly and wilfully, etc., cutting fence.**—Any person who shall wantonly, or with intent to injure the owner, (and) wilfully cut, injure or destroy any fence, or part of a fence, (without such fence is the property of the person so cutting or destroying the same) shall be deemed guilty of an offense, and upon conviction therefor shall be punished by confinement in the State penitentiary for a term not less than one nor more than five years. A fence within the meaning of this law is any structure of wood, wire, or of both, or of any other material, intended to prevent the passage of cattle, horses, mules, asses, sheep, goats or hogs; provided, however, that it shall constitute no offense for any person owning and residing upon land inclosed by the fence of another, who refuses permission to such person or persons so residing within said inclosure free egress and ingress to their said land, for said person or persons to open a passage way through said inclosure. (Act Feb. 6, 1884, Acts 1884, p. 34.)

Sec. 2254. **Form for indictment.**

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 John Doe on the.....day of....., A. D..... in said county and State did wantonly, and did wilfully and with intent to injure .....the owner thereof, cut, injure, and destroy the fence of said owner there situate, the said fence not being then and there the property of the said John Doe, and the said John Doe not then and there being the owner of and residing upon the land inclosed by said fence.

Against the peace and dignity of the State.

.....

Foreman of the grand jury.

Sec. 2255. **Indictment for fence cutting.**—Indictment held good. Spears v. State, 24 Texas Crim. App. 537; 7 S. W. 245.

Sec. 2256. **Evidence.**—Declarations going to show motive may be proved against defendant, where he makes such declarations, or where the declaration was made in his presence and hearing and receives his active or tacit consent. Smith v. State, 44 Texas Crim. Rep. 218; 70 S. W. 84.

When defendant seeks to show that another, defendant not assisting, committed the offense, there must be other facts also in evidence pertinently connecting such

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other with the offense at the time of its commission before proof of remote acts or motive on the part of such other is admissible. Smith v. State, 44 Texas Crim. Rep. 218; 70 S. W. 84.

Sec. 2257. **Withdrawing or separating fence.**
Sec. 2258. May remove by consent.
Sec. 2259. May remove after notice.
Sec. 2260. Removing without notice—Form for complaint.
Sec. 2261. Failing to remove—Form for complaint.
Sec. 2262. Statute construed.

Art. 1243. (796) **Unlawful for owner of party fence to remove, etc.**—Hereafter it shall be unlawful for any person who is a joint owner of any separating or dividing fence, or who is in any manner interested in any fence attached to or connected with any fence owned or controlled by any other person, to remove the same except by mutual consent or as hereinafter provided. (Sec. 1, Act April 6, 1889, Acts 1889, p. 45.)

Sec. 2258. **May remove by consent.**—Any person who is a joint owner of any separating or dividing fence, or who is in any manner interested in any fence attached to or connected with any fence owned or controlled by any other person, may remove the same with the consent of any joint owner thereof. Bailey v. State, 48 Texas Crim. Rep. 262; 87 S. W. 700.

Sec. 2259. **May remove after notice.**—After the expiration of the notice of six months given in writing, as provided for in article 1244 of the Penal Code, the party giving it would have the authority to withdraw his fence from the fence of the party to whom the notice is given. Dennis v. State, 43 Texas Crim. Rep. 464; 66 S. W. 838.

Art. 1244. (797) **Notice of intention to remove.**—Any person who is the owner or part owner of any fences connected with or adjoined to any fences owned in part or in whole by any other person, shall have the right to withdraw or separate his fence or part of fence from the fence of any other person or persons in this State; that such person who desires to withdraw or separate such fence from the fence of any other person shall give notice in writing to such person, his agent, attorney, or lessee, of his intention to separate or withdraw his fence or part thereof for at least six months prior to the time of such intended withdrawal or separation. Any person failing to comply with the provisions of this article shall be fined in any sum not less than two dollars nor more than fifty dollars, and every ten days shall constitute a separate offense for the violation of this article. (Sec. 2, Act of April 6, 1889, Acts 1889, p. 45.)

Sec. 2260. **Removing without notice—Form for complaint.**
In the name and by the authority of the State of Texas:
Before me the undersigned authority on this day personally appeared..... who being by me duly sworn deposes and says that John Doe heretofore on the .....day of....., A. D.....in the county of.....and State of Texas was then and there owner and part owner of a fence there situate and then and there connected with and adjoined with the fence of ....., and the said John Doe did then and there withdraw and separate his fence from the fence of the said....., without the consent of the said.....and without having given notice in writing either to said.....or to the agent, attorney, or lessee of the said.....of the intention of the said John Doe to

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separate or withdraw his fence or part thereof for at least six months prior to the time of said withdrawal or separation.

Against the peace and dignity of the State.

.....(affiant).

Subscribed and sworn to before me on this the.....day of....., A. D. .....

.....

J. P., Prec. No. ....., ... county, Texas.

(In charging a failure of defendant to perform a duty the use of "or" is proper).

Failure to allege want of consent and that defendant failed to give notice will vitiate the pleading under article 1244 (797). Warder v. State, 29 Texas Crim. App. 534; 16 S. W. 338.

An allegation that defendant did not give notice to the owner is not alone sufficient, as it does not exclude the idea that he may have given notice to his agent, attorney, or lessee. The allegation must be that he did not give notice to either, and want of notice must not be so alleged as to require defendant to have given notice to all.

Art. 1245. (798) **Notice requiring removal.**—Any person who is the owner of any fence wholly upon his own land to which the fence of another is adjoined or connected in any manner, may require the owner of any such fence to disconnect and withdraw the same back on his own land by first giving notice in writing for at least six months to such person, his agent, attorney, or lessee, to disconnect and withdraw his fence back on his own land. Any person who shall negligently or wilfully fail to disconnect his fence and remove the same back upon his own land, after the expiration of said notice, shall be fined in any sum not less than ten nor more than fifty dollars, and each ten days failure after such notice shall constitute a separate offense for the violation of the provisions of this article. (Sec. 3, Act April 6, 1889, Acts 1889, p. 45.)

Sec. 2261. **Failing to remove fence—Form for complaint.**

In the name and by the authority of the State of Texas:

Before me the undersigned authority on this day personally appeared..... who being by me duly sworn deposes and says that John Doe heretofore on the .....day of....., A. D.....in the county of.....and State of Texas was the owner of a fence there situate, and.....was the owner of a fence then and there situate and wholly upon his own land to which the fence of the said John Doe was then and there adjoined and connected, and on said day said.....did then and there give notice in writing to said John Doe (or "to said John Doe through his agent" or "attorney" or "lessee" "to wit,..... who was then and there acting as such") to disconnect and withdraw his, the said John Doe's fence back on his own land, and on to wit, more than six months and ten days after service of said notice, the.....day of....., A. D.....in said county and State said fences were still so adjoined and connected, and the said John Doe did then and there negligently and wilfully fail to disconnect his said fence and remove the same back upon his own land after the expiration of said notice which as aforesaid had been given him for more than six months and ten days prior thereto, and it then and there became the duty of said John Doe after the expiration of said notice and within ten days thereafter to so disconnect and remove his said fence, which as aforesaid the said John Doe did then and there so fail to do and after said six months and ten days have passed and up to said last named date has still so failed to do.

Against the peace and dignity of the State.

.....(affiant).

Subscribed and sworn to before me this the ..... day of ....., A. D. .....

.....

J. P., Prec. No. ....., ... County, Texas.

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(An indictment, information, or complaint for failing to remove a fence after due notice is bad if it fails to negative the idea that it was removed within the ten days after the expiration of the six months notice. Elkins v. State, 40 Texas Crim. Rep. 589; 51 S. W. 372.)

Sec. 2262. **Statute construed.**—The statute is not intended to prevent the joint owner from moving his fence from one point to another, provided he does not leave the premises of another uninclosed. Camp v. State, 49 Texas Crim. Rep. 396; 92 S. W. 845.

A division fence may be withdrawn or separated after giving proper notice for at least six months prior thereto. Dennis v. State, 43 Texas Crim. Rep. 464; 66 S. W. 838, but not without the notice or without consent if the effect of the withdrawal or separation is to leave the premises of another uninclosed. Jamison v. State, 27 Texas Crim. App. 442; 11 S. W. 483.

Sec. 2263. **Dogging stock when fence insufficient.**
Sec. 2264. Form for complaint.
Sec. 2265. Statute construed.
Sec. 2266. Evidence.

Art. 1246. (799) (685) **Dogging stock when fence insufficient.**—Any owner, proprietor, lessee, or other person in charge of cleared and cultivated land surrounded with an insufficient fence, or the agent or employe of such person, who shall, with fire-arms, dogs, or otherwise, maim, wound or kill any cattle, horses or hogs of another within such inclosure, or who shall cause or procure the same to be done, shall be fined not less than ten nor more than two hundred dollars. (Act Oct. 18, 1871, Acts 1871, p. 10.)

Art. 1247. (800) (686) **"Insufficient fence" defined.**—An "insufficient fence," as used in the preceding article, means a fence less than five feet high, or with openings or crevices in some part thereof sufficiently large for the passage of the animal so maimed, wounded or killed. (Added in revising, 1879.)

Sec. 2264. **Form for complaint.**

In the name and by the authority of the State of Texas:

Before me, the undersigned authority, on this day personally appeared ....., who being by me duly sworn deposes and says that John Doe heretofore on the ..... day of ....., A. D. ....., in the county of ..... and State of Texas was the (or "agent and employe of ..... the") owner, proprietor, lessee, and a person in charge of cleared and cultivated land there situate and then and there surrounded with an insufficient fence, and the said John Doe did then and there with fire-arms (or "with dogs," or otherwise, stating how) maim, wound, and kill and did then and there cause and procure to be maimed, wounded and killed one head of cattle (or "a horse" or "a hog"), the said animal then and there being the property of another, to wit, ..., and the said animal being then and there within such inclosure.

Against the peace and dignity of the State.

.....(affiant).

Subscribed and sworn to before me this the ..... day of ....., A. D. .....

.....
J. P., Prec. No. ....., ... county, Texas.

Sec. 2265. **Statute construed.**—When the stock law is in force a person is not required to fence against hogs. Brewer v. State, 28 Texas Crim. App. 565; 13 S. W. 1004. Hoak v. State, 26 S. W. 508. Gerdes v. State, 34 S. W. 268. McCampbell v. State, 45 S. W. 711.

To constitute the offense of maiming, wounding, or killing any cattle, horses or hogs of another within an enclosure surrounded by an insufficient fence, it is not

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incumbent upon the State to show that it was wantonly or wilfully done, but it would not constitute a variance if the proof should so show. If defendant is proven to be within the classes of persons named in article 1246 (799), as alleged, and fails to show the existence of some stock law which relieves him of the necessity of fencing his cleared and cultivated land, and the State proves that he had an insufficient fence around such enclosure, and that he did therein maim, wound, or kill any cattle, horses or hogs of another, as alleged, then with proof of time and venue, the State's case is made, and in such case it is no defense that it was done in defense of the crop.

Sec. 2266. **Evidence.**—An objection to oral proof of the existence of a stock or hog law is properly sustained where it is offered to defeat a prosecution for malicious mischief. Kaffenberger v. State, 34 Texas Crim. Rep. 142; 29 S. W. 779.

An allegation that defendant was the owner, proprietor and person in charge of the inclosure is not sustained by proof that defendant was a married woman living with her husband and that the inclosure was his separate property. Lucas v. State, 36 Texas Crim. Rep. 397; 37 S. W. 427.

A conviction will not be sustained on proof which amounts to a mere suspicion. High v. State, 61 Texas Crim. Rep. 432; 135 S. W. 135.

Sec. 2267. **Removing rock, etc., from land of another.**
Sec. 2268. Form for information.
Sec. 2269. Alleging the offense.
Sec. 2270. Evidence.

Art. 1248. (801) (687) **Removing rock, etc., from premises of another.**—If any person shall knowingly enter upon the land or premises of another, and take or remove therefrom any rock, earth, sand, coal, slate or mineral of any description, without the consent of the owner of such land or premises, he shall be fined in any sum not exceeding one thousand dollars. (Act June 24, 1876, Acts 1876, p. 28.)

Sec. 2268. **Form for information.**
In the name and by authority of the State of Texas:
....., County Attorney of ..... county, Texas, comes in behalf of the State of Texas and presents in and to the County Court of ..... county, Texas, at the ..... term, A. D. ....., of said court that John Doe heretofore on the ..... day of ....., A. D. ....., in said county and State did knowingly enter upon the land and premises of ....., then and there the owner thereof, the same being situated in said county and described as ....., and did then and there take and remove rock (or "earth," or whatever it was) therefrom without the consent of said owner.
Against the peace and dignity of the State.

.....
County Attorney, ... county, Texas.

Sec. 2269. **Alleging the offense.**—The indictment or information should describe the land or premises from which the sand, etc., was removed. Hayworth v. State, 168 S. W. 859.

Sec. 2270. **Evidence.**—The ownership of the land or premises must be proved as laid. Dean v. State, 34 Texas Crim. Rep. 474; 31 S. W. 378. Hayworth v. State, 168 S. W. 859.

If the defendant has title or a fair color of title to the land the issue should be settled in a civil suit. Hayworth v. State, 168 S. W. 859.

Art. 1249. **Stock running at large in prohibited territory.**—If any person or persons shall knowingly permit any horses, mules, jacks, jennets, and cattle to run at large in any territory in this State where the provisions of the laws of this State have been adopted prohibiting any of such animals from running at large, such person or persons shall

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be deemed guilty of a misdemeanor, and upon conviction shall be fined in any sum not less than five dollars nor more than two hundred dollars. (Sec. 20b, Act April 3, 1907, Acts 1907, p. 124.)

(Neuvar v. State, 163 S. W. 58.) (See authorities under article 1241.)

Art. 1250. (802) (690) **Herding stock in half mile of residence.**—If any person shall herd any drove of horses, mules, cattle, sheep, goats, or hogs, numbering more than five head, upon any land not his own, and within one-half mile of the residence of any citizen of this State, whenever the owner, lessee or legal representative of such land shall forbid such herding, and shall fail, neglect, or refuse to remove such drove at once upon the request of such owner, lessee or legal representative; or whenever any person shall herd any such drove of horses, mules, cattle, sheep, goats or hogs upon the inclosed lands or pasture of another, or cause the same to be so herded, without the consent of such owner, lessee or legal representative, he shall be fined in any sum not exceeding one hundred dollars; provided, that this article shall not apply to droves which are driven through pastures by the usual route of travel through such pastures, in the most direct and practicable route to any named point of destination, traveling at the greatest practicable speed, and where there is no public road leading to the point of destination; and provided further, that no person shall be authorized under the provisions of this article to drive any drove or herd of stock of any kind into any inclosure belonging to another, for the purpose of grazing or holding such drove or herd of stock for any length of time whatever, without the consent of the owner, lessee or person in charge of such inclosure. This article shall not apply to herds or droves of stock while being held for shipment; provided, that the owner or agent of such stock shall pay the owner of the premises so herded upon, reasonable pasturage and all damages done by said stock. (Act March 13, 1885, Acts 1885, p. 29, amended Acts 1897, p. 183.)

Art. 1251. (803) (691) **Each hour a separate offense.**—Each hour of delay, after notice given or request made, shall constitute a separate offense under the preceding article. (Act June 2, 1873, Acts 1873, p. 186.)

Sec. 2271. **Interfering with reclamation survey.**—Any person or persons who shall wilfully destroy or deface any corner, line, mark, bench mark or other object fixed or established in connection with the work authorized to be done by and under the direction of the State Reclamation Engineer, as herein authorized, shall be guilty of a misdemeanor, and upon conviction thereof, shall be fined in any sum not less than one hundred dollars nor more than one thousand dollars; or by imprisonment in the county jail for a period of not less than thirty days; or by both such fine and imprisonment. (Sec. 9, Act April 7, 1913, Acts 1913, p. 296.)

Art. 1252. (803b) **Wilful destruction of irrigating canal, etc.**—Any person who shall wilfully or maliciously injure or destroy any irrigation canal or its appurtenances, or any irrigation reservoir, dam, well, or any of the appurtenances thereto to the extent of fifty dollars.

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or if such injury shall amount in value to fifty dollars, shall be deemed guilty of a felony, and for each offense shall be punished by confinement in the State penitentiary for not less than two nor more than ten years. (Acts 1895, p. 25, Sec. 16.)

Sec. 2272. **Indictment.**—An indictment drawn under article 1252 (803b), to be sufficient, must allege the ownership of the irrigation canal, reservoir, dam, or well, or appurtenances thereof, which are alleged to be injured or destroyed. Dolan v. State, 60 Texas Crim. Rep. 5; 129 S. W. 840.

Art. 1253. **Filling up, etc., canal, drain, etc.**—Any person who shall wrongfully or purposely fill up, cut, injure or destroy or in any manner impair the usefulness of any canal, drain, ditch or water-course or other work constructed, repaired or improved for the purpose of drainage or protection from an overflow of water, shall be deemed guilty of a misdemeanor, and upon conviction, may be fined in any sum not exceeding one hundred dollars, or imprisonment in the county jail not exceeding two months. (Sec. 39, Act March 23, 1907, Acts of 1907, p. 88.)

Art. 1254. **Cut, destroy, or injure levee.**—Any person or persons who shall wrongfully or purposely cut, injure, destroy, or in any manner impair the usefulness of any levee or other reclamation improvement, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than one hundred dollars nor more than one thousand dollars; or by imprisonment in the county jail not exceeding one year; or by both such fine and imprisonment. (Sec. 40, Act March 19, 1909, Acts 1909, p. 152, amended by Sec. 40, Act April 1, 1915, Acts 1915, p. 244.)

Sec. 2273. **Mischief with levee improvement work.**—Any person or persons who shall wilfully destroy or deface any corner, line, mark, bench mark, or other object fixed or established in connection with the work authorized by the Act creating Levee Improvement Districts, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than one hundred dollars nor more than one thousand dollars, or by imprisonment in the county jail for a period of not less than thirty days or by both such fine and imprisonment. (Sec. 41, Act April 1, 1915, Acts 1915, p. 244.)

Sec. 2274. **Unlawfully constructing levee.**—It shall be unlawful for any person, corporation or levee improvement district, without first obtaining the approval of plans for the same by the State Reclamation Engineer, to construct, attempt to construct, cause to be constructed, maintain or cause to be maintained, any levee or other such improvement on, along or near any stream of this State which is subject to floods, freshets or overflows, so as to control, regulate or otherwise change the flood waters of such stream; and any person, corporation or district violating this section shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than one hundred dollars nor more than one thousand dollars, or by imprisonment in the county jail for a period of not more than one year, or by both such fine and imprisonment, and each day any such structure is maintained or caused to be maintained shall constitute a separate offense. (Sec. 62, Act April 1, 1915, Acts 1915, p. 248.)

Art. 1255. **Entering inclosed land and hunting or fishing.**—Any person who shall enter upon the inclosed land of another without the consent of the owner, proprietor or agent in charge, and therein hunt with fire-arms, or therein catch or take any fish from any pond, lake,

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tank or stream, or in other manner depredate upon the same, shall be punished by fine not less than ten nor more than one hundred dollars. Provided (further) that this article shall not apply to inclosures including two thousand acres or more in one inclosure. (Act March 31, 1885, Acts 1885, p. 80, amended by Act May 1, 1893, p. 87, amended Acts 1903, p. 159.)

(This is a general law and applies to all counties in the State, notwithstanding article 1256.)

Sec. 2275. **Form for complaint.**

In the name and by the authority of the State of Texas:

Before me, the undersigned authority, on this day personally appeared ....., who being by me duly sworn deposes and says that John Doe, heretofore on the .... ..day of ....., A. D. ....., in the county of ..... and State of Texas did enter upon the inclosed land there situated and being an inclosure of less than two thousand acres of ..... who was then and there the owner of said land, without the consent of either the owner, proprietor or agent in charge, and did then and there therein hunt with fire-arms (or "therein catch and take fish from a pond" or "lake," or "tank," or "stream" or "did then and there and therein depredate upon the same by .....," stating how).

Against the peace and dignity of the State.

..... (affiant).

Subscribed and sworn to before me this the ..... day of ....., A. D. .....

.....

J. P., Prec. No. ....., ... county, Texas.

(Partridge v. State, 170 S. W. 717.)

Sec. 2276. **Indictment.**—It is not sufficient to allege that defendant did enter the inclosed land of another without the consent of the owner, because this does not cover the language of article 1255 (804) as to the want of consent. It must be alleged that he did enter without the consent of the owner, proprietor or agent in charge, and the use of "or" is proper in that connection because defendant would not have to have the consent of all. Holtzgraft v. State, 23 Texas Crim. App. 404; 5 S. W. 117.

Sec. 2277. **Hunting on inclosed and posted lands.**
Sec. 2278. The statute.
Sec. 2279. Statute construed.

Sec. 2278. **The statute.**

Sec. 1. It shall be unlawful for any person or persons knowingly to hunt with fire-arms or dogs upon the enclosed and posted lands of another without the consent of the owner thereof where such lands are in use as agricultural lands or for grazing purposes, having cattle, horses, sheep or goats herding or grazing thereon. By enclosed lands is meant any structure for fencing either of wood or iron, or a combination of wood and iron, or wood and wire, or partly enclosed by a fence of iron or wood, or wood and iron, or wood and wire, and partly by water or streams, canon, brush, or rock or bluffs, or any of the islands; provided, same are used for pasturage or cultivation as designated herein; provided, the State shall prove in the trial of any case under this act, before a conviction shall be had, that all the lands in said enclosure is owned or leased by the proprietor of such enclosure, where such lands are subject to purchase or lease; provided, that proof of ownership or lease may be made by oral testimony.

Sec. 2. Any person who shall knowingly, without the consent of the owner or agent enter the enclosed and posted lands of another and shall, with fire-arms or dogs, hunt on such lands, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than two hundred dollars; providing further, that nothing in this act shall prohibit any bona fide traveler, while traveling along a public road in an enclosure, from killing game within a distance of four hundred yards on either side of said road.

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Sec. 3. No person shall be liable to the penalty prescribed in the preceding article unless the owner or proprietor of such enclosure shall at each entrance thereto keep a notice in a conspicuous place, with the word "posted" plainly marked thereon, which shall constitute posting within the meaning of this act.

Sec. 4. Nothing in this act shall be construed to repeal the present law relating to enclosures of two thousand acres or less.

Sec. 5. Nothing in this act shall be held to authorize any person to hunt in any enclosure which is a farm, or in which are growing crops, without the consent of the owner or lessee of such enclosure. (Acts 1899, p. 173.) This Act was omitted from the Code of 1911 by mistake. It should have been the article immediately preceding Article 1256. Berry v. State, 156 S. W. 626.

Art. 1256. **Counties exempt.**—The following counties are hereby exempted, and the provisions of the preceding article shall not have effect or be operative therein, or in any thereof, viz., Upton. (Sec. 6 of Chapter 102, Acts 1899, p. 173, copied in the preceding section, and to which this article should have referred, amended since passed in 1899 by Acts 1903, p. 193, by Acts 1905, p. 99, by Acts 1907, p. 190, by Acts 1909, p. 58, by Acts 1909, p. 153, by Acts 1911, p. 90, leaving only Upton county exempt.)

Sec. 2279. **Statute construed.**—In Berry v. State, 156 S. W. 626, it was held that the Act of 1899 was omitted by mistake, and was in force, notwithstanding its omission from the Code.

The history of the Act, and the original Acts may be looked to for the purpose of determining what counties, if any, are exempt when an article of the Penal Code undertakes to exempt counties from the operation of some other article, the presumption being that the codifiers did not intend to change the law, and this notwithstanding the article naming certain counties as exempt is general in its language. Braun v. State, 40 Texas Crim. Rep. 236; 49 S. W. 620.

A mistake of fact as to the land being owned by one who had no objection to defendant hunting thereon is a defense. Sims v. State, 157 S. W. 1194.

Where a quail flew up out of a lane and went over into an inclosure and defendant went over and fired one shot, he could hardly be said to be "hunting." Sims v. State, 157 S. W. 1194.

Art. 1257. (806) (691c) **Preventing the moving of railroad trains.**—Any person or persons who shall, by force, threats, or intimidation of any kind whatever, against any railroad engineer or engineers, or any conductor, brakeman, or other officer or employe employed or engaged in running any passenger train, freight train, or construction train, running upon any railroad in this State, prevent the moving or running of said passenger, freight or construction train, shall be deemed guilty of an offense, and upon conviction thereof, each and every person so offending shall be fined in a sum not less than one hundred dollars nor more than five hundred dollars, and also imprisoned in the county jail for any period of time not less than three months nor more than twelve months. (Sec. 1, Act March 30, 1887, Acts 1887, p. 72.)

Art. 1258. (807) (691d) **Each day a separate offense.**—Each day said train or trains mentioned in the preceding article are prevented from moving on their road, as specified in the preceding article, shall be

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deemed a separate offense, and shall be punished as prescribed in the preceding article. (Sec. 2, Act March 30, 1887, Acts 1887, p. 72.)

Art. 1259. (808) (691e) **Wilfully injuring railroad, etc.**—Any person who shall wilfully injure any railroad, locomotive engine or tender, or baggage, passenger or freight car of any railroad in this State, so as to prevent the use of (the) same, shall be punished by fine in any sum not less than one hundred dollars, and imprisoned in the county jail not less than three nor more than twelve months. (Sec. 3, Act March 30, 1887, Acts 1887, p. 72.)

Sec. 2280. **Statute construed.**—Article 1259 (808) is not invalid because the statute does not prescribe the maximum fine that may be imposed for its violation. Hamilton v. State, 153 S. W. 135.

Ownership of the car injured may be alleged in the railroad company in the actual control, care and management of the car at the time it was injured. Hamilton v. State, 153 S. W. 135.

CHAPTER IV

INFECTIOUS DISEASES AMONG ANIMALS AND BEES

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Article 1260. (809) (692) **Failing to confine horse with glanders or farcy.**—If any person shall wilfully and knowingly fail, neglect or refuse to place and keep in secure confinement, separate and apart from all other stock, any animal of the horse or ass species, diseased with glanders or farcy, belonging to him or subject to his control, he shall be fined not less than twenty-five nor more than two hundred dollars, or imprisoned in the county jail not less than ten days nor more than three months. (Act Aug. 19, 1876, Acts 1876, p. 211.)

Art. 1261. **Sale or trade of horse with glanders.**—If any person or persons shall trade or sell, or offer to trade or sell, any animal of the horse or ass species known or suspected to be affected with glanders, he shall be fined in any sum not less than five nor more than one hundred dollars, or imprisoned in the county jail not less than ten days nor more than ninety days. (Acts 1897, p. 216.)

Art. 1262. (812a) **Driving sheep affected with contagious disease.**—If any person owning or controlling sheep affected with the scab, or other infectious or contagious disease, shall drive or permit to be driven, such sheep over or along any public road or highway in this State, or shall drive such sheep so affected, or direct or permit such sheep so affected to be driven on or over the inclosed lands of another without first obtaining the written consent of the owner or person in charge of such inclosed lands, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not less than one hundred dollars nor more than five hundred dollars. (Act March 19, 1909, Acts 1909, p. 114.)

Art. 1263. (810) (693) **Using horse with glanders or farcy.**—If any person shall ride, drive or in any manner use any animal of the horse or ass species diseased with glanders or farcy, knowing the same to be so diseased, he shall be punished as prescribed in the preceding article. (Acts 1866, p. 102.)

(This article should have followed article 1260, and evidently is dependent upon that article for its penalty, notwithstanding its faulty position in the Penal Code.)

Art. 1264. (811) **Using or permitting animal with glanders to run at large.**—Any person who may drive, lead or ride any animal

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infected with said diseases of glanders or farcy, knowing them to be so infected, on, along or across any public highway in this State, or allow any such animal so diseased (knowing them to be so diseased and owning such animal) to run at large on the open range of any county in this State, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined in any sum not less than ten dollars nor more than two hundred dollars. (Acts 1892, p. 11, Sec. 5, Act April 12, 1892, 1st Called Session.)

Art. 1265. (812) (694) **Permitting sheep with scab to run at large.**—If any person owning or controlling sheep affected with the scab or other infectious or contagious disease, shall permit such sheep to run at large or in charge of any one beyond the limits of his own land, he shall be fined not exceeding one thousand dollars. (Act Dec. 28, 1861, Acts 1861, p. 21.)

Sec. 2281. **Sheep scab and inspection of sheep.**—The Act of 1911, p. 7 of the General Laws of the Regular Session, repeals some of the articles of this chapter.

Sec. 2282. **Sale or purchase of sheep with scab.**—From and after the first day of July, 1911, it shall be unlawful for any person, firm or corporation to sell or buy any sheep affected with scab. (Sec. 1, Act of Feb. 10, 1911.)

Sec. 2283. **"Scab" defined.**—Scab in this Act is defined to be a disease or itch caused from a bug or parasite which works itself into the wool and flesh of the sheep, causing a crusted sore, injuring the wool and causing same to fall from the animal. (Sec. 1a, Act of 1911.)

Sec. 2284. **Importing sheep with scab.**—From and after the first day of July, 1911, it shall be unlawful for any person, firm or corporation to import into this State any sheep affected with scab. (Sec. 2, Act of 1911.)

Sec. 2285. **Moving sheep with scab from one county to another.**—From and after the first day of July, 1911, it shall be unlawful for any person, firm or corporation to move from one county to another in this State any sheep affected with scab. (Sec. 3, Act of 1911.)

Sec. 2286. **Moving sheep with scab from one part to another part of county.**—From and after the first day of July, 1911, it shall be unlawful for any person, firm or corporation to move from one part of any county in this State to any other part of the same county any sheep affected with scab. (Sec. 4, Act of 1911.)

Sec. 2287. **Driving sheep with scab across lands of another.**—From and after the first day of July, 1911, it shall be unlawful for any person, firm or corporation to drive or cause to be driven on or across the lands of another any sheep affected with scab. (Sec. 5, Act of 1911.)

Sec. 2288. **Driving sheep with scab along or over public road.**—From and after the first day of July, 1911, it shall be unlawful for any person, firm or corporation to drive along or over a public road any sheep affected with scab. (Sec. 6, Act of 1911.)

Sec. 2289. **Penalty.**—Any person, whether acting for himself or as agent for another person, firm or corporation, who shall violate Sections 1, 3, 4, 5, or 6 of this Act shall be guilty of a misdemeanor, and, on conviction thereof, shall be fined in any sum not less than one hundred dollars and not more than two hundred dollars. (Sec. 7, Act of 1911.)

Sec. 2290. **Penalty for importing sheep with scab.**—Any person, whether acting for himself or as agent or employe of any other person, firm or corporation, who shall in person or by agent violate any of the provisions of Section 2 of this Act shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in any sum

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not less than five hundred and not more than two thousand dollars. (Sec. 8, Act of 1911.)

Sec. 2291. **One bad sheep affects whole flock.**—It shall be the duty of the inspector of sheep or his deputy to carefully and minutely examine and inspect at any time sheep in his county, or which may be driven into or through the county; and when one or more sheep affected with scab are found in any flock so inspected, the entire flock shall be condemned by said inspector or deputy and considered as affected with said disease. (Sec. 11, Act of 1911.)

Sec. 2292. **Refusing to permit sheep to be dipped.**—If scab or scabbies are found in any flock of sheep when same is inspected, which inspection shall be made whenever the Live Stock Sanitary Commission may receive information by notification by any citizen or otherwise that scab probably exists, any member of said commission, or an inspector appointed by said commission, shall have the power, and he is hereby given the power, to inspect and dip said sheep at the owner's expense; and if any owner or owners shall refuse to permit said sheep to be dipped after having been examined and condemned by said commission, he shall be fined in any amount not less than fifty dollars nor more than two hundred dollars. (Act March 23, 1915, Acts 1915, p. 168.)

Sec. 2293. **Failing to cure sheep with scab.**—Should the inspector of sheep find any flock or flocks of sheep in his county affected with scab, he shall notify the owner of such sheep, and demand of the owner that his sheep be cured of scab in thirty days; and should such owner fail or refuse to cure his sheep of scab within that period of time, then the inspector is authorized to take charge of such flock or flocks of sheep and dip the same in lime and sulphur; provided, however, that if the owner or owners of such infected sheep cannot be found in the county where the sheep are situated, then the notice herein provided for shall be given to the person or persons in charge of such sheep, and such notice shall be as binding as if given to the owner or owners. And in addition to the recovery by the Commissioners Court as herein provided, should any owner or any person in charge of such flock or flocks of sheep fail or refuse to cure such sheep of scab when instructed to do so by the inspector, such owner or person in charge of such sheep shall be liable upon conviction therefor to a fine of not less than one hundred dollars nor more than two hundred dollars. (Sec. 13, Act of 1911.)

Sec. 2294. **County judge or Commissioners Court liable.**—Any county judge or Commissioners Court wherein this law is operative, who shall fail or refuse to discharge the duties incumbent upon them as provided for in this Act, shall be deemed guilty of a misdemeanor and upon conviction shall be fined in any sum not less than one hundred dollars nor more than two hundred dollars; and it is hereby made the special duty of the district judge of any county coming within the provision of this Act to specially charge the grand jury at each term of the court to diligently investigate as to whether this law is being violated. (Sec. 17, Act of 1911.)

Art. 1266. **Import same into State or move from one county to another.**—It shall be unlawful to import into this State, or to move from one county to another, or to move from their accustomed range onto lands owned or leased by any person, without permission of such person, any flock of sheep in which one or more of such animals are infected with scab; and any person moving from one county into an adjoining county, with sheep, shall, before crossing the boundary line of said adjoining county, notify the county judge of said county wherein he proposes to enter or cross, and the said county judge shall appoint two competent persons, well versed in the knowledge of the scab disease, to examine said flock or flocks; and, if the same shall be found free of scab, or other infectious disease, then said sheep shall be allowed to proceed through said county; and the county judge shall receive the sum of two dollars and fifty cents for his services; and the said

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persons so appointed by him shall receive the sun of two dollars per day for their services. Said money to be paid by the party owning said sheep. Any person violating any of the provisions of this law shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined in any sum of not less than fifty dollars and not more than one hundred dollars for each such offense. Provided, that this law shall not apply to any person en route from his ranch for the purpose of delivery of his sheep at a railroad shipping point, or any point designated by the buyer thereof; provided, that said party can show a written contract signed by himself and the party to whom he has sold said sheep, specifying the place of delivery; said contract being witnessed by two reputable and creditable persons, citizens of the county in which said sheep were sold; provided, that the person desiring to import into this State, or to move from one county to another, any flock of sheep, shall not be required to have said sheep examined, except in the first county through which he proposes to pass with said sheep; and he shall indicate to the persons making the examination the destination of said sheep; and the county judge making the examination shall issue to the owner or persons in charge of said sheep a certificate showing said sheep to be free from scab and other infectious diseases, which certificate shall be good for one continuous journey of not exceeding thirty days. (Sec. 1, p. 222, Acts of 1905.)

Art. 1267. **Moving sheep with scab along public road.**—Any person who shall move sheep infected with scab along a public road in this State shall be fined in any sum not less than fifty hundred (fifty) nor more than one hundred dollars. (Sec. 2, p. 223, Acts 1905. Repealed by Sec. 6, Act of 1911, Acts of 1911, p. 7.)

Art. 1268. **Refusing to permit sheep to be examined.**—Any person who shall refuse to permit his sheep to be examined for scab or other infectious diseases, or to place the sheep in pen for such purpose, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined in any sum not less than fifty dollars nor more than one hundred dollars. (Sec. 3, p. 223, Acts of 1905.)

Art. 1269. (813) **Inspector of sheep to be appointed, when, etc.**—(This article is Section 1, p. 140, Acts of 1891, and is repealed by Section 9, p. 7, Acts 1911. See Act March 23, 1915, Acts 1915, p. 168.)

Art. 1270. (814) **Bond of inspector.**—(This article is Section 2 of the Act of 1891, p. 140, and is the same as Section 10 of the Act of 1911, p. 8. Such articles as these do not belong in a Penal Code.)

Art. 1271. (815) **Duties of inspector.**—(This article is Section 3, Act 1891, and is in effect about the same as Section 11, p. 8, Act of 1911.)

Art. 1272. (816) **Fees of inspector.**—(This article is Section 4, Act of 1891, and by Act of 1911, p. 8, and by Acts of 1913, p. 422, the inspector of sheep is to be paid a salary.)

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Art. 1273. (817) **Duty of inspector.**—(This article is Section 5, Act of 1891, and is repealed by Section 13, Act of 1911.)

Art. 1274. (818) **Sheep with scab to be cured by owner.**—Whenever any flock of sheep in any county in this State has been inspected as provided for in this law, and found to be affected with scab, it shall be the duty of the owner or person in charge of such flock to thoroughly cure the same within twenty days from said inspection. (Sec. 6, Acts 1891, p. 141. See Section 13, Act of 1911, which allows thirty days at least.)

Sec. 2295. **Alleging a failure to cure sheep of disease.**—Information held bad. Hand v. State, 37 Texas Crim. Rep. 310; 39 S. W. 676.

Art. 1275. (819) **Penalty for violation of this law, etc.**—Any inspector of sheep or his deputy who shall fail to comply with any of the provisions of this chapter, or who shall wilfully or with intent to harass, vex or put to expense, any owner or person in charge of sheep, notify such owner or person in charge that his flock is diseased, or who shall unlawfully demand or receive any fee or compensation where none is allowed by law, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined in any sum not less than fifty nor more than two hundred dollars; and thereupon the office shall be deemed vacant, and the commissioners court may appoint another inspector for such county. (Sec. 7, Acts of 1891, p. 142.)

Art. 1276. (820) **Penalty for violation by owners.**—Any owner or person in charge of sheep who shall wilfully and knowingly violate any of the provisions of this chapter, when the penalty is not otherwise provided for by this chapter, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined in any sum not less than fifty nor more than two hundred dollars. (Sec. 8, Acts 1891, p. 142.)

Art. 1277. (821) **Wool growers may pay inspectors, etc.**—Whenever in any county in the State there shall not be sufficient scab or other contagious and infectious diseases among the sheep to pay the sheep inspector a fair remuneration, under the fees provided by this law, it shall be lawful for any association of wool growers in such counties to pay such inspector such additional sums of money as to them may seem right and proper in order to keep such inspector in the performance of the duties of his office. (Sec. 9, Acts 1891, p. 142.)

Art. 1278. (822) **Counties exempt.**—The counties of Freestone, Gonzales, Morris, Titus, Cass, Marion, Bowie, Red River, Trinity, San Jacinto, Polk, Anderson, Van Zandt, Cameron, Collin, Colorado, Grimes, Houston, Webb, Encinal, Hunt, Hopkins, Ellis, Dallas, Rockwall, Denton, Fannin, Henderson, Brazos, Smith, Panola, Gregg, Lamar, Wood, Rains, Limestone, Cooke, Brown, Comanche, Cherokee, Mills, Montgomery, Shelby, Lee, Burleson, Rusk, Lavaca, Milam, Wise, Upshur, Robertson, Camp, Parker, Franklin, Navarro, Karnes, Wilson, Atascosa, Harrison, San Augustine, Sabine, Fayette, Austin, Leon, Mad-

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ison, Hill, Bosque, Waller, Fort Bend, Washington, Guadalupe, Caldwell, Hays, Tarrant, Johnson, Clay, Montague, Erath, Hood, Somervell, Bastrop, Harris, Harrison, Orange, Jefferson, Hardin, Liberty, Chambers, Newton, Tyler, Jasper, Kaufman, Nacogdoches, DeWitt, Victoria, Jackson, Calhoun, Refugio, Goliad and Aransas counties are exempted from the provisions of this chapter. (Sec. 10, Acts 1891, p. 142, amended Acts 1903, p. 117.)

Art. 1279. (823) **To graze along public road.**—If any person shall drive or graze, or cause to be driven or grazed, along or upon any public road in this State, any sheep affected with scab, knowing the same to be so affected, he shall be fined not exceeding one thousand dollars. (Acts 1876, p. 227.)

Art. 1280. (824) **Importation of sheep with scab.**—If any person shall drive or cause to be driven into this State from any other State or country, any sheep affected with scab or any other infectious or contagious disease, knowing the same to be so affected, he shall be fined not exceeding one thousand dollars. (Act Dec. 28, 1861, Acts 1861, p. 21.)

Art. 1281. (824a) **Bringing infected animal into the State.**—Any person who shall knowingly bring into this State any domestic animal which is infected with any contagious or infectious disease, or any animal which has been exposed to any contagious or infectious disease, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than five hundred nor more than five thousand dollars. (Sec. 8, Act April 20, 1893, Acts 1893, p. 72.)

Art. 1282. (824b) **Refusing examination by live stock commissioner.**—Any person who owns or is in possession of live stock, which is reported to be affected with any infectious or contagious disease, who shall refuse to allow the State live stock sanitary commissioners to examine such stock, or shall hinder or obstruct the said commissioners in any examination of, or in any attempt to examine, such stock, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than one hundred nor more than five hundred dollars. (Sec. 9, Act April 20, 1893, Acts 1893, p. 72.)

Art. 1283. (824c) **Owner permitting infected animal to run at large.**—Any person who shall have in his possession any domestic animal affected with any contagious or infectious disease, knowing such animal to be affected, who shall permit such animal to run at large, or who shall keep such animal where other domestic animals, not affected by or previously exposed to such disease, may be exposed to its contagion or infection, or who shall ship, drive, sell, trade, or give away such diseased animal or animals which have been exposed to such infection or contagion, or who shall move or drive any domestic animal in violation of any direction, rule, regulation, or order of the live stock sanitary commission of Texas establishing and regulating live stock quarantine, shall be deemed guilty of a misdemeanor, and upon convic-

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tion thereof shall be fined in any sum not less than one hundred dollars nor more than five hundred dollars for each of such exposed or diseased domestic animals which he shall permit to run at large, or sell, ship, drive, trade, or give away in violation of the provisions of this article; provided, that any owner of a domestic animal which has been affected with or exposed to any contagious or infectious disease, may dispose of the same, after having obtained from the State live stock sanitary commissioners a bill of health for such animal or animals. (Sec. 10, Act April 20, 1893, Acts 1893, p. 72.)

Art. 1284. (824d) **Penalties.**—Except as otherwise provided in this law, any person who shall violate, disregard, or evade, or attempt to violate, disregard, or evade any of the provisions of this law, or who shall violate, disregard, or evade, or attempt to violate, disregard, or evade any of the rules, regulations, orders, or directions of the live stock sanitary commission, establishing and governing quarantine, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than one hundred nor more than five thousand dollars. (Sec. 13, Act April 20, 1893, Acts 1893, p. 72. See Acts 1913, p. 355, Sec. 6.)

Sec. 2296. **Violating live stock quarantine—Indictment.**—Where the statute makes it an offense to move or drive a domestic animal in violation of any regulation or order of the live stock sanitary commission, it is not a sufficient allegation to allege that the regulation and order was made by an inspector. Rhea v. State, 156 S. W. 643.

An indictment for moving or driving a domestic animal in violation of quarantine regulations, to be sufficient, must allege that the acts of defendant were among the rules announced by the proclamation of the Governor. Wallace v. State, 69 S. W. 506. Rhea v. State, 156 S. W. 643.

Sec. 2297. **Live stock quarantine regulations.**—When the statute so provides, a quarantine line cannot legally be established by the State Live Stock Sanitary Commission except in conformity with the Federal quarantine line. Roberson v. State, 38 Texas Crim. Rep. 507; 43 S. W. 989. Wallace v. State, 69 S. W. 506. Trent v. State, 75 S. W. 857. (The Act of 1913 gives authority to the commission to establish other quarantine lines when conditions demand it. Smith v. State, 168 S. W. 522.)

The question as to whether cattle can be moved within this State has nothing to do with the Federal law on that subject. Roberson v. State, 38 Texas Crim. Rep. 507; 43 S. W. 989.

The Legislature has authority to authorize the Governor and the Live Stock Sanitary Commission to establish quarantine lines. Smith v. State, 168 S. W. 522.

Sec. 2298. **Live Stock Sanitary Commission.**—"Any person, company or corporation violating any of the provisions of this Act, or any of the rules or regulations prescribed to (by) the Live Stock Sanitary Commission, shall be deemed guilty of a misdemeanor and on conviction shall be punished by a fine of not less than fifty nor more than one thousand dollars." (Sec. 6, Act April 8, 1913, Acts 1913, p. 355.)

Sec. 2299. **Refusing to treat animals when directed.**—"Any person, company or corporation owning, controlling or caring for any domestic animals affected with or known to have been exposed to any contagious or infectious disease or the agency or transmission thereof, who shall fail or refuse to dip or otherwise treat such live stock at such time and in such manner as directed by the Live Stock Sanitary Commission shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than fifty dollars nor more than one thousand dollars." (Sec. 7, Act April 8, 1913, Acts 1913, p. 356.)

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Sec. 2300. **Charbon or anthrax.**
Sec. 2301. Failing to report cases of charbon.
Sec. 2302. Failing to destroy carcass.
Sec. 2303. Disobeying charbon quarantine.
Sec. 2304. Permitting animals to run at large.

Sec. 2301. **Failing to report cases of charbon or anthrax.**—"Each person residing in a district where charbon or anthrax is prevalent or where the same is supposed to be prevalent shall report in writing to the county health officer, who in turn shall report in writing to the president of the State Board of Health at Austin, all cases where an animal or animals are suffering with charbon or anthrax or supposed to have such disease, and each physician practicing in the State of Texas shall report in writing to the president of the State Board of Health all persons suffering from charbon or anthrax or supposed to be suffering from same and in case of failure to do so any person so failing shall be deemed guilty of a misdemeanor and upon conviction shall be fined in any sum not less than $10.00 nor more than $25.00 and each case of which no report is made shall constitute a separate offense." (Sec. 10b, Act of March 31, 1913, Acts 1913, p. 147.)

Sec. 2302. **Failing to destroy carcass.**—"Carcasses of stock which have died from charbon or anthrax shall be destroyed by burning by the owner or person in charge within 24 hours after death and any owner or person having charge of said animals who should fail to destroy said carcasses as herein provided shall be guilty of a misdemeanor and upon conviction shall be fined in any sum not less than $25.00 nor more than $100.00 and each 24 hours after the first 24 hours that said carcass is permitted to remain undestroyed shall be considered a separate offense." (Sec. 10e, Act March 31, 1913, Acts 1913, p. 148.)

Sec. 2303. **Disobeying charbon quarantine.**—"The county health officer shall be the exclusive judge of the necessity of isolation or quarantine of all animals infected therewith and when in the judgment of said county health officer there exists a necessity therefor said county health officer shall issue a proclamation directing that all animals of certain classes which he may specify in the infected district, in either the entire county or any political subdivision thereof, shall be placed and kept in an enclosure by the owners or keeper thereof, and any owner, or keeper of such animals for the owners, who shall fail or refuse to obey the requirements of such proclamation shall be fined in any sum not less than $10.00 nor more than $50.00 and where any owner or keeper for the owner shall have more than ten animals subject to the quarantine regulations herein provided the fine shall be doubled and each day that any owner or keeper for such owner shall fail to comply with the proclamation of said county health officer, shall constitute a separate offense and such quarantine shall continue and be in effect as long as in the judgment of such county health officer it may be necessary to prevent the spread or charbon or anthrax." (Sec. 10f, Act March 31, 1913, Acts 1913, p. 148.)

Sec. 2304. **Permitting animals to run at large.**—From and after the issuance and posting according to law of the proclamation declaring the result of the election held in a charbon district to be against the running at large of domestic animals therein it shall be unlawful for any owner or keeper of cattle, horses, sheep, goats, and hogs, or any of them, to permit such animals as have been voted upon to run at large within such county or subdivision thereof at any time within which the same has been prohibited; and in case of failure or refusal of any owner or keeper of such stock or any of them to comply with such proclamation he shall be deemed guilty of a misdemeanor and shall be fined in any sum not less than five dollars nor more than fifty dollars and each day that any owner or keeper for such owner shall fail to comply with the law as herein provided for, shall constitute a separate offense. (Sec. 10i, Act March 31, 1913, Acts 1913, p. 150.)

Sec. 2305. **Honey bees.**
Sec. 2306. Authority of State Entomologist.
Sec. 2307. Common carriers accepting shipment.
Sec. 2308. Protective quarantine.
Sec. 2309. Restrictive quarantine.
Sec. 2310. Regulating sale and shipment.
Sec. 2311. Penalty.

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Sec. 2312. Duty to report diseased bees.
Sec. 2313. Sale, etc., of infected bees, etc.
Sec. 2314. Exposing infected honey, etc.
Sec. 2315. Interfering with inspection, etc.

Articles 1285 to 1288, inclusive, are so amended by the Act of March 27, 1913, Acts of 1913, p. 96, as to make it unnecessary to set them out, their subject matter and effect being fully covered by the later law, which is divided into subjects for convenience and set out in the following sections.

Sec. 2306. **Authority of State Entomologist.**—"The State Entomologist shall have full and plenary power to deal with all contagious or infectious diseases of honey bees which, in his opinion, may be prevented, controlled or eradicated; and shall have full power and authority to make, promulgate and enforce such rules, ordinances, orders and regulations, and to do and perform such acts as, in his judgment, may be necessary to control, eradicate or prevent the introduction, spread or dissemination of any (or) all contagious diseases of honey bees as far as may be possible, and all the rules, ordinances, orders and regulations of said State Entomologist shall have the force and effect of law in so far as they conform to the General Laws of this State and the United States. The State Entomologist, in the exercise of the power and authority herein delegated, shall have authority to prohibit the shipment or bringing into this State of any honey bees, honey, honeycomb, or articles or things capable of transmitting contagious or infectious diseases of bees, from any State, territory or foreign country, except under such rules and regulations as may be adopted and promulgated by said State Entomologist." (Sec. 3, Act March 27, 1913, Acts 1913, p. 96.)

Sec. 2307. **Common carriers accepting shipment.**—"It shall be unlawful for railroad companies, express companies and other common carriers to accept for shipment, between points within this State, any honey bees, used honeycombs, used beehives or fixtures, except under such regulations and provisions as the State Entomologist shall prescribe." (Sec. 5, Act March 27, 1913, Acts 1913, p. 97.)

Sec. 2308. **Protective quarantine.**—"The State Entomologist shall have authority to declare a protective quarantine in any district, county, precinct or other defined area wherein foul brood or other contagious disease of bees is not known to exist, or wherein any disease of bees is being eradicated in accordance with the provisions of this Act, said quarantine to prohibit the movement or shipment, into said district, county, precinct or other area, of any bees, honey, appliances or other things capable of transmitting the disease or infection, except under such rules and regulations as he shall prescribe." (Sec. 8, Act March 27, 1913, Acts 1913, p. 97.)

Sec. 2309. **Restrictive quarantine.**—"The State Entomologist shall have authority when, in his opinion, public welfare and necessity require it, to place a restrictive quarantine upon any district, county, precinct or other defined area wherein are located any honey bees infected with contagious or infectious disease, said quarantine to prohibit the movement or shipment therefrom of any bees, honey, appliances or other things capable of transmitting the infection, except under such rules and regulations as he shall prescribe." (Sec. 9, Act March 27, 1913, Acts 1913, p. 98.)

Sec. 2310. **Regulating sale and shipment.**—"Queen bees and their attendant bees shall not be sold or offered for sale in this State unless accompanied by a copy of a certificate from a State or Government entomologist or apiary inspector to the effect that the apiary from which said queen bees are shipped has been inspected within the preceding twelve months and found apparently free from contagious and infectious diseases, or by a copy of a statement by the beekeeper made before a notary public or other officer having a seal that the bees are not diseased to the best belief of affiant and that the honey used in making the candy contained in the queen cage has been diluted and boiled for at least thirty minutes in a closed vessel." (Sec. 10, Act March 27, 1913, Acts 1913, p. 98.)

Sec. 2311. **Penalty.**—"Any person, firm or corporation violating any of the provisions of this Act, or violating any of the rules, quarantines, orders or regulations of the State Entomologist issued in accordance with the provisions of this Act shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof, be fined in any sum not less than twenty-five nor more than two hundred dollars." (Sec. 11, Act March 27, 1913, Acts 1913, p. 98.)

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Sec. 2312. **Duty to report diseased bees.**—"If any owner of, or any person having control or possession of any honey bees in this State, knows that any bees so owned or controlled are affected with American foul brood, or any other contagious or infectious disease, or knows of any other bees so diseased, it shall be and is hereby made his duty to at once report such fact to the State Entomologist at College Station, Texas, setting out in his said report all the facts known with reference to said infection." (Sec. 13, Act March 27, 1913, Acts 1913, p. 99.)

Sec. 2313. **Sale, etc., of infected bees, etc.**—"If any owner or keeper of any diseased colonies of bees shall barter, give away, sell, ship or move any infected bees, honey or appliances, or shall expose any other bees to the danger of infection of the disease, or shall refuse or neglect to make report as provided in Section 13 of this Act, he shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not less than twenty-five nor more than two hundred dollars." (Sec. 17, Act March 27, 1913, Acts 1913, p. 99.)

Sec. 2314. **Exposing infected honey, etc.**—"It shall be unlawful for any person, firm or corporation to expose, on their own premises or elsewhere, any honey, hives, frames, combs, brood or appliances known to be infected by foul brood or other dangerous disease of bees, in such a manner that honey bees may have access to same; and it shall be unlawful to sell, offer for sale, barter, give away, ship or distribute any honey taken from a colony or colonies of bees infected with foul brood or other infectious or contagious disease. Violation of this section shall be deemed a misdemeanor and any person, firm or corporation convicted thereof shall be fined in any sum not less than twenty-five nor more than two hundred dollars." (Sec. 18, Act March 27, 1913, Acts 1913, p. 99.)

Sec. 2315. **Interfering with inspection, etc.**—"Anyone who shall seek to prevent any inspection of bees, honey or appliances under the direction of the State Entomologist, in accordance with this Act, or who shall seek or attempt to prevent the discovery or treatment of diseased honey bees, or who shall attempt to intimidate the State Entomologist, his assistants or inspectors, or otherwise interfere with them in the lawful discharge of their duties as herein defined shall be deemed guilty of a misdemeanor, and shall, upon conviction, be fined in any sum not less than twenty-five nor more than two hundred dollars." (Sec. 19, Act March 27, 1913, Acts 1913, p. 100.)

CHAPTER V

CUTTING AND DESTROYING TIMBER

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Article 1289. (825) **Punishment for.**—If any person, without the consent of the owner, shall knowingly cut down or destroy any tree or timber upon any land not his own, or shall knowingly, and without such consent, carry away any such timber, he shall be fined not less than ten nor more than five hundred dollars. (Code of 1856, art. 717.)

Art. 1290. (826) **"Timber" and "owner" include what.**—The word "timber," as used in the preceding article, includes rails or other articles manufactured from timber; and the word "owner" includes the State and any corporation, public or private, owning lands within this State. (Added in revising 1879.)

Sec. 2316. **Timber.**—Before the word "timber" was specially defined by statute so that it is given a meaning different from its ordinary meaning, it was held that fence rails did not come within the meaning of the term "timber." McCauley v. State, 43 Texas 374.

The term "timber" does not embrace wood which is suitable for no other purpose than fuel. Wilson v. State, 17 Texas Crim. App. 394.

Art. 1291. (827) **Procedure in prosecutions.**—In any prosecution under article 1289, the indictment or information need not allege the name of the owner of the timber, but it shall be sufficient for it to state that the timber was not the property of the accused; and it shall be sufficient to describe the land by the name of the owner, or of the original grantee, or by any name or names by which it may be commonly known in the neighborhood in which the alleged offense was committed.

Sec. 2317. **Form for information.**
In the name and by the authority of the State of Texas:

....., County Attorney of ..... county, Texas, comes in behalf of the State of Texas, and presents in and to the County Court of ..... county, Texas, at the ..... term, A. D. ....., of said court that John Doe heretofore on the ..... day of ....., A. D. ....., in said county and State did without the consent of the owner knowingly cut down and destroy (or "cut down and carry away") trees and timber not his own upon land not his own, the said land being then and there owned by ..... (or "the said land being then and there the tract originally granted to ....." or "the said land being then and there commonly known as .....").

Against the peace and dignity of the State.

.....
County Attorney, ... county, Texas.

Sec. 2318. **Indictment or information.**—It must be alleged that the act was "knowingly" done, and it is not sufficient to allege that it was "unlawfully" or "willfully" done. State v. Stalls, 37 Texas 441. State v. Arnold, 39 Texas 74.

The indictment or information need not describe the land further than to follow the language of the statute. Welsh v. State, 11 Texas 374. State v. Warren, 13 Texas 46. Leggett v. State, 25 Texas Crim. App. 535; 8 S. W. 660.

A material variance between the information and the complaint on which it is based as to the ownership of the land is fatal. Calvert v. State, 8 Texas Crim. App. 538.

Giving the name of the owner of the land is a sufficient description of the land, and when this is done it is not necessary to give the name of the original grantee. State v. Warren, 13 Texas 46.

It may be alleged in the same count that defendant "did cut down and destroy" or "did cut down and carry away" the tree or timber, and proof that the offense was

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committed in either manner will support such allegation. This form of allegation is permitted because these two phases of the offense are not repugnant to each other and are punishable in the same manner and to the same extent. But it should not be alleged in the same count that defendant "did destroy and carry away," because these two phases are repugnant to each other.

Art. 1292. (828) **Modes of proving ownership.**—Upon the trial of any case coming within the provisions of article 1289, the State may prove the ownership of the land to be in some person other than the defendant by either of the following modes:

1. By the copy of a grant duly certified from the General Land Office.

2. By a deed, or a copy of a deed, or other evidence of title, duly certified, from the office of the clerk of the county court of the county where the prosecution is pending.

3. By a certificate from the comptroller's office, or from the assessor and collector of the county, that some person other than the defendant pays taxes on the land.

4. By verbal testimony of title, or of notorious use and possession of the land by some person other than the defendant; and such proof shall be held sufficient until contradicted by competent evidence on the part of the defendant that he is the owner of the land. (Acts 1858, p. 179.)

Sec. 2319. **Proof of ownership.**—The burden of proof is upon the State to show that defendant was not the owner of the timber or of the land. Belverman v. State, 16 Texas 132. White v. State, 14 Texas Crim. App. 450. Mann v. State, 47 Texas Crim. Rep. 250; 83 S. W. 195.

Prima facie proof on the part of the State is all that is required to throw upon defendant the burden of proving a superior right or title in himself. Belverman v. State, 16 Texas 132.

It is not necessary to prove that the title to the land was in another than defendant as alleged when that fact is already proven by the admissions of defendant. Welsh v. State, 11 Texas 368.

Title cannot be proven by proof of hearsay declarations of the supposed owner, nor by proof of an opinion based on having seen title deeds. Belverman v. State, 16 Texas 131.

Proof of notorious use and possession of the land may be made by verbal testimony. Belverman v. State, 16 Texas 131. Phillips v. State, 17 Texas Crim. App. 169.

If defendant at the time of cutting the timber also had notorious use and possession of the land, the testimony that another than defendant at the same time had such notorious use and possession is not sufficient proof that defendant was not the owner of the land. White v. State, 14 Texas Crim. App. 451.

Sec. 2320. **Evidence.**—If defendant had the consent of the owner, or had inadvertently cut the trees, it is a matter of defense. Welsh v. State, 11 Texas 374.

A conviction will not be sustained where defendant believed that the land was his, and the ownership is in doubt. White v. State, 14 Texas Crim. App. 451. Allsup v. State, 62 S. W. 1062. Mann v. State, 47 Texas Crim. Rep. 250; 83 S. W. 195.

Defendant is entitled to prove that he believed that the land on which the timber or trees was cut belonged to him, and that it was under such belief that it was cut. Matthews v. State, 42 S. W. 375.

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If the indictment or information unnecessarily describes the survey, the allegation, being descriptive, must be proved as laid. Evans v. State, 40 S. W. 988.

Where a lease had been transferred without consent of the lessor, and defendant had been notified by the agent of the lessor not to carry away the timber, he could not defend on the ground of his purchase from the transferee of the lessee. Lindley v. State, 44 S. W. 166.

Sec. 2321. **Charge of the court.**—If there is evidence that the land on which the timber was cut belonged to defendant the court should give a charge affirmatively presenting this theory. Mann v. State, 47 Texas Crim. Rep. 250; 83 S. W. 195.

If there is evidence that the land belonged to the wife of defendant, the court should charge the jury that if this was the case defendant would have a right to cut the timber from it. White v. State, 14 Texas Crim. App. 452.

If the State's only proof that defendant was not the owner of the land is that another than defendant had notorious use and possession of it, and there is testimony that defendant also had such use and possession, the court should charge the jury that if these were the facts it would not be sufficient proof that the defendant was not the owner of the land. White v. State, 14 Texas Crim. App. 451.

It is error to refuse to submit to the jury the issue of a mistake of fact when there is evidence to support such theory. Thomas v. State, 54 Texas Crim. Rep. 377; 112 S. W. 1049.

If there is evidence that defendant purchased the timber in good faith believing it to be the property of his vendor, the court should charge the jury that if this was the fact he would not be guilty. Lackey v. State, 14 Texas Crim. App. 165.

The term "timber" is correctly defined by a charge that informs the jury that by "timber" as used in the statute, is that sort of wood which is proper for building, or for tools, utensils, furniture, carriages, fences, ships, and the like, usually said of fallen trees, but sometimes of those standing. Wilson v. State, 17 Texas Crim. App. 393.

Art. 1293. (829) **Road repairs, etc., not included.**—Nothing in the foregoing articles of this chapter contained shall render any person guilty of an offense who cuts or uses timber for the purpose of making or repairing any public road or bridge passing over or immediately adjacent to the land on which such tree or timber may be found, or who uses a reasonable amount of wood standing outside of an inclosure for the purpose of making fires while traveling upon the road.

Art. 1294. (830) **If the offense is theft, punishable as such.**—Nothing contained in the foregoing articles of this chapter shall exempt a person from the penalty affixed to the offense of theft whenever timber is taken in such manner as to come within the definition of that offense.

Art. 1295. (831) **Destroying pecan or walnut tree.**—If any person shall cut down or otherwise destroy or injure any pecan or walnut tree on land not his own without authority in writing from the owner of such pecan or walnut tree, he shall be punished by fine of not less than twenty-five nor more than fifty dollars. (Acts 1871, p. 42.)

Art. 1296. **Gathering pecans or injuring pecan timber.**—Any person who shall, hereafter, gather any pecan nuts upon inclosed land not owned, leased or controlled by him, unless it be made to appear in defense that it was done by the consent of the owner, lessor, or person in control, or any person who shall cut, destroy or injure any pecan

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timber upon lands not his own, unless it be made to appear in defense that it was done with the consent of the owner thereof, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than five dollars and not more than three hundred dollars, or by imprisonment in the county jail not more than three months, or by both such fine and imprisonment. (Acts 1897, p. 53.)

Art. 1297. (832) **Person floating timber shall brand same.**—Any person engaged in floating or rafting timber upon the waters of any river or creek of this State shall have a log brand with which to brand every log or stick that he may float or haul and put into the waters for sale or market, the same to be distinctly branded. (Act April 7, 1879, p. 81, Sec. 1.)

Art. 1298. (833) **Shall have brand recorded.**—He shall have said brand recorded in every county in which he cuts any of said timber, and in the county where he proposes to sell or market said timber, by the county clerk in a book to be kept by said clerk for that purpose, for which said clerk shall receive a fee the same as is by law allowed for recording stock brands. (Act April 7, 1879, p. 81, Sec. 2.)

Art. 1299. (834) **Shall make report of logs cut, etc.**—Any persons who float any logs or timber in this State shall, on the first day of April, first day of July, first day of October and the first day of January of each year, or within fifteen days of such dates, make a written report, under oath, showing the number of logs cut or floated during the next preceding three months, the survey or surveys of land from which they were cut or carried, and the number cut from each, and a description of the brand placed thereon, and shall file the same with the county clerk of the county in which the timber was cut, and such clerk shall record the same in a book kept for that purpose, and index it, and receive therefor the sum of fifty cents from the party presenting the same; provided, this act shall not apply to pickets, posts, rails or firewood. (Act of April 7, 1879, p. 81, Sec. 3.)

Art. 1300. (835) **Certificate of clerk evidence of ownership.**—A certificate, under the hand of the county clerk, containing a description of a log brand and the name of the owner thereof, with a transfer on the back of it, signed and acknowledged by such owner or proved as other instruments for record, shall be prima facie evidence that the person to whom the transfer is made owns the logs described thereon. (Act April 7, 1879, p. 81, Sec. 4.)

Art. 1301. (836) **Offenses and punishment; definitions.**—Any person who shall buy or sell any timber or log floating or that has been floated in this State, before the same has been branded, shall be guilty of a misdemeanor, and upon conviction shall be fined not more than ten dollars for each log or piece of timber so purchased, sold or traded for. Any person who shall float any unbranded log or timber for market, or who shall fail to make the reports required by this act, or any

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person who shall brand any log or timber of another without his authority, or any person who shall deface any brand on any log or timber otherwise than when it is in the act of being sawed or manufactured into lumber or other commodity for use in building, or any person not an employe of the owner, who shall, without the written consent of the owner, take into possession any branded or unbranded log or timber cut for floating or sawing, or any sawed timber, lumber or shingle, floating in any of the waters of this State, or deposited upon the banks of any river or stream in this State, shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by fine not exceeding two hundred dollars for each offense. By "lumber" is meant lumber attached or bound together in some way for floating, and not loose lumber, and by "shingles" is meant shingles in bunches or bundles, and not loose shingles. (Act April 7, 1879, p. 81, Sec. 5.)

Art. 1302. (837) **Venue.**—The courts of the county in which the timber or lumber was deposited in the water, or in which it was unlawfully taken into possession or unlawfully defaced, sold, purchased or branded, as the case may be, shall have jurisdiction of the violation of the act or omission complained of or constituting an offense under this chapter. (Act April 7, 1879, p. 81, Sec. 6.)

CHAPTER VI

BURGLARY

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Article 1303. (838) (704) **"Burglary" defined.**—The offense of burglary is constituted by entering a house by force, threats or fraud, at night; or in like manner by entering a house at any time, either day or night, and remaining concealed therein, with the intent in either case of committing a felony or the crime of theft. (O. C. 724, amended Acts 1876, p. 231, amended Acts 1897, p. 65.)

Art. 1304. (839) (705) **Burglary by breaking.**—He is also guilty of burglary who, with intent to commit a felony or theft, by breaking, enters a house in the daytime. (O. C. 725, amended by Acts 1876, p. 231.)

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Sec. 2322. **Breaking with intent to steal—Form for indictment.** 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 John Doe on the ..... day of ....., A. D. ....., in said county and State did break and enter a house then and there occupied and controlled by ..... with the intent then and there to fraudulently take therefrom corporeal personal property therein being and then and there belonging to the said ..... from the possession of the said ..... without his consent and with the intent then and there to deprive the said ..... of the value of the same and to appropriate it to the use and benefit of the said John Doe.

Against the peace and dignity of the State.

.....
Foreman of the grand jury.

Sec. 2323. **Burglary without breaking—Form for indictment.** In the name and by the 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 John Doe on the ..... day of ....., A. D. ....., in said county and State did by force, threats and fraud, and at night, enter a house then and there occupied and controlled by ..... with the intent then and there to (here allege the felony or theft intended to be committed in all its essential elements).

And the grand jury aforesaid in said court do further present that John Doe on the ..... day of ....., A. D. ....., in said county and State did by force, threats and fraud enter a house then and there occupied and controlled by ..... and did then and there remain concealed therein with the intent then and there to (here allege the felony or theft intended to be committed, setting out the essential elements thereof).

Against the peace and dignity of the State.

.....
Foreman of the grand jury.

Sec. 2324. **Allegation of ownership.**—An allegation that the house was "owned by" is equivalent to an allegation that it was "occupied and controlled by" the injured party, and the allegation of ownership may be made in either form. Wilson v. State, 42 S. W. 290. Price v. State, 58 S. W. 83.

In the law of burglary and theft the person in actual care, control and management of the property at the time of the alleged burglary or alleged theft is the owner thereof, and ownership may be alleged in the person in such actual care, control and management, and it is not necessary to allege whether the title is in a corporation, partnership, or firm. Pyland v. State, 33 Texas Crim. Rep. 382; 26 S. W. 621. Linhart v. State, 33 Texas Crim. Rep. 504; 27 S. W. 260. Lega v. State, 36 Texas Crim. Rep. 38; 34 S. W. 926. Lamater v. State, 38 Texas Crim. Rep. 249; 42 S. W. 304. Ricks v. State, 41 Texas Crim. Rep. 676; 56 S. W. 928. Cogshall v. State, 58 S. W. 1011. Blackwell v. State, 73 S. W. 960. Mays v. State, 50 Texas Crim. Rep. 391; 97 S. W. 703. King v. State, 100 S. W. 387. Shelton v. State, 52 Texas Crim. Rep. 612; 108 S. W. 679. Clark v. State, 58 Texas Crim. Rep. 181; 125 S. W. 12. Moore v. State, 59 Texas Crim. Rep. 363; 128 S. W. 1115. Kinkead v. State, 61 Texas Crim. Rep. 651; 135 S. W. 573. Whorton v. State, 151 S. W. 300. Holmes v. State, 157 S. W. 487. Powers v. State, 162 S. W. 832.

The rules as to alleging and proving ownership in cases of burglary are the same as in cases of theft. Moore v. State, 59 Texas Crim. Rep. 363; 128 S. W. 1115. Payne v. State, 148 S. W. 694. Whorton v. State, 151 S. W. 300. Powers v. State, 162 S. W. 832.

An indictment for burglary, as in cases of theft, may ignore the mere custody of a clerk, servant, or other person in mere temporary custody. Buchanan v. State, 24 Texas Crim. App. 195; 5 S. W. 847. Linhart v. State, 33 Texas Crim. Rep. 504; 27 S. W. 260. King v. State, 100 S. W. 387. Moore v. State, 59 Texas Crim. Rep. 363; 128 S. W. 1115.

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The term "occupied" in the law of burglary is equivalent to possession, and the pleader may allege that the injured party occupied the house alleged to have been burglarized although the proof discloses that it was a chicken house or other house not in fact then occupied by any person. Tidwell v. State, 45 S. W. 1015. Moore v. State, 48 Texas Crim. Rep. 400; 88 S. W. 230.

Ownership may be directly alleged in the person in possession, that is, in the actual care, control and management of the property at the time of the alleged burglary, and it is not necessary to allege how such person, who is in law the special owner, came to be such owner. Linhart v. State, 33 Texas Crim. Rep. 504; 27 S. W. 260. Reed v. State, 34 Texas Crim. Rep. 597; 31 S. W. 404. Alvia v. State, 42 Texas Crim. Rep. 424; 60 S. W. 551. Johnson v. State, 48 Texas Crim. Rep. 339; 88 S. W. 813.

Where property is owned in common or jointly by two or more persons, either as general or special owners, ownership may be alleged to be in all or either of them. Coates v. State, 31 Texas Crim. Rep. 257; 20 S. W. 585. Tidwell v. State, 45 S. W. 1015. Farris v. State, 69 S. W. 140. Mass v. State, 81 S. W. 45. Whorton v. State, 151 S. W. 300. Powers v. State, 162 S. W. 832. Lewis v. State, 162 S. W. 867.

When the testimony supports the allegation, the court may charge the jury the statutory provisions as to the sufficiency of the allegation of ownership and possession. Lamater v. State, 38 Texas Crim. Rep. 249; 42 S. W. 304. Clark v. State, 58 Texas Crim. Rep. 181; 125 S. W. 12.

If the entry was made with intent to steal, the fact that the property actually taken belonged to the wife of the prosecuting witness does not require the ownership of such property to be alleged in her. Smith v. State, 53 Texas Crim. Rep. 646; 111 S. W. 939.

Sec. 2325. **Alleging want of consent.**—An indictment for burglary need not allege in terms that the entry was made without the consent of the owner. The allegation that defendant "did break and enter," or that the entry was by force, threats or fraud necessarily embraces the idea that such an entry was without the free consent of the occupant. Sullivan v. State, 13 Texas Crim. App. 462 (overruling Brown v. State, 7 Texas Crim. App. 621). Summers v. State, 9 Texas Crim. App. 396. Reed v. State, 14 Texas Crim. App. 666. Buntain v. State, 15 Texas Crim. App. 487. Langford v. State, 17 Texas Crim. App. 451. Black v. State, 18 Texas Crim. App. 127. Smith v. State, 22 Texas Crim. App. 353; 3 S. W. 238. Taylor v. State, 23 Texas Crim. App. 639; 5 S. W. 141. Sampson v. State, 20 S. W. 708. Williams v. State, 143 S. W. 634. Alsup v. State, 153 S. W. 627.

An indictment for burglary with intent to commit theft is bad if it fails to allege that the accused intended to take the property without the consent of the owner. Treadwell v. State, 16 Texas Crim. App. 644. Fox v. State, 61 Texas Crim. Rep. 544; 135 S. W. 570.

In setting out the elements of the theft intended to be committed the rules as to alleging the want of consent of the owner to the taking which apply in theft cases are also applicable in burglary cases. Taylor v. State, 23 Texas Crim. App. 639; 5 S. W. 141. Smith v. State, 44 S. W. 521. Fox v. State, 61 Texas Crim. Rep. 544; 135 S. W. 570.

Sec. 2326. **Describing the house.**—An indictment for burglary need not allege that an ordinary building or house was not a private residence. Shaffer v. State, 65 S. W. 1072. Gilford v. State, 48 Texas Crim. Rep. 312; 87 S. W. 698. Stephens v. State, 154 S. W. 1001.

Except when it is sought to allege the burglary of a private residence at night, it is not necessary to allege any further description of the building, structure, or house alleged to have been burglarized other than to allege in the language of the statute that it was "a house." Shaffer v. State, 65 S. W. 1072. Stephens v. State, 154 S. W. 1001.

The failure to use the word "house" in an indictment for burglary is not fatal to the validity thereof if the place as described therein comes within the meaning of "a house." Bingham v. State, 31 Texas Crim. Rep. 244; 20 S. W. 577.

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Sec. 2327. **"Did break and enter."**—In an indictment for burglary other than the burglary of a private residence at night, if it is alleged that the accused "did break and enter" it need not be alleged whether the entry was in the daytime or at night; and under such allegation when the proof shows an entry by force applied to the house, which is a "breaking," with the intent to commit the felony or theft alleged, it is immaterial whether the house was entered in the daytime or at night. Carr v. State, 19 Texas Crim. App. 635. Martin v. State, 21 Texas Crim. App. 10; 17 S. W. 430. Buchanan v. State, 24 Texas Crim. App. 199; 5 S. W. 847. Finlan v. State, 13 S. W. 866. Sampson v. State, 20 S. W. 708. Rodriguez v. State, 26 S. W. 406. Lane v. State, 28 S. W. 468. Smith v. State, 34 Texas Crim. Rep. 124; 29 S. W. 775. Combs v. State, 49 S. W. 585. Wilks v. State, 51 S. W. 902. Shaffer v. State, 65 S. W. 1072. True v. State, 48 Texas Crim. Rep. 631; 89 S. W. 1066. Newman v. State, 55 Texas Crim. Rep. 274; 116 S. W. 577. Montgomery v. State, 55 Texas Crim. Rep. 506; 117 S. W. 1160. Walker v. State, 55 Texas Crim. Rep. 546; 117 S. W. 797. Vargas v. State, 60 Texas Crim. Rep. 196; 131 S. W. 594. Snodgrass v. State, 148 S. W. 1095. Stephens v. State, 154 S. W. 1001. Howard v. State, 178 S. W. 513.

The word "force" need not be used in an indictment for burglary if it is alleged that defendant "did break and enter." It is not possible to break and enter without resorting to force. Sullivan v. State, 13 Texas Crim. App. 464. Carr v. State, 19 Texas Crim. App. 635.

When it is not sought to charge the burglary of a private residence at night, it is not the better practice to allege whether the entry was made in the daytime or at night when the entry was by breaking. When the burglary of a private residence at night is not involved, an allegation that defendant "did break and enter" without alleging whether the entry was in the daytime or at night is a sufficient allegation of the entry to support a conviction for a burglary by breaking either in the daytime or at night, and under such allegation and proof the charge of the court is not required to even mention daytime or nighttime or to define those terms or either of them. Carr v. State, 19 Texas Crim. App. 635. Lane v. State, 28 S. W. 468. Smith v. State, 34 Texas Crim. Rep. 124; 29 S. W. 775. Combs v. State, 49 S. W. 585. Howard v. State, 178 S. W. 513.

Sec. 2328. **Unnecessary words.**—The words "burglariously" or "feloniously" are entirely unnecessary in an indictment for burglary under our Code. Reed v. State, 14 Texas Crim. App. 664. Jones v. State, 55 S. W. 491.

It is not necessary to allege that the entry was "fraudulently" made, as this is not equivalent to an allegation that the entry was made "by fraud," and there is nothing in the statute that requires the entry to be "fraudulently" made. Sullivan v. State, 13 Texas Crim. App. 462.

When not descriptive of that which is legally essential to the validity of the indictment, unnecessary words may be rejected as surplusage. Hammons v. State, 29 Texas Crim. App. 445; 16 S. W. 99.

Sec. 2329. **Allegation of intent.**—To constitute burglary under our Code the entry must be with the intent to commit a felony or the crime of theft, and the intent, therefore, is an essential element of the offense of burglary and must be proven in order to sustain a conviction for burglary, and being a material fact in the description of such offense the intent must be alleged in the indictment by direct and affirmative allegations and not by way of inference. Reeves v. State, 7 Texas Crim. App. 278. Sullivan v. State, 13 Texas Crim. App. 465. Hammons v. State, 29 Texas Crim. App. 445; 16 S. W. 99. Robinson v. State, 160 S. W. 457.

It is essential to the validity of an indictment for burglary that it allege that the entry was with intent to commit a felony or the crime of theft, and the indictment, in addition to alleging the burglarious entry, must also allege each element or ingredient of the felony or theft intended to be committed. State v. Williams, 41 Texas 101. Wilburn v. State, 41 Texas 237. White v. State, 1 Texas Crim. App. 211. Brown v. State, 7 Texas Crim. App. 622. Webster v. State, 9 Texas Crim. App. 75. Rodriguez v. State, 12 Texas Crim. App. 552. Reed v. State, 14 Texas Crim. App. 662. Treadwell v. State, 16 Texas Crim. App. 643. Taylor v. State, 23 Texas Crim. App. 639; 5 S. W. 141. O'Brien v. State, 27 Texas Crim. App. 448; 11 S. W. 459.

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Fox v. State, 61 Texas Crim. Rep. 544; 135 S. W. 570. Robinson v. State, 160 S. W. 457.

Sec. 2330. **Alleging intent to steal.**—The Act of 1876 extended the law of burglary so as to include the intent to commit all theft, whether felony or misdemeanor, and it is not, therefore, necessary to allege the value of the property intended to be stolen after the entry. The very nature of the offense of burglary renders it unnecessary in an indictment for burglary to describe therein the property intended to be stolen. Martin v. State, 1 Texas Crim. App. 528. Coleman v. State, 2 Texas Crim. App. 512. Summers v. State, 9 Texas Crim. App. 396. Sullivan v. State, 13 Texas Crim. App. 464. Washington v. State, 17 Texas Crim. App. 203. Black v. State, 18 Texas Crim. App. 124. Collins v. State, 20 Texas Crim. App. 197. Green v. State, 21 Texas Crim. App. 68; 17 S. W. 262. Neiderluck v. State, 23 Texas Crim. App. 38; 3 S. W. 573. Davis v. State, 23 S. W. 687. Hamilton v. State, 24 S. W. 32. Gilder v. State, 61 Texas Crim. Rep. 16; 133 S. W. 883. Bradford v. State, 62 Texas Crim. Rep. 424; 138 S. W. 118. Stephens v. State, 154 S. W. 1001.

Where it is sought to allege that the entry was made with intent to commit theft, an indictment for burglary is bad if there is no allegation of the intent to take the property "from the possession" of the owner. Reed v. State, 14 Texas Crim. App. 662. O'Brien v. State, 27 Texas Crim. App. 448; 11 S. W. 459. Robinson v. State, 160 S. W. 457.

If an indictment for burglary alleges that the intent was to commit theft and in the same count a completed theft is correctly alleged, it is not bad for failing to allege the elements of theft in connection with the intent. Williams v. State, 24 Texas Crim. App. 69; 5 S. W. 838. Bigham v. State, 31 Texas Crim. Rep. 250; 20 S. W. 577. Coates v. State, 31 Texas Crim. Rep. 257; 20 S. W. 585.

Where the burglary is sought to be based upon an entry with intent to commit theft, it is necessary to allege that the intent was to fraudulently take the property "without the consent" of the owner. Treadwell v. State, 16 Texas Crim. App. 644. Fox v. State, 61 Texas Crim. Rep. 544; 135 S. W. 570.

Sec. 2331. **Allegation of nighttime burglary.**—In Summers v. State, 9 Texas Crim. App. 396, and Bravo v. State, 20 Texas Crim. App. 188, it was held that the indictments in those cases did not allege a nighttime burglary for failure to allege that the entry was made at night or in the day and remaining concealed until night; but it having been alleged in each of those indictments that the defendant did "break and enter" the indictments did charge and were good for a burglary by breaking whether the entry by breaking was made in the daytime or at night.

In an indictment for burglary committed at night it is unnecessary to allege that the entry was by means of a breaking; an allegation that the entry was at night by force, or by threats, or by fraud, or by force, threats and fraud, is sufficient. Garner v. State, 31 Texas Crim. Rep. 22; 19 S. W. 333. Bradford v. State, 62 Texas Crim. Rep. 424; 138 S. W. 118.

Art. 1305. (839a) **Burglary of a private residence at night.**—The offense of burglary of a private residence is constituted by entering a private residence by force, threats or fraud, at night, or in any manner by entering a private residence at any time, either day or night, and remaining concealed therein until night, with the intent, in either case, of committing a felony, or the crime of theft. (Act June 5, 1899, Acts 1899, p. 318.)

Sec. 2332. **Burglary of private residence—Form for indictment.**
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 John Doe on the ..... day of ....., A. D....., in said county and State did by force, threats and fraud, and at night, enter a house there situate, the same being then and there the private residence of .....,

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and being then and there occupied and actually used by the said ..... as a place of residence, with the intent then and there to fraudulently take therefrom corporeal personal property then and there therein and belonging to the said ..... from the possession of the said ..... without the consent of the said ..... and with the intent to deprive the said ..... of the value of the same and to appropriate it to the use and benefit of the said John Doe.

Against the peace and dignity of the State.

.....

Foreman of the grand jury.

Sec. 2333. **Indictment for burglary of a private residence.**—An ordinary indictment for burglary alleging that defendant "did break and enter" is good for the burglary of a private residence entered in the daytime by breaking, and when these are the facts it is not necessary to allege that the house was a private residence. Williams v. State, 42 Texas Crim. Rep. 606; 62 S. W. 1057. Adams v. State, 62 S. W. 1058. Reyes v. State, 51 Texas Crim. Rep. 420; 102 S. W. 421. Martinez v. State, 51 Texas Crim. Rep. 584; 103 S. W. 930. Ellis v. State, 57 Texas Crim. Rep. 601; 124 S. W. 667.

It is not sufficient to allege in the language of the statute that the accused entered "a private residence," but it must be also alleged in some way that the house entered was occupied and actually used at the time of the offense by some person or persons as a place of residence. Jones v. State, 50 Texas Crim. Rep. 101; 96 S. W. 44. Johnson v. State, 50 Texas Crim. Rep. 116; 96 S. W. 45. Lewis v. State, 54 Texas Crim. Rep. 636; 114 S. W. 819.

An allegation that the "house was then and there the private residence of the said Woody Salyer, and the said Woody Salyer was then and there using said house as a private residence" was held sufficient. Sedgwick v. State, 57 Texas Crim. Rep. 420; 123 S. W. 703.

An allegation that the house was "occupied and controlled by B. G. Tartt, which said house was then and there actually used and occupied by the family of B. G. Tartt as a private residence" was held sufficient. Knuckles v. State, 55 Texas Crim. Rep. 7; 114 S. W. 825.

An allegation that the "house was then and there actually used, occupied and controlled by R. Bernadoni as the private residence of his family" was held sufficient. Jones v. State, 55 Texas Crim. Rep. 537; 117 S. W. 127.

An indictment for burglary of a private residence at night need not set out the names of the family of the injured party. Jones v. State, 55 Texas Crim. Rep. 535; 117 S. W. 127.

An allegation of an entry into a "house, the same being occupied and actually used by a family as a private residence, then and there occupied and controlled by B. W. Collins" is bad. Lewis v. State, 54 Texas Crim. Rep. 636; 114 S. W. 819.

Where the husband and wife are living together, the ownership of the house, if community property, must be alleged in the husband. Jones v. State, 47 Texas Crim. Rep. 127, 80 S. W. 530.

The indictment may allege in different counts a daytime burglary of a house, and a nighttime burglary of a private residence, when based on the same transaction, so as to meet the proof on the trial and to prevent a variance, and the State is not required to elect between such counts. Jackson v. State, 71 S. W. 280. Martinez v. State, 51 Texas Crim. Rep. 584; 103 S. W. 930. Johnson v. State, 52 Texas Crim. Rep. 203; 107 S. 52. Hawthorn v. State, 62 Texas Crim. Rep. 114; 136 S. W. 776. Fox v. State, 62 Texas Crim. Rep. 430; 138 S. W. 413.

To allege in the same count a daytime and a nighttime burglary of a private residence would render that count bad for duplicity, the punishment being different, and both offenses being completely alleged.

Art. 1306. (840) (706) **"Entry" defined.**—The "entry" into a house, within the meaning of article 1303, includes every kind of entry

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but one made by the free consent of the occupant, or of one authorized to give such consent; it is not necessary that there should be any actual breakage (breaking) to constitute the offense of burglary, except when the entry is made in the daytime. (O. C. 725a.)

Sec. 2334. **The entry.**—When a burglary by breaking is alleged and relied on, article 1306 of the Penal Code has no application to such a burglary; it having reference only to a burglary by a constructive breaking, such as an entry by force not applied to the house, or an entry by threats or by fraud, any consent obtained by such means not being a free consent. When it is alleged that the defendant "did break and enter" and the proof shows an entry by actual force applied to the house, the court should ignore the provisions of this article in the charge to the jury and thereby avoid the questions that arise from attempts to apply the provisions of an article that is not applicable in the particular case.

Article 1306 of the Penal Code is an aid to a proper construction of the general statute; it furnishes a rule of reason to be considered, but not a rule of law to be obeyed, and it is safer not to attempt to charge its provisions to the jury as well as wholly unnecessary.

Article 1306 does not repeal or change the provisions of article 1303 requiring that the entry be by force, threats or fraud in order to constitute a nighttime burglary. Hamilton v. State, 11 Texas Crim. App. 116.

A charge that by "entry" is meant every kind of entry but one made by the free consent of the occupant is erroneous if the jury are left under the impression that no breaking is necessary to constitute burglary. Buntain v. State, 15 Texas Crim. App. 488. Ross v. State, 16 Texas Crim. App. 559. Bates v. State, 50 Texas Crim. Rep. 568; 99 S. W. 551. Newman v. State, 55 Texas Crim. Rep. 275; 116 S. W. 577. Winkler v. State, 58 Texas Crim. Rep. 564; 126 S. W. 1136.

It is error to charge the jury that by "entry" is meant every kind of entry but one made by free consent of the occupant where the entry was made in the daytime, and the jury are left under the impression that if defendant entered the house without the consent of the occupant it would be burglary. Bates v. State, 50 Texas Crim. Rep. 568; 99 S. W. 551. Winkler v. State, 58 Texas Crim. Rep. 568; 126 S. W. 1136.

An abstract charge that by "entry" is meant every kind of entry but one made by the free consent of the occupant is not reversibly erroneous if, in applying the law to the facts the jury are required to find force, and the defensive theory of an open door is affirmatively submitted. Jones v. State, 60 Texas Crim. Rep. 426; 132 S. W. 476.

An abstract charge that by "entry" is meant every kind of entry but one made by free consent of the occupant is not reversibly erroneous if it is followed by a proper definition of breaking, and the jury are required to find a breaking as alleged before they could convict. Montgomery v. State, 55 Texas Crim. Rep. 502; 116 S. W. 1160.

When it is proven that some one burglariously entered the house as alleged, the confession of defendant is sufficient to prove that he was the guilty party. Attaway v. State, 35 Texas Crim. Rep. 403; 34 S. W. 112. Kelly v. State, 61 Texas Crim. Rep. 663; 136 S. W. 58.

Sec. 2335. **Entry by fraud.**—An allegation that defendant "did fraudulently enter" does not charge an entry by fraud. Sullivan v. State, 13 Texas Crim. App. 462.

It is error to charge on the theory that the entry was by fraud when there is no allegation to support such theory. Sullivan v. State, 13 Texas Crim. App. 462.

To constitute an entry by fraud there must be some trick, device, stratagem, or false statement, in other words, fraud, practiced upon the occupant; and consent obtained by fraud is not "free consent." Hamilton v. State, 11 Texas Crim. App. 123. Sullivan v. State, 13 Texas Crim. App. 465. Neiderluck v. State, 23 Texas Crim. App. 39; 3 S. W. 573. Edwards v. State, 36 Texas Crim. Rep. 387; 37 S. W. 438.

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Where defendant removed his shoes from his feet to prevent detection and clandestinely entered the house, it was not an entry by fraud, the occupant not being thereby led to consent to such entry. Hamilton v. State, 11 Texas Crim. App. 123.

Art. 1307. (841) (707) **"Entry" further defined.**—The entry is not confined to the entrance of the whole body; it may consist of the entry of any part for the purpose of committing a felony; or it may be constituted by the discharge of fire-arms or other deadly missile into the house, with intent to injure any person therein; or it may be constituted by the introduction of any instrument for the purpose of taking from the house any personal property, although no part of the body of the offender should be introduced. (O. C. 726.)

Sec. 2336. **Entry of part of body.**—The language of the statute, article 1307, is that "the entry is not confined to the entrance of the whole body; it may consist of the entry of any part for the purpose of committing a felony." The language of article 1307 (Old Code 726) was not changed to "a felony or the crime of theft" as was article 1303 (Old Code 724) by the Act of 1876, and in Jones v. State, 48 Texas Crim. Rep. 336; 87 S. W. 1157, it was held that where only a part of the body entered the house it must be shown that the intent was to commit a felony. In Mason v. State, 100 S. W. 383, and Williams v. State, 53 Texas Crim. Rep. 2; 108 S. W. 371, the Jones case was overruled, and the words "or the crime of theft" were added to article 1307.

Sec. 2337. **Entry through door.**—Pushing, shoving, or pulling open a door that is closed is sufficient force to constitute a breaking. Sparks v. State, 34 Texas Crim. Rep. 87; 29 S. W. 264. Matthews v. State, 38 S. W. 172. Parker v. State, 38 S. W. 790. Wagner v. State, 47 S. W. 372. Hedrick v. State, 40 Texas Crim. Rep. 536; 51 S. W. 252. Duke v. State, 42 Texas Crim. Rep. 5; 57 S. W. 652. Barber v. State, 69 S. W. 515. Jones v. State, 60 Texas Crim. Rep. 426; 132 S. W. 476. Hollis v. State, 153 S. W. 853.

Opening a closed door with intent to commit theft is a burglary by breaking although the door unlatched and opened was the door of a store which had been opened for business, and the door afterwards closed. Gonzales v. State, 50 S. W. 1018.

A witness is not entitled to testify that his impression is, from his habit as to such matters, that he closed the door of the house when he left. Green v. State, 49 Texas Crim. Rep. 240; 90 S. W. 1115.

The entry through an open door when neither force, threats, or fraud is used or made to effect such entry is not a burglarious entry if the statute requires that the entry be by breaking, or by force, threats, or fraud. Hamilton v. State, 11 Texas Crim. App. 123. Melton v. State, 24 Texas Crim. App. 288; 6 S. W. 303. Jones v. State, 25 Texas Crim. App. 228; 7 S. W. 669. Williams v. State, 13 S. W. 609. Edwards v. State, 36 Texas Crim. Rep. 389; 37 S. W. 438. Duke v. State, 42 Texas Crim. Rep. 5; 57 S. W. 652. Stout v. State, 51 Texas Crim. Rep. 569; 103 S. W. 391. Newman v. State, 55 Texas Crim. Rep. 275; 116 S. W. 577. Malley v. State, 58 Texas Crim. Rep. 425; 126 S. W. 599. Moore v. State, 59 Texas Crim. Rep. 361; 128 S. W. 1115.

When burglary of a private residence by remaining concealed until night is not involved, the statute requires that an entry into a house and remaining concealed must be made by force, threats, or fraud, and an entry through an open door and remaining concealed in the house is not burglarious unless the entry was effected by force, threats, or fraud. Edwards v. State, 36 Texas Crim. Rep. 389; 37 S. W. 438. St. Louis v. State, 59 S. W. 889. Smith v. State, 60 S. W. 669. Malley v. State, 58 Texas Crim. Rep. 425; 126 S. W. 599.

When the statute requires the entry to be by breaking, or by force, threats or fraud, then proof that the defendant broke out of the house is not sufficient to prove such an entry. Edwards v. State, 36 Texas Crim. Rep. 389; 37 S. W. 438. St. Louis

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v. State, 59 S. W. 889. Smith v. State, 60 S. W. 669. Malley v. State, 58 Texas Crim. Rep. 425; 126 S. W. 599.

Though the entry be through an open door, yet if when within the house the party so entering open a closed door and enter with intent to commit a felony or theft, this is burglary. Martin v. State, 1 Texas Crim. App. 530. Anderson v. State, 17 Texas Crim. App. 305. McKinney v. State, 29 S. W. 271. Williams v. State, 34 Texas Crim. Rep. 327; 30 S. W. 669.

Entering a store through an open door, no force, threats, or fraud being used to effect such entry, and remaining concealed until the occupants left and then taking goods and opening the door and going out is not burglary. Edwards v. State, 36 Texas Crim. Rep. 387; 37 S. W. 438. St. Louis v. State, 59 S. W. 889. Smith v. State, 60 S. W. 669. Malley v. State, 58 Texas Crim. Rep. 425; 126 S. W. 599.

A clandestine entry through an open door is not an entry by force. Hamilton v. State, 11 Texas Crim. App. 123. Costello v. State, 21 S. W. 360. Malley v. State, 58 Texas Crim. Rep. 425; 126 S. W. 599.

If the proof shows without controversy that no door was open, it is not error to fail or refuse to charge on the theory of an entry through an open door. Mays v. State, 58 Texas Crim. Rep. 651; 127 S. W. 546.

If there is evidence that the entry was through an open door and such evidence, if true, would show that defendant was not guilty of burglary, it is error to fail to affirmatively present this defensive theory no matter from what source such testimony comes, and the charge on such defensive theory should be apart from and untrammeled by the State's theory. Duke v. State, 42 Texas Crim. Rep. 5; 57 S. W. 652. Stout v. State, 51 Texas Crim. Rep. 569; 103 S. W. 391. Moore v. State, 59 Texas Crim. Rep. 361; 128 S. W. 1115.

Where defendant opened the door of a house and entered there is no necessity or occasion for the court to define the terms "force" or "entry." Dupree v. State, 56 Texas Crim. Rep. 206; 119 S. W. 685.

If there is no evidence that the door at which defendant entered was open it is not necessary to define the terms "force" or "entry." Brown v. State, 56 Texas Crim. Rep. 91; 119 S. W. 312.

Sec. 2338. **Burglary by discharge of fire-arms.**—Indictments held good. Searcy v. State, 1 Texas Crim. App. 440. Garner v. State, 31 Texas Crim. Rep. 22; 19 S. W. 333. Shetters v. State, 147 S. W. 582.

To discharge fire-arms or other deadly missile into a house with the intent to unlawfully injure any person therein is burglary. Garner v. State, 31 Texas Crim. Rep. 22; 19 S. W. 333. Railey v. State, 58 Texas Crim. Rep. 1; 121 S. W. 1120. Windham v. State, 59 Texas Crim. Rep. 366; 128 S. W. 1130. Gradington v. State, 155 S. W. 210.

If the defendant shot into the house with an intent to unlawfully injure any person therein, it is not necessary to charge on aggravated assault. Railey v. State, 58 Texas Crim. Rep. 1; 121 S. W. 1120. Windham v. State, 59 Texas Crim. Rep. 366; 128 S. W. 1130.

The charge of the court assumes that the shooting had been proven if the jury are instructed that the first question to determine is, "who did the shooting?" Searcy v. State, 1 Texas Crim. App. 442.

In a prosecution for burglary by shooting into a house, antecedent menaces, former quarrels, grudges, and assaults may be shown to prove motive. Gradington v. State, 155 S. W. 210.

The State is not entitled to prove a disconnected subsequent threat or a subsequent disconnected attempt to injure the prosecuting witness. Crass v. State, 30 Texas Crim. App. 480; 17 S. W. 1096. Windham v. State, 59 Texas Crim. Rep. 366; 128 S. W. 1130.

Art. 1308. (842) (708) **"Breaking" defined.**—By the term "breaking," as used in article 1304, is meant that the entry must be

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made with actual force. The slightest force, however, is sufficient to constitute breaking; it may be by lifting the latch of a door that is shut, or by raising a window, the entry at a chimney, or other unusual place, the introduction of the hand or any instrument to draw out the property through an aperture made by the offender for that purpose. (O. C. 727.)

Sec. 2339. **Entry at unusual place.**—An entry into a house made at an unusual place with intent to commit a felony or theft is a burglary by breaking, and, therefore, is burglary whether such entry was made in the daytime or at night. Anderson v. State, 17 Texas Crim. App. 305; Nash v. State, 20 Texas Crim. App. 386. Painter v. State, 26 Texas Crim. App. 465; 9 S. W. 774. Knotts v. State, 32 S. W. 532. Green v. State, 58 S. W. 99. Holland v. State, 47 Texas Crim. Rep. 623; 85 S. W. 798. Davis v. State, 52 Texas Crim. Rep. 335; 107 S. W. 855. Kinney v. State, 148 S. W. 785.

It is not necessary in the charge to the jury to define the term "unusual place of entry;" whether the entry was made at an unusual place is a question of fact for the jury. Painter v. State, 26 Texas Crim. App. 454; 9 S. W. 774. Green v. State, 58 S. W. 99.

A window may or may not be an unusual place of entry; it is a question of fact for the jury. Alexander v. State, 31 Texas Crim. Rep. 359; 20 S. W. 756. Davis v. State, 52 Texas Crim. Rep. 335; 107 S. W. 855.

An entry made through a transom over a door is an entry at an unusual place. Holland v. State, 47 Texas Crim. Rep. 623; 85 S. W. 798.

An entry through a small hole under a sill is an entry at an unusual place. Knotts v. State, 32 S. W. 532.

Sec. 2340. **Aperture.**—It is not burglary to reach through an opening in a house and take property therefrom where the aperture was not made by the offender for that purpose. Winkler v. State, 58 Texas Crim. Rep. 564; 126 S. W. 1136.

Sec. 2341. **Charge on "breaking."**—Where it is alleged that defendant "did break and enter" it is proper for the charge to inform the jury what is a breaking, and it is better to directly instruct the jury on the facts in evidence which, if true, would show a breaking, such as "the opening of a closed door is a breaking;" "the entry at an unusual place is a breaking;" "the raising a window and entering therein is a breaking and entry;" and the like, although it is not reversible error to include in the definition of a breaking all or any of the statutory illustrations which find no support in the testimony. It is not error to fail to define a breaking when a breaking is proven to have been made by actual force applied to the house. The charge should always however, in fairness, be restricted to the case as made by the allegations and the testimony. Levine v. State, 22 Texas Crim. App. 683; 3 S. W. 660. Sparks v. State, 34 Texas Crim. Rep. 86; 29 S. W. 264. Young v. State, 44 S. W. 835. Green v. State, 58 S. W. 99.

Art. 1309. (843) (709) **"House" defined.**—A "house," within the meaning of this chapter, is any building or structure erected for public or private use, whether the property of the United States, of this State, or of any public or private corporation or association, or of any individual, and of whatever material it may be constructed. (O. C. 728.)

Sec. 2342. **House.**—The definition of the term "house," as defined with reference to particular offenses, is limited to the particular offenses to which it relates; there being no general statute defining that term. Waul v. State, 33 Texas Crim. Rep. 228; 26 S. W. 199.

In burglary cases the term "house" is defined by the statute to mean any building or structure erected for public or private use and of whatever material it may

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be constructed. Anderson v. State, 17 Texas Crim. App. 310. James v. State, 63 Texas Crim. Rep. 559; 140 S. W. 1086. Dennis v. State, 158 S. W. 1008. Williams v. State, 162 S. W. 838.

When not specially defined by statute, the term "house" must be taken and construed in its ordinary sense which is every kind of building or structure "housed in" or roofed, regardless of whether it has ever been inhabited; any structure which has walls on all sides and is covered by a roof. Waul v. State, 33 Texas Crim. Rep. 230; 26 S. W. 199.

The term "house" in arson cases is defined as "any building, edifice, or structure inclosed with walls and covered, whatever may be the materials used for building." Smith v. State, 23 Texas Crim. App. 362; 5 S. W. 219. Allen v. State, 62 Texas Crim. Rep. 505; 137 S. W. 1133.

The law does not mention the character of structure or the material of which it shall be made. It protects the humble tenant in his tent as well as his more fortunate neighbor in his palace. Favro v. State, 39 Texas Crim. Rep. 452; 46 S. W. 932.

An humble structure built of odd planks and boxes and covered with a wagon sheet, and used by the occupant as his residence is a "house" within the burglary statute. Favro v. State, 39 Texas Crim. Rep. 453; 46 S. W. 932.

A building with walls, roof, and door, used for and commonly called "a smokehouse" is a house within the burglary statute. Irvin v. State, 37 Texas 412. Albritton v. State, 26 S. W. 398.

The fact that a barn is nailed up tight does not take it out of the definition of a "house." Crow v. State, 48 Texas Crim. Rep. 25; 85 S. W. 1057.

A building used as a corn-crib is a house. Barber v. State, 69 S. W. 515.

A fruit stand built somewhat in the shape of a piano box and being about eight feet high and containing counters and shelves, and large enough so the proprietor in making sales could stand inside or outside as he desired, is a "house" within the burglary statute. Willis v. State, 33 Texas Crim. Rep. 168; 25 S. W. 1119.

A place partitioned off and used separately from the other portions of a warehouse as an office, and commonly known as a room in the house, is a "house" within the burglary statute although its walls are not solid and do not reach the ceiling. Anderson v. State, 17 Texas Crim. App. 309. Kinney v. State, 148 S. W. 785.

To constitute a house within the burglary statute, it is not necessary that a partition be of a permanent character. Kinney v. State, 148 S. W. 783.

A showcase detached from the building which is about six feet square and eight feet high with a cover on it and a door with a lock is not a "house" within the burglary statute. Clark v. State, 56 Texas Crim. Rep. 494; 120 S. W. 892.

A display window in a store may constitute a "house" within the burglary statute. Williams v. State, 162 S. W. 839.

An icebox in a cold storage house, used by the renter thereof to store meats, and which is about six feet wide and seven feet high and with a door as the means of going in and out thereof, is a "house" within the burglary statute. James v. State, 63 Texas Crim. Rep. 559; 140 S. W. 1086.

A portable box 6x14 feet with four sides and a cover made to hold about two hundred bushels of oats is not a "house" within the burglary statute. Williamson v. State, 39 Texas Crim. Rep. 60; 44 S. W. 1107.

A telephone booth open to the public indiscriminately is not a "house" within the meaning of the burglary statute. Love v. State, 52 Texas Crim. Rep. 84; 105 S. W. 791.

If the house is described with unnecessary particularity in the indictment, the allegation, being descriptive, must be proved as laid. Martinez v. State, 51 Texas Crim. Rep. 584; 103 S. W. 930.

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The failure to use the word "house" in an indictment will not render it defective if the place named therein is a house. Bigham v. State, 31 Texas Crim. Rep. 244; 20 S. W. 577.

A burglary may be committed on the inside of the main house although the entry into the main house was through an open door. Martin v. State, 1 Texas Crim. App. 530. Anderson v. State, 17 Texas Crim. App. 305. McKinney v. State, 29 S. W. 271.

Breaking into a showcase or show window made into and a part of the house is a breaking into a house. Lewis v. State, 162 S. W. 867.

Art. 1310. (844) (710) **"Daytime" defined.**—By the term "daytime" is meant any time of the twenty-four hours from thirty minutes before sunrise until thirty minutes after sunset. (O. C. 737.)

Sec. 2343. **"Nighttime" defined.**—By the term "nighttime," so far as it relates to burglary and to theft at night, is meant any time of the twenty-four hours from thirty minutes after sunset until thirty minutes before sunrise. Laws v. State, 26 Texas Crim. App. 643; 10 S. W. 220. Jackson v. State, 38 S. W. 990.

Art. 1311. (845) (711) **Punishment for burglary.**—The punishment for burglary shall be imprisonment in the penitentiary not less than two nor more than twelve years.

Sec. 2344. **Intent to steal.**—The intent with which the defendant entered the house is a question of fact for the jury, to be gathered from all the circumstances of the case. When it is alleged that the burglarious entry was made with intent to commit theft, and the jury have found that such entry was made with such intent, and such finding has been approved by the trial court, the judgment of conviction will ordinarily be sustained if there is nothing in the testimony to indicate that such entry was made with any other intent. Franco v. State, 42 Texas 276. Alexander v. State, 31 Texas Crim. Rep. 359; 20 S. W. 756. Mullens v. State, 35 Texas Crim. Rep. 149; 32 S. W. 691. Matthews v. State, 38 S. W. 172. Smith v. State, 51 Texas Crim. Rep. 427; 102 S. W. 406. Moore v. State, 52 Texas Crim. Rep. 364; 107 S. W. 355. Williams v. State, 143 S. W. 634. Black v. State, 165 S. W. 571.

It is error to charge the jury that a theft after an entry raises a presumption that the entry was made with the intent to commit theft. Black v. State, 18 Texas Crim. App. 129.

It is the intent, and not the character or value of the articles stolen after the burglarious entry, which characterizes and makes the offense of burglary complete. Black v. State, 18 Texas Crim. App. 128. Collins v. State, 20 Texas Crim. App. 201. Farris v. State, 69 S. W. 140. Smith v. State, 53 Texas Crim. Rep. 646; 111 S. W. 939.

It is error to charge the jury to convict defendant of burglary if they find that the entry was made with the intent "to commit a felony or theft," if the only intent alleged is an intent to commit theft. The charge of the court should never authorize the jury to convict the defendant of an offense which is not alleged. Williams v. State, 53 Texas Crim. Rep. 2; 108 S. W. 371. Emerson v. State, 54 Texas Crim. Rep. 628; 114 S. W. 835. Newman v. State, 55 Texas Crim. Rep. 276; 116 S. W. 577. Winkler v. State, 58 Texas Crim. Rep. 564; 126 S. W. 1136.

Proof that the property taken did not belong to the alleged owner does not constitute a variance if the defendant, at the time of the burglarious entry, had the intent to steal the property of the alleged owner. Johnson v. State, 48 Texas Crim. Rep. 339; 88 S. W. 813. Polk v. State, 60 Texas Crim. Rep. 463; 132 S. W. 135.

In a burglary case the value of the property stolen is immaterial where it is alleged and proven that the burglarious entry was made with the intent to commit theft. Collins v. State, 20 Texas Crim. App. 201. Mason v. State, 98 S. W. 854. Boyd v. State, 57 Texas Crim. Rep. 647; 124 S. W. 651.

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Where the taking of the property is a part of the *res gestæ* of the burglary, the kind and value of such property may be proven, although not alleged, to prove that the entry was made with intent to commit theft as alleged and to aid the jury in assessing the punishment should they find defendant guilty. It is not necessary, however, for the State to make proof of the value of the property taken after the burglarious entry. Hayes v. State, 36 Texas Crim. Rep. 146; 35 S. W. 983. Hays v. State, 36 Texas Crim. Rep. 533; 38 S. W. 171. Franks v. State, 45 S. W. 1014. Moseley v. State, 43 Texas Crim. Rep. 559; 67 S. W. 414. Johnson v. State, 48 Texas Crim. Rep. 339; 88 S. W. 813. Lynne v. State, 53 Texas Crim. Rep. 386; 111 S. W. 151. Alinis v. State, 63 Texas Crim. Rep. 371; 140 S. W. 227. Prata v. State, 172 S. W. 974.

Proof of a judicial confession in the nature of a plea of guilty to a misdemeanor theft of the same property involved in the burglary case is admissible whether or not defendant was warned when he plead guilty to such misdemeanor. Johnson v. State, 39 Texas Crim. Rep. 627; 48 S. W. 70. Beason v. State, 43 Texas Crim. Rep. 444; 67 S. W. 96.

It is not necessary to give a general definition of theft in the charge to the jury if the charge as given requires the jury to find beyond a reasonable doubt all the elements of theft as alleged before they can convict. Ragsdale v. State, 61 Texas Crim. Rep. 147; 134 S. W. 234.

Sec. 2345. **Consent of owner.**—Under the allegation that the entry into the house was with intent to commit theft, the State is not required to prove that defendant did not have the consent of persons not named in the indictment to take the property therefrom. If defendant had the consent of a person not mentioned in the indictment, whether the real or a joint owner, a mere custodian, or other person, he may make proof of that fact. The State's case is made by proving the allegations of a good indictment and the State is not required to go further; however, although unnecessary, it is not error for the State to prove that some other person not referred to in the indictment, as the real or a joint owner, a clerk, servant, or other temporary custodian of the property, did not consent to the taking thereof. Coates v. State, 31 Texas Crim. Rep. 261; 20 S. W. 585. Willis v. State, 33 Texas Crim. Rep. 168; 25 S. W. 1119. Hurley v. State, 35 Texas Crim. Rep. 282; 33 S. W. 354. Lega v. State, 36 Texas Crim. Rep. 38; 34 S. W. 926; 35 S. W. 381. Holmes v. State, 42 S. W. 979. Skaggs v. State, 56 Texas Crim. Rep. 80; 119 S. W. 106. Williams v. State, 143 S. W. 634. Whorton v. State, 151 S. W. 300. Alsup v. State, 153 S. W. 627. Holmes v. State, 156 S. W. 1176.

It not being necessary to allege the want of consent of the owner to a forcible entry, it follows that the State is not required to prove that the house was entered without the consent of the owner or occupant thereof, or of anyone authorized to give such consent, further than to show that the entry was by breaking as alleged, or by force as alleged, but it is not error to make such proof or to prove the want of consent of the person who temporarily had charge of the house. Buchanan v. State, 24 Texas Crim. App. 199; 5 S. W. 847. Sampson v. State, 20 S. W. 708. Williams v. State, 143 S. W. 634.

The State is entitled to prove that the owner did not give defendant consent to make the burglarious entry into the house, or to take any property therefrom, whether the proof as to a breaking is direct, or is only to be inferred from the fact that inanimate objects will not leave a closed house of their own volition. Kubacak v. State, 59 Texas Crim. Rep. 165; 127 S. W. 836.

In the absence of a statement of facts it will be presumed on appeal that the want of consent of the owner was proven on the trial. Lega v. State, 36 Texas Crim. Rep. 38; 34 S. W. 926.

Where it is alleged that the burglarious entry was with intent to commit theft, a judgment of conviction therefor will be reversed if there is no evidence in the Statement of Facts to support the allegation of want of consent to take the property. Caddell v. State, 49 Texas Crim. Rep. 134; 90 S. W. 1013. Moray v. State, 61 Texas Crim. Rep. 547; 135 S. W. 569. Moray v. State, 61 Texas Crim. Rep. 550; 135 S. W. 569.

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The allegation of want of consent to take the property must be proven in a burglary case when the intent to commit theft is relied on as fully as though the indictment directly charged theft, and where the alleged owner is a witness and fails to give direct and positive testimony of his want of consent to take the property, such want of consent will not be inferred from other circumstances in evidence. Good v. State, 30 Texas Crim. App. 277; 17 S. W. 409. Wisdom v. State, 42 Texas Crim. Rep. 580; 61 S. W. 926. Caddell v. State, 49 Texas Crim. Rep. 134; 90 S. W. 1013. Moray v. State, 61 Texas Crim. Rep. 547; 135 S. W. 569.

Defendant is entitled to prove that he had authority or consent, either express or implied, to make the entry alleged to be burglarious. Trevenio v. State, 42 S. W. 594. McKinney v. State, 63 Texas Crim. Rep. 470; 140 S. W. 344. Lopez v. State, 167 S. W. 844.

(For authorities as to implied consent, see section 2453.)

Sec. 2346. **Possession of property recently stolen.**—If the State proves a burglary as alleged was committed by someone, and based on proof that defendant was found in possession of property recently stolen from the burglarized house the jury have found defendant guilty of the burglary, and that finding has been approved by the trial court whose duty it is to set aside the conviction if not satisfied that defendant is guilty as charged, the judgment will be sustained on appeal unless clearly wrong if there are facts or circumstances in evidence which justify the jury in disbelieving defendant's explanation of such possession, if any he made. Payne v. State, 21 Texas Crim. Rep. 184; 17 S. W. 463. Morgan v. State, 25 Texas Crim. App. 513; 8 S. W. 487. Rust v. State, 31 Texas Crim. Rep. 75; 19 S. W. 763. Trent et al. v. State, 31 Texas Crim. Rep. 251; 20 S. W. 547. Lightfoot v. State, 24 S. W. 650. McKinney v. State, 29 S. W. 271. Richardson v. State, 42 S. W. 996. Clayton v. State, 44 S. W. 165. Binyon v. State, 56 S. W. 339. Odell v. State, 71 S. W. 971. Archibald v. State, 47 Texas Crim. Rep. 153; 83 S. W. 189. Nightengale v. State, 50 Texas Crim. Rep. 3; 95 S. W. 531. Reyes v. State, 51 Texas Crim. Rep. 420; 102 S. W. 421. Ryan v. State, 53 Texas Crim. Rep. 54; 108 S. W. 1180. Scott v. State, 53 Texas Crim. Rep. 332; 111 S. W. 657. Lynne v. State, 53 Texas Crim. Rep. 386; 111 S. W. 151. Brown v. State, 56 Texas Crim. Rep. 91; 119 S. W. 312. Mays v. State, 58 Texas Crim. Rep. 651; 127 S. W. 546. Kubacak v. State, 59 Texas Crim. Rep. 165; 127 S. W. 836. Roberts v. State, 60 Texas Crim. Rep. 23; 129 S. W. 611. Spencer v. State, 61 Texas Crim. Rep. 60; 133 S. W. 1049. Hayden v. State, 61 Texas Crim. Rep. 211; 134 S. W. 703. Kinkead v. State, 61 Texas Crim. Rep. 651; 135 S. W. 573. Waltemayer v. State, 62 Texas Crim. Rep. 51; 136 S. W. 256. Dixon v. State, 62 Texas Crim. Rep. 53; 136 S. W. 462. Hawthorn v. State, 62 Texas Crim. Rep. 114; 136 S. W. 776. Griffith v. State, 62 Texas Crim. Rep. 642; 138 S. W. 1016. Alinis v. State, 63 Texas Crim. Rep. 272; 139 S. W. 980. Toliver v. State, 63 Texas Crim. Rep. 563; 140 S. W. 776. Williams v. State, 64 Texas Crim. Rep. 494; 142 S. W. 878. Griego v. State, 145 S. W. 613. Briscoe v. State, 148 S. W. 565. Parker v. State, 149 S. W. 108. Coggins v. State, 151 S. W. 311. Walker v. State, 151 S. W. 822. Ragland v. State, 153 S. W. 1137. Stephens v. State, 154 S. W. 1001. Johnson v. State, 158 S. W. 284. Wilson v. State, 158 S. W. 1114. Kimball v. State, 160 S. W. 380. Powers v. State, 162 S. W. 832. Lewis v. State, 162 S. W. 866. O'Fallin v. State, 169 S. W. 897. Hamilton v. State, 177 S. W. 496.

With the exception that the State must prove that a burglary was committed by someone, the rules as to possession of property recently stolen and explanation thereof which are applicable in theft cases apply also in burglary cases. Ross v. State, 16 Texas Crim. App. 559. Payne v. State, 21 Texas Crim. App. 184; 17 S. W. 463. Field v. State, 24 Texas Crim. App. 422; 6 S. W. 200. Morgan v. State, 25 Texas Crim. App. 513; 8 S. W. 487. Jackson v. State, 28 Texas Crim. App. 370; 13 S. W. 451. Boersh v. State, 62 S. W. 1060. Strickland v. State, 87 S. W. 689. Scott v. State, 53 Texas Crim. Rep. 332; 111 S. W. 657. Brown v. State, 56 Texas Crim. Rep. 87; 119 S. W. 312.

(For rules as to proving explanation by defendant of his possession of property recently stolen, see section 2462 of this book.)

Proof of possession of property recently stolen is not sufficient to sustain a conviction for burglary in the absence of sufficient testimony to show that the house

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alleged to have been burglarized was in fact burglariously entered. Strickland v. State, 87 S. W. 689. Williams v. State, 156 S. W. 938. Jobe v. State, 161 S. W. 966.

If the testimony shows that the stolen goods could not have left the house except by being carried away by someone who made a burglarious entry therein, it is sufficient to show a burglary by someone. Bartley v. State, 47 Texas Crim. Rep. 45; 83 S. W. 190. Taylor v. State, 52 Texas Crim. Rep. 190; 107 S. W. 58. Doyle v. State, 59 Texas Crim. Rep. 39; 126 S. W. 1131. Kubacak v. State, 59 Texas Crim. Rep. 165; 127 S. W. 836.

When the indictment alleges that the entry was with intent to commit theft, the State is entitled to prove that defendant was in possession of all or part of the property recently stolen from the alleged burglarized house, and such testimony is admissible whether or not such property is described in the indictment. Gass v. State, 56 S. W. 73. Boersh v. State, 62 S. W. 1060. Lynne v. State, 53 Texas Crim. Rep. 386; 111 S. W. 151. Alinis v. State, 63 Texas Crim. Rep. 272; 139 S. W. 980. Alinis v. State, 63 Texas Crim. Rep. 371; 140 S. W. 227.

It is error to charge on the subject of "reasonable explanation" when defendant made no explanation of his possession, or when challenged as to the property he stated that he knew nothing about it or claimed it as his own. Mayfield v. State, 23 Texas Crim. App. 649; 5 S. W. 161. Wilson v. State, 34 S. W. 284. Ballew v. State, 34 S. W. 616. Franks v. State, 36 Texas Crim. Rep. 150; 35 S. W. 977. Grande v. State, 37 Texas Crim. Rep. 51; 38 S. W. 613. Hopperwood v. State, 39 Texas Crim. Rep. 19; 44 S. W. 841. Smith v. State, 44 Texas Crim. Rep. 81; 68 S. W. 510. Stewart v. State, 77 S. W. 791. Carson v. State, 48 Texas Crim. Rep. 157; 86 S. W. 1011. Gilford v. State, 48 Texas Crim. Rep. 312; 87 S. W. 698. Dobbs v. State, 57 Texas Crim. Rep. 55; 121 S. W. 859. Handy v. State, 173 S. W. 299.

When the only proof against defendant is the possession of property claimed to have been recently stolen from the burglarized house, the evidence is insufficient if there is no positive identification of the property as being the same taken from the house at the time of the burglary. Green v. State, 31 S. W. 386. Price v. State, 58 S. W. 84. Stevens v. State, 66 S. W. 549. Adams v. State, 102 S. W. 1129. Love v. State, 58 Texas Crim. Rep. 270; 124 S. W. 932. Oliver v. State, 153 S. W. 309. Jobe v. State, 161 S. W. 966.

If defendant's explanation of his entry is reasonable and probably true and inconsistent with the theory of a burglarious entry, the evidence is insufficient to sustain a conviction unless in some way such explanation is shown to be false. Moore v. State, 37 S. W. 747. Burrell v. State, 50 Texas Crim. Rep. 386; 97 S. W. 706.

If the only proof tending to connect defendant with the burglary is proof of possession of property recently stolen from the burglarized house, and defendant's explanation of such possession, made when his possession was first questioned, is reasonable and probably true and inconsistent with the theory that he was guilty of burglary, the evidence is insufficient to support a conviction for burglary unless in some way such explanation is shown to be false. Ross v. State, 16 Texas Crim. App. 559. Oliver v. State, 153 S. W. 309.

When a house has been burglarized on more than one occasion and there is no evidence of an acting together on any given case of burglary, testimony as to goods found in possession of one defendant is not admissible against the other. Love v. State, 58 Texas Crim. Rep. 270; 124 S. W. 932.

If there is no evidence of any explanation made by defendant, the court is not called on to charge on the subject of possession of property recently stolen. Baldwin v. State, 31 Texas Crim. Rep. 589; 21 S. W. 679. Bennett v. State, 32 Texas Crim. Rep. 216; 22 S. W. 684. Gilford v. State, 48 Texas Crim. Rep. 312; 87 S. W. 698. Young v. State, 54 Texas Crim. Rep. 560; 113 S. W. 764. Diseren v. State, 59 Texas Crim. Rep. 149; 127 S. W. 1038. Spencer v. State, 61 Texas Crim. Rep. 60; 133 S. W. 1049. Holland v. State, 61 Texas Crim. Rep. 201; 134 S. W. 693. Kinkead v. State,

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61 Texas Crim. Rep. 653; 135 S. W. 574. Dixon v. State, 62 Texas Crim. Rep. 53; 136 S. W. 462. Alinis v. State, 63 Texas Crim. Rep. 272; 139 S. W. 980.

Sec. 2347. **Other offenses and transactions.**—Proof of other offenses is admissible if such proof is a part of the *res gestæ* of the alleged offense for which defendant is being tried, or if it tends to show intent when intent is an issue, or serves to prove identity when identity is an issue, or when it is sought to show the guilt of defendant by circumstantial evidence and such proof of another offense connects or tends to connect the defendant with the alleged offense for which he is being tried, or when it tends to defeat the defensive theory. Kelley v. State, 31 Texas Crim. Rep. 211; 20 S. W. 365. Dawson v. State, 32 Texas Crim. Rep. 552; 25 S. W. 21. Mixon v. State, 31 S. W. 408. Fielden v. State, 40 Texas Crim. Rep. 187; 49 S. W. 376. Camarillo v. State, 68 S. W. 795. Bright v. State, 74 S. W. 912. Perry v. State, 78 S. W. 13. Penrice v. State, 105 S. W. 797. Johnson v. State, 52 Texas Crim. Rep. 202; 107 S. W. 52. Snodgrass v. State, 148 S. W. 1095. Stephens v. State, 154 S. W. 1001. Serrato v. State, 171 S. W. 1142. Johns v. State, 174 S. W. 610. Nowlin v. State, 175 S. W. 1070.

Any competent evidence which tends to defeat the defense urged is admissible, though it tends to show an offense of which defendant has been acquitted. Craig v. State, 23 S. W. 1108. Stovall v. State, 97 S. W. 93.

Where defendant claims that he entered the alleged burglarized house by mistake, it may be shown, for the purpose of defeating such defensive theory, that he burglariously entered other houses on the same night. Camarillo v. State, 68 S. W. 795.

Where defendant was found in possession of tools stolen from another house on the same night and with which he effected the second entry, proof of both burglaries is admissible as a part of the *res gestæ* and for identity. Perry v. State, 78 S. W. 13.

It may be shown on a trial for burglary that defendant when arrested had door and skeleton keys in his pocket. McCoy v. State, 48 Texas Crim. Rep. 31; 85 S. W. 1072.

As a circumstance to show that some one had been in the house it may be shown as a part of the *res gestæ* that property in the house belonging to others than the alleged owner was taken or damaged. Kubacak v. State, 59 Texas Crim. Rep. 165; 127 S. W. 836.

The defendant should be tried on the merits of each case, and it is error to admit proof of disconnected and separate burglaries or other offenses when the only purpose such proof could serve would be to show that the defendant was a criminal generally. Marshall v. State, 22 S. W. 878. Ware v. State, 36 Texas Crim. Rep. 597; 38 S. W. 198. Long v. State, 39 Texas Crim. Rep. 546; 47 S. W. 363. McIver v. State, 60 S. W. 51. Denton v. State, 42 Texas Crim. Rep. 429; 60 S. W. 670. Johnson v. State, 42 Texas Crim. Rep. 440; 60 S. W. 667. Hunt v. State, 60 S. W. 965. Hill v. State, 44 Texas Crim. Rep. 603; 73 S. W. 9. McAnally v. State, 73 S. W. 405. McCoy v. State, 81 S. W. 47. Barnett v. State, 50 Texas Crim. Rep. 538; 99 S. W. 556. Herndon v. State, 50 Texas Crim. Rep. 555; 99 S. W. 558. Lightfoot v. State, 106 S. W. 345. Saldiver v. State, 55 Texas Crim. Rep. 177; 115 S. W. 584. Elkins v. State, 57 Texas Crim. Rep. 247; 122 S. W. 394. Johnson v. State, 57 Texas Crim. Rep. 488; 123 S. W. 1106 (subsequent disconnected burglary of the same house). Clark v. State, 59 Texas Crim. Rep. 246; 128 S. W. 131. Overstreet v. State, 150 S. W. 632. Bowman v. State, 155 S. W. 940.

Proof of other burglaries or other offenses is not admissible to show system, identity, or intent, if none of these matters are in issue. Denton v. State, 42 Texas Crim. Rep. 429; 60 S. W. 670. Barnett v. State, 50 Texas Crim. Rep. 338; 99 S. W. 556. Herndon v. State, 50 Texas Crim. Rep. 555; 99 S. W. 558. Clark v. State, 59 Texas Crim. Rep. 246; 128 S. W. 131. Overstreet v. State, 150 S. W. 632. Bowman v. State, 155 S. W. 940.

It is error to permit the State to prove a subsequent disconnected threat to again burglarize the same house. Windham v. State, 59 Texas Crim. Rep. 366; 128 S. W. 1130.

It is error to permit the State to prove that a search of defendant's premises failed to disclose any of the property stolen from the burglarized house but did dis-

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close property probably stolen elsewhere. Hunt v. State, 60 S. W. 965. Gonzales v. State, 105 S. W. 196. Elkins v. State, 57 Texas Crim. Rep. 247; 122 S. W. 394.

Where part of the property stolen was a Canadian quarter and a Mexican quarter, it is error to permit the State to prove that an officer obtained similar coins from a merchant where the coins so obtained were in no manner traced to the defendant. Mann v. State, 27 Texas Crim. App. 580; 11 S. W. 640.

Proof that the same house had been previously broken into is not admissible even to explain why the owner was on watch, if defendant was not connected with the previous burglary. Glenn v. State, 76 S. W. 757.

Proof that prosecutor had sued out a search warrant against defendant is not admissible for the State. Elkins v. State, 57 Texas Crim. Rep. 247; 122 S. W. 394.

Proof of identification of goods found in the possession of defendant which belong to and are identified by other persons than the alleged injured party is not admissible when it tends to solve no issue in the case. Elkins v. State, 57 Texas Crim. Rep. 247; 122 S. W. 394.

Sec. 2348. **Charge on defensive theory.**—A charge on a defensive theory should be submitted to the jury in a distinct and affirmative manner and apart from and untrammeled by the State's theory. Moore v. State, 59 Texas Crim. Rep. 361; 128 S. W. 1115.

If there is evidence raising the issue, it is error to refuse to charge the jury that if defendant formed the intent to steal after he entered the house he should be acquitted. Harris v. State, 20 Texas Crim. App. 655.

If the State's case is a burglarious entry with intent to steal, and defendant denies that he entered at all, it is proper to refuse to charge on the theory that the intent to steal was formed after the entry. Riding v. State, 40 Texas Crim. Rep. 452; 50 S. W. 698. Snodgrass v. State, 148 S. W. 1095.

If there is no testimony that defendant had any other intent when he entered the house other than to steal, it is proper to refuse to charge on the theory that he formed the intent to steal after making the entry. Matthews v. State, 38 S. W. 172.

If there is evidence that the intent of defendant was to commit an offense other than that alleged, he is entitled to an affirmative charge on this theory. Miller v. State, 28 Texas Crim. App. 445; 13 S. W. 646. Vickery v. State, 62 Texas Crim. Rep. 311; 137 S. W. 687.

If the indictment charges only a burglary committed at night, and there is evidence that it may have been or was entered in the daytime, the court should give a charge to the effect that if the burglary was committed in the daytime the jury should acquit on account of the failure to prove the allegation of a burglary at night. Henderson v. State, 50 Texas Crim. Rep. 620; 99 S. W. 1001.

If there is evidence that defendant entered the house and took the property under a claim of right, an affirmative charge presenting this theory should be given to the jury. Harris v. State, 51 Texas Crim. Rep. 564; 103 S. W. 390.

If there is evidence that defendant's connection with the property claimed to have been taken after a burglarious entry was entirely subsequent to the alleged burglary, he is entitled to an affirmative charge on this theory. Reynolds v. State, 8 Texas Crim. App. 415. Knight v. State, 65 S. W. 88. Simmons v. State, 74 S. W. 762. Gather v. State, 81 S. W. 717. Gusemano v. State, 155 S. W. 217.

If there is evidence that defendant entered for the purpose of going to sleep, a charge shifts the burden if the jury are thereby required before they can acquit to find that the entry was for the purpose of only going to sleep. The jury should be charged that if defendant entered the house for the purpose of going to sleep or entered with any other intent than that alleged in the indictment they should acquit. True v. State, 48 Texas Crim. Rep. 631; 89 S. W. 1066. Bird v. State, 49 Texas Crim. Rep. 96; 90 S. W. 651.

If there is evidence that defendant did not intend to take property belonging to or under the charge and control of the alleged owner, it is error to authorize a

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conviction on the theory that defendant intended to commit theft without further requiring the intent to be to take the property of the alleged owner. Roberson v. State, 51 Texas Crim. Rep. 337; 101 S. W. 800. Harris v. State, 51 Texas Crim. Rep. 564; 103 S. W. 390.

If the State's case depends mainly on possession of property recently stolen, and there is evidence that defendant was employed to haul the property found in his possession, he is entitled to an affirmative charge on his defense. Gather v. State, 81 S. W. 717.

If there is evidence that defendant purchased the property found in his possession which, if true, would defeat the State's case as alleged, defendant is entitled to an affirmative presentation of this defensive theory. Bond v. State, 23 Texas Crim. App. 180; 4 S. W. 580. Shuler v. State, 23 Texas Crim. App. 182; 4 S. W. 581. Hays v. State, 30 Texas Crim. App. 474; 17 S. W. 1063. Alvia v. State, 42 Texas Crim. Rep. 425; 60 S. W. 551. Merriweather v. State, 55 Texas Crim. Rep. 135; 115 S. W. 44. White v. State, 60 Texas Crim. Rep. 519; 132 S. W. 772. Moray v. State, 61 Texas Crim. Rep. 549; 135 S. W. 569. Gusemano v. State, 155 S. W. 217. Robinson v. State, 160 S. W. 457.

If defendant's explanation of his possession of property recently stolen or his testimony on the trial is to the effect that he purchased such property, a charge is correct which instructs the jury that if they have a reasonable doubt as to whether defendant bought the property in question or that he got it from any other place than the house of the alleged owner they should acquit. Hays v. State, 36 Texas Crim. Rep. 533; 38 S. W. 171. Hays v. State, 51 Texas Crim. Rep. 111; 100 S. W. 926.

Sec. 2349. **Burglary with intent to murder.**—An indictment sufficiently alleged the intent of the entry to be "with the intent then and there with malice aforethought to murder Cymantha Stinnett." Stinnett v. State, 32 Texas Crim. Rep. 527; 24 S. W. 908.

If defendant had the express or implied consent of the tenant to enter the premises, it is error to permit the State to prove that the landlord had ordered him to stay away. Trevenio v. State, 42 S. W. 594.

It is error to permit the prosecutrix to testify that she did certain things because she was afraid defendant would kill her, if such testimony was but the expression of her apprehensions and a mere opinion as to his intent. Trevenio v. State, 42 S. W. 594.

Conviction sustained. Hopkins v. State, 61 Texas Crim. Rep. 590; 135 S. W. 553.

Sec. 2350. **Allegation of intent to rape.**—An indictment for burglary is good if a burglarious entry is properly alleged together with the allegation that the entry was with the intent to commit acts which constitute the offense of rape. Burke v. State, 5 Texas Crim. App. 74.

The elements of the rape intended to be committed must be set out in an indictment for a burglary committed with intent to rape. State v. Williams, 41 Texas 100. Brown v. State, 7 Texas Crim. App. 622.

After alleging a burglarious entry, the allegation of intent may be "with the intent then and there to ravish and obtain carnal knowledge of ....., a woman then and there therein, by force, threats and fraud, and without her consent," or "with the intent then and there to have carnal knowledge of ....., a female then and there therein, said female being then and there under the age of fifteen years and then and there not being the wife of the said ..... (defendant)."

Sec. 2351. **Proof of intent to rape.**—If there is sufficient evidence, if believed, to support the conclusion of the jury that the burglarious entry was made with intent to commit rape as alleged, the judgment of conviction approved by the trial court will be sustained on the facts on appeal unless clearly wrong. Burke v. State, 5 Texas Crim. App. 74. Dickson v. State, 64 S. W. 1043. Miller v. State, 50 Texas Crim. Rep. 589; 100 S. W. 398. Ballentine v. State, 56 Texas Crim. Rep. 24; 117

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S. W. 972. Smith v. State, 60 Texas Crim. Rep. 81; 131 S. W. 313. Alsup v. State, 153 S. W. 624.

The presumption will not be indulged, without sufficient facts to support it, that the entry was made with intent to commit rape. Hamilton v. State, 11 Texas Crim. App. 116. Allen v. State, 18 Texas Crim. App. 120. Mitchell v. State, 32 Texas Crim. Rep. 479; 24 S. W. 280. Mitchell v. State, 33 Texas Crim. Rep. 575; 28 S. W. 475. Price v. State, 83 S. W. 185. Sedgwick v. State, 57 Texas Crim. Rep. 420; 123 S. W. 703.

The evidence is insufficient to sustain a conviction for an attempt to commit burglary with intent to rape if it only shows that defendant knocked on the door at night and then went to a window. Kelly v. State, 22 S. W. 588.

The evidence is insufficient to identify defendant where his good character was proven and it was shown that he had loaned his shoes to another who had not been seen since the burglary and where the prosecuting witness could only say that defendant's voice sounded like that of her assailant. Porter v. State, 50 S. W. 380.

Proof that defendant was getting in the window of the room in which a lady was sleeping is not sufficient of itself to show that his intent was to commit rape. Sedgwick v. State, 57 Texas Crim. Rep. 420; 123 S. W. 703.

The evidence is insufficient to show that the entry was with the intent to commit rape where the action of defendant in fleeing as soon as he touched the person of the female disproves the theory that his intent was to commit rape. Hamilton v. State, 11 Texas Crim. App. 116. Turner v. State, 24 Texas Crim. App. 12; 5 S. W. 511. Coleman v. State, 26 Texas Crim. App. 259; 9 S. W. 609. Mitchell v. State, 32 Texas Crim. Rep. 479; 24 S. W. 280. Fields v. State, 24 S. W. 907. Mitchell v. State, 33 Texas Crim. Rep. 575; 28 S. W. 475. Mason v. State, 47 Texas Crim. Rep. 404; 83 S. W. 689.

A conviction for burglary based on an intent to commit rape will not be disturbed on the facts on appeal if the proof shows a burglarious entry as alleged and that defendant was choking the female and fled only when the lamp was turned up. Dickson v. State, 64 S. W. 1044.

A conviction for burglary based upon an intent to commit rape will not be disturbed on the facts on appeal if it is shown that defendant pursued the female and desisted only when a pistol was drawn on him and there is no evidence that the entry was made with any other intent. Miller v. State, 50 Texas Crim. Rep. 589; 100 S. W. 389.

If the allegation is that the entry was with the intent to commit a rape by force, it is essential to the sufficiency of the evidence that a specific intent to commit such rape be established by the testimony on the trial and the proof must go beyond the possibility of such intent. Hamilton v. State, 11 Texas Crim. App. 116. Allen v. State, 18 Texas Crim. App. 120. Turner v. State, 24 Texas Crim. App. 12; 5 S. W. 511. Coleman v. State, 26 Texas Crim. App. 259; 9 S. W. 609. Williams v. State, 13 S. W. 609. Walton v. State, 29 Texas Crim. App. 163; 15 S. W. 646. Mitchell v. State, 32 Texas Crim. Rep. 479; 24 S. W. 280. Fields v. State, 24 S. W. 907. Mitchell v. State, 33 Texas Crim. Rep. 575; 28 S. W. 475. Moore v. State, 37 S. W. 747. Mason v. State, 47 Texas Crim. Rep. 404; 83 S. W. 689.

A clandestine entry through an open door is not an entry by breaking or by force, threats, or fraud. Hamilton v. State, 11 Texas Crim. App. 116. Melton v. State, 24 Texas Crim. App. 287; 6 S. W. 303.

Sec. 2352. **Charge on intent to rape.**—If an intent to commit rape by force is alleged and relied on, the charge of the court should define the character of force necessary to constitute rape by force. Williams v. State, 13 S. W. 609. Walton v. State, 29 Texas Crim. App. 163; 15 S. W. 648. Mitchell v. State, 32 Texas Crim. Rep. 479; 24 S. W. 280.

It is error to charge the jury that an attempt to have carnal knowledge of a woman while she was asleep would constitute fraud. King v. State, 22 Texas Crim. App. 650; 3 S. W. 342.

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Where the jury were charged that if defendant had any other intent than to commit rape or if they had a reasonable doubt as to his having such specific intent they should acquit him, it was all he could ask as to his intent in the absence of any testimony tending to show that he had any reason to expect carnal favors by consent. Ballentine v. State, 56 Texas Crim. Rep. 24; 117 S. W. 972.

Sec. 2353. **Burglary of a private residence.**
Sec. 2332. Form for indictment.
Sec. 2333. Indictment.
Sec. 2354. Statute construed.
Sec. 2355. Private residence.
Sec. 2356. Evidence.
Sec. 2357. Charge of the court.

Art. 1312. (845a) **Penalty for burglary of private residence.**—The punishment for burglary of a private residence shall be by imprisonment in the penitentiary for any term of years not less than five. (Act June 5, 1899, Acts 1899, p. 318.)

Art. 1313. (845b) **Burglary of private residence at night distinct offense.**—Nothing in articles 1305 and 1312 of this chapter shall be construed to alter or in any manner repeal articles 1303 and 1304 (of this chapter), nor any part thereof, but shall be construed to make burglary of a private residence at night a separate and distinct offense from burglary, as defined in articles 1303 and 1304. (Act June 5, 1899, Acts 1899, p. 318.)

Art. 1314. (845c) **"Private residence" defined.**—The term "private residence," mentioned in this (article 1312) and articles 1305 and 1313 (of this chapter), shall be construed to mean any building or room occupied and actually used at the time of the offense by any person or persons as a place of residence. (Act June 5, 1889, Acts 1899, p. 318.)

Sec. 2354. **Statute construed.**—The daytime burglary of a private residence is not affected by the Act of June 5, 1899, relating to burglary of a private residence at night, but is left as an offense under the old statute as simply the burglary of a house. Williams v. State, 42 Texas Crim. Rep. 606; 62 S. W. 1057. Adams v. State, 62 S. W. 1058. Reyes v. State, 51 Texas Crim. Rep. 420; 102 S. W. 421. Ellis v. State, 57 Texas Crim. Rep. 601; 124 S. W. 667. Snodgrass v. State, 148 S. W. 1095.

Where a private residence is burglarized in the day time, it is an ordinary burglary, and the punishment therefor is the same as for an ordinary burglary. Williams v. State, 42 Texas Crim. Rep. 606; 62 S. W. 1057. Adams v. State, 62 S. W. 1058. Holland v. State, 45 Texas Crim. Rep. 172; 74 S. W. 763. Ellis v. State, 57 Texas Crim. Rep. 601; 124 S. W. 667. Wright v. State, 63 Texas Crim. Rep. 664; 141 S. W. 229.

Burglary of a private residence at night is a separate and distinct offense from the burglary at night of a house other than a private residence, as defined by article 1303 of the Penal Code, and is a separate and distinct offense from a burglary committed in the daytime by breaking and entering any house, whether a private residence or not, as defined by article 1304 of the Penal Code. Williams v. State, 42 Texas Crim. Rep. 606; 62 S. W. 1057. Adams v. State, 62 S. W. 1058. Jones v. State, 47 Texas Crim. Rep. 126; 80 S. W. 530. Martinus v. State, 47 Texas Crim. Rep. 528; 84 S. W. 831. Reyes v. State, 51 Texas Crim. Rep. 420; 102 S. W. 421. Sedgwick v. State, 57 Texas Crim. Rep. 420; 123 S. W. 703. Ellis v. State, 57 Texas Crim. Rep. 601; 124 S. W. 667. Malley v. State, 58 Texas Crim. Rep. 425; 126 S. W. 599. Rodgers v. State, 59 Texas Crim. Rep. 146; 127 S. W. 834. Hopkins v. State, 61 Texas Crim. Rep. 593; 135 S. W. 553. Alinis v. State, 63 Texas Crim. Rep. 272; 139 S. W. 980.

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It is not essential that the family or occupant be personally present at the very time the residence is burglarized in order to constitute the offense of burglary of a private residence at night if the building or room was actually used at the time of such burglary as a place of residence. Handy v. State, 46 Texas Crim. Rep. 407; 80 S. W. 526. Johnson v. State, 52 Texas Crim. Rep. 204; 107 S. W. 52.

Sec. 2355. **Private residence.**—The fact that one room in the house was used as a place of residence by the occupant and was therefore a private residence does not necessarily make the entire house, or the other rooms in the main house, a private residence. Part of a house may be a "private residence," and the other part not. Alinis v. State, 63 Texas Crim. Rep. 272; 139 S. W. 980. Alinis v. State, 63 Texas Crim. Rep. 371; 140 S. W. 227. Shornweber v. State, 156 S. W. 222.

Where the room is the home of the person or persons who occupy and actually use it as a place of residence, it is considered the private residence of the occupant. Mays v. State, 50 Texas Crim. Rep. 391; 97 S. W. 703.

A room used as a bedroom and controlled, occupied and actually used at the time of the burglary thereof as a place of residence by a single man is the private residence of such occupant. Ullman v. State, 1 Texas Crim. App. 222. Stewart v. State, 34 Texas Crim. Rep. 33; 28 S. W. 806. Cleland v. State, 61 S. W. 492. Holland v. State, 45 Texas Crim. Rep. 172; 74 S. W. 763. Holland v. State, 47 Texas Crim. Rep. 623; 85 S. W. 798. Martinez v. State, 51 Texas Crim. Rep. 584; 103 S. W. 930. Kinkead v. State, 61 Texas Crim. Rep. 651; 135 S. W. 573.

A room in a hotel or flat rented by a single man and occupied and actually used by him at the time of the burglary thereof as a place of residence is his private residence. Holland v. State, 45 Texas Crim. Rep. 172; 74 S. W. 763. Holland v. State, 47 Texas Crim. Rep. 623; 85 S. W. 798. Kinkead v. State, 61 Texas Crim. Rep. 651; 135 S. W. 573.

Where the husband was not permanently separated from his wife, the fact that he slept away from their home most of the time does not make their home cease to be his private residence. Payne v. State, 148 S. W. 694.

Sec. 2356. **Evidence.**—A conviction cannot be legally sustained on proof of facts which amount to a mere suspicion. Acosta v. State, 155 S. W. 251.

If the indictment, or the count on which defendant was convicted, is for ordinary burglary, and the proof shows undisputably a burglary of a private residence at night, the variance is fatal, the two offenses being separate and distinct. Fonville v. State, 62 S. W. 573. Martinus v. State, 47 Texas Crim. Rep. 528; 84 S. W. 831. Mays v. State, 50 Texas Crim. Rep. 391; 97 S. W. 703. Rodgers v. State, 59 Texas Crim. Rep. 146; 127 S. W. 834.

Where the proof shows without controversy a burglary of a private residence at night, a conviction for ordinary burglary will be set aside, the two offenses being separate and distinct. Jones v. State, 47 Texas Crim. Rep. 128; 80 S. W. 530. Martinus v. State, 47 Texas Crim. Rep. 528; 84 S. W. 831.

A conviction for ordinary burglary will not be set aside on the claim of a variance because there is testimony tending to show the burglary of a private residence at night, if there is any evidence that the house was not a private residence as defined by the statute, or that it was entered in the daytime by breaking. Lewis v. State, 52 Texas Crim. Rep. 20; 105 S. W. 194. Hopkins v. State, 61 Texas Crim. Rep. 590; 135 S. W. 553. Wright v. State, 63 Texas Crim. Rep. 664; 141 S. W. 229.

Under an indictment charging in one count a burglary of a private residence at night and in the other count a burglary by breaking in the daytime, and the evidence leaves it entirely in doubt as to whether the house was entered at night or in the daytime, but it is cogently proven that it was burglariously entered sometime either at night or in the daytime, the State is not required to elect between such counts, and a verdict of guilty of daytime burglary will not be set aside on the ground that the evidence fails to show an entry in the daytime. Lewis v. State, 52 Texas Crim. Rep. 20; 105 S. W. 194.

Sec. 2357. **Charge of the court.**—It is not necessary to define the term "private residence" in the charge to the jury if the proof shows without controversy that the

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house was occupied and actually used at the time of the burglary thereof as a place of residence. Johnson v. State, 52 Texas Crim. Rep. 203; 107 S. W. 52.

Where the proof shows without controversy a burglary of a private residence at night, the court should not charge on ordinary burglary. Jones v. State, 47 Texas Crim. Rep. 128; 80 S. W. 530. Rodgers v. State, 59 Texas Crim. Rep. 146; 127 S. W. 834.

It is not necessary to define the term "nighttime" to the jury if the proof shows without controversy that the private residence was entered at night. Johnson v. State, 52 Texas Crim. Rep. 203; 107 S. W. 52.

The charge should follow the allegations of the indictment in submitting the intent with which the alleged entry was made, and should not submit as a basis for conviction a theory that the entry was made with an intent which is not alleged. Williams v. State, 53 Texas Crim. Rep. 3; 108 S. W. 371. Emerson v. State, 54 Texas Crim. Rep. 628; 114 S. W. 835. Newman v. State, 55 Texas Crim. Rep. 276; 116 S. W. 577. Winkler v. State, 58 Texas Crim. Rep. 564; 126 S. W. 1136.

When the proof shows without controversy that the private residence was occupied and actually used by the alleged injured party as a place of residence, it is not error to fail to use the word "actually" in the charge of the court. Payne v. State, 148 S. W. 694.

Art. 1315. **Burglary with explosives.**—Any person who shall commit burglary as defined by the Penal Code of this State, and in the commission of the offense uses nitro-glycerine, dynamite, gunpowder or other high explosives, shall be deemed guilty of burglary with explosives. (Sec. 1, Act April 16, 1907, Acts 1907, p. 210.)

Art. 1316. **Punishment for burglary with explosives.**—Any person who shall be convicted of burglary with explosives shall be punished by imprisonment in the State prison for not less than twenty-five years and not more than forty years. (Sec. 2, Act April 16, 1907, Acts 1907, p. 210.)

Art. 1317. (846) (712) **Other offenses committed after entry punishable.**—If a house be entered in such manner as that the entry comes within the definition of burglary, and the person guilty of such burglary shall, after so entering, commit theft, or any other offense, he shall be punished for burglary, and also for whatever other offense is so committed. (O. C. 734, amended Acts 1858, p. 180.)

Art. 1318. (847) (713) **Felony committed after entry.**—If the burglary was effected for the purpose of committing one felony, and the person guilty thereof shall, while in the house, commit another felony, he shall be punishable for any felony so committed as well as for the burglary. (O. C. 735.)

Sec. 2358. **Former jeopardy.**—A previous conviction of theft of the property taken from the house alleged to have been burglarized will not bar a subsequent prosecution for the burglary, since defendant may be convicted of the burglary and for whatever offense he may have committed after the burglarious entry. Smith v. State, 22 Texas Crim. App. 353; 3 S. W. 238. Rust v. State, 31 Texas Crim. Rep. 75; 19 S. W. 763. Loakman v. State, 32 Texas Crim. Rep. 561; 25 S. W. 20. Fielder v. State, 40 Texas Crim. Rep. 184; 49 S. W. 376. Richardson v. State, 75 S. W. 505.

A former conviction for burglary will not bar a prosecution for theft of the property taken from the burglarized house, since defendant may be convicted of the offense committed after the burglarious entry as well as for the burglary. Howard

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v. State, 8 Texas Crim. App. 447. Clark v. State, 59 Texas Crim. Rep. 246; 128 S. W. 131. McDonald et al. v. State, 156 S. W. 209.

A former conviction for burglary will not bar a prosecution for an assault with intent to rob. Adams v. State, 62 S. W. 1059.

A former acquittal for theft will not bar a prosecution for burglary although both of the alleged offenses grew out of the same transaction. Wallace v. State, 57 Texas Crim. Rep. 354; 123 S. W. 135.

A former acquittal of burglary will not bar a prosecution for theft of property taken from the alleged burglarized house. Roman v. State, 64 Texas Crim. Rep. 515; 142 S. W. 913.

An acquittal for burglary will not bar a prosecution for knowingly receiving or concealing the same property taken in the alleged burglary. Richardson v. State, 75 S. W. 505.

Art. 1319. (848) (714) **Actual breaking necessary in case of domestic servant.**—An entry into a house for the purpose of committing theft, unless the same is effected by actual breaking, is not burglary when the same is done by a domestic servant or other inhabitant of such house, but a theft committed by such person after entering a house is punishable as in other cases. (O. C. 736.)

Sec. 2359. **Domestic servant.**—If a domestic servant is acting with others, his right to enter the house will not benefit the other conspirators. Neiderluck v. State, 23 Texas Crim. App. 38; 3 S. W. 573. Alexander v. State, 48 Texas Crim. Rep. 531; 89 S. W. 642.

The term "domestic servant" does not include a servant whose employment is out of doors and not in the house. Wakefield v. State, 41 Texas 556. Williams v. State, 41 Texas 649. Waterhouse v. State, 21 Texas Crim. App. 663; 2 S. W. 889. Morrow v. State, 25 S. W. 284. Williams v. State, 143 S. W. 634.

The fact that defendant had been placed on the outside of the house to protect it from fire does not of itself authorize him to enter the house. Morrow v. State, 25 S. W. 284.

An entry into a house for the purpose of committing theft is not burglary unless the entry is effected by actual breaking when the same is done by a domestic servant. Peters v. State, 33 Texas Crim. Rep. 170; 26 S. W. 61.

It is proper to refuse to charge on the theory that the entry was made by a domestic servant when the testimony does not raise such issue. James v. State, 63 Texas Crim. Rep. 559; 140 S. W. 1086.

A temporary employee may be a domestic servant when the nature of such employment is such as to give such employee free access to the house. Coleman v. State, 44 Texas 109.

A porter whose duties are such as to give him free access to the house is a domestic servant. Taylor v. State, 42 Texas 387.

A porter of a hotel is not a domestic servant of a saloon in the hotel in which he had no duties. Jackson v. State, 43 Texas Crim. Rep. 260; 64 S. W. 864.

The term "inhabitant" does not include a boarder. Ullman v. State, 1 Texas Crim. App. 222. Holland v. State, 47 Texas Crim. Rep. 623; 85 S. W. 798.

Sec. 2360. **Attempt at burglary.**
Sec. 2361. Form for indictment.
Sec. 2362. Indictment.
Sec. 2363. "Attempt" defined.
Sec. 2364. Evidence.
Sec. 2365. Charge of the court.

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Art. 1320. (849) (715) **Attempt at burglary.**—If any person shall attempt to commit the crime of burglary, he shall be punished by confinement in the penitentiary not less than two nor more than four years. (Acts 1860, p. 100.)

Art. 1321. (850) (716) **"Attempt" defined.**—An "attempt" in the sense in which the word is used in the preceding article, is an endeavor to accomplish the crime of burglary carried beyond mere preparation, but falling short of the ultimate design in any part of it. (Acts 1860, p. 100.)

Sec. 2361. **Form for indictment**

In the name and by the 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 John Doe on the.....day of....., A. D....., in said county and State did by force and at night attempt to break and enter a house there situate, the same being then and there the private residence of..... and being then and there occupied and actually used at the time of said attempt by the said.....as a place of residence, with the intent then and there to fraudulently take therefrom corporeal personal property then and there therein and belonging to the said.....from the possession of the said..... without the consent of the said.....and with the intent to deprive the said.....of the value of the same and to appropriate it to the use and benefit of him, the said John Doe, and the said John Doe did then and there in carrying out said design to break and enter said house with the intent aforesaid raise a window in said house (or "attempt by force to raise a window in said house," or "unlock a door in said house," or "open a closed door in said house," or whatever it was that was done in the attempt to enter) with the intent then and there to so enter.

And the grand jury aforesaid do further present that John Doe on the..... day of....., A. D....., in said county and State did attempt to break and enter a house then and there occupied and controlled by.....with the intent then and there to take therefrom corporeal personal property then and there therein and belonging to the said.....from the possession of the said..... without the consent of the said.....and with the intent to deprive the said .....of the value of the same and to appropriate it to the use and benefit of him the said John Doe, and the said John Doe did then and there in carrying out said design to break and enter said house with the intent aforesaid raise a window in said house (or whatever it was that was done in the attempt to enter) with the intent then and there to so enter.

Against the peace and dignity of the State.

.....

Foreman of the grand jury.

(The first count of the preceding form is good for an attempt to break and enter a private residence at night, and the second count is good for an attempt to break and enter a private residence in the daytime or for an attempt to break and enter a house other than a private residence either in the daytime or at night.)

Sec. 2362. **Indictment for an attempt.**—The indictment must allege what defendant did in the attempt to commit burglary and not merely state a conclusion. It must appear to the court from the allegations in the indictment that what defendant did would constitute an attempt to commit burglary. Fonville v. State, 62 S. W. 573.

The act of defendant in trying to break in the house is sufficiently alleged by an allegation that the attempt was "by attempting by force to raise a window in said house." Jones v. State, 53 Texas Crim. Rep. 470; 110 S. W. 748.

Sec. 2363. **"Attempt" defined.**—An "attempt" is an endeavor to accomplish the crime of burglary carried beyond mere preparation, but falling short of the ultimate design in any part of it. Robinson v. State, 34 Texas Crim. Rep. 71; 29 S. W. 40. Fonville v. State, 62 S. W. 573. Peters v. State, 154 S. W. 563.

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Sec. 2364. **Evidence.**—A person cannot be legally convicted for an attempt to burglarize a railroad car, a steamboat, or vessel, in the absence of a statute making it a penal offense to attempt to burglariously enter the same, and under our Penal Code a railroad car, steamboat, or vessel is not within the meaning of the term "house." Summers v. State, 49 Texas Crim. Rep. 90; 90 S. W. 310.

Sec. 2365. **Charge of the court.**—A correct charge on the theory of implied consent to make the entry. Robinson v. State, 34 Texas Crim. Rep. 71; 29 S. W. 40.

Sec. 2366. **Circumstantial evidence.**
Sec. 2367. When charge should be given.
Sec. 2368. Not necessary to charge.
Sec. 2477. Correct charges.
Sec. 1876. Errors in charge on circumstantial evidence.
Sec. 2369. Conviction on suspicion.

Sec. 2367. **Charge on circumstantial evidence should be given.**—The *factum probandum* of burglary, the **main fact** to be proved, is the breaking and entry, and if there is no **direct** evidence of the **main fact** a charge on circumstantial evidence is demanded. If the **main fact** is proved as a matter of **inference** from other facts in evidence, the case rests wholly, in a legal sense, upon circumstantial evidence. Struckman v. State, 7 Texas Crim. App. 581. Gonzales v. State, 12 Texas Crim. App. 663. Black v. State, 18 Texas Crim. App. 124. Sullivan v. State, 18 Texas Crim. App. 623. Robertson v. State, 33 Texas Crim. Rep. 366; 26 S. W. 508. Robertson v. State, 26 S. W. 728. Beason v. State, 63 S. W. 633. Beason v. State, 43 Texas Crim. Rep. 442; 67 S. W. 96.

In a burglary case if the main fact, the breaking and entry by defendant, is only to be inferred from the fact of subsequent possession of property recently stolen, it is a case of circumstantial evidence. Possession of property recently stolen is but a circumstance. Sullivan v. State, 18 Texas Crim. App. 623. Robertson v. State, 33 Texas Crim. Rep. 366; 26 S. W. 508. Robertson v. State, 26 S. W. 728. Beason v. State, 63 S. W. 633. Beason v. State, 43 Texas Crim. Rep. 442; 67 S. W. 96.

Proof that the accused plead guilty to theft of the same property involved in the burglary case does not relieve the court from charging on circumstantial evidence in the burglary case. Beason v. State, 63 S. W. 633. Beason v. State, 43 Texas Crim. Rep. 442; 67 S. W. 96.

If it is only by a process of inference from the confession or admission of defendant that it can be determined that he was the party who made the burglarious entry or participated therein, the court in a case of burglary should charge the jury on circumstantial evidence. Beason v. State, 63 S. W. 633. Beason v. State, 43 Texas Crim. Rep. 442; 67 S. W. 96.

Sec. 2368. **Not necessary to charge on circumstantial evidence.**—If a confession of defendant that he committed the burglary is in evidence a charge on circumstantial evidence is not demanded. A confession of the breaking and entry is direct evidence of the main inculpatory fact. Carr v. State, 24 Texas Crim. App. 569; 7 S. W. 328. Allbritton v. State, 26 S. W. 398. Glover v. State, 46 S. W. 824. Ricks v. State, 41 Texas Crim. Rep. 677; 56 S. W. 928. Knuckles v. State, 55 Texas Crim. Rep. 6; 114 S. W. 825. Whorton v. State, 151 S. W. 300.

In a burglary case when there is direct evidence of the breaking and entry, a charge on circumstantial evidence is not demanded because the intent is sought to proven by circumstantial evidence.

In a burglary case if defendant admits the breaking and entry a charge on circumstantial evidence is not required. Wright v. State, 63 Texas Crim. Rep. 664; 141 S. W. 230. Whorton v. State, 151 S. W. 300.

If there is direct evidence from any source that defendant was the party who broke and entered the house or participated in the breaking and entry then there is direct evidence of the main fact to be proved, and the burglary case does not rest wholly upon circumstantial evidence. Pullen v. State, 156 S. W. 936.

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The fact that the only direct evidence that defendant broke and entered comes from an accomplice witness does not require a charge on circumstantial evidence. Barber v. State, 69 S. W. 516.

In a burglary case if the facts proven are in such close juxtaposition to the main fact to be proved, the breaking and entry, as to be equivalent to direct evidence, a charge on circumstantial evidence is not required. Holland v. State, 45 Texas Crim. Rep. 172; 74 S. W. 765. Smith v. State, 90 S. W. 638. Smith v. State, 51 Texas Crim. Rep. 427; 102 S. W. 406. Montgomery v. State, 55 Texas Crim. Rep. 504; 116 S. W. 1160.

Sec. 2369. **Conviction on suspicion.**—If the proof shows as strong a case against another as it does against the defendant and there is no proof that they acted together, a conviction for burglary will not be sustained. Love v. State, 58 Texas Crim. Rep. 270; 124 S. W. 932.

A conviction for burglary based on circumstantial evidence will not be sustained if the circumstances proven do not exclude every other reasonable hypothesis except that of defendant's guilt. The law requires a greater degree of proof than a mere probability or a strong suspicion. Buntain v. State, 15 Texas Crim. App. 485. Morgan v. State, 25 Texas Crim. App. 498; 8 S. W. 488. Munson v. State, 34 Texas Crim. Rep. 498; 31 S. W. 387. Warren v. State, 52 Texas Crim. Rep. 218; 106 S. W. 132. Love v. State, 58 Texas Crim. Rep. 270; 124 S. W. 932. Green v. State, 59 Texas Crim. Rep. 6; 127 S. W. 549. Remlinger v. State, 148 S. W. 316. Williams v. State, 156 S. W. 938.

To sustain a conviction for burglary it should appear not only that a burglary as charged has been committed but there should also be proof to a greater degree of certainty than a mere probability or a strong suspicion that the party charged was the person who committed it or was a participant in its commission. There must be legal and competent evidence pertinently identifying the defendant with the transaction charged against him. Green v. State, 31 S. W. 386. Munson v. State, 34 Texas Crim. Rep. 498; 31 S. W. 387. Bowen v. State, 60 Texas Crim. Rep. 595; 133 S. W. 256. Lawrence v. State, 146 S. W. 928.

Circumstantial evidence is sufficient to support a conviction for burglary if the circumstances proven are sufficient to exclude every other reasonable hypothesis except that of defendant's guilt. Painter v. State, 26 Texas Crim. App. 454; 9 S. W. 774. Barrett v. State, 33 S. W. 1085. O'Fallin v. State, 169 S. W. 897.

CHAPTER VII

OFFENSES ON BOARD OF VESSELS, STEAMBOATS AND RAILROAD CARS

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Article 1322. (851) (717) **Nighttime burglary of railroad car, etc.**—If any person, by any of the means enumerated in article 1303, shall at night enter any vessel, steamboat or railroad car, with intent to commit a felony or theft, he shall be punished by confinement in the penitentiary not less than two nor more than five years. (O. C. 738.)

Art. 1323. (852) (718) **Entry by breaking.**—If any person shall, by breaking, enter a vessel, steamboat or railroad car in the daytime, with intent to commit a felony or theft, he shall be punished as prescribed in the preceding article. (O. C. 739.)

Sec. 2370. **Breaking—Form for indictment.**
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 John Doe on the.....day of....., A. D....., in said county and State did break and enter a railroad car then and there in the possession, actual care, control and management of.....(here name conductor or person in charge—this being an allegation of ownership according to the outward form, but if the pleader prefers to allege ownership according to its legal effect, the allegation may be that such person "owned" or "occupied and controlled" said car—) with the intent then and there to fraudulently take therefrom corporeal personal property therein being and then and there in the actual care, control and management of said.....(or "belonging to said.....") from the possession of the said.....without his consent and with the intent to deprive the said.....of the value of the same and to appropriate it to the use and benefit of the said John Doe.

Against the peace and dignity of the State.

.....
Foreman of the grand jury.

Sec. 2371. **Indictment for breaking into railroad car.**—Facts may be set out according to their outward form as well as according to their legal effect, and when plead according to their outward form it is not necessary to also allege their legal effect.

When it is alleged that defendant "did break and enter," it is equivalent to alleging that the entry was by "force" and "breaking," and it is unnecessary, under such allegation, to either allege in terms that the entry was in the daytime or in the nighttime or to prove whether the entry was made in the daytime or nighttime. Carr v. State, 19 Texas Crim. App. 635. Smith v. State, 34 Texas Crim. Rep. 124; 29 S. W. 775. True v. State, 48 Texas Crim. Rep. 631; 89 S. W. 1066. Newman v. State, 55 Texas Crim. Rep. 273; 116 S. W. 577. Howard v. State, 178 S. W. 513.

Notwithstanding the mistake of the codifiers in renumbering the articles referred to in article 1325 (854) in not naming article 1308 (842) therein, a proper construction thereof will correct the mistake, and the term "breaking" as applied to the offense of entering a railroad car by breaking with intent to commit a felony or theft has the same meaning as in cases of ordinary burglary so far as applicable, and means force applied to the car, the slightest force, however, being sufficient, such as breaking the seals and opening the door, or lifting the latch of a closed door, the entry at an unusual place, etc.

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When the entry into the railroad car is made by force not amounting to a "breaking," that is, force not applied to the car, or by threats or by fraud, it is necessary to allege that the entry was made at night.

Sec. 2372. **Ownership and possession.**—Ownership and possession may be alleged and proven as in cases of ordinary burglary. Pyland v. State, 33 Texas Crim. Rep. 382; 26 S. W. 621. Kelly v. State, 149 S. W. 110. McDonald et al. v. State, 152 S. W. 1061.

In any kind of burglary case the person in actual care, control and management of the property is in possession thereof and is, in law, the owner thereof, and ownership and possession may be alleged in such person, and it is not necessary to allege who was the actual owner. Pyland v. State, 33 Texas Crim. Rep. 382; 26 S. W. 621. Kelly v. State, 149 S. W. 110.

When ownership and possession is alleged in an employee of the railroad company, the State is entitled to show by oral testimony that such employee had the actual care, control and management of the car and the property therein at the time of the alleged burglary, and proof beyond a reasonable doubt that he did have such actual care, control and management at such time is sufficient to prove such allegations of ownership and possession. Pyland v. State, 33 Texas Crim. Rep. 382; 26 S. W. 621. Kelly v. State, 149 S. W. 110. McDonald et al. v. State, 152 S. W. 1061.

It is not necessary to allege to what railroad company the car belonged, nor is it necessary to allege on what railroad the burglary was committed. Hamilton v. State, 26 Texas Crim. App. 215; 9 S. W. 687.

Sec. 2373. **Description of car.**—It is a sufficient description of the car to allege in the language of the statute that defendant did enter "a railroad car," and it is not necessary to allege whether the railroad car was a box, closed, open, or flat car. Hamilton v. State, 26 Texas Crim. App. 215; 9 S. W. 687. Aguillar v. State, 26 S. W. 405.

Sec. 2374. **Want of consent.**—When it is alleged that the burglary was by force or by breaking, it is not necessary to allege that the entry into the railroad car was without the consent of the owner. Buntain v. State, 15 Texas Crim. App. 485.

When ownership and possession of the railroad car is alleged in an employee of the railroad who was in possession—actual care, control and management—of the car and the property therein at the time of the alleged burglary, the State is only required to prove the want of consent of such employee, and then if defendant relies on the consent of some other person as a defense he may make proof thereof. It is not error, however, for the State to prove the want of consent of persons not named in the indictment. Whorton v. State, 151 S. W. 300.

Sec. 2375. **Evidence.**—If it is alleged that defendant "did break and enter," and the proof shows a breaking by force applied to the car, it is immaterial whether the car was entered in the daytime or at night. Carr v. State, 19 Texas Crim. App. 635. Smith v. State, 34 Texas Crim. Rep. 124; 29 S. W. 775. True v. State, 48 Texas Crim. Rep. 631; 89 S. W. 1066. Newman v. State, 55 Texas Crim. Rep. 273; 116 S. W. 577.

When the State relies upon the testimony of an accomplice witness, or upon the testimony of two or more accomplice witnesses, the testimony of such accomplice witness or accomplice witnesses must be corroborated both as to the *corpus delicti* and as to defendant's connection with the alleged burglary. Brooks v. State, 65 S. W. 924. Brooks v. State, 70 S. W. 419. Newman v. State, 55 Texas Crim. Rep. 273; 116 S. W. 577.

Newly discovered evidence that the door of the railroad car alleged to have been burglarized was open may entitle defendant to a new trial. True v. State, 48 Texas Crim. Rep. 631; 89 S. W. 1066.

As tending to defeat the State's case defendant is entitled to prove that an inculpatory witness is to be regarded as an accomplice witness, and for such purpose

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may prove any fact which would be admissible against such witness if such witness was on trial either as a principal, accomplice or accessory. Dawson v. State, 32 Texas Crim. Rep. 535; 25 S. W. 21. Dawson v. State, 34 Texas Crim. Rep. 263; 30 S. W. 224.

Sec. 2376. **Waybills and entries.**—The waybill which is made out and sent along with the railroad car alleged to have been burglarized is admissible in evidence as tending to prove that the property or articles therein mentioned were shipped in said car, and it is not necessary to produce the clerk who made such waybill. Dawson v. State, 32 Texas Crim. Rep. 551; 25 S. W. 21.

The entries made by the clerks at the time of examining the contents of the cars to determine if any of the property was missing is admissible as original testimony. Dawson v. State, 32 Texas Crim. Rep. 551; 25 S. W. 21.

Sec. 2377. **Charge of the court.**—It is not necessary to limit the testimony as to the burglary of other railroad cars where there was but one transaction and all the cars were entered at practically the same time. Gilbert v. State, 57 Texas Crim. Rep. 85; 121 S. W. 1126.

The court is not required to charge the jury that if defendant was too drunk to form an intent to steal he should be acquitted. Kelly v. State, 149 S. W. 110.

Where defendant claimed that he had been instructed to nail up a car, but did not claim that he was in car by the direction of his foreman, it is error to limit an acquittal to a reasonable doubt of his being in the car by direction of his foreman. Butler v. State, 52 Texas Crim. Rep. 529; 107 S. W. 840.

When threats or fraud are not in the case, but a breaking is relied on, it is error to charge the jury that by "entry" is meant every kind of entry but one made with the free consent of the occupant; thus leaving the jury under the impression that whether the entry was through an open door or by breaking was immaterial. Newman v. State, 55 Texas Crim. Rep. 275; 116 S. W. 577.

In a prosecution for burglary of a railroad car by breaking it is not necessary to define the term "entry."

When the allegation is that the car was entered with intent to commit theft, the court should confine the consideration of the jury to the intent alleged and should not charge that defendant would be guilty if he entered with intent to commit "a felony" or theft. Newman v. State, 55 Texas Crim. Rep. 273; 116 S. W. 577.

When the defensive theory is a purchase of the property after the alleged burglary and without being connected therewith, it is error to require the jury to find that defendant's explanation of his possession is consistent with his innocence. Gusemano v. State, 155 S. W. 217.

Art. 1324. (853) (719) **Offense committed after entry.**—If a vessel, steamboat or railroad car be entered in such manner as that the entry, if made in a house, would be burglary, and the person so entering shall commit theft or any other offense after entry, he shall be punished for the offense defined in article 851 (1322), and also for whatever other offense he may so commit. (O. C. 740.)

Sec. 2378. **Former jeopardy.**—A former conviction for burglary will not bar a prosecution for theft. A defendant may be convicted for burglary and also for the theft committed after the burglarious entry. McDonald et al. v. State, 156 S. W. 209.

A former conviction for theft will not bar a prosecution for burglary, since defendant may lawfully be convicted of the burglary and for whatever offense he may commit after the burglarious entry.

A former acquittal for burglary will not bar a prosecution for the theft committed after the burglarious entry. Roman v. State, 64 Texas Crim. Rep. 515; 142 S. W. 913.

A former acquittal for theft will not bar a prosecution for burglary.

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Art. 1325. (854) (720) **Rules of burglary applicable.**—The definitions, rules and explanations of terms in the preceding chapter are applicable to such terms in this chapter; and the rules prescribed in articles 1303, 1304, 1305 (1308), 1306 and 1307 of the preceding chapter shall also apply to similar cases on board of a vessel, steamboat or railroad car. (O. C. 741.)

Art. 1326. (855) (721) **Theft on board by servant.**—A theft on board a steamboat, vessel or railroad car, committed by a servant or employee, except in cases where there has been an actual breaking in, is punishable simply as theft. (O. C. 742.)

CHAPTER VIII

ROBBERY

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Article 1327. (856) (722) **Robbery.**—If any person by assault or violence or by putting in fear of life or bodily injury shall fraudulently take from the person or possession of another any property with intent to appropriate the same to his own use, he shall be punished by confinement in the penitentiary for life, or for a term of not less than five years; and when a firearm or other deadly weapon is used or exhibited in the commission of the offense, the punishment shall be death or by confinement in the penitentiary for any term not less than five years. (O. C. 743, amended by Acts 1866, p. 202, by Act April 12, 1883, Acts 1883, p. 80, and by Acts 1895, p. 89.)

Sec. 2379. **Form of indictment for robbery by assault or violence.**
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 John Doe on the.....day of..... A. D..... in said county and State in and upon.....did make an assault and did then and there by said assault (or "by violence," or "by said assault and by violence") fraudulently and against the will of the said.....take from the person and possession of the said.....fifty dollars in money (or "one watch," or "one purse," or "one knife," or whatever it was), the same being the property of the said.....and with the intent then and there to deprive the said..... of the value of the same and to appropriate the same to the use of him the said John Doe.

Against the peace and dignity of the State.

.....
Foreman of the grand jury.

Sec. 2380. **Form of indictment for robbery.**
In the name and by the 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 John Doe on the.....day of....., A. D..... in said county and State in and upon.....did make an assault and did then and there by said assault and by violence and by putting the said..... in fear of life and bodily injury (and by then and there using and exhibiting a firearm, to wit, a pistol) fraudulently and against the will of the said..... take from the person and possession of the said.....five dollars in money (or "one ring," or whatever it was), the same being the property of the said .....and with the intent then and there to deprive the said..... of the value of the same and to appropriate the same to the use of him the said John Doe.

Against the peace and dignity of the State.

.....
Foreman of the grand jury.

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Sec. 2381. **Indictments held good.**—Indictments for robbery held good may be found in the following cases. Clark v. State, 28 Texas Crim. App. 190 (by assault and violence). Colter v. State, 37 Texas Crim. Rep. 284; 39 S. W. 576 (by three modes). Murphy v. State, 43 Texas Crim. Rep. 516; 67 S. W. 108 (by assault). Flannagan v. State, 55 Texas Crim. Rep. 163; 116 S. W. 54 (without firearms). Robinson v. State, 149 S. W. 186 (by firearms). Collins v. State, 178 S. W. 347 (by firearms).

The common law form of indictment for robbery is good in Texas. Bell v. State, 1 Texas Crim. App. 598. Reardon v. State, 4 Texas Crim. App. 602. Burns v. State, 12 Texas Crim. App. 275. Trimble v. State, 16 Texas Crim. App. 115.

Sec. 2382. **Alleging use of firearm.**—An indictment for robbery is not bad for duplicity because in the same count with the allegations of ordinary robbery it is alleged that a firearm was used in the commission of the offense. The use of a firearm or of a deadly weapon is but a circumstance of aggravation, and must be alleged in order to authorize the infliction of the more severe penalty. Robbery by firearms is not a separate offense, but the use or exhibition of a firearm or deadly weapon in the commission of robbery, when alleged and proven, authorizes the infliction of a more severe penalty than when an ordinary robbery is alleged. Beaumont v. State, 1 Texas Crim. App. 536. Green v. State, 147 S. W. 593 (overruling Murdock v. State, 52 Texas Crim. Rep. 263; 106 S. W. 374). Robinson v. State, 149 S. W. 186. Bell v. State, 177 S. W. 966.

The statutory aggravation of using or exhibiting a firearm or deadly weapon may be added to the indictment before the allegation of assault if the pleader so desires. The location of the allegation of the circumstance of aggravation is a matter of convenience or taste.

Sec. 2383. **Dismissal of part of indictment.**—State's counsel may, with the consent of the court, when the case is called for trial or during the trial, dismiss or abandon that portion of the indictment which charges the use or exhibition of a firearm or deadly weapon. Weaver v. State, 52 Texas Crim. Rep. 11; 105 S. W. 189.

Sec. 2384. **Want of consent need not be alleged.**—In an indictment for robbery it is not necessary to allege that the taking was without the consent of the person robbed. Want of consent is not made an element of the offense by the statute, and need not be alleged or proven by the State. Williams v. State, 37 Texas Crim. Rep. 155; 38 S. W. 999. Brown v. State, 61 Texas Crim. Rep. 334; 136 S. W. 265.

Sec. 2385. **"Against the will" need not be alleged.**—It need not be alleged that the property was taken against the will of the person robbed, as the statute does not use those words. Chancey v. State, 58 Texas Crim. Rep. 54; 124 S. W. 426.

Sec. 2386. **Need not allege a carrying away.**—An indictment for robbery need not contain an allegation that the property was carried away. Thompson v. State, 35 Texas Crim. Rep. 520; 34 S. W. 629.

Sec. 2387. **Allegation of value.**—In an indictment for robbery the value of the property taken need not be alleged as the value of the property does not affect the penalty. Winston v. State, 9 Texas Crim. App. 143. Williams v. State, 10 Texas Crim. App. 15. Kelley v. State, 34 Texas Crim. Rep. 413; 31 S. W. 174. Williams v. State, 34 Texas Crim. Rep. 531; 31 S. W. 405.

Sec. 2388. **Description of property.**—The property acquired by robbery should be described as in cases of theft. A general description is sufficient. Winston v. State, 9 Texas Crim. App. 143.

(See the chapter on theft for rules as to description of property.)

Sec. 2389. **Description of money.**—It is a sufficient description of United States money obtained by the robbery to allege either in words or figures that it was a certain number of dollars "in money," as, for example, "one hundred dollars in money," "$50.00 in money," and the like. The courts take judicial knowledge of the value of United States money when it is described in the indictment as "money," and an allegation that "money" was taken will be held to mean money of the United States unless the contrary appears. Kelley v. State, 34 Texas Crim. Rep. 413; 31

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S. W. 174. Thompson v. State, 35 Texas Crim. Rep. 522; 34 S. W. 629. Fay v. State, 70 S. W. 744.

An allegation that the money taken was "one hundred dollars of the value of one hundred dollars" is good. Thompson v. State, 35 Texas Crim. Rep. 522; 34 S. W. 629. Fay v. State, 70 S. W. 744.

An allegation that the defendant took "two dollars in silver coin money of the United States of the value of two dollars" is good. Moore v. State, 36 Texas Crim. Rep. 89; 35 S. W. 668.

A description of the property taken as "silver coin of the value of one dollar and fifty cents" was held good in Compton v. State, 148 S. W. 580.

An allegation that the property acquired by the robbery was "forty dollars in silver, current money of the United States of America" is good. Kelley v. State, 34 Texas Crim. Rep. 413; 31 S. W. 174.

The property acquired by the robbery is sufficiently described by an allegation that it was "seven dollars and fifty cents, current money of the United States." Parrent v. State, 76 S. W. 474. Terrell v. State, 174 S. W. 1089.

(Other authorities as to the description of money may be found under that head in the chapter on embezzlement.)

Sec. 2390. **Acts which make one a principal need not be alleged.**—An indictment charging two or more defendants with robbery need not allege that they "acted together," and such allegation, if made, not being descriptive, may be rejected as surplusage. Bell v. State, 1 Texas Crim. App. 598. Gallagher v. State, 34 Texas Crim. Rep. 306; 30 S. W. 557. Madrid et al. v. State, 161 S. W. 95.

The acts which make defendant a principal need not be alleged in the indictment. He may be charged directly with the commission of the offense although it may not have actually been committed by him. Bell v. State, 1 Texas Crim. App. 598. Farris v. State, 26 Texas Crim. App. 105; 9 S. W. 487. Gallagher v. State, 34 Texas Crim. Rep. 306; 30 S. W. 557. Madrid et al. v. State, 161 S. W. 95.

Sec. 2391. **Alleging robbery by violence.**—It is better pleading to follow the language of the statute, but an allegation of "force" is equivalent to the statutory word "violence." Robinson v. State, 149 S. W. 186.

When it is alleged that the property was fraudulently taken by violence, it is not necessary to also allege that the injured party was put in fear of life or bodily injury. Bond v. State, 20 Texas Crim. App. 421. Robinson v. State, 149 S. W. 186.

Sec. 2392. **Alleging robbery by assault.**—When it is alleged that the property was fraudulently taken by an assault, it is not necessary to also allege that the injured party was put in fear of life or bodily injury. Bond v. State, 20 Texas Crim. App. 421.

Sec. 2393. **Different modes may be alleged in same count.**—It may be alleged in one count that the robbery was committed by either or all of the several varying ways in which robbery may be committed, and under an allegation charging more than one way in the conjunctive, proof that it was committed in any one of such ways is sufficient. Kimble v. State, 12 Texas Crim. App. 420. Bond v. State, 20 Texas Crim. App. 421. Weaver v. State, 52 Texas Crim. App. 11; 105 S. W. 189.

Sec. 2394. **Alleging robbery of more than one person.**—The robbery of two or more persons may be alleged in the same count of the indictment if the allegations do not show on their face that the robbery was committed at different times. Clark v. State, 28 Texas Crim. App. 189; 12 S. W. 729. Compton v. State, 148 S. W. 580.

Sec. 2395. **Allegations must be direct.**—An indictment for robbery is bad if it fails to allege other than by way of inference who was assaulted or put in fear. Parker v. State, 9 Texas Crim. App. 351. Trimble v. State, 16 Texas Crim. App. 120.

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Sec. 2396. **Omitting syllable of essential word.**—An allegation that the property was taken from the "possion" of the alleged injured party is not equivalent to an allegation that it was taken from his "possession." Evans v. State, 34 Texas Crim. Rep. 111; 29 S. W. 266 (overruling State v. Williamson, 43 Texas 500).

Sec. 2397. **Allegation of ownership.**—Ownership of the property acquired by the robbery may be alleged in the person having the actual control, care and management of such property at the time of the roberry. Williams v. State, 34 Texas Crim. Rep. 531; 31 S. W. 405. Williams v. State, 37 Texas Crim. Rep. 154; 38 S. W. 999. Bell v. State, 177 S. W. 966.

An indictment for robbery is bad if it is not alleged other than, by inference to whom the property taken belonged. Besides the allegation that the property was fraudulently taken from the person or possession of another, it is necessary to allege in some way the ownership of the property. Barnes v. State, 9 Texas Crim. App. 128. Huggins v. State, 19 S. W. 503.

Sec. 2398. **Robbery.**—Robbery may be committed in either or all of three ways: (1) By assault; (2) by violence; and (3) by putting in fear of life or bodily injury. Bond v. State, 20 Texas Crim. App. 421. Pendy v. State, 34 Texas Crim. Rep. 643; 31 S. W. 647. Robinson v. State, 149 S. W. 186.

If the property was fraudulently taken from the person by violence to the person, the offense is robbery and not theft from the person. Gallagher v. State, 34 Texas Crim. Rep. 307; 30 S. W. 557.

The use of violence after the taking of the property will not of itself raise the crime to robbery. Hanson v. State, 1 N. E. 136. Dawson v. State, 74 S. W. 701. Johnson v. State, 55 Texas Crim. Rep. 414; 117 S. W. 964. Walters v. State, 56 Texas Crim. Rep. 10; 118 S. W. 543.

The mere snatching of property from another's hand is not such violence as will constitute the taking robbery. Johnson v. State, 35 Texas Crim. Rep. 140; 32 S. W. 537.

Where there was more than a mere snatching of money, the proof showing that without the voluntary consent of the prosecutor he was searched and his property fraudulently taken by defendant, the offense is robbery. Tones v. State, 48 Texas Crim. Rep. 369; 88 S. W. 217. Williams v. State, 51 Texas Crim. Rep. 364; 102 S. W. 1134. Keys v. State, 60 Texas Crim. Rep. 279; 131 S. W. 1069.

Where two officers had prosecutor under arrest and held and searched him and fraudulently appropriated his money, the jury is authorized to find them guilty of robbery. Tones v. State, 48 Texas Crim. Rep. 369; 88 S. W. 217.

A person has no legal right to collect debts with a pistol. Fannin v. State, 51 Texas Crim. Rep. 45; 100 S. W. 916.

Sec. 2399. **Delivery of the property.**—It is not essential that the property be delivered at the time of the demand if at the time of the delivery the fear of the menace continued to operate upon the mind of the person robbed. Ashworth v. State, 31 Texas Crim. Rep. 421; 20 S. W. 982.

If the prosecutor was forced to deliver his property to defendant, it is a taking by defendant. Coffelt v. State, 27 Texas Crim. App. 608; 11 S. W. 639.

The prosecuting witness may state his reasons for giving up his property. Dill v. State, 6 Texas Crim. App. 113.

Sec. 2400. **Robber claiming to be an officer.**—Where defendant drew his pistol and made demand for the money of prosecutor which was promptly delivered to him under the fear of such menace, the fraudulent taking thereof is robbery although defendant falsely claimed to be an officer, and in such case it is not necessary to charge on the theory of a swindle. McCormick v. State, 26 Texas Crim. App. 688; 9 S. W. 277. Williams v. State, 55 S. W. 501.

Sec. 2401. **Money won gambling.**—Money won in a gambling game which under the rules of the game has passed into the actual possession of the winner

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by delivery from the loser or without protest is in law the property of the winner, and a claim that the money was lost unfairly will not prevent the forcible re-taking from being a robbery. Blain v. State, 34 Texas Crim. Rep. 448; 31 S. W. 368. Carroll v. State, 42 Texas Crim. Rep. 30; 57 S. W. 99. Coker v. State, 160 S. W. 368. Glasper v. State, 174 S. W. 585.

Where defendant did not admit losing the money but denied it and claimed that he won the money at the time the alleged injured party took it and that he re-took his money without violence to the person or the use of arms, he is entitled to an affirmative charge on his theory. Palmer v. State, 160 S. W. 349.

Sec. 2402. **Proof of taking of part only.**—In a robbery case it is not necessary to prove that all the property alleged was taken, and proof of the taking of any part thereof is sufficient in that regard. Harris v. State, 34 Texas Crim. Rep. 497; 31 S. W. 382. Jones v. State, 43 S. W. 162. Maloney v. State, 45 S. W. 719. White v. State, 57 S. W. 100. Pones v. State, 43 Texas Crim. Rep. 201; 63 S. W. 1021. Robinson v. State, 62 Texas Crim. Rep. 645; 138 S. W. 704. Jones v. State, 64 Texas Crim. Rep. 510; 143 S. W. 621.

Sec. 2403. **Defendant's financial condition.**—The State may prove the financial condition of defendant both before and after the alleged robbery if such proof would shed any light upon the transaction. Armstrong v. State, 34 Texas Crim. Rep. 248; 30 S. W. 235. Garza v. State, 39 Texas Crim. Rep. 362; 46 S. W. 242. Perry v. State, 155 S. W. 263.

Sec. 2404. **Belief as to identity.**—A witness may state his belief or best impression as to the identity of defendant or another party, and the fact that the witness cannot be absolutely certain in his identification only goes to the weight of his testimony and not to its admissibility. Tate v. State, 35 Texas Crim. Rep. 234; 33 S. W. 121. Brooks v. State, 37 S. W. 739. Coffman v. State, 51 Texas Crim. Rep. 486; 103 S. W. 1128. Buzan v. State, 59 Texas Crim. Rep. 213; 128 S. W. 389. Sparkman v. State, 61 Texas Crim. Rep. 429; 135 S. W. 134. Adams v. State, 143 S. W. 185. Grant v. State, 148 S. W. 760. Perry v. State, 155 S. W. 265.

(For other authorities on identification, see section 2481.)

Sec. 2405. **Want of consent.**—Where prosecutor had marked money on his person in anticipation of a robbery, but did nothing to induce it except to visit the place where the robbers were operating, there was no implied consent to a robbery. McAfee v. State, 50 S. W. 83. Tones v. State, 48 Texas Crim. Rep. 366; 88 S. W. 217.

When a fraudulent taking is alleged, the State is not required to prove the want of consent of a person not mentioned in the indictment. If the consent of any person not mentioned in the indictment would authorize the defendant to take the property from the person or possession of another then defendant may prove that he had such consent. Stewart v. State, 31 S. W. 407. Williams v. State, 37 Texas Crim. Rep. 154; 38 S. W. 999.

The circumstances of the taking may be sufficient to show beyond a reasonable doubt that the property was fraudulently taken without the voluntary consent of the person robbed or of any other person in whom ownership may be alleged. Stewart v. State, 31 S. W. 407.

Sec. 2406. **Other evidence for the State.**—Under an indictment for ordinary robbery, there is no variance if the proof shows that a firearm or deadly weapon was used or exhibited. Farrell v. State, 44 S. W. 512. Farrell v. State, 44 S. W. 1108. Carroll v. State, 42 Texas Crim. Rep. 30; 57 S. W. 99. Wyatt v. State, 55 Texas Crim. Rep. 74; 114 S. W. 812. Wyatt v. State, 58 Texas Crim. Rep. 115; 124 S. W. 929.

Proof of the taking of other property on the same occasion although not charged in the same indictment is admissible as a part of the *res gestæ*. Tabor v. State, 52 Texas Crim. Rep. 392; 107 S. W. 1116. Serop v. State, 154 S. W. 557. Bracher v. State, 161 S. W. 124.

Statements of the party robbed made at the time of the robbery or so shortly thereafter as to be a part of the transaction may be admitted as a part of the *res gestæ*.

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Walling v. State, 55 Texas Crim. Rep. 258; 116 S. W. 813. Watts v. State, 171 S. W. 203. Bruce v. State, 173 S. W. 301.

If a rape forms a part of the same transaction in which the robbery was committed, proof of such rape is admissible as a part of the *res gestæ*. Harris v. State, 32 Texas Crim. Rep. 279; 22 S. W. 1037. Davis v. State, 23 S. W. 684.

Where in a very short time after prosecutor and defendant left a saloon, prosecutor, who had his overcoat when he left, returned in a state of great agitation without it, and in an excited way said that defendant had robbed him, proof of such declaration is admissible as a part of the *res gestæ*. Walling v. State, 55 Texas Crim. Rep. 258; 116 S. W. 813. Watts v. State, 171 S. W. 203.

Where more than one party commits the robbery, it may be shown, as an exception to the general rule, that after the robbery one of the co-conspirators or co-defendants was found in possession of the fruits of the robbery. Clark v. State, 28 Texas Crim. App. 193; 12 S. W. 729. Wyatt v. State, 38 Texas Crim. Rep. 256; 42 S. W. 598.

Where a check was obtained by means of the robbery it may be shown that defendant cashed the check and procured the money thereon. Williams v. State, 34 Texas Crim. Rep. 531; 31 S. W. 405.

The State is not bound by the date alleged and may prove that the robbery was committed either before or after the date alleged if the date proven is a date anterior to the presentment of the indictment and not so remote as to be barred by limitation. Perry v. State, 155 S. W. 263. Collins v. State, 178 S. W. 345.

Where defendant seeks to show that another, defendant not assisting, committed the robbery, there must be other facts also in evidence pertinently connecting such other with the robbery at the time of its commission before proof of remote acts or declaration of such other is admissible. Thompson v. State, 35 Texas Crim. Rep. 511; 34 S. W. 629.

Sec. 2407. **Proof of money.**—If the property alleged to have been taken is unnecessarily described in the indictment with more than the required particularity, the proof must correspond with the description as alleged. Coffelt v. State, 27 Texas Crim. App. 615; 11 S. W. 639. Harris v. State, 30 S. W. 221. Early v. State, 56 Texas Crim. Rep. 61; 118 S. W. 1036.

An allegation that the property taken was paper money is not sustained by proof that silver money was taken. Harris v. State, 30 S. W. 221.

(This subject is more fully briefed in section 2620.)

Sec. 2408. **Evidence insufficient.**—If only a robbery by assault is alleged, a conviction for robbery will not be sustained if no assault was proven. Williams v. State, 12 Texas Crim. App. 240. Kimble v. State, 12 Texas Crim. App. 420.

Where defendant forced the alleged injured party to give him the identical amount of money which defendant claimed as his own and the proof shows a sound basis for his belief that he was re-taking his own money, a conviction for robbery will not be sustained. Glenn v. State, 49 Texas Crim. Rep. 350; 92 S. W. 806.

A conviction based on circumstantial evidence will not be sustained if the circumstances proven do not exclude every other reasonable hypothesis except that of defendant's guilt. Gables v. State, 68 S. W. 289.

The name of the person robbed must be proved as alleged either by proof that the name alleged was in fact his name or of the same sound or that he was known by the name alleged. Sparks v. State, 177 S. W. 968.

Sec. 2409. **Convictions sustained.**—When the jury have solved the issues presented in the testimony under a fair and proper charge of the court and have found defendant guilty of robbery as alleged, and there is sufficient evidence, if believed, to sustain the verdict, and the verdict is approved by the trial judge whose duty it is to set the conviction aside if not satisfied from the evidence that defendant is guilty as charged, the verdict will not be disturbed on the facts on appeal unless clearly

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wrong. Odle v. State, 13 Texas Crim. App. 612. Ashworth v. State, 31 Texas Crim. Rep. 419; 20 S. W. 982. Rogers v. State, 32 Texas Crim. Rep. 447; 24 S. W. 282. Carson v. State, 24 S. W. 643. Thompson v. State, 26 S. W. 1081. Bennett v. State, 27 S. W. 135. Millirons v. State, 34 Texas Crim. Rep. 12; 28 S. W. 685. Gallagher v. State, 34 Texas Crim. Rep. 302; 30 S. W. 558. Gallagher v. State, 34 Texas Crim. Rep. 306; 30 S. W. 557. Harris v. State, 34 Texas Crim. Rep. 497; 31 S. W. 382. Colter v. State, 37 Texas Crim. Rep. 284; 39 S. W. 576. Jones v. State, 43 S. W. 162. Tones v. State, 48 Texas Crim. Rep. 363; 88 S. W. 217. O'Hara v. State, 57 Texas Crim. Rep. 577; 124 S. W. 95. Jackson v. State, 60 Texas Crim. Rep. 273; 131 S. W. 1076. Brown v. State, 61 Texas Crim. Rep. 334; 136 S. W. 265. Robinson v. State, 62 Texas Crim. Rep. 645; 138 S. W. 704. Harris v. State, 150 S. W. 796. Johnson v. State, 150 S. W. 903. Spiller v. State, 150 S. W. 1164. Serop v. State, 154 S. W. 557. Perry v. State, 155 S. W. 263. Hendricks v. State, 160 S. W. 1190. Madrid et. al. v. State, 161 S. W. 94. Phillips v. State, 164 S. W. 1004. Raleigh v. State, 168 S. W. 1050. Harriss v. State, 174 S. W. 354. McCaskey v. State, 174 S. W. 338. Glasper v. State, 174 S. W. 585. Bell v. State, 177 S. W. 966. Collins v. State, 178 S. W. 345.

Circumstantial evidence is sufficient to sustain a conviction for robbery if the circumstances proven exclude every other reasonable hypothesis except that of defendant's guilt. Tabor v. State, 52 Texas Crim. Rep. 387; 107 S. W. 1116. Brown v. State, 61 Texas Crim. Rep. 334; 136 S. W. 265.

Sec. 2410. **Verdict.**—There are no degrees in robbery and a general verdict is sufficient. Gamble v. State, 50 S. W. 458. Dosh v. State, 161 S. W. 979.

(For trial brief on "Verdicts" see section 645.)

Sec. 2411. **Former jeopardy.**—A former conviction for assault with intent to murder will bar a prosecution for robbery committed by means of the same assault. The State can carve but once. Herera v. State, 35 Texas Crim. Rep. 607; 34 S. W. 943. Moore v. State, 33 Texas Crim. Rep. 166; 25 S. W. 1120.

A dismissal before verdict upon the discovery that there is a variance between the allegation and proof as to the property obtained by the robbery is not a bar to a prosecution under a new indictment correctly describing such property. McCaskey v. State, 174 S. W. 338.

A former **acquittal** for the robbery of one person is no bar to a prosecution for the robbery of another person though both were robbed at the same time. Epps v. State, 38 Texas Crim. Rep. 284; 42 S. W. 552.

(For trial brief on "Former jeopardy" see section 623.)

Sec. 2412. **Offenses included in robbery.**—Under an indictment for robbery the defendant cannot legally be convicted of an assault with intent to murder. Munson v. State, 21 Texas Crim. App. 329; 17 S. W. 251.

Under an indictment for simple robbery alleging an assault but containing no allegation that a deadly weapon was used in the assault, a defendant may be convicted of a simple but not of an aggravated assault. Foreman v. State, 57 S. W. 844.

Sec. 2413. **Election by the State.**—If the testimony develops more than one distinct transaction, the State should be required to elect as to which of them a conviction would be sought. Harris v. State, 55 Texas Crim. Rep. 469; 117 S. W. 839.

The State is not required to elect between counts charging the accused as a principal and as an accomplice. Collins v. State, 178 S. W. 349.

Sec. 2414. **Proof of another robbery.**—Proof of another robbery than the one alleged is not admissible when it tends to solve no issue in the case but could only serve to prejudice the jury against the defendant. Underwood v. State, 39 Texas Crim. Rep. 413; 46 S. W. 245. Harris v. State, 55 Texas Crim. Rep. 478; 117 S. W. 839. (For other rules see section 2347.)

Sec. 2415. **Defining robbery in the charge.**—A general definition of robbery need not be given in the charge to the jury if in the paragraph applying the law to the facts the jury are required to find beyond a reasonable doubt every essential ele-

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ment of the robbery as alleged before they are authorized to convict the defendant. Coker v. State, 160 S. W. 367.

Sec. 2416. **Charge of the court.**—The charge may and should submit only such phase or phases of robbery alleged as find support in the testimony. Bond v. State, 20 Texas Crim. App. 421. Jackson v. State, 33 Texas Crim. Rep. 288; 26 S. W. 194. Pendy v. State, 34 Texas Crim. Rep. 643; 31 S. W. 647. Powell v. State, 60 Texas Crim. Rep. 201; 131 S. W. 591. Palmer v. State, 160 S. W. 352.

The charge of the court should be construed as a whole. Walling v. State, 55 Texas Crim. Rep. 254; 116 S. W. 813. Terrell v. State, 174 S. W. 1088.

Where a robbery by violence is alleged and proven, it is proper to charge the jury only on the theory of a robbery by violence, and in charging on a robbery by violence it is not necessary to require the jury to also find that the person alleged to have been so robbed was put in fear of life or bodily injury. Bond v. State, 20 Texas Crim. App. 421. Pendy v. State, 34 Texas Crim. Rep. 643; 31 S. W. 647. Palmer v. State, 160 S. W. 352.

When a robbery by assault is alleged and proven, it is proper to charge the jury only on the theory of a robbery by assault, and in charging on a robbery by assault it is not necessary to require the jury to find that the person alleged to have been so robbed was also put in fear of life or bodily injury. Pendy v. State, 34 Texas Crim. Rep. 643; 31 S. W. 647.

If the robbery alleged and proven is a robbery by assault, it is not error to refuse to charge the jury that unless they find that the alleged injured party was put in fear of life or bodily injury they should acquit. Pendy v. State, 34 Texas Crim. Rep. 643; 31 S. W. 647.

If there is no evidence that the alleged injured party was put in fear, it is error to authorize a conviction on such theory. Powell v. State, 60 Texas Crim. Rep. 201; 131 S. W. 591.

The court should not charge on a robbery by the use of a firearm or a deadly weapon if the indictment fails to allege such a robbery. Jackson v. State, 33 Texas Crim. Rep. 288; 26 S. W. 194.

A charge is not reversibly erroneous because it puts an extra burden on the State by requiring the jury to find that the alleged injured party was put in fear of "serious" bodily injury. Green v. State, 32 Texas Crim. Rep. 298; 22 S. W. 1094.

The charge of the court should require the jury to find that the taking was "fraudulent." Bollen v. State, 48 Texas Crim. Rep. 74; 86 S. W. 1025.

The omission to require the jury to find that the taking was "fraudulent" is not reversible error if the proof shows, without controversy, that the taking was fraudulent. Murphy v. State, 43 Texas Crim. Rep. 515; 67 S. W. 108.

In submitting the State's theory as a basis for conviction the charge of the court need not in terms require the jury to find that the property was taken "without the consent" of the person alleged to have been robbed. Brown v. State, 61 Texas Crim. Rep. 334; 136 S. W. 265.

In a charge on robbery it is not necessary to use the term "wilfully," but the use of such term or a charge correctly defining its meaning is not injurious to defendant. Madrid et al. v. State, 161 S. W. 94.

If the jury is required to find that a deadly weapon was used, the failure to require them to find that violence was used is not reversible error if such omission was not calculated to injure the rights of the defendant. Johnson v. State, 150 S. W. 623.

If the State was only able to show the presence of defendant at the robbery by circumstantial evidence, it is not error to charge on alibi though there was no affirmative testimony tending to prove an alibi. Tabor v. State, 52 Texas Crim. Rep. 396; 107 S. W. 1116.

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A charge on circumstantial evidence is not required if there is direct testimony from any source that defendant was the party who committed the alleged robbery or if there is direct testimony that he was present and engaged in the robbery. Makinson v. State, 16 Texas Crim. App. 133. Evans v. State, 31 S. W. 648. Colter v. State, 37 Texas Crim. Rep. 284; 39 S. W. 576. Droak v. State, 43 S. W. 988. Perry v. State, 155 S. W. 265.

The court may charge the law applicable to principals although the indictment charges directly that defendant committed the offense. Gallagher v. State, 34 Texas Crim. Rep. 306; 30 S. W. 557. Madrid et al. v. State, 161 S. W. 95.

If the indictment alleges a taking from the person only and the proof shows that some articles were taken from the person and some from the possession, a charge authorizing a conviction on proof that the property was taken from the person or the possession is erroneous. Evans v. State, 34 Texas Crim. Rep. 112; 29 S. W. 266.

If the court charges **affirmatively** on a defense predicated upon the same facts involved in defendant's explanation of his possession, it is not necessary to again charge on it by way of charging on "recent possession and explanation." Ford v. State, 41 Texas Crim. Rep. 4; 51 S. W. 935.

Where defendant admits an assault on the person alleged to have been robbed but denies taking the property, a charge directing the jury that if he did not take the property they should acquit is sufficient without charging on simple assault. Clemmons v. State, 161 S. W. 973.

If it is an issue as to whether defendant believed that he had won the money fairly in a card game and believed it belonged to him, the charge should submit the defense of taking under a claim of right. Carr v. State, 55 Texas Crim. Rep. 352; 116 S. W. 591.

Sec. 2417. **Fraudulent acquisition of property by threats.**
Sec. 2418. Form of indictment.
Sec. 2419. Indictment.
Sec. 2420. Evidence.
Sec. 2421. Charge of the court.

Art. 1328. (857) (723) **Fraudulent acquisition of property by threats.**—If any person, by threatening to do some illegal act injurious to the character, person or property of another, shall fraudulently induce the person so threatened to deliver to him any property, with intent to appropriate the same to his own use, he shall be punished by confinement in the penitentiary not less than two nor more than five years. (O. C. 744, amended by Act Feb. 12, 1858, Acts 1858, p. 180.)

Sec. 2418. **Form of indictment.**

In the name and by the 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 John Doe on the.....day of....., A. D....., in said county and State did unlawfully threaten to do an illegal act injurious to the character (or "person" or "property") of....., to wit, he the said John Doe did then and there unlawfully threaten to (here set out the threat and the illegal act threatened to be done so as to show by direct and affirmative allegations that the threat was to do an illegal act) and the said John Doe did then and there by the means aforesaid and with the intent to appropriate the same to his own use fraudulently induce the said.....to deliver to him fifty dollars in money (or "one horse," or whatever property it was) and the said.....did then and there by reason thereof deliver to the said John Doe the said property, the same being then and there the property of the said.....

Against the peace and dignity of the State.

.....
Foreman of the grand jury.

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Sec. 2419. **Indictment.** An indictment for the fraudulent acquisition of property by threats is bad if the allegations fail to show that the act threatened to be done was an illegal act. Davis v. State, 37 Texas Crim. Rep. 49; 38 S. W. 792. Scales v. State, 144 S. W. 263.

An indictment for the fraudulent acquisition of property by threats should aver the threat and the illegal act threatened with reasonable certainty and should set out the other elements of the offense. Williams v. State, 13 Texas Crim. App. 285. Scales v. State, 144 S. W. 263.

If the injured party is fraudulently induced to deliver and does deliver a check signed by a firm name to defendant on account of defendant's threat to do some illegal act injurious to the character, person or property of such party, ownership may be alleged only in such party and in such case want of consent of any of the other firm members need not be alleged or proven. Williams v. State, 34 Texas Crim. Rep. 531; 31 S. W. 405.

Indictments for robbery by threats held good; Williams v. State, 34 Texas Crim. Rep. 529; 31 S. W. 405. Burnsides v. State, 51 Texas Crim. Rep. 402; 102 S. W. 118.

Sec. 2420. **Evidence.**—If the obtaining of the property was by means of a threat to do an act perfectly legitimate, the proof does not show a robbery by threats; the act threatened must, in itself, be an illegal act, in order to constitute this offense. Davis v. State, 37 Texas Crim. Rep. 49; 38 S. W. 792. Burnsides v. State, 51 Texas Crim. Rep. 399; 102 S. W. 118. Scales v. State, 144 S. W. 263.

When defendant is indicted for the fraudulent acquisition of property by threats and the proof supports the allegations, there is no variance because the proof shows that in addition to the threat such violence was used as would have supported a conviction for robbery. Williams v. State, 34 Texas Crim. Rep. 530; 31 S. W. 405.

Sec. 2421. **Charge of the court.**—If there is evidence that defendant was acting in good faith, the charge of the court should affirmatively present this defensive theory. Burnsides v. State, 51 Texas Crim. Rep. 403; 102 S. W. 118.

If the indictment charges a robbery by threatening to do an illegal act, it is error to submit to the jury as a basis for conviction a threat to do a legal act. Davis v. State, 37 Texas Crim. Rep. 47; 38 S. W. 792. Burnsides v. State, 51 Texas Crim. Rep. 399; 102 S. W. 118. Scales v. State, 144 S. W. 263.

CHAPTER IX

THEFT IN GENERAL

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Article 1329. (858) (724) **"Theft" defined.**—"Theft" is the fraudulent taking of corporeal personal property belonging to another from his possession, or from the possession of some person holding the same for him, without his consent, with intent to deprive the owner of the value of the same, and to appropriate it to the use or benefit of the person taking. (O. C. 745.)

Sec. 2422. **Venue.**—Where property is stolen in one county and carried off by the offender to another, he may be prosecuted either in the county where he took the property, or in any other county through or into which he may have carried the same, and the theft may be alleged to have been committed in the county where the prosecution is instituted. Cox v. State, 43 Texas 101. Allen v. State, 4 Texas Crim. App. 583. Cameron v. State, 9 Texas Crim. App. 335. Roth v. State, 10 Texas Crim. App. 27. Dixon v. State, 15 Texas Crim. App. 480. Shubert v. State, 20 Texas Crim. App. 320. Clark v. State, 23 Texas Crim. App. 613; 5 S. W. 178. Lyon v. State, 34 S. W. 947. Hoffman v. State, 42 S. W. 309. Homer v. State, 65 S. W. 371. Rose v. State, 65 S. W. 911. Warren v. State, 51 Texas Crim. Rep. 616; 103 S. W. 853. Warren v. State, 105 S. W. 817. Rogers v. State, 153 S. W. 856. Johnson v. State, 162 S. W. 512. Turner v. State, 170 S. W. 1097.

It may be alleged that the property was fraudulently taken in one county and was brought into the county of the prosecution. Connell v. State, 2 Texas Crim. App. 422.

The identical property stolen must be carried into the county of the prosecution before a prosecution for theft is authorized there; if the identity of a stolen animal is changed by death before its removal to another county, it becomes a different character of property, and the venue would only be in the county where the theft thereof was committed. Ballow v. State, 42 Texas Crim. Rep. 263; 58 S. W. 1023. Grant v. State, 42 Texas Crim. Rep. 274; 58 S. W. 1026.

Accomplices and accessories to the crime of theft may be prosecuted in the 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. West v. State, 28 Texas Crim. App. 1; 11 S. W. 635.

Sec. 2423—**Form of indictment for theft.**

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 John Doe on the ..... day of ....., A. D. ....., in said county and State did fraudulently take one watch (or "one bracelet," or "fifty dollars in money," or whatever it was) of the value of ..... dollars, the same then and there being the corporeal personal property of and belonging to ..... from the possession of the said ....., without the consent of the said ....., and with the intent then and there to deprive said ..... of the value of the same, and to appropriate it to the use and benefit of him, the said John Doe.

Against the peace and dignity of the State.

.....

Foreman of the grand jury.

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Sec. 2424. **Description of property.**—A particular description of the property stolen is not required. Stolen property may be generally described in the indictment by the name usually applied to it. Proof that the property alleged to have been stolen was generally known by the name assigned to it in the indictment is sufficient to support the allegation. Dignowitty v. State, 17 Texas 521. Green v. State, 28 Texas Crim. App. 495; 13 S. W. 784. Sims v. State, 64 Texas Crim. Rep. 435; 142 S. W. 574. Romah v. State, 64 Texas Crim. Rep. 515; 142 S. W. 912. Schenk v. State, 174 S. W. 357.

If the money stolen was money of the United States, it is sufficiently described in the indictment by an allegation either in words or figures that it was a stated number of dollars in money, as, for example, "one hundred dollars in money," "$100 in money," and the like. Green v. State, 28 Texas Crim. App. 495; 13 S. W. 784. Wofford v. State, 29 Texas Crim. App. 536; 16 S. W. 535. Otero v. State, 30 Texas Crim. App. 455; 17 S. W. 1081. Jasper v. State, 61 S. W. 393. Bell v. State, 62 S. W. 567. Sims v. State, 64 Texas Crim. Rep. 435; 142 S. W. 572. McAdams v. State, 172 S. W. 792.

A general description of the stolen property is sufficient in an indictment for theft, as "one pair of shoes' and "one razor" (Johnson v. State, 42 Texas Crim. Rep. 104; 58 S. W. 69); "one money purse" (Bush v. State, 53 Texas Crim. Rep. 213; 109 S. W. 184); "one watch" (Grissom v. State, 40 Texas Crim. Rep. 147; 49 S. W. 93); "two diamond rings" and "one diamond brooch" (Butler v. State, 49 Texas Crim. Rep. 160; 93 S. W. 743); "two knives and one ring" (Campbell v. State, 61 Texas Crim. Rep. 504; 135 S. W. 548); "one suit of clothes" (Baldwin v. State, 175 S. W. 701).

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, is sufficient. Lewis v. State, 28 Texas Crim. App. 141; 12 S. W. 736. Green v. State, 28 Texas Crim. App. 495; 13 S. W. 784; Taylor v. State, 29 Texas Crim. App. 466; 16 S. W. 302. Mathews v. State, 39 Texas Crim. Rep. 556; 48 S. W. 189. Johnson v. State, 42 Texas Crim. Rep. 103; 58 S. W. 69. Roman v. State, 64 Texas Crim. Rep. 515; 142 S. W. 912. Schenk v. State, 174 S. W. 357.

A general description of a domestic animal is sufficient in an indictment for theft of such animal, as "one hog" (Lunn v. State, 44 Texas 85. Grant v. State, 2 Texas Crim. App. 166. Moore v. State, 55 Texas Crim. Rep. 4; 114 S. W. 807); "one cow" (Johnson v. State, 1 Texas Crim. App. 120); "one head of cattle" (Mathews v. State, 41 Texas Crim. Rep. 99; 51 S. W. 915. Walton v. State, 41 Texas Crim. Rep. 457; 55 S. W. 566. Warren v. State, 105 S. W. 817); "one horse" (Velasco v. State, 9 Texas Crim. App. 77. Johnson v. State, 16 Texas Crim. App. 402. Davis v. State, 23 Texas Crim. App. 210; 4 S. W. 590); and the like. Henry v. State, 45 Texas 84. Robertson v. State, 1 Texas Crim. App. 313. Moore v. State, 2 Texas Crim. App. 350. Grant v. State, 3 Texas Crim. App. 4. Duval v. State, 8 Texas Crim. App. 370. Smith v. State, 24 Texas Crim. App. 290; 6 S. W. 40. Coward v. State, 24 Texas Crim. App. 595; 7 S. W. 332.

In describing a domestic animal, it is not necessary to allege that it was corporeal personal property. Damron v. State, 27 S. W. 7. Hendricks v. State, 56 S. W. 55.

In describing a domestic animal in an indictment, the law presumes an intention to allege a living animal unless the animal is described as dead. Thompson v. State, 30 Texas 358. Ballow v. State, 42 Texas Crim. Rep. 261; 58 S. W. 1022. Ballow v. State, 42 Texas Crim. Rep. 267; 58 S. W. 1023. Grant v. State, 42 Texas Crim. Rep. 274; 58 S. W. 1026.

An indictment for theft of a written instrument need not set it out by its tenor. Dignowitty v. State, 17 Texas 521. Gaines v. State, 77 S. W. 10.

A material difference between the information and the complaint as to the description of the property stolen is fatal. Snoga v. State, 46 Texas Crim. Rep. 419; 80 S. W. 625.

Unnecessary descriptive averments do not vitiate an indictment but merely impose upon the prosecution the burden of proving them. Soria v. State, 2 Texas

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Crim. App. 297. Rogers v. State, 26 Texas Crim. App. 429; 9 S. W. 762. Martinez v. State, 51 Texas Crim. Rep. 585; 103 S. W. 930.

An indictment for theft is bad if it does not, in some way, designate the number of things or animals alleged to have been stolen. Mathews v. State, 39 Texas Crim. Rep. 556; 48 S. W. 189.

If more than one noun is used to designate the property stolen and they are of different meaning, their use in the alternative will render the indictment bad for uncertainty, as "one certain trunk or chest." Castello v. State, 36 Texas 324. Potter v. State, 39 Texas 388.

"One promissory note of the value of thirty dollars" is too general. Calentine v. State, 50 Texas Crim. Rep. 154; 94 S. W. 1061.

"Six railroad tickets, reading from Texarkana, Texas, to Kansas City" is too general. Patrick v. State, 50 Texas Crim. Rep. 496; 98 S. W. 840.

The charge of the court in describing the property alleged to have been stolen should be as full as the description thereof in the indictment. Johnson v. State, 58 Texas Crim. Rep. 442; 126 S. W. 597.

In authorizing a conviction for theft, the charge of the court should not include articles which were not alleged to have been stolen or articles which the proof shows the prosecutor did not lose. Snelling v. State, 57 Texas Crim. Rep. 416; 123 S. W. 610.

The charge of the court may descend into particulars in describing the property though the indictment does not, if there is no material variance between the description in the charge and the description given in the indictment. Hurley v. State, 36 Texas Crim. Rep. 73; 35 S. W. 371.

If stolen property be described with unnecessary particularity, the description must be proved as laid. McGee v. State, 4 Texas Crim. App. 625. Coleman v. State, 21 Texas Crim. App. 526; 2 S. W. 859. Poston v. State, 58 Texas Crim. Rep. 583; 126 S. W. 1148. Ferguson v. State, 147 S. W. 592.

If the age, color, brand or sex of an animal is unnecessarily alleged, the proof must correspond with such descriptive averment. Hill v. State, 41 Texas 257. Lunsford v. State, 1 Texas Crim. App. 448. Ranjel v. State, 1 Texas Crim. App. 462. Courtney v. State, 3 Texas Crim. App. 261. Allen v. State, 8 Texas Crim. App. 360. Cameron v. State, 9 Texas Crim. App. 336. Gray v. State, 11 Texas Crim. App. 411. Davis v. State, 15 Texas Crim. App. 219. Loyd v. State, 22 Texas Crim. App. 649; 3 S. W. 670. Ward v. State, 21 S. W. 250.

Sec. 2425. **Fraudulent taking must be alleged.**—An indictment for theft is bad if there is no allegation that the property was "fraudulently" taken. Muldrew v. State, 12 Texas Crim. App. 617. Sloan v. State, 18 Texas Crim. App. 225. Ortis v. State, 18 Texas Crim. App. 282. Ware v. State, 19 Texas Crim. App. 13. Spain v. State, 19 Texas Crim. App. 469. McPherson v. State, 20 Texas Crim. App. 194. Chance v. State, 27 Texas Crim. App. 441; 11 S. W. 457. Doxey v. State, 12 S. W. 412. Wells v. State, 50 Texas Crim. Rep. 499; 98 S. W. 851. Watt v. State, 61 Texas Crim. Rep. 662; 136 S. W. 56. Baldwin v. State, 175 S. W. 701.

Bad spelling of the word "fraudulent" will not vitiate an otherwise good indictment or information for theft if the sense is not affected and the meaning cannot be mistaken. State v. Earp, 41 Texas 487. St. Louis v. State, 59 S. W. 889.

Sec. 2426. **The taking.**—It is not necessary to allege that the taking was "felonious." Austin v. State, 42 Texas 345. Jorasco v. State, 6 Texas Crim. App. 240.

The charge of the court in a theft case is erroneous if it fails to require the jury to find that the taking was fraudulent. Holsey v. State, 24 Texas Crim. App. 35; 5 S. W. 523. Beard v. State, 45 Texas Crim. Rep. 522; 78 S. W. 348. Wilson v. State, 59 Texas Crim. Rep. 623; 129 S. W. 836.

The omission of the word "fraudulent" in the charge of the court is not always reversible error. Ashlock v. State, 16 Texas Crim. App. 22.

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It is error to charge the jury that a sale is a taking. Madison v. State, 16 Texas Crim. App. 441.

Selling an animal on the range is not a taking if neither defendant nor his purchaser, in person or by agent, takes possession of the animal. Hardeman v. State, 12 Texas Crim. App. 207.

Proof of a mere wounding of an animal and pursuit of it without capturing it does not show a taking. Minter v. State, 26 Texas Crim. App. 218; 9 S. W. 561.

Killing an animal may constitute a taking of it where the circumstances show an intent to steal. Hall v. State, 41 Texas 287. Coombes v. State, 17 Texas Crim. App. 265. Stegall v. State, 32 Texas Crim. Rep. 100; 22 S. W. 146.

To constitute a fraudulent taking it is not essential that defendant intended that any pecuniary benefit should accrue to him or others. Dignowitty v. State, 17 Texas 530. Stegall v. State, 32 Texas Crim. Rep. 100; 22 S. W. 146.

If defendant, to prevent the identification and proof of a previous theft, killed an animal while in the possession of one who bought it from him, intending only to destroy it, it is a fraudulent taking from such vendee. Stegall v. State, 32 Texas Crim. Rep. 100; 22 S. W. 146.

To constitute the taking fraudulent it is not necessary that defendant should have known who was the owner of the property taken. Lawrence v. State, 20 Texas Crim. App. 540.

Defendant cannot justify a fraudulent taking by proof of a custom. The law does not authorize thieving by custom. Lawrence v. State, 20 Texas Crim. App. 540. Vick v. State, 69 S. W. 156. Ragazine v. State, 47 Texas Crim. Rep. 46; 84 S. W. 832.

The act of throwing property from a train may constitute a taking. Price v. State, 41 Texas 215. Roman v. State, 64 Texas Crim. Rep. 515; 142 S. W. 912.

If there is evidence from which the jury might infer that the taking was not fraudulent but only wrongful, the charge of the court should instruct the jury as to the distinction between trespass and theft. Bray v. State, 41 Texas 203. Loza v. State, 1 Texas Crim. App. 488. Harris v. State, 2 Texas Crim. App. 102. Banks v. State, 7 Texas Crim. App. 592. Ainsworth v. State, 11 Texas Crim. App. 344. Wilson v. State, 18 Texas Crim. App. 270. Guest v. State, 24 Texas Crim. App. 241; 5 S. W. 840. Schultz v. State, 30 Texas Crim. App. 94; 16 S. W. 756. Pyles v. State, 62 Texas Crim. Rep. 49; 136 S. W. 464.

If the taking was from the person a conviction will not be sustained if the indictment charges only ordinary theft. Harris v. State, 17 Texas Crim. App. 134. Nichols v. State, 28 Texas Crim. App. 107; 12 S. W. 500. Dalton v. State, 27 S. W. 259.

If the indictment charges the taking of more than one animal or article and the testimony discloses that they were taken at such different times as not to constitute one transaction or fails to show that they were taken at one "taking," the State should be required to elect as to which animal or article a conviction would be sought. Lunn v. State, 44 Texas 85. Harris v. State, 55 Texas Crim. Rep. 469; 117 S. W. 839. Mazureczk v. State, 59 Texas Crim. Rep. 211; 128 S. W. 136.

In theft a fraudulent taking is the gist of the offense—the *factum probandum*—the main fact to be proved. Crowell v. State, 24 Texas Crim. App. 409; 6 S. W. 318. Demint v. State, 26 Texas Crim. App. 370; 9 S. W. 738. Taylor v. State, 27 Texas Crim. App. 463; 11 S. W. 462. Hayes v. State, 30 Texas Crim. App. 407; 17 S. W. 940. Johnson v. State, 34 Texas Crim. Rep. 254; 30 S. W. 228. Harvard v. State, 49 Texas Crim. Rep. 290; 92 S. W. 804.

Sec. 2427. **Taking must be complete.**—To constitute a taking, the property must be brought under the dominion and control of the defendant with power to take it into his manual possession; if the property is attached to the owner or to something else the taking is not complete if the attempt to take it is interrupted before it is severed or detached. Rodriguez v. State, 71 S. W. 596. Tarrango v. State, 44 Texas Crim. Rep. 385; 71 S. W. 597. Herr v. State, 52 Texas Crim. Rep. 53; 105 S. W. 190. Walters v. State, 56 Texas Crim. Rep. 10; 118 S. W. 543. Clark v. State, 59 Texas Crim. Rep. 246; 128 S. W. 131.

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Where defendant pulled out a drawer and took out six dollars, and there was forty-five dollars more therein, he being interrupted while his hand was in the drawer, the taking of the fifty-one dollars was sufficiently shown. Harris v. State, 29 Texas Crim. App. 101; 14 S. W. 390.

Sec. 2428. **Taking by innocent agent.**—If defendant fraudulently procured a person innocent of any fraudulent intent to take the property for him, it is a taking through an innocent agent, and a taking by an innocent agent is a taking by defendant. In a legal sense, defendant was present when the act was done if he fraudulently caused that act to be done by an innocent agent although in fact he was in a different county or State. Madison v. State, 16 Texas Crim. App. 442. Doss v. State, 21 Texas Crim. App. 509; 2 S. W. 814. Dale v. State, 32 Texas Crim. Rep. 78; 22 S. W. 49. Sikes v. State, 28 S. W. 688. Lane v. State, 41 Texas Crim. Rep. 559; 55 S. W. 831. Walls v. State, 43 Texas Crim. Rep. 70; 63 S. W. 328. Jessup v. State, 44 Texas Crim. Rep. 83; 68 S. W. 988. Farris v. State, 55 Texas Crim. Rep. 481; 117 S. W. 798.

Sec. 2429. **Property attached to realty.**—The act of severance converts the article severed from the realty into personal property, and, no matter how instantaneous its removal may be, the fraudulent taking of such article with the intent to deprive the owner of the value of the same and to appropriate it to the use or benefit of the person taking is theft. Ex parte Willke, 34 Texas 155. Harberger v. State, 4 Texas Crim. App. 26. Alvia v. State, 42 Texas Crim. Rep. 424; 60 S. W. 551. Farris v. State, 69 S. W. 140.

Sec. 2430. **Assuming the taking in the charge.**—The charge of the court should not assume that the defendant took the property if the taking is not an admitted fact. Owens v. State, 28 Texas Crim. App. 122; 12 S. W. 506.

If the taking is an admitted fact the charge of the court may assume that the property was taken. Tanner v. State, 44 S. W. 489.

Sec. 2431. **Continuous taking. Felony or misdemeanor.**—Misdemeanors cannot be added to or multiplied by each other so as thus to make a felony. Lacey v. State, 22 Texas Crim. App. 659; 3 S. W. 343. Stallings v. State, 29 Texas Crim. App. 220; 15 S. W. 716. Cody v. State, 31 Texas Crim. Rep. 184; 20 S. W. 398. Barnes v. State, 43 Texas Crim. Rep. 358; 65 S. W. 922. Johnson v. State, 57 Texas Crim. Rep. 308; 122 S. W. 879.

Where different articles are alleged to have been stolen and values are affixed to each article, the evidence must show a taking of articles of the value of fifty dollars or over at one and the same time in order to sustain a conviction for a felony. Lacey v. State, 22 Texas Crim. App. 659; 3 S. W. 343. Clark v. State, 26 Texas Crim. App. 489; 9 S. W. 767. Stallings v. State, 29 Texas Crim. App. 220; 15 S. W. 716. Johnson v. State, 57 Texas Crim. Rep. 308; 122 S. W. 879.

If it is an issue as to whether enough property to constitute a felony was taken at one trip or more, the decision of that issue should be left to the jury. Lacey v. State, 22 Texas Crim. App. 659; 3 S. W. 343. Cody v. State, 31 Texas Crim. Rep. 185; 20 S. W. 398. Barnes v. State, 43 Texas Crim. Rep. 358; 65 S. W. 922. White v. State, 72 S. W. 185. Johnson v. State, 57 Texas Crim. Rep. 308; 122 S. W. 878. Wilson v. State, 158 S. W. 516 (it was).

Where defendant is found in possession of more than one article and there is no suggestion in the testimony that they were taken at separate times, the court is not required to charge on the issue of separate taking. White v. State, 33 Texas Crim. Rep. 95; 25 S. W. 290. Donaho v. State, 47 S. W. 469.

The issue of misdemeanor theft should be submitted to the jury if there is nothing in the testimony to indicate whether the articles were taken at the same or at different times and no one article is of sufficient value to make the theft a felony. Johnson v. State, 57 Texas Crim. Rep. 308; 122 S. W. 878.

When defendant admits the theft, but no one article taken was of sufficient value to make the theft a felony and there is testimony that he had opportunity to take them at different times, the court should charge on misdemeanor theft. White v. State, 72 S. W. 185. Johnson v. State, 57 Texas Crim. Rep. 311; 122 S. W. 879.

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If the only evidence that the theft was continuous is that of an accomplice, the court should charge that the accomplice must be corroborated as to the theft being continuous before the jury would be authorized to find against defendant on that issue. Close v. State, 55 Texas Crim. Rep. 382; 17 S. W. 137.

Where there is one design, impulse and purpose to get prosecutor's money, and the same is obtained with fraudulent intent to appropriate it, by the use of successive pretexts, and the whole transaction is a part of the original design, the taking is continuous, and the various amounts so taken may be added together to make the theft a felony. Flynn v. State, 47 Texas Crim. Rep. 28; 83 S. W. 206.

The value of property not alleged or proven to have been taken is not to be considered in determining the value of the property taken. Clark v. State, 26 Texas Crim. App. 489; 9 S. W. 767. Howell v. State, 47 Texas Crim. Rep. 252; 83 S. W. 185.

Sec. 2432. **Ownership.**
Sec. 2433. Ownership must be alleged.
Sec. 2434. Allegation of ownership.
Sec. 2435. Alleging ownership in different counts.
Sec. 2436. Alleging ownership in heir.
Sec. 2437. Alleging ownership of minor's property.
Sec. 2438. Alleging ownership in husband or wife.
Sec. 2439. Alleging ownership in corporation.
Sec. 2440. Proof of ownership.
Sec. 2441. Charge as to ownership.
Sec. 2442. Unknown owner.

Sec. 2433. **Ownership must be alleged.**—An indictment for theft is bad if it does not in some way allege the ownership of the property. Stone v. State, 12 Texas Crim. App. 193. Williams v. State, 12 Texas Crim. App. 397. Maddox v. State, 14 Texas Crim. App. 447. Williams v. State, 19 Texas Crim. App. 409. Long v. State, 20 S. W. 576.

It may be alleged that the owner of the stolen property is unknown. Culberson v. State, 2 Texas Crim. App. 324. Taylor v. State, 5 Texas Crim. App. 1. Jorasco v. State, 6 Texas Crim. App. 241. Mackey v. State, 20 Texas Crim. App. 607. McVey v. State, 23 Texas Crim. App. 661; 5 S. W. 174. Reed v. State, 32 Texas Crim. Rep. 139; 22 S. W. 403.

Sec. 2434. **Allegation of ownership.**—Ownership and possession may be alleged in the person having actual control, care and management of the property at the time of the theft, since such person is known in law as the special owner, and it is immaterial whether the title be in a corporation, partnership, or in a private person. Cox v. State, 43 Texas 101. Henry v. State, 45 Texas 84. Jinks v. State, 5 Texas Crim. App. 68. Crockett v. State, 5 Texas Crim. App. 526. Turner v. State, 7 Texas Crim. App. 598. Pippin v. State, 9 Texas Crim. App. 269. Wilson v. State, 12 Texas Crim. App. 481. May v. State, 15 Texas Crim. App. 430. Duren v. State, 15 Texas Crim. App. 627. Frazier v. State, 18 Texas Crim. App. 434. Clark v. State, 26 Texas Crim. App. 486; 9 S. W. 767. Arcia v. State, 28 Texas Crim. App. 202; 12 S. W. 599. Fenner v. State, 20 S. W. 355. Linhart v. State, 33 Texas Crim. Rep. 504; 27 S. W. 260. Ledbetter v. State, 29 S. W. 1084. Ledbetter v. State, 35 Texas Crim. Rep. 197; 32 S. W. 903. Lamater v. State, 38 Texas Crim. Rep. 250; 42 S. W. 304. Ricks v. State, 41 Texas Crim. Rep. 676; 56 S. W. 928. McAnally v. State, 57 S. W. 832. Kersh v. State, 45 Texas Crim. Rep. 451; 77 S. W. 790. Barnes v. State, 46 Texas Crim. Rep. 513; 81 S. W. 735. King v. State, 100 S. W. 387. Miles v. State, 51 Texas Crim. Rep. 587; 103 S. W. 854. Shelton v. State, 52 Texas Crim. Rep. 612; 108 S. W. 679. Price v. State, 55 Texas Crim. Rep. 158; 115 S. W. 586. Kelley v. State, 56 Texas Crim. Rep. 516; 120 S. W. 877. Lockett v. State, 59 Texas Crim. Rep. 531; 129 S. W. 627. Suggs v. State, 143 S. W. 186.

Ownership may be alleged in a special owner and it would make no difference whether he would be responsible to the actual owner or not if he had the actual control, care and management of the property at the time of the theft. King v. State, 43 Texas 351. King v. State, 100 S. W. 389. Howard v. State, 178 S. W. 510.

The statute as to allegations of ownership and possession applies to special owners as well as to general owners. Duncan v. State, 49 Texas Crim. Rep. 150; 91

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S. W. 572. Bailey v. State, 50 Texas Crim. Rep. 402; 97 S. W. 694. King v. State, 100 S. W. 387. Lockett v. State, 59 Texas Crim. Rep. 531; 129 S. W. 627.

Where property is owned—either as general or special owners—in common or jointly by two or more persons, the ownership may be alleged to be in all or either of them. Samora v. State, 4 Texas Crim. App. 508. Calloway v. State, 7 Texas Crim. App. 585. Terry v. State, 15 Texas Crim. App. 69. Pitts v. State, 14 S. W. 1014. Clark v. State, 26 Texas Crim. App. 486; 9 S. W. 767. Coates v. State, 31 Texas Crim. Rep. 261; 20 S. W. 585. Duncan v. State, 49 Texas Crim. Rep. 150; 91 S. W. 572. Bailey v. State, 50 Texas Crim. Rep. 402; 97 S. W. 694. Lockett v. State, 59 Texas Crim. Rep. 531; 129 S. W. 627. Davis v. State, 63 Texas Crim. Rep. 453; 140 S. W. 349. Whorton v. State, 151 S. W. 300. Powers v. State, 162 S. W. 832.

If the stolen property belonged to joint owners or partners, but when stolen was in the actual control, care and management of one of them, ownership and possession may be alleged to be in the latter alone. Samora v. State, 4 Texas Crim. App. 508. Farris v. State, 69 S. W. 140. Davis v. State, 63 Texas Crim. Rep. 453; 140 S. W. 349. Suggs v. State, 143 S. W. 186. Whorton v. State, 151 S. W. 300.

It is not necessary to allege facts showing how the person in whom ownership is laid became the special owner. An allegation that he was the owner is sustained by proof that he was either the general or the special owner. Linhart v. State, 33 Texas Crim. Rep. 504; 27 S. W. 260. Suggs v. State, 143 S. W. 186.

The old rule that ownership could not be laid in one joint owner where the property stolen was not in the possession and control of either was abrogated by the statute which provides that 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. Calloway v. State, 7 Texas Crim. App. 585.

Sec. 2435. **Alleging ownership in different counts.**—Ownership may be alleged in different persons in different counts in order to meet the proof as it transpires and to prevent a variance. Irving v. State, 8 Texas Crim. App. 46. Vaden v. State, 25 S. W. 777. Shuman v. State, 34 Texas Crim. Rep. 69; 29 S. W. 160. Smith v. State, 34 Texas Crim. Rep. 123; 29 S. W. 774. Wright v. State, 35 Texas Crim. Rep. 470; 34 S. W. 273. McLaughlin v. State, 34 S. W. 280. Dawson v. State, 55 S. W. 49.

Sec. 2436. **Alleging ownership in heir.**—If the property belonged to the estate of a deceased person at the time of the theft ownership may be alleged in any one of the heirs. Henry v. State, 45 Texas 84. Crockett v. State, 5 Texas Crim. App. 526. Dreyer v. State, 11 Texas Crim. App. 508. Pate v. State, 54 Texas Crim. Rep. 492; 113 S. W. 757.

Sec. 2437. **Alleging ownership of minor's property.**—Property of a minor residing with his parent, which is under the joint control of both, may be alleged to be owned by the parent. Bazan v. State, 24 S. W. 100. Wright v. State, 35 Texas Crim. Rep. 470; 34 S. W. 273.

Ownership of property in the exclusive control of a minor residing with his parent may be alleged to be in either. Jackson v. State, 79 S. W. 521.

Sec. 2438. **Alleging ownership in husband or wife.**—Ownership of the separate property of the wife may be alleged to be in either the husband or the wife. Coombes v. State, 17 Texas Crim. App. 258. Sinclair v. State, 34 Texas Crim. Rep. 453; 30 S. W. 1070. Kaufman v. State, 53 Texas Crim. Rep. 210; 109 S. W. 172. Smith v. State, 53 Texas Crim. Rep. 646; 111 S. W. 939.

Ownership of the wife's separate property or of the community property may be alleged to be in her husband. Wilson v. State, 3 Texas Crim. App. 209. Alexander v. State, 9 Texas Crim. App. 48. McGee v. State, 46 S. W. 930. Combs v. State, 49 S. W. 585. Smith v. State, 53 Texas Crim. Rep. 646; 111 S. W. 939.

Ownership of community property must be alleged in the husband, unless taken in his absence and while his wife has actual control, care and management of the property. Merriweather v. State, 33 Texas 790. Wilson v. State, 3 Texas Crim. App. 209. Lucas v. State, 36 Texas Crim. Rep. 397; 37 S. W. 427. Jones v. State, 47 Texas Crim. Rep. 126; 80 S. W. 530.

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Ownership of community property taken in the absence of the husband while in the actual control, care and management of the wife may be alleged in the wife; not because she is a part owner, but solely because in such event she would be a special owner. Ware v. State, 2 Texas Crim. App. 549. Miles v. State, 51 Texas Crim. Rep. 587; 103 S. W. 854. Lane v. State, 152 S. W. 897.

Sec. 2439. **Alleging ownership in corporation.**—Where an indictment is for theft of property of a corporation, it must not only describe the corporation by its correct corporate name, but should also allege that it was a corporation. The better and safer practice is to allege ownership in the special owner, but if it is sought to allege the actual ownership in the corporation the safer practice is to allege that the property was taken from the possession of someone, naming him, holding the same for the incorporated company. White v. State, 24 Texas Crim. App. 231; 5 S. W. 857. Thurmond v. State, 30 Texas Crim. App. 539; 17 S. W. 1098.

Sec. 2440. **Proof of ownership.**—Proof that the person in whom ownership is alleged had the actual control, care and management of the property at the time of the theft thereof is sufficient proof that he was the owner. Grant v. State, 3 Texas Crim. App. 4. Bagley v. State, 3 Texas Crim. App. 163. Turner v. State, 7 Texas Crim. App. 598. Pippin v. State, 9 Texas Crim. App. 269. Dodd v. State, 10 Texas Crim. App. 376. Wilson v. State, 12 Texas Crim. App. 481. Morrow v. State, 22 Texas Crim. App. 239; 2 S. W. 624. Von Emons v. State, 20 S. W. 1106. Linhart v. State, 33 Texas Crim. Rep. 504; 27 S. W. 260. Ledbetter v. State, 35 Texas Crim. Rep. 195; 32 S. W. 903. Lamater v. State, 38 Texas Crim. Rep. 249; 42 S. W. 304. McMullen v. State, 59 S. W. 891. King v. State, 100 S. W. 387. Shelton v. State, 52 Texas Crim. Rep. 612; 108 S. W. 679. Kelley v. State, 56 Texas Crim. Rep. 516; 120 S. W. 877. Moore v. State, 59 Texas Crim. Rep. 363; 128 S. W. 1115. Lockett v. State, 59 Texas Crim. Rep. 531; 129 S. W. 627. Taylor v. State, 62 Texas Crim. Rep. 611; 138 S. W. 615. Howard v. State, 178 S. W. 510.

If the person in whom ownership is alleged had the actual control, care and management of the property at the time of the taking thereof, or was a joint owner thereof at such time, there is no variance as to the proof of ownership if the proof shows that the property was owned jointly by him and others. Clark v. State, 26 Texas Crim. App. 486; 9 S. W. 767. Pitts v. State, 14 S. W. 1014. Coates v. State, 31 Texas Crim. Rep. 257; 20 S. W. 585. Farris v. State, 69 S. W. 140. Bailey v. State, 50 Texas Crim. Rep. 402; 97 S. W. 694. Price v. State, 55 Texas Crim. Rep. 158; 115 S. W. 586. Lockett v. State, 59 Texas Crim. Rep. 531; 129 S. W. 627. Davis v. State, 63 Texas Crim. Rep. 453; 140 S. W. 349. Suggs v. State, 143 S. W. 186. Whorton v. State, 151 S. W. 300.

The allegation of ownership of the alleged stolen property, being descriptive and essential, must be proved as laid. Cady v. State, 4 Texas Crim. App. 238. Calloway v. State, 7 Texas Crim. App. 585. Anderson v. State, 14 Texas Crim. App. 49. Willis v. State, 24 Texas Crim. App. 487; 6 S. W. 200. Clark v. State, 29 Texas Crim. App. 437; 16 S. W. 171. Kinney v. State, 19 Texas Crim. App. 681. Overturf v. State, 31 Texas Crim. Rep. 10; 23 S. W. 147. Hernandez v. State, 43 Texas Crim. Rep. 80; 63 S. W. 320. Franklin v. State, 53 Texas Crim. Rep. 547; 110 S. W. 909. Hardeman v. State, 58 Texas Crim. Rep. 51; 124 S. W. 632. Grantham v. State, 59 Texas Crim. Rep. 556; 129 S. W. 839. Coleburn v. State, 61 Texas Crim. Rep. 26; 133 S. W. 882. Spiller v. State, 61 Texas Crim. Rep. 555; 135 S. W. 549. Schenk v. State, 174 S. W. 357.

Joint ownership, if alleged, must be proved as laid. Hernandez v. State, 43 Texas Crim. Rep. 80; 63 S. W. 320. Franklin v. State, 53 Texas Crim. Rep. 547; 110 S. W. 909. Hardeman v. State, 58 Texas Crim. Rep. 51; 124 S. W. 632.

If ownership is alleged to be in more than one person, the proof must correspond with the allegation. Hernandez v. State, 43 Texas Crim. Rep. 80; 63 S. W. 320. Franklin v. State, 53 Texas Crim. Rep. 547; 110 S. W. 909. Grantham v. State, 59 Texas Crim. Rep. 556; 129 S. W. 839.

If it is alleged that possession was in one person and that he was holding the property for another, both allegations must be proved as laid. Ward v. State, 21 S. W. 250. York v. State, 42 Texas Crim. Rep. 531; 61 S. W. 128. Coleburn v. State, 61 Texas Crim. Rep. 27; 133 S. W. 882.

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If the proof shows that the general owner had never been in either the actual or constructive possession of the property it will not support an allegation of ownership in the general owner. Cody v. State, 31 Texas Crim. Rep. 185; 20 S. W. 398. Peck v. State, 54 Texas Crim. Rep. 85; 111 S. W. 1019.

An allegation of ownership in a special owner is not supported if the proof shows that possession was never delivered to or acquired by him but was only conditioned upon his finding the property. Bryan v. State, 49 Texas Crim. Rep. 196; 91 S. W. 580.

Ownership of personal property may be proven by oral testimony. Dodd v. State, 10 Texas Crim. App. 376. Ledbetter v. State, 35 Texas Crim. Rep. 195; 32 S. W. 903. Stevens v. State, 49 S. W. 105. Calloway v. State, 50 Texas Crim. Rep. 72; 94 S. W. 902.

Cattle cannot of their own volition change ownership. Alford v. State, 31 Texas Crim. Rep. 299; 20 S. W. 553. Denton v. State, 69 S. W. 142. Taylor v. State, 75 S. W. 35.

Defendant is entitled to disprove the allegations of ownership or possession. Wilson v. State, 3 Texas Crim. App. 206. Baker v. State, 11 Texas Crim. App. 262. Clark v. State, 29 Texas Crim. App. 437; 16 S. W. 171. Wilson v. State, 58 Texas Crim. Rep. 104; 124 S. W. 943. Jackson v. State, 62 Texas Crim. Rep. 106; 136 S. W. 783.

A conviction will not be sustained if the ownership of the alleged stolen property is proven alone by the testimony of one or more accomplices. Crowell v. State, 24 Texas Crim. App. 411; 6 S. W. 318. Hanson v. State, 27 Texas Crim. App. 140; 11 S. W. 37.

The ownership of a house cannot legally be proven by general reputation. Steed v. State, 43 Texas Crim. Rep. 569; 67 S. W. 328.

Proof of acts and declarations of the alleged owner or of others done and said in the absence of the defendant is not admissible to prove ownership. Anderson v. State, 14 Texas Crim. App. 49. Cannada v. State, 29 Texas Crim. App. 537; 16 S. W. 341. Sapp v. State, 77 S. W. 457. Elkins v. State, 59 Texas Crim. Rep. 157; 127 S. W. 833. Richards v. State, 59 Texas Crim. Rep. 206; 127 S. W. 824.

The State is not entitled to prove that a third person did not bring a civil suit for the recovery of the property claimed by defendant to belong to such person and claimed by the State to belong to the alleged injured party and taken away by or for the latter. Elkins v. State, 59 Texas Crim. Rep. 157; 127 S. W. 833. Harris v. State, 160 S. W. 451.

Proof that defendant or his relatives did not bring a civil suit for the recovery of the property taken away by or for the alleged injured party is not admissible to prove ownership in such party or to disprove ownership as claimed by defendant on the trial. Elkins v. State, 59 Texas Crim. Rep. 157; 127 S. W. 833. Harris v. State, 160 S. W. 451.

Proof that the person in whom ownership is alleged was known by the name alleged is sufficient proof of his name. Lott v. State, 24 Texas Crim. App. 723; 14 S. W. 277. Brooks v. State, 39 Texas Crim. Rep. 622; 47 S. W. 640.

The name of the owner when alleged must be proved as laid, either by proof that the name alleged was his name or of the same sound or that he was known by the name alleged. Willis v. State, 24 Texas Crim. App. 487; 6 S. W. 200. Atkins v. State, 44 Texas Crim. Rep. 291; 70 S. W. 744.

If the property was bailed to the person in possession so that he is legally responsible for it to the general owner he is not in mere custody but is a special owner. Blackburn v. State, 44 Texas 457. Conner v. State, 24 Texas Crim. App. 250; 6 S. W. 138.

It is not a test of ownership in a special owner under an indictment for theft that he would or would not be responsible for the loss of the property alleged in his possession. King v. State, 100 S. W. 389.

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Sec. 2441. **Charge as to ownership.**—It is proper for the court in the charge to the jury to instruct them as to the sufficiency of the allegation of ownership and as to the proof necessary and sufficient to support it. Williams v. State, 4 Texas Crim. App. 11. Samora v. State, 4 Texas Crim. App. 512. Alexander v. State, 9 Texas Crim. App. 48. Coates v. State, 31 Texas Crim. Rep. 261; 20 S. W. 585. Lamater v. State, 38 Texas Crim. Rep. 249; 42 S. W. 304. Clark v. State, 58 Texas Crim. Rep. 181; 125 S. W. 12. Suggs v. State, 143 S. W. 186. Turner v. State, 170 S. W. 1097.

If there is no controversy as to ownership, the failure to require the jury to find that the ownership was proved as alleged is not reversible error. Cunningham v. State, 27 Texas Crim. App. 481; 11 S. W. 485. Conners v. State, 31 Texas Crim. Rep. 454; 20 S. W. 98.

If there is a conflict in the evidence as to ownership, the court should charge the jury that the ownership must be proved beyond a reasonable doubt as alleged and if not that they should acquit. Robinson v. State, 5 Texas Crim. App. 519. Bonner v. State, 59 Texas Crim. Rep. 350; 128 S. W. 1102. Davis v. State, 152 S. W. 1096. Schenk v. State, 174 S. W. 357.

Where the evidence of the identity of the alleged stolen property is uncertain, the court should give a charge requiring the jury to find beyond a reasonable doubt that the property in controversy was the property of the person alleged as owner. Doss v. State, 28 Texas Crim. App. 510; 13 S. W. 788. Davis v. State, 152 S. W. 1096.

Unless the ownership of the property is narrowed down to the issue of being either the alleged owner's or defendant's, it is error to charge the jury that if they have a reasonable doubt whether it belonged to the alleged owner or to defendant they should acquit. Armstead v. State, 48 Texas Crim. Rep. 307; 87 S. W. 824.

It is error to authorize a conviction upon a theory of ownership which is not alleged. Clark v. State, 29 Texas Crim. App. 437; 16 S. W. 171. Otero v. State, 30 Texas Crim. App. 454; 17 S. W. 1081. Ganoway v. State, 21 S. W. 46. York v. State, 42 Texas Crim. Rep. 531; 61 S. W. 128.

If ownership is alleged in two persons jointly the allegation is not supported by proof that each was the owner of a distinct share, and the court should direct an acquittal if ownership is not proved as laid. Hernandez v. State, 43 Texas Crim. Rep. 80; 63 S. W. 320.

If ownership is laid in two or more persons jointly and the proof shows that one or more persons named as joint owners had no interest in the property, the variance is fatal, and the court should direct an acquittal. Franklin v. State, 53 Texas Crim. Rep. 549; 110 S. W. 909. Hardeman v. State, 58 Texas Crim. Rep. 51; 124 S. W. 632.

Sec. 2442. **Unknown owner.**
Sec. 2443. Allegation of unknown owner.
Sec. 2444. Proof of unknown owner.
Sec. 2445. Charge as to unknown owner.

Sec. 2443. **Allegation of unknown owner.**—It may be alleged that the owner of the stolen property is to the grand jurors unknown. Culberson v. State, 2 Texas Crim. App. 324. Taylor v. State, 5 Texas Crim. App. 1. Jorasco v. State, 6 Texas Crim. App. 241. Mackey v. State, 20 Texas Crim. App. 607. McVey v. State, 23 Texas Crim. App. 661; 5 S. W. 174. Reed v. State, 32 Texas Crim. Rep. 139; 22 S. W. 403. Melton v. State, 56 S. W. 67.

It may be alleged that the stolen property was "the property of some person who is to the grand jury unknown." Melton v. State, 56 S. W. 67.

When it is alleged that the owner is unknown it is not necessary to allege that defendant was not the owner or that the grand jury used diligence to ascertain the owner. Thompson v. State, 9 Texas Crim. App. 301. Reed v. State, 32 Texas Crim. Rep. 139; 22 S. W. 403. Melton v. State, 56 S. W. 67.

Sec. 2444. **Proof of unknown owner.**—If the testimony on the trial shows that the name of the owner was known to the grand jury it will not sustain an allegation that the owner was unknown. Boren v. State, 23 Texas Crim. App. 33; 4 S. W. 463.

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If the evidence on the trial shows that the owner is known and there is no evidence that the grand jury used diligence to ascertain the name of the owner of the property, the evidence is insufficient to show that the owner was unknown. Jorasco v. State, 6 Texas Crim. App. 243. Langham v. State, 26 Texas Crim. App. 539; 10 S. W. 113. Sharp v. State, 29 Texas Crim. App. 213; 15 S. W. 176. Yantis v. State, 144 S. W. 950.

If the owner is alleged to be unknown and on the trial the evidence shows the name of the owner, the State is required to go further and show that the grand jury did not know the name of the owner and could not, by reasonable diligence, have obtained that information. Jorasco v. State, 6 Texas Crim. App. 243. Williamson v. State, 13 Texas Crim. App. 518. Brewer v. State, 18 Texas Crim. App. 456.

If the evidence on the trial shows that the owner was known, but the State goes further and shows that the grand jury after proper inquiry could not ascertain the name and that the witnesses first learned it after the indictment was found, the proof supports the allegation that the owner was unknown. Jorasco v. State, 8 Texas Crim. App. 540. Cock v. State, 8 Texas Crim. App. 665. Yantis v. State, 144 S. W. 950.

Where it appears from the evidence on the trial that the grand jury could have ascertained the name of the owner by inquiry of witnesses who appeared before them, or by the use of proper or reasonable diligence, an allegation that the owner was unknown to the grand jury is not sustained. Jorasco v. State, 6 Texas Crim. App. 241. Williamson v. State, 13 Texas Crim. App. 518. Atkinson v. State, 19 Texas Crim. App. 466. Kimbrough v. State, 28 Texas Crim. App. 369; 13 S. W. 218. Swink v. State, 32 Texas Crim. Rep. 530; 24 S. W. 893. Grant v. State, 36 S. W. 264. Shockley v. State, 38 Texas Crim. Rep. 458; 42 S. W. 972. McKay v. State, 49 Texas Crim. Rep. 120; 90 S. W. 653. Hellums v. State, 55 Texas Crim. Rep. 356; 116 S. W. 590.

To support an allegation that the owner was unknown, the introduction of the testimony of witnesses who had been before the grand jury and of the grand jurors as to what was done to ascertain the name of the owner is proper. McLaughlin v. State, 34 S. W. 280. Clements v. State, 43 Texas Crim. Rep. 404; 66 S. W. 301. Davis v. State, 144 S. W. 939.

If there is nothing in the evidence on the trial to suggest that the grand jury might have ascertained the name of the owner, proof that the witnesses did not know who was the owner is sufficient to sustain the allegation that the owner was unknown. Peevehouse v. State, 27 S. W. 142. Logan v. State, 36 Texas Crim. Rep. 2; 34 S. W. 925. McCarty v. State, 36 Texas Crim. Rep. 135; 35 S. W. 994. Wright v. State, 45 S. W. 1016.

If the proof on the trial shows that the stolen animal was an estray having no known general or special owner, and nothing suggests that the ownership might have been known by the use of diligence, it is not necessary to go further and make proof that diligent inquiry was made by the grand jury. McCarty v. State, 36 Texas Crim. Rep. 135; 35 S. W. 994.

No presumption of ownership arises from defendant's possession of an estray or from his possession of property belonging to an unknown owner. Wills v. State, 40 Texas 70. Owens v. State, 7 Texas Crim. App. 470. Mackey v. State, 20 Texas Crim. App. 608.

The same amount of proof is required in a case of theft from an unknown owner as where the owner is named in the indictment, except that want of consent may always be shown by circumstances. Mackey v. State, 20 Texas Crim. App. 608. Dawson v. State, 61 S. W. 490.

If the State is unable to identify the property as belonging to a known owner it would be the property of an unknown owner. McLaughlin v. State, 34 S. W. 280. Clements v. State, 43 Texas Crim. Rep. 405; 66 S. W. 301.

An allegation that the owner was unknown will not support proof that known owners had lost cattle. Dawson v. State, 61 S. W. 490.

It seems that if known owners had lost cattle but it could not be shown which known owner owned the animal stolen, a conviction could not be sustained if the

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allegation was that the owner was unknown. Dawson v. State, 61 S. W. 491 (such a situation may be effectively met by alleging ownership in different counts in each of the known owners).

Theft of an animal from an unknown owner is not shown if the proof fails to show that any stray animal was taken or that any animal belonging to an unknown owner was taken. Lane v. State, 45 S. W. 693. Melton v. State, 56 S. W. 67.

A person holding an animal taken up as an estray is a special owner, and proof showing that the grand jury knew or should have known that it was stolen from a known person so holding it will not sustain an allegation that the owner was unknown. Swink v. State, 32 Texas Crim. Rep. 532; 24 S. W. 893. Thomason v. State, 34 S. W. 121.

Sec. 2445. **Charge as to unknown owner.**—The failure to submit the question of diligence used by the grand jury in ascertaining the owner of the alleged stolen property will not be ground for reversal in the absence of a statement of the facts. Anderson v. State, 39 Texas Crim. Rep. 690; 24 S. W. 517.

If the proof shows, without controversy, that the property had no known owner, a charge on the use of diligence to discover the owner need not be given. McCarty v. State, 36 Texas Crim. Rep. 135; 35 S. W. 994. Anderson v. State, 39 Texas Crim. Rep. 690; 24 S. W. 517.

If the proof shows that the State's witness owned the alleged stolen property, it is error to refuse to charge the jury that the evidence must show that the owner was unknown to the county attorney when he filed the information and that he used due diligence to ascertain the owner. Hellums v. State, 55 Texas Crim. Rep. 356; 116 S. W. 590.

Where no witness testified to the loss of an animal which belonged to an unknown owner and no stray animal was shown to have been taken, it is error to refuse to charge the jury that the State must prove that some specific animal was taken from the possession of said unknown owner and that it is not sufficient that the animal found in defendant's possession was unknown, but that the proof must identify it as the one taken from the possession of an unknown owner. Melton v. State, 56 S. W. 67.

When no proof on such issues is made it is error to refuse to charge the jury that the allegation that the owner was unknown must be sustained by proof and by proof that the grand jury had used reasonable diligence to discover the owner and had failed, and that as the State had failed to show that the owner was unknown or that diligence was used to ascertain the owner they should acquit. Lane v. State, 45 S. W. 693.

Sec. 2446. **Possession.**
Sec. 2447. Allegation of possession.
Sec. 2448. Proof of possession.
Sec. 2449. Charge as to possession.

Sec. 2447. **Allegation of possession.**—An allegation that the property was taken from the possession of someone is essential to the validity of an indictment, information, or complaint for theft. Garcia v. State, 26 Texas 210. Castello v. State, 36 Texas 324. Gadson v. State, 36 Texas 350. Garner v. State, 36 Texas 693. Watts v. State, 6 Texas Crim. App. 263. O'Brien v. State, 27 Texas Crim. App. 448; 11 S. W. 459. Riley v. State, 27 Texas Crim. App. 606; 11 S. W. 642. Henley v. State, 61 Texas Crim. Rep. 428; 135 S. W. 133. Ryan v. State, 176 S. W. 49.

It may be alleged that the property was taken "from the possession of some person to the grand jurors unknown." Jorascò v. State, 6 Texas Crim. App. 241.

An indictment for theft is bad if the preposition "of" is omitted after the word "possession." Riley v. State, 27 Texas Crim. App. 606; 11 S. W. 642.

A material variance between the information and the complaint as to the allegation of possession is fatal. Johnson v. State, 4 Texas Crim. App. 594.

When possession is alleged in the special owner it is not necessary to allege that he was holding the property for the general owner. Alexander v. State, 4 Texas

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Crim. App. 261. Frazier v. State, 18 Texas Crim. App. 434. Otero v. State, 30 Texas Crim. App. 455; 17 S. W. 1081. Price v. State, 55 Texas Crim. Rep. 157; 115 S. W. 586.

Possession must be alleged in the person having the actual control, care and management of the property at the time of the fraudulent taking. Frazier v. State, 18 Texas Crim. App. 434. Bailey v. State, 20 Texas Crim. App. 76. Briggs v. State, 20 Texas Crim. App. 106. Littleton v. State, 20 Texas Crim. App. 171. Hall v. State, 22 Texas Crim. App. 632; 3 S. W. 338. Tinney v. State, 24 Texas Crim. App. 112; 5 S. W. 831. Alexander v. State, 24 Texas Crim. App. 126; 5 S. W. 840. Otero v. State, 30 Texas Crim. App. 455; 17 S. W. 1081. Massey v. State, 31 Texas Crim. Rep. 91; 19 S. W. 908. Williams v. State, 51 S. W. 905. Williams v. State, 47 Texas Crim. Rep. 537; 84 S. W. 829. Bonner v. State, 58 Texas Crim. Rep. 195; 125 S. W. 23. McKnight v. State, 156 S. W. 1189. Howard v. State, 178 S. W. 510.

If the employe, servant, or person in charge of the property at the time of the taking had more than the mere custody thereof and had the actual control, care and management of the property at that time not under the immediate supervision of the general owner, possession must be alleged in such employe, servant or person having such possession. Bailey v. State, 18 Texas Crim. App. 426. Frazier v. State, 18 Texas Crim. App. 434. Bailey v. State, 20 Texas Crim. App. 76. Briggs v. State, 20 Texas Crim. App. 106. Littleton v. State, 20 Texas Crim. App. 171. Williams v. State, 26 Texas Crim. App. 131; 9 S. W. 357. Dawson v. State, 24 S. W. 414. Green v. State, 30 S. W. 220. Daggett v. State, 39 Texas Crim. Rep. 9; 44 S. W. 842. Williams v. State, 42 Texas Crim. Rep. 18; 57 S. W. 93. Bonner v. State, 58 Texas Crim. Rep. 195; 125 S. W. 23. Bonner v. State, 59 Texas Crim. Rep. 350; 128 S. W. 1102. McKnight v. State, 156 S. W. 1189.

Mere custody is not possession. Thomas v. State, 1 Texas Crim. App. 289. Garling v. State, 2 Texas Crim. App. 44. Bailey v. State, 18 Texas Crim. App. 426. Clark v. State, 23 Texas Crim. App. 614; 5 S. W. 178. Hawkins v. State, 20 S. W. 830. Emmerson v. State, 33 Texas Crim. Rep. 89; 25 S. W. 289. Graves v. State, 42 S. W. 300. Odell v. State, 44 Texas Crim. Rep. 310; 70 S. W. 964. Kersh v. State, 45 Texas Crim. Rep. 451; 77 S. W. 790. Byrd v. State, 49 Texas Crim. Rep. 279; 93 S. W. 114. King v. State, 100 S. W. 387. Bryan v. State, 54 Texas Crim. Rep. 59; 111 S. W. 1035. Russell v. State, 55 Texas Crim. Rep. 330; 116 S. W. 573. Staha v. State, 151 S. W. 543.

Property in the mere custody of a servant or other person is and may be alleged to be in the possession of the owner if no special owner had possession. Thomas v. State, 1 Texas Crim. App. 295. Garling v. State, 2 Texas Crim. App. 44. Bailey v. State, 18 Texas Crim. App. 426. Frazier v. State, 18 Texas Crim. App. 434. Clark v. State, 23 Texas Crim. App. 614; 5 S. W. 178. Emmerson v. State, 33 Texas Crim. Rep. 89; 25 S. W. 289. Strickland v. State, 36 S. W. 169. Graves v. State, 42 S. W. 300. Livingston v. State, 38 Texas Crim. Rep. 535; 43 S. W. 1008. Willis v. State, 44 S. W. 826. Gentry v. State, 41 Texas Crim. Rep. 497; 56 S. W. 68. McMullen v. State, 59 S. W. 891. Kersh v. State, 45 Texas Crim. Rep. 451; 77 S. W. 790. Byrd v. State, 49 Texas Crim. Rep. 279; 93 S. W. 114. Crouch v. State, 52 Texas Crim. Rep. 463; 107 S. W. 859. Bryan v. State, 54 Texas Crim. Rep. 59; 111 S. W. 1035. Russell v. State, 55 Texas Crim. Rep. 330; 116 S. W. 573. Staha v. State, 151 S. W. 543.

Animals on their accustomed range are in the possession of their owner, and possession may be alleged in the general owner in such case if no special owner had the actual control, care and management thereof at the time of the fraudulent taking. Cameron v. State, 44 Texas 652. Deggs v. State, 7 Texas Crim. App. 360. Moore v. State, 8 Texas Crim. App. 496. Littleton v. State, 20 Texas Crim. App. 171. Mackey v. State, 20 Texas Crim. App. 608. Owens v. State, 28 Texas Crim. App. 122; 12 S. W. 506. Huffman v. State, 28 Texas Crim. App. 178; 12 S. W. 588. Hayes v. State, 30 Texas Crim. App. 406; 17 S. W. 940. McGrew v. State, 31 Texas Crim. Rep. 341; 20 S. W. 740. Bennett v. State, 32 Texas Crim. Rep. 216; 22 S. W. 684. Strickland v. State, 35 S. W. 169. Barnes v. State, 46 Texas Crim. Rep. 515; 81 S. W. 735.

Animals on their accustomed range are in the possession of the special owner when the general owner leaves them in the actual control, care and management of

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another. Littleton v. State, 20 Texas Crim. App. 171. Alexander v. State, 24 Texas Crim. App. 126; 5 S. W. 840. Conner v. State, 24 Texas Crim. App. 250; 6 S. W. 138. Williams v. State, 26 Texas Crim. App. 131; 9 S. W. 357. Green v. State, 30 S. W. 220. Barnes v. State, 46 Texas Crim. Rep. 515; 81 S. W. 735. Honea v. State, 56 Texas Crim. Rep. 279; 119 S. W. 851. Bonner v. State, 58 Texas Crim. Rep. 195; 125 S. W. 23. Bonner v. State, 59 Texas Crim. Rep. 350; 128 S. W. 1102. McKnight v. State, 156 S. W. 1189.

If the person in actual possession did not know who the owner was and was holding the property for the owner as lost property at the time it was stolen, ownership may and possession should be alleged in such person in actual possession. Tinney v. State, 24 Texas Crim. App. 112; 5 S. W. 831. Swink v. State, 32 Texas Crim. Rep. 532; 24 S. W. 893. Thomason v. State, 34 S. W. 121. Williams v. State, 51 S. W. 904. Williams v. State, 47 Texas Crim. Rep. 537; 84 S. W. 829.

Where the owner and his employe or tenant both look after the animal and exercise a joint possession thereof, an indictment for the theft of such animal may allege the possession in either. Bailey v. State, 50 Texas Crim. Rep. 402; 97 S. W. 694.

To turn an animal back to where it was accustomed to range is a friendly act and does not change the possession. Dawson v. State, 59 S. W. 262.

Property left in a hotel is in the possession of the owner if he did not surrender his possession and no other person became a special owner. Odell v. State, 44 Texas Crim. Rep. 307; 70 S. W. 964.

Where a man and his wife occupy the same room, the possession of her separate property which she keeps in his collar box may be alleged in her. Kauffman v. State, 53 Texas Crim. Rep. 211; 109 S. W. 172.

Sec. 2448. **Proof of allegation of possession.**—A fraudulent taking may be theft whether the possession be lawful or not, and the exercise of actual control, care and management of the property by the person from whom the property was stolen constitutes possession. King v. State, 43 Texas 351. Crockett v. State, 5 Texas Crim. App. 526. Moore v. State, 8 Texas Crim. App. 496.

Proof that prosecutor was a joint owner and possessor with others of the stolen property will support the allegation of the indictment which laid ownership and possession in him only. Clark v. State, 26 Texas Crim. App. 486; 9 S. W. 767. Farris v. State, 69 S. W. 140. Calloway v. State, 50 Texas Crim. Rep. 72; 94 S. W. 902. Hatfield v. State, 147 S. W. 237.

If possession is alleged jointly, the proof, to support the allegation, must show a joint possession as alleged. Owens v. State, 28 Texas Crim. App. 123; 12 S. W. 506.

The allegation of possession must be proved as laid. Case v. State, 12 Texas Crim. App. 228. Frazier v. State, 18 Texas Crim. App. 434. Owens v. State, 28 Texas Crim. App. 123; 12 S. W. 506. Otero v. State, 30 Texas Crim. App. 455; 17 S. W. 1081. Massey v. State, 31 Texas Crim. Rep. 91; 19 S. W. 908. Dawson v. State, 24 S. W. 414. Honea v. State, 56 Texas Crim. Rep. 278; 119 S. W. 851. Bonner v. State, 58 Texas Crim. Rep. 195; 125 S. W. 23. Lewis v. State, 164 S. W. 5.

If the evidence fails to show any privity between the owner of the property in whom possession is alleged and the person from whose possession it was taken, there is a variance. Case v. State, 12 Texas Crim. App. 228.

An allegation of possession is not sustained by proof of a mere custody. Owens v. State, 28 Texas Crim. App. 123; 12 S. W. 506. Bryan v. State, 54 Texas Crim. Rep. 59; 111 S. W. 1035.

The State may show the relation and contract between the owner and the person in whom possession is laid so as to show that the possession is not a mere custody. Hill v. State, 55 Texas Crim. Rep. 407; 117 S. W. 823.

The mere custody of property by an employe or servant of the general or special owner does not operate to take the property out of the possession of such owner. Thomas v. State, 1 Texas Crim. App. 295. Bailey v. State, 18 Texas Crim. App. 426.

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Frazier v. State, 18 Texas Crim. App. 434. Clark v. State, 23 Texas Crim. App. 612; 5 S. W. 178. Doss v. State, 28 Texas Crim. App. 506; 13 S. W. 788. Emmerson v. State, 33 Texas Crim. Rep. 89; 25 S. W. 289. Graves v. State, 42 S. W. 300. Willis v. State, 44 S. W. 826. Gentry v. State, 41 Texas Crim. Rep. 497; 56 S. W. 68. McMullen v. State, 59 S. W. 891. Odell v. State, 44 Texas Crim. Rep. 307; 70 S. W. 964. Kersh v. State, 45 Texas Crim. Rep. 451; 77 S. W. 790. Byrd v. State, 49 Texas Crim. Rep. 279; 93 S. W. 114. Staha v. State, 151 S. W. 543.

The allegation of possession is sustained if the proof shows that the person alleged to have been in possession had the actual control, care and management of the property at the time it was stolen. Bailey v. State, 18 Texas Crim. App. 426. Frazier v. State, 18 Texas Crim. App. 434. Willis v. State, 44 S. W. 426. Kersh v. State, 45 Texas Crim. Rep. 451; 77 S. W. 790. Byrd v. State, 49 Texas Crim. Rep. 279; 93 S. W. 114. Cain v. State, 49 Texas Crim. Rep. 360; 92 S. W. 808. King v. State, 100 S. W. 387. Price v. State, 55 Texas Crim. Rep. 158; 115 S. W. 586. Kelley v. State, 56 Texas Crim. Rep. 516; 120 S. W. 877. McDonald et al. v. State, 156 S. W. 209.

An allegation of possession in the owner is sustained if the proof shows that he had actual control, care and management of the property at the time it was stolen. Owens v. State, 28 Texas Crim. App. 123; 12 S. W. 506. Doss v. State, 28 Texas Crim. App. 506; 13 S. W. 788. Odell v. State, 44 Texas Crim. Rep. 307; 70 S. W. 964. Byrd v. State, 49 Texas Crim. Rep. 279; 93 S. W. 114. Bailey v. State, 50 Texas Crim. Rep. 401; 97 S. W. 694. Kelley v. State, 56 Texas Crim. Rep. 516; 120 S. W. 877. Staha v. State, 151 S. W. 543.

Proof that the owner was out of the State at the time of the theft will not change his possession if he did not leave the property in the actual control, care and management of another. Cameron v. State, 44 Texas 652. Webb v. State, 44 S. W. 498. Parks v. State, 89 S. W. 1064.

If possession is alleged in the general owner and the proof shows that another had the actual control, care and management of the property at the time of the theft and that the general owner was not then in possession, the variance is fatal. Case v. State, 12 Texas Crim. App. 228. Bailey v. State, 20 Texas Crim. App. 76. Briggs v. State, 20 Texas Crim. App. 106. Littleton v. State, 20 Texas Crim. App. 171. Hall v. State, 22 Texas Crim. App. 632; 3 S. W. 338. Tinney v. State, 24 Texas Crim. App. 112; 5 S. W. 831. Alexander v. State, 24 Texas Crim. App. 127; 5 S. W. 840. Conner v. State, 24 Texas Crim. App. 245; 6 S. W. 138. Williams v. State, 26 Texas Crim. App. 131; 9 S. W. 357. Otero v. State, 30 Texas Crim. App. 455; 17 S. W. 1081. Dawson v. State, 24 S. W. 414. Green v. State, 30 S. W. 220. Williams v. State, 51 S. W. 905. Williams v. State, 42 Texas Crim. Rep. 18; 57 S. W. 93. Honea v. State, 56 Texas Crim. Rep. 279; 119 S. W. 851. Bonner v. State, 59 Texas Crim. Rep. 195; 125 S. W. 23. McKnight v. State, 156 S. W. 1189.

Animals running on their accustomed range are in the possession of the general owner if no other person by reason of having the actual control, care and management thereof became the special owner. Bennett v. State, 32 Texas Crim. Rep. 216; 22 S. W. 684. Dugat v. State, 148 S. W. 793.

Possession of property may be proven by oral testimony. Calloway v. State, 50 Texas Crim. Rep. 72; 94 S. W. 902.

Sec. 2449. **Charge as to possession.**—When authorized by the testimony the court may charge the jury that if the animal was fraudulently taken from its accustomed range it was taken from the possession of the owner. Huffman v. State, 28 Texas Crim. App. 178; 12 S. W. 588.

The court may charge the jury that if the person in whom possession is alleged had the actual control, care and management of the property at the time of the taking (if any), either alone or jointly with another, that the allegation of possession is proven. Emmerson v. State, 33 Texas Crim. Rep. 89; 25 S. W. 289. Duncan v. State, 49 Texas Crim. Rep. 150; 91 S. W. 572. Bailey v. State, 50 Texas Crim. Rep. 401; 97 S. W. 694.

The charge of the court should follow the indictment as to the allegation of possession. Otero v. State, 30 Texas Crim. App. 454; 17 S. W. 1081. Taylor v. State, 53 Texas Crim. Rep. 616; 111 S. W. 151.

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The charge should require the jury to find that the property was taken from the possession of the person in whom possession is laid. Shoefercater v. State, 5 Texas Crim. App. 211. Otero v. State, 30 Texas Crim. App. 454; 17 S. W. 1081. Eubanks v. State, 57 Texas Crim. Rep. 153; 122 S. W. 36.

If the allegation of possession is supported by the testimony, the charge requiring the jury to find the possession as alleged is not reversibly erroneous because the word "actual" is omitted. Kennon v. State, 46 Texas Crim. Rep. 359; 82 S. W. 518.

If there is an issue as to whether the person in whom possession is alleged really had possession, the court should charge on the issue of whether another was in possession. White v. State, 33 Texas Crim. Rep. 95; 25 S. W. 290. Green v. State, 30 S. W. 220. Long v. State, 39 Texas Crim. Rep. 462; 46 S. W. 821. Tankersley v. State, 51 Texas Crim. Rep. 224; 101 S. W. 997. Bonner v. State, 59 Texas Crim. Rep. 350; 128 S. W. 1102.

If the testimony raises the issue as to whether the person in whom possession is alleged was a servant in mere custody or was in possession as a special owner, the charge should define what it takes to make custody and possession and leave the determination of that issue to the jury. Phillips v. State, 42 S. W. 557.

Sec. 2450. **Want of consent.**
Sec. 2451. Allegation of want of consent.
Sec. 2452. Proof of want of consent.
Sec. 2453. Implied consent.
Sec. 2454. Charge as to want of consent.

Sec. 2451. **Allegation of want of consent.**—An indictment for theft is bad if it fails to allege that the property was taken without the consent of the alleged owner. Johnson v. State, 39 Texas 393. Williams v. State, 12 Texas Crim. App. 397. Swink v. State, 32 Texas Crim. Rep. 532; 24 S. W. 893. Long v. State, 39 S. W. 674.

If ownership is alleged in one person and possession in another, the indictment must show, in some way, that the property was taken without the consent of either. Bland v. State, 18 Texas Crim. App. 12. Bailey v. State, 18 Texas Crim. App. 432. Swink v. State, 32 Texas Crim. Rep. 532; 24 S. W. 893.

It may be alleged that the property stolen was taken without the consent of either of the owners. Woods v. State, 26 Texas Crim. App. 508; 10 S. W. 108. Smith v. State, 44 S. W. 521.

An allegation that the property was taken "without the consent of John Brown and without the consent of L. Carr" was held sufficient. Taylor v. State, 62 Texas Crim. Rep. 611; 138 S. W. 615.

If more than one person is alleged as joint owner, the allegation of want of consent is bad if it only shows a want of joint consent. It would not be theft if defendant had the consent of either joint owner and the allegation, in some way, must show that the taking was without the consent of each. Taylor v. State, 18 Texas Crim. App. 489. Williams v. State, 23 Texas Crim. App. 619; 5 S. W. 129. Taylor v. State, 23 Texas Crim. App. 640; 5 S. W. 141. Woods v. State, 26 Texas Crim. App. 508; 10 S. W. 108. Young v. State, 42 Texas Crim. Rep. 301; 59 S. W. 890. Scott v. State, 68 S. W. 680. Arseneaux v. State, 63 Texas Crim. Rep. 566; 140 S. W. 776.

If two or more persons are named as joint owners of the property, an allegation that the property was taken without the consent of the "owner" is bad. McIntosh v. State, 18 Texas Crim. App. 286. Jones v. State, 20 S. W. 395.

If ownership or possession is not alleged to be joint but the allegation is that the property was taken from different owners, an allegation that the taking was "without the consent of the said owners" is good. Smith v. State, 21 Texas Crim. App. 97; 17 S. W. 560. Smith v. State, 21 Texas Crim. App. 133; 17 S. W. 558.

An allegation that the property was taken without the consent of the "owner" is good if the indictment alleges ownership in a firm and sets out the names of its members. Williams v. State, 19 Texas Crim. App. 279. *Contra:* Scott v. State, 68 S. W. 680.

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If the indictment alleges ownership in a firm and sets out the names of its members, an allegation that the property was taken without the consent of the "owners" is sufficient. Wesley v. State, 45 Texas Crim. Rep. 64; 73 S. W. 960.

Sec. 2452. **Proof of want of consent.**—The State is not required to prove the want of consent of any person not mentioned in the indictment or information. It is not error, however, to do so. Burt v. State, 7 Texas Crim. App. 580. Skipworth v. State, 8 Texas Crim. App. 135. Coombes v. State, 17 Texas Crim. App. 258. Barrett v. State, 18 Texas Crim. App. 64. Bailey v. State, 18 Texas Crim. App. 426. Frazier v. State, 18 Texas Crim. App. 434. House v. State, 19 Texas Crim. App. 238. Atterberry v. State, 19 Texas Crim. App. 406. Clark v. State, 23 Texas Crim. App. 614; 5 S. W. 178. Coates v. State, 31 Texas Crim. Rep. 261; 20 S. W. 585. Von Emmons v. State, 20 S. W. 1106. Emmerson v. State, 33 Texas Crim. Rep. 89; 25 S. W. 289 (temporary custodian). Willis v. State, 33 Texas Crim. Rep. 168; 25 S. W. 1119. Hurley v. State, 35 Texas Crim. Rep. 282; 33 S. W. 354. Schwen v. State, 37 Texas Crim. Rep. 370; 35 S. W. 172. Wilson v. State, 37 Texas Crim. Rep. 383; 38 S. W. 624. Holmes v. State, 42 S. W. 979. Gentry v. State, 41 Texas Crim. Rep. 499; 56 S. W. 68. King v. State, 100 S. W. 388. Skaggs v. State, 56 Texas Crim. Rep. 80; 119 S. W. 106. Hatfield v. State, 147 S. W. 237. Whorton v. State, 151 S. W. 300.

If ownership is alleged in one person and possession in another, the State must prove the want of consent of each. Frazier v. State, 18 Texas Crim. App. 443. Schultz v. State, 20 Texas Crim. App. 310. Swink v. State, 32 Texas Crim. Rep. 532; 24 S. W. 893.

When defendant voluntarily becomes a witness the State may prove by him on cross examination that he did not have the consent of the owner to take the property. Lynch v. State, 156 S. W. 1182.

Want of consent may be proven by circumstantial evidence if the alleged owner is dead, incompetent to testify, or when, without fault on the part of the State, direct testimony cannot be produced. Wilson v. State, 45 Texas 76. Spruill v. State, 10 Texas Crim. App. 697. Clayton v. State, 15 Texas Crim. App. 354. Mackey v. State, 20 Texas Crim. App. 608. Brown v. State, 28 S. W. 536. Brooks v. State, 38 Texas Crim. Rep. 167; 31 S. W. 410. Guin v. State, 50 S. W. 350. Atkins v. State, 44 Texas Crim. Rep. 292; 70 S. W. 744. Caudle v. State, 74 S. W. 545. Taylor v. State, 75 S. W. 35. Sapp v. State, 77 S. W. 457. Nixon v. State, 93 S. W. 555. Jordan v. State, 51 Texas Crim. Rep. 647; 104 S. W. 900.

The best evidence of the want of consent of the person or persons in whom ownership and possession is alleged is the direct testimony of such person or persons, and, if objection is made on the trial, the best evidence must be produced or its absence satisfactorily accounted for. Erskine v. State, 1 Texas Crim. App. 407. Jackson v. State, 7 Texas Crim. App. 363. Wilson v. State, 12 Texas Crim. App. 487. Smith v. State, 13 Texas Crim. App. 513. Love v. State, 15 Texas Crim. App. 566. Miller v. State, 18 Texas Crim. App. 38. Williams v. State, 19 Texas Crim. App. 279.

If no bill of exceptions was reserved to the circumstantial evidence offered to prove want of consent, the judgment will not be reversed because the person or persons in whom ownership and possession is alleged were not placed on the witness stand to testify directly and in terms to want of consent. Stewart v. State, 9 Texas Crim. App. 321. Williams v. State, 19 Texas Crim. App. 279. Schultz v. State, 20 Texas Crim. App. 311. Allen v. State, 24 S. W. 30. Brown v. State, 58 Texas Crim. Rep. 336; 125 S. W. 916.

When the person or persons in whom ownership and possession is alleged testify on the trial and fail to testify directly and in terms to want of consent, it will not be inferred from the other circumstances in the case that want of consent was shown. Garcia v. State, 26 Texas 210. Dixon v. State, 15 Texas Crim. App. 480. Good v. State, 30 Texas Crim. App. 277; 17 S. W. 409. Wisdom v. State, 42 Texas Crim. Rep. 579; 61 S. W. 926. Ridge v. State, 66 S. W. 774. Spiars v. State, 69 S. W. 533. Caddell v. State, 49 Texas Crim. Rep. 134; 90 S. W. 1013. McConico v. State, 61 Texas Crim. Rep. 48; 133 S. W. 1047. (*Contra:* McMahon v. State, 1 Texas Crim. App. 102. Rains v. State, 7 Texas Crim. App. 588. Stewart v. State, 9 Texas

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Crim. App. 321. Williams v. State, 19 Texas Crim. App. 280. McLaughlin v. State, 34 S. W. 280. Hoskins v. State, 43 S. W. 1003.)

Want of consent will not be inferred from the fact that the alleged owner testified on the examining trial where his testimony on that trial is not in the record. Faris v. State, 43 Texas Crim. Rep. 370; 66 S. W. 299.

Proof that one joint owner consented to the taking is ordinarily a complete defense to theft. Tyler v. State, 70 S. W. 750.

If defendant does not defend upon the ground that his co-defendant had the consent of the owner to take the property, it is error to permit the State to prove that the owner had not given the co-defendant consent to take it. Grant v. State, 42 Texas Crim. Rep. 273; 58 S. W. 1026.

If defendant, with the fraudulent consent of the "special owner," fraudulently took the property, it is not theft but embezzlement. Chalk v. State, 18 S. W. 864. Bismarck v. State, 45 Texas Crim. Rep. 54; 73 S. W. 965. Burk v. State, 50 Texas Crim. Rep. 185; 95 S. W. 1064. Pearce v. State, 50 Texas Crim. Rep. 509; 98 S. W. 861.

Sec. 2453. **Implied consent.**—If the owner or his agent induces the original intent to steal on the part of defendant there is implied consent to the taking of the property. Speiden v. State, 3 Texas Crim. App. 156. Bird v. State, 49 Texas Crim. Rep. 98; 90 S. W. 651.

If the person claiming to be a "detective" had the express or implied authority to inaugurate the enterprise to steal, or if defendant believed he had such consent, in either event he would be entitled to an acquittal. Speiden v. State, 3 Texas Crim. App. 156. McGee v. State, 66 S. W. 563. Bird v. State, 49 Texas Crim. Rep. 98; 90 S. W. 651.

Implied consent is not shown where defendant suggests the enterprise to the "detective" who in turn notifies the owner who instructs the "detective" to neither encourage nor discourage the project. Robinson v. State, 34 Texas Crim. Rep. 71; 29 S. W. 40.

Implied consent is not shown where the owner or his agent or servant, not being connected with the original design, but ascertaining the unlawful purpose on the part of the defendant, merely fail to prevent a suspected burglary or theft, though they join in it sufficiently to bring about detection. Alexander v. State, 12 Texas 540. Pigg v. State, 43 Texas 108. Johnson v. State, 3 Texas Crim. App. 592. Allison v. State, 14 Texas Crim. App. 126. Conner v. State, 24 Texas Crim. App. 250; 6 S. W. 138. Tones v. State, 48 Texas Crim. Rep. 368; 88 S. W. 217. Sanchez v. State, 48 Texas Crim. Rep. 591; 90 S. W. 641. Bird v. State, 49 Texas Crim. Rep. 98; 90 S. W. 651. Crowder v. State, 50 Texas Crim. Rep. 92; 96 S. W. 934. Price v. State, 55 Texas Crim. Rep. 159; 115 S. W. 586.

Sec. 2454. **Charge as to want of consent.**—If consent is an issue or if there is no proof as to want of consent, the charge of the court, to be sufficient, must require the jury to find that the property was taken without the consent of the person or persons in whom ownership and possession is laid. McConico v. State, 61 Texas Crim. Rep. 48; 133 S. W. 1046.

The failure to require the jury to find want of consent is not reversible error if the proof shows, without controversy, that defendant did not have consent to take the property. Simnacher v. State, 43 S. W. 512. Moore v. State, 48 Texas Crim. Rep. 400; 88 S. W. 230.

The charge of the court should not ignore the issue of the want of consent of the person or persons in whom ownership and possession is alleged, and should not authorize a conviction on the theory that a person not mentioned in the indictment did not consent to the taking. Otero v. State, 30 Texas Crim. App. 454; 17 S. W. 1081. Henley v. State, 61 Texas Crim. Rep. 428; 135 S. W. 133.

If the State had to rely upon circumstantial evidence to prove want of consent, it is proper to charge the jury that want of consent may be shown by circumstantial evidence. Jackson v. State, 49 Texas Crim. Rep. 215; 91 S. W. 788.

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If there is no evidence that the property was taken without the consent of the person in whom possession is alleged, the court should not charge on the theory of a taking without consent. Sanders v. State, 38 Texas Crim. Rep. 345; 42 S. W. 983.

If ownership or ownership and possession is alleged in two or more persons, a charge is error if it authorizes a conviction on the theory that the property was taken without the consent of "either" of the persons mentioned in the indictment or information. McIntosh v. State, 18 Texas Crim. App. 286. Woods v. State, 26 Texas Crim. App. 508; 10 S. W. 108. Jones v. State, 28 Texas Crim. App. 42; 11 S. W. 830. Towls v. State, 26 S. W. 990. Henley v. State, 61 Texas Crim. Rep. 428; 135 S. W. 133. Davis v. State, 152 S. W. 1094.

If all the persons mentioned in the indictment testify directly and in terms to their want of consent to the taking, and this is uncontroverted, it is not reversible error to authorize a conviction on the theory that the property was taken without the consent of "either." Key v. State, 37 Texas Crim. Rep. 513; 40 S. W. 296.

Sec. 2455. **The intent.**
Sec. 2456. Allegation of intent.
Sec. 2457. Intent.

Sec. 2456. **Allegation of intent.**—An indictment for theft is not bad because the allegation is that the intent was to appropriate the "value" of the property taken. Thompson v. State, 16 Texas Crim. App. 74. Barrett v. State, 18 Texas Crim. App. 65.

It may be alleged that the intent was to appropriate the stolen property to the use and benefit of defendant. Pate v. State, 47 Texas Crim. Rep. 373; 83 S. W. 695.

An indictment for theft is bad if there is no allegation that the taking was with intent to deprive the owner of the value of the property. State v. Sherlock, 26 Texas 106. Ridgeway v. State, 41 Texas 231. Williams v. State, 12 Texas Crim. App. 397. Jones v. State, 12 Texas Crim. App. 424. Tallant v. State, 14 Texas Crim. App. 234. Peralto v. State, 17 Texas Crim. App. 578. Robinson v. State, 17 Texas Crim. App. 589. Moore v. State, 166 S. W. 1153.

An indictment for theft is bad if an intent to "appropriate" the property is not alleged. Jones v. State, 25 Texas Crim. App. 621; 8 S. W. 801.

An indictment for theft is bad if the allegation is that the intent was to appropriate the stolen property to the use of the **owner.** Lawless v. State, 19 S. W. 676.

Sec. 2457. **Intent.**—To constitute theft, when no false pretext is used, the proof must show a fraudulent intent at the very time of the taking. Knutson v. State, 14 Texas Crim. App. 575. White v. State, 23 Texas Crim. App. 643; 5 S. W. 164. Graves v. State, 25 Texas Crim. App. 333; 8 S. W. 471. Bryant v. State, 25 Texas Crim. App. 752; 8 S. W. 937. Siemers v. State, 55 S. W. 334. Gosler v. State, 56 S. W. 51. Drummond v. State, 158 S. W. 549.

A charge is erroneous if so worded as to authorize the jury to convict of ordinary theft if they find a subsequent intent to appropriate the property. Warren v. State, 17 Texas Crim. App. 209. Cunningham v. State, 27 Texas Crim. App. 479; 11 S. W. 485. Davis v. State, 19 S. W. 251. Cady v. State, 39 Texas Crim. Rep. 236; 45 S. W. 568. McClure v. State, 59 Texas Crim. Rep. 287; 128 S. W. 386. Roman v. State, 64 Texas Crim. Rep. 515; 142 S. W. 916.

It is error to fail to charge the jury that they must find that defendant intended to appropriate the property to his own use or benefit. Willis v. State, 24 Texas Crim. App. 585; 6 S. W. 856.

If there is evidence that the property was taken without any fraudulent intent the court should charge the jury affirmatively upon this issue. Schultz v. State, 30 Texas Crim. App. 94; 16 S. W. 756. Young v. State, 37 Texas Crim. Rep. 457; 36 S. W. 272. Veasly v. State, 85 S. W. 274.

Sec. 2458. **Drunkenness.**—Mere drunkenness is no defense to either burglary or theft, and the court is not required to charge the jury that if the defendant was too drunk to form an intent to steal he should be acquitted. Kelley v. State, 31 Texas

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Crim. Rep. 216; 20 S. W. 357. Stoudenmire v. State, 58 Texas Crim. Rep. 258; 125 S. W. 399. Doyle v. State, 59 Texas Crim. Rep. 43; 126 S. W. 1132.

Sec. 2459. **Charge on subsequent connection.**—If there is evidence that defendant was not concerned in the original taking so as to make him liable as a principal, but there is evidence which would only show him to be an accessory or a receiver of stolen property, the court should charge the jury affirmatively on the theory of subsequent connection with the property. Cohea v. State, 9 Texas Crim. App. 175. Clayton v. State, 15 Texas Crim. App. 355. Herron v. State, 20 Texas Crim. App. 301. Tucker v. State, 21 Texas Crim. App. 699; 2 S. W. 893. Collins v. State, 24 Texas Crim. App. 152; 5 S. W. 848. Boyd v. State, 24 Texas Crim. App. 582; 6 S. W. 853. Willis v. State, 24 Texas Crim. App. 584; 6 S. W. 856. Buchanan v. State, 26 Texas Crim. App. 55; 9 S. W. 57. Moore v. State, 28 Texas Crim. App. 377; 13 S. W. 152. Davis v. State, 19 S. W. 251. Wheeler v. State, 34 Texas Crim. Rep. 350; 30 S. W. 913. Moore v. State, 33 S. W. 980. Jackson v. State, 80 S. W. 632. Mickey v. State, 49 Texas Crim. Rep. 255; 91 S. W. 587. Leak v. State, 97 S. W. 476. Burdett v. State, 51 Texas Crim. Rep. 345; 101 S. W. 988. Jones v. State, 57 Texas Crim. Rep. 144; 122 S. W. 31. Lee v. State, 57 Texas Crim. Rep. 177; 122 S. W. 390. Mazureczk v. State, 59 Texas Crim. Rep. 211; 128 S. W. 136. McClure v. State, 59 Texas Crim. Rep. 287; 128 S. W. 386. Jones v. State, 154 S. W. 1018. McKnight v. State, 156 S. W. 1188. Pendley v. State, 158 S. W. 811. Harris v. State, 160 S. W. 450.

Where possession was obtained by lawful means, no false pretext being used, the court should charge the jury that a subsequent appropriation would not be theft. Wilson v. State, 20 Texas Crim. App. 665. Williams v. State, 22 Texas Crim. App. 332; 3 S. W. 226. Guest v. State, 24 Texas Crim. App. 241; 5 S. W. 840. Lott v. State, 24 Texas Crim. App. 725; 14 S. W. 277. Cunningham v. State, 27 Texas Crim. App. 482; 11 S. W. 485. Rumbo v. State, 28 Texas Crim. App. 33; 11 S. W. 680. Nichols v. State, 28 Texas Crim. App. 107; 12 S. W. 500. Brownfield v. State, 25 S. W. 1120. Siemers v. State, 55 S. W. 334. Veasly v. State, 85 S. W. 274. Leak v. State, 97 S. W. 476. Flagg v. State, 51 Texas Crim. Rep. 603; 103 S. W. 855.

It is error to charge the jury that if they find that defendant received the stolen property, knowing it to be stolen, he would be guilty of theft. Williams v. State, 4 Texas Crim. App. 11. Gonzales v. State, 13 Texas Crim. App. 48. Roman v. State, 64 Texas Crim. Rep. 515; 142 S. W. 912.

Sec. 2460. **Trade.**—A witness who was present when a trade was made and heard the negotiations of the parties thereto and who heard them agree that they had traded is as competent to prove the trade as the parties to the same, and such testimony would be original and not hearsay. Hester v. State, 15 Texas Crim. App. 576.

If there is evidence that the defendant acquired the alleged stolen property by a trade, he is entitled to an affirmative charge on this theory. Beckham v. State, 8 Texas Crim. App. 52.

When the charge directs the jury to acquit if they believe that defendant traded for the property or if they have a reasonable doubt as to whether or not he traded for it, it is not necessary to also submit the same issue by way of a charge on explanation of possession. Stephens v. State, 154 S. W. 996.

If there is evidence that defendant traded for the property subsequent to the original taking, a charge sufficiently presents that issue if the jury are thereby informed that if defendant had traded for the property, or if the jury have a reasonable doubt as to whether the trade was made, they should acquit. Glass v. State, 34 Texas Crim. Rep. 299; 30 S. W. 556. Cleveland v. State, 57 Texas Crim. Rep. 356; 123 S. W. 142. Stephens v. State, 154 S. W. 996. Brooks v. State, 160 S. W. 696.

Sec. 2461. **Purchase.**—The defendant is entitled to a distinct and affirmative and not merely an implied and negative presentation of the issues which arise from the evidence, in order to prevent the jury from ignoring the defensive testimony and to conduct them to a proper verdict if they find such testimony to be true. It is immaterial from what source it comes and if there is evidence that the property was purchased by defendant, which, if true, would defeat the State's case, the defendant is entitled to an affirmative charge on the theory of purchase. Heath v. State, 7 Texas

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Crim. App. 466. Vincent v. State, 9 Texas Crim. App. 303. Scott v. State, 10 Texas Crim. App. 112. Anderson v. State, 11 Texas Crim. App. 583. Faulkner v. State, 15 Texas Crim. App. 115. Clayton v. State, 15 Texas Crim. App. 355. Murphy v. State, 17 Texas Crim. App. 645. Ryan v. State, 22 Texas Crim. App. 703; 3 S. W. 547. Bond v. State, 23 Texas Crim. App. 180; 4 S. W. 580. Smith v. State, 24 Texas Crim. App. 290; 6 S. W. 40. Roy v. State, 24 Texas Crim. App. 369; 6 S. W. 186. McDaniel v. State, 24 Texas Crim. App. 552; 7 S. W. 249. Navarrow v. State, 17 S. W. 545. Wheeler v. State, 34 Texas Crim. Rep. 354; 30 S. W. 913. Wright v. State, 35 Texas Crim. Rep. 471; 34 S. W. 273. Ballow v. State, 69 S. W. 513. Bailey v. State, 50 Texas Crim. Rep. 402; 97 S. W. 694. Wilson v. State, 59 Texas Crim. Rep. 623; 129 S. W. 836. Jones v. State, 154 S. W. 1018.

The defensive theory of purchase is sufficiently presented by a charge instructing the jury that if they find that defendant bought the property he is charged with stealing or if they have a reasonable doubt as to his having bought said property they must acquit him. Harrall v. State, 4 Texas Crim. App. 428. Boyd v. State, 24 Texas Crim. App. 583; 6 S. W. 853. Lynch v. State, 32 Texas Crim. Rep. 45; 22 S. W. 47. Mathews v. State, 32 Texas Crim. Rep. 357; 23 S. W. 690. Teague v. State, 31 S. W. 402. Hinsley v. State, 60 Texas Crim. Rep. 568; 132 S. W. 779. Hawthorn v. State, 62 Texas Crim. Rep. 116; 136 S. W. 776. Fennell v. State, 153 S. W. 127. Law v. State, 163 S. W. 90. Swafford v. State, 171 S. W. 225.

If a solution by the jury of the question of title solves the issue of purchase, a charge as to title only is sufficient. Threadgill v. State, 32 Texas Crim. Rep. 453; 24 S. W. 511.

Where the question is whether defendant came into the possession of the property after the same had been stolen and without himself being a party to the theft thereof, it is error to burden a charge on purchase by the issue of good or bad faith. Parchman v. State, 2 Texas Crim. App. 242. McAfee v. State, 14 Texas Crim. App. 674. Clayton v. State, 15 Texas Crim. App. 354. Prator v. State, 15 Texas Crim. App. 368. Barrett v. State, 18 Texas Crim. App. 67. Phillips v. State, 19 Texas Crim. App. 158. Morrow v. State, 22 Texas Crim. App. 239; 2 S. W. 624. Curlin v. State, 23 Texas Crim. App. 683; 5 S. W. 186. Prewitt v. State, 29 S. W. 792.

If there is evidence that defendant purchased the property subsequent to the theft, it is error to charge the jury that if defendant knew the property did not belong to his vendor he could not defend on the ground of purchase. Dreyer v. State, 11 Texas Crim. App. 642. McAfee v. State, 14 Texas Crim. App. 674. Vaughn v. State, 17 Texas Crim. App. 562. Barrett v. State, 18 Texas Crim. App. 67. Hodge v. State, 41 Texas Crim. Rep. 231; 53 S. W. 862.

When the only defensive theory is a purchase subsequent to the theft, it is error to charge the jury that if the property came into defendant's possession in good faith with the consent of anyone who had the right to give such consent they should acquit. Barrett v. State, 18 Texas Crim. App. 67. Prewitt v. State, 29 S. W. 792.

If defendant took an animal from the range or from the possession of the general or special owner and bases his right of taking upon a bill of sale from a third person, it is proper to charge on good faith in buying such animal if the facts do not show that his vendor was in possession. Ashlock v. State, 16 Texas Crim. App. 23. Hart v. State, 22 Texas Crim. App. 563; 3 S. W. 741. Baxter v. State, 43 S. W. 87.

It is error to charge the jury that defendant must prove a purchase before they could acquit, as such charge ignores all other facts proven and confines the jury to the simple question of purchase. Williams v. State, 37 Texas 474.

Proof of hearsay declarations of a co-defendant is not admissible on the trial of defendant to show that defendant bought the property in good faith from his co-defendant. Cooper v. State, 29 Texas Crim. App. 8; 13 S. W. 1011.

A returned bank-check is admissible to corroborate proof of payment. Tankersley v. State, 51 Texas Crim. Rep. 228; 101 S. W. 997.

Sec. 2462. **"Recent possession" and explanation.**
Sec. 2463. Possession of defendant.
Sec. 2464. Possession and explanation.
Sec. 2465. Charge on "recent possession" and explanation.

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Sec. 2463. **Possession by defendant of stolen property.**—To warrant an inference or presumption of guilt from the circumstance alone of possession, such possession must be personal, must be recent, must be unexplained, and must involve a distinct and conscious assertion of property by the defendant. Casas v. State, 12 Texas Crim. App. 59. Lehman v. State, 18 Texas Crim. App. 174. Robinson v. State, 22 Texas Crim. App. 690; 3 S. W. 736. Moreno v. State, 24 Texas Crim. App. 401; 6 S. W. 299. Field v. State, 24 Texas Crim. App. 422; 6 S. W. 200. Bryant v. State, 25 Texas Crim. App. 754; 8 S. W. 937. Funderburg v. State, 34 S. W. 613 (as a charge to the jury this proposition is on the weight of the evidence. Franks v. State, 36 Texas Crim. Rep. 150; 35 S. W. 977. Berry v. State, 37 Texas Crim. Rep. 46; 38 S. W. 812. Ballow v. State, 69 S. W. 513. Stewart v. State, 77 S. W. 791. Neblett v. State, 85 S. W. 17).

If the fact of possession by defendant is doubtful and is not admitted and the State's case depends wholly upon whether defendant was in possession of the stolen property which was found on or near his premises or premises where he was staying, the court should charge the jury as to what it takes to constitute possession. Moreno v. State, 24 Texas Crim. App. 401; 6 S. W. 299. Clark v. State, 30 Texas Crim. App. 402; 17 S. W. 942. Leonard v. State, 57 Texas Crim. Rep. 254; 122 S. W. 549.

If defendant in any way admits his possession it is not necessary to charge the jury as to what constitutes possession. Law v. State, 163 S. W. 90.

Defendant is not shown to have been in possession of the stolen property if the facts relied on by the State to show such possession do not involve a distinct and conscious assertion of property by the defendant. Casas v. State, 12 Texas Crim. App. 59. Lehman v. State, 18 Texas Crim. App. 174. Robinson v. State, 22 Texas Crim. App. 690; 3 S. W. 736. Moreno v. State, 24 Texas Crim. App. 401; 6 S. W. 299. Field v. State, 24 Texas Crim. App. 422; 6 S. W. 200. Bryant v. State, 25 Texas Crim. App. 754; 8 S. W. 937.

Defendant may be in such close juxtaposition to the stolen property as to amount to possession. Perry v. State, 78 S. W. 513.

To raise a presumption of guilt from the circumstance alone of possession of property recently stolen, defendant must be shown to have been in possession thereof recently after the theft. The following cases held the possession too remote to be "recent." Yates v. State, 37 Texas 202 (bed clothing—five months). Beck v. State, 44 Texas 430 (mule—two years). Bragg v. State, 17 Texas Crim. App. 221 (horse—five and a half months). Bean v. State, 24 Texas Crim. App. 11; 5 S. W. 525 (mare—eleven months). Romero v. State, 24 Texas Crim. App. 131; 5 S. W. 663 (horse—two and a half years). Romero v. State, 25 Texas Crim. App. 396; 8 S. W. 641 (horse—three years). Tolliver v. State, 25 Texas Crim. App. 600; 8 S. W. 806 (coat—one year). Matlock v. State, 25 Texas Crim. App. 654; 8 S. W. 818 (cow—two years). Florez v. State, 26 Texas Crim. App. 477; 9 S. W. 772 (mule—eleven months). Menchaca v. State, 58 Texas Crim. Rep. 198; 125 S. W. 20 (jewelry—three and a half months).

The jury may infer the stealing of the whole from the possession of a part. (A charge to this effect would be upon the weight of the evidence. White v. State, 17 Texas Crim. App. 188. Gonzales v. State, 18 Texas Crim. App. 453.) Hill v. State, 41 Texas 256. Jack v. State, 20 Texas Crim. App. 656. Rose v. State, 52 Texas Crim. Rep. 155; 106 S. W. 143.

Sec. 2464. **Possession and explanation of defendant.**—When defendant was found in possession of property recently stolen and his explanations of his possession are conflicting, the judgment will not be reversed on the facts on appeal. Von Emons v. State, 20 S. W. 1106. Cabral v. State, 57 Texas Crim. Rep. 304; 122 S. W. 872. Stephens v. State, 154 S. W. 996.

Proof of possession of property recently stolen will sustain a conviction for theft if there are circumstances in evidence which authorize the jury to disbelieve the explanation of such possession, and when such conviction is approved by the trial judge whose duty it is to set it aside if not satisfied from the evidence that defendant is guilty as charged. Roberts v. State, 17 Texas Crim. App. 82. Teague v. State,

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31 S. W. 401. Odell v. State, 71 S. W. 971. Harper v. State, 95 S. W. 126. Hernandez v. State, 57 Texas Crim. Rep. 15; 121 S. W. 505. Cabral v. State, 57 Texas Crim. Rep. 304; 122 S. W. 872. Roberts v. State, 60 Texas Crim. Rep. 24; 129 S. W. 611. Stephens v. State, 154 S. W. 996.

Whether the explanation of defendant is sufficient is not the sole question; the State must make out a case. Norwood v. State, 20 Texas Crim. App. 306. Johnson v. State, 36 Texas Crim. Rep. 396; 37 S. W. 424. Lane v. State, 45 S. W. 693. Watson v. State, 82 S. W. 514. Gross v. State, 147 S. W. 579. Peace v. State, 153 S. W. 320.

Defendant's explanation of his possession of property supposed to have been recently stolen is admissible as original evidence in his behalf, if made at the time his possession was first directly or circumstantially challenged, or when charged with the theft. To be admissible defendant must be in possession of the property, or the explanation must be made when arrested for the theft, or when charged with or informed that he is suspected of the theft. Ward v. State, 41 Texas 612. Shackelford v. State, 43 Texas 138. Darnell v. State, 43 Texas 147. Knox v. State, 11 Texas Crim. App. 148. Anderson v. State, 11 Texas Crim. App. 576. Castellow v. State, 15 Texas Crim. App. 551. Howell v. State, 16 Texas Crim. App. 93. Saltillo v. State, 16 Texas Crim. App. 251. Lewis v. State, 17 Texas Crim. App. 140. Heskew v. State, 17 Texas Crim. App. 166. Phillips v. State, 19 Texas Crim. App. 163. Windham v. State, 19 Texas Crim. App. 413. Kegans v. State, 27 Texas Crim. App. 708; 11 S. W. 644. Lopez v. State, 28 Texas Crim. App. 346; 13 S. W. 219. Goens v. State, 35 Texas Crim. Rep. 73; 31 S. W. 656. Hodge v. State, 41 Texas Crim. Rep. 231; 53 S. W. 862.

The explanation, to be admissible, must be made when the party is first directly or circumstantially called upon to explain his possession of property recently stolen. Cameron v. State, 44 Texas 652. Harmon v. State, 3 Texas Crim. App. 51. Robinson v. State, 3 Texas Crim. App. 487. Williams v. State, 4 Texas Crim. App. 9. Hampton v. State, 5 Texas Crim. App. 468. Henry v. State, 9 Texas Crim. App. 358. Taylor v. State, 15 Texas Crim. App. 360. White v. State, 18 Texas Crim. App. 62. Martin v. State, 32 Texas Crim. Rep. 443; 24 S. W. 512. Threadgill v. State, 32 Texas Crim. Rep. 451; 24 S. W. 511. Johnson v. State, 55 S. W. 576. Williams v. State, 45 Texas Crim. Rep. 240; 75 S. W. 509. Vargas v. State, 60 Texas Crim. Rep. 196; 131 S. W. 594. Jones v. State, 60 Texas Crim. Rep. 426; 132 S. W. 476.

Proof of the explanation of an alleged or supposed co-conspirator or co-principal, if made when his possession of the stolen property was first directly or circumstantially challenged, is admissible as original evidence on behalf of defendant. Garcia v. State, 26 Texas 209. Wright v. State, 10 Texas Crim. App. 479. Shelton v. State, 11 Texas Crim. App. 36.

If the witnesses differ as to the explanation made by defendant, he is entitled, in order to corroborate the other evidence in his favor, to prove his explanation made at a subsequent time. Andrews v. State, 25 Texas Crim. App. 339; 8 S. W. 328. Butler v. State, 52 Texas Crim. Rep. 531; 107 S. W. 840.

Where the State proves different explanations of defendant as original evidence and he takes the witness stand and gives another explanation, he is not entitled to prove that he made the same statement to others that he made on the stand where the State does not impeach his statement on the stand but merely contradicts it. Welch v. State, 50 Texas Crim. Rep. 30; 95 S. W. 1035.

The jury is not authorized to arbitrarily disregard the testimony of a State witness who testifies to a complete defense though the evidence shows defendant's explanation to be false. Norwood v. State, 20 Texas Crim. App. 306. Bean v. State, 24 Texas Crim. App. 11; 5 S. W. 525.

Where defendant's explanation is reasonable and is sufficient to rebut the circumstance of possession of property recently stolen, the evidence is insufficient to sustain a conviction if it fails to show that the explanation was false. Perry v. State, 41 Texas 486. Powell v. State, 11 Texas Crim. App. 401. Johnson v. State, 12 Texas Crim. App. 385. Taylor v. State, 15 Texas Crim. App. 356. Castellow v. State, 15 Texas Crim. App. 551. Ross v. State, 16 Texas Crim. App. 559. York v. State, 17

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Texas Crim. App. 441. Miller v. State, 18 Texas Crim. App. 34. Loving v. State, 18 Texas Crim. App. 459. Latham v. State, 19 Texas Crim. App. 305. Schultz v. State, 20 Texas Crim. App. 319. Vaughn v. State, 21 Texas Crim. App. 573; 2 S. W. 825. Clark v. State, 22 Texas Crim. App. 599; 3 S. W. 744. Gilleland v. State, 24 Texas Crim. App. 529; 7 S. W. 241. Guest v. State, 24 Texas Crim. App. 530; 7 S. W. 242. Tarin v. State, 25 Texas Crim. App. 360; 8 S. W. 473. Anderson v. State, 25 Texas Crim. App. 593;9 S. W. 43. Cudd v. State, 25 Texas Crim. App. 666; 8 S. W. 814. Adams v. State, 13 S. W. 1009. Woods v. State, 24 S. W. 99. Trevenio v. State, 69 S. W. 72. Porter v. State, 45 Texas Crim. Rep. 66; 73 S. W. 1053. Daniel v. State, 60 Texas Crim. Rep. 515; 132 S. W. 773.

Sec. 2465. **Charge on "recent possession" and explanation.**—Possession of property recently stolen being a **circumstance** only, no inference of guilt is deduced therefrom as a matter of law; therefore it is no more necessary to single out and charge on the circumstance of such possession than it would be to single out and charge on the circumstance of flight or motive. Nor does the fact that an **explanation** of such possession is in evidence require a charge on the subject of possession and explanation. An explanation is of no consequence to either side unless it involves some **defense**; hence an **affirmative** charge on the defense involved in the explanation is all that is required and is the safest and fairest way of submitting the issue to the jury. McWhorter v. State, 11 Texas Crim. App. 585. Mathews v. State, 32 Texas Crim. Rep. 355; 23 S. W. 690. Wheeler v. State, 34 Texas Crim. Rep. 350; 30 S. W. 913. Gilmore v. State, 33 S. W. 120. Wright v. State, 35 Texas Crim. Rep. 470; 34 S. W. 273. Franks v. State, 36 Texas Crim. Rep. 151; 35 S. W. 977. Hays v. State, 36 Texas Crim. Rep. 533; 38 S. W. 171. Williams v. State, 38 S. W. 989. Thomason v. State, 41 S. W. 638. Sisk v. State, 42 S. W. 987. Reed v. State, 46 S. W. 931. Riding v. State, 40 Texas Crim. Rep. 452; 50 S. W. 698. Coleman v. State, 55 S. W. 836. Benson v. State, 69 S. W. 165. Smith v. State, 75 S. W. 298. Scott v. State, 53 Texas Crim. Rep. 333; 111 S. W. 657. Roberts v. State, 60 Texas Crim. Rep. 24; 129 S. W. 611. Presley v. State, 60 Texas Crim. Rep. 102; 131 S. W. 333. Hinsley v. State, 60 Texas Crim. Rep. 568; 132 S. W. 781. Hawthorn v. State, 62 Texas Crim. Rep. 116; 136 S. W. 776. Bowen v. State, 143 S. W. 187. Stephens v. State, 154 S. W. 996. Webb v. State, 154 S. W. 1013.

If the trial court is bent on charging on "recent possession and explanation," the following form is as nearly correct as can be devised under the authorities: "If you believe from the evidence that the property described in the indictment had been stolen from the prosecutor, and that recently thereafter the defendant was found in possession thereof, and when his possession was first questioned he made an explanation of how he came by the same, and you believe that such explanation is reasonable and probably true, and accounted for defendant's possession in a manner inconsistent with the allegations of the indictment, then you will consider such explanation as true, and acquit the defendant. If, on the contrary, you believe such explanation was unreasonable, and did not account for defendant's possession in a manner inconsistent with the allegations of the indictment, or if you believe that same accounted for defendant's possession in a manner inconsistent with the allegations of the indictment, but the State has shown the falsity thereof, then you will take the possession of defendant, together with his explanation, in connection with all the other facts and circumstances, if any, in evidence, and if you believe the defendant guilty beyond a reasonable doubt you will so find; otherwise you will acquit the defendant." Wheeler v. State, 34 Texas Crim. Rep. 350; 30 S. W. 913. (This opinion says, "If in this case the court had pertinently charged on purchase of the hogs, this would have been sufficient without a charge on explanation.") Wheeler v. State, 38 Texas Crim. Rep. 73; 41 S. W. 615. Lovelace v. State, 45 Texas Crim. Rep. 263; 76 S. W. 756. Roberts v. State, 60 Texas Crim. Rep. 24; 129 S. W. 611. Bacon v. State, 61 Texas Crim. Rep. 208; 134 S. W. 690.

A charge is erroneous if it requires the explanation of defendant's possession to account for his **innocence**. The jury are not required, before they are authorized to acquit, to believe that the defendant is innocent. Cagle v. State, 52 Texas Crim. Rep. 308; 106 S. W. 856.. Gusemano v. State, 155 S. W. 217.

A charge is erroneous if in effect it instructs the jury that if they find that defendant's explanation was false they should convict him. Defendant's guilt should not be made to hinge upon the truth or falsity of his explanation. James v. State,

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32 Texas Crim. Rep. 509; 24 S. W. 642. Pollard v. State, 33 Texas Crim. Rep. 197; 26 S. W. 70. Wheeler v. State, 34 Texas Crim. Rep. 353; 30 S. W. 913. Pace v. State, 31 S. W. 173. Wilson v. State, 34 S. W. 284. McCarty v. State, 36 Texas Crim. Rep. 138; 35 S. W. 994. Scott v. State, 36 S. W. 277. Hopperwood v. State, 39 Texas Crim. Rep. 15; 44 S. W. 841. Armstrong v. State, 50 S. W. 346. Smith v. State, 56 S. W. 55. Dyer v. State, 77 S. W. 456. Hart v. State, 47 Texas Crim. Rep. 158; 82 S. W. 652. Bernal v. State, 95 S. W. 118. Jordan v. State, 51 Texas Crim. Rep. 646; 104 S. W. 900. Harris v. State, 160 S. W. 450.

When the defense involved in the explanation, if true, would defeat the State's case whether defendant acquired possession honestly or dishonestly, the charge is erroneous if it requires the explanation to show defendant's possesion was honest before the jury could acquit on account of such explanation. Lacy v. State, 31 Texas Crim. Rep. 81; 19 S. W. 896.

Where the theft was committed a month before defendant was found in possession of the alleged stolen property, a charge assuming that such posesssion was recent is erroneous. Spillman v. State, 38 Texas Crim. Rep. 607; 44 S. W. 149.

A charge is erroneous if it instructs the jury that if the explanation is probably true that then they will not consider the possesion for any purpose; because if defendant's explanation of such possession is probably true the jury should acquit him. Lovelace v. State, 45 Texas Crim. Rep. 263; 76 S. W. 756.

If defendant's explanation was not made while he was in possession of the stolen property, a charge is erroneous which restricts the jury to an explanation made "while in possession." McCall v. State, 14 Texas Crim. App. 364.

If the charge on "recent possession and explanation" is reversibly erroneous, the error is not cured by the giving of a correct charge on that subject or by a correct charge affirmatively presenting the defense involved in the explanation. Armstrong v. State, 50 S. W. 346. Hart v. State, 47 Texas Crim. Rep. 158; 82 S. W. 652. Cagle v. State, 52 Texas Crim. Rep. 307; 106 S. W. 356.

If defendant's explanation is inculpatory, it is error to charge on the subject of "recent possession and explanation." Ewing v. State, 29 Texas Crim. App. 434; 16 S. W. 185.

Where the identical property charged to have been stolen is not found in the possession of the defendant it is error to charge on the subject of "recent possession." Thomas v. State, 43 Texas 661. Roy v. State, 34 Texas Crim. Rep. 301; 30 S. W. 666. Smith v. State, 44 Texas Crim. Rep. 81; 68 S. W. 510. Leonard v. State, 57 Texas Crim. Rep. 254; 122 S. W. 549.

It is error to charge on the subject of "reasonable explanation" when defendant made no explanation of his possession, or when challenged as to the property he stated that he knew nothing about it or claimed it as his own. Mayfield v. State, 23 Texas Crim. App. 649; 5 S. W. 161. Wilson v. State, 34 S. W. 284. Ballew v. State, 34 S. W. 616. Franks v. State, 36 Texas Crim. Rep. 150; 35 S. W. 977. Grande v. State, 37 Texas Crim. Rep. 51; 38 S. W. 613. Hopperwood v. State, 39 Texas Crim. Rep. 19; 44 S. W. 841. Smith v. State, 44 Texas Crim. Rep. 81; 68 S. W. 510. Stewart v. State, 77 S. W. 791. Carson v. State, 48 Texas Crim. Rep. 157; 86 S. W. 1011. Gilford v. State, 48 Texas Crim. Rep. 312; 87 S. W. 698. Dobbs v. State, 57 Texas Crim. Rep. 55; 121 S. W. 859. Handy v. State, 173 S. W. 299.

The court is not required to charge on "reasonable explanation" where the only explanation in evidence is the one made by defendant while on the witness stand during the trial. Cleveland v. State, 57 Texas Crim. Rep. 358; 123 S. W. 142. Diseren v. State, 59 Texas Crim. Rep. 149; 127 S. W. 1037. Spencer v. State, 61 Texas Crim. Rep. 60; 133 S. W. 1049. Dixon v. State, 62 Texas Crim. Rep. 53; 136 S. W. 462.

If there is no explanation in evidence it is not error to fail or refuse to charge on "recent possession" or upon "recent possession and explanation." Baldwin v. State, 31 Texas Crim. Rep. 589; 21 S. W. 679. Bennett v. State, 32 Texas Crim. Rep. 216; 22 S. W. 684. Young v. State, 54 Texas Crim. Rep. 560; 113 S. W. 764. Davis v. State, 55 Texas Crim. Rep. 499; 117 S. W. 159. Cleveland v. State, 57 Texas Crim. Rep. 358; 123 S. W. 142. Diseren v. State, 59 Texas Crim. Rep. 149; 127 S. W. 1037.

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Spencer v. State, 61 Texas Crim. Rep. 60; 133 S. W. 1049. Holland v. State, 61 Texas Crim. Rep. 201; 134 S. W. 693. Alinis v. State, 63 Texas Crim. Rep. 272; 139 S. W. 980. Myers v. State, 144 S. W. 1135. McGee v. State, 155 S. W. 246.

If there is any inference of guilt to be drawn from the possession of property recently stolen, it is an inference of fact and not an inference of law, since such possession is but a circumstance. A charge is on the weight of the evidence if it singles out the circumstance of possession of property recently stolen and authorizes the jury to consider it against defendant or to consider it as positive or presumptive evidence of guilt. Thomas v. State, 43 Texas 658. McCoy v. State, 44 Texas 616. Foster v. State, 1 Texas Crim. App. 363. Alderson v. State, 2 Texas Crim. App. 10. Watkins v. State, 2 Texas Crim. App. 73. Merritt v. State, 2 Texas Crim. App. 182. Williams v. State, 11 Texas Crim. App. 276. McWhorter v. State, 11 Texas Crim. App. 584. McNair v. State, 14 Texas Crim. App. 83. Bryant v. State, 16 Texas Crim. App. 149. Lehman v. State, 18 Texas Crim. App. 178. Gonzales v. State, 18 Texas Crim. App. 452. Ayres v. State, 21 Texas Crim. App. 399; 17 S. W. 253. Brothers v. State, 22 Texas Crim. App. 463; 3 S. W. 737. Stockman v. State, 24 Texas Crim. App. 387; 6 S. W. 298. Arispe v. State, 26 Texas Crim. App. 581; 10 S. W. 111. Lee v. State, 27 Texas Crim. App. 475; 11 S. W. 483. Cooper v. State, 29 Texas Crim. App. 19; 13 S. W. 1011. Lockhart v. State, 29 Texas Crim. App. 36; 13 S. W. 1012. Pollard v. State, 33 Texas Crim. Rep. 197; 26 S. W. 70. Tomerlin v. State, 26 S. W. 214. Wheeler v. State, 34 Texas Crim. Rep. 353; 30 S. W. 913. Hayes v. State, 36 Texas Crim. Rep. 148; 35 S. W. 983. Franks v. State, 36 Texas Crim. Rep. 151; 35 S. W. 977. Berry v. State, 37 Texas Crim. Rep. 44; 38 S. W. 812. Spillman v. State, 38 Texas Crim. Rep. 607; 44 S. W. 149. Ballow v. State, 69 S. W. 513. McCulloh v. State, 71 S. W. 278. Stewart v. State, 77 S. W. 791. Neblett v. State, 85 S. W. 17. Gilford v. State, 48 Texas Crim. Rep. 313; 87 S. W. 698. Lee v. State, 57 Texas Crim. Rep. 177; 122 S. W. 390. McKnight v. State, 156 S. W. 1188.

Sec. 2466. **Hired hand.**—If there is evidence that defendant was a hired hand and acted under the honest belief that his employer had a right to take the property, or that defendant's assistance was wholly subsequent to the theft, he is entitled to an affirmative charge on such theory. Allen v. State, 42 Texas 518. Ivey v. State, 43 Texas 425. Taylor v. State, 5 Texas Crim. App. 529. Anderson v. State, 8 Texas Crim. App. 544. Taylor v. State, 15 Texas Crim. App. 356. White v. State, 18 Texas Crim. App. 63. Wright v. State, 18 Texas Crim. App. 365. Willeys v. State, 22 Texas Crim. App. 414; 3 S. W. 570. Gather v. State, 81 S. W. 717. Burdett v. State, 51 Texas Crim. Rep. 345; 101 S. W. 988. McKnight v. State, 156 S. W. 1188.

Correct charges on the defense of "hired hand" are found in Taylor v. State, 5 Texas Crim. App. 529. Anderson v. State, 8 Texas Crim. App. 544. English v. State, 29 Texas Crim. App. 181. Ray v. State, 35 Texas Crim. Rep. 358; 33 S. W. 869.

A charge on the defensive theory of "hired hand" is erroneous if it fails to inform the jury that defendant would not be guilty of theft in any event unless he knowingly aided in the theft. Ivey v. State, 43 Texas 430. Riojas v. State, 8 Texas Crim. App. 49.

Sec. 2467. **Joke.**—A joke should not be carried too far. Shaw v. State, 23 Texas Crim. App. 493; 5 S. W. 317.

If the evidence shows that the taking was a simple joke a judgment of conviction for theft will be set aside on appeal. Black v. State, 46 Texas Crim. Rep. 107; 79 S. W. 311.

If there is evidence that the taking was a joke and not with the intent at the time of permanently appropriating the property taken, the court should charge the jury affirmatively on this theory. Colwell v. State, 34 S. W. 615.

It is error to exclude testimony that defendant had told others before the alleged theft that he and others were going to play a joke on prosecutor by taking his property in sport for a temporary purpose. Colwell v. State, 34 S. W. 615.

Proof that the taking was a joke is a defense to a prosecution for theft. Black v. State, 46 Texas Crim. Rep. 107; 79 S. W. 311. Baxter v. State, 150 S. W. 912.

Sec. 2468. Claim of right.—Where the property was taken under a claim of right and defendant appears to have any fair color of title, or if the title of prosecutor be

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brought into doubt at all, the court should direct an acquittal. Smith v. State, 42 Texas 444. Evans v. State, 15 Texas Crim. App. 38. Harris v. State, 17 Texas Crim. App. 177. Darnell v. State, 43 Texas Crim. Rep. 89; 63 S. W. 631.

Where the taking is open and under a claim of right, the question of title should be settled in a civil suit. Seymore v. State, 12 Texas Crim. App. 391. Thompson v. State, 21 Texas Crim. App. 141; 17 S. W. 718. Owens v. State, 21 Texas Crim. App. 579; 2 S. W. 808. McGowan v. State, 27 Texas Crim. App. 183; 11 S. W. 112. Parks v. State, 29 Texas Crim. App. 597; 16 S. W. 532. Young v. State, 47 Texas Crim. Rep. 468; 83 S. W. 808. Matura v. State, 48 Texas Crim. Rep. 530; 89 S. W. 648. Brokaw v. State, 85 S. W. 801. Spiller v. State, 61 Texas Crim. Rep. 555; 135 S. W. 549.

If property be taken openly under a fair color of title, it is not theft; if the taking, though wrongful, be not fraudulent, it is not theft. Kay v. State, 40 Texas 32. Winn v. State, 11 Texas Crim. App. 304. Boyd v. State, 18 Texas Crim. App. 339. Phipps v. State, 22 Texas Crim. App. 621; 3 S. W. 761. Howard v. State, 25 Texas Crim. App. 602; 8 S. W. 806. Demint v. State, 26 Texas Crim. App. 370; 9 S. W. 738. Green v. State, 27 Texas Crim. App. 570; 11 S. W. 636. Parks v. State, 29 Texas Crim. App. 597; 16 S. W. 532. Matura v. State, 48 Texas Crim. Rep. 530; 89 S. W. 648.

Defendant is entitled to prove his declarations made prior to the taking of the property which tend to show a taking under a claim of right. Heskew v. State, 17 Texas Crim. App. 166. Green v. State, 30 S. W. 220.

Reasonable doubt should be given in connection with the charge on claim of right. Bray v. State, 41 Texas 561. Reese v. State, 43 Texas Crim. Rep. 542; 67 S. W. 325.

If there is evidence that defendant believed that the property in question was his and that he had a right to take it, the court should charge the jury affirmatively on this theory. Varas v. State, 41 Texas 527. Bray v. State, 41 Texas 561. Johnson v. State, 41 Texas 608. Camplin v. State, 1 Texas Crim. App. 108. Miles v. State, 1 Texas Crim. App. 510. Cameron v. State, 9 Texas Crim. App. 332. Henry v. State, 9 Texas Crim. App. 358. Ainsworth v. State, 11 Texas Crim. App. 339. Johnson v. State, 34 Texas Crim. Rep. 254; 30 S. W. 228. Vance v. State, 34 Texas Crim. Rep. 395; 30 S. W. 792. Bullard v. State, 41 Texas Crim. Rep. 225; 53 S. W. 637. Wilson v. State, 76 S. W. 434. Abrigo v. State, 178 S. W. 518.

If there is evidence that defendant took or received the property in question by the authority of another whom he believed to be authorized to give such authority, the court should charge the jury affirmatively on this theory. Miles v. State, 1 Texas Crim. App. 513. Cameron v. State, 9 Texas Crim. App. 332. Heskew v. State, 18 Texas Crim. App. 279. Moore v. State, 28 Texas Crim. App. 377; 13 S. W. 152. James v. State, 32 Texas Crim. Rep. 511; 24 S. W. 642. Coleman v. State, 55 S. W. 836. Melton v. State, 56 S. W. 67.

A charge is correct which instructs the jury that if they believe or have a reasonable doubt that defendant took the property in controversy as his own, believing at the time that it belonged to him, then they should acquit him. Hunter v. State, 36 S. W. 323. Fields v. State, 57 Texas Crim. Rep. 613; 124 S. W. 652. Lockett v. State, 59 Texas Crim. Rep. 533; 129 S. W. 627.

If there is evidence that the taking was under a claim of right and evidence of a subsequent appropriation, the court should charge the jury that if the taking was under a claim of right by honest mistake a subsequent appropriation would not be theft. Leak v. State, 97 S. W. 476.

When there is evidence that the property belonged to the father of defendant and not to the alleged injured party, a charge is correct which instructs the jury that if the property belonged to defendant's father they should acquit or if defendant took the property under an honest, though mistaken, belief that it was his father's they should acquit. Phillips v. State, 31 S. W. 644.

The defendant is entitled to an acquittal if he believed he had title to the alleged stolen property when he took it, although in fact he had no title, and a charge is error if it restricts the defense to the question of title if there is any evidence from

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which it might be inferred that he was mistaken as to his right to take such property. Heskew v. State, 18 Texas Crim. App. 279. Lawrence v. State, 30 S. W. 668. Darnell v. State, 43 Texas Crim. Rep. 86; 63 S. W. 631. Reese v. State, 43 Texas Crim. Rep. 539; 67 S. W. 325.

If the issue is simply one of title, it is not error to restrict the charge on the theory of a claim of right to the issue of title. Spencer v. State, 34 Texas Crim. Rep. 67; 29 S. W. 159. Ledbetter v. State, 35 Texas Crim. Rep. 198; 32 S. W. 903. Darnell v. State, 43 Texas Crim. Rep. 86; 63 S. W. 631. Holloway v. State, 63 Texas Crim. Rep. 503; 140 S. W. 453.

Sec. 2469. **Mistake.**—If the taking was under an honest mistake it would not be fraudulent. Herber v. State, 7 Texas 70. Smith v. State, 42 Texas 444. Madison v. State, 16 Texas Crim. App. 435. Martindale v. State, 19 Texas Crim. App. 333. Tarin v. State, 19 Texas Crim. App. 359. Donahoe v. State, 23 Texas Crim. App. 457; 5 S. W. 245. White v. State, 23 Texas Crim. App. 643; 5 S. W. 164. Speer v. State, 26 Texas Crim. App. 173; 9 S. W. 358. McGowan v. State, 27 Texas Crim. App. 183; 11 S. W. 112. Green v. State, 27 Texas Crim. App. 570; 11 S. W. 636. Parks v. State, 29 Texas Crim. App. 597; 16 S. W. 532. Brooks v. State, 27 S. W. 141. Fruger v. State, 63 S. W. 130. Edwards v. State, 47 Texas Crim. Rep. 65; 79 S. W. 542.

If the taking was by an honest mistake, it would not be a fraudulent taking whether defendant used proper care or not. When the State's case depends upon a fraudulent taking and the defense is an honest mistake, it is error to require the jury to find that defendant used proper care. Bray v. State, 41 Texas 204. Neely v. State, 8 Texas Crim. App. 64. Pressler v. State, 13 Texas Crim. App. 95.

If there is evidence that the taking was not fraudulent but was by an honest mistake, the court should charge affirmatively on this issue. Winn v. State, 17 Texas Crim. App. 284. Criswell v. State, 24 Texas Crim. App. 606; 7 S. W. 337. Chambers v. State, 59 S. W. 261. Hazlett v. State, 96 S. W. 37. Richards v. State, 59 Texas Crim. Rep. 206; 127 S. W. 824. Harris v. State, 160 S. W. 451.

The payment of money by mistake to defendant does not make him a bailee when there was no intent to deliver money to him for any purpose. If at the time defendant received the money paid to him by mistake, he formed the criminal design to appropriate it to his own use and did so appropriate it, he is guilty of theft. Fulcher v. State, 32 Texas Crim. Rep. 621; 25 S. W. 625.

Sec. 2470. **Taking for debt.**—If there is evidence that defendant took the property to pay or secure his debt, he is entitled to an affirmative charge on this theory. Lawrence v. State, 11 Texas Crim. App. 306. Wolf v. State, 14 Texas Crim. App. 210. Williams v. State, 22 Texas Crim. App. 332; 3 S. W. 226. Young v. State, 34 Texas Crim. Rep. 290; 30 S. W. 238. Young v. State, 37 Texas Crim. Rep. 457; 36 S. W. 272.

Sec. 2471. **Taking for reward.**—If there is evidence that the property was taken with intent to return it and get the reward offered, if offered, the court should charge affirmatively on this defensive theory. Micheaux v. State, 30 Texas Crim. App. 660; 18 S. W. 550. Davis v. State, 45 Texas Crim. Rep. 132; 74 S. W. 544.

A charge instructing the jury that if the property was taken with the intent to hold it until a reward was offered and then to return it and get the reward and without intent to return it unless a reward was offered, then such taking would be theft is proper where the converse is also charged, that is, that if the property was taken with the intention of returning it and getting a reward or with intent to return it if no reward was offered then such taking would not be theft. Dunn v. State, 34 Texas Crim. Rep. 257; 30 S. W. 227. Davis v. State, 45 Texas Crim. Rep. 132; 74 S. W. 544.

It is proper to charge the jury that if defendant found the property, but took it with the intent to hold it for the purpose of obtaining a reward and without any intention to permanently appropriate it, he would not be guilty of theft. Stepp v. State, 31 Texas Crim. Rep. 349; 20 S. W. 753.

Sec. 2472. **Taking for temporary use.**—If there is evidence that defendant did not intend at the time he took the property to permanently appropriate it but only

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obtained it for a temporary use, the court should charge affirmatively on the issue of temporary use and should instruct the jury as to the distinction between trespass and theft. Blackburn v. State, 44 Texas 463. Loza v. State, 1 Texas Crim. App. 492. Dunham v. State, 3 Texas Crim. App. 465. Banks v. State, 7 Texas Crim. App. 591. Wilson v. State, 18 Texas Crim. App. 270. Schultz v. State, 30 Texas Crim. App. 94; 16 S. W. 756. Brownfield v. State, 25 S. W. 1120. Mahoney v. State, 33 Texas Crim. Rep. 389; 26 S. W. 622. Colwell v. State, 34 S. W. 615. Harrell v. State, 37 Texas Crim. Rep. 612; 40 S. W. 799. Ximinez v. State, 54 S. W. 589. Cain v. State, 49 Texas Crim. Rep. 360; 92 S. W. 808. Taylor v. State, 50 Texas Crim. Rep. 379; 97 S. W. 473. Kellar v. State, 176 S. W. 723.

If there is no evidence to support the theory that the property was taken only for temporary use, the court is not required to charge on such theory. Hyatt v. State, 32 Texas Crim. Rep. 581; 25 S. W. 291. King v. State, 67 S. W. 410.

To constitute theft, the intent must be to permanently appropriate the property, and if the taking, though wrongful, such as for a temporary use, be not fraudulent, it is not theft but only trespass. Loza v. State, 1 Texas Crim. App. 491. Berg v. State, 2 Texas Crim. App. 152. Knutson v. State, 14 Texas Crim. App. 575. Wilson v. State, 18 Texas Crim. App. 270. Schultz v. State, 30 Texas Crim. App. 94; 16 S. W. 756. Lucas v. State, 33 Texas Crim. Rep. 290; 26 S. W. 213. Smith v. State, 146 S. W. 547 (automobile). Kellar v. State, 176 S. W. 723.

When temporary use is an issue it is error to charge the jury that if the horse was fraudulently taken and defendant did not intend to use it temporarily but abandoned it because it was ridden down it would be theft; if it was fraudulently taken it would be theft whether it was ridden to where it was abandoned or not; or if the court should so charge then the converse should be given, that is, that if the horse was not fraudulently taken the fact that he was ridden down and abandoned would not be evidence of a fraudulent taking. Carroll v. State, 50 Texas Crim. Rep. 486; 98 S. W. 859.

Sec. 2473. **Theft by clerk or servant.**—If property is put in the custody of a servant by the master, his possession is not adverse to that of his master, and if, without the consent of the master and with the intent to deprive the master of the value of the property the servant fraudulently converts it to his own use, he is guilty of theft. Cobletz v. State, 36 Texas 353. Livingston v. State, 38 Texas Crim. Rep. 535; 43 S. W. 1008. Crook v. State, 39 Texas Crim. Rep. 252; 45 S. W. 720. Zysman v. State, 42 Texas Crim. Rep. 432; 60 S. W. 669.

A clerk in a store put in custody of goods by his employer with power to sell does not hold such goods adverse to his employer, and fraudulent appropriation of such goods by the clerk is theft. Roeder v. State, 39 Texas Crim. Rep. 199; 45 S. W. 570. Zysman v. State, 42 Texas Crim. Rep. 432; 60 S. W. 669.

A temporary custodian of goods is guilty of theft if he steals from his principal or employer. Livingston v. State, 38 Texas Crim. Rep. 535; 43 S. W. 1008. Roeder v. State, 39 Texas Crim. Rep. 199; 45 S. W. 570. Zysman v. State, 42 Texas Crim. Rep. 432; 60 S. W. 669.

If goods are delivered to the servant for the master, and before they have reached the possession of the master are fraudulently converted by the servant, the offense may be embezzlement from the special owner but not theft. Cody v. State, 31 Texas Crim. Rep. 185; 20 S. W. 398.

Sec. 2474. **Defining theft in the charge.**—If the charge of the court requires the jury, before they are authorized to convict, to believe beyond a reasonable doubt the existence of all the essential elements of the offense of theft, it is not necessary to give the statutory definition of theft. Franklin v. State, 63 Texas Crim. Rep. 438; 140 S. W. 1092.

Sec. 2475. **Date of the offense.**—When the prosecution for theft is by indictment, the time alleged must be anterior to the presentment of the indictment, but it is not material that the exact date stated in the indictment be proved as laid. The proof may extend back to any date not barred by limitation on the one hand, and on the other may establish any subsequent date to that alleged, provided it be a date

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anterior to the date of the presentment of the indictment. Johnson v. State, 1 Texas Crim. App. 118. Barfield v. State, 41 Texas Crim. Rep. 19; 51 S. W. 908. Green v. State, 86 S. W. 332. Perry v. State, 155 S. W. 263.

When the prosecution for theft is by information, the theft need not be proven to have been committed on the exact date alleged, and the date of the theft may be shown to have been either before or after the date alleged so that it is not barred by limitation on the one hand, and so that on the other it be a date anterior to the date of the making of the complaint on which such information is based.

(See section 431 of this Code for further authorities as to the date of the offense.)

Sec. 2476. **Charge on circumstantial evidence.**
Sec. 2477. Correct charges.
Sec. 2478. When charge should be given.
Sec. 2479. Charge in misdemeanors.
Sec. 2480. When charge need not be given.
Sec. 1876. Errors in charge on circumstantial evidence.

Sec. 2477. **Correct charges on circumstantial evidence.**—In order to warrant a conviction on circumstantial evidence each fact necessary to establish defendant's guilt must be proven by the evidence to the satisfaction of the jury beyond a reasonable doubt; all such facts must be consistent with each other and with the defendant's guilt, and all the circumstances taken together must be of a conclusive nature leading on the whole to a satisfactory conclusion and producing in effect a reasonable and moral certainty that the defendant committed the offense charged, and must exclude every other reasonable hypothesis except that of defendant's guilt. Moseley v. State, 59 Texas Crim. Rep. 90; 127 S. W. 178. Roberts v. State, 60 Texas Crim. Rep. 20; 129 S. W. 611. Diaz v. State, 62 Texas Crim. Rep. 320; 137 S. W. 377. Gordon v. State, 62 Texas Crim. Rep. 638; 138 S. W. 705.

In order to warrant a conviction on circumstantial evidence each fact necessary to the conclusion sought to be established must be proved by competent evidence beyond a reasonable doubt; all the facts (that is, the facts necessary to the conclusion) must be consistent with each other and with the main fact sought to be proved; and the circumstances, taken together, must be of a conclusive nature, leading, on the whole, to a satisfactory conclusion, and producing in effect a reasonable and moral certainty that the accused, and no other person, committed the offense charged. It is not sufficient that the circumstances coincide with, account for, and therefore render probable the guilt of the defendant; they must exclude every other reasonable hypothesis except that of defendant's guilt; and unless they do so beyond a reasonable doubt you will find the defendant not guilty. Boggs v. State, 38 Texas Crim. Rep. 83; 41 S. W. 642. Diaz v. State, 62 Texas Crim. Rep. 320; 137 S. W. 377. Manley v. State, 153 S. W. 1141. McGee v. State, 155 S. W. 246.

If the charge on the circumstantial evidence contains the **test of exclusion,** it need not in terms require the jury to find that "defendant and no other person committed the offense charged." Moore v. State, 39 Texas Crim. Rep. 266; 45 S. W. 809. Boersh v. State, 62 S. W. 1060. Ramirez v. State, 43 Texas Crim. Rep. 455; 66 S. W. 1101. Bell v. State, 71 S. W. 24. Moseley v. State, 59 Texas Crim. Rep. 90; 127 S. W. 178.

Sec. 2478. **When charge should be given.**—In cases of theft proof of possession of property recently stolen which is unexplained, or proof of such possession explained when the explanation does not admit the **taking** of the property from the person in whom possession is laid, is but a circumstance, and if there is no direct evidence of such taking a charge on circumstantial evidence is required. Flores and Bernal v. State, 13 Texas Crim. App. 668. Montgomery v. State, 13 Texas Crim. App. 669. Faulkner v. State, 15 Texas Crim. App. 117. Kenneda v. State, 16 Texas Crim. App. 261. Mathews v. State, 17 Texas Crim. App. 475. Lehman v. State, 18 Texas Crim. App. 178. Counts v. State, 19 Texas Crim. App. 452. Schultz v. State, 20 Texas Crim. App. 311. Boyd v. State, 24 Texas Crim. App. 581; 6 S. W. 853. Crowley v. State, 26 Texas Crim. App. 578; 10 S. W. 217. Taylor v. State, 27 Texas Crim. App. 465; 11 S. W. 462. Navarrow v. State, 17 S. W. 545. Hyden v. State, 31 Texas Crim. Rep. 404; 20 S. W. 764. Montgomery v. State, 20 S. W.

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926. Martin v. State, 32 Texas Crim. Rep. 441; 24 S. W. 512. McCamant v. State, 37 S. W. 437. Hodge v. State, 41 Texas Crim. Rep. 231; 53 S. W. 862. Davis v. State, 55 S. W. 340. York v. State, 42 Texas Crim. Rep. 528; 61 S. W. 128. Wallace v. State, 66 S. W. 1102. Davis v. State, 45 Texas Crim. Rep. 132; 74 S. W. 544. Cortez v. State, 74 S. W. 544. Jones v. State, 54 Texas Crim. Rep. 37; 111 S. W. 653. Stewart v. State, 160 S. W. 381.

If the **main fact** is proved as a matter of **inference** from other facts in evidence, the case rests wholly, in a legal sense, upon circumstantial evidence. In cases of theft the main fact to be proved is the **taking** from the possession of the person in whom possession is laid, and if there is no direct evidence of such **taking**—the main fact—a charge on circumstantial evidence is required. Ward v. State, 10 Texas Crim. App. 297. Barr v. State, 10 Texas Crim. App. 513. Ray v. State, 13 Texas Crim. App. 55. Wyers v. State, 13 Texas Crim. App. 58. Harris v. State, 13 Texas Crim. App. 318. Flores and Bernal v. State, 13 Texas Crim. App. 668. Cook v. State, 14 Texas Crim. App. 101. Lee v. State, 14 Texas Crim. App. 270. Howell v. State, 16 Texas Crim. App. 97. Allen v. State, 16 Texas Crim. App. 237. Cooper v. State, 16 Texas Crim. App. 344. Mathews v. State, 17 Texas Crim. App. 475. Vaughn v. State, 17 Texas Crim. App. 564. Dupree v. State, 17 Texas Crim. App. 591. Murphy v. State, 17 Texas Crim. App. 645. Wright v. State, 18 Texas Crim. App. 364. Counts v. State, 19 Texas Crim. App. 452. Ramirez v. State, 20 Texas Crim. App. 133. Crowell v. State, 24 Texas Crim. App. 409; 6 S. W. 318. Boyd v. State, 24 Texas Crim. App. 581; 6 S. W. 853. Fuller v. State, 24 Texas Crim. App. 597; 7 S. W. 330. Guajardo v. State, 24 Texas Crim. App. 603; 7 S. W. 331. Willard v. State, 26 Texas Crim. App. 130; 9 S. W. 358. Crowley v. State, 26 Texas Crim. App. 578; 10 S. W. 217. Taylor v. State, 27 Texas Crim. App. 465; 11 S. W. 462. Smith v. State, 12 S. W. 869. Montgomery v. State, 20 S. W. 926. Polanka v. State, 33 Texas Crim. Rep. 634; 28 S. W. 541. Green v. State, 34 S. W. 283. Pace v. State, 41 Texas Crim. Rep. 208; 53 S. W. 689. Arismendis v. State, 41 Texas Crim. Rep. 377; 54 S. W. 599. Davis v. State, 55 S. W. 340. Gentry v. State, 41 Texas Crim. Rep. 497; 56 S. W. 68. Stewart v. State, 77 S. W. 791. Guerrero v. State, 46 Texas Crim. Rep. 445; 80 S. W. 1001. Jones v. State, 54 Texas Crim. Rep. 37; 111 S. W. 653. Goode v. State, 56 Texas Crim. Rep. 418; 120 S. W. 199. Stewart v. State, 160 S. W. 381.

Proof of an admission of defendant will not relieve the court from the necessity of charging on circumstantial evidence in a theft case unless the same is an unequivocal admission of the **taking** of the property by defendant from the possession of the person in whom possession is laid, and if it is only by a process of inference that it can be determined that there is a confession or admission of such taking—the main fact—the court should charge on circumstantial evidence. Crowell v. State, 24 Texas Crim. App. 410; 6 S. W. 318. Willard v. State, 26 Texas Crim. App. 130; 9 S. W. 358. Pace v. State, 41 Texas Crim. Rep. 208; 53 S. W. 689. Gentry v. State, 41 Texas Crim. Rep. 497; 56 S. W. 68.

Sec. 2479. **Charge on circumstantial evidence in misdemeanors.**—The failure to charge on circumstantial evidence in a case of misdemeanor will not be considered as a ground for reversal unless a correct special charge on that subject was asked and refused and exception properly reserved. Howard v. State, 8 Texas Crim. App. 612. Lucio v. State, 35 Texas Crim. Rep. 320; 33 S. W. 358. Bennett v. State, 50 S. W. 945. Schneider v. State, 156 S. W. 944.

Sec. 2480. **Charge on circumstantial evidence not required.**—In a theft case if there is direct evidence from any source of the **taking** of the property by defendant from the possession of the person in whom possession is laid, the case does not, in a legal sense, rest wholly on circumstantial evidence, and a charge on circumstantial evidence is not in that event required. Mackey v. State, 20 Texas Crim. App. 603. Jack v. State, 20 Texas Crim. App. 660. Hayes v. State, 30 Texas Crim. App. 407; 17 S. W. 940. Conners v. State, 31 Texas Crim. Rep. 453; 20 S. W. 981. Bennett v. State, 32 Texas Crim. Rep. 216; 22 S. W. 684. Rodgers v. State, 36 Texas Crim. Rep. 563; 38 S. W. 184. Nixon v. State, 93 S. W. 555. Smith v. State, 62 Texas Crim. Rep. 124; 136 S. W. 481. Gowans v. State, 145 S. W 616. Wilcox v. State, 150 S. W. 898. Ballard v. State, 160 S. W. 94. Law v. State, 160 S. W. 98.

When there is direct evidence from any source of the **taking** of the property by defendant from the possession of the person in whom possession is alleged, a

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charge on circumstantial evidence is not required because the fraudulent intent is sought to be proven by circumstantial evidence. Houston v. State, 47 S. W. 468. Roberts v. State, 44 Texas Crim. Rep. 267; 70 S. W. 423 (claim of right). Nixon v. State, 93 S. W. 555. Flagg v. State, 51 Texas Crim. Rep. 603; 103 S. W. 855. Smith v. State, 62 Texas Crim. Rep. 124; 136 S. W. 481. Burton v. State, 146 S. W. 186.

In cases of theft, the *factum probandum*—the main fact to be proved—is the taking of the property from the possession of the person in whom possession is alleged, and when there is in evidence an admission of defendant of such taking, a charge on circumstantial evidence is not required. House v. State, 19 Texas Crim. App. 240. Jack v. State, 20 Texas Crim. App. 660. Huffman v. State, 28 Texas Crim. App. 174; 12 S. W. 588. Rodgers v. State, 36 Texas Crim. Rep. 563; 38 S. W. 184. Gann v. State, 59 S. W. 896. Landreth v. State, 44 Texas Crim. Rep. 239; 70 S. W. 758. Smith v. State, 62 Texas Crim. Rep. 124; 136 S. W. 481. Taylor v. State, 62 Texas Crim. Rep. 611; 138 S. W. 615. Ellington v. State, 63 Texas Crim. Rep. 420; 140 S. W. 1102. Gowans v. State, 145 S. W. 616. Burton v. State, 146 S. W. 188. Meadows v. State, 154 S. W. 546.

A charge on circumstantial evidence is not required in a theft case if there is evidence of an unequivocal confession of defendant that he committed the theft alleged. Speights v. State, 1 Texas Crim. App. 555. Jack v. State, 20 Texas Crim. App. 659. Wampler v. State, 28 Texas Crim. App. 353; 13 S. W. 144. Dunn v. State, 34 Texas Crim. Rep. 259; 30 S. W. 227. Mathews v. State, 39 Texas Crim. Rep. 554; 47 S. W. 647. Mathews v. State, 41 Texas Crim. Rep. 98; 51 S. W. 915. Whitehead v. State, 49 Texas Crim. Rep. 123; 90 S. W. 876. Smith v. State, 62 Texas Crim. Rep. 124; 136 S. W. 481.

A charge on circumstantial evidence is not required because the confession of defendant was only testified to by an accomplice witness. Wampler v. State, 28 Texas Crim. App. 353; 13 S. W. 144.

The fact that the only direct evidence of defendant's guilt comes from an accomplice witness does not require the court to charge on circumstantial evidence. Wampler v. State, 28 Texas Crim. App. 353; 13 S. W. 144. Williams v. State, 45 S. W. 494. Rios v. State, 39 Texas Crim. Rep. 675; 47 S. W. 987. Rios v. State, 48 S. W. 505. Martinez v. State, 61 Texas Crim. Rep. 29; 133 S. W. 881. Johnson v. State, 162 S. W. 512. Forward v. State, 166 S. W. 725.

Though there be no direct evidence of the taking, yet if the facts proven are in such close juxtaposition to the main fact—the taking—as to be equivalent to direct testimony, the failure to charge on circumstantial evidence in a theft case is not calculated to injure the rights of the defendant. Wheeler v. State, 15 Texas Crim. App. 612. Baldwin v. State, 31 Texas Crim. Rep. 589; 21 S. W. 679. Adams v. State, 34 Texas Crim. Rep. 471; 31 S. W. 372. Ballard v. State, 160 S. W. 92. Forward v. State, 166 S. W. 725.

Sec. 2481. **Identification.**
Sec. 2482. Identification of stolen property.
Sec. 2483. Identification of persons.
Sec. 2484. Identification by voice.

Sec. 2482. **Identification of stolen property.**—The State may trace by positive or circumstantial evidence the property alleged to have been stolen, and whether the property shown to have been in the possession of defendant was the identical property stolen is in most cases a question for the jury. Bagley v. State, 3 Texas Crim. App. 166. Polin v. State, 65 S. W. 183. Hooten v. State, 53 Texas Crim. Rep. 6; 108 S. W. 651. Lynne v. State, 53 Texas Crim. Rep. 376; 111 S. W. 729. Suggs v. State, 143 S. W. 186.

Proof that money or other property found in the possession of the defendant was similar to that alleged to have been stolen is not of itself sufficient proof of identity. Cline v. State, 43 Texas 499. Bishop v. State, 25 S. W. 25. Green v. State, 31 S. W. 386. Johnson v. State, 36 Texas Crim. Rep. 395; 37 S. W. 424. Price v. State, 58 S. W. 84. Johnson v. State, 42 Texas Crim. Rep. 441; 60 S. W. 667. Polin v. State, 65 S. W. 184. Barnett v. State, 50 Texas Crim. Rep. 539; 99

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S. W. 556. Adams v. State, 102 S. W. 1129 (cigars of same brand). Taylor v. State, 53 Texas Crim. Rep. 615; 111 S. W. 151. Lawrence v. State, 146 S. W. 928. Oliver v. State, 153 S. W. 309. Smith v. State, 153 S. W. 851.

A witness may testify as to the similarity of cost marks or stock marks on property whether the property be introduced in evidence or not. Williams v. State, 63 Texas Crim. Rep. 507; 140 S. W. 448.

The burden is on the State to prove the identity of the alleged stolen property with that traced to the possession of defendant, and when the proof is uncertain as to the identity thereof, the court should give defendant's requested charge as to identity when it pertinently presents the issue. Doss v. State, 28 Texas Crim. App. 506; 13 S. W. 788. Davis v. State, 152 S. W. 1096.

When the identity of property alleged to have been stolen is a vital issue, it is error to admit hearsay testimony as to identity. Roberts v. State, 47 S. W. 358. Sapp v. State, 77 S. W. 457.

When the testimony of the owner as to the identification of the alleged stolen property is not impeached, it is not permissible to prove as original evidence by other witnesses that he identified the property. Ballew v. State, 34 S. W. 616.

If the identity or ownership of alleged stolen property is in dispute, it is error to admit as original evidence proof of the acts, omissions or declarations of persons done or said in the absence of the defendant showing their opinion or conclusion as to the identity or ownership of such property. Anderson v. State, 14 Texas Crim. App. 49. Fuller v. State, 19 Texas Crim. App. 380. Cannada v. State, 29 Texas Crim. App. 537; 16 S. W. 341. Cannada v. State, 24 S. W. 513. Clay v. State, 40 Texas Crim. Rep. 556; 51 S. W. 212. Thompson v. State, 42 Texas Crim. Rep. 142; 57 S. W. 805. Ballow v. State, 42 Texas Crim. Rep. 266; 58 S. W. 1024. Polin v. State, 65 S. W. 184. Benson v. State, 69 S. W. 165. Sapp v. State, 77 S. W. 457. Brittain v. State, 52 Texas Crim. Rep. 169; 105 S. W. 817. Green v. State, 56 Texas Crim. Rep. 600; 120 S. W. 1002. White v. State, 57 Texas Crim. Rep. 196; 122 S. W. 391. Elkins v. State, 59 Texas Crim. Rep. 157; 127 S. W. 833. Richards v. State, 59 Texas Crim. Rep. 206; 127 S. W. 824.

When the person in whom ownership of the property alleged to have been stolen is not produced as a witness, proof that such person identified and claimed the property is not admissible when it is not a part of the *res gestæ* and when such identification was made in the absence of defendant. Anderson v. State, 14 Texas Crim. App. 49. Cannada v. State, 29 Texas Crim. App. 537; 16 S. W. 341. Cannada v. State, 24 S. W. 513.

A witness may state his best judgment or belief as to the identity of property. Osgood v. State, 49 S. W. 94. Turner v. State, 48 Texas Crim. Rep. 585; 89 S. W. 975. Harris v. State, 62 Texas Crim. Rep. 235; 137 S. W. 375. Williams v. State, 63 Texas Crim. Rep. 507; 140 S. W. 447.

If the purpose is not to prove ownership, it is not error to prove as a physical fact that the alleged stolen property found at defendant's house was turned over to the alleged owner by the justice of the peace. Olibare v. State, 48 S. W. 69.

When the person in whom ownership of the alleged stolen property is laid is produced as a witness, it may be shown that he saw his property at a place where defendant was not present and there identified it, and it may be shown how such property came to be at such place. House v. State, 19 Texas Crim. App. 238. Davis v. State, 55 S. W. 340.

Sec. 2483. **Identification of persons.**—A witness may state his belief or best impression as to the identity of a person. The fact that a witness cannot be positive in his identification goes to the weight of the testimony but not to its admissibility. Cooper v. State, 23 Texas 338. Tate v. State, 35 Texas Crim. Rep. 234; 33 S. W. 121. Brooks v. State, 37 S. W. 739. Coffman v. State, 51 Texas Crim. Rep. 486; 103 S. W. 1128. Buzan v. State, 59 Texas Crim. Rep. 213; 128 S. W. 389. Sparkman v. State, 61 Texas Crim. Rep. 429; 135 S. W. 134. Adams v. State, 143 S. W. 185. Grant v. State, 148 S. W. 760. Perry v. State, 155 S. W. 265.

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A witness may testify that defendant is about the same size and height as the person he saw at the place where the alleged burglary, robbery, theft, murder, or other alleged offense was committed, the jury being the judges of the weight of such testimony. Angley v. State, 35 Texas Crim. Rep. 427; 34 S. W. 116. Andrews v. State, 83 S. W. 188. Trevenio v. State, 48 Texas Crim. Rep. 207; 87 S. W. 1162. Buzan v. State, 59 Texas Crim. Rep. 213; 128 S. W. 389. Bowen v. State, 60 Texas Crim. Rep. 595; 133 S. W. 256.

If the witness is unable to identify defendant at the trial but says he pointed out the proper party shortly after the transaction, it may be shown that defendant was the party he pointed out. Ruston v. State, 4 Texas Crim. App. 432. Reno v. State, 56 Texas Crim. Rep. 230; 120 S. W. 429.

Proof that an officer got a description of the offender and then arrested defendant is not admissible. Mallory v. State, 37 Texas Crim. Rep. 484; 36 S. W. 751.

It is error to permit the State to prove that no strange negro had been seen and that the officer could find none in the county, and thus attempt to prove by negative evidence that defendant was the guilty party. Oxsheer v. State, 38 Texas Crim. Rep. 505; 43 S. W. 335.

It is error to admit as original evidence proof of the identification of defendant by deceased where same was not a part of the *res gestæ* nor part of a dying declaration. Bowen v. State, 47 Texas Crim. Rep. 147; 82 S. W. 520.

The confession of defendant may be used in aid of the *corpus delicti*. Nicks v. State, 40 Texas Crim. Rep. 7; 48 S. W. 186. Tidwell v. State, 40 Texas Crim. Rep. 40; 47 S. W. 466. Landreth v. State, 44 Texas Crim. Rep. 241; 70 S. W. 758.

The identity of defendant cannot be legally shown by proving the hearsay declarations of bystanders. Felder v. State, 23 Texas Crim. App. 477; 5 S. W. 145. Kennedy v. State, 57 S. W. 648. Hughes v. State, 62 Texas Crim. Rep. 288; 136 S. W. 1068.

Defendant's identity as the criminal may rest alone upon his uncorroborated confession. Nicks v. State, 40 Texas Crim. Rep. 7; 48 S. W. 186; Landreth v. State, 44 Texas Crim. Rep. 241; 70 S. W. 758.

It is error to permit the State to prove that the wife of deceased was nervous and weak from crying and had to be assisted to walk on the day after her husband was killed, the object being to account for her failure to then identify defendant. Oates v. State, 51 Texas Crim. Rep. 452; 103 S. W. 859.

When the only inculpatory witness makes affidavit after the trial and conviction of defendant that he or she was mistaken in the identity of defendant, a new trial should be granted. Green v. State, 49 Texas Crim. Rep. 204; 91 S. W. 585.

The witness cannot be legally re-inforced as to his identification of defendant by proof that he failed to identify other suspects who were turned loose upon such failure. Moore v. State, 40 Texas Crim. Rep. 443; 50 S. W. 942.

It is not error, when identity is an issue, to prove by the prosecuting witness that he, or she, identified defendant at the jail as the guilty party, though such proof is not admissible as original evidence if made by another. Fulcher v. State, 28 Texas Crim. App. 465; 13 S. W. 750. Bruce v. State, 31 Texas Crim. Rep. 590; 21 S. W. 681. Land v. State, 34 Texas Crim. Rep. 337; 30 S. W. 788. Weaver v. State, 150 S. W. 785.

When the prosecuting witness identified defendant on the trial, and is then impeached by proof that he had identified another person as the guilty party, the State is entitled to sustain the witness by proof that he identified defendant at the jail. White v. State, 62 S. W. 749. Gonzales v. State, 171 S. W. 1151.

It is error to prove as original evidence that the injured party or another person identified defendant at another time or to prove the circumstances surrounding the identification. A witness who is not attacked cannot be legally bolstered up by proof of his or her acts not occurring at the time the alleged offense was committed. Reddick v. State, 35 Texas Crim. Rep. 467; 34 S. W. 274. Clark v. State, 39 Texas

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Crim. Rep. 159; 45 S. W. 696. Murphy v. State, 41 Texas Crim. Rep. 126; 51 S. W. 940. Polin v. State, 65 S. W. 183. Bowen v. State, 47 Texas Crim. Rep. 146; 82 S. W. 520. Turman v. State, 50 Texas Crim. Rep. 12; 95 S. W. 533. Ripley v. State, 51 Texas Crim. Rep. 132; 100 S. W. 943.

Sec. 2484. **Identification by voice.**—A witness familiar with the voice of the party or person whose identity is in question may testify that he identified such party or person by his voice. Davis v. State, 15 Texas Crim. App. 594. Stepp v. State, 31 Texas Crim. Rep. 349; 20 S. W. 753. Price v. State, 35 Texas Crim. Rep. 504; 34 S. W. 622. Weaver v. State, 46 Texas Crim. Rep. 621; 81 S. W. 39. Waggoner v. State, 98 S. W. 258. Mahoney v. State, 98 S. W. 854. White v. State, 61 Texas Crim. Rep. 498; 135 S. W. 562. Liles v. State, 62 Texas Crim. Rep. 32; 135 S. W. 1177. Reynolds v. State, 63 Texas Crim. Rep. 270; 139 S. W. 977. Belcher v. State, 161 S. W. 459. Forester v. State, 163 S. W. 87. Collins v. State, 178 S. W. 353.

Testimony of the prosecuting witness that he identified defendant as the guilty party by his voice is not sufficient identification when the witness was not familiar with the voice of defendant and his opinion was in effect a mere guess or suspicion. Walker v. State, 50 Texas Crim. Rep. 221; 96 S. W. 35.

Proof of a conversation had over the telephone may be admitted in evidence where the witness testifies that he was familiar with and identified the voice of the party talking to him if the conversation is otherwise admissible. Stepp v. State, 31 Texas Crim. Rep. 349; 20 S. W. 752. Collins v. State, 178 S. W. 355.

Sec. 2485. **Conviction on suspicion.**—To sustain a conviction for theft it should appear not only that the theft as charged has been committed, but there should also be proof to a degree of certainty greater than a mere probability or mere suspicion tending to establish that the party charged was the person who committed it or was a participant in its commission. There must be legal and competent evidence pertinently identifying the defendant with the transaction constituting the offense charged against him. Tollett v. State, 44 Texas 95. Grant v. State, 3 Texas Crim. App. 5. Barnell v. State, 5 Texas Crim. App. 115. Hernandez v. State, 43 Texas Crim. Rep. 80; 63 S. W. 320. Polin v. State, 65 S. W. 183. Yarbrough v. State, 151 S. W. 545. Rios v. State, 153 S. W. 308.

If the testimony shows as strong a case against another as it does against defendant and there is no proof that they acted together, a conviction for theft based on circumstantial evidence will not be sustained. Curry v. State, 7 Texas Crim. App. 267. Buntain v. State, 15 Texas Crim. App. 490. Johnson v. State, 16 Texas Crim. App. 410. Caldwell v. State, 42 S. W. 304. Yarbrough v. State, 151 S. W. 545.

A conviction for theft based on circumstantial evidence will not be sustained if the testimony does not exclude every other reasonable hypothesis except that of defendant's guilt. Irvine v. State, 13 Texas Crim. App. 501. Scott v. State, 19 Texas Crim. App. 331. Bennett v. State, 25 Texas Crim. App. 695; 8 S. W. 933. Johnson v. State, 36 Texas Crim. Rep. 394; 37 S. W. 424. Caldwell v. State, 42 S. W. 304. Jackson v. State, 65 S. W. 520. Wilson v. State, 100 S. W. 153. Johnson v. State, 52 Texas Crim. Rep. 510; 107 S. W. 845. Brooks v. State, 56 Texas Crim. Rep. 513; 120 S. W. 878. Yarbrough v. State, 151 S. W. 545. Rios v. State, 153 S. W. 308.

Art. 1330. (859) (725) **Property must have some value.**—The property must be such as has some specific value capable of being ascertained. It embraces every species of personal property capable of being taken. (O. C. 746.)

Sec. 2486. **Value.**
Sec. 2487. Allegation of value.
Sec. 2488. Proof of value.
Sec. 2489. Charge on value.
Sec. 2490. Newly discovered evidence of value.

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Sec. 2487. **Allegation of value.**—The value of the property must be alleged if it affects the penalty. Sheppard v. State, 1 Texas Crim. App. 522. Powell v. State, 7 Texas Crim. App. 469. Pittman v. State, 14 Texas Crim. App. 576. Melton v. State, 20 Texas Crim. App. 209.

If the value of the property does not affect the penalty, it is not necessary to allege or prove that the property had any value. Lopez v. State, 20 Texas 780. Johnson v. State, 29 Texas 492. Davis v. State, 40 Texas 135. Sullivan v. State, 13 Texas Crim. App. 464. Collins v. State, 20 Texas Crim. App. 197. Green v. State, 21 Texas Crim. App. 64; 17 S. W. 262. Shaw v. State, 23 Texas Crim. App. 493; 5 S. W. 317. Beard v. State, 45 Texas Crim. Rep. 522; 78 S. W. 348. Campbell v. State, 61 Texas Crim. Rep. 504; 135 S. W. 548. Sims v. State, 64 Texas Crim. Rep. 435; 142 S. W. 572.

Failure to allege value when necessary, being a substantial defect, cannot be cured by amendment. State v. McCormack, 22 Texas 297.

An indictment is not bad merely because it alleges the aggregate value instead of the several individual values of the articles charged to have been stolen. Thompson v. State, 43 Texas 268. Ware v. State, 2 Texas Crim. App. 548.

If the indictment alleges the aggregate value and not the individual value of each article and the property is not necessarily of uniform value, the proof must show a theft of all the property so alleged. Thompson v. State, 43 Texas 268. Ware v. State, 2 Texas Crim. App. 548. Meyer v. State, 4 Texas Crim. App. 121. Doyle v. State, 4 Texas Crim. App. 253. Street v. State, 7 Texas Crim. App. 7.

If the property stolen be of uniform value, so that it is a simple calculation to determine the value per pound or the value of each article, a conviction for theft may be sustained on proof of a less quantity or number than alleged, though the value be alleged in the aggregate only. Duren v. State, 15 Texas Crim. App. 624. Moore v. State, 24 S. W. 900. Harris v. State, 34 Texas Crim. Rep. 497; 31 S. W. 382 (money). Jones v. State, 44 S. W. 162 (money). Pones v. State, 43 Texas Crim. Rep. 201; 63 S. W. 1021 (money). Kersh v. State, 45 Texas Crim. Rep. 451; 77 S. W. 790. Anglin v. State, 52 Texas Crim. Rep. 475; 107 S. W. 835 (money). Smith v. State, 53 Texas Crim. Rep. 171; 109 S. W. 127.

Sec. 2488. **Proof of value.**—The manner or method of proving value will not be revised on appeal in the absence of a proper bill of exceptions. Ramon v. State, 98 S. W. 872.

If the theft of the property alleged to have been stolen is a felony without regard to its value, an unnecessary allegation of value is not descriptive and need not be proven. Davis v. State, 40 Texas 135. Hart v. State, 14 Texas Crim. App. 660.

Defendant is entitled to any competent evidence tending to defeat the allegation of value. The trial court is not authorized to assume that the State's theory is true and deny to defendant the right to adduce legal testimony which bears upon a material issue. Cannon v. State, 18 Texas Crim. App. 173.

The court takes judicial notice of the allegations in the indictment and if a witness states that the property was of greater value than alleged in the indictment, the proof of value is sufficiently definite. Harris v. State, 21 Texas Crim. App. 484; 2 S. W. 830.

Property not mentioned in the indictment or the value of which is not proven will not be considered in estimating the value of the property stolen. Clark v. State, 26 Texas Crim. App. 489; 9 S. W. 767. Howell v. State, 47 Texas Crim. Rep. 252; 83 S. W. 185.

In a misdemeanor case proof that money was paid for the property is sufficient to show that it was of value. Hatfield v. State, 147 S. W. 237.

If the property in question is specifically named in the statute creating the offense, the courts will take judicial notice that it has some value. Melton v. State, 20 Texas Crim. App. 209.

If the property in question is not specifically named in the statute creating the offense and value is necessary to be alleged, then the evidence must show some specific

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value. Cady v. State, 4 Texas Crim. App. 238 (breast-strap). Watts v. State, 6 Texas Crim. App. 264 (pistol). Perry v. State, 22 Texas Crim. App. 19; 2 S. W. 600 (razor). Ellison v. State, 25 Texas Crim. App. 328; 8 S. W. 462 (corn). Sands v. State, 30 Texas Crim. App. 581; 18 S. W. 86 (100 pounds of pork). Hasley v. State, 50 Texas Crim. Rep. 45; 94 S. W. 899 (chicken).

If money is unnecessarily described as "United States currency," and the like, and not described as "money," its value must be proven. Cook v. State, 2 Texas Crim. App. 290. Simpson v. State, 10 Texas Crim. App. 681.

Courts will take judicial knowledge of the value of United States money if it is described as "money." Warren v. State, 29 Texas 370. Bagley v. State, 3 Texas Crim. App. 167. Menear v. State, 30 Texas Crim. App. 475; 17 S. W. 1082. Nelson v. State, 35 Texas Crim. Rep. 205; 32 S. W. 900. Gibson v. State, 100 S. W. 776. Sowles v. State, 52 Texas Crim. Rep. 18; 105 S. W. 178. Sims v. State, 64 Texas Crim. Rep. 435; 142 S. W. 572.

The best evidence of value is the market value of the property if it had such value. Martinez v. State, 16 Texas Crim. App. 122. Cannon v. State, 18 Texas Crim. App. 172. Saddler v. State, 20 Texas Crim. App. 196. Smith v. State, 44 S. W. 520. McBroom v. State, 61 S. W. 480. Baden v. State, 74 S. W. 769. Close v. State, 55 Texas Crim. Rep. 381; 117 S. W. 137.

If the testimony is conclusive that the property had a market value, that value would control, although the owner testified that the property was worth over fifty dollars. McBroom v. State, 61 S. W. 480.

If the market value of the property was the same everywhere, a witness may testify to its market value in other counties than the county of the prosecution. Odell v. State, 44 Texas Crim. Rep. 309; 70 S. W. 964.

Proof of the market value of a higher class of goods than those alleged to have been stolen is not admissible. Close v. State, 55 Texas Crim. Rep. 381; 117 S. W. 137.

If the property had no market value, the State may resort to some other standard of value. Martinez v. State, 16 Texas Crim. App. 122. Saddler v. State, 20 Texas Crim. App. 196. Cooksie v. State, 26 Texas Crim. App. 72; 9 S. W. 58 (second-hand clothes). Rollins v. State, 32 Texas Crim. Rep. 566; 25 S. W. 125. Baden v. State, 74 S. W. 769. Roberts v. State, 61 Texas Crim. Rep. 434; 135 S. W. 144. Robinson v. State, 63 Texas Crim. Rep. 373; 140 S. W. 228. Brown v. State, 162 S. W. 345.

In proving value it is always admissible to resort to hearsay. Brown v. State, 162 S. W. 345.

Sec. 2489. **Charge on value.**—The term "market value" is a well understood expression and it is not error to fail or refuse to define it. Williams v. State, 63 Texas Crim. Rep. 507; 140 S. W. 447.

If the proof shows, without controversy, that the alleged stolen property was of sufficient value to constitute its theft a felony, it is not error to fail to require the jury to find its value. Nelson v. State, 35 Texas Crim. Rep. 205; 32 S. W. 900. Diaz v. State, 53 S. W. 633. Height v. State, 150 S. W. 908.

If the evidence in a misdemeanor theft case shows without controversy that the property was of value, it is not error to fail to require the jury to find that it was of value. Thompson v. State, 78 S. W. 941.

If the value affects the penalty, it is error to authorize the jury to convict of a felony without requiring them to find that the property was of the value of fifty dollars or over, especially where the article was second-hand. Schwartz v. State, 53 Texas Crim. Rep. 451; 111 S. W. 399.

If value is an issue, the court should charge on the standard of value, which is the market value at the time of the taking (if taken) if the property had such value, and if not, what it would cost to replace it. Martinez v. State, 16 Texas Crim. App. 128. Saddler v. State, 20 Texas Crim. App. 196. Osborne v. State, 56 S. W.

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53. Baden v. State, 74 S. W. 769. Keipp v. State, 51 Texas Crim. Rep. 419; 103 S. W. 392. Close v. State, 55 Texas Crim. Rep. 382; 117 S. W. 137. Roberts v. State, 61 Texas Crim. Rep. 434; 135 S. W. 144.

A charge is correct if it informs the jury that the rule of law as to the value of the property alleged to have been stolen is its market value at the time and place of the taking (if taken) in its condition at that time, that is, what it would sell for in cash, giving a reasonable time for selling it. Saddler v. State, 20 Texas Crim. App. 195. Keipp v. State, 51 Texas Crim. Rep. 419; 103 S. W. 392. Williams v. State, 63 Texas Crim. Rep. 507; 140 S. W. 447.

Second-hand clothing has no market value, and in such case the court may charge the jury that if they find defendant guilty they would be governed by what, if anything, they believed from the evidence was the fair and reasonable value of the property. Cooksie v. State, 26 Texas Crim. App. 72; 9 S. W. 58.

Sec. 2490. **Newly discovered evidence of value.**—Where defendant is put upon notice by the allegations of the indictment that value would be an issue and a subject of inquiry on the trial, a new trial will not ordinarily be granted for newly discovered evidence of value. Moore v. State, 18 Texas Crim. App. 212 (granted). Haskins v. State, 20 S. W. 832. Timatis v. State, 31 Texas Crim. Rep. 556; 21 S. W. 362.

Art. 1331. (860) (726) **Asportation not necessary.**—To constitute "taking" it is not necessary that the property be removed any distance from the place of taking; it is sufficient that it has been in the possession of the thief, though it may not be moved out of the presence of the person deprived of it; nor is it necessary that any definite length of time shall elapse between the taking and the discovery thereof; if but a moment elapse, the offense is complete.

Sec. 2491. **Asportation.**—Neither asportation nor actual manual possession of the property is essential to constitute a taking. Jorasco v. State, 6 Texas Crim. App. 240. Conner v. State, 6 Texas Crim. App. 455. Coombes v. State, 17 Texas Crim. App. 266. Doss v. State, 21 Texas Crim. App. 509; 2 S. W. 814. Conner v. State, 24 Texas Crim. App. 250; 6 S. W. 138. Coward v. State, 24 Texas Crim. App. 594; 7 S. W. 332. Harris v. State, 29 Texas Crim. App. 103; 14 S. W. 390. Thompson v. State, 35 Texas Crim. Rep. 511; 34 S. W. 629. Powers v. State, 152 S. W. 909.

Asportation need not be alleged or proved in order to sustain a conviction for theft. Austin v. State, 42 Texas 345. Jorasco v. State, 6 Texas Crim. App. 240. Conner v. State, 6 Texas Crim. App. 455. Reece v. State, 170 S. W. 317.

Art. 1332. (861) (727) **The "taking" must be wrongful.**—The taking must be wrongful, so that if the property came into the possession of the person accused of theft by lawful means, the subsequent appropriation of it is not theft, but if the taking, though originally lawful, was obtained by any false pretext, or with any intent to deprive the owner of the value thereof, and appropriate the property to the use and benefit of the person taking, and the same is so appropriated, the offense of theft is complete. (O. C. 748.)

Sec. 2492. **Theft by false pretext.**
Sec. 2493. Indictment for theft by false pretext.
Sec. 2494. Pretext need not be a legal one.
Sec. 2495. Evidence.
Sec. 2496. Charge of the court.

Sec. 2493. **Indictment for theft by false pretext.**—Under an ordinary indictment or information for theft charging that the property was taken without the consent of the owner, a conviction may be had for theft though the taking was with the consent of the owner if the proof shows that such consent was obtained by any

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false pretext. Maddox v. State, 41 Texas 205. Quitzow v. State, 1 Texas Crim. App. 70. Berg v. State, 2 Texas Crim. App. 153. Jones v. State, 8 Texas Crim. App. 649. Hudson v. State, 10 Texas Crim. App. 229. Dow v. State, 12 Texas Crim. App. 345. Morrison v. State, 17 Texas Crim. App. 37. Atterberry v. State, 19 Texas Crim. App. 407. Taylor v. State, 25 Texas Crim. App. 101; 7 S. W. 861. Jones v. State, 49 S. W. 387. Lewis v. State, 48 Texas Crim. Rep. 311; 87 S. W. 831. Glascow v. State, 50 Texas Crim. Rep. 639; 100 S. W. 933. Hawkins v. State, 58 Texas Crim. Rep. 407; 126 S. W. 269. Anderson v. State, 177 S. W. 85.

If the pleader desires to specifically charge theft by false pretext, the indictment will be bad if it is not alleged in some way that defendant did appropriate the property. Price v. State, 49 Texas Crim. Rep. 131; 91 S. W. 571.

An indictment for theft is bad if the allegations show that prosecutor intended to part with the title to the property. Price v. State, 49 Texas Crim. Rep. 131; 91 S. W. 571.

Sec. 2494. **Pretext need not be a legal one.**—It is no defense to a party obtaining money or other personal property by a false pretext that the person from whom it was so obtained parted with it for an illegal purpose. Lovell v. State, 48 Texas Crim. Rep. 85; 86 S. W. 758. (This judgment should have been reversed because prosecutor intended to part with the title to the money and the transaction was therefore swindling and not theft, the proof showing a false pretense and that prosecutor thought the money was to be used to bribe the county attorney. Underwood v. State, 49 Texas Crim. Rep. 285; 91 S. W. 572.)

If a person intends to part only with the possession and not with the title to money or personal property and expects to receive the same money or property back, the fact that it was intended by such person to so part with it for an illegal purpose would be no defense to a prosecution for theft against one obtaining such possession by a false pretext.

Sec. 2495. **Theft by false pretext.**—It is not essential to a conviction for theft that a demand was made for the return of the property that was obtained by a false pretext. Hawkins v. State, 58 Texas Crim. Rep. 407; 126 S. W. 269.

The consent of the owner obtained under any false pretext would not be a defense to the charge of theft if it is made to appear that the intention really was to divest him of his property. Maddox v. State, 41 Texas 205. Quitzow v. State, 1 Texas Crim. App. 70. Porter v. State, 23 Texas Crim. App. 295; 4 S. W. 889. Conner v. State, 76 S. W. 924. Anderson v. State, 177 S. W. 85.

Where a card game is used as a false pretext to get possession of the money of prosecutor in order to permanently appropriate it and the same is so obtained and appropriated, it is theft if prosecutor expected to get the same money back. Porter v. State, 23 Texas Crim. App. 295; 4 S. W. 889; Conner v. State, 76 S. W. 924.

A conviction for theft will be sustained on proof that defendant obtained possession of a horse by a false pretext that he wanted to go to a certain place and he went in a different direction and appropriated it. Quitzow v. State, 1 Texas Crim. App. 65. Weeks v. State, 24 S. W. 905. Lewis v. State, 48 Texas Crim. Rep. 311; 87 S. W. 831.

If what defendant said when he got the property was simply a promise, the truth of which when made not being susceptible of proof, it is not a false pretext. Stokely v. State, 24 Texas Crim. App. 510; 6 S. W. 538.

There is a difference between a **pretext** and a **pretense**. Anderson v. State, 177 S. W. 85.

Evidence held insufficient to show that defendant acquired the property by a false pretext. Hornbeck v. State, 10 Texas Crim. App. 408. Dow v. State, 12 Texas Crim. App. 344. Stokely v. State, 24 Texas Crim. App. 509; 6 S. W. 538. Williams v. State, 30 Texas Crim. App. 154; 16 S. W. 760. Neel v. State, 33 Texas Crim. Rep. 408; 26 S. W. 726. Randle v. State, 70 S. W. 958.

To constitute theft by false pretext the testimony must show an appropriation. Berg v. State, 2 Texas Crim. App. 148. Jones v. State, 49 S. W. 387.

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If the possession of the property fraudulently appropriated was obtained by a false pretext, the offense is theft and not embezzlement. Johnson v. State, 46 Texas Crim. Rep. 415; 80 S. W. 621.

Sec. 2496. **Charge on theft by false pretext.**—If the State's case is that the possession of the property was obtained by a false pretext, the court should charge pointedly on appropriation as well as on the intent to appropriate. Berg v. State, 2 Texas Crim. App. 153. Jones v. State, 49 S. W. 387.

If there is no testimony which suggests that prosecutor intended to part with the title to his property, it is not necessary to charge on such issue. Braxton v. State, 50 Texas Crim. Rep. 633; 99 S. W. 994.

If there is evidence that defendant borrowed the money in good faith, the jury should be affirmatively charged on this defense. Powell v. State, 44 Texas Crim. Rep. 278; 70 S. W. 968.

The court is not required to charge on theft by false pretext where the pretext did not induce the prosecutor to part with the possession of his property but only furnished an opportunity for the taking by defendant. Pones v. State, 43 Texas Crim. Rep. 206; 63 S. W. 1021.

It is error to charge on theft by false pretext if such theory is not supported by the testimony. Stewart v. State, 15 Texas Crim. App. 598. Sanders v. State, 38 Texas Crim. Rep. 345; 42 S. W. 983.

Correct complete charge on theft by false pretext; Porter v. State, 23 Texas Crim. App. 295; 4 S. W. 889.

Sec. 2497. **Possession obtained by lawful means.**—When possession was obtained by lawful means, no false pretext being used, a charge is erroneous if it fails to inform the jury that to constitute theft they must find a fraudulent intent at the very time the possession of the property was obtained and that no subsequent fraudulent intent, if any, would constitute theft. Guest v. State, 24 Texas Crim. App. 235; 5 S. W. 840. Lott v. State, 24 Texas Crim. App. 725; 14 S. W. 277. Taylor v. State, 25 Texas Crim. App. 101; 7 S. W. 861. Cunningham v. State, 27 Texas Crim. App. 482; 11 S. W. 485. Rumbo v. State, 28 Texas Crim. App. 33; 11 S. W. 485. Nichols v. State, 28 Texas Crim. App. 107; 12 S. W. 500. Davis v. State, 19 S. W. 251. Brownfield v. State, 25 S. W. 1120. Siemers v. State, 55 S. W. 334. Flagg v. State, 51 Texas Crim. Rep. 603; 103 S. W. 855. Warren v. State, 106 S. W. 382.

If defendant obtained the property by lawful means so that he became the bailee of the owner, the prosecution for theft should be under the statute making conversion by a bailee constitute theft. Nichols v. State, 28 Texas Crim. App. 107; 12 S. W. 500. Peters v. State, 49 Texas Crim. Rep. 356; 91 S. W. 224.

Though possession of property be acquired with the consent of the owner, yet if defendant intended to fraudulently appropriate it at the time he acquired possession and did so appropriate it, it is theft. Keonio v. State, 4 Texas Crim. App. 173. Atterberry v. State, 19 Texas Crim. App. 401. Givens v. State, 32 Texas Crim. Rep. 457; 24 S. W. 287. Weeks v. State, 24 S. W. 905. Hawkins v. State, 58 Texas Crim. Rep. 407; 126 S. W. 269. Anderson v. State, 177 S. W. 85.

If the taking was originally lawful, no false pretext being used, the fraudulent intent must exist at the very time of the taking before a conviction for theft will be sustained, for if the fraudulent intent did not exist at the time of the taking no subsequent fraudulent intent would render the previous lawful taking theft. Quitzow v. State, 1 Texas Crim. App. 69. Dow v. State, 12 Texas Crim. App. 345. Morrison v. State, 17 Texas Crim. App. 37. Cain v. State, 21 Texas Crim. App. 662; 2 S. W. 888. Tucker v. State, 21 Texas Crim. App. 699; 2 S. W. 893. Williams v. State, 22 Texas Crim. App. 332; 3 S. W. 226. Nichols v. State, 28 Texas Crim. App. 107; 12 S. W. 500. Abbey v. State, 35 Texas Crim. Rep. 591; 34 S. W. 930. Jones v. State, 49 S. W. 387. Gosler v. State, 56 S. W. 51. Peters v. State, 49 Texas Crim. Rep. 365; 91 S. W. 224.

If the original taking was lawful, no false pretext being used, a conviction based upon a subsequent appropriation will not be sustained under an ordinary

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indictment for theft. Stokely v. State, 24 Texas Crim. App. 509; 6 S. W. 538. Taylor v. State, 25 Texas Crim. App. 101; 7 S. W. 861. Nichols v. State, 28 Texas Crim. App. 107; 12 S. W. 500. Williams v. State, 30 Texas Crim. App. 153; 16 S. W. 760. Jones v. State, 49 S. W. 387. Gosler v. State, 56 S. W. 51. Peters v. State, 49 Texas Crim. Rep. 365; 91 S. W. 224. Warren v. State, 106 S. W. 382. Richards v. State, 55 Texas Crim. Rep. 281; 116 S. W. 587.

Proof of the conversion of the property is not sufficient, of itself, to show that defendant intended at the time of the taking to deprive the owner of the value of the same and to appropriate it to the use or benefit of defendant. Pitts v. State, 3 Texas Crim. App. 210. Hernandez v. State, 20 Texas Crim. App. 152. Stokely v. State, 24 Texas Crim. App. 510; 6 S. W. 538. Cox v. State, 28 Texas Crim. App. 95; 12 S. W. 493. Williams v. State, 30 Texas Crim. App. 155; 16 S. W. 760. Lopez v. State, 37 Texas Crim. Rep. 650; 40 S. W. 972. Gosler v. State, 56 S. W. 51.

Sec. 2498. **Theft of lost property.**
Sec. 2499. Theft of lost property.
Sec. 2500. Charge as to theft of lost property.

Sec. 2499. **Theft of lost property.**—To constitute a finding a theft, the intent to defraud the owner and to appropriate the property to the finder's own use must exist in the mind of the finder at the time he takes possession of the property. If the intent to steal did not exist at the time the property was found, no subsequent intent to steal would make the original finding amount to theft. Reed v. State, 8 Texas Crim. App. 42. Robinson v. State, 11 Texas Crim. App. 409. Rhodes v. State, 11 Texas Crim. App. 575. Martinez v. State, 16 Texas Crim. App. 130. Wilson v. State, 20 Texas Crim. App. 664. Stepp v. State, 31 Texas Crim. Rep. 351; 20 S. W. 753. Martin v. State, 44 Texas Crim. Rep. 539; 72 S. W. 386. Worthington v. State, 53 Texas Crim. Rep. 178; 109 S. W. 187. Landreth v. State, 53 Texas Crim. Rep. 556; 110 S. W. 905.

If, when defendant found the property, he really believed that the owner could not be found or he intended to restore it to the owner when found, and he afterwards disposed of it to his own use either before or after ascertaining the identity of the owner, the case is not theft. Reed v. State, 8 Texas Crim. App. 42. Martinez v. State, 16 Texas Crim. App. 130. Wilson v. State, 20 Texas Crim. App. 664. Whitsel v. State, 49 Texas Crim. Rep. 42; 90 S. W. 505. Worthington v. State, 53 Texas Crim. Rep. 178; 109 S. W. 187.

Marks of identification on the property may be sufficient to put the finder on inquiry as to the identity of the owner. Robinson v. State, 11 Texas Crim. App. 409. Rhodes v. State, 11 Texas Crim. App. 575. Stepp v. State, 31 Texas Crim. Rep. 351; 20 S. W. 753.

Proof of the advice of defendant's father as to the disposition defendant should make of the found property is admissible. Worthington v. State, 53 Texas Crim. Rep. 178; 109 S. W. 187.

Proof of what defendant said when he deposited the found property with the witness is admissible as a part of the *res gestæ* of his act in depositing the property. Martin v. State, 44 Texas Crim. Rep. 540; 72 S. W. 386.

A conviction for theft of lost property will not be sustained when there was no effort to conceal the property and nothing to show that defendant formed the intent to steal it at the time he found it. McLaren v. State, 21 Texas Crim. App. 513; 2 S. W. 858. Whitsel v. State, 49 Texas Crim. Rep. 42; 90 S. W. 505. Landreth v. State, 53 Texas Crim. Rep. 556; 110 S. W. 905.

If goods are accidently left in a particular place, this would not be a case of lost property, and the taking would be from the possession of the owner. Statum v. State, 9 Texas Crim. App. 274. Rose v. State, 52 Texas Crim. Rep. 154; 106 S. W. 143. Moxie and Brackens v. State, 54 Texas Crim. Rep. 535; 114 S. W. 375.

Lost property, if not taken from the possession of a person holding it as lost property for the owner, is in the constructive possession of the real owner. Robinson v. State, 11 Texas Crim. App. 407. Tinney v. State, 24 Texas Crim. App. 112;

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5 S. W. 831. Williams v. State, 51 S. W. 904. Martin v. State, 44 Texas Crim. Rep. 539; 72 S. W. 386. Williams v. State, 47 Texas Crim. Rep. 537; 84 S. W. 829.

Sec. 2500. **Charge as to theft of lost property.**—Upon the theory of a finding a charge is correct which instructs the jury that if the property was lost and defendant found it he could not be convicted of the theft of it unless they believe from the evidence that at the time he found it he fraudulently took it with the intent at that time to deprive the owner of the value of it and to appropriate it to his own use or benefit, and that no fraudulent intent in his mind in relation to such property which was formed after he had taken the property would authorize his conviction for theft thereof. Martinez v. State, 16 Texas Crim. App. 122.

Correct charges on the theory of lost property. Stepp v. State, 31 Texas Crim. Rep. 351; 20 S. W. 753. Rochell v. State, 55 Texas Crim. Rep. 153; 115 S. W. 583.

A charge is correct which informs the jury that if defendant found the property, but took it with intent to hold it for the purpose of obtaining a reward and without any intention to permanently appropriate it, he would not be guilty of theft. Stepp v. State, 31 Texas Crim. Rep. 349; 20 S. W. 753.

It is error to charge the jury that defendant would be guilty of theft if he formed in his mind an intent to defraud at the time of the finding "or immediately thereafter." Warren v. State, 17 Texas Crim. App. 209.

On a trial for theft if there is evidence that defendant found the property, the rules of law as to the finding of lost property should be included in the charge to the jury. Wilson v. State, 14 Texas Crim. App. 205. Martinez v. State, 16 Texas Crim. App. 122. Bayne v. State, 29 Texas Crim. App. 132; 15 S. W. 404.

The charge of the court should, in some way, inform the jury that if the defendant did not have the intent to fraudulently appropriate the property at the time of the finding it would not be theft, although defendant afterwards appropriated the property either before or after knowing who the owner was. Reed v. State, 8 Texas Crim. App. 42. Martinez v. State, 16 Texas Crim. App. 122. Warren v. State, 17 Texas Crim. App. 209. Wilson v. State, 20 Texas Crim. App. 664. Worthington v. State, 53 Texas Crim. Rep. 178; 109 S. W. 187.

If the testimony does not raise the issue that defendant found the property, it is not necessary to charge on such theory. Berry v. State, 46 Texas Crim. Rep. 423; 80 S. W. 630.

Sec. 2501. **Theft of abandoned property.**—The term "abandoned," when applied to theft cases, means a total desertion; absolute relinquishment; a throwing away; voluntary leaving without any intention or expectation to regain the property. To constitute abandonment of property there must be a concurrence of the intention to abandon and the relinquishment of the property so that it may be appropriated by the next comer. Sikes v. State, 28 S. W. 688. Worsham v. State, 56 Texas Crim. Rep. 260; 120 S. W. 439.

The throwing away of a negotiable instrument not expecting anyone to take it and use it does not make such instrument abandoned property. Worsham v. State, 56 Texas Crim. Rep. 260; 120 S. W. 439.

A water wheel placed and left by the owner for nine years on a railroad right of way is not "abandoned property," it not being of such character that it could be carried with the person of the owner. Sikes v. State, 28 S. W. 688.

Art. 1333. (862) (728) **Possession and ownership need not be in same person.**—It is not necessary, in order to constitute theft, that the possession and ownership of the property be in the same person at the time of taking. (O. C. 749.)

Art. 1334. (863) (729) **Possession, how constituted.**—Possession of the person so unlawfully deprived of property is constituted by the exercise of actual control, care and management of the property, whether the same be lawful or not.

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Sec. 2502. **Possession need not be lawful.**—Ownership and possession may be alleged in the person having the actual control, care and management of the property at the time of the taking, and it is immaterial whether the exercise of such actual control, care and management be lawful or not. King v. State, 43 Texas 351. Gaines v. State, 4 Texas Crim. App. 330. Crockett v. State, 5 Texas Crim. App. 526. Moore v. State, 8 Texas Crim. App. 496. Tinney v. State, 24 Texas Crim. App. 112; 5 S. W. 831.

Art. 1335. (864) (730) **Theft of one's own property.**—No person can be guilty of theft by taking property belonging to himself, except in the following cases:

1. Where the property has been deposited with the person in possession as a pledge or security for debt.

2. Where it is in the possession of an officer of the law by process from a court of competent jurisdiction.

3. Where the property is in the possession of an executor or administrator for the purpose of administration.

4. In all other cases where the person so deprived of possession is, at the time of taking, lawfully entitled to the possession thereof as against the true owner. (O. C. 751.)

Sec. 2503. **Theft of one's own property.**—Defendant may be guilty of the theft of his own property where it has been deposited with the person in possession as a pledge or security for debt. Haley v. State, 156 S. W. 637.

Theft of pledged property may be proven under an ordinary indictment for theft. Connell v. State, 2 Texas Crim. App. 422. Taylor v. State, 7 Texas Crim. App. 661. Smith v. State, 29 S. W. 785. Lewis v. State, 50 Texas Crim. Rep. 331; 97 S. W. 481.

If defendant fraudulently took his own property from a person who was lawfully entitled to the possession thereof as against defendant, he is guilty of the theft of the property itself and it is not necessary to allege the value of any repairs. State v. Stephens, 32 Texas 155.

Defendant is not guilty of theft in taking his own property unless such taking is fraudulent and the person so deprived of possession is, at the time of such taking, lawfully entitled to the possession thereof as against defendant. Taylor v. State, 7 Texas Crim. App. 661. Duren v. State, 15 Texas Crim. App. 627. Bullard v. State, 41 Texas Crim. Rep. 225; 53 S. W. 637. Scott v. State, 166 S. W. 732.

The mere fact that one's own property was taken from the possession of an officer does not constitute the taking any more fraudulent than if taken from a private person. Bullard v. State, 41 Texas Crim. Rep. 225; 53 S. W. 637.

The defendant is entitled to introduce in evidence every possible fact which can legitimately tend to illustrate his intent in taking his property and which may serve to disprove any fraudulent motive for his conduct (such as his declarations at the time of the taking). Taylor v. State, 7 Texas Crim. App. 662.

When defendant is being tried for the theft of his own property, the court should charge the jury affirmatively on the issue of good faith or mistake if there is evidence to support such theory. Bullard v. State, 41 Texas Crim. Rep. 225; 53 S. W. 637.

Sec. 2504. **Theft of one's wife's property.**—The mere separation of the husband and wife will not of itself cause his taking of her separate property to amount to theft. Overton v. State, 43 Texas 616. Ellington v. State, 48 Texas Crim. Rep. 163; 87 S. W. 153.

A sale by the husband of his wife's separate property, made without her consent, acquiesence or ratification, will not pass title, and a subsequent sale thereof by the husband will not constitute theft from the first purchaser. Hudspeth v. State, 54 Texas Crim. Rep. 371; 112 S. W. 1069.

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Art. 1336. (865) (731) **Theft by part owner.**—If the person accused of the theft be part owner of the property, the taking does not come within the definition of theft, unless the person from whom it is taken be wholly entitled to the possession at the time. (O. C. 752.)

Sec. 2505. **Taking by part owner.**—If defendant be part owner of the alleged stolen property, the taking of the same or a part thereof by him does not come within the definition of theft, unless the person from whom it was taken be wholly entitled to the possession at the time. Connell v. State, 2 Texas Crim. App. 422. Bell v. State, 7 Texas Crim. App. 25. Fairy v. State, 18 Texas Crim. App. 314. Gipson v. State, 57 Texas Crim. Rep. 290; 122 S. W. 557.

The fact that the defendant was the owner or part owner of the property alleged to have been stolen is no defense if he fraudulently took it from the possession of a person who, at the time of such taking, had and was lawfully entitled to the possession thereof as against defendant. Connell v. State, 2 Texas Crim. App. 422.

Art. 1337. (866) (732) **"Property" defined.**—The term "property," as used in relation to the crime of theft, includes money, bank bills, goods of every description commonly sold as merchandise, every kind of agricultural produce, clothing, any writing containing evidence of an existing debt, contract, liability, promise or ownership of property real or personal, any receipts for money, discharge, release, acquittance, and printed book or manuscript, and in general any and every article commonly known as and called personal property, and all writings of every description, provided such property possesses any ascertainable value. (O. C. 753.)

Art. 1338. (867) (733) **Domesticated animals and birds are property.**—Within the meaning of "personal property," which may be the subject of theft, are included all domesticated animals and birds, when they are proved to be of any specific value. (O. C. 755.)

Sec. 2506. **A dog is property.**—A dog is personal property. Hurley v. State, 30 Texas Crim. App. 333; 17 S. W. 455. Lynn v. State, 33 Texas Crim. Rep. 153; 25 S. W. 779. Hicks v. State, 47 S. W. 1016.

Art. 1339. (868) (734) **Particular penalties exclude general.**—Theft of certain particular kinds of property, as of a horse, property wrecked, etc., have a punishment affixed differing from the general punishment of the crime of theft; whenever, therefore, the law provides a particular punishment for theft committed in regard to a special kind of property, theft of such property is not included within the law affixing a general penalty to the offense; but in other cases, whenever it is declared to be an offense to steal or otherwise fraudulently appropriate property, the provision is intended to include any and every species of personal property according to its general and broadest signification. (O. C. 754.)

Art. 1340. (869) (735) **Punishment for felony theft.**—Theft of property of the value of fifty dollars or over shall be punished by confinement in the penitentiary not less than two nor more than ten years. (O. C. 756, amended by Acts 1858, p. 181, by making twenty dollars the dividing line between misdemeanor and felony theft, and amended by Acts 1895, p. 15.)

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Art. 1341. (870) (736) **Punishment for misdemeanor theft.**—Theft of property under the value of fifty dollars shall be punished by imprisonment in the county jail not exceeding two years, during which time the prisoner may be put to hard work on the county roads or otherwise, and by fine not exceeding five hundred dollars, or by such imprisonment without fine. (O. C. 757, amended by Acts 1858, p. 181, by Acts 1876, p. 242, and by Acts 1895, p. 15.)

Sec. 2507. **Punishment for misdemeanor theft.**—Misdemeanor theft may be punished by imprisonment without fine, but it cannot be punished by fine alone under article 1341 of the Penal Code as it now reads. Fowler v. State, 9 Texas Crim. App. 149. Sager v. State, 11 Texas Crim. App. 110. Johnson v. State, 18 Texas Crim. App. 7. Coleman v. State, 170 S. W. 150.

If misdemeanor theft may be punished by imprisonment without fine, a charge is erroneous if it fails to inform the jury that they might inflict the imprisonment without fine. Irvin v. State, 25 Texas Crim. App. 588; 8 S. W. 681.

Art. 1342. (871) (737) **General penalties not applicable when.**—The two preceding articles do not apply to theft of property from the person, nor to cases of theft of any particular kind of property where the punishment is specially prescribed. (O. C. 758.)

Art. 1343. (872) (738) **Voluntary return of stolen property.**—If property, taken under such circumstances as to constitute theft, be voluntarily returned within a reasonable time, and before any prosecution is commenced therefor, the punishment shall be by fine not exceeding one thousand dollars. (O. C. 759, amended by Acts 1858, p. 181.)

Sec. 2508. **Voluntary return of stolen property.**—If the stolen property be voluntarily returned within a reasonable time and before any prosecution is commenced therefor, the offense is a misdemeanor, and if such a voluntary return is shown by the testimony a conviction assessing a more severe penalty than authorized by the statute when there is a voluntary return will not be sustained. Ingle v. State, 1 Texas Crim. App. 307. Allen v. State, 12 Texas Crim. App. 190. Bennett v. State, 17 Texas Crim. App. 143.

What is a "reasonable time" is ordinarily a question for the jury to determine. Stepp v. State, 31 Texas Crim. Rep. 351; 20 S. W. 753.

A return may be "voluntary" though induced partly by fear of detection or punishment. Allen v. State, 12 Texas Crim. App. 190. Bird v. State, 16 Texas Crim. App. 532.

Stolen property is not "voluntarily returned" when it was returned only upon threat of prosecution. Owen v. State, 44 Texas 248. Ware v. State, 47 Texas Crim. Rep. 541; 84 S. W. 1065.

The return of, or payment for, or offer to return or pay for the stolen property, made when or after the defendant was caught in possession thereof or in the act of stealing it, is not a voluntary return. Horseman v. State, 43 Texas 353. Brill v. State, 1 Texas Crim. App. 575. Grant v. State, 2 Texas Crim. App. 167. Stephenson v. State. 4 Texas Crim. App. 591. Trafton v. State, 5 Texas Crim. App. 484. Harris v. State, 29 Texas Crim. App. 101; 14 S. W. 390. Boze v. State, 31 Texas Crim. Rep. 347; 20 S. W. 752. Powell v. State, 24 S. W. 515. Hyatt v. State, 32 Texas Crim. Rep. 581; 25 S. W. 291. Blount v. State, 34 Texas Crim. Rep. 641; 31 S. W. 652. Elkins v. State, 35 Texas Crim. Rep. 206; 32 S. W. 1046. Dalton v. State, 50 Texas Crim. Rep. 523; 98 S. W. 855. Moore v. State, 55 Texas Crim. Rep. 5; 114 S. W. 807. Petty v. State, 59 Texas Crim. Rep. 591; 129 S. W. 615. Sanford v. State, 64 Texas Crim. Rep. 607; 143 S. W. 1172.

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Stolen property is not "voluntarily returned" where none of the property was returned before defendant's arrest for the theft. Purcelly v. State, 29 Texas Crim. App. 1; 13 S. W. 993. Taylor v. State, 75 S. W. 35. Dalton v. State, 50 Texas Crim. Rep. 523; 98 S. W. 855. Moxie v. State, 54 Texas Crim. Rep. 534; 114 S. W. 375.

The stolen property was not "voluntarily returned" if the same property, all of it and unchanged, was not returned. Horseman v. State, 43 Texas 353. Grant v. State, 2 Texas Crim. App. 166. Wheeler v. State, 15 Texas Crim. App. 612. Bird v. State, 16 Texas Crim. App. 528. Powell v. State, 24 S. W. 515. Elliston v. State, 50 Texas Crim. Rep. 575; 99 S. W. 999.

Proof of marking another's animal and turning it loose on the range does not raise the issue of a voluntary return. Moore v. State, 8 Texas Crim. App. 496. Thorne v. State, 52 Texas Crim. Rep. 309; 107 S. W. 831.

If the return was not strictly into the actual possession of the owner, still, if it was such a return as the owner desired and he was satisfied with, it is sufficient to demand a charge upon the issue of voluntary return. Bird v. State, 16 Texas Crim. App. 533.

A voluntary return must be an actual, and not merely a constructive, return of the property into the possession of the owner. Moore v. State, 8 Texas Crim. App. 496. Bird v. State, 16 Texas Crim. App. 533. Thorne v. State, 52 Texas Crim. Rep. 309; 107 S. W. 831.

In a case of misdemeanor theft the mere omission to charge the jury on the issue of a voluntary return of the property is not reversible error when no special charge on that issue was requested by the defendant. Stubbs v. State, 160 S. W. 87.

If there is evidence of a "voluntary return," it is error to fail or refuse to charge the jury on such issue. Bird v. State, 16 Texas Crim. App. 533. Dupree v. State, 17 Texas Crim. App. 591. Schultz v. State, 20 Texas Crim. App. 315. Guest v. State, 24 Texas Crim. App. 533; 7 S. W. 242. Anderson v. State, 25 Texas Crim. App. 593; 9 S. W. 43. Bennett v. State, 28 Texas Crim. App. 342; 13 S. W. 142. Kellar v. State, 176 S. W. 723.

It is error to charge the jury upon the theory of a voluntary return when there is no testimony to support it, since such a charge is liable to mislead the jury. Schultz v. State, 30 Texas Crim. App. 94; 16 S. W. 756. Eubanks v. State, 57 Texas Crim. Rep. 153; 122 S. W. 36.

Art. 1344. (873) (739) **"Steal" and "stolen" defined.**—The words "steal" or "stolen," when used in this Code in reference to the acquisition of property, include property acquired by theft. (O. C. 760.)

Sec. 2509. **Use of "steal" or "stolen."**—The word "steal" or the word "stolen," when used in a bail bond or recognizance, is equivalent to reciting in terms that the property was acquired by theft. Carr et al. v. State, 9 Texas Crim. App. 463. Sands v. State, 30 Texas Crim. App. 578; 18 S. W. 86.

Art. 1345. (874) (740) **Stealing agricultural products.** — The stealing or felonious taking any growing, standing, or ungathered Indian corn, wheat, cotton, potatoes, rice, or other agricultural product, shall hereafter be deemed theft; and any person who shall hereafter steal or feloniously take, pluck, sever, or carry away any Indian corn, or wheat, cotton, potatoes, rice, or other agricultural product, growing, standing or remaining ungathered in any plantation, field, or other ground, shall, on conviction thereof, be deemed guilty of theft, and suffer punishment as in other cases of theft. (O. C. 761.)

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Sec. 2510. **Theft of agricultural products.**
Sec. 2511. Form for indictment.
Sec. 2512. Indictment.
Sec. 2513. Evidence.
Sec. 2514. Charge of the court.

Sec. 2511. **Form for indictment.**

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 John Doe on the.....day of....., A. D....., in said county and State did fraudulently take, pluck, sever, and carry away ten bushels (or "one hundred pounds," or whatever quantity it was) of Indian corn (or "potatoes," or whatever agricultural product it was) of the value of..... dollars, the same then and there growing, standing, and remaining ungathered in the plantation (or "field," or whatever ground it was) of....., from the possession of the said.....who was then and there the owner thereof, and without the consent of the said....., and with the intent then and there to deprive the said.....of the value of the same and to appropriate it to the use and benefit of him the said John Doe.

Against the peace and dignity of the State.

.....

Foreman of the grand jury.

Sec. 2512. **Indictment for theft of agricultural products.**—An allegation that defendant "did fraudulently take" the agricultural product is equivalent to an allegation that he "did steal" it. McKinney v. State, 28 S. W. 816.

If it is alleged that defendant "did fraudulently take" the agricultural product, it is not necessary to also allege that it was "feloniously" done, because the statute uses the words in the disjunctive. McKinney v. State, 28 S. W. 816.

Ownership of the land may be alleged in the person who has the actual control, care and management of the land on which the agricultural product was growing or standing though such person was a renter. Williams v. State, 98 S. W. 246.

It is not necessary to allege in terms that any of the agricultural products specifically mentioned by name in the statute were agricultural products, but if it is sought to allege the theft of any agricultural product not specifically named in the statute then it should be alleged that it was an agricultural product.

If it is sought to prosecute defendant for stealing an agricultural product growing, standing, or remaining ungathered in any plantation, field, or other ground, the indictment or information must be drawn under the statute creating such offense and not under the general theft statute. Carson v. State, 57 Texas Crim. Rep. 30; 121 S. W. 861.

An indictment charging only ordinary theft will not sustain a conviction if the proof shows theft of an agricultural product growing, standing, or remaining ungathered in a plantation, field, or other ground. Carson v. State, 57 Texas Crim. Rep. 30; 121 S. W. 861.

Sec. 2513. **Evidence.**—Defendant could not be divested of his ownership in an undivided crop by prosecutor having the same picked. Gipson v. State, 57 Texas Crim. Rep. 290; 122 S. W. 557.

Sec. 2514. **Charge of the court.**—The charge should in some way require the jury to find that the taking was fraudulent. McKinney v. State, 28 S. W. 816.

A charge making ownership depend on how equitably a crop had been divided and grouping the facts is on the weight of the evidence. Gipson v. State, 57 Texas Crim. Rep. 290; 122 S. W. 557.

Art. 1346. (875) (741) **Stealing record books or filed papers.**—If any person shall take and carry away any record book or filed paper from any clerk's office, public office, or other place where the same may

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be lawfully deposited, or from the lawful possession of any person whatsoever, with intent to destroy, suppress, alter or conceal, or in any wise dispose of the same, so as to prevent the lawful use of such record book or filed paper, he shall be deemed guilty of theft, and punished by imprisonment in the penitentiary not less than three nor more than seven years. (Act Feb. 12, 1858, Acts 1858, p. 181.)

Sec. 2515. **Theft of a filed paper.**—An indictment for theft of a filed paper should allege the lawful use sought to be prevented by the defendant. Witte v. State, 21 Texas Crim. App. 88; 17 S. W. 723.

If defendant is charged with the theft of a filed paper and the evidence is wholly circumstantial, the court should charge the jury that if defendant took it for any purpose than that alleged he should be acquitted. Counts v. State, 49 Texas Crim. Rep. 629; 89 S. W. 972.

Sec. 2516. **Theft of a written instrument.**
Sec. 2517. Indictment.
Sec. 2518. Evidence.
Sec. 2519. Charge of court.

Sec. 2517. **Indictment for theft of a written instrument.**—An indictment for theft of a written instrument need not set out such instrument by its tenor. Dignowitty v. State, 17 Texas 521. Gaines v. State, 77 S. W. 10. Fulshear v. State, 59 Texas Crim. Rep. 376; 128 S. W. 135.

Sec. 2518. **Evidence.**—A deed is the subject of theft. Roberts v. State, 61 Texas Crim. Rep. 434; 135 S. W. 144.

A railroad ticket is the subject of theft. Patrick v. State, 50 Texas Crim. Rep. 497; 98 S. W. 840.

A promissory note is the subject of theft. Calentine v. State, 50 Texas Crim. Rep. 154; 94 S. W. 1061.

A check or other negotiable instrument, even in the hands of the maker, is the subject of theft. Calentine v. State, 50 Texas Crim. Rep. 154; 94 S. W. 1061. Worsham v. State, 56 Texas Crim. Rep. 255; 120 S. W. 439. Fulshear v. State, 59 Texas Crim. Rep. 376; 128 S. W. 135.

On a trial for theft of a written instrument, the State is not required to introduce such instrument in evidence. Fulshear v. State, 59 Texas Crim. Rep. 378; 128 S. W. 135.

If the written instrument is set out by its tenor in the indictment, the proof must conform thereto with almost minute precision. Huddleston v. State, 11 Texas Crim. App. 22.

If the name of the endorsee of a stolen writing is alleged, the proof, to be sufficient, must support the allegation. Ferguson v. State, 147 S. W. 592.

The State is not required to give notice that secondary evidence will be introduced on the trial to prove the contents of a written instrument when defendant is charged with the theft of it. Counts v. State, 48 Texas Crim. Rep. 629; 89 S. W. 972.

In a prosecution for theft of a deed, the State is entitled to prove that after the theft defendant deeded to another the property described in the stolen deed, for the purpose of showing that the defendant was exercising acts of ownership under the deed alleged to have been stolen. Roberts v. State, 61 Texas Crim. Rep. 434; 135 S. W. 144.

A railroad ticket not stamped and filled out so as to be good for transportation is of no more value than the paper on which it was printed or written. Patrick v. State, 50 Texas Crim. Rep. 498; 98 S. W. 840.

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If the written instrument alleged to have been stolen had no market value, then the State may prove what it would cost to replace it. Roberts v. State, 61 Texas Crim. Rep. 434; 135 S. W. 144.

Sec. 2519. **Charge of the court.**—When there is direct testimony that defendant did take the written instrument he is charged with stealing, it is not necessary to charge on circumstantial evidence. Roberts v. State, 61 Texas Crim. Rep. 434; 135 S. W. 144.

If the written instrument is set out in the indictment by its tenor and the instrument offered in evidence or testified about varies from the description in the indictment, the court should leave it to the jury to decide whether or not the variance was caused by an alteration of it after it was taken, if it is a question as to whether it had been altered before or after the alleged theft. Huddleston v. State, 11 Texas Crim. App. 22.

Art. 1347. (876) (742) **Stealing from a wreck.**—If any person, with intent to deprive the true owner of the value thereof, shall appropriate to his own use, or dispose of to his own benefit, any property taken or driven on shore from any vessel wrecked, stranded or burned on the seashore, or on any river, bay or harbor of the State, he shall be punished by confinement in the penitentiary not less than two nor more than five years. (O. C. 770.)

Art. 1348. (877) (742a) **Conversion by a bailee is theft.**—Any person having possession of personal property of another by virtue of a contract of hiring or borrowing, or other bailment, who shall, without the consent of the owner, fraudulently convert such property to his own use with intent to deprive the owner of the value of the same, shall be guilty of theft, and shall be punished as prescribed in the Penal Code for theft of like property. (Act March 8, 1887, Acts 1887, p. 14.)

Sec. 2520. **Theft by bailee.**
Sec. 2521. Form for indictment.
Sec. 2522. Indictment.
Sec. 2523. Statute construed.
Sec. 2524. Bailment.
Sec. 2525. Venue.
Sec. 2526. The conversion.
Sec. 2527. Evidence.
Sec. 2486. Value.
Sec. 2528. Charge of the court.

Sec. 2521. **Form of indictment for theft by bailee.**
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 John Doe on the.....day of....., A. D....., in said county and State then and there having possession of fifty dollars in money of the value of fifty dollars (or "one horse," or whatever the property was, alleging its value if value affects the punishment), the same being then and there the personal property of and belonging to....., by virtue of his contract of hiring (or "borrowing," or whatever bailment it was) with the said.....(or "with .....who was the agent and employee of the said.....and who was thereunto duly authorized by the said.....and who as such agent and employee made said contract with the said John Doe"), did then and there while in possession of said property as such bailee without the consent of said owner of said property (or "without the consent of said owner of said property and without the consent of said agent and employee") fraudulently convert such property to his

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own use with the intent then and there to deprive the said owner of the value of the same.

Against the peace and dignity of the State.

.....

Foreman of the grand jury.

Sec. 2522. **Indictment for theft by bailee.**—Indictments for theft by bailee held good. Young v. State, 45 Texas Crim. Rep. 247; 75 S. W. 798. Butler v. State, 49 Texas Crim. Rep. 160; 93 S. W. 743. Collins v. State, 56 Texas Crim. Rep. 386; 118 S. W. 1038.

It is not necessary to allege the particular facts constituting the bailment. Gebhardt v. State, 27 S. W. 136. Elton v. State, 40 Texas Crim. Rep. 342; 50 S. W. 379. McCarty v. State, 45 Texas Crim. Rep. 512; 78 S. W. 506. Butler v. State, 49 Texas Crim. Rep. 160; 93 S. W. 743.

If the contract of bailment was in fact in the alternative, it may be so alleged. Collins v. State, 56 Texas Crim. Rep. 386; 118 S. W. 1038.

If the contract of bailment is alleged to have been made directly with defendant, it is not necessary to further allege how he came to be selected as the bailee. Butler v. State, 49 Texas Crim. Rep. 160; 93 S. W. 743.

If it is alleged in the indictment that defendant had possession of the property by virtue of a contract of bailment with the owner or agent of the owner, it sufficiently shows that it was defendant who made such contract. Elton v. State, 40 Texas Crim. Rep. 343; 51 S. W. 245 (overruling Smith v. State, 38 Texas Crim. Rep. 232; 42 S. W. 302).

An indictment for theft by a bailee must show in some way that defendant was a party to the contract of bailment. Calkins v. State, 34 Texas Crim. Rep. 251, 29 S. W. 1081.

If the bailment was made with the agent of the owner, the indictment should directly allege that the agent was duly authorized to make such contract. McCarty v. State, 45 Texas Crim. Rep. 512; 78 S. W. 506. Evans v. State, 155 S. W. 531 (it did).

An allegation that defendant made the contract of hiring with the employee of the owner and that the employee was thereunto duly authorized by the owner sufficiently alleges the authority of the employee to make the contract. Elton v. State, 40 Texas Crim. Rep. 342; 50 S. W. 379. Evans v. State, 155 S. W. 531.

If the contract of bailment is alleged to have been made with the agent of the owner, the want of consent of the agent to the conversion should also be alleged. McCarty v. State, 45 Texas Crim. Rep. 512; 78 S. W. 506.

An indictment for theft by a bailee need not allege that the property was fraudulently taken, or that it was obtained by false pretenses, or with intent to appropriate it at the time the possession was obtained. Purcelly v. State, 29 Texas Crim. App. 4; 13 S. W. 993.

An allegation that defendant had possession of a mule and converted a horse is bad for repugnancy. Duncan v. State, 70 S. W. 543.

A conviction cannot be had for theft by a bailee under an ordinary indictment for theft. Taylor v. State, 25 Texas Crim. App. 101; 7 S. W. 861. Nichols v. State, 28 Texas Crim. App. 107; 12 S. W. 500. Williams v. State, 30 Texas Crim. App. 153; 16 S. W. 760. Torres v. State, 33 Texas Crim. Rep. 125; 25 S. W. 128. Mangum v. State, 38 Texas Crim. Rep. 231; 42 S. W. 291. Peters v. State, 49 Texas Crim. Rep. 365; 91 S. W. 224. Warren v. State, 106 S. W. 382. Whitaker v. State, 62 Texas Crim. Rep. 36; 136 S. W. 1072.

Sec. 2523. **Statute construed.**—It is not necessary to prove that defendant resorted to a false pretext or entertained at the time he acquired possession the intent to appropriate the property; he may have obtained it in good faith, but having acquired possession as a bailee, a subsequent fraudulent conversion is theft by bailee. Abbey v. State, 35 Texas Crim. Rep. 591; 34 S. W. 930. Young v. State, 45 Texas

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Crim. Rep. 247; 75 S. W. 798. Butler v. State, 49 Texas Crim. Rep. 159; 93 S. W. 743. Harding v. State, 49 Texas Crim. Rep. 601; 95 S. W. 528. Whitaker v. State, 62 Texas Crim. Rep. 38; 136 S. W. 1072.

The rules in cases of ordinary theft as to alleging and proving ownership and possession apply also to cases of theft by a bailee. Piper v. State, 56 Texas Crim. Rep. 121; 119 S. W. 969.

Sec. 2524. **Bailment.**—A bailment may be defined as a delivery of personal property in trust to another for some purpose, upon a contract, either expressed or implied, that such purpose shall be carried out, and as used in the statute making conversion by a bailee theft includes all characters of bailments. Fulcher v. State, 32 Texas Crim. Rep. 624; 25 S. W. 625. Malz v. State, 36 Texas Crim. Rep. 451; 37 S. W. 748 (pledge or pawn). Harding v. State, 49 Texas Crim. Rep. 601; 95 S. W. 528. Northcutt v. State, 60 Texas Crim. Rep. 259; 131 S. W. 1128. Thompson v. State, 150 S. W. 181 (loan). Height v. State, 150 S. W. 908. Creale v. State, 158 S. W. 268 (to have property repaired). Himmelfarb v. State, 174 S. W. 586.

A bailment need not be such a contract as would give defendant the right of possession against the real owner. Piper v. State, 56 Texas Crim. Rep. 121; 119 S. W. 969.

The fact that a person is employed by another does not prevent him from being a bailee. Malz v. State, 36 Texas Crim. Rep. 447; 37 S. W. 748. Butler v. State, 49 Texas Crim. Rep. 159; 93 S. W. 743.

The specific property alleged to have been converted must have been delivered to defendant by the bailor upon an express or implied contract. Northcutt v. State, 60 Texas Crim. Rep. 259; 131 S. W. 1128.

Money paid by mistake, not being delivered for any purpose, is not a bailment. Fulcher v. State, 32 Texas Crim. Rep. 624; 25 S. W. 625.

A mere custody of property, such as that of an employee or of a clerk in a store, is not a bailment. Livingston v. State, 38 Texas Crim. Rep. 535; 43 S. W. 1008.

The delivery of a piano to defendant upon which his child was to be permitted to play as a consideration for his keeping the piano is a contract of hiring. Height v. State, 150 S. W. 908.

Where defendant took a horse to break it for the owner and to use it while making it gentle, it was a contract of hiring. Neel v. State, 33 Texas Crim. Rep. 409; 26 S. W. 726.

If money or other property is deposited with defendant for safe-keeping, he is a bailee. Cosby v. State, 63 S. W. 129. Butler v. State, 49 Texas Crim. Rep. 159; 93 S. W. 743. Whitaker v. State, 62 Texas Crim. Rep. 38; 136 S. W. 1072.

If the property alleged to have been converted was never in the possession of the alleged bailor, so that he could not deliver it to the defendant, there is no bailment. Northcutt v. State, 60 Texas Crim. Rep. 259; 131 S. W. 1128.

Where defendant organized a Lodge and the money was turned over to him by the treasurer, defendant being authorized to receive it, he was not a bailee of the treasurer. Mosbey v. State, 54 Texas Crim. Rep. 433; 113 S. W. 276.

Sec. 2525. **Venue.**—The venue of a prosecution for theft by a bailee is in the county where the conversion occurred. Abbey v. State, 35 Texas Crim. Rep. 589; 34 S. W. 930. Yost v. State, 38 S. W. 192. Lopez v. State, 37 Texas Crim. Rep. 649; 40 S. W. 972. McAlister v. State, 59 Texas Crim. Rep. 237; 128 S. W. 123. Pickrell v. State, 60 Texas Crim. Rep. 572; 132 S. W. 938.

The conversion of a horse in the county of the hiring is sufficiently shown by proof that defendant as soon as he secured possession left in an opposite direction from where he stated he was going and disposed of it in another county. Givens v. State, 32 Texas Crim. Rep. 457; 24 S. W. 287. Elton v. State, 40 Texas Crim. Rep. 342; 50 S. W. 379. Pickrell v. State, 60 Texas Crim. Rep. 572; 132 S. W. 938.

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An act in repudiation of the owner's title is a conversion, and proof that the property was sold or pawned in another county will not preclude the jury from being justified in finding that the act of defendant in leaving the county was a conversion in the county where the property was obtained by him as bailee. Givens v. State, 32 Texas Crim. Rep. 457; 24 S. W. 287. Steadham v. State, 40 Texas Crim. Rep. 43; 48 S. W. 177. Elton v. State, 40 Texas Crim. Rep. 342; 50 S. W. 379. Wilson v. State, 82 S. W. 651. Butler v. State, 49 Texas Crim. Rep. 159; 93 S. W. 743. Jeffreys v. State, 51 Texas Crim. Rep. 568; 103 S. W. 886. Piper v. State, 56 Texas Crim. Rep. 121; 119 S. W. 969. Pickrell v. State, 60 Texas Crim. Rep. 572; 132 S. W. 938. Height v. State, 150 S. W. 908.

If venue is an issue, it must be affirmatively submitted in the charge to the jury. McAlister v. State, 59 Texas Crim. Rep. 237; 128 S. W. 123. Pickrell v. State, 60 Texas Crim. Rep. 572; 132 S. W. 938.

It is error to charge the jury that if defendant conceived the idea of converting the property in the county of the prosecution the venue would be in that county; the venue is in the county where it was converted. Pickrell v. State, 60 Texas Crim. Rep. 572; 132 S. W. 938.

When there is no way to determine whether or not there was a conversion until the disposition of the property, and it was obtained as bailee in one county and disposed of in another, the court should give an affirmative charge submitting the issue of venue. McAlister v. State, 59 Texas Crim. Rep. 237; 128 S. W. 123.

Sec. 2526. **The conversion.**—The act of defendant in borrowing money on the property held by him as bailee is not a conversion if he retains possession of the property. McAlister v. State, 59 Texas Crim. Rep. 237; 128 S. W. 123.

As long as the bailee holds the property subject to the rights of the bailor, and not adversely in his own right, there is no fraudulent conversion. Cannon v. State, 38 Texas Crim. Rep. 324; 42 S. W. 981. McAlister v. State, 59 Texas Crim. Rep. 237; 128 S. W. 123.

Proof merely that defendant did not return the property is not sufficient to show a conversion. White v. State, 11 Texas 769.

If the conversion occurred after the bailment as alleged had ended, a conviction for theft by bailee will not be sustained. Czernecki v. State, 47 Texas Crim. Rep. 610; 85 S. W. 796.

To sustain a conviction under the statute making conversion by a bailee constitute theft, the proof must show that such conversion was fraudulent. Von Senden v. State, 45 S. W. 725. Smith v. State, 45 Texas Crim. Rep. 251; 76 S. W. 434.

The conversion may be proven by circumstantial evidence. Steadham v. State, 40 Texas Crim. Rep. 43; 48 S. W. 177. Elton v. State, 40 Texas Crim. Rep. 342; 50 S. W. 379. Pickrell v. State, 60 Texas Crim. Rep. 572; 132 S. W. 938.

If there is evidence that no fraudulent intent existed at the very time of the conversion, but that it was a temporary appropriation, the court should charge the jury affirmatively on this issue. Taylor v. State, 50 Texas Crim. Rep. 379; 97 S. W. 473.

A charge is on the weight of the evidence if it instructs the jury that if defendant borrowed a horse and was to return it in two days, and did not return it but took it to another city, it would be a fraudulent conversion. It is for the jury to say whether the facts show a fraudulent conversion. Jaimes v. State, 32 Texas Crim. Rep. 473; 24 S. W. 297.

Sec. 2527. **Evidence.**—Proof of acts and declarations of the defendant occurring long subsequent to the conversion is not admissible in his behalf as original evidence. Brooks v. State, 26 Texas Crim. App. 184; 9 S. W. 562.

Proof of any act or word of defendant done or said by him prior to his conversion of the property which relates to or is explanatory of his possession is admissible in his behalf as *res gestæ*. Rumbo v. State, 28 Texas Crim. App. 33; 11 S. W. 680.

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As a part of the *res gestæ* of that act, defendant is entitled to prove his statements made at the time of pawning the property. Williams v. State, 4 Texas Crim. App. 8. Taylor v. State, 50 Texas Crim. Rep. 378; 97 S. W. 473.

If the defense is that defendant intended to redeem the property which had been intrusted to him as bailee and which he pawned, it is error to exclude testimony going to show why he did not redeem it. Taylor v. State, 50 Texas Crim. Rep. 378; 97 S. W. 473.

When defendant proves that his bailor did not promptly have him arrested when he pawned her property, she may testify that she was threatened by him or that he promised to redeem and return the property. Creale v. State, 158 S. W. 268.

When the defensive theory is only that the property was pawned with the consent of the bailor, testimony that defendant intended to pay for the property is immaterial. Creale v. State, 158 S. W. 268.

Where defendant pawned the property of his bailor and testified that he had authority to do so and that he had never claimed it as his own, it may be shown that he offered to pawn it to another and at that time claimed it as his own. Creale v. State, 158 S. W. 268.

The fraudulent intent must exist at the very time of the conversion, and the temporary appropriation or use of the property, without the intent to permanently appropriate it, would not constitute theft. Taylor v. State, 50 Texas Crim. Rep. 379; 97 S. W. 473.

A conviction for conversion of property by a bailee should not be sustained if it appears that the prosecuting witness was using the criminal courts to collect a debt. Von Senden v. State, 45 S. W. 725.

If the proof shows that defendant was not the bailee of the alleged bailor but that he received the property as the agent of a third person, the variance is fatal. Crain v. State, 56 S. W. 912.

Where an officer took money from his prisoner without such force as to constitute robbery and without the intent at the time of the taking to appropriate the money, a subsequent fraudulent conversion by him is sufficient to sustain a conviction for theft by bailee. Leonard v. State, 56 Texas Crim. Rep. 307; 120 S. W. 183.

Sec. 2528. **Charge of the court.**—The charge is erroneous if it fails to require the jury to find that the conversion was **fraudulent.** Smith v. State, 45 Texas Crim. Rep. 252; 76 S. W. 434.

If the testimony only suggests a contract of **hiring,** it is error to authorize the jury to convict if they find a fraudulent conversion under a contract of **borrowing.** Harrison v. State, 42 Texas Crim. Rep. 509; 60 S. W. 963.

If there is evidence to support it, the court should charge affirmatively on the defensive theory that defendant had authority to sell or dispose of the property. Pickrell v. State, 60 Texas Crim. Rep. 572; 132 S. W. 938. Thompson v. State, 150 S. W. 181.

A charge is correct if it instructs the jury that if they believe from the evidence that the owner authorized or gave his permission or consent to defendant to sell or otherwise dispose of the property, or if they have a reasonable doubt thereof, they would acquit. Smith v. State, 45 Texas Crim. Rep. 251; 76 S. W. 434. Creale v. State, 158 S. W. 268.

It is not necessary to define the term "conversion." Barrow v. State, 160 S. W. 458.

It is not necessary to charge on the issue of misdemeanor theft where it appears that if defendant converted any of the property at all the value of the property converted was sufficient to constitute the theft thereof a felony. Sanford v. State, 64 Texas Crim. Rep. 607; 143 S. W. 1172.

If the evidence raises the issue of a temporary appropriation, the court should charge affirmatively on such defensive theory. Taylor v. State, 50 Texas Crim. Rep. 379; 97 S. W. 473.

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Where the court charged the jury that if defendant obtained the possession of the property in the county alleged and "did then and there" fraudulently convert the same, etc., the charge is sufficiently definite as to venue. Pech v. State, 154 S. W. 998.

It is not necessary to charge on circumstantial evidence when the only issue is whether the conversion was fraudulent. Creale v. State, 158 S. W. 268. Barrow v. State, 160 S. W. 458.

It is not necessary to charge on circumstantial evidence merely because proof of the fact that defendant in person received the property depends on circumstantial evidence. Lewallen v. State, 48 Texas Crim. Rep. 283; 87 S. W. 1159.

A charge requiring the jury to believe beyond a reasonable doubt that defendant was in possession of the property by virtue of a contract of hiring does not assume the existence of such contract. Lewallen v. State, 48 Texas Crim. Rep. 283; 87 S. W. 1159.

Art. 1349. (878) (743) **Receiving stolen property.**—If any person shall receive or conceal property which has been acquired by another in such manner as that the acquisition comes within the meaning of the term theft, knowing the same to have been so acquired, he shall be punished in the same manner as if he had stolen the property. (O. C. 745a, Acts 1858, p. 180, amended by Act March 20, 1897, Acts 1897, p. 26.)

Sec. 2529. **Receiving and concealing stolen property.**
Sec. 2530. Form for indictment.
Sec. 2531. Indictment.
Sec. 2532. Venue.
Sec. 2533. Statute construed.
Sec. 2534. Evidence.
Sec. 2535. Sufficiency of evidence.
Sec. 2536. Charge of the court.

Sec. 2530. **Form for indictment.**

In the name and by the 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 John Doe on the.....day of....., A. D....., in said county and State did fraudulently receive from.....(or "some person to the grand jurors unknown") certain corporeal personal property then and there belonging to.....(or "a person to the grand jurors unknown") and which said property had theretofore been acquired by the said.....(or "unknown person from whom it was so received") in such manner as that the acquisition comes within the meaning of the term theft, the said property being one horse (or "one watch of the value of fifty dollars," or whatever property it was, stating the value if the value affects the penalty), and the said John Doe did then and there fraudulently receive and conceal the said property then and there well knowing the same to have been so acquired.

Against the peace and dignity of the State.

.....

Foreman of the grand jury.

Sec. 2531. **Indictment.**—Judge Willson's form for receiving and concealing stolen property is good. Brothers v. State, 22 Texas Crim. App. 462; 3 S. W. 737. Moore v. State, 12 S. W. 407. Taylor v. State, 51 S. W. 237.

The punishment being the same, it may be alleged in the same count that defendant did receive and conceal the stolen property. Nourse v. State, 2 Texas Crim. App. 312.

An indictment for receiving and concealing stolen property need not allege the name of the person from whose possession the property was stolen. Trail v. State, 57 S. W. 92.

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An indictment for receiving and concealing stolen property need not allege all the facts going to constitute theft against the original taker from whom the property was received. Nourse v. State, 2 Texas Crim. App. 313. Brothers v. State, 22 Texas Crim. App. 462; 3 S. W. 737. Trail v. State, 57 S. W. 92.

In an indictment for receiving stolen property it is not necessary to allege that defendant received the property without the consent of the owner, or that it was received with intent to deprive the owner of the value thereof, or with intent to appropriate it to the use or benefit of defendant. Nourse v. State, 2 Texas Crim. App. 313. Brothers v. State, 22 Texas Crim. App. 462; 3 S. W. 737.

Ownership should be alleged as in theft, and the indictment should allege the name of the person from whom the property was received, or should allege that such person is unknown. State v. Perkins, 45 Texas 10. Brothers v. State, 22 Texas Crim. App. 462; 3 S. W. 737. McKay v. State, 49 Texas Crim. Rep. 120; 90 S. W. 653.

If the name of the person from whom defendant received the stolen property was unknown to the grand jury when the indictment was presented, it is proper to allege and prove that such name was unknown to the grand jury. Yantis v. State, 144 S. W. 949. Mooney v. State, 164 S. W. 830. Mooney v. State, 176 S. W. 53.

The offenses of theft and knowingly receiving stolen property may be alleged in different counts of the same indictment in order to meet the proof as it transpires and to prevent a variance. Trimble v. State, 18 Texas Crim. App. 632. Houston v. State, 47 S. W. 468.

Sec. 2532. **Venue.**—A prosecution for knowingly receiving or concealing stolen property may be commenced and carried on in the county where the theft was committed, or in any county through or into which the property may have been carried by the thief, or in any county where the property may have been received or concealed by the offender. Moseley v. State, 35 Texas Crim. Rep. 210; 32 S. W. 1042. Bonner v. State, 32 S. W. 1043. Moseley v. State, 36 Texas Crim. Rep. 578; 38 S. W. 197. Thurman v. State, 37 Texas Crim. Rep. 646; 40 S. W. 795. Polk v. State, 60 Texas Crim. Rep. 150; 131 S. W. 580. Mooney v. State, 176 S. W. 53.

If defendant is acquitted of theft under one count and convicted of receiving and concealing the property under another count, the judgment will be reversed if there is no testimony authorizing a conviction for receiving or concealing the property in the county where the venue is laid. Venue must be proved. Arrington v. State, 62 Texas Crim. Rep. 357; 137 S. W. 669.

Sec. 2533. **Statute construed.**—The place where a party convicted of knowingly receiving or concealing stolen property is to be confined is determined by his age at the time of the trial and not by the age of the thief. Ramsey v. State, 34 Texas Crim. Rep. 16; 28 S. W. 808.

In a legal sense defendant was present when the property was concealed if it was concealed by his innocent agent. Davis v. State, 61 Texas Crim. Rep. 611; 136 S. W. 45.

It is not necessary that defendant be present nor manually receive the stolen property when it was concealed under his direction on his premises by the thief. Kaufman v. State, 159 S. W. 58.

A person may be guilty of receiving stolen property though he made no concealment thereof. It would be difficult, however, for him to conceal the stolen property without first having received it. Thurman v. State, 37 Texas Crim. Rep. 646; 40 S. W. 795.

The word "conceal" is not to be given the literal construction of hiding, but the handling of property in a manner that would throw the owner off his guard in his search for the same. Polk v. State, 60 Texas Crim. Rep. 150; 131 S. W. 580. Davis v. State, 61 Texas Crim. Rep. 611; 136 S. W. 45.

Property can be concealed by carrying it off. Moseley v. State, 36 Texas Crim. Rep. 581; 37 S. W. 736; Polk v. State, 60 Texas Crim. Rep. 150; 131 S. W. 580. Davis v. State, 61 Texas Crim. Rep. 611; 136 S. W. 45.

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An indictment which only charges theft will not support a conviction for knowingly receiving or concealing stolen property. Brown v. State, 15 Texas Crim. App. 581. Chandler v. State, 15 Texas Crim. App. 593. Trimble v. State, 18 Texas Crim. App. 632. Herron v. State, 20 Texas Crim. App. 301. Gaither v. State, 21 Texas Crim. App. 538; 1 S. W. 456. Gray v. State, 24 Texas Crim. App. 615; 7 S. W. 339. Fernandez v. State, 25 Texas Crim. App. 542; 8 S. W. 667. Roman v. State, 64 Texas Crim. Rep. 515; 142 S. W. 912.

Sec. 2534. **Evidence.**—If theft and knowingly receiving stolen property is alleged in separate counts of the indictment and there is evidence tending to prove both offenses, the State is not required to elect as to which count a conviction would be sought. Houston v. State, 47 S. W. 468.

In a prosecution for knowingly receiving or concealing stolen property, the State may and must prove the theft. Wilson v. State, 12 Texas Crim. App. 481. Tucker v. State, 23 Texas Crim. App. 518; 5 S. W. 180. Johnson v. State, 42 Texas Crim. Rep. 441; 60 S. W. 667. Polin v. State, 65 S. W. 183. Goldstein v. State, 171 S. W. 709. Mooney v. State, 176 S. W. 53.

The indictment and final judgment of conviction against the thief is admissible as prima facie evidence that the property was stolen before defendant received it, but such proof must be limited in the charge to the jury. Cooper v. State, 29 Texas Crim. App. 18; 13 S. W. 1011. Meek v. State, 160 S. W. 698.

Proof of the declarations of the thief made in the absence of the defendant is admissible if they tend to legitimately prove the theft, but such proof must be limited in the charge to the jury. Tucker v. State, 23 Texas Crim. App. 518; 5 S. W. 180. Forrester v. State, 152 S. W. 1041.

It is error to admit proof of the declarations of the thief made in the absence of the defendant to the effect that defendant had agreed to receive the property. Richardson v. State, 75 S. W. 505.

Proof of hearsay declarations of the thief is not admissible to prove that defendant bought the property in good faith. Cooper v. State, 29 Texas Crim. App. 8; 13 S. W. 1011.

If the defense is purchase in good faith, defendant may show that prior to his purchase his vendor claimed the property as his own and bargained it to another person. Harwell v. State, 22 Texas Crim. App. 251; 2 S. W. 606.

Proof of the name of the person from whom it is alleged defendant received the stolen property must be proved as laid, either by proof that the name alleged was his name or of the same sound, or that he was known by the name alleged. Moseley v. State, 36 Texas Crim. Rep. 578; 37 S. W. 736. Henningberg v. State, 72 S. W. 175. McKay v. State, 49 Texas Crim. Rep. 120; 90 S. W. 653.

On a trial for receiving stolen property, proof of receiving other stolen property is admissible if it tends to develop the *res gestæ*, or if it tends to show intent or system when such matters are in issue. Morgan v. State, 31 Texas Crim. Rep. 9; 18 S. W. 647. Kaufman v. State, 159 S. W. 58. Henderson v. State, 172 S. W. 794.

Proof of receiving other stolen property is not admissible if no part of the same transaction, and if it is simply proof of subsequent receiving so removed in point of time as to form different transactions. Bismark v. State, 45 Texas Crim. Rep. 54; 73 S. W. 967. Forrester v. State, 152 S. W. 1041.

A person under indictment for receiving the same property for which defendant is being tried for stealing was held not a competent witness for defendant. Crutchfield v. State, 7 Texas Crim. App. 65. (The reason given for this decision is that a receiver is an accessory to the thief, but the law is that a mere receiver of stolen property is not an accessory. Street v. State, 39 Texas Crim. Rep. 134; 45 S. W. 527.)

Sec. 2535. **Sufficiency of evidence.**—The ownership of the property may be alleged in the real owner where he had the actual control, care and management of the property at the time of the theft, and the mere custody of a servant or employe may be ignored. Hogg v. State, 146 S. W. 195.

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Proof that the property found in the possession of defendant was similar to that stolen is not of itself sufficient proof of identity. Polin v. State, 65 S. W. 183.

Guilty knowledge and the receiving of the stolen property must concur. Nourse v. State, 2 Texas Crim. App. 304. Arcia v. State, 26 Texas Crim. App. 205; 9 S. W. 685. Murio v. State, 31 Texas Crim. Rep. 210; 20 S. W. 356. Bonura v. State, 98 S. W. 267.

Guilty knowledge may be implied if defendant received the property under circumstances sufficient to satisfy a man of ordinary intelligence and caution that the property was stolen. Murio v. State, 31 Texas Crim. Rep. 210; 20 S. W. 356. Hogg v. State, 146 S. W. 195. Stanfield v. State, 165 S. W. 217.

The bare fact that defendant received the stolen property is not sufficient to show that he knew that it was stolen. Wilson v. State, 12 Texas Crim. App. 481. Estes v. State, 23 Texas Crim. App. 611; 5 S. W. 176. Arcia v. State, 26 Texas Crim. App. 205; 9 S. W. 685. Castleberry v. State, 35 Texas Crim. Rep. 383; 33 S. W. 875. Trail v. State, 57 S. W. 92.

The evidence must show beyond a reasonable doubt that the property was stolen, and that thereafter defendant received the property from the person alleged with fraudulent intent, knowing the same to have been stolen. Wilson v. State, 12 Texas Crim. App. 481. Arcia v. State, 26 Texas Crim. App. 205; 9 S. W. 685. Trail v. State, 57 S. W. 92. Johnson v. State, 42 Texas Crim. Rep. 441; 60 S. W. 667. Polin v. State, 65 S. W. 183. Kaufman v. State, 159 S. W. 58.

Where defendant bought a watch worth ten dollars from an unknown negro for three and a half dollars and sold it for eight dollars and did not conceal it, the evidence is insufficient to convict although he stated he paid ten dollars in trade for it. Trail v. State, 57 S. W. 92.

If the property was bought by defendant's wife in his absence, a conviction will not be sustained if there is no proof that he instructed her to buy it. Henningberg v. State, 72 S. W. 176.

The value of the property, if an issue, must be proved as in theft. Sands v. State, 30 Texas Crim. App. 580; 18 S. W. 86. Bismark v. State, 45 Texas Crim. Rep. 54; 73 S. W. 967.

If the allegation is that defendant received the property in another State and afterwards brought it into this State, the allegation must be proved as laid. Bryan v. State, 54 Texas Crim. Rep. 63; 111 S. W. 1035.

Where defendant was clerking for prosecutor and after a burglary, which he was shown to have guilty knowledge of, some of the property was found at his house, the facts do not suggest receiving stolen property as his offense. Bowmer v. State, 55 Texas Crim. Rep. 421; 116 S. W. 798.

If the thief is permitted to turn State's evidence, his testimony must be corroborated both in respect to the theft and as to the receiving by defendant. Johnson v. State, 42 Texas Crim. Rep. 441; 60 S. W. 667. Hanks v. State, 55 Texas Crim. Rep. 405; 117 S. W. 149.

If the property was taken with the fraudulent consent of the bailee of the property, or of the special owner, it would not be theft but embezzlement, and in such event one receiving such property cannot be legally convicted of receiving stolen property. Bismark v. State, 45 Texas Crim. Rep. 54; 73 S. W. 967.

If the evidence makes it apparent that the grand jury knew or could have ascertained by the use of reasonable diligence the name of the person from whom the property was received, a conviction will not be sustained if the allegation is that such person was unknown. McKay v. State, 49 Texas Crim. Rep. 118; 90 S. W. 653. Williams v. State, 153 S. W. 1136.

If there is nothing in the evidence to suggest that the name of the person from whom defendant received the property was known to the grand jury or that it could have been ascertained by them, proof that the witnesses did not know such name is sufficient to support the allegation that such person was unknown. Yantis v. State, 144 S. W. 947.

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Sec. 2536. **Charge of the court.**—It is error to charge the jury that if defendant did not receive the goods under circumstances sufficient to satisfy a man of ordinary intelligence and caution that the goods were stolen they should acquit him. The statute requires knowledge that the property was stolen and a fraudulent intent in receiving them, and guilt does not depend upon whether defendant exercised ordinary diligence and caution. Forrester v. State, 152 S. W. 1041.

The charge of the court should not authorize a conviction on the theory that defendant received or concealed the property in a county other than the county alleged in the indictment. Mooney v. State, 164 S. W. 830.

If the thief or a party knowingly and unlawfully aiding the thief is used as a witness and testifies to inculpatory facts, the charge should apply the law of accomplice testimony to his evidence given against defendant. Miller v. State, 4 Texas Crim. App. 251. Johnson v. State, 42 Texas Crim. Rep. 441; 60 S. W. 667. Goldstein v. State, 166 S. W. 149.

If the charge of the court affirmatively submits the defense involved in defendant's explanation of his possession, it is not necessary to also charge on such explanation. Sisk v. State, 42 S. W. 985. Bonura v. State, 98 S. W. 267 (opinion sets out correct charge).

It is error to charge on the subject of "recent possession and explanation" when there is no evidence of any explanation. Grande v. State, 37 Texas Crim. Rep. 54; 38 S. W. 613.

To charge on the subject of possession and explanation without charging, in connection therewith, on knowingly receiving the property, would be error. Grande v. State, 37 Texas Crim. Rep. 54; 38 S. W. 613.

If theft and receiving are both charged on, a charge to the effect that possession of property recently stolen would be a presumption of guilt, though intended only to apply to the theft count, is error, since the jury might apply it to the count charging receiving. Trail v. State, 57 S. W. 92.

If there is evidence that defendant thought the property was smuggled, it is error to charge the jury that if he bought it in good faith he should be acquitted. Bargna v. State, 68 S. W. 999.

If it is an issue as to whether the property was stolen or purchased by the person from whom defendant received it, the court should charge the jury affirmatively on the theory of purchase. Stanfield v. State, 165 S. W. 217.

If the defensive theory is purchase in good faith, defendant is entitled to an affirmative charge on this defense, and whether put in evidence by the State or defendant or as a part of the *res gestæ* or by way of explanation of his possession, it is only necessary to charge the jury that if he purchased the property in good faith or if there is a reasonable doubt that he so purchased it he should be acquitted. Grande v. State, 37 Texas Crim. Rep. 54; 38 S. W. 613.

If there is evidence that defendant believed that the person from whom he received the property was the owner and that it was turned over to defendant to sell, the court should charge the jury affirmatively on this theory. Harris v. State, 57 S. W. 834.

If the defensive theory is affirmatively submitted and the omission is not calculated to injure the defendant, it is not reversible error to refuse to charge the jury that the receiving and concealing must be accompanied with a criminal intent. Bonura v. State, 98 S. W. 267.

If there is evidence that the property was of less value than required to constitute a felony, the court should submit the issue of a misdemeanor to the jury. Williams v. State, 153 S. W. 1136.

On a trial only for receiving stolen property where there is evidence that defendant stole the property himself instead of receiving it from the thief, the court should charge the jury that if such was the case the defendant would not be guilty of receiving stolen property. Allen v. State, 175 S. W. 700.

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A charge is erroneous if it authorizes the conviction of defendant as a receiver if the jury find that he was a principal in the theft. Pollard v. State, 33 Texas Crim. Rep. 197; 26 S. W. 70.

Though the only direct testimony that defendant received the property comes from an accomplice witness a charge on circumstantial evidence is not required. Hanks v. State, 55 Texas Crim. Rep. 451; 117 S. W. 150.

CHAPTER X

THEFT FROM THE PERSON

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Article 1350. (879) (744) **Punishment.**—If any person shall commit theft by privately stealing from the person of another, he shall be punished by confinement in the penitentiary not less than two nor more than seven years. (O. C. 762.)

Art. 1351. (880) (745) **Ingredients of the offense.**—To constitute the offense it is necessary that the following circumstances concur:

1. The theft must be from the person; it is not sufficient that the property be merely in the presence of the person from whom it is taken.

2. The theft must be committed without the knowledge of the person from whom the property is taken, or so suddenly as not to allow time to make resistance before the property is carried away.

3. It is only necessary that the property stolen should have gone into the possession of the thief; it need not be carried away in order to complete the offense. (O. C. 763.)

Sec. 2537. **Both phases in one count—Form for indictment.**

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 John Doe on the ..... day of ....., A. D. ....., in said county and State did then and there fraudulently take from the person and possession of ..... five dollars in money (or "one watch," or "one ring," or "one money purse," or "one knife," or whatever it was), the same being then and there the corporeal personal property of said ....., without the consent of said ..... and without the knowledge of said ..... and so suddenly as not to allow time to make resistance before the same was carried

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away, and with the intent then and there to deprive the said ..... of the value of the same and to appropriate it to the use and benefit of him the said John Doe.

Against the peace and dignity of the State.

.....

Foreman of the grand jury.

(Jasper v. State, 61 S. W. 392. Steele v. State, 46 Texas Crim. Rep. 337; 81 S. W. 962.)

Sec. 2538. **Taking without knowledge—Form for indictment.**

In the name and by the 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 John Doe on the ..... day of ....., A. D. ....., in said county and State did fraudulently take from the person and possession of ..... one purse (or "ten dollars in money," or whatever it was), the same being then and there the corporeal personal property of the said ....., without the consent of the said ..... and without the knowledge of the said ....., and with the intent then and there to deprive the said ..... of the value of the same and to appropriate it to the use and benefit of him the said John Doe.

Against the peace and dignity of the State.

.....

Foreman of the grand jury.

(Chitwood v. State, 44 Texas Crim. Rep. 439; 71 S. W. 973.)

Sec. 2539. **Sudden taking—Form for indictment.**

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 John Doe on the ..... day of ....., A. D. ....., in said county and State did fraudulently take from the person and possession of ..... one pistol, and seventy dollars in money (or "one razor," or whatever it was), the same being then and there the corporeal personal property of the said ....., without the consent of the said ..... and so suddenly as not to allow time to make resistance before the same was carried away, and with the intent then and there to deprive the said ..... of the value of the same and to appropriate it to the use and benefit of him the said John Doe.

Against the peace and dignity of the State.

.....

Foreman of the grand jury.

(Shaw v. State, 23 Texas Crim. App. 497; 5 S. W. 317. Bush v. State, 53 Texas Crim. Rep. 214; 109 S. W. 184. Sims v. State, 64 Texas Crim. Rep. 435; 142 S. W. 573.)

Sec. 2540. **Two counts—Form for indictment.**

In the name and by the 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 John Doe on the ..... day of ....., A. D. ....., in said county and State did fraudulently take twenty dollars in money (or "one pocket knife," or whatever it was), the same then and there being the corporeal personal property of ....., from the person and possession of the said ..... without the knowledge and without the consent of the said ....., and with the intent then and there to deprive the said ..... of the value of the same and to appropriate it to the use and benefit of him the said John Doe.

And the grand jury aforesaid do further present in and to said court that John Doe on the ..... day of ....., A. D. ....., in said county and State did fraudulently take twenty dollars in money (or "one pocket knife," or whatever it was), the same then and there being the corporeal personal property of .....,

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from the person and possession of the said ..... without the consent of the said ..... and so suddenly as not to allow time to make resistance before the same was carried away, and with the intent then and there to deprive the said ..... of the value of the same and to appropriate it to the use and benefit of him the said John Doe.

Against the peace and dignity of the State.

.....

Foreman of the grand jury.

Sec. 2541. **Indictment.**—Indictment charging taking without knowledge only held good: Chitwood v. State, 44 Texas Crim. Rep. 439; 71 S. W. 973.

Indictments held good—charging a sudden taking only: Shaw v. State, 23 Texas Crim. App. 497; 5 S. W. 317. Bush v. State, 53 Texas Crim. Rep. 214; 109 S. W. 184. Sims v. State, 64 Texas Crim. Rep. 435; 142 S. W. 573.

Indictments held good—charging a taking without knowledge and a sudden taking in the same count. Jasper v. State, 61 S. W. 392. Steele v. State, 46 Texas Crim. Rep. 337; 81 S. W. 962.

An indictment for theft from the person charging in the same count a taking without knowledge and a sudden taking is not bad for duplicity, the punishment being the same and the two phases of the offense not necessarily being repugnant to each other. Jasper v. State, 61 S. W. 392. Steele v. State, 46 Texas Crim. Rep. 338; 81 S. W. 962. Thomas v. State, 51 Texas Crim. Rep. 333; 101 S. W. 797. Wright v. State, 156 S. W. 624.

An indictment for theft from the person need not contain the word "privately." The word "privately" as used in the statute has reference to the manner of the taking, and a theft by privately stealing is shown by alleging a fraudulent taking without knowledge or a sudden taking or both. Brown v. State, 22 S. W. 24. Bush v. State, 53 Texas Crim. Rep. 215; 109 S. W. 184. Sims v. State, 64 Texas Crim. Rep. 435; 142 S. W. 572.

An indictment for theft from the person is bad if there is no allegation that the property was taken "without the knowledge" of the person from whom it was taken or "so suddenly as not to allow time to make resistance." Kerry v. State, 17 Texas Crim. App. 178.

An indictment for theft from the person is bad if there is no allegation that the property was taken from the "person." Jones v. State, 39 Texas Crim. Rep. 387; 46 S. W. 250.

It is proper to allege ownership of the property in the party in possession of the same at the time it was stolen from the person. Bell v. State, 71 S. W. 24.

An ordinary indictment for theft will not support a conviction if the proof shows that the theft was from the person. The punishment is different. Harris v. State, 17 Texas Crim. App. 134. Nichols v. State, 28 Texas Crim. App. 107; 12 S. W. 500. Dalton v. State, 27 S. W. 259.

An indictment charging only the offense of theft from the person will not support a conviction for misdemeanor theft. Roberts v. State, 33 Texas Crim. Rep. 83; 24 S. W. 895.

Sec. 2542. **Allegation of value.**—The value of the property stolen from the person need not be mentioned in an indictment for theft from the person, nor is it necessary to prove the value on the trial of the case, or to mention it in the charge to the jury. The statute makes any theft from the person a felony. While wholly unnecessary, it would not be reversible error to prove value on the trial. Bennett v. State, 16 Texas Crim. App. 236. Harris v. State, 17 Texas Crim. App. 132. Shaw v. State, 23 Texas Crim. App. 497; 5 S. W. 317. Green v. State, 28 Texas Crim. App. 496; 13 S. W. 784. Roberts v. State, 33 Texas Crim. Rep. 83; 24 S. W. 895. Chitwood v. State, 44 Texas Crim. Rep. 440; 71 S. W. 973. Campbell v. State, 61 Texas Crim. Rep. 504; 135 S. W. 548. Sims v. State, 64 Texas Crim. Rep. 435; 142 S. W. 573. Watts v. State, 171 S. W. 204.

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Sec. 2543. **Description of the property.**—A general description of the property stolen is sufficient, as "one watch," "one pocket knife," "one knife," "one razor," and the like. Grissom v. State, 40 Texas Crim. Rep. 146; 49 S. W. 93. Johnson v. State, 42 Texas Crim. Rep. 104; 58 S. W. 69. Campbell v. State, 61 Texas Crim. Rep. 504; 135 S. W. 548. Sims v. State, 64 Texas Crim. Rep. 435; 142 S. W. 573.

Describing the property stolen as "four dollars in money," or as any other certain sum of money, stated either in words or figures, is good. Under such an allegation the word "money" will be held to mean the money of the United States, and proof of any kind of money of the United States will sustain such allegation. Green v. State, 28 Texas Crim. App. 495; 13 S. W. 784. Jasper v. State, 61 S. W. 393. Campbell v. State, 61 Texas Crim. Rep. 504; 135 S. W. 548. Sims v. State, 64 Texas Crim. Rep. 435; 142 S. W. 572.

An allegation describing the property stolen as "one pocket book" or "one money purse" is sufficient. Bush v. State, 53 Texas Crim. Rep. 213; 109 S. W. 184. Sims v. State, 64 Texas Crim. Rep. 435; 142 S. W. 572.

The property stolen is sufficiently described by an allegation that it was "one purse containing money and checks." Wilson v. State, 160 S. W. 967.

An allegation describing the property stolen as "one knife" or "one pocket knife" is sufficient. Bryant v. State, 16 Texas Crim. App. 148. Grissom v. State, 40 Texas Crim. Rep. 146; 49 S. W. 93.

The property stolen is sufficiently described by an allegation that it was "one five dollar bill in money." Green v. State, 28 Texas Crim. App. 495; 13 S. W. 784.

The property stolen may be described as so many "dollars of lawful money of the United States." Burrus v. State, 172 S. W. 982.

Sec. 2544. **Venue.**—The venue of the offense of theft from the person is only in the county where the theft from the person was committed. Gage v. State, 22 Texas Crim. App. 125; 2 S. W. 638. Nichols v. State, 28 Texas Crim. App. 105; 12 S. W. 500.

Sec. 2545. **Recent possession and explanation.**—The rules as to possession of property recently stolen and defendant's explanation thereof and to the charge of the court thereon which are applicable to ordinary theft also apply in cases of theft from the person. Roberts v. State, 33 Texas Crim. Rep. 85; 24 S. W. 895. Bowen v. State, 143 S. W. 187. Brooks v. State, 151 S. W. 549. Black v. State, 162 S. W. 521.

It is error to permit the State to prove by an attorney that his client had paid him money corresponding in amount with the alleged stolen property when he could only have known of such inculpatory fact by reason of his employment. Holden v. State, 44 Texas Crim. Rep. 383; 71 S. W. 600.

Sec. 2546. **Convictions sustained.**—If the property was taken—reduced to possession—so suddenly as not to allow time to make resistance, it was also "carried away" so suddenly as not to allow time to make resistance before it was carried away. Flynn v. State, 42 Texas 301. Dukes v. State, 22 Texas Crim. App. 193; 2 S. W. 590. Johnson v. State, 156 S. W. 1181.

In a case of theft from the person the proof need not show that the property alleged to have been stolen was in fact carried away; if it was reduced to possession by defendant it is a taking although the defendant did not succeed in withdrawing the property from the pocket of the alleged injured party. Flynn v. State, 42 Texas 301. Dukes v. State, 22 Texas Crim. App. 192; 2 S. W. 590. Green v. State, 28 Texas Crim. App. 497; 13 S. W. 784. Files v. State, 36 Texas Crim. Rep. 206; 36 S. W. 93. Clemmons v. State, 39 Texas Crim. Rep. 280; 45 S. W. 911.

The fact that after the owner knew that the defendant had taken his property he might have prevented the defendant from carrying it away does not alter or affect the case. Green v. State, 28 Texas Crim. App. 497; 13 S. W. 784. Files v. State, 36 Texas Crim. Rep. 206; 36 S. W. 93.

The word "privately," as used in the statute, has reference to the manner of the taking and not to the place where the property was taken from the person, and it

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is no defense to a fraudulent taking from the person that it occurred in the presence of other persons. Clemmons v. State, 39 Texas Crim. Rep. 281; 45 S. W. 911. Black v. State, 52 Texas Crim. Rep. 9; 104 S. W. 897.

It is not necessary to prove that all of the property alleged to have been stolen from the person was taken; proof of any part is sufficient. Grissom v. State, 40 Texas Crim. Rep. 147; 49 S. W. 93. Green v. State, 86 S. W. 332. Sims v. State, 64 Texas Crim. Rep. 435; 142 S. W. 572.

Snatching money or other property from the hand of another with the fraudulent intent to appropriate it is theft from the person. Johnson v. State, 35 Texas Crim. Rep. 140; 32 S. W. 537. Clemmons v. State, 39 Texas Crim. Rep. 279; 45 S. W. 911. Green v. State, 86 S. W. 332. Nelson v. State, 48 Texas Crim. Rep. 471; 88 S. W. 807. Washington v. State, 53 Texas Crim. Rep. 300; 109 S. W. 157. Johnson v. State, 62 Texas Crim. Rep. 284; 136 S. W. 1058. Sims v. State, 64 Texas Crim. Rep. 435; 142 S. W. 572. Green v. State, 156 S. W. 682.

Property fraudulently taken from the person, without violence to the person, in the confusion caused by crowding, is theft from the person. Burns v. State, 71 S. W. 965. Long v. State, 55 Texas Crim. Rep. 55; 114 S. W. 632. Johnson v. State, 55 Texas Crim. Rep. 414; 117 S. W. 964. Walters v. State, 56 Texas Crim. Rep. 10; 118 S. W. 543.

Violence subsequent to the taking of the property will not of itself make the original taking constitute robbery. Johnson v. State, 55 Texas Crim. Rep. 414; 117 S. W. 964. Walters v. State, 56 Texas Crim. Rep. 10; 118 S. W. 543.

Where the property was taken suddenly, without the use of threats or weapons, and defendant's hand was on the property before the struggle began so that it was too late for effective resistance, a conviction for theft from the person was sustained, the court having charged the jury that if the property was taken by means of a struggle they should acquit. Johnson v. State, 55 Texas Crim. Rep. 414; 117 S. W. 964.

Where the defendants saw that their efforts to induce the prosecutor to bet on a device had failed and they then snatched his watch from his person, twisted his money from his hand, and fled in different directions, the conviction for theft from the person was sustained. Boyd v. State, 29 S. W. 157.

A conviction may be sustained on the testimony of an accomplice witness where his testimony shows that the defendant is guilty as charged and is believed by the jury to be true and is corroborated by other testimony tending to connect the defendant with the commission of the offense. Ezell v. State, 71 S. W. 283. Forward v. State, 166 S. W. 725.

The State is not bound by the date alleged and may prove that the theft from the person was committed either before or after the date alleged if the date proven is a date anterior to the presentment of the indictment and not so remote as to be barred by limitation. Green v. State, 86 S. W. 332.

Sec. 2547. **Evidence insufficient.**—The evidence is insufficient to show a theft from the person if it fails to show that the property was reduced to possession by defendant. Rodriguez v. State, 71 S. W. 596. Tarrango v. State, 44 Texas Crim. Rep. 385; 71 S. W. 597. Herr v. State, 52 Texas Crim. Rep. 53; 105 S. W. 190.

Property must be entirely severed from the owner, that is detached from whatever secures it to the person, before it can be said to be reduced to possession. To constitute theft possession must be complete in the taker. Rodriguez v. State, 71 S. W. 596. Tarrango v. State, 44 Texas Crim. Rep. 385; 71 S. W. 597. Herr v. State, 52 Texas Crim. Rep. 53; 105 S. W. 190. Walters v. State, 56 Texas Crim. Rep. 10; 118 S. W. 543. Clark v. State, 59 Texas Crim. Rep. 246; 128 S. W. 131.

A conviction for theft from the person will not be sustained if the proof fails to show that the theft was from the person, and it is not sufficient that the property was merely in the presence of the person from whom it was taken. Day v. State, 53 Texas Crim. Rep. 648; 111 S. W. 408.

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A conviction for theft from the person will not be sustained if the proof fails to show that the defendant had the fraudulent intent to appropriate the property when he reduced it to possession. Roberts v. State, 21 Texas Crim. App. 464; 1 S. W. 452. Graves v. State, 25 Texas Crim. App. 333; 8 S. W. 471.

Proof that defendant took some money from the person of the owner and held in his hand for some minutes without objection being made and afterwards appropriated it is not sufficient to show that he had the fraudulent intent to appropriate it when he took it. Graves v. State, 25 Texas Crim. App. 333; 8 S. W. 471.

Circumstantial evidence to be sufficient to sustain a conviction must exclude every other reasonable hypothesis except that of defendant's guilt. Hammel v. State, 14 Texas Crim. App. 326. Johnson v. State, 52 Texas Crim. Rep. 510; 107 S. W. 845. Brooks v. State, 56 Texas Crim. Rep. 513; 120 S. W. 878.

If the only phase of theft from the person submitted to the jury is a taking without the knowledge of the owner, the proof is insufficient to support a conviction for theft from the person if it shows that the owner knew his property was being taken before it was reduced to possession by the defendant. McLin v. State, 29 Texas Crim. App. 173; 15 S. W. 600. Files v. State, 36 Texas Crim. Rep. 206; 36 S. W. 93. Thomas v. State, 51 Texas Crim. Rep. 332; 101 S. W. 797. Day v. State, 53 Texas Crim. Rep. 648; 111 S. W. 408. Grant v. State, 59 Texas Crim. Rep. 123; 127 S. W. 174.

Proof of declarations of the alleged injured party made in the absence of defendant and which is not a part of the *res gestæ* is not admissible to prove ownership. Anderson v. State, 14 Texas Crim. App. 49.

Sec. 2548. **Charge of the court.**—In a case of theft from the person if the charge of the court properly applies the law to the facts it is not necessary to define theft in general. Chitwood v. State, 44 Texas Crim. Rep. 439; 71 S. W. 973.

It is proper to charge the jury that a person in possession of money or property at the time it is fraudulently taken from his person is in law the owner of the same. Bell v. State, 71 S. W. 24.

If defendant fraudulently took any of the money or property alleged in such manner as to constitute theft from the person he would be guilty of that offense, and the court may so charge the jury. Grissom v. State, 40 Texas Crim. Rep. 147; 49 S. W. 93.

In a prosecution for theft from the person the value of the property not affecting the penalty it is not necessary to charge the jury as to value nor as to a misdemeanor theft. Green v. State, 28 Texas Crim. App. 496; 13 S. W. 784. Roberts v. State, 33 Texas Crim. Rep. 83; 24 S. W. 895. Chitwood v. State, 44 Texas Crim. Rep. 440; 71 S. W. 973. Black v. State, 52 Texas Crim. Rep. 8; 104 S. W. 897.

If the indictment contains two counts, one charging ordinary theft and one theft from the person, it is not error to submit both counts to the jury where the testimony fails to show the precise means and method of the taking. Masterson v. State, 20 Texas Crim. App. 576. Hooton v. State, 53 Texas Crim. Rep. 8; 108 S. W. 651.

A broader abstract definition of theft from the person than authorized by the allegations of the indictment should not be given, but is not reversibly erroneous if the charge in applying the law to the facts conforms to the allegations of the indictment. McLin v. State, 29 Texas Crim. App. 173; 15 S. W. 600. Mathis v. State, 65 S. W. 523. Brewin v. State, 49 Texas Crim. Rep. 296; 92 S. W. 420. Black v. State, 52 Texas Crim. Rep. 9; 104 S. W. 897.

(In charging the jury on theft from the person no abstract definitions of theft or theft from the person are necessary. A charge applying the law to the facts is all that is required.)

The charge of the court is fundamentally erroneous if the only authority given the jury to convict is a phase of the statute which is not alleged. Grant v. State, 59 Texas Crim. Rep. 123; 127 S. W. 173.

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If the charge also authorizes a conviction of theft from the person on the theory of a taking "without knowledge" and there is neither allegation nor proof of a taking "without knowledge," the error is harmless where the allegation and proof is that the property was taken so suddenly as not to allow time to make resistance. Robinson v. State, 37 Texas Crim. Rep. 197; 39 S. W. 107. Nelson v. State, 48 Texas Crim. Rep. 471; 88 S. W. 807.

If the only phase of theft from the person alleged is that the property was taken so suddenly as not to allow time to make resistance and there is evidence that the property was taken without the knowledge of the alleged injured party, the judgment will be reversed if the charge of the court authorizes a conviction on the theory that the property was taken without the knowledge of such party. Swartz v. State, 27 S. W. 136. Grant v. State, 59 Texas Crim. Rep. 123; 127 S. W. 173.

If the only phase of theft from the person relied on is a taking without knowledge, a charge is correct which instructs the jury to acquit unless they find beyond a reasonable doubt that the defendant had the property in his hand (reduced to possession) before the owner knew it. Files v. State, 36 Texas Crim. Rep. 206; 36 S. W. 93.

Where the case is submitted to the jury only upon the theory of a "sudden taking" and there is evidence of a taking "without knowledge," it is error not to charge the jury that if the property was taken without the knowledge of the prosecutor and that he did not discover his loss until the property had been reduced to possession by defendant they should acquit. Burke v. State, 58 Texas Crim. Rep. 233; 125 S. W. 8.

The use of the word "privately" in the charge, while wholly unnecessary, is not of itself tantamount to charging on the theory that the property was taken without the knowledge of the alleged injured party. Mathis v. State, 65 S. W. 523.

The term "knowledge" is used in its ordinary sense and no definition of it should be attempted. It is error to charge the jury that if the prosecutor knew his property was being taken yet was incapable of making resistance through drunkenness or stupor the taking would be without his knowledge. Still v. State, 50 S. W. 357. Roquemore v. State, 50 Texas Crim. Rep. 546; 99 S. W. 547.

A charge authorizing a conviction if the property was taken so suddenly as not to allow time to make resistance "taking into consideration the condition of the alleged injured party at the time" is on the weight of the evidence. Still v. State, 50 S. W. 357.

It is not error to charge the jury that if the property was reduced to possession by defendant it need not have been carried away in order to constitute a taking. Newman v. State, 64 S. W. 259.

Under an indictment for theft from the person the court may, when there is evidence to support the theory, authorize a conviction for an attempt to commit theft from the person. Bell v. State, 156 S. W. 1194.

Where there is evidence of express or implied consent to take the money or property of the alleged injured party and of subsequent intent to appropriate it, the court should charge the jury on such issue. Graves v. State, 25 Texas Crim. App. 333; 8 S. W. 471. Clark v. State, 34 Texas Crim. Rep. 121; 29 S. W. 382. McMahan v. State, 50 Texas Crim. Rep. 244; 96 S. W. 17.

Where there is evidence of implied consent on the part of the alleged injured party for defendant to take the property, it is error to base defendant's right to an acquittal upon an understanding and agreement to that effect. McMahan v. State, 50 Texas Crim. Rep. 246; 96 S. W. 17.

Where there is evidence raising the issue, it is error to refuse to charge the jury that if the property was not taken by defendant but was received by him from another than the alleged injured party they should acquit. Felts v. State, 53 Texas Crim. Rep. 48; 108 S. W. 654. Bowen v. State, 143 S. W. 187 (the court did and the charge was correct).

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If there is no testimony that the alleged injured party was throwing his money around promiscuously at the time of the alleged theft, it is not error to refuse to submit such theory to the jury. Hooton v. State, 53 Texas Crim. Rep. 8; 108 S. W. 651.

It is not necessary to charge the jury on the subject of "recent possession and explanation" when an affirmative charge on the defense involved in the explanation is given to the jury. Brooks v. State, 151 S. W. 549.

When the defensive theory is that defendant won the money gambling, a charge is correct which instructs the jury to acquit if they believe he won the money gambling with the alleged owner or in a game in which said owner participated or if they have a reasonable doubt thereof. Green v. State, 156 S. W. 682.

Where the alleged injured party claims that a small sum of money was taken from him while he was having carnal knowledge of defendant, the fact that he disclosed such a transaction tends to impair his credit, and her rights should be carefully guarded. White v. State, 62 S. W. 750.

Art. 1352. (880a) **Attempt to commit theft from the person.**—If any person shall attempt to commit the offense of theft from the person as defined in the two preceding articles, he shall be punished by confinement in the penitentiary not less than one nor more than three years. (Act March 5, 1909, Acts 1909, p. 70.)

CHAPTER XI

THEFT OF ANIMALS

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Article 1353. (881) (746) **Theft of horse, ass or mule.**—If any person shall steal any horse, ass, or mule, he shall be punished by confinement in the penitentiary not less than two nor more than ten years.

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(O. C. 765, amended Acts 1858, p. 181; in revising in 1879 by omitting the words "gelding, mare, colt," and by Acts 1897, p. 83, by changing the penalty.)

Sec. 2549. **Theft of horse, ass, or mule—Form for indictment.**
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 John Doe on the ..... day of ....., A. D. ....., in said county and State did fraudulently take one horse (or "one ass" or "one mule") belonging to ..... from the possession of the said ..... without the consent of the said ..... and with the intent then and there to deprive the said owner of the value of the same and to appropriate it to the use and benefit of him the said John Doe.

Against the peace and dignity of the State.

.....
Foreman of the grand jury.

Sec. 2550. **Indictment.**—It is not necessary to allege or prove the value of the horse, ass, or mule alleged to have been stolen since the punishment is not dependent upon its value. Lopez v. State, 20 Texas 780. Johnson v. State, 29 Texas 492. Davis v. State, 40 Texas 135.

Prior to the revision of the Penal Code in 1879 the statute made it a felony to steal any "horse, gelding, mare, colt," etc., and for any theft of such an animal committed prior to the taking effect of such revision it was necessary to designate the animal alleged to have been stolen in the language of the statute, and it was held in Banks v. State, 28 Texas 644, and cases following up to and including Valesco v. State, 9 Texas Crim. App. 76, that an allegation that the animal was a "horse" was not supported by proof that it was a "gelding," "mare," or "colt," but for theft of a horse, gelding, mare, or colt, committed since the taking effect of the revision of 1879, it is only necessary to follow the language of the statute, and allege in general terms that the animal was a "horse," and under such general allegation proof that it was a horse, mare, gelding, or colt will be sufficient. Unnecessary descriptive allegations will not vitiate the indictment, but will devolve upon the prosecution the burden of proving them as laid. The language of the statute formerly required a designation, now it only requires a classification. Johnson v. State, 16 Texas Crim. App. 402. Davis v. State, 23 Texas Crim. App. 210; 4 S. W. 590.

All courts know that a horse is corporeal personal property, and it is not necessary to allege in terms that a horse is "corporeal personal property." Damron v. State, 27 S. W. 7. Hendricks v. State, 56 S. W. 55.

Art. 1354. (882) (747) **Theft of cattle or hog.**—If any person shall steal any cattle or hog, he shall be punished by confinement in the State penitentiary not less than two nor more than four years. (O. C. 766, amended by Act May 17, 1873, Acts 1873, p. 80, and amended by Act March 15, 1893, Acts 1893, p. 25, so as to make the theft of hogs a felony.)

Sec. 2551. **Cattle or hog theft—Form for indictment.**
In the name and by the 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 John Doe, on the ..... day of ....., A. D. ....., in said county and State did fraudulently take one head of cattle (or "one hog") belonging to ..... from the possession of the said ..... without the consent of the said ..... and with the intent then and there to deprive the said ..... of the value of the same and to appropriate it to the use and benefit of him, the said John Doe.

Against the peace and dignity of the State.

.....
Foreman of the grand jury.

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Sec. 2552. **Indictment for cattle theft.**—The animal alleged to have been stolen is sufficiently described by an allegation that it was "one head of cattle." Mathews v. State, 41 Texas Crim. Rep. 99; 51 S. W. 915. Walton v. State, 41 Texas Crim. Rep. 457; 55 S. W. 566. Warren v. State, 105 S. W. 817.

An indictment for cattle theft is bad if it does not designate in some way the number of animals stolen. Mathews v. State, 39 Texas Crim. Rep. 556; 48 S. W. 189.

The theft of cattle is a felony without reference to value and it is not necessary either to allege or prove the value of the cattle alleged to have been stolen.

Sec. 2553. **Evidence in cattle theft cases.**—Proof of other offenses is admissible if such proof is a part of the *res gestæ* of the alleged offense for which defendant is being tried, or if it tends to show intent when intent is an issue, or serves to prove identity when identity is an issue, or when it is sought to show the guilt of defendant by circumstantial evidence and such proof of another offense connects or tends to connect the defendant with the alleged offense for which he is being tried, or when it tends to defeat the defensive theory. Satterwhite v. State, 6 Texas Crim. App. 612. Long v. State, 11 Texas Crim. App. 381. Tyler v. State, 13 Texas Crim. App. 205. McCall v. State, 14 Texas Crim. App. 353. Bonners v. State, 35 S. W. 650. Thompson v. State, 42 Texas Crim. Rep. 143; 57 S. W. 805. Watters v. State, 94 S. W. 1038.

The defendant should be tried on the merits of each case, and proof of other offenses is not admissible if the only purpose it could serve would be to show that defendant was a criminal generally. Gilbraith v. State, 41 Texas 567. Ivey v. State, 43 Texas 425. Williamson v. State, 13 Texas Crim. App. 518. Kelley v. State, 18 Texas Crim. App. 262. Carter v. State, 23 Texas Crim. App. 510; 5 S. W. 128. Barbee v. State, 30 Texas Crim. App. 669; 18 S. W. 680. Buck v. State, 38 S. W. 772. Unsell v. State, 39 Texas Crim. Rep. 330; 45 S. W. 1022. Wilson v. State, 41 Texas Crim. Rep. 118; 51 S. W. 916. Walton v. State, 41 Texas Crim. Rep. 454; 55 S. W. 566. Bryan v. State, 49 Texas Crim. Rep. 200; 91 S. W. 581. McKnight v. State, 156 S. W. 1188.

If the defendant, while before the grand jury, declined to produce a bill of sale on the ground that it would incriminate him, it is error to permit proof of such refusal to be used as evidence against him on the trial. Wilson v. State, 41 Texas Crim. Rep. 119; 51 S. W. 916.

Under an indictment charging only the offense of theft, a conviction cannot legally be had for the different offense of wilfully driving live stock out of its range. Long v. State, 39 Texas Crim. Rep. 461; 46 S. W. 821. Chambers v. State, 59 S. W. 261.

A fraudulent taking of an animal may be evidenced by an illegal marking and branding for the purpose of permanently appropriating the animal. Smith v. State, 8 Texas Crim. App. 141. Coward v. State, 24 Texas Crim. App. 594; 7 S. W. 332.

The killing and skinning of cattle with the fraudulent intent to secure and sell the hides constitutes theft of the animals. Musquez v. State, 41 Texas 226. Moore v. State, 2 Texas Crim. App. 350. McPhail v. State, 9 Texas Crim. App. 164. Jackson v. State, 62 Texas Crim. Rep. 106; 136 S. W. 783.

The taking is complete when the defendant fraudulently takes possession of a cow and ties her to a tree to be butchered. Powers v. State, 152 S. W. 909.

Proof of the opinion of witnesses who have qualified as experts is admissible to show whether hides were taken from slaughtered animals or from animals that died from natural causes. Clay v. State, 41 Texas Crim. Rep. 655; 56 S. W. 629.

The hide of the animal in question may be introduced in evidence. Ledbetter v. State, 35 Texas Crim. Rep. 195; 32 S. W. 903. Hendricks v. State, 56 S. W. 55.

What is done with the hides of animals butchered for market may be proven by any witness who knows the custom in that regard. Taylor v. State, 42 S. W. 287.

It may be shown by stockmen that they, by accident, sometimes misplace their brands on their stock. Boren v. State, 23 Texas Crim. App. 37; 4 S. W. 463.

A stockman of experience in branding and handling cattle may give his opinion as to whether a brand had been altered. Gatlin v. State, 163 S. W. 428.

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It is not competent for a witness to testify that a calf recognized a certain cow as its mother. Berry v. State, 37 Texas Crim. Rep. 44; 38 S. W. 812.

An expert witness is not entitled to testify that unless some disease was prevalent more than one cattle could not die at the same time and place from natural causes. Clay v. State, 41 Texas Crim. Rep. 656; 56 S. W. 629.

When it tends to shed light upon the case a witness who has been engaged in handling cattle may testify that the cattle found in the possession of the defendant showed to have been driven hard and that they were drawn. Kennon v. State, 46 Texas Crim. Rep. 359; 82 S. W. 518.

When it tends to shed light upon the case a witness familiar with such matters may testify what the effect is upon fat cattle to drive them fast. Kennon v. State, 46 Texas Crim. Rep. 359; 82 S. W. 518.

The owner may testify that defendant knew his cattle if he states facts in connection with that statement which indicate unmistakably that he knows what he is talking about. Wright v. State, 44 S. W. 152.

If it is alleged in the indictment that more than one animal was stolen the State is not required to prove that more than one animal was stolen. Alderson v. State, 2 Texas Crim. App. 10.

If the evidence is circumstantial it is competent to show that bones were dug up which appeared to be those of an animal corresponding in size with the alleged stolen animal. Foster v. State, 56 S. W. 58.

The alleged owner may give his opinion as to the identity of the head of a cow, the weight of such opinion being a matter for the jury. Osgood v. State, 49 S. W. 94.

If the person in whom ownership is alleged was in actual care, control and management of the cattle claiming ownership under a bill of sale, the State may introduce such bill of sale in evidence although it be unacknowledged and unrecorded, it not being necessary to show a legal title in order to establish the allegation of ownership. Morrow v. State, 22 Texas Crim. App. 249; 2 S. W. 624. Wilson v. State, 32 Texas Crim. Rep. 22; 22 S. W. 39.

If the execution of a bill of sale made by the defendant is proven on the trial or if its execution is admitted by defendant on the trial, it is not necessary that it be filed and notice to defendant given before it is admissible in evidence. Britt v. State, 21 Texas Crim. App. 221; 17 S. W. 255. Abrigo v. State, 29 Texas Crim. App. 149; 15 S. W. 408. Williams v. State, 30 Texas Crim. App. 153; 16 S. W. 760. Lockwood v. State, 32 Texas Crim. Rep. 137; 22 S. W. 413.

If the animal escapes or is abandoned after the original theft and returns to the actual or constructive possession of the owner, a subsequent fraudulent taking from such possession is theft from the owner. Ashlock v. State, 16 Texas Crim. App. 24. Trimble v. State, 33 Texas Crim. Rep. 399; 26 S. W. 727.

Sec. 2554. **Marks and brands.**—Article 7160, Chapter 2, Title 124, of the Revised Civil Statutes of Texas was amended by the Act of March 31, 1913, Acts 1913, p. 129, so as to read as follows: "Article 7160. No brands, except such as are recorded by the officers named in this chapter, shall be recognized in law as any evidence of the ownership of the cattle, horses or mules, upon which the same may be used; provided, that this shall not apply in criminal cases." Turner v. State, 160 S. W. 358. Turner v. State, 170 S. W. 1096. Mooney v. State, 176 S. W. 53.

Notice to defendant is not required as a predicate for the admission in evidence of the record of a brand or of a certified copy of such record. Ninnon v. State, 17 Texas Crim. App. 650.

The certificate of the county clerk is sufficient if it recites that "the foregoing is a true copy of the record of the brand of" the person named in such certificate. Byrd v. State, 26 Texas Crim. App. 374; 9 S. W. 759. Thompson v. State, 26 Texas Crim. App. 466; 9 S. W. 760.

Proof of a recorded brand must be made by the record or by a certified copy of the record thereof. Allen v. State, 42 Texas 518. Wilson v. State, 3 Texas Crim. App.

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206. Elsner v. State, 22 Texas Crim. App. 687; 3 S. W. 474. Byrd v. State, 26 Texas Crim. App. 385; 9 S. W. 759. Thompson v. State, 26 Texas Crim. App. 466; 9 S. W. 760.

A brand properly recorded in one county is evidence of ownership in any county in the State. Atterberry v. State, 19 Texas Crim. App. 406. Walton v. State, 41 Texas Crim. Rep. 454; 55 S. W. 566.

The record of a brand need not show whether it is for cattle, horses, or mules. McGrew v. State, 31 Texas Crim. Rep. 341; 20 S. W. 740.

Proof of a recorded brand upon a cow may be made as evidence of ownership of her unbranded calf. Thurmond v. State, 37 Texas Crim. Rep. 423; 35 S. W. 965.

If the certificate of the county clerk fails to show whether the brand was recorded prior to or after the alleged theft, the copy of the record so certified is only admissible as to identity. Chowning v. State, 41 Texas Crim. Rep. 82; 51 S. W. 946.

A brand recorded subsequently to the alleged theft affords no proof of ownership, but may be shown as a circumstance to identify the alleged stolen animal. Priesmuth v. State, 1 Texas Crim. App. 481. Harvey v. State, 21 Texas Crim. App. 183; 17 S. W. 158. Groom v. State, 23 Texas Crim. App. 87; 3 S. W. 668. Crowell v. State, 24 Texas Crim. App. 411; 6 S. W. 318. Turner v. State, 39 Texas Crim. Rep. 327; 45 S. W. 1020. Chowning v. State, 41 Texas Crim. Rep. 82; 51 S. W. 946.

It has been held that proof of the recorded brand is not admissible for the State if the record fails to designate or is uncertain as to the part of the animal on which the brand was to be placed. Massey v. State, 31 Texas Crim. App. 91; 19 S. W. 908. Reese v. State, 43 Texas Crim. Rep. 541; 67 S. W. 325. Steed v. State, 43 Texas Crim. Rep. 569; 67 S. W. 328.

The side of the animal where the brand is to be placed need not be designated, or it may be designated in the alternative. Thompson v. State, 25 Texas Crim. App. 161; 7 S. W. 589. Hayes v. State, 30 Texas Crim. App. 405; 17 S. W. 940.

The part of the animal on which the brand is to be placed is sufficiently designated if the record recites that the brand is to be placed on the "hip, thigh and flank." Thompson v. State, 25 Texas Crim. App. 161; 7 S. W. 589. McGrew v. State, 31 Texas Crim. Rep. 341; 20 S. W. 740. Ledbetter v. State, 35 Texas Crim. Rep. 198; 32 S. W. 903.

The State may show how the particular brand on the animal came to be placed there instead of the recorded brand. Harwell v. State, 22 Texas Crim. App. 254; 2 S. W. 606. Garrett v. State, 42 Texas Crim. Rep. 524; 61 S. W. 129.

A variance between the place of the brand on the animal and that designated by the record of the brand does not destroy the admissibility of the record as evidence. Priesmuth v. State, 1 Texas Crim. App. 480. Harwell v. State, 22 Texas Crim. App. 254; 2 S. W. 606. Myers v. State, 24 Texas Crim. App. 341; 6 S. W. 194. Massey v. State, 31 Texas Crim. Rep. 92; 19 S. W. 908. Garrett v. State, 42 Texas Crim. Rep. 525; 61 S. W. 129.

A person cannot legally have more than one recorded brand, and if he has more than one such brand proof of same is admissible as flesh marks on the issue of identity. Turner v. State, 39 Texas Crim. Rep. 322; 45 S. W. 1020. Unsell v. State, 39 Texas Crim. Rep. 331; 45 S. W. 1022. Swan v. State, 76 S. W. 464.

Proof of a recorded brand is only prima facie and not conclusive proof of ownership and may be rebutted. Harwell v. State, 22 Texas Crim. App. 255; 2 S. W. 606. Turner v. State, 39 Texas Crim. Rep. 328; 45 S. W. 1020.

Proof of a recorded brand is not of itself proof of ownership in one who purchased from the owner of the brand. Horn v. State, 30 Texas Crim. App. 543; 17 S. W. 1094.

Where the owner of the brand had been selling cattle out of that brand every year for six years, proof of a recorded brand alone is not sufficient proof of ownership. Clark v. State, 20 S. W. 555.

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Hearsay testimony is not admissible to establish the fact that an animal bore any particular brand. Grant v. State, 3 Texas Crim. App. 1.

Any witness may give his opinion as to whether the brand was "a picked brand," as this is a matter of common observation. Clark v. State, 43 S. W. 522.

A witness may state what brand or brands were on the animal without regard to whether such brands were recorded or not. Poage v. State, 43 Texas 454. Shackelford v. State, 53 S. W. 885. Welch v. State, 42 Texas Crim. Rep. 338; 60 S. W. 46.

The State is not and never was required by law to prove a recorded brand when the alleged stolen animal is identified and proven by the flesh marks. Jones v. State, 3 Texas Crim. App. 498. Lockhart v. State, 3 Texas Crim. App. 569. Fisher v. State, 4 Texas Crim. App. 181. Wolf v. State, 4 Texas Crim. App. 332. Hutto v. State, 7 Texas Crim. App. 47. Hays v. State, 72 S. W. 598. Mooney v. State, 164 S. W. 828.

Proof of an unrecorded brand is admissible for defendant if it tends to rebut the theory of criminal intent. Wills v. State, 40 Texas 77. Long v. State, 1 Texas Crim. App. 476.

Proof that after the alleged stolen animal was received from the defendant it was branded in the brand of the alleged injured party is not admissible. Wallace v. State, 66 S. W. 1102.

When the State proves that the owner's brand had been altered, the fact that defendant claimed the new brand may be shown by oral proof of his declarations no matter whether he had in fact such a brand or whether it had ever been recorded. Fisher v. State, 4 Texas Crim. App. 182.

Proof of an earmark may be made without producing the record thereof. Johnson v. State, 1 Texas Crim. App. 344. Kelly v. State, 1 Texas Crim. App. 633. Dreyer v. State, 11 Texas Crim. App. 641. Gear v. State, 42 S. W. 285.

Proof of the earmark is admissible for whatever it is worth as evidence of ownership whether such mark was recorded or unrecorded. Dreyer v. State, 11 Texas Crim. App. 641. Love v. State, 15 Texas Crim. App. 566. Coffelt v. State, 19 Texas Crim. App. 436. Lawrence v. State, 20 Texas Crim. App. 541. Wyers v. State, 22 Texas Crim. App. 261; 2 S. W. 722.

Testimony as to an unrecorded brand, like testimony as to any other flesh mark, is admissible on the issue of identity. Fisher v. State, 4 Texas Crim. App. 183. Hutto v. State, 7 Texas Crim. App. 47. Coombes v. State, 17 Texas Crim. App. 266. Lockwood v. State, 32 Texas Crim. Rep. 137; 22 S. W. 413. Shackelford v. State, 53 S. W. 885. Welch v. State, 42 Texas Crim. Rep. 338; 60 S. W. 46. Sapp v. State, 77 S. W. 457. Williams v. State, 147 S. W. 571. Turner v. State, 160 S. W. 358. Reynolds v. State, 160 S. W. 364.

It is error to charge the jury that a brand is either presumptive or conclusive proof of ownership. Maddox v. State, 12 Texas Crim. App. 433. Harwell v. State, 22 Texas Crim. App. 255; 2 S. W. 606. Alexander v. State, 24 Texas Crim. App. 127; 5 S. W. 840.

Sec. 2555. **Charge on cattle theft.**—When supported by the testimony it is proper to charge the jury that cattle running in their respective range were in the possession of their owner. Barnes v. State, 46 Texas Crim. Rep. 513; 81 S. W. 735.

A charge is on the weight of the evidence if it instructs the jury that possession of an animal without a written transfer or bill of sale is prima facie evidence that such possession is illegal. Garcia v. State, 12 Texas Crim. App. 340. Flores v. State, 13 Texas Crim. App. 668. Schindler v. State, 15 Texas Crim. App. 396. White v. State, 21 Texas Crim. App. 341; 17 S. W. 727. Willeys v. State, 22 Texas Crim. App. 414; 3 S. W. 570. Gilleland v. State, 24 Texas Crim. App. 529; 7 S. W. 241.

A charge is on the weight of the evidence if it singles out a bill of sale introduced in evidence and instructs the jury that if it is a sham they should consider it. Arismendis v. State, 41 Texas Crim. Rep. 377; 54 S. W. 599. Arismendis v. State, 41 Texas Crim. Rep. 379; 54 S. W. 601.

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When defendant is indicted for theft only as a principal and there is evidence that he was not present when the animal was originally taken and evidence of his guilty connection with the theft either before or after the same was committed, it is error to fail to charge the jury affirmatively that if defendant was only an accomplice, accessory, or receiver of stolen property they should acquit him. Guinn v. State, 39 Texas Crim. Rep. 259; 45 S. W. 694. Criner v. State, 41 Texas Crim. Rep. 290; 53 S. W. 873. Steed v. State, 43 Texas Crim. Rep. 567; 67 S. W. 328. McAlister v. State, 45 Texas Crim. Rep. 258; 76 S. W. 760. Davis v. State, 55 Texas Crim. Rep. 501; 117 S. W. 159. Jones v. State, 57 Texas Crim. Rep. 144; 122 S. W. 31. Silvas v. State, 159 S. W. 223.

If there is evidence sufficient to raise the issue it is error to fail or refuse to charge the jury that if the defendant was not connected with the taking as a principal he could not be convicted of theft. McPhail v. State, 10 Texas Crim. App. 128. Black v. State, 38 Texas Crim. Rep. 58; 41 S. W. 606. Guinn v. State, 39 Texas Crim. Rep. 259; 45 S. W. 694. Farias v. State, 45 S. W. 721. Mickey v. State, 49 Texas Crim. Rep. 255; 91 S. W. 587. Goode v. State, 56 Texas Crim. Rep. 419; 120 S. W. 199. Jones v. State, 57 Texas Crim. Rep. 144; 122 S. W. 31. Lee v. State, 57 Texas Crim. Rep. 177; 122 S. W. 390. Silvas v. State, 159 S. W. 223.

It is error to so word a charge as that it authorizes a conviction of defendant for theft as a principal although he may not have been concerned in the original taking. Curlin v. State, 23 Texas Crim. App. 683; 5 S. W. 186. Bell v. State, 39 Texas Crim. Rep. 677; 47 S. W. 1010. Criner v. State, 41 Texas Crim. Rep. 290; 53 S. W. 873. Walton v. State, 41 Texas Crim. Rep. 454; 55 S. W. 566. Steed v. State, 43 Texas Crim. Rep. 567; 67 S. W. 328. Eddens v. State, 47 Texas Crim. Rep. 529; 84 S. W. 828. Armstead v. State, 48 Texas Crim. Rep. 306; 87 S. W. 824. Davis v. State, 55 Texas Crim. Rep. 495; 117 S. W. 159. Jones v. State, 57 Texas Crim. Rep. 148; 122 S. W. 31. Silvas v. State, 159 S. W. 323.

When defendant is charged with felony theft and there is evidence of an **alibi**, it is error to charge the jury that defendant might or would "be a principal if the minds of the parties concurred whether in point of fact he was bodily present or not." Bell v. State, 39 Texas Crim. Rep. 677; 47 S. W. 1010. Criner v. State, 41 Texas Crim. Rep. 290; 53 S. W. 873. Steed v. State, 43 Texas Crim. Rep. 571; 67 S. W. 328. Fruger v. State, 50 Texas Crim. Rep. 622; 99 S. W. 1014. Davis v. State, 55 Texas Crim. Rep. 501; 117 S. W. 159. Jones v. State, 57 Texas Crim. Rep. 144; 122 S. W. 31. Silvas v. State, 159 S. W. 223.

Sec. 2556. **Hog theft.**—An allegation that defendant did fraudulently take "one hog" sufficiently describes the property. Johnson v. State, 1 Texas Crim. App. 120. Moore v. State, 55 Texas Crim. Rep. 4; 114 S. W. 807.

An indictment charging the theft of a "male hog" is sustained by proof that the hog stolen was a "barrow." Williams v. State, 17 Texas Crim. App. 524.

In order to sustain a conviction for ordinary theft the proof must show a fraudulent taking. McGowan v. State, 27 Texas Crim. App. 183; 11 S. W. 112. Lane v. State, 45 S. W. 693. Womack v. State, 48 Texas Crim. Rep. 148; 86 S. W. 1015.

The evidence is insufficient to sustain a conviction on appeal if it only shows that there was a hog and that defendant is a negro. Lane v. State, 45 S. W. 693. Walker v. State, 81 S. W. 716. Spiller v. State, 61 Texas Crim. Rep. 555; 135 S. W. 549.

In a prosecution for hog theft it is necessary to prove the *corpus delicti*. Lane v. State, 45 S. W. 693. Motley v. State, 145 S. W. 620.

Proof of possession by defendant of fresh hog meat and proof of suspicious circumstances attending such possession is not sufficient to establish the *corpus delicti* where there is no proof that any hog was missed. Whether defendant's explanation of his possession is sufficient is not the sole question in a theft case; the State must make out its case. Lane v. State, 45 S. W. 693. Watson v. State, 82 S. W. 514.

To fraudulently take a hog when unmarked is as much theft as if it had been marked. Lawrence v. State, 20 Texas Crim. App. 541.

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In a prosecution for hog theft the State must prove the allegation of ownership as laid. Ellis v. State, 27 Texas Crim. App. 190; 11 S. W. 111. Stone v. State, 27 Texas Crim. App. 576; 11 S. W. 637. Lane v. State, 45 S. W. 693. Fruger v. State, 54 Texas Crim. Rep. 638; 114 S. W. 794. Spiller v. State, 61 Texas Crim. Rep. 555; 135 S. W. 549. Matthews v. State, 155 S. W. 228.

The person alleged to have been the owner of the stolen hog may testify that he identified the hog by the ear mark although the proof shows that such mark was recorded. Gear v. State, 42 S. W. 285.

A charge is erroneous if it leaves the issues in such shape as that the defendant could be convicted of felony theft as a principal whether or not he participated in the original taking. O'Quinn v. State, 55 Texas Crim. Rep. 18; 115 S. W. 39. McClure v. State, 59 Texas Crim. Rep. 287; 128 S. W. 386. Pendley v. State, 158 S. W. 811.

If there is evidence that defendant killed the hog because it was a trespasser or that he took it up to keep it out of his field and that he afterwards formed the intent to appropriate it, the court should charge that a subsequent intent to appropriate the hog would not constitute theft. McPhail v. State, 10 Texas Crim. App. 128. Gear v. State, 42 S. W. 285. Jameson v. State, 68 S. W. 275 (court did charge on this issue and the charge was correct). Veasly v. State, 85 S. W. 274.

If there is evidence that more than one hog was taken and no election is made to prosecute for the taking of any one hog, the court should not single out any one hog in the charge and give it undue prominence. Green v. State, 56 Texas Crim. Rep. 601; 120 S. W. 1002.

Art. 1355. (883) (748) **Theft of sheep or goat.**—If any person shall steal any sheep or goat, he shall be punished by confinement in the State penitentiary for not less than two nor more than four years. (O. C. 766, amended Acts 1873, p. 80, amended by Act Feb. 16, 1905, Acts 1905, p. 16.)

Sec. 2557. **Theft of sheep or goat—Form for indictment.**
In the name and by the 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 John Doe on the ..... day of ....., A. D. ....., in said county and State, did fraudulently take one sheep (or "one goat") belonging to ..... from the possession of the said ..... without the consent of the said ..... and with the intent then and there to deprive the said owner of the value of the same and to appropriate it to the use and benefit of him the said John Doe.

Against the peace and dignity of the State.

.....
Foreman of the grand jury.

Sec. 2558. **Theft of sheep or goat.**—Prior to the amendment of 1873, the theft of a sheep or goat was a felony without regard to the value of the animal stolen, and by the Act of 1873 and subsequent revisions of the Penal Code including the Penal Code of 1895 the value of the sheep or goat stolen determined the grade of the offense, and by the Act of Feb. 16, 1905, the theft of a sheep or goat was again made a felony without regard to the value. When the statute made the grade of offense depend upon the value of the sheep or goat stolen it was necessary to allege and prove value. The article now in force makes the theft of a sheep or goat a felony without regard to the value of such animals and it is therefore not necessary to either allege or prove value.

Art. 1356. (884) (749) **Wilfully driving stock from range.**—If any person shall wilfully take into possession and drive, use or remove from its accustomed range, any live stock not his own, without the consent of the owner, and with intent to defraud the owner thereof, he shall

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be deemed guilty of theft, and on conviction, shall be confined in the penitentiary not less than two nor more than five years, or be fined in a sum not to exceed one thousand dollars, or by both such imprisonment and fine, at the discretion of the jury trying the case. (Act Nov. 12, 1866, Acts 1866, p. 187.)

Sec. 2559. **Indictment for theft by driving stock from range.**—Indictments held good: State v. Thompson, 40 Texas 516. Darnell v. State, 43 Texas 147. Shubert v. State, 20 Texas Crim. App. 329.

A conviction for theft by wilfully taking into possession and driving live stock from the range cannot legally be had under an indictment charging only ordinary theft. Long v. State, 39 Texas Crim. Rep. 461; 46 S. W. 821. Chambers v. State, 59 S. W. 261.

An indictment for theft by driving stock from its range need not allege an intent to appropriate the stock to the use and benefit of the defendant. Smith v. State, 34 Texas 612.

An indictment for theft by driving stock from its range need not set out the limits of the range. State v. Thompson, 40 Texas 516. Darnell v. State, 43 Texas 147. Foster v. State, 21 Texas Crim. App. 86; 17 S. W. 548.

An allegation that the stock was driven from "the" instead of "its" range does not vitiate the indictment. Fowler v. State, 38 Texas 559.

An allegation that the accused did "wilfully and fraudulently" take the live stock into his possession and drive it from its range with the fraudulent intent to "deprive" the owners thereof is equivalent to an allegation that the driving was "with intent to defraud." Shubert v. State, 20 Texas Crim. App. 330.

Art. 1357. (885) (750) **May drive stock in range.**—Nothing in the preceding article contained shall be construed to prevent any person from driving his own and other stock that may be mixed therewith to the nearest convenient point within the usual range of such stock, for separation. (Acts 1866, p. 187.)

Art. 1358. (886) (751) **What proof sufficient for the State.**—In any prosecution under article 1356 it shall only be necessary for the State to prove the act of driving, using or removing from its accustomed range any live stock not belonging to or under the control of the accused, and it shall devolve upon the accused to show any fact under which he can justify or mitigate the offense. (Acts 1866, p. 187.)

Sec. 2560. **Theft by driving stock from its range.**—The accused may be prosecuted in any county through or into which he may have driven the live stock, and the range may be alleged to be in the county where the indictment was presented. Shubert v. State, 20 Texas Crim. App. 330. McElmurray v. State, 21 Texas Crim. App. 691; 2 S. W. 892.

Proof of the instructions and directions given by the accused to his employes while collecting the live stock is admissible to show the intent and purpose of the accused. Bawcom v. State, 41 Texas 189.

The term "wilfully" need not be defined in the charge to the jury as a charge requiring the jury to find that the accused intended to defraud the owner is itself a definition of that term. Wheeler v. State, 23 Texas Crim. App. 599; 5 S. W. 160 (this rule is not applicable to the misdemeanor created by Article 1386 of which an intent to defraud is not an element).

It is not necessary to charge the jury on the theory that the stock was not taken wilfully if the testimony does not raise such issue. Beachamp v. State, 28 S. W. 807.

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CHAPTER XII

MISCELLANEOUS PROVISIONS RELATING TO THE RECOVERY OF STOLEN ANIMALS AND THEFT THEREOF

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Article 1359. (887) (752) **Want of bill of sale prima facie evidence of illegal possession.**—Upon the trial of any person charged with the theft of any animal of the horse, ass or cattle species, the possession of such stolen animal by the accused, without a written transfer or bill of sale containing a specific description of such animal, shall be prima facie evidence against the accused that such possession was illegal. (Acts 1866, p. 223, Acts 1899, p. 87.)

Sec. 2561. **Want of bill of sale.**—A charge is on the weight of the evidence which singles out the want of a bill of sale and instructs the jury that possession of an animal without a written transfer or bill of sale is prima facie evidence that such possession was illegal. The statute charged abstractly is liable to leave the jury under the impression that the inquiry should be confined to the question as to whether or not the defendant had a written conveyance. The State has nothing to lose by the ignoring of this subject in the charge, and it is better and safer not to charge on it. Garcia v. State, 12 Texas Crim. App. 340. Flores et al. v. State, 13 Texas Crim. App. 668. Schindler v. State, 15 Texas Crim. App. 396. White v. State, 21 Texas Crim. App. 341; 17 S. W. 727. Willeys v. State, 22 Texas Crim. App. 414; 3 S. W. 570. Gilleland v. State, 24 Texas Crim. App. 529; 7 S. W. 241.

Any presumption that is only prima facie may be rebutted by competent testimony to the contrary. Wills v. State, 40 Texas 69. Garcia v. State, 12 Texas Crim. App. 340. Gomez v. State, 15 Texas Crim. App. 64.

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If the court thinks it necessary to charge the jury that possession of an animal without a written transfer or bill of sale is prima facie evidence that such possession was illegal, the court should also inform the jury that such presumption is not conclusive, but may be rebutted by competent evidence. Flores et al. v. State, 13 Texas Crim. App. 668. Gomez v. State, 15 Texas Crim. App. 64.

Art. 1360. (888) (753) **Driving stock to market without bill of sale.**—Any person who may be found in any county of this State driving to market any animals such as are specified in the preceding article, and who has not in his possession a bill of sale or transfer for each and all of said animals, containing their marks and brands, or a list of such marks and brands of any of such animals as were raised by himself, both said bill of sale and list being duly certified as recorded by the clerk of the county court of the county from which said animals have been driven, shall be deemed guilty of a misdemeanor and upon conviction shall be fined not exceeding two thousand dollars. (Acts 1866, p. 223, Acts 1899, p. 87.)

Sec. 2562. **Venue.**—This offense is not complete until the animals have been driven out of the county, and therefore a prosecution cannot be commenced and carried on in the county from which the animals were driven. Senterfit v. State, 41 Texas 186.

Art. 1361. (889) (754) **Butchering unmarked or unbranded animals.**—If any butcher or other person engaged in the slaughter of animals shall kill or cause to be killed any unmarked or unbranded animal for market, or shall purchase and kill or cause to be killed, any animal, without having taken a bill of sale or written transfer from the party selling the same, he shall be fined not less than fifty nor more than three hundred dollars. (Acts 1866, p. 224, Acts 1899, p. 87.)

Art. 1362. (890) (755) **Preceding article not applicable.**—The preceding article shall not apply to the slaughter of any animal raised by the person slaughtering the same. (Acts 1866, p. 224, Acts 1899, p. 87.)

Sec. 2563. **Form for information.**

In the name and by the authority of the State of Texas:

..... County Attorney of ..... county, Texas, comes in behalf of the State of Texas and presents in and to the County Court of ..... county, Texas, at the ..... term, A. D. ....., of said court that John Doe heretofore on the ..... day of ....., A. D. ....., in said county and State was a butcher (or "person engaged in the slaughter of animals") and he did then and there kill and cause to be killed an unmarked (or "unbranded") calf (or "cow," or whatever animal it was) for market (or "did then and there purchase from ..... a calf" [or "cow," or whatever animal it was] and did then and there kill and cause to be killed said animal without having taken a bill of sale or a written transfer from said .....).

Against the peace and dignity of the State.

.....
County Attorney, ... county, Texas.

Sec. 2564. **Butchering unmarked or unbranded animals.**—It is not necessary to allege that the animal was not raised by the defendant. The exception is in a separate article and is not descriptive. If defendant did raise the animal the burden is on him to prove it, this being a fact peculiarly within his own knowledge.

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The fact that the killing preceded the purchase is immaterial when it was all done in one transaction between the same parties. Hunt v. State, 33 Texas Crim. Rep. 93; 25 S. W. 127.

Sec. 2565. **Butcher failing to make report.**
Sec. 2566. Form for information
Sec. 2567. Indictment or information.
Sec. 2568. Statute construed.

Art. 1363. (891) (756) **Butcher failing to make report of animals slaughtered.**—If any person engaged in the slaughter and sale of animals for market in any county, city, town or village in this State shall fail to report to the commissioners' court of the county in which he transacts such business, at each regular term thereof, the number, color, age, sex, marks and brands of every animal slaughtered by him since the last term of said court, accompanied with a bill of sale or written conveyance to him of every animal slaughtered, save such as were raised by himself, which shall be specified, he shall be punished by a fine of not less than fifty nor more than three hundred dollars. (Acts 1866, p. 224, Acts 1899, p. 87.)

Sec. 2566. **Form for information.**
In the name and by the authority of the State of Texas:

....., County Attorney of ..... county, Texas, comes in behalf of the State of Texas and presents in and to the County Court of ..... county, Texas, at the ..... term, A. D. ....., of said court that John Doe heretofore on or about the ..... day of ....., A. D. ....., in said county and State was then and there a person engaged in the slaughter and sale of animals for market in said county (or "in the city of ..... there situate," or "in the town of ..... there situate"), and the said John Doe did before its adjournment then and there fail to report to the Commissioners' Court of said county in which he transacted said business at the regular term thereof which thereafter began on the ..... day of ....., A. D. ....., and adjourned on the ..... day of ....., A. D. ....., the number, color, age, sex, marks and brands of every animal slaughtered by him since the last term of said court, accompanied with a bill of sale or written conveyance to him for every animal slaughtered by him save such as were raised by himself and so specified, and said last term of said court had adjourned theretofore on the ..... day of ....., A. D. ....., and said John Doe on said first named date and on each day until said term of said court first mentioned began was then and there so engaged in said business and as such butcher did then and there while so engaged slaughter a number of animals for market in said county (or "city" or "town") since the last term of said court above mentioned and prior to said regular term of said court first mentioned above and was then and there by reason thereof required to make said report.

Against the peace and dignity of the State.

.....
County Attorney, ... county, Texas.

Sec. 2567. **Indictment or information.**—It is proper to use the word "or" in alleging that the report of the animals slaughtered was not accompanied with a bill of sale or written conveyance, defendant not being required to have both, and to allege only that it was not accompanied with a bill of sale would leave the indictment bad because if he had a written conveyance he did not need a bill of sale. It is one of the exceptions to the use of "and" instead of "or."

It should be alleged not only that defendant was a butcher, but that he had slaughtered a number of animals prior to the regular term of the Commissioners' Court at which he failed to make his report. Braun v. State, 40 Texas Crim. Rep. 236; 49 S. W. 620.

It should be alleged that defendant was engaged in the business as a butcher prior to the regular term of the court at which he failed to report the number of animals slaughtered. Braun v. State, 40 Texas Crim. Rep. 236; 49 S. W. 620.

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The statute requires the butcher to report all animals slaughtered by him, whether purchased or raised by himself, and an allegation that he failed to report all animals purchased and slaughtered by him is only a partial statement of the offense. Kinney v. State, 21 Texas Crim. App. 348; 17 S. W. 423.

Sec. 2568. **Statute construed.**—Article 1363 (891) is constitutional and valid. Dreyer v. State, 10 Texas Crim. App. 97. Aston v. State, 27 Texas Crim. App. 574; 11 S. W. 637.

Article 1363 (891) requiring butchers to report every animal slaughtered by them to each regular term of the Commissioners' Court was not repealed by the Acts of 1889 or 1893. Braun v. State, 40 Texas Crim. Rep. 236; 49 S. W. 620.

When defendant is charged with failing to report every animal slaughtered by him to a certain regular term of the Commissioners' Court, a report made by him is not admissible in evidence where it was not sworn to by him until after the term unless it is shown that the report was in fact filed at the proper term and was sworn to *nunc pro tunc*. Bruns et al. v. State, 33 Texas Crim. Rep. 415; 26 S. W. 722.

Art. 1364. **Butchers to register.**—Before engaging in the business of slaughter and sale of animals for market, every person, firm or corporation desiring to so engage must first register his name or their names with the county clerk indicating their purpose to engage in such business and upon failure to so first register their names they may be fined in any sum not less than five dollars nor more than twenty-five dollars. Provided nothing in this law shall be construed to apply to slaughter houses in this State slaughtering as many as three hundred cattle per day. (Acts 1907, p. 239.)

Art. 1365. (892) **Butcher or slaughterer to file bond.**—Every person, before he shall set up and carry on the trade or occupation of a butcher or slaughterer of cattle in the State of Texas, shall file a bond to be approved by the county judge of the county in which he resides (desires) to carry on the business, in a sum not less than two hundred dollars, nor more than one thousand dollars, payable to the State of Texas, conditioned that he shall keep a true and faithful record in a book kept for that purpose of all cattle purchased or slaughtered by him, with a description of the animal including marks, brands, age, color, weight and from whom purchased and the date thereof; that he will have the hide and ear of such animal inspected by the inspector, or some magistrate of the county within twenty days after it is slaughtered, and that he will not purchase any cattle that has been slaughtered by another unless the hide and ears of such slaughtered animal accompany said animal offered for sale, and that he will not purchase any animal that has been slaughtered by another when the ear marks or brands on the hide accompanying such animal, when offered for sale, have been changed, mutilated, or destroyed. (Sec. 1, Act of April 6, 1889, Acts of 1889, p. 84, Acts of 1893, p. 38, Acts of 1899, p. 87.)

Art. 1366. (893) **Penalty for failure to make such bond.**—Every person who shall carry on the business of butcher or slaughterer of animals, without having filed with the clerk of the county court of the county in which he conducts such business the bond provided for in

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article 1365, shall be fined in any sum not less than five dollars nor more than two hundred dollars. (Sec. 2, Act April 6, 1889, Acts 1893, p. 38, Acts of 1899, p. 87.)

Art. 1367. (894) **Butcher to keep record.**—Every person who shall carry on the business of butcher or slaughterer of animals and shall fail to keep a true and faithful record, in a book kept for the purpose, of all cattle purchased and slaughtered by him, together with a description of each animal, including brand, age, color, weight and from whom purchased and the date of purchase, or shall fail to have the hide and ears of such animal or animals inspected by the inspector or some magistrate, within twenty days after such animal is slaughtered, shall be fined in any sum not less than twenty dollars nor more than two hundred dollars. (Sec. 3, Act of April 6, 1889, Acts 1893, p. 38, Acts of 1899, p. 87.)

Art. 1368. (895) **Purchasing slaughtered cattle without hide and ears accompanying.**—Any person engaged in butchering or slaughtering and who shall purchase any cattle that have been slaughtered by another without the hide and ears of such animal accompanying the same, or shall purchase any animal that has been slaughtered by another when the ear mark or brand on the hide accompanying the same, when offered for sale, have been changed, mutilated or destroyed, shall be fined in any sum not less than fifty nor more than two hundred dollars. (Sec. 4, Act of April 6, 1889, Acts 1893, p. 38, Acts 1899, p. 87.)

Art. 1369. (896) **Record to be open for inspection.**—The record provided for in article 1367 of this chapter shall be open to the inspection of all parties, and any butcher refusing to permit such inspection at any reasonable hour shall be fined in any sum not exceeding twenty-five dollars. (Sec. 5, Act of April 6, 1889, Acts 1893, p. 38, Acts 1899, p. 87.)

Art. 1370. (897) **Duty of county attorney.**—In addition to the criminal prosecution that may be brought under this law, it is the duty of the county attorney to bring a civil action against any butcher or slaughterer of animals for any violation of the terms of the bond prescribed in article 1365. (Acts 1893, p. 38, Acts 1899, p. 87.)

Art. 1371. (898) **Inspector to keep record.**—It shall be the duty of the inspector or magistrate to keep a record of the marks, brands, color and general description of such hides, and for whom inspected, with the date of inspection, and return a copy of the same to the clerk of the county court of the county in which it was inspected within thirty days after said inspection, and said inspector or magistrate shall be entitled to receive ten cents for each hide so inspected, to be paid by the party having the hide inspected, and any inspector or magistrate failing to keep such book, or failing to make such report as above provided for, may be fined in any sum not less than one dollar nor more than twenty-five dollars. (Acts 1893, p. 38, Acts 1899, p. 87.)

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If the court thinks it necessary to charge the jury that possession of an animal without a written transfer or bill of sale is prima facie evidence that such possession was illegal, the court should also inform the jury that such presumption is not conclusive, but may be rebutted by competent evidence. Flores et al. v. State, 13 Texas Crim. App. 668. Gomez v. State, 15 Texas Crim. App. 64.

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Against the peace and dignity of the State.

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County Attorney, ... county, Texas.

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Against the peace and dignity of the State.

.....
County Attorney, ... county, Texas.

Sec. 2567. **Indictment or information.**—It is proper to use the word "or" in alleging that the report of the animals slaughtered was not accompanied with a bill of sale or written conveyance, defendant not being required to have both, and to allege only that it was not accompanied with a bill of sale would leave the indictment bad because if he had a written conveyance he did not need a bill of sale. It is one of the exceptions to the use of "and" instead of "or."

It should be alleged not only that defendant was a butcher, but that he had slaughtered a number of animals prior to the regular term of the Commissioners' Court at which he failed to make his report. Braun v. State, 40 Texas Crim. Rep. 236; 49 S. W. 620.

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The statute requires the butcher to report all animals slaughtered by him, whether purchased or raised by himself, and an allegation that he failed to report all animals purchased and slaughtered by him is only a partial statement of the offense. Kinney v. State, 21 Texas Crim. App. 348; 17 S. W. 423.

Sec. 2568. **Statute construed.**—Article 1363 (891) is constitutional and valid. Dreyer v. State, 10 Texas Crim. App. 97. Aston v. State, 27 Texas Crim. App. 574; 11 S. W. 637.

Article 1363 (891) requiring butchers to report every animal slaughtered by them to each regular term of the Commissioners' Court was not repealed by the Acts of 1889 or 1893. Braun v. State, 40 Texas Crim. Rep. 236; 49 S. W. 620.

When defendant is charged with failing to report every animal slaughtered by him to a certain regular term of the Commissioners' Court, a report made by him is not admissible in evidence where it was not sworn to by him until after the term unless it is shown that the report was in fact filed at the proper term and was sworn to *nunc pro tunc*. Bruns et al. v. State, 33 Texas Crim. Rep. 415; 26 S. W. 722.

Art. 1364. **Butchers to register.**—Before engaging in the business of slaughter and sale of animals for market, every person, firm or corporation desiring to so engage must first register his name or their names with the county clerk indicating their purpose to engage in such business and upon failure to so first register their names they may be fined in any sum not less than five dollars nor more than twenty-five dollars. Provided nothing in this law shall be construed to apply to slaughter houses in this State slaughtering as many as three hundred cattle per day. (Acts 1907, p. 239.)

Art. 1365. (892) **Butcher or slaughterer to file bond.**—Every person, before he shall set up and carry on the trade or occupation of a butcher or slaughterer of cattle in the State of Texas, shall file a bond to be approved by the county judge of the county in which he resides (desires) to carry on the business, in a sum not less than two hundred dollars, nor more than one thousand dollars, payable to the State of Texas, conditioned that he shall keep a true and faithful record in a book kept for that purpose of all cattle purchased or slaughtered by him, with a description of the animal including marks, brands, age, color, weight and from whom purchased and the date thereof; that he will have the hide and ear of such animal inspected by the inspector, or some magistrate of the county within twenty days after it is slaughtered, and that he will not purchase any cattle that has been slaughtered by another unless the hide and ears of such slaughtered animal accompany said animal offered for sale, and that he will not purchase any animal that has been slaughtered by another when the ear marks or brands on the hide accompanying such animal, when offered for sale, have been changed, mutilated, or destroyed. (Sec. 1, Act of April 6, 1889, Acts of 1889, p. 84, Acts of 1893, p. 38, Acts of 1899, p. 87.)

Art. 1366. (893) **Penalty for failure to make such bond.**—Every person who shall carry on the business of butcher or slaughterer of animals, without having filed with the clerk of the county court of the county in which he conducts such business the bond provided for in

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article 1365, shall be fined in any sum not less than five dollars nor more than two hundred dollars. (Sec. 2, Act April 6, 1889, Acts 1893, p. 38, Acts of 1899, p. 87.)

Art. 1367. (894) **Butcher to keep record.**—Every person who shall carry on the business of butcher or slaughterer of animals and shall fail to keep a true and faithful record, in a book kept for the purpose, of all cattle purchased and slaughtered by him, together with a description of each animal, including brand, age, color, weight and from whom purchased and the date of purchase, or shall fail to have the hide and ears of such animal or animals inspected by the inspector or some magistrate, within twenty days after such animal is slaughtered, shall be fined in any sum not less than twenty dollars nor more than two hundred dollars. (Sec. 3, Act of April 6, 1889, Acts 1893, p. 38, Acts of 1899, p. 87.)

Art. 1368. (895) **Purchasing slaughtered cattle without hide and ears accompanying.**—Any person engaged in butchering or slaughtering and who shall purchase any cattle that have been slaughtered by another without the hide and ears of such animal accompanying the same, or shall purchase any animal that has been slaughtered by another when the ear mark or brand on the hide accompanying the same, when offered for sale, have been changed, mutilated or destroyed, shall be fined in any sum not less than fifty nor more than two hundred dollars. (Sec. 4, Act of April 6, 1889, Acts 1893, p. 38, Acts 1899, p. 87.)

Art. 1369. (896) **Record to be open for inspection.**—The record provided for in article 1367 of this chapter shall be open to the inspection of all parties, and any butcher refusing to permit such inspection at any reasonable hour shall be fined in any sum not exceeding twenty-five dollars. (Sec. 5, Act of April 6, 1889, Acts 1893, p. 38, Acts 1899, p. 87.)

Art. 1370. (897) **Duty of county attorney.**—In addition to the criminal prosecution that may be brought under this law, it is the duty of the county attorney to bring a civil action against any butcher or slaughterer of animals for any violation of the terms of the bond prescribed in article 1365. (Acts 1893, p. 38, Acts 1899, p. 87.)

Art. 1371. (898) **Inspector to keep record.**—It shall be the duty of the inspector or magistrate to keep a record of the marks, brands, color and general description of such hides, and for whom inspected, with the date of inspection, and return a copy of the same to the clerk of the county court of the county in which it was inspected within thirty days after said inspection, and said inspector or magistrate shall be entitled to receive ten cents for each hide so inspected, to be paid by the party having the hide inspected, and any inspector or magistrate failing to keep such book, or failing to make such report as above provided for, may be fined in any sum not less than one dollar nor more than twenty-five dollars. (Acts 1893, p. 38, Acts 1899, p. 87.)

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Art. 1372. (899) **Counties exempt.**—The provisions of this law shall not apply to either of the following counties: Denton, Comanche, Clay, Van Zandt, Galveston, Harris, Montgomery, Walker, San Jacinto, Chambers, Liberty, Jefferson, Hardin, Newton, Jasper, Tyler, Polk, Trinity, Houston, Cherokee, Nacogdoches, Angelina, San Augustine, Sabine, Shelby, Panola, Rusk, Smith, Gregg, Harrison, Marion, Upshur, Wood, Rains, Hopkins, Franklin, Camp, Titus, Morris, Cass, Bowie, Red River, Delta, Lamar, Fannin, Grayson, Collin, Hunt, Dallas, Tarrant, Johnson, Ellis, Kaufman, Van Zandt, Henderson, Anderson, Navarro, Hill, McLennan, Limestone, Freestone, Leon, Madison, Grimes, Waller, Austin, Fayette, Bastrop, Lee, Fort Bend, Washington, Burleson, Brazos, Milam, Robertson, Falls, Bell, Williamson, Travis, Bexar, Bee, Calhoun, De Witt, Goliad, Refugio, Wharton, Matagorda, Brazoria, Lavacca, Comal, Hays, Caldwell, Guadalupe, Karnes, Gillespie, Blanco, Llano, Kendall, Kimball, Mason, Kerr, Bandera, Sutton, Gonzales, and Colorado. It is further provided that Palo Pinto county is exempt from the operation of this law. (Sec. 9, Act of April 6, 1889, amended Acts 1893, p. 38, Acts 1899, p. 87, Acts 1905, p. 104, Acts 1911, p. 22, Act March 19, 1915, Acts 1915, p. 115, and Act June 3, 1915, 1st Called Session, p. 35.)

Sec. 2569. **Preceding article construed.**—Article 1372 (899) prior to the Act of April 11, 1899, only applied to such articles of this chapter as were taken from the Acts of 1889 and 1893, and did not apply to other articles of this chapter previously passed, it being held that the codifiers in placing section nine of the Acts of 1889 and 1893 in the Code as Article 899 and the Legislature in adopting the chapter as codified did not extend these exemptions to every article of this chapter. Braun v. State, 40 Texas Crim. Rep. 236; 49 S. W. 620. Since that opinion was rendered the Act of April 11, 1899, was passed and it embraced every article in the chapter in the same Act including Article 899 (now 1372), but it does not appear that the Legislature intended by the Act of 1899 to affect the construction placed upon this article in the Braun case, or that they did so.

Art. 1373. (901) (757) **Auctioneer selling animal.**—If any auctioneer or other person shall sell at auction any horse, mule, or ox, without first requiring from the party for whom such sale is made a written statement signed by him of the manner in which, and the name and residence of the person from whom he acquired such animal, he shall be fined not less than fifty nor more than one hundred dollars. (Acts 1874, p. 98, Acts 1899, p. 89.)

Art. 1374. (902) (758) **Auctioneer failing to report sales of animals.**—If any auctioneer or other person shall sell at auction any horse, mule, or ox, and shall fail within ten days after such sale, to file with the clerk of the county court the written statement specified in the preceding article, duly attested with his certificate as to its genuineness, and accompanied with a further certificate containing an accurate description of the animal sold, together with the names and residence of the seller and purchaser, he shall be punished as prescribed in the preceding article. (Acts 1874, p. 98, Acts 1899, p. 89.)

Art. 1375. **Karnes county exempt.**—The provisions of chapter 12, title 17, of the Penal Code, in so far as the same relate to and require

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the inspection by a magistrate, or an inspector, of the ears and hides of animals slaughtered by butchers, shall not apply to Karnes county. (Acts 1909, p. 132.)

CHAPTER XIII

ILLEGAL MARKING AND BRANDING AND OTHER OFFENSES RELATING TO STOCK

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Sec. 2570. **Illegal marking and branding.**
Sec. 2571. Form for indictment.
Sec. 2572. Indictment.
Sec. 2573. Evidence.
Sec. 2574. Charge of the court.

Article 1376. (903) (759) **Illegal marking and branding.**—Every person who shall mark or brand any horse, mule, ass or cattle, or who shall mark any sheep, goat or hog, not being his own, and without the consent of the owner, and with intent to defraud, shall be punished in the same manner as if he had committed a theft of such animal.

Sec. 2571. **Form for indictment.**

In the name and by the 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 John Doe on the ..... day of ....., A. D. ....., in said county and State did with intent to defraud mark and brand one head of cattle (or "one horse" or "one mule" or "one ass" or "mark one sheep," or "mark one goat," or "mark one hog,") the said animal not being then and there his own but

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being then and there the property of ....., the owner thereof (or "the said animal being then and there the property of and owned by some person to the grand jury unknown"), without the consent of said owner.

Against the peace and dignity of the State.

.....

Foreman of the grand jury.

Sec. 2572. **Indictment.**—An indictment for illegal marking or branding must allege each element of the offense. State v. Faucett, 15 Texas 584. State v. Hall, 27 Texas 333. State v. Haws, 41 Texas 161. Cresap v. State, 28 Texas Crim. App. 529; 13 S. W. 992.

An indictment for illegal marking or branding is bad if there is no allegation of the want of consent of the owner, or if there is no allegation of the intent to defraud. State v. Hall, 27 Texas 333. Cresap v. State, 28 Texas Crim. App. 529; 13 S. W. 992.

An indictment for illegal marking or branding is bad if there is no allegation of ownership. State v. Faucett, 15 Texas 584.

Ownership of the animal may be alleged in an unknown owner. State v. Haws, 41 Texas 161.

The indictment may give the generic name of the animal, as "one horse," or the name of one of the species may be alleged, as "one colt." Pullen v. State, 11 Texas Crim. App. 91.

It is not necessary to allege the value of any of the animals mentioned in Article 1376 (903) under the present statutes, as theft of either is a felony and the value of the animal does not affect the penalty. Melton v. State, 20 Texas Crim. App. 202. Barfield v. State, 43 S. W. 333.

Sec. 2573. **Evidence.**—The elements of the offense of illegally marking an animal are (1) marking the animal of another, (2) without the consent of the owner, and (3) with intent to defraud, and each of these elements must be proven. Proof of marking only without the consent of the owner will not prove the intent to defraud. Taylor v. State, 35 Texas 496. Fossett v. State, 11 Texas Crim. App. 40. Foster v. State, 12 S. W. 506. Cresap v. State, 28 Texas Crim. App. 529; 13 S. W. 992. Montgomery v. State, 13 S. W. 1000.

The intent to defraud may be established by proof of the surrounding facts. Fossett v. State, 11 Texas Crim. App. 40. Samples v. State, 64 S. W. 1041.

The ownership of the animal must be proved as laid. Mayes v. State, 33 Texas 341. Foster v. State, 12 S. W. 506. Hawkins v. State, 20 S. W. 830.

A conviction for an illegal marking or branding of one animal will bar a prosecution for the illegal marking or branding of another animal, belonging to the same or a different owner, marked or branded at the same time, if the marking or branding in fact constituted but one transaction although accomplished by separate acts. Adams v. State, 16 Texas Crim. App. 162.

An illegal branding by an innocent agent acting under the authority of defendant is an illegal branding by defendant, and in law defendant was present at such branding no matter where he was in fact. Arismendis v. State, 41 Texas Crim. Rep. 378; 54 S. W. 601.

If the same transaction is referred to, a count for theft and one for illegal marking and branding may properly be inserted in one indictment, and in such event the State can not be driven to elect as to which count will be relied on for conviction. Welhousen v. State, 30 Texas Crim. App. 623; 18 S. W. 300.

Proof of separate and disconnected thefts and illegal brandings is not admissible when it does not tend to defeat the defensive theory, or to develop the *res gestæ*, or to show intent when intent is an issue, or to show identity, and when the only purpose it could serve would be to prejudice the jury against the defendant. Welhousen v. State, 30 Texas Crim. App. 623; 18 S. W. 300.

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Sec. 2574. **Charge of the court.**—The court is not required to charge on the theory that defendant acquired title to the animal by limitation if there is no testimony that defendant claimed it as his own. Reed v. State, 22 S. W. 402.

It is error to charge the jury that defendant would be guilty if he branded or caused the animal to be branded. If the court desires to submit any other theory than that defendant did the branding the law of principals should be given in the charge to the jury. Arismendis v. State, 41 Texas Crim. Rep. 378; 54 S. W. 601.

When the defense is purchase and the court charges on that theory the charge should not single out the bill of sale and charge on it against defendant, but if singled out and charged on as "a sham," the converse should be submitted, that is, that it was executed in good faith so far as defendant was concerned. Arismendis v. State, 41 Texas Crim. Rep. 378; 54 S. W. 601.

A charge is correct which informs the jury that although they might believe that the animals belonged to the alleged owner, yet if a third person had given defendant permission to mark certain animals, and that defendant marked the animals believing at the time he did so that they were the animals of such third person they should acquit. Goree v. State, 34 S. W. 119.

Sec. 2575. **Altering or defacing mark or brand.**
Sec. 2576. Form for indictment.
Sec. 2577. Indictment.
Sec. 2578. Evidence.
Sec. 2579. Charge of the court.

Art. 1377. (904) (760) **Altering or defacing mark or brand.**—Every person who shall alter or deface the mark or brand of any horse, mule, ass or cattle, or shall alter or deface the mark of any sheep, goat or hog, not being his own property, and without the consent of the owner, and with intent to defraud, shall be punished in the same manner as if he had committed a theft of such animal. (O. C. 768, amended by Acts of 1858, p. 181, and amended in revising 1879.)

Sec. 2576. **Form for indictment.**

In the name and by the 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 John Doe on the ..... day of ....., A. D. ....., in said county and State did with intent to defraud, alter and deface the mark (or "mark and brand" or "brand") of one horse (or "mule," or "ass," or "head of cattle," or "sheep," or "goat," or "hog"), the same not being his own property, but being then and there the property of ....., the owner thereof (or "the property of a person to the grand jury unknown"), without the consent of said owner.

Against the peace and dignity of the State.

.....
Foreman of the grand jury.

Sec. 2577. **Indictment.**—It is not necessary to allege the value of any of the animals mentioned in article 1377 (904) because the theft of either, under the present statute, is a felony and the penalty is not dependent upon their value. A change of penalty in the main statute also changes the penalty in a statute dependent upon it for the penalty. Barfield v. State, 43 S. W. 333. Barfield v. State, 44 S. W. 1104.

So far as allegations of ownership or possession are concerned the rules applicable to cases of theft govern. Alford v. State, 31 Texas Crim. Rep. 299; 20 S. W. 553. Williams v. State, 42 Texas Crim. Rep. 18; 57 S. W. 93.

An unnecessary allegation of the manner or means by which the alteration or defacing was effected, or an unnecessary description of the mark or brand, will not

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vitiate the indictment, but such unnecessary allegations being descriptive must be proved as laid. Davis v. State, 13 Texas Crim. App. 219. House v. State, 15 Texas Crim. App. 522.

Sec. 2578. **Evidence.**—The words "alter" and "deface" are not synonymous terms. Linney v. State, 6 Texas 1.

Adding a new mark or brand to the old one is "altering" it. Linney v. State, 6 Texas 1. Samples v. State, 64 S. W. 1041.

To "deface" a brand means to obliterate it. Linney v. State, 6 Texas 1.

An alteration may be made by clipping the hair on the original brand so as to change it into another brand. Slaughter v. State, 7 Texas Crim. App. 123.

The same rules as to marks and brands as are applicable in theft cases apply to prosecutions for altering or defacing a mark or brand. Childers v. State, 37 Texas Crim. Rep. 392; 35 S. W. 654.

Ownership and possession must be proved as laid. Williams v. State, 42 Texas Crim. Rep. 18; 57 S. W. 93.

If the manner or method of the altering or defacing is alleged, such unnecessary allegation, being descriptive, must be proved as laid. Davis v. State, 13 Texas Crim. App. 219. House v. State, 15 Texas Crim. App. 522.

If defendant is charged with altering the brand on more than one animal, it is not necessary to make good the charge that the proof should show that the brands on all the animals were changed as alleged, proof that the brand on any one of the animals was altered as alleged being sufficient. House v. State, 15 Texas Crim. App. 522.

If the State has to rely upon the same facts in both cases and it is the same transaction, the conviction or acquittal of defacing a brand would bar a prosecution for theft of the animal. Powell v. State, 42 Texas Crim. Rep. 11; 57 S. W. 94.

Sec. 2579. **Charge of the court.**—Although defendant admits altering the mark on an animal, yet a charge on circumstantial evidence is required if circumstantial evidence only is relied on to prove the identity of the animal. Childers v. State, 37 Texas Crim. Rep. 395; 35 S. W. 654.

A charge on circumstantial evidence is not required if there is direct testimony—even from an accomplice witness—that defendant altered the mark on the animal of the alleged owner. Diaz v. State, 53 S. W. 632.

Art. 1378. (905) (761) **Using mark or brand not on record.**—If any person shall mark or brand any unmarked or unbranded stock with a mark or brand not upon record, he shall be punished by fine not exceeding five hundred dollars. (Acts 1866, p. 188, since amended as to penalty.)

Art. 1379. (906) (762) **Altering mark or brand to one unrecorded.**—If any person shall alter or change any mark or brand upon any stock of his own, or that is under his control, without first having such changed mark or brand recorded, he shall be punished as prescribed in the preceding article. (Acts 1866, p. 188, since amended as to penalty.)

Art. 1380. (907) (763) **Killing unmarked or unbranded cattle.**—If any person shall knowingly kill any unmarked or unbranded animal of the cattle species, or any unmarked hog, sheep or goat not his own, he shall be fined not less than twenty-five nor more than one hundred dollars.

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Art. 1381. (908) (764) **Ownership under preceding article.**—In prosecutions under the preceding article, it shall only be necessary for the State to allege and prove that the animal killed was not the property of the accused, without stating or proving the true owner of such animal.

Art. 1382. (909) (765) **Skinning cattle.**—If any person shall remove the hide, or any part thereof, from any cattle not his own, and without the consent of the owner, he shall be fined in a sum not less than twenty nor more than one hundred dollars; and the removal of each separate hide from each animal shall constitute a separate offense. (Acts 1887, p. 105.)

Art. 1383. (910) (765a) **Having hide without owner's consent.**—If any person shall be found in possession of any hide of any cattle not his own, and possession of said hide is obtained without the consent of the owner or his legal representative, he shall be fined in a sum not less than twenty nor more than one hundred dollars. (Acts 1887, p. 105.)

Art. 1384. (911) (765b) **Having hide with brand cut out or disfigured.**—If any person be found in possession of any hide of any cattle with brand cut out or disfigured, and shall offer the same for sale, he shall be fined in a sum not less than twenty nor more than one hundred dollars, and the possession and offer of sale of each hide with the brand cut out or disfigured shall constitute a separate offense; provided, that nothing in this act shall prevent any person who shall be guilty of the offense of theft of such hide from being prosecuted and convicted for such offense. (Acts 1887, p. 105.)

Art. 1385. (912) (766) **Milking another's cow.**—If any person without the consent of the owner shall take up, use or milk any cow, not his own, he shall, for every such offense, be punished by fine not exceeding ten dollars. (Acts 1866, p. 188.)

Art. 1386. (913) (767) **Driving live stock from range.**—If any person shall wilfully kill, or destroy, or drive, or remove from its accustomed range, any live stock not his own, without the consent of the owner, under such circumstances as not to constitute theft, he shall, nevertheless, be guilty of a misdemeanor, and shall be punished by fine not exceeding one thousand dollars. (Acts 1866, p. 187, since amended as to penalty.)

Art. 1387. (914) **Preceding article qualified.**—Nothing in the preceding article shall be construed to prevent any person from driving his own and other stock, which may be mixed therewith, until the same can be conveniently separated; provided, that nothing herein shall be construed to authorize any person under any circumstances to remove any live stock, not his own, from their usual range. (Acts 1866, p. 187.)

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Art. 1388. (915) **Procedure in such cases.**—In any prosecution under article 1386, it shall only be necessary to prove the act of killing, or destroying or driving, using, or removing from the range of any stock not belonging to or under the control of the accused, and it shall devolve upon the accused to show any fact under which he can justify or mitigate the offense. (Acts 1866, p. 187.)

Sec. 2580. **Form for Information.**
In the name and by authority of the State of Texas:

.....County Attorney of.....county, Texas, comes in behalf of the State of Texas and presents in and to the County Court of..... county, Texas, at the.....term, A. D....., of said court that John Doe heretofore on the.....day of....., A. D....., in said county and State did wilfully drive and remove one head of cattle (or "two," or whatever number it was, or "one horse," or whatever number it was, and if any other kind of live stock name it, stating the number) from the accustomed range of said live stock, the said live stock being then and there not his own but being then and there owned by.....(or "some person to the grand jury unknown") without the consent of said owner thereof.

Against the peace and dignity of the State.

.....
County Attorney.....county, Texas.

(The rules of pleading do not require an allegation that it was under such circumstances as not to constitute theft, nor would proof that it was theft constitute a variance.)

Sec. 2581. **Driving stock from range.**—The notes under article 1356 will be found useful in cases under article 1388.

Under an indictment charging only theft a conviction can not be had for the misdemeanor of wilfully driving live stock from their range. Long v. State, 39 Texas Crim. Rep. 461; 46 S. W. 821. Chambers v. State, 59 S. W. 261.

The evidence is insufficient if it fails to show that the act was done "wilfully," that is, with evil intent, or without reasonable grounds for believing that it was lawful. Yoakum v. State, 21 Texas Crim. App. 260; 17 S. W. 254. Butcher v. State, 56 S. W. 923. Newport v. State, 77 S. W. 224.

If there is evidence that the animal was not driven purposely the defendant is entitled to an affirmative charge on this theory. Day v. State, 47 Texas Crim. Rep. 178; 82 S. W. 657.

Art. 1389. (916) **Use of false pedigree or certificate of sale.**—Any person who shall knowingly and wilfully furnish or give to a purchaser of any animal any false pedigree or false certificate of sale of such animal, and every person who shall knowingly and wilfully use, for the purpose of deceiving, any false pedigree or false certificate of sale of any animal, whether such false pedigree or false certificate was furnished, given or procured in this State or elsewhere, shall upon conviction thereof be punished by a fine in any sum not less than twenty-five nor more than five hundred dollars, or be imprisoned in the county jail for a term not exceeding six months, or by both such fine and imprisonment. (Act of April 13, 1891, Sec. 1, Acts of 1891, p. 84.)

Sec. 2582. **Animals found dead along railroad.**—Whenever any animal is killed or found dead upon the roadbed or right of way of any railroad company in this State, the section foreman of the railroad where said animal is killed or found dead, shall take and make a description of such animal, stating its kind, the marks and brands, color, and apparent age, and any other description that may serve to

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identify said animal, which description must be taken and made before said animal is buried or otherwise disposed of, and shall transmit same to the County Clerk of the county in which said animal is found or killed, within ten days from the date of finding or killing, which description shall be by said County Clerk filed and kept of record in his office without exacting any fees from the section foreman for filing same, and any person violating any of these provisions shall upon conviction be fined in any sum not less than five nor more than twenty-five dollars. (Act March 22, 1915, Acts 1915, p. 126.)

CHAPTER XIV

OFFENSES RELATING TO ESTRAYS

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Article 1390. (917) **Unlawfully disposing of an estray.**—If any person shall unlawfully remove, sell, or in any other manner dispose of any animal which has been taken up by him as an estray, he shall be punished by fine not exceeding two hundred and fifty dollars. (Acts 1858, p. 184.)

Sec. 2583. **Form for information.**

In the name and by authority of the State of Texas:

.....County Attorney.....county, Texas, comes in behalf of the State of Texas and presents in and to the County Court of.....county, Texas, at the.....term, A. D....., of said court that John Doe heretofore on the.....day of....., A. D....., in said county and State did unlawful remove (or "did unlawfully sell to.....at a private sale" or "did unlawfully kill," or otherwise unlawfully dispose of, stating how) a horse (or "mule" or whatever animal it was), the said animal being then and there an estray, and which said animal had been taken up by said John Doe as an estray.

Against the peace and dignity of the State.

.....

County Attorney.....county, Texas.

Sec. 2584. **Unlawful sale of estray—Form for Information.**

In the name and by the authority of the State of Texas:

.....County Attorney.....county, Texas, comes in behalf of the State of Texas and presents in and to the County Court of.....county, Texas, at the.....term, A. D....., of said court that John Doe heretofore on the.....day of....., A. D....., in said county and State, did unlawfully sell to.....(or "to himself") a horse (or "a mule" or other animal naming it), which said animal had been taken up by him as an estray, and did then and there unlawfully sell said animal as aforesaid without then and there having said animal at the place of the sale within view of the persons who were then and there present at said sale and bidding on the same.

And the County Attorney aforesaid in and to said court does further present that John Doe heretofore on the.....day of....., A. D....., in said county and State did unlawfully sell to..... (or "to himself") a horse which said animal had been taken up by him as an estray, and did then and there unlawfully sell said animal as aforesaid without there being present at said sale at

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least three adult bidders in attendance at said sale beside the family of the said John Doe.

Against the peace and dignity of the State.

.....

County Attorney.....county, Texas.

Sec. 2585. **Indictment or information.**—An allegation that the animal was an estray is a sufficient allegation that the ownership was unknown. State v. Anderson, 34 Texas 611.

It is not necessary to allege the want of consent of the owner. If defendant had such consent he may prove it, but the issue of want of consent is not a statutory constituent of the offense. Floyd v. State, 68 S. W. 690.

It is not necessary to allege the age, color, sex, marks or brands on the animal. State v. Crist, 32 Texas 100. *Contra:* State v. Meschac, 30 Texas 519.

It is not necessary to allege where the animal was taken up as an estray. The gist of the offense is the unlawful disposition of the animal, and it is proper to lay the venue in the county where the unlawful disposition was made. Brogden v. State, 44 Texas 103.

To charge one with unlawfully killing an animal which he had taken up as an estray manifestly alleges an unlawful disposition of it and the manner in which it was done. Brogden v. State, 44 Texas 103.

Under the original article the punishment was dependent upon the value of the animal, and it was therefore necessary to allege its value. State v. McCormack, 22 Texas 297, but under the present statute it is neither necessary to allege or prove the value of the animal, the penalty being independent of the value of the animal.

Sec. 2586. **"Family" defined.**—The word "family," as used in the statute requiring at least three persons besides the family of the taker up to be present at the sale of an estray, means the collective body of persons who live in one house under one head or manager. Goode v. State, 16 Texas Crim. App. 415.

Art. 1391. (918) **Taking up and using without complying with the law.**—If any person shall, without complying with the law regulating estrays, take up and use, or otherwise dispose of, any animal coming within the meaning of estray, he shall be punished as prescribed in the preceding article. If the unlawful taking or disposition of an estray animal be effected in such manner as to come within the meaning of theft, the person guilty of the same shall be punished for that offense. (Acts of 1858, p. 184.)

Sec. 2587. **Taking up and using estray—Form for information.**

In the name and by the authority of the State of Texas:

.....County Attorney of.....county, Texas, comes in behalf of the State of Texas and presents in and to the County Court of..... county, Texas, at the.....term, A. D....., of said court that John Doe heretofore on the.....day of....., A. D....., in said county and State did without complying with the laws regulating estrays unlawfully take up and use a horse, the said animal then and there coming within the meaning of an estray, and the said animal being then and there an estray.

Against the peace and dignity of the State.

.....

County Attorney.....county, Texas.

Sec. 2588. **Indictment or information.**—To be sufficient the allegation must be that defendant "did take up and use" the estray, and the proof must show both a "taking up" and a "using." Davis v. State, 30 Texas 352. Thompson v. State, 40 S. W. 997. Williams v. State, 78 S. W. 928.

It must be alleged that the animal was taken up and used "without complying with the law regulating estrays." State v. Hutchinson, 26 Texas 111.

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An allegation that the animal was taken up and used "without estraying it in the manner prescribed by law" is equivalent to the statutory words. State v. Moreland, 27 Texas 726.

The omission to allege that defendant "did" the act constituting the offense is fatal. State v. Hutchinson, 26 Texas 111.

A general description of the animal is sufficient as "one horse," "one mule," "one ox," etc. State v. Moreland, 27 Texas 726. State v. Ivy, 33 Texas 647.

When the charge is that defendant did take up and use an estray without complying with the laws regulating estrays, it is sufficient to allege that fact in the language of the statute. State v. Crist, 32 Texas 100. Davis v. State, 2 Texas Crim. App. 162.

CHAPTER XV

OFFENSES AGAINST LABELS, TRADE MARKS, ETC.

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Article. 1392. (918a) **Unlawful to use trade mark of another.**—All manufacturers or dealers in carbonated goods, mineral waters, soda water, wine, cider, or other beverage, or manufacturers of medicine or other compound requiring the use of kegs, casks, barrels, boxes, syphons, bottles, or any other vessels for containers, upon which the names, brands, marks, or trade marks, or other designation of ownership or proprietorship, is stamped, engraved, etched, blown in, impressed, or otherwise produced upon such boxes, syphons, bottles, or any other vessel for containers, may file in the office of the county clerk of the county in which the principal place or office of business is situated, a fac simile or description of the name or names, marks or devices, so used by such manufacturer or dealer in such wares herein enumerated, and cause such description to be published in a public newspaper published in such county for three successive weeks; and the act of so filing and causing to be recorded by the county clerk, and publishing, shall operate as a trade mark, securing to the said manufacturer the full protection of the law as a trade mark, entitling the said manufacturer to the sole and exclusive use in Texas of said mark, name or device; for which services the clerk shall be allowed the sum of one dollar, to be paid by the party having such brands, etc., recorded. It is hereby declared to be unlawful for any person or persons, corporate or otherwise, other than the proprietor, or by his written consent, to fill, for the purpose of traffic, or for sale, with any compound whatever, any box, syphon, bottle or other container so marked, recorded in the office of the county clerk, and published as provided in this article, or to deface, erase, obliterate, cover up or otherwise remove

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or cancel any such mark or device. (Acts 1893, p. 125, amended by Acts 1901, p. 288.)

Art. 1393. (918b) **Possession prima facie evidence, etc.**—To knowingly and wilfully have in possession, otherwise than by contract with the proprietor of the goods herein enumerated, or with his duly accredited agents, any of the vessels in said article enumerated, or to use, buy, sell or dispose of any such vessel, with or without contents of any kind, except by authority of the proprietor, or to wantonly and wilfully break, damage, mar, injure, or destroy any such vessel, is declared hereby to be prima facie evidence of such unlawful use, and shall constitute a misdemeanor, punishable by fine upon conviction in a court of competent jurisdiction, an employe being equally liable with the principal so offending. (Acts 1893, p. 125.)

Art. 1394. (918c.) **Penalties.**—Any person violating any of the provisions of the two preceding articles shall be deemed guilty of a misdemeanor, and upon conviction before a justice of the peace shall be fined for such unlawful use of each and every box, five dollars; for each and every syphon, five dollars; for each and every bottle, five dollars; and for every other receptacle, except a fountain, five dollars; and for each fountain, twenty-five dollars; the fines so designated to be the minimum in each case, the maximum not to exceed double the minimum. (Acts 1893, p. 125.)

Art. 1395. (918d) **Counterfeiting trade mark, etc.**—Whenever any person, association, private corporations or union of working men, incorporated or unincorporated, have adopted, or shall hereafter adopt for their protection any label, trade mark, design, device, imprint or form of advertisement, indicating that goods to which such label, trade mark, design, device, imprint or form of advertisement shall be attached, were manufactured by such person, association, private corporations or union, or by a member or members of such association or union, it shall be unlawful for any person, inclusive of officers, agents, receiver or receivers of corporations, to counterfeit or imitate such label, trade mark, design, device, imprint or form of advertisement or to use such counterfeit or imitation of such label, trade mark, design, device, imprint, or form of advertisement, knowing the same to be counterfeit or imitation, or to aid, assist, countenance or knowingly permit such counterfeit or imitation or the use of such counterfeit or imitation for his own use or benefit, or for the use or benefit of any corporation of which he may then be an officer, agent or receiver. Every person, whether in his individual capacity or as an officer, agent or receiver of a corporation, violating this article, shall, upon conviction, be punished by fine of not less than twenty-five nor more than one hundred dollars, and each day's violation of this article shall be considered a separate offense. (Sec. 1 Act of April 29, 1895, Acts of 1895, p. 108.)

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Art. 1396. (918e) **Unlawfully using or displaying.**—Every person, whether in his individual capacity or as the officer, agent or receiver of a corporation, who shall wilfully and knowingly use or display the genuine label, trade mark, design, device, imprint, or form of advertisement, or name of any such person, association or union, incorporated or unincorporated, not being authorized to use or display the same, or shall aid, assist, countenance or knowingly permit the use of same, not being authorized to use the same, shall, upon conviction, be punished by fine of not less than twenty-five nor more than one hundred dollars. (Sec. 2, Act of April 29, 1895, Acts of 1895, p. 108.)

CHAPTER XVI

OFFENSES RELATING TO THE PROTECTION OF STOCK RAISERS

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Article 1397. (919) (772) **Inspector giving a fraudulent certificate.**—Any inspector of hides and animals who shall give a certificate of inspection without having first made such inspection in accordance with law, or who shall fraudulently issue any certificate of inspection of any hides or animals, shall be fined not less than fifty nor more than five hundred dollars. (Sec. 31, Act of Aug. 23, 1876, Acts of 1876, p. 302.)

Art. 1398. (920) (772a) **Inspector failing to examine hides, etc.**—If any inspector or deputy inspector of hides and animals shall knowingly fail or refuse to faithfully examine and inspect all hides or animals known or reported to him as sold, or as leaving or going out of the county for sale or shipment, and all animals driven or sold in his dis-

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trict for slaughter, packeries, or butcheries, shall be fined not less than twenty-five dollars nor more than two hundred dollars. (Act of April 4, 1889, Acts of 1889, p. 36.)

Art. 1399. (921) (772b) **Inspector failing to keep record.**—Any inspector of hides and animals who shall fail to provide and keep a well bound book and record therein a correct statement, showing the number, ages, and marks and brands of each animal inspected by him or by his deputy or deputies, and the number and all the marks and brands of all hides inspected by him or by his (deputy or) deputies, and whether the hides are dry or green, and the name or names of the vendor or vendors and of the purchaser or purchasers of said animals or hides, shall be fined not less than fifty dollars nor more than three hundred dollars. (Act of April 4, 1889, Acts of 1889, p. 36.)

Art. 1400. (922) (772c) **Certificate by inspector.**—Any inspector or deputy inspector of hides and animals who shall fail to correctly state in his certificate of inspection or in his certificate of acknowledgment all the marks and brands of all animals and hides inspected by him, shall be fined not less than twenty-five dollars nor more than three hundred dollars. (Act of April 4, 1889, Acts of 1889, p. 36.)

Art. 1401. (923) (772d) **Return of certified copies, etc.**—Any inspector of hides and animals who shall fail to return a certified copy of all entries made in his record during each month to the clerk of the county court of his county on the last day of each month, shall be fined not less than fifty nor more than three hundred dollars. (Act of April 4, 1889, Acts of 1889, p. 36.)

Art. 1402. (924) (773) **Counterbranding cattle without consent of owner.**—Any person who shall counterbrand any cattle without the consent of the owner, or his agent, shall be fined not less than ten nor more than fifty dollars for each animal so counterbranded. (Sec. 32, Act of Aug. 23, 1876, Acts of 1876, p. 302.)

Art. 1403. (925) (774) **Clandestine driving cattle into Mexico.**—Any person who shall drive any cattle across the Rio Grande into Mexico, at any other point than where a United States custom house is established, or (where there is a) place of inspection by United States custom house officers, or without first having the same inspected in accordance with law, shall be confined in the penitentiary not less than two nor more than five years. (Sec. 35, Act of Aug. 23, 1876, Acts of 1876, p. 302.)

Art. 1404. (926) (775) **Shipping hides imported from Mexico.**—Any person who shall ship from any port in this State any hides of cattle imported from Mexico without first having procured a certificate of importation and inspection in accordance with law, shall be fined not less than one nor more than five dollars for each hide so shipped. (Sec. 35, Act of Aug. 23, 1876, Acts of 1876, p. 302.)

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Art. 1405. (927) (776) **Selling hides without inspection.**—Any person who shall sell any hides of cattle without the same having been inspected shall be punished as prescribed in the preceding article. (Sec. 36, Act of Aug. 23, 1876, Acts of 1876, p. 302.)

Art. 1406. (928) (777) **Driving cattle without road-branding.**—Any person who shall drive any cattle out of any county, with the intention of driving the same beyond the limits of the State, to a market, without first having road-branded the same in accordance with law, shall be fined not less than twenty nor more than one hundred dollars for each animal so driven. (Sec. 37, Act of Aug. 23, 1876, Acts of 1876, p. 302.)

Art. 1407. (929) (778) **Driving stock out of county without owner's consent.**—Any person who shall drive any cattle or horses out of any county, without the written authority of the owner thereof, duly authenticated as the law requires, and without first having the same duly inspected, shall be punished as prescribed in the preceding article. (Sec. 39, Act of Aug. 23, 1876, Acts of 1876, p. 302.)

Sec. 2589. **Driving stock out of county without consent of owner.**—Except under local option laws, an offense committed within four hundred yards of the county line may be prosecuted in the county, and this offense is complete the instant the county line or boundary is passed and may be prosecuted as well in the county from which the animal was driven as in the county to which it is driven. Rogers v. State, 9 Texas Crim. App. 43.

To be sufficient an indictment for this offense must negative the fact that the cattle or horses driven belonged to and were the property of the defendant. Covington v. State, 6 Texas Crim. App. 512. Long v. State, 6 Texas Crim. App. 642. Heard v. State, 8 Texas Crim. App. 466.

Art. 1408. (930) (779) **Purchasing animal without bill of sale.**—Any person who shall purchase any animal or hides of cattle without obtaining a bill of sale from the owner or his agent, shall be fined not less than twenty nor more than one hundred dollars for each animal or hide so purchased. (Sec. 39, Act of Aug. 23, 1876, Acts of 1876, p. 302.)

Sec. 2590. **Form for information.**

In the name and by the authority of the State of Texas:

.....County Attorney of.....county, Texas, comes in behalf of the State of Texas and presents in and to the County Court of..... county, Texas, at the.....term, A. D....., of said court that John Doe heretofore on the.....day of....., A. D....., in said county and State did purchase one (or "two," or whatever number it was) head of cattle (or "horses," or whatever animals it was, or "ten" or "two" or whatever number it was "hides of cattle"), from.....without then and there obtaining a bill of sale thereof from the owner thereof or his agent, the said animals (or "hides") being then and there the property of and owned by.....at the time of said purchase.

Against the peace and dignity of the State.

.....

County Attorney.....county, Texas.

Sec. 2591. **Purchasing without taking bill of sale.**—Long v. State, 6 Texas Crim. App. 646 sets out an information for this offense which is therein held good, but same is bad for failure to allege the ownership of the cattle purchased. It is necessary to allege the ownership of the animals or hides purchased. Houston v. State, 13 Texas Crim. App. 595.

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If the defendant did in fact purchase the cattle through an agent, and the cattle were received by said agent when the defendant was not present, before the defendant could be legally convicted the proof would have to show that he consented to the receiving of the cattle by his agent without a bill of sale. Houston v. State, 13 Texas Crim. App. 595. Brockman v. State, 16 Texas Crim. App. 54.

Defendant is entitled to prove that the cattle in question were purchased for him by another person to whom he gave money for that purpose, and that this other person did purchase and receive them for him, and gave him a bill of sale, saying at the time that it was a bill of sale to said cattle. Brockman v. State, 16 Texas Crim. App. 54.

The statute was evidently intended to require the bill of sale to accompany the delivery of the cattle. Houston v. State, 13 Texas Crim. App. 595.

Art. 1409. (931) (780) **Agent selling without power of attorney.**—Any person who shall, as the agent of another, sell any cattle without first having obtained a power of attorney from the owner, duly authenticated, shall be fined not less than fifty nor more than five hundred dollars. (Sec. 40, Act of Aug. 23, 1876, Acts of 1876, p. 302.)

Art. 1410. (932) (781) **More than one brand or mark.**—Any person who shall, in originally branding or marking cattle, use more than one mark or brand, shall be fined not less than twenty-five nor more than one hundred dollars for each animal so branded or marked. Sec. 41, Act of Aug. 23, 1876, Acts of 1876, p. 302.)

Art. 1411. (933) (782) **Branding or marking outside a pen.**—Any person who shall brand or mark any animal, except in a pen, shall be fined not less than ten nor more than fifty dollars for each animal so branded or marked. (Sec. 42, Act of Aug. 23, 1876, Acts of 1876, p. 302.)

Art. 1412. (934) (783) **Clerk improperly recording brand.**—Any clerk of the county court who shall record any brand when the person having the same recorded fails to designate the part of the animal upon which the same is to be placed, shall be fined not less than ten nor more than fifty dollars. (Sec. 43, Act of Aug. 23, 1876, Acts of 1876, p. 302.)

Art. 1413. (935) (784) **Receiving uninspected animals for shipment.**—If any agent of any railroad, steamship, sailing vessel, or shipping company of any kind, shall receive for shipment any horses or cattle, unless such horses or cattle have been duly inspected according to law, he shall be fined not less than twenty-five nor more than one thousand dollars for each animal so unlawfully shipped. (Act April 10, 1883, Acts of 1883, p. 71.)

Art. 1414. (936) **Counties exempted.**—The counties of Anderson, Austin, Angelina, Bell, Bowie, Brazos, Bastrop, Bosque, Burleson, Brazoria, Burnet, Caldwell, Camp, Calhoun, Cass, Chambers, Cherokee, Collin, Colorado, Cooke, Dallas, Delta, Denton, Ellis, Erath, Fannin, Franklin, Falls, Freestone, Gonzales, Eastland, Stephens, Fayette, Fort Bend, Galveston, Goliad, Grayson, Gregg, Grimes, Hardin, Harrison, Hays, Henderson, Hill, Hood, Hunt, Hopkins, Houston, Jackson, De

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Witt, Jasper, Jefferson, Johnson, Kaufman, Lamar, Lee, Leon, Lampasas, McLennan, Madison, Marion, Montgomery, Montague, Morris, Nacogdoches, Newton, Orange, Panola, Parker, Polk, Palo Pinto, Rains, Red River, Robertson, Rockwall, Rusk, Sabine, San Augustine, San Jacinto, Shackelford, Shelby, Smith, Tarrant, Titus, Trinity, Tyler, Upshur, Van Zandt, Walker, Washington, Wharton, Wise, Wood, Jack, Harris, Clay, Young, Wheeler, Lavaca, Nueces, Bee, Refugio, Limestone, San Patricio, Somervell, Matagorda, Waller, Karnes, Victoria, Milam, Live Oak, Williamson, Liberty, Wichita, Wilbarger, Archer, Hardeman, Childress Hall, Collingsworth, Donley, Gray, Armstrong, Briscoe, Floyd, Randall, Kendall, Comal, Travis, Navarro, Brown, Coryell, Hamilton, Mills, Duval, Comanche, Bailey, Deaf Smith, Dallam, Oldham, Hartley, Hockley, Cochran, and Foard, are hereby exempt from the operation of this law, and the provisions of the same shall in nowise relate or apply to the aforesaid counties; provided that in those counties bordering on the line of the State, except those bordering on Red River, and the Rio Grande, where there is a depot or place for the shipment of cattle, no inspector of hides and animals shall be elected, but one for each of such counties shall be appointed by the Governor, who shall hold office for two years, and until his successor shall be appointed, and said inspector so appointed to take the constitutional oath of office and give the bond now required of inspectors of hides and animals, and such inspector shall receive the same fees now allowed to inspectors of hides and animals, and perform the same duties; provided that such cattle shall not be subject to inspection on board of any railroad, unless the same have been placed on board of such train for the purpose of evading the provisions of this law; and provided, further, that the counties of Limestone, Fayette, Lavaca, Gonzales, Colorado, Bell, Calhoun, Hays, Caldwell, Blanco, Llano, Kendall, Comal, Houston, Austin, Johnson, Hill, Ellis, Jackson, Victoria, De Witt, Freestone, Hamilton, Williamson, Milam, Live Oak, Harris, Bosque, Erath, Hood, Somervell, Liberty, Coryell, Lampasas, Mills, Wichita, Wilbarger, Hardeman, Childress, Hall, Collingsworth, Donley, Gray, Armstrong, Briscoe, Floyd, Randall, Kendall, Fannin, Camp, Delta, Franklin, Hopkins, Hunt and Navarro, shall be exempt from all laws regulating inspection of hides. All laws and parts of laws in conflict with the provisions of this law are hereby repealed. (Act May 11, 1893, Acts 1893, p. 162. Sec. 46, Act of Aug. 23, 1876, Acts of 1876, p. 302, has been amended prior to the Act of May 11, 1893, too often to enumerate here.)

Art. 1415. (937) **Counties placed under the law.**—The counties of Wichita, Wilbarger, Hardeman, Childress, Donley, Armstrong, Carson, Potter, Oldham, Hartley, Dallam, Gray, Hemphill, Roberts, Lipscomb, Callahan, Taylor, Nolan, Mitchell, Howard, Martin and Karnes are placed under the operation of the inspection laws now in force and which may be in force under the provisions of this law.

(This article is inaccurate on the face of it.)

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Sec. 2592. **Constitutionality of stock laws.**—The Legislature has authority, under the Constitution, to pass general laws, such as the above, for the regulation of live-stock and the protection of stock raisers in the stock-raising portion of the State, and such laws are general laws although exempting many counties from their provisions because the Constitution on this subject authorizes a designation as well as a classification, and thus furnishes an exception to the general rule. Lastro v. State, 3 Texas Crim. App. 363.

CHAPTER XVII

EMBEZZLEMENT

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Article 1416. (938) (786) **Embezzlement.**—If any officer, agent, clerk or attorney at law or in fact, of any incorporated company or institution, or any clerk, agent, attorney at law or in fact, servant or employe of any private person, copartnership or joint stock association, or any consignee or bailee of money or property, shall embezzle, fraudulently misapply or convert to his own use, without the consent of his principal or employer, any money or property of such principal or

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employer which may have come into his possession or be under his care by virtue of such office, agency or employment, he shall be punished in the same manner as if he had committed a theft of such money or property. (O. C. 771, amended Acts 1858, p. 182, amended Acts 1876, p. 9.)

Sec. 2593. **Statute construed.**—The fraudulent conversion may be consummated in any manner capable of effecting it, and its commission is a question of fact and not of pleading when the indictment charges that the defendant did embezzle, fraudulently misapply and convert to his own use the property intrusted to him. Leonard v. State, 7 Texas Crim. App. 444. Cole v. State, 16 Texas Crim. App. 470. Golden v. State, 22 Texas Crim. App. 15; 2 S. W. 531. Epperson v. State, 22 Texas Crim. App. 698; 3 S. W. 789. Hamer v. State, 60 Texas Crim. Rep. 341; 131 S. W. 815. Pope v. State, 170 S. W. 152.

There must be a fraudulent intent connected with the conversion of the money or property in order to constitute embezzlement. Stallings v. State, 29 Texas Crim. App. 222; 15 S. W. 716. Eilers v. State, 34 Texas Crim. Rep. 345; 30 S. W. 811. Ximenez v. State, 54 S. W. 588. Bryant v. State, 57 Texas Crim. Rep. 267; 122 S. W. 543. Mortimore v. State, 60 Texas Crim. Rep. 69; 130 S. W. 1004. Maddox v. State, 156 S. W. 206.

The mere receipt of the money or property does not constitute the gist of the offense of embezzlement; being entitled to receive the money or property it is the fraudulent conversion thereof that is the offense. Lawshe v. State, 57 Texas Crim. Rep. 32; 121 S. W. 867.

To constitute embezzlement, it is not necessary that a demand was made on the defendant for the money or property intrusted to him. Leonard v. State, 7 Texas Crim. App. 417.

It is the breach of a trust reposed in the agent or employe by his principal or employer which is the gist of the offense of embezzlement. State v. Johnson, 21 Texas 775. Brady v. State, 21 Texas Crim. App. 660; 1 S. W. 462. Bryant v. State, 57 Texas Crim. Rep. 267; 122 S. W. 543. Clark v. State, 61 Texas Crim. Rep. 539; 135 S. W. 575.

To constitute embezzlement there must be an intent to permanently appropriate the property. A mere temporary appropriation or use of property in the hands of one intrusted with it, without the intent to permanently appropriate it, is not embezzlement. Ximenez v. State, 54 S. W. 588.

The law does not as between the employers and the employee regard the former class with such peculiar favor as to provide a criminal remedy for the enforcement of their contracts and the collection of their debts. Webb v. State, 8 Texas Crim. App. 310. Stallings v. State, 29 Texas Crim. App. 222; 15 S. W. 716. Loving v. State, 44 Texas Crim. Rep. 375; 71 S. W. 277. Maddox v. State, 156 S. W. 206.

If defendant did not come within any of the classes of persons named in the statute at the time of the conversion of the property intrusted to him he is not guilty of embezzlement. State v. McLane, 43 Texas 404.

A conviction for embezzlement will not be sustained under an indictment for theft. Huntsman v. State, 12 Texas Crim. App. 619. Lott v. State, 24 Texas Crim. App. 725; 14 S. W. 277. Cody v. State, 31 Texas Crim. Rep. 185; 20 S. W. 398.

The fact that defendant might have been convicted of theft does not militate against the fact that he might, under the same circumstances, be guilty of embezzlement. Golden v. State, 22 Texas Crim. App. 14; 2 S. W. 531. Landrum v. State, 166 S. W. 726.

The fact that the employer is protected from loss by an indemnity bond does not relieve the employee from liability to prosecution for embezzlement. Smith v. State, 34 Texas Crim. Rep. 272; 30 S. W. 236.

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The defendant is not entitled to question the right of a corporation to own the kind of property embezzled. Leonard v. State, 7 Texas Crim. App. 441.

Sec. 2594. **Venue.**—The offense of embezzlement may be prosecuted in any county in which the offender may have taken or received the property or through or into which he may have undertaken to transport it. Cohen v. State, 20 Texas Crim. App. 228. Brown v. State, 23 Texas Crim. App. 217; 4 S. W. 588. Burk v. State, 50 Texas Crim. Rep. 187; 95 S. W. 1064. O'Marrow v. State, 147 S. W. 252. Poteet v. State, 153 S. W. 863.

A prosecution for embezzlement may be commenced and carried on in the county where the money or property alleged to have been embezzled was received by the defendant. Cole v. State, 16 Texas Crim. App. 469. Cohen v. State, 20 Texas Crim. App. 228. O'Marrow v. State, 147 S. W. 252. Poteet v. State, 153 S. W. 863.

Where defendant carried money or property embezzled in one county into another county he may be prosecuted for such embezzlement in either county. Reed v. State, 16 Texas Crim. App. 586. Brown v. State, 23 Texas Crim. App. 217; 4 S. W. 588.

Where defendant's employer shipped some trunks containing samples from Galveston county to another county and handed defendant the trunk checks in Galveston county, this was a delivery to defendant of the trunks in Galveston county and the venue was properly laid in that county although the embezzlement of the property occurred in another county. Cohen v. State, 20 Texas Crim. App. 228.

Any county through which the embezzled property was shipped by defendant has venue to try defendant for the embezzlement, and it is not necessary, before venue attaches, that defendant accompany the shipment. Burk v. State, 50 Texas Crim. Rep. 187; 95 S. W. 1064.

Where the property is received in one county and embezzled in another defendant may be prosecuted in either county for the embezzlement of the property, and where the count relied on is for embezzlement of the property and not for the proceeds of same, the prosecution may be had in the county where the property was received by defendant although it was sold and the proceeds thereof received in another county. Cole v. State, 16 Texas Crim. App. 469.

Sec. 2595. **Indictments held good.**—Indictment for embezzlement by bailee held good. Dowdy v. State, 64 S. W. 253.

Indictments for embezzlement by agent of a private person held good. Templeton v. State, 57 S. W. 831. Hamer v. State, 60 Texas Crim. Rep. 341; 131 S. W. 815. Adams v. State, 172 S. W. 220.

Judge White's form is good for embezzlement. Golden v. State, 22 Texas Crim. App. 14; 2 S. W. 531. Garner v. State, 51 Texas Crim. Rep. 579; 105 S. W. 187.

Judge Willson's form is good for embezzlement. Mortimore v. State, 60 Texas Crim. Rep. 69; 130 S. W. 1004.

Sec. 2596. **Allegation of ownership.**—The rules as to alleging ownership in cases of theft apply also in cases of embezzlement. Leach v. State, 46 Texas Crim. Rep. 509; 81 S. W. 733. Manovitch v. State, 50 Texas Crim. Rep. 263; 96 S. W. 1.

In an indictment for embezzlement ownership may be alleged in a special owner as in cases of theft. Riley v. State, 32 Texas 766. Leach v. State, 46 Texas Crim. Rep. 509; 81 S. W. 733. Manovitch v. State, 50 Texas Crim. Rep. 263; 96 S. W. 1.

It is not error to charge the jury that the ownership is properly alleged. Manovitch v. State, 50 Texas Crim. Rep. 263; 96 S. W. 1.

An indictment for embezzlement against an agent of an express company may allege the ownership of the money embezzled in the express company, it being a special owner. Riley v. State, 32 Texas 766.

Where defendant was a hotel clerk, and as such clerk received money from a guest for safe keeping and then fled with the money, ownership in a prosecution for

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embezzlement is properly alleged in the proprietor of the hotel. Manovitch v. State, 50 Texas Crim. Rep. 263; 96 S. W. 1 (or defendant could have been prosecuted for theft by bailee and ownership alleged in the guest. Butler v. State, 49 Texas Crim. Rep. 161; 93 S. W. 743).

Sec. 2597. **Alleging a corporation.**—Giving the name of the corporation and alleging that it was "an incorporated company" is a sufficient allegation that it was a corporation. Leonard v. State, 7 Texas Crim. App. 434. Stallings v. State, 29 Texas Crim. App. 222; 15 S. W. 716. Smith v. State, 34 Texas Crim. Rep. 271; 30 S. W. 236. Garner v. State, 51 Texas Crim. Rep. 579; 105 S. W. 187.

Where the name of the owner as alleged refers, in its usual acceptation, to a person, it is not necessary to allege in terms that such owner is a private person but such an allegation will only support proof that the owner was a private person. Sprulock v. State, 45 Texas Crim. Rep. 284; 77 S. W. 447.

If the allegation is that defendant was the agent of a certain literary society, the indictment is bad if there is no allegation showing whether such society was a corporation, joint stock company or copartnership. Reese v. State, 55 Texas Crim. Rep. 429; 116 S. W. 1147.

An indictment for embezzlement by an officer of a city properly alleges that the city was incorporated, but when it is drawn under the statute as to misapplying city funds which does not use the word "incorporated" in it is not necessary to allege that the city was incorporated. Steiner v. State, 33 Texas Crim. Rep. 293; 26 S. W. 214.

Sec. 2598. **Allegation of want of consent.**—An indictment for embezzlement is bad if there is no allegation of want of consent of the principal or employer. State v. Longworth, 41 Texas 163. Turner v. State, 32 S. W. 767.

Where property is embezzled by an agent of the express company, an indictment for embezzlement should allege ownership in and want of consent of the express company. Griffin v. State, 4 Texas Crim. App. 416. Turner v. State, 32 S. W. 767.

Sec. 2599. **Description of property embezzled.**—An indictment is bad for duplicity if it is therein alleged in the same count the embezzlement of a horse (a felony) and the embezzlement of a gun (a misdemeanor). Heineman v. State, 22 Texas Crim. App. 44; 2 S. W. 619.

A general description of the property embezzled is sufficient. Taylor v. State, 29 Texas Crim. App. 466; 16 S. W. 302.

The property embezzled is sufficiently described where it is alleged as "certain money, viz., $2000 of the value of $2000." Taylor v. State, 29 Texas Crim. App. 499; 16 S. W. 302.

The property embezzled is sufficiently described where it is alleged to be "sixty four dollars in money," or any other definite sum of money stated in either words or figures. Taylor v. State, 29 Texas Crim. App. 499; 16 S. W. 302. Smith v. State, 34 Texas Crim. Rep. 271; 30 S. W. 236. Templeton v. State, 57 S. W. 831. Dowdy v. State, 64 S. W. 253. Hamer v. State, 60 Texas Crim. Rep. 341; 131 S. W. 814.

"One vendor's lien note for the paymeut of $8,000 and of the value of $8,000" is a sufficient description of the property embezzled. Pye v. State, 171 S. W. 741.

Sec. 2600. **Allegation of value.**—When a certain sum stated in either words or figures is alleged to be "money" it is not necessary to allege its value; property alleged to be "money" will be taken to mean the money of the United States and the courts take judicial notice of its value. Hamer v. State, 60 Texas Crim. Rep. 341; 131 S. W. 814.

If the punishment for embezzlement depends upon the value of the property embezzled it is necessary to allege its value. The rules as to alleging value in a case of theft are applicable also in a case of embezzlement. Heineman v. State, 22 Texas Crim. App. 44; 2 S. W. 619.

Sec. 2601. **Unnecessary allegations.**—An indictment for embezzlement need not contain an allegation that the property was taken with the intent to deprive the

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owner of the value thereof and to appropriate it to the use and benefit of defendant. Leonard v. State, 7 Texas Crim. App. 435.

If it is alleged that the property had come into the possession of the defendant by virtue of his agency, it is not necessary to allege that it was in his possession when he embezzled it. Taylor v. State, 29 Texas Crim. App. 501; 16 S. W. 302.

It is not necessary to allege in the indictment that defendant gave a receipt for the money intrusted to him. Dowdy v. State, 64 S. W. 253.

It is not necessary to allege the names of the various persons from whom defendant received the money where he was an officer of a corporation. Malcolmson v. State, 25 Texas Crim. App. 289; 8 S. W. 468.

An indictment for embezzlement by an officer of a city need not set out the ordinance creating such office. Steiner v. State, 33 Texas Crim. Rep. 293; 26 S. W. 214.

Sec. 2602. **Allegation of possession.**—An indictment for embezzlement against a clerk of a Lodge is bad if it fails to directly allege that it was the duty of the clerk to receive the money of the Lodge. State v. Johnson, 21 Texas 775.

An indictment for embezzlement by a bailee is bad if it fails to directly allege that the property was in the possession of defendant by virtue of the bailment. Gaddy v. State, 8 Texas Crim. App. 128.

An indictment for embezzlement by a clerk is bad if it fails to allege directly that the defendant had the possession of the money or property by virtue of his clerkship. State v. Johnson, 21 Texas 775.

An allegation that defendant was a clerk of a firm and as such clerk was intrusted to collect the money of the firm and that as such clerk he did receive and embezzle the money of the firm sufficiently shows that the money was in his possession by virtue of his clerkship. Wise v. State, 41 Texas 139.

An indictment for embezzlement is not bad for failure to allege in terms that the property embezzled was in the possession of defendant by virtue of his employment where the facts showing the relation of the parties and the contract between them are alleged with such certainty as to be equivalent to such allegation. Evans v. State, 40 Texas Crim. Rep. 54; 48 S. W. 194.

Sec. 2603. **Officer.**—Where defendant is alleged to have been an officer in a Lodge, the proof must show that he occupied the position in the Lodge which authorized him by virtue of his office to receive the money of the Lodge. Loving v. State, 44 Texas Crim. Rep. 375; 71 S. W. 277.

Sec. 2604. **Attorney at law.**—Prior to the amendment of 1876, the statute on embezzlement did not embrace embezzlement by an attorney at law as such. State v. McLane, 43 Texas 404, but the statute since said amendment of 1876 includes an attorney at law and an attorney in fact. Griffin v. State, 4 Texas Crim. App. 390. Farmer v. State, 34 S. W. 620.

Sec. 2605. **Agent.**—An "agent" is a person in the employment of another for a specific purpose. An express messenger may be an agent of the company although he is called a "messenger." Lamb v. State, 49 Texas Crim. Rep. 442; 93 S. W. 734.

In order to sustain a prosecution for embezzlement of money against an agent of a private person or corporation, four distinct propositions of fact must be established in evidence beyond a reasonable doubt. These are as follows: 1. That the defendant was the agent of the person or corporation as alleged, and by the terms of his employment was charged with the duty of receiving the money of his principal. 2. That he did so receive money belonging to his principal. 3. That he received it in the course of his employment. 4. That he embezzled, misapplied, or converted it to his own use. Webb v. State, 8 Texas Crim. App. 310. Taylor v. State, 29 Texas Crim. App. 466; 16 S. W. 302.

One who is not an agent may become a principal in embezzlement by aiding an agent to embezzle the money or property of his employer. Thomas v. State, 45 Texas Crim. Rep. 83; 73 S. W. 1045.

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Where defendant acting together and with the consent of the special owner of the property fraudulently appropriated it, he was guilty of embezzlement of the property from the real owner, it being alleged that he aided and abetted said special owner who was the agent of the real owner. Bismark v. State, 45 Texas Crim. Rep. 54; 73 S. W. 965. Burk v. State, 50 Texas Crim. Rep. 185; 95 S. W. 1064.

The true test of whether the husband was the agent of his wife and authorized to intrust defendant with her property is, would a purchaser have been protected where the sale was confessedly made in accordance with the terms and authority given. Henderson v. State, 55 Texas Crim. Rep. 643; 117 S. W. 825.

Where defendant was authorized to take the separate property of his friend's wife to sell and such authority was given by the husband in the presence of the wife and the property was taken away with her knowledge and consent, the evidence is sufficient to show that it was under the care of defendant by virtue of his agency and sufficient to sustain the allegation that defendant was the agent of the husband. Henderson v. State, 55 Texas Crim. Rep. 643; 117 S. W. 825.

Where the owner of land against which there was a vendor's lien was handed the entire purchase price with the understanding that he would take the money and pay off such lien, the money became a trust fund and if, instead of paying off the lien, defendant converted the money given him for that purpose he was guilty of embezzlement. Cowan v. State, 49 Texas Crim. Rep. 468; 93 S. W. 553.

Where defendant is intrusted with property and sells it as the property of his principal by retaining a mortgage on it in the name of the real owner, or without any pretense that the property was his own, he is not guilty of embezzling the property itself. McCrary v. State, 51 Texas Crim. Rep. 505; 103 S. W. 924.

Although defendant had authority to sell the property, yet if he sold it with the fraudulent intent at the time of such sale to appropriate the proceeds thereof, he is guilty of the embezzlement of the property itself. Leonard v. State, 7 Texas Crim. App. 444. Epperson v. State, 22 Texas Crim. App. 694; 3 S. W. 789. Henderson v. State, 55 Texas Crim. Rep. 644; 117 S. W. 825.

If an agent of an organ company intrusted defendant with an organ to sell and defendant embezzled it, it seems that defendant could not be convicted for embezzling property of greater value than the price agreed on between said agent and the organ company. McCrary v. State, 51 Texas Crim. Rep. 496; 103 S. W. 926. McCrary v. State, 51 Texas Crim. Rep. 505; 103 S. W. 924.

Where the property was received by authority, either direct, or such as might be reasonably implied from the situation of the parties and their course of dealing, having in view their position and attitude and the confidential nature of their relations, in such case such property is in the care of such agent by virtue of his office, agency or employment. Smith v. State, 53 Texas Crim. Rep. 121; 109 S. W. 118. Adams v. State, 172 S. W. 219.

Two school trustees may make a third trustee their agent so as to make him liable as a private person for embezzling school money. Adams v. State, 172 S. W. 219.

Sec. 2606. **Partnership property.**—One intrusted with money to buy property which when bought would be partnership property is guilty of embezzlement if he fraudulently converts such money before buying the property. Napoleon v. State, 3 Texas Crim. App. 522. Ray v. State, 48 Texas Crim. Rep. 124; 86 S. W. 761. O'Marrow v. State, 147 S. W. 252.

Where a contemplated partnership was never consummated, defendant doing nothing in the performance of the conditional agreement, his fraudulent conversion of the money advanced to him before the conditions of the executory contract were fulfilled was embezzlement. Napoleon v. State, 3 Texas Crim. App. 522. Ray v. State, 48 Texas Crim. Rep. 124; 86 S. W. 761. O'Marrow v. State, 147 S. W. 252.

If defendant was intrusted with money to buy cattle which when bought would be partnership property, defendant would not be guilty of embezzling such cattle from his partner. Ray v. State, 48 Texas Crim. Rep. 122; 86 S. W. 761.

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Where defendant was intrusted with money to buy cattle or other property, the profits on which were to be divided between the alleged injured party and defendant, and the money was embezzled before the cattle or other property was bought, it was held to be not such a bailment as is included in the embezzlement statute, the court in these cases holding the defendant to be a partner. Dancy v. State, 41 Texas Crim. Rep. 299; 53 S. W. 886. Manuel v. State, 44 Texas Crim. Rep. 433; 71 S. W. 973. (Under the circumstances of these cases defendant would not be a partner but an agent, but the court follows the authorities in holding that defendant was not a bailee under the embezzlement statute.)

Where one furnished money to defendant under an agreement that defendant was to use it in a designated business and receive a part of the net profits as pay for his services, defendant having no interest in the property to be so purchased and his part of the profits being in the nature of a contingent salary, defendant was an agent of and not a partner of the party furnishing such money. Butler v. State, 54 Texas Crim. Rep. 44; 111 S. W. 146.

A partner cannot be guilty of embezzlement of partnership funds, because such partner combines in himself at once the character of principal and agent. The partners have a community of property and interest in the partnership effects. Napoleon v. State, 3 Texas Crim. App. 522. Ray v. State, 48 Texas Crim. Rep. 122; 86 S. W. 761.

Where defendant was intrusted with an organ to sell, the agent of the real owner furnishing team and board for defendant while in town and defendant paying the expenses when on trips and were to share equally in the profits, they became partners and defendant would not be guilty of embezzling the organ from his partner. McCrary v. State, 51 Texas Crim. App. 496; 103 S. W. 926. McCrary v. State, 51 Texas Crim. Rep. 502; 103 S. W. 924.

Although the property which defendant embezzled was fraudulently delivered to him by a partner of the employer, such partner would not be an accomplice in the embezzlement because he would have a right to dispose of the property. Aldrich v. State, 29 Texas Crim. App. 396; 16 S. W. 251.

Sec. 2607. **Bailee.**—A fraudulent conversion of personal property by a bailee will constitute embezzlement when a fiduciary relation exists between the parties and when the bailment is exclusively for the benefit of the bailor, as where money or other personal property is deposited for safe keeping. Johnson v. State, 159 S. W. 849.

The term "bailee" as used in the embezzlement statute does not include a bailee for hire of personal property; it only includes such bailments as are exclusively for the benefit of the bailor. Reed v. State, 16 Texas Crim. App. 590. Johnson v. State, 159 S. W. 849.

A bailment is a delivery of personal property to another for some purpose upon a contract, either express or implied, that such purpose will be carried out. Malz v. State, 36 Texas Crim. Rep. 451; 37 S. W. 748.

(To constitute the delivery of money or property a bailment, the delivery must be in trust for some special object or purpose, and upon a contract, either express or implied, to conform to the object or purpose of the trust, and the bailor must expect the bailee to return the identical money or property to him when the purpose or object of the trust has been accomplished.)

If defendant obtained the property wrongfully by a false pretext he was not a bailee and would not be guilty of embezzlement of such property. Johnson v. State, 46 Texas Crim. Rep. 415; 80 S. W. 621.

Where defendant was intrusted with money to pay to another, it was held to be an implied bailment. Goodwyn v. State, 64 S. W. 251. (Defendant had the care of this money as an agent and not as a bailee, because the injured party did not expect to get his money back when he delivered it.)

Where the indictment alleges a direct contract of bailment between the defendant and the alleged owner of the property, it is not necessary to allege the facts

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showing how defendant came to be the bailee, and under such direct allegation proof of the facts showing the nature of defendant's business and the circumstances which led to his being intrusted with the property is admissible. Goodwyn v. State, 64 S. W. 251. Butler v. State, 49 Texas Crim. Rep. 160; 93 S. W. 743.

The fact that defendant is employed by another does not prevent his being a bailee. Butler v. State, 49 Texas Crim. Rep. 161; 93 S. W. 743.

The fact that the acts may constitute theft by a bailee affords no reason when a fidicuary relation is created and the bailment is exclusively for the benefit of the bailor why it would not also constitute embezzlement. Wilson v. State, 47 Texas Crim. Rep. 160; 82 S. W. 651. Johnson v. State, 159 S. W. 849.

When defendant is alleged to be a bailee, the proof must support that allegation and it is not sufficient to show that a co-defendant, with whom defendant conspired to embezzle the property, was the bailee. Price v. State, 40 S. W. 596.

Where defendant was intrusted with a horse to ride to town and get some medicine and fraudulently converted the horse, it was a bailment under the embezzlement statute, his custody being that of a mere servant. Wilson v. State, 47 Texas Crim. Rep. 160; 82 S. W. 651.

Sec. 2608. **Date of offense.**—The State is not bound by the date alleged and may prove that the defendant embezzled the property alleged on any day prior to the presentment of the indictment which is within the period of limitation. Hamer v. State, 60 Texas Crim. Rep. 341; 131 S. W. 813. Irby v. State, 155 S. W. 543.

Reference may be had to another count of the indictment to determine the date of the alleged offense even if the other count has been either dismissed or abandoned. Manovitch v. State, 50 Texas Crim. Rep. 263; 96 S. W. 1.

Sec. 2609. **Evidence.**—The fact that books of a certain office do not contain certain entries may be shown by a witness who is familiar with the business of that office and who has examined the books with a view of ascertaining the facts. Strong v. State, 18 Texas Crim. App. 24.

Parol testimony is admissible to explain an apparent variance between the allegation and proof in relation to a written instrument offered in evidence. Leonard v. State, 7 Texas Crim. App. 437.

Where defendant was intrusted with money to deposit in a bank and gave a receipt for the money which recited that it was payable on demand, oral testimony is admissible to explain the receipt, it not being contractual. Stephens v. State, 49 Texas Crim. Rep. 491; 93 S. W. 545. Hamer v. State, 60 Texas Crim. Rep. 341; 131 S. W. 815.

The State is not required to prove a demand for the return of the property intrusted to defendant. Leonard v. State, 7 Texas Crim. App. 447.

The State may prove that any or all of the property alleged was embezzled, the rule being the same as in cases of robbery or theft. Goodwyn v. State, 64 S. W. 251.

Descriptive averments of the money or property alleged to have been embezzled must be proved as laid. Gerard v. State, 10 Texas Crim. App. 692. Poston v. State, 58 Texas Crim. Rep. 583; 126 S. W. 1148. Robinson v. State, 60 Texas Crim. Rep. 592; 132 S. W. 944.

An allegation that "money" was embezzled, being descriptive, must be proved as laid. Stallings v. State, 29 Texas Crim. App. 222; 15 S. W. 716. Lieske v. State, 60 Texas Crim. Rep. 276; 131 S. W. 1126.

Where the embezzlement of a check is alleged there is no variance because the check when produced at the trial is ornamented or incumbered with stamps, monograms, indorsements or writings which are not a part of the check itself or which were placed thereon after the conversion thereof. Irby v. State, 155 S. W. 543.

When the embezzlement of a check is alleged, the State may prove that the drawer had money on deposit in the bank so as to prove the value of the check. Nesbitt v. State, 144 S. W. 945.

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Where the only proof of value is the statement of a witness that the value was about as alleged in the indictment, it is sufficient, as the court will take judicial notice of the pleadings in the case. Harris v. State, 21 Texas Crim. App. 484; 2 S. W. 830.

There is no error in proving by a certificate of the Comptroller that a bank was authorized to do a banking business. Leonard v. State, 7 Texas Crim. App. 436.

Permitting leading questions to be propounded by State's counsel upon direct examination will require a reversal when such questions are not authorized and bear upon a vital issue in the case. Goodsoe v. State, 52 Texas Crim. Rep. 627; 108 S. W. 388.

Testimony that after the embezzlement the parties had agreed upon a settlement of the matter is immaterial as a settlement between individuals made at such time will not affect a criminal prosecution. Dancy v. State, 41 Texas Crim. Rep. 296; 53 S. W. 635. Nesbitt v. State, 155 S. W. 203.

When there is a conflict in the testimony as to whom defendant received the money from, proof of conversations of parties in the absence of defendant is not admissible to prove that fact. Feinstein v. State, 73 S. W. 1052.

Want of consent in a corporation may be proven by testimony of the agent in the actual care, control and management of the office from which the property was received by the defendant, and especially when want of consent is not made a contested issue. Smith v. State, 34 Texas Crim. Rep. 271; 30 S. W. 236.

Sec. 2610. **Proof of a corporation.**—In a criminal case when the injured party is alleged to be a corporation, proof that it was a corporation may be made by oral testimony. Fleener v. State, 23 S. W. 1. Whitman v. Com. 121 Mass. 361. Lowe v. State, 46 Ind. 305. Jaynes v. State, 78 N. C. 504. *Contra:* Ragazine v. State, 47 Texas Crim. Rep. 48; 84 S. W. 832 (*dicta*).

(In a civil case the allegation of a corporation must be denied under oath, but the civil statute does not apply to a criminal case. The criminal statutes prescribe what pleas must be verified.)

In a criminal case when the injured party is alleged to be a corporation, the proof, to be sufficient, must support such descriptive allegation. Wisdom v. State, 49 Texas Crim. Rep. 534; 95 S. W. 505. Tucker v. State, 59 Texas Crim. Rep. 291; 128 S. W. 617.

Sec. 2611. **Other offenses and other transactions.**—Testimony as to other distinct and independent offenses is not admissible against defendant when introduced as original evidence and where it does not tend to show identity, system, or intent, when some of these matters are in issue, or serve to develop the *res gestæ* or tend to defeat the defensive theory. A defendant in a criminal case should be tried on the merits of the case. Felsenthal v. State, 30 Texas Crim. App. 676; 18 S. W. 644. Alford v. State, 52 Texas Crim. Rep. 623; 108 S. W. 364. Nesbitt v. State, 144 S. W. 944.

It is error to permit the State to prove that at the time of his arrest defendant was trying to enter a box-car, such attempted burglary having nothing to do with the case on trial. Alford v. State, 52 Texas Crim. Rep. 623; 108 S. W. 364.

It is error to permit the State to introduce as original evidence proof that defendant had been convicted of another offense. Felsenthal v. State, 30 Texas Crim. App. 676; 18 S. W. 644.

On a trial for embezzlement of money, it is error to permit the State to offer proof of a fraudulent land transaction in no way connected with the embezzlement of the money. Malcolmson v. State, 25 Texas Crim. App. 290; 8 S. W. 468.

It is error to admit as original evidence proof of fraudulent transactions of defendant or proof of matters which could only serve to prejudice the jury against defendant and which is in no way connected with the alleged embezzlement for which defendant is being tried. Malcolmson v. State, 25 Texas Crim. App. 290; 8 S. W. 468. Nesbitt v. State, 144 S. W. 944.

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Where defendant induced his relative to sell her land and intrust him with the proceeds, evidence of the sale of the land and of his participation therein is admissible. Jackson v. State, 44 Texas Crim. Rep. 261; 70 S. W. 760.

Testimony that the alleged injured party had intrusted other money to defendant at different times is admissible where the whole is a part of a system and such testimony is necessary to develop the *res gestæ*. Leach v. State, 46 Texas Crim. Rep. 510; 81 S. W. 733.

On a trial for embezzlement of a horse which defendant claims he had authority to sell, the State may show that he also sold some notes without authority if the horse and the notes were taken at the same time in payment for the property of the principal. Smith v. State, 52 Texas Crim. Rep. 527; 107 S. W. 844.

Proof of other offenses is admissible if such proof is a part of the *res gestæ* of the alleged offense for which defendant is being tried, or if it tends to show intent when intent is an issue, or serves to prove identity when identity is an issue, or when it is sought to show the guilt of defendant by circumstantial evidence and such proof of another offense connects or tends to connect the defendant with the alleged offense for which he is being tried, or when it tends to defeat the defensive theory. Leonard v. State, 7 Texas Crim. App. 446. Gallardo v. State, 40 S. W. 974. Dancy v. State, 41 Texas Crim. Rep. 293; 53 S. W. 635. Leach v. State, 46 Texas Crim. Rep. 510; 81 S. W. 733. Smith v. State, 52 Texas Crim. Rep. 527; 107 S. W. 844.

Sec. 2612. **Convictions sustained.**—Leonard v. State, 7 Texas Crim. App. 417 (bailee of corporation). Cole v. State, 16 Texas Crim. App. 461 (intrusted with goods to be sold on commission). Golden v. State, 22 Texas Crim. App. 1; 2 S. W. 531 (intrusted with money to deposit in bank). Harris v. State, 34 S. W. 922 (pawned property). Brumley v. State, 49 Texas Crim. Rep. 523; 95 S. W. 503 (defendant was a party to a pretended robbery). Schweir v. State, 50 Texas Crim. Rep. 119; 94 S. W. 1049 (money collected). Garner v. State, 52 Texas Crim. Rep. 578; 105 S. W. 187 (money intrusted to pay freight charges). Hamer v. State, 60 Texas Crim. Rep. 341; 131 S. W. 813 (money intrusted to loan). O'Marrow v. State, 147 S. W. 252 (intrusted with money to buy property). Pope v. State, 158 S. W. 527 (goods consigned). Landrum v. State, 166 S. W. 726 (intrusted with stock). Pope v. State, 170 S. W. 152 (of employers' money).

A conviction for embezzlement will be sustained where defendant was intrusted with money or property to be disposed of in a particular way and the proof shows he did not do that and defendant fails to show an honest disposition thereof. Riley v. State, 32 Texas 763. Bridgers v. State, 8 Texas Crim. App. 147. Evans v. State, 40 Texas Crim. Rep. 58; 48 S. W. 194. Hamer v. State, 60 Texas Crim. Rep. 341; 131 S. W. 813.

When a trust fund is received and the execution of the trust is peculiarly within the knowledge of the trustee, the burden is cast on him to account for the trust fund. Evans v. State, 40 Texas Crim. Rep. 58; 48 S. W. 194. Jackson v. State, 44 Texas Crim. Rep. 265; 70 S. W. 760.

When the jury have solved the issues presented in the testimony under a fair and proper charge of the court and have found defendant guilty of the embezzlement as alleged, and the verdict has been approved by the trial court whose duty it is to set it aside if not satisfied from the evidence that the defendant is guilty as charged, and there is sufficient evidence in the record, if believed, to sustain the verdict, it will not be disturbed on the facts on appeal unless clearly wrong. Templeton v. State, 57 S. W. 831. Brumley v. State, 49 Texas Crim. Rep. 523; 95 S. W. 503. Pope v. State, 158 S. W. 527.

Where defendant was intrusted with money to deposit in a bank, it is immaterial whether the deposit in his own name or his withdrawal of it be treated as the conversion. Stephens v. State, 49 Texas Crim. Rep. 492; 93 S. W. 545. Hamer v. State, 60 Texas Crim. Rep. 341; 131 S. W. 813.

The fact that defendant had executed an indemnity bond to his employer does not authorize him to embezzle the money of his employer. Smith v. State, 34 Texas Crim. Rep. 265; 30 S. W. 236.

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An admission by defendant that he had taken and used the money of a corporation and had lost it gambling is tantamount to an admission that he had converted it without the consent of the corporation. Smith v. State, 34 Texas Crim. Rep. 265; 30 S. W. 236.

When want of consent is not a controverted issue, proof of want of consent of the agent in actual and exclusive care, control and management of the office from which the property in question was taken is sufficient to show want of consent of the corporation. Smith v. State, 34 Texas Crim. Rep. 271; 30 S. W. 236.

Where defendant sold personal property intrusted to him with the fraudulent intent at the time to appropriate the proceeds to his own use, he is guilty of embezzlement of such property although he had authority to sell it. Leonard v. State, 7 Texas Crim. App. 444. Cole v. State, 16 Texas Crim. App. 461. Epperson v. State, 22 Texas Crim. App. 694; 3 S. W. 789. Henderson v. State, 55 Texas Crim. Rep. 644; 117 S. W. 825.

Where defendant was intrusted with a horse for a specific and temporary purpose, but went in a different direction and was found trying to sell it, the facts showed a conversion. Wilson v. State, 47 Texas Crim. Rep. 160; 82 S. W. 651.

An allegation that money was embezzled is supported by proof that defendant, who had authority to sign the name of his employer to checks drawn to pay any debt due by his employer, drew a check for a larger sum than was due and fraudulently converted the money of his employer on deposit in the bank by having exchange for the excess drawn in favor of one not his employer and which he subsequently cashed. Pope v. State, 170 S. W. 152.

Where defendant was intrusted with a check with authority to loan out the money when the check was cashed, an allegation of embezzlement of money would be sustained because the defendant had authority to cash the check. Leach v. State, 46 Texas Crim. Rep. 511; 81 S. W. 733.

Where defendant was intrusted with a horse and some other property to trade for another horse, but succeeded in making an "even trade" and concealed that fact from his principal and converted the other property, he was guilty of embezzling the "boot." O'Morrow v. State, 44 Texas Crim. Rep. 221; 70 S. W. 209.

Sec. 2613. **Evidence insufficient.**—A conviction for embezzlement will not be sustained where the evidence fails to show a fraudulent intent. Stallings v. State, 29 Texas Crim. App. 222; 15 S. W. 716. Eilers v. State, 34 Texas Crim. Rep. 345; 30 S. W. 811. Ximenez v. State, 54 S. W. 588. Bryant v. State, 57 Texas Crim. Rep. 267; 122 S. W. 543. Mortimore v. State, 60 Texas Crim. Rep. 69; 130 S. W. 1004. Maddox v. State, 156 S. W. 206.

When the State's testimony fails to make out a case, the failure of defendant to introduce any testimony will not supply the defects in the State's case. Strong v. State, 18 Texas Crim. App. 25.

A mere breach of contract does not constitute embezzlement. Williams v. State, 25 Texas Crim. App. 733; 8 S. W. 935.

Where defendant without any authority from his employer collected a debt due his employer and appropriated the money, if the debt still existed he would not be guilty of embezzlement because the money did not come into his hands by virtue of his employment. Brady v. State, 21 Texas Crim. App. 660; 1 S. W. 462.

A conviction for embezzlement will not be sustained when the proof shows that the money alleged to have been misapplied was an advance payment made to the defendant on a contract and not money of another intrusted to him. Keeller v. State, 4 Texas Crim. App. 527.

Where defendant took a horse with the understanding that he was either to return him or pay for him no fiduciary relation was created. Bryant v. State, 57 Texas Crim. Rep. 267; 122 S. W. 543.

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Where defendant put a horse in a pasture once bringing him to town to return to the owner and making no other claim to him, the evidence is insufficient to show a conversion. Bryant v. State, 57 Texas Crim. Rep. 267; 122 S. W. 543.

An appropriation for mere temporary use without the intent to permanently appropriate the property is not a conversion. Ximenez v. State, 54 S. W. 588. Pye v. State, 171 S. W. 744.

Where defendant was intrusted with money to send to the State Treasurer, the State did not discharge its burden of proving that the money was not disposed of in the particular way alleged where the Treasurer was not produced as a witness and the only proof on that subject was that the books showed no such entry. Strong v. State, 18 Texas Crim. App. 25.

Where defendant at no time concealed or attempted to conceal any of his transactions and contended that he had not been given credits to which he was entitled and that upon a fair settlement he would not be indebted to the alleged injured party, the controversy should be settled in a civil suit. Stallings v. State, 29 Texas Crim. App. 222; 15 S. W. 716. Loving v. State, 44 Texas Crim. Rep. 375; 71 S. W. 277. Maddox v. State, 156 S. W. 206.

Where the employer had a contract with defendant to sell machines for cash, but changed the contract by giving defendant authority to take stock in payment, defendant to sell the stock and pay the employer in cash from the proceeds of the sale of the stock, and defendant exchanged the machines for stock and tendered the stock to his employer who refused them, the stock or the proceeds of their sale then belonged to defendant and the employer had only a civil suit against defendant. Webb v. State, 8 Texas Crim. App. 310.

It will not be presumed that defendant received money because it was his duty to do so. Brace v. State, 43 Texas Crim. Rep. 48; 62 S. W. 1067.

A conviction for embezzlement of money by a bailee will not be sustained when the testimony shows that the bailor consented to the disposition of the money. Wilkinson v. State, 49 Texas Crim. Rep. 304; 91 S. W. 589.

When it is alleged that the embezzlement was from a firm, it is necessary to prove that the conversion was without the consent of each member of such firm. Cohen v. State, 20 Texas Crim. App. 229.

A conviction for embezzlement will not be sustained where defendant, if guilty of anything, was only guilty of a fraudulent disposition of mortgaged property. Forbish v. State, 49 Texas Crim. Rep. 486; 93 S. W. 1029.

Ownership of the money or property alleged to have been embezzled must be proved as laid. Livingston v. State, 16 Texas Crim. App. 652.

To constitute embezzlement a felony it is necessary where value affects the penalty to prove that money or property of sufficient value to constitute the embezzlement a felony was embezzled at one time. Stallings v. State, 29 Texas Crim. App. 222; 15 S. W. 716.

A conviction for embezzlement will be set aside where it appears not to be based on a fraudulent conversion but resulted simply from the fact that the defendant did not return borrowed money soon enough to suit the prosecutrix. Bowden v. State, 46 Texas Crim. Rep. 69; 79 S. W. 539.

Where defendant was simply a borrower and the alleged injured party a lender of the money alleged to have been embezzled no fiduciary relation was created. Clark v. State, 61 Texas Crim. Rep. 539; 135 S. W. 575.

A conviction for embezzlement will be set aside when the testimony is too uncertain and is insufficient to sustain the conviction. Perry v. State, 22 Texas Crim. App. 19; 2 S. W. 600.

A conviction for embezzlement will be reversed on the facts on appeal although there be sufficient evidence, if believed, to support it, if the conviction clearly appears to be wrong. Henderson v. State, 1 Texas Crim. App. 432 (the alleged injured party

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was impeached by proof of contradictory statements and by proof of improper motive).

Sec. 2614. **Charge of the court.**—The charge should set forth the law applicable to the facts and this is not accomplished by simply announcing the general principles of law defining the offense. Goodsoe v. State, 52 Texas Crim. Rep. 627; 108 S. W. 388.

The words "embezzle, fraudulently misapply, and convert" are used in the statute on embezzlement in their ordinary sense, and it is not necessary to define them in the charge to the jury. Bridgers v. State, 8 Texas Crim. App. 147. Jackson v. State, 44 Texas Crim. Rep. 266; 70 S. W. 760.

The term "consignee," as used in the statute on embezzlement, has a well understood meaning and is used in its ordinary sense and it is not necessary to define such term in the charge to the jury. Pope v. State, 158 S. W. 527.

In construing the charge of the court the charge should be construed as a whole. Thompson v. State, 160 S. W. 704.

Where defendant's confession to the embezzlement is in evidence a charge on circumstantial evidence is not required. Burk v. State, 50 Texas Crim. Rep. 189; 95 S. W. 1064.

A correct charge on embezzlement by an agent is found in Henderson v. State, 55 Texas Crim. Rep. 645; 117 S. W. 825.

If the charge relied on is embezzlement it is error to only charge the law of theft by conversion. Maulding v. State, 53 Texas Crim. Rep. 220; 108 S. W. 1182.

It is error to charge the jury that certain facts show a fraudulent conversion. Whether the facts were or not sufficient to show a fraudulent conversion must be found as a matter of fact by the jury and not as a matter of law by the court. Jaimes v. State, 32 Texas Crim. App. 473; 24 S. W. 297.

If the defendant claims that the alleged injured party gave him the right to use the money or property alleged to have been embezzled the court should submit this defensive theory to the jury. Henderson v. State, 1 Texas Crim. App. 437. Pye v. State, 171 S. W. 741.

It is unnecessary to charge upon the limitation within which the alleged embezzlement could be prosecuted if there is no issue or question of limitation raised by the testimony in the case. Cohen v. State, 20 Texas Crim. App. 229.

Where the defendant, a hotel clerk, fled with money intrusted to him as such clerk and of which in law the hotel proprietor was the special owner and also took with him some money actually belonging to the proprietor, it is not necessary to limit in the charge of the court the testimony as to the latter money as it was all a part of the same transaction and in law the proprietor was the owner of all the money so taken. Manovitch v. State, 50 Texas Crim. Rep. 264; 96 S. W. 1.

Where defendant was intrusted with money, part of which he embezzled, and afterwards on his principal becoming uneasy about the safety of the money induced her to take and she did take his note for practically all the money, it is not error to charge the jury that if he embezzled any of the money prior to the execution of the note he would be guilty of embezzlement. Jackson v. State, 44 Texas Crim. Rep. 263; 70 S. W. 260.

Where defendant is charged with the embezzlement of certain property, a charge is correct which authorizes a conviction if he sold it with the intent at the time to appropriate the proceeds thereof and afterwards did appropriate them, where the jury are also charged that if he had no such intent and first conceived the idea of converting the proceeds after the sale he would not be guilty of embezzling the property. Leonard v. State, 7 Texas Crim. App. 444. Cole v. State, 16 Texas Crim. App. 470. Epperson v. State, 22 Texas Crim. App. 698; 3 S. W. 789. Huggins v. State, 42 Texas Crim. Rep. 365; 60 S. W. 52. Henderson v. State, 55 Texas Crim. Rep. 646; 117 S. W. 825.

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Where defendant was intrusted with a horse to sell and sold the horse and appropriated the proceeds of the sale, it is proper to charge the jury that if defendant sold the horse as his own property with the fraudulent intent at the time to appropriate the proceeds to his own use he would be guilty of embezzlement of the horse. Huggins v. State, 42 Texas Crim. Rep. 365; 60 S. W. 52.

Where defendant is charged with the embezzlement of certain property and there is no controversy over the fact that he sold the property as his own, it is not error to fail to require the jury to find that he sold the property as his own. Henderson v. State, 55 Texas Crim. Rep. 646; 117 S. W. 825.

When the statute, since changed in revising, made embezzlement of "proceeds" a separate element of the offense, it was held error to authorize the jury to convict on proof of embezzlement of the proceeds when defendant was charged with embezzling the property itself. Baker v. State, 6 Texas Crim. App. 346.

Sec. 2615. **Charge on misdemeanor embezzlement.**—Where defendant embezzles property which he was authorized to sell, if, on receipt of the money from the sale thereof, he is entitled to a commission on the money so collected it is not embezzlement so far as the commission is concerned, and if his commissions amount to a sufficient sum to prevent the embezzlement of the remainder from constituting a felony the court should govern his charge by such fact. Aldrich v. State, 29 Texas Crim. App. 397; 16 S. W. 251.

Where the employment or agency and all transactions were continuous and the shortage was in an amount sufficient to constitute the embezzlement a felony, it is not error to only require the jury to find that a sufficient sum to constitute a felony was fraudulently converted at one time. Taylor v. State, 29 Texas Crim. App. 466; 16 S. W. 302. Lawshe v. State, 57 Texas Crim. Rep. 32; 121 S. W. 867. Hamer v. State, 60 Texas Crim. Rep. 341; 131 S. W. 813.

Where the money alleged to have been embezzled came into the possession of the defendant in small amounts at various times and the evidence is circumstantial, or if there is evidence that a sufficient amount to constitute a felony was not appropriated at any one time, it is error not to submit the issue of a misdemeanor embezzlement to the jury. Loving v. State, 44 Texas Crim. Rep. 375; 71 S. W. 277. Day v. State, 159 S. W. 1186.

Where defendant was intrusted with goods on consignment to the value of more than fifty dollars and the contract was that he was to make a final account and settlement at a certain time and there was no proof of any conversion until he had disposed of more than fifty dollars' worth of the goods, the issue of a misdemeanor was not raised. Clark v. State, 48 Texas Crim. Rep. 527; 89 S. W. 647.

Art. 1417. (939) (787) **Embezzlement by factor or commission merchant.**—If any factor or commission merchant shall embezzle or fraudulently misapply or convert to his own use any money, goods, produce, commodity or other property, which shall have come into his possession or shall be under his care by virtue of his office, agency or employment, he shall be punished in the same manner as if he had committed a theft of such money, goods, produce, commodity or other property. (Acts 1858, p. 182.)

Sec. 2616. **Indictment.**—An indictment against a commission merchant for embezzlement is not defective because it describes the accused as "the" commission merchant. Bridgers v. State, 8 Texas Crim. App. 145.

An indictment against a factor or commission merchant for embezzlement need not contain any further allegations of fraudulent intent than is required by the language of the statute. Bridgers v. State, 8 Texas Crim. App. 145.

Art. 1418. (940) (788) **Embezzlement by carrier is theft.**—If any carrier, to whom any money, goods, or other property, shall have been

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delivered, to be carried by him; or if any other person, who shall be intrusted with such property shall embezzle or fraudulently convert to his own use any such money, goods, or property, either in the mass, as the same were delivered, or otherwise, he shall be deemed guilty of theft, and shall be punished as prescribed for that offense according to the value of the money, goods or other property so embezzled or converted. (Acts 1858, p. 182.)

Sec. 2617. **Indictment.**—If the property embezzled was intrusted to defendant as a carrier, the indictment should be drawn under the statute of theft by carrier, article 1418 (940). Reside v. State, 10 Texas Crim. App. 675.

An indictment for theft by a carrier should show by its allegations from whom the accused received the property, for what purpose, and state its intended destination. Nassits v. State, 36 Texas Crim. Rep. 5; 34 S. W. 957. Nesbitt v. State, 144 S. W. 944. Nesbitt v. State, 155 S. W. 203.

Where property has been intrusted to a carrier to be delivered by the carrier and is by the carrier intrusted to the defendant, an indictment against the defendant for the fraudulent conversion thereof should allege the want of consent of such carrier. Turner v. State, 32 S. W. 767.

Sec. 2618. **Conversion by carrier.**—When defendant is indicted for theft of a check intrusted to him as a carrier and which is alleged to have been fraudulently converted to his own use, the State is entitled to prove that the drawer of the check had money on deposit so as to prove the value thereof. Nesbitt v. State, 144 S. W. 944.

When defendant is indicted in one count for theft of a check and in another count for the theft of the proceeds, the State is entitled to prove that the check was deposited by defendant to his own credit and to prove that the defendant drew checks against the account. Nesbitt v. State, 144 S. W. 944.

Testimony which tends to solve no issue in the case but which could only tend to show that the defendant was a criminal generally should not be admitted. Nesbitt v. State, 144 S. W. 944.

Where defendant introduced a receipt for the package from the consignee, the court should charge the jury that if defendant delivered the package they should acquit him, and such charge should be given when supported by such a receipt although there is other evidence that the package was not in fact delivered. Wadhams v. State, 50 Texas Crim. Rep. 599; 99 S. W. 1014.

Art. 1419. (941) (789) **"Money" and "property" defined.**—The term "money," as used in this chapter, includes, besides gold, silver, copper or other coin, bank bills, government notes or other circulating medium current as money; and the term "property" includes any and every article commonly known and designated as personal property, and all writings of every description that may possess any ascertainable value. (Added in revising 1879.)

Sec. 2619. **Describing money in an indictment.**—When money of the United States has been fraudulently taken, acquired or converted, it is a sufficient description thereof in an indictment or information to allege either in words or figures that it was a stated number of dollars in money, as, for example, "thirty-five dollars in money," "$100 in money," and the like. Brooks v. State, 42 Texas 62 (embezzlement). Green v. State, 28 Texas Crim. App. 495; 13 S. W. 784 (theft from the person). Taylor v. State, 29 Texas Crim. App. 499; 16 S. W. 302 (embezzlement). Wofford v. State, 29 Texas Crim. App. 536; 16 S. W. 535 (theft). Otero v. State, 30 Texas Crim. App. 455; 17 S. W. 1081 (theft). Smith v. State, 34 Texas Crim. Rep. 271; 30 S. W. 236 (embezzlement). Thompson v. State, 35 Texas Crim. Rep. 522; 34 S. W. 629 (robbery). Jasper v. State, 61 S. W. 393 (theft from the person).

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Bell v. State, 62 S. W. 567 (theft). Dowdy v. State, 64 S. W. 253 (embezzlement). Fay v. State, 70 S. W. 744 (robbery). Campbell v. State, 61 Texas Crim. Rep. 504; 135 S. W. 548 (theft from the person).

An allegation that the property alleged to have been fraudulently taken, acquired or converted was "money" will be held to mean the money of the United States. Brooks v. State, 42 Texas 62. Menear v. State, 30 Texas Crim. App. 476; 17 S. W. 1082. Kirk v. State, 35 Texas Crim. Rep. 230; 32 S. W. 1045. Burries v. State, 36 Texas Crim. Rep. 15; 35 S. W. 164.

If the property alleged to have been fraudulently taken, acquired or converted is described as "money," it is not necessary to also allege its value in terms, as the courts take judicial notice of the value of money of the United States. Warren v. State, 29 Texas 372. Otero v. State, 30 Texas Crim. App. 455; 17 S. W. 1081. Kelley v. State, 34 Texas Crim. Rep. 413; 31 S. W. 174. Hamer v. State, 60 Texas Crim. Rep. 341; 131 S. W. 814. Sims v. State, 64 Texas Crim. Rep. 435; 142 S. W. 572.

It need not be alleged that the money was "current money." Malcolmson v. State, 25 Texas Crim. App. 289; 8 S. W. 468.

Unnecessary descriptive averments do not vitiate the indictment, but merely devolve upon the prosecution the burden of proving such averments. Mathews v. State, 10 Texas Crim. App. 283. Coffelt v. State, 27 Texas Crim. App. 615; 11 S. W. 639. Early v. State, 56 Texas Crim. Rep. 61; 118 S. W. 1036. Snelling v. State, 57 Texas Crim. Rep. 416; 123 S. W. 611. Maxey v. State, 58 Texas Crim. Rep. 118; 124 S. W. 928. Johnson v. State, 58 Texas Crim. Rep. 442; 126 S. W. 597.

An allegation that the property was "one dollar in Mexican money" is bad, since foreign money must be described as other property by name, kind, quality, number and ownership. Wade v. State, 35 Texas Crim. Rep. 173; 32 S. W. 772.

If the indictment or information does not use the word "money," but describes the property as a currency note, or bank bill, or as so many dollars, or as a gold piece, etc., it is bad unless it is further alleged in that connection what country or nation issued such paper or coin and such other description of it given so as to identify it with reasonable certainty. Martinez v. State, 41 Texas 164. Lavarre v. State, 1 Texas Crim. App. 685. Williams v. State, 5 Texas Crim. App. 116. Winston v. State, 9 Texas Crim. App. 143. Dukes v. State, 22 Texas Crim. App. 192; 2 S. W. 590. Jackson v. State, 34 Texas Crim. Rep. 91; 29 S. W. 265. Early v. State, 56 Texas Crim. Rep. 61; 118 S. W. 1036.

An allegation that the property was "three thousand dollars current money of the United States" is good. Goldstien v. State, 23 S. W. 686. Butler v. State, 46 Texas Crim. Rep. 289; 81 S. W. 743.

The allegation is good where the property is described as "one hundred dollars in money, then and there current money of the United States." Lewis v. State, 28 Texas Crim. App. 140; 12 S. W. 736. Goldstien v. State, 23 S. W. 686. Blain v. State, 34 Texas Crim. Rep. 448; 31 S. W. 368. Parrent v. State, 76 S. W. 474. Butler v. State, 46 Texas Crim. Rep. 289; 81 S. W. 743. Brewin v. State, 49 Texas Crim. Rep. 296; 92 S. W. 420. Dalton v. State, 50 Texas Crim. Rep. 524; 98 S. W. 255. Longardy v. State, 60 Texas Crim. Rep. 511; 132 S. W. 766.

An allegation that the property was "ten dollars in money which passed current as money of the United States" is good. Colter v. State, 37 Texas Crim. Rep. 284; 39 S. W. 576. Brewin v. State, 49 Texas Crim. Rep. 296; 92 S. W. 420. Longardy v. State, 60 Texas Crim. Rep. 511; 123 S. W. 766.

The allegation is good where the property is described as "one ten dollar bill of lawful currency of the United States." Spencer v. State, 55 S. W. 58. Berry v. State, 46 Texas Crim. Rep. 423; 80 S. W. 630.

An allegation that the property was "two $20 bills lawful and current money of the United States" is good. Jackson v. State, 60 Texas Crim. Rep. 274; 131 S. W. 1076.

The allegation is good where the property is described as "fifty dollars in paper currency, lawful currency of the United States of the value of fifty dollars."

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Morris v. State, 20 S. W. 979. Diaz v. State, 62 Texas Crim. Rep. 317; 137 S. W. 377.

The allegation is good where the property is described as "one ten dollar bill United States paper currency money." Morris v. State, 20 S. W. 979. Rucker v. State, 26 S. W. 65. Harris v. State, 31 S. W. 382. Wilson v. State, 72 S. W. 862. Summers v. State, 76 S. W. 762. Lane v. State, 152 S. W. 900.

The description is good where the allegation is "eighty dollars of the current paper money of the United States." Kimbrough v. State, 28 Texas Crim. App. 367; 13 S. W. 218. Morris v. State, 20 S. W. 979. White v. State, 57 S. W. 100. Nubel v. State, 65 S. W. 374. Gables v. State, 68 S. W. 288. Dennis v. State, 74 S. W. 559. Diaz v. State, 62 Texas Crim. Rep. 317; 137 S. W. 377.

The description is sufficient where the allegation is "one five dollar bill in money." Bryant v. State, 16 Texas Crim. App. 148. Green v. State, 28 Texas Crim. App. 495; 13 S. W. 784.

The description is sufficient where the allegation is "two dollars in silver coin money of the United States." Moore v. State, 36 Texas Crim. Rep. 89; 35 S. W. 668.

The description is sufficient where the allegation is "four one-half dollar silver pieces, United States silver coin." Davison v. State, 12 Texas Crim. App. 214. Kirk v. State, 32 S. W. 1045. Moore v. State, 36 Texas Crim. Rep. 89; 35 S. W. 668.

The allegation is good where the property is described as "forty dollars in silver, current money of the United States of America." Kelley v. State, 34 Texas Crim. Rep. 412; 31 S. W. 174.

The description is sufficient where the allegation is "ten cents in the money of the United States of America." Menear v. State, 30 Texas Crim. App. 475; 17 S. W. 1082.

Sec. 2620. **Proof of "money."**—The courts will take judicial notice of the value of the money of the United States, if it is described as "money." Warren v. State, 29 Texas 370. Bagley v. State, 3 Texas Crim. App. 167. Menear v. State, 30 Texas Crim. App. 475; 17 S. W. 1082. Nelson v. State, 35 Texas Crim. Rep. 205; 32 S. W. 900. Gibson v. State, 100 S. W. 776. Sowles v. State, 52 Texas Crim. Rep. 18; 105 S. W. 178. Sims v. State, 64 Texas Crim. Rep. 435; 142 S. W. 572.

If the property alleged to have been fraudulently taken, acquired or converted is spoken of on the trial by the witnesses as "money," it will be held to mean the money of the United States. Colter v. State, 37 Texas Crim. Rep. 284; 39 S. W. 576. Bacon v. State, 61 Texas Crim. Rep. 209; 134 S. W. 690. Sims v. State, 64 Texas Crim. Rep. 435; 142 S. W. 572. Sparks v. State, 177 S. W. 968.

The terms "money" and "current money of the United States" include gold, silver, and other minor coins, bank bills, legal tender notes, gold and silver certificates, and every kind of paper currency which passes current as money under the guarantee of the United States. Nubel v. State, 65 S. W. 374. Dennis v. State, 74 S. W. 559. Butler v. State, 46 Texas Crim. Rep. 289; 81 S. W. 743. Berry v. State, 46 Texas Crim. Rep. 420; 80 S. W. 630. Jackson v. State, 60 Texas Crim. Rep. 273; 131 S. W. 1076. Ferrell v. State, 152 S. W. 901. (*Contra:* Lewis v. State, 28 Texas Crim. App. 142; 12 S. W. 736. Otero v. State, 30 Texas Crim. App. 450; 17 S. W. 1081. Summers v. State, 76 S. W. 762.)

The term "United States paper currency money" means any paper currency authorized by the laws of the United States as a circulating medium for money and includes gold and silver certificates. Kimbrough v. State, 28 Texas Crim. App. 368; 13 S. W. 218. Rucker v. State, 26 S. W. 65.

Under an allegation describing the property as "lawful money," proof of silver certificates is a variance. Perry v. State, 42 Texas Crim. Rep. 541; 61 S. W. 400.

Nickels are legal tender. Black v. State, 46 Texas Crim. Rep. 107; 79 S. W. 311.

If the money is described in the indictment as "current money of the United States," or otherwise described with unnecessary particularity, the allegation, being

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descriptive, cannot be rejected as surplusage but must be proved as laid. Statum v. State, 9 Texas Crim. App. 273. Mathews v. State, 10 Texas Crim. App. 283. Simpson v. State, 10 Texas Crim. App. 681. Gerard v. State, 10 Texas Crim. App. 691. Childers v. State, 16 Texas Crim. App. 527. Coffelt v. State, 27 Texas Crim. App. 615; 11 S. W. 639. Early v. State, 56 Texas Crim. Rep. 61; 118 S. W. 1036. Snelling v. State, 57 Texas Crim. Rep. 416; 123 S. W. 610. Rogers v. State, 58 Texas Crim. Rep. 146; 124 S. W. 921. Maxey v. State, 58 Texas Crim. Rep. 118; 124 S. W. 928. Johnson v. State, 58 Texas Crim. Rep. 442; 126 S. W. 597.

Proof of the theft of a bank check will not support an allegation of the theft of money. Lancaster v. State, 9 Texas Crim. App. 393. Lieske v. State, 60 Texas Crim. Rep. 276; 131 S. W. 1126.

An allegation that the money was "currency" or "paper money" is not sustained by proof that it was gold or silver coin. Childers v. State, 16 Texas Crim. App. 524. Harris v. State, 30 S. W. 221. Pones v. State, 43 Texas Crim. Rep. 201; 63 S. W. 1022. (*Contra:* Brittain v. State, 52 Texas Crim. Rep. 169; 105 S. W. 817. The difference between the terms "current money" and "currency" is the difference between a classification and a mere designation. A mere designation is not a classification.)

Proof that more or less money of the same character as that alleged was taken. acquired or converted will not cause a variance between the allegation and proof. Moore v. State, 20 Texas Crim. App. 240. Harris v. State, 34 Texas Crim. Rep. 497; 31 S. W. 382. Jones v. State, 43 S. W. 162. Maloney v. State, 45 S. W. 719. White v. State, 57 S. W. 100. Pones v. State, 43 Texas Crim. Rep. 201; 63 S. W. 1021. Robinson v. State, 62 Texas Crim. Rep. 645; 138 S. W. 704. Jones et al. v. State, 64 Texas Crim. Rep. 510; 143 S. W. 621.

Sec. 2621. **Receiving embezzled property.**
Sec. 2622. Form for indictment.
Sec. 2623. Indictment.
Sec. 2624. Statute construed.

Art. 1420. (942) (789a) **Receiving or concealing embezzled property.**—If any person shall fraudulently receive or conceal any property which has been acquired (converted) by another in such manner as that the acquisition (conversion) comes within the meaning of embezzlement, knowing the same to have been so acquired (converted), he shall be punished in the same manner as the person embezzling the same would be liable to be punished. (Act March 16, 1883, Acts 1883, p. 24.)

Sec. 2622. **Form for indictment.**

In the name and by the 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 John Doe on the ..... day of ....., A. D. ....., in said county and State did fraudulently receive from ..... one horse (or "one ring of the value of ..... dollars," or whatever property it was, and if the value would affect the penalty allege its value), the same being the personal property of ....., and the said John Doe did then and there fraudulently conceal said property, and the said property then and there fraudulently received and fraudulently concealed by the said John Doe had been theretofore acquired and converted by the said ..... in such manner as that said acquisition and conversion did come within the meaning of embezzlement and the said John Doe then and there did fraudulently receive and conceal said property knowing the same to have been so acquired and converted.

Against the peace and dignity of the State.

.....
Foreman of the grand jury.

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Sec. 2623. **Indictment.**—The indictment need not allege all the elements or all the facts going to constitute embezzlement against the embezzler from whom defendant received the property. The offense is analogous to that of receiving stolen property, knowing it to be stolen. Hodges v. State, 22 Texas Crim. App. 415; 3 S. W. 739.

Sec. 2624. **Statute construed.**—The Act creating this offense is sufficiently definite, it being the clear intention of the Legislature to provide for the punishment of those who fraudulently receive or conceal embezzled property knowing it to have been so converted. Hodges v. State, 22 Texas Crim. App. 415; 3 S. W. 739.

CHAPTER XVIII

SWINDLING AND FRAUDULENT DISPOSITION OF MORTGAGED PROPERTY

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Article 1421. (943) (790) **"Swindling" defined.**—"Swindling" is the acquisition of any personal or movable property, money or instrument of writing conveying or securing a valuable right, by means of some false or deceitful pretense or device, or fraudulent representation, with intent to appropriate the same to the use of the party so

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acquiring, or of destroying or impairing the rights of the party justly entitled to the same. (Acts 1858, p. 183.)

Sec. 2625. **Statute construed.**—Whether the offense of swindling committed by the defendant is a felony or a misdemeanor is determined by the value of the property acquired by means of the false pretenses and it is immaterial that the injured party was protected in part by the property received from defendant where the representations made by defendant as to some of the property claimed to be owned by him were false and were a material part of such pretenses. LaMoyne v. State, 53 Texas Crim. Rep. 221; 111 S. W. 950 (overruling Gaskins v. State, 38 S. W. 470. Perry v. State, 39 Texas Crim. Rep. 495; 46 S. W. 816. Lively v. State, 74 S. W. 321.)

"A valuable right" mentioned in the statute is one which could be enforced by law. A chance in a raffle is not such a right. Rosales v. State, 22 Texas Crim. App. 675; 3 S. W. 344.

The defendant's ability or his ultimate intention to pay the debt created by his false pretenses cannot save him. Buntain v. State, 15 Texas Crim. App. 521.

Neither the promise to pay nor the intention or ability to pay will deprive the false and fraudulent act in acquiring the property of its criminality. Buntain v. State, 15 Texas Crim. App. 521.

A prosecution for swindling cannot be predicated upon a judgment rendered by a court of competent jurisdiction. Hunter v. State, 46 Texas Crim. Rep. 504; 81 S. W. 730.

Swindling may be predicated upon a negotiable note where its execution has been obtained by false pretenses. Baker v. State, 14 Texas Crim. App. 337 (indictment held good).

The offense of swindling may be committed by false representations as to the ownership of land. Yoakum v. State, 150 S. W. 910. Bedford v. State, 170 S. W. 727.

It is no defense to a party obtaining money or other property by false pretenses that the person from whom it was so obtained intended it to be used for an illegal purpose. Underwood v. State, 49 Texas Crim. Rep. 285; 91 S. W. 572.

Sec. 2626. **Distinction between swindling and theft.**—The distinction between the offenses of swindling and theft where the property is acquired by means of false pretenses is this: if the owner was induced to part and did part with his property finally by means of the false pretense, that is, if he intended to part with both the title and possession of his property, the offense is swindling; if the owner—the injured party—only intended to part with the possession and custody and not the title to his property, the offense is not swindling, but may be theft. White v. State, 11 Texas 769. State v. Vickery, 19 Texas 326. Pitts v. State, 5 Texas Crim. App. 122. Porter v. State, 23 Texas Crim. App. 295; 4 S. W. 889. Frank v. State, 30 Texas Crim. App. 381; 17 S. W. 936. Taylor v. State, 32 Texas Crim. Rep. 110; 22 S. W. 148. Randle v. State, 70 S. W. 958. Price v. State, 49 Texas Crim. Rep. 131; 91 S. W. 571. Underwood v. State, 49 Texas Crim. Rep. 285; 91 S. W. 572. Bink v. State, 50 Texas Crim. Rep. 445; 98 S. W. 863. Bink v. State, 50 Texas Crim. Rep. 452; 98 S. W. 249. Taylor v. State, 64 Texas Crim. Rep. 157; 141 S. W. 949. Lewis v. State, 171 S. W. 217.

If the evidence shows that the injured party intended to part with the title to the property the offense, if the property was obtained by a false representation of a past or present fact, is not theft but may be swindling. Pitts v. State, 5 Texas Crim. App. 122. Frank v. State, 30 Texas Crim. App. 381; 17 S. W. 936. Taylor v. State, 32 Texas Crim. Rep. 110; 22 S. W. 148. Powell v. State, 44 Texas Crim. Rep. 278; 70 S. W. 968. Price v. State, 49 Texas Crim. Rep. 131; 91 S. W. 571. Underwood v. State, 49 Texas Crim. Rep. 285; 91 S. W. 572. Bink v. State, 50 Texas Crim. Rep. 449; 98 S. W. 863. Bink v. State, 50 Texas Crim. Rep. 453; 98 S. W. 249. Taylor v. State, 64 Texas Crim. Rep. 157; 141 S. W. 949.

If the injured party believed that the money he was induced to deliver and did deliver to defendant was to be used or spent and did not expect to get the same

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money back but only expected the loan to be repaid, then he intended to part with the title to such money, and if it was obtained by false pretenses under such circumstances the offense is not theft but may be swindling. Bink v. State, 50 Texas Crim. Rep. 449; 98 S. W. 863. Bink v. State, 50 Texas Crim. Rep. 453; 98 S. W. 249. Taylor v. State, 64 Texas Crim. Rep. 157; 141 S. W. 949.

If the injured party merely intended to part with the possession and not the title to his money expecting at the time he delivered it to defendant to receive the same money back, the issue of swindling is not in the case. Porter v. State, 23 Texas Crim. App. 295; 4 S. W. 889. Randle v. State, 70 S. W. 958. Conner v. State, 76 S. W. 924. Braxton v. State, 50 Texas Crim. Rep. 633; 99 S. W. 994. Glascow v. State, 50 Texas Crim. Rep. 639; 100 S. W. 933. Lewis v. State, 171 S. W. 217.

Sec. 2627. **The pretense.**—To constitute the offense of swindling, some false representation as to existing facts or past events must have been made. Mere false promises or false professions of intention, although acted upon, are not sufficient. Johnson v. State, 41 Texas 65. Mathews v. State, 10 Texas Crim. App. 285. Allen v. State, 16 Texas Crim. App. 151. Williams v. State, 34 Texas Crim. Rep. 606; 31 S. W. 649. Martin v. State, 36 Texas Crim. Rep. 125; 35 S. W. 976. Hurst v. State, 39 Texas Crim. Rep. 198; 45 S. W. 573. Campbell v. State, 52 Texas Crim. Rep. 208; 106 S. W. 130. Windham v. State, 160 S. W. 72. Anderson v. State, 177 S. W. 85.

An allegation is not the basis of a charge of swindling where it is a charge of something to be done in the future, and not an allegation of a past or present existing fact. Hurst v. State, 39 Texas Crim. Rep. 198; 45 S. W. 573. Windham v. State, 160 S. W. 72.

Where a false promise to do something in the future is connected with a false statement as to an existing fact without which the injured party would not have parted with his property, the pretense is sufficient. Boscow v. State, 33 Texas Crim. Rep. 390; 26 S. W. 625.

A matter of opinion that defendant's goods were better than others is not a false pretense. Curtis v. State, 88 S. W. 236.

It is not necessary that the false pretense should be in words. Blum v. State, 20 Texas Crim. App. 592. Speer v. State, 50 Texas Crim. Rep. 273; 97 S. W. 469.

A false representation as to the ownership of land may constitute a basis for a prosecution for swindling. Yoakum v. State, 150 S. W. 910.

If defendant made a distinct false representation that his land was unincumbered it will support a prosecution for swindling although the deed reciting the incumbrance was of record. Brown v. State, 62 Texas Crim. Rep. 592; 138 S. W. 604.

In order to constitute swindling it is not necessary that the false pretense should be the sole inducement which moved the injured party to part with his property. Blum v. State, 20 Texas Crim. App. 578. McFarland v. State, 45 Texas Crim. Rep. 248; 75 S. W. 788.

To constitute swindling the injured party must have relied on the pretenses and have believed them to be true. Buckalew v. State, 11 Texas Crim. App. 352. Thorpe v. State, 40 Texas Crim. Rep. 346; 50 S. W. 383. McPearson v. State, 79 S. W. 522. Hunter v. State, 46 Texas Crim. Rep. 498; 81 S. W. 730. Doxey v. State, 47 Texas Crim. Rep. 505; 84 S. W. 1063.

The pretense must induce the injured party to deliver the property in order to constitute swindling. Where a $5 bill was handed to defendant to get it changed and he claimed it was a $1 bill, the transaction was not swindling, as the pretense did not induce the delivery. DeYoung v. State, 41 S. W. 598.

To constitute swindling the pretenses must not only induce the injured party to part with his property, but they, or some of them, must be reasonably calculated to produce that result. Peckham v. State, 28 S. W. 532. DeYoung v. State, 41 S. W. 598. Cowan v. State, 41 Texas Crim. Rep. 617; 56 S. W. 751. Schillings v. State, 60 Texas Crim. Rep. 309; 131 S. W. 1075.

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If the injured party knew that the pretense was false when he parted with his property there is no swindle. Buckalew v. State, 11 Texas Crim. App. 352. McDaniel v. State, 63 Texas Crim. Rep. 260; 140 S. W. 232.

To constitute swindling the pretense need not be such as will impose upon a man of ordinary prudence; it need not be such as cannot be guarded against by a man of ordinary caution. May v. State, 17 Texas Crim. App. 216. Harrison v. State, 44 Texas Crim. Rep. 244; 70 S. W. 421. Brown v. State, 48 Texas Crim. Rep. 433; 88 S. W. 811. Brown v. State, 62 Texas Crim. Rep. 592; 138 S. W. 604.

Subsequent matters over which defendant had no control will not make a representation false which defendant believed to be true when he made it. Williams v. State, 34 Texas Crim. Rep. 606; 31 S. W. 649. Fairy v. State, 50 Texas Crim. Rep. 396; 97 S. W. 700.

The false pretense must be proved as alleged. If a different pretense from that alleged was the means by which the property was acquired there is a variance. Warrington v. State, 1 Texas Crim. App. 168. Marwilsky v. State, 9 Texas Crim. Rep. 377. Peckham v. State, 28 S. W. 532. Dechard v. State, 57 S. W. 814.

An allegation that the false pretense was that the injured party owed defendant nine dollars is not supported by proof that the pretense was that he owed defendant six dollars. Marwilsky v. State, 9 Texas Crim. App. 377, but the amount of money acquired by the swindle need not be proved as alleged; the same rule applies as in cases of theft or robbery. Moore v. State, 20 Texas Crim. App. 240.

Evidence is not admissible to prove a pretense which is alleged to have been made, but which is not negatived or traversed and thereby assigned so as to admit proof of its falsity. Salter v. State, 36 Texas Crim. Rep. 503; 38 S. W. 212.

The alleged false pretenses or fraudulent representations must be shown to be false, and mere proof of contradictory statements is not sufficient. Thurman v. State, 59 Texas Crim. Rep. 285; 128 S. W. 404.

An allegation that the false pretense was that defendant said he had a large amount of money in a certain bank is substantially proven by testimony that he said he had $5,000 in said bank. Moore v. State, 20 Texas Crim. App. 239.

Sec. 2628. **Venue.**—The venue of a prosecution for swindling is only in the county where the property of the injured party was acquired by the accused. Sims v. State, 28 Texas Crim. App. 447; 13 S. W. 653. Dechard v. State, 57 S. W. 814.

Where the injured party notified a bank in another county that he would honor the draft of defendant and the money was paid in the other county, the venue is in the county where the money was paid to defendant. Dechard v. State, 57 S. W. 814.

Art. 1422. (944) (791) **Certain wrongful acts included.**—Within the meaning of the term "swindling" are included the following wrongful acts:

1. The exchange of property upon the false pretense that the party is the owner or has the right to dispose of the property given in exchange.

2. The purchase of property upon the faith and credit of some other person upon the false pretense that such other has given the accused the right to use his name in making the acquisition.

3. The obtaining by false pretense the possession of any instrument of writing, certificate, field notes or other paper relating to lands, the property of another, with the intent that thereby the proper owner shall be defeated of a valuable right in such lands.

4. The obtaining by any person of any money or other thing of value with intent to defraud by the giving or drawing of any check,

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draft or order upon any bank, person, firm or corporation, with which or with whom such person giving or drawing said check, draft or order has not at the time of the giving or drawing of such check, draft or order, or at the time when in the ordinary course of business such check, draft or order would be presented to the drawee for payment, sufficient funds to pay same, and no good reason to believe that such check, draft or order will be paid.

Sec. 2628½. **Form for information.**
In the name and by authority of the State of Texas:

....., County Attorney of ..... county, Texas, presents in and to the County Court of ..... county, Texas, at the ..... term, A. D. ....., of said court, that ..... heretofore on the ..... day of ....., A. D. ....., in said county and State, devising and intending to unlawfully acquire ..... of the value of ..... dollars, did then and there with intent to defraud, obtain said property, the same then and there being the personal property of ....., with the further intent to appropriate the same when so acquired to the use of him, the said ....., and the same was so obtained from said owner by the said ..... by the means of giving and drawing a certain check of the tenor following: ..... and which said check was then and there so given and drawn by the said ..... and the said ..... did then and there deliver said check to said owner in exchange for said property which was then and there delivered to the said ..... by said owner, and said owner did then and there part with the title and possession of said property to the said ..... in consideration of the said delivery of said check. Whereas, in truth and in fact the said ..... at the time of so giving and drawing said check did not have with said bank sufficient funds to pay said check, and then and there had no good reason to believe that said check would be paid by said bank when the same would be, in the ordinary course of business, presented to said bank for payment; and the said check was, in due course of business, presented to said bank, and payment of the same was refused for want of sufficient funds of said drawer.

Against the peace and dignity of the State.

.....
County Attorney, ... county, Texas.

5. The special enumeration of cases of swindling above set forth shall not be understood to exclude any case which by fair construction of the language comes within the meaning of the preceding article.. (Acts 1858, p. 183, amended by Act April 2, 1913, Acts 1913, p. 184, by adding subdivision 4.)

Sec. 2629. **Indictments held good:** Baker v. State, 14 Texas Crim. App. 332 (signatures to a note). Sims v. State, 21 Texas Crim. App. 650; 1 S. W. 465 (Exchange of property. This indictment fails to show any connection between the false pretenses and the acquisition of the property.) Scott v. State, 27 Texas Crim. App. 264; 11 S. W. 320 (Using written instrument as the means. This indictment shows that the offense was knowingly passing as true a forged instrument in writing, and the prosecution should have been for that offense.). Gray and Ross v. State, 32 Texas Crim. Rep. 598; 25 S. W. 627 (Using trick knife as means. The count for theft was sufficient to support a conviction for theft by false pretext. The count for swindling shows that the injured party did not intend to part with the title to his horse, and does not charge swindling, but does charge theft by false pretext according to the outward form of pleading.) Glover v. State, 57 Texas Crim. Rep. 210; 122 S. W. 398 (exchange of property).

Sec. 2630. **Allegation of ownership.**—Where one person owns the property and another has the possession, charge and control thereof, ownership may be alleged in either. May v. State, 15 Texas Crim. App. 437.

An indictment for swindling is bad if it fails to allege, clearly and directly, the ownership of the property acquired by the false pretenses. Washington v. State,

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41 Texas 583. Mays v. State, 28 Texas Crim. App. 485; 13 S. W. 787. Johnson v. State, 57 Texas Crim. Rep. 347; 123 S. W. 143.

The rules as to alleging ownership in theft cases are also applicable in cases of swindling. May v. State, 15 Texas Crim. App. 430.

One who signs a note as surety never becomes the owner of the note even though he is compelled to pay it. Hubbert v. State, 147 S. W. 267.

Sec. 2631. **Description of property.**—The rules in theft cases as to the description of property are also applicable in cases of swindling.

Where the indictment sets out a mortgage which describes the property as a bay mare and the indictment describes the property as a bay mare mule, the variance is fatal if not explained in the indictment. Tuttle v. State, 49 S. W. 82.

Where a mortgage misdescribes the property, the indictment may allege a mutual mistake. Tuttle v. State, 49 S. W. 82.

A general description of the property acquired by the false pretenses is sufficient. Childers v. State, 16 Texas Crim. App. 527.

If the right acquired by the false pretenses was a signature to a note it should be alleged that the signature was acquired, and an allegation that the note was so acquired is not equivalent to an allegation that the signature was so acquired. Hubbert v. State, 147 S. W. 267.

Where defendant by false pretenses induced the injured party to indorse a promissory note which was made and owned by defendant, an indictment setting out these facts and alleging that defendant acquired the note from the injured party is bad; it should have been alleged that the defendant acquired the indorsement. Johnson v. State, 57 Texas Crim. Rep. 347; 123 S. W. 143.

Sec. 2632. **Alleging a corporation.**—If it becomes necessary in an indictment for swindling to allege a corporation it is sufficient to set out the correct corporate name and allege that it was "an incorporated company."

If the false pretense was that defendant had money in a certain bank, it is not necessary to allege whether the bank was a corporation, the bank not being the injured party. Brown v. State, 43 S. W. 986. Glover v. State, 57 Texas Crim. Rep. 212; 122 S. W. 398.

If the injured party is alleged to be a bank, the indictment is bad if it fails to allege whether the bank was an individual, partnership, corporation or joint-stock company. Nasets v. State, 32 S. W. 698.

If the injured party was an individual it is only necessary to allege his name, but if the injured party was a corporation that fact must be alleged. If the name only of the injured party is alleged it is proper and sufficient to prove that the injured party was an individual, but if the proof under such allegation should show that the injured party was a corporation there would be a variance. Nasets v. State, 32 S. W. 698. Faulk v. State, 38 Texas Crim. Rep. 78; 41 S. W. 616. Spurlock v. State, 45 Texas Crim. Rep. 284; 77 S. W. 447.

Sec. 2633. **Must allege parting with title.**—An indictment for swindling, to be sufficient, must allege in some way that the injured party intended to part with the title to the property acquired by the false pretenses. Curtis v. State, 31 Texas Crim. Rep. 40; 19 S. W. 604. Robinson v. State, 60 Texas Crim. Rep. 353; 132 S. W. 354.

Sec. 2634. **Allegation must be direct.**—In an indictment for swindling the charge must be made positively and directly and not inferentially or by way of recital or argument. State v. Baggerly, 21 Texas 757. White v. State, 3 Texas Crim. App. 608. Marwilsky v. State, 9 Texas Crim. App. 380. Dwyer v. State, 24 Texas Crim. App. 132; 5 S. W. 662. Mays v. State, 28 Texas Crim. App. 485; 13 S. W. 787. Curtis v. State, 31 Texas Crim. Rep. 40; 19 S. W. 604. Cowan v. State, 41 Texas Crim. Rep. 617; 56 S. W. 751. Robinson v. State, 60 Texas Crim. Rep. 353; 132 S. W. 354. Windham v. State, 160 S. W. 72. Tripp v. State, 160 S. W. 1191.

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An indictment for swindling is bad if its allegations leave it uncertain as to who was swindled. Burd v. State, 39 Texas 509.

An indictment for swindling should directly and affirmatively allege to whom the false pretenses were made. Colbert v. State, 1 Texas Crim. App. 314. Hunter v. State, 46 Texas Crim. Rep. 505; 81 S. W. 730.

Sec. 2635. **Alleging the pretenses.**—An indictment for swindling is bad if it fails to set out by its tenor, or substantially with good reason for so pleading it, the written instrument which was the inducement or a part thereof. White v. State, 3 Texas Crim. App. 609. Dwyer v. State, 24 Texas Crim. App. 132; 5 S. W. 662. Hardin v. State, 25 Texas Crim. App. 75; 7 S. W. 534. Ferguson v. State, 25 Texas Crim. App. 452; 8 S. W. 479. Salter v. State, 36 Texas Crim. Rep. 504; 38 S. W. 212. Lively v. State, 74 S. W. 322. Doxey v. State, 47 Texas Crim. Rep. 506; 84 S. W. 1061.

If the swindle was complete before the execution and delivery of the written instrument and the latter was not a part of the false pretenses, it is not necessary to mention or set out such instrument in the indictment. Hardin v. State, 25 Texas Crim. App. 75; 7 S. W. 534. Brown v. State, 22 S. W. 22. Brown v. State, 48 Texas Crim. Rep. 433; 88 S. W. 811.

Where it is alleged in the indictment that the property of the injured party was acquired by means of false pretenses as to the ownership of stock and that defendant promised to give a lien, the mere promise to give a lien was not a part of the false pretenses and failure to set out the lien if ever given is immaterial. Brown v. State, 22 S. W. 22.

Where the swindle was perpetrated by means of a draft and the draft is set out by its tenor in the indictment, the indorsements thereon, if not relied upon, need not be set out. May v. State, 15 Texas Crim. App. 437.

If by false pretenses as to his ownership of property defendant secured money for which he executed a note, it is not necessary to allege that the note was never paid. Baxter v. State, 51 Texas Crim. Rep. 576; 105 S. W. 195.

If the swindle is predicated upon the false pretense that defendant's land was unincumbered, an indictment is bad if it only sets out a vendor's lien note against it and fails to set out a deed containing the lien and averring that such deed was of record. If the alleged injured party would be an innocent purchaser without notice, he would occupy the Gibraltar of defenses, and would not be swindled. Graves v. State, 31 Texas Crim. Rep. 65; 19 S. W. 895.

If the false pretense was verbal the words used may be set out by their substance or by their tenor. Moore v. State, 20 Texas Crim. App. 240.

An indictment for swindling in misrepresenting a written instrument as valid should set out in what particulars such instrument was invalid. State v. Dyer, 41 Texas 520. Wills v. State, 24 Texas Crim. App. 400; 6 S. W. 316.

Sec. 2636. **Alleging falsity of pretense.**—An indictment for swindling should directly allege that the false pretenses were untrue. State v. Levi et al., 41 Texas 563.

An indictment for swindling, to be sufficient, must allege that defendant knew the representations to be false when he made them. Maranda et al. v. State, 44 Texas 442. Hirsch v. State, 1 Texas Crim. App. 393. Mathena v. State, 15 Texas Crim. App. 474. Doxey v. State, 47 Texas Crim. Rep. 506; 84 S. W. 1061. Johnson v. State, 57 Texas Crim. Rep. 347; 123 S. W. 143.

Sec. 2637. **Alleging reliance on pretense.**—If it is alleged in the indictment that the injured party was induced by the false pretenses to part and did part with his property, it is not necessary to allege in terms that he relied on the false pretenses and believed them to be true. Baker v. State, 14 Texas Crim. App. 338. Fairy v. State, 50 Texas Crim. Rep. 397; 97 S. W. 700.

Sec. 2638. **Alleging the acquisition.**—An indictment for swindling, to be sufficient, should show by its allegations that it was by means of the false pretenses that the property of the injured party was acquired by the accused. White v. State, 3

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Texas Crim. App. 610. Ervin v. State, 11 Texas Crim. App. 537. Mathena v. State, 15 Texas Crim. App. 473. Hightower v. State, 23 Texas Crim. App. 451; 5 S. W. 343. Curtis v. State, 31 Texas Crim. Rep. 39; 19 S. W. 604.

A connection must be shown between the false pretenses and the obtention of the property. White v. State, 3 Texas Crim. App. 605. Lutton v. State, 14 Texas Crim. App. 523. Curtis v. State, 31 Texas Crim. Rep. 39; 19 S. W. 604. Hurst v. State, 39 Texas Crim. Rep. 196; 45 S. W. 573. Hunter v. State, 46 Texas Crim. Rep. 505; 81 S. W. 730. Robinson v. State, 60 Texas Crim. Rep. 353; 132 S. W. 354.

An indictment for swindling is bad if there is no allegation that the property was acquired by the accused, and an allegation that the property was delivered to or paid to him is not sufficient to show that he acquired it. Epperson v. State, 42 Texas 79. Cannon v. State, 15 S. W. 117. Robinson v. State, 60 Texas Crim. Rep. 353; 132 S. W. 354.

Sec. 2639. **Alleging exchange of property.**—An indictment for swindling by exchange of property should allege a sale and delivery by the accused so as to show a connection between the false pretenses and the acquiring of the property of the injured party by the accused. Lutton v. State, 14 Texas Crim. App. 523. Curtis v. State, 31 Texas Crim. Rep. 40; 19 S. W. 604. Cummings v. State, 36 Texas Crim. Rep. 152; 36 S. W. 266.

Where the allegation is that the injured party paid the accused money for the property the accused claimed to own but which he did not have, it is not defective for failing to allege a delivery by the accused as he could not deliver what he did not have. King v. State, 146 S. W. 543.

It was held that an allegation that defendant did induce the injured party to exchange his property for the property of defendant was a distinct allegation of an exchange. Faulk v. State, 38 Texas Crim. Rep. 79; 41 S. W. 616; but as all persons do not do what they are induced to do, the better allegation is that he "was induced to deliver and did deliver." State v. Hubbard, 70 S. W. 883.

Sec. 2640. **Allegation of intent.**—To constitute swindling by false pretenses the property must be acquired with intent to appropriate the same to the use of the party so acquiring, or of destroying or impairing the rights of the party justly entitled to the same, and it is necessary to allege in the indictment the intent with which the property was acquired. Stringer v. State, 13 Texas Crim. App. 522.

Sec. 2641. **Allegation of value.**—The rules which apply in theft cases as to the allegation and proof of value are also applicable in cases of swindling.

Sec. 2642. **Evidence for the State.**—Proof of similar contemporaneous transactions is admissible in evidence to show system, identity, or intent, if any of such matters are in issue. Davidson v. State, 12 Texas Crim. App. 218. Hutcherson v. State, 35 S. W. 375. Trimble v. State, 145 S. W. 929. Bedford v. State, 170 S. W. 727. Arnold v. State, 179 S. W. 1184.

If the injured party is alleged to be a corporation the allegation must be proven. Tucker v. State, 59 Texas Crim. Rep. 291; 128 S. W. 617.

A certificate of protest of an unpaid draft used as a basis of the swindle is admissible in evidence, but must be limited in the charge of the court. May v. State, 15 Texas Crim. App. 439. May v. State, 17 Texas Crim. App. 217.

The injured party may testify that he had money on deposit in a bank. Robinson v. State, 63 Texas Crim. Rep. 212; 139 S. W. 978.

Where a check drawn on a bank is alleged to be worthless, the State is entitled to prove that payment of same was refused. Glover v. State, 57 Texas Crim. Rep. 208; 122 S. W. 398.

If the property acquired by defendant was a check which is set out in the indictment by its tenor, no variance is caused by failure to allege any indorsements placed thereon after it was acquired by defendant. May v. State, 15 Texas Crim. App. 437. Melton v. State, 63 Texas Crim. Rep. 573; 140 S. W. 781.

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An allegation that the injured party delivered the property acquired by defendant is supported by proof that it was delivered by a clerk or servant acting under the immediate direction and order of the injured party. Facts may be plead according to their legal effect as well as according to their outward form. Tuttle v. State, 41 Texas Crim. Rep. 96; 51 S. W. 911. McPearson v. State, 79 S. W. 522.

An allegation of ownership is supported by proof that the person in whom ownership is laid had the actual care, control and management of the property at the time it was acquired by the false pretenses. May v. State, 15 Texas Crim. App. 437.

A mortgage or deed of trust is in law given to the person who is shown by such instrument to have the beneficial interest therein. Robinson v. State, 63 Texas Crim. Rep. 212; 139 S. W. 978.

The flight of defendant may be proven. McFarland v. State, 45 Texas Crim. Rep. 248; 75 S. W. 788.

It is no objection to proof of declarations of defendant offered to show the falsity of his representations that the injured party was not present when such declarations were made. McPearson v. State, 79 S. W. 522.

Sec. 2643. **Evidence for defendant.**—The allegation of the ownership of the property acquired by means of the false pretenses must be proved as laid. Mathews v. State, 33 Texas 102. Pilgrim v. State, 150 S. W. 1170.

If the property acquired by means of the false pretenses is described in the indictment with unnecessary particularity, the proof to be sufficient, must satisfy the description as laid. Childers v. State, 16 Texas Crim. App. 527.

If a written instrument forming a part of the alleged swindle be set out in the indictment by its tenor, the instrument offered in evidence must conform thereto with almost minute precision. Baker v. State, 14 Texas Crim. App. 338. Feeney v. State, 58 Texas Crim. Rep. 152; 124 S. W. 945.

Where the issue is who had title to the land which was the basis of the alleged swindle, it is error to permit the State to prove that a third person told the injured party in the absence of the defendant that he had acquired no title to the land by the deed thereto. Brown v. State, 48 Texas Crim. Rep. 433; 88 S. W. 811.

Defendant is entitled to show the course of dealing between the parties both before and after the alleged swindle as reflecting upon the intent of defendant, or as throwing light upon the question of whether the creditor was using the criminal law to enforce the payment of a debt. Lutton v. State, 14 Texas Crim. App. 518.

Where the swindle alleged was falsely using the credit of another, defendant should be permitted to show that he did take the goods to the person for whom he claimed to purchase them and that they were used by such person. Allegations in an indictment do not prove themselves, and an accused party is entitled to disprove the allegations of an indictment. Bozier v. State, 5 Texas Crim. App. 220.

Sec. 2644. **Evidence sufficient.**—Where a minor acquired property by false pretenses it is immaterial in a criminal case that the articles were not necessaries. Lively v. State, 74 S. W. 321.

Where defendant knowingly acted together with another in perpetrating a swindle, he is a principal whether he had any interest in the property so acquired or not. Blum v. State, 20 Texas Crim. App. 578. Medders v. State, 54 Texas Crim. Rep. 494; 113 S. W. 270.

Defendant is guilty as an accomplice to a felony swindle if he did not aid the swindle itself but before the swindle was perpetrated he advised and planned the swindle or advised, commanded or encouraged the principal to commit it. Tuttle v. State, 41 Texas Crim. Rep. 96; 51 S. W. 911. Bragg v. State, 166 S. W. 162.

One who would be guilty as an accomplice if the swindle was a felony is a principal offender if the swindle is a misdemeanor.

The fact that the injured party was induced to bet his money upon his ability to operate a device does not prevent the transaction from being a swindle if the

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device was fixed so that he had no chance to win. Gray and Ross v. State, 32 Texas Crim. Rep. 598; 25 S. W. 627. McFarland v. State, 45 Texas Crim. Rep. 248; 75 S. W. 788.

Where defendant fraudulently pledged property not his own on the pretense that he owned it, neither his promise to pay nor his ability to do so will prevent the transaction from being a swindle. Buntain v. State, 15 Texas Crim. App. 520.

Sec. 2645. **Evidence insufficient.**—The intent to defraud must have existed at the time the representations by which the property was obtained were made. Popinaux v. State, 12 Texas Crim. App. 140. Williams v. State, 34 Texas Crim. Rep. 606; 31 S. W. 649. Schillings v. State, 60 Texas Crim. Rep. 309; 131 S. W. 1075.

The evidence is insufficient to support a conviction for swindling if it fails to show beyond a reasonable doubt the falsity of the pretenses relied on. Brown v. State, 29 Texas 504. Moore v. State, 20 Texas Crim. App. 233. Scott v. State, 27 Texas Crim. App. 264; 11 S. W. 320. Harris v. State, 14 S. W. 447. Thurman v. State, 59 Texas Crim. Rep. 285; 128 S. W. 404. Nurse v. State, 59 Texas Crim. Rep. 354; 128 S. W. 906. McDaniel v. State, 63 Texas Crim. Rep. 260; 140 S. W. 232.

Where more than one false pretense is alleged and all are submitted to the jury, but one or more of such pretenses were not shown to be false, a conviction will not be sustained. Abernathy v. State, 55 Texas Crim. Rep. 77; 114 S. W. 1178. McDaniel v. State, 63 Texas Crim. Rep. 260; 140 S. W. 232.

A material variance between the allegation and the proof as to the name of the injured party is fatal. Mathews v. State, 33 Texas 107.

Where the State's case shows a sale on credit and defendant's case is a trade, the transaction, from either standpoint, is not swindling. Campbell v. State, 52 Texas Crim. Rep. 208; 106 S. W. 130.

Where defendant gave a check to cover a pre-existing debt, stating that it would be paid, the transaction is not swindling as no right was lost by the creditor and nothing was acquired by the defendant. Allen v. State, 58 Texas Crim. Rep. 494; 126 S. W. 571.

Before the amendment to article 1422 of the Penal Code by the Act of 1913, as shown by subdivision 4 of said article as amended, it was held that it was not a false pretense and did not amount to swindling simply to give a check on a bank where the defendant had no money. This subdivision now defines under what conditions or circumstances such an act might be swindling. The cases referred to are Martin v. State, 36 Texas Crim. Rep. 125; 35 S. W. 976. Ayers v. State, 37 Texas Crim. Rep. 1; 38 S. W. 792. Brown v. State, 37 Texas Crim. Rep. 107; 38 S. W. 1008. Blackwell v. State, 41 Texas Crim. Rep. 105; 51 S. W. 919.

Where the injured party parted with his property by reason of an error of opinion on his part and not by reason of any pretenses or acts of the defendant, there is no swindle although defendant knew that the injured party was acting upon such opinion and did not correct it. Blum v. State, 20 Texas Crim. App. 594.

Where the defendant gave a solvent bond conditioned for the carrying out of his part of the contract with the injured party and the bond covered the loss, the injured party was not swindled out of anything. Dechard v. State, 57 S. W. 814.

Proof by a bank cashier that the books of the bank showed no deposit is not sufficient to disprove a representation that defendant had money on deposit in the bank; the burden does not shift to defendant in the absence of the testimony of the other employees of the bank. Moore v. State, 20 Texas Crim. App. 241.

Sec. 2646. **Charge of the court.**—In a charge on swindling it is not necessary to require the jury to find that the representations were made with the intent to defraud. McPearson v. State, 79 S. W. 522.

It is not error to refuse to charge the jury that if the alleged injured party had the means at hand of ascertaining the truth or falsity of the representations then it was his duty to do so. Brown v. State, 48 Texas Crim. Rep. 433; 88 S. W. 811.

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It is not error to refuse to charge the jury that the pretense must be calculated to deceive a person of ordinary prudence. Colbert v. State, 1 Texas Crim. App. 320.

The charge of the court should follow the allegations of the indictment as to ownership. Pilgrim v. State, 150 S. W. 1170.

If the money of the injured party was acquired by a pretended sale of a lot which defendant had no right to sell, it is not error to refuse to charge the jury that if the injured party voluntarily left the lot without having been dispossessed of the same defendant would not be guilty. Brown v. State, 48 Texas Crim. Rep. 433; 88 S. W. 811.

Where the property of the injured party was acquired by false pretenses made by defendant as to the property sold to such party by defendant, it is not error to refuse to charge the jury that if a third person and not defendant owned the property sold by him and the fraud enured to the benefit of such third person defendant should be acquitted. Speer v. State, 50 Texas Crim. Rep. 273; 97 S. W. 469.

Testimony of other similar fraudulent transactions if admitted should be limited in the charge of the court. Moody v. State, 24 Texas Crim. App. 458; 6 S. W. 321. Martin v. State, 36 Texas Crim. Rep. 127; 35 S. W. 976.

The charge of the court need not require the jury to find the falsity of those parts of the pretenses which were mere promises of future intention or statements of something to be done in the future. Baxter v. State, 51 Texas Crim. Rep. 576; 105 S. W. 195.

If the proof fails to show the falsity of one or more of the pretenses alleged, it is error to submit such pretenses in the charge to the jury and thereby authorize a conviction upon a representation which is not shown to be false. Abernathy v. State, 55 Texas Crim. Rep. 77; 114 S. W. 1178.

If the bank did not place the entire proceeds of a draft to defendant's credit but only advanced him less than fifty dollars, pending collection of the draft, the court should charge on the issue of a misdemeanor based on this theory. Faulk v. State, 38 Texas Crim. Rep. 80; 41 S. W. 616.

It is not error to fail or refuse to charge the jury that if defendant intended to refund the money acquired by pledge of property falsely pretended to be owned by him and to redeem the pledge at the time he obtained the money he would not be guilty. Buntain v. State, 15 Texas Crim. App. 520.

Where defendant is identified as the party who acquired the property alleged by the false representations alleged, a charge on circumstantial evidence is not required from the fact that proof of his intent rests on circumstantial evidence. Buntain v. State, 15 Texas Crim. App. 515. Brown v. State, 43 S. W. 986.

Art. 1423. (945) (792) **"Money" defined.**—Within the meaning of "money," as used in this chapter, are included also bank bills or other circulating medium current as money. (Acts 1858, p. 183.)

Sec. 2647. **Money.**—(The annotations under article 1419 (941) of this Code are applicable to the offense of swindling.)

An allegation that the property acquired was "money" is supported by proof that it was National Bank bills. Baxter v. State, 51 Texas Crim. Rep. 576; 105 S. W. 195.

An allegation that money was acquired by the false pretenses is not supported by proof that a check was so acquired. Lieske v. State, 60 Texas Crim. Rep. 276; 131 S. W. 1126.

An allegation that the property acquired was money is supported by proof that the injured party and defendant went to the bank and the check was cashed in the presence of each of them. Robinson v. State, 63 Texas Crim. Rep. 212; 139 S. W. 978.

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An allegation that defendant acquired "money" from the bank by means of false pretenses is supported by proof that the amount was passed to his credit on the books of the bank. Medders v. State, 54 Texas Crim. Rep. 494; 113 S. W. 270.

Art. 1424. (946) (793) **No benefit need accrue to defendant.**—It is not necessary, in order to constitute the offense of swindling, that any benefit shall accrue to the person guilty of the fraud or deceit, nor that any injury shall result to the person intended to be defrauded, if it is sufficiently apparent that there was a wilful design to receive benefit or cause an injury. (Acts 1858, p. 183.)

Sec. 2648. **No benefit need accrue to defendant.**—It is not necessary, in order to constitute the offense of swindling, that any benefit shall accrue to the person guilty of the fraud or deceit, nor that any injury shall result to the person intended to be defrauded, if it is sufficiently apparent that there was a wilful design to receive benefit or cause an injury. May v. State, 15 Texas Crim. App. 436. Brown v. State, 48 Texas Crim. Rep. 433; 88 S. W. 811. Speer v. State, 50 Texas Crim. Rep. 273; 97 S. W. 469. Baxter v. State, 51 Texas Crim. Rep. 576; 105 S. W. 195. LaMoyne v. State, 53 Texas Crim. Rep. 221; 111 S. W. 950.

Art. 1425. (947) (794) **If the act constitutes any other offense.**—Where property, money, or other articles of value enumerated in the definition of swindling, are obtained in such manner as to come within the meaning of theft, or some other offense known to the law, the rules herein prescribed with regard to swindling shall not be understood to take any such case out of the operation of the law which defines any such other offense. (Acts 1858, p. 184.)

Sec. 2649. **If the act constitutes any other offense.**—Article 1425 (947) was passed in order to avoid as far as possible any embarrassment in determining the particular offense for which the accused should be held to answer in the event the property was acquired in such manner as to come within the meaning of some offense other than swindling, and where the property was acquired in such manner as to come within the meaning of some offense other than swindling then the prosecution should be for that offense and not for swindling. Mathews v. State, 33 Texas 104. Hirshfield v. State, 11 Texas Crim. App. 207. Witherspoon v. State, 37 S. W. 433. Scott v. State, 40 Texas Crim. Rep. 108; 48 S. W. 523. Abel v. State, 97 S. W. 1055. Bink v. State, 50 Texas Crim. Rep. 445; 98 S. W. 863.

Art. 1426. (948) (795) **Conversion of estate is swindling.**—If any executor, administrator or guardian having charge of any estate, real, personal or mixed, shall unlawfully, and with intent to defraud any creditor, heir, legatee, ward or distributee interested in such estate, convert the same or any part thereof to his own use, he shall be deemed guilty of the offense of swindling. (Acts 1858, p. 184, amended by Act April 10, 1883, Acts 1883, p. 66, by adding the word "creditor.")

Sec. 2650. **Conversion of estate by executor, administrator or guardian.**—The Legislature has the authority to make it a penal offense for an executor, administrator or guardian to unlawfully convert an estate, and article 1426 (948) of the Penal Code which creates such offense is not invalid because the Legislature called the offense swindling, although such offense would not come within the general definition of swindling because it is not necessary that the property be acquired by false pretenses. Walls v. State, 45 Texas Crim. Rep. 332; 77 S. W. 8.

In a prosecution against a guardian for conversion of the funds of the estate, it is error to admit in evidence the petition to remove him, the citation thereon, and the judgment removing him as guardian. Testimony which is but a mere opinion of defendant's guilt is not admissible. Moody v. State, 24 Texas Crim. App. 458; 6 S. W. 321.

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Art. 1427. (949) (796) **Punishment for swindling.**—Every person guilty of swindling shall be punished in the same manner as is provided for the punishment of theft, according to the amount of the money or the value of the property or instrument of writing so fraudulently acquired.

Art. 1428. **Obtaining board or lodging by trick, etc.**—Every person who shall obtain board or lodging in any hotel or boarding house by means of any trick or deception or false or fraudulent representations, or statement or pretense, and shall fail or refuse to pay therefor, shall be held to have obtained the same with the intent to cheat and defraud such hotel or boarding house keeper, and shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine not exceeding one hundred dollars, or by imprisonment in the county jail not exceeding one month, or by both such fine and imprisonment. (Act May 10, 1899, Acts 1899, p. 172.)

Art. 1429. **Conviction under foregoing article.**—It shall be the duty of every hotel and boarding house keeper in the State to post a printed copy of this law in a conspicuous place in each room of his or her hotel or boarding house, and no conviction shall be had under the foregoing article until it shall be made to appear to the satisfaction of the court that the provisions of said article have been substantially complied with by the hotel or boarding house keeper making the complaint. (Act May 10, 1899, Acts 1899, p. 172.)

(Jannin v. State, 42 Texas Crim. Rep. 631; 51 S. W. 1126; 62 S. W. 419.)

Sec. 2651. **Fraudulent disposition of mortgaged property.**
Sec. 2652. Indictments held good.
Sec. 2653. Alleging the mortgage.
Sec. 2654. Allegation of intent.
Sec. 2655. Name of purchaser must be alleged.
Sec. 2656. Duplicity.
Sec. 2657. Lien holder.
Sec. 2658. Description of property.
Sec. 2659. Allegation of a growing crop.
Sec. 2660. Value of property.
Sec. 2661. Venue.
Sec. 2662. Defenses.
Sec. 2663. Evidence.
Sec. 2664. Proof of other sales.
Sec. 2665. Variance.
Sec. 2666. Convictions sustained.
Sec. 2667. Charge of the court.
Sec. 2668. Continuance.

Art. 1430. (950) (797) **Fraudulent disposition of mortgaged property.**—If any person has given, or shall hereafter give any mortgage, deed of trust or other lien, in writing, upon any personal or movable property or growing crop of farm produce, and shall remove the same or any part thereof out of the State, or shall sell or otherwise dispose of the same with intent to defraud the person having such lien, either originally or by transfer, he shall be punished by imprisonment in the penitentiary not less than two nor more than five years.

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(O. C. 773, amended by Acts 1858, p. 183, and amended by Act March 31, 1885, Acts 1885, p. 85, by adding the words "or growing crop of farm produce.")

Sec. 2652. **Indictments held good.**—Indictments held good: Glass v. State, 23 Texas Crim. App. 426; 5 S. W. 131. Martin v. State, 28 Texas Crim. App. 365; 13 S. W. 151. Stewart v. State, 60 Texas Crim. Rep. 92; 131 S. W. 329.

Indictment for removing mortgaged property out of the State held good. Williams v. State, 27 Texas Crim. App. 259; 11 S. W. 114.

Sec. 2653. **Alleging the mortgage.**—The statute does not include verbal liens, hence it is necessary to allege in terms that the mortgage or other lien was in writing. Moye v. State, 9 Texas Crim. App. 88.

It should be alleged that the mortgage was valid, subsisting and unpaid at the time of the sale relied on. Satchell v. State, 1 Texas Crim. App. 438.

It should be alleged in some way that the mortgage was given to secure an indebtedness, naming the amount, and that the debt was unpaid. McElroy v. State, 150 S. W. 797.

An indictment alleging a conditional pledge is bad if there is no allegation that the mortgage had become absolute by the happening of the condition. State v. Devereux, 41 Texas 383.

It is not necessary to set out the mortgage by its tenor, the making of the mortgage being mere inducement. Glass v. State, 23 Texas Crim. App. 426; 5 S. W. 131. Jones v. State, 35 Texas Crim. Rep. 569; 34 S. W. 631. Haile v. State, 43 S. W. 999.

Sec. 2654. **Allegation of intent.**—It is not an offense to remove mortgaged property out of the State or to sell or otherwise dispose of the same unless it was done with intent to defraud the person having such lien, and it being necessary to prove such intent it is necessary to allege it. Robberson v. State, 3 Texas Crim. App. 502.

In Small's case, 31 Texas 184, it was held that the indictment must charge the offense as having been done "feloniously," but so far as this State is concerned that was not the law then and is not the law now.

Sec. 2655. **Name of purchaser must be alleged.**—An indictment for selling mortgaged property with intent to defraud the person having such lien, to be sufficient, must allege the name of the person to whom such property was sold, or must allege that the name of such purchaser is to the grand jury unknown. Presley v. State, 24 Texas Crim. App. 494; 6 S. W. 540. Smith v. State, 26 Texas Crim. App. 577; 10 S. W. 218. Alexander v. State, 27 Texas Crim. App. 94; 10 S. W. 764. Armstrong v. State, 27 Texas Crim. App. 462; 11 S. W. 462.

Sec. 2656. **Duplicity.**—Each sale of mortgaged property made with intent to defraud the person having such lien is a separate offense; hence an indictment is bad for duplicity if two or more separate sales are alleged in the same count. Wood v. State, 47 Texas Crim. Rep. 543; 84 S. W. 1058.

Sec. 2657. **Lien holder.**—Where the mortgagee was dead when the mortgaged property was fraudulently sold, it may be alleged that the administrators of such mortgagee held the lien. State v. Maxey, 41 Texas 524.

Sec. 2658. **Description of property.**—If the property was incorrectly described in the mortgage, it may be alleged in the indictment that it was incorrectly described, stating wherein the description was incorrect and alleging a true description thereof, so as to show that the property fraudulently disposed of was the property mortgaged. Coleman v. State, 21 Texas Crim. App. 526; 2 S. W. 859.

Sec. 2659. **Allegation of a growing crop.**—If the property was a growing crop of farm produce it must be so described in the indictment. Hardeman v. State, 16 Texas Crim. App. 1. Honeycut v. State, 23 Texas Crim. App. 71; 3 S. W. 716.

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The term "eighteen acres of cotton" means a cotton crop growing upon eighteen acres of land. Hardeman v. State, 16 Texas Crim. App. 1.

If the crop was not planted when mortgaged, it should be alleged that the mortgage was executed upon a crop to be planted and that same was afterwards planted and that when growing said mortgage attached to and became a lien upon said growing crop. Mooney v. State, 25 Texas Crim. App. 31; 7 S. W. 587.

Sec. 2660. **Value of property.**—In cases of fraudulent disposition of mortgaged property the value of the property does not affect the punishment and it is not necessary to allege the value of the property. State v. Maxey, 41 Texas 524.

Sec. 2661. **Venue.**—A prosecution for the fraudulent sale of mortgaged property can only be legally commenced and carried on in the county where such sale was made. Robberson v. State, 3 Texas Crim. App. 506.

A prosecution for removing mortgaging property out of the State with intent to defraud the person having such lien may be commenced and carried on in any county in which the defendant is found. Williams v. State, 27 Texas Crim. App. 261; 11 S. W. 114.

Sec. 2662. **Defenses.**—A minor cannot be guilty of the offense of fraudulently disposing of mortgaged property, since his disposing of the property is a disaffirmance of the mortgage. Jones v. State, 31 Texas Crim. Rep. 252; 20 S. W. 578.

The defendant is not entitled to a new trial so he can get further proof that he was a minor, since he was aware of that fact, if it was a fact, before the trial. Brown v. State, 56 S. W. 56.

It is no offense to remove mortgaged property from one county to another within the State. Robberson v. State, 3 Texas Crim. App. 502.

When defendant is charged with selling mortgaged property with intent to defraud the mortgagee, proof that defendant had the consent of the mortgagee to make the sale is a defense. Cowart v. State, 158 S. W. 809.

It is no defense to a sale of mortgaged property made with intent to defraud the person having such lien that the mortgage was recorded and therefore the purchaser took with notice of the mortgage. Thornton v. State, 34 Texas Crim. Rep. 469; 31 S. W. 372.

It is no defense to a sale of mortgaged property made with intent to defraud the person having such lien that defendant was sick and destitute and needed the money. Briggs v. State, 44 S. W. 491.

Sec. 2663. **Evidence.**—It may be shown that at the time defendant sold the mortgaged property he stated that it was unincumbered. Coley v. State, 150 S. W. 789.

Defendant is entitled to prove that he told the purchaser at the time of the sale and during its negotiation that the property was under mortgage. Massey v. State, 40 S. W. 726.

Testimony that defendant told the purchaser before the sale was completed that the property was under mortgage is admissible, but is not, as a matter of law, a defense. Briggs v. State, 44 S. W. 491.

It is error to exclude testimony that the mortgaged property remained in control of the defendant after he sold it and that he notified the purchaser before the sale was completed that it was under mortgage. Briggs v. State, 44 S. W. 491. Griffin v. State, 46 S. W. 644.

Defendant is entitled to prove that before any prosecution was begun he went to the person having the lien and proposed to pay off the mortgage. Owens v. State, 46 Texas Crim. Rep. 17; 79 S. W. 575.

Testimony that after the sale defendant's father wrote to the prosecutor offering to pay for the property is immaterial. Haile v. State, 43 S. W. 999.

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Testimony of other debts, in connection with proof of the assets of defendant, may be admitted when it tends to show fraudulent intent in disposing of the mortgaged property. Owens v. State, 46 Texas Crim. Rep. 16; 79 S. W. 575.

Defendant as a witness is entitled to explain any fact proven against him tending to create a distrust of his integrity or truthfulness. Cowart v. State, 158 S. W. 809.

Abbreviations used in the mortgage may be explained. Jones v. State, 35 Texas Crim. Rep. 571; 34 S. W. 631.

The statute was not intended to permit a mortgagee to go in with another and force defendant by means of the mortgage to pay the unsecured debt of the other person or to apply payments as the mortgagee sees fit. Owens v. State, 46 Texas Crim. Rep. 14; 79 S. W. 575.

Making the mortgage is mere inducement, the gist of the offense is the fraudulent sale of the property after the mortgage is given. Haile v. State, 43 S. W. 999.

If the indictment alleges that the name of the purchaser was unknown, the proof is insufficient if it shows his name and that it could have been ascertained by the grand jury by the use of reasonable diligence. Presley v. State, 24 Texas Crim. App. 494; 6 S. W. 540.

Sec. 2664. **Proof of other sales.**—When intent is an issue, the State is entitled to prove that defendant also sold to another person some of the property covered by the mortgage. Martin v. State, 28 Texas Crim. App. 365; 13 S. W. 151.

Proof of another and distinct sale of mortgaged property not connected with the sale relied on and which sheds no light thereon is not admissible. Owens v. State, 46 Texas Crim. Rep. 17; 79 S. W. 575.

Sec. 2665. **Variance.**—A material variance between the indictment and the mortgage as to the property described is fatal. Honeycut v. State, 23 Texas Crim. App. 71; 3 S. W. 716.

The fact that the mortgage covers other property than alleged in the indictment does not constitute a variance. Martin v. State, 28 Texas Crim. App. 364; 13 S. W. 151. Jones v. State, 35 Texas Crim. Rep. 569; 34 S. W. 631.

Where the property is described in the indictment sufficiently to identify it as the same property described in the mortgage there is no variance, although it is better to describe it in the indictment as fully as it is described in the mortgage. Glass v. State, 23 Texas Crim. App. 426; 5 S. W. 131.

It being necessary to describe the property in the indictment the proof must correspond with the allegations as to such description although the property is described with unnecessary particularity. Proof that a horse was a "sorrel" does not support an allegation that he was "a chestnut sorrel." Loyd v. State, 22 Texas Crim. App. 649; 3 S. W. 670.

An allegation that the mortgaged property removed from the State was a "Studebaker wagon" must be proven to be of that make. Loyd v. State, 22 Texas Crim. App. 649; 3 S. W. 670.

Where the State fails to prove that the property disposed of bore the particular though unnecessary description alleged, it is error to authorize the jury to convict if they find that it was the same property mortgaged where no allegation of mutual mistake or incorrect description is contained in the indictment. Coleman v. State, 21 Texas Crim. App. 526; 2 S. W. 859.

Sec. 2666. **Convictions sustained.**—Williams v. State, 27 Texas Crim. App. 258; 11 S. W. 114. Jones v. State, 35 Texas Crim. Rep. 565; 34 S. W. 631. Haile v. State, 43 S. W. 999. Wisdom v. State, 39 Texas Crim. Rep. 621; 47 S. W. 1118. Stewart v. State, 60 Texas Crim. Rep. 92; 131 S. W. 329. Loggins v. State, 149 S. W. 170. Coley v. State, 150 S. W. 789.

A conviction for selling mortgaged property with intent to defraud the person having such lien was sustained where the proof was that defendant sold a mortgaged

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buggy a short time after he bought it on credit and told the purchaser that he paid cash for it. Wisdom v. State, 39 Texas Crim. Rep. 621; 47 S. W. 1118.

Sec. 2667. **Charge of the court.**—A charge does not assume any fact when it requires the jury to believe beyond a reasonable doubt the existence of the facts necessary to a conviction before they are authorized to convict. Coley v. State, 150 S. W. 789.

If it is an issue as to whether the mortgage was released prior to the sale by defendant alleged to have been made with intent to defraud it is proper to submit that issue to the jury. Loggins v. State, 149 S. W. 170.

If there is evidence that defendant had the consent of the mortgagee to sell the mortgaged property, defendant is entitled to an affirmative charge on this defensive theory. Cowart v. State, 158 S. W. 809.

If the evidence raises the issue of the disposition being only temporary until defendant could straighten up the mortgage, there being testimony that defendant had informed the purchaser that the property was under mortgage, it is error to fail to charge affirmatively on this defensive theory. Glass v. State, 23 Texas Crim. App. 427; 5 S. W. 131.

When the defensive theory is that the mortgagee had given defendant consent to sell the property, it is error to limit to the intent of defendant testimony that he had given defendant an order to the clerk for the mortgage, and thereby prevent the jury from considering it on the issue of consent. Cowart v. State, 158 S. W. 809.

Where defendant claims that he notified the purchaser of the existence of the mortgage which the purchaser agreed to pay if defendant did not, an affirmative charge on this theory should be given to the jury. Sweat v. State, 59 S. W. 265.

If the State proves that other property than that alleged was disposed of, the court should limit the effect of such testimony. Martin v. State, 28 Texas Crim. App. 364; 13 S. W. 151. Jones v. State, 35 Texas Crim. Rep. 570; 34 S. W. 631. Harris v. State, 67 S. W. 328.

It is proper to charge the jury that if the farm on which the mortgaged crop was raised was known by the name alleged then the proof would sustain the allegation as to such name although the farm was also known by another name. Martin v. State, 28 Texas Crim. App. 364; 13 S. W. 151.

Sec. 2668. **Continuance.**—A continuance is properly refused when defendant's testimony on the trial contradicts what he stated he expected to prove by the absent witness. Haile v. State, 43 S. W. 999.

A continuance should have been granted to secure the attendance of a witness to support defendant's claim that when he sold the property he informed the purchaser of the mortgage and that it was agreed that the purchaser should hold the property until the mortgage was paid off. Massey v. State, 40 S. W. 726.

CHAPTER XIX

OFFENSES COMMITTED IN ANOTHER COUNTRY OR STATE

	Sec.	Art.
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Article 1431. (951) (798) **Bringing stolen property into this State.**—If any person having committed an offense in any foreign country, State or territory, which if committed in this State would have been robbery, theft, embezzlement, or receiving of stolen goods or property, knowing the same to have been stolen, or fraudulently receiving or concealing property acquired by another by embezzlement, knowing the same to have been so acquired, shall bring into this State any property so acquired or received, he shall be deemed guilty of robbery, theft, embezzlement, or receiving of goods or property stolen or embezzled, as the case may be, knowing the same to have been stolen or embezzled, and shall be punished as if the offense had been committed in this State. And in cases herein mentioned the offense may be charged to have been committed in any county into or through which the property may be brought in the same manner as if the act constituting such offense had taken place wholly within this State. (O. C. 774, amended Act April 29, 1895, Acts 1895, p. 116.)

Art. 1432. (952) (799) **Requisites of guilt under preceding article.**—To render a person guilty under the preceding article it must appear that by the law of the foreign country, State or territory from which the property was taken and brought to this State the act committed would also have been robbery, embezzlement, theft or receiving stolen goods or property, or receiving or concealing goods or property embezzled. (O. C. 775, amended by Act April 29, 1895, Acts 1895. p. 116.)

Sec. 2669. **Bringing stolen property into this State—Form for indictment.** 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 John Doe, in the State of Oklahoma (or "Arkansas," or whatever foreign country, State, or territory it was), heretofore on or about the ..... day of ....., A. D. ....., did fraudulently take one horse (or "one head of cattle," or whatever property it was, and if value affects the punishment in this State, alleging its value) then and there the personal property of and belonging to ..... from the possession of the said ..... without the consent of the said ..... and with the intent then and there to deprive the said owner of the value of the same, and with the intent then and there to appropriate it to the use and benefit of the said John Doe, and which acts so then and there committed by the said John Doe were then and there by the laws of said foreign State (or "country," or "territory") then and there in force the offense of theft, and which said acts, if the same had been so committed in the State of Texas would then and there have been theft under the laws of this State, and the said John Doe did thereafter on or about the....day of....., A. D. ....., bring into the State of Texas and into the county of ..... the said property so acquired, and the said John Doe was then found (or "is now") in said ..... county, State of Texas.

Against the peace and dignity of the State.

.....

Foreman of the grand jury.

(McKenzie v. State, 32 Texas Crim. Rep. 568; 25 S. W. 426. Beard v. State, 45 Texas Crim. Rep. 523; 78 S. W. 348.)

Sec. 2670. **Venue.**—Prosecutions for offenses committed wholly or in part without, and made punishable by law within this State, may be commenced and carried on in any county of this State in which the offender is found. McKenzie v. State, 32 Texas Crim. Rep. 576; 25 S. W. 426.

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Sec. 2671. **Indictment.**—Indictments held good: Cummins v. State, 12 Texas Crim. App. 121. Cowell v. State, 16 Texas Crim. App. 57. McKenzie v. State, 32 Texas Crim. Rep. 568; 25 S. W. 426. Sinclair v. State, 34 Texas Crim. Rep. 453; 30 S. W. 1070. Beard v. State, 45 Texas Crim. Rep. 523; 78 S. W. 348. Beard v. State, 47 Texas Crim. Rep. 183; 83 S. W. 824. Zweig v. State, 171 S. W. 747 (receiving).

An indictment for bringing into this State property fraudulently acquired or converted in a foreign country, State, or territory, in such manner as to constitute theft, or some other offense named in article 1431 (951), to be sufficient, must allege that the acts committed in the foreign country, State, or territory, were by the laws of such foreign country, State, or territory, the offense of theft or some other of the offenses named in said article, so as to thus aver the law of such foreign country, State or territory and thereby authorize proof of such foreign law. State v. Morales, 21 Texas 298. Carmisales v. State, 11 Texas Crim. App. 474.

When it is alleged in general terms that by the law of the foreign country, State, or territory from which the property was taken and brought into this State, the acts there committed would, if committed in this State, have been robbery, theft, or some other of the offenses named in article 1431 (951), it is not essential that the indictment allege the constituent elements of the offense as defined by the law of the foreign country, State, or territory. Cummins v. State, 12 Texas Crim. App. 121. Cowell v. State, 16 Texas Crim. App. 57.

An indictment for bringing into this State property which had been acquired by robbery in a foreign State which fails to allege that the property was taken from the person, but alleges that it was taken from the possession, is bad if by the law of such foreign State robbery cannot be committed by taking property from the possession of another. Smith v. State, 37 Texas Crim. Rep. 342; 39 S. W. 933.

It is not necessary for the indictment to allege that defendant was punishable by or subject to the laws of the foreign country, State, or territory. Cummins v. State, 12 Texas Crim. App. 124. Clark v. State, 27 Texas Crim. App. 405; 11 S. W. 374.

Ownership of the property stolen in a foreign country, State, or territory, and brought into this State, may be alleged as in cases of theft committed in this State. Sinclair v. State, 34 Texas Crim. Rep. 453; 30 S. W. 1070.

Sec. 2672. **Statute construed.**—The ingredients of the offense of bringing into this State property which was stolen in a foreign country, State, or territory, are (1) the acts and intents must constitute theft by the law of the foreign country, State, or territory in which the property was taken, (2) such acts and intents must constitute theft under the laws of this State, and (3) the thief must bring the stolen property into this State. McKenzie v. State, 32 Texas Crim. Rep. 576; 25 S. W. 426. Bink v. State, 50 Texas Crim. Rep. 453; 98 S. W. 249. Gorrell v. State, 164 S. W. 1012.

This State does not propose to punish the party for theft committed beyond its borders, but proposes to punish him for stealing the property beyond its boundaries and bringing his plunder into this State. McKenzie v. State, 32 Texas Crim. Rep. 576; 25 S. W. 426.

It is not an offense, under the present statute, to bring into this State, property acquired beyond its boundaries in such manner as to constitute swindling. Bink v. State, 50 Texas Crim. Rep. 450; 98 S. W. 249.

Sec. 2673. **Evidence.**—To justify a conviction for bringing into this State property stolen out of the State, it must be shown (with other requisites) that the party who committed the theft brought the property into this State, or, at least, that he had possession or control over it after it was brought into this State. Carter v. State, 37 Texas 362. Sutton v. State, 16 Texas Crim. App. 492.

If the defendant not only aided in receiving or stealing the property in such manner as to be a principal offender, but furnished the means for bringing it into this State, and then came here himself in pursuance of an agreement to do so, and here received his portion of the fruits of the crime, he, within the meaning of the

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law, brought the property into this State. Sutton v. State, 16 Texas Crim. App. 492. Zweig v. State, 171 S. W. 747.

Sec. 2674. **Foreign laws.**—The law of the foreign country, State, or territory, is an issuable fact to be alleged and proven in a prosecution for bringing into this State property fraudulently acquired or converted in a foreign country, State, or territory, in such manner as to come within our statute, which prohibits such bringing into this State. Cummins v. State, 12 Texas Crim. App. 121. Fernandez v. State, 25 Texas Crim. App. 538; 8 S. W. 667. Beard v. State, 45 Texas Crim. Rep. 522; 78 S. W. 348.

On appeal from a conviction for bringing into this State property fraudulently acquired or converted in a foreign country, State, or territory, the statement of facts should contain the proof of the law of such foreign country, State, or territory, which was made on the trial in this State. Beard v. State, 45 Texas Crim. Rep. 522; 78 S. W. 348.

The printed statute books of the United States, of the District of Columbia, or of any State or territory of the United States, or of any foreign government purporting to have been printed under the authority thereof, shall be received as evidence of the acts and resolutions therein contained. Cummins v. State, 12 Texas Crim. App. 121. Cowell v. State, 16 Texas Crim. App. 57. Fernandez v. State, 25 Texas Crim. App. 538; 8 S. W. 667. Sinclair v. State, 34 Texas Crim. Rep. 453; 30 S. W. 1070.

A certified copy, under the hand and seal of the Secretary of State, of any act or resolution contained in any of the printed statute books of the United States, of the District of Columbia, or of any State or territory of the United States, or of any foreign government, purporting to have been printed under the authority thereof, which were deposited in his office, or of any law or bill, public or private, deposited in his office in accordance with law, shall be received as evidence thereof. Patterson v. State, 17 Texas Crim. App. 108.

Where a Code or statutes of another State or country have been published by authority, and purport to have been so published, a reprint of such book is admissible in evidence, without other proof of its sanction by the government of that State or country. Fernandez v. State, 25 Texas Crim. App. 540; 8 S. W. 667.

Where a "Revised and Annotated Statutes" of another State, was by the law of that State made presumptive evidence of the laws thereof, and purports to have been printed under the authority thereof, it is admissible in evidence in this State as prima facie proof of the laws of such foreign State. Beard v. State, 47 Texas Crim. App. 191; 83 S. W. 824.

An imprint on the title page of a book may be sufficient to show that it purports to have been printed under the authority of the foreign country, State, or territory, the laws of which are in issue. Cummins v. State, 12 Texas Crim. App. 121. Fernandez v. State, 25 Texas Crim. App. 540; 8 S. W. 667. Beard v. State, 47 Texas Crim. Rep. 191; 83 S. W. 824.

It is the province of the court to determine when the laws of a foreign country, State, or territory have been established in evidence, and to construe such laws, and when supported by the evidence it is proper for the court to charge the jury as a matter of law that the law of the foreign country, State, or territory, as to the offense in question to be proved by that law, had been proven, and the purport of that law. Clark v. State, 27 Texas Crim. App. 405; 11 S. W. 374. Williams v. State, 27 Texas Crim. App. 466; 11 S. W. 481. Gorrell v. State, 164 S. W. 1012.

The error of the court in leaving it to the jury to determine whether the law of the foreign territory had been proven as alleged could only injure the State, and is not reversible error. Williams v. State, 27 Texas Crim. App. 466; 11 S. W. 481.

Sec. 2675. **Charge of the court.**—When there is evidence to support the theory that defendant was only a receiver of the stolen property, and he is indicted only as a principal for theft, the court should charge the jury affirmatively on the theory that

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a mere receiver of stolen property is not a principal offender in the theft. Fernandez v. State, 25 Texas Crim. App. 538; 8 S. W. 667.

In charging the jury on theft, the charge should require the jury to find a "fraudulent" taking. Beard v. State, 45 Texas Crim. Rep. 522; 78 S. W. 348.

In charging the jury as to the penalty for bringing a stolen horse into this State, it is proper to charge the penalty appropriate to theft of a horse. Beard v. State, 45 Texas Crim. Rep. 522; 78 S. W. 348.

It is not necessary to charge on circumstantial evidence as to theft where there is direct evidence of the taking. Granado v. State, 37 Texas Crim. Rep. 426; 35 S. W. 1069.

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TITLE XVIII

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CHAPTER I

CONSPIRACY

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Article 1433. (953) (800) **Definition.**—A conspiracy is an agreement entered into between two or more persons to commit any one of the offenses hereafter named in this chapter. (O. C. 776, amended by Act Oct. 26, 1871, Acts 2nd Session, 1871, p. 15.)

Art. 1434. (954) (801) **When offense complete.**—The offense of conspiracy is complete, although the parties conspiring do not pro-

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ceed to effect the object for which they have so unlawfully combined. (O. C. 777, amended by Act. Oct. 26, 1871.)

Sec. 2676. **Agreement to commit felony completes conspiracy.**—The offense of conspiracy is complete, although the parties conspiring do not proceed to effect the object for which they have so unlawfully combined. Johnson v. State, 3 Texas Crim. App. 590. Whitford v. State, 24 Texas Crim. App. 492; 6 S. W. 537.

A conviction of a felony as a principal will not bar a prosecution for a conspiracy to commit the same felony, because the offense of conspiracy was complete when a positive agreement to commit the felony was entered into. Whitford v. State, 24 Texas Crim. App. 489; 6 S. W. 537.

An acquittal of a felony as a principal will not bar a prosecution for conspiring to commit the same felony. Bailey v. State, 42 Texas Crim. Rep. 289; 59 S. W. 900.

Parties may be guilty of a conspiracy to commit burglary although a prosecution for the burglary would fail on account of the implied consent of the owner. Johnson v. State, 3 Texas Crim. App. 590.

After a positive agreement between two or more persons to commit a felony is entered into, the offense of conspiracy is complete, and a withdrawal therefrom is no atonement for the offense consummated. Dill v. State, 35 Texas Crim. Rep. 240; 33 S. W. 126.

Art. 1435. (955) (802) **Agreement must be positive.**—Before any conviction can be had for the offense of conspiracy, it must appear that there was a positive agreement to commit one of the offenses hereafter named in this chapter. It will not be sufficient that such agreement was contemplated by the parties charged. (O. C. 778, amended by Act Oct. 26, 1871.)

Art. 1436. (956) (803) **Mere threat not sufficient.**—A threat made by two or more persons acting in concert will not be sufficient to constitute conspiracy. (O. C. 779, amended by Act Oct. 26, 1871.)

Art. 1437. (957) (804) **What crimes the subject of.**—The agreement, to come within the definition of conspiracy, must be to commit one or more of the following offenses, to-wit: murder, robbery, arson, burglary, rape, or any other offense of the grade of felony. (O. C. 780, amended by Act Oct. 26, 1871, amended by Act Feb. 5, 1884, Acts 1884, p. 25.)

Art. 1438. (958) (805) **Punishment for conspiracy.**—Conspiracy to commit murder shall be punished by confinement in the penitentiary not less than two nor more than ten years. Conspiracy to commit any one of the other offenses named in the preceding article shall be punished by confinement in the penitentiary not less than two nor more than five years. (O. C. 781, amended by Act Oct. 26, 1871, and amended in revising.)

Art. 1439. (959) (806) **Conspiracy to commit murder defined.**—A conspiracy to kill a human being shall be deemed a conspiracy to commit murder. (O. C. 782, amended by Act Oct. 26, 1871.)

Art. 1440. (960) (807) **Conspiracy to commit an offense in another State.**—A conspiracy entered into in this State for the purpose

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of committing any one of the offenses named in article 1437 in any other of the States or Territories of the United States, or in any foreign territory, shall be punished in the same manner as if the conspiracy so entered into was to commit the offense in this State. (O. C. 783, amended by Act Oct. 26, 1871.)

Art. 1441. (961) (808) **Conspiracy in another State to commit offense in this.**—A conspiracy entered into in another State or Territory of the United States to commit any one of the offenses named in article 1437 in this State, shall be punished in the same manner as if the conspiracy had been entered into in this State. (Added in revising, 1879.)

Sec. 2677. **Form for indictment.**
In the name and by authority of the State of Texas:

The grand jury of ..... county, State of Texas, duly organized as such at the ..... term, A. D. ....., of the District Court of said county, in said court at said term do present that ..... and ..... on the ..... day of ....., A. D. ....., in said county and State did conspire, combine, confederate and enter into a positive agreement together and between themselves of their malice aforethought to kill one ..... (or "to wilfully set fire to and burn the house of ..... there situate," or whatever felony it was, setting out the elements thereof in general terms).

Against the peace and dignity of the State.

.....
Foreman of the grand jury.

Sec. 2678. **Indictment for conspiracy.**—The same particularity is not expedient or requisite in setting out the facts constituting an unexecuted conspiracy as when the act has been consummated. Brown v. State, 2 Texas Crim. App. 115.

An indictment for conspiracy to commit a felony need not set out the means intended to be used. Cowan v. State, 41 Texas Crim. Rep. 617; 56 S. W. 751.

Indictment for conspiracy to commit burglary held good: Brown v. State, 2 Texas Crim. App. 115.

The parties to the conspiracy must be named in the indictment, and there must be at least two principals. Dever et al. v. State, 37 Texas Crim. Rep. 396; 30 S. W. 1071.

Where it is alleged that more than two parties entered into the conspiracy, the allegation of the name of one not shown to be a party thereto may be rejected as surplusage, it not being descriptive. Woodworth v. State, 20 Texas Crim. App. 375.

An unnecessary allegation of the means proposed to be used in committing the felony which is the object of the conspiracy is descriptive and cannot be rejected as surplusage. Cowan v. State, 41 Texas Crim. Rep. 617; 56 S. W. 751.

An indictment for conspiracy to commit a felony in another State, to be sufficient, must directly aver that the conspiracy was to be consummated in another State. Cowan v. State, 41 Texas Crim. Rep. 617; 56 S. W. 751.

Sec. 2679. **Conspiracy.**—One is not guilty of a conspiracy to commit a felony where the only other party to the agreement entered into had no intention of committing the crime or of aiding its commission but his sole purpose and intent in making the agreement was to entrap the defendant. A conspiracy cannot be committed by one person alone. Woodworth v. State, 20 Texas Crim. App. 375.

If one of several defendants charged with conspiracy be acquitted the record of acquittal is evidence for another defendant subsequently tried. Paul v. State, 12 Texas Crim. App. 346.

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When necessary to prove the conspiracy alleged, it may be shown that the defendant on trial committed the offense he agreed to commit. Bailey v. State, 42 Texas Crim. Rep. 289; 59 S. W. 900.

The offense of conspiracy is complete when the positive agreement to commit the felony alleged is entered into, and on a trial for conspiracy a conspiracy cannot be established by proof of the acts and declarations of a co-conspirator in the absence of the defendant on trial and after the completion of the offense. Sessions v. State, 37 Texas Crim. Rep. 62; 38 S. W. 623. Dawson v. State, 38 Texas Crim. Rep. 9; 40 S. W. 731.

If a co-conspirator testifies as a witness in establishment of the conspiracy, his testimony is that of an accomplice, and is insufficient, unless corroborated as such. Sessions v. State, 37 Texas Crim. Rep. 62; 38 S. W. 623. Dever et al. v. State, 37 Texas Crim. Rep. 396; 30 S. W. 1071.

One accomplice cannot corroborate another. Sessions v. State, 37 Texas Crim. Rep. 63; 38 S. W. 623.

Sec. 2680. Venue.—The offense of conspiracy may be prosecuted in the county where the conspiracy was entered into, or in the county where the same was agreed to be executed, and the court may so charge the jury. Kutch v. State, 32 Texas Crim. Rep. 184; 22 S. W. 594. Dawson v. State, 38 Texas Crim. Rep. 9; 40 S. W. 731.

An allegation that the conspiracy was entered into in the county in which the indictment was presented is supported by proof that it was to be executed in that county. Dawson v. State, 38 Texas Crim. Rep. 11; 40 S. W. 731.

CHAPTER II

THREATS

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Article 1442. (962) (809) **Threats to take life, etc.**—If any person shall threaten to take the life of any human being, or to inflict upon any human being any serious bodily injury, he shall be punished by fine of not less than one hundred nor more than two thousand dollars, and, in addition thereto, he may be imprisoned in the county jail not exceeding one year. (O. C. 784, Act Feb. 22, 1875, Acts 1875, p. 51.)

Art. 1443. (963) (810) **Threat must be seriously made.**—In order to render a person guilty of the offense provided (for) in the preced-

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ing article, it is necessary that the threat be seriously made. (O. C. 785, Acts 1875, p. 51.)

Art. 1444. (964) (811) **Whether seriously made is a question of fact.**—It is for the jury to determine, in every case of prosecution under article 1442, whether the threat was seriously made or was merely idle and with no intention of executing the same. (O. C. 786, Acts 1875, p. 51.)

Art. 1445. (965) (812) **Certain threats not included.**—A threat that a person will do any act merely to protect himself, or to prevent the commission of some unlawful act by another, does not come within the meaning of this chapter. (O. C. 787, Acts 1875, p. 52.)

Sec. 2681. **Form for information.**
In the name and by authority of the State of Texas:
....., County Attorney of ..... county, Texas, comes in behalf of the State of Texas, and presents in and to the County Court of ..... county, Texas, at the ..... term, A. D. ....., of said court that John Doe heretofore on the ..... day of ....., A. D. ....., in said county and State did threaten to take the life of (or "to kill," or "to inflict serious bodily injury upon") ....., the said threat being then and there seriously made.
Against the peace and dignity of the State.

.....
County Attorney, ... county, Texas.

Sec. 2682. **Indictment or information.**—It is not necessary to allege in terms that the party threatened was a human being.

An allegation that the accused did threaten "to kill" is equivalent to an allegation that he did threaten to take life. Buie v. State, 1 Texas Crim. App. 58.

An indictment or information for seriously threatening to take the life of a human being or to inflict serious bodily injury upon a human being need not set out the words constituting the threat. The legal effect of the language constituting the threat may be alleged, and when this is done it is not necessary for the indictment or information to contain the language in which the threat was expressed. McFain v. State, 41 Texas 387. Longley v. State, 43 Texas 492. Buie v. State, 1 Texas Crim. App. 58. Gay v. State, 3 Texas Crim. App. 168. Tynes v. State, 17 Texas Crim. App. 127.

An indictment or information under article 1442 of the Penal Code sufficiently defines that offense when it charges that the threat was to take the life of another or to inflict upon him any serious bodily injury, and that the threat was seriously made. Longley v. State, 43 Texas 492.

If the threat was merely to protect the party or to prevent the commission of some unlawful act by another, this is a matter of defense, and need not be averred in the indictment. Longley v. State, 43 Texas 493.

Sec. 2683. **Conditional threat.**—Though the threat be conditional, yet if the accused had no right to require the condition the threat is tantamount to an unqualified threat. McFain v. State, 41 Texas 389.

When the court charges on the theory that the accused had no right to require the condition, it is error to refuse to charge the jury that if he did not intend to execute the threat even if his condition was not complied with he should be acquitted. Haynie v. State, 2 Texas Crim. App. 168.

Sec. 2684. **Proof of other threats.**—When intent is an issue, proof of threats made at other times is admissible on the issue of intent, and such proof should be limited in the charge to the jury. Longley v. State, 43 Texas 490. Thrasher v. State, 3 Texas Crim. App. 281.

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Sec. 2685. **Motive.**—Proof of remarks affecting the defendant made by the party alleged to have been threatened and which were known to the defendant before he made the alleged threat is admissible when it shows motive. Shelton v. State, 56 Texas Crim. Rep. 266; 119 S. W. 862.

The state of feeling on the part of the defendant toward the party threatened may be shown. Aycock v. State, 2 Texas Crim. App. 382.

Sec. 2686. **Evidence.**—Whether or not the threat was seriously made with the intention of executing the same is a question for the jury. Longley v. State, 43 Texas 493. Wilkerson v. State, 30 S. W. 807. Gerick v. State, 45 S. W. 492.

The fact that the party threatened was not present when the threat was made is no defense. The threat may be made to any person. Gerick v. State, 45 S. W. 492. Gerick v. State, 45 S. W. 717.

Testimony that the witness heard others say that defendant had threatened the life of prosecutor is hearsay. Woods v. State, 37 Texas Crim. Rep. 459; 36 S. W. 96.

A witness is not entitled to give his own opinion that defendant was a dangerous man. Woods v. State, 37 Texas Crim. Rep. 459; 36 S. W. 96.

The State is not entitled to put in issue the reputation of defendant as a dangerous man unless defendant first puts such reputation in issue. Woods v. State, 37 Texas Crim. Rep. 459; 36 S. W. 96.

Proof of a rash and inconsiderate expression, provoked by an angry altercation in which the parties were at the time engaged, will not support a conviction where the parties lived afterwards in the same neighborhood without further trouble between them. March v. State, 3 Texas Crim. App. 107. Bolt v. State, 150 S. W. 431.

Sec. 2687. **Wife as a witness.**—If the defendant threatened to take the life of his wife or to inflict serious bodily injury upon her she is a competent witness against him in a prosecution for making such threat. Murray v. State, 48 Texas Crim. Rep. 141; 86 S. W. 1024.

Sec. 2688. **Charge of the court.**—The court is not required to charge the jury that if defendant had an opportunity to kill prosecutor and did not do so they might infer that the threat, if made, was not seriously made. Vincent v. State, 3 Texas Crim. App. 678.

When the evidence shows that defendant had opportunity to execute the threat and that after making the threat he was on friendly terms with the party threatened, it is error to refuse to charge the jury that if he had no intention of executing the threat then it was not seriously made and he should be acquitted. Wilkerson v. State, 30 S. W. 807.

Art. 1446. (966) (813) **Sending or delivering threatening letter.**—If any person shall knowingly send or deliver to another any letter or writing, whether signed or not, threatening to accuse such other person of a criminal offense, with a view of extorting money, property, thing of value, or any advantage whatever from such other person, or threatening to kill or in any manner injure the person of such other, or to burn or otherwise destroy or injure any of his property, real or personal, or to do any other injury to such other person, he shall be punished by fine not less than one hundred nor more than one thousand dollars, and, in addition thereto, may be imprisoned in the county jail not exceeding one year. (Added in revising, 1879.)

Sec. 2689. **Form for information.**
In the name and by the authority of the State of Texas:

....., County Attorney of ..... county, Texas, comes in behalf of the State of Texas and presents in and to the County Court of said county

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at the ..... term, A. D. ....., of said court that John Doe heretofore on the ..... day of ....., A. D. ....., in said county and State did knowingly send and did knowingly deliver to ..... a letter (or "writing") threatening to accuse the said ..... of a criminal offense, to wit, ... (or "threatening to kill the said ....." or whatever other purpose named in the statute it was), and the said John Doe did then and there so send and deliver the same as aforesaid with a view of extorting money (or "property, to wit, ..." or whatever it was) from said ....., the said letter (or "writing") being then and there of the tenor following: (here make exact copy of the letter or writing, or give the substance thereof together with good reason for so pleading it).

Against the peace and dignity of the State.

.....
County Attorney, ... county, Texas.

Sec. 2690. **Indictment or information.**—An indictment or information for knowingly sending a threatening letter must allege in terms that it was "knowingly" sent. Tynes v. State, 17 Texas Crim. App. 126.

The indictment should state the distinct offense threatened against the party to whom the threatening letter was sent and not leave this to be gathered by intendment. Enough should be stated, if it is not an offense *eo nomine*, to show the particular offense threatened against the party. Cohen v. State, 37 Texas Crim. Rep. 118; 38 S. W. 1005.

The letter or writing must be set out by its tenor in the indictment, or the indictment must allege good reason for the failure to so plead it. Tynes v. State, 17 Texas Crim. App. 126. Hanson v. State, 35 Texas Crim. Rep. 593; 34 S. W. 929.

A material variance between the purport and tenor clause of the indictment as to the name of the party to whom the letter was sent is fatal if there are no averments explaining such variance. Hanson v. State, 35 Texas Crim. Rep. 593; 34 S. W. 929.

An allegation that defendant did **send** the letter with a view to extort money is not equivalent to an allegation that he **delivered** the letter with such view. Landa v. State, 26 Texas Crim. App. 580; 10 S. W. 218.

An allegation that defendant did knowingly threaten by sending a threatening letter is bad for failure to allege that he knowingly sent the letter. Castle v. State, 23 Texas Crim. App. 286; 4 S. W. 892.

Sec. 2691. **Venue.**—If the only phase of the statute correctly alleged is that defendant did **send** the letter, the venue is only in the county from which the letter was sent. Landa v. State, 26 Texas Crim. App. 580; 10 S. W. 218.

Sec. 2692. **Evidence.**—Defendant may prove the truth of the contents of the letter if such proof tends to shed light upon the question of whether the letter was sent with a view of extorting money. Cohen v. State, 37 Texas Crim. Rep. 118; 38 S. W. 1005.

It is no defense that the letter does not in terms contain all the requisites of a good indictment; the letter will be construed with a view of ascertaining the intention of the defendant. Wynne v. State, 41 Texas Crim. Rep. 504; 55 S. W. 837.

To come within the statute the letter must be a threatening letter. Hanson v. State, 35 Texas Crim. Rep. 593; 34 S. W. 929.

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Article 1447. (967) (814) **Seduction.**—If any person, by promise to marry, shall seduce an unmarried female under the age of twenty-five years, and shall have carnal knowledge of such female, he shall be punished by imprisonment in the penitentiary not less than two nor more than ten years. (Acts 1858, p. 185, amended by Acts 1903, p. 221 by omitting fine as a punishment and increasing the maximum term from five to ten years.)

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Art. 1448. (968) (815) **"Seduction," how used.**—The term "seduction" is used in the sense in which it is commonly understood.

Sec. 2693. **Statute construed.**—The offense of seduction is sufficiently defined in the Penal Code. Cole v. State, 40 Texas 147.

A general review of the elements of the offense of seduction is found in Putnam v. State, 29 Texas Crim. App. 456; 16 S. W. 97.

An unchaste woman is not the subject of seduction; such a woman cannot be seduced. Mrous v. State, 31 Texas Crim. Rep. 597; 21 S. W. 764. Gorzell v. State, 43 Texas Crim. Rep. 84; 63 S. W. 126. Simmons v. State, 54 Texas Crim. Rep. 625; 114 S. W. 841. Vantreese v. State, 59 Texas Crim. Rep. 281; 128 S. W. 383. Coleman v. State, 158 S. W. 1137.

"No one can with any degree of plausibility contend that a virtuous female could be seduced without any of those arts, wiles, and blandishments so necessary to win the hearts of the weaker sex. To say that such a one was seduced by simply a blunt offer of wedlock *in futuro*, in exchange for sexual favors *in praesenti*, is an announcement that smacks too much of bargain and barter, and not enough of betrayal. 'This is hire, or salary, not seduction.'" State v. Reeves, 10 S. W. 845. Spenrath v. State, 48 S. W. 193. Murphy v. State, 143 S. W. 619. Gleason v. State, 178 S. W. 506.

The statute on seduction was not intended to cover mere acts of illicit intercourse, and to be used in case something happened on account of such intercourse to constrain the man to marry the woman. Spenrath v. State, 48 S. W. 193. Gorzell v. State, 43 Texas Crim. Rep. 84; 63 S. W. 126.

The statute on seduction is mainly intended to redress frailty when induced by a promise of marriage, not when existing before. Kelly v. State, 33 Texas Crim. Rep. 32; 24 S. W. 295.

If the female was over the age of fourteen years when the accused promised to marry her and had carnal knowledge of her, the State may elect to prosecute for seduction and not for rape. Murphy v. State, 143 S. W. 617.

Sec. 2694. **Form of indictment for seduction.**

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 John Doe on the ..... day of ....., A. D. ....., in said county and State did under and by virtue of a promise of marriage made by him to ....., who was then and there an unmarried female under the age of twenty-five years, seduce and have carnal knowledge of such female.

Against the peace and dignity of the State.

.....

Foreman of the grand jury.

Sec. 2695. **Indictment for seduction.**—If the acts constituting seduction are set forth in the language of the statute, the indictment is sufficient in that respect. Luckie v. State, 33 Texas Crim. Rep. 562; 28 S. W. 533. McCullar v. State, 36 Texas Crim. Rep. 214; 36 S. W. 585. Wisdom v. State, 45 Texas Crim. Rep. 215; 75 S. W. 22.

An indictment for seduction need not allege whether the accused was married or single. Luckie v. State, 33 Texas Crim. Rep. 562; 28 S. W. 533.

Failure to allege that the female seduced was an unmarried female is fatal to the validity of an indictment for seduction. Mesa v. State, 17 Texas Crim. App. 395.

A promise of marriage must be alleged in an indictment for seduction, and "prom" is not equivalent to "promise." Latham v. State, 63 Texas Crim. Rep. 632; 141 S. W. 953.

Sec. 2696. **Continuance.**—In the absence of a proper bill of exceptions the supposed error in overruling an application for a continuance will not be revised on appeal. Luckie v. State, 33 Texas Crim. Rep. 567; 28 S. W. 533.

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A continuance is properly denied if the absent testimony is not material. Bush v. State, 157 S. W. 944.

A continuance should be granted if the absent testimony is material and the diligence sufficient. Creacy v. State, 166 S. W. 162.

A continuance will not ordinarily be granted to obtain testimony which would only be available to impeach a witness. Cole v. State, 156 S. W. 929.

The discretion of the court in refusing a continuance for witnesses to testify to the good character of the accused will not ordinarily be revised on appeal. Parks v. State, 35 Texas Crim. Rep. 379; 33 S. W. 872.

If the trial court in the exercise of his sound discretion refuses a continuance it will not require a reversal if no diligence was shown. Bost v. State, 144 S. W. 594. Cole v. State, 156 S. W. 929.

Where the conduct of the female before and after the alleged seduction causes suspicion as to her chastity, a continuance should be granted for witnesses to whom it is claimed she granted carnal favors, although the diligence used may be insufficient. Kelly v. State, 33 Texas Crim. Rep. 31; 24 S. W. 295. Sharp v. State, 61 Texas Crim. Rep. 247; 134 S. W. 333. Creacy v. State, 166 S. W. 162.

The denial of an application for a continuance will not be revised on appeal where the facts expected to be proved are not set out, but a mere general statement is made, without stating time and place, that another than defendant had taken undue liberties with the prosecutrix and had fondled her person. Snodgrass v. State, 36 Texas Crim. Rep. 210; 36 S. W. 477. Merrell v. State, 70 S. W. 980. Hinman v. State, 59 Texas Crim. Rep. 29; 127 S. W. 222.

Sec. 2697. **Promise of marriage.**—A minor will not be heard to say that he could not make a valid promise to marry. State v. Brock, 85 S. W. 596.

If the promise to marry was the moving cause, it does not matter that it was not repeated at the time the carnal knowledge was had. Bailey v. State, 36 Texas Crim. Rep. 546; 38 S. W. 185.

Besides the testimony of the female alleged to have been seduced there must be other testimony corroborative of hers as to the promise to marry. Snodgrass v. State, 31 S. W. 366. Spenrath v. State, 48 S. W. 192. Fine v. State, 45 Texas Crim. Rep. 291; 77 S. W. 806. Wooley v. State, 50 Texas Crim. Rep. 216; 96 S. W. 27. Howe v. State, 51 Texas Crim. Rep. 176; 102 S. W. 409.

Sec. 2698. **Conditional promise of marriage.**—If the promise to marry was conditional upon the female becoming pregnant, it will not support a prosecution for seduction. Simmons v. State, 54 Texas Crim. Rep. 625; 114 S. W. 841. Muhlhause v. State, 56 Texas Crim. Rep. 288; 119 S. W. 868.

When there is testimony to support the theory it is error to refuse to charge the jury that if the promise to marry was conditioned upon the prosecutrix becoming pregnant they should acquit. Simmons v. State, 54 Texas Crim. Rep. 624; 114 S. W. 841. Muhlhause v. State, 56 Texas Crim. Rep. 288; 119 S. W. 868. Browning v. State, 64 Texas Crim. Rep. 148; 142 S. W. 1 (court did charge on such issue and charge was correct).

If the testimony raises the issue of a conditional promise to marry, a charge is erroneous if it limits an acquittal to a yielding for any other reason than a promise to marry, since such a charge eliminates a conditional promise. Muhlhause v. State, 56 Texas Crim. Rep. 288; 119 S. W. 868.

Where the defendant promised to marry prosecutrix when he got out of his trouble (meaning a criminal case then pending against him), it was not a conditional promise but was merely fixing a time for the proposed marriage. Barnes v. State, 37 Texas Crim. Rep. 328; 39 S. W. 684.

Sec. 2699. **Female alleged to be seduced may testify.**—In a prosecution for seduction the female alleged to have been seduced shall be permitted to testify, but no conviction can legally be had upon her testimony unless the same is cor-

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roborated by other evidence tending to connect the defendant with the offense charged. McCullar v. State, 36 Texas Crim. Rep. 213; 36 S. W. 585. Williams v. State, 59 Texas Crim. Rep. 349; 128 S. W. 1121. Nash v. State, 61 Texas Crim. Rep. 259; 134 S. W. 709. Curry v. State, 151 S. W. 319.

Sec. 2700. **Testimony of prosecutrix.**—Prosecutrix may testify that no one but defendant ever had carnal knowledge of her and that a child was born to her. While not of itself a corroboration that defendant was the father of her child, it is corroborative of the fact that some man had carnal knowledge of her. Stapp v. State, 144 S. W. 942.

Prosecutrix may testify that she is pregnant and that defendant was responsible therefor. Knight v. State, 144 S. W. 967.

Prosecutrix may be asked why it was she permitted defendant to have intercourse with her. Browning v. State, 64 Texas Crim. Rep. 148; 142 S. W. 2. Black v. State, 160 S. W. 721.

The State may ask prosecutrix "if there was any inducement or consideration for the first act of intercourse, state what it was." Harvey v. State, 53 S. W. 102.

The question is leading and suggestive where prosecutrix is asked "would you have yielded to the sexual embrace of defendant had it not been on account of his promise to marry you?" but reversible error is not shown where the answer is not shown or where she had already detailed all the circumstances. Snodgrass v. State, 36 Texas Crim. Rep. 211; 36 S. W. 477. Fine v. State, 81 S. W. 723. Hinman v. State, 59 Texas Crim. Rep. 29; 127 S. W. 222. Carter v. State, 59 Texas Crim. Rep. 73; 127 S. W. 217. Browning v. State, 64 Texas Crim. Rep. 148; 142 S. W. 2. Black v. State, 160 S. W. 721.

It is not error to ask prosecutrix to state whether or not defendant in his actions toward her appeared affectionate, kind and true as a lover should. Faulkner v. State, 53 Texas Crim. Rep. 260; 109 S. W. 199.

It is error to permit prosecutrix to bolster up her testimony by stating as a fact as original testimony that she had told others of her engagement to defendant, though she was not permitted to name whom she told. Harvey v. State, 53 S. W. 102.

Where prosecutrix had already detailed the extent of her association with defendant it is not error to permit her to be asked if she had been associated with him like young people generally are. Bishop v. State, 144 S. W. 278.

It is error to refuse to permit defendant to ask prosecutrix questions tending to show by her that the act relied on was not her first carnal experience, such as whether it was attended by pain or soreness. Barnes v. State, 37 Texas Crim. Rep. 326; 39 S. W. 684.

Proof that prosecutrix adjusted her person and dress to accommodate defendant is immaterial because such acts are in harmony with seduction which apprehends the consent of the female. Barnes v. State, 37 Texas Crim. Rep. 326; 39 S. W. 684.

Sec. 2701. **Baby of prosecutrix.**—The State may prove by the prosecutrix that defendant is the father of the child in her arms. Snodgrass v. State, 36 Texas Crim. Rep. 211; 36 S. W. 477. Whitehead v. State, 61 Texas Crim. Rep. 558; 137 S. W. 368.

The child of the prosecutrix should not be exhibited to the jury. Gray v. State, 43 Texas Crim. Rep. 300; 65 S. W. 375.

It is error to permit the introduction of a child of tender years for the purpose of comparison in order to establish paternity, or to admit opinion evidence as to similarity between such child and its supposed parent. Higginbotham v. State, 20 S. W. 360. Barnes v. State, 37 Texas Crim. Rep. 329; 39 S. W. 684. Copeland v. State, 40 S. W. 589. Kilpatrick v. State, 39 Texas Crim. Rep. 11; 44 S. W. 830. Hilton v. State, 41 Texas Crim. Rep. 193; 53 S. W. 113. Gray v. State, 43 Texas Crim. Rep. 300; 65 S. W. 375. Gleason v. State, 178 S. W. 506.

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To account for the birth of her baby, the State in a seduction case is entitled to show that defendant had carnal knowledge of prosecutrix subsequent to the date of the alleged seduction. Hinman v. State, 59 Texas Crim. Rep. 29; 127 S. W. 222. Murphy v. State, 143 S. W. 618. Bishop v. State, 144 S. W. 278. Walls v. State, 153 S. W. 130.

Sec. 2702. **Chastity of prosecutrix.**—Hearsay testimony is not admissible to prove that another than defendant had had carnal knowledge of prosecutrix. Murphy v. State, 143 S. W. 617. Walls v. State, 153 S. W. 130.

Proof of acts of unchastity must be proven by the witness thereof and it is not error to exclude proposed proof of rumors, opinions, and hearsay remarks as to the unchastity of prosecutrix. The general reputation of the prosecutrix for unchastity may be proven. Parks v. State, 35 Texas Crim. Rep. 380; 33 S. W. 872. Carter v. State, 59 Texas Crim. Rep. 73; 127 S. W. 218. Hart v. State, 175 S. W. 436.

The defendant may prove the general reputation for chastity of the associates of the prosecutrix. Caviness v. State, 42 Texas Crim. Rep. 420; 60 S. W. 565. Jeter v. State, 52 Texas Crim. Rep. 212; 106 S. W. 371.

Testimony that prosecutrix had kissed and had been kissed and embraced by other men is admissible as tending to show a lack of chastity. Creighton v. State, 41 Texas Crim. Rep. 101; 51 S. W. 910.

Proof of unchaste acts with other parties after the alleged seduction is admissible on the issue of chastity. Davis v. State, 36 Texas Crim. Rep. 550; 38 S. W. 174. Creighton v. State, 41 Texas Crim. Rep. 101; 51 S. W. 910. Nolan v. State, 48 Texas Crim. Rep. 436; 88 S. W. 242.

If prosecutrix testifies that defendant is the only one who ever had carnal knowledge of her, it is competent to contradict her by proof that others than defendant had received sexual favors from her, though defendant was the first. Davis v. State, 36 Texas Crim. Rep. 550; 38 S. W. 174.

Where defendant's witness testifies that he had carnal knowledge of prosecutrix, the State may show that the reason she yielded to the witness was because he had caught her and defendant in the act and that at defendant's instigation she also yielded to the witness to keep him from telling on her. Anderson v. State, 39 Texas Crim. Rep. 88; 45 S. W. 15.

The State may introduce testimony as to the virtue and chastity of the prosecutrix as original evidence. Knight v. State, 144 S. W. 967.

Sec. 2703. **Letters of prosecutrix.**—A letter written by prosecutrix to a third party accusing him of being the father of her child is admissible in evidence. Davis v. State, 36 Texas Crim. Rep. 551; 38 S. W. 174.

A letter written by prosecutrix to a third party showing a vulgar and lascivious mind is admissible in evidence. Nolan v. State, 48 Texas Crim. Rep. 437; 88 S. W. 242.

Sec. 2704. **Character of defendant.**—In a prosecution for seduction the accused is entitled to prove his general reputation as a law-abiding citizen. Bishop v. State, 160 S. W. 705.

Sec. 2705. **Declarations of defendant.**—The State may prove admissions of defendant which tend to show that he was having carnal knowledge of prosecutrix. Knight v. State, 144 S. W. 967.

The State may prove that the defendant, prior to the alleged seduction, said that he intended to have intercourse with the prosecutrix but that he did not intend to marry her. Bailey v. State, 30 S. W. 669. Hinman v. State, 59 Texas Crim. Rep. 29; 127 S. W. 223.

Sec. 2706. **Evidence.**—The State may show that the female alleged to have been seduced had died before the trial. Bailey v. State, 36 Texas Crim. Rep. 545; 38 S. W. 185. Merrell v. State, 70 S. W. 980.

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The State may show that the female alleged to have been seduced was pregnant when she died. Merrell v. State, 70 S. W. 980.

It is error to permit the State to prove that the female committed suicide after her alleged seduction. Bailey v. State, 30 S. W. 669.

The State may resort to circumstantial evidence to prove that defendant had carnal knowledge of the female alleged to have been seduced when it is shown that she died before the trial. Bailey v. State, 36 Texas Crim. Rep. 546; 38 S. W. 185.

The State may prove that the defendant did not marry the female alleged to have been seduced. Merrell v. State, 70 S. W. 981.

Proof that the mother of prosecutrix from the attentions of defendant to her daughter regarded him as her future son-in-law is a mere opinion and not admissible. Snodgrass v. State, 31 S. W. 366.

The State may prove that defendant was received at the home of the mother of prosecutrix on terms of familiarity. Snodgrass v. State, 36 Texas Crim. Rep. 211; 36 S. W. 477.

The mother of prosecutrix may be permitted to testify that she welcomed defendant to her home and that he was treated well. Howe v. State, 51 Texas Crim. Rep. 177; 102 S. W. 409.

In a criminal prosecution for seduction depositions taken in a civil suit are not admissible as original evidence. Luckie v. State, 33 Texas Crim. Rep. 567; 28 S. W. 533.

Sec. 2707. **Convictions for seduction sustained.**—The evidence may be sufficient to support a conviction for seduction although the female alleged to have been seduced was dead when the case was tried. Bailey v. State, 36 Texas Crim. Rep. 545; 38 S. W. 185. Merrell v. State, 70 S. W. 979. Curry v. State, 162 S. W. 851.

A judgment will not be reversed for want of proof that the female alleged to have been seduced was an unmarried female where it appears that she had died before the trial, lived with her mother, received the addresses of defendant and was called "Miss." Bailey v. State, 36 Texas Crim. Rep. 545; 38 S. W. 185.

If the prosecutrix was a pure girl when defendant seduced her, proof of subsequent acts of carnal intercourse with others will not save him. Anderson v. State, 39 Texas Crim. Rep. 88; 45 S. W. 15. Walls v. State, 153 S. W. 130. Curry v. State, 162 S. W. 851. Hart v. State, 175 S. W. 436.

If the testimony of the prosecutrix shows that defendant is guilty of seduction and she is corroborated by other evidence tending to connect the defendant with the offense charged, the judgment of conviction will not be reversed because she is not corroborated as to her age. Williams v. State, 59 Texas Crim. Rep. 347; 128 S. W. 1121.

A conviction for seduction may be sustained where the testimony of the prosecutrix is corroborated by circumstantial evidence tending to connect defendant with the offense charged. Creighton v. State, 61 S. W. 493. Hinman v. State, 59 Texas Crim. Rep. 29; 127 S. W. 221. Thorp v. State, 59 Texas Crim. Rep. 517; 129 S. W. 607. Nash v. State, 61 Texas Crim. Rep. 259; 134 S. W. 709. Hayes v. State, 162 S. W. 870.

When the jury have solved the questions presented in the testimony under a fair and proper charge of the court and have found defendant guilty of seduction, and that verdict has been approved by the trial judge whose duty it is to set it aside if not satisfied therewith, and there is sufficient evidence in the record, if believed, to sustain the verdict, it will not be disturbed on the facts on appeal unless clearly wrong. Luckie v. State, 33 Texas Crim. Rep. 562; 28 S. W. 533. Anderson v. State, 39 Texas Crim. Rep. 87; 45 S. W. 15. Creighton v. State, 61 S. W. 493. Merrell v. State, 70 S. W. 979. Barnard v. State, 48 Texas Crim. Rep. 111; 86 S. W. 760. Howe v. State, 51 Texas Crim. Rep. 174; 102 S. W. 409. Faulkner v. State, 53 Texas Crim. Rep. 258; 109 S. W. 199. Carter v. State, 59 Texas Crim.

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Rep. 73; 127 S. W. 216. Hinman v. State, 59 Texas Crim. Rep. 29; 127 S. W. 221. Thorp v. State, 59 Texas Crim. Rep. 517; 129 S. W. 608. Beeson v. State, 60 Texas Crim. Rep. 39; 130 S. W. 1006. Nash v. State, 61 Texas Crim. Rep. 259; 134 S. W. 709. Barclay v. State, 62 Texas Crim. Rep. 323; 137 S. W. 118. Browning v. State, 64 Texas Crim. Rep. 148; 142 S. W. 1. Bost v. State, 144 S. W. 589. Stapp v. State, 144 S. W. 941. Knight v. State, 144 S. W. 967. Wooldridge v. State, 146 S. W. 550. Walls v. State, 153 S. W. 130. Blackburn v. State, 160 S. W. 687. Black v. State, 160 S. W. 720. Curry v. State, 162 S. W. 851. Hayes v. State, 162 S. W. 870. Cooper v. State, 163 S. W. 424. Gillespie v. State, 166 S. W. 135. DeRossett v. State, 168 S. W. 531. Slaughter v. State, 174 S. W. 580. Hart v. State, 175 S. W. 436. Grimes v. State, 178 S. W. 523.

Sec. 2708. **Evidence insufficient.**—A conviction for seduction will not be sustained where it appears that the prosecutrix extended carnal favors as soon as requested and that the promise of marriage was but slight inducement. Garlas v. State, 48 Texas Crim. Rep. 449; 88 S. W. 345. Murphy v. State, 143 S. W. 616. Gleason v. State, 178 S. W. 506.

A conviction for seduction will not be sustained if the testimony of prosecutrix as to the promise to marry is without corroboration. Snodgrass v. State, 31 S. W. 366. Spenrath v. State, 48 S. W. 192. Fine v. State, 45 Texas Crim. Rep. 291; 77 S. W. 806. Murphy v. State, 143 S. W. 616.

Where it is manifest that the verdict was wrong and it is clear that injustice has been done the defendant, the verdict will be set aside though there is evidence sufficient to support it. Snodgrass v. State, 31 S. W. 366. Spenrath v. State, 48 S. W. 192. Gorzell v. State, 43 Texas Crim. Rep. 84; 63 S. W. 126. Sledge v. State, 63 S. W. 317. Fine v. State, 45 Texas Crim. Rep. 290; 77 S. W. 806. Garlas v. State, 48 Texas Crim. Rep. 449; 88 S. W. 345. Murphy v. State, 143 S. W. 616. Curry v. State, 151 S. W. 319.

What prosecutrix told her mother when she found that she was pregnant does not corroborate her testimony. Snodgrass v. State, 31 S. W. 366.

If defendant had no intercourse with prosecutrix for ten months prior to the birth of her baby it is very unlikely that he was its father. Jeter v. State, 52 Texas Crim. Rep. 217; 106 S. W. 371.

Defendant must be acquitted of seduction if another had carnal knowledge of prosecutrix before he did, although the other made her carnal acquaintance subsequent to defendant's promise to marry her. Barnard v. State, 76 S. W. 475.

Continuous association or carnal intercourse for about two years after the promise to marry is not sufficient to corroborate the promise to marry, but rather serves to destroy the idea of marriage. Spenrath v. State, 48 S. W. 192. Fine v. State, 45 Texas Crim. Rep. 291; 77 S. W. 806.

Sec. 2709. **Letters as corroboration.**—Letters claimed to have been written by the defendant are not corroborative of the testimony of the prosecutrix if she is the only witness who proves them up. Carrens v. State, 91 S. W. 30. Smith v. State, 58 Texas Crim. Rep. 106; 124 S. W. 919. Bishop v. State, 151 S. W. 821. James v. State, 161 S. W. 472.

Sec. 2710. **Prosecutrix must be corroborated.**—The female alleged to be seduced occupies the attitude of an accomplice witness in the sense that a conviction cannot legally be had upon her testimony unless the same is corroborated by other evidence tending to connect the defendant with the offense charged. McCullar v. State, 36 Texas Crim. Rep. 215; 36 S. W. 585.

An accomplice witness cannot corroborate herself by proof of her statements to other parties. Snodgrass v. State, 31 S. W. 366. Barnard v. State, 76 S. W. 475.

While it is necessary to corroborate the testimony of the female alleged to have been seduced by other evidence tending to connect the defendant with the offense charged, yet this corroboration may be made either by direct or by circumstantial evidence. Creighton v. State, 61 S. W. 493. Nash v. State, 61 Texas Crim. Rep.

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259; 134 S. W. 709. Bost v. State, 144 S. W. 596. DeRossett v. State, 168 S. W. 531. Slaughter v. State, 174 S. W. 580.

The testimony of the female alleged to have been seduced must be corroborated both as to the promise to marry and as to the carnal knowledge. Wooley v. State, 50 Texas Crim. Rep. 216; 96 S. W. 27. Howe v. State, 51 Texas Crim. Rep. 176; 102 S. W. 409.

The testimony of the accomplice is required by the statute to be corroborated by other evidence tending to connect the defendant with the offense charged. Nash v. State, 61 Texas Crim. Rep. 259; 134 S. W. 709. Curry v. State, 151 S. W. 319. Gillespie v. State, 166 S. W. 135. DeRossett v. State, 168 S. W. 531. Slaughter v. State, 174 S. W. 580.

Sec. 2711. **Correct charge on accomplice testimony.**—"You cannot convict the defendant upon the testimony of the witness.....alone unless you first believe that her testimony is true and that it shows that the defendant is guilty of seduction as charged in the indictment, and even then you cannot convict the defendant upon said testimony unless you further believe that there is other evidence tending to connect the defendant with the offense charged." King v. State, 57 Texas Crim. Rep. 370; 123 S. W. 139. Murphy v. State, 143 S. W. 618. Slaughter v. State, 174 S. W. 581.

The form suggested in Campbell v. State, 57 Texas Crim. Rep. 302; 123 S. W. 583, would be good form if it was changed so as to require the jury to find that the testimony of the prosecutrix shows that defendant is guilty as charged instead of only requiring the jury to find that it "connects" him with the offense.

Sec. 2712. **Charge on accomplice testimony.**—If the charge informs the jury that the prosecutrix is an accomplice it is not necessary to define the term "accomplice." Smith v. State, 65 S. W. 186.

If the jury are charged that a conviction cannot be had upon the testimony of the prosecutrix unless it is corroborated, it is not necessary to state in terms that she is an accomplice. King v. State, 57 Texas Crim. Rep. 370; 123 S. W. 139.

A charge that the jury cannot convict on the testimony of the prosecutrix unless the same was corroborated is on the weight of the evidence in assuming that she told the truth. The charge should require the jury to find that her testimony is true. Garlas v. State, 48 Texas Crim. Rep. 451; 88 S. W. 345. Campbell v. State, 57 Texas Crim. Rep. 302; 123 S. W. 583. Lemmons v. State, 58 Texas Crim. Rep. 269; 125 S. W. 400. Vantreese v. State, 59 Texas Crim. Rep. 281; 128 S. W. 383. James v. State, 161 S. W. 472.

A charge on accomplice testimony is erroneous if it is assumed therein that the offense charged was committed. Vantreese v. State, 59 Texas Crim. Rep. 281; 128 S. W. 383.

The charge on accomplice testimony given in Wooley v. State, 50 Texas Crim. Rep. 215, 96 S. W. 27, was held to be an approved form in Howe v. State, 51 Texas Crim. Rep. 174, 102 S. W. 409, but is erroneous for only requiring the testimony of the accomplice to "tend" to show that defendant was guilty. Barrett v. State, 55 Texas Crim. Rep. 185; 115 S. W. 1187. Ware v. State, 60 Texas Crim. Rep. 38; 129 S. W. 836.

The charge on accomplice testimony need not in terms require the jury to find that the prosecutrix has been corroborated on both the promise to marry and the carnal knowledge. Howe v. State, 51 Texas Crim. Rep. 174; 102 S. W. 409. Murphy v. State, 143 S. W. 618. (*Contra:* Wooley v. State, 50 Texas Crim. Rep. 215; 96 S. W. 27.) (On request the court should so charge. Barnard v. State, 76 S. W. 475. Keaton v. State, 83 S. W. 911. *Contra:* Slaughter v. State, 174 S. W. 580.)

If requested the court should charge the jury that proof of the acts or declarations of the prosecutrix could not be considered as corroborating her testimony. Barnard v. State, 76 S. W. 475.

A charge on accomplice testimony is not sufficient if the jury are not thereby informed that the corroborating testimony must tend to connect defendant with the

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offense charged. Wisdom v. State, 45 Texas Crim. Rep. 217; 75 S. W. 22. Bishop v. State, 144 S. W. 278.

In discussing the sufficiency of the testimony the opinion in Wright v. State, 31 Texas Crim. Rep. 354, 20 S. W. 756, states that the corroborative evidence need not be direct and positive, or such evidence as is sufficient to convict, independent of that of the prosecutrix, but simply such facts or circumstances as tend to support her testimony, and shall satisfy the jury she is worthy of credit. This is a rule of reason to be considered and not a rule of law to be obeyed, and as a charge is unfair and unsafe, and it is safer and fairer not to charge on this subject at all, but simply to give a proper charge on accomplice testimony. As a charge it is incorrect because the statute provides that there must be other testimony tending to connect the defendant with the offense charged. Wisdom v. State, 45 Texas Crim. Rep. 217; 75 S. W. 22. Vantreese v. State, 59 Texas Crim. Rep. 281; 128 S. W. 383. Bishop v. State, 144 S. W. 278. (In Beeson v. State, 60 Texas Crim. Rep. 39, 130 S. W. 1006, Murphy v. State, 143 S. W. 618, and Gillespie v. State, 166 S. W. 135, it was held that such charge was not erroneous when in that connection the jury are properly instructed in the language of the statute.)

A witness who saw defendant and prosecutrix having carnal knowledge of each other is not an accomplice witness because he, with defendant's consent and under threat of exposure, induced her to also yield to him. Anderson v. State, 39 Texas Crim. Rep. 86; 45 S. W. 15.

Sec. 2713. **Charge on circumstantial evidence.**—If the case is one of circumstantial evidence only, it is error to omit to instruct the jury in the charge as to the rules of law applicable to such evidence. Daniels v. State, 14 S. W. 395.

Sec. 2714. **Charge on limitation.**—If there is evidence to support it, the court should charge on the theory that the alleged offense was barred by limitation. Thorp v. State, 59 Texas Crim. Rep. 517; 129 S. W. 607.

A charge is not erroneous because it covers the whole period of limitation where such method of submitting the date could not injure the rights of the defendant. Bost v. State, 144 S. W. 596.

If there is evidence of two different promises to marry and seduction could only be based upon the first, it is error, in applying the law to the facts, to authorize the jury to consider the subsequent promise as a basis of conviction. The charge in such case should not cover the whole period of limitation. Humphrey v. State, 143 S. W. 641.

Sec. 2715. **Assuming facts in the charge.**—A charge instructing the jury to acquit if they believed that the prosecuting witness had carnal intercourse with some other person before she copulated with defendant is on the weight of the evidence in assuming that defendant had copulated with her. McLaurin v. State, 146 S. W. 557.

Sec. 2716. **Undue prominence.**—A charge is erroneous if it singles out and gives undue prominence to part of the testimony, such as calling attention to the child of prosecutrix, its eyes, hair and complexion, although its effect is sought to be limited. Barnes v. State, 37 Texas Crim. Rep. 329; 39 S. W. 684.

Sec. 2717. **Limiting evidence.**—It is not error to fail to limit testimony introduced by defendant where such charge would not have benefited him. Murphy v. State, 143 S. W. 619.

Testimony as to the unchastity of prosecutrix after the alleged seduction may and should be limited to the issue of whether she was chaste at the time of the alleged seduction. Nolan v. State, 48 Texas Crim. Rep. 438; 88 S. W. 242. Humphrey v. State, 143 S. W. 641. Walls v. State, 153 S. W. 130.

If proof of other acts of carnal knowledge go to show prosecutrix unchaste and defendant not guilty of seduction, it is error to limit such proof to the issue of her credibility. Davis v. State, 36 Texas Crim. Rep. 551; 38 S. W. 174.

If testimony admitted tends to also impeach prosecutrix, it is error to limit it to contradiction alone. Nolan v. State, 48 Texas Crim. Rep. 437; 88 S. W. 242.

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Sec. 2718. **Defining "seduction."**—"Seduction" means to lead away a female from the path of virtue; to entice or persuade her by means of a promise of marriage to surrender her chastity and have carnal knowledge with the man making such promise. Wisdom v. State, 45 Texas Crim. Rep. 217; 75 S. W. 22. Browning v. State, 64 Texas Crim. Rep. 148; 142 S. W. 2. Cole v. State, 156 S. W. 929.

"Seduction" means an enticement of a woman on the part of a man to surrender her chastity by means of some art, influence, promise or deception calculated to accomplish that object and to include the yielding of her person to him as much as if it was expressly stated. Putnam v. State, 29 Texas Crim. App. 457; 16 S. W. 97. Faulkner v. State, 53 Texas Crim. Rep. 261; 109 S. W. 199. Hinman v. State, 59 Texas Crim. Rep. 33; 127 S. W. 223. Bost v. State, 144 S. W. 589.

The term "seduction" should be defined in the charge to the jury. Putnam v. State, 29 Texas Crim. App. 454; 16 S. W. 97. Bailey v. State, 30 S. W. 669.

Where acts of prosecutrix that indicate unchastity are shown, it is error to fail to define the term "seduction." Gorzell v. State, 43 Texas Crim. Rep. 84; 63 S. W. 126.

Where the testimony is conflicting as to the chastity of prosecutrix, it is error to fail to define the term "seduction." Merrell v. State, 42 Texas Crim. Rep. 19; 57 S. W. 289.

Where the reputation of prosecutrix for chastity is attacked, it is error to fail to define the term "seduction." Sledge v. State, 63 S. W. 317.

If the term "seduction" is properly defined in the charge it will be considered as a part of the charge applying the law to the facts. A charge should be considered as a whole. Wisdom v. State, 45 Texas Crim. Rep. 217; 75 S. W. 22. Carter v. State, 59 Texas Crim. Rep. 73; 127 S. W. 220.

It is not error to fail to define the term "seduction" if the defensive theory is affirmatively submitted and the charge as a whole in effect does define that term. Blackburn v. State, 160 S. W. 687.

When the term "seduction" is not defined, it is error to charge the jury that the word "seduce" is used in the sense in which it is commonly used. In such sense it does not carry the full meaning of the offense. It must appear that the female yielded alone to the solicitation of defendant in consideration of his promise to marry her. Cole v. State, 40 Texas 150.

Sec. 2719. **Approved charges.**—In the following seduction cases the charge of the court was approved: Hinman v. State, 59 Texas Crim. Rep. 29; 127 S. W. 223. Browning v. State, 64 Texas Crim. Rep. 148; 142 S. W. 2. Bost v. State, 144 S. W. 595. Knight v. State, 144 S. W. 967. Bush v. State, 157 S. W. 944.

Sec. 2720. **Charge construed as a whole.**—The charge of the court should be construed as a whole. Luckie v. State, 33 Texas Crim. Rep. 562; 28 S. W. 533. Wisdom v. State, 45 Texas Crim. Rep. 217; 75 S. W. 22. Carter v. State, 59 Texas Crim. Rep. 73; 127 S. W. 220. Blackburn v. State, 160 S. W. 687.

Sec. 2721. **Charge on defensive theory.**—A charge is erroneous if the jury are thereby required to believe that prosecutrix was generous and promiscuous in bestowing her carnal favors before defendant would be entitled to an acquittal on the ground that she was unchaste. Vantreese v. State, 59 Texas Crim. Rep. 281; 128 S. W. 383.

When supported by the testimony it is not error to charge the jury that if defendant had seduced and had carnal knowledge of prosecutrix by virtue of a promise of marriage and at that time she was a chaste woman and had not previously had intercourse with any other, the fact, if it was a fact, that she afterwards had intercourse with others would be no defense to defendant. Walls v. State, 153 S. W. 130.

It is not error to refuse to charge the jury that defendant would be absolved from his promise to marry prosecutrix if she had intercourse with another after defendant seduced her. Carter v. State, 59 Texas Crim. Rep. 73; 127 S. W. 220.

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It is not error to refuse to charge the jury that the carnal knowledge must be under a promise to marry, not in the future, but immediately. Merrell v. State, 42 Texas Crim. Rep. 26; 57 S. W. 289.

If there is evidence raising the issue, it is error to refuse to charge the jury that if prosecutrix had had carnal intercourse with anyone before she had with defendant he would not be guilty of seduction. Barnard v. State, 76 S. W. 475. Simmons v. State, 54 Texas Crim. Rep. 624; 114 S. W. 841. Sharp v. State, 61 Texas Crim. Rep. 247; 134 S. W. 333. Humphrey v. State, 143 S. W. 641. Bishop v. State, 144 S. W. 278.

If there is evidence raising the issue, it is error to refuse to charge the jury that prosecutrix must have yielded alone upon the promise of marriage, and that if she yielded partly upon the promise and partly by fear or lust they should acquit. Barnes v. State, 37 Texas Crim. Rep. 328; 3 S. W. 684. Spenrath v. State, 48 S. W. 192. Fine v. State, 45 Texas Crim. Rep. 290; 77 S. W. 806. Nolan v. State, 48 Texas Crim. Rep. 438; 88 S. W. 242. Muhlhause v. State, 56 Texas Crim. Rep. 288; 119 S. W. 868. Coleman v. State, 158 S. W. 1140.

If there is evidence raising the issue, it is error to refuse to charge that if the prosecutrix was actuated either in whole or in part by lust or passion or any such consideration or motive the jury should acquit. Simmons v. State, 54 Texas Crim. Rep. 624; 114 S. W. 841.

If there is evidence raising the issue, it is error to refuse to charge the jury that they should acquit if prosecutrix did not wholly rely upon a promise to marry, but that she was moved to let defendant have carnal knowledge of her partly through fear, or partly through lust, or through both fear and lust, although they should believe that a promise to marry was then made and was part though not the sole and only inducement. Nolan v. State, 48 Texas Crim. Rep. 438; 88 S. W. 242. Muhlhause v. State, 56 Texas Crim. Rep. 288; 119 S. W. 868. Coleman v. State, 158 S. W. 1137.

If there is evidence to support the theory it is error to refuse to charge the jury that if defendant had carnal knowledge of prosecutrix before he promised to marry her he should be acquitted. Humphrey v. State, 143 S. W. 641. Coleman v. State, 158 S. W. 1140.

An unchaste woman cannot be seduced, and it is error to charge the jury that defendant would be guilty of seduction if he knew that prosecutrix was unchaste before he promised to marry her. Mrous v. State, 31 Texas Crim. Rep. 597; 21 S. W. 764.

If there is evidence that another had carnal knowledge of prosecutrix after defendant promised to marry her but before defendant had carnal knowledge of her, it is error to charge that defendant would not be guilty if she had intercourse with any other person prior to the promise of marriage. If defendant was not the first one to have carnal knowledge of prosecutrix after he promised to marry her he would not be guilty of seduction. Barnard v. State, 76 S. W. 475.

Sec. 2722. **Minority as defense.**—It is not error to charge the jury in a seduction case that the fact that defendant was a minor and that his parent would not consent to his marriage with prosecutrix is no defense. McCullar v. State, 36 Texas Crim. Rep. 216; 36 S. W. 585. Merrell v. State, 42 Texas Crim. Rep. 24; 57 S. W. 289.

A minor will not be heard to say that he could not make a valid promise to marry. State v. Brock, 85 S. W. 596.

Sec. 2723. **Objection to charge must be specific.**—To require consideration of a supposed error in the charge of the court the exception must specifically point it out; a mere general objection is not sufficient. Browning v. State, 64 Texas Crim. Rep. 148; 142 S. W. 2. Wooldridge v. State, 146 S. W. 550. Blackburn v. State, 160 S. W. 687.

Sec. 2724. **Argument of counsel.**—Abuse is not logic and vituperation is not argument, and personal and undignified abuse of defendant by counsel in argument to the jury may require a new trial. Parks v. State, 35 Texas Crim. Rep. 380; 33 S. W. 872. Cooper v. State, 163 S. W. 424.

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Art. 1449. (969) (816) **Marriage obliterates offense.**—If the parties marry each other at any time before the defendant pleads to the indictment before a court of competent jurisdiction, then the prosecution, if begun, shall be . . . dismissed . . . if, after the prosecution is begun, and prior to the time he pleads to the indictment before a court of competent jurisdiction, the defendant in good faith, offers to marry the female so seduced, and if she refuses to marry him, such refusal shall be a bar to further prosecution; but the benefit of this article shall not apply to the case of a defendant who was in fact married at the time of committing the offense. (O. C. 790, amended by Acts 1903, p. 221. All of this article is not copied here for the reason that the portion omitted relating to reviving the offense if the wife is abandoned after marriage was held unconstitutional in Waldon v. State, 50 Texas Crim. Rep. 512; 98 S. W. 848.)

Sec. 2725. **Offer to marry after seduction.**—If defendant marries prosecutrix before plea to the indictment he cannot be legally prosecuted for seduction. Eledge v. State, 50 Texas Crim. Rep. 223; 96 S. W. 39.

Under the statute before it was amended by the Act of 1903 defendant was entitled to have the prosecution for seduction dismissed if he in good faith offered to marry the female seduced at any time before his conviction. Wright v. State, 31 Texas Crim. Rep. 357; 20 S. W. 756.

By the term "in good faith offers to marry the female" is meant only that defendant take the marriage vows. The only test of his "good faith" is to start the ceremony and see if he will go through it. Wright v. State, 31 Texas Crim. Rep. 358; 20 S. W. 756.

An offer to marry in good faith means ability to consummate marriage. It is no defense that defendant was willing but that being a minor his parent would not consent. Harvey v. State, 53 S. W. 102. Merrell v. State, 42 Texas Crim. Rep. 19; 57 S. W. 289.

An offer to marry in good faith means ability to consummate marriage, and it is no defense that prosecutrix married another after defendant seduced her. Thorp v. State, 59 Texas Crim. Rep. 517; 129 S. W. 608. Morris v. State, 81 S. E. 257.

The fact that prosecutrix broke the engagement after defendant seduced her is no bar to a prosecution for seduction unless defendant in good faith offered to marry her. Hinman v. State, 59 Texas Crim. Rep. 29; 127 S. W. 224.

If the prosecutrix refuses to marry defendant after his offer to marry her is made to her in good faith before he pleads to the indictment, the prosecution, if begun, should be dismissed. Wright v. State, 31 Texas Crim. Rep. 354; 20 S. W. 756.

To escape prosecution for seduction it is not sufficient that defendant agreed to marry, prosecutrix when he became of age, and, notwithstanding such offer, if she died before he reached his majority, it will not bar the prosecution. Merrell v. State, 42 Texas Crim. Rep. 25; 57 S. W. 289.

The offer to marry must be made to prosecutrix and it is immaterial what message was sent to her parents. Nolan v. State, 48 Texas Crim. Rep. 438; 88 S. W. 242.

Art. 1450. **Abandonment after seduction and marriage.**—If any person, by promise of marriage, shall seduce an unmarried female under the age of twenty-five years, and shall have carnal knowledge of such female, and if after prosecution has begun, the parties marry each other, at any time before the defendant pleads to the indictment before a court of competent jurisdiction, and if the defendant within

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two years after said marriage, without the fault of his said wife, such fault amounting to acts committed by her after said marriage as would entitle him to a divorce under the laws of this State, shall abandon her or refuse to live with her, or shall be so cruel to her as to compel her to leave him, or shall be guilty of such outrages or cruelties towards her as to make their living together insupportable, thereby leaving her or forcing her to leave him and live apart from each other, shall be guilty of the offense of abandonment after seduction and marriage, and any person convicted of said offense shall be confined in the penitentiary for a term not less than two nor more than ten years, and said marriage shall be no bar to the qualifications of said female to testify against the defendant and the female so seduced and subsequently married and abandoned as herein provided shall be a competent witness against said defendant. (Act March 17, 1909, Acts 1909, p. 97.)

Sec. 2726. **Statute is constitutional.**—The Act of March 17, 1909, creating the offense of abandonment after seduction and marriage is constitutional. Thacker v. State, 62 Texas Crim. Rep. 294; 136 S. W. 1095. Qualls v. State, 158 S. W. 539.

Sec. 2727. **Indictment for abandonment after seduction and marriage.**—Bad spelling of the word "woman" will not vitiate an otherwise good indictment if in other parts of the indictment she is alleged to be a female. Qualls v. State, 158 S. W. 540.

The indictment may set out one or more ways by which the offense be committed. Qualls v. State, 158 S. W. 540. Baskins v. State, 171 S. W. 724.

Sec. 2728. **Evidence.**—The abandonment statute specifically authorizes the wife who has been abandoned to testify. Qualls v. State, 158 S. W. 539.

If it is an issue as to whether defendant abandoned his wife or whether she abandoned him, proof that he stated that he did not intend to live with her longer than the two years required by the statute is admissible on that issue. Qualls v. State, 165 S. W. 202.

When defendant testifies that he had been informed that his wife had quit him it is error to refuse to permit him to prove by his informant the statements of the wife and that such proposed witness had told defendant. Qualls v. State, 158 S. W. 539.

Proof of a filing of a complaint in the Justice Court is proof that the prosecution was begun. Baskins v. State, 171 S. W. 723.

The best evidence that a prosecution for seduction was begun in the Justice Court is the records of said court or certified copies thereof. Baskins v. State, 171 S. W. 723.

Sec. 2729. **Charge of the court.**—In a prosecution for abandonment after seduction and marriage the court should give the same charge as to the element of seduction as if the defendant were only on trial for that offense. Coleman v. State, 158 S. W. 1137.

It is error to authorize a conviction on a phase of the statute which is not alleged. Qualls v. State, 158 S. W. 539.

If the defensive theory is that defendant did not abandon his wife but that she abandoned him the court should charge on this theory. Qualls v. State, 158 S. W. 539. Baskins v. State, 171 S. W. 723.

A charge instructing the jury that if after their marriage defendant's wife abandoned him they should acquit him sufficiently presents that issue. Qualls v. State, 165 S. W. 203.

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The court is not required to charge the jury to acquit if they believe that defendant married the woman he seduced in ignorance of the fact that before their marriage and after he seduced her she had granted carnal favors to others. The statute only justifies abandonment by the husband for acts committed by the wife after their marriage. James v. State, 167 S. W. 727.

In a prosecution for abandonment after seduction and marriage it is not necessary to charge the jury that the prosecutrix must be corroborated both as to the act of intercourse and the promise of marriage. James v. State, 167 S. W. 727.

Art. 1451. (970) (817) **Liability of married man for seduction.**—No person who was, at the time of committing the offense, married, and the fact of marriage known to the woman, shall be held liable for the offense defined in this chapter.

CHAPTER IV

EMPLOYMENT OF SAILORS AND CREW

Restricting employment of crew of foreign vessel..... 1452

Article 1452. (971) (817a) **Restricting employment of crew of foreign vessel.**—No sailor or portion of the crew of any foreign sea-going vessel shall engage in working on the wharves or levees of ports in the State of Texas beyond the end of the vessels' tackle. Any officer, sailor or member of the crew of a foreign sea-going vessel violating this law shall be deemed guilty of a misdemeanor, and on conviction shall be fined in a sum not less than ten dollars nor more than one hundred dollars, or be imprisoned in the county jail for not less than ten nor more than thirty days, or both in the discretion of the court or jury. (Act March 26, 1885, Acts 1885, p. 52.)

CHAPTER V

PROTECTION OF SETTLERS ON SCHOOL LANDS

Preventing settlement on public lands..... 1453

Article 1453. (972) (817b) **Preventing settlement on public lands.**—Any person who by force, threats or intimidations shall prevent or attempt to prevent, or shall combine and confederate with others to prevent or attempt to prevent any person who has acquired a right thereto in accordance with the laws of the State from peaceably entering upon and establishing a settlement on any parcel or tract of land belonging to the Common School, University, the Lunatic, Blind, Deaf and Dumb and Orphan Asylum lands, subject to purchase and settlement under and in accordance with the laws of this State, shall be deemed guilty of a misdemeanor and upon conviction therefor shall be fined in any sum not less than two hundred nor more than one

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thousand dollars, and in addition thereto shall be imprisoned in the county jail not less than one nor more than six months. (Act March 31, 1885, Acts 1885, p. 83.)

CHAPTER VI

TRUSTS—CONSPIRACIES AGAINST TRADE

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Article 1454. **Defining trusts.**—A "trust" is a combination of capital, skill or acts by two or more persons, firms, corporations or associations of persons, or either two or more of them for either, any, or all of the following purposes:

1. To create, or which may tend to create or carry out, restrictions in trade or commerce or aids to commerce, or in the preparation of any product for market or transportation, or to create or carry out restrictions in the free pursuit of any business authorized or permitted by the laws of this State.

2. To fix, maintain, increase or reduce the price of merchandise, produce, or commodities, or the cost of insurance, or of the preparation of any product for market or transportation.

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3. To prevent or lessen competition in the manufacture, making, transportation, sale or purchase of merchandise, produce, or commodities, or the business of insurance, or to prevent or lessen competition in aids to commerce, or in the preparation of any product for market or transportation.

4. To fix or maintain any standard or figure whereby the price of any article or commodity of merchandise, produce or commerce, or the cost of transportation, or insurance, or the preparation of any product for market or transportation, shall be in any manner affected, controlled or established.

5. To make, enter into, maintain, execute or carry out any contract, obligation or agreement by which the parties thereto bind, or have bound, themselves not to sell, dispose of, transport or to prepare for market or transportation any article or commodity, or to make any contract of insurance at a price below a common standard or figure, or by which they shall agree, in any manner, to keep the price of such article or commodity, or charge for transportation or insurance, or the cost of the preparation of any product for market or transportation, at a fixed or graded figure, or by which they shall, in any manner, affect or maintain the price of any commodity or article, or the cost of transportation or insurance, or the cost of the preparation of any product for market or transportation, between them or themselves and others, to preclude a free and unrestricted competition among themselves or others in the sale or transportation of any such article or commodity or business of transportation or insurance, or the preparation of any product for market or transportation, or by which they shall agree to pool, combine or unite any interest they may have in connection with the sale or purchase of any article or commodity, or charge for transportation or insurance, or charge for the preparation of any product for market or transportation, whereby its price or such charge might be in any manner affected.

6. To regulate, fix or limit the output of any article or commodity which may be manufactured, mined, produced or sold, or the amount of insurance which may be undertaken, or the amount of work that may be done in the preparation of any product for market or transportation.

7. To abstain from engaging in or continuing business, or from the purchase or sale of merchandise, produce or commodities partially or entirely within the State of Texas, or any portion thereof. (Acts 1903, p. 119.)

Hathaway v. State, 36 Texas Crim. Rep. 261; 36 S. W. 465.

Art. 1455. **"Monopoly" defined.**—A "monopoly" is a combination or consolidation of two or more corporations when effected in either of the following methods:

1. When the direction of the affairs of two or more corporations is in any manner brought under the same management or control for the purpose of producing, or where such common management or con-

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trol tends to create a trust as defined in the first section of this chapter.

2. Where any corporation acquires the shares or certificates of stock or bonds, franchise or other rights, or the physical properties, or any part thereof, of any other corporation or corporations, for the purpose of preventing or lessening, or where the effect of such acquisition tends to affect or lessen competition, whether such acquisition is accomplished directly or through the instrumentality of trustees or otherwise. (Acts 1903, p. 120.)

Art. 1456. **"Conspiracy in restraint of trade" defined.**—Either or any of the following acts shall constitute a conspiracy in restraint of trade:

1. Where any two or more persons, firms, corporations or associations of persons, who are engaged in buying or selling any article of merchandise, produce or any commodity, enter into an agreement or understanding to refuse to buy from or sell to any other person, firm, corporation or association of persons, any article of merchandise, produce or commodity.

2. Where any two or more persons, firms, corporations or associations of persons, shall agree to boycott or threaten to refuse to buy from or sell to any person, firm, corporation or association of persons for buying from or selling to any other person, firm, corporation or association of persons. (Acts 1903, p. 120.)

Art. 1457. **Trusts, monopolies, and conspiracies in restraint of trade prohibited.**—Any and all trusts, monopolies and conspiracies in restraint of trade, as herein defined, are hereby prohibited and declared to be illegal. (Acts 1903, p. 121.)

Art. 1458. **Corporations forfeit charter for violation of this law.**—Any corporation holding a charter under the laws of the State of Texas, which shall violate any of the provisions of this chapter, shall thereby forfeit its charter and franchise, and its corporate existence shall cease and determine. (Acts 1903, p. 121.)

Art. 1459. **Duty of Attorney General.**—For a violation of any of the provisions of this chapter by any corporation mentioned herein, it shall be the duty of the Attorney General, upon his own motion, and without leave or order of any judge or court, to institute suit or quo warranto proceedings in Travis county, at Austin, or at the county seat of any county in the State, where such corporation exists, does business, or may have a domicile, for the forfeiture of its charter rights and franchise, and the dissolution of its corporate existence. (Acts 1903, p. 121.)

Art. 1460. **When corporation of this State has forfeited its charter, no other corporation to which property of defaulting corporation has been transferred shall be incorporated or be permitted to do business in this State.**—When a corporation organized under the laws of this State, shall have been convicted of a violation of any of the provisions

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of this chapter, and its charter and franchise has been forfeited, as provided in article 1458, no other corporation to which the defaulting corporation may have transferred its properties and business, or which has assumed the payment of its obligations, shall be permitted to incorporate or do business in Texas. (Acts 1903, p. 121.)

Art. 1461. **Foreign corporation violating this law forbidden to do business.**—Every foreign corporation violating any of the provisions of this chapter is hereby denied the right, and is prohibited from doing any business within this State; and it shall be the duty of the Attorney General to enforce this provision by injunction or other proceedings in the district court of Travis county, in the name of the State of Texas. (Acts 1903, p. 121.)

Art. 1462. **Quo warranto proceedings.**—The provisions of the Revised Statutes of this State, prescribing the remedy and regulating the proceedings by quo warranto, etc., shall, except in so far as they conflict herewith, govern and control the proceedings when instituted to forfeit any charter under this chapter. (Acts 1903, p. 121.)

Art. 1463. **Foreign corporations convicted of violating this law, no other corporation to which the defaulting corporation has transferred its business or property shall be permitted to incorporate or do business in this State.**—When any foreign corporation has been convicted of a violation of any of the provisions of this chapter, and its right to do business in this State has been forfeited, as provided in article 1461, no other corporation to which the defaulting corporation may have transferred its properties and business, or which has assumed the payment of its obligations, shall be permitted to incorporate or do business in Texas. (Acts 1903, p. 121.)

Art. 1464. **Penalty may be recovered for violating this law.**—Each and every firm, person, corporation or association of persons, who shall in any manner violate any of the provisions of this chapter, shall, for each and every day that such violation shall be committed or continued, forfeit and pay the sum of fifty dollars, which may be recovered in the name of the State of Texas in any county where the offense is committed or where either of the offenders reside, or in Travis county; and it shall be the duty of the Attorney General, or the district or county attorney under the direction of the Attorney General, to prosecute for the recovery of the same; and the fees of the prosecuting attorney for representing the State in proceedings under this chapter shall be over and above the fees allowed him under the general fee bill. (Acts 1903, p. 121.)

Art. 1465. **Contract in violation of provisions of this law void.**—Any contract or agreement in violation of the provisions of this chapter shall be absolutely void and not enforcible either in law or equity. (Acts 1903, p. 122.)

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Art. 1466. **Punishment for violating this law.**—And, in addition to all other penalties and forfeitures herein provided for, every person violating the provisions of this chapter shall be further punished by imprisonment in the penitentiary not less than two nor more than ten years. (Acts 1907, p. 194.)

Art. 1467. **In prosecutions for violating this law, what evidence used.**—In prosecutions for the violations of any of the provisions of this chapter, evidence that any persons has acted as the agent of a corporation in the transaction of its business in this State shall be received as prima facie proof that his act in the name, behalf or interest of the corporation of which he was acting as the agent, was the act of the corporation. (Acts 1903, p. 122.)

Art. 1468. **Persons may be summoned and required to testify.**—Upon the application of the Attorney General or of any of his assistants, or of any district or county attorney, acting under the direction of the Attorney General, made to any county judge, or any justice of the peace, in this State, stating that he has reason to believe that a witness, who is to be found in the county in which such county judge or justice of the peace is an officer, knows of a violation of any of the provisions of this chapter, it shall be the duty of the county judge, or of the justice of the peace, as the case may be, before whom such application is made, to have summoned and to have examined such witness in relation to violations of any of the provisions of this chapter, said witness to be summoned as provided for in criminal cases. The said witness shall be duly sworn; and the county judge, or justice of the peace, as the case may be, shall cause the statements of the witness to be reduced to writing and signed and sworn to before him; such sworn statement shall be delivered to the Attorney General, his assistants, or the district or county attorney, upon whose application the witness was summoned. Should the witness summoned as aforesaid fail to appear, or to make statements of the facts within his knowledge, under oath, or to sign the same after it has been reduced to writing, he shall be guilty of contempt of court, and may be fined not exceeding one hundred dollars, and may be attached and imprisoned in the county jail until he shall make a full statement of all the facts within his knowledge with reference to the matter inquired about. Any person who shall testify before any county judge, or justice of the peace, as provided for in this chapter, or who shall testify as a witness for the State in the course of any statutory proceeding to secure testimony for the enforcement of this law, or in the course of any judicial proceeding to enforce the provisions of this chapter, shall not be subject to indictment or prosecution for any transaction, matter or thing concerning which he shall so give evidence, documentary or otherwise. (Acts 1907, p. 221.)

Art. 1469. **Actions brought under this law have precedence.**—All actions authorized and brought under this chapter shall have prece-

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dence, on motion of the prosecuting attorney or the Attorney General, of all other business, civil and criminal, except criminal cases where the defendants are in jail. (Acts 1903, p. 122.)

Art. 1470. **Entering into agreement to form trust, monopoly, etc., penalty.**—If any person shall enter into an agreement or understanding of any character to form a trust, or to form a monopoly, or to form a conspiracy in restraint of trade, as these offenses are defined in this chapter, or shall form a trust, monopoly or conspiracy in restraint of trade, or shall be a party to the formation of a trust or monopoly or conspiracy in restraint of trade, or shall become a party to a trust or monopoly or conspiracy in restraint of trade, or shall do any act in furtherance of or aid to such trust or monopoly or conspiracy in restraint of trade, he shall be punished by imprisonment in the penitentiary for a period of not less than two years nor more than ten years. (Acts 1907, p. 457.)

Art. 1471. **Person, member, agent, employe, etc., operating in violation of this law, penalty.**—If any person shall, as a member, agent, employe, officer, director or stockholder of any business, firm, corporation or association of persons, form, in violation of the provisions of this chapter, or shall operate, in violation of the provisions of this chapter, any such business, firm, corporation or association formed in violation of this chapter, or shall make any sale, or purchase, or any other contract, or do business for such business, firm, corporation or association, or shall do any other act which has the effect of violating or aiding in the violation of any of the provisions of this chapter, or shall, with the intent or purpose of driving out competition or for the purpose of financially injuring competitors, sell within this State at less than cost of manufacture or production, or sell in such a way or give away within this State, products for the purpose of driving out competition or financially injuring competitors engaged in a similar business, or give secret rebates on such purchase for the purpose aforesaid, he shall be punished by confinement in the penitentiary for a period of not less than two years nor more than ten years. (Acts 1907, p. 457.)

Art. 1472. **Persons outside State liable to punishment, when.**—If any person shall, outside of this State, do anything which, if done within this State, would constitute the formation of a trust or monopoly or conspiracy in the restraint of trade, as defined in this chapter, and shall cause or permit the trust or monopoly so formed by him to do business within this State, or shall cause or permit such trust, monopoly, or conspiracy in restraint of trade to have any operation or effect within this State, or, if such trust, monopoly or conspiracy in restraint of trade, having been formed outside of said State, any person shall give effect to such trust, monopoly or conspiracy in this State, or he shall do anything to help or aid in doing business in this State, or otherwise violate the anti-trust laws of this State, or if any

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person shall buy or sell or otherwise make contracts for or aid any business, firm, corporation or association of persons, formed or operated in violation of the provisions of this chapter, or so formed or operated as would be in violation of the laws of this State, if it had been formed within this State, shall be punished by confinement in the penitentiary for a period of not less than two years nor more than ten years. (Acts 1907, p. 457.)

Art. 1473. **Persons, etc., who have formed trusts, etc., penalty for.**—If any person or employe or employes, or agent or agents, stockholder or stockholders, officer or officers of any person, firm, association of persons, or corporation, now doing business in this State, who have formed a trust, as defined in this chapter, or formed a monopoly, as defined in this chapter, or has formed a conspiracy in restraint of trade, as defined in this chapter, or shall do or perform any act of any character to carry out such trust, monopoly or conspiracy in restraint of trade, such person, employe or employes, agent or agents, stockholder or stockholders, officer or officers, shall be punished by confinement in the penitentiary for not less than two years nor more than ten years. (Acts 1907, p. 458.)

Art. 1474. **Venue.**—Criminal prosecutions under this chapter may be conducted in Travis county, Texas, or in any county in this State wherein a trust, monopoly, or conspiracy in restraint of trade is being carried on; a recovery or prosecution against any person for any violation of this act shall not bar a prosecution of or recovery against any other person or persons for the same offense. (Acts 1907, p. 458.)

Art. 1475. **District or county attorney may commence prosecution.**—Prosecutions under this chapter may be instituted and prosecuted by any county or district attorney of this State, and when any such prosecutions have been instituted by any county or district attorney, such officer shall forthwith notify the Attorney General of such fact, and it is hereby made the duty of the Attorney General, when he shall receive such notice, to join such officer in such prosecution and do all in his power to secure the enforcement of this chapter. (Acts 1907, p. 458.)

Art. 1476. **Fee of district and county attorney.**—For every conviction obtained under the provisions of this chapter, the State shall pay to the county or district attorney in such prosecution the sum of two hundred and fifty dollars, and if both the county and district attorney shall serve together in such prosecution, such fee shall be divided between them as follows: One hundred dollars to the county attorney and one hundred and fifty dollars to the district attorney. (Acts 1907, p. 458.)

Art. 1477. **Agricultural products and live stock in hands of producer exempt.**—The provisions of this law shall not apply to agricultural products or live stock while in the hands of the producer or

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raiser; and it shall be lawful for any and all persons engaged in any kind of work or labor, manual or mental, or both, to associate themselves together and form trades unions and other organizations for the purpose of protecting themselves in their personal work, personal labor, and personal service, in their respective pursuits and employments. (Acts 1899, p 262.)

Art. 1478. **Trade unions, etc., exempt when.**—And it shall not be held unlawful for any member or members of such trades union or other organization or association, or any other person, to induce or attempt to induce, by peaceable and lawful means, any person to accept any particular employment, or quit or relinquish any particular employment in which such person may then be engaged, or to enter any pursuit, or refuse to enter any pursuit, or quit or relinquish any pursuit, in which such person may then be engaged; provided, that such member or members shall not have the right to invade or trespass upon the premises of another without the consent of the owner thereof. (Acts 1899, p. 262.)

Art. 1479. **Preceding article not to apply to combination, etc.**—The foregoing article shall not be held to apply to any combination or combinations, association or associations of capital, or capital and persons, natural or artificial, formed for the purpose of limiting the production or consumption of labor's products, or for any other purpose in restraint of trade; provided, that nothing herein contained shall be held to interfere with the terms and conditions of private contract with regard to the time of service, or other stipulations between employers and employes; provided, further, that nothing herein contained shall be construed to repeal, affect or diminish the force and effect of any statute now existing on the subject of trusts, conspiracies against trade, pools and monopolies. (Acts 1899, p. 262.)

CHAPTER VII

PUBLIC HOUSES OF AMUSEMENT

Art.
"Public house of amusement" defined..... 1480
Discrimination against reputable productions..... 1481
List of bookings..... 1482
Leases of houses of public amusement..... 1483

Article 1480. **"Public house of amusement" defined.**—All buildings constructed, fitted and equipped for the purpose of theaters, commonly called theaters, opera houses, play houses, or by whatever name designated, which are and shall hereafter be used for public performances, the production and exhibition of plays, dramas, operas and other shows of whatever nature, to which admission fees are charged, be, and the same are hereby declared to be public houses of amusement, and

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the same shall be subject to regulation by the public will as expressed by ordinance, statute, or other law; provided that owners and lessees shall have the right to assign seats to patrons thereof, and to refuse admission to objectionable characters. (Act March 5, 1907, Acts 1907, p. 21.)

Art. 1481. **Discrimination against reputable productions.**—Hereafter it shall be unlawful for any owner, or lessee, or any manager, agent, employe or representative of the owner or lessee who may be in charge and having the care and management of such house or houses of public amusement, to discriminate against reputable theaters, operas, shows or other productions by whatever name known. And any owner or lessee, or any manager, agent, employe, or representative of the owner or lessee, in charge of such house or houses, who shall fail and refuse to rent, lease and let such house or houses of public amusement, for one or more performances, and upon such terms and conditions as shall not be deemed unreasonable, extortionate or prohibitive, to the agent, manager, proprietor or representative, who may in good faith make application therefor, of any reputable theater, opera or show, by whatever name known, shall be deemed guilty of a misdemeanor and shall, upon conviction thereof in any court of competent jurisdiction of this State, be fined in any sum not less than one hundred dollars nor more than five hundred dollars, one-half of which fine shall be paid to the complainant, the balance to go to the jury fund of the county in which such prosecution is had; and in addition, such person or persons so convicted may be committed to the county jail for a period of not more than ten days. Each violation of any of the provisions of this chapter shall be a separate offense. Provided, however, that if at the time of the application to lease or rent such house or houses of public amusement for said purposes, it shall be shown by the owner, lessee or other person in charge thereof that said house or houses of public amusement has or have been already leased, let or rented to other persons or parties, and that other bookings have in good faith been made for the date or dates so applied for, and that such leasing, renting, and bookings were made in good faith, and not with the intention of evading the provisions of this chapter, then and in that instance, the penalties provided by this article shall not be imposed. (Act March 5, 1907, Acts 1907, p. 22.)

Art. 1482. **List of bookings.**—Owners, lessees, managers or other persons in charge of such house or houses of public amusement shall make and keep in convenient form, a list of all bookings of shows for such house or houses, with the dates as to time specifically set out therein, and said list of bookings shall be exhibited upon request, to all persons applying therefor, who in good faith, desire to lease or rent such house or houses for the purposes indicated in Article 1480; and the failure or refusal of such owner, lessee, or other person or persons in charge of such house or houses, to keep and exhibit such list of bookings as aforesaid, shall upon conviction thereof, be fined in any

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sum not less than ten nor more than twenty dollars; and each failure or refusal to so exhibit such list of bookings shall be a separate and distinct offense. (Act March 5, 1907, Acts 1907, p. 22.)

Art. 1483. **Leases of houses of public amusement.**—All leases and renewals of leases hereafter taken and made for a term upon such houses of public amusement as defined in Article 1480, shall contain a provision therein to the effect that the lessees and his assigns shall in good faith comply with the provisions of this law; and the failure or refusal of any such lessee or his assigns to comply with the provisions of this law shall at once terminate such lease, and upon conviction of the violation of any provision of this law, such lessee or his assigns in addition to the penalties provided in Articles 1481 and 1482, shall forfeit his lease and all rights and privileges under the same. (Act March 5, 1907, Acts 1907, p 22.)

CHAPTER VIII

CORPORATIONS

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Article 1484. **Attorney general may examine records.**—Every corporation doing business in this State, by virtue of a permit or charter, granted under the laws of this State, shall permit the Attorney General, or any of his assistants or representatives, when authorized in writing by the Attorney General, to make examination of all the books, accounts, records, minutes, letters, memoranda, documents, checks, vouchers, telegrams, constitution and by-laws and other records of said corporation, as often as he may deem it necessary. The Attorney General, or his assistant or assistants, or representative or representatives shall present a request in writing to the president, vice-president, treasurer, secretary, manager, agent or other officer of said corporation at the time the Attorney General or his assistant or assistants, or representative or representatives, desire to examine said books, accounts, records, minutes, letters, memoranda, documents, checks, vouchers, telegrams, constitution and by-laws and other records belonging to said corporation, and it shall be the duty of the officer or agent of any corporation to whom said request is presented to immediately permit the Attorney General, or his authorized assistant or assistants, or representative or representatives to inspect and examine all the books, records and other documents of said corporation as hereinabove set forth. (Sec. 1, Act March 15, 1907, Acts 1907, p. 34.)

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Art. 1485. **Examination of records of corporation.**—The Attorney General or any of his assistants or representatives when authorized in writing by the Attorney General, shall have the power and authority to make diligent investigation into the organization, conduct and management of any corporation authorized to do business within this State, and shall have power to inspect and examine all or any books, accounts, records, minutes, letters, memoranda, documents, checks, vouchers, telegrams, constitution and by-laws and other records of such corporation, and take copies of any or all of such records or documents herein set forth as in his judgment may show or tend to show that said corporation has been or is engaged in acts or conduct in violation of its charter rights and privileges, or in violation of any law of this State; provided, that the Attorney General or his assistant or assistants or representative or representatives shall not make public or use said copies or any information derived in the course of said examination of said records or documents as herein above set forth except in the course of some judicial proceedings of which the State is a party or in a suit by the State to cancel the permit or forfeit the charter of such corporation or to collect penalties for a violation of the law of this State, or for the information of any of the officers of this State charged with the enforcement of its laws. (Sec. 2, Act March 15, 1907, Acts 1907, p. 35.)

Art. 1486. **Refusing to permit examination of records of corporation.**—If any president, vice-president, treasurer, secretary, manager, agent or other officer of any corporation doing business under permit or charter from this State shall fail or refuse to permit the Attorney General or any of his assistants or representatives who may be authorized in writing by the Attorney General to make such examination, to examine any or all of the books, accounts, records, minutes, letters, memoranda, documents, checks, vouchers, telegrams, constitution and by-laws and other records of said corporation, or shall fail or refuse to permit said Attorney General or his authorized assistant or assistants or representative or representatives to take copies of same, he shall be guilty of a misdemeanor, and upon conviction therefor shall be punished by a fine of not less than one hundred dollars nor more than one thousand dollars, and by imprisonment in the county jail for not less than thirty nor more than one hundred days, and each day of such failure or refusal to comply with the provisions of this chapter shall constitute a separate offense. (Sec. 3, Act March 15, 1907, Acts 1907, p. 35.)

Art. 1487. **Doing business in name of defunct corporation.**—When any charter or permit heretofore or hereafter granted under the laws of the State of Texas to any corporation to do business in said State, shall have been forfeited, it shall be unlawful for any persons who were members or officers of said defunct corporation at the time of such forfeiture to do business in Texas under the old corporate name of such corporation, or to use the same or like signs or advertisements

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which were used by such corporation before such forfeiture, and any such persons so violating this law shall be deemed guilty of a misdemeanor and on conviction shall be fined in any sum not more than one thousand dollars, nor less than two hundred and fifty dollars; provided, this shall not apply where the charter of a corporation has been revived in the manner provided by law and is at the time in good standing. (Act April 17, 1905, Acts 1905, p. 335.)

Sec. 2730. **Sale of stock of corporation.**
Sec. 2731. Certain corporations subject to this law.
Sec. 2732. Other corporations also subject.
Sec. 2733. Unlawfully selling stock of corporation.
Sec. 2734. Certain corporations exempt.

Sec. 2731. **Certain corporations subject to this law.**—"Every private corporation, foreign or domestic, organized for profit, which is now attempting or shall hereafter attempt to increase its capital stock, and every proposed corporation attempted to be organized which shall, directly or indirectly, through itself, its agents or employes, or through any person or association of persons, holding companies, sales companies or otherwise, or through any other agents, sell or contract to sell any stock of such corporation or proposed corporation, upon which sale or proposed sale or contract of sale any part of the proceeds derived or to be derived therefrom are used or to be used, directly or indirectly for the payment of any commission, promotion, organization fee or other expenses incident, directly or indirectly, to the sale of its shares of stock, except attorney's fees, charter fees, franchise tax, permit fees and stationery and supplies, shall be subject to the provisions of this act." (Sec. 1, Act Aug. 21, 1913.)

Sec. 2732. **Other corporations also subject.**—"This act shall also apply to any mining, oil or gas corporation increasing its stock or proposed mining, oil or gas corporation attempting to sell stock in which any land or mineral or thing of value is to be procured from, in or under such land that has been or is to be placed as an asset with or in the corporation or proposed corporation, whether any promotion fee is charged or not, and to any townsite corporation or proposed townsite corporation." (Sec. 2, Act Aug. 21, 1913.)

Sec. 2733. **Unlawfully selling stock of corporation.**—"It shall hereafter be unlawful for any officer, agent or employe or trustee, or holding company, or sales agents, or person, or association of persons in this State to sell, or offer to sell, or contract to sell, directly or indirectly, for such concern, any stock of any corporation or proposed corporation, subject to this act, which has been, proposed to be, is now being, or may hereafter be organized for profit, without first complying with the provisions of this act, and any person so offending shall be guilty of a misdemeanor, and upon conviction shall be fined not less than twenty-five dollars nor more than two thousand dollars, and in addition thereto may be imprisoned in the county jail for any period not more than one year, or by both such fine and imprisonment." (Sec. 12, Act Aug. 21, 1913.)

Sec. 2734. **Certain corporations exempt.**—"The terms of this act shall not apply to any national bank, nor to any corporation having a charter granted under any act of the Congress of the United States, nor to any State bank, bank and trust company or trust company organized under the laws of this State, nor to any corporation organized under the Federal Reclamation Act, approved June 17, 1902, or the regulations established by the Secretary of the Department of the Interior in pursuance thereof. Nor shall the terms of this act apply to any corporation or the promoters of any corporation organized under the laws of Texas which does not sell or contract to sell its stock to more than twenty-five bona fide purchasers; provided, it does not act as the agent or trustee, holding company or sales company in the promotion of any concern which is included under the terms of this act. Nor shall this act apply to any railroad or railway company or interurban railroad or railway company, or street railroad or railway company. Nor shall this act apply to the sale of stock of a corporation by a bona fide owner of same, who had in good faith bought the same, and who in the purchase and sale of same was and is not acting directly or indirectly

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as promoter or agent of such corporation. Nor shall this act apply to a bona fide stock or stock broker in the sale of stock, which stock has been by such corporation sold and issued to a bona fide purchaser prior to the offering of same for sale by such broker; provided, that such purchaser or broker was not acting, directly or indirectly, as promoter of such corporation." (Sec. 14, Act Aug. 21, 1913.)

CHAPTER IX

STATE REVENUE AGENT

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Refusing to permit State Revenue Agent to inspect records..... 1489
State Revenue Agent making false report..... 1490

Article 1488. (989) **Duties of State Revenue Agent.**—The Governor is hereby authorized to appoint a suitable person as Revenue Agent for the State, for the purpose of securing a better enforcement of the revenue laws of the State. The Agent provided for herein shall be known as the State Revenue Agent. Said Revenue Agent shall be subject to the directions of the Governor, who may, whenever in his judgment the public service demands it, direct the said Revenue Agent to investigate books and accounts of the assessing and collecting officers of this State, and all officers and persons disbursing, receiving or having in their possession public funds, and to make such other investigations and perform such other duties in the interest of the public revenues as the Governor may direct. Whenever any such investigation is ordered by the Governor, the Revenue Agent shall report to him in writing the results of such investigations, and to point out the particulars, if any, wherein the revenue laws have been violated or their enforcement neglected, together with the names of the parties delinquent therein. Whereupon the Governor shall institute civil and criminal proceedings through the Attorney General in the name of the State against such delinquent parties who are reported by such agent to be delinquent. And it is further provided that said Revenue Agent shall have power at any time to examine and check up all and any disbursements or expenditures of money appropriated for any of the State institutions or for any other purpose or for improvements made by the State on State property or money received and disbursed by any board authorized by law to receive and disburse any State money. (Sec. 1, Act April 13, 1891, Act 1891, p. 87.)

Art. 1489. (990) **Refusing to permit State Revenue Agent to inspect records.**—When said Revenue Agent acting under the direction of the Governor, calls on any person connected with the public service to inspect his accounts, records or books, said officers or officials so called upon shall submit to said agent all books, records and accounts so called for without delay. Any failure or refusal on the part of any officer or official to comply with the provisions of this article, shall be an offense, for which, on conviction thereof he shall be fined not less

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than one hundred nor more than one thousand dollars, and may be imprisoned in the county jail not more than one year. (Sec. 2, Act April 13, 1891, Acts 1891, p. 88.)

Art. 1490. (991) **State Revenue Agent making false report.**—If the Revenue Agent herein provided for shall wilfully make a false or fraudulent report of the financial condition of the books of any officer or official department or institution, handling, receiving or disbursing any State funds appropriated or unappropriated, he shall be guilty of a misdemeanor, and on conviction thereof shall be fined not less than five hundred nor more than one thousand dollars and imprisoned in the county jail for any period not to exceed twelve months. (Sec. 3, Act April 13, 1891, Acts 1891, p. 88.)

CHAPTER X

GUARANTY AND FIDELITY COMPANIES

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Article 1491. (992) **Certified copy of articles, etc., to be filed.**—Hereafter any corporation organized or created under the laws of this State, or of any other State or Territory, or of any municipality of such State or Territory, or of any foreign government, sovereignty or municipality, for the purposes of issuing surety, guaranty or indemnity bonds, guaranteeing the fidelity of persons in private offices, employments or positions of trusts and contracts, or for acting as security on any such bonds, shall file with the Commissioner of Insurance and Banking a certified copy of its articles of incorporation and all amendments thereto. (Sec. 1, p. 176, Acts 1891.)

Art. 1492. (993) **Copy of by-laws, etc., to be filed.**—Such corporation shall file with the certified copy of articles of incorporation and

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amendments thereto a copy of its by-laws, together with the names and places of residence of its officers and directors, and a statement of its assets and liabilities, showing its net capital stock, and of what it consists, certified to by the president or secretary thereof. (Sec. 2, p. 176, Acts 1891.)

Art. 1493. (994) **Capital stock required.**—No such corporation shall transact any business in this State, unless it is possessed of at least one hundred thousand dollars actual capital stock; and, if the capital stock of such corporation consists, either in whole or in part, of bonds, mortgages, securities, or other property than money, the Commissioner of Insurance and Banking shall require satisfactory evidence that the market value thereof is at least one hundred thousand dollars. (Sec. 3, p. 176, Acts 1891.)

Art. 1494. (995) **Amount deposited with State Treasurer required.**—Such corporation shall, before the certificate of authority hereafter provided for is issued, deposit with the treasurer of this State money or bonds or other securities, to be approved by the Commissioner of Insurance and Banking, to the amount of twenty-five thousand dollars, or shall produce satisfactory proof that such corporation owns real estate in this State, the value of which shall not be less than twenty-five thousand dollars. (Sec. 4, p. 177, Acts 1891.)

Art. 1495. (996) **Deposit or real estate subject to judgment.**—The deposit or real estate required by the preceding article shall be held liable to pay any judgments that may be rendered against such corporation, and may be so decreed by the court rendering judgment against it. Nor shall such company be permitted to withdraw its deposit from the State treasury, or to sell its real estate while any suit is pending, or any judgment against it in this State remains unsatisfied. (Sec. 5, p. 177, Acts 1891.)

Art. 1496. (997) **Service of process, etc.**—Such corporation shall file with the certified copy of its articles of incorporation a power of attorney, under its corporate seal, authorizing the Commissioner of Insurance and Banking or some designated agent, to accept service of any civil process for and on behalf of such corporation, and consenting that the service of any civil process upon the Commissioner of Insurance and Banking or designated agent, as the case may be, in any suit or proceeding in which the corporation is a party shall be taken and held to be valid. Said power of attorney shall be embodied in a resolution duly adopted by such corporation, and shall be signed by the president, manager or secretary thereof officially. If any agent, other than the Commissioner of Agriculture, Insurance, Statistics and History, be designated by said power of attorney, he shall be a citizen of this State; and his full name and place of residence shall be stated in the power of attorney. (Sec. 6, p. 177, Acts 1891.)

Art. 1497. (998) **Commissioner of Insurance and Banking shall issue certificate.**—When any such corporation has complied with the

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provisions of this act, the Commissioner of Agriculture, Insurance, Statistics and History shall issue his certificate of authority, authorizing said corporation to transact business in this State. (Sec. 7, p. 177, Acts 1891.)

Art. 1498. (999) **Who are agents.**—Any person who solicits business for, or on behalf of, such corporation, or makes or transmits for any person other than himself any application for guaranty or security, or who advertises or otherwise gives notice that he will receive or transmit the same, or who will receive or deliver a contract of guaranty or security, or who shall examine or investigate the character of any applicant for guaranty or security than himself, or who shall refer any applicant for guaranty or security to such corporation, whether any of said acts shall be done at the instance and request or by the employment of such corporation, or other corporation or person, or any person who shall issue indemnifying bonds or contracts, whose solvency and compliance with his said bond or obligation is guaranteed, directly or indirectly, by any corporation, shall be held to be the agent of the corporation so far as relates to all the liabilities and penalties prescribed by this chapter. (Sec. 8, p. 177, Acts 1891.)

Art. 1499. (1000) **Acting as agent without certificate.**—Any person who shall perform any of the acts or things mentioned in the preceding article for any such corporation, without such corporation having first complied with the provisions of this chapter, and having received the certificate of authority from the Commissioner of Agriculture, Insurance, Statistics and History as provided in article 1497 of this chapter, shall be deemed guilty of a misdemeanor and upon conviction for the first offense shall be fined in any sum not less than five hundred dollars and not more than one thousand dollars and imprisonment in the county jail for a period of three months, and for each subsequent offense such person shall be fined in any sum not less than one thousand dollars and not more than two thousand dollars, and confined in the county jail for a period of six months. (Sec. 9, p. 177, Acts 1891.)

Art. 1500. (1001) **Corporation acting without certificate of authority.**—Any persons, association of persons or corporation who shall accept any corporation created for the purposes, or either of them, mentioned in article 1491 of this chapter, without such corporation having previously complied with the provisions and requirements of this chapter and having received from the Commissioner of Agriculture, Insurance, Statistics and History the certificate of authority, provided for in article 1497 of this chapter, shall forfeit as a penalty the sum of five hundred dollars, to be recovered by suit in the name of the State in any court of competent jurisdiction. (Sec. 10, p. 177, Acts 1891.)

Art. 1501. (1002) **Statement required on refusal to further guarantee.**—When any such corporation shall cancel a bond of guar

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anty or indemnity, or shall notify the employer of the person whose fidelity is guaranteed that said corporation will no longer guarantee or be security for the fidelity of said person, or when said corporation has once guaranteed the fidelity of any person or acted as security therefor, and on application refuses to do so again, it shall furnish to such person a full statement in writing of the facts on which the action of the corporation is based, and if such action be based in whole or in part on information, all such information, together with the name or names of the informants, with their place of residence, and any such corporation failing or refusing to furnish such written statement within thirty days after a request therefor, shall be liable to the person injured in the sum of five hundred dollars, in addition to all other damages caused thereby, which may be sued for and recovered in any court of competent jurisdiction. (Sec. 11, p. 178, Acts. 1891.)

Art. 1502. (1003) **Certificate revoked on failure to comply.**—If any such corporation shall fail or refuse to comply with the provisions of article 1501 of this chapter the Commissioner of Agriculture, Insurance, Statistics and History shall revoke the certificate of authority issued to said corporation. (Sec. 12, p. 178, Acts 1891.)

Art. 1503. (1004) **Corporations charged with a public use.**—Corporations created for the purposes mentioned in article 1491 of this chapter are hereby declared to be charged with a public use. (Sec. 13, p. 178, Acts 1891.)

CHAPTER XI

BOND INVESTMENT COMPANIES

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Article 1504. **Bond investment company required to make deposit.**—Every corporation, company or individual, doing business in this State as a bond investment company, or company to place or sell bonds, certificates or debentures, on the partial payment or installment plan, shall, and the same is hereby required to, deposit with the State Treasurer, in cash or securities approved by the State Treasurer, the sum of five thousand dollars; and, in addition thereto, they shall be required to deposit semi-annually with the State Treasurer in cash or securities to be approved by said officer, ten per cent of all the net premium received, until the sum deposited shall amount to the sum of one hundred thousand dollars. (Acts 1897, p. 118.)

Art. 1505. **Failure to make deposit.**—If any such company, being a domestic corporation, shall fail, for sixty days after the organization

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of such company, to make with the State Treasurer the deposit required by this chapter, it shall be considered to have forfeited its charter; and the Attorney General shall, immediately upon receiving information thereof, bring suit in the name of the State, in the district court of Travis county, to have such charter or certificate of incorporation declared forfeited and of no effect; and said court shall declare such charter forfeited, and appoint a receiver for such company, whose duty it shall be, under the order of the court, to distribute to the shareholders the assets of the company. The court shall, out of the assets of the company, make such allowance for compensation for the receiver as shall be equitable and just. (Acts 1897, p. 118.)

Art. 1506. **Transacting business in violation of law.**—If any officer, agent, or representative of any such company or companies, whether they be foreign or domestic corporations, shall attempt to place or sell shares, or to transact any business whatsoever in the name or on behalf of such company or companies, while they fail or refuse to comply with the provisions of this chapter, said officer, agent or representative shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be fined not less than one hundred dollars nor more than one thousand dollars for each offense, or be imprisoned in the county jail for not less than thirty days nor more than six months, or by both such fine and imprisonment. (Acts 1897, p. 118.)

CHAPTER XII

PRIZE FIGHTING, ROPING CONTESTS, ETC.

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Article 1507. (1005) **Pugilistic encounters prohibited; penalty.**—Any person who shall voluntarily engage in a pugilistic encounter between man and man, or a fight between a man and a bull, or any other animal, for money or other thing of value, or for any championship, or upon the result of which any money or anything of value is bet or wagered, or to see which any admission fee is charged, either directly or indirectly, shall be deemed guilty of a felony, and upon conviction, shall be punished by imprisonment in the penitentiary for not less than two nor more than five years. (Act October 3, 1895.)

Art. 1508. (1005a) **"Pugilistic encounter" defined.**—By the term, "pugilistic encounter," as used in this act, is meant any voluntary fight or personal encounter by blows by means of the fists or otherwise, whether with or without gloves, between two or more men for

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money, or for a prize of any character, or for any other thing of value, or for any championship, or upon the result of which any money or anything of value is bet or wagered. (Act October 3, 1895.)

Art. 1509. (1005b) **Exhibition of prize fights by means of moving pictures prohibited.**—It shall be unlawful for any person, association, corporation, or any agent or employe of any person, association, corporation or receiver, partnership or firm, to give or present to the public an exhibition of prize fights or glove contests, or of any obscene, indecent or immoral picture of any character whatsoever, by means of moving picture films, bioscopes, vitascopes, magic lanterns or other device or devices in moving picture shows, theaters, or any other place whatsoever.

Any person or persons, association, or any agent or employe of any person, association, corporation or receiver violating any of the provisions of this act shall, upon conviction thereof, be fined in any sum not less than one hundred dollars and not more than one thousand dollars, or be imprisoned in the county jail for not less than ten nor more than sixty days, or both, in the discretion of the court or jury, and each day's violation of any of the provisions of this article shall constitute and be punishable as a separate offense. (Act August 15, 1910, Acts 1910, S. S. p. 21.)

Art. 1510. **Matching cock fight, etc.**—Any person who shall match or be concerned in matching any cock fight or who shall match or be concerned in matching or causing a fight between any animals or fowls, or who shall keep or be concerned in keeping any cock pit or other place for the purpose of matching fights between cocks or any other animals or fowls, shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in any sum not less than ten nor more than one hundred dollars. Each day such cock pit or other place as aforesaid shall be kept shall constitute a separate offense. (Act April 5, 1907, Acts 1907, p. 156.)

Art. 1511. **Engaging in roping contest.**—Any person who shall engage in a roping contest with other persons or alone, in which cattle or other animals are roped as a test or trial of the skill of the person or persons engaged in such roping contest, for money or prize of any character, or for any championship, for anything of value, or upon the result of which any money or anything of value is bet or wagered, shall be guilty of a misdemeanor and upon conviction, shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, and each animal roped, or attempted to be roped, shall constitute a separate offense. (Act March 29, 1905, Acts 1905, p. 69.)

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CHAPTER XIII

TEACHERS, SCHOOLS AND BOOKS.

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Article 1512. (1006) **Unlawfully approving teacher's contract or voucher.**—Any county or city superintendent or board of trustees who shall approve any teacher's certificate (contract) or voucher until the person has presented a valid certificate, shall be guilty of a misdemeanor and on conviction thereof shall be fined not less than twenty-five nor more than one hundred dollars. (Sec. 9b, Act April 28, 1891, Acts 1891, p. 187.)

Art. 1513. **Examination questions for applicants for teachers' certificates.**—Any person or persons who shall sell, barter or give away, prior to any forthcoming examination, to applicants for teachers' certificates, or to any other person, the questions prepared by the State Superintendent of Public Instruction to be used by the county boards of examiners or summer normal boards of examiners in the examination of teachers at said forthcoming examination, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be fined in any sum not less than twenty-five nor more than two hundred dollars. (Act April 18, 1901, Acts 1901, p. 272.)

Sec. 2735. **Examination questions for applicants for teachers' certificates.**—The Act of April 18, 1901, on which article 1513 was based, was repealed by implication by the Act of 1905, chapter 124, section 124a, Acts 1905, p. 296, and the Act of 1905 was overlooked by the Codifiers of the Penal Code of 1911. Section 124a of the Act of 1905 reads as follows: "Any person or persons who shall sell, barter or give away, prior to any forthcoming examination, to applicants for teachers' certificates, or to any other person, the questions prepared by the State Superintendent of Public Instruction to be used by the county summer normal or any other boards of examiners in the examination of teachers at said forthcoming examination, or any person or persons who shall accept or otherwise obtain possession of such questions or the answers thereto, prior to any such examination, or any person or persons who shall use the same fraudulently at the time of such examination, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than one hundred dollars and not more than five hundred dollars, and in addition thereto shall be imprisoned in the county jail for any number of days not less than twenty and not more than sixty."

The Act of 1905 which provides that if any person shall fraudulently use the questions prepared by the State Superintendent of Public Instruction to be used in the examination of teachers he shall be guilty of a misdemeanor is constitutional. Felder v. State, 50 Texas Crim. Rep. 388; 97 S. W. 701.

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Proof that the defendant used answers is not sufficient to show that he fraudulently used the questions. Felder v. State, 50 Texas Crim. Rep. 388; 97 S. W. 701. Fulsom v. State, 50 Texas Crim. Rep. 470; 98 S. W. 853.

The statute requires that the use of the questions must be fraudulent before an offense is committed, and the charge of the court should require the jury to find that the questions were fraudulently used. Felder v. State, 50 Texas Crim. Rep. 388; 97 S. W. 701.

Art. 1514. **Overcharging for school books—Loitering on school grounds.**—* * * If any teacher or trustee shall knowingly and directly or indirectly receive from any pupil a greater price therefor (for school books adopted by law), he shall be guilty of a misdemeanor, and upon conviction shall be fined not less than fifty dollars nor more than one hundred dollars. It shall be unlawful for any person or persons to loiter or loaf upon any public school grounds in this State, during the session of such school, after being warned by the person in charge of such school to leave such grounds, and such person or persons so found shall be guilty of a misdemeanor, and upon conviction therefor, shall be fined in any sum not less than five and not to exceed twenty-five dollars. (Article 419 of this Code covers the omitted portion of this article.)

Sec. 2736. **Loitering on school grounds.**—One aiding or instigating a minor to unlawfully loiter around public school grounds is guilty of an offense. King v. State. 169 S. W. 675.

Sec. 2737. **Compulsory school attendance Act.**
Sec. 2738. Employment of school child.
Sec. 2739. Duties of parent or guardian.

Sec. 2738. **Employment of school child.**—No child under fourteen years of age not lawfully excused from attendance upon school shall be employed by anyone during the school hours in any occupation during the period which the child is required to be in school, as provided by law. Any person, firm or corporation found guilty of employing any child or any person inducing any child to remain out of school who is subject to the provisions of this Act shall be fined not to exceed ten dollars for each offense, and each day that said child is employed after due notice given by any school official that said child cannot be legally employed shall constitute a separate offense. (Sec. 5, Act March 13, 1915, Acts 1915, p. 94.)

Sec. 2739. **Duties of parent or guardian.**—If any parent or person standing in parental relation to a child within the compulsory school attendance ages who is not properly excused from attendance upon school for some one or more of the exemptions provided by law fails to require such child to attend school regularly for such period as is required by law, it shall be the duty of the attendance officer who has jurisdiction in the territory where said parent or person standing in parental relation resides, to warn such parent or person standing in parental relation, that the provisions of this Act must be immediately complied with, and upon failure of said parent or persons standing in parental relation to immediately comply with the provisions of this Act after such warning has been given, the official discharging the duties of the attendance officer shall forthwith file complaint against such parent or person standing in parental relation to said child, which complaint shall be filed in the County Court, or in the Justice Court in the precinct where such parent or guardian resides, and shall diligently prosecute same to its conclusion. Any parent or other person standing in parental relation upon conviction for failure to comply with the provisions of this Act shall be deemed guilty of a misdemeanor, and shall be fined for the first offense five dollars, and for the second offense ten dollars, and for each subsequent offense twenty-five dollars. Each day that said child remains out of school after said warning has been given or after said child has been ordered in school by the Juvenile Court, may constitute a separate offense; provided, however, that if any parent or per-

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son standing in parental relation to any child within the compulsory school attendance ages shall present proofs that he or she is unable to compel such child to attend school, said person in parental relation shall be exempt from the above penalties as regards the non-attendance of such child, and such child may be proceeded against as an habitual truant and be subject to commitment to the State Juvenile Training School or any other suitable school agreed upon between the parent or the guardian of said child and the judge of the Juvenile Court. (Sec. 9, Act March 13, 1915, Acts 1915, p. 96.)

Sec. 2739½. **Detaining book, etc.**—Whoever wilfully detains any book, newspaper, magazine, pamphlet, manuscript, or other property belonging to any public or incorporated library, reading room, museum, or other educational institution for thirty days after notice in writing to return the same, given after the expiration of the time which by the rules of such institution such articles or other property may be kept, shall be punished by a fine of not less than one dollar nor more than twenty-five dollars, and the said notice shall bear on its face a copy of this section. (Act April 5, 1913, Acts 1913, p. 281.)

CHAPTER XIV

RAILROAD COMMISSION

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Article 1514. (1007) **Right to inspect books and papers.**—The Commissioners, or either of them, or such persons as they employ therefor, shall have the right, at such times as they may deem necessary, to inspect the books and papers of any railroad company, and to examine under oath any officer, agent or employe of such railroad in relation to the business and affairs of the same. If any railroad shall refuse to permit the Commissioners, or either of them, or any person authorized thereto, to examine its books and papers, such railroad company shall, for each offense, pay to the State of Texas not less than one hundred and twenty-five dollars nor more than five hundred dollars for each day it shall so fail or refuse; provided, that any person other than one of said Commissioners who shall make any such demands shall produce his authority, under the hand and seal of said Commission, to make such inspection. (Acts 1891, p. 60, Sec. 10.)

Penalty for refusal to exhibit books or papers.—Any officer, agent or employe of any railroad company who shall, upon proper demand, fail or refuse to exhibit to the Commissioners, or either of them, or any person authorized to investigate the same, any book or paper of such railroad company, which is in the possession or under the control of such officer, agent or employe, shall be deemed guilty of a misdemeanor, and upon conviction in any court having jurisdiction thereof shall be fined for each offense a sum not less than one hundred and twenty-five dollars and not to exceed five hundred dollars. (Sec. 10, Acts 1891, p. 60.)

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Art. 1515. (1008) **Commissioners may propound questions to be answered.**—1. The said Commission shall cause to be prepared suitable blanks with questions calculated to elicit all information concerning railroads, and as often as it may be necessary, furnish said blanks to each railroad company. Any railroad company receiving from the Commission any such blanks shall cause said blanks to be properly filled out so as to answer fully and correctly each question therein propounded, and in case they are unable to answer any question, they shall give a satisfactory reason for their failure; and the said answers, duly sworn to by the proper officer of said company shall be returned to said Commission at its office in the city of Austin within thirty days from the receipt thereof. (Sec. 12, Acts 1891, p. 61.)

Penalty for refusal to answer and fill out blanks.—2. If any officer or employe of a railroad company shall fail or refuse to fill out and return any blanks as above required, or fail or refuse to answer any question therein propounded, or give a false answer to any such question, where the fact inquired of is within his knowledge, or shall evade the answer to any such question, such person shall be guilty of a misdemeanor, and shall on conviction thereof be fined for each day he shall fail to perform such duty, after the expiration of the time aforesaid a penalty of five hundred dollars, and the Commission shall cause a prosecution therefor in the proper court; and a penalty of like amount shall be recovered from the company when it appears that such person acted in obedience to its direction, permission or request in his failure, evasion or refusal. Said Commission shall have the power to prescribe a system of bookkeeping to be observed by all the railroads subject hereto, under the penalties prescribed in this article. (Sec. 12, Acts 1891, p. 61.)

Art. 1516. (1009) **Punishment for false billing, classification, weight, etc.**—Any officer or agent of any railroad subject to this law who by means of false billing, false classification, false weight, or by any other device, shall suffer or permit any person or persons to obtain transportation for property at less than the regular rates then in force on such railroad, or who by means of false billing, false classification, false weighing, or by any device whatever shall charge any person, firm or corporation more for the transportation of property than the regular rates, shall be guilty of a misdemeanor, and on conviction thereof fined in a sum of not less than one hundred dollars nor more than one thousand dollars. (Sec. 16, Acts 1891, p. 63.)

Art. 1517. **"Unjust discrimination" defined, penalty for.**—If any officer, agent, clerk, servant or employe, or any receiver, or his servant, agent or employe of any railroad company in this State shall, directly or indirectly, or by any special rate, rebate, drawback, or other device, for, and on behalf of, such railroad company, knowingly charge, demand, contract for, collect or receive from any person, firm or corporation a greater or less compensation for any service rendered, or to be rendered, by any such railroad company in this State than such railroad company, or its said officers, agents, clerks, servants or

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employes, or receiver thereof, charges, demands, contracts for, collects or receives from any other person, firm or corporation for doing a like and contemporaneous service, or if any officer, agent, clerk, servant or employe, or receiver, or his agents, servants or employes, of any railroad company in this State, who shall, for, and on behalf of, such railroad company, make or give any undue or unreasonable preference or any advantage to any particular person, company, firm, corporation or locality, as to any service rendered, or to be rendered or performed, by such railroad company, or to subject any particular description of traffic on such railroad company to any undue or unreasonable prejudice, delay or disadvantage in any respect whatever, such officer, clerk, servant or employe, or receiver, his agents, servants or employes of such railroad company, shall be deemed guilty of unjust discrimination within the meaning of this chapter, and, on conviction thereof, shall be punished by confinement in the State penitentiary for not less than two nor more than five years. (Acts 1899, p. 203.)

Art. 1518. **Not applicable, when.**—Nothing herein shall prevent the carriage, storage or handling, by railroad companies in this State, or by their agents, officers, clerks, servants and employes, of freight free or at reduced rates, or to prevent railroads, their agents and employes and officers, from giving free transportation or freight rates to any railroad officers, agents, employes, attorneys, stockholders or directors, or to any other officer or person, when permitted by chapter 16 of this title, article 1533.

Art. 1519. **Persons compelled to testify exempt from prosecution.**—Any court, officer or tribunal, having jurisdiction of the offense mentioned in this chapter, or any district or county attorney, may subpoena persons and compel their attendance as witnesses to testify as to the violations of this chapter; and any person so summoned and examined shall not be liable to prosecution for any violation of this law about which he may testify; and for any offense by reason of violations of this chapter, a conviction may be had upon the unsupported evidence of an accomplice or participant. (Acts 1899, p. 203.)

Art. 1520. **District judge to specially charge grand jury.**—It shall be the duty of every district judge in this State in whose court a grand jury shall be impaneled to charge said grand jury, whenever organized, to thoroughly investigate with reference to violations of this chapter. (Acts 1899, p. 203.)

Art. 1521. (1009a) **Railroad official making false statement to secure registration of bond.**—Each and every railroad director, president, secretary or other official who shall knowingly make any false statement upon which to secure the registration of any bond or other evidence of debt, as required by the law regulating the issuance of stocks and bonds, or who shall by false statement knowingly made procure of the Railroad Commission direction to the Secretary of State to register the same, and which shall be by the Secretary of State reg-

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istered, or shall with knowledge of such fraud negotiate or cause to be negotiated any such bond or other security issued in violation of said chapter, shall be guilty of a felony, and upon conviction thereof in any court of competent jurisdiction shall be punished by confinement at hard labor in the State penitentiary for a term of years not less than two nor more than fifteen, and shall likewise be liable to any creditor of such company for the full amount of damages sustained by such wrongful conduct. Venue in such cases shall be in either of the district courts held in Travis county, or in the county where the principal office of the railway company whose property is sought to be so incumbered or affected is located. (Acts 1893, p. 59.)

Art. 1522. **Railroad Commission may require construction of union depots.**—Where two or more railroad companies reach the same city or town in this State, it shall be the duty of the Railroad Commission of Texas to ascertain whether it is practicable and feasible for such railroad companies to use a joint or union passenger depot; and if the Railroad Commission finds upon investigation that it is practicable for such railroad companies to join in the construction and use of a passenger depot, then it shall give notice to said railroad companies, and after investigation and public hearing may require the construction and maintenance of such union passenger depot by the railroad companies entering any such city or town, provided that it shall appear to the Railroad Commission that the construction and maintenance of such joint or union passenger depot are just and reasonable to the railroad companies involved, and demanded by the public interest. The Railroad Commission may specify the requirements of such union depot as to kind and character; and said Railroad Commission may apportion the cost of constructing and maintaining the same to each railroad company, in cases where the interested railroad companies can not themselves agree.

Failure upon the part of any railroad company to observe and obey the orders of the Railroad Commission, issued in compliance with this article, shall subject such railroad company to the fines and penalties prescribed by law for failure to obey the lawful requirements, orders, judgments and decrees made by the Railroad Commission of Texas. (Acts 1909, p. 399.)

CHAPTER XV

OFFENSES BY RAILWAY OFFICIALS OR AGAINST RAILWAYS

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Article 1523. (1010) 1. **Separate coaches to be provided.**—Every railway company, street car company and interurban railway company, lessee, manager, or receiver thereof doing business in this State as a common carrier of passengers for hire shall provide separate coaches or compartments, as hereinafter provided, for the accommodation of white and negro passengers, which separate coaches or compartments shall be equal in all points of comfort and convenience.

2. **"Negro" defined.**—The term Negro used herein includes every person of African descent as defined by the statutes of this State.

3. **"Separate coach" defined.**—Each compartment of a railroad coach divided by good and substantial wooden partitions with a door therein shall be deemed a separate coach within the meaning of this law, and each separate coach shall bear in some conspicuous place appropriate words in plain letters indicating the race for which it is set apart; and each compartment of a street car or interurban car divided by board or marker placed in a conspicuous place, bearing appropriate words in plain letters indicating the race for which it is set apart, shall be sufficient as a separate compartment within the meaning of this law.

4. **Penalty for failure.**—Any railway company, street car company or interurban railroad company, lessee, manager or receiver thereof which shall fail to provide its cars bearing passengers with separate coaches or compartments, as above provided for, shall be liable for each and every failure to a penalty not less than one hundred nor more than one thousand dollars, to be recovered by suit in the name of the State in any court of competent jurisdiction, and each trip run with such train or street car or interurban car without such separate coach or compartment shall be deemed a separate offense.

5. **Violating separate coach law.**—If any passenger upon a train or street car or interurban car provided with separate coaches or compartments, as above provided, shall ride in any coach or compartment not designated for his race after having been forbidden to do so by the conductor in charge of the train, he shall be guilty of a misde-

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meanor, and upon conviction shall be fined not less than five nor more than twenty-five dollars.

6. **Exceptions.**—The provisions of this law shall not be so construed as to prohibit nurses from traveling in any coach or compartment with their employer, or employes upon the train or cars in the discharge of their duty, nor shall it be construed to apply to such freight trains as carry passengers in cabooses, provided that nothing herein contained shall be construed to prevent railroad companies in this State from hauling sleeping cars, dining or cafe cars or chair cars attached to their trains to be used exclusively by either white or negro passengers, separately but not jointly.

7. **Law to be posted.**—Every railroad company carrying passengers in this State shall keep this law posted in a conspicuous place in each passenger depot and in each passenger coach provided in this law.

8. **Excursion trains excepted.**—The provisions of this law shall not apply to any excursion train or street car or interurban car as such for the benefit of either race.

9. **Duty of conductor.**—Conductors of passenger trains, street cars or interurban lines provided with separate coaches shall have the authority to refuse any passenger admittance to any coach or compartment in which they are not entitled to ride under the provisions of this law, and the conductor in charge of the train or street car or interurban car shall have authority, and it shall be his duty, to remove from a coach or street car, or interurban car any passenger not entitled to ride therein under the provisions of this law, and upon his refusal to do so knowingly shall be guilty of a misdemeanor, and upon conviction shall be fined in any sum not less than five or more than twenty-five dollars.

10. **Fines to go to school fund.**—All fines collected under the provisions of this law shall go to the available common school fund of the county in which conviction is had. Prosecutions under the provisions of this law may be instituted in any court of competent jurisdiction in any county through or into which said railroad may be run or have an office. (Act March 22, 1907, Acts 1907, p. 58.)

Art. 1524. (1010a) **Failing to sound bell and whistle.**—A bell of at least thirty pounds weight and a steam whistle shall be placed on each locomotive engine, and the whistle shall be blown and the bell rung at the distance of at least eighty rods from the place where the railroad shall cross any public road or street, and such bell shall be kept ringing until it shall have crossed such public road or stopped; and each locomotive engine approaching a place where two lines of railway cross each other, shall, before reaching such railway crossing, be brought to a full stop; and any engineer having charge of such engine, and neglecting to comply with any of the provisions of this article, shall be fined in any sum not less than five nor more than one hundred dollars for such neglect, and the corporation operating such

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railway shall be liable for all damages which shall be sustained by any person by reason of any such neglect: Provided, however, that the full stop at such crossings may be discontinued when the railroads crossing each other shall put into full operation at such crossing an interlocking switch and signal apparatus, and shall keep a flagman in attendance at such crossings. (Act May 1, 1893, Acts 1893, p. 87.)

Art. 1525. (1010b) **Ticket agent to have certificate of authority.**—It shall be the duty of all railroad companies doing business in this State, or the receiver of any such railroad company, through their duly authorized officers, to provide each agent who may be authorized to sell tickets or other evidences entitling the holder to travel upon any such railroad, with a certificate setting forth the authority of such agent to make such sale. Such certificate shall be duly attested by the corporate seal of such railroad company, or the signature of the receiver, if any there be, of such railroad company, or by the signature of the officer whose name is signed upon the tickets or coupons which such agent may be authorized to sell. (Sec. 1, Act May 2, 1893, Acts 1893, p. 97.)

Art. 1526. (1010e) **Agent must exhibit authority.**—It shall be the duty of every agent who shall be authorized to sell tickets or parts of tickets, or other evidences of the holder's right to travel over any railroad within this State, upon demand, to exhibit to any person desiring to purchase a ticket, or to any officer of the law who may request it, the certificate of his authority to sell, and to keep said certificate posted in a conspicuous place in his office for the information of travelers. (Sec. 4, Act May 2, 1893, Acts 1893, p. 97.)

Art. 1527. (1010f) **Unused tickets to be redeemed.**—It shall be the duty of all railroad companies in this State or the receiver or trustee of any such railroad company, to provide for the redemption, from the holder thereof, of the whole, or any parts or coupons, of any ticket or tickets which they or any of their duly authorized agents may have sold, if for any reason the holder has not used, and does not desire to use the same, upon the following terms: If neither the ticket nor any part thereof has been used by the holder, he shall be entitled to receive the full amount he paid therefor, and where the ticket has been used in part, the holder thereof shall be entitled to receive the remainder of the price paid for the whole ticket, after deducting therefrom the tariff rate between the points for which the portion of said ticket was actually used. (Sec. 5, Act May 2, 1893, Acts 1893, p. 97.)

Art. 1528. (1010f) **Demand must be made within ten days.**—Provided, however, such tickets or parts thereof shall be presented for redemption to the railroad company from which it has been purchased, or the receiver of such railroad company, or to any of the duly authorized ticket agents of such railroad company, or receiver thereof, or in case of a through ticket, to any of the authorized agents of any connecting line, within a time not exceeding ten days after the right to

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use said ticket has expired by limitation of time as stipulated therein. (Sec. 5, Act May 2, 1893, Acts 1893, p. 97.)

Art. 1529. (1010f) **Refusal to redeem ticket.**—Any railroad company, or receiver, or trustee of such railroad company, over or on which said ticket may be used, which shall refuse or fail to redeem the whole or any part or coupon of any ticket or tickets, when presented, shall forfeit to the holder thereof a sum not less than one hundred dollars, nor more than five hundred dollars, recoverable in any court of competent jurisdiction. (Sec. 5, Act May 2, 1893, Acts 1893, p. 98.)

Art. 1530. (1010g) **Law to be printed on tickets.**—It shall be the duty of the railway company to print conspicuously across the face of every ticket sold by its duly authorized agents in this State a notice to the holder thereof that this ticket, or any unused part thereof, is redeemable by the company or its receiver at any ticket office of the company, when presented for redemption. (Sec. 6, Act May 2, 1893, Acts 1893, p. 98.)

Art. 1531. (1010h) **Unlawfully boarding a train.**—Any person who shall board any passenger, freight or other railway train, whether moving or standing, for any purpose and without in good faith intending to become a passenger thereon, and with no lawful business thereon, and with intent to obtain a free ride on such train, however short the distance, without the consent of the person or persons in charge thereof, shall be guilty of a misdemeanor, and shall be punished by fine of not less than five dollars nor more than one hundred dollars. (Acts 1895, p. 178.)

Sec. 2740. **Indictment.**—An allegation that the defendant boarded a passenger and freight train on a certain railroad is sufficient to charge that he boarded a railway train. Daugherty v. State, 41 Texas Crim. Rep. 661; 56 S. W. 620.

The court will not take judicial knowledge that certain initials stand for any particular railroad company. Cardenas v. State, 58 Texas Crim. Rep. 109; 124 S. W. 953.

Under the statute making it an offense to board a train with no lawful business thereon and with intent to obtain a free ride without the consent of the person in charge of the train, the indictment should allege the want of consent of such person, giving the name, and if his name is not known, or cannot be ascertained by reasonable diligence, the fact should be stated. Daugherty v. State, 41 Texas Crim. Rep. 661; 56 S. W. 620.

Sec. 2741. **Train dispatchers.**
Sec. 2742. Duty of train dispatcher.

Sec. 2742. **Duty of train dispatcher.**—The train dispatcher shall keep all agents at stations having telegraph offices in or near them informed of the movement of all passenger trains one hour prior to the time such passenger train or trains are due, according to the published schedule at such stations. And in the event any such passenger train is delayed for more than one hour than the published schedule, then it shall be the duty of such train dispatcher to inform such local agents how late said train is and the last telegraph station passed. If such train dispatcher shall fail or refuse to furnish the information concerning the movement of trains to agents as herein required, then such dispatcher shall be deemed guilty of a misdemeanor, and upon conviction, shall be punished by a fine of not less than fifty nor more than two hundred dollars for each offense. (Act April 7, 1913, Acts 1913, p. 318.)

Sec. 2743. **Bulletin of passenger trains.**
Sec. 2744. **Failing to bulletin.**

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Sec. 2744. **Failing to bulletin passenger train.**—It shall be the duty of every railroad agent at stations having telegraphic communication with the train dispatcher of the railroad, to ascertain one hour before the schedule time of the arrival of passenger trains, if such train is on time, and if on time, to bulletin that fact on a board provided by the company and placed in some conspicuous place at the passenger station. And if the train is late, he shall bulletin how late, and the last telegraph station passed by such train. If later than one hour, said agent shall thereafter ascertain the latest news from such train dispatcher, or some other reliable source, every hour, and bulletin such information and the time of the probable arrival of such train. If any such agent shall fail or refuse to perform the duties required of him by this article, he shall be deemed guilty of a misdemeanor for each time he fails or refuses to perform such duties, and upon conviction shall be punished by a fine of not less than fifty nor more than one hundred dollars for each offense. (Act April 8, 1913, Acts 1913, p. 350.)

Sec. 2745. **Derailing Devices.**
Sec. 2746. Unlawfully using tracks to make or repair cars.

Sec. 2746. **Unlawfully using tracks to make or repair cars.**—It shall be unlawful for any person, firm, corporation or receiver operating any railroad, machine shop or other concern engaged in repairing or manufacturing cars within this State to use any tracks not equipped with derailing devices upon which to repair or manufacture cars; such derailing devices to be provided with private locks, to be kept locked at all times when tracks are in use; provided, that nothing in this Act shall be construed as prohibiting temporary repairs to cars on tracks other than where cars are regularly repaired or manufactured. Any person, firm, corporation or receiver, operating any railroad, machine shop or other concern engaged in the repairing or manufacture of cars in this State who shall violate this law shall upon conviction be fined not less than fifty dollars nor more than two hundred dollars and each day such violation shall exist shall constitute a separate offense. (Act April 8, 1913, Acts 1913, p. 334.)

Sec. 2747. **Inspection of railway brakes.**
Sec. 2748. Operating train without brake inspection.
Sec. 2749. Exceptions.
Sec. 2750. Penalty.

Sec. 2748. **Operating train without brake inspection.**—It shall be unlawful for any person, corporation or receiver to operate or cause to be operated any train, on any line of railroad in this State, without first having the air brakes and air brake attachments inspected and tested before leaving the division terminals for such trains, by a competent inspector, who shall have had at least three years' experience as a car inspector or car repairer. Provided, that this Act shall not apply to tram roads engaged in hauling logs to any sawmill. (Sec. 1, Act March 13, 1911, Acts 1911, p. 106.)

Sec. 2749. **Exceptions.**—The provisions of this Act shall not apply in case of emergency where such companies cannot obtain the employes mentioned in this Act who have the qualifications prescribed by the provisions thereof, then such companies may employ temporary inspectors. Provided, the provisions of this Act do not apply to railroads under forty miles in length. (Sec. 2, Act March 13, 1911, Acts 1911, p. 106.)

Sec. 2750. **Penalty.**—Any person, corporation or receiver violating any of the provisions of this Act shall be fined not less than fifty dollars nor more than one hundred dollars, and each operation of any such train without such inspection first having been made, as provided herein, shall constitute a separate offense. (Sec. 3, Act March 13, 1911, Acts 1911, p. 106.)

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CHAPTER XVI

RAILROADS, ETC.—PROHIBITING ISSUANCE OF FREE PASSES, ETC.

Art.
Free pass, frank, privilege, or free haul or carrying of persons or property free of charge..... 1532
Provisions of preceding article not to be held to prohibit what..... 1533
Person offering to use permit, pass, frank, etc., issued to any other person or applying for same, knowing he is not entitled thereto, penalty.... 1534
Discrimination by any means or device, penalty..... 1535
Companies, their lessees and receivers shall report annually the name and residence of each person to whom free transportation was given..... 1536
Person other than those exempt using free pass, free ticket, etc., penalty.. 1537
Director, officer, agent, receiver, etc., wilfully violating this law or permitting its violation, penalty..... 1538
Person may be compelled to testify..... 1539

Article 1532. **Free pass, frank, privilege or free haul or carrying of persons or property free of charge, penalty for.**—If any steam or electric railway company, street railway company, interurban railway company, or other chartered transportation company, express company, sleeping car company, telegraph or telephone company, or person or association of persons operating the same, or the receivers or lessees thereof, or any officer, agent or employe of any such company in this State, shall knowingly haul or carry any person or property free of charge, or give or grant to any person, firm, association of persons, or corporation, a free pass, frank, a privilege or a substitute for pay, or a subterfuge which is used, or which is given to be used instead of the regular fare or rate for transportation, or any authority or permit whatsoever, to travel or to pass or convey or transport any person or property free, or sell any transportation for anything except money, or for any greater or less rate than is charged to all persons under the same conditions, over any railway or other transportation line, or part of line, in this State, or shall knowingly permit any person to transmit any message free in this State, or shall give any frank or right or privilege to transmit messages free in this State, or property free of charge or for greater or less fare or rate than is charged other persons in this State, for similar service, except such persons as are hereinafter exempted under the provisions of this chapter, shall be guilty of a misdemeanor, and upon conviction in any action brought on this account, and for that purpose, shall pay to the State of Texas the sum of five thousand dollars for each and every act which violates the provisions of this article; and any person, president, director, officer, employe or agent of any such corporation or association of persons, who shall sell any transportation for anything except money, or knowingly give, grant, issue, or cause to be issued, a free pass, a frank, a privilege or any substitute for, or in lieu thereof, for the transportation

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of any person, article or thing, or the sending or transmitting any messages over wire or other means of transmitting messages in this State, except to such persons as are hereinafter exempted from the provisions of this chapter, shall be deemed guilty of a felony under the laws of this State, and upon conviction for such act, shall be punished by a fine of not less than five hundred dollars nor more than two thousand dollars, and may, in addition thereto, in the discretion of the jury, be imprisoned in the penitentiary for a term of not less than six months nor more than two years. (Acts 1907, p. 93.)

Art. 1533. **Provisions of preceding article not to be held to prohibit what.**—The provisions of article 1532 shall not be held to prohibit any steam or electric or interurban railway company, or chartered transportation company, or sleeping car company, or the receivers or lessees thereof, or persons operating the same, or the officers, agents or employes thereof, from granting free or exchanging free passes, franks, privileges, substitute for pay or other thing herein prohibited, to the following persons: The actual bona fide employes of any such companies and the dependent members of their immediate families. The term employe shall be construed to embrace the following persons only: All persons actually employed and engaged in the service of any of such companies, including its officers, bona fide ticket, passenger and freight agents, physicians, surgeons and general attorneys and attorneys who appear in courts of record to try cases and who receive a reasonable annual salary, and also ex-employes within four months after leaving the service of any of such companies and while seeking employment. Also persons actually employed on sleeping cars, express cars, linemen of telegraph and telephone companies, newsboys employed on trains, railway mail service employes, post office inspectors, chairman and bona fide members of grievance committees of employes, bona fide custom and immigration inspectors employed by the government, the state health officer and one assistant, and federal health officers; also when livestock, poultry, fruit, melons, or other perishable produce is shipped, the necessary care-takers while en route and return; also trip passes to the indigent poor, when application therefor is made by any religious or charitable organization, sisters of charity; also persons injured in wrecks upon the road of any such company, immediately after such injury, and the physicians and nurses attending such persons at the time thereof; also persons and property carried in cases of general epidemic, pestilence or other calamitous visitations at the time thereof, or immediately thereafter; also the state rangers, sheriffs or other bona fide elective peace officers, whose duties are to execute criminal processes; provided, that if any such railroad or transportation company shall grant to any sheriff, a free pass over its lines of railroad, then it shall issue like free transportation to each and every sheriff in this State who may make to it written application therefor; and provided, further, that said sheriffs and other peace officers above mentioned, using such free passes or transportation, shall deduct the

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money value of the same, at the legal rate per mile, from any mileage accounts against the State and litigants earned by them in executing process when such pass was used or could have been used; also members of the live-stock sanitary commission of Texas, not exceeding twelve in number for any one year; provided, that nothing in this act shall prevent any such companies, the receivers or lessees thereof, or the officers, agents or employes from granting to ministers of religion reduced rates of one-half the regular fare, nor shall anything in this act prevent any such companies, their receivers or lessees from transporting free of charge any article being sent to any orphan home or other charitable institution; provided, further, that nothing in this law shall be construed to prohibit any such companies, their receivers or lessees or officers, agents or servants from making special rates for special occasions or under special conditions; but no such rate shall ever be made without first obtaining authority from the Railroad Commission of Texas; and provided, further, that no person who holds any public office in this State shall, at any time during their term of office, be entitled to any such free pass or transportation, privilege or franks or substitute for fare or charges over any railroad or other company, mentioned in article 1532, except employes operating trains when in the actual discharge of their duties as such, and the officers hereinbefore exempted; provided further, that nothing in this chapter shall prohibit any street railway company from transporting free of charge police officers and fireman in any city where said company is authorized so to do by any ordinance or authority from the city council of any such city; provided, however, that no person or persons, beneficiaries of free transportation herein permitted, shall ride on a free pass or enjoy free transportation to or from any political convention, or on any political errand. Nothing in this chapter shall prohibit any express company from hauling or carrying free of charge the packages and property of its actual and bona fide officers, attorneys, agents and employes who are actually in the employment of any such company, its receivers or lessees, at the time when such free transportation or the right thereto is given. And provided, further, that nothing in this chapter shall be construed to prohibit any telegraph or telephone company from carrying and transmitting, free of charge, the messages of its bona fide officers, attorneys, agents and employes who are actually in the employment of such company, its receivers or lessees, at the time when such free transmission, or the right thereto, was given. (Acts 1907, p. 94.)

Art. 1534. **Persons offering to use permit, pass, franks, etc., issued to any other person, or applying for same, knowing he is not entitled thereto, penalty.**—If any person shall present, or offer to use, in his own behalf, any permit or frank whatsoever, to travel, pass or to convey any person or property or message which has been issued to any other person, or shall, knowing that he is not entitled under the provisions of this chapter, apply to any railway, express, telegraph or

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telephone company, officer, agent, lessee or receiver thereof, for any free pass, frank, privilege or a substitute for pay given or to be used instead of the regular fare or rate for transportation, or for any other consideration, except money, he shall be deemed guilty of a misdemeanor, and upon conviction, shall be punished by confinement in the county jail for not less than thirty days and not more than twelve months, and by a fine of not less than one hundred dollars and not more than one thousand dollars. (Acts 1907, p. 95.)

Art. 1535. **Discrimination by any means or device, penalty.**—No company, subject to the provisions of this chapter, shall, directly or indirectly, by any special rate, rebate, draw-back, or other device or exchange, demand, charge or collect or receive from any person, firm, association of persons or corporation a greater or less or different compensation for any service rendered, or to be rendered, in the transportation of passengers, property or messages, than it charges, demands, collects or receives from any other person, firm, association of persons or corporation for doing for him, them or it, a like service, if the transportation or transmission is a like kind of traffic or service under substantially similar circumstances and conditions; and any such company violating these provisions shall be deemed guilty of a misdemeanor, and for each offense, on conviction, shall pay to the State of Texas a penalty of five thousand dollars. (Acts 1907, p. 96.)

Art. 1536. **Name and residence of persons to whom free transportation is given to be reported.**—Each and all companies subject to the provisions of this chapter, their receivers and lessees, shall report annually on such dates as may be fixed by the Railroad Commission of this State, the name and residence of each and every person to whom free transportation, or right thereto, was given to travel, or to have his property or messages transported or transmitted over its transportation, express, sleeping car or railway or telegraph or telephone line; and any company violating this provision shall be deemed guilty of a misdemeanor, and for each offense, on conviction, shall pay to the State of Texas a penalty of one thousand dollars. (Acts 1907, p. 96.)

Art. 1537. **Persons other than those exempt using free pass, free ticket, etc., penalty.**—Any person, other than the persons excepted in this chapter, who uses any such free ticket, free pass or free transportation, frank or privilege over any railway or other transportation line or sleeping or express car, telegraph or telephone line mentioned in this chapter, for any distance under the control and operation of either of said companies subject to the provisions of this chapter or under their authority, or shall knowingly and wilfully by any means or device whatsoever obtain, use or enjoy from any such company a less fare or rate than is charged, demanded, collected or received by any such company from any other person, firm, association of persons or corporations for doing for him, them or it, a like service, if the transportation or service is of a like kind of traffic or service under substantially

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similar circumstances and conditions, such person or such officer or agent who acts for such corporation or company thus favored, shall be guilty of a misdemeanor, and, on conviction for each offense, shall be fined not less than one hundred dollars and not more than one thousand dollars. (Acts 1907, p. 96.)

Art. 1538. **Director, officer, agent, receiver, etc., wilfully violating this law or permitting its violation, penalty.**—Any director, officer, agent or any receiver, trustee, lessee or person acting for, or employed by, any company subject to the provisions of this chapter, who alone, or with any other corporation, company, persons or party, shall wilfully do, or cause to be done, or shall wilfully suffer, or permit to be done, any act, matter or thing in this chapter prohibited or declared to be unlawful, or who shall aid or abet therein, or shall wilfully omit or fail to do any act, matter or thing in this act required to be done, or shall cause or wilfully suffer or permit any act, matter or thing so directed, required by this chapter to be done, not to be done, or shall aid or abet any such omission or failure, or shall be guilty of any infraction of this chapter, or shall aid or abet therein, shall be deemed guilty of a misdemeanor, and shall, upon conviction, be subject to a fine of not less than one hundred dollars nor more than one thousand dollars; and, if the offense for which any person shall be convicted under this section shall be unlawful discrimination in rates, fares or charges for the transportation of passengers or property, or the transmission of messages, such person may, in addition to the fines hereinbefore provided for, at the discretion of the jury, be imprisoned in the penitentiary for a term not less than six months nor more than two years. (Act 1907, p. 96.)

Art. 1539. **Person may be compelled to testify, exempt from prosecution.**—In any investigation, suit or prosecution which may be had, or instituted, under the provisions of this chapter, the court or tribunal in which the investigation, suit or prosecution is pending may compel all persons to attend and give testimony, and to produce such papers, books and documents as may be desired by the State; and no person shall be exempt from giving testimony therein; provided, however, that no criminal action or proceeding shall be brought or prosecuted against such witness on account of any testimony so given or furnished by him. (Act 1907, p. 97.)

CHAPTER XVII

RAILROADS AND OTHER COMMON CARRIERS.—BILLS OF LADING, PRESCRIBING CERTAIN REQUIREMENTS FOR ISSUANCE

	Art.
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Fraudulently procuring issuance of false bill of lading	1550

Article 1540. **All common carriers to issue bills of lading.**—It shall be the duty of all railroad companies, steamship companies and other common carriers, or receivers thereof, except express companies and pipe line companies, upon the receipt of freight for transportation, to issue bills of lading therefor, and to authenticate, validate or certify such bills of lading, when the same shall be demanded by the shipper, in accordance with the provisions of this chapter. (Act 1910, S. S., p. 138.)

Art. 1541. **What bills of lading may contain.**—Each bill of lading issued by a common carrier, to which the provisions of this chapter apply, for an intrastate shipment, shall contain, and each bill of lading issued by such carrier for interstate or foreign shipment may contain, within the written or printed terms, in addition to the other requirements of this chapter, the following:

(a) The date of its issuance;

(b) The name of the person from whom the goods have been received;

(c) The place where the goods have been received;

(d) The place to which the goods are to be transported;

(e) A statement of whether the goods will be delivered to a specific person or to the order of a specific person;

(f) A description of the goods, or the packages containing them, which may, however, be in the terms such as may be approved by the Railroad Commission;

(g) The signature of the carrier, or the duly authorized agent of the carrier; said bill of lading shall be so signed with pen and ink, and the person signing the same shall attach his signature below all written, printed or stamped matter contained in said bill of lading, except the words, "Authorized agent of ....." (stating the name of his principal), which shall appear below his signature;

(h) The carrier may insert in a bill of lading issued by him any other terms and conditions, provided such terms and conditions shall not be contrary to law or public policy or the orders promulgated by the Railroad Commission; and provided further, that no language shall be inserted in any bill of lading having the effect of limiting or avoiding any of the provisions of this chapter;

(i) Provided, that when any form of bill of lading has been approved by the Interstate Commerce Commission, and has been adopted by any carrier and made a part of its tariff, then such bill of

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lading, as to interstate and foreign shipments, shall be a sufficient compliance with the provisions of this article. (Act 1910, S. S., p. 139.)

Art. 1542. **"Straight" and "order" bills of lading defined; latter not issued in duplicate, etc.**—A bill of lading in which it is stated that the goods are consigned or destined to a specific person is a "straight" bill of lading, and a bill of lading in which it is stated that the goods are consigned to the order of any person named in such bill of lading is an "order" bill of lading. Order bills of lading shall not be issued in sets or in duplicate, but copies thereof may be issued; provided such copy has written or printed across the face thereof: "Copy—Not Negotiable." (Act 1910, S. S., p. 139.)

Art. 1543. **Railroad Commission shall prescribe forms, etc., of bills of lading, and regulate issuance thereof.**—It shall be the duty of the Railroad Commission of Texas to adopt and prescribe forms, terms and conditions for the authentication, certification and validation of all bills of lading issued by common carriers referred to in article 1540, and to regulate the method and manner of their issuance, and to take all such steps as it may deem necessary to carry into effect the provisions of this chapter. (Act 1910, S. S., p. 139.)

Art. 1544. **Authority of agents of common carriers under this law to be posted.**—It shall be the duty of the carriers affected by this chapter to keep posted for public inspection in some conspicuous place in the station or place where freight is received an instrument of writing, authorizing the agent of such carrier, or person authorized to act for such carrier, selected for such purpose, to execute, sign and issue bills of lading; and the agent, or person so authorized to act for said carrier, so selected, shall attach his signature to such instrument in the same manner that he signs bills of lading. (Act 1910, S. S., p. 139.)

Art. 1545. **Penalty for failure or refusal of officer or agent to issue bill of lading.**—Any officer, agent or servant of any carrier, railroad or transportation company, or receiver thereof, affected by this chapter, who shall fail or refuse to issue a bill of lading in accordance with this chapter and the regulations and orders of the Railroad Commission, when the same is rightfully demanded, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not exceeding two hundred dollars or by imprisonment in the county jail not exceeding six months or by both such fine and imprisonment. (Act 1910, S. S., p. 141.)

Art. 1546. **Penalty for issuing wrongful, fraudulent or unauthorized bill of lading.**—Any officer, agent, or servant of a carrier, railroad or other transportation company, or receiver thereof, affected by this chapter, who shall wrongfully issue a bill of lading, with the intent to defraud any person, or who shall, with intent to defraud, knowingly misdescribe any goods, articles or other property, or the quantity or amount thereof, described in any bill of lading, or who shall knowingly

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issue a bill of lading without authority so to do, with the intent to defraud any person, shall be deemed guilty of a felony, and upon conviction thereof, shall be punished by confinement in the State penitentiary for a term of not less than two years and not exceeding ten years. (Act 1910, S. S., p. 141.)

Art. 1547. **Penalty for forgery of name of agent, etc., to bill of lading, or uttering such forgery.**—Any person who shall forge the name of any agent of a railroad company, or other common carrier, to a bill of lading, with the intent to defraud, or who shall forge the name of any person to any certificate attached to a bill of lading issued by such carrier, with the intent to defraud, or who shall knowingly utter or attempt to utter any such forged instrument with intent to defraud, shall be deemed guilty of a felony, and upon conviction thereof, shall be punished by confinement in the State penitentiary for a term of not less than five years and not exceeding fifteen years. (Act 1910, S. S., p. 141.)

Art. 1548. **Penalty for duplication, etc., of order bill of lading.**—Any officer, agent or servant of a common carrier, who knowingly issues, or aids in issuing, or knowingly permits to be issued in parts or sets, or in duplicate, an order bill of lading, shall be guilty of a felony, and upon conviction, shall be punished for such offense by a fine not exceeding five thousand dollars, and by confinement in the State penitentiary for a term not exceeding five years. (Act 1910, S. S., p. 141.)

Art. 1549. **Penalty for transfer of bill of lading issued in violation of this law.**—Any person who knowingly, and with the intent to defraud, negotiates or transfers a bill of lading issued in violation of the provisions of this chapter, or who knowingly and with the intent to defraud, negotiates or transfers a bill of lading which contains any statement of fact that is untrue, and which statement relates to a material matter, shall be deemed guilty of a felony, and, upon conviction of such offense shall be punished by a fine not exceeding five thousand dollars and by imprisonment in the State penitentiary for a term not exceeding ten years. (Act 1910, S. S., p. 141.)

Art. 1550. **Penalty for fraudulently procuring issuance of false bill of lading.**—Any person who shall knowingly and fraudulently procure and cause the agent of any common carrier to make and set forth in any bill of lading issued by him on behalf of such carrier any statements or representations which are false and which materially misrepresent the number, amount or quantity of the goods, chattels or other articles therein described, or who shall procure or cause any agent of a common carrier to issue to him a bill of lading with the intent to defraud, shall be deemed guilty of a felony and shall be punished by confinement in the penitentiary not less than two years nor more than five years. (Act 1910, S. S., p. 141.)

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CHAPTER XVIII

RAILROAD EMPLOYES—LIMITING THE WORK HOURS OF SAME

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On duty more than fourteen consecutive hours, prohibited; exceptions when	1551
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Penalty for corporation or receiver violating this act	1553
Officer, agent or representative of corporation or receiver violating this act, penalty	1554
Railroad telegraph or telephone operator not to work more than eight hours in twenty-four consecutive hours, penalty	1555

Article 1551. **On duty more than fourteen consecutive hours prohibited, exceptions when.**—It shall hereafter be unlawful for any corporation or receiver, operating any line of railroad, in whole or in part, in this State, or any officer, agent or representative of such corporation or receiver, to require, or knowingly permit, any conductor, engineer, fireman, brakeman, train dispatcher or telegraph operator, who has been on duty for fourteen consecutive hours, to perform any work, until he has had at least eight hours off duty, except in cases where such fourteen hours expires while a train is between stations or at a station where there are no facilities for sidetracking such train, in either of which events, the conductor, engineer, fireman, or brakeman, or all of them, may be permitted to proceed with such train to the first station where such facilities can be had, but no further; provided, however, that in case said fourteen hours shall expire when a train is within twenty miles of a terminal toward which it is going, or within twenty miles of its destination, the aforementioned employes, operating such train, may be permitted to proceed to such terminal or destination, but in such case shall not be required or permitted to do any switching or other work which would, in any manner, retard them in speedily reaching such terminal or destination, provided, further, that this law shall not apply in case of casualty upon such railroad, directly affecting such employe, nor shall it apply to sleeping car companies. (Acts 1907, p. 113.)

Art. 1552. **Same subject.**—It shall hereafter be unlawful for any corporation or receiver operating any line of railroad, in whole or in part, in this State, or any officer, agent or representative of such corporation or receiver to require, or knowingly permit, any conductor, engineer, fireman, brakeman, train dispatcher or telegraph operator, who has been on duty for fourteen consecutive hours, and who has gone off duty, to again go on duty or perform any work for such corporation or receiver, until he has had at least eight hours off duty. (Acts 1907, p. 114.)

Art. 1553. **Penalty for corporation or receiver violating this law.**—Any corporation or receiver, operating a line of railroad, in whole

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or in part within this State, who shall violate any of the provisions of this law shall be liable to the State of Texas in a penalty of not less than two hundred dollars nor more than one thousand dollars for each offense; and such penalties shall be recovered, and suit therefor shall be brought, in the name of the State of Texas, in any court having jurisdiction of the amount in Travis county, Texas, or in any county into or through which said railroad may pass. Such suit or suits may be brought either by the attorney general or under his direction, or by the county attorney or district attorney of any county or judicial district into or through which said railroad may pass; and such attorney, bringing any action under this chapter shall be entitled to a compensation of one-third of the total amount of penalties recovered. (Acts 1907, p. 114.)

Art. 1554. **Officer, agent or representative of corporation or receiver violating this law.**—Any officer, agent or representative of any corporation or receiver, operating any line of railroad, in whole or in part, within this State, who shall violate any of the provisions of this chapter, shall be deemed guilty of a misdemeanor, and upon conviction therefor, shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars for each offense, or by confinement in the county jail for not less than ten nor more than sixty days, or by both such fine and imprisonment; and such person so offending may be prosecuted under this article, either in the county where such person may be at the time of the commission of the offense, or in any county where such employe has been permitted or required to work in violation of this chapter. (Acts 1907, p. 114.)

Art. 1555. **Railroad telegraph or telephone operator not to work more than eight hours a day.**—It shall be unlawful for any railroad telegraph or telephone operator to work more than eight hours in twenty-four consecutive hours at such occupation; and any such operator, violating this article, shall pay a fine in any sum not less than twenty-five dollars nor more than one hundred dollars; provided, that, in case of an emergency, any operator may remain on duty for an additional two hours. (Acts 1907, p. 223.)

CHAPTER XIX

RAILROAD COMPANIES.—REQUIRING ENGINEERS OR CONDUCTORS TO SERVE FIRST AS FIREMEN OR BRAKEMEN

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Person running a locomotive engine upon any railroad, qualification of		1556
Person engaged as conductor on railroad, qualification of		1557
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Article 1556. **Person running a locomotive engine upon any railroad, qualification of.**—If any person shall run or operate any locomotive engine upon any railroad in the State of Texas without having served three years prior thereto as a fireman or engineer on a locomotive engine, he shall be deemed guilty of a misdemeanor, and he shall be punished by a fine of not less than twenty-five dollars nor more than five hundred dollars, and each day he so engages shall constitute a separate offense. (Act March 11, 1909, Acts 1909, p. 92.)

Art. 1557. **Unlawfully acting as conductor.**—If any person shall act or engage to act as a conductor on a railroad train in this State without having for two years prior thereto served or worked in the capacity of a brakeman or conductor on a freight train on a line of railroad, he shall be deemed guilty of a misdemeanor, and shall be punished by a fine of not less than twenty-five dollars nor more than five hundred dollars, and each day he so engages shall constitute a separate offense. (Act March 11, 1909, Acts 1909, p. 92.)

Art. 1558. **Penalty.**—If any person shall knowingly engage, promote, require, persuade, prevail upon or cause any person to do any act in violation of the provisions of the two preceding articles, he shall be deemed guilty of a misdemeanor, and shall be punished by a fine of not less than twenty-five dollars nor more than five hundred dollars, and each day he so engages shall constitute a separate offense. (Act March 11, 1909, Acts 1909, p. 92.)

Art. 1559. **Exceptions to preceding articles.**—Nothing in this law shall be construed as applying to the running or operating of engines, in taking said engines to or from trains at division terminals by engine hostlers, or of the shifting of cars or making up trains, or doing any work appurtenant thereto at engine houses, tram or freight yards by switchman or yardman, or in the case of the disability of an engineer or a conductor while out on the road between division terminals. In case of emergency where such companies can not obtain the employes mentioned in this law who have the qualifications prescribed by the provisions thereof, then such companies may employ temporary firemen, engineers and conductors who have not the qualifications prescribed by this law, but no such employment shall continue longer than such companies can supply their respective places with men who have the qualifications prescribed by this law, and provided further, that nothing herein contained shall relieve any of such companies from the negligence of any of its employes. (Act March 11, 1909, Acts 1909, p. 92.)

Art. 1560. **Not to apply to railroads less than twenty-five miles in length.**—The provisions of this law shall not apply to any railroad company within this State or the receiver, (or) lessee thereof, whose line of railway is less than twenty-five miles in length. (Act March 11, 1909, Acts 1909, p. 92.)

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Sec. 2751. **Unlawfully acting as conductor.**—The act of March 11, 1909, which makes it an offense upon any person to act or engage to act as conductor on a railroad train within this State without having for two years prior thereto served or worked in the capacity of a brakeman or conductor upon a freight train on a line of railroad is unconstitutional. Smith v. State, 146 S. W. 900. (Reversed and dismissed after receiving mandate from United States Supreme Court.)

The act of March 11, 1909, making it an offense to act as conductor on a railroad train without having for two years prior thereto served or worked in the capacity of brakeman or conductor on a freight train on a line of railroad does not require that the two years' previous experience shall have been served within this State. Byrne v. State, 60 Texas Crim. Rep. 518; 132 S. W. 473.

CHAPTER XX

RAILROAD COMPANIES REQUIRED TO DO REPAIR WORK IN TEXAS AND FURNISH SUFFICIENT MOTIVE POWER

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Article 1561. **Having shops in this State, required to repair, renovate or rebuild in Texas.**—All railroad corporations operating in the State of Texas, and having their repair shops within the State, shall, and are hereby required to repair, renovate or rebuild, in the State of Texas, any and all defective or broken cars, coaches, locomotives or other equipment, owned or leased by said corporations in the State of Texas, when such rolling stock is within the State of Texas; provided, that such railway shall have, or be under obligation to have, proper facilities in the State, to do such work; and provided, this chapter shall not be so construed as to require any railway corporation to violate the safety appliance law of the Congress of the United States; and provided further that no railway shall be required to haul such disabled equipment a greater distance for repairs at a point within the State of Texas than would be necessary to reach their repair shops in another State; and provided further that no such railway company shall haul or be permitted to haul for purposes of repair any disabled equipment by or past any shop owned or operated by any such company where said disabled equipment can be repaired, in order to reach some other repair shop at a greater distance for purposes of repairing said disabled equipment; provided, that the provisions of this chapter shall not apply to companies having less than sixty continuous miles of railroad in operation in this State. (Acts 1909, p. 73.)

Art. 1562. **Prohibited from sending cars, coaches, etc., out of Texas to be repaired.**—All railroad corporations operating in the State of Texas, and having their repair shops within the State, shall be pro-

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hibited from sending or removing any of their cars, coaches, locomotives or other equipment out of the State of Texas to be repaired, renovated or rebuilt, when the same is in a defective or broken condition, and within the State. (Acts 1909, p. 73.)

Art. 1563. **Not to apply to strikes, etc.**—The provisions of this chapter shall not apply in cases of strikes, fires, or other unforeseen casualties and emergencies. (Acts 1909, p. 73.)

Art. 1564. **Penalty.**—Any railway corporation, lessee, receiver, superintendent, or agent, who shall violate any of the provisions of this chapter, shall, after conviction by any court of competent jurisdiction, be liable to a fine of not less than one hundred dollars nor more than five hundred dollars. (Acts 1909, p. 73.)

Art. 1565. **Shall equip and furnish sufficient motive power, etc., to handle passenger and freight traffic.**—It is hereby declared to be the duty of every railroad company, incorporated under the laws of the State of Texas and doing business in this State, under limitations and regulations prescribed by the Railroad Commission of Texas, to equip and provide sufficient motive power and rolling stock to handle all passenger and freight traffic expeditiously and without delay. (Acts 1907, p. 297.)

Art. 1566. **Penalty for violating preceding article.**—Any railroad company or common carrier failing to comply with the provisions of this chapter or to obey the orders of the Railroad Commission, made in pursuance of the provisions hereof, shall be deemed guilty of an abuse of their rights and privileges, and, upon conviction, shall be subject to a fine of one hundred dollars for a violation or failure to comply with any order that may be issued by the Railroad Commission as is provided said commission may do by Article 1553 (Sec. 2, Act April 23, 1907, Acts 1907, p. 297), and each day that such railroad company or common carrier neglects, fails or refuses to comply with such orders shall constitute a separate offense. (Acts 1907, p. 298.)

CHAPTER XXI

ESTABLISHING NAME FOR A RAILWAY STATION OTHER THAN NAME OF POSTOFFICE

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Station or depot to bear name of postoffice	1567
Exceptions	1568
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Article 1567. **Station or depot to bear name of post office.**—It shall hereafter be unlawful for any corporation or receiver, operating any line of railroad, in whole or part, in this State, or any officer, agent, or representative of such corporation or receiver to retain, maintain,

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or establish a name for any railway station or depot in any incorporated or unincorporated town or city, within this State, other than the name of the town or city, which have, and bears, the name of its post office so given by the United States Government. (Act March 10, 1909, Acts 1909, p. 89.)

Art. 1568. **Exceptions.**—The provisions of Article 1552 (1567) shall not apply to two or more incorporated or unincorporated towns or cities in this State which now are situated within five miles of each other, and which each have therein established (a) post office named and designated by the United States Government. Provided, that this chapter shall not apply to those cases where the post-office name of the city, town, village or settlement is so similar in sound or otherwise to that of some other station upon such railroad, as that confusion in train orders and directions may arise therefrom; and provided further that where the name of such place is changed by the postal department of the Federal Government such railway shall not be required to again change the name of its station, and provided further that all railways having stations affected hereby shall have ninety days from and after this chapter becomes effective to comply therewith. (Act March 10, 1909, Acts 1909, p. 89.)

Art. 1569. **Penalty.**—Any officer, agent, or representative of any corporation, or receiver operating any line of railroad in whole, or in part, within this State, who shall violate the provisions of this chapter shall be deemed guilty of a misdemeanor, and upon conviction therefor shall be punished by a fine of not less than two hundred dollars nor more than five hundred dollars for such offense, or by confinement in the county jail for not less than thirty nor more than ninety days, or by both such fine and imprisonment. Provided that the venue of all suits originating under the provisions of this chapter shall be in the county where the station about which the suit occurs, is located. (Act March 10, 1909, Acts 1909, p. 89.)

CHAPTER XXII

STREET RAILWAYS

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Half fare for children of twelve years and under	1570
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Transfers	1573
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Article 1570. **Half fare for children of twelve years and under.**—All persons or corporations, owning or operating street railways in or upon the public streets of any town or city in this State of not less than forty thousand inhabitants are required to carry children of the

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age of twelve years or less, at, and for one-half, the charge of fare regularly collected by such person or corporation for the transportation of adult persons; provided, that this chapter shall not apply to street cars carrying children or students to and from schools, colleges or other institutions of learning, situated at a distance of one mile or more beyond the limits of the incorporated city or town from which said cars run. (Acts 1903, p. 182.)

Art. 1571. **Sale of tickets in lots.**—All such persons or corporations, owning or operating street railways, shall sell or provide for the sale of tickets in lots of twenty, each good for one trip over the line or lines owned or operated by such person or corporation, at, and for, one-half the regular fare or charge collected for the transportation of adult persons, to students not more than seventeen years of age in actual attendance upon any academic, public or private school, of grades not higher than the grades of the public high schools of this State, situated within, or adjacent to, the town or city in which such street railway is located. Such tickets are required to be sold only upon the presentation by the student desiring to purchase the same of the written certificate of the principal of the school upon which he is in attendance, showing that he is not more than seventeen years of age, is in regular attendance upon such school, and is within the grades hereinbefore provided. Such tickets are not required to be sold to such students, and shall not be used except during the months of the year when such schools are in actual session; and such students shall be transported at half fare only upon the presentation of such tickets. (Acts 1903, p. 182.)

Art. 1572. **Children five and under transported free.**—All such persons or corporations are required to transport children of the age of five years or less, when attended by a passenger of above said age, free of charge. (Acts 1903, p. 182.)

Art. 1573. **Transfers.**—All such persons or corporations are required to accord to all passengers referred to in Article 1561 (1570), 1562 (1571) and 1563 (1572) the same rights as to the use of transfers issued by their own or other lines as are, or may be, accorded to passengers paying full fare. (Acts 1903, p. 182.)

Art. 1574. **Penalty.**—Any officer of any corporation or other person who shall knowingly violate any of the provisions of this chapter shall, upon conviction, be adjudged guilty of a misdemeanor, and fined not less than twenty-five nor more than one hundred dollars. (Acts 1903, p. 182.)

Art. 1575. **Misrepresenting age or grade.**—Any person who shall misrepresent the age or the grade of any person for the purpose of securing the reduced fare herein provided for shall, upon conviction, be adjudged guilty of a misdemeanor, and be fined not less than twenty-five nor more than one hundred dollars. (Acts 1903, p. 182.)

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CHAPTER XXIII

ASSIGNOR

Art.
Secreting or concealing property from assignee..... 1576

Article 1576. (1011) **Secreting or concealing property from assignee.**—If any assignor shall secrete or conceal from his assignee any portion of the property belonging to his estate other than that which is exempt from execution; or shall, previous to and in contemplation of the assignment transfer any property with the intent or design to defraud his creditors, such assignor shall be adjudged guilty of a felony, and upon conviction thereof, shall be punished by imprisonment and labor in the penitentiary for not less than two nor more than five years. (Sec. 11, Act March 24, 1879, Acts 1879, p. 59.)

CHAPTER XXIV

DUPLICATION OF PROCESS FOR WITNESSES

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Article 1577. (1012) **Duplication of process for witnesses.**—It shall be unlawful for the clerk of any district court, after a witness in a felony case has been served with a subpoena or an attachment, to issue any other or further process for said witness, except upon the order of the presiding judge, made upon application to him for that purpose. When a witness has been served with process by one party, it shall inure to the benefit of the opposite party in case he should need said witness, and as far as practicable the clerk shall include in one process the names of all witnesses for the State and defendant, and such process shall show that the witnesses are summoned for the State and defendant. Any district clerk who shall violate the provisions of this law shall be deemed guilty of a misdemeanor and punished by a fine of not less than ten nor more than one hundred dollars. (Act March 30, 1889, Acts 1889, p. 145.)

Sec. 2752. **Statute construed.**—The provisions of the Act of March 30, 1889, as to duplication of process, by its terms has no application to cases of misdemeanor, but is confined solely to felonies. Searcy v. State, 40 Texas Crim. Rep. 463; 53 S. W. 344.

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CHAPTER XXV

COUNTY FINANCES

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Article 1578. (1013) **State or county officer refusing information.**—If any State or county officer shall fail or refuse to give any data, statistics and information required of him by law, such State or county officer shall be guilty of a misdemeanor, and upon conviction be fined in a sum not less than twenty-five nor more than one hundred dollars. (Act 21st Leg., April 2, 1899, p. 23.)

Art. 1579. (1013a) **Clerk failing to keep finance ledger.**—If the clerk of the county court of any county in this State, or county auditor in counties having an auditor, shall wilfully fail, neglect, or refuse to keep, or cause to be kept, the finance ledger, provided for by law, or shall wilfully fail, neglect, or refuse to make, or cause to be made, the quarterly statement as provided for by law, the clerk or auditor so failing, neglecting or refusing shall be fined in any sum not less than fifty nor more than two hundred dollars; provided, that such failure, neglect or refusal, for each quarter, shall constitute a separate offense. (Acts 1893, p. 161.)

Art. 1580. (1013b) **Treasurer to make report.**—Any county or city treasurer, or treasurer of the school board of each city or town having exclusive control of its schools, failing to make and transmit the report required by law, and certified copy, or either, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined in any sum not less than fifty dollars nor more than five hundred dollars. (Act 1893, p. 188.)

Art. 1581. **Selecting depository of funds of county.**—The commissioners' court of each county in this State are authorized, at the February term thereof every two years, to receive proposals from any banking incorporation, association or individual banker in such county, as may desire to be selected as the depository of the funds of such county. Notice that such bids will be received shall be published by, and over the name of the county judge, once each week for at least twenty days before commencement of such term, in some newspaper published in said county; and if no newspaper be published therein,

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then in any newspaper published in the nearest county, and in addition thereto notice shall be published by posting same at the courthouse door of said county. (Acts 1907, p. 208.)

Art. 1582. **Member of commissioners' court failing or refusing to vote.**—Any member of the commissioners' court of any county who shall fail or refuse to vote for a compliance with the requirements of this section shall be deemed guilty of a misdemeanor, and on conviction shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, or by imprisonment in the county jail for (not) less than one nor more than six months, or by both such fine and imprisonment, and such failure or refusal shall be deemed ground for removal from office. (Acts 1907, p. 208.)

Art. 1583. **Selecting depository of funds of city.**—The city council of every city in the State of Texas, incorporated under the general laws thereof, or incorporated under special charter, at its regular meeting in July of each year, is authorized to receive sealed proposals, for the custody of the city funds, from any banking corporation, association or individual banker, doing business within the city, that may desire to be selected as the depository of the funds of the city. The school funds, from whatsoever source derived, of incorporated cities, is part of the city funds, and is subject to the provisions of this chapter. Notice that such bids will be received shall be published by the city secretary, not less than one nor more than four weeks before such meeting, in some newspaper published in the city. Any banking corporation, association or individual banker, doing business in the city, desiring to bid, shall deliver to the city secretary on or before the day of such meeting designated by said published notice, a sealed proposal, stating the rate per cent upon daily balances that said banking corporation, association or individual banker offers to pay to the city for the privilege of being made the depository of the funds of the city for the year next following the date of such meeting; or, in the event that said election shall be made for a less term than one year, as hereinafter provided, then, for the time between the date of bid and the next regular time for the selection of a depository as aforesaid. All such proposals shall be securely kept by the secretary, and shall not be opened until the meeting of the council for the purpose of passing upon same; nor shall any other proposals be received after they shall have been opened. It shall be a misdemeanor for the City Secretary or other person to open any of said proposals or to disclose directly or indirectly the amount of any such bid to any person or persons before the selection of such depository, and upon conviction he shall be fined in a sum of not less than ten nor more than one hundred dollars. (Act April 5, 1907, Acts 1907, p. 132.)

Art. 1584. **Checks and warrants on city depository, how drawn.**—No check shall be drawn upon the city depository by the treasurer, except upon a warrant signed by the mayor and attested by the secre-

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tary. No warrant shall be drawn by the mayor and secretary upon any of the special funds, created for the purpose of paying the bonded indebtedness of said city in the hands of the city treasurer, or in the depository, for any purpose whatsoever, other than to pay the principal or interest of said special fund, or for the purpose of investing said special fund according to law. No city treasurer shall pay off, or issue a check, to pay any money out of any special fund created for the purpose of paying any bonded indebtedness of said city other than for the purpose to pay interest due on said bonds, the principal of said bonds, or for the purpose of making an investment of said fund according to law. Any mayor who shall draw a warrant against a special fund as above defined for any other purpose than above specified, or any city treasurer who shall pay, or issue a check to pay a warrant drawn on the special fund of any city other than for the legal purpose of paying interest due on said bonds, the principal of said bonds, of (or) for investing said sinking fund according to law, shall be guilty of a felony, and upon conviction shall be confined in the penitentiary for any term not less than one year nor more than five years. (Sec. 39, Act May 1, 1905, Acts 1905, p. 397.)

CHAPTER XXVI

LABOR

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Article 1585. **Commissioner of Labor Statistics, duty of.**—The Commissioner of Labor Statistics shall collect, assort, systematize and present in biennial reports to the Governor, statistical details relating to all departments of labor in Texas, and especially as affecting or bearing upon the commercial, social, educational and sanitary conditions of the employees and their families, the means of escape from dangers incident to their employment, the protection of life and health in factories and other places of employment, the labor of children and of women and the number of hours of labor exacted of them, and in general all matters and things which affect or tend to affect the prosperity of the mechanical, manufacturing and productive industries of this State, and of the persons employed therein. Said commissioner shall also, as fully as may be done, collect reliable reports and infor-

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mation from each county, showing the amount and condition of the mechanical, mining and manufacturing interests therein, and all sites offering natural or acquired advantages for the location and operation of any of the different branches of industry, and he shall, by correspondence with interested parties in other parts of the United States, or in foreign countries, impart to them such information as may tend to induce the location of manufacturing and producing plants within the State, together with such information as may tend to increase the employment of labor and the products of such employment in Texas. (Sec. 3, Act Feb. 26, 1909, Acts 1909, p. 59.)

Art. 1586. **Failure to attend or testify before commissioner.**—The Commissioner of the Bureau of Labor Statistics shall have power to issue subpoenas, administer oaths and take testimony in all matters related to the duties herein required of the said bureau, but such testimony must be taken in the vicinity of the residence or office of the person testifying. Any person duly subpoenaed under the provisions of this chapter who shall wilfully neglect or fail to attend or testify at the time and place mentioned in the subpoena shall be deemed guilty of a misdemeanor, and upon conviction thereof before any court of competent jurisdiction shall be punished by a fine of not to exceed fifty dollars or by imprisonment in the county jail for not to exceed thirty days. Provided, however, that no witness shall be compelled to go outside of the county in which he resides in order to testify. (Sec. 5, Act Feb. 26, 1909, Acts 1909, p. 60.)

Art. 1587. **Duty of owner, etc., of factory, etc.**—It shall be the duty of every owner, manager and superintendent of every factory, mill, workshop, mine, store, business house, public or private work, or any other establishment or place, where five or more persons are employed at work, to make to the Bureau of Labor Statistics, upon blanks to be furnished by such bureau, such reports and returns as said bureau may require for the purpose of securing such labor statistics as are contemplated by this chapter, and such reports and returns shall be made within not to exceed sixty days from the receipt of the blanks furnished by the commissioner or by the bureau, and the same shall be verified under oath. Any owner, manager, superintendent or other person in charge or control of any factory, mill, workshop, mine, store, business house, public or private work, or other establishment or place, where five or more persons are employed at work, who shall neglect or refuse to make such reports and returns as are required by the provisions of this chapter shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not to exceed one hundred dollars, or by imprisonment in the county jail for not to exceed thirty days. (Sec. 6, Act Feb. 26, 1909, Acts 1909, p. 60.)

Art. 1588. **Disclosing name of informant.**—In the reports made by the Commissioner of Labor Statistics to the Governor the names of

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individuals, firms or corporations supplying information under the provisions of this chapter shall not be disclosed, nor shall the name of any such individual, firm or corporation be communicated to any person or persons, except such as are employed in the Bureau of Labor Statistics, and any officer or employee of such bureau violating any of the provisions of this article shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not to exceed five hundred dollars, or by imprisonment in the county jail for not more than ninety days. (Sec. 7, Act Feb. 26, 1909, Acts 1909, p. 60.)

Art. 1589. **Commissioner may enter factory, etc.**—Upon the written complaint of two or more persons, or upon his failure otherwise to obtain information, in accordance with the provisions of this chapter, the Commissioner of Labor Statistics shall have the power to enter any factory, mill, workshop, mine, store, business house, public or private work, or other establishment, or place where five or more persons are employed at work, when the same is open and in operation, for the purpose of gathering facts and statistics, such as are contemplated by this chapter, and for the purpose of examining into the methods of protecting employees from danger and the sanitary conditions in and around such building or place, of all of which the said commissioner shall make and return into the Bureau of Labor Statistics a true and detailed record in writing. (Sec. 9, Act Feb. 26, 1909, Acts 1909, p. 61.)

Art. 1590. **Commissioner shall notify county or district attorney.**—If the Commissioner of Labor Statistics shall learn of any violation of the law with respect to the employment of children, or fire escapes, or the safety of employees, or the preservation of health, or in any other way affecting the employees, he shall at once give written notice of the facts to the county or district attorney of the county in which the law has been violated, or of some other county, if any there be, having jurisdiction of the offense, and the county or district attorney to whom such notice has been given shall immediately institute the proper proceedings against the guilty person. (Sec. 10, Act Feb. 26, 1909, Acts 1909, p. 61.)

Art. 1591. **Interfering with Bureau of Labor Statistics.**—Any owner, manager, superintendent or other persons in charge or control of any factory, mill, workshop, mine, store, business house, public or private work, or other establishment or place, where five or more persons are employed at work, who shall refuse to allow any officer or employee of the said Bureau of Labor Statistics to enter the same, or to remain therein for such time as is reasonably necessary, or who shall hinder any such officer or employee, or in any way prevent or deter him from collecting information, shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in any sum not to exceed one hundred dollars, or imprisonment in the county jail for not to exceed sixty days. (Sec. 11, Act Feb. 26, 1909, Acts 1909, p. 61.)

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Sec. 2753. **Female employe.**
Sec. 2754. **Hours of work.**
Sec. 2755. **Hours of laundry worker.**
Sec. 2756. **Hours of cotton goods worker.**
Sec. 2757. **Seats for female employes.**
Sec. 2758. **Penalty.**

Sec. 2754. **Hours of work for female employe.**—No female shall be employed in any factory, mine, mill, workshop, mechanical or mercantile establishment, laundry, hotel, restaurant or rooming house, theater or moving picture show, barber shop, telegraph, telephone or other office, express or transportation company, or any State institution, or any other establishment, institution or enterprise where females are employed, except as hereinafter provided, for more than nine hours in any one calendar day, nor more than fifty-four hours in any one calendar week; provided, however, that in case of extraordinary emergencies, such as great public calamities, or where it becomes necessary for the protection of human life or property, longer hours may be worked, but for such time not less than double time shall be paid such female with the consent of the said female; provided, this Act shall not apply to stenographers and pharmacists. (Sec. 1, Act March 15, 1915, Acts 1915, p. 105.)

Sec. 2755. **Hours of female laundry worker.**—No female shall be employed in any laundry for more than fifty-four hours in one calendar week; the hours of such employment to be so arranged as to permit the employment of such female at any time so that she shall not work more than a maximum of eleven hours during the twenty-four hours' period of one day; provided, that if such female is employed for more than nine hours in any one day she shall receive pay at the rate of double her regular pay for such time as she is employed for more than nine hours per day. (Sec. 1a, Act March 15, 1915, Acts 1915, p. 105.)

Sec. 2756. **Hours of female cotton goods worker.**—No female shall be employed in any factory engaged in the manufacture of cotton, woolen or worsted goods or articles of merchandise manufactured out of cotton goods for more than ten hours in any one calendar day, nor more than sixty hours in any one calendar week. Provided, that if such female is employed for more than nine hours in any one day she shall receive pay at the rate of double her regular pay for such time as she may be employed for more than nine hours per day. (Sec. 1b, Act March 15, 1915, Acts 1915, p. 105.)

Sec. 2757. **Seats for female employes.**—Every employer owning or operating any factory, mine, mill, workshop, mechanical or mercantile establishment, laundry, hotel, restaurant or rooming house, theater or moving picture show, barber shop, telegraph or telephone or other office, express or transportation company, the superintendent of any State institution or any other establishment, institution or enterprise where females are employed as provided by Sections 1, 1a and 1b, shall provide and furnish suitable seats, to be used by such employes when not engaged in the active duties of their employment, and shall give notice to all such female employes by posting in a conspicuous place, on the premises of such employment in letters not less than one inch in height, that all such female employes will be permitted to use such seats when not so engaged. (Sec. 2, Act March 15, 1915, Acts 1915, p. 106.)

Sec. 2758. **Penalty.**—Any employer, overseer, superintendent, foreman, or other agent of any such employer who shall permit any female to work in any of the places mentioned in Sections 1, 1a and 1b more than the number of hours provided for in this Act during any day of the twenty-four hours, or who shall fail, negect or refuse to so arrange the work of females employed in the said places mentioned in Sections 1, 1a and 1b so that they shall not work more than the number of hours provided for in Sections 1, 1a and 1b of this Act, during any day of twenty-four hours or the number of hours prescribed by this Act in any one week, or who shall fail, neglect or refuse to provide suitable seats as provided in Section 2 of this Act shall be deemed guilty of a misdemeanor, and upon conviction in any court of competent jurisdiction shall be fined in any sum not less than fifty nor more than two hundred dollars and each day of such violation and each such female employe required or permitted to work more than the time provided in the various sections of this Act shall constitute a separate offense. "Provided, that the provisions of the law shall not apply to telegraph and telephone companies in rural districts and in cities or towns of less than

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3,000 inhabitants, as shown by the last Federal census." Provided, that the provisions of this Act shall not apply to mercantile establishments in rural districts and in cities and towns and villages of less than 3,000 inhabitants. (Sec. 3, Act March 15, 1915, Acts 1915, p. 106.)

Sec. 2759. **Hours of labor upon public works.**
Sec. 2760. Eight hours a day's work.
Sec. 2761. Cases of emergency.
Sec. 2762. Penalty.

Sec. 2760. **Eight hours a day's work.**—Eight hours shall constitute a day's work for all laborers, workmen or mechanics now employed or who may hereafter be employed by or on behalf of the State of Texas, or by or on behalf of any county, municipality, or political subdivision of the State, county or municipality in any one calendar day, where such employment, contract or work is for the purpose of constructing, repairing or improving buildings, bridges, roads, highways, streams, levees, or other work of a similar character, requiring the service of laborers, workmen or mechanics. (Sec. 1, Act March 31, 1913, p. 127.)

Sec. 2761. **Violating eight-hour law.**—All contracts hereafter made by or on behalf of the State of Texas, or by or on behalf of any county, municipality or other legal or political subdivision of the State, with any corporation, persons or association of persons for the performance of any work, shall be deemed and considered as made upon the basis of eight hours constituting a day's work. It shall be unlawful for any corporation, person or association of persons having a contract with the State or any political subdivision thereof, to require or permit any such laborers, workmen, mechanics or other persons to work more than eight hours per calendar day in doing such work, except in cases of emergency, which may arise in times of war, or in cases where it may become necessary to work more than eight hours per calendar day for the protection of property, human life or the necessity of housing inmates of public institutions in case of fire or destruction by the elements. In such emergencies the laborers, workmen, mechanics or other persons so employed and working to exceed eight hours per calendar day shall be paid on the basis of eight hours constituting a day's work; provided, that not less than the current rate of per diem wages in the locality where the work is being performed shall be paid to the laborers, workmen, mechanics or other persons so employed by or on behalf of the State of Texas, or for any county, municipality or other legal or political subdivision of the State, county or municipality, and every contract hereafter made for the performance of work for the State of Texas, or for any county, municipality or other legal or political subdivision of the State, county or municipality, must comply with the requirements of this section; provided, that nothing in this Act shall affect contracts in existence at the time of the taking effect of this Act; provided further, that nothing in this Act shall be construed to affect the present law governing State and county convict labor while serving their sentences as such. (Sec. 2, Act March 31, 1913, Acts 1913, p. 127.)

Sec. 2762. **Penalty for violating eight-hour law.**—Any person, or any officer, agent or employe of any person, corporation or association of persons, or any officer, agent or employe of the State, county, municipality or any legal or political subdivision of the State, county or municipality, who shall fail or refuse to comply with the provisions of this Act or who shall violate any of the provisions of this Act, shall, on conviction thereof, be deemed guilty of a misdemeanor, and shall be punished by a fine of not less than fifty dollars nor more than one thousand dollars, or by imprisonment not to exceed six months or by both such fine and imprisonment and each and every day of such violation shall constitute a separate offense. (Sec. 3, Act March 31, 1913, Acts 1913, p. 127.)

Sec. 2763. **Private employment agencies.**
Sec. 2764. License for private employment agency.
Sec. 2765. Register and fees.
Sec. 2766. Illegal acts of agency.
Sec. 2767. Penalty.
Sec. 2768. "Private agency for hire" defined.

Sec. 2764. **License for private employment agency.**—No person, firm or corporation in this State shall open, operate or maintain a private employment agency for

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hire, or where a fee is charged to either applicant for employment or for help, without first obtaining a license for the same from the Commissioner of Labor Statistics, and such license fee shall be twenty-five dollars. Such license shall be of force for one year, but may be renewed from year to year upon the payment of a fee of twenty-five dollars for each renewal. The license, together with a copy of this Act, shall be posted in a conspicuous place in each and every employment agency. (Sec. 1, Act March 22, 1915, Acts 1915, p. 163.)

Sec. 2765. **Register and fees.**—It shall be the duty of every licensed agency to keep a register in a substantial book, in the form prescribed by the Commissioner of Labor Statistics, in which shall be entered the age, sex, nativity, trade or occupation, name and address of every applicant. Such licensed agency shall also enter in a register the name and address of every person who shall make application for help or servants, and the name and nature of the employment for which such help shall be wanted. Such register shall, at all reasonable hours, be open to the inspection and examination of the Commissioner of Labor Statistics or his deputies or inspectors. Where a registration fee is charged for filing or receiving application for employment or help, said fee shall in no case exceed the sum of two dollars, for which a receipt shall be given, in which shall be stated the name of the applicant, the amount of the fee, the date, the name or character of the work or the situation to be secured. In case the said applicant shall not obtain a situation or employment through such licensed agency within one month after registration as aforesaid, then said licensed agency shall forthwith repay and return to such applicant, upon demand being made therefor, the full amount of the fee paid or delivered by said applicant to said licensed agency; provided, that such demand be made within thirty days after the expiration of the period aforesaid. (Sec. 2, Act March 22, 1915, Acts 1915, p. 163.)

Sec. 2766. **Illegal acts of employment agency.**—No agency shall send or cause to be sent any female help or servants to any place of bad repute, house of ill fame or assignation house, or any house or place kept for immoral purposes. No such licensed agency shall publish, or cause to be published, any false information, or to make any false promise concerning or relating to work or employment to anyone who shall register for employment, and no such licensed agency shall make any false entries in the register to be kept as herein provided, and all entries in such registers shall be made in ink. Any licensed person or agency shall not by himself or itself, agent or otherwise, induce, or attempt to induce, any employe to leave his employment with a view to obtaining other employment through such agency. (Sec. 3, Act March 22, 1915, Acts 1915, p. 164.)

Sec. 2767. **Penalty.**—Any person convicted of a violation of any of the provisions of Sections 1, 2, 3 shall be guilty of a misdemeanor, and upon conviction shall be fined not less than fifty dollars nor more than two hundred dollars for each offense; provided, that any person or persons who shall send any female help or servants to any place of bad repute, house of ill fame or assignation house or any house or place kept for immoral purposes, shall be deemed guilty of a felony, and upon conviction shall be punished by a fine of not less than one thousand dollars nor more than five thousand dollars, or by imprisonment in the penitentiary not less than two years nor more than ten years, or by both such fine and imprisonment. (Sec. 4, Act March 22, 1915, Acts 1915, p. 164.)

Sec. 2768. **"Private agency for hire" defined.**—A private agency for hire is defined and interpreted to mean any person, firm or corporation engaged in the occupation of furnishing employment or help, or giving information as to where employment or help may be secured, or displaying any employment sign or bulletin, or through the medium of any card, circular or pamphlet, offering to secure employment or help; provided, that charitable organizations not charging a fee shall not be included in said term. (Sec. 5, Act March 22, 1915, Acts 1915, p. 164.)

Sec. 2768½. **City firemen.**—No member of any paid fire department in any city containing twenty-five thousand inhabitants or more, according to the last United States census, shall be required to be on duty for more than six days in any one week, except in cases of emergency. (Sec. 1, Act May 29, 1915.)

The city official having supervision of the fire department shall designate the day of the week upon which each member of such department shall not be required to be on duty. (Sec. 2, Act May 29, 1915.)

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Any city official having charge of the fire department in any city coming under this Act who shall violate any of the provisions hereof shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than $10.00 nor more than $100.00. (Sec. 3, Act May 29, 1915, Acts First Called Session, 1915, p. 22.)

CHAPTER XXVII

MINES AND MINING

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Article 1592. **Unlawfully employing persons in mine.**—It shall be unlawful for the owner, agent, lessee, receiver or operator of any mine in this State to employ any person or persons in said mine for the purpose of working therein, unless there are in connection with every seam or stratum of coal or ore worked in such mine not less than two openings or outlets, separated by a stratum of not less than one hundred and fifty feet at surface and not less than thirty feet at any place, at which openings or outlets, safe and distinct means of ingress and egress, shall, at all times, be available for the persons employed in such mine. The escapement shafts or slopes shall be fitted with safe and available appliances by which the employes of the mine may readily escape in case of accident. In slopes used as haulage roads, where the dip or incline is ten degrees or more, there must be provided a separate traveling way, which shall be maintained in a safe condition for travel, and kept free from dangerous gases. (Acts 1903, p. 103.)

Art. 1593. **Time for completing escapement shaft.**—The time which shall be allowed for completing such escapement shaft or opening as is required by the terms of this chapter, shall be: For mines already open, one year for sinking any shaft or slope two hundred feet or less in depth, and one additional year, or pro rata portion thereof, for every additional two hundred feet or fraction thereof; but for mines which

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shall be opened after the taking effect of this chapter, the time allowed shall be two years for all shafts or slopes more than two hundred feet in depth, and one year for all shafts two hundred feet in depth or less; and the time shall be reckoned in all cases from the date on which coal or ore is first hoisted from the original shaft or slope, for sale or use. (Acts 1903, p. 103.)

Art. 1594. **Shafts, cages and passways, constructed, how.**—Any shaft in process of sinking, and any opening projected for the purpose of mining coal of all kinds shall be subjected to the provisions of this chapter.

At the bottom of every shaft and every caging place therein, a safe, commodious passageway must be cut around said landing place, to serve as a traveling way by which employes shall pass from one side of the shaft to the other without passing under or near (on) the cage.

The upper and lower landings at the top of each shaft, and the openings of each intermediate seam from or to the shaft shall be clear and free from loose materials and shall be securely fenced with automatic or other gates or bars so as to prevent either men or materials from falling into the shaft.

Every hoisting shaft must be equipped with substantial cages fitted to guide rails running from the top to the bottom. Said cages must be safely constructed, they must be furnished with suitable boiler iron covers to protect persons riding thereon from falling objects, and they must be equipped with safety catches. Every cage on which people are carried must be fitted with iron bars, rings, or chains in proper place and in sufficient number to furnish a secure handhold for every person permitted to ride thereon. At the top landing, cage supports, where necessary, must be carefully set and adjusted so as to work properly and securely hold the cages when at rest.

In all cases where the human voice can not be distinctly heard there shall be provided a metal tube or telephone from the top to the bottom of the shaft or slope through which conversation may be held between persons at the bottom and top of such shaft or slope, and that there shall also be maintained an efficient system of signaling to and from the top of the shaft or slope and each seam or opening.

Every underground place on which persons travel, worked by self-acting engines, windlasses or machinery of any description shall be provided with practical means of signaling between the stopping places and the ends of the plane, and shall further be provided, at intervals of not more than sixty feet, with sufficient manholes for places of refuge.

Every mine shall be supplied with props and timbers of suitable length and size, and if from any cause the timbers are not supplied when required, the miners shall vacate any and all such working places until supplied with timber needed.

All openings worked out or abandoned portions of every operated mine likely to accumulate explosive gases or dangerous conditions

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shall be securely gobbed and blocked off from the operative portions thereof so as to protect every person working in such mines from all danger that may be caused or produced by such worked out portions of such mines. (Sec. 1, Act April 30, 1907, Acts 1907, p. 331.)

Art. 1595. **Current of fresh air shall be maintained throughout mine.**—(a) Throughout every mine there shall be maintained currents of fresh air sufficient for the health and safety of all men and animals employed therein; and such ventilation shall be produced by a fan or some other artificial means; provided, a furnace shall not be used for ventilating any mine in which explosive gases are generated.

(b) The quantity of air required to be kept in circulation and passing a given point shall be not less than one hundred cubic feet per minute for each person, and not less than three hundred cubic feet per minute for each animal in the mine, measured at the foot of the downcast; and this quantity may be increased at the discretion of the inspector, whenever, in his judgment, unusual conditions make a stronger current necessary. Said current shall be forced into every working place throughout the mine, so that all parts of the same shall be reasonably free from standing powder smoke and deleterious air of any kind.

(c) The measurement of the current of air shall be taken with an anemometer at the foot of the downcast, at the foot of the upcast, and at the working face of each division or split of the air current.

(d) The main current of air shall be split or subdivided as to provide a separate current of reasonably pure air to every one hundred men at work; and the inspector shall have authority to order separate currents for smaller groups of men, if in his judgment special conditions make it necessary.

(e) The air current for ventilating the stable shall not pass into the intake air current for ventilating the working parts of the mine.

(f) Whenever the inspector shall find men working without sufficient air, he shall at once give the mine manager or operator notice and a reasonable time in which to restore the current, and upon his or their refusal or neglect to act promptly the inspector may order the endangered men out of the mine. (Sec. 2, Act April 30, 1907, Acts 1907, p. 332.)

Art. 1596. **Appearance of fire damp, notice to be given.**—Immediate notice must be conveyed by the mine owner to the inspector, upon the appearance of any large body of fire damp in any mine, whether accompanied by any explosion or not, and upon the concurrence of any serious fire within the mine or on the surface. (Sec. 3, Act April 30, 1907, Acts 1907, p. 333.)

Art. 1597. **Mining cage.**—Cages on which men are riding shall not be lifted or lowered at a rate greater than six hundred feet per minute, except with the written consent of the inspector. No person shall carry any tools or material with him on a cage in motion, except for use in

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making repairs, and no one shall ride on a cage while the other cage contains a loaded car. No cage having an unstable or self-dumping platform shall be used for the carriage of men or materials unless the same is provided with some convenient device by which said platform can be securely locked, and unless it is so locked whenever men or material are being conveyed thereon. (Sec. 4, Act April 30, 1907, Acts 1907, p. 333.)

Art. 1598. **Unlawfully carrying powder into mine.**—No miner or other person shall carry powder into the mine except in the original keg or in a regulation powder can securely fastened, and the can in otherwise air tight condition. (Sec. 5, Act April 30, 1907, Acts 1907, p. 333.)

Art. 1599. **Cut-throughs.**—It shall be the duty of the mine foreman to see that proper cut-throughs are made in all the pillars at such distances as in the judgment of the mine inspector may be deemed requisite, not more than twenty yards nor less than ten yards apart, for the purpose of ventilation, and the ventilation shall be conducted through said cut-throughs into the rooms and entries by means of check doors made of canvas or other material, placed on the entries or in other suitable places, and he shall not permit any room to be opened in advance of the ventilating current. Should the mine inspector discover any room, entry, airway or other working place being driven in advance of the air current contrary to the requirements of this article he shall order the workmen in such places to cease work at once until the law is complied with. (Sec. 6, Act April 30, 1907, Acts 1907, p. 333.)

Art. 1600. **Safety lamps in mines.**—At any mine where the inspector shall find fire damp is being generated so as to require the use of a safety lamp in any part thereof, the operator of such mine upon receiving notice from the inspector that one or more such lamps are necessary for the safety of the men in the mines, shall at once procure and keep for use such number of safety lamps as may be necessary. (Sec. 7, Act April 30, 1907, Acts 1907, p. 334.)

Art. 1601. **Endangering life or health of persons in mines.**—It shall be unlawful for any miner, workman or other person knowingly or carelessly to injure any shaft, safety lamp, instrument, air-course or brattice, or to obstruct or throw open an air-way, or to carry any open lamp or lighted pipe or fire in any form into a place worked by the light of safety lamps or within three feet of any open powder, or to handle or disturb any part of the hoisting machinery, or to enter any part of the mine against caution, or to do any wilful act whereby the lives or health of persons working in mines or the security of the mine machinery thereof is endangered. (Sec. 8, Act April 30, 1907, Acts 1907, p. 334.)

Art. 1602. **Mine rules shall be posted.**—It shall be the duty of every operator to post on the engine house and at the pit top of his

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mine, in such manner that the employees of the mine can read them, rules not inconsistent with this chapter, plainly printed in the English language, which shall govern all persons working in the mine. And the posting of such notice, as provided, shall charge all employees of such mine with legal notice of the contents thereof. (Sec. 9, Act April 30, 1907, Acts 1907, p. 334.)

Art. 1603. **Scales shall be provided.**—The owner or operator of every mine shall provide adequate and accurate scales for weighing coal, and it shall be the duty of the mine inspector to examine such scales and if same are not found to be accurate he shall notify the owner to repair same, and if such owner fails or refuses to repair same within a reasonable time said inspector shall institute proceedings under the law against the proper parties. (Sec. 10, Act April 30, 1907, Acts 1907, p. 334.)

Art. 1604. **Check weighman.**—The employes in any mine in this State shall have the right to employ a check weighman at their own option and their own expense. (Sec. 11, Act April 30, 1907, Acts 1907, p. 334.)

Art. 1605. **Kind of oil to be used in mine.**—No miner or other person employed in a mine shall use any kind of oil other than a good quality of lard oil for lighting purposes, except when repairing downcast or upcast shafts. (Sec. 12, Act April 30, 1907, Acts 1907, p. 334.)

Art. 1606. **Penalty.**—Any person who shall wilfully violate any of the provisions of this act shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine not exceeding five hundred dollars, or imprisonment in the county jail for a period not exceeding six months. (Sec. 13, Act April 30, 1907, Acts 1907, p. 334.)

Sec. 2769. **Insulating live wires in mines.**
Sec. 2770. Live electric wires in mines must be protected.
Sec. 2771. Penalty.
Sec. 2772. Map of mine to be made and filed.
Sec. 2773. Penalty.

Sec. 2770. **Live electric wires in mines must be protected.**—"From and after September 1, 1911, in all mines in this State where electricity is or hereafter shall be used as a part of the system, power or means of mining and procuring the coal or other mineral from any of said mines, that the owners or operators of every such mine shall cause all wires conducting electricity in and about said mine to be carefully and thoroughly insulated or protected in a safe manner, so that the person or animals coming in contact therewith shall not be injured thereby; all wires as aforesaid shall either be thoroughly insulated or placed where persons employed in and about the mines cannot come in contact therewith, or shall be covered, protected or shielded in a safe manner, so as to prevent any injuries or accidents therefrom to those in or about the mines; provided, however, it shall not be necessary to insulate or cover trolley wires, but they shall all be hung and kept not less than five feet and six inches above the rail, and shall be securely fastened, and not permitted to sag less than said height. Where there is sufficient height in existing entries to permit this, but where sufficient height is not available in existing entries, then the trolley wires shall be placed to one side of the entry, six inches outside the rail; and in all such cases the trolley wire shall be placed on the side of the entry opposite from the working rooms, except where there are rooms on both sides of the entry, in which event, the

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trolley wires may be placed over the opening of said rooms, said trolley wires to be safely shielded; provided, where it is impracticable in existing entries to place trolley wires six inches outside of the rail, or five feet six inches high, and where separate travel way is not provided, then the trolley wire shall be safely shielded; and it is further provided that this Act shall not apply to entries that are not used as travel ways for workmen or work animals; provided, however, that this section shall not apply to mines in operation in this State on January 1, 1902, and prior thereto, and which have developed until there is at least two thousand (2,000) feet distance from the shaft to the face of the coal being operated, except as to extensions of trolley wires made and to be made after January 1, 1910, in such mines." (Sec. 1, Act of March 23, 1911, Acts 1911, p. 196.)

Sec. 2771. **Penalty.**—"Any person who shall violate any of the provisions of this Act shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine not exceeding five hundred ($500.00) dollars, or imprisonment in the county jail for a period not exceeding six months." (Sec. 2, Act March 23, 1911, Acts 1911, p. 197.)

Sec. 2772. **Map of mine to be made and filed.**—"It shall be the duty of every operator of a coal mine in the State of Texas to make a map of the underground workings of every mine in his charge, under operation on the first day of January, 1912, or that may be opened thereafter; said map shall be drawn on a scale of one inch to one hundred feet, and shall indicate the surface land lines as well as the rooms, entries or openings underground. It shall be brought up to date at least once each month, covering operations for the preceding month. The original of said map shall be on file at the office of the operator at or near said mine. Said map shall be extended or brought up to date at any time requested by the State Mine Inspector, at least every three months, if, for any reason, a mine should be closed, then a final map shall be made and filed; provided, however, that maps existing on the date of the passage of this Act may be continued on the same scale as begun, if not smaller than one-half inch to one hundred feet." (Sec. 4, Act March 23, 1911, Acts 1911, p. 197.)

Sec. 2773. **Penalty.**—"The penalty for non-compliance with Section 4 hereof shall be by a fine of not less than twenty-five dollars nor more than fifty dollars for each offense." (Sec. 5, Act March 23, 1911, Acts 1911, p. 197.)

Sec. 2774. **Animals and feed in mines.**
Sec. 2775. Feeding animals or storing feed.
Sec. 2776. Keeping animal in mine too long.
Sec. 2777. Mines excepted.
Sec. 2778. Penalty.

Sec. 2775. **Feeding animals or storing feed in mines.**—"It shall be unlawful for any person, association of persons, corporation or receiver, owning, operating or managing any mine in this State, to feed or permit to be fed any work animal in said mines, or to store or keep any feed for such animals in said mines." (Sec. 1, Act March 23, 1911, Acts 1911, p. 205.)

Sec. 2776. **Keeping animal in mine too long.**—"It shall be unlawful for any person, association of persons, corporation or receiver, owning, operating or managing any mine in this State, to permit any work animal to remain in any mine longer than ten consecutive hours." (Sec. 2, Act March 23, 1911, Acts 1911, p. 205.)

Sec. 2777. **Mines excepted.**—"It is further provided that Sections 1 and 2 shall not apply to mines complying with the following provisions:

"All stables in mines in which work animals are kept shall be equipped with fireproof doors at each opening, with a door frame of concrete, stone or brick, laid in mortar, and such stable door shall be kept closed during working hours of mines.

"All feed, hay, grass, cane, etc., except corn, corn chops, bran and shelled oats, shall not be taken down the hoisting shaft until after the regular day shift is out of the mine.

"It is further provided that no open light shall be taken into any underground stable by any person.

"It is further provided that not over twenty-four hours' supply of hay, grass or cane, or any other kind of inflammable stock food, except corn, corn chops, bran and shelled oats, shall be taken down in any one day." (Sec. 2a Act March 23, 1911, Acts 1911, p. 205.)

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Sec. 2778. **Penalty.**—"Every person violating any of the provisions of this Act shall be guilty of a misdemeanor and upon conviction shall be punished by imprisonment in the county jail for not less than one month nor more than one year." (Sec. 4, Act March 23, 1911, Acts 1911, p. 205.)

Sec. 2779. **Bathing facilities for coal mines.**—It shall be the duty of the operator, owner, lessees or superintendent of any coal mine in this State employing ten or more men to provide a suitable building convenient to the principal entrance of such mine, for the use of persons employed in and about said mine, for the purpose of washing themselves and changing their clothing when entering or leaving the mine. Such building shall be provided with proper light and heat, with a supply of hot and cold water and shower baths, and with properly constructed individual lockers for the use of such employees. The employees shall furnish their own towels, soap and locks for their lockers, and shall exercise control over and be responsible for all property by them left in such house. The baths and lockers for negroes shall be separate from those for whites, but may be in the same building. Any operator, owner, lessee or superintendent of any coal mine violating the provisions of this law shall upon conviction be punished by a fine of not less than twenty-five dollars nor more than two hundred dollars, or by imprisonment in the county jail for not more than sixty days or by both such fine and imprisonment. Every two weeks of such violation shall constitute a separate offense. Any person wilfully injuring or destroying any property mentioned herein shall be punished as provided by law. (Act March 8, 1915, Acts 1915, p. 100.)

CHAPTER XXVIII

PENITENTIARIES—CONTROL AND TREATMENT OF PRISONERS

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Article 1607. **Prison commission created.**—The management and control of the prison system of the State of Texas shall be vested in a board to be known as the Board of Prison Commissioners, and for the purposes of this chapter shall be referred to as the Prison Commission. Said Board of Prison Commissioners shall be composed of three men to be appointed by the Governor, with the advice and consent of the Senate, whose term of office shall be two years from date of appointment, except those first appointed under this chapter, who shall hold their offices respectively for eight, sixteen and twenty-four months from the date of their appointment and qualification. (Sec. 4, Act September 17, 1910, Acts 1910, p. 143.)

Art. 1608. **Duty of Prison Commission.**—The Prison Commission shall be vested with the exclusive management and control of the prison

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system of this State, and shall be held responsible for the proper care, treatment, feeding, clothing and management of the prisoners confined therein, and at all times for the faithful enforcement of the spirit, intent and purpose of the laws and rules governing said system; provided that the Prison Commission shall be held responsible for maltreatment of prisoners, and, if permitted, it shall be grounds for removal from office. (Sec. 8, Act September 17, 1910, Acts 1910, p. 145.)

Art. 1609. **Commission to classify prisoners.**—The Prison Commission shall provide for the classification of all prisoners, separating them into the following classes: In the first class shall be included young men, first offenders, those appearing to be corrigible, or less vicious than others, and likely to observe the laws, and to maintain themselves by honest industry after their discharge. In the second class shall be included those appearing to be less corrigible, or more vicious, but content to work and reasonably obedient to prison discipline as not to seriously interfere with the productiveness of their labor, or with the labor or conduct of those with whom they may be employed. In the third class shall be included those appearing to be incorrigible or so insubordinate or so vicious in their nature as to seriously interfere with the labor and moral development of those with whom they must come in contact.

The Prison Commission shall make rules and regulations for the promotion and reduction of the prisoners from one class to another, and shall transfer them from one class to another from time to time as they may seem to merit promotion or reduction.

The prisoners in each of the classes hereinbefore named shall be kept in or upon different or separate prisons or farms. Any prisoner upon entering the prison system shall be assigned to one of its institutions according to his class, as hereinbefore provided, and shall be entered in said institution in a neutral grade which shall be known as grade No. 2, and in which he shall be furnished with a suitable uniform designated for that grade. The Prison Commission shall adopt rules for a higher grade which shall be known as grade No. 1, as a reward for obedience to prison discipline and good conduct, and shall provide a suitable uniform for this grade; and they shall provide for a lower grade as a punishment for misconduct and violation of prison discipline, which grade shall be known as No. 3, and in which the prisoner shall be clothed in stripes. The uniforms for grades Nos. 1 and 2 shall not be stripes. The Prison Commission shall provide rules for promotion of prisoners from any grade to another for good conduct and obedience to prison discipline, and for demotion of prisoners for misconduct and violation of prison discipline. The Prison Commission shall provide specifically for the extension or denial of privileges for the various grades herein provided. (Sec. 33, Act September 17, 1910.)

Art. 1610. **Penalty for excessive whipping of refractory prisoners.**—The Prison Commission may adopt such modes of punishment as

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may be necessary, such punishment being always humane, and placing prisoners in stocks shall be prohibited. Whipping with not exceeding twenty lashes on the bare rump and thighs may be resorted to with prisoners of the third class, who can not be made to observe the rules by milder methods of punishment. The strap to be used must be of leather, not over two and one-half inches wide, and twenty-four inches long, attached to a wooden handle; no convict shall be whipped until same has been authorized by at least two members of the Prison Commission upon their written order, and such order so issued shall be executed only in the presence of a prison physician, and a sworn report shall be made by the officer executing such order to the Penitentiary Commission, who shall keep a record of all such reports in a well bound book to be kept for that purpose, which shall be at all times open to public inspection; and such report so to be made by such officer executing the order of the Prison Commission, shall state the name of the convict whipped, the number of strokes administered, the size of the strap used, the time and place thereof, in whose presence same was done, and the cause thereof. It shall further be the duty of the Prison Commission to make a semi-annual report of the whipping of convicts to the district judge of the county where such whippings occurred, who shall report same to the grand jury, which is hereby authorized to make investigation thereof, if they deem same advisable. The utmost care must be used by the officer executing the order of the commission not to break the skin of the prisoner whipped, and any person guilty of whipping a prisoner more lashes or other than as provided herein, or striking a prisoner, except in self-defense, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than twenty-five dollars nor more than two hundred and fifty dollars, and imprisoned in the county jail not less than thirty days nor more than six months. White and negro prisoners shall not be worked together when it can be avoided, and shall be kept separate when not at work. (Sec. 33, Act September 17, 1910.)

Art. 1611. **Penalty for misapplication of money of prisoners by officers, etc., of prison.**—Prisoners when received into the penitentiary shall be carefully searched. If money be found on the person of the prisoner, or received by him at any time, it shall be taken in charge by the Prison Commission and placed to the prisoner's credit, and expended for the prisoner's benefit on his written order, and under such restrictions as may be prescribed by law or the rules. Any officer or employe having charge of a prisoner's money who misappropriates the same or any part thereof, shall be deemed guilty of a felony and upon conviction thereof shall be confined in the penitentiary for a term of not more than five years. (Sec. 47, Act September 17, 1910.)

Art. 1612. **Duties of officers, etc., on decease of prisoner, and penalty for failure to perform.**—If any prisoner shall die while in prison, the officer in charge of the prisoner at the time of his death shall immediately report the same to the Prison Commission, and, if he knows

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the address or place of residence of any relative within the third degree, either by consanguinity or affinity, shall also notify by wire said relative of the death of such prisoner, and if the relative of such prisoner claim the body or will take charge of same, then the body of such prisoner shall be turned over to such relative, and the expense of shipping the body to where it is to be buried, provided it is within this State, shall be paid by the Prison Commission out of any available penitentiary funds on hand upon the request of such relative. If the residence and address of the relative of such prisoner is unknown, such prisoner shall be decently buried in citizen's clothes, and the grave marked by a stone with the name of said prisoner, date of death and age, if known, inscribed thereon. If the body of such prisoner is not claimed by the relatives, the Prison Commission shall at once notify the county judge of the county from which the prisoner was sentenced of his death, the date and cause of death and place of burial. The Prison Commission shall cause to be made and kept a record of the deaths of prisoners, and certified copies of the same made by the custodian thereof shall be admissible in evidence under the rules of law applying to official records. Any officer or employe of the prison system of whom any duties are required by this article, who shall fail to discharge such duties, shall be guilty of a misdemeanor and upon conviction shall be fined in any sum not exceeding five hundred dollars. (Sec. 48, Act September 17, 1910.)

Art. 1613. **Same.**—The Prison Commission, or other person in charge of prisoners, upon the death of any prisoner under their care and control, shall at once notify the nearest justice of the peace of the county in which said prisoner died, of the death of said prisoner, and it shall be the duty of such justice of the peace, when so notified of the death of such prisoner, to go in person and make a personal examination of the body of such prisoner, and inquire into the cause of the death of such prisoner, and said justice of the peace shall reduce to writing the evidence taken during such inquest and shall furnish a copy of the same to the Prison Commission and a copy of the same to the district judge of the county in which said prisoner died, and the copy so furnished to said district judge shall be turned over by the district judge to the succeeding grand jury, and the said judge shall charge the grand jury, if there should be any suspicion of wrong doing shown by the inquest papers, to thoroughly investigate the cause of such death.

Any officer or employe of the prison system having charge of any prisoner at the time of the death of such prisoner, who shall fail to immediately notify a justice of the peace of the death of such prisoner, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, and by confinement in the county jail not less than sixty days nor more than one year; provided, that the justice of the peace making such examination shall be paid a fee as is now pro-

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vided by law for holding inquests, said fee to be on sworn account therefor approved by the Prison Commission. (Sec. 49, Act September 17, 1910, Acts 1910, p. 156.)

Art. 1614. **Prison physician failing to make report, or making false report.**—The Prison Commission shall provide for competent medical attention for all prisoners, and shall establish rules whereby all physicians shall be required to keep a record of all cases of sickness, accident or injury which they treat. The physicians so employed shall be reputable practicing physicians of not less than two years of experience in practice. Each physician employed in the prison system shall at the end of each month file with the Prison Commission a report in writing, subscribed and sworn to by him, which report shall state the names, race and sex of each prisoner treated, or examined by him during said month, the malady or disease with which each was afflicted, and if any shall be suffering with wounds or injuries inflicted by accident or some individual, he shall state the nature and extent of said injuries, by whom and by what means inflicted, or how the same occurred, and all such other information concerning said matters, and the condition of each prisoner treated or examined by him during said months, as he may possess; provided further, that for a failure to make such a report or any false statement knowingly made by any such physician in any such reports he shall be prosecuted for the offense of perjury or false swearing, as provided by law. (Acts September 17, 1910, Sec. 50.)

Art. 1615. **Conversion of prison property.**—Any officer or employe of the prison system who shall fraudulently convert to his own use and benefit any food, clothing, or other property, belonging to or under control of the prison system, shall be guilty of theft, and upon conviction shall be punished as prescribed by law. (Sec. 55, Act September 17, 1910.)

Art. 1616. **Acquiring financial interest in contracts on behalf of prison, or to peculate in any prison transaction.**—Any officer, agent or employe in any capacity connected with the prison system of this State, who shall be financially interested either directly or indirectly in any contract for the furnishing of supplies or property to the prison system, of the purchase of supplies or property for the prison system, or who shall be financially interested in any contract to which said prison system is a party or who shall knowingly and fraudulently sell or dispose of any property belonging to said prison system below its reasonable market value, or who shall be financially interested in any other transaction connected with the prison system, shall be guilty of a felony, and upon conviction thereof shall be punished by confinement in the State penitentiary for a term of not less than two years nor more than five years, and each transaction shall constitute a separate offense. (Sec. 56, Act September 17, 1910.)

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Art. 1617. **Inflicting unauthorized punishment on any prisoner.**—Any sergeant, guard or other officer or employe of the prison system of this State who shall inflict any punishment upon a prisoner, not authorized by the rules of the prison system, shall be guilty of an assault, and upon conviction thereof shall be punished as prescribed by law; and it shall be the duty of the Prison Commission to make complaint before the proper officer of any county in which such assault was committed upon such prisoner. Provided that in all cases where any person is charged by complaint or indictment with an offense against a prisoner, prisoners and ex-prisoners shall be permitted to testify. (Sec. 57, Act September 17, 1910.)

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TITLE XIX

REPETITION OF OFFENSES

	Sec.	Art.
Second and subsequent convictions for misdemeanor		1618
Subsequent conviction for felony		1619
Third conviction for felony		1620
Second conviction for capital offense		1621
Increase of penalty because of repetition of offense	2780	

Article 1618. (1014) (818) **Second and subsequent convictions for misdemeanor.**—If it be shown on the trial of a misdemeanor that the defendant has been once before convicted of the same offense, he shall, on a second conviction, receive double the punishment prescribed for such offense in ordinary cases, and upon a third, or any subsequent conviction for the same offense, the punishment shall be increased, so as not to exceed four times the penalty in ordinary cases.

Art. 1619. (1015) (819) **Subsequent conviction for felony.**—If it be shown, on the trial of a felony less than capital, that the defendant has been before convicted of the same offense, or one of the same nature, the punishment on such second or other subsequent conviction shall be the highest which is affixed to the commission of such offenses in ordinary cases.

Art. 1620. (1016) (820) **Third conviction for felony.**—Any person who shall have been three times convicted of a felony less than capital, shall, on such third conviction, be imprisoned to hard labor for life in the penitentiary.

Art. 1621. (1017) (821) **Second conviction for capital offense.**—A person convicted a second time of any offense to which the penalty of death is affixed as an alternate punishment, shall not receive on such second conviction, a less punishment than imprisonment for life in the penitentiary.

Sec. 2780. **Increase of penalty because of repetition of offense.**
Sec. 2781. Alleging repetition of offense.
Sec. 2782. Statute construed.
Sec. 2783. Proof of repetition of offense.
Sec. 2784. Charge of the court.

Sec. 2781. **Alleging repetition of offense.**—For the State to avail itself of the increased punishment the complaint and information, or the indictment, must aver that the defendant had been previously convicted of an offense of like character to that declared on, and it is not sufficient to allege, in the language of the statute, that the defendant had been previously convicted of the "same offense." Kinney v. State, 45 Texas Crim. Rep. 500; 79 S. W. 570. Neece v. State, 62 Texas Crim. Rep. 378; 137 S. W. 919. Collins v. State, 171 S. W. 730.

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In order to authorize the court to charge the jury as to an increased penalty because of a repetition of the same offense, it must be alleged that after the conviction of the former the subsequent offense was committed. Long v. State, 36 Texas 9. Kinney v. State, 45 Texas Crim. Rep. 500; 79 S. W. 570. Neece v. State, 62 Texas Crim. Rep. 378; 137 S. W. 919.

The previous convictions of offenses of a like character to the one proposed to be tried must be shown by the allegations of the indictment or information to be successive offenses. Kinney v. State, 45 Texas Crim. Rep. 500; 79 S. W. 570. Neece v. State, 62 Texas Crim. Rep. 378; 137 S. W. 919.

Sec. 2782. **Statute construed.**—The statute does not undertake to visit the increased penalty on a subsequent trial merely because the defendant had been previously tried and convicted in other cases of a similar character. Kinney v. State, 45 Texas Crim. Rep. 500; 79 S. W. 570. Kinney v. State, 47 Texas Crim. Rep. 496; 84 S. W. 590. Neece v. State, 62 Texas Crim. Rep. 378; 137 S. W. 919.

The statute as to increased penalty because of repetition of offenses must be enlarged to mean **after a conviction** for the first, and does not warrant the cumulation of a number of cases occurring about the same time. Long v. State, 36 Texas 9. Kinney v. State, 45 Texas Crim. Rep. 500; 79 S. W. 570. Kinney v. State, 47 Texas Crim. Rep. 496; 84 S. W. 590. Neece v. State, 62 Texas Crim. Rep. 378; 137 S. W. 919.

By the term "same offense," as used in the statute as to repetition of offenses, is meant a similar offense. A conviction for any phase of the Sunday law is sufficient to form a predicate to inflict greater punishment for an offense alleged and proven to have been committed after the conviction for the former. Muckenfuss v. State, 55 Texas Crim. Rep. 217; 117 S. W. 853. Gould v. State, 146 S. W. 178. Gould v. State, 147 S. W. 247.

Sec. 2783. **Proof of repetition of offense.**—A formal judgment in the corporation court is not required when it is only sought to prove, for the purpose of increasing the penalty, that the defendant had been previously convicted of a similar offense. Muckenfuss v. State, 55 Texas Crim. Rep. 216; 117 S. W. 853. Gould v. State, 146 S. W. 174.

If the former judgment which is relied on as a basis for an increased penalty is final on its face, the burden is on the defendant to show that a new trial had been granted or that it had been appealed from. Gould v. State, 146 S. W. 177.

Sec. 2784. **Charge of the court.**—When a former conviction for an offense of a like character has been properly alleged and proven, it is proper to charge the jury that the proof of such former conviction could not be considered by them in passing upon whether or not the defendant was guilty of the charge then being tried but could be considered in case he was found guilty in fixing the penalty. Gould v. State, 147 S. W. 247.

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