THE HIGHER COURTS.

Synopses of Decisions Rendered at the Tyler Sitting.

COURT OF APPEALS—TYLER TERM, 1886.

J. Willingham vs. the State. Appeal from Erath county. The charge in this case though objected to, taken as a whole, is full, fair and correct. There was no such error in the court below as tended to prejudice the rights of the defendant, the record showing that he was accorded a fair and impartial trial. Affirmed. Willson, J.

Allen Rogers vs. the State. From Lamar county. This was an appeal from a conviction of burglary. The overruling of motion for continuance is cited by counsel for defense as error. The continuance was properly refused, because that diligence was not shown which the statute requires. The motion for a new trial was properly overruled as to continuance, because the evidence was not probably true in view of other facts proved. Affirmed. Willson, J.

J. S. Clark vs. the State. Appeal from Erath county. This appeal is from a conviction for theft of a horse. Possession of the alleged stolen horse recently after the theft thereof is the only inculpatory circumstance of defendant's guilt of any weight. This circumstance he explained before called upon to do so. His explanation was that he traded a mare and colt to a man named Haynes, who represented that he lived on Armstrong creek, in Erath county. While the defendant did not prove by direct evidence the truth of this explanation of his possession of the horse, he proved it circumstantially, and almost conclusively, if his witness testified truly. It was proven by the state that defendant did not get said horse from Haynes living on Armstrong creek, there being but one man of that name living on said creek, and he swore that defendant never got the horse in question from him. When defendant was called upon to account for his possession of the horse, he claimed that he got him from a man named Haynes, but did not say it was the Haynes who lived on Armstrong creek. Defendant also proved that the man he got the horse from told another party he lived in Mason county. It was also shown that defendant did not attempt to conceal his possession of the horse, but claimed him boldly upon all occasions, and never accounted for his possession in any other way than that he swapped with one Haynes. We are of the opinion that defendant's explanation of his possession of the horse is a reasonable, natural and probable one, and rebutted and destroyed the inculpatory force of the circumstances of his possession of the stolen horse, and it devolved upon the state to show the falsity of such explanation, otherwise the defendant should have been acquitted. The evidence does not show the falsity of defendant's explanation, the conviction is unsupported by the evidence, and the cause will be reversed and remanded. Willson, J.

Joe Hawkins vs. the State. Appeal from Somervell county. Where the record fails to show that notice of appeal was given and entered in the minutes of the court below, this court has no jurisdiction. Appeal dismissed. Willson, J.

John May vs. the State. Appeal from Lamar county. In a motion for a new trial on the ground of newly discovered testimony, which is only cumulative, there being other testimony of the same kind in the trial and the same was not controverted by the state, the motion should be overruled. When the evidence totally fails to raise an issue of a lower degree of homicide than murder in the first degree the court need not and should not charge upon any lower grade of homicide. We find no error whatever in the conviction. Willson, J.

W. R. Orman vs. the State. Appeal from McLennan county. Appellant was convicted of murder of the second degree and sentenced to the penitentiary for fourteen years for the killing of W. F. Houston in the city of Waco. It was shown that appellant went and consulted his attorney as to what punishment he should receive if he were to kill deceased. His attorney was placed on the stand and over objections of appellant his evidence was admitted. Held, that in a civil case this testimony should have been excluded; the rule, however, in criminal cases is different. In the Queen vs. Cox, decided December 20, 1884 (5 Am. Crim. Rep., 140), the following were announced to be the correct rules, and in which we concur: 1. To be privileged the communications must pass between the client and his attorney in professional confidence, and in the legitimate course of professional employment of the attorney. 2. If the communications are made by the client to the attorney before the commission of the crime, and for the purpose of being guided or helped in its commission, they are not privileged. 3. Nor does the fact that the attorney was wholly without blame, in any particular whatever affect the second rule. The third rule is in conflict with some decisions, but in our opinion is sustained by the weight of authority. The evidence was admissible. The judge below submitted the following charge: "If you believe from the evidence beyond a reasonable doubt that the defendant did unlawfully kill William Houston by shooting him with a certain pistol, and that the same was done under the immediate influence of sudden passion (as herein before defined) arising from an adequate cause, such as insulting words or conduct of the said Houston toward female relatives of defendant, you will find the defendant guilty of manslaughter." This was objected to by appellant, because it requires the killing to take place under the immediate influence of sudden passion. In the opinion of the writer there is reversible error in this charge. His brethren, however, disagree with him. On the subject of self-defense the court gave the following charge: "Homicide is justifiable in the protection of the person against any unlawful and violent attack, but in such case 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." Held erroneous. This court holds that if an attack of less magnitude than murder was made on appellant, the court should have instructed the jury that if the attack produced in the mind of defendant a reasonable expectation or fear of death, or some serious bodily injury, the defendant would not be required to resort to other means to prevent the threatened injury, nor kill while his adversary was in the very act of making an attack, but may kill instantly. Reversed and remanded. Hurt, J.

John Vanvickle vs. the State. Appeal from Rains county. The indictment in this case reads as follows: "In the name and by the authority of the state of Texas the grand jurors of the state of Texas, charged, empanelled and sworn to diligently inquire into, and true presentment make of all crimes and offenses against the law committed, within the body of the county of Rains and state of Texas—that one John Vanvickle of the county of Rains and state of Texas, with force and arms, in the county of Rains," etc., proceeding then to set out certain facts given to constitute the offense of "false swearing" in order to procure the issuance of a marriage license by the county clerk. Held, that in our opinion it is only inferentially stated that the grand jury was the grand jury of Rains county. There is a total want of connection between the allegations with reference to the impanelling of the grand jury and the facts stated with regard to the subsequent acts of John Vanvickle. The usual ordinary words of accusation, to-wit: "on their oaths present," it will be seen are entirely omitted, and no similar or equivalent words are used or substituted. In short, while this paper shows a grand jury for Rains county were impanelled to inquire into crimes committed in said county, and while it shows that John Vanvickle did certain acts therein set out, it is not shown, nor is it anywhere alleged that the said grand jury charge, aver, allege, or accuse the said Vanvickle with doing those acts. It is certainly not stated that the grand jury charged or accused him with the commission of those acts and deeds. Then who did? We are nowhere informed. Reversed and dismissed. White, P. J.

Eaton, Gulean & Co. vs. Leon Caperon. Appeal from Taylor county. This is a suit for damages, actual and consequential, by appellee against appellants, for the non-delivery of 140 barrels of apples to be delivered between the 18th and 20th of December, 1884. Appellants contend that the court below had no jurisdiction, because they only claimed $175 damages, and they were not entitled to consequential damages. We cannot agree to this. Appellants knew that the apples were ordered specially for the holidays, and that the demand for apples during the holidays would be very great, and that the great probability was that appellee had not supplied himself with apples from other parties, and we are clearly of the opinion that appellee was entitled to consequential damages, thus giving the court below jurisdiction. Plaintiff, in the court below was permitted, over objections of defendant, to introduce in evidence that the apples were for the holiday trade. Held, that there was no error in admitting this testimony. Affirmed. Hurt, J.

William Phipps vs. the State. Appeal from Bosque county. The judgment of conviction for theft rendered in this case in the court below is wholly unsupported by and is contrary to the evidence sent up in the record. Reversed and remanded. White, P. J.

Ben Hart vs. the State. Appeal from Hopkins county. The state was permitted over objections of appellant to prove that defendant forfeited his bail bond. Held, not error. Flight by a defendant is admissible in all cases whether the evidence be circumstantial or direct. The following charge was objected to by defendant because it did not instruct the jury to acquit if the state failed to show that the explanation of defendant was false. "When a person found in possession of property recently stolen, when first found in possession of it or when his title thereto is first called in question, gives a reasonable and probable explanation consistent with his innocence, such explanation rebuts the presumption of guilt arising from such recent possession, and it devolves upon the prosecution to prove that such explanation is false." It is insisted that the court should have made a direct application of this rule to the facts bearing upon the matter. Held, that the charge above was full, fair and sufficient. Affirmed. Hurt, J.

Texas Express Company vs. J. P. Heffner. Appeal from Tarrant county. The son of appellee had been employed by an agent of appellant. Said son of appellee deposited $100 with said agent to indemnify appellant against any loss hat might occur through his dishonesty or negligence. The contract was repudiated, appellee's son discharged, and the agent of appellant fails and refuses to repay said deposit. This suit is brought to recover said deposit. There was a verdict for plaintiff in the court below. Appellant insists that the agent acted beyond the scope of his authority, that all persons were required to give bond to secure the company, etc., that said agent had no authority to accept monied security instead of a bond. It was error for the court to exclude evidence of Witness Smith that appellee's son presented to witness for payment several of Heffner's personal due bills, which witness refused to pay but spoke to Thomas, the agent, about it, when Thomas told witness to cash due bills of Heffner as he was well secured against loss by Heffner. This should have been admitted in view of the defense set out. It was error for the court to exclude the evidence of the superintendent of appellant company, to the effect that the agent had no authority to accept money security in lieu of a bond. Appellants claim the deposit was a personal matter between Thomas and Heffner, and this evidence should have been admitted. Appellee can not recover interest on deposit until January 1, it being an open account. Reversed and remanded. Hurt, J.

George McCormick vs. the State. Appealed from Bexar county. When a continuance is asked for the purpose of procuring testimony which is improbable and in direct conflict with the weight of evidence, the continuance is properly refused. The special charge asked by defense, that if the jury believed defendant obtained the money by personating an officer, and Adams believing him to be an officer, suffered him to take his money, was properly refused by the court. There is no reversible error. Affirmed. Hurt, J.

G. W. Boyett vs. the State. Appeal from Taylor county. In this case there was a change of venue on the motion of the district attorney, from Nolan county to Taylor county. It is contended that he should have removed the course to the nearest county seat to Nolan county. Held, that the district judge had the right to send the case to any county within his district. When the jury separate by consent of parties and of the court, some misconduct must be shown, or this court will not reverse on that ground alone. A statement made by a witness under the rule, who had not been arrested, was admissible. When the jury delivered their verdict they were discharged. Within half a minute after this, while some were still in rank, it was discovered that the verdict was informal, and they were immediately recalled and the error cured, to which defendant raises objection. There was evidently no injury to the rights of defendant, hence no reversible error. Affirmed. Hurt, J.

THE GROWING SOUTH.

The Gigantic Industrial Developments in the South During the Last Two Weeks.

The Baltimore Manufacturers' Record of December 18, under the head of "The Gigantic Industrial Developments in the South During the Last Two Weeks," says: Never before probably in the history of this country has there been such an era of industrial development as we now see in the South. For the last few weeks the rapidity with which enterprises of great extent and importance have followed one upon another has been simply astounding. The click of the telegraph as it announces the organization of one great enterprise has hardly ceased ere another is reported, and each day seems to swell the volume of new business. Taking the last two weeks only, and briefly as possible summing up some of the most important enterprises reported in our weekly list of new industries during that time, we may well be amazed at what the South is doing.

In Alabama there has been reported the Ensley Land Co., capital stock $10,000,000, to build a manufacturing town near Birmingham, establish water and electric light works, and manufacture iron and steel. Four other companies with capital running from $150,000 to $800,000 have been organized at Birmingham for similar work. A $3,000,000 company, organized at Florence, has arranged to build three large furnaces. A $500,000 company has been organized to purchase and refit an old cotton mill at the same place. At Birmingham there has been organized a $100,000 axe and tool company, and a new rolling mill is to be built. At Sheffield a $100,000 pipe and nail mill, a 125-ton furnace (in addition to five previously reported) and electric light and gas works. Twelve thousand acres of mineral land in Jackson county are to be developed. A Memphis company has been organized to build furnaces and mine coal near Jasper. An old furnace at Round Mountain is being put in shape to go in blast again. An ice factory at Montgomery, carriage factory at Meridian, $50,000 electric light company and a $50,000 waterworks company at Florence. Arkansas shows up with two smelters, two $3,000,000 mining companies and one of $5,000,000. In Florida there have been reported a $25,000 furniture factory, electric light works and a number of lumber mills. Georgia reported a $50,000 fertilizer company to build small factories at some nine or ten points, a $50,000 glass factory, $50,000 iron and machine company, a plow company and other enterprises. In Kentucky we have had a $500,000 coal and iron company, a $1,000,000 lumber and mineral land development company, a $50,000 carpet company, bids asked for Bessemer steel works, etc. Maryland shows a $500,000 company, to manufacture fruit carriers; a $65,000 cotton and woolen company, a $10,000 clothing factory, etc. North Carolina reports a $33,000 tobacco tool factory, a carriage factory, $15,000 electric light company and a number of large saw mills, and South Carolina a $50,000 gas and water works company. Tennessee, like Alabama, has exhibited great activity; it has captured the big $200,000 stove works, to be built by Perry & Co., of Albany, N. Y., for which several places have been contending; a $5,000,000 company to manufacture wool, alcohol, iron and steel; a $150,000 light and heat company; a $100,000 marble quarrying company; a coal and coke company, to develop 11,000 acres of land; a furnace company to purchase an old iron property build furnaces, etc; a $5000 brick and terra cotta company; a $100,000 electric light company, and a number of other important enterprises. In Texas there have been organized a flour-mill company, a canning factory, a $10,000 kaolin company, a $50,000 cracker manufacturing company, a $100,000 dressed beef company, etc. Virginia reports $50,000 car-seal company, flour mill, carriage factory, etc., and West Virginia, a $300,000 oil and gas company, $50,000 electric light company, several coal mining companies, etc.

As a summary of some of the leading enterprises only, reported in two weeks, the foregoing facts give some light conception of the wonderful rapidity with which the South is marching on to prosperity.

Ordinance No. 408.

An ordinance regulating the moving of dead bodies and the issuance of burial permits.

Be it ordained by the city council of the city of Fort Worth—

Section 1. It shall be the duty of every undertaker, or other person acting as such, having in charge the interment of any deceased person, to deposit with the city sexton, sextons, or superintendent of the cemetery wherein said interment is to take place, the proper burial permit from the board of health, and it shall be the duty of the city sexton, sextons, or superintendents of cemeteries in the city of Fort Worth to keep a register, to be provided by the city, of all persons buried in said cemeteries, giving in alphabetical order the name of the deceased, the number of the lot in which the body was buried. A true copy of which register shall be kept on file by such sextons or superintendents, subject at all times to inspection by the board of health and the general public.

Sec. 2. No body or remains of any deceased person shall be buried or interred in any cemetery, burial ground or other place within the city limits, nor shall the body of any deceased person be removed from the place of death, nor shall the body of any deceased person be disinterred from any place within the city limits unless the proper permit therefor has been issued by the board of health.

Sec. 3. In case of the death of any person in the city every physician or person acting as such who had charge of, or was in attendance upon such person at the time of death, shall forthwith fill out a blank certificate, furnished by the health department, stating all particulars as called for in said certificate of death and shall deliver or cause to be delivered to the undertaker having in charge the burial of deceased, and said undertaker, by presenting the said certificate to the chairman of the board of health, shall be given and furnished free of charge with a burial permit for the interment of deceased.

Burial permits shall also be issued when properly filled out by a coroner's jury acting in any case.

Sec. 4. That any person or persons violating any of the provisions of this ordinance shall upon conviction be fined in any sum from $25 to $100 for each offense.

Sec. 5. That all ordinances and parts of ordinances in conflict with this ordinance be and the same are hereby repealed.

Sec. 6. That this ordinance take effect and be in force from and after its publication according to law.

This ordinance not having been disproved nor disapproved within three days as prescribed by the charter of said city takes effect the same as if approved.

H. R. EARLY, City Secretary.

Filed December 6, 1886.
H. R. EARLY, City Secretary.
Passed December 11, 1886.
Recorded December 15, 1886.
H. R. EARLY, City Secretary.