on the range when caught by Williams, and that when he was in the act of catching it, or after having caught it, he was on his way to the house, and Smith came upon him under these circumstances, and Williams had told him that he intended to take the colt to defendant. Would not his statement to Smith be competent evidence? Certainly it would. Now, suppose he had caught the colt for the same purpose, and was waiting for his horse to eat before starting upon the trip. Would his statement be evidence? We think so, and in support of this proposition we cite Greenl. Ev. 108. Williams had caught the colt, and had it staked near by. These were acts relating to the colt, and what was said by him accompanying these acts was admissible, and admissible though not said at the precise moment when he caught the colt. The facts being in so close juxtaposition, this was not required. Stockman v. State, 24 Tex. App. 392, 6 S. W. Rep. 298, and the authorities there cited. As we have said above, an important and vital issue of fact was dependent upon whether the man Williams had delivered to appellant a colt before the latter took up the colt belonging to Gerald, and the rejected testimony was of the utmost importance, because it makes solid the theory of the defense that the taking was through mistake. Other questions will not be discussed. The judgment is reversed, and the cause remanded. All judges present and concurring.

POWER v. STATE.

(*Court of Appeals of Texas.* Feb. 24, 1892.)

RAPE—EVIDENCE.

On a trial for assault with intent to commit rape, it appeared that defendant, a youth, was living with his father a short distance from prosecutrix and her husband; that, on the morning of the alleged crime, defendant complained of feeling sick, and did not go to work; that, about 3 o'clock in the afternoon, he entered the tent of the prosecutrix, who had just been nursing her baby, and, without speaking, struck her two blows on the head; that after the first blow she screamed loud enough to be heard by her husband in the field, but that the second blow knocked her senseless; that defendant then returned to his father's tent, where he was arrested in the evening, and on examination was found to have a slight fever. *Held*, that the evidence would not sustain a verdict of conviction.

Appeal from district court, San Saba county; W. M. ALLISON, Judge.

Indictment of Joseph Mitchell Power for assault with intent to commit rape. Verdict and judgment of conviction. Defendant appeals. Reversed.

John T. Walters, for appellant. *Richard H. Harrison*, Asst. Atty. Gen., for the State.

DAVIDSON, J. Appellant was indicted for, and convicted of, the offense of an assault with intent to commit rape. Appellant is a youth of 17 years of age, and was living with his father's family in a tent on the farm of one Hall, in San Saba county. Mrs. Lowrance, the alleged injured female, with her husband, was also living in a tent, about 200 or 300 yards distant from the tent in which appellant and his father's family lived. All of these parties had been engaged in picking cotton for Hall. On the 30th day of September, Mrs. Lowrance did not go to the cotton-patch to pick cotton. Neither did appellant go to the field to pick cotton, but, being sick, remained at his father's tent. About 3 o'clock in the evening, Mrs. Lowrance was in her tent, and had just laid her baby down, after nursing it, and was fastening up her bosom, when appellant suddenly came into the tent, and, without saying anything to her, struck her two severe blows upon the head, one of which knocked her senseless. She screamed out at the first blow, and her screams were heard by her husband and other parties out in the field, who immediately rushed to the tent, where they found her wounded and bleeding profusely. As soon as appellant had knocked her senseless, he left her tent, and went back to his father's. When Mrs. Lowrance's husband and Mr. Dodd reached her, after they heard her scream, she was standing just outside of the tent, and told them that a crazy man had come into her tent, and tried to burst her brains out. Appellant was arrested about 9 or 10 o'clock the same evening, at his father's tent, where he was found, lying upon his bed; and he was complaining of being sick, and there was blood-spots upon his clothing and hat. The doctor who had been called in to attend Mrs. Lowrance also went down to the tent where appellant was, with the officers who went to arrest him, and he says they found appellant lying down, and complaining of being sick, and he examined him very fully; found that he had slight fever, but was otherwise all right.

These are the essential facts disclosed by the record in this case, and we are of opinion that, while they show at least a most clear and indisputable case of aggravated assault and battery, if not a higher offense, they fail to sustain the indictment and verdict for an assault with intent to commit rape. There is not the slightest particle of testimony tending to show that appellant's intention was to commit rape. Whatsoever might have been his motive for his conduct,—the parties being comparatively strangers to each other, Mrs. Lowrance having only seen defendant a few times before the date of the assault,—and howsoever much we may condemn his inexcusable conduct, we cannot sanction the verdict and judgment which has been rendered in this case, because they are, in our opinon, directly contrary to the evidence; and for this reason the judgment is reversed and the cause remanded. All judges present and concurring.

CITY OF DALLAS *et al.* v. WESTERN ELECTRIC CO.

(*Supreme Court of Texas.* Feb. 5, 1892.)

CONSTITUTIONAL LAW—LOCAL AND SPECIAL LAWS—EXEMPTION OF CITY FROM GARNISHMENT.

1. The exemption of the city of Dallas from garnishment proceedings, by section 109 of the city charter, passed under Const. art. 11, § 5, which authorizes charters of cities having more

than 10,000 inhabitants to be granted by special act, does not conflict with Const. art. 3, § 56, which forbids, "except as otherwise provided in this constitution," the enactment of any local or special law for certain specified purposes, including the changing of "methods for the collection of debts or the enforcing of judgments."

2. The exemption of a city from liability as garnishee inures to the benefit of sureties upon the debtor's bond, given in such a proceeding to the plaintiff, conditioned to pay any judgment recovered therein against the city.

Appeal from district court, Dallas county.

Action by the Western Electric Company against the Queen City Electric Light & Power Company upon an account. A writ of garnishment was served upon the city of Dallas, and thereupon a bond executed by J. W. Johnson, Joseph P. Smith, and H. Pringle was given by the Queen City Company, conditioned to pay any judgment recovered against the city. Judgment for plaintiff. Defendants appeal. Reversed.

A. P. Wozencraft and *M. Trice*, for city. *Crawford & Crawford*, for other appellants. *Wooten & Kimbrough*, for appellee.

HENRY, J. This was a garnishment suit against the city of Dallas, instituted by the Western Electric Company, plaintiff, in a suit for debt against the Queen City Electric Light & Power Company. The city answered, admitting an indebtedness, at the time it was served with writ, to the Queen City Electric Light & Power Company, but claimed that it was exempted from suit as a garnishee by virtue of the following provision in its charter: "Sec. 169. The property, real and personal, belonging to said city shall not be liable to be sold or appropriated under any writ of execution or cost-bill; nor shall the funds belonging to said city in the hands of any person be liable to garnishment; nor shall the city be liable to garnishment on account of any debt it may owe or funds it may have on hand due any person; nor shall the city, or any of its officers or agents, be required to answer any writ of garnishment on any account whatsoever." Another section of the charter reads as follows: "Sec. 193. That this act shall be deemed a public act, and judicial notice shall be taken thereof in all courts and places without the same having been read in evidence." The plaintiff asked judgment upon the admission of indebtedness in the answer of the garnishee, contending that the exemption claimed under its charter is unconstitutional. The cause was tried by the court without a jury, and the judge, holding that said exemption was forbidden by the constitution, rendered judgment in favor of the plaintiff.

The following are the clauses of the constitution which are relied upon to defeat the charter: Article 3, § 56: "The legislature shall not, except as otherwise provided in this constitution, necessary local or special law, * * * regulating the practice or jurisdiction of, or changing the rules of evidence in, any judicial proceeding or inquiry before courts, justices of the peace, sheriffs, commissioners, arbitrators, or other tribunals, or providing or changing methods for the collection of debts, or the enforcing of judgments, or prescribing the effect of judicial sales of real estate; * * * and, in all other cases where a general law can be made applicable, no local or special law shall be enacted." If these provisions were the only ones found in the constitution relating to the subject, it would be clear that the clause of the charter now in question is forbidden. Another provision of the same section denies to the legislature the power to pass a local or special law "incorporating cities, towns, or villages, or changing their charters." But by section 5 of article 11 it is otherwise provided that "cities having more than ten thousand inhabitants may have their charters granted or amended by special act of the legislature." It cannot be plausibly contended that the right to give such cities special charters is in subordination to the requirement quoted from article 3, that no special law shall be enacted "where a general law can be made applicable;" so that such special charter, when given, shall not contain any provision that would be applicable to all such cities found in the state. The prohibitions, limitations, and requirements contained in section 56 of article 3 of the constitution are intended to operate on such subjects as are embraced alone by that section, and not upon such as are excepted from it. It is the purpose of the constitution that the grant of power in the charter of a city having more than 10,000 inhabitants shall be complete without reference to any other law, notwithstanding it would be easy to provide for the exercise of the greater number of the privileges granted to such cities by a general law applicable alike to all of them. While there are limitations and restrictions upon the right to grant such charters, they are not to be sought for in section 56 of article 3 of the constitution. If provisions found in the charters of cities containing over 10,000 inhabitants are subject to no other objection than that they are local or special, and such as could be provided for by a general law, they must stand because they are permitted by section 5 of article 11, and therefore expressly excepted from the operation of section 56 of article 3. If the privileges and powers contained in such charters are such as can be given to cities by either general or special legislation, they must be respected. After the service of the writ of garnishment, the debtor, the Queen City Electric Light & Power Company, executed a bond to the plaintiff in pursuance of the act of the legislature approved February 9, 1889, (Acts 21st Leg. p. 1,) which being approved and filed, the garnishee paid the debt to the defendant, and it and its sureties appeared and defended in the garnishment suit. The act provides that in such cases "such defendant may make any defense which the defendant in garnishment could make in such suit." The court rendered judgment in favor of the plaintiff for the amount of its debt, both against the city as garnishee and against the debtor and the sureties on its bond. If the city was subject to the writ of gar-

nishment, it may be very well questioned whether a judgment against it for the debt was proper after it had, in obedience to the law, paid the money to the debtor upon his giving security to the plaintiff. We deem it unnecessary now, however, to further consider or to decide this issue, as, in our opinion, the provision of the charter of the city exempting it from liability as a garnishee must be enforced. The bond given by the debtor is only necessary or proper when there is a garnishee lawfully charged with liability through the garnishment proceedings, and the exemption of the garnishee must inure to the benefit of the bondsmen. The judgment is reversed, and the cause is dismissed.

STATE v. ANDREWS *et al.*

(*Supreme Court of Texas.* Oct. 30, 1891.)

INTOXICATING LIQUORS—RETAIL DEALER'S BOND—"OPEN HOUSE."

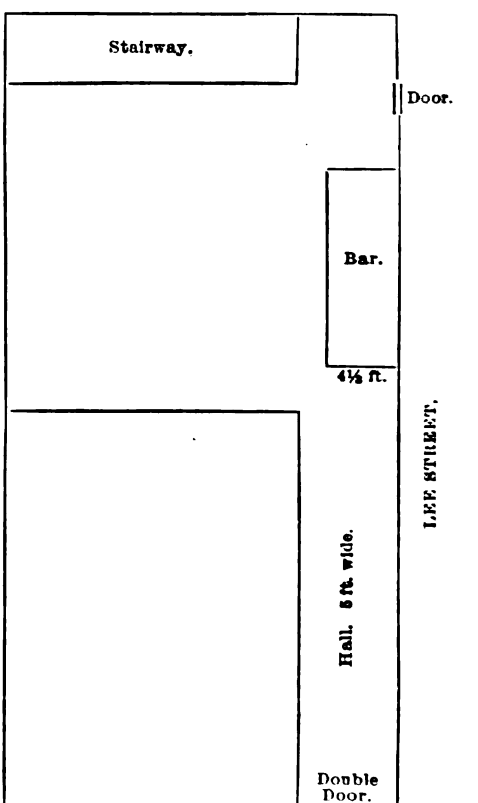
The condition of a retail liquor dealer's bond, as required by Act March 29, 1887, that he will keep "an open house," defined by the statute as "one in which no screen or other device is used or placed * * * for the purpose of or that will obstruct the view through the open door or place of entrance," is not violated by the partitioning of the room in which the liquors are sold, for the purpose of renting a part of it, and not to obstruct the view, and which does not in fact obstruct the view of the bar from the front door.

Appeal from district court, Hunt county.

Action by the state against Andrews & Bray and others upon a retail liquor dealer's bond, for failure to keep an open house, as required by Act March 29, 1887. Judgment for defendants. The state appeals. Affirmed.

A. R. Cushman, Grubbs & Hefner, and *T. D. Montrose*, for the state.

GAINES, J. This suit was brought in the name of the state of Texas to recover of appellees, as obligors upon a retail liquor dealer's bond, a penalty of $500 for an alleged failure to keep an open house, as required by the act of March 29, 1887, (2 Sayles' Civil St. art. 3226*a*, § 4.) There having been a judgment for the defendants, the case is brought here upon the findings of fact and conclusions of law filed by the trial judge. It is claimed, in effect, that upon the facts found by the judge the judgment should have been for the state. The law took effect July 4, 1887. It appears from the conclusions of fact that just previous to that time the defendants Andrews & Bray were in possession, as lessees, of the room in which they subsequently carried on their business as liquor dealers. It was a room upon the ground floor of a store-house which fronted east on the public square in the city of Greenville. The west wall ran along a street, which was subsequently as much used as the public square. The room had a double door in front at the north-east corner, and also a side door in the west wall, near the rear end. Before the law went into effect, and before defendants Andrews & Bray had any actual knowledge of the passage, they agreed to sublet a portion of the room, and for that purpose ran partition walls, so as to inclose a space in the south-east portion, 15 feet in width by 40 feet in length. This room fronted on the public square. The double doors, about five feet in width, opened into the space between the west partition and the west wall, and served as an entrance into the main room. After the partition was made they offered the tenant the choice of the two rooms. He selected the smaller one, and in it set up and carried on a confectionery and ice-cream business. They set up their bar in the rear room, on the north side, and in front of their front entrance. Persons drinking at the bar were in full view from the front door. The bar was also visible from the door which opened upon the side street. The position of the bar in reference to the partition and the doors is shown upon the following diagram of the lower floor of the building:



PUBLIC SQUARE.

The court also found that the object of Andrews & Bray in subletting the smaller room was not to obstruct the view of their bar, but to reduce their rent. It was also found that the view of the bar from the front door was not in fact obstructed. One of the conditions of a retail liquor dealer's bond is that he will keep "an open house." "An open house" is defined in the statute to be "one in which no screen or other device is used or placed, either inside or outside of such place of business, for the purpose of or that will ob-