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THE EVOLUTION OF JUVENILE COURT JURISDICTION AND PROCEDURE IN TEXAS

*Martin A. Frey**

One of the most frustrating tasks facing a lawyer when he researches in an area of active legislative reform is to determine speedily and with certainty the relative validity of a case once precedent. Would, for example, the 1937 criminal court conviction of a 9-year-old for murder be possible today even though new juvenile court legislation has been enacted? What about the 1949 holding that the juvenile court was not required to warn the child of his privilege against self-incrimination prior to testifying? The 1910 decision that juvenile court jurisdiction was based on age at the time of trial, not at the time of the offense? On the theorem that history is relevant, this article will explore the evolution of juvenile court jurisdiction and procedure in Texas.

THE PRE-JUVENILE COURT PERIOD: 1836-1907

A. Infancy Defense to Criminal Prosecution

On March 2, 1836, Texas declared its independence from Mexico; Mexican authority came to an end with the Battle of San Jacinto, April 21, 1836. In 1840 the Republic of Texas adopted the English common law, which it carried with it when admitted to the Union, December 29, 1845.¹ Implicit in the common law was a limitation on the criminal responsibility of children. A child under 14 years of age was presumed to be incapable of criminal responsibility. This presumption was irrebuttable for children under 7 and rebuttable for children between 7 and 14.² In 1857 the ages were changed by statute to 9 and 13

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1. Tex. Laws 1840, An Act to adopt the Common Law of England § 1, at 3, 2 GAMMEL, LAWS OF TEXAS 177 (1898), now TEX. REV. CIV. STAT. ANN. art. 1 (1969).

2. *Queen v. Smith*, 1 Cox Crim. Cas. 260 (1845); 4 W. BLACKSTONE, COMMENTARIES *22-24; R. PERKINS, CRIMINAL LAW 837 (2d ed. 1969). Reference to the common law presumptions appeared in *Ake v. State*, 6 Tex. Ct. App. 398 (1879).

In addition to the defense of infancy, some offenses have been drafted so that they could be committed only by a person who had attained the age of 21. *Schenault v. State*, 10 Tex. Ct. App. 410 (1881) (aggravated assault or battery on a female or a child); *cf. Jones v. State*, 31 Tex. Crim. 252, 20 S.W. 578 (1892) (selling mortgaged property). Other cases have been unsuccessful in raising this defense. *Neal v. State*, 101 S.W. 212 (Tex. Crim. App. 1907) (swindling); *Lively v. State*, 74 S.W. 321 (Tex. Crim. App. 1903) (swindling).

respectively.³ Under this statute the burden of proof shifted twice before a conviction could be had. The initial burden of proving the commission of the offense was on the state. The burden then shifted to the defendant to establish that he was between 9 and 13. It then shifted back to the state to show that although between 9 and 13 he had discretion to understand the nature and illegality of the act constituting the offense.⁴ Once the burden had shifted back to the state, the most obvious failure to carry this burden occurred when the state made no effort to prove that the defendant had discretion.⁵ When an attempt was made, its sufficiency was then in issue. Proof that defendant knew good from evil, or right from wrong, or that he was possessed of the intelligence of ordinary boys of his age was not sufficient.⁶ The proof must have shown that he understood the nature of the act and that the act was illegal. This could be shown by circumstances, education, habits of life, general character, and moral and religious instruction.⁷

In 1904, the Texas Court of Criminal Appeals reversed a rape conviction which had been based on the testimony of the 7-year-old

3. TEX. PEN. CODE art. 36 (1857):

No person shall in any case be convicted of any offence committed before he was of the age of nine years; nor of any offence committed between the years of nine and thirteen, unless it shall appear by proof that he had discretion sufficient to understand the nature and illegality of the act constituting the offence.

Article 36 became TEX. PEN. CODE art. 34 (1879). Under this provision a person became 9 or 13 years of age the day before the 9th or 13th anniversary of his birthday. *Lenhart v. State*, 33 Tex. Crim. 504, 27 S.W. 260 (1894).

4. *Ake v. State*, 6 Tex. Ct. App. 398, 419 (1879). The defendant has not always established that he was between 9 and 13 at the time of commission of the offense. For example, in *McDaniel v. State*, 5 Tex. Ct. App. 475 (1879), the minor defendant failed to introduce evidence that he was between 9 and 13 and thus was convicted of killing a dog and fined \$10 without the state having to prove that he had discretion sufficient to understand the nature and illegality of the act constituting the offense.

5. *Gardiner v. State*, 33 Tex. 692 (1871) (conviction of boy under 13 for horse-stealing with 7-year penitentiary sentence reversed and dismissed); *Allen v. State*, 37 S.W. 757 (Tex. Crim. App. 1896) (conviction of 10-year-old boy for theft reversed).

6. *Simmons v. State*, 50 Tex. Crim. 527, 97 S.W. 1052 (1906); *Price v. State*, 50 Tex. Crim. 71, 94 S.W. 901 (1906); *Keith v. State*, 33 Tex. Crim. 341, 26 S.W. 412 (1894); *Carr v. State*, 24 Tex. Ct. App. 562, 7 S.W. 328 (1888); *Parker v. State*, 20 Tex. Ct. App. 451 (1886).

7. *Allen v. State*, 37 S.W. 757 (Tex. Crim. App. 1896). The court's charge to the jury was crucial to the state's burden of proof. In *Wusnig v. State*, 33 Tex. 651 (1871), the defendant, about 12 at the time of the shooting, was indicted for murder, tried and convicted of manslaughter, and sentenced to 2 years in the penitentiary. The Texas Supreme Court reversed and remanded for a new trial because the court's charge to the jury violated the infancy statute in that it withdrew from the jury any consideration of the question of infancy and responsibility, excepting so far as it would tend to reduce murder to manslaughter. For additional errors in a court's instructions to the jury on the presumption of incapacity, see *Binkley v. State*, 51 Tex. Crim. 54, 100 S.W. 780 (1907).

victim. The court held that article I, section 5 of the Texas Constitution dictated that

if a person cannot be punished for perjury, who takes an oath as a witness, such an oath is not binding, and such person cannot be a witness in a case involving life or liberty; and a conviction based in whole or in part upon the testimony of such a witness cannot be sustained. . . . We respectfully call the attention of the Legislature to this condition, as it may follow in many cases, especially injuries committed on children of tender years, that the guilty party may escape punishment, however intelligent the witness may be, and however capable of understanding the nature and obligation of an oath, simply because such a witness does not testify under the pains and penalties of perjury, which is required by our Constitution.⁸

The following year the legislature responded by amending the infancy statute so that persons under 9 could be competent as witnesses. This was accomplished by permitting the presumptions of criminal incapacity to remain the same except for the offense of perjury.⁹

B. Capital Punishment

In 1857 the death penalty was eliminated for persons who committed an offense before becoming 17.¹⁰ The burden of proof was on the defendant to establish that he was under 17 at the time of commission and therefore exempt from the death penalty. This question was distinct from the state's burden of proving the offense charged.¹¹ The elimination of the death penalty for persons under 17

8. *Freasier v. State*, 84 S.W. 360-61 (Tex. Crim. App. 1904).

9. *Tex. Laws* 1905, ch. 59, § 1, at 83 (emphasis added):

No person shall in any case be convicted of any offense committed before he was of the age of nine years, *except perjury, and for that only, when it shall appear by proof that he had sufficient discretion to understand the nature and obligation of an oath; nor of any other offense committed between the years of nine and thirteen, unless it shall appear by proof that he had discretion sufficient to understand the nature and illegality of the act constituting the offense.*

10. *TEX. PEN. CODE* art. 37 (1857):

A person for an offence committed before he arrived at the age of seventeen years, shall in no case be punished with death, but may, according to the nature and degree of the offence be punished by imprisonment for life, or receive any of the other punishments affixed in this Code, to the offence of which he is guilty.

Article 37 became *TEX. PEN. CODE* art. 35 (1879).

11. *Perry v. State*, 44 Tex. 473, 480 (1876) (first-degree murder conviction with death sentence reversed and remanded for new trial) (court suggested that in new trial fuller investigation be given to whether defendant was under 17 at time of commission); *Wilcox v. State*, 32 Tex. Crim. 284, 22 S.W. 1109 (1893) (rape conviction with death penalty reversed and remanded) (evidence showed that defendant was under 17 at time of commission); *Ellis v. State*, 30 Tex. Ct.

had further ramifications. For example, removal of the death penalty reduced first-degree murder from a capital to a noncapital offense. The defendant was now entitled to bail.¹²

C. Place of Confinement

In 1857 legislation was enacted which stated that confinement of persons who committed an offense before becoming 17 was to be in the house of correction instead of in the penitentiary.¹³ Whether this was ever implemented seems doubtful since the judgments rendered after the enactment of the statute prescribed confinement in the penitentiary with no mention of the house of correction.¹⁴ In 1887 a house of correction and reformatory was established for the confinement of persons under 16 when conviction was for a felony and imprisonment was assessed at 5 years or less.¹⁵ In 1889 confinement in the house of correction and reformatory was expressly limited to males.¹⁶ Girls were sent to the penitentiary.¹⁷ The 1889 provision also gave the jury discretion whether

App. 601, 18 S.W. 139, 140 (1892) (first-degree murder with death penalty) (burden of proving that defendant was under 17 was on defendant); *Ingram v. State*, 29 Tex. Ct. App. 33, 14 S.W. 457 (1890) (rape conviction with death penalty reversed and remanded) (evidence that boy was 17 at commission was insufficient); *Walker v. State*, 28 Tex. Ct. App. 503, 13 S.W. 860 (1890) (first-degree murder) (district attorney admitted as a fact that defendant was under 17 at time of commission); *Ake v. State*, 6 Tex. Ct. App. 398, 420 (1879) (rape conviction with death sentence affirmed) (defendant did not carry burden of proving that he was under 17), *discussed in Jones v. State*, 13 Tex. Ct. App. 1, 11-12, 14-15 (1882).

12. *Ex parte Walker*, 28 Tex. Ct. App. 246, 13 S.W. 861 (1889).

13. TEX. PEN. CODE art. 77 (1857):

Where it appears by the proof on the trial of a cause that the offender was at the time of the commission of the offence, not over the age of seventeen years, he shall be sent to the House of Correction, in all cases where a person over that age would be liable to imprisonment in the Penitentiary for the same offence.

Article 77 does not appear in TEX. PEN. CODE (1879).

14. *Gardiner v. State*, 33 Tex. 692 (1871) (boy under 13 sentenced to 7 years in penitentiary); *Wusnig v. State*, 33 Tex. 651 (1871) (boy about 12 at commission sentenced to 2 years in penitentiary); *Parker v. State*, 20 Tex. Ct. App. 451 (1886) (12-year-old boy sentenced to 2 years in penitentiary); *Jones v. State*, 13 Tex. Ct. App. 1 (1882) (5 years in penitentiary).

15. Tex. Laws 1887, ch. 84, §§ 1-10, at 64-66.

16. Tex. Laws 1889, ch. 85, §§ 1-16, at 95-98. Tex. Laws 1889, ch. 85, §§ 11, 12, at 97, replaced Tex. Laws 1887, ch. 84, §§ 6, 7, respectively. TEX. CODE CRIM. P. art. 1145 (1895) codified Tex. Laws 1889, ch. 85, § 12, *as amended*, Tex. Laws 1895, ch. 68.

17. The limitation to males only was expressed in *Ex parte Creel*, 29 Tex. Ct. App. 439, 16 S.W. 256 (1891), in which a female under 16 was convicted of burglary and sentenced to 2 years in the reformatory. The superintendent of the reformatory refused to accept her and she was taken to the penitentiary. In granting her writ of habeas corpus from the penitentiary on the ground that she could not be taken to a place other than that which the judgment provided, the court compared the 1887 and 1889 statutes and noted that where the 1887 statute had referred to "all the persons" and "his or her sentence" the 1889 statute now referred to "all male persons" and "his sentence." *Accord, Ex parte Matthews*, 38 Tex. Crim. 617, 44 S.W. 153 (1898).

to send the boy to the house of correction and reformatory or to the penitentiary.¹⁸ The judge was required to instruct the jury to find specially in the verdict the age of the youthful offender and to specify the place of confinement.¹⁹ The verdict was fatally defective if it did not find the age of the defendant when the question of place of confinement was raised.²⁰ However, if the verdict failed to name the place of confinement, the place could be set by the judge.²¹ Failure to state the place of confinement in the judgment made the judgment fatally defective.²²

JUVENILE COURT LEGISLATION: 1907-PRESENT

The first juvenile court legislation was enacted in 1907.²³ Two years later section 9 of the act, dealing with when a child could be

18. At first section 12 was construed as being mandatory on the jury. If the jury found the defendant 16 or under and assessed the period of confinement at 5 years or less, they would then have to send him to the reformatory, but if the period of confinement was assessed at more than 5 years they would have to send him to the penitentiary. *Washington v. State*, 28 Tex. Ct. App. 411, 13 S.W. 606 (1890); see *Duncan v. State*, 29 Tex. Ct. App. 141, 15 S.W. 407, 408 (1890). *Washington v. State* was overruled in *Hays v. State*, 30 Tex. Ct. App. 472, 17 S.W. 1063, 1064 (1891). Section 12 was construed to give the jury discretion on whether to send a defendant who was 16 or under and was to be confined for 5 years or less to the house of correction and reformatory or to the penitentiary. *Accord*, *Rocha v. State*, 38 Tex. Crim. 69, 41 S.W. 611 (1897); *Ex parte Wood*, 36 Tex. Crim. 7, 34 S.W. 965 (1896); *Green v. State*, 32 Tex. Crim. 298, 22 S.W. 1094 (1893); *Sanchez v. State*, 31 Tex. Crim. 484, 21 S.W. 364 (1893). In addition, the defendant's age, not at the date of commission of the offense, but at the time of trial determines whether he could receive the benefits of section 12. *Aikins v. State*, 49 Tex. Crim. 229, 91 S.W. 790 (1906); *Sanchez v. State*, 31 Tex. Crim. 484, 21 S.W. 364 (1893).

19. *Simmons v. State*, 50 Tex. Crim. 527, 97 S.W. 1052 (1906).

20. *Lewis v. State*, 99 S.W. 1011 (Tex. Crim. App. 1907); *Henderson v. State*, 50 Tex. Crim. 620, 99 S.W. 1001 (1907); *Bates v. State*, 50 Tex. Crim. 568, 99 S.W. 551 (1907); *Simmons v. State*, 50 Tex. Crim. 527, 97 S.W. 1052 (1906); *Watson v. State*, 49 Tex. Crim. 371, 92 S.W. 807 (1906). The issue of age must be properly raised. *Ex parte White*, 50 Tex. Crim. 473, 98 S.W. 850 (1906) (habeas corpus not available when appeal should have been used); *Gutierrez v. State*, 47 S.W. 372 (Tex. Crim. App. 1898) (age issue could not be raised for the first time in motion for new trial).

21. *Ex parte Wood*, 36 Tex. Crim. 7, 34 S.W. 965 (1896) (verdict was for 2 years imprisonment for burglary with no name of place of confinement; judgment named house of correction and reformatory as place of imprisonment). *Accord*, *Ex parte Matthews*, 38 Tex. Crim. 617, 44 S.W. 153 (1898). The jury rendered a verdict that the girl be imprisoned for 5 years in the state reformatory for second-degree murder. The judgment changed the place of confinement to the penitentiary since there was no provision for incarcerating girls in the house of correction and reformatory.

22. *Watson v. State*, 49 Tex. Crim. 371, 92 S.W. 807 (1906). The judgment must specify an actual place of confinement. *Evans v. State*, 35 Tex. Crim. 485, 34 S.W. 285 (1896) (conviction for burglary reversed because judgment provided for punishment in "reform school" instead of in "house of correction and reformatory"). *Cf. Ex parte Creel*, 29 Tex. Ct. App. 439, 16 S.W. 256 (1891) (judgment provided for girl to be incarcerated in house of correction and reformatory for boys).

23. Tex. Laws 1907, ch. 65, §§ 1-10, at 137-40, codified as TEX. REV. CIV. STAT. tit.

subject to criminal prosecution for a misdemeanor and when a criminal court could dismiss a felony prosecution and transfer to juvenile court, was amended and codified in the revised civil statutes.²⁴ In 1911 when the revised civil statutes and the code of criminal procedure were recodified, the civil statutes included the juvenile court act as it appeared in 1907, while the code included the juvenile court act as amended in 1909.²⁵ The juvenile court act in the code was further amended in 1913 but no comparable amendments were made in the

33b, §§ 1-10 (Supp. 1908). Section 10 described the purpose of the act:

This act shall be liberally construed, to the end that its purposes may be carried out; that is, that the interests of the child and its reformation shall at all times be the object in view of proceeding against it; provided, that no costs or expenses incurred in the enforcement of this act shall be paid by the State.

Tex. Laws 1907, ch. 65, § 10, at 140, codified as TEX. REV. CIV. STAT. tit. 33b, § 10 (Supp. 1908); recodified as TEX. REV. CIV. STAT. art. 2201 (1911); TEX. CODE CRIM. P. art. 1207 (1911). In 1913 article 1207 was amended to change "reformation" to "restoration to society." Tex. Laws 1913, ch. 112, § 12, at 219-20.

The constitutionality of the juvenile court act was upheld in *Ex parte Bartee*, 76 Tex. Crim. 285, 174 S.W. 1051, 1053 (1915).

24. Tex. Laws 1909, ch. 55, § 1, at 101-03, amending Tex. Laws 1907, ch. 65, § 9. This version of section 9 was codified as TEX. REV. CIV. STAT. tit. 33b, § 9 (Supp. 1910).

25.

TEX. CODE CRIM. P. (1911)	Tex. Laws 1913, ch. 112	TEX. CODE CRIM. P. (1916)
article 1197	section 3	article 1197
1198	4	1198
1199	5	1199
1200	6	1200
1201	7	1201
1202	8	1202
1203	9	1203
1204	10	1204
1205	13	repealed
1206	11	1206
1207	12	1207

civil statutes.²⁶ Thus, throughout this early period, two juvenile court acts were in existence. Although the court of criminal appeals first held that "it was the intention of the Legislature that all these laws were to be construed together as one whole,"²⁷ it later distinguished this position and held the juvenile court act in the code dominant.²⁸

In 1925 all previous juvenile court legislation was repealed and a new set of laws pertaining to the delinquent child was enacted.²⁹ Except

26.

Tex. Laws 1907, ch. 65	TEX. REV. CIV. STAT. tit. 33b (Supp. 1908)	TEX. REV. CIV. STAT. (1911), (1914)	TEX. CODE CRIM. P. (1911)
section 1	section 1	article 2191	article 1197
2	2	2192	1198
3	3	2193	1199
4	4	2194	1200
5	5	2195	1201
6	6	2196	1202
7	7	2197	1203
8	8	2198	1204
9, par. 1	9, par. 1	2199	
9, par. 2	9, par. 2	2200	

Tex. Laws 1909, ch. 55	TEX. REV. CIV. STAT. tit. 33b (Supp. 1910)		
section 9, par. 1-4	section 9, par. 1-4		1205
9, par. 5-6	9, par. 5-6		1206

Tex. Laws 1907, ch. 65	TEX. REV. CIV. STAT. tit. 33b (Supp. 1908)		
section 10	section 10	2201	1207

27. The said sections 9 and 10 of the act of 1907, embodied as articles 2199 and 2200 of the Revised Civil Statutes, have neither been amended expressly nor repealed expressly. Taking the various enactments, we conclude that it was the intention of the Legislature not to repeal said articles 2199 and 2200. It is a universal rule that repeals by implication are not favored.

McCallen v. State, 76 Tex. Crim. 353, 174 S.W. 611, 613 (1915).

28. *McLaren v. State*, 82 Tex. Crim. 449, 199 S.W. 811 (1917); *accord*, editor's notes to TEX. REV. CIV. STAT. arts. 2191-2201a (Supp. 1918), (Supp. 1920), art. 2200 (Supp. 1922).

29. The existing code and revised statutes provisions were repealed by TEX. CODE CRIM. P. at 181 (1925), recodified (1936):

Be it further enacted by the Legislature of the State of Texas: That all penal laws and all laws relating to criminal procedure in this State, that are not embraced in this

for two provisions found in the revised statutes entitled "juvenile court" and "care of delinquent child" all the laws appeared solely in the code of criminal procedure.

Although the first proceedings under juvenile court legislation were not considered criminal,³⁰ this view soon changed,³¹ and the procedure remained criminal until 1943 when new legislation was enacted. The legislature expressed the need for a more realistic method of handling juvenile delinquency cases, a procedure in the nature of guardianship.³² Thus the provisions in the code of criminal procedure and in the revised civil statutes relating to delinquent children were repealed³³ and a new procedure enacted and codified.³⁴ *In re Dendy*, the first case to interpret

Act and that have not been enacted during the present session of the Legislature, be and the same are hereby repealed. All laws and parts of laws relating to crime omitted from this Act have been intentionally omitted, and all additions have been intentionally added, and this Act shall be construed to be an independent Act of the Legislature enacted under the caption hereof, and the articles contained in this Act, as revised, re-written, changed, combined and codified shall not be construed as a continuation of former laws, except as otherwise herein provided.

The new juvenile code appeared as TEX. CODE CRIM. P. arts. 1083-93 (1925). TEX. CODE CRIM. P. arts. 1083-93 (1936) recodified TEX. CODE CRIM. P. arts. 1083-93 (1925), *as amended*, Tex. Laws 1927, ch. 163, §§ 1-2, at 236-37.

30. *Ex parte Bartee*, 76 Tex. Crim. 285, 174 S.W. 1051, 1053 (1915).

31. *Miller v. State*, 82 Tex. Crim. 495, 200 S.W. 389, 391-92 (1918) (motion for rehearing); *Ex parte McLoud*, 82 Tex. Crim. 299, 200 S.W. 394, 397 (1917). Under the 1925 Code of Criminal Procedure the juvenile court proceedings were still classified as criminal. See TEX. CODE CRIM. P. arts. 1095, 1093 (1925).

32. Tex. Laws 1943, ch. 204, § 25, at 319.

33. Tex. Laws 1943, ch. 204, § 24, at 318, repealed TEX. CODE CRIM. P. arts. 1084-93 (1936); Tex. Laws 1937, ch. 492, § 1, at 1328 (substitute provision for TEX. CODE CRIM. P. art. 1083 (1936)); TEX. REV. CIV. STAT. art. 2329 (1925), (1936); TEX. REV. CIV. STAT. art. 2338 (1925), (1936), *as amended*, Tex. Laws 1941, ch. 193, § 1, at 355.

34. Tex. Laws 1943, ch. 204, §§ 1 to 24-A, were codified as TEX. REV. CIV. STAT. art. 2338-1, §§ 1 to 24-A (Supp. 1943). Tex. Laws 1943, ch. 204, § 24, at 318 (laws repealed) and § 25, at 319 (time of taking effect) did not appear in the codification. The new act was held constitutional in *In re Dendy*, 175 S.W.2d 297 (Tex. Civ. App.—Amarillo 1943), *aff'd sub nom. Dendy v. Wilson*, 142 Tex. 460, 179 S.W.2d 269 (1944); *Steed v. State*, 180 S.W.2d 446, 448 (Tex. Civ. App.—Texarkana), *rev'd on other grounds*, 143 Tex. 82, 183 S.W.2d 458 (1944). For a discussion of delinquency under the 1943 act, see B. ANDERSON & R. GURLEY, *THE JUVENILE OFFENDER AND TEXAS LAW* (rev. ed. 1966); Gardner, *What Reforms Are Needed in the Texas Juvenile Court Statute?*, 38 TEXAS L. REV. 870 (1960); Hughes, *Handling of Juvenile Delinquents in Texas*, 38 TEXAS L. REV. 870 (1960); Hughes, *Handling of Juvenile Delinquents in quents in Texas*, 38 TEXAS L. REV. 290 (1960); Comment, *The New Juvenile Delinquency Act*, 23 TEXAS L. REV. 165 (1945). For a discussion of the law prior to 1943, see Comment, *Adolescent Delinquency and Youth Correction Authority Act*, 20 TEXAS L. REV. 754 (1942); Comment, *Juvenile Delinquency*, 20 TEXAS L. REV. 590 (1942).

the new law, the court of civil appeals held it to be neither criminal nor civil.³⁵ The supreme court leaned more heavily on civil procedure:

[T]he Act repeals by specific mention certain articles of both the civil statutes and the Code of Criminal Procedure, and all laws or parts of laws in conflict therewith. The Act provides for a jury trial when a jury is demanded, and authorizes the trial court to order a jury on its own motion. Nothing is said about the payment of a jury fee. The Act does not require a minor to testify against himself in a proceeding under same, and it does not require the trial court to follow the rules of civil procedure in taking testimony in the trial of such cases. We think, however, that the whole Act discloses that the Legislature intended that proceedings instituted thereunder should be governed, as far as practicable, by the rules relating to civil procedure.³⁶

A. *The Allocation of Jurisdiction Between Juvenile and Criminal Courts*

The first juvenile court act gave the county and district courts jurisdiction as juvenile courts.³⁷ In 1925 the criminal district court was added to the list of available courts.³⁸ It was temporarily removed between 1943 and 1945.³⁹ The legislature in 1949 created a juvenile

35. 175 S.W.2d 297, 302 (Tex. Civ. App.—Amarillo 1943):

The Act sets up a complete jurisdiction and procedure for the hearing of juvenile delinquent cases and there is no other law, civil or criminal, to govern such cases and situations as defined by the Act and placed within the exclusive jurisdiction of the juvenile court provided for in this Act. Nowhere does the Act provide that either criminal or civil procedure shall be followed.

36. *Dendy v. Wilson*, 142 Tex. 460, 179 S.W.2d 269, 274 (1944), noted in 26 TEXAS L. REV. 819 (1948); accord, *Steed v. State*, 143 Tex. 82, 183 S.W.2d 458, 459 (1944); *Hultin v. State*, 171 Tex. Crim. 425, 351 S.W.2d 248 (1961); *Yzaguirre v. State*, 427 S.W.2d 687 (Tex. Civ. App.—Corpus Christi 1968, no writ); *Lee v. McKay*, 414 S.W.2d 956 (Tex. Civ. App.—San Antonio 1967, writ dismissed); *Gamble v. State*, 405 S.W.2d 384 (Tex. Civ. App.—Eastland 1966, no writ); *In re Gonzalez*, 328 S.W.2d 475 (Tex. Civ. App.—El Paso 1959, writ refused n.r.e.); *Mendoza v. Baker*, 319 S.W.2d 147 (Tex. Civ. App.—Houston 1958, no writ); *In re Brown*, 201 S.W.2d 844, 846 (Tex. Civ. App.—Waco 1947, writ refused n.r.e.).

37. Tex. Laws 1907, ch. 65, § 2, at 138. Section 2 was codified as TEX. REV. CIV. STAT. tit. 33b, § 2 (Supp. 1908) and recodified as TEX. REV. CIV. STAT. art. 2192 (1911), (1914), and as TEX. CODE CRIM. P. art. 1198 (1911), construed in *Ex parte Meggs*, 99 Tex. Crim. 391, 269 S.W. 790 (1925); *Ex parte Fowler*, 85 Tex. Crim. 436, 213 S.W. 271 (1919). The court, in *Ex parte Davis*, 85 Tex. Crim. 218, 211 S.W. 456 (1919), ruled that the legislature had the power to confer this jurisdiction.

38. TEX. REV. CIV. STAT. art. 2329 (1925), (1936). For special legislation concerning Cameron County, see Tex. Laws 1931, ch. 307, § 2, at 769.

39. In 1943 the criminal district court was removed from the list. Tex. Laws 1943, ch. 204, § 4, at 314, codified as TEX. REV. CIV. STAT. art. 2338-1, § 4 (Supp. 1943). But in 1945 it returned when section 4 of the 1943 juvenile court act was amended to add the criminal district courts and to provide that appeals from these courts be taken to the court of civil appeals. Tex.

court in counties having 10 or more district courts and having a juvenile board composed of the district judges and the county judge of that county.⁴⁰ In 1953 the aspect in the law which made it impossible for some counties to have a resident juvenile judge was remedied by permitting the county court to be designated the juvenile court as well as the district court and the criminal district court.⁴¹ Beginning in 1949, domestic relations courts began to be created for individual counties.⁴²

When several courts had juvenile court jurisdiction their concurrent jurisdiction caused confusion. 1909 legislation authorized the judges of the courts eligible to be juvenile courts to select one of the courts to handle all cases arising under the juvenile court law.⁴³ In

Laws 1945, ch. 35, § 1, at 52, *amending* Tex. Laws 1943, ch. 204, § 4, at 314. The amended provision was codified as TEX. REV. CIV. STAT. art. 2338-1, § 4 (1948). This provision was amended in 1949. Tex. Laws 1949, ch. 368, § 1, at 702-03. In 1951 the legislature enacted this same piece of legislation that they had enacted in 1949. Tex. Laws 1951, ch. 156, §§ 1-4, at 270-72. The purpose for this second enactment does not appear in the statute. The amended version was codified as TEX. REV. CIV. STAT. ANN. art. 2338-1, § 4 (1964).

40. Tex. Laws 1949, ch. 283, §§ 1-4, at 518.

41. Tex. Laws 1953, ch. 165, § 1, at 475-76.

42. Tex. Laws 1949, ch. 426, §§ 1-16, at 792-95 (Potter County); Tex. Laws 1953, ch. 325, §§ 1-18, at 799-802 (Harris County); Tex. Laws 1955, ch. 49, §§ 1-13, at 75-78 (Hutchinson County); Tex. Laws 1957, ch. 16, §§ 1-25, at 20-24 (Smith County); Tex. Laws, 2d Spec. Sess. 1957, ch. 23, §§ 1-2, at 185-86, *amending* Tex. Laws 1957, ch. 16, §§ 2, 6; Tex. Laws 1957, ch. 511, §§ 1-22, at 1490-93 (Dallas County) (juvenile and domestic relations courts); Tex. Laws 1959, ch. 31, §§ 1-21, at 56-59 (Nueces County); Tex. Laws 1959, ch. 143, §§ 1-2, at 248-49, *amending* Tex. Laws 1957, ch. 511, §§ 21-22 (Dallas County); Tex. Laws 1959, ch. 242, §§ 1-18, at 540-44 (domestic relations courts numbers 2 and 3 for Harris County); Tex. Laws 1959, ch. 331, §§ 1-5, at 727 (juvenile court for Ector County); Tex. Laws 1959, ch. 443, §§ 1-25, at 952-55 (Gregg County); Tex. Laws, 3d Spec. Sess. 1959, ch. 13, §§ 1-18, at 389-92 (domestic relations court number 2 for Dallas County); Tex. Laws 1961, ch. 159, §§ 1-19, at 305-08 (Jefferson County); Tex. Laws 1961, ch. 291, §§ 1-3, at 621-24 (juvenile and county court number 2 for Galveston County); Tex. Laws, 3d Spec. Sess. 1962, ch. 6, §§ 1-18, at 16-19 (Tarrant County); Tex. Laws, 3d Spec. Sess. 1962, ch. 64, §§ 1-22, at 171-75 (Galveston County); Tex. Laws 1963, ch. 44, §§ 1-23, at 64-67 (Taylor County); Tex. Laws 1963, ch. 299, §§ 1-19, at 778-82 (domestic relations court number 4 for Harris County); Tex. Laws 1965, ch. 278, §§ 1-17, at 548-51 (domestic relations court number 2 for Tarrant County); Tex. Laws 1965, ch. 289, §§ 1-20, at 569-71 (juvenile court for Harris County); Tex. Laws 1965, ch. 307, §§ 1-28, at 618-23 (Brazoria County); Tex. Laws 1965, ch. 537, §§ 1-24, at 1142-45 (Midland County); Tex. Laws 1965, ch. 694, §§ 1-4, at 1623-24, *amending* Tex. Laws, 3d Spec. Sess. 1962, ch. 6, §§ 1-18 (Tarrant County).

In 1967 the legislature amended the various statutes that pertained to jurisdiction of domestic relations and juvenile courts for named counties. Tex. Laws 1967, ch. 565, §§ 1-19, at 1242-53. For a discussion of these courts, see Stokes, *Special Courts for Domestic Relations*, 12 TEX. B.J. 153 (1949).

In 1957 legislation was enacted to provide for juvenile court referees in counties having a population of 806,700 or more. Tex. Laws 1957, ch. 186, §§ 1-7, at 384-85. In 1965 referees were authorized for juvenile and district courts of Wichita County. Tex. Laws 1965, ch. 612, §§ 1-11, at 1350-51.

43. Tex. Laws 1909, ch. 55, § 1, at 101-03, *amending* Tex. Laws 1907, ch. 65, § 9. This

1943 the authority to designate the juvenile court was shifted to the juvenile board, if the county had one.⁴⁴

Juvenile courts have jurisdiction over delinquent children. What then is a delinquent child? Two factors are required: he must be within the requisite age to be classified a child and his conduct must be proscribed as delinquent. In 1907 the requisite age for being classified a child within the delinquency statute was under 16.⁴⁵ The upper delinquency age was raised in 1913 from a child under 16 to any male under 17 and any female under 18.⁴⁶ In 1937 the legislature became concerned with the fact that under existing law a boy or girl of tender age, convicted of being a delinquent child, could be sent to a training school where he or she would be associated with delinquent children up to the age of 21. This led to the establishment of a minimum age of 10 for the delinquent child.⁴⁷ With the minimum age came the problem that a child of 9 could be convicted in criminal court of a crime since he was above the age of criminal incapacity and below the age for

was codified in TEX. REV. CIV. STAT. tit. 33b, § 9 (Supp. 1910). This provision did not appear in TEX. REV. CIV. STAT. (1911) but did appear as TEX. CODE CRIM. P. art. 1205 (1911).

44. Tex. Laws 1943, ch. 204, § 4, at 314, codified as TEX. REV. CIV. STAT. art. 2338-1, § 4 (Supp. 1943). For an application of the statute, see *In re Hoskins*, 198 S.W.2d 460 (Tex. Civ. App.—Amarillo 1946, writ ref'd n.r.e.). Cf. *Lamon v. Ferguson*, 213 S.W.2d 86 (Tex. Civ. App.—Austin 1948, no writ) (mandamus to compel payment of salary to member of county juvenile board).

45. Tex. Laws 1907, ch. 65, § 1, at 137-38. Section 1 was codified as TEX. REV. CIV. STAT. tit. 33b, § 1 (Supp. 1908) and recodified as TEX. REV. CIV. STAT. art. 2191 (1911) and as TEX. CODE CRIM. P. art. 1197 (1911).

46. Tex. Laws 1913, ch. 112, § 3, at 215, amended TEX. CODE CRIM. P. art. 1197 (1911) to change the age. TEX. REV. CIV. STAT. art. 2191 (1911), the corresponding provision in the civil statutes, was not amended. TEX. CODE CRIM. P. art. 1197 (1911), as amended in 1913, was codified as TEX. CODE CRIM. P. art. 1197 (1911), as amended in 1913, was codified as TEX. CODE CRIM. P. art. 1197 (1916). TEX. CODE CRIM. P. art. 1083 (1925), (1936); Tex. Laws 1943, ch. 204, § 3, at 313, codified as TEX. REV. CIV. STAT. art. 2338-1, § 3 (Supp. 1943) (1948), and TEX. REV. CIV. STAT. ANN. art. 2338-1, § 3 (1964); Tex. Laws 1965, ch. 577, § 1, codified as TEX. REV. CIV. STAT. art. 2338-1, § 3 (Supp. 1966); and Tex. Laws 1967, ch. 475, § 2, codified as TEX. REV. CIV. STAT. art. 2338-1, § 3 (Supp. 1968), retained the use of 17 and 18 years of age as the maximum delinquency age for boys and girls, respectively.

The marriage of a girl under 18 did not exempt her from the juvenile delinquency statutes. *Phillips v. State*, 20 S.W.2d 790 (Tex. Crim. App. 1929), noted in 8 TEXAS L. REV. 584 (1930); *Williams v. State*, 219 S.W.2d 509 (Tex. Civ. App.—Galveston 1949, no writ).

47. TEX. CODE CRIM. P. art. 1083 (1936) was expressly repealed by Tex. Laws 1937, ch. 492, § 6, at 1330. The new provision, Tex. Laws 1937, ch. 492, § 1, at 1328, began: "The term 'delinquent child' shall include any boy between the ages of ten (10) and seventeen (17) years and/or any girl between the ages of ten (10) and eighteen (18) years who . . ." The minimum age was retained in Tex. Laws 1943, ch. 204, § 3, at 313, codified as TEX. REV. CIV. STAT. art. 2338-1, § 3 (Supp. 1943), (1948) and TEX. REV. CIV. STAT. ANN. art. 2338-1, § 3 (1964); Tex. Laws 1965, ch. 577, § 1, at 1256, codified as TEX. REV. CIV. STAT. art. 2338-1, § 3 (Supp. 1966); and Tex. Laws 1967, ch. 475, § 2, at 1082, codified as TEX. REV. CIV. STAT. art. 2338-1, § 3 (Supp. 1968).

juvenile court jurisdiction.⁴⁸ This possibility was eliminated in 1967 when the age for criminal incapacity was raised to 15.⁴⁹

With the enactment of special legislation based on age, the act was so construed that the accused would not be entitled to the law's benefits if he were over the delinquency age at the time of trial. This was true even if he had been within the age of delinquency at the time of commission of the offense.

[I]f we should hold otherwise, we would have the anomalous condition of sending a man to the juvenile court to be confined in the school for the training of children, and who at the time of the trial might be 40 or 50 years of age, on the ground that he was a juvenile at the time of the commission of the offense. It was never so intended by the lawmakers. The object and purpose of this act, together with the act of the same Legislature making provision for the commitment to state institutions for the training of juveniles, all persons under the age of 16 years, was to remove children of tender years from the association of confirmed felons and bad characters, and place them under a training for the purpose of developing their character and fitting them for useful citizenship, and it was never intended by said act to reach those cases where the man was over 16 years of age at the time of the trial.⁵⁰

48. *Real v. State*, 132 Tex. Crim. 178, 103 S.W.2d 741 (1937) (9-year-old convicted of murder in criminal court—reversed on other grounds).

49. Tex. Laws 1967, ch. 475, § 7, at 1086, codified as TEX. PEN. CODE ANN. art. 30 (Supp. 1969-1970).

50. *Arrandell v. State*, 60 Tex. Crim. 350, 131 S.W. 1096, 1097 (1910) (Tex. Laws 1909, ch. 54, § 1, at 100-01) (conviction of first-degree murder affirmed: 15 at commission, 17 at trial); *accord*, *Smith v. State*, 99 Tex. Crim. 402, 269 S.W. 793 (1925) (under 17 at commission, over 17 at indictment and trial); *Smith v. State*, 98 Tex. Crim. 409, 266 S.W. 153 (1925) (under 16 at commission and at indictment but became 17 before trial); *Watson v. State*, 90 Tex. Crim. 576, 237 S.W. 298 (1922) (speedy trial issue when accused was under 17 at commission and at indictment but became 17 before trial); *Fifer v. State*, 90 Tex. Crim. 282, 234 S.W. 409 (1921) (under 17 at commission, would be 18 at trial); *Stracner v. State*, 86 Tex. Crim. 89, 215 S.W. 305 (1919) (motion for rehearing) (under 17 at commission, 19 at trial); *Jefferson v. Smith*, 85 Tex. Crim. 614, 214 S.W. 981 (1919); *McLaren v. State*, 82 Tex. Crim. 449, 199 S.W. 811, 816 (1917) (dissent).

TEX. CODE CRIM. P. arts. 1084, 1085 (1925), (1936); *see* TEX. CODE CRIM. P. art. 1088 (1925), (1936); *Hardie v. State*, 140 Tex. Crim. 368, 144 S.W.2d 571 (1940); *Stallings v. State*, 129 Tex. Crim. 300, 87 S.W.2d 255 (1935); *see* *Osborne v. Brooks*, 75 S.W.2d 963 (Tex. Civ. App.—San Antonio 1934, no writ). In *Green v. State*, 112 S.W.2d 451 (Tex. Crim. App. 1938), defendant withdrew his appeal because if new trial was ordered then he might be subject to longer confinement as an adult. Delay in trial for the sole purpose of depriving the accused of his privilege under the juvenile law would not be sanctioned by the court. The burden of proving such a delay was on the accused. *Walker v. State*, 119 Tex. Crim. 330, 45 S.W.2d 987 (1932) (accused did not satisfy burden of proof).

Enactment of the 1943 juvenile court legislation did not change the application of juvenile court law to age. Age at the time of trial was retained.⁵¹ Having defined the age limitations for the delinquent child, let us now consider his conduct. The 1907 juvenile court act defined the delinquent child as a child

who violates any laws of this State, or any city ordinance; or who is incorrigible; or who knowingly associates with thieves, vicious or immoral persons, or who knowingly visits a house of ill repute; or who knowingly patronizes or visits any place where any gambling device is or shall be operated; or who patronizes any saloon or place where any intoxicating liquors are sold; or who wanders about the streets in the night time without being on any business or occupation; or who habitually wanders about any railroad yards or tracks; or who habitually jumps on or off of any moving train, or enters any car or engine without lawful authority; or who habitually uses vile, obscene, vulgar, profane or indecent language; or who is guilty of immoral conduct in any public place.⁵²

51. *Dendy v. Wilson*, 142 Tex. 460, 179 S.W.2d 269, 275 (1944); *Ex parte Miranda*, 415 S.W.2d 413 (Tex. Crim. App. 1967) (2 defendants, one 15 and the other 16 at commission, both 17 at criminal trial for murder); *Foster v. State*, 400 S.W.2d 552 (Tex. Crim. App. 1966) (15 at commission, 17 at criminal trial for murder); *Ex parte Sawyer*, 386 S.W.2d 275 (Tex. Crim. App. 1964) (15 at commission, 17 at criminal trial for two murders); *Hultin v. State*, 171 Tex. Crim. 425, 351 S.W.2d 248 (1961) (16 at commission, 17 at criminal trial for murder with malice aforethought of Ruble, with interim spent at training school because of commitment for delinquency based on aggravated assault on Lethcoe and murder of Ruble); *Martinez v. State*, 171 Tex. Crim. 443, 350 S.W.2d 929 (1961) (13 at commission, 17 at criminal trial for murder, with interim spent at training school because of commitment for delinquency based on assault with intent to rob, arising out of same incident); *Perry v. State*, 171 Tex. Crim. 282, 350 S.W.2d 21 (1961) (16 at commission, 17 at criminal trial for murder, with interim spent at training school because of commitment for delinquency based on unlawfully carrying a pistol, part of same incident); *Elliot v. State*, 168 Tex. Crim. 140, 324 S.W.2d 218 (1959) (16 at commission, 17 at criminal trial for rape, with interim spent at training school where he was an inmate at time of the rape); *Peterson v. State*, 156 Tex. Crim. 105, 235 S.W.2d 138, *cert. denied*, 341 U.S. 932 (1951) (girl 17 at commission of murder, 18 at criminal trial); *Roberts v. State*, 153 Tex. Crim. 308, 219 S.W.2d 1016 (1949) (15 at commission of murder, 17 at trial, with parole from juvenile training school revoked during the interim); *Northern v. State*, 152 Tex. Crim. 569, 216 S.W.2d 192 (1949); *Dearing v. State*, 151 Tex. Crim. 6, 204 S.W.2d 983 (1947) (16 at commission, 17 at trial); *Dillard v. State*, 439 S.W.2d 460 (Tex. Civ. App.—Houston 1969, writ ref'd n.r.e.); *State v. Garza*, 358 S.W.2d 749 (Tex. Civ. App.—San Antonio 1962, no writ); *State v. Ferrell*, 209 S.W.2d 642 (Tex. Civ. App.—Fort Worth 1948, writ ref'd n.r.e.) (girl 17 at commission and at juvenile court hearing that was reversed and remanded; since she was past 18 at time the court of appeals wrote its opinion, she was no longer within the juvenile court's jurisdiction and any subsequent trial would be in criminal court); *see Solis v. State*, 418 S.W.2d 265 (Tex. Civ. App.—San Antonio 1967, no writ).

52. Tex. Laws 1907, ch. 65, § 1, at 137-38. Section 1 was codified as TEX. REV. CIV. STAT. tit. 33b, § 1 (Supp. 1908) and recodified as TEX. REV. CIV. STAT. art. 2191 (1911), (1914), and as TEX. CODE CRIM. P. art. 1197 (1911).

Tex. Laws 1913, ch. 112, § 3, at 215, amended the definition of a delinquent child by deleting

In 1915 a compulsory education bill was passed which provided for public school attendance of children between 8 and 14. It specifically provided that violation of the compulsory education law could be delinquency.⁵³ In 1918 the part of the statute dealing with felonies and misdemeanors was held inoperative as applied to girls.⁵⁴ The legislature responded by providing a procedure whereby a female under 18 who was charged with a felony could be tried as a delinquent.⁵⁵ The 1925 and 1936 codes used basically the 1918 definition for delinquent child with only minor changes.⁵⁶ During this period the words *incorrigible* and *habitual* were defined. An *incorrigible* was one whose reformation could not be effected by the control to which he was subject, but to bring it about the intervention of the power of the state would be necessary.⁵⁷ *Habitual* was defined as formed or acquired by or resulting

one "who habitually uses vile, obscene, vulgar, profane or indecent language." TEX. REV. CIV. STAT. art. 2191 (1911) was not amended. TEX. CODE CRIM. P. art. 1197 (1911), as amended in 1913, was codified as TEX. CODE CRIM. P. art. 1197 (1916).

53. Tex. Laws 1915, ch. 49, § 9, codified as TEX. CODE CRIM. P. art. 1207c (1916).

54. *Ex parte* McLoud, 82 Tex. Crim. 299, 200 S.W. 394, 396-97 (1917):

We believe that in the absence of some provision such as that contained in article 1195, supra, with reference to boys, exempting them from prosecution under the ordinary criminal laws of the state, that article 1197 is inoperative in so far as it occupies the same field as the statutes against felonies and misdemeanors, and that it is effective only as to that part of the article which is not in conflict with the other criminal laws of the state (*Cole v. State of Texas ex rel. Cobolini*, 106 Tex. 472, 170 S.W. 1036); that is to say, that part of it is effective only which defines a delinquent child as a female under 18 years of age who is incorrigible, or who knowingly associates with thieves, vicious or immoral persons, or who knowingly visits a house of ill repute, or who knowingly patronizes or visits any place where any gambling device is or shall be operated, or who patronizes any saloon or place where any intoxicating liquors are sold, or who habitually wanders about the streets in the nighttime without being on any business or occupation, or who habitually wanders about any railroad yards or tracks, or who is guilty of immoral conduct in any public place; and we believe that the statute is inoperative in failing to fix any measure by which the jury is authorized to determine the terms of duration or place of confinement.

55. Tex. Laws, 4th Spec. Sess. 1918, ch. 26, § 1, at 43-44, amending TEX. CODE CRIM. P. art. 1197 (1916), construed in *Williams v. State*, 88 Tex. Crim. 214, 225 S.W. 173 (1920) (perjury); *Slade v. State*, 85 Tex. Crim. 358, 212 S.W. 661 (1919). In the process the definition was amended by changing "who violates any laws of this State, or any city ordinance" to "who violates any law of this State."

56. "[W]ho violates any law of this State" was changed to "who violates any penal law of this State"; "who knowingly patronizes or visits any place where any gambling device is or shall be operated" was changed to "who knowingly patronizes or visits any place where a gambling device is being operated"; "who habitually jumps on or off of any moving train" was changed to "habitually jumps on and off moving trains"; and "who patronizes any saloon or place where any intoxicating liquors are sold" was deleted. TEX. CODE CRIM. P. art. 1083 (1925), (1936). The repeal of article 1083 by Tex. Laws 1937, ch. 492, § 6, at 1330, had no effect on the acts that would constitute delinquency since the same acts appeared in the new definition. Tex. Laws 1937, ch. 492, § 1, at 1328.

57. *Hogue v. State*, 87 Tex. Crim. 170, 220 S.W. 96 (1920).

from habit, frequent use, or custom. Single or occasional acts would not be habitual.⁵⁸

A new definition for the delinquent child was adopted in 1943. He was one

- (a) who violates any penal law of this state of the grade of felony;
- (b) or who violates any penal law of this state of the grade of misdemeanor where the punishment prescribed for such offense may be by confinement in jail;
- (c) or who habitually violates any penal law of this state of the grade of misdemeanor where the punishment prescribed for such offense is by pecuniary fine only;
- (d) or who habitually violates any penal ordinance of a political subdivision of this state;
- (e) or who habitually violates a compulsory school attendance law of this state;
- (f) or who habitually so deports himself as to injure or endanger the morals or health of himself or others;
- (g) or who habitually associates with vicious and immoral persons.⁵⁹

1951 legislation, cumulative with the juvenile court act,⁶⁰ proscribed certain motor vehicle conduct committed by a minor between 14 and 17. The provisions were repealed in 1957 and new legislation made driving while intoxicated by a male 14 to 17 or a female 14 to 18 a misdemeanor punishable by fine.⁶¹ An amendment in 1967 provided that the plea of guilty be made in open court before the judge and that there be no conviction except in the presence of one or both parents or guardians.⁶²

58. *Meggs v. State*, 101 Tex. Crim. 415, 276 S.W. 262 (1925).

59. Tex. Laws 1943, ch. 204, § 3, at 313, codified as TEX. REV. CIV. STAT. art. 2338-1, § 3 (Supp. 1943), (1948), and TEX. REV. CIV. STAT. ANN. art. 2338-1, § 3 (1964). In 1965 section 3 was amended but the acts constituting delinquency remained unchanged. Tex. Laws 1965, ch. 577, § 1, codified as TEX. REV. CIV. STAT. art. 2338-1, § 3 (Supp. 1966). Section 3 was amended in 1967 but again without change as to the acts constituting delinquency. Tex. Laws 1967, ch. 475, § 2, codified as TEX. REV. CIV. STAT. art. 2338-1, § 3 (Supp. 1968).

The vagueness of section 3(f) has been raised on several occasions but without success. *E.S.G. v. State*, 447 S.W.2d 225 (Tex. Civ. App.—San Antonio 1969, writ ref'd n.r.e.) (rejected by the majority); *Leach v. State*, 428 S.W.2d 817, 821 (Tex. Civ. App.—Houston 1968, no writ) (concurring opinion).

60. Tex. Laws 1951, ch. 436, §§ 1-5, at 786-87.

61. Tex. Laws 1957, ch. 302, §§ 1-7, at 736-37.

62. Tex. Laws 1967, ch. 476, §§ 1-2, at 1086-87. Section 1a appears in TEX. PEN. CODE ANN. art. 802e, § 1a (Supp. 1969-1970).

The 1907 juvenile court act required an arrested child to be taken directly before the juvenile court. If for any reason he was taken instead before a justice of the peace or a police court, it was the duty of the justice of the peace or city judge to transfer the case to the juvenile court where the case would be heard as if it had been brought there in the first instance.⁶³ At first the juvenile court act did not require every case to be brought to juvenile court. Only cases begun in the justice of the peace or police courts were required to be transferred. There was no requirement that a felony case on the criminal docket of the district court had to be transferred. Transfer was left to the discretion of the criminal court judge.⁶⁴ In 1917 discretion was eliminated in favor of

63. Tex. Laws 1907, ch. 65, § 5, at 139:

[W]hen any child sixteen years of age or under is arrested on any charge, with or without warrant, such child, instead of being taken before a justice of the peace or any police court, shall be taken directly before the county or district court, or, if the child should be taken before a justice of the peace or a police court upon a complaint sworn out in such court or for any other reason, it shall be the duty of such justice of the peace or city judge to transfer the case to said county or district court, and in any such case the court may hear and proceed to dispose of the case in the same manner as if such child had been brought before the court upon information originally filed as herein provided.

Section 5 was codified as TEX. REV. CIV. STAT. tit. 33b, § 5 (Supp. 1908) and recodified as TEX. REV. CIV. STAT. art. 2195 (1911), (1914), and as TEX. CODE CRIM. P. art. 1201 (1911). In 1913, Tex. Laws 1913, ch. 112, § 7, at 216, amended TEX. CODE CRIM. P. art. 1201 (1911) to change "any child sixteen-years of age or under" to "any male child under seventeen years of age, or female child under eighteen years of age." This amended version was recodified as TEX. CODE CRIM. P. art. 1088 (1925), (1936), and construed in *Continental Cas. Co. v. Miller*, 135 S.W.2d 501 (Tex. Civ. App.—Waco 1940, no writ) (action for damages for unlawful arrest and imprisonment); *Osbörne v. Brooks*, 75 S.W.2d 963 (Tex. Civ. App.—San Antonio 1934, no writ).

64. Tex. Laws 1907, ch. 65, § 9, at 140:

Whenever it shall appear to the district court of this State that any person being prosecuted in such court for a felony is a child under sixteen years of age, such court shall have authority to order such prosecution dismissed and to order such child to be committed to the juvenile court of the county in which such district court is being held, for such action and disposition as said juvenile court may think proper in the premises.

Section 9 was codified as TEX. REV. CIV. STAT. tit. 33b, § 9 (Supp. 1908), *construed in Ex parte Thomas*, 56 Tex. Crim. 66, 118 S.W. 1053 (1909). In 1909 section 9 was rewritten. Tex. Laws 1909, ch. 55, § 1, at 101-03, *amending* Tex. Laws 1907, ch. 65, § 9. This version was codified as TEX. REV. CIV. STAT. tit. 33b, § 9 (Supp. 1910). The 1911 codification of the civil statutes included the 1907 and not the 1909 provision. TEX. REV. CIV. STAT. art. 2200 (1911).

In 1909 the Code of Criminal Procedure of 1895 was amended to provide that when a male juvenile under 16 was indicted for a felony the judge had the authority to order the prosecution dismissed and order the juvenile turned over to the juvenile court. Tex. Laws 1909, ch. 54, § 1, at 100-01, *amending* TEX. CODE CRIM. P. art. 1145 (1895). Article 1145, *as amended*, became TEX. CODE CRIM. P. art. 1195 (1911), *construed in Ragsdale v. State*, 61 Tex. Crim. 145, 134 S.W. 234 (1911). The court's discretion was not subject to revision without an abuse of discretion. *Arrandell v. State*, 60 Tex. Crim. 350, 131 S.W. 1086 (1910). In 1913, article 1195 was amended by Tex. Laws 1913, ch. 112, § 1, at 214, so that if the male juvenile was under 17 the judge "shall dismiss." Although this language would ordinarily be mandatory, it was construed as

mandatory transfer.⁶⁵ The 1943 laws vested the juvenile court with exclusive original jurisdiction in proceedings governing any delinquent child.⁶⁶ In addition the criminal courts were required to transfer to juvenile court *all* cases where the defendant was a female between 10 and 18 or a male between 10 and 17.⁶⁷ The burden of raising and

discretionary in order to be consistent with TEX. REV. CIV. STAT. art. 2200 (1911), (1914), which was still in full force. *McCallen v. State*, 76 Tex. Crim. 353, 174 S.W. 611 (1915); *accord*, *Davis v. State*, 80 Tex. Crim. 118, 188 S.W. 990 (1916); *Townser v. State*, 79 Tex. Crim. 4, 182 S.W. 1104 (1916). Article 1195, as amended in 1913, appeared as TEX. CODE CRIM. P. art. 1195 (1916). In 1918 the code was amended to apply to females under 18. Tex. Laws, 4th Spec. Sess. 1918, ch. 26, § 1, at 44, *amending* TEX. CODE CRIM. P. art. 1197 (1916), *construed in* *Slade v. State*, 85 Tex. Crim. 358, 212 S.W. 661 (1919); *cf. Ex parte McLoud*, 82 Tex. Crim. 299, 200 S.W. 394 (1917); *Townser v. State*, 79 Tex. Crim. 4, 182 S.W. 1104 (1916).

65. The change was judicial. *McLaren v. State*, 82 Tex. Crim. 449, 199 S.W. 811 (1917), after distinguishing *McCallen v. State*, 76 Tex. Crim. 353, 174 S.W. 611 (1915), and *Townser v. State*, 79 Tex. Crim. 4, 182 S.W. 1104 (1916), held that under TEX. CODE CRIM. P. art. 1195 (1916) transfer of felony cases was mandatory.

TEX. CODE CRIM. P. art. 1084 (1925), (1936) (indictment), *construed in* *Singleton v. State*, 104 Tex. Crim. 9, 282 S.W. 804 (1926), combined TEX. CODE CRIM. P. art. 1195 (1916) (which dealt with males) and Tex. Laws, 4th Spec. Sess. 1918, ch. 26, § 1, at 44 (which dealt with females). These older acts had required the judge, if satisfied from the evidence that the juvenile was a male under 17 or a female under 18, to dismiss the prosecution and proceed to try the juvenile as a delinquent, under the provisions of the act. The new provision required the judge to transfer the case to the juvenile docket and proceed, under the same indictment, to try the child as a delinquent. *Accord*, TEX. CODE CRIM. P. art. 1085 (1925), (1936) (information and complaint).

66. Tex. Laws 1943, ch. 204, § 5, at 314, codified as TEX. REV. CIV. STAT. art. 2338-1, § 5 (Supp. 1943), (1948), and TEX. REV. CIV. STAT. ANN. art. 2338-1, § 5 (1964). In 1965 the last paragraph, pertaining to continued jurisdiction, was amended by Tex. Laws 1965, ch. 577, § 2, codified as TEX. REV. CIV. STAT. art. 2338-1, § 5 (Supp. 1966). In 1967 the first paragraph was amended to provide for waiver of jurisdiction to the appropriate district or criminal district court, and a fourth paragraph was added to permit criminal proceedings against a child for perjury. Tex. Laws 1967, ch. 475, § 3, codified as TEX. REV. CIV. STAT. art. 2338-1, § 5 (Supp. 1968).

Transfers could be made between juvenile courts. Tex. Laws 1943, ch. 204, § 6, at 314, codified as TEX. REV. CIV. STAT. art. 2338-1, § 6 (Supp. 1943), (1948), and TEX. REV. CIV. STAT. ANN. art. 2338-1, § 6 (1964). This paragraph was retained in Tex. Laws 1965, ch. 577, § 3, codified as TEX. REV. CIV. STAT. art. 2338-1, § 6 (Supp. 1966). A similar provision appeared in Tex. Laws 1967, ch. 475, § 4, codified as TEX. REV. CIV. STAT. art. 2338-1, § 6(a) (Supp. 1968):

When a child under the jurisdiction of a court moves from one county to another the court may transfer the case to the court in the county of the child's residence if the transfer is in the child's best interest. The transferring court shall forward transcripts of records in the case to the judge of the receiving court, who shall file them in the office of his clerk.

67. Tex. Laws 1943, ch. 204, § 12, at 316, codified as TEX. REV. CIV. STAT. art. 2338-1, § 12 (Supp. 1943), (1948), and TEX. REV. CIV. STAT. ANN. art. 2338-1, § 12 (1964), *construed in* *Dendy v. Wilson*, 142 Tex. 460, 179 S.W.2d 269, 274 (1944). When section 12 was amended in 1965, it remained the same except for permitting the criminal court to retain children who have been transferred there by the juvenile court under section 6. Tex. Laws 1965, ch. 577, § 4, codified as TEX. REV. CIV. STAT. art. 2338-1, § 12 (Supp. 1966). In *Solis v. State*, 418 S.W.2d 265 (Tex. Civ. App.—San Antonio 1967, no writ), the court held that the juvenile court need not adjudge

proving juvenility was on the defendant.⁶⁸ The question was a matter

the child a delinquent on the same charge that had brought him before the criminal court. In *Solis* the delinquency proceeding was based on assault with intent to murder, while the complaint before the justice court was for murder with malice. The child's argument was an attempt to preclude subsequent criminal prosecution for murder with malice once he became 17.

When section 12 was amended again, in 1967, the paragraph was reworded and a new restriction is found in the last sentence. The addition would seem to strike at the problem raised in *Solis*. Tex. Laws 1967, ch. 475, § 5, codified as TEX. REV. CIV. STAT. art. 2338-1, § 12 (Supp. 1968):

If, while a criminal charge or indictment is pending against any person in a court other than a juvenile court, it is ascertained that the person is a child at the time of the trial for the alleged offense, it is the duty of the court in which the case is pending to transfer the child immediately together with all papers, documents, and records of testimony connected with the case to the juvenile court of the county unless the child is being held under the authority of Section 6 of this Act. The transferring court shall order the child to be taken forthwith to the place of detention designated by the juvenile court, or to the juvenile court itself, or to release the child to the custody of a probation officer or any suitable person to appear before the juvenile court or the probation department of the county at a time designated. The receiving juvenile court shall set the case for hearing and dispose of the case as if it had been instituted in that court originally. Unless the child is subsequently transferred by the juvenile court as provided by Section 6 of this Act, he is not subject to prosecution at any later date for the alleged offense.

68.

[T]he parent, guardian, attorney or next friend of said juvenile or said juvenile himself may file a sworn statement in court setting forth the age of such juvenile at any time before announcement of ready for trial is made in the case. . . .

Tex. Laws 1909, ch. 54, § 1, at 100, *amending* TEX. CODE CRIM. P. art. 1145 (1895). This was codified as TEX. CODE CRIM. P. art. 1195 (1911), (1916), *construed in* *Valdez v. State*, 98 Tex. Crim. 166, 265 S.W. 161 (1924) (waiver); *Robertson v. State*, 92 Tex. Crim. 350, 243 S.W. 1098 (1922); *McRuffin v. State*, 91 Tex. Crim. 569, 240 S.W. 309 (1922); *Fifer v. State*, 90 Tex. Crim. 282, 234 S.W. 409 (1921) (waiver of right to be proceeded against as juvenile); *Flores v. State*, 89 Tex. Crim. 506, 231 S.W. 786 (1921); *Lee v. State*, 86 Tex. Crim. 146, 215 S.W. 326 (1919) (court cannot refuse to hear juvenility issues). These provisions applied only to male delinquents. In 1918, Tex. Laws, 4th Spec. Sess. 1918, ch. 26, § 1, at 43-44, *amending* TEX. CODE CRIM. P. art. 1197 (1916), added a similar provision applying to females. The same provision appeared in TEX. CODE CRIM. P. art. 1084 (1925), (1936) (indictment) and TEX. CODE CRIM. P. art. 1085 (1925), (1936) (information and complaint).

The question of age must have been presented at time of trial. *Rice v. State*, 137 Tex. Crim. 21, 127 S.W.2d 889 (1939) (attempt to raise juvenility issue after court pronounced sentence); *Ex parte Winfield*, 74 Tex. Crim. 457, 168 S.W. 92 (1914) (attempt to raise juvenility issue by habeas corpus after conviction for misdemeanor theft).

With the enactment of the new juvenile court act in 1943, transfer to juvenile court was still required. However, there still appeared to be a way the defendant could waive juvenile court jurisdiction without a waiver statute. This in fact occurred in *Ex parte Huddleston*, 149 Tex. Crim. 388, 194 S.W.2d 401 (1946), where defendant was brought to criminal court. On his plea of guilty, he was convicted of felony theft and sentenced to 2 years' confinement in the penitentiary. He did not appeal from the conviction. After being convicted, he filed a petition for a writ of habeas corpus on the ground that he was only 15 at the time of trial and therefore the criminal court was without jurisdiction. This argument was rejected.

We can regard the proceeding here pursued in no other light than as a collateral attack against the judgment of conviction upon relator's plea of guilty under facts then

for the court and not for the jury.⁶⁹ Transfer could also move in the opposite direction. The early juvenile court had the authority to transfer misdemeanor cases to criminal court for criminal prosecution.⁷⁰ No provision was enacted for the transfer of felony cases to criminal court. The 1925 Code of Criminal Procedure made no mention of transfer from juvenile to criminal court. The past practice of transferring misdemeanor cases that was sanctioned by the revised civil statutes appeared to be revoked by the general repealing clause of the 1925 code, with the result that from 1925 to 1965 no transfer was possible. Then in 1965 the juvenile court was authorized to certify a child 16 or older at the time of the offense to criminal court for prosecution as an adult if the offense would have been a felony if committed by an adult.⁷¹ The following year *Foster v. State* held part of the waiver statute unconstitutional.⁷² The net effect of the 1965

before the court which rendered said judgment not void, but voidable only. If the burden was upon the state in the first instance to show that relator was more than seventeen years old, the burden was discharged when upon the hearing under his plea of guilty relator testified that he was seventeen years old and made the same statement in his confession introduced in evidence. *Id.* at 393, 194 S.W.2d at 404.

The language of the court poses the interesting problem whether the burden of raising the question of juvenility had shifted from the accused to the state. Subsequent cases state that the burden remained on the juvenile. *Northern v. State*, 152 Tex. Crim. 569, 216 S.W.2d 192 (1949); *Ex parte Munoz*, 152 Tex. Crim. 413, 209 S.W.2d 767 (1948) (attempt to raise juvenility issue by habeas corpus after conviction for robbery by assault). Failure to raise the question constitutes a waiver. *Bradley v. State*, 365 S.W.2d 789 (Tex. Crim. App. 1963); *Ex parte Nolden*, 172 Tex. Crim. 553, 360 S.W.2d 151 (1962).

69. *Tucker v. State*, 119 Tex. Crim. 490, 43 S.W.2d 103 (1931); *Robertson v. State*, 93 Tex. Crim. 39, 245 S.W. 443 (1922); *Robertson v. State*, 92 Tex. Crim. 350, 243 S.W. 1098 (1922); *Flores v. State*, 89 Tex. Crim. 506, 231 S.W. 786 (1921); *Flores v. State*, 88 Tex. Crim. 349, 227 S.W. 320 (1921) (trial court's decision, based on sufficient evidence, was binding on the court of criminal appeals); *Jefferson v. State*, 85 Tex. Crim. 614, 214 S.W. 981 (1919).

The representatives of the state were prohibited from making an admission as to age. The male accused must prove to the court by "full and sufficient evidence" that he was less than 17. *Hardie v. State*, 140 Tex. Crim. 368, 144 S.W.2d 571 (1940); *Smith v. State*, 98 Tex. Crim. 409, 266 S.W. 153 (1924).

70. Tex. Laws 1907, ch. 65, § 9, at 140. Section 9 was codified as TEX. REV. CIV. STAT. tit. 33b, § 9 (Supp. 1908). In 1909 Tex. Laws 1909, ch. 55, § 1, at 101-03, amended Tex. Laws 1907, ch. 65, § 9. This version of section 9 was codified as TEX. REV. CIV. STAT. tit. 33b, § 9 (Supp. 1910) and TEX. CODE CRIM. P. art. 1205 (1911). TEX. REV. CIV. STAT. art. 2199 (1911) recodified the 1907 version of section 9. In 1913 TEX. CODE CRIM. P. art. 1205 (1911) was expressly repealed by Tex. Laws 1913, ch. 112, § 13, at 220. TEX. REV. CIV. STAT. art. 2199 (1911) was not amended or expressly repealed but was recodified as TEX. REV. CIV. STAT. art. 2199 (1914). The result was that article 2199 was still in force and the juvenile court judge could order the criminal prosecution of a child charged with a misdemeanor. *McCallen v. State*, 76 Tex. Crim. 353, 174 S.W. 611 (1915); *accord*, *Townser v. State*, 79 Tex. Crim. 4, 182 S.W. 1104 (1916).

71. Tex. Laws 1965, ch. 577, § 3, codified as TEX. REV. CIV. STAT. art. 2338-1, § 6 (Supp. 1966).

72. 400 S.W.2d 552, 557-58 (Tex. Crim. App. 1966) (court affirmed conviction of child who was under 16 at time of commission of offense):

House Bill 444, enacted at the last legislature, amending certain sections of Art.

2338-1 V.C.S. (Acts 59th Leg. 1965, p. 1256, Ch. 577) was approved June 17, 1965. It did not become effective until August 30, 1965, hence was not in effect at the time this case was tried and decided in the trial court.

The provisions added to Art. 2338-1 which concerned us to such extent that the case was re-submitted and re-argued are those which might be construed as barring the trial of any defendant as an adult under any conditions upon a showing that such defendant was under 16 years of age at the time the offense was committed. If this be so, the decisions of this Court in the cases above cited, as to such a defendant under 16 years of age at the time he committed the offense, have been overruled and neither this nor any future conviction of such a defendant without regard to his age at the time of his trial as an adult can stand.

One portion of Section 6 of Article 2338-1 as amended by House Bill 444, Acts 59th Legislature 1965, p. 1256, Ch. 577, provides for the certification of a child 16 years of age or older by the Juvenile Court for criminal proceedings with the provision that no child under 16 years of age at the time the offense is committed shall be so certified.

The Caption of the Act gave notice that it was "providing for transfers of certain cases in Juvenile Courts from the jurisdiction of Juvenile Courts to the jurisdiction of the other courts in this State" and was "providing that certain delinquent children shall be subject to the penal laws and criminal prosecution the same as if they were adults."

The above portion of amended Section 6 conforms to the purpose and intent of the Legislature as expressed in the emergency clause: "The fact that the present law is inadequate to curb juvenile delinquency in this State creates an emergency. * * *"

We find it difficult to understand the further provisions of Section 6 as amended which reads:

"[A]nd no child under sixteen (16) years of age at the time the offense is committed shall be prosecuted as an adult at any later date *unless transferred by the Juvenile Court*, and all such offenses committed by children *not so transferred* shall be subject to disposition by the Juvenile Court only."

If, under the rules of statutory construction, there is any way to construe these provisions so as to conform to the notice in the Caption, and to the purpose and intent of the Legislature as indicated by the Caption and the emergency clause, and leave a statute that is not contradictory, vague and uncertain, we have been unable to find it.

The Caption gave notice to the Legislature and the public that House Bill 444 would provide that certain delinquent children *shall be* subject to the penal laws and criminal prosecution the same as if they were adults, but no notice that the act would provide that male defendants over 17 and females over 18 years of age would no longer be subject to but would be exempt from such penal laws and criminal prosecution if they were under 16 years of age at the time they committed the crime.

That portion of the amendment of Section 6 of Art. 2338-1 which provides "no child under sixteen (16) years of age at the time the offense was committed shall be prosecuted as an adult at any later date unless transferred by the Juvenile Court, and all such offenses committed by children not so transferred shall be subject to disposition by the Juvenile Court only," is so indefinitely framed and of such doubtful construction that it cannot be understood, either from the language in which it is expressed or from some other written law of the state, and must be regarded as wholly inoperative. Art. 6 P.C.; *Ex parte Marshall*, 72 Tex.Cr.R. 83, 161 S.W. 112.

Under the holding of this Court in *Ex parte Meyer*, 172 Tex.Cr.R. 403, 357 S.W.2d 754, and cases cited, such portion of the statute is likewise invalid because the Caption of the Act is misleading and fails to give notice that persons under 16 years of age at the time the offense was committed were to be exempted from penal laws and criminal prosecution.

waiver authorization was demonstrated in *Ex parte Miranda*.⁷³ On December 15, 1965, Rodriguez and Miranda were arrested in connection with an investigation of a murder which had occurred the evening before. Petitions filed in juvenile court alleged that Rodriguez and Miranda had committed sodomy on December 14 and that each had committed a burglary almost a year before. On December 21, 1965, Rodriguez, 15 years, 11 months old, and Miranda, 16 years and 28 days old, were declared delinquent on the basis of the sodomy and burglaries and delivered to Gatesville State School for Boys. On January 24, 1967, after each had become 17, a bench warrant was issued for their return to Hidalgo County on a charge of murder to await the action of the grand jury. On their return they filed applications for writs of habeas corpus, which were denied. On appeal, the court of criminal appeals held that in regard to Rodriguez, who had been under 16 at the time of the juvenile court hearing, the waiver provision of juvenile court jurisdiction no longer applied. Since he was now 17 he could be tried in criminal court for the murder. In regard to Miranda, who had been 16 at the time of the juvenile court hearing, the waiver provision did not require the juvenile court to hold a waiver hearing. Therefore, he could be tried as a delinquent while 16 and then tried as an adult when he became 17.⁷⁴

In 1967 the transfer age was reduced from 16 to 15 and the requirements for transfer were explicitly stated.⁷⁵ However, certain

73. 415 S.W.2d 413 (Tex. Crim. App. 1967). The court's discussion of section 6 was dictum, since the appeal from the judgment remanding appellants to the custody of the sheriff was dismissed because of the return of the indictment the day following the entry of notice of appeal.

74. *Broadway v. State*, 418 S.W.2d 679 (Tex. Crim. App. 1967), was a case of rape by a 16-year-old boy, certified to criminal court under the 1965 amendment to section 6.

75. Tex. Laws 1967, ch. 475, § 4, codified as TEX. REV. CIV. STAT. art. 2338-1, § 6 (Supp. 1968), construed in *In re Buchanan*, 433 S.W.2d 787 (Tex. Civ. App.—Fort Worth 1968, writ ref'd n.r.e.):

(b) If a child is charged with the violation of a penal law of the grade of felony and was fifteen years of age or older at the time of the commission of the alleged offense, the juvenile court may, within a reasonable time after the alleged offense, waive jurisdiction by following the requirements set out in Subsections (c) through (j) of this section, and transfer the child to the appropriate district court or criminal district court for criminal proceedings.

(c) The juvenile court shall conduct an informal hearing under Section 13 of this Act on the issue of waiver of jurisdiction.

(d) Prior to the hearing, the juvenile court shall order and obtain a complete diagnostic study, social evaluation, and full investigation of the child, his circumstances, and the circumstances of the alleged offense.

(e) The juvenile court shall appoint counsel for any child who does not have retained counsel, and shall allow counsel at least ten days to prepare for the hearing.

limitations were built into the system. For example, if the juvenile court held a waiver hearing and the child appealed from the decision to certify, the appeal would be dismissed as moot if at the time the appeal was heard the child had become 17 if a boy or 18 if a girl.⁷⁶ Thus the

The presence of counsel at the hearing may not be avoided or waived. Appointed counsel is entitled to a fee for each day actually spent in court in the amount and from the same source as specified in Article 26.05 of the Code of Criminal Procedure, or any future amendment of that article.

(f) The juvenile court shall give counsel access to all the records relating to the child including the report of the investigation that must precede the hearing in the possession of the court, its staff, or employees. The juvenile court may refuse to reveal the source of any information if it finds that revelation would be injurious to the child or would prejudice the future availability of similar information. If the court refuses to reveal the source of any information and the child or his counsel objects to the refusal, the court shall preserve the identity of the source and make it available to the district or criminal district court if the child is transferred for criminal proceedings.

(g) After full investigation and hearing the juvenile court shall retain jurisdiction of the case unless it determines that, because of the seriousness of the offense or the background of the offender, the welfare of the community requires criminal proceedings.

(h) In making the determination under Subsection (g) of this section, the court shall consider, among other matters:

- (1) whether the alleged offense was against person or property, with greater weight in favor of waiver given to offenses against the person;
- (2) whether the alleged offense was committed in an aggressive and premeditated manner;
- (3) whether there is evidence upon which a grand jury may be expected to return an indictment;
- (4) the sophistication and maturity of the child;
- (5) the record and previous history of the child;
- (6) the prospects of adequate protection of the public and the likelihood of reasonable rehabilitation of the child by use of procedures, services, and facilities currently available to the juvenile court.

(i) If the juvenile court retains jurisdiction, the child is not subject to prosecution at any time for any offense alleged in the petition or for any offense within the knowledge of the juvenile judge as evidenced by anything in the record of the proceeding.

(j) If the juvenile court waives jurisdiction it shall certify its action, including the written order and findings of the court and accompanied by a complaint against the child, and transfer the child to the appropriate district court or criminal district court for criminal proceedings. Upon transfer of the child for criminal proceedings he shall be dealt with as an adult and in accordance with the Code of Criminal Procedure. The transfer of custody is an arrest. However, the examining trial shall be conducted by the district court or criminal district court which may remand the child to the jurisdiction of the juvenile court.

(k) If the child's case is brought to the attention of the grand jury and the grand jury does not indict for the offense charged in the complaint forwarded by the juvenile court, the district court or criminal district court shall certify the grand jury's failure to indict to the juvenile court. Upon receipt of the certification the juvenile court may resume jurisdiction of the child.

76. *Dillard v. State*, 439 S.W.2d 460 (Tex. Civ. App.—Houston 1969, writ ref'd n.r.e.).

child would be subject to the criminal court's jurisdiction, since age at trial and not age at commission controls.

Once juvenile court jurisdiction has attached and the child has been declared a delinquent, when may the court's order be modified or revoked or juvenile court jurisdiction terminated? Before 1965 the child would continue under the jurisdiction of the juvenile court until he became 21, unless discharged prior to becoming 21.⁷⁷ A petition could be filed with the juvenile court to modify or revoke an order of commitment.

This was in no sense a collateral attack on the judgment. It was a direct attack brought in the court in which the judgment was rendered to "revoke or modify" the judgment. Moreover, being filed and heard at the same term of court at which the judgment was rendered, it may be regarded either as a motion for new trial (the court having jurisdiction over the judgment during the term), or as an independent proceeding to set the judgment aside. Here the nomenclature is not of substantial importance.⁷⁸

In 1965 the juvenile court lost some of its power to modify or revoke, or terminate jurisdiction. Juvenile court jurisdiction continued until the child was discharged by the court or until he became 21, but only in those cases where he was not committed to the Texas Youth Council.⁷⁹ Once the juvenile court committed the child to the "control of the agency of the state charged with the care, training, control of, or parole of delinquent children," its jurisdiction over the child ended.

B. Juvenile Court Procedure

1. Before Hearing

The 1907 juvenile court act provided that juvenile court proceedings were to be instituted by sworn complaint and information filed by the county attorney.⁸⁰ When an indictment for a felony was

77. TEX. REV. CIV. STAT. ANN. art. 2338-1, § 5 (1964).

78. *Reyna v. State*, 206 S.W.2d 651, 653 (Tex. Civ. App.—Austin 1947, no writ) (no motion for new trial or appeal taken within 5 days as provided by statute).

79. Tex. Laws 1965, ch. 577, § 2, at 1257; Tex. Laws 1967, ch. 475, § 3, at 1083, codified as TEX. REV. CIV. STAT. art. 2338-1, § 5 (Supp. 1968), construed in *Lee v. State*, 425 S.W.2d 698, 699 (Tex. Civ. App.—San Antonio 1968, no writ).

80. Tex. Laws 1907, ch. 65, § 3, at 138. Section 3 was codified as TEX. REV. CIV. STAT. tit. 33b, § 3 (Supp. 1908) and recodified as TEX. REV. CIV. STAT. art. 2193 (1911), (1914), and as TEX. CODE CRIM. P. art. 1199 (1911). The 1913 revision of the code, Tex. Laws 1913, ch. 112, § 5, at 215, left article 1199 intact. TEX. CODE CRIM. P. art. 1199 (1916), construed in *Ex parte Roach*, 87 Tex. Crim. 370, 221 S.W. 975 (1920).

In 1909 the juvenile court act was amended so a parent or guardian of an incorrigible boy

dismissed from the docket of the district court and the case transferred to the juvenile docket, it was necessary to file a complaint and information against the juvenile. He could not be proceeded against as a delinquent under the indictment.⁸¹ The complaint and information had to set forth the acts of delinquency with sufficient certainty to enable the accused to understand the charge. In most instances, the mere recitation of the language of the statute was sufficient. Others, such as incorrigibility, required a more detailed statement.⁸² The information did not have to state that the act committed constituted the accused a delinquent child.⁸³ The complaint and information were

could present a petition to the juvenile court to have the boy committed. No comparable provision existed for incorrigible girls. *Tex. Laws 1909, ch. 55, § 1, at 101-03, amending Tex. Laws 1907, ch. 65, § 9.* Although this version of section 9 was codified as *TEX. REV. CIV. STAT. tit. 33b, § 9 (Supp. 1910)*, it did not appear in *TEX. REV. CIV. STAT. (1911)*. It did appear as *TEX. CODE CRIM. P. art. 1206 (1911)*. Except for raising the age to 17, *Tex. Laws 1913, ch. 112, § 11, at 219*, left this code provision unchanged. *TEX. CODE CRIM. P. art. 1206 (1916), construed in Ex parte Davis, 85 Tex. Crim. 218, 211 S.W. 456 (1919).*

81. *Ex parte Ramseur, 81 Tex. Crim. 413, 195 S.W. 864 (1917); accord, Brown v. State, 99 Tex. Crim. 70, 268 S.W. 460 (1925); Ex parte Ellis, 82 Tex. Crim. 641, 200 S.W. 840 (1918); Ex parte Medrano, 81 Tex. Crim. 388, 195 S.W. 865 (1917).*

82. *Rose v. State, 137 Tex. Crim. 316, 129 S.W.2d 639 (1939)* (degree of specificity of the specific crime); *Moore v. State, 111 Tex. Crim. 461, 14 S.W.2d 1041 (1929)* (allegation of "incorrigible" without more was insufficient); *Ex parte Douglas, 109 Tex. Crim. 463, 5 S.W.2d 153 (1928)* ("then and there unlawfully loiter on the public streets and refuse to obey her parents" could not be the basis of prosecution); *Meggs v. State, 101 Tex. Crim. 415, 276 S.W. 262 (1925)* ("was then and there and is incorrigible" was insufficient but "did then and there habitually wander about the streets of the city of Fort Worth, in the nighttime, without being on any business or occupation" was sufficient); *Ex parte Gordon, 89 Tex. Crim. 125, 232 S.W. 520 (1921)* (incorrigible insufficient); *Ex parte Roach, 87 Tex. Crim. 370, 221 S.W. 975 (1920)* (incorrigible insufficient); *Hogue v. State, 87 Tex. Crim. 170, 220 S.W. 96 (1920)* (incorrigible insufficient).

In *Fleming v. State, 102 Tex. Crim. 530, 278 S.W. 846 (1925)*, the charging part of the information read:

* * * With force and arms did unlawfully hereto commit offenses enumerated herein such as to constitute said Kermit Fleming a delinquent child. Said offenses complained of are as follows: Did on or about 3d day of March, 1925, commit the offense of burglary, by breaking into the hardware store of J. F. Henslee in Cooper, Delta County, Tex. Did on or about 3d day of March, 1925, commit the offense of theft over \$50 by taking from the possession of J. F. Henslee, without the consent of said J. F. Henslee, pistols of more than the value of \$50. Did on or about 6th of March, 1925, commit the offense of robbery with firearms, by forcing one Alvin Taylor, by threats of life, to deliver to him certain money to the amount of \$3, contrary to the form and statute in such cases made and provided, and against the peace and dignity of the state.

The court held that the motion to quash should have been sustained because in none of the subdivisions of the information were there contained averments sufficient to charge the felony named therein.

83. *Davis v. State, 113 Tex. Crim. 429, 21 S.W.2d 1068 (1929).*

fatally defective if they did not state that the accused was within the juvenile court's age bracket.⁸⁴

The 1925 Code of Criminal Procedure eliminated the prohibition against proceeding against a delinquent under an indictment. The new code provided that the juvenile could be proceeded against under an information and complaint or under an indictment.⁸⁵ Proceedings based on an information without a complaint or on a complaint without an information were a nullity.⁸⁶ Once the law was changed so that the juvenile could be tried in juvenile court on an indictment transferred

84. In 1918, Tex. Laws, 4th Spec. Sess. 1918, ch. 26, § 1, at 44, added a provision to TEX. CODE CRIM. P. art. 1197 (1916):

Any proceeding under this Act begun by information and sworn complaint which states upon its face the age of the child as under seventeen years in the case of males and under eighteen years in the case of females, shall not be regarded as charging such child with a felony or a misdemeanor, but as a delinquent child, although such acts would otherwise charge a felony or a misdemeanor. . . .

A motion to quash was the proper place for raising the failure to specify age. If the defendant waited until after the judgment was rendered, it was too late. *Ex parte Chandler*, 99 Tex. Crim. 255, 268 S.W. 749 (1925) (original application for habeas corpus); *Gordon v. State*, 89 Tex. Crim. 59, 228 S.W. 1095 (1921) (motion in arrest of judgment).

TEX. CODE CRIM. P. art. 1085 (1925), (1936):

A proceeding against a delinquent child may be begun by an information based upon a sworn complaint, each of which shall state in general terms that the acts alleged constitute such child a delinquent child, and shall conform in other respects to the rules governing prosecutions for misdemeanors begun by information and complaint. Any proceeding so begun which states upon the face of the information that the age of the child is under seventeen in the case of males and under eighteen years in the case of females shall not be regarded as charging said child with a felony or a misdemeanor but as a delinquent child, although such acts alleged would otherwise charge a felony or a misdemeanor. If such pleading does not allege the age of the accused, then the accused, his or her parent, guardian, attorney or next friend, may make and file an affidavit at any time before announcement of ready setting up the age of the accused, and on proof that such age is within the juvenile limits, the case shall be transferred to the juvenile docket, or, if the court is not a juvenile court to the proper juvenile court, entered on the juvenile docket and proceeded with against the accused as a delinquent child upon the same information and complaint.

See *Stewart v. State*, 110 Tex. Crim. 145, 8 S.W.2d 140 (1928).

With the enactment of a minimum age of 10, the complaint and information were insufficient to confer active jurisdiction on the court and over the subject if it were not alleged that the child was over 10. *Barron v. State*, 142 Tex. Crim. 292, 152 S.W.2d 760 (1941); *Beadles v. State*, 139 Tex. Crim. 1, 138 S.W.2d 809 (1940); *Haywood v. State*, 138 Tex. Crim. 413, 136 S.W.2d 866 (1940); *Rose v. State*, 137 Tex. Crim. 316, 129 S.W.2d 639 (1939).

85. TEX. CODE CRIM. P. arts. 1084 (1925), (1936) (indictment) and 1085 (1925), (1936) (information and complaint). See *Osborne v. Brooks*, 75 S.W.2d 963 (Tex. Civ. App.—San Antonio 1934, no writ).

86. Information without a complaint: *Ex parte Tomlin*, 107 Tex. Crim. 643, 298 S.W. 902 (1927). Complaint without an information: *Ex parte Boggs*, 146 Tex. Crim. 86, 171 S.W.2d 879 (1943); *Barron v. State*, 142 Tex. Crim. 292, 152 S.W.2d 760 (1941); *Nunn v. State*, 132 Tex. Crim. 613, 106 S.W.2d 702 (1937).

from criminal court, the court noted that since the indictment would not have contained an allegation as to the accused's age the omission would not make the indictment defective in juvenile court.⁸⁷ However, with the enactment of a minimum age for juvenile court jurisdiction, the indictment would have been defective had it not alleged that the accused was above the minimum age of 10.⁸⁸

In 1943 the procedure was changed so that the county attorney or any attorney could prepare and file in the juvenile court a "petition" alleging delinquency. No longer were the proceedings to be instituted by information and complaint or indictment.⁸⁹ The 1943 Revised Civil Statutes expressly required the delinquency petition to allege briefly:

the facts which bring said child within the provisions of this Act, and stating: (1) the name, age and residence of the child; the names and residences, (2) of his parents, (3) of his legal guardian, if there be one; (4) of the person or persons having custody or control of the child; and (5) of the nearest known relative, if no parent or guardian can be found. If any of the facts herein required are not known by the petitioner, the petition shall so state.⁹⁰

In order for the petition to allege "briefly the facts which bring said child within the provisions of this Act," it is essential to state in the petition that the child committed one of the seven acts enumerated in the juvenile court act that would constitute delinquency. Failure to do so renders the petition insufficient to charge a violation of the juvenile delinquency act. Such was the case in *Ballard v. State*,⁹¹ in which the

87. *Davis v. State*, 113 Tex. Crim. 429, 21 S.W.2d 1068 (1929); *Stewart v. State*, 110 Tex. Crim. 145, 8 S.W.2d 140 (1928).

88. *Haywood v. State*, 138 Tex. Crim. 413, 136 S.W.2d 866 (1940) (dictum).

89. Tex. Laws 1943, ch. 204, § 7, at 314, codified as TEX. REV. CIV. STAT. art. 2338-1, § 7 (Supp. 1943), (1948), and TEX. REV. CIV. STAT. ANN. art. 2338-1, § 7 (1964). Tex. Laws 1943, ch. 204, § 7-A, at 314-15, codified as TEX. REV. CIV. STAT. art. 2338-1, § 7-A (Supp. 1943), (1948), and TEX. REV. CIV. STAT. ANN. art. 2338-1, § 7-A (1964), established venue.

90. Tex. Laws 1943, ch. 204, § 7, at 314, codified as TEX. REV. CIV. STAT. art. 2338-1, § 7 (Supp. 1943), (1948), and TEX. REV. CIV. STAT. ANN. art. 2338-1, § 7 (1964), construed in *Hawkins v. State*, 401 S.W.2d 301 (Tex. Civ. App.—Houston 1966, no writ) (petition failed to allege the names and residences of the child's parents or to state that these facts were unknown); *In re Fisher*, 184 S.W.2d 519 (Tex. Civ. App.—Amarillo 1944, no writ).

91. 192 S.W.2d 329 (Tex. Civ. App.—Amarillo 1946, no writ). A similar problem occurred in *Ex parte Yelton*, 298 S.W.2d 285 (Tex. Civ. App.—Beaumont 1957, no writ); the girl was charged with unlawfully wandering about the streets without being on any business or occupation, against the peace and dignity of the state. *Viall v. State*, 423 S.W.2d 186 (Tex. Civ. App.—Amarillo 1967, no writ) (petition alleged that each boy "habitually deported himself so as to injure and endanger the morals of himself"); *Johnson v. State*, 401 S.W.2d 298 (Tex. Civ. App.—Houston 1966, no writ) (petition alleged that the child had "habitually violated the penal ordinances"); *Carter v. State*, 342 S.W.2d 593 (Tex. Civ. App.—Amarillo 1961, no writ) (petition alleged that "said child is a delinquent child under the law").

petition charged that the child "injured public property, to-wit, a sewer pipe belonging to the City of Ralls, Texas" but did not charge that this was done in violation of "any penal ordinance of a political subdivision of this State," as was one of the seven enumerated delinquent acts. Another case was *Robinson v. State*,⁹² in which the petition read "that said child is a delinquent child under the law: 5 cases of Arson, a violation of the Penal Law of the State of Texas, of the grade of felony." The court of appeals sustained the exception that contended that the petition was

indefinite and uncertain and so vague that it makes it impossible for the defendant to properly prepare his defense, to-wit: That the names of the owners of the property involved in the five charges of arson are not given, that the time of the commission of the offenses is not stated, nor is the location of the property set out, nor is the offense of arson stated in a statutory manner.

Beginning with the 1907 juvenile court act, the notice provision appeared directed at giving the parents notice that juvenile court proceedings were to be held so that they would be responsible for the child's presence in court. A parent's promise to have the child present would alleviate the necessity of the child's incarceration prior to hearing.⁹³ The courts, however, did not limit notice to the threat of incarceration but instead considered notice to the child's parent or guardian imperative in all situations so that the parent would have adequate warning of the charge in order to prepare a defense.⁹⁴ No provision existed for supplying the child with notice.

92. 204 S.W.2d 981, 982 (Tex. Civ. App.—Austin 1947, no writ).

93. Tex. Laws 1907, ch. 65, § 4, at 138. Section 4 was codified as TEX. REV. CIV. STAT. tit. 33b, § 4 (Supp. 1908), and recodified as TEX. REV. CIV. STAT. art. 2194 (1911), and codified as TEX. CODE CRIM. P. art. 1200 (1911). This part of article 1200 was left intact by Tex. Laws 1913, ch. 112, § 6, at 215-16, and appeared as TEX. CODE CRIM. P. art. 1200 (1916), construed in *Ex parte Cain*, 86 Tex. Crim. 509, 217 S.W. 386, 388 (1920). The notice and service requirements of the 1925 code were the same as those appearing in the 1916 code. TEX. CODE CRIM. P. art. 1087 (1925).

94. *Ex parte Webb*, 109 Tex. Crim. 192, 3 S.W.2d 810 (1928); *Ex parte Tomlin*, 107 Tex. Crim. 643, 298 S.W. 902 (1927); *Ex parte Burkhart*, 94 Tex. Crim. 583, 253 S.W. 259, 260 (1923) (motion for rehearing); *Ex parte Gordon*, 89 Tex. Crim. 125, 232 S.W. 520 (1921).

Saliz v. State, 142 Tex. Crim. 278, 152 S.W.2d 367 (1941), held that verbal notice, as opposed to written notice, was not reversible error when the object and purpose of the statute were attained by the presence of the parent with the child at the trial.

The father was not required to have been notified of proceedings before the criminal court judge to determine whether the accused was within the juvenile court age bracket. The notice provision applied only to proceedings before the juvenile court. *Singleton v. State*, 104 Tex. Crim. 9, 282 S.W. 804 (1926).

In 1943 a new summons and notice provision was enacted⁹⁵ along with instructions on service of the summons.⁹⁶ Basically the act required the service of notice or summons on the child's parents or his guardian unless they "shall voluntarily appear." When the parents received oral notification and attended the hearings, the statutory requirement was satisfied.⁹⁷ However, if the parents received merely a

95. Tex. Laws 1943, ch. 204, § 8, at 315, codified as TEX. REV. CIV. STAT. art. 2338-1, § 8 (Supp. 1943), (1948), and TEX. REV. CIV. STAT. ANN. art. 2338-1, § 8 (1964).

96. Tex. Laws 1943, ch. 204, § 9, at 315, codified as TEX. REV. CIV. STAT. art. 2338-1, § 9 (Supp. 1943), (1948), and TEX. REV. CIV. STAT. ANN. art. 2338-1, § 9 (1964). Tex. Laws 1943, ch. 204, § 10, at 315, codified as TEX. REV. CIV. STAT. art. 2338-1, § 10 (Supp. 1943), (1948), and TEX. REV. CIV. STAT. ANN. art. 2338-1, § 10 (1964):

If any person summoned as herein provided shall, without reasonable cause, fail to appear, he may be proceeded against for contempt of court. In case the summons cannot be served, or the parties served fail to obey the same, or in any case when it shall be made to appear to the Judge that the servicing will be ineffectual, or the welfare of the child requires that he shall be brought forthwith into the custody of the court, a warrant may be issued against the child himself.

97. *In re Gonzalez*, 328 S.W.2d 475 (Tex. Civ. App.—El Paso 1959, writ ref'd n.r.e.); *Lazaros v. State*, 228 S.W.2d 972 (Tex. Civ. App.—Dallas 1950, no writ); *In re Fisher*, 184 S.W.2d 519 (Tex. Civ. App.—Amarillo 1944, no writ); see *Williams v. State*, 219 S.W.2d 509 (Tex. Civ. App.—Galveston 1949, no writ) (mother made complaint to probation department and was present at each proceeding).

Hawkins v. State, 401 S.W.2d 301, 302-03 (Tex. Civ. App.—Houston 1966, no writ), questioned who must be summoned:

We call attention to the fact that the term "parties hereinafter named," considered in context with the further provisions of Sec. 8, is quite indefinite. If it were necessary to a decision of this case, it would be difficult to determine whether the voluntary appearance of the "person or persons who have the custody or control of the child" alone would dispense with the necessity of a summons; or whether, in addition, the child or the parent or guardian, must voluntarily appear.

In the absence of the voluntary appearance of the required parties, the section requires the service of a summons on the person or persons having the "custody or control" of the child. In addition, where such person is not the parent or guardian of the child, "then the parent *or* guardian, *or* both, shall be notified of the pendency of the case * * * by personal service *before the hearing* * * *." This provision for notice is vague and indefinite. Where there is a guardian, is it necessary to give notice to both parents and the guardian, or to one parent and the guardian, or will notice to the guardian alone, or the parents alone, be sufficient? How long before the hearing must notice be given?

Apparently service of the summons at least two days before the time fixed in the summons "for the return thereof" is jurisdictional. Sec. 9, however, provides that "jurisdiction may be obtained by the court" if the court is satisfied that the parent, guardian, or person having custody of the child cannot be located, but there is no procedure provided for obtaining such jurisdiction. The necessity for *securing* jurisdiction over the child is pointed up by the provisions relating thereto in Sections 5 and 7, Art. 2338-1, V.A.T.S.

In this case no summons was issued. Notice is not specifically required unless a summons to produce the child is served on one other than the parent or guardian. Notice was delivered to the father, but not to the mother. The hearing was held prior

subpoena to appear "as witnesses for the state" and no grounds for delinquency were set out, appearance did not satisfy notice.⁹⁸ In 1967 several of these existing practices were changed by the United States Supreme Court's decision in *In re Gault*.⁹⁹ *Gault* held that for notice of the first hearing to comply with due process (1) the notice must be in writing; (2) it must be given sufficiently in advance of scheduled court proceedings to afford reasonable opportunity to prepare an appearance; and (3) it must set forth the alleged misconduct with particularity.

The 1907 juvenile court act limited incarceration of children pending juvenile court hearing to those cases where it was necessary to insure the attendance of the child in court. The statute further provided that if the child was incarcerated confinement should not be in any compartment of a jail or lockup in which persons over 16 were being detained.¹⁰⁰ In 1913 the code of criminal procedure was amended to increase the age for separate incarceration from 16 to 18 and to add a provision which required counties with a population over 100,000 to provide a suitable place for detention of these children.¹⁰¹ In 1927 the

to the date set in the notice. The judgment does not recite jurisdictional facts, i.e., voluntary appearance or service of a summons. The hearing was had the day following the date of the filing of the petition.

In the absence of a summons served on the father, named in the petition as having the custody and control of the child, or on any other person, and in the absence of a recitation of jurisdictional facts in the judgment, particularly in view of the fact that the notice of the hearing delivered to the father recited that the case was to be heard on the day after the day it was heard and judgment was entered, despite the fact that no statement of facts is in this record, we hesitate to presume that the trial court had jurisdiction by reason of the voluntary appearance of the parties.

These matters are noted, although not necessary to a decision in this case, for the reason that remedial legislation appears to be necessary. It is most unfortunate that doubt and uncertainty as to the procedure to be followed in the initiation and processing of juvenile delinquency petitions necessarily remains.

98. *Reyna v. State*, 206 S.W.2d 651, 653 (Tex. Civ. App.—Austin 1947, no writ).

99. 387 U.S. 1, 33 (1967). The Court's decision on notice was expressly limited to the first hearing. For a discussion of *Gault* and Texas law, see Billings, *The New Juvenile Delinquent Law*, 31 TEX. B.J. 203 (1968); McKay, *Juvenile Law, 1969 A.D., 2 A.G.*, 32 TEX. B.J. 291 (1969); Steele, *Criminal Law and Procedure*, 22 SW. L.J. 211, 214-15 (1968); Comment, *Application of Gault: Its Effect on Juvenile Delinquency Proceedings in Texas*, 20 BAYLOR L. REV. 113 (1967).

100. Tex. Laws 1907, ch. 65, § 4, at 138-39. Section 4 was codified as TEX. REV. CIV. STAT. tit. 33b, § 4 (Supp. 1908) and recodified as TEX. REV. CIV. STAT. art. 2194 (1911), (1914), and as TEX. CODE CRIM. P. art. 1200 (1911). This provision pertained to incarceration pending juvenile court and not criminal court hearing. *Ex parte Thomas*, 56 Tex. Crim. 66, 118 S.W. 1053 (1909).

101. Tex. Laws 1913, ch. 112, § 6, at 215-16, amending TEX. CODE CRIM. P. art. 1200 (1911). TEX. CODE CRIM. P. art. 1200 (1911), as amended in 1913, was codified as TEX. CODE CRIM. P. art. 1200 (1916). A similar provision was adopted in 1925. TEX. CODE CRIM. P. art. 1087 (1925).

legislature, expressing concern that in many counties delinquent children frequently were placed in the same jail and often in the same cell with a habitual criminal, lowered the size of the county in which a separate jail or lockup was required from over 100,000 to over 50,000.¹⁰² The 1943 Revised Civil Statutes provided for custody of the child pending hearing¹⁰³ and specified proper places of detention.¹⁰⁴

Beginning in 1907, juvenile court legislation gave the incarcerated child the right to give bail.¹⁰⁵ During the period when the proceedings in juvenile court were criminal in nature, the rules of criminal procedure applied to the right to reasonable bail pending appeal.¹⁰⁶ When the juvenile court became civil in nature the court discarded the criminal concept of bail. As a result the right to bail pending appeal became discretionary.¹⁰⁷

2. *The Hearing*

a. *The Closed Hearing*

The closed hearing came with the 1943 juvenile court act:

The Act does not require the trial court to conduct the

102. Tex. Laws 1927, ch. 163, § 1, at 236-37, *amending* TEX. CODE CRIM. P. art. 1087 (1925). *Cf.* Continental Cas. Co. v. Miller, 135 S.W.2d 501 (Tex. Civ. App.—Waco 1940, no writ) (action for damages for unlawful arrest and imprisonment) (law of arrest for adults also applies to juveniles).

103. Tex. Laws 1943, ch. 204, § 11, at 315-16, codified as TEX. REV. CIV. STAT. art. 2338-1, § 11 (Supp. 1943), (1948), and TEX. REV. CIV. STAT. ANN. art. 2338-1, § 11 (1964). In *Mendoza v. Baker*, 319 S.W.2d 147 (Tex. Civ. App.—Houston 1958, no writ), the court of civil appeals held that an order from the juvenile court, directing that the child be placed in custody of the supervisor of the juvenile detention home until a final hearing on the delinquency petition, and an order of the juvenile court, refusing to grant the child a writ of habeas corpus releasing him from the supervisor's custody, were temporary orders from which appeals could not be taken to the court of civil appeals.

104. Tex. Laws 1943, ch. 204, § 17, at 317-18, codified as TEX. REV. CIV. STAT. art. 2338-1, § 17 (Supp. 1943), (1948), and TEX. REV. CIV. STAT. ANN. art. 2338-1, § 17 (1964). In 1965 section 17 was amended to exclude those children transferred to criminal court under section 6. Tex. Laws 1965, ch. 577, § 7, codified as TEX. REV. CIV. STAT. art. 2338-1, § 17 (Supp. 1966).

105. Tex. Laws 1907, ch. 65, § 4, at 139. Section 4 was codified as TEX. REV. CIV. STAT. tit. 33b, § 4 (Supp. 1908) and recodified as TEX. REV. CIV. STAT. art. 2194 (1911), (1914) and as TEX. CODE CRIM. P. art. 1200 (1911). This phrase was left intact by Tex. Laws 1913, ch. 112, § 6, at 215, which amended article 1200 and later was recodified as TEX. CODE CRIM. P. arts. 1200 (1916) and 1087 (1925), (1936). *Cf. Ex parte Enderli*, 110 Tex. Crim. 629, 10 S.W.2d 543 (1928) (murder by male under 17 was per se bailable).

106. *Ex parte Osborne*, 127 Tex. Crim. 453, 75 S.W.2d 265 (1934).

107. *Espinosa v. Price*, 144 Tex. 121, 188 S.W.2d 576 (1945). The language treating the matter of bond in delinquency proceedings appeared in Tex. Laws 1943, ch. 204, § 21, codified as TEX. REV. CIV. STAT. art. 2338-1, § 21 (Supp. 1943), (1948), and TEX. REV. CIV. STAT. ANN. art. 2338-1, § 21 (1964). For a discussion of discretionary bond, see *Ex parte Rheude*, 163 Tex. Crim. 39, 289 S.W.2d 239 (1956) (court of criminal appeals refused to consider the matter on the ground that it was a problem for the civil courts); *Thomasson v. State*, 269 S.W.2d 956 (1954), *rev'd on other grounds*, 154 Tex. 151, 275 S.W.2d 463 (1955).

proceedings in such cases behind closed doors and in chambers. It does authorize the trial court to exclude the general public from the hearing of any case if he thinks proper. This is done for the protection of the child and to keep him from being subjected to publicity and possible public ridicule that may have a tendency to destroy his morale and make him worse rather than better. It seems that it will be for the best interests of the child and for the general public that such cases be not publicized. Most parents would not complain at the trial court for excluding the general public from attending such a hearing but would prefer that such be done. We think such a provision is wisely given for the protection of the child if and when the trial court thinks it is proper to exercise such discretion. It is our opinion that this Act was passed making the juvenile court an agency to safeguard the child who, because of the neglect or lack of interest of others, has become a "problem child" and a potential criminal. This Act affords the juvenile court an opportunity to counsel with such a child, give him the proper guidance for good citizenship, counteract any demoralizing influences that may have been leading him astray, and to substitute the court as far as he can for parental supervision in wisely directing the energies of the child. Such can be done best by ascertaining a history of the case, winning the confidence of the child and proving an interest manifestly in his well being. Parents do not attempt such discipline of their children before the general public and it stands to reason that there are times when a juvenile court would consider it for the best interest of the child and society to exclude the general public when he resorts to such methods of discipline. It is our opinion that such a provision in said Act does not contravene either the State or Federal Constitution.¹⁰⁸

b. Consolidation of Two Cases for Trial in One Hearing

The first question concerning consolidation arose immediately after enactment of the 1943 juvenile court act. The court in *In re Dendy* held:

The Act makes no provision for consolidating for trial by the

108. *In re Dendy*, 175 S.W.2d 297, 302-03 (Tex. Civ. App.—Amarillo 1943). The court of appeals concluded that the trial court did not commit error in excluding the general public from the hearing in this case since the record failed to show that the exclusion resulted in any harm. The supreme court affirmed the court of appeals position.

The law also authorizes the trial court to exclude the general public from a hearing of any case, if it thinks proper to do so. This saves the minor from embarrassment, and also permits the court to avoid the publicity that often surrounds the trial of a case. Since the proceedings under this Act must be governed largely by rules governing civil actions, the trial court did not err in excluding the general public from the trial. *Dendy v. Wilson*, 142 Tex. 460, 179 S.W.2d 269, 274 (1944).

trial court of two or more such cases; neither does it prohibit such. Since the trial court is given much discretion in procedure in all cases involving the rights and future destinies of minor children and since the instant cases were parallel cases that grew out of the same transaction and since the record does not disclose any injustice or harm done to either child, we believe the trial court did not abuse his discretion in consolidating the two cases and trying them together and that no error was committed by so doing.¹⁰⁹

c. Right to Counsel and Guardian ad Litem

Beginning with the 1907 juvenile court act, the juvenile court was authorized to appoint counsel to appear and defend on behalf of the child.¹¹⁰ If counsel was waived, the probation officer was authorized to represent the interests of the child when the case was heard.¹¹¹ The early cases held that the court was not required to inform the juvenile and his parents that he was entitled to be represented by counsel.¹¹²

Gault changed the practice for notification of right to counsel. Now, under *Gault*, it is necessary to notify the child *and* his parents that the child has a right to be represented by counsel retained by them or, if they are unable to afford counsel, that counsel will be appointed to represent the child.¹¹³ The counsel aspect of *Gault* had retroactive effect. In *Gutierrez v. State ex rel. Wichita County*¹¹⁴ the child, without being informed of his right to counsel, was adjudged a delinquent in 1963 and placed on probation. In 1968 the child, now represented by counsel, was charged with breach of his probation terms. The juvenile court revoked the prior probation order and committed the juvenile to

109. 175 S.W.2d 297, 303 (Tex. Civ. App.—Amarillo 1943), *aff'd sub nom.* Dendy v. Wilson, 142 Tex. 460, 179 S.W.2d 269, 274 (1944).

110. Tex. Laws 1907, ch. 65, § 4, at 139, codified as TEX. REV. CIV. STAT. tit. 33b, § 4 (Supp. 1908), TEX. REV. CIV. STAT. art. 2194 (1911), (1914), and TEX. CODE CRIM. P. art. 1200 (1911). This part of article 1200 was left intact by Tex. Laws 1913, ch. 112, § 6, at 216, and appeared as TEX. CODE CRIM. P. art. 1200 (1916), *construed in Ex parte* Gordon, 89 Tex. Crim. 125, 232 S.W. 520 (1921). The 1925 and 1936 codes, like the 1916 code, authorized the juvenile court to appoint counsel to defend the child. TEX. CODE CRIM. P. art. 1087 (1925), (1936).

111. Tex. Laws 1907, ch. 65, § 6, at 139, codified as TEX. REV. CIV. STAT. tit. 33b, § 6 (Supp. 1908), and recodified as TEX. REV. CIV. STAT. art. 2196 (1911), (1914), and as TEX. CODE CRIM. P. art. 1202 (1911). For a discussion on the advice of the probation or juvenile officer to the parents on employment of counsel, see *Noble v. State*, 124 Tex. Crim. 162, 61 S.W.2d 494 (1933); *In re Brown*, 201 S.W.2d 844, 855-56 (Tex. Civ. App.—Waco 1947, writ ref'd n.r.e.).

112. *Lazaros v. State*, 228 S.W.2d 972 (Tex. Civ. App.—Dallas 1950, no writ); *cf.* *Hegwood v. Kindrick*, 264 F. Supp. 720 (S.D. Tex. 1967); *Roberts v. Beto*, 245 F. Supp. 235 (S.D. Tex. 1965); *Dudley v. State*, 219 S.W.2d 574 (Tex. Civ. App.—Amarillo 1949, writ ref'd).

113. *In re Gault*, 387 U.S. 1, 41 (1967); *Leach v. State*, 428 S.W.2d 817 (Tex. Civ. App.—Houston 1968, no writ).

114. 433 S.W.2d 777, 779 (Tex. Civ. App.—Fort Worth 1968, no writ).

the custody of the Texas Youth Council. The court of appeals remanded the case to the juvenile court for further proceedings consistent with the principles set out in *Gault*:

Under the law pronounced in *Gault* which we must and do follow, we declare the 1963 decree invalid. It follows that the court in 1968 had no authority to commit appellant to the Youth Council on an order based on said decree.

*In re Gonzalez*¹¹⁵ was the first case to raise the issue of guardian ad litem. Here the child alleged that the juvenile court committed error in failing to appoint for him a guardian ad litem. The court of appeals responded that there was no requirement of this nature in the pertinent statutes and added that it must be remembered that the child's parents had been present at the hearing and trial. The point was therefore overruled. *Lee v. McKay*¹¹⁶ limited the *Gonzalez* opinion to cases where the parent or guardian is present.

d. Privilege Against Self-Incrimination

During the pre-1943 period, the criminal rules pertaining to self-incrimination applied.¹¹⁷ When the procedure was changed to follow civil procedure "as far as practicable," it was not long before the question was raised whether the juvenile court had the power to compel minors to testify against themselves. In *In re Dendy* the court of appeals held that there still existed a privilege against self-incrimination:

[T]here are certain fundamental basic principles of law that men have recognized and observed since time immemorial and our American jurisprudence has followed many such principles and rules of law. One of these rules is that the accused is entitled to have a trial by an impartial jury, if he demands such, and another is that the accused cannot be compelled to give evidence against himself. Numerous authorities hold that a witness cannot be compelled to give evidence

115. 328 S.W.2d 475, 478 (Tex. Civ. App.—El Paso 1959, writ ref'd n.r.e.).

116. 414 S.W.2d 956 (Tex. Civ. App.—San Antonio 1967, writ diss'd); *accord*, *Yzaguirre v. State*, 427 S.W.2d 687 (Tex. Civ. App.—Corpus Christi 1968, no writ). *But see* *Starks v. State*, 449 S.W.2d 559 (Tex. Civ. App.—Eastland 1969).

117. *Miller v. State*, 113 Tex. Crim. 417, 21 S.W.2d 304 (1929). The statement did not show that the accused had been warned by the person to whom the confession was made, that she did not have to make any statement at all, nor did it show that she was advised that any statement made by her might be used in evidence against her on her trial for the offense concerning which the confession was made. *See* *Saliz v. State*, 142 Tex. Crim. 278, 152 S.W.2d 367 (1941) (use of confession in misdemeanor cases).

that will tend either directly or indirectly to incriminate himself, whether the case be civil or criminal. . . . Both the New Century Dictionary and Webster's New International Dictionary define the word "incriminate" as follows: "to charge with a crime or fraud; to accuse, or to involve in an accusation." According to these authorities, it would be error to compel an accused juvenile to give evidence against himself whether the procedure be criminal or civil.

The Act does not require an accused child in such a procedure to testify against himself in such a case and nowhere does the Act require the trial court to follow civil procedure in taking testimony in such cases. We, therefore, believe the trial court committed error in requiring Billy Dendy and L.J. King, Jr. to give evidence, over their objections, against themselves.¹¹⁸

When *Dendy* was appealed, the supreme court further developed the privilege against self-incrimination. Since at that time the child could be proceeded against for the same offense in criminal court, the privilege against self-incrimination should apply to the civil proceedings.¹¹⁹ The juvenile had no concomitant right before testifying to be warned by the juvenile court of his privilege.¹²⁰

With the advent of *Gault*, the child became entitled to a warning.

Appellee has confessed error to the extent of admitting that the record of this case does not clearly show at what time during the

118. 175 S.W.2d 297, 302 (Tex. Civ. App.—Amarillo 1943).

119. *Dendy v. Wilson*, 142 Tex. 460, 179 S.W.2d 269 (1944); see *In re Brown*, 201 S.W.2d 844, 855 (Tex. Civ. App.—Waco 1947, writ ref'd n.r.e.); *Ballard v. State*, 192 S.W.2d 329, 331 (Tex. Civ. App.—Amarillo 1946, no writ). In *Robinson v. State*, 204 S.W.2d 981, 982 (Tex. Civ. App.—Austin 1947, no writ), a nonjury case.

The second and third assignments complain of the admission in evidence of a written confession of the defendant, over the objections, in substance, that: It was not free and voluntary; he was only 12 years old; was in jail at the time; was brought direct from the jail to the county attorney's office; he was not advised that he had a right to be represented by an attorney, and was not so represented. The officers who took the confession testified to its voluntary character, that defendant was warned that anything he might say would be used against him. He was not, however, advised that he had the right to legal counsel, and in fact did not have the advice of such counsel. In the brief, under the assignments, it is urged that he was at the time under illegal arrest, in that various formalities prescribed by Art. 2338-1, Sec. 11, were not complied with. This being a civil proceeding, it was immaterial whether he was under arrest, legal or illegal, at the time the confession was made. While there was some evidence that coercion or intimidation was used in its procurement; such evidence was sufficient only to raise a fact question on that issue. The evidence was clearly sufficient to warrant admission of the confession, even in a criminal proceeding. It was clearly admissible in a civil case.

120. *Williams v. State*, 219 S.W.2d 509 (Tex. Civ. App.—Galveston 1949, no writ).

interrogation of Gary Wayne Choate he was given such warnings by Officer Turner so as to show a knowing and intelligent waiver of his privilege to remain silent.

Inculpatory admissions made prior to a waiver of the privilege against self-incrimination are not admissible. *Miranda v. State of Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Appellee's brief shows that appellee recognizes that by *In re Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967), the United States Supreme Court has made applicable to juveniles the privilege against self-incrimination as it was applied to adults in *Miranda v. Arizona*, *supra*.

The same privilege arises in connection with both the signed statement and the search of appellants' home.

As this case was developed in the trial court the written statement of Gary Wayne Choate, which was admitted in evidence over appellants' objection, was crucial in establishing the State's position.

In accordance with Rule 434, Texas Rules of Civil Procedure, the judgment of the Trial Court is reversed and remanded.¹²¹

If the case is before a judge without a jury, then even an inadmissible confession received into evidence is not necessarily prejudicial error. There is a presumption in a nonjury trial that the trial court did not consider the inadmissible evidence. Without this presumption, the positive declaration by the trial judge that he did not consider the statement would make the admission of improper evidence harmless where there was sufficient proper evidence on which to base the decision.¹²² An admission of an improper confession in a jury trial could not be harmless.¹²³

e. Confrontation and Cross-Examination

The use of civil procedure raised the question whether there existed the right to hear evidence and to cross-examine witnesses. *Gault* held that

absent a valid confession, a determination of delinquency and an order of commitment to a state institution cannot be sustained in the

121. *Choate v. State*, 425 S.W.2d 706-07 (Tex. Civ. App.—Houston 1968, no writ); *accord*, *In re Gault*, 387 U.S. 1, 42-57 (1967).

122. *Yzaguirre v. State*, 427 S.W.2d 687 (Tex. Civ. App.—Corpus Christi 1968, no writ). This case also discusses when a confession would be inadmissible under *Miranda* and *Gault*.

123. *Leach v. State*, 428 S.W.2d 817 (Tex. Civ. App.—Houston 1968, no writ); *cf. Roberts v. Beto*, 245 F. Supp. 235 (S.D. Tex. 1965) (voluntary confession based on totality-of-circumstances doctrine enunciated in *Gallegos v. Colorado*, 370 U.S. 49 (1962)); *In re Garcia*, 443 S.W.2d 594 (Tex. Civ. App.—El Paso 1969, no writ) (voluntary confession).

absence of sworn testimony subjected to the opportunity for cross-examination in accordance with our law and constitutional requirements.¹²⁴

Intertwined with the right to hear evidence was the question of the scope of evidence admitted for the court's consideration. Should the court admit hearsay evidence or extraneous material not charged in the petition? These questions were raised and decided in *Ballard v. State*.¹²⁵

Appellants further complain that the trial court heard and considered evidence concerning extraneous matters and other alleged misconduct of the child not alleged in the petition and that hearsay evidence and statements made out of the presence and hearing of appellants were considered by the trial court in arriving at its findings in support of the judgment rendered. It is agreed by stipulation and the trial court states that he, in pronouncing sentence on the child and rendering judgment in the case, heard and considered statements made to him out of the presence and hearing of appellants and that such statements were not made at the trial. Particularly, did the trial court admit hearing such statements made by the child's school teacher about its being absent from school and its attitude in school. The statement of facts reflects that hearsay testimony, appearing to us to be material, was heard by the trial court and that testimony concerning extraneous matters not alleged in the petition was heard on the trial. Particularly was evidence heard about the child being absent from school at different times without the consent of its parents and about the child being suspected of having committed other offenses.

The accused in such cases should be faced by the witnesses who gave evidence against him and should be permitted to hear such evidence and have an opportunity to cross-examine the witnesses. The evidence given in such cases should also be confined to the charges alleged in the petition filed in the case. We are of the opinion, therefore, that the trial court erred in considering statements of a material nature made to him out of the presence and hearing of appellants. It was likewise error for the trial court to hear and consider hearsay evidence of a material nature and to hear and consider evidence about extraneous matters and misconduct of the child with which it was not charged in the petition presented in the case.

124. *In re Gault*, 387 U.S. 1, 57 (1967).

125. 192 S.W.2d 329, 331-32 (Tex. Civ. App.—Amarillo 1946, no writ).

The decision as to the prejudicial nature of the evidence is based on whether the trial court considered the statements made to it.

The rule in respect to admitting inadmissible evidence in the trial of a case in which there is no jury is that if there is sufficient evidence to support the court's judgment without the aid of such inadmissible testimony, unless the contrary is shown, it will be presumed that the court disregarded the same in rendering its judgment.¹²⁶

Arguments to the jury also were subject to scrutiny. For instance, the county attorney could not tell the jury: "If the defendant's attorney hadn't objected so much and the court hadn't sustained him in his objections, I would have proved a whole lot more on this boy than I have."¹²⁷

The problem is somewhat different if the hearing is not the original hearing on whether the child is a delinquent but is a subsequent hearing on whether the original disposition order of the court should be changed.

The hearing was had to determine whether or not the child had violated its parole and to determine what was for the child's best interest in the future. The Juvenile Act gives the court much discretion in conducting such a hearing and specifically provides that "The Judge may conduct the hearing in an informal manner." In this hearing the pleadings authorized much latitude at the hearing; however, it has been held that a court may conduct a hearing such as this without pleadings. . . . It has likewise been often held that the trial court is not limited to the ordinary rules of pleading in a hearing pertaining to the custody of a minor child. . . . The record reveals that the trial court excluded from consideration at the hearing all hearsay testimony. If such had not been excluded it is presumed that the trial court did not consider any improper evidence heard. . . . We overrule appellants' points of error complaining that improper evidence was heard and considered by the trial court.¹²⁸

126. *In re Brown*, 201 S.W.2d 844, 846-47 (Tex. Civ. App.—Waco 1947, writ ref'd n.r.e.); *accord*, *Williams v. State*, 219 S.W.2d 509, 513 (Tex. Civ. App.—Galveston 1949, no writ); *see Gamble v. State*, 405 S.W.2d 384 (Tex. Civ. App.—Eastland 1966, no writ).

In *Williams*, a nonjury case, the court held that where there was no showing that the juvenile court considered any evidence on extraneous matters in committing the child, the appellate court would presume that the juvenile court judge did not consider this evidence. *See In re Brown*, 201 S.W.2d 844, 847-49 (Tex. Civ. App.—Waco 1947, writ ref'd n.r.e.) (evidence needed for disposition).

127. *Stallings v. State*, 129 Tex. Crim. 300, 87 S.W.2d 255 (1935).

128. *In re Hoskins*, 198 S.W.2d 460, 464 (Tex. Civ. App.—Amarillo 1946, writ ref'd n.r.e.).

f. Right to Trial by Jury

The 1907 juvenile court act authorized any interested person to demand a jury trial, or the judge on his own motion to order a jury trial. This provision was codified in both the revised civil statutes and the code of criminal procedure.¹²⁹ In 1913 the judge's authority to order a jury trial on his own motion was deleted from the code but not from the revised statutes.¹³⁰ In 1909 a second jury provision made a brief appearance in both the civil statutes and the code. It required the juvenile court judge to have a jury summoned, unless waived, in felony cases transferred from the district to the juvenile court. This provision disappeared from the civil statutes in 1911 and was repealed from the code in 1913.¹³¹ Although the 1925 code did not include a provision authorizing any interested person to demand a jury trial, several provisions discuss the duties of the jury. From these, it could be concluded that the right to demand a jury remained intact.¹³² The 1943 statute was more explicit in authorizing a jury.¹³³ However, the right could be lost if a jury were not demanded in the manner required by the rules of civil procedure.¹³⁴

129. Tex. Laws 1907, ch. 65, § 2, at 138. Section 2 was codified as TEX. REV. CIV. STAT. tit. 33b, § 2 (Supp. 1908) and recodified as TEX. REV. CIV. STAT. art. 2192 (1911), (1914), and as TEX. CODE CRIM. P. art. 1198 (1911).

130. Tex. Laws 1913, ch. 112, § 4, at 215, *amending* TEX. CODE CRIM. P. art. 1198 (1911). TEX. CODE CRIM. P. art. 1198 (1911), as amended in 1913, was codified as TEX. CODE CRIM. P. art. 1198 (1916), *construed in Ex parte* Gordon, 89 Tex. Crim. 125, 232 S.W. 520 (1921). No change was made in the civil statutes. See TEX. REV. CIV. STAT. art. 2192 (1914).

131. Tex. Laws 1909, ch. 55, § 1, at 101-03, amended Tex. Laws 1907, ch. 65, § 9. The amended version of section 9 was codified as TEX. REV. CIV. STAT. tit. 33b, § 9 (Supp. 1910) but did not appear in either TEX. REV. CIV. STAT. art. 2199 (1911) or TEX. REV. CIV. STAT. art. 2200 (1911), the recodifications of section 9. This provision did appear as TEX. CODE CRIM. P. art. 1205 (1911) but was repealed by Tex. Laws 1913, ch. 112, § 13, at 220.

132. TEX. CODE CRIM. P. arts. 1089 (1925), (1936) (verdict and judgment), 1090 (1925), (1936) (term of commitment), and 1091 (1925), (1936) (substitution of place of confinement).

133. Tex. Laws 1943, ch. 204, § 13, at 316-17, codified as TEX. REV. CIV. STAT. art. 2338-1, § 13 (Supp. 1943), (1948), and TEX. REV. CIV. STAT. ANN. art. 2338-1, § 13 (1964), (1948), and TEX. REV. CIV. STAT. ANN. art. 2338-1, § 13 (1964). Section 13 was amended in 1965 by Tex. Laws 1965, ch. 577, § 5, codified as TEX. REV. CIV. STAT. art. 2338-1, § 13 (Supp. 1966), and in 1967 by Tex. Laws 1967, ch. 475, § 6, codified as TEX. REV. CIV. STAT. art. 2338-1, § 13 (Supp. 1968).

134. *In re Dendy*, 175 S.W.2d 297, 302 (Tex. Civ. App.—Amarillo 1943), held that the rules of civil procedure need not be followed in demanding a jury.

The Act in question provides for a jury trial when a jury is demanded and authorizes the trial court to order a jury on his own motion in such cases. Nowhere does the Act provide for the payment of a jury fee and nowhere does it require the trial court to follow civil procedure in demanding and impanelling a jury if and when a jury is demanded in such cases. Therefore, we believe the trial court committed error in denying Billy Dendy and L. J. King, Jr., a trial by an impartial jury.

Prior to 1943, if the trial was by jury, then the jury would decide both guilt and assessment of punishment. Failure to assess punishment was fatal error.¹³⁵ This was changed in 1943 when the jury was authorized to state only whether the child was delinquent. Disposition was then for the court.¹³⁶

The right to a jury trial applied only to the original hearing on whether the child was a delinquent. It did not extend to subsequent hearings concerning change in custody.

Under the provisions of the Act the question of modifying or revoking former orders entered in a juvenile case is discretionary with the trial court and upon proper notice it is wholly within the sound discretion of the trial court to determine whether or not it will be for the best interest of the child to commit it to the custody of an institution. It was therefore not error for the trial court to refuse a request for a jury in the hearing and appellants' complaint about such refusal is therefore overruled.¹³⁷

The trial court had no obligation to advise the juvenile of his right to jury trial.¹³⁸

g. Insanity and Infancy Defenses to Prosecution

In Texas insanity has been held to be a defense in a juvenile delinquency proceeding.¹³⁹ Thus a guilty mind is required for a child to be a delinquent just as a guilty mind is required for an adult to be a criminal.

On appeal to the supreme court, *Dendy v. Wilson*, 142 Tex. 460, 179 S.W.2d 269, 274 (1944), the court of appeals was ruled in error.

This law provides for a trial by jury, and a person tried thereunder is entitled to a jury if properly demanded. No jury was properly demanded in this instance and under the facts the trial court did not err in proceeding with the trial without a jury.

Accord, *In re Gonzalez*, 328 S.W.2d 475 (Tex. Civ. App. 1959); see *In re Hoskins*, 198 S.W.2d 460 (Tex. Civ. App.—Amarillo 1946, writ ref'd n.r.e.).

135. *Ex parte Pruitt*, 82 Tex. Crim. 394, 200 S.W. 392 (1917). TEX. CODE CRIM. P. art. 1089 (1925), (1936).

136. *In re Brown*, 201 S.W.2d 844, 849 (Tex. Civ. App.—Waco 1947, writ ref'd n.r.e.). Tex. Laws 1943, ch. 204, § 13, at 316-17, codified as TEX. REV. CIV. STAT. art. 2338-1, § 13 (Supp. 1943), (1948), and TEX. REV. CIV. STAT. ANN. art. 2338-1, § 13 (1964). Section 13 was amended in 1965 by Tex. Laws 1965, ch. 577, § 5, codified as TEX. REV. CIV. STAT. art. 2338-1, § 13 (Supp. 1966), and in 1967 by Tex. Laws 1967, ch. 475, § 6, codified as TEX. REV. CIV. STAT. art. 2338-1, § 13 (Supp. 1968).

137. *In re Hoskins*, 198 S.W.2d 460, 464 (Tex. Civ. App.—Amarillo 1946, writ ref'd n.r.e.).

138. *Yzaguirre v. State*, 427 S.W.2d 687 (Tex. Civ. App.—Corpus Christi 1968, no writ) (criminal procedure for jury waiver inapplicable); *Lazaros v. State*, 228 S.W.2d 972 (Tex. Civ. App.—Dallas 1950, no writ).

139. *State v. Ferrell*, 209 S.W.2d 642 (Tex. Civ. App.—Fort Worth 1948, writ ref'd n.r.e.) (murder).

With the enactment of special legislation applicable solely to juveniles, the infancy defense which had begun as a defense to criminal prosecution now was applied to cases on the juvenile docket.¹⁴⁰ The defense remained unchanged from what it had been prior to the juvenile court act. The presumption of incapacity was irrebuttable for children under 9 and rebuttable for children between 9 and 13.¹⁴¹ The state still carried the burden of showing that the child between 9 and 13 had sufficient discretion to understand the nature and illegality of the act constituting the offense.¹⁴² Prior to the establishment of the minimum age of 10 for delinquency proceedings, the effect of applying this defense to cases on the juvenile docket was to place a minimum age of 9 on juvenile court proceedings.

The 1943 juvenile court act did not repeal by implication the criminal incapacity provisions found in the penal code.¹⁴³ However, changing the procedure from criminal to civil did play havoc with the

140. Delinquency proceedings: *Purvis v. State*, 133 Tex. Crim. 441, 112 S.W.2d 186 (1938); *Howard v. State*, 107 Tex. Crim. 585, 298 S.W. 587 (1927); *Miller v. State*, 82 Tex. Crim. 495, 200 S.W. 389 (1918); *Windham v. State*, 67 Tex. Crim. 664, 150 S.W. 613 (1912).

141. The criminal incapacity provision, TEX. PEN. CODE art. 34 (1911), became TEX. PEN. CODE art. 30 (1925) and TEX. PEN. CODE ANN. art. 30 (1952). The capital punishment provision, TEX. PEN. CODE art. 35 (1911), construed in *Flores v. State*, 89 Tex. Crim. 506, 231 S.W. 786 (1921); *Williams v. State*, 77 Tex. Crim. 237, 177 S.W. 965 (1915); *Munger v. State*, 57 Tex. Crim. 384, 122 S.W. 874 (1909), became TEX. PEN. CODE art. 31 (1925) and TEX. PEN. CODE ANN. art. 31 (1952), and was shortened to read:

A person for an offense committed before he arrived at the age of seventeen years shall in no case be punished with death.

This new provision was applied in *Ex parte Adams*, 383 S.W.2d 596 (Tex. Crim. App. 1964) (waiver of jury in murder case because not capital when committed by one 17); *Hultin v. State*, 171 Tex. Crim. 425, 351 S.W.2d 248 (1961); *Hall v. State*, 164 Tex. Crim. 573, 301 S.W.2d 161, 165-66 (1957) (motion for rehearing) (physical age rather than mental age controls); *Northern v. State*, 152 Tex. Crim. 569, 216 S.W.2d 192 (1949).

In addition, there still remained offenses that could be committed only by a person who had attained 21: *White v. State*, 68 Tex. Crim. 147, 151 S.W. 826 (1912) (aggravated assault on a female); *contra*, *Hand v. State*, 88 Tex. Crim. 422, 227 S.W. 194 (1921) (aggravated assault); *Stracner v. State*, 86 Tex. Crim. 89, 215 S.W. 305 (1919) (seduction). For a discussion of the principal-accomplice problem, see *Smith v. State*, 91 Tex. Crim. 15, 237 S.W. 265 (1921).

142. Juvenile court cases: *Purvis v. State*, 133 Tex. Crim. 441, 112 S.W.2d 186 (1938); *Howard v. State*, 107 Tex. Crim. 585, 298 S.W. 587 (1927).

Criminal court cases: *Real v. State*, 132 Tex. Crim. 178, 103 S.W.2d 741 (1937) (murder conviction of 9-year-old); *Miller v. State*, 82 Tex. Crim. 495, 200 S.W. 389, 392 (1918) (motion for rehearing); *Scott v. State*, 71 Tex. Crim. 41, 158 S.W. 814 (1913); *Windham v. State*, 67 Tex. Crim. 664, 150 S.W. 613 (1912); *Pyron v. State*, 62 Tex. Crim. 639, 138 S.W. 705 (1911); *Ragdale v. State*, 61 Tex. Crim. 145, 134 S.W. 234 (1911).

The perjury exception for children was retained: *Flannery v. State*, 135 Tex. Crim. 235, 117 S.W.2d 1111 (1938) (9-year-old witness in rape case); *Smith v. State*, 73 Tex. Crim. 273, 164 S.W. 838 (1914) (no error in permitting 5-year-old to testify in rape case); *Munger v. State*, 57 Tex. Crim. 384, 122 S.W. 874 (1909) (no error in permitting 7-year-old to testify in rape case).

143. *Dendy v. Wilson*, 142 Tex. 460, 179 S.W.2d 269, 276 (1944).

use of children 10 or older as witnesses in criminal cases, because they could not be punished for perjury. In *Santillian v. State*¹⁴⁴ the court of criminal appeals was forced to choose between permitting a child to testify or upholding the juvenile court act, which stated that no male child between 10 and 17 and no female child between 10 and 18 shall be "charged with or convicted of crime in any court." The court, in permitting the child to be a witness, held the latter phrase in violation of article 1, section 5, of the Texas Constitution and the equal protection provision in the 14th amendment to the United States Constitution.¹⁴⁵ For witnesses under 10 this problem did not arise because they were not subject to the juvenile court act.¹⁴⁶ In 1967 the criminal incapacity statute was amended to read:

Section 1. No person may be convicted of any offense, except perjury, which was committed before he was 15 years of age; and for perjury only when it appears by proof that he had sufficient discretion to understand the nature and obligation of an oath.

Sec. 2. No male under 17 years of age and no female under 18 years of age may be convicted of an offense except perjury unless the juvenile court waives jurisdiction and certifies the person for criminal proceedings.¹⁴⁷

This would appear to eliminate infancy as a defense to juvenile court proceedings.

h. Sufficiency of the Evidence and Burden of Proof

Delinquency proceedings, like other types of proceedings, required proof of the allegation in the complaint. Failure to prove the charges resulted in reversal for insufficiency of the evidence.¹⁴⁸ However, when

144. 147 Tex. Crim. 554, 182 S.W.2d 812 (1944).

145. *Santillian v. State*, 147 Tex. Crim. 554, 182 S.W.2d 812 (1944) (motion for rehearing) (15-year-old boy proper witness in marijuana case); *accord*, *Slusser v. State*, 155 Tex. Crim. 160, 232 S.W.2d 727 (1950) (motion for rehearing) (10-year-old boy proper witness in sodomy case); *Head v. State*, 147 Tex. Crim. 594, 183 S.W.2d 570 (1944) (11-year-old boy proper witness in sodomy case); *Fields v. State*, 147 Tex. Crim. 540, 182 S.W.2d 815 (1944) (13-year-old girl proper witness in rape case).

146. *Head v. State*, 147 Tex. Crim. 594, 183 S.W.2d 570 (1944) (8-year-old boy proper witness in sodomy case).

147. Tex. Laws 1967, ch. 475, § 7, at 1086, codified as TEX. PEN. CODE ANN. art. 30 (Supp. 1968).

148. *Moore v. State*, 111 Tex. Crim. 461, 14 S.W.2d 1041 (1929) (habitually wandered about the streets in the nighttime without being on any business or occupation); *Meggs v. State*, 101 Tex. Crim. 415, 276 S.W. 262 (1925) (single or occasional acts do not constitute sufficient evidence that accused "habitually" roamed the streets at night); *De La O v. State*, 94 Tex. Crim. 204, 250 S.W. 182 (1923); *Woods v. State*, 88 Tex. Crim. 200, 225 S.W. 517 (1921) (state did

the indictment or information charged a specific penal law violation, the evidence was not insufficient if the facts would have supported the conclusion of guilt of a violation of a lesser included offense. For example, in *Morgan v. State* the accused, age 14, was tried before a jury in a delinquency proceeding on an indictment that charged assault with intent to murder. The juvenile contended that the evidence was insufficient to show a specific intent to kill the party assaulted. The court of criminal appeals held:

It would appear to be immaterial to ascertain whether the jury intended to find the appellant guilty of an assault with intent to murder, or of an aggravated assault, or of simple assault. Under the indictment, he might be convicted as a delinquent, if found guilty of any of the above offenses. If the jury found him guilty of the lowest grade of assault, they would have the right under the statute to adjudge him a delinquent and to punish him by confining him in the boys' training school at Gatesville for a term longer than that given to this appellant, in their discretion.

An examination of the facts in the instant case leads us to conclude that the jury were justified in accepting the state's testimony and finding that appellant made an assault upon the alleged injured party with a knife. This being true, we are unable to agree with appellant's contention that the evidence does not justify the conviction.¹⁴⁹

With the 1943 change in the procedure from criminal to civil, the state had to prove the acts alleged in the petition.¹⁵⁰ New problems of sufficiency of the evidence arose. For example, in making a motion for directed verdict the rules of civil procedure were to be followed.

Passing on to the question whether the objections urged in the

not prove that Woods was in fact the boy who burglarized the store); *Simpson v. State*, 87 Tex. Crim. 227, 220 S.W. 777 (1920); *Guerrero v. State*, 87 Tex. Crim. 260, 220 S.W. 1095 (1920).

For a discussion of the denial of due process in a delinquency proceeding where the hearing lasted no longer than 5 minutes, and no witnesses testified, other than the county juvenile officer, and none of the allegedly stolen items was produced in court, see *Hegwood v. Kindrick*, 264 F. Supp. 720 (S.D. Tex. 1967).

149. *Morgan v. State*, 114 Tex. Crim. 434, 25 S.W.2d 842, 843 (1930); *accord*, *Davis v. State*, 113 Tex. Crim. 429, 21 S.W.2d 1068 (1929) (information charged aggravated assault—evidence sufficient for simple assault).

150. *Osborne v. State*, 343 S.W.2d 467 (Tex. Civ. App.—Amarillo 1961, no writ) (evidence insufficient to establish the fact that sexual intercourse was by reason of the promise to marry); *Cantu v. State*, 207 S.W.2d 901 (Tex. Civ. App.—San Antonio 1948, no writ) (evidence insufficient to establish the fact that sexual intercourse was by reason of the promise to marry); *Reyna v. State*, 206 S.W.2d 651 (Tex. Civ. App.—Austin 1947, no writ); *In re Fisher*, 184 S.W.2d 519 (Tex. Civ. App.—Amarillo 1944, no writ).

instant case met the requirements of the Rules of Civil Procedure, we agree with the Court of Civil Appeals that the basis of the objections was not sufficiently specific. It will be noted that there are two elements, both of which must be present, which are necessary before a person is a delinquent child. First, he or she must be within the age limits set by Section 3 of the Act, and second, he or she must have committed one of the enumerated acts. The objections leveled in this case could as well have been taken to mean that the evidence did not show that the defendants had committed the act upon which the delinquency was based.

Rule 268 provides: "A motion for directed verdict shall state the specific grounds therefor." Rule 322 provides in part: "Grounds of objections couched in general terms—as that * * * the verdict of the jury is contrary to law, and the like—shall not be considered by the court." We agree with the Court of Civil Appeals that these Rules were not complied with in this case.¹⁵¹

In establishing whether the judgment is supported by sufficient evidence, the shift from criminal to civil procedure changed the degree of proof from beyond a reasonable doubt to a preponderance of the evidence. Since the conduct that constituted delinquency was criminal, how should the state prove the elements of the offense in a civil proceeding?

It is true that in a proceeding of this kind the State should not be held to the same strict technical proof that is required for a conviction of a felony in a criminal case, but certainly it must be shown that the crime charged has been committed in all of its elements.¹⁵²

Discussion began in 1968 on whether the burden of proof should be

151. *Steed v. State*, 143 Tex. 82, 183 S.W.2d 458, 459-60 (1944), *reversing on other grounds* 180 S.W.2d 446 (Tex. Civ. App.—Texarkana 1944).

152. *Cantu v. State*, 207 S.W.2d 901, 903 (Tex. Civ. App.—San Antonio 1948, no writ). The court continued: "The yielding of the female by means of an unconditional promise of marriage upon which she relies, is the very gist of the offense of seduction, and unless this fact is established by the evidence there is no seduction."

In *Thomasson v. State*, 269 S.W.2d 956 (Tex. Civ. App.—Fort Worth 1954), the court of civil appeals held that where there was no evidence that the acquisition of property in the manner described in the petitions constituted robbery in the sister state of Arkansas, the adjudication of delinquency for bringing this property into Texas was improper. The Texas Supreme Court reversed. *Thomasson v. State*, 154 Tex. 151, 275 S.W.2d 463, 464 (1955):

It is a well established rule of civil procedure that in the absence of proof to the contrary the law of a sister state is presumed to be the same as that of the State of Texas. . . . It would therefore be presumed that robbery with force and violence is a felony in the State of Arkansas as it is in Texas.

beyond a reasonable doubt instead of preponderance of the evidence.¹⁵³ This culminated in *Santana v. State* in which the juvenile court held the burden of proof was the preponderance of the evidence, the court of civil appeals reversed holding that it was beyond a reasonable doubt, and the Texas Supreme Court reversed thus going back to the preponderance of the evidence.¹⁵⁴ While a petition for certiorari in *Santana* was pending before the United States Supreme Court, the Court, in the New York case of *In re Winship* required application of the beyond a reasonable doubt standard to juvenile court adjudication hearings when the delinquency was predicated on conduct that would have been criminal had it been committed by an adult.¹⁵⁵

Using preponderance of the evidence as the burden of proof reduces the need for corroborating proof of the commission of the crime. For example, the rule in criminal cases was that a confession of arson was insufficient to support a conviction, unless there was corroborating proof of the commission of the crime. Yet in *Robinson v. State* the court said:

In this State the rule in civil cases is that it is only necessary to establish the material allegations of the petition by a preponderance of the evidence, even though the cause of action sued upon requires proof of the commission of a crime. . . . The confession being voluntary, and being sufficient in itself as an admission against

153. *Leach v. State*, 428 S.W.2d 817, 821 (Tex. Civ. App.—Houston 1968, no writ) (concurring opinion) (contention that child is denied due process and equal protection with preponderance of evidence), *noted in* 22 Sw. L.J. 889 (1968).

154. 431 S.W.2d 558, 560 (Tex. Civ. App.—Amarillo 1968):

The elements of due process required by [the *Gault*] decision all deal with the "proceedings" or hearing where a "determination is made as to whether a juvenile is a 'delinquent' as a result of alleged misconduct on his part". The quantum of proof required to make a "determination" of the alleged delinquency is a vital element of that proceeding. Although the court specifically considered "only the problems presented to us by this case" we conclude the underlying reasoning of *Gault* logically requires that a determination of delinquency is valid only when the facts of delinquency are proved beyond a reasonable doubt rather than by a preponderance of the evidence as now required by the present Texas decisions. We believe this is the clear and unmistakable effect of that decision.

In *In re Garcia*, 443 S.W.2d 594, 595 (Tex. Civ. App.—El Paso 1969, no writ), the juvenile court instructed the jury to use "beyond a reasonable doubt."

State v. Santana, 444 S.W.2d 614 (Tex. 1969), *followed in* *E.S.G. v. State*, 447 S.W.2d 225 (Tex. Civ. App.—San Antonio 1969, writ ref'd n.r.e.).

155. In *Santana v. Texas*, 90 S. Ct. 1350 (1970), the United States Supreme Court, in a per curiam opinion, granted the petition for the writ of certiorari, vacated the judgment, and remanded the case to the Texas Supreme Court for further consideration in the light of *In re Winship*, 397 U.S. 358 (1970).

interest to establish the case of the State as to the commission of the crimes charged, corroborating evidence was not essential.¹⁵⁶

Preponderance applied equally to defenses as well as offenses. When a child raised a defense such as insanity, he had the burden to show by a preponderance of the evidence that he was insane at the time of the commission of the offense.¹⁵⁷ He need not have established insanity beyond a reasonable doubt.

3. *The Disposition*

Two functions are performed by the juvenile court. The first is adjudication of delinquency, and the second is disposition of the delinquent. Normally, the adjudication and disposition occur at the same hearing. On occasion a motion for separate hearings has been granted.¹⁵⁸ When both functions are handled at one hearing, evidence inadmissible for the determination of delinquency could be admissible for the determination of the disposition. With separate hearings, the court has broad discretion in the use of hearsay and other information not subject to cross-examination in determining disposition. *In re Gonzalez* questioned what evidence was admissible after a determination of delinquency but before the disposition.

Appellant's eighth point complains that the court heard and considered evidence and testimony against appellant in private, and not in the presence of appellant and deprived appellant of the opportunity of confronting and refuting such testimony. The record shows that the court announced his judgment of delinquency on the day the matter was tried, and merely waited two or three days to determine what disposition should be made of the delinquent. What matters he heard or may have heard, or what information he may have received or did receive during such interval would not, therefore, touch on the matter of delinquency, but only on the extent and

156. 204 S.W.2d 981, 982 (Tex. Civ. App.—Austin 1947, no writ); *accord, In re Gonzalez*, 328 S.W.2d 475, 478 (Tex. Civ. App.—El Paso 1959, writ ref'd n.r.e.); *Cantu v. State*, 207 S.W.2d 901 (Tex. Civ. App.—San Antonio 1948, no writ).

157. *State v. Ferrell*, 209 S.W.2d 642 (Tex. Civ. App.—Fort Worth 1948, writ ref'd n.r.e.).

158. In *In re Garcia*, 443 S.W.2d 594 (Tex. Civ. App.—El Paso 1969, no writ), upon motion by the child, a bifurcated trial before the jury was granted, first to determine delinquency and then to determine the possible placement. Upon proper instructions, the jury determined the appellant was a delinquent child and, for the best interest and welfare of the child and the community in which he resided, he should be committed to the Texas Youth Council, Gatesville State School for Boys. On the basis of the jury's findings, the appellant was found to be a delinquent child, and upon the verdict of the jury and the decision of the court the appellant was committed to the Youth Council for confinement in Gatesville for an indeterminate period of time not extending beyond the time he reached 21.

severity of the sentence. This has been held to be proper: *In re Brown* (supra). This matter was tried without a jury, and we believe the court was merely trying to obtain as much information so as to serve the best interests of the child. This is a field where much latitude has been indulged and, certainly, it has been done many, many times in other courts, such as the Federal court where, after conviction, the matter is submitted to a probation officer before the judge imposes sentence. We think this point is without merit and must, therefore, be overruled.¹⁵⁹

The 1907 juvenile court act authorized the juvenile court to make three types of dispositions in regard to the delinquent child: to permit him to remain at home, to place him in the home of suitable family, or to commit him to a county or state institution.¹⁶⁰ Confinement was limited to those places stated in the juvenile court act:

[T]he court may commit it to any institution in the county that may care for children that is willing to receive it or which may be provided for by the State or county suitable for the care of such children willing to receive it, or of any State institution which may now or hereafter be established for boys or girls, willing to receive such child, or to any other institution in the State of Texas for the care of such children willing to receive it.¹⁶¹

159. *In re Gonzalez*, 328 S.W.2d 475, 479 (Tex. Civ. App.—El Paso 1959, writ ref'd n.r.e.).

160. Tex. Laws 1907, ch. 65, § 7, at 139-40. Section 7 was codified as TEX. REV. CIV. STAT. tit. 33b, § 7 (Supp. 1908) and recodified as TEX. REV. CIV. STAT. art. 2197 (1911), (1914), and as TEX. CODE CRIM. P. art. 1203 (1911). This part of TEX. CODE CRIM. P. art. 1203 (1911), unaltered by Tex. Laws 1913, ch. 112, § 9, at 218, was recodified as TEX. CODE CRIM. P. art. 1203 (1916).

161. Tex. Laws 1907, ch. 65, § 7, at 139-40. Other places, such as the county jail, were not possibilities. *Windham v. State*, 67 Tex. Crim. 664, 150 S.W. 613 (1912). When the case was heard on the criminal docket, the places of confinement were those described in the Code of Criminal Procedure of 1895. *Conley v. State*, 55 Tex. Crim. 370, 116 S.W. 806 (1909) (age at trial governs). In 1909 the code was amended so that if the verdict was for confinement for 5 years or less the jury was no longer able to designate whether the juvenile was to be sent to the training school or to the penitentiary but confinement was automatically in the training school. Tex. Laws 1909, ch. 54, § 1, at 100-01, amending TEX. CODE CRIM. P. art. 1145 (1895), was codified as TEX. CODE CRIM. P. art. 1195 (1911). The proviso which had been added in 1889, that "The jury convicting shall say in their verdict whether the convict shall be sent to the reformatory or the penitentiary," was omitted. Tex. Laws 1913, ch. 112, § 1, at 214, amending TEX. CODE CRIM. P. art. 1195 (1911), was codified as TEX. CODE CRIM. P. art. 1195 (1916). *Accord*, *Dill v. State*, 87 Tex. Crim. 49, 219 S.W. 481 (1920); *Ragsdale v. State*, 61 Tex. Crim. 145, 134 S.W. 234 (1911).

The law of suspended sentences applied to delinquency cases as well as to criminal felony cases. In *Hogue v. State*, 87 Tex. Crim. 170, 220 S.W. 96 (1920), the delinquency judgment was reversed and the cause remanded because the jury was not instructed on the law of suspended sentences.

Although the 1925 and 1936 Codes of Criminal Procedure did not enumerate the types of disposition as previous codes had done, the 1925 and 1936 Revised Civil Statutes did enumerate the previously permissible types of disposition.¹⁶² In 1940 the Attorney General of Texas rendered an opinion that construed the revised civil statutes as being limited by the three code of criminal procedure provisions that pertained to verdict and judgment, term of commitment, and substitution of place of confinement for juveniles.¹⁶³ The legislature reacted in 1941 by reenacting the provision in the revised civil statutes and repealing all conflicting laws.¹⁶⁴

In all cases of confinement of male juveniles between 1907 and 1925, maximum commitment was limited to 5 years, or not beyond the time when the child reached 21.¹⁶⁵ For the female delinquent the maximum commitment was not to be beyond the time when she reached 21; there was no fixed maximum length of 5 years as in the case of boys.¹⁶⁶ The 1925 code made a change, eliminating the

162. TEX. CODE CRIM. P. art. 1091 (1925), (1936), construed in *Ex parte Hughes*, 111 Tex. Crim. 66, 11 S.W.2d 319 (1928); *Currey v. State*, 107 Tex. Crim. 265, 296 S.W. 307 (1927). TEX. REV. CIV. STAT. art. 2338 (1925), (1936). For the application of the law of suspended sentences after the 1925 codifications, see *Meggs v. State*, 106 Tex. Crim. 136, 291 S.W. 545 (1927).

163. TEX. ATT'Y GEN. OP. No. 0-2759 (1940). For legislative comment on this opinion, see Tex. Laws 1941, ch. 193, § 3, at 355-56. The attorney general held that, where the court or jury had found a juvenile to be a delinquent child, the child could be committed only to a place or institution described by articles 1090 and 1091 of the code of criminal procedure. These provisions, unlike TEX. REV. CIV. STAT. art. 2338 (1936), did not authorize the court to commit the delinquent child to the care and custody of an individual—a practice which has been prevalent throughout Texas.

164. Tex. Laws 1941, ch. 193, § 1, at 355. The amended provision was identical to TEX. REV. CIV. STAT. art. 2338 (1936) except for language. It was intended to take care of the inconsistency in TEX. CODE CRIM. P. arts. 1090-91 (1936).

165. In no case was commitment to be beyond the age of 21. Tex. Laws 1907, ch. 65, § 7, at 139-40, codified as TEX. REV. CIV. STAT. tit. 33b, § 7 (Supp. 1908) and recodified as TEX. REV. CIV. STAT. art. 2197 (1911), (1914), and as TEX. CODE CRIM. P. art. 1203 (1911). This part of TEX. CODE CRIM. P. art. 1203 (1911), unaltered by Tex. Laws 1913, ch. 112, § 9, at 218, was recodified as TEX. CODE CRIM. P. art. 1203 (1916). Between 1909 and 1913 the length of commitment for male juveniles was prescribed by statute at an indeterminate period of not less than 2 nor more than 5 years. After 1913 the 2-year minimum was deleted but the 5-year limit was retained. Tex. Laws 1909, ch. 55, § 1, at 101-03, amending Tex. Laws 1907, ch. 65, § 9, was codified as TEX. REV. CIV. STAT. tit. 33b, § 9 (Supp. 1910). It did not appear in TEX. REV. CIV. STAT. arts. 2199, 2200 (1911), the corresponding articles of the 1911 codification. The amended version of section 9 was codified as TEX. CODE CRIM. P. art. 1205 (1911). In 1913, article 1205 was repealed. Tex. Laws 1913, ch. 112, § 13, at 220. See *Ex parte Bartee*, 76 Tex. Crim. 285, 174 S.W. 1051, 1053 (1915). The 5-year limit on confinement was retained in TEX. REV. CIV. STAT. art. 5231 (1914).

166. *Ex parte Cain*, 86 Tex. Crim. 509, 217 S.W. 386, 388 (1920) (female age 13 confined to the girls' training school until 21); accord, *Ex parte Chandler*, 99 Tex. Crim. 255, 268 S.W. 749 (1925) (female age 14 committed for minority).

maximum commitment of 5 years for boys, thus equalizing the maximum for both boys and girls at 21.¹⁶⁷

The 1943 statutes authorized the court to make one of the following dispositions:

(1) place the child on probation or under supervision in his own home or in the custody of a relative or other fit person, upon such terms as the court shall determine;

(2) commit the child to a suitable public institution or agency, or to a suitable private institution or agency authorized to care for children; or to place them in suitable family homes or parental homes for an indeterminate period of time, not extending beyond the time the child shall reach the age of twenty-one (21) years;

(3) make such further disposition as the court may deem to be for the best interest of the child, except as herein otherwise provided.¹⁶⁸

The choice of disposition was not left to the arbitrary discretion of the juvenile court. There was a check on the court.

It is error for the trial court to commit a delinquent child to others than the child's parents in the absence of evidence that such

167. TEX. CODE CRIM. P. art. 1090 (1925), (1936). In *Uwanich v. State*, 131 Tex. Crim. 623, 101 S.W.2d 567 (1937), the court held that, when a delinquent would attain her majority before expiration of the maximum period of confinement assessed, reversal of the conviction was not required when the disposition also provided that she should not be confined after she reached 21.

168. Tex. Laws 1943, ch. 204, § 13, at 316-17, codified as TEX. REV. CIV. STAT. art. 2338-1, § 13 (Supp. 1943), (1948), and TEX. REV. CIV. STAT. ANN. art. 2338-1, § 13 (1964). These alternatives remained unchanged in the 1965 and 1967 amendments to section 13. Tex. Laws 1965, ch. 577, § 5, codified as TEX. REV. CIV. STAT. art. 2338-1, § 13 (Supp. 1966); Tex. Laws 1967, ch. 475, § 6, codified as TEX. REV. CIV. STAT. art. 2338-1, § 13 (Supp. 1968).

In addition, the court was authorized to adjudge that a parent or other responsible person shall pay for the support of the committed child. Tex. Laws 1943, ch. 204, § 13-A, at 317, codified as TEX. REV. CIV. STAT. art. 2338-1, § 13-A (Supp. 1943), (1948), and TEX. REV. CIV. STAT. ANN. art. 2338-1, § 13-A (1964).

The court could order physical and mental examinations, Tex. Laws 1943, ch. 204, § 16, at 317, codified as TEX. REV. CIV. STAT. art. 2338-1, § 16 (Supp. 1943), (1948), and TEX. REV. CIV. STAT. ANN. art. 2338-1, § 16 (1964):

The Court may cause any person coming under its jurisdiction to be examined by a physician, psychiatrist, or psychologist, appointed by the Court. If it is determined that the child is either feeble-minded or mentally ill, it shall be the duty of the Judge of the Juvenile Court to proceed to have the necessary legal steps taken to have said child adjudged feeble minded or insane.

The fact that the juvenile under juvenile court law could be incarcerated for a longer period than an adult tried for the same crime does not violate equal protection or due process of the 14th amendment. *Smith v. State*, 444 S.W.2d 941 (Tex. Civ. App.—San Antonio 1969, writ ref'd n.r.e.). The court rejected a similar argument based on cruel and unusual punishment in *R.R. v. State*, 448 S.W.2d 187 (Tex. Civ. App.—San Antonio 1969, writ ref'd n.r.e.).

parents are not proper persons to have the care, guidance and custody of such minor, or that it is for the best interest of such minor and the State that he be committed to the custody of others than his own parents.¹⁶⁹

But this appears not to have remained the law for very long. In *Dudley v. State*¹⁷⁰ the court held:

We find nothing in the statute which requires the custody of delinquent children to be placed with their parents if they are fit and proper persons to have such custody. If that were the law, no child of exemplary parents, with a good home, could ever be placed in the Gatesville State School for Boys or in any place other than the home of its parents. The provision of the statute is that, when the juvenile is found to be a delinquent child, the court may, by order duly entered, proceed (1) to place him on probation in his own home or place him in the custody of a relative or other fit person, (2) commit him to a suitable public institution or agency or (3) make such further disposition as the court may deem to be for the best interest of the child. This does not mean that the court must first eliminate the question of whether or not the parents are suitable persons to have the child's custody before the second alternative may be considered nor that the second alternative must be eliminated before the court can consider the third alternative. It simply places upon the court the duty of exercising its sound discretion and make such provision for the custody of the juvenile as will serve the child's welfare and the best interest of the State. In concluding the question of custody, probation and supervision of the child, the court should consider the disposition and conduct of the child as reflected by the testimony and place him in one or the other of the environments designated by the statute which, in the judgment of the court, will best carry out the purpose of the law and secure for the child such care and guidance as will tend to correct any wayward tendencies that might be shown to have caused or contributed to his delinquency.

When a jury was impaneled, under the early statutes, the trial judge was without power or authority to fix the punishment. The guilt of the accused, as well as the amount of his punishment, was a matter exclusively within the province of the jury.¹⁷¹ In 1943 when the

169. *Cantu v. State*, 207 S.W.2d 901, 904 (Tex. Civ. App.—San Antonio 1948, no writ).

170. 219 S.W.2d 574, 575 (Tex. Civ. App.—Amarillo 1949, writ ref'd); *accord*, *Lazaros v. State*, 228 S.W.2d 972, 976 (Tex. Civ. App.—Dallas 1950, no writ).

171. *Gebhardt v. State*, 87 Tex. Crim. 25, 218 S.W. 1047 (1920). TEX. CODE CRIM. P. art. 1089 (1925), (1936) required the jury to state in its verdict the time and place of confinement. *Curry v. State*, 107 Tex. Crim. 265, 296 S.W. 307 (1927) (jury should be allowed to choose the

authority of the jury was limited to the finding of delinquency, the assessment of disposition became the province of the court. Under either system, after the initial assessment of punishment, the juvenile court retained the power to change the disposition.¹⁷²

A proper juvenile court judgment had to define and set out the truth of the particular matter which constituted the accused a delinquent child and had to specify both the time and place of confinement.¹⁷³ At times the court would commit error by setting a confinement period exceeding that permitted by statute or by failing to state the maximum commitment time.¹⁷⁴ With the change in institutional names, a verdict directing confinement in an institution which no longer existed was initially viewed as fatally defective. It could not be corrected by a judgment that provided for confinement in an institution which did exist, since the judgment was considered inconsistent with the verdict.¹⁷⁵ In 1918 a milder view was taken.

place of confinement). In *Stewart v. State*, 110 Tex. Crim. 145, 8 S.W.2d 140 (1928) (verdict—Boys' Training School at Gatesville; judgment—Boys' Training School in Coryell County), the court held that if the proper place of confinement was not designated in the judgment, it could be corrected on appeal. Here, the only state juvenile training school was located in Gatesville, Coryell County.

The jury was required to find in its verdict in express terms that the defendant was not over the juvenility age. *Byrd v. State*, 55 Tex. Crim. 390, 116 S.W. 1146 (1909).

172. Pre-1943: *Ex parte McDowell*, 76 Tex. Crim. 1, 172 S.W. 213 (1914) (juvenile court ordered the child discharged from industrial school and returned to his parents). TEX. REV. CIV. STAT. art. 2338 (1925), (1936). *Cf. Ex parte Lassiter*, 113 Tex. Crim. 18, 18 S.W.2d 637 (1929).

Post-1943: Tex. Laws 1943, ch. 204, §§ 13, 14, at 316-17, codified as TEX. REV. CIV. STAT. art. 2338-1, §§ 13, 14 (Supp. 1943), (1948), and TEX. REV. CIV. STAT. ANN. art. 2338-1, §§ 13, 14 (1964); Tex. Laws 1965, ch. 577, § 5, codified as TEX. REV. CIV. STAT. art. 2338-1, § 13 (Supp. 1966); Tex. Laws 1967, ch. 475, § 6, codified as TEX. REV. CIV. STAT. art. 2338-1, § 13 (Supp. 1968). *See Ex parte Maldonado*, 148 Tex. Crim. 358, 187 S.W.2d 223 (1945); *Reyna v. State*, 206 S.W.2d 651 (Tex. Civ. App.—Austin 1947, no writ); *In re Fisher*, 184 S.W.2d 519 (Tex. Civ. App.—Amarillo 1944, no writ). In 1965 section 14 was amended to exclude cases transferred to criminal court. Tex. Laws 1965, ch. 577, § 6, codified as TEX. REV. CIV. STAT. art. 2338-1, § 14 (Supp. 1966).

The juvenile court was given power to require reports from the institution, association, or person to whose care the child was committed. Tex. Laws 1907, ch. 65, § 8, at 140, codified as TEX. REV. CIV. STAT. tit. 33b, § 8 (Supp. 1908); TEX. REV. CIV. STAT. art. 2198 (1911), (1914); TEX. CODE CRIM. P. art. 1204 (1911), (1916). Tex. Laws 1913, ch. 112, § 10, at 219, did not alter TEX. CODE CRIM. P. art. 1204 (1911).

173. *Ex parte Burkhart*, 94 Tex. Crim. 583, 253 S.W. 259 (1923); *Guinn v. State*, 88 Tex. Crim. 509, 228 S.W. 233 (1921); *Ex parte Roach*, 87 Tex. Crim. 370, 221 S.W. 975 (1920); *Ex parte Brooks*, 85 Tex. Crim. 252, 211 S.W. 592 (1919).

174. *Ex parte Roach*, 87 Tex. Crim. 370, 221 S.W. 975 (1920) (judgment void because there was neither a beginning nor an ending of the confinement nor anything as to the duration of confinement); *Ex parte Brooks*, 85 Tex. Crim. 252, 211 S.W. 592 (1919) (8-year confinement made judgment void); *Miller v. State*, 82 Tex. Crim. 495, 200 S.W. 389 (1918) (court could reform judgment to be for an indeterminate period).

175. *Zimmer v. State*, 64 Tex. Crim. 114, 141 S.W. 781 (1911).

The name of the school or institution at Gatesville has been changed from time to time by statute. There can be no doubt from the charge of the court, verdict, and judgment that the institution at Gatesville, providing for the training of male juveniles, was meant and intended so that while therein said institution is called the "juvenile training school" that would be no ground for a reversal of the judgment herein. Such calling it would undoubtedly be embraced within the said juvenile statute.¹⁷⁶

The 1925 Revised Civil Statutes required that the court's order committing the child must prescribe the length of time and the conditions of the commitment.¹⁷⁷ The judgment did not have to recite specifically that the accused was adjudged a delinquent,¹⁷⁸ but unless it stated the duration of the term of commitment it was void.¹⁷⁹ The court of criminal appeals had the power to reform a judgment.¹⁸⁰

The 1943 act retained the requirement that the judgment must state the duration of the commitment. In *Steed v. State* the supreme court held the judgment to be uncertain and indefinite as to when the minors should be discharged from Gatesville in that it did not state the dates of their 21st birthdays nor did it contain any other data from which it could have been determined when the term of their commitment would end.

It would serve no useful purpose to direct the trial court to correct this error in the judgment as provided for in Rule 434, because there was no testimony, as reflected by this record, introduced before the trial court from which such information could be ascertained.¹⁸¹

Clerical errors in the date when the juvenile would reach 21 could be reformed without making the entire judgment void.¹⁸²

4. Appeal

Although the 1907 juvenile court act did not expressly provide for

176. *Miller v. State*, 82 Tex. Crim. 495, 200 S.W. 389, 390 (1918).

177. TEX. REV. CIV. STAT. art. 2338 (1925), (1936).

178. *Morgan v. State*, 114 Tex. Crim. 434, 25 S.W.2d 842 (1930) (motion for rehearing).

The finding by the court that accused was under 17 fixed his status as a juvenile. When the verdict and judgment found that he violated a penal law, it brought him within the status of a delinquent, notwithstanding the omission of a specific recital in the judgment.

179. *Ex parte Douglas*, 109 Tex. Crim. 463, 5 S.W.2d 153 (1928).

180. *Phillips v. State*, 20 S.W.2d 790, 792 (Tex. Crim. App. 1929) (motion for rehearing) (reformed from a term of years not less than 4 to not more than 4).

181. *Steed v. State*, 143 Tex. 82, 183 S.W.2d 458, 460 (1944); *accord*, *Ballard v. State*, 192 S.W.2d 329 (Tex. Civ. App.—Amarillo 1946, no writ).

182. *In re Gonzalez*, 328 S.W.2d 475, 478 (Tex. Civ. App.—El Paso 1959, writ ref'd n.r.e.) (October 16, 1957, reformed to October 16, 1967).

appeal from the juvenile court, appeals were permitted at first.¹⁸³ Then in 1915 the court of criminal appeals refused to accept appeals from the juvenile court:

[W]e do not think an appeal would lie to this court from a trial adjudging one a delinquent child, but that on habeas corpus an appeal would lie, or we would have authority to issue an original writ, to determine whether or not one had been tried in accordance with the provisions of this law, and whether or not one was illegally restrained of his liberty.¹⁸⁴

The court again changed positions in 1918. It held that prosecution and conviction under the delinquency statutes were criminal proceedings, and that for any claimed error in the trial resort should be to a direct appeal to the court of criminal appeals, not a writ of habeas corpus.¹⁸⁵ In 1918 a provision was added which directed that an appeal could be taken to the court of criminal appeals.¹⁸⁶ Habeas corpus could still be used to attack a void judgment.¹⁸⁷ Since juvenile proceedings were

183. *Windham v. State*, 67 Tex. Crim. 664, 150 S.W. 613 (1912). Habeas corpus was available also. *Ex parte McDowell*, 76 Tex. Crim. 1, 172 S.W. 213 (1914).

184. *Ex parte Bartee*, 76 Tex. Crim. 285, 174 S.W. 1051, 1057 (1915); *accord*, *Ex parte Ramseur*, 81 Tex. Crim. 413, 195 S.W. 864 (1917); *Klopner v. State*, 80 Tex. Crim. 232, 189 S.W. 268 (1916); *Horn v. State*, 78 Tex. Crim. 407, 181 S.W. 727 (1916); *Mills v. State*, 77 Tex. Crim. 129, 177 S.W. 492 (1915).

185. *Miller v. State*, 82 Tex. Crim. 495, 200 S.W. 389, 391-92 (1918) (motion for rehearing); *Ex parte McLoud*, 82 Tex. Crim. 299, 200 S.W. 394, 397 (1917).

186. Tex. Laws, 4th Spec. Sess. 1918, ch. 26, § 1, at 44, *amending* TEX. CODE CRIM. P. art. 1197 (1916). *Accord*, *Ex parte Meggs*, 99 Tex. Crim. 391, 269 S.W. 790 (1925); *Ex parte Burkhart*, 94 Tex. Crim. 583, 253 S.W. 259 (1923); *Ex parte Cain*, 86 Tex. Crim. 509, 217 S.W. 386, 388 (1920); *Tippins v. State*, 86 Tex. Crim. 205, 217 S.W. 380 (1919) (appeal dismissed because of the absence of a final judgment); *Ex parte Brooks*, 85 Tex. Crim. 252, 211 S.W. 592 (1919); *Ex parte Davis*, 85 Tex. Crim. 218, 211 S.W. 456 (1919).

TEX. CODE CRIM. P. art. 1093 (1925), (1936):

A prosecution and conviction of a juvenile shall be regarded as a criminal or misdemeanor case, and an appeal lies from such conviction directly to the Court of Criminal Appeals of Texas, the appeal to be governed by the same rules as apply in cases of misdemeanors.

187. Evidence sufficient that no complaint was filed, or that no warrant or *capias* was issued, or in the case of an infant with parents living in the vicinage that no notice was given them, and no opportunity afforded for a trial by jury, or to be represented by counsel of her own or their choice—any one of these would constitute an attack upon the judgment which should be permitted, and, if sustained by the evidence, the judgment should be held void and the relator released.

Ex parte Cain, 86 Tex. Crim. 509, 217 S.W. 386, 387-88 (1920); *accord*, *Ex parte Johnson*, 131 Tex. Crim. 438, 99 S.W.2d 598 (1936); *Ex parte Tomlin*, 107 Tex. Crim. 643, 298 S.W. 902 (1927); *Ex parte Burkhart*, 94 Tex. Crim. 583, 253 S.W. 259 (1923) (judgment failed to set out time and place of confinement); *Guinn v. State*, 88 Tex. Crim. 509, 228 S.W. 233 (1921) (when judgment recited notice, the fact question of notice was for trial court and not for court of

considered criminal, the bills of exception were required to be filed within the period granted for criminal, not civil cases.¹⁸⁸ Without notice of appeal being given and entered in the record, the appeal would be dismissed.¹⁸⁹

When the juvenile procedure was changed from criminal to civil in 1943, appeal was no longer to the court of criminal appeals. The new route for appeal was to the court of civil appeals, with access to the Texas Supreme Court by writ of error or upon certificate, as in other civil cases.¹⁹⁰ Habeas corpus could not be used as a substitute for an appeal¹⁹¹ although it could be used to attack a void judgment.¹⁹²

The strict rules of appellate procedure, however, were held inapplicable.

The legislature no doubt realized that in many instances the child proceeded against would be of tender years, and intended that such proceedings, in respect to his right of appeal, should not be encumbered by any hard and technical rules of procedure. The Act itself gives any party interested the right of appeal and makes no provision for an appeal bond or affidavit in lieu thereof, but says the Act shall be liberally construed. Considering the Act in its entirety and the purpose for which it was enacted, we do not believe that it was the intention of the legislature that a bond or affidavit in lieu thereof should be required as a prerequisite to his right of appeal.¹⁹³

This was expanded to include the parents' right to a transcript and statement of facts, without cost, although no appeal bond or deposit

criminal appeals on application for a writ of habeas corpus); *Ex parte* Roach, 87 Tex. Crim. 370, 221 S.W. 975 (1920).

188. *Bradshaw v. State*, 110 Tex. Crim. 216, 6 S.W.2d 230 (1928).

189. *Hostetter v. State*, 117 Tex. Crim. 102, 36 S.W.2d 165 (1931). Prior to appeal the defendant was required to file an appeal bond or recognizance if he was not in custody; otherwise his appeal would have been dismissed. *Reyes v. State*, 146 Tex. Crim. 310, 174 S.W.2d 323 (1943).

190. Tex. Laws 1943, ch. 204, § 21, at 318, codified as TEX. REV. CIV. STAT. art. 2338-1, § 21 (Supp. 1943), (1948), and TEX. REV. CIV. STAT. ANN. art. 2338-1, § 21 (1964), construed in *In re Garcia*, 443 S.W.2d 594 (Tex. Civ. App.—El Paso 1969, no writ). For a case caught in the middle of the changing procedure, see *Ex parte* Maldonado, 148 Tex. Crim. 358, 187 S.W.2d 223 (1945); *Maldonado v. State*, 184 S.W.2d 859 (Tex. Civ. App.—San Antonio 1945, no writ).

191. *Lazaros v. State*, 228 S.W.2d 972 (Tex. Civ. App.—Dallas 1950, no writ); *Mozingo v. Mitchell*, 220 S.W.2d 900 (Tex. Civ. App.—Austin 1949, no writ).

192. *Ex parte* Yelton, 298 S.W.2d 285 (Tex. Civ. App.—Beaumont 1957, no writ).

193. *In re* Brown, 201 S.W.2d 844, 846 (Tex. Civ. App.—Waco 1947, writ ref'd n.r.e.). *But cf.* *State v. Garza*, 358 S.W.2d 749 (Tex. Civ. App.—San Antonio 1962, no writ) (under TEX. R. CIV. P. 324 motion for new trial was prerequisite to appeal). This result was reaffirmed in *Lee v. McKay*, 414 S.W.2d 956 (Tex. Civ. App.—San Antonio 1967, writ dism'd).

in lieu of an appeal bond had been filed.¹⁹⁴ In 1969, the Texas Supreme Court restricted the right to appeal and transcript. It held that when a juvenile is financially able to do so he must pay, or give security for, the costs of his appeal. This limited free appeals and transcripts to those who would qualify under the pauper's oath.¹⁹⁵ When a juvenile has been declared a delinquent and escapes custody during the pendency of the appeal, and is still at large, he has not forfeited his right to the appeal. A motion by the state to dismiss the appeal would not be in order.¹⁹⁶

5. *Problems Subsequent to Juvenile Court Proceedings*

a. Juvenile Court Records and Evidence

Beginning in 1907 juvenile court records were kept separate from criminal court records.¹⁹⁷ Subsequent use of the disposition and evidence gathered in delinquency proceedings was limited to other juvenile court proceedings.¹⁹⁸ This did not make one who testified in a

194. *In re Garcia*, 443 S.W.2d 594 (Tex. Civ. App.—El Paso 1969, no writ); *Ciulla v. Hardy*, 431 S.W.2d 364 (Tex. Civ. App.—Houston 1968, no writ); *Hernandez v. Hardy*, 426 S.W.2d 258 (Tex. Civ. App.—Houston 1968, no writ); *Lee v. McKay*, 414 S.W.2d 956 (Tex. Civ. App.—San Antonio 1967, writ *dism'd*).

195. *Brenan v. Court of Civil Appeals*, 14th Dist., 444 S.W.2d 290 (Tex. 1969).

196. *Williams v. State*, 219 S.W.2d 509, 513 (Tex. Civ. App.—Galveston 1949, no writ).

197. Tex. Laws 1907, ch. 65, § 2, at 138. Section 2 was codified as TEX. REV. CIV. STAT. tit. 33b, § 2 (Supp. 1908) and recodified as TEX. REV. CIV. STAT. art. 2192 (1911), (1914), and as TEX. CODE CRIM. P. art. 1198 (1911), (1916).

198. Tex. Laws 1907, ch. 65, § 1, at 137-38. Section 1 was codified as TEX. REV. CIV. STAT. tit. 33b, § 1 (Supp. 1908) and recodified as TEX. REV. CIV. STAT. art. 2191 (1911), (1914); TEX. CODE CRIM. P. art. 1197 (1911), (1916); and as TEX. CODE CRIM. P. art. 1092 (1925), (1936), *construed in Monday v. State*, 124 Tex. Crim. 44, 60 S.W.2d 435 (1933); *Lott v. State*, 123 Tex. Crim. 591, 60 S.W.2d 223 (1933); *Schafer v. State*, 121 Tex. Crim. 452, 51 S.W.2d 356 (1932); *Jimenez v. State*, 111 Tex. Crim. 359, 13 S.W.2d 93 (1929); *O'Rear v. State*, 110 Tex. Crim. 490, 9 S.W.2d 333 (1928) (witness, convicted as a delinquent child, was competent to testify in liquor prosecution); *McGuffey v. State*, 107 Tex. Crim. 365, 296 S.W. 552, 554 (1927) (motion for rehearing). A similar provision appeared in the 1943 statutes: Tex. Laws 1943, ch. 204, § 13, at 316-17, codified as TEX. REV. CIV. STAT. art. 2338-1, § 13 (Supp. 1943), (1948), and TEX. REV. CIV. STAT. ANN. art. 2338-1, § 13 (1964). This did not apply to evidence gathered during juvenile court investigation but not introduced in juvenile court hearings. *Dearing v. State*, 151 Tex. Crim. 6, 204 S.W.2d 983 (1947). In 1965 section 13 was amended to exclude the child who has been transferred to criminal court under section 6. Tex. Laws 1965, ch. 577, § 5, codified as TEX. REV. CIV. STAT. art. 2338-1, § 13 (Supp. 1966). In 1967 section 13 was amended again. This time a perjury exception was added to the status provision and the use-of-evidence provision was rewritten. Tex. Laws 1967, ch. 475, § 6, codified as TEX. REV. CIV. STAT. art. 2338-1, § 13 (Supp. 1968).

The defendant could not be cross-examined as to the result of juvenile proceedings for the purpose of impeachment or to prevent a suspended sentence. *Smith v. State*, 113 Tex. Crim. 124, 18 S.W.2d 1070 (1929); *Robinson v. State*, 110 Tex. Crim. 345, 7 S.W.2d 571 (1928) (motion for rehearing).

juvenile hearing incompetent to testify in a criminal trial.¹⁹⁹ Also, once the juvenile court became authorized to certify an older child to criminal court to be treated as an adult, the juvenile court act did not prohibit proof of the child's general reputation for being a peaceable and law-abiding citizen, upon a trial of the child as an adult.²⁰⁰ In 1943 the statutes also provided for the confidentiality of the juvenile record.²⁰¹

b. Plea of Former Conviction

Between 1907 and 1943, if the accused was declared a delinquent, a plea of former conviction would bar criminal prosecution for a felony on the identical offense on which the delinquency conviction was predicated.²⁰² When the procedure was changed to civil, the plea of former conviction would not apply since it would be applicable only to a prior criminal conviction.²⁰³ With the change in procedure, there was no prior criminal conviction.²⁰⁴ As long as separate offenses were specified in the delinquency petition and in the criminal indictment the court felt justified in rejecting the former conviction argument. In 1963 when identical offenses were used the court resolved:

We need not here concern ourselves with a consideration of the question of former conviction in a court of competent jurisdiction or

199. *Hultin v. State*, 171 Tex. Crim. 425, 351 S.W.2d 248 (1961) (Tex. Laws 1957, ch. 281, § 33, at 668, codified as TEX. REV. CIV. STAT. art. 5143d, § 33 (1958), TEX. REV. CIV. STAT. ANN. art. 5143d, § 33 (1964)).

200. *Banda v. State*, 424 S.W.2d 938 (Tex. Crim. App. 1968) (rape); *Broadway v. State*, 418 S.W.2d 679 (Tex. Crim. App. 1967) (16-year-old tried for rape).

201. Tex. Laws 1943, ch. 204, § 15, at 317, codified as TEX. REV. CIV. STAT. art. 2338-1, § 15 (Supp. 1943), (1948), and TEX. REV. CIV. STAT. ANN. art. 2338-1, § 15 (1964):

Juvenile Court records shall not be inspected by persons other than probation officers or other officers of the Juvenile Court unless otherwise directed by the court.

202. *Van Hatten v. State*, 97 Tex. Crim. 123, 260 S.W. 581 (1924); see *Smith v. State*, 99 Tex. Crim. 402, 269 S.W. 793 (1925). For an unsuccessful attempt to force the former conviction issue, see *Osborne v. Brooks*, 75 S.W.2d 963 (Tex. Civ. App.—San Antonio 1934, no writ).

203. See *Dendy v. Wilson*, 142 Tex. 460, 179 S.W.2d 269 (1944).

204. *Hultin v. State*, 171 Tex. Crim. 425, 351 S.W.2d 248 (1961) (delinquency petition based on aggravated assault of Lethcoe and murder of Ruble, and criminal charge based on murder with malice aforethought of Ruble); *Martinez v. State*, 171 Tex. Crim. 443, 350 S.W.2d 929 (1961) (delinquency petition based on assault with intent to rob, and criminal charge based on murder); *Perry v. State*, 171 Tex. Crim. 282, 350 S.W.2d 21 (1961) (delinquency petition based on unlawfully carrying a pistol, and criminal charge based on murder); *Wood v. State*, 171 Tex. Crim. 307, 349 S.W.2d 605 (1961) (after the incident, the training school refused to release the juvenile and he was subsequently tried in criminal court for assault with intent to murder with malice); *Roberts v. State*, 153 Tex. Crim. 308, 219 S.W.2d 1016 (1949) (after the murder, parole from juvenile training school was revoked and child became of age for criminal trial 2 years later); *Dearing v. State*, 151 Tex. Crim. 6, 204 S.W.2d 983 (1947) (also separate and distinct offenses; burglary committed 5 days prior to murder).

of former jeopardy based upon a proceeding, civil in nature, in the Juvenile Court prior to indictment. In addition to jeopardy, denial of due process in violation of the 14th Amendment to the Constitution of the United States is presented.

The record herein shows without dispute that as a result of the state having invoked the jurisdiction of the Juvenile Court upon the allegation that the appellant herein committed the murder for which he was indicted, tried and convicted after he reached the age of 17, the appellant was committed and remained in custody and under control of the State School for Boys until he was indicted and taken into custody to answer said indictment.

It is interesting to note that the sentence was credited as for time spent in jail (Art. 768, Vernon's Ann. C.C.P.), the provision being "said sentence to begin and operate from and after the 21st day of July, A.D. 1961, the date of defendant's incarceration."

As has been stated, the verdict finding the appellant herein to be a delinquent child was returned on July 21, 1961.

To affirm this conviction in the light of the record would be to hold that, for an offense committed before he reached the age of 17 years, the offender who has committed no other offense against the law may, upon petition of the district attorney, be adjudged a delinquent child and held in custody as such, and without regard to how he may respond to the guidance and control afforded him under the Juvenile Act, be indicted, tried and convicted for the identical offense after he reaches the age of 17.

We sustain appellant's contention that such a conviction violates the principles of fundamental fairness and constitutes a deprivation of due process under the 14th Amendment.²⁰⁵

This did not change the court's position when the delinquency petition and the criminal indictment were not identical,²⁰⁶ nor was there a

205. *Garza v. State*, 369 S.W.2d 36, 39 (Tex. Crim. App. 1963), noted in 1 *HOUSTON L. REV.* 281 (1964).

206. *Ex parte Miranda*, 415 S.W.2d 413 (Tex. Crim. App. 1967) (delinquency petition alleged burglary and sodomy, and indictment alleged murder); *Foster v. State*, 400 S.W.2d 552 (Tex. Crim. App. 1966) (delinquency petition alleged theft from a person, and indictment alleged murder); see *Ex parte Martinez*, 386 S.W.2d 280 (Tex. Crim. App. 1964) (delinquency petition alleged assault with intent to rob, and criminal indictment alleged murder) (court based decision on fact that jeopardy did not attach in juvenile court because proceedings were civil); *Solis v. State*, 418 S.W.2d 265 (Tex. Civ. App.—San Antonio 1967, no writ) (delinquency petition alleged assault with intent to murder; 15-year-old defendant's attempt to raise murder with malice charge to preclude subsequent criminal prosecution was unsuccessful).

There existed some difference in opinion as to when the delinquency petition and the criminal indictment were for identical offenses. In *Ex parte Sawyer*, 386 S.W.2d 275 (Tex. Crim. App. 1964), the court of criminal appeals held that the delinquency petition did not allege either murder although evidence of both was introduced in the delinquency hearing. Thus prosecution in criminal

change in the inapplicability of the double jeopardy contention because of the different nature of the two forums.²⁰⁷

In 1967 the possibility of a subsequent criminal conviction was eliminated by statute:

No person who has been adjudged a delinquent child may be convicted of any offense alleged in the petition to adjudge him a delinquent child or any offense within the knowledge of the juvenile judge as evidenced by anything in the record of the juvenile proceeding.²⁰⁸

Still left uncovered was the case in which probation or parole was revoked because of the incident and the child was later tried in criminal court for it.

In 1968 the court of civil appeals in *Collins v. State*²⁰⁹ upheld a double jeopardy contention based on two juvenile court hearings.

A juvenile delinquency trial is a civil proceeding conducted in accordance with the Texas Rules of Civil Procedure except insofar as special statutes are applicable. *Steed v. State*, 143 Tex. 82, 183 S.W.2d 458; *Gamble v. State*, Tex.Cr.App., 405 S.W.2d 384; Art. 2338-18, Sec. 18, Vernon's Ann. Tex. Civ. St. However, since it is a proceeding which seeks to deprive the defendant of his liberty, the defendant is guaranteed all of the privileges and immunities which he would have if it were a criminal proceeding. *In re Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed. 2d 527. Among those rights is the right to be tried in accordance with due process, including the immunity from twice being placed in jeopardy for the same offense. *Sawyer v. Hauck*, D.C., 245 F. Supp. 55; *Garza v. State* (Tex.Cr.App.), 369 S.W.2d 36;

court for the murders was not barred. The United States District Court for the Western District of Texas viewed them as identical.

Since the indictments, trials and convictions in causes Nos. S-61553 and S-61554 were for the same acts and offenses for which petitioner had been previously adjudged a delinquent child and confined in the Gatesville State School for Boys, they violated fundamental fairness and constituted a deprivation of due process under the Fourteenth Amendment to the Constitution of the United States.

The convictions were ordered set aside and the juvenile returned to the Texas Youth Council. *Sawyer v. Hauck*, 245 F. Supp. 55, 57 (W.D. Tex. 1965); *accord*, *Hultin v. Beto*, 396 F.2d 216 (5th Cir. 1968).

207. *Roberts v. Beto*, 245 F. Supp. 235 (S.D. Tex. 1965).

208. Tex. Laws 1967, ch. 475, § 7, at 1086, codified as TEX. PEN. CODE ANN. art. 30, § 3 (Supp. 1969-1970).

209. 429 S.W.2d 650, 652 (Tex. Civ. App.—Houston 1968, no writ). For a discussion of the double prosecution problem, see Steele, *The Doctrine of Multiple Prosecution in Texas*, 22 Sw. L.J. 567, 578-79 (1968); Comment, *Age and Related Jurisdictional Problems of the Juvenile Courts*, 36 TEXAS L. REV. 323 (1958).

Art. 1, Sec. 14, Constitution of the State of Texas, Vernon's Ann.; Art. 1.10, Texas Code of Criminal Procedure, Vernon's Ann.

If on January 4, 1968, this defendant was placed in jeopardy pursuant to a charge that he stole some tires from Alphonse Kanuses, then his subsequent trial on February 8, 1968, for the same offense, would obviously be in violation of that privilege of immunity. *McLelland v. State* (Tex.Cr.App.), 420 S.W.2d 417; *Davis v. State*, 144 Tex.Cr.R. 474, 164 S.W.2d 686.

We are of the opinion that the record before us indicates an intention on the part of both the State and the defendant that the January 4th trial be a trial on the charge of stealing tires from Alphonse Kanuses. It is not at all inconsistent with the applicable Texas Rules of Civil Procedure that issues be tried by consent without written pleadings being on file at the time the evidence is presented. *Bednarz v. State*, 142 Tex. 138, 176 S.W.2d 562; *Chambless v. J. J. Fritch, General Contractor*, Tex.Civ.App., 336 S.W.2d 200, writ ref., n. r. e.; Rules 66 and 67, Texas Rules of Civil Procedure. In this case the State got the Court's permission to file a trial amendment and the defendant agreed thereto. While the State did not then and there file a written trial amendment, later, without any dismissal of the case, another pleading was filed in the same numbered case pleading the facts which, according to the oral representations made by the attorney for the State to the court and the defendant, were to be included in the trial amendment. Thus, we are of the opinion that the defendant was, on January 4, 1968, placed in jeopardy of a charge of stealing tires from Alphonse Kanuses. Therefore, his subsequent trial and conviction on February 8, on that same offense, was a violation of his constitutional protection from twice being placed in jeopardy for the same offense.

The judgment of the trial court is reversed and judgment is here rendered for the defendant that he be released from the custody of the Texas Youth Council.

c. Criminal Prosecution Prior to Discharge from Juvenile Court

Juvenile court jurisdiction attaches to a male under 17 and a female under 18 and continues until he or she becomes 21 or is discharged prior to becoming 21. Once the juvenile becomes 17 or 18, depending on sex, the criminal court may prosecute even though he or she is under a commitment from the juvenile court.²¹⁰

210. *Leos v. State*, 410 S.W.2d 445 (Tex. Crim. App. 1966); *Wood v. State*, 171 Tex. Crim. 307, 349 S.W.2d 605 (1961).

CONCLUSION

The 63-year history of the Texas juvenile court is one exhibiting constant flux. Jurisdictionally, the definition of the delinquent child has changed in both the acts that constitute delinquency and the age of the delinquent. The courts eligible for designation as juvenile courts and the method of selection have been altered. The current trend involves a shift from part-time juvenile courts to full-time domestic relations courts.

Procedurally, despite the change from criminal to civil procedure, many of the basic safeguards have been retained—right to counsel, right to jury trial, privilege against self-incrimination, and right to notice of the charge. Some alterations have occurred in applying the safeguards. More care must be taken in observing the rights of the child.

