occasion in question the record shows that he merely left the key of the store in possession of appellant to take care of the house until he returned, which was expected to be the next morning. This, in our opinion, did not constitute him such special owner as would authorize him to maintain an action of trespass for the taking of said goods, but showed him a bare custodian of same, as that of a servant. See Livingston v. State (Tex. Cr. App.) 43 S. W. 1008; Graves v. State (Tex. Cr. App.) 42 S. W. 300; Willis v. State (Tex. Cr. App.) 44 S. W. 826; 2 Bish. Cr. Proc. §§ 721, 722; 1 McClain, Cr. Law, p. 539, note 2; State v. Addington, 1 Bailey, 310. There being no errors in the record, the judgment is affirmed.

BARRY v. STATE.

(Court of Criminal Appeals of Texas. April 27, 1898.)

LOTTERIES—WHAT CONSTITUTE—LICENSE.

1. Defendant kept a stand, the circumference of which was divided into spaces by nails driven on the edge, and between the nails different articles of value were placed, on which the prices were marked. A spindle turned on a pivot, and the speculator obtained whatever was in the space at which the point of the spindle stopped. *Held*, that it was a lottery within Pen. Code 1895, art. 373.

2. The legislature has no power to license lotteries, since Const. art. 3, § 47, provides that it shall pass laws prohibiting the establishment of lotteries as well as sale of tickets in lotteries or other evasions involving the lottery principles established or existing in other states.

Appeal from Falls county court; William Shelton, Judge.

J. D. Barry was convicted of establishing a lottery, and he appeals. Affirmed.

W. W. Walling and Mann Trice, for the State.

DAVIDSON, J. Appellant was convicted of establishing a lottery, and appeals.

The principal contention made is that the state has levied an occupation tax upon lotteries, and therefore the offense denounced against lotteries ceased to be a criminal offense. There are other questions also suggested for our consideration in regard to charges given and refused. The information charges that appellant did "unlawfully establish a lottery, under the name and denomination of 'Cheap John Board,' and did then and there dispose of certain personal estate by said lottery." In his motion for a new trial, appellant suggests that the court erred in overruling his motion to quash the information, and refers us to his bill of exceptions numbered 1. Said bill is not incorporated in the record, nor is the motion to quash the information. We are not therefore advised of the grounds of said motion.

The court charged the jury, at the instance of the state, that the establishing of a lottery by a person, notwithstanding the same may be licensed by law, and the license tax paid, is an offense against the law; and, further, that the state has no right to license a lottery, so that in case the jury should believe that, at the time and place mentioned in the information, "defendant carried on and established a lottery, by means of which personal property was disposed of by chance, and that defendant had obtained a license to run the lottery, you will find him guilty." The defendant excepted to this charge, and asked a counter charge,—that "it would not be a violation of the law for a person to keep or operate a knife rack, cane rack, doll rack, or any other device upon which rings are pitched, or at which balls are thrown." The charge asked by defendant is based upon article 5049 of the Revised Statutes of 1895, in force at the time of the trial (1896). That portion of said article is in the following language: "From every person or firm keeping a knife, cane or doll rack, or any other device upon which rings are pitched, or at which balls are thrown, an annual tax of one hundred dollars." The testimony discloses that the defendant kept a stand so constructed that a spindle would be turned on a pivot horizontally. The circumference of the board was divided in spaces by nails driven on the edge, and between the nails different articles of value were placed, such as pocket knives, shaving mugs, and other articles. Prices were marked on some of the articles. The shaving mug was marked 50 cents, and other articles at different prices. Some of the spaces had collar buttons, worth about 5 cents per dozen. One of the witnesses testified that he had heard it called a "Cheap John Board," and also a "Cheap John Wheel." He said he would call it a "Wheel of Fortune." We are of opinion that these facts would constitute this a lottery, within the purview of article 373 of the Penal Code of 1895. See State v. Randle, 41 Tex. 292; Randle v. State, 42 Tex. 580.

If the section of article 5049, above quoted, was intended to license lotteries, then it is clearly unconsitutional and void. The legislature has no authority to license lotteries in Texas, and any attempt on its part to do so would be nugatory. Article 3, § 47, of our constitution, provides: "The legislature shall pass laws prohibiting the establishment of lotteries, and gift enterprises in this state, as well as the sale of tickets in lotteries, gift enterprises, or other evasions, involving the lottery principle established or existing in other states." However sweeping may be the taxing power of the legislature in this state, it is not broad enough to set at naught the plain provisions of the constitution. The court was therefore correct in giving the charge submitted, and did not err in refusing the special instruction requested by appellant. The quotation from article 5049 above would indicate that the matters therein specified would constitute lotteries, they being simply matters of chance. This being true,

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the legislature would not be authorized to license or tax these games. The judgment is affirmed.

WILLIAMS v. STATE.

(Court of Criminal Appeals of Texas. April 13, 1898.)

CRIMINAL LAW—NEW TRIAL—NEWLY-DISCOVERED EVIDENCE.

Where a witness was interviewed by counsel for accused on only one particular phase of the case, and, though summoned, was not placed on the stand, her testimony on another phase of the case cannot be considered newly-discovered evidence, so as to be ground for new trial.

Appeal from district court, Tarrant county; W. D. Harris, Judge.

George Williams was convicted of an assault with intent to rob, and he appeals. Affirmed.

W. W. Walling and Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of an assault with intent to rob, and his punishment assessed at two years' confinement in the penitentiary; hence this appeal.

There are no bills of exception in the record. Appellant complains, in his motion for a new trial, that, on the ground of newly-discovered evidence, his motion should have been granted by the court below, and that this case should be reversed on that account. We do not believe the alleged newly-discovered testimony of Stella Morgan can be regarded as such. She appears to have been summoned as a witness, and the counsel for defendant had a conversation with her while the trial was in progress, and he did not place her on the stand. He excused himself, however, because his conversation was not thorough, but that he merely confined himself to asking her whether or not she was sleeping in the same room with appellant the night before the alleged assault. If she had testified to this fact, it would have been in impeachment of appellant's own evidence and that of his two witnesses, who testified as to who slept in the room on that night; so that he could scarcely have assumed that she was sleeping in said room. Due diligence certainly required of him to inquire of the witness as to what facts she knew in regard to the case, and especially in regard to appellant's alibi, which was his main, if not his only, defense. Furthermore, in the face of the testimony introduced by the state in this case, showing the positive identification of appellant as the person who committed the assault, and the circumstantial evidence strongly corroborating their positive testimony, it does not occur to us, if the newly-discovered evidence had been before the jury, that it would in the least have affected or changed the result reached. We have examined the record carefully, and, in our opinion, the evidence amply supports the verdict. The charge of the court covered every phase of the case. The judgment is affirmed.

LENSING v. STATE.

(Court of Criminal Appeals of Texas. April 13, 1898.)

CRIMINAL LAW—APPEAL—RECORD—OBSTRUCTING PUBLIC ROAD—INTENT—INSTRUCTIONS.

1. A bill of exceptions to the court's refusal to permit witnesses to answer certain questions stated cannot be considered, when the answers expected to be given are not stated.
2. An intent to violate the law is a constituent element of the offense of willfully obstructing a public road; but such intent, not being presumed from the obstruction, must be proved as a fact.
3. In a prosecution for willfully obstructing a public road, it is error to refuse to give a proper definition of the word "willful," when specially requested.
4. Where a road had been used and worked as a public road for nearly 30 years, it is not necessary, to constitute an obstruction thereof a criminal offense, that the road should have been laid out in one of the ways provided by law.
5. It is error to refuse a proper charge as to the burden of proof in establishing defendant's guilt, when specially requested.
6. In a criminal prosecution, it is error to refuse to charge that the jury is the exclusive judge of the credibility of witnesses, of the weight to be given their testimony, and of what is a reasonable doubt, when such charge is specially requested.

Appeal from Travis county court; A. S. Walker, Jr., Judge.

Alf Lensing was convicted of willfully obstructing a public road, and appeals. Reversed.

M. C. Granberry, for appellant. W. W. Walling and Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of willfully obstructing a public road, and appeals.

He reserved a bill of exceptions to the action of the court refusing to permit the witnesses Calvin and Rogers to answer questions in regard to the width of the road between the property of himself and owners of land upon the opposite side of the road. The answers of said witnesses are not stated. If it was to prove the width of the road at said points after the defendant had moved his fence, as charged, so as to obstruct said road, or to show that his fence, with those upon the same side, formed a continuous line, the facts expected to be proved should have been stated in the bill. As presented, the bill is too indefinite to be considered.

The bill of exceptions further recites that the court verbally charged the jury, without objection, until after the court had finished said verbal charge, at which time defendant requested the court to give a written charge, which the court declined to do. He then objected to the oral charge, and requested the court to charge the jury in writing; whereupon the court announced to the jury that he with-

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