not to let any one see the pistol taken from him. This is the pistol shown to have been taken from the alleged burglarized house. Upon cross-examination, the defendant proved by this witness that he was under arrest at the time of making said statement. He then moved the court to exclude said testimony. The court, on objection of the state, refused to do so, because it came too late; and, further, because "the defendant should not be permitted to experiment in such manner with the evidence." Where illegal testimony has been admitted without objection, the accused has the right, in proper time, to move its exclusion; and, if it is not excluded, upon proper exception reserved, this court will reverse the judgment. Branch v. State, 15 Tex. App. 96; Thomas v. State, 17 Tex. App. 437; Phillips v. State, 22 Tex. App. 139, 2 S. W. 601; Gose v. State, 6 Tex. App. 121; Marshall v. State, 5 Tex. App. 273; Rountree v. State, 10 Tex. App. 110. Of course, this rule applies to testimony drawn out by the state, and not to illegal testimony elicited by defendant. Speights v. State, 1 Tex. App. 551; Moore v. State, 6 Tex. App. 563. For the error refusing to exclude said testimony, the judgment is reversed and the cause remanded.

Ex parte CALVIN.

(Court of Criminal Appeals of Texas. Dec. 21, 1898.)

APPEAL AND ERROR—HABEAS CORPUS FOR POSSESSION OF MINOR—JURISDICTION.

1. Where an appeal is from a habeas corpus proceeding in vacation, the record must be certified by the judge, as the clerk's certificate alone is insufficient.

2. Where the right of possession of a child is in issue in a habeas corpus proceeding, the court of criminal appeals has no jurisdiction of an appeal therein, as it is not a criminal case.

Appeal from Ellis county court; J. E. Lancaster, Judge.

Habeas corpus proceeding for the possession of Bessie Calvin, a minor. From an order denying the writ, applicant appeals. Dismissed.

Mann Trice, for the State.

DAVIDSON, J. This is a habeas corpus proceeding with reference to the possession of a minor. The assistant attorney general moves to dismiss the appeal, because the record is not certified by the judge who granted the writ and tried the cause. The whole proceeding occurred in vacation. When this is the case, the record must be certified by the judge. It is not sufficient that the clerk certify to the correctness of the transcript. Ex parte Malone, 35 Tex. Cr. R. 297, 31 S. W. 665, 33 S. W. 360, which has been followed in subsequent decisions.

There is another question in the case, had the record been properly certified, which would have been fatal to the appeal to this court. (We mention this because a proper record can be easily made out, and again brought before us.) Where the right of possession of a child is the issue in the habeas corpus proceeding, it is not a criminal case; therefore this court would have no jurisdiction of the appeal. Ex parte Reed, 34 Tex. Cr. R. 9, 28 S. W. 689; Ex parte Berry, 34 Tex. Cr. R. 36, 28 S. W. 806; Legate v. Legate, 87 Tex. 248, 28 S. W. 281. We call attention to this question of jurisdiction, so the parties interested may carry the appeal to a court which has authority to try it. The appeal is accordingly dismissed.

GUSTAFSON v. STATE.

(Court of Criminal Appeals of Texas. Dec. 21, 1898.)

OYSTER FISHING—PUBLIC WATERS—EQUAL RIGHTS.

1. Pen. Code 1895, arts. 529*k*, 529*l*, making it a misdemeanor for any person to take oysters from the public beds and reefs who is not a citizen of the United States, and a resident and taxpayer of the state, and requiring a license, which only citizens and taxpayers as aforesaid are entitled to hold, are wholly void, as in violation of the bill of rights (article 1, § 3), declaring all men to have equal rights, and that no man is entitled to exclusive, separate public emoluments or privileges, but in consideration of public services, in that the statutes discriminate against nontaxpaying citizens.

2. The right to take oysters in public waters of the state is not a privilege subject to the bestowal by the state on whom it pleases, but a public right of all the citizens.

On motion for rehearing. Judgment reversed.

For former opinion, see 45 S. W. 717.

HENDERSON, J. Appellant was convicted of a violation of the fish and oyster law, and his punishment assessed at a fine of $15. The case was affirmed at the Austin term, 1898, and now comes before us on motion for rehearing. The decision was predicated on the proposition that the statute making this a penal offense had not been repealed. Appellant, however, insists that we overlooked the constitutional question raised by him, and now urges the same. He claims that the statute is violative of that provision of section 3 of article 1 of our bill of rights which reads as follows: "All free men when they form a social compact have equal rights, and no man or set of men is entitled to exclusive separate public emoluments or privileges, but in consideration of public services." The clause of the statute which he contends is in violation of this provision of the constitution is that portion which limits the right to pursue the business of catching oysters in the public waters of the state to all citizens of the United States, resident in the state of Texas, who are taxpayers; thus inhibiting all citizens of the United States who may be residents of the state of Texas, but who are not taxpayers, from taking oysters in waters controlled or owned by the state. We are referred to articles 529*k* and 529*l*, Pen. Code 1895. Article 529*k* is as follows: "It shall be unlawful for any person to catch or take oysters from the public beds

and reefs for sale who is not a bona fide citizen of the United States and a resident and tax payer of the state. Any person offending against this section shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not less than ten dollars nor more than two hundred and fifty dollars." Article 529*l* reads: "It shall be unlawful for any person to gather oysters with tongs or otherwise from the public beds and reefs of this state for sale without a license from the fish and oyster commissioner or his deputy for each and every pair of tongs that shall be used on his boat, and for such license he must pay to the fish and oyster commissioner or his deputy the sum of five dollars for each pair of tongs; and any person shall be entitled to hold such license who is a citizen of the United States and a resident and tax payer of the state of Texas. Such license shall be good from day of issuance until April 30th next; such license shall be signed by the fish and oyster commissioner or his deputy, and stamped with the seal of his office, and shall state the name of applicant and date of issuance; provided, that any person holding such license in his own name may take or catch oysters from any boat. Any one offending against this article shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not less than ten dollars, nor more than two hundred and fifty dollars, and each day shall constitute a separate offense." So it will be seen that the statutes on the subject are as claimed by him; that is, that persons who are not taxpayers, although they may be citizens of the United States, and residents in the state of Texas, cannot procure a license to take oysters within the waters of the state, although they may be able to purchase a license, and make tender of the amount to the proper authority. The question then is, does the fact that such persons are prohibited from procuring a license, while all other persons, citizens of the United States, and residents within the state of Texas, and taxpayers, can procure a license, to take oysters, render the statute in question violative of the constitution of the state, above quoted. We can find no case in which the question as here presented has been adjudicated. We do find a number of cases in which the question of proprietary rights and common rights in fisheries has been discussed. In all the cases, so far as we are advised, it is held that navigable rivers, and contiguous portions of the sea embraced within the territory belonging to the state, are the property of the state, that they belong to all the citizens thereof, and that every citizen has a right in common with every other citizen to take fish in such waters. See Collins v. Benbury, 2 N. C. 277; Carson v. Blazer, 2 Bin. 475; Chalker v. Dickinson, 1 Conn. 382; Lay v. King, 5 Day, 72; Peck v. Lockwood, Id. 22. The last-cited case was a case involving the right to take shellfish on land claimed by plaintiff. The facts were that plaintiff owned a tract of land fronting on the river, where the tide ebbed and flowed. At low tide the locus in quo was dry land, but, when the tide was in, it was covered by the flow of the sea. Plaintiff claimed proprietary rights in the locus in quo, and defendant justified on the ground that at high water it was a part of the river or sea, and was open, for the purposes of fishing, to all the citizens of the state. The court discussed a number of common-law authorities on the subject, and from them deduced the following: "That the right to fish on the soil of another, when overflowed with the tide from the sea or arm of the sea, is a common right; and every one may fish in the sea, of common right, though it flows on the soil of another." As stated, however, there is no controversy upon this point: that is, that the locus in quo in this case was the property of the state. Nor is it controverted that the state may properly regulate the use of all its property, but it is insisted that in granting privileges to use its public domain, whether of land or water, it must do so under the operation of the fundamental principle upon which our government is established,—that is, equality. Our constitution provides (section 3, art. 1): "All free men when they form a social compact have equal rights, and no man or set of men is entitled to exclusive separate public emoluments or privileges, but in consideration of public services." Section 26 provides: "Perpetuities and monopolies are contrary to the genuis of a free government, and shall never be allowed." Mr. Cooley says on this subject (Cooley, Const. Lim. 485): "Equality of rights, privileges, and capacities unquestionably should be the aim of the law; and if special privileges are granted or special burdens or restrictions imposed, in any case, it must be presumed that the legislature designed to depart as little as possible from this fundamental maxim of government. The state, it is to be presumed, has no favors to bestow, and designs to inflict no arbitrary deprivation of rights. Special privileges are always obnoxious, and discrimination against persons or classes is still more so." But it is contended here that the right to take the oysters in the public waters of the state is a privilege which the state can bestow as it pleases; that it can lease or let its public domain on whatever terms it sees fit. We cannot assent to this proposition. It might be so in a kingly government, but not in a free government, in which all are equal before the law. And right here, it occurs to us, is where the provisions of our constitution above quoted come into operation. The state has no right to discriminate against any citizen or class of citizens as to the enjoyment of its public domain. The state has no more right to authorize one class of its citizens, to the exclusion of another class, to use or rent this character of property, than it would have to authorize one class of its citizens, to the exclusion of another class of its citizens, to rent or use its public lands. We do not believe it would be seriously contended that the state could authorize only taxpayers to rent its public do-

main of lands, to the exclusion of another class of its citizens who were not taxpayers. This would not only be a discrimination, but discrimination in favor of the rich as against the poor; and this, as we understand it, was exactly what our constitution intended to guard against. If the state could authorize its citizens who were taxpayers to fish, and inhibit its citizens who were not taxpayers from fishing, in its public waters, it could equally authorize its citizens who were not taxpayers to fish in such waters to the exclusion of those who were taxpayers. In this connection, we would observe that we think the law on this subject, as passed by the legislature, intended to apply to persons who paid taxes on property. If this be the true construction, then a great number of our citizens would be deprived of the power to procure a license to take oysters in the public waters of the state, no matter how willing they might be to pay the license tax and comply with the law in other respects. But it is said that our constitution authorizes a poll tax. But if one who pays a poll tax be considered a taxpayer, under the provisions of this law, we find that the legislature has eliminated certain citizens from the payment of the poll tax: that is, it has exempted persons over a certain age from the payment of a poll tax. And the defendant in one of these cases offered to prove that he was exempt, under the provisions of the statute, from the payment of the poll tax, and that, not being even a poll-tax payer, under the law he was debarred the right of procuring a license. This illustrates the fact that if it be conceded that a poll-tax payer is a taxpayer, in contemplation of this law, still it operates against a class of our citizens. It may be said, however, that the law may be unconstitutional in part, but operative as to those who are not excluded from its benefits and privileges. To this we reply that we do not believe that the act is so framed as to be separated, and a part held to be constitutional. The fact that it is class legislation qualifies the act, or that provision of it authorizing the granting of a license, and so renders it unconstitutional and void. Pullman Palace-Car Co. v. State, 64 Tex. 274; Ex parte Jones (Tex. Cr. App.) 43 S. W. 513.

We hold that the waters of the state, as well as all its domain of public lands, are equally open to all of its citizens upon the same terms and conditions, and that the attempt of the legislature to prohibit residents of the state who are not taxpayers, but who are willing to pay the license tax, from fishing in the public waters of the state, is violative of those provisions of the constitution before mentioned. We therefore hold that the act in question levying the license tax is null and void. The motion for rehearing is granted, and the judgment is reversed, and the prosecution ordered dismissed.

HURT, P. J. Owing to bad health, I have not given the subject discussed in this opinion that investigation necessary for me to form an opinion. I therefore express no opinion upon the question upon which the judgment was reversed.

LOVEJOY v. STATE.

(Court of Criminal Appeals of Texas. Dec. 21, 1898.)

FORGERY — EVIDENCE — VARIANCE — REASONABLE DOUBT—INSTRUCTIONS.

1. An averment that a note, to which additional signatures are alleged to have been forged, was originally signed by two certain persons, is sustained by the production of the note, bearing their signatures, and testimony of one of the makers that he and the other maker signed it and delivered it to accused, and testimony of the payee referring to the original signers as being such two persons.

2. The words, "No. ——. Due ——," on the margin of the note, not being a part of it, there is no variance between an indictment for forging a note, which sets out the note as containing said words, and proof that the note in question did not contain them.

3. A charge to acquit, if the jury does not believe that accused forged the instrument in question, or if they believe that the alleged signers signed it, does not deprive accused of the benefit of a reasonable doubt, where it has been charged that, in order to convict, they must find beyond a reasonable doubt that accused forged such instrument, and that no conviction can be had unless accused's guilt be established by the evidence beyond a reasonable doubt.

4. A conviction under an indictment for forgery and for uttering a forged instrument will not be reversed because the court stated to the jury that the maximum punishment was seven years, when for uttering it was only five, where the verdict of guilty was general, and the punishment assessed was less than the maximum for either offense.

5. Forgery and uttering a forged instrument, though separate offenses, are not inconsistent; and, under a general verdict of guilty under an indictment for forgery and for uttering a forged instrument, the court may apply the sentence to the count for forgery alone.

Appeal from district court, Bosque county; J. M. Hall, Judge.

R. E. Lovejoy was convicted of forgery, and appeals. Affirmed.

Spencer & Kincaid, for appellant. Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of forgery, and his punishment assessed at confinement in the penitentiary for a term of four years; hence this appeal.

The forgery declared is alleged to consist in fraudulently and without lawful authority altering a certain promissory note, in the sum of $300, signed by J. W. Winters and F. B. Winters, by adding thereto the names of J. T. Wade and T. R. Johnson. Appellant contends that the state failed to prove that said note was originally signed, as alleged, by J. W. Winters and F. B. Winters. We have examined the record carefully in this regard, and in our opinion the testimony is sufficient to show that it was so signed, and there is no variance between the allega-