ment, with a specification of the reason why it should be reversed, and should be copied or substantially stated in the briefs." But in that case the question before us was not presented. The assignments which were held bad were that "the court erred in refusing the defendant a new trial for the reasons given in said motion," and that "the court erred in not giving the several special charges to the jury asked by the defendant." The assignments specified no particular error, and were therefore insufficient. They did not call for the determination of the question whether the reasons for alleging error should be stated or not. In Earle v. Thomas, supra, the question of the particularity requisite in an assignment was discussed, and, as we think, the true rule laid down. The assignment which was objected to in that case was that "the court erred in refusing the charge asked by the defendant." The court say: "It is objected on behalf of the appellee that the assignment of error in this particular is too general. It is, however, sufficiently specific in respect to the charge refused, and that, we think, sufficiently indicates in what respect the charge given was objected to as erroneous. It would have been better if the assignment in reference to the charge given had been more specific. * * * What shall be a sufficiently special assignment of error is not susceptible of precise definition. It should be such as to draw the mind to the apprehension of the particular error relied on. But what shall be sufficient for the process still remains to be determined upon the particular circumstances of each case." It is to be borne in mind that the statute and rules which require errors to be assigned were intended primarily for the relief of the appellate courts, and to secure a prompt dispatch of the business that should be brought before them. They should be given a reasonable and practical construction, and not one calculated to embarrass suitors in the appellate tribunals by unnecessary restrictions. It is certain that it was never intended to hedge either the courts of civil appeals or the supreme court around with technical and arbitrary requirements, so as to cut off the approach of such parties as seek relief in good faith from the consequences of supposed errors committed to their prejudice in the trial courts. Where an assignment of error is sufficiently specific to enable the court to see that a particular ruling is complained of, it should be held good, although it should fail to state the reason why such ruling is claimed to be erroneous. An assignment may be brief, and yet specific; and brevity, in such cases, is commendable, and accords with good practice. The reasons by which allegations of error are sought to be sustained find their proper place in the propositions, statements, and authorities required to be set forth in the brief under and in support of the respective assignments. We conclude that the assignment in question is sufficient.

We are also of the opinion that the assignment that "the court erred in overruling the defendant's general demurrer to plaintiffs' original petition" should be held good, though we are not prepared to say that the demurrer should have been sustained. The petition alleges that the plaintiffs' land was securely fenced and inclosed, and that the defendant permitted its cattle to break through their inclosure. Under the rule, every reasonable intendment must be indulged in favor of the petition, the demurrer being general. Rule 17, 84 Tex. 711, 20 S. W. xiii. If the fence was secure, and the cattle broke through it, it is a reasonable inference that they were peculiarly vicious in that particular, and were fence-breaking animals. The motion for rehearing is overruled.

STATE ex rel. BARRY v. CONNOR.

(Supreme Court of Texas. Nov. 16, 1893.)

APPEAL—RECORD—ELECTIONS — NUMBERING BALLOTS—COUNTING — CONSTITUTIONALITY OF STATUTE.

1. An agreed statement of facts, on which a case is tried in the court below, and which the court embodies in its judgment, is sufficient, under Rev. St. art. 1293, to authorize a revision of the judgment on matters growing out of such facts, in the absence of a statement of facts or findings of fact by the court, or an agreed case for appeal, under articles 1333 and 1414.

2. Under Const. art. 6, § 4, relating to elections, and directing the legislature to provide for the numbering of ballots, the legislature enacted Rev. St. arts. 1694, 1697, which, respectively direct a judge of election to write the voter's poll-list number on the ballot, and forbid the counting of an unnumbered ballot. *Held*, that article 1694, is mandatory and that article 1697 is binding on the courts, as well as the officers of election.

3. Act April 12, 1892, § 28, relating to elections in cities, provides that "any elector or anyone who shall, contrary to provisions of this act, place any marks upon or do anything to his ballot by which it may afterward be identified as the one voted by any particular individual, upon conviction shall be punished." *Held*, that the legislature did not intend to prohibit the numbering of ballots as required by Const. art. 6, § 4, and Rev. St. art. 1694, and that the words, "contrary to the provisions of this act," were intended to except, from the prohibition to mark, the numbers required to be placed on the ballots.

Certified questions from court of civil appeals of fifth supreme judicial district.

Proceeding by the state, on the relation of Bryan T. Barry, against W. C. Connor, to contest an election.

John P. Gillespie, H. P. Lawther, F. M. Etheridge, and Harris & Knight, for petitioner. R. E. Cowart, J. C. Kearby, A. P. Woozencraft, Wm. P. Ellison, G. G. Wright, and J. M. McCormick, for respondent.

BROWN, J. The following questions of law were certified to this court by the court of civil appeals for the fifth supreme district: "First. Is an agreed statement of facts upon which a case was tried in the

court below, and which the court embodied in its judgment, sufficient, in the absence of a statement of the facts or findings of fact by the court, or agreed case for appeal under the statute, to authorize a revision of the judgment upon matters growing out of such facts? Second. Is the statement in regard to the seventeen hundred and forty-seven unnumbered ballots, as contained in the first clause of the said agreement set forth, a sufficiently certain statement of the facts as to show how said ballots were cast and counted as to authorize this court to revise said judgment upon the facts? Third. Is it necessary, under the constitution and laws of Texas, and the charter of the city of Dallas, as set forth in said above agreement, after the adoption by the city council of the city of Dallas of the act of April 12, 1892, commonly known as the 'Australian Ballot System,' that all ballots cast in an election in said city for city officials shall be numbered; and, if so, is such requirement directory or mandatory? Fourth. If such unnumbered ballots can in any event be counted, can this be done by the court, in the absence of testimony showing the bona fides of the ballots?"

1. To the first question, we answer that the agreed statement of facts made and signed by the counsel and parties to the cause, and embodied in the judgment of the court, fully authorizes the court of civil appeals to review that judgment upon any question arising upon the facts therein stated. Article 1293, Rev. St., is as follows: "The parties may in any case submit the matter in controversy between them to the court upon an agreed statement of facts made out and signed by them or their counsel, filed with the clerk, upon which judgment shall be rendered as in other cases; and in such case the statement so agreed to and signed and certified by the court to be correct and the judgment rendered thereon, shall constitute the record of the cause." Incorporating the agreed statement of facts in the record by the court is as much an approval as if the judge had made a certificate under the statute. The object of requiring a statement of facts to be made out is to place before the appellate court all the facts upon which the judgment was rendered. Article 1293 provides the manner in which this may be done before the trial is had. The law was substantially complied with by the agreement made, and the incorporation of that agreement in the record. Fowler v. Simpson, 79 Tex. 617, 15 S. W. 682; Hill v. Baylor, 23 Tex. 263. Article 1333, Rev. St., provides for the filing by the court of findings of fact and conclusions of law or a special verdict by a jury, in either of which cases an appeal may be taken without other statement of facts. Article 1414, Id., permits the parties to present their case to the court of appeals upon an agreed statement of the facts and proceedings certified by the court after trial. In each of these methods the same result is reached, of presenting to the appellate court, in condensed form, the material facts upon which the judgment was rendered. In Salinas v. Wright, 11 Tex. 578, this court said: "To authorize the revision of a judgment on the merits, a formal statement of facts is not essential, where all the evidence legally and conclusively appears by the record." In that case the fact appeared by bill of exceptions. It conclusively appears from the record in this case that all the evidence which was introduced, and upon which judgment was rendered, is embraced in the agreement signed by counsel and the parties, and embodied in the judgment of the court.

2. The statement contained in the first clause of the agreement, as set forth, is sufficiently explicit to enable the court to revise the judgment on the facts, and to enter judgment in accordance with the agreement. If there was any doubt arising upon the language of the agreement, it refers to the "first amended original information," which alleges that the 1,747 ballots were unnumbered, were counted and included in the aggregate of the vote; that, if they had not been so counted, relator would have received a plurality of all votes cast, and, being counted, the respondent received such plurality. There is no reason why the parties to this character of proceeding may not make agreements as in any other case. If it had been a suit for land, and the agreement had read, "if the court shall hold that the deed from A. to B. is valid and sufficient to pass title to the land, then judgment shall be entered for the plaintiff, but, if the court shall hold that said deed is invalid, then judgment shall be entered for the defendant," no question would be made of the sufficiency of the agreement to authorize a judgment in accordance therewith.

3. The third question propounded embraces two propositions: (1) Did the law require the officers conducting the election in the city of Dallas to number the ballots of the electors in compliance with article 1694, Rev. St.? (2) If so, could the officers who conducted the election legally count the ballots not numbered, and can the court sustain the counting of such unnumbered ballots?

Articles 1694 and 1697 of the Revised Statutes were in force in the city of Dallas at the time of the election in question, and it was the duty of the officers holding the election to number the ballot of each elector in accordance with the requirements of article 1694. The prohibition contained in article 1697 is binding upon all courts, as well as officers of the election. The law is mandatory, and cannot be disregarded. If ballots not numbered were counted in such election, such ballots were illegal, and must be rejected by the court upon an examination and revision of the judgment rendered.

It is claimed on behalf of the respondent that the law of April 12, 1892, entitled "An

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act to provide for the registration of all voters in all cities containing a population of ten thousand inhabitants or more, and to protect the purity of the ballot in such cities and to provide penalties for the violation of the same," prohibits the numbering of ballots in accordance with article 1694, above referred to, and by implication repealed said article. The following language of said act, contained in the twenty-eighth section, is relied upon to sustain the contention upon this point: "Any elector or anyone who shall, contrary to the provisions of this act place any mark upon or do anything to his ballot by which it may afterward be identified as the one voted by any particular individual upon conviction shall be punished," etc. By the act of March 16, 1848, the officers of election were required to "write and number the name of each voter. * * * One of the managers shall in every case, at the time of receiving the ticket or ballot, write upon it the voter's number corresponding with the clerk's list. * * * No ticket not thus numbered, shall be counted or noticed in counting out the votes." This continued to be the law in Texas until 1870, when the 12th legislature enacted a statute by which it was provided that one of the judges of election should write upon each ticket one or all of the words, "State," "District," and "Congress," according as the voter might be entitled to cast his ballot for one or all of said offices. It was made a penal offense for any officer of election to place any other mark upon any ballot. Laws 12th Leg. § 19, p. 131. An election for members of congress was held in the state in 1872, and in Brazos county the ballots were numbered as under the Law of 1848. When the returns were to be made up, and certificate of election given, Gov. Davis excluded from the estimate the vote of Brazos county because the ballots were numbered, alleging as his reason that the numbering of the ballots operated to intimidate voters. Note to article 6483, 2 Pasch. Dig. The 13th legislature, which assembled in 1873, repealed the act of 1870, and re-enacted, substantially, the law of 1848 on the point. The constitutional convention which framed the constitution that was adopted in 1876, inserted in that instrument the following provision: "Sec. 4, (art. 6.) In all elections by the people the vote shall be by ballot and the legislature shall provide for the numbering of tickets and make such other regulations as may be necessary to detect and punish fraud and preserve the purity of the ballot box. But no law shall ever be enacted requiring a registration of voters of this state." Two important changes have been made in the manner of conducting elections in this state. The registration of voters was required, and the numbering of ballots had been forbidden. The law requiring the numbering of ballots had been restored, and the registration law had been repealed; but, to make sure that such laws should not be again enacted, the section quoted was framed and adopted as a part of the constitution. This section of the constitution was framed and adopted in view of the recent changes of the law, and of the action of the governor in the case referred to. The language is such as to manifest the purpose to declare that the numbering of ballots was not calculated to intimidate voters, but was a means necessary to "detect and punish fraud and to preserve the purity of the ballot box." The legislature which assembled in 1876, the first after the adoption of the constitution, promptly enacted articles 1694, 1697, Rev. St. When article 6, § 4, of the constitution, was amended, in 1891, the same language was used, omitting the prohibition against registration, with the addition of the permission to the legislature to enact laws for registration of voters in cities of 10,000 population or more. The purpose to have the ballots numbered was again expressed, and commanded to be observed. The permission given to provide by law for the registration of voters in such cities as had the requisite population was intended as an additional safeguard against fraud in elections. We must presume that the laws in force on the subject of numbering ballots, and the prohibition as to counting the ballots not numbered, were in the minds of the members of the convention and the legislature when these provisions were framed, and the laws were not condemned, but approved. We cannot presume that the legislature, in enacting the law of April 12, 1892, intended to prohibit the doing of an act which was commanded by the constitution, and the law enacted in pursuance thereof. Nothing short of positive and unequivocal words could be so construed.

The legislature did not intend, in passing the act of April 12, 1892, to prohibit the numbering of ballots in accordance with article 1694. Section 28 of that act does not justify any such conclusion. It prohibits officers and others, including the elector, from doing certain acts before the ballot is deposited, and was intended to protect the ballot from marks which would enable any one, without looking into it, to tell by whom it was cast, and to prevent any officer of the election to tell by whom it was voted, without comparison with the poll list. For example, suppose that the elector or other person should place upon the ballot a mark so that the officer of the election or other person looking on while the ballots were being counted could see or determine by whom it was cast, then, in calling the ballot for counting, the vote of such person could be exposed. The object was to prevent the elector from being exposed unlawfully.

Looking to the journals of both houses of the called session of the 22d legislature, we get the history of the passage of this law, which throws light upon the intention of the legislature. The senate passed an act to

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govern all elections, framed after the plan of the Australian system, in which was embraced, in substance, section 28 of the law under consideration, with almost the same language as that upon which the appellee's counsel rely to sustain their contention. In other provisions of that bill was the direction to number the ballots as required in article 1694. The first 22 sections of the law of April 12, 1892, constituted the latter part of the senate bill. It was not passed by the house. The house, however, passed a bill to provide for registering voters in cities of 10,000 population or more, being the first 22 sections of the act of April 12, which went to the senate, and there the last sections of the law now being considered were added by way of amendment,—almost literally taken from the bill passed by the senate and sent to the house. The language used in the senate bill was, in substance: "Any elector, or any one who shall, contrary to the provisions of this act, place any distinguishing mark upon, or do anything to, his ballot, by which it may be identified as the one voted by any particular individual," etc. It will be seen that the difference between the language quoted, and that in the law as it passed, consists in omitting the word "distinguishing," and inserting the word "afterward." Any mark by which a ballot could be identified must be a distinguishing mark, and such identification must be at a future time; that is, afterwards. The language in each means the same thing. The words, "contrary to the provisions of this act," referred to the provisions of the senate bill, from which the section was taken and attached to the house bill, and were intended to except, from the prohibition to mark, the marks authorized by that bill, which required the ballots to be numbered. We think that this explains the language upon which the counsel rely for the support of the proposition that it forbids numbering the ballots. The act of April 12th is not in itself a complete system for holding elections in cities of 10,000 population. It does not provide for keeping any poll books or tally sheets, nor for making returns of the election, nor for counting the vote and preserving the ballots. It is evidently intended simply as an additional means of "detecting and preventing fraud, and preserving the purity of the ballot," which any such city may apply if 500 of its citizens petition for it. It does not apply to all cities of 10,000 population, but to those only in which registration may be ordered. The law does not continue beyond the election for which the registration is ordered, but at each election the same steps must be taken, else that law cannot be enforced. If, at the next election in Dallas for municipal officers, no registration should be demanded, this law would not be in force, but the election would be conducted under the general law, and ballots must be numbered. The result of which would be that the prohibition of numbering claimed to be expressed in the act would be put in force, or not, at the option of 500 citizens of that city. It would be an extraordinary power for the legislature to delegate to so few of the citizens to suspend the operation of a general law of the state.

The right to petition for registration, and thereby put this law into effect, within the cities having the requisite population, applies to elections for state, county, and precinct officers, as well as to those for municipal offices. If the position that the numbering of ballots is forbidden by this law is sound, then, in elections for state and county offices, we would have the general law in force in all precincts in Dallas county outside of the city, and the ballots numbered in them, while in the city no number could be placed upon them. If a contest should occur, and it be charged that persons not qualified as electors were permitted to vote at a precinct outside the city, the ballots could be inspected, and compared with the poll books, to ascertain for which candidate the illegal votes were cast. If the contest was upon the ground that such persons voted inside the city, then no such investigation could be had, for the reason that without the numbers the ballots of the illegal voters could not be identified, and thus a discrimination would exist, for which there can be no sound reason given, and fraud would be promoted in the cities, rather than prevented.

If the elections for state, county, and municipal officers should occur at the same time, and the law of April 12, 1892, is put into force in a city, then, by the terms of section 24 of said act, "all ballots used by the voters at said election shall be furnished by the officers conducting said election, upon which shall be printed the names of all candidates for state, county, precinct or city offices upon one ticket," etc. The general law governing elections for state, county, and precinct offices requires the ballot to be numbered; and if the law governing election for municipal offices forbids such numbering, with the names of each upon the same ticket, what can be done? If not numbered, so far as the state, county and precinct election is concerned, they cannot be counted; and if numbered, under the contention of appellee, so far as municipal officers is concerned, the officer placing the number thereon is liable to a heavy penalty. These embarrassing consequences serve to show more clearly that the construction sought to be placed upon the law is not a correct interpretation of it. No legislature would have enacted a law involving elections in such complications, and introducing such discriminations between citizens of different localities as to the exercise of a right equally sacred to all. It was believed that there was a necessity in cities, that did not exist in towns and country precincts, for additional means of protecting

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the voter from undue influence, and to preserve the ballot from the corrupting influence of fraud, and for this purpose the law was enacted.

It is claimed that the legislature has no power to enact any law by which the elector may be deprived of the benefit of his ballot without fault on his part. The right of suffrage is conferred by the constitution, and is not one of the natural and inalienable rights which are excepted out of the powers of government. The elector takes the right subject to limitations imposed by the constitution, and such limitations as the legislature may impose, not inconsistent with the fundamental law. While the right to vote is a valuable right, which should be duly guarded, the public has a right that the ballot shall be protected from fraud; and this right in the public is paramount to the individual right of the citizen to cast his vote. When necessary to preserve the right of the public in a pure ballot, the right of the citizen to have his ballot counted must yield to the needs of the public good, as in many other instances the private right must be subservient to public necessity. But no elector is here claiming the right to have any one or all of the unnumbered ballots counted; and, if it were so, no one of them could enforce it, because the ballot of no elector who cast one of those not numbered could be identified. In form, this is a proceeding in the name of the state, but in fact it is a contest between two opposing candidates for the possession of an office. The exercise of the functions of that office is a right which belongs, under the constitution and laws, to that one who was legally elected, and the right should be determined according to the rules prescribed by law. Articles 1694, 1697, Rev. St., were enacted in pursuance of the commands of section 4, art. 6, of the constitution of this state. It was for the legislature to determine the necessity, and the courts cannot disregard the law. It is consistent with the constitutional requirement that the ballots be numbered, and is perhaps the only means by which fraud perpetrated by persons voting, who are not qualified electors, could be effectually punished, thus depriving the promoter of the fraud of its fruits. It may be that in some instances the failure to number might occur by reason of a misunderstanding of the law, or from negligence in the officer, and the voter might be deprived of the benefit of his ballot without his fault; but the constitution has declared that it is one of the means to be adopted by the legislature to detect, prevent, and punish fraud. The legislature has so enacted, and it must be obeyed.

It is unnecessary to discuss the difference between directory and mandatory statutes. The law commands that the number shall be written on the ballot, and forbids those not numbered to be counted. Taking the two articles together, and especially in connection with section 4, art. 6, of the constitution, there can be no doubt that they are mandatory. "A clause is directory when the provision contains mere matter of direction, and no more, but not so when they are followed by words of positive prohibition." Bladen v. Philadelphia, 60 Pa. St. 466; Pearse v. Morrice, 2 Adol. & E. 96. Prohibitory words can rarely, if ever, be directory. There is but one way to obey the command "thou shalt not," which is to abstain altogether from doing the act forbidden. The answer to the third question renders it unnecessary to answer the fourth.

FITZGERALD v. STATE.

(Court of Criminal Appeals of Texas. Nov. 8, 1893.)

CRIMINAL LAW—APPEAL—REVIEW.

In misdemeanor cases, where no objections are made to instructions, nor instructions asked, the court of criminal appeals will not review the instructions on appeal from an order denying a new trial.

Appeal from Smith county court; B. B. Beaird, Judge.

D. Fitzgerald, convicted of carrying a pistol on or about his person, appeals. Affirmed.

R. L. Henry, Asst. Atty. Gen., for the State.

HURT, P. J. Conviction for carrying on or about his person a pistol. There is in the record neither statement of facts nor bills of exceptions. In the motion for new trial, several objections are made to the charge of the court. Appellant neither objected to the charge when given, nor requested instructions to the jury upon any matter. This being a misdemeanor, in the absence of objections or requested instructions, this court will not revise the charge of the court. Whether a "woman was at the bottom of it" or not, as some of the jurors were willing to believe she was, may and may not have been prejudicial to appellant. "J. W. Kilpatrick may have been unfortunate in knowing too much about the matter," but whether he knew too much about the woman being at the bottom of it, or about the pistol being carried by the appellant, we know not; and whether his overmuch knowledge "about the matter" was favorable or unfavorable to appellant, we are also unadvised. The judgment is affirmed.

MORGAN v. STATE.

(Court of Criminal Appeals of Texas. Nov. 8, 1893.)

DISTURBANCE OF PUBLIC WORSHIP—RECOGNIZANCE ON APPEAL.

Under Pen. Code, art. 180, prescribing a punishment for one who willfully disturbs a religious congregation conducting themselves

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