that the drainage district might prepare a form in which the bonds were to be executed thereafter, and submit that for examination by the Attorney General, calling upon him to pass upon and certify to the validity of bonds which might be issued in future. With due respect to the argument of relator's counsel, we think it would be absurd to say that a public official could be required to certify to facts which had not transpired, to declare valid and binding obligations bonds which had not received the signature of the officers authorized to execute them. The language of the twenty-fourth and twenty-fifth sections of the act forbid such an interpretation. The law does not authorize the drainage district to take the opinion of the Attorney General as to whether under the preparatory procedure already had it may issue valid bonds, but it requires such district, after the county officials have executed the bonds in conformity with the law, to submit the matter to the Attorney General to decide whether or not the bonds have been properly prepared.

We conclude that the relator shows no right to have the Attorney General make the certificate which he seeks by means of the mandamus from this court. It is therefore ordered that the writ of mandamus do not issue and that the Attorney General go hence, and that the relator pay all costs of this proceeding.

LIVELY et al. v. MISSOURI, K. & T. RY. CO. OF TEXAS.

(Supreme Court of Texas. June 25, 1909.)

1. TAXATION (§ 37*) — ASSESSMENT — STATUTORY AND CONSTITUTIONAL PROVISIONS.

Act 30th Leg. (Laws 1907, p. 469, c. 17), amending Act 29th Leg. (Laws 1905, p. 351, c. 146), providing for the taxing of the intangible assets of certain corporations, is not violative of Const. art. 8, § 11, requiring all property to be assessed in the county in which it is situated, nor section 14, empowering the tax collector to assess the value of property, in so far as it relates to the intangible assets of a railroad company; such constitutional provisions being applicable only to property having a fixed situs within a given county.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 65; Dec. Dig. § 37.*]

2. TAXATION (§ 25*) — POWERS OF LEGISLATURE—ASSESSMENT OF INTANGIBLE ASSETS—PREVENTING INTERFERENCE BY LOCAL OFFICERS.

The Legislature, having authority to create a state board to assess the intangible assets of corporations, as it did by Act 30th Leg. (Laws 1907, p. 469, c. 17), it was also authorized to prohibit an interference with the assessment made by the board by local officers of counties to which a portion of the assessment was apportioned.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 59; Dec. Dig. § 25.*]

3. TAXATION (§ 609*)—ASSESSMENT—CORPORATIONS—RAILROADS—INTANGIBLE PROPERTY—EQUALITY.

Under Act 30th Leg. (Laws 1907, pp. 475, 476, c. 17, §§ 16, 17), forbidding the county assessor and board of equalization from interfering with the assessment of intangible property of corporations by the state board, a county board of equalization had no power to grant relief to a railroad company for an unequal assessment of its intangible assets in proportion to the assessment of other property within the county, and hence a railroad company was not required to apply to such board for relief before suing to restrain the enforcement of the tax.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1243; Dec. Dig. § 609.*]

4. TAXATION (§ 49*)—UNIFORMITY—ASSETS OF CORPORATIONS—RAILROADS.

Where the property of individuals in a county was assessed at 66⅔ per cent. of its real value, in accordance with a deliberately adopted policy, an assessment of the intangible assets of a railroad company apportioned to that county at full value constituted a violation of Const. art. 8, § 1, requiring all property to be taxed in proportion to its value.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 119; Dec. Dig. § 49.*]

5. TAXATION (§ 45*)—UNIFORMITY—MODE OF ASSESSMENT.

Such assessment is violative of Const. art. 8, § 1, requiring equality and uniformity of taxation.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 100–103; Dec. Dig. § 45.*]

6. CONSTITUTIONAL LAW (§ 229*) — EQUAL PROTECTION OF LAWS—TAXATION.

Such assessment is violative of Fed. Const. Amend. 14, § 1, as denying to railroad companies the equal protection of the Constitution and laws of the state.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 685; Dec. Dig. § 229.*]

Certified Questions from Court of Civil Appeals of Fifth Supreme Judicial District.

Suit by the Missouri, Kansas & Texas Railway Company of Texas against Hiram F. Lively and others. Decree for complainant, and defendants appealed. On certified questions from the Court of Civil Appeals.

R. V. Davidson, Atty. Gen., Jas. D. Walthall and Claude Pollard, Asst. Attys. Gen., D. L. Lewelling, Co. Atty., and J. L. Goggans, for appellants. Coke, Miller & Coke, A. H. McKnight, and Thomas & Rhea, for appellee.

BROWN, J. Certified questions from Court of Civil Appeals of the Fifth Supreme Judicial District, as follows:

"This is a suit brought by the Missouri, Kansas & Texas Railway Company of Texas, appellee, against Hiram F. Lively, county judge of Dallas county, Texas, R. W. Eaton, H. H. Bennett, C. D. Smith, and W. H. Pippin, county commissioners of Dallas county, Texas, constituting the board of equalization of said Dallas county and Henry W. Jones, tax collector of Dallas county, each in his official capacity, to set aside alleged acts of the board of equalization of said county, and to enjoin the said tax collector from collecting or attempting to collect a portion of the tax upon the intangible assets of appellee.

"Appellee alleged in its petition, in sub-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

stance, that the state tax board, acting under an act of the Thirtieth Legislature, being chapter 17, p. 469, of the General Laws of the First Called Session of 1907, fixed, determined, and declared the value of its intangible assets at the full and fair market value thereof, and more than the full and fair market value of the same, and so apportioned to said county said assets, and that the tax assessor of said county has placed, set down, and listed said intangible assets upon the tax rolls of said county at the value fixed, determined, declared, and certified by the state tax board, and that the commissioners' court of said county, sitting as a board of equalization, approved the roll of the tax assessor which contained the intangible assets of appellee as apportioned to said county at the full and fair market value thereof, etc.; that the property of taxpayers generally throughout the county for the year 1907, and for several years prior thereto, had been assessed, equalized, and placed on the tax rolls for taxing purposes at not exceeding 50 per cent. of its value; that said undervaluation of property generally was by virtue of a fixed and established custom, usage, design, and intention; that the act of the board of equalization in so equalizing, or purporting to equalize, the property to said county and in approving the lists of the tax assessor containing the intangible assets at full value was intentional, arbitrary and fraudulent, and plaintiff was by said act unjustly, arbitrarily, and illegally discriminated against. The petition does not allege that the plaintiff sought before the board of equalization of Dallas county to have the value of its intangible assets reduced or to have advanced the valuation of all other property in the county to its true value in money. Nor does said petition show any excuse for plaintiff's failure to do so.

"The material facts are as follows: The plaintiff is a railway corporation, and owns and operates a line of railway, beginning at the Texas state line about five miles north of the city of Denison, Grayson county, Texas, and extending into and through Dallas county in said state. The defendants hold and have held for more than one year prior to January 27, 1908, their respective offices of county judge, county commissioners, and tax collector of Dallas county, Texas. Plaintiff's line of railway extending into and through said Dallas county, including the right of way, roadbed, superstructure, depots, and grounds upon which the said depots are situate, and all shops and fixtures of every kind used in operating said line of road, was duly rendered and assessed for taxation in said county of Dallas for the year 1907, and was duly placed on the tax rolls of said county, and approved by the board of equalization for said county at a valuation of $482,890. The rolling stock of plaintiff was duly assessed for taxes for that year in Dallas county, Texas, at a valuation of $795,568, and $35,700 of the amount was duly apportioned by the Comptroller of Public Accounts to the said Dallas county. The state tax board of this state, claiming to act under and by virtue of an act of the Twenty-Ninth Legislature of said state (Laws 1905, p. 351, c. 146), as amended by the Thirtieth Legislature of Texas (Laws 1907, p. 469, c. 17), finally determined and fixed the value of plaintiff's intangible assets at the sum of $22,420, and apportioned of said amount the sum of $1,169,300 to Dallas county, which sum so fixed and apportioned constitutes and represents the full and fair market value of said intangible assets in said Dallas county. The commissioners' court of said Dallas county, Texas, as required by law, met as a board of equalization on the 10th day of June, 1907, and after having inspected, corrected, and equalized the tax lists and books of the tax assessor of said county, approved the same, and the property of plaintiff as so equalized, and the assessment thereof approved by the board of equalization, was thereafter by the assessor placed on the tax rolls of said county at the following valuation: Plaintiff's tangible property at the sum of $518,590; its intangible property at the sum of $1,169,300.

"The manner, custom, and habit of assessing property for taxation in Dallas county, Texas, has been as follows: For the year 1907 all property situate in said county, excepting money and the intangible assets of railway companies, was assessed, equalized, and placed on the tax rolls for taxation at an average valuation of 57 per cent. of its fair market value. The assessor of Dallas county in assessing the property other than money and intangible assets in said county, intended and undertook to assess and place the same on the tax rolls for taxation purposes at 66⅔ per cent. of its fair market value, and the board of equalization of said county approved said valuation, and when the assessor was assessing said property, and when the board of equalization was approving same, the said assessor and board of equalization understood that the said property was being assessed at 66⅔ per cent. of its fair market value, and if it was not so assessed, it was a mistake or error in the judgment of said assessor and said board. A like custom and habit had been in vogue and effect in Dallas county with reference to the assessing and equalization of property for taxation for several years prior to the year 1907, and said manner and method had been carried on, and was for the year 1907 followed, by virtue of a fixed and established custom and usage. The bank stock in Dallas county was for the year 1907, and has been for a long number of years thereto, assessed at 66⅔ per cent. of its fair market value, arrived at upon the basis of accepting the face value of the stock, together with the surplus of the bank, as representing the fair market value of its stock. In a few isolated cases real estate was in

Dallas county for the year 1907 assessed at its fair market value. There were special reasons for so doing in these cases, however, the general effort being to tax land at the valuation above stated. In a few instances land was, in Dallas county, assessed for the year 1907, and for many years prior thereto, at not exceeding 25 or 30 per cent. of its fair market value. In Dallas county for the year 1907, and for many years prior thereto, money was taxed at its full face value, and for the year 1907 there was taxed in Dallas county money amounting to $846,250, which said sum represented but a small proportion of the money in said county subject to taxation as shown by bank reports. The custom herein referred to with reference to taxing property at 66⅔ per cent. of its fair market value is not the result of any agreement or understanding between the tax assessor of Dallas county and the board of equalization of same, or between the tax assessor and the said board, or either of them, with any other officer of the state or county.

"The custom above referred to with reference to the taxation of the property in general in Dallas county does not apply to the intangible assets of railway companies, but for the year 1907 the tax assessor of said Dallas county did place, set down, and list the intangible assets of plaintiff and other railway companies in said Dallas county at the full and fair market value thereof, as fixed, determined and declared, apportioned, and certified by the said state tax board, and said board of equalization approved the assessment lists, and books of the said tax assessor, showing the value of same at the amount fixed, determined, apportioned, and certified to the tax assessor by the state tax board, and said board of equalization at the time said books and lists were approved, as aforesaid, understood that the said intangible assets had been fixed and declared by the said state tax board as their full and fair market value. The plaintiff appeared before the board of equalization of Dallas county a time or two in connection with the assessment of its property in response to notice from the board to appear and show cause why its rendition should not be raised, but the plaintiff did not appear before the said board of equalization and make demand that the value on its intangible assets be reduced, and the plaintiff did not so appear because it understood that if its said application had been made it would have been refused, and further, that said application would have been refused if made, by reason of the provisions of sections 16 and 17, c. 17, pp. 475, 476, of the General Laws of the First Called Session of the Thirtieth Legislature of the state of Texas. The plaintiff herein, when before the board of equalization of Dallas county, Texas, for the year 1907, in response to said notice, urged as one reason why the value of its other property, for the purpose of taxation, should not be raised, the fact that it would have to pay taxes on a high valuation of its intangible assets. But the said board of equalization did not consider this argument in any wise, in fixing the value of the tangible property of plaintiff, and raised the valuation as rendered $200 per mile. The tangible property of plaintiff in Dallas county, Texas, for the year 1907 was and is assessed for taxation at as high a per cent. of its full and fair market value as other property in said county was and is assessed, but said tangible property of plaintiff in said county is not assessed at a higher per cent. of its full and fair market value than is the tangible property of other railway companies in said county. This, however, does not apply to the Texas & New Orleans Railway Company and the Lancaster Tap. The plaintiff has tendered to the defendant Henry W. Jones, tax collector of Dallas county, Texas, the sum of $4,382.08, in full of all state and county taxes justly due by it in said county for the year 1907 on its tangible property therein, which said sum the said tax collector has accepted and received in satisfaction of said taxes on plaintiff's tangible property, and the plaintiff has further tendered to said defendant Henry W. Jones the sum of $4,940.30, in satisfaction of the state and county taxes as justly due by it on its intangible assets in said county for the year 1907, or to be by him received on account for said taxes, which said sum the said tax collector accepted and receipted plaintiff for on account, but has demanded that it pay to him the said sum of $9,880.59, the same being the full amount assessed against said intangible assets for the year 1907, as shown by the said tax rolls in his hands. The plaintiff has paid said sum of $4,940.30, being the amount which it alleges is justly due as taxes for the year 1907, on said intangible assets in said county, and offers to pay any other fair sum which the court, upon hearing, may determine to be justly due from it for taxes in said county for the year 1907 on its intangible assets. Unless legally restrained, H. W. Jones as tax collector of Dallas county will proceed to collect said taxes in the amount claimed by him to be due as stated. All railway companies having intangible assets in Dallas County, except the following, Dallas Terminal & Union Depot Company, and possibly one other, have paid in full their taxes on their intangible assets in Dallas county for the year 1907, at the value fixed by the state tax board as shown by the tax collector's roll.

"Appellee paid to the tax collector of Dallas county, Texas, the taxes upon its intangible assets for said county at 50 per cent. of the value of same, which amount was accepted by the tax collector and receipted for on account, as stated, and the injunction sought was to restrain the collection of the remaining taxes upon 50 per cent. of the value of said intangible assets. The appellants de-

murred generally and specially to appellee's petition, and the demurrers were overruled. The case was submitted to the court without a jury upon an agreed statement of facts, from which it appeared that property generally in the county had been assessed and equalized for taxation at a general average of 57 per cent. of its value. The effort being to assess at 66⅔ per cent. of its value. The appellee having paid in court the difference between the 50 per cent. and the 66⅔ per cent., the court rendered judgment for the appellee setting aside the act of the board of equalization of Dallas county in equalizing the value of the intangible assets of appellee at full value, and restraining the tax collector of the county from collecting or attempting to collect from the appellee any tax upon its intangible assets in excess of the 66⅔ per cent. paid. From this judgment appellants have perfected an appeal to this court. The members of this court are not agreed upon a decision of some of the issues of law arising upon the appeal, and, in view of that fact and of the great importance of the matters involved, we deem it advisable to certify the questions set out below to the Honorable Supreme Court of Texas for adjudication.

"Question 1. Is the act of the Thirtieth Legislature, passed at its called session in 1907, approved May 16, 1907 (Laws 1907, p. 469, c. 17), and amending an act of the Twenty-Ninth Legislature, approved April 17, 1905 (Laws 1905, p. 351, c. 146), providing for the taxing of the intangible assets of certain corporations, and especially sections 16 and 17 of said first-mentioned act, repugnant to or violative of article 8, § 18, of the Constitution of Texas?

"Question 2. Does the act of the Legislature in question violate article 8, § 1, of the Constitution of Texas, that taxation shall be equal and uniform?

"Question 3. The plaintiff having failed to seek relief from the board of equalization by asking for a reduction in the valuation of its intangible assets or for an increase in the valuation of its intangible assets or for an increase in the valuation placed on other property generally, can it maintain an action to enjoin the collection of a portion of the tax upon its intangible assets? Or, in other words, did appellee have a full, complete, and adequate remedy at law?

"Question 4. Was plaintiff entitled to the relief sought and obtained by the judgment of the district court, under the facts stated, on the ground that its intangible assets had been assessed at their full and fair market value or real value, while other property of Dallas county was generally assessed by the tax assessor of said county and approved by the commissioners' court of said county, sitting as a board of equalization, at less than its full value in disobedience to the statute?

"Question 5. If the state tax board fixed, determined, and assessed plaintiff's intangible assets at their full and fair market value or real value, and so certified such valuation to the tax assessor of Dallas county, and other property generally, in Dallas county, was intentionally and in pursuance of a fixed and established custom and usage valued and assessed for taxation by the local assessing officers of said county at less than its full and fair market value or real value, was appellee entitled to maintain this suit and obtain the relief sought?

"Question 6. Under the facts stated, did the trial court err in rendering judgment in favor of the plaintiff perpetuating the injunction in this case and granting to it the relief sought?"

To the first and second questions propounded we answer that the act of the Thirtieth Legislature, referred to in the questions, is not in conflict with the state Constitution in the particulars mentioned. In Railway Co. v. Shannon, 100 Tex. 379, 100 S. W. 138, 10 L. R. A. (N. S.) 681, it was contended that by article 8, § 11, of the Constitution of the state, all property must be assessed in the county in which it was situated, and by section 14 of that article the tax assessor and collector for the county was alone empowered to assess the value of such property. This court held that the intangible assets of a railroad company had not a situs in any county through which the road passed, and that, therefore, the provisions of sections 11 and 14, art. 8, of the Constitution did not apply. Those sections were construed as governing and controlling such property as had a situs within a given county. We are still of the opinion that was the correct construction of the Constitution, and that the Legislature had the power to create a state board for the purpose of assessing the intangible assets of the corporations. If the assessor and collector of the county had no jurisdiction to assess the intangible assets of the railroad company, then it must be held that the board of equalization provided for in section 18 of said article could have no authority over the assessment made by the state board organized by the Legislature. The equalization referred to in section 18 is of the character of property which is required to be assessed in the county under section 11. The Legislature having authority then to create the board to assess the intangible assets of the railroad corporations for the whole state and to distribute it among the counties had likewise authority to prohibit an interference with that assessment by the county board and to require the observance and enforcement of it by the local county officers.

To the third question we answer that it was not necessary for the railroad company to apply to the board of equalization of Dallas county for relief, because that board had no power to grant any such relief. Sections 16 and 17 of the Act of 1907 read as follows:

"Sec. 16. Such county tax assessor shall extend and prorate upon said rolls the state and county taxes upon all such intangible assets in the same manner as taxes upon other property are extended and prorated. Said assessment, valuation and apportionment of such intangible assets so fixed, determined, declared and certified by such state tax board shall not be subject to review, modification or change by the tax assessor of such county, nor by the board of equalization of such county, and the state and county taxes thereon shall be collected by the tax collector of such county and accounted for by him in the same manner and under the same penalties as taxes upon other property.

"Sec. 17. Any county tax assessor who shall violate or in any respect fail to comply with any of the provisions of this act, and any member of any board of equalization and any county tax assessor who shall modify or change or vote to modify or change in any manner whatsoever the finding, valuation or apportionment of any of said intangible assets as so fixed, determined, declared and certified by said state tax board, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not less than one hundred nor more than one thousand dollars."

These sections of that act forbid the tax assessor and the board of equalization of Dallas county to interfere with the assessment made by the state board. In order to secure the equal protection of the law by having other property taxed at the same ratio as its intangible assets the railroad company would have to go before the board of equalization of the county and give notice to every taxpayer to appear and to enter upon an examination of each assessment to ascertain how much the assessment of each should be increased. It is not necessary to say that this would be impracticable.

The substance of the fourth and fifth questions are embraced in the sixth, and we will include the three in one answer. Article 8, § 1, of the Constitution, contains this language: "All property in this state, whether owned by natural persons or corporations, other than municipal, shall be taxed in proportion to its value, which shall be ascertained as may be provided by law." The rule announced by that provision is "equality and uniformity." To secure this "uniform and equal" taxation, the same sentence prescribes that the property of all persons and corporations, other than municipal, "shall be taxed in proportion to its value, which shall be ascertained as may be provided by law." This is a clearly expressed purpose, that the officers charged with the assessment of property shall in the manner prescribed by law ascertain its value. "The value of the property is to be determined by what it can be bought and sold for." New York State v. Barker, 179 U. S. 287, 21 Sup. Ct. 124, 45 L. Ed. 194. If it means full market value when applied to the intangible assets of a railroad company, it means the same thing when applied to land, horses, etc. The standard of uniformity prescribed by the Constitution being the value of the property, taxation cannot be in the same proportion to the value of the property, unless the value of all property is ascertained by the same standard. The value of the intangible assets of appellee being fixed at their full value, and the value of all other property in Dallas county being assessed at 66⅔ per cent. of its value, appellee was denied the right of equal and uniform taxation secured to it by the Constitution of the state.

Section 1 of the 14th amendment to the Constitution of the United States provides as follows: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The facts certified show that the assessment of the property of the people of Dallas county and the assessment of the intangible assets of the appellee were not made according to the same rule or standard of value, and appellee was denied, by such action of the officers, the equal protection of the Constitution and laws of the state, contrary to and in violation of the above-quoted section 1 of the 14th amendment to the Constitution of the United States. It is apparent that the facts show a deprivation of the same right which is secured by both state and federal Constitutions, therefore decisions by the courts, whether based upon the 14th amendment or upon provisions of the state Constitutions similar to ours are equally applicable to this case.

It is objected that the wrong done by the officers of Dallas county was not the act of the state, and therefore the appellee had no right to an injunction. The facts certified show conclusively that the tax assessors and the board of equalization of Dallas county for a number of years had adopted a rule for the assessment of property situated in that county by which it was assessed at 66⅔ per cent. of its real value, except money and the intangible assets of railroad companies, and possibly a few isolated exceptions not necessary to mention. The intangible assets of the appellee were assessed and placed upon the roll at 100 cents on the dollar. It is evident that this was a deliberate scheme on the part of the officers of Dallas county by which the assessment was made at the proportion of its value stated, and there is nothing in the case to indicate that there was any mistake on the part of the officers. It was the deliberately adopted policy to so discriminate between the different classes of property in the assessment for

taxation. It is not necessary that the officers in so discriminating should have intended specifically to injure the appellee or other railroad companies. It is sufficient that by their action they denied the appellee the equal protection of the Constitution and laws of the state. The intention with which the acts were done is of no consequence. Such deliberate action on the part of officers charged with the enforcement of the law must be held to be the act of the state, and the appellee was entitled to relief against the enforcement of the excessive assessment. Raymond v. Chicago Union Traction Co., 207 U. S. 20, 28 Sup. Ct. 7, 52 L. Ed. 78; Chicago, B. & Q. Ry. Co. v. Board of Com'rs, 54 Kan. 781, 39 Pac. 1039; Andrews v. King Co., 1 Wash. St. 46, 23 Pac. 409, 22 Am. St. Rep. 136; Taylor v. L. & N. Ry. Co., 88 Fed. 365, 31 C. C. A. 537.

We are referred by counsel for appellant to the case of Engelke v. Schlenker, 75 Tex. 559, 12 S. W. 999. In that case a suit was brought to enjoin the collection of taxes levied on shares of national bank stock on the ground that the assessment of taxes was in violation of the Constitution of this state as well as the act of Congress forbidding a higher rate of taxation on national bank stock than of other moneyed capital. Judge Henry delivered the opinion of this court, and in the course of the opinion it is said that the plaintiff had failed to make proof of the facts alleged, and Judge Henry said: "The court correctly concluded that it [the unequal assessment] was not established. Even if it had been established it could not have properly affected the result of this suit. It appears that the appellant's property was not assessed beyond its true value." This was dictum, and manifestly without due consideration of the question. The learned judge adopted the view, which is urged in this case, that the injury complained of consisted in requiring the complainant to pay taxes on the full value of its shares, when, in fact, the wrong consisted in that case as in this in denying the appellee the right to have other property owners in the county to pay taxes in the same proportion upon their property as it was required to pay. The fact that appellee was not required to pay more than it should does not satisfy the constitutional right to have all others owning property in the same territory and subject to like taxation to bear their equal portion of the burden of government. That is a substantial right that may be asserted and enforced in the courts.

Counsel for the appellants object to the reduction of the value of appellee's property as assessed by the state board because that assessment was made in conformity to the Constitution and laws of the state and was therefore valid. It is claimed that it is not permissible to overturn this valid assessment and to base the judgment of the court upon that which was made contrary to the laws and Constitution. That is a plausible proposition, and would be applicable if the object of this proceeding were to enforce the rights of the appellee to a fair valuation of its property. But, as stated before in this opinion, the wrong which was inflicted upon the appellee was not in requiring it to pay taxes upon the full value of its property, but in denying to it the equality of taxation secured by the Constitution, which equality of taxation necessarily depends upon uniformity of assessment. In administering the remedy, the court must take the course which is most practical to secure uniformity of valuation of the property to be taxed. This may be done either by increasing the assessment of each property owner in the county to its full value and to collect from each the taxes upon this full value, or to reduce the assessment of the intangible assets of the railroad company to 66⅔ per cent. on the $100 of its assessed value. The court will adopt that plan which is most feasible and calculated to secure justice to the parties. The same question arose in the case of Taylor v. Louisville & N. R. R. Co., 88 Fed. 364, 31 C. C. A. 537. The learned judge who presided at the trial of that case recognized the difficulty and solved it, announcing his conclusion in the following forcible and clear language: "How is it to be remedied? It is said on behalf of the defendants that the only method consistent with the Constitution is by raising the assessments of the real and personal property. This is no remedy at all. It has been suggested (but we cannot regard the suggestion as a serious one) that the railroad companies of the state should go before the taxing authorities of each county, and, after notifying each taxpayer, attempt to secure an increase in the total tax assessment of the real and personal property of the state from $312,000,000 to $416,000,000. The absolute futility of such a course, the enormous expense, and the length of time necessary in attempting to follow it, need no comment. * * * Therefore, to enjoin the enforcement of the prescribed method of assessment as to one species of property, when there is a departure from it as to all others, if the injunction secures uniformity as to all, is not so great a violation of the method really prescribed as that involved in a continuance of the existing conditions, and the denial of relief to the injured taxpayer. The court is placed in a dilemma, from which it can only escape by taking that path which, while it involves a nominal departure from the letter of the law, does injury to no one, and secures that uniformity of tax burden which was the sole end of the Constitution. To hold otherwise is to make the restrictions of the Constitution instruments for defeating the very purpose they were intended to subserve. It is to stick in the bark, and to be blind to the substance of things. It is to sacrifice justice to its incident."

It would be utterly impracticable to in-

crease the assessment of all other property owners in Dallas county to its full value, therefore a court of equity will adopt the other method—reducing the assessment made by the state board to the same proportion of value as was placed upon the mass of property in the county. In doing this the assessment made by the state board is not overturned, but, for the purpose of adjusting the rights of these parties, is treated as the taxable value of the intangible assets just as the taxable value of the property of Dallas county was treated as the basis upon which to apportion the tax; that is, the taxes will be levied upon the same ratio of value—66⅔ cents on the dollar—as was the general assessment made for county purposes.

It appearing that the appellee has paid all the taxes due from it to the county and state, the court correctly entered a judgment perpetuating the injunction against the collection of taxes on the excess of valuation of the intangible assets of the appellee, and we answer the sixth question in the negative.

McCOY v. STATE.

(Court of Criminal Appeals of Texas. May 19, 1909. On Rehearing, June 23, 1909.)

1. CRIMINAL LAW (§ 1043*) — APPEAL — INSTRUCTIONS—OBJECTIONS.

An objection to a charge on the ground that it is vague, indefinite, and misleading is too indefinite to be considered.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2654; Dec. Dig. § 1043.*]

2. LARCENY (§ 75*)—INSTRUCTIONS—"FRAUDULENT TAKING."

On a trial for theft, an instruction that by "fraudulent taking" is meant that the person taking knew at the time of taking that the property was not his own, that the property was taken without the consent of the owner, and with intent to deprive the owner of the value thereof and to appropriate it to the use or benefit of the person taking, was correct.

[Ed. Note.—For other cases, see Larceny, Dec. Dig. § 75.*

For other definitions, see Words and Phrases, vol. 3, p. 2961.]

3. CRIMINAL LAW (§ 775*)—ALIBI—INSTRUCTIONS.

In a trial for theft, a charge that if the evidence raised a reasonable doubt as to the presence of defendant at the time and place when and where the property was fraudulently taken, if the same was taken then, the jury should find defendant not guilty, was correct, and the court was not required to instruct that if the jury believed from the evidence that defendant was not, and could not be, the person who committed the offense charged, etc., they should find him not guilty.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1833-1837; Dec. Dig. § 775.*]

4. CRIMINAL LAW (§ 763*)—TRIAL—INSTRUCTIONS—WEIGHT OF EVIDENCE.

An instruction that defendant did not have to testify, and that the jury must not consider his failure to testify as a criminative circumstance, was not on the weight of the evidence.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 763.*]

5. LARCENY (§ 46*)—EVIDENCE—VALUE.

On a trial for theft of a watch, the prosecuting witness was properly permitted to state what she gave for the watch, it being one of the bases for ascertaining its value.

[Ed. Note.—For other cases, see Larceny, Dec. Dig. § 46.*]

Appeal from Criminal District Court, Harris County; E. R Campbell, Judge.

Dudley McCoy was convicted of theft, and appeals. Affirmed.

F. J. McCord, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of theft, and his punishment assessed at two years' confinement in the penitentiary.

The record before us shows the court adjourned on the 30th day of January, 1909, after having granted a 20-day order for the filing of the statement of facts in this case. The statement of facts was filed March 1, 1909. This being true, the same cannot be considered in passing upon the questions in this record. We find no bill of exception in the record, and, in the absence of statement of facts and bill of exception, there is nothing suggested herein that authorizes a reversal of the case.

The judgment is accordingly affirmed.

On Rehearing.

This case was affirmed on a previous day of this term, and now comes before us on motion for rehearing. We were mistaken in holding in the original opinion that the statement of facts was not filed in time.

In the second ground of the motion for a new trial appellant complained of the following charge of the court: "If you believe from the evidence beyond a reasonable doubt that about the time and place as alleged in the indictment the defendant, Dudley McCoy, did fraudulently take corporeal personal property, to wit, that alleged in the indictment, or any part thereof, of the value of fifty dollars, or more belonging to Mrs. M. Lucas, from the possession of the said Mrs. M. Lucas, without her consent and with the intent to deprive the said Mrs. M. Lucas of the value of said property, and to appropriate the same and the value thereof to his own use and benefit, then you will find him guilty, and assess his punishment at confinement in the state penitentiary for a term of not less than two nor more than ten years." Appellant objected to said charge because said paragraph of the court's charge, among other reasons, is not the law applicable to the facts in this case, and, further, that there was no evidence showing that any property was taken from the possession of Mrs. M. Lucas, because the evidence in this case