surance company, in cases of this kind, cannot avoid its contract of indemnity except upon a clear and unequivocal showing of a breach of a material warranty.

We therefore recommend that the judgment of the Court of Civil Appeals be affirmed.

CURETON, C. J. Judgment of the Court of Civil Appeals affirmed.

FELTON v. JOHNSON. (No. 368-3365.)

(Commission of Appeals of Texas, Section B. Feb. 14, 1923.)

1. Justices of the peace ⟸72—Exception in venue statute as to suits for "labor actually performed" does not include professional services of real estate broker.

In Vernon's Sayles' Ann. Civ. St. 1914, art. 2308, as to suit in justice court, in county and precinct where defendant resides, the 1917 amendment (Vernon's Ann. Civ. St. Supp. 1918, art. 2308), to the exception as to written contracts, providing that suits to recover for "labor actually performed" may be brought where such labor is performed, whether the contract therefor be oral or written, the words "labor actually performed" do not include professional services rendered by a real estate broker, but carry the ordinary meaning of toil or manual exertion of a toilsome nature—(citing 3 Words and Phrases, Second Series, Labor).

2. Statutes ⟸211—Caption restricted by context of act.

While a caption of a statute may be used as a guide and circumstance showing the legislative intent, where there is a discrepancy between the caption and the statute, it is proper to seek to account for the discrepancy by reference to the legislative history of the statute, and, where the statute and the caption conflict, the caption must yield.

Appeal from Court of Civil Appeals of Seventh Supreme Judicial District.

Action by J. N. Johnson against W. F. Felton. Judgment for plaintiff, and defendant appealed, and the Court of Civil Appeals certifies a question. Question answered.

Tatum & Strong, of Dalhart, for appellant.
Bailey & Richards, of Dalhart, for appellee.

POWELL, J. This case is before the Supreme Court on the following certificate from the honorable Court of Civil Appeals of the Seventh District:

"Appellee, J. N. Johnson, brought this suit in the justice's court, precinct No. 2 of Dallam county, against appellant, W. F. Felton, to recover $175, as broker's commission, alleged to have been earned by appellee in the sale of certain property belonging to appellant, situated in Dallam county. After trial and judgment in the justice's court, the case was appealed to the county court, where judgment was rendered for the appellee, and the appellant prosecutes this appeal to this court from said judgment. The appellant resided in precinct No. 1, Dallas county, Tex., and in proper time filed and presented his plea of privilege to be sued in the precinct and county of his said residence. Under the pleading and the evidence, the plea should have been sustained, unless the venue in Dallam county can be maintained by virtue of the following provision of article 2308, § 4, as amended by the Acts of the 35th Legislature (1917) c. 124, p. 321 (Vernon's Ann. Civ. St. Supp. 1918, art. 2308): 'Provided that in all suits to recover for labor actually performed, suit may be brought and maintained where such labor is performed, whether the contract for same be oral or in writing.' The appellee resided in Dallam county, and his services as a broker in the sale of the land, which was also situated in Dallam county, were performed in such county, and the concrete question presented by the plea of privilege is whether such services are 'labor,' within the terms of the law just quoted. The Court of Civil Appeals for the Second District, in the case of Walker v. Alexander, 212 S. W. 713, held, Judge Buck dissenting, that such services do constitute 'labor' within the terms of said act. On original hearing we followed this decision and affirmed the judgment of the lower court. On rehearing, the majority of the court became convinced that we were in error in this ruling and therefore granted the motion for rehearing, and held that the plea of privilege should have been sustained, and reversed and remanded the cause, with instructions that the plea of privilege be sustained and that the cause be transferred to the justice court, precinct No. 1, of Dallas county. This decision is, as we have already stated, in conflict with that of the Court of Civil Appeals for the Second District, in the said case of Walker v. Alexander, supra, and one of the members of this court is inclined to think that we were in error in so holding. The question thus raised, as to the proper construction of the provisions of the act referred to, is one that will be constantly recurring in the practice, and an early decision thereof is desirable, but, under the circumstances, a conclusive decision is only possible by a decision of your honorable court. We have, therefore, thought it proper, pending the final disposition of this cause, to certify to your honorable court for decision the following question: 'Did we err in holding that the plea of privilege should have been sustained under the circumstances heretofore stated?"

[1] Article 2308 of Vernon's Sayles' Revised Civil Statutes of Texas of 1914 reads as follows:

"Every suit in the court of a justice of the peace shall be commenced in the county and precinct in which the defendant, or one or more of the several defendants, resides, except in

the following cases and such other cases as are or may be provided by law."

The aforesaid article of the statutes is followed by three subdivisions providing certain exceptions. Then the article proceeds thus:

"In the following cases the suit may, at the plaintiff's option, be brought either in the county and precinct of the defendant's residence, or in that provided in each exception."

This last-quoted language was immediately followed by subdivision 4 of the article in question, which subdivision, prior to 1917, read as follows:

"Suits upon a contract in writing promising performance at any particular place, may be brought in the county and precinct in which such contract was to be performed."

By Act March 29, 1917, the last-quoted subdivision was amended by adding thereto the following provisions:

"Provided that in all suits to recover for labor actually performed, suit may be brought and maintained, where such labor is performed, whether the contract for same be oral or in writing."

As to whether or not "labor actually performed," within the purview of the amendment last quoted, would include the professional services rendered by a real estate broker, has apparently never been before our Supreme Court, either directly or indirectly. It was first considered in an appellate court in Texas by the Court of Civil Appeals at Fort Worth, in the case of Walker v. Alexander, 212 S. W. 713. In that case, that court held such services to be "labor" within the meaning of this statute. As shown by the certificate now under consideration, the Court of Civil Appeals, in the instant case, on original hearing, followed the opinion in Walker v. Alexander, supra, and affirmed the trial court in overruling the plea of privilege.

[2] Upon a careful consideration of the opinion of each of the Courts of Civil Appeals just referred to, it is quite clear that both courts would have held just the contrary to what they did hold but for the language of the caption of the act of 1917, supra. In other words, both courts held, and we think correctly, that the word "labor," in its usual and ordinary signification, would not include professional services rendered by a real estate broker. We think the great weight of authority supports this conclusion of the Courts of Civil Appeals. For instance, 3 Words & Phrases, Second Series, 1320, says:

"The word 'labor,' in legal parlance, has a well-defined, understood, and accepted meaning. It implies continued exertion of the more onerous and inferior kind, usually and chiefly consisting in the protracted exertion of muscular force. 'Labor' may be business, but it is not necessarily so, and business is not always labor. In legal significance, labor implies toil; exertion producing weariness; manual exertion of a toilsome nature."

In this same connection, the Supreme Court of New Hampshire has written a most interesting opinion in case of Weymouth v. Sanborn, 43 N. H. 171, 80 Am. Dec. 144. In the latter case, a doctor was trying to collect for professional services by levying on a homestead, contending that an account for such services was a claim for "labor" to which even a homestead was subject. The Supreme Court in that state overruled such contention. We quote from that opinion, as follows:

"The common and ordinary signification of the term labor accords, we think, with the definition given by the best lexicographers, and is understood to be physical toil. And the term laborer is ordinarily employed to denote one who subsists by physical toil, in distinction from one who subsists by professional skill. The exception of claims for labor would not, therefore, ordinarily be understood to embrace the services of the clergyman, physician, lawyer, commission merchant, or salaried officer, agent, railroad and other contractors, but would be confined to claims arising out of services where physical toil was the main ingredient, although directed and made more valuable by mechanical skill."

In the absence of any provision in a statute evidencing a contrary intention, it will be presumed that the Legislature used words in their usual and ordinary meaning. Consequently we find the Courts of Civil Appeals in this state, in the opinions first above referred to, basing their decisions, not upon the language of the very act in question, but upon its caption, the latter reading, in part, as follows:

"Providing that all suits to recover for labor performed or any kind of personal services rendered may, at the option of the plaintiff, be brought and maintained where such labor is performed or personal services rendered."

It is doubtless true that a caption may be used as a guide and circumstance showing the legislative intent. Inasmuch as "labor" in its broadest sense might include personal services of any kind rendered, we are not surprised that the Courts of Civil Appeals, both at Fort Worth and Amarillo, gave the statute this broad construction, basing their conclusions upon the language of the caption and the light it shed upon the intention of the Legislature. In this connection, the Amarillo court says:

"We would not be inclined to give the statute under consideration such a broad construction, were it not for the fact that, from the language of the caption, it was clearly the intent of the Legislature to include those who perform 'any kind of personal service.'"

As before stated, it is equally clear that the Fort Worth court based its conclusion upon the language of the caption in the same way.

It will be observed that aforesaid language of the caption is very much broader than the wording of the statute itself. The latter speaks only of "labor actually performed." The former talks about recovering, not only for "labor performed," but also for "any kind of personal services rendered." Under such circumstances, it is proper to try to account for that discrepancy, if the legislative history of the act will clear it up. See Red River National Bank v. Ferguson, 109 Tex. 287, 206 S. W. 923. In the latter case, our Supreme Court looked not only to the journals of the House and Senate, but to the Governor's message in that connection as well. In that case, Chief Justice Phillips says:

"As originally passed, the bill had the identical caption of this act—that is, the act as finally adopted. And as originally passed, in respect to the wife's unlimited power to contract, it conformed fully to the caption."

Judge Phillips then shows that the act there in question was recalled from the Governor's office by the Legislature and amended by important changes in its provisions. Following this, that eminent jurist adds:

"The broad terms of the title of the act in respect to the wife's authority to contract are thus accounted for. They were intended as a part of a title of an act as broad as their general import, but which, as finally passed, left her in that particular with only restricted powers. The title of an act is of influence in its construction. An act is to be interpreted in the full light of its title. Missouri, K. & T. Ry. Co. of Texas v. Mahaffey, 105 Tex. 394, 150 S. W. 881. But the title, of itself, has no enacting force, and cannot confer powers not mentioned in the act. Sutherland on Statutory Construction, § 339."

Upon the authority of Bank v. Ferguson, supra, counsel for appellant in the case at bar, on motion for rehearing, brought before the Court of Civil Appeals the journals of the Legislature and showed the history of this act of 1917 as reflecting the intention of the Legislature in its enactment. Upon the showing made, and which we shall hereafter set out more fully, the Court of Civil Appeals set aside their original opinion and sustained the plea of privilege, ordering the case transferred to the county of appellant's residence. It does not appear that this same showing as to the contents of the legislative journals in connection with this act was made before the Fort Worth Court of Civil Appeals. Had it been, we feel rather confident that said court would likewise have set its former ruling aside. Both opinions of the Amarillo court were written by Justice Hall, and, while he expressed some doubt as to the correctness of the court's final holding, he entered no formal dissent.

The journals of the Legislature show that the act itself, just like its caption, heretofore quoted, as introduced and passed in the House, provided:

"Providing that all suits to recover for labor performed or any kind of personal service rendered may at the option of plaintiff be brought and maintained where such labor is performed or personal service rendered."

As so passed by the House, it went to the Senate. In the Senate, it was amended so as to read as first hereinbefore quoted. As so amended by the Senate, it was concurred in by the House and went to final passage. In other words, the Senate, with the concurrence of the House, refused to include "any kind of personal services rendered" within the act. It is absolutely clear to us that such action completely negatives the theory that the Legislature intended to bring all kinds of labor and personal services within the terms of this act. As passed by the House, its meaning was entirely clear. The Senate knew that the language employed by the House would include practically every account or claim one person might have against another, for every service rendered involves either mental or physical effort. The Senate was clearly unwilling to employ this all-embracing language, so its members used only the words "labor actually performed," and eliminated "any kind of personal services rendered."

It is true that, as finally passed, the act itself and its caption are in conflict. That being true, the caption must yield. Bank v. Ferguson, supra. It is quite evident that the Legislature, in amending the act itself in the Senate, overlooked amending the caption so as to conform thereto, just as was true in the statute under consideration by our Supreme Court in Bank v. Ferguson, supra. The direct and positive act of the Legislature in amending the House bill itself as it did seems to us to completely overcome the force of the caption, which, at most, is but a circumstance tending to show legislative intent. Bank v. Ferguson, supra.

The author of this bill and each branch of the Legislature evidently had in mind the usual and ordinary meaning of the word "labor" in enacting this law. Otherwise there would have been no necessity to specifically include in the bill, as originally drawn and passed by the House, not only the provision for "labor performed" but also the words "any kind of personal services rendered." They had these distinctions in mind. By their affirmative acts they showed beyond any doubt, as we see it, that they did not want to include professional services within the word "labor" as used in this statute. In other words, they showed they did not desire

to give to that word its broadest possible meaning, but only its usual and ordinary meaning. In view of the history of this bill, we think we would do violence to the plain intent of the Legislature if we recommended a construction of this statute which would include professional services of a real estate broker within its terms. Before we could make such a recommendation, we think it would be necessary for us to insert in this statute the very provisions which the Legislature not only refused to include therein but expressly eliminated therefrom. The courts should not do that. To do so would clearly invade the prerogatives of the legislative branch of the state government. We are of the view that the Court of Civil Appeals, in its opinion on rehearing in the instant case, rendered the correct judgment.

Therefore, we recommend that the certified question herein be answered in the negative.

CURETON, C. J. The opinion of the Commission of Appeals, answering certified questions, adopted and ordered certified to the Court of Civil Appeals.

TEXAS ELECTRIC RY. CO. v. GREENHILL. (No. 383-3570.)*

(Commission of Appeals of Texas, Section A. Feb. 14, 1923.)

Appeal and error ⟸58—Petition held not to state amount within appellate jurisdiction.

A petition for negligent killing of an animal, stating "that the fair reasonable cash market value of said heifer at the time and place of her death was $95, for which sum he alleges that defendant is liable," and "wherefore plaintiff prays for his damages, interest, all costs, and for all other relief, general and special, legal and equitable, to which he may show himself entitled," *held* not to state an amount within the appellate jurisdiction of the Court of Civil Appeals; plaintiff not being entitled to recover interest eo nomine, until after judgment, and being presumed to have laid $95 as his full compensation.

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

Action by G. S. Greenhill against the Texas Electric Railway Company. There was a judgment for plaintiff, and defendant appealed to the Court of Civil Appeals, which certifies question. Question answered.

Templeton, Beall, Williams & Callaway, of Dallas, and J. J. Averitte and Wear, Wood & Wear, all of Hillsboro, for plaintiff.

Vaughan & Abney, of Hillsboro, for defendant.

RANDOLPH, J. The Court of Civil Appeals has filed with the Supreme Court the following statement and certified question, which has been referred to this section for consideration:

"Appellee sued appellant in the justice of peace's court of Hill county to recover damages for the alleged negligent killing an animal by appellant which belonged to appellee. The record contains no pleading except the citation issued in the justice court which plaintiff adopted as his pleading. In this citation appellee alleged the acts of negligence relied upon as proximately causing the death of the animal, and immediately preceding the prayer is this allegation: 'Plaintiff alleges that the fair, reasonable cash market value of said heifer at the time and place of her death was $95, for which sum he alleges that defendant is liable.' There is no other allegation of the amount of damage. The prayer, however, is as follows: 'Wherefore, plaintiff prays for his damages, interest, all costs, and for all other relief, general and special, legal and equitable, to which he may show himself entitled.'

"The suit was filed on February 26, 1920. The cause of action arose on October 18, 1919. A trial in the justice of peace's court resulted in a judgment for appellant, defendant there. Appellee appealed to the county court, where the cause was tried on October 29, 1920, resulting in a judgment against appellant in appellee's favor for $75, with interest from the date of the judgment.

"Appellant prosecuted its appeal to this court, and we dismissed the appeal on the ground that the amount in controversy was below the jurisdiction of the court. We took this view because the allegation in the citation was that appellant was liable to appellee for $95, there being no other allegation of amount; and also because, even if the prayer of the petition should be construed as making interest a part of the damages determining the amount in controversy, yet by calculation, interest at 6 per cent. from the date the alleged cause of action arose until the date of filing the suit, added to the $95, would not make a sum in excess of $100, and there being no language in the prayer fairly indicating that interest to accrue between the date of filing and the date of trial was sought as damages, but that the prayer was for damages which had already accrued, we considered that under any possible construction we had no jurisdiction.

"Appellant has filed its motion requesting that we certify to the Supreme Court the question of whether or not our construction of the pleadings with reference to the allegation of amount in controversy is correct, appellant contending that our judgment dismissing this cause is in direct conflict with the decisions of the Supreme Court in the following cases: Railway Co. v. Fromme, 98 Tex. 459, 84 S. W. 1054, and Railway Co. v. Greathouse, 82 Tex. 104, 17 S. W. 834, and also in direct conflict with the opinion of the Court of Civil Appeals in Railway Co. v. Perkins, 184 S. W. 725, and the opinion of the Court of Civil Appeals in Railway Co. v. Timon, 110 S. W. 82. * * *

"Not being satisfied that our ruling is not in conflict with the above-named opinions of the

---

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied March 7, 1923.