to base the claim. We think there is no error in the judgment, and that it should be affirmed.

STAYTON, C. J. Report of the commission of appeals examined, their opinion adopted, and the judgment affirmed.

(75 Tex. 50.)

INTERNATIONAL & G. N. R. Co. *et al.* v. BELL.

(*Supreme Court of Texas.* Nov. 5, 1889.)

MASTER AND SERVANT—APPLIANCES.

In an action against a railroad company for injuries received by an employe the court charged as follows: "(2) Railways are not bound to their employes to provide the best possible appliances, but they are bound only to supply such appliances as are in common use by well-managed railways, and which they have skillfully constructed and carefully maintained in repair. They are bound to furnish such appliances as are reasonably safe and suitable, such as a prudent man would furnish if his own life were exposed to the danger that would result from unsuitable or unsafe appliances;" and "(12) If the track, switch, and guard at the place of the injury were in ordinarily good condition as to safety and fitness, as defined in section No. 2 of this charge, then the plaintiff cannot recover." *Held*, that such instructions were erroneous, as leading the jury to believe that more than ordinary care was required of a railroad company in regard to appliances for the use of its employes.

Commissioners' decision. Appeal from district court, Travis county; A. S. WALKER, Judge.

Maxey & Fisher, for appellant. *John Dowell*, for appellee.

ACKER, J. Appellee was employed by appellant as a switchman in its yard at Austin, and had been so employed for about nine months on the 3d day of June, 1886, when, on that day, while engaged in uncoupling cars, his foot became fastened between the guard-rail and track-rail, and he was run over by a car, and received injuries that necessitated the amputation of his leg. This suit was brought to recover damages for the injury. Appellee alleged in his petition that, "owing to the insufficient manner in which the guard-rail was constructed, it prevented his foot from being withdrawn when accidentally inserted; that, had said switch on place where the rails come together been properly supplied with a proper and sufficient guard in it, then his foot would not have been caught in it." The defendant answered by general denial and special answer, setting up that its railroad was properly constructed of good material, after the usual manner of constructing first-class railroads; that plaintiff was familiar and well acquainted with said railroad, guard-rails, and switches at the place of the accident; and if there was any defect in the respect mentioned by plaintiff, or otherwise, he had full knowledge of such defects, or had equal means with defendant of discovering them, and continued in the performance of his duties without objection; and pleaded contributory negligence. There was verdict and judgment for appellee for $7,240.

Paragraphs 2 and 12 of the charge given by the court are as follows: "(2) Railways are not bound to their employes to provide the best possible appliances, but they are bound only to supply such appliances as are in common use by well-managed railways, and which they have skillfully constructed and carefully maintained in repair. They are bound to furnish such appliances as are reasonably safe and suitable, such as a prudent man would furnish if his own life were exposed to the danger that would result from unsuitable or unsafe appliances." "(12) If the track, switch, and guard, at the place of the injury, were in ordinarily good condition as to safety and fitness, as defined in section No. 2 of this charge, then the plaintiff cannot recover." It is urged that the court erred in giving these charges, because, while defendant was under obligations to use reasonable and ordinary care to furnish plaintiff with reasonably safe appliances for the performance of the duties of his employment, the duty extended no further, and the charge imposed a greater degree of care upon defendant than the law requires. The language of the charge is peculiar, and, while the learned judge who gave it may not have intended that it should be construed as requiring more than ordinary care on the part of defendant in furnishing appliances to plaintiff, it prescribes a novel test of diligence, which we think well calculated to mislead the jury. It is believed to be settled beyond controversy that the test of diligence required of a railroad company in furnishing and maintaining proper appliances for the use of its employes is that of ordinary care. Railway Co. v. Oram, 49 Tex. 341; Railroad Co. v. Lyde, 57 Tex. 509; Railroad Co. v. McCarthy, 64 Tex. 635; Pierce, R. R. 370; Wood, Mast. & Serv. §§ 344, 345. Ordinary care is such care as an ordinarily prudent man would exercise under the circumstances. Railway Co. v. Oram, 49 Tex. 341; Railroad Co. v. Beatty, 11 S. W. Rep. 858. Looking to the evidence as presented in the record before us, it seems probable that the jury may have been misled by the charge complained of, and we think the court erred in giving it. We are therefore of opinion that the judgment should be reversed and the cause remanded.

STAYTON, C. J. Report of the commission of appeals examined, their opinion adopted, and the judgment reversed and cause remanded.

(75 Tex. 33.)

JOHNSON v. MARTIN *et al.*

(*Supreme Court of Texas.* Nov. 5, 1889.)

PUBLIC WEIGHER—CONSTITUTIONAL LAW.

1. Act Tex. April 12, 1883, § 1, which leaves it discretionary with the commissioners' court to order the election of public weighers, is not unconstitutional as a delegation of legislative power, as the commissioners' court has no power to revise or

amend the act in any way, it being complete as a law by legislative enactment, in accordance with constitutional forms, and the subject a matter of local regulation.

2. Act April 19, 1879, which creates the office of public weigher, and is entire, and a substitute for the act of 1875, and contains 10 sections, each section complete in itself, is not in contravention of Const. Tex. art. 3, § 36, providing that "no law shall be revived or amended by reference to its title; but in such case the act revived, or the section or sections amended, shall be re-enacted and published at length."

3. The act is entitled "An act to amend an act creating the office of public weigher, and regulating the appointment, and defining the duties and liabilities, thereof." *Held*, that section 8, which declares it to be unlawful to employ any one except the public weigher to perform his duties, and provides that any person violating such provision shall be liable to damages at the suit of the public weigher, is not in violation of Const. art. 3, § 35, which provides that a bill shall not contain more than one subject, which shall be expressed in its title.

4. The act of 1879 authorized the governor to appoint public weighers for specified cities and other incorporated towns as in his judgment might be deemed expedient. The act of 1883, which is amendatory thereof, provides that the governor shall make such appointment in every city which annually receives over 100,000 bales of cotton for sale or shipment, and vests a discretion in the commissioners' court to order an election in cities, towns, or railroad stations which receive less than that amount. *Held*, that the acts are not in conflict with Const. art. 3, § 56, which declares that the legislature shall not, except as otherwise provided, pass any local or special law "regulating the affairs of counties, cities, towns, wards, or school-districts."

5. Under Rev. St. Tex. final tit., § 20, which provides that "any law passed by the sixteenth legislature in conflict with any provision of this act shall be the law of the state, this act to the contrary notwithstanding," the act of 1879, passed by the sixteenth legislature, and amended by the act of 1883, is not invalidated by Rev. St. Tex. p. 587, art. 4081, etc., which was passed with the Revised Statutes, and requires the governor to appoint the officer.

Commissioners' decision. Appeal from district court, Lamar county; D. H. SCOTT, Judge.

Hale & Hale and *R. Wooldridge*, for appellant. *Burdett & Connor* and *J. M. Long*, for appellees.

COLLARD, J. On the 6th day of November, 1886, appellant brought suit against appellees for $130,000 damages. Plaintiff's petition alleges that on the 4th day of November, 1884, he was duly elected public weigher for Lamar county, and that he qualified as such, and entered upon the duties of the office in the city of Paris; that defendants were then, and now are, partners engaged in buying cotton; that during the latter part of the year 1885, and the first part of the year 1886, the defendants unlawfully, and without instructions or consent from the owners thereof, employed one P. M. Spears and one A. B. Long to weigh bales of cotton in the city of Paris, and that said employes, under such employment, did weigh 18,000 bales of cotton in said city, brought to said city by the owners thereof for sale, and by them offered for sale; and that said cotton was not the property of said Martin, Wise & Fitzhugh, or either of them, or of the said Spears, or the said Long,—to plaintiff's damage $90,000. Plaintiff also alleged that during the latter part of the year 1886 the defendants so unlawfully employed the said P. M. Spears to weigh cotton in said city of Paris, and that he did weigh 8,000 bales, which were brought by the owners to said city, and offered for sale; that neither of the defendants nor the said P. M. Spears was a public weigher, or the deputy of a public weigher,—to plaintiff's damage $40,000; making a total damage to plaintiff of $130,000. On the 8th day of April, 1887, defendants answered *First*, general demurrer; *second*, two special exceptions,—the first of which is because there is no such office as a public (cotton) weigher in Lamar county, Tex., created by law, under the constitution and laws of Texas, and because the legislature could not delegate the power of creating said office to the commissioners' court of Lamar county; (2) because the statutes of 1879, approved April 19, 1879, and of 1883, approved April 12, 1883, are unconstitutional, and in conflict with sections 35, 36, and 56 of article 3 of the constitution. Upon hearing the demurrer and special exceptions, the court sustained them upon the ground that section 1 of the act of 1883 was unconstitutional and void, "in so far as it attempts to confer upon the commissioners' court the authority to create the office of public weigher, either by appointment, or ordering an election therefor;" so the court gave final judgment for the defendants upon the demurrer and exceptions. Upon this ruling of the court, the plaintiff appealed, and assigned errors.

Section 1 of the act of 1883, amendatory of the act of 1879, reads as follows: "The governor is hereby authorized and required to appoint five competent persons as public weighers in every city which receives annually over one hundred thousand bales of cotton on sale, or for shipment. In all cities or towns or railroad stations which receive annually less than one hundred thousand bales of cotton, the county commissioners' courts of the counties in which said cities or towns or railroad stations are situated, should the commissioners' court deem the same necessary to protect the sellers, may order an election at which all the qualified voters of the county may vote for one or more public weighers: provided, that the county commissioners' court may provide by appointment for cotton weighers to hold office until the next general election, and until their successors are qualified: provided that, if any election is held under the provisions of this act before the next general election, the terms of office of those elected shall expire at the next general election, or so soon thereafter as their successors are elected and qualified: provided, that in towns and railroad stations outside of county-seats the county commissioners' court may appoint one or more public weighers: provided, nothing herein contained shall be construed so as to prevent any other person from weighing cot-

ton, wool, or hides when requested to do so by the owner or owners thereof. All public weighers shall hold their offices for two years, and until their successors are appointed or elected, as the case may be, and qualified, subject to removal," etc. Section 2 of the act requires weighers so appointed to qualify and give bond. Gen. Laws 1883, pp. 83, 84. Section 1 of the act of 1879 required the governor to appoint public weighers in certain cities named, "and at such other incorporated cities or towns as in the judgment of the governor may be expedient, who shall hold his office two years, and until his successor is appointed and qualified," etc.

It is not unusual to provide for an office by a requirement that there shall be an election by the qualified voters for the officer. The offices of county attorney and sheriff are so created by our constitution. Const. art. 5, §§ 21, 23. This, however, is not the question before us. It is not contended by the appellee, in support of the judgment below, that the law would have been unconstitutional if it had been mandatory, that is, if it had commanded the commissioners' court to order the election; but that the law is unconstitutional because it left the expediency of ordering the election to the discretion of the commissioners' court, thereby delegating to them the legislative power. The position of the appellees is untenable. The law as it stands was enacted by the legislature in accordance with constitutional forms, and, as a law, was complete by the legislative enactment. The commissioners' court have no power to revise or modify the act in any respect. They merely have the right to put the law in force by having an election; to organize, by calling an election for the officer, who is to execute the law as it came from the hands of the legislature. It might be said that the law is to take effect upon the happening of a subsequent event; that is, the decision of the commissioners' courts that it is necessary in their respective counties. Such discretion to the counsel boards of subordinate branches or divisions of the government is not unusual, and is not unconstitutional. It is allowed to them because, in matters of local regulation, it may be fairly supposed "they are more competent to judge of their needs than a central authority." The legislature cannot merely propose a law to be adopted by the people; but, where there is affirmative legislation, its enforcement in counties, districts, or towns, when the law so provides, may be left to the option of such localities. It might not be allowed to submit a general law to the people of the state at large to all the electors. This has been held to be in violation of the constitution, which gives to the legislature the exclusive right to make such laws. See Cooley, Const. Lim. 145-147. But even this was held to be legitimate in some cases. Smith v. City, 26 Wis. 291, and cases there cited. The privilege of the electors of a district to be affected by a law to say whether they will accept its provisions, the law giving them the right to accept or reject, is now generally permitted, and regarded as constitutional. People v. Stout, 23 Barb. 349; Dome v. Wilcox, 45 Mo. 458; Bank v. Brown, 26 N. Y. 470; Ex parte Wall, 48 Cal. 279; San Antonio v. Jones, 28 Tex. 32. In the last-above case cited, Chief Justice MOORE said: "The legislature may grant authority as well as give commands, and acts done under its authority are as valid as if done in obedience to its commands. Nor is a statute whose complete execution and application to the subject-matter is, by its provisions, made to depend on the assent of some other body a delegation of legislative power. The discretion goes to the exercise of the power conferred by the law, but not to make the law itself." Id. See authorities cited; and, *contra*, State v. Swisher, 17 Tex. 441. In Werner v. City of Galveston, Justice GAINES announces the correct doctrine, and it may be regarded as settled in this state by that case. He says: "It is a well-settled principle that the legislature cannot delegate its authority to make laws, by submitting the question of their enactment to a popular vote; * * * but it does not follow from this that the legislature has no authority to confer a power upon a municipal corporation, and to authorize its acceptance or rejection by the municipality according to the will of its voters." See 7 S. W. Rep. 726, where the case is reported; also Graham v. City of Greenville, 67 Tex. 62, 2 S. W. Rep. 742.

It is also contended by the appellees in cross-assignment of error that the act of 1879 creating the office of public weigher is unconstitutional because it seeks to amend a law (Act 1875) merely by reference to its title. Const. art. 3, § 36, provides that "no law shall be revived or amended by reference to its title; but in such case the act revived, or the section or sections amended, shall be re-enacted and published at length." The act of 1879 contains 10 sections, each of which is complete in itself. There is no attempt to amend the law of 1875 by reference to its title. The act of 1879 is entire, and is a substitute for the act of 1875.

Section 8 of the act of 1879 declares it unlawful for any factor, commission merchant, or other person to employ any one other than the public weigher to perform his duties; and provides that any person violating the provision "shall be liable, at the suit of the public weigher, to damages in any sum not less than five dollars for each bale of cotton," etc. Appellee, by cross-assignment insists that this section of the act is in violation of article 3, § 35 of the constitution, which provides that a bill shall not contain more than one subject, which shall be expressed in its title. The act of 1875 is entitled "An act creating the office of public weigher, and regulating the appointment, and defining the duties and liabilities, thereof." The act of 1879 is "an act to amend an act entitled 'An act,'" etc., giving the title of the act of 1875. Section 8 of the act of 1875 made it unlawful for any

person other than the public weigher, or his deputies, to weigh cotton, etc., and provided that any person offending against the law should be "fined five dollars for each and every bale of cotton," etc. The act of 1879 changed the above provision so as to give the public weigher a right of action for damages against persons violating the law, instead of punishing by fine. Mr. Dillon, in discussing this provision of the constitution, says: "This provision has been frequently construed to require only the general or ultimate object to be stated in the title, and not the details by which the object is to be attained. Any provision calculated to carry the declared object into effect is unobjectionable, although not specially indicated in the title." 1 Dill. Mun. Corp. § 28. The foregoing has been practically adopted in this state. Ex parte Mabry, 5 Tex. App. 93; Cox v. State, 8 Tex. App. 254. The provisions of the act said not to be embraced in its title are necessary to the enforcement of the main object of the law. Without some mode of redress to the public weigher, or some mode of punishment of persons violating the law and the rights of the officer, the law would be a dead letter. See Austin v. Railway Co., 45 Tex. 266, 267.

The appellees also contend that the acts of 1883 and 1879 are in conflict with section 56, art 3, of the constitution. The section declares that the legislature shall not, except as otherwise provided, pass any local or special law "regulating the affairs of counties, cities, towns, wards, or school-districts," etc. Section 1 of the act of 1879 authorized the governor to appoint public weighers for Galveston, Houston, Sherman, Dallas, Austin, and Waco, and at other incorporated cities or towns as in the judgment of the governor might be deemed expedient. Section 1 of the amended act of 1883, as has been seen, required the governor to appoint in every city which receives annually over 100,000 bales of cotton on sale or for shipment; and in cities, towns, or railroad stations which receive less than 100,000 bales of cotton annually a discretion is given to the commissioners' court to order an election by the qualified voters of each county for the election of a public weigher. Plaintiff instituted his suit as an elected public weigher. There can be no question that the portion of the act of 1883 under which plaintiff was elected is not in violation of the section of the constitution quoted above. It is a general law, as we think is the entire section; and it does not attempt to regulate any of the affairs of any particular county, town, or city.

Appellees contend, also, that the only valid law creating the office of public weigher is the act in Rev. St. p. 587, art. 4081, etc., which requires the governor to appoint the officer, passed with the Revised Statutes, February 21, 1879, and took effect September 1, 1879; that the act of April 19, 1879, which took effect July 24, 1879, never became the law, and hence the act of 1883, which amends sections 1, 2, and 9 of the act of April 19, 1879, cannot have effect, because it did not refer to the statute in force; that plaintiff was elected under the act of 1883, and so alleges; that he is not, therefore, a public weigher, appointed as the law requires, and cannot maintain the suit. The Revised Statutes and the act of April 19, 1879, were passed by the same legislature,—the sixteenth,—and at the same session. Section 20 of the final title of the Revised Statutes provides that "any law passed by the sixteenth legislature in conflict with any provision of this act shall be the law of the state, this act to the contrary notwithstanding." It must be held that the act of 1879, as amended by the act of 1883, under which plaintiff was elected and sues, is the act in force. Because of the error heretofore pointed out in the judgment of the court sustaining defendants' special exceptions to plaintiff's petition, we conclude the same should be reversed, and the cause remanded.

STAYTON, C. J. Report of the commission of appeals examined, their opinion adopted, and the judgment is reversed, and the cause remanded.

(74 Tex. 546.)

FOSSETT v. MCMAHAN.

(*Supreme Court of Texas.* Oct. 23, 1889.)

HOMESTEAD—EVIDENCE—ADVERSE POSSESSION.

1. An order of the probate court setting apart a homestead to the widow and children of a decedent is not a judgment or decree whereby the title to land is recovered, nor a partition of land, within the meaning of Rev. St. Tex. art. 4339, requiring all judgments and decrees deciding questions of title to land, or directing partition thereof, to be recorded, before they are admissible in evidence; and in an action against the widow and children for the land, where defendants show a deed to their decedent therefor, and that they have been in possession thereof for more than the period of limitation, the order setting apart the homestead is admissible, though not recorded, to show the extent of their claim.

2. Where the deed to decedent conveyed an undivided interest in the land, the widow and children can hold it to that extent under the homestead designation, though they have no title to the remainder, and their right is not disturbed by a subsequent administrator's sale of the land under order of court, unless such order was obtained in a direct proceeding to vacate the order designating the homestead.

Commissioners' decision. Appeal from district court, Bosque county; J. M. HALL, Judge.

Gillette & Murrell, for appellant. *Wm. M. Knight, Crane & Ramsey*, and *West & McGown*, for appellee.

ACKER, J. Henry Fossett died in July, 1881, seised and possessed of 196 acres of land off of the south side of the Moses King survey, on which he and his family, consisting of his wife, the appellant, and their children, had lived and had their homestead for 20 years. T. H. McMahan, who died in 1871, leaving nine heirs, owned 216 acres of the King survey north of and adjacent to the 196 acres owned by Fossett. In December, 1880, M. V. McMahan, one of the nine