

signment of error based upon that ruling, for which reasons the judgments of both courts are reversed, and the cause is remanded to the district court.

DENMAN, J., did not sit.

### ARMSTRONG v. TRAYLOR et al.

(Impounding Court of Texas. March 21, 1895.)

#### IMPOUNDING STOCK—CONSTITUTIONAL LAW—DUE PROCESS OF LAW—LOCAL LAWS—ADOPTION.

1. Rev. St. arts. 4604-4607, providing that the owner of inclosed premises may impound stock unlawfully trespassing thereon, and for the assessment of damages by three freeholders, and for a sale of the stock to pay the damages, violates Const. art. 1, § 19, providing that no citizen shall be deprived of property without due process of law.

2. Under Const. art. 16, § 23, authorizing the legislature to submit to the voters of a subdivision of a county a law regarding live stock, the legislature may authorize the voters to designate the boundaries of the subdivision in which they wish the law to be applied.

3. It is competent for the legislature to pass a law regulating live stock which shall be applicable to any particular subdivision of a county, only on vote of the freeholders of that subdivision. Const. art. 16, § 23.

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

Action by William Armstrong against J. H. Traylor and another. The case was taken to the supreme court on a statement of facts and certified questions.

S. A. McCall, for appellant. C. W. Robinson and McKinney & Hill, for appellees.

BROWN, J. The following statement and questions are submitted to this court by the court of civil appeals for the First district: "The suit was brought by the appellant, William Armstrong, in a justice's court of San Jacinto county against the appellees, J. H. Traylor and Emma Elmore, to recover of them a certain hog, or its value, twenty-five dollars, alleged to be wrongfully withheld from his possession by the defendants. Defendants answered, admitting the possession of plaintiff's hog, but that they were rightfully in possession thereof because it had been impounded and sold by virtue of the law to prevent certain animals from running at large, as provided in chapter 4, tit. 93, Rev. St., then in force in the subdivision of San Jacinto county in which defendant Elmore lived. They set up at length the proceedings required by the statute for the adoption of the law; the impounding of the hog by defendant Elmore; the assessment of damages by three disinterested freeholders, and the sale of the hog and its purchase by defendant Traylor; and showed that the law had been in all respects complied with. Plaintiff demurred to the answer. The district court overruled the demurrer, and rendered judgment in favor of the defendants on proof of the facts alleged. (1) Is the statute in conflict with the

bill of rights, in that it authorizes the seizure, condemnation, and sale of plaintiff's property without due process of law? (2) Is the remedy provided by the statute for the assessment and collection of the damages done by the animal due process of law? (3) Had the legislature the power to submit the adoption of the law to a division of territory designated by persons signing the application for the election, and not by the legislature itself, as to the county or a fixed subdivision thereof? (4) Does section 23, art. 16, of the constitution, apply to laws to prevent domestic animals from running at large so as to authorize the submission to the vote of the freeholders only? or does not such legislation come within the scope of section 22, art. 16, of the constitution, authorizing the passage of fence laws applicable to any subdivision of the state? If it comes within the latter section, has the legislature the power to limit the right to vote upon the question of adoption of the law by freeholders only? (5) Did the district court err in overruling plaintiff's demurrer to the answer?"

Article 1, § 19, of the constitution of this state, is in this language: "No citizen of this state shall be deprived of life, liberty, property, privileges, or immunities, or in any manner disfranchised, except by the due course of the law of the land." The articles of the Revised Statutes which are claimed to be in conflict with the above provision of the constitution are in substance as follows: Article 4604 permits the owner, lessee, or person in possession of any inclosed premises or lands to take up any stock forbidden by the law to run at large, when it has been adopted for that county or subdivision of the county, if such stock shall enter upon the inclosed lands, or about the residence, lots, or cultivated lands of such person, without his consent, and to impound and hold such stock until his fees and damages are paid by the owner thereof. Article 4605 requires that, upon the taking up of such stock, notice shall at once be given to the owner, and he shall have the right to regain possession upon payment of fees and damages. By article 4606, the fees to which the person taking the stock into custody shall be entitled from the owner of the stock are prescribed, and it is also provided therein that the damages done by the stock to the person taking the same up may be assessed by any three disinterested freeholders of the county whose judgment shall be final. By article 4607 the person impounding the stock is authorized to sell the same at public auction for cash, upon giving notice as required for court sales of personal property, and to apply the proceeds to the payment of the damages assessed, and the fees to which he is entitled by law, paying the remainder, if any, to the owner.

Do these provisions of the law meet the constitutional requirement that the proceeding by which the owner is divested of his

property must be "due course of the law of the land"? Mr. Cooley in his work on Constitutional Limitations (page 432) says: "By the law of the land is most clearly intended the general law; a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his liberty, life, property, and immunities under the protection of the general rules which govern society. Everything which may pass under the form of an enactment is not, therefore, to be considered the law of the land." The legislature has the power to enact laws to protect the public from the inconveniences of having stock running at large upon the highways, and under our constitution may provide such laws with a view to protecting the private interests of the citizen from the same evils, but such power must be exercised in subordination to and in accordance with the constitution. Whether or not a law secures the protection afforded by the constitution depends upon the subject upon which it operates and the character of the rights that it affects. The law in question does not have in view the protection of the public against the inconvenience of having the free use of the highway impeded by the running of the stock therein, but protects the private citizen in the enjoyment of his private property, and provides for compensating him for injury to such private property. The questions involved are, has there been an infraction of the rights of the citizen, not the public, and what injury has he sustained? These are strictly private rights, arising between individuals, in which the public has no more concern than in any other private wrong. No public officer has authority to impound the stock for the public protection. No public pound is required. The fees do not go to a public officer in support of the enforcement of the law. The private citizen whose rights have been invaded can alone act in the premises. The fees are given to him to remunerate him for acting in his own interest, and he takes the property into his own custody without bond or any security to the owner. No penalty is given for a wrong to the public, but compensation for the private injury done to the property of the man who is authorized to seize the stock and for expenses incurred by him in so doing without the consent of its owner. Under the provisions of these articles, the interested party is authorized to determine the question of a trespass having been committed by the stock. It is not provided that this question shall be inquired into by any other person or officer. Its seizure is its condemnation, leaving nothing to be ascertained except the amount of the damages. The same person must select the freeholders to assess the damages which he is to receive. The law makes him the sole actor in the matter. When thus selected, the freeholders are not required to hear evidence

as to the trespass or the amount of the damages. In fact, they have no power to decide whether or not the trespass has been committed, but are confined to the amount of compensation. The owner has no voice in the selection of the freeholders, nor has he the right to appear before them in person or by attorney. He has no right of appeal; in fact, no right except to pay the costs incurred, and the damages assessed, or give up his stock. There is no hearing, no inquiry, and no trial before judgment; no officer to sell the property, nor process under which sale is to be made; nothing that bears the faintest resemblance to a judicial proceeding. Such a law affords no security to the owner of the stock. It is not due process of law, and the property is not sold "by the due course of the law of the land." These articles are therefore void (which, of course, does not affect other articles), and the court erred in overruling the demurrer to the answer because it showed no title to the hog nor justification for its detention. *Cooley, Const. Lim. p. 447; Rockwell v. Nearing, 35 N. Y. 302; Rhine v. City of McKinney, 53 Tex. 354.* Under our constitution, the legislature might accomplish all the purposes sought, giving to the person authorized to impound the stock his fees, and compensation for injuries committed, to be ascertained under provisions of the law which would afford the proper protection to the owner of the stock, by providing for a trial fair and impartial, though it might be a summary proceeding. *Campbell v. Evans, 45 N. Y. 356; Grover v. Huckins, 26 Mich. 476; Campau v. Langley, 39 Mich. 451.*

To the third question we answer that the legislature, being authorized by the constitution to submit the law to the voters of any subdivision of a county, had the power to adopt the method of ascertaining the subdivision to be affected that seemed most advisable, and could authorize the voters to designate the boundaries of the subdivision in which they desired that the law should be applied. The policy of such a course was a matter for the consideration of the legislature, and not of the courts.

To the fourth question we reply that section 23<sup>1</sup> of article 16 of the constitution authorized the legislature to pass a law regulating live stock, making it applicable to the entire state, or it might have exempted any county or counties from the operation of such law. The legislature might also have enacted a law regulating live stock in any given county or in any subdivision of such county, or it might, as it did in this instance, pass a law not to be in force in any county

<sup>1</sup> Const. art. 16, § 23, provides that the legislature may pass laws for the regulation of live stock, and exempt from the operations of such laws any counties or sections, providing that any local law thus passed shall be submitted to the freeholders of the section to be affected thereby, and approved by them, before it shall go into effect.

or part of a county until adopted. In case of passing a local law either directly applicable to a particular locality, or a general law to be applied by a vote to a locality, such law could not be made operative until it was adopted by a vote of the freeholders of the locality or section to be affected. The power to pass a general law upon this subject is given by the first part of the section, but the authority to pass a local law is conferred by the provision of the section which prescribes the condition that it shall not go into effect except upon the vote of the freeholders of that section.

JONES et al. v. GILCHRIST et al.

(Supreme Court of Texas. March 11, 1895.)

CONSTRUCTION OF CONTRACT—POWER OF ENGINEER.

A contract for the construction of a railroad provided that all materials used should be subject to the approval of the engineer of the railroad company; that the engineer should have power to remove, at the contractor's expense, any work that might be performed in a manner contrary to the instructions; and, as to stone work, provided that the courses should not be less than 12 nor more than 30 inches thick. *Held*, that the engineer had authority to determine the quality of stone to be used, and to direct it to be cut down to such a thickness as that all unfit material would be removed from it.

Error to court of civil appeals of Second supreme judicial district.

Action by Gilchrist, Ramsey & Henderson against Jones & Carey and the Gulf, Colorado & Santa Fé Railway Company. There was a judgment for plaintiffs, against defendants Jones & Carey, which was affirmed by the court of civil appeals (27 S. W. 890), and said defendants bring error. Reversed.

Stanley, Spoons & Meek, for plaintiffs in error. Ball & Ball, for defendants in error.

DENMAN, J. In October, 1886, the Gulf, Colorado & Santa Fé Railway Company and Jones & Carey entered into a written contract whereby Jones & Carey agreed to build the road of the company, including clearing, grubbing, grading, masonry, timber work, and track laying, in Indian Territory, from Red river to the Canadian river; the work to be done according to the specifications attached, and "in conformity to the plans and directions and to the satisfaction and acceptance of the chief engineer of the railroad company." The contract fixed the prices of the various kinds of work, and provided for its payment on the monthly estimates of the engineer, and also provided that the decision of any dispute growing out of the contract should be referred to a board of arbitration, whose action thereon should be final. The specifications attached to said contract, and made part thereof, were pre-

pared for an extension of a line of railroad through an undeveloped country, and provided, under separate subdivisions, for the various kinds of work necessary to be done in the construction of a railroad. The subdivision "masonry" embraced all the rock-work, which was again subdivided into (1) first-class bridge masonry; (2) second-class bridge masonry; (3) arch-culvert masonry; (4) box-culvert masonry; (5) paving; and (6) riprap,—with separate provisions as to each. In reference to the "first-class bridge masonry" the specifications provided (1) that it "should be built of the best description of range rockwork"; and (2) that "the courses should not be less than twelve nor more than thirty inches in thickness, decreasing from bottom to top of walls." After each separate class of work had been provided for, the specifications stated certain "general conditions" applicable to all the classes, among which were: (1) "The kind and quality of all materials to be used in the work shall be subject to the inspection, test, and approval of the engineer;" and (2) "any departure from or refusal to comply with the instructions given by the engineer shall be considered a violation of this contract, and the engineer shall have full power to remove or cause to be removed, at the contractor's expense, any work that may be performed in a manner contrary to the specifications or instructions given." On June 4, 1887, Jones & Carey entered into a written contract with Gilchrist, Ramsey & Henderson wherein the latter agreed with the former to do all said "first-class bridge masonry" at certain points on said road, "according to the specifications of the Gulf, Colorado & Santa Fé Railroad, and to the satisfaction and acceptance of the chief engineer of the said company." Said specifications became and were a part of said contract. Plaintiffs, Gilchrist, Ramsey & Henderson, introduced testimony tending to show that before signing said contract of June 4, 1887, they had a verbal agreement with said engineer and Jones & Carey that the rock necessary to construct the piers of the bridges agreed to be constructed by them under said contract could be taken from the "Red River Quarry," and that, after the contract was signed, said engineer refused to allow stone from that quarry to be used for the foundations of said piers, and required them to procure therefor a much harder stone, whereby they were compelled to expend large sums of money in excess of what it would have cost them to procure the stone so agreed upon; and for such excess they sought to recover against defendants, the contract price having been already paid to plaintiffs. Defendants, in their testimony, denied the existence of said oral agreement. The court instructed the jury that said contracts and specifications did not determine, nor authorize the engineer to determine, the kind and quality of stone that should be used, and that, therefore, the antecedent ora'