near the depot station? The object of the legislature in enacting the article referred to appears to have been to promote the interest of the public alone, by making permanent the places for the transaction of business by such corporations. There is nothing in the law to indicate that the legislature had in mind the protection of individual property owners at such places. In the case of House v. Waterworks Co., 88 Tex. 233, 31 S. W. 179, we carefully examined the legal principles which apply to this case. In that case this court said: "It is not true that, for every failure to perform a public duty, an action will lie in favor of any person who may suffer injury by reason of such failure. If the duty is purely a public duty, then the individual will have no right of action; but it must appear that the object and purpose of imposing the duty was to confer a benefit upon the individuals composing the public." In addition to the authorities cited in that case, we refer to the following: Kinealy v. Railroad Co., 69 Mo. 658; Proprietors v. Newcomb, 7 Metc. (Mass.) 276; Smith v. City of Boston, 7 Cush. 254. In the case of Kinealy v. Railway Co., cited above, the facts were that the railroad company, under its charter, had constructed a line of its road into the city of St. Louis, which passed near to the plaintiff's property, over which it operated all of its trains to its depot within the city. Subsequently, it constructed a line from a point on its main line to its depot in the city, so as to pass its through trains through the city, without passing over the original line, for which plaintiff claimed damages to the value of his property. The court, in disposing of the case, said: "Here it is evident that the construction of the road and its maintenance were authorized by legislative enactment, solely for the public benefit, and not for the benefit of any individual composing the public. So that, as between the plaintiffs and the defendant company, there is neither breach of contract nor breach of duty, and consequently no right of action. This case, therefore, so far as it concerns plaintiffs, stands precisely as if they had bought lots, and built thereon, contiguous to any other public improvement, on the faith of the maintenance of such improvement." In the case of Proprietors v. Newcomb, before cited, the court states the legal proposition in this language: "Where one suffers in common with all the public, although from his proximity to the obstructed way, or otherwise from his more frequent occasion to use it, he may suffer in a greater degree than others, still, he cannot have an action, because it would cause such a multiplicity of suits as to be itself an intolerable evil. But when he sustains a special damage, differing in kind from that which was common to others,—as where he falls into a ditch unlawfully made in a highway, and hurts his horse, or sustains a personal damage,—he may bring his action." If the plaintiff in this case acquired a vested right in the continuance of the depot at that particular place, then the legislature could neither authorize nor require the railroad company to move it thereafter. Walker v. Tarrant Co., 20 Tex. 21. The result of holding that purchasers of property acquired a right to have a depot continued would be to deprive the legislature of the power to authorize or require such changes to be made, no matter how great the public necessity. It matters not that the removal was made contrary to law. This did not confer upon appellee any right. The state must determine for itself the policy of enforcing that provision of its law. We answer that, under the facts certified, appellee had no right of action against the railroad company.

STORRIE v. CORTES et ux.

(Supreme Court of Texas. Dec. 7, 1896.)

STARE DECISIS—CONSTITUTIONAL LAW—HOMESTEAD—LOCAL ASSESSMENTS.

1. The doctrine of stare decisis does not require that a prior decision, holding that a homestead is subject to forced sale for the satisfaction of a local assessment, in contravention of the constitution, should be followed.

2. The decision of a court is not a "law," within the meaning of the provision of the constitution of the United States forbidding states from passing any law impairing the obligation of contracts; and the subsequent overruling of a decision, in reliance whereon contracts have been made, is not a violation of that constitutional provision.

3. Where a state legislature can empower a municipal corporation to make a local improvement, it can also authorize the municipal corporation to make the cost of the improvement a personal charge against the owner of the property benefited, as well as a lien on his property.

On Rehearing.

The court will take judicial notice of the provision of a city charter which declares that it is a public law.

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

Action by Robert C. Storrie against H. W. Cortes and wife to foreclose improvement certificate liens. From a judgment for defendants, plaintiff appealed. Questions of law arising on the facts certified, with a statement of the facts, by the court of civil appeals, to this court for decision.

Ewing & Ring, for appellant. E. P. Hamblen, for appellees.

BROWN, J. The court of civil appeals for the First supreme judicial district has certified to this court the following statement and questions: "This cause, which is now pending before this court on appeal, was an action brought in the district court of Harris county by Robert C. Storrie, the appellant, against Henry W. Cortes and his wife, Mary M. Cortes, appellees, to foreclose an alleged lien of certain improvement certificates, of less amount than $500, upon the homestead of appellees, based on local assessments made for paving the street abut-

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ting on said homestead, pursuant to the provisions of the charter of the city of Houston, a city of more than 10,000 inhabitants. The contract for the paving of the street was let June 18, 1889, in accordance with the provisions of the charter of the city, and the assessment was made and the improvement certificates were issued in compliance with said charter, so as to make them a lien on the land, except for the fact that it was the homestead of appellees. Upon the trial below the court rendered judgment in favor of the appellees upon the merits, instead of dismissing the case. The following questions of law arise upon the facts, which are submitted to the supreme court for determination: (1) Should a lien be enforced, in favor of the appellant, against the homestead of appellees, for the amount of said improvement certificates, by reason of the fact that the contract for the pavement was made and performed before the decision of the supreme court in the case of Higgins v. Bordages [88 Tex. 458, 31 S. W. 52, 803]? (2) In case no lien should be enforced against the homestead of appellees, are they or the appellee Henry W. Cortes personally liable for the amount of the certificates?"

It is claimed by counsel for the appellant that the lien upon the homestead of appellees, attempted to be created by the action of the city council of the city of Houston, ought to be enforced in this case, notwithstanding the decision heretofore made by this court in the case of Higgins v. Bordages, 88 Tex. 458, 31 S. W. 52, 803, because the rights of the appellant under the contract made with the city of Houston accrued after the decision in the case of Lufkin v. City of Galveston, 58 Tex. 545, and before the decision in the case of Higgins v. Bordages. Two grounds are asserted upon which this court may and ought to sustain that lien, although its later decision upon the subject be maintained. It is claimed (1) that a correct application of the doctrine of stare decisis would leave the case of Lufkin v. City of Galveston in force as to all contracts made and rights accruing after it was made and before the rendition of the later decision which overruled it; (2) that the decision in the case of Higgins v. Bordages, in so far as it affects contracts made between the dates named, is violative of the obligation of such contracts, and is, therefore, not to be given effect as to them.

The rule of stare decisis was thoroughly considered by this court before it made the decision in Higgins v. Bordages, and also upon the motion for rehearing filed in that case. Recognizing the importance of standing by the former decision of the court as a general rule, we, however, determined that, in the circumstances of that case, it was the duty of the court to overrule the former decision of Lufkin v. City of Galveston. We have found no authority which attempts to apply the doctrine of stare decisis as is here sought, nor do we see any sound reason which would sustain such application of it. On the contrary, we think that the very foundation of the rule is antagonistic to the proposition now urged upon this court. If we stand by Lufkin v. City of Galveston, we must overrule Higgins v. Bordages, because it cannot be true that a case can be overruled and at the same time be held to be the law of the state in which it was rendered. 9 Am. Law Rev. p. 398.

The second ground requires more careful examination, although we think it equally untenable; but it has been supported by the citation of cases decided by the supreme court of the United States which demand our careful consideration. The doctrine here sought to be ingrafted upon the jurisprudence of this state originated in a dictum of Chief Justice Taney in the case of Insurance Co. v. De Bolt, 16 How. 432, in which he used the following language: "Indeed, the duty imposed upon this court to enforce contracts honestly and legally made would be vain and nugatory, if we were bound to follow those changes in judicial decisions which the lapse of time and the change in judicial officers will often produce. The writ of error to a state court would be no protection to a contract, if we were bound to follow the judgment which a state court had given, and which the writ of error brings up for revision here. And the sound and true rule is that, if the contract, when made, was valid by the laws of the state, as then expounded by all of the departments of the government and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent act of the legislature of the state or decision of its court altering the construction of the law." As we before stated, this was a dictum of Chief Justice Taney. Indeed, in the beginning of the opinion, he says: "In this case the judgment of the supreme court of the state of Ohio is affirmed; but the majority of the court who give this judgment do not altogether agree in the principles upon which it ought to be maintained. I proceed to state my own opinion, in which I am authorized to say my Brother Grier entirely concurred." It is thus seen that the expression quoted above was simply the opinion of the chief justice, concurred in by one of his associates, and upon a proposition which could not have been involved in the affirmance of the judgment, for in its very terms the proposition of law laid down could not have had reference to any other than the judgment then under consideration, which was affirmed. It is worthy of notice that so eminent a jurist should have thought it necessary to say that an appellate court was not bound by the judgment under review, in support of the proposition that the federal courts are not bound by decisions of state courts. In almost every case which followed this in the supreme court of the United States, as well as the cases in the

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state courts which follow them, the statement made by Chief Justice Taney has been made the basis for refusing to follow the decision of the state court when found to be antagonistic to what was thought to be the obligation of a contract made prior thereto. In no case decided by the supreme court of the United States, nor, do we believe, in any case decided by any state court, has it ever been held that a decision which overruled a former decision of the same court was obnoxious to the provision of the constitution of the United States, or of the state, which prohibits a state from enacting any law that violates the obligation of a contract. On the contrary, in every instance where the question has come before the supreme court of the United States in the exercise of appellate jurisdiction over the supreme court of a state, and in which the federal supreme court was confined in the determination of the question to definite constitutional and legal principles, it has been held that a decision of a court is not a law, within the provisions of the constitution of the United States. In the case of Land Co. v. Laidley, 159 U. S. 103, 16 Sup. Ct. 82, which involved the very question, the court said: "In order to come within the provision of the constitution of the United States which declares that no state shall pass any law impairing the obligation of contracts, not only must the obligation of the contract have been impaired, but it must have been impaired by some act of the legislative power of a state, and not by a decision of its judicial department only." The supreme court of the United States here recognizes the doctrine that the decision of a court is not a law, and does not come within the meaning of that word as used in the constitution of the United States. That eminent court has not unfrequently overruled its own decisions, but in no instance has it applied the same rule that is by it applied to like cases arising under overruled decisions of state courts.

The cases decided by the supreme court of the United States which bear upon this question may be classified as follows: (1) Those which hold that, where the contract was valid when made, under a statute recognized as valid by the officers of the different departments of the state government, such contract will be sustained, as against a decision of the highest court of that state declaring the law void, if made subsequently to the time when the contract was entered into. Pine Grove Tp. v. Talcott, 19 Wall. 666; Insurance Co. v. De Bolt, cited above; Olcott v. Supervisors, 16 Wall. 678. In the last case cited, the court, after quoting substantially what has been quoted from the opinion of Chief Justice Taney, said: "Such a rule is based upon the highest principles of justice. Parties have a right to contract, and they do contract, in view of the law as declared to them when their engagements are formed. Nothing can justify us in holding them to any other rule. If, then, the doctrine asserted in Whiting v. Fond du Lac County [25 Wis. 188] is inconsistent with what was the recognized law of the state when the county orders were issued, we are under no obligation to accept it, and apply it to this case. The orders were issued in February, 1869, and it was not until 1870 that the supreme court of the state decided that the uses for which taxation was authorized by the statute of April 10, 1867, were not public uses, and, therefore, that the statute was invalid." The decision of the supreme court of Wisconsin, referred to, was made after the issuing of the orders by the county; and the supreme court of the United States followed what was understood to be the law in Wisconsin prior to that time, in opposition to the decision of the supreme court of that state. (2) Another class of cases embraces those in which the supreme court of the state had made a decision construing a statute or the constitution of the state, and thereafter contracts were entered into which, according to the construction placed upon the law by the existing decisions of the supreme court, were valid, but subsequently thereto the same court overruled the former decision, and held such contracts to be void. In this class of cases the supreme court of the United States has in some instances held that the later decision of the state court was violative of the obligation of a contract, relying upon the quotation from the opinion of Chief Justice Taney, and that, therefore, they would follow the decision under which the contract was made. Ralls Co. v. Douglass, 105 U. S. 728; City of Kenosha v. Lamson, 9 Wall. 477; Gelpcke v. City of Dubuque, 1 Wall. 175. (3) The third class of cases consists of those in which the court has held that, where there is a conflict in the decisions of the supreme court of the state, the United States courts will, in the exercise of their independent jurisdiction, decide according to their own judgment of the law. Pleasant Tp. v. Aetna Life Ins. Co., 138 U. S. 67, 11 Sup. Ct. 215; Burgess v. Seligman, 107 U. S. 20, 2 Sup. Ct. 10. (4) The last class that we notice consists of those cases in which the supreme court of the United States was in the exercise of its appellate jurisdiction by writ of error to the supreme court of a state; and in this class that court has uniformly held that the decision of a state court is not a law, within the meaning of the constitution of the United States, wherein it prohibits a state from passing a law impairing the obligation of contracts. Land Co. v. Laidley, 159 U. S. 109, 16 Sup. Ct. 80; Knox v. Bank, 12 Wall. 379; Water Co. v. Easton, 121 U. S. 388, 7 Sup. Ct. 916; Railroad Co. v. McClure, 10 Wall. 511.

The first three classes of cases mentioned above originated in federal courts whose jurisdiction was concurrent with and independent of the courts of the state, and thence carried to the supreme court of the United

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States. In the greater number of those cases the proposition laid down by Chief Justice Taney, which we have quoted, is cited, and would appear, upon casual reading, to be the basis of the decision of the court; but an examination of the opinions in the several cases will bring one to the conclusion that the real ground upon which each of the decisions rests is that the federal courts do not consider themselves bound to follow the state courts in the determination of questions of which they have concurrent and independent jurisdiction, and that, in determining what the law of the state is as to the matter under consideration, they will follow or disregard the decisions of the state court, as they may deem best. It follows that the decisions of the supreme court of the United States in those cases are not binding upon the state courts as authority in the determination of like questions. However unfortunate such a conflict may be, the state courts cannot afford to surrender the independent exercise of their judicial power over such questions. In the fourth class of cases stated above, the jurisdiction of the supreme court of the United States was appellate, and exercised by writ of error to the supreme court of the state. In such cases its decisions are binding as authority upon the state courts, and must be followed. As before shown, the supreme court of the United States, when exercising its appellate jurisdiction over a state court, and when governed by the provisions of the constitution of the United States, has held against the contention that a decision of a court is a law; and we believe that this class of decisions truly and correctly announces the rule of law by which this case must be governed.

This question has never before arisen in our state, so far as we are able to find, and, in fact, it appears to have been passed upon in but few of the states of this Union. In the case of Levy v. Hitsche, 40 La. Ann. 500, 4 South. 472, the supreme court of that state held that it would disregard later decisions which overruled former decisions upon the question of jurisdiction of one of its courts, and would follow the former decision in support of rights accruing thereunder. But a careful reading of the opinion seems to justify the conclusion that the court overruled the later decisions in so far as they were in conflict with those formerly made. The supreme court of Alabama, in the case of Farrior v. Security Co., 92 Ala. 176, 9 South. 532, fully commits itself to the doctrine stated by Chief Justice Taney, and so often repeated by the supreme court of the United States, to the effect that, where a contract was valid, at the time it was made, under a decision of the highest court in the state, a subsequent decision of the same court overruling the first would be in violation of the obligation of the contract, and void. This is the only decision of a state court that we have been able to find which clearly announces that doctrine. Menges v. Dentler, 33 Pa. St. 495, is also cited as holding the same doctrine. In that case, a certain sheriff's deed was held by the supreme court of the state of Pennsylvania to be void, and afterwards the legislature enacted a law declaring the deed to be valid. Subsequently the same deed came before the court in a controversy over a tract of land, and the supreme court held the deed valid under the act of the legislature. After this decision was made, a third party purchased the land from that one which prevailed in the last decision, and paid a valuable consideration for it. In a subsequent suit, brought by plaintiff in the former case against the purchaser, the court held that, as he had purchased in good faith, under the judgment of the supreme court in the former case, he would be protected, although that judgment was erroneous in holding the statute constitutional which affirmed the validity of the deed. We do not consider this as supporting the doctrine contended for here.

If the decisions of the supreme court of the United States are based upon the ground that the federal court may at pleasure disregard the decisions of the highest courts in the different states, it can be easily understood as the arbitrary exercise of power; but, when it is sought to sustain those decisions upon the asserted ground that a decision of any court, or the recognition by any department or all the departments of government, can give validity to a law which is contrary to the constitution of the state, and make valid that which the legislature could not enact, and, further, that a subsequent decision which overrules that which was wrongly made violates the obligation of contracts made during the continuance of the first and erroneous decision, we cannot comprehend how this can be, unless the court is authorized to exercise sovereign power by which alone the constitution of a state can be changed. When courts speak of the obligation of contracts, they mean the legal obligation or binding force of such contracts; and, if the law upon which the validity of the contract depends be unconstitutional, it is not a law, and never was a law, and the pretended contract is void, and has no legal obligation to be violated. In the case of Gelpcke v. City of Dubuque, 1 Wall. 175, the validity of bonds issued under a law passed by the legislature of Iowa was in question; and a majority of the court held that the bonds were valid, because issued under a line of decisions which affirmed the validity of the law, and before the rendition of the decisions which declared the law void. Judge Miller filed a very able dissenting opinion, from which we make the following extract: "They have said to the federal court sitting in Iowa: 'You shall disregard this decision of the highest court of the state on this question. Although you are sitting in the state of Iowa, and administering her laws, and construing her constitution, you shall not follow the latest, though it be the soundest, exposition of its constitution by the

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supreme court of the state, but you shall decide directly to the contrary; and where that court has said that a statute is unconstitutional, you shall say that it is constitutional. When it says bonds are void, issued in that state, because they violate its constitution, you shall say they are valid, because they do not violate the constitution.'" The judge then proceeds to show the evil results which will follow such a line of decisions, and the conflict that must result from them, and continues: "But, while admitting the general principle thus laid down, the court says it is inapplicable to the present case, because there have been conflicting decisions on this very point by the supreme court of Iowa, and that, as the bonds issued while the decisions of that court holding such instrument to be unconstitutional [constitutional] were unreversed, that this construction of the constitution must now govern this court instead of the later one. The moral force of this proposition is unquestionably very great, and, I think, taken in connection with some fancied duty of this court to enforce contracts, over and beyond that appertaining to other courts, has given the majority a leaning towards the adoption of a rule which, in my opinion, cannot be sustained either on principle or authority. The only special charge which this court has over contracts, beyond any other court, is to declare judicially whether the statute of a state impairs their obligation. No such question arises here, for the plaintiff claimed under and by virtue of a statute which is here the subject of discussion. Neither is there any question of the obligation of contracts, or the right to enforce them. The question goes beyond that. We are called upon, not to construe a contract, nor to determine how one shall be enforced, but to decide whether there ever was a contract made in the case. To assume that there was a contract, which contract is about to be violated by the decision of the state court of Iowa, is to beg the very question in dispute. In deciding this question, the court is called upon, as the court in Iowa was, to construe the constitution of a state. It is a grave error to suppose that this court must, or should, determine this upon any principle which would not be equally binding on the courts of Iowa, or that the decision should depend upon the fact that certain parties had purchased bonds which were supposed to be valid contracts when they really were not. The supreme court of Iowa is not the first or the only court which has changed its ruling on questions as important as the one now presented. I understand the doctrine to be, in such cases, not that the law is changed, but that it was always the same as expounded by the later decisions, and that the former decision was not, and never had been, the law, and is overruled for that reason. The decision of this court contravenes this principle, and holds that the decision of the court makes the law, and, in fact, that the same statute or constitution means one thing in 1853, and another thing in 1859. For it is impliedly conceded that, if these bonds had been issued since the more recent decision of the Iowa court, this court would not hold them valid." We have quoted thus lengthily from this dissenting opinion, because, in our judgment, it presents a clear and conclusive statement of the rules which ought to be adopted by the courts in determining this class of questions. The proposition, announced by Judge Miller, that a decision of a court is not a law, but merely the evidence of what the law is, and that, when it is overruled, it is not a change of the law, but a declaration and judicial ascertainment that it never was the law, is supported by ample authority. 1 Kent, Comm. 473; Ram. Leg. Judgm. 47; Yates v. Lansing, 9 Johns. 395; Cooley, Const. Lim. p. 65; Broom, Leg. Max. 151; Bradshaw v. Mill Co. (Minn.) 53 N. W. 1066; Allen v. Allen (Cal.) 30 Pac. 213; Stockton v. Manufacturing Co., 22 N. J. Eq. 56; Bish. Cont. § 569. We believe this to be the true rule, and that a decision of a court is not in fact a law, and, if erroneously made, cannot make a law. It is simply the declaration of a court as to what the law is in the opinion of the judges. In the nature of things, judges are sometimes in error, and, when that error is discovered, either by the same judges or their successors, it becomes a question as to whether or not, under all the circumstances, the rule of stare decisis shall be applied to that case. If the court stands by the decision, the error is perpetuated, as being a less evil to the public than to restore the law in its correctness. If the erroneous decision is overruled, it is then as if it had never been made, and the law is to be considered as declared in the later opinion.

Under the proposition contended for by the appellant, this court is called upon to hold that a decision of the supreme court of a state, although erroneously made, could give validity to a statute which the legislature had no power to enact, and thereby deprive the citizens of Texas of their constitutional right of exemption of their homesteads from this class of charges. The power to change the constitution of the state resides in the people themselves, and no change can be made in that instrument except by their approval. How, then, can a court, which is created by the constitution, exercise the sovereign power of amending or altering that instrument, when no such power has been delegated to it? It is also claimed that this court should declare the decision in the case of Lufkin v. City of Galveston valid and binding as to all contracts made subsequent to its promulgation and prior to the time when it was overruled. If that decision was ever the law, then this court should not have overruled it, either upon principle or policy, because, if it was sound as a matter of law, the court had no authority to change it, and, if it was the law as to contracts made and rights accruing under it, then it would be just as good law, for all time to come, to other persons who might contract with reference thereto. If the supreme court

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had the right to say that those people upon whose property burdens had been placed, as in this case, under the decision referred to, must bear that burden, and be deprived of the constitutional protection, then this court had as much authority to say that the people in all future time should suffer the same deprivation of their constitutional rights. Such a decision as that sought would be violative of the fundamental principles of our jurisprudence, and an assumption of power forbidden to be exercised by the court, and would involve the administration of justice in many and insurmountable difficulties; but we will not pursue this part of the case farther. We believe that we must do one of two things,—either overrule Higgins v. Bordages and restore Lufkin v. City of Galveston, or we must maintain Higgins v. Bordages and let the other case stand overruled and as if it had never been made. We see no reason for changing our opinion as to the proper construction of the constitution, and we therefore stand by the last decision. The policy of conferring upon this court the power to limit its decisions to the future is a question for the people, and we cannot, under any notion of injustice, overstep the constitutional limitation to our power, no matter howsoever desirable the departure might be.

It is now well settled that, in the absence of any limitation in the constitution of a state, the legislature of such state may authorize a municipal corporation to assess upon the owners of abutting property the cost of improving the streets, and may create a lien upon such property to secure the payment of the assessment so made. There is, however, some conflict in the authorities as to whether the legislature of a state, when not authorized by the constitution to do so, may empower a municipal corporation to make the cost of such local improvements upon the street a charge against the person of the owner as well as a lien upon property abutting thereon. Mr. Cooley, in his work on Taxation (page 674), seems to take position against the existence of such power in the legislature, but admits that the weight of authority is in favor of it. The number of cases which directly hold the affirmative of the proposition, or in which the right to collect such assessment from the owner has been enforced without question, are too numerous to admit of the citation of any large proportion of them in this opinion. We note the following cases as sustaining the affirmative of the proposition: City of Muscatine v. Chicago, R. I. & P. Ry. Co., 79 Iowa, 646, 44 N. W. 909; Hazzard v. Heacock, 39 Ind. 172; Schumm v. Seymour, 24 N. J. Eq. 143; Baptist Church v. McAtee, 8 Bush. 508. In support of his text, Mr. Cooley cites Taylor v. Palmer, 31 Cal. 240; Carlin v. Cavender, 56 Mo. 286; Town of Macon v. Patty, 57 Miss. 378; Craw v. Village of Tolono, 96 Ill. 255; Wolf v. City of Philadelphia, 105 Pa. St. 25. In the cases cited from the supreme courts of California and Illinois, the decisions rest upon provisions in the constitutions of those states which are construed to limit the power of the legislature to enforcing a payment of such assessments by sale of the particular property, and are, therefore, not in point upon the question now under discussion. Wolf v. City of Philadelphia, 105 Pa. St. 25, seems to be based upon a construction of the statute of that state, and not upon any general principle denying power to the legislature to make the assessment a personal charge. In City of St. Louis v. Allen, 53 Mo. 44, it is held, broadly, that, without constitutional authority, the legislature has no power to authorize a municipal corporation to make the cost of local improvements a personal charge against the owner of the abutting property. Town of Macon v. Patty, 57 Miss. 378, follows the decisions in the state of Missouri, holding the same doctrine. We have found no other authorities sustaining Mr. Cooley in his position, and we conclude that, it being conceded that the legislature may authorize a municipal corporation to make an improvement in the streets of a town or city, and, upon the alleged ground that it is a benefit to the abutting property, charge the cost to the owner, and enforce it against such abutting property, there is no sound reason why the benefit so conferred will not as well sustain a personal liability as it will a charge upon the particular property, because the benefit to the property is compensation to the owner equally whether the cost be collected from the particular property or from him personally. The reasoning of the supreme court of Kentucky in the case of Baptist Church v. McAtee, cited above, seems to be a satisfactory answer to all objections that can be made to the exercise of that power. The court said: "The legislature, having the power to impose a taxation, cannot be restricted in determining the mode of its collection; nor will this construction enable the city, in any case, to extort from property owners, under the guise of taxation, more than the value of the property subjected directly to the tax."

Objection is made that the cost of the improvement might exceed the value of the property, and thus the property be sacrificed, and the owner compelled to pay the cost out of his general estate, which was not benefited. This is a contingency which is possible, but not probable, and, therefore, too remote to govern in establishing a general rule of law upon any subject. What remedy the owner might have in such a case it is not now necessary for us to consider.

To the first question we answer that the lien claimed by the appellant against the homestead of appellees in this case, under the facts stated by the court, should not be enforced. To the second question we answer that, if the terms of the charter of the city of Houston empowered that city to make the cost of such improvement a personal charge against the owners of the property, and if the city has done so, then the appellees would

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be liable for the cost of the improvement so made, although it cannot be enforced against their homestead.

On Rehearing.

(Dec. 24, 1896.)

For the purpose of filing an amendment to our answers heretofore filed to the questions certified in this case, the motion for rehearing is granted. The second question propounded by the court reads as follows: "In case no lien should be enforced against the homestead of appellees, are they or the appellee Henry W. Cortes personally liable for the amount of the certificates?" Our attention has been called to the provision of the charter of the city of Houston which declares that act to be a public law. Therefore it is the subject of judicial cognizance. By act of the 21st legislature, approved March 15, 1889, section 23 of the original charter of the city of Houston was amended so as to embrace several sections, in which the power to make local assessments for street improvements is conferred upon the city council of that city, and the manner in which that power is to be exercised is regulated. Provision is made for the payment of so much of the cost of such local improvement as shall be charged against the owner of the abutting property in four equal annual installments, and in such case it is provided that a certificate shall be issued for the amount chargeable against each lot or block, which shall state the amount to be paid each year, the name of the owner, and describe the lot, and, among other things not necessary to mention, the certificate is required to state "that said sum of money is a tax against such property owner, named therein, and a lien upon the property described." The charter of the city contains this clause: "Should the property owner fail to pay the amount of said certificate when the same becomes due or when any installment provided for in the same becomes due, the owner thereof may institute suit for the enforcement of the tax and the foreclosure of the lien provided for in any court having jurisdiction." Sp. Laws 21st Leg. p. 104. The statement accompanying the certified questions contains this language: "The assessment was made and the improvement certificates were issued in compliance with the said charter, so as to make them a lien on the land, except for the fact that it was the homestead of the appellees." Under the terms of the charter as above quoted, whenever the assessment constitutes a lien upon the property, it is likewise a personal charge against the owner of the property; and the right of personal action is given against the owner named in the certificate upon failure to pay, as well as a foreclosure of lien. As we have before held, it was within the power of the legislature to confer this authority upon the city council, and, having conferred it, the personal responsibility attaches, although the property is not subject to the lien by virtue of the constitutional exemption of the homestead. In lieu of the answer to the second question heretofore filed, we answer that the appellee Henry W. Cortes, being the owner of the property at the time the assessment was made, is personally liable for the amount of the certificates issued by the city council by virtue of said assessment. Mary M. Cortes, being a married woman, is not liable personally for such assessment.

CLASSEN v. ELMENDORF et al.

(Supreme Court of Texas. Dec. 21, 1896.)

SUPREME COURT—JURISDICTION ON CERTIFICATE OF DISSENT.

Rev. St. art. 1040, provides that when the court of civil appeals renders a decision in which a judge dissents as to any material conclusions of law, he shall enter the grounds of his dissent of record, and such court shall, on motion of a party, or on its own motion, certify the point or points of dissent to the supreme court. Section 1042 provides that after the question is decided the supreme court shall notify the court of civil appeals of their decision, and the same shall be entered as the judgment of said court of civil appeals. *Held*, that on a certificate of dissent the jurisdiction of the supreme court over the case is restricted to a determination of the very point or points on which the judges of the court of civil appeals disagreed, and it has no power either to modify, reverse, or affirm the judgment of the trial court or of the court of civil appeals.

On motion for rehearing. Denied.

For former reports, see 37 S. W. 245 and 37 S. W. 1062.

GAINES, C. J. This cause came to us upon a certificate of dissent. On the 24th day of June, 1896, the court of civil appeals filed their opinion, in which it was held that there was error in the judgment of the trial court, but in which it was also ruled that the appellees should be allowed 10 days within which to file a remittitur for certain damages recovered in the court below; that, in the event the remittitur should be filed within that time, the judgment should be reformed and affirmed; but that otherwise it should be reversed, and the cause remanded. To this judgment there was a dissent. On the 23d day of September thereafter, no remittitur having been filed (as is to be presumed), judgment was entered by the court of civil appeals reversing the judgment of the district court, and remanding the cause. Appellees' motion for rehearing having been overruled, the court, at their instance, certified the point of dissent to this court for our decision. On a former day we decided the question against the appellees, and ordered our opinion to be certified to the court of civil appeals. A motion is now filed for rehearing in this court, in which we are asked to permit the appellees to remit the sum specified in the opinion of the court of civil appeals, and affirm the judgment of the district court. Article 1040 of Revised Statutes provides that: "When

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