CITY OF CLEBURNE *v.* GULF, C. & S. F. RY. CO.

(*Supreme Court of Texas.* June 18, 1886.)

MUNICIPAL CORPORATIONS — RAILWAY CORPORATIONS — APPROPRIATIONS FOR RIGHT OF WAY.

Under the Texas constitution of 1875, art. 10, § 9, and art. 11, § 3, a municipality, as such, has no authority to donate the right of way, other than through its streets, where no appropriation is required, and appropriate money for such right of way.

Appeal from Johnson county.

Action to recover the value of certain warrants issued by defendant in payment for the right of way it had previously donated to plaintiff. Judgment for plaintiff, and appeal therefrom by defendant.

English & Ewing and *S. C. Padelford*, for appellant, City of Cleburne. *Tillman Smith & Ballinger* and *Mott & Terry*, for appellee, Gulf, C. & S. F. Ry. Co.

ROBERTSON, J. Section 3 of article 11 of the constitution prohibits municipal corporations from making appropriations or donations or loans of its credit to private corporations. The object of this provision was to deprive municipalities of the power possessed by them under the constitution of 1869, in the exercise of which many counties and towns in the state assumed burdens not yet discharged, in anticipation of benefits never realized. The increase in population and values expected from railway connection in many instances never came; and the tax, not lightened from these sources, depressed values, prevented immigration, and became a curse to the localities which had invited it as a blessing. In localities in which the delusion had not been dissipated by experience, the people were still stimulated by false hopes and fraudulent assurances to make extravagant donations to coveted railroads. While the power lasted, corporate greed found local pride and ambition an open way to municipal revenues. The scheme was generally consummated by a contract, by which the railway company bound itself to construct its line through a county, or in a given distance of a town, in consideration of so many thousand dollars of negotiable bonds of the county or town. This section deprived municipalities of the power to make such contracts. Its terms are broad enough to prohibit a city or town, in its corporate capacity, from appropriating its revenues, or using its credit, to obtain right of way and depot grounds for a railway company, and the section must be given this effect, unless it is modified in this particular by section 9 of article 10 of the constitution. That section (9) requires railway companies, projecting a road within three miles of a county-seat, to run through the county-seat, if not prevented by natural obstacles: "provided, such town, or its citizens, shall grant the right of way through its limits, and sufficient ground for ordinary depot purposes." The duty of the railway company is the same whether the grant is made by the town or by its citizens. The power of citizens to contract is not limited. They may grant the right of way and depot grounds from lands already owned by them, or they may purchase the needed lands for cash or on credit, and make the grant, and thus secure the road. Before they can make the grant they must acquire the subject of it; but there is no restriction upon their power to make the necessary acquisition. It is not made the duty of the town to make the grant,—the duty would imply all the powers necessary to its proper execution,—but the grant is authorized to be made by the town or its citizens. It is contemplated that the town cannot or will not exercise its authority in some instances. It can exercise it in all cases in which the right of way is over a street, and the land for depot purposes is owned by the town, without incurring any debt. The grant of right of way over the street would be subject to the right of abutting proprietors to recover damages caused by the new servitude. *Railway Co. v. Eddins*, 60

Tex. 656. But the grant by the city would pass the right of way. The citizens may act, if the city cannot or will not. The power to borrow money, and buy the land, in order to make the grant, is not expressly conferred. If it exists, it must be implied from the mere permission to make the grant, which can be made in certain contingencies without the power, and which the citizens may make without the aid of the city, if the city either cannot or will not act.

Section 3, art. 11, forbids a city to make either a donation or appropriation for the benefit of a railway company. Section 9, art. 10, authorizes a donation in the special case mentioned in the proviso; but neither expressly, nor by necessary implication, authorizes an appropriation in any case. A power will be implied only when without its exercise an expressed duty or authority would be nugatory. Cooley, Const. Lim. 235 *et seq.*, and notes. Municipal powers are strictly construed in the United States, (Id.,) and the entire article in the constitution of 1875, on municipalities, indicates a determination to impose new limitations on the powers of cities, towns, and counties. From the authority conferred in one section to make a grant, the power to acquire the subject of the grant, in flat violation of another section, when the grant is compulsory in no case, is possible in some cases without the power, and may be made by the citizens when the city does not own the subject, cannot be fairly implied. The agreement of the city of Cleburne to purchase for the railway company right of way and depot grounds, or to refund the money paid out for this purpose by the railway company, contemplates an appropriation for the benefit of the railway company prohibited by section 3 of article 11 of the constitution. The ordinance authorizing the scrip in controversy and the scrip issued are void. It was not the purpose of the city to exempt the railway company from taxation under article 436, Rev. St. If the ordinance authorizing this scrip could have such effect, its repeal revoked the exemption. It is not certain, by any means, that, under article 436, a city could exempt from taxation the general property of the railway company. At all events, such was not the purpose of any ordinance in this record.

The judgment below, affirming the validity of the city ordinance of September 17, 1881, and of the scrip issued under it, and enforcing the terms of both as a contract binding on the city of Cleburne, must be reversed; and, as the case was tried by the court without a jury, a general judgment for the defendant below will be here rendered. It is so ordered.

PURINTON and Wife v. DAVIS.

(*Supreme Court of Texas.* June 18, 1886.)

1. INJUNCTION—EXECUTION SALE OF WIFE'S LAND.
   A court of equity has no jurisdiction to enjoin a threatened sale of lands belonging to the wife, under an execution against her husband.
2. SAME—TRESPASS—REMEDY AT LAW.
   Upon the consummation of such a sale, the wife has a complete legal remedy by an action in form trespass *quare clausum*, and meanwhile her title is neither jeopardized nor beclouded.

Appeal from Wichita county.

Joint petition in equity by husband and wife to enjoin the defendant, as sheriff, from selling, under an execution against the husband, lands belonging to the wife. Defendant demurs generally for want of equity. Demurrer sustained, petition dismissed without prejudice, and plaintiffs appeal therefrom.

Swan & Bomar, for appellants, M. M. Purinton and Wife. *M. D. Priest*, for appellee, F. M. Davis.

ROBERTSON, J. The title to personal property can be tested in advance of sale under execution by a trial of the right of property under the statute.