purchasers of the property. If the only object had been to protect the latter class, it could have been effected as well by requiring the record of the contract itself, without declaring it to be a chattel mortgage, as is the case in some states; for instance, Nebraska and Wisconsin. Jones, Chat. Mortg. §§ 216, 234. In fact, it is the record alone that gives protection to these third parties, but it is the character given to the instrument which affords protection to the vendee. The instruments being chattel mortgages, the vendor had the rights of a mortgagee under a chattel mortgage containing the stipulations of right to take possession, which would be to take possession of the property if he deemed himself insecure, or the debt not being paid, and to hold or dispose of the property in the character of mortgagee, and not as owner. We answer the question that, under the law, the instruments were chattel mortgages, and by their terms the defendant, Creech, had the right to take possession upon failure to pay, or if he deemed himself insecure, but he had no right to convert the property to his own use. It was the property of the plaintiff, subject to the defendant's rights as mortgagee.

WOMACK et al. v. GARNER et al.

(Supreme Court of Texas. June 10, 1895.)

TITLE OF ACT—AMENDMENT.

1. Act April 14, 1883, relating to appeals entitled "An act to amend title 32, c. 17 of the Revised Statutes of the state of Texas by adding thereto articles 1639a and 1639b," and Act April 2, 1887, amending article 1639a, similarly entitled, are not unconstitutional, as violating Const. art. 3, § 35, providing that the subject of a bill shall be expressed in its title. 30 S. W. 589, affirmed.

2. Nor do they violate Const. art. 3, § 36, providing that no law shall be amended by reference to its title. 30 S. W. 589, affirmed.

Certified question from court of civil appeals of Third supreme judicial district.

Garnishment proceedings by Womack & Sturgis against John Garner and others, seeking to subject to the payment of a debt due plaintiff by T. J. Inman a debt claimed to be due by said Garner to Inman. There was an affirmance by the court of civil appeals (30 S. W. 589) of a judgment for plaintiffs. Brought up on a certified question.

R. L. Penn, for appellants. Robt. A. John and W. T. Stamer, for appellees.

BROWN, J. The following question is certified to this court by the court of civil appeals of the Third supreme judicial district: "On the 18th day of December, 1893, was there any statute law in force in this state authorizing a pauper's oath, in lieu of an appeal bond, to appeal a case from a court of a justice of the peace to the county court? In other words, was the act of the legislature approved April 14, 1883, containing articles 1639a and 1639b, entitled 'An act to amend title 32, chapter 17 of the Revised Statutes of the state of Texas by adding thereto articles 1639a and 1639b,' violative of article 3, §§ 35 or 36,[1] of the state constitution? And was the act of 1887, approved April 2, 1887, amendatory of article 1639a of the act of 1883, unconstitutional upon the same ground?" We answer that neither of the acts mentioned in the foregoing question was in conflict with the constitution of the state, and that the act of 1887 was in force on the day named. The opinion of the court of civil appeals in this case, by Judge Collard, is a clear statement of the law upon the question, and leaves nothing to be added by us in support of the answer given to the question submitted.

TRAVIS COUNTY et al. v. TROGDEN et al.

(Supreme Court of Texas. June 10, 1895.)

CONDEMNATION OF LAND — OPENING HIGHWAY—NECESSITY OF PRIOR COMPENSATION—ASSESSMENT OF DAMAGES—EFFECT OF APPEAL.

1. The condemnation by a county of private land for a public road is a taking "for the use of the state," within the meaning of the bill of rights (section 17), requiring compensation to "be first made or secured by a deposit of money," when property is taken by condemnation, except when the taking is "for the use of the state." 29 S. W. 47, reversed.

2. Sayles' Civ. St. art. 4372, allowing the opening of a public road pending appeal by the owner of the land condemned from the assessment of damages by the commissioners' court, does not violate the bill of rights (section 17), prohibiting the taking of private property for public use, "except for the use of the state," until adequate compensation has been "first made." 29 S. W. 47, reversed.

3. The bill of rights (section 17), in providing that "adequate compensation" shall be made for private land taken for public use, requires the payment to the owner of the intrinsic value of the land taken, without reference to the benefits he may derive from the improvements.

4. A county is properly enjoined from opening a public road where it has failed to allow the owner adequate compensation for the land taken, as required by bill of rights (section 17), and to comply with Rev. St. art. 4372, authorizing the opening of a road only when such compensation is "paid or secured by deposit with the treasurer to the credit of the owner."

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

Suit by Robert Trogden and wife against Travis county and others to enjoin the opening of a certain road. From an affirmance by the court of civil appeals (29 S. W. 47, 405) of a judgment for plaintiffs, defendants bring error. Modified.

A. S. Walker, Jr., Co. Atty., for plaintiffs in error. John Dowell, for defendants in error.

DENMAN, J. Proceedings having been instituted in the commissioners' court of Travis county to establish a public road over Trogden's land, he made claim for damages before the jury of view, who, in their report.

[1] Const. art. 3, § 35, provides that the subject of a bill should expressed in its title; and section 36 provides that no law shall be amended by reference to its title.

Digitized by Google

allowed him nothing; and the commissioners' court having approved the report, and ordered the road opened, he appealed to the county court, where the cause is now pending. Pending such appeal, the road overseer having attempted, under the order of the commissioners' court, to open the road, Trogden procured the issuance of an injunction from the district court, which, on trial, was made perpetual; but the decree was reformed by the court of civil appeals, as hereafter indicated.

The constitution of 1876 provides that: "No person's property shall be taken, *damaged, or destroyed for* or applied to public use without adequate compensation being made, unless by the consent of such person; *and when taken, except for the use of the state, such compensation shall be first made, or secured, by a deposit of money.*"[1] We have italicized the words added in the constitution of 1876; the remainder of said provision having remained unchanged in the constitutions of 1836, 1845, 1866, and 1868, except that in the constitutions of 1836 and 1868 the word "just" was used instead of "adequate" in the others. Thus it appears that prior to 1876 the constitutions simply required that, when property was taken for a public use, "adequate compensation" should be made, but made no distinction, as to time of payment, or the manner in which the compensation should be made, between the two great classes of cases where property is taken for public use; one class being where the right of eminent domain is exercised in favor of the state, either directly, in its own name, or indirectly, in the name of one of its governmental subdivisions, and the other being that numerous and constantly increasing class in which the right of eminent domain has been delegated to private persons or corporations engaged in the performance of public, or quasi public, duties. The legislature in the meantime had construed this constitutional provision as not requiring payment to be made before or at the time of the taking of the property in either class of cases above mentioned, and this court had strongly intimated, if it had not decided, such construction proper, with the qualification that, at the time of taking the property, adequate provision must be made to insure the speedy payment of the compensation; and this seems to have been the construction of similar provisions in other states. Railroad Co. v. Ferris, 26 Tex. 588; Smith v. Taylor, 34 Tex. 589; Railroad Co. v. Daugherty, 40 Ind. 33; Commissioners' Court v. Bowie, 34 Ala. 461; Talbot v. Hudson, 16 Gray, 417; Lowerre v. City of Newark, 38 N. J. Law, 151; White v. Railroad Co., 7 Heisk. 518. It had also been generally held in other states that a condemnation by a county for road purposes was a taking by and for the use of the state. See cases above cited. Therefore, when the convention came to revise said provisions of the old constitutions, in 1876, it found two questions partially, if not entirely, settled by construction in this and other states: (1) That said provision did not require the actual payment of the compensation at the time of taking the property, no matter whether the right of eminent domain were exercised by the state, or by some private person or corporation, it being sufficient if adequate provision be made to insure its speedy ascertainment and payment; and (2) that a taking by a county for the purpose of a public road is a taking by and for the use of the state. It also found that the necessities of modern civilization and progress frequently demanded that the legislature confer the right of eminent domain on private persons and corporations, in a class of cases, and to an extent, not probably contemplated when said general provision was incorporated into our organic law, in 1838, and that in conferring such sovereign power upon persons and corporations over whose finances the state had little or no control, and whose solvency was often questionable, the legislature had not always been sufficiently cautious in providing a certain and speedy method whereby the citizens might secure the "adequate compensation" provided by the constitution, and that for want thereof the courts, in order to protect the citizen, had been compelled, in some instances, to enjoin the taking of the property. Railroad Co. v. Ferris, 26 Tex. 588. It was therefore necessary, in this class of cases, that some additional compensation should be provided by the organic law for the security of the property rights of the citizen against improvident legislation and the possible indisposition or inability of such persons or corporations to pay for the property taken. In order to make such guaranty perfect, it was provided in 1876 that "such compensation shall be first made, or secured by a deposit of money." The evil, however, did not exist in that class of cases where the right of eminent domain had been exercised in behalf of the state, whether directly, in its own name, or through one of its counties; for the state has control of its own finances and those of its governmental subdivisions, and can compel the payment of such claims, and the presumption must have been indulged that the state would deal justly with its citizens. Therefore, in requiring the compensation to "be first made or secured, by a deposit of money," an express exception was made of that class of cases in which property is taken "for the use of the state." We are satisfied that this language includes condemnations for public roads by county commissioners' courts, because, as indicated above, such was its construction at the time it was incorporated into the constitution of 1876, and because it is one of the functions of government to establish and maintain public roads; and, no matter through what agency such function is

[1] Const. Bill of Rights, § 17.

Digitized by Google

exercised, the roads are the property and for the use of the state, which, through its legislature, has absolute control over the same, which control it may or may not, from time to time, delegate to the local authorities.

Having determined that the portion of the constitution above quoted, providing that "such compensation shall be first made, or secured by a deposit of money," has no application to a condemnation of land for a public road, we will next proceed to determine to what extent the legislature has exercised its power; for though it may have power to take the property of the citizen "for the use of the state," by making proper arrangements for ascertaining and paying compensation therefor, without paying same in advance, nevertheless it may not deem it proper to exercise such power, but may require payment in advance, as in other cases, or may require payment in advance on condition that the owner will accept the compensation fixed by the commissioners' court. The act of the legislature approved February 5, 1884, amended article 4372 of the Revised Statutes so as to read: "If the commissioners' court shall approve of the report and order such road to be opened, they shall consider the assessment of damages by the jury and the claimant's statement thereof, and allow to such owner just damages and adequate compensation for the land taken, and when paid or secured by deposit with the county treasurer, to the credit of such owner, they may proceed to have such road opened. If the owner of the land is not satisfied with the assessment by the commissioners' court, he may appeal therefrom as in cases of appeal from judgment of justices' court, but such appeal shall not prevent the road from being opened, but shall be only to fix the amount of damages." It cannot be denied that the legislature had power to make the action of the commissioners' court final. In fact, such was the law prior to the passage of the amendment above quoted, which first allowed the owner the right of appeal on the question of damages. Since the legislature had the power, under the constitutional provision above, to provide for the taking of Trogden's property for the purpose of a public road without paying the compensation in advance, and since it could have made the action of the commissioners' court final as to amount of damages, as well as to the right to take the property, it follows that said provision did not inhibit it from the exercise of the lesser power of providing for the taking of the property and opening of the road upon paying or depositing the sum allowed by the commissioners' court, notwithstanding the appeal. Trust Co. v. Harless (Ind. Sup.) 29 N. E. 1062. If, therefore, the commissioners' court had complied with the provision of the statute above by allowing to Trogden "just damages and adequate compensation for the land taken," and "paying or securing by deposit with the county treasurer, to the credit of Trogden," the sum so allowed, we would have no hesitation in holding that Trogden had no right to an injunction pending the appeal. The statute made it the duty of the commissioners' court to allow Trogden (1) "just damages" and (2) "adequate compensation for the land taken." It is conceded that the road will take land inclosed, and belonging to Trogden, of the value of over $60, and that neither the jury of view nor the commissioners' court allowed him anything therefor, though his claim was duly presented. It is contended on behalf of the county that the jury of view and commissioners' court had the right to offset both items of liability above stated by whatever benefits might accrue to Trogden by reason of the establishment of the road, and that since, on the whole case, nothing was allowed him, this court should presume, in favor of the validity of such judgment, that the jury of view and commissioners' court had found the benefits to be equal to both the damages and the value of the land taken, and that, therefore, Trogden was not entitled to anything.

The first difficulty encountered in attempting to maintain this contention is that the constitution does not permit such a disposition of Trogden's claim. In Railroad Co. v. Ferris, 26 Tex. 588 (decided in 1863), this court held that the constitutional provision above cited, as then in force, required payment to the owner (1) of the intrinsic value of the land taken, without reference to benefits he might derive from the improvement, and that such claim could not be offset by such benefits; and (2) of any damage occasioned to the remainder of the property, in estimating which damages the benefits of the remainder of the tract were legitimate subjects of consideration. After this construction of said constitutional provision, it was, as above indicated, incorporated, without change, into the constitutions of 1866, 1868, and 1876; and in the case of Dulaney v. Nolan Co., 85 Tex. 225, 20 S. W. 70, this court approved such construction, and applied the same to the provision of the constitution now in force, as above quoted. We regard this construction of the constitution as settled law in this state, though there are expressions to the contrary in an opinion which does not refer either to the constitution, or to the case above in 26 Tex. 588, construing same. Bourgeois v. Mills, 60 Tex. 77.

The next difficulty encountered in attempting to maintain the contention of the county is that the act of the legislature above quoted, passed in 1884, after the decision in the case of Bourgeois v. Mills, above cited, expressly requires the commissioners' court, as above indicated, "to allow to such owner" (1) "just damages" and (2) "adequate compensation for the land taken," and only authorizes them to open the road when such allowance is "paid or secured by deposit with the treasurer to the credit of the own-

Digitized by Google

er." This statute is in harmony with the constitution, as construed by the decisions above cited. It would probably be within the power of the jury of view and the commissioners' court, by a decision made in good faith, to conclude that the benefits were equal to the damages sustained by the owner, and therefore refuse to allow him anything on his claim for "just damages" to the land not taken. This proposition is based upon the apparent truth that, if the benefits equal or exceed the injury to the other property, there is no real or "just damage" thereto. It is offsetting an incidental and somewhat conjectural injury with a similar benefit. But both the constitution and the statute unconditionally command that "adequate compensation" be made for the land taken, and no offset thereto can be allowed. It is suggested that this provision can be evaded by the allowance and deposit of a nominal sum in compliance with the constitution and statute. A sufficient answer to this is that the organic law uses no uncertain or idle language when it commands that "adequate compensation" shall be made for the property taken, and courts of equity have ample power to enforce its mandate, as against a collusive or colorable order designed to defeat it.

We are therefore of opinion that, in refusing to allow Trogden "adequate compensation for the land taken," the commissioners' court failed to comply with either the constitution or the statute, and, in failing to pay or secure same "by deposit with the county treasurer," it failed to comply with the statute, and therefore had no authority to order the opening of the road, and was properly enjoined. While we are of opinion that the condemnation in question was for "the use of the state," within the meaning of the constitution, and that the provision of the statute allowing the opening of a road pending an appeal is not, therefore, unconstitutional, we agree with the court of civil appeals, in view of the fact that Trogden's appeal is pending in the county court, that the judgment of the district court should be so reformed as to render the injunction inoperative after the county court of Travis county, or other tribunal having jurisdiction, shall have adjudicated and assessed appellees' compensation, and said compensation shall have been paid to appellees or secured by a proper deposit of money as required by said statute, and that the costs shall be taxed against appellant Travis county. It is so ordered.

SHAW v. STATE.

(Court of Criminal Appeals of Texas. May 8, 1895.)

HOMICIDE—INSTRUCTIONS—INTENT.

Pen. Code, art. 612, relating to homicide, provides that, "if the instrument be one not likely to produce death, it is not to be presumed that death was designed, unless shown by the manner in which it was used." *Held*, on a trial for murder committed by striking deceased with a stick, that a charge that when the instrument used, or the means in which it was used, was reasonably calculated to produce death, then the law presumes that such was the intent of the party, is erroneous, because it left the jury to infer intention from the mere fact that death followed the blow.

Appeal from district court, Cooke county; D. E. Barrett, Judge.

S. M. Shaw was convicted of murder in the second degree, and appeals. Reversed.

Potter, Potter & Cofer, for appellant. Mann Trice, Asst. Atty. Gen., for the State.

HURT, P. J. This conviction is for murder in the second degree, the punishment being assessed at 20 years in the penitentiary. The uncontroverted facts in this case establish that the deceased was a young man, about grown, hired to work for the defendant about the 1st of February, 1893, on his farm in Cooke county, at $12.50 per month, with board and washing; that he continued in the employment of defendant until about the 16th or 17th of July of said year, when, not giving satisfaction to his employer, he was discharged. At the time he was discharged, the defendant was engaged in running a threshing machine, and deceased was one of the hands, and his business was to fire and run the engine. The discharge occurred on Friday or Saturday, and, on the following Wednesday, Jones, the deceased, came to Cook's, where the defendant was then engaged in threshing wheat. An altercation occurred between defendant and deceased. The defendant struck the deceased a blow on the head, which knocked him down, and from the effects of which he died the next day. As to the details of the occurrence there is some difference between the testimony of the witnesses for the state and defendant on the salient points. We will proceed to give the substance of the evidence.

It appears that the beginning of the trouble occurred with reference to the discharge of the deceased, Jones. The witness Crane testified that he was present at the time the discharge occurred; that something occurred to stop the machine, and after they had fixed it, and started to begin running again, that the steam had gone down. Shaw said to Jones: "What in the world's the matter? You have got no steam; and you have done this way before. You get down from here, and get away. I won't be bothered with you any longer." And then Jones said: "Well, you will have to pay me, then." And Shaw said: "I will settle with you and pay you for every day's work that you have done." Shaw said to Jones that he had given him more trouble than any man he had ever had anything to do with in his life. Shaw says: That, when he found that the steam had gone down, he asked Jones what was the matter; and he said, "I am getting

Digitized by Google