THE

LAWS OF TEXAS

1822-1897

Austin's Colonization Law and Contract; Mexican Constitution of 1824; Federal Colonization Law; Colonization Laws of Coahuila and Texas; Colonization Law of State of Tamaulipas; Fredonian Declaration of Independence; Laws and Decrees, with Constitution of Coahuila and Texas; San Felipe Convention; Journals of the Consultation; Proceedings of the General Council; Goliad Declaration of Independence; Journals of the Convention at Washington; Ordinances and Decrees of the Consultation; Declaration of Independence; Constitution of the Republic; Laws, General and Special, of the Republic; Annexation Resolution of the United States; Ratification of the same by Texas; Constitution of the United States; Constitutions of the State of Texas, with all the Laws, General and Special, passed thereunder, including Ordinances, Decrees, and Resolutions, with the Constitution of the Confederate States and the Reconstruction Acts of Congress.

COMPILED AND ARRANGED BY

H. P. N. GAMMEL

OF AUSTIN.

WITH AN INTRODUCTION BY C. W. RAINES.

VOLUME IX.

AUSTIN:
THE GAMMEL BOOK COMPANY.
1898

certain lands surveyed in this state, and the rights of actual settlers and purchasers are dependant upon the validity of such surveys, creates an emergency and imperative public necessity authorizing the suspension of the constitutional rule requiring bills to be read on three several days, and demanding that this act take effect and be in force from and after its passage, and it is so enacted.

[Note.—The foregoing act originated in the senate, and passed the same by a vote of 27 yeas, no nays; and passed the house by a vote of 70 yeas, 11 nays.]

Approved, April 16, 1889.

LANDS—UNORGANIZED COUNTY SCHOOL.

Sec.
1. Commissioner of land office authorized to lease lands of unorganized counties.
2. Control of lands vests in the county upon organization.
3. Emergency clause.

CHAP. 95.—[S. B. No. 143.] An Act to provide for leasing the unorganized county school leagues.

Section 1. Be it enacted by the Legislature of the State of Texas: The commissioner of the general land office is hereby authorized to lease, for a term of not exceeding ten years, at a price not less than two cents per acre, the three hundred and twenty leagues of land set apart and surveyed in the year 1882 for the unorganized counties of the state, situated in the counties of Hockley, Cochran, Bailey, Lamb, Andrews, Martin, Dawson, and Grimes, under the same rules and upon the same terms as are prescribed by law for the lease of the university lands. The proceeds of such lease shall be paid into the state treasury and become a part of the available school fund of the state.

Sec. 2. Whenever any county entitled to said lands shall be organized, the control of said lands belonging to such county shall vest in the commissioners court of such county, and any lease money thereafter becoming due, shall be payable to such county, but all leases executed before such organization of the county shall be binding for the full term thereof.

Sec. 3. There being no law requiring or providing for the lease of said land creates an emergency, and the importance of this bill creates an imperative public necessity requiring the suspension of the rule requiring bills to be read on three several days, and said rule is hereby suspended.

[Note.—The foregoing act originated in the senate, and passed the same March 25, 1889; and passed the house April 6, 1889.]

Approved, April 8, 1889.

LANDS—MILAM COUNTY SCHOOL.

Sec.
1. Provides for warrants to reimburse settlers for amounts paid on pre-emptions of Milam County school lands.
2. $1500 appropriated for purposes of this bill.
3. Emergency clause.

CHAP. 96.—[H. B. No. 310.] An Act for the relief of settlers upon the Milam County school lands located in Hood County, and to make an appropriation therefor.

Whereas under an act of the legislature of the state of Texas, approved July 21, 1870, certain settlers on the Milam County school lands, located in Hood County, bought their pre-emption claims from the state of Texas at the rate of fifty cents per acre, and received patents therefor from the state; and

whereas the supreme court has declared said law unconstitutional and said patents void; and whereas the said settlers, or their assigns, have lost said lands at the suit of Milam County, and said parties have given notice of their intention to apply for relief at the hands of the Twenty-first Legislature, and ask to be reimbursed in their purchase money with lawful interest:

Section 1. Be it enacted by the Legislature of the State of Texas: That upon proper proof being made to the comptroller of public accounts that the said settlers, or their assigns, who then owned and paid for said pre-emption surveys and lost the same through the courts of this state, that the said comptroller is authorized and ordered to draw a warrant on the state treasurer in favor of each of said settlers, or his assigns, for the amount or amounts paid by him to the state for said pre-emption claims.

Sec. 2. That the sum of fifteen hundred dollars, or so much thereof as may be necessary, be appropriated out of the general revenue not otherwise appropriated to pay the same.

Sec. 3. The near approach of the end of the present session of the legislature, and the great probability that this bill will not be reached on the regular call of business before the end of the same, creates an emergency, and an imperative public necessity exists requiring the suspension of the constitutional rule requiring bills to be read on three several days, and said rule is so suspended, and that this act take effect and be in force from and after its passage, and it is so enacted.

[Note.—The foregoing act originated in the house, and passed the same by a vote of 86 yeas, no nays; and passed the senate by a vote of 23 yeas, no nays.]

Approved, March 6, 1889.

LA SALLE AND MILLS COUNTIES.

Sec.
1. Jurisdiction of county courts of La Salle and Mills limited to probate matters, etc.
2. Duty of clerks of said courts.
3. Appeals from justices, etc.
4. As to executions on existing judgments.
5. Repealing clause.
6. Emergency clause.

CHAP. 97.—[H. B. No. 552.] An act to diminish the civil and criminal jurisdiction of county courts of La Salle and Mills counties.

Section 1. Be it enacted by the Legislature of the State of Texas: That the county courts of La Salle and Mills counties shall have and exercise the general jurisdiction of a probate court; shall probate wills, appoint guardians of minors, idiots, lunatics, persons non compos mentis, and common drunkards; settle accounts of executors, administrators, and guardians; transact all business appertaining to the estates of deceased persons, minors, idiots, lunatics, persons non compos mentis, and common drunkards, including the partition, settlement, and distribution of estates of deceased persons, and to apprentice minors as prescribed by law, and to issue all writs necessary for the enforcement of its own jurisdiction, and to punish contempts under such provisions as may be prescribed by general laws governing county courts, and to have and exercise general jurisdiction over questions of eminent domain as prescribed by law, but said county courts shall have no other jurisdiction, civil or criminal.

Sec. 2. It shall be the duty of the county clerks of La Salle and Mills counties, within twenty days after the passage of this act, to make a full and complete transcript of all orders on the dockets of said county courts in cases still pending in said courts, of which cases the district courts of said counties

REPORTS

OF

CASES ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

STATE OF TEXAS.

DURING

PART OF THE GALVESTON SESSION, 1870, THE ENTIRE TYLER SESSION, 1870
AND PART OF THE FIRST ANNUAL SESSION OF THE COURT ORGANIZED
UNDER THE CONSTITUTION OF 1869, WHICH COMMENCED ON
THE FIRST MONDAY IN DECEMBER, 1870.

BY

E. M. WHEELOCK.

VOLUME XXXIII.

AUSTIN:
TRACY, SIEMERING AND COMPANY.
1872.

Statement of the case.

MILAM COUNTY v. R. P. ROBERTSON AND OTHERS.

1. The act of August 30th, 1856, (Paschal's Digest, Art. 3470,) providing that limitation shall not run in favor of settlers on school lands, was probably designed to deter persons from settling on such lands, and was of itself sufficient to put all settlers on inquiry.
2. If the act of February 10th, 1852, (Paschal's Digest, Art. 4562,) requiring the field notes of all prior surveys to be returned to the General Land Office by the thirty-first of August, 1853, had any application to surveys of school lands granted to the several counties by the act of January 26th, 1839, (Paschal's Digest, Art. 3464,) the omission by a county to comply with its provisions was a dereliction of which the State alone could take advantage.
3. The counties are only trustees of the school lands for the use of the people; and when a county made a survey of its school lands in 1849 upon the domain afterwards comprised within the Mississippi and Pacific railroad reserve, but failed to return the field notes to the General Land Office by the thirty-first of August, 1853, such survey did not become subject to pre-emption when the reserve was opened to location by the act of August 26th, 1856. (Paschal's Digest, Art. 5038.)
4. The fact that four leagues had been surveyed in a single county as school lands must in the nature of things have been too notorious to be ignored by any citizen of the county, and is considered by this court as a cogent circumstance to charge citizens of that county with notice of the locality of such surveys.

APPEAL from Johnson. Tried below before the Hon. John J. Good.

On the twenty-fourth of February, 1866, this action of trespass to try title was instituted by the county of Milam against Rachel P. Robertson and nine other defendants, who were in possession of different parcels of a league of land in Johnson county, patented on the tenth of October, 1860, to Milam county as part of her school lands. The plaintiff prayed judgment for the land and for fifteen thousand dollars damages for timber, &c. By amendment the plaintiff alleged that the defendants, at the time they settled on the land, had actual notice of its prior appropriation by her.

Statement of the case.

The defendants pleaded a general denial and not guilty, and further alleged that the plaintiff's survey was made long before the passage of the act of February 10, 1852 (Paschal, Art. 4562), and that the field notes thereof were not returned to the General Land Office on or before the thirty-first of August, 1853; that the plaintiff's patent was therefore null and void, was obtained illegally, and was fraudulently issued by the Commissioner of the General Land Office, contrary to law and to the injury of the defendants. Five of the defendants filed other and special answers, setting up pre-emption titles to the parcels claimed by them, A plea of limitation was also filed by the defendants, but no attention seems to have been paid to it in the further progress of the cause. The defendants charged that the plaintiff's patent was a cloud upon their title, and prayed that it be removed and they be quieted in their possession, etc.

The plaintiff denied the allegations of the defendants. And on this state of the pleadings the cause came to a trial at the April term, 1867, of the District Court of Johnson county.

There was no particular contest over the facts of the case. The pre-emptors went into possession in the year 1855, and it appeared that they took all requisite steps to perfect their claims, provided the land was subject to be taken up by them.

The jury found in favor of the pre-emption titles, and for the plaintiff the remainder of the league. The judgment of the court below quieted the possession of the defendants' claiming under the pre-emptions, and gave the plaintiff a writ of possession for the remainder of the league. The plaintiff moved for a new trial, but it was refused, and the county appealed.

One of the defendants, against whom there was judgment below, also brings up the case by writ of error.

Such other facts as are pertinent to the rulings made by this court are stated in the opinion.

Argument for the appellant.

J. G. Terrell and *H. G. Hendricks*, for the appellant.—We do not think that the act of tenth of February, 1852, requiring the return of field notes to the General Land Office by the thirty-first of August, 1853, applies to land set apart for educational purposes under Article 10 of the State Constitution of 1845, and the laws passed pursuant thereto. (See Art. 10, § 4, Constitution; also, Paschal's Digest, Arts. 3465 and 3466.)

The act of twenty-sixth of January, 1839, section 3, (Paschal, 3466,) requires the surveyor to return a correct description of the land, with the field notes of the survey, to the clerk of the county court, who shall record the same, and forward a transcript to the General Land Office. But there is no law requiring the field notes themselves to be returned to the General Land Office, or requiring patents to issue thereon. It is therefore regarded as a legislative grant, which was complete when the lands subject to location were surveyed, and the field notes returned to and recorded in the county clerk's office. The only object in requiring the clerk to forward a transcript to the General Land Office was to notify that officer, as also subsequent locators, of the appropriation of the land. In this case the defendants had actual notice of the prior appropriation of the lands by Milam county. The court therefore erred in charging the jury that Milam county had forfeited her right to the land by not returning her field notes to the General Land Office by the thirty-first of August, 1853. (Causici v. Lacoste, 20 Tex., 269; Parish v. Weatherford, 19 Tex., 210.)

In support of the position that the counties hold their school lands as grants, in trust for educational purposes, and that the field notes were not required to be returned and filed in the General Land Office, nor patents to issue thereon to the counties, reference is made to the action of the government in her disposition of the university lands, appropriated by the fourth section of said act of twenty-sixth of January, 1839. (See act of thirtieth August,

1856, Paschal's Digest, Arts. 3555 to 3558.) These lands, when surveyed, were reserved from location or appropriation by other parties. But patents, under the acts referred to, are to issue to the purchasers in tracts of 160 acres, under provisions of the act.

So the county school lands, secured under the first, second and third sections of the act of twenty-sixth of January, 1839, when surveyed, were reserved from appropriation by others; and though the field notes should be recorded in the county clerk's office, and a transcript forwarded by the clerk to the General Land Office, yet no law has prescribed any time within which it should be done. But as to how the lands shall be disposed of, and to whom patented, if patents are to issue at all, are subjects for subsequent legislation, just as in the disposition of university lands.

S. P. Donley and *A. J. Hood*, for the appellees.—The appellant's counsel maintain that neither the act of the tenth of February, 1852, nor any other law, required that field notes to school land should be returned to the Commissioner of the General Land Office. We maintain the reverse.

In urging this legal proposition for the consideration of this court, appellant's counsel presents the true issue. And we frankly admit that if the law is with Milam county on this issue, that then all the settlers on the land must vacate their homes; but if the law is with the appellees, as we confidently believe it to be, then the patent of Milam county to the league of land in controversy is a nullity, conferring no legal nor equitable right whatever to any portion of it.

In argument of opposing counsel on this issue, it is broadly asserted that "there is no law requiring the field notes themselves to be returned to the General Land Office, or requiring patents to issue thereon." Now, it does seem to us that it would indeed be difficult for any one to assume and to assert a legal proposition more wholly unsustained by law than this is. It seems to us

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that directly the reverse of this proposition has been most clearly and indubitably established, both by oft repeated legislative enactments and by a number of decisions of this court.

We will first call the attention of this court to some of the legislation of the country, bearing directly on the return of field notes. But before proceeding we wish to state, with due deference to opposing counsel, that we have examined carefully the only decisions cited by the appellant, viz.: Causici v. Lacoste, 20 Texas, 269, and Parish v. Weatherford, 19 Texas, 210; and that we are wholly unable to discover in those decisions anything having the slightest application to the issue.

Then as to the legislation of the country requiring return of field notes and issuance of patents. We include issuance of patents, because, as opposing counsel seem to be aware, if we show that the laws of the country contemplated the issuance of patents on field notes to school lands, we thereby, as a necessary consequence, establish the legal proposition that such field notes had to be returned to the General Land Office. Let us see what the law is, and "was aforetime." Congress, December 22, 1836, passed an act for the establishment of a General Land Office. (See Hartley's Dig., Art. 1783.) Under this act there was to be one Commissioner of the General Land Office, with clerks, etc. Texas was divided into eleven land districts. (See Hartley's Dig., Art. 1793.) Under this system there were eleven land offices. (See Hartley's Dig., Art. 1793.) A surveyor general was to be appointed for each of these districts, whose duty in each district it was, among other things, after returns were made to him, "to examine the field notes and plots of all surveys which have been or may be made within the bounds of his authority, for the purpose of getting a patent for them." (See Hartley's Dig., Art. 1794.) This act further affirmatively declared that "all surveys shall be patented." (See Hartley's Dig., Art. 1798.) This law also provided for the appointment of one register and one receiver for each

Counter 26641

land office in the eleven districts, and made it the duty of the register at each of these land offices, after the field notes were examined, etc., by the surveyor general, to make out and transmit to the Commissioner of the General Land Office blank patents for his signature. (See Hartley's Dig., Art. 1798.)

Congress, June 12, 1837, passed a supplemental act. This act did not materially change the features of the act to which it was supplementary. It, however, required that the act of December 22, 1836, should go into operation on the first of October, 1837. September 30, 1837, Congress passed a joint resolution closing the Land Office. Congress after this passed the act of December 14, 1837. (See Hartley's Dig., Art. 1887.) It was entitled "An act entitled an act to reduce into one act and to amend the several acts relating to the establishment of a General Land Office." This law in many features changed the former land system. County surveyors were provided for, who were to keep their offices at the county seats, to have deputies, etc. Surveyor general and the district land offices were abolished; in lieu, to be but one land office, a general land office, at the seat of government. Duties of the Commissioner of the General Land Office were enlarged. Field notes of all surveys were to be returned to the Commissioner of the General Land Office. (See § 9 of this act, Hartley's Dig., Art 1845.) It is there enacted that county surveyors shall examine all field notes of surveys which have been or may hereafter be made in said county, and upon which patents are to be obtained, and shall certify the same under his hand to the Commissioner of the General Land Office." This act provided for the issuing of patents on all surveys. Even lands surveyed under orders of survey made before the closing of the land office, in 1855, were to be patented.

We will next call the attention of this court to the two donating acts under which appellant, Milam county, obtained a certificate by virtue of which she, December 23, 1849, had the league of land

in controversy surveyed. The first of these acts was passed January 26, 1839. (See Hartley's Dig., Art. 881.) This act conferred on each county the right to locate for school purposes three leagues of land. The other act was passed on the fifth of February, 1840. (See Hartley's Dig., Art. 887.) This act made the Chief Justice and two commissioners of each county a board of school commissioners, and gave to each county that had taken the benefit of the act of 1839, the right to locate an additional league; and to such counties as had not located at all—four leagues; thus making it equal between all the counties.

Now, it seems to us an undeniable proposition of law, that, had the legislation of the country on the subject of the return of field notes ended here, and there had been nothing in the donating acts of 1839 and 1840 on that subject, that still the field notes to the league of land in controversy should have been returned to the General Land Office. Why? Because, as above shown, the general laws of the land most positively required that field notes to all surveys should be so returned. There can be no limitation or exception to the scope of a general law, unless the law itself makes the exception. But apart from the general laws requiring the return of all field notes of all surveys, we submit that the third section of the act of January 26, 1839, did itself contemplate such return. (See Hartley's Dig., Art 883, latter clause.) It is there enacted, on the subject of the return of field notes of school land, that "when the lands so surveyed are not situated in the county for which it is surveyed, the description and field notes shall be recorded in the county where it is surveyed, as well as in the county for which it is surveyed, and forwarded to the Land Office, as above described." We will here remark that at this date there was under the law but one land office, a general land office; also that the land in controversy was not in Milam county.

But for argument sake, suppose this donating act did not expressly require the return of field notes of school lands to the

Argument for the appellees.

General Land Office, would that prove that no such return should be made? Not at all. If it did, it would be a very easy task to prove that no field notes whatever had to be returned—for none of the many donating acts, passed before and about this period, expressly provided for such return. That was done by general laws.

Why it was that the preceding part of the above section required a description of the land, and the field notes to be recorded in the county, and a transcript thereof to be forwarded to the General Land Office is not very apparent. It was probably merely intended as a means of apprising that officer of the fact that the county was willing to accept the survey, as made by the surveyor making it. But after all is said that can be said about the provisions of the donating act of 1839, there are some things that cannot be controverted. There is certainly nothing in the act of 1839 against the return of the field notes to the General Land Office, and the general laws of the land did positively require such return. Before Milam county took any steps to secure her school land, the further donating act of February 5, 1840, was passed, donating a right to locate four leagues; and it was under this act that Milam county did finally have the league of land in controversy surveyed. Years elapsed, however, before Milam county had the survey, here in litigation made. In the meantime the return of field notes was the subject of oft repeated legislation. On the very day of the passage of the act donating four leagues to counties, viz.: February 5, 1840, the Congress of the Republic passed another act bearing on this subject. (See Hartley's Dig., Art. 1991.) The first section of this act says "that all surveys heretofore made shall be returned as required by law, and with the government dues paid thereon, to the General Land Office, by the first day of January next; and all surveys hereafter made shall be returned as above, within nine months from the date of the survey, otherwise they shall be null and void, and subject to relocation."

Counter 26644

Argument for the appellees.

There are other features in the last two named acts, to which we will here call the attention of the court. The first section of the donating act of February 5, 1840, (see Hartley's Dig., Art. 887,) made the chief justice of each county, with two associate justices, school commissioners, whose duty it was to locate the school lands. The second section of the other act, passed on the same day, (see Hartley's Dig., Art. 1992,) provided that chief justices should, as before then, act as receivers. Then the third section of this act, (see Hartley's Dig., Art. 1993,) made it the duty of said receivers to forward all field notes to the Commissioner of the General Land Office, "unless the person interested therein shall prefer to convey the same to the General Land Office." Then the sixth section (see Hartley's Dig., Art. 1996) provides that county surveyors shall examine and certify field notes, and deliver them "to the chief justice, or any person interested therein."

Thus it seems that on the very day, to-wit: on the fifth of February, 1840, that Congress passed the law donating to Milam county the right to locate her four leagues of land, another law was passed, making it the duty of her chief justice to forward to the Commissioner of the General Land Office the field notes to her school land; and that the same act also affirmatively declared that "all surveys hereafter made shall be returned as above, within nine months from the date of the survey, otherwise they shall be null and void, and subject to relocation."

At this period, under the law as it then existed, the surveying was done by deputy surveyors, whose duty it was to make returns of all surveys made by them to the county surveyors. And on the nineteenth of January, 1841, (see Hartley's Dig., Art. 2024,) a law was passed, enacting "That the county surveyors of the various counties be required to forward the field notes of all surveys returned to their offices to the Commissioner of the General Land Office, any law to the contrary notwithstanding."

counter 26675

Argument for the appellees.

Now we insist that if there had been, prior to this, any law in force exempting field notes of school lands from being returned to the General Land Office as other field notes, that this latter statute would have operated as a repeal of such law. But the truth is, there never was at any time any law exempting field notes of school lands, or any other lands. Even the field notes of university lands had to be so returned; and, in one case at least, where they were not, it was the legislative will of the country that subsequent location should hold. (See Paschal's Dig., Art. 897.) The law also contemplated that patents should issue on university lands.

But, to return: Congress, on the tenth day of December, 1840, (see Hartley's Dig., Art. 2065,) passed a joint resolution, giving twelve months longer for the return of field notes to the General Land Office. On the twenty-seventh of November, 1841, (see Hartley's Dig., Art. 2076,) it was enacted that "the further time of twelve months" be given for return of field notes. Then on the twenty-seventh of December, 1842, (see Hartley's Dig., Art. 2101,) the time for the return of field notes was extended "until the first day of January, one thousand eight hundred and forty-six."

Again, on the twenty-sixth of June, 1845, (see Hartley's Dig., Art. 2154,) the law was extended, requiring the return of field notes, until first of January, 1848.

Afterwards, December 31, 1847, (see Hartley's Dig., Art. 2193,) the time for return of field notes is extended until first day of February, 1850.

Then again, on thirty-first of December, 1849, (see Hartley's Dig., Art. 2223,) the time for return of field notes is extended until first day of January, 1852.

An inspection of these several acts will show that by none of them was repealed the act of February 5, 1840, which declared that "all surveys" that were not returned within nine months

from the date of the survey, "shall be null and void." The act of February 5, 1840, was only extended from time to time. Thus we find, from oft repeated legislation, that it was the determined, settled legislative policy of the country that all field notes that were not returned to the General Land Office should eventually be "null and void."

The league of land in controversy was surveyed on the twenty-third day of December, 1849, but the field notes were never returned to the Commissioner of the General Land Office until the sixteenth day of June, 1858. Between the date of the survey and return of the field notes, to-wit: on the tenth day of February, 1852, an act was passed, as is well known by all familiar with the history of the times, for the express purpose of putting an end to what at one time seemed endless legislation on the subject of the return of field notes.

By the first section of this law, (see Paschal's Dig., Art. 4562,) it was enacted as follows: "The field notes of all surveys made previous to the passage of this act shall be made out and returned in the manner now required by law to the General Land Office, on or before the thirty-first day of August, 1853, or they shall become null and void, and the said surveys shall become vacant land, and be subject to be relocated and surveyed as in other cases, by any persons holding a genuine land certificate, or other legal evidence of claim to land."

Comment on this statute is deemed superfluous. No field notes within the bounds of the State were exempt from its provisions—not even those belonging to minors. "The Legislature had the right so to declare." (See note in Paschal's Dig., No. 1007, page 751, and authorities there cited.)

Appellant's counsel insist, in argument, that the act of February 10, 1852, does not apply to field notes of school land. But they seem to be wholly unable to cite one line of law in support of the proposition. For argument's sake, however, suppose it is

Argument for the appellees.

as they would have it. What then? In avoiding Scylla, would they not be hopelessly wrecked by Charybdis? This survey, as before stated, was made December 23, 1849, and never returned until the sixteenth day of June, 1858. Then if the act of the tenth of February, 1852, does not apply, it cannot be successfully denied but that the act of February 5, 1840, does apply, which declares that "all surveys" made after its passage, and not returned to the General Land Office within nine months from the date of the survey, shall be null and void. This law, as above stated, was never repealed, only extended from time to time. And the last extension act (save the act of February 10, 1852,) expired on the first day of January, 1852. And it has been held by this court that the act of February, 10, 1852, operated in relief of, and rendered valid, surveys and field notes that otherwise would have been forfeited and void under the act of February 5, 1840. (See Hart v. Gibbons, 14 Tex., 215.)

Hence it seems indubitably true that it is only by the healing operation of the act of February 10, 1852, that surveys made over nine months before the first of January, 1852, and not returned to the General Land Office by that time, are validated.

No one, it seems to us, will pretend to say that the act of February 5, 1840, did not mean what it said—"all surveys." It was passed the very day of the passage of the law which authorized Milam county to locate the four leagues, of which the one in controversy is a part. It was on the statute books of the country, unrepealed, at the time Milam county located her certificate and had the land surveyed. Then what possible benefit would it be to appellant's counsel to succeed in that argument? For if the act of February 10, 1852, does not apply for one purpose it cannot for another, and if it does not apply at all to these field notes, they are still under the act of February 5, 1840, and in the very language of that act, "null and void."

We wish here to notice another point, or rather statement,

made by appellant's counsel. They assume it, in their brief, as a fact proven on the trial, that appellees, at the time of their settlement on the land in 1855, had actual notice that Milam county claimed the land. Now as a law question, we cannot see how either notice or want of notice can have the slightest legal bearing on the issue in this cause. Notice does not affect. (See Jennings v. DeCordova, 20 Tex., 508; Cravens v. Brooks, 17 Tex., 274.)

The question of the non-return of field notes has been several times before this court, and in no case heretofore passed on, within our knowledge, has the court attached the least importance to the question of notice. In determining whether field notes to land are void or valid—and this is the issue, there is no medium ground—what possible light can be thrown on the question by proving that other claimants to the land knew of the existence of the survey and field notes? But, with due respect to opposing counsel, we must be permitted to say that when they assume, as they do, that "in this case defendants had actual notice of the prior appropriation of the land by Milam county," that they make a statement unsustained by the record. It is true that appellant averred actual notice, and on the trial introduced a number of witnesses to prove it, but most signally failed; in fact, proved an entire want of even constructive notice.

The third section of the act of January 26, 1839, (see Hartley's Digest, Art. 883,) positively required that Milam county should have her field notes recorded in both Johnson and Milam counties. Yet she never did, at any time, have them recorded in Johnson county. And she wholly failed to have them recorded in Milam county until the ninth of June, 1858, which was three years after appellees had settled on the land. In this connection we will remark, because it is part of the history of the country, that in December, 1849, the date of appellant's survey, no white man lived west of the Brazos river in the region of these lands.

How then could appellees, at the time of their settlement in 1855, have had notice of appellant's survey? Milam county had neglected to comply with the law. She had neither returned her field notes to the General Land Office nor placed them on record anywhere.

It is true that some of the witnesses disclosed the fact that some time after appellees settled on the land, they found out that Milam county had, at one time, surveyed the land; but the understanding even then was that she had abandoned it. But every witness introduced, who was in the country at the time of settlement, swore positively that nothing was known of the survey of Milam county in 1855, when appellees settled.

So it seems conclusively true that if the question of notice raises equities, such equities are all in favor of the appellees.

Appellant's counsel, in their argument, desire this court to regard the certificate, survey and field notes of Milam county as "a legislative grant." This cannot be. And we would not notice this branch of their argument but for the seeming seriousness with which it is made.

Appellant's counsel, in making this argument, contradict themselves. If the certificate, survey and field notes of Milam county constitute "a legislative grant," why did they in the court below introduce in evidence, and rely on their patent instead of their certificate and field notes, as title to the land?

To regard the certificate procured by Milam county, under the acts of 1839 and 1840, and its location and survey, as a legislative grant, vesting the absolute fee, would be in contravention of our whole land system, repugnant to oft repeated legislation on the subject of surveys, field notes and patents. It would also be in direct conflict with many uniform decisions of this court. Under our land system, field notes and surveys that are valid, at the furthest, confer on their owners no more than inchoate rights to land, and being merely incipient rights, are clearly under the

legislative control of the State. This doctrine is incontrovertibly established by numerous decisions. In one of the earlier cases this court held that, "as an incident to the fee being in the government, it has the right to attach such terms, and impose such regulations as may be deemed most consistent with sound policy; that this has been the uniform construction given to the power of the Legislature over all inchoate and imperfect claims to land." (See League v. DeYoung, 2 Tex., 500; Hughes v. Lane, 6 Tex., 292; Peck v. Moody, 23 Tex., 94; Hosmer v. DeYoung, 1 Tex., 769; Hart v. Gibbons, 14 Tex., 215; Hamilton v. Avery, 20 Tex., 634.)

We will dispose of this issue, for we feel that we would be asking too much of this court were we to attempt to argue it further; for as we remarked in the outset, the question as to whether or not "all field notes" should be returned to the General Land Office, as required by the act of the tenth of February, 1852, is not an open one. This court has several times passed on this identical issue, and the unanimous opinion of the court each time has been in favor of the appellees. See Stewart v. Lapsley, 11 Texas, 42, in which this court held "that the field notes of the survey of all lands located and surveyed before the passage of the act, must be returned to and filed in the General Land Office on or before the thirty-first day of August, A. D. 1853. See Hart v. Gibbons, 14 Texas, 213; Upshur v. Pace, 15 Texas, 531.)

Then, did the patent which Commissioner White issued to Milam county on the tenth of October, 1860, confer on her any right to the league of land in controversy? None whatever. It issued contrary to law, on field notes that were null and void, and it therefore is itself a nulity.

The law is that "the issuing of a patent is a ministerial act, and must be performed according to law. If it issues against law it is void, and those claiming under it acquire no right." (See State v. Delesdernier, 7 T. R. 109; Russel v. Mason, 1 Texas,

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721; Kimmell v. Wheeler, 22 Texas, 84; Sherwood v. Fleming, Austin Term, December, 1860; Stoddard v. Chambers, 2 How., 318, 345; Winter v. Saltmarsh, 18 How., 87; Samssegack v. the United States, 7 Pet., 222; Barwick's case, 3 Coke, 94.)

WALKER, J.—This is an action to try title commenced in the district court of Johnson county, February 24th, 1864.

The land sued for was patented to appellant on the tenth day of October, 1860, and was part of the school lands surveyed and appropriated by her on the twenty-third day of December, 1849.

On the tenth of August, 1852, the Legislature passed an act requiring the field notes of all surveys made prior thereto to be returned to the General Land Office by the thirty-first day of August, 1853.

The appellees claim title as pre-emptors, under the act of August 26, 1856, authorizing the location and sale of the Mississippi and Pacific Railroad reserve, of which the lands in dispute are a part.

The plaintiff claims title under her patent of 1860.

The appellees claim that appellant did not comply with the requirements of the act of February 10, 1852, and therefore was not entitled to the patent for the land. They show that they returned their surveys when made, tendered fifty cents per acre for the land, and demanded title from the State. It appears that the Commissioner of the General Land Office refused to accept their money, and also to issue patents.

The title to the lands was in the State until the tenth day of October, 1860. No statute of limitation could run against the State. Nor could a settler, under the act of August 26, 1856, acquire title by prescription; for three days after the passage of the act under which the defendants made their pre-emptions, the Legislature passed another act (Paschal's Digest, Art. 3470,) which provides that no statute of limitation shall operate to give

title to lands heretofore or hereafter granted for educational purposes. And this act was, in all probability, passed to deter settlers from settling on school lands, and was in itself a sufficient notice to put them on inquiry; and at the time they made these pre-emptions it was their duty to know, and as a matter of fact we have no doubt they did know that the county had surveyed the lands for school purposes, and at all events they are chargeable with notice from and after the time when they returned their surveys and applied for patents.

The appellees and the court below also, appear to have concluded that the plaintiff, by laches in not returning her field notes on or before the thirty-first day of August, 1853, had lost her right to have the lands patented as school lands, and that their title under the pre-emption laws thereby became good.

We think that if the act of February, 1852, applied at all to the surveys of school lands (which had been granted by public act of the Legislature), the State only could have taken advantage of the laches of the appellant, and it was not for third parties to take advantage of her neglect. The county of Milam was and is a trustee, holding these lands for the use of the people, and it would not only be contrary to law, but much against public policy to allow the interests of the whole community to be prejudiced by the negligence of the trustees, when the parties seeking the advantage are chargeable with notice of the trust; and though the evidence does not positively establish actual notice, prior to their attempts to obtain the patents from the State, yet we believe they had such notice, for the existence of the fact of four leagues of land being set off and surveyed within the limits of one county for such a purpose, must in the nature of things have been too notorious for any intelligent citizen of the county to claim ignorance of it; and the appellees are fairly chargeable with constructive notice.

There was error in the court below overruling the motion for a

Syllabus.

new trial. There was error in the charge of the court, and there was error in the court refusing to charge as requested by plaintiffs' counsel.

There is very little dispute about the facts in the case; most of the evidence consists in the muniments of title, as derived by the parties. The matters to be determined were mainly questions of law; and believing it wholly unnecessary to remand the case for further proceedings, it is therefore considered by the court that the appellant do have and recover from the appellees the land described in the petition, together with all her costs in this and in the district court expended; and that a writ of restitution do issue to the sheriff of Johnson county, commanding him to place the appellant in possession of all of said lands; and that this judgment be certified below for observance.

Reversed and rendered.

JOHN COOPER v. JOHN MCCRIMMIN.

1. A subscription paper, stipulating that the sums annexed to the subscribers' names would be paid to any person who would build a free bridge at a designated place, constitutes a valid contract between the subscribers and any one who afterwards built a bridge in accordance with the tenor of the instrument. (Hopkins v. Upshur, 20 Texas, 89, cited by the court.)

2. Such an instrument is like a note payable to bearer, so far as relates to the payee; and when the bridge was completed the consideration was unimpeachable.

3. In a suit by the bridge-builder against the subscribers, it was not competent for the latter to vary or contradict the subscription paper by parol proof that the building of the bridge was to be let out to the lowest bidder—there being no such provisions in the paper itself.

CASES

ARGUED AND DECIDED

IN

THE SUPREME COURT

OF

THE STATE OF TEXAS,

DURING

PART OF THE TYLER TERM, 1880, THE GALVESTON TERM, 1881, AND A PART OF THE AUSTIN TERM, 1881.

REPORTED BY
A. W. TERRELL.

VOL. LIV.

ST. LOUIS, MO.:
THE GILBERT BOOK COMPANY.
1881.

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ie citation in this case is hich we are referred by in all respects strictly reg- shows who are the de-

ollow the petition. In the , F. C. Vanzandt, as exec- nzandt, is the sole and only in favor of her and K. M. the judgment as heirs of error the judgment is re-

EVERSED AND REMANDED.

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Syllabus.

BONNER, ASSOCIATE JUSTICE.—This is a simple suit in debt, on a promissory note for $328.95, less credits indorsed, brought October 5, 1877, by the National Bank of Jefferson against Bruhn & Williams, in the county court of Marion county.

Judgment from which this appeal was taken was rendered in favor of the bank by the district court of Marion county, January 3, 1880.

The record fails to disclose how, or for what reason, the case came into the district court.

As a general rule, the district court cannot entertain jurisdiction over an amount less than $500.

In those cases which are transferred from the county to the district court, the latter exercises a special jurisdiction only, and the same presumptions will not be indulged as when in the exercise of its general jurisdiction.

REVERSED AND REMANDED.

[Opinion delivered December 21, 1880.]

MILAM COUNTY v. J. M. BATEMAN ET AL.

(Case No. 853.)

1. VESTED RIGHT — LOCATION AND SURVEY.— A valid location on vacant land, and a survey thereunder, constitutes a vested right, and the legislature does not retain the absolute disposition of the land until the patent issues.
2. COUNTIES.— Counties are bodies corporate and politic, and have capacity to take and hold title in fee to real and personal property; as such they could acquire title to their school lands donated by the state.
3. CONSTITUTIONAL LAW — COUNTY SCHOOL LANDS.— The grants, first of three leagues, and afterwards of four leagues of land to each county for school purposes, made by the act of January 26, 1839, and the act of January 16, 1850, were recognized and confirmed by sec. 4, art. X of the constitution of 1845.

Syllabus.

4. CONSTITUTIONAL LAW — SCHOOL LANDS.— Though, under the constitution of 1869, the legislature had the right to control county school lands and to provide for their sale, the proceeds to be added to the public school fund of the state, without any reservation such as was contained in the constitution of 1866, that each county should receive the full benefit of the interest arising from the proceeds of sales of its lands, yet the constitution of 1869 did not divest the title of the counties to their school lands.

5. SAME.— Construing section 6, art. VII of the constitution of 1876, in connection with the constitutions which preceded it, it is clear that it has always been the intention of the state to vest the right of property in the county school lands in the several counties respectively.

6. CONSTITUTIONAL LAW.— The legislature, as the representative of the state sovereignty, can exercise absolute power, when not restrained by constitutional prohibition, over the political rights of counties; and those rights are not within the constitutional prohibition against retroactive laws, and those which impair vested rights. The property rights of a county, however, are protected by the same constitutional guarantees which protect the property of the citizen.

7. VESTED RIGHT.— The fact that a county obtains property by donation from the state does not impair its right to have it protected as a vested right.

8. SAME.— If the property was donated by the state for a specified object, the state may exercise such supervisory control as may be necessary to enforce a performance of the trust, but it cannot by legislation divert its use to other and different parties and purposes than those contemplated when it was originally granted.

9. CONSTITUTIONAL LAW — COUNTY SCHOOL LAND.— The state has no power to take from a county, school land which it had acquired legally, and arbitrarily give it, as was attempted by the act of July 21, 1870, to private parties.

10. CONSTITUTIONAL LAW.— The act of July 21, 1870, under which the legislature attempted, for the relief of settlers on Milam county school lands, to authorize the issuance of patents in violation of the law, as already decided by the supreme court, was judicial and not legislative, and was unconstitutional.

11. CONSTITUTIONAL LAW — LEGISLATIVE POWER.— The legislative action cannot be made to retroact upon past controversies, and to reverse decisions which the courts in the exercise of their jurisdiction have made; this would not only be the exercise of judicial power, but would be its exercise in its most objectionable form. Such a doctrine would make the legislature a court of review, to which parties might appeal when dissatisfied with the rulings of a court.

TEMAN. [Tyler Term,

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Statement of the case.

12. FORFEITURE — RETURN OF FIELD NOTES.— The failure of Milam county to have the field notes of the surveys of its school lands recorded in the office of the county clerk, and returned to the general land office by the 31st day of August, 1853, did not defeat its title to the county school lands.
13. CASES APPROVED.— Fannin County *v.* Riddle, 51 Tex., 360, and Henderson *v.* Shook, 51 Tex., 370, approved.
14. QUIT-CLAIM DEED.— A party claiming land under a quit-claim deed cannot defend as a *bona fide* purchaser.

APPEAL from Hood. Tried below before the Hon. T. L. Nugent.

Suit by Milam county, in trespass to try title, against J. M. Bateman and twenty-five others, for rents and profits for one league of land situated in Hood county Texas, claiming the same as a part of the land granted to her for school purposes, under two acts of the congress of the republic of Texas, the first approved January 26, A. D. 1839, the second approved February 5, A. D. 1840; located and surveyed on the 23d day of December, A. D. 1849, and the field notes recorded in Milam county June 9, A. D. 1858, duly certified by the clerk of the county court of Milam county, Texas, and filed in the general land office June 16, A. D. 1858, and patented to Milam county October 10, A. D. 1860.

Plaintiff claimed that the title set up by certain of the defendants was, by the judgment of the supreme court, rendered May, A. D. 1870, determined in favor of Milam county, and claimed that the defendants were estopped from denying or setting up title.

T. P. Randall and W. H. Beaumont intervened and claimed part of the land sued for.

The defenses relied upon were:

1st. General demurrer.

2d. Not guilty.

3d. The invalidity of plaintiff's title, because plaintiff did not have the field notes returned to the general land office before the 31st day of August, 1853.

Statement of the case.

4th. Pleading title in themselves to their respective claims; first, under the act of the legislature of Texas, of the 21st day of July, A. D. 1870, entitled "An act authorizing and requiring the commissioner of the general land office to issue patents on certain settlers' claims of one hundred and sixty acres of land each, on payment of usual office fees and fifty cents per acre.

Intervenors Randall and Beaumont and certain others claimed under locations made by virtue of certificates, one the J. H. Davis bounty for one thousand two hundred and eighty acres, and the other for six hundred and forty acres issued to the S. A. & M. G. R. R. Co., located after the issuance to plaintiff of a patent to the land sued for, claiming plaintiff's patent had been cancelled and reissued on another location, at the instance of plaintiff's agent, one J. D. McCamant.

The court sustained defendants and intervenors' general demurrer to plaintiff's petition, and overruled plaintiff's general and special exceptions to defendants' answer and to the plea of intervention filed by Randall and Beaumont. Plaintiff filed a trial amendment.

Verdict and judgment for defendants and intervenors for the land claimed by them respectively.

In addition to facts stated in the opinion, it was admitted on the trial that J. D. McCamant, under whom six of the defendants claimed, located a San Antonio & Mexican Gulf Railroad Company six hundred and forty acre certificate on the land claimed by the intervenors, which was a part of the land in controversy and covered by plaintiff's patent, and was patented to McCamant, as assignee of the railroad company, on the 12th day of October, A. D. 1872.

It was proven on the trial, by R. G. Peters, that after the supreme court made its decisions, in 1870, in a former suit between Milam county and the settlers for the land in controversy, he leased a part of the land claimed by

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Argument for the appellant.

plaintiff, and which is covered by the location made by J. D. McCamant, for himself and his boys; and that one of his boys went on the land under this lease in the year 1871 or 1872, and was on the same — the part called the J. H. Davis survey — when J. D. McCamant made the surveys on the J. H. Davis bounty warrant, and on the San Antonio & Mexican Gulf six hundred and forty acre certificate; that both surveys were made by J. D. McCamant at the same time, and that he told said McCamant, on that day, that he and his boys were claiming the land as Milam county school land, under a lease from the county, and had made their surveys and selections, and to go away and let them alone.

It was proved on the trial that the J. H. Davis survey was made prior to the cancellation of plaintiff's patent.

It was further established that J. D. McCamant was the agent of Milam county to collect rents and procure patents on unpatented land for the county.

Milam county had tenants on the land covered by the S. A. & M. G. R. R. six hundred and forty acre certificate, from 1869 up to the date of trial. The defendant, J. D. McCamant, before the cancellation of plaintiff's patent, stated that he did not know whether he would get patents on the Milam county school lands or not; that his agents at Austin were altogether too slow; that if he was at Austin, he would give one of the deputies in the land office fifty dollars, and have the patent out and gone before any one knew it, but it would not do to fool with old man Kuechler — he was too honest.

J. C. Terrell, *A. M. Carter* and *Smith & Jarvis*, for appellant.

I. The court erred in sustained defendants' demurrer to plaintiff's original and amended petition.

II. The court erred in not sustaining plaintiff's special

exceptions to defendants' amended answer, and to the plea of intervention filed by T. P. Randall and W. H. Beaumont.

III. The court erred in charging, "if plaintiff, Milam county, had the land surveyed in 1849, and the field notes thereof recorded in Milam county in 1858, and thereafter duly certified by the county clerk of Milam county, and returned to and filed in the general land office, and that if, on the 10th day of October, 1860, the commissioner of the general land office issued to plaintiff a patent to said land, that therefore the field notes, survey and patent to said land were null and void."

IV. The legislature of the state of Texas cannot divest the counties of their school lands, granted to them for educational purposes. Galveston County *v.* Tankersley, 39 Tex., 657; Bell County *v.* Alexander, 22 Tex., 359; Kuechler *v.* Wright, 40 Tex., 606; Fannin County *v.* Riddle, Texas Law Journal, vol. 2, No. 38, p. 598; Dartmouth College *v.* Woodward, 4 Wheat., 577; Wilcox *v.* Jackson, 13 Pet., 498; Const. of U. S., art. I, sec. 10; Cooley's Constitutional Limitations, 273–275.

V. Where a question concerning the title to real estate has been finally passed upon by the highest court in the state of Texas, the legislature of the state has no constitutional right to pass any law, or grant any relief, which would change the condition of the litigant parties as fixed by the court in such a case, whether the decision be right or not. Art. II, sec. 1, Const. 1868–9; Sedgwick on the Construction of Statutory and Constitutional Law, 128–145; Cooley's Constitutional Limitations (3d ed.), 87–116; Denny *v.* Mattoon, 2 Allen, 361; Hadfield *v.* Mayor, etc., 6 Robt., 501; Davis *v.* Menasha, 21 Wis., 491; Atkinson *v.* Dunlap, 50 Me., 111; Taylor *v.* Place, 4 R. I., 324.

VI. The commissioner of the general land office has no authority to cancel a patent for conflict, except when the patent is returned for cancellation by the owner, nor un-

BATEMAN. [Tyler Term,

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Argument for the appellees.

less there is a real actual conflict with an older equitable or legal title.

A. J. Hood and *McCall & McCall*, for appellees.

I. The act of July 21, 1870, under which appellees purchased and obtained patents, was not in violation of either the constitution of the United States or the then existing constitution of this state. See Const. of 1869, in force July 21, 1870, art. IX, sec. 8; Fannin County *v.* John L. Riddle, Tex. Law Journal, vol. 2, No. 38, p. 598; Bass *v.* Fontleroy, 11 Tex., 706; San Antonio *v.* Odin, 15 Tex., 544. See act July 21, 1870. But suppose our state constitution and our state decisions silent on the question. What then? The act of July 21, 1870, was constitutional and valid. See Rule of Construction, Cooley's Con. Lim., 3d ed., pp. 181, 182. Then what are counties? and what power has the legislature of a state over them? See 3 Pars. on Con., 6th ed., 528; Laramie County *v.* Albany County, 92 U. S. (2 Otto), 308, 311, bottom; Darmouth College *v.* Woodward, 4 Wheat., (Curtis), 485; 1 Dillon on Mun. Corp., sec. 10; id., secs. 38, 39; Cooley on Const. Lim., 240; 49 Mo., 236; 26 Ark., 37; 114 Mass., 214; 16 Kan., 498; 25 Ill., 187; 1 Humph. (Tenn.), 48; 12 Ill., 8; 1 Greenl. Ev., art. 331 (9th ed.); 10 How., 511; 11 Pet., 539; 4 Ohio, 42; 13 Wend., 325.

II. Milam county, in regard to school lands pertaining to that county on the 21st day of July, 1870, was a creature and mere agent of the state, and is now a mere agent of the state, and she cannot in the courts of the state do that which the state says she shall not do, viz.: recover the lands and oust the appellees therefrom. As to capacity in which counties hold: They at farthest held, and now hold alone, in trust, subject to the legislative will of the state. See Const. of 1869, art. IX, sec. 8; see present State Const., art. VII, latter part of sec. 6; also see Fannin County *v.* John L. Riddle, Texas Law Journal,

vol. 2, No. 38, p. 598. Then, as to what the legislative will of the state is and was, see act of July 21, 1870.

III. On the 26th day of August, 1856, the several parcels of land embraced in the respective patents of these appellees were parts and parcels of the public domain of the state, and had not been by the state, through any action of Milam county, severed and set apart for educational purposes.

IV. The issuance of a patent is a ministerial act, and is void if issued on invalid field notes. See State *v.* Delesdenier, 7 Tex., 109; Russell *v.* Mason, 1 Tex., 721; Kimmel *v.* Wheeler, 22 Tex., 84.

V. If it be shown by the record in any case that the court in fact acted, in rendering the judgment, without jurisdiction over either the person or thing, such judgment is a nullity, and the question of jurisdiction as to that particular judgment is in all time ever thereafter an open one, even to collateral attack. See Freeman on Judgments, 2d ed., secs. 116, 117, 120, 263, 266; Horan *v.* Wahrenberger, 9 Tex., 319; Elliot *v.* Piersol, 1 Pet., 328, 340; Voorhees v. Bank of the U. S., 10 Pet. 474; Williamson *v.* Berry, 8 How., 540; Webster *v.* Reed, 11 How., 437; 13 Pet., 499; 3 How., 750; C. & H.'s Notes to Phillips' Ev., 206, 214; 21 Tex., 163; 10 Tex., 140; 9 Tex., 294; 12 Tex., 99; 6 Tex., 242. Also see Milam County *v.* Robinson, 47 Tex.; Freeman on Judgments, 2d ed., sec. 141; Ford *v.* Doyle, 37 Cal., 346; Moseley *v.* Cocke, 7 Leigh, 225.

BONNER, ASSOCIATE JUSTICE.—In December, 1849, Milam county had two of the four leagues of land to which she was entitled, as school lands, surveyed in Milam land district, now Hood county. These are the subject matter of this and the suit of Milam County *v.* Blake *et al.*, also pending before us. Both were brought by Milam county against a number of defendants who claimed adversely to her.

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Opinion of the court.

The field notes of the league in controversy in this suit were duly returned and approved by the district surveyor within a reasonable time after the survey was made. They were recorded in the office of the clerk of the county court of Milam county May 11, 1858, returned to the general land office June 16, 1858, and patent issued thereon October 10, 1860. This patent embraced the land in controversy.

Subsequently to August 31, 1853, the date at which, under act February 10, 1852 (Pasch. Dig., art. 4562), the field notes of surveys made previously to the passage of that act should have been returned to the general land office, and before October 10, 1860, the date of the issuance of this patent, the claims of certain of the defendants who derive title as pre-emptors had their origin by settlement upon this league. Patents were refused upon their surveys because in conflict with it.

February 24, 1866, Milam county instituted in the district court of Johnson county, in which the land was situated, action of trespass to try title against a number of these settlers, including some of the defendants to this suit, which resulted, April 10, 1867, in a judgment against Milam county in favor of those defendants who set up claim to the land.

April 27, 1870, this judgment below was, on appeal, reversed, and judgment rendered by this court in favor of Milam county for the land in controversy, reported as Milam County *v.* Robertson, 33 Tex., 366.

Afterwards, July 21, 1870, the legislature of the state of Texas passed an act, in the nature of a special act, for the relief of the settlers, including the defendants in the above mentioned suit, on the Milam county school lands in Hood county, virtually reversing and setting aside the former decision of this court, and requiring the commissioner of the general land office to issue patents to such of these settlers as were upon the land previously to June 16,

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1858, the date of the return of the field notes by Milam county to the general land office. Pasch. Dig., art. 7064.

In accordance with this act, patents were issued to part of the land in controversy, under which six of the defendants in this suit, eight in the other, claim title. In addition to this claim, it is also contended by them, and by all the defendants, that Milam county had forfeited her surveys by failure to have the field notes recorded in the proper county and returned to the general land office, under the provision of our statutes. Pasch. Dig., arts. 3466, 4562.

September 25, 1871, the county court of Milam county, by order duly entered of record, appointed one John D. McCamant agent for the county, to collect and receive the rents due or to become due on her school lands, and "to institute any legal proceedings that may be necessary for the collection of said rents, and to procure patents to all school lands belonging to Milam county which are not yet patented."

Afterwards, September 23, 1872, McCamant had the patent cancelled, which previously, on October 10, 1860, had been issued to Milam county for the league in controversy, and on the same day of its cancellation had a new patent issued to Milam county, so as not to include these six pre-emption surveys patented by virtue of the special act of July 21, 1870, and which were embraced in the first patent; and so as not to include two surveys which McCamant had previously caused to be made for his own benefit, while acting as agent for the county, and when the original patent to Milam county was still outstanding. One of these two surveys in favor of McCamant was made by virtue of the J. H. Davis bounty warrant for 1,280 acres, which conflicts both with the league in controversy in this suit, and with the adjoining league in controversy in Milam County *v.* Blake *et al.*

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Opinion of the court.

640 acre certificate granted to the San Antonio & Mexican Gulf Railroad, and conflicts with the league in litigation in this case.

McCamant procured patents upon both these surveys.

The defendants, Patterson, and the intervenors Beaumont and Randall, deraign title under McCamant to lands embraced within these two surveys; the intervenors under quit-claim deed.

On the trial below, on verdict of a jury, judgment was rendered against Milam county, from which this appeal is taken.

The court charged the jury in effect, that the act of July 21, 1870, was constitutional, and that the patents which issued to the defendants by virtue of it, divested the titles to the lands embraced by them out of Milam county, and vested it into the several patentees, "the judgment of the supreme court to the contrary notwithstanding."

It has been decided by this court that a valid location or survey of land is a vested right, and that the legislature does not retain the absolute disposition of the land until the patent issues. Hamilton *v.* Avery, 20 Tex., 635; Sherwood *v.* Flemming, 25 Tex. Sup., 408.

It is contended by defendants, that counties being mere political subdivisions of the state, cannot, as against the will of the legislature, hold lands which have been previously donated to them by the state for the purposes of public education.

By our statutes, counties are bodies corporate and politic, and have capacity to take and hold title in fee to real and personal property. Pasch. Dig., arts. 1044, 1051; R. S., arts. 676, 680; Bell Co. *v.* Alexander, 22 Tex., 359; Baker *v.* Panola Co., 30 Tex., 86.

That they could acquire title to their school lands donated by the state, we think evident from our several constitutional and statutory provisions on this subject.

Section 5, Gen. Prov. Constitution of the Republic, required that congress, as soon as circumstances would permit, should provide by law a general system of education. Accordingly, the act of January 26, 1839, was passed, donating for a general system of education three leagues of land to each county, which by act of January 16, 1850, was increased to four leagues; requiring the counties to have the same "surveyed and set apart" at their own expense. Pasch. Dig., arts. 3464, 3468; Wilcox *v.* Jackson, 13 Pet., 498.

Section 4, article X, constitution 1845, provided "that the several counties in this state which have not received their quantum of lands for the purposes of education, shall be entitled to the same quantity heretofore appropriated by the congress of the republic of Texas to other counties."

In Bell County *v.* Alexander, 22 Tex., 363, it is said that this recognized and confirmed the grants of school lands made by the above statutes.

Although under section 6, article X, constitution 1866, the legislature had the right to control these school lands, and to provide terms and regulations for their sale, the proceeds to be added to the public school fund of the state, yet it was provided that "each county shall receive the full benefit of the interest arising from the proceeds of the sale of the lands granted to them respectively." It was further provided that the lands which had already been patented to the counties should not be sold without their consent.

Section 8, article IX, constitution 1869, gave similar control over these lands to the legislature, omitting the proviso that the interest on the proceeds should go to the counties respectively.

In commenting upon this provision, in Worley *v.* The State, it is said that although such proceeds are placed in the general school fund without any reservation as in the

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constitution of 1866, yet it did not divest the title of the counties to their school lands. 48 Tex., 1; Galveston County *v.* Tankersley, 39 Tex., 657; Kuechler *v.* Wright, 40 Tex., 606.

Section 6, article VII, constitution 1876, declaratory of the will of the people of the state in convention assembled, as to the *status* of the title to such property, provides that "all lands heretofore or hereafter granted to the several counties of this state for education or schools, are of right the property of said counties respectively to which they were granted, and the title thereto is vested in said counties, and no adverse possession or limitation shall ever be available against the title of any county."

Taking these several provisions together as construed by the decisions of this court, it would seem clear that it was the intention of the state to vest the right of property in the school lands in the several counties respectively.

Counties in their relation toward the state may be viewed in a two-fold aspect: one, which pertains to their political rights and privileges; the other, to their rights of property.

Over the former, the legislature as the representative of state sovereignty can exercise absolute power unless restricted by the organic law. If it could not exercise such power over the delegated political rights and privileges of counties, which are subdivisions of state governmental authority, we might have a system of petty discordant governments within a government, without unity of design or action.

Hence the political rights and privileges delegated to counties are not within the constitutional prohibitions against retroactive laws and those which impair vested rights. Cooley's Const. Lim., 237; People *v.* Morris, 13 Wend., 331.

A different principle, however, obtains as regards the

rights of counties to property which they may acquire. Such rights, as a general rule, are protected by the same constitutional guarantees which shield the property of individuals. Cooley's Const. Lim., 237, 277; Grogan *v.* San Francisco, 18 Cal., 590.

Even though the state itself may have donated the property, it thereby becomes such vested right as will be protected. Wade on Retroactive Laws, § 56; Grogan *v.* San Francisco, 18 Cal., 590.

If given for a specific object, the state may very properly, as in the instance under consideration of our school lands granted to counties, exercise such supervision and control over the actions of the counties as to compel the proper execution of the trust, or prevent its being defeated; but it is believed that this control, unless by the consent of the county, should be subject to the restriction, that the purpose for which the property was originally acquired shall, as far as circumstances will admit, be kept in view; and that it shall not arbitrarily be diverted, as in the case before us, to private parties and to a wholly different purpose. Cooley's Const. Lim., 238, and authorities in note 3. In relation to these school lands, the county, through agents for the state, may be compared to agencies coupled with an interest, which cannot be revoked at the pleasure of the principal.

It does not become necessary in the present case to decide how far the legislature might, in the exercise of its legitimate power over the political rights and privileges of counties, so far change their boundaries, or even abolish the counties altogether, as to modify or destroy their rights to public property which had been given them by the state for a use and purpose which then no longer existed. Bass *v.* Fontleroy, 11 Tex., 698.

Here the question in this connection is, that if the existing county of Milam had acquired the right to the lands in controversy, for public educational purposes,

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under a constitutional and statutory right common to all the counties of Texas, could the state, by the legislative act of July 21, 1870, arbitrarily take from the county this land and give it to private parties and for a private purpose?

That the state could not do this because it would impair a vested right, we think beyond question. This act is subject to the further constitutional objection, that it is judicial and not legislative in its character.

Although the legislature by express provision is given the right to judge of the qualifications and election of its own members, and perform other judicial acts for its proper government, as to punish disorderly conduct, yet, under our system of government, unlike the parliament of Great Britain, it has no general judicial powers.

As said by Mr. Cooley, "the legislative action cannot be made to retroact upon past controversies, and to reverse decisions which the courts, in the exercise of their undoubted authority, have made; for this would not only be the exercise of judicial power, but it would be its exercise in the most objectionable and offensive form, since the legislature would in effect sit as a court of review, to which parties might appeal when dissatisfied with the rulings of the courts." Cooley's Const. Lim., 94; Wade on Retroactive Laws, § 31; Denny *v.* Mattoon, 2 Allen, 361.

It is also contended by defendants that the right of Milam county to this land was forfeited, by the delay to have the field notes recorded in the office of the county clerk, and the failure to have them returned to the general land office by the 31st day of August, 1853. Pasch. Dig., arts. 3466, 4562.

That the mere failure of the counties to comply with the provisions of these statutes as to record and return of field notes, would not defeat the title to their school lands, was decided by this court in the former suit in which this question was raised upon this very title, and to which

some of the present defendants were parties. 33 Tex., 366.

That decision was subsequently approved by this court in Fannin Co. Bank *v.* Riddle, 51 Tex., 360; Henderson Co. *v.* Shook, 51 Tex., 870.

It would seem that the legislature did not consider the failure to return the field notes to the general land office by the 31st day of August, 1853, caused a forfeiture, as in this act of July 21, 1870, it was provided "that nothing in this act shall be construed so as to authorize the issuance of a patent on any settler's claim situated on either of said two leagues, when the settlement thereof did not actually take place before the 16th day of June, A. D. 1858," the date when the field notes were returned to the general land office. Pasch. Dig., 7064.

If Milam county had appropriated the land by a valid location and survey, which as to the return of the field notes did not come within the provisions of the act of February 10, 1852 (Pasch. Dig., art. 4562), then a subsequent locator must, at his peril, take notice of the rights of the county. Wyllie *v.* Wynne, 26 Tex., 42.

It is also contended by defendants that Milam county, through her agent, McCamant, voluntarily had the patent which issued upon the original survey cancelled, and the second one issued for lands which did not include those in controversy.

We are of opinion that the facts as presented by the record do not show any sufficient authority to McCamant to have the patent cancelled so as to bind the county; and further, that the patents procured by him for his own use and benefit on the Davis bounty warrant and the railroad certificate were obtained in violation of the trust confided to him, and were fraudulent as against the county. We are also of opinion that all the parties who claim under McCamant are chargeable with notice of his want of authority, and by the cancelled patent, former suit and

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Statement of the case.

judgment, and act of July 21, 1870, with notice of the claim of Milam county to the land in controversy. As to those parties who derive title under him by quit-claim deed, this of itself would prevent them from being *bona fide* purchasers. Rodgers *v.* Burchard, 34 Tex., 441; Hamman *v.* Keigwin, 39 Tex., 35; Carter *v.* Wise, 39 Tex., 274; Harrison *v.* Boring, 44 Tex., 256.

Reversed and remanded.

[Opinion delivered December 21, 1880.]

Milam County v. C. M. Blake.

(Case No. 787.)

1. Vested right.—See opinion for facts under which a county acquired a vested right, before the issuance of patent, in school lands surveyed for it, which could not be affected by the unauthorized act of one acting as agent of the county, who floated the certificate to other lands, or by the issuance of patents to other parties under the special act of July 21, 1870.

Appeal from Hood. Tried below before the Hon. J. R. Fleming.

A full report of the preceding case obviates the necessity of an extensive notice of this. The opinion states all essential facts embodied in a record of over two hundred pages. By an order of the Milam county court, entered September 28, 1871, J. D. McCamant was appointed agent of the county, "to collect and receive rents which are or may be due on any and all school lands, etc., situated in the county of Hood," and "to institute any legal proceeding that may be necessary for the collection of said rents, and to procure patents on all school lands belonging to Milam county which are not yet patented." No authority existed for him to float locations.