nine, without regard to consent of parties, and, in such case, the verdict must be signed by each of the jurors returning it.

We think other errors assigned are immaterial, and need not be considered. Finding no error in the record requiring reversal, we are of opinion that the judgment of the court below should be affirmed.

STAYTON, C. J. Report of commission of appeals examined, opinion adopted, and judgment affirmed.

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## WERNER *et al.* *v.* CITY OF GALVESTON *et al.*

(*Supreme Court of Texas.* March 20, 1888.)

1. CONSTITUTIONAL LAW—LEGISLATIVE POWER—DELEGATION OF.
An act of the legislature authorizing municipal corporations to take control of their public schools, by a majority vote of their electors, is not unconstitutional as being a delegation of legislative functions to such electors.[1]

2. SAME—TITLES OF LAWS—AMENDMENT BY REFERENCE TO TITLE.
Under Const. Tex. art. 3, § 36, providing that no law shall be amended by reference to its title, but that any section amended shall be published at length, an act of the legislature authorizing municipal corporations to take control of their public schools is not unconstitutional as being an amendment to a city charter.

3. SAME—TITLES OF LAWS—SUBJECT EXPRESSED.
Rev. St. Tex. tit. 17, entitled "Cities and Towns," applies to all cities and towns in the state, and not alone to those of 10,000 inhabitants or less; and an amendment to such statute, whose title refers thereto, and states that it relates "to charters of cities and towns, and towns and villages," which is applied to a city of over 10,000 inhabitants, is not unconstitutional as embracing a subject not expressed in its title.

4. TAXATION—POWER OF—CONSTITUTIONAL LIMITATION—ELECTION.
An act of the legislature providing that a certain tax may be levied by municipal governments, if two-thirds of the tax-payers voting shall vote in favor thereof, is not in violation of a constitutional provision that the tax may be levied if two-thirds of the tax-payers shall vote for it.

5. SAME—CONSTITUTIONAL LIMIT—EXTENSION OF.
Under an act of the legislature authorizing municipal corporations to levy a certain tax for school purposes, a city government may levy such tax in excess of the amount of taxes authorized by its charter; the legislature having authority to extend its taxing power.

6. MUNICIPAL CORPORATIONS—CHARTER—AMENDMENT BY SPECIAL ACT—GENERAL LAWS.
A general act of the legislature authorizing municipal authorities to take control of their public schools is not prevented from applying to cities of over 10,000 inhabitants by a constitutional provision that such cities may have their charters granted or annulled by "special act of the legislature."

Appeal from district court, Galveston county; WILLIAM H. STEWART, Judge.

*L. E. Trezevant*, for appellants. *Geo. P. Finlay*, City Atty., for appellees.

GAINES, J. This suit was brought by appellants, William Werner and others, to restrain appellees, John A. McCormick, tax collector of the city of Galveston, and the city itself, from proceeding to collect certain taxes assessed on behalf of the city for the support of its public schools. Exceptions to the petition were sustained, and appellants declining to amend, their suit was dismissed, and they have prosecuted an appeal to this court.

The second assignment (which is the first presented in the brief) calls in

[1] An act which provides that any county or town or city of a certain class may, by a majority vote, put such county, city, or town under its operation is not a delegation of legislative power. State v. Pond, (Mo.) 6 S. W. Rep. 469; State v. District Court, (Minn.) 22 N. W. Rep. 625; nor a law conferring authority upon a municipality, to be exercised at its discretion, City v. Hillis, (Iowa,) 8 N. W. Rep. 638; nor a law which submits to the popular vote merely the question as to whether or not, in any given locality, liquor licenses shall be granted, Savage v. Com., (Va.) 5 S. E. Rep. 563.

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question the validity of the elections held in the city on the 13th of June, 1881, and the 6th of September of the same year, by which the city assumed control of its public schools, and authorized the levy of a tax for their support. The petition sets forth a history of the legislation of the state, contained in the constitution and statutes, authorizing cities and towns, by a vote, to assume control of the public schools within their limits; and alleges that at the election held September 6, 1881, only 560 votes were cast in favor of the proposition to confer authority to levy the tax, to 243 votes against it; and that, although the number of votes in the affirmative were two-thirds of the whole number of votes actually cast, it was not two-thirds of the tax-payers who were qualified voters in the city.

It is contended that the act of April 3, 1879, which authorized cities and towns, by a majority vote of their qualified electors, to take control of the public schools within their respective limits, is unconstitutional, because it is an abdication by the legislature of its legislative functions in favor of the voters of the respective municipalities. It is a well-settled principle that the legislature cannot delegate its authority to make laws by submitting the question of their enactment to a popular vote; and in *State* v. *Swisher*, 17 Tex. 441, this court held an act of the legislature which authorized the counties of the state to determine by popular vote whether liquor should be sold in their respective limits to be unconstitutional. But it does not follow from this that the legislature has no authority to confer a power upon a municipal corporation, and to authorize its acceptance or rejection by the municipality according to the will of its voters as expressed at the ballot-box. Mr. Dillon says: "It is well established that a provision in a municipal charter that it shall not take effect unless assented to or accepted by a majority of the inhabitants is in no just sense a delegation of legislative power, but merely a question as to the acceptance or rejection of a charter." 1 Dill. Mun. Corp. § 44, and cases cited. See, especially, *Alcorn* v. *Hamer*, 38 Miss. 652. That such legislation is not unconstitutional is expressly decided by this court in the case of *Graham* v. *City of Greenville*, 67 Tex. 62, 2 S. W. Rep. 742. The act under consideration merely leaves each town or city in the state to determine, by a vote, whether it will exercise the power of controlling its public schools as a separate school district or not, and is, in our opinion, clearly constitutional.

It is further claimed that the act is inoperative as to all cities having over 10,000 inhabitants, because of section 5, art. 11, Const., which provides that such cities "may have their charters granted or annulled by special act of the legislature." But we think that it was not intended by this section to prohibit the legislature from providing for the incorporation of such cities by general law, but to confer authority to grant special charters. We cannot presume that the framers of the constitution meant to prohibit the law-making power from passing a general act in reference to a special matter, which should apply alike to every municipal corporation in the state. No reason is seen for imposing any such restriction, and the prohibition will not therefore be implied.

But it is contended that the act of April 3, 1879, in so far as it applies to the city of Galveston, is in conflict with section 36, art. 3, Const., which reads as follows: "No law shall be revised or amended by reference to its title; but in such case the act revised, or section or sections amended, shall be re-enacted and published at length." This provision is wholly inapplicable to the law in question. It amends no section of the charter of the city, but merely adds to the powers already granted to the cities and towns of the state, and authority not previously conferred.

It is also submitted that the act of March 26, 1881, is in conflict with the constitution, because it embraces a subject not expressed in its title. We do not think the objection to the act well taken. The title reads as follows: "An act to amend chapters 5 and 11 of title 17 of the Revised Civil Statutes of the

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state, relating to charters of cities and towns, and towns and villages, so as to authorize the levy of a tax for the support of public free schools, under certain circumstances." The contention seems to be that title 17, Rev. St., relates solely to towns and to cities of 10,000 inhabitants or less, and that there is nothing in the language quoted to indicate that the act was intended to apply to cities having special charters. If it were true that title 17 applies to only cities and towns incorporated under the general laws, then the objection to the statute under consideration, in so far as it is sought to make it applicable to cities having more than 10,000 people, would probably be fatal. But such is not the case. It is true that title 17 relates mainly to cities and towns which had been, and which were to be, incorporated under the general law. It is in most of its provisions but a re-enactment of the former statutes upon the same subject. It provides the method by which these municipalities may be created, or by which those previously incorporated by special charters may accept its provisions; and it defines their mode of organization, and the powers and duties of their officers and governing bodies. But the title reads: "Title XVII. Cities and Towns." It contains one provision, at least, applicable by its express terms only to cities having over 10,000 inhabitants. Article 426. This is copied from section 5, art. 11, Const., but it shows clearly that such cities were in the purview of that title of the Revised Statutes. This also appears by article 505, which reads: "The incorporated cities in this state are hereby authorized to establish free libraries in such city," etc., and clearly embraces all cities. The title of the act of March 26, 1881, distinctly points out the purpose of the law; and it follows from what we have said that in our opinion the law itself was not only legally, but appropriately, incorporated in title 17, Rev. St., as a proper addition to the provisions already contained therein, and is to be construed as applying alike to all the cities and towns in the state.

It is further contended that the act of March 26, 1881, is unconstitutional, because it provides that the tax shall be levied if "two-thirds of" the taxpayers voting "shall vote in favor thereof," while the constitution ordains that the tax may be levied "if * * * two-thirds of the tax-payers of such city or town shall vote for such tax." In *Fort Worth* v. *Davis*, 57 Tex. 225, and *Duryer* v. *Hackworth*, Id. 245, this precise question came before this court, and the law was held constitutional. These decisions have been acted on, and have been acquiesced in, for nearly six years; and during this time a majority, perhaps, of the cities in the state have accepted the provisions of the law, and have established an efficient system of public instruction under it. In *Perry* v. *Rockdale*, 62 Tex. 451, the doctrine was reaffirmed. The court who rendered those decisions could not say the act was clearly unconstitutional, nor can we so declare. Sustained as it is by those decisions, and important interests having been created under it, we must uphold its constitutionality, and declare it valid. Following those decisions, we must also hold that the city council having canvassed the vote, and declared the result, its action is now conclusive, and cannot be collaterally attacked in a proceeding of this character.

The petition in this case showed that the city, before the levy of the tax in question, had already made levies to the limit of taxation authorized by its charter, which is one and a half per cent. of its taxable property. The legislature had the power to authorize it to levy to the extent of two and a half per cent. The question therefore is, was it the intention, in passing the act, to confer authority to levy the tax therein provided in addition to that already authorized? We think this question must be answered in the affirmative. There is nothing in the language of the statute which indicates that it was intended merely to authorize the appropriation taxes which these municipalities already had power to levy, and therefore the purpose would seem to have been to provide for an additional levy. We think, therefore, that the

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law empowered the city council to levy the special tax voted for school purposes in addition to the amount authorized by the city charter.

We find no error in the judgment, and it is affirmed.

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## ADAMS v. HOUSTON & T. C. RY. CO.

(*Supreme Court of Texas.* March 16, 1888.)

1. PUBLIC LANDS—LOCATION ON ELDER CLAIM—LIFTING CERTIFICATE—REV. ST. TEX. ART. 3898.
Under Rev. St. Tex. art. 3898, relating to the location and survey of public lands, the holder of a land certificate which has been located on land in part appropriated by an older claim, can only lift or float so much of the certificate as covers the land in conflict.

2. SAME—LOCATION ON PRIOR SURVEY—CONST. TEX. ART. 14, § 2.
Const. Tex. art. 14, § 2, providing that land certificates shall not be located or surveyed on "any land titled, or equitably owned under color of title, from the sovereignty of the state," forbids a location on lands located and surveyed by virtue of certificates which, by a prior survey, were located on other lands already appropriated, but does not forbid a location on lands located and surveyed by virtue of certificates which, by a prior survey, were located on other vacant lands.

3. SAME—LOCATION ON PRIOR SURVEY—SECOND LOCATION.
Where land certificates by mistake are located and surveyed on lands not vacant, and the certificates filed in the land-office, a location and survey of other vacant lands under the same certificates will be valid, although the certificates are in the land-office at the time the second surveys are made, and the holder has failed to take out duplicates of such certificates.

4. SAME—SECOND LOCATION—REV. ST. TEX. ART. 3921.
Rev. St. Tex. art. 3921, providing that "all surveys properly made by virtue of valid land certificates, * * * and not in conflict with any other claim, shall be deemed valid," does not validate a second survey of public lands made by virtue of certificates which, by a prior survey, were located on other vacant lands.

Appeal from district court, Travis county; A. S. WALKER, Judge.

Action of trespass to try title, brought by S. J. Adams against the Houston & Texas Central Railway Company. Judgment for defendant, and plaintiff appeals.

*Leake & Henry*, for appellant. *H. D. Prendergrast* and *David H. Hewlett*, for appellee.

STAYTON, C. J. This is an action of trespass to try title, prosecuted by S. J. Adams in his own right, and as executor of the last will of J. L. Leonard, to recover 105 sections of land located and surveyed for them by valid alternate certificates covered by them. The appellee claims the land by virtue of surveys made for it prior to the time the locations and surveys were made for Adams and Leonard. The cause was tried without a jury, and the conclusions of fact found show fully the nature of the controversy between the parties. The conclusions are as follows: "(1) The land certificates under which the plaintiff claims were issued October 10, 1879, to the Dallas & Wichita Railroad Company, and were, by the company, conveyed to Adams and Leonard. The plaintiff represents the ownership of Adams and Leonard. (2) The said certificates were regularly located in June and July, 1880, upon the lands sued for; surveys made January, 1881; field-notes and certificates were returned to, and filed in, the land-office in February, 1881. These field-notes and certificates remain in the land-office. (3) The plaintiff shows title sufficient to recover upon unless the land had been previously appropriated by the defendant by files, locations, and surveys, etc., of which the plaintiff had notice before their locations were made. (4) July 1, 1872, certain land certificates were issued by the state to the defendant. Some of these certificates are the basis of the claim of the defendant to the land in controversy. (5) After the issuance of these certificates the defendant caused its agent to set

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