holder of the certificate to have the survey made in accordance with the file. If, however, the survey is acquiesced in by others adversely interested by reason of priority of location, and is received by the owner conceding rights which might have been enforced, such concession is final. The action of the surveyor is presumed to be proper, and the presumption cannot be disputed after the surveys have matured into patents. Hence the inquiry as to what lands are granted by the patent is directed to the survey as made, and not as it should have been made by the surveyor. The file then becomes immaterial, save as it may throw light upon the actual survey. *Booth* v. *Upshur*, 26 Tex. 68. The action of the court in its charges given and in the refusal of instructions asked upon the legal effect of the files was immaterial; and, as it was not calculated to injure the plaintiffs, they cannot complain.

The testimony showed that the Tyron survey was identified; its N. E. corner, its E. and N. sides, were known. The S. W. corner of the Johnson school land survey, which is common with the S. E. corner of the Boyce, seems to have been identified. The identification was perhaps aided by the Tyron survey. It is not disputed but that the S. W. and N. W. corners of the Boyce survey are well marked and known. There is also evidence that the N. line of the Boyce was run, but there is found no corner at its east extremity. The N. and S. lines of the Boyce each call for 3,978 varas in length. From the common corner, the S. E. corner of the Boyce, to the known S. W. corner is only 3,778 varas. Constructing the Boyce survey by running its E. line from the S. E. corner by its course, gives the land in suit to the defendant. In the absence of anything to mark the identity of the N. E. corner of the Boyce survey, we do not think the verdict was without or against the testimony, in giving the land to defendant. It is insisted that the court should have told the jury that upon finding from the testimony the N. E. corner of the Boyce to be 3,978 varas from the N. W. corner, and the length of the S. line only 3,778 varas, they should find the dividing line by correcting these corners, giving plaintiffs all west, and defendant all east, of the line. This would have only been proper had both these corners been identified. It is not shown in the testimony that the N. E. corner was so identified. Besides, the corners of the survey are all right angles. The Johnson county school land could be identified without the aid of the Boyce. The Boyce survey was junior in date, and hence, in case of conflict, would yield to the older. The charge of the court as to the legal effect of the different calls, monuments, etc., was fair and full, carefully directing the jury to the issue to be determined. We find no material error in the record, and the judgment below will be affirmed.

(71 Tex. 291.)

STATE v. WILSON.

(*Supreme Court of Texas.* June 29, 1888.)

1. STATES AND STATE OFFICERS—WARRANTS—DISCOUNTS—LIABILITY OF STATE.
The holder of a warrant drawn by the comptroller of the state upon the state treasurer, who sells his warrant at a discount because of a want of funds to meet it, cannot hold the state liable for the loss sustained.

2. SAME—POWER OF GOVERNOR.
The governor of the state has no power to bind the state to pay the loss sustained by a holder of a warrant drawn by the comptroller of the state upon the treasurer, who sells it at a discount because of a want of funds to meet it.

3. SAME—LEGISLATIVE POWER—CONSTITUTIONAL LAW.
The payment of a claim against the state of Texas for the loss sustained by a holder of a warrant drawn by the comptroller of the state upon the treasurer, who sells it at a discount because of a want of funds to meet it, is prohibited by Const. Tex. art. 3, § 44, which provides that the legislature shall not "grant * * * any money out of the treasury of the state to any individual on a claim, real or pretended, when the same shall not have been provided for by pre-existing law."

Appeal from district court, Travis county.

J. S. Hogg, for appellant. *Walton, Hill & Walton*, for appellee.

GAINES, J. Kanmacher & Denig entered into a contract with the state of Texas for building its penitentiary at Rusk. According to the terms of the agreement, the work was to be paid for in installments as it progressed, and the payments were to be made "by the treasurer of the state of Texas upon warrants drawn on him by the comptroller." During the years 1877, 1878, and 1879, many warrants were issued to the contractors at times when there was no money in the treasury, and were discounted with bankers in the city of Austin, to whom they were ultimately paid by the state. According to the finding of the court below, the contractors lost, by having to discount their warrants at the market value, something over $7,000. The claim for the sum so lost was transferred for value to the appellee, who, by virtue of the authority of a special act of the legislature, brought this suit to enforce its collection. Sp. Laws, 1887, p. 18. It was alleged and proved that Kanmacher & Denig were compelled to discount their warrants in order to raise money with which to complete the building, and thereby comply with their contract with the state. The special act of the legislature merely gave consent that a suit might be brought against the state in order to determine the question of its liability upon the alleged claim. The simple question is, can the holder of a warrant drawn by the comptroller of the state upon its treasurer, who sells his warrant at a discount because of a want of funds to meet it, hold the state legally liable for the loss he thereby sustains? We know of no authority which supports the affirmation of this question; nor have we been enabled to conceive of any principle by which the claim of appellee can be plausibly maintained. If A. agrees to pay B. a certain sum of money at a given time, and fails to pay, the measure of B.'s damage is the money and interest. He can obtain a judgment for no more, although A.'s credit may be so impaired that the judgment when obtained is worth only 50 cents upon the dollar. Suppose, however, that B. holds A.'s written promise to pay, and sells it to C. at a discount, and that A. pays the debt to C., what lawful demand has B. upon A., however great his losses may have been in the transaction? Clearly none. Kanmacher & Denig had no greater right against the state when the warrants were presented to the treasurer and the treasurer failed to pay. We are cited to no authority which sanctions the claim that they could sell their warrants at a discount, and hold the state liable for the loss; and we are confident none can be found. But it is insisted that, because the warrants were at a discount when issued, they are to be treated as payments in a depreciated currency, and are to be credited upon the state's debt at their real and not their face value. But such are not the legal *status* and effect of the transaction. The state's contract was to cause warrants to be issued by its comptroller and paid by its treasurer. The issue of the warrants was in accordance with the terms of the contract. They were not delivered as payments, but as evidence of debt, and authority to the treasurer to make the payments. The warrants were eventually paid to the lawful holders; and the attempt here is to make the state pay a part of a debt which it has already fully discharged. A brief consideration of the authorities cited by appellee will show that they do not apply to the case before us. In *Tyers* v. *U. S.*, 5 Ct. Cl. 509, the claimant had been awarded a sum of money against the government payable in coin. The treasurer refused to pay coin, but paid in United States treasury notes, which were then depreciated. The claimant having received the currency under protest, and having authority to sue the government, brought his suit for the difference in value between the coin and currency, and was held entitled to recover. In *Walkup* v. *Houston*, 65 N. C. 501, the holding was that credits in currency indorsed on a note payable in specie were to be deducted at the value of the currency estimated in specie. The other cases cited merely hold that a payment in the bills of a broken bank (the party recovering them being ignorant of the failure) is no payment. *Bank* v. *Lightbody*, 13 Wend. 111; *Gilman* v. *Peck*, 11 Vt. 516; *Wainwright*

v. *Webster*, Id. 576; *Fogg* v. *Sawyer*, 9 N. H. 365; *Magee* v. *Carmack*, 13 Ill. 289; *Bank* v. *Morse*, 22 Me. 88; *Harley* v. *Thornton*, 2 Hill, Eq. 509; *Westfall* v. *Braley*, 10 Ohio St. 188. In this case it is not claimed that the debts were not ultimately paid in full in good money. It is held that the board of supervisors of a county, where warrants are depreciated, has no power to issue warrants in payment of a debt for a greater amount than the debt to be discharged, in order that the creditors may receive full payment. *Foster* v. *Coleman*, 10 Cal. 278; *Shirk* v. *Pulaski Co.*, 4 Dill. 209; *Goyne* v. *Ashley Co.*, 31 Ark. 552; *Bauer* v. *Franklin Co.*, 51 Mo. 205. The same rule applies to municipal corporations proper, (*Clark* v. *Des Moines*, 19 Iowa, 199,) and is also clearly applicable to the obligations of the state. The case last cited holds that the warrant of a municipal corporation upon its treasurer is in legal effect a promissory note, and the state's warrants in this case can be held to be no more. The payee who receives and discounts them has no claim against the state for the loss, any more than a holder of a promissory note who had discounted it after maturity would have against the maker to recover the discount. The contractors, in this case, have suffered a misfortune in common with numerous other creditors of the state, who, during the years of a depleted treasury, were forced to place their warrants upon the market, and sell them at the best price that could be obtained. Is the state of Texas resting under obligation to make good to all its officers, agents, and contractors who have received and discounted its warrants, the loss which they have thereby sustained? There may be some moral obligation in the premises, but there is no legal one. Its warrants having been paid, its legal liability no longer exists.

There is testimony to the effect that the governor of the state at the time of the transactions in question told the contractors to look to the state for the difference; but it is too clear for argument that he had no power to bind the state in such a manner. The payment of this claim is prohibited by section 44, art. 3, Const., which provides that the legislature shall not "grant, by appropriation or otherwise, any money out of the treasury of the state to any individual on a claim real or pretended, when the same shall not have been provided for by pre-existing law." It follows that we are of opinion that the judgment should be reversed, and here rendered for the appellant; and it is so ordered.

CRUMLEY, Clerk, *et al.* v. MCKINNEY *et al.*

(*Supreme Court of Texas.* June 30, 1888.)

1. APPEAL—BOND—WHEN A SUPERSEDEAS.
Rev. St. Tex. art. 1400, requires an appellant, in order to perfect his appeal, to execute a bond, to be approved by the clerk, payable to the appellee, in a sum at least double the probable amount of the costs of the suit in the court above and below, conditioned that the appellant shall prosecute the appeal, etc. Article 1404 provides that if the appellant desires to suspend execution, in addition to the above-mentioned bond, he shall execute a bond in at least double the amount of the judgment, interest, and costs, and conditioned that if judgment be awarded against him he will perform such judgment, etc. Article 1405 provides that where the judgment is for the recovery of land, the bond shall be further conditioned to pay the value of the rent or hire of the land, etc. *Held*, that a bond in an action where judgment is rendered for foreclosure of a lien on land owned by the appellants, for which they were not personally liable, conditioned as provided in article 1400, with the additional condition required by article 1405, is not a *supersedeas* bond.

2. SAME—EVIDENCE.
On an application for a *mandamus* to compel a clerk to issue a writ of *supersedeas* the judgment and appeal-bond should both be received in evidence in order to determine whether the appeal-bond entitles the applicant to a *supersedeas*.

3. MANDAMUS—GRANTING EX PARTE.
Under Rev. St. Tex. art. 1446, it is error to grant a peremptory *mandamus* on an *ex parte* hearing without notice.

Appeal from district court, Hill county.