ward Hanrick, as claimed in his petition, operates as an estoppel upon Nicholas Hanrick against the assertion in this action of title to other lands claimed herein by the same right of inheritance therein set up and adjudicated. (2) Especially, does the decision of the court in the former suit upon the question of law arising upon the facts alleged in the petition, and admitted by the demurrer, as to such right of inheritance, preclude further examination of such question of law in a different suit between the same parties, where the plaintiff claims other lands under the same right?

The attention of counsel is invited to the following authorities: Southern Pac. R. Co. v. U. S., 168 U. S. 49, 18 Sup. Ct. 18, 42 L. Ed. 355; Cromwell v. Sac. Co., 94 U. S. 353, 24 L. Ed. 195; Nichols v. Dibrell, 61 Tex. 541; Birckhead v. Brown, 5 Sandf. 145; Boyd v. Alabama, 94 U. S. 645, 24 L. Ed. 302; Beloit v. Morgan, 7 Wall. 621, 19 L. Ed. 205; McDonald v. Insurance Co., 65 Ala. 358; Freem. Judgm. §§ 256–259; Bernard v. Mayor, etc., 27 N. J. Law, 412; Bigelow, Estop. (4th Ed.) p. 95; Town of South Ottawa v. Perkins, 94 U. S. 260, 24 L. Ed. 154; Packet Co. v. Sickles, 5 Wall. 592, 18 L. Ed. 550; Goodrich v. City of Chicago, 5 Wall. 566–574, 18 L. Ed. 511; Stewart v. Lansing, 104 U. S. 505, 26 L. Ed. 866; 2 Black, Judgm. § 750, and authorities cited.

KIMBROUGH v. BARNETT.

(Supreme Court of Texas. Feb. 5, 1900.)

PUBLIC SCHOOLS—CITY SUPERINTENDENT—SCHOOL TRUSTEES—PUBLIC OFFICERS—TERM OF OFFICE.

1. The position of superintendent of public schools of the city of Houston is an office, and the lawful incumbent thereof may sue to recover either the office itself or its emoluments, in case he is unlawfully deprived of the same.

2. Where there was a contest over the office of superintendent of public schools of a city between two claimants, appointed by different boards of school trustees, each acting under alleged authority of law, it was not necessary that a claimant present his claim to the state superintendent of public instruction before bringing suit for the office.

3. Under Const. art. 16, § 30, providing that the duration of offices not fixed by the constitution shall not exceed two years, trustees of independent school districts, authorized to exercise exclusive control over the management of free schools within their districts, and to hold title to the school property, are public officers, though they receive no salary or compensation.

4. Const. art. 7, § 1, authorizes the legislature to establish and make suitable provision for the maintenance of a system of public free schools. Id. art. 16, § 30, provides that the duration of offices not fixed by the constitution shall not exceed two years. *Held*, that the legislature, under the power to maintain a system of schools, could not give a four-years term to the office of school trustee created by it.

5. Act March 30, 1899, providing a uniform method of electing school trustees, and giving a four-years term to the trustees, is void, as a whole, under Const. art. 16, § 30, providing that the duration of offices not fixed by the constitution shall never exceed two years.

Certified questions from court of civil appeals of First supreme judicial district.

Action by W. W. Barnett against W. H. Kimbrough. From a judgment for plaintiff, defendant appealed to the court of civil appeals, which certified questions for the opinion of the supreme court.

Ross & Wood, W. C. Oliver, and J. M. Coleman, for appellant. Fisher, Sears & Sherwood and John S. Stewart, for appellee.

BROWN, J. The court of civil appeals for the First supreme judicial district has certified to this court the following statement and questions:

"Upon August 21, 1899, W. W. Barnett brought suit in the district court of Harris county, for the 55th judicial district, against W. H. Kimbrough for the office or position of superintendent of the public schools of the city of Houston. Barnett recovered judgment October 2, 1899, for the office and its emoluments, and Kimbrough has appealed. The contest arose out of the construction of an act of the 26th legislature concerning school trustees of independent districts; being chapter 51 of the General Laws of that body, approved March 30, 1899. Barnett claims that the law in question does not apply to the city of Houston, or that, if it does apply, its provision as to the election of trustees does not go into effect until the year 1901, and that he is entitled to the office by reason of (1) his nomination thereto by the mayor and confirmation by the city council; and (2) his election thereto by a majority of the legally constituted board of public-school trustees of the city of Houston. Kimbrough claims that the law does apply, and that he was regularly elected superintendent of the public schools by the board of trustees lawfully constituted under the act of March 30, 1899. There were two bodies, each claiming to be the legal board of public-school trustees of the city of Houston. The questions in the case arise upon the constitutionality and construction of the act of March 30, 1899, above referred to. The city of Houston assumed exclusive control of the public free schools within its limits on December 5, 1876, by virtue of an election held under the school law of 1876; and when the law of March 30, 1899, went into effect it was conducting its schools in accordance with its charter and the law applicable to such control, and had been so conducting them ever since December 5, 1876. After the passage of the act of March 30, 1899, a difference of opinion arose in the board of trustees as to the construction of the law, which resulted in the formation of two boards, one of which elected Kimbrough, and the other Barnett, as superintendent of the schools. At the date of the passage of the act the board was composed of the following members, to wit: J. R. Cade, C. P. Bloxsom, Fred Fenwick, Rufus Cage, and James Charlton; also S. H. Brashear, mayor of the city of Houston, as ex officio

member. On April 17, 1899, Henry F. Fisher was appointed by the mayor, and confirmed by the city council, as a trustee in the place of Rufus Cage; and the board as thus constituted continued to act without objection until July 4, 1899, when it met, and, the question of electing a superintendent for the public schools having come up, it appeared that Cade, Shearn, Bloxsom, and Fenwick were in favor of retaining Kimbrough, who was the incumbent; and Brashear, Charlton, and Fisher were in favor of electing Barnett. The board adjourned without an election. Cage, Shearn, and Cade had been appointed as members of the board by the mayor, and confirmed by the council, on May 17, 1897; Charlton, Bloxsom, and Fenwick were thus appointed and confirmed June 6, 1898. The term of office of trustees was two years under the law as it existed when the act of March 30, 1899, was passed. At the meeting of the city council July 10, 1899, the mayor, S. H. Brashear, nominated as trustees of the public schools Andrew Dow and George Jones, who were confirmed by the city council. A majority of the board thus constituted by the appointment of Dow and Jones in lieu of Shearn and Cade, to wit, Charlton, Fisher, Dow, and Jones, with whom acted Brashear, met on July 13, 1899, and elected the appellee as superintendent of the public schools of the city; and afterwards, on July 17, 1899, the appellee was appointed by the mayor, and confirmed by the city council, as such superintendent for the term of two years. The trustees Shearn and Cade did not resign their offices, but, acting with Bloxsom and Fenwick, on July 14, 1899, organized with Shearn as president, and elected the appellant, Kimbrough, as superintendent for the ensuing two years. Prior to the passage of the act of March 30, 1899, the school superintendent was required by the charter to be appointed by the mayor and confirmed by the council. The salary attached to the position is $2,500. Kimbrough had been duly appointed superintendent, and was acting as such at the time of his election, and was elected at the expiration of the term for which he had been appointed. On July 19, 1899, the Shearn board brought a suit in the district court of Harris county for the 11th judicial district against the Brashear board and Barnett for an injunction, and a temporary order was granted restraining them from interfering with the plaintiffs in the management of the schools or school property, and restraining them from acting as trustees and superintendent, respectively. That suit is still pending, and the temporary restraining order is still in force.

Out of the foregoing facts, the following questions of law arise, which are certified to the supreme court for decision: "(1) Is the position of superintendent of the public schools of the city of Houston an office for which a suit may be maintained in the district court? (2) Was it necessary for the plaintiff to submit his contention to the state superintendent of public instruction or the state board of education before he could maintain this suit? (3) Does chapter 51 of the General Laws of the 26th Legislature, concerning school trustees and independent districts, approved March 30, 1899, apply to the control of the public schools of the city of Houston? (4) Did said act, in its application to the city of Houston, if it applies, take effect, with respect to the election or appointment of school trustees, on March 30, 1899? What action in accordance with said act was required with respect to the election or appointment of public-school trustees for the city of Houston? Was the mayor ex officio a member of the board of trustees after March 30, 1899? (5) Is said act of the legislature constitutional, with respect to the term of office fixed by it for public-school trustees? If not, does its want of constitutionality in this respect invalidate the entire law? (6) Were conflicting provisions of the charter of the city of Houston repealed by the said act of March 30, 1899? (7) Does the provision for the appointment of school superintendent by the mayor in section 7 of the charter of the city of Houston apply only to the first appointment after the grant of the power? Does the charter empower the board of trustees to make subsequent appointments?"

We answer the first question in the affirmative. The position of superintendent of the free schools in the city of Houston is an office, and the lawful incumbent of it would have a right of action to recover it or its emoluments in case he was unlawfully deprived of the benefit. State v. Catlin, 84 Tex. 48, 19 S. W. 302.

The superintendent of public education for the state has no jurisdiction of the questions involved in this case, and it was not necessary for the plaintiff below to present his claim to the office to the superintendent before bringing suit.

Under question 5, we will answer all the other questions that we deem necessary. The act of March 30, 1899, in so far as it relates to the election of trustees for public schools in independent school districts, and fixes the term of office of such trustees, is void; being in conflict with article 16, § 30, of the constitution, which reads as follows: "The duration of all offices not fixed by this constitution shall never exceed two years; provided, that when a railroad commission is created by law, it shall be composed of three commissioners, who shall be elected by the people at a general election for state officers, and their terms of office shall be six years; provided, railroad commissioners first elected after this amendment goes into effect shall hold office as follows: One shall serve two years; and one four years, and one six years, their terms to be decided by lot, immediately after they shall have qualified. And one railroad commissioner shall be elected every two years thereafter. In case of vacancy in said office, the governor of the state shall fill said vacancy by appointment until the next general election." It is

not denied that the position of trustee of a free school in an independent district is, in a sense, an office, but it is claimed that it does not come within the meaning of the word "office" as used in the section of the constitution above quoted. The term "office" is defined by Mr. Mechem, in his work on Public Officers (section 1), thus: "Public office is the right, authority, and duty created and conferred by law, by which, for a given period, either fixed by law, or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public." The correctness of this definition is nowhere questioned, so far as we know, and it is useless to add supporting authorities. In order to determine if the school trustees in independent districts are officers, we will enumerate some of their powers. The law authorizes and empowers such trustees (1) to adopt rules, regulations, and by-laws; (2) to select the chairman, secretary, treasurer, and other officers necessary for the discharge of their duties; (3) to exercise exclusive control over the management of the free schools within their districts; (4) to hold title to the property belonging to such free schools within their district, and to exercise exclusive possession and control over it; (5) to sue and be sued with regard to such property; (6) to employ teachers and disburse the school fund belonging to the district, whether derived from the state or by special taxation; (7) their duties are all derived from the law itself, and not by contract, and the terms of office are fixed by the statutes. Every essential element of an office is embraced in the powers conferred. Besides, many powers are vested in trustees which are not necessary to constitute an office. Indeed, the authority conferred is broad in its scope, ample in its adaptation to the performance of the duties enjoined, and largely independent of the control of others. No salary or compensation is given, but that is not necessary to make the employment an "office." We think there can be no doubt that a school trustee of an independent school district in this state is a county officer, as was held in the case of Hendricks v. State (Tex. Civ. App.) 49 S. W. 705.

It is urged by the apppellant's counsel that the position of trustee, if an office, is not embraced in the meaning of article 16, § 30, of the constitution. To support this contention, it is conceded that an office of a municipal corporation comes within the letter and spirit of the constitutional limitation, as was held in the case of State v. Catlin, before cited; but it is claimed that there is a difference between the power exercised by the legislature in carrying into effect the following constitutional provisions: "A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the legislature of the state to establish and make suitable provision for the support and maintenance of an efficient system of public free schools" (Const. art. 7, § 1),—by the creation of school districts, and the authority by which that body may create a municipal corporation. Appellant strenuously urges that the former provision commits to the legislature authority to create such offices as it may deem fit, and confer upon them any length of term, without regard to the limitation of the constitution before cited. To support this contention, the appellant cites Wheeler v. Brady, 15 Kan. 26; State v. Comes, 15 Neb. 444, 19 N. W. 682; Belles v. Burr, 76 Mich. 1, 43 N. W. 24. Each of these cases involves the question of the right of a female to vote at an election for school trustee. In neither is the official character of the school trustee involved. In Wheeler v. Brady, 15 Kan. 26, the supreme court held that an election for school trustee did not come within the terms of the constitution of that state which prescribe the qualifications for voters at elections. The clause of the constitution which prescribes the qualifications of voters is not copied in that opinion, but it is said that the constitution provides "that all officers whose election or appointment is not provided for in the constitution shall be elected or appointed as prescribed by law." The court held that this authorized the legislature to extend suffrage at such elections beyond the constitutional provision. The supreme court of Nebraska does not give the terms of the constitution under construction, and we are not able to pass upon the applicability of that decision to the facts of this case; but the court does say that the election of school trustees is not embraced in the provisions of their constitution. The supreme court of the state of Michigan, in the case of Belles v. Burr, 76 Mich. 1, 43 N. W. 24, held that a provision of their constitution which provided that in "all elections" males of a given age, possessing certain other qualifications, should be qualified voters, was intended to apply only to such elections as were provided for by the constitution itself, and did not control the legislature in regard to elections not mentioned therein. Judge Campbell, one of the ablest judges who has graced the bench of that state, dissented from that decision. If, however, we concede, for the sake of argument, that the cases cited were rightly determined, they do not furnish support for the contention of appellant in this case. The convention which framed our constitution named the principal officers who were to discharge the functions of government for the state and counties and some subdivisions of counties, and to each named office, from governor to constable, except notary public, fixed a term for which it should be held. The terms ranged from six years for the appellate courts and railroad commissioners down to two years for almost every other office. It is manifest that the convention did not desire or intend that public servants of this state should hold their offices for a great length of time, but it was the poli-

cy of that body that they should return to the power under which they received their authority for its renewal at short intervals; and having applied this rule to all the offices named by them, save the one, it placed a limitation upon the action of the legislature as to such offices as it might create. There was no office created by the constitution to which the limitation could apply, and it therefore must be held that it was designed to apply to such as might be created by the legislative department in the execution of its powers. This view is sustained by the case of State v. Catlin, before cited; for it is just as true of municipal corporations that the offices to be created for the discharge of municipal duties are not named in the constitution as it is of the free schools.

But it is insisted with earnestness and with apparent confidence that the authority exercised by the legislature in the creation of the office of school trustees is different from that which creates the office of secretary, alderman, or other position of a city. The distinction, if it exists, is too fine for our perception. We are not able to grasp it. All authority of the legislature is derived from the same source.—the people. It is sovereign power, exercised by the same department, although applied to different subjects. The duties to be performed by both municipal and school officers relate to the public interest, and we are wholly unable to see how there can be any such distinction as that which has been urged with so much earnestness and with no little force. In support of this last contention, it was pressed upon this court that the construction which has been placed upon the constitution by the legislative department of the government, as well as by those who have been charged with the execution of the laws on the subject of public education, should control, and enforce upon us a construction which is at variance with the plain, unambiguous letter of that instrument. We recognize the value of contemporaneous construction, and the propriety of following it in all cases where there is ambiguity or doubt as to the meaning of the constitution; but we must insist that it is not within the province of this court, in deference to the construction of another department, to set aside the constitution, framed by the people of this state. Such a rule would set the legislature above the people and above their convention, and, to sustain it, the courts, instead of construing and enforcing the provisions of the constitution, must seek methods for evading its limitations and denying the binding force of its mandates. Upon the force to be given by courts to contemporaneous construction, Mr. Cooley, in his work on Constitutional Limitations (page 83), says: "Great deference has been paid in all cases to the action of the executive department, where its officers have been called upon, under the responsibilities of their official oaths, to inaugurate a new system, and where it is to be presumed they have carefully and conscientiously weighed all considerations, and endeavored to keep within the letter and the spirit of the constitution. If the question involved is really one of doubt, the force of their judgment, especially in view of the injurious consequences that may result from disregarding it, is fairly entitled to turn the scale in the judicial mind. Where, however, no ambiguity or doubt appears in the law, we think the same rule obtains here as in other cases,—that the court should confine its attention to the law, and not allow extrinsic circumstances to introduce a difficulty where the language is plain. To allow force to a practical construction in such a case would be to suffer manifest perversions to defeat the evident purpose of the lawmakers. 'Contemporary construction * * * can never abrogate the text. It can never fritter away its obvious sense. It can never narrow down its true limitations. It can never enlarge its natural boundaries.'" The duties of a court under such circumstances as surround this case are clearly and fairly stated in the quotation. Regretting as we do the inconvenience that may follow our decision, we must nevertheless halt at the boundary line between fair construction and judicial legislation, and decline to write into the fundamental law an exception at variance with its plain terms. The people must make the change, if it be changed.

The provisions of the act giving a four-years term to the trustees, and those providing for alternate elections, are the heart of the act in question. All other parts are so dependent upon and connected with those that to declare the former void renders the act ineffectual for the accomplishment of the purpose which induced its enactment. The legislature evidently would not have passed the law without the void provisions, and we must hold the law void as a whole. W. U. Tel. Co. v. State, 62 Tex. 630.

ROWAN et al. v. KING et al.

(Supreme Court of Texas. Feb. 5, 1900.)

SCHOOL TRUSTEES—TERM OF OFFICE—CONSTITUTIONAL LAW.

Act March 30, 1899, entitled "An act to provide a uniform method of electing school trustees in independent districts," etc., and fixing the term of office of school trustees at four years, is void as a whole, under Const. art. 16, § 30, providing that the duration of offices not fixed by the constitution shall never exceed two years.

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

Action by W. A. Rowan and others against R. H. King and others. From a judgment sustaining a demurrer to the petition, plaintiffs appealed to the court of civil appeals, which certified questions for the opinion of the supreme court.

J. C. McBride and B. K. Goree, for appellants. F. J. & R. C. Duff, for appellees.