parties, and which was finally consummated by their respective conveyances. The ground upon which the authorities which hold parol evidence inadmissible in such a case proceed is that the effect of the proof is to except the incumbrance from the covenant, and thus to vary the contract as shown by the writing. But does proof of the promise to discharge the debt which is a lien upon the land except anything from the covenant? Does it conflict with, or is it inconsistent with, the terms of the conveyance? We think not. Clearly, in a suit for a breach of a covenant against incumbrances, it could be shown that a lien had been discharged either before or at the time of or after the execution of the deed; and we think that the effect of the promise which was proved by parol in this case was not to except the vendor's lien notes from the covenant, but was to show that, as between the parties to the contract, the incumbrance had been discharged. In a case which, we think, is not to be distinguished in principle from this, the supreme court of Pennsylvania say: "This being so, this mortgage was, as between the grantors and the corporation grantee, paid." Johnston v. Paper Co., 153 Pa. St. 195, 25 Atl. 560, 885. Is the appellant to be permitted to claim a right by reason of the nonpayment of a debt, which, by his own promise, he became primarily liable to pay? Does it lie in his mouth to complain that his grantor has not done that which he bound himself to do? The lien remained after his promise, but, as between him and the grantor, it was no longer an incumbrance resting upon the latter, but one which he had taken upon himself. It seems to us that, although this is a question of law, the equitable principle should apply that that is considered as done which ought to be done, and that, as between the parties, the lien should be held to be discharged.

We are aware that our text writers lay down the rule that parol evidence is not admissible in such cases, and claim that it is supported by the weight of authority. 1 Jones, Real Prop. § 862; 2 Devl. Deeds, § 914. Such, also, seems to be the opinion of the author of Rawle on Covenants for Title. See Rawle, Cov. (5th Ed.) § 88, notes. As we have previously said, it seems to us that the weight of authority is the other way. In the following cases, where the precise question was presented, it was ruled that parol evidence was admissible: Sidders v. Riley, 22 Ill. 110; Wachendorf v. Lancaster, 66 Iowa, 458, 23 N. W. 922; Blood v. Wilkins, 43 Iowa, 567; Strohauer v. Voltz, 42 Mich. 444, 4 N. W. 161; Landman v. Ingram, 49 Mo. 212; Miller v. Fichthorn, 31 Pa. St. 252; Johnston v. Paper Co., 153 Pa. St. 195, 25 Atl. 560, 885, cited above; Hays v. Peck, 107 Ind. 389, 8 N. E. 274. The decision in the case last cited is the more pointed, since the same court, within a few days thereafter, held that parol evidence was not admissible to show, as against covenants in a deed, that it was agreed between the parties at the time of the conveyance that the grantee was to assume and pay off a certain dower interest in the land; calling it an incumbrance. The court ruled that it was not an incumbrance, but an interest in the land itself, and that the effect of the evidence was to vary the deed, and that it was not admissible.

A portion of the opinion in the case of Miller v. Fichthorn, above cited, was quoted with approval by this court in the case of Thomas v. Hammond, 47 Tex. 42, and with reference to the case the court say: "In that case Miller was sued on his obligation for $293, the balance of the purchase money of land conveyed to him by Fichthorn, for an expressed consideration of $550, and which land, at the time of the conveyance, was subject to the lien of a judgment against a prior owner for $202.34, under which the property was subsequently sold by the sheriff. The question seems to have been, whose fault was it that the land was sold? And the plaintiff was allowed to show that the party who contracted for the land, and had it conveyed to Miller at the time of the delivery of the deed, agreed to pay the judgment lien, in addition to the $293, for which he gave his obligation. This case, in its facts and in the questions involved, is not unlike the case in hand." In Thomas v. Hammond, however, it does not appear that there was any express covenant against incumbrances, though there might have been one implied, as in the present case, from the language of the conveyance. The conveying clause does not appear in the report of the case. In Massachusetts it is held that parol evidence is not admissible in a case like the present. Simanovich v. Wood, 145 Mass. 180, 13 N. E. 391; Flynn v. Bourneuf, 143 Mass. 277, 9 N. E. 650. The supreme court of Minnesota probably holds the same view, though the case decided by them did not present the exact question presented in the present case. Bruns v. Schreiber, 43 Minn. 468, 45 N. W. 861. For the reasons given, we are of opinion that the majority of the court of civil appeals were correct in holding that parol evidence was admissible to show that at the time of the execution of the deed in question it was agreed between the parties that the grantee assumed the payment of the notes which were a charge upon the premises, and our opinion will be so certified.

REED v. ROGAN, Commissioner, et al.

(Supreme Court of Texas. Nov. 22, 1900.)

PUBLIC LANDS—SCHOOL—SALE—LEASE—STATUTES—VALIDITY—LOCAL LAWS—MANDAMUS.

1. Laws 1897, pp. 186, 187, providing that in a certain section of the state the school lands which have been leased shall not be subject to sale during the existence of the lease, is not in contravention of Const. art. 7, § 4, providing that the lands set apart to the public free school fund shall be sold under such regu

lations, at such times, and on such terms as may be prescribed by law, and is therefore valid.

2. Laws 1897, pp. 186, 187, providing that in a certain section of the state the school lands which have been leased shall not be subject to sale during the existence of the lease, is not a local or special law prohibited by Const. art. 3, §§ 56, 57, since the sale of school lands is a matter of public interest.

3. Under laws 1897, pp. 186, 187, providing that south and west of a certain line the school lands which had been leased should not be subject to sale during the existence of the lease, and that, except south and west of the designated line, any actual settler might lease a certain quantity of the lands within a certain radius held by another leaseholder in excess of a certain amount, an actual settler within such district is not entitled to mandamus to compel the transfer or lease to him of school lands leased to another.

Petition by W. M. Reed against Charles Rogan, as commissioner of the general land office, and another, for mandamus to compel the sale or lease of certain school lands. Petition denied.

Kirby & Kirby, for relator. T. S. Smith, Atty. Gen., T. S. Reese, Asst. Atty. Gen., and Looney & Hamner, for respondent Rogan. Upson, Newton & Ward and Tarlton & Ayres, for respondent C. C. Slaughter.

GAINES, C. J. In 1897 the legislature passed an act amendatory of the laws for the sale and lease of the school lands of the state, which provided, among other things, that in a certain section of the state the lands which had been leased should not be subject to sale during the existence of the lease. The two sections of school land in controversy in this suit lie within the district made subject to the provision. In 1898 they were leased to C. C. Slaughter, one of the respondents, for the term of five years. They were situate within a radius of five miles of another section, upon which the plaintiff, Reed, was an actual settler, and of which he had become a purchaser from the state. Being desirous of purchasing the two sections in question, in January, 1900, he made application for the purchase of one of them, tendered to the state treasurer the cash payment, and executed his obligation for the balance of the purchase money, as required by law. In September of the same year he took the like steps for the purchase of the other section. Each application was rejected by the commissioner of the land office. Thereupon the plaintiff filed in this court his original petition for a mandamus to compel the commissioner of the general land office to cancel the lease of respondent Slaughter, and to accept his application to purchase, and to award him the land as a purchaser under the law. Subsequently the relator amended his petition by adding an additional count, in which it was alleged that, after his application to purchase was rejected, he made application to lease the lands in controversy, and that this was also rejected. He prayed in the amended petition that, in the event that the court should hold that he was not entitled to purchase, the respondent Rogan should be commanded to award him a lease. The cause has been submitted upon demurrers to the petition.

The contention on behalf of the relator is that the provision of the act of May 7, 1897, in so far as it attempts to exempt the school lands in a certain district which have been leased from purchase by actual settlers during the term of the lease, is in conflict with the constitution of the state, and is therefore void. The contention is based upon two grounds: First, that, since the constitution provides that the school lands shall be sold, the legislature was without power to provide for a long lease, and to provide at the same time that they should not be sold during the existence of the lease; and, second, that the act in question is a local law, and that it was passed without notice having been given of the intention to apply for its passage, as required by the constitution. We think neither position is tenable. The act which contains the provision which is assailed by the legislature amends the Revised Statutes of 1895. Article 4218f of that act provides that the school lands, when classified, shall be subject to sale to actual settlers, except when otherwise provided by law, upon certain conditions and terms. The provision in question is found in article 4218s, and reads as follows: "Any lands which may be leased south and west of the line herein designated shall not be sold during the term of the lease until otherwise provided by law; provided, the sections leased by any one party are not so selected as to detach sections which are thereby left unleased." Then follows a description of the line. "Except in that portion of the state south and west of the above delineated line, any actual settler shall have the right to lease within a radius of five miles of the land occupied by him, not exceeding three sections of the land held by a lease holder who is leasing more than ten sections from the state, but shall not be allowed thereby to reduce the large leasehold to less than ten sections." Laws 1897, pp. 186, 187. The requirement of the constitution which is claimed to render these provisions invalid reads as follows: "The lands herein set apart to the public free school fund shall be sold under such regulations, at such times and on such terms as may be prescribed by law." Article 7, § 4.

The first question we shall discuss is, does the requirement deprive the legislature of power to authorize a lease of the character of that in controversy? Even if this were a question of the first impression, we should have but little difficulty in determining it. The constitution declares the will of the people that the lands shall be sold, and makes it the duty of the legislative department of the government to provide for their sale; but as to the times, terms, and manner of sale the several legislatures are vested with an unlimited discretion. At the time the constitution was framed, and at the time it

was adopted, the great body of the school lands already set apart and the unappropriated public domain (one-half of which was dedicated to free-school purposes) lay in the unsettled part of the state, and it must have been contemplated, as the event has proved, that many years would elapse before all of them could be sold for a price approximating their intrinsic value. The use of the word "times" tends to show that it was thought that they would become salable at different periods; and it might well have been considered that many years, even decades, might elapse before all could be sold. Considering the pronounced policy of the state to promote a public free school system, and to the pressing need of funds to carry on the system as already established, it is not conceivable that it was intended to prohibit the legislature from deriving a revenue by a lease of the lands until such time as, in its wisdom, it deemed it proper to place them upon the market for sale. But the question as to the power of the legislature to authorize leases is no longer an open one. Smisson v. State, 71 Tex. 232, 9 S. W. 112; Swenson v. Taylor, 80 Tex. 584, 16 S. W. 336; Brown v. Shiner, 84 Tex. 509, 19 S. W. 686. In each of the cases cited the lease laws then under consideration were held not to be in conflict with the constitution. The only doubt that has been expressed is as to the validity of a law authorizing leases which would operate to prevent a sale of the lands when desired by a succeeding legislature. Whether one legislature can, by authorizing a lease of the school lands, prevent another from providing for a sale of the leased premises, is a grave question; but it is one that we are not called upon to decide in this case. The provision in controversy does not absolutely exempt the lands in the designated district from sale during the term of a lease. As we construe the proviso found in the law in question, and reading "until otherwise provided by law," its purpose was to avoid the difficulty growing out of the constitutional provision we are considering, and to make all leases subject to the condition that they might be terminated by a sale of the leased premises in case the legislature which passed the act, or any subsequent legislature, should see proper to authorize such sale. It not being mandatory upon the legislature to provide for a sale of the school lands at any particular time, it was competent for it to provide for the sale or a lease, and also to provide that, should a lease be first effected, the lands should not be again subject to sale until such lease had expired, provided the right to authorize a sale by future legislation was preserved. Not only is the provision in question not in conflict with the decision of this court in the case of Smisson v. State, above cited, but it is also in accord with the intimations thrown out in the opinion therein rendered. The legislature seems to us to have drawn the provision in the light of that decision, and with a view to obviate the question suggested by the opinion, but not decided in that case. Our conclusion is that the law in question does not contravene section 4 of article 7 of the constitution; and that, since the discretion of the legislature was absolute as to the time when and conditions on which the school lands should be sold, the relator has shown no right to have the sections in controversy awarded to him as a purchaser, unless the provision be void upon some other ground.

This brings us to the second question, is it a local law, within the meaning of section 56 of article 3 of the constitution? Local it is in the sense that it applies to the lands of the state situate in a particular locality. But, in our opinion, it is not local within the meaning of the term as used in our constitution. The question as to what constitutes a local law in the latter sense came before us at the last term of this court, and it was there held that the act of 1897, restricting the compensation of certain officers in a designated class of counties in the state, and commonly known as the "Fee Bill," was not a local law. Clark v. Finley, 93 Tex. 173, 54 S. W. 343. The effect of that decision was the holding that the mere fact that a law was made to operate upon certain counties of the state, and was not operative as to others, did not make it either a local or special law; and it seems to us that the point there decided is decisive of the question now under consideration. While the determination of the counties in which the law should have effect depended upon the population of the respective counties of the state, it was distinctly as local in its operation as the provision the validity of which is now involved in this suit. It has been well said that "a law is not local that operates upon a subject in which the people at large are interested." Healey v. Dudley, 5 Lans. 115. The sales of the school lands of the state may be a matter of especial importance to the people who reside in the localities where they are situate. They are none the less a matter of interest to the people in general and to the state itself. Not only is the school fund of which the lands are a part a matter of public interest, but also the provision in question confers upon every citizen of the state who is capable of contracting, and who may comply with its conditions, the right to lease or purchase the lands therein designated. The enactment is not arbitrary. The fact that it is made to operate in a certain locality only grows out of its subject-matter. The subject-matter being lands, the legislation, in order to be provident, must be made to apply in some localities, and not in others, unless, perchance, there were school lands in every locality in the state, and all were of a uniform quality and character. But in fact our school lands differ greatly in quality, have been classified by law, and are marketable

in varying degrees. To say that the legislature cannot provide different conditions for the sale of the lands in one locality from those provided in another, except by a law passed under the constitutional restrictions as to local legislation, would be to say that it could not authorize a sale or make other disposition of the landed property owned by it in its capital city without giving notice of the intention to apply for the passage of the law, as is provided in section 57 of article 3 of the constitution. In such a case, who is to give the notice? The simple solution of the question is that the people of the state—its public—are interested in the property of the state, and that a law which provides for its sale is a general and public law. If the law is valid, then it is clear that under its provisions the relator has no right either to purchase or lease the lands which were already under lease to the respondent Slaughter. The writ of mandamus is therefore refused.

RAMIREZ et al. v. SMITH.

(Supreme Court of Texas. Nov. 22, 1900.)

MORTGAGES — JUDGMENTS — RECORD — CONSTRUCTIVE NOTICE—FAILURE TO INVESTIGATE TITLE OF OCCUPANT — APPEAL — REVERSAL—DISPOSITION.

1. A mortgagee is not chargeable with constructive notice of the equitable title of others in the premises by reason of recitals in a judgment obtained by mortgagor's grantor which would indicate that mortgagor had received the legal title as trustee, where mortgagor's legal title is complete, and in no way depends on such judgment.

2. Land held by the mortgagor in trust for certain heirs was mortgaged. For several years prior to, and up to the date of, the mortgage, one of the heirs was in possession of a portion of the premises, claiming in behalf of himself and the other heirs. While on such premises he took care of them, and used them in carrying on mortgagor's stock business, and accounted to mortgagor. *Held* sufficient to place mortgagee on inquiry as to the occupant's title, though the mortgagor had a complete legal title.

3. A judgment in a suit involving title to land in controversy, that appears to have been rendered in favor of plaintiff on an agreement by the heirs of deceased defendant in consideration of a conveyance by plaintiff to one of their number, who was acting in the suit as representative of the minor defendants, does not excuse a subsequent mortgagee of the heir to whom the conveyance was made from investigating the title of another heir in occupancy of the premises, who claimed in behalf of himself and the others.

4. Where a defendant who has not appealed, but is joined as appellee in the appeal of other defendants, is materially affected by an alteration in the judgment, a new trial will be ordered, as between him and plaintiff, on determination of the appeal.

Error from court of civil appeals of Fourth supreme judicial district.

Action by Francis Smith against A. G. Ramirez and others. From a judgment in favor of plaintiff, modified by court of civil appeals (56 S. W. 254), defendants bring error. Reversed.

J. B. Wells and Denman, Franklin, Cobbs & McGown, for plaintiffs in error. Upson & Newton, for defendant in error.

WILLIAMS, J. Defendant in error brought this suit against F. O. Skidmore to recover the amount due on certain promissory notes of which he was the maker, and to foreclose a vendor's lien on two tracts of land, one known as the "Retaches," and the other as the "Robert Moore Survey," for the purchase money of which the notes were given. Plaintiffs in error were made defendants as claimants of an interest in the land. Plaintiffs in error pleaded their rights as they will hereafter appear. Skidmore defended the action on the notes, alleging that by reason of the claim of his co-defendants (plaintiffs in error), who were in possession of the land, he had been unable to obtain possession thereof, and prayed, among other things, that, if such co-defendants should recover the land or any part thereof as against plaintiff, the notes be canceled.

The title of plaintiff to the whole of the land was derived through the foreclosure of a deed of trust on the two tracts, executed to Francis Smith & Co. on the 9th day of April, 1892, by Antonio G. Ramirez, in whom the legal title was then vested, to secure a loan of money made to him by Smith & Co. Plaintiff had also acquired the interests of certain ones of defendants through sale under execution prior to his sale to Skidmore, and as to this there was no dispute. The plaintiffs in error, at the time of execution of the deed of trust from Antonio Ramirez to Francis Smith & Co. and of the foreclosure thereof, held the equitable title to interests in the land, the legal title being vested in Antonio in trust for them; and the chief question in the case was and is whether or not the mortgagees were chargeable with notice of such equitable title, there being no pretense that the purchaser at the foreclosure sale acquired any right superior to that to which the mortgage attached.

The history of the two titles is as follows: Lino Ramirez, the father of Antonio and the other plaintiffs in error, was, in his lifetime, engaged in stock raising, and conducted a number of separate ranches upon land which was the community property of himself and his wife, Lucia, one of which was called "Las Comitas." He extended his fence around this ranch across a vacant tract of 1,280 acres, now the James Moore survey, and on to the Retaches, and inclosed within his ranch all of the former, and about 1,500 acres of the latter, believing all of it to be included in Las Comitas or to be vacant land. He located certificates upon, and procured patents for, some of the land embraced in the Retaches tract. John L. Haynes was then the owner of the Retaches, and in 1886 he brought suit against Lino Ramirez to recover that tract and to cancel the junior patents and surveys. Pending this suit, a verbal