not when some other person fails so to do. These sureties obligated themselves to respond in case Zadek & Co. did not establish that the goods levied on were their partnership property. They were not responsible for any one else's default in establishing title to the goods, and could not be liable if Mrs. Caspar did not sustain her individual claim to the property. The rights of the sureties were *strictissimi juris*, and, having undertaken to answer for the title of one claimant, they cannot be made responsible for another and different claim. Mrs. Caspar's claim not having been accompanied by a proper bond, the court, for this reason, if for no other, properly refused to allow it filed. The claimants were then in the same condition as if they had never set up any claim whatever to the property, excepting their liability upon the bond. There was no question left as to the title to the goods, and nobody left to contest it. There was therefore no room for an intervenor to come in and make the contest, or to attack the judgment or execution under which the goods were seized. Had the court allowed the appellants, either as claimants or intervenors, to make such a contract, or assail the execution, they would have enjoyed all the privileges of claimants in a strictly statutory proceeding, without complying with a single statutory requirement.

The only question left open was the value of the property, and upon this the appellants were heard. They were entitled to be heard no further, and the court did not err in refusing to allow them the privilege of raising any other issues in the case.

There is no error in the judgment, and it is affirmed.

MELLINGER and Wife *v.* CITY OF HOUSTON.

(*Supreme Court of Texas.* January 18, 1887.)

1. MUNICIPAL CORPORATIONS—TAXES—STATUTE OF LIMITATIONS RUNS AGAINST.
   The statute of limitations will run against a municipal corporation, to operate as a bar to the collection of city taxes, when the defense thereunder is not expressly taken away by statute.
2. TAXES—COLLECTION—SP. SESS. TEX. 1879, GEN. LAWS, PAGE 15, APPLIES TO PURCHASER OF LAND—UNPAID TAXES—LIMITATION MATURED PRIOR TO.
   The Texas act of July 4, 1879, (Sp. Sess. Tex. 1879, Gen. Laws, p. 15,) providing "that no delinquent tax-payer shall have the right to plead in any court, or in any manner rely upon, any statute of limitation by way of defense against the payment of any taxes due from him or her, either to the state or any county, city, or town," applies to a purchaser of property incumbered with a lien for taxes, and such act does not avail to take away the defense of the statute of limitations to taxes already barred by it at the date of its enactment, but does so in those cases where such bar had not matured at that date.[1]
3. CONSTITUTIONAL LAW — CONST. TEX. ART. 1, § 16 — RIGHTS OTHER THAN THOSE TO PROPERTY.
   Const. Tex. art. 1, § 16, providing that "no bill of attainder, *ex post facto* law, retroactive law, or any law impairing the obligation of contracts, shall be made," was intended to protect every right, although not strictly a right to property, which might accrue under existing laws prior to the passage of any law, which, if permitted a retroactive effect, would take away such rights.

Appeal from Harris county.

Action to recover tax due. Judgment for City of Houston, plaintiff. Defendants appeal.

E. P. Turner, for plaintiffs in error. *S. Taliaferro*, for defendant in error.

STAYTON, J. This action was brought to recover taxes due to the city of Houston on lots owned by the plaintiffs in error. The petition was filed on October 20, 1884, and sought a recovery of taxes levied for the years 1875, 1876, 1877, 1878, 1879, and 1880. The defendants purchased the property taxed in the year 1881. Under the charter of the city of Houston the recov-

[1] See County of McCracken v. Mercantile Trust Co., (Ky.) 1 S. W. Rep. 588, and note.

ery of taxes on real property is authorized by suit, and the taxes constitute a lien on the property taxed. In defense of the action the defendants pleaded the statutes of limitation of two and four years. The cause was tried without a jury, and the court below held that limitation did not run against the city. An assignment of error questions the correctness of that ruling.

In *Galveston* v. *Menard*, 23 Tex. 408, it was held that the statute of limitations could run against a municipal corporation, and that by adverse possession a claimant might acquire title to land which constituted a part of a public street. In *Houston & T. C. Ry. Co.* v. *Travis Co.*, 4 Tex. Law Rev. 22, it was held that limitation would run against a county. The same ruling has been made in many cases in reference to rights and property held by municipal corporations for public use, or in trust for public purposes. *City of Wheeling* v. *Campbell*, 12 W. Va. 44; *Evans* v. *Erie Co.*, 66 Pa. St. 228; *School Directors* v. *Goerges*, 50 Mo. 195; *Lessee of Cincinnati* v. *First Presbyterian Church*, 8 Ohio, 310; *City of Cincinnati* v. *Evans*, 5 Ohio St. 594; *Knight* v. *Heaton*, 22 Vt. 482; *Varick* v. *Mayor, etc., of New York*, 4 Johns. Ch. 54; *Town of Litchfield* v. *Wilmot*, 2 Root, 288; *Armstrong* v. *Dalton*, 4 Dev. 570; *Rowan's Ex'rs* v. *Portland*, 8 B. Mon. 259; *Dudley* v. *Trustees of Frankfort*, 12 B. Mon. 617; *Clements* v. *Anderson*, 46 Miss. 597; *Peoria* v. *Johnston*, 56 Ill. 51; *City of Pella* v. *Scholte*, 24 Iowa, 293.

In the case of *City of Burlington* v. *Burlington & M. R. Co.*, 41 Iowa, 140, it was held that the statute of limitations would operate to bar a recovery of taxes levied by a municipal corporation. In disposing of the case it was said: "The right of the city to maintain this action can only be supported on the ground that the taxes are debts,—property held by it in its proprietary character. It appears in this action in that character, claiming to recover on the ground that the defendant is its debtor upon an obligation created by the assessment and levy of the taxes. In the debt thus created it has a right of property in its proprietary character."

In *City of St. Louis* v. *Newman*, 45 Mo. 138, it was held that the city was the substantial plaintiff, and that an action to recover a special tax levied for street improvement was barred by the statute of limitations, there being in force in that state no statute exempting municipal corporations from the operation of such statutes.

In the case of *City of Jefferson* v. *Whipple*, 71 Mo. 521, an action was brought by the city to recover taxes due, and to enforce a lien against the taxed property, and it was held that as to the city the action was barred by the statute of limitations. It appears from the opinion in that case that the city held, under the statute, no lien for taxes; but a lien for municipal taxes was given to the state, and that under the terms of the statute it might by suit enforce the lien. In an action by the state to enforce the lien it was held that limitation would not run; but this difference between an action by the state and one by the municipality to which the tax was due, was not based on the fact that in the action by the state a lien might be enforced, while this could not be done by the city; but was based on the fact that, as against a state, limitation does not run unless permitted by statute, while, as against a municipal corporation, it will run unless restrained by statute. This is evident from the opinion, which declares that "the statute cannot be pleaded to an action brought by the state for taxes, whether state and county, or to enforce a lien for delinquent city taxes. In an ordinary suit between the city and the individual against whom the taxes are assessed, the plea of the statute is a good defense. This presents an anomaly. The statute can be pleaded against the city, while in an action by the state to enforce the lien for the same taxes the statute is not a bar to the action. This seems to be the condition in which the legislature has left the subject, and it is not the province of this court to bring order and harmony out of this confusion and discord."

We see no real ground of distinction on which the operation of the statutes of limitation may be denied when the collection of municipal taxes is sought, and still recognized in other cases in which the subject-matter of litigation, held as a public trust or for public use, as directly and materially may affect the public welfare as does the collection of taxes. The general statutes of limitation do not exempt municipal corporations from their operation, and the courts have no power to do so upon mere grounds of expediency, or to avoid a seeming hardship.

The only inquiry remaining is as to the effect to be given to the sixteenth section of the act of July 4, 1879, (Gen. Laws Sp. Sess. 1879, p. 15.) That section provides that "no delinquent tax-payer shall have the right to plead in any court, or in any manner rely upon, any statute of limitation by way of defense against the payment of any taxes due from him or her, either to the state, or any county, city, or town." The manifest purpose of this statute was to deny to every person the right to defeat the collection of taxes through a plea of the statute of limitation, and it shows that such a statute was deemed necessary by the legislature to withdraw this right from the person indebted for taxes even to the state. It would seem that one who has purchased property incumbered with a lien for taxes should be deemed, as to such taxes, a delinquent tax-payer. Such a purchaser takes the property charged with the lien, and he cannot interpose any defense which his vendor might not had he continued to be the owner. It appears from the record that the taxes sued for were due at the end of the year for which they were levied; and the fourth subdivision of article 3203, Rev. St., is applicable to an action such as this, and fixes the period of limitation at two years. Under this the taxes due for the years 1875 and 1876 were barred at the time the act of July 4, 1879, was passed, but the other taxes claimed were not.

In the absence of constitutional restrictions upon the subject, it is almost universally accepted as a sound rule of construction that a statute shall have only a prospective operation, unless its terms show clearly a legislative intention that it shall have a retroactive effect. There is nothing in the statute before us to evidence the intention of the legislature to give a strictly retroactive effect to the statute under consideration, and it must be held to be a valid law, governing in all actions brought to recover taxes after its passage, against which some valid defense did not exist at the time it took effect. It is true that the statute does not in terms restrict its operation to such actions as might be founded on causes of action not barred by laws in force at the time of its passage, and that its broad and general language might make it applicable to all actions thereafter brought, even upon causes of action then barred; but, if the statute was in terms such as to require such a construction, we are of the opinion that the constitution of this state forbids such legislation.

There has been much controversy as to whether a statute giving a remedy for a debt barred by the statutes of limitation was not in violation of that part of the fourteenth amendment to the constitution of the United States which declares that no state shall "deprive any person of life, liberty, or property without due process of law," or in violation of equivalent constitutional provisions found in the constitutions of most of the states of this Union. That question was considered by the supreme court of the United States in the recent case of *Campbell* v. *Holt*, 6 Sup. Ct. Rep. 209, which arose under the forty-third section of article 12 of the constitution of this state, framed in 1868, which declared that the statutes of limitation should be considered as suspended from the twenty-eighth of January, 1861, until the acceptance of that constitution by the United States congress. In that case it was "held that in an action to recover real or personal property, when the question is as to the removal of the bar of the statute of limitations by a legislative act passed after the bar has become perfect, that such act deprives the party of

his property without due process of law. The reason is that, by the law in existence before the repealing act, the property has become the defendant's. Both the legal title and the real ownership had become vested in him, and to give the act the effect of transferring this title to plaintiff would be to deprive him of his property without due process of law." The court, however, declared "that to remove the bar which the statute of limitations enables a debtor to interpose to prevent the payment of his debt stands on a very different ground," and held that the constitutional provision then under consideration, in so far as it removed the bar of the statute as to matters of debt, was valid.

It may be conceded under that decision—and we do not wish to be understood as questioning its correctness—that the statute under consideration, if required to be construed as a retroactive law, would not vitiate the provision of the constitution of this state, which declares that "no citizen of this state shall be deprived of life, liberty, property, privileges, or immunities, or in any manner disfranchised, except by due course of the law of the land." The people of this state have, however, provided, in all the state constitutions adopted by them, that "no bill of attainder, *ex post facto* law, retroactive law, or any law impairing the obligation of contracts shall be made," (Const. art. 1, § 16;) thus giving protection to rights, by prohibiting the enactment of retroactive laws, which the constitution of the United States does not give in terms. Rights based on contract are as fully protected by section 16, art. 1 of the constitution of this state, as they are by section 10, art. 1 of the constitution of the United States. It has been constantly held that the section of the constitution of the United States last referred to does not prohibit the passage of laws retroactive in their character, even though such law may divest antecedent vested rights of property, unless such rights be founded on contract. *Satterlee* v. *Matheuson*, 2 Pet. 412; *Watson* v. *Mercer*, 8 Pet. 110. Such rights as are held to be protected by that part of the fourteenth amendment to the constitution of the United States to which we have referred, are as fully protected by the nineteenth section of article 1 of the constitution of this state.

In the construction of a constitution it is to be presumed that the language in which it is written was carefully selected, and made to express the will of the people, and that in adopting it they intended to give effect to every one of its provisions; and it cannot be presumed that separate and distinct provisions were intended to have the same and no other effect than one of them has, unless the language used, when considered in connection with the whole instrument, shows that this must have been the intention. It cannot be presumed that in adopting a constitution which contained a declaration "that no retroactive law shall be made," that it was intended to protect thereby only such rights as were protected by other declarations of the constitution which forbade the making of *ex post facto* laws, laws impairing the obligation of contract, or laws which would deprive a citizen of life, liberty, property, privileges, or immunities otherwise than by due course of the law of the land. The character of laws which, within the meaning of the constitution, would operate as *ex post facto* laws and laws impairing the obligations of contracts were well understood, not only from the language descriptive of them used in the constitution but from adjudications made by the highest courts in the land prior to the time the constitution was adopted; and there can be no doubt that, by the clause in the constitution which forbids the making of retroactive laws, it was intended to give protection to every citizen against the arbitrary exercise of some power not forbidden by the other clauses of the constitution referred to, which might be lawfully exercised but for this prohibition. The section of the constitution which declares that "no citizen of this state shall be deprived of life, liberty, property, privileges, or immunities, or in any manner disfranchised, except by the due course of the law of the land," is written in

plain language, but had not been so fully construed, as to its operation on laws retroactive in character, when the constitution was adopted, as it has since been by the decision of the supreme court of the United States, to which we have referred; but it must be held that the people intended, by that clause of the constitution, in so far as it is identical with the fourteenth amendment, to place thereby just such restrictions on the powers of the legislature as the highest court in the nation has declared is the true construction of like language made a part of the constitution of the United States for the purpose of placing a limitation on the power of the legislatures of the several states. As construed, that section of the constitution only forbids the making of laws retroactive in effect, whereby title to property which had vested under former laws would be divested. To give this protection against arbitrary legislation there was no necessity for the broader declaration "that no retroactive law shall be made." The making of it evidences an intention to place a further restriction on the power of the legislature; and it must be held to protect every right, although not strictly a right to property, which may accrue under existing laws prior to the passage of any, which, if permitted a retroactive effect, would take away the right. A right has been well defined to be a well-founded claim, and a well-founded claim means nothing more nor less than a claim recognized or secured by law.

Rights which pertain to persons, other than such as are termed natural rights, are essentially the creatures of municipal law, written or unwritten; and it must necessarily be held that a right, in a legal sense, exists, when, in consequence of the existence of given facts, the law declares that one person is entitled to enforce against another a given claim, or to resist the enforcement of a claim urged by another. Facts may exist out of which, in the course of time or under given circumstances, a right would become fixed or vested by operation of existing law, but until the state of facts which the law declares shall give a right comes into existence there cannot be in law a right; and for this reason it has been constantly held that, until the right becomes fixed or vested, it is lawful for the law-making power to declare that the given state of facts shall not fix it, and such laws have been constantly held not to be retroactive in the sense in which that term is used. This has been illustrated by so many decisions, made upon so great a variety of facts, that it has become the settled law of the land. When, however, such a state of facts exists as the law declares shall entitle a plaintiff to relief in a court of justice on a claim which he makes against another, or as it declares shall operate in favor of a defendant as a defense against a claim made against him, then it must be said that a right exists, has become fixed or vested, and is beyond the reach of retroactive legislation, if there be a constitutional prohibition of such laws. This, so far as we have been enabled to ascertain, has been the ruling in every state in this Union which has a constitutional provision in terms forbidding retroactive laws, in which any ruling upon the question has been made.

As early as the year A. D. 1784 the people of the state of New Hampshire placed in the constitution of that state the declaration that "retroactive laws are highly injurious, offensive, and unjust. No such laws, therefore, should be made, either for the decision of civil causes or the punishment of offenses," (Const. N. H. art. 1, § 23;) and the same provision was inserted in the constitution adopted in 1792, in that state, where it still remains. The question now before us came before the superior court of judicature of that state as early as the year 1826, in the case of *Woart* v. *Winnick;* and, basing its decision on the section of the constitution we have quoted, the court held that an action barred by the statute of limitations was forever barred, and that the right of the defendant to insist upon the bar of the statute could not be taken away by retroactive legislation. The principle involved in that decision has been asserted in many cases, arising on different facts, by the same court.

Dow v. *Norris*, 4 N. H. 16; *Clark* v. *Clark*, 10 N. H. 380; *Willard* v. *Harvey*, 24 N. H. 351; *Rich* v. *Flanders*, 39 N. H. 304; *Rockport* v. *Walden*, 54 N. H. 167; *Simpson* v. *Savings Bank*, 56 N. H. 470.

The declaration "that no retroactive law * * * shall be made," was inserted in the constitution of the state of Tennessee as early as the year 1796, and it has been inserted in the constitutions of that state subsequently adopted. We find no direct adjudication of the question before us by the supreme court of that state, but all the decisions found lead to the belief that the same ruling would be made in that state which has been constantly made in the state of New Hampshire. *Fisher's Negroes* v. *Dabbs*, 6 Yerg. 138; *Officer* v. *Young*, 5 Yerg. 220. In the case of *Girdner* v. *Stephens*, 1 Heisk. 280, it was held that the people of the state had no power, even by a provision placed in the constitution of the state, to take away the defense of statutes of limitations, when the facts which gave it had transpired before the adoption of the constitution. The same ruling was made in *Yancy* v. *Yancy*, 5 Heisk. 353; and these decisions leave no doubt as to what the ruling would be in a case in which the constitutional provision forbidding retroactive laws to be made could be applied, though one of them is in conflict with the decision of the supreme court of the United States to which we have referred.

As early as the year 1820 the people of Missouri incorporated into the constitution of that state the declaration "that no * * * law * * * retrospective in its operation can be passed," (Const. Mo. art. 13, § 17,) and this provision has been carried into all the constitutions since adopted in that state. We have not access to all the reports of that state, and do not know what all the rulings made in the supreme court of that state upon the question before us have been; but we find it decided in the case of *State* v. *Heman*, 70 Mo. 456, that an act of the legislature of that state reviving a cause of action already barred would be unconstitutional. In *Hope Mut. Ins. Co.* v. *Flynn*, 38 Mo. 484, it is said that "a statute which takes away or impairs any vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect to transactions already past, is to be deemed retrospective or retroactive. * * * No new ground for the support of an existing action ought to be created by legislative enactment, nor any legal bar which goes to deprive a party of his defense." *Barton Co.* v. *Walser*, 47 Mo. 200, is to the same effect.

The constitution of Louisiana has a provision declaring that no law shall be passed divesting vested rights unless for purposes of public utility and for adequate compensation made, and the state of Colorado has declared in its constitution, "No law retrospective in its operation shall be passed;" but from the reports of those states, to which we have access, we do not see that the question before us has been considered.

The states to which we have referred are the only ones which have constitutional provisions in effect the same as exists in this state.

The section of the constitution under consideration was considered in the case of *De Cordova* v. *City of Galveston*, 4 Tex. 480; and, while the facts in that case did not call for the decision of the question before us, it did call for a determination of the character of laws which the constitution forbids. It was said that "laws are deemed retrospective, and within constitutional prohibition, which by retrospective operation destroy or impair vested rights, or rights to do certain actions, or possess certain things, according to the law of the land, (*Brown* v. *Van Braam*, 3 Dall. 349;) but laws which affect the remedy merely are not within the scope of the inhibition unless the remedy be taken away altogether, or incumbered with conditions that would render it useless or impracticable to pursue it, (*Bronson* v. *Kinzie*, 1 How. 315;) or if the provisions regulating the remedy be so unreasonable as to amount to a denial of right,—as, for instance, if a statute of limitations applied to existing causes barred all remedy, or did not afford a reasonable

period for their prosecution; or if an attempt were made by law, either by implication or expressly, to revive causes of action already barred, such legislation would be retrospective, within the intent of the prohibition, and would therefore be wholly inoperative." We have no doubt that the law is thus correctly stated.

Such has been the holding in many of the states in which there was no express constitutional prohibition of retroactive legislation. The cases bearing upon this question are collected in notes to Cooley, Const. Lim. 449, 455; Sedg. St. & Const. Law, 160–173.

The entry of a personal judgment against the appellants was evidently an inadvertence.

For the errors noticed, the judgment of the court below will be reversed, and the cause remanded.

FOWLER v. STATE *ex rel.* GEORGE.

(*Supreme Court of Texas.* January 18, 1887.)

1. ELECTIONS—CONTEST—COUNTING VOTES—COUNTY TREASURER.
In a proceeding to test the title to a county office the district court may count the returns or the ballots, as the case may be, notwithstanding irregularities by the officers in holding the elections, where such irregularities are in breach of requirements which are directory only, and it is shown that they have in no manner changed the result of the election, or its fair and honest character.

2. SAME—FAILURE TO COMPLY WITH PROVISIONS OF ELECTION LAW.
In an election for county officers a failure to comply with such requirements of the election law as the following, to-wit: (1) No tally-sheets of the votes cast, or poll-list of the voters by whom they were cast, being kept or returned by the presiding officer and managers of the election; (2) the election returns which contained no more than a mere statement of the result of the voting, and the ballot-box containing the tickets voted, being sent to the county judge and clerk through the United States mail, instead of by the presiding officer, or any manager of the election; (3) the non-reception of the returns sent him by the county judge; (4) the returns not being made in triplicate; (5) the box used at the election, and in which the returns were made to the county court, not being a proper one,—will not vitiate the election, provided it is made to appear that the neglect or misconduct of the officers has not prevented an honest and fair election.

3. SAME—QUO WARRANTO—QUALIFICATIONS FOR OFFICE.
In an information asking for proceedings in *quo warranto* to place relator in the office of county treasurer, and to oust defendant therefrom, an allegation that such relator was a citizen of the county, and entitled to the office of county treasurer, is a sufficient averment, as to his being qualified to hold the office, against a general demurrer.

4. SAME—AVERMENT OF VOTES RECEIVED BY RELATOR.
In such proceedings an allegation that the relator received a majority of the ballots of the qualified voters of the county is sufficient, without setting forth the facts which constituted their qualifications.

5. SAME—DISTRICT ATTORNEY PRO TEM.
An attorney who is appointed by the court, under Code Crim. Proc. Tex., art. 39, during the absence of the district attorney, is the proper person to file an information for a *quo warranto* in such a case, and the authority of an attorney so appointed cannot be collaterally attacked.

Appeal from Nolan county.

These proceedings in the nature of *quo warranto* were commenced by the relator, J. C. George, on the petition of E. A. Chaffee, appointed by the court district attorney *pro tem.*, in the absence of the regular attorney of the state, on November 11, 1886, to oust appellant, J. H. Fowler, from the office of county treasurer of Nolan county, and to place the relator there. The relator alleged that on November 2, 1886, there was held in Nolan county an election for state, county, and precinct officers, at which the relator was a candidate for the office of county treasurer; that relator polled a majority of the votes; that because of irregularities in the returns of officers holding the election in precincts Nos. 3 and 4, in said county, the commissioners' court of said