Cockrill & Cockrill, for appellants. Fulk, Fulk & Fulk, for appellee.

RIDDICK, J. (after stating the facts). This case is now before us for the second time. A fuller statement of the facts can be found by reference to the first decision. Fitzgerald v. La Porte, 64 Ark. 34, 40 S. W. 261.

The main contention of appellants on this appeal is that the presiding judge erred in refusing to instruct the jury that the examination of the work and view of the premises by them was not evidence in the case, and that they should not base their verdict in any degree upon such examination. There is considerable conflict in the decisions of the different courts on this point. But we are of the opinion that the view of the premises by the jury is a species of evidence, and must necessarily operate to some extent upon the minds of the jury. The verdict must be supported by other evidence than the view, and a verdict depending upon a view alone could not be upheld, but we do not think the court erred in refusing to tell the jury that they must not base their verdict in any degree upon such an examination. If the jury were not allowed to base their verdict in any degree upon the facts ascertained by the view, there would be little advantage in allowing a view to be made. If that was the rule, a view would be almost certain to prejudice one side or the other; for the jury, after having seen the work itself, could hardly eradicate the impression thereby made upon their minds, so as to render their verdict without reference thereto. The statute permits the view by the jury, to enable them better to understand the testimony, and for the reason that it may tend to enlighten their minds with reference to the issues of fact involved in the case. We think it was evidence to be considered by the jury in connection with other facts in the case. Benton v. State, 30 Ark. 349; Tully v. Railroad Co., 134 Mass. 503; Smith v. Morse, 148 Mass. 407, 19 N. E. 393; People v. Thorne (N. Y. App.) 42 L. R. A. 368, note (s. c. 50 N. E. 947). On this, as well as on other points discussed, we think the charge of the presiding judge was correct. Certain instructions asked by the defendants were refused, but the points involved were substantially covered by other instructions given to the jury. It is not our province to pass upon the weight of evidence. The evidence was conflicting, and, on the whole case, we are of the opinion that the judgment should be affirmed. It is so ordered.

BATTLE, J., absent.

CLARK, Sheriff, v. FINLEY, Comptroller.

(Supreme Court of Texas. Dec. 14, 1899.)

STATUTES—TITLE—PLURALITY OF SUBJECTS—COUNTY OFFICERS—FEES—DUTIES—JUDGES—SHERIFFS—MANDAMUS.

1. Act 1897 (Laws 1897, p. 5) entitled "An act to fix civil fees to be charged by certain county and precinct officers, and to fix and limit the fees and compensation of clerks of the district court, district attorneys, county attorneys, sheriffs and constables in felony cases, to be paid by the state, and to fix the compensation of assessors and collectors of taxes, and to limit and regulate the compensation of the sheriff, clerk of the county court, county judge, district and county attorney, clerk of the district court, assessor and collector of taxes, justices of the peace and constables, and to prescribe penalties for the violation of this act, and to repeal all laws in conflict herewith," provides for a reduction of fees throughout the state for certain services and fees of the sheriffs in certain counties, and limits the compensation of other county officers and district attorneys, and also attempts to regulate the appointment of deputies in certain cases. *Held*, that such act, in so far as it regulates the compensation of officers and their fees, is not invalidated by the provision relating to the appointment of deputies, within Const. art. 3, § 35, as containing more than one subject, not expressed in its title, since such section declares that an act in violation thereof shall be void only as to that part not expressed in its title.

2. Const. art. 3, § 36, which provides that, where an act is revised or amended, the act revised and sections amended shall be re-enacted or published at length, does not apply to a law which fully declares its provisions without direct reference to any other act, though its effect is to enlarge or restrict the operation of some other statute.

3. Act 1897 (Laws 1897, p. 5), limiting the fees and compensation of certain officers in counties of less than 3,000 voters is not a local or special law, within the meaning of Const. art. 3, § 56, prohibiting the passage of local or special laws in certain specified cases, and in every case where a general law may be applicable.

4. Act 1897 (Laws 1897, p. 5), limiting the fees and compensation of certain officers in counties of less than 3,000 voters, and providing that the county judge shall designate the number of deputies to which certain officers may be entitled, does not violate Const. art. 5, § 18, declaring that the commissioners' court shall exercise such powers and jurisdiction over all county business as is conferred by the constitution and laws of the state, or may hereafter be prescribed, as the number of deputies an officer may employ is not county business, and the officers to whom such act applies, though acting within the county, are state officers.

5. The county judge is not a judicial officer only, and hence Act 1897 (Laws 1897, p. 5), conferring on him the power to designate the number of deputies of certain officers in counties of less than 3,000 voters, is not invalid, though the power thus conferred is not judicial.

6. Act 1897 (Laws 1897, p. 5), regulating the fees and salaries of certain officers in counties of less than 3,000 voters, and providing that those officers whose compensation is limited to a maximum shall pay any surplus of fees received by them over a sufficiency to pay their respective salaries and those of their deputies into the county treasury, is not invalid in that its effect might be to take from the revenues of the state, raised by taxation at large, moneys to pay fees of an office, and to appropriate them to the use of certain counties.

Original proceeding for mandamus by Sterling P. Clark, as sheriff, to compel R. W. Finley, as comptroller, to draw his warrant for the amount of relator's fees. Writ denied.

A. T. Watts, E. G. Senter, Wallace & Hendricks, and Tarlton & Ayres, for petitioner. T. S. Smith, Atty. Gen., and R. H. Ward, Asst. Atty. Gen., for respondent.

GAINES, C. J. At the called session of the 25th legislature a statute was enacted for the

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purpose of limiting the compensation of certain officers and reducing the fees of office. It specially reduced certain fees of sheriffs and constables in certain counties of the state. Laws 1897, p. 5. Tarrant county belonged to the class to which the law applied. Sterling P. Clark is the sheriff of that county, and, having rendered services as such for which he was entitled to be paid by the state, he made out account therefor, charging the fees allowed by the law as it existed before the act was passed. His account was approved by the district judge, and was presented to the comptroller, who refused to allow the same for the fees as charged, but offered to draw his warrant for the amount authorized by the new law. The sheriff, as relator, has filed in this court this, his original petition for the writ of mandamus against the comptroller, as respondent, to compel the latter to draw his warrant for the amount of the account as charged by him and as allowed by the district judge. The respondent has demurred to the petition. If the act of June 16, 1897, is valid, the mandamus must be denied; if invalid, the writ should issue. Therefore the validity of the act is the question for our determination.

The validity of the statute is assailed upon several grounds. First, it is contended that it is in conflict with section 35 of article 3 of the constitution. This section provides that "no bill, except general appropriation bills, * * * shall contain more than one subject, which shall be expressed in its title." The evident purpose of the act is to reduce fees, and to limit the compensation of district attorneys and of certain county officers in certain of the larger counties of the state. The underlying theory of the law was that in the more populous counties of the state the officers named in it were receiving a compensation in excess of the value of their services. It reduces fees throughout the state for certain services, and fees of the sheriffs in certain counties, and limits the compensation of other county officers and district attorneys. It also attempts to regulate the appointment of deputies in certain cases. All these matters have one general object, and relate to the one subject of the compensation of the state's officers, except, possibly, the last. It matters not, in our opinion, that the act prescribes fees both in criminal cases and in civil actions, and that since the adoption of our Code of Criminal Procedure these two classes of fees have usually been provided for in separate enactments. The title of the act is as follows: "An act to fix certain civil fees to be charged by certain county and precinct officers, and to fix and limit the fees and compensation of clerks of the district court, district attorneys, county attorneys, sheriffs and constables in felony cases, to be paid by the state, and to fix the compensation of assessors and collectors of taxes, and to limit and regulate the compensation of the sheriff, clerk of the county court, county judge, district and county attorney, clerk of the district court, assessor and collector of taxes, justices of the peace and constables, and to prescribe penalties for the violation of this act, and to repeal all laws in conflict herewith." Laws 1897, p. 5. With the exception of the appointment of deputies, the subject-matter of the bill seems to us very fully expressed in the title. The provision in regard to deputies was intended to limit their number and fix their compensation, but whether it is germane to the subject of the act, and sufficiently within the purview of the title as to bring it within the rule of the constitution under consideration, we need not pause to inquire. No question in regard to that provision is directly involved in this proceeding. The section of the constitution from which we have already quoted has this additional provision: "But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed." It follows that, if the matter of the appointment of deputies does not come within the compass of the title, it goes for naught; but the vice does not otherwise affect the law. The act stands as if the obnoxious provision had never been inserted. Our conclusion is that the statute in question, in so far as it regulates the compensation of officers and their fees, is not in conflict with section 35 of article 3 of the constitution. The cases of State v. Shadle, 41 Tex. 404, and Bills v. State, 42 Tex. 305, relied on by counsel for the relator, are not at all satisfactory to us. In the former the statute was held inoperative before they reached the constitutional question, and, when reached, the court merely say, "It also embraces more than one object, and is repugnant to the provisions of the constitution on this subject." What the two or more objects were is not pointed out by the court, and they are not apparent to us. In the latter case (which, by the way, was dismissed for the want of jurisdiction) the court simply refer to the decision in the former case.

It is also insisted that the act in question is an amendment to various provisions of our Revised Statutes which prescribe the fees and fix the compensation of the officers named therein, and that it is, therefore, prohibited by section 36 of article 3 of the constitution. That article provides that "no law shall be revived or amended by reference to its title; but in such case the act revived or the section or sections amended shall be reenacted and published at length." A similar question was certified for the decision of this court in the case of Snyder v. Compton, 87 Tex. 374, 28 S. W. 1061, and in disposing of it the court say: "It is not meant by this provision that every act which amends the statutory law shall set out at length the entire law as amended. Under such a rule, legislation would in many instances be impracticable. This is especially the case in this state, where the existence of the common law

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is due to statutory enactment. The practice which it was the purpose of the provision in question to prohibit was that of amending a statute by referring to its title, and by providing that it should be amended by adding to or striking out certain words, or by omitting certain language and inserting in lieu thereof certain other words. It was not intended to prohibit the passage of a law which declared fully its provisions without direct reference to any other act, although its effect should be to enlarge or restrict the operation of some other statutes. Similar provisions in other constitutions have been construed not to apply to implied amendments." There is no attempt in the act in question to amend any law "by reference to its title," and hence it would seem that section 36 has no application whatever.

In the next place, it is urged that the act in question is repugnant to that section of the constitution which prohibits the passage of special or local laws in certain specified cases, and in every case where a general law may be made applicable. Article 3, § 56, Const. 1876. The ground of the contention is that most of the vital provisions of the act are, by its terms, made applicable to a minority only of the counties in the state. Its most important provisions do not apply to counties in which the vote at the last election for president was less than 3,000. Does this make a local or special law, within the meaning of section 56 of article 3 of the constitution? We might rest our determination of the question upon a former decision of this court. A similar provision to that embraced in the section in question was incorporated in the constitution of 1869 by an amendment which took effect by ratification of the two houses of the legislature in January, 1874. Sayles' Const. 476. On the 23d day of March, 1874, the same legislature which ratified the amendment (as was required by that constitution) passed an act "to encourage stock raising, and for the protection of stock raisers," which contained many important provisions, and from the operation of which more than 50 counties of the state were exempted by name. The question of the validity of the act came before the court in Beyman v. Black, 47 Tex. 558, and it was held valid. The court, in their opinion, say: "The act in question is general in its terms and in its operation, save in certain specified counties, and can with no propriety be termed a local or special law. Indeed, it has not been argued that the act violates any of the provisions of the constitutional amendments of January, 1874, forbidding local or special laws in certain enumerated cases, and providing that 'in all other cases, where a general law can be made applicable, no special law shall be enacted,' and that 'the legislature shall pass general laws providing for the cases before enumerated in this section, and for all other cases which, in its judgment, may be provided by general laws.' Laws 14th Leg. p. 235." If that act was not a local or special law, clearly the statute under consideration is not.

But we do not find it necessary to repose upon the former ruling of the court. A law is not special because it does not apply to all persons or things alike. Indeed, most of our laws apply to some one or more classes of persons or of things and exclude all others. Such are laws as to the rights of infants, married women, corporations, carriers, etc. Indeed, it is perhaps the exception when a statute is found which applies to every person or thing alike. Hence it cannot be that the statute under consideration is special merely because it is made to operate in some counties of the state and not in others. The definition of a general law, as distinguished from a special law, given by the supreme court of Pennsylvania in the case of Wheeler v. Philadelphia, 77 Pa. St. 338, and approved by the supreme court of Missouri, is perhaps as accurate as any that has been given. State v. Tolle, 71 Mo. 645. The court in the former case say: "Without entering at large upon the discussion of what is here meant by a 'local or special law,' it is sufficient to say that a statute which relates to persons or things as a class is a general law, while a statute which relates to particular persons or things of a class is special, and comes within the constitutional prohibition." The law in question is applicable to every county of the designated class. Now, we do not propose to be led off into any extended discussion as to what is a proper class for the application of a general law. The tendency of the recent decisions upon the subject, as it seems to us, is to drift into refinements that are rather more specious than profitable. It is said in some of the cases that the classification must be reasonable; in others, that it must not be unreasonable or arbitrary, etc. If it is meant by this that the legislature cannot evade the prohibition of the constitution as to special laws by making a law applicable to a pretended class, which is, in fact, no class, we concur in the proposition. Such was the law passed upon in the case of Com. v. Patton, 88 Pa. St. 258. That statute was made applicable to all counties in which there was a population of more than 60,000, and an incorporated city with a population exceeding 8,000, "situate at a distance from the county seat of more than twenty-seven miles by the usually traveled public road." There was but one city in the state which came within the pretended class. The court held this a covert attempt at special legislation, and that the act was a nullity. It seems that in Pennsylvania there has been a studied and constant effort by the legislature to evade the constitutional requirement of that state as to local and special legislation, and that the supreme court of that state has found it necessary to repress it with a strong hand. In so far as the courts which undertake to define the basis upon which the classification must rest hold that the legislature cannot, by a pretended classification, evade a constitutional re-

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striction, we fully concur with them. But if they hold that a classification which does not manifest a purpose to evade the constitution is not sufficient to support a statute as a general law merely because, in the court's opinion, the classification is unreasonable, we are not prepared to concur. To what class or classes of persons or things a statute should apply is, as a general rule, a legislative question. When the intent of the legislature is clear, the policy of the law is a matter which does not concern the courts. A legislature may reach the conclusion that the compensation of certain officers in certain counties of the state is excessive, while in others it is not more than enough. By the reduction of the fees of office throughout the state they may correct the evil in those in which the compensation is too great, but they would probably inflict a greater evil by making the compensation too small in all the others. In such a case it becomes necessary to make the law applicable to some, and not to all. There must be a classification. That classification may be either by population or by taxable values. One legislature might do, as the legislature of Texas did, make the classification by population; another, as was done by the legislature of Arizona, might make the taxable values of the respective counties the basis of the classification. Shall the courts inquire which is correct? Can they say that the work of an officer is not, in some degree, proportionate to the population of his county? On the other hand, can they say that, the more the property of a county, the more the crime? To ask these questions is to make it apparent that they are questions of policy, determinable by the political department of the government, and not questions the determination of which by the legislature is subject to review by the courts. Therefore, should we adopt the rule that, in order to make an act a general law, the classification adopted should be reasonable, we should still be constrained to hold the statute in question a general law, and valid, under our constitution; for we cannot say that the classification is unreasonable. It may be, as urged in the argument, that there are counties in the class to which the law is made applicable, the population of which very slightly exceeds that of other counties which are without it, and that it seems unreasonable to make a discrimination upon so slight a difference. To this the answer is, the line must be drawn somewhere, and that a similar difficulty would probably result if the classification were made upon any other basis. Exact equality in such matters, however desirable, is practically unattainable.

Nor do we think the act in question can be considered a local law, within the meaning of the term as used in the provision of the constitution under consideration. We have found no very satisfactory definition of a local law. But it seems to us that it is one the operation of which is confined to a fixed part of the territory of the state. It is plain from the reading of the statute in question that it was not contemplated that it should have effect in every county of the state. While, by the determination of an extrinsic fact, its operation in the main may be restricted to a minority of the counties in the state, still it applies generally to the whole state. Besides, the territory is not fixed, but is subject to change according to the increase or decrease of the population of the respective counties as may appear by the vote. And again it is held that a statute, although its enforcement be restricted to a fixed locality, is not local in its character if persons or things throughout the state be affected by it. Williams v. People, 24 N. Y. 405; Healey v. Dudley, 5 Lans. 115. But, holding as we do, that as to the question before us there is no material difference whether the classification be by population or by the taxable values of the counties, we have high authority that a statute of the character of that under consideration is neither a special nor a local law. An act of congress prohibited the legislatures of the territories of the United States from passing local or special laws in terms similar to those employed in section 56 of article 3 of our constitution. The territory of Arizona passed a statute which fixed the salaries of county officers at different sums, according to a classification of the counties based on the assessed value of property. In Harwood v. Wentworth, 162 U. S. 547, 16 Sup. Ct. 890, 40 L. Ed. 1069, the validity of the act was attacked upon the ground that it was a local or special act, and was, as such, prohibited by the act of congress. The act was held valid, and in disposing of the question the court say: "We are of the opinion that the territorial act is not a local or special law, within the meaning of the act of congress. It is true that the practical effect of the former is to establish higher salaries for the particular officers named, in some counties, than for the same class of officers in other counties. But that does not make it a local or special law. The act is general in its operation. It applies to all counties in the territory. It prescribes a rule for the stated compensation of certain public officers. No officer of the classes named is exempted from its operation; and there is such a relation between the salaries fixed for each class of counties, and the equalized assessed valuation of property in them, respectively, as to show that the act is not local and special in any just sense."

The fact that the statute prescribes that the county judge shall designate the number of deputies to which certain officers may be entitled is also urged as a ground for holding the act invalid. In discussing the question whether or not the act embraces more than one subject, we have already partially considered this question. But it is especially contended that this provision vitiates the law, because it attempts to devolve a function upon the county judge which, under the constitution, can be legally devolved upon the

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commissioners' court only. But we do not concur in the proposition that the determination of the number of deputies which may be employed by an officer is a county affair, within the meaning of that provision of the constitution which prescribes that the commissioners' court "shall exercise such powers and jurisdiction over all county business as is conferred by this constitution and the laws of this state, or as may be hereafter prescribed." Article 5, § 18. The officers to whom the provision applies, though called county officers, are in fact officers of the state (Fears v. Nacogdoches Co., 71 Tex. 337, 9 S. W. 265); and the number of deputies to be allowed to each cannot properly be deemed a county affair. Besides, under the provision quoted, the power of the commissioners' court extends only to such business as is intrusted to it by the constitution and to such as the legislature may confide to it. The provision does not inhibit the legislature from committing a matter of county business to some other agency.

But it is also contended that the act is invalid because, by the provision under consideration, the legislature attempts to confer upon a judicial officer a power which is not judicial. To this it is sufficient to answer that the county judge is not a judicial officer only. When holding sessions of his court, his powers are, as a rule, purely judicial; but, in addition to his duties as a judge, there are various executive and ministerial functions conferred upon him by the constitution and laws. Besides this, we have held that a court may, if it will, exercise an extrajudicial power conferred upon it by the legislature,—such as the removal of the disabilities of a minor. Brown v. Wheelock, 75 Tex. 385, 12 S. W. 111, 841. The statute provides that those officers whose compensation is limited to a maximum shall pay any surplus of fees received by them, over a sufficiency to pay their respective salaries and those of their deputies, into the county treasury; and since the state pays certain fees to the district clerks, county judges, and justices of the peace, it is contended that the effect of the law is to take from the revenues of the state, raised by taxation at large, moneys to pay fees of office, and to appropriate them to the use of certain counties. If this were shown to be true, however inequitable and out of harmony with the spirit of the constitution it may seem, we do not see that it violates any special provision of that instrument. He who claims that an act of the legislature infringes the fundamental law should point out the restriction which is claimed to have been violated. But, unless the fees paid by the state to any particular officer should be more than sufficient to pay his salary, we do not see how it could be said that the tax money was covered into the county treasury. If it were unlawful so to appropriate the state's revenues, it would be deemed that the surplus which was to be paid to the use of the counties was paid from the fees collected from private parties. It has not been shown in this proceeding that the fees of office paid by the state to any officer affected by the act will be more than sufficient to pay his salary, and we gravely doubt whether such fees will be sufficient to pay the compensation of any officer in any county in the state to which the provision applies. We conclude that the act in question in this case is valid, and therefore the writ of mandamus is denied.

HANRICK et al. v. GURLEY et al.[1]

(Supreme Court of Texas. Dec. 18, 1899.)

ALIENS—RIGHT TO INHERIT — LIMITATIONS — TRESPASS TO TRY TITLE—PARTITION—CONTRIBUTIONS FOR EXPENDITURES—ADVERSE POSSESSION—RES JUDICATA — DEED — TITLE CONVEYED—SUIT TO SET ASIDE—PURCHASER PENDENTE LITE—NOTICE — REVIEW — FINDING OF FACT—MORTGAGEE—NOTICE OF CONVEYANCES TO MORTGAGOR—AGENT'S AUTHORITY — SCOPE — VENDOR AND PURCHASER—INTEREST CREATED BY CONTRACT TO CONVEY — RESTRICTION BY SUBSEQUENT CONVEYANCES — PROBATE COURTS — JURISDICTION — ASSIGNMENTS OF ERROR — FAILURE TO STATE FACTS.

1. An alien may inherit land in Texas.

2. Heirs had conveyed their interest in land by deeds which, though absolute on their face, were executed without consideration, and on an express trust to enable a suit to recover their interest in the land to be brought in the grantee's name, and which left in them the equitable title. They began an action of trespass to try title against another heir in possession, claiming adversely to them without alleging the facts on which they relied to avoid their deeds, until they filed an amended petition asking also for partition, and an adjudication of the rights of all parties in the land. *Held* that, as the averment of these facts was unnecessary to recovery in the original action of trespass to try title, the failure to make it did not delay interruption of limitations in defendant's favor until the amended petition was filed.

3. A finding of actual possession by tenants of separate undescribed parcels of land, not stating the duration thereof, does not show such adverse possession of the whole of two grants in question as would bar an action therefor.

4. Failure of plaintiff in trespass to try title to an undivided interest in land, which she claimed in her own right, to also assert in the action her right to another interest, the legal title to which she held in trust, does not bar the owners of the equitable title under the trust from afterwards asserting the same against defendant, as plaintiff was not bound to set up the title held in trust.

5. The judgment in trespass to try title is res judicata only as to the land in issue, though plaintiff's claim thereto is based on her claim to a larger tract including it.

6. In a suit for partition, defendant could not complain because plaintiffs relinquished their rights to land conveyed by him, and not included in the land of which partition was sought.

7. If there is any evidence to sustain a finding of fact affirmed by the appellate court, it cannot be disturbed.

8. A suit to set aside a deed does not affect a purchaser from the grantee with notice as a purchaser pendente lite, unless the grantee has been duly served with the summons therein.

9. A mortgagee is affected with notice of the character of the conveyances of the mortgaged premises to the mortgagor, as shown by a suit to set them aside, where he took the mortgage pendente lite.

10. One employed "to take all proper and legal suits and proceedings to recover possession and obtain undisputed title" to premises claimed by his principals was empowered to employ attor-

[1] For opinion on motion for rehearing, see 55 S. W. 119.

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