itation. We find it unnecessary to decide that question in this case.

Garner claims that the trial judge found that Black had abandoned the place as a home, but the sixth conclusion of fact is positively to the contrary. In the conclusion of law the trial judge enumerated certain facts, and said: "These facts constitute, as to a bona fide purchaser, an abandonment of the homestead, despite the intention of plaintiffs to some time reoccupy it, and the circumstance that they had not ownership of another home." This was the conclusion of the court that, as a matter of law, the plaintiffs were estopped to claim the home, although not in fact abandoned.

We find no error in the judgment of the court of civil appeals, and it is therefore affirmed.

WEBB COUNTY v. BOARD OF SCHOOL TRUSTEES OF LAREDO.

(Supreme Court of Texas. Dec. 23, 1901.)

PUBLIC SCHOOL FUND—FAILURE TO APPORTION—LIABILITY OF COUNTY—COMPLAINT—UNCERTAIN AVERMENTS—CONSTRUCTION.

1. In an action by an independent school district to recover its proportion of public school funds from a county, the complaint averred that the "defendant and its officers" had neglected to make apportionment of such funds, and that defendant had expended all the available proceeds of such funds upon schools outside of such district. *Held* that, since the averments of the complaint left the court in doubt as to what county officers were meant to be charged with violation of the duty of apportionment, they would be construed against the pleader, and therefore be presumed to charge such violation to the county superintendent, upon whom Rev. St. art. 3934, imposes the duties for violation of which the action was brought.

2. Const. art. 7, § 1, devolves the duty of establishing and maintaining public free schools upon the legislature. Sections 2, 5, create the fund for such free schools, and section 5 provides that the income derived from such fund, and from the tax provided for in section 3, shall constitute the public school fund of the state. Section 6 provides that counties shall hold the lands granted to it for school fund purposes in trust for the public schools of such counties, and section 8 provides that the governor, comptroller, and secretary of state shall constitute the board of education of the state, and shall distribute the school funds to the counties thereof, and perform such other duties as may be prescribed by law. Rev. St. art. 3931 provides that the county judges, or county superintendent, if there be one, shall have, under direction of the state superintendent, the immediate supervision of all matters pertaining to public education in their respective counties. Article 3934 provides that such county superintendent shall apportion and make distribution of the school fund of his county among the several districts thereof, and article 3935 provides that the county treasurer shall be the treasurer of the school fund of his county. *Held* that, when the commissioners' court has paid the proceeds of the school fund received by it to the county treasurer, as provided in article 3935, it has done its whole duty, and the county cannot be held liable for the failure of the county superintendent to make the apportionment required by law, since such apportionment is a function assumed by the state, to be discharged by an officer acting for it.

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

Action by the board of school trustees of the city of Laredo, intervening in an action by the city of Laredo against the county of Webb. From a judgment of the court of civil appeals (64 S. W. 486) reversing a judgment for defendant, it brings error. Judgment of court of civil appeals reversed, and of district court affirmed.

E. A. Atlee, for plaintiff in error. J. F. Mullally, for defendants in error.

GAINES, C. J. This action was originally brought by the city of Laredo against the county of Webb to recover the proportion of the available school fund of the county due to the independent school district of the city of Laredo for a series of years before the filing of the suit. A demurrer to the petition was interposed for the want of proper parties, and the trustees of the independent school district intervened, setting up the same cause of action, and claiming a recovery thereon. The court sustained the demurrer, both to the petition of the plaintiff and to the intervening petition of the board of trustees, and, the parties declining to amend, judgment was entered for the defendant. The board of trustees alone appealed. The court of civil appeals reversed the judgment and remanded the cause.

The question is, did the petition in intervention set up a good cause of action against Webb county? The allegations of that petition show that Webb county was the owner in trust of certain lands for the benefit of its common schools, and also of a fund, the proceeds of the sale of such lands, and that from the year 1884 up to the time of bringing this suit there had been received by that county an annual income therefrom, which properly belonged to the available school fund of the county, and that no part of the same had been apportioned or paid to the independent school district of Laredo for the maintenance of the public schools under its charge. The share due to the independent school district is alleged to be $6,028.71, for which judgment was asked against the county. The wrong alleged in the petition is set forth in the following language: "That defendant and its officers, not regarding their duty in the premises, neglected throughout said period of time to make any apportionment of such funds whereby any part thereof was apportioned to said independent district, and neglected to pay over to the treasurer or any other officer of said independent district any part of said revenue so payable for its use, and that no part of said money has ever been used for the benefit of such independent district, and the same remains due and wholly unpaid. Interveners say that the defendant, throughout said period of time, expended all of such trust revenues so received by it in maintaining schools in said

county outside of said independent district, paying teachers' salaries, school house rent, buying school furniture, supplies, etc., and for incidental expenses connected with such schools, and was thereby enabled to maintain its said schools without levying or collecting any special tax therefor, and never levied or collected any such school tax, and that said money does not now exist in the treasury of defendant to the credit of its school fund; wherefore interveners say that defendant wrongfully converted said money due said independent district to its own use, and received the benefit thereof, and thereby became justly indebted and bound to pay to said independent district the said sums of money, amounting, in the aggregate, to $6,028.71." Interveners also alleged "that it would be idle and useless to sue the county superintendent of public instruction of defendant county, to compel him to apportion such revenues so collected during such time, according to the provisions of Rev. St. art. 3934, or to compel him to approve any warrant or draft on the county treasurer therefor, and it would also be idle and useless to sue the county treasurer of defendant county to compel him to pay any such draft or warrant, because the said funds have long since been converted by defendant, and spent by it for its own use and benefit, and do not now exist under the control of such county treasurer; wherefore, interveners say that said county superintendent and county treasurer are neither necessary nor proper parties to this proceeding." The chief difficulty in disposing of the case arises, in our opinion, from the vagueness of these allegations. In order to be called upon to make answer to the suit, it is clear that the defendant was entitled to be apprised by the petition what particular officer or officers were guilty of the wrongs for which it is sought to be held liable. Hence, if a special demurrer had been interposed to the averments first quoted, on the ground that they were vague and indefinite, it should have been sustained. But the demurrers, though they assign special reasons why they should be sustained, are, in effect, general. Such being the case, we must, under the rules, indulge every reasonable intendment in favor of the pleading. But, subject to this rule, averments of doubtful meaning must be construed against the pleader. The averment that "defendant and its officers * * * have neglected, throughout said period of time, to make any apportionment of such funds" leaves the court to conjecture what officers are meant. A failure to do a duty cannot be imputed from the allegations in a pleading, when such failure is not charged, either by express averment or by necessary implication; and, in this case especially, it is not to be inferred that it was the intention of the pleader to charge that the commissioners' court failed to make an apportionment, since the statute devolves that duty upon the county superintendent, and not upon that body. Rev. St. art. 3934. The duty being imposed by law upon the superintendent of public schools of the county, it is to be presumed from the averments that he is the officer for whose misconduct the county is sought to be held liable. We also think the subsequent allegation, "that the defendant, throughout said period of time, expended all of such trust revenues so received by it in maintaining schools in said county outside of said independent district," is to be construed in connection with the foregoing, and that, so construed, it is to be implied that it is the county superintendent who is charged with the misappropriation of the funds. This construction is borne out, in part at least, by the subsequent allegations, which assert reasons for not bringing suit against the superintendent and the county treasurer. Besides, unless the allegation "that the defendant" misapplied the funds be construed in connection with the next preceding averment, we doubt whether it can be given any effect whatever. The county, being a quasi corporation, can only act through some officer or body authorized by law to act for it. Hence to say that the county did or failed to do an act is to state a mere conclusion of law. The averments should "be of the facts which constitute the cause of action in the given case, and not merely statements of the evidence by which the cause of action, if stated, might be maintained, or of conclusions derived from the evidence." Gray v. Osborne, 24 Tex. 157, 76 Am. Dec. 99. In the case quoted from, the plaintiff alleged that the defendants were indebted to him by a certain promissory note, a copy of which was set out in the petition; but did not allege that the defendants executed the instrument, and it was held that a general demurrer should have been sustained to the petition. In Sneed v. Moodie, 24 Tex. 159, there was no assignment of error upon a similar ruling of the court, but the error was held fundamental, and the judgment was reversed.

Giving to the allegations of the petition of interveners their broadest intendment, we think the most that can be allowed to them, under proper rules of pleading, is that they seek to hold the defendant county liable for the failure of the officer charged with the apportionment of the special available school fund of the county to set apart to the independent school district of Laredo its proper share of such fund. So treating the averments, the question then is, is the county liable for the failure of the county superintendent to properly apportion the fund? and we think this question must be answered in the negative. Our organic law, in the article devoted to the subject of public education, contains this emphatic declaration: "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. This devolves the duty of establishing and maintaining public free schools upon the legislature, and shows that the function of such establishment and maintenance was to be performed by state agencies. Sections 2, 5, of the same article provide that certain funds and property, including one-half of the unappropriated public domain, shall constitute a permanent free school fund. Section 5 also declares, in effect, that the annual income derived from the permanent fund, together with the tax provided for in section 3, shall constitute the available school fund of the state, by which is meant the fund which may be appropriated annually to the maintenance of the schools. Section 6 of the article reads in part as follows: "All lands heretofore or hereafter granted to the several counties of this state for educational purposes are of right the property of said counties respectively to which they were granted, and title thereto is vested in said counties, and no adverse possession or limitation shall ever be available against the title of any county. Each county may sell or dispose of its lands in whole or in part, in manner to be provided by the commissioners' court of the county. * * * Said lands and the proceeds thereof, when sold, shall be held by said counties alone as a trust for the benefit of public schools therein; said proceeds to be invested in bonds of the United States, the state of Texas, or counties in said state, or in such other securities and under such restrictions as may be prescribed by law; and the counties shall be responsible for all investments; the interest thereon and other revenue, except the principal, shall be available fund." That the several funds so provided for the respective counties was to supplement the portion of the general available fund of the state which should be set apart to the respective counties, and to be appropriated solely to the support of the schools established by the state, is made clear by the declaration that "the lands and proceeds, when sold, shall be held by said counties alone as a trust for the benefit of public schools therein." The counties are mere trustees, and the public free schools are the beneficiaries. Section 8 of the article reads as follows: "The governor, comptroller and secretary of state shall constitute a board of education, who shall distribute said funds to the several counties, and perform such other duties concerning public schools as may be prescribed by law." The legislation for the establishment and maintenance of the public schools provided for the division of the counties into school districts and school communities. They also devolved the duties of superintendence of such schools upon the county judges of the respective counties, but also authorized the commissioners' court of such county to create the office of county superintendent for such county, and to provide for his election at each general election. It was also provided that the county superintendent, in case the office was created, should perform the duties with reference to the public schools which were prescribed for the county judge. Article 3931 of the Revised Statutes provides: "The county judge, or the county superintendent, if there be one, shall have, under the direction of the state superintendent the immediate supervision of all matters pertaining to public education in his county," etc. The duties of the county superintendent or county judge, as the case may be, with reference to the apportionment of the available school funds, are declared in the following article 3934 of the Revised Statutes. It reads as follows: "The county superintendent, upon the receipt of the certificate issued by the board of education for the state fund belonging to his county, shall apportion the same to the several school districts (not including the independent school districts of the county), making a pro rata distribution as per the scholastic census, and shall at the same time apportion the income arising from the county school funds to all the school districts, including the independent school districts of the county, making a pro rata distribution as per scholastic census." In article 3935 of the Revised Statutes it is provided that "the treasurers of the several counties shall be treasurers of the available public free school fund, and also of the permanent county school fund for their respective counties." Such are the laws by which, as we conceive, the question presented in this case must be determined.

We will first inquire as to the duty devolved upon the respective counties with reference to their special school funds by section 6, art. 7, of the constitution. As we have said, they hold these lands, and the principal of the proceeds of these sales, in trust, for the benefit of the state schools in the counties; and it may be that they are bound to make good any loss which may result from an investment of such proceeds. As to what they shall do with the available proceeds of such fund, the constitution does not prescribe. This was left for the determination of the legislature; and it is manifest, from article 3935, quoted above, that it was the intention of the lawmakers that the income of the fund should be paid to the county treasurer for the maintenance of the schools for the current year. In our opinion, when the commissioners' court, who are made by the organic law the executive board for administering the affairs of the county, have done this, they have discharged the liability of the county for that fund. It is expressly made the duty of the county superintendent, whenever there is one, to make

the apportionment among the school districts and communities of the county. In the performance of that duty, he is not subject to the control of the commissioners' court; on the contrary, his administration of "all matters pertaining to public education in his county" is expressly made subject to "the direction of the state superintendent." In the case of White v. City of San Antonio (Tex. Sup.) 60 S. W. 426, notwithstanding the hardship of the result, we held that the city was not liable for the conduct of its health officer in making a pesthouse of the plaintiff's hotel,—for the reason that the functions the officer was called upon to perform were in the interest of the public at large, and not for the special interest of the city, and that therefore he was acting for the state and not for the city. For a stronger reason we must hold that a county cannot be held responsible for the failure of the county superintendent to make a proper apportionment of the available school fund of the county. Though, in a sense, a county officer, and though called "county superintendent," he is, in fact, the officer and agent of the state,—the state having assumed the functions of maintaining public free schools for the education of the children throughout its domain, the counties being recognized with reference to that business merely as convenient subdivisions of territory, and some of their officers as proper agents for the administration of affairs relating to the public free schools. Such officers, with respect to such affairs, act for the state, and not for the county. This is the case, even as to officers who, in other respects, are county officers in fact as well as in name. White v. City of San Antonio, supra; Johnson v. Hanscom, 90 Tex. 321, 38 S. W. 761. The complaint here is that there was a failure to properly apportion the special available school fund of Webb county for certain years mentioned in the petition, whereby the independent school district of the city of Laredo received no part of such fund during such years. Since the apportionment was a function assumed by the state, to be discharged by an officer acting for it, we are of opinion that the county cannot be held liable for his action. We are of opinion, therefore, that the trial court properly sustained the demurrer to the intervening petition of the trustees of the school district. If the petition had charged that the commissioners' court had diverted this fund to strictly county purposes, and that the county, in its quasi corporate capacity, had the benefit of such diversion, we would have had a different question,—one to which the cases relied upon in support of the petition would probably have been applicable. But we do not understand that the petition makes such a case.

The judgment of the court of civil appeals is reversed, and that of the district court is affirmed.

DIMMIT COUNTY v. CAVENDER.[1]

(Court of Civil Appeals of Texas. Nov. 13, 1901.)

TAXATION—ASSESSOR—FEES—STATUTES—COMMISSIONERS' COURT—APPROVAL OF ROLL—JUDGMENT.

1. The law provides that the compensation of a county tax assessor shall be estimated on the value of the property assessed; and Rev. St. art. 5135, enacts that the county commissioners' court shall issue an order on the county treasurer for compensation of the assessor, to be paid out of the first money received from the collector on the roll of that year. *Held* that, where an assessment roll was approved by an order of the county commissioners' court, the tax collector was, by force of the statute, entitled to the compensation fixed by statute, in the manner prescribed by law, and he could not sue the county for the sum due him before anything had been collected on the roll.

2. The order of the court approving the roll was equivalent to an adjudication of the amount the assessor was entitled to, and could not be collaterally attacked, in a suit by him for the amount due.

Appeal from district court, Dimmit county; M. F. Lowe, Judge.

Suit by J. B. Cavender against Dimmit county. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

F. Vandervoort, for appellant. Ellis, Garner & Love, for appellee.

NEILL, J. This suit was brought by J. B. Cavender against the appellant, Dimmit county, to recover the sum of $585.55, alleged to be due him as tax assessor of appellant county for assessing taxes and making out the tax rolls of such assessment for the year 1900. From the judgment against it for the amount claimed, the county has appealed.

The facts show: That the appellee, as assessor of taxes of appellant county, in the year 1900 assessed the property situated in said county, and made assessment rolls for the same. That said tax rolls included a supplemental roll showing lands assessed from the years 1886 to 1899, inclusive, known as the "Great Northern Railroad Lands." The supplemental rolls were made at the instance and under the direction of the county commissioners' court of Dimmit county. That these assessment rolls were submitted to the county commissioners' court of Dimmit county, and by said court examined, and approved by an order of said court, and were made in conformity to the law regulating the assessment of taxes. The valuations of the property in Dimmit county, as shown by said rolls, are as follows: By the regular roll, $1,782,222; by the supplemental roll, $6,310,577. That the commissions allowed by statute on the total valuations of both rolls amounted to $1,100.38, of which sum $585.55 has been paid, leaving $514.83 remaining to

[1] Rehearing denied December 18, 1901.