cannot be maintained. We are unable to distinguish this case, in principle, from those of Pruitt v. Scrivner (Tex. Civ. App.) 77 S. W. 976, and Trevy v. Lowrie, 89 S. W. 981, 14 Tex. Ct. Rep. 75, in which the holdings of Courts of Civil Appeals were approved by this court upon applications for writs of error. In the examination of the present case we were at first inclined to question the soundness of those decisions, but mature consideration of the subject has led to the conclusion that they should be adhered to. When the holder of a lease makes a valid purchase of land included in it, his obligations as purchaser are susbtituted for those of lessee, and the land purchased is necessarily taken out of the operation of the lease. The lease therefore comes to an end in its effect upon such land without any cancellation, and the regulation in the statute of the cancellation of leases for nonpayment of rent has no application. But how is it when the attempted sale proves to be absolutely void because the Commissioner was without power to make it to the person who applied for it? Logically, it would not be correct to say that a void contract of sale and purchase has the legal effect of destroying, by its own force, an existing valid contract of leasing. Therefore, if the rights of the parties under the lease are to be held to have ceased, it must be because of something in their conduct beyond their futile attempt to substitute a different contract. If only the attitude of the person attempting to make such a purchase were to be regarded, there would perhaps be no injustice in holding him to the position in which, by his misconduct, he has put himself, and in giving to such misconduct the effect of an abandonment of his relation as lessee, and an assumption of that of purchaser, and in recognizing only such rights as he has as purchaser. But we must also consider the rights of the state. In such cases as this its officer had power only to sell to one who was an actual settler, and that officer consented to substitute the obligation of purchaser for that of lessee, in the belief and upon the representation that the person applying to purchase was such a settler, when in fact he was not. The state is therefore not bound by the action of the Commissioner in attempting to make the sale. That action is void, and leaves in existence the right of the state to insist upon its lease contract. Evidently it might still have asserted that right when plaintiff attempted to purchase, and was therefore not bound to give them up in order to allow a third person to buy the land during the term of the lease, whether it might have done so or not. After discovery of the nullity of the sale it had taken no action to avoid the lease or to offer the land for sale to others, and hence it cannot be held that the land was on the market when plaintiff applied to purchase. It was taken off the market for the term of the lease when it was executed, and the evidence adduced and offered by the plaintiff did not show any facts which would have the effect, of themselves, to restore it. Matters were still in a condition in which the state had the rights of a lessor, if it chose to exercise them, and hence its officer was not bound to sell to plaintiff. As the latter relied upon rejected applications, it was necessary that he show that when they were rejected he had an absolute right to purchase, and this he failed to do.

Affirmed.

GLASGOW v. TERRELL et al.

(Supreme Court of Texas. May 22, 1907.)

1. PUBLIC LANDS — SCHOOL LANDS — SALE — STATUTORY PROVISIONS.

Const. art. 1, declares that no men are entitled to exclusive separate public emoluments or privileges except in consideration of public services, and article 7, § 4, provides in relation to the disposition of school lands that the lands shall be sold under such regulations, at such times, and on such terms as may be prescribed by law. *Held*, that Laws 1905, p. 163, c. 103, giving the lessee or assignee of a lease of school lands the right to purchase during the existence of the lease, which right no one else may exercise, is not violative of Const. art. 1.

2. SAME — PURCHASE OF SCHOOL LANDS — RIGHTS OF ASSIGNEE OF LESSEE.

Laws 1905, p. 163, c. 103, § 5, gives a lessee of school lands the right to purchase during the existence of the lease, and gives the same right to an assignee of an entire lease. The next section provides that "the foregoing provisions shall apply only to leases heretofore made." In the same section a preference right to buy is given to certain assignees of parts of leases, but it is limited to those whose leases were evidenced by a written assignment executed prior to March 17, 1902. *Held*, that the preference right of purchase given by section 5 is not confined to assignees who were such when the statute took effect.

Mandamus by George W. Glasgow to compel J. J. Terrell, as Commissioner of the General Land Office, to award relator a section of school land which he had made application to purchase. Writ denied.

James & Geiser, for relator. R. V. Davidson, Atty. Gen., Wm. E. Hawkins, Asst. Atty. Gen., R. L. Ball, I. H. Burney, C. C. Clamp, Rogan & Simmons, and Denman, Franklin & McGown, for respondents.

GAINES, C. J. This suit is an original proceeding instituted by Glasgow, as relator, to compel respondent, Terrell, as Commissioner of the General Land Office, to award him a section of school land which he had made application to purchase. H. L. Kokernot was made a co-respondent on the ground that he was asserting a claim to the land adverse to that of the relator. Each respondent filed an answer and the relator thereafter filed a supplemental petition in reply thereto.

The undisputed facts as shown by the pleadings, and as given in chronological or-

der, are that on the 27th day of February, 1903, the Commissioner executed to one J. W. Kokernot a lease of the section of school land in controversy, the term to begin on the 2d day of January, 1902, and to continue for the period of three years; that on the 23d day of September, 1905, J. W. Kokernot assigned the entire lease to the respondent H. L. Kokernot; that on the same day, as such assignee, the latter made application to purchase the section; and that on the 18th day of November, next thereafter, the land was awarded to him by the Commissioner. On the 28th day of February, 1906, the relator filed his application to purchase the same section, and complied in all respects with the prerequisites of the statute necessary to become a purchaser of school lands. His application was rejected by the Commissioner for the sole reason that the section had already been sold to the respondent Kokernot.

The relator assails the action of the Commissioner in rejecting his application on the ground that the sale to Kokernot was not authorized by law. He asserts that the award to Kokernot was illegal for two reasons: (1) Because section 5 of the act for the sale and lease of the free school and asylum lands which was approved April 15, 1905, and which took effect on the same day (Laws 1905, p. 163, c. 103), under the terms of which the award was made, is in conflict with the Constitution in so far as it undertakes to give a preference right to purchase to the assignees of leases theretofore made; and (2) that, even if the provision be valid, it applied only to assignees, who were such before the act became a law.

The provision of our Constitution which is relied upon by relator as prohibiting the legislation in question is contained in the first article, denominated the "Bill of Rights," and is as follows: "All freemen when they form a social compact have equal rights, and no man or set of men is entitled to exclusive separate public emoluments or privileges, but in consideration of public services." The part of section 5 of the act above cited, which is claimed to be in conflict with the provision of the Constitution just quoted, reads as follows: "An original lessee or the assignee of an entire lease out of which no sale of one complement of land has been made under this act may purchase out of his lease at any time the quantity of land allowed to one purchaser under the provisions of this act." This undertakes to give the lessee or the assignee of an entire lease (which is absolute) the right to purchase during the existence of the lease, a right which no one else may exercise. That it can not be deemed an emolument in any proper sense of that word we think clear. That it is a privilege we think also clear. But is it a public privilege? We think not. It is a private right granted a lessee of the school lands of the state, or to his assignee, by reason of the relation created by the contract between such lessee and the state. It is a matter of a private contract, unless it should be held that all contracts made by and on behalf of the state are public. Every state has of necessity dual functions to perform—first, its political functions, which affect the public; second, its private functions, such as the acquisition of private property and the disposition of property already acquired. The latter are not in our opinion affected by the provision of the Constitution in question. It was so held in the case of Williams v. Cammack, 27 Miss. 209, 61 Am. Dec. 508, in which a provision of the Constitution of Mississippi couched in substantially the same language was in question. In speaking of that provision the court say: "But the section in question is not liable to the objection urged against it. The clause of the Constitution referred to declares, as a part of the organic law of this state, 'that all freemen are equal in rights' and, 'that no man or set of men are entitled to exclusive, separate public emoluments or privileges from the community but in consideration of public services.' The principle here announced is that of equality in political rights, and a denial of all title to individual privileges, honors, and distinctions from the community but for public services. It was directed against superiority of personal and political rights, distinctions of rank, birth, or station, and all claims of emoluments from the community, by any man or set of men, over any other citizen of the state. It declares that honors, emoluments, and privileges of a personal and political character are alike free and open to all the citizens of the state. But it has no reference to the private relations of the citizens, nor to the action of the Legislature in passing laws regulating the domestic policy and business affairs of the people, or any portion of them. Such matters are left, with but few limitations, to the discretion of the Legislature." We have found no other case in which the words "public emoluments and privileges" have been construed.

Our Constitution itself is not without directions as to the disposition of the school lands. Section 4 of article 7 prescribes that: "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; and the Legislature shall not have power to grant any relief to purchasers thereof." This clearly makes it the duty of the Legislature to provide by law for the sale of the school lands. It was doubtless contemplated that the provisions so made should be such as in the opinion of the lawmaking department would yield the largest sum of money to the fund for which the lands were set apart. In accordance with this view, we have held that the Legislature had the power to withhold from sale such of the lands as were not fairly marketable, and, as incidental thereto, to lease them until they should come upon the market. Consequently we have held that the

Legislature could authorize a lease of the lands, whenever in their opinion they were not salable at their reasonable value. For many years they have as a rule authorized sales to actual settlers only, and this has become the settled policy of the state. That this was a legitimate exercise of the legislative power we see no good reason to doubt. When and to whom the lands shall be sold is a question of sound policy, and belongs to the political department. So that as we think the Legislature in giving a preference right to lessees and their assignees to purchase the lands held by them under lease has not transcended its powers under the Constitution.

Nor do we think that the preference right of purchase, given by section 5 of the act in question, is confined to assignees who were such when the act took effect. Following the provision previously quoted, the section contains this express limitation, "The foregoing provisions shall apply only to leases heretofore made"; and it seems to us that, if it had been the purpose to limit the provision to assignees who had acquired leases before the passage of the law, that intention would have been clearly expressed in the same sentence, or in close connection therewith. In the same section a preference right to buy is given to certain assignees of parts of leases, but it is carefully limited to those whose leases were evidenced "by a written assignment executed prior to March 17, 1902." Also the same right is given to an actual settler who holds under an assignment of a part of a lease executed prior to January 1, 1905. These provisions evidence to our minds that the Legislature was careful to express in the section 5 the only limitations which it intended should apply to the preference right of purchase given by it.

We are of opinion the writ of mandamus should be refused, and it is accordingly so ordered.

KELLY v. SEARCY.

(Supreme Court of Texas. May 15, 1907.)

1. WRIT OF ERROR—JURISDICTION—AMOUNT IN CONTROVERSY.

Though the Supreme Court would have no jurisdiction of an action where the principal of the obligation was less than $1,000, even though the amount involved exceeded that amount when interest was added, still such court has jurisdiction of an action against the guardian of the beneficiaries in a policy of insurance to recover certain payments made by plaintiff, at insured's request, to keep up the policy under a contract for reimbursement, after the death of insured, for the amount so paid, together with interest thereon, where the money payable on the policy was paid by the insurer to the guardian, which amount, together with interest, exceeded $1,000, though the principal itself was less than that amount, since the action was not one to recover interest as such upon the money paid by plaintiff, but to recover the money collected by the guardian from the insurance company to which plaintiff was entitled, which was the amount paid out by him, together with the interest thereon.

2. INSURANCE—MUTUAL BENEFIT INSURANCE—DUES AND ASSESSMENTS—PAYMENT BY THIRD PERSONS—REIMBURSEMENT—BENEFICIARIES—DEATH BEFORE INSURED.

A person insured in a fraternal insurance society, being unable to pay his dues and assessments, allowed his benefit certificate to lapse, but subsequently an agreement was entered into between insured, the beneficiaries under the certificate of insurance, and plaintiff, by which plaintiff agreed to pay the money required to reinstate insured and to pay the dues and assessments required to keep the benefit in force during the life of insured, for which he was to be reimbursed out of the proceeds of the certificate at insured's death. Before the death of the insured the beneficiaries died, and no new designation was made. By the laws of the society the minor children of insured succeeded to the rights of the original beneficiaries. *Held* that, such children having received the benefit of the contract made with the original beneficiaries for the preservation of the certificate through the payment of the installments which fell due at different times, the funds which they thereby received should be subjected to plaintiff's claim for reimbursement.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 1976.]

Error to Court of Civil Appeals of First Supreme Judicial District.

Action by B. C. Kelly against Y. M. Searcy, guardian. From a judgment of the Court of Civil Appeals (98 S. W. 1080) reversing a judgment for plaintiff, plaintiff brings error. Judgment of Court of Civil Appeals reversed and judgment of district court affirmed.

J. Walter McDavid and Jno. R. Arnold, for plaintiff in error. Turner & Turner, for defendant in error.

BROWN, J. B. C. Kelly sued Searcy, as guardian of Thaddie and Preston Hart, minor children of T. L. Hart, deceased, to recover for moneys paid by the said Kelly in discharge of the assessments made upon a certificate of life insurance issued to the said T. L. Hart by the Knights of Honor. The certificate was for the sum of $2,000, and was made payable to his wife, M. Hart, and Theodore Hart, his brother, in equal amounts. The assessments were paid by Kelly under an agreement which was entered into between him and the beneficiaries and the said T. L. Hart, as stated in the findings of fact by the trial court hereinafter copied. The case was tried before the judge of the district court, who rendered judgment for Kelly in the sum of $1,361.78, which judgment the Court of Civil Appeals reversed and rendered judgment in favor of Searcy, as guardian. From the opinion of the Court of Civil Appeals we copy the following conclusions of fact filed by the district judge:

"On March 1, 1893, and for some time prior thereto, the Knights of Honor was a fraternal and benevolent association of persons, having an established benefit fund from which, on the evidence of the death of a