OPINIONS.

Commissioner of the General Land Office, can not re-classify lands which have heretofore been placed on the market, after application to purchase under such classification has been filed, so as to defeat any rights that applicant may have acquired by virtue of his application.

ATTORNEY-GENERAL'S OFFICE,
Austin, Texas, January 19, 1895.

Hon. A. J. Baker, Commissioner General Land Office, Austin, Texas.

Dear Sir: I beg to acknowledge the receipt of yours of yesterday, in which you say that on the 14th day of December, 1894, the Hon. W. L. McGaughey, the then Commissioner of the Land Office, having become satisfied that a large number of sections of land in Harris county, embracing lands referred to in papers thereto attached, ought to be reclassified and made to appear as agricultural lands and subject to sale in quantities of one section only; and after conference with the Governor and Attorney-General, as you are informed, he decided to reclassify them, which he did on the date last mentioned, to-wit, December 14, 1894, of which fact he immediately notified the county clerk of Harris county, and forwarded to him a list of the lands so reclassified. At the time of the reclassification, the application of Mr. Hall's clients was already made and presented; and that you are advised that the money awaited notice from your department to be applied by the Treasurer to the first payment on the said lands.

You then ask:

1. Whether the Land Commissioner can reclassify pasture or agricultural lands after application to purchase has come to his knowledge, and after moneys are placed with the Treasurer to be applied as a credit on the award, so as to change the character of the lands from pasture to agricultural lands, and thus defeat the application to buy pasture lands as provided in section 5 of chapter 99, acts of 1887?

2. Have Mr. Hall's clients any vested rights in the purchase of those lands, which the Commissioner shall regard as against the general policy of the State to encourage actual settlement for homes?

3. Would the failure of the Commissioner to observe sections 2 and 13 of the above recited act make invalid a sale otherwise regular?

I assume, then, in this case, from the statements made, that those lands have been classified and placed upon the market as pasture lands, and that the record of that fact was in the office of the county clerk of Harris county; in other words, that they were on the market for sale at the price fixed by law for such lands, and that before they were reclassified the applicants concluded to accept the proposition of the State, went thereon, and complied with the statute in every respect.

If such is the case, I think they have a vested right in the lands, and that no act of the Legislature or of the Land Commissioner could defeat it. If, however, the applicants knew that the Commissioner was

dissatisfied with the classification, and had indeed taken them off the market, and made their application before notice of his reclassification could be furnished the clerk of the county court of Harris county, they would acquire no title unless the lands were indeed pasture lands and incapable of being classified as agricultural lands.

The following authorities seem to settle the proposition first stated: White vs. Martin, 66 Texas, 340; Baker vs. Millman, 77 Texas, 47; Jumbo Cattle Co. vs. Bacon & Graves, 79 Texas, 12; Martinez vs. Johnson, 1 Ct. Civ. App., 12; section 9, acts of 1887, page 86.

If the law were in all other respects complied with, I think the failure of the Commissioner to observe sections 2 and 13 of the act would not invalidate the sale.

If I had any doubt as to whether this application was made for the purpose of preventing the reclassification, which the parties knew had been determined upon by the Commissioner, in order to enable them to purchase agricultural lands on terms prescribed for the sale of grazing lands, I would require them to bring their suit and make out their case in one of the cases, which could easily be made a test case.

I believe the law has been stated herein as favorably for the State as it exists. I beg to remain, yours very truly,

(Signed) M. M. CRANE, Attorney-General.

District Judge, Qualification of. Whether elected or appointed by Governor, must be a resident of the district to the bench of which he seeks to be appointed or elected.

ATTORNEY-GENERAL'S OFFICE,
Austin, Texas, January 25, 1895.

Hon. C. A. Culberson, Austin, Texas.

Dear Sir: I have the honor to acknowledge the receipt of yours of today, in which you say that section 7, article 5, of the Constitution, as originally adopted, and as amended, provides that each district judge shall have resided in his district for two years next preceding his election; and asking me whether or not, in my opinion, this constitutional provision applies to persons appointed by the Governor to fill vacancies; and second, whether it applies where a single county is geographically divided into two or more districts.

The language of the Constitution, as amended, is as follows:

"For each district there shall be elected, by the qualified voters thereof, at a general election, a judge, who shall be a citizen of the United States, and of this State, who shall have been a practicing lawyer of this State, or a judge of a court in this State, for four years next preceding his election, who shall have resided in the district in which he was elected for two years next preceding his election, who shall reside in his district during his term of office, and who shall hold his office for a period of four years, and shall receive for his services an annual salary of $2500 until otherwise changed by law."

There is nothing in the Constitution which seems to indicate that the operation of section 7 was to be limited to counties which were not geographically divided into districts.

It is evident that the language of the Constitution, above quoted, was inserted for the purpose of defining the qualifications of a district judge. The fact that he must reside in the district seems to me to have been as definitely stated as that he shall have been a practicing lawyer for four years next preceding his election.

While section 12, article IV, of the Constitution, gives the Governor authority to make the appointment, I think it was never contemplated that he should appoint anyone to the office who had not the qualifications, both as to residence and experience, as a judge or a practicing lawyer prescribed by section 7, article V, of the Constitution, above quoted.

I am not unmindful that the view here presented is not a literal construction of the Constitution, but it seems to me to conform to the spirit and intention so manifest from the portions cited, as well as other parts thereof. If I am wrong in the construction of the Constitution here presented, it must follow that there is no provision in that instrument which undertakes to prescribe the qualifications of the district judge who may be appointed, but only undertakes to prescribe the qualifications of those who are to be elected. The same may be said of the Supreme Court. I can not believe that it was the intention of the constitutional convention, nor of the Legislature in submitting the last judiciary article, to authorize the appointment of anyone to the office of district judge unless he possesses all of the qualifications described by the terms of the Constitution for one who is to be elected. I beg to remain, very truly yours,

(Signed) M. M. CRANE, Attorney-General.

State Convict. Is qualified juror when he has been granted a full pardon.

ATTORNEY-GENERAL'S OFFICE,
Austin, Texas, February 5, 1895.

C. A. McKnight, Esq., County Judge, Dickens, Texas.

Dear Sir: Yours of recent date, in which you ask, "Is a man convicted of a felony, served a part of the sentence, and afterward pardoned, a qualified juror?" has been received.

Among the grounds named as a challenge for cause in article 636 of the Revised Statutes, and which renders a person incapable and unfit to serve on a jury, is the following: "Section 3. That he has been convicted of theft or any felony." This section is a complete bar to jury service, unless the party's disabilities can be removed by the Governor.

Article 4, section 11, Constitution, provides as follows: "In all criminal cases he (the Governor) shall have power, after conviction, to grant pardons."

Article 981 of the Code of Criminal Procedure provides: "In all criminal cases the Governor shall have the power, after conviction, to grant pardons." The power to grant pardons conferred by the Constitution has been held to carry with it the power to make the pardon full, partial, or conditional. (19 Crim. App., 634; 24 Crim. App., 163.)

Another rule, which has been considered to be sound in reason and law, is that the Governor may annex to a pardon any condition, whether

precedent or subsequent, not forbidden by law, and it is binding upon the grantee. (8 Howard, U. S., 307.)

Keeping these ideas in view, it becomes necessary to consider the character of a pardon granted by the Governor to the party referred to in your inquiry. A full pardon absolves the person from all legal consequences of his crime, and amongst the disabilities removed is his incapacity to serve as a juror. Only a full pardon, however, has that effect. The effect of a full pardon is to make the offender a new man, to acquit him of all corporal penalties and forfeitures annexed to the offense for which he obtains his pardon, and gives him new credit and capacity; it is a remission of guilt, and it releases the offender and obliterates the offense in legal contemplation; it blots out the existence of guilt, so that in the eyes of the law the offender is as innocent as if he had never committed the offense, and absolves him from all of the legal consequences of his crime and of his conviction, direct and collateral, including the punishment, of whatever character, the law has provided.

The partial or conditional pardon remits only a portion of the punishment, or absolves from only a portion of the legal consequences of the crime, and does not become operative until the grantee has performed some specific act, or where it becomes void when some specified event transpires.

From these conclusions, it becomes evident that before a convict's competency as a juror is restored, he must have been absolved from all the consequences of his crime and its punishment by a full pardon. There must have been a remission of his guilt. He must, as it were, have been made a new man, with new capacity and credit, whose offense has been blotted out.

If this is the character of the pardon granted in the case you mention, it is the opinion of this department that the rights of citizenship have been restored to the party; and there being no other legal disqualification, he would be a competent juror.

If the pardon is only partial or conditional, he would not be a qualified juror. To show a restoration of competency, the pardon itself should be produced, or its non-production should be satisfactorily accounted for; in which case, it might be proven by the next best evidence, which would be a certified copy thereof, or an exemplification from the record of the Secretary of State's office. Respectfully,

(Signed) E. P. HILL, Office Assistant Attorney-General.

Public State Property. How disposed of when no longer needed by the State. Duty of Superintendent of Public Buildings in reference thereto.

ATTORNEY-GENERAL'S OFFICE,
Austin, Texas, February 16, 1895.

Hon. Charles T. Simpson, Superintendent, Etc., Austin, Texas.

Dear Sir: In reply to your request as to the mode and manner of disposing of certain property at the asylum, will say:

Article 3675, Revised Statutes, provides that the Commissioner of Insurance, etc., the State Treasurer and the Comptroller are constituted

a board to inspect and condemn for sale, exchange or destruction such useless or injured property belonging to or controlled by the State institutions or State boards as to the majority of said board may be deemed proper for such disposition.

Article 3675, section 2, requires said board to keep a record of the proceedings, which shall be kept and deposited in the office of the Comptroller of Public Accounts; and also provides, among other things, that all property acquired by exchange shall be delivered to the officer in charge of, and used for the benefit of, the department or institution from which the effects may have been taken that were used in making the exchange.

Article 3675a makes express provision for the sale of such property when it is condemned for sale, providing that the property shall be turned over to the Superintendent of Public Buildings and Grounds and sold at public auction.

No express provision as to the mode and manner of making such exchanges, or by whom to be made, is found. The law seems to contemplate that when property is condemned by the board for exchange, that the exchange should be made by the board or someone acting for and authorized by them.

You are, therefore, advised that after the property to which you have reference shall be condemned by the board for exchange, that the board can authorize you to act for them and in their name in making exchanges, they keeping a record of same as having been done by their authority, and such record deposited by them in the office of the Comptroller of Public Accounts. If the property is condemned for sale, such sale must be made as prescribed by article 3675a, Revised Statutes.

Very respectfully,

(Signed) H. P. BROWN, Office Assistant Attorney-General.

School Law. Contract made by school board with teachers can not be changed without consent of teachers. Law forbidding school trustees to make law that will create a deficiency not violated by a contract which from unforeseen circumstances not caused by the contracts themselves brings about a deficiency.

ATTORNEY-GENERAL'S OFFICE,
Austin, Texas, March 7, 1895.

Hon. J. M. Carlisle, Superintendent Public Instruction, Capitol.

Dear Sir: Your letter, enclosing a communication from Hon. J. M. Goggin to you of date February 14, and asking for an opinion of the department on the question submitted in said communication, has been received. The communication of Hon. J. M. Goggin submits the following facts, and then propounds the question of law hereinafter stated:

Eagle Pass is, and for several years past has been, incorporated, as provided by law, for school purposes only. It, therefore, belongs, for school purposes, to the general class of independent school districts, the same, I suppose, as Austin, San Antonio and most other cities and towns of this State.

According to the scholastic census, Eagle Pass has, and for several

years has had, scholastic population of more than 500; in fact, of nearly 1000. It runs its schools, and has run them for several years, not less than nine scholastic months. It also employs, and has employed for some time, a city superintendent of schools, and has a city board of teachers' examiners.

Prior to the beginning of the present scholastic year, September 1, 1894, the board of trustees of the independent school district of Eagle Pass made contracts with teachers, duly qualified, to teach in the public school of this city during the scholastic year 1894-95 for a term of nine months, to begin September 1, 1894. The facts going to make up the contracts were these:

The board met and made an estimate of the income that would be received for school purposes during the scholastic year for which the teachers and superintendent were to be employed. This estimate at the time seemed conservative and business-like. On the strength of this estimate it was decided that said teachers and superintendent could safely be employed for the respective terms and at the respective salaries subsequently specified in their contracts. Thereupon the board decided to run the schools for nine months, which decision was entered of record. At said meeting, or a subsequent one, the teachers now concerned were elected for the "ensuing term," and the secretary of the board was directed to notify them in writing of their election. This is also of record. The teachers were accordingly notified of their election for the "ensuing term," which they understood at the time to mean a term of nine months; and under that impression they accepted. At the beginning of school, on September 1, each entered upon the discharge of his or her duties, and has been teaching in the schools under said contract ever since.

The following are the estimates submitted by the treasurer of the board and accepted by the board immediately preceding the employment of the teachers and superintendent:

Resources.

State per capita	$3,353 40
Interest on notes for Hockley county school land sold	1,088 46
Interest on $1000, Maverick county school bond	65 28
Rental on school land in Maverick county leased	65 28
Rental on Eagle Pass school property	144 00
Tuition	360 00
Total	$5,244 97

Liabilities.

Deficit from last year	$66 05
Salaries of Superintendent, teachers and janitor	4,560 00
Insurance, and treasurer's commission	92 00
Rent, fuel and water	90 00
Sundries	200 00
Total	$5,008 05

Recapitulation.

Resources	$5,244 97
Liabilities	5,008 05
Balance to forward, August 31, 1895	$236 95

The foregoing estimates will be verified, except the item of the Hockley county school land sold, $1088.16. This interest is payable annually in advance on the 1st of May. The next payment, which the board depended on receiving, is due the first of next May. This the board will doubtless lose, as the purchasers of said lands are thought to be insolvent, and have given notice that they can not and will not meet the next interest payment.

On account of the unexpected loss of said $1088.45, the school board will have no funds with which to carry on the school for the full term of nine months according to the contract with the teachers; nor will there be sufficient funds with which to pay the annual salary of the superintendent.

QUESTION OF LAW.

In view of the facts stated, the question arises: Can the school board close the school as soon as the school funds are exhausted, and treat, after that date, the contracts with the teachers and superintendent as null and void? This question is raised under a clause in section 54 of the Digest of the School Laws of Texas, edition of 1893, which reads thus: "Provided, that trustees of districts, in making contracts with teachers, shall not create a deficiency debt against the district."

It is gathered from the foregoing statement that legal and valid contracts, by the parties authorized to make the contracts, were made in a legal manner with teachers duly qualified to contract. This conclusion seems to follow from the facts stated, taken in connection with copies of the agreement with the teachers subsequently sent to this office by you at the request of this department.

That a contract legally made by the board of trustees with a teacher is binding and can not be subsequently changed, modified, or reformed by said board without the consent of the teacher, is unquestionably the law. Caviel v. Coleman, 72 Texas, 551; Bell v. Kuykendall, 22 S. W., 112. The only ground upon which it is claimed that the school board can close the school as soon as the school funds on hand are exhausted, and that after that date the contracts with the teachers and superintendent are null and void, is based upon the following proviso in section 54 of the Digest of the School Laws of Texas, to-wit: "Provided, that trustees of districts, in making contracts with teachers, shall not create a deficiency debt against the district." Waiving the pertinent question as to whether or not this provision is applicable to the contracts under consideration, let us see if the contracts above referred to were made in violation of said statute, or were in conflict with its terms.

In discussing this question, I shall avail myself of and adopt the clear and forcible presentation of the following authorities made by Hon. J. M. Goggin, as I have examined the authorities and find that they fully support his deductions:

In Rudy v. School District, 30 Mo. App. Rep., 113, the question passed on seems to have been almost identical with the one under consideration. The Constitution of Missouri provided at that time as follows: "No county, city, town, township, school district or other political corporation, or subdivision of the State, shall be allowed to become indebted in any manner, or for any purpose, to any amount exceeding in any year the revenue and income provided for such year, without the assent of two-thirds of the voters thereof voting at an election held for that purpose." Rudy contracted with a board of school directors to teach a ten months' school at a specified salary per month. He entered upon the discharge of his duties and taught for eight months, at the expiration of which time the school was closed by the directors for want of funds. In an action upon his contract, the defense was that the salary could not be paid without a violation of the provision of the Constitution thus quoted. The defense was overruled by the court in the following language: "But the defense here set up does not show that the revenue provided for the school year in question was not sufficient to pay all teachers; it merely shows that there was a failure to pay into the school district treasury enough funds for that purpose. If this were a sound view, then the right of a teacher under this contract may be displaced by the negligence or fraud of a tax collector. In that case, if the collector fails to collect the school taxes, or negligently fails to turn them over, the directors could, even upon the brief notice of five days, close the school and cancel the contract with the teacher. We are of the opinion that such is not the law." The teacher was permitted to recover on his contract.

In Hannory School Township v. Moore, 80 Ind., 276, and Harrison School Township v. McGregor, 96 Ind., 185, it was held that the fact that a trustee had no funds with which to pay a teacher after he had taught a part of his term is no excuse for refusing to allow him to complete the full term specified in his contract, nor can that fact prevail as a defense against an action for his services.

In Mulford v. Zeigler, 1 Ind. App., 138, it was held that a contract with a teacher can not be annulled by abolishing the school he was to have taught.

Other authorities are cited by Mr. Goggin and can be found referred to in the American and English Encyclopedia of Law, Book .., page .., et seq., but the above are deemed decisive of the question. The following cases support the proposition that the happening of an unlooked-for and unexpected contingency not provided for by the contract with the teacher, and which to some extent disable the trustees from carrying out the contract, as, for instance, the burning of the school building, or the lack of school funds, will not authorize the closing of the schools and annul the contract with the teachers. The cases which apparently announce the contrary rule base their conclusions on the fact that the contract provided for the contingency and authorized the action of the trustees, or on the construction of the contract as justifying such action in the particular case. In the present case, at the time the contracts were made the assets and resources of the school district fully justified the making of such contracts. The provision of the statutes, that trustees of districts in making contracts with teachers shall not create a deficiency debt against the district, it seems to me means simply that

the deficiency debt must be caused by and be a result of such contracts. The deficiency debt must be created and caused by the act of the trustees in making the contract, and not by some subsequent failure to realize on a debt or collect money due to the district at the time the contracts were made. It was the failure to collect money due and belonging to the district, and not the making of the contracts with the teachers, that will cause the deficiency debt against the district.

Without further discussion of the question, suffice it to say that in the opinion of this department the school board has no legal right to close the schools as soon as the school funds on hand are exhausted and treat, after that date, the contracts with the teachers and superintendent as null and void. Very respectfully,

H. P. BROWN, Office Assistant Attorney-General.

Commissioners Court. No authority to issue bonds to maintain or build a bridge within corporate limits of a city whose charter gives it exclusive control of public streets.

ATTORNEY - GENERAL'S OFFICE,
Austin, Texas, March 12, 1895.

Mr. M. J. Montgomery, County Commissioner, McGregor, Texas.

Dear Sir: In reply to yours of March 8, you are respectfully advised that I have carefully investigated the question of the right of the county to co-operate with the city of Waco in the construction of a bridge across the Brazos river, wholly within the city limits, and have reached the conclusion that the county has no authority to appropriate money or to issue bonds for such purpose. Waco, under the provisions of its charter, has exclusive control and management over its public highways and streets, with full power to repair and establish bridges, etc. A bridge is an essential part of a road, and the "erection of a bridge is but the laying out of a highway." Commissioners' courts can only assume charge of the streets in a city under certain conditions, as authorized in article 4359a, Revised Civil Statutes, and any attempt to assume jurisdiction under other conditions would have no legal effect.

The county, it is true, possesses a general jurisdiction, co-extensive with the limits of the county, to lay out and establish public roads and highways, conferred by a general law which is applicable to every county in the State. The act incorporating the city of Waco gives it authority to have exclusive control over the streets and highways, co-extensive in its operation with the limits of the town. To permit both county and city to exercise jurisdiction over streets in an incorporated city would bring about a conflict of authority never contemplated, and under the decisions of our courts the giving the city unlimited control over the streets within its limits takes away from the county its jurisdiction over roads and highways therein. The authority of one must cease and yield to the other; and the courts hold that the authority of the county must yield to that of the town. The city has full and ample power to construct the bridge, and when completed it alone can repair same, and exercise a police control and supervision over same, and become liable for failure to keep same safe, upon the theory that it has

exclusive control over it and power to maintain it in safe condition for travel.

Under the law, counties have authority to issue bonds, but the law permits the creation of debts for specified purposes only; and under numerous decisions of our courts any attempt to create a debt for a purpose not specified would be without validity.

In the opinion of this department, no authority exists permitting the county to co-operate with the city of Waco in the construction of a bridge across the Brazos river within the corporate limits of said city, and any appropriation of money or issuance of bonds by the county for that purpose would be without authority and void. Very respectfully,

E. P. HILL, Office Assistant Attorney-General.

Circus. What is meaning of, in reference to collection of occupation tax.

ATTORNEY-GENERAL'S OFFICE,
Austin, Texas, March 12, 1895.

Hon. R. W. Finley, Comptroller, Austin, Texas.

Dear Sir: Your letter of March 9, directed to the Attorney-General, has been received. You state that the act of 1889, page 26, provides that from every circus, where equestrian or acrobatic feats or performances are exhibited for which pay for admission is demanded or received for such performance, there shall be collected a tax of $50; and for every exhibition where acrobatic feats are performed for profit, not connected with the circus, $10 for each performance; and you ask what constitutes a circus within the meaning of this act, and if an exhibition of acrobatic feats alone can be termed a circus, or if the equestrian performance is necessary to constitute a circus within the meaning of this act.

You are respectfully advised that it is the opinion of this department that the statute referred to considers the meaning of the word "circus" in its generally accepted sense, as used throughout the State, contradistinguished from theatrical, acrobatic, sleight-of-hand, minstrel and pugilistic performances. The word circus in the first and limited sense means a ring, but to take this meaning and couple it with the idea of a show gives us the common understanding of the word as a show for the performance of equestrian and other feats, to which may be attached shows and feats of other kinds as are customarily exhibited. I take it that as the exhibition designated *circus* takes its name from the ring, and as the ring is constructed for the sole purpose of giving an artificial field for the horses and riders, that an equestrian performance is a natural but not necessary feature to constitute a show a circus in the meaning of the statute. Acrobatic feats alone, not accompanied by equestrian performances, would not be a circus.

I am also of the opinion that a tax should be collected from every department of a show where additional admission fees are charged for different exhibits; as where what are commonly known as *side shows* are attached to the main, but charge fees separate and apart from the general admission fee. But I do not mean that these should be charged *circus* taxes.

To pursue the matter further, it is not my intention to construe the statute so that a circus tax would not be the proper tax to collect from exhibitions that had all the elements of a circus, as above described, save and except the actual equestrian performances; but that such a tax should be levied when the majority of the elements are present constituting a *circus*, as above described; and this might be determined by taking into consideration the general nature of the exhibit; and if a ring was one of the constituent parts, in which trained animals of any class were shown for profit; or if no ring were present, and yet all the other elements of a circus were there, it would be proper to place such an exhibit in the category with a taxable circus, and tax it as such.

Very respectfully,

(Signed) R. R. LOCKETT, Office Assistant Attorney-General.

Commissioner of the General Land Office may declare lands sold under the Acts of 1883 and 1885 forfeited for non-payment of interest, without suit.

ATTORNEY-GENERAL'S OFFICE,
Austin, Texas, March 16, 1895.

Hon. Andrew J. Baker, Commissioner of the General Land Office, Austin, Texas.

Dear Sir: I have before me yours of the 23d ultimo, in which you ask for a construction of the acts of the Legislature relating to the sales of lands, approved April 11, 1883, and April 1, 1887, respectively; and how far a construction of the same is affected by the Act of 1885 on the same subject; the questions propounded after the statement being in substance as follows: "Were the forfeitures of the Land Commissioner after the Act of 1887 for non-payment of interest on sales made under the Act of 1883, prior to the Act of 1885, legal forfeitures? To be more definite, did the Act of 1887 have the effect of repealing the act of 1885, and at the same time revive or clothe the Commissioner with the power to forfeit such sales made under the act of 1883, prior to the act of 1885, for the non-payment of interest? and are such forfeitures made since the act of 1887 legal forfeitures?"

Replying thereto, I beg to say, that since the receipt of your letter I have received from the attorneys of interested parties arguments and opinions which, if adopted, either in substance or effect, would compel me to answer your questions in the negative. I have not been averse to hearing from those interested in the subject, because I have been anxious to determine the question correctly.

The main points contended for by these gentlemen are as follows:

First. That the act of 1887 was intended to have a prospective effect only; in other words, that it was the intention of the Legislature to have its provisions relate to forfeiture of lands, the sale of which were made subsequent to the passage of the act, and not to sales made prior thereto.

Second. That if any other construction than that for which they contend be placed upon the act of 1887, it would be giving the same a retrospective effect, rather than a prospective one, and, therefore, would be obnoxious to the criticsm frequently made that no act shall be given

retrospective effect unless the intention of the Legislature to do so is clearly manifest.

Third. That if the construction for which they contend is not given it, the act itself is unconstitutional, in that it impairs the obligations of contracts previously made.

Fourth. Because the privilege of the State to have the Commissioner of the General Land Office to declare lands forfeited which had been sold under the act of 1883 was waived by the State by the act of 1885, and, therefore, that the rights so waived could not be made available by the State unless the consent of the other party to the contract could be secured. To this may be added the contention of some others, to the effect that the question is no longer an open one, in that the Supreme Court decided it in the negative in the case of Berrendo Stock Co. v. McCarty, 85 Texas, 412. This last point, however, is not well taken, because the Supreme Court itself, in the case of Anderson v. Bank, 86 Texas, 619, expressly states that the case of Berrendo Stock Co. v. McCarty is not conclusive of the question involved in that case, for the reason that the act of 1887 had not been called to its attention at the time the opinion reported in 85 Texas was rendered.

Taking up the propositions made by those who insist that a negative answer should be given, the question is, was the act of 1887 intended to relate to sales made subsequent to its passage, or did it affect those made prior thereto? It is very clear that the act is in one sense prospective, in that it does not seek to affect *forfeitures* made prior to its enactment, but it does purport to affect those, and those only, made after its passage. But the contention is that it can not authorize the forfeiture of land *sold* before its passage.

An examination of the act itself will disclose that it does not purport to be an amendment of any previous existing law. It was to be, and was, the result of a comprehensive measure covering the whole subject to which it related. It provided for the classification and sale of lands, fixed the price therefor, provided the remedy for the State in the event the purchasers failed to pay the obligations which they assumed. Section 26 thereof expressly repealed all laws and parts of laws in conflict therewith. Section 8 made specific provision for those purchasing under former laws, and clearly indicated an intent on the part of the Legislature to make the act applicable to all purchasers.

The question arises, what portions of the act of 1885 were in conflict with the provisions of this act? Certainly, that section of the act of 1885 which provided that no forfeiture could be had without judicial ascertainment of the facts, was repealed; because section 11 of the act of 1887 specifically stated that the Commissioner of the General Land Office is authorized to endorse on the obligation of a purchaser "land forfeited" in the event he failed to make the payments on the days designated, and that thereupon said lands shall be forfeited to the State without the necessity of re-entry or judicial ascertainment of the facts. The provision of the act of 1885 on the same subject, being in conflict with this, was expressly repealed by section 26 above referred to. It must follow, therefore, that unless the act of 1887 authorizes the Land Commissioner to forfeit lands sold under the act of 1883, prior to the passage of the act of 1885, that there is no law which authorizes the forfeiture of said lands at all, the act of 1885 being repealed. The

State, then, is practically without a remedy as to all sales made under the act of 1883. I do not think it ought to be seriously insisted that the Legislature intended any such thing. It is said, however, that section 25 of the act of 1887 exempts from operation all sales made under previous acts. The portion of section 25 upon which that contention is based is in the following language:

"Nothing in this act shall be construed to impair, interfere with, or in any manner affect, any lease, or sale or rights growing out of the same made under former laws, of the lands herein referred to; provided, that any person or persons who have heretofore leased lands from this State at prices fixed by the land board, and whose leases are not yet expired, shall have their rental for the remainder of the unexpired term reduced to the prices charged under this bill for the lease of similar lands."

Section 25 is simply declaratory of what the law would be had it been omitted from the act. It was beyond the power of the Legislature to impair, interfere with, or in any manner affect any lease or sale or right growing out of the same, made before the passage of this act. Section 25, therefore, becomes immaterial.

It is clear that the Legislature, in conferring on the Land Commissioner the power to forfeit lands by the act of 1887, did not interfere with, impair or in any manner affect any lease or sale, or rights growing out of the same, previously made. It simply gave the State a new remedy—one, indeed, that was in existence at the date when the sales were made, but which was taken away by the act of 1885, and was restored by the act of 1887. It has rarely ever been decided, though it be admitted it has sometimes been declared, that laws affecting a remedy must apply only to contracts made after its passage. But the great weight of authority is, that laws affecting remedies only apply to all contracts that are sought to be enforced, whether they are made before the passing of the law or afterward. Mr. Cooley, in his great work on Constitutional Limitations, pages 346-47, says: "Whatever belongs simply to the remedy may be altered according to the will of the State, provided the alteration does not impair the obligation of the contract; and it does not impair, provided it leaves the parties a substantial remedy according to the course of justice as it existed at the time the contract was made." The act of 1887 leaves the purchasers under the act of 1883 " a substantial remedy according to the course of justice *as it existed at the date the contract was made.*" The provisions of the acts of 1883 and 1887 on the point raised are substantially the same.

In Iowa, it has been decided that a statute giving municipalites the right to sell land for taxes has been held to apply to delinquencies on the ground that it was remedial. (Haskell v. Burlington, 30 Iowa, 232.) A statute regulating procedure acts retrospectively; that is to say, as to contracts made before its passage, and as to suits pending when it was passed. (Kimbray v. Draper, Law R. 3 Q. B., 160; Hoa v. La Franc, 18 La. Ann., 393; Donner v. Palm, 23 Cali., 40; Bensby v. Ellis, 39 Cali., 309.)

It would seem, therefore, from the fact that the Legislature, by the act of 1887, repealed the act of 1885, and that the bill itself was such a comprehensive one, embracing the entire subject to which it related, leaving nothing to be done under previous acts, and expressly repealing

all laws and parts of laws in conflict therewith, that the Legislature must have intended to clothe the Land Commissioner with power to forfeit all lands sold under the act of 1883 when the obligations given therefor were not paid within the time prescribed by the terms of the act of 1887.

The authorities above quoted also clearly indicate that there is nothing in the contention of interested parties, to the effect that the construction of the act of 1887 herein indicated would make it unconstitutional, in that it was retroactive and impaired the obligations of contracts previously made. It can not be said to impair the obligation of contracts in any sense. The law at the time the contracts were made is the same as it was made by the act of 1887, so far as this question is concerned, but, even if it were different, the conclusion would be unchanged.

Chief Justice Marshall, in 12 Wheaton, settled that question, and his decision has never been departed from within my knowledge. On page 215 of that volume he uses the following language: "That an act of the Legislature does not enter into a contract and become one of the conditions stipulated by the parties, nor does it act externally on the agreement unless it have full force of law. That contracts derive their obligations from the acts of the parties, not from the grant of the government. * * * That the obligation of a contract is not identified with the means which the government may furnish to enforce it, and that a prohibition to pass any law impairing, does not imply a prohibition *varying* the remedy."

The Supreme Court of the United States, in the case of Tennessee v. Sneed, 96 U. S., uses the following language: "Our own reports and those of the States are full of cases holding that the Legislature may modify or alter the remedy to enforce contracts, without impairing their obligations. The case of Sturgess v. Crowinshead, 4 Wheat., 132, is among the first of the class, where the question arose upon the abolition of the right of imprisonment of a debtor as a means of compelling payment of his debt. It was held that the repeal of that law authorizing the imprisonment of a debtor did not impair the obligation of a contract, though it took away one of the remedies." To the same effect was the decision in Mason v. Hale, 12 Wheat., 370.

The court in the same case proceeds as follows: "The rule seems to be that in modes of proceeding and in forms of enforcing a contract, the Legislature has control, and may enlarge, limit or alter them, provided that it does not deny a remedy or so embarrass it with restrictions and conditions as seriously to impair the value of the right." In support of the proposition last made, the Supreme Court cites the cases of Bronson v. Kinzie, 1 How., 311; Von Huffman v. City of Quincy, 4 Wall., 535; Price v. Schuyler et al., 9 Ill., 221; Evans v. Montgomery, 4 Watts & S. (Penn.), 218; Read v. Frankfort Bank, 23 Me., 318.

So far as the doctrine of waiver is concerned, it has no application to this case; the State has waived no right. Through its legislative department in 1885 it changed a remedy. By the act of 1887 the remedy was again changed so as to be substantially the same as given by the act of 1883. The doctrine of waiving a right can not be said to apply when the waiver relates to the remedy only. The case of Davis v. Gray, 16 Wall., therefore, has no application. In that case, it must be noted,

too, that two of the ablest judges on the bench dissented from the conclusion therein stated.

It must follow, therefore, if I am correct in the foregoing, that where sales were made under the act of 1883, at a time when the Commissioner of the General Land Office had the authority to forfeit them without judicial ascertainment of the facts, that the Commissioner of the General Land Office, after the passage of the act of 1887, had the authority to forfeit lands sold under the act of 1883, prior to the act of 1885, and that the effect of the repeal of the act of 1885 was to clothe the Land Commissioner with power to forfeit such sales under the act of 1883 for non-payment of interest, and if such forfeitures were in all other respects regular they are legal. Very respectfully,

M. M. CRANE, Attorney-General.

Occupation Tax. Merchant: Class of to be determined by estimate of goods to be purchased during year for which tax is levied.

ATTORNEY-GENERAL'S OFFICE,
Austin, Texas, March 25, 1895.

Hon. R. W. Finley, Comptroller, Etc., Capitol.

Dear Sir: Your letter of this day, directed to the Attorney-General, has been received. You state that "under the act of March 13, 1895, to provide a method of ascertaining the class of a merchant so as to determine the amount of his occupation tax, it is provided that he shall file with the tax collector an affidavit of the amount of his annual purchases if previously engaged in business, and also the estimated amount of his annual purchases for the ensuing year. Your opinion is respectfully asked on which amount the tax should be based, the amount for the past year or the amount for the ensuing year as estimated."

In answer thereto, you are advised that the statute fixing the amount of occupation taxes to be paid by merchants as defined in said article of said statute, levies such tax according to the business done by said merchant each year. An occupation tax is a tax levied on a profitable pursuit, and the intent of the Legislature was in this case to levy an "annual tax" as expressed, and it is evident that such an intent must have reference to the year at hand, and it is, therefore, to be construed that as the tax is levied for each year such tax should be levied for that year covering the grade of estimated purchases for the year, and not on the purchases for a previous year.

The conclusion is strengthened by the fact that there are many chances of reduction or increase of business from year to year, and from the further fact that the first occupation tax paid by said merchant covered the first year's purchases and so on up to the present, when the new law takes effect. I take it that it is the intention of the statute to base the amount of taxes on the estimate of purchases for the ensuing year. Very respectfully,

R. R. LOCKETT, Office Assistant Attorney-General.

Incorporation for School Purposes. What area must be embraced.

ATTORNEY-GENERAL'S OFFICE,
Austin, Texas, May 14, 1895.

Hon. J. M. Carlisle, Superintendent, Etc., Capitol.

Dear Sir: Your letter of May 2, 1895, enclosing a letter from Hon. W. B. Thompson, county judge of Bosque county, has been received. In your letter you state that in a letter to Judge Thompson you have held that a district may be incorporated for school purposes only and become an independent school district, provided there is a town in the district, and provided further that the population of the whole district to be incorporated shall not be less than 200. You further state that you are in some doubt as to whether this 200 population should be in the town proper, but as such town without incorporation has no territorial limit you have been led to hold that the statute, in fixing the population, refers to the population of the whole district. You then ask an opinion of the Attorney-General as to this statute.

In reply will say that in my opinion the 200 population should be in the town proper; or in other words, that the statute, in fixing the population, refers to the population of the town and not to the population of the whole district. A short review of the statutes and decisions of our higher courts thereon will, I think, show the correctness of this conclusion.

The act approved April 6, 1881, amending chapter 11, title 17, of the Revised Civil Statutes, by the addition of 541a, permitting towns and villages authorized to incorporate under that chapter, or having 200 inhabitants or over not desiring to incorporate for municipal purposes to be incorporated for free school purposes only. Nothing was said in this act as to the area or territory that might be included in such corporation. In the case of the State ex rel. v. Eidson, 76 Texas, 302, our Supreme Court held that an attempted act of incorporation, whereby many square miles of rural territory were embraced therein, was void. The question arose in that case under the above act of 1881, and was an attempted incorporation for school purposes only. In the course of the opinion the court said: "It is only towns and villages authorized to incorporate under that chapter (chapter 11) which are authorized to incorporate for free school purposes only. Sayles' Civil Statutes, article 541a. The Revised Statutes authorize towns to establish a corporation by an election, *provided they contain more than* 200 *and less than* 10,000 *inhabitants.* No definition of the word 'town' is given, and it follows that we must take the word in its ordinary signification—*a collection of inhabited houses.* The term carries with it the idea of a considerable aggregation of people living in close proximity. A town population is distinguished from a rural population, which is understood to signify a people scattered over the country and engaged in agricultural pursuits, or some similar avocation, requiring a considerable area of territory for its support. A section of country so inhabited can not be called a town, nor treated as a part of a town, without doing violence to the meaning ordinarily attached to the word."

The principle laid down in the above case was followed in the subsequent cases of School Incorporation vs. School District, 81 Texas,

148, and Ewing vs. State, 81 Texas, 172, which cases arose while the above act of 1881 was in force. In the latter case the court, by Associate Justice Gaines, used the following language: "It follows that the manner of incorporating towns and villages for school purposes and for incorporating cities, towns and villages for municipal purposes is precisely the same; and that if a town is not authorized to embrace within the limits of its incorporation for school purposes territory beyond the limits of the actual town, a city when it seeks to create a corporation for municipal purposes must confine itself to its actual boundaries. This is the literal meaning of the statutes upon this subject. Who are empowered to create the corporation? The inhabitants of cities, towns and villages. What are they empowered to incorporate? The cities, towns and villages themselves, and not also such portions of the adjacent territory as their inhabitants may be pleased to embrace within the limits of the corporation."

Such was the law up to the passage of the act approved April 10, 1891. It will be seen that at and before the time of the enactment of this latter act, the words "town" and "village" had a clearly defined meaning and construction placed thereon by the Supreme Court. The act of 1891 was an amendment to the act of 1881, and used the identical language of said act of 1881, but added by amendment the following proviso: "Provided, that the territory incorporated shall not exceed four miles square," etc.

In the case of the State ex rel. Manning vs. Alleque et al., 22 S. W. Rep., 289, the Court of Civil Appeals, by Fisher, C. J., passing on the act of 1891, held that the act of 1891 permits *towns and villages to incorporate for school purposes, and to include* such of the adjacent territory as did not exceed four miles square. The act of 1893, p. 175, which is the present law, amended the act of 1891, and while authorizing the same character of towns and villages to incorporate for school purposes, only permitted them to include such of the adjacent territory as did not exceed an area of sixteen square miles. Construing this last act in the light of the above decisions of the Court of Civil Appeals, it seems clear that the act intended to give the power to incorporate only to such towns and villages as are mentioned in the act, but permitted them to include such of the adjacent territory as did not exceed an area of sixteen square miles. Who under the act of 1893 are empowered to create the corporation? The inhabitants of towns and villages authorized to incorporate under chapter 11, title 17, Revised Statutes, or having 200 inhabitants or over. What are they empowered to incorporate? Such towns and villages themselves, and adjacent territory, so that the whole corporation shall not exceed an area of sixteen square miles.

It is my opinion, therefore, that the power of creating the corporation mentioned in the act of 1893 by the act of 1893 upon the inhabitants of such towns and villages as are therein described, and that the 200 population referred to in the act means the population of the town proper. Very truly yours,

H. P. BROWN, Office Assistant Attorney-General.

Notary Public. May qualify before any officer authorized to administer oaths; and may qualify within a reasonable time after notice to appear and do so.

ATTORNEY-GENERAL'S OFFICE,
Austin, Texas, June 10, 1895.

Hon. Allison Mayfield, Secretary of State, Capitol.

Dear Sir: Your letter of June 7, directed to the Attorney-General, has been received. You ask of this office the following questions:

First. Must a notary public desiring to qualify do so before the county clerk of his county? Can the notary take his oath of office before any officer duly authorized to administer oaths other than the county clerk?

Second. Can the notary public qualify after ten days from the time he is notified by the county clerk, unless absent from the county or sick, and if so what length of time thereafter may the notary appear and qualify?

The statute, article 3376a, Sayles, directs that "When a notary is appointed the Secretary of State shall forward the commission to the clerk of the county court of the county where the party resides, and the said clerk shall immediately notify said party to appear before him within ten days, pay for his commission and qualify according to law." That he must qualify before the clerk is evident, but it is not believed that such qualification means that he can not take the oath of office before any other person authorized to administer oaths. The authorities go even further, and say that where the statutes themselves prescribe who shall administer an oath of office to a certain officer, that such a statute is merely directory, and that the oath may be administered by any officer authorized to do so by a general statute. Section 178, p. 189, Throop on Public Officers, citing Ex Parte Heath, 3 Hill (N. Y.), 42; Canniff vs. Mayor, etc., 4 E. D. Smith (N. Y.), 430; State vs. Stanley, 66 N. C., 59.

It would appear that the qualification prescribed by the statute contemplates that the person appointed notary shall appear before the clerk and either be sworn in by him or present a duly certified oath of office taken before some one else authorized to administer oaths, and present to the clerk a good and sufficient bond under the statutes.

It is nowhere said that the appointee shall be sworn in by the clerk, but that he shall qualify before him. Article 3363 would indicate, regardless of the construction placed upon article 3376a, that another officer than the clerk could administer the oath. After prescribing that he shall give bond, etc., article 3363 says, "and shall also take and subscribe the oath of office prescribed by the Constitution, which shall be endorsed on said bond *with the certificate of the officer administering the same.*" If the statute had intended that the clerk alone should administer the oath, is it not probable that it would have said "with the certificate of the *clerk* administering the same?" And if it had said this, in what respect would it have changed the effect of the statutes when the authorities say that such a provision is directory merely?

In answer to your second query, you are respectfully advised that it is the opinion of this department that article 3376a fixes the time of

the qualification of a notary at ten days from the receipt of such notice from the clerk, no matter at what time the notice is given, and if the person is sick or absent from the county ten days' extension is given by the same article after such return to the county or restoration to health.

Our own reports, as well as many other authorities, hold that this statute is merely directory, and that an officer can qualify at any reasonable time thereafter, when the delay is not occasioned by any fault of his own. Throop on Public Officers, sec. 173, p. 184; Flatau vs. State, 56 Texas, 93.

It will be left to the courts to say what qualifications or amplifications shall attach to this view, but it is believed that it affords ample instruction under which to proceed, as the statutes fix the time at which the term of office shall begin, which is the first day of June of the year of the appointment. Very respectfully,

(Signed) R. R. LOCKETT, Office Assistant Attorney-General.

State Board of Education has no power to exchange bonds in which the school fund has been invested for other bonds. The power to purchase given to a public officer does not imply the power to exchange.

ATTORNEY-GENERAL'S OFFICE,
Austin, Texas, June 19, 1895.

Hon. J. M. Carlisle, Superintendent Public Instruction, Capitol.

Dear Sir: In yours of recent date you ask the following: "Has the State Board of Education authority to exchange bonds held to the credit of the permanent school fund for other bonds?"

Section 4, article 7, of the Constitution, provides that "the Comptroller shall invest the proceeds of such sales (lands set apart to the public free school fund) as may be directed by the Board of Education herein provided for, in the 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 provided by law."

By an examination of the Public Free School Act of 1893, you will observe that the authority of the Board of Education in relation to the investment of the school fund in county bonds is limited to the purchase of such county bonds as have been first submitted to the Attorney-General for inspection and the validity thereof certified to by him. Being restricted by law to the power to purchase, would that power confer or authorize the right to exchange bonds already purchased, in lieu of new bonds? The general rule applicable to public agents is that they have such power only as has been specifically conferred upon them. In respect to the acts of public agents, the same rule does not prevail which ordinarily governs in relation to mere private agents; but in the case of public agents, the extent to which they can go is measured by the power *actually* given to them, and this rule seems indispensable in order to guard the public against losses and injuries arising from the mistakes and indiscretions of their agents; but in the case of mere private agents, the exercise of power is measured by authority *apparently* given. Storey on Agency, 307; 93 U. S., 257; 101 U. S., 699.

The Board of Education is restricted by law in the investment of the school fund in county bonds to a purchase of such county bonds as

the Attorney-General certifies have been issued in conformity with the Constitution and laws; but nowhere is authority specifically given to exchange old bonds for new, nor does the statute require the Attorney-General to pass upon bonds submitted for exchange, but to inspect only such as are submitted for purchase. While to hold that the authority to exchange is incident to the power to purchase might result in benefit to the school fund, this would not excuse an exercise of such power, as the mere fact that the agent is disobeying instructions intended to promote the principal's interests will not exonerate him. 125 Mass., 577; 47 Mo., 181.

It is the opinion of this department that the Board of Education, in investing the school fund in county bonds, must take notice of the extent of its authority as conferred and defined by statute, and the mode having been specially and plainly prescribed and limited, that mode is exclusive and must be pursued. Very respectfully,

E. P. HILL, Office Assistant Attorney-General.

Prizefighting. Act of 1891, in reference thereto, valid.

ATTORNEY-GENERAL'S OFFICE,
Austin, Texas, July 13, 1895.

Hon. John P. Gillespie, County Attorney, Dallas, Texas.

Dear Sir: I received yours recently written in reference to the proposed Corbett-Fitzsimmons fight; it came by due course of mail.

In it you propound in substance the following questions:

First. Is there any valid law in Texas prohibiting prizefighting?

Second. If there is, can it be enforced so as to prevent the proposed fight?

Third. Have the courts any authority to restrain such an exhibition by injunction?

I have not sought to quote your language, but only what I conceive to be its effect. From your letter of course I gather the fact, which I know you recognize, that the Legislature, by the act of 1891, sought to prohibit prizefighting; and that the provisions of that act were, with verbal modifications, carried forward into the Penal Code adopted by the Twenty-fourth Legislature, which will be in effect October next.

After I received your letter I was asked to withhold my answer thereto until such time as those who believed that the provisions of the statute above referred to were invalid could be heard. I waited and received from the hands of the attorneys of the gentleman who is seeking to have the fight take place at Dallas most elaborate and ingenious arguments on the subject. Briefly stated, they make (though in many different forms) the following propositions:

First. That the law of 1891, by which it was sought to prohibit prizefighting, is invalid for two reasons: (1) Because it denounces the offense as a felony and affixes thereto the punishment of a misdemeanor; and (2) because the act was so indefinitely framed, and is of such doubtful construction, considered either by itself or in connection with the other provisions of the written law, that it can not be understood.

Second. Because the Twenty-fourth Legislature, in adopting the Revised Codes, carried into the Civil Code the act of 1889, which licenses

prizefighting; and that the Civil Code, with that provision in it, was finally passed at a time subsequent to the adoption of the Penal Code, in which is incorporated the statute prohibiting prizefighting; and that, therefore, the statute licensing prizefighting by implication repealed the penal law on the same subject, which had been previously passed.

I am unable to agree with those who insist that the laws of Texas permit prizefights. On the contrary, I think they are plainly prohibited by the statute. That the law of 1891, by which the Legislature sought to prohibit such contests, was and is operative, is not now an open question. The Court of Criminal Appeals has held it to be valid. Sullivan's case, 32 App., 50. Sullivan had been convicted in Dallas county for giving an exhibition of the kind in question without having paid the occupation tax levied thereon by the act of 1889. From the judgment of conviction he appealed, insisting that he had been wrongfully convicted, because the act levying the occupation tax had been repealed by the act of 1891, which in express terms prohibited prizefighting. That question alone was considered by the Court of Criminal Appeals in disposing of that case. In determining the question, the court said: "This law (meaning the act of 1889 licensing prizefights), however, has been changed by the act of March 23, 1891, which practically prohibits prizefighting and pugilism, and declares that a pugilistic encounter between man and man or a fight between man and bull or other animal, for money or other thing of value, or upon which money is bet, or to see which admission fees are charged, shall be deemed guilty of a felony and punished by a fine of not less than $400 nor more than $1000, and by confinement in the county jail for not less than 60 days nor more than one year."

I know that it is insisted that the Court of Criminal Appeals did not consider the question of the validity of the act of 1891. That suggestion does no credit to the learned court deciding the case. To say that there was but one question in the case, and that the court failed to consider that, is a reflection I am not willing to indulge in reference to the three learned judges who composed that court. The report of the case shows that they were all present and concurring in the decision. The act itself is quoted—not literally, but substantially—in the opinion rendered. It was impossible for the trained lawyers, not to say trained specialists, who composed that court, to have read that statute without discovering the fact that it denounced the offense as a felony and imposed the penalty of a misdemeanor. The validity of the act was necessary to be considered in determining whether it repealed the act of 1889. An invalid act repeals nothing; it is as inoperative as if never passed. Morton vs. Shelby County, 118 U. S., 426.

The decision of the Court of Criminal Appeals in the Sullivan case, in which the validity of the act in question was maintained, announced no new doctrine. It but conformed to established precedents and followed a well-beaten track. It only recognized the rules of statutory construction firmly imbedded in our system of laws and made a part thereof.

It must be remembered that our code expressly provides that the distinction usually made between the construction of penal laws and laws upon other subjects shall not obtain in Texas. Penal Code, article 9. In other words, penal laws will be no more strictly construed than laws upon other subjects. To ascertain the legislative intent is the purpose

of courts in the construction of all statutes, whether in reference to civil or criminal cases. When a statute is so indefinite as to be incapable of being understood, article 6 of the Penal Code says it shall be inoperative. That would be the rule without reference to article 6 of the Penal Code. If the court could not ascertain the legislative intention from the language used, nor from the context, it could not declare it. Article 6, therefore, becomes immaterial.

The rules of statutory construction have been frequently reviewed by our Court of Criminal Appeals. As before stated, the Sullivan case was decided in strict conformity thereto. That court found it necessary to state these principles in the Walker case (7 Ct. App., 257); the first among them is what is therein denominated "the corner-stone of statutory construction." It is as follows: "In interpreting a law, the main object to be arrived at is the intention of the law-making power; and the interpretation to be given to the language used to express the intention should be such as to make the statute consistent with reason." The second rule laid down is that "every interpretation that leads to an absurdity ought to be rejected." And third, "a thing within the intention is within the statute, though not within the letter; and a thing not within the letter is not within the statute unless within the intention. The real intention, when accurately ascertained, will always prevail over the literal sense of the terms."

In the Albrecht case (8 Ct. App., 314), the court in a different form reannounced the substance of the rules above quoted. In that case the court said: "This purpose (meaning the legislative purpose or intent) so manifest, can not be disregarded in the search for the proper rule of construction, but must be given effect to unless qualified or restricted by some potent provision of the law rendering a contrary construction of the law imperative. If a reasonable construction of the language would tend to effectuate this purpose, and another construction equally as reasonable would have a contrary tendency, under the well established canons of construction courts should not hesitate in choosing the former to the exclusion of the latter. The intention frequently controls the express language in the construction of statutes."

These rules were again stated in the Chapman case (16 Ct. App., 76) and applied to the statute therein construed. The defendant in that case had been convicted of a misdemeanor in the District Court. The first part of the statute relied upon by the State to give jurisdiction to that court, vested in the District Court of Atascosa county exclusive jurisdiction of all criminal cases then pending in the County Court of said county. It then proceeded as follows: "The District Court shall have and exercise all civil and criminal jurisdiction heretofore vested in the said County Court by the Constitution and laws not divested by this act." The court, in construing these contradictory provisions of the same statute, said: "The word 'not,' which we have italicized, evidently was placed where it was found by mistake. If we are to regard it as a word intentionally placed there, its effect would be to defeat entirely the manifest intention of the statute. It directly conflicts with other provisions of the act. If this word 'not' is left out of the sentence, then the provisions of the act harmonize and the intent of the Legislature is accomplished. Are we at liberty, in construing the statute, to disregard this word in order that the plain intent of the statute may be made to prevail We think we are. When the intention of a

statute is plainly discernable, the intention is as obligatory as the letter of the statute, and will even prevail over the strict letter. Whenever the intention of the statute can be discovered, it ought to be followed, although it may seem to be contrary to the letter of the statute."

According to the contention of those who believe that the statute against prizefighting is void on account of its declaration that the crime is a felony, and the punishment of a misdemeanor is applied thereto, the statute would be perfect if the word misdemeanor could be substituted for the word felony. Following the doctrine announced in the above quotation, the court was at perfect liberty to eliminate that word felony if such elimination were necessary to give effect to the legislative intent. It must be plain that the court believed that the intention of the Legislature was to prohibit prizefighting. If the court further believed that the fact that the Legislature affixed the punishment of a misdemeanor to the offense of prizefighting, and that the word felony was inserted by mistake, it was at perfect liberty to disregard that word in the construction of the statute. The doctrine announced in the Chapman case amply justified it; indeed, the court could not have done less.

In the case of the State of New York vs. Utica Insurance Company, 15 Johns, 379-381, this proposition is clearly stated: "Such construction ought to be put on a statute as can best answer the intention which the makers had in view, and this intention is sometimes to be collected from the cause or necessity of making the statute, and sometimes from other circumstances; and whenever such intention can be discovered, it ought to be followed with reason and discretion in the construction of the statute, *although such construction seem contrary to the letter of the statute.* * * * And such construction ought to be put upon it as does not suffer it to be eluded."

As stated in Bishop on Written Laws, section 82, page 66, courts will endeavor to shape the meaning of a statute that it can be neither eluded nor its purposes defeated. And in section 81 of the same book, page 64, it is said: "Even in opposition to the strict letter, the clear purpose of the Legislature, as apparent on an inspection of the statute itself, will be carried out."

It has been repeatedly held that the conjunction "and" will be read as "or," and "or" as "and," when the sense obviously so requires, and this in plain cases, even in criminal statutes against the accused. Bishop on Written Laws, section 243. A misnomer, for example, in the name of a person or corporation, which can be corrected by other parts of the statute, will be corrected in the interpretation, for courts will look into the entire enactment and compare part with part. Ib., section 244. To the same effect is Brooks vs. Hicks, 20 Texas, 666; Holmes vs. Casley, 31 N. Y., 290; Chase vs. R. R. Co., 26 N. Y., 523; Sedgwick on Statutory Construction, pp. 225, et seq.; Potter's Dwarris on Statutory Construction, pp. 174, et seq.

It is clear from the authorities above cited that the Court of Criminal Appeals correctly held the act of 1891 to be valid, and that it therefore repealed the act of 1889, which authorized prizefights to be licensed.

The validity of the act in question is not affected by the revision of the Code. If it be conceded that the Civil Code, embracing the act of 1889, was passed after the Penal Code was adopted, the question will

not be affected, and it will be just the same as if it had passed before. But I do not concede that the Civil Code was last adopted. Indeed, I think the reverse is true. The Civil Code passed the Legislature before the Penal Code did, and not afterward. The Civil Code passed on the 23d of April and the Penal Code on the 24th. Neither was signed by the Governor. By the terms of the Constitution, it seems to me that neither, unsigned, would be in effect or considered as having passed all stages of legislative control until the ten days had expired. But, as before stated, that is immaterial. It is known to all lawyers that in 1891 the Legislature provided for the appointment of commissioners to revise the statutes of the State. Their duties were plainly stated in the act providing for their appointments. (See acts of 1891, p. 53.) By the terms of that act they were not authorized to write any new laws, nor to change any of the old ones, except to correct evident clerical or typographical errors. Section 3 of the act made it obligatory on them to collate and arrange all the Civil Statutes amendatory of and germain to the Revised Statutes of 1879. They had no authority to omit anything except such parts as had been displaced by amendments plainly written. They, of course, could not take cognizance of constructive repeals or of repeals by implication, as that would be assuming judicial functions. The commissioners did their work and reported to the Twenty-third Legislature. That body failed for some reason to adopt their report. It does not seem to have been in any way acted upon during the session of that body. The Twenty-fourth Legislature, as is shown by section 8, page 111, of the act of 1895, adopted the report of the commissioners as made, and appointed a codifier, whose principal and only duty, in so far as the question at issue is concerned, was to adjust the acts of the Twenty-third and Twenty-fourth Legislatures to the work of the commissioners previously done, and to superintend the publication of the new codes, read the proofs, etc. The codifier had no authority to omit any statute repealed prior to the session of the Twenty-third Legislature. It must be clear, therefore, that the intention of the Legislature, as manifested by these two acts, was not to pass a new system of laws, but only to rearrange, collate and continue the old system. No other construction is admissible. But, if any doubt existed upon the subject, it should be removed by reference to section 19 of the final title of the new revised code, which, according to our Court of Appeals should be considered as a part of the Penal Code as well as of the Civil Code. (7 App., 261.) That specifically states that all laws embodied in the Revised Statutes which were in existence at the time of its adoption, should be considered to be a continuation and not as new enactments. That settles the one question that the act of 1889, as embodied in the new Revised Civil Code, was not intended by the Legislature to be a new enactment, but was simply a continuation of the act of 1889. If it had no force after the adoption of the act of 1891, it had none after the Revised Code was adopted. This question seems to have been clearly settled by our Court of Criminal Appeals in the Walker case, 7 App., 259-261. In that case the court quotes approvingly an extract from the opinion in Wright vs. Oakley, 5 Metcalf, 406. It is in these words: "In construing Revised Statutes, and the connecting acts of amendment and repeal, it is necessary to observe great caution to avoid giving effect to those acts which were never contemplated by the Legislature. In terms, the whole body

of the statute law was repealed, but these repeals went into operation simultaneously with the Revised Statutes which were substituted for them and were intended to replace them with such modifications as were intended to be made by the revision. For practical operation and effect, therefore, they are rather to be considered as continuations and modifications of the old laws, than as the abrogation of those old and the re-enactment of new ones. In order to consider them correctly, we must take the whole Revised Statutes, together with the acts of amendment and repealing acts, and consider them in reference to the known purpose which the Legislature had in view in making the revision." To the same effect is the State vs. Brewer, 22 La. Ann., 273. The same question was presented to the Court of Appeals of Virginia at an early day. There was supposed to be an irreconcilable conflict between two provisions of the code of that State. One of them was passed in 1800 and the other in 1792. In construing them, the court said, in the case of Wynn vs. Jones, 6 Leigh, 75: "If there be an inconsistency between them (meaning these two conflicting provisions), this last must prevail; for in the construction of laws re-enacted in a revisal, we must in case of irreconcilable difference look to the dates of the original statutes in order to ascertain the last declaration of the legislative will."

In section 161 of Southerland on Statutory Construction, the following doctrine is announced: "Where two statutes *in pari materia* originally enacted at different periods of time are subsequently incorporated in a revision and re-enacted in substantially the same language, with the design to accomplish the purpose they were originally intended to produce, the time when they first took effect will be ascertained by the courts, and effect will be given to that which was the latest declaration of the will of the Legislature, if they are not harmonious."

In section 156 of the same work the following language is used: "Though a revision operate to repeal the laws revised, whether repugnant or not, yet those portions that are re-enacted are continuations. The revision is, however, a re-enactment and to be alone consulted to ascertain the law when its meaning is plain; but when there is irreconcilable conflict of one part with another, the part last enacted in the original form will govern." To the same effect is Douglas vs. Douglas, 5 Hun., 140, and many other authorities. This precise question was determined by the Federal Court in the case of Mobile Savings Bank vs. Patty, 16 Fed. Rep., 751. An Alabama statute was amended so as to repeal by implication another article of their Revised Code previously enacted. Thereafter, in 1876, the laws were again revised. The repealed article was carried into the new revision as well as the article which had been held to repeal it. The court held that evidently the repealed statute was inserted through mistake. That in determining the legislative intent, the dates of the enactments will be looked to, and the one last in time will be held as the law. For that reason the article which had been repealed by implication before its insertion in the new code was held to be inoperative. To the same effect is Posey vs. Tripley, 60 Ala., 249. Indeed, the rule above stated is well settled.

Now let me ask, is not the intention of the Legislature manifest in the act under discussion? Is it not absolutely clear that its intention was to prohibit prizefighting? Did it not clearly define the offense? And did it not clearly affix a penalty thereto? All these questions must be answered in the affirmative. Then it is not a case coming within

the operation of article 6 of the Penal Code. In other words, it is not so indefinitely framed, nor of such doubtful construction, that it can not be understood. What, then, must be done? The duty is plain, to follow the rules of construction laid down by our court of last resort, by all other courts of last resort, and by text writers: The first is, to give effect to the legislative intention so plainly manifest, and to so interpret the statute as to make it consistent with reason. The second, to avoid that interpretation that leads to an absurdity. Following this second rule would prevent anyone's insisting that the Legislature intended to create the offense of a felony and affix thereto the punishment of a misdemeanor, because that is manifestly absurd. The third, that the legislative intention, when accurately ascertained, as in this instance, will always prevail over the literal sense of the terms; that the intention will control the express language in the construction of a statute; or, as our Court of Criminal Appeals has so often said, "the intention ought to be followed, although it may seem to be contrary to the letter of the statute;" and in the language of the court of last resort in New York, "the intention should be given effect to, even though such construction seem contrary to the letter of the statute," and that "such construction ought to be placed upon it as does not suffer it to be eluded." Or, as announced by an able text writer, that "even in opposition to the strict letter, the clear purpose of the Legislature will be carried out."

Applying these rules, the Court of Criminal Appeals could not have arrived at any other conclusion than that the act of 1891 prohibiting prizefighting is valid; and that it could not have been declared inoperative without violating every rule of construction which the court had previously recognized and adopted. The construction which seeks to invalidate the statute is based upon the idea that courts in construing a statute undertake to find some means of avoiding it, when the contrary is true. In the language of the Supreme Court of the United States, "we ought rather, adopting the language of Lord Hale, 'to be curious and subtle to invent reasons and means to carry out the clear intent of the law-making power.'" Oats vs. National Bank, 100 U. S., 244. "The judiciary must respect the expression of the legislative will and not permit it to be eluded by mere construction." Ib.

It is the duty of the courts to enforce the law if possible, and only to refuse to declare them valid when it is impossible, from the language used, whether considered by itself or in connection with other provisions of the written law, to ascertain what the Legislature did intend to do. That is not true in this case; therefore, the statute must be declared valid.

Believing, as I do, that the Court of Appeals was right when it declared this statute valid, I of course insist that it should be enforced. But whether I believed that the Court of Criminal Appeals were right originally or not, it is no part of my duty, nor is it any part of your duty, nor of the sheriff of Dallas county, to sit down and determine that the Court of Appeals was wrong, or that they did not consider the case before deciding it. In saying this much, I do not mean to imply that you or the sheriff have any disposition to do so; I assume that the contrary is true. But I mean to emphasize the fact that it is our duty to bow in unquestioned obedience to the decision of that high court on all

questions of which the Constitution gives it jurisdiction. Of this question it had jurisdiction.

The law being valid, it follows that it is the duty of your sheriff to enforce it. He is not authorized to permit the fight to go on and then arrest the parties. It is made his plain duty by the statute to prevent the fight. Article 49 of the Code of Criminal Procedure is as follows: "Each sheriff shall be the conservator of the peace in his own county and shall arrest all offenders against the laws of the State in his view or hearing and take them before the proper court for examination or trial. He shall quell and suppress all assaults and batteries, affrays, insurrections and unlawful assemblies." Remembering that it is the duty of the sheriff to suppress all assaults and batteries, affrays, insurrections and unlawful assemblies, it is only necessary to inquire what is an unlawful assembly. Article 279 of the Penal Code says an unlawful assembly is a meeting of three or more persons with intent to aid each other by violence, *or in any other manner*, either to commit an offense or to illegally deprive any person of any right, etc. Article 292 of the Penal Code says: "If the purpose of any unlawful assembly be to effect *any unlawful object*, other than those mentioned in the preceding articles of this chapter, all persons engaging therein shall be liable to a fine of not exceeding $200." That a crowd gathered together to witness a prizefight and give it aid and encouragement is an unlawful assembly no one can doubt. It is as much an unlawful assembly before the fight commences as afterward. It is difficult to understand how there could be a prizefight unless there was a meeting of at least three persons with the intention of committing the offense of prizefighting. It being an unlawful assembly, it is made the special duty of the sheriff and all other peace officers to quell and suppress it. The prizefight is a violation of law, and it is the sheriff's sworn duty to prevent all violations of law in so far as he can, as well as to apprehend the offenders after the offense is committed.

The Code of Criminal Procedure, in discussing the duties of sheriffs and other officers, in article 26 thereof, uses this language: "The provisions of this code shall be liberally construed so as to attain the objects intended by the Legislature, to-wit, the prevention and suppression and punishment of crime." It being plainly stated in the code that it (the code) must be liberally construed so as to attain the objects intended by the Legislature, to-wit, the prevention and suppression of crime, as well as its punishment, it must follow that the authority conferred upon the sheriff is ample, and it is his duty to exercise it. He has the power to call to his assistance any number of men he may choose. Should he deem it necessary, he can call on the Governor for the militia, or for such other assistance as he may need. In this connection, however, permit me to add that if the sheriff says there shall be no prizefight, there will be no attempt to have one. Violations of the law, in most instances, of the character named, are caused by the officers winking at them. Wherever a sheriff announces his determination to prevent the commission of any such offense, and those who propose to engage in it believe that he is sincere, they will not prosecute their purpose further. It is only when they believe that his announcement is made to secure the favor of those opposed to the fight, and that really he is in sympathy with it, and is averse to preventing it, and his efforts in that direction will be purposely abortive, that they attempt to pro-

ceed. Knowing your sheriff, however, as I do, I believe that he will endeavor to enforce the law; and when the people of Dallas county understand his position they will act accordingly. To say that a sheriff has no such authority is absurd. If he has no authority to prevent a prizefight, but must wait until the offense is complete before interfering, then it must follow that if he saw a man with a lighted torch in the act of setting fire to a house he would be powerless to interfere until the crime of arson had been committed. He could see two men about to engage in a street fight and be unable to interfere until blows had passed and an offense committed. He could see two men with weapons in their hands and imprecations on their tongues approach each other with the avowed purpose of taking life, and yet he would be powerless to interfere until murder had been committed. Yet he is declared to be a conservator of the peace. Such a construction destroys article 26 of the Code of Criminal Procedure and renders the sheriff impotent to prevent the commission of crime, except in so far as that result may be reached by punishing those guilty of offense. That construction is contrary to the plainest language of the statutes and to public policy as well.

This renders it unnecessary to answer your third question. I have only to say that the new code will be in effect before October. Article 3015 thereof seems to fully authorize the State to proceed by injunction to prevent, prohibit or restrain the violation of any revenue or penal law of the State. But an injunction will not be necessary if it be ascertained that the sheriff is opposed to the fight and will interfere to prevent it. Regretting my unavoidable delay in answering you, I am, very truly yours,

M. M. CRANE, Attorney-General.

Notaries Public. Mistake in name of by Senate in confirming; how governed.

ATTORNEY-GENERAL'S OFFICE,
Austin, Texas, July 20, 1895.

Hon. Allison Mayfield, Secretary of State, Capitol.

Dear Sir: In your letter of to-day you make the following statement: "As shown by the list of notaries confirmed by the Senate at the last session, Henry N. Tenison and W. W. Haynes were appointed and confirmed as notaries for Dallas county. This is made to appear both from the Senate Journal and from the list of notaries sent by the clerk of the Senate to the Governor notifying him of the confirmation of the notaries. I am advised by Mr. R. B. Allen, Representative of the Seventy-third District, that there are no such individuals in Dallas county, but there are Henry *L.* Tenison and W. *M.* Haynes. You will observe that the error, if any, is in the middle initial of each. These gentlemen apply to me for commissions giving their correct initials."

You then propound the following questions: First, will it be proper and legal for me to go outside of the record in determining who are entitled to receive commissions? Second, under the facts stated, am I lawfully authorized to issue commissions to each of the above named

gentlemen, reciting his name as he gives it, or must I be controlled entirely by the records?

In reply, will say that this identical question has been previously passed upon by this department. You are respectfully advised that in issuing such commissions you are to be governed by the Senate Journal; and in the cases referred to by you the commissions should be issued to Henry N. Tenison and W. W. Haynes. While it is true that the law recognizes but one christian or baptismal name, yet it does not contemplate that you should resolve yourself into a court for the purpose of taking extrinsic testimony in regard to the identity of the demandant of the commission with the appointee as shown by the Senate Journal, nor does it make any provision for the record or the perpetuation of such evidence in your department. Art. 3376a, Sayles' Civil Stats., provides that "when a notary is appointed the Secretary of State shall forward commission to the clerk of the county court of county where the party resides; and said clerk shall immediately notify said party to appear before him within ten days and pay for his commission and qualify according to law." This statute leaves the identity of the person named in the commission with the person appearing before him to qualify to be determined by the clerk; and in such cases as the above, if the clerk satisfies himself, upon diligent inquiry that the person desiring to qualify is actually the person appointed, although the initial letter of his middle name is different from the middle initial of the name appearing in the commission, he should thereupon allow such person to qualify, because the middle name or initial is not known in law unless it affirmatively appears that it is used to designate a different person. McCay v. Speak, 8 Texas, 336; Cummings v. Rice, 9 Texas, 527; State v. Manning, 14 Texas, 402; Stockton v. State, 25 Texas 772; Steen v. State, 27 Texas, 81; Page v. Armin, 29 Texas, 53; 99 Amer. Dec., 350, note and cases cited; Myers' Fed. Dec., under subject named.

The above opinion is almost identical in language with the previous opinion rendered from this department on a similar question. It would appear from the above authorities that where the christian and surname of the demandant of the commission are written in full the clerk would have no difficulty in ascertaining the identity of the person named in the commission and the demandant of the same, though the initial letter of the middle name may vary. Yours very truly,

H. P. BROWN, Office Assistant Attorney-General.

Taxation. When land, located by virtue of Confederate Scrip, becomes subject to taxation.

ATTORNEY-GENERAL'S OFFICE,
Austin, Texas, July 25, 1895.

Hon. R. W. Finley, Comptroller, Etc., Capitol.

Dear Sir: Your letter of the 22d, enclosing letters from Hon. W. B. Abney, together with a letter from Hon. R. M. Hall, and requesting an opinion of this department on the question therein presented, has been received.

In reply will say that the question presented, as gathered from the enclosed letters, is as to when lands located by Acker & Toland under Con-

federate scrip became subject to taxation. The location of a genuine land certificate upon lands subject to location severs the land from the public domain, and the right of the owner of such certificates to the land attaches at the date of his filing an application to the proper surveyor for its survey, and can not be defeated by the refusal of the officer to accept the location. Such locations, followed by a survey of the land, and the return to and filing of the field notes and the certificates by which the survey was made in the General Land Office, within the time prescribed by law, create a vested interest in and right to the land, and entitle the owner of the certificate to demand a patent to said land. See Montel v. Speed, 53 Texas, 339; Sayles' Texas Civil Statutes, articles 3897, 3902, 3909, 3953; Hamilton v. Avery, 20 Texas, 635; Milam County v. Bateman, 54 Texas, 153; Gullett v. O'Connor, 54 Texas, 408.

Where a right to a patent is complete, and the equitable title to the land is fully vested, without anything more to be paid, or any act done going to the foundation of the right, the land is subject to taxation. Blackwell on Tax Title, 5 ed., vol. 2, sec. 818, p. 767; Amer. and Eng. Enc., vol. 25, p. 111.

From the time of the location of a certificate on land subject to location, and the survey of such land, and the return of the field notes and certificate to and filing same in the General Land Office, the entire equitable and beneficiary interest in said land becomes vested in the owner of the certificate. The State only holds the legal title in trust for him, and from that time the interest of such owner is taxable, and this result is not changed by the refusal of the officer whose duty it is to do so to issue patent, on the ground that the party was not, on account of the existence of facts that did not defeat his right to the land, entitled to such patent. Farrham v. Sherry, 71 Wis., 568, and authorities there cited; North. Pac. Ry. Co. v. Wright, 54 Fed. Rep., 68.

Although the patent may not issue until long after the right to the land is acquired by virtue of entry and locations, it seems that the land is chargeable with taxes from the date of the entry or location. Witherspoon v. Duncan, 4 Wall. (U. S.), 219.

Land held by a certificate and survey, and in a condition to authorize the owner to demand a patent, is subject to taxation. Upshur v. Pace, 15 Texas, 533, bottom of page; Pitts v. Booth, 15 Texas, 435.

The owner of the certificate, who has located same on lands subject to such location, and who had the survey and the certificates returned and filed in the General Land Office within the time prescribed by law, is in condition to demand a patent, and the refusal of the Commissioner to issue said patent upon grounds which present no legal barrier to such owner's right, could not have the effect to relieve such land from being subject to taxation. It is, therefore, thought that the lands in reference to which this opinion is sought, were subject to taxation upon January 1 following the date of the location and survey, and return of the field notes of such survey, and filing same in the General Land Office.

The letters and papers enclosed in your letter are herewith returned to you. Very truly yours,

H. P. BROWN, Office Assistant Attorney-General.

Occupation tax on certain agents of insurance companies. Construction of law. Duty of Comptroller under.

ATTORNEY-GENERAL'S OFFICE,
Austin, Texas, August 17, 1895.

Hon. R. W. Finley, Comptroller, Etc., Capitol.

Dear Sir: Your letter of August 14, asking a construction of part of chapter 55 of the acts of 1895, has been received.

The letter points out the specific sections upon which a construction is desired, and is as follows:

"Referring to chapter 55 of the laws of 1895, imposing an occupation tax on agents of life, fire, marine and accident insurance companies doing business in this State, this department desires your opinion as to whether a person employed by a general agent to appoint local agents, adjust losses and audit accounts of local agents, is an agent within the meaning of the act; if an agent, would he be termed a general or a local agent? Again: Is an employe of the general agent, who adjusts losses and audits accounts of local agents, subject to the tax imposed by this act; if so, what tax?"

You are respectfully advised that section 1 of the act referred to provides "that there is hereby imposed upon and shall be collected from each and every person or firm acting as general agent or agents of life, fire, marine and accident insurance companies, who may transact any business as such in this State, an annual occupation tax of $50. By 'general agent,' as used in this act, is meant any person or firm, representative of any insurance company in this State, or who exercises a general supervision over the business of such insurance company in this State, or over the local agencies thereof in this State, or any subdivision thereof."

And section 2 of said act provides:

"That there is hereby imposed upon and shall be collected from each and every person or firm acting as local agent or agents of life, fire, marine and accident insurance companies who may transact any business as such in this State, an annual occupation tax of seven dollars. By 'local agent,' as used in this act, is meant any person or firm who may solicit, contract for or receive premiums for insurance in this State for any insurance company, or companies, or who may deliver contracts or policies of insurance, including railway agents and employes who may solicit or receive premiums for accident insurance in this State; Provided, that local agents shall pay county occupation taxes in each and every county in which they do business."

The first thing to be ascertained is whether a person appointed as indicated in your letter comes within the meaning of either of the classes of agents defined in the act, and if either, under which class, and after the class is ascertained, the amount of tax to be levied is no longer a matter of doubt.

A discussion of the general question of agency, or a consideration of other agents than the ones mentioned in the act, is unnecessary. The act provides who shall be taxed, dividing the persons to be so taxed into two, and only two, classes, defining a general agent and a local agent, with the intention apparent of taxing all agents of insurance companies coming under either division, and impliedly exempting any other not coming within the designated classification.

If the duties of the person mentioned in your letter are confined to appointments, to the adjustment of losses, and the auditing of accounts of local agents, and he himself is employed by a general agent, such a person could not be a general agent as defined by the statute, for he is not clothed with any of the functions of a general agent, his duty being clerical, and his authority restricted to the appointments, to adjusting losses and the auditing of accounts of local agents. The statute says that a general agent is "any person or firm representative of any insurance company in this State;" the one appointed as indicated is not a representative of the company any more than a bookkeeper in your office is authorized to act in law as the Comptroller. Again; "Or who exercises general supervision over the business of such insurance company in this State." No such authority is vested in the auditor and adjuster of losses. And again: "Or over the local agencies thereof in this State, or any subdivision thereof." The agent in question has no such general supervision; his duties are restricted and confined. To be taxed as a general agent, he must possess some of the authority that general agents possess as defined in the act. No matter to what position appointed, or what name his position is given, if he performs the functions of "general agent" he will be subject to the tax as such, but if he does not, though he may be appointed by that personage, he will not be subject to the occupation tax. Confining himself to the duties set out in your letter, he could not be held liable for the tax as general agent.

It is to be understood that persons acting for insurance companies may be general agents, though appointed as "special agents"; the mere naming the place they hold, and undertaking to evade the law by such a designation, would be of no consequence, for at last it is the power they exercise and coming within the definition of general agents as set out in section 1 of said act that determines their liability as such, and the class in which they come, is a question of fact to be determined from the position of each by the proper officers whose duty it is to levy and collect such taxes.

Under the definition, I take a general agent to be one who represents an insurance company within the State, with a general supervision over the business of such insurance company, or over the local agencies thereof, who reports to some superior officer who is a general agent for several States, or an officer of the company; and where the State is divided into several insurance districts by a company, each district may be supervised by an agent who reports to some superior officer of the company, and thus making each of the district agents a general agent. Each company may be represented by one or more general agents within the State, but I do not think an employe of those general agents, whose duties are confined to the things set out in your letter, and who himself reports to and is subordinate to a general agent, is a general agent within the meaning of the act.

This disposition of the liability as above discussed brings us to the consideration of his liability under section 2 of the act, which defines a local agent to be "any person or firm who may solicit, contract for, or receive premiums for insurance in this State, for any insurance company or companies, or who may deliver contracts, or policies of insurance, including railway agents and employes who may solicit or receive premiums for accident insurance in this State." The person in question having neither solicited, contracted, delivered, nor received pre-

miums for insurance companies, would not come under the division classed as local agents, and consequently could not be taxed as such.

Having reviewed the liability of the person to be taxed under the sections of the article in question, you are respectfully advised that it is the opinion of this department that he is liable neither as a general nor local agent, and therefore is exempt from the law. Very respectfully,

R. R. LOCKETT, Office Assistant Attorney-General.

Unlawful Assembly. Suppression of. Sheriff may take human life when necessary to suppress a riot.

ATTORNEY-GENERAL'S OFFICE,
Austin, Texas, August 26, 1895.

Governor C. A. Culberson, Austin, Texas.

Dear Sir: I have your letter of the 20th instant. In it you say, in substance, that you have a letter from the sheriff of Dallas county in reference to the proposed prizefight, in which the sheriff asks you for advice in reference thereto. The quotation you make from his letter is in the following words: "I am advised that the criminal statute defining prizefighting makes it a misdemeanor and not a felony. I would, therefore, respectfully ask you, as chief executive of the State, and as you say it is your constitutional duty to see that the law is enforced, whether I would be justified to use such force as would be necessary to prevent it, even if it required the shooting down of citizens, and would you advise me to use such force?" You then ask my opinion as to the force the sheriff would be justified in using in preventing a violation of the law by prizefighting.

To be able to accurately answer the question it is necessary to restate some propositions, about which I understand there can be no controversy:

First, it is conceded by all persons that a prizefight, or "glove contest," such as is proposed to be held in Dallas, will bring together a large number of people, and necessarily there must be more than three people engaged in the contest. There must be the contestants, the referee, the seconds, and those aiding and encouraging them, who would be, according to the rules of law, principals in any offense that they might commit. It is impossible to conceive of a prizefight or "glove contest" without conceiving that there are at least more than three persons engaged in the common enterprise. Prizefighting being an offense against the laws of the State, all those gathered together to engage therein, or who aid by acts or encourage by words those actually engaged therein, constitute an unlawful assembly, and come clearly within the definition laid down in articles 279 and 292 of the Penal Code. They are as follows:

"Article 279. An unlawful assembly is a meeting of three or more persons with intent to aid each other, by violence or in any other manner, either to commit an offense, or illegally to deprive any person of any right, or to disturb him in the enjoyment thereof."

"Article 292. If the purpose of an unlawful assembly be to effect any illegal object other than those mentioned in the preceding articles of this chapter, all persons engaged therein shall be liable to a fine not exceeding $200."

The duty of sheriffs and other peace officers in reference to unlawful assemblies is clearly stated in article 49 of the Code of Criminal Procedure. It is as follows:

"Each sheriff shall be a conservator of the peace in his county, shall arrest all offenders against the laws of the State in his view or hearing, and take them before the proper court for examination or trial. He shall quell and suppress all assaults and batteries, affrays, insurrections and unlawful assemblies. * * *"

The duty of the sheriff to quell and suppress prizefighting, it being an unlawful assembly, is plainly stated in the article last quoted. The sheriff seems, however, to want to know what he would be justified in doing, and what would be his duty to do in the event that the unlawful assembly, that is to say, those who propose to engage in the prizefight and those who propose to aid and abet them therein, should refuse to be suppressed, but insist on the accomplishment of their purpose. The legal status of the proposed prizefighters and their friends in the event they should refuse to disperse on the command of the sheriff, and to desist from their unlawful undertaking, is clearly stated in article 295 of the Penal Code. It reads as follows: "If the persons unlawfully assembled together do, or attempt to do, any illegal act, all those engaged in such illegal acts are guilty of riot." In which case the duties of the sheriff are stated in the following articles:

Article 112 of the Code of Criminal Procedure says: "Whenever a number of persons are assembled together in such a manner as to constitute a riot according to the penal law of the State, it is the duty of the magistrate or peace officer to cause such persons to disperse; this may be either done by commanding them to disperse or by arresting the persons engaged, if necessary, either with or without warrant."

Article 113: "In order to enable the officer to disperse a riot, he may call to his aid the power of the county, in the same manner as is provided when it is necessary for the execution of process."

Article 114: "The officer engaged in suppressing a riot, and those who aid him, are authorized and justified in adopting such measures as are necessary to suppress the riot, but are not authorized to use any greater degree of force than is requisite to accomplish that object."

Article 566 of the Penal Code says: "Homicide is justifiable when necessary to suppress a riot, when the same is attempted to be suppressed in the manner pointed out in the Code of Criminal Procedure, and can in no way be suppressed except by taking life."

The provisions of the Code above quoted make plain the duty of the sheriff. His duty is to go on the ground with such force as may be necessary and prevent the prizefight. If they will heed his suggestions and abandon their unlawful purpose, nothing further will be necessary than to state to them that they can not fight. If, however, they attempt to fight, notwithstanding his protest, then it is his duty, if necessary to prevent their doing so, to arrest the persons engaged therein, either with or without warrant. To effect this, he can call to his aid the power of the county in the same manner as provided where it is

necessary for the execution of process. If the power of the county is insufficient, he may call on the militia of the State to aid him. (C. C. P., article 111.) And he can continue to arrest the parties thereto, even though they give bond, until their unlawful purpose has been abandoned and the unlawful assembly dispersed.

These are the only specific directions that the law gives, but in order to cover every possible contingency it is expressly stated in article 114 of the Code of Criminal Procedure that the officer engaged in suppressing a riot, and those who aid him, are justified in adopting such measures as are necessary to suppress the riot. The measures that may be necessary must depend upon the existing circumstances. He is not authorized to use any force that is not necessary; if, however, he should be resisted—if an effort were to be made to rescue the parties after he had arrested them—then it would be his duty to use such force as would be necessary to overcome the resistance or to prevent the rescue. The sheriff well understands that; he is plainly authorized to arrest, either with or without warrant, and to do all things that are necessary in executing the law. As indicated in article 566 of the Penal Code, if the riot can be suppressed in no other way except by taking life, it is his duty to suppress the riot and let the consequences take care of themselves Great caution should be exercised by police officers at all times, and human life should never be taken except, in the language of the statute, "when the law can be enforced in no other way."

Instances are not wanting where it has been necessary to take human life in the suppression of riots. If the sheriff of Dallas county should be reduced to that extremity, he would doubtless regret the necessity, but inasmuch as he did not produce the emergency calling for the exercise of such harsh measure he would be in no wise responsible therefor.

I have no fears, however, that he will be called upon to kill anybody in enforcing the law in Dallas county. I will not believe that the people of Dallas county intend by force to attempt to override the law of the State. Very truly yours,

(Signed) M. M. CRANE, Attorney-General.

Counties can not issue bonds to fund existing indebtedness which is in nature of county warrants drawn against general fund of the county.

ATTORNEY-GENERAL'S OFFICE,
Austin, Texas, September 27, 1895.

Messrs. McKinney & Hill, Attorneys-at-Law, Huntsville, Texas.

Dear Sirs: This department has completed examination of papers submitted by you relative to the issue of funding bonds by Walker county. The indebtedness it is proposed to fund is described in the order passed by the commissioners' court at the regular August term, 1895, as will appear from the following extract from said order:

"It appearing to the commissioners' court that the said county of Walker had, prior to January 1, 1895, by authority of law, lawfully made and undertaken an indebtedness amounting to the sum of $23,-

940.62, represented by valid and subsisting county warrants drawn by order of said court on the county treasurer, and payable out of the common county, or third class, fund of the county, and issued in settlement of the current expenses of the county incurred prior to the 1st day of January, 1895."

To pay interest and create a sinking fund sufficient to redeem bonds at maturity, the order provides as follows: "That a tax of 12½ cents on the $100 valuation of all property in said county subject to taxation be and is hereby levied; * * * and that this levy of taxes shall continue in force until the whole amount of the principal and interest of said bonds shall have been fully paid."

The bonds are to run for twenty years, but may be paid off at any time after two years from the date of their issuance.

The sole question in this case, as I understand it, is the right of a county to bond its floating indebtedness for current expenses, and involves the construction of the funding act passed by the Twenty-fourth Legislature, chapter 108, page 165, which is claimed as authority for the issuance of such bonds. This act is an amendment to the acts of 1889 and 1891, the purpose of all three being to "authorize counties to fund their indebtedness, and to provide means to pay same," and provides that "the county commissioners' court of any county in this State is hereby authorized to compromise, compound, refund, settle with and to fund any existing indebtedness lawfully made and undertaken by such county by authority of law; * * * and for this purpose, the said commissioners' courts are hereby authorized and empowered to issue bonds * * * to become due and payable in twenty years from the date of their issuance; * * * and the said commissioners' courts are further authorized and empowered to levy a tax upon all real and personal property situated in the county, not to exceed 25 cents on the $100 on the assessed value of said property in any one year, to pay the annual interest, and not less than 2 per cent annually of the principal of said bonds; * * * and no bonds shall be issued under this act until a levy as herein provided shall have been made; and when such levy shall have been made, the same shall continue in force until the whole amount of the principal and interest shall have been fully paid; provided, that nothing herein shall be construed to authorize any county to levy any tax in excess of that authorized by the Constitution and laws now in force."

The above is a correct statement of the character of indebtedness it is proposed to fund by the issuance of bonds as provided by you and the authority claimed for such purpose.

In construing the act of 1895, one of the first questions presented is, what is meant by an existing indebtedness created by authority of law? and is an indebtedness incurred by a county for current expenses such a debt?

As stated above, chapter 108, General Laws of the Twenty-fourth Legislature, authorizes the county commissioners' court of any county to compromise, refund, etc., "any existing indebtedness lawfully made and undertaken by such county by authority of law, created prior to January 1, 1895."

Among other provisions of the Constitution in reference to municipal indebtedness, we find in article 11, section 7, the following provi-

sion: "But no debt for any purpose shall ever be incurred in any manner by any city or county unless provision is made at the time of creating the same for levying and collecting a sufficient tax to pay the interest thereon, and provide at least 2 per cent as a sinking fund." "Indebtedness" is a condition resulting from incurring a debt. By the above section of the Constitution, the making of a provision at the time a debt is created for levying and collecting the tax therein specified is a condition precedent to the incurring of any debt by a county or city. Unless such condition was complied with, there could be no debt incurred by a city or county by authority of law; and hence, there could be no "existing indebtedness lawfully made and undertaken by a county by authority of law," unless such condition was observed in the incurring of a debt. Without observing the regulations prescribed by said section of the Constitution, a city or county incurs no debt, and where no debt has been incurred an "existing indebtedness" could never have been lawfully made and undertaken by authority of law. An indebtedness could never be existing *by authority of law* when the provisions of the Constitution necessary to be complied with before it could exist at all were not observed. It must follow, therefore, that the only indebtedness that can be funded under the above act of 1895 is an indebtedness for the payment of which at the time of its creation "provision was made for levying and collecting a sufficient tax to pay the interest thereon and provide at least 2 per cent as a sinking fund." The indebtedness that can be funded under the above act must be an indebtedness which the county, in its corporate character and as an artificial person, created, and in the creation of which the constitutional provisions and regulations above cited were complied with. Liabilities of a county resulting from expenses necessarily concomittant with the existence of municipal government can not be said to be an indebtedness lawfully made and undertaken by said county by authority of law created, but they are liabilities imposed on the county by the general laws of the State in the administration of its governmental affairs, and not indebtedness lawfully made and undertaken *by the county itself* as an artificial person and in its corporate character.

It is true that the act of 1895 provides for a specific tax with which to pay interest and create a sinking fund to redeem bonds at maturity, but this provision is destroyed by another section which prohibits the levy of a greater amount of taxes than is authorized by the Constitution. Clearly, then, if this is a debt, as claimed by you, no tax can be levied for bonds issued under this act unless authorized by the Constitution. By an examination of article VIII, section 9, of the Constitution, we find that counties can levy taxes for the following purposes: Roads and bridges, 15 cents on the $100 valuation; county purposes, 25 cents on the $100 valuation; public buildings and other permanent improvements, 25 cents on the $100 valuation. An additional 15 cents may be levied for the maintenance of public roads, if a majority of the qualified taxpaying voters shall vote such tax; and for indebtedness created prior to the adoption of the amendment, September 25, 1883, there is no limit.

It is not contended that any of the indebtedness you propose to fund was created prior to September, 1883. You could not use any of the tax

authorized for roads and bridges and public buildings and permanent improvements to pay off your current expense debt, as our Supreme Court has expressly decided this. Citizens' Bank of Terrell v. City of Terrell, 78 Texas, 460; Nalle v. City of Austin, 85 Texas, 541. The only tax left is the 25 cents authorized for "county purposes." These words are synonymous with "current expenses," and all mean substantially the same thing. 25 Kan., 356; 14 Minn., 252; 21 Kan., 308. At any rate, "current expenses" are included in the phrase "county purposes" and mean the ordinary expenses of the county, such as are necessarily incurred in carrying on the business of the county. I do not believe that the commissioners' court has any authority to pledge or appropriate any part of this tax for a series of years to the payment of bonded indebtedness. In the case of City of Austin v. Nalle, 85 Texas, Judge Gaines says that "a tax for current expenses is to be directly applied to their purposes, and it does not mean that it is to be appropriated to the payment of the interest and sinking fund of a bonded indebtedness." In the case of San Francisco Gas Co. v. Brickurdel, 62 Cali., 642, the Supreme Court says that "each year's revenue and income must pay each year's indebtedness and liability; and that no indebtedness or liability incurred in any one year shall be paid out of the revenue or income of any future year." In the case of Shaw v. Statler, 74 Cali., 258, the Supreme Court reaffirms this doctrine. If a county can appropriate a part of this tax for a series of years, it can pledge all of it, and thus deprive itself of the necessary revenues to pay officers' salaries, buy stationery and provide for other actual and necessary expenses. If the county has not been able, by the full limit of taxation, to raise sufficient money for the needs of each year, what a deplorable result there would be if it is to be deprived of a portion or all of this tax for a period of twenty years. From my investigation, I think the law contemplates that this 25-cent tax for "county purposes" is to be specifically appropriated to the payment of ordinary and necessary current expenses within the limit of taxation; and if this purpose may be diverted and defeated by an appropriation of a part of the tax for years to come, the functions of the county government may be suspended; and to pledge the current income beyond the year would be subversive of the structure of the county government itself. It would result in counties incurring liabilities and indebtedness far in excess of their income and revenue for the year in which the same were contracted, thus creating another floating indebtedness which would have to be paid out of the income and revenue for future years, and the evil consequences of such a system would soon be felt.

There is another objection to the appropriation of this tax for a series of years, which to my mind is conclusive of the fact that the commissioners' court has no such authority. What right has one commissioners' court to limit succeeding courts in expenditures of the county for general purposes for a series of twenty years? How can the commissioners' court for the present year foresee what the expenses for county purposes will be next year, or two or twenty years from now? The county may, and probably will, increase in wealth and population, and the expenses necessarily become larger year by year; and if the present court were to set aside now, for a period of twenty years, the

only tax provided to meet the ordinary expenses of each year, of what avail are the provisions of our fundamental laws which are intended to protect our counties against the evils of a bankrupt treasury? In the case of East St. Louis v. Zebley, 110 U. S., 324, the United States Supreme Court says: "The question, what expenditures are proper and necessary for the municipal administration, is not judicial; it is confided by law to the discretion of the municipal authorites. No court has the right to control that discretion, much less to usurp and supersede it. To do so in a single year would require a revision of the details of every estimate and expenditure, based upon all inquiry into all branches of the municipal service: to do it for a series of years and in advance is to attempt to foresee every exigency and to provide against every contingency that may arise to affect the public necessities."

Judge Henry, in the case of Citizens' Bank v. City of Terrell, 78 Texas, 460, says: "The city had no authority to pledge or appropriate any part of the current revenues to the payment of the principal or interest of the debt. That fund is devoted by the Constitution to the support of the city government, and *is always under the control* of the council for that purpose." If the city council of the present year has authority to appropriate the only tax provided by the Constitution for annual current expenses for twenty years, then for that length of time so much of the tax appropriated will "not always be under the control of the city council," because its annual levy, or at least so much thereof as is necessary, is pledged for the entire period in order to create a sinking fund to pay off the debt at maturity. These special funds are sacred in the eyes of the law, and can not be drawn upon or diverted from the purpose for which created.

The whole purport of our Constitution and of the decisions of our State has been to restrict and limit within proper bounds the power to contract municipal indebtedness, and as far as possible protect taxpayers and *bona fide* creditors from the evils on one hand of reckless expenditure and on the other of depreciated credit; but if an indebtedness of this character can be created, and when the constitutional limit of taxation has been exhausted, the commissioners' court of a county can continue to issue certificates of indebtedness and then levy a sinking fund tax for the payment of the same, it seems to me that there would practically be no limitation upon their power to contract debts. But I do not believe that such is the law, and I do not believe that the act of 1895 gives such authority. As Judge Henry says in the Terrell case (78 Texas), "so far as the statutes can be harmonized with the requirements of the Constitution, they will furnish useful guides, and must be observed. When they are in conflict with it or lead to a different result, they must be disregarded." Very respectfully,

(Signed) E. P. HILL, Office Assistant Attorney-General.

Bonds. The act of 1895 authorizing the refund of bridge, courthouse and jail bonds is unconstitutional.

ATTORNEY-GENERAL'S OFFICE,
Austin, Texas, September 27, 1895.

Hon. A. R. Stephenson, County Judge, Floresville, Texas.

Dear Sir: I have completed examination of the papers submitted by you to this department providing for the "refunding of outstanding bridge bonds." The order passed by the commissioners' court on August 15, 1895, recites that the proposed bonds are to be "issued under and by virtue of an act of the Twenty-fourth Legislature." This act referred to is chapter 108, page 165, Laws of 1895. I do not believe that bridge, courthouse or jail bonds can be refunded under the act of 1895. In 1889 the Legislature passed an act authorizing counties to fund their indebtedness. In 1891 the act of 1889 was amended so as to include indebtedness created prior to January 1, 1891. The act of 1895, as it recites, is an amendment to the acts of 1889 and 1891, and is exactly the same, except it permits the refunding of indebtedness prior to January 1, 1895. The objection of the act of 1895 is that the acts of 1889 and 1891, which it purports to amend, were repealed by the act of May 3, 1893, in so far as the said acts of 1889 and 1891 relate to the funding of bridge, courthouse and jail bonds. The act of May 3, 1893, chapter 84, page 112, Laws of 1893, authorizes the county commissioners' courts of the several counties in this State to issue courthouse, and jail and bridge bonds, and provides that when bonds have heretofore legally issued for any of these purposes (courthouse and jail and bridge) new bonds in conformity with this law (act of May 3, 1893) may be issued in lieu thereof; and provides for the repeal of all other laws authorizing counties to issue bonds for the purposes named. The effect of the 1893 act was to repeal the acts of 1889 and amendment thereto of 1891 in so far as the latter authorized the refunding of courthouse and jail and bridge bonds; and the act of 1895 being, as it recites, an amendment of the acts of 1889 and 1891, was an amendment of a law which had been repealed in 1893.

In case of Robertson v. State, 12 Texas Court of Appeals Reports, 550, Judge Willson, in discussing an amendment to a repealed statute, says that "a repealed law is not the subject of amendment." The Legislature has general power to amend statutes, but an amendatory act, to be valid as such, must relate to an existing statute, and not to one which is non-existent, or has been repealed or declared unconstitutional. 33 Ind., 465; 11 Colo., 515; 50 Ind., 194; 125 Ind., 529; 33 Neb., 834. Where a later act attempted to amend an earlier one previously repealed by implication, the copying of parts of the earlier act into the amendment was held not to re-enact it. 9 Ore., 62; 89 Ala., 150; 38 Cali., 574.

In the case of the State ex rel. County of Stewart vs. Thomas H. Benton, auditor, the facts are identical with the present condition of our statutes on this subject. In 1877 the Legislature of Colorado passed an act authorizing counties to refund bonds. This act of 1877 was carried into the Revised Statutes of 1881 as sections 11, 12 and 13. In 1883 the Legislature passed another act authorizing counties to issue funding bonds. In 1885 the Legislature passed an act to amend sections 11,

12 and 13 of the Revised Statutes (acts of 1877). The Supreme Court in its decision said: "It is true, repeals by implication are not favored, but when there is a complete act covering the whole subject, as in that of 1883, it was clearly intended by the Legislature to be exclusive to repeal the act above referred to, of 1877, as sections 11, 12 and 13 of the compiled statutes of 1881. These sections, therefore, were not in force when it was sought to amend them by the act of 1885. The general rule in such case is that the amendatory act is void, having nothing to rest upon. The act of 1883 therefore is still in force."

The act of May 3, 1893, was a complete act, covering the whole subject of the refunding of bridge, court house and jail bonds; and such effect has been given to it ever since its passage. In that particular it is utterly inconsistent with the act of 1889, and the amendment thereto of 1891, and under the authorities above quoted must prevail.

For these reasons you are respectfully advised that, in the opinion of this department, the act of 1895 being an amendment to a repealed law insofar as it authorizes the refunding of bridge, courthouse and jail bonds, is nugatory and of no effect; and the act of 1893 still stands as an enactment; and refunding bonds for the purposes named must be issued as formerly, under said act of 1893. Very respectfully,

(Signed) E. P. HILL, Office Assistant Attorney-General.

Charter of Incorporation. Whether embraces two subjects or less. American Cotton Bale Improvement Company. Charter. Fees to be charged by Secretary of State on filing charter.

ATTORNEY-GENERAL'S OFFICE,
Austin, Texas, November 15, 1895.

Hon. Allison Mayfield, Secretary of State, Capitol.

Dear Sir: Your letter of November 9, enclosing the application of permit of the American Cotton Bale Improvement Company, has been received. As I understand your letter, you desire to know (1) if the charter embraces more than one object of incorporation, so that it is incumbent on you to charge two charter fees; (2) where the capital stock is exactly $1,000,000, what amount you are authorized to charge as charter or permit fees.

In answer to the first query, I am of the opinion that the object of the Legislature was to double the fee where it is evident that the objects are so at variance as ordinarily would require the forming of two distinct concerns to carry on the affairs, or where two charters would seem to be necessary to be taken out. The objects expressed in the charter under consideration are as follows: "To construct, buy, sell and operate machinery and plants for the ginning, compressing, baling, covering, cleaning and manufacturing and generally preparing of cotton for market: also to buy, sell, gin, compress, bale, clean, store, manufacture and prepare cotton for market, in the seed or otherwise, and to do all things pertaining to the handling and transportation of cotton, to construct warehouses for the storing of cotton and issue receipts therefor, and to establish branch offices."

It is to be considered whether the objects stated are separate and distinct, standing to themselves as different and independent purposes, or whether each designated object is a mere incident to the major object, and so intimately associated with it as to be a part and parcel of the major object itself, forming in fact but one object.

In the case of the application submitted, it appears that the objects are multifarious and broad in extent, but it also appears that they tend to a single purpose, the minor objects being but an incident to a general purpose of dealing in raw cotton and supplies for its manufacture, or ginned cotton, baled and compressed, with authority to store, ship and transport it. You are therefore advised that the application is thought to present but one object, in the meaning of the law, and but one fee is authorized to be charged for filing the permit.

The second question certainly presents a peculiar case, and while the language of the act is ambiguous, awkward, and clumsily expressed, the intention of the Legislature is apparent. When we are confronted with the anomalous condition of a conflict between the use of words and the evident intent of the law-makers, the primary and fundamental rule of construction is that the intent will prevail. Sedgwick on Constitutional and Statutory Laws, 231; Miller vs. State, 106 Ind., 415; State vs. Faukner, 70 Ind., 241; Evansville vs. Summers, 108 Ind., 192.

Judge Thompson, in rendering an opinion in the case of People v. Utica Ins. Co., 15 J. R., 358-380, expressed a clearly defined rule of construction that is doubtless concurred in by all authoritative text writers. He says: "That in construing a statute, the intention of the Legislature is a fit and proper subject of inquiry, is too well settled to admit of dispute. That intention is to be collected from the act itself and other acts *in pari materia*. It may not, however, be amiss to state and keep in view some of the established and well settled rules on the subject. Such construction ought to be put upon a statute as may best answer the intention which the makers had in view, and this intention is sometimes is to be collected from the cause or necessity of making the statute, and sometimes from other circumstances; and whenever such intention can be discovered it ought to be followed, with reason and discretion, in the construction of the statute, although such construction seems contrary to the letter of the statute. Where any words are obscure or doubtful, the intention of the Legislature is to be resorted to in order to find the meaning of the words. A thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter; and a thing which is within the letter of a statute is not within the statute unless it be within the intention of the makers; and such construction ought to be put upon it as does not suffer it to be eluded."

It might be said that this is a rule the courts uniformly sustain. Decisions too numerous to mention might be cited, but there is no necessity for it, as the rule is fixed.

The statute under consideration, chapter 78, section 5, of the laws of 1889 is as follows: "Such corporation shall, if its capital stock be one hundred thousand dollars or less, pay a fee of twenty-five dollars to procure such permit; if its capital stock be more than one hundred thousand dollars and less than five hundred thousand dollars, it shall

pay a fee of fifty dollars; if its capital stock be five hundred thousand dollars and less than one million dollars, it shall pay a fee of one hundred dollars; if its capital stock exceed one million dollars, it shall pay a fee of two hundred dollars."

We here find that the fee paid by any foreign corporation for its permit to do business in this State is according to the ratio of the capital stock, or fixed on a sliding scale. One hundred thousand dollars was taken as the initial point, running back to the smallest amount of capital stock, for which a fee of twenty-five dollars is charged. The next gradation begins with the next figure after the hundred thousand dollar mark, and runs to, but does not include, the five hundred thousand dollar mark, fixing the fee at fifty dollars. The next charge begins with and includes the five hundred thousand dollar mark, and goes to, but does not include, the million mark, fixing a fee of one hundred dollars. At this point in the act a hiatus appears, and the next gradation seemingly begins at the first point after the million has been reached, charging a fee of two hundred dollars. If this be so, then the Legislature taxed every permit for amounts below and above, but failed to tax a fee for a permit where the capital stock is exactly one million dollars.

Now to the rule of construction: Did the Legislature intend, as the awkward language implies, to exempt corporations whose capital stock is exactly one million dollars from payment of the permit fee? No sane person would contend that such was the intention of the makers of this law. It must follow that a fee was intended to be levied on the million dollar capital stock. But what fee? In making the gradations from the original point it will be seen that the first step was at the five hundred thousand, but it did not include it. The next began and included five hundred thousand and went to, but did not include, one million. It is but reasonable to suppose that if there had been a necessity for continual gradations that the next assessment would have begun where the five hundred thousand left off and would thus have included the million in the two hundred dollar assessment; and as the Legislature certainly intended to fix a fee for a capital stock of one million dollars, the wording of the statute to the contrary, it is clear that original design of assessments according to gradations would have been followed; and therefore the fee for a capital stock of one million dollars is two hundred dollars. "All parts of the same statute must be taken together. If one part standing by itself is obscure, it must be aided by another." 23 Am. and Eng. Ency. of Law, 306. This is a cardinal principle of construction, and is uncontradicted so far as I am able to ascertain. The latter part of section 5 of the above act is ambiguous, and the aid of the first part of it is invoked, with the result of the conclusion just reached.

The failure of the Legislature, through mistake, to specifically allege the amount for a certain fee when by implication and intent it does do it, is not fatal. And the amount will be substituted when it is clear it should be done, and especially when the rule is laid down by which such amount may be correctly determined.

Judge Story, in the case of Blanchard vs. Sprague, 3 Sumn. (U. S.), 282, uses the following language in a decision treating a similar subject: "I agree that in construing an act of Congress if there be a plain mistake apparent upon the face of the act, which may be corrected by other

language in the act itself, the mistake is not fatal." In the case of Brinsfield vs. Carter, 2 Ga., 143, it was held that the omission of the word "grant" in one section of the statute might be explained by other parts of the same statute, so as to supply the omitted word and give the act its intended effect.

If any doubt remained as to the meaning and intention of the Legislature in this matter, such would be dispelled by an application of construction to charter grants and privileges and revenue laws under the American rule, the authorities holding to the doctrine that the construction must be liberal in favor of the State and against the grantees or persons charged with the payment of revenues. See 25 Am. and Eng. Ency. of Law, pp. 404 and 407; Sedgwick on Stat. and Const. Law, p. 338.

It is clear to my mind that the Legislature intended that a foreign corporation with a capital stock of one million dollars or more should pay to the Secretary of State the sum of two hundred dollars for the permit to do business in this State, and you are so advised. Very truly yours.

(Signed) R. R. LOCKETT, Office Assistant Attorney-General.

Taxes. Collection of, by Comptroller under Act of 1895. What former laws are repealed by said act.

ATTORNEY-GENERAL'S OFFICE,
Austin, Texas, November 22, 1895.

Hon. R. W. Finley, Comptroller, etc., Capitol.

Dear Sir: Your letter of November 20th has been received. You say: "Referring to chapter 42, General Laws Twenty-fourth Legislature, I respectfully ask your opinion as to the following: 1st. Does said act repeal articles 5179 to 5186 inclusive, Revised Statutes, 1895 (arts. 4751 to 4757 R. S., 1879), relative to making sales of real property for taxes? 2nd. If you hold affirmatively in response to my first question, then I desire that you advise me fully as to this: Section 10 of said chapter 42, Laws of the Twenty-fourth Legislature, provides that the tax collector of each county shall make up a list of the lands and lots on the 31st day of March of each year on which the State and county taxes for the preceding year remain unpaid, etc. Does this mean that such lands and lots shall be charged by the collector with all the taxes assessed against the owner thereof, including all taxes upon his personal property and poll tax delinquent for such year, or is it contemplated by the law in question that such lands and lots shall be charged only with the tax assessed against such real estate?"

It is difficult and perhaps impossible to answer either question affirmatively or negatively without explanation, as both must be qualified to bring them within the intent of the acts governing realty and personal property.

The Constitution (section 15, article 8) and the statutes (article 4746a) declare all taxes of a person due the State and county a charge upon the property, both real and personal, of the delinquent, and the above article and section of the Constitution attach a special lien upon

lands for taxes assessed against the land. The mode of procedure prior to the passage of the delinquent tax bill by the Twenty-fourth Legislature, which for convenience will be called the "Colquitt bill," was a levy and sale of the realty for delinquent taxes, without the intervention of judicial foreclosure. Since the passage of the Colquitt bill the procedure for seizure and sale of landed property for taxes has been entirely changed, but the method of collecting taxes by levy and sale by collector of personal property of all delinquent taxes due by the owner thereof remains as it was before the passage of the said bill, and all the laws embraced in article 4751 to 4757, inclusive, relating to the procedure of collection of delinquent taxes by sale of realty has necessarily been repealed, being in conflict with the provision of the Colquitt bill. Article 4751 of the statute relates both to real and personal property, consequently only so much of said article as relates to the procedure or method of the collection of taxes by sale of realty has been repealed, and the other part stands as before.

To make the answer more satisfactory to your second question, I again quote a part of it: "Does this mean that such lands and lots shall be charged by the collector with all the taxes assessed against the owner thereof, including all taxes upon his personal property and poll tax delinquent for such year, or is it contemplated by the law in question that such land and lots shall be charged only with the taxes assessed against such real estate?"

Such taxes are by the Constitution (article VIII, sec. 15) and statutes (article 4746a) made a charge upon all the property of the delinquent, both real and personal. The personal property is subject to levy and sale by virtue of the assessment rolls for any taxes, landed, poll or personal, for the payment thereof. If no personal property be found out of which to make the amount assessed against the owner, the State, county, city or town has the remedy of action at law by suit to enforce the payment by judicial execution after judgment satisfied by levy upon any reality in the possession of the delinquent. I take it that you desire to know what method to pursue where taxes are due on personalty, poll and on realty where no personalty can be found out of which to satisfy any of the taxes. It is not clear that the remedy for the collection of taxes on personalty out of realty is or is not cumulative in the Colquitt bill. By the old method a simple levy, as provided under the assessment roll, was sufficient: under the new law, judicial execution is required: and as the real object of the Colquitt bill is to enforce the payment of taxes for which realty is liable, by divesting the delinquent of the title and investing the purchaser with a good title, it is safe to say that a suit and judicial sale of the realty for any delinquent taxes is a safe course. The lands and lots are charged with all the taxes, both by the Constitution and statutes, that the delinquent may owe; and it is immaterial, so far as results are concerned, whether the land taxed be sold under a lien to pay the real, personal and poll tax, or whether such tax for personalty and poll is made by execution and sale after judgment, as any other judicial execution to satisfy a judgment.

Section 10 of the act in question, which provides that the collector shall report to the county clerk and Comptroller a list of lands and lots delinquent for taxes, construed in connection with article 4746a, evidently intends that such report shall show all the delinquent taxes as-

sessed against the owner, and due by him for the preceding year, as the basis for institution of suit. When reference is made to a charge upon all property, homesteads are not intended to be placed within the rule, for a homestead is not liable for any taxes except such as are assessed against it. Very truly yours,

(Signed) R. R. LOCKETT, Office Assistant Attorney-General.

Furniture of School Houses, what is. Superintendent of Education is empowered to prescribe certain rules and regulations, not inconsistent with the law, in respect to the administration of the school fund.

ATTORNEY-GENERAL'S OFFICE,
Austin, Texas, March 31, 1896.

Hon. J. M. Carlisle, Superintendent, Etc., Capitol.

Dear Sir: This department is in receipts of your letter of February 11, 1896, enclosing a letter of N. M. Hart, Esq., county treasurer of Jasper county, Texas. In your letter you propound substantially the following question: Whether or not the purchase of maps, charts, mathematical blocks and similar articles is authorized by the school laws, and whether vouchers for such purchases should be paid.

In a subsequent communication to this department, you follow the above query with the following: "If it should be held that these purchases are not necessarily illegal, is not the term 'furniture,' as used in the school law, of sufficient uncertainty in meaning to authorize the Department of Education, by a ruling under section 23 of the School Laws, to define and limit its meaning so as to render future sales of apparatus as furniture illegal?"

It seems to me that if it should be held that your second query must be answered in the affirmative, an answer to your first question, except in the way of suggestion as to disposition to be made of former purchases of the articles named, would be unnecessary. The reason is, that if, by the school laws, the Superintendent of Public Instruction is vested with the power to construe the provisions of doubtful meaning in the school law, and his interpretation of same is made binding and obligatory by the law itself, it would be improper for this department to substitute its construction for that of the Superintendent in cases in which there may be differences of opinion in reference to the proper construction of the law. In referring to the School Laws in this letter, I shall make reference to the Digest of School Laws of Texas (issue of 1895), as the provisions in same, so far as applicable to the question under consideration, are the same as those of the Revised Statutes of Texas (1895).

The constitutional provision necessary or proper to be considered in discussing the questions propounded is as follows: "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." (Constitution, article VII, section 1.)

The statutory provisions necessary to be considered are sections 81,

82, 83 and 86 of said Digest of School Laws (1895). Eliminating the provisions of said sections which have no application to the questions under discussion, we find that section 81 provides as follows: "When school houses are in need of furniture, the trustees may contract for the purchase of furniture, and may use for such purpose and other purposes mentioned in said section, not more than 25 per cent annually of the school fund of a district, for a period of five years."

Section 82 provides that the trustees may make application to the county superintendent for any appropriation named in the preceding section, before making any contract with any teacher for the years in which such appropriation is desired, which application shall be accompanied with plans and specifications of the house or houses sought to be erected, with a statement of the estimated cost, or in case of desired repairs or furniture, a detached (detailed?) statement of the repairs or furniture desired, together with an estimate of the cost of same.

Section 83 provides, among other things, that after the receipt of such application, the county superintendent, if it appears to his satisfaction that the furniture desired is necessary, and that the requirements of the law have been complied with, shall make an order appropriating such amount of school fund to the credit of such district for each year as he may deem expedient, necessary and proper for the purposes specified in such application; but in making any such appropriation for a district, the scholastic interests of the district as a whole shall be considered, and no part of such appropriation shall be drawn from the treasury or paid until in case of furniture the delivery thereof, according to such contract as the trustees may have made, and then only upon the warrant of the county superintendent.

Section 85 provides as follows: "So much of the available school fund of any school district for one year, not to exceed 25 per cent of said fund, as the county superintendent may deem expedient, necessary and proper, may be used in the purchase of suitable school property upon the terms and conditions hereinbefore specified."

Section 23 of said Digest provides as follows: "The State Superintendent shall advise and counsel with the school officers of the counties, cities, towns, and school districts as to the best method of conducting the public schools, and shall be empowered to issue instructions and regulations binding for observance on all officers and teachers in all cases wherein the provisions of the school law may require interpretation in order to carry out the designs expressed therein."

By an analysis of the above sections of the law, it will be observed that in determining the kind and character of furniture that may be purchased, several provisions of the law must be taken into consideration. In the first place, it is only furniture of which the school house is in need that the trustees are authorized to contract for the purchase of, as provided by section 81. In the second place, as provided in section 83, the furniture so contracted for and desired must be such as the county superintendent shall be satisfied is necessary. It is therefore furniture of which the school house is in need, and which in the opinion of the county superintendent is necessary, that the law authorizes the purchase of. Whether the articles mentioned above are included in the general word "furniture" in the connection in which it is used, that is, whether they could be said to be furniture such as a school house would

be in need of in order to render it "suitable, convenient, or agreeable," and such as was intended by the Legislature to be purchased under the above sections, is doubtful. Again, whether such articles could be included in the meaning of the words "suitable school property," as used in section 86 above cited, or whether those words refer to the character of property mentioned in the preceding sections is also doubtful. If such articles are included in the term furniture, as used in section 81, then under the provisions of said section, twenty-five per cent annually of the school fund of a district for a period of five years could be used in the purchase of such articles. If on the other hand, such articles are not included in the word "furniture" as used in section 81, but are included in the words "suitable school property" as used in section 86, then only twenty-five per cent of the available school fund of a district for any one year, as the county superintendent may deem expedient, necessary and proper, could be used in the purchase of such articles.

I have said this much to show that the law is in such a condition as to call for the exercise of the power conferred on the State Superintendent in section 23 to "issue instructions and regulations binding for observance on all officers and teachers in all cases wherein the provisions of a school law may require interpretation in order to carry out the designs expressed therein." Your second question is therefore answered in the affirmative.

In reference to past contracts of purchase for the above articles, if you should be of the opinion that the purchase of such articles is not authorized by law, I will say that I think that where such articles were sold during the time when your department held that such articles were included in the term "furniture" or the terms "suitable school property," as the case may be, and contracts were made for the purchase of same in accordance with the requirements of law, and the interpretation placed on same by the State Superintendent, the amounts due upon said articles should be paid out of the school funds of the various districts the officers of which have made such contracts of purchase. Very truly yours,

(Signed) H. P. BROWN, Office Assistant Attorney-General.

Teacher's Certificate, first grade and permanent. When examinations for same may be held.

ATTORNEY - GENERAL'S OFFICE,
Austin, Texas, April 4, 1896.

Hon. J. M. Carlisle, Superintendent, etc., Capitol.

Dear Sir: Your letter of April 3rd, in regard to the certificate of Mr. Chatfield, has been considered. Your statement of the situation was as follows:

"Mr. F. W. Chatfield some time ago took a county examination in Callahan county, and obtained a first grade certificate. His papers were not forwarded to this department for examination by State Board of Examiners. Hence the first grade county certificate was not exchanged for a first grade State certificate. At the February examination Mr.

Chatfield took the county examination on the additional subjects required for permanent certificate. These papers he forwarded to this department for examination by the State Board of Examiners, with the view to exchange his county permanent certificate for a State permanent certificate. In the meanwhile the papers written by him in his examination for first grade certificate had been misplaced and could not be forwarded. Mr. Chatfield proposed to show by the county examiners and the county judge that he had made a very high average on those papers. But he was advised by this department that a State certificate should not issue upon the grading of the county board unless the papers could be forwarded and the grading of the county board approved by the State board.

"Mr. Chatfield now proposes to take the next county examination on the first grade subjects, have them graded by the county board, obtain another first grade county certificate, and then forward those papers to this department, and let the State Board of Examiners pass upon all these papers. This, you will observe, would be reversing the order prescribed by the statute, which provides for the first grade examination to precede the examination on the additional permanent certificate subjects. I am in doubt whether this would be proper, and at Mr. Chatfield's request submit the question to you."

It is true that it is contemplated that the examination for a first grade certificate should precede the examination for a permanent certificate, not so much because there is any special inhibition against reversing the order of examinations, as because in most instances it will be found more convenient to follow the order contemplated; and in some instances it might prove a waste of time and energy on the part of the applicant, examiners, and other officers to examine for a permanent certificate before a first grade certificate had been obtained. It might possibly happen that the applicant might pass a satisfactory examination in the branches required for a permanent certificate, and yet fail to obtain the required per cent to entitle him to a first grade certificate. In such a case it would be found that the examination for a permanent certificate had been a work of supererogation; and the time of the applicant and the board of examiners have been wasted. Hence, it is proper for the county superintendent and examiners ordinarily to require that the applicant shall pass a satisfactory examination for a first grade certificate before applying for the examination for a permanent certificate.

But I think the order of conducting the different examinations is largely a matter of convenience, and economy of time and energy, affecting the applicant and the board of county examiners, and possibly others. And I see no legal objection to permitting the applicant to be examined for a permanent certificate before he passes the examination for a first grade certificate if he is willing to take the risk. And in a case like that of Mr. Chatfield, where he has actually received a first grade certificate before being examined for a permanent certificate, and the examination papers relating to the first grade certificate have been lost through no fault of his, so as to prevent him from obtaining from the State board a certificate good throughout the State, I see no legal objection or impropriety in permitting him to be examined again for

a first grade certificate; and then to send those papers, together with the papers pertaining to the permanent certificate, to the State Board of Examiners, to be passed on by them for the purpose of ascertaining whether a State certificate should be issued or not.

You are therefore advised that there is no legal objection to Mr. Chatfield being examined for a first grade certificate, although he has been previously examined for a permanent certificate. Nor is there any legal objection to the examination papers so made being considered by the State Board of Examiners for the purpose of determining whether a State certificate should issue in lieu of the county certificate.

I have the honor to be, respectfully,

(Signed) W. M. KNIGHT, Office Assistant Attorney-General.

Equitable Loan and Security Company of Georgia, Charter of.

ATTORNEY-GENERAL'S OFFICE,
Austin, Texas, April 10, 1896.

Hon. Allison Mayfield, Secretary of State, Capitol.

Dear Sir: Your letter of April 8, enclosing the charter of the "Equitable Loan and Security Company of Georgia," with the accompanying affidavit, has been received and considered. You ask an opinion of this department in the following words: "Your opinion is respectfully requested as to whether or not this office should require proof made on the basis that $100,000 is the authorized capital stock, or whether the affidavit furnishes a sufficient authority to justify this office in filing the charter and issuing a permit."

The clause in the charter upon which your question is predicated is in the following words: "That the amount of capital to be employed by them actually paid is $2500, which capital they desire the privilege of increasing to $100,000 when and as the needs of the business, in the judgment of a majority of the stockholders, may demand such increase."

You are respectfully advised that in the opinion of this department the authorized capital stock of the incorporation as determined from its charter is $2500. It would seem that the clause in the charter authorizing the capital to be increased to $100,000 is not to be regarded as determining the amount of its authorized capital, nor as determining that the capital ever will, indeed, be increased to $100,000; for, as a matter of fact, it might be possible that the corporation will never employ a larger capital than $2500 in business. In the opinion of this department, the clause in the charter simply grants the power to the stockholders to increase the capital stock to $100,000, presupposing, of course, that such stockholders will proceed in the methods indicated by law to accomplish this purpose.

In regard to the verbal suggestion made by you, as to whether a foreign corporation increasing its capital stock would have to be controlled by the statute in this State upon that subject, it is deemed best to make no authoritative ruling for your government.

The charter and affidavit are herewith returned to you.

I have the honor to be, very truly yours,

WM. M. KNIGHT, Office Assistant Attorney-General.

Primary Election. Saloons not required to close on days of.

ATTORNEY-GENERAL'S OFFICE,
Austin, Texas, April 20, 1896.

Hon. John B. Carter, District Attorney, Marshall, Texas.

Dear Sir: Your letter of recent date directed to this department, asking if it be unlawful for saloons to be kept open on days on which primary elections are held, has been received, and in response thereto, you are respectfully advised that in reaching a correct conclusion in this matter it is necessary to consider what class of elections article 185 of the Penal Code (article 178, Willson's) embraces; i. e., whether this article has reference to elections of every character and kind, or whether it relates only to elections legalized and authorized by law; and if the conclusion be reached that this article has reference only to elections authorized by law, then it becomes necessary to determine whether a primary election is such as is authorized by law.

It seems that no question had ever arisen in this State involving the issues herein till the passage by the Twenty-fourth Legislature of "An act concerning primary elections, called and held by authority of any political party; to prevent illegal voting at same, and false returns thereof, and to prevent the bribery of officers and voters, and providing penalties therefor," approved April 8, 1895.

The article regulating the sale of intoxicating liquors is as follows (Art. 185, P. C., Rev. Stats., 1895): "If any person shall open or keep open any barroom, saloon or other place, house or establishment where vinous, malt, spirituous or intoxicating liquors are sold during any portion of the day on which an election is held for any purpose or office whatever, in the voting precinct, village, town or city where such election is held, or within three miles of any such voting precinct, village, town or city where such an election is held; or shall, in such voting precinct, village, town or city, or within three miles thereof, sell, barter or give away any vinous, malt, spirituous or intoxicating liquor during the day on which any such election is held; or if any person shall carry to the polling place on the day of an election, or in the neighborhood of the same, any intoxicating liquors for the purpose of sale or gift; or if any person shall find and take possession of any intoxicating liquors at or near the polling place, or inform another of the whereabouts of the said intoxicating liquors, he shall be fined not less than one hundred nor more than five hundred dollars."

It at once becomes necessary to ascertain what is meant, and what the Legislature intended to be understood by "the day on which an election is held for any purpose or office whatsoever." Did the law makers intend that the election herein mentioned should apply to all methods of choice of persons, places, offices; of the methodical determination of questions at all times arising in each neighborhood, in every church, in every school community, in every club, and around every fireside? Does the "election for any purpose or office" have reference to the choice of officers and directors in corporations? Does it relate to the choice of ministers or deacons? Does it refer to the selection or election of presidents and chairmen of associations and orders. These are all purposes and officers, and Mr. Webster defines the word "election" as meaning

"The act of choosing; choice; the act of selecting one or more from others. The act of choosing a person to fill an office, or employment, by any manifestation of preference; as by ballot, uplifted hands or viva voce."

An election, then, has divers meanings, and it is reasonable to presume that some *certain election* for a certain purpose or purposes was contemplated when the above statute was passed. What election, what purpose, what office is meant? By reference to the statutes we find article 185, Penal Code (1895), incorporated in the provisions of title VI, chapter 4, relating to "miscellaneous offenses affecting the right of suffrage," and each and every article in said chapter relates to elections legalized and authorized by law; and construing this article together with the other provisions of the same chapter, the conclusion is inevitable that elections therein referred to are such elections as the statutes make provisions for holding, and provide ways and means for carrying out. All of the elections that are authorized by law are to be held at times fixed by the statutes, or to be fixed and due notice thereof given by certain officers, thereby putting upon notice all persons interested in the sale or gift of intoxicating liquors, advantage of which notice they can and must take to prevent a breach of the law. If, however, it should be held that the election referred to in said article 185 relates to all methods of choosing and determining officers and disputed questions respectively, without reference to the authority of law, then persons are liable to be dragged before the tribunals of justice for the commission of offenses that they had no opportunity of knowing that they were committing, for it is nowhere in the statute made incumbent upon any political boss or secretary of any club or association, or the chairman of any political party, to give notice of any election that they may choose to hold, and by word of mouth or by any other private means may assemble together all the members of such club, party or association, as the case may be, and hold an election for a purpose or for an office, and surely it could not be seriously contended that a construction could be placed upon the law to hold a person liable to punishment under article 185 for keeping open a saloon, etc., or giving or selling intoxicating liquors on a day on which such an election as this was held. Were this true, the persons opposed to the sale of intoxicating liquors could by banding themselves together as a political party in any precinct, village, town or city, effectually stop and prevent the sale or gift of such liquors any or all days out of the three hundred and sixty-five—regardless of the fact that dealers pay a large license and tax for the privilege of conducting their business.

In the Acts of 1875 of general election laws of Arkansas, we find a statute not unlike the provisions of article 185, Penal Code, 1895, now under consideration; the Arkansas statute is as follows: "All dramshops or drinking houses in any city, town or township shall be closed during the day of *any election* held therein, and the succeeding night, and any person selling or giving away intoxicating liquors during said day or night, in any county, city, town or township in which such election may be held, shall be punished by fine, etc." The italicised words "*any election*" are not italicised in the acts, but the italics are now placed in to direct attention to the similarity of that part of each act that is of the most importance therein in the consideration of the question before

us. Under the Arkansas statute above referred to, charges were preferred in the Circuit Court of Conway county against one Stout, charged with giving away intoxicating liquors in his school district on the day of annual school meeting, at which a director was to be elected. Stout was convicted and fined $200; from the judgment and decree Stout appealed. The testimony showed that on the day of the election of the school directors the defendant gave a man a drink of whisky after the polls were closed. Justice Smith, in rendering an opinion in the case, which is reported in volume 43 of the Arkansas Reports, page 413, says: "Penal statutes, in declaring what acts shall constitute an offense, and in prescribing the punishment to be inflicted, are to be construed vigorously. The general word shall be restrained for the benefit of him against whom the penalty is inflicted. The case of an offender must fall both within the words and the mischiefs to be remedied;" citing Potter's Dwarris on Statutes, 245; Grace v. State, 40 Ark., 97. This is a sound enunciation of the general rule, but it is somewhat modified perhaps by our own statutes (Art. 9, P. C., 1895). In concluding his opinion in this case, Mr. Justice Smith says: "The annual school meeting which is provided for by sections 54-5-6 of the Common Schools Act of December 9, 1875, is not an election within the meaning of the above quoted act. Each school district is by law a *quasi* corporation. The corporators, who are the qualified electors residing within the district, meet at 2 p. m. of the day fixed for meeting, five constituting a quorum, elect a director, vote a tax, transact other school business, and then adjourn. Ballots are used in determining a choice of a director and the rate of taxation to be voted. But it is no more an election within the contemplation of the statute than the appointment of a city clerk or attorney by the council of a city, or the election of presiding and other officers by the houses of the General Assembly. Reversed and remanded, with directions to arrest the judgment."

It will be seen that although the statute says "all dram-shops shall be closed * * * during the day of any election, * * * and any person selling or giving away, etc., shall be punished," and under the definitions of Mr. Webster, the above action of the electors would be an election, the court has wisely reached the conclusion that the expression *any election* has a definite and fixed meaning in law and refers only to the acts of suffragists under directions of statutes authorizing popular elections, fixing a time for holding them, and providing means to carry the provisions into effect. There are elections for so many purposes, and can be for so many purposes, that unless the statutes say specifically which are meant, public policy would demand that a limit should be somewhere placed upon the effects of a law that would without restriction be destructively far-reaching. The natural, the true, and the proper limit then to place about the clause "the day on which an election is held for any purpose or office whatsoever," is that already indicated, viz., a construction holding it operative in cases of popular elections authorized and provided for by law, and that the statute does not apply to the many other elections which are not popular elections authorized by law.

That we have no common law crimes is too well known to undertake, at the expense of waste of time and energy, to prove: therefore we must look to the Penal Code for a definition in plain language of every offense against the laws of this State. It must be admitted that the purity of

the ballot box was the object of the law closing liquor shops and preventing the sale and gift of liquors on election days, and it may be contended with some degree of plausibility that it is as essential that the primary elections be as free from taint and corruption as the general and ultimate elections, and the laymen are not without judicial support in this view, for it is said by the court in the case of Strasburger vs. Burks, 13 Am. Law Reg., p. 607, Justice Brown rendering the opinion, that "The same principles of public policy, therefore, which apply to elections ordained by law must for the same reasons be applicable to the primary elections. It is equally injurious to the public whether a man sell his influence with the voters at a primary election or at a legal election, and it is equally corrupting to the voters whether they are treated to beer and cigars to influence their votes at a primary election or at a legal election." This sounds well as an extract from some book written to please the fancy, and might be applicable to the law of contracts under the common law, but its application to the Penal Code of our State is not so easily appreciated, for it is believed that our penal statutes make no more provision for the closing of saloons and preventing the gift and sale of intoxicating liquors on the days on which primary elections are held than the code makes for the prevention of the gift and sale of cigars on that day. Why the law-makers did not hedge in the sacredness of the primary elections with the same degree of care that they did the general, ordained and authorized popular election is not a subject of inquiry; such is in the scope of the Legislature, and it will be presumed that they threw about these elections all the protection thought necessary. We can not, as is well known, look to the common law or unwritten law for the definition or punishment attached to offenses; we must look to our statute law. Article 1 of the Penal Code declares that, "The design of enacting this Code is to define in plain language every offense against the laws of this State, and to affix to each offense its proper punishment," and article 3 of the Penal Code declares that "in order that the system of penal law in force in this State may be complete within itself, and that no system of foreign laws, written or unwritten, may be appealed to, it is declared that no person shall be punished for any act or omission, unless the same is made a penal offense and a penalty is affixed thereto by the written law of this State." It may be as great a moral offense, as Justice Brown says, to contaminate the ballot at its source as at the mouth of the political stream, but before we can affix a penalty to the acts of the wrongdoers, we must pass a law declaring it an offense and then attach the punishment.

To our mind, the statute under consideration refers only to such elections as are ordained, legalized and authorized by law. The natural question that follows this conclusion is, is a primary election recognized as a popular election and authorized by law? We think not. The only statute relating to primary elections is to be found in the Acts of the Regular Session of 1895, page 40 (p. 36, P. C., 1895). There is no law upon the books anywhere providing for the holding of primary election; there is no law upon the books defining what a primary election is. There is no law upon the books declaring that a primary election shall ever be held, or providing a method of giving notice of such a primary election, if it should be held.

Who is to determine, in the absence of a statutory definition, what a

primary election is? Shall we hastily conclude that everybody is familiar with the definition of "a primary election," and that the courts will take judicial knowledge of the correctness of an arbitrary definition supposed to be evolved from common usage? The most common method of holding political primaries in this State is the announcement by a select committee that the voters shall or will assemble at a certain time for the purpose of voting for or choosing by ballot the persons for the choice of that particular party as candidates of that party to be held out for office at the authorized elections, and the assembling of the voters at such time and place and depositing their ballots, from which the result is subsequently determined. This perhaps would be one of the definitions that would be given, but Rapalje and Lawrence's Law Dictionary uses the phrase "primary election" and gives quite a different definition. That dictionary defines a primary election to be "A popular election, held by members of a particular political party, for the purpose of choosing delegates to a convention empowered to nominate candidates for that party to be voted for at the approaching election." The last definition, which is entitled to as much respect as the former, corresponds to a true definition that might be given of county and State conventions, according to the present understanding of such conventions. These conventions do the very things that the dictionary above referred to says are done in primaries. Once every four years there assembles in this State at designated points political conventions, that remain in session an indefinite period, that by the ballot of the people assembled thereat choose delegates to conventions empowered to nominate candidates for the respective parties to be voted for at an approaching election.

The above mentioned dictionary is recognized as a standard work, and its definitions are entitled to great weight and credit, and yet if we accept its definition of a "primary election" as the correct one, and if it should be admitted that primary elections are authorized by law, it would be compulsory upon those who enforce the law to see to it that no saloons are kept open and no intoxicating liquor sold or given away in the county on the days during which a State political convention might be assembled in such county for the purpose of selecting delegates to the national convention to there choose the candidates for certain federal offices, and persons so keeping open saloons and giving away or selling intoxicating liquors would be guilty of an offense against the laws of the State as provided in article 185, Penal Code, 1895. It is not thought that the Legislature ever contemplated any such construction should ever be placed on the act punishing the gift, etc., of liquors on election days.

Let us see how far the Legislature went in extending protection to the primary elections. Chapter 34 of the Acts of 1895 punished as a misdemeanor (1st) persons who vote thereat that are not qualified electors in the general election; (2nd) persons who repeat at the same election; (3rd) persons who knowingly procure any illegal vote to be cast; (4th) any presiding officer who makes false returns; (5th) any presiding officer who shall divulge how any person voted; (6th) any person who shall bribe or offer to bribe any presiding officer, etc.; (7th) any person who shall bribe any voter for the purpose of influencing his vote.

The emergency clause of this act begins: "The fact that many cities

and towns of this State will hold their elections at an early date, and in many of them primary elections will be held, which should have the protection of this act, creates an emergency and an imperative public necessity for the suspension of the constitutional rule," etc. What is meant by the "protection of this act"? Nothing is clearer than that by this was meant that the above seven restrictions should be placed about primary elections when held, and by specifically naming them it is to be assumed that these seven are exclusive of all other remedies, and that no other protection was considered necessary to throw about primary elections.

It will be noted, when a comparison is made, that a different punishment is fixed to violations of the primary election law, and the law governing general elections. In the case of the former, the penalties are all misdemeanors; in the latter, a number of the offenses are felonies. For instance, section 1 of chapter 34 of the General Laws of 1895, concerning primary elections, provides that if any person at any primary election held by authority of any political party shall vote therein who is not a qualified voter in the election precinct where he offers to vote, at the next general election, he shall be punished by a fine not exceeding five hundred dollars, or by imprisonment in the county jail not exceeding sixty days, or by both such fine and imprisonment; while for a corresponding offense at a popular authorized election according to article 171 of the Penal Code, 1895, the person offending shall be punished by confinement in the penitentiary not less than two nor more than five years.

If the Legislature had intended to recognize primary elections as lawful elections, and had intended to make the penal statutes applicable to general elections applicable to them, what earthly use was there in doing more than passing a bill saying that the method of holding general elections should apply to primaries, and that the punishment for violation of them should be the same in both.

If the law preventing the sale, etc., of intoxicating liquors at *any election* should by a stretch of construction apply to primary elections, why would not all other offenses against the election laws be an offense against primary elections; under chapter 3, Penal Code, 1895, relative to offenses affecting suffrage, are a number of articles that protect voters at polls and punish persons violating the provisions thereof. One of these articles prohibits and punishes riots at a place of holding a *public election*: and another prohibits and punishes unlawful assemblies at the place of holding *an election*: another prohibits and punishes mobs and tumultuous assemblies at *any elections*: another prohibits and punishes intimidation of *voters*: another prohibits and punishes the carrying of arms *at any voting place*. These articles use the words "*any elections*," "*any voting place*," etc. Yet it is not difficult to see that they are used in the restricted sense and refer to lawful and legalized elections. If all these and many more penal statutes relate to primary elections, what could be the object of passing a law concerning primary elections, and in that act specifically name seven (and only seven) offenses against primary elections, and leave out of the large category of crimes that can be committed against the general election law, numerous offenses?

If the general *penal* statutes relating to elections are applicable to

primary elections, it must follow that the primary elections are also to be governed by the general *civil* statutes relating to elections, for the civil statutes, too, speak of "*all elections*," "*any elections*," etc.

Article 1704, Revised Statutes, 1895, provides that "All elections shall be held for one day only at each election, and the polls shall be open on that day from 8 o'clock a. m. to 6 o'clock p. m." The language in this is as broad as the language in Penal Code, article 185, which says "of the day on which an election is held," and this last article is the one, if any, that is charged with making the sale, gift, etc., of intoxicating liquors on a primary election day an offense.

If Rapalje and Lawrence's Law Dictionary has any right to offer a definition of "a primary election," and it must be conceded that this right exists, and may be accepted as correct till the statutes define it differently, and if article 1704, Revised Statutes of 1895, is applicable to primary elections, and it is so applicable if article 185, Penal Code, is, all of our State conventions that meet to select delegates to a convention to nominate candidates for President and Vice President of the United States must meet and be ready for business at 8 a. m., and must conclude and adjourn or close the polls or ballot boxes at 6 p. m. of the same day, and every saloon must be closed in the State on that day, and the gift and sale of intoxicating liquors throughout the State of Texas on that day is forbidden: such was never the intention of the Legislature.

It has heretofore been the custom of several cities in this State to hold their primary elections at night, but if the act of 1895 concerning primary elections had the effect of legalizing primary elections, they would come within the provisions of the general penal and civil statutes, and such primaries would of necessity, to comply with the law, have to be held between the hours of 8 a. m. and 6 p. m.; but fortunately the Legislature did not undertake to legalize primary elections, and thus bring them under the yoke of the general elections law.

In the case of the State vs. Hirsch, 125 Indiana, 207, the defendant was indicted, under section 2098, Revised Statutes (Ind.), 1881, for selling intoxicating liquors on the day of a primary election in the town of Winchester, held by a political party for the election of candidates for various offices to be voted for at the next general election.

The Court of Appeals, consisting of five judges, two of them dissenting in this case, held the defendant was guilty of an offense against the elections law; but the conclusion of the court rested on a statutory provision of a succeeding section of the same act, which sections were construed together; one of them in specific terms saying certain persons should not sell intoxicating liquors on a primary election day. This has no general application to our own law, as the question went off on a statutory provision, but the statute of Indiana is quoted, and the conclusions of the court and dissenting judges given to show that the case, which might in a superficial consideration be confused with law applicable to conditions here, having in fact no application, except, perhaps, to confirm the view herein held.

Section 2098, Revised Statutes (Ind.), 1881, is as follows: "Whoever shall sell, barter or give away, to be drunk as a beverage, any spirituous, vinous, malt, or other intoxicating liquor upon Sunday, the fourth day of July, the first day of January, the twenty-fifth day of December

(commonly called Christmas day), Thanksgiving day as designated by proclamation of the President of the United States, * * * or any legal holiday; or upon the day of any election in the township, town or city where the same may be holden; or between the hours of 11 o'clock p. m. and 5 o'clock a. m., shall be fined," etc. And the succeeding section prohibits the sale of intoxicating liquors by druggists or druggists' clerks on Sunday, the fourth day of July, first day of January, the twenty-fifth day of December, Thanksgiving day, or any legal holiday, or upon the day of any State, county, township, *primary*, or municipal election in the township, town or city where the same may be holden. Justice Olds, in delivering the opinion of the court in the case above referred to, says: "Thus the Legislature, in the same act, has defined what elections it is intended the law shall apply to. There is a difference in the phraseology of the two sections, but it is manifest, when we construe them together, that they are intended to apply to the same days, and prohibit the sale of intoxicating liquors by all persons on those days. In section 2099, in fixing the date, Thanksgiving day is named, without designating by what authority it shall be proclaimed; in section 2098 there are used the words 'Thanksgiving day, as designated by proclamation of the Governor of this State or the President of the United States.' It is manifest that Thanksgiving day as used in section 2099 includes only such days as are proclaimed as such by the Governor of this State or the President of the United States. To hold that the Legislature intended to prohibit druggists and their clerks from selling intoxicating liquors on the days when primary elections are held within a township, town or city, and to allow all others who have license to sell upon those days, would be an absurdity. When we look to the whole act to determine what the Legislature intended, we find a well regulated system in regard to the sale of intoxicating liquor, whereby the sale of it is prohibited by all persons on certain days, viz., Sundays, etc."

The majority of the court adopted the opinion as delivered by Judge Olds, but Justices Elliott and Coffey dissent, and say that "the omission of the word 'primary' in the section of the statute upon which the indictment is based is one that the courts can not supply, and that in the absence of that word the statute refers to ordinary elections, that is, elections held under the law, and for the choice of officers."

The majority of the court in substance held that the word "primary" in the second section was descriptive and related back to, and applied to the first section, viz., section 2098. Following up this reasoning, it is but natural to presume that if the word "primary" had been omitted from the second (2099) section that the opinion of the court would have been just the reverse of what it was with this statutory provision incorporated.

For the reasons heretofore set out, and some hereafter added, it is believed that article 185, Penal Code, 1895, has reference to elections authorized by law; and it is believed that primary elections are not authorized by law so as to bring them within the general meaning of the civil statutes affecting suffrage and elections, and certainly not within the meaning of the penal statutes affecting suffrage and elections, because in addition to the rule of construction of civil and penal statutes (article 9, Penal Code, 1895), there are other rules laid down in the Penal Code that are mandatory and must be considered in the construction of laws

and determining offenses. The very first article of the Penal Code says: "The design of enacting this code is to definein plain language every offense against the laws of this State, and to affix to each offense its proper punishment"; and article 3, ib., says, "In order that the system of penal laws in force in this State may be complete within itself, and that no system of foreign laws, written or unwritten, may be appealed to, it is declared that no person shall be punished for any act or omission unless the same is made a penal offense, and a penalty is affixed thereto by the written law of this State." Article 53, Penal Code, 1895, defines an offense to be "an act or omission forbidden by positive law, and to which is annexed, on conviction, any punishment prescribed in this Code."

It is made an offense in Indiana to sell intoxicating liquors on the Fourth of July, and the same reason that would prompt the passage of that law for Indiana would obtain in Texas. It is an offense to sell intoxicating liquors in Indiana on primary election days, so says the court, and the same moral reasons for the passage of that law would obtain in Texas; but our penal laws are not codes of morals, but they are positive legislative acts, with penalties attached for the violation of offenses therein defined. Very respectfully,

(Signed) R. R. LOCKETT, Office Assistant Attorney-General.

After apportionment for school year has been made, the State board is not authorized to withhold notice of, or refuse to make, the monthly apportionment due to each county.

ATTORNEY-GENERAL'S OFFICE,
Austin, Texas, May 5, 1896.

Hon. J. M. Carlisle, Superintendent, etc., Capitol.

Dear Sir: Your letter of May 4 has been received, and you are respectfully advised that after the apportionment for the school year has been made, the State Board of Education is not authorized to withhold the notices of, or refuse to make, the monthly apportionments due to each county, although some county may have defaulted in the payment of interest due the permanent school fund on bonds held by it. These monthly apportionments are but the ascertainment of the amount that can be paid monthly on the apportionment made at the beginning of the school year. They in no sense change or modify what has been done in the annual apportionment. In the opinion of this department, the several counties, whether in default or not, must be recognized, not only in the annual apportionment, but in the monthly ascertainment of the amount that can be paid on the respective coupons. Nor will it follow that because the annual apportionment and the monthly apportionments have recognized a county that is in default with payment of interest due by it to the permanent school fund, that therefore such counties will receive warrants from the Comptroller for their proportional part of the school fund. No reason is apparent why article 283, Revised Statutes, should not govern the Comptroller in his issuance of warrants against the available school fund, the same as in other cases. Very truly yours,

(Signed) WM. M. KNIGHT, Office Assistant Attorney-General.

State Board of Education can not refuse to make apportionment to a county of the amount of the school fund due it because such county is indebted to the State; nor can it refuse to do so when such county is indebted to another county on bonds and refuses to pay them or the interest.

ATTORNEY-GENERAL'S OFFICE,
Austin, Texas, May 5, 1896.

Hon. J. M. Carlisle, Superintendent, etc., Capitol.

Dear Sir: Your letter submitting the following questions has been received, dated May 2nd:

"Has the State Board of Education the right to refuse to make an apportionment of the available school fund to a county which refuses to pay the interest on its bonds held by the permanent school fund?

"When a county refuses to pay the interest on its bonds held by the permanent school fund of another county, can the State Board of Education, on this account, refuse to make an apportionment of the State available school fund to the defaulting county, or is there any other method by which the State Board of Education or this department can assist in protecting the school funds of the various counties from losses and annoyances in this way?"

You are respectfully advised that in the opinion of this department both said questions must be answered in the negative. I have been able to find no provision in the statutes that in my opinion would authorize the State Board of Education to refuse to apportion to any county its proportional part of the available school fund, even if it is in arrears in interest on its bonds held by the permanent school fund.

I am also of the opinion that the State Board of Education can not refuse to apportion to any county its proportional part of the available school fund in a case where such county is in default to another county on bonds held by such other county. Nor do I know of any method by which the State Board of Education or your department can assist the county which has loaned its school fund to such defaulting county.

Very truly yours,
(Signed) WM. M. KNIGHT, Office Assistant Attorney-General.

State Teacher's Certificate. Can not be issued to person who has not taught for five years, although he may have a college diploma.

ATTORNEY-GENERAL'S OFFICE,
Austin, Texas, May 16, 1896.

Hon. J. M. Carlisle, Superintendent, etc., Capitol.

Dear Sir: Your communication of May 15, stating that you had before your department an application for a State certificate based on college graduation, by authority of section 77, School Laws of 1895. You state in addition that the applicant is now employed in the service of the Federal Government, and has been in Washington for three years, and has not been engaged in teaching school for five years. You ask if you are authorized to issue a certificate as applied for.

You are respectfully advised that in the opinion of this department you are only authorized to issue certificates under section 77 to *teachers*.

It seems to the writer that a person who is actually engaged in some other business, and has been for a period of five years, can not claim to be a teacher; and therefore, in that view of the case, you are advised that said section would not authorize you to issue the certificate.

Section 66 provides that if any person holding a permanent certificate shall withdraw from school work for a period of three years or longer, any such certificate shall become void; and it shall be the duty of the proper superintendent to cancel the same upon his record. This section in its terms applies to all persons, making no distinction as to how the certificate was obtained, whether by reason of an examination or by reason of graduation from certain State institutions, or by reason of having received certain academic degrees from colleges and universities of the first class; and it seems manifest that the general spirit of the school law is to require all persons holding a permanent certificate to continue in the work of teaching.

Section 78 also provides for the cancellation of any certificate for good cause. Certainly no useful purpose can be subserved by permitting a person not a teacher to obtain a permanent certificate; and the granting of a permanent certificate was intended to be of service to persons actually engaged in the occupation of teaching in Texas. It was not designed as a means of advertisement of the person's capabilities in a general way.

We think that the same reasons which require the cancellation of a permanent certificate held by one who obtained it on an examination, apply to one who may hold a permanent certificate by reason of having received certain academic degrees from first class universities. And therefore it is the opinion of this department that no one is entitled to a permanent certificate on account of his previous merits or previous qualifications, unless at the time of the application he is actually engaged in the business of teaching in Texas, or in good faith intends to become so engaged in the immediate future. I have the honor to be, very truly yours.

(Signed) WM. M. KNIGHT, Office Assistant Attorney-General.

Fire Insurance Companies. Construction of section 50, article 642, relating to.

ATTORNEY-GENERAL'S OFFICE,
Austin, Texas, September 13, 1896.

Hon. A. J. Rose, Commissioner, etc., Capitol.

Dear Sir: This department is in receipt of the proposed charter of "The Mutual Relief Association of Travis County," with its principal office at Pfleugerville, and it has received due consideration and investigation.

You are respectfully advised that in the opinion of this department, this charter can not be lawfully filed for the following reasons:

The charter evidently provides for the organization and incorporation of a *fire insurance* company. The language of section 50, article 642, Revised Statutes, 1895, is so very uncertain in its meaning that it is im-

possible for this department to say that it was intended to authorize the incorporation of mutual fire *insurance* associations, the language authorizing the incorporation of "mutual fire associations." Exactly what is meant by it we are unable to say.

Section 46 of the same article authorizes the incorporation of fire, marine, life and live stock insurance companies. But if it be conceded that it was the intention of the Legislature by section 50 to authorize the incorporation of mutual fire *insurance* associations, with the authorized or subscribed capital stock, then attention is invited to the fact that chapter 1 of title 58 provides that insurance companies may be incorporated with a capital stock, and that chapter fixes the minimum amount at $100,000. It would follow, therefore, that section 50 of article 642 is in conflict with the several provisions of chapter 1 of title 58. Title 58 is one especially and solely devoted to the subject of insurance, while section 50, article 642, is a mere general authorization of the incorporation of certain kinds of associations; and applying the familiar rule of construction adopted by the courts, where two statutes are inconsistent with each other, that one which is specially and particularly directed to a certain subject will control mere general provisions relating thereto.

In a word, this department is unable to say that section 50 of article 642 was ever designed to authorize the incorporation of a fire insurance association, but if it was, then it provides that it may be organized without an authorized or subscribed capital stock, and this provision is diametrically opposed to the several provisions contained in chapter 1, title 58. Very truly yours,

(Signed) WM. M. KNIGHT, Office Assistant Attorney-General.

Private domestic corporations must have actual notice before charter can be forfeited for non-payment of franchise tax.

ATTORNEY-GENERAL'S OFFICE,
Austin, Texas, Jan. 6, 1897.

Hon. Allison Mayfield, Secretary of State, Austin, Texas:

Dear Sir: In your letter of recent date you state that the Austin Gaslight and Coal Company, a private domestic corporation, failed to pay its franchise tax for the year ending April 30, 1895. That prior to said default you addressed a letter to said company at Austin, Texas, demanding payment of the franchise tax, and that said letter was stamped and mailed at the postoffice in Austin. The company failed to pay the tax, and at the expiration of the allotted time the charter of said corporation was marked and treated as forfeited on the records of your office. The company now makes application to pay all accrued taxes, and in support thereof furnishes affidavits that the notice mailed to it by your department was never received. Predicated upon these facts, you ask the advice of this department as to whether or not you are authorized to erase from your records the forfeiture of the charter of said company. The act passed by the Twenty-fourth Legislature, and approved in March, 1895, will afford no relief to this corporation, as application to be reinstated was not made within ninety days after this act

took effect, and having refused to avail itself of the privilege to have its charter revived under said act, its right now to be restored depends upon the construction to be given a part of section 6, Act of May 11, 1893, prescribing the time and manner of collecting franchise taxes from private domestic corporations. This last mentioned act directs that the Secretary of State shall, on or before the 1st day of March of each year, notify all corporations subject to the payment of the annual franchise tax, but does not prescribe the mode and manner of giving the notice. It was competent for the Legislature to prescribe the particular manner in which the notice should be given, especially when they require as a condition precedent to the doing of an act that notice shall be given. The Legislature had the power to say that the notice might be given by publication, or by leaving it at the residence or place of business of the party affected, or by mail in a letter properly stamped and addressed, as was done by you in this case, but there being no statutory method of serving the notice, it seems to be settled that in the absence of any such legislative provision, whenever the Legislature requires notice to be given, it must be personal notice. We have a statute in this State which authorizes a wife to bring suit upon a liquor dealer's bond for selling liquor to her husband, but only after she had notified them in writing not to do so. In a case of this character reported in the Court of Appeals, civil cases (4 vol., Willson), the proof showed that the plaintiff, through a deputy sheriff, notified the defendants, in writing, not to sell to her husband any intoxicating liquors. The notice was served by the deputy sheriff reading it to the defendants. In the trial court special exception to the petition was made upon the ground that it did not show that a written notice was *delivered* to the parties to be served, and this exception was sustained by the court and the suit was dismissed. On appeal the court held that the special exception was properly sustained and that no statutory mode of the service being prescribed, the rule is that the service must be a personal one, and merely reading the notice to the person to be served therewith is not sufficient service. In Michigan the charter of a Mutual Insurance Company provided that the members should be *notified* of assessments by circular or verbally, and that if they did not pay within a fixed time they would forfeit protection through their policy. It was held by the Supreme Court that such personal liability could not attach from merely mailing the notice, if it was not actually received. Our statute says that "the Secretary of State shall *notify*," etc. In legal proceedings, this word is generally, if not universally, used as importing a notice to be given by some person, whose duty it is to give it, and to some person entitled to receive it, and to give notice of a fact to a person who is entitled to know it is to bring it to his knowledge. Was the fact of mailing the letter, which contained the information for the Austin Gaslight and Coal Company, sufficient of itself to constitute the notification required by the statute? The consequences to flow from this notification are admitted to be important. Valuable rights and privileges depend upon it. In case of failure of the corporation to respond by the payment of the amount of the tax within a certain time as communicated in the letter, the charter of said corporation was to be marked and treated as forfeited on the records of your office. In principle it is not easy to distinguish the nature of the required notification here, from the office and object

of service of process, and to me there seems to be as much reason for real notice in a case of this character as in the case of an action. The destruction or loss of the mail or accidents preventing its delivery, or even a considerable delay, might at any time, without fault of the sender or of the person who is to receive it, eventuate in widespread loss and injustice. To hold that the mailing of the notice was sufficient would be giving the statute a construction open to too much objection, and this is not necessary or required by its terms. I believe it is contemplated that the corporation should have *real* information. The language of the statute is not that notice or information shall be mailed, but it is to be "notified"—that is, informed; to have made known to it the fact that the tax was to be due. As sustaining the above view, I refer to the following authorities: Wade on Notice, sec. 1334 et seq.; Willson's 4th App. Civil Cases, sec. 133; 50 Mich., 273; 4 How. (U. S.), 185; 25 Barb. (N. Y.), 635; 13 Hun. (N. Y.), 211; 32 Mo., 295; 31 Conn., 381.

In conclusion, you are respectfully advised that the company having furnished affidavits that it did not receive the notice, the fact that it was properly addressed, stamped and mailed would not of itself constitute the notification required to be given, and upon payment of all accrued taxes, said company can have its charter reinstated as it existed prior to such default. Very respectfully,

E. P. HILL, Office Assistant Attorney-General.